BOND CONDITIONS AS FOURTH AMENDMENT SEIZURES

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INTRODUCTION

On September 10, 2013, Keith Smith was arrested in Chicago when two police officers stopped and searched a vehicle in which he was a passenger.[1] Following his arrest, and up until the resolution of his case, Smith was held in the Cook County Jail for a total of seven months.[2] He was finally released in March 2014 on bond[3] conditions that required him to appear at court hearings and seek the court's permission before leaving the state.[4] For nearly two and a half years, Smith was required to adhere to those bond conditions in order to stay out of jail until he was found not guilty on July 21, 2016.[5]

1 Smith v. City of Chicago, No. 18 C 4918, 2019 WL 4242503, at *1 (N.D. Ill. Sept. 6, 2019), *aff'd*, 3 F.4th 332 (7th Cir. 2021), *vacated*, 142 S. Ct. 1665 (2022).

2 *Id.*

3 In this Note, I use the words "bond" and "pretrial release" interchangeably. Both refer to the post-arraignment, pre-trial conditions upon which a defendant is released from physical custody in order to ensure their return to court.

4 *Smith*, 2019 WL 4242503, at *1.

5 *Id.*

On July 18, 2018, two years after his acquittal, Smith filed a § 1983[6] complaint alleging that the arresting officers conspired to fabricate a police report which led to Smith's wrongful detention.[7] The district court dismissed this initial complaint as untimely because, they held, the two-year statute of limitations for a § 1983 fabricated evidence claim began to accrue when he was released from the Cook County Jail in March of 2014—not when he was acquitted and released from his bond conditions.[8] In response, Smith filed a motion to reconsider on the grounds that his claim did not begin to accrue until he was wholly released from his bond conditions upon acquittal.[9] The district court, without rejecting the possibility that pretrial conditions *could* be Fourth Amendment seizures, held that Smith's conditions of release were "inadequate" to establish a Fourth Amendment seizure, granting the defendant-officers' motion to dismiss the claim.[10]

On appeal, the Seventh Circuit considered whether the district court wrongly granted the defendant-officers' motion to dismiss Smith's complaint.[11] Basing his argument on the Supreme Court's holding in *McDonough v. Smith*,[12] Smith argued that his detention, for Fourth Amendment purposes, did not end until he was acquitted and fully

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6 The federal Civil Rights Act of 1871 provides a civil action to protect individuals harmed by misuse of state power by state officials. *See* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."). While the statute expressly omits "judicial officer[s]" from liability in § 1983 actions, these officials may be personally liable for damages under § 1983 for actions taken while acting under official capacity, so long as plaintiffs sue defendants in their individual capacities. 6 JAMES BUCHWALTER ET AL., FEDERAL PROCEDURE, LAWYERS EDITION § 11:308 (2022) (citing Hafer v. Melo, 502 U.S. 21 (1991)).

7 *Smith*, 2019 WL 4242503, at *1.

8 *Id.*

9 *See id.*

10 *Id.* at *2 (holding that pretrial release requirements to appear in court and "mere threat of a travel restriction" were inadequate to constitute a Fourth Amendment seizure).

11 Smith v. City of Chicago, 3 F.4th 332, 334 (7th Cir. 2021), *vacated*, 142 S. Ct. 1665 (2022).

12 *Id.* at 336 ("Smith argues that . . . . the Supreme Court's recent decision in *McDonough* . . . establish[ed] that the accrual date for Smith's claim occurred at the favorable termination of his legal proceedings, not when he was released on bond."); *see* McDonough v. Smith, 139 S. Ct. 2149, 2160–61 (2019) (holding that petitioner's § 1983 fabricated evidence claim did not begin to accrue until "the criminal proceedings against him terminated in his favor," even though "the injury caused by a classic malicious prosecution . . . first occurs as soon as legal process is brought to bear on a defendant").

released from his pretrial release conditions.[13] Smith argued that the burdens he endured as a result of being required to adhere to these bond conditions made it such that he was unable to bring his claim until he was fully relieved of these restrictions.[14] Thus, he argued, the statute of limitations could not begin to run until he was fully acquitted because up until that point he was, in his view, "detained" under the Fourth Amendment while out on bond.[15]

As to the question of whether the conditions of Smith's pretrial release constituted a Fourth Amendment seizure such that he was effectively still detained, the Seventh Circuit held that "standard bond conditions," which the court had imposed on Smith, did not constitute a Fourth Amendment seizure.[16] In doing so, however, it did not preclude the *possibility* that a pretrial release condition could constitute a Fourth Amendment seizure, but it also did not offer an example of what such a condition would be.[17] The Seventh Circuit did clarify, however, that any such condition "must fall within the traditionally-defined scope" of a Fourth Amendment seizure.[18] Again, beyond an implicit allusion to the Supreme Court's already-murky jurisprudence on the matter of Fourth Amendment seizures, the Seventh Circuit did not elaborate on this point.

The question of whether a pretrial release condition may be a "seizure" for Fourth Amendment purposes remains unsettled among federal courts.[19] The United States Circuit Courts of Appeals are currently split on the issues of (1) whether a bond condition may be a seizure under the Fourth Amendment, and (2) if so, how to analyze which bond conditions are seizures and which are not.[20]

Much of this discrepancy turns on how courts define and restrict what constitutes a Fourth Amendment seizure. Some courts have, at least in part, adopted the "continuing seizure" theory proposed by Justice

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13 *Smith*, 3 F.4th at 334–35.

14 *Id.* at 338 ("Smith argues that his Fourth Amendment claim would have necessarily impugned his prosecution, urging us to conclude—as the Court did for the plaintiff in *McDonough*—that he could not have brought his claim until the favorable termination of his proceedings.").

15 *Id.* (citing Manuel v. City of Joliet (*Manuel II*), 903 F.3d 667, 669–70 (7th Cir. 2018)).

16 *Id.* at 340 ("We now conclude that the standard bond conditions that Smith experienced did not constitute a continuing seizure.").

17 *Id.* at 342 ("We adopt a case-by-case approach on this issue, and we do not foreclose the possibility that a bond condition might constitute a Fourth Amendment seizure.").

18 *Id.*

19 Bernie Pazanowski, *Bond Conditions Don't Delay Window to Sue Over Made-Up Evidence*, BLOOMBERG L. (June 29, 2021, 10:48 AM), http://www.bloomberglaw.com/product/blaw/bloomberglawnews/true/XBOHBK2C000000?bna_news_filter=true#jcite (last visited Dec. 27, 2022).

20 *Id.*

Ginsburg in her concurrence in *Albright v. Oliver*,[21] positing that a seizure is more than a fixed occurrence and additionally encouraging courts to look to the degree, rather than the kind, of a restrictive pretrial release condition that may constitute a Fourth Amendment seizure.[22] Other circuits have rejected this doctrine altogether, casting doubt on the possibility that a seizure can extend past the point of physical detention.[23] The lack of uniformity among the circuit courts highlights the judicial uncertainty around this issue and thus the need for a standardized analysis for federal courts to apply for purposes of judicial legitimacy, as well as for equitable treatment of the falsely accused, and all criminal defendants, no matter their jurisdiction.[24]

This Note will advocate for the view that federal courts should adhere to a baseline standard that categorizes certain pretrial release conditions as Fourth Amendment seizures. It will encourage federal courts to consider cases even where pretrial release conditions do not quite reach this proposed threshold and will endorse a framework for federal courts to apply when analyzing whether the bond conditions in such cases constitute seizures under the Fourth Amendment. This Note will also provide a few potential examples of currently imposed pretrial release conditions that may constitute Fourth Amendment seizures. Finally, this Note will conclude by exploring the potential implications of categorizing pretrial release conditions as Fourth Amendment seizures.

Section I.A of this Note will provide an overview of the Fourth Amendment, first by outlining its historical foundation and then by demonstrating the ways in which divergent understandings of its origins have influenced the Supreme Court's evolving jurisprudence on the protections provided by the Fourth Amendment's proscription of unreasonable searches and seizures. It will additionally examine the various and frequently ambiguous methods of the Supreme Court in approaching Fourth Amendment questions and will explore the present state of Supreme Court jurisprudence on the nature of Fourth Amendment seizures, specifically.

Section I.B will highlight the central significance of Justice Ginsburg's "continuing-seizure" doctrine to analyze whether pretrial release conditions may be Fourth Amendment seizures. It will also

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21 For a comprehensive explanation of the continuing seizure doctrine, see *infra* Section I.B. For discussion on whether the federal courts embrace this theory, see *infra* Section I.E.

22 Black v. Montgomery County, 835 F.3d 358, 367–68 (3d Cir. 2016) ("We have described the analysis in Justice Ginsburg's *Albright* concurrence as 'compelling and supported by Supreme Court case law,' and have expressly adopted her concept of 'continuing seizure.'" (first quoting Gallo v. City of Philadelphia, 161 F.3d 217, 223 (3d Cir. 1998); and then quoting Schneyder v. Smith, 653 F.3d 313, (3d Cir. 2011))).

23 *See infra* Section I.E.3.

24 *See infra* Part II.

underscore any indication that the Supreme Court and federal circuit courts have made, in either direction, about whether to adopt the continuing seizure theory in their own analyses.

Section I.C of this Note will explain how pretrial release presently operates under federal law. It will then delineate where both the Supreme Court and the circuit courts stand on the issue of whether pretrial release conditions may be Fourth Amendment seizures and, if so, which conditions may fall into that category.

Section I.D will lay the groundwork for the main argument in this Note by categorizing the methods of the circuit courts into three groups: the limited "case-by-case" approach, adopted most recently by the Seventh Circuit;[25] the broader "continuing-seizure" or "degree-of-restriction" analysis, embraced most prominently by the Second[26] and Third Circuits;[27] and finally, the outright refusal by some courts to recognize a pretrial release condition as a seizure[28] or judicial reticence by others on the matter.[29]

Section II.A of this Note will argue that federal courts should uniformly adopt a baseline threshold of the point at which specific pretrial release conditions become Fourth Amendment seizures. Section II.B will endorse a framework for federal courts to employ in more ambiguous cases to establish whether a pretrial release condition is a Fourth Amendment seizure for purposes of judicial clarity and deference to the civil rights of criminal defendants. Section II.C will advocate for an analysis that looks to the degree, rather than the kind, of restrictions imposed by pretrial release conditions and will rely on existing case law to exemplify its pragmatic application. It will then propose some specific, contextualized examples of which pretrial release conditions would likely constitute Fourth Amendment seizures under this framework.

Finally, Section II.D of this Note will lay out some of the potential implications of categorizing certain bond conditions as Fourth Amendment seizures under this framework, most notably on litigants' capacity to bring civil rights claims against law enforcement under 42 U.S.C. § 1983. It will also address some broader questions that could arise should federal courts choose to implement this proposed framework in their own analyses.

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25 Smith v. City of Chicago, 3 F.4th 332, 341–42 (7th Cir. 2021), *vacated*, 142 S. Ct. 1665 (2022).

26 *See* Murphy v. Lynn, 118 F.3d 938, 946 (2d Cir. 1997) (agreeing with Justice Ginsburg's view in *Albright v. Oliver* that an individual released pretrial may still be seized "in the constitutionally relevant sense" (quoting Albright v. Oliver, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring))).

27 *See Black*, 835 F.3d at 366–67.

28 *See, e.g.*, Nieves v. McSweeney, 241 F.3d 46, 55–56 (1st Cir. 2001).

29 *See, e.g.*, Whiting v. Traylor, 85 F.3d 581, 584 (11th Cir. 1996).

I. BACKGROUND

A. *The Ambiguity of Fourth Amendment Jurisprudence*

The text of the Fourth Amendment provides, in pertinent part, that absent a warrant substantiated by probable cause, individuals are protected against "unreasonable" searches and seizures of their persons, homes, or other property.[30] Since its inception, this Amendment has been particularly wrought with confusion, due in large part to what many legal scholars agree is a consistently "incoherent" approach to Fourth Amendment issues by the Supreme Court.[31] Critics have attributed this lack of jurisprudential clarity to several causes including, inter alia, inconsistent decision making by the Supreme Court,[32] incoherent or misconstrued interpretations of the text and history of the Fourth Amendment,[33] and the text's own inherent ambiguity.[34] An exploration of its history, therefore, provides some contextual clarity for an otherwise enigmatic body of case law.

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30 U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

31 Nicholas Kahn-Fogel, *An Examination of the Coherence of Fourth Amendment Jurisprudence*, 26 CORNELL J.L. & PUB. POL'Y 275, 276 (2016); *see also* David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581, 581 (2008).

32 Kahn-Fogel, *supra* note 31, at 278 ("For decades, authors have characterized the Court's pronouncements on the Fourth Amendment as 'illogical, inconsistent with prior holdings, and, generally, hopelessly confusing'; 'a mass of contradictions and obscurities'; 'an embarrassment'; 'arbitrary, unpredictable, and often border[ing] on incoherent'; 'lack[ing] a coherent explanation'; and 'subjective, unpredictable, and conceptually confused.'" (alterations in original) (footnotes omitted) (first quoting Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468, 1469 (1985); then quoting Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994); then quoting David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 47 (2005); then quoting Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 478 (2011); and then quoting William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1823 (2016))).

33 Amar, *supra* note 32, at 757–58 (arguing that several "pillars" of Fourth Amendment case law, including the call for warrants and probable cause, are "misguided" and "hard to support" as they relate to the text and history of the Fourth Amendment and "plain old common sense," and that the Justices, while upholding these less coherent rules, often ignore the more "sensible rules" of the Amendment, including the reasonableness requirement).

34 Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 79 (2019) ("Even many originalist scholars acknowledge that the original meaning of constitutional text is sometimes vague or ambiguous . . . .").

1. The Fourth Amendment's Disputed History

Like most other matters of the Fourth Amendment, the history surrounding its inception is a topic of great debate amongst legal scholars.[35] Some scholars argue that the Fourth Amendment was borne out of the Founders' disdain for the pre-Revolutionary practice of the English crown, whereby British officers employed general, open-ended search warrants as a means to enforce trade laws and assert control over the American economy.[36] Others argue that the Founders' focus was much narrower, and that they were merely concerned with physical trespasses into individuals' homes by government agents.[37]

The dispute over the historical bases for the Fourth Amendment is not limited to the spheres of academia; this confusion bleeds into Supreme Court jurisprudence on Fourth Amendment matters as well, due in large part to the Justices' own differing interpretations of the Fourth Amendment's history.[38] Despite this, much of Supreme Court jurisprudence has a tendency––albeit an inconsistent tendency[39]––to lean on historical interpretation in Fourth Amendment cases.[40] In particular, some Justices cite the values that they believe the Founders intended to protect at the time of the Amendment's passage, and then apply those values to specific contemporary issues.[41] These divergent applications of such history, however, have been the subject of much scrutiny and criticism by lawyers and scholars alike.[42] It is helpful,

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35 *See* Steinberg, *supra* note 31, at 582–83; *see also* M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. REV. 905, 912 (2010) ("The immediate aim of the Fourth Amendment was to ban general warrants and writs of assistance.").

36 LEWIS R. KATZ, JOHN MARTIN & JAY MACKE, BALDWIN'S OHIO PRACTICE: CRIMINAL LAW § 2:2 (3d ed. 2021).

37 *See* Steinberg, *supra* note 31, at 583.

38 For a recent example of such a dispute, see *Torres v. Madrid*, 141 S. Ct. 989, 1001 (2021) ("In any event, the officers and the dissent misapprehend the history of the Fourth Amendment by minimizing the role of practices in civil cases.").

39 David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV 1739, 1741 (2000) (describing the ebb and flow of the role of historical analysis in Fourth Amendment jurisprudence from Justice Frankfurter's time on the Court through 2000).

40 *Id.* at 1740–43.

41 *Id.*

42 Arnold H. Loewy, *The Fourth Amendment: History, Purpose, and Remedies*, 43 TEX. TECH. L. REV. 1, 1 (2010); *see also* Amar, *supra* note 32; Michael, *supra* note 35, at 921 (juxtaposing how Justice Stevens used "formative history to explain" that the Fourth Amendment's "central concern . . . about giving police officers unbridled discretion to rummage at will among a person's private effects" protects individuals against warrantless vehicle searches incident to the arrest of a driver, while Justice Scalia wrote a concurring opinion emphasizing a "frozen-common-law approach" by applying the common law principles exactly as they existed at the time of the Amendment's inception (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009))).

therefore, to lay out a broad strokes overview of Supreme Court jurisprudence from the Fourth Amendment's inception to the present day.

2. Broad Strokes: Supreme Court Jurisprudence

The Fourth Amendment and its application to the evolving privacy challenges of the modern world is one of the leading legal issues the Supreme Court engages with each term.[43] While the principle of an individual's right to privacy is enshrined in the Fourth Amendment's language, most of the significant guarantees and protections it affords are much more recent developments.[44] In fact, the Supreme Court made no substantive decision regarding the Fourth Amendment until *Ex parte Jackson* in 1878,[45] and the Fourth Amendment was not extensively litigated––at least at the Supreme Court level––until the twentieth century.[46]

The Supreme Court held in *Wolf v. Colorado* that the Fourth Amendment's protection against unreasonable searches and seizures, and its requirement for law enforcement to obtain a warrant based on probable cause in order to engage in such searches or seizures, requires the exclusion of any "fruit of the poisonous tree," i.e., evidence procured in violation of the Fourth Amendment, from a criminal prosecution.[47] In *Wolf*, however, the Court declined to incorporate this protection to the states, making the Fourth Amendment's protection exclusively applicable to federal matters.[48] It was at this point that Fourth Amendment litigation truly accelerated.[49] Over a decade after deciding *Wolf*, the Supreme Court expanded the reach of the Fourth Amendment's protection against unreasonable searches and seizures in its holding in *Mapp v. Ohio* by incorporating the Amendment to the states.[50]

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43 Brent E. Newton, *The Supreme Court's Fourth Amendment Scorecard*, 13 STAN. J.C.R. & C.L. 1, 2–3 (2017).

44 *Id.* at 5.

45 Timothy C. MacDonnell, *Justice Scalia's Fourth Amendment: Text, Context, Clarity, and Occasional Faint-Hearted Originalism*, 3 VA. J. CRIM. L. 175, 178 (2015).

46 *Id.*

47 Wolf v. Colorado, 338 U.S. 25, 28 (1949). The phrase "fruit of the poisonous tree," conceptualized in a later Fourth Amendment case, espouses the principle of the exclusionary rule as developed in *Wolf* in much punchier language. *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963).

48 *Wolf*, 338 U.S. at 33.

49 *See* MacDonnell, *supra* note 45, at 178–79; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.3, at 549 (6th ed. 2019) (citing *Wolf*, 338 U.S. 25).

50 *See* MacDonnell, *supra* note 45, at 179 (citing Mapp v. Ohio, 367 U.S. 643, 655 (1961)).

Whether or not a government intrusion amounts to a search or seizure under the Fourth Amendment is the first part of the Supreme Court's analysis as to whether a violation has occurred, and the Court has taken many approaches to answer this question.[51] But even the mere determination of whether an action constitutes a search or seizure is wrought with uncertainty.[52] Beginning with the inception of the Amendment, and particularly prevalent in earlier Fourth Amendment cases, the Court focused on physical intrusions—either of property or person—to govern its analysis of whether one's privacy interest was violated by a search or seizure.[53]

While the Court's analysis of privacy rights may have expanded beyond this viewpoint, the emphasis on physical intrusions remains a fundamental part of Supreme Court jurisprudence on the Fourth Amendment.[54] Moving away from––but not overruling––the property-based approach, the Supreme Court expanded the scope of what constitutes a "constitutionally protected area"[55] with the "reasonable expectation of privacy" test proposed in *Katz v. United States*.[56] Still, the Court often wavers from case to case as to which standard to apply when determining what constitutes a violation under the Fourth Amendment, and such analytical variability has contributed greatly to the lack of clarity in the Court's Fourth Amendment jurisprudence.[57]

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51 *See* Kyllo v. United States, 533 U.S. 27, 31 (2001) ("[T]he . . . question whether or not a Fourth Amendment 'search' has occurred is not so simple under our precedent.").

52 *See* Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 233–35 (2019) ("[A]fter decades of Supreme Court jurisprudence, a coherent definition of the term 'search' remains surprisingly elusive.").

53 LEWIS R. KATZ, OHIO ARREST, SEARCH AND SEIZURE § 1:5 (2022) ("Prior to 1967, the Supreme Court limited the scope of review of Fourth Amendment protections to physical intrusions."); *see also* Paul Ohm, *The Olmsteadian Seizure Clause: The Fourth Amendment and the Seizure of Intangible Property*, 2008 STAN. TECH. L. REV. 2, 8–10 (2008) (describing the Court's "property-based conception of the Fourth Amendment" in *Olmstead v. United States*, 277 U.S. 438 (1928)).

54 *See* KATZ, *supra* note 53, § 1:8 ("In 2012, the Supreme Court once again altered the privacy analysis under the Fourth Amendment, returning to its trespass-based roots."); *see also* United States v. Jones, 565 U.S. 400, 406–07 (2012).

55 *See* Katz v. United States, 389 U.S. 347, 351–53 (1967) (holding that because the defendant had a reasonable expectation that his conversation would be private, "upon which he justifiably relied while using the telephone booth," the government's electronic surveillance of his phone call constituted a search and seizure under the Fourth Amendment).

56 *Id.* at 360–62 (Harlan, J., concurring); *see also* Ohm, *supra* note 53, at 10 ("*Katz* represents to most observers of criminal procedure a strong signal that the Fourth Amendment will not be constrained to crabbed, property-based rules.").

57 *See, e.g.*, KATZ, *supra* note 53, § 1:9 (noting that both tests coexist but have not been applied "with precision and uniformity").

3. "Reasonableness" Under the Fourth Amendment

Congruent with the inherent ambiguity of the Fourth Amendment's text and history, the Supreme Court's method for determining what "reasonableness" means under the Amendment[58] and when to analyze a government intrusion using this standard, as opposed to the warrant-presumption approach,[59] is self-contradictory at best.[60] This discrepancy is highly significant because reasonableness is often the central concern of Fourth Amendment analyses and holdings.[61]

Like everything else in Fourth Amendment jurisprudence, the Court's analysis of reasonableness is not operatively identical and is, therefore, frankly, confusing.[62] To assess reasonableness, one of the tests the Court often relies on is the "totality-of-the-circumstances" test, which looks to the specific facts of each case and considers them in sum to determine whether a Fourth Amendment violation has occurred.[63] In general, though, a search or seizure is "ordinarily unreasonable in the absence of individualized suspicion."[64] The Supreme Court's analysis of reasonableness may rely on an effort to balance so-called "public safety"

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58 *See* Kit Kinports, *The Origins and Legacy of the Fourth Amendment Reasonableness-Balancing Model*, 71 CASE W. RSRV. L. REV. 157, 158 (2020) (advocating for the warrant-presumption model "[g]iven the vagueness and malleability of the reasonableness-balancing model, and the absence of any principled standard suggesting when it applies").

59 *See id.* at 157 (defining the warrant-presumption model, "which determines the constitutionality of a search or seizure by asking whether law enforcement officials had probable cause and a warrant, or some exception to those requirements").

60 *See, e.g.*, Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978 (2004) (noting that in its efforts to analyze modern-day Fourth Amendment cases, "the reasonableness analysis employed by the Supreme Court has repeatedly changed and each new case seems to modify the Court's view of what constitutes a reasonable search or seizure").

61 68 AM. JUR. 2D *Searches and Seizures* § 13 (2022) ("Reasonableness is always the touchstone of Fourth Amendment analysis."); *see also* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 384–85 (1988) ("Determining that the reasonableness clause governs certain government intrusions accomplishes little unless the Court adequately defines a reasonable search or seizure. As the Court's current efforts illustrate, reasonableness is a slippery concept that, without definitional restraints, can allow the range of acceptable government intrusions to expand and overwhelm the privacy interests at stake.").

62 *See generally* Kahn-Fogel, *supra* note 31.

63 *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 238 (1983) (applying a totality-of-circumstances test to determine reliability of informant upon whom probable cause is based); *see also* Florida v. Royer, 460 U.S. 491, 506–07 (1983) (applying a totality-of-circumstances test to determine whether constructive arrest had taken place); Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973) (holding that voluntariness is to be determined based on the totality of the circumstances).

64 City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

concerns against an individual's right to privacy.[65] The Justices may also consider other factors, such as the intention of the Framers, or may come to their own, arguably arbitrary, conclusions about which expectations of privacy are generally accepted by society.[66]

4. Supreme Court Jurisprudence on Fourth Amendment Seizures

Seizure cases, as they relate to the restraint of one's person, typically fall into one of several categories: "arrests, stops, search warrant seizures, checkpoints, encounters, and police use-of-force."[67] Unlike the Supreme Court's broader interpretation of the Fourth Amendment's concern with regard to searches, the Court most often attributes Fourth Amendment seizures to tangible, physical, and fixed intrusions.[68] And while it is at least somewhat clear that the Court's analysis of Fourth Amendment searches has evolved from a property-based doctrine––despite the Court's tendency to waver on which approach it ultimately employs[69]––to the "reasonable expectation of privacy" test set forth in *Katz v. United States*, understanding the Supreme Court's analysis of seizures remains a more elusive undertaking.[70]

Some legal scholars have argued that, in the context of property, the Supreme Court analyzes searches and seizures from ostensibly opposite

65 Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 8–10 (2011) (explaining that the Court's assessment of reasonableness entails a "balance between the public interest and the individual's right to personal security" (quoting Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977))).

66 Oliver v. United States, 466 U.S. 170, 178 (1984).

67 Lauryn P. Gouldin, *Redefining Reasonable Seizures*, 93 DENV. L. REV. 53, 59–60 (2015).

68 *See* Ohm, *supra* note 53, at 2 (noting that the Seizure Clause has been "consistently interpreted to protect only physical property rights and to regulate only the deprivation of tangible things").

69 *See* Katz v. United States, 389 U.S. 347 (1967); *see, e.g.*, Florida v. Jardines, 569 U.S. 1, 11 (2013) ("The *Katz* reasonable-expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." (quoting United States v. Jones, 565 U.S. 400, 409 (2012))); *see also supra* Section I.A.2.

70 *See* Ohm, *supra* note 53, at 10–15 (arguing that the Supreme Court's analysis of seizures is rooted in a property-based approach closer to the viewpoint presented in *Olmstead v. United States*, 277 U.S. 438 (1928)). *But see* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 312 (1998) ("Underlying *Boyd* and *Olmstead* were two conflicting visions of the Fourth Amendment, with the former advocating a liberal construction and the latter a literal one. . . . Both of those lines of authority coexisted uneasily until 1967, when the Court rejected [the *Olmstead*] property analysis and substituted privacy analysis to measure the scope of the Fourth Amendment's protections.").

frameworks.[71] Others have identified the Supreme Court's approach in its "personal-seizure precedent," rooted in its decision in *Terry v. Ohio*, as an expansion or more liberal construction of the Fourth Amendment seizure doctrine.[72] As it relates to pretrial detention––and perhaps certain pretrial release conditions––the Supreme Court has implicitly acknowledged that extended restrictions of liberty may be Fourth Amendment seizures and has held that the Fourth Amendment requires probable cause in such instances.[73]

B. *The Continuing Seizure Doctrine*

In her concurring opinion in *Albright v. Oliver*, Justice Ginsburg concluded that a criminal defendant released on pretrial conditions may well be seized "in the constitutionally relevant sense."[74] Basing her argument on an analysis of the common law understanding of seizures, Justice Ginsburg posited that pretrial detention and pretrial release on conditions, both intended to ensure a defendant's return to court, are methods by the government to assert control over an individual's liberty; thus, her theory supports the notion that both types of restrictions can be categorized as Fourth Amendment seizures.[75] She reasoned that, under a continuing seizure approach, a defendant remains seized for trial whether

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71 *See* Ohm, *supra* note 53, at 10 ("Two generations of scholars have commented on the shift from *Olmstead*'s property-based conception of the Fourth Amendment to *Katz*'s privacy-based reasonable expectation of privacy test. Although some scholars disagree, *Katz* represents to most observers of criminal procedure a strong signal that the Fourth Amendment . . . . still prevails in courts when seizure, not search, is the issue." (footnotes omitted)).

72 *See, e.g.*, Diana E. Cole, Comment, *The Antithetical Definition of Personal Seizure: Filling the Supreme Court Gap in Analyzing Section 1983 Excessive-Force Claims Arising After Arrest and Before Pretrial Detention*, 59 CATH. U. L. REV. 493, 503–04 (2010) (explaining the Supreme Court's expansion of the definition of a seizure in *Terry v. Ohio*, which held that the stop-and-frisk of an individual, though not an official arrest, constituted a seizure because the individual was at that point no longer free to leave (citing Terry v. Ohio, 392 U.S. 1, 16, 19 n.16 (1968))).

73 Gerstein v. Pugh, 420 U.S. 103, 103 (1975) (holding that "[t]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest").

74 Albright v. Oliver, 510 U.S. 266, 277–79 (1994) (Ginsburg, J., concurring) ("At common law, an arrested person's seizure was deemed to continue even after release from official custody. . . . The purpose of an arrest at common law, in both criminal and civil cases, was 'only to compel an appearance in court,' and 'that purpose is equally answered, whether the sheriff detains [the suspect's] person, or takes sufficient security for his appearance, called bail.'" (alteration in original) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *290)).

75 *Id.* at 278 ("The common law . . . seems to have regarded the difference between pretrial incarceration and other ways to secure a defendant's court attendance as a distinction between methods of retaining control over a defendant's person, not one between seizure and its opposite.").

or not they are in jail or released on bond conditions.[76] Thus, applying the continuing seizure approach to the context of pretrial release conditions essentially ensures that any condition requiring a defendant to return to court would be a seizure for Fourth Amendment purposes.[77]

Whether or not a federal court has adopted this theory—in part or in whole—influences its capacity, or perhaps willingness, to recognize a pretrial release condition as a seizure.[78] In light of the federal circuit split on this theory, it follows that determinations as to whether a pretrial release condition may be a Fourth Amendment seizure vary greatly depending on the court's jurisdiction.[79] Thus, a court's espousal of this theory is pertinent, if not critical, to whether a criminal defendant's bond condition may be codified as a Fourth Amendment seizure.[80]

C. *Pretrial Release Under the Law*

1. Pretrial Release Conditions Are Highly Discretionary

Section 203(a) of the Bail Reform Act of 1984 codified the procedure for how a federal magistrate might decide whether to release an individual

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76 *Id.* at 279 (arguing that a defendant is "indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges").

77 *Id.* at 278 ("[The common law] view of the definition and duration of a seizure comports with common sense and common understanding. A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip."); *see also* Graham Miller, Comment, *Right of Return:* Lee v. City of Chicago *and Continuing Seizure in the Property Context*, 55 DEPAUL L. REV. 745, 753 (2006) ("According to this construction, a person is considered seized even if he is released before trial . . . .").

78 *See* Darby G. Sullivan, Note, *Continuing Seizure and the Fourth Amendment: Conceptual Discord and Evidentiary Uncertainty in* United States v. Dupree, 55 VILL. L. REV. 235, 238 (2010) ("Seizures generally fall within one of four categories: (1) seizure by physical force that subdues the suspect; (2) seizure by show of authority to which the suspect submits; (3) seizure by physical force from which the suspect breaks away before being ultimately apprehended; and (4) seizure by show of authority to which the suspect momentarily submits prior to flight and before being apprehended. In the former two categories, the seizure is a static event, and it is settled that evidence obtained during the encounter is admissible only if reasonable suspicion was present at the outset of the seizure. In the latter two categories, however, the admissibility of any evidence obtained hinges upon whether a court recognizes the concept of continuing seizure." (footnotes omitted)).

79 *See* Miller, *supra* note 77, at 746 (discussing the variability amongst the circuit courts in determining whether the government has made a seizure under the Fourth Amendment in a property context based on the court's understanding of a seizure's temporal component).

80 See *infra* Sections I.D–I.E, which will explore in greater detail the various positions of the Supreme Court and the circuit courts on the continuing seizure doctrine and the implications that follow with regard to their analyses of whether and which bond conditions may constitute seizures.

pending trial, sentence, or appeal in 18 U.S.C. § 3141.[81] The Act further codified § 3142 to dictate the parameters of judicial discretion when courts analyze whether to release a defendant pending trial and, if release is authorized, discretion as to what conditions the court may impose.[82] When a judge determines that releasing a defendant on his own personal recognizance or an unsecured bond will not provide the reasonable assurance that the individual will return to court, or that they will not be a threat to the community,[83] the judge must order the pretrial release of that individual with conditions that are the "least restrictive," while still assuring that they will appear in court.[84] Judges have a significant amount of latitude in their decision making when imposing pretrial conditions, or a combination of conditions, on a criminal defendant; the only real statutory requirement, at least on a federal level, is that judges adhere to the largely ambiguous and undefined requirement that they order the "least restrictive" condition of bond.[85]

Multiple pretrial release conditions exist for judges to apply in each case,[86] and the availability of those conditions vary by state.[87] When determining which conditions are appropriate, courts may consider factors such as the nature of the offense charged, the weight of the evidence against the defendant, the defendant's family ties, employment, financial resources, character and mental condition, status and duration of residence in the community, "record of convictions, and his record of appearance at court proceedings or of flight . . . or failure to appear."[88] Common examples of pretrial release conditions include prohibitions on the possession of firearms, abstention from drugs or alcohol, varying degrees of travel restrictions—including the State's use of surveillance technology to track the individual—or involvement in community programming, among others.[89]

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81 Bail Reform Act of 1984 § 203(a), Pub. L. No. 98-473, 98 Stat. 1976 (codified at 18 U.S.C. §§ 3141–3150); 18 U.S.C. § 3141.

82 18 U.S.C. § 3142(a).

83 *Id.* § 3142(c) (explaining that pretrial release generally must be ordered where personal recognizance or unsecured appearance bond "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community").

84 *Id.* § 3142(c)(1)(B) (providing that following a discretionary determination to release an individual from custody, judges have a nondiscretionary obligation to release the defendant "subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community").

85 *Id.*

86 Expert Report of Michael R. Jones, Ph.D. at 4, Egana v. Blair's Bail Bonds, Inc., No. 17-cv-5899, 2019 WL 9123051 (E.D. La. Dec. 3, 2019).

87 *Id.* at n.2.

88 United States v. Beaman, 631 F.2d 85, 87 (6th Cir. 1980) (citing 18 U.S.C. § 3146(b)).

89 8 C.J.S. *Bail* § 31 (2022).

D. *Which Pretrial Conditions Constitute Seizures: The Supreme Court*

Despite the ambiguity around the issue, the Supreme Court and many circuit courts have asserted, or at least implied, that certain pretrial conditions could be Fourth Amendment seizures.[90] However, few federal courts have identified precisely which conditions are, or would be, definitively Fourth Amendment seizures. Instead, some courts have provided greater clarity around which conditions do *not* constitute seizures.[91]

1. The Supreme Court's View on Pretrial Release Conditions as Seizures

The issue of whether a pretrial release condition may be a seizure has only been addressed by the Supreme Court in the context of pretrial detention based on fabricated evidence.[92] In these cases, the Supreme Court has held that claims of "unlawful detention" are sound under the Fourth Amendment.[93] The Supreme Court has offered limited clarity, however, as to whether a pretrial release condition may constitute a Fourth Amendment seizure; in fact, it has said little beyond holding that a subpoena requiring an individual to appear before a grand jury is not a seizure under the Fourth Amendment.[94] "[N]or [is] a grand jury directive to produce either a voice exemplar or a handwriting exemplar"[95] a seizure under the Fourth Amendment.[96]

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90 For a discussion on the Supreme Court's view of pretrial release conditions as seizures, see *infra* Section I.D.1. For a discussion on various circuit court approaches, see *infra* Section I.E.

91 *See infra* Sections I.D.1, I.E.

92 *See* Manuel v. City of Joliet, 580 U.S. 357 (2017).

93 Artman v. Gualandri, No. 20 C 4501, 2021 WL 2254961, at *3 (N.D. Ill. June 3, 2021) (citing *Manuel*, 580 U.S. at 370).

94 United States v. Dionisio, 410 U.S. 1, 9 (1973) ("[A] subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome.").

95 1 DAVID S. RUDSTEIN, C. PETER ERLINDER & DAVID C. THOMAS, CRIMINAL CONSTITUTIONAL LAW § 2.03 (2022) (footnote omitted) (first citing *Dionisio*, 410 U.S. at 13–15; then citing United States v. Mara, 410 U.S. 19, 21–22 (1973); then citing United States v. Hollins, 811 F.2d 384, 387 (7th Cir. 1987); then citing United States v. McVeigh, 896 F. Supp. 1549, 1560–61 (W.D. Okla. 1995); and then citing United States v. Euge, 444 U.S. 707, 717 (1980)).

96 *Id.* (footnote omitted).

The Supreme Court has come close to invalidating Justice Ginsburg's continuing seizure doctrine, though merely in dicta.[97] Other standards espoused by the Supreme Court suggest that the classification of a restriction of liberty as a seizure may be a more malleable standard than previously applied.[98] The notion that the termination of an individual's freedom of movement may be a determinative factor in assessing whether a Fourth Amendment seizure has occurred comports with the continuing seizure doctrine's, and the arguments made by the doctrine's proponents, that pretrial release conditions are, by their very nature, intentionally applied restrictions on an individual's freedom of movement.[99]

Specifically as it pertains to the use of excessive force, the Supreme Court has declined to extend Fourth Amendment protection beyond the point of arrest to cover individuals in pretrial detention, though it reserved the question for future resolution.[100] In his dissent in *Kingsley v. Hendrickson*, Justice Alito alluded to the Court's silence on the issue while urging the Court to decide whether a pretrial detainee may bring an excessive force claim under the Fourth Amendment.[101] In light of the dearth of discussion at the Supreme Court level, it is helpful to look to the various circuit court approaches to determining whether pretrial release conditions can be Fourth Amendment seizures and, if so, which to codify as such.[102]

E. *The Various Circuit Court Approaches*

The discord amongst the federal circuit courts regarding whether pretrial release conditions may constitute seizures mirrors the ambiguity of the Supreme Court's Fourth Amendment jurisprudence as a whole.

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97 *See* Torres v. Madrid, 141 S. Ct. 989, 1002 (2021) ("'A seizure is a single act, and not a continuous fact.' For centuries, the common law rule has avoided such line-drawing problems by clearly fixing the moment of the seizure." (citation omitted) (quoting California v. Hodari D., 499 U.S. 621, 625 (1991))).

98 Brower v. County of Inyo, 489 U.S. 593, 596–97 (1989) (asserting that "only when there is a governmental termination of freedom of movement through means intentionally applied" does a seizure occur).

99 Albright v. Oliver, 510 U.S. 266, 277–78 (1994) (Ginsburg, J., concurring); *see* Murphy v. Lynn, 118 F.3d 938, 946 (2d Cir. 1997); *infra* Section I.E.2.

100 Riley v. Dorton, 115 F.3d 1159, 1162 (4th Cir. 1997) (citing Graham v. Connor, 490 U.S. 386, 395 n.10 (1989)), *abrogated on other grounds by* Wilkins v. Gaddy, 559 U.S. 34 (2010).

101 Kingsley v. Hendrickson, 576 U.S. 389, 408 (2015) (Alito, J., dissenting) ("Before deciding what a pretrial detainee must show in order to prevail on a due process excessive force claim, we should decide whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee. We have not yet decided that question.").

102 *See infra* Section I.E.

This derivative confusion, in the context of pretrial release conditions specifically, is due in large part to the circuit split on the issue of whether a temporal gap can exist in a seizure and, if so, how long a seizure may continue after an initial arrest.[103]

In *Smith v. City of Chicago*, the Seventh Circuit held that "standard bond conditions," such as requirements to appear in court and to request permission to leave the state, are not Fourth Amendment seizures.[104] In doing so, the court adopted a "case-by-case" approach—a framework jointly espoused by the Fifth Circuit[105]—to analyze whether pretrial release conditions are seizures.[106] The Third Circuit has taken a broader view, holding that a combination of the conditions the Seventh Circuit might consider to be standard bond conditions could, in fact, be Fourth Amendment seizures.[107] This view comports with holdings of the Second[108] and Fifth Circuits.[109] Other circuit courts have been hesitant to label pretrial release conditions as Fourth Amendment seizures at all, or prefer to reserve the question for the Supreme Court.[110] For purposes of clarity, these approaches can be codified into three categories.

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103 *See also* Cole, *supra* note 72, at 496–97 ("[T]he [Supreme] Court has not indicated which constitutional provision governs such claims arising between arrest and pretrial detention. Consequently, a temporal gap has emerged, leaving an arrestee's constitutional rights uncertain. This temporal gap is the result of the Court's failure to define when a Fourth Amendment seizure ends." (footnotes omitted)). *See generally* Miller, *supra* note 77 (highlighting the circuit split on whether a Fourth Amendment seizure must be an instantaneous event and advocating the view that the continuing seizure doctrine is supported by the Constitution).

104 Smith v. City of Chicago, 3 F.4th 332, 341–42 (7th Cir. 2021), *vacated*, 142 S. Ct. 1665 (2022).

105 *Id.* (citing Evans v. Ball, 168 F.3d 856, 861 (5th Cir. 1999), *abrogated on other grounds by* Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003)).

106 *Id.* at 342 ("We adopt a case-by-case approach on this issue, and we do not foreclose the possibility that a bond condition might constitute a Fourth Amendment seizure.").

107 Gallo v. City of Philadelphia, 161 F.3d 217 (3d Cir. 1998) (holding that restrictions on the defendant's ability to travel and the mandatory requirement that he return to court together constituted a seizure).

108 *Id.* at 222 ("Thus, as the Court of Appeals for the Second Circuit stated in a post-*Albright* decision, a plaintiff asserting a malicious prosecution claim must show 'some deprivation of liberty consistent with the concept of "seizure."'" (quoting Singer v. Fulton Cnty. Sheriff, 63 F.3d 110, 116 (2d Cir. 1995))).

109 *See Evans*, 168 F.3d at 861.

110 *See infra* Section I.E.3.

1. The Seventh Circuit Approach

The Seventh Circuit has rejected the continuing seizure doctrine.[111] Despite its rejection of this doctrine, however, the Seventh Circuit remains open to the possibility that certain pretrial release conditions may be seizures under the Fourth Amendment.[112] In light of the view that pretrial release conditions are not fixed instances but rather ongoing seizures,[113] this would appear to be an incompatible position. However, in *Smith*, the Seventh Circuit declined to foreclose the notion that a pretrial release condition could be a Fourth Amendment seizure under different circumstances.[114]

While the Seventh Circuit has not expressly stated which pretrial release conditions might constitute seizures under the Fourth Amendment, it has left the question open for future cases.[115] The Seventh Circuit first entertained the possibility that a pretrial release condition could qualify as a seizure in *Mitchell v. City of Elgin*, where it found that as long as the condition imposed significant restrictions on an individual's liberty, it could potentially be a Fourth Amendment seizure.[116]

Remaining in line with the general principle underlying federal court analyses of Fourth Amendment seizures, which looks to both the termination of or restriction on an individual's freedom of movement,[117] the Seventh Circuit most recently held that "standard bond conditions," such as requirements to appear in court and to request permission to leave the state, are not Fourth Amendment seizures.[118] The Court argued, as it noted in *Mitchell*, that where a pretrial release condition involves a

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111 *See Smith*, 3 F.4th at 340 ("[T]he seizure is a specific event, and 'we have repeatedly rejected the concept of "continuing seizure."'" (quoting Welton v. Anderson, 770 F.3d 670, 675 (7th Cir. 2014))); *see also* Mitchell v. City of Elgin, 912 F.3d 1012, 1016–17 (7th Cir. 2019) ("[W]e rejected the concept of a continuous seizure." (citing *Welton*, 770 F.3d at 675)).

112 *See Smith*, 3 F.4th at 342 ("[W]e do not foreclose the possibility that a bond condition might constitute a Fourth Amendment seizure.").

113 *See* Albright v. Oliver, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring) (arguing that a defendant is "indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges").

114 *See Smith*, 3 F.4th at 342.

115 *Id.*

116 *Mitchell*, 912 F.3d at 1016 ("[P]retrial release might be construed as a 'seizure' for Fourth Amendment purposes if the conditions of that release impose significant restrictions on liberty.").

117 Fonder v. Martinez, No. 18-CV-2281, 2019 WL 10506599, at *4 (C.D. Ill. May 1, 2019) (noting that determining whether a seizure has occurred turns on "whether a state official has 'terminate[d] or restrain[ed]' an individual's 'freedom of movement' such that 'a reasonable person would have believed that he was not free to leave'" (alterations in original) (quoting Brendlin v. California, 551 U.S. 249, 254–55 (2007))).

118 *Smith*, 3 F.4th. at 341–42.

significant restriction on individual liberty, a finding that the condition truly constitutes a seizure requires it to fall within the "traditional[]" definition of a seizure.[119] The Seventh Circuit failed, however, to define what "traditionally characterizes" a Fourth Amendment seizure.[120] Instead, the Seventh Circuit has merely provided that requirements to appear in court or request permission before leaving the state do not constitute significant restrictions of freedom and, thus, are not Fourth Amendment seizures.[121]

Despite its failure to provide a clear definition or set examples of pretrial release conditions that could constitute Fourth Amendment seizures, the Seventh Circuit did recently establish a framework for analyzing this issue.[122] In *Smith*, the court adopted a case-by-case approach to the question of whether a pretrial release condition could be a Fourth Amendment seizure.[123] This approach is a fact-specific analysis similar to that which federal courts traditionally employ when hearing Fourth Amendment claims.[124] The framework, though it comports with Fourth Amendment jurisprudence broadly, is wanting for clarity in the absence of any tangible examples of what pretrial release conditions may constitute a seizure.[125] Fortunately, several of the other circuit courts have offered both express and implied examples of which conditions they would consider to be Fourth Amendment seizures.[126]

2. Proponents of the Continuing Seizure Doctrine

The continuing seizure doctrine—a temporal conceptualization of Fourth Amendment seizures as phenomena that extend past a singularly

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119 *Id.* at 342 ("A condition might involve the present and significant restriction of freedom that traditionally characterizes a Fourth Amendment seizure. But any challenged condition must fall within the traditionally-defined scope of what constitutes a seizure."); *see Mitchell*, 912 F.3d at 1016–17.

120 *Id.*

121 Messino v. City of Elmhurst, No. 19-cv-2985, 2021 WL 4318082, at *5 (N.D. Ill. Sept. 23, 2021) (citing *Smith*, 3 F.4th at 342).

122 *Smith*, 3 F.4th at 342 (clarifying that the Seventh Circuit employs a "case-by-case" analysis on the issue of whether pretrial release conditions are Fourth Amendment seizures).

123 *Id.*

124 *Id.* at 341–42 ("Some [circuits] have held that such conditions can constitute a Fourth Amendment seizure in principle and proceed case-by-case." (citing Evans v. Ball, 168 F.3d 856, 861 (5th Cir. 1999), *abrogated on other grounds by* Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003))); *see also* Clancy, *supra* note 70, at 333–34 (explaining that the Court's approaches to whether a state action constitutes a search under the *Katz* reasonable-expectation-of-privacy test "are often case-specific").

125 *See Smith*, 3 F.4th at 341–42.

126 *See infra* Section I.E.2.

fixed moment—is critical to the analysis of whether a pretrial release condition may be a Fourth Amendment seizure because of the ongoing nature of pretrial release conditions.[127] Several circuit courts recognize this imperative and therefore embrace the doctrine to inform their analyses in such matters.[128]

The Third Circuit, with few limitations, has expressly adopted Justice Ginsburg's concept of a continuing seizure.[129] The Second Circuit has taken a similar approach, holding that the Fourth Amendment additionally governs deprivations of liberty beyond the scope of physical detention.[130] Other circuit courts have offered more ambivalent responses to the continuing seizure theory. The Fifth Circuit, without embracing or rejecting this theory,[131] has nonetheless suggested its openness to the concept by holding that the Fourth Amendment protects against violations that might occur before the start of trial.[132] The Ninth Circuit has acknowledged that, at least in the time between arrest and pretrial, a seizure may "continue[]"; however, like the Fifth Circuit, it has not acknowledged whether a pretrial release condition itself may be such a continuing seizure.[133]

Relying on a continuing seizure rationale, the Third Circuit has held that pretrial release conditions aimed at securing a future defendant's attendance in court are in fact seizures, emphasizing that the distinction between actual detention and the restricted liberties inherent in pretrial release conditions turns on the *degree* of the restriction, rather than the

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127 *See* Albright v. Oliver, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring) (arguing that a defendant is "indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges").

128 *See, e.g.*, Gallo v. City of Philadelphia, 161 F.3d 217 (3d Cir. 1998); *see also* Kingsland v. City of Miami, 369 F.3d 1210, 1222 (11th Cir. 2004) (noting that pretrial release requirements that plaintiff pay $1,000 bond, appear at her arraignment, and make two trips from New Jersey to Florida to defend herself in court amounted to a Fourth Amendment seizure under the continuing seizure doctrine); Fisher v. Dodson, 451 F. App'x 500, 502 (6th Cir. 2011) (acknowledging the role of the continuing seizure doctrine in determining whether a pretrial release condition beyond physical detention is a seizure, without deciding on the validity of the doctrine).

129 *See* Black v. Montgomery County, 835 F.3d 358, 366–67 (3d Cir. 2016).

130 Murphy v. Lynn, 118 F.3d 938, 945 (2d Cir. 1997) ("The liberty deprivations regulated by the Fourth Amendment are not limited to physical detention.").

131 Castellano v. Fragozo, 352 F.3d 939, 959 (5th Cir. 2003) (stating that the continuing seizure theory "did not attract support in *Albright* and we need not here further define its limits").

132 *Id.* ("[T]he umbrella of the Fourth Amendment, broad and powerful as it is, casts its protection solely over the pretrial events of a prosecution.").

133 *See* Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985) (holding that "once a seizure has occurred, it continues throughout the time the arrestee is in the custody of the arresting officers," but seeming only to apply this doctrine in a limited context between arrest and pretrial detention without acknowledging whether a pretrial release condition itself may be a "continuing" seizure); *see also* Fontana v. Haskin, 262 F.3d 871, 879 (9th Cir. 2001).

kind of restriction.[134] Furthermore, the Third Circuit has likened a defendant's obligation to appear in court to a *Terry* stop, in which an individual, while not formally under arrest, is subject to an investigative stop and is thus deemed seized under the Fourth Amendment.[135] That being said, the Third Circuit has placed limiting parameters on this view elsewhere; in *DiBella v. Borough of Beachwood*, the Third Circuit held that individuals are not seized when they are issued a summons and are required to attend trial,[136] as "merely attending trial does not amount to a seizure for Fourth Amendment purposes."[137]

Unlike many of the other circuit courts—and the United States Supreme Court—the Second and Third Circuits have taken a more open approach to the continuing seizure doctrine, have spoken explicitly on whether pretrial release conditions can be Fourth Amendment seizures, and have even offered some tangible examples of such conditions.[138] The Second and Third Circuits express similar views regarding the threshold at which point pretrial release conditions constitute seizures; these circuits require, at least, that a court's order both demands the defendant appear in court and places restrictions on their ability to travel.[139] The Second Circuit has expanded on this view, suggesting that the Fourth Amendment is implicated when an individual is required to return to court several times and when a state statute––implicitly or explicitly––forces that individual to remain in the state by requiring them to always be available to the court at a moment's notice, thereby effectively

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134 Schneyder v. Smith, 653 F.3d 313, 320 (3d Cir. 2011) ("Pre-trial restrictions of liberty aimed at securing a suspect's court attendance are all 'seizures' . . . [because] the difference between detention in jail, release on bond, and release subject to compliance with other conditions is in the *degree* of restriction on the individual's liberty, not in the *kind* of restriction.").

135 *See* Gallo v. City of Philadelphia, 161 F.3d 217, 223 (3d Cir. 1998) ("When he was obliged to go to court and answer the charges against him, Gallo, like the plaintiff in *Terry*, was brought to a stop. This process may not have the feel of a seizure because it is effected by authority of the court, not by the immediate threat of physical force. . . . [But] it is difficult to distinguish this kind of halt from the exercise of authority deemed to be a seizure in *Terry*."); *see also* Terry v. Ohio, 392 U.S. 1, 19 (1968) (holding that Fourth Amendment seizures extend beyond physical arrest, reasoning that "'[s]earch' and 'seizure' are not talismans[, so the Court] therefore reject[s] the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search'").

136 DiBella v. Borough of Beachwood, 407 F.3d 599, 603 (3d Cir. 2005) ("Attending one's trial is not a government 'seizure' in a 42 U.S.C. § 1983 malicious prosecution action for violation of the Fourth Amendment.").

137 *See* Black v. Montgomery County, 835 F.3d 358, 367 (3d Cir. 2016) ("We noted that unlike the 'significant pretrial restrictions' imposed in *Gallo*, the plaintiffs' liberty in *DiBella* was restricted only during their municipal court trial and that merely attending trial does not amount to a seizure for Fourth Amendment purposes." (footnote omitted) (quoting *DiBella*, 407 F.3d at 603)).

138 *See, e.g.*, *Schneyder*, 653 F.3d at 320–21; *see also* Murphy v. Lynn, 118 F.3d 938, 946 (2d Cir. 1997).

139 *Black*, 835 F.3d at 367; *see also Murphy*, 118 F.3d at 946.

restricting their ability to travel.[140] The Third Circuit has taken the position, however, that pretrial release conditions that go beyond the threshold of "the least intrusive means" of assuring the defendant's return to court cannot be the sole basis for a finding that such conditions constitute an unreasonable seizure.[141]

3. Rejection, Skepticism, and Judicial Silence on Pretrial Release Conditions as Fourth Amendment Seizures

Several circuit courts, like the Fourth[142] and Seventh Circuits,[143] have rejected the concept of continuing seizure entirely.[144] Others have cast doubt on, but have not outright admonished, the theory.[145] The First Circuit has been vocal about its opposition to the continuing seizure theory, arguing, like the Seventh Circuit, that standard bond conditions cannot be categorized under the Fourth Amendment definition of a seizure.[146] The Eleventh Circuit has voiced its concerns about the continuing seizure theory, but it has not gone as far as the First Circuit as to outright reject the doctrine; instead, it has left the issue open while expressing its doubts about the theory's applicability.[147] The Fourth Circuit has adopted a more rigid view that a seizure only occurs when there is an actual, physical detention.[148] It has also advised that inquiry into the reasonableness of pretrial conditions or restrictions ought to be conducted exclusively under the Due Process Clause of the Fourteenth Amendment.[149]

With this understanding of the circuit split as it relates to the codification of bond conditions as Fourth Amendment seizures and the

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140 *See* Rohman v. N.Y.C. Transit Auth., 215 F.3d 208, 216 (2d Cir. 2000).

141 Holland v. Rosen, 895 F.3d 272, 302 (3d Cir. 2018) (quoting Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 837 (2002)).

142 Riley v. Dorton, 115 F.3d 1159, 1164 (4th Cir. 1997).

143 Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989); *see also* Smith v. City of Chicago, 3 F.4th 332, 341 (7th Cir. 2021), *vacated*, 142 S. Ct. 1665 (2022).

144 *Holland*, 895 F.3d at 302; *see also Smith*, 3 F.4th at 341.

145 *See, e.g.*, Cummin v. North, 731 F. App'x 465, 471 (6th Cir. 2018) ("[W]e have not yet explicitly addressed the 'continuing seizure' doctrine advanced by Justice Ginsburg. . . . [A]nd to date have not decided whether to adopt the 'continuing seizure' doctrine.").

146 Nieves v. McSweeney, 241 F.3d 46, 55 (1st Cir. 2001) (holding that "run-of-the-mill conditions of pretrial release do not fit comfortably within the recognized parameters of [a seizure]").

147 Whiting v. Traylor, 85 F.3d 581, 584 (11th Cir. 1996).

148 Riley v. Dorton, 115 F.3d 1159, 1162 (4th Cir. 1997) ("A deprivation of liberty . . . is not the same thing as a condition of detention."), *abrogated on other grounds by* Wilkins v. Gaddy, 559 U.S. 34 (2010).

149 *Id.*

variant receptions among the circuit courts to the continuing seizure doctrine, Part II recommends that federal courts establish a uniform minimum threshold that identifies specific pretrial release conditions as Fourth Amendment seizures in order to protect the rights of criminal defendants and to promote judicial clarity, efficiency, and fairness.[150]

II. ANALYSIS

In response to the Seventh Circuit's judgment against his § 1983 claim, Keith Smith has filed a writ of certiorari to the Supreme Court, asking the Court to address whether "ordinary conditions of bail" constitute Fourth Amendment seizures.[151] If it chooses to address this question, the Supreme Court should hold that federal courts must uniformly adhere to a baseline threshold at which certain pretrial release conditions ought to be categorized as Fourth Amendment seizures.[152]

Specifically, the baseline should provide that pretrial release conditions are unequivocally Fourth Amendment seizures when they (a) require an individual to return to court and (b) impose a restriction on or compulsion to travel.[153] In cases where the conditions of bond do not reach this baseline, federal courts should approach each case on a fact-specific, "case-by-case" basis that looks to the degree of intrusion on the individual's liberty, rather than dismissing the claim automatically.[154] Establishing a uniform standard for federal courts to employ in these cases will advance the liberty interests of individuals and mitigate judicial uncertainty while remaining in line with the Supreme Court's Fourth Amendment jurisprudence.[155]

A. *The Importance of a Uniform Minimum Threshold*

Certain combinations of pretrial release conditions should be uniformly recognized by federal courts as Fourth Amendment seizures. Specifically, conditions that require an individual to return to court while imposing any restriction on or compulsion to travel should operate as the

150 *See infra* Part II.

151 Petition for Writ of Certiorari at 14–16, Smith v. City of Chicago, 142 S. Ct. 1665 (2022) (No. 21-700).

152 *See infra* Section II.A.

153 *See infra* Section II.A.

154 *See infra* Section II.B.

155 *See infra* Sections II.A–II.B.

baseline threshold for courts to find that pretrial release conditions are Fourth Amendment seizures.

Restrictions on an individual's capacity to travel, either as an overt prohibition or a mere requirement that an individual seek permission to leave the state, are sufficiently onerous such that they should be considered Fourth Amendment seizures.[156] In *Murphy v. Lynn*, the plaintiff in a § 1983 malicious prosecution case was prohibited from leaving the State of New York and required to attend court appointments.[157] The Second Circuit grounded its holding that these conditions constituted Fourth Amendment seizures in the view that there exists a constitutional right for individuals to travel state to state.[158] The Third Circuit has affirmed this notion that the restriction of travel, in conjunction with requirements to come to court, is a sufficiently onerous deprivation of liberty such that it should be considered a Fourth Amendment seizure.[159] Other circuit court decisions support these arguments, and all are similarly concerned with the potentially extreme burden caused by impositions on an individual's right to travel freely.[160]

B. *A Case-by-Case Analysis Comports with Supreme Court Jurisprudence*

In cases where a defendant's pretrial release conditions do not meet this baseline threshold, federal courts should apply a fact-specific analysis to determine whether the conditions are sufficiently onerous such that they constitute a Fourth Amendment seizure. In doing so, it should give significant deference to the burden on the individual's liberty interests.

Because the Seventh Circuit's fact-specific, case-by-case analysis adopted in *Smith v. City of Chicago* so closely resembles the fact-specific methods by which the Supreme Court already approaches Fourth Amendment jurisprudence,[161] it is an appropriate lens through which federal courts should analyze the question of whether a pretrial release condition constitutes a Fourth Amendment seizure. The Supreme Court

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156 *See, e.g.*, Murphy v. Lynn, 118 F.3d 938, 945–47 (2d Cir. 1997).

157 *Id.* at 942.

158 *Id.* at 945 ("The Supreme Court has long recognized that a citizen's freedom to travel from state to state is a fundamental right that can properly be restricted only in the narrowest of circumstances." (citing Shapiro v. Thompson, 394 U.S. 618, 634 (1969))).

159 *See* Black v. Montgomery County, 835 F.3d 358, 366–67 (3d Cir. 2016); *see also* Gallo v. City of Philadelphia, 161 F.3d 217, 222–23 (3d Cir. 1998).

160 *See, e.g.*, Kingsland v. City of Miami, 369 F.3d 1210, 1222 (11th Cir. 2004) (holding that requirement compelling plaintiff to travel from New York to Florida, in conjunction with requirements to pay $1,000 bond and appear in court, was a continuing seizure).

161 *See supra* Sections I.A.3–I.A.4.

has held that the reasonableness of seizures relies on a balance of the public interest in law enforcement and an individual's right to be secure from arbitrary interference by government officials.[162] Assessing the degree of restriction on an individual's liberty imposed by a pretrial release condition directly comports with this type of balancing test.[163] In fact, the Supreme Court has already endorsed such an assessment in the context of probation conditions.[164]

C. *Examples of Pretrial Release Conditions That Are Fourth Amendment Seizures*

In light of the considerations explored and recommendations made throughout this Note, a few tangible examples of contexts in which pretrial release conditions are Fourth Amendment seizures emerge.[165] As noted, the Supreme Court and circuit courts have offered limited guidance or specificity as to which kinds of pretrial release conditions ought to be categorized as Fourth Amendment seizures.[166] In line with the Court's inclination to associate seizures with a physical touching, pretrial release conditions that include some kind of requirement that a defendant be adorned with an electronic monitoring device or be subject to other physical requirements should perhaps most clearly be categorized across the board as Fourth Amendment seizures.

One notably egregious example of such a pretrial release condition would be the use of ankle monitors or similar devices used by the State to surveil the whereabouts of criminal defendants. Some advocates go so far as to argue that "[e]lectronic surveillance is not an alternative to incarceration, it's an alternative *form* of incarceration."[167] These types of tracking devices are both physically restrictive and collaterally

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162 United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (explaining that the reasonableness of a seizure "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers" (first citing Terry v. Ohio, 392 U.S. 1, 20–21 (1968); and then citing Camara v. Municipal Court of San Francisco, 387 U.S. 523, 536–37 (1967))).

163 United States v. Knights, 534 U.S. 112, 112–13 (2001) ("The Fourth Amendment's touchstone is reasonableness, and a search's reasonableness is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed to promote legitimate governmental interests." (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999))).

164 *Id.* at 113 (noting that "Knights' status as a probationer subject to a search condition informs both sides of [the] balance" between individual liberty and government interest).

165 *See supra* Section I.E.2.

166 *See supra* Section I.D.1.

167 KATE WEISBURD ET AL., ELECTRONIC PRISONS: THE OPERATION OF ANKLE MONITORING IN THE CRIMINAL LEGAL SYSTEM (2021).

damaging.[168] It follows that other conditions that are similarly restrictive upon an individual's freedom from restraint (or a physical touching) should be categorized unequivocally as Fourth Amendment seizures.

D. *Potential Implications of Codifying Bond Conditions as Fourth Amendment Seizures*

1. Claims Brought Under 42 U.S.C. § 1983

In order for a claimant to have standing to bring a § 1983 action, the law requires a type of post-arraignment liberty restriction that constitutes an unreasonable seizure under the Fourth Amendment.[169] The time at which a § 1983 claim accrues relies on an analysis that begins with the identification of a "specific constitutional right" alleged to have been infringed upon by the State—in the aforementioned cases, that violation would be a wrongful restriction of liberty, or an unreasonable seizure, under the Fourth Amendment.[170]

Moreover, these specific constitutional claims, including false imprisonment, have a statute of limitations period that does not begin to accrue until the criminal defendant's release from detention.[171] The First Circuit has articulated this requirement as a claimant's obligation to show "some post-arraignment deprivation of liberty, caused by the application of legal process, that approximates a Fourth Amendment seizure."[172] The Seventh Circuit relied on this understanding that "a Fourth Amendment claim for unlawful pretrial detention accrues upon the plaintiff's release from detention, and not upon the favorable termination of the charges against the plaintiff," in concluding that a pretrial release condition *could* constitute "detention" under certain circumstances.[173] Thus, where a bond condition is codified as a Fourth Amendment seizure, more litigants might have an opportunity to bring these types of claims after they are released from the burdensome conditions they are obligated to

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168 Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 757 (2020).

169 *See, e.g.*, Smith v. City of Chicago, 3 F.4th 332 (7th Cir. 2021), *vacated*, 142 S. Ct. 1665 (2022).

170 McDonough v. Smith, 139 S. Ct. 2149, 2155 (2019) (quoting Manuel v. City of Joliet, 580 U.S. 357, 370 (2017)).

171 Wallace v. Kato, 549 U.S. 384, 389 (2007) ("[T]o determine the beginning of the limitations period in this case, we must determine when petitioner's false imprisonment came to an end."); *see also McDonough*, 139 S. Ct. at 2159.

172 Charron v. County of York, No. 18-cv-00105, 2020 U.S. Dist. LEXIS 65281, at *91 (D. Me. Apr. 14, 2020) (emphasis omitted) (quoting Nieves v. McSweeney, 241 F.3d 46, 54 (1st Cir. 2001)).

173 Switzer v. Village of Glasford, No. 18-cv-1421, 2021 WL 4975730, at *3 (C.D. Ill. Oct. 26, 2021) (quoting *Smith*, 3 F.4th at 339).

adhere to in the post-arraignment portion of the criminal proceedings against them.

While a consequential adjustment of the accrual period for these types of claims does not necessarily follow the codification of certain pretrial release conditions as Fourth Amendment seizures, it certainly begs the question.[174] Some courts, like the Sixth Circuit, have suggested that it might not make a difference because "[e]ven if we assume that being subject to the authority of the court constitutes a Fourth Amendment seizure, [state actors] would still be entitled to qualified immunity because the particularized right alleged . . . is not clearly established."[175] Nevertheless, in cases like that of Keith Smith, where the sole bar to his claim was the court's unwillingness to recognize his bond conditions as a Fourth Amendment seizure, and where the particularized right to not be unreasonably seized is not only clearly established but also enshrined within the Constitution itself, the Sixth Circuit's flippant dicta does not suffice to justify this outcome absent a broader conversation among the federal courts.

2. Potential Decrease in Pretrial Detention Release?

The backlash to recent nationwide bail reform serves as a reminder of the potential for backlash when government bodies implement policy reforms favorable to criminal defendants.[176] It is imperative to consider the possibility––assuming that judicial leniency may be motivated by the potential for pretrial release conditions to be analyzed under a Fourth Amendment seizure framework––that this framework will induce a similarly harmful effect. Bail reform serves as an empirical example of this phenomenon. In 2019, the New York State Legislature passed a high-profile bail reform bill, a move that was both celebrated by advocates and scrutinized by law enforcement.[177] For the next two years, jail populations across the state shrunk from 20,000 to less than 15,000.[178] In the beginning of 2020, however, an uptick in crime, combined with frenzied

174 *Smith*, 3 F.4th at 334 (holding that a Fourth Amendment claim accrues when an individual is released from detention).

175 Noonan v. County of Oakland, 683 F. App'x 455, 463 (6th Cir. 2017) (quoting Rapp v. Putman, 644 F. App'x 621, 628 (6th Cir. 2016)).

176 *See, e.g.*, Fola Akinnibi, *How Bail Reform, Crime Surge Mix in an Angry Debate*, BLOOMBERG (Nov. 4, 2022, 12:41 PM), https://www.bloomberg.com/news/articles/2022-01-21/how-bail-reform-crime-surge-mix-in-an-angry-debate-quicktake [http://perma.cc/C2U3-JWMF].

177 Jamiles Lartey, *New York Tried to Get Rid of Bail. Then the Backlash Came.*, POLITICO: MAG. (Apr. 23, 2020, 5:08 AM), https://politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299 [https://perma.cc/WT79-RTF9].

178 *Id.*

media coverage, caused many to react negatively to these reforms.[179] Tabloids, prosecutors, law enforcement officials, and Republican politicians rallied around the notion that bail reform was to blame for this increase in crime.[180] Notably absent from these arguments, however, was any acknowledgment of the coincidentally rising sense of desperation, particularly amongst historically marginalized populations, due to the socioeconomically devastating impact of the coronavirus pandemic. The backlash to these reforms, though misguided, has caused greater adversity between advocates for and opponents against criminal legal reform.[181]

3. Broader Fourth Amendment Implications

Furthermore, if pretrial release conditions can constitute seizures under the Fourth Amendment, this also raises some broader questions about the implications on the protections of the Fourth Amendment itself. While this Note will not provide an in-depth analysis on the answers to these questions, they are important issues to acknowledge in light of this proposed framework.

For instance, one could argue that judges would be required to rely on probable cause that an individual would not show up to court before ordering a bond condition that might constitute a Fourth Amendment seizure. If so, a further ambiguity exists as to whether there might be implied consent or waiver in a defendant's acceptance of a pretrial release condition. For example, some scholarship indicates that courts would not see a need to rely on probable cause to impose pretrial release conditions, even if they were Fourth Amendment seizures, based on the expansive scope of power granted to law enforcement under modern Fourth Amendment jurisprudence.[182]

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179 *Id.*

180 *Id.*

181 *Id.*

182 *See* Cole, *supra* note 72, at 504 ("*Terry* dramatically expanded the scope of personal seizure by holding that a person may be seized without the existence of probable cause.").

a. Pretrial Release Conditions as Fourth Amendment Seizures May Require Federal Courts to Employ a Reasonableness Analysis

One of the potential implications of codifying pretrial release conditions as Fourth Amendment seizures is the possibility that, like other Fourth Amendment claims, individuals may have the opportunity to challenge the constitutionality of their pretrial release conditions on grounds of reasonableness.[183] There is some federal caselaw that may offer guidance on this issue; for instance, the Ninth Circuit has held that, absent probable cause to drug test a criminal defendant pending trial, a pretrial release condition requiring a defendant to "consent" to random testing without a warrant was an unreasonable intrusion under the Fourth Amendment.[184] Furthermore, the Ninth Circuit held that defendants do not waive their Fourth Amendment rights when they consent to pretrial release conditions.[185]

b. Applying the Logic of Administrative Searches and Seizures and Exigent Circumstances

If the question of reasonableness is raised where pretrial release conditions are codified as seizures, then, as with other Fourth Amendment claims where probable cause is required, exceptions to the warrant requirement might apply here as well. Most notably, courts might apply the administrative search doctrine, which allows the state to conduct searches or seizures when there is a "special need[]" that weighs more favorably to the public or government interest than its detriment to the individual.[186] Of course, this would require the court to find that the government would be acting beyond purposes of a "general interest in crime control."[187] So, whether this exception applies turns on whether a court would hold that a magistrate's determination of how to secure an individual's return to court was a "special need[]" as it relates to the administrative search doctrine.[188]

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183 For further discussion on a reasonableness analysis of Fourth Amendment claims, see *supra* Section I.A.3.

184 United States v. Scott, 450 F.3d 863 (9th Cir. 2006).

185 *Id.* at 868.

186 *See* Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)) ("[W]e have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring)); *see also id.* at 875–76 ("We think it clear that the special needs of Wisconsin's probation system make the warrant requirement impracticable and justify replacement of the standard of probable cause by 'reasonable grounds,' as defined by the Wisconsin Supreme Court.").

187 City of Indianapolis v. Edmond, 531 U.S. 32, 41 (2000) (quoting Delaware v. Prouse, 440 U.S. 648, 659 n.18 (1979)).

188 *See Griffin*, 483 U.S. at 873 (quoting *T.L.O.*, 469 U.S. at 351).

In the context of a state's probation system, the Supreme Court has already engaged in such an analysis and has found that it does.[189] Much of this analysis relies on the Court's concern with the State's strong interest in probation restrictions serving "as a period of genuine rehabilitation" and protecting the community at large from individuals who have been convicted of crimes being released back into society.[190] In light of the State's apparent concern with a criminal defendant's promise to return to court and hypothetical (and frequently dubiously calculated) level of risk to the community,[191] it would be unsurprising for federal courts to find that such conditions could fall under the administrative search exception as well.

CONCLUSION

Pretrial release conditions are burdensome and engender tangible costs to the individuals who are required to adhere to them.[192] Furthermore, federal courts' failure to recognize these conditions as Fourth Amendment seizures has far-reaching implications, particularly on the falsely accused.[193]

Keith Smith is the quintessential example of why federal courts need clearer, more lenient standards for pretrial release conditions to be codified as Fourth Amendment seizures. It is undisputed that Smith was wrongly arrested and incarcerated, and subsequently tethered to pretrial release conditions that restricted his individual liberties, based on the fabricated claims of two police officers.[194] However, because the Seventh Circuit refuses to recognize the conditions to which he was subjected as a Fourth Amendment seizure, Smith may seek no recourse for the two and a half years in which he endured loss of liberty and opportunity, and most

189 *Id.* at 873–74.

190 *Id.* at 875.

191 *See supra* Section I.C.1; *see also* 18 U.S.C. § 3142.

192 *See, e.g.*, Murphy v. Lynn, 118 F.3d 938 (2d Cir. 1997) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." (quoting Gerstein v. Pugh, 420 U.S. 103, 114 (1975))); *see also* Albright v. Oliver, 510 U.S. 266, 278–79 (1994) (Ginsburg, J., concurring) ("He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.").

193 *See supra* Section II.D.1.

194 *See* Smith v. City of Chicago, 3 F.4th 332, 334 n.1 (7th Cir. 2021) ("We accept as true all material allegations of the complaint and draw all reasonable inferences in the plaintiff's favor." (citing Doe v. Holcomb, 883 F.3d 971, 975 (7th Cir. 2018))), *vacated*, 142 S. Ct. 1665 (2022).

certainly suffered from the emotional trauma of being incarcerated for seven months, despite his innocence.[195]

The purpose of remedying the horrific ordeals that the wrongly accused endure should be reason enough for federal courts to recognize pretrial release conditions as Fourth Amendment seizures. At a broader level, though, federal courts should honor the purpose of the Fourth Amendment by protecting individual liberties from government intrusions wherever possible.[196] Therefore, where federal courts are faced with the question of whether a pretrial release condition is a seizure under the Fourth Amendment, they should, at minimum, adhere to a baseline threshold and find that any restriction on or compulsion to travel, in conjunction with a requirement to appear in court, constitutes a Fourth Amendment seizure. In cases that fall below this threshold, federal courts should not automatically dismiss these claims, but instead, they should employ an analytical framework that examines each case on a fact-specific, case-by-case basis, owing significant weight to the degree of intrusion on the individual's liberty.

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195 *Id.* at 333–34.

196 *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 11 (1977) (holding that the "purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests" (citing Boyd v. United States, 116 U.S. 616 (1886))).