No. 17-16756

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICAH JESSOP; BRITTAN ASHJIAN,
Plaintiffs-Appellants,

v.

CITY OF FRESNO; DERIK KUMAGAI; CURT CHASTAIN; TOMAS CANTU,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Case No. 1:15-cv-316 (Drozd, J.)

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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INTEREST OF THE *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL), founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. The NACDL has thousands of members nationwide and, when its affiliates' members are included, total membership amounts to approximately 40,000 attorneys. The NACDL's members include criminal defense lawyers, public defenders, U.S. military defense counsel, law professors, and judges.

The NACDL's interest in this matter stems from its members' involvement—through litigation and public policy advocacy—in vindicating the rights of victims of law enforcement misconduct. The NACDL believes protection of those rights and deterrence of future misconduct require robust civil legal remedies, which are too frequently frustrated by the doctrine of qualified immunity. The panel decision in this case, if left undisturbed, will insulate police officer misconduct from adequate oversight by immunizing officers from civil liability for outright theft.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 1.5 million members dedicated

to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Southern California and the ACLU of Northern California are affiliates of the national ACLU. Since their founding, both the ACLU of Southern California and the ACLU of Northern California have had an abiding interest in the promotion of liberty and individual rights, including the freedom from unreasonable seizures guaranteed by the Fourth Amendment to the United States Constitution and by Article I, § 13 of the California Constitution.

Because this case concerns important questions regarding the right to be free from unreasonable seizure and the scope of the Fourth Amendment's protection against violations of that right by law enforcement, proper resolution of this matter is of significant concern to the NACDL, the ACLU of Southern California, the ACLU of Northern California, and their members.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29, this brief is accompanied by a motion for leave to file, as appellees declined to give their consent to the filing of this brief. Counsel for *amici* affirm that no party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than the *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel decision places a police officer's theft from a citizen as beyond constitutional scrutiny. But the Fourth Amendment's guarantee against unreasonable seizures prohibits law enforcement officers from stealing from the public they serve. The Founders' desire for this commonsense restriction motivated them to enshrine it in the Bill of Rights. And, apart from the panel decision here, this constitutional prohibition remains just as obvious today, as sister circuits have reaffirmed that the Fourth Amendment forbids such transparent abuses of power. *United States v. Webster*, 809 F.3d 1158, 1168 (10th Cir. 2016); *Nelson v. Streeter*, 16 F.3d 145, 151 (7th Cir. 1994).

Rehearing is warranted because the panel decision overlooked this history and precedent. In doing so, the panel not only badly misapplied the doctrine of qualified immunity but also implicitly gave law enforcement officers permission to use their authority to steal for personal enrichment. The panel's approach to qualified immunity nullifies Section 1983—the principal remedy for the public to hold officers accountable for such flagrant and intentional misconduct. The holding that City of Fresno police officers "did not have clear notice" that their alleged theft

of over $225,000 violated the Fourth Amendment should not remain on the books. Addendum to the Petition at 8. The case should be reheard and the judgment reversed.

ARGUMENT

I. The panel decision failed to recognize that the Fourth Amendment plainly prohibits police officers from stealing private property for personal gain.

Rehearing is warranted because the panel decision granted law enforcement officers the Court's blessing—in the form of § 1983 immunity—to commit outright theft for the indefinite future. That is the result of the holding that clearly established law does not prohibit theft as an unreasonable seizure under the Fourth Amendment. That holding in turn rests on the panel opinion's misapprehension of the issue presented. Viewed in the light most favorable to plaintiffs, *Friedman v. Boucher*, 580 F.3d 847, 852 (9th Cir. 2009), this case is not about whether defendants failed to *return* property that was *lawfully* seized in an investigation.[2]

[2] In mischaracterizing the issue, the panel also overlooked Ninth Circuit authority establishing that the failure to return lawfully seized property can violate the Fourth Amendment. This Court has held that "the Fourth Amendment is implicated by a delay in returning . . . property." *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017); *see also Sandoval v. Sonoma Cty.*, 912 F.3d 509 (9th Cir. 2018); *United States v. Dass*, 849 F.2d 414

Rather, the question presented is whether defendants violate the Fourth Amendment when, under cover of a search warrant, they *steal* property in the course of seizing other property under the warrant.

The record on summary judgment makes this distinction clear. The items allegedly stolen here (currency and rare coins worth over $225,000) were neither included on the search inventory reports nor booked into evidence with the police department. ER 43–44, 491–92. When that omission was brought to the defendants' attention during the first post-search meeting, the defendants denied ever taking the coins. ER 221. That assertion is incompatible with the panel decision's treatment of this as a "failure to return" case. Assuming that the plaintiffs can prove that the police took the cash and coins, those valuables were never seized for legitimate "police purposes." *Warden, Md. Penitentiary v. Hayden*, 387

(9th Cir. 1988). That holding accords with Supreme Court precedent holding that "a seizure lawful at its inception can nevertheless violate the Fourth Amendment [if] its manner of execution unreasonably infringes possessory interests protected by the . . . prohibition on 'unreasonable seizures.'" *United States v. Jacobsen*, 466 U.S. 109, 124-25 (1984). And the Court gave as an example "convert[ing] what had been only a temporary deprivation of possessory interests into a permanent one"—as occurs in cases of theft. *Id.* The intracircuit conflict heightens the need for rehearing.

U.S. 294, 307 (1967). Rather, the cash and coins were unlawfully taken for personal enrichment.

Once defendants' conduct is properly viewed as theft at the time of the seizure, there is no room to argue that clearly established law does not make clear that theft under color of law violates the Fourth Amendment's prohibition of unreasonable seizures. The history of the Fourth Amendment, combined with precedent overlooked by the panel decision, reveal that the alleged theft so clearly ran afoul of the Constitution that defendants are not entitled to qualified immunity.

A. The Fourth Amendment was designed in part to prohibit the Colonial Era practice of officers stealing private property.

From its inception, the Fourth Amendment has always prohibited the arbitrary confiscation of private property by public officers. No reasonable officer—whether in 1813, 1913, or 2013—could have believed the Constitution countenanced stealing private property under the guise of executing a search warrant. The Supreme Court noted just last year that the Fourth Amendment was specifically designed "as a response to the reviled general warrants and writs of assistance of the colonial era, which allowed British officers to rummage through homes in an unrestrained

search for evidence of criminal activity." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (internal quotation marks omitted); *see also Boyd v. United States*, 116 U.S. 616, 630 (1886) (discussing origin of Fourth Amendment as arising from Founders' "struggles against arbitrary power").

That revulsion to general warrants was based in part on their use as a means to commit theft. Colonial-era officers would ransack homes seeking goods on which they could allege taxes were owed. *See* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 54 (The Johns Hopkins Press, 1937).[3] Those officers had real incentives to seize as much as possible; they kept one-third of their forfeitures. *Id.* at 63–64 n.48. Given the extensive but unevenly enforced trade laws, a customs officer could "take and carry away whatever he shall in his pleasure deem uncustomed goods." William Henry Drayton, *A Letter from Freeman of South-Carolina to the Deputies*

[3] Concerns of theft during the execution of a search can be dated at least to ancient Rome, where a victim of theft was allowed to search the accused thief's home for the stolen goods "[c]lad only in an apron" and accompanied by a bailiff. Lasson, *History and Development*, at 18.

of North-America Assembled in the High Court of Congress at Philadelphia 10 (1774). Naturally, such corruption prompted the public to object that "they should not be exposed to writs of assistance merely to put fortunes in private pockets." Lasson, *History and Development*, at 63–64 n.48.

Curbing these abuses was a central purpose of the Bill of Rights. At Virginia's ratifying convention in 1788, Patrick Henry argued that the Constitution, as originally drafted, did nothing to prevent this outright theft. *See* Maureen Brady, *The Lost "Effects" of the Fourth Amendment*, 125 Yale L.J. 946, 991 (2016). Without constitutional protections, Henry warned, "any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason." 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 588 (2d ed. 1891). These concerns—the use of general warrants to ransack and steal at whim—were central to the formation and ratification of the Bill of Rights. James Madison himself recognized such unrestrained authority as "the most prominent illustration … of the need of a bill of rights." Lasson, *History and Development*, at 99 & n.74. By holding that the Fourth Amendment does not clearly forbid officers

from stealing during the execution of a search warrant, the panel decision defies history as well as common sense.

B. Case law confirms that the Fourth Amendment prohibits officers from stealing private property while executing a warrant.

In addition, the panel decision overlooked case law that reinforces what history makes clear: Officers violate the Constitution when they exploit their badge to steal private property. The doctrine of qualified immunity is designed to "shield officials … when they perform their duties reasonably," but not those who "exercise power irresponsibly." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting) (describing doctrine as covering "mere mistakes in judgment"). As the Petition notes, immunity may not apply even where there is no precedent on all fours, as the doctrine recognizes that there are easy cases for which the violation is obvious. Pet. at 6–7 (citing *United States v. Lanier*, 520 U.S. 259, 271 (1997)). Plaintiffs need not show "the very action in question has previously been held unlawful"; it is enough that "in the light of pre-existing law the unlawfulness [is] apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

This should be an easy case. The plain text of the Fourth Amendment prohibits "unreasonable searches and seizures." No matter how malleable that term may be, it is by no means "difficult for an officer to know" that the theft of private property from a residence is unreasonable. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017). The Supreme Court has recognized that such an obvious violation of a requirement "set forth in the text of the Constitution" is sufficient to defeat qualified immunity. *Groh*, 540 U.S. at 563.

But even at a finer level of particularity, the courts of appeals have found that an officer's outright theft runs afoul of the Constitution. In *United States v. Webster*, 809 F.3d 1158, 1162–63, 1170 (10th Cir. 2016), the Tenth Circuit condemned as "patently unconstitutional" the actions of police officers who, in the course of executing a search warrant, stole money and electronics from the suspect's home.

Webster cannot be meaningfully distinguished from this case. In both, rogue officers stole the items directly at the scene of a warranted search. Just as now-former Officer Kumagai is alleged to have stolen the rare coins during an unaccompanied visit to the plaintiffs' bedroom, ER 43–44, the officers in *Webster* "act[ed] alone, without the knowledge or

help of the [other] agents executing the search warrant." 809 F.3d at 1163. In both cases, the stolen items were taken "for personal reasons unrelated at all to law enforcement." *Id.* And in both cases the stolen items were never listed on the warrant return. *Id.*; ER 491–92.[4]

The Tenth Circuit is not alone in recognizing theft by public officials as transparently unconstitutional. As the Petition notes, the Seventh Circuit has also held that such theft so "obvious[ly]" violates the Fourth Amendment that no case law was needed to dispel qualified immunity. Pet. at 10 (quoting *Nelson v. Streeter*, 16 F.3d 145, 150–51 (7th Cir. 1994)). The panel decision does not mention *Webster* or *Nelson*, and thus does not try to explain how the patent unconstitutionality of theft by government officials could be less obvious in 2013 California than it was in 1988 Illinois.

Nor did the panel grapple with this Court's own precedent holding that clearly established Fourth Amendment law demands that seizures made in connection with a search warrant be reasonably related to the legitimate purpose of the investigation. *San Jose Charter of Hells Angels*

[4] The offending officers in *Webster* were arrested, criminally prosecuted, and convicted for their larceny. 809 F.3d at 1170.

Motorcycle Club v. City of San Jose, 402 F.3d 962, 974–75 (9th Cir. 2005). In *San Jose*, this Court found no immunity attached where officers intentionally seized "truckloads" of items bearing Hells Angels insignia. *Id.* at 965. The Court held that officers violated clearly established Fourth Amendment law by seizing the items—even though they fell "within the literal terms of the search warrant"—because the seizure was so out of proportion to the meager legitimate investigative purpose of establishing the fact (obvious to any California driver) "that the Hells Angels had common symbols." *Id.* at 966.

The present case is even more extreme. While in both cases the seized items may have technically fallen within the scope of the warrant, the currency and rare collectible coins here were pocketed at the scene—not impounded for *any* law enforcement purpose. In light of *San Jose*, no officer could reasonably believe the Fourth Amendment permits the theft of private property while executing a search warrant.

II. Rehearing is necessary to prevent immunizing serious law enforcement abuses.

In addition to correcting the panel opinion's mistaken Fourth Amendment analysis, rehearing is vitally important to ensure that future thefts are not immunized indefinitely.

The panel opinion explicitly refused to announce that an officer violates the Fourth Amendment by stealing private property in the course of executing a search warrant. That decision takes too far the flexibility afforded by *Pearson v. Callahan*. After *Pearson*, courts adjudicating qualified immunity cases no longer always have to determine as a threshold matter whether plaintiff pleaded a constitutional violation. 555 U.S. at 236. But the *Pearson* Court noted that making those determinations is "often beneficial" and "promotes the development of constitutional precedent." *Id.* Accordingly, this Court has continued to identify constitutional violations even if not clearly established—and particularly in "area[s] where this court's guidance is sorely needed." *Mattos v. Agarano*, 661 F.3d 433, 440 & n.3 (9th Cir. 2011) (en banc) (collecting cases); *see also Thompson v. Rahr*, 885 F.3d 582, 590 (9th Cir. 2018) (finding constitutional violation so that "[g]oing forward, . . . the law is clearly established in this scenario").

A clear pronouncement is sorely needed here. It is not a hard question whether an officer violates the Fourth Amendment when he uses his badge and a search warrant to steal property for his own enrichment. Limited to the outright theft alleged here—as opposed to the excessively long retention of lawfully seized property—this case does not present difficult line-drawing problems. The Fourth Amendment prohibits officers, acting under the color of their authority, from stealing private property.

Moreover, the panel's refusal to answer that straightforward question poses serious practical problems going forward. If the panel opinion stands, officers in the nine states of the Ninth Circuit will be immunized from § 1983 liability for stealing suspects' property.[5] For example, an officer executing a search warrant could quite literally drive off in a suspect's car, claim it as his own, and cite the panel's decision for the proposition that it is not clearly established that the Fourth Amendment prohibits brazen theft. That would neuter the central purpose of § 1983: "deterrence of future abuses of power by persons acting under color of

[5] The panel decision will likely have ramifications nationwide as well. Just as the panel relied on (dissimilar) out-of-circuit cases to find a lack of consensus, so too can other circuits rely on the panel decision to hold (mistakenly) that the constitutional right to be free from officer theft is not clearly established.

state law." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981).

This is not the first time an officer has used his authority to steal private property for personal gain. *See Webster*, 809 F.3d at 1162; *United States v. Gougis*, 432 F.3d 735, 741–43 (7th Cir. 2005) (discussing police officer who admitted stealing watch while executing search warrant). For example, in *United States v. Roach*, Tennessee officers were caught stealing money from Hispanic immigrants during traffic stops. 502 F.3d 425, 428–30 (6th Cir. 2007). And newspaper reports suggest that these abuses will continue into the future.[6] As Justice Thomas has noted, these

[6] *See, e.g.*, *Hernandez v. Borough of Palisades Park Police Dep't*, 58 F. App'x 909, 910–11 (3d Cir. 2003) (§ 1983 action addressing string of home robberies committed by five police officers); *Yang v. Hardin*, 37 F.3d 282, 283 (7th Cir. 1994) (officers stole merchandise while investigating crime scene); *West Palm Beach Officer arrested; accused of stealing cash from suspect*, WPTV News, Nov. 30, 2018, https://www.wptv.com/news/region-c-palm-beach-county/west-palm-beach/west-palm-beach-officer-arrested-accused-of-stealing-cash-from-suspect (last visited April 24, 2019); *Denver police officer accused of stealing cash from suspect after body camera reveals missing money*, Denver Post, Oct. 28, 2016, https://www.denverpost.com/2016/10/28/denver-police-officer-stealing-cash-from-suspect-after-body-camera-missing-money/ (last visited April 24, 2019); *Body camera shows cop stealing cash from DUI suspect*, N.Y. Post, Jan. 31, 2017, https://nypost.com/2017/01/31/body-camera-shows-cop-stealing-cash-from-dui-suspect/ (last visited April 24, 2019).

practices have "led to egregious and well-chronicled abuses." *See Leonard v. Texas*, 137 S. Ct. 847, 848–49 (2017) (statement of Thomas, J., respecting the denial of certiorari). One study documented that in a seven-year period nearly 1,400 nonfederal law enforcement officers were arrested for profit-motivated crimes, and over two-thirds of those occurred while on duty. Philip Matthew Stinson, Sr., et al., *Police Integrity Lost: A Study of Law Enforcement Officers Arrested* 167–68 (2016). Yet under the panel decision, victims of such flagrantly unlawful activity will not be able to use section 1983 to vindicate their rights to be free from unreasonable seizures. It is therefore imperative that this Court rehear this case to make clear that theft clearly violates the constitutional protection against unreasonable seizures so that offending officers may be held liable under Section 1983.

* * *

CONCLUSION

The petition for rehearing en banc should be granted and the judgment reversed.

May 13, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 29–2, the undersigned counsel for the *amici curiae* certifies that this brief:

(i) complies with the type-volume limitation of Rule 29–2(c)(2) because it contains 3,257 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ *Donald M. Falk*

CERTIFICATE OF SERVICE

I hereby certify that all participants in this case are registered CM/ECF users and that, on May 13, 2019, service of the foregoing brief was accomplished electronically via the Court's CM/ECF system.

/s/ *Donald M. Falk*