No. 19-1021

IN THE

Supreme Court of the United States

MICAH JESSOP; BRITTAN ASHJIAN,

Petitioners,

v.

CITY OF FRESNO, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE DKT LIBERTY PROJECT, REASON FOUNDATION, THE INDIVIDUAL RIGHTS FOUNDATION, THE LAW ENFORCEMENT ACTION PARTNERSHIP, AND RESTORE THE FOURTH, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), the DKT Liberty Project, Reason Foundation, the Individual Rights Foundation, the Law Enforcement Action Partnership, and Restore the Fourth, Inc. respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. All parties were timely notified of *amici*'s intent to file the attached brief as required under Rule 37.2(a). This motion is necessary because counsel of record for Respondents has withheld consent to the filing of this brief. Counsel of record for Petitioners have consented to the filing of this brief.

Amici are nonprofit organizations dedicated to the protection of individual liberties, especially those guaranteed by the Constitution of the United States. As organizations concerned about the expansion of qualified immunity—and that doctrine's ability to shield egregious violations of individuals' constitutional rights from any meaningful liability—*amici* have a particular interest in this case. Collectively, *amici* have filed numerous briefs as *amici* in this Court and before other federal courts.

The decision below granted qualified immunity to City of Fresno police officers whom Petitioners allege stole over $200,000 in cash and rare coins during a search of Petitioners' property—for no law enforcement reason whatsoever. That holding exacerbates the already significant costs that an expansive immunity doctrine imposes on litigants, the public, and law enforcement.

Moreover, the court's holding continues the widespread practice of lower courts declining to reach constitutional questions in qualified immunity cases, even in cases involving obvious constitutional violations. *Amici*, as organizations that frequently advocate for the protection of individual liberties, have significant experience addressing qualified immunity issues and are uniquely positioned to comment on the impact the Ninth Circuit's decision will have on individuals' ability to protect their constitutional rights under Section 1983, as well as on the growing accountability gap for law enforcement.

Amici offer a useful perspective on the issue before this Court. *Amici* therefore respectfully request that the Court grant this motion for leave to file the attached brief in support of Petitioners.

March 19, 2020

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are nonprofit organizations dedicated to the protection of individual liberties, especially those guaranteed by the Constitution of the United States. As organizations concerned about the expansion of qualified immunity—and that doctrine's ability to shield egregious violations of individuals' constitutional rights from any meaningful liability—*amici* have a particular interest in this case. *Amici* are the following:

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government overreach, and promoting every American's right and responsibility to function as an autonomous and independent individual. The Liberty Project espouses vigilance against government overreach of all kinds, but especially law enforcement overreach that restricts individual civil liberties. The Liberty Project has filed briefs as *amicus curiae* in both this Court and in state and federal courts in cases involving constitutional rights and civil liberties—and particularly those involving qualified immunity, when the application of

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[1] Pursuant to Rule 37.2(a), counsel for *amici curiae* provided timely notice to counsel of record for all parties of *amici*'s intention to file this brief. Counsel of record for Petitioners consented to the filing of this brief. Counsel of record for Respondents withheld consent. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

that doctrine would shield egregious violations of individuals' constitutional rights from liability.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. Reason participates as *amicus curiae* in cases raising significant constitutional or legal issues.

The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

The Law Enforcement Action Partnership ("LEAP") is a 501(c)(3) nonprofit of police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy and associated Fourth Amendment issues, today LEAP's speakers bureau now numbers more than 300 criminal justice professionals advising on police-community relations, incarceration, civil asset

forfeiture, harm reduction, drug policy, and global issues.

Restore the Fourth, Inc. ("Restore the Fourth") is a national, nonpartisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right. Restore the Fourth advances these principles by overseeing a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.

SUMMARY OF ARGUMENT

Petitioners allege that City of Fresno police officers stole over $200,000 in cash and rare coins during a search of Petitioners' property. The officers did not seize that property for law enforcement purposes. Nor did they seize it as evidence. Instead, the officers simply pocketed the property for their own pecuniary gain. Without doubt, the conduct Petitioners allege is shocking. Yet, without deciding the underlying constitutional issue, the Ninth Circuit concluded that no clearly established law holds "that officers violate the Fourth or Fourteenth Amendment *when they steal property* seized pursuant to a warrant." Pet. App. at 3a (emphasis added).

That holding was wrong, both under this Court's precedent and as a matter of common sense. At a minimum, the constitutional violation Petitioners have alleged is so egregious as to be obvious. The Ninth Circuit's failure to hold as much continues the widespread practice of lower courts declining to reach constitutional questions in qualified immunity cases. This practice improperly stunts the development of the law and impedes the reach of constitutional protections to those most in need. If courts continue to grant immunity even in cases of *obvious* constitutional violations, the ability to hold government officials accountable under Section 1983 will become a hollow promise.

By unjustifiably extending qualified immunity to cover even the base theft alleged here, the Ninth Circuit's decision exacerbates the already significant costs that an expansive immunity doctrine imposes on litigants, the public, and law enforcement. Litigants are discouraged from bringing lawsuits in even the most appalling cases because they know immunity will make success extremely difficult. Bad actors are not held accountable, undermining public trust in law enforcement and making policing by those officers who do act reasonably more difficult and less safe. And concerns about the abuse of civil asset forfeiture—which already allows law enforcement to seize property with little legal recourse—are heightened when law enforcement can seize property for personal gain with *no* legal recourse for the victims.

The decision below allows police officers to steal from suspects with impunity, and without any concern that

they might be subject to civil liability. The decision is both wrong and consequential. This Court should grant the petition for certiorari.

ARGUMENT

I. The Decision Below Extends Qualified Immunity To Its Extreme.

The Ninth Circuit granted qualified immunity in this case on the sole basis that, in the court's view, no decision of this Court or the Ninth Circuit addressed "th[e] precise question" of whether "the theft of property covered by the terms of a search warrant, and seized pursuant to that warrant, violates the Fourth Amendment." Pet. App. at 6a-7a. This Court's qualified immunity precedent, however, does not demand a case presenting the precise factual circumstances. Some violations are so clear as to be obvious.

A. The Court Should Say When Constitutional Violations Are Obvious.

If there ever were an obvious constitutional violation, this case is it. To ask the question of whether a law enforcement official's theft of an individual's property violates the Fourth Amendment is to answer it. Outright theft by a government official of an individual's property is a seizure: it poses a clear "interference with an individual's possessory interests." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). And that seizure is unreasonable: the theft of property has no valid law enforcement purpose and fails to advance any "governmental interest[]." *Tennessee v. Gardner*, 471 U.S. 1, 8 (1985).

This Court has repeatedly explained that qualified immunity doctrine need not blind itself to obvious constitutional violations, and that a violation can be clearly established even without a specific, factually analogous case on point. "[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quotation marks omitted). Indeed, it should come as no surprise that "[t]he easiest cases," in which a constitutional violation is so clear as to be unquestionable, "don't even arise." *United States v. Lanier*, 520 U.S. 259, 271 (1997) (quotation marks omitted). It would "be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015) (Gorsuch, J.) (denying qualified immunity).

But immunizing the most obvious unconstitutional conduct is precisely what the Ninth Circuit's decision here does. The court correctly acknowledged that the defendants certainly "ought to have recognized that the alleged theft of Appellants' money and rare coins was morally wrong." Pet. App. at 8a. Yet, focusing myopically on the supposed lack of a factually analogous case and disregarding constitutional principles that "apply with obvious clarity to the specific conduct in question," *Hope*, 536 U.S. at 741, the court nonetheless granted immunity.

The constitutional violation here is obvious, and this Court should grant certiorari to say so. Any other result

stunts the development of constitutional law and immunizes truly brazen unconstitutional conduct.

B. The Ninth Circuit Is Not Alone In Applying Qualified Immunity To Insulate Even Obvious Constitutional Violations From Liability.

Even a cursory review of recent qualified immunity decisions resolved on the "clearly established" prong of the inquiry demonstrates that the doctrine has morphed to shield even egregious behavior from accountability. One example is the Tenth Circuit's decision last year in *Doe v. Woodard*. There, the court affirmed a finding of qualified immunity for a government caseworker who strip-searched a four-year-old child and then photographed her while she was undressed—all without either a warrant or parental consent. 912 F.3d 1278 (10th Cir.), *cert. denied*, 139 S. Ct. 2616 (2019). Limiting its analysis to whether any constitutional violation was clearly established by directly on-point precedent—and without answering the constitutional question—the court noted that the plaintiffs had not "cited a Supreme Court or Tenth Circuit decision specifically holding that a social worker must obtain a warrant to search a child at school for evidence of reported abuse." *Id.* at 1293. Therefore, the court held that the plaintiffs had not "met their burden of showing clearly established law." *Id.*

Or take *Young v. Borders*, in which the Eleventh Circuit upheld the granting of qualified immunity to an officer who shot and killed a man seconds after he answered the door of his apartment. 620 F. App'x 889 (11th Cir. 2015) (per curiam), *en banc review denied*, 850 F.3d 1274 (11th Cir. 2017). Without a warrant or

reasonable suspicion, and based only on a hunch that a motorcycle parked outside of the man's apartment might be both the same motorcycle observed speeding in the area and the same motorcycle involved in a separate armed assault and battery that took place miles away, several officers approached the man's apartment, guns drawn, and knocked loudly without identifying themselves as police. *Young v. Borders*, 850 F.3d 1274, 1288 (11th Cir. 2017) (Martin, J., dissenting from denial of rehearing *en banc*). The man, startled, retrieved a lawfully owned handgun and opened the door, with his gun pointed safely toward the ground. *Id.* at 1290-91. Upon seeing the officers, and without lifting the firearm, the man attempted to retreat inside. But one officer fired six shots—three of which struck and killed the man. *Id.* at 1291. A panel of the Eleventh Circuit summarily concluded there was "no reversible error" in the district court's order granting qualified immunity given the lack of a prior case presenting similar facts. *Young*, 620 F. App'x at 890; *see also Young*, 850 F.3d at 1282-84 (Hull, J., concurring in denial of rehearing *en banc*) (explaining the panel did not decide whether the conduct was unconstitutional because, in the panel's view, there was "no prior case with facts remotely similar").

These cases present differing factual circumstances, to be sure, from the conduct Petitioners allege. And there can be little doubt that the base theft Petitioners' allege here is not a context in which law enforcement officials even arguably require any "breathing room" to avoid chilling their law enforcement duties. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). But, at a minimum,

each of these cases, like the decision below, demonstrate that courts are increasingly applying qualified immunity to shield even obvious violations of constitutional rights.

C. Immunizing Obvious Constitutional Violations Precludes The Development Of "Clearly Established" Law.

Lower courts, admittedly, have discretion to bypass the first step in the qualified immunity analysis—determining whether there was a constitutional violation—and to grant immunity based only on a finding that any such violation was not "clearly established." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). At the same time, this Court has also cautioned that first determining whether a constitutional right has been violated is "often beneficial," because it "promotes the development of constitutional precedent." *Id.* Providing answers to constitutional questions "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.*

When courts decline to grapple with the merits of constitutional claims, they preclude the development of exactly the type of fact-bound decisions that the Ninth Circuit below found lacking here. By avoiding an examination of underlying constitutional questions and reflexively granting immunity in the absence of a case that has analyzed identical, or nearly identical, factual circumstances, courts effectively lock in a state where constitutional violations—even the most obvious ones—"might *never* be clearly established." Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 12 (2015). Put more bluntly,

"[c]ontinuing to resolve the question at the clearly established step means the law will never get established." *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018).

Unfortunately, this appears to be what is happening. Since the Court's 2009 decision in *Pearson*, in less than ten percent of cases have lower courts exercised their discretion to decide a constitutional question when finding defendants are entitled to immunity because violations are not "clearly established." Nielson & Walker, *supra*, at 33, 37-38. It is the rare court that extends itself out to decide a constitutional question. *See, e.g.*, *Sims*, 894 F.3d at 638 (finally deciding question regarding First Amendment retaliation, noting that the case was "the fourth time in three years that an appeal has presented the question"). Skipping the first step of the qualified immunity inquiry, as the Ninth Circuit did below, risks "reduc[ing] the meaning of the Constitution to the lowest plausible conception of its content." John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115, 120.

The result is that even egregious violations of constitutional rights will be shielded from any liability under Section 1983. And this is particularly true of the violation Petitioners allege here. The Ninth Circuit's holding below now requires all courts in that circuit to conclude that law enforcement officers, currently, lack notice that it is unconstitutional to steal properly listed in a warrant. Nor is there any possibility that the question will arise in another context, potentially providing notice prospectively that theft *does* violate the Fourth Amendment notwithstanding the Ninth

Circuit's holding in this case. By definition, when property is stolen and not inventoried on a search warrant or maintained for law enforcement purposes, that property will not be used for evidence and cannot form the basis of a suppression motion.

Given these realities, it is all the more important that courts deny immunity when—as in this case—an *obvious* constitutional violation is presented. Demanding that a precisely on point case exist in even those circumstances to defeat qualified immunity will only shield even outrageous violations of constitutional rights from any liability under Section 1983.

II. The Extension Of Qualified Immunity To Insulate Egregious Constitutional Violations Undermines Public Trust In The Rule Of Law.

Beyond its legal infirmities, the decision below also has practical consequences—it undermines the rule of law. Congress intended Section 1983 "to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 700-01 (1978). While it should shield law enforcement officers who act reasonably, qualified immunity should not be an obstacle standing in the way of holding officials "accountable when they exercise power irresponsibly." *Pearson*, 555 U.S. at 231.

When courts extend qualified immunity to cover those who act as egregiously as the officers did here, the rule of law suffers. Considerable evidence proves that, when bad actors are not held accountable, both litigants

and public trust in law enforcement pay the price. The decision below only entrenches these concerns.

A. Qualified Immunity Imposes A Significant Procedural Hurdle To Litigants' Vindication Of Constitutional Rights.

As an initial matter, qualified immunity places a nearly insurmountable hurdle in the way of civil rights litigants seeking to hold state actors accountable and to vindicate the purpose of Section 1983.

1. These hurdles manifest themselves in the initial decision of whether to bring a lawsuit at all. Immunity frequently discourages litigants from bringing cases—even when an obvious constitutional violation is at issue. A survey of civil rights litigators shows that the availability of a qualified immunity defense plays a substantial role in lawyers' assessment of whether to take a case. Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J. 477, 492-93 (2011). In that study, "[n]early every respondent, regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense play a substantial role at the screening stage" and "[f]or some, qualified immunity was the primary factor when evaluating a case for representation." *Id.* at 492.

When, despite these challenges, litigants do choose to bring a case, qualified immunity poses a continuing obstacle, even when blatant constitutional violations are at issue. A district court's denial of qualified immunity is an immediately appealable collateral order. *See Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014). Thus, every civil rights litigant must be prepared to defeat a

qualified immunity defense *both* in the district court and in the court of appeals before proceeding with her case. And she must do so at every stage of the proceeding—from motions to dismiss to summary judgment. Moreover, she often must do so without critical factual development, because discovery is frequently stayed during the pendency of an appeal, even when the district court has denied immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed.").

This gauntlet is formidable. Litigants are unlikely to be willing to run it, particularly if courts require plaintiffs to point to a specific factually on-point case when a violation is obvious. When courts take such a stringent view of "clearly established" law and grant defendants immunity in even the most egregious cases, those outcomes only further discourage litigants from vindicating their rights and holding police officers accountable.

2. This is particularly problematic because a civil action under Section 1983 is often the only means through which a victim of misconduct can seek to hold bad actors accountable. Criminal charges and formal disciplinary processes have proven entirely ineffective.

Law enforcement officials are only rarely charged criminally for violations of individuals' constitutional rights. *See, e.g.*, Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, Wash. Post (Apr. 11, 2015).[2] Similarly, formal complaints frequently lead

[2] https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.86c08aa2aa36.

nowhere. In Chicago, for example, "[f]rom 2011 to 2015, 97 percent of more than 28,500 citizen complaints resulted in no officer being punished." Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. Times (Nov. 18, 2015)[3]; *see also* U.S. Dep't of Justice, *Investigation of the Ferguson Police Department*, at 82 (Mar. 4, 2015) (explaining that Ferguson's "internal affairs system fails to respond meaningfully to complaints of officer misconduct" and "does not serve as a mechanism to restore community members' trust in law enforcement, or correct officer behavior").[4] Most telling of all, even 72% *of police officers* in a 2017 Pew Research Center survey disagreed with the representation that "officers who consistently do a poor job are held accountable." *See* Rich Morin *et al.*, *Behind the Badge*, Pew Research Center, at 40 (2017) (describing survey of nearly 8,000 police officers).[5]

Given these realities, private lawsuits can provide the sunshine needed to expose unlawful police practices that might not otherwise come to light. Private lawsuits "are a valuable source of information about police-misconduct allegations" because they may alert departments to possible misconduct that might not otherwise surface. Joanna C. Schwartz, *What Police*

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[3] https://www.nytimes.com/2015/11/19/us/few-complaints-against-chicago-police-result-in-discipline-data-shows.html.

[4] https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[5] https://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report_FINAL_web.pdf.

Learn from Lawsuits, 33 Cardozo L. Rev. 841, 844-45 (2012). In fact, acts like the Fourth Amendment violation here are among the types of misconduct *most likely* to escape notice. "[P]otentially serious constitutional violations" that do not involve the use of force—like those that take place during "vehicle pursuits, searches, and home entries"—"[may] not trigger reporting requirements." *Id.*

B. Qualified Immunity Undermines Accountability And Public Trust In Law Enforcement.

A failure to hold bad actors accountable also has a counterproductive effect on the public at large and the very police officers who "perform their duties reasonably." *Pearson*, 555 U.S. at 231. Section 1983 serves a critical deterrent function that is undermined by a narrow reading of the "clearly established" doctrine that insulates egregious constitutional violations.

1. The unjustified extension of qualified immunity erodes public trust in police. It undermines the belief that law enforcement will do their jobs fairly, and will be held accountable when they do not. That erosion works to the detriment of police officers and frustrates their ability to form the very community relationships that allow police to do their job—and to do it safely.

It is "critical to successful policing" that law enforcement officers are "viewed as fair and just." Inst. on Race and Justice, Northeastern Univ., *COPS Evaluation Brief No. 1: Promoting Cooperating*

Strategies to Reduce Racial Profiling, at 21 (2008).[6] When the actions of law enforcement officials are viewed as legitimate, individuals are more likely to comply with the law, more likely to cooperate with and assist police, and more likely to support and empower law enforcement. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 Law & Soc'y Rev. 513, 534 (2003). Such positive externalities promote conformance with the law and therefore "free[] the police up to deal with problematic people and situations." *Id.* at 535.

Even law enforcement agrees: police officers themselves report that, in order for policing to be successful, it is critical to demonstrate fairness and respect when dealing with the public. *See* Morin *et al.*, *Behind the Badge*, *supra*, at 65, 72. Overall, "[l]awful policing increases the stature of the police in the eyes of citizens, creates a reservoir of support for police work, and expedites the production of community safety by enhancing cooperation with the police." Nat'l Research Council, *Fairness and Effectiveness in Policing: The Evidence* 6 (2004).

Unfortunately, the reverse is also true: if law enforcement is perceived as unfair, "it will undermine their effectiveness." Inst. on Race and Justice, *supra*, at 21; *see also* DOJ, *Investigation of Ferguson Police*, *supra*, at 80 ("[W]hen police and courts treat people unfairly, unlawfully, or disrespectfully, law enforcement

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[6] *available at* https://www.researchgate.net/publication/269931068_Promoting_cooperative_strategies_to_reduce_racial_profiling.

loses legitimacy in the eyes of those who have experienced, or even observed, the unjust conduct."). When application of the law is perceived as arbitrary or unfair, it "fosters a sense of second-class citizenship" and "increases the likelihood people will fail to comply with legal directives." Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 Harv. L. Rev. 2283, 2356 (2018). People are "more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime." DOJ, *Investigation of Ferguson Police*, *supra*, at 80.

And, currently, police are facing a public perception crisis. In 2015, in the midst of several high-profile policing events, public trust in police officers fell to a twenty-two year low. Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, Gallup (June 19, 2015).[7] Almost 90% of police report that they are more concerned for their safety in recent years, and that policing has become more dangerous and more difficult. *See* Morin *et al.*, *Behind the Badge*, *supra*, at 80.

Against this backdrop, decisions like the Ninth Circuit's below only increase the public's perception that law enforcement can blatantly violate people's rights and still escape accountability. Indeed, this particular decision has been the subject of national media coverage decrying how far courts have gone in extending immunity to shield even the worst actions by law enforcement from accountability. *See* David McDonald, *The Courts Have Shown Too Much Deference to*

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[7] https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx.

Unaccountable Government Officials, Nat'l Rev. (Apr. 12, 2019) (initial panel decision described as a "particularly egregious example of the toxic deference that has infected this nation's court system")[8]; *see also* Nick Sibilla, *Federal Court: Cops Accused of Stealing Over $225,000 Have Legal Immunity*, Forbes (Sept. 17, 2019)[9]; Stephen Robinson, *Ninth Circuit Rules It's OK for Cops to Steal from You. That's It. It's Okay for Cops to Steal from You*, Wonkette (Mar. 28, 2019).[10]

2. With respect to the specific conduct Petitioners allege in this case, moreover, there is every reason to suspect that the Ninth Circuit's decision will provide only greater incentive for bad actors to steal from suspects. Sadly, the conduct Petitioners allege is not unusual. Officers repeatedly have unlawfully stolen suspects' property in recent years, under the guise of a search warrant or other purported legal authorization. For example, one Nashville police officer was sentenced in November 2018 to two years in prison for the theft of more than $100,000 in the course of executing search warrants.[11]

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[8] https://www.nationalreview.com/2019/04/courts-show-undue-deference-unaccountable-government-officials/.

[9] https://www.forbes.com/sites/nicksibilla/2019/09/17/federal-court-cops-accused-of-stealing-over-225000-have-legal-immunity/#5ecba675a85a.

[10] https://www.wonkette.com/ninth-circuit-court-rules-its-ok-for-cops-to-steal-from-you-as-long-as-they-suck-at-math.

[11] *See* Joey Gill, *Former Metro Police Officer Sentenced to Federal Prison for Stealing Money*, News4 (Oct. 24, 2018), https://www.

In another case, Baltimore police officers were convicted in 2017 and early 2018 for their roles in a wide-ranging scheme in which the officers repeatedly stole from criminal suspects while conducting searches under the guise of their law enforcement authority. In one particularly egregious incident, the officers stole $100,000 from a safe in a suspect's home—and, in an effort to conceal their theft, began the police recording of the search only *after* stealing the cash.[12]

In several of these cases, the officers were prosecuted. But frequently, as in this case, officers are not held accountable for such actions. State law is unlikely to provide victims with any recourse. *See* Pet. at 32-33. And now, given the Ninth Circuit's holding with respect to immunity, potential bad actors are assured that such theft will not lead to *civil* liability at all. By granting immunity even where law enforcement officers outright steal an individual's property, the decision below only exacerbates the public

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wsmv.com/news/former-metro-police-officer-sentenced-to-federal-prison-for-stealing/article_223d1502-d7d1-11e8-8fe8-2742b152d549.html; *see also* Indictment, *United States v. Dunaway*, No. 3:18-cr-00108 (M.D. Tenn. May 2, 2018), ECF No. 3; Judgment, *United States v. Dunaway*, No. 3:18-cr-00108 (M.D. Tenn. Nov. 13, 2018), ECF No. 39.

[12] Justin Fenton, *Baltimore Gun Trace Task Force Officers Were 'Both Cops and Robbers' at Same Time, Prosecutors Say*, Balt. Sun (Jan. 23, 2018, 1:20 PM), http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-gttf-opening-statements-20180123-story.html?utm_source=nextdraft&utm_medium=email; *see also* Indictment, *United States v. Gondo*, No. 1:17-cr-00106 (D. Md. Feb. 23, 2017), ECF No. 1.

accountability gap and works at cross-purposes with the rationale underlying immunity.

C. By Immunizing Outright Theft, The Decision Below Only Exacerbates Existing Concerns Over Asset Forfeiture.

Finally, the decision below is all the more striking because it provides officers with an avenue to seize individuals' personal property without any legal recourse for the victims. Civil asset forfeiture, which gives the government authority to seize personal property with little legal scrutiny, is already widely abused. Police departments and individual officers routinely misuse their authority by seizing property to which they are not actually entitled, and using that property to fund their departments. The Ninth Circuit's decision now goes even further; it immunizes individual officers who steal property for their own *personal* use. Given the abuse that already exists when the government is permitted to seize property for the government's own use, further immunizing officers who commit outright theft for their own personal profit will make it even easier for government officials to abuse their authority and escape any liability.

Civil asset forfeiture historically began as a tool to combat piracy and enforce regulations on the high seas (where *in personam* actions against property owners were often impossible), but many governments now turn to forfeiture as a major source of revenue. *See Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). In recent decades, forfeiture has "become widespread and highly profitable." *Id.* Because the entity that seizes the

property often keeps it, law enforcement has "strong incentives to pursue forfeiture." *Id.*

At the federal level, the Departments of Justice and Treasury had seized more than $5 billion worth of assets by 2014—a 4,667% increase since 1986. Dick M. Carpenter II *et al.*, Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 10 (2d ed. 2015)[13]; Christopher Ingraham, *Law Enforcement Took More Stuff from People than Burglars Did Last Year*, Wash. Post Wonkblog (Nov. 23, 2015).[14] Facing a declining state and local tax base and increased criminal justice spending, many state and local governments have also turned to forfeiture as a source of revenue. Forty-four states now authorize law enforcement to keep at least 45% of the assets they seize; in thirty states, law enforcement may keep 90% of the assets. Carpenter *et al.*, *Policing for Profit*, at 14.

This system—allowing police to "seize property with limited judicial oversight and retain it for their own use"—has "led to egregious and well-chronicled abuses." *Leonard*, 137 S. Ct. at 848. Law enforcement have strong incentives to view more property they encounter as suspicious or otherwise subject to forfeiture. The incentive to err on the side of seizure has led to countless examples of innocent Americans having their money taken while traveling to make large purchases or move

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[13] https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf.

[14] https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/.

to a new community. As just one example, in August 2012, over $17,550 was seized from Mandrel Stuart after he was stopped for a minor traffic violation in Virginia. *See*, Robert O'Harrow Jr., *et al.*, *They Fought the Law. Who Won?*, Wash. Post (Sept. 8, 2014).[15] Mr. Stuart planned to use the money, which he had earned from his barbeque business, to purchase equipment and supplies for his restaurant. But police claimed that the money was drug money, and it took Mr. Stuart fourteen months to succeed in having the money returned—after hiring counsel and winning a unanimous jury verdict. In the interim, his business folded because he lacked the cash flow to keep it operating. *Id.*

The proliferation of civil asset forfeiture is alarming enough. But the Ninth Circuit's decision opens an unlawful, new, and even less scrutinized means for officials to seize individuals' property. Now, not only can officials seize and retain personal property with little judicial oversight under the guise of civil asset forfeiture; law enforcement also can outright steal personal property for their own use with impunity and without fear of civil liability. The Constitution demands more.

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[15] https://perma.cc/HA9R-W85E.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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