No. 19-1021

In The
Supreme Court of the United States

MICAH JESSOP & BRITTAN ASHJIAN,

Petitioners,

v.

CITY OF FRESNO, DERIK KUMAGAI, CURT CHASTAIN & TOMAS CANTU,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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1.0 Introduction

The Petition for Writ of Certiorari fails on both the facts and the law. Petitioners' selective inclusion and omission of facts paints an artificially favorable portrait of petitioners, violating petitioners' duty to summarize the facts accurately. Petitioners' legal discussion fails to establish any conflict between the Ninth Circuit's decision and any other circuit's; and fails to show any conflict with this Court's qualified immunity jurisprudence. Petitioners (and the *amici curiae* who submitted briefs in support of review) also exaggerate the importance of the Ninth Circuit's decision, by inaccurately arguing that qualified immunity cuts off any ground for holding police officers accountable for alleged theft in the course of executing a search warrant—theft that, respondents maintain—did not actually occur here. The *amici*'s requests that this Court grant review to reconsider qualified immunity, and the rules the Court has established for applying it, are contrary to this Court's support for qualified immunity and the procedure for deciding it. Respondents respectfully request that the Court deny certiorari.

2.0 Argument

2.1 No Theft Took Place.

The petitioners' arguments (and those of the *amici curiae* who have sought leave to file briefs supporting the petition) all assume that the defendant officers indeed stole petitioners' property. The respondent City

and officers emphasize that they do not concede this point. *Respondents categorically deny that they stole petitioners' property*. (2ER:271; 3ER:486, 489; *see* Answering Brief, 9th Cir. Dkt. # 17, 90-92.) The record is replete with evidence indicating that the petitioners' theft accusations are flimsy.

For instance, petitioners allegedly discovered currency and coins were missing in September 2013. (2ER:164-165, 232.) At that time, they had legal representation. (2ER:221-222.) Yet they did not file suit until February 2015—after respondent officer Derik Kumagai was arrested for an unrelated incident. (2ER:37; 3ER:522.) The petitioners' accusations that the amount of money the officers seized exceeded the amount disclosed as seized stem primarily from petitioner Jessop's after-the-fact reconstruction of the amount of currency he believes was in his car when the officers searched it. (2ER:207-209.) Jessop contends that a coin collection he kept in a plastic tub—unappraised and uninsured—consisted of solid gold coins, and was worth six figures. (2ER:216-218.) He based his valuation on a list of coins he recreated from memory, a piece of paper containing some of the items, and an Internet search. (2ER:217-218.)

This issue is ultimately immaterial to qualified immunity. As the Ninth Circuit ruled, even if petitioners' accusations are credited for the purpose of argument, the respondent officers are entitled to qualified immunity. Pet. App. 8a-10a. But the issue matters to respondents. No argument they make should be taken

as a concession that petitioners' accusations have merit.

2.2 The "Factual Background" Set Forth in the Petition Is Misleading.

"The Court relies heavily upon the good faith of Petitioner's counsel in accurately stating or summarizing the pertinent facts" in a petition for certiorari. Robert L. Stern & Eugene Gressman, et al., *Supreme Court Practice* 430 (8th ed. 2002). "The unfavorable facts . . . must be given whenever necessary to a proper and full understanding of the case by the Court." *Id*. at 431.

Petitioners did not follow those guidelines. The "Factual Background" selectively omits facts in a manner that suggests the petitioners are innocent subjects of a police investigation, rather than admitted violators of the law. The petition states that the petitioners are "former missionaries." Pet. 5. It states that "no criminal charges were ever filed against" the petitioners. Pet. 7. The petition then points to the subsequent and unrelated criminal prosecution of respondent Derik Kumagai. *Id.*

The petition leaves out the undisputed fact that when officers confronted petitioner Micah Jessop with a photograph of petitioner Brittan Ashjian unloading a "coin pusher" (an illegal gambling machine), Jessop "kind of chuckled" and said something in the nature of, "Oh well, you got us red-handed." (2ER:348.) The petition omits Jessop's statement to the police that a bank bag of quarters in Jessop's car came from cleaning out

one of the machines. (3ER:350.) It omits the coin machines that police found on the side of Jessop's house. (2ER:43-44, 269.)

The Petition also does not mention that the petitioners entered into a contract with the City of Fresno to become informants, in exchange for not being charged; and that they agreed to forfeit to the City $50,000 collected from the searches. (2ER:224-225, 271; 3ER:472-475, 486.)

The Constitution protects both the innocent and the guilty. But petitioners who seek to invoke this Court's jurisdiction should not convey the impression they are innocent by omitting the facts establishing they are guilty.

2.3 The Petition Fails to Show Any Conflict Among the Circuits—or with this Court's Holdings—on Qualified Immunity That Requires This Court's Review.

2.3.1 Petitioners' Arguments That the Case Was Wrongly Decided Fail to Show a Ground for Review.

"[The] purpose of persuading the Court to hear the case is rarely achieved merely by arguing that the decision below is erroneous. . . ." *Supreme Court Practice*, *supra*, at 432-433. Yet that is the thrust of the petition. *See* Pet. 10-25, 30-36. The *amici* briefs follow suit. Absent a conflict with this Court's decisions on qualified immunity, or a demonstration of conflict between the

circuits on the qualified immunity decision here, review should not be granted. As discussed below, petitioners fail to show any such conflict.

2.3.2 Petitioners Fail to Establish any Conflict between Circuits.

At Pet. 25-30, petitioners argue that the Ninth Circuit's decision conflicts with decisions from "lower courts." "A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." *Supreme Court Practice*, *supra*, 226. Yet petitioners fail to identify any conflicting circuit court of appeals decisions dealing with qualified immunity in a case in which a police officer allegedly seized property called for in a search warrant, while executing the warrant, and then kept the property.

The only decisions petitioners identify that denied qualified immunity in 42 U.S.C. § 1983 Fourth Amendment claims arising out of alleged theft while executing a search warrant are unpublished orders from district courts within the Ninth Circuit. Pet. 26-27, citing *McDonald v. W. Contra Costa Narcotics Enf't Team*, No. 14-CV-04154-VC, 2015 WL 13655774, at *1 (N.D. Cal. Mar. 20, 2015) and *Mertens v. Shensky*, No. CV05-147-N-EJL, 2006 WL 173651, at *2 (D. Idaho Jan. 23, 2006). "The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely

because it is in direct conflict on a point of law with a decision rendered by a district court, whether in the same circuit or a different circuit." *Supreme Court Practice*, *supra*, 237. It is the circuit courts' duty to maintain uniformity within their respective circuits. *Id.* That is particularly true for district courts within the circuit that rendered the decision, because the district court cases do not create a conflict; the circuit court's decision governs and contrary district decisions do not.

The circuit court decisions petitioners cite do not address alleged theft of property seized under a search warrant. *See* Pet. 25-30, citing *Nelson v. Streeter*, 16 F.3d 145, 147-148, 151 (7th Cir. 1994) (officers, in front of TV cameras, take painting off display, put it in their police car, and return it the next day); *United States v. Webster*, 809 F.3d 1158, 1160-1161 (10th Cir. 2016) (in criminal prosecution, theft of property by officers while other officers execute search warrant is not ground for blanket exclusion of seized evidence); *Simon v. City of New York*, 893 F.3d 83, 97-98 (2d Cir. 2018) (qualified immunity denied for executing material witness arrest warrant without complying with warrant's terms); *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011) (no qualified immunity for prosecutor who failed to follow judge's instructions to keep him informed of whether trial at which imprisoned material witness needed was continued, resulting in witness's overdetention); *Gustafson v. Adkins*, 803 F.3d 883, 892 (7th Cir. 2015) (qualified immunity denied for claim that police chief violated Fourth Amendment by putting surveillance

camera in female officers' dressing room, despite legal advice that doing so was illegal); *Sims v. Labowitz*, 885 F.3d 254, 264-265 (4th Cir. 2018) (qualified immunity denied for executing search warrant for photos of minor's erect penis by forcing minor to masturbate in front of officers); and *Buonocore v. Harris*, 65 F.3d 347, 356-357 (4th Cir. 1995) (denying qualified immunity to officer who allowed private citizen to participate in execution of search warrant on residence).

Petitioners' resort to dissimilar cases in an attempt to show a conflict confirms that there is no conflict.

Finally, petitioners argue that the Ninth Circuit's decision conflicts with an unpublished Delaware state court decision that denied state statutory qualified immunity (which, unlike federal qualified immunity, turns on subjective good faith) to probation officers who allegedly stole property from a residence during an administrative search. Pet. 28, citing *Haskins v. Kay*, 963 A.2d 138, 2008 WL 5227187 (Del. 2008) (unpublished). A purported conflict between a Ninth Circuit decision based on federal law and the unpublished decision of a state court (outside the Ninth Circuit) interpreting state law does not warrant this Court's attention.

Petitioners have failed to establish a conflict between circuits.

2.3.2 Because the Ninth Circuit's Decision Follows the Rules This Court Has Laid Down for Applying Qualified Immunity, Petitioners Fail to Show any Conflict between the Ninth Circuit's Decision and This Court's Precedent.

Petitioners assert that in the underlying decision, "The Ninth Circuit Severely Misapplied Qualified Immunity Doctrine." Pet. 20-25. Petitioners essentially contend that the decision conflicts with this Court's qualified immunity jurisprudence. Pet. 20. The Ninth Circuit's decision in this case comports with this Court's rulings on qualified immunity, as most recently set forth in *City of Escondido, Cal. v. Emmons*, __ U.S. __, 139 S. Ct. 500 (2019); *Kisela v. Hughes*, __ U.S. __, 138 S. Ct. 1148 (2018); and *District of Columbia v. Wesby*, __ U.S. __, 138 S. Ct. 577 (2018).

In those cases, the Court held that for purposes of the second prong of qualified immunity, "the clearly established right must be defined with specificity." *Emmons*, 139 S. Ct. at 503. "'[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.'" *Kisela*, 138 S. Ct. at 1152, quoting *Mullenix v. Luna*, 577 U.S. __, 136 S. Ct. 503, 508 (2015). The Fourth Amendment issue addressed in *Emmons* and *Kisela*, use of excessive force, requires that

existing precedent "squarely gover[n]" the specific facts at issue before qualified immunity can be denied. *Kisela*, 138 S. Ct. at 1153; *Emmons*, 139 S. Ct. at 503. Even in Fourth Amendment cases, like this one, dealing with search and seizure issues other than use of force, the Court has "stressed the need to 'identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment.'" *Wesby*, *supra*, 138 S. Ct. 577, 590, quoting *White v. Pauly*, 580 U.S. __, 137 S. Ct. 548, 552 (2017). Outside of the rare "obvious case," a "controlling case or robust consensus of cases" is usually necessary to clearly establish the law. *Wesby*, 138 S. Ct. at 590-591 (internal quotations omitted). "While there does not have to be 'a case directly on point,' existing precedent must place the lawfulness of the particular arrest 'beyond debate.'" *Wesby*, 138 S. Ct. at 590, quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011).

Further, the Court has not only permitted but encouraged courts to resolve qualified immunity cases on the second prong (the officer did not violate clearly-established law) without addressing the first prong (whether the officer's conduct violated the Constitutional right at issue). *Wesby*, *supra*, 138 S. Ct. at 589, n. 7. Second-prong resolution is especially appropriate where a court may quickly and easily decide that there was no violation of clearly-established law, without addressing the "more difficult question" of whether under the facts there was a constitutional violation at all. *Pearson v. Callahan*, 555 U.S. 223, 239 (2009).

The Ninth Circuit opinion followed all of these rules. The Ninth Circuit panel's resolution on the

second prong of qualified immunity—without addressing whether the defendant officers violated the constitution—was appropriate. Pet. App. 5a. The panel wrote that there was no Ninth Circuit authority at the time of the alleged conduct that addressed whether alleged theft of property covered by a search warrant's terms, and seized pursuant to that warrant, violated the Fourth Amendment. Pet. App. 6a-8a. The court further ruled that there was no consensus of cases on the issue. Instead, there was only a decision from the Fourth Circuit—unpublished—addressing failure to return property seized from a home pursuant to a search warrant. Pet. App. 6a, 8a, citing *Mom's Inc. v. Willman*, 109 F. App'x 629, 636-637 (4th Cir. 2004). (Indeed, although the Ninth Circuit did not mention it, the *Mom's* court ruled that the officers who allegedly converted the watch were entitled to qualified immunity to the Fourth Amendment claim—because the Fourth Amendment violation was not clearly established. (*Mom's*, at 637.)) Next, the panel analyzed whether the violation of the Fourth Amendment was "obvious." It concluded that whether an alleged theft of property seized under a valid search warrant violates the Fourth Amendment—as opposed to a matter for state tort law—would not be so clear to a reasonable officer as to be "obvious." Pet. App. 8a-9a. Finally, the panel applied the same analysis to petitioners' Fourteenth Amendment claim. It noted no Ninth Circuit authority on the subject; and that a Seventh Circuit case on failure to return lawfully-seized property to its owner held that the conduct did not violate substantive due process. Pet. App. 9a-10a. The Ninth Circuit therefore

followed the rules for qualified immunity analysis, as laid down by this Court, to the letter.

Petitioners' argument otherwise appears to be that the Ninth Circuit's succinct opinion should have been longer. They contend that the Ninth Circuit had to review this Court's Fourth Amendment decisions, and apply them to the facts of the case, before determining whether the law was clearly established. Pet. 20-25.

But petitioners fail to identify any Supreme Court precedent governing the specific issue here: whether alleged theft of property that a valid search warrant identifies as subject to seizure, and which is seized during execution of the warrant, violates the Fourth Amendment. Instead, they appear to argue that the Ninth Circuit had to discuss this Court's general precedent establishing the contours of the Fourth Amendment, apply it to the facts alleged, and then determine whether the right was clearly established.

They do not identify a Supreme Court case that requires lower courts to "show their work" in appellate decisions by reasoning from the broad principles of Fourth Amendment jurisprudence to the facts at hand whenever they address the second prong of qualified immunity. Instead, as discussed above, this Court has established that the "clearly established" prong analysis may be done "quickly and easily" by determining whether there is a precedent holding an officer violated the Fourth Amendment under similar circumstances. *Wesby*, *supra*, 138 S. Ct. at 589-590 and n. 7. Having

found no such precedent, the Ninth Circuit properly resolved the second prong issue "quickly and easily."

Finally, petitioners appear to argue that this Court's decisions in *Wilson v. Layne*, 526 U.S. 603 (1999) and *U.S. v. Jacobsen*, 466 U.S. 109 (1984) clearly established a Fourth Amendment violation here. Pet. 23-24 and n. 3. But neither case deals with facts similar to the allegations here. *See Wesby*, *supra*, 138 S. Ct. at 590.

Wilson held that officers violated the Fourth Amendment by bringing reporters into a residence while the officers executed a search warrant, because "the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion. . . ." *Id.*, 526 U.S. at 611. *Wilson* also held that the officers were entitled to qualified immunity under the clearly-established-law prong, because "the constitutional question presented by this case is by no means open-and-shut" and because no case at the time had established that this conduct violated the Fourth Amendment. *Id.* at 615-617. *Wilson* does not deal with alleged theft of property that was subject to seizure under a warrant and allegedly seized while executing that warrant.

Similarly, *Jacobsen* held that when search of a damaged package by the courier's employees revealed plastic bags with white powder inside, federal agents' subsequent re-removal of the bags from the package, removal of powder from them, and field testing of the powder (destroying a portion of it) did not require a

warrant. *Id.*, 466 U.S. at 125. The *Jacobsen* court held that "a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'" *Id.* at 124. But *Jacobsen* did not find a violation of the Fourth Amendment under the facts in that case; and did not "establish" that the alleged conduct here violated the Fourth Amendment.

Plaintiffs have failed to establish a conflict with this Court's jurisprudence.

2.4 Petitioners and *Amici* Exaggerate the Impact of the Decision.

Petitioners assert that, "If the decision below stands, all of the persons engaged in this misconduct will be immunized from liability. . . ." Pet. 32. An *amici curiae* brief submitted to support the petition echoes the proposition that the Ninth Circuit's opinion eliminates any liability for police officers who steal property seized under a warrant. *See* Motion for Leave to File and Brief of the DKT Liberty Project, et al., at 19 ("State law is unlikely to provide victims with any recourse. . . ."; under Ninth Circuit's decision, "potential bad actors are assured that such theft will not lead to *civil* liability at all" [italics in original]). The proposition is incorrect. If a police officer steals property (as, respondents repeat, did not actually occur here), a Fourth Amendment claim under 42 U.S.C. § 1983 is not the only vehicle available for holding the officer liable.

First, theft is a crime. Under California law, Cal. Pen. Code § 484 defines the crime of theft of personal property. Cal. Pen. Code § 1202.4 requires defendants convicted of crimes to pay restitution to their victims. At Pet. 31-32 and n. 5, petitioners discuss convictions of police officers for theft. Nothing in the Ninth Circuit's opinion immunizes police officers who commit theft from criminal liability. Criminal law therefore continues to provide a vehicle for both liability for offenders and recompense for victims.

Second, state law provides civil remedies for theft. California, for instance, recognizes the common law tort of conversion. *Plummer v. Day/Eisenberg, LLP*, 184 Cal. App. 4th 38, 45, 108 Cal. Rptr. 3d 455, 460-461 (2010) (setting forth elements of conversion). Cal. Gov't Code § 820(a) subjects public employees, such as peace officers, to the same tort liability as private persons, except as otherwise provided by statute (*e.g.*, statutory immunities).

At Pet. 32-33, petitioners argue that Cal. Gov't Code § 821.6's immunity for instituting or prosecuting judicial or administrative proceedings "affords police officers broad immunity from tort liability for acts taken during criminal investigations." They cite *Amylou R. v. Cty. of Riverside*, 28 Cal. App. 4th 1205, 1209, 34 Cal. Rptr. 2d 319, 321 (1994) for support. Pet. 32-33. *Amylou R.* holds that § 821.6 immunizes police officer actions or omissions incidental to investigating a crime (including allegedly spreading false information about a suspect) that are within the scope of the officer's employment. *Id.*, 28 Cal. App. 4th at 1209,

1211. Nothing in *Amylou R.* holds that § 821.6 would immunize officers from conversion liability for theft. To the contrary, *Tallmadge v. Cty. of Los Angeles*, 191 Cal. App. 3d 251, 254-255, 236 Cal. Rptr. 338, 340-341 (1987) held that § 821.6's immunity does not apply to conversion claims that do not arise out of instituting or prosecuting a proceeding (such as destroying lawfully seized property after a criminal prosecution ends).

Finally, nothing in the Ninth Circuit's decision prevents either the Ninth Circuit or other circuits from addressing the issue the panel here declined to address: Whether, under the first prong of qualified immunity, alleged officer theft violates the Fourth Amendment. The Ninth Circuit's decision that the law on the subject was not clearly established in 2013 does not prevent it from rendering a future decision that clearly establishes the law on the subject. And the Ninth Circuit's ruling on the second prong of qualified immunity does not bind other circuits. If a circuit reaches a contrary conclusion in the future, *that* decision may be subject to review. At this point, however, mere speculation that other circuits will avoid the subject does not support review.

2.5 The *Amici Curiae* Calls for an End to or Changes to Qualified Immunity Do Not Support Granting Review.

The refrain amongst the *amici curiae* who have sought leave to file briefs in support of petitioners is that the Court should either eliminate qualified

immunity entirely, or reconsider its decision in *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009) giving lower courts discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first.

This Court's unanimous decision in *Emmons*, *supra*. 139 S. Ct. 500, and the unanimous decision on qualified immunity (including the concurrences by Justice Sotomayor and Justice Ginsburg) in *Wesby*, *supra*, 138 S. Ct. 577, illustrate this Court's continued support for qualified immunity, particularly in the complex area of Fourth Amendment liability. Where the law does not clearly establish that a particular act or omission violates the Fourth Amendment—and, particularly, where judges disagree on that issue—"it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618, 119 S. Ct. 1692, 1701, 143 L. Ed. 2d 818 (1999).

And *Pearson*, *supra*, 555 U.S. at 236-240 outlines the multiple instances in which resolving cases on the second prong of qualified immunity will serve judicial economy without preventing the orderly development of the law.

The *amici*'s requests that the Court eliminate qualified immunity, or reconsider the rules it has set for applying the immunity, should provide no support for review of this case—particularly since, as explained above, the grounds for review are absent.

2.6 If This Court Were to Rule the Alleged Conduct Violated the Fourth Amendment, the Respondent Officers Would Still Be Entitled to Qualified Immunity.

Finally, respondents point out that even if this Court were to review the issue of whether the alleged theft violated the Fourth Amendment, and rule that it did, the result would be the same: The respondent officers would be entitled to summary judgment based on the second prong of qualified immunity. A ruling in the future on the Fourth Amendment question would not clearly establish the law at the time the alleged conduct took place. Petitioners' and *amici*'s contention that the Fourth Amendment violation was "obvious" fails. The question is not whether a police officer should recognize that theft of lawfully-seized property "was a tort, a crime, and even a sin," but whether the officers should have recognized the alleged theft violated the Fourth Amendment. *Mom's Inc.*, *supra*, 109 F. App'x 629, 637. As the Fourth Circuit recognized in *Mom's Inc.*, *supra*, and the Ninth Circuit ruled here, the answer to that question is not so obvious as to require denying a police officer qualified immunity.

3.0 Conclusion

Petitioners have not and cannot establish grounds for review.

Respectfully submitted,

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