No. 19-1021

IN THE
Supreme Court of the United States

MICAH JESSOP, ET AL.,
Petitioners,

v.

CITY OF FRESNO, CALIFORNIA, ET AL.,
Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

Some decisions really are indefensible. Given the opportunity to explain how "reasonable officers" could believe that the Fourth Amendment permits them to steal items listed in a search warrant, respondents offer no defense at all. They do not claim that stealing from a suspect constitutes a "reasonable" seizure. They do not argue that the text or history of the Fourth Amendment or this Court's cases leave room for doubt on the question. They do not dispute that every prior court to consider such theft, ever, has found it obviously unconstitutional.

Instead, respondents stake their case against certiorari on the same overbroad understanding of qualified immunity as the panel below. So long as there is no Supreme Court precedent addressing "the *specific issue* here," they claim, they are off the hook—and so too is every officer from Honolulu to Helena who wishes to steal from a criminal suspect, at least until the Ninth Circuit gets around to explicitly declaring that theft is unconstitutional. Opp. 11 (emphasis added). That is not how the law of qualified immunity works. And, 229 years in, it should be obvious that it is not an outcome that the Fourth Amendment tolerates.

In recent years, many parties have sharply criticized the doctrine of qualified immunity, contending that it too often allows outrageous misconduct to escape justice. This case at least should mark the outer boundaries of the doctrine: Whatever else qualified immunity may protect, it does not protect outright theft. Summary reversal is warranted. Alternatively, certiorari should be granted. No matter what, this manifestly indefensible decision should not be permitted to stand.

ARGUMENT

I. RESPONDENTS CANNOT DEFEND THE DECISION BELOW.

The constitutional question in this case is straightforward. Theft of property listed in a warrant is a "seizure": It is a permanent interference with property rights carried out by officers acting under color of law. U.S. Const. amend. IV; *see United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984). Such theft is

also "unreasonable." U.S. Const. amend. IV. It advances no legitimate "governmental interest[]," *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985), hinders rather than advances the "objectives of the authorized intrusion," *Wilson* v. *Layne*, 536 U.S. 603, 611-614 (1999), and replicates one of the very abuses the Fourth Amendment was designed to prevent, *see* Pet. 15-17. As every prior court to address the question has concluded, theft of property listed in a warrant thus flatly violates the Fourth Amendment. *See id.* at 26-28.

Remarkably, respondents do not even attempt to argue otherwise. They do not argue that theft actually *complies* with the Fourth Amendment. Nor do they identify any basis for *uncertainty* on the question—they do not argue, for instance, that reasonable officers could "debate" whether theft is a seizure, *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741 (2011), or that it would be "difficult for an officer to determine" whether stealing property rather than taking it into government custody serves a legitimate governmental interest, *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1152-53 (2018) (per curiam) (quoting *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)). Respondents admit that the Ninth Circuit did not undertake those inquiries, either. *See* Opp. 11 (acknowledging that the Ninth Circuit did not "review this Court's Fourth Amendment decisions" or attempt to "apply them to the facts of the case"). That all but settles the qualified immunity question: If neither respondents nor the court below can mount a reasonable (or even colorable) argument that the conduct at issue is constitutional, then text and

precedent have plainly "placed the *** constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741.

Respondents nonetheless insist that the Ninth Circuit was right to grant them qualified immunity, because there is no Supreme Court precedent addressing "the *specific* issue here: whether alleged theft of property [identified in] a valid search warrant *** violates the Fourth Amendment." Opp. 11 (emphasis added). That, however, is precisely what this Court has held is *not* required to overcome qualified immunity. To quote one of respondents' own authorities, "there does not have to be a case directly on point." *City of Escondido* v. *Emmons*, 139 S. Ct. 500, 504 (2019) (per curiam) (citation omitted). Or, to quote another, "the unlawfulness of [an] officer's conduct" can be "sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 590 (2018) (citation omitted). All that is required, this Court has time and again held, is that "existing precedent *** place the lawfulness of the particular [action] beyond debate." *Id*. (internal quotation marks omitted); *see Brosseau* v. *Haugen*, 543 U.S. 194, 198-199 (2004) (per curiam); *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002); Cato Institute et al. Amicus Br. 2-3. This is such a case: The plain text and established precedents of the Fourth Amendment "unmistakably" dictate that the theft of property listed in a warrant is unconstitutional, and the absence of a prior case specifically condemning that "flagrantly unlawful" conduct is no basis for immunity. *Browder* v. *City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015) (Gorsuch, J.).

It is thus beside the point that *Wilson* and *Jacobsen* do not address the precise facts of this case. *See* Opp. 12-13. What matters is that those cases—along with the text, history, and other precedents of the Fourth Amendment, none of which respondents address—establish rules that "apply with obvious clarity to the specific conduct in question." *United States* v. *Lanier*, 520 U.S. 259, 271 (1997).

Equally irrelevant is respondents' extended effort to litigate the facts of the case. Respondents claim (at 1-3) that trial will prove that they did not steal petitioners' property. But as respondents ultimately acknowledge, those protestations are "immaterial" at the summary judgment stage, Opp. 2, when courts must view evidence "in the light most favorable to the opposing party"—here, petitioners—and where there is more than sufficient evidence to create a triable question of fact.[1] *Tolan* v. *Cotton*, 572 U.S. 650, 656-657 (2014) (per curiam) (citation omitted). As for respondents' claim (at 3-4) that petitioners are guilty of the misdemeanor gambling offenses for which they were being investigated, *see* EOR 086, it

[1] Among other things, deponents testified that Detective Kumagai returned to Jessop's home after the search was completed and went alone into the room where Jessop kept his rare coin collection, EOR 43-44; that Jessop's coin collection and other seized items and currency were found missing following the search, EOR 163-165; that those items were not included in the police inventory, *id*; that, when asked to produce the missing property shortly after the search, respondents failed to do so, EOR 165-166, 223; and that the missing property was not produced even when charges against petitioners were dropped, *see id*.

is axiomatic that the Fourth Amendment "protect[s] both the innocent and the guilty from unreasonable intrusions," *Trupiano* v. *United States*, 334 U.S. 699, 709 (1948). Petitioners "obvious[ly]" suffered such an intrusion when police officers stole their property, *Brosseau*, 543 U.S. at 199, and no court or party—even now—has tried to mount a plausible case to the contrary.

II. THE NINTH CIRCUIT'S DECISION IS A SEVERE OUTLIER.

Respondents also do not dispute that the Ninth Circuit's decision stands in a class of one. Every other circuit to consider the question presented has determined that theft by law enforcement officers while executing a search is not only unconstitutional, but obviously so. *See* Nat'l Ass'n of Criminal Defense Lawyers ("NACDL") Amicus Br. 6-8; Pet. 26-28. That is what the Tenth Circuit found in *United States* v. *Webster*, 809 F.3d 1158, 1162, 1170 (10th Cir. 2016) (describing it as "patently unconstitutional" to "steal[ ] personal property during a search conducted pursuant to a warrant" (citation omitted)), the Sixth Circuit held in *Lynn* v. *City of Detroit*, 98 F. App'x 381, 385 (6th Cir. 2004) ("[i]t seems clear" that officers who stole money during a search "violated the plaintiffs' constitutional rights"), and the Seventh Circuit concluded in *Nelson* v. *Streeter*, 16 F.3d 145, 151 (7th Cir. 1994) (even in "the absence of case law," it is "obvious" that police violate the Fourth Amendment by "steal[ing] private property"). Respondents do not identify any case apart from the decision below that has expressed any doubt on this point. And respondents are simply wrong to assert

(at 5) that the "[t]he only decisions" to address this question "are unpublished orders from district courts"—although all of those decisions, too, found theft of property listed in a warrant obviously unconstitutional. *See* Pet. 26-27.

Furthermore, respondents do not contest that other circuits have rejected the *reasoning* employed by the Ninth Circuit in this case. Other circuits have repeatedly found that officers violated clearly established law when they engaged in conduct plainly prohibited by the text and precedents of the Fourth Amendment, even if no prior case involved "similar circumstances." Opp. 11; *see* Pet. 28-30 (discussing cases). Respondents observe that those cases did not involve allegations of theft. Opp. 6-7. But that entirely misses the point. What matters is that those circuits rejected the sole rationale respondents and the Ninth Circuit have offered in support of the decision below: that law can only be clearly established by a case involving the same "factual scenario." *Simon* v. *City of New York*, 893 F.3d 83, 97 (2d Cir. 2018).

III. THE DECISION BELOW WILL HAVE GRAVE CONSEQUENCES IF LEFT UNCORRECTED.

The Ninth Circuit's decision will have severe consequences if permitted to stand. Respondents do not even contest that the decision below will prospectively immunize any law enforcement officer anywhere in the Ninth Circuit who steals property listed in a warrant. Pet. 30-31. Nor do respondents dispute that such thefts are already disturbingly common. *Id.* at 31-32; *see* NACDL Amicus Br. 3-6 (reporting

hundreds of examples of profit-motivated crimes by on-duty police, including numerous thefts); DKT Liberty Project ("DKT") et al. Amicus Br. 15-20 (discussing other recent examples).

Respondents offer the vague hope that, at some point in the future, the Ninth Circuit might address the underlying constitutional question and at last declare theft unconstitutional. Opp. 15. But that would do nothing to afford relief to the persons injured in the interim, whose claims will remain foreclosed by the decision below. And a highly unlikely chain of events would need to take place for the Ninth Circuit to even reach the question: Plaintiffs would need to bring suit in the teeth of a holding barring them from monetary recovery even if they prevailed; the case would need to reach the Ninth Circuit on the question of qualified immunity; and the Ninth Circuit would need to address the underlying constitutional issue, rather than simply follow its precedent deeming the violation not clearly established. *See* DKT Amicus Br. 10 (noting that fewer than 10% of qualified-immunity cases are resolved on the first prong). In the meantime, the Ninth Circuit's decision will make it difficult for courts in other circuits to deem this question "clearly established." Pet. 33-34. The decision below thus threatens to establish a kind of "anti-precedent," which will allow "a 'not-clearly established' right to potentially remain that way, indefinitely." New Civil Liberties Alliance Amicus Br. 5, 11-12.

Nor is there any realistic prospect that state law will fill the gap. *Cf.* Opp. 13-15. Plaintiffs can hardly count on "the same system of law enforcement

that violated their rights in the first place" to identify and prosecute wrongdoers. NACDL Amicus Br. 6; *see* DKT Amicus Br. 13-14. And some states, including California, have granted law enforcement officers broad immunity from civil liability for torts committed in the course of a criminal investigation. *See, e.g.*, Cal. Gov't Code § 821.6. Contrary to respondents' suggestion, courts have repeatedly held that this immunity extends to "claims for conversion" arising out of a criminal investigation. *Chaudhry* v. *City of Los Angeles*, 573 F. App'x 628, 633 (9th Cir. 2014) (citing Cal. Gov't Code § 821.6); *see, e.g.*, *Christiana* v. *City of Laguna Beach*, No. G056944, 2019 WL 6648970, at *5 (Cal. Ct. App. Dec. 6, 2019); *Baughman* v. *California*, 45 Cal. Rptr. 2d 82, 88-89 (Ct. App. 1995).[2]

In any event, the very purpose of § 1983 is to ensure that persons who suffer violations of their constitutional rights do not need to rely on the grace of state legislatures or officials to afford them protection. *See* Const. Accountability Ctr. Amicus Br. 16. That federal remedy applies with full force to persons who have been subjected to unconstitutional searches and seizures. *See Manuel* v. *City of Joliet*, 137 S. Ct. 911 (2017); *Groh* v. *Ramirez*, 540 U.S. 551

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[2] California courts have distinguished *Tallmadge* v. *County of Los Angeles*, 236 Cal. Rptr. 338 (Ct. App. 1987), *cited in* Opp. 15, on the ground that it involved alleged misconduct by a court clerk, rather than a police officer involved in "instituting or prosecuting" a criminal case. *Brogden Props., Inc.* v. *City of Oceanside*, No. D055945, 2010 WL 3810168, at *3 (Cal. Ct. App. Sept. 30, 2010).

(2004); *Wilson*, 526 U.S. 603. The Court should not permit it to be diluted for the residents of nine States based on a gross misapplication of the doctrine of qualified immunity.

IV. THE COURT SHOULD SUMMARILY REVERSE OR GRANT CERTIORARI.

Summary reversal is warranted. The decision below is manifestly incorrect, at odds with the decisions of every other court to consider the issue, and bound to spawn untold mischief if permitted to stand. The Court has summarily reversed far less consequential misapplications of qualified immunity. *See* Pet. 35-36. And it has repeatedly issued summary reversals of decisions that stood against the great weight of authority or clearly misapplied settled doctrine. *See, e.g.*, *Davis* v. *United States*, 140 S. Ct. 1060 (2020) (per curiam) (summarily reversing Fifth Circuit's "outlier" decision misapplying plain-error standard); *Hinton* v. *Alabama*, 571 U.S. 263 (2014) (per curiam) (summarily reversing clear misapplication of *Strickland*). This case checks each of those boxes. Plenary review is unnecessary to identify and correct the Ninth Circuit's clear errors.

Alternatively, this Court should grant certiorari. The Ninth Circuit's misapplication of the law of qualified immunity is sufficiently grave and consequential that the decision would merit certiorari even absent a circuit split. *See, e.g.*, *Hope*, 563 U.S. at 733; *Lanier*, 520 U.S. at 261. But the Ninth Circuit has also divided from the decisions of multiple circuits on both the precise question presented and the proper approach to qualified immunity more broadly. *See supra* pp. 6-7. And without this Court's

intervention, the decision below is likely to entrench itself in Ninth Circuit law for years to come, endangering the property and liberty of innumerable individuals until this Court or the Ninth Circuit at last steps in and announces the obvious.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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