No. 19A____

IN THE

Supreme Court of the United States

MICAH JESSOP; BRITTAN ASHJIAN,

Applicants,

v.

CITY OF FRESNO; ET AL.,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 26, 2019

APPLICATION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), applicants Micah Jessop and Brittan Ashjian respectfully request a 30-day extension of time, to and including February 14, 2020, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

1. The Ninth Circuit issued its original decision on March 20, 2019. *See Jessop* v. *City of Fresno*, 918 F.3d 1031 (Appendix B). Applicants timely sought panel rehearing and rehearing en banc, and the panel issued a superseding opinion on September 4, 2019. *See Jessop* v. *City of Fresno*, 936 F.3d 937 (Appendix A). The Ninth Circuit then denied rehearing en banc on October 17, 2019 (Appendix C). Unless extended, the time to file a petition for certiorari will expire on January 15, 2020. This application is being filed more than ten days before a petition is currently due. *See* S. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. Micah Jessop and Brittan Ashjian own a business in the Central Valley of California that operates and services automated teller machines. In 2013, police began investigating whether Jessop and Ashjian possessed coin operated gambling devices, a misdemeanor offense under California law. The investigation was

led by Derik Kumagai, a police detective who was later fired and convicted of extorting bribes from drug dealers.

3. In September 2013, Kumagai obtained a warrant to search Jessop and Ashjian's business and residences for evidence and proceeds of their alleged gambling operation. During an initial search of the properties, Kumagai and his team seized several stacks of currency. Kumagai then returned to the Jessop's residence at a time when only Jessop's wife was present. Kumagai informed her that he needed to search the house again, and went alone to the Jessops' bedroom, where Jessop stored a collection of coins valued at over $125,000. After remaining in the back of the house for several minutes, Kumagai announced that he had completed his investigation and left.

4. Following the search, Jessop and Ashjian determined that the police had taken over $275,000 in currency and coins, including Jessop's rare coin collection. Plaintiffs went to the police station and asked to see the property that had been taken. The police provided an inventory claiming that they had seized only $50,000 in currency. Although plaintiffs asked where the remaining $225,000 was, the department never produced the missing property. No criminal charges were ever filed against Jessop or Ashjian.

5. Plaintiffs brought a 42 U.S.C. § 1983 suit against the City of Fresno, Kumagai, and the other Officers who conducted the search, claiming that the defendants violated the Fourth and Fourteenth Amendments by engaging in the "theft" of approximately $225,000 of their property. The individual defendants as-

serted that they were entitled to qualified immunity, and moved for summary judgment.

6. The district court granted summary judgment on the basis of qualified immunity, and the Ninth Circuit affirmed. App. 14a-15a. The panel stated that "[w]e need not—and do not—decide whether the City Officers violated the Constitution." App. 14a. Rather, the court held that "[a]t the time of the incident, there was no clearly established law holding that officers violate the Fourth or Fourteenth Amendment when they steal property that is seized pursuant to a warrant." *Id.* The panel pointed to several out-of-circuit cases finding that "the government's failure to *return* property seized pursuant to a warrant does not violate the Fourth Amendment." App. 17a-18a (emphasis added). The panel reasoned that because there was a split on this "similar question," Kumagai and his colleagues "did not have clear notice" that "the alleged theft of Appellants' money and rare coins . . . violated the Fourth Amendment." App. 17a-19a. Furthermore, the panel thought it was "not obvious" that "the theft of over $225,000" violated the Fourth Amendment "without a case directly on point." App. 19a (citation and quotation marks omitted). The panel thus affirmed the grant of summary judgment on the Fourth Amendment claim. *Id.*. It found that the Fourteenth Amendment claim "suffers the same fate." *Id.*

7. Plaintiffs petitioned for panel rehearing and rehearing en banc. In response, the panel withdrew its prior opinion and issued a superseding opinion. App. 2a. The panel once again declined to decide the constitutional question, and held

that the Officers had qualified immunity. *Id.* This time, however, the panel did not claim there was a split on the question presented, or a "similar" question; on the contrary, the sole out-of-circuit case it cited held that similar conduct was unconstitutional. App. 5a-6a. Further, the panel admitted that the Ninth Circuit's 2017 decision in *Brewster* v. *Beck*, 859 F.3d 1194, "suggest[ed] that the City Officers' alleged theft of Appellants' property could * * * implicate the Fourth Amendment." App. 6a-7a. Nonetheless, the panel concluded that these authorities did not place it "beyond debate" that "the theft of property seized pursuant to a warrant violates the Fourth Amendment." App. 7a-8a (internal quotation marks omitted). And although the panel "acknowledge[d] that virtually every human society teaches that theft generally is morally wrong," and that the "allegation of any theft by police officers * * * is deeply disturbing," it still thought it was not "obvious" that the Officers' theft of plaintiffs' property was unconstitutional in the absence of directly on-point precedent. App. 5a n.1, 8a (internal quotation marks omitted). Judge Smith concurred to express disagreement with the Ninth Circuit's *Brewster* decision. App. 9a-12a. The full court then denied rehearing en banc. App. 21a.

8. The Ninth Circuit's decision warrants this Court's review. Its remarkable holding—that it is not clearly established that officers violate the Constitution when they "*steal* property seized pursuant to a warrant," App. 2a—conflicts with the precedents of this Court, splits from the decisions of other courts, and presents a question of substantial importance about the scope of the doctrine of qualified immunity. Officers should not have required any precedent to tell them that a search

warrant does not permit them to steal property that they find during their search. Yet this Court's precedents amply confirm what common sense dictates: Under the Fourth Amendment, a search warrant does not permit officers to seize property for reasons "not related to the objectives of the authorized intrusion," or for no "legitimate law enforcement purposes" at all—a rule that plainly prohibits seizing property for an officer's personal enrichment. *Wilson* v. *Layne*, 526 U.S. 603, 611-612 (1999). The panel's contrary decision conflicts with decisions of other courts, which have held that the "theft of a person's property" is "[s]o obvious[ly]" unconstitutional that "the absence of case law can[not] establish a defense of immunity." *Nelson* v. *Streeter*, 16 F.3d 145, 151 (7th Cir. 1994) (Posner, J.). And it extends the doctrine of qualified immunity to the breaking point, by giving officers a pass for even the most egregious and manifestly unlawful conduct. This disagreement is anything but trivial: By holding that it is not clearly established that theft during a search violates the Constitution, and then declining to answer the underlying constitutional question, the Ninth Circuit prospectively immunized law enforcement officers in nine States who commit theft while executing a search warrant, until the time (if it ever comes) that the Ninth Circuit actually addresses the Fourth Amendment question.

9. Over the next several weeks, counsel is occupied with briefing deadlines and arguments for a variety of matters, including: (1) a petition for certiorari in *Facebook, Inc.* v. *Nimesh Patel, Adam Pezen, and Carlo Licata, individually and on behalf of all others similarly situated*, No. 18-15982 (9th Cir.) to be filed December 2; (2) an en banc brief in *Price* v. *Godiva Chocolatier, Inc., et al.*, No. 16-16486

(11th Cir.), due December 4; (3) oral argument in *McKinney* v. *Arizona*, No. 18-1109 (U.S.), scheduled on December 11; (4) a reply brief in support of certiorari in *Ambac Assurance Corporation* v. *Financial Oversight & Management Board*, No. 19-387 (U.S.), due December 11; (5) a reply brief in support of certiorari in *Assured Guaranty Corp.* v. *Financial Oversight and Management Board*, No. 19-391 (U.S.), due December 11; (6) a petition for certiorari in *Steiner* v. *Utah State Tax Commission*, No. 20180223 (Utah), due December 12; (7) a petition for certiorari in *Taylor* v. *County of Pima*, No. 17-16980 (9th Cir.), due December 12; (8) a summary judgment reply brief in *United States ex rel. Krahling* v. *Merck & Co., Inc.*, No. 10-cv-4374 (E.D. Pa.), due December 20; (9) a reply brief in support of certiorari in *Smith* v. *United States*, No. 19-361 (U.S.), due December 23; and (10) oral argument in *Romag Fasteners Inc.* v. *Fossil Inc.*, No. 18-1233 (U.S.), scheduled on January 14. Applicants request this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

10. For these reasons, Applicants respectfully request that an order be entered extending the time to file a petition for certiorari to and including February 14, 2020.

Respectfully submitted,

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