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 *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

As required by Supreme Court Rule 37.2(b), the National Association of Criminal Defense Lawyers (NACDL) respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of Petitioners. All parties were timely notified of the NACDL's intent to file as required under Rule 37.2(a). Petitioners consented to this filing, but Respondents withheld consent.

The Motion should be granted because *amicus* is a nonprofit organization dedicated to protecting and vindicating the public's constitutional rights, including those that prevent law enforcement misconduct against individuals accused or suspected of criminal activity. *Amicus* achieves these goals in part by filing numerous amicus briefs each year, bringing to the Court's attention more context and analysis that may aid the Court in reaching a just resolution. *Amicus* has a particular interest in this case because the panel decision has the principal effect of insulating law enforcement officers from Section 1983 liability when they use the trappings of their authority to steal from private individuals for personal enrichment. This holding, in the view of *amicus*, has national ramifications. Theft by law enforcement is a recurring national problem and certiorari is necessary to confirm that such conduct violates the Constitution. In addition, the Ninth Circuit's decision creates an intolerable circuit split that must be addressed by this Court.

The 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. In the last two years, the NACDL has filed over two dozen amicus briefs in this Court. See, *e.g.*, *Torres* v. *Madrid*, No. 19-292 (Feb. 7, 2020); *McCoy* v. *United States*, No. 19-814 (Jan. 27, 2020); *Kansas* v. *Glover*, No. 18-556 (Sept. 6, 2019).

Consistent with these interests, the proposed brief is desirable and relevant to the Court's disposition of this case because it provides the Court with context of the prevalence of theft by police officers. Separately, the proposed brief discusses the circuit split the Ninth Circuit opinion creates that, unless corrected by this Court, will nullify the lines of cases identifying theft by police officers as a constitutional violation. Together, if left undisturbed, the Ninth Circuit opinion will have undesirable, real-world consequences. Given the experience *amicus* has in participating in appeals involving these constitutional protections and the supplemental analysis contained in the proposed brief, *amicus* believes that its participation in this case will assist the Court.

For these reasons, the Court should grant this Motion, and permit *amicus* to file the accompanying brief.

Respectfully submitted,

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

REASONS WHY CERTIORARI SHOULD BE GRANTED 3

A. The Misuse Of A Search Warrant To Engage In Theft Raises Important And Recurring Issues. 3

B. The Decision Below Creates An Intolerable Circuit Split. 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases

Cruz v. *City of Chicago*,
No. 20-cv-250, (N.D. Ill. Jan. 13, 2020) 5

Hernandez v. *Borough of Palisades Park Police Dep't*,
58 F. App'x 909 (3d Cir. 2003) 5

Illinois v. *Lafayette*,
462 U.S. 640 (1983) 3

Lynn v. *City of Detroit*,
98 F. App'x 381 (6th Cir. 2004) 7, 8

Mom's Inc. v. *Willman*,
109 F. App'x 629 (4th Cir. 2004) 7

Nelson v. *Streeter*,
16 F.3d 145 (7th Cir. 1994) 7

Pearson v. *Callahan*,
555 U.S. 223 (2009) 9

San Jose Charter of the Hell's Angels Motorcycle Club v. *City of San Jose*,
No. 99-20022, 1999 WL 1211672
(N.D. Cal. Dec. 6, 1999) 6

United States v. *Elizondo*,
No. 18-cr-286, ECF No. 135
(N.D. Ill. Oct. 23, 2019) 4

United States v. *Roach*,
502 F.3d 425 (6th Cir. 2007) 5

United States v. *Taylor*,
942 F.3d 205 (4th Cir. 2019) 4

United States v. *Webster*,
809 F.3d 1158 (10th Cir. 2016) 8

Yang v. *Hardin*,
37 F.3d 282 (7th Cir. 1994) 6

Statutes

42 U.S.C. § 1983 ..... *passim*

Cal. Gov't Code § 821.6 6

Other Authorities

Bremerton police officer suspected of stealing money during search of home, KIRO 7 News (Jan. 28, 2020), https://tinyurl.com/rsswz7z 4

Philip Matthew Stinson, Sr., et al., *Police Integrity Lost: A Study of Law Enforcement Officers Arrested* (Jan. 2016) 3, 4

U.S. Attorney's Office for the District of New Jersey, *Paterson Police Sergeant Charged with Conspiracy to Violate Civil Rights and Filing False Police Report* (Feb. 27, 2020), https://tinyurl.com/qkdjpcr 5

INTEREST OF *AMICUS 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 is described at length in the Motion for Leave, *ante*.[1]

SUMMARY OF ARGUMENT

On rare occasions, this Court's review is necessary merely to state the obvious. This is such a case.

The decision below permits law enforcement officers in the Ninth Circuit's nine states to use a search warrant as a license to steal without facing repercussions under federal law. By refusing to acknowledge that an officer's theft of private property is clearly an unreasonable seizure under the Fourth Amendment, the decision turns that Amendment into a shield for police rather than a protection for citizens.

The ill effects of the decision below stretch into the indefinite future. The Ninth Circuit held that using a

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[1] Pursuant to Rule 37, all parties were timely notified of the NACDL's intent to file this brief. Petitioners consented, but Respondents declined to consent. No counsel for any party authored this brief in whole or in part and no person other than *amicus* and its counsel funded its preparation or submission.

warrant to steal property does not make a seizure constitutionally unreasonable under clearly established law. Yet the court of appeals also refused to rule on the constitutional issue, citing approval for that approach in this Court's qualified immunity precedent. That combination makes it practically impossible for this core constitutional issue to be resolved within the Ninth Circuit, as it is difficult to imagine how the issue of theft using a warrant could arise in a context that did not present a question of qualified immunity.

This Court's action is urgently needed because allegations of theft through search and seizure recur frequently throughout the Nation. Much of that theft consists of contraband and thus goes unchallenged. This case presents an ideal vehicle for resolving the constitutional issue, however, because the police here stole cash and rare coins. Petitioners, and similar victims elsewhere, should not be deprived of their remedies under the Constitution and 42 U.S.C. § 1983.

Moreover, the decision below conflicts with decisions of other circuits that have been willing to state the obvious rather than leave that task to this Court. Those courts of appeals have recognized that the Fourth Amendment does not permit government officers to steal any private property that is arguably covered by a search warrant. Although this Court's qualified immunity precedents deny relief unless an asserted constitutional violation is "clearly established," some violations are so obvious and fundamental that clear precedent from this Court should be unnecessary.

The decision below demonstrates that at least one court of appeals, and the 60 million citizens within its

reach, require this Court's intervention to say what should not need to be said: theft of property renders a search and seizure unreasonable even if conducted under a warrant.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. The Misuse Of A Search Warrant To Engage In Theft Raises Important And Recurring Issues.

The decision below gives law enforcement officers within the Ninth Circuit practical immunity for misusing search warrants to steal from the citizenry they swore to protect. Unless corrected, that decision will have profound and effectively permanent impact, not only within the Ninth Circuit but in any other Circuit that may find the underlying issue unsettled based on the Ninth Circuit's error.

The misconduct alleged here is not an isolated instance. And the decision below provides powerful and perverse incentives to dishonest law enforcement officers to use search warrants as a get-rich-quick device. Certiorari should be granted to prevent those deleterious effects.

This Court long ago remarked that it was "not unheard of for persons employed in police activities to steal property taken from arrested persons." *Illinois* v. *Lafayette*, 462 U.S. 640, 646 (1983). "[N]ot unheard of" understates the magnitude of the problem. Between 2005 and 2011, nearly 1,400 nonfederal law enforcement officers were arrested for profit-motivated crimes. Philip Matthew Stinson, Sr., et al., *Police Integrity Lost: A Study of Law Enforcement*

Officers Arrested 167–168 (2016).[2] More than two-thirds of those crimes occurred while the officers were on duty. *Ibid.* Given the frequency with which law enforcement officers are credibly accused of stealing from the public they serve, this Court's review is necessary to ensure that such allegations of intentional misconduct are resolved on their merits.

Reports of officers stealing private property in the line of duty arise throughout the Nation. The issue most often comes to light when officers are criminally prosecuted for their thefts. For example, seven Baltimore police officers were convicted of robbing citizens of hundreds of thousands of dollars through a racketeering conspiracy. See *United States* v. *Taylor*, 942 F.3d 205 (4th Cir. 2019). While executing a search warrant, some of those officers stole $100,000 from a safe. *Id.* at 212.

In the last six months alone, four law enforcement officers have been criminally charged with, or convicted of, using their badges to steal from private citizens.[3] In October 2019, Chicago police officers Xavier Elizondo and David Salgado were convicted of lying to obtain search warrants and stealing drugs and money found during their raids. *United States* v. *Elizondo*, No. 18-cr-286, ECF No. 135 (N.D. Ill. Oct. 23, 2019). In the wake of the conviction, at least two of the officers' victims have filed a § 1983 suit alleging,

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[2] *Available at* https://tinyurl.com/ydbyomvh.

[3] Recent news reports indicate additional instances of officers engaged in theft while executing search warrants. See *Bremerton police officer suspected of stealing money during search of home*, KIRO 7 News (Jan. 28, 2020), *available at* https://tinyurl.com/rsswz7z (noting Washington police officer resigned after home security camera footage showed him stealing money while executing search warrant).

among other things, that the officers "stole $800 from Plaintiffs' apartment." *Cruz* v. *City of Chicago*, No. 20-cv-250, ECF No. 1, ¶ 27 (N.D. Ill. Jan. 13, 2020).

In January of this year, an Illinois police officer, Brian Williams, was sued under § 1983 for allegedly stealing approximately $12,000 during a search of a citizen's home. See *Holzhauer* v. *Town of Normal*, No. 20-cv-1037, ECF No. 1, ¶ 12 (C.D. Ill. Jan. 27, 2020). The victim's § 1983 suit against the officer has been stayed pending resolution of criminal charges for the same misconduct. *Holzhauer*, ECF No. 16 (April 1, 2020).

Just weeks later, Sergeant Michael Cheff of the Paterson, New Jersey Police Department was indicted for conspiring to deprive individuals of civil rights under color of law by supervising other officers in stealing money and other items while searching citizens' cars and apartments. See U.S. Attorney's Office for the District of New Jersey, *Paterson Police Sergeant Charged with Conspiracy to Violate Civil Rights and Filing False Police Report* (Feb. 27, 2020).[4]

Similar examples of this frequently recurring problem are scattered through the Federal Reporter and Federal Appendix. See, *e.g.*, *United States* v. *Roach*, 502 F.3d 425, 428–30 (6th Cir. 2007) (affirming officers' convictions for violating civil rights by stealing money from Hispanic immigrants during traffic stops); *Hernandez* v. *Borough of Palisades Park Police Dep't*, 58 F. App'x 909, 910–911 (3d Cir. 2003) (affirming summary judgment for police department under *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), where five police officers committed string of home robberies)); *Yang* v. *Hardin*,

[4] *Available at* https://tinyurl.com/qkdjpcr.

37 F.3d 282 (7th Cir. 1994) (affirming § 1983 liability against officers who, among other things, stole merchandise while investigating crime scene).

Certiorari is warranted to ensure that victims of such serious and frequent breaches of the public trust can pursue effective relief for these constitutional violations. The decision below would leave the victims of these abuses no remedy under § 1983. As the Petition explains, Section 1983 frequently will be the only vehicle for victims to recover their stolen property. Pet. 32–33. State-law tort claims are often unavailable because states such as California provide law enforcement officers with broad immunity even for malicious and intentional torts. Cal. Gov't Code § 821.6; see *San Jose Charter of the Hell's Angels Motorcycle Club* v. *City of San Jose*, No. 99-20022, 1999 WL 1211672, at *15 (N.D. Cal. Dec. 6, 1999) (holding § 821.6 provides immunity from conversion claims), *aff'd on other grounds*, 402 F.3d 962 (9th Cir. 2005). And while victims may receive restitution as part of a criminal sentence, that relief requires a successful prosecution—which is dependent on the Government's discretion and proof beyond a reasonable doubt. Victims of theft-by-warrant should not have to rely solely on the same system of law enforcement that violated their rights in the first place.

B. The Decision Below Creates An Intolerable Circuit Split.

The Ninth Circuit's denial of the obvious conflicts with decisions of at least four courts of appeals, and Respondents' attempt to distinguish these cases is unpersuasive. See Opp. 5–7.

The amended opinion did recognize its conflict with the Fourth Circuit's decision in *Mom's Inc.* v.

Willman, 109 F. App'x 629, 636–637 (4th Cir. 2004). See Pet. App. 6a. But that is the tip of the iceberg.

The Seventh Circuit held it so "obvious" that public officials cannot "steal private property" that qualified immunity was unavailable despite the absence of case law precisely on point. *Nelson* v. *Streeter*, 16 F.3d 145, 151 (7th Cir. 1994). As the court explained, "[t]he purpose of the doctrine of official immunity is to protect officials from legal surprises," but there could be no surprise in learning that theft was off limits. *Ibid.*

Similarly, the Sixth Circuit found a "seem[ingly] clear" violation of constitutional rights where "four rogue police officers" committed "a string of illegal searches, false arrests, and thefts." *Lynn* v. *City of Detroit*, 98 F. App'x 381, 382, 385 (6th Cir. 2004). Much as the officers in the present case allegedly recorded only a fraction of what they seized, the officers in *Lynn* raided a suspected drug house and "took about $400" but only reported $61 in official police records. *Id.* at 382–383. The officers were investigated by Internal Affairs after that department received "[a]bout a dozen complaints alleging theft," and they were ultimately indicted and convicted of several offenses. *Id.* at 383; see also *ibid.* ("[C]itizens were complaining 'almost daily at times' about robberies committed by the officers.").

The issue in *Lynn* was whether the convicted officers' supervisors were entitled to qualified immunity under § 1983. Although the panel divided in granting the supervisors immunity, the court unanimously agreed that the subordinates' thefts violated the victims' constitutional rights: an issue that "seem[ed] clear" to the majority (*id.* at 385–386)

and that the dissenting judge considered "established" (*id.* at 388) (Clay, J., dissenting).

And in a case nearly on all fours with this one, 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. *United States* v. *Webster*, 809 F.3d 1158, 1162–63, 1170 (10th Cir. 2016). In both *Webster* and this case, rogue officers stole items under cover of a search warrant. Just as Petitioners allege that an officer stole rare coins during an unaccompanied visit to Petitioners' bedroom, Pet. App. 3a, 37a, 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." *Ibid.* And in both cases the stolen items were not listed on the warrant return. *Ibid.*; Pet. App. 3–4a, 17a.

What was "clear," "obvious," and "patently unconstitutional" to the Sixth, Seventh, and Tenth Circuits somehow seemed inconclusive to the Ninth Circuit. The amended opinion below does not cite—much less distinguish—*any* of these decisions.

The conflict among the Circuits makes it imperative for this Court to state clearly that officers who use a search warrant to steal private property violate the Fourth Amendment. The decision below not only leads to different results on the same facts in different Circuits, but the very existence of a division among the Circuits may thwart victims' recovery under § 1983 nationwide. As the Court has held, a constitutional question is not clearly established if it has produced a "divergence of views" among the

circuits. *Pearson* v. *Callahan*, 555 U.S. 223, 245 (2009) (citing *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999)). The conflict here should never have arisen, and this Court should resolve it now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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