No. 17-16756

IN THE

United States Court of Appeals for the Ninth Circuit

MICAH JESSOP; BRITTAN ASHJIAN,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California, No. 1:13-CV-00316-DAD-SAB
District Judge Dale A. Drozd

PETITION FOR REHEARING EN BANC

KEVIN G. LITTLE
LAW OFFICE OF KEVIN G. LITTLE
P.O. Box 8656
Fresno, CA 93747
Telephone: (559) 342-5800
Fax: (559) 242-2400
Email: kevin@kevinglittle.com

NEAL K. KATYAL
COLLEEN E. ROH SINZDAK
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
Email: neal.katyal@hoganlovells.com

Attorneys for Appellants Micah Jessop and Brittan Ashjian

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FRAP 35(b) STATEMENT

Micah Jessop and Brittan Ashjian allege that police officers stole over $225,000 of cash and coins while executing a search warrant. Jessop and Ashjian sued the officers under 42 U.S.C. § 1983, contending that this unlawful "seizure" of property from their homes and vehicles violated the Fourth and Fourteenth Amendments. A panel of this Court, however, granted the officers qualified immunity, reasoning that "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." Add. 4 (emphasis added). That remarkable holding merits this Court's en banc review.

First, the panel decision is obviously wrong. The notion that police officers were not on fair notice that the Fourth Amendment bars them from entering a person's home and pocketing whatever they please beggars belief, and converts the doctrine of qualified immunity from a protection for "reasonable but mistaken judgments" into an absolute shield for those who knowingly violate the law. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). It would be clear to any competent officer that a search warrant permits officers to seize property only for "police purposes," not for their personal enrichment. *Warden v. Hayden*, 387 U.S. 294, 306-307 (1967). And any officer would recognize that using a warrant as an excuse for theft flatly violates the Fourth Amendment's "mandate of

reasonableness." *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 971-972 (9th Cir. 2005) (citation omitted).

Second, the panel's holding splits from the precedents of this Court and other circuits and threatens to inflict serious real-world harm. Until now, the Ninth Circuit and other courts have invariably denied qualified immunity for searches and seizures that lacked any valid law enforcement purpose, even absent precedent specifically condemning such egregious conduct. And the Seventh Circuit has held that it is "obvious" that public officials violate the Fourth Amendment by stealing. *Nelson v. Streeter*, 16 F.3d 145, 150-151 (7th Cir. 1994). By breaking with these precedents, this decision expands the doctrine of qualified immunity far beyond what the Supreme Court has required. Moreover, because the panel did not resolve the underlying constitutional question, its decision gives officers in this Circuit a free pass to steal property covered by a warrant without fear of constitutional liability unless and until this Court holds otherwise.

It should be common ground that the Fourth Amendment bars police officers from entering a person's home and stealing property for their own enrichment. The panel severely erred by holding otherwise. Rehearing en banc should be granted, and the judgment should be reversed.

BACKGROUND

Micah Jessop and Brittan Ashjian run a business that owns and services a number of automated teller machines in the Central Valley of California. EOR 527-528. In 2013, police began investigating whether Jessop and Ashjian possessed and operated coin operated gambling devices, a misdemeanor offense under California law. EOR 266-267. The investigation was led by Derik Kumagai, a detective later convicted of extorting bribes from drug dealers. EOR 037-042, 053-055; *see* Mem. of Plea Agreement 13-16, *United States v. Kumagai*, No. 1:14-cr-00061-AWI-BAM (E.D. Cal. Feb. 20, 2015). Kumagai and his team surveilled Jessop and Ashjian for several months, during which time they saw plaintiffs transporting substantial quantities of cash to and from their residences, much of it in connection with the ATM business. EOR 279-282.

In September 2013, Kumagai obtained a warrant to search Jessop and Ashjian's homes, vehicles, and office for evidence and proceeds of their alleged gambling operation. EOR 273-286. During an initial search of the plaintiffs' properties, Kumagai and his team seized large stacks of cash and coins from plaintiffs' residences and the trunks of their cars. EOR 061-066, 155-157, 211. Kumagai then returned to the Jessops' residence at a time when only Jessop's wife was present. EOR 043-044. 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. EOR 043-044, 217. After remaining in the back of the house for several minutes, Kumagai announced that he had completed his investigation and left. EOR 044.

Following the search, Jessop and Ashjian consulted their business records and determined that the police had taken over $275,000 in cash and coins, including Jessop's coin collection. EOR 176-178, 233, 528-529. Plaintiffs went to the police station and asked to see the property that had been taken. EOR 164-165. The police provided an inventory claiming that they had seized only $50,000 in currency, and wheeled out a cart allegedly containing the seized cash and coins. EOR 165, 223-224, 529. When plaintiffs asked where the remaining property was, Kumagai "shrugged," and the department never produced the missing currency. EOR 165-166, 223. No criminal charges were ever filed against Jessop or Ashjian. EOR 529.

In 2015, plaintiffs brought a § 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. EOR 529-531. The individual defendants asserted that they were entitled to qualified immunity and moved for summary judgment.

The district court granted summary judgment on the basis of qualified immunity, and the Ninth Circuit affirmed. Add. 10. Writing for the panel, Judge M. Smith stated that "[w]e need not—and do not—decide whether the City Officers violated the Constitution." Add. 4. Rather, the panel 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 holding that "the government's failure to *return* property seized pursuant to a warrant does not violate the Fourth Amendment." Add. 7 (emphasis added). Because there was a split on this "similar question," the panel reasoned, the officers "did not have clear notice" that "the alleged theft of Appellants' money and rare coins . . . violated the Fourth Amendment." Add. 7-8. 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." Add. 8-9 (quoting *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 455 (9th Cir. 2013)). The panel thus affirmed the grant of summary judgment on the Fourth Amendment claim, and found that the plaintiffs' Fourteenth Amendment claim "suffers the same fate." Add. 9.

REASONS FOR GRANTING REHEARING EN BANC

Rehearing en banc is urgently warranted to correct the panel's decision. On the merits, that decision was flatly incorrect: The most basic principles of the

Fourth Amendment and numerous longstanding precedents confirm that a search warrant does not permit police officers to steal property from a person's home. No circuit has ever held otherwise, and no reasonable police officer would ever think differently. If left uncorrected, the panel's decision will immunize police officers throughout the Ninth Circuit for the most brazen acts of theft; split from the holdings of this Court and other circuits; and expand the doctrine of qualified immunity to unrecognizable scope.

I. The Panel Decision Is Plainly Incorrect.

The doctrine of qualified immunity holds that public officials may be held liable under § 1983 for conduct that violates "clearly established statutory or constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This doctrine is designed to "give[ ] government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U.S. at 743. It does not protect an official who had "fair notice that her conduct was unlawful" but engaged in it anyway. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

While the requisite "fair notice" often comes from precedent, some constitutional violations are so "obvious" that they are clearly established "even without a body of relevant case law." *Id.* at 199. Indeed, the Supreme Court has observed that "[t]he easiest cases don't even arise." *United States v. Lanier*, 520

U.S. 259, 271 (1997) (citation omitted). "There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." *Id.* (alterations in original; citation omitted); *see Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015) (Gorsuch, J.) ("[I]t 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.").

This Circuit has thus repeatedly refused to extend qualified immunity to "obvious[ly]" unlawful conduct, "even without a case directly on point." *A.D.*, 712 F.3d at 455. For instance, it has denied qualified immunity to officers who "needlessly ransack[ed] [a] home" while "executing a search warrant," *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (9th Cir. 2000) (citation omitted), or who seized "truckloads" of evidence falling within "the literal terms of [a] search warrant" for no valid law enforcement purpose, *San Jose*, 402 F.3d at 973-975, even though no case specifically proscribed such egregious misconduct. *See also, e.g.*, *Hernandez v. City of San Jose*, 897 F.3d 1125, 1138 (9th Cir. 2018); *Deorle v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001).

In this case, the constitutional violation could hardly have been clearer. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const.

amend. IV. It was included in the Bill of Rights "to guard against arbitrary governmental invasions of the home," *Payton v. New York*, 445 U.S. 573, 582 n.17 (1980), and to proscribe warrants that "allowed royal officials to search and seize whatever and whomever they please while investigating crimes," *al-Kidd*, 563 U.S. at 742. If nothing else, then, the Fourth Amendment forbids police from entering a person's home and seizing his property for reasons "not related to the objectives of the authorized intrusion," or for no "legitimate law enforcement purposes" at all. *Wilson v. Layne*, 526 U.S. 603, 611-612 (1999); *see Maryland v. Garrison*, 480 U.S. 79, 87 (1987) ("[T]he purposes justifying a police search strictly limit the permissible extent of the search.").

That is precisely what happened here. Officers entered Jessop's and Ashjian's homes and stole over $225,000 worth of property. EOR 529-531. While the officers entered plaintiffs' homes pursuant to a search warrant, they did not pretend to seize the property for "legitimate law enforcement purposes": They did not record taking possession of the property; they did not lodge the property with the evidence lawfully seized during the search; indeed, they did not document its seizure in any way. *Id.* The officers simply took the property as their own.

Well-established precedent—not to mention common sense—confirms that entering a person's home and stealing property for an officer's personal enrichment violates the Fourth Amendment. Theft perpetrated by the police is obviously a

"seizure": It is "governmental action" that effects a "meaningful interference with an individual's possessory interests." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). And it assuredly is not authorized by a search warrant or by any conceivable exception to the warrant requirement. A search warrant constitutes a limited license for police officers to enter a home and seize private property for "police purposes," such as to "aid in apprehending and convicting criminals." *Warden*, 387 U.S. at 306-307; *see, e.g.*, *Messerschmidt v. Millender*, 565 U.S. 535, 551 (2012). A warrant does not license officers to steal property—and no police officer but "the plainly incompetent" would think otherwise. *Messerschmidt*, 565 U.S. at 546 (citation omitted).

Furthermore, stealing property during a search flatly contravenes the Fourth Amendment's reasonableness requirement. "An officer's conduct in executing a search is subject to the Fourth Amendment's mandate of reasonableness from the moment of the officer's entry until the moment of departure." *San Jose*, 402 F.3d at 971 (quoting *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997)); *see United States v. Ramirez*, 523 U.S. 65, 71 (1998). That means that any intrusion on a person's property or privacy interests during a Fourth Amendment search must serve some "law enforcement purpose" that adequately "justif[ies] the . . . intrusion." *Wilson*, 526 U.S. at 612-613; *see Garrison*, 480 U.S. at 87; *Jacobsen*, 466 U.S. at 124; *United States v. Becker*, 929 F.2d 442, 446 (9th Cir. 1991). Thus,

in *San Jose*, the Court held that it was "clearly established," even absent a case directly on point, that officers executing a warrant to search a person's home could not seize evidence that fell "within the literal terms of the search warrant" if seizing that property had no "evidentiary value" and did not advance the warrant's "limited purpose." 402 F.3d at 972-975.

By any standard, stealing property from a homeowner to line a police officer's pockets is "unreasonable." Theft advances no law enforcement purpose whatsoever; to the contrary, it is itself a crime. And it effects the most basic intrusion on a person's property rights. The unreasonableness of such conduct is heightened, not mitigated, if the stolen property is within the scope of a search warrant. By stealing evidence that a neutral magistrate has deemed of potential evidentiary value, police officers not only deprive a private individual of his property for no valid purpose, but deprive the state of evidence that could be useful in investigating and prosecuting criminal conduct.

It is unsurprising, then, that other courts have concluded that theft by police during a search is obviously unconstitutional. In *Nelson v. Streeter*, Judge Posner wrote that public officials "violated [the plaintiff's] rights under the Fourth Amendment" by engaging in "the theft of [his] property," and that this violation was "[s]o obvious . . . that we do not think the absence of case law can establish a defense of immunity." 16 F.3d at 150-151. In *McDonald v. West Contra Costa*

Narcotics Enforcement Team, Judge Chhabria likewise denied qualified immunity to officers alleged to have stolen money from the plaintiff's store during a Fourth Amendment search, explaining that "[i]t's obviously 'unreasonable' to steal someone's money while executing a search warrant." 2015 WL 13655774, at *1 (N.D. Cal. Mar. 20, 2015); *see also, e.g.*, *Ayeni v. CBS Inc.*, 848 F. Supp. 362, 368 (E.D.N.Y. 1994) (finding it clear that qualified immunity would be unavailable to "a rogue policeman using his official position to break into a home in order to steal objects for his own profit or that of another").

In holding otherwise, the panel did not attempt to apply Fourth Amendment principles, or explain how theft could be compatible with "the Fourth Amendment's mandate of reasonableness." *San Jose*, 402 F.3d at 971 (citation omitted). Instead, the panel reasoned simply that it cannot be "clearly established" that stealing during a search is unconstitutional because other circuits have ostensibly considered "similar question[s]" and reached differing results. Add. 7-8.

But the cases the panel cited are not "similar" at all. Each one involved claims that a police department violated the Fourth Amendment by "refus[ing] to return lawfully seized property" in a timely manner. *Id.*; *see Case v. Eslinger*, 555 F.3d 1317, 1330 (11th Cir. 2009) (complaint of "continued retention of legally seized property"); *Lee v. City of Chicago*, 330 F.3d 456, 460 (7th Cir. 2003) ("refusal to return . . . car" that was lawfully impounded); *Fox v. Van Oosterum*,

176 F.3d 342, 351 (6th Cir. 1999) ("refusal to return . . . property" following an "initial, lawful seizure); *United States v. Jakobetz*, 955 F.2d 786, 802 (2d Cir. 1992) ("failure . . . to issue a timely order to return [a] photograph" taken in an uncontested search); *Mom's Inc. v. Willman*, 109 F. App'x 629, 636-637 (4th Cir. 2004) (per curiam) ("fail[ure] to return a watch"). Four circuits have rejected those claims on the ground that the Fourth Amendment regulates only the initial seizure of property, not the length of time for which it is retained. *See Case*, 555 F.3d at 1330; *Lee*, 330 F.3d at 466; *Fox*, 176 F.3d at 350; *Jakobetz*, 955 F.2d at 802. The Fourth Circuit, by contrast, has accepted such a claim on the theory that "[t]he Fourth Amendment regulates all . . . interference[s] [with possessory interests in property], and not merely the initial acquisition of [property]." *Mom's Inc.*, 109 F. App'x at 637.

That split, although important, is irrelevant to the facts as they are actually presented here. Plaintiffs' complaint is not that the government is holding on to lawfully seized property for too long, but that the initial seizure of their property was unlawful because it was theft. Other circuits' reasons for rejecting excessive-duration claims in no way suggest that they would reject liability for an officer accused of stealing during the execution of a search warrant; if anything, their distinction between *seizure* and *retention* makes clear that they would view a claim that police stole property *ab initio* entirely differently than a claim that officers

held on to property for too long. Indeed, one of those circuits (the Seventh) has found it "obvious" that stealing property *is* a Fourth Amendment violation. *Nelson*, 16 F.3d at 150-151.

The panel appeared to believe that this case was analogous to the out-of-circuit precedents it cited because it equated the seizure of property "covered by the terms of a search warrant" with property that has been "*lawfully* seized." Add. 7 (emphasis added). By conflating these concepts, however, the panel committed a fundamental analytic error. This Court has expressly held—building on a long line of Supreme Court precedent—that the seizure of property falling within "the literal terms of the search warrant" is *un*lawful if the seizure does not advance the purpose of the warrant or if it is otherwise unreasonable. *San Jose*, 402 F.3d at 973. That is exactly what plaintiffs allege occurred here. The panel could not simply assume away the basic predicate of plaintiffs' claim and grant defendants qualified immunity on that basis.

In any event, even if plaintiffs were complaining that their property was stolen *after* the initial seizure, qualified immunity would still be unwarranted. It has long been clearly established in this Circuit that the Fourth Amendment regulates not only the initial seizure of property but also its subsequent disposition. As this Court recently explained, "[i]t's *well established* that 'a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of

execution unreasonably infringes possessory interests.' " *Brewster v. Beck*, 859 F.3d 1194, 1196 (9th Cir. 2017) (emphasis added; citation omitted); *see id.* at 1197 ("The Fourth Amendment doesn't become irrelevant once an initial seizure has run its course."). Thus, in multiple cases predating the search at issue here, the Ninth Circuit held that police violated the Fourth Amendment by unreasonably interfering with a person's possessory interests after property was seized, such as by destroying that property for no valid reason, *see Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012), or by retaining it for an excessive period of time, *see United States v. Dass*, 849 F.2d 414, 414-415 (9th Cir. 1988). These cases would have placed reasonable officers in the Ninth Circuit on notice that they could not lawfully steal property—an "unreasonabl[e] interference" with "possessory interests" by any measure—even after that property was seized.

II. The Panel Decision Is Irreconcilable With The Holdings Of This Court And Other Circuits.

The panel decision was not merely wrong on its own terms. It is also irreconcilable with the decisions of this Court and of other circuits.

First, the panel decision splits with the Fourth Amendment precedents of this Court and other circuits. The panel ignored a long line of this Circuit's precedents holding that a search warrant authorizes police officers to seize property within its scope only when the seizure advances the warrant's legitimate purpose and is done in a "reasonable[ ]" manner. *San Jose*, 402 F.3d at 971; *see supra* pp. 8-10. It also

split with the Seventh Circuit, which has deemed it "obvious" that theft is a Fourth Amendment violation. *Nelson*, 16 F.3d at 150-151. By holding that it is not "clearly established" that the Fourth Amendment prohibits theft, the panel introduced confusion into this Circuit's law and effectively diminished the rights of Ninth Circuit residents relative to persons elsewhere in the country.

Second, the panel decision represents a novel expansion of the doctrine of qualified immunity. Qualified immunity has come under withering criticism in recent years, as a diverse set of judges and scholars have critiqued the doctrine's questionable legal basis and its harsh practical effects. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). This Court is of course constrained to follow the doctrine as it is defined by the Supreme Court's precedents, but it should go no further. Holding that immunity shields officers who have stolen property during a search is substantially further than the Supreme Court has ever gone.

It is also much further than this Court has ever gone. Prior panels have invariably held that it is "obvious" that the Fourth and Fourteenth Amendments prohibit police officers from engaging in conduct that lacks any "legitimate law enforcement objective," even absent a case specifically proscribing such flagrant

misconduct. *A.D.*, 712 F.3d at 455; *see San Jose*, 402 F.3d at 973-975; *Deorle*, 272 F.3d at 1285; *Mena*, 226 F.3d at 1041. Many other circuits have done the same. *See, e.g.*, *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1307 (11th Cir. 2006) ("handcuffing Gray, a compliant, nine-year-old girl for the sole purpose of punishing her was an obvious violation of Gray's Fourth Amendment rights"); *Gustafson v. Adkins*, 803 F.3d 883, 892 (7th Cir. 2015) ("identification of a body of relevant case law is unnecessary" where employer engaged in "flagrant Fourth Amendment violation" by installing hidden cameras to film female employees in changing area). This case should if anything have been easier than these prior precedents. While some actions in prior cases arguably required split-second judgments, no officer could possibly believe, even in the heat of the moment, that theft is lawful.

By holding that qualified immunity protects even this egregious conduct—solely on the basis of out-of-circuit cases that addressed a markedly differently issue—the panel departed from the comparatively broad construction it has previously given the "obviousness" principle. And it threatens to turn qualified immunity from a protection for reasonable mistakes into an "absolute shield" for even the most brazen misconduct. *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

III. The Panel Decision Will Have Serious Practical Consequences.

The practical consequences of the panel's error will be severe. Because the panel did not resolve the underlying constitutional question, the rule in the Ninth Circuit is now that there is no clearly established law holding that police officers violate the Constitution by stealing property covered by a search warrant. Unless and until this Circuit holds otherwise, police officers throughout the Ninth Circuit will thus have a free pass to steal during searches without fear of incurring constitutional liability. That concern is more than hypothetical. The Supreme Court observed over 35 years ago that "[i]t is not unheard of for persons employed in police activities to steal property taken from arrested persons." *Illinois v. Lafayette*, 462 U.S. 646, 646 (1983). In the intervening decades, there have been hundreds of reported instances of police theft during searches, *see* Philip Matthew Stinson, Sr., et al., *Police Integrity Lost: A Study of Law Enforcement Officers Arrested* 142-143, 314 (2016), https://www.ncjrs.gov/pdffiles1/nij/grants/249850.pdf, and growing concerns about revenue-based policing practices that often cross the line into illegality, *see* Civil Rights Div., U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf; Dick M. Carpenter II et al., Institute

for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf.

Section 1983 provides a critical and often exclusive means of redress for this serious breach of personal liberty and the public trust. Many states, including California, afford police officers broad immunity from tort liability for acts taken during criminal investigations. *See, e.g.*, *Amylou R. v. County of Riverside*, 28 Cal. App. 4th 1205, 1209-10 (1994) (holding that any "actions taken in preparation for formal [criminal] proceedings," including the "investigation of a crime," are "cloaked with immunity" (citing Cal. Gov. Code § 821.6)). And because property that is stolen by police officers for their personal enrichment will, by definition, never be introduced as evidence against a criminal defendant, a suppression motion does not provide an avenue for testing the legality of that conduct. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (explaining that addressing the merits of a constitutional claim in § 1983 cases is "especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable"). It is therefore vital that this Court grant rehearing en banc and reaffirm the obvious: The Fourth Amendment does not permit police officers to enter a person's home and steal his property.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

/s/ Neal K. Katyal

KEVIN G. LITTLE
LAW OFFICE OF KEVIN G. LITTLE
P.O. Box 8656
Fresno, CA 93747
Telephone: (559) 342-5800
Fax: (559) 242-2400
Email: kevin@kevinglittle.com

NEAL K. KATYAL
COLLEEN E. ROH SINZDAK
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910
Email: neal.katyal@hoganlovells.com

Attorneys for Appellants Micah Jessop and Brittan Ashjian

Dated: May 3, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 17-16756

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Signature s/ Neal K. Katyal **Date** May 3, 2019

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ADDENDUM

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICAH JESSOP; BRITTAN ASHJIAN, *Plaintiffs-Appellants*, v. CITY OF FRESNO; DERIK KUMAGAI; CURT CHASTAIN; TOMAS CANTU, *Defendants-Appellees*.	No. 17-16756 D.C. No. 1:15-cv-00316-DAD-SAB OPINION

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Argued and Submitted December 18, 2018
San Francisco, California

Filed March 20, 2019

Before: MILAN D. SMITH, JR., JACQUELINE H. NGUYEN, Circuit Judges, and JANE A. RESTANI,[*] Judge.

Opinion by Judge Milan D. Smith, Jr.

[*] The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

SUMMARY**

Civil Rights

The panel affirmed the district court's order granting the City Officers' motion for summary judgment in an action alleging that City of Fresno police officers violated the Fourth and Fourteenth Amendments when they stole Appellants' property after conducting a search and seizure pursuant to a warrant.

Following the search, the City Officers gave Appellants an inventory sheet stating that they seized approximately $50,000 from Appellants' properties. Appellants alleged, however, that the officers actually seized $151,380 in cash and another $125,000 in rare coins. Appellants alleged that the City Officers stole the difference between the amount listed on the inventory sheet and the amount that was actually seized from the properties.

The panel held that it need not decide whether the City Officers violated the Constitution. The panel determined that at 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. The panel noted that the five other circuits that had addressed that question, or the similar question of whether the government's refusal to return lawfully seized property violated the Fourth Amendment, had reached different results. The panel held that in the absence of binding authority or a consensus of persuasive

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

authority on the issue, Appellants failed to demonstrate that it was clearly established that the City Officers' alleged conduct violated the Fourth Amendment. Accordingly, the panel held that the City Officers were entitled to qualified immunity.

COUNSEL

Kevin G. Little, Esquire (argued), Law Office of Kevin G. Little, Fresno, California, for Plaintiffs-Appellants.

Daniel P. Barer (argued), Pollak, Vida & Barer, Los Angeles, California, for Defendants-Appellees City of Fresno, Curt Chastain, Tomas Cantu, and Derik Kumangai.

Peter J. Ferguson and Allen Christiansen, Ferguson, Praet & Sherman, APC, Santa Ana, California, for Defendants-Appellees the City of Fresno, Curt Chastain and Tomas Cantu.

Kevin M. Osterberg, Haight, Brown & Bonesteel, LLP, Riverside, California, for Defendant-Appellee Derik Kumangai.

OPINION

M. SMITH, Circuit Judge:

Micah Jessop and Brittan Ashjian (Appellants) appeal an order granting a motion for summary judgment on the defense of qualified immunity filed by the City of Fresno and City of Fresno police officers Derik Kumagai, Curt Chastain, and Tomas Cantu (City Officers) in an action

alleging that the City Officers violated the Fourth and Fourteenth Amendments when they stole Appellants' property after conducting a search and seizure pursuant to a warrant.

We need not—and do not—decide whether the City Officers violated the Constitution. At 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. For that reason, the City Officers are entitled to qualified immunity.

FACTUAL AND PROCEDURAL BACKGROUND

As part of an investigation into illegal gambling machines in the Fresno, California area, the City Officers executed a search warrant at three of Appellants' properties in Fresno. The warrant, signed by Fresno County Superior Court Judge Dale Ikeda, authorized the

> seiz[ure] [of] all monies, negotiable instruments, securities, or things of value furnished or intended to be furnished by any person in connection to illegal gambling or money laundering that may be found on the premises . . . [and] [m]onies and records of said monies derived from the sale and or control of said machines.

If the City Officers found the property listed, they were "to retain it in [their] custody, subject to the order of the court as provided by law."

Following the search, the City Officers gave Appellants an inventory sheet stating that they seized approximately

$50,000 from the properties. Appellants allege, however, that the officers actually seized $151,380 in cash and another $125,000 in rare coins. Appellants claim that the City Officers stole the difference between the amount listed on the inventory sheet and the amount that was actually seized from the properties.

Appellants brought suit in the Eastern District of California alleging, among other things, claims against the City Officers pursuant to 42 U.S.C. § 1983 for Fourth and Fourteenth Amendment violations. The City Officers moved for summary judgment on the basis of qualified immunity. The district court granted the motion and dismissed all of Appellants' claims.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review summary judgment determinations, and officers' entitlement to qualified immunity, *de novo*. *Glenn v. Washington County*, 673 F.3d 864, 870 (9th Cir. 2011).

ANALYSIS

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "In determining whether an officer is entitled to qualified immunity, we consider (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014).

I. Fourth Amendment

The parties dispute whether the City Officers' actions violated the Fourth Amendment. The City Officers insist that because they seized Appellants' assets pursuant to a valid warrant, there was no Fourth Amendment violation. Appellants, on the other hand, argue that the City Officers' alleged theft was an unreasonable seizure that violated the Fourth Amendment.

We need not address the merits of the Fourth Amendment claim. Although courts were formerly required to determine whether plaintiffs had been deprived of a constitutional right before proceeding to consider whether that right was clearly established when the alleged violation occurred, *see Saucier v. Katz*, 533 U.S. 194, 201 (2001), that requirement has been eliminated. The Supreme Court has instructed that courts have the discretion to determine which prong of qualified immunity should be analyzed first. *Pearson*, 555 U.S. at 236. Indeed, the Court has urged us to "think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Pearson*, 555 U.S. at 236–37). Addressing the second prong before the first is especially appropriate, therefore, where "a court will rather quickly and easily decide that there was no violation of clearly established law." *Pearson*, 555 U.S. at 239. This is one of those cases.

To determine whether a defendant violated an individual's clearly established rights, we must determine "'whether the state of the law' at the time of an incident provided 'fair warning'" to the defendant that his or her conduct was unconstitutional. *Tolan v. Cotton*, 572 U.S.

650, 656 (2014) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. Thus, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "[W]e may look at unpublished decisions and the law of other circuits, in addition to Ninth Circuit precedent." *Prison Legal News v. Lehman*, 397 F.3d 692, 702 (9th Cir. 2005).

We have never before addressed whether the theft of property covered by the terms of a search warrant and seized pursuant to that warrant violates the Fourth Amendment. At the time of the incident, the five circuits that had addressed that question, or the similar question of whether the government's refusal to return lawfully seized property violates the Fourth Amendment, had reached different results. *Compare Case v. Eslinger*, 555 F.3d 1317, 1330 (11th Cir. 2009), *Lee v. City of Chicago*, 330 F.3d 456, 460–66 (7th Cir. 2003), *Fox v. Van Oosterum*, 176 F.3d 342, 349–51 (6th Cir. 1999), *and United States v. Jakobetz*, 955 F.2d 786, 802 (2d Cir. 1992), *with Mom's Inc. v. Willman*, 109 F. App'x 629, 636–37 (4th Cir. 2004).

The Second, Sixth, Seventh, and Eleventh Circuits have held that the government's failure to return property seized pursuant to a warrant does not violate the Fourth Amendment. Some of these courts have reasoned that because "the word 'seizure' [has been] defined as a temporally limited act," the Fourth Amendment provides protection only against the initial taking of property, not its continued retention. *Lee*, 330 F.3d at 462; *accord Fox*, 176 F.3d at 351 ("[T]he Fourth Amendment protects an

individual's interest in retaining possession of property but not the interest in regaining possession of property."). Others have said that the failure to return seized property to its owner does not implicate the underlying rationales of the Fourth Amendment. *Jakobetz*, 955 F.2d at 802.

The Fourth Circuit, on the other hand, has held that federal agents violate the Fourth Amendment when they steal property that is seized during the execution of a search warrant. *Mom's Inc.*, 109 F. App'x at 637. The court relied on the Supreme Court's decision in *United States v. Place*, 462 U.S. 696, 706 (1983), and reasoned that the Fourth Amendment "regulates all [] interference" with an individual's possessory interests in property, "not merely the initial acquisition of possession." *Id.* Thus, because the agents' theft of the plaintiff's watch interfered with the plaintiff's interest in it, "such theft violates the Fourth Amendment." *Id.*

The absence of "any cases of controlling authority" or a "consensus of cases of persuasive authority" on the constitutional question compels the conclusion that the law was not clearly established at the time of the incident. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). Although the City Officers ought to have recognized that the alleged theft of Appellants' money and rare coins would be improper, they did not have clear notice that it violated the Fourth Amendment.

Nor is this "one of those rare cases in which the constitutional right at issue is defined by a standard that is so 'obvious' that we must conclude . . . that qualified immunity is inapplicable, even without a case directly on point." *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 455 (9th Cir. 2013). The allegation of any theft by police officers—most certainly the theft of over $225,000—is undoubtedly deeply

disturbing. Whether that conduct violates the Fourth Amendment's prohibition on unreasonable searches and seizures, however, is not obvious. The split in authority on the issue leads us to conclude so. *See Wilson*, 526 U.S. at 618 (where "judges [] disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy").

In the absence of binding authority or a consensus of persuasive authority on the issue, Appellants have failed to demonstrate that it was clearly established that the City Officers' alleged conduct violated the Fourth Amendment. Accordingly, we hold that the City Officers are protected by qualified immunity against Appellants' Fourth Amendment claim.

II. Fourteenth Amendment

Appellants' Fourteenth Amendment claim suffers the same fate. Appellants argue that the City Officers' theft of their property violated their substantive due process rights under the Fourteenth Amendment. Assuming that to be true, however, the City Officers are entitled to qualified immunity because that right was not clearly established. We have not held that officers violate the substantive due process clause of the Fourteenth Amendment when they steal property that is seized pursuant to a warrant. The Seventh Circuit is the only circuit that has addressed the related question of whether the government's refusal to return lawfully seized property to its owner violates the Fourteenth Amendment; it held that the substantive due process clause does not provide relief against such conduct. *See Lee*, 330 F.3d at 466–68. Because the City Officers could not have known that their actions violated the Fourteenth Amendment's substantive due process clause, they are entitled to qualified immunity against Appellants' Fourteenth Amendment claim.

CONCLUSION

We sympathize with Appellants. They allege the theft of their personal property by police officers sworn to uphold the law. Appellants may very well have other means through which they may seek relief.[1] But not all conduct that is improper or morally wrong violates the Constitution. Because Appellants did not have a clearly established Fourth or Fourteenth Amendment right to be free from the theft of property seized pursuant to a warrant, the City Officers are entitled to qualified immunity.

AFFIRMED.

[1] Indeed, the district court noted in its Order Granting Defendants' Motion for Summary Judgment that Appellants "had access to an adequate post-deprivation remedy under California tort law."

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2019, I filed the foregoing Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Neal K. Katyal
Neal K. Katyal