No. 17-16756

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, Case No. 1:13-CV-00316-DAD-SAB
The Honorable Dale A. Drozd

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* THE DKT LIBERTY PROJECT, REASON FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, PUBLIC JUSTICE, NATIONAL POLICE ACCOUNTABILITY PROJECT, LAW ENFORCEMENT ACTION PARTNERSHIP, INSTITUTE FOR JUSTICE, AND AMERICANS FOR PROSPERITY IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b) and Circuit Rules 29-2 and 29-3, the eight non-profit organizations listed below ("proposed *amici*") move this Court for leave to participate as *amici curiae* in support of Plaintiffs-Appellants' Petition for Rehearing *en banc*. A proposed brief has been filed in conjunction with this motion. Proposed *amici* have endeavored to obtain the consent of all parties to the filing of this brief. Only Plaintiffs-Appellants have consented.

INTEREST OF *AMICI CURIAE*

Proposed *amici* are eight nonprofit organizations: the DKT Liberty Project, Reason Foundation, the Individual Rights Foundation, Public Justice, the National Police Accountability Project, the Law Enforcement Action Partnership, the Institute for Justice, and Americans for Prosperity.

Collectively, proposed *amici* are dedicated to the protection of individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against all forms of government interference. Proposed *amici* are concerned about the expansion of qualified immunity—and that doctrine's ability to shield egregious violations of individuals' constitutional rights from any meaningful liability. These potential *amici* share a commitment to ensuring that government actors who violate individuals' constitutional rights are held accountable. As a result, proposed *amici* have a particular interest in this case.

ARGUMENT AND SUMMARY OF PROPOSED BRIEF

This Court "has broad discretion" to grant the participation of *amici curiae*. *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). An *amicus* brief "should normally be allowed . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (citing *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203 (9th Cir. 1982) (per curiam)); *see also Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 n.3 (9th Cir. 1987) (granting "amicus status" in order to "avail[] ourselves of the benefit of . . . thorough" arguments from an official with an important perspective).

Consistent with "the classic role of amicus curiae"—"assisting in a case of general public interest," *Miller-Wohl Co.*, 694 F.2d at 204—the proposed *amici* desire to submit the enclosed brief to inform the Court of several issues uniquely within their expertise. In particular, proposed *amici* seek to bring to the Court's attention the robust scholarship demonstrating that the unjustified extension of qualified immunity harms the public, civil rights litigants, and even the law enforcement officers that the doctrine is designed to protect. Given proposed *amici*'s experience participating in cases in which qualified immunity defenses are raised,

proposed *amici* also wish to provide the Court with an understanding of qualified immunity's real-world impact. The scholarship proposed *amici* highlight and proposed *amici*'s experiences are particularly relevant to the facts and context of this case, in which Plaintiffs-Appellants allege that police officers stole their property while executing a search warrant. All of these issues are relevant to the Court's consideration of the Petition for rehearing *en banc*, and allowing amicus participation here would be desirable and help inform the Court as to matters relevant to the disposition of the case. *See* Fed. R. App. Proc. 29(a)(3)(B).

CONCLUSION

Proposed *amici* believe that their input may be of assistance to the Court in resolving Plaintiffs-Appellants' Petition for rehearing *en banc*, and respectfully urge this Court to grant leave to submit the attached brief.

Dated: May 13, 2019

Respectfully submitted,

/s/ Jessica Ring Amunson

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 13, 2019. Service on registered parties will be accomplished via the Court's ECF system.

Dated: May 13, 2019

/s/ Jessica Ring Amunson

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* state that none of them has a parent corporation, and that no publicly held corporation owns a 10% or more ownership interest in any of the *amici*.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are nonprofit organizations dedicated to the protection of individual liberties, especially those liberties guaranteed by the Constitution of the United States, against all forms of government interference. As organizations concerned about the expansion of qualified immunity—and that doctrine's ability to shield egregious violations of individuals' constitutional rights from any meaningful liability—*amici* have a particular interest in this case.

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government overreach, and protecting every American's right and responsibility to function as an autonomous and independent individual. The Liberty Project espouses vigilance over government overreach of all kinds, but especially law enforcement overreach that restricts individual civil liberties. The Liberty Project has filed several briefs as *amicus curiae* with state and federal courts and with the United States Supreme Court on issues involving constitutional rights and civil liberties.

[1] *Amici* hereby certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and no person other than *amici* and their counsel contributed money intended to fund the preparation or submission of this brief.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. Reason participates as *amicus curiae* in cases raising significant constitutional or legal issues.

The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

Public Justice is a national public-interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. It specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil-justice system, and the protection of the poor and the powerless.

The National Police Accountability Project ("NPAP") was founded in 1999 to address misconduct by law enforcement and detention facility officers. NPAP has approximately 600 attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information, and resources for nonprofit organizations and community groups involved with victims of law-enforcement and detention-facility misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as *amicus curiae* in cases of particular importance for its members' clients.

The Law Enforcement Action Partnership ("LEAP") is a 501(c)(3) nonprofit of police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, today LEAP's speakers bureau numbers more than 200 criminal justice professionals advising on police-community relations, incarceration, harm reduction, drug policy, and global issues.

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ litigates in state and federal courts nationwide to secure these guarantees, including in defense of private property rights, educational choice,

economic liberty, and free speech. As part of its commitment to protecting private property rights, IJ fights to roll back civil forfeiture.

Americans for Prosperity ("AFP") recruits, educates, and mobilizes citizens to build a culture of mutual benefit where people succeed by helping others improve their lives. Such a culture can only flourish in a justice system in which the rule of law is clear, law enforcement is just, and due process thrives. Current qualified immunity doctrine in the United States violates all three of these principles, and AFP is thus mission-bound to advocate for a reconsideration of the doctrine and, by extension, a justice system that better supports a culture of mutual benefit.

SUMMARY OF ARGUMENT

Plaintiffs allege that City of Fresno police officers stole over $200,000 in cash and rare coins during a search of their property. The officers did not seize that property for law enforcement purposes. Nor did they seize it as evidence. Instead, the officers simply pocketed the property for their own pecuniary gain. The conduct plaintiffs allege is shocking. Yet, without deciding the underlying constitutional issue, the panel concluded that the officers could not be held accountable for their actions under 42 U.S.C. § 1983 because there was no case clearly establishing that their conduct violated the Fourth Amendment.

That holding was wrong, both under existing case law and as a matter of common sense. At a minimum, the alleged constitutional violation is so egregious

as to be obvious. The panel's failure to hold as much continues the widespread practice of lower courts declining to reach constitutional questions in qualified immunity cases. This practice improperly stunts the development of the law and impedes the reach of constitutional protections to those most in need.

By unjustifiably extending qualified immunity to cover even the base theft alleged here, the panel's decision also exacerbates the significant costs that an expansive immunity doctrine imposes on litigants, the public, and law enforcement. Litigants are discouraged from bringing lawsuits in even the most egregious cases because they know immunity will make success extremely difficult. Bad actors are not held accountable, which undermines public trust in law enforcement and makes policing by those officers who act reasonably more difficult and less safe. And concerns about the abuse of civil asset forfeiture—which already allows law enforcement to seize property with little legal recourse—are heightened when law enforcement can seize property for their own personal gain with *no* legal recourse for the victims.

The panel's decision allows police officers to steal from suspects with impunity, and without any concern that they might be subject to civil liability. The decision is both wrong and consequential. This Court should grant rehearing *en banc* to reverse the judgment.

ARGUMENT

I. The Panel Decision Extends Qualified Immunity To Its Extreme By Insulating Egregious Constitutional Violations From Liability.

On the sole basis that no case law clearly holds that police officers violate the Constitution when they pocket a suspect's property for their own gain, the panel decision granted defendants qualified immunity. As the petition explains, that conclusion was erroneous because there *is* case law specifically establishing that the defendants' conduct violated the Fourth Amendment. Petition at 8-11. But *even if* there were no case directly on point, the unlawfulness of defendants' misconduct was, at a minimum, so clearly unconstitutional as to be obvious. *Id.* at 7-8. By insulating even egregious misconduct from liability whenever there is no prior case specifically on point, the panel's reasoning extends qualified immunity doctrine to its extreme.

To be sure, lower courts have discretion to bypass the first step in the qualified immunity analysis—determining whether there was a constitutional violation—and grant immunity based only on a finding that any such violation was not "clearly established." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). But the Supreme Court has cautioned that first determining whether a constitutional right has been violated is "often beneficial," "promotes the development of constitutional precedent," and "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.*

When lower courts avoid an examination of the underlying constitutional question and reflexively grant immunity absent a case that has analyzed identical, or nearly identical, factual circumstances, they risk locking in a state where constitutional rights, even the obvious ones, "might *never* be clearly established." Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 12 (2015). Unfortunately, that appears to be what is happening. In less than ten percent of cases since the Court's 2009 decision in *Pearson* have lower courts exercised their discretion to reach a constitutional question before going on to nevertheless grant immunity. *Id.* at 33, 37-38. By abdicating their authority to analyze the constitutional question, courts place qualified immunity doctrine in a vicious cycle. The law will never become "clearly established" if courts do not reach the constitutional question. Thus, "[f]or rights that depend on vindication through damages actions, the repeated invocation of qualified immunity will reduce the meaning of the Constitution to the lowest plausible conception of its content." John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115, 120.

Qualified immunity doctrine, however, need not blind itself to obvious constitutional violations, and a violation can be clearly established even without a specific, factually analogous case on point. As the Supreme Court has noted, "a general constitutional rule already identified in the decisional law may apply with

obvious clarity to the specific conduct in question." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quotation marks omitted); *see also United States v. Lanier*, 520 U.S. 259, 271 (1997) (acknowledging that often "[t]he easiest cases don't even arise" (quotation marks omitted)). Indeed, it 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." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015) (Gorsuch, J.) (denying qualified immunity).

That is precisely the situation here. The panel correctly acknowledged that the defendants certainly "ought to have recognized that the alleged theft of Appellants' money and rare coins would be improper." Petition Add. at 8. Yet, focusing myopically on the supposed lack of a factually analogous case and disregarding constitutional principles that "apply with obvious clarity to the specific conduct in question," *Hope*, 536 U.S. at 741, the panel nonetheless granted immunity. The constitutional violation here is obvious, and this Court should say so. Doing so also would establish a definitive ruling providing even more specific notice to government officials of what the Constitution prohibits. Any other holding stunts the development of constitutional law and immunizes truly brazen and egregious unconstitutional conduct.

II. The Unjustified Extension Of Qualified Immunity Harms Litigants, The Police, And Law Enforcement.

Qualified immunity is intended to protect officers who act reasonably while also holding officers "accountable when they exercise power irresponsibly." *Pearson*, 555 U.S. at 231. Research suggests that when bad actors are not held accountable, litigants, the public, and law enforcement in general suffer. The panel's decision only deepens these concerns.

A. Qualified Immunity Imposes A Significant Procedural Hurdle To Litigants' Vindication Of Constitutional Rights.

Qualified immunity already places nearly insurmountable hurdles in the way of civil rights litigants who seek to hold state actors accountable. Immunity often discourages litigants from bringing cases—even when obvious constitutional violations are at issue. A survey of civil rights litigants shows that the availability of a qualified immunity defense plays a substantial role in lawyers' assessment of whether to take a case. Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J. 477, 492-93 (2011). In that study, "[n]early every respondent, regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense play a substantial role at the screening stage" and "[f]or some, qualified immunity was the primary factor when evaluating a case for representation." *Id.* at 492.

Because a district court's denial of qualified immunity is an immediately appealable collateral order, *see Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014), every civil rights litigant must be prepared to defeat a qualified immunity defense *both* in the district court and in the court of appeals before being able to proceed with her case. And she must do so at every stage of the proceeding—from motions to dismiss to summary judgment. Moreover, she often must do so without critical factual development as discovery is frequently stayed during the pendency of an appeal, even when the district court has denied immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed.").

This gauntlet is formidable, and litigants were unlikely to be willing to run it even before the panel's decision. When this Court improperly expands the circumstances in which defendants are granted immunity to even the most egregious cases—as the panel's decision to grant immunity over the obvious alleged violation did here—this Court only further discourages litigants from vindicating their rights and holding police officers accountable.

B. Qualified Immunity Undermines Accountability And Public Trust In Law Enforcement.

A failure to hold bad actors accountable also has a counterproductive effect on the public at large and the very police officers who "perform their duties reasonably." *Pearson*, 555 U.S. at 231. The unjustified extension of qualified

immunity erodes public trust in police by undermining the belief that law enforcement will do their jobs fairly, and will be held accountable when they do not. That erosion works to the detriment of police officers and undermines their ability to form the very community relationships that allow police to do their job—and to do it safely.

"Being viewed as fair and just is critical to successful policing in a democracy," and when police "are perceived as unfair in their enforcement, it will undermine their effectiveness." Inst. on Race and Justice, Northeastern Univ., *COPS Evaluation Brief No. 1: Promoting Cooperating Strategies to Reduce Racial Profiling*, at 21 (2008). Officers themselves report that, in order for policing to be successful, it is critical to demonstrate fairness and respect when dealing with the public. *See* Rich Morin *et al.*, *Behind the Badge*, Pew Research Center 65, 72 (2017). Overall, "[l]awful policing increases the stature of the police in the eyes of citizens, creates a reservoir of support for police work, and expedites the production of community safety by enhancing cooperation with the police." Nat'l Research Council, *Fairness and Effectiveness in Policing: The Evidence* 6 (2004).

Police already are facing a public perception crisis. In 2015, in the midst of several high-profile policing events, public trust in police officers fell to a twenty-two year low. Jeffrey M. Jones, Gallup, *In U.S., Confidence in Police Lowest in 22*

Years (June 19, 2015).[2] And almost 90% of police report that they are more concerned for their safety in recent years and that policing has become more dangerous and more difficult. *See* Morin *et al.*, *Behind the Badge*, at 80.

Qualified immunity increases the public's perception that police are not held accountable. Even a cursory review of recent qualified immunity decisions demonstrates that the doctrine has morphed to shield even truly egregious behavior from accountability.

In *Young v. Borders*, for example, the Eleventh Circuit upheld the granting of qualified immunity to an officer who shot and killed a man seconds after he answered the door of his apartment. 620 F. App'x 889 (11th Cir. 2015), *en banc review denied*, 850 F.3d 1274 (11th Cir. 2017). Without a warrant or reasonable suspicion, and based only on a hunch that a motorcycle parked outside of the man's apartment might be both the same motorcycle observed speeding in the area and the same motorcycle involved in a separate armed assault and battery that took place miles away, several officers approached the man's apartment, guns drawn, and knocked loudly without identifying themselves as police. *Young v. Borders*, 850 F.3d 1274, 1288 (11th Cir. 2017) (Martin, J., dissenting from denial of rehearing *en banc*). The man, startled, retrieved a lawfully owned handgun and opened the door,

[2] https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx.

with his gun pointed safely toward the ground. *Id.* at 1290-91. Upon seeing the officers, and without lifting the firearm, the man attempted to retreat inside. But one officer fired six shots—three of which struck and killed the man. *Id.* at 1291. Despite these egregious circumstances, a panel of the Eleventh Circuit summarily concluded there was "no reversible error" in the district court's order granting qualified immunity. *Young*, 620 F. App'x at 890; *see also Young*, 850 F.3d at 1280-82 (Hull, J., concurring in denial of rehearing *en banc*) (explaining the panel did not decide whether the conduct was unconstitutional because, in the panel's view, there was "no prior case with facts remotely similar").

Another example of outrageous conduct that escaped liability is the Tenth Circuit's decision earlier this year in *Doe v. Woodard*. There, the court affirmed a finding of qualified immunity for a government caseworker who strip-searched a four-year old child and then photographed her while she was undressed—all without either a warrant or parental consent. 912 F.3d 1278 (10th Cir. 2019), *petition for cert. filed*, 87 U.S.L.W. 3380 (U.S. Mar. 11, 2019) (No. 18-1173). Limiting its analysis to whether any constitutional violation was clearly established—and without answering the constitutional question—the court noted that the plaintiffs had not "cited a Supreme Court or Tenth Circuit decision specifically holding that a social worker must obtain a warrant to search a child at school for evidence of

reported abuse." *Id.* at 1293. Therefore, the court held that the plaintiffs had not "met their burden of showing clearly established law on either ground." *Id.*

Cases like these are reason enough to question the extension of qualified immunity and to raise concern about the doctrine's effect on public confidence in police. Yet, with respect to the conduct plaintiffs allege in this case, there is every reason to suspect that the panel's decision will provide greater incentive for bad actors to steal from suspects. Sadly, the conduct plaintiffs allege is not unusual, and plaintiffs cite several cases demonstrating that the conduct is not an isolated event. Petition at 10-11. In fact, officers repeatedly have unlawfully stolen suspects' property in recent years, under the guise of a search warrant or other purported legal authorization. For example, one Nashville police officer was sentenced in November 2018 to two years in prison for the theft of more than $100,000 in the course of executing search warrants.[3] In another case, Baltimore police officers were convicted in 2017 and early 2018 for their roles in a wide-ranging scheme in which the officers repeatedly stole from criminal suspects while conducting searches under

[3] *See* Joey Gill, *Former Metro Police officer sentenced to federal prison for stealing money*, News4 (Oct. 24, 2018), https://www.wsmv.com/news/former-metro-police-officer-sentenced-to-federal-prison-for-stealing/article_223d1502-d7d1-11e8-8fe8-2742b152d549.html; *see also* Indictment, *United States v. Dunaway*, No. 3:18-cr-00108 (M.D. Tenn. May 2, 2018), ECF No. 3; Judgment, *United States v. Dunaway*, No. 3:18-cr-00108 (M.D. Tenn. Nov. 13, 2018), ECF No. 39.

the guise of their law enforcement authority. In one particularly egregious incident, the officers stole $100,000 from a safe in a suspect's home—and, in an effort to conceal their theft, began the police recording of the search only *after* stealing the cash.[4]

In several of these cases, the officers were prosecuted. But private lawsuits can also provide the sunshine needed to expose unlawful police practices that might not otherwise come to light. Private lawsuits "are a valuable source of information about police-misconduct allegations" because they may alert departments to possible misconduct that might not otherwise surface. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841, 844-45 (2012). In fact, acts like those plaintiffs allege in his case are the *most likely* to escape notice. Because they do not involve the use of force, "potentially serious constitutional violations" that take place during "vehicle pursuits, searches, and home entries . . . [may] not trigger reporting requirements." *Id.* The panel decision provides potential bad actors with assurance that such conduct will not lead to civil liability—and therefore virtually ensures that this conduct may never come to light at all.

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[4] Justin Fenton, *Baltimore Gun Trace Task Force officers were 'both cops and robbers' at same time, prosecutors say*, Balt. Sun (Jan. 23, 2018, 1:20 PM), http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-gttf-opening-statements-20180123-story.html?utm_source=nextdraft&utm_medium=email; *see also* Indictment, *United States v. Gondo*, No. 1:17-cr-00106 (D. Md. Feb. 23, 2017), ECF No. 1.

Extending qualified immunity to obvious and brazen constitutional violations—as the panel decision did here—exacerbates the public accountability gap and works at cross-purposes with the rationale underlying immunity.

C. By Immunizing Outright Theft, The Panel Decision Only Exacerbates Existing Concerns Over Asset Forfeiture.

Finally, the panel's decision is all the more striking because it provides officers with an avenue to seize individuals' personal property without any legal recourse for the victims. Civil asset forfeiture, which gives the government authority to seize personal property with little legal scrutiny, is already widely abused. Police departments and individual officers routinely misuse their authority to seize assets connected to a crime by seizing property to which they are not actually entitled, and using that property to fund their departments. The panel's decision now goes even further. The decision immunizes individual officers who steal property for their own *personal* use. Given the abuse that already exists when the government is permitted to seize property for the government's own use, further immunizing officers who commit outright theft for their own personal profit will make it even easier for government officials to abuse their authority and escape any liability.

Civil asset forfeiture historically began as a tool to combat piracy and enforce regulations on the high seas (where *in personam* actions against property owners were often impossible), but many governments now turn to forfeiture as a major source of revenue. *See Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J.,

statement respecting denial of certiorari). In recent decades, forfeiture has "become widespread and highly profitable." *Id.* Because the entity that seizes the property often keeps it, law enforcement has "strong incentives to pursue forfeiture." *Id.*

At the federal level, the Departments of Justice and Treasury had seized more than $5 billion worth of assets by 2014—a 4,667% increase since 1986. Dick M. Carpenter II *et al.*, Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 10 (2d ed. 2015); Christopher Ingraham, *Law Enforcement Took More Stuff from People than Burglars Did Last Year*, Wash. Post Wonkblog (Nov. 23, 2015). Facing a declining state and local tax base and increased criminal justice spending, many state and local governments have also turned to forfeiture as a source of revenue. Forty-four states now authorize law enforcement to keep at least 45% of the assets they seize; in thirty states, law enforcement may keep 90% of the assets. Carpenter *et al.*, *Policing for Profit*, at 14.

This system—allowing police to "seize property with limited judicial oversight and retain it for their own use"—has "led to egregious and well-chronicled abuses." *Leonard*, 137 S. Ct. at 848. Law enforcement have strong incentives to view more property they encounter as suspicious or otherwise subject to forfeiture. The incentive to err on the side of seizure has led to countless examples of innocent Americans having their money taken while traveling to make large purchases or move to a new community. As just one example, in August 2012, over $17,550 was

seized from Mandrel Stuart after he was stopped for a minor traffic violation in Virginia. *See,* Robert O'Harrow Jr., *et al.*, *They Fought the Law. Who Won?*, Wash. Post (Sept. 8, 2014). Mr. Stuart planned to use the money, which he had earned from his barbeque business, to purchase equipment and supplies for his restaurant. But police claimed that the money was drug money, and it took Mr. Stuart fourteen months to succeed in having the money returned—after hiring counsel and winning a unanimous jury verdict. In the interim, his business folded because he lacked the cash flow to keep it operating. *Id.*

The proliferation of civil asset forfeiture is alarming enough. But the panel's decision opens an unlawful, new, and even less scrutinized means for officials to seize individuals' property. Now, not only can officials seize and retain personal property with little judicial oversight under the guise of civil asset forfeiture; law enforcement also can outright steal personal property for their own use with impunity and without fear of civil liability. The Constitution demands more. This Court should grant rehearing *en banc* to rectify that holding.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the petition for rehearing *en banc*.

Dated: May 13, 2019

Respectfully submitted,

/s/ Jessica Ring Amunson

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CERTIFICATES

Jessica Ring Amunson, counsel for *amici curiae* (The DKT Liberty Project, Reason Foundation, the Individual Rights Foundation, Public Justice, the National Police Accountability Project, the Law Enforcement Action Partnership, the Institute for Justice, and Americans for Prosperity), hereby certifies that:

1. I am a member in good standing of the Bar of the United States Court of Appeals for the Ninth Circuit.

2. This Brief complies with the type-volume limitation in Circuit Rule 29-2 because, excluding the parts of the document exempted by Rule 32(f), this document contains 4,099 words.

3. This Brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this document has been prepared in a proportionally-spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

4. On this date, the foregoing Brief of *Amici Curiae* was filed electronically and served on the other parties via the Court's ECF system.

Dated: May 13, 2019

/s/ Jessica Ring Amunson

Counsel for Amici Curiae