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
Case No. 1:13-CV-00316-DAD-SAB

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* the New Civil Liberties Alliance states that it is a nonprofit organization organized under the laws of the District of Columbia. It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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INTERESTS OF AMICUS CURIAE

The New Civil Liberties Alliance (NCLA) is a nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms against systemic threats, including attacks by state and federal administrative agencies on due process, jury rights, and freedom of speech. NCLA also opposes judicial abdication of courts' independent judgment through conventions of deference and avoidance. We uphold these constitutional rights on behalf of all Americans, of all backgrounds and beliefs, and we do this through original litigation, occasional *amicus curiae* briefs, and other means.

The "new civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. However, these selfsame civil rights are also "new"—and in dire need of renewed vindication—precisely because judicially created immunities to section 1983 cases impermissibly shield the unconstitutional actions of state executives and administrators from liability. Whenever courts are unwilling to hold the government accountable for its constitutional transgressions against citizens, the vitality of every American's civil liberties diminishes.

NCLA therefore aims to defend civil liberties—primarily by asserting constitutional constraints on administrative and executive actors and by reminding courts of their duty to exercise impartial and independent judgment in resolving the cases and controversies before them. NCLA is particularly disturbed that the panel opinion has

willfully opted out of deciding a matter as simple—but gravely consequential—as whether it is unconstitutional for a police officer to use the cover of a search warrant to steal from a suspect. By choosing not to decide the issue, the panel granted immunity not only to the Fresno police, but also to police officers throughout the Ninth Circuit accused of theft in the future, who now may continue to assert that the constitutional protections from theft are not "clearly established." Thus, NCLA's principal interest in this litigation is to vindicate the section 1983 statutory scheme Congress enacted to ensure that states cannot deprive any person of life, liberty, or property without due process of law. NCLA also wishes to remind the Court that it has a constitutional duty to decide pressing issues such as these.

RULE 29 STATEMENT OF COMPLIANCE

NCLA moves this Court for leave to file this *amicus curiae* brief. The plaintiffs-appellants consented to NCLA's filing but the defendants-appellees did not. No counsel for a party authored any part of this brief. No one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

En banc rehearing of this matter is imperative. The panel mishandled this case by refusing to resolve whether the defendants had violated the plaintiffs' constitutional rights. The appellants correctly assert that the Fourth Amendment most certainly prohibits the police from using a search warrant as an artifice for personally enriching themselves through the theft of a suspect's property. *See* Pet. for Rehearing En Banc at 6 (May 3, 2019). Moreover, if the panel's decision remains unchanged, police officers will be immune from constitutional liability for blatant thievery. In choosing not to decide whether police theft violates the Constitution, the panel transformed qualified immunity into absolute impunity from constitutional liability. *See id.* at 17. This ruling is not a faithful application of the Supreme Court's modification of the qualified immunity deliberative process set forth in *Pearson v. Callahan*, 555 U.S. 223 (2009).

Qualified immunity is a flawed, court-invented regime inconsistent in its current form with the letter and spirit of section 1983. *See generally* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 48–49 (2018). Even if a plaintiff proves that a state actor violated his or her constitutional rights, the victim will not recover damages if the state actor did not violate "clearly established law." *See Pearson*, 555 U.S. at 232. The Supreme Court justifies such harsh results by explaining that qualified immunity is designed to "provide[] ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Moreover, until *Pearson*, courts would subsequently clearly establish the

law to prevent uncertainty among state actors prospectively. *See Pearson*, 555 U.S. at 227.

In 2009, the *Pearson* Court eroded section 1983's utility even further by permitting courts to skip the first step in their qualified immunity analyses. *See id. Pearson* held that if it "will best facilitate the fair and efficient disposition" of a case, courts are not required to decide whether the plaintiff has alleged a constitutional right in the first instance. *See id.* at 242.

Then, earlier this year, the panel opinion obliterated the Supreme Court's *Malley* line by allowing police officers to assert qualified immunity even when they *knowingly* violate the law by stealing others' property. *Compare Jessop*, 918 F.3d at 1037 *with Malley*, 475 U.S. at 341. Instead of constitutional vindication, the *Jessop* plaintiffs received the panel's sympathy. *Jessop*, 918 F.3d at 1037 ("We sympathize with the Appellants. They allege the theft of their personal property by police officers sworn to uphold the law."). This peculiar decision undermines—if it does not completely destroy—the ability of section 1983 to deter deprivations of federal constitutional and statutory rights.

The panel failed to recognize that current qualified-immunity jurisprudence—including *Pearson*—required it to determine whether the plaintiffs had alleged a violation of their constitutional rights *prior* to considering whether the right was "clearly established." Courts must not skip steps in their qualified immunity analysis where constitutional law may require elaboration from case to case. Additionally, courts must not skip steps where a case would not be best served by skipping. NCLA asks the Ninth Circuit to require lower courts in this jurisdiction to consider the first step

at either point in the qualified immunity deliberative process. This approach would prevent *Jessop*'s precedent paradox which stands the doctrine of *stare decisis* on its head by allowing not "clearly established" rights to potentially remain that way indefinitely.

ARGUMENT

I. *PEARSON* DOES NOT PERMIT STEP-SKIPPING WHERE, AS HERE, CONSTITUTIONAL RIGHTS REQUIRE ELABORATION

Contrary to the panel's apparent understanding of the controlling precedent for analyzing qualified immunity, courts do not have carte blanche to ignore either step in their deliberation over qualified immunity. In determining whether a police officer or other state actor is entitled to qualified immunity, courts consider (1) whether the defendant violated the plaintiff's constitutional rights; and (2) whether that constitutional right was clearly established at the time of the officer's misconduct. *See Pearson*, 555 U.S. at 232 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). In *Saucier v. Katz*, the Supreme Court required judges first to consider a threshold question when ruling on a qualified immunity defense: "do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (modified in part by *Pearson*, 555 U.S. at 227). In setting the first step in the then-mandatory sequence of analysis, the *Saucier* Court indicated that such determinations are "the process for the law's elaboration from case to case[.]" *Id.* The Court emphasized that its instruction to inferior courts "to concentrate at the outset on the definition of the constitutional right and to determine whether … a constitutional violation could be found is important." *Id.* at 207.

Eight years later, the Supreme Court changed course on the *Saucier* protocol. *See Pearson*, 555 U.S. at 234. The *Pearson* Court examined "a considerable body of new experience … regarding the consequences of requiring adherence to this inflexible procedure." *Id.* The Court believed that the judiciary wasted resources in cases where (1) it was unclear whether in fact a constitutional right existed in the first place, but (2) the alleged right was obviously not clearly established at the time of the misconduct. *See id.* at 237. The *Pearson* Court was also concerned that parties should not be forced "to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them[.]"[1] *See id.* (internal quotations and citations omitted).

In changing course regarding the *Saucier* protocol, however, the *Pearson* Court did *not* overrule *Saucier*. The Court could not have been clearer:

> Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases.

Id. at 242. Indeed, the *Pearson* Court endorsed *Saucier*'s analysis regarding the importance of determining whether the act complained of violated a constitutional right:

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1. The *Pearson* Court identified other rationales for reforming the rigid *Saucier* two-step framework, including concerns regarding the adequacy of the briefing of constitutional questions in lower courts and the principle of constitutional avoidance. *See Pearson*, 555 U.S. at 239 & 241. Neither of these issues are unique to qualified immunity questions. The former concern is simply a question of the issues preserved and presented on appeal and the latter is a long-established issue-specific prudential tool.

> [T]he *Saucier* Court was *certainly correct* in noting that the two-step procedure 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. at 236 (emphasis added).

Although holding that the two-step *Saucier* procedure is not always the best formula, it said that the protocol is "often … advantageous[.]" *Id.* at 242. The *Pearson* Court stood by the principle that the first step "is necessary to support the Constitution's elaboration from case to case[.]" *See id.* at 232 (quoting *Saucier*, 533 U.S. at 201) (internal quotations omitted). It quoted *Saucier* favorably for articulating the concept that without the first step, "[t]he law might be deprived of this explanation were a court simply to skip ahead[.]"*Ibid.* Thus, while no longer requiring a rigid sequential analysis in every qualified-immunity decision, the *Pearson* Court reaffirmed that *Saucier*'s sequence "is often appropriate" and "often beneficial." *Id.* at 236.

Pearson indicates that the panel's step-skipping was inappropriate in this case.[2] The only context in which a court could clearly establish whether stealing under the guise of a search warrant is unconstitutional is in section 1983 litigation. Stolen evidence cannot be the subject of *constitutional* adjudication in any other setting. If "[t]he law might be deprived of [constitutional] explanation[,]" the *Pearson* Court said, a court should engage in a first-step analysis. *See Pearson*, 555 U.S. at 232. Since

2. It should be noted that *Pearson* prohibits step-skipping in other circumstances as well, including those where "there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the 'clearly established prong.'" *Pearson*, 555 U.S. at 236.

the Fourth Amendment question presented here "do[es] not frequently arise in cases in which a qualified immunity defense is unavailable[,]" the panel should have first determined whether the plaintiff had suffered a constitutional injury. *See Pearson*, 555 U.S. at 236. The Ninth Circuit should rehear this matter en banc to correct the panel's mistake and resolve the Fourth Amendment question.

II. *PEARSON* SANCTIONS STEP-SKIPPING ONLY IN SPECIAL CIRCUMSTANCES THAT ARE NOT PRESENT HERE

As noted above, the Supreme Court has ruled that "courts should have the discretion to decide whether [the *Saucier*] procedure is worthwhile *in particular cases*." *Pearson*, 555 U.S. at 242. The *Pearson* Court indicated that this will depend on the facts of each case, but step-skipping may be permissible where a case will not make a meaningful contribution to constitutional precedent, *id.* at 237; where it appears the constitutional question will soon be answered by a higher court, *id.* at 237-38; where constitutional rights depend on a federal court's "uncertain assumptions" about state law, *id.* at 238; or where "a kaleidoscope of facts" at the pleadings stage has not been fully developed, *id.* at 238-39. These exceptions to the *Saucier* protocol are not at all applicable to the qualified-immunity question presented here.

The panel, however, claimed that step-skipping was

> especially appropriate … 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.

Jessop, 918 F.3d at 1035. But "quickly and easily" is not the standard for determining whether step-skipping may be used to decide qualified immunity.[3] Moreover, a conclusory statement such as this, without any analysis, does not sufficiently establish that "[t]his is one of those cases."

The panel should not have asked whether it could decide the case more "quickly and easily" by applying one step instead of two. Proper application of *Pearson* required the panel to ask what analytical framework "will best facilitate [its] fair and efficient disposition[,]" given the unique facts and circumstances surrounding the alleged constitutional violation giving rise to the section 1983 action. *Pearson*, 555 U.S. at 242, 236. The panel should have either scrutinized step one—whether the plaintiffs alleged that the police violated a constitutional right—or else explained why engaging in a step-one analysis would not have advanced *Saucier*'s goal of developing important constitutional precedent. *See id.* at 242. As the panel did not undertake either of these lines of inquiry, the Ninth Circuit should rehear this matter en banc to correct the panel's mistake.

3. The panel incorrectly cites this section as part of the holding of *Pearson*. It is not. The quote comes from a portion of the opinion explaining that the Court was concerned that sometimes judges applying the *Saucier* protocol begin by deciding step two, before going back to step one and giving step one short shrift. *See Pearson*, 555 U.S. at 239.

III. Where a Constitutional Right Is Not Clearly Established, Courts Should Decide Whether the Right Actually Exists, for Future Application

A. Failing to Decide Whether a Constitutional Right Is Clearly Established Creates a Troubling Kind of "Anti-Precedent"

The *Jessop* decision makes it likely that a constitutional right *once* deemed not clearly established, will become a constitutional right not clearly established indefinitely, standing the doctrine of *stare decisis* on its head. That is, instead of a thing once decided remaining decided, here a right whose existence is left undecided is likely to remain not decided (and, therefore, to not exist for section 1983 purposes). The Ninth Circuit has explained that precedent

> attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.

United States v. Osborne, 76 F.3d 306, 309 (9th Cir. 1996). In the Ninth Circuit, binding precedent may be found in the decisional authority issued by the United States Supreme Court or Ninth Circuit courts. *See Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004). A court commits an error of law when it runs afoul of binding precedent. *See United States v. Lopez*, 913 F.3d 807, 830 (9th Cir. 2019). Indeed, *stare decisis*'s critical role in judicial reasoning and the just application of the law are axiomatic. *See Crater v. Galaza*, 508 F.3d 1261, 1266 (9th Cir. 2007).

The decisional authority in *Jessop* is its holding that the police enjoyed the benefits of qualified immunity. The panel reasoned that it did not have to decide whether the Appellants alleged a constitutional violation, since the "Appellants [ ] failed to

demonstrate that it was clearly established that the City Officers' alleged conduct violated the Fourth Amendment." *See Jessop*, 918 F.3d at 1036. It is important to emphasize that the panel did *not* offer decisional authority regarding whether the police's theft of a suspect's property under the guise of a search warrant violates the Fourth Amendment. *See id.* at 1035. In other words, the panel did not "furnish[] the rule for the determination of a subsequent case" regarding the constitutional issue. *See Osborne*, 76 F.3d at 309. This question about the scope and nature of the Fourth Amendment thus remains unanswered in the Ninth Circuit.

Leaving the constitutional question explicitly unanswered means the next time a police officer steals from a suspect while executing a search warrant, he or she will be able to cite *Jessop* to show that there *is no clearly established precedent* regarding whether his or her theft violated a constitutional right. In other words, by holding that the constitutional violation was not "clearly established" and *simultaneously refusing to establish* whether a constitutional right existed at all, the panel created a precedent paradox—an "anti-precedent," if you will—that could hamstring the Ninth Circuit from ever answering the constitutional question in the future.

B. This Anti-Precedent Could Prevent a Future Ninth Circuit Panel From Deciding Whether the Constitutional Right Is Clearly Established

Since qualified immunity is immunity from suit, a district court will not try a case where the defendant's immunity from suit is clear. So, while the anti-precedent lacks decisional authority under *stare decisis*, it nevertheless exerts the preclusive power of a thing decided, under these factual circumstances.

There is now no precedent in the Ninth Circuit deeming police thefts in the course of executing search warrants to be constitutional violations. At least four bad effects logically flow from this fact:

First, the precedent creates at least some incentive for a dishonest police officer to commit theft, knowing that qualified immunity will obtain unless and until a future Ninth Circuit case clearly establishes that theft in the execution of a search warrant violates the Constitution. Second, there is a much-reduced incentive for a would-be plaintiff to bring a section 1983 lawsuit, because a well-counseled plaintiff will know that such a lawsuit will be futile, as it will run up against the defendant's qualified immunity. Third, for the next similar case that comes along, the district court will know that the defendant enjoys qualified immunity and therefore the court will be far less likely to bother developing the facts of the case to distinguish it from *Jessop*. So, fourth, when the next case gets to the Ninth Circuit on appeal, even if the panel does not want to step-skip, and even if it faithfully follows the teaching of *Pearson*, the case might well not have enough factual development in the record from the district court to enable the court of appeals to clearly establish at that time that police theft in the course of executing a search warrant violates the Constitution.

Thus, the anti-precedent transforms careful consideration of whether a state actor may be entitled to qualified immunity into a rubber stamp of absolute impunity—for a good, long while, if not in perpetuity. For instance, take the constitutional right "not clearly established" in *Pearson* itself, "consent-once-removed." *Pearson*, 555 U.S. at 244-45. Ten years after the *Pearson* Court's decision, the doctrine appears

still not clearly established, at least in certain circuits. The Eleventh Circuit has commented that it has not

> addressed the 'consent-once-removed' doctrine after the Supreme Court's 2009 decision in *Pearson*. Therefore, *the doctrine is no more settled today than it was in 2009*. Thus, if the Deputies were entitled to rely upon the doctrine in *Pearson*, they also were entitled to rely upon it here.

Fish v. Brown, 838 F.3d 1153, 1165 (11th Cir. 2016) (emphasis added). Whether the issue is consent-once-removed in the Eleventh Circuit or police theft in the Ninth, the void of clearly established constitutional rights ironically ensures that these rights, if they exist, will linger as not clearly established.

To resolve this paradox, the Ninth Circuit should require courts to consider the first step at some point in the deliberative process. Where a court permissibly determines that it "will best facilitate the fair and efficient disposition" of a case by initially considering whether the alleged constitutional violation is "clearly established," the court should then be required to determine whether in fact the constitutional right claimed by the plaintiff exists, for its prospective application. In this way, qualified immunity will be granted to a government employee the first time a court deems a right "not clearly established," but only the first time.

It will ultimately conserve judicial resources—and salvage judicial reputation—to settle this question definitively, now.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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Dated: May 13, 2019

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CERTIFICATE OF SERVICE

I certify that this document has been filed with the clerk of the court and served by CM/ECF on May 13, 2019, upon all counsel of record. I further certify that all participants in the case are registered CM/ECF users and will be served through the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

with type-volume limitation, typeface requirements,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,959 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it uses Equity Text B 14-point type face throughout, and Equity Text B is a proportionally spaced typeface that includes serifs.

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