IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICAH JESSOP; BRITTAN ASHJIAN, *Plaintiffs–Appellants*, v. CITY OF FRESNO, et al., *Defendants–Appellees*.	9th Cir. No. 17-16756 On Appeal from the United States District Court for the Eastern District of California E.D. Cal. No. 1:15-cv-316

Motion of Restore the Fourth, Inc. & Americans for Forfeiture Reform Under 9th Circuit Rule 29-2 for Leave to File an *Amici Curiae* Brief in Support of Plaintiffs-Appellants' Petition for Rehearing En Banc

On March 20, 2019, a panel of this Court issued a precedential decision in the above-captioned case. The panel concluded it is not "clearly established … that officers violate the Fourth or Fourteenth Amendment when they steal property that is seized pursuant to a warrant." *Jessop v. City of Fresno*, 918 F.3d 1031, 1033–34 (9th Cir. 2019).

On May 3, 2019, Appellants petitioned for rehearing en banc.

Movants Restore the Fourth, Inc. and Americans for Forfeiture Reform now seek this Court's leave under Ninth Circuit Rule 29-2 to file a joint amici brief in support of Appellants' en banc rehearing petition. Attached to this motion is the proposed amici brief. Movants also ask the Court to grant blanket permission for the filing of *amicus curiae* briefs on the merits should the Court grant rehearing in this case.

Identities of the Proposed Amici

The proposed amici are two national civil-liberties organizations: Restore the Fourth, Inc. and Americans for Forfeiture Reform.

Restore the Fourth, Inc. is a non-partisan nonprofit dedicated to robust enforcement of the Fourth Amendment. Restore the Fourth oversees a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. Restore the Fourth also files amicus briefs in significant Fourth Amendment cases. *See, e.g.,* Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Plaintiff-Appellee Araceli Rodriguez, *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018) (No. 15-16410).

Americans for Forfeiture Reform ("AFR") is a non-partisan nonprofit dedicated to the time-honored rule that "[f]orfeitures are not favored" in the law. *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939). AFR regularly files amicus briefs in forfeiture-related and Bill of Rights cases. *See, e.g.,* Brief of *Amicus Curiae* AFR in Support of Petitioner, *Luis v. United States*, 136 S. Ct. 1083 (2016) (No. 14-419); Brief of *Amicus Curiae* AFR in Support of Claimant-Appellee Straughn Gorman, *United States v. Gorman*, 859 F.3d 706 (9th Cir. 2017) (Nos. 15-16660, 15-17103); Brief of *Amicus Curiae* AFR in Support of Appellants, *United States v. $28,000*, 802 F.3d 1100 (9th Cir. 2015) (No. 13-55266).

Interest of the Proposed Amici

Restore the Fourth, Inc. and Americans for Forfeiture Reform (together, "Amici") are interested in *Jessop* because of the panel's qualified-immunity analysis, which in essence grants the police a constitutional license-to-steal. The panel decision thus "shrink[s] the realm of guaranteed privacy" under the Fourth Amendment, *Kyllo v. United States*, 533 U.S. 27, 34 (2001), and "leave[s] room for the play and action of purely personal and arbitrary power," which contravenes due process. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The Amici believe these realities merit rehearing—especially insofar as they put every person's rights "in the hands of every petty officer." *Boyd v. United States*, 116 U.S. 616, 625 (1886).

Reasons to Allow the Proposed Amici Brief

The Amici "are entities with particular expertise" and their proposed brief collects authorities "that merit judicial notice." *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.). In particular, both Restore the Fourth[1] and AFR[2] have an established record of helping courts

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[1] *See, e.g.*, Kim Janssen, *Chief Justice of U.S. Supreme Court Cites 'Ferris Bueller's Day Off' During Oral Argument*, CHICAGO TRIB., Jan. 10, 2018, http://trib.in/2nEg1yo (detailing the oral-argument influence of Restore the Fourth's amicus brief in *Collins v. Virginia*, 138 S. Ct. 1663 (2018)—a case about the automobile exception to the Fourth Amendment).

[2] *See, e.g.*, Oral Argument at 46:48, *Briles v. 2013 GMC Terrain*, 907 N.W.2d 628 (Minn. 2018) (Lillehaug, J.) (citing AFR amicus brief while questioning counsel), *available at* https://bit.ly/2SbJXiV; Oral Argument Tr. at 51, *Luis v. United States*, 136 S. Ct. 1083 (2016) (Ginsburg, J.) (same), *available at* https://bit.ly/2z5NdqL; Oral Argument at 39:08, *United States*

analyze questions of government power and constitutional rights. Their proposed brief seeks to do the same here in detailing the original meaning of the Fourth Amendment and due process. The Amici thus respectfully submit that the information in their proposed brief "will help the [C]ourt toward [the] right answers" in this case. *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999).

Request for Blanket Allowance of Merits En Banc Amicus Briefs

As required by Ninth Circuit Rule 29-3, the Amici "endeavored to obtain the consent of all parties to the filing" of their proposed amici brief. Appellants Micah Jessop and Brittan Ashjian consented; Appellees City of Fresno, Derik Kumagai, Curt Chastain, and Tomas Cantu did not consent. The Amici therefore submit this leave-to-file motion.

At the same time, should the Court grant en banc review in this case, the Amici respectfully seek to avoid the time and expense of preparing a second leave-to-file motion. *See* 9th Cir. Rule 29-2(a) ("An amicus curiae may be permitted to file a brief … when the Court has granted rehearing."). The Amici anticipate that Appellees will continue to oppose amicus briefs even if en banc review is granted, making consent-based filing impossible. There is no good reason, in turn, for the Court to put itself (or the Amici) through a second round of Rule 29-2 leave-to-file motions.

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v. $28,000, 802 F.3d 1100 (9th Cir. 2015) (No. 13-55266) (Hurwitz, J.) (same), *available at* https://youtu.be/907ne2CCGD4?t=39m8s.

The better approach is for the Court to grant blanket permission to file. This is what the Second Circuit did just a few years ago in a case that also raised major Fourth Amendment issues. *See United States v. Ganias*, 791 F.3d 290, 290 (2d Cir. 2015) (granting en banc review and "invit[ing] amicus curiae briefs"). This approach conserves the resources of the Court and potential amici. It also reaffirms the basic tenet that "[i]nformation, speech, and truth do not hurt; they only shed light." *Warren v. Comm'r*, 282 F.3d 1119, 1120 (9th Cir. 2002) (Reinhardt, J., concurring).

Conclusion

Based on the foregoing points, the Court should allow the filing of the attached Amici brief in support of rehearing and, if en banc review is granted, provide blanket permission to file amicus briefs.

Respectfully submitted,

Dated: May 13, 2019

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CERTIFICATE OF COMPLIANCE

Counsel certifies under Fed. R. App. P. 32(g) that the foregoing motion meets the formatting and type-volume requirements set under Fed. R. App. P. 27(d) and Fed. R. App. P. 32(a). The motion is printed in 14-point, proportionately-spaced typeface utilizing Microsoft Word 2010 and contains **1,028 words**, including headings, footnotes, and quotations, and excluding all items identified under Fed. R. App. P. 32(f).

Dated: May 13, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2019, I electronically filed the foregoing motion with the Clerk of Court using the CM/ECF System, which will send notice of such filing to counsel for all parties to this case. I further certify that counsel for all parties to this case are registered as ECF Filers and that they will be served by the CM/ECF system.

Dated: May 13, 2019

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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. 1:15-cv-316-DAD-SAB

BRIEF OF *AMICI CURIAE* RESTORE THE FOURTH, INC. & AMERICANS FOR FORFEITURE REFORM SUPPORTING APPELLANTS' PETITION FOR REHEARING EN BANC

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Corporate Disclosure Statement

In accordance with the requirements of Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that *amici curiae* Restore the Fourth, Inc. and Americans for Forfeiture Reform are nonprofit organizations that have no parent corporation and no shareholders who are subject to disclosure.

Respectfully submitted,

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Amici Identity, Interest, & Authority to File

A. Identity of the Amici

Restore the Fourth, Inc. ("Restore the Fourth") is a non-partisan nonprofit civil liberties organization dedicated to robust enforcement of the Fourth Amendment. Restore the Fourth oversees a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. Restore the Fourth also files amicus briefs in significant Fourth Amendment cases. *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Plaintiff-Appellee Araceli Rodriguez, *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018) (No. 15-16410).

Americans for Forfeiture Reform ("AFR") is a non-partisan nonprofit civic group. AFR champions the time-honored judicial rule that "[f]orfeitures are not favored" in the law. *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939). AFR advances this mission by filing amicus briefs in significant forfeiture-related and Bill of Rights cases. *See, e.g.*, Brief of *Amicus Curiae* Americans for Forfeiture Reform in Support of Petitioner, *Luis v. United States*, 136 S. Ct. 1083 (2016) (No. 14-419); Brief of *Amicus Curiae* Americans for Forfeiture Reform in Support of Claimant-Appellee Straughn Gorman, *United States v. Gorman*, 859 F.3d 706 (9th Cir. 2017) (No. 15-16660).

B. Interest of the Amici

The panel decision in *Jessop* concludes that police officers are entitled to qualified immunity "when they steal property that is seized pursuant to a warrant." 918 F.3d 1031, 1034 (9th Cir. 2019). The Amici are interested in this holding because it "shrink[s] the realm of guaranteed privacy" under the Fourth Amendment, *Kyllo v. United States*, 533 U.S. 27, 34 (2001), and "leave[s] room for the play and action of purely personal and arbitrary power," which abridges due process. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The Amici believe these realities merit rehearing insofar as they ultimately place every person's rights "in the hands of every petty officer." *Boyd v. United States*, 116 U.S. 616, 625 (1886).

C. Authority of the Amici to File

The Amici file this brief in accordance with Federal Rule of Appellate Procedure 29(b)(2) and Ninth Circuit Rule 29-2(a). Both of these rules authorize—with court permission—the filing of amicus briefs in support of petitions for rehearing en banc.

The Amici also affirm under Fed. R. App. P. 29(a)(4)(E) that no party, nor counsel for any party, in this case: (1) wrote this amicus brief in part or in whole; or (2) contributed money meant to fund the preparation or submission of this brief. Only the Amici, including their members and counsel, have contributed money to fund the preparation and submission of this brief.

Argument

If there is any cardinal principle in our nation, it is that all government officers "from the highest to the lowest, are creatures of the law, and are bound to obey it. "*United States v. Lee*, 106 U.S. 196, 220 (1882). "No officer of the law may set that law at defiance with impunity." *Id.* Yet, that is just what the panel did here. The panel determined there is no "clearly established Fourth or Fourteenth Amendment right to be free from [police] theft of property seized pursuant to a warrant." *Jessop v. City of Fresno,* 918 F.3d 1031, 1037 (9th Cir. 2019). Because that conclusion overlooks—and stands in defiance of—the original meaning of the Fourth Amendment and due process, the panel decision merits en banc review.

I. En banc review should be granted to reaffirm the original meaning of the Fourth Amendment.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In concluding that police theft is not a clearly-established violation of this guarantee, the panel cites the "absence of any cases of controlling authority or a consensus of cases of persuasive authority." *Jessop*, 918 F.3d at 1036. The panel thus assumes that clearly-established Fourth Amendment law is limited to modern precedents. It is not. As the Supreme Court has made clear time and again, Fourth Amendment analysis must also account for the original meaning of this provision.

Indeed, nearly a century ago, the Supreme Court affirmed that the Fourth Amendment "is to be construed in the light of what was deemed an unreasonable search and seizure **when it was adopted**." *Carroll v. United States*, 267 U.S. 132, 149 (1925) (bold added). And the Court has reaffirmed this point in recent years through decisions expressly seeking to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). The Court has, for example, renewed "the common-law trespassory test" for when police conduct will trigger Fourth Amendment review. *United States v. Jones*, 565 U.S. 400, 409 (2012); *id.* at 410 ("[W]e apply … an 18th-century guarantee against unreasonable searches ….").

The importance of the Fourth Amendment's original meaning cannot be overstated. As Justice Frankfurter explains, the Fourth Amendment's words "are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to the words." *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). The "makers of our Constitution" conferred "as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *United States v. Olmstead*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). "One cannot [then] wrench 'unreasonable searches [and seizures]' from the … historic content of the Fourth Amendment." *Rabinowitz*, 339 U.S. at 70 (Frankfurter, J., dissenting).

Now, even a cursory review of the Fourth Amendment's history reveals a clearly-established hostility to arbitrary seizures—which, by definition, includes police theft. The Fourth Amendment's immediate object was "to prohibit the general warrants and writs of assistance that English judges had employed against the colonists." *Virginia v. Moore*, 553 U.S. 164, 168–69 (2008). British officials used these devices to assume "blanket authority" over colonial property, spurring James Otis to denounce the resulting seizures as "the worst instrument of arbitrary power." *Stanford v. Texas*, 379 U.S. 476, 481 (1965). According to John Adams, Otis's speech was "the first scene of the first act of opposition to the arbitrary claims of Great Britain." 10 WORKS OF JOHN ADAMS 248 (C. Adams ed. 1856).

Based on this history, it is clearly established that the Fourth Amendment forbids seizures that the Framers' "struggles against arbitrary power … for more than twenty years would have been too deeply engraved in their memories to have allowed them to approve." *Boyd v. United States*, 116 U.S. 616, 630 (1886). The *Jessop* panel decision, however, contains not a word of this history. *See* 918 F.3d at 1034–36. Moreover, at oral argument, one panel member dismissed this history altogether. *See Jessop* Oral Argument at 2:58 (Smith, M., J.), https://youtu.be/J6eJFrd1tfo?t=178 ("As fascinating as James Otis and all those good folks were … I didn't find any[] [case] that suggests that the Fourth Amendment ever contemplated the factual situation [that] we're talking about here.").

The Supreme Court, by contrast, has mandated that courts must "begin with history …. to determine the norms that the Fourth Amendment was meant to preserve." *Virginia*, 553 U.S. at 168. The alternative is to impair that "degree of protection" the Amendment provides "at a minimum." *Jones*, 565 U.S. at 410. Of course, in recent years, the Court has reiterated that close-fitting precedent is needed before lower courts may impose Fourth Amendment liability for split-second, life-and-death police decisions. *See, e.g.*, *White v. Pauly*, 137 S. Ct. 548, 549, 552 (2017) (per curiam). But the Court has never extended this rule to misconduct like premeditated murder or theft that plainly abridges the Fourth Amendment's original meaning: "to secure the privacies of life against arbitrary power." *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quotation marks omitted). For this reason, *Jessop* warrants en banc rehearing.

II. En banc review should be granted to reaffirm the original meaning of due process.

The Fourteenth Amendment guarantees that state and local governments may not take property "without due process of law." In concluding that police theft is not a clearly-established violation of this guarantee, the panel mirrors its Fourth Amendment analysis. *See Jessop*, 918 F.3d at 1036. Once again, the panel assumes clearly-established due-process law is limited to modern precedents. The panel thus again fails to recognize how original meaning broadens due process, no less than the Fourth Amendment.

The original meaning of due process is rooted in Magna Carta. In particular, Magna Carta provided that no free person could be deprived of life, liberty, or property except "by the law of the land." *Twining v. New Jersey*, 211 U.S. 78, 100 (1908). This provision led founding era legal scholar William Blackstone to observe that "[s]o great … is the regard of [British] law for private property, that [the law] will not authorize the least violation of it." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *135 (1st ed. 1765). To this end, British statutes forbade the King from "dispos[ing] of the lands or goods of any subjects of this kingdom" in any "arbitrary way whatsoever." *Id.* at *138. Such imperial appropriation of property instead had "to be tried and determined in the ordinary courts of justice, and by *course of law*." *Id.* (italics in original).

It has then been clearly-established law since Magna Carta in 1215 that due process forbids government theft—i.e., "that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land." *Id.* at 134. Early Supreme Court decisions cement this principle, emphasizing "the words from Magna Charta … were intended to secure the individual from the arbitrary exercise of the powers of government." *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819). Hence, as the Court has explained in more recent times, "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citation omitted).

Government conduct is therefore bound as much by the original meaning of due process as by later cases interpreting this guarantee. "[N]o change in ancient procedure can be made which disregards those fundamental principles … which have relation to process of law and protect the citizen … against the arbitrary action of government." *Twining*, 211 U.S. at 101; *see also Sessions v. Dimaya,* 138 S. Ct. 1204, 1224–25 (2018) (Gorsuch, J., concurring) (drawing on the original meaning of due process). A good illustration is *Loan Association v. Topeka*, 87 U.S. 655 (1875). At issue was a state law that allowed local governments "to take the property of the citizen under the guise of taxation … and [then] use it in aid of the enterprises of others which are not of a public character." *Id.* at 659.

The Supreme Court found the law was invalid. *See id.* at 663–64. The Court explained that there are "[i]mplied reservations of individual rights, without which the social compact could not exist." *Id.* at 663. These rights meant that "[n]o court … would hesitate to declare void a statute" that decreed "the homestead now owned by A. should no longer be his, but should henceforth be the property of B." *Id.* As such, the Court was obliged to conclude that where the government was demanding "the property of the citizen" in order to give it to "favored individuals to aid private enterprises and build up private fortunes," this was unconstitutional "robbery." *Id.* at 664. And this remained true even though the government's conduct was "done under the form of law and … called taxation." *Id.*

The *Jessop* panel decision overlooks this possibility. In its rush to rely on a seeming lack of controlling precedent, the panel neglects "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *In re Kemmler*, 136 U.S. 436, 448–49 (1890). These principles bar "any arbitrary deprivation of … property." *Id.* These principles then clearly establish that police theft violates due process, as does any other government-claimed "power of destroying at pleasure without the direction of laws." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *133. *Jessop* merits en banc review to vindicate this reality.

Conclusion

The Court should grant en banc review to uphold the original meaning of the Fourth Amendment and due process.

Respectfully submitted,

Dated: May 13, 2019

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Certificate of Compliance

The undersigned counsel certifies under Fed. R. App. P. 32(g) that the foregoing amici brief in support of en banc rehearing meets the formatting and type-volume requirements established by Fed. R. App. P. 32(a) and 9th Cir. R. 29-2(c)(2).

This amici brief is printed in 14-point, proportionately-spaced typeface using Microsoft Word 2010 and contains **2,100 words**, including headings, footnotes, and quotations, and excluding all items identified under Fed. R. App. P. 32(f).

Dated: May 13, 2019

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Certificate of Service

The undersigned counsel certifies that on May 13, 2019, he electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. The undersigned counsel further certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 13, 2019

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