IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERSHEL OSCAR ROSENBAUM; C.R.; J.R., Plaintiffs-Appellants, vs. WASHOE COUNTY; DENNIS BALAAM, in his official capacity; JAMES FORBUS, in his individual capacity, Defendants-Appellees.	No. 10-15637 U.S. District Court No. 3:08-cv-00418-ECR-RAM

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

On Appeal from the United States District Court
for the Northern District of Nevada

The Honorable Edward C. Reed, Senior District Judge

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Pursuant to Federal Rule of Appellate Procedure 29, California State Association of Counties ("CSAC") and the League of California Cities (the "League") respectfully move this Court for leave to file the brief submitted herewith, as amicus curiae in support of Petitioners-Appellees Washoe County, et al.'s Petition for Rehearing and for Rehearing En Banc.[1]

As explained more fully in the brief itself, CSAC and the League are interested in the present case because they represent over 500 local governmental entities in California that employ law enforcement agencies and officers. The opinion of the panel, if allowed to stand, could place a significant burden on the dwindling resources of those entities by not only increasing their liability but also by forcing those entities to scour their limited records to defend themselves. Public safety could also suffer as more evidence may be suppressed. Finally, arrestees will likely face greater burdens as well because local law enforcement agencies will probably reduce prosecutorial discretion and charge more crimes in response to the panel's decision.

The brief submitted by CSAC and the League does not repeat the arguments of Petitioners-Appellees. Instead, the brief expands upon the intra-circuit and inter-circuit conflicts identified by Petitioners-Appellees. It also discusses in more detail the bedrock principles of Fourth Amendment jurisprudence violated by the panel's decision. Finally, the brief focuses on the negative impact of the decision on local governments like the ones represented by CSAC and the League.

The attorneys who have drafted the brief – including the authoring attorney, Danny Chou – are familiar with the issues presented in this case. They have

[1] Petitioners-Appellees have consented to the filing of this brief. Amici curiae have asked Respondents-Appellants for their consent but have received no response.

reviewed the relevant materials, including the Petition for Rehearing and for Rehearing En Banc, the District Court order, and the panel's opinion. They have also discussed the issue with counsel for Petitioners-Appellees.

Accordingly, CSAC and the League respectfully moves this Court for leave to file the brief of amicus curiae submitted herewith.

Dated: October 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to FRAP 25(d), I certify that I am an employee of the Office of the San Francisco City Attorney, over the age of 21 years and not a party or nor interested in the within action. I certify that on this date a true and correct copy of the foregoing Motion for Leave to File Brief of Amici Curiae in Support of Petition for Rehearing or Rehearing *En Banc* was electronically mailed to the following:

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Dated this 11th day of October, 2011, at San Francisco, California.

/s/
Martina Hassett

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INTRODUCTION AND INTEREST OF AMICI CURIAE[1]

The panel in this case held that a police officer violates the Fourth Amendment if he arrests a person based on probable cause for a crime that was "so remote and obscure as to not be within any reasonable officer's arsenal of criminal offenses." Slip opn. at 11390. As appellees explained in their petition, the panel's ruling directly conflicts with this Court's decision in *Edgerly v. City and County of San Francisco*, 599 F.3d 946 (9th Cir. 2010) and the United States Supreme Court's decision in *Devenpeck v. Alford*, 543 U.S. 146 (2004). In addition, the ruling conflicts with many other decisions from this and other circuits. These conflicts have arisen because the panel's ruling violates basic principles of Fourth Amendment jurisprudence. Specifically, the ruling improperly: (1) makes the subjective intent of the arresting officer the basis for invalidating an arrest; (2) makes the protections of the Fourth Amendment dependent on the variable practices of different local jurisdictions; and (3) creates a rule that is difficult, if not impossible, to administer.

Amicus Curiae California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

Amicus Curiae League of California Cities (the "League") is an association of 469 California cities dedicated to protecting and restoring local control to

[1] Counsel for amici curiae authored the brief in whole.

provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

Amici curiae are concerned about the burden that the ruling will place on the many governmental entities that they represent. The panel ruled that local law enforcement officers who do not charge the correct offense in an arrest report cannot rely on the existence of probable cause for another offense, if the uncharged offense is too "remote and obscure." Slip opn. at 11390. As a result, local governments will have to scour their records and court records – neither of which may be computerized – in order to demonstrate that an uncharged offense has been charged or prosecuted with sufficient vigor. For many, if not all, local law enforcement agencies – which have limited and dwindling resources – this is not feasible. Thus, these agencies and their officers will face increased liability. Public safety will also suffer because evidence recovered in a search incident to the arrest will be suppressed. And faced with the specter of increased liability, local law enforcement agencies will have a strong incentive to charge its arrestees with every conceivable crime. For these reasons, amici curiae respectfully request that this Court grant rehearing or rehearing en banc.

ARGUMENT

I.

THE PANEL'S RULING CONFLICTS WITH MANY DECISIONS FROM THIS AND OTHER CIRCUITS.

Amici curiae agree with appellees that the panel's ruling conflicts with this Court's decision in *Edgerly* and the Supreme Court's decision in *Devenpeck*. Both

of those decisions make it clear that *any* criminal offense – no matter how remote or obscure – may support a finding of probable cause. *See Edgerly*, 599 F.3d at 954 ("probable cause supports an arrest so long as the arresting officers had probable cause to arrest the suspect for *any* criminal offense . . . ." (italics added)); *Devenpeck*, 543 U.S. at 594 ("Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest."). This is not surprising. In *Virginia v. Moore*, 553 U.S. 164, 172 (2008), the Supreme Court stated that "[w]e thought it obvious that the Fourth Amendment's meaning *did not change with local law enforcement practices* . . . ." (Italics added). Yet, the panel's ruling – that "remote and obscure" offenses cannot support a finding of probable cause – makes local law enforcement practices the touchstone for determining whether a Fourth Amendment violation has occurred. Slip opn., at 11390. As a result, the ruling conflicts with many other decisions from this and other circuits.

For example, contrary to the panel's ruling, this Court in *Benas v. Baca*, 159 Fed.Appx. 762, 765 (9th Cir. 2005) held that "[a]n arrest is lawful so long as there is probable cause to arrest the suspect for *any* offense on the basis of facts known to the arresting officers." (Italics in original.) The Fourth, Seventh, and Tenth Circuits have adopted the same rule. *See U.S. v. McNeill*, 484 F.3d 301, 311 (4th Cir. 2007) ("the arrest is nonetheless valid if, based on the facts known to the officer, objective probable cause existed as to *any* crime" (italics in original)); *Duncan v. Fapso*, 216 Fed.Appx. 588, 590 (7th Cir. 2007) (holding that arrest is lawful "so long as [the officer] had probable cause to arrest for *any* offense" (italics in original)); *U.S. v. Turner*, 553 F.3d 1337, 1344 (10th Cir. 2009) ("As *Devenpeck* made clear, the probable cause inquiry is not restricted to a particular offense, but rather requires merely that officers had reason to believe that a crime – *any crime* – occurred." (italics added.)

Indeed, the panel's ruling appears to directly conflict with *Duncan*. In *Duncan*, the Seventh Circuit upheld an arrest because the officers had probable cause to arrest the plaintiff for violating a statute that prohibited "trespassing on the privately owned railway right-of-way" – a criminal offense arguably as remote and obscure as the offense at issue in this case. *Duncan*, 216 Fed.Appx. at 590.

Because the panel's ruling creates many intra-circuit and inter-circuit conflicts, rehearing or rehearing en banc should be granted.

II.
THE PANEL'S RULING VIOLATES FUNDAMENTAL FOURTH AMENDMENT PRINCIPLES.

Over the years, certain bedrock principles of Fourth Amendment jurisprudence have developed. For example, the protections of the Fourth Amendment should be governed by objective standards and should not depend on an officer's subjective state of mind. *Devenpeck*, 543 U.S. at 153. Those protections also should not depend on the locale or the times. *Whren v. United States*, 517 U.S. 806, 815 (1996). And those protections should be "readily administrable." *Atwater v. Lago Vista*, 532 U.S. 318, 347 (2001). Because the panel's ruling violates every one of these basic Fourth Amendment principles, rehearing or rehearing en banc should be granted.

A. The Panel's Ruling Improperly Makes The Subjective Intent Of The Arresting Officer The Basis For Invalidating An Arrest.

Under the Fourth Amendment, the subjective intent of the arresting officer is "irrelevant." *Devenpeck*, 543 U.S. at 153. This is because "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."

Horton v. California, 496 U.S. 128, 138 (1990). Ostensibly, the panel's ruling establishes an objective standard: an arrest is unlawful when "no reasonable officer, no matter how experienced, would have known of" the crime. Slip. opn., at 11390. But as the panel acknowledges, its objective standard aims to root out arrests made for the wrong reason. *See* slip opn., at 11390 (absent the new rule, "officers could arrest without a warrant under virtually any set of facts and later search the legal archives for a statute that might arguably justify it"). In doing so, the panel's standard makes the subjective intent of the arresting officer the basis for invalidating an arrest. *See Devenpeck*, 543 U.S. at 594 (recognizing that rules "aimed at rooting out the subjective vice of arrests made for the wrong reason" through "objective means" still make the officer's state of mind the basis for invalidating an arrest). And the "[s]ubjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest." *Id*. at 154-5. The panel's ruling violates this bedrock principle of Fourth Amendment.

B. Under The Panel's Ruling, The Validity Of An Arrest Will Vary From Place To Place And Time To Time.

The Fourth Amendment does not provide "arbitrarily variable protection." *Devenpeck*, 543 U.S. at 146. But the panel's ruling ignores this by making the protections of the Fourth Amendment "vary from place to place and from time to time." *Whren*, 517 U.S. at 815. This is because the obscurity of a criminal offense may depend on where and when the offense was committed. For example, some agrarian offenses – like polling a horse in violation of California Penal Code § 597g – rarely, if ever, occur in urban areas. Those offenses may be remote and obscure in San Francisco but not in Modesto or Stanislaus County. Likewise, law

enforcement practices may change over time. A commonly enforced criminal statute today may become disfavored in the future because it is committed less often or because another related statute becomes more favored by law enforcement.[2] On the other hand, a rarely enforced criminal statute today may become more popular in the future as more officers learn about it. Indeed, the panel acknowledged this very possibility when it observed that "this case may well have surfaced the offense [that it had just found to be remote and obscure] for future officers." Slip opn., at 11391, n.2. Because the Fourth Amendment should not "produce such haphazard results," rehearing or rehearing en banc should be granted. *Devenpeck*, 543 U.S. at 595.

C. The Panel's Ruling Creates A Vague And Unpredictable Rule That Is Extremely Difficult To Administer.

When applying the Fourth Amendment, courts have an "essential interest in readily administrable rules." *Atwater*, 532 U.S. at 347. The new rule adopted by the panel, however, leaves a host of unanswered questions. As a result, determining whether a crime falls "reasonably within the arsenal of crimes that officers enforce in the state" becomes very complicated and results in an administrative nightmare for courts and law enforcement. Slip opn., at 11391.

To implement the panel's new rule, both courts and law enforcement must resolve many difficult questions. How often does the crime have to be charged or prosecuted before it becomes part of the arsenal of crimes that officers enforce? How much time must lapse after the last time the crime was charged or prosecuted

[2] Charging decisions are within the sole discretion of local prosecutors. And those decisions are typically guided by policies established by elected officials who head the prosecutor's office. As a result, electoral changes often lead to changes in charging decisions. For example, a newly elected district attorney may decide not to charge or prosecute certain offenses because he or she has different priorities.

before the crime falls outside of that arsenal? When do newly created crimes become part of or fall outside of an officer's arsenal of criminal offenses? What evidence is sufficient to show that a crime falls within that arsenal? To establish that a crime falls within its officers' arsenal, do local law enforcement agencies have to show that the crime has been charged or prosecuted in the city, county, or state? Does a crime fall within the arsenal if it has been used as the basis for arrests but never charged or prosecuted?

These unanswered questions reveal a constitutional regime that is "no less vague and unpredictable than the" ones the United States Supreme Court has previously "rejected." *Moore*, 553 U.S. at 175. And the consequences of this new regime are just as grave. Cash-strapped local governments will face increased liability, and public safety will suffer because more evidence will be suppressed. Rehearing or rehearing en banc should therefore be granted for this reason as well.

III.
THE PANEL'S RULING PLACES AN UNTENABLE BURDEN ON LOCAL LAW ENFORCEMENT AGENCIES AND ENCOURAGES THOSE AGENCIES TO OVERCHARGE ARRESTEES.

By establishing a vague and unpredictable rule, the panel's ruling places a significant burden on the dwindling resources of local law enforcement agencies. To maximize the arsenal of crimes that their officers may enforce and minimize the risk of liability, local law enforcement agencies must maintain comprehensive and readily accessible records of crimes that are charged or prosecuted. But for many local law enforcement agencies, those records may not be computerized. And for those agencies with computerized records, the computerized records may only go back a limited time. Thus, determining whether a crime has been charged or prosecuted may often be a herculean and expensive task for most, if not all, local

law enforcement agencies. To compound these problems, law enforcement agencies in different jurisdictions often cannot access each other's records because their computer systems are not compatible. As a result, proving that a crime falls within the reasonable officer's arsenal may not only be difficult and expensive for many local law enforcement agencies, it may be impossible.[3]

The panel's ruling also encourages excessive charging and prosecution. Rather than allow a crime to become stale and unusable, local law enforcement agencies will have a strong incentive to charge and prosecute an individual with as many crimes as conceivable. *See Devenpeck*, 543 U.S. at 595 (observing that rule limiting offenses subject to probable cause inquiry may encourage officers to "give every reason for which probable cause could conceivably exist"). This places a far greater burden on officers and prosecutors who must learn about and apply many more criminal statutes. And by eroding prosecutorial discretion, it also places a far greater burden on arrestees who will likely face more charges.

Nothing justifies the imposition of those burdens. There is no epidemic of post hoc justifications of arrests based on remote and obscure criminal offenses and "hence 'a dearth of horribles demanding redress.' " *Moore*, 553 U.S. at 175, *quoting Atwater*, 532 U.S. at 353.

CONCLUSION

For the reasons stated in this brief, amici curiae respectfully ask this Court to grant the petition for rehearing and accept the suggestion for rehearing en banc.

[3] Relying on appellate decisions does not solve these problems. Many minor offenses rarely become the subject of appellate rulings.

Dated: October 11, 2011

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 2532 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 11, 2011.

Respectfully submitted,

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AMENDED CERTIFICATE OF SERVICE

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