No. 17-______

In the Supreme Court of the United States

BRANDEN HUERTAS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can an individual "submit" to an assertion of police authority—and thus become seized within the meaning of this Court's Fourth Amendment precedents—by complying temporarily before fleeing?

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PETITION FOR A WRIT OF CERTIORARI

Branden Huertas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 864 F.3d 214. The opinion of the district court (App., *infra*, 16a-21a) is unreported but available at 2015 WL 1517403.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2017. On October 6, 2017, Justice Ginsburg extended the time to file a petition for a writ of certiorari to December 7, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

INTRODUCTION

This case presents an important question of Fourth Amendment law concerning a frequently recurring fact pattern: A police officer attempts to seize an individual by show of authority, the individual temporarily complies with the show of authority, but the individual fless soon after and is later apprehended and arrested.

According to this Court's cases, an individual is seized within the meaning of the Fourth Amendment when he submits to a police officer's assertion of authority. *Brendlin* v. *California*, 551 U.S. 249, 254-255 (2007); *California* v. *Hodari D.*, 499 U.S. 621, 625-626

(1991). The question here is whether an individual's temporary, pre-flight compliance with the officer's show of authority can be a "submission," rendering the pre-flight encounter a seizure. The question is immensely important because its answer dictates the point at which officers must have articulable suspicion of illegal activity to support the seizure (see *Florida* v. *Royer*, 460 U.S. 491, 497-498 (1983) (citing *Terry* v. *Ohio*, 392 U.S. 1, 32-33 (1968)) and thus very often dictates, as it did here, whether evidence discarded by the individual during his flight is admissible against him.

The facts here are prototypical of this fact pattern and thus cleanly present the question.

A police officer received an anonymous, uncorroborated tip that there was a man in the area with a weapon. Such tips do not provide the kind of articulable suspicion necessary to justify a seizure. See *Florida* v. *J.L.*, 529 U.S. 266, 271-272 (2000). Upon spotting petitioner several minutes later, the officer nevertheless attempted to detain him. Petitioner complied with the officer's conceded show of authority for somewhere between 30 and 60 seconds, remaining still and answering the officer's questions. But when the officer exited his car and began approaching petitioner, petitioner fled. In the course of his flight, petitioner discarded a weapon, which the police eventually recovered. Petitioner was later convicted of being a felon in possession of a firearm.

The Tenth Circuit, D.C. Circuit, and the Supreme Court of Arizona have considered facts materially identical to these and held that (1) temporary compliance with an officers' show of authority was a submission notwithstanding the subsequent flight, and (2) the evidence discarded during the suspect's flight therefore had to be suppressed as fruit of the illegal detention.

See *United States* v. *Hernandez*, 847 F.3d 1257 (10th Cir. 2017); *United States* v. *Brodie*, 742 F.3d 1058 (D.C. Cir. 2014); *State* v. *Rogers*, 924 P.2d 1027 (Ariz. 1996). The First Circuit came to the same conclusion in a case involving a subsequent struggle rather than flight. See *United States* v. *Camacho*, 661 F.3d 718 (1st Cir. 2011).

Joining the Third Circuit, the Second Circuit below expressly rejected the reasoning of these other courts, holding that a suspect who temporarily complies with a show of authority and then flees cannot have submitted within the meaning of the Fourth Amendment. In the Second Circuit, "a suspect must do more than halt temporarily" before fleeing. App., *infra*, 19a (quoting *United States* v. *Baldwin*, 496 F.3d 215, 218 (2d Cir. 2007)). The court of appeals affirmed the denial of petitioner's suppression motion on that ground.

This Court's review of the question presented is a matter of self-evident importance. It is not unusual for a suspect to comply initially with a police officer's assertion of authority before fleeing. And whether that initial period of compliance constitutes a Fourth Amendment seizure frequently dictates the admissibility of subsequently uncovered evidence. Because the issue is cleanly presented here, and because the Second Circuit's categorical answer to the question presented cannot be reconciled with this Court's precedents, further review is warranted.

STATEMENT

A. Factual background

At around eleven o'clock at night, Officer Thomas Lattanzio received a tip from an anonymous woman passing in a car that there was a man nearby with a firearm in a bag. App., *infra*, 2a, 17a. Although he was unable to corroborate or verify any of the details from the tip, Officer Lattanzio drove in his marked police

cruiser in search of the man. After a few minutes, the officer spotted petitioner standing on a corner a block away. *Ibid*. Petitioner was standing quietly on a well-lit street corner, holding a black bag and minding his business. D. Ct. Dkt. 44-1, at 2, 5. The officer turned, driving the wrong way down a one-way street toward petitioner. App., *infra*, 2a, 17a. He turned on his spotlight and shone it on petitioner, who was still and compliant as the officer approached. *Ibid.*

With his spotlight still shining on petitioner, Officer Lattanzio began calling out questions from his car window, including "What happened with the girl?" and "Did you have an argument or something like that?" App., *infra*, 2a, 17a. Petitioner stood still for 30 or 60 seconds while being interrogated. *Id.* at 2a-3a, 18a.[1]

Officer Lattanzio exited his vehicle and began to approach petitioner, but petitioner, fearing arrest, fled. App., *infra*, 2a-3a. Petitioner was later apprehended and arrested. App., *infra*, 18a. Police officers recovered a black bag containing a firearm, which petitioner had discarded in his flight from Officer Lattanzio. *Id.* at 3a, 18a.

B. Procedural background

Petitioner was charged with unlawful possession of a firearm in violation of 18 U.S.C. §§ 922 and 924. App., *infra*, 16a.

1. Petitioner moved to suppress the firearm as the fruit of an illegal seizure of his person. He argued,

[1] The parties disputed whether petitioner was walking and stopped or was standing on the sidewalk and remained there. App., *infra*, 4a n.2, 10a. That is not a distinction that makes a difference for purposes of the question presented. See *Brendlin*, 551 U.S. at 255 ("[A]n individual's submission to a show of governmental authority [can take] the form of passive acquiescence.").

among other things, that he had been seized when Officer Lattanzio, driving the wrong way down a one-way street late at night, had interrogated him under a spotlight on the sidewalk; that the unsubstantiated, anonymous tip was insufficient to justify the investigative detention; and that the recovery of the gun discarded in his subsequent flight was therefore the fruit of an illegal seizure of his person.

On the question whether petitioner was seized, the government offered two responses.

It argued principally that a seizure had occurred, but that Officer Lattanzio had sufficient suspicion to justify the detention. See App., *infra*, 20a n.1; Gov't Opp. to Suppression Mot. 13-19 (Dist. Ct. Dkt. 41) (Feb. 10, 2015) ("Suppression Opp.") (asserting that Officer Lattanzio "initiated an investigative stop based on reasonable suspicion").

The government argued as a fallback that Officer Lattanzio had only "attempted" to stop petitioner, and that "Officer Lattanzio['s] unsuccessful attempt to stop the defendant for questioning did not ripen into a 'seizure' of the defendant" because petitioner subsequently fled. Suppression Opp. 15-19. See also D. Ct. Dkt. 44-1, at 5 (Office Lattanzio affirming that he "attempt[ed] to detain the accused for a brief curbside discussion" but "[t]he accused ran away").[2]

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[2] The government's concession before the district court that Officer Lattanzio's conduct was at least an "attempted" seizure is unsurprising in light of cases like *United States* v. *Johnson*, 874 F.3d 571 (7th Cir. 2017) (en banc), which held that officers' shining a spotlight at night on the occupants of a parked car "implied that the occupants were not free to drive away." *Id.* at 574. The government nevertheless attempted to retract its concession on appeal. See Gov't C.A. Br. 13-21. The court of appeals expressly declined to reach the issue. App., *infra*, 3a.

2. The district court denied the motion to suppress. App., *infra*, 16a-21a. "In order 'to comply with an order to stop—and thus to become seized,'" the district court began, "a suspect must do more than halt temporarily; he must submit to police authority, for 'there is no seizure without actual submission.'" App., *infra*, 19a (quoting *United States* v. *Baldwin*, 496 F.3d 215, 218 (2d Cir. 2007)). Because a "brief stop and verbal exchange [do] not constitute 'submission' as it has been interpreted in [the Second] Circuit," and because a brief stop and verbal exchange is all that occurred here, "Mr. Huertas was not seized until he was arrested by police" after his flight. *Id.* at 19a-20a. The district court thus denied petitioner's motion to suppress on the ground that no seizure occurred before petitioner fled. The court accordingly declined to reach the question whether Officer Lattanzio had articulable suspicion to justify a seizure. *Id.* at 20a n.1.

Petitioner conditionally pled guilty, preserving his right to appeal the suppression ruling.

3. The court of appeals affirmed in a divided opinion. App., *infra*, 1a-15a.

a. The majority led off observing that "[t]he only question on appeal is whether Huertas was seized." App., *infra*, 3a. And because "[i]t is undisputed that Officer Lattanzio used no physical force, Huertas was seized only if he (1) 'submitted' (2) to an 'assertion of authority.'" *Ibid.* The majority concluded succinctly that "Huertas never 'submitted' to Officer Lattanzio and was therefore never 'seized' within the meaning of the Fourth Amendment." *Ibid.* It affirmed on that ground. *Id.* at 9a.

To reach that conclusion, the majority started with the truism that an "'evasion of police authority' is 'not submission.'" App., *infra*, 4a (quoting *Baldwin*, 496

F.3d at 219). Here, the majority concluded, the full course of petitioner's conduct—including his initial compliance with Officer Lattanzio's assertion of authority—constituted evasion. According to the majority's reasoning, initial compliance with a show of authority necessarily gives a suspect "a chance to quiet suspicion" and thereby avoid arrest. *Id*. at 5a. Initial compliance, when followed by flight, is therefore—and essentially always—a first step in "evading police authority." *Ibid*. Put the other way around, a suspect's compliance matures into submission only if the suspect "let[s] pass his opportunity to flee." *Id*. at 6a. Otherwise, he never submits at all.

Applying that framework here, the majority held that petitioner had not submitted to Officer Lattanzio's show of authority. The court did not find that petitioner answered Officer Lattanzio's questions as part of "a plan or design to flee." *Id.* at 8a. Rather, it held that petitioner's submission to Officer Lattanzio's interrogation on the sidewalk was evasive because stopping and answering questions necessarily "maximized his chance of avoiding arrest," regardless of his intent. *Id.* at 5a. It therefore was not a submission.

On its way to that conclusion, the majority recognized disagreement with the First and Tenth Circuits, which have suppressed evidence under similar circumstances. It acknowledged that the First Circuit has held that a suspect can submit to a show of authority by responding briefly to a police officer's questions despite subsequent noncompiance. App., *infra*, 7a (citing *United States* v. *Camacho*, 661 F.3d 718 (1st Cir. 2011)). But the majority expressed "doubt" as to the correctness of that decision and observed dismissively that "we are not bound by the First Circuit's holding." *Ibid*. The majority recognized that the Tenth Circuit likewise has reached a contrary conclusion (*id.*

at 7a n.3 (citing *United States* v. *Hernandez*, 847 F.3d 1257 (10th Cir. 2017) and *United States* v. *Morgan*, 936 F.2d 1561 (10th Cir. 1991))), but it similarly dismissed the Tenth Circuit's holdings, noting that "[o]ur circuit has explicitly rejected [the Tenth Circuit's] reasoning." *Ibid*. (citing *Baldwin*, 496 F.3d at 218-219).

The majority summed up by observing that the rule previously announced in *Baldwin* "is not fact-limited" and stands for the proposition that, "when a suspect remains out of reach [of the police] and takes flight when police move to lay hands on him," prior compliance with a show of authority is not submission, "[s]ubject to the specific circumstances of each case." App., *infra*, 9a.

b. Judge Pooler dissented. App., *infra*, 9a-15a. She would have found that "[a]ctions more substantial than momentary hesitation, including answering questions, should be considered strong signs of submission." *Id*. at 14a. Judge Pooler cautioned that because even "momentar[y] detention may constitute a seizure, we must be careful not to remove constitutional protections surrounding brief seizures even where suspects later flee." *Id*. at 15a. Judge Pooler further criticized "the view that answering questions to clear one's name counts as 'evasion.'" *Id*. at 12a. She recognized "[a]n important distinction * * * between initial, earnest submission followed by later flight," on the one hand, and "an entire course of conduct undertaken to ensure a getaway," on the other hand. *Id*. at 11a. According to the majority's counterintuitive reasoning, "stopping to speak with the police, even at length, is unlikely to constitute a seizure because it instead will constitute evasion." *Id*. at 12a.

Judge Pooler concluded that the majority had "join[ed] the wrong side of a deepening split between

the circuits over this important issue." App., *infra*, 15a. Accord *id.* at 13a. And she warned that the majority opinion "further complicates and impairs the constitutional protections afforded to persons facing police questioning, and will increase uncertainty about protections applicable during the course of investigations." *Id.* at 15a. For these reasons, Judge Pooler voted to reverse.

REASONS FOR GRANTING THE PETITION

This case presents a recurring question on which there is a deep and acknowledged conflict. The question presented is tremendously important, arising in countless cases across the country each year. Because this is a suitable vehicle for resolving the question, and because the Second Circuit is on the wrong side of the split, further review is in order.

A. There is an acknowledged conflict over the question presented

The courts of appeals are in open conflict over whether temporary compliance with a police officer's show of authority, followed by flight, can constitute a submission within the meaning of this Court's Fourth Amendment precedents. In the Second and Third Circuits, it cannot. But in the Tenth, D.C., and First Circuits and the state courts of Arizona, it can.

The conflict is widely recognized by courts and commentators. See pp. 16-17, *infra*. It also is deeply entrenched; the courts on either side of the split have acknowledged the contrary reasoning of their peers and have had multiple opportunities to reconsider their positions, but the conflict has persisted. Thus, only this Court can restore uniformity on this important question of Fourth Amendment law.

1. Numerous courts have held that temporary compliance followed by flight can be a submission

The **Tenth Circuit** has held that temporary compliance with a show of authority, even when followed by flight, *may* constitute a submission sufficient to trigger a Fourth Amendment seizure.

The seminal Tenth Circuit case is *United States* v. *Morgan*, 936 F.2d 1561 (10th Cir. 1991). There, officers told the defendant to "hold up." *Id*. at 1565. The defendant responded by engaging with the officers verbally before fleeing. *Ibid*. The Tenth Circuit recognized that "the initial attempted questioning by [the officer] and the subsequent exchange between [the officer and the suspect] was minimal." *Id*. at 1567. It nevertheless held that "Mr. Morgan was seized for purposes of the Fourth Amendment during the initial portion of the encounter" because he had, "at least momentarily, yielded to the Officer's apparent show of authority," despite later fleeing. *Ibid*. (emphasis omitted) (citing *California* v. *Hodari D.*, 499 U.S. 621, 626 (1991)). As the Tenth Circuit later elaborated, the "conclusion that Mr. Morgan briefly submitted to the officer's authority was based on his brief conversation with the officer" in response to the assertion of authority. *United States* v. *Salazar*, 609 F.3d 1059, 1068 (10th Cir. 2010). Accord *United States* v. *Mosley*, 743 F.3d 1317, 1326 (10th Cir. 2014) ("[Morgan] was * * * 'momentarily' seized when he responded to the officer's question." (quoting *Morgan*, 936 F.2d at 1567)).

More recently, the Tenth Circuit decided *United States* v. *Hernandez*, 847 F.3d 1257 (10th Cir. 2017), which involved facts indistinguishable from those here. The defendant in that case was a pedestrian on the sidewalk; the police were in a cruiser, shouting ques-

tions out of the car window; and the defendant initially answered the officers' questions before attempting to flee. *Id.* at 1260-1261. The court there concluded that a defendant who complies with an officer's assertion of authority and answers questions may be seized, later flight notwithstanding. *Id.* at 1263. The court thus affirmed the district court's suppression of the firearm as fruit of the initial, unlawful detention. *Id.* at 1261, 1270.

The **D.C. Circuit** has likewise held that temporary compliance followed by flight can amount to submission. In *United States* v. *Brodie*, 742 F.3d 1058 (D.C. Cir. 2014), that court considered a case in which the defendant complied with an order to place his hands on the officer's vehicle but very soon thereafter fled. The court rejected the government's argument that "the compliance was too 'momentary' to constitute submission." *Id.* at 1061. According to the D.C. Circuit, "the short duration of [the defendant's] submission means only that the seizure was brief, not that no seizure occurred." *Ibid.* Thus, "[l]ater acts of noncompliance do not negate a defendant's initial submission, so long as it was authentic." *Ibid.* The court thus reversed the denial of the defendant's motion to suppress, reasoning that the weapons and contraband discarded in the defendant's flight from the police were fruit of the unlawful detention. *Id.* at 1063-1064.

The district court's decision in *Flythe* v. *District of Columbia*, 4 F. Supp. 3d 216 (D.D.C. 2014), confirms the conflict between the D.C. Circuit, on the one hand, and the Second and Third Circuits, on the other. Prior to the D.C. Circuit's decision in *Brodie*, the *Flythe* court had relied upon *United States* v. *Baldwin*, 496 F.3d 215, 218-19 (2d Cir. 2007) and *United States* v. *Valentine*, 232 F.3d 350, 359 (3d Cir. 2000)—cases we address below—to conclude that "momentarily submit-

[ting] to a show of authority * * * d[oes] not render [an] encounter a seizure for purposes of the Fourth Amendment." *Flythe* v. *District of Columbia*, 994 F. Supp 2d. 50, 65 (D.D.C. 2013). But after the D.C. Circuit decided *Brodie*, the *Flythe* court changed its position: Whether the defendant "subsequently and ultimately fled" was "no longer dispositive [of the submission question] because, in light of *Brodie,* a momentary submission *is* enough to constitute a seizure." *Flythe*, 4 F. Supp. 3d at 220 (emphasis added).

In line with the Tenth and D.C. Circuits, the **First Circuit** also has held that a defendant may be seized even when submission is temporary. In *United States* v. *Camacho*, 661 F.3d 718 (1st Cir. 2011), the court held that the defendant "submitted to [the officer's] show of authority by responding to his questions." *Id.* at 726. Although the defendant later ceased complying and engaged in a struggle with the police officer, the court held that the defendant's temporary compliance with the officer's "initial questioning of [the defendant] constituted a seizure for purposes of the Fourth Amendment." *Id.* at 726. Like the Tenth Circuit in *Hernandez* and the D.C. Circuit in *Brodie*, the First Circuit thus held that the weapon recovered from the defendant after he ceased complying with the show of authority was fruit of the unlawful detention and should have been suppressed. *Id.* at 731.

Finally, the **Arizona Supreme Court** has held that an individual can be seized by temporarily complying with an assertion of authority before fleeing. In *State* v. *Rogers*, 924 P.2d 1027 (Ariz. 1996), the court held that the defendant had submitted to a show of authority when he "stopped, albeit briefly, and spoke to the officers before running." *Id.* at 1030. Relying on the Tenth Circuit's decision in *Morgan*, the court concluded that "the defendant had 'momentarily yielded' and that

a seizure had, therefore, occurred." *Ibid.* (quoting *Morgan*, 936 F.2d at 1567). The court thus affirmed the trial court's suppression of evidence that the suspect had discarded during his flight. *Ibid.* See also *State* v. *Guillory*, 18 P.3d 1261, 1265 (Ariz. Ct. App. 2001) (*Rogers* found a seizure because the defendant "momentarily yielded" when he "stopped, had a verbal exchange with the officers, and then fled" (quoting *Rogers*, 924 P.2d at 1030)).

There is little question that petitioner would have been deemed seized if his case had arisen in the Tenth, D.C., or First Circuits or in the state courts of Arizona. Petitioner temporarily complied with Officer Lattanzio's "attempt to stop the defendant for questioning" (Suppression Opp. 15) by staying put and answering his questions for some 30-to-60 seconds before fleeing (App., *infra*, 2a-3a, 18a). In any one of those other jurisdictions, the courts would have concluded that (1) petitioner submitted to Officer Lattanzio's assertion of authority, (2) he was therefore unlawfully seized, and (3) the weapon that petitioner subsequently discarded in flight should have been suppressed.[3]

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[3] To be sure, the government argued before the district court that Officer Lattanzio had articulable suspicion to justify the stop. Suppression Opp. 15-19. But the government effectively abandoned that argument on appeal, raising it only in a footnote. See U.S. CA2 Br. 26 n.5. The Second Circuit thus treated the issue as unpreserved. See App., *infra*, 3a ("The only question on appeal is whether Huertas was seized."). Regardless, the government's argument before the district court was meritless. See *Florida* v. *J.L.*, 529 U.S. 266, 271-272 (2000) (an anonymous and uncorroborated tip does not provide sufficient justification for an investigative detention).

2. In the Second and Third Circuits, momentary compliance followed by flight is not a submission

The **Second Circuit's** decision in this case cannot be squared with the reasoning or outcomes in these other cases. Under the majority's approach below, anyone who initially complies with a show of authority will, by virtue of compliance, have "a chance to quiet suspicion" and thus evade arrest. *Id.* at 5a. Initial compliance, when it is followed by flight, is therefore always and necessarily a first step in "evading police authority"—and "conduct that 'amount[s] to evasion of police authority' is 'not submission.'" *Id.* at 4a-5a (quoting *Baldwin*, 496 F.3d at 219). On this reasoning, compliance ripens into submission only once the suspect, while complying with the police, "let[s] pass his opportunity to flee." *Id.* at 6a.

The holding below was, in large measure, an application of the Second Circuit's prior decision in *Baldwin*. The defendant in *Baldwin* pulled his car over in response to the police cruiser's overhead lights and siren (496 F.3d at 218)—ordinarily a textbook example of compliance with a show of authority. When the officers exited their vehicle, the defendant fled. *Id.* at 217. The court held that the defendant's temporary compliance with the assertion of authority was not a submission because "to comply with an order to stop—and thus to become seized—*a suspect must do more than halt temporarily*." *Id.* at 218 (emphasis added).

The categorical nature of the *Baldwin* rule was reaffirmed by the majority below, which explained that "the principle of *Baldwin* is not fact-limited" and is implicated in all cases where "a suspect remains out of reach and takes flight when police move to lay hands on him." App., *infra*, 9a.

Judge Pooler's dissent confirms this. She described *Baldwin* as "stand[ing] clearly for [the] legal proposition * * * that 'a suspect must do more than halt temporarily' in order 'to comply with an order to stop and thus to become seized,'" a proposition that she later characterized as a "rule[]." App., *infra*, 9a (alteration omitted). And by "extend[ing]" that rule to the facts of this case, Judge Pooler explained, "[t]he majority [has] adopt[ed] the view that answering questions to clear one's name counts as 'evasion'" in and of itself. *Id*. at 12a. This extension of *Baldwin*, according to Judge Pooler, "elid[es]" the "important distinction [that] exists between initial, earnest submission followed by later flight, as opposed to an entire course of conduct undertaken to ensure a getaway" (*id*. at 11a-12a), and it does so categorically.

It therefore comes as little surprise that the district courts within the Second Circuit have interpreted the Second Circuit's cases as establishing a *per se* rule that temporary compliance followed by flight is never a submission under the Fourth Amendment.

Pointing to *Baldwin*, the district court in *United States* v. *Jones*, No. 15-cr-133S, 2016 WL 7208756 (W.D.N.Y. Dec. 13, 2016), for example, stated the rule categorically: "The submission to authority cannot be temporary." *Id*. at *3 (citing *Baldwin*, 496 F.3d at 218). Because the defendant's "submission to [the officer's] show of authority was only fleeting" before flight in that case, the court concluded that no seizure had occurred. *Ibid*. Similarly, the district court in *Reyes* v. *City of New York*, 992 F. Supp. 2d 290 (S.D.N.Y. 2014), recognized that the defendant there "did stop," but—likewise relying on *Baldwin*—it held that the stop was not a submission because "the stop was temporary" before the suspect ran at the police. *Id*. at 296 (citing *Baldwin*). Indeed, the Second Circuit itself, reviewing

such district court decisions, has treated *Baldwin* as establishing a categorical rule. See, *e.g.*, *United States* v. *Hightower*, 387 F. App'x 118, 119-120 (2d Cir. 2010) (holding that the suspect "fled and [was], therefore, not entitled to have the evidence at issue suppressed" because "*Baldwin* governs this case").

In sum, in the Second Circuit, a temporary stop followed by flight is never a submission within the meaning of the Fourth Amendment.

The **Third Circuit** has taken a similar approach. In *United States* v. *Valentine*, 232 F.3d 350 (3d Cir. 2000), the defendant asserted that he had been ordered by a police officer to stop and place his hands on the officer's car. *Id*. at 359. In response, the defendant stopped and gave the officer his name, but he then attempted to run past the officer. *Ibid*. The Third Circuit held that "momentary compliance" of this sort cannot constitute a submission: "Even if Valentine paused for a few moments and gave his name, he did not submit in any realistic sense to the officers' show of authority, and therefore there was no seizure until Officer Woodard grabbed him." *Ibid*.[4]

As in the Second Circuit, courts within the Third Circuit have read *Valentine* as establishing a categorical rule and regularly reject defendants' Fourth Amendment claims on that basis. See, *e.g.*, *United States* v. *Grant*, 459 F. App'x 154, 156 (3d Cir. 2012) ("To

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[4] The Third Circuit held in *United States* v. *Coggins*, 986 F.2d 651 (3d Cir. 1993), that the suspect there did submit to the officers' show of authority, even though he later ran. *Id*. at 654. But in *Coggins*, the suspect complied with instructions to sit, and in fact did sit while police interviewed his companion, before eventually running. *Ibid*. *Valentine* thus distinguished *Coggins* as having involved a "lengthy detention" as opposed to a "momentary" one. 232 F.3d at 359.

trigger a 'seizure' a citizen must submit to an officer's show of authority and do so beyond mere momentary compliance." (citing *Valentine*)); *Verdier* v. *Borough*, 796 F. Supp. 2d 606, 620 (E.D. Pa. 2011) ("When an individual refuses to submit to a show of authority, or momentarily complies and then refuses to submit, no seizure has occurred." (citing *Valentine*)); *United States* v. *Grant*, 2009 WL 3921369, at *2 (E.D. Pa. 2009) ("Notably, momentary compliance with an officer's orders is not a submission to a show of authority that can effectuate a seizure in the absence of physical force." (citing *Valentine*)); *United States* v. *Dupree*, 2008 WL 2522432, at *3 (E.D. Pa. 2008) ("Mere 'momentary compliance' does not constitute submission." (citing *Valentine*)).

3. The conflict is widely recognized

The conflict on the question presented is widely recognized. Both the majority and the dissent in this case expressly acknowledged the split. See App., *infra*, 6a-7a & n.3 (majority); *id.* at 13a-15a (dissent). The majority, in particular, expressly considered the contrary analyses of the Tenth and First Circuits and rejected them, reaffirming *Baldwin* and casting its lot with the Third Circuit. *Id.* at 7a & n.3.

The Tenth Circuit also has acknowledged the split. See, *e.g.*, *United States* v. *Roberson*, 864 F.3d 1118, 1123 (10th Cir. 2017) (recognizing that "[o]ther circuits have not taken *Morgan*'s approach and instead have held that a momentary hesitation and a brief conversation did not amount to submission"); *Brooks* v. *Gaenzle*, 614 F.3d 1213, 1224 n.9 (10th Cir. 2010) (recognizing conflict between *Morgan* and *Baldwin* and *Valentine*).

District courts have described the conflict as well. The District Court for the Northern District of Illinois, for example, observed that *Baldwin* "declined to adopt

the reasoning in *Morgan*" and held that *Baldwin* is "more persuasive than *Morgan*." *Garth* v. *City of Chicago*, No. 08-cr-5870, 2009 WL 3229627, at *3 (N.D. Ill. Oct. 2, 2009).

Commentators too have recognized the split. According to one, "*Hodari* has complicated lower courts' task of assessing the point at which a seizure occurs [when] an individual is initially subject to physical force or a show of authority and that person momentarily yields, but then subsequently resists or breaks free from police before eventually being subdued." Darby G. Sullivan, Note, *Continuing Seizure and the Fourth Amendment*, 55 Vill. L. Rev. 235, 237 (2010). And precisely because "*Hodari* offers conflicting guidance on this question," its resolution "has long divided federal courts of appeal." *Id.* at 237 & n.15 (citing, among other cases, *Baldwin* and *Morgan*). See also Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 Vand. L. Rev. 1137, 1149, 1199 (2012) (observing that "the courts are split" over "[w]hether brief submission to [an] officer's show of authority, as suggested in [*Hodari*], constitutes [a] seizure").

Against this backdrop, the confusion among the lower courts on the question presented is undeniable. Moreover, the conflict has persisted despite repeated opportunities for the lower courts to consider the reasoning adopted by their peers. Thus, only this Court can resolve the conflict.

B. The question presented is important

Proper resolution of the question presented is a matter of considerable practical importance warranting this Court's review. Whether a suspect has "submitted" within the meaning of this Court's cases is dispositive of the question whether the suspect was seized and

thus whether he is entitled to challenge the officer's conduct. And because submission determines when a Fourth Amendment seizure begins, it also often determines whether a seizure is supported by reasonable suspicion. Confusion over the question presented thus burdens not only defendants, but also officers, who lack meaningful guidance as to when the Fourth Amendment is implicated.

1. In countless Fourth Amendment cases, "the primary dispute concerns the submission-to-authority requirement." *Mosley*, 743 F.3d at 1325 (quoting *Salazar*, 609 F.3d at 1064). In all such cases, as in this one, "the critical inquiry" is "where to draw the line between submission and non-submission in the face of an individual's equivocal reaction to * * * a show of authority." *United States* v. *Stover*, 808 F.3d 991, 999 (4th Cir. 2015). And in many of these cases, the question whether there was a submission turns at least in part on the fact that the suspect ultimately fled or otherwise ceased compliance with the officers' assertion of authority.[5]

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[5] Such cases are legion. See, *e.g.*, *United States* v. *Wilson*, 670 F. App'x 377, 377-378 (5th Cir. 2016); *United States* v. *Holley*, 602 F. App'x 104, 107 (4th Cir. 2015); *United States* v. *Ray*, 597 F. App'x 832, 837-838 (6th Cir. 2015); *United States* v. *Chappell*, No. 2:16-cr-550, 2017 WL 3333177, at *2 (M.D. Ala. Aug. 4, 2017); *United States* v. *Garrette*, No. 3:17-cr-022, 2017 WL 3337258, at *2-3 (N.D. Fla. Aug. 4, 2017); *United States* v. *Ward*, No. 3:16-cr-157, 2017 WL 3085352, at *2-3 (S.D. Ohio July 20, 2017); *United States* v. *Oster*, 17-cr-13, 2017 WL 2937574, at *2 (D. Mont. July 7, 2017); *United States* v. *Gonzalez*, No. 13-cr-10343, 2017 WL 2538782, at *9-10 (D. Mass. June 20, 2017); *United States* v. *Palmer*, No. 16-cr-282, 2017 WL 1303477, at *3 (E.D. Pa. Apr. 7, 2017); *United States* v. *Jones*, No. 15-cr-133S, 2016 WL 7208756, at *3 (W.D.N.Y. Dec. 13, 2016); *United States* v. *Ridgeway*, No. 1:15-cr-00238, 2016 WL 4429933, at *4-5 (M.D. Pa. Aug. 22, 2016); *United States* v. *Hester*, 161 F. Supp. 3d 338, 345-346 (D.N.J. 2016);

The outcome of the submission question typically dictates whether evidence subsequently discarded in the suspect's flight is admissible, as in this case. See also, *e.g.*, *Hernandez*, 847 F.3d at 1260; *Brodie*, 742 F.3d at 1063; *Camacho*, 661 F.3d at 731.

Resolution of the submission question dictates not only the existence but also the timing of a seizure. This matters because evidence discarded before a detention commences is abandoned (*Hodari*, 499 U.S. at 629), as the government argued below (Gov't C.A. Br. 12). Thus, in many cases, "whether the district court properly denied [the defendant's] motion to suppress hinges entirely on *when* the 'seizure' for Fourth Amendment purposes occurred." *United States* v. *Griffin*, 652 F.3d 793, 798 (7th Cir. 2011) (emphasis added).

Moreover, if a defendant has been seized prior to flight, then subsequent evasive actions cannot be used to support the suspicion necessary to justify the initial seizure. After all, "the reasonable suspicion needed to support a *Terry* stop is measured as of the time of submission, not as of the time when the seizure was initiated or first attempted." *United States* v. *Jones*, 562 F.3d 768, 775 (6th Cir. 2009). Cf. *Florida* v. *J.L.*, 529 U.S. 266, 271 (2000) ("The reasonableness of of-

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United States v. *Casarez*, No. 2:15-cr-168, 2015 WL 9900070, at *3-5 (D. Nev. Oct. 22, 2015), report and recommendation adopted, 2016 WL 259693 (D. Nev. Jan 21, 2016); *United States* v. *Nichols*, No. 2:15-cr-85, 2015 WL 13344676, at *3-4 (E.D. Pa. Oct. 8, 2015); *United States* v. *Libby*, No. 15-cr-182, 2015 WL 5472760, at *5 (D. Minn. Sept. 16, 2015); *Darling* v. *State*, 158 A.3d 1065, 1076-1077 (Md. Ct. Spec. App. 2017), cert. denied, 165 A.3d 462 (Md. 2017); *State* v. *Roberts*, No. 2015-CA-104, 2016 WL 6043536, at *3 (Ohio Ct. App. Oct. 14, 2016), appeal denied, 74 N.E.3d 465 (Ohio 2017); *United States* v. *Giles*, No. 14-cr-281, 2016 WL 47881, at *6-7 (W.D. Pa. Jan. 4, 2016); *People* v. *Prentice*, 64 V.I. 79, 92 (V.I. Super. 2016).

ficial suspicion must be measured by what the officers knew before they conducted their search."). It is common for courts to hold that, if a defendant does not initially submit and flees, a subsequent detention may be justified by the defendant's evasive conduct itself. *E.g.*, *Illinois* v. *Wardlow*, 528 U.S. 119, 124-125 (2000); *United States* v. *Smith*, 633 F.3d 889, 893-894 (9th Cir. 2011); *Valentine*, 232 F.3d at 359; *United States* v. *Johnson*, 212 F.3d 1313, 1316-1317 (D.C. Cir. 2000).

Because so much turns on the question of when an individual submits to an assertion of authority, and because "lower courts will frequently be confronted with difficult questions concerning precisely when the requisite * * * submission to authority * * * occurs" (4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4(d) (5th ed. 2017)), this Court's immediate resolution of the question presented is essential to ensure even-handed administration of the Fourth Amendment.

C. The Second Circuit erred

An acknowledged division of authority on an issue of significant practical importance is reason enough to grant the petition. Certiorari is all the more warranted in this case because the Second Circuit's decision below is plainly wrong.

1. According to the majority, initial compliance with an assertion of police authority, when followed by flight, is always a first step in evasion and thus cannot ever constitute submission under the Fourth Amendment. App., *infra*, 4a-6a. Only if the suspect "let[s] pass his opportunity to flee" will his initial compliance ripen into submission. *Id*. at 6a.

There are two clear problems with this holding. First, the Second Circuit's rule "rest[s] * * * on a single fact" rather than "all of the circumstances surrounding

the encounter." *Florida* v. *Bostick*, 501 U.S. 429, 437 (1991). As this Court has said many times, "any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account all of the circumstances surrounding the incident in each individual case." *Michigan* v. *Chesternut*, 486 U.S. 567, 572 (1988) (internal quotation marks omitted). And as Judge Pooler recognized, "[a]n important distinction exists between initial, earnest submission followed by later flight, as opposed to an entire course of conduct undertaken to ensure a getaway." App., *infra*, 11a. The majority's "eliding [of] this distinction" (*id.* at 12a) creates a categorical rule that turns on a single fact: whether or not the suspect ultimately fled, regardless whether or not the initial period of compliance was earnest. This categorical approach is no more reconcilable with common sense than it is with this Court's precedents. See *Wardlow*, 528 U.S. at 135 (this Court "avoid[s] categorical rules concerning a person's flight").[6]

Second, in reaffirming *Baldwin*'s holding that "a suspect must do more than halt temporarily" (496 F.3d at 218), the court below emphasized "the brevity of the interaction" between petitioner and Officer Lattanzio before petitioner fled (App., *infra*, 5a). But the lower court's discounting of "brief" or "momentary" seizures on the basis of their duration is wholly out of step with this Court's precedents, which have consistently held that a seizure may occur "even if [the detention is] only for a brief period." *Whren* v. *United States*, 517 U.S. 806, 809 (1996). Accord *Delaware* v. *Prouse*, 440 U.S.

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[6] The majority accused Judge Pooler of "propos[ing] a per se rule." App., *infra*, 8a. We do not believe that is an accurate reading of her dissent. The point is of no moment as petitioner does not seek a per se rule.

648, 653 (1979) (a seizure occurs even if "the resulting detention [is] quite brief"). Thus, this Court has repeatedly stressed that a defendant "may not be detained *even momentarily* without reasonable, objective grounds for doing so." *Florida* v. *Royer*, 460 U.S. 491, 498 (1983) (plurality opinion) (emphasis added) (citing *Mendenhall*, 446 U.S. at 556 (plurality opinion)). See also *United States* v. *Jacobsen*, 466 U.S. 109, 113 n.5 (1984) (the Court's "oft-repeated definition of the 'seizure' of a person * * * [is] meaningful interference, *however brief*, with an individual's freedom of movement" (emphasis added)).

2. Apart from its inconsistency with this Court's cases, the Second and Third Circuits' approaches are also unworkable as a practical matter. This Court has long recognized the importance of clear and predictable rules to officers policing the nation's streets. It is crucial that officers be able to "determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Chesternut*, 486 U.S. at 574. Officers who understand their Fourth Amendment obligations are better equipped to perform their essential duties as public servants. Likewise, officers who know their conduct has brought about a submission (and therefore a seizure) can take appropriate precautions to ensure that they respect a suspect's constitutional rights and that the evidence they gather is lawfully collected and admissible.

The Second and Third Circuits' approaches undermine these important goals in separate ways. In the Second Circuit, whether a person has "submitted" to an assertion of authority turns on not only the circumstances of the exchange between the suspect and the officer *at the time*, but also what the suspect does or does not do *in the future*. If a suspect is complying with police instructions but is still in a position to run, he

has not yet "submitted" under the decision in this case—but only if he in fact runs. If the suspect does not ultimately run, courts within the Second Circuit will presumably deem the encounter to have been a seizure from the get-go, as to which articulable suspicion was required all along. See *Florida* v. *Royer*, 460 U.S. 491, 497-498 (1983) (citing *Terry* v. *Ohio*, 392 U.S. 1, 32-33 (1968)). This creates a strange circumstance in which the suspect's conduct becomes a submission retroactively based on the passing of his opportunity to flee, complicating the point at which officers must have articulable suspicion of criminal activity. It also creates a perverse incentive for officers to induce suspects who *are* complying with a show of authority to run so as to render the encounter not a seizure. And in all cases, it will leave officers with little more than guesswork to guide their behavior.

As for the Third Circuit, *Valentine* requires officers to decipher whether a suspect's temporary compliance with an assertion of authority before flight was only "momentary" (in which case there will not have been a submission under *Valentine*) or whether it was instead "lengthy" (in which case there will have been a submission under *Coggins*). See, *supra*, p.16 & n.4. This kind of indeterminate line-drawing exercise is directly at odds with officers' practical need to determine with clarity, and in advance, "whether the conduct contemplated will implicate the Fourth Amendment." *Chesternut*, 486 U.S. at 574.

Thus, for the benefit of police officers who must comply with constitutional rules, courts that must administer those rules, and citizens whose liberty is protected by them, the Court should grant review to correct the lower court's error and restore national uniformity on this important issue.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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