No. 17-818

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

REPLY BRIEF FOR PETITIONER

EUGENE R. FIDELL
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

JENNIFER MELLON
Assistant Federal Public Defender
265 Church Street, Suite 702
New Haven, CT 06510
(203) 498-4200

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mkimberly@mayerbrown.com

Counsel for Petitioner

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INTRODUCTION

The Second Circuit held in *United States* v. *Baldwin*, 496 F.3d 215, 218 (2d Cir. 2007), that "to comply with an order to stop—and thus to become seized—a suspect must do more than halt temporarily" before fleeing. In this case, the majority doubled down on that rule, declaring that "the principle of *Baldwin* is not fact-limited" and is applicable any time a suspect flees. Pet. App. 9a. That conclusion, and that conclusion alone, formed the basis for the decision below. What is more, both the majority and the dissent recognized that the law of the Second Circuit now conflicts with that of at least two other courts of appeals. And no one denies the issue's importance.

In nevertheless opposing certiorari, the government begins with a defense of the Second Circuit's decision on the merits. But the defensibility of the holding below is a question for the Court's consideration *after* granting certiorari; it is not a basis for denying review where, as here, the lower courts are sharply divided on an important, frequently recurring question of constitutional law. Regardless, the government's cursory merits arguments are insubstantial.

The government also asserts that this case is a poor vehicle for review because it has two fallback arguments for affirming. But neither the district court nor the court of appeals reached those issues because both courts recognized that applying *Baldwin* obviated the need to do so. The government thus does not suggest that its alternative arguments would in any way inhibit this Court's review of the issue posed in the petition. Those issues are therefore (at most) matters to be addressed on remand.

But they are probably not even that: The government failed to preserve either argument in proceedings below, no doubt because they lack merit. This case thus

offers an unusually clean vehicle for resolving the question presented. Because all of the other factors supporting further review are satisfied, the Court should grant the petition.

ARGUMENT

A. The split is real and entrenched

1. We showed in the petition (at 9-18) that the lower courts are openly divided over the question presented. The First, Tenth, and D.C. Circuits and the Arizona Supreme Court have all held that a suspect *can* submit temporarily even if he later flees. The Second and Third Circuits disagree. The conflict is broadly recognized (Pet. 17-18), including by all three judges below (Pet. App. 6a-7a & n.3, 13a-15a). At bottom, if petitioner's case had arisen in the First Circuit, Tenth Circuit, D.C. Circuit, or Arizona state court, the court would have held that he submitted.

We further demonstrated that district courts across the country—including the district court in this case (Pet. App. 19a)—have interpreted the Second and Third Circuit's cases in categorical terms, leading to divergent results on logically similar facts. See Pet. 15-17. Perhaps the clearest demonstration of the resulting split comes in *Flythe*. The district court there initially relied upon the Second and Third Circuits' respective decisions in *Baldwin* and *United States* v. *Valentine*, 232 F.3d 350 (3d Cir. 2000), to conclude that temporary compliance before flight "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). After the D.C. Circuit decided *United States* v. *Brodie*, 742 F.3d 1058 (D.C. Cir. 2014), however, the *Flythe* court changed its position: "[I]n light of *Brodie*, a momentary submission is enough to constitute a seizure" after all. *Flythe* v. *District of*

Columbia, 4 F. Supp. 3d 216, 220 (D.D.C. 2014). On that basis, the district court reversed itself on the question whether the suspect could have been detained during his temporary compliance before flight. *Id.* at 221 (describing *Brodie* as "an intervening change in the law" vis-à-vis *Baldwin* and *Valentine*).

The government does not dispute that the district courts are treating *Baldwin* and *Valentine* categorically. Indeed, it does not even acknowledge *Flythe* or any of the other cases that we cited in the petition (at 15-17) to support that proposition.[1] It is therefore hard to take seriously the government's assertion (BIO 12-13) that "[t]he courts' differing outcomes result not from their adoption of conflicting legal approaches but from their consideration of different factual scenarios." If that were so, the court in *Flythe* would have had no reason to change positions after *Brodie*.

From there the government retreats, describing the split as "overstate[d]" and the cases as distinguishable on their facts. BIO 12-16. But the distinctions it attempts to draw among the conflicting appellate opinions are immaterial to the question presented.

The government notes, for example (BIO 12-15 & n.3), the suspects in many of the conflicting cases complied with affirmative police commands, which is not so here. But the Second Circuit itself dismissed that as irrelevant: The pertinent question, according to the majority below, is not whether a suspect passively

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[1] *E.g.*, *United States* v. *Jones*, 2016 WL 7208756, at *3 (W.D.N.Y. 2016) (citing *Baldwin* for the categorical rule that "[t]he submission to authority cannot be temporary"); *Verdier* v. *Borough*, 796 F. Supp. 2d 606, 620 (E.D. Pa. 2011) (citing *Valentine* for the categorical rule that "[w]hen an individual refuses to submit to a show of authority, or momentarily complies and then refuses to submit, no seizure has occurred").

acquiesces in an assertion of authority or actively responds to an affirmative command; it is instead whether a suspect, after initially complying with an assertion of authority *in whatever form*, "let[s] pass his opportunity to flee." Pet. App. 6a (citing *Brendlin* v. *California*, 551 U.S. 240, 262 (2007)). Because temporary compliance will always give a suspect a chance to "quiet suspicion" and thus to "avoid[] arrest," according to the majority, a suspect who initially complies but then flees will necessarily be engaged in evasion all along. *Id.* at 5a-6a.

For similar reasons, it makes no difference whether officers assert their authority by hollering verbally (as in this case) or obstructing physically (as in other cases). The question is whether a suspect's conduct can *ever* amount to a submission when it is relatively brief and followed by flight. Under the Second Circuit's reasoning in *Baldwin* and below, the answer is straightforwardly *no*. See Pet. App. 5a-6a. That is so regardless of *how* the suspect initially submits to police authority or *how* that authority is asserted. The government's purported factual distinctions (BIO 13-15) are thus simply irrelevant.[2]

2. The government next accuses us of "misconstru[ing] the [lower] court's rationale," which it characterizes as resting upon "[a]ll [the] circumstances" of the

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[2] The majority (but not the government) attempted to distinguish *Brodie* on the ground that the suspect there did not harbor an "ulterior purpose" to "facilitate escape." Pet. App. 6a. But that too is irrelevant, because "the Fourth Amendment regulates conduct rather than thoughts." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 736 (2011). Thus, this Court has never "look[ed] to subjective intent when determining who is seized." *Brendlin*, 551 U.S. at 260. For its part, concerning *Brodie*, the government notes (BIO 14) that a search of the suspect's person in that case was "inevitable" before the suspect fled. It is unclear what difference that makes.

encounter, not just the "single fact" that petitioner fled. BIO 8. But it is the government that is guilty of misdirection. Aside from the "brevity" of petitioner's compliance and his subsequent flight, the only circumstance that the government cites to support its characterization is that petitioner "was never within reach" of Officer Lattanzio. *Ibid*. That is just another way of saying that petitioner had not "let pass his opportunity to flee." Pet. App. 6a.

More to the point, the majority below stressed that "the principle of *Baldwin* is not fact-limited." Pet. App. 9a. And *Baldwin* stated in clear terms that "to comply with an order to stop—and thus to become seized—a suspect must do more than halt temporarily" before fleeing. 496 F.3d at 218. That is a categorical rule through and through. And it cannot be reconciled with decisions like *Brodie*, where the D.C. Circuit held that "[l]ater acts of noncompliance do not negate a defendant's initial submission." 742 F.3d at 1061. See also Pet. 10-13 (discussing other conflicting cases).

The government thus misses the point when it emphasizes that the Fourth Amendment requires a totality-of-the-circumstances analysis—an observation with which we agree. The point is that the Second and Third Circuit's precedents have established a categorical rule *precluding* district courts from undertaking the kind of full-view analysis that this Court's cases require. See Pet. 15-17.

The government persists (BIO 15) that "the question of submission has resulted in different outcomes within individual circuits." But to support that statement, the government points to cases from the D.C. and Tenth Circuits (which do not apply a categorical rule), not the Second or Third Circuits (which do). Regardless, the cited cases do not in fact demonstrate

"different outcomes" on the question presented. The court in *United States* v. *Washington*, 12 F.3d 1128, 1132 (D.C. Cir. 1994), held there was no submission because the suspect in fact never complied with the officer's instructions. The same goes for the non-binding, single-judge opinion in *United States* v. *Roberson*, 864 F.3d 1118, 1125 (10th Cir. 2017) (opinion of Matheson, J.). Neither of those conclusions has any bearing on the question whether a person who *does* comply, but only for a brief period before fleeing, can be seized within the meaning of the Fourth Amendment.

B. This is an appropriate vehicle for review

As we explained in the petition, this case cleanly presents the question framed in the petition. Both the district court and the Second Circuit squarely decided the question presented, which furnished the sole basis for both courts' decisions.

The government nevertheless says that this is a "poor vehicle" because it has alternative arguments for affirming the denial of the suppression motion. That is unpersuasive for several reasons.

1. To begin with, the government does not contend that there is any impediment to the Court reaching and resolving the question posed in the petition. That is because there is none. Both of the lower courts declined to address the government's alternative arguments precisely *because* they rested their decisions on their independently sufficient and logically distinct answer to the question presented. BIO 6.

No court having considered, much less ruled upon, the government's fallback arguments, it would be "for the [lower] courts to consider in the first instance whether suppression turns on any other issue" if this Court grants certiorari and reverses. *Brendlin*, 551 U.S. at 263. See also, *e.g.*, *Stinson* v. *United States*, 508

U.S. 36, 47-48 (1993) ("declin[ing] to address [an] argument" that "the Court of Appeals did not consider" and leaving it to be addressed "on remand").

To this point, the case has turned exclusively on the Second Circuit's rule that temporary compliance followed by flight cannot constitute submission to police authority. That the government may seek to revive additional, separate arguments on remand does nothing to undermine this case as a clean vehicle for reviewing that conclusion.[3]

2. It is nonetheless worth noting that neither of the government's backup arguments is preserved, much less persuasive.

a. The government's assertion-of-authority argument (BIO 9-12) fails on two scores. First, the government conceded in the district court that Officer Lattanzio's conduct constituted a show of authority, admitting that he "attempted to initiate an investigative stop" and "attempt[ed] to stop the defendant for questioning." Suppression BIO 15-19. That concession was sensible in light of the record. Officer Lattanzio himself stated in his incident report that he "attempt[ed] to detain the accused for a brief curbside discussion" from the outset of the encounter. Dkt. 44-1, at 5.

The government attempts to walk back its concession, insisting that it argued at the evidentiary hearing that there was "no show of authority." BIO 10 n.1 (citing U.S. CA2 App. GA27). In fact, the transcript shows the opposite: Counsel for the government cited

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[3] The government asserts (BIO 10) that the submission and show-of-authority questions are "closely linked." Yet it admits on the very same page that the lower court did not reach the show-of-authority question "because it was *unnecessary* in light of its conclusion that petitioner did not submit to Officer Lattanzio." BIO 10 n.1 (emphasis added).

only *Hodari*, *Baldwin*, and *United States* v. *Swindle*, 407 F.3d 562 (2d Cir. 2005)—all cases concerning submission—to support an argument that there was no seizure "because the defendant fled." U.S. CA2 App. GA27. Accord *id*. at GA28-29. Although counsel described the broader context of the encounter, she did not so much as mention the words "show of authority" on page 27 of the government's appendix.

Even if it were otherwise, the government's no-show-of-authority argument would fail. Nobody in petitioner's position would have felt free to disregard Officer Lattanzio. Disagreeing, the government relies principally on *Michigan* v. *Chesternut*, 486 U.S. 567 (1988). But that case is not at all "analogous" (BIO 11) to this one. There, the police merely "drove alongside" a walking suspect "for a short distance." 486 U.S. at 569. Here, there was far more: Officer Lattanzio approached petitioner—who was standing on the sidewalk—by driving his cruiser the wrong way down a one-way street late at night, shining his spotlight on him, pulling alongside him, and shouting questions out his window at him. This was not some tame request to engage in a voluntary conversation; by yelling questions out his window at a suspect illuminated under a spotlight, Officer Lattanzio undeniably conveyed an expectation of compliance. Cf. *Roberson*, 864 F.3d at 1125 (opinion of Matheson, J.) (illuminating an occupied vehicle with spotlights and approaching it on foot was an "initial show of authority"); *id*. at 1136 (Moritz, J., dissenting) (agreeing).[4]

[4] True, Officer Lattanzio did not turn on his emergency lights or brandish a weapon. But this Court has never held such conduct to be the *sine qua non* of a show of authority. On the contrary, and as the government acknowledges (BIO 10), simply "us[ing] language or a tone of voice that indicate[s] that compliance [is] required" can be enough in itself.

b. The government's assertion that Officer Lattanzio had articulable suspicion to support the investigative detention is likewise unpersuasive—again, for two reasons. First, as we noted in the petition (at 13 n.3), the government failed to preserve this argument in the court of appeals. The government insists otherwise (BIO 16), observing that it raised the argument in a footnote in its Second Circuit brief. But in the Second Circuit, "an argument made only in a footnote [is] inadequately raised for appellate review" and is therefore "waived." *City of Syracuse* v. *Onondaga County*, 464 F.3d 297, 308 (2d Cir. 2006).

In any event, the government cannot seriously argue that, after *Florida* v. *J.L.*, 529 U.S. 266 (2000), the uncorroborated, anonymous tip in this case was enough to justify the initial detention. In this case, just like in *J.L.*, "[a]ll the police had to go on * * * was the bare report of an unknown, unaccountable informant." *Id.* at 271. Furthermore, nothing that the tipster said "supplied any basis for believing [s]he had inside information about" the suspect. *Ibid.* If such facts were not enough for articulable suspicion in *J.L.*, they are not so here.

Indeed, the indicia of reliability here were even more lacking than in *J.L.*: The informant in this case pointed down the street and told Officer Lattanzio that a man with a black bag was "right there." Pet. App. 17a. But he wasn't. Officer Lattanzio had to drive down several different streets before spotting petitioner. *Ibid.* And if the government truly believed that its contrary contention had merit, it would have devoted more than a footnote to it below.[5]

[5] This Court's more recent decision in *Navarette* v. *California*, 134 S. Ct. 1683 (2014), does not favor the government. The tipster there had detailed, reliable information about the suspect; gave a

C. The government's merits arguments do not undermine the case for certiorari

We demonstrated in the petition (at 21-24) that the Second Circuit's approach to the question presented is inconsistent with the Court's cases. This Court has repeatedly stressed that the unlawfulness of a detention does not turn on its length and has emphasized that courts must not reduce the Fourth Amendment seizure analysis to a checklist of categorical rules.

Although the government attempts to defend the decision below, the merits are not a reason to deny plenary review. All the same, two points bear mention.

First, while the government insists that petitioner was not seized, it offers little more than an *ipse dixit* that petitioner's "actions did not constitute submission to police authority." BIO 8. The only two facts that the government cites to support that position are (1) the encounter lasted only "a few seconds" and (2) "as soon as Officer Lattanzio opened the door of his cruiser, petitioner fled." *Id.* at 7-8. Whether those facts mean that petitioner's compliance was not a submission *is* the question here—and the government's unadorned say-so does little to answer it.

Second, the government does not dispute our description of the myriad practical problems inherent in the Second Circuit's decision below. See Pet. 23-24. As we explained, officers in the Second Circuit will be unable to determine whether a suspect has submitted until he lets pass his chance to flee, which may be long after the encounter begins. Yet officers require clarity

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"contemporaneous report" of having been run off the road "under the stress of excitement caused by a startling event"; and gave her tip over the 911 system, which "allow[s] for identifying and tracing callers." *Id.* at 1689-1690. There was nothing like any of that in this case.

from the start of an encounter. Beyond that, the Second Circuit's rule will perversely encourage officers to prompt suspects to flee, so that the pre-flight encounters are deemed non-custodial. Such impracticalities weigh strongly in favor of reversal.

CONCLUSION

The petition should be granted.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

JENNIFER MELLON
Assistant Federal
Public Defender
265 Church Street, Suite 702
New Haven, CT 06510
(203) 498-4200

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3127
mkimberly@
mayerbrown.com

Counsel for Petitioner

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