No. _____

In the Supreme Court of the United States

ABILIO HERNANDEZ, LAZARO BETANCOURT, NORGE RODRIGUEZ, and JOSE PEREZ

Petitioners

v.

JASON BOLES and DONNIE CLARK,

Respondents

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In a civil rights lawsuit, should a federal appellate court grant deference to a jury's conclusions of law about constitutional issues?

II. While waiting for a drug-sniffing dog during a traffic stop, may the police extend the stop by subjecting the driver and passengers to repetitive, back-to-back checks for outstanding warrants, and by interrogating the driver and the passengers about their activities and their backgrounds? Or does such delay violate the Fourth Amendment?

PARTIES TO THE PROCEEDING

Petitioners Abilio Hernandez, Lazaro Betancourt, Norge Rodriguez, and Jose Perez were the Plaintiffs in the trial court, and they were the Appellants in the appellate court.

Respondents Jason Boles and Donnie Clark were the Defendants in the trial court, and the Appellees in the appellate court. They were troopers with the Tennessee Highway Patrol, sued only in their individual capacity.

No corporate disclosure is required because none of the parties is a corporate entity.

RELATED PROCEEDINGS

Hernandez v. Boles, 949 F.3d 251 (6th Cir. 2020) (Case number 18-6281)

Hernandez v. Boles, 4:17-cv-00025 (E.D. Tenn. Nov. 07, 2018).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Abilio Hernandez, Lazaro Betancourt, Norge Rodriguez, and Jose Perez pray for a writ of certiorari. They ask for this writ to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, case number 18-6281. First, this case is about whether an appellate court should allow a jury in a civil rights case to define the terms of the Fourth Amendment — even where the facts are undisputed. Second, this case is about whether, instead of just writing a traffic ticket, the police may constitutionally extend a traffic stop by checking and double-checking the driver and passengers for outstanding warrants, and by interrogating them to look for discrepancies, while waiting for a drug-sniffing dog.

OPINION BELOW

The Sixth Circuit panel issued its decision on January 30, 2020. Petition App., at 1a. A timely petition for rehearing was denied on March 06, 2020. Pet. App. 15a. The opinion has been published at *Hernandez v. Boles*, 949 F.3d 251 (6th Cir. 2020). A copy of the slip opinion (#18-6281) is also reproduced in the Appendix herein, pages 1a-13a.

JURISDICTION

This court has appellate jurisdiction under 28 U.S.C. § 1254(1). The federal courts have subject-matter jurisdiction under 28 U.S.C. § 1331 (Federal question).

This petition for certiorari is timely because it is being filed within 150 days of an order denying rehearing.

The normal deadline for filing a petition for certiorari is 90 days from the latest of: 1) The date of the intermediate court opinion, 2) The date of the denial of a timely petition for rehearing, 3) The date of the denial of an untimely petition for rehearing, if appropriately entertained late, or 4) The date of any *sua sponte* consideration of rehearing. Sup. Ct. R. 13.3. However, on March 19, 2020, due to the Covid-19 pandemic, the Supreme Court granted a universal 60-day extension to all prospective applicants. Due to that extension, the deadline is now due after 150 days.

This petition for certiorari is being filed within 150 days of the denial of a timely petition for rehearing. The panel opinion was filed on January 30, 2020. App., at 1a. Hernandez and company then filed a timely petition for rehearing fourteen days later on February 13, 2020. Pet. App. 27a, entry #28. Notably, on February 14, 2020, the electronic filing was locked by the appellate court clerk, with directions for the Plaintiffs to re-file the document with the panel opinion attached. Pet. App. 27a, at entry #28. Hernandez and company then re-filed the document that same day, this time with the opinion attached. Pet. App. 27a, at entry #29. The Sixth Circuit then considered the petition on the merits, denying it on March 06, 2020, on the basis that the court had already considered all the issues therein. Pet. App. 15a.

To be clear, the rehearing petition was timely filed on February 13, 2020, and only re-filed the next day at the court's express direction. But even if somehow deemed untimely due to the court's locking it with instructions to re-file, the petition would still reset the clock for requesting certiorari, given that the panel "entertained" the petition, actively considered the request for rehearing, and denied the petition on the merits. *See* Sup. Ct. R. 13.3; *Hibbs v. Winn*, 542 U.S. 88, 97-98 (2004); *Young v. Harper*, 520 U.S. 143, 147 n. 1 (1997).

STATEMENT OF THE CASE

This case involves a Fourth Amendment civil rights lawsuit under 42 U.S.C. § 1983, specifically regarding the unlawful extension of a traffic stop.

A. The So-Called Traffic Stop

On 17 December 2015, Defendant Jason Boles pulled over the four Plaintiffs for speeding by seven miles per hour on the interstate. Pet. App. 2a. The Defendants, Troopers Jason Boles and Donnie Clark, both work for Interdiction Plus. Pet. App. 2a. This entity is a division of the Tennessee Highway Patrol. Pet. App. 2a. Importantly, Interdiction Plus employs an "all crimes approach." The "all crimes approach" means pulling ordinary travelers over for minor traffic violations, and then looking for "indicators" to justify seizing them for more serious crimes. 2a.

If the "indicators" are absent, the motorists are just given a warning, and released. Pet. App. 2a.

In the sense that the Troopers typically only give warnings instead of prosecuting traffic offenses, arguably the traffic law has very little to do with their mission in general. Regardless, here Trooper Boles specifically acknowledged that he never intended to prosecute this driver for speeding. Pet. App. 2a. Instead, Boles was simply looking for "indicators." Pet. App. 2a. If no indicators were present, he planned to give the driver a warning. Pet. App. 2a.

The 'traffic stop' began at 11:52 a.m. Pet. App. 2a. Plaintiff Hernandez was the driver. Pet. App. 3a. Plaintiff Betancourt, owner of the vehicle, was the front-seat passenger. Pet. App. 3a. Plaintiffs Rodriguez and Perez were the two passengers seated in the back. Pet. App. 3a.

Initially, Trooper Boles just collected the car registration, insurance, and driver's license of Hernandez. Pet. App. 3a. But when he learned that the vehicle actually belonged to the front passenger, Betancourt, he also took the front passenger's license, too. Pet. App. 3a. He returned to his own vehicle, where he ran both licenses for outstanding warrants.

By 11:59 a.m. (seven minutes into the stop), both men had been run through NCIC successfully. Pet. App. 3a. Both men had come back clean. Pet. App. 3a. At this point, Trooper Boles went back to the driver, Hernandez, and told him to step out for interrogation. Pet. App. 3a. For the following several minutes, he asked

Hernandez various questions, including but not limited to where he was going, who was in the car with him, and whether he had ever been in trouble. Pet. App. 3a.

Trooper Donnie Clark arrived while the interrogation of the driver was in progress. Pet. App. 3a. He participated in the seizure from that point forward. Pet. App. 3a-4a.

By about 12:05 p.m. (thirteen minutes into the stop), the interrogation was complete. After the interrogation of the driver was complete, Trooper Boles went back to the vehicle in order to interrogate the passengers. Pet. App. 3a. However, he could not get very far with that interrogation because the passengers did not speak good English. Pet. App. 3a. Specifically, at 12:05 p.m., Trooper Boles collected the driver's licenses of the two back passengers. Pet. App. 30a, at ¶ ix. After collecting these remaining licenses, he began running the back two passengers' names through NCIC for outstanding warrants. By 12:13 p.m., (twenty-one minutes into the stop), the back passengers came back clean through NCIC. Pet. App. 31a, at ¶ xi.

Around that same time, namely at 12:12 or 12:13 p.m., the second officer, Trooper Clark, began running *all four* Plaintiffs' names through a *second* database. Pet. App. 3a. The purpose of the second database was to conduct a "more detailed check" on individuals. Pet. App. 3a.

A canine handler arrived at 12:17 p.m. (twenty-five minutes into the stop), and shortly thereafter the dog began sniffing the vehicle. Pet. App. 3a. Supposedly

the dog alerted to something. Pet. App. 3a. Although not relevant to this petition, the Sixth Circuit held that the resulting search of the car was unsupported by probable cause, but nonetheless granted qualified immunity for that error. Pet. App. 8a-13a. Regardless, the car was indeed searched. Pet. App. 3a-4a. Based on that search, an "unknown substance" was found inside, along with some re-encoded gift cards. Pet. App. 4a. The four Plaintiffs were arrested. Pet. App. 4a. In the end, their criminal cases were dismissed. Pet. App. 4a.

B. The Lawsuit

This lawsuit followed. The four Plaintiffs sued Trooper Boles and Trooper Clark under 42 U.S.C. § 1983 for violating their Fourth Amendment rights, most notably by delaying a traffic stop unlawfully. Pet. App. 4a. The trial court had jurisdiction under 28 U.S.C. § 1331. Eventually, both sides moved for summary judgment. Pet. App. 4a. But on the general issue of whether the traffic stop was illegally extended, summary judgment was denied to both parties. Pet. App. 4a. The trial judge did grant partial summary judgment to the Defendants on the unrelated issue of whether the dog alert was reliable. Pet. App. 4a. But the more general claim about the unlawful extension of the traffic stop proceeded to trial.

With the Plaintiffs having been denied judgment as a matter of law at the summary judgment stage, the trial went forward. At trial, the parties stipulated to the basic timeline. Pet. App. 29-30a (List of stipulations). Video evidence was also

introduced showing what had occurred. *See* Pet. App. 3a and 24a, at Entry #20. Seemingly, no facts were even disputed. But in the end, the jury simply ruled that the stop was not extended unlawfully. Pet. App. 16a.

Fortunately, though, prior to the verdict, the Plaintiffs had moved a second time for a judgment as a matter of law, citing Rule 50(a). Pet. App. 16a-17a. That motion was denied. Pet. App. 16a-17a. Also, again after the verdict, the Plaintiffs moved for judgment as a matter of law a third time, citing Rule 50(b). Pet. App. 16a. Relief was again denied. Pet. App. 16a-22a.

C. Ruling of the Sixth Circuit

Hence, the Plaintiffs appealed. 1a-2a. Ultimately, the Sixth Circuit affirmed. Pet. App. 2a. Notably, the Sixth Circuit did hold that the Troopers had forfeited any argument that they had reasonable suspicion to extend the seizure. Pet. App. 6a, at n. 2. Therefore, the only issue was whether the stop was indeed extended. Notwithstanding, the Sixth Circuit affirmed the verdict, holding that the stop had not been extended beyond a normal traffic stop. Pet. App. 5a-8a.

Importantly, the Sixth Circuit held that the jury could have rightly ruled in favor of either the Troopers, or the Plaintiffs, under the same undisputed facts. Pet. App. 7a-8a. In essence, the court said that the jury could do whatever it wanted. As the court held:

> Certainly, the jury could have found that it was unreasonable to continue to detain the Hernandez-Plaintiffs after the initial warrant check of Hernandez

> and Betancourt came back negative because that was not necessary to carry out the traffic stop — especially given that no ticket was being written — or that the Troopers were unreasonably dilatory in waiting 20 minutes to call BLOC [the second database]. But the Hernandez-Plaintiffs cite no authority mandating such a determination as a matter of law. And though the delay caused by checking two databases is troubling, the Hernandez-Plaintiffs point to no bright-line rule that officers are limited to checking one database for warrants during a traffic stop. Whether the traffic mission was (or should have been) over by the time the dog arrived was a question properly submitted to the jury.

Opinion, at Pet. App. 7a-8a. Hence, in the end, the court held that the jury must be given deference on this question of constitutional law. As such, the judgment in favor of the officers was affirmed. Pet. App. 8a.

REASONS TO GRANT CERTIORARI

I. THE SIXTH CIRCUIT ERRED BY SHOWING DEFERENCE TO A JURY ON A QUESTION OF CONSTITUTIONAL LAW

This Court should grant the writ because the Sixth Circuit departed from the rule of *Muehler v. Mena*, 544 U.S. 93, 98 n. 1 (2005), requiring that an appellate court only grant deference to a trial court's findings of fact and not its conclusions of law. Here the lower court expressly held that the Defendants' undisputed conduct was "troubling," but declined to say whether it violated the Constitution. Instead, the court held that the Constitution was up to the jury to decide. According to the Sixth Circuit, the jury could have either condemned, or condoned, the undisputed conduct as the jury saw fit. The unfortunate effect of this ruling is to let civil juries decide constitutional rights on an *ad hoc* basis. By granting deference to a jury's conclusions of law, the lower court erred. In effect, this error also denied the Plaintiffs their right even to have a judge rule on their claim.

This Court has previously held that a jury's interpretations of the Fourth Amendment should not be granted any deference on appeal. For example, a finder of fact on a criminal motion to suppress should only receive deference on factual determinations, not on the overall legal assessments, such as whether probable cause existed. *Ornelas v. United States*, 517 U.S. 690 (1996). In a later ruling, this Court reiterated and arguably expanded that holding, applying it also to civil jury verdicts on civil rights claims. *Muehler v. Mena*, 544 U.S. 993, 98 n. 1 (2005).

Indeed, rejecting deference to jurors on questions of law makes good sense, given that juries are untrained in the law. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388-389 (1996) (Making a similar point, specifically with regard to jurors' lack of training in the field of interpreting patents).

More recently, this Court has carved out a limited exception to the rule of de novo review. Namely, the Court has allowed deference to a factfinder on certain idiosyncratic mixed questions of law in a bankruptcy appeal. *U.S. Bank Nat. v. Village at Lakeridge*, 138 S.Ct. 960, 967 (2018). As justification for the relaxed standard in that area, the Court noted that the legal issues in play had minimal, if any, value in establishing a uniform body of law. *Id.* But even in that case, the Court again reaffirmed its more basic position that, for *constitutional* questions, de novo review remains important. *Id.* at 967 n. 4. That is, it remains important to adjudge constitutional issues afresh, without deference, in order to maintain a uniform body of constitutional law. Indeed, independent review of Fourth Amendment questions is "necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Ornelas*, 517 U.S. 690 at 697 (internal citation omitted). Hence, for constitutional questions, the standard of de novo review should still stand. Under the rule set by the present case, however, the Sixth Circuit has given up control over the legal principles to each individual jury.

Here the Sixth Circuit has declined to say whether the Fourth Amendment was even violated. Instead, the court said that the jury *could* have ruled the stop

unreasonable on the basis of the Troopers' undisputed conduct (which the court found "troubling"), but also that the jury could have chosen (as it did) to rule in favor of the Troopers. Pet. App. 7a-8a. Apparently, the Sixth Circuit would have shown deference either way. *See also McKenna v. Edgell*, 617 F.3d 432, 440-441 (6th Cir. 2010) (Discussing, in somewhat more depth than the court did here, the Sixth Circuit's policy of showing deference to juries on mixed questions of law). Ultimately, the court therefore faulted the Plaintiffs for not pointing to a "bright-line rule," which was supposedly needed to overturn a jury's legal opinion. Pet. App. 8a. The problem with all this analysis is that review must be de novo. Finding error only if a bright-line rule was broken is effectively the opposite of review *de novo*. Instead, such lax review equates to requiring an abuse of discretion.

In fact, requiring a bright-line legal rule for reversal is generally even *more deferential* than reviewing for abuse of discretion. *See, e.g., Bowman Trans., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) ("[A]rbitrary and capricious" standard considers only whether there was a "clear error" in judgment) (internal citation omitted). If anything, the Sixth Circuit's policy for reviewing civil rights verdicts most resembles the high level of deference afforded to a state court judgment in federal habeas corpus proceedings. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), federal habeas courts may not override a state court's constitutional conclusions unless those decisions of law were not just wrong, but clearly wrong. *Harrington v. Richter*, 562 U.S. 86 (2011). This limited

review in the habeas context, as set by Congress's AEDPA statute, has received its fair share of criticism. But regardless of whether it makes any sense in that field, there is simply no justification for enacting a similar type of deference for civil rights trials.

By declining to say whether the jury was right or wrong, effectively the Sixth Circuit has declined to rule on the Fourth Amendment altogether. Per the Seventh Amendment, the judge and the appellate courts have always held the role of reviewing a jury verdict in accordance with the common law. As such, although a jury verdict is entitled to deference, still it may be overridden if no rational trier of fact could have reached it. Fed. R. Civ. P. 50(b). The question there is a factual one. Here all of the meaningful facts have always been undisputed. The jury's role should have been minimal, or non-existent (which is why the Plaintiffs moved for summary judgment). Allowing a jury to decide a Fourth Amendment claim where the facts are undisputed, and then granting deference to the jury on matters of law, allows for jury nullification in a civil rights case. It fractures any possibility of establishing a uniform body of law on issues of constitutional rights. Finally, it deserves note that while the Sixth Circuit is now looking for bright-line rules, such rules will never arise until the courts choose to actually rule. By declining to rule on whether the Troopers' conduct violated the law, the Sixth Circuit and the trial court both denied the Plaintiffs' any opportunity to have a judge consider their claim in accordance with the common law.

One proper remedy for this error would be to grant certiorari and to direct the Sixth Circuit to reconsider its ruling in light of *Muehler v. Mena*, 544 U.S. 993 (2005). Alternatively, the Court could more broadly grant certiorari and decide the Fourth Amendment issue as a whole. That latter possibility is addressed next.

II. AS A MATTER OF LAW, THE TROOPERS UNREASONABLY EXTENDED THIS TRAFFIC STOP

By detaining the Plaintiffs for repeated, back-to-back warrants checks for both the driver and the passengers, and also for roadside interrogation of both the driver and the passengers, the troopers unreasonably extended the traffic stop in violation of the Fourth Amendment. The result of their conduct (and presumably its aim) was to delay the stop for long enough that a drug dog could arrive. Because all the meaningful facts of the claim were undisputed, the trial court should have granted judgment as a matter of law notwithstanding the verdict. Ultimately, certiorari should be granted on these issues because the Fourth Amendment was indeed violated, the constitutional issues in play are important, and there is now a three-way circuit split on these issues.

A. The Fourth Amendment was Violated

To start, spending any time at all checking the outstanding warrants of the passengers was constitutionally unreasonable. Such an activity deviates from the stop's traffic-related mission. This Court has previously ruled that the purpose of an outstanding warrants check during a traffic stop is to ensure the safety of the roadway. *Rodriguez v. United States*, 135 S.Ct. 1609, 1615 (2015), *citing Delaware v. Prouse*, 440 U.S. 648, 658-660 (1979) *and* 4 W. LaFave, Search and Seizure § 9.3(c) pp. 507-517 (5th ed. 2012). The warrants check ensures that a traffic citation is not being written to a driver who has disregarded past citations. *Id.* If a driver

could simply disregard traffic citations with impunity, traffic enforcement would be meaningless.

The same thing cannot be said of passengers, though. Here these Troopers deviated from that Fourth Amendment justification. They spent much of their time checking the warrants of not just the alleged traffic violator, but also his passengers. Pet. App. 3a-4a. A traffic stop is supposed to be constrained by its actual "mission" — enforcing the traffic law. *Rodriguez*, 135 S.Ct. 1609 at 1612. There is no traffic-related purpose for checking the status of passengers. Whether the passengers had any history of ignoring past traffic tickets was completely irrelevant. By spending the traffic stop worrying about the passengers, instead of dealing with the actual speeding violation, the Troopers abandoned their mission.

Likewise, even assuming that the passengers could rightly be checked at all, the Troopers acted unreasonably by checking the driver and the passengers *more than once*, and by waiting a lengthy period before even starting the second and third warrants checks. This Court has previously held that the duration of a traffic stop must be measured based on an objective standard, namely a reasonable officer. *Rodriguez*, 135 S. Ct. 1609 at 1614, *citing United States v. Sharpe*, 470 U.S. 675, 686 (1985). A reasonable officer must act diligently. *Id.* These present Troopers did not act diligently because, even assuming that the second and third warrants checks were somehow important for traffic enforcement, there was no justification for doing the checks consecutively, instead of concurrently.

If the second check (i.e., the back-seat passengers, through the first database) were somehow needed, then the Troopers should have gone ahead and done it at the beginning. They should not have waited until thirteen (13) minutes into the traffic stop to begin that effort. Likewise, if the third check (the driver again, plus all the passengers again, through a second database) were somehow important, then the Troopers should have gone ahead and done it at the beginning as well. They should not have waited until twenty (20) minutes into the traffic stop to begin. Given these undisputed, measurable delays, no rational juror could have found that the traffic stop was reasonable and unextended. *Cf.* Fed. R. Civ. P. 50.

Similarly, the roadside interrogation of the driver, which asked him things such as where he was going, why he was going there, who his passengers were, whether he had ever been in trouble before, where he worked, and who he worked with, was an unreasonable detention of his person. By extension, the passengers were also unreasonably seized. *See Brendlin v. California*, 551 U.S. 249 (2007) (Holding that passengers are seized if the driver is seized). This Court has previously held that police may ask irrelevant questions during a traffic stop, but only if the questions happen alongside the stop's more legitimate activities, as opposed to measurably extending the stop. *Arizona v. Johnson*, 555 U.S. 323, 783 (2009). Here the prosecution of a traffic violation was entirely put on hold so that the troopers could investigate the four men's backgrounds and travel activities.

In total, the four men were held for a warrants check, a second warrants check, a third warrants check, and a roadside interrogation. These facts, all undisputed, showed a Fourth Amendment violation as a matter of law.

B. The Constitutional Issues are Important

Because traffic stops affect countless individuals every year, and because they often (but not always) result in criminal charges or money forfeitures, review is needed to address this issue of national importance. As documented in the trial of this case, the Tennessee Highway Patrol has devoted an entire division ("Interdiction Plus") to the sole purpose of pulling people over for trivial traffic offenses and then searching for evidence of serious felonies, all without any apparent goal of actual traffic enforcement. Pet. App. 2a. Not only was "no ticket . . . being written" here prior to the drug dog's arrival, Pet. App. 8a, but the Troopers frankly admitted that they do not typically even prosecute traffic offenses. Pet. App. 2a. Instead, they only write warnings. Law enforcement agencies, at least in Tennessee, are taking advantage of the courts' unwillingness to condemn unreasonable traffic seizures. Due to the importance of these issues, and to better shape the law on these points, the Court should grant certiorari.

C. There is a Three-Way Federal Circuit Split on these Issues

In addition to the erroneous ruling and the importance of the constitutional question, the Court should extend certiorari in order to unify the law nationally. At this point, a circuit split has indeed developed that needs to be fixed. According to Rule 10(a) of the Supreme Court, the Court will more likely accept review where "a United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter[.]" At present, three circuits have directly addressed the issues addressed herein. Oddly enough, all three circuits have come out differently. The Circuits involved in the three-way split are the Ninth, Fourth, and Sixth Circuits.

To start, the Ninth Circuit squarely agrees with Hernandez and his fellow Plaintiffs. For one thing, the Ninth Circuit has condemned any delay of a traffic stop in order to check the warrant status of *passengers*, as opposed to the driver. *United States v. Landeros*, 913 F.3d 862, 868 (9th Cir. 2019). As already discussed above, that position is quite sound, given that passengers' history of paying traffic tickets does not even matter. Moreover, the Ninth Circuit has condemned the type of stalling interrogation carried out here. Specifically, in *Landeros*, the court condemned not only checking the passengers for warrants, but also even asking for the passengers' *names*. *Id.* Gathering information from passengers was deemed outside the purpose of the traffic stop. *Id.* Indeed, it is hard to dispute that proposition. In the present case, the Trooper gave no traffic-related reason for

needing to interrogate the passengers — or the driver, either, for that matter. Additionally, the Ninth Circuit has condemned repeat database checks of a driver. Addressing the question of whether an officer may perform an "ex-felon registration check" after having already received a clean result from NCIC for outstanding warrants, the Court found that the second delay was unreasonable under the Fourth Amendment. *United States v. Evans*, 786 F.3d 779 (9th Cir. 2015)[1]. A*s* the Ninth Circuit has articulated its rule on this point, "Non-routine record checks and dog sniffs are paradigm examples of 'unrelated' investigations that may not be performed if they prolong a roadside detention absent independent reasonable suspicion." *United States v. Gorman*, 859 F.3d 706, 715 (9th 2017), *citing Rodriguez*, 135 S.Ct. 1609 at 1615.

In stark contrast, the Fourth Circuit has sided against Hernandez's position on all the above points. Namely, the Fourth Circuit has held that passengers may be checked for warrants, and interrogated, and that all vehicle occupants, including passengers, may also be checked multiple times. The Fourth Circuit has held that an officer may conduct "safety-related checks that do not directly bear on the reasons for the stop," including not just checking for outstanding warrants, but also "checking for criminal records[.]" *United States v. Palmer*, 820 F.3d 640, 649 (4th Cir. 2016). While the initial ruling was less than clear on what exactly the court meant by such language, the Fourth Circuit later clarified and expanded its

1 Although the denial of qualified immunity in the present case under this issue was neither appealed nor cross-appealed by the Troopers, it bears note that the opinion in *United States v. Evans* was already issued seven months before the incident here. 786 F.3d 779.

holding. As such, now the Fourth Circuit condones the performance of a second background check, which shows all interactions with police, even after the prior check through NCIC has already shown that there are no outstanding warrants for traffic violations. *United States v. Hill*, 852 F.3d 377, 382-383 (4th Cir. 2017). Moreover, the Fourth Circuit allows such checks and double-checks of not just the traffic violator, but also the passengers. *Id.* at 383. [2] As such, the arguably harassing patrols of "Interdiction Plus" would fare well in the Fourth Circuit.

Finally, in the present case, the Sixth Circuit has weighed in. But as already discussed, instead of actively taking sides, the Sixth Circuit has passively left the matter up to each individual jury. Duplicative warrants checks and interrogations of passengers are apparently fine in the Sixth Circuit — but only if the individual jurors feel like it. 5a-8a. The Sixth Circuit's refusal to take sides on these issues amounts to a third legal position altogether.

Altogether, between the Ninth, Fourth, and Sixth Circuits, we now have three different positions on the same basic set of issues. The Fourth Circuit has voted "Aye," the Ninth Circuit has voted "Nay," and the Sixth Circuit has voted "Present." Such a three-way split is unfortunate. But it further justifies Supreme Court review of this important matter.

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2 Similarly, taking cues from the Fourth Circuit and citing this case law, the Tenth Circuit has condoned the verbal interrogation of a driver about his criminal history. *United States v. Cone*, 868 F.3d 1150, 1153-54 (10th Cir. 2017). The court reasoned that if a computer check is fine, then verbal questioning must also be fine. *Id.*

CONCLUSION

Given the problematic standard of review adopted by the Sixth Circuit for reviewing constitutional issues, the importance of the constitutional claims in this particular case, and the three-way circuit split, the Plaintiffs ask that the Court grant a writ of certiorari to review the case.

Respectfully submitted,

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