

No. 22A\_\_

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IN THE  
**Supreme Court of the United States**

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JEAN HENDERSON, as next friend and guardian of CHRISTOPHER HENDERSON,  
*Applicant,*

v.

HARRIS COUNTY, TEXAS; ARTHUR SIMON GARDUNO,  
*Respondents.*

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**APPLICATION FOR AN EXTENSION OF TIME TO FILE A  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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February 2, 2023

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## APPLICATION

To the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Jean Henderson, as next friend and guardian of Christopher Henderson, respectfully requests a 60-day extension of time, to and including May 1, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

1. The Fifth Circuit entered judgment on October 12, 2022. *See Henderson v. Harris County*, 51 F.4th 125 (5th Cir. 2022) (per curiam); App. 1a-16a. The court denied Applicant's petition for rehearing en banc on December 2, 2022. *See App. 30a*. Unless extended, the time to file a petition for a writ of certiorari will expire on March 2, 2023. This application is being filed more than ten days before a petition is currently due. *See Sup. Ct. R. 13.5*. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. This case arises from an incident of excessive force in which Harris County police officer Arthur Garduno tased Christopher Henderson three times after Henderson obeyed Garduno's order to surrender with his hands up. The incident left Henderson disabled for life.

3. Garduno had spotted Henderson and two other young men in a park and claimed that he smelled marijuana. App. 2a. Henderson headed towards his apartment, where he lived with his grandmother, and Garduno pursued him—first

in his patrol car, then on foot. *Id.* Garduno eventually caught up to Henderson and ordered him to stop. *Id.* With his back to Garduno, Henderson did what Garduno ordered—he stopped, raised his hands in the air, and turned his head slightly back to see the officer. *Id.* He was not carrying a weapon and was not suspected of a serious crime. *Id.* at 3a.

4. Despite Henderson’s compliance, Garduno fired his taser. *Id.* at 2a. One barb hit Henderson in the face. Garduno then fired his taser a second time. *Id.* at 2a-3a. “This time both prongs lodged in Henderson’s back.” *Id.* at 3a. The shock immobilized Henderson, who fell backward and slammed his head against the pavement. *Id.* While Henderson lay there, bleeding from his ears, nose, and mouth, Garduno tased him a third time. *See id.*; Second Am. Compl. at 7-8, *Henderson v. Harris County*, No. 4:18-cv-02052 (S.D. Tex. Sept. 6, 2019). Henderson underwent an emergency craniectomy to reduce brain swelling, spent nearly two months in the hospital, and is now permanently disabled. *See* Second Am. Compl. at 10-11.

5. No drug paraphernalia was recovered from the location in the park where Garduno claims he first smelled marijuana. The charges initially brought against Henderson—for possession of a small amount of marijuana—were dismissed on the prosecution’s motion, App. 3a, on the ground that “[n]o probable cause exists at this time to believe the defendant committed the offense,” Resp. to Mot. for Summ. J. at 9-10, *Henderson*, No. 4:18-cv-02052 (Oct. 21, 2020).

6. Henderson and his grandmother filed suit in the United States District Court for the Southern District of Texas. In relevant part, the complaint alleged that

Garduno violated Henderson’s Fourth Amendment right to be free from excessive force by tasing him three times after he had surrendered. *See* App. 17a-20a.

7. Garduno asserted qualified immunity and moved for summary judgment, which the District Court granted. *Id.* at 5a, 20a-29a. Although the District Court agreed that Garduno’s use of force was unconstitutionally excessive, *id.* at 22a-24a, it concluded that Henderson’s right to be free from that force was not yet clearly established, *id.* at 24a-29a.

8. The Fifth Circuit affirmed. The panel did not address whether Garduno used excessive force, holding instead that any right Garduno may have violated was not clearly established at the time of the incident. *Id.* at 9a-16a. After concluding that Henderson failed to “identify an on-point case” clearly barring Garduno’s conduct, *id.* at 10a-15a, the panel held that “this case is not obvious,” *id.* at 15a. The panel maintained that this Court’s precedents involving obvious constitutional violations may not be entitled to “any weight” in the Fourth Amendment context. *Id.* The panel then concluded that Garduno’s conduct was not obviously unreasonable because defendants cannot expect to be free from excessive force if they flee from the police before surrendering. *Id.* at 15a-16a (citing *Salazar v. Molina*, 37 F.4th 278, 282-283 (5th Cir. 2022)).

9. The Fifth Circuit’s decision conflicts with the precedent of this Court, splits with decisions from several other circuits, and presents a question of significant importance regarding the scope of qualified immunity. As this Court recently reaffirmed in another case from the Fifth Circuit, officials are not entitled to qualified

immunity where the constitutional violation is so obvious that “any reasonable officer should have realized that” their conduct “offended the Constitution.” *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam). The Fifth Circuit below flouted this precedent by demanding precisely analogous cases to overcome qualified immunity. The panel thus granted Garduno qualified immunity even though it is obviously unreasonable to deploy a taser *three times* against a victim who has *already surrendered* and who is not suspected of a serious crime—particularly in a manner so likely to cause severe injury.

10. The Fifth Circuit’s opinion creates a split with other circuits and state supreme courts, which have concluded that officers are not entitled to qualified immunity in nearly identical circumstances. *See, e.g., Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848, 852-853 (6th Cir. 2016); *Miller v. Gonzalez*, 761 F.3d 822, 828-830 (7th Cir. 2014); *Baskin v. Martinez*, 233 A.3d 475, 484-486 (N.J. 2020). Lower courts commonly confront cases like this one where officers are accused of using excessive force after a suspect has initially fled. This Court’s guidance will be critical to ensure that courts properly evaluate qualified immunity in this recurring scenario.

11. Catherine E. Stetson of Hogan Lovells U.S. LLP, Washington, D.C., was recently retained to file a petition for certiorari on behalf of Applicant in this Court. Over the next several weeks, counsel is occupied with briefing deadlines and arguments for a variety of matters, including an opposition to a motion for summary judgment and cross-motion for summary judgment in *Javice v. JPMorgan Chase Bank, N.A.*, No. 2022-1179 (Del. Ch.), due February 3; a motion to dismiss in *United*

*States v. Inhance Technologies, LLC*, No. 22-5055 (E.D. Pa.), due February 21; an intervenor response brief in *Sierra Club v. FERC*, Nos. 22-1325, 22-1267 (D.C. Cir.), due February 28; a petition for writ of certiorari in *Carswell v. Camp*, No. 21-10171 (5th Cir.), currently due February 28; an oral argument in *Synopsys, Inc. v. Risk Based Security, Inc.*, No. 22-1812 (4th Cir.), scheduled for the week of March 7; and a principal cross-appeal brief in *Sherwin-Williams Co. v. PPG Industries, Inc.*, No. 22-02059 (Fed. Cir.), due March 13. Applicant requests this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

12. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including May 1, 2023.

Respectfully Submitted,

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