No.

In the Supreme Court of the United States

MARQUES A. JOHNSON, PETITIONER

v.

JAMES DUNN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits arresting a passenger in a car not suspected of any wrongdoing solely for failing to immediately provide identification to law enforcement, as the First, Fifth, Eighth, Ninth, and Tenth Circuits have held, or whether it permits such arrests, as the Eleventh Circuit held below; and whether the law was "clearly established" on the date of Petitioner's arrest.

2. Whether the doctrine of qualified immunity, which shields government officials from liability for civil damages unless they violated a clearly established constitutional right, should be overruled or limited.

PARTIES TO THE PROCEEDING

Petitioner Marques A. Johnson was the plaintiff-appellee in the court below.

Respondent James Dunn was the defendant-appellant in the court below.

Chris Nocco is not a party in this Court but was a defendant-appellant in the court below.

RELATED PROCEEDINGS

Johnson v. Nocco, No. 21-10670, United States Court of Appeals for the Eleventh Circuit. Rehearing on banc denied April 14, 2024.

Johnson v. Nocco, No. 20-cv-1370, United States District Court for the Middle District of Florida. Motion to Dismiss denied February 18, 2021.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Statutes

Other Authorities

OPINIONS BELOW

The amended opinion of the court of appeals, Pet. App. 1a-53a, is reported at 91 F.4th 1114. The original opinion of the court of appeals, Pet. App. 54a-105a, is reported at 83 F.4th 896. The order denying rehearing en banc, Pet. App. 139a, is unreported. The district court order that held that the law was clearly established at the time of Petitioner's arrest that there was not arguable probable cause to arrest Petitioner, Pet. App. 116a-135a, is unreported, but available at 2020 WL 6701606. The district court's subsequent order reiterating that law enforcement did not have a valid basis to require Petitioner to provide identification, Pet. App. 106a-115a, is unreported, but available at 2021 WL 633546.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 30, 2024, and a timely petition for panel rehearing and rehearing en banc was denied on April 15, 2024. On May 20, 2024, Justice Thomas extended the time for filing a petition for a writ of certiorari to August 13, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States constitution provides, in relevant part, "[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." U.S. Const. amend. IV.

INTRODUCTION

This case raises an important question of constitutional law: Whether the Fourth Amendment protects citizens who are not suspected of any wrongdoing from arrest for declining to identify themselves to law enforcement.

This Court already squarely answered this question in *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177 (2004), where this Court held that "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." *Id.* at 178. *Hiibel* simply applied settled law first announced in *Brown v. Texas*, 443 U.S. 47 (1979), where this Court wrote that "even assuming … [a weighty social objective] is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it." *Id.* at 52.

In this case, sheriff's deputies filming a reality TV show arrested Petitioner, a passenger in his father's vehicle stopped for suspicion of a trivial traffic infraction, when he declined to immediately identify himself. (His father was later released with only a warning). After Petitioner sued the police officers who unjustifiably arrested him, the district court denied

the officers' motion to dismiss, citing both *Hiibel* and *Brown* in concluding the police violated Petitioner's clearly established Fourth Amendment rights. Yet a splintered panel of the Eleventh Circuit reversed; concluding that the Fourth Amendment allows officers to arrest passengers for refusing to identify themselves even absent any particularized suspicion of wrongdoing or danger to the officer, without ever engaging with those facially controlling cases in its analysis.

This case meets this Court's conventional criteria for certiorari. The Circuits are now divided about an important question of constitutional law. The First, Fifth, Eighth, Ninth, and Tenth Circuits—applying *Hiibel* and *Brown*—have squarely held that arresting a person for merely failing to identify himself violates the Fourth Amendment—and held that law was clearly established before the arrest in this case. *See Corona v. Aguilar*, 959 F.3d 1278, 1284 (10th Cir. 2020) (holding that the officer "could not—in the absence of reasonable suspicion of some predicate, underlying crime—lawfully arrest Plaintiff for concealing identity based solely on his failure or refusal to identify himself"); *United States v. Landeros*, 913 F.3d 862, 869 (9th Cir. 2019) ("law enforcement may not require a person to furnish identification if not reasonably suspected of any criminal conduct"); *Johnson v. Thibodaux City*, 887 F.3d 726, 734 (5th Cir. 2018) (relying on *Hiibel* and *Brown* to hold that officers could not continue the

detention of a passenger unsuspected of wrongdoing "solely to obtain identification" when identification of the passenger "had nothing to do" with the purpose for the stop); *Stufflebeam v. Harris*, 521 F.3d 884 (8th Cir. 2008) (holding "consistent with the Supreme Court's recent categorical statement" in *Hiibel* that an officer may not arrest a passenger for refusing to identify himself when the passenger "is not suspected of other criminal activity and his identification is not needed to protect officer safety or to resolve whatever reasonable suspicions prompted the officer to initiate an on-going traffic stop or *Terry* stop"); *United States v. Henderson*, 463 F.3d 27 (1st Cir. 2006) (holding police could not "demand [the passenger's] identifying information," purportedly "for reasons of officer safety," where they lacked any reasonable suspicion the passenger posed a danger to officers).

In square conflict with those decisions, the Eleventh Circuit's lead opinion concluded that the Fourth Amendment allows officers to arrest passengers for refusing to identify themselves, even absent any suspicion of wrongdoing or danger to the officer. And the Eleventh Circuit majority held that it is still not clearly established in 2024 that police cannot arrest an innocent passenger for nothing more than declining to identify himself.

The issue is important. It governs basic interactions between every citizen and police officers, and as demonstrated by the large number of courts that have weighed in on the issue, it arises daily.

Indeed, 50,000 traffic stops occur in the United States *every day*, and approximately 7% of the adult population of this country is pulled over every year.

The Court should grant certiorari to resolve once and for all the critical constitutional issue of whether the Fourth Amendment permits citizens not suspected of any wrongdoing to be subject to a full custodial arrest for simply declining to identify themselves to law enforcement. The Eleventh Circuit's decision allowing such arrests conflicts with the established precedents of this Court which protect individuals from being compelled to identify themselves without reasonable suspicion and created a square circuit conflict with the First, Fifth, Eighth, Ninth, and Tenth Circuits. Those Courts all have concluded—consistent with *Hiibel* and *Brown*—that the Fourth Amendment prohibits such arrests. The question is of profound importance, affecting everyday interactions between citizens and police, and given the frequency of traffic stops, this issue impacts a significant portion of the population. Uniformity in constitutional protections across the country is essential, and the Court's intervention is necessary to ensure that citizens' Fourth Amendment rights are consistently upheld.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

Since its inception, this Court has often been called to consider the bounds of the Fourth Amendment.

When can law enforcement detain a private citizen? When can law enforcement order a private citizen to identify himself or face arrest and criminal prosecution? The throughline of cases make the answer plain. The Fourth Amendment requires that officers have reasonable suspicion of ongoing criminal activity before demanding identification on pain of arrest. This is a rule of general application, applicable to pedestrian stops as well as automobile stops.

The Fourth Amendment was designed to prevent overzealous police surveillance.

> [T]he forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.

United States v. Di Re, 332 U.S. 581, 595 (1948). And these "obstacles"—*i.e.* the protections guaranteed by the Fourth Amendment were incorporated by the Fourteenth Amendment to protect against state action. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

This Court first addressed the ability of officers to detain a suspect based on suspicion short of probable cause in *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the Court was faced with the question of whether a police officer's stop and frisk of a suspect violated the Fourth Amendment. The case arose when an officer observed men engaging in behavior that led the officer to

suspect they were planning a robbery. *Id*. at 6. Acting on this suspicion, the officer approached the men, identified himself, and conducted a quick pat-down search, discovering weapons in the suspects' possession. *Id*. at 6-7. Defendants challenged the officer's stop and frisk under the Fourth Amendment, asserting that it was unlawful because the officer did not have probable cause to arrest the defendants. *Id*. at 8. The Court disagreed, holding

> where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where, in the course of investigating this behavior, he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30.

A decade later, in *Brown v. Texas*, 443 U.S. 47, 52–53 (1979) the Court was asked to consider the application of *Terry* and the Fourth Amendment to a Texas criminal statute requiring detainees to identify themselves when lawfully stopped by the police.

Officers stopped the defendant and demanded that he identify himself even though he was not suspected of any misconduct. A unanimous Court held that whatever purposes may be served by "demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it." *Id.*

Post-*Brown*, the Court has consistently required reasonable suspicion of criminal activity before law enforcement may demand identification upon threat of arrest. For example, in *Kolender v. Lawson*, 461 U.S. 352 (1983), the Court confronted a California law "that require[d] persons who loiter or wander on the streets to provide a 'credible and reliable identification and account for their presence when required by a peace officer." *Id*. at 356. The Court held that the statute requiring individuals to identify themselves was unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment where there was no suspicion of any wrongdoing. *Id*. at 361.

Twenty years ago, this Court once again categorically reaffirmed that "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." *Hiibel v. Sixth Jud. Dist. Ct.,* 542 U.S. 177 (2004). In *Hiibel*, law enforcement received a report that a man had assaulted a woman in a specifically identified truck at

a specific location. *Id*. at 180. Police officers drove to that location, spotted the truck, approached the suspect, and asked for the suspect's identification in order to further their investigation of the specifically reported crime. *Id*. at 180–81. The suspect refused to identify himself after being asked eleven times, so the officers arrested him for violating Nevada's "stop and identify" statute. *Id*. The Court held that the Fourth Amendment permitted the officers to demand a suspect's identification only because "there is no question that the initial stop was based on reasonable suspicion, satisfying the Fourth Amendment requirements." *Id*. at 184.

Similarly, this Court has consistently maintained that persons detained by law enforcement have no obligation to answer their questions. In *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984), this Court held that:

> Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose 'observations lead him reasonably to suspect' that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to 'investigate the circumstances that provoke suspicion. . . . Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to*

> *respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.*

Id. (emphasis added); *see also Houston v. Hill*, 482 U.S. 451, 462-63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.")

In *Florida v. Bostick*, 501 U.S. 429 (1991), which involved questioning a passenger on a parked commercial bus, the Court emphasized that "an individual may decline an officer's request without fearing prosecution." *Id.* at 437. Thus, *Bostick* established "that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification and request consent to search his or her luggage—as long as the police do not convey a message that compliance with their requests is required." *Id*. at 434.

The rule that officers may ask any question they like so long as they do not demand an answer applies to traffic stops as well. In *Rodriguez v. United States*, 575 U.S. 348, 354–56 (2015), the Court explained that "[a] seizure for a traffic violation justifies a police investigation of that violation." *Id*. at 354. Thus, in conducting a traffic stop, an officer may, in addition to determining whether to issue a citation, conduct

ordinary inquiries to investigate the suspected wrongdoing, such as checking the license of the driver, determining whether the driver has outstanding warrants, and inspecting the vehicle registration and proof of insurance. *Id.* at 355. The "[a]uthority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.* at 354.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Petitioner's arrest

In August 2018, Respondent was on patrol as a Pasco County Sheriff's Deputy while also filming for the reality television series "Live PD."[1] Pet. App. 25a

While filming, Respondent pulled up behind a car driven by Petitioner's father towing a trailer. Pet. App. 4a, 25a. Respondent initiated a traffic stop, claiming it was because the trailer's license tag was partially obscured, a minor infraction, Fla. Stat. § 316.605(1). *Id.* at 4a n.5. Respondent approached the front passenger side of the vehicle and asked Petitioner's father for his driver's license and

[1] Live PD is an A&E Network television show akin to COPS broadcasting real time interactions between law enforcement and the general public. https://www.aetv.com/shows/live-pd (last visited August 12, 2024). A video depicting the body camera footage of the deputies and Johnson's cell phone recording is available at https://youtu.be/zXEXu640E1k (last visited August 12, 2024).

registration. *Id.* Respondent then asked Petitioner, seated in the front passenger seat, if he "had his 'ID on him too.'" *Id.* at 4a, 25a. Petitioner replied that he was "merely a passenger in the vehicle and was not required to identify himself." *Id.* at 5a. Respondent answered that "under Florida law he was required to identify himself and that if he did not identify himself, [Respondent] would 'pull him out and he would go to jail for resisting.'" *Id.*

Another Deputy then said to Petitioner's father, "Listen, you can tell us who he is. We can do it that way." *Id.* at 25a. Petitioner's father promptly identified the passenger as his son and told the deputies Petitioner's full name. *Id.* at 25a.

Respondent then ordered a colleague to have a police dog conduct a drug sniff of the car. *Id.* The deputy told Petitioner and the other vehicle occupants that his dog would be conducting a narcotics sniff of the vehicle and ordered Petitioner to exit. *Id.* at 25a-26a. As Petitioner was exiting the vehicle, Respondent stated to a colleague that "I am going to take him in no matter what because he's resisting me." *Id.* at 26a. Respondent then arrested Petitioner. *Id.* Petitioner asked why he was being arrested and Respondent answered that it was because he had not given his name when the deputies had demanded it. *Id.* The deputies then conducted a thorough search of the car. *Id.*

Petitioner's father again provided Petitioner's information to deputies, even confirming the spelling of Petitioner's first name and date of birth. *Id.* One of these deputies went to Respondent to provide him with this information, but Respondent stated, "Oh, I got it. I got his ID out of his wallet." *Id.*

The canine sniff and a thorough search of the vehicle uncovered no evidence of any crime. Finding nothing beyond the trailer's partially obscured license plate, Respondent and his colleagues told Petitioner's father that he was free to go with only a warning. Petitioner, on the other hand, was arrested, charged with resisting an officer without violence, Fla. Stat. § 843.02, and taken to Pasco County Jail. Pet. App. 27a.

Petitioner quickly won dismissal of the charge. Pet. App. 136a. In granting Petitioner's motion to dismiss, the Pasco County Circuit Court relied on precedential Florida Courts of Appeals decisions explaining that the Fourth Amendment protects individuals from having to identify themselves unless an officer has reasonable suspicion of criminal activity. *Id.* (citing, *e.g.*, *Burkes v. State*, 719 So.2d 29 (Fla. 2d DCA 1998); *J.R. v. State*, 627 So.2d 126 (Fla. 5th DCA 1993)). The State moved to reconsider, but the court denied the motion. Pet. App. 138a.

B. District Court proceedings

Petitioner then brought this suit in the U.S. District Court for the Middle District of Florida,

alleging that Respondent violated his Fourth Amendment rights by arresting him for declining to identify himself, in violation of 42 U.S.C. § 1983. Respondent filed a motion to dismiss, arguing that the suit was barred by qualified immunity.

The district court denied Respondent's motion, holding that Respondent violated Petitioner's clearly established Fourth Amendment rights and so was not entitled to qualified immunity. Pet. App. 123a. The court explained that Florida law, consistent with the United States Constitution, permits officers to demand identification on pain of arrest only from persons they have reasonable suspicion to believe are engaged in criminal activity. *Id.* Because Respondent lacked any "reasonable suspicion that the passenger had committed, was committing, or was about to commit a criminal offense"—a finding Respondent did not challenge—law enforcement "did not … have a valid basis to also require … [Petitioner] to provide identification." Pet. App. 110a. The district court further held that this law was clearly established at the time of the arrest. *Id.* The district court relied on *Hiibel* and *Brown* to reach this conclusion. *Id.* at 123a. Respondent appealed.

C. Eleventh Circuit proceedings

A panel of the court of appeals issued a fractured decision reversing the district court's denial of qualified immunity.

The lead opinion, authored by Judge Tjoflat, concluded that the Fourth Amendment allows officers to arrest passengers for refusing to identify themselves, even absent any particularized suspicion of wrongdoing or danger to the officer. Pet. App. 73a. Although the lead opinion noted the district court's reliance on *Hiibel* and *Brown* (and that Petitioner had cited those authorities), Pet. App. 59a, 62a, it did not otherwise discuss them or the many other court of appeals cases recognizing that they are controlling in the context of auto stops. Instead, it held that such arrests were consistent with the Fourth Amendment by analogy to cases holding that officers may order passengers to exit vehicles during an otherwise lawful traffic stop in the interest of officer safety. *Id.* at 71a. Without acknowledging that both *Hiibel* and *Brown* had discussed the reasonableness of demanding identification under *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the lead opinion "engage[d] in *Brignoni-Ponce* balancing" to conclude that demanding identification from persons not suspected of wrongdoing "is a precautionary measure to protect officer safety," and those who refuse are subject to a full custodial arrest and prosecution. *Id.* at 72a. The lead opinion did not acknowledge that the Florida court had dismissed the State's prosecution of petitioner, or that state appellate courts had consistently held that the Fourth Amendment does not permit arresting people for failure to identify themselves. But the lead opinion nonetheless

concluded that Petitioner lacked "a Fourth Amendment right to refuse to identify himself" because "[w]e doubt that the Florida Supreme Court would hold that a passenger is free to resist an officer's request for identification in the setting this case presents." *Id*. at 73a.

Judge Branch wrote a separate opinion "concur[ring] in the judgment of the majority," agreeing that Respondent was entitled to qualified immunity. *Id*. at 75a. Declining to reach the merits of the Fourth Amendment question, Judge Branch concluded that the "vehement[] debate" between her colleagues "[wa]s an indication that the caselaw does not clearly establish that a constitutional violation occurred." *Id*. at 74a.

Judge Wilson dissented, stating that he "would affirm the well-reasoned decision of the district court denying [Respondent's] motion to dismiss." *Id*. at 76a. "In [his] view, this arrest ran afoul of the Fourth Amendment's protections. As caselaw from the Supreme Court and this circuit makes clear, a police officer may not arrest individuals for declining to provide their names absent any reasonable suspicion of wrongdoing." *Id*. at 85a. Relying on *Brown* and *Hiibel*, he explained that "it was not lawful for [Respondent] *to require* the disclosure of Johnson's identity absent reasonable suspicion of wrongdoing." *Id*. at 88a. Judge Wilson rejected Respondent's argument that generalized concerns for officer safety overrode the Fourth Amendment's protections and

permitted him to arrest Johnson for failing to identify himself. *Id*. at 89a. Unlike the risk of a passenger reaching for a concealed weapon, Judge Wilson explained, any risk associated with "not knowing everyone in a group while investigating the conduct of an individual[ ] is not unique to a traffic-stop setting." *Id*. at 94a. And thus whether an officer can require a person to identify himself on pain of arrest is controlled by on-point Supreme Court cases governing that question for other investigatory stops. *Id*. at 96a.

Finally, Judge Wilson concluded that Petitioner's right not to accede to Respondent's demand was clearly established because, "[a]t the time of [Petitioner's] arrest, a string of controlling cases made clear that police officers may not require identification absent reasonable suspicion of criminality." *Id*. at 101a.

Petitioner filed a timely petition for rehearing and rehearing en banc. Approximately one month later, the court of appeals entered an order stating that "[a] judge of this Court withholds issuance of the mandate in this appeal." Dkt. 48. Three months after the rehearing petition was filed, the court of appeals panel vacated the original opinion "sua sponte" and substituted a new opinion. Pet. App. 2a. The lead opinion, captioned "opinion of the court" on the

Eleventh Circuit website,[2] was unchanged, as was the dissent.

Judge Branch's concurring opinion, however, had been materially revised. In the substituted concurrence, Judge Branch began by stating,

> Judge Tjoflat and I agree that the judgment of the district court is due to be reversed. But I agree for different reasons than those set forth in Judge Tjoflat's opinion. Therefore, I concur in the judgment only. Because none of the three opinions here garner a majority vote of the panel, none of them represent the views of this Court for precedent purposes.

Pet. App. 22a. She also replaced references to "the Majority" with references to "Judge Tjoflat." *Id.*

Petitioner again filed a timely petition for rehearing and rehearing en banc, noting that the panel's Fourth Amendment holding and its qualified immunity determination was impossible to reconcile with *Hiibel*, *Brown*, and a host of decisions by other courts. The court of appeals denied rehearing, noting that "no judge in regular active service on the Court ha[d] requested that the Court be polled on rehearing en banc." Pet. App. 140a.

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[2] *See* https://media.ca11.uscourts.gov/opinions/pub/files/202110670.op2.pdf

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari. This case involves a square circuit conflict. The Eleventh Circuit decision below opens a circuit conflict with five other circuits, and directly conflicts with decades of Supreme Court precedent that police officers may not demand identification upon threat of arrest without first having reasonable suspicion that the person is engaged in wrongdoing. This issue concerns basic interactions between police officers and members of the public that arise tens of thousands of times every day.

Additionally, this case offers the Court an opportunity to pare back or eliminate the doctrine of qualified immunity. Qualified immunity has been widely recognized as ahistorical, atextual, and antithetical to basic principles of civil accountability for unconstitutional government conduct.

I. THE DECISION BELOW OPENS A 5-1 CIRCUIT CONFLICT AND DIRECTLY CONTRAVENES THIS COURT'S PRECEDENTS

A. The Decision Below Opens A Square Conflict With Five Other Federal Circuits and Florida Courts

Every other court of appeals to consider this question has held that an officer may not arrest a vehicle passenger for refusing to identify himself

when the officer's inquiry is unrelated to any reasonable suspicion of wrongdoing. Unlike the majority opinion below, those decisions—from the First, Fifth, Eighth, Ninth, and Tenth Circuits—examined and correctly applied *Hiibel* and *Brown*. They rightly determined that those decisions unambiguously establish that a mere passenger in a stopped car need not identify himself to police on demand, and concluded that *Hiibel* and *Brown* clearly established that principle decades ago.

In *Corona v. Aguilar*, 959 F.3d 1278 (2020), for example, the Tenth Circuit considered a passenger's wrongful-arrest claim on facts nearly identical to those in this case. There, an officer pulled a car over for running a red light, and demanded that the passenger provide identification. *Id.* at 1280–81. Like here, the officer lacked any reasonable suspicion of wrongdoing as to the passenger. *Id.* at 1284. The passenger refused, and the officer arrested him for concealing his identity. *Id.* at 1281. The Tenth Circuit correctly recognized that *Hiibel* and *Brown* required denying qualified immunity to the defendant, stating

> [t]he question before us, however, is not whether Defendant Aguilar violated the Fourth Amendment by *asking* Plaintiff to provide his ID. Defendant Aguilar's initial *request* for ID may have been lawful, but he could not—in the absence of "reasonable suspicion of some predicate, underlying crime"—lawfully *arrest* Plaintiff for

> concealing identity based solely on his failure or refusal to identify himself.

Id. at 1284. The difference between voluntarily providing information and being compelled to provide it under threat of arrest is exactly the distinction that the Court recognized in *Bostick*, 501 U.S. at 437. To hold otherwise, the Tenth Circuit explained, would be to "toss to the wind Supreme Court precedent." *Id.* at 1284. Further, the court held that the fact that the plaintiff was a passenger in a vehicle rather than a pedestrian "is a distinction without difference for purposes of our clearly-established-law analysis." *Id.* at 1287.

The Ninth Circuit reached the same result in *United States v. Landeros*, 913 F.3d 862 (2019). In *Landeros*, an officer pulled over a car for speeding and then demanded that a passenger identify himself. 913 F.3d at 864. Again, the officer lacked reasonable suspicion of wrongdoing as to the passenger; rather, the officer explained that it was "standard for [law enforcement] to identify everybody in the vehicle." *Id.* at 865. The passenger declined and the officer arrested him. *Id.* In considering the lawfulness of the arrest, the Ninth Circuit examined *Hiibel*, which requires a *suspect* to provide the officer with identification, and *Brown*, which "held squarely that law enforcement may not require a person to furnish identification if not reasonably suspected of any criminal conduct." *Id.* at 869. Consequently, the court held that because "the officers had no reasonable

suspicion that [the passenger] had committed an offense, . . . [h]is repeated refusal to [identify himself] thus did not, as the government claims, constitute a failure to comply with an officer's lawful order" and could not support arrest. *Id.* at 870.

Corona and *Landeros* are just the tip of the iceberg. In case after case, courts of appeals have concluded that *Hiibel* and *Brown* have held that the Fourth Amendment requires the same result.

For example, in *Johnson v. Thibodaux City*, 887 F.3d 726, 734 (2018) the Fifth Circuit applied *Hiibel* and *Brown* to hold that officers could not continue the detention of a passenger unsuspected of wrongdoing "solely to obtain identification" when identification of the passenger "had nothing to do" with the purpose for the stop. In *Johnson*, the passenger who had fully complied with the officer's instructions to stay in the car, was sitting in the vehicle, when law enforcement demanded her identification. *Id*. at 729. The passenger refused to provide it and was arrested. *Id*. The Fifth Circuit held that the arrest was unconstitutional because there was no probable cause to arrest solely for refusing to provide identifications. *Id*. at 735.

In *Stufflebeam v. Harris*, 521 F.3d 884 (2008), the Eighth Circuit examined a similar issue. In that case, law enforcement stopped the car because it was not displaying a license plate. After the driver produced his documents, the officer asked the passenger for his

identification. *Id*. at 886. The passenger, who was not suspected of any wrongdoing, refused, stating, "You either arrest me and take me to jail *or* I don't have to show you anything!" *Id*. Law enforcement then arrested the passenger. *Id*. The Eighth Circuit noted that "the issue here is whether the subsequent arrest, not the initial request, violated the Fourth Amendment." *Id*. at 888. The circuit court held "consistent with the Supreme Court's recent categorical statement" in *Hiibel* that an officer may not arrest a passenger for refusing to identify himself when the passenger "is not suspected of other criminal activity and his identification is not needed to protect officer safety or to resolve whatever reasonable suspicions prompted the officer to initiate an on-going traffic stop or *Terry* stop") *Id*. at 887. (footnote omitted).

Similarly, in *United States v. Henderson*, 463 F.3d 27 the First Circuit held police could not "demand [the passenger's] identifying information," purportedly "for reasons of officer safety," where they lacked any reasonable suspicion the passenger posed a danger to officers.

Although the Florida Supreme Court has not yet addressed the issue, the state appellate courts have unanimously held that the Fourth Amendment and Florida law[3] prohibit requiring persons to identify

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[3] The Florida Stop and Frisk Law, Fla. Stat. § 901.151(2), consistent with the Fourth Amendment, specifically requires law

themselves absent suspicion of wrongdoing. In dismissing the criminal charges against Petitioner, the Florida trial court cited three binding decisions of Florida appellate courts: *Burkes v. State*, 719 So. 2d 29, 30 (Fla. 2d DCA 1998) ("An individual may properly refuse to give his name or otherwise identify himself to law enforcement when he has not been lawfully arrested."), *J.R. v. State*, 627 So. 2d 126, 126-27 (Fla. 5th DCA 1993) ("a defendant's failure to cooperate with the police by refusing to answer questions or identify himself by name cannot itself be criminal conduct consistent with fourth and fifth amendment protections."); and *Burgess v State*, 313 So. 2d 479, 481 (Fla. 2d DCA 1975) (holding that there was not "any lawful basis for the appellant's arrest" for refusing to identify himself to law enforcement).

In this case, although briefing before the court of appeals discussed these decisions, the judges in the majority never engaged with any of the opinions of other circuits or the Florida courts, much less explain why *Hiibel* and *Brown* were not controlling. Rather, the lead opinion simply ignored them, incorrectly framing the issue by focusing on officers' undisputed authority to *ask* for identification, as opposed to whether they can then arrest an individual for *refusing* to provide identification, which this Court has time and again explained is unconstitutional. By

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enforcement to have a reasonable suspicion that an individual has or was going to commit a crime before they can be detained for the purposes of determining identity.

framing the issue incorrectly, and ignoring Supreme Court precedent and case law from other Circuits, the lead opinion upends well-established law and standards for police conduct.

In most of the nation, law enforcement cannot arrest a passenger in a vehicle who is not suspected of any wrongdoing for failing to provide their identification. But now, because of the majority decision in this case, vehicle passengers in Florida, Georgia and Alabama are subject to arrest and prosecution if they do not immediately identify themselves to law enforcement. This is entirely inconsistent with this Court's holdings that the guarantees of the Fourth Amendment do not permit demanding identification from an individual without any specific basis for believing he is involved in criminal activity. *Hiibel,* 542 U.S. at 188; *Brown*, 443 U.S. at 52.

B. The Decision Below Is Egregiously Wrong

This Court has long held that police may demand a person's identity on pain of arrest only with reasonable, individualized suspicion of criminal activity. *Hiibel* 542 U.S. at 188; *Brown*, 443 U.S. at 52. In concluding the opposite, the Eleventh Circuit "directly conflicts" with these on-point, controlling cases—although it barely acknowledges them at all. And in failing to acknowledge that those precedents long ago "clearly established" officers' legal

obligations, the Eleventh Circuit clearly erred. A writ of certiorari from the Supreme Court is warranted to correct this misapplication of squarely controlling law.

The rule requiring reasonable suspicion before compelling someone to identify himself has been clearly established for more than four decades. In *Brown*, a unanimous Court held that the Fourth Amendment bars arrest for "refusing to comply with a policeman's demand that [a person] identify himself." 443 U.S. at 48. The Court recognized that the state statute requiring identification there was "designed to advance a weighty social objective," but such an intrusion into "personal security and privacy" requires "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Id.* at 51-52. Requiring those suspected of no wrongdoing to identify themselves on pain of arrest, the Court explained, would create a "risk of arbitrary and abusive police practices" that "exceeds tolerable limits." *Id.* at 52.

Two decades ago, the Court reaffirmed the principle that those suspected of no wrongdoing may not be compelled to identify themselves to police. In *Hiibel*, the Court took up the question whether the Fourth Amendment "permit[s] a State to require a suspect to disclose his name in the course of a *Terry* stop." 542 U.S. at 187. The Court held that it does *only so long as* there is "reasonable suspicion that [the] person may be involved in criminal activity" and the

request for identification, like any other aspect of a investigatory stop, is "'reasonably related in scope to the circumstances which justified' the initial stop." *Id.* at 186, 188 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). "[A]n officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." *Id.* at 188.

In this case, law enforcement explicitly stated that compliance with the demand for identification was required. Specifically, Petitioner was told immediately upon interacting with law enforcement that if he did not provide his identification, they would "pull him out and he would go to jail for resisting." Pet. App. 5a. And even after Petitioner's father took advantage of another deputy's invitation to identify Petitioner, something the arresting officer acknowledged when he stated "[h]e didn't want to give me his ID and all that, but his dad gave him up," Petitioner was still immediately arrested. Thus, contrary to *Bostick*, police impermissibly "convey[ed] a message that compliance with their requests is required," 501 U.S. at 437.

Although the lead Eleventh Circuit opinion acknowledged that the district court cited *Hiibel* and *Brown*, and quotes the district court (in turn paraphrasing *Hiibel* and *Brown*), it made no real effort to acknowledge, much less grapple with that controlling caselaw. Instead, the opinion inexplicably ignores *Hiibel* and *Brown* to engage in its own

"*Brignoni-Ponce* balancing," concluding that demanding the identity of a passenger suspected of no wrongdoing "is a precautionary measure to protect officer safety." Pet. App. At 15a. (citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)). But there is no place for freeform balancing-of-interests when the Supreme Court has previously spoken to the precise question at issue. *See Brown*, 443 U.S. at 51 (discussing *Brignoni-Ponce*); *Hiibel*, 542 U.S. at 185 (same). And the fact that the lead opinion fails to address controlling Supreme Court precedent is no reason to conclude that "the caselaw does not clearly establish that a constitutional violation occurred," Pet. App. 22a. *See Taylor v Riojas*, 592 U.S. 7, 9 & n.2 (2020) (summarily reversing grant of qualified immunity where court of appeals wrongly identified "ambiguity in the caselaw").

Neither the lead opinion's view of the merits nor the majority's judgment that this law was not clearly established can be squared with controlling Supreme Court authority. The Eleventh Circuit's decision turns a blind eye to controlling authority and, in doing so, upends otherwise clearly established constitutional rights. The result is a needless rift with not just the Supreme Court, but five sister circuits. Review would allow this Court to engage with the relevant precedent and provide clarity on an important and frequently recurring constitutional question.

C. The Law Was Clearly Established At The Time Of Petitioner's Arrest

The arrest at issue in this case occurred on August 2, 2018 and the law was clearly established long before that date.

Brown was decided in 1979. *Brown*, 443 U.S. 47. *Hiibel* was decided in 2004. *Hiibel*, 542 U.S. 177. The First Circuit case of *Henderson* was decided in 2006. *Henderson*, 463 F.3d 27. The Eighth Circuit decided the law was clearly established in 2008. *Stufflebeam*, 521 F.3d 884. The Fifth Circuit held that the law was clearly established in 2018. *Johnson*, 887 F.3d 726. The arrest in *Landeros* that was held to violate clearly established law occurred on February 9, 2016. *Landeros,* 913 F.3d at 864. Similarly, although the written appellate opinion in *Corona* was not issued until 2020, the arrest, which was found to violate then existing clearly established law occurred on August 3, 2014. *Corona*, 959 F.3d at 1285.

The U.S. Department of Justice has taken the position that this Fourth Amendment principle was already well established by 2015. In its widely publicized investigation of the Ferguson, Missouri Police Department, the Department of Justice concluded that an officer "exceeds his authority under the Fourth Amendment by arresting passengers who refuse, as is their right, to provide identification." U.S. Dep't of Justice, Civil Div., *Investigation of the Ferguson Police Department* 22 (March 4, 2015),

https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. The Department of Justice explained that it violated the Fourth Amendment in the auto-stop context to "arrest individuals . . . for failure to identify themselves despite lacking reasonable suspicion to stop them in the first place." *Id.* at 21. That widely publicized guidance provides sufficient notice to any reasonable officer that arresting a passenger for refusing to provide identification is unlawful. *See Hope v. Pelzer*, 536 U.S. 730, 745-46 (2002) (a "DOJ report condemning the practice[] put a reasonable officer on notice that" the practice was unlawful); Richard Perez-Pena, *The Ferguson Police Department: The Justice Department Report, Annotated*, N.Y. Times (March 4, 2015), https://nyti.ms/3UQp0wI; *Read: Justice Department Investigation into Ferguson Police Department*, Orlando Sentinel. https://www.orlandosentinel.com/2015/03/04/read-justice-department-investigation-into-ferguson-police/(hosting full report).

In sum, there can be no legitimate argument that the law was unclear.

II. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT AND WARRANT REVIEW IN THIS CASE

The Department of Justice's Bureau of Justice Statistics reports that in 2020, an estimated 7% of

United States residents experienced a traffic-stop. Press Release, Department of Justice, Bureau of Justice Statistics (Nov. 18, 2022), https://bjs.ojp.gov/press-release/contacts-between-police-and-public-2020. The Stanford University Open Policing Project estimates, based on data from 21 states and 29 municipalities, that an average of 50,000 people are subject to traffic stops *daily*. Stanford Open Policing Project, *Findings*, https://openpolicing.stanford.edu/findings/. Traffic stops thus are one of the most frequent interactions that Americans have with law enforcement. *See* James B. Hyman, Police/Civilian Encounters: Officers' Perspectives on Traffic Stops and the Climate for Policing at 3, 11 (2024) (confirming 50,000 daily figure and account for "fully 40% of all civilian encounters with police") https://proctor.gse.rutgers.edu/sites/default/files/Police%3ACivilian%20Encounters_Final.pdf

The Eleventh Circuit has unsettled the law for the first time in nearly five decades. That upheaval comes in a form that is likely to maximize confusion. The lead decision ignores binding precedent, and the concurring opinion points to the lead opinion's own failure to acknowledge binding precedent from this Court alone as sufficient to establish that a constitutional right is unsettled. The result is an opinion that raises more questions than it answers and leaves police officers and vehicle passengers without proper guidance on the rules that govern

requests for identification during high-stakes police-citizen encounters. For this reason alone, a writ of certiorari is warranted to clarify a question of exceptional importance.

Notwithstanding the concurrence's assurance that this case is non-precedential, it *in fact* represents published, binding Eleventh Circuit authority holding that the Fourth Amendment rights clearly established in *Brown* and *Hiibel*—and recognized by every other court to have considered the question—are no longer clearly established in the Eleventh Circuit.

The uncertainty generated by these irreconcilable positions is intolerable. At *best*, the uncertainty generated by the majority's decision will chill individuals from standing on their clearly established Fourth Amendment rights. At worst, the opinion erases clearly established Supreme Court precedent, exposing passengers to the kind of harassment that Petitioner experienced—being arrested and taken to jail despite the fact that he was not suspected of any wrongdoing (and that his father had already identified him)—for simply exercising what the Supreme Court and five other circuit courts have long understood to be a constitutional right.

The concurring opinion's caveat that "none of the three opinions here garner a majority vote of the panel," and so "none of them represent the views of this Court for precedent purposes," magnifies the

uncertainty and the problematic nature of the decisions. Pet. App. 22a. *See Plumley v. Austin*, 574 U.S. 1127, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari) (holding that attempt by court of appeals to avoid creating binding law for the Circuit was "yet another reason to grant review").

If the case is non-precedential, presumably *Brown* and *Hiibel* should remain clearly established controlling law in the Eleventh Circuit on which vehicle passengers should be entitled to rely. Yet the majority *judgment*, garnering two votes on the panel, is that *Brown* and *Hiibel* do *not* clearly establish the right to refuse an officer's request to identify yourself. Id. at 1125-1126. Thus, the published panel decision very much establishes circuit precedent that the Fourth Amendment right to refuse police identification requests is not clearly established—in conflict with other circuits. *E.g.*, *Corona v. Aguilar*, 959 F.3d 1278.

The Court should grant this case a writ of certiorari in order to resolve this important and recurring question and bring the Eleventh Circuit in line with binding precedent.

III. THE ISSUE OF PASSENGERS' RIGHTS IS CLEARLY FRAMED IN THIS CASE

This case is an ideal vehicle for addressing the critical questions about the rights of passengers. The facts are straightforward and uncontested. There is

video of the incident with multiple cameras and there is no dispute as to what happened in this case. Petitioner was arrested after he refused to immediately identify himself to law enforcement despite there being no suspicion of any wrongdoing at all. There was no split second decision-making or exigent circumstances. Rather, this case was like tens of thousands of interactions that occur on a daily basis between citizens and law enforcement. The clear record and streamlined facts of this case make it an exceptionally good vehicle to decide the questions presented.

IV. THIS COURT SHOULD OVERRULE OR LIMIT QUALIFIED IMMUNITY

There is another, more fundamental reason the Court should grant this petition: It presents an opportunity to reexamine modern qualified immunity jurisprudence, which derives neither from the text of § 1983 nor the common law of official immunity.

The doctrine of qualified immunity and the clearly established test do not appear in the text of the section 1983, the Constitution, or any other statute. As Justice Thomas has observed, the clearly established test "cannot be located in §1983 text." *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., respecting the denial of certiorari).

Rather, qualified immunity derives from the premise that there is "no evidence that Congress intended to abrogate the traditional common law"

immunities in Section 1983 actions. *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983). But Section 1983, as originally enacted in 1871, contained express language abrogating state common law immunities which was mistakenly omitted during codification; the provision imposed liability "any … law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." These counter-textual problems with qualified immunity have been highlighted by Professor Alexander Reinert and others, like Judge Willett in *Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring). Reinert's research suggests that the original text of the section 1983 explicitly displaced common law defenses through the use of the "Notwithstanding Clause," but that part of the text was omitted in later compilations. *Id.* As noted by Judge Willett,

> [n]ot all Supreme Court Justices have overlooked the Notwithstanding Clause. In *Butz v. Economu,* the Court quoted the as passed statutory language, including the Notwithstanding Clause, yet, in the same breath, remarked that §1983's originally enacted text "said nothing about immunity for state officials." Indeed, members of the Supreme Court have often noted the Notwithstanding Clause's existence and omission from the U.S. Code.

Rogers, 63 F.4th at 981, fn. 11 (citations omitted).

Members of this Court have expressed strong reservations with the lack of a basis for the clearly established analysis. *Baxter v. Bracey*, 140 S. Ct. 1862, at 1864 (2020) (Thomas, J. dissenting from denial of certiorari) ("There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe.").

In addition, Justice Sotomayor recently wrote that the time may have come to "reexamine its judge-made doctrine of qualified immunity writ large," based upon her concerns with the clearly established standard. *N. S., only child of decedent Stokes v. Kansas City Bd. of Police Commissioners,* 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J. dissenting from denial of certiorari).

One of the problems of qualified immunity jurisprudence—the failure to enforce constitutional norms unless they are clearly established—is on full display in this case. On one side of the equation are 16 United States Courts of Appeals judges,[4] the District Court judge, and the Florida trial court judge

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[4] Judge Wilson dissented in this case because he felt the law was clearly established and there were no dissents from any of the other circuit decisions which represented a broad swath of the federal judiciary. Judges Tymkovich, Baldock, and Carson in the Tenth Circuit, *Corona,* 959 F.3d 1278, Berzon, Rawlinson, Watford in the Ninth Circuit, *Landeros*, 913 F.3d 862, Reavley, Smith, and Owen in the Fifth Circuit, *Johnson*, 887 F.3d 726, Loken, Gruender, and Benton in the Eighth Circuit, *Stufflebeam,* 521 F.3d 884, 886 and Lipez, Cyr and Stahl in the First Circuit, *Henderson*, 463 F.3d 27.

in this case, all of whom conclude that the text of the Fourth Amendment, *Hiibel, Brown* and other cases squarely dispose of this case. On the other side is a single Court of Appeals judge. In the concurrence, Judge Branch then relies on this single judge's refusal to acknowledge binding Supreme Court precedent to render a right not "clearly established" for one of the most populous sections of the country. For Petitioner, and now any passenger in Florida, Georgia, and Alabama, what was a clearly established right to be free from arrest for refusing to produce identification has been upended by a single judge.

This demonstrates how the concept of clearly established law as it currently functions creates an arbitrary and unpredictable standard. Constitutional rights should not hinge on a single judge's subjective interpretation of what constitutes clearly established law. This approach results in a patchwork of protections, where an individual's rights are recognized in one jurisdiction but denied in another. The variability in judicial determinations of clearly established law undermines the uniformity and predictability essential to the rule of law and this case highlights the problem in a very direct manner.

By reexamining and clarifying the doctrine of qualified immunity, the Supreme Court can ensure that constitutional rights are not dependent on the unpredictable and varied interpretations of lower courts. A more objective and consistent standard is

necessary to protect individuals' rights uniformly and to maintain public confidence in the justice system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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