No. 24-892

IN THE

Supreme Court of the United States

ALEJANDRO MARTINEZ,

Petitioner,

v.

CITY OF ROSENBERG, TEXAS, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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INTRODUCTION

This case is an exceedingly poor vehicle for resolving the Question Presented—beginning with the fact that Petitioner never raised the Question Presented before either the district court or the Fifth Circuit. Having failed to preserve the issue, Petitioner has waived and/or forfeited it. It has long been settled practice that this Court will not grant certiorari to consider a question that was not argued and preserved below absent exceptional circumstances. Petitioner's failure to challenge the lower courts' asserted treatment of the *de minimis* injury issue deprived those courts of the opportunity to develop the record and address the argument. Since no exceptional circumstances exist, there is no basis for departing from the waiver rule here.

Beyond waiver, the Petition should be denied because the question is not squarely presented and is not outcome determinative given that the district court did not dismiss Petitioner's claims based on the so-called *de minimis* injury standard that Petitioner asserts is in conflict with the law of other circuits. Instead, the district court applied a "totality of the circumstances" analysis consistent with the Fifth Circuit's own evolving jurisprudence—and guided by this Court's teachings in *Graham v. Connor*, 490 U.S. 386 (1989)—that has moved away from requiring more than a *de minimis* injury to maintain an actionable excessive force claim and that, instead, treats the degree of injury as interrelated with and informative of the reasonableness of the officer's use of force in the qualified immunity analysis. The district court thus assumed that Petitioner had suffered the requisite more than *de minimus* injury but concluded that the still-minor alleged harm, unsupported by any evi-

dence, weighed in favor of its conclusion that the individual officer's use of force in effecting what it determined as a matter of law to be a lawful arrest was reasonable and therefore entitled to qualified immunity. The Fifth Circuit affirmed on the basis of the district court's reasoning. Contrary to Petitioner's presentation, there is no simple legal question presented by this case. Instead, this is another Fourth Amendment case where the lower courts have "slosh[ed their] way through" a "factbound morass" to decide whether an officer's use of force was objectively reasonable. *Scott v. Harris*, 550 U. S. 372, 383 (2007). Such factbound cases are particularly poorly suited for review by this Court.

Lastly, the decision below presents no question of exceptional importance that merits this Court's review. This case is not like *Barnes v. Felix*, 605 U.S. ___ Slip Op. (U.S. May 15, 2025), where this Court rejected the Fifth Circuit's rule engrafting a hard-and-fast temporally-limiting "moment of threat" restriction onto *Graham's* already-admittedly-complicated "totality of the circumstances" analysis. Here, the lower courts decided the case based on the overall totality of the circumstances without treating the "*de minimis*" injury issue as short-circuiting and terminating the inquiry altogether. Because Petitioner fails to seek review of the district court's determination that the force used was reasonable under the totality of the circumstances—the ground, or at the least an independent alternative ground, for the district court's ruling and the Fifth Circuit's affirmance—the judgment would stand even if the Court were to undertake to resolve the Question Presented, rendering review unnecessary and contrary to principles of judicial economy, if not an impermissible advisory opinion altogether.

The Petition should be denied.

STATEMENT OF THE CASE

I. Factual Background

On February 6, 2019, Officer Cantu of the City of Rosenberg Police Department observed Petitioner walking on the wrong side of the street in violation of the Texas Transportation Code.[1] Cantu approached Petitioner and asked him to "come here" several times intending to advise him about the danger of walking along the road with his back toward oncoming vehicles. Petitioner originally complied but, after conversing with Officer Cantu for approximately one minute, he began to walk away. Cantu did not tackle Petitioner but approached him and put his arms around Petitioner's upper body and neck and took him to the ground for handcuffing.

Officer Dondiego arrived on the scene and helped Cantu handcuff Petitioner after he was already on the ground. The arrest was made using only open hand control and no blows or strikes of any kind occurred. Petitioner alleged that he complained of pain during and after the event.

Following the encounter, four additional officers—Gallegos, Macha, Reid, and Manriquez—arrived and helped to escort Petitioner to a squad car. He was transferred to Oak Bend Medical Hospital for a medical evaluation. Medical staff reported that Petitioner's pain was "chronic," he had no broken bones, and he was sufficiently mobile. After administering

[1] Texas Transportation Code Section 552.006(b).

pain medicine, the hospital cleared Petitioner as fit for jail.

Body-cam video showed Petitioner being verbally hostile and uncooperative as he argued and yelled obscenities. (Pet. App. 24a). Video further documented that Petitioner attempted to walk away from the scene despite Cantu's orders to stay, and actively resisted arrest by struggling and kicking. (Pet. App. 24a). The video further confirmed that the force used in handcuffing Petitioner consisted entirely of open hand control. (Pet. App. 25a).

II. Proceedings Before the District Court

As relevant here, Petitioner's Second Amended Complaint, the operative pleading, asserted Fourth Amendment excessive force claims against the individual officers. They interposed defenses, including that the force used was reasonable, and that their actions were shielded by qualified immunity.[2]

The individual officers moved for summary judgment. They supported their motion with dash camera, body camera and backseat videos as well as their individual declarations. [ECF Doc. 45].

Petitioner did not proffer any evidence in his opposition. Petitioner's 10-page opposition was unsupported by any declaration, even from Petitioner himself, nor did he proffer any other evidence concerning the circumstances of his arrest, the force used, or his alleged injury. Petitioner's opposition did not even mention Officers Manriquez, Reid, Macha and

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[2] The claims against the City of Rosenberg were dismissed on a Rule 12(b)(6) motion, a ruling that was affirmed by the Fifth Circuit and is not at issue here. [ECF Doc. 10 and Pet. App. 5a-7a].

Gallegos, the officers who arrived after Petitioner was in custody. [ECF Doc. 47].

Of particular importance here, Petitioner's opposition made no mention at all—much less did it undertake to challenge or even make any attempt to preserve such a challenge for a future appeal—of the Fifth Circuit's jurisprudence regarding an injury requirement in use of force cases. Petitioner therefore waived the issue he seeks to litigate here.

Notably, Petitioner *did* undertake to preserve for appellate review his argument that the entire doctrine of qualified immunity should be abolished (ECF Doc. 47 at 9-10)—an argument that he also raised before the Fifth Circuit. Although properly preserved for presentation here, Petitioner has elected not to tilt at that windmill before this Court.

The district court granted summary judgment in favor of the officers on qualified immunity grounds. The court ruled that the uncontroverted evidence established that probable cause existed for the arrest and that, under the "totality of the circumstances," the force used by the officers was reasonable. (Pet. App. 25a).

Importantly, the "*de minimis*" issue that Petitioner seeks to challenge for the first time here was not outcome determinative before the district court. To be sure, that court cited the Fifth Circuit's requirement in an excessive force case that "a plaintiff generally 'need not demonstrate a significant injury, but the injury must be more than *de minimis*.'" (Pet. App. 23a) (*quoting Solis v. Serrett*, 31 F.4th 975, 981 (5th Cir. 2022). Contrary to Petitioner's assertion, however, the district court did not base its decision on Petitioner's failure to demonstrate "more than *de minimis*" injury.

Rather, that court assumed that Petitioner had met that threshold. But, the district court concluded on the uncontroverted evidentiary record that any such injury was minimal—not so minimal as to be disqualifying by itself under Fifth Circuit precedent, but a telling factor in evaluating whether the officers' use of force was reasonable. (Pet. App. 23a). As relevant here, having concluded that probable cause for arrest existed and no excessive force was used, the Court granted summary judgment on the ground that the officers were entitled to qualified immunity against all of Petitioner's claims against them. (Pet. App. 25a). The district court's analysis of the reasonableness of the force was thorough and was explicitly viewed by that court through the "totality of circumstances" lens.

III. Appeal to the Fifth Circuit

In the Fifth Circuit, Martinez again asserted that "qualified immunity is a fundamentally flawed doctrine that should no longer exist." (Martinez CAB28-30). Again, however, Petitioner never raised a challenge to the Fifth Circuit's *de minimis* injury requirement for excessive force claim.

The Fifth Circuit affirmed "essentially for the reasons stated in the district court's order." (Pet. App. 8a). It went on to hold that "[w]ith respect to Martinez's excessive use of force claim, we agree with the district court that any injury was de minimis, *and* Cantu used reasonable force given the totality of the circumstances."[3] (Pet. App. 9a) (emphasis added).

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[3] To reiterate, the district court assumed more than a *de minimis* injury but concluded based on the record and the totality of the circumstances that the officers were entitled to qualified immunity. The wording of the Fifth Circuit's opinion is imprecise

Judge Higginbotham's opinion for the panel majority noted the lack of evidence in the record of a serious injury but considered the extent of force used in light of the totality of the circumstances in agreeing with the district court's holding that the officers were entitled to qualified immunity.[4]

REASONS FOR DENYING THE PETITION

I. This Case Is an Exceptionally Poor Vehicle for Considering the Question Presented

A. Petitioner Waived the Question Presented Throughout the Underlying Proceedings

The Question Presented by Petitioner is whether an otherwise unreasonable use of excessive force is permitted under the Fourth Amendment so long as it results in no, or only minor injuries. (Cert. Pet. at i). Petitioner asserts that the Fifth Circuit's formulation of the elements of an excessive force claim as requiring something more than a "*de minimis* injury" is inconsistent with those of other circuits and with certain holdings of this Court (in the 8th Amendment, not 4th

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to the extent that it can be read as suggesting that the district court rested its decision exclusively or directly on Petitioner's threshold failure to demonstrate more than a *de minimis* injury.

[4] It bears noting that Judge Higginbotham, who authored the Fifth Circuit's opinion in *Barnes*, while at the same time taking the unusual step of writing a separate concurring opinion to flag his concern that the Fifth Circuit's "moment of threat" doctrine improperly impinged upon *Graham's* totality of the circumstances test, expressed no similar concern that the *de minimis* injury standard as applied here by the district court through the lens of the totality of the circumstances might impinge on the *Graham* standard.

Amendment, context). But the very first time that Petitioner raised this issue was in its certiorari petition to this Court. Petitioner never even so much as hinted that this might be an issue either in the district court or in the Fifth Circuit. Because the argument was never made, the lower courts obviously had no opportunity to consider it, much less to rule on it.

This Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Absent exceptional circumstances, this Court will not consider a question "without the benefit of thorough lower court opinions to guide [its] analysis of the merits." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). The "traditional rule" is to deny certiorari "when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (cleaned up); *See, Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *See also, Hall Street Assocs. L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 591 (2008) (refusing to consider an issue even where a petitioner had "suggested something along these lines in the Court of Appeals"). "[C]hief among" the considerations supporting that rule "is [the Court's] own need for a properly developed record on appeal." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988); *See also, Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016) ("The Department failed to raise this argument in the courts below, and we normally decline to entertain such forfeited arguments.").

Petitioner knew how to raise and preserve an issue—even one that would require this Court to overturn its own settled precedent—having taken the position before both lower courts that the doctrine of qualified immunity is flawed and should be abolished.

But Petitioner did not argue or raise the issue that the Fifth Circuit injury requirement should be revisited or even suggest something along these lines. As a result, Petitioner has deprived the Court of the valuable sharpening of the issue in the lower courts through the advocacy of counsel as well as having given the Fifth Circuit itself the opportunity to review its past decisions—and potentially decide that, as the Appellee in *Solis* argued to that court, the *de minimis* standard should be abandoned as altogether "obsolete."[5] Further hampering any review by this Court of the Question Presented, Petitioner failed to create any meaningful evidentiary record as to what, if any, actual injuries he suffered because he failed to proffer *any* supporting evidence in his opposition to the motion for summary judgment.

Petitioner's failure to challenge the Fifth Circuit's treatment of the *de minimis* issue below deprived the lower courts of the opportunity to develop the record and address the argument. This failure undermines judicial economy and fairness. No exceptional circumstances justify departing from the waiver rule here, and the Petition should be denied.

B. The Question Is Not Even Squarely Presented Because the Case Was Decided on Qualified Immunity Grounds, Not Failure to Establish a Greater-than-*De Minimis* Injury

Petitioner misstates the district court's holding when it asserts that the district court granted summary judgment against him because it found no

[5] Brief of Appellee, 2021 WL 5982154, at *34 ("Defendants' *de minimus* argument relies on obsolete authority.")

constitutional violation could have occurred because of the lack of a sufficiently serious injury. The actual holding was that the officers were entitled to qualified immunity because the force used was neither excessive nor unreasonable based on the "totality of the circumstances." (Pet. App. 25a). While the lack of any evidence of serious injury factored into the analysis of whether the force the officers used in effecting what the district court concluded was a lawful arrest under that analysis, the district court did not hold that it defeated Petitioner's claim of its own weight. The district court used the minimal injury shown in the record—which was devoid of any medical records, experts, or even a supporting declaration from the petitioner—as a factor to be considered in its qualified immunity analysis, but, to repeat, it did *not* use the *de minimis* test to disqualify Petitioner's claim.

In the end, by eliding that his claim actually was dismissed using a totality of the circumstances rubric consistent with this Court's *Graham* approach, Petitioner is simply asking the Court to review a result with which he disagrees—that the force used was reasonable under the totality of the circumstances. This does not warrant certiorari review. *Salazar-Limon v. City of Houston*, 581 U.S. 946, 137 S. Ct. 1277, 1278 (2017) (the Court may grant review if the lower court conspicuously failed to apply a governing legal rule but it rarely grants review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case.).

Even if this Court were to resolve the Question Presented, the judgment would stand based on the holding that no excessive force was used under the totality of the circumstances, rendering review unnec-

essary and contrary to the principles of judicial economy. *See,* Stephen Shapiro et al., *Supreme Court Practice* § 4.4(e)-(f) (11th ed. 2019) (recognizing this Court generally denies review when alternative grounds for resolving case exist and when purported circuit conflict is irrelevant to ultimate outcome). There is no compelling reason to grant the Petition when the district court and the Fifth Circuit did not treat the *de minimis* requirement as disqualifying in this case and the outcome would not change regardless of whether this Court were to decide the Question Presented.

II. The Question Presented Is Not Exceptionally Important

Certiorari should also be denied because the jurisprudence of the Fifth Circuit itself on this issue is evolving and should be permitted to continue to percolate. Petitioner contends (at 15) that the Fifth Circuit imposes a "rigid" injury threshold to the cognizability of an excessive force claim. That contention, however, is belied by the evolution of that court's jurisprudence as demonstrated by more recent Fifth Circuit decisions showing that the Fifth Circuit has moved—and continues to move—away from a strict *de minimis* injury requirement in excessive force cases under the Fourth Amendment. In more recent cases, the Fifth Circuit has been closely aligned with this Court's decision in *Graham*, which emphasizes evaluating the reasonableness of force based on the totality of the circumstances, without requiring a specific threshold of injury.

For example, in *Alexander v. City of Round Rock,* 854 F.3d 298 (5th Cir. 2017), the Fifth Circuit reversed dismissal of an excessive force claim. In doing so, it explained that even insignificant injuries may support

an excessive force claim, as long as they result from unreasonably excessive force:

> Although a *de minimis* injury is not cognizable, the extent of injury necessary to satisfy the injury requirement is directly related to the amount of force that is constitutionally permissible under the circumstances. Any force found to be objectively unreasonable necessarily exceeds the *de minimis* threshold, and, conversely, objectively reasonable force will result in *de minimis* injuries only. Consequently, only one inquiry is required to determine whether an officer used excessive force in violation of the Fourth Amendment. In short, as long as a plaintiff has suffered some injury, even relatively insignificant injuries and purely psychological injuries will prove cognizable when resulting from an officer's unreasonably excessive force.

Id. at 309 (cleaned up).

Then, in *Buehler v. Dear*, 27 F.4th 969, 982 (5th Cir. 2022), the court emphasized "the injury requirement is a sliding scale, not a hard cutoff." In *Buehler* the court held that abrasions, bruises on a tricep and plaintiff's head as well as allegation of mental trauma "while minor, are not so minor that his excessive-force claim necessarily fails as a matter of law." *Id.*

The trend continued in *Solis,* where the court first noted that "[r]ecently, this circuit has characterized the injury requirement as 'a sliding scale, not a hard cutoff.'" 31 F.4th at 981 (quoting *Buehler*, 27 F.4th at 982). In *Solis*, the court found a hurt back and wrist and mental anguish sufficient to establish "some injury" and treated the extent of the injuries as

evidentiary rather than a threshold disqualification. *Id.* at 982. *Accord, Duckworth v. Landrum*, 62 F.4th 209, 219 (5th Cir. 2023).

The trend within the Fifth Circuit away from any hard-and-fast cutoff—and away from any continued relevance of Petitioner's Question Presented—is also reflected in numerous other opinions from that court in recent years. *See e.g.*, *Scott v. White*, 810 F. App'x 297, 300-302 (5th Cir. 2020) ("Scott's physical injuries are not categorically *de minimis* as a matter of law.") (citing *Alexander); Hinson v. Martin*, 853 F. App'x 926, 932 (5th Cir. 2021) ("the relatively minor injury (pain) that Hinson alleges resulted from being kicked, when examined in the context of a subdued, handcuffed, and compliant arrestee, may suffice to meet the injury element of an excessive force claim, if objectively unreasonable") (citing *Alexander*); *Durant v. Brooks*, 826 F. App'x 331, 336 (5th Cir. 2020) ("any injury suffered by Durant—even sore ribs—is sufficient to establish the injury element of his excessive force claim.") (citing *Alexander*); *Sam v. Richard*, 887 F.3d 710, 714 (5th Cir. 2018) ("Sam's alleged injuries—which include minor bleeding—meet *Alexander's* 'some injury' test."). This evolution within the Fifth Circuit effectively has eliminated the *de minimis* injury requirement as a stand-alone requirement for a viable excessive force claim in favor of considering the extent of the injury as another factor in determining whether the force was "excessive" under the totality of the circumstances.

The district court assumed the injury was cognizable and treated the extent of the injury, to the extent it was supported by the threadbare record, as another factor to be considered. This is the admittedly and intentionally-squishy standard prescribed by this

Court in *Graham*, as reconfirmed last week by this Court in *Barnes*.

But unlike *Barnes*, no categorically-disqualifying "rule constrict[ing] the proper inquiry into the 'totality of the circumstances'" was superimposed over the totality of the circumstances analysis by either the district court or the Fifth Circuit. *Barnes v. Felix,* 605 U.S. ___ Slip Op. at 4-5 (U.S. May 15, 2025). Per *Buehler* and *Solis,* the injury requirement is now part of "a sliding scale, not a hard cut off." While one can argue over whether a categorically-disqualifying "more than *de minimis* injury requirement" still can be read as continuing to exist within the jurisprudence of the Fifth Circuit, it was not actually utilized to decide the case in the lower courts. To the extent that Petitioner is seeking to attack the use of the minor nature of the injury as a factor in the reasonableness calculus in qualified immunity cases, he simply has not presented an exceptionally important question, but rather is asking the Court to get stuck in the factual weeds of his particular case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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