No. 17-1584

In the Supreme Court of the United States

DANIEL J.H. BARTELT,

Petitioner,

v.

WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

BRIEF OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S REQUEST FOR CERTIORARI

Rex S. Heinke
Counsel Of Record
Akin Gump Strauss Hauer & Feld LLP
1999 Avenue of the Stars
Suite 600
Los Angeles, CA 90067
(310) 229-1000
rheinke@akingump.com

David M. Shapiro
Roderick And Solange MacArthur Justice Center
375 E. Chicago Avenue
Chicago, IL 60611
(312) 503-0711

Bryan M. Wittlin
Drinker Biddle & Reath LLP
1800 Century Park East
Suite 1500
Los Angeles, CA 90067
(310) 203-4041

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

SUMMARY OF ARGUMENT

Whether a law enforcement officer has to give *Miranda* warnings to question a suspect is determined by whether the suspect is in custody. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966). This Court "has never explicitly clarified how much weight a 'you're not under arrest' advisement may be given" when deciding whether a suspect was in custody. *See, e.g.*, *Smith v. Clark*, 612 F. App'x 418, 422 (9th Cir. 2015) (Watford, J., concurring), *cert. denied*, 136 S. Ct. 1464 (2016). Some lower courts, however, have given "all-but-dispositive weight" to such an advisement. *Id.* In doing so, these courts misapply *California v. Beheler*,

---

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than the *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have received timely notice of the intent to file this brief, and have consented to this filing.

463 U.S. 1121 (1983), a case in which a suspect was told during questioning that he was not under arrest, and this Court held that he was not in custody. Seizing on this, law enforcement trains officers to keep interrogations nominally non-custodial by telling suspects "you're not under arrest" or "you're free to leave." This tactic is engrained to the point that officers have coined a name for it: "*Beheler*-ing."

In this case, the lower court found that Petitioner Daniel J.H. Bartelt was not in custody, even after he confessed to a serious crime. This decision allows officers to continue with un-*Mirandized* questioning after a suspect confesses to a serious crime, even though no reasonable person would believe they are free to leave in such circumstances.

As it did with *Beheler*, law enforcement will seize onto this ruling to circumvent *Miranda* if this Court does not intervene. Law enforcement will seek to keep post-confession interrogations technically non-custodial by, among other things, repeating hollow "you're free to leave" warnings and maintaining the same tone of voice after a suspect confesses.

These steps will not change the reality that no reasonable suspect will feel free to leave in such circumstances. Accordingly, this Court should grant Petitioner's petition for a writ of certiorari to the Wisconsin Supreme Court and address the practice—condoned by many lower courts—of un-*Mirandized* interrogations in the highly coercive situation Petitioner was in here: a stationhouse interrogation after confessing to a serious crime.

ARGUMENT

The officers here chose not to give *Miranda* warnings after Petitioner confessed to a crime. The Wisconsin Supreme Court approved this decision by holding that Petitioner was not in custody.

If this Court does not intervene, the rule applied by the lower court here will empower officers to continue un-*Mirandized* questioning in such highly coercive circumstances.

I. Some Police Officers Are Trained To Circumvent This Court's Jurisprudence in *Miranda* By Advising Suspects That They Are Not In Custody.

In *Miranda*, this Court explained that the "incommunicado interrogation of individuals in a police-dominated atmosphere" generates "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona*, 384 U.S. 436, 445, 467 (1966). This Court prescribed *Miranda* warnings "to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination." *Id.* at 467.

"The Court has pegged the trigger for *Miranda* warnings to the concept of 'custody,' defined to mean either formal arrest or circumstances in which the suspect has otherwise been 'deprived of his freedom of action in any significant way.'" *See, e.g.*, *Smith v. Clark*, 612 F. App'x 418 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1464 (2016) (quoting *Miranda*, 384 U.S. at 444); *see Berkemer v. McCarty*, 468 U.S. 420, 428–31 (1984). This is because "the coercion inherent in custodial interrogation blurs the line between voluntary

and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.'" *Dickerson v. United States*, 530 U.S. 428, 435, (2000) (citing *Miranda*, 384 U.S. at 439).[2]

However, law enforcement has become "adroit in the realm of non-custodial investigation,"[3] with some officers creating "non-custodial interrogation contexts that are indistinguishable in many respects from post-arrest questioning."[4]

Training materials produced by various law enforcement entities discourage "needlessly *Mirandiz[ing]*" suspects[5] and specifically describe this Court's decision in *California v. Beheler*, 463 U.S.

---

[2] As a corollary to this framework, "[i]f the police take a suspect into custody and then ask him questions without informing him of [his *Miranda* rights], his responses cannot be introduced into evidence to establish his guilt." *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984) (collecting cases).

[3] Emily Bretz, *Don't Answer the Door: Montejo v. Louisiana Relaxes Police Restrictions for Questioning Non-Custodial Defendants*, 109 MICH. L. REV. 221, 236 (2010).

[4] Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1546 (2008).

[5] Weisselberg, *supra* note 4, at 1542 n.131 (quoting Cal. Peace Officers' Assoc., *Too Much Miranda*, TRAINING BULL. SERVICE (May 2006), at 2) (noting training manual describing a situation as one where officer "needlessly *Mirandized*" a suspect instead of giving a "*Beheler* admonition")); *see also id.* (citing police trainings and manuals "suggesting a series of tactics to convince a subject to come to the police station for an interview without *Miranda* warnings").

1121 (1983) (per curiam) as "'a wonderful case for use.'"[6]

Courts rely on *Beheler* and its progeny when deciding whether a suspect was in custody during an interrogation. Beheler's step-brother killed a woman in the course of his attempt, together with Beheler, to steal from the woman.[7] Beheler called the police, told them his step-brother killed the victim, and "voluntarily agreed to accompany police to the station house although the police specifically told Beheler that he was not under arrest."[8] The Court explained: "At the station house, Beheler agreed to talk to police about the murder, although the police did not advise Beheler of the rights provided him under [*Miranda*]. The interview lasted less than 30 minutes. After being told that his statement would be evaluated by the district attorney, Beheler was permitted to return to his home."[9] The Court held that Beheler was not in custody, based on the totality of the circumstances,

---

[6] Weisselberg, *supra* note 4, at 1542 n.131 (quoting SACRAMENTO SHERIFF'S DEP'T TRAINING ACAD., CLASS HANDOUT, INTERVIEWS & INTERROGATIONS 2, 18 (Ron Wells, Instructor, 2004); Bretz, *supra* note 3, at 238 (collecting sources describing the breadth of law enforcement attention on tactics to take advantage of *Beheler*).

[7] *California v. Beheler,* 463 U.S. 1121, 1122 (1983) (per curiam).

[8] *Id.*

[9] *Id.*

and thus the officers were not required to give him his *Miranda* warnings.[10]

Since then, this Court has repeatedly reaffirmed that the custody test is based on an objectively reasonable person standard. *See, e.g.*, *Stansbury v. California*, 511 U.S. 318, 325 (1994). In *Stansbury*, this Court clarified that "an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but *only if* the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave."[11]

These post-*Miranda* decisions have allowed some police "officers to easily manipulate the distinction between custodial and noncustodial interrogations."[12]

---

[10] *Id.* at 1125 (citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

[11] *Stansbury v. California*, 511 U.S. 318, 325 (1994) (emphasis added); *see also Yarborough v. Alvarado*, 541 U.S. 652, 669 (2004) (whether a suspect was in custody is based on "objective circumstances of the interrogation"); *Howes v. Fields*, 565 U.S. 499, 515 (2012) (applying objectively reasonable person standard to determine if questioning of prisoner was a custodial interrogation).

[12] Aurora Maoz, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309, 1320-21 (2012); Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 44 (1992); Weisselberg, *supra* note 4, at 1541.

This is because, under these cases, "it does not matter if officers bring a defendant to the police station intending to arrest him or if the defendant actually believes he is in custody, so long as a court determines, at an *ex post* suppression hearing, that some abstract, hypothetical, objectively reasonable person would have felt free to leave."[13]

With an eye toward these cases, law enforcement trains officers to keep interrogations of a nature that, upon *ex post* review, would be held non-custodial.

Criminologist and law professor Fred Inabu, who coauthored the initial police manuals to which the *Miranda* court reacted, continues to write training manuals and counsels that: "whenever possible, officers should conduct formal interrogations in a 'noncustodial environment' to avoid awarding suspects the increased rights that accompany custodial interrogations" so as to expand the number of admissible confessions.[14] Another manual teaches officers:

> Because warnings are only required prior to custodial interrogation, one way to minimize the adverse impact of *Miranda* on investigations is to try to conduct interrogations whenever possible in non-custodial settings (such as at the suspect's home or on the street, without arrest-like restraints). . . . [I]t is also possible to interrogate an

---

[13] Weisselberg, *supra* note 4, at 1541–42.

[14] Maoz, *supra* note 12, at 1321 (citing Fred E. Inbau, et al., CRIMINAL INTERROGATION AND CONFESSIONS (5th ed. 2011), at p. 89).

un-arrested suspect at the police station without warnings, if the situation is handled properly.[15]

Officers across the country are specifically trained to use the *Beheler* admonishment, i.e., to tell a suspect "you're not under arrest" or "you're free to leave," to avoid triggering the need to give *Miranda* warnings.[16] This circumvents *Miranda*'s purposes, however, because officers can "transform questioning scenarios and employ softly coercive techniques that create, in non-custodial settings, the very compelling pressures that *Miranda* sought to eliminate."[17] Indeed, in some instances, giving a *Beheler* warning

---

[15] Bretz, *supra* note 3, at 238–39 n.132 (2010) (citing Devallis Rutledge, *Non-Custodial Stationhouse Interrogations: How to Talk to Suspects Without Mirandizing*, Police: THE L. ENFORCEMENT MAG. (Jan. 1, 2009), available at http://www.policemag.com/Channel/Patrol/Articles/2009/01/Non-Custodial-Stationhouse-Interrogations.aspx.)

[16] Weisselberg, *supra* note 4, at 1546 (citing Interrogation Law, *POST Telecourse Reference Guide* (Aug. 2003), at E1, available at http://www.post.ca.gov/training/cptn/pdf/Interrogation%20Law%202003.pdf); Maoz, *supra* note 12, at 1321 (citing *id.*) ("Further, a study of police training materials in California reveals the development of a '*Beheler* admonishment.' Officers call suspects down to the stationhouse for interrogation, and then inform them that they are not under arrest and are free to leave, thereby obviating the need—as the training goes—to worry about following the mandates of *Miranda*.").

[17] Bretz, *supra* note 3, at 239; Weisselberg, *supra* note 4, at 1547 ("The *Miranda* Court assumed that the element of 'custody' would effectively separate interrogations that contain inherently compelling pressures from those that do not . . . [but] giving *Beheler* warnings does not uniformly make stationhouse interrogations less coercive.").

may actually make certain interrogation tactics more effective at exerting pressure to confess.[18]

Yet the examples of trainings encouraging officers to use *Beheler*-ing abound. A POST training course teaches that a *Beheler* admonishment will make an interrogation non-custodial, and that after giving the admonishment officers "may use the full toolkit of interrogation tactics—including confrontation, cutting off denials, and minimization techniques—to question a non-custodial suspect at the stationhouse."[19] Some trainings also include suggested language for "*Beheler* admonishments."[20] Indeed, the Ninth Circuit has observed that California police departments commonly interpret *Beheler* to

---

[18] Specifically, a *Beheler* admonishment may aid an interrogating officer's efforts to employ "minimization" techniques. Weisselberg, *supra* note 4, at 1547. Under this approach, officers focus questioning on why the suspect committed the crime with an aim toward minimizing the moral culpability for the conduct. *Id.* Giving a *Beheler* admonishment may "make the 'why' approach all the more credible. The message to suspects is something like this: 'You're not under arrest. In fact you're free to go. I just need to know why you took the money. Was it because you are a bad person, or did you need to buy food for your kids?'" *Id.*

[19] Weisselberg, *supra* note 4, at 1543 n.136 (citing Interrogation Law, *POST Telecourse Reference Guide* (Aug. 2003), at E1, available at http://www.post.ca.gov/training/cptn/pdf/Interrogation%20Law%202003.pdf).

[20] *Id.*

mean that so long as a suspect is told he or she is not under arrest, *Miranda* warnings are unnecessary.[21]

Some trainings emphasize that *Beheler* allows officers to decide when giving the warnings would work strategically in their favor. Specifically, officers are told to give the warnings if the suspect seems cooperative and likely to waive their rights. On the other hand, if the suspect appears unlikely to waive their rights, officers are trained to avoid the *Miranda* warnings and instead give a *Beheler* admonishment.[22] In a legal update, Prosecutor Robert C. Phillips advises:

> If . . . the subject appears to be uncooperative and not likely to waive, consider taking the coerciveness (i.e., the "custody") out of the interrogation by simply informing him that he is not under arrest (e.g.; *see California v. Beheler*, *infra*.), when practical to do so under the circumstances, and interview the subject without a *Miranda* admonishment and waiver.[23]

Thus, officers are trained to strategically avoid giving *Miranda* warnings.

---

[21] *Clark*, 612 F. App'x at 421, 423 (Watford, J., concurring).

[22] Weisselberg, *supra* note 4, at 1541.

[23] *Id.* at 1542-43 (quoting Robert C. Phillips, Fifth Amendment; *Miranda*, LEGAL UPDATE (Deputy Dist. Attorney & Law Enforcement Liaison Deputy, San Diego, Cal.) (Oct. 2005)).

II. Law Enforcements' Intentional Avoidance Of *Miranda* By Advising Suspects That They Are Not In Custody Is Pervasive.

Importantly, the trainings appear to be effective: these tactics are used by officers nationwide. One scholar found, by 2008, "decisions with some form of *Beheler* admonishments in questioning" by federal agents[24] and by police in at least thirty-two states (not including the state at issue in this case, Wisconsin) and the District of Columbia.[25] The practice of using this admonishment to avoid giving *Miranda* warnings is pervasive enough that law enforcement has coined a term for the practice, calling it "*Beheler*-ing." Indeed, in *Smith v. Clark*, where the Court held that a suspect was not in custody, one interrogating officer asked another after the defendant's initial interrogation: "You *Beheler*-ing here?"[26]

---

[24] *Id.* at 1545-46 n.140 (citing cases involving *Beheler* admonishments by the Bureau of Alcohol, Tobacco and Firearms; the Naval Criminal Investigative Service; the Missouri Highway Patrol; FBI; Air Force Office of Special Investigations; and local law enforcement in those cases); *see also* Maoz, *supra* note 12, at 1321 (discussing use of *Beheler* admonishments).

[25] *Id.* at 1545 n.141 (citing cases with *Beheler* admonishments by law enforcement in Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Washington, D.C., Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Maine, Minnesota, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and West Virginia).

[26] *Clark*, 612 F. App'x at 424 (Watford, J., concurring). As Judge Watford points out in his concurring opinion, "[u]ntil the Supreme Court says otherwise, California courts will remain

Officers are trained to, and do, exploit opportunities to subvert this Court's jurisprudence in *Miranda*. This phenomenon is demonstrated by law enforcement's use of a "*Beheler* admonishment" to avoid giving *Miranda* warnings.

III. Post-*Miranda* Cases Have Enabled Some Police Officers To Conduct Coercive Interrogations Without Giving *Miranda* Warnings By Advising Suspects That They Are Not In Custody.

Law enforcement's misuse of *Beheler* is enabled by some lower courts that, when deciding whether a suspect was in custody, give significant or "all-but-dispositive" weight to the fact that a suspect was told that he or she was not under arrest or was free to leave. *See, e.g.*, *Clark*, 612 F. App'x at 424, (Watford, J., concurring) (observing that California courts give "all-but-dispositive weight to a 'you're not under arrest' advisement" and noting that this Court "has never explicitly clarified how much weight a 'you're not under arrest' advisement may be given, much less explicitly forbidden state courts to give such an advisement the heavy weight it received here."); *see also Locke v. Cattell*, 476 F.3d 46, 53–54 (1st Cir. 2007) ("Most significantly, [defendant] was told at least five times that he did not have to speak with the police and that he was free to leave."); *United States v. Muegge*, 225 F.3d 1267, 1271 (11th Cir. 2000) (finding a non-custodial interview primarily because the suspect was told directly that he was free to leave); *United States v. LeBrun*, 363 F.3d 715, 724 (8th Cir.

---

free to validate the '*Beheler*-ing' of suspects, even when that practice is used to evade *Miranda's* requirements." *Id.* at 422.

2004) (holding that defendant who was "specifically told on four different occasions during the course of the interview that he was not under arrest and could go home" was not in custody).

In *Clark*, the police intensely interrogated the 16-year-old defendant in a small, windowless room in the police station, for hours, without any family members present.[27] Yet, in finding that the defendant was not in custody, the only factor the court identified was that he had been advised three times that he was not under arrest.[28] The Ninth Circuit also noted in its majority opinion that this Court has not "categorically prohibited the deliberate use of the 'you're not under arrest' strategy.'"[29]

When the *Beheler* admonishment is weighed too significantly against custody, it can allow officers to game Constitutional criminal procedure because officers can still conduct intensely coercive questioning so long as they tell the suspect "you're not under arrest" or "you're free to leave." This allows for the too easy evasion of *Miranda*'s protections.

---

[27] *Smith v. Clark*, 612 F. App'x 418, 422 (9th Cir. 2015) (Watford, J., concurring).

[28] *Id.*

[29] *Id.* at 421.

IV. This Court Should Intervene To Prevent Law Enforcement From Conducting Un-*Mirandized* Interrogations After A Suspect Confesses To A Crime.

As it does with *Beheler*, law enforcement will exploit the lower court's rule to evade *Miranda* if this Court does not intervene. Specifically, law enforcement will likely train officers to repeat *Beheler* admonishments *after* a suspect confesses to a crime. Officers will also likely be taught to keep a calm tone of voice if they decide to keep an interrogation non-custodial after a confession. *See, e.g.*, *Bartelt v. Wisconsin*, 379 Wis. 2d 588, 611, n.11 (2018) (noting that after the confession the officers did not "raise their voice" and "the ambiance of the interview remained [largely] unchanged."). These steps, however, will not eliminate the overriding reality: no suspect would feel free to leave after confessing to a serious crime.

CONCLUSION

The decision of the Wisconsin Supreme Court enables officers to use un-*Mirandized* questioning *after* a suspect has confessed to a serious crime. If this Court does not intervene, law enforcement will seize the opportunity to train police officers to exploit the rule applied by the Wisconsin Supreme Court below. This phenomenon is demonstrated by the strategic and institutionalized use of *Beheler* admonishments. The lower court's decision would also allow for broader misuse of *Beheler*, as law enforcement will train officers to continuing telling suspects—after they confess—that they are free to leave.

The Court should issue a writ of certiorari to address un-*Mirandized* questioning after a suspect has confessed to a serious crime because permitting this practice to continue undermines *Miranda*'s purpose of protecting suspects' Fifth Amendment rights.

Respectfully submitted,

Rex S. Heinke
Counsel of Record
Akin Gump Strauss Hauer & Feld LLP
1999 Avenue of the Stars
Suite 600
Los Angeles, CA 90067
(310) 229-1000
rheinke@akingump.com

David M. Shapiro
Roderick And Solange MacArthur Justice Center
375 E. Chicago Avenue
Chicago, IL 60611
(312) 503-0711

Bryan M. Wittlin
Drinker Biddle & Reath LLP
1800 Century Park East
Suite 1500
Los Angeles, CA 90067
(310) 203-4041

Counsel for Amicus Curiae

JULY 11, 2018