No. _____

IN THE
Supreme Court of the United States

ANDRES SOTO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

In determining whether an accused person is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), must courts give significant weight to whether the person reasonably feels free to leave the encounter with police?

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OPINION BELOW

The unpublished memorandum disposition of the United States Court of Appeals for the Ninth Circuit is reproduced in the appendix, and is published at *United States v. Soto*, 753 F. App'x 544 (9th Cir. 2019). *See* Pet. App. 1-4. The order amending the unpublished memorandum and denying rehearing and rehearing en banc is also reproduced in the appendix, and is published at 769 F. App'x 519 (9th Cir. 2019). *See* Pet. App. 5-6.

JURISDICTION

The court of appeals entered judgment on February 21, 2019. Pet. App. 1-4. The court of appeals amended the memorandum and denied rehearing on May 8, 2019. Pet. App. 5-6. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

"The 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.

"No person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V.

STATEMENT OF THE CASE

I. Background.

In August 2016, Petitioner Andres Soto was stopped by a group of police and border patrol officers while driving a semi truck in Imperial County, California. The

officers searched the truck and discovered several people inside who lacked immigration documents. The officers removed Petitioner from the truck and interrogated him by the side of the road. The officers did not inform Petitioner of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), prior to this roadside interrogation. Petitioner made a number of incriminating statements during the interrogation, including admitting that he was being paid to transport the undocumented people. Petitioner was then arrested and charged with transporting aliens, in violation of 8 U.S.C. § 1324.

Petitioner moved to suppress the statements from the roadside interrogation in district court, arguing that they were obtained in violation of *Miranda*. The district court conducted a suppression hearing with testimony from several of the officers involved in the interrogation. These officers testified that they would not have allowed Mr. Soto to leave the roadside encounter. Mr. Soto also filed a sworn declaration in district court stating that he was explicitly told by the officers that he was not to leave.

The district court denied Petitioner's motion, finding that Petitioner was not in custody when the interrogation occurred. Petitioner then entered a conditional guilty plea that preserved his right to appeal the *Miranda* issue.

II. The appeal.

Appeal was taken to the United States Court of Appeals for the Ninth Circuit, which exercised jurisdiction pursuant to 18 U.S.C. § 3231. On appeal, Petitioner argued that the district court reversibly erred by finding that Petitioner was not in

custody while he was interrogated. Petitioner argued that the explicit instructions of the officers not to leave the encounter, as well as the officers' admission that they would not have permitted Petitioner to leave, triggered Petitioner's *Miranda* rights.

The court of appeals affirmed. *See* Pet. App. 1-4. According to the Ninth Circuit, "the traffic stop did not become custodial because a Border Patrol agent told Soto 'not to leave.'" *Id.* at 3.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court ought to grant this petition in order to resolve a circuit split concerning the test for whether an interrogation is custodial. Several courts of appeals instruct judges to give significant weight to whether a person reasonably felt free to leave an encounter when deciding whether the person was in custody for *Miranda* purposes. These include the Sixth Circuit, Seventh Circuit, Eighth Circuit, and Tenth Circuit. In this memorandum decision, the Ninth Circuit held that when officers explicitly tell a person "not to leave" a police encounter, and testify in court that they would not have permitted the person to leave, that does not make the encounter custodial. This continues a series of cases in which the Ninth Circuit has minimized the importance of the defendant's belief that they cannot leave the police encounter.

This Court should grant this petition in order to resolve this circuit split concerning whether the *Miranda* custody inquiry gives significant weight to a "freedom to leave" component.

I. The Sixth, Seventh, Eighth, and Tenth Circuits have all held that when a person does not feel free leave a police encounter, that weighs substantially in favor of finding that they are in custody for *Miranda* purposes.

In determining whether a person is in custody for *Miranda* purposes, the courts of appeals have applied a totality of the circumstances test. *See, e.g.*, *United States v. Salvo*, 133 F.3d 943, 948 (6th Cir. 1998). The key question under this test is how a reasonable person in the suspect's position would have understood their situation. If a reasonable person would have understood that they were under arrest, then the rights provided by *Miranda* are triggered. *Id.; see also Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) ("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.").

As part of the test for determining whether a person is in custody for *Miranda* purposes, several courts of appeal have explicitly instructed that one important question is whether the suspect felt free to leave the encounter. In *Salvo*, the government argued on appeal that when courts are deciding whether a person is in custody, they cannot look at whether the person felt that they were free to leave the encounter. *Salvo* at 950. The Sixth Circuit rejected the government's argument, concluding that courts can take into account whether a reasonable person in the suspect's position would have felt that they were free to leave the police encounter. *Id.* The Sixth Circuit concluded that "courts may consider, as one component or aspect

of the totality of the circumstances under which the suspect is questioned, whether a reasonable person in the suspect's position would have felt free to leave." *Id.*

Several other courts of appeal have explicitly made this "free to leave" inquiry a key part of the test for determining custody. In *United States v. Hocking*, 860 F.2d 769, 773 (7th Cir.1988) (partially reversed on other grounds), the Seventh Circuit determined that "[t]he accused's freedom to leave the scene and the purpose, place and length of interrogation are all relevant factors in making this determination." The Eight Circuit adopted the same test in *United States v. Helmel*, 769 F.2d 1306, 1320 (8th Cir.1985). In *United States v. Jones*, 933 F.2d 807, 810 (10th Cir. 1991), the Tenth Circuit affirmed a district court judge's formulation of the relevant test as whether "a reasonable person in the defendant's position would think he was free to leave."

Multiple circuits, therefore, instruct that whether a person reasonably believes that they are able to leave a police encounter is a significant factor when deciding whether that person needs to be informed of their *Miranda* rights.

II. The Ninth Circuit remains an outlier, as illustrated by this case, and this Court should grant cert to resolve the circuit split.

The memorandum opinion in this case states that "the traffic stop did not become custodial because a Border Patrol agent told Soto 'not to leave.'" Pet. App. 3. The Ninth Circuit instead looked to other factors in finding that the stop was not custodial, including "that [one officer] told Soto that he was not under arrest, the stop took place in public on the shoulder of a busy road, none of the officers used

threatening language, physical force, or drew their weapons, and Soto was not 'confronted with evidence of guilt.'" Pet. App. 3-4 (citation omitted). By adopting this reasoning, the Ninth Circuit has minimized the importance of the Petitioner's reasonable belief that he could not leave the encounter, as well as the explicit instructions of the officers that he could not leave, as factors in deciding whether he was in custody.

The Ninth Circuit's de-emphasis of the defendant's inability to leave the encounter continues a trend in that court's law. Indeed, two of the cases relied on by the opinion below illustrate the Ninth Circuit's unique test. Both cases involved agents of the United States Border Patrol investigating an immigration-related crime near the border, and in both cases the Ninth Circuit downplayed or disregarded the defendant's inability to leave the encounter. In *United States v. Medina-Villa*, 567 F.3d 507 (9th Cir. 2009), *as amended* (June 23, 2009), the Ninth Circuit determined that the interrogation of a suspected undocumented immigrant detained in a car did not require *Miranda* warnings. The Ninth Circuit reached this decision even though "the border patrol agent prevented Medina from leaving the parking lot by blocking his car, approaching it with his gun drawn, and interrogating him about his citizenship and immigration status . . ." *Id.* at 520.

Similarly, in *United States v. Galindo-Gallegos*, 244 F.3d 728 (9th Cir. 2001), *as amended* 255 F.3d 1154 (9th Cir. 2001), the Ninth Circuit decided that the interrogation of a suspected undocumented immigrant near the border did not necessitate a *Miranda* advisal. The Ninth Circuit reached this conclusion despite the

fact that the suspect "tried to run away from the officers, was chased and caught, and was brought back, made to sit in a circle, and questioned." *Id.* at 735. In both of these cases, the Ninth Circuit gave little or no weight to the fact that the person being interrogated reasonably knew that they could not leave the encounter.

The Ninth Circuit is carving out its own test for when *Miranda* warnings must be given. This unusual test is likely a product of the fact that these cases involve immigration-related crimes occurring near the border. The Ninth Circuit's test conflicts with the weight of circuit authority, and causes uneven application of the law. Certiorari should be granted to resolve the inter-circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: August 6, 2019

s/ Eric S. Fish

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