No. 23-1250

IN THE

Supreme Court of the United States

CARLOS VEGA,

Petitioner,

v.

TERENCE B. TEKOH,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Police Organizations (NAPO) is a coalition of police units and associations from across the United States. It was organized to advance the interests of America's law enforcement officers. Founded in 1978, NAPO is the strongest unified voice supporting law enforcement in the country. NAPO represents more than 1,000 police units and associations, more than 241,000 sworn law enforcement officers, and more than 100,000 citizens who share common dedication to fair and effective law enforcement. NAPO often appears as *amicus curiae* in cases of special importance.

NAPO has a strong interest in this case because the Ninth Circuit's opinion casts doubt on interrogation tactics commonly used by law enforcement and exposes NAPO's members to additional and unwarranted liability. If the Ninth Circuit's decision is allowed to stand, law enforcement will think twice before vigorously investigating crimes and questioning potential suspects. This is a dangerous result for officers and the public alike. NAPO thus urges the Court to grant the petition and reverse the decision below.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Parties received timely notice of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Two years ago, this Court held that the Ninth Circuit wrongly ordered a new trial for Terence Tekoh, a nursing assistant who was accused of and confessed to sexually assaulting a stroke patient. On remand, the Ninth Circuit once again held that Tekoh is entitled to a new trial. This time, a divided panel concluded that the district court abused its discretion by refusing to allow Dr. Iris Blandón-Gitlin—a false confession theorist—to testify at trial. Blandón-Gitlin "planned to testify about the use of 'minimization tactics'—'excuses the interrogator creates to explain why the person may have committed the act they are accused of'—and how 'Mr. Tekoh's written confession,' which according to Tekoh was dictated by [Officer] Vega, indicated the use of such tactics." Pet. 8; 1-ER-84, 90. And she also planned to testify that Tekoh's confession was a "'textbook example'" of a false confession, improperly bolstering Tekoh's claims. App. 6a-7a.

If allowed to stand, the Ninth Circuit's decision will harm law enforcement and undermine everyday police interrogations. First, in a "drive-by statement," the panel criticized minimization techniques as "classic coercion." App. 85a (Collins, J., dissenting from denial of rehearing en banc); App. 2a-3a (panel opinion). But minimization is a lawful, effective, and widely-used interrogation technique that helps law enforcement obtain confessions, solve crimes, and secure justice for victims. Indeed, minimization tactics are used in over a third of all interrogations. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L &

Criminology 266, 278 tbl. 5 (1996). Yet the Ninth Circuit's decision—if upheld—will raise uncertainty about the legality of these important techniques and undermine law enforcement's confidence in using them. That, in turn, will impede the use of confessions in criminal proceedings across a large swath of the country. As Petitioner explains, "the decision below effectively gives every criminal defendant who confesses the right to introduce expert testimony that the confession was coerced—not only at criminal trials, but also in follow-on civil proceedings (like this one) for money damages." Pet. 4.

"[R]estructuring police interrogations throughout" the Ninth Circuit in this way is simply not justified by empirical evidence. Paul G. Cassell, *The Guilty and the "Innocent": An Examination*, 22 Harv. J.L. & Pub. Pol'y 523, 527 (1999). The panel majority reasoned that Blandón-Gitlin's testimony should have been admitted because "false confessions are an issue beyond the common knowledge of the average layperson" and that jurors would be "'better equipped to evaluate [Tekoh's] credibility and the confession'" when armed with Blandón-Gitlin's expert testimony. App. 3a (alteration in original). But false-confession literature is rife with problems, and the data that does exist is largely unreliable. *See United States v. Begay*, 497 F.Supp.3d 1025, 1049-50 (D. N.M. 2020).

Opponents of traditional confession techniques aim to justify "dramatic changes in how the justice system handles interrogations and confessions," but fail to quantify the purported problem in any way that justifies taking their ideas seriously. Cassell, *The*

Guilty and the "Innocent," supra, at 524. Police interrogations are one of the most important—if not the most important—investigative techniques. True confessions protect the innocent by preventing them from being wrongly accused. *Id.* at 525. And they prevent lost convictions and the attendant dangers of having guilty criminals walk free. Any regulation of police interrogation techniques imposes clear costs on law enforcement and society at large. And any assessment of the policy reforms desired by the false confession theorists requires "some assessment of the relative frequency" of false confessions to lost confessions. *Id.* at 526. But any such assessment is sorely lacking from the so-called expert analysis. Thus, the district court was right to exclude Blandón-Gitlin's false confessions testimony.

The Court should grant the petition and reverse the decision below.

ARGUMENT

I. If left uncorrected, the Ninth Circuit's decision will harm law enforcement officers and the public they protect.

A. The decision below breeds uncertainty about the legality of widely used, effective interrogation techniques and imposes significant costs on law enforcement.

Thorough, effective, and efficient investigations are the heart of good police work. Yet the Ninth Circuit's decision criticizing this widely used interrogation technique as "classic coercion" threatens that work by putting every confession under the microscope. App. 2a-3a.

Classic or inherent coercion exists in circumstances where no reasonable person could conclude that the accused retained "mental freedom" during an interrogation. *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973) ("'[I]f his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.'"). Or, as the jury was instructed in this case, a confession is "improperly coerced or compelled under the Fifth Amendment if a police officer uses physical or psychological force or threats *not permitted by law* to undermine a person's ability to exercise his or her free will." Pet. 26; 1-ER-12.

Minimization tactics do not alone deprive a person of mental freedom or threaten to undermine his free will. These tactics typically downplay the "legal,

moral, and psychological consequences of confessing." *See* Jonathan P. Vallano et al., *An Experimental Manipulation of Rapport and Moral Minimization Within a Criminal Interview*, 28 Psych. Pub. Pol. & L. 515, 516 (2022). To employ this tactic, an officer may "appeal[] to the suspect's self-interest, offer[] sympathy, moral justifications, and excuses, minimiz[e] the moral seriousness of the offense, and appeal[] to the suspect's religion or conscience." Christopher E. Kelly et al., *On the Road (to Admission): Engaging Suspects with Minimization*, 25 Psych. Pub. Pol. & L. 166, 167-68 (2019). A law enforcement officer who sympathizes with a suspect, downplays the seriousness of his crime, or suggests blame-reducing excuses for the suspect's crime does not destroy mental freedom or impermissibly use "physical or psychological force" to "undermine [the] person's ability to exercise his or her free will." Pet. 26; 1-ER-12. Such tactics do not come close to rendering a confession involuntary.

Nor is there any empirical evidence that minimization tactics produce involuntary or false confessions. *See* Cassell, *The Guilty and the "Innocent*," s*upra*, 525-26. Indeed, as Judge Collins pointed out in dissent, the panel's "startling holding" that minimization tactics are inherently coercive is "based on no authority at all." App. 85a-86a.

Courts across the country agree that psychological ploys like minimization tactics are not inherently coercive. *See Illinois v. Perkins*, 496 U.S. 292, 297 (1990). Tactics like "exaggerating the quality of … evidence," "minimizing the gravity of [the accused's] offense," and "emphasizing that negative media

attention that would attend [a] trial all fall safely within the realm of … permissible 'chicanery' sanctioned by" many courts. *United States v. Jacques*, 744 F.3d 804, 812 (1st Cir. 2014). Indeed, "police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties" so long as they do not "magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible." *Dassey v. Dittmann*, 877 F.3d 297, 316 (7th Cir. 2017) (quoting *United States v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir. 1990)).

Stigmatizing these lawful police interrogation techniques—as the Ninth Circuit does here—imposes significant costs on law enforcement and society at large. As the number of Section 1983 suits has grown over time, law enforcement officers and departments are constantly forced to exercise an over-abundance of caution in investigations. *See* Michael P. Stone & Marc Berger, *Civil Rights Liability for Intentional Violations of* Miranda *Part One: Liability Considerations*, 7 AELE Mo. L.J. 501, 508-10 (2009); Jacquelyn Kuhens, *The Newest Constitutional Right-The Right to* Miranda *Warnings,* Fed. L. Enf't. Training Ctr., bit.ly/2ZrF7WL. The Ninth Circuit's decision only exacerbates that problem by inviting defendants to offer expert testimony arguing that any methods of interrogation violate the Fifth Amendment and may be challenged under Section 1983. Indeed, because "every situation is theoretically susceptible to some sort of expert analysis," such a rule would expand Section 1983 to cover nearly every kind of investigation. App. 6a (Miller, J., dissenting).

Forcing officers to constantly exercise an overabundance of caution will slow the investigative process and increase its cost, while lowering its effectiveness. It may encourage officers to be overly timid with their investigative techniques. Fearing even the potential for liability, officers may "refrain from acting, may delay their actions, may become formalistic by seeking to 'build a record' with which subsequently to defend their actions, or may substitute 'safe' actions for riskier, but socially more desirable, actions." Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 652 (1987) (citation omitted).

Rather than focusing on effective questioning and fact-finding, fear of liability may distract officers, causing them to over-analyze the interaction. The mere possibility of a different perspective could spark an expensive lawsuit. Thus, rather than taking immediate action when necessary, officers fearing "the prolonged agony of being sued" might delay critical interrogations to wait for further instruction from legal advisors. Stone & Berger, *supra*, at 510. Or they might avoid an interrogation at all, "foregoing the possibility of immediately exonerating the suspect or gathering legally admissible evidence indirectly useful in convicting the suspect." Martin R. Gardner, *Section 1983 Actions Under Miranda: A Critical View of the Right to Avoid Interrogation*, 30 Am. Crim. L. Rev. 1277, 1326 (1993). And law enforcement departments could even adopt restrictive policies that stifle their officers' ability to interrogate suspects. Such a system would

incapacitate law enforcement officers, their departments, and the victims of crime who depend on them.

Ultimately, casting doubts on legitimate investigation techniques does significant harm. It threatens effective, efficient, and proper investigations. Police officers "should be free to exercise their duties unembarrassed by the fear of" lawsuits that "would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Barr v. Mateo*, 360 U.S. 564, 571 (1959).

B. The existing empirical evidence on false confessions does not justify dramatic changes in how law enforcement handles interrogations and confessions.

Empirical evidence about false confessions does not justify "restructuring police interrogations throughout" the Ninth Circuit. Cassell, *The Guilty and the "Innocent," supra,* at 527. The panel majority reasoned that Blandón-Gitlin's testimony should have been admitted because "false confessions are an issue beyond the common knowledge of the average layperson" and that jurors would be "'better equipped to evaluate [Tekoh's] credibility and the confession'" when armed with Blandón-Gitlin's expert testimony. App. 3a (alteration in original). But false-confession literature is rife with problems and the data that does exist is largely unreliable. *See Begay*, 497 F.Supp.3d at 1025.

Regulation of police interrogation techniques imposes clear costs on law enforcement and society at large. Thus any assessment of the policy reforms desired by the false confession theorists requires "some assessment of the relative frequency" of false confessions as compared to lost confessions. Cassell, *The Guilty and the "Innocent," supra,* at 526. Yet leading false confession theorists aim to justify "dramatic changes in how the justice system handles interrogations and confessions," but fail to quantify the purported problem in any way that justifies taking their ideas seriously. *Id.* at 524. Today, any such assessment is sorely lacking from the so-called expert analysis. Thus, the district court was right to exclude Blandón-Gitlin's false confessions testimony.

Police interrogation and confession-taking are critical to solving crimes. "[I]nterrogation involves some of the most important governmental functions in any society: the investigation of crime, the apprehension of offenders, the restoration or order, and the deterrence of future crime." Richard A. Leo, *Police Interrogation and American Justice* 1 (2008). In field research on police interrogations, Professor Richard Leo found that "virtually every detective to whom [he] spoke insisted that more crimes are solved by police interviews and interrogations than by any other investigative method." Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And from Miranda*, 88 J. of Crim. L. & Criminology 497, 498 (1998). Some crimes, "such as conspiracy and extortion, or even rape and child abuse," often can be "solved only by a confession" from the

perpetrator "since there may be no other evidence of guilt." Leo, *Police Interrogation and American Justice, supra* at 2. And other serious crimes like murder "are more commonly solved by confessions than by any other type of evidence." *Id.* Police interrogations thus provide an unparalleled social benefit by furthering "the capture, prosecut[ion], and convict[ion] of wrongdoers." *Id.*

Today, the "available empirical evidence provides reason to believe" that "the innocent are more at risk from restraints on police that hinder their efforts to obtain truthful confessions than from the lack of additional protections against the comparatively rare risk of false confessions." Cassell, *The Guilty and the "Innocent," supra*, at 524. That makes sense since law enforcement's ability to obtain true confessions protects the innocent in several ways. First, true confessions prevent the innocent from being wrongly accused or charged by helping officers "separate a guilty suspect from the possibly innocent ones, while the failure to obtain a truthful confession creates a risk of mistake." Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And from* Miranda, *supra*, at 498. On top of that, "police interrogation is an important means of exoneration." *Id.* at 499. In the "rare circumstances" in which an innocent person "is facing the real possibility of conviction—or, indeed, has been wrongfully convicted," reliable confessions from the true perpetrators are among the leading sources of exoneration. *Id.* Studies show that true confessions were responsible for between 40 and 54 percent of exonerations. *Id.* at 531-33.

True confessions also prevent lost convictions and the attendant dangers of having guilty criminals walk free. But the "regulation of interrogation can, by blocking truthful confessions, lead to the release of guilty criminals to commit further crimes." *Id.* at 499. Without broad power to investigate, "those who were guilty might wholly escape prosecution, and many crimes would go unsolved." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). "In short, the security of all would be diminished." *Id.*

Despite the overwhelming evidence that law enforcement interrogations and confessions are a net social good, false confession theorists still aim to change the landscape of interrogations without significant empirical evidence of the purported problem they seek to solve. *See Begay*, 497 F. Supp. 3d at 1074. False confession theory is based mainly on anecdotal evidence and small sample-size studies. *See id.* at 1074-75. For example, a leading study in the field of false confession relies on "a handpicked, statistically insignificant sample size, where the researchers then drew their conclusions from unreliable sources." *Id.* at 1075. The authors then relied on contemporaneous news stories and other secondary sources to determine which confessions were false. *Id.*; Cassell, *The Guilty and the "Innocent*," *supra*, at 525-26. In a later analysis of the study, the authors' success rate in identifying false confessions in the disputed cases was determined to be about 55 percent, "barely better than one would expect from flipping a coin to decide a controverted issue." *See Begay*, 497 F. Supp. 3d. at 1076-77.

Even if theorists could determine with certainty when a confession is false, they lack empirical evidence on which forms of interrogations and tactics, or even general circumstances, are likely to cause false confessions. *Id.* at 1073 (citing Lawrence S. Wrightsman & Saul M. Kassin, *Confessions in the Courtroom* 75 (1993)). At best, "the existing research has shown: (1) that certain interrogation techniques are more likely than other techniques to result in false confessions; and (2) that certain types of people—such as juveniles and the mentally impaired—appear somewhat more likely than the average suspect to give a false confession." *Id.* (quoting Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far*, 99 Mich. L. Rev. 1168, 1192 (2001)). There is insufficient research to determine when a person initiates a false confession voluntarily, versus when he gives a false confession due to a coercive interrogation. And even within the category of coerced false confessions, psychologists recognize there are two responses to social control attempts—compliance and internalization. A compliance response is "an overt, public acquiescence to a social influence intended to achieve some immediate gain while internalization refers to a personal acceptance of the values or beliefs espoused in that attempt." Saul M. Kassin & Lawrence S. Wrightsman, *The Psychology of Evidence and Trial Procedures* 76-77 (Beverly Hills: Sage Publications 1985). Thus, while research on false confessions can identify certain factors that are more likely to lead to false confessions, the research cannot estimate how often standard interrogation methods produce false

confessions due to law enforcement action, rather than external factors.

At bottom, any police interrogation reform recommendation must demonstrate that the benefits of reducing false confessions are not outweighed by the competing risks to innocent people from lost confessions and lost convictions. False confession literature does not provide any such basis for its recommendations. Altering how law enforcement may conduct interrogations only increases the likelihood that victims of crime will not receiving justice, as police officers are deterred from confidently investigating and questioning suspects for fear of potential liability. The Court should grant the petition and reverse the decision below.

CONCLUSION

For these reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

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