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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Tekoh defends a mischaracterized version of the Ninth Circuit's ruling that bears no resemblance to the panel's actual decision, which prompted ten judges to dissent from the denial of rehearing en banc. As those dissenters recognized, the decision established a categorical rule requiring admission of expert testimony opining on the allegedly coercive circumstances of a confession. Instead of justifying that rule, Tekoh spins the decision as a "garden-variety" decision limited to the "particular facts" of this case. Opp.1. But narrow case-specific rulings do not trigger ten-judge dissents. Tekoh's attempt to reinvent the decision fails.

Properly understood, the Ninth Circuit's holding cries out for this Court's review. The panel's categorical rule directly conflicts with longstanding precedent from the Tenth Circuit, the Second Circuit, and other courts—none of which would have required admission of the expert testimony in this case. No other court has mandated the admission of testimony that describes normal interrogative techniques—like "just asking questions," Pet.App.4a—on the theory that they are unlawfully coercive. The Ninth Circuit's rule is fundamentally flawed, usurping the jury's power to make credibility determinations and injecting confusing and irrelevant expert opinion into every case alleging a coerced confession. Finally, as amici have explained, the Ninth Circuit's decision will wreak havoc and needlessly prolong meritless cases against police officers.

This Court should grant certiorari.

ARGUMENT

I. THE NINTH CIRCUIT ADOPTED A CATEGORICAL RULE ON THE ADMISSION OF EXPERT TESTIMONY

Tekoh reconceptualizes the decision below, framing it as narrow and fact-bound. Opp.1. He insists the panel did not "creat[e] new standards regarding the admission of evidence." *Id.* That revisionist reading cannot be squared with the decision itself, the analysis of the ten en banc dissenters, or even Tekoh's own defense of the decision before this Court.

First, Tekoh's description of the decision ignores the panel's core holding—that the district court abused its discretion by excluding expert testimony "about the science of coercive interrogation tactics," such as "minimization tactics," "false evidence ploy[s]," and "just asking questions." Pet.App.2a-4a. According to the majority's broad reasoning, the district court abused its discretion by excluding Blandón-Gitlin's testimony because "the circumstances surrounding Tekoh's confession go to the heart of his case" and "contextualizing his account was crucial to the outcome." Pet.App.4a. But that describes *every* case involving an allegedly coerced confession. In such cases, expert testimony will always be "relevant" under the Ninth Circuit's view, either because the expert will "opine[] on how" a confession might "indicate classic symptoms of coercion" or how common "tactics"—including "just asking questions"—"could elicit false confessions." Pet.App.2a-4a. The decision below contains no limiting principle.

Tekoh tries to sidestep the issue by asserting (at 35-36) that the "panel majority did not require Dr. Blandón-Gitlin's testimony to be admitted in full," and "[w]hether any particular testimony should be excluded [under Fed. R. Evid. 403]" "can be addressed on remand." But the panel nowhere suggested such a limitation. Instead, Tekoh relies on the en banc concurrence, which unpersuasively purports to cabin the panel's decision to "the unique facts of Tekoh's case." Opp.6 n.1, 35; Pet.App.65a-66a. The panel itself, however, conspicuously chose not to amend its published opinion, which is the only thing that binds lower courts. And as the en banc dissent explained, the concurrence's nothing-to-see-here approach "is hard to square with the opinion that the panel majority wrote." Pet.App.86a.

Tekoh also overlooks that the district court already engaged in "classic Rule 403 analysis," Pet.App.88a, when it excluded Blandón-Gitlin's testimony as "time-consuming and potentially confusing," 3-ER-550. The panel majority reversed anyway. Moreover, Rule 403 could hardly blunt the force of the Ninth Circuit's categorical rule, because Rule 403 must "be used 'sparingly." *Sidibe v. Sutter Health*, 103 F.4th 675, 691 (9th Cir. 2024) (listing nine circuits in agreement).

Second, ten Ninth Circuit judges share Vega's straightforward reading of the panel's categorical decision. As the dissenters explained, if "the mere use of such common techniques triggers a need to admit such expert testimony," district court judges will lack any meaningful discretion to exclude such testimony. Pet.App.72a. Because "the circumstances surrounding" a confession will always "go to the heart of [the] case," it will "be difficult, if not impossible, to

distinguish this opinion in future coerced confession cases." Pet.App.4a, 87a. The en banc dissenters were right that the decision below "effectively creat[es] a *per se* rule." Pet.App.72a.

Third, Tekoh's own opposition unwittingly illustrates the categorical nature of the ruling. Tekoh asserts that "[t]here is no question that, as a general matter, [testimony by a coerced-confession expert] is relevant expert testimony." Opp.9. Tekoh says that this is because "[t]here is a commonly held presumption that innocent people do not confess to crimes they did not commit." *Id.* at 19; *see id.* at 15, 22-24, 30. Combined with Tekoh's repeated assertion that Rule 702 is "in essence a relevance inquiry," Tekoh's pronouncement essentially restates the *per se* rule he so emphatically disclaims. *Id.* at 8 (citation omitted); *see id.* at 29-30. His efforts to rebrand the Ninth Circuit's opinion do not withstand scrutiny.

II. THIS COURT SHOULD OVERTURN THE NINTH CIRCUIT'S CATEGORICAL RULE

Once properly understood as described above, the Ninth Circuit's rule splits from other circuits, misapplies the Federal Rules of Evidence, and will inflict harmful consequences on local governments, law enforcement, and citizens alike. Tekoh's strained arguments to the contrary lack merit.

A. The Circuit Split Is Real

1. The petition explained (at 14-17)—and the dissenters recognized—that the decision below "directly conflicts" with the Tenth Circuit's view on expert testimony opining on the coercive circumstances of a confession. Pet.App.78a-79a. While the Ninth Circuit adopts a categorical rule requiring the admission of such testimony, *supra* at

2-4, the Tenth Circuit holds that such testimony should generally be excluded.

Tekoh resists the circuit split by mischaracterizing the Tenth Circuit's holding in *United States v. Benally*, 541 F.3d 990 (10th Cir. 2008). Tekoh claims *Benally* disallowed testimony because the expert "was not planning to testify about the actual circumstances surrounding the defendant's confession," but rather about conditions that could coerce false confessions "more generally." Opp.13. Here, by contrast, "Blandón-Gitlin's proffered testimony was directed to the particular circumstances and issues involved in this case." *Id.*

But *Benally* explicitly rejected that very distinction by reaffirming the Tenth Circuit's earlier holding in *United States v. Adams*, 271 F.3d 1236, (10th Cir. 2001). 541 F.3d at 994-95. There, the court excluded an expert who *was* planning to opine on the specifics of the case and "to provide an opinion as to whether the defendant before the court falsely confessed." *Id.* at 995. The *Benally* defendant sought "to distinguish" *Adams* on the grounds that his expert was planning to testify more generally. *Id.* But the Tenth Circuit considered the distinction legally irrelevant: In either case, the court held, "the import of [the] expert testimony would be" to "disregard the concession and credit the defendant's testimony that his confession was a lie." *Id.* Thus, the testimony "inevitably would 'encroach[] upon the jury's vital and exclusive function to make credibility determinations.'" *Id.* (alteration in original).

Tekoh points to *Benally*'s comment that "'a district court may not categorically exclude all expert testimony of this variety.'" Opp.13 (quoting 541 F.3d at 994). But Tekoh omits the rest of that quotation,

which categorically states that "'the credibility of witnesses'"—whether through specific or more general statements—"'is generally *not* an appropriate subject for expert testimony.'" 541 F.3d at 994 (emphasis added). The omitted language refutes Tekoh's case-specific reading of *Benally*. Rather, the different outcomes in *Benally* and this case reflect starkly divergent approaches to the admissibility of expert testimony on the allegedly coercive circumstances of a confession.

Tekoh's attempt to dismiss the split by framing *Benally* as merely a Rule 403 decision, Opp.12-13, is also wrong. While *Benally* recognized that coerced-confession testimony could be problematic under Rule 403, its frontline holding was that it "encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not assist the trier of fact *as required by Rule 702*." 541 F.3d at 994-95 (emphasis added) (citation omitted). The Ninth Circuit's determination that Blandón-Gitlin's testimony must be admitted under Rule 702, Pet.App.2a-3a, squarely conflicts with *Benally*.

2. Tekoh also lacks a compelling response to the other cases cited in the petition (at 15-18) showing that numerous other courts also would have rejected Blandón-Gitlin's credibility-bolstering testimony.

Tekoh attempts to distinguish *Nimely v. City of New York*, 414 F.3d 381, 398 (2d Cir. 2005), by claiming that the expert there made a "direct credibility assessment[]" when he "'rejected' the possibility that the officers had lied and gave reasons why officers have no incentive to lie in excessive-force cases." Opp.14. But that uncannily tracks Blandón-Gitlin's proffered testimony. Her bottom-line

conclusion was that "Mr. Tekoh's written confession was coerced and highly unreliable." 1-ER-80-81. And she planned to explain, based on "various factors known in psychological science," why Tekoh would falsely confess, as well as why a jury should "critically evaluate the reliability of Deputy Vega's account of events." 1-ER-81, 90. More broadly, the Second Circuit's interpretation of Rule 702 tracks the Tenth Circuit's: "[E]xpert testimony that 'usurp[s] . . . the role of the jury in applying [the] law to the facts before it' by definition does not 'aid the jury in making a decision.'" *Nimely*, 414 F.3d at 397 (citations omitted). The decision below holds the opposite.

Tekoh's only rejoinder to the decisions of other courts that accord with *Benally*—e.g., *Commonwealth v. Alicia*, 92 A.3d 753, 755 (Pa. 2014)—is to disparage them for espousing "outdated view[s] of the science of coerced confessions." Opp.15. Yet those decisions are not based on any particular view of science; they rest on the time-honored understanding "of the jury's role as the exclusive arbiter of credibility" and the insight that admitting expert coerced-confession testimony would be "an impermissible invasion of [that] role." *Alicia*, 92 A.3d at 764.

That is precisely what *Benally* held—and *Alicia* expressly noted its agreement with *Benally*'s approach. *Id.* Tekoh is ultimately forced to assert that *Benally* itself "reflect[s]" the same "outdated approach" as *Alicia* and Vega's other cases. Opp.16. The agreement of other courts with *Benally*'s bottom line and reasoning only confirms the Ninth Circuit's outlier status and the need for this Court's review.

B. The Decision Is Indefensible

1. Tekoh barely grapples with many of Vega's merits arguments. The petition explained (at 22-24) how the Ninth Circuit's categorical rule makes a hash of the Federal Rules of Evidence and ignores that "questions of credibility, whether of a witness or of a confession, are for the jury." *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) (citation omitted). Tekoh has no answer besides insisting that the Ninth Circuit did not mean what it said. Opp.1. Yet again, instead of defending the decision below, Tekoh reinvents it.

Vega's petition cited many instances of impermissible vouching in Blandón-Gitlin's expert report. Pet.23. Tekoh seemingly concedes that the report contains impermissible vouching, but insists "[t]hat was not its purpose" and that Blandón-Gitlin "was not going to testify about who the jury ought to believe." Opp.14. But her own expert report tells a different story. For example, she (1) listed factors that "contributed to the unreliability of [Tekoh's] confession," (2) described Tekoh's confession as "poor quality" evidence, (3) stated that the lack of a recording "seriously undermined" the confession's "reliability," and (4) claimed that discrepancies between "Deputy Vega's account" and "various witnesses' accounts" suggested that "Mr. Tekoh's confession was coerced and highly unreliable"—all while "assuming the veracity of . . . Tekoh's accounts of events." 1-ER-80-81, 87, 89. Credibility-vouching statements like those permeated Blandón-Gitlin's report. Her testimony would have amounted to little more than an opinion that the jury should believe Tekoh.

Tekoh fails to respond to Vega's argument (at 23) that expert testimony on coercion is especially problematic in civil cases because it provides the jury with a legal conclusion on the ultimate issue: whether the confession was unlawfully coerced. That distinction likely explains Judge Collins's observation that "there does not appear to be any prior *civil* case in which an appellate court has held that such expert testimony must be admitted." Pet.App.92a.

Tekoh's citation (at 20) to a Section 1983 case where "Blandón-Gitlin's mentor" submitted a declaration does not undermine that point. That case involved a substantive due process claim alleging that the interrogation was "so coercive as to 'shock the conscience,'" and the Ninth Circuit merely quoted the expert's observation that it was "'the most psychologically brutal interrogation" he ever observed, supporting what the court itself had gleaned from other evidence. *Crowe v. County of San Diego*, 608 F.3d 406, 431 (9th Cir. 2010). Because that case was decided on summary judgment, neither the district court nor the Ninth Circuit ever ruled on the testimony's admissibility under Rules 702 and 403. Tekoh's other cases (at 21-22) all involved criminal defendants. Judge Collins was right: On this issue, "the panel majority's decision apparently stands alone." Pet.App.92a.

2. Tekoh's affirmative merits argument is that "Blandón-Gitlin's testimony was plainly relevant" to whether Tekoh's confession was coerced, and the district court abused its discretion by "exclud[ing] [that] testimony as irrelevant." Opp.27, 30. But as the district court explained, "if the jury believed Mr. Tekoh's version" of events, then "his confession was clearly coerced," and the expert "added nothing of

substance." 1-ER-42; *see* Pet.28-30. The district court even offered to instruct the jurors that if they believed Tekoh's account, they should find that the confession "was coerced." Pet.App.12a; Pet.30. Tekoh's only rejoinder is that the jury was free to "believ[e] any combination of facts" and it may have believed only part of Tekoh's version of events. Opp.29.

That "mix-and-match approach to resolving the sharp credibility dispute" between the parties defies common sense. Pet.App.81a. In any event, Tekoh "did not raise such an argument in the district court." *Id.* In fact, his counsel expressly disclaimed such a "middle ground," insisting that the question of credibility here was "all or nothing." C.D. Cal. Dkt. 342 at 33-34. Expert testimony is admissible to "help the trier of fact to understand *the evidence*," Fed. R. Evid. 702(a) (emphasis added), not to help understand an ad hoc permutation of the facts that no party ever presented as its theory of the case.

Tekoh nevertheless insists (at 29) that "[a]t a minimum," Blandón-Gitlin should have been allowed to testify "about evidence ploys, 'minimization' [tactics,] and 'maximization' tactics to explain his own behavior." This attempt to salvage some of Blandón-Gitlin's testimony is non-responsive to the sharp, all-or-nothing credibility dispute between Tekoh and Vega. It also ignores that all those techniques are perfectly lawful and cannot establish unconstitutional coercion. Pet.25-26. Expert testimony on the impact of lawful interrogation techniques will almost always be irrelevant and confusing in a coerced-confession case. Tekoh has no answer on this. Nor does Tekoh even attempt to defend the need for expert testimony explaining how "just asking questions" can be coercive. Pet.App.4a.

Tekoh also has no persuasive response on the disconnect between his testimony and Blandón-Gitlin's proffered testimony about minimization tactics. Pet.27-28. Tekoh now suggests that Vega engaged in minimization tactics by telling him to start his written confession "'by showing the remorse to the judge.'" Opp.31-32. That generic reference to remorse has none of the "moral justifications or face-saving excuses" that constitute minimization tactics. 1-ER-84. In any event, this post hoc attempt to conjure up the missing minimization tactics does not align with Tekoh's testimony. Tekoh attributed his decision to confess to uncertainty over "what [Vega] would do to [him] if [he] kept resisting"—i.e., to Vega's alleged *maximization* techniques—not to vague instructions to show remorse, or any other purported minimization tactics. 2-ER-285.

C. The Decision Will Have Destructive Consequences

All the above is enough to warrant certiorari. But the practical impact of the Ninth Circuit's decision underscores the urgent need for review. Vega's supporting amici—the International Municipal Lawyers Association (IMLA, representing local government entities across the country) and the National Association of Police Organizations (NAPO, representing over 240,000 law enforcement officers)—speak with real-world credibility on these issues. As they make clear, the Ninth Circuit's categorical rule will "hamper effective police investigations and risk community safety." IMLA Br.9-10; *see generally* NAPO Br.5-9; *see also* Pet.31-34

Tekoh does not deny amici's warning that a categorical rule would have "deleterious effects on law

enforcement efficacy and morale, and ultimately, on public safety." IMLA Br.4. Instead, he again runs away from what the decision below actually holds. Tekoh assures (at 36) that the decision "will not disrupt routine police work" because it "does not hold what [Vega] claims." Because that is decidedly wrong, *supra* at 2-4, Tekoh's assurance rings hollow. The en banc dissenters and amici are right. If allowed to stand, the Ninth Circuit's decision will "have a substantial disruptive effect on the administration of justice," Pet.App.71a, and "will harm law enforcement and undermine everyday police interrogations." NAPO Br.2.

Vega's petition (at 27) emphasized how the decision below brands common investigative techniques—including so-called "minimization tactics," and even the ubiquitous tactic of "just asking questions," Pet.App.4a—as impermissibly "coerci[ve]." Tekoh responds (at 35) that the decision below does not "decide that any particular interrogation technique is inherently or unconstitutionally coercive." The dissenters disagreed, noting that the Ninth Circuit's assertion about coercion is a "startling holding" that "arguably prohibits [the] use [of common interrogation techniques] in this circuit." Pet.App.85a-86a.

At a minimum, the Ninth Circuit's ruling will cause officers to "second-guess which measures they should use to obtain information from witnesses and suspects," thereby handicapping routine police work. IMLA Br.11; *see* Pet.27, 32-34. Correcting the "gratuitous breadth" of the decision below and extricating officers "from the ambiguous haze of liability" are themselves sufficient grounds for review and correction. IMLA Br.6, 13.

* * *

This litigation should have ended in Vega's favor following the Court's straightforward remand two years ago. But the Ninth Circuit instead resuscitated Tekoh's meritless case with another flawed and dangerous legal theory. That ruling should not stand.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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