No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN CABRERA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTIONS PRESENTED

In *Howes v. Fields*, 565 U.S. 499 (2012), the Court established a two-step test for determining whether a suspect is "in custody" for purposes of *Miranda v. Arizona,* 384 U.S. 436 (1966). Under step one, courts consult a list of relevant factors to determine whether a reasonable person would feel free to leave. But because "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*," courts then proceed to the second step of determining "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* at 509.

In the dozen years since *Howes*, nine circuit courts have adopted this two-step test. But the Eighth and Tenth Circuits continue to apply only the first step. And the Ninth Circuit sometimes applies the first step and sometimes considers a completely different test—whether the stop was permissible under *Terry v. Ohio*, 392 U.S. 1 (1968). Accordingly, the question presented is:

Whether courts must apply the second step of *Howes* to determine if a person is "in custody" for *Miranda* purposes.

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Juan Cabrera and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Cabrera,* U.S. District Court for the Southern District of California, Oral ruling issued June 7, 2021.
- *United States v. Cabrera*, No. 21-50259 & 21-50261, U.S. Court of Appeals for the Ninth Circuit. Published opinion issued September 29, 2023.
- *United States v. Cabrera*, No. 21-50259 & 21-50261, U.S. Court of Appeals for the Ninth Circuit. Order denying petition for panel rehearing and rehearing en banc. December 19, 2023.

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INTRODUCTION

In *Howes v. Fields*, 565 U.S. 499 (2012), the Court established a two-step test for determining whether a suspect is "in custody" for purposes of *Miranda v. Arizona,* 384 U.S. 436 (1966). Nine circuit courts apply that test. Three do not.

The Eighth and Tenth Circuits have never mentioned the second step of this test—let alone applied it. And the Ninth Circuit applies only the first step or else holds, as it did in this case, that the relevant inquiry is whether a stop is "permissible pursuant to *Terry*, rather than whether [the person] was 'in custody' pursuant to *Miranda*." Pet. App. 11a. As a result, federal courts in nearly every state west of the Mississippi River apply a different rule for determining "custody" than federal courts in every state east of the Mississippi River. To ensure that all federal courts are uniformly applying the Court's precedent on a critical and oft-arising Fifth Amendment issue, the Court should grant certiorari.

OPINION BELOW

A three-judge panel of the Ninth Circuit affirmed Mr. Cabrera's conviction in a published opinion. *See United States v. Cabrera*, 83 F.4th 729 (9th Cir. 2023) (attached here as Appendix A). Mr. Cabrera then petitioned for panel rehearing and rehearing en banc. On December 19, 2023, the panel denied Mr. Cabrera's petition for panel rehearing, and the full court declined to hear the matter en banc (attached here as Appendix B).

JURISDICTION

On September 29, 2023, the Ninth Circuit denied Mr. Cabrera's appeal and affirmed his conviction. *See* Appendix A. Mr. Cabrera then filed a petition for panel rehearing and rehearing en banc, which the Ninth Circuit denied on December 19, 2023. *See* Appendix B. This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

When Juan Cabrera was a child in El Salvador, he watched a death squad execute his father. He and his remaining family members fled to the mountains to try to avoid further violence. And as an adult, Mr. Cabrera continued to encounter violence. Every day he went to work, rival gangs stopped, harassed, searched, robbed, and threatened him.

In 2018, Mr. Cabrera came to the U.S. and applied for asylum based on the gang violence he suffered. An asylum officer found his account credible but concluded it did not legally qualify for asylum. Mr. Cabrera was again deported to El Salvador, where he continued to fear for his life.

In the fall of 2019, Mr. Cabrera returned to the U.S. border. At this time, a policy of "metering" was in place, where border officials limited the number of people who could apply for asylum daily at the port of entry. This created a backlog that forced people to wait up to six months in Tijuana before they could begin the asylum process. At any given time, eight to ten thousand people were living in encampments along the border near the main San Diego port of entry.

One morning in November, Mr. Cabrera went to an area about five miles west of these encampments, near the Pacific Ocean. He climbed over one of two border fences into a restricted zone that the public is not allowed to enter. He never attempted to hide or conceal himself. After scaling the first fence, Mr. Cabrera crawled up a steep slope to a road that only Border Patrol agents could access. This road was next to a second fence, about 20 feet tall. But Mr. Cabrera did not try to climb this second fence. Instead, he sat down and waited.

After about seven minutes, a Border Patrol agent drove up. Mr. Cabrera did not hide or try to run away. Without giving any *Miranda* warnings, the agent asked Mr. Cabrera questions about his citizenship, if he had any immigration documents, how and when he entered the U.S., and why he came to the United States. As to this last question, Mr. Cabrera purportedly said he came to "work," rather than to apply for asylum. The agent then placed Mr. Cabrera in his vehicle and took him to a nearby Border Patrol station.

The government charged Mr. Cabrera with attempted illegal entry under 8 U.S.C. §1325 and attempted illegal reentry under 8 U.S.C. § 1326. Before trial,

Mr. Cabrera moved to suppress the non-*Mirandized* responses he gave to the agent—particularly the purported statement that he came for "work." Mr. Cabrera argued that he was in custody at the time of this statement because he was in a highly-militarized and restricted zone between the primary and secondary border fences, where only Border Patrol agents are allowed to go. The district court disagreed that Mr. Cabrera was "in custody" during this interrogation and denied the motion to suppress.

At trial, Mr. Cabrera's theory of defense was that he lacked the specific intent to enter the U.S. without permission because he climbed over the fence in order to apply for asylum. He pointed to the thousands of people and the months-long wait at the border as evidence that a person desperate to seek asylum might enter in order to be taken into custody so they could start the asylum process. But the agent testified that Mr. Cabrera said he came to "work," which contradicted his entire theory of defense. The jury then found him guilty of both counts.

Mr. Cabrera appealed his conviction to the Ninth Circuit Court of Appeals, arguing *inter alia* that the district court erred by failing to suppress his non-*Mirandized* statements. Under this Court's most recent precedent, judges must apply a two-step test to determine whether a person is "in custody" for purposes of *Miranda*. *See Howes v. Fields*, 565 U.S. 499 (2012). The "initial step" requires courts to consider the "objective circumstances of the interrogation" to determine whether "a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* at 509 (quotations and alterations omitted). Factors

relevant to this analysis include the "location of the questioning," its "duration," the "statements made," any use of "physical restraints," and whether the person is released "at the end of the questioning." *Id*.

But even if these factors suggest a reasonable person would not feel free to leave, "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Id*. So under *Howes*, courts must then proceed to the second step by asking the "additional question" of "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id*.

But in a published opinion, the Ninth Circuit did not apply the *Howes* two-step test. Initially, the court noted that "[o]rdinarily, we assess whether someone is 'in custody' for *Miranda* purposes by determining whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." Pet. App. 8a (quotations omitted). But it then declined to undertake this step-one analysis at all, holding that in the context of "*Miranda* challenges at the border," the relevant question was whether the detention "constituted a permissible *Terry* stop, or something more." Pet. App. 10a. In fact, the Ninth Circuit went so far as to say that "in considering Cabrera's case, we must determine whether his being questioned in between the border fences was permissible pursuant to *Terry,* rather than whether he was 'in custody' pursuant to *Miranda*." Pet. App. 11a.

The Ninth Circuit then concluded that "[t]he stop here meets the requirements of *Terry*." Pet. App. 11a. To reach this conclusion, the court considered factors that appear nowhere in the *Howes* two-step custody analysis, such as whether the agent had "reasonable suspicion" to stop Mr. Cabrera or asked questions that exceeded the scope of the stop. Pet. App. 11a–12a. Moreover, the Ninth Circuit never conducted the second step of the *Miranda* custody inquiry by asking "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509. In other words, the Ninth Circuit applied an entirely different custodial test than this Court mandated in *Howes*—one that focused purely on whether the detention was a *Terry* stop.

Mr. Cabrera then filed a petition for panel and en banc rehearing. The three-judge panel denied Mr. Cabrera's petition for panel rehearing, and the full court declined to hear the matter en banc. Pet. App. 28a. This petition follows.

REASONS FOR GRANTING THE PETITION

I.

The courts of appeals are applying different tests to determine whether a person is "in custody" for purposes of *Miranda*.

In the dozen years since this Court issued *Howes*, most circuit courts have adhered to its two-part test to determine whether a suspect is "in custody" for purposes of *Miranda*. But three holdouts remain. The Eighth and Tenth Circuits have yet to acknowledge *Howes'* second step and continue to apply only the first step of whether a reasonable person would feel free to leave. The Ninth Circuit

usually does the same. But in the context of border-related detentions, the Ninth Circuit does not even do this—instead, it determines whether a stop is "permissible pursuant to *Terry*, rather than whether [the person] was 'in custody' pursuant to *Miranda*." Pet. App. 11a. To ensure that all the circuits are uniformly applying established precedent on an important Fifth Amendment issue, this Court should grant certiorari.

A. *Howes* set forth a two-step test for determining whether a person is "in custody" for *Miranda* purposes.

In *Howes v. Fields*, this Court considered whether an inmate who was taken to a separate room and questioned about events that occurred before he came to prison was "in custody" for *Miranda* purposes. 565 U.S. at 505. The Court observed that "custody" is a "term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Id.* at 508–09. Thus, to determine whether a person is in custody, the "initial step" is to decide "whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* at 509 (quotations, citation, and alteration omitted). To do so, courts consider a series of "[r]elevant factors," such as the "location of the questioning," its "duration," the "statements made during the interview," the use of any "physical restraints," and "the release of the interviewee at the end of the questioning." *Id.*

But the Court clarified that determining whether "an individual's freedom of movement was curtailed" is "simply the first step in the analysis, not the last." *Id.* Because the Court has "'declined to accord talismanic power' to the freedom-of-

movement inquiry," it explained that "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Id.* (quoting *Berkemer v. McCarty,* 468 U.S. 420, 437 (1984)). Thus, after courts analyze the freedom-of-movement factors under step one, they must ask an "additional question" under step two—whether "the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* Because step one is only a "necessary and not a sufficient condition for *Miranda* custody," the facts must satisfy both steps before an interrogation is deemed custodial. *Id.*

B. Nine courts of appeals have adopted *Howes*' two-step test.

In the dozen years since *Howes*, most circuit courts have applied this two-step approach to custodial determinations. Citing *Howes*, the First Circuit explained that "[a] two-step inquiry is used to determine whether a suspect is in custody," in which courts decide 1) whether a reasonable person would have felt free to leave and 2) if not, whether "the environment in which the interrogation occurred 'presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.'" *United States v. Monson*, 72 F.4th 1, 10 (1st Cir. 2023) (quoting *Howes*, 565 U.S. at 509) (alteration omitted). The Eleventh Circuit similarly explained that "[o]ur evaluation of this coercion question proceeds in two steps." *United States v. Woodson, 30 F.4th* 1295, 1303 (11th Cir. 2022) (citing Howes); *see also United States v. Leggette*, 57 F.4th 406, 410–11 (4th Cir. 2023) (discussing the "two steps" for determining custody under *Howes*).

Even courts that have not expressly referred to the inquiry as a two-step analysis still apply the second prong. For instance, the Seventh Circuit stated that "[i]n the end, there is no custody unless 'the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda.*'") *United States v. Cox*, 54 F.4th 502, 511 (7th Cir. 2022) (quoting *Howes*, 565 U.S. at 509). *See also United States v. Schaffer*, 851 F.3d 166, 175 (2d Cir. 2017) ("Where there is evidence that an individual's freedom to move was limited, courts should consider whether 'the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.'") (quoting *Howes*); *United States v. Ludwikowski*, 944 F.3d 123, 131 (3d Cir. 2019) (same); *United States v. Howard*, 815 F. App'x 69, 78–79 (6th Cir. 2020) (same); *United States v. Cooper*, 949 F.3d 744, 748 (D.C. Cir. 2020) (same). Indeed, the Fifth Circuit reversed where a district court had "confined its analysis to the first inquiry" and the interrogation did not occur in "in an environment resembling the station house questioning at issue in *Miranda*." *United States v. Coulter*, 41 F.4th 451, 457–58 (5th Cir. 2022). Thus, nine courts of appeals follow the *Howes*' two-step approach to custodial determination.

C. Three courts of appeals apply only the first *Howes* step or a different test entirely.

As these nine courts of appeals have shown, the *Howes* two-step test for determining custody is not complicated. Yet inexplicably, three circuit courts have ignored it, continuing to apply their own pre-*Howes* precedent.

The Eighth Circuit applies only the first step of "whether, given the totality of the circumstances, a reasonable person would have felt at liberty to terminate the interrogation and leave or cause the agents to leave." *United States v. Sandell*, 27 F.4th 625, 628–29 (8th Cir. 2022) (quotations omitted); *see also United States v. Treanton*, 57 F.4th 638, 641 (8th Cir. 2023) ("We consider 'the circumstances surrounding the questioning and whether, given those circumstances, a reasonable person would have felt free to terminate the questioning and leave.'") (quoting *United States v. Ferguson*, 970 F.3d 895, 901 (8th Cir. 2020)). The Tenth Circuit does the same—curiously, by quoting *Howes* but *only* as to the first step. *See United States v. Wagner*, 951 F.3d 1232, 1250 (10th Cir. 2020) ("An interrogation is custodial when, 'in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.'") (quoting *Howes*, 565 U.S. at 509); *see also United States v. Guillen*, 995 F.3d 1095, 1109 (10th Cir. 2021). Neither the Eight nor Tenth Circuit has ever applied or even mentioned the second step of whether "the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509.

The Ninth Circuit takes an even more arbitrary approach. In many situations, the Ninth Circuit mirrors the Eighth and Tenth Circuits by applying only the first step of whether a reasonable person "would have felt, under a totality of the circumstances, that they were not at liberty to terminate the interrogation and leave." *United States v. Mora-Alcaraz*, 986 F.3d 1151, 1155 (9th Cir. 2021)

(quotations omitted). Under this inquiry, the Ninth Circuit applies the "*Kim* factors," which pre-date *Howes* and largely resemble the *Howes* first-step inquiry. *Id.* at 1156 (citing *United States v. Kim*, 292 F.3d 969 (9th Cir. 2002)).

But in cases involving border-related detentions, the Ninth Circuit applies an entirely different test. In a series of cases, the court has likened border stops to the traffic stop at issue in *Berkemer,* 468 U.S. 420, concluding that border-related stops are "ordinarily a *Terry* stop" not requiring *Miranda* warnings. *United States v. Galindo-Gallegos*, 244 F.3d 728, 732 (9th Cir. 2001). So rather than applying the factors set forth in *Howes* (or even *Kim*), the Ninth Circuit focuses on *Terry*-related factors such as whether there was "reasonable suspicion" for the stop and whether the questions were "reasonably limited in scope" to the justification for the stop. *United States v. Cervantes-Flores*, 421 F.3d 825, 830 (9th Cir. 2005). For instance, in one case where a Border Patrol agent prevented a person from leaving a parking lot by "blocking his car, approaching it with his gun drawn, and interrogating him about his citizenship and immigration status," the court refused to consider the question of whether a reasonable person would feel free to leave, holding only that the agent did not exceed the scope of *Terry* or *Berkemer*. *United States v. Medina-Villa*, 567 F.3d 507, 520 (9th Cir. 2009), *as amended* (June 23, 2009).

Here, the Ninth Circuit doubled down on this approach in a published opinion. It acknowledged that "[o]rdinarily, we assess whether someone is 'in custody' for *Miranda* purposes by determining whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she

would not be free to leave." Pet. App. 8a (quotations omitted). But because this was a border-related stop, the court refused to conduct this step-one analysis, asking instead "whether the detention constituted a permissible *Terry* stop, or something more." Pet. App. 10a. In fact, the court abandoned any pretense of applying the *Howes* step-one factors, stating that, "in considering Cabrera's case, we must determine whether his being questioned in between the border fences was permissible pursuant to *Terry*, rather than whether he was 'in custody' pursuant to *Miranda*." Pet. App. 11a.

But the *Howes* test is different than the *Terry* test. *Terry* held that an officer may briefly detain and question a person so long as the stop's "intensity and scope" do not transform it into an "unreasonable" search or seizure under the Fourth Amendment. *Terry*, 392 U.S. at 18. But *Howes* raises an entirely different constitutional question—not whether the officer's actions were "reasonable," but whether the officer's actions, combined with the "coercive pressures" of the "relevant environment," trigger an objective conclusion that a person was in custody. *Howes*, 565 U.S. at 509; *see also Leggette*, 57 F.4th at 411 n.5 ("*Terry*'s Fourth Amendment analysis and *Miranda*'s Fifth Amendment analysis remain distinct inquiries, focused on different questions."). So while an unreasonable stop under the Fourth Amendment might contribute to the coercion that transforms a detention into custody for *Miranda* purposes, "the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness." *Fisher v. United States*, 425 U.S. 391, 400 (1976); *New York v. Quarles*, 467 U.S. 649, 653 n.3 (1984) (same);

Here, for instance, the Ninth Circuit did not compare the "relevant environment"—interrogation by a Border Patrol agent in a restricted, heavily-militarized zone between border fences—to that of the "coercive pressures" of the station house in *Miranda*. *Howes*, 565 U.S. at 509. Instead, it considered this environment *only* to find that the agent had "reasonable suspicion to believe [Mr. Cabrera] may have been entering the country illegally" under *Terry*. Pet. App. 11a. The only other factors it considered were whether the agent's questions were "reasonably related" to the justification for the stop and whether the level of restraint was "limited and reasonable." Pet. App. 11a–12a. But again, "the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness." *Fisher*, 425 U.S. at 400. So even if the agent's "reasonable" actions justified a seizure under the Fourth Amendment, the Ninth Circuit did not answer the separate Fifth Amendment inquiry of whether a person in Mr. Cabrera's position would feel free to leave and whether the environment posed the "same inherently coercive pressures" as in *Miranda*. *Howes*, 565 U.S. at 509.

This Court did not obfuscate or hide the ball in *Howes*—it set forth a straightforward two-step test for determining whether an individual is in custody for *Miranda* purposes. Despite having more than a decade to adopt and apply this test, three courts of appeals are ignoring it—in fact, the Ninth Circuit here issued a published opinion that further entrenched its arbitrary approach. This Court should grant certiorari to bring the Eighth, Ninth, and Tenth Circuits in line with the other nine courts of appeals that faithfully apply *Howes*.

II.

This case presents an important and recurring constitutional issue.

By definition, every *Miranda* analysis requires judges, prosecutors, and defense attorneys to make a threshold determination of whether there was "such a restriction on a person's freedom as to render him 'in custody.'" *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). Not surprisingly, this question arises daily in a variety of interrogation contexts, such as prisons, *Maryland v. Shatzer*, 559 U.S. 98 (2010), schools, *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), police stations, *Thompson v. Keohane*, 516 U.S. 99 (1995), private homes, *Beckwith v. United States*, 425 U.S. 341 (1976), and traffic stops, *Berkemer*, 468 U.S. 420. Apart from the Fourth Amendment, it is hard to imagine a more frequently-implicated constitutional protection in criminal cases.

Not only does this inquiry occupy the minds of judges and lawyers *after* criminal charges arise, it affects police officers who must make "in-the-moment judgments as to when to administer *Miranda* warnings." *J.D.B.*, 564 U.S. at 271. Not surprisingly, such officers often have "difficulty deciding exactly when a suspect has been taken into custody." *Berkemer*, 468 U.S. at 441. Accordingly, one of the Court's goals in creating an objective custody test was to "give clear guidance to the police." *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004). But when three circuit courts encompassing 22 states—i.e., nearly the entire population west of the Mississippi River—decline to follow even the guidance this Court *has* issued, it is no

wonder police struggle to make "in-the-moment judgments as to when to administer *Miranda* warnings." *J.D.B.*, 564 U.S. at 271.

When police are confused as to the rule for determining custody, this confusion clogs trial and appellate courts with pretrial motions, direct appeals, and habeas challenges. Many challenges could be easily avoided if all circuits simply took note of and implemented this Court's holdings. Thus, this case presents a recurring and important issue that the Court should resolve.

III.

Mr. Cabrera's case is an excellent vehicle to correct this oversight and provide guidance on applying *Howes*' second step.

Mr. Cabrera's case is an ideal vehicle to correct the approaches of the Eighth, Ninth, and Tenth Circuits, for several reasons.

First, the issue of custody was thoroughly raised and decided below. At the trial level, Mr. Cabrera filed a motion to suppress his statements on *Miranda* grounds and argued that his location in the restricted zone between border fences rendered him "in custody" for *Miranda* purposes. C.A. E.R. 4–14, 456–59. The trial court agreed that "[t]he question here is whether the defendant was in custody," but concluded he was not. C.A. E.R. 15–16. On appeal, the Ninth Circuit affirmed, issuing a published opinion that focused primarily on the *Miranda* issue and resolved it *solely* on the basis that Mr. Cabrera was not "in custody." Pet. App. 8a–12a. Thus, this case presents a clean, preserved record with *Miranda* custody at the forefront.

Second, the Ninth Circuit applied the wrong test. Under *Howes*, the first step of a custodial determination is to decide whether "a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave" in light of the "location of the questioning," its "duration," the "statements made," any use of "physical restraints," and whether the person is released "at the end of the questioning." *Howes*, 565 U.S. at 509. If the answer is no, the second step is to decide "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.*

But here, the Ninth Circuit did neither. Instead, it considered whether Mr. Cabrera's stop was "permissible pursuant to *Terry*, rather than whether he was 'in custody' pursuant to *Miranda*." Pet. App. 11a. To do so, it looked to: 1) whether the agent had "reasonable suspicion to believe [Mr. Cabrera] may have been entering the country illegally"; 2) whether the agent's questions were "reasonably related" to the justification for the stop; and 3) whether the level of restraint was "limited and reasonable." Pet. App. 11a–12a. But "the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness." *Fisher*, 425 U.S. at 400. And at most, only one of these factors (the use of restraints) overlapped with one of the five factors in the first step of the *Howes* analysis—and the Ninth Circuit did not consider the second step at all. So the Ninth Circuit applied an entirely different inquiry than *Howes* requires.

Finally, this case presents an opportunity for the Court to provide greater guidance on how to apply *Howes*' step two—and to do so in a context that it has not

yet considered. Step two requires courts to determine "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509. This step has the potential to overlap with the first step, as some of the same factors that would lead a reasonable person to believe they were not free to leave are the same factors that would pose the same "inherently coercive pressures" as the stationhouse interrogation in *Miranda*. *Id*. Yet *Howes* provided no specific guidance on where step one ends and step two begins.

But here, the unique facts of Mr. Cabrera's case make the analysis easier. Mr. Cabrera climbed over the first border fence, walked up a hill, sat down by a 20-foot second border fence, and waited seven minutes for Border Patrol agents to arrive. These facts satisfy step one, since any person who is encountered by Border Patrol agents in a remote area next to a fence along the southwestern fence would not feel free to leave. So the question then becomes whether apprehension in the off-limits heavily-militarized zone *between* border fences presents "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509.

Berkemer suggests it would. *Berkemer* pointed to "[t]wo features of an ordinary traffic stop" that distinguished it from more coercive environments. 468 U.S. at 437. First, "detention of a motorist pursuant to a traffic stop is presumptively temporary and brief," since "[t]he vast majority of roadside detentions last only a few minutes." *Id*. Thus, "[a] motorist's expectations, when he

sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way." *Id.*

But no person detained in a restricted border zone that is closed to the general public would believe that his detention would "last only a few minutes," after which he would be allowed to "continue on his way." *Id.* The clear presumption is that a noncitizen has just crossed from Mexico and lacks permission to enter the U.S.—thus, they can be arrested and criminally prosecuted, or at least deported. And even if the individual *did* turn out to be a citizen, federal law makes it a crime for anyone to enter the country at a place other than a designated port of entry. *See* 19 U.S.C. § 1459 (reporting requirements for individuals). Thus, this situation is more akin to a person who trespasses on an area affecting national security—for instance, by climbing a fence surrounding the White House, a military base, a major airport, or a nuclear power plant—than a person subject to a traffic stop who believes they will be free to leave "in a few minutes." *Berkemer*, 468 U.S. at 437.

Second, *Berkemer* noted that motorists subject to a traffic stop do not feel "completely at the mercy of the police," since "the typical traffic stop is public," and "[p]assersby, on foot or in other cars, witness the interaction of officer and motorist." *Id.* at 438. This public setting "reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse." *Id.*

But the restricted nature of the border zone is the antithesis of a "public" traffic stop. No passersby may "witness the interaction" between a Border Patrol agent and a detainee because no one besides Border Patrol agents are allowed to enter this zone. *Id.* If anything, this environment *increases* the "ability of an unscrupulous" agent to use "illegitimate means to elicit self-incriminating statements" and exacerbates the risk the detainee will be "subject to abuse." *Id.* Indeed, such abuses are well documented along the border. *See, e.g.,* "U.S. border agents habitually abuse human rights, report reveals," *The Guardian,* Aug. 2, 2023, *available at*: https://www.theguardian.com/us-news/2023/aug/02/us-mexico-border-human-rights-abuses (discussing a report that "details a pattern of misuse of lethal force, intimidation, sexual harassment, and falsifying documents). Thus, Mr. Cabrera's detention lacked the two features of an "ordinary traffic stop," and presumably had "the same inherently coercive pressures" as in *Miranda*." *Howes*, 565 U.S. at 509.

IV.

This Court should bring the Eighth, Ninth, and Tenth Circuits in line with its precedent.

It goes without saying that courts of appeals do not have discretion to ignore this Court's precedent. Given that nine circuit courts have adopted *Howes*' two-step test, it was not buried in the decision or hidden to the average jurist. Yet three courts of appeals have simply failed to apply it for more than a decade, creating an unnecessary and unjustified circuit split. Because it would take little for this Court

to bring all circuit courts into alignment, this Court should grant the petition for certiorari.

CONCLUSION

For these reasons, this Court should grant Mr. Cabrera's petition for a writ of certiorari.

Respectfully submitted,

Date: March 5, 2024

s/ Kara L. Hartzler

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