No. 23-6976

IN THE SUPREME COURT OF THE UNITED STATES

JUAN CABRERA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO A WRIT OF CERTIORARI

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INTRODUCTION

In his petition for certiorari, Mr. Cabrera explained that the Eighth, Ninth, and Tenth Circuits apply the wrong test to determine whether a suspect is "in custody" for purposes of *Miranda v. Arizona,* 384 U.S. 436 (1966). Twelve years ago, this Court established a two-step custodial framework that considers: 1) whether a reasonable person would feel free to "terminate the interrogation and leave"; and 2) whether the relevant environment presented "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes v. Fields*, 565 U.S. 499, 509 (2012). While nine circuit courts correctly apply both steps of this test, the Eighth and Tenth Circuits have never mentioned or applied the second step. And the Ninth Circuit applies only the first step or holds, as it did here, 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.

In its Brief in Opposition (BIO), the Government denies that the Eighth, Ninth, and Tenth Circuits are ignoring *Howes*' second step. It cites no case in which those circuits *have* applied the second step. Instead, it suggests that for the past twelve years, the Eighth and Tenth Circuits have resolved *Miranda* custody issues under the first step, thereby "obviating the need to proceed to Howes' second step inquiry." BIO 11. But numerous cases in those circuits have concluded that a defendant was in custody without applying the second step. In fact, Eighth Circuit precedent affirmatively rejects *Howes*' second step by holding that the custodial inquiry is "not whether the interview took place in a coercive or police dominated

environment." *United States v. Cowan*, 674 F.3d 947, 957–58 (8th Cir. 2012). Thus, the Eighth and Tenth Circuits are openly defying this Court's framework governing *Miranda* custody.

The Government's defense of the Ninth Circuit fares no better. While it admits that the Ninth Circuit "did not cite Howes" anywhere in its opinion, it claims that "the substance of [the Ninth Circuit's] analysis was not materially different from the one Howes prescribes." BIO 8. But both the Ninth Circuit and the Government improperly rely on Fourth Amendment "reasonableness" factors associated with *Terry v. Ohio*, 392 U.S. 1 (1968), rather than the factors *Howes* uses to resolve Fifth Amendment custodial issues. Because these are distinct constitutional inquiries, the Ninth Circuit—like the Eighth and Tenth Circuits—applies the wrong custody test.

Finally, the Government does not dispute that this case presents a critical *Miranda* issue that arises in tens of thousands of cases ever year. Moreover, it identifies no procedural reasons for denying certiorari, nor can it. Not only did Mr. Cabrera squarely present and preserve the issue below, the Government never denies that the district court's failure to suppress Mr. Cabrera's statement affected the outcome of his trial. To ensure that courts in the western half of the country are using the same legal test to determine *Miranda* custody as courts in the eastern half of the country, the Court should grant certiorari.

REASONS FOR GRANTING THE PETITION

I.

The Eighth and Tenth Circuits have never applied the second step of *Howes*—in fact, their precedent rejects it.

In his petition, Mr. Cabrera explained that nine circuit courts have applied the *Howes* two-step approach to custodial determinations. Pet. 8–9. But he showed that in the dozen years since the Court issued *Howes*, the Eighth, Ninth, and Tenth Circuits have never mentioned the second step of this test—let alone applied it. Pet. 9–10. Because courts of appeals do not have discretion to ignore this Court's precedent, he urged the Court to grant certiorari.

In response, the Government denies that the Eighth and Tenth Circuits are failing to apply the second step of the *Howes* custody test. Rather, the Government claims that those courts are not ignoring step two—they just aren't reaching it. BIO 11. For instance, the Government says that in the Eighth and Tenth Circuit cases Mr. Cabrera cited, the courts of appeals found that "the defendant was free to leave" under the first step of *Howes*, thus "obviating the need to proceed to Howes' second step inquiry." BIO 11 (citing *United States v. Sandell*, 27 F.4th 625 (8th Cir. 2022), and *United States v. Wagner*, 951 F.3d 1232 (10th Cir. 2020)).

But in the two cases the Government cites (as well as the three it didn't), the Eighth and Tenth Circuits began by setting forth the full legal framework their courts use to determine *Miranda* custody. *See Sandell*, 27 F.4th at 628–29; *Wagner*, 951 F.3d at 1249–50; *see also United States v. Treanton*, 57 F.4th 638, 641 (8th Cir. 2023); *United States v. Ferguson*, 970 F.3d 895, 901 (8th Cir. 2020); *United States v.*;

United States v. Guillen, 995 F.3d 1095, 1109 (10th Cir. 2021). These frameworks say nothing about the *Howes* second step. So it strains credulity for the Government to claim that, had the defendant satisfied step one, the courts of appeals would have spontaneously applied a second legal step that was never previously mentioned and appears nowhere in their jurisprudence.

In fact, the Eighth Circuit routinely applies a *Miranda* test that affirmatively contradicts *Howes*. The *Howes* second step 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*." 565 U.S. at 509. But the Eighth Circuit has repeatedly rejected such an analysis, holding that "'the critical inquiry is *not whether the interview took place in a coercive or police dominated environment*, but rather whether the defendant's freedom to depart was restricted in any way.'" *United States v. Cowan*, 674 F.3d 947, 957–58 (8th Cir. 2012) (emphasis added) (quoting *United States v. LeBrun*, 363 F.3d 715, 720 (8th Cir. 2004) (en banc)). Other Eighth Circuit decisions hold the same. *See, e.g.*, *United States v. Ferguson*, 970 F.3d 895, 901 (8th Cir. 2020) ("[T]he critical inquiry is not whether the interview took place in a coercive or police dominated environment, but rather whether the defendant's freedom to depart was restricted in any way.") (quotations omitted); *United States v. Diaz*, 736 F.3d 1143, 1149 (8th Cir. 2013) (same). So the Eighth Circuit is not failing to reach the *Howes* second step, as the Government claims—it is squarely rejecting it.

Taking their cues from the Eighth Circuit, district courts in that circuit also reject the *Howes* second step. For instance, one Minnesota court rebuffed any comparison to *Howes'* "station house questioning," 565 U.S. at 509, by stating that "the critical inquiry is not whether the interview took place in a coercive or police dominated environment *[like a police station]*, but rather whether the defendant's freedom to depart was restricted in any way." *United States v. Spack*, 2014 WL 1847691, at *3 (D. Minn. May 8, 2014) (quotations omitted) (emphasis added) (bracketed addition in *Spack*). Other district courts also ignore the *Howes* second step and are routinely affirmed by the Eighth Circuit.[1]

The Tenth Circuit takes the same approach. Conspicuously, the Government does not mention *Guillen*, a case Mr. Cabrera cited in which the Tenth Circuit held that a person *was* in custody for *Miranda* purposes and yet did not apply the *Howes* second step. 995 F.3d 1109–11. There, the court concluded that under a totality of the circumstances, "a reasonable person in [the detainee's] position would not have felt free to leave or otherwise end the interview." *Id*. at 1110. But while this

[1] *See United States v. Simpson*, 2020 WL 7130589, at *8 (D. Neb. Aug. 27, 2020), *aff'd,* 44 F.4th 1093 (8th Cir. 2022) ("[T]he critical inquiry is not whether the interview took place in a coercive or police dominated environment, but rather whether the defendant's freedom to depart was restricted in any way.") (quotations omitted); *United States v. Hoeffener*, 2018 WL 2995789, at *5 (E.D. Mo. Mar. 12, 2018), *aff'd,* 950 F.3d 1037 (8th Cir. 2020) (same); *see also United States v. Nava*, 2022 WL 3593724, at *4 (W.D. Ark. Aug. 1, 2022) (same); *United States v. Leon*, 2020 WL 2079261, at *5 (D. Neb. Apr. 30, 2020) (same); *United States v. Hale*, 2019 WL 3417367, at *11 (W.D. Mo. Jan. 2, 2019) (same); *United States v. Hammerschmidt*, 2015 WL 5313513, at *9 (D. Minn. Sept. 9, 2015) (same); *United States v. McArdle*, 2015 WL 13608427, at *3 (S.D. Iowa Aug. 6, 2015); *United States v. Travis*, 2015 WL 439393, at *14 (D. Minn. Feb. 3, 2015) (same); *United States v. Schildt*, No. 4:11CR3138, 2012 WL 1574421, at *3 (D. Neb. Apr. 11, 2012) (same).

satisfies the first step of *Howes*, the Tenth Circuit never went on to decide whether it satisfied the second step. *See id.* This directly contradicts the Government's claim that in "each" case Mr. Cabrera cited, the court found that the defendant was not in custody because he was "free to leave" under the first step of *Howes*, thus "obviating the need to proceed to Howes' second step inquiry." BIO 11.

District courts within the Tenth Circuit have done the same. For instance, in *United States v. Archuleta*, one court explained that "the question the court must ask is whether, under the totality of the circumstances, a reasonable person in [the detainee's] position would have felt free to end the encounter with [the officer] and leave." 981 F. Supp. 2d 1080, 1091 (D. Utah 2013). The court then held that the defendant was in custody without ever applying the second step, finding only that "a reasonable person in [the detainee's] position would not have felt free to refrain from answering [the officer's] questions and leave." *Id.* at 1093. The Tenth Circuit affirmed. *See United States v. Archuleta,* 619 F. App'x 683 (10th Cir. 2015).

As these cases show, the Government's only excuse for the Eighth and Tenth Circuits' failure to adhere to this Court's precedent is simply false. These courts of appeals (and the district courts within those circuits) are not failing to apply *Howes*' step two because the defendant never made it past step one, as the Government claims. Rather, the courts are affirmatively applying precedent that contradicts step two, thereby employing a different legal test for *Miranda* custodial inquiries in nearly every federal court west of the Mississippi River. This warrants a grant of certiorari.

II.

Rather than applying *Howes*, the Ninth Circuit improperly uses a Fourth Amendment *Terry* test to make a Fifth Amendment *Miranda* custody determination.

In his petition for certiorari, Mr. Cabrera also explained that the Ninth Circuit, like the Eighth and Tenth Circuits, frequently declines to apply the second step of *Howes*. Pet. 10–13 (discussing *United States v. Kim*, 292 F.3d 969 (9th Cir. 2002)). But in cases involving border-related detentions, the Ninth Circuit goes even further by applying an entirely different test—asking whether the stop was permissible under *Terry*, 392 U.S. 1. *See United States v. Galindo-Gallegos*, 244 F.3d 728, 732 (9th Cir. 2001) (holding that border-related stops are a *Terry* stop not requiring *Miranda* warnings). So rather than applying the factors set forth in *Howes*, 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).

But as Mr. Cabrera explained, the Ninth Circuit cannot substitute the Fifth Amendment test for custody under *Miranda* and *Howes* with the Fourth Amendment test for reasonable suspicion under *Terry v. Ohio*. Pet. 12–13. This violates the Court's longstanding holding that "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). Yet in Mr. Cabrera's case, the Ninth Circuit doubled down on this very

proposition in a published opinion, holding 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.

The Government tries to defend the Ninth Circuit's incorrect approach by relying on *Berkemer v. McCarty,* 468 U.S. 420, 437 (1984), which considered whether a driver subject to a valid *Terry* stop was in custody for *Miranda* purposes. The Government quotes *Berkemer* to claim that "'persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda.'" BIO 7 (quoting *Berkemer*, 468 U.S. at 440). But as courts have recognized, *Berkemer* itself does not support—and in fact, contradicts—the notion that *Terry* controls the *Miranda* custody analysis.

In *Berkemer*, the Court held that a person detained and questioned pursuant to a "routine traffic stop" is not "in custody" for *Miranda* purposes. 468 U.S. at 435. Compared to formal interrogations, it reasoned that "ordinary" traffic stops are presumptively "brief," "public," and "noncoercive." *Id*. at 437–40. But the Court also recognized that when a particular stop becomes more coercive—for instance, when the individual was "instructed to get into the police car" such that his "freedom of action is curtailed to a degree associated with formal arrest"—he was "entitled to the full panoply of protections prescribed by *Miranda*." *Id*. at 434, 440. Indeed, the Court cited a traffic stop where a person was in custody for *Miranda* purposes because he was "subjected to persistent questioning in the squad car" and "denied permission to contact his mother." *Id*. at 442 n.36.

In other words, *Berkemer* recognized that a person subject to a valid *Terry* stop could still be "in custody" for *Miranda* purposes. Courts have acknowledged as much, reading *Berkemer* to establish that "when a given traffic stop becomes more coercive than a routine traffic stop," a person may be in custody "even though the underlying seizure of the individual might qualify as a reasonable investigative detention under the Fourth Amendment." *United States v. Revels*, 510 F.3d 1269, 1273–74 (10th Cir. 2007). Thus, even when a *Terry* stop is "reasonable within the meaning of the Fourth Amendment," it may "create the custodial situation in which *Miranda* was designed to operate." *Id.* at 1274. *See also United States v. Smith*, 3 F.3d 1088, 1096 (7th Cir. 1993) (discussing *Berkemer* and explaining that a Fifth Amendment *Miranda* custody inquiry requires a "completely different analysis of the circumstances" than a Fourth Amendment *Terry* stop); *United States v. Streifel*, 781 F.2d 953, 958 (1st Cir. 1986) (acknowledging *Berkemer*'s holding that a *Terry* stop "does not end the inquiry" of whether a person is in custody for *Miranda*); *United States v. Leggette*, 57 F.4th 406, 411 n.5 (4th Cir. 2023) ("*Terry*'s Fourth Amendment analysis and *Miranda*'s Fifth Amendment analysis remain distinct inquiries, focused on different questions."). So contrary to the Government's theory, *Berkemer* did not hold that a valid *Terry* stop necessarily excuses an officer from providing *Miranda* warnings.

The Government nevertheless points to cases where courts "referenced the Terry framework when addressing whether a suspect was in custody for Miranda purposes." BIO 10. But "referenc[ing] the Terry framework," as the Court did in

Berkemer, is different than assuming that *Terry controls* the *Miranda* analysis. Yet that is precisely what the Ninth Circuit did here, asking whether Mr. Cabrera's detention was "permissible pursuant to *Terry*, *rather than* whether he was 'in custody' pursuant to *Miranda*." Pet. App. 11a (emphasis added). This "rather than" language is where the Ninth Circuit errs, since it means that the Ninth Circuit uses *Terry*—not merely to inform the *Miranda* custodial inquiry—but to resolve it. And using *Terry* to resolve the *Miranda* inquiry flouts the *Howes* two-step test and this Court's established framework for determining Fifth Amendment custodial issues.

The Government admits that the Ninth Circuit "did not cite Howes" anywhere in its opinion. BIO 8. Nevertheless, it claims that no practical error occurred because "the substance of [the Ninth Circuit's] analysis was not materially different from the one Howes prescribes." BIO 8.

But in its published opinion, the Ninth Circuit relied on "reasonableness" factors under *Terry* that appear nowhere in the *Howes* two-step test. For instance, the court believed that Mr. Cabrera's location gave the agent "reasonable suspicion" for the stop, that the amount of restraint was "reasonable under the circumstances," and that the questions were "reasonably related in scope to the justification for [the stop]." Pet. App. 11a (quotations omitted). As Mr. Cabrera pointed out in his certiorari petition (and the Government never addresses), "the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness." Pet. 12 (quoting *Fisher*, 425 U.S. at 400, and *Quarles*, 467 U.S. at 653 n.3). Moreover, *Howes* does not list the "reasonableness" of the officer's actions as a consideration in

its two-step test. 565 U.S. at 505. Thus, the Ninth Circuit's analysis *was* in fact "materially different from the one Howes prescribes." BIO 8.

Furthermore, *Berkemer* itself held that reasonableness and a police officer's mindset have "no bearing on the question whether a suspect was 'in custody' at a particular time." 468 U.S. at 442. Rather, "the *only* relevant inquiry is how a reasonable man *in the suspect's position* would have understood his situation." *Id.* (emphases added). *See also Beckwith v. United States*, 425 U.S. 341, 346 (1976) (relying on the "compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted"). So at a minimum, the Ninth Circuit's erroneous approach is "materially different" than *Howes* because it relies on the reasonableness of the officer's actions—a legal factor that has "no bearing" on the custodial analysis. *Berkemer*, 468 U.S. at 442.

Even if a Fourth Amendment *Terry* analysis could control the *Miranda* custody analysis, Mr. Cabrera also pointed out that a border stop is fundamentally different than an ordinary traffic stop, for two reasons. Pet. 17–19. First, while a typical traffic stop is "presumptively temporary and brief," *Berkemer*, 468 U.S. at 437, a person like Mr. Cabrera who is arrested in a militarized security zone between two international border fences would not believe they would soon be free to leave. Second, while "the typical traffic stop is public," thereby lessening the risk of "abuse," *id.* at 438, a restricted border zone populated exclusively by agents is more akin to "the type of station house questioning at issue in *Miranda*." *Howes*,

565 U.S. at 509. Indeed, Mr. Cabrera showed in his petition that the nature of isolated encounters in remote border areas frequently leads to the types of abuse that would create a coercive environment. *See* Pet. 19. Thus, the Ninth Circuit's entire premise for its *Terry*-based analysis—that a border-related detention is the equivalent of a traffic stop—finds no support in *Berkemer*.

The Government never mentions or addresses these distinctions between traffic stops and border-related detentions. So at a minimum, nothing justifies the Ninth Circuit's presumption that a border-related detention is the equivalent of a *Terry* stop. Because the Ninth Circuit's erroneous reliance on *Terry* applies the wrong legal test to determine whether a person is in custody for *Miranda* purposes, the Court should grant certiorari.

III.

This case presents an important issue that was preserved below and would have changed the outcome in Mr. Cabrera's case.

In his petition, Mr. Cabrera also provided other compelling reasons for granting certiorari. First, the question of when a person is "in custody" presents an important and recurring constitutional issue that arises in nearly every *Miranda* case. Pet. 14–15. Second, this custodial issue was raised and decided at every stage of the case, providing the Court a clean vehicle to reach the merits. Pet. 15. Finally, the trial court's failure to suppress Mr. Cabrera's statement on *Miranda* grounds likely swayed the jury's verdict, since it was the most damaging piece of evidence contradicting his trial defense. Pet. 3–4.

The Government disputes none of these compelling reasons. It does not deny that thousands of judges make *Miranda* custodial determinations every day. It identifies no failure to preserve this issue or other procedural defect that would prevent the Court from reaching the merits. And it never argues that there was sufficient evidence to convict Mr. Cabrera absent his statement. Instead, it simply denies the fact that the Eighth, Ninth, and Tenth Circuits are declining to apply the *Howes* two-step test, contrary to all the authority presented herein. BIO 7–12.

This Court's precedent deserves more than the Government's casual shrug. For the past twelve years, three circuit courts have ignored an unambiguous holding of this Court on a critical Fifth Amendment issue. This indifference not only applies a different legal test to people accused of crimes in the western half of the United States, it tolerates and encourages judicial noncompliance with this Court's decisions. To bring the Eighth, Ninth, and Tenth Circuits into conformity with the rest of the circuits on a key *Miranda* issue, the Court should grant certiorari.

CONCLUSION

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

Respectfully submitted,

Date: May 17, 2024

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