No._____

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR CAMPOS-AYALA, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

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

SHANE O'NEAL
O'NEAL LAW
101 E. Avenue B
Alpine, Texas 79830
(713) 516-3505
shane@shaneoneallaw.com

Counsel of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Victor Campos, Martin Moncada, Karina Castro, and Castro's daughter walked into the United States on December 23, 2020. The next morning, they stood by the highway and flagged down a car, the driver of which offered them a ride. The young man driving the car later dropped them at a roadside park and asked them to get out and wait, promising to return. He did. His car was now filled with wrapped bundles of marijuana. Campos and Moncada rearranged the bundles so the four travelers could wedge themselves back into the car to keep their ride. Down the road, the car was stopped by Texas troopers.

The troopers removed the driver and handcuffed him by the roadside. They held the other four inside the car until Border Patrol arrived. When Border Patrol arrived, agents parked a transport van, with an interior cage, in front of the car. Agents loaded the driver, Castro, and her daughter in the van before asking Campos and Moncada, still held inside the car, for their citizenship, where they were coming from, and then whether they knew what they were sitting on. When they confirmed they knew it was marijuana, agents removed Moncada and loaded him in the van as well. Finally, Campos was removed. During that removal, including a frisk, an agent accused Campos of importing the marijuana, using his phones to coordinate the

smuggling event, and helping with the marijuana. Campos admitted to helping as he was being walked to the secure transport van.

The young man wasn't quite 18, so the government did not prosecute him for the bundles, which contained marijuana. Instead, it charged Campos and Moncada with possessing marijuana with the intent to distribute it.

They both told the arresting agents the story of the journey. The government did not charge Castro. They did deport her before she could be interviewed, deposed, or subpoenaed by a defendant. At trial, the government acknowledged through its witnesses that Castro's story of the journey was in accord with the men's defense, but it asked the jury to doubt her story that its witnesses had recounted. The jury found the men guilty.

This case presents three important questions, a *Miranda* question, the subject of a deep and long-standing circuit split that the Fifth Circuit has now joined, a possession question that has now divided the circuits, and a question concerning the government's responsibility not to deport a witness it knows has evidence material and favorable to the defense. The issues presented are:

1. Whether, during an investigation arising from a traffic stop, agents, who act reasonably under the Fourth Amendment, must

read *Miranda* warnings when they restrain and interrogate someone prior to the completion of a formal arrest.

2. Whether, for purposes of the Controlled Substances Act, proof of possession with intent to distribute requires a showing of control over the drugs, rather than mere touching of someone else's drugs.
3. Whether, when the government has deported a witness who has material evidence favorable to the defendant, that evidence can be deemed cumulative if the government admits a summary of the deported witness's testimony and then asks the jury to disbelieve that summary.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

No._____

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR CAMPOS-AYALA, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

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

Victor Campos-Ayala asks that a writ of certiorari issue to review the opinion and judgment entered on June 7, 2024 by the en banc United States Court of Appeals for the Fifth Circuit.

PARTIES TO THE PROCEEDING

In addition to Campos and the government, Martin Moncada de la Cruz was a party to the proceedings in the courts below. Moncada has also filed a petition. *Moncada de la Cruz v. United States*, No. 24-5451 (Petition filed August 29, 2024).

RELATED PROCEEDINGS

United States v. Martin Moncada de la Cruz and Victor Campos Ayala, U.S. District Court for the Western District of Texas, Number 4: 21 CR 00038, Judgment entered July 15, 2021.

United States v. Victor Campos Ayala and Martin Moncada de la Cruz, United States Court of Appeals for the Fifth Circuit (panel opinion), Number 21-50642, Opinion entered June 7, 2023, and opinion vacated on August 31, 2023, by grant of en banc rehearing. *See* 81 F.4th 460 (5th Cir. 2023).

United States v. Victor Campos Ayala and Martin Moncada de la Cruz, United States Court of Appeals for the Fifth Circuit (en banc), Number 21-50642, Judgment entered June 7, 2024.

OPINION BELOW

The opinion of the en banc court of appeals, *United States v. Campos-Ayala,* 105 F.4th 235 (5th Cir. 2024) (en banc), is attached as Appendix A to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on June 7, 2024. This petition is filed within 90 days after judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "no person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."

The Sixth Amendment to the U.S. Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . to have compulsory process for obtaining witnesses in his favor[.]".

STATUTORY PROVISION INVOLVED

Title 21, Section 841 of the United States Code provides in pertinent part that "[E]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

STATEMENT

Petitioner Victor Campos Ayala and his codefendant Martin Moncada de la Cruz were charged with possessing more than 100 kilograms of marijuana with the intent to distribute it, an offense that carries a mandatory 5-year imprisonment sentence under 21 U.S.C. § 841(b)(1)(B).[1] The men were not charged with a drug conspiracy under 21 U.S.C. § 846. The jury that heard their case was not instructed on aiding-and-abetting liability under 18 U.S.C. § 2. The only question for the jury was whether Moncada and Campos, travelers who had caught a ride with a man who turned out, some ways into the journey, to be a marijuana smuggler, had possessed with intent to distribute the marijuana with which they shared space in the man's car for a part of the ride they accepted from him.

Campos, a middle-aged man, and Moncada, a young man, traveled together from their shared hometown in Mexico toward the United States. Each man was heading to Odessa, Texas, where he would make arrangements with his family to get him to his final destination in the United States. Along the way, the men began

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

traveling with Karina Castro Hernandez and Castro's six-year-old daughter. The group crossed the Mexico-United States border on their own, without a guide, on the evening of December 23, 2020, and slept outside near the border city of Presidio, Texas.

The next morning, the group went to the highway and attempted to flag down a ride. A silver car stopped. Its young driver, 17 soon to be 18, offered them a ride. The driver later dropped the travelers off at a roadside park near Van Horn, Texas, and told them he would be back in about 30 minutes. When the driver returned, he had five large bundles in the car. Campos, Moncada, Castro, and the child arranged themselves around, over, and next to the bundles, with Campos and Moncada moving the bundles to allow the travelers to squeeze back into the car. In the car, Campos was sprawled over the bundles with his feet hooked across a bundle. Appendix C. Moncada was in a fetal position, wedged between the rear of the front seat and the bundles. EROA.509-10, 770-71[2] Castro was in the front seat with a bundle atop her. Castro's daughter sat on the front seat console. Appendix C.

As the silver car drove east on the interstate highway toward Odessa, it attracted the attention of a person who telephoned the police about it. Troopers from the Texas Department of Public Safety stopped the car. When the troopers approached, they saw bundles in the car and smelled marijuana. The troopers took the driver out of the car, handcuffed him, and sat him on the grass on the side of the

[2] EROA stands for the electronic record on appeal in the court of appeals. Page citations are to the record for Mr. Campos. Although all trial proceedings were joint, separate records, differently paginated were prepared for Campos and for Moncada.

road. Because the passengers were immigrants, the troopers left them in the car and waited for Border Patrol agents to arrive. The passengers remained in their odd positions inside the car until Border Patrol agents arrived and arrested them. See *Campos-Ayala,* 105 F.4th at 268 (photograph showing Campos after arrival of Border Patrol agents). The troopers did not give the passengers *Miranda* warnings.

When the first Border Patrol agent arrived, he immediately asked wither the Troopers had given the driver *Miranda* warnings yet. A trooper answered no. Five minutes later, more Border Patrol agents arrived, and a total of six uniformed officers surrounded the vehicle. The agents removed Castro and her daughter and loaded them into a secured transport van. The agents then questioned Campos and Moncada. They asked where they were coming from and whether they were U.S. citizens. Then, Border Patrol agent Eric Ramos asked the men, in Spanish, "Do you know what you're on?" Campos shrugged. Moncada said no. Ramos then asked, "That's marijuana?" Moncada "shook his head yes." Campos answered, "Yes." While he was talking to them, Ramos blocked the door to stop them from exiting the vehicle.

Moncada was removed, frisked, and moved to the transport van. While Moncada was being removed, Ramos asked Campos if he had anything harmful. Campos responded that he did not. Ramos removed Campos from the car and placed his hands on the vehicle, while searching him. During the search, Ramos asked him, "Why did you help with the drugs?" Campos replied that he did not. Ramos found two cell phones and accused Campos, "Why do you need two phones? … You have a lot of people you have to call for drugs?" Campos answered, No." Then, as he walked

Campos to the transport van, with his hands on him, Ramos asked "Why did you cross with the drugs?" Campos replied, "I didn't cross. I just helped." Ramos responded, "Exactly." It is undisputed that Campos had not received *Miranda* warnings.

At the Border Patrol station, agent Valerie Kettani questioned both men, while task-force Sergeant Javier Bustamante listened in. Both testified at trial as to what they remembered Campos and Moncada saying.

According to both, Moncada told Kettani that he and Campos had entered the U.S. with Castro and her daughter. They had caught a ride and then been dropped off and told by the driver that he would return. EROA.186-88, 196. When the driver did return, his car was filled with bundles. Moncada helped move the bundles around, removing them from the car to "fix them so that they were able to fit in there." EROA.611-16, 655. Bustamante recalled Moncada saying that "he helped rearrange so everybody could fit inside the vehicle because it's a small vehicle." EROA.616.

Of Campos, Sergeant Bustamante recalled that towards the end of his interview, "Ms. Kettani was telling him if he understood why he was being arrested, what charges was being pressed against him and if he understood why that–and I remember him tilting his head and using the words (speaking Spanish), which is basically in slang is: That's just the way things are and I was in possession of the marijuana."

Karina Castro was not charged. The government took her statement and then removed her from the country.

After the government sent her out of the country, the defense learned that Castro had related to Agent Kettani an account of the group's travels that matched the one Moncada and Campos had told. Castro had confirmed that the travelers had crossed the border together, spent the night near Presidio, and caught a ride in the silver car in the morning. Castro also said that the driver later dropped them off and told them to wait, and that, when the driver returned his car was full of bundles. The travelers squeezed in and resumed their trip toward Odessa. EROA.650-52.

Campos and Moncada moved to dismiss the indictment, arguing that the government's removal of Castro from the country had deprived them of material, favorable, non-cumulative evidence in violation of the due process and compulsory process clauses and the rule of *United States v. Valenzuela-Bernal,* 458 U.S. 858 (1982). The district court denied that motion. Appendix B.

Campos and Moncada moved to suppress the statements they made because they had been subject to custodial interrogation with *Miranda* warnings. The district court denied that motion. Appendix B.

At trial, Kettani and Bustamante testified on cross-examination about the statements Campos and Moncada had made about the journey. They also testified to Castro's statement to them that corroborated those statements. And Kettani testified that Campos had two cellphones. Kettani had looked at Campos's phones, but none of the text messages she could see struck her as significant. Campos had consented to a forensic search of his phones, but the government did not do such a search, and

the government's only evidence was Kettani's testimony that the phone showed nothing suspicious. EROA.634, 656-57, 664.

In closing argument, the prosecutor disparaged Castro's statements and urged the jury not to credit them. He argued "And so they go to a park and they drop them off at a random park. This kid leaves and half an hour later he comes back. These grown men are putting the blame on a 17-year-old boy. Do you believe that that 17-year-old boy loaded up 128 kilograms by himself in 30 minutes?" EROA.750.

The jury found Campos and Moncada guilty. The men appealed, arguing that the evidence did not show they possessed the driver's marijuana, let alone possessed it with the intent to distribute it. They also argued that the government had violated their Fifth and Sixth amendment rights by removing Castro when it knew she possessed evidence that was favorable, material, and non-cumulative to their defense. Finally, they argued that the district court had erred by denying the motion to suppress their statements. A panel of the Fifth Circuit ruled that the government had failed to prove possession beyond a reasonable doubt, observing that possession required control over the object possessed and it had not been shown that the men had actual or constructive control over the driver's marijuana bundles. *United States v. Campos-Ayala,* 70 F.4th 261, 266-70 (5th Cir. 2023). One panel member dissented, believing the physical positions of the men wedged in amongst the marijuana demonstrated that they had physical control over the drugs. 70 F.4th at 270-71. The Fifth Circuit later granted en banc rehearing sua sponte.

A majority of the en banc court affirmed the conviction. *United States v. Campos-Ayala,* 105 F.4th 235 (5th Cir. 2024) (en banc). On Campos's suppression argument, the court held that the district court had correctly denied the motion to supress statements because he was seized as part of a "routine traffic stop," made the statement before being "placed into a patrol car," and asked about his "involvement with marihuana" in an attempt "to ascertain whether the agents were dealing only with aliens, or instead with a more serious situation posing a greater immediate risk." *Id.* at 249.

On the possession argument, the court stated that "[t]he government repeatedly argued that this case is all about possession, and that is so. And that is the reason we have juries." *Id.* at 245. The en banc majority wrote that "[i]t was for the twelve jurors to consider all the evidence and to decide the nature of the defendants' encounter with the driver. A jury is entitled to give whatever weight it wishes to any part of the evidence and to draw, or not draw, the inferences that the law allows." 105 F.4th at 245. The court decided possession had been proved sufficiently, pointing to evidence that the marijuana surrounded the men and that the men had handled it to rearrange the bundles to get back in the car. *Id.* at 245. Of course, the question was precisely whether the definition of possession as control allowed an inference of guilt from touching the marijuana to rearrange it to fit in the car, and thus countenancing the conviction meant that the court of appeals decided that legal possession was established by the mere touching of a controlled substance. 105 F.4th at 245-46.

The en banc court also rejected the men's *Valenzuela-Bernal* argument, holding that, because the government agents testified to most of Castro's statements, her testimony would have been cumulative. 105 F.4th at 246-48. The court wrote that Castro's testimony would have been cumulative, because "[n]othing in her reported statements contradicted the defendants' admissions regarding (1) their knowledge of the presence of marihuana or (2) their rearranging the bundles in the car. Instead, Castro reinforced the defendants' acknowledgements that they re-entered the vehicle knowing it was packed tight with marihuana." *Id.* at 248. But Castro's testimony, as the dissent pointed out, went directly to the questions of possession and intent to distribute. *Id.* at 270-72.

Four judges, speaking through Chief Judge Richman, dissented. They believed the government had failed to meet its burden of proving that Campos had possessed the marijuana in the driver's car and had the intent to distribute it. 105 F.4th at 250. The dissent highlighted that control is "the hallmark of possession," and that meant that the government had to prove the defendants had "some right or ability to control the disposition of the contraband." *Id.* at 256 (citing *United States v. Smith,* 997 F.3d 215 (5th Cir. 2021)). No evidence showed that right or ability in this case. The evidence showed only mere presence around and touching of drugs, 105 F.4th at 255-56 (citing *United States v. Moreno-Hinojosa,* 804 F.2d 845 (5th Cir. 1986) and *United States v. Hagman,* 740 F.3d 1044 (5th Cir. 2014)). The dissent concluded that, "to define the defendant's interaction with the marijuana as `possession' stretches that word beyond recognition." 105 F.4th at 256.

That overstretched definition, the dissent observed, had brought the Fifth Circuit into conflict with other circuits. *Id.* at 257 (citing *United States v. Lane,* 267 F.3d 715, 718 (7th Cir. 2001), *United States v. Edwards,* 166 F.3d 1262, 1364 (11th Cir. 1999), and *United States v. Kearns,* 61 F.3d 1422, 1425 (9th Cir. 1995)). Those circuits required "more than just mere physical contact; he must have the perceived right among the criminals with whom he is interacting to deal, use, transport, or otherwise control what happens to the drugs." *Campos-Ayala,* 105 F.4th at 257 (Richman, C.J., dissenting and quoting *Lane,* 267 F.3d at 718); *see also United States v. Kitchen,* 57 F.3d 516, 524 (7th Cir. 1995). That evidence was nowhere to be found in this case: "There was no indication [the defendants] could use, consume, or sell the marihuana, or move it from the car." *Id.* at 256. There was only evidence that the driver obtained the marijuana and intended to deliver it, and thus that he alone possessed it. *Id.* at 256-57.

The dissent also observed that the en banc majority's rule greatly expanded the reach of the drug-trafficking statute. It noted that, if mere touching of a significant amount of a controlled substance suffices to prove possession and intent to distribute may be inferred from such "possession" of a controlled substance, then the Controlled Substances Act and its significant punishments would reach many persons with no intention to traffic in drugs, among them the well-intended who aimed to prevent another from trafficking in drugs but who move or touch that person's drugs while attempting to dissuade them. *Id.* at 259-60.

The en banc dissents also would have held that the district court erred by admitting statements made by Campos to federal agents at the scene of the arrest because he made them while subject to custodial interrogation without receiving *Miranda* warnings. *Id.* at 261-68.

Finally, the en banc dissenters would have held that the government had violated the Fifth and Sixth Amendments by removing Castro from the country and preventing the defendants from calling her as a witness. *Id.* at 271. They observed that, unlike the defendant in *Valenzuela-Bernal,* Campos had no opportunity to examine an eyewitness before and during trial because the government had deprived him of the only eyewitness. 105 F.4th at 271. The dissent found it obvious that "the credibility of Castro-Hernandez was critical, and there was no substitute for her first-hand account of all that transpired prior to the arrests." *Id.* at 270. In these circumstances, "the materiality and favorability of [Castro's] testimony are beyond dispute." *Id.*

The dissenters found that the en banc majority had employed a deeply flawed cumulative-evidence analysis in concluding that the agents' "hearsay statements adequately protected these defendants' rights." *Id.* at 271. The majority's theory "ignores the simple fact that the defendants had no opportunity to examine the only available eyewitness in front of the jury." *Id.* at 271. And indeed, the majority's own opinion, which was full of suppositions and speculations as to what might have occurred on the journey, *see id.* at 245, reflected many of the matters that no one but Castro as the sole eyewitness "could have testified to" *id.* at 271 Richman, C.J.,

dissenting). "Indeed, we would likely have answers to many of the majority opinion's inferences if not for the government prematurely deporting Castro-Hernandez." *Id.*

The dissenters found the most untenable part of the majority's new cumulative-evidence test to be that the government could both appear to "present" the accused's defense and then overtly undermine its own presentation. "It cannot plausibly contend Castro-Hernandez's testimony would have been cumulative of the hearsay testimony of the government agents, and at the same time contend that Castro-Hernandez's statements to the agents were not believable." *Id.* at 271-72.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHEN, DURING A TRAFFIC STOP, TREATMENT OF A SUSPECT RENDERS HIM "IN CUSTODY", FOR PRACTICAL PURPOSES.

The Fifth Amendment provides "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. To safeguard that privilege, a suspect must receive *Miranda* warnings before being subject to "custodial interrogation." *Miranda v. Arizona*, 384 U.S. 436, 444, 467 (1966). A person is subject to "custodial interrogation" when, given the circumstances surrounding the interrogation, "a reasonable person" would not "have felt he or she was at liberty to terminate the interrogation and leave," establishing a "restraint on freedom of movement of the degree associated with formal arrest." *J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011). In evaluating the circumstances surrounding the interrogation, this Court has identified the "duration of the encounter," "statements made during the interview," "the presence or absence of physical restraints during the questioning," and "the release of the interviewee at the end of questioning" as pertinent factors. *Howe v. Fields*, 565 U.S. 499, 509 (2012).

A traffic stop normally "does not constitute *Miranda* custody" due to the "temporary and relatively nonthreatening detention" required for questioning. *Maryland v. Shatzer*, 559 U.S. 98, 113 (2010). But, when "a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984).

A. This case deepens an enduring circuit split over whether "custody" during a traffic stop, short of a formal arrest, is determined by officer reasonableness or the reasonable person's perception of the restraint.

Since this Court's holding in *Berkemer*, a split has developed in the lower courts over when an officer has restrained a person's movement to the degree associated with formal arrest during a traffic stop. In *Berkemer*, this Court discussed the "nonthreatening character" of a "*Terry* stop" as a reason why people subject to "ordinary traffic stops" are not "'in custody' for the purposes of *Miranda*." 468 U.S. at 439-40 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Some courts look to the amount of restraint exercised against the motorist, while others hold that as long as officers conduct a traffic stop, reasonable under *Terry*'s requirements, they need not advise suspects of *Miranda* rights short of formal arrest. *See* Wayne R. LaFave, 2 Crim. Proc. § 6.6(e), n.105, n. 106 (4th ed.) (summarizing split and scholarly debate over appropriate reconciling of *Terry* and *Miranda*).

Some circuits—the First Fourth, Eighth, and now the Fifth—have adopted the approach that a suspect is never deemed to be in *Miranda* custody as long as officers have not yet arrested the suspect and are in the midst of a reasonable *Terry*-like traffic stop. *See United States v. Pelayo-Ruelas*, 345 F.3d 589, 592 (8th Cir. 2003); *United States v. Trueber*, 238 F.3d 79, 92 (1st Cir. 2001); *United States v. Leshuk*, 65 F.3d 1105, 1110 (4th Cir. 1995).

The Second, Seventh, Ninth, and Tenth circuits, however, hold that a *Terry*-like traffic stop can require *Miranda* warnings, given sufficient restraint, even when officers behave reasonably. *See, United States v. Newton*, 369 F.3d 659, 673 (2d Cir.

2004) ("This Court has specifically rejected Fourth Amendment reasonableness as the standard for resolving *Miranda* custody challenges."); *United States v. Kim*, 292 F.3d 969, 976 (9th Cir. 2002); *United States v. Ali*, 68 F.3d 1468, 1472-73 (2d Cir. 1995) (holding that whether a stop was permissible under *Terry* is irrelevant to the *Miranda* question, because "*Terry* is an exception to the Fourth Amendment probable cause requirement, not the Fifth Amendment protections against self-incrimination."); *United States v. Smith*, 3 F.3d 1088, 1097 (7th Cir. 1993); *United States v. Perdue*, 8 F.3d 1455, 1466 (10th Cir. 1993).

In *J.D.B.*, this Court reaffirmed that the *Miranda* requirement depends on "how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave." 564 U.S. at 271. Nonetheless, some lower courts still improperly focus on the reasonableness of the officers' actions. In *United States v. Rabbia*, for example, the First Circuit evaluated whether "a *Terry* stop ha[d] escalated into a de facto arrest" under "a number of factors" and concluded, "Above all, an inquiring court must bear in mind that it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." 699 F.3d 85, 91 (1st Cir. 2012). The First Circuit concluded that an officer's "display of his service weapon, his use of his handcuffs, and his pat-frisk" did not require *Miranda* warnings prior to questioning because, "When officer safety is a legitimate concern, these prophylactic measures can be employed, even in combination, without exceeding the constitutional limits of a *Terry* stop." *Id.* at 92.

The Fifth Circuit has recently joined the view that the *Miranda* warnings are unnecessary so long as officers act reasonably and, in this case, taken it a step further by applying the reasonableness inquiry beyond the limits of a *Terry*-like traffic stop. In *United States v. Coulter*, a traffic stop for "squeaky brakes," expired registration, and no insurance, which combined with other factors created a suspicion of burglary, escalated when the occupant—standing outside of the car—admitted to being on parole for aggravated robbery and after initial denials, admitted there was a gun in the car. 41 F.4th 451, 454 (5th Cir. 2022). When he was handcuffed for officer safety and told he was "just detained," Coulter "explicitly admitted for the first time that he had a gun in his backpack." *Id.* The Fifth Circuit held that a district court had erred by suppressing the final statement—that there was a gun in Coulter's backpack—because "objective concerns for officer safety necessitated the amount of restraint generated by the handcuffs, Coulter implicitly acknowledged the limited purpose of the restraint, and a reasonable person would not have equated such restraint with formal arrest." *Id.* at 460. The dissent accurately noted both that the government had not briefed and therefore forfeited "the *New York v. Quarles* public safety exception" and that the "relevant inquiry . . . is whether a 'reasonable person would have felt he or she was not at liberty to terminate the interrogation and proceed.'" *Id.* at 469 (Richman, C.J., dissenting).

The en banc Fifth Circuit, in this case, extended its reasoning far beyond any previous court, essentially engrafting the Fourth Amendment "reasonableness"

inquiry into the *Miranda* requirement—holding that so long as the agents acted reasonably, they need not give *Miranda* warnings prior to the completion of an arrest.

This case quickly escalated from a *Terry*-like traffic stop to a detention based on probable cause. Texas troopers had heard a tip that a silver car with a partial license plate had recently been loaded with large bundles of marijuana. ROA.428. When the troopers pulled over the car, which matched the description, they immediately noticed large bundles of marijuana inside. ROA.387, ROA.429. The troopers decided to hold the occupants, in the car, for approximately thirty minutes until Border patrol arrived, explicitly to secure against the possibility of the occupants fleeing. (Gov't Ex. 3 at 25:00-26:50); *Campos-Ayala*, 105 F.4th at 248. Despite this Court's description of *Terry*-like traffic stops as involving an officer "ask[ing] the detainee a moderate number of questions to determine his identity and try to obtain information confirming or dispelling the officer's suspicions," the Fifth Circuit described the troopers' prolonged detention of Campos and the others inside the car as "a routine detention to investigate whether there was a crime, not custody or a formal arrest." *Id.* at 249.

After that initial detention, "Campos-Ayala (1) was surrounded by six armed, uniformed officers; (2) was verbally instructed not to leave the car and was physically restrained from doing so for [an additional 10 minutes]; (3) was told he would be searched; (4) watched as the handcuffed driver and other passengers were taken to the transport van; (5) was frisked and had his hands pushed forward onto the car doors; (6) had his possessions confiscated; (7) was asked accusatory questions; (8) was

physically escorted to the transport van; and (9) was never told he was not under arrest or would be free to leave after a brief detention." *Id.* at 105 F.4th at 268 (Richman, C.J. dissenting). The majority did not offer any analysis about why a reasonable person would not equate that degree of restraint with a de facto arrest. Instead, the Fifth Circuit relied on the absence of a formal arrest, "Campos was not placed into a patrol car, handcuffed, or removed from the scene before Ramos's questioning" and the reasonableness of the agents' questions, "[t]he inquiry as to Campos's involvement with the marihuana was reasonably designed to ascertain whether the agents were dealing only with aliens or, instead, with a more serious situation posing a greater immediate risk." *Id.*

Other than a perfunctory recitation of the factors that can satisfy the "in custody requirement," the Fifth Circuit relied solely on a need for officer safety wholly unmentioned in the record. *Id.* The majority also mentioned that the agent was "calm and respectful" and that Campos could not have left because "he was a passenger in a car driven by a stranger." *Id.* at 249-50. As the dissent noted, though "extrinsic factors limited Campos-Ayala's ability to leave, those factors did not foreclose this possibility. Instead, it was the state and federal officers who physically restricted Campos-Ayala's movement." *Id.* at 265.

Not only does the majority's opinion squarely join the view that a *Terry*-like stop cannot require *Miranda* warnings until a formal arrest, it also extends that holding to a search incident to arrest and the beginning of the formal arrest. The majority concedes that Campos and the others "were . . . arrested [when] they were

taken to the transport vehicle." *Id.* at 249 (quoting the district court). As the dissent argued, Campos's formal arrest should be viewed as beginning "when Agent Ramos searched him before taking him to the transport vehicle. That search operated more like a search incident to arrest than a temporary *Terry* frisk." *Id.* at 266. Campos's statement about his two phones was made during the frisk. *Id.* His statement that he only 'helped' was made while he was being walked to the transport van. *Id.* In light of those facts, the majority's holding—that Campos's statement that he helped was not custodial—must also hold that *Miranda* warnings are required in a traffic stop only once the formal arrest is complete, not in progress, and that any degree of restraint prior must only be reasonable for questioning during it to be admissible. As Chief Judge Richman concluded, "it is difficult to imagine when—if ever—a routine traffic stop may evolve into *Miranda* custody in [the Fifth Circuit]." *Id.* 105 F.4th at 268.

The Fifth Circuit's holding splits with many state and federal court holdings. In addition to the split described above, an array of other state and federal courts, consistent with *Berkemer*, have held that a traffic stop ripens into a custodial interrogation on far less coercive facts than were present here. *United States v. Mitchell*, 161 F. App'x 537, 540 (6th Cir. 2006) (custodial interrogation when two people in a vehicle, stopped by four officers who said they were investigating drug trafficking, told them to exit the vehicle, and questioned them); *United States v. Davis*, 645 F.Supp.2d 541, 552 (W.D.N.C. 2009) (custodial interrogation began when an officer, who had pulled over a motorist, "was in the process of placing [him] under

arrest"); *United States v. Avezov*, 731 F.Supp.2d 1194, 1206-07 (N.D Okla. 2010) (driver and passenger were subject to custodial interrogation when held in two patrol cars while waiting for drug-detecting dog); *State v. Hackett*, 944 So. 2d 399 (Fla. Dist. Ct. App. 4th Dist. 2006) (custodial interrogation occurred when officer asked a car's passenger about a bag of cocaine after he had issued a traffic ticket to the driver, arrested driver for possession of drug paraphernalia, found a bag of cocaine, and only then questioned the passengers about it); *State v. Drake*, 733 So. 2d 33, 39 (La. Ct. App. 2d Cir. 1999) (custodial interrogation of passenger when driver of vehicle was arrested, focus of investigation turned to passenger, passenger was ordered out of vehicle, handcuffed, and questioned);

In *People v. Polander*, the en banc Colorado Supreme Court confronted a case like this one, in which officers responded to a vehicle with multiple occupants on a tip that drug activity was ongoing. 41 P.3d 698, 701 (Colo. 2001) (en banc). After they identified the driver and located narcotics in his pocket, the officers handcuffed the driver and had him sit on a nearby curb. *Id.* The other occupants were patted down and directed to sit on the curb as well, though they were not handcuffed. *Id.* After a search of the vehicle, officers found a bag with drugs, asked who it belonged to, and Polander, one of the passengers, said it was hers. *Id.* The Colorado Supreme Court held that the question occurred during custodial interrogation because, though she "was not confined at the police station, nor did the police draw their guns, use handcuffs, or otherwise demonstrate the kind of force typically associated with an arrest," Polander was "seized and subject to a question about the ownership of

contraband, under circumstances in which it was apparent to all that the police had grounds to arrest the occupants of the vehicle." *Id.* at 705. The Colorado Supreme Court dismissed the formality of whether her seizure had elevated to an arrest because "it is clear that the defendant had every reason to believe she would not be briefly detained and then released as in the case of an investigatory stop or a stop for a minor offense. Under these circumstances the defendant's freedom of action was curtailed to a degree associated with a formal arrest." *Id.*

Here, the Fifth Circuit went further, it held that Campos's statement that he helped, made while he was being walked to a secured transport van, was not custodial because he was not handcuffed or in the van, yet. The Fifth Circuit's en banc ruling, if not reexamined, would effectively mean that officers may ask any question of an arrested motorist, at least until he is in the patrol car or the police station.

B. Campos's case is an excellent vehicle through which to clarify when the *Miranda* warnings must be given in a traffic stop.

Campos's case is an excellent vehicle for the Court to resolve the enduring circuit split over when a *Terry*-like traffic stop evolves into a custodial interrogation. The facts are undisputed. Further, Campos raised a vigorously debated sufficiency challenge, *see* Section II, *infra*.

In deciding the sufficiency factor against Campos, the en banc Fifth Circuit held that "perhaps" the "most important[ ]" factor was "Campos's admissions that he 'possessed' and 'helped with' the marihuana and of course knew it was marihuana." *Campos-Ayala*, 105 F.4th at 245. Campos made the statement that he knew it was

marijuana after he had been held in the car for forty minutes, just before Moncada and he were extracted. Campos made the statement that he "helped with" the marijuana as he was being walked, restrained by the hand of one agent and the presence of five more, from the car to a secured transport van, arriving at which the majority conceded Campos was "really arrested." *Id.*

Because there were multiple statements, at different stages of Campos's apprehension, and those statements were critical to Campos's conviction, this case presents an ideal vehicle for this Court to define precisely when a person is "in custody" during a traffic stop.

II. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER POSSESSION FOR PURPOSES OF THE CONTROLLED SUBSTANCES ACT REQUIRES MORE THAN MERE TOUCHING.

The Controlled Substances Act makes it a felony to possess specified scheduled drugs, including marijuana, with the intent to distribute them. 21 U.S.C. § 841. The Act aims to "provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and [to] strengthen law enforcement tools against the traffic in illicit drugs." *Gonzales v. Raich,* 545 U.S. 1, 10 (2005). The Act defines many terms, among them deliver and distribute. 21 U.S.C. § 802(8), (11). It does not define the term possession. In the absence of a statutory definition, the courts of appeals have now split on what must be shown to prove that a defendant has possession of a controlled substance with the intent to distribute it. *Compare United States v. Campos-Ayala,* 105 F.4th 235, 245-46 (5th Cir. 2024) (en banc) *with United States v. Kitchen,* 57 F.3d 516, 522-24 (7th Cir. 1995).

The consequences of that split matter: whether a person is criminally liable under the Act for merely being around or merely handling a controlled substance now varies from circuit to circuit. The split therefore interferes with the uniform application of the primary federal drug-trafficking statute, 21 U.S.C. § 841. Campos's case presents the Court with the right opportunity to clarify the meaning of possession in the statute. He was charged only with possession with intent to distribute, not with a drug conspiracy, and his jury was not instructed on aiding-and-abetting liability. His conviction therefore turns on whether touching or making physical contact with a distributable amount of drugs violates the drug-trafficking statute.

A. The Circuits Are Now Divided as to Whether Control Is Needed to Prove Possession Under the Controlled Substances Act.

Common as the word possession is in the law, the court and commentators have long recognized that a clear definition, apt to the particular area of the law it is to be applied in, is both tricky and necessary. A century ago the Court commented that "there is no word more ambiguous in its meaning than possession." *National Safe Deposit Co. v. Stead,* 232 U.S. 58, 67 (1914); *see also Possession*, Bryan A. Garner, Garner's Dictionary of Legal Usage 688 (3d ed. 2011) (calling possession a "chameleon-hued word"). That ambiguity poses particular danger in the criminal context. There, "the word . . . is so fraught with danger that the courts must scrutinize its use with all diligence.'" *United States v. Phillips,* 496 F.2d 1395, 1397 (5th Cir. 1974) (quoting *Guevara v. United States,* 242 F.2d 745, 747 (5th Cir. 1957)).

To do less is to ignore that "the line between knowing possession and guilt by association can be very thin." *Phillips*, 496 F.2d at 1397.

Through case law, the courts had worked out some parameters to reduce the dangers of that ambiguity and to limn what it was necessary for the government to show to prove possession. The focus has been on possession as control, a rule that kept those merely around someone else's drugs from being convicted for running with bad company or being in the wrong place at the wrong time. *See Campos-Ayala,* 105 F.4th at 255-60 (Richman C.J., dissenting) (citing, *inter alia, United States v. Moreno-Hinojosa,* 804 F.2d 845, 47 (5th Cir. 1986); *see also Kitchen,* 57 F.3d at 522-24 (7th Cir. 1995).

The Court's decision in *Henderson v. United States,* 575 U.S. 622 (2015), strongly suggested that this was the correct way to think about possession in the criminal context. *Henderson* stated that "[a]ctual possession exists when a person has *direct physical control* over a thing. See Black's Law Dictionary 1047 (5th ed. 1979) (hereinafter Black's); 2A O'Malley § 39.12, at 55. Constructive possession is established when a person, though lacking such physical custody, *still has the power and intent to exercise control* over the object. See Black's 1047; 2A O'Malley § 39.12, at 55." *Henderson,* 575 U.S. at 626 (emphases added). "What matters" in determining as a legal matter whether control exists "is whether the [person] will have the ability to use or direct the use" of the object that he is claimed to possess. *Id.* at 630.

By and large the courts of appeals have taken a view consistent with *Henderson,* a view that more than touching drugs, moving them, or rearranging the

containers drugs are in was needed to show control over drugs. *Cf. Kitchen,* 57 F.3d at 524 (possession requires ability to exercise ultimate control over drugs). A "defendant needs more than just mere physical contact; he must have the perceived right among the criminals with whom he is interacting to deal, use, transport, or otherwise control what happens to the drugs." *United States v. Lane,* 267 F.3d 715, 718 (7th Cir. 2001) (citing *Kitchen,* 57 F.3d at 524). "There is a meaningful distinction between physical contact and the ability or authority to control the drugs, so we require proof of a factor beyond mere physical contact to show that the defendant exerted authority or the ability to physically control the drugs." *Lane,* 267 F.3d at 718. The Seventh Circuit expressed the same view that *Henderson* later would: the necessary control "is a type of property right to carry" away the item. *Kitchen,* 57 F.3d at 521. *Kitchen,* surveying other circuits, discerned that evidence showing an ability to control drugs by directing where they would go or carrying them off personally was necessary to proving this type of possession. 57 F.3d at 521-22 (citing, *inter alia, United States v. Jones,* 676 F.2d 327, 332 (8th Cir. 1983)) (defendant loaded bales of marijuana into his van); *see also United States v. Edwards,* 166 F.3d 1362, 1364 (11th Cir. 1999) ("We have previously held that mere inspection of contraband, standing alone, is not sufficient to establish possession."); *United States v. Kearns,* 61 F.3d 1422, 1425 (9th Cir. 1995) ("We hold that [the defendant's] brief sampling of the marijuana, in the absence of other steps taken to give him physical custody of or dominion and control over the drugs, is not sufficient to constitute 'possession.'").

The Fifth Circuit's break with this precedent, in favor of requiring only evidence of touching and circumstances that some might view with suspicion, *Campos-Ayala,* 105 F.4th at 245-46, was presaged in the dissenting opinion in *United States v. Smith,* 997 F.3d 215 (5th Cir. 2021). The question in *Smith* was whether a defendant had possessed a firearm in violation of 18 U.S.C. § 922, when the only evidence was that he had touched the gun. The *Smith* majority held that such mere touching was insufficient because it failed to show the defendant ever had control of the firearm. 997 F.3d at 221-23; *cf. Henderson,* 575 U.S. at 626-30; *Possession*, Bryan A. Garner, Garner's Dictionary of Legal Usage 693 (3d ed. 2011) ("Control emphasizes the possession and exercise of the authority either to manage and direct or to regulate the allocation or progress of things.").

The dissenting judge in *Smith,* who wrote for the en banc court in this case, expressed the view that control was unnecessary for actual possession and was only a matter of interest for constructive possession. 997 F.3d at 225; *see also United States v. Campos-Ayala,* 70 F.4th at 261, 270 (Oldham, J., dissenting (the "hugging and otherwise being sandwiched between and under" marijuana bundles that was shown in photograph sufficient to prove possession). The *Smith* dissenter reached this conclusion by embracing an alternative dictionary definition of possession as seizure and discerning in *Torres v. Madrid,* 592 U.S. 306 (2021), a rule that a mere touching can be an actual seizure. 997 F.3d at 226-29.

But *Torres* does not support the idea that touching an object is possession of the object. *Torres* involved an attempted arrest, a seizure of a person. The seizure of

a person occurs when a government agent touches a person with intent to control him, attaining actual control of the person is not necessary. A seizure of the person has occurred even if the person runs off. *Torres,* 592 U.S. at 312-13. That is not the case for property. A seizure of property occurs only when the property is controlled, when it is possessed. As *Torres* explained, "when speaking of property, "from the time of the founding to the present, the word 'seizure' has meant a 'taking possession.'" 592 U. S. at 312 (quoting *California v. Hodari D,* 499 U.S. 621, 624 (1991)). Thus the mere-physical-contact rule of drug possession that animated the panel dissent in *Smith* and the panel dissent in Campos's case before becoming Fifth Circuit law in the en banc decision is contrary to the mainstream of possession law.

Physical contact is not enough to establish actual legal possession of an object. *Hodari D.,* 499 U.S. at 624. In a criminal case, a reviewing court has a responsibility to ensure that the element of possession has been shown as a matter of law. *In re Winship,* 397 U.S. 358 (1970) (elements of offense must be proved beyond reasonable doubt); *Jackson v. Virginia,* 443 U.S. 307, 314-18 (1979) (reasonable-doubt review required to ensure all elements have been proved). The en banc Fifth Circuit's ruling that physical contact allowed a jury to conclude that possession with intent to distribute a drug one merely touched is contrary to history, the Court's teachings, and decisions of the other courts of appeals.

B. Campos's case is an excellent vehicle through which to clarify what must be shown to prove possession with intent to distribute in a drug-trafficking case under the Controlled Substances Act.

Campos's case is an excellent vehicle for defining possession with intent to distribute in the context of the Controlled Substance Act. There was no conspiracy charge made against Campos–thus Campos's conviction for possession with intent to distribute could not rest on actions taken by others with whom an agreement had been made or could be inferred. *Pinkerton v. United States,* 328 U.S. 640 (1946). There was no aiding-and-abetting instruction given to the jury in this case–thus Campos's conviction for possession with intent to distribute could not rest on a finding that he was a mere traveler when the driver offered them a ride, but became associated with the driver's drug-trafficking venture at some point and acted to help it succeed. *Cf. Rosemond v. United States,* 572 U.S. 65 (2014) (explaining aiding and abetting liability). This case presents a pure question of whether mere touching of another's drugs can be actual possession with intent to distribute as denounced by the Controlled Substances Act.

This case also plainly presents the problem, identified by Chief Judge Richman in her dissent, that the Fifth Circuit's new physical-contact rule improperly expands the reach of the Controlled Substances Act beyond its plain language and beyond what Congress intended. *Campos-Ayala,* 105 F.4th at 259-60. Congress, in prohibiting drug distribution meant to denounce and punish drug dealers, not bystanders or people who associated with drug dealers in a way unrelated to drug dealing. *Cf. Raich,* 545 U.S. at 10 (Congress aimed Act at illegal traffickers). Congress did not penalize contact with or touching of drugs in § 841; it penalized possession of drugs with the intent to distribute them.

Congress defined distribute as meaning to "deliver" a controlled substance. 21 U.S.C. § 802(11). It defined deliver as "the actual, constructive, or attempted transfer of a controlled substance[.]" 21 U.S.C. § 802(8). Thus to have possession with intent to distribute one must intend to transfer the controlled substance. The Fifth Circuit opinion in this case holds that physical contact with a distributable amount of drugs is proof of possession with intent to distribute. 105 F.4th at 245-46. But, as Chief Judge Richman wrote, this rule will make into criminals many who have neither legal possession of drugs nor an intent to transfer them to anyone else. *Campos-Ayala,* 105 F.4th at 259-60. Campos is one of those people: nothing in the record allows an inference that he could control the drugs in the car or that he had any intent to transfer the marijuana to anyone. He touched and moved the marijuana with the intent to allow the travelers to get back in the car. EROA.610-15, 655-56. The government had no evidence that he intended to do anything else with the marijuana, let alone deliver it to another person.

This case presents the issue cleanly and clearly. The issue is one of importance and has divided the circuit courts. Certiorari should be granted.

III. The Fifth Circuit's Cumulative-Evidence Approach Contravenes the Court's Teachings on the Right to Present a Defense.

The Fifth Amendment "guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice.'" *United States v. Valenzuela-Bernal,* 458 U.S. 858, 872 (1982) (quoting *Lisenba v. California,* 314 U.S. 219, 236 (1941)). Included in that right is the "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary," which "is in

plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas,* 388 U.S. 14, 19 (1967). The Sixth Amendment guarantees a defendant that, to assist his defense, he will be able to use compulsory process for "obtaining witnesses in his favor." *Id.* at 18.

The Fifth Circuit's decision in this case allows the prosecutor to determine how the jury will hear the accused's defense. It does so by holding that the government may deport, and thus put out of reach of compulsory process, a witness that the government knows has material evidence favorable to the defense case. The government can do so, the Fifth Circuit ruled, as long as it presents its summary of the witness's material, favorable evidence to the jury through government agents. *Campos-Ayala,* 105 F.4th at 247-48. In essence, the government, by introducing its summary of the witness's testimony can render the witness's testimony merely cumulative of its summary and thus avoid the responsibility of having put the witness out of reach of the accused.

The Fifth Circuit's ruling cannot be reconciled with the Court's precedent. Precedent makes clear that the government cannot arbitrarily deprive a defendant of "testimony [that] would have been *relevant* and *material*, and . . . *vital* to the defense." *Valenzuela-Bernal,* 458 U.S. at 867 (quoting *Washington,* 388 U.S. at 16) (emphasis added by *Valenzuela-Bernal*). These guarantees are offended against "if, by deporting potential witnesses, [the government] diminished a defendant's opportunity to put on an effective defense." *California v. Trombetta,* 467 U.S. 479,

486 (1984). That is exactly what happened in Campos's case. The government deported Castro, even though it knew she had material information favorable to Campos's defense. She was the only witness who could provide the jury with eyewitness testimony about the events at the roadside park when the driver returned to pick them up with bundles in his car. *See Campos-Ayala,* 105 F.4th at 271-72 (Richman, C.J., dissenting).

The government knew that. Its agent had spoken with Castro and knew that her statement of events supported Campos's defense. Nonetheless, the government deported her. Under *Valenzuela-Bernal,* that was a violation of due process and compulsory process. The government has a responsibility to make a "*good-faith determination that [the witness] possess[es] no evidence favorable to the defendant in a criminal prosecution."* 458 U.S. at 872 (emphasis added). It may be that the good-faith effort required to meet *Valenzuela-Bernal* does not demand much in the way of affirmative investigation by the government, but here the government did the investigation–Kettani's interview with Castro, and it discovered material, favorable evidence. The government was not, under *Valenzuela-Bernal*'s good-faith-determination rule, allowed to ignore what it had learned during that investigation. 458 U.S. at 872 (setting out standard).

When the government has removed a potential defense witness with material, favorable evidence, that action prejudices the accused, if the witness was not "merely cumulative to the testimony of available witnesses," and, in the context of the entire record, there was "a reasonable likelihood that the testimony could have affected the

judgment of the trier of fact." *Valenzuela-Bernal*, 458 U.S. at 873-74 (citing *Giglio v. United States,* 405 U.S. 150, 154 (1972)). When the case is a close one and "the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Valenzuela-Bernal,* 458 U.S. at 874 n.10 (quoting *United States v. Agurs,* 427 U.S. 97, 112-13 (1976)). Campos's case was a close one; the government had only evidence that the immigrants had taken an uncomfortable ride in a vehicle that also, for part of the drive, contained marijuana. The verdict very much was open to question. *Campos-Ayala,* 105 F.4th at 270-72 (Richman, C.J., dissenting).

But Campos never had a chance to present Castro as a witness. Castro's statement, even though it was obviously exculpatory of Campos, was provided to Campos's counsel only after the government had deported Castro and put her beyond the reach of judicial process. 105 F.4th at 270-72; Appendix B. The Fifth Circuit decided this was acceptable, because the government presented its version of Castro's testimony through Agent Kettani and Sergeant Bustamante. The two agents recounted some statements that they recalled Castro making. The government in closing argument then told the jury those agented-recounted statements should not be credited because they did not fit with what the prosecutor thought happened. *See Campos-Ayala,* 105 F.4th at 269-72.

The Fifth Circuit thought the government's partial recounting and prosecutorial discounting enough to render Castro's actual presence in the courtroom as a witness cumulative. 105 F.4th at 246-48. That ruling contravenes many of the

teachings of this Court regarding the adversarial nature of our criminal justice system. The government agents questioned Castro in their position as inquisitors engaged in the "often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14 (1948). Even then they found evidence favorable to Campos. But, unsurprisingly, the agents, because they were partisans, did not develop other material, favorable evidence that Castro's statements showed she had to have regarding the journey, such as the lack of intent to do anything but catch a ride, or the traveler's surprise when the driver returned with a laden car. Most critically, she could have testified about what she observed when the driver returned with the marijuana. She could have described the traveler's demeanors, including how Campos and Moncada looked when they saw the driver's load. She could have described their actions and any contextual, non-hearsay discussions that were held before the men made room for the migrants to cram back in and resume their journeys. The agents had no incentive to develop such evidence; defense counsel apprised of Kettani's statement would have wanted to interview, depose, and subpoena her to develop that evidence.

Turning the presentation of the defense case over to prosecution—by declaring a defendant's presentation of a witness favorable to him would have been merely cumulative—upsets the balance of our adversarial system of justice. And it stands in complete opposition to the Court's teaching that the right to present a defense, including through compulsory process, "is in plain terms . . . the right to present the

defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas,* 388 U.S. 14, 19 (1967).

The Fifth Circuit's decision allows the government to deport a favorable defense witness, to present its own case for the defendant's guilt, and to then present the government's version of the defense case. The decision excuses the government from its constitutional responsibilities under the Fifth and Sixth Amendments and it deprives an accused of his right to have a jury hear from his witnesses his defense. That is contrary to *Washington,* to *Valenzuela-Bernal,* to *Trombetta*, to the Constitution. The Court should grant certiorari to determine whether the Fifth Circuit's cumulative-evidence rule can stand consistently with precedent and the constitution.

Conclusion

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ SHANE O'NEAL
Counsel of Record for Petitioner

DATED: September 5, 2024.