No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROSALIO GONZALEZ-SILVA,
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 Rosalio Gonzalez-Silva 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. Gonzalez-Silva,* 20-mj-20081-BLM-CAB, U.S. District Court for the Southern District of California, written ruling issued July 17, 2023.
- *United States v. Gonzalez-Silva*, No. 23-1604, U.S. Court of Appeals for the Ninth Circuit. Memorandum disposition issued November 18, 2024.
- *United States v. Gonzalez-Silva*, No. 23-1604, U.S. Court of Appeals for the Ninth Circuit. Order denying petition for panel rehearing and rehearing en banc. January 17, 2025.

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

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 *United States v. Cabrera*, 83 F.4th 729 (9th Cir. 2023), that the relevant inquiry is whether a stop is "permissible pursuant to *Terry*, rather than whether [the person] was 'in custody' pursuant to *Miranda*." *Cabrera*, 83 F.4th at 735. 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. Gonzalez-Silva's conviction in a memorandum disposition. (attached here as Appendix A). Mr. Gonzalez-Silva then petitioned for panel rehearing and rehearing en banc. On January 17, 2025, the panel denied Mr. Gonzalez-Silva's petition for panel rehearing, and the full court declined to hear the matter en banc (attached here as Appendix B).

JURISDICTION

On November 18, 2024, the Ninth Circuit denied Mr. Gonzalez-Silva's appeal and affirmed his conviction. *See* Appendix A. Mr. Gonzalez-Silva then filed a petition for panel rehearing and rehearing en banc, which the Ninth Circuit denied on January 17, 2025. *See* Appendix B. This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

In January 2020, a scope operator deployed along the southern international border saw the thermal image glow of nine individuals climbing up and over the border wall. Without seeing their faces, the scope operator dispatched Border Patrol Agent Arreola. Dressed in his full uniform and carrying his service weapon, Agent Arreola drove his patrol car from the station to a location about half a mile to three

quarters of a mile short of the border. He parked his car, got out, and hid in nearby brush.

There were no businesses or houses, only grass, brush, and trees with trails used by hikers. Agent Arreola waited, kneeling in the brush for over thirty minutes. Eventually, Agent Arreola heard brush breaking and then saw a person later identified as Mr. Gonzalez-Silva run past him.

Agent Arreola stood up, flashed his light at Mr. Gonzalez-Silva, announced himself, and commanded Mr. Gonzalez-Silva to stop. Mr. Gonzalez-Silva complied. Agent Arreola's commands continued: get on your knees, lay flat on your stomach. With each command, Mr. Gonzalez-Silva complied. Agent Arreola approached Mr. Gonzalez-Silva, at no point losing sight of him.

Once Agent Arreola reached Mr. Gonzalez-Silva, he commanded Mr. Gonzalez-Silva to place his hands behind his back. Again, Mr. Gonzalez-Silva complied. Without asking any questions or exchanging any words, Agent Arreola took out his handcuffs and attempted to handcuff Mr. Gonzalez-Silva as he lay on his stomach with his hands behind his back. But Agent Arreola could not place the handcuffs around Mr. Gonzalez-Silva's wrists because the person was "too big." Instead, Agent Arreola decided to handcuff him in the front. After Agent Arreola placed Mr. Gonzalez-Silva in handcuffs, the questioning began.

Agent Arreola asked Mr. Gonzalez-Silva three questions: had he been inspected at the port of entry, what his citizenship was, and how or when he crossed the border. The person responded that he had not been inspected at the port of

entry, he was a Mexican citizen, and he had crossed the border a few moments before.

The government charged Mr. Gonzalez-Silva with attempted illegal entry under 8 U.S.C. § 1325. Mr. Gonzalez-Silva had a bench trial before a magistrate judge where he was found guilty of the single charge. He appealed that conviction to the district court, which affirmed.

Mr. Gonzalez-Silva then appealed his conviction to the Ninth Circuit Court of Appeals, arguing *inter alia* that the lower courts 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 its memorandum disposition, the Ninth Circuit did not apply the *Howes* two-step test. Initially, the court noted that "[t]he general issue for decision is 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. 2a (quotations omitted). The Ninth Circuit panel, however, avoided the custody question altogether by citing its decision in *United States v. Cabrera*, which held that when it comes to border stops, courts do not ask "whether [the defendant] was 'in custody' pursuant to *Miranda*." 83 F.4th 729, 735 (9th Cir. 2023). Instead, courts must assume that immigration stops are mere noncustodial *Terry* stops and consider whether the stop exceeded *Terry*'s bounds. *See id*. In keeping with this approach, the panel stated, "[i]f an apprehension is more like a *Terry* stop than a formal arrest, *Miranda* warnings are not required." Pet. App. 2a (quotations omitted). The Ninth Circuit then took it a step further and stated that "when a border patrol agent has safety concerns or fears a suspect will attempt to flee, the agent may physically restrain the suspect without transforming a stop into *Miranda* custody." *Id.* (quotations omitted). Because the circumstances in which the border patrol agent restrained Mr. Gonzalez-Silva did not exceed a *Terry* stop, the panel held that no *Miranda* warnings were required. *Id*. at 3.

But to reach this conclusion, the Ninth Circuit considered factors that appear nowhere in the *Howes* two-step custody analysis, such as whether the border patrol

agent "reasonably feared" that he was outnumbered. Pet. App. 3a 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. Gonzalez-Silva filed a petition for panel and en banc rehearing. The three-judge panel denied Mr. Gonzalez-Silva's petition for panel rehearing, and the full court declined to hear the matter en banc. Pet. App. 1B. 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 does not require warnings in the *Terry* context, such as when "a person is detained by law enforcement officers, is not free to go, but is not 'in custody' for *Miranda* purposes." Pet. App. 2a (quotations

omitted). 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).

In *Cabrera*, 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." *Cabrera*, 83 F.4th at 734. 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." *Id*. 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*." *Id.* at 735.

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 after being ordered to stop, get on his knees, lie flat on the ground, and be handcuffed—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 it "justified the border agent's

restraint of Gonzalez- Silva, and the stop was not transformed into custody" under *Terry*. Pet. App. 2–3a.

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 issued a published opinion in *Cabrera* 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. Gonzalez-Silva's case is an excellent vehicle to correct this oversight and provide guidance on applying *Howes*' second step.

Mr. Gonzalez-Silva'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. Gonzalez-Silva filed a motion to suppress his statements on *Miranda*

grounds. C.A. E.R. 183–84. The trial court found that Mr. Gonzalez-Silva was not in custody and that *Miranda* warnings were not required. C.A. E.R. 201. On appeal, the Ninth Circuit affirmed, issuing a decision that focused primarily on the *Miranda* issue and resolved it *solely* on the basis that Mr. Gonzalez-Silva's "stop was not transformed into custody." Pet. App. 3a. 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. Gonzalez-Silva's stop was "more like a *Terry* stop than a formal arrest [where] *Miranda* warnings are not required." Pet. App. 2a.

Finally, this case presents an opportunity for the Court to make clear that *both* prongs of the custody analysis apply equally at the border. This Court uses a disjunctive test to decide whether a person is in custody. "In determining whether an individual [is] in custody" for purposes of *Miranda*, "the ultimate inquiry is simply whether there [is] a formal arrest or restraint on freedom of movement of the

degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322 (1994) (simplified). That means that the suspect can be in custody "*either* as part of a 'formal arrest' *or* as part of a less formal 'restraint on freedom of movement of the degree associated with a formal arrest.'" *United States v. Coutchavlis*, 260 F.3d 1149, 1157 (9th Cir. 2001) (emphasis added) (emphasis added).

Howes primarily addressed the latter prong of the disjunctive test, instructing courts on how to determine whether the circumstances create the same degree of pressure as a formal arrest. But *Howes* also alluded to the formal-arrest prong. In asking "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*," *Howes* considered whether the detention was similar to "the paradigmatic *Miranda* situation—a person is *arrested* in his home or on the street and whisked to a police station for questioning." 565 U.S. at 511 (emphasis added); *see also id.* (considering how a suspect feels "[w]hen [they are] *arrested* and taken to a station house for interrogation" (emphasis added)). This is in line with the standard *Miranda* inquiry asking whether the suspect was under arrest, either de facto or de jure. *See Stansbury*, 511 U.S. at 322.

Here, however, the Ninth Circuit built on *Cabrera*'s error by extending its logic even to circumstances where the person is actually arrested. The record in this case was replete with evidence of an arrest: Agent Arreola ordered Mr. Gonzalez-Silva to stop, get on his knees, and lie face down on the ground. He than handcuffed Mr. Gonzalez-Silva prior to asking him questions.

That should have been dispositive. This Court has already made clear in *Berkemer*—a traffic stop case relied upon in *Howes*, 565 U.S. at 509–10—that the "formal arrest" prong of the custody analysis applies equally to *Terry* stops. The state in *Berkemer* asked the Court to rule that formal arrest did not trigger *Miranda* custody: "When the police *arrest* a person for allegedly committing a misdemeanor traffic offense and then ask him questions without telling him his constitutional rights, . . . his responses should be admissible against him." *Id.* at 429 (emphasis added). This Court disagreed. The Court explained that since *Miranda*'s inception, police have followed a bright-line rule that formal arrest triggers the obligation to give *Miranda* warnings. *Id.* at 429–30. Creating an exception for misdemeanor traffic stops would undermine the "clarity of the rule." *Id.* at 430.

The Court therefore decided to "[a]dhere[] to the principle that *all* suspects must be given such warnings." *Id.* (emphasis added). "[A] person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." *Id.*

By sidestepping the custody analysis entirely, the Ninth Circuit failed to apply this bright-line rule to an unambiguous formal arrest. Pet. App. 2a–3a. This case therefore provides this Court the opportunity not only to bring the Eighth, Ninth, and Tenth Circuits into alignment with *Howe*'s test for de facto arrests, but also to clarify that both aspects of the custody test apply at the border.

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. Gonzalez-Silva's petition for a writ of certiorari.

Respectfully submitted,

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