No. 99-5525

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES THOMAS DICKERSON
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF THE MARICOPA COUNTY ATTORNEY'S OFFICE AS AMICUS CURIAE SUPPORTING AFFIRMANCE

Filed March 9, 2000

QUESTION PRESENTED

Whether 18 U.S.C. § 3501, which requires the admission in evidence of any confession that is found by the trial court to be "voluntary," violates the Fifth Amendment to the United States Constitution.

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BRIEF OF THE MARICOPA COUNTY ATTORNEY'S OFFICE AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF AMICUS CURIAE[1]

The question presented in this case is whether 18 U.S.C. § 3501, which requires trial courts to admit voluntary confessions in evidence, comports with the Fifth Amendment. Amicus curiae Maricopa County Attorney's Office is the largest prosecutors' office in the State of Arizona, and it initiated the prosecution that culminated in this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). Maricopa County prosecutors have experienced the adverse effects of *Miranda*'s rigid exclusionary rule in ways that may not be apparent to this Court from an examination of reported cases alone. Because prosecutors must make charging decisions on the basis of the legally admissible evidence likely to be available at trial, Maricopa County prosecutors have foregone bringing charges, or have brought reduced charges pursuant to plea bargains, in cases in which officers failed to comply with the technical requirements imposed by *Miranda*.

Arizona, like the United States, has enacted a statute that would ameliorate those untoward consequences of the *Miranda* regime. Like Section 3501, Arizona's statute provides that "[i]n any criminal prosecution * * *, a confession shall be admissible in evidence if it is voluntarily given." ARIZ. REV. STAT. § 13-3988A. Arizona law instructs trial judges to consider all relevant circumstances in determining voluntariness, and it expressly highlights for the court's consideration the same factors

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amicus Maricopa County Attorney's Office states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

set forth at 18 U.S.C. § 3501(b). *See* ARIZ. REV. STAT. § 13-3988B. Because this Court's ruling in this case will affect the constitutionality of that parallel Arizona statute, amicus has a vital interest in the correct resolution of this case.

STATEMENT

A. The Law of Confessions Before *Miranda*: "Voluntariness" And *McNabb-Mallory*

1. Voluntary confessions "are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (internal quotation marks omitted). The Court has long recognized, however, that confessions may sometimes be produced by tactics that offend federal law.

Beginning with *Brown v. Mississippi*, 297 U.S. 278 (1936), a case in which a confession had been obtained by the use of beatings and other physical torture, the Court consistently relied on the Due Process Clause of the Fourteenth Amendment to rule that coerced confessions may not be admitted in evidence. Although the Court's initial rulings dealt with confessions produced by physical brutality or its threat, *e.g.*, *White v. Texas*, 310 U.S. 530, 532 (1940) (beatings); *Ashcraft v. Tennessee*, 322 U.S. 143, 147 (1944) ("fear of violence at the hands of a mob"), the Court's "voluntariness" analysis also came to encompass confessions that were coerced by improper psychological ploys—*i.e.*, ploys that unfairly exploited those characteristics of a suspect that rendered him less able to exercise free will. *E.g.*, *Leyra v. Denno*, 347 U.S. 556 (1954) (abuse of physician-patient relationship to extract confession); *Lynumn v. Illinois*, 372 U.S. 528 (1963) (defendant offered leniency and the opportunity to retain her two young children and welfare assistance). In sum, the Court's "voluntariness" doctrine recognized that "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, [were] so offensive to a civilized system of justice" that they could not be reconciled with due process. *Colorado v. Connelly*, 479 U.S. 157, 163 (1987) (internal quotation omitted).

2. Although this Court's "voluntariness" cases addressed the admissibility of confessions in State cases solely by insisting on observance of the basic requirements of due process, the Court adopted a different approach with respect to confessions introduced in federal prosecutions. In *McNabb v. United States*, 318 U.S. 332, 341 (1943), "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts," the Court mandated exclusion of confessions that had been obtained during custodial interrogation—if the defendant's custody violated the rule (now set forth in FED. R. CRIM. P. 5) that requires an arrested person to be taken before a magistrate without undue delay. *McNabb* explained that the purpose of that prompt-presentment rule, to be vindicated by the new suppression remedy, was to "check[] resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." 318 U.S. at 344.

The *McNabb* rule reached its apogee in *Mallory v. United States*, 354 U.S. 449 (1957), where the Court reversed the defendant's rape conviction and death sentence solely because of a delay in presentment. The defendant in *Mallory* had been presented to a magistrate the morning immediately following the afternoon on which he was arrested, and he had confessed in the interim. *Id.* at 450-51. The *Mallory* Court explained the rationale for the *McNabb* exclusionary rule by pointing to FED. R. CRIM. P. 5, which requires (in language now found in Rule 5(c)) that, upon presentment, a defendant be advised that he has a right to counsel, that he need not make any statement, and that any statement he does make may be used against him. *Id.* at 453-54. The Court believed that the arresting officers improperly deprived Mallory of the safeguard provided by that "judicial caution" by delaying his appearance before a magistrate in order to obtain a confession. *Id.* at 455.

The lower federal courts construed *Mallory* quite strictly, ruling that delays in presentment as short as a few minutes warranted suppression of a defendant's confession. Indeed, in a case that later became a focus of congressional concern, *see* S. REP. NO. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2124-25, a confession given within five

minutes of arrest was ordered suppressed under the *McNabb-Mallory* rule even though the arresting officers had advised the defendant that "he need make no statement and if he did it would be used against him." *Alston v. United States*, 348 F.2d 72, 73 (D.C. Cir. 1965) (opinion of Bazelon, C.J.).

B. The *Miranda* Decision

Seven years after its decision in *Mallory*, this Court concluded in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment's privilege against compelled self-incrimination is binding on the States through the Due Process Clause of the Fourteenth Amendment. That ruling provided an essential predicate for *Miranda v. Arizona*, 384 U.S. 436 (1966), where the Court held for the first time that the Fifth Amendment privilege may be implicated when State authorities question a suspect who is in police custody.[2]

1. The *Miranda* Court concluded that custodial interrogation can generate "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. To counteract those pressures, the Court devised a set of prophylactic rules intended to safeguard the Fifth Amendment privilege in the context of custodial interrogation. In particular, the Court held that police must advise a suspect that he has the right to remain silent, that he has the right to consult with counsel and to have such counsel present during interrogation, and that counsel can be appointed for the suspect if he is indigent. Police must also

[2] Between its decisions in *Mallory* and *Miranda*, the Court decided *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Escobedo* ruled a custodial confession inadmissible on the ground that, in the circumstances of that case, the suspect's interrogation violated his Sixth Amendment right to the "Assistance of Counsel." The Court later disavowed *Escobedo*'s Sixth Amendment rationale, and "in retrospect perceived that the prime purpose of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, to guarantee full effectuation of the privilege against self-incrimination." *Moran v. Burbine*, 475 U.S. 412, 429-30 (1986) (internal quotation marks omitted).

advise a suspect that if he waives those rights, anything he says can be used against him in Court. *Id.* at 467-73. Those warnings largely parallel the "caution" that a judicial officer must give the defendant under FED. R. CRIM. P. 5. Indeed, the *Miranda* Court stated that the "prophylaxis" created by the *McNabb-Mallory* exclusionary rule, while anchored in the Court's "supervisory" authority, was "nonetheless responsive to the same considerations of Fifth Amendment policy" that prompted its *Miranda* ruling. *Id.* at 463.

2. As the Court's concern with the *risk* of compelled self-incrimination made clear, the warnings prescribed by *Miranda* were "not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). Indeed, *Miranda* itself expressly invited Congress and State legislatures to devise other procedures for protecting the privilege (384 U.S. at 467):

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.

C. Congressional Response To *Mallory* And *Miranda*: 18 U.S.C. § 3501

Congress reacted to this Court's rulings in both *Mallory* and *Miranda* with Title II of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 210. The Senate Judiciary Committee conducted extensive hearings on the

subject and formulated the provisions relating to the admissibility of confessions that are now codified at 18 U.S.C. § 3501.

The Senate Judiciary Committee Report that accompanied the legislation made clear that Section 3501 was intended to supersede the inflexible exclusionary rules invoked by this Court in *McNabb*, *Mallory* and *Miranda*. Based on "the mass of evidence" adduced during hearings, the Judiciary Committee became "convinced * * * that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement." 1968 U.S.C.C.A.N. at 2132. The same was true, the Committee believed, with respect to the *McNabb-Mallory* rule, which imposed "a very high price * * * for a 'constable's blunder.'" *Id.* at 2124. In particular, "[i]nstance after instance [was] documented * * * where the most vicious criminals ha[d] gone unpunished, even though they had voluntarily confessed their guilt." *Id.* at 2132; *see also ibid.* ("testimony and statements from district attorneys, police chiefs, and other law enforcement officers in cities and towns all over the country[] demonstrat[e] beyond doubt the devastating effect upon the rights of society of the *Miranda* decision").[3]

The Judiciary Committee's hearings also revealed "that the so-called third-degree methods deplored by the Supreme Court and cited as a basis for the [Court's] opinion in *Miranda* [were]

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[3] Indeed, "the testimony of many witnesses, and statements and letters of many other interested parties," persuaded the Committee that the decisions in *Mallory* and *Miranda* had

> resulted in the release of criminals whose guilt is virtually beyond question. This has had a demoralizing effect on law-enforcement officials whose efforts to investigate crimes and interrogate suspects have been stymied by th[ose] technical roadblocks * * *. The general public is becoming frightened and angered by the many reports of depraved criminals being released to roam the streets in search of other victims. For example, the infamous Mallory was convicted on another rape charge shortly after his rape conviction was reversed by the Supreme Court.

1968 U.S.C.C.A.N. at 2127.

not a correct portrayal of what actually goes on in police stations across the country." 1968 U.S.C.C.A.N. at 2134 (citing testimony from Arlen Specter, then District Attorney for Philadelphia, Pennsylvania). To the contrary, the Committee found that "cases of police using coercive tactics" were "isolated" and very much "the exception rather than the rule." *Ibid.* Because coercive police practices that "might have been approved 30 years ago" were no longer in use, the Committee concluded that this "Court overreacted to defense claims that police brutality is widespread." *Ibid.*

That record led the Committee to conclude that the traditional "voluntariness" inquiry should govern the admissibility of all custodial confessions in federal court. The Committee noted that "[s]ince the *McNabb-Mallory* rule was formulated in the exercise of the Supreme Court's supervisory powers * * * and has never been considered a constitutional requisite, no constitutional obstacle is imposed in the way of its legislative repeal." 1968 U.S.C.C.A.N. at 2126 (quoting testimony from Thomas C. Lynch, Attorney General of California). With respect to *Miranda*, the Committee noted that "a few ha[d] expressed" doubts about Congress's authority to overturn *Miranda*'s exclusionary rule, but that "the vast majority of the witnesses" who testified on the issue "expressed no doubt as to the constitutionality" of legislation requiring admission of all voluntary confessions, since this Court expressly contemplated that Congress could legislate in the area and "[v]oluntary confessions have been admissible in evidence since the early days of the Republic." 1968 U.S.C.C.A.N. at 2137, 2124. The Committee also noted that Congress has the "power to prescribe rules of evidence in Federal courts," and that, by conducting hearings, it is "possible for Congress to examine all the facets of human experience that must be taken into account in solving the problem of confessions"; whereas courts "consider[] only the limited facts and issues of each particular case [and] do not have the opportunity to evaluate all these factors." *Id.* at 2133.

Congress adopted the Committee's view by enacting Section 3501 of Title 18. Subsection (a) of the statute repudiates the rigid exclusionary rules laid down in *McNabb*, *Mallory* and

Miranda by providing that, in any federal prosecution, "a confession * * * shall be admissible in evidence if it is voluntarily given." 18 U.S.C. § 3501(a). Subsection (a) goes on to endorse this Court's decision in *Jackson v. Denno*, 378 U.S. 368 (1964), by requiring that the trial judge determine the issue of voluntariness outside the hearing of the jury. In addition, subsection (a) gives the defendant a second opportunity to challenge the voluntariness of his confession by requiring that the jury be permitted to assess the voluntariness issue independently.

Subsection (b) provides that, in determining the issue of voluntariness, the trial judge must take into consideration all relevant circumstances, and further emphasizes five specific factors. In deference to the concerns articulated by this Court in the *McNabb-Mallory* cases, the trial court must consider the time between arrest and arraignment, if the confession occurred after arrest and before arraignment. *See* 18 U.S.C. § 3501(b)(1). In deference to the concerns articulated by this Court in *Miranda*, the trial court must also consider whether the defendant knew the nature of the offense of which he was suspected when he made his confession; whether the defendant knew that he was not required to make a statement and that any statement could be used against him; whether the defendant had been advised prior to questioning of his right to the assistance of counsel; and whether the defendant was without counsel when he was questioned. *See* 18 U.S.C. § 3501(b)(2)-(5).

D. Proceedings Below

1. On January 24, 1997, the First Virginia Bank in Alexandria, Virginia, was robbed at gunpoint. A witness took down the license plate for the getaway car, which was traced to petitioner. J.A. 36-37.

A team of FBI agents and local police visited petitioner at his apartment in Takoma Park, Maryland. Although petitioner refused the agents consent to search his apartment, he agreed to accompany them to the FBI's Washington, D.C., field office, where he was interviewed by FBI Special Agent Lawlor and Alexandria Detective Durkin. J.A. 37, 167-68. In that initial interview, petitioner admitted only that, on the morning of the

bank robbery, he had parked his car in the Old Town area of Alexandria in order to purchase a bagel. *Id.* at 43, 168. Because that admission placed petitioner and his car near the scene of the robbery, Agent Lawlor left the interview room to obtain (by telephone) a warrant to search petitioner's apartment for evidence of the bank robbery. *Ibid.* Agent Lawlor then returned to the interview room and told petitioner that his apartment would be searched. *Id.* at 44-45, 170.[4]

There was conflicting testimony at the suppression hearing about what occurred next. Agent Lawlor testified that petitioner was advised of his rights under *Miranda* and that petitioner waived those rights before he proceeded to describe how, on the morning of the robbery, he had been in Old Town with one Jimmy Rochester, whom petitioner knew to be a bank robber. According to Agent Lawlor, petitioner claimed that Rochester had put something in the trunk of petitioner's car, and that he had asked petitioner to run a red light as they drove away. Petitioner also claimed that Rochester had given him a pistol and dye-stained money. J.A. 45-47, 49-50, 170. Petitioner, on the other hand, testified that he made those statements *before* he was advised of his *Miranda* rights. *Id.* at 61, 171-72.

2. The district court credited petitioner's testimony that he received *Miranda* warnings only after he had confessed, and it accordingly suppressed petitioner's statements. J.A. 154-55. The court also concluded, however, that petitioner's statements were voluntary, and for that reason it refused to suppress evidence found as a result of the statements. *Id.* at 158 n.1, 212.

The government sought reconsideration, contending, *inter alia*, that Section 3501 required admission of petitioner's voluntary statements "even if *Miranda* warnings were required and not timely given." *Id.* at 94-95. The court denied the government's motion without addressing Section 3501. *Id.* at 157-61.

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[4] The search of petitioner's apartment revealed "a silver .45-caliber handgun [like the one used in the robbery], dye-stained money, a bait bill from another robbery, ammunition, masks, and latex gloves." J.A. 170.

3. The court of appeals reversed. J.A. 162-225. The court found it "perfectly clear that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court." *Id.* at 163, 197. In finding that Congress has the power to overrule *Miranda*'s inflexible exclusionary rule, the court noted that the *Miranda* opinion never "refer[s] to the warnings as constitutional rights," and that this Court "consistently (and repeatedly) has referred to the warnings as 'prophylactic,' and 'not themselves rights protected by the Constitution.'" *Id.* at 203 (citations omitted).

After surveying the history of *Miranda*'s application by this Court—especially this Court's refusal to apply the "tainted fruits" doctrine to evidence obtained as a result of unwarned confessions—the court of appeals held that "the irrebuttable presumption created * * * in *Miranda* * * * is *a fortiori* not required by the Constitution." J.A. 207. The court further concluded that the voluntariness standard in Section 3501 will not "provide[] those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings" because "providing the four *Miranda* warnings is still the best way to guarantee a finding of voluntariness." *Id.* at 210-11. Because the district court had already determined that petitioner's statements were voluntary, the court of appeals reversed the district court's order suppressing them. *Id.* at 212, 217.

SUMMARY OF ARGUMENT

Congress acted well within its constitutional authority in enacting 18 U.S.C. § 3501, because *Miranda*'s exclusionary rule is neither an interpretation of the Fifth Amendment nor otherwise required by the Constitution. Although *Miranda* itself suggested that the Court was interpreting the Fifth Amendment, that view is inconsistent with the traditional understanding of "compulsion," to which this Court has continued to adhere, and with many post-*Miranda* cases that have expressly disclaimed a constitutional basis for *Miranda,* particularly *Harris v. New York*, 401 U.S. 222 (1971), *New York v. Quarles*, 467 U.S. 649 (1984), and *Oregon v. Elstad*, 470 U.S. 298 (1985). Those

post-*Miranda* cases permit use of statements obtained in violation of *Miranda*, among other things, to impeach the defendant and to secure other evidence against him. Because the Fifth Amendment requires exclusion of *all* evidence derived from compelled testimony and forbids using such evidence even for impeachment, *see, e.g.*, *Kastigar v. United States*, 406 U.S. 441 (1972), this Court necessarily has held that *Miranda*'s exclusionary rule does not remedy any Fifth Amendment violation. Indeed, this Court has expressly repudiated the standard for compulsion embraced by *Bram v. United States*, 168 U.S. 532 (1897), the case on which the *Miranda* Court based its conclusion. *Miranda*, 384 U.S. at 461.

Moreover, if *Miranda* were required by the Fifth Amendment, as petitioner and the Solicitor General contend, it would create another anomaly—this one in this Court's substantive due process jurisprudence. It is clear that a claim is not to be analyzed under substantive due process if it is "covered by a specific constitutional provision." *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). Yet this Court has held that a defendant who received *Miranda* warnings may nevertheless seek to suppress his statements on the ground that they were "involuntary" under substantive due process standards. *Mincey v. Arizona*, 437 U.S. 385 (1978).

The fact that this Court has applied *Miranda* to the States and allowed it to be raised in habeas proceedings does not establish that *Miranda*'s exclusionary rule is required by the Fifth Amendment. This Court has never expressly addressed the basis of its authority to apply *Miranda* to the States, and has, in any event, rejected the notion that Congress lacks authority to provide remedies for violation of the Constitution that are different from those prescribed by this Court. *See, e.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Congress surely must possess similar power to create alternatives to prophylactic rules that guard against the mere *risk* of a constitutional deprivation.

Indeed, as this Court recently made clear in *Smith v. Robbins*, 120 S. Ct. 746 (2000), judicially created prophylactic

rules—even rules devised in State cases and consistently applied by this Court to the States—may be modified so long as the underlying constitutional right is vindicated. *Miranda* itself invited Congress and the States to develop their own alternative approaches to the admissibility of custodial confessions, and disclaimed any intent to create a "constitutional straitjacket" that would "handicap sound efforts at reform." *Miranda*, 384 U.S. at 467. If, as the parties essentially contend, no alternative is permissible that does not incorporate *Miranda*'s scheme of mandatory warnings and an inflexible exclusionary rule, the Court's invitation would be largely meaningless.

Even if Congress does not have the power to reject *Miranda*'s exclusionary rule, this Court should do so because the principles of *stare decisis* do not counsel in favor of retaining that rule. This Court's cases since *Miranda* have rejected its Fifth Amendment premises, and Congress has rejected its factual ones. In addition, *Miranda* runs afoul of this Court's teaching in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that the federal government cannot impose prophylactic rules on States without showing congruence and proportionality between the injury and the remedy.

Law enforcement officers undoubtedly will continue their practice of giving the warnings as an efficient way of establishing voluntariness, but rejection of *Miranda*'s inflexible exclusionary rule will ensure that the criminal process will have the benefit of competent, reliable and constitutional evidence in the rare cases in which officers fail to comply with the technical requirements of *Miranda* doctrine.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT REQUIRE *MIRANDA*'S EXCLUSIONARY RULE

Petitioner and the Solicitor General spend the bulk of their respective briefs attempting to establish that—notwithstanding this Court's numerous statements to the contrary—*Miranda*'s exclusionary rule is somehow *required* by the Fifth Amendment, and that it therefore may not be modified by Congress or

the States unless this Court "overrules" *Miranda*. SG Br. 11-26; Pet. Br. 13-27. Neither the Solicitor General nor petitioner, however, explains how that contention can be squared with any coherent analysis of elementary principles of Fifth Amendment doctrine that this Court has consistently followed both before and after *Miranda*.

Those principles unmistakably show what this Court has, in any event, repeatedly conceded—*i.e.*, that *Miranda*'s exclusionary rule cannot plausibly be viewed as a remedy for any Fifth Amendment "compulsion." Indeed, both the Solicitor General and petitioner cloak their contentions in gauzy terminology—repeatedly asserting, for example, that *Miranda* is "constitutionally based" or that it has "constitutional weight"—that tellingly exposes their utter inability to identify, either in the plain terms of the Fifth Amendment or in conventional Fifth Amendment doctrine, a home for *Miranda*'s unyielding exclusionary rule. *E.g.*, SG Br. 23; Pet. Br. 22.

Because the Fifth Amendment plainly does not *require* that inflexible rule of exclusion for voluntary, though unwarned, custodial statements, Congress acted well within its proper sphere of authority in enacting 18 U.S.C. § 3501. There is therefore no need to "overrule" *Miranda* in order to sustain the constitutionality of the statute. Even were this Court to conclude otherwise, "the customary deference accorded the judgments of Congress," particularly where, "as here, Congress specifically considered the question of the Act's constitutionality," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), and the inconsistency of *Miranda*'s rigid exclusionary rule with significant bodies of constitutional doctrine, should cause this Court to reconsider and reject that exclusionary rule.

A. This Court Has Rejected The Proposition That *Miranda* Is Required By The Fifth Amendment

1. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." As is evident from its language, "[t]he constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony," and therefore it "does not prohibit

every element which influences a criminal suspect to make incriminating admissions." *United States v. Washington*, 431 U.S. 181, 187-88 (1977); *see also Fisher v. United States*, 425 U.S. 391, 397 (1976) ("[t]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege"); *Hoffa v. United States*, 385 U.S. 293, 304 (1966) ("a necessary element of compulsory self-incrimination is some kind of compulsion"); *United States v. Monia*, 317 U.S. 424, 427 (1943) ("[t]he Amendment speaks of compulsion"). In particular, nothing in the Fifth Amendment "preclude[s] a witness from testifying voluntarily in matters which may incriminate him." *Monia*, 317 U.S. at 427.

At the outset, *Miranda* fits uneasily within that basic framework, because it effectively requires that unwarned custodial statements be "presumed compelled and * * * excluded from evidence at trial in the State's case in chief" (*Oregon v. Elstad*, 470 U.S. 298, 317 (1985)) even though the accused has never affirmatively claimed the privilege. Yet this Court has long held—both before and since *Miranda*—that a person who fails affirmatively to claim the protection of the Fifth Amendment is not "considered to have been 'compelled' within the meaning of the Amendment." *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (quoting *Monia*, 317 U.S. at 427); *Garner v. United States*, 424 U.S. 648, 654 (1976) ("if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself"); *United States ex rel. Vatjauer v. Commissioner of Immigration*, 273 U.S. 103, 112-13 (1927) (same). In other words, "a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself. * * * [I]f he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty from his decision to do so." *Murphy*, 465 U.S. at 429.

Murphy suggested that the "extraordinary safeguard[s]" that *Miranda* adopted are a "well-known exception" to conventional

Fifth Amendment doctrine. 465 U.S. at 429-30. The Court has, however, often articulated a far more plausible explanation for *Miranda*'s failure to meet the doctrinal requirements for "compulsion" that this Court repeatedly embraced both before and after *Miranda*—*i.e.*, that "[t]he *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself." *Duckworth v. Egan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring). As the Court has repeatedly stated, "[t]he prophylactic *Miranda* warnings * * * are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *Michigan v. Tucker*, 417 U.S. at 444); *see also Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) ("*Miranda* * * * is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose"); *Elstad*, 470 U.S. at 310 ("The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced"); *Arizona v. Roberson*, 486 U.S. 675, 691 (1988) (Kennedy, J., dissenting) (*Miranda* "operates even absent constitutional violation").

Indeed, while *Miranda* itself suggested that the Court's analysis of compulsion (and its consequent adoption of an exclusionary rule) reflected the Court's interpretation of the Self-Incrimination Clause of the Fifth Amendment, this Court has been explicit in rejecting the precedent on which *Miranda* relied to suggest that the Clause is directed to the subject of custodial confessions. *Bram v. United States*, 168 U.S. 532 (1897), a case that *Miranda* described as "set[ting] down the Fifth Amendment standard for compulsion which we implement today" (*Miranda*, 384 U.S. at 461-62), long stood for the proposition that a statement must be deemed "compelled" if it was induced by any threat or promise or by the exertion of any improper influence "however slight." *Bram*, 168 U.S. at 542-43. That broad conception of "compulsion" best explains why *Miranda* was able to reason that pressures inherent in custodial interrogation may suffice to "compel" a confession. Yet this Court has expressly repudiated *Bram*, explaining that "under

current precedent" that case "does not state the standard for determining the voluntariness of a confession." *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991). It is, to say the least, anomalous for petitioner and the Solicitor General to proclaim the existence of a "constitutional basis" for *Miranda* without even discussing this Court's express rejection of the principal precedential basis that decision ever purported to have.

2. This Court not only has *said* that *Miranda*'s exclusionary rule is not an interpretation of, nor otherwise required by, the Fifth Amendment; this Court's cases have necessarily so *held*. *Miranda*'s exclusionary rule cannot be viewed as a remedy for any Fifth Amendment "compulsion," because, as demonstrated by this Court's immunity cases, true "compulsion" *must* be remedied by excluding all evidence derived directly or indirectly from the "compelled" statement. This Court, by contrast, has repeatedly held that such a remedy is not necessary for *Miranda* violations. Neither petitioner nor the Solicitor General attempts to reconcile those two lines of authority.

a. The quintessential example of true Fifth Amendment "compulsion" is a judicial order directing a citizen to answer on pain of punishment. In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the first case in which this Court considered the constitutionality of immunity statutes, this Court made clear that such compulsion requires a broad suppression remedy. The immunity statute at issue in *Counselman* provided that no "evidence obtained from a party or witness by means of a judicial proceeding * * * shall be given in evidence, or in any manner used against him * * * in any court of the United States." *Id.* at 560. This Court construed that language as affording a witness protection only against use by the government of the specific testimony compelled from the witness under the grant of immunity, and thus as not "prevent[ing] the use of his testimony to search out" other evidence. *Id.* at 564. As so construed, the statute was found to violate the Fifth Amendment, because the prohibition on the government's use of the compelled testimony was not "a full substitute" for that amendment's prohibition. *Id.* at 585-86. In other words, the immunity provided by the statute in *Counselman* "was incomplete, in that it merely forbade the use

of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony." *Ullmann v. United States*, 350 U.S. 422, 437 (1956).

By contrast, in *Kastigar v. United States*, 406 U.S. 441 (1972), the Court upheld the constitutionality of the current federal immunity statute, 18 U.S.C. § 6002. Unlike the statute considered in *Counselman*, Section 6002 provides immunity from the use of compelled testimony *and* from the use of any evidence derived "directly or indirectly" from such testimony. *Kastigar* reasoned that because Section 6002 "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect," the immunity it provides "is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." 406 U.S. at 453.

Since its decision in *Kastigar*, the Court has repeatedly held that a witness who has been "compelled" to testify within the meaning of the Fifth Amendment *must* be accorded both "use" *and* "derivative use" immunity. *See, e.g., United States v. Balsys*, 524 U.S. 666, 692 (1998) (noting that the Fifth Amendment "requir[es] the Government to pay a price in the form of use (and derivative use) immunity"); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 254-55 (1983) (same). As the Court explained in holding that such compelled statements may not be used even to *impeach* a witness, true "compulsion" implicates the Fifth Amendment "in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible." *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).

b. This Court's *Miranda* cases cannot be reconciled with the proposition that *Miranda* redresses any form of Fifth Amendment "compulsion." In *Harris v. New York*, 401 U.S. 222 (1971)—one of the Court's earliest *Miranda* cases—this Court held that unwarned custodial statements may be used to impeach the defendant if he takes the stand. Although *Miranda* itself had suggested that unwarned statements could not be so used, *see Miranda*, 384 U.S. at 477, this Court explained that

that suggestion "was not at all necessary to the Court's holding and cannot be regarded as controlling." *Harris*, 401 U.S. at 224. Reasoning that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief," the Court refused to endorse a more sweeping exclusionary rule. *Id.* at 225-26. Thus, the *Miranda* doctrine expressly permits the use of unwarned custodial statements to impeach the defendant, and it does so on the basis of a balancing of interests that would be wholly impermissible if the Court were dealing with statements obtained in violation of the Fifth Amendment. *See Portash*, 440 U.S. at 459. That "balance was struck in *Harris*" and the Court has not been "disposed to change it." *Oregon v. Hass*, 420 U.S. 714, 723 (1975); *see also Michigan v. Harvey*, 494 U.S. 344, 350-51 (1990) (reaffirming *Harris* rule).

Nor are the impeachment cases isolated examples of *Miranda*'s inconsistency with the rule that truly compelled statements may not be used for any purpose. In *Quarles*, *supra*, the Court adopted a "public safety" exception to *Miranda*, concluding that unwarned custodial statements and physical evidence derived from those statements need not be excluded—even from the prosecution's case-in-chief—if the interrogation that produced those statements was prompted by the officer's reasonable concern for public safety. *Quarles*, 467 U.S. at 654-57. The Court "conclude[d] that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657. That conclusion, the Court observed, is consistent with the traditional Fifth Amendment rule that neither compelled statements nor evidence derived from them may be used at trial, because *Miranda* did not hold that unwarned custodial statements are in fact "compelled" or "coerced." *Id.* at 655 & n.5. Instead, the *Miranda* Court held merely that warnings "would reduce the likelihood that * * * suspects would fall victim to constitutionally impermissible practices of police interrogation in the presumptively coercive environment of the station house." *Id.* at 656.

The Court reaffirmed that view of *Miranda* in *Elstad*, *supra*, where it again held that unwarned statements do not "taint" evidence subsequently derived from those statements, so as to make such derivative evidence inadmissible in the prosecution's case-in-chief. The Court emphasized that a "simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment," and that *Miranda* "itself recognized this point when it disclaimed any intent to create a 'constitutional straitjacket' and invited Congress and the States to suggest 'potential alternatives for protecting the privilege.'" *Elstad*, 470 U.S. at 306-07 & n.1.

In sum, *Harris*, *Quarles* and *Elstad* necessarily establish that *Miranda*'s inflexible exclusionary rule is *not* required by the Fifth Amendment. Although the Self-Incrimination Clause *does* require a rigid exclusionary rule for truly compelled statements, the Court's willingness to modify the *Miranda* rule on the basis of considerations of policy, as evidenced by its rulings on impeachment and derivative evidence, belies any argument that *Miranda* is the rule that the Constitution requires.[5] In other words, despite this Court's view that unwarned statements must be "presumed * * * compelled" (*Elstad*, 470 U.S. at 317), the departure in *Harris*, *Quarles* and *Elstad* from the *Counselman-Kastigar* rule demonstrates that the "presumption" does not reflect any conclusion that such unwarned statements are *in fact* "compelled" within the meaning of the Fifth Amendment.[6]

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[5] Indeed, Congress's decision to provide a remedy for compelled statements that mirrored the results obtained under *Harris*, *Quarles* and *Elstad* was the reason this Court struck down the immunity statute at issue in *Counselman*. Neither petitioner nor the Solicitor General has explained how, if *Miranda*'s exclusionary rule is indeed required to remedy some form of Fifth Amendment "compulsion," this Court could lawfully assert (by ruling as it did in *Harris*, *Quarles* and *Elstad*) for itself the authority that it has long denied to Congress.

[6] The view that *Miranda* does not remedy any Fifth Amendment "compulsion" also follows, of course, from the Court's traditional rule that no such compulsion occurs unless the witness affirmatively claims the protection of the privilege. *Monia*, 317 U.S. at 427.

Where there is no constitutional violation, Congress must be free to craft an alternative framework for the admissibility of those statements.

B. This Court's Substantive Due Process Decisions Are Inconsistent With The Proposition That *Miranda* Defined The Fifth Amendment

The fact that unwarned custodial statements are simply not "compelled" within the meaning of the Fifth Amendment also explains another aspect of this Court's jurisprudence of confessions that both petitioner and the Solicitor General ignore: this Court's insistence that a defendant who receives warnings in accordance with *Miranda* may nonetheless seek to suppress his statements on the ground that those statements were "involuntary" under *due process* standards. *See Mincey v. Arizona*, 437 U.S. 385, 396-402 (1978) (suppressing statements on that theory); *see also Elstad*, 470 U.S. at 307-08 ("Where an unwarned statement is preserved for use in situations that fall outside the sweep of * * * *Miranda* * * *, the primary criterion of admissibility remains the 'old' due process voluntariness test") (internal brackets, quotation marks and citation omitted).

1. The Court's retention of *due process* "voluntariness" as a claim that a defendant may make *in addition* to any claim he may have under *Miranda* and its progeny strongly supports the view that unwarned custodial statements do not, as a general matter, violate any provision of the Fifth Amendment. That is because the Court has made clear that due process is a *residual* doctrine that may be invoked *only* when no specific provision of the Bill of Rights addresses the alleged deprivation at hand. *See, e.g., Graham v. Connor*, 490 U.S. 386, 395 (1989).

As the Chief Justice has noted, because the Framers of our Constitution sought to restrict arbitrary or oppressive government action primarily through the Bill of Rights, only the specific Amendment that addresses a "particular sort of government behavior," rather than substantive due process principles, should be applied to claims challenging that particular behavior. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J., joined by O'Connor, Scalia, &

Ginsburg, JJ.); *see also id.* at 281 (Kennedy, J., joined by Thomas, J., concurring in judgment) ("I agree with the plurality that [the] allegation * * * must be analyzed under the Fourth Amendment without reference to more general considerations of due process"). Thus, under settled doctrine, "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997)).

2. The Court's continued reliance on substantive due process principles in assessing the voluntariness of custodial confessions necessarily means that such confessions are not "covered by" the Self-Incrimination Clause of the Fifth Amendment—presumably because the Court continues to adhere to the conventional understanding of "compulsion" reflected in *Monia* and similar cases. Indeed, that reliance on substantive due process would be inexplicable if—as petitioner and the Solicitor General appear to believe—unwarned custodial statements violate some undefined component of the Self-Incrimination Clause of the Fifth Amendment.

C. That This Court Has Ruled On *Miranda* Issues In State Cases Does Not Establish That Congress Lacks Power To Reject *Miranda*'s Exclusionary Rule

The parties contend, however, that this Court's application of *Miranda* to the States, and its conclusion that *Miranda* claims may be raised in habeas corpus proceedings, *Withrow v. Williams*, 507 U.S. 680 (1993), conclusively show that *Miranda* is a rule of federal constitutional law that Congress is powerless to modify. *See* Pet. Br. 27; *see also* SG Br. 23-25. That argument is unavailing.

1. To begin with, while this Court has decided *Miranda* issues in cases arising out of State courts, this Court has never clearly defined the basis for, or the contours of, its authority to apply *Miranda*'s exclusionary rule to the States, and it certainly has not examined those questions in the wake of *Harris*,

Quarles and *Elstad*. Those State cases therefore have no precedential value on those antecedent questions, since, as the Court has frequently stated, "questions which merely lurk in the record are not resolved, and no resolution of them may be inferred." *United States v. Shabani*, 513 U.S. 10, 16 (1994) (internal quotation marks omitted); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Webster v. Fall*, 266 U.S. 507, 511 (1925). Indeed, even if those State cases were viewed as speaking to whether *Miranda*'s exclusionary rule in fact remedies any Fifth Amendment violation, that would *at most* establish that they are inconsistent with *Harris*, *Quarles* and *Elstad*, which—unless this Court is to overrule *Counselman* and *Kastigar*—necessarily stand for the contrary proposition. Yet neither petitioner nor the Solicitor General offers a persuasive reason for simply picking one line of authority and ignoring the other.

2. In any event, the argument advanced by petitioner and the Solicitor General proceeds from an erroneous premise. Although it is true that this Court lacks authority to impose "supervisory" rules (*i.e.*, rules dictated solely by this Court's sense of desirable practice) on the State courts, it by no means follows that any rule that this Court bases on the Constitution, or that it decides to apply to the States, may never be overridden legislatively. In fact, this Court's cases are to the contrary.

To cite only the most obvious example, the Court has recognized private rights of action—based on the Constitution itself—for damages caused by violations of the Fourth, Fifth and Eighth Amendments, while consistently recognizing that Congress retains authority to "provide[] an alternative remedy which it explicitly declare[s] to be a substitute for recovery directly under the Constitution." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (emphasis omitted) (Eighth Amendment); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (Due Process Clause of the Fifth Amendment; "in the absence of affirmative action by Congress"); *Bivens*, 403 U.S. at 397 (Fourth Amendment; noting absence of an "explicit congressional declaration that persons injured * * * must instead be remitted to another remedy, equally effective in the view of Congress"). The rule could

hardly be otherwise, because—even with respect to *actual* violations of the Constitution—Congress has undoubted authority to direct courts to employ one constitutionally adequate remedy rather than another. *See* U.S. CONST. amend. XIV, § 5. It would be strange indeed if Congress possessed no similar authority with respect to "prophylactic" rules intended merely to guard against the *risk* of a constitutional deprivation.

D. *Miranda* Itself Invited Congress And The States To Develop Their Own Approaches To The Admissibility Of Custodial Confessions

The parties' contention that Congress lacks authority to modify *Miranda*'s exclusionary rule rings especially hollow in light of this Court's invitation to Congress and the States, in *Miranda* itself, to frame their own approaches to the admissibility of confessions. *Miranda*, 384 U.S. at 467. The parties contend, however, that this Court's invitation permits only those alternative approaches that, like *Miranda*, expressly apprise a defendant of his rights. *E.g.*, SG Br. 27. Although certain language in *Miranda* does support that proposition, this Court should reject the parties' argument.

1. There is no basis in this Court's cases for the parties' attempt to parse through the *Miranda* opinion as though it were a statute. *Cf. Duckworth v. Egan*, 492 U.S. at 203 ("courts * * * need not examine *Miranda* warnings as if construing a will or defining the terms of an easement"). That approach is especially inadvisable given that the parties' reading of *Miranda* would transform that opinion into the very "constitutional straitjacket" that the Court was at pains to disclaim (384 U.S. at 467), and would effectively nullify any alternative approach to the admissibility of confessions that does not take the *Miranda* framework as an unchangeable "floor." The result could stifle alternative frameworks—or new technologies—that may well be more efficacious than *Miranda* in assuring the voluntariness of confessions.

Far from being required by precedent, that inflexible approach to prophylactic rules was recently rejected by the Court in *Smith v. Robbins*, 120 S. Ct. 746, 756-59 (2000). *Robbins*,

like this case, involved a claim that earlier opinions of this Court required States to use a particular "prophylactic framework" to vindicate a defendant's constitutional rights—in that case, the constitutional right to appellate counsel. Although the Court conceded that the claim was not without some support in its cases, it rejected the claim because it "contraven[ed] [the Court's] established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Id.* at 757.

In fact, *Robbins* completely devastates the parties' claim that this Court's application of a prophylactic rule to cases coming from the State courts necessarily establishes that such a rule is impervious to change save by this Court. The rule at issue in *Robbins*—which governed appeals by convicted indigents, *see Anders v. California*, 386 U.S. 738 (1967)—had, like *Miranda*, been described by this Court as a "prophylactic framework" and "not 'an independent constitutional command.'" *Robbins*, 120 S. Ct. at 757. And, like *Miranda*, it had been announced by this Court in a State case; indeed, this Court had applied it *only* in State cases. Nonetheless, this Court concluded that the California courts had the authority to modify those procedures, so long as the alternative procedures "focus[ed] on the underlying goals that the procedure should serve," thus assuring compliance with the relevant constitutional norm. *Id.* at 760.

2. The parties cannot reasonably dispute that Section 3501 meets those requirements. The statute requires that *two* fact-finders—the trial judge and the jury—be persuaded that the defendant's confession meets the constitutional standard of voluntariness.[7] Although no single factor conclusively controls the

[7] In 1986, nearly twenty years after the passage of 18 U.S.C. § 3501, this Court for the first time squarely held that due process and the Sixth Amendment require that a defendant be permitted to reargue the voluntariness of his confession to the jury. In reaching that conclusion, the Court relied in part on Section 3501(a) and similar state statutes as evidence of a broad consensus within the federal system that such a procedure is needed to assure a fair trial. *See Crane v. Kentucky*, 476 U.S. 683, 689 (1986).

question of voluntariness, and courts are free to consider other factors, Congress's inclusion of five specific factors that trial courts *must* consider in assessing that question—including any delay in presentment and whether the defendant received *Miranda* warnings—ensures that courts will remain alert to the factors that this Court has found most likely to assure that custodial statements will in fact be voluntary.

Indeed, while reviving the traditional "totality of the circumstances" approach to admissibility, Section 3501 emphasizes protections that are required neither by the *Miranda* framework nor by the Constitution. Thus, the trial judge must consider whether the "defendant knew the nature of the offense" of which he was suspected (18 U.S.C. § 3501(b)(2)), even though such knowledge is not required to ensure a valid waiver of *Miranda* rights under this Court's cases. *See Colorado v. Spring*, 479 U.S. 564, 577 (1987). Section 3501(b)(1) goes even further by requiring express consideration of delay in presentment, thus retaining some elements of the non-constitutional *McNabb-Mallory* rule. In that manner, Congress assured that police officers will know that protracted custodial interrogation, without judicial intervention (through which the suspect will certainly be told of his rights, *see* FED. R. CRIM. P. 5), places the admissibility of any ensuing confession at risk. *Compare Brown v. Allen*, 344 U.S. 443, 476 (1953) (under traditional voluntariness precedent, "[m]ere detention and police examination in private of one in official state custody do not render involuntary the statements or confessions made by the person so detained"), *with* 18 U.S.C. § 3501(c) (confession may be found inadmissible "solely because of delay" in presenting the accused to a magistrate if delay exceeds six hours). And, as the Fourth Circuit noted, law enforcement officers retain, under the statute, a strong incentive to "giv[e] the now familiar *Miranda* warnings." J.A. 210. Those procedures are plainly sufficient to meet the requirements of the Constitution.

E. If This Court Concludes That Congress Lacks Power To Reject *Miranda*'s Exclusionary Rule, The Court Should Do So Itself

Even if petitioner and the Solicitor General are correct in asserting that Congress lacks constitutional authority to modify *Miranda*'s rigid exclusionary rule, this Court should do so to the extent necessary to sustain the constitutionality of Section 3501.

1. "*Stare decisis* is not an inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), but merely reflects a policy preference for stability in the law. *Agostini v. Felton*, 521 U.S. 203, 235 (1997). That preference is "reduced * * * in the case of a procedural rule" such as *Miranda*, "which does not serve as a guide to lawful behavior," *United States v. Gaudin*, 515 U.S. 506, 521 (1995), and "cannot possibly be controlling when, in addition to those factors, the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *Ibid.*; *Agostini*, 521 U.S. at 235-36.

Those principles dictate abandonment of *Miranda*'s inflexible exclusionary rule. Indeed, petitioner's contrary arguments are largely misdirected. The *stare decisis* issue in this case—if there is one—is not whether *Miranda* should be repudiated wholesale, but whether *Miranda*'s exclusionary rule should be retained. No one contends that law enforcement officers should be *precluded* from giving the *Miranda* warnings. If it is indeed true that law enforcement officers find it easy and advantageous to administer *Miranda* warnings because they virtually assure the admission of a confession (SG Br. 33-38), then self-interest alone will suffice to ensure that officers will continue to use such warnings and that the flood of litigation feared by the Solicitor General (*id.* at 37) will fail to materialize.[8] Similarly, it

[8] *Miranda*'s exclusionary rule serves, if anything, to increase the number of issues over which parties can litigate. The *Miranda* doctrine requires a trial judge to determine (1) whether the arresting officers complied with *Miranda* and its complex progeny, including rules governing how police must react to a suspect's invocation of rights, *see, e.g.*, *Edwards v. Arizona*, 451 U.S. 477 (1981); *Minnick v. Mississippi*, 498 U.S. 146 (1990); (2) whether the suspect "voluntarily" waived his *Miranda* rights, *see North Carolina v. Butler*, 441 U.S. 369, 373 (1979); and (3) whether the suspect's statements are "voluntary" under due process standards. Courts almost invariably will be called upon to make several of these determinations. If the court finds that the officer violated *Miranda*, it will be required to address (as the district court did in this case) the issue of voluntariness in order to assess whether the defendant's statements can be used for impeachment and whether the government is entitled to introduce evidence derived from those statements. If the officer complied with *Miranda*, the court must still address whether the defendant voluntarily waived his rights, and whether the statements are voluntary under due process standards.

is difficult to see what valid "[r]eliance" interests in *Miranda*'s exclusionary rule conceivably could be claimed by a defendant who has suffered no actual constitutional harm—much less by society at large (SG Br. 38), whose "legitimate and compelling" interest is that the guilty be brought to justice. *Schall v. Martin*, 467 U.S. 253, 264 (1984).

Moreover, neither petitioner nor the Solicitor General comes to grips with the significant factual and legal developments that have occurred since this Court decided *Miranda*. Neither attempts to reconcile *Miranda* and its progeny with the larger body of this Court's Fifth Amendment doctrine, particularly *Counselman* and *Kastigar*; instead, both parties treat this Court's decisions in *Harris*, *Quarles* and *Elstad* as more or less *sui generis*. Nor do the parties address this Court's repudiation of *Bram*'s standard of compulsion (*Fulminante*, 499 U.S. at 285), even though the *Miranda* Court expressly based its decision on that standard. *Miranda*, 384 U.S. at 461. And although "Congress is a coequal branch of government whose Members take the same oath * * * to uphold the Constitution" as this Court does, and whose judgment is entitled to "great weight," *Rostker*, 453 U.S. at 64, neither petitioner nor the Solicitor General gives *any* weight to the fact that Congress, after conducting extensive hearings, not only rejected the "legislative facts" that underlay *Miranda*'s conclusions but also concluded that

Miranda inflicts unjustified harm on legitimate law enforcement practices. Those detailed conclusions, which are consistent with the experience of Maricopa County prosecutors and which are supported by contemporary scholarship, *see* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998), deserve a more respectful treatment from this Court than the Executive Branch is willing to accord them. Indeed, petitioner and the Solicitor General dismiss even the vast change in public awareness of a defendant's rights vis-à-vis the criminal justice system that has occurred since *Miranda*—a change that recently prompted this Court to observe that, "[i]n the modern age of frequently dramatized 'Miranda' warnings," it is "implausible" to suggest that a "person may be unaware of his right to remain silent." *Brogan v. United States*, 522 U.S. 398, 405 (1998).

2. Those considerations do not lose their force simply because the parties assert that this Court must have some authority to adopt "prophylactic" rules. *E.g.*, SG Br. 43-47. As this Court recognized in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Constitution itself imposes limits on the federal government's ability to frame "prophylactic" rules, especially when those rules are made binding on the States. In particular, there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 508.[9] *Miranda*'s exclusionary rule cannot meet that test and should not be reaffirmed for that additional reason. Indeed, had Congress enacted *Miranda*'s requirements itself, it is inconceivable that—after *City of Boerne*—such a statute would be upheld by this Court.

[9] *City of Boerne* framed that test in order to determine whether Congress permissibly invoked its power under Section 5 of the Fourteenth Amendment. A judicially devised "prophylactic" measure must comply with *City of Boerne* because Congress's authority is, if anything, broader than this Court's implied power to devise remedies for constitutional violations. *Compare Katzenbach v. Morgan*, 384 U.S. 641, 649-50 (1966) (upholding congressional ban on literacy test under Section 5), *with Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (refusing to strike down literacy requirement under Court's own authority to enforce the Constitution).

The constitutional harm that *Miranda* is designed to prevent is the risk that suspects in custody will be "compelled" to make self-incriminating statements, which will then be used at trial in violation of the Fifth Amendment. Yet the record on which *Miranda* relied for supposing that this was a pervasive problem is significantly weaker than the legislative records that the Court found inadequate to establish the pervasiveness of the underlying harm in *City of Boerne* and in every subsequent case that has considered "prophylactic" legislation. *See City of Boerne*, 521 U.S. at 531 ("anecdotal evidence" that did not reveal a "widespread pattern of religious discrimination in this country"); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2207 (1999) ("Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations"); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 649 (2000) ("it is sufficient for these cases to note that Congress failed to identify a widespread pattern of age discrimination by the States").

In fact, the Court conceded in *Miranda* that examples of brutality "were undoubtedly the exception" even thirty-four years ago, *Miranda*, 384 U.S. at 447, and based its conclusion primarily on "police manuals and texts" that, in its view, suggested widespread use of interrogation techniques *capable* of overbearing a suspect's free will. *Id.* at 448. As Justice White noted in dissent, however, "even if the relentless application of the described procedures could lead to involuntary confessions, it most assuredly [did] not follow that each and every case will disclose * * * this type of consequence." *Id.* at 533 (White, J., dissenting). The Court, for its part, did not contend otherwise, but was satisfied to treat the "potentiality for compulsion" (*id.* at 457) itself as the pervasive evil that justified the creation of a prophylactic rule. Because the Court failed to demonstrate that this "potentiality" was realized frequently enough to make *compulsion* pervasive, however, the *Miranda* "prophylactic" regime is essentially indistinguishable from the statutory regime this

Court struck down in *City of Boerne*. *See* 521 U.S. at 531; *cf. Coleman v. Thompson*, 501 U.S. 722, 737 (1991) ("the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time").

In sum, given *Miranda*'s "infirmities, and its increasingly wobbly, moth-eaten foundations," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (brackets omitted), no justification remains for retaining *Miranda*'s inflexible exclusionary rule, particularly in the teeth of an Act of Congress that fully safeguards the underlying constitutional right while preserving society's compelling interest in the detection and prosecution of crime. If this Court should conclude that Congress lacks sufficient authority to modify that inflexible rule, this Court should itself reject that rule and sustain Congress's judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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