No. 99-5525

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES THOMAS DICKERSON
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF AMICUS CURIAE OF SENATORS ORRIN G. HATCH, TRENT LOTT, DON NICKLES, STROM THURMOND, BOB SMITH, LARRY E. CRAIG, PAUL COVERDELL, FRED THOMPSON, JON KYL AND JEFF SESSIONS URGING AFFIRMANCE

Filed March 9, 2000

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INTEREST OF AMICI CURIAE[1]

This brief is filed on behalf of Senators Orrin G. Hatch, Trent Lott, Don Nickles, Strom Thurmond, Bob Smith, Larry E. Craig, Paul Coverdell, Fred Thompson, Jon Kyl and Jeff Sessions (hereinafter "Amici"), urging affirmance of the judgment below. Amici contend that 18 U.S.C. § 3501 (hereinafter "§ 3501") represents a valid and constitutional exercise of Congress' legislative authority to establish the rules of procedure and evidence for federal courts. As members of the United States Senate, Amici further believe they will bring to the Court's attention relevant information the parties have not addressed.

Amici's interest in this case is significant because no formal representative of the federal government is arguing in support of § 3501's constitutionality. Historically, the Justice Department has defended the constitutionality of congressional acts unless it can make no "reasonable argument" in the Act's defense. *See* Letter from Janet Reno, United States Attorney General, to Albert Gore, Jr., President of the United States Senate 2 (Nov. 1, 1999) ("It has been, and continues to be, the traditional practice of the Department of Justice in virtually all cases to defend the constitutionality of an Act of Congress unless it is plainly unconstitutional."); *see also* 5 Opinions of the Office of Legal Counsel 25, 25-26 (Apr. 6, 1981) ("[T]he Department has the duty to defend an Act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts."). In addition, the Justice Department historically has supported the use of § 3501. *See The Clinton Justice Department's Refusal to Enforce the Law*

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[1] Pursuant to Rule 37.6, this brief was authored and prepared in its entirety by Amici.

on Voluntary Confessions: Hearing Before the Senate Subcomm. on Crim. Justice Oversight of the Senate Comm. on the Judiciary, 106th Cong., 1st Sess. 95-97 (1999) (discussing support for § 3501 by Nixon, Reagan and Bush administrations).

In congressional testimony before the Senate Judiciary Committee, Attorney General Janet Reno, Deputy Attorney General Eric Holder and former Solicitor General Drew Days each testified that the Justice Department had "no policy" against invoking § 3501 and, to the contrary, was prepared to use the statute "in an appropriate case." *Solicitor General Oversight: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 42 (1995) (statement of then-Solicitor General Drew Days); *see also The Administration of Justice and the Enforcement of Laws: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 91 (1995) (written answer of Attorney General Janet Reno); *Confirmation of Deputy Attorney General Nominee Eric Holder: Hearing before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. 124 (1997) (written answer of Deputy Attorney General-designate Eric Holder). They testified that the Justice Department previously had declined to invoke § 3501, not because the Department believed the statute to be unconstitutional, but because of procedural problems in particular cases. *See, e.g., Department of Justice Oversight: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. 89-90 (1997) (testimony of Attorney General Janet Reno).

Notwithstanding the foregoing, the Justice Department has decided not to defend the constitutionality of § 3501 in this case and instead has joined the petitioner in challenging the statute. This is so, notwithstanding the fact that "reasonable arguments" unquestionably can be made in the statute's defense. Courts that have squarely addressed the issue have determined that § 3501 is constitutional. *See, e.g., United States v. Dickerson*, 166 F.2d 667 (4th Cir. 1999) (holding that "§ 3501, rather than *Miranda*, governs the admissibility of confessions in federal court"), *cert. granted in part by Dickerson v. United States*, 120 S. Ct. 578 (1999) (No. 99-5525); *United States v. Crocker*, 510 F.2d 1129, 1138 (10th Cir. 1975) (holding "that the trial court did not err in applying the guidelines of section 3501 in determining the issue of the voluntariness of Crocker's confession"); *United States v. Tapia-Mendoza*, 41 F. Supp.2d 1250, 1255 (D. Utah 1999) (holding that "[r]esponses by defendants in criminal cases to custodial and other questions are governed by a post-*Miranda* statute" (citing § 3501)); *United States v. Rivas-Lopez*, 988 F. Supp. 1424, 1436 (D. Utah 1997) (applying § 3501 to determine voluntariness despite apparent *Miranda* violation due to continued questioning after defendant had invoked *Miranda* rights); *see also Davis v. United States*, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) (stating that there "is no excuse" for the "United States' repeated refusal to invoke § 3501"). Moreover, the Justice Department has refused to defend the statute despite the fact "that at least one federal law enforcement agency, the Drug Enforcement Administration, (1) determined that the *Miranda* decision hinders its investigations and (2) requested that the Department of Justice defend the constitutionality of 18 U.S.C. § 3501 before the Supreme Court." Letter from Senator Orrin G. Hatch, Chairman of the Senate Judiciary Committee, and Senator Strom Thurmond, Chairman of the Senate Subcommittee on Criminal Justice Oversight, to Janet Reno, United States Attorney General, and Seth P. Waxman, United States Solicitor General (Feb. 15, 2000).[2]

[2] In response to the letter sent by Senators Hatch and Thurmond on February 15, 2000, respondent lodged with the Court, *inter alia*, two memoranda of the Drug Enforcement Administration ("DEA"). In substance, the memoranda assert that "the automatic exclusion from evidence of all statements that do not comply with the *Miranda* rule is harmful to the administration of justice," Memorandum from Robert C. Gleason, Deputy Chief Counsel, DEA, to Patty Stemler, Chief, Criminal Division, Appellate Section 1 (undated); and that "Section 3501 provides greater flexibility to the law enforcement officer in obtaining voluntary statements," Memorandum from Richard A. Fiano, Chief of

In the view of Amici, the Justice Department's failure to invoke § 3501 in appropriate cases, as well as its refusal to defend the statute's constitutionality in this case, is not "consistent with the Executive's obligation to 'take Care that the Laws be faithfully executed.'" *Davis*, 512 U.S. at 465 (Scalia, J., concurring) (quoting U.S. Const. art. II, § 3). In cases where the Executive Branch declines to defend an Act of Congress, this Court has routinely accepted briefing from Members of Congress. *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983). Given this case's importance and the deference owed congressional judgments by the Executive and Judicial Branches, Amici respectfully submit this brief as *amici curiae* and urge this Court to affirm the judgment below.[3]

SUMMARY OF ARGUMENT

Section 3501, rather than *Miranda*, governs the admissibility of confessions in federal court. The *Miranda* rules are not mandated by the Constitution. The *Miranda* decision itself does not purport to be a constitutional ruling, and this Court, in numerous cases, has repeatedly referred to the *Miranda* rules as prophylactic safeguards that are non-constitutional in nature.

In enacting § 3501, Congress determined that unwarned custodial confessions are not necessarily coercive, thereby undermining the central factual assumption upon which the *Miranda* decision was based. Congress' determination in this respect was based on considerable deliberation and debate. Section 3501 supersedes *Miranda*'s conclusive presumption that unwarned custodial confessions necessarily are the product of coercion and therefore are inadmissible. The statute, however, reaffirms *Miranda*'s basic holding that suspects in custody should be advised of their constitutional rights.

If this court accepts the arguments advanced by petitioner and respondent, then Congress' authority to establish rules of procedure and evidence for federal courts will be diminished. Although this Court may devise non-constitutional rules of procedure and evidence for federal courts, it may only do so in the absence of a statute. If the non-constitutional *Miranda* rules are upheld in this case, then this Court effectively will have plenary power to devise both constitutional and non-constitutional rules for federal courts.

Finally, § 3501 is constitutional. The statute does not lessen the constitutional protections afforded to suspects in custody. Instead it merely alters the non-constitutional prophylactic safeguards this Court devised in *Miranda*. Congress determined that § 3501 was constitutional when it enacted the statute and that determination is entitled to deference.

Operations, DEA, to Frank A.S. Campbell, Deputy Assistant Attorney General, Office of Policy Development 2 (Oct. 13, 1999). In an effort to explain away these memoranda, respondent has lodged with the Court a third, recently-authored DEA memorandum which attempts "to clarify" DEA's earlier memoranda. *See* Memorandum from Cynthia R. Ryan, Chief Counsel, DEA, to Seth P. Waxman, Solicitor General 1 (Feb. 22, 2000). Although this third memorandum claims that DEA "did not intend" in its prior memoranda to depart from the "basic belief" that "complying with the *Miranda* decision generally does not hinder DEA investigations," it concedes that DEA prefers "the flexibility that 18 U.S.C. § 3501 could provide." *Id.* at 2. Thus, it seems apparent, contrary to the impression made by respondent's brief, that federal law enforcement agencies are mixed on whether the legal rules of § 3501, as opposed to those of *Miranda*, are preferable to law enforcement and should be defended by the Justice Department before this Court.

[3] This brief is filed with the consent of the parties pursuant to Rule 37.3(a). Letters of consent have been filed with the Clerk of the Court.

ARGUMENT

I. SECTION 3501 GOVERNS THE ADMISSIBILITY OF CONFESSIONS IN FEDERAL COURT.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court first prescribed a rule of procedure: police shall provide suspects in custody with four specified warnings, *see id.* at 444; and then set forth a rule of evidence: any statement stemming from the custodial interrogation of a suspect is conclusively presumed to be involuntary, and therefore inadmissible, unless the warnings first were given (or waived), *see id.* In *Miranda* itself, however, this Court made clear that *Miranda*'s warnings and its conclusive presumption that unwarned custodial confessions necessarily are coercive, are not mandated by the Constitution. Thus, this Court invited Congress and the States to create their own procedures to safeguard the privilege against compelled self-incrimination.

Congress acted on the Court's invitation and, following hearings and extensive floor debate, found that the facts upon which *Miranda*'s conclusive presumption is based are incorrect. Congress determined that an unwarned custodial confession is not necessarily the product of coercion and therefore does not have to be excluded from trial *per se*. Accordingly, acting pursuant to its legislative authority to establish rules of procedure and evidence for the federal courts, Congress enacted § 3501. In so doing, Congress codified the familiar *Miranda* warnings, but superseded *Miranda*'s conclusive presumption that unwarned custodial interrogations necessarily produce involuntary, and hence inadmissible, confessions.

A. The *Miranda* Rules Are Not Mandated by the Constitution.

The *Miranda* Court made the factual assumption that "without proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. Based upon this factual assumption, the Court held that any statement resulting from the custodial interrogation of a suspect would be *conclusively presumed* to be involuntary, and therefore inadmissible, unless express warnings first had been given (or waived). *See id.* at 479. Thus, the Court devised an "anticipatory remedy" for potential constitutional violations that might occur.

Since *Miranda*, however, this Court has held in numerous cases that an unwarned custodial confession is not tantamount to a Fifth Amendment violation and, therefore, does not have to be excluded from evidence on a *per se* basis. Stated differently, this Court effectively has come to reject *Miranda*'s conclusive presumption that unwarned custodial interrogations necessarily produce coerced confessions. As a result, this Court has admitted confessions into evidence, even though the suspect was in custody and *Miranda* warnings were not given. *See, e.g., New York v. Quarles*, 467 U.S. 649, 657 (1984) (recognizing a "public safety" exception to *Miranda*'s "prophylactic rule"); *Oregon v. Hass*, 420 U.S. 714, 722-23 (1975) (admitting unwarned statements to impeach testifying defendant at trial); *Michigan v. Tucker*, 417 U.S. 433, 445-47 (1974) (holding that the failure to apply *Miranda*-'s interrogation safeguards is not *per se* a constitutional violation and that a statement will not invariably be deemed "compelled" in violation of the Fifth Amendment simply because it was unwarned); *Harris v. New York*, 401 U.S. 222, 224 (1971) (admitting unwarned statements for impeachment); *see also Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (declining to suppress

fruits of an unwarned confession). Indeed, this Court frequently has observed that the *Miranda* rules are "prophylactic" in character and that an unwarned statement is not necessarily "compelled" in violation of the Fifth Amendment. *See, e.g.*, *Davis*, 512 U.S. at 457; *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987). These cases establish that statements resulting from an unwarned custodial interrogation do not necessarily have to be excluded from evidence – *i.e.*, they show that the conclusive presumption of *Miranda* is unsupportable.[4]

Conclusive presumptions, like the one set forth in *Miranda*, are "designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). The *Miranda* Court noted that pursuant to the conclusive presumption it established, "we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." 384 U.S. at 468. Such presumptions "require the Court to make broad generalizations. . . . Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977). Accordingly, conclusive presumptions are based upon judicial convenience, not on the Constitution.

At no point did the *Miranda* Court state that the conclusive presumption it set forth was constitutionally required. The *Miranda* Court acknowledged that the Constitution did not command this safeguard, *see Miranda*, 384 U.S. at 467; disclaimed

[4] Respondent admits as much. *See* Brief for the United States at 40, *Dickerson v. United States*, No. 99-5525 (filed Jan. 28, 2000) ("The Court's decisions in *Tucker* and later cases rest on the conclusion that . . . a violation of *Miranda*'s prophylactic rules does not necessarily produce statements that are themselves 'compelled.'").

any intent to create a "constitutional straightjacket," *id.*; referred to the warnings and the conclusive presumption as "procedural safeguards," *id.* at 444; and specifically invited Congress and the States "to develop their own safeguards for [protecting] the privilege," *id.* at 490. Moreover, the *Miranda* Court specifically recognized that the Constitution requires no "particular solution" for the regulation of police interrogations. *Id.* at 467. Thus, *Miranda*, by its own terms, did not purport to establish as a constitutional rule the conclusive presumption that a confession obtained without the warnings is presumed involuntary. *Cf. Vance v. Terrazas*, 444 U.S. 252, 266 (1980) (noting that rule set forth in *Nishikawa v. Dulles*, 356 U.S. 129 (1958), was non-constitutional in part because *Nishikawa* itself "did not purport to be a constitutional ruling").

Recently, this Court held in *Smith v. Robbins*, 120 S. Ct. 746 (2000), that the judicially-created *Anders* rule concerning the acceptable procedure for handling frivolous appeals of indigent criminal defendants, *see Anders v. California*, 386 U.S. 738 (1967), was not mandated by the Constitution. The *Anders* rule had been referred to by this Court in cases subsequent to *Anders* as a "prophylactic framework," *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), and a "safeguard" for protecting a defendant's right to appellate counsel, *Penson v. Ohio*, 488 U.S. 75, 80 (1988). Similarly, the judicially-created rules set forth in *Miranda*, which this Court repeatedly has referred to as being "prophylactic" and "procedural safeguards" protecting the constitutional right against self-incrimination, are not mandated by the Constitution. *Compare Smith*, 120 S. Ct. at 757 (stating that if the *Anders* rule was mandated by the Constitution, then a "straitjacket" would be placed upon the States' efforts "to experiment with solutions to difficult problems of policy"), *with Miranda*, 384 U.S. at 467 (disclaiming any intention to create a "constitutional straitjacket which will handicap sound efforts at reform"). In sum, this Court, both in *Miranda* itself and in subsequent cases, has made clear that

the procedural and evidentiary rules set forth in *Miranda* are rules of judicial convenience, not rules required by the Constitution.

B. In Enacting § 3501, Congress Determined That Unwarned Custodial Interrogations Do Not Necessarily Produce Compelled Confessions.

The conclusive presumption set forth in *Miranda* – that unwarned custodial confessions necessarily are the product of coercion and therefore are inadmissible – is based upon a factual assumption that "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures." 384 U.S. at 467. As support for this factual assumption,[5] the *Miranda* Court surveyed certain police manuals to obtain a general picture of police interrogation practices, reviewed the so-called "Wickersham Report" detailing police misconduct in the 1930s, and gleaned anecdotal evidence of police brutality from individual cases. *See id.* at 445-47.

Congress, however, determined that *Miranda*'s factual predicate for establishing the warnings and conclusive presumption was erroneous. Congress concluded that an unwarned custodial confession is not necessarily the product of coercion; as a result, Congress found that an unwarned confession did not necessarily need to be excluded from evidence. *See* 18 U.S.C. § 3501(b); *see also* S. Rep. No. 1097, 90th Cong., 2d Sess. 60 (1968) (asking

[5] Whether a suspect (or a class of future suspects) was coerced into confessing necessarily is a factual question. *See Haynes v. Washington*, 373 U.S. 503, 515 (1963) (discussing factual inquiry into "the effect of psychologically coercive pressures and inducements on the mind and will of an accused"); *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (noting that the "question in each case is whether the defendant's will was overborne at the time he confessed"); *see also* S. Rep. No. 1097, 90th Cong., 2d Sess. 58 (1968) (noting that "whether *in fact* a confession has been voluntarily made" is an "essential *fact* issue[]" (emphasis in original)).

rhetorically "if, *in fact*, custodial interrogation is not inherently coercive, how does the constitutional basis of the decision fare?"). In considering the legislation that became § 3501, Congress determined that *Miranda*'s factual assumption was not supported by the evidence.[6] In *Miranda*,

> the Court made a finding of fact that every custodial interrogation was inherently coercive and intimidating. And upon what basis is this conclusion drawn? It is . . . not by examination of the records of any police interrogation, not by drawing upon a developing consensus among the authorities in this area. . . . Rather, the Court notes that since "[i]nterrogation still takes place in privacy," there is a secrecy which "results in a gap in our knowledge as to what *in fact* goes on in the interrogation rooms."

S. Rep. No. 1097, 90th Cong., 2d Sess. 55 (1968) (quoting *Miranda*, 384 U.S. at 448); *see also id.* (noting that the "data supporting the [Court's] conclusion of inherent coercion in custodial interrogation were drawn solely from police manuals and texts which may or may not have been followed"); *see also id.* at 48 (finding in 1968 that "while coercive practices might have been approved 30 years ago, they have no place in modern police techniques" and that "the Court overreacted to defense claims that police brutality is widespread"). Congress' conclusion that

[6] The dissenting Justices make this abundantly clear. *See Miranda*, 384 U.S. at 499-500 (Clark, J., dissenting) (noting that "the examples of police brutality mentioned by the Court are rare exceptions to the thousands of cases that appear every year in the law reports"); *id.* at 515-26 (Harlan, J., dissenting) (noting that the majority "portrays the evils of normal police questioning in terms which I think are exaggerated"); *id.* at 536 (White, J., dissenting) (noting that "for all the Court's expounding on the menacing atmosphere of police interrogation procedures, it has failed to supply any foundation for the conclusions it draws or the measures it adopts").

Miranda's factual assumption was empirically wrong was based upon data collected from a broad range of sources and was the product of considerable deliberation and debate. *See generally* S. Rep. No. 1097, *supra*; Michael Edmund O'Neill, *Undoing* Miranda, 2000 B.Y.U. L. Rev. 101 (forthcoming 2000).

Unlike the Supreme Court, Congress is not bound by the parties' submissions, but instead can conduct hearings, canvass constituents and obtain information from a broad range of sources. With respect to gathering facts relating to custodial interrogations, "Congress, with its vastly superior fact-gathering powers, is in a much better position than the Court to formulate standards most likely to result in a correct determination, in a given case, of the issue of voluntariness of a confession." S. Rep. No. 1097, *supra* at 47 (statement of then-California Attorney General Thomas C. Lynch); *see also Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (noting that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions"); *Miranda*, 384 U.S. at 524 (Harlan, J., dissenting) (noting that "legislative reforms . . . have the vast advantage of empirical data and comprehensive study . . . [and] allow experimentation and use of solutions not open to the courts"). The *Miranda* Court seemed to have recognized its own inherent institutional limitations, as it specifically invited Congress and State legislatures "to develop their own safeguards for [protecting] the privilege" against self-incrimination. *Id.* at 490.

Congress was justified in superseding *Miranda*'s conclusive presumption when it enacted § 3501. This Court has held that conclusive presumptions "should not be applied . . . in situations where the generalization is incorrect as an empirical matter." *Coleman*, 501 U.S. at 737. In fact, "the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Id.* Here, according to congressional findings, the basis for *Miranda*'s conclusive presumption is incorrect as an empirical matter and the

presumption does not reach the correct result – *i.e.*, suppressing only coerced confessions – most of the time that it is applied.

It is well established that Congress may, in enacting legislation, substitute its own factual determinations for those of the Supreme Court. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), for example, this Court upheld § 4(e) of Voting Rights Act of 1965, which prohibited States from using English literacy tests to prevent certain non-English speaking minorities from voting. *See id.* at 653. Prior to the enactment of § 4(e), this Court had made the factual determination that a North Carolina statute that established English literacy as a voting prerequisite did not violate the Fourteenth Amendment's Equal Protection Clause. *See Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959). Congress, however, disagreed with the Court's factual determination in *Lassiter* and decided that the North Carolina law did, in fact, violate the Equal Protection Clause. To remedy that violation, Congress enacted § 4(e) of the Voting Rights Act of 1965. Opponents challenged the constitutionality of § 4(e), arguing that Congress could not act under its Fourteenth Amendment remedial authority unless the Court first determined that a constitutional violation had occurred. In the absence of such a violation, it was claimed, Congress had no authority to act.

In *Katzenbach*, the Court rejected that limited vision of Congress' authority. The Court instead determined that Congress had sufficient factual evidence before it to support a reasonable conclusion that § 4(e) was necessary to prevent a denial of equal protection. *See* 384 U.S. at 653. Congress simply made its own appraisal of the facts and reached a different factual conclusion than the Court; in turn, the Court deferred to Congress' judgment. *See id.* ("It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.").

Under the reasoning of *Katzenbach*, although Congress may not legislatively require the admission of an involuntary

confession in violation of the Fifth Amendment, it may rely on its "specially informed legislative competence," *id.* at 656, to make its own appraisal of the facts when enacting legislation in its "search for increasingly effective ways of protecting the individual while promoting efficient enforcement of our criminal laws," *Miranda*, 384 U.S. at 467. Indeed,

> because *Miranda* . . . was based upon a factual conclusion by the Justices, and [because] . . . Congress may undertake to mold constitutional policy by itself making factual determinations, it is proper and appropriate for Congress, by simple legislation, not to override *Miranda*, but to present to the Court a factual determination and conclusion different from that underpinning *Miranda*.

S. Rep. No. 1097, *supra*, at 63.

C. Section 3501 Reaffirms *Miranda*'s Basic Holding That Suspects in Custody Should Be Advised of Their Constitutional Rights.

Section 3501 provides that "a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C. § 3501(a). In determining the issue of voluntariness, the statute provides that the trial judge shall

> take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or

> knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel, and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

Id. at § 3501(b). Additionally, the statute provides that "[t]he presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession." *Id.*

Section 3501 was a progressive expansion of suspects' rights as compared to pre-*Miranda* law. First, the text of § 3501 reveals that Congress codified the familiar *Miranda* warnings,[7] which were not mandated prior to the *Miranda* decision, and specifically directed the trial court to consider whether the warnings were given. Congress thus took into account the testimony of congressional hearing witnesses who indicated that warnings of some sort were needed.

In several additional respects, Congress went well beyond pre-*Miranda* law when it enacted § 3501. The statute codified the requirement set forth by this Court in *Jackson v. Denno*, 378 U.S. 368 (1964), that while the judge shall admit voluntary confessions, he also "shall instruct the jury to give such weight to the confes-

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[7] *Compare id.* at § 3501(b)(3)-(4) (trial court to determine "whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him" and "whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel"), *with Miranda*, 384 U.S. at 444 ("Prior to any questioning, the person [in custody] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed").

sion as the jury feels it deserves under all the circumstances." 18 U.S.C. § 3501(a). Such an instruction permits the defendant to place the confession within its proper context and seek mitigation from the jury. The statute also requires the judge to consider whether the "defendant knew of the nature of the offense with which he was charged or of which he was suspected at the time of the confession." *Id.* at § 3501(b)(2). This requirement not only surpasses pre-*Miranda* law, but also current law, which holds that the failure of police to inform a suspect "of the subject matter of the interrogation could not affect [his] decision to waive his Fifth Amendment privilege in a constitutionally significant manner." *Colorado v. Spring*, 479 U.S. 564, 577 (1987). Section 3501 also is considerably broader than pre-*Miranda* law in recognizing a statutory right to counsel and making relevant whether a suspect "was without the assistance of counsel when questioned and when giving such confession." 18 U.S.C. § 3501(b)(5). Prior to *Miranda*, no general right to assistance of counsel during police interrogation existed.

Section 3501's declaration that the "presence or absence" of the warnings "*need not be conclusive* on the issue of the voluntariness of the confession," 18 U.S.C. § 3501(b) (emphasis added), makes clear that Congress rejected *Miranda*'s conclusive presumption that all unwarned confessions necessarily are compelled and therefore are inadmissible at trial. This Court, however, is free to read the statute as requiring courts to give strong consideration to the absence of warnings as a factor suggesting a confession was given involuntarily. In summary, the text of § 3501 reveals that Congress engaged in a reasoned legislative approach to craft procedural requirements that balance the need for efficient law enforcement against the protection of suspects' constitutional rights.

II. IF THIS COURT ACCEPTS THE ARGUMENTS ADVANCED BY PETITIONER AND RESPONDENT, THEN CONGRESS' AUTHORITY TO ESTABLISH RULES OF PROCEDURE AND EVIDENCE FOR FEDERAL COURTS WILL BE DIMINISHED.

The authority of Congress to establish rules of procedure and evidence for federal courts will be seriously diminished if this Court accepts the arguments advanced by petitioner and respondent. This Court repeatedly has held that Congress enjoys the power to supersede by legislation judicially-created rules of procedure and evidence that are not constitutionally required. *See, e.g., Vance*, 444 U.S. at 265 (upholding statute altering judicially-created evidentiary standard for expatriation proceedings because "the Constitution" did not require prior standard); *Palermo v. United States*, 360 U.S. 343, 345-48 (1959) (upholding federal statute establishing narrower criteria for disclosing *Jenks* material than prior non-constitutional rule established by Supreme Court).[8] "This power, rooted in the authority of Congress conferred by Art. I, § 8, cl. 9, of the Constitution to create inferior federal courts, is undoubted and has been frequently noted and sustained." *Vance*, 444 U.S. at 265-66 (citing cases). Accordingly, if a judicially-created rule is not required by the Constitution, then Congress may exercise its "congressional judgment," *see id.* at 266, and enact a

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[8] Amici do not dispute that, in the "absence of statutory provision," the Supreme Court has inherent supervisory power "to prescribe procedures for the administration of justice in the federal courts." *Palermo v. United States*, 360 U.S. 343, 345 (1959). Indeed, federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983). The power of the Supreme Court to prescribe non-constitutional rules of procedure and evidence for the federal courts, however, "exists only in the absence of a relevant Act of Congress." *Palermo*, 360 U.S. at 353 n.11 (citing *Funk v. United States*, 290 U.S. 371, 382 (1933), and *Gordon v. United States*, 344 U.S. 414, 418 (1953)).

statute that supersedes the non-constitutional rule.[9]

This Court's inherent, supervisory power over lower federal courts does not include the power to prescribe rules that circumvent or conflict with federal statutes. *See, e.g., Carlisle v. United States*, 517 U.S. 416, 425-26 (1996) (recognizing inherent power of federal courts to develop rules of criminal procedure unless the rules "circumvent or conflict with the Federal Rules of Civil Procedure"); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988) (federal courts have no authority "to disregard constitutional or statutory provisions"). Accordingly, if Congress decides "to exercise its power to define the rules that should govern . . . instead of leaving the matter to the lawmaking of the courts," *Palermo*, 360 U.S. at 348, then such congressional rules or statutes – not judicially-created rules – must prevail, *see id.*

Congress exercised its power to define the rules that should govern the admissibility of confessions in federal court when it enacted § 3501. Accordingly, § 3501 is "the statute governing the admissibility of confessions in federal prosecutions." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994). Petitioner and respondent, however, contend that the extra-constitutional, judicially-created rules this Court set forth in

[9] For example, although this Court has yet to consider the issue, federal courts have found that the very statute at issue in this case – § 3501 – superseded the non-constitutional rule regarding the admissibility of confessions obtained during an unreasonable delay between a defendant's arrest and initial appearance set forth by this Court in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957). *See United States v. Pugh*, 25 F.3d 669, 675 (8th Cir. 1994) (holding that § 3501 supersedes the *McNabb/Mallory* rule); *United States v. Christopher*, 956 F.2d 536, 538-39 (6th Cir.1991) (noting that § 3501, rather than *McNabb/Mallory*, governs the admissibility of confessions in federal court). Because the rule set forth in *McNabb* and *Mallory* is not required by the Constitution, the Eighth and Sixth Circuits concluded that Congress possessed the legislative authority to overrule both cases. *See Pugh*, 25 F.3d at 675; *Christopher*, 956 F.2d at 538-39.

Miranda should govern the admissibility of confessions in federal court. The procedural and evidentiary rules devised by the *Miranda* Court, however, are not mandated by the Constitution. *See* Section I.A., *supra*. If this Court accepts the arguments made by petitioner and respondent, then this Court will be empowered to exercise its supervisory authority to establish both constitutional and non-constitutional rules of procedure and evidence for the federal courts – and the legislative authority of Congress will be seriously diminished. Congress' authority to establish non-constitutional rules for the federal courts, and this Court's authority to devise such rules only in the "absence of statutory provision," *Palermo*, 360 U.S. at 345, should be upheld.

III. SECTION 3501 IS CONSTITUTIONAL.

Section 3501 is constitutional because it is "fully as effective," *Miranda*, 384 U.S. at 490, as the rules of procedure and evidence set forth in *Miranda* in safeguarding a suspect's constitutional rights while at the same time balancing society's legitimate interest in law enforcement. The statute codified the *Miranda* warnings, so law enforcement officers have every incentive to continue to advise suspects in custody of their constitutional rights. The statute also sets forth other factors not contemplated by *Miranda* that district courts are to consider in assessing whether the suspect was compelled to confess. In addition, civil and criminal remedies that did not exist when *Miranda* was decided provide remedies for suspects whose constitutional rights have been violated. Importantly, Congress, a co-equal branch of government, determined, after thoroughly considering the issue and after substantial debate, that the statute comports fully with the requirements of the Constitution. Congress' judgment in this regard is entitled to deference.

A. The Statute Does Not Lessen the Constitutional Protections Afforded to Suspects in Custody.

In *Miranda*, this Court stated that "Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as [the four warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." 384 U.S. at 490. Congress' decision to supersede the conclusive presumption created by *Miranda* does not "restrict, abrogate, or dilute," *Katzenbach*, 384 U.S. at 651 n.10, the protections afforded to suspects in custody by the Fifth Amendment, *cf. id.* (holding that although Congress may enact legislation to "enforce" the Equal Protection Clause that is more protective than the Equal Protection Clause itself, Congress has no power to enact legislation that would violate the Equal Protection Clause). Section 3501 does not lessen the protections afforded by the Fifth Amendment because it expressly states that only confessions that are "voluntarily given" are admissible in evidence. *See* 18 U.S.C. § 3501(a). Indeed, this Court has recognized that *Miranda*'s conclusive presumption goes beyond what is required by the Constitution to protect the privilege. That is why, under *Miranda*, even "patently voluntary statements . . . must be excluded" in some cases. *Elstad*, 470 U.S. at 307. In enacting § 3501, Congress simply recognized the need to offset the harmful effects created by *Miranda*'s conclusive presumption. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 523 (1979) (recognizing the harmful effects created by the use of mandatory conclusive presumptions in criminal cases).

Furthermore, Congress' decision to supersede *Miranda*'s conclusive presumption did not lessen the non-constitutional, prophylactic safeguards that protect the Fifth Amendment privilege against compelled self-incrimination. To the contrary, the "congressional remedies" adopted in § 3501 "constitute means which are not prohibited by, but are consistent 'with the letter and

spirit of the constitution.'" *Katzenbach*, 384 U.S. at 656. When enacting § 3501, Congress agreed that the four warnings set forth in *Miranda* are important safeguards in protecting the Fifth Amendment privilege against self-incrimination. Accordingly, § 3501 specifically lists the *Miranda* warnings as factors that a district court should consider when determining whether a confession was voluntarily given. *See* 18 U.S.C. § 3501(b)(3)-(4). Congress also believed that the suspect's knowledge regarding the offense for which he is being charged or investigated would be an important indicator of whether the suspect was compelled to make a statement, or confessed voluntarily. As a result, § 3501 instructs the trial judge to consider, in assessing voluntariness, whether the defendant "knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession." *Id.* at § 3501(b)(2). The *Miranda* decision includes no such prophylactic safeguard.

Section 3501 also provides that the trial judge shall "take into consideration all the circumstances surrounding the giving of the confession," *id.* at 3501(b), requiring trial courts to hold meaningful suppression hearings to assess whether, in fact, the suspect was compelled to confess in violation of the Constitution. This procedural safeguard – a full-blown suppression hearing – requires trial courts to consider whether, in fact, the suspect confessed voluntarily, not just whether the suspect received the warnings or waived his *Miranda* rights. *See* Mark Berger, *Compromise and Continuity:* Miranda *Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. Pitt. L. Rev. 1007, 1010 (1988) ("If *Miranda*'s prerequisites are followed, any resulting statement is virtually certain to be admissible at trial").

In addition to § 3501's safeguards, expanded criminal and civil penalties that were not in existence when *Miranda* was decided now operate to deter abusive police conduct and provide a remedy for individuals whose Fifth Amendment right against

self-incrimination has been violated. Federal civil rights statutes prohibit conspiracies that violate constitutional rights. *See* 42 U.S.C. § 1983; 18 U.S.C. §§ 241, 242. This Court recently held that "[b]eating to obtain a confession plainly violates" 18 U.S.C. § 242. *United States v. Lanier*, 520 U.S. 259, 271 (1997). Individuals may sue government officials directly for constitutional injuries suffered. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971).[10] And, Congress waived federal immunity from claims for deprivation of constitutional rights under the Federal Tort Claims Act ("FTCA"). *See* 28 U.S.C. § 2671. Specifically, individuals may sue under the FTCA for claims arising "out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h). Thus, victims may now sue both the government and individual law enforcement officers for abusive interrogation tactics. Section 3501, then, viewed in the proper context and considered within the landscape of legal remedies available to suspects whose rights have been violated, is constitutional because it substitutes other "fully effective" procedural safeguards for protecting the privilege against self-incrimination.

B. Congress' Determination That § 3501 Is Constitutional Is Entitled to Deference.

The Constitution imposes on all branches of government, not just the courts, a duty to comply with the Constitution. A necessary inference is that Congress is authorized to make its own judgments on constitutional issues, including whether a statute is constitutional. In fact, congressional findings can help support

[10] Moreover, victims of police overreaching can sue municipalities directly under 42 U.S.C. § 1983 for any unconstitutional policy. *See Monnell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). This option did not exist at the time of the *Miranda* decision. *See Monroe v. Pope*, 365 U.S. 167 (1961).

statutes that courts otherwise would invalidate on constitutional grounds. *See, e.g., United States v. Lopez*, 514 U.S. 549, 563 (1995) (noting that adequately drawn "congressional findings" might support a conclusion that "the activity in question substantially affected interstate commerce"); *Adarand Constr. Inc. v. Pena*, 515 U.S. 200, 236 (1995) (requiring Congress to justify affirmative action legislation with specific congressional findings); S. Rep. No. 1097, *supra*, at 62-63 (noting that "Congress on the basis of its determination of a factual issue has been allowed to mold constitutional policy").

Here, Congress held hearings, filed a comprehensive report, and engaged in extensive floor debate regarding whether § 3501 is constitutional. *See, e.g., Controlling Crime Through Effective Law Enforcement: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967); S. Rep. No. 1097, *supra*; 114 Cong. Rec. 11,200-07, 11,228-30, 11,234-35, 11,593-97, 11,611-13, 11,740-47, 11,891-907, 12,457-75, 12,477-81, 12,798-822, 12,829-36, 13,202-03, 13,652-56, 13,845-67, 13,989-14,084, 14,129-59, 14,162-84, 16,066-298 (1968). After doing so, it determined that the statute fully comports with the requirements of the Constitution. *See* S. Rep. No. 1097, *supra*, at 63; *see also* 18 U.S.C. § 3501.

In enacting § 3501, Congress did not trench on the judiciary's ultimate authority to construe the Constitution in a case or controversy before the Court. *See City of Boerne v. Flores*, 521 U.S. 507, 516-29 (1997); *see generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Nor did it attempt to alter the meaning of the Fifth Amendment itself. Instead, it merely altered the judicially-created prophylactic safeguards surrounding the Fifth Amendment. *Cf. Smith*, 120 S. Ct. at 757-58. Congress made no attempt to direct the outcome of a particular case or class of cases. Rather, it merely established rules that courts must use in determining whether a particular piece of evidence should be admitted at

trial.[11] Accordingly, § 3501 is distinguishable from the Religious Freedom Restoration Act ("RFRA"), which this Court held sought to impose Congress' interpretation of the First Amendment's Free Exercise Clause upon the Supreme Court. *See City of Boerne*, 521 U.S. at 519.[12]

In *City of Boerne*, this Court held that for a prophylactic measure to be upheld as truly remedial or preventive, there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 508. In assessing the "proportionality" of a particular measure, courts are to consider whether (1) the record demonstrates "a pattern of constitutional violations" and (2) the measure is "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Kimel v. Florida Bd. of Regents*, 120

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[11] In enacting § 3501, Congress simply

> mandated that voluntary statements be admitted despite noncompliance with *Miranda*'s rules. Applying *Miranda* in such a case accordingly requires a federal court to violate an Act of Congress. Complying with the Act would involve no violation of a constitutional right of the defendant.

Office of Legal Policy, *Report to the Attorney General on the Law of Pre-Trial Interrogation: Truth in Criminal Justice* at 96 (Feb. 12, 1986), *reprinted in* 22 U. Mich. J.L. Reform 437 (1989).

[12] Moreover, § 3501 is distinguishable from RFRA because *Miranda*, unlike *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the case to which RFRA responded, stressed that if it were "shown other procedures which are at least as effective in appraising accused persons of their right of silence and in assuring a continuous opportunity to exercise it," then the *Miranda* rules could be dispensed with altogether. 384 U.S. at 467. The *Miranda* Court expressly invited Congress and the States to act. *See id.* Presumably, it expected some sort of legislative response to its decision.

S. Ct. 631, 644, 647 (2000) (quoting *City of Boerne*, 521 U.S. at 532). The requirement that prophylactic measures be proportional applies equally to congressionally enacted measures and to those created by courts in the exercise of their supervisory authority. If this were not so, then Congress' power to enact prophylactic measures by legislation would be narrower than the Court's power to adopt prophylactic measures pursuant to its supervisory power. In fact, the reverse may very well be true. *Compare Katzenbach*, 384 U.S. at 649-50 (1966) (upholding Congress' prophylactic ban on literacy tests as prerequisite to voting), *with Lassiter*, 360 U.S. at 53 (1959) (refusing to strike down literacy tests under Court's authority to enforce Equal Protection Clause). Thus, neither Congress nor the Supreme Court has the authority to establish sweeping prophylactic measures that are disproportionate to the actual or potential injury.

The *Miranda* Court, however, established prophylactic measures – the now-familiar warnings and the automatic exclusion from evidence of unwarned confessions – that are not congruent or proportional to the injury to be prevented or remedied – the introduction into evidence of a confession compelled in violation of the Fifth Amendment. First, the record before the *Miranda* Court did not demonstrate a "pattern of constitutional violations." *Kimel*, 120 S. Ct. at 644. To the contrary, the record before the Court failed to demonstrate that police consistently force suspects to confess and then introduce such compelled confessions into evidence in violation of the Fifth Amendment. *See* Section I.B., *supra*. The Court, in fact, admitted that such occurrences "are undoubtedly the exception now." *Miranda*, 384 U.S. at 447. Second, *Miranda*'s irrebuttable presumption is "so out of proportion . . . that it cannot be understood as responsive to . . . unconstitutional behavior." *Kimel*, 120 S. Ct. at 647. The automatic exclusion of unwarned confessions is disproportionate because it does not reach the correct result – suppressing only coerced confessions – most of the time that it is applied. *See* Section I.B.,

supra. As such, *Miranda* fails the test this Court outlined in *City of Boerne* for distinguishing between permissible prophylactic measures adopted to remedy or prevent unconstitutional actions and impermissible attempts to rewrite constitutional protections disguised as prophylactic remedial measures. *See* 521 U.S. at 516-29. Given the absence in the record of a pattern of constitutional violations and the disproportionate nature of the rule automatically excluding unwarned confessions, Congress itself could not constitutionally have enacted legislation adopting *Miranda*'s prophylactic measures.

Unlike the *Miranda* Court (and unlike Congress with respect to RFRA), Congress did not adopt sweeping, disproportionate prophylactic measures when it enacted § 3501. Instead, Congress struck a reasonable balance between the injury to be prevented or remedied and the means adopted to that end. *See* Section I.C., *supra*; *cf. Katzenbach*, 384 U.S. at 649-50 (holding that Congress' ban of literacy tests was proportional to potential constitutional injury). Because Congress, exercising its independent judgment, determined that the statute does not run afoul of the Constitution, and because § 3501, in fact, does not lessen the constitutional protections afforded to suspects in custody, this Court should affirm the judgment below and uphold the constitutionality of the statute.

CONCLUSION

For the reasons set forth herein, Amici respectfully request that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

Respectfully submitted,

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