No. 99-5525

IN THE
Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

JOHN T. PHILIPSBORN
LAW OFFICES OF JOHN T. PHILIPSBORN
507 Polk Street, Suite 250
San Francisco, CA 94103
(415) 771-3801
Counsel for *Amicus Curiae* California Attorneys for Criminal Justice

PAUL M. SMITH *
DEANNE E. MAYNARD
KIAL S. YOUNG
MATTHEW HERSH
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

LISA B. KEMLER
ZWERLING & KEMLER, P.C.
108 N. Alfred Street
P.O. Box 20900
Alexandria, VA 22320
(703) 684-8000
Counsel for *Amicus Curiae* National Association of Criminal Defense Lawyers

* Counsel of Record

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors.[1/] Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. Because the Fourth Circuit's decision deprives citizens in that Circuit of their Fifth Amendment right against self-incrimination, the NACDL respectfully submits this brief *amicus curiae* in support of reversal.

California Attorneys for Criminal Justice ("CACJ") is the largest organization of criminal defense lawyers in California. Its membership includes both public defenders and privately employed criminal defense lawyers. In the past twenty-five years, CACJ has appeared as *amicus curiae* not only in this Court, but in other courts throughout the United States in cases important to the administration of justice. Recently, CACJ has been involved in litigation related to the issues presented in this case. Through its involvement in *California Atty's for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), *amended by,* No. 97-56499, __ F.3d __, 2000 WL 1639 (9th Cir. Jan. 3, 2000), and *California v. Peevy*, 953 P.2d 1212 (Cal.), *cert. denied*, 119 S. Ct. 595 (1998), the organization has attempted to bring to light certain law

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1/ Letters of consent have been filed with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for a party authored this brief in whole or part and no person or entity, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

enforcement practices apparently designed to attempt to circumvent *Miranda v. Arizona*.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court is the final arbiter of the meaning of the Constitution. In *Miranda v. Arizona*, the Court determined that custodial interrogation is inherently coercive, that the Fifth Amendment requires procedural protections "to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored," and that in the absence of such protections, no statements obtained can constitutionally be admitted into evidence. 384 U.S. 436, 478-79 (1966). Although the specific language of the "*Miranda* warnings" is not constitutionally required, *Miranda*'s requirement of *some* protection prior to interrogation is a constitutional holding. That *Miranda*'s requirement of procedural safeguards operates as a prophylactic of constitutional rights in no way undermines *Miranda*'s constitutional stature, and is similar to protective measures that the Court has determined are required by the Constitution to secure other constitutional rights. None of the cases relied upon by the Fourth Circuit undermines this conclusion.

Congress cannot override *Miranda*'s interpretation of what the Constitution requires. Section 3501 of Title 18 attempts to do just that. As the Fourth Circuit acknowledged, Section 3501 attempts to reinstate the "totality of the circumstances" case-by-case test that existed prior to *Miranda*, Pet. App. 12a; it does not create procedural safeguards that are equally effective to the warnings suggested in *Miranda*. Because Section 3501 would allow admission of custodial statements obtained in the absence of the procedural protections required by *Miranda*'s interpretation of the Constitution -- as

evidenced by the Fourth Circuit's decision in this case -- the statute is unconstitutional.

The Court should not overturn *Miranda*. Some procedural safeguards at the time of custodial interrogation continue to be essential to protect the Fifth Amendment privilege in the broad run of cases. The warnings suggested by the *Miranda* decision to fulfill that procedural requirement are easy to administer and are ones on which all participants in the criminal justice system have come to rely.

ARGUMENT

I. SECTION 3501 WAS NOT A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL AUTHORITY

A. *Miranda* Held That Some Procedural Safeguards Are Constitutionally Required Prior to Custodial Interrogation

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. As this Court recently reaffirmed, the privilege against self-incrimination reflects

> many of our fundamental values and most notable aspirations: . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; . . . our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" . . .

> and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Withrow v. Williams, 507 U.S. 680, 691-92 (1993) (citations omitted). As such, the Fifth Amendment preserves, "by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change." *Bram v. United States*, 168 U.S. 532, 544 (1897).

In *Miranda v. Arizona*, the Court held that the prosecution could not use any statement from custodial interrogation of the defendant unless it could demonstrate "the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. The Court reviewed the historical development of the privilege against self-incrimination and concluded that "the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Id.* at 460 (citation and quotation omitted). The Court determined that for this guarantee to be realized during the "inherently compelling pressures" of custodial interrogation, "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* at 467. Although *Miranda* explicitly recognized that the Constitution did not require the specific language of its suggested warnings, the Court nevertheless made clear that the Constitution did require *some* equally effective measures prior to custodial interrogation if the statements were to be used against the accused. *Id.* Accordingly, *Miranda*'s constitutional holding is not the now-familiar warnings themselves, but the

requirement of some such procedural safeguards to protect against the inherently coercive atmosphere of custodial interrogation.

The Fourth Circuit was therefore incorrect to construe the entire *Miranda* decision as merely a rule of "evidence and procedure" that could be overruled by an Act of Congress. Pet. App. 13a-14a. For one, contrary to the Fourth Circuit's assertion, *id.* at 14a, the *Miranda* Court did not fail to state a constitutional basis for its requirement of some procedural safeguards. Rather, the Court stated explicitly -- in the very first paragraph of its opinion -- that its decision was rooted in the "Fifth Amendment to the Constitution." 384 U.S. at 439. Indeed, the Court took pains throughout its opinion to underscore the constitutional values at stake, noting its "concern for adequate safeguards to protect precious Fifth Amendment rights," *id.* at 457, describing "the Fifth Amendment standard for compulsion which we implement today," *id.* at 461, and observing that its safeguards were necessary "to insure that what was proclaimed in the Constitution had not become but a form of words." *Id.* at 444 (citation and quotation omitted).

Nor is the constitutional nature of *Miranda*'s requirement that there be some procedural safeguards undercut by its suggestion that States develop their own safeguards to protect the privilege against self-incrimination, as the Fourth Circuit erroneously asserted. Pet. App. 14a. As explained above, although the Court did recognize that the Constitution does not require "adherence to any particular solution," 384 U.S. at 467, the Court was quick to point out that its safeguards were to be observed "unless we are shown other procedures which are *at least as effective* in apprising accused persons of their right of silence and in assuring a continuous opportunity

to exercise it." *Id.* (emphasis added). To the *Miranda* Court, there was little doubt that the judiciary, rather than the legislature, would have the final word as to whether any particular safeguards were constitutionally sufficient: "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." *Id.* at 491.

That *Miranda* read the Constitution to require procedural safeguards is further demonstrated by this Court's imposition of *Miranda* upon the States. Indeed, three of the four cases decided in the *Miranda* opinion itself arose out of State-court decisions. *See id.* at 491-99. Since then, the Court has ordered the exclusion of evidence on *Miranda* grounds in at least seven State cases,[2/] while applying *Miranda* (though eventually permitting the use of challenged evidence) in nearly two dozen others.[3/] The Fourth Circuit did not attempt to

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2/ *See, e.g., Stansbury v. California*, 511 U.S. 318 (1994); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Smith v. Illinois*, 469 U.S. 91 (1984); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Orozco v. Texas*, 394 U.S. 324 (1969).

3/ *See, e.g., McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Illinois v. Perkins*, 496 U.S. 292 (1990); *Arizona v. Mauro*, 481 U.S. 520 (1987); *Colorado v. Spring*, 479 U.S. 564 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Colorado v. Connelly*, 479 U.S. 157 (1986); *Oregon v. Elstad*, 470 U.S. 298 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Minnesota v. Murphy*, 465 U.S. 420 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *California v. Prysock*, 453 U.S. 355 (1981); *Rhode Island v. Innis*, 446 U.S. 291 (1980); *Fare v. Michael C.*, 442 U.S. 707 (1979); *North Carolina v. Butler*, 441 U.S. 369 (1979); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Michigan v. Mosley*, 423 U.S. 96 (1975); *Oregon v. Haas*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971); *Johnson v. New Jersey*, 384 U.S. 719 (1966). Though the Court held in each of these cases that *Miranda* did not bar the use of the challenged evidence, at no time did the Court suggest that it lacked the power to apply *Miranda* to a State-court decision.

explain how *Miranda* could have been applied so routinely to the States if the requirement of procedural safeguards were not constitutionally compelled, acknowledging only that it raised "an interesting academic question." Pet. App. 24a n.21. But far from being an "academic question," the matter is rather one of long-settled constitutional law. As this Court has made clear on many occasions, "[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of *constitutional dimension*." *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (emphasis added).[4/] The meaning of these words could not be more plain: *Miranda*'s requirement of safeguards must be rooted in the Constitution, or the States would be free to ignore it.

Finally, the constitutional nature of *Miranda*'s requirement of procedural safeguards is further evidenced by the Court's consideration of *Miranda* claims on federal habeas review. The Court has entertained a number of habeas claims on the basis of *Miranda*, the latest as recently as 1995.[5/]

4/ *See also Harris v. Rivera*, 454 U.S. 339, 344-45 (1981) ("Federal judges have no general supervisory power over state trial judges; they may not require the observance of any special procedures except when necessary to assure compliance with the dictates of the Federal Constitution."); *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) (for cases tried in State courts, "our authority is limited to enforcing the commands of the United States Constitution").

5/ *Thompson v. Keohane*, 516 U.S. 99 (1995). *See also Withrow v. Williams*, 507 U.S. 680 (1993); *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Moran v. Burbine*, 475 U.S. 412 (1986); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Estelle v. Smith*, 451 U.S. 454 (1981); *Michigan v. Tucker*, 417

Though the application of *Miranda* to habeas claims has occasionally brooked dissent, *see, e.g.*, *Withrow*, 507 U.S. at 650-57 (O'Connor, J., concurring in part and dissenting in part), no Justice of this Court has ever suggested that habeas petitioners who were denied adequate safeguards during the course of their custodial interrogations are not "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The reason for this is once again clear: *Miranda*'s requirement of some procedural safeguards is one of constitutional origin.

B. The "Prophylactic" Nature of *Miranda*'s Holding Does Not Undermine its Constitutional Stature

The Fourth Circuit mistakenly relied on this Court's occasional suggestion that the *Miranda* requirement of procedural safeguards is not a constitutional "right," but instead functions as a "prophylactic" protecting underlying Fifth Amendment rights. Pet. App. 14a. The Court has indeed recognized that excluding confessions obtained in the absence of the required procedural protections can, on occasion, overprotect the right against compelled self-incrimination. *See Oregon v. Elstad*, 470 U.S. 298, 307 (1985). But the Court also has recognized that, absent some such procedural safeguards, it is inevitable that the Fifth Amendment rights of many persons will be violated. Contrary to the conclusion of the Fourth Circuit, *Miranda* is no less a *constitutional* requirement

U.S. 433 (1974); *Frazier v. Cupp*, 394 U.S. 731 (1969).

merely because it is designed to protect constitutional rights in the broad run of cases.[6/]

Although *Miranda* itself described its requirement as "procedural safeguards," 384 U.S. at 444, the *Miranda* Court clearly believed its "prophylaxes" were required by the Constitution. Given the inherently coercive nature of custodial interrogation, *Miranda* erected under the Fifth Amendment an irrebuttable "presumption of compulsion" in the absence of *ex ante* procedures to protect the privilege against self-incrimination. *Elstad*, 470 U.S. at 307. It did so -- despite the fact that some custodial confessions of some individuals may not in fact be "coerced," even without warnings or other comparable procedural safeguards -- based on a judgment about the institutional competence of the courts to assess compulsion on a *post hoc* basis. The Court recognized that, in the absence of procedures to ensure notice of the applicable rights, the courts would frequently fail to identify those cases where subtle coercion was exploited by the police.

The requirement of prophylactic safeguards in *Miranda* is consistent with many other constitutional decisions in which the Court, based on its assessment of practical realities, has demanded broad-based standards or procedures to ensure the vindication of constitutional rights. For example, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court interpreted the First Amendment to require, as a "safeguard[]" to ensure the protection of the constitutional right to freedom of speech, that a public official prove "actual malice" to recover

6/ *See, e.g.*, Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 153-62 (1998); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435 (1987); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988).

damages for a defamatory falsehood. *See id.* at 264-65, 279. In so holding, the Court rejected a rule that would have allowed damages unless the speaker could prove the truth of his factual assertions, *i.e.*, that his speech was actually protected by the First Amendment. *See id.*; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("there is no constitutional value in false statements of fact"). The Court did so based on its empirical judgment that, "[u]nder such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Sullivan*, 376 U.S. at 279.

Analogous to its holding in *Miranda*, the Court concluded that the "breathing space" afforded by its "actual malice" test, *see id.* at 271-72 -- which necessarily overprotects First Amendment rights *in fact* -- was *necessary* "to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct." *Id.* at 264-65. This prophylactic rule is based in part on the practical limitations of attempting to judge each case individually to determine whether the libel action would infringe on First Amendment rights. *See Gertz*, 418 U.S. at 343-44 ("Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application."). The prophylactic nature of the *New York Times v. Sullivan* holding, however, does not alter its constitutional status, because the Court has recognized that, without this protection, constitutional rights will frequently be trampled.

Similarly, in a line of cases beginning with *Lovell v. City of Griffin*, 303 U.S. 444 (1938), the Court has held that, in the absence of "narrow, objective, and definite standards to guide . . . licensing authorit[ies]," the regulation of speech violates the First Amendment, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969), even if *in fact* that speech might have been properly subject to regulation. *See id.* at 151 ("[A] person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license."). This rule is based in part on the Court's empirical assessment that, in practice, licensing officials who exercise standardless discretion are likely to infringe on constitutionally protected speech. *See Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 (1965) (noting that a standardless statute is "[i]nstinct with . . . ever-present potential for arbitrarily suppressing First Amendment liberties"). *See also Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("[O]ne has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license"); *Marcus v. Search Warrants*, 367 U.S. 717, 731 (1961) ("Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled"); *Speiser v. Randall*, 357 U.S. 513, 524 (1958) ("[C]riminal advocacy can be suppressed or deterred, but it is clear that the State which attempts to do so must provide procedures amply adequate to safeguard against invasion of speech which the Constitution protects") (citations omitted).

As *Miranda* illustrates, the Court has seen a need for similar prophylactic rules in the area of constitutional criminal

procedure. Subsequent to *Miranda*, for example, the Court imposed an additional protective layer to the privilege against self-incrimination in the case of *Edwards v. Arizona*, 451 U.S. 477 (1981), holding that a suspect who has asked for counsel will not be deemed to have relinquished that right unless the suspect "initiates further communication, exchanges or conversation" with authorities. *Id.* at 485. A similar protective measure governs the Sixth Amendment right to counsel, which may not be deemed waived unless the suspect has initiated a conversation with the police. *Michigan v. Jackson*, 475 U.S. 625 (1986).[7/] Other examples include the conclusive presumption that an indigent has a need for appointed counsel, regardless of his maturity, background, or education, *Gideon v. Wainwright*, 372 U.S. 335 (1963), the presumption that a judge who imposes a harsher sentence on retrial after reversal of an earlier conviction has been motivated by vindictiveness, *North Carolina v. Pearce*, 395 U.S. 711 (1969), and a like presumption regarding prosecutors who charge a more serious offense at a defendant's rightful retrial. *Blackledge v. Perry*, 417 U.S. 21 (1974).[8/]

7/ The Sixth Amendment is also the source of the presumption, derived from the Confrontation Clause, that no limiting instruction can cure the introduction into evidence of a nontestifying codefendant's confession in a joint trial. *Bruton v. United States*, 391 U.S. 123 (1968).

8/ Interestingly, the Court also adhered to a number of prophylactic rules in evaluating claims of coerced confessions under the Fourteenth Amendment's "involuntariness" standard, which prior to *Miranda* was the primary source of regulation of State custodial interrogations. *See, e.g., Ashcraft v. Tennessee*, 322 U.S. 143, 154 n.9 (1944) (holding that the questioning of a suspect for 36 hours straight "preclude[s] a holding that he acted voluntarily" in confessing, irrespective of any other factor); *Stein v. New York*, 346 U.S. 156, 182 (1953) ("Physical violence or threat of it by the custodian of a prisoner during detention . . . invalidates confessions that would otherwise be convincing. . . . When present, there is no need to weigh or measure its effects on the will of the individual victim."), *overruled on other grounds, Jackson v. Denno*, 378 U.S. 368 (1964).

The empirical assessments made in *Miranda* are no different, and that decision's prophylactic safeguards are no less constitutionally required. Whatever the procedures are called, "[a] major purpose of the Court's opinion in *Miranda v. Arizona* . . . was 'to give concrete *constitutional* guidelines for law enforcement agencies and courts to follow.'" *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) (emphasis added). As the *Miranda* Court explained, without such specific safeguards implementing the Constitution, "[i]ts general principles would have little value and be converted by precedent into impotent and lifeless formulas." 384 U.S. at 443 (citation and quotation omitted). As such, the holding in *Miranda* is precisely the type of constitutional interpretation envisioned in *Marbury v. Madison*. *See* 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

C. Subsequent Supreme Court Cases Do Not Undermine *Miranda*'s Constitutional Status

The Fourth Circuit relied upon several Supreme Court cases subsequent to *Miranda* for its conclusion that "it is certainly well established that the failure to deliver *Miranda* warnings is not itself a constitutional violation." Pet. App. 14a-16a (discussing *Harris v. New York*, 401 U.S. 222 (1971); *Michigan v. Tucker*, 417 U.S. 433 (1974); *New York v. Quarles*, 467 U.S. 653 (1984); and *Oregon v. Elstad*, 470 U.S. 298 (1985)) (citation omitted). But the cases cited in no way suggest that *Miranda* can be legislatively overruled.

None of the holdings in these cases poses any threat at all to the central holding of *Miranda*, which is that statements taken without procedural protections may not be used in the State's case in chief. In *Harris*, the Court allowed such statements to be used for impeachment purposes, 401 U.S. at 225-26, but the Court was careful to reaffirm explicitly the *Miranda* Court's holding that these statements could never be used in the case in chief. *Id.* at 224. In *Tucker* and *Elstad* the Court held that evidence constituting the "fruit" of a confession taken from a suspect during an interrogation lacking adequate safeguards could properly be admitted against the suspect in question;[9/] in both cases, again, the Court was careful to make clear that the confession *itself* was not permitted in the prosecution's case in chief. *Tucker*, 417 U.S. at 445; *Elstad*, 470 U.S. at 306 n.1, 317. And in *Quarles*, the Court held that procedural safeguards were not necessary where the custodial questioning of a suspect was compelled by "overriding considerations of public safety," 467 U.S. at 651; the Court made clear that its exception was intended to be a narrow one. *Id.* at 659 n.8.

Nor do any of these cases, when read in their proper light, cast doubt on the factual predicate of *Miranda* -- the recognition that custodial interrogations are inherently coercive. *See* 384 U.S. at 458. Instead, the Court appears to have relied on a practical assessment that the use of confessions

9/ In *Tucker* the Court held that where a suspect's confession in violation of *Miranda* led police to a witness, it was permissible for the State to introduce the testimony of that witness. *Tucker*, 417 U.S. at 450. In *Elstad* the Court held that where a suspect confessed prior to being given *Miranda* warnings, the police could properly warn the suspect under *Miranda* and then obtain a usable confession, even if the second confession was in effect a "fruit" of the first. *Elstad*, 470 U.S. at 318.

to impeach or for their evidentiary "fruits" is sufficiently removed from the core concerns of the Fifth Amendment that *Miranda* need not be extended that far. In essence, the Court has recognized that the constitutional requirements governing custodial confessions cannot be applied without reference to the uses to which the government intends to put the confessions. *See Quarles*, 467 U.S. at 668-69 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("The *Miranda* decision quite practically does not express any societal interest in having those warnings administered for their own sake. Rather, the warnings and waiver are only required to ensure that 'testimony' used against the accused at trial is voluntarily given."). It is one thing to erect a prophylactic rule barring use of a potentially coerced confession as direct evidence against the speaker. That is a quintessential form of self-incrimination. But the constitutional calculus is quite different when the use of the confession is much more indirect.[10/]

D. The Theory of "Constitutional Common Law" Provides No Support for the Legislative Overruling of *Miranda*

The Court should decline the invitation posed by *amicus curiae* Washington Legal Foundation to hold that *Miranda* is a form of "constitutional common law" that can be

10/ As noted, the Fourth Circuit also commented that the Court cast doubt on *Miranda*'s constitutional basis when it recognized a "public safety" exception in *Quarles*. But public safety exceptions are a regular appendage to many well-established constitutional rights. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (finding an exigent-circumstances exception to the warrant requirement of the Fourth Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (setting out the terms by which a State may abridge the right of free speech in order to avoid "imminent lawless action").

legislatively overruled. *Brief Amicus Curiae of Washington Legal Foundation in Partial Support of Petitioner*, at 9 (filed Nov. 1, 1999) (citation omitted) ("WLF Brief"). Drawing largely on a twenty-five-year-old law review article,[11/] proponents of this theory assert that so-called "constitutional common law," as a form of judge-made law designed to advance constitutional values, shares the same ranking as federal statutes in our constitutional framework -- capable of being imposed upon the States, but subject to revision at any time by Congress. To its proponents, this argument explains at one stroke why *Miranda* has been applied to the States and why Congress, in the form of Section 3501, was empowered to overrule it.

But this argument either proves too little or proves too much. To the extent that it merely recognizes the power of this Court to elaborate prophylactic rules needed to enforce the Constitution, *amici* agree that such a power exists, and have already set forth the reasons why Congress (although perhaps empowered to suggest alternative prophylactic rules) cannot simply repeal them. But to the extent the argument is that federal courts can make up common law, subject to legislative repeal, in any area generally touched by the Constitution, it is simply wrong.

Not even the article relied upon by *amicus* goes that far. It recognized that, even if the specific language of the warnings suggested by the *Miranda* Court are themselves accurately described as "constitutional common law," "*Miranda* . . . holds that 'adequate' safeguards are constitutionally required, and

11/ Henry P. Monaghan, *Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975).

this puts a check on what Congress may do." Henry P. Monaghan, *Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1, 42 n.217 (1975). Thus understood, the "constitutional common law" theory is of no more service to *amicus curiae* than the *Miranda* opinion itself -- which permits legislative experimentation so long as suitable protections remain.

Moreover, acceptance of *amicus curiae*'s vision of "constitutional common law" would represent a dangerous departure from long-accepted constitutional principles. It would upset the federal-state balance by providing the Court with an almost unrestrained power to meddle in affairs previously thought to be within the purview of the States. It would upset the separation-of-powers doctrine by blurring the lines between judicial and legislative authority, defying the Framers' vision of distinct spheres of authority. *See The Federalist No. 51* (J. Madison). And by granting the legislature a license to overrule decisions of this Court, it would risk undermining the respect for judicial authority and finality that *Marbury v. Madison* instilled in the Republic nearly two centuries ago. The Court should reject this impoverished vision of its constitutional role, and read *Miranda* for what it is: a decision resting on, interpreting, and construing the Constitution. Neither common sense nor constitutional history admits of any principled alternative.[12/]

12/ *See* Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv. L. Rev. 1117 (1978).

E. Section 3501 Is an Unconstitutional Attempt to Overrule the Constitutional Holding of *Miranda*, Not a Procedural Safeguard That Is "At Least as Effective" as Those Suggested in *Miranda*

Contrary to the suggestion of *amicus curiae*, WLF Brief at 13, Section 3501 cannot be the sort of "alternative[] for protecting the privilege" that the *Miranda* decision sanctioned. As *Miranda* makes clear, for such an alternative to be constitutionally sufficient, it must operate *prior* to the custodial interrogation and must be "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it" as the warnings suggested in that case. *Miranda*, 384 U.S. at 467.[13/] Section 3501, however, does not (and does not even purport to) create *any* procedural safeguard at the time of the custodial interrogation. To the contrary, as the Fourth Circuit recognized, Section 3501 attempts to restore the "case-by-case determination" standard used prior to *Miranda*. Pet. App. 12a; *see* S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2134-35, 2137-38.[14/]

13/ *See id.* at 444 ("other fully effective means . . . to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it"); *id.* at 445 ("a full and effective warning of his rights at the outset of the interrogation process"); *id.* at 457 ("appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice"); *id.* at 467 ("the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored").

14/ This case is thus not like *Smith v. Robbins*, No. 98-1037, 2000 WL 33469 (U.S. Jan. 19, 2000), decided earlier this Term. There, California had adopted an alternative procedural safeguard to the one suggested by the Court in *Anders v. California*, 386 U.S. 738 (1967); here, Section 3501 creates *no* procedural safeguard.

Under the terms of Section 3501, the admissibility of all confessions, including ones made during custodial interrogation, would be based on a judicial *post hoc* review of the "totality of the circumstances." The majority in *Miranda*, however, rejected this standard as constitutionally insufficient to determine the admissibility of statements made while in custody. *See* 384 U.S. at 468-69 (noting that a *post hoc* consideration of the sort conducted under the "totality of the circumstances" inquiry "can never be more than speculation" and concluding that, in any event, "a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time"). Because, as established above, the requirement of some procedural protection at the time of interrogation represents the Supreme Court's interpretation of what the Constitution requires, the statute is beyond the power of Congress, *see City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), and is thereby void. *See Marbury*, 5 U.S. (1 Cranch) at 180 ("a law repugnant to the constitution is void").[15/]

15/ Indeed, many of the principal sponsors of Section 3501 appeared to view their legislation as an effort to persuade the Court to revisit *Miranda* rather than an attempt to overrule it directly. *See* Yale Kamisar, *Can (Did) Congress 'Overrule' Miranda?*, 85 Cornell L. Rev. (forthcoming April 2000) (manuscript at 19-20, lodged with the Court).

II. THIS COURT SHOULD NOT REVISIT *MIRANDA*'S REQUIREMENT OF PROCEDURAL SAFEGUARDS

Miranda's requirement of procedural safeguards, in conjunction with its suggested warnings, has provided, and continues to provide, an eminently workable rule under which suspects and law enforcement alike are informed, respectively, of their fundamental rights and what conduct is required of them. Experience has not borne out the need for reexamination of the premises underlying *Miranda*'s exclusionary rule -- indeed, the coercive nature of custodial interrogation that prompted the Court to enunciate that rule simply has not diminished over time. Moreover, provision of some procedural safeguards prior to custodial interrogation has come to be viewed as an essential component of fair prosecutorial procedure. Any retreat from those safeguards would undermine public confidence in our criminal justice system and in this Court's commitment to vindicating the fundamental rights of citizens.

The principles of *stare decisis* weigh decidedly in favor of reaffirming *Miranda*. *Stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). Adherence to this doctrine is duly recognized as the preferred course, because it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Stare decisis* is not an "inexorable command," *id.* at 828, and admittedly is less rigidly applied in

constitutional cases such as this one, *see id.*; *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). Nonetheless, *stare decisis* is firmly rooted in the rule of law, and "even in constitutional cases, the doctrine carries such persuasive force that [this Court] has always required a departure from precedent to be supported by 'special justification.'" *United States v. International Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996) (quoting *Payne*, 501 U.S. at 842 (Souter, J. concurring)).

Among the factors the Court considers in determining whether to revisit precedent are "whether the rule has proven intolerable simply in defying practical workability," "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation," "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," and "whether the facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 854-55. None of these factors supports -- let alone compels -- reexamination of *Miranda* today.

A. *Miranda* Sets Forth a Workable Requirement

There can be no serious dispute that *Miranda* sets forth a workable requirement, particularly given its suggestion of specific warnings that are sufficient to meet that requirement. *See Miranda*, 384 U.S. at 444-45. Those warnings -- or some equally effective substitute -- must be provided prior to custodial interrogation; if they are not, any statements obtained will be excluded from proof for the government's case at

trial.[16/] The warnings are easy for law enforcement to administer. *See Berkemer v. McCarty*, 468 U.S. 420, 430 (1984) (extolling merit of ease and clarity of *Miranda*'s application); *Roberson*, 486 U.S. at 680 (same). Indeed, the government itself has acknowledged that "[f]ederal agents do not find it difficult, in general, to read a suspect his rights and determine whether the suspect wishes to answer questions." Pet. Resp. 21. Further telling evidence of *Miranda*'s workability is that the Federal Bureau of Investigation made use of substantially similar warnings even before *Miranda* required some such procedural safeguards. *See id.*; *Miranda*, 384 U.S. at 483-84 & n.54.

This Court has repeatedly agreed. Most recently, in *Withrow*, 507 U.S. at 695, the Court observed: "We must remember . . . that *Miranda* came down some 27 years ago . . . and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements." *See also Quarles*, 467 U.S. at 663 (since *Miranda*, "law enforcement practices have adjusted to its strictures") (O'Connor, J., concurring in the judgment in part and dissenting in part) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring in the judgment)). Empirical research has confirmed the ease with which law enforcement has implemented *Miranda*'s simple mandate. *See, e.g.*, Schulhofer, *Reconsidering Miranda*, at 455-57 & n.56 (noting "many studies have shown that the degree of compliance with *Miranda*'s requirements . . . has been high").

16/ The public safety exception recognized in *Quarles* is the only exception to this rule, allowing the substantive use of unwarned statements obtained under circumstances implicating public safety. *See Quarles*, 467 U.S. at 655.

That the exact form of the procedural safeguards is open to refinement further evidences *Miranda*'s workability. Recognizing that the Constitution does not require the precise warnings articulated in the *Miranda* decision, the Court made clear that Congress and the States are free to establish alternative procedures for protecting the privilege against self-incrimination, so long as any alternative they adopt is "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 467. *Miranda* itself thus allows for adjustments to be made -- within constitutional limits -- to improve the workability of its requirement, should such adjustments become necessary.

Any potential "costs" resulting from *Miranda*'s exclusion of custodial confessions obtained in the absence of the required safeguards are entirely beside the point in evaluating the workability of *Miranda*'s requirement. As the *Miranda* Court made abundantly clear, society's interest in interrogating a suspect is subordinate to the commands of the Constitution. *See Miranda*, 384 U.S. at 479; *Quarles*, 467 U.S. at 662 (O'Connor, J. concurring in the judgment in part and dissenting in part). Even so, it is manifestly apparent that the benefits of *Miranda*'s protections outweigh any attendant costs. Barring the use of a statement taken in the absence of safeguards imposes at most a slight cost; the government is merely forced to prove its case against the defendant using other evidence -- it does not face necessary defeat. As such, *Miranda* has not caused "undue interference" with our system of law enforcement, 384 U.S. at 481, and it has certainly not "proven intolerable." *Casey*, 505 U.S. at 855.

By contrast, the use of an unlawfully obtained confession poses a danger of constitutional magnitude for the

accused. In addition to violating his Fifth Amendment right against self-incrimination, such use may effectively deprive the accused of his Sixth Amendment right to trial by relieving the government entirely of its burden of proof; faced with his own confession, the suspect could well lose his defense before he has an opportunity to present it. *Cf. Tucker*, 417 U.S. at 440-41 ("[A]n inability to protect the [Fifth Amendment] right [to silence] at one stage of a proceeding may make its invocation useless at a later stage. For example, a defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to give evidence against himself before a grand jury."). Such a result is antithetical to "our accusatory system of criminal justice [which] demands that the government seeking to punish an individual produce the evidence against him *by its own independent labors*, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda*, 384 U.S. at 460 (emphasis added). Plainly, if there is any risk to be allocated here, the Constitution requires that it be borne by the government, not by the accused.

B. Reliance Interests Support Adherence to *Miranda*'s Dictates

Generally speaking, the reliance factor is most pertinent in commercial cases, but it nonetheless has some resonance here. *See Casey*, 505 U.S. at 856 (recognizing societal reliance on tenets of *Roe v. Wade*, 410 U.S. 113 (1973)). Since *Miranda*, society has come to expect the procedural safeguards of *Miranda* as an indication of the government's commitment to making the custodial interrogation process fair and to protecting the constitutional rights of suspects. As one scholar has noted, "compliance with the *Miranda* safeguards is widely considered an elementary prerequisite of fair procedure and the

decent restraint of police power." Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500, 501 (1996); *see also id.* at 562 (noting that "criminal procedure safeguards . . . help shape the self-conception and define the role of conscientious police professionals; they underscore our constitutional commitment to restraint in an area in which emotions easily run uncontrolled"). Repudiation of the procedural safeguards required by *Miranda* thus would undermine society's confidence in the prosecutorial process, and in law enforcement's commitment to uphold the fundamental rights of the citizens they are charged with protecting. Moreover, evisceration of *Miranda*'s dictates likely would encourage law enforcement to test the limits of lawful interrogation practices, a result this Court should not invite.

C. Developments in the Law Have Not Rendered *Miranda*'s Requirement Obsolete

This Court has never suggested that *Miranda*'s core holding should be overruled. There has been some suggestion among commentators, however, that post-*Miranda* developments in the law have diminished the need for *Miranda*'s exclusionary rule. Specifically, the theory has been advanced that various civil, criminal, and administrative remedies now available against law enforcement officers who engage in coercive interrogation tactics provide both a remedy for that unlawful conduct and a deterrent to future coercive behavior. *See, e.g.*, WLF Brief at 13-15. In light of these remedies, the theory goes, "the legal incentives for non-coercive police questioning [are] almost unrecognizably greater than when *Miranda* was decided," and *Miranda*'s exclusionary rule is thus unnecessary. *Id.* at 13.

The theory is wrong. The basic intuition underlying *Miranda* is a recognition that it is very difficult to show coercion of a confession after the fact. Nothing has changed that reality. The expansion of *post hoc* remedies, although commendable, can have at most a marginal effect. It is simply fantasy to suppose that more than a small fraction of victims of coercion in a post-*Miranda* world would initiate (and succeed with) civil, criminal, or administrative proceedings. It follows that the availability of sanctions against offending officers does not weaken *Miranda*'s requirement in the least, let alone render it obsolete or a mere "remnant of abandoned doctrine." *Casey*, 505 U.S. at 855; *see also Mapp v. Ohio*, 367 U.S. 643, 651-53 (1961) (holding that only the exclusion of improperly seized evidence would be a sufficient remedy to deter violations of the Fourth Amendment).

Moreover, any reliance on *post hoc* remedies overlooks the fact that *Miranda* imposes constitutional constraints on two distinct phases of criminal proceedings: when statements are taken in the course of custodial interrogation as well as when those statements are later used at trial. *Post hoc* remedies are aimed at the former but do nothing to address the latter. It follows that even if *post hoc* remedies were capable of deterring some coercive interrogations, these remedies would not adequately "guard against 'the use of unreliable statements at trial.'" *Withrow*, 507 U.S. at 692 (citation omitted); *see also id.* at 690 ("'Prophylactic' though it may be, in safeguarding a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental trial right.'") (citation omitted). As the suppression remedy is "quite possibly contained within the guarantee of the Fifth Amendment itself," *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring), it is obvious that *post hoc* remedies, however effective they may be, cannot possibly serve

as an adequate substitute for the exclusion of statements taken in violation of *Miranda*.

D. The Factual Premises Underlying *Miranda* Remain Valid and Thus Support Affirming That Decision

Miranda was based primarily on the Court's conclusion that custodial interrogation is inherently coercive. In each of the cases before it, the defendant was subjected to incommunicado interrogation in a police-dominated atmosphere. Taking special notice of the fact that "in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements [made] were truly the product of free choice," the Court found it "obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner." *Miranda*, 384 U.S. at 457. The Court, therefore, concluded that the "practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles -- that the individual may not be compelled to incriminate himself," and that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Miranda*, 384 U.S. at 457-58.[17/]

17/ In reaching this conclusion, the Court noted particularly that police manuals of the time affirmatively promoted the use and efficacy of this approach. *See Miranda*, 384 U.S. at 449 ("[t]he officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is privacy -- being alone with the person under interrogation'").

The factual circumstances underlying *Miranda*'s holding have not changed. Suspects still are questioned in isolation under conditions containing "inherently compelling pressures." *Id.* at 467. Notably, we have not progressed to a point where counsel is provided to a suspect at the interrogation stage, or a magistrate is present to monitor and preserve the integrity of the interrogation process. *Cf. id.* at 466 (presence of counsel would constitute adequate protective device to make process of police interrogation conform to dictates of privilege against self-incrimination). Moreover, substantial empirical evidence exists that coercive interrogation tactics continue to be employed by law enforcement personnel throughout the country. *See, e.g.*, Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 153-62 (1998) (reviewing various interrogation techniques and their effects on suspects). Indeed, scholarship suggests that in recent years, police questioning techniques -- including the deliberate interrogation of suspects in contravention of the *Miranda* requirements in order to obtain material usable as impeachment or for its evidentiary "fruits" -- have become even more psychologically compelling than those considered by the *Miranda* Court itself. *See, e.g., id.* at 158-62. Nor has the Court itself questioned the factual premise of its holding in *Miranda* since that case was decided. These circumstances demonstrate the continuing need to provide suspects with some procedural safeguards prior to custodial interrogation. Accordingly, it cannot be said that "the facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *See Casey*, 505 U.S. at 855.[18/]

18/ Nor does the fact that the *Miranda* warnings have become embedded in our culture reduce the need to inform each and every suspect of his right to silence prior to custodial questioning. If citizens today are more familiar with their right to silence than they were in the past, that is merely testament to the *Miranda* rule's value and efficacy; it is not proof that the rule is outdated or no longer necessary. As long as custodial interrogation continues to be conducted behind closed doors, the suspect alone with his questioner(s), there will be a need to apprise him, or remind him, *at that time* of his rights.

This Court has strayed from the "straight path of *stare decisis* . . . only when [it] has felt obliged to bring its opinions into agreement with experience and with facts newly ascertained." *Vasquez*, 474 U.S. at 266 (quotation omitted). Neither experience nor factual developments since *Miranda* justify a departure from the fundamental dictates of that decision. Moreover, the Court today does not consider the propriety of *Miranda*'s procedural safeguard requirement on a clean slate. For more than thirty years, this requirement has protected the right against self-incrimination for hundreds of thousands of persons confronted with the inherently compelling pressures of custodial interrogation. The requirement has further served as demonstrable evidence of this Court's commitment to vindicating the constitutional rights of citizens. It should not be abandoned now.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

JOHN T. PHILIPSBORN
LAW OFFICES OF
JOHN T. PHILIPSBORN
507 Polk Street, Suite 250
San Francisco, CA 94103
(415) 771-3801

Counsel for *Amicus Curiae*
California Attorneys for
Criminal Justice

PAUL M. SMITH*
DEANNE E. MAYNARD
KIAL S. YOUNG
MATTHEW HERSH
JENNER & BLOCK
601 Thirteenth Street, NW
Washington, DC 20005
(202) 639-6000

LISA B. KEMLER
ZWERLING & KEMLER, P.C.
108 N. Alfred Street
(703) 684-8000

Counsel for *Amicus Curiae*
National Association of
Criminal Defense Lawyers

* *Counsel of Record*

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