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 OF *AMICUS CURIAE*, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, the National Legal Aid and Defender Association (NLADA), is a private, non-profit membership organization, founded in 1911. Its membership is comprised of approximately 3,000 offices that provide legal services to poor people, including the majority of public defender offices, coordinated assigned counsel systems and legal services agencies around the nation. The NLADA's primary purpose is to assist in affording effective legal services to people unable to retain counsel, as the Fifth and Sixth Amendment right to counsel enables poor people in our criminal justice system to assert all of their other rights.

This case asks the Court to decide whether federal investigators are bound by the procedures set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). The NLADA has a profound interest in this issue. While this Court in *Miranda* declined to require the presence of counsel for an accused during a custodial interrogation, *Miranda* at least ensures that a suspect be informed of his or her Fifth Amendment privilege and have a continuous opportunity to assert it. This knowledge and opportunity are both critically important for the indigent and often ill-

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[1] No counsel for any party authored this brief in whole or in part. The brief was written by counsel for *Amicus Curiae* with the assistance of Jennifer A. Cartee and Michael Zara, students at the University of California School of Law (Boalt Hall). No one other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation or sumission of the brief.

Both Petitioner and Respondent have consented to the filing of this brief.

educated clients served by the NLADA's members. Further, abandoning *Miranda*'s bright-line rules would relegate police, prosecutors, defense counsel and courts to the days before 1966, when all found it difficult to discern when a constitutional line had been crossed during a police interrogation.

STATEMENT OF THE CASE

On January 27, 1997, FBI agents and a city police detective went to Charles Dickerson's home to investigate a bank robbery. *See* Pet. App. 3a. Mr. Dickerson returned to the FBI Field Office with them and was questioned. *See id.* He denied any involvement in the robbery. *See id.* Agents arranged for a search warrant and they told Mr. Dickerson that they were about to search his apartment. *See* Pet. App. 4a. At that point, Mr. Dickerson made a statement. *See id.* The district court ruled that Mr. Dickerson's statement came before agents administered the warnings required by *Miranda v. Arizona*. *See* Pet. App. 5a. The district court therefore suppressed the statement (*see id.*), and subsequently denied cross motions for reconsideration. *See United States v. Dickerson*, 971 F. Supp. 1023, 1025 (E.D. Va. 1997).

The government filed an interlocutory appeal. *See* Pet. App. 3a, 6a. The United States Court of Appeals for the Fourth Circuit reversed. *See* Pet. App. 19a. While the government did not urge this point (*see* Pet. App. 8a-9a), the court of appeals found that the admissibility of Mr. Dickerson's statement was governed by a statute, 18 U.S.C. § 3501, and not by this Court's ruling in *Miranda*.

See Pet. App. 17a. Judge Michael dissented from this portion of the opinion. *See* Pet. App. 25a. Although the district court did not assess whether Mr. Dickerson's statement was voluntary under the specific factors set forth in 18 U.S.C. § 3501(b), the court of appeals ruled that Mr. Dickerson's statement was voluntary and should be admitted. *See* Pet. App. 17a.

SUMMARY OF ARGUMENT

Miranda v. Arizona provides a bright line that protects suspects' Fifth Amendment rights and, at the same time, affords law enforcement officers a means to avoid compulsion in custodial interrogations. The *Miranda* rule operates by reducing the compelling pressures that are inherent in a custodial interrogation. As this Brief explains, recent studies of interrogation practices confirm that these pressures continue to exist.

Given the pressures that are always part of an in-custody interrogation, *Miranda* properly holds that certain safeguards are needed to protect the Fifth Amendment privilege. *Miranda*'s procedures are the minimum required by the Constitution because no person may make an unfettered decision whether to speak or remain silent unless officers inform that person of his or her rights and indicate that the exercise of those rights will be respected. Although a legislature may craft an alternative to *Miranda*, any proposed replacement must be equally effective in apprising a suspect of the right to remain silent and in assuring that the exercise of that right will be honored.

The statute at hand, 18 U.S.C. § 3501, must fall because it does not include any safeguards – much less equally-effective safeguards – to ensure that a suspect is informed of the right to remain silent and can exercise that right. Nor does § 3501 set out a clear rule to enable law enforcement or officers of the court to determine when a Fifth Amendment violation may occur. For this reason, the statute is likely to lead to many more forced confessions, which will disproportionately impact the indigent clients served by *Amicus Curiae*'s members.

Some of *Miranda*'s critics, particularly Professor Paul G. Cassell, have attempted to determine *Miranda*'s "costs." *Amicus Curiae* rejects the notion that *Miranda*'s impact can be seen as a hurtful "cost," or that it is detrimental to our society for officers to tell suspects about their rights. However, even if a cost-benefit analysis might apply to *Miranda* in theory, it is not possible to do so in practice. *Miranda*'s rule is not amenable to a cost-benefit analysis, as the "costs" and "benefits" of *Miranda* are incommensurate. Moreover, there is still no reliable measure of *Miranda*'s costs: analyses of confession and clearance rates are incomplete, contain inaccurate information, and are subject to manipulation. As a result, we have no sure way to calculate the "costs" of *Miranda;* nor, for that matter, may we estimate with certainty the "costs" of implementing § 3501. One "cost" we may surely anticipate, however, is increased litigation over the voluntariness of statements given to the police.

ARGUMENT

MIRANDA'S BRIGHT-LINE RULES PROTECT THE FIFTH AMENDMENT PRIVILEGE AND SHOULD NOT BE CAST ASIDE

A. *Miranda* Protects the Fifth Amendment Privilege by Reducing the Compelling Pressures Inherent in a Custodial Interrogation

1. *Miranda* protects the ability to choose between speech and silence

The Court in *Miranda v. Arizona* described the privilege against self-incrimination as necessary "[t]o maintain a 'fair state-individual balance,' to require the government to shoulder the entire load," and to respect individual autonomy. 384 U.S. 436, 460 (1966) (citations omitted). The procedures set out in *Miranda* are the minimum necessary to safeguard a suspect's Fifth Amendment privilege. As the Court held, without these procedures or others "which are at least as effective," the process of in-custody interrogation "contains inherently compelling pressures" that undermine the privilege. *Id.* at 467. *Miranda* creates an environment in which a suspect can make an informed decision whether to assert or waive the Fifth Amendment privilege, and *Miranda* does so in two ways.

First, *Miranda* demands that officers provide a suspect with a modicum of information about the right to remain silent and the right to counsel. *See id.* at 467-72. This does not require police to disclose all of the information that a person might want before choosing between speech and silence. *See, e.g., Colorado v. Spring*, 479 U.S. 564, 573-77 (1987) (officers do not have to divulge the subject matter of the interrogation); *Moran v. Burbine*, 475

U.S. 412, 425 (1986) (officers are not required to disclose that a suspect's lawyer is trying to reach him). Nor must the warnings be precise; it is sufficient for officers to "touch[ ] all of the bases." *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989). Nevertheless, without warning a suspect of the right to remain silent and the right to counsel, no waiver of the privilege can be deemed informed. *See Miranda*, 384 U.S. at 468-72. The warnings are particularly important for poor, ill-educated or disabled persons accused of crimes, people for whom the NLADA holds a special concern.[2] Even so, "[i]t is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations." *Id.* at 468.

Second, *Miranda*, coupled with *Edwards v. Arizona*, 451 U.S. 477 (1981), requires officers to honor a suspect's

[2] "Eighty-five percent of all federal criminal defendants are indigent at the time of their convictions." *Statement of Judge Maryanne Trump Barry, Chair, Committee on Criminal Law of the Judicial Conference of the United States Before the Comm. on the Judiciary, United States Senate, on S.173, The "Crime Victims Restitution Act of 1995," Nov. 8, 1995*, at 2. According to a 1996 survey of inmates in local jails, 76.6% of those convicted of felonies and 56.3% of those convicted of misdemeanors were represented by court-appointed counsel. *See* Bureau of Justice Statistics, *Correctional Populations in the United States, 1996*, tbl. 4.9. 46.5% of the jail inmates had not graduated from high school. *See id.* at tbl. 4.1. Of the defendants convicted of federal offenses in a recent year, 41.5% had not graduated from high school. *See* Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 1997*, tbl. 3.5. Almost half (47.6%) had no prior convictions. *See id.* One-fourth (25.6%) of the local jail inmates in the 1996 survey had received mental health services because of a mental or emotional problem. *See Correctional Populations, supra*, tbl. 4.22.

decision to invoke the privilege.[3] In *Connecticut v. Barrett*, Chief Justice Rehnquist wrote for the Court that "[t]he fundamental purpose of the Court's decision in *Miranda* was 'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.' " 479 U.S. 523, 528 (1987) (quoting *Miranda*, 384 U.S. at 469). *Miranda* furthers this purpose by fostering absolute respect for a limited zone of autonomy in a custodial interrogation. A suspect who waives the Fifth Amendment may be questioned at length, though *Miranda* gives the suspect the right to curtail the interrogation if these tactics prove too discomforting. Indeed, *Miranda* may dampen the use of overbearing tactics because it gives officers an incentive not to make the interrogation so difficult that a suspect will ask for a lawyer. *See* William J. Stuntz, *Waiving Rights*, 75 Va. L. Rev. 761, 820-21 (1989).

While one might propose safeguards that provide greater protection for the Fifth Amendment privilege, the privilege may not survive with less. *See infra* at arg. B. Given the pressures that are always present in a custodial interrogation, no waiver of the privilege against self-

[3] Some law enforcement agencies have recently trained officers that *Miranda* and *Edwards* are hortatory, not mandatory. *See California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1041, 1049-50 (9th Cir. 1999), *amended*, 2000 WL 1639 (9th Cir. 2000); Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109, 132-40, 189-92 (1998). *Amicus Curiae* suggests that this case affords the Court an opportunity to make plain that when a suspect in custody invokes the Fifth Amendment, questioning must cease.

incrimination can be effective unless officers affirmatively tell a suspect that he or she has the right to remain silent and to have the assistance of counsel, and indicate that the police are prepared to respect the suspect's choice. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), this Court ruled that officers need not advise a suspect of the right to refuse consent to search, but specifically distinguished cases involving police interrogation.[4] Consent searches, the Court held, are "immeasurably far removed from 'custodial interrogation' " (*id.* at 232) because "the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation." *Id.* at 247.[5]

[4] Because a waiver of Fifth Amendment rights in the station house may affect the integrity of the fact-finding process in court, the Court has treated *Miranda* waivers similar to waivers of trial-type rights. *See Bustamonte*, 412 U.S. at 238-41; *see also Michigan v. Tucker*, 417 U.S. 433, 440-41 (1974) (the inability to protect the Fifth Amendment privilege at one stage of a proceeding may make its invocation useless at a later stage). This Court has generally upheld a waiver of a trial-type right only if the accused was aware of the existence of that right. *See, e.g., Brady v. United States*, 397 U.S. 742, 748, 756 (1970) (right to trial); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969) (same); *Patton v. United States*, 281 U.S. 276, 312-13 (1930) (right to a jury); *Crosby v. United States*, 506 U.S. 255, 261-62 (1993) (right to be present at trial); *Cross v. United States*, 323 F.2d 629, 633 (D.C. Cir. 1963) (same); *Faretta v. California*, 422 U.S. 806, 835 (1975) (right to counsel at trial); *Patterson v. Illinois*, 487 U.S. 285, 296 (1988) (right to counsel during post-indictment questioning).

[5] *See also United States v. Mandujano*, 425 U.S. 564, 579-80 (1976) (*Miranda* warnings need not be given to a grand jury witness because of the marked contrast between a grand jury proceeding and a custodial interrogation).

2. Custodial interrogations still contain inherently compelling pressures

In *Miranda*, this Court stressed "that the modern practice of in-custody interrogation is psychologically rather than physically oriented." 384 U.S. at 448. Following a careful review of police practices (*id.* at 448-57), the Court concluded 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." *Id.* at 458. As set forth below, this conclusion remains valid; studies confirm that compelling pressures still are part and parcel of a custodial interrogation.

After *Miranda*, officers were trained to give suspects the required warnings, but most of the other tactics used during interrogations have not changed. This is perhaps most evident from the introduction to the second edition of Inbau and Reid's highly-influential training manual,[6] published in the immediate wake of *Miranda*:

[6] The first edition of the manual, Criminal Interrogation and Confessions was featured prominently in *Miranda*. *See* 384 U.S. at 449-55. The manual is currently in its third edition. *See* Fred E. Inbau, John E. Reid & Joseph P. Buckley, Criminal Interrogation and Confessions (3d ed. 1986). Various editions are referenced in a number of this Court's cases. *See, e.g., Davis v. United States*, 512 U.S. 452, 470 n.4 (1994) (Souter, J., concurring); *Stansbury v. California*, 511 U.S. 318, 324 (1994) (per curiam); *Moran v. Burbine*, 475 U.S. at 459 n.45 (Stevens, J., dissenting). According to one of the world's leading experts on the psychology of interrogation, "[a]lthough many police interrogation manuals have been produced . . . , undoubtedly the most authoritative and influential manual is the one written by Inbau, Reid and Buckley." Gisli Gudjonsson, The Psychology of Interrogations, Confessions and Testimony 31 (1992); *see also*

> As we interpret the . . . decision of the Supreme Court of the United States in *Miranda v. Arizona*, all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid if used after the recently prescribed warnings have been given to the suspect under interrogation, and after he has waived his self-incrimination privilege and his right to counsel.

Fred E. Inbau & John E. Reid, Criminal Interrogation and Confessions 1 (2d ed. 1967).

The current edition of the manual advocates a multi-step approach to the interrogation of a suspect whose guilt appears "definite" or "reasonably certain" to police. Inbau, Reid & Buckley, *supra*, at 78.[7] The first step is "direct, positive confrontation." *Id.* at 84-93. Next, interrogators develop and maintain a theme. Some themes are designed to soften up a suspect (suggesting, for example, that a crime was morally justified); other themes are more

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Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 118 (1997) (it is "[t]he most widely used manual"); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 U. Conn. L. Rev. 425, 431 n.31 (1996) (it is "the best known manual on police interrogations").

[7] Officers are trained to rely on nonverbal cues to help distinguish between denials made by those who are innocent and those who are guilty. *See* Saul M. Kassin & Christina T. Fong, *"I'm Innocent!" Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 Law & Hum. Behav. 499, 500 (1999). However, this training has not been shown to increase accuracy in assessing truth or falsity. *See id.* at 511.

contentious and seek to convince the suspect that remaining silent merely postpones the inevitable.[8] The interrogator must deal with the suspect's expected denials. The accused should not be permitted to continue to deny involvement, for this would give him "psychological fortification." *Id.* at 142-44. "In some instances, it may become necessary for the interrogator to feign annoyance as a tactic to stop a guilty suspect from repeating [the] denial." *Id.* at 147.[9] After the accused's resistance is weakened, interrogators must still increase the person's desire to confess. According to followers of this model of interrogation:

> One way to accomplish this objective is to express a concern to the suspect that if he does not tell the truth people may make false assumptions about why he committed the crime.

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[8] *See, e.g., id.* at 97-99 (sympathize with the suspect); *id.* at 99-101 (reduce feelings of guilt by minimizing moral seriousness of the offense); *id.* at 102-06 (suggest a less revolting and more acceptable motivation for the offense); *id.* at 106-18 (blame the victim, accomplice, or anyone else); *id.* at 120-25 (suggest that victim may have exaggerated, and the truth can only be learned from the suspect); *id.* at 126-27 (point out futility of continued criminal behavior); *id.* at 128-19 (get an admission of lying about an incidental aspect of the offense, and then use this lie against the suspect in the interrogation); *id.* at 130 (have the suspect place himself or herself at the scene); *id.* at 131 (convince the suspect that the evidence is overwhelming and there is no point in denying involvement); *id.* at 132-36 (play one suspect against another).

[9] Preventing an accused from asserting innocence can easily lead to a compelled statement. *See State v. Hermes*, 904 P.2d 587, 589 (Mont. 1995) (statement was involuntary where, *inter alia*, the interrogating officer structured his questions so that the defendant could not effectively deny his involvement).

> The technique culminates by asking the suspect "alternative questions" which offer two descriptions about some aspect of the crime. The alternative questions are phrased so that either choice is incriminating.

Brian C. Jayne & Joseph P. Buckley, *Criminal Interrogation Techniques on* Trial, Prosecutor 23, 28 (Fall 1991) (footnote omitted).[10]

Richard Leo's study of police interrogations in three cities confirms the use of these techniques. He tracked the tactics employed by officers during 182 interrogations, and reported the percentage of interrogations in which they were used. Some of the tactics used frequently were confronting the suspect with evidence of guilt (85% of interrogations), undermining the suspect's confidence in denial (43%), identifying contradictions in the story (42%), offering moral justifications or excuses (34%), confronting with false evidence of guilt (30%), and minimizing the moral seriousness of the offense (22%). *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L.

[10] Other interrogation manuals convey similar messages. One manual, for example, instructs that officers should "[e]stablish a friendly atmosphere, but never let the suspect develop any doubt about your competence and your complete control of the interrogation." Robert E. Royal & Steven R. Schutt, The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide 119 (1976) (emphasis omitted). The interrogator must "undermine [the accused's] confidence in escaping." *Id.* Another expert writes that "modern practices of in-custody interrogation are psychologically based and similar in some respects to brainwashing techniques." A. Daniel Yarmey, Understanding Police and Police Work: Psychosocial Issues 157 (1990).

& Criminology 266, 278 (1996). A common strategy was "to tell the suspect that they are here to discuss why, not whether, the suspect committed the crime." Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 Law & Society Rev. 259, 274 (1996). Further, the interrogators communicated implicit promises of leniency for cooperation by inviting the suspect to imagine how prosecutors or juries would perceive the case if no statement were made. *Id.* at 275-79.

Experimental psychologists have demonstrated the powerful impact of these techniques. Saul Kassin and Karlyn McNall tested subjects' reactions to interrogation transcripts. The subjects believed that suspects exposed to "maximization" techniques – tactics such as exaggerating the strength of the evidence and the seriousness of the offense – would receive harsher sentences than a control group of suspects who were not interrogated. Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 Law & Hum. Behav. 233, 236-38 (1991). They also determined that minimization techniques – such as offering a suspect an excuse or moral justification for the crime – communicate implied expectations of leniency just as effectively as explicit promises of leniency. *Id.* at 236, 241. More recently, Kassin and Katherine Kiechel constructed an experiment in which subjects were falsely accused of accidentally deleting data as they quickly typed letters on a computer. When the experiment was conducted with a common interrogation tactic (a "witness" who claimed to have seen the subjects delete the data) every single one of the subjects signed a written confession admitting the false allegation, and 65%

internalized the false claim. *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions Compliance, Internalization, and Confabulation*, 7 Psychology Sci. 125, 126-27 (1996).[11]

These studies validate the conclusion reached by this Court in *Miranda*: that custodial interrogations contain inherently compelling pressures, and that certain procedures are required to dispel them. While *Miranda*'s rules do not prevent all false or compelled confessions, they do act to discourage them. By giving suspects the choice whether to speak or remain silent, and by affording them an absolute ability to end a difficult interrogation simply by asserting Fifth Amendment rights, *Miranda* goes a long way towards dissipating the compelling pressures that are inherent in a custodial interrogation.

B. *Miranda*'s Procedures Are the Minimum Necessary to Counter the Compelling Pressures in a Custodial Interrogation and Thus Protect the Fifth Amendment Privilege

Miranda v. Arizona describes the minimum procedures necessary to protect the Fifth Amendment and

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[11] *See also* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. L. Rev. 979, 985-1000 (1997) (reviewing actual interrogations and describing how suspects may be convinced to confess to crimes that they did not commit); Gisli H. Gudjonsson & James MacKeith, *Disputed Confessions and the Criminal Justice System*, Maudsley Discussion Paper No. 2, Instit. of Psychiatry, London (1997) (same); Gisli H. Gudjonsson, Michael D. Kopelman & James A. C. MacKeith, *Unreliable admissions to homicide: A case of misdiagnosis of amnesia and misuse of abreaction technique*, 174 British J. of Psychiatry 455 (1999) (describing an unreliable confession and how it was obtained).

the values embedded within it. This Court held that warnings and respect for the invocation of the Fifth Amendment privilege are required to combat the compelling pressures that are inherent in a custodial interrogation. *See* 384 U.S. 444, 467. Though a legislature might propose different safeguards to protect the Fifth Amendment privilege, this Court made clear that any proposed alternatives must be "at least as effective in apprising persons of their right of silence and in assuring a continuous opportunity to exercise it." 384 U.S. at 467.[12] But surely no other safeguards can be equally effective unless they ensure that a suspect is informed of his or her rights, and guarantee that officers will honor the unequivocal assertion of those rights. *Miranda*'s procedures embody this constitutional minimum.[13]

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[12] Professor Henry P. Monaghan has noted that *Miranda* "holds that 'adequate' safeguards are constitutionally required, and this puts a check on what Congress may do." Henry P. Monaghan, *Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1, 42 n. 216 (1975). His article provides an example of a statute that might permissibly replace the *Miranda* rule, a statute that would actually require the presence of counsel. *See id.* at 33. This law would, of course, afford suspects greater protection from compulsion than the *Miranda* rule itself. Further, Monaghan characterizes Congress' behavior in passing § 3501 as a "gesture of defiance" rather than as action taken as part of "a good faith dispute over the power of Congress to shape a rule protective of the fifth amendment using its own assessment of how subconstitutional policies should be compromised." *Id.* at 34, n. 176 (citation omitted). While Monaghan does call the *Miranda* rule "constitutional common law" (*id.* at 19-20), his work does not support the conclusion that a legislature has a free hand to overturn *Miranda*.

[13] Indeed, in commenting upon a draft of the *Miranda* opinion, Justice Brennan confessed that he could not "think of

Given that *Miranda* describes the minimum procedures necessary to preserve the Fifth Amendment privilege, 18 U.S.C. § 3501 may not be upheld. The statute contains no safeguards to lessen the compelling pressures that are applied during an interrogation. It does not in any way assure that suspects will be apprised of their rights or have the continuous opportunity to assert them. Without a warning of the right to remain silent, only the well-educated will understand that they are not required to speak. Without a warning of the right to appointed counsel, only the wealthy will know that they need not stand alone. Without an indication that officers are prepared to honor an invocation, only the most resolute will be able to make an unfettered choice whether to speak or remain silent in the station house. *Miranda* therefore requires – and this Court should reaffirm – that safeguards must exist to ensure that the Fifth Amendment privilege is available to all in our society.

C. *Miranda*'s Rule is Not Amenable to a Cost-Benefit Analysis

Because *Miranda*'s procedures are the minimum required to protect a suspect's Fifth Amendment rights,

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other procedures that [would] serve the purpose." Weisselberg, *supra*, at 124-25 (citation omitted).

For further discussions of the "equally effective" language in *Miranda*, *see* Yale Kamisar, *The Warren Court and Criminal Justice*, *in* The Warren Court 116, 126 (B. Schwartz ed., 1996); Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500, 553-55 (1996); Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 97 Sup. Ct. Rev. 99, 119 (1977); Weisselberg, *supra*, at 121-25.

they cannot be abrogated simply by applying a cost-benefit analysis, as some might suggest.[14] Moreover, *Amicus Curiae* wholly rejects the notion that *Miranda*'s impact can be viewed as a hurtful "cost." *Amicus Curiae* cannot accept that it is detrimental to our society for officers to tell suspects about their rights, and for suspects to assert them. *Miranda*'s requisite warnings are most important for the poor and ill-educated, people who do not know their rights. The claim that law enforcement officers should not be required to advise suspects of their rights implies that police should be able to take advantage of the poor and uneducated, and this claim is repugnant to our system of justice.

While *Amicus Curiae* rejects the application of a cost-benefit analysis to *Miranda*, it is also important to understand that *Miranda* is simply not amenable to such an approach. In the remainder of this brief, *Amicus Curiae* explains why applying a cost-benefit analysis to *Miranda* is itself a fruitless task.

1. The Purported "Costs" And "Benefits" Of *Miranda* Are Incommensurate

There is no single empirical method to establish the ordering of Fifth Amendment values and the "costs" of *Miranda*. These values and costs are incommensurate; they cannot be measured along the same scale. We may

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[14] *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. Rev. 839, 927 (1996) (arguing that *Miranda*'s rules "stem not from constitutional command, but rather from cost-benefit prophlaxis," which may be changed with a different assessment of costs and benefits.)

describe Fifth Amendment values, such as respect for individual autonomy and retention of the predominantly adversarial character of our system, but we cannot quantify them. Thus, even if it were possible to estimate the cases that *Miranda* renders "lost" or not subject to prosecution, there is no single metric that can capture *Miranda*'s "costs" and "benefits."

2. There Is No Reliable Measure of *Miranda*'s "Costs"

Even if it were possible to directly balance the "costs" and "benefits" of *Miranda*, there is as of yet no reliable measure of "costs." Professor Paul G. Cassell – *Miranda*'s most ardent critic today – has published a series of articles in which he asserts that *Miranda* has significantly damaged law enforcement efforts. As described below, Cassell's work has been heavily criticized by respected scholars. *Amicus Curiae* submits that neither his analyses of the empirical data, nor the data themselves, provide significant support for any revision to *Miranda*'s settled rules.

a. Pre- And Post-*Miranda* Confession Rates Do Not Provide A Reliable Measure Of "Costs"

Though Professor Cassell and his critics have devoted hundreds of pages in the law reviews to analyzing confession rate data, the studies all share one critical flaw: no jurisdiction accurately charted confession rates for any significant period of time before *Miranda* was decided. As detailed and meticulous as some of the

studies following *Miranda* may be, there are no reliable pre-*Miranda* data against which to measure them. For that reason alone, the studies provide an insufficient benchmark against which to assess whether *Miranda* had an immediate or long-term effect on confession rates. However, there are other problems with the studies that are worth addressing here.

Professor Cassell initially examined eleven studies of pre- and post-*Miranda* confession rates, all conducted shortly after *Miranda* was announced. *See* Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387 (1996). One must first question whether the pre- and post-*Miranda* studies are relevant today. The latest of the studies collected data only until 1968,[15] and they are therefore only relevant if one assumes that the police have not learned to adjust to *Miranda* in the decades since. *See* Richard A. Leo & Welsh S. White, *Adapting to* Miranda: *Modern Interrogators' Strategies for Dealing With the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397, 407 (1999) ("Cassell's most glaring defect may be his failure to take into account the ways in which interrogators have adapted to the obstacles posed by *Miranda* over the past thirty-three years"); *see also* Schulhofer, Miranda's *Practical Effect*, *supra*, at 507-10 (describing ways in which police have adapted to *Miranda*).[16] Of

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[15] *See* Cassell, Miranda's *Social Costs*, *supra*, at 405 ("Seaside City" Study).

[16] For example, one the studies Cassell cites, the Philadelphia study, illustrates the possibility of a rebound effect in confession rates. *See* Cassell, Miranda's *Social Costs*, *supra*, at 402-05. Senator Arlen Specter participated in the study when he served as District Attorney (*id.*), and later admitted that,

course, so much else has changed in our criminal justice system that one must also question whether any inferences from the old studies should hold today. *See* Schulhofer, Miranda's *Practical Effect*, *supra*, at 512-13. Nevertheless, even if the studies are somehow relevant, they are subject to such varying interpretations as to make them unreliable.

Based on the old studies, Professor Cassell concludes that the *Miranda* rule has resulted in an average decrease in the confession rate of approximately 16.1%, or one lost confession for every six criminal cases, leading to a loss of 3.8% of all prosecutions against suspects who are questioned. *See* Cassell, Miranda's *Social Costs*, *supra*, at 417, 437-38. Professor Stephen J. Schulhofer has carefully reviewed the pre- and post-*Miranda* studies and, to the extent that the studies are relevant at all, Schulhofer concludes that they show – at most – an average decrease in confession rates of 4.1%, with 0.78% of convictions lost due to *Miranda*. *See* Schulhofer, Miranda's *Practical Effect*, *supra*, at 538-39.[17] Of course, such a decrease may mean only that *Miranda* has worked as intended: if the point of

"whatever the preliminary indications . . . I am now satisfied that law enforcement has become accustomed to *Miranda*." Yale Kamisar, Editorial, *Landmark Ruling's Had No Detrimental Effect*, Boston Globe, Feb. 1, 1987, A27 (quoting Sen. Specter).

[17] Several of the studied jurisdictions required some form of warnings prior to *Miranda*. Professor Schulhofer's figures of 4.1% and 0.78% are for comparisons to pre-*Miranda* regimes that included some warnings. His figures for lost confessions and convictions are 9.6% and 1.1%, respectively, for comparisons to pre-*Miranda* regimes with no warnings. *Id.*

Miranda is to provide safeguards against compelled confessions, then an immediate drop in the confession rate may mean that people who might have made statements due to compulsion now felt they had the option of remaining silent, as it was their right to do.

Cassell next produced a study of interrogations in Salt Lake County in 1994. *See* Cassell & Hayman, *supra*. Cassell and Hayman report that 9.5% of suspects invoked their rights and 33.3% confessed. *See id.* at 868-69. Comparing this confession rate to the pre-*Miranda* rate in the earlier studies from other parts of the United States, Cassell and Hayman conclude that *Miranda* is responsible for a fall in confession rates in Salt Lake County from approximately 55-60% to 33%. *See id.* at 871-76. This study was critiqued by Professor George Thomas, who examined Cassell and Hayman's data and determined that a more accurate custodial confession rate in Salt Lake County was 54%. *See* George C. Thomas III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. Rev. 933, 951-52 (1996).

The data in the eleven pre- and post-*Miranda* studies, along with Cassell's own Utah study, were not collected according to a common methodology, and are thus subject to varied interpretations. That Professors Cassell, Thomas and Schulhofer interpret the same data differently highlights the difficulty in arguing that these data should support any modification to *Miranda*'s settled rule. Some examples from these studies make this point clear.

One older study that presents particular problems is James Witt's examination of police practices in "Seaside

City." *See* James W. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. Crim. L. & Criminology 320 (1973). Witt found only a small drop in the confession rate after *Miranda*, from 68.9% to 66.9%. *See* Cassell, Miranda's *Social Costs*, *supra*, at 405. Professor Cassell finds this 2% decline overly conservative because Witt examined only cases in which suspects were actually arrested and incarcerated by the police, and because "Seaside City" police gave limited *Miranda*-like warnings before the case was decided and did not describe how "Seaside City" police implemented *Miranda*. *See id.* Professor Schulhofer, on the other hand, takes the "Seaside City" study as an ideal opportunity to assess the difference between a partial *Miranda* regime and one in which full warnings are implemented. *See* Schulhofer, Miranda's *Practical Effect*, *supra*, at 529. Further, in examining the raw data, Schulhofer determines that the pre-*Miranda* confession rate was actually 71%, and the post-*Miranda* rate was 73% – an *increase* of 2% (*id.*) – an indication that there is no observable change in confession rates post-*Miranda*. *Id.* at 529-30.

There are similar problems in Professor Cassell's decision to omit certain studies from his article. For example, Cassell excludes a Los Angeles study because of concerns about the sampling technique, which led him to believe that the result of the study (which showed a 10% *increase* in confessions post-*Miranda*) could not possibly be correct. *See* Cassell, Miranda's *Social Costs*, *supra*, at 415-16. Professor Schulhofer, on the other hand, views the Los Angeles study as another example of the distinction between Cassell's proposed regime and *Miranda*'s rule,

similar to the "Seaside" study, and discounts Cassell's sampling concerns. *See* Schulhofer, Miranda's *Practical Effect*, *supra*, at 534-37. Including this study would have altered Cassell's final figures.

There is also dispute about interpretation of Professor Cassell's own 1994 Salt Lake County data. Cassell reports a 33.3% confession rate in Salt Lake County, but that includes defendants who were never questioned; of the defendants who were actually questioned by police, 42.2% confessed. *See* Cassell & Hayman, *supra*, at 868-69. Professor George Thomas found that even the 42.2% rate was artificially depressed by two flaws in the interpretation of the data, Cassell's inclusion of non-custodial questioning and an overly restrictive treatment of partially-incriminating statements. *See* Thomas, *supra*, at 946-50. Adjusting for these flaws, Thomas found the custodial confession rate to be 54%, "remarkably like" the rate that Cassell claims existed prior to *Miranda*. *Id.* at 951-53; *see also* Schulhofer, Miranda's *Practical Effect*, *supra*, at 509, n. 28.

That all of these studies have been interpreted to support different results means that we can have little confidence in obtaining an accurate comparison of pre- and post-*Miranda* confession rates. *Amicus Curiae* entirely rejects the application of a cost-benefit analysis to *Miranda*. But even if we might wish to apply such an analysis, we do not have reliable data showing a drop in confession rates after *Miranda*.

b. Clearance Rates Do Not Provide A Reliable Measure of "Costs"

Professor Cassell has also attempted to link a decline in some crime clearance rates to *Miranda*. He initially published a simple chart, purporting to show a decrease in violent crime clearance rates in the wake of *Miranda*. *See* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 Nw. U. L. Rev. 1084, 1089-91 (1996).[18] After the chart was critiqued,[19] Cassell created a regression model and has claimed that the aggregate clearance rates for violent and property crimes would be 6.7% higher without *Miranda*. *See* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement* 50 Stan. L. Rev. 1055, 1082 (1998). Law professor and economist John Donohue has analyzed this study carefully, and has expressed serious reservations about the data and the model. *See* John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 Stan. L. Rev. 1147, 1151-62 (1998). After much effort, Donohue is left with "an unbridgeable uncertainty about how much confidence to repose in any of the statistical results." *Id.* at 1172.

The clearance rate data are plagued by serious problems. Though Cassell argues that because clearance rates have been collected by the FBI since the 1950s, they are

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[18] *See also* Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 Ariz. St. L. J. 299, 307 (1996).

[19] *See generally* Stephen J. Schulhofer, Miranda *and Clearance Rates*, 91 Nw. U. L. Rev. 278 (1996).

the best available way to obtain a broad perspective on *Miranda's* effects (*see* Cassell & Fowles, *supra*, at 1063), Donohue raises real concerns about whether the FBI clearance rates are accurate measures. *See* Donohue, *supra*, at 1152. There are a number of factors that affect the reporting of crime data, including political manipulation (*id.* at 1152-53), more accurate reporting of crime (*id.*), and changes in the pool of cities that have reported data over time (*id.* at 1167).

Moreover, a drop in crime clearance data over time may only be attributed to *Miranda* if one successfully controls for other forces for change in our legal system and society. Other factors affecting the analysis might include: increasing crime rates (*see, e.g.*, Schulhofer, Miranda *and Clearance Rates*, *supra*, at 281-83); declining police resources (*see id.* at 288); increasing professionalism in police departments (*see, e.g.*, Schulhofer, Miranda's *Practical Effect*, *supra*, at 511-12); decreasing tolerance of courts to confessions that appear to be compelled in violation of the Fourteenth Amendment (*see id.*); the implementation of *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Mapp v. Ohio*, 367 U.S. 643 (1961) (*see id.* at 512-13); and increasing drug use (*see* Donahue, *supra*, at 1159), among others. As Professor Donohue notes, "Neither Cassell and Fowles, nor any other researchers, have found a way to control for these influences in regression models, so the Cassell-Fowles article implicitly attributes all of these effects to *Miranda*." *See id.*

Finally, because of the difficulties with the clearance rate data and Cassell's model, Donohue suggests limiting the regression analysis to murder because murder is the most accurately-reported crime. *Id.* at 1153. Critically,

Cassell has found no statistically significant effect of *Miranda* on homicide clearance rates. *See* Cassell & Fowles, *supra*, at 1086, tbl. II.

Again, *Amicus Curiae* rejects the application of a cost-benefit analysis to *Miranda*. Even so, as with the pre- and post-*Miranda* studies, clearance rates simply do not provide a reliable measure of *Miranda*'s "costs."

3. There Is No Reliable Measure of the "Costs" of Section 3501 or Alternative Regimes

Just as we have no means for reliably measuring *Miranda*'s "costs," we have no method to assess the costs of implementing either 18 U.S.C. § 3501 or any other alternative regime.

Section 3501 purports to make two fundamental changes in the federal criminal justice system. First, it obliterates the "bright line rules" that have guided federal law enforcement officers, courts and lawyers for 33 years. Second, it returns us to the days before *Miranda* by replacing a prescriptive approach with a statute that seeks only to ameliorate harm that has already occurred.

Without any sure compass, officers will more frequently engage in tactics that force statements from unwilling suspects, particularly those who are poor and ill-educated. This Court has repeatedly emphasized the importance of affording clear guidance to police. *See, e.g., Davis v. United States*, 512 U.S. 452, 461 (1994) (emphasizing the importance of a bright line rule "that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of

information").[20] There is no reason to believe that officers will have any more success determining the permissible limits of interrogation under § 3501 than they had in gleaning clear rules from this Court's voluntariness jurisprudence prior to *Miranda*.[21] *Amicus Curiae* fears that the "costs" of § 3501 will be primarily borne by the poor and poorly-educated, people who do not understand and will not be told that they have a right to remain silent during a custodial interrogation. Compelled statements exact a heavy price from suspects, the innocent and the guilty alike (*see Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir.) (en banc), *cert. denied*, 506 U.S. 953 (1992)), and we will see many more such statements.

Section 3501 also fails to give courts, prosecutors, or defense counsel any specific means to determine whether

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[20] *See also Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) (praising interrogation decisions that provide clarity and certainty); *Arizona v. Roberson*, 486 U.S. 675, 682 (1988) (stressing the value of " 'clear and unequivocal' guidelines"); *Burbine*, 475 U.S. at 425 (" '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application.") (internal citation omitted); *New York v. Quarles*, 467 U.S. 649, 658 (1984) (recognizing "the importance of a workable rule 'to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.' ") (internal citation omitted).

[21] Indeed, this Court's pre-*Miranda* decisions "yield no talismanic definition of voluntariness mechanically applicable to the host of situations where the question has arisen. 'The notion of voluntariness, Mr. Justice Frankfurter once wrote, 'is itself an amphibian.' " *Bustamonte*, 412 U.S. at 224 (internal citations omitted).

a confession was in fact compelled. Section 3501(b) provides that the judge should consider "all of the circumstances surrounding the giving of the confession," and then enumerates several non-determinative factors. The statute gives no indication of the weight to be given to these factors, nor does it provide any limitation as to other evidence that may bear on the voluntariness determination. The statute will be subject to many conflicting interpretations and, in the end, it is unlikely that any clear rule will emerge.

Law enforcement will also suffer under § 3501. Erasing *Miranda's* bright-line rule will cause uncertainty in the field, jeopardizing prosecutions. As this Court noted in *Michigan v. Tucker*, *Miranda's* rules were designed "to help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost." 417 U.S. 433, 443 (1974). Without sure rules, officers will err more often, leading to diminished conviction rates.

Finally, while *Miranda* permits the states to enact other procedures that are "at least as effective" in protecting the Fifth Amendment privilege (384 U.S. at 467), a decision upholding § 3501 would invite experimentation without a constitutional floor. We do not know what form the states' experiments will take, nor may we gauge the effectiveness of their legislative actions.[22] But we do

[22] Professor Cassell, for example, argues that videotaping interrogations "would certainly be as effective as *Miranda* in preventing police coercion and probably more so." Cassell, Miranda's *Social Costs*, *supra*, at 487. While videotaping may resolve many factual disputes about the circumstances of an interrogation, it does not directly require police to take any steps to lessen the coercive atmosphere in the station house. Moreover, as a recent and disturbing study has made clear, there will always be interactions between the officers and the suspect that are not caught on videotape (*see* Mike McConville, *Videotaping Interrogations: police behaviour on and off camera*, [1992] Crim. L. R. 532), leaving open the possibility that constitutionally-impermissible compulsion will continue even under a system that requires taping.

know that state and federal courts will be embroiled in litigation for years to come, assessing voluntariness on a case-by-case basis as well as determining whether any proposed legislative alternatives comport with the Constitution.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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