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No. 01-1444

In the Supreme Court of the United States

BEN CHAVEZ,
Petitioner,

v.

OLIVERIO MARTINEZ,
Respondent.

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

BRIEF OF *AMICI CURIAE*, THE NATIONAL POLICE ACCOUNTABILITY PROJECT AND THE NATIONAL BLACK POLICE ASSOCIATION, INC., SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The National Police Accountability Project (NPAP) of the National Lawyers Guild (NLG) is dedicated to protecting all persons from the unlawful or unconstitutional use of police power. Claims of coercive interrogation are raised in significant numbers by the clients served by NPAP. If the Court were to adopt the views of Petitioner herein, it would significantly impair the ability of these clients to obtain a meaningful remedy when their constitutional rights are violated.

The National Black Police Association, Inc. is an advocacy organization created in 1972 and established to represent approximately 20,000 African Americans in law enforcement. It is also involved in the examination and analysis of criminal justice policies and practices that have an adverse impact on people of color and their communities. The National Black Police Association works to educate and train its members, the public, policymakers, and other criminal justice practitioners about the system wide injustices that often happen to the poor and people of color in America.

SUMMARY OF ARGUMENT

I. The Fifth and Fourteenth Amendments to the Constitution are violated when police officers coerce a statement from a suspect, regardless of whether this statement is ever introduced in a criminal trial, and regardless of whether there is a criminal trial. Two lines of cases make this point very clearly - the penalty cases, and the involuntary

[1] No counsel for any party in this case authored this brief in whole or in part and no person or entity other than amici, their members and their counsel have made monetary contributions to the perpetration or submission of this brief.

confession cases. Neither dicta in *United States v. Verdugo-Urquidez* nor the possibility of an official grant of immunity change this point.

A. This Court has consistently held that any attempt by a government official to coerce a waiver of the privilege against self-incrimination violates the Fifth Amendment, regardless of whether the coercion is successful. In those cases where a suspect refuses to waive his privilege, and suffers the coercive consequence, the Court has found a fifth amendment violation to be complete, despite the fact that no incriminating statement was obtained, and thus the admission of such statement in a criminal trial is impossible. The most recent of these penalty cases, *McKune v. Lile*, post-dates earlier dicta to the contrary.

B. At the direction of this Court, law enforcement officers have been advising suspects for the past thirty-six years that they have a right to remain silent. This Court has recognized that the Fifth Amendment guarantees the right to remain silent in cases before and subsequent to *Miranda* both during custodial interrogation and in other contexts. The text of the Fifth Amendment does not compel the conclusion that it creates rights only during criminal proceedings, as this Court recognized in *Pennsylvania v. Muniz*.

C. The Court has permitted government officials to replace the privilege with an immunity grant, in certain circumstances. In *Kastigar v. United States*, the Court held that a suspect can be "compelled" to give testimony in a public proceeding enforced by judicial process, where said suspect is first properly informed that the government is invoking an immunity statute, and informed that neither direct nor derivative evidence obtained in this manner can be used against him in a criminal trial. The Court has never held that police can informally grant immunity by exercising coercive

pressure against a suspect, that police can decide when and whether to grant this testimonial immunity during custodial interrogation without prior or later approval of the public prosecutor, and that police need not even inform the suspect that he has been granted such immunity.

II. The Court reaffirmed *Miranda v. Arizona*'s constitutional exegesis in *Dickerson v. United States*.

A. The *Miranda* warnings and their exceptions are best viewed as constitutional prophylactic rules protecting the privilege against self-incrimination. The ubiquity and legitimacy of constitutional prophylactic rules and remedies has been well established.

B. Without civil rights liability for continuing to question a suspect after invocation of her Miranda right to remain silent, an innocent suspect (for whom exclusion is not an option) will have no method of enforcement. Moreover, officers will be encouraged to advise a suspect of her rights only to ignore any invocation, in order to obtain impeachment and other derivative evidence will is admissible. The Court cannot afford to send out the message that constitutional rules directed toward deterring police abuse are optional.

III. A public safety exception to the Fifth and Fourteenth Amendments is not required on the facts of this case, and any discussion of such an exception would be dictum. There was no emergency requiring immediate information to save lives, rather this case involved simple after the fact evidence gathering.

ARGUMENT

I. The Fifth and Fourteenth Amendments are Violated When Police Officers Coerce a Statement from a Suspect At Any Location.

Petitioner contends that neither the Fifth Amendment nor the Fourteenth Amendment protect the right of a person in police custody to be free from interrogation methods that coerce an involuntary statement.[2] Petitioner is asking this Court to rule that there is no constitutionally protected right to remain silent when questioned by police or other government officials, unless the questioning occurs at or is admitted in a criminal trial. This radical proposition, ignoring the fundamental tenets of this Court's jurisprudence, must be rejected.

A. Early and Recent Precedents of This Court Have Found the Fifth and Fourteenth Amendments Violated Where the Invocation of the Privilege is Penalized, and Where a Statement Is Coerced, Regardless of Whether a Statement is Obtained or Introduced in a Criminal Trial.

The Petitioner's argument that there is no right to be free from coercive interrogation other than at trial is inconsistent with the holdings of this Court that this right can be protected only by applying the privilege against self-incrimination in any pre-trial setting where questioning may elicit an incriminating response. "It is well settled that the prohibition … privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in

[2] Petitioner acknowledges only the existence of a Fourteenth Amendment right to be free from interrogation practices that violate substantive due process by shocking the conscience.

future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 40, 426 (1986). Thus the Court has found the Constitution violated, and ordered injunctive and other relief, even where there was no possibility that a statement would be used in a criminal trial, and even where no statement was generated.

For example, in *Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation of the City of New York, et. al.*, 392 U.S. 280 (1968), three public workers who were called before a grand jury refused to sign waivers of immunity and testify against themselves were fired. This Court found a Fifth Amendment violation and ordered the City of New York to reinstate these workers. If a constitutional violation occurs only at trial, the Court could not have stepped in unless and until an incriminating statement was offered in a criminal proceeding against these workers. However, since the workers refused to waive their privilege and never made any statement, the admission of statements in a criminal trial was impossible.[3] Likewise, in *Spevack v. Klein*, 385 U.S. 511 (1967), this Court insisted the State of New York reinstate an attorney who had been disbarred for failing to waive his Fifth Amendment privilege at a judicial inquiry into professional misconduct. Again there was never a resulting statement that could be used in a criminal trial, yet the Court imposed a remedy for the constitutional violation. In *Slochower v. Board of Education*, 350 U.S. 551 (1956), a public school teacher was dismissed for refusing to waive her Fifth Amendment right not to incriminate herself in front of a Congressional Committee. Again, the Court ordered

[3] The Court noted that such a waiver may have been ineffective after *Garrity v. New Jersey,* which would have compelled the state to grant immunity. However, "[t]he possible ineffectiveness of this waiver does not change the fact that the State attempted to force petitioners upon penalty of loss of employment to relinquish a right guaranteed to them by the Constitution." *Sanitation Men*, 392 U.S. at 284.

reinstatement, finding the Fifth Amendment violated despite the fact that no statement was given, hence no admission in a later criminal proceeding was possible.[4]

Most recently, in *McKune v. Lile*, 122 S.Ct. 2017 (2002), this Court accepted that the privilege is available in a psychiatric prison treatment program, again well in advance of any potential criminal case. Though there was sharp disagreement regarding the issue of whether the alleged penalty/loss of benefit imposed on the prisoner (transfer to a more secure facility and loss of privileges) for refusing to admit to the crime of conviction and other prior criminal acts constituted "compulsion" within the meaning of the privilege, every member of this Court accepted the plaintiff's use of 42 U.S.C. section 1983 as a vehicle to obtain an injunction to prevent the imposition of a penalty upon invocation of the privilege. The opinion began by noting that if the program amounted to compulsion, it would have to be terminated.[5] This was true despite the fact that the plaintiff refused to make a statement, and hence the introduction of an incriminating statement at a future criminal proceeding was impossible.

In addition to the penalty cases, which apply and enforce the Fifth Amendment in grand jury proceedings,

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[4] *See also Lefkowitz v. Turley*, 414 U.S. 70 (1973), where this Court invalidated a New York statute requiring that public contractors testify before a grand jury and waive immunity from the use of such statements against them in a future criminal trial under threat of loss of contract, and *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), holding that a grand jury witness cannot be divested of political office as a penalty for invoking the privilege.

[5] "So the central question becomes whether the State's program, and the consequences for nonparticipation in it, combine to create a compulsion that encumbers the constitutional right. If there is compulsion, the State cannot continue the program in its present form ..." 122 S.Ct. at 2025.

congressional committees, and prison psychiatric interviews, a similar line of cases applies the self-incrimination clause to coercive police interrogations of suspects, regardless of where they occur. In 1897, the Court in *Bram v. United States*, 168 U.S. 532, 542 (1897), first applied the self-incrimination clause to bar involuntary confessions offered in federal criminal trials. A long series of cases post-*Bram* but pre-incorporation applied exactly the same standard to the coercion of statements by state officials, and condemned as a violation of due process the use of overbearing police tactics to coerce confessions from suspects. As in the penalty cases, the Court required that federal and state officials honor a suspect's desire to remain silent. When officers ignore such a desire and engage in conduct which compels an involuntary statement, the privilege (if in federal court) or due process (if in state court) is violated. Though the remedy asked for in those criminal cases was the exclusion of evidence, the Court made clear that the coercion itself was prohibited by the due process clause: "The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' ... It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners ..." *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (confession obtaining beatings violate due process) .

See also, Watt v. Indiana, 338 U.S. 49 (1949) ("In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life taken."); *Haynes v. Washington*,

373 U.S. 503, 536 (1963) (a "confession obtained by police use of threats is violative of due process"); *Lynumn v. Illinois*, 372 U.S. 578 (1963); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (36 hour interrogation); *Mincey v. Arizona*, 437 U.S. 385 (1978) (questioning gravely ill suspect in hospital).

In *Spano v. New York*, 360 U.S. 315 (1959), the Court clearly demonstrated that the dictates of the Fourteenth Amendment control the legality of the actions by police during interrogations, not merely the actions of judges during trials:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime.

Spano, at 320-21.

Similarly, in *Haynes v. State of Washington*, 373 U.S. 503 (1963), the Court explicitly declared that the methods of the police that were employed to coerce a written confession were themselves "constitutionally impermissible." *Haynes*, at

319. The *Haynes* Court also cited its earlier opinion in *Rogers v. Richmond*, 365 U.S. 534, 541 (1961) where it had characterized the interrogation methods themselves as "constitutionally impermissible."

In 1964, this Court explicitly incorporated the Fifth Amendment's privilege into the Fourteenth and applied it to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964). Since incorporation, the Court uses the same test for finding that a statement was "compelled" within the meaning of the privilege, or "involuntary" within the meaning of due process, in fact using these terms interchangeably.[6] However, this Court continues to utilize the "due process" approach, perhaps in part because this approach makes it easy for judges to differentiate between statements found involuntary by a judge considering the facts before her (regardless of whether the *Miranda* warnings are required or given), and statements

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[6] *See* Lawrence Herman, The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II), 53 Ohio St. L.J. 497 (1992), for lists and comparisons of cases.

Amici do not mean to suggest that the Court has well explained what makes a statement compelled or involuntary. Such effort has stumped the Court and philosophers for as long as they have asked the question. *See, e.g., McKune v. Lile*, 122 S.Ct. 2017 (2002) (O'Connor, J., concurring) (noting failure of both plurality and dissent to offer coherent theory of compulsion); Albert W. Alschuler, Constraints and Confessions, 74 Denv. U.L. Rev. 957 (1997). It is precisely for this reason that the Court has developed categories of official acts that are always considered compelling (threatening loss of employment, *Garrity,* commenting on a defendants refusal to take the stand, *Griffin*), and imposed rules of conduct for police officers to follow during custodial interrogation (the *Miranda* warnings). However, the issue of whether Mr. Martinez' statements were compelled must be resolved in Respondent's favor, as it was below and is not a question upon which *cert*. was granted.

considered involuntary because of *Miranda*'s legal presumption. See *Withrow v. Williams*, 507 U.S. 680, 693 (1993) (eliminating habeas review of *Miranda* claims would not advance federalism or efficiency, as even if dictates of *Miranda* were followed, petitioners could still claim statements were involuntary under "the due process approach").[7] Regardless of whether this Court now chooses to frame the issue as one of due process or of privilege, the voluntariness test and condemnation of coercive police practices should be identical. Just as the constitution is violated at the moment a state official compels an employee to make a statement (and thus waive her invocation of the privilege) by threat of employment loss, the constitution is violated when police officers compel a suspect to make a statement (and thus waive her invocation of the privilege) by threat of continuous harassment.

B. The Fifth and Fourteenth Amendments Protect a Right to Remain Silent During Custodial Interrogations by State Officials.

Two years after incorporation, the Court reaffirmed *Bram* and *Malloy*, again holding that the privilege is applicable at the stationhouse, in *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The most familiar legacy of *Miranda*, of course, is the requirement that police officers must advise suspects prior to interrogation that, "You have a right to remain silent." For thirty-six years, countless officers have advised countless Americans, at the specific direction of this Court, that this is a right they possess. Petitioner's argument

[7] This legal distinction is necessary for two reasons. First, statements found to be involuntary given the circumstances cannot be used to impeach, unlike statements presumptively involuntary because of a *Miranda* failure. Second, there are numerous situations, such as a suspect questioned while not in custody, where *Miranda*'s presumption of involuntariness is not triggered.

that the Fifth and Fourteenth Amendments, except for extreme cases that "shock the conscience," apply only at trial, cannot be accepted without concluding that the suspect in the stationhouse in fact has no "right" to remain silent, at least no right that is enforceable.

In assessing whether law enforcement officers were, in effect, ordered by this Court in 1966 to mislead the American public about the nature of their rights, it is useful to consider whether the "right to remain silent" originated only with *Miranda*. It did not. The *Miranda* opinion itself explained that the need to warn suspects that they have a right to remain silent was essential so that suspects would have a simple awareness of a pre-existing Fifth Amendment privilege that could be exercised by remaining silent:

> At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it--the threshold requirement for an intelligent decision as to its exercise. … Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

364 U.S. at 467-468.

This last sentence of this passage also makes clear that the interrogators, having advised the suspect of his rights, were constitutionally required to honor them.

The right to remain silent had been recognized by this Court prior to the decision in *Miranda*. For example, in *Escobedo v. State of Illinois*, 378 U.S. 478, 485 (1964), the Court referred to the suspect's "absolute right to remain

silent" in the face of police accusations. *See also Culombe v. Connecticut*, 367 U.S. 568, 631 (1961); *Crooker v. State of California*, 357 U.S. 433, 440 (1958) (referring to "a voluntary confession by a college-educated man with law school training who knew of his right to keep silent").

This Honorable Court has consistently described the Fifth Amendment privilege as including a right to remain silent, regardless of the context in which it is exercised. For example, it is clear that a criminal defendant has a "right to remain silent" during a psychiatric interview arranged by the state in connection with determining future dangerousness as a factor bearing on the imposition of the death penalty. *Estelle v. Smith*, 451 U.S. 454 (1981). The Court has not merely held that unwarned statements taken from a prisoner cannot be introduced in evidence against him–it has made clear that the defendant may not be compelled to answer the psychiatrist's questions:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, *may not be compelled to respond to a psychiatrist* if his statements can be used against him at a capital sentencing proceeding. *Id.* at 468.

In a completely different context, the Fifth Amendment protects a public employee's "right to remain silent" in response to questions put to him by his employer where the answer might lead to a criminal prosecution. As Chief Justice Rehnquist recently noted for a unanimous Court in *LaChance v. Erickson*, 522 U.S. 262 (1998): "If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment *right to remain silent*." *Id.* at 267.

These cases demonstrate that the right to remain silent in the face of police inquiries is both implicit in the concept of ordered liberty and recognized by this Nation's history and tradition.

Petitioner and *amici* in support of petitioner now also suggest that the *text* of the Fifth Amendment, specifically the references to a "witness" in a "criminal case" compel the conclusion that Fifth Amendment rights do not exist during interrogation by the police and thus the only "right" protected by *Miranda* and the Fifth Amendment is the right to exclusion of a coerced or non-Mirandized statement in a criminal trial. This Court has already visited this issue in the pre- and post-*Miranda* penalty cases, discussed in part IA, and in *Miranda* itself. Moreover, in *Pennsylvania v. Muniz,* 496 U.S. 582 (1990), the Court made clear that a person is a "witness against himself" when he provides the state with evidence of a "communicative nature," and that application of the Amendment is not limited to testimony that takes place in a courtroom.

The Court specifically held that a suspect may be compelled to be a witness against himself during custodial interrogation:

> Because the privilege was designed primarily to prevent 'a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality,' it is evident that a suspect is 'compelled … to be a witness against himself' at least whenever he must face the modern-day analog of the historic trilemma--either during a criminal trial where a sworn witness faces the identical three choices, or during custodial interrogation where, as we explained in *Miranda,* the choices are analogous and hence

> raise similar concerns. *Id.* at 596 (footnote and citation omitted).

Repeating language from *Miranda*, the Court concluded that despite the differences between courtroom testimony and custodial interrogation, "[w]e are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." *Id.* at 596, n. 10, (quoting *Miranda*, 384 U.S. at 461).

The Petitioner and amici in support of Petitioner rely heavily on a statement from this Court's opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) that a Fifth Amendment "violation occurs only at trial."

In *Verdugo* the Court considered "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." Id. at 261. The holding of the case was limited solely to the search in Mexico, the Fourth Amendment and the rights of aliens.

The Court in *Verdugo* rejected the argument that Fourth Amendment rights are violated by introduction of evidence at trial, concluding that the exclusionary rule is remedial.

The Court, for the sake of illustration, contrasted the Fourth Amendment with the Fifth, where there is clearly a violation at trial if a coerced statement is introduced in evidence. The Court had no occasion to consider, even for the purpose of the comparison it was making, whether a Fifth Amendment violation can occur prior to trial.

C. *Kastigar* Immunity Permits Compulsion Only Where A Suspect Is Promised Use and Derivative Use Immunity Pursuant to Statute, and Testimony is Compelled in a Public Judicial Proceeding.

Petitioner apparently believes that *Kastigar* heralded a radical change in Fifth and Fourteenth Amendment jurisprudence. According to this theory, police and other government officials can use any method to compel a statement that could potentially be incriminating in a future criminal proceeding without violating the Fifth Amendment, because a court will later exclude the resulting statement. *Kastigar* in fact stands for a much narrower proposition. A government official may use a certain form of compulsion, utilizing judicial process in a public fora, in exchange for an explicit promise, pursuant to state statute, not to use that statement or any evidence derived from that statement in a future state or federal criminal prosecution. The two requirements before *Kastigar* immunity is coextensive with the privilege are clear: (1) the "compelled" testimony must be taken in a public proceeding enforced by judicial process; and (2) the suspect must be properly informed that the government is invoking an immunity statute, whereby neither direct nor derivative evidence can be used against him in a future criminal proceeding. The first requirement ensures that the testimony is accurately transcribed, obtained in a humane manner (by public questioning), and enforced by legal process (threat of contempt, rather than threat of a beating, sleep or food deprivation, or psychological harassment). The second requirement ensures that there is no possibility of future incriminating use of this testimony.

Neither of these requirements is met when police coerce statements from suspects in the backroom of the stationhouse. During the majority of custodial interrogations,

there is no video or audio recording to transcribe what the suspect actually said and to memorialize what form of compulsion was used. This is, then, a *private* proceeding where compulsion is exerted by the policeman. Moreover, the suspect has no promise of official immunity pursuant to statute, or even any guarantee that a later court will in fact find a resulting statement coerced and exclude it. Even if such exclusionary findings were uniform among Circuits and predictable, few suspects would be sufficiently conversant with the law to make such an advance judgment.

The relationship between judicial grants of immunity and the privilege against self-incrimination was explored at greater length in *United States v. Balsys,* 524 U.S. 666 (1998). The Court held that the Fifth Amendment does not apply when the only fear of prosecution is in a foreign country. The Court explained that the Fifth Amendment privilege also protects against using statements compelled by the federal government in state prosecutions and statements compelled by state officials in federal prosecutions, as a consequence of the Court's decisions in *Murphy v. Waterfront Comm'n. of N.Y. Harbor*, 378 U.S. 52 (1964) and *Malloy v. Hogan*, 378 U.S. 52 (1964). In this connection, the Court explained the nature of the government's power to offer immunity in exchange for testimony that would otherwise be protected by the Fifth Amendment privilege:

> [U]nder the Self-Incrimination Clause, the government has an option to exchange the stated privilege for an immunity to prosecutorial use of any compelled inculpatory testimony. The only condition on the government when it decides to offer immunity in place of the privilege to stay silent is the

> requirement to provide an immunity as broad as the privilege itself.

Balsys, at 682.

Murphy achieved this by imposing an exclusionary rule prohibiting the federal use of testimony compelled by a state in the absence of a statute effectively providing for federal immunity.

Justice Souter's opinion for the Court, however, makes clear that this judicially created immunity is not the primary vehicle for enforcing the Fifth Amendment, but only a "fail-safe" device "to ensure that compelled testimony is not admitted in a criminal proceeding" in the absence of a previous grant of immunity. Id. at 683, n. 8. The Court explained:

> The general rule requires a grant of immunity prior to the compelling of any testimony. We have said that the prediction that a court in a future criminal prosecution would be obligated to protect against the evidentiary use of compelled testimony is not enough to satisfy the privilege against compelled self-incrimination. The suggestion that a witness should rely on a subsequent motion to suppress rather than a prior grant of immunity 'would [not] afford adequate protection. Without something more, [the witness] would be compelled to surrender the very protection which the privilege is designed to guarantee.

Id. (citations omitted).

Balsys thus makes clear that the constitutionality of compelling testimony on the basis of a grant of immunity does not mean that the Fifth Amendment privilege is a "trial right"

only. Clearly the "right to remain silent" is protected by the Fifth Amendment prior to and at the time of any government attempt to compel or coerce a statement.

Thus, Mr. Martinez could have been brought in front of a grand jury and "compelled," upon pain of formal judicial sanction, to recount his version of events the night he was blinded and crippled by a police officer, even if such statements might have been incriminating, after an official grant of immunity from the state of California. He may not, however, be secreted to the back room of a station house (or confined to a hospital bed) and be subjected to the third degree until he breaks, despite the fact that any resulting statements will never by used in a future criminal proceeding (because they will be properly excluded by the state judge as involuntary, because Mr. Martinez is an innocent man and never charged, or because Mr. Martinez might later agree to testify for the government in exchange for a *nolle pros)*. The privilege against self-incrimination and due process clauses of the Fifth and Fourteenth Amendments were violated by the coercive tactics of harassing Mr. Martinez for 45 minutes while he screamed in pain and begged to be left alone. This is not the form of compulsion the *Kastigar* Court blessed, and no immunity was offered.

In petitioner's world, a statement can be physically or psychologically coerced from a suspect upon the whim of a police officer, and the suspect's invocation of her privilege safely ignored. In the real world, every professional police officer knows such behavior violates the constitution. Thus, there is uniform agreement among the lower courts that interrogation practices which coerce a statement from a suspect leads to liability under 42 U.S.C. 1983, absent qualified immunity. Whether those courts call such coercion

a violation of the Self-Incrimination or Due Process Clause,[8] they all agree the constitutional violation is complete

[8] *See, e.g., Deshawn E. v. Safir*, 156 F.3d 340, 348 (2nd Cir. 1998) ("the Due Process Clause of the Fourteenth Amendment prohibits self incrimination based on fear, torture or any other type of coercion. . . .the question in each case is whether the conduct of law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self determined.") *Gray v. Spillman*, 925 F.2d 90, 94 (4th Cir. 1991) (an attempt to coerce an incriminating statement constituted a viable ' 1983 claim for violation of the Fifth and Fourteenth Amendment); *Weaver v. Brenner*, 40 F.3d 527, 536 (7th Cir. 1994) (". . . if the confessor is found as a fact to have been coerced, [this] violates [plaintiff's] constitutional rights and serves as the predicate for his ' 1983 action.)"; *Duncan v. Nelson*, 466 F.2d 939, 945 (7th Cir. 1972) (there "is no indication. . .that physical violence need be present to produce the coercion. . .cognizable under ' 1983); *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1244 (7th Cir. 1990) (if the prosecutor coerced confession by "depriving a suspect of food and sleep during an interrogation, or beating him with a rubber truncheon," then the constitutional injury is complete at that moment), *vacated and remanded*, 112 S.Ct. 40 (1991), *affirmed as modified*, 952 F.2d 965 (7th Cir. 1992), *reversed on other grounds*, 509 U.S. 259 (1993); *Rex v. Teeples*, 753 F.2d 840, 843 (9th Cir. 1985) ("We also conclude that [plaintiff] has stated the constitutional claim arising from the interrogation. Extracting an involuntary confession by coercion is a due process violation."); *Cooper v. Dupnik*, 963 F.2d 1220, 1237 (9th Cir. 1992) (*en banc*) ("It is irrelevant that Cooper's coerced statements were never introduced against him at trial the task force's wrongdoing was complete at the moment it forced Cooper to speak."); *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997) (upholding ' 1983 action and denying qualified immunity for defendant who used a coerced statement and a warrant to arrest plaintiff, although such statement was never introduced in a criminal case).

Pre-*Miranda*, preincorporation cases likewise allowed a ' 1983 claim based upon a coerced confession, regardless of whether the statement was used in court. *See, e.g., Robichaud v. Ronan*, 351 F.2d 533, 534 (9th Cir. 1965); *Geach v. Moynahan*, 207 F.2d 714, 615 (7th Cir. 1953); *Refoule v. Ellis*, 74 F.Supp. 336, 339 (No. Dist. Ga. 1947).

regardless of whether the resulting statement is ever used or offered in a criminal proceeding.

II. This Court's Recent Precedent in *Dickerson* Affirms That The Constitution Mandates that Officers Deliver the *Miranda* Warnings and Honor the Invocation of these Rights.

Should this Court find that Respondent's statement was not "involuntary" or "compelled" within the meaning of the Self-Incrimination and Due Process Clauses, the Court should nonetheless permit a civil rights action based upon Petitioner's refusal to honor Respondent's invocation of his *Miranda* rights. Unlike the uniform agreement among the courts of appeals that the Self-Incrimination and Due Process Clauses are violated when an officer coerces a statement from a suspect, there is sharp disagreement over whether a *Miranda* violation (in the form of failure to deliver the warnings or refusal to honor a suspect's invocation of rights) is cognizable in a § 1983 claim.[9]

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[9] A minority of circuits hold that where a police officer intentionally disregards a suspects invocation of one of his Miranda rights, there is a violation of the Fifth Amendment regardless of whether any resulting statements were actually coerced or used in a criminal trial. *See California Attorneys for Criminal Justice v. Butts,* 195 F.3d 1039 (9th Cir. 2000) (police department scheme to continue to question suspects despite the invocation of their *Miranda* rights, violated clearly established law and constituted a 42 U.S.C. Section 1983 violation); *United States v. North*, 920 F.2d 940, 948 (D.C. Cir. 1990) ("where *Miranda* warnings are not given, the constitutional violation occurs independent of the grand jury.").

The majority of circuits hold that a mere *Miranda* violation cannot constitute a section 1983 action, either because the resulting statement is only presumptively (not actually) coerced, the resulting statement is never used in a criminal trial, the police officers are not the proximate cause of the plaintiff's injury, or the police officers testifying as witness and not

The position which best harmonizes *Miranda*'s purpose and exceptions with this Court's reaffirmation of *Miranda*'s constitutional pedigree in *United States v. Dickerson*, 530 U.S. 428 (2000), is that where law enforcement officers disregard a suspect's invocation of her *Miranda* right to remain silent, they may be liable for monetary penalties pursuant to 42 U.S.C. § 1983. Any officer making a reasonable mistake regarding whether a suspect invoked her *Miranda* right to silence or counsel would be fully protected by the doctrine of qualified immunity.

Prior to the *Miranda* Court's requirement that police officers inform suspects of their privilege against self-incrimination and right to counsel, officer conduct during custodial interrogation was deemed unconstitutional only if, considering the "totality of circumstances," they overbore a suspect's will.[10] After 30 years of attempting to ensure that police do not coerce statements from suspects by examining each confession which came before it, the Court admitted defeat. Thus, the *Miranda* Court demanded the four warnings (or an equally effective alternative) to accomplish two goals. First, it eased its own adjudicative task by providing an objective model against which all custodial interrogations

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acting under color of law. *See* Susan R. Klein, Miranda *Deconstitutionalized When the Self Incrimination Clause and Civil Rights Act Collide*, 143 U. PENN. L. REV. 417, 434-48 (1994) (collecting cases and suggesting, as since accomplished in *Dickerson*, that the Court reconstitutionalize *Miranda*).

[10] This test examines the conduct of the police in interrogating the suspect (threats or promises, trickery, withholding food and water, the duration of the questioning, plays upon sympathy, and the use of family and friends) and the characteristics of the suspect that may make him susceptible to coercion (age, intelligence, education, psychological problems and physical limitations). *See, e.g.*, *Colorado v. Connolly*, 479 U.S. 157 (1986) (some police pressure required).

could be measured. The Court simply couldn't review a sufficient number of cases, and the risk of erroneously admitting involuntary statements was too high.[11] Second, it prevented violations of the Self-Incrimination Clause by issuing a set of "bright-line" rules for police officers to follow during custodial interrogations.[12] It was difficult for honest law-abiding officers to know in advance when the inherent pressure surrounding custodial interrogations became unconstitutional compulsion. There is no doubt that the *Miranda* Court intended to directly regulate police conduct, as such Court regulation of the police provides the only "assurance that practices of this nature will be eradicated in the foreseeable future."*Miranda*, 384 U.S. at 447. The *Miranda* decision is best viewed as a compromise between the values enshrined in the Fifth Amendment and law enforcement's interest in crime fighting, a compromise that favors law enforcement.

Just two terms ago, the Court definitively resolved the issue of whether the *Miranda* warnings were required by the privilege against self-incrimination in *Dickerson*. In answering in the affirmative, Chief Justice Rehnquist noted that "we have consistently applied *Miranda*'s rule to prosecutions arising in state courts. . . . with respect to proceedings in state courts, our 'authority' is limited to enforcing the commands of the United States Constitution.'" *Dickerson*, 530 U.S. at 438. Though Chief Justice Rehnquist

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[11] As Chief Justice Rehnquist noted in *Dickerson*, "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment…'"530 U.S. at 435.

[12] As Chief Justice Rehnquist recently explained, the *Miranda* Court granted *certiorari* "to give concrete constitutional guidelines for law enforcement agencies and court to follow." *Dickerson*, 530 U.S. at 435.

acknowledged that the Court has "repeatedly referred to the *Miranda* warnings as "prophylactic," and thus subject to exceptions by the Court or substitution by Congress, this does not mean that the *Miranda* warnings are "not themselves rights protected by the Constitution" but that "no constitutional rule is immutable." 530 U.S. at 438, 441 (quoting *Michigan v. Tucker*, 417 U.S. 433 (1974)).

In fact, scholars have long recognized and applauded the Court's duty to develop "constitutional common law" to both prevent and remedy constitutional violations.[13] "Constitutional criminal procedure is rife with prophylactic rules, which most often take the form of rebuttable or conclusive evidentiary presumptions or bright-line rules for law enforcement officials to follow." Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules: Safe Harbors and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001). While more overprotect the constitutional right at issue and thus favor the civil liberties of crime suspects, some of them provide "safe harbors" to government officials following certain procedures, and thus favor law enforcement. *See id* at 1037-47.

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[13] *See, e.g.*, Mitchell N. Berman, *Coercion Without Baselines; Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001) David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 287 (1988); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986);. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 203 (1975); Paul Bator, et al, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 700, 770 (2d 1973).

A. While This Court Has Permitted Limited Use of Statements Obtained After *Miranda* Violations, the U.S. Constitution Mandates that Officers Provide the *Miranda* Warnings and Honor The Invocation of these Rights.

Just as it is legitimate to craft constitutional prophylactic rules, it is legitimate to impose limits and exceptions upon them. As with crafting exceptions to core constitutional provisions,[14] this Court has been willing to craft exceptions to constitutional prophylactic rules and remedies where such exceptions do not hamper the goals of deterrence of executive misconduct or ease of adjudication, or where there are other equally weighty interests at stake.

One example of Court-created constitutional common law is the Fourth Amendment exclusionary sanction developed in *Weeks v. United States,* 232 U.S. 383 (1914) and imposed on state actors in *Mapp v. Ohio*. 367 U.S. 643 (1961). Though this sanction is imposed only after a violation of the Fourth Amendment, the Constitution itself does not demand it as a remedy for the violation.[15] Rather, the exclusionary sanction is a judicially created procedure designed to deter future Fourth Amendment violations, and the Court has not been hesitant to create numerous exceptions to the exclusionary rule wherever its costs (in terms of the truth-seeking function of a criminal trial) outweigh its deterrent effect (in terms of preventing Fourth Amendment violations

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[14] *Schenck v. United*, 249 U.S. 47 (1919) (the First Amendment free speech right does not extend to yelling "fire" in a crowded movie theater); *Warden v. Hayden*, 387 U.S. 294 (1967) (police can search without warrant in emergency despite Fourth Amendment).

[15] Unlike violations of the Fifth Amendment's self-incrimination clause or sixth amendment right to counsel, which would demand exclusion as part of the right itself.

by police officers).

Likewise, in the Fifth Amendment context, the Court has limited the judicial consequences of a violation of *Miranda*'s constitutional prophylactic rule where imposing exclusion from a criminal trial would not deter police misconduct or would otherwise have unacceptable costs. Thus, in a series of cases this Court excluded statements taken in violation of *Miranda* only from the prosecutor's case-in-chief, allowing the use of such statements for impeachment purposes if the defendant chooses to testify, and permitting the use of derivative evidence. After the Court considered the serious costs of applying the exclusionary rule in those circumstances, such as a "license to use perjury by way of defense," blocking a witness' voluntary decision to testify, or excluding reliable derivative evidence, it decided to limit the exclusionary sanction to the prosecutor's case-in-chief. *See, e.g.*, *Harris v. New York*, 401 U.S. 222, 226 (1971); *Oregon v. Hass*, 420 U.S. 714 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Oregon v. Elstad*, 470 U.S. 298, 316 (1984). Where public safety is at risk, the Court has gone even further, not requiring that the *Miranda* warnings be delivered. *New York v. Quarles*, 467 U.S. 649 (1984) (public safety interests in removing a gun from a grocery store outweighed the deterrent effect of the prophylactic rule).

Just as the Court has limited Miranda's exclusionary remedy where deterrence is not fostered and other values are at stake, it has extended *Miranda*'s exclusionary sanction where necessary to deter police coercion and ease the Court's task of adjudication. Thus, the Court held in *Arizona v. Roberson*, 486 U.S. 675 (1988), that police cannot initiate interrogation even about other crimes, once a suspect has invoked his *Miranda* right to counsel. As Justice Kennedy explained, after *Miranda* was extended again in *Minnick v. Mississippi*, 498 U.S. 146 (1990), to cover situations where

suspects had consulted with their attorney, this rule "ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, …. [The] rule provides clear and unequivocal guidelines to the law enforcement profession."

None of the cases expanding or contracting *Miranda*'s exclusionary remedy speak to the Court's willingness to allow police departments to develop schemes to refuse to deliver the *Miranda* warnings, in the absence of public safety considerations, without constitutional liability. Moreover, no case condones a plan to ignore a suspect's invocation of her rights. Such action by police officers is clearly unconstitutional in the wake of *Dickerson*, regardless of whether judicially-created remedies by the Court exclude or admit statements taken in violation of this constitutional provision. Officer misconduct can best be deterred by means less costly to truth seeking function of trial than exclusion, such as by civil rights actions.

B. Civil Rights Liability For Continuing to Question a Suspect After her Invocation of the *Miranda* Right to Remain Silent Is Necessary to Safeguard the Privilege Against Self Incrimination

If the Court excludes from civil rights liability unreasonable violations of Fifth and Fourteenth Amendment rights, there will be no effective protection for the right to be free from coercive interrogation. In the first place, the exclusionary rule is actually invoked only in a tiny fraction of all serious criminal cases. Over 90% of felony cases are resolved by a plea and no trial is ever held.[16]

[16] Between October 1999 and September 2000, of the 68,079 federal criminal cases disposed of by plea or trial, 63,863 (93.8%) defendants

Moreover, consider the present incentive structure for an honest officer intent on solving a crime. Where it is clear that a suspect is in custody and undergoing interrogation, the two triggers of the *Miranda* rule, most rational officer will read the warnings. 80% of suspects waive their *Miranda* rights,[17] and the officer can correctly predict that he will, most likely, obtain an admissible statement. This incentive structure is turned on its head once a suspect actually invokes any *Miranda* right. An officer who honors a suspect's invocation of his right to remain silent or consult with an attorney obtains absolutely no benefit from honoring the invocation -- he gets no statement or fruits. On the other hand, a rational police officer who ignores a suspect's invocation of his *Miranda* rights, at least in the absence of monetary liability under § 1983, has nothing to lose and much to gain. If his continued questioning succeeds in convincing a suspect who has invoked his *Miranda* right to waive them instead, he may obtain a useful statement. Though such a statement will be excluded from the prosecutor's case-in-chief, it can be used to keep the defendant off the stand and to lead to other witnesses or physical evidence of the crime.

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pleaded guilty, 1235 (1.8%) were convicted or acquitted after bench trials, and only 2981 (4.4%) were convicted or acquitted after jury trials. Stat. Div., Admin. Office of the U.S. Courts, Statistical Tables for the Federal Judiciary September 30, 2000, tbl.D-4. In 1996 of the 997,972 state felony defendants whose cases were resolved by plea or verdict, 905,957 (90.8%) entered pleas of guilty or nolo contendre, 54,474 (5.5%) had bench trials, and only 37,541 (3.8%) had jury trials. Bureau of Justice Stat., U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 1998, tbl.5.42, at 432.

[17] Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

Thus, there are no disadvantages of ignoring a *Miranda* invocation, but numerous advantages. We should therefore not be surprised by the widespread training in California advocating the violation of *Miranda*. *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998); Charles D. Weisselberg, *In the Stationhouse after* Dickerson, 99 MICH. L. REV. 1121 (2001). Nor should we be surprised by the *Cooper* Court's description of an Arizona police agency's decision to ignore *Miranda* invocations in high profile cases. See *Cooper v. Dupnik*, 924 F.2d at 1523-25 (describing joint task force of the Tucson Police Department and the Pima County Sheriff's Department decision to disregard the defendant's request for counsel since 1981), *reversed,* 963 F.2d at 1235. *See also* Klein, Miranda *Deconstitutionalized* at 456-468, *supra* n. 9. (providing additional example of the District of Columbia police department's decisions to ignore *Miranda* in certain cases). Should the Court in the case at bar inform federal, state, and local police agencies that the constitutional prophylactic rules developed in *Miranda* (and throughout constitutional criminal procedure) are actually *optional*, this sends the intolerable signal that judicial restraints on abusive police tactics have been abandoned.

III. This Case Is Not the Appropriate Vehicle for Crafting a Terrorism Exception to the Fifth and Fourteenth Amendments

The Department of Justice argues that this Court should reject civil rights liability for intentional violations of Miranda and for intentional and coercive behavior to obtain involuntary confessions, in part, so that police may "obtain potentially life-saving information during emergencies." Brief for the United States as Amicus Curiae Supporting Petitioner 27. Three pages of their brief are devoted to discussions of

public safety, imminent threat of harm, and exploding bombs. The simplest answer to this argument is that in fact no such emergency existed in this case, nor does Petitioner or any government agency claim that there was such an emergency. Any alleged criminal conduct in this matter was terminated, there were no weapons at large, and there were no victims unaccounted for. This case involved simple evidence-gathering. If this case were viewed as an emergency situation, it would be hard to imagine what the limits of such an exception to the ordinary rules would be. The government's thinly-veiled reference to domestic and foreign terrorism should not persuade the Court to dilute or eliminate Fifth and Fourteenth Amendment protections for citizens in ordinary cases. Should an actual emergency arrive, judicial and executive branch officials have ample means of safeguarding the public.

First, there is already an exception to *Miranda* where public safety is at issue. *See New York v. Quarles*, 467 U.S. 649 (1984). Second, there is nothing to prevent this Court from addressing the question of whether a narrow emergency exception for actual coercion needs to be created, should the appropriate case arise.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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