No. 21-499

IN THE
Supreme Court of the United States

CARLOS VEGA,

Petitioner,

v.

TERENCE B. TEKOH,

Respondent.

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

BRIEF FOR CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND PROFESSOR CHARLES D. WEISSELBERG AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

California Attorneys for Criminal Justice ("CACJ") and Professor Charles D. Weisselberg respectfully submit this brief as *amici curiae* in support of respondent Terence B. Tekoh. *Amici curiae* have special knowledge and experience with the former California law enforcement practice of questioning "outside *Miranda*," meaning deliberately interrogating custodial suspects over a clear invocation of the right to counsel or right to remain silent. This practice will return if the petitioner's arguments are accepted by this Court.

CACJ is a non-profit corporation founded in 1972. It has over 2,000 members, primarily criminal defense lawyers. For years, CACJ fought California law enforcement's practice of questioning in deliberate violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). CACJ participated as *amicus curiae* in outside *Miranda* cases in California, including before the California Supreme Court. The organization served as the lead plaintiff in *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000), a civil rights lawsuit that was instrumental in ending outside *Miranda* questioning in California. CACJ also appeared as *amicus* in *Dickerson v. United State*s, 530 U.S. 428 (2000) to underscore the psychological compulsion of questioning after a *Miranda* invocation. CACJ members are gravely concerned that California will return to the

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, CACJ members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. This brief is filed with the consent of all the parties.

days of questioning outside *Miranda* if this Court reverses the decision below.

Charles D. Weisselberg is the Yosef Osheawich Professor of Law at the University of California, Berkeley, School of Law.[2] For many years, Professor Weisselberg has written and litigated about *Miranda v. Arizona* and questioning outside *Miranda*. He served as co-counsel in *California Attorneys for Criminal Justice v. Butts*, as well as for CACJ and other *amici* in *Miranda* cases in the California Supreme Court and this Court. Through discovery in *CACJ v. Butts* as well as sixty responses to requests under the California Public Records Act,[3] Professor Weisselberg has obtained and catalogued law enforcement training materials on interrogation law and practice in California.[4] Two of his articles and a training video he

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[2] His title and affiliation are provided for identification purposes only. He does not represent the University of California.

[3] Cal. Gov't Code §§6250-6276.48 (West 2019).

[4] See Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109, 133-37, 189-92 (1998) (describing materials obtained through discovery); Charles D. Weisselberg, *In the Stationhouse after* Dickerson, 99 Mich. L. Rev. 1121, 1135-51 (2001) (discussing materials produced pursuant to August 2000 Public Records Act requests); Charles D. Weisselberg, *Mourning* Miranda, 96 Calif. L. Rev. 1519, 1523-24, 1600-01 (2008) (describing materials produced pursuant to Fall 2005 Public Records Act requests). In response to his Public Records Act request, the California Commission on Peace Officer Standards and Training provided access to its library in Sacramento, which contains print materials and an archive of training videos. *Amicus* conducted research at POST's library on four occasions from 2006 to 2008, including reviewing fifty-nine training videos produced by POST from April 1993 to June 2008. See *Mourning* Miranda, *supra*, at 1524, 1600-01. Professor Weisselberg continued to review POST's *Case*

obtained were cited in *Missouri v. Seibert*, 542 U.S. 600, 610 n.2 (2004) (plurality op.). His articles describe training materials discussed in this brief. In Professor Weisselberg's view, California has demonstrated the unconstitutional practices that develop when there is no meaningful deterrent to *Miranda* violations.

SUMMARY OF ARGUMENT

For a dozen years, California law enforcement officers were trained that it is advantageous to continue to interrogate suspects in custody who invoke their right to counsel or to silence. This practice of questioning "outside *Miranda*" spread throughout the state. The California Supreme Court and Court of Appeal repudiated the practice and told officers to stop violating *Miranda v. Arizona*, 384 U.S. 436, 474 (1966), which states that after suspects invoke, interrogation "must cease." But this training and practice did not end until after federal courts found that officers and cities could be civilly liable under 42 U.S.C. §1983.

The first part of this brief documents the rise and fall of questioning outside *Miranda*, with links to police training videos and print materials that the Court can watch and read. Police were trained that if they continue to question suspects who invoke their rights, officers can obtain statements for impeachment, lock uncounseled suspects into their accounts of events, and obtain physical evidence, among other advantages. Questioning outside *Miranda* was built on a key premise—that *Miranda* establishes only a rule

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Law Today monthly video series from January 2008 until June 2015, when the series discontinued.

of evidence and does not guide police conduct—the very theory advanced by the petitioner here. Officers were assured that they would not violate the Constitution or be subject to civil liability if they used this interrogation tactic. The training stopped after the court of appeals denied officers qualified immunity for questioning outside *Miranda* in *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000).

While *Miranda* is housed within the Fifth Amendment, its reach is greater. As this Court has repeatedly noted, compliance with *Miranda*'s rules often prevents officers from coercing statements in violation of the Due Process Clause. It also helps courts avoid more difficult *post hoc* determinations of voluntariness. California's unfortunate practice of questioning outside *Miranda* forced numerous courts to navigate the murky totality-of-the-circumstances test in cases where officers continued interrogating suspects over repeated invocations, effectively communicating to the suspects that they had no choice but to speak.

This Court should be clear-eyed about the impact of its decision in this case. The petitioner and his *amici* argue for reducing *Miranda* to a rule of evidence, but their briefs elide the real-world consequences for courts and people. Without *Miranda*'s guardrails for police, questioning outside *Miranda* will return. If this Court accepts the petitioner's theory, California's repudiated past will become the nation's future.

ARGUMENT

I. QUESTIONING "OUTSIDE *MIRANDA*" FLOURISHED IN CALIFORNIA BEFORE OFFICERS WERE SUBJECT TO CIVIL RIGHTS LIABILITY, AND WITHOUT LIABILITY THE PRACTICE WILL RETURN

The rule in *Miranda* is clear: if suspects in custody invoke the right to counsel or silence, questioning "must cease." *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). Beginning in 1988, however, officers in California were trained to question suspects over their unambiguous invocations, based on the theory that *Miranda* is only a rule of evidence that does not apply to police. This training came from the highest echelons of law enforcement, and the practice of questioning outside *Miranda* spread throughout the state. The practice persisted even as it was condemned by courts, ending only after officers were made subject to civil liability. Without liability, the practice will return.

A. Based On The Claim That *Miranda* Establishes Only A Weak Evidentiary Rule, Officers Were Trained To Question Custodial Suspects Who Invoked Their Rights

Prior to 1988, officers in California did not have an incentive to violate *Miranda*. Although *Harris v. New York*, 401 U.S. 222 (1971) and *Oregon v. Hass*, 420 U.S. 714 (1975), permitted prosecutors to use some statements obtained in violation of *Miranda* to impeach the accused at trial as a matter of federal law, California took a different approach under state law. The California Supreme Court ruled that any use of a statement taken in violation of *Miranda*—including for impeachment—would violate article I, section 15 of the California Constitution, which contains the state's privilege against compelled self-incrimination.

See *People v. Disbrow*, 16 Cal. 3d 101, 113, 545 P.2d 272, 280 (1976). However, in 1988 that court determined that an amendment to the California Constitution had abrogated the holding in *Disbrow*, thereby aligning California with *Harris* and *Hass*. See *People v. May*, 44 Cal. 3d 309, 315, 748 P.2d 307, 310 (1988).

It did not take long for law enforcement trainers to seize on the "advantages" of *Harris* and *Hass*. For many years, the California Commission on Peace Officer Standards and Training ("POST") produced a monthly video series for officers with updates on judicial decisions.[5] As a frequent trainer explained in a July 1996 POST video:

> [E]ver since the California Supreme Court in *May* came down with this decision putting California on a par with the rest of the country, we on this program, or some of us in this program, have been encouraging you to continue to question a suspect after they've invoked their *Miranda* rights, and the reason we've encouraged you to do that is we want to lock them into their story now, so they can't change it later on . . .
>
> [W]e've been encouraging you to do this for the last eight years . . .

POST, *Case Law Updates*, Miranda: *Post-Invocation Questioning* (July 11, 1996) at 02:55-03:31, https://n2t.net/ark:/85779/j41t0d.[6]

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[5] See Charles D. Weisselberg, *In the Stationhouse after* Dickerson, 99 Mich. L. Rev. 1121, 1136-37 (2001); Charles D. Weisselberg, *Mourning* Miranda, 96 Calif. L. Rev. 1519, 1539-40 (2008). At various times, the series was called *Case Law Updates* or *Case Law Today*.

[6] This video was submitted to the Court in *Missouri v. Seibert*, No. 02-1371. Several briefs in *Seibert* discussed the video. On

The strategic advantages of questioning "outside *Miranda*"—as the trainers themselves called this practice—extended far beyond impeachment. In a 1990 video, produced just two years after *People v. May*, a leading trainer listed some of these for officers:

> Maybe his statement "outside *Miranda*" will reveal methods — his methods of operation . . .
>
> He may reveal the existence and identity and location of other accomplices . . . or other witnesses on the case and we may be able to track them down and get them to come in and testify.
>
> Or, his statements might reveal the existence and the location of physical evidence . . . [Y]ou go "outside *Miranda*" and take a statement and then he tells you where the stuff is, we can go and get all that evidence.
>
> And it forces the defendant to commit to a statement . . . So if you get a statement "outside *Miranda*" . . . he's tied to that, he is married to that . . .

Devallis Rutledge, *Questioning: "Outside* Miranda*"* (1990), *reprinted in* Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109, 189-92 (1998).[7]

Consistent with this training, a legal outline produced by POST for law enforcement instructors to use in their own training sessions contained a section titled "Statements Obtained Outside of *Miranda*." It

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March 19, 2004, after oral argument, the Clerk directed Respondent Seibert's lawyer to provide a copy to the Court. The video was quoted in the plurality opinion. See *Missouri v. Seibert*, 542 U.S. 600, 610 n.2 (2004).

[7] The videotape was obtained during discovery in *California Attorneys for Criminal Justice v. Butts*, CV 95-8634-ER (C.D. Cal.). See *Saving* Miranda, 84 Cornell L. Rev. at 133, 135-36.

advised that in addition to impeachment use, an outside *Miranda* statement may help obtain physical evidence, locate the crime scene, identify witnesses, and clear cases. See POST, *Interrogation Law Instructors' Outline* 20-21 (Dec. 1996), https://n2t.net/ark:/85779/j4s94k.

The theory animating questioning outside *Miranda* was that *Miranda* sets out only a rule of admissibility, and not a guide for police behavior. Therefore, "While the courts can decide that police compliance with Miranda is prerequisite to confession admissibility, the courts have no authority to declare that noncompliance is 'unlawful' . . .." *Interrogation Law Instructors' Outline* at 21. The training materials also assured officers that they would not face civil liability for questioning outside *Miranda*: "Non-coercive police questioning that departs from Miranda does not violate a suspect's civil rights or his Fifth Amendment Rights." *Id.* (emphasis omitted).

Officers receiving outside *Miranda* training would naturally be skeptical since they had previously been taught to comply with *Miranda*. One trainer took direct aim at the skeptics:

> Let me back up for a second because you may have raised an eyebrow . . . When you violate *Miranda*, you're not violating the Constitution. *Miranda* is not in the Constitution. It's a court-created decision that affects the admissibility of testimonial evidence and that's all it is . . . So you're not doing anything unlawful, you're not doing anything illegal, you're not violating anybody's civil rights, you're doing nothing improper . . ..
>
> Now, some people worry, . . . "Won't I get sued in civil court for violating his civil rights?" Well

> just ask yourself, have you ever seen hundreds—hundreds and hundreds—of published cases where a court found a *Miranda* violation . . . Did any of those police officers get sued? Zero . . . [Y]ou're not violating the Constitution, you're not violating his civil rights, you're not incurring any civil liability.

Rutledge, *Questioning: "Outside* Miranda,*" reprinted in Saving* Miranda, 84 Cornell L. Rev. at 191-92.

Officers were thus taught to treat *Miranda* as a rule of trial evidence, with advantages to interrogating suspects who invoked their rights, and without fear of civil lawsuits.

B. "Outside *Miranda*" Training Came From The Top, And The Practice Spread Throughout California

The Commission on Peace Officer Standards and Training is part of the California Department of Justice and has long served as the state's top training authority. See Cal. Penal Code §13500(a) (West 2021). POST's responsibilities include implementing training and educational programs for law enforcement and certifying peace officer training. See Cal. Penal Code §§13503, and 13510.1 (West 2021). Of course, other agencies and organizations also produced training materials on *Miranda*, including the California District Attorneys Association, California Peace Officers' Association, various District Attorneys' Offices, and police departments. See *In the Stationhouse after* Dickerson, 99 Mich. L. Rev. at 1135-51 (collecting sources). While the training was not uniform across agencies, POST was the leader. Its materials were disseminated across the state.

The training took root. In 1995, California Attorneys for Criminal Justice and two individual plaintiffs

brought a civil rights action against the cities of Los Angeles and Santa Monica, as well as several police officers, for their practice of questioning outside *Miranda*. *California Attorneys for Criminal Justice v. Butts*, 922 F. Supp. 327, 329 (C.D. Cal. 1996) ("*CACJ v. Butts*"). In its answer, the Los Angeles defendants expressly admitted "that the Los Angeles Police Department has trained its officers that it is legally permissible to continue non-coercive questioning of suspects who have asserted their right to remain silent and . . . their right to counsel." Answer of Defendants City of Los Angeles, et. al. to Second Amended Complaint, *CACJ v. Butts*, No. CV-95-8634 (C.D. Cal.) (filed Jan. 24, 1997), at ¶¶17, 27, 32, 37, https://n2t.net/ark:/85779/j40t03. The Santa Monica defendants later submitted declarations from trainers for POST and POST-certified courses, explaining the theory and practice of questioning outside *Miranda*. See, *e.g.*, Declarations of Devallis Rutledge, Raymond Hill, and Joel Carey, *CACJ v. Butts*, No. CV-95-8634 (C.D. Cal.) (filed May 5, 1997), https://n2t.net/ark:/85779/j44h20; see also *People v. Nguyen*, 61 Cal. 4th 1015, 1074-75, 354 P.3d 90, 132 (2015) (officer questioned over an invocation pursuant to in-person and video training from Devallis Rutledge).

Questioning outside *Miranda* became widely practiced in California. We can see its spread simply from the law enforcement agencies involved in direct criminal appeals with deliberate *Miranda* violations. See, *e.g.*, *People v. Baker*, 220 Cal. App. 3d 574, 579, 269 Cal. Rptr. 475, 478 (1990) (San Diego police); *People v. Bey*, 21 Cal. App. 4th 1623, 1626-27, 27 Cal. Rptr. 2d 28, 29-30 (1993) (Los Angeles police); *In re Gilbert E.*, 32 Cal. App. 4th 1598, 1600-01, 38 Cal. Rptr. 2d 866,

866-67 (1995) (Oxnard police); *People v. Peevy*, 17 Cal. 4th 1184, 1189, 953 P.2d 1212, 1215 (1998) (San Bernardino County sheriffs); *People v. Neal*, 31 Cal. 4th 63, 68-69, 72 P.3d 280, 282-83 (2003) (Tulare County sheriffs); *People v. Jablonski*, 37 Cal. 4th 774, 810-12, 126 P.3d 938, 962-63 (2006) (Riverside County sheriffs and Burlingame police); *Nguyen*, 61 Cal. 4th at 1074-75, 354 P.3d at 132 (Westminster police); *People v. Johnson*, 12 Cal. 5th 544, 568-69, 501 P.3d 651, 674-75 (2022) (Ventura County sheriffs and District Attorney's investigator); see also *Henry v. Kernan*, 197 F.3d 1021, 1025-27 (9th Cir. 1999) (as amended) (habeas corpus case involving Sacramento County sheriffs). The practice took hold in agencies large and small, across the state.

C. The Practice Persisted Even As It Was Condemned By Courts

The California Court of Appeal, the state's intermediate appellate court, saw the first outside *Miranda* criminal appeals, and most justices were critical. The court characterized one of the earliest appeals as "a very troubling case, presenting a deliberate police violation of *Miranda* coupled with a misrepresentation to appellant about the legal consequences of that violation." *People v. Bey*, 21 Cal. App. 4th 1623, 1628, 27 Cal. Rptr. 2d 28, 30 (1993); see also *In re Gilbert E.*, 32 Cal. App. 4th 1598, 1602, 38 Cal. Rptr. 2d 866, 868 (1995) ("When the police deliberately step over the line and disobey Supreme Court pronouncements, respect for the rule of law necessarily diminishes.") In both of these cases, the appellate court found the defendants' statements to be coerced and involuntary. *Bey*, 21 Cal. App. 4th at 1628, 27 Cal. Rptr. 2d at 31; *Gilbert E.*, 32 Cal. App. 4th at 1601, 38 Cal. Rptr. 2d at 867.

Rather than heed these decisions, POST doubled down. POST's July 1996 training video discussed *Bey* and *Gilbert E.*, and the judicial findings of involuntariness. The trainer discounted the court's strong language, saying that "some judges . . . have taken exception" to this questioning, and "everybody's entitled to their opinion and certainly judges are entitled to think that 'You know, that's just not a good idea.'" POST, *Case Law Updates*, Miranda: *Post-Invocation Questioning* (July 11, 1996), at 03:30-03:47, https://n2t.net/ark:/85779/j41t0d. But POST did not tell officers to follow *Miranda*. Instead, the trainer explained,

> What it means is, our job is getting harder with respect to obtaining information from a suspect after they've invoked their *Miranda* rights. I'm not telling you, "Stop questioning him after that." The law under *Harris v. New York* and *People v. May* is what it is . . . and we want to take advantage of that to the extent we can . . ..

Id. at 08:50-09:19. The trainer then suggested tactics to induce suspects to speak after invoking their rights. See *infra* at 24-25.

Two years later, the California Supreme Court squarely addressed questioning outside *Miranda* in *People v. Peevy*, 17 Cal. 4th 1184, 953 P.2d 1212 (1998). A sheriff's deputy arrested Peevy and gave *Miranda* warnings, but the defendant said he did not wish to speak. *Id.*, 17 Cal. 4th at 1189, 953 P.2d at 1215. Peevy was taken to the office of another sheriff's deputy, who gave a second set of warnings; this time the defendant asked for a lawyer. *Id.* The deputy testified that he knew he was violating *Miranda* but continued questioning for "impeachment purposes." *Id.* Peevy made statements, which the trial court allowed

the prosecutor to use in rebuttal at trial. *Id.*, 17 Cal. 4th at 1189-91, 953 P.2d at 1215-16. The trial court ruled that a third interrogation was "abusive," and prohibited any use of statements from that session. *Id.*, 17 Cal. 4th at 1190, 953 P.2d at 1215.

The California Supreme Court expressly rejected the argument that *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981), "impose no affirmative duties upon police officers, but merely establish rules of evidence." *Peevy*, 17 Cal. 4th at 1202, 953 P.2d at 1224. Rather, there is "an affirmative duty upon interrogating officers to cease questioning once a suspect invokes the right to counsel . . .." *Id.* Reviewing decisions from this Court, Chief Justice George wrote that while "the high court . . . has characterized the rules promulgated by these decisions as prophylactic, it never has retreated from the requirement that police officers regulate their conduct according to the dictates of these cases." *Id.*, 17 Cal. 4th at 1203, 953 P.2d at 1224. Moreover, the claim that *Miranda* and *Edwards* are mere rules of evidence "is inconsistent with the rationale underlying the exclusionary rule of those cases. . . . [S]uch evidence is excluded because the evidence was obtained *illegally*." *Id.*, 17 Cal. 4th at 1204, 953 P.2d at 1225 (emphasis in original). "[I]t is indeed police misconduct to interrogate a suspect in custody who has invoked the right to counsel." *Id.* 17 Cal. 4th at 1205, 953 P.2d at 1225.

Although the California Supreme Court decried the practice of questioning "outside *Miranda*," it affirmed Peevy's conviction. The Court concluded that under *Harris v. New York*, 401 U.S. 222 (1971) and its progeny, voluntary statements are admissible for im-

peachment even if they are obtained through deliberate *Miranda* violations. *Peevy*, 17 Cal. 4th at 1200-02, 953 P.2d at 1222-24.

Amicus examined police training in the wake of *Peevy* and subsequent cases. See generally *In the Stationhouse after* Dickerson, 99 Mich. L. Rev. at 1135-51. As *amicus* wrote in 2001, "One of the most striking aspects of the training materials is simply how little changed" after *Peevy*. *Id*. at 1152. While some local and county agencies moderated their training, statewide leaders did not. *Id*.

The California Department of Justice publishes a widely used and highly regarded volume for law enforcement officers, the *California Peace Officers Legal Sourcebook*. In the wake of *Peevy*, the *Legal Sourcebook* reaffirmed that statements taken in deliberate violation of *Miranda* could be used for impeachment. See *id.* §§7.40a, 7.48b (rev. July 1998), https://n2t.net/ark:/85779/j4ht0r. It characterized as dicta the part of *Peevy* calling such tactics "illegal" and suggested the issue would require further review. See *id*. §7.40b (rev. July 1998).

POST was more emphatic:

> You see sometimes the newscasters giving you the news and then they want to give you their opinion about that . . . And so down at the bottom of the screen it says, opinion or commentary. When a court does that they call it dicta. They've got the ruling, which might be the news, and then they've got their commentary, which is called dicta. It means this is not binding on anybody. This is not a statement of the law.

POST, *Case Law Updates*, *Questioning "Outside* Miranda*" for Impeachment* (July 8, 1998), at 04:20-04:44,

https://n2t.net/ark:/85779/j4x087. Strikingly, POST's basic curriculum for new recruits in police academies included a section on the advantages of questioning outside *Miranda* but then noted, without any explanation or instruction, that the California Supreme Court called this "illegal" and "unlawful." See POST, *Basic Course Workbook Series*, *Learning Domain #30, Preliminary Investigation, Interrogation* 4-36 (1998), https://n2t.net/ark:/85779/j4nh2n.

Thus, much of the outside *Miranda* training continued unabated, even as courts condemned the practice.

D. Officers Were Not Deterred From Questioning "Outside *Miranda*" Until They Were Subject To Civil Liability

While the California courts were addressing questioning outside *Miranda* in appeals from criminal convictions, the civil rights case of *CACJ v. Butts* progressed in federal court. Two individual plaintiffs were questioned by the defendant officers in deliberate violation of *Miranda*; one plaintiff's statement was used for impeachment at trial, and the other's statement was considered at sentencing. *CACJ v. Butts*, 195 F.3d 1039, 1042-45 (9th Cir. 1999). One plaintiff was told that because he had invoked the right to counsel, nothing he said could be used against him. *Id*. at 1043-44. Police told the other plaintiff that because he did not waive his rights, his statements could not be used in court; the officers went so far as to ask him if he was familiar with "outside *Miranda*." *Id*. at 1044. The district court denied the officers' motion for summary judgment on the ground of qualified immunity, and they appealed. *Id*. at 1041. In November 1999, the court of appeals affirmed. *Id*. at 1050.

The court of appeals refused to divorce *Miranda* from the constitutional rights it protects. *Miranda* might be considered a prophylactic rule, "[b]ut *Miranda* rights are brigaded with the right against self-incrimination" and provide "'practical reinforcement" for the Fifth Amendment. *Id*. at 1045 (citations omitted). To make that point, the court also noted the officers' assurances that the plaintiffs' statements would not be used against them. *Id*. at 1047-48. Critically, the court rejected the officers' claim that they were entitled to qualified immunity because they relied on outside *Miranda* training. *Id*. at 1049. "[A] reasonable police officer should have known that this conduct was improper." *Id*. at 1050. "Officers who intentionally violate the rights protected by *Miranda* must expect to have to defend themselves in civil actions." *Id*. The defendants' petition for writ of certiorari was denied on June 26, 2000, the same day this Court decided *Dickerson v. United States*, 530 U.S. 428 (2000). *Butts v. McNally*, 530 U.S. 1261 (2000).

The impact of *CACJ v. Butts* is clear from the training materials, especially the *Legal Sourcebook*, which had not told officers to stop the practice after *Peevy*. After certiorari was denied in *CACJ v. Butts*, the California Department of Justice revised the *Legal Sourcebook* to advise that

> a *deliberate* or *intentional* violation of *Miranda* is an *extremely risky* tactic in California at this time, not so much because of *Dickerson*, but rather because of the *Ninth Circuit*, which has ruled that a *deliberate Miranda* violation, in *combination* with almost *any other or additional conduct* which the court also views as 'coercive,' will . . . entitle the suspect to sue for a *civil rights* violation . . .

California Attorney General, *California Peace Officers Legal Sourcebook* §7.40c (rev. Sept. 2000) (emphasis in original), https://n2t.net/ark:/85779/j4d08k. "[T]he 'bottom line' now must be: *do not intentionally violate Miranda*, in particular, *do not ignore an invocation of the right to silence or counsel*" because it "will virtually guarantee a civil rights lawsuit against you and your department . . .." *Id.* §7.40d (rev. Sept. 2000) (emphasis in original).

In August 2000, POST's executive director issued a memorandum to trainers, stating POST's policy that "[n]o officer shall intentionally violate *Miranda* by continuing to interrogate a suspect after they have invoked their right to counsel or to remain silent." Kenneth J. O'Brien, Memorandum to POST Certified Training Presenters 1 (Aug. 14, 2000), https://n2t.net/ark:/85779/j4mh2b.[8]

The California Peace Officers' Association published a training bulletin noting that "[u]p until the Fall of 1999"—when the court of appeals decided *CACJ v. Butts*—officers were trained that "it was appropriate in some cases to continue questioning to gather impeachable testimony . . . Consensus was that unless you were coercive in some way you had a lot to gain and nothing to loose [sic] by continuing." California Peace Officers' Association, Training Bulletin Service, Miranda *Update—Questioning "Outside"* Miranda (Aug. 2000), https://n2t.net/ark:/85779/j4r948. But "the issue is now settled; police are not permitted to continue questioning suspects who invoke their

[8] The directive was somewhat muddied by a note that procedures relating to the impeachment exception "are a matter of local policy." *Id.*

Fifth Amendment Rights without facing potential personal liability, as well as the inadmissibility of any statements . . .." *Id.* "[A]ll questioning *shall* cease when Miranda Rights are invoked . . .." *Id.* (emphasis in original). See also Alameda County District Atty's Office, *Point of View Segment 1301,* Miranda: *Beyond* Miranda *Back in Court* (Dec. 6, 1999), at 07:40-07:50, https://n2t.net/ark:/85779/j4gt0f (discussing *CACJ v. Butts* and concluding, "As far as outside *Miranda* goes, don't do it.")

Amicus also collected eleven formal directives from police and sheriffs' departments instructing officers not to question outside *Miranda*. See *In the Stationhouse after* Dickerson, 99 Mich. L. Rev. at 1149-51. The timing of the directives underscores the deterrent effect of civil rights liability. One came down prior to *Peevy*, seven were issued after the court of appeals' decision in *CACJ v. Butts*, and three after *Dickerson*. See *id.* at 1151. One of the directives on the heels of *CACJ v. Butts* was from the chief of the Los Angeles Police Department. Citing *CACJ v. Butts*, he wrote: "Effective immediately and until further judicial clarification, officers shall no longer question a suspect regarding criminal activity . . . after the suspect has invoked his/her Miranda rights." Bernard C. Parks, Chief of Police, Notice 3.3.1 to All Sworn Personnel (Dec. 2, 1999), https://n2t.net/ark:/85779/j4w08x. He ordered commanding officers to ensure that all sworn personnel receive this notice and sign an acknowledgment. *Id.*

In sum, the prospect of civil liability deterred officers from violating *Miranda*. Of course, it was not the only deterrent; *Dickerson* was a factor as well. See *In the Stationhouse after* Dickerson, 99 Mich. L. Rev. at 1138-53 (discussing the impact of the two cases). But

civil liability was undeniably instrumental in ending the practice of questioning outside *Miranda*.

E. Without Civil Liability, Questioning "Outside *Miranda*" Will Return

Miranda's exclusionary rule alone is too weak to deter officers from questioning suspects who have invoked their rights. If this Court reverses the decision below, particularly on the theory that *Miranda* provides only a rule of exclusion and not requirements for police, questioning outside *Miranda* will return. It will become a national problem.

When this Court first created an impeachment exception to *Miranda*'s exclusionary rule, the dissenters feared it could undermine the objective of "deterring police practices in disregard of the Constitution." *Harris v. New York*, 401 U.S. 222, 232 (1971) (Brennan, J., dissenting). In *Oregon v. Hass*, the Court observed that officers who continue to interrogate custodial suspects after their invocations "may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material," *id.*, 420 U.S. 714, 723 (1975), a view apparently shared by California law enforcement. See California Peace Officers' Association, Miranda *Update—Questioning "Outside"* Miranda, *supra*, https://n2t.net/ark:/85779/j4r948. The majority in *Hass* called this conduct merely a "speculative possibility." 420 U.S. at 723. Not so today. Almost fifty years after the Court's hopeful characterization, the "possibility" is no longer "speculative."

Decisions in the decades since *Hass* have only increased the incentive for officers to violate *Miranda*. Today, the physical fruits of *Miranda* violations are admissible in the prosecution's case-in-chief. *United States v. Patane*, 542 U.S. 630, 634 (2004). Officers

who obtain un-Mirandized breakthrough statements will not suffer the loss of subsequent Mirandized statements, unless the later statements were involuntary or there is an identity between them, among other factors. See *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (voluntariness requirement); *Missouri v. Seibert*, 542 U.S. 600, 615-17 (2004) (plurality op.) (multifactor test); *Bobby v. Dixon*, 565 U.S. 23, 30-32 (2011) (per curiam) (applying *Seibert*). And even prior to *Hass*, this Court held that witness testimony is admissible even though officers learned about the witness only through statements taken in violation of *Miranda*. *Michigan v. Tucker*, 417 U.S. 433, 451-52 (1974). None of this is lost on officers and their trainers. See *supra* at 6-8.

California's experience with the practice of questioning outside *Miranda* shows that courts cannot deter police misconduct simply by applying *Miranda*'s exclusionary rule. Even after the California Supreme Court held in *People v. Peevy* that officers act illegally and commit misconduct by questioning over clear invocations of the right to counsel or silence, the practice persisted. It did not end until officers faced the threat of civil liability. Current training continues to deter officers only because civil liability derives from *Miranda* violations. That is why the *Legal Sourcebook* tells officers not to violate *Miranda*. See California Attorney General, *California Peace Officers Legal Sourcebook* §7.22e (Nov. 2019), https://n2t.net/ark:/85779/j4894x. Further, "An intentional violation will open you and your department to a potential civil rights suit—with possible *personal liability*." *Id*. §7.22h (emphasis in original).

Without civil liability, questioning outside *Miranda* will return and will spread. Its return is guaranteed if this Court accepts the petitioner's invitation to frame *Miranda* as an evidentiary trial rule, not one that constrains officers. See Pet. Br. at 15-19. This theory was the foundation on which questioning outside *Miranda* was built in California. If a return to that practice is what this Court wants, that is what it will get.

II. REMOVING *MIRANDA*'S GUARDRAILS FOR POLICE WILL LEAD TO MORE COMPELLED AND COERCED STATEMENTS

This Court has sometimes called *Miranda*'s constitutional rule "prophylactic." To the extent it is, the prophylaxis necessarily extends in several directions. By providing clear rules of conduct for police, *Miranda* helps prevent violations of the Fifth Amendment privilege against compelled self-incrimination. It also reduces the incidence of statements that are coerced under the traditional voluntariness standard of the Due Process Clause. Treating *Miranda* as a mere rule of admissibility will remove the guardrails for police, leading to many more compelled and coerced statements. And exclusion from the case-in-chief cannot undo the harm of involuntary statements. Coerced statements cannot be used for any purpose at trial, including impeachment. See, *e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Jackson v. Denno*, 378 U.S. 368, 376 (1964). Further, plaintiffs may bring civil rights actions for substantive due process violations even if no statements were introduced at trial. See *Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (plurality op.); *id.* at 779-80 (Souter, J., for the Court); *id.* at 795-99 (Kennedy, J., concurring in part and dissenting in part).

We begin with the link between *Miranda*'s safeguards and the voluntariness doctrine. Next, we return to California's experience with outside *Miranda* questioning and involuntary statements.

A. As This Court Has Emphasized, *Miranda* Also Prevents Due Process Clause Violations

It is worth remembering how we got to *Miranda* in the first place. Before *Miranda*, this Court issued decision after decision, weighing whether a statement was involuntary under the totality of the circumstances. Even Justice Frankfurter's sixty-seven-page exegesis in *Culombe v. Connecticut* failed to provide a definitive explanation of the voluntariness doctrine. See *Culombe v. Connecticut*, 367 U.S. 568, 568-635 (1961) (plurality op.). As it announced the rule in *Miranda*, the Court recited its long history of Due Process Clause decisions. See *Miranda*, 384 U.S. at 446 n.6. And it acknowledged coercion as a continuing concern: "Unless a proper limitation upon custodial interrogation is achieved—such as these decisions [in *Miranda*] will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future." *Id.* at 447. The Court clearly meant its rules to limit police behavior, else there would be no way to eradicate such unlawful behavior. *Miranda* thus expressly provides "concrete constitutional guidelines for law enforcement agencies"—not just courts—"to follow." *Id.* at 441-42.

In the subsequent decades, this Court has emphasized how *Miranda*'s "concrete constitutional guidelines for law enforcement" help prevent coercion, as well as avoid difficult *post hoc* judicial determinations of voluntariness under the Due Process Clause. Some of the purposes of *Miranda*'s safeguards are "to *ensure*

that the police do not coerce or trick captive suspects into confessing . . . and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary." *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984) (footnotes omitted; emphasis in original); see also *Dickerson v. United States*, 530 U.S. 428, 444 (2000) ("the totality-of-the-circumstances test . . . is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner."); *Chavez v. Martinez*, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part) (the *Miranda* warning "is a constitutional requirement adopted to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause."); *Missouri v. Seibert*, 542 U.S. 600, 609 (2004) (plurality op.) ("litigation over voluntariness tends to end with a finding of a valid waiver."); *J.D.B. v. North Carolina*, 564 U.S. 261, 285 (2011) (Alito, J., dissenting) (because "the voluntariness standard proved difficult" for officers, "*Miranda* greatly simplified matters by requiring police to give suspects standard warnings before commencing any custodial interrogation.")

B. Questioning "Outside *Miranda*" Causes Coerced Statements And Difficult Challenges For Courts

As we have shown, if *Miranda* is just a rule of admissibility and does not regulate the police, we will return to the practice of questioning outside *Miranda*. The clear lines for officers will be erased. At that point—with police free to continue questioning custodial suspects after they have unequivocally invoked their right to remain silent or their right to counsel—how will law enforcement officers avoid coercing a

statement in violation of the Due Process Clause? And how will courts assess the voluntariness of statements from unwilling suspects? California's unfortunate experience once again provides insight.

After courts of appeal in California began finding outside *Miranda* statements to be involuntary, trainers suggested some new tactics. The July 1996 POST video advised officers that to overcome a possible finding of involuntariness, "you need to have the suspect acknowledge a willingness to continue to speak even after he's invoked his *Miranda* rights." POST, *Case Law Updates*, Miranda: *Post-Invocation Questioning* (July 11, 1996), at 09:50-09:58, https://n2t.net/ark:/85779/j41t0d. For someone who has invoked the right to silence,

> You can ask him something like this: "Would it be O.K. if I continue to ask you a few questions about something related or even peripheral to the case?" . . . "Lookit, would it be O.K. if I turn the tape recorder off?" or "Would it be O.K. if I had my partner step out of the room and just you and I talked just one-on-one." If . . . he acknowledges a willingness to talk . . . at least that puts something on the record that we have acknowledging that these additional statements that he's going to be giving are voluntarily made.
>
> What if he asks for an attorney? You could ask him something like, "Well, O.K., you have the right to an attorney, and since you asked for a lawyer, we're going to arrange to get you one. Now would it be O.K. if we continued to ask you some questions while we're arranging to get counsel here for you?" If he says, "Yeah" . . . you['ve] put something on the record establishing a . . . voluntariness on his part to continue to engage in some kind of a dialogue.

Id. at 10:00-11:28. This deceptive advice had the goal of convincing courts to admit statements, not to reduce coercion itself. It demonstrates the difficulty of training officers to conduct non-coercive interrogations without *Miranda*'s clear rules.

As for the courts, no case better demonstrates the relationship of outside *Miranda* questioning and the voluntariness doctrine than *People v. Neal*, 31 Cal. 4th 63, 72 P.3d 280 (2003). During his first set of interrogations, Neal invoked his right to remain silent and his right to counsel seven to ten times, according to the interrogating detective's own count. *Id.*, 31 Cal. 4th at 74, 72 P.2d at 286. The detective testified that he continued to question for impeachment purposes, "applying what he called a 'useful tool' that he had learned from a supervisor . . .." *Id.* Neal did not confess and was put in jail overnight. The next morning, he sent word to the detective that he would like to talk, and subsequently made two inculpatory statements, which were admitted at trial. *Id.*, 31 Cal. 4th at 74-77, 72 P.2d at 286-88.

A unanimous California Supreme Court reversed Neal's conviction, finding that his re-initiation of contact and subsequent statements were involuntary, and thus inadmissible for any purpose. *Id.*, 31 Cal. 4th at 80, 87, 72 P.2d at 290, 295. The Court reviewed all relevant factors under the totality-of-the-circumstances test, and stated:

> the first circumstance that weighs most heavily against the voluntariness of defendant's initiation of the second interview, and against the voluntariness of his two subsequent confessions as well, is the fact that . . . Detective Martin intentionally continued interrogation in deliberate violation of *Miranda* . . . Martin's message

> to defendant could not have been clearer: Martin would not honor defendant's right to silence or his right to counsel until defendant gave him a confession.

Id., 31 Cal. 4th at 81-82, 72 P.2d at 291.

Since the practice of questioning outside *Miranda* was so widespread in California, *Neal* was far from the only case where courts had to assess the voluntariness of statements when suspects were unable to halt their interrogations. See, *e.g.*, *supra* at 10-11 (listing cases). Although the practice ended years ago, California courts are still cleaning up the mess, including as recently as this January. See *People v. Johnson*, 12 Cal. 5th 544, 577-98, 501 P.3d 651, 679-94 (2022) (voluntariness of re-contact and waiver following deliberate *Miranda* violations during 1996 interrogations); *id.*, 12 Cal. 5th at 637-50, 501 P.3d at 721-30 (Liu, J., dissenting).

With *Miranda*'s guardrails gone, we will be left with a voluntariness test that includes warnings and waivers as non-determinative factors, precisely what this Court found inadequate in *Dickerson v. United States*, 530 U.S. 428, 442-43 (2000). Interrogating officers still often isolate suspects and employ strategies that increase anxiety and induce a sense of hopelessness.[9] Telling people that they have rights, only to

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[9] See Saul M. Kassin & Gisli H. Gudjonnson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psychol. Sci. In The Publ. Interest 33, 42-43 (2004) (describing the interplay of psychological processes). For descriptions of techniques observed in the field, as well as surveys of officers, see Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. Crim. L. & Criminology 219 (2006); Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266 (1996); Saul M. Kassin et al., *Police Interview-*

refuse to honor them, magnifies this psychological pressure and can easily make a statement involuntary, as the *Neal* court perceived. It communicates to suspects that they are in the hands of officers who are unwilling to obey the law, and that they have no choice but to speak. It places suspects in a worse position than if no warnings were given at all.

This will leave an unsettled future for courts, police, and people. Perhaps a jurisprudence of voluntariness will evolve for the many instances where officers will question suspects who have invoked their rights. Courts might hear more often from experts to better understand the psychological impact of these techniques upon suspects. Or courts might try to draw a new bright line, holding—for example—that suspects' wills are overborne if they speak after asking for a lawyer three times, as in *People v. Bey*, 21 Cal. App. 4th 1623, 1626-27, 27 Cal. Rptr. 2d 28, 30 (1993), or after seven to ten invocations, as in *Neal*, *supra*.

But considering these possibilities suggests a simpler answer. We have operated for fifty-five years with this unequivocal command: when suspects in custody unambiguously invoke their rights, interrogation "must cease." *Miranda*, 384 U.S. at 474. In urging the Court to abandon *Miranda* as regulating police, the petitioner would launch this nation's officers and courts on an adventure without a guide. It is difficult to understand this as better than what *Miranda* clearly requires today.

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ing and Interrogation: A Self-Report of Police Practices and Beliefs, 31 Law & Hum. Behav. 381 (2007). See also Weisselberg, *Mourning* Miranda, 96 Calif. L. Rev. at 1530-37 (collecting studies and training materials on interrogation techniques).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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