No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE WILLIE RIOS, Petitioner,

vs.

STATE OF ARIZONA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When police sought a custodial interrogation with George Rios, prior to questioning, an officer read the following warning:

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning. Um. If you can't afford one we'll provide one for you. Ok. Do you understand those rights?

Inconsistent with the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny, the officer failed to advise Rios that he had the right to the presence of counsel during questioning. The Arizona courts, consistent with a minority rule, permitted this deficient advisory to stand.

The question presented is:

Does *Miranda* require that a person subjected to custodial interrogation be informed of his right to invoke the presence of counsel during questioning?

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PETITION FOR WRIT OF CERTIORARI

George Willie Rios respectfully petitions for a writ of certiorari to review the Arizona Court of Appeals' opinion dated April 10, 2023, which held, contrary to *Miranda v. Arizona*, 384 U.S. 436 (1966), that the Fifth Amendment does not require an arrestee subjected to a custodial interrogation to be informed of the full panoply of rights. In particular, the officer interrogating Rios failed to inform him of his right to the presence of counsel during questioning.

In *Bridgers v. Texas*, 532 U.S. 1034 (2001), this Court denied certiorari in a nearly identical case. Justice Breyer, joined by Justices Stevens and Souter, gave a statement respecting that denial that noted, "if the problem purportedly present here proves to be a recurring one, I believe that it may well warrant this Court's attention." Since that time, not only have state and federal courts become intractably divided on the question, but federal courts reviewing habeas petitions lack any clearly established law from this Court that will assist in deciding the question. Notably, in *Bridgers v. Dretke*, 431 F.3d 853, 859-60 (5th Cir. 2005), the court relied on the circuit split detailed herein for proof that the Texas court's resolution of Bridgers' claim was not an unreasonable application

of *Miranda*. For these reasons, Rios asks this Court to grant the petition and decide this important question of constitutional law.

OPINIONS BELOW

The Arizona Court of Appeals' opinion dated April 10, 2023, is reported at 528 P.3d 479 (Ariz. Ct. App. 2023). Exhibit 1. The Arizona Supreme Court's order denying discretionary review dated September 12, 2023, is unreported.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals, Division Two, entered its judgment on April 10, 2023. Exhibit 1. The Arizona Supreme Court entered its judgment on September 12, 2023. Exhibit 2. The issue raised herein was raised before the Arizona courts as an issue of federal constitutional law. Exhibits 1, 2. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides as follows:

> . . . [N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . .

Section One of the Fourteenth Amendment to the United States

Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The relevant facts in the opinion of the Arizona Court of Appeals are undisputed:

> In October 2019, Rios was doing construction work at a fitness center in Tucson. M.V. also worked there as a custodian. On the morning of the offense, M.V. drove her son's blue 2011 Chevrolet HHR to work and parked in the front of the building. After she went inside, M.V. retrieved a janitorial cart and hung her lanyard, which included her car keys, on the cart.
>
> When her shift ended, M.V. noticed that both her keys and car were missing. Fitness center staff viewed the facility's surveillance footage, which showed a man walking across the parking lot and driving away in M.V.'s car. The man was wearing a black jacket over a pullover sweatshirt, a white hard-hat, jeans, and work boots. He was carrying a broom and shovel. Rios's employer identified the man as Rios, based on his clothing, the broom, and the shovel. M.V. identified the car as hers and stated that she had not given Rios permission to drive it.
>
> The next day, police officers detained Rios for questioning. After giving a *Miranda* advisory, they asked Rios what had happened the day before. Rios responded that nothing had seemed out of the ordinary. He denied stealing

> any vehicles and provided his residential address.
>
> …
>
> The undisputed record shows that when Rios was arrested, an officer gave him the following Miranda advisory before questioning:
>
> > You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning. Um. If you can't afford one we'll provide one for you. Ok. Do you understand those rights?

State v. Rios, 528 P.3d 479, 482-83 (Ariz. Ct. App. 2023).

Both in the trial court and in the Arizona Court of Appeals, Rios relied on binding Arizona case law that explained that the warnings given to the suspect must include each of *Miranda*'s essential rights. *See State v. Carlson*, 266 P.3d 369, 372 (Ariz. Ct. App. 2011); *State v. Moorman*, 744 P.2d 679, 686 (Ariz. 1987). Notwithstanding the requirement in *Miranda* that a suspect be given all warnings, the Arizona Court of Appeals held that two extrajurisdictional cases supported the state's view that being advised of the right to counsel before questioning was sufficient to advise Rios of the right during questioning. Only one of those cases had been cited in the state's answering brief, which Rios described as an "aberration." The court found the second case on its own, and though Rios never had an opportunity to

address that case, the court stated Rios failed to address it at all. *Id*. at 484. The Arizona Supreme Court denied discretionary review. Exhibit 2.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition because the issue related to this piece of the *Miranda* warnings has arisen several times before, including in Bridgers where this Court denied certiorari. Since that time, not only has an intractable split emerged, but habeas courts have been foreclosed from considering claims related to deficient *Miranda* warnings that are otherwise meritorious. Because the facts are undisputed and the Arizona courts squarely addressed the question, this case offers an ideal vehicle to resolve the question presented.

I. State and Federal Courts Are Intractably Divided on Whether a Suspect Must Be Informed of the Right to Presence of Counsel During Questioning.

A. General Principles

The Fifth Amendment requires that suspects be warned of their *Miranda* rights before interrogation begins. *Dickerson v. United States*, 530 U.S. 428, 439-40 (2000). "The rule the Court established in *Miranda* is clear. In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to

such questioning of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation." *Fare v. Michael C.*, 442 U.S. 707, 717 (1979). *Miranda* warnings need not use magic words like a "talismanic incantation," but they must convey the essence of every element of the warnings. *California v. Prysock*, 453 U.S. 355, 359-60 (1981). *See also Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (finding *Miranda* warnings sufficient where law enforcement stated, "You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning."). Most recently, in *Florida v. Powell*, 559 U.S. 50, 54 (2010), the suspect was advised of "the right to talk to a lawyer before answering any ... questions" and he could "use any of these rights at any time you want during the interview." 559 U.S. at 54.

For more than a half century, this Court's cases consistently require that *Miranda* warnings must be substantively complete even if the exact verbiage may vary. Yet, in the absence of any binding decision from this Court, lower courts have separated into two camps: those that find that *Miranda* requires the suspect to be advised clearly of the right to have counsel present during questioning in addition to before questioning, and

those that find that advising the suspect of the right to counsel generally has the impact of advising as to both rights. It does not appear that this split will be resolved through natural development of case law.

B. Arizona Joins a Significant Minority of Jurisdictions That Conflate the Separate Warnings of "Prior To" and "During" Questioning

The Arizona Court of Appeals' opinion in this case adds Arizona to a minority of jurisdictions that do not recognize the importance of advising the suspect of the right to the presence of counsel during questioning. Other jurisdictions in the minority include Florida and the Second, Fourth, Sixth, and Eighth Circuits.

Florida. In *Rigterink v. State*, 66 So.3d 866 (Fla. 2011), the Florida Supreme Court originally ruled in favor of the defendant, but this Court granted certiorari and remanded for reconsideration in light of this Court's decision in *Powell*. *Rigterink*, 66 So.3d at 886. Upon reconsideration, the court saw no substantial difference between the warnings given to Powell and to Rigterink. *Id*. at 887. This is factually erroneous; the advisory Rigterink signed said:

> I, *Thomas Rigterink*, do hereby understand that (1) I have the right to remain silent. (2) Anything I say can and will be used against me in court. (3) I have the right to have an attorney *present prior to questioning*. (4) If I cannot afford an attorney

one will be appointed to represent me by the court.

Id. at 884 (emphasis in original). Instead of recognizing the factual distinction between *Powell* and *Rigterink*, the Florida Supreme Court found the warnings equivalent, and for that reason it found Rigterink's advisory sufficient.

Second Circuit. In *United States v. Lamia*, 429 F.2d 373 (2d Cir. 1970), the court distinguished a recent case in which several *Miranda* violations occurred and held that merely neglecting to inform the suspect of the right to the presence of counsel during questioning is insignificant. *Id.* at 376-77 (citing *United States v. Fox*, 403 F.2d 97, 100 (2d Cir. 1968)). "Lamia was . . . told that he had the 'right to an attorney' and if he was not able to afford an attorney one would be appointed by the court"—which the court found sufficient because "Lamia was effectively warned that he need not make any statement until he had the advice of an attorney." *Id.* The Second Circuit upheld this rule in *United States v. Burns*, 684 F.2d 1066, 1074-75 (2d Cir. 1982).

Fourth Circuit. In *United States v. Frankson*, 83 F.3d 79, 82 (4th Cir. 1996), the detective said, "You have the right to an attorney. If you cannot afford an attorney, the Government will get one for you." The

court found this general warning "communicated to Frankson that his right to an attorney began immediately and continued forward in time without qualification." *Id*.

Sixth Circuit. In *United States v. Clayton*, 937 F.3d 630, 634 (6th Cir. 2019), the detective said, "You have the right to talk to a lawyer before we ask you any questions. . . . If you cannot afford to have a lawyer, one will be appointed for you before any questioning if you wish." While acknowledging that *Miranda* and *Powell* required some form of warning that the right can be invoked during questioning, *id*. at 637-38, the court equated the two warnings without any explanation. *Id*. at 639-40.

Eighth Circuit. In *United States v. Caldwell*, 954 F.2d 496, 502 (8th Cir. 1992), the court reviewed a warning that "failed to specifically warn him of his right to counsel before and during the interrogation" but did "generally warn Caldwell that he had the right to an attorney." Although a two-judge majority found the general warning was sufficient and did not constitute plain error, it noted that an advisory that erroneously linked the right to counsel to a temporal moment would certainly violate *Miranda*. *Id*.

C. The Majority Rule Among State and Federal Courts Requires a Suspect to Be Advised of Both the Right to the Presence of Counsel "Prior To" and "During" Questioning

The Fifth, Seventh, Ninth, and Tenth Circuits, on the other hand, along with several other states, have ruled that knowledge of the right to the presence of counsel during questioning is distinct from knowledge of the right to confer with counsel before questioning, and thus a failure to advise the suspect of the right to presence of counsel during questioning violates *Miranda*.

Fifth Circuit. *Windsor v. United States*, 389 F.2d 530, 532 (5th Cir. 1968), involved a defendant who was arrested one day after this Court issued the opinion in *Miranda*, was given a version of the warnings that "advised [him that he] could speak with an attorney or anyone else before saying anything at all." That court found the warning defective: "Merely telling [a defendant] that he could speak with an attorney . . . before he said anything at all is not the same as informing him that he is entitled to the presence of an attorney during interrogation and that one will be appointed if he cannot afford one." *Id*. at 533.

Seventh Circuit. In *United States v. Wysinger*, 683 F.3d 784, 789, 797 (7th Cir. 2012), the agent began reading Miranda warnings when,

feeling something on his neck, he loudly slapped the table shortly after uttering the words: "If you can't afford a lawyer, one will be appointed for you before we ask any questions." The agent also "told Wysinger that he had the 'right to talk to a lawyer for advice before we ask any questions or have one—have an attorney with you during questioning.'" *Id*. at 798. Because the agent used "or" instead of "and" in relation to the right to the presence of counsel before and during questioning, the court found the words put a false choice to the suspect. *Id*. at 798-99. The court recognized that the right to the presence of counsel during questioning was essential to *Miranda*'s holding and it distinguished *Prysock* and *Powell* as cases where the suspect received the full advisory. *Id*. at 798-800.

Ninth Circuit. In *United States v. Noti*, 731 F.2d 610, 614-15 (9th Cir. 1984), the court noted the split between the Second and Fifth Circuit decisions in *Lamia* and *Windsor*, and it found the Fifth Circuit's approach preferable. It noted *Miranda*'s recognition that "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will. . . . Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process." *Id*. at 615 (quoting *Miranda*, 384 U.S. at 469-70).

Tenth Circuit. In *United States v. Anthon*, 648 F.2d 669, 672-73 (10th Cir. 1981), the court noted that Anthon had been warned three separate times. The first and second warnings were inadequate since he was not advised that his right to counsel encompassed the right to have counsel present during any questioning and the right to have an attorney appointed if he could not afford one; but as to the third set of warnings, "[n]othing in the record before us establishes other than that Anthon was advised of the right to have counsel present." *Id.* at 674. In finding the earlier warnings defective, the Tenth Circuit's analysis relied heavily on this Court's statement in *Fare* that law enforcement must specifically advise the suspect of the right to have counsel present during interrogation. *Id.* at 673 (quoting *Fare*, 442 U.S. at 717).

Several state courts also ascribe to this majority rule. *See, e.g.*, *People v. Carter*, 414 P.3d 15, 19 (Colo. App. 2015) (quoting *Miranda*, 384 U.S. at 471, for proposition "that a suspect 'be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation,' and "[t]his warning 'is an absolute prerequisite to interrogation,' and must instruct the suspect that the right to the presence of an attorney begins before, and continues throughout, the

interrogation.'"); *State v. Banks*, 2 N.E.3d 71, 79 (Ind. Ct. App. 2014) ("The record reveals that Detective Mitchell's advisement did not inform Banks that he had the right to have counsel present during the questioning at issue and thus failed to properly advise Banks of his *Miranda* rights."); *State v. Williams*, 144 So. 3d 56, 59 (La. Ct. App. 2014) (stressing the right to the presence of an attorney during questioning as distinct from consulting with an attorney before questioning); *People v. Mathews*, 922 N.W.2d 371, 379 (Mich. App. 2018) ("Notably, this 'need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.'") (quoting *Miranda*, 384 U.S. at 470); *State v. Serna*, 429 P.3d 1283, 1287-88 (N.M. Ct. App. 2018) (advising of right to counsel during questioning does not cover the right to counsel before questioning); *Coffey v. State*, 435 S.W.3d 834, 843 (Tex. Ct. App. 2014) ("Because Coffey was not provided with the required *Miranda* and statutory warning that he had the right to have an attorney present during questioning . . ., the recorded statement was inadmissible.").

Arizona appeared to ascribe to the majority rule until the Arizona

Court of Appeals issued its opinion in Rios's case. There is no clear trend that courts are moving in one direction or the other, as some of the courts in the minority have rendered their decisions in recent years. Only a decision from this Court can settle the law.

II. This Court Should Adopt the View that Counsel's Presence "During Questioning" is Critical to the *Miranda* Warnings.

Miranda's plain language promises that police must warn the suspect that he has the right to the presence of counsel both prior to and during questioning. But there are other reasons to find that the warning in this case is defective. First is a matter of logic and linguistics. Second is a matter of the relative importance of the two separate rights.

Because *Miranda* warnings need not be a verbatim recitation of this Court's case law, the question becomes how a normal person would understand the warnings that are actually given to a suspect. While it is true that "reviewing courts are not required to examine the words employed 'as if construing a will or defining the terms of an easement,'" *Powell*, 559 U.S. at 60 (quoting *Duckworth*, 492 U.S. at 203), the warnings must still "reasonably 'convey to a suspect his rights as required by *Miranda*.'" *Id*. The question is how a reasonable person would interpret the challenged advisement.

Rios was told: "You have the right to the presence of an attorney to assist you prior to questioning." Unlike many other warnings that have been upheld under *Prysock* and *Powell*, this warning placed a temporal limit on his access to counsel: Rios could only speak with an attorney before questioning began. The Arizona Court of Appeals' conclusory assertion that informing Rios of the right to "presence" of counsel, "coupled with the 'prior to questioning' language, conveyed to Ruiz [sic] that the right to counsel was triggered before questioning. It logically continued through questioning." *Rios*, 528 P.3d at 485. But the rules of logic—not to mention the interpretative canon *expressio unius est exclusion alterius*—dictate otherwise.

Professor Croxall's student comment on the importance of explicitly advising of the right to presence of counsel during questioning explains the problem of assuming that suspects can infer the right from incomplete warnings. Daniel J. Croxall, *Inferring Uniformity: Toward Deduction and Certainty in the* Miranda *Context*, 39 MCGEORGE L. REV. 1025 (2008). Because the *Miranda* warnings provide only a couple of specifics, it is dangerous to assume that the listener would infer a broader right that is not necessarily encompassed in the other warnings. *Id.* at

1032-33. On the other hand, with deductive reasoning, providing true premises necessarily leads to a true conclusion; if the suspect is warned of the right to presence of counsel during interrogation, then it is undoubtedly true that Miranda has been satisfied. *Id.* at 1029, 1035.

One must also consider the value of the right to consult with counsel prior to questioning compared with the opportunity to have counsel present during questioning. A person who is only offered conference with counsel prior to questioning could, upon accepting that offer, consider the range of possible questions that a detective might pose as well as the risks and rewards of participating in an interrogation. If the questioning takes an unanticipated turn, however, the suspect has nowhere to turn for assistance. On the other hand, a person who is only offered counsel's presence during interrogation will have a helping hand throughout the process; counsel can assist the suspect in foreclosing certain areas of inquiry or advising the suspect not to answer certain questions. This scenario is hardly hypothetical; in fact, *Miranda* not only anticipated it but pointed out that it is more the rule than the exception:

> The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. . . . Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence

> which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that "Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defense 'out' at the time of trial."

384 U.S. at 451-52 (quoting Inbau & Reid, *Criminal Interrogation and Confessions*, at 40 (1962)).

This Court should take the opportunity uphold the core holding of *Miranda*: that "this warning [to the right to presence of counsel during interrogation] is an absolute prerequisite to interrogation." *Id.* at 471.

III. This Case Squarely Presents This Fifth Amendment Issue and Provides an Ideal Vehicle for Deciding It.

Rios's case is an ideal vehicle because there is no factual dispute, and the question was squarely presented at every level in the Arizona courts. Rios's interrogation was recorded and transcribed, and the parties agree on the precise verbiage of the *Miranda* warnings given in this case. The only question is whether the deficient warning was a constitutional violation.

On appeal the State argued that admission of the statement, if erroneous, was harmless. Arizona law applies the doctrine of judicial estoppel, which prohibits a party from making an argument in one

proceeding to obtain a favorable ruling and then making a contrary argument in a later proceeding. *Compare New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), *with State v. Towery*, 920 P.2d 290, 304 (Ariz. 1996). Since *Towery*, Arizona has consistently applied this doctrine to the state in criminal cases. Arizona courts have specifically noted the impropriety of the state arguing harmless error on appeal when the trial prosecutor emphasized the importance of obtaining a favorable ruling. *State v. Ramos*, 372 P.3d 1025, 1029 n.2 (Ariz. Ct. App. 2016); *see also State v. Coghill*, 169 P.3d 942, 950 (Ariz. Ct. App. 2007) ("the state's contention that the evidence…had a negligible impact on the case is undermined by the prosecutor's strenuous and persistent efforts to place that evidence before the jury…"). Had Rios's *Miranda* claim succeeded in the Arizona Court of Appeals, that court certainly would have rejected the state's argument that any error was harmless.

Because Rios's case squarely presents this important Fifth Amendment question, this Court should accept review of his petition.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court accept review of the opinion of the Arizona Court of Appeals.

Respectfully submitted,

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