No. 02-1371

IN THE
Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

PATRICE SEIBERT,

Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF EASTERN MISSOURI, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

Other Authorities:

TABLE OF AUTHORITIES—Continued

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STATEMENT OF INTEREST

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with over 400,000 members that has been engaged in defense of the Bill of Rights since 1920.[1] The ACLU of Eastern Missouri is

[1] All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than the amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

one of its affiliates. Many of the ACLU's efforts have focused on enforcing those portions of the Bill of Rights having to do with the administration of criminal justice, including participation as amicus curiae in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), *Dickerson* v. *United States*, 530 U.S. 428 (2000), and *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003).

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders, and law professors. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. NACDL has participated as amicus curiae in more than 30 cases before this Court, including numerous cases addressing *Miranda*. *See*, *e.g.*, *United States* v. *Patane*, No. 02-1183; *Dickerson*, 530 U.S. 428.

This brief will concentrate on the factual circumstances of custodial interrogations today, including the increasingly common police practice of questioning "outside *Miranda*"—a strategic method of interrogation that includes everything from intentionally withholding *Miranda* warnings to ignoring requests for counsel or invocations of the right to remain silent. Our brief will also discuss the threat to the integrity of this Court's role as the final arbiter of constitutional standards, and more generally to the rule of law, if this improper practice is allowed to continue without consequence. What was so in 1966 remains so today: If the Fifth Amendment privilege is to remain an effective guarantor of our accusatorial system of criminal justice, the right to remain silent during custodial interrogation must be protected, both by ensuring that warnings are provided to persons subjected to custodial interrogation and by requiring police to respect an individual's right to cut off questioning. Deliberate disregard

of *Miranda* severely undermines this Court's endeavor to establish concrete constitutional guidelines for law enforcement agencies to follow during the interrogation process, and tarnishes the integrity of our judicial process.

STATEMENT OF THE CASE

Based on a recorded statement made during a custodial interrogation, respondent Patrice Seibert was convicted of second-degree murder for her role in the death of Donald Rector in a fire in the mobile home where they both lived. *State* v. *Seibert*, 93 S.W.3d 700, 701 (Mo. 2002). The facts relevant to the issue before the Court are as follows.

Five days after the trailer fire, Officer Richard Hanrahan instructed his colleague to arrest Seibert. At the time of her arrest, she was sleeping in a hospital in St. Louis where her son was being treated for burns. When ordering the arrest, "Officer Hanrahan specifically instructed Officer Clinton not to advise Seibert of her *Miranda* rights." *Id.* at 702.

When Seibert arrived at the police station, she was confined in a small interview room alone for 15 to 20 minutes. Then, Officer Hanrahan entered the room and, without providing a *Miranda* warning, interrogated her for 30 to 40 minutes. During the interrogation, he repeatedly squeezed her arm and said "Donald [the victim] was also to die in his sleep." *Id.*

Eventually, Seibert conceded that the phrase Officer Hanrahan kept repeating was correct. Once she made this admission, Officer Hanrahan provided Seibert a cup of coffee and a cigarette. Twenty minutes later, he resumed his interrogation. This time, however, he advised Seibert of her *Miranda* rights, had her sign a waiver, and taped the conversation. *Id.*

When he began taping the interrogation, Officer Hanrahan referred to the unwarned portion of the interrogation: "OK, '[T]rice, we've been talking for a little while about what

happened on Wednesday the twelfth, haven't we?" *Id.* He then continued questioning Seibert, referring back to what she said during the unwarned portion of the interrogation, until he succeeded in getting her to "repeat[ ] statements she had made prior to receiving [the] *Miranda* [warnings]." *Id.*

Officer Hanrahan's subsequent testimony at trial made clear that "he [had] made a conscious decision to withhold *Miranda* hoping to get an admission of guilt." *Id.* Indeed, he was trained in and encouraged to use this interrogation tactic throughout his law enforcement career. Officer Hanrahan "testified that an institute, from which he has received interrogation training, has promoted this type of interrogation 'numerous times' and that his current department, as well as those he was with previously, all subscribe to this training." *Id.*

He employed this *Miranda*-evading interrogation technique and affirmatively linked together the pre-warning and post-warning portions of the interrogation, using Seibert's pre-warning admissions during the second stage of the interrogation:

> Officer Hanrahan: Now, in discussion you told us, you told us that there was an understanding about Donald. (Here, he is referring to the unwarned portion of the interview.)
>
> Seibert: Yes.
>
> Hanrahan: Did that take place earlier that morning (February 12, 1997)?
>
> Seibert: Yes.
>
> Hanrahan: Ok. And what was the understanding about Donald?
>
> Seibert: If they could get him out of the trailer, to take him out of the trailer.
>
> Hanrahan: And if they couldn't?

> Seibert: I, I never even thought about it. I just figured they would.
>
> Hanrahan: Trice, *didn't you tell me that he was supposed to die in his sleep*?
>
> Seibert: If that would happen, 'cause he was on that new medicine, you know. * * *
>
> Hanrahan: The Prozac? And it makes him sleepy. So he was supposed to die in his sleep?
>
> Seibert: Yes. [*Seibert*, 93 S.W.3d at 702-703 (parentheticals and emphases in original).]

In light of this colloquy, the Supreme Court of Missouri "presume[d] that the violation of *Miranda* was a tactic to elicit a confession and was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights." *Id.* at 705. On that basis, it distinguished this Court's decisions in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad,* 470 U.S. 298 (1985). After noting the twin goals underlying *Miranda*—to "deter improper police conduct and * * * assure trustworthy evidence," *id.* at 703-04—the Supreme Court of Missouri then concluded that Seibert's conviction must be reversed. As the court explained:

> To hold otherwise would encourage future *Miranda* violations and, inevitably, *Miranda*'s role in protecting the privilege against self-incrimination would diminish. Were police able to use this "end run" around *Miranda* to secure the all-important "breakthrough" admission, the requirement of a warning would be meaningless. Officers would have no incentive to warn, knowing they could accomplish indirectly what they could not accomplish directly. [*Id.* at 706-707.]

SUMMARY OF ARGUMENT

Interrogations in which the police deliberately ignore the rule of *Miranda* v. *Arizona* are unconstitutional. This

Court's landmark decision in *Miranda* established fundamental constitutional rules that remain among the most widely recognized constitutional protections in our criminal justice system: that an individual must be advised of his right to counsel, that he must be warned about the peril of self-incrimination, and that the police must, in fact, honor an individual's request to remain silent or to speak with counsel.

Despite *Miranda*'s otherwise absolute commands, in the past 37 years, this Court has crafted a series of workable rules and limited exceptions that fully respect the legitimate needs of law enforcement. These narrow refinements to the *Miranda* rule, however, were all based on an important assumption: that the police would in good faith follow the bright-line rule of *Miranda*. Indeed, this Court has dismissed suggestions that the police would exploit exceptions to *Miranda* as "speculative."

Time and experience, however, now demonstrate that the Court's assumption of good faith was misplaced. Real-world experience reveals that today, police officers—including the one who interrogated the respondent in this case—are trained to flout the requirements of *Miranda* and routinely question suspects "outside *Miranda*," either by failing to give any warning, or by ignoring requests to remain silent or for counsel, or both. Indeed, a slew of police training materials (including instructions from district attorneys to officers), academic research, and reported cases confirm that police routinely and deliberately ignore the dictates of *Miranda*. These sources provide a disturbing glimpse into well-developed police practices aimed at making an end-run around the requirements of the Constitution.

These practices not only violate the individual's Fifth Amendment rights, but also undermine the rule of law and the authority of this Court as the ultimate arbiter of the Constitution. This Court has long held it will not allow governments and government officials to ignore its rulings

on what is required by the Constitution. So too here. This Court should not countenance the pervasive practice of deliberately violating *Miranda*. To hold otherwise would be to place the Court's imprimatur on illegal police actions.

ARGUMENT

I. THE PRACTICE OF INTERROGATING SUSPECTS "OUTSIDE *MIRANDA*" HAS BECOME WIDESPREAD AND WILL CONTINUE TO GROW UNLESS THE COURTS EXCLUDE STATEMENTS AND EVIDENCE RESULTING FROM THE INTENTIONAL VIOLATION OF *MIRANDA*.

A. The Rules Surrounding *Miranda* Assume That The Police Will Obey This Court's Decisions.

Nearly four decades ago, this Court recognized in *Miranda* that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." 384 U.S. at 455. To protect the individual's Fifth Amendment right against self-incrimination in that inherently hostile environment, this Court then articulated "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* at 442. In no uncertain terms, the Court held: "*Prior to any questioning*, the person *must be warned* that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444 (emphases added). *See also Moran* v. *Burbine*, 475 U.S. 412, 420 (1986). This Court recently reaffirmed the central thrust of *Miranda* by emphasizing that "*Miranda requires* procedures that will warn a suspect in custody of his right to remain silent and which *will assure* the suspect that the exercise of that right will be honored." *Dickerson* v. *United States*, 530 U.S. at 442 (emphases added). Indeed, the strength of the *Miranda* rule "lies in the clarity of its command and the certainty of its application." *Minnick* v. *Mississippi*, 498 U.S. 146, 151

(1990); *see also Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring in judgment) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures * * *.").

While recognizing the importance of *Miranda* to the operation of our criminal justice system, this Court has also placed limits on its scope and has occasionally recognized exceptions to *Miranda*'s exclusionary rule. For example, in *Harris* v. *New York*, 401 U.S. 222 (1971), the Court held that voluntary statements made before the *Miranda* warnings are given may be used to impeach a defendant, even though the statements may not be used in the prosecution's case-in-chief. *See also New York* v. *Quarles*, 467 U.S. 649 (1984) (recognizing public safety exception); *Michigan* v. *Tucker*, 417 U.S. 433 (1974) (permitting testimony of witness identified by defendant in statement given without *Miranda* warning). Later, in *Oregon* v. *Elstad*, this Court recognized another narrow exception to *Miranda*'s rule of exclusion, concluding that a suspect's post-warning statements were admissible despite the police officer's initial "simple failure to administer the warnings." 470 U.S. 298, 309 (1985).

With cases like *Elstad*, *Harris*, and *Quarles*, this Court gave police officers breathing room to do their job in good faith. *See Dickerson*, 530 U.S. at 443 ("If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling * * *."). Given the nature of the *Miranda* violations at issue in those cases, the Court concluded that an overly strict exclusionary rule might hinder the search for "trustworthy evidence" without any offsetting benefits in terms of deterring improper police conduct. *See Elstad*, 470 U.S. at 308 (noting that trustworthy evidence and deterrence are twin goals of *Miranda* rule); *Tucker*, 417 U.S. at 445-446 (same).

In fashioning these narrow exceptions, this Court assumed that the police would not deliberately disregard the constitutional protections afforded by *Miranda*. For example, in *Harris*, while recognizing that statements made without the benefit of *Miranda* warnings could be used for purposes of impeachment, the majority dismissed as "speculative" the "possibility that impermissible police conduct [would] be encouraged." 401 U.S. at 225. Similarly, in *Oregon* v. *Hass*, the Court rejected as "speculative" the possibility that police might flout *Miranda* because they "may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material." 420 U.S. 714, 723 (1975). And, in *Elstad*, the Court responded to Justice Brennan's description of the majority opinion as a "crippling blow" against *Miranda*, 470 U.S. at 358, by noting that the dissent's "apocalyptic tone * * * distorts the reasoning and holding of the decision," *id.* at 318 n.5, which permitted the use of post-warning statements after a preceding *Miranda* violation that the Court described as an "oversight." *Id.* at 316. As demonstrated below, however, it is no longer mere speculation that police are ignoring the mandates of this Court.

B. The Court's Assumption That The Police Will Comply With The Rules Articulated In *Miranda* And Its Progeny Has Proven Incorrect.

Real-world developments have demonstrated that what the Court once thought "speculative" has now become actual and pervasive. Questioning "outside *Miranda*" is standard operating procedure at many police departments across the country. Despite this Court's faith in law enforcement agencies to comply with *Miranda*, many police officers and departments have responded to the incentives created by this Court's decisions narrowing the scope of the *Miranda* exclusionary rule by deliberately disregarding *Miranda*. This response is based on a calculation that what is lost—the ability to use unwarned statements in the prosecution's direct

case—is often outweighed by what is gained—the ability to use unwarned statements as impeachment, or in hope they will lead to discovery of other evidence and witnesses, or, as here, to help induce later admissions. When this happens, the assumption of good faith compliance underlying *Miranda*'s careful balance between deterring improper police conduct and assuring "truthful evidence" is undermined. By deliberately withholding *Miranda* warnings from a suspect—or by ignoring the suspect's invocation of his "*Miranda* rights"—in an effort to obtain incriminating statements or evidence, police officers reduce the *Miranda* Court's commands to mere suggestions, to be followed only when nothing is to be gained by their breach. Under these circumstances, the vitality of *Miranda* as a constitutional rule demands exclusion. Even in *Elstad*, the Court carefully cabined its exception to *Miranda* by noting that the police would not be allowed to use "deliberately coercive or improper tactics in obtaining the initial [unwarned] statement." *Elstad*, 470 U.S. at 314; *cf. Brown* v. *Illinois*, 422 U.S. 590, 611 (1975) (Powell, J., concurring) (flagrant abuse of Fourth Amendment rights requires strict application of exclusionary rule).

As the ACLU explained in its amicus brief in *Chavez*, empirical evidence concerning commonly used custodial interrogation techniques provides alarming confirmation that the police abuse evident in this case has become commonplace. While disavowed by some law enforcement groups—notably the FBI—the technique of questioning "outside *Miranda*" is now routinely used by many police departments to obtain incriminating statements and valuable information from suspects.[2] Even the publications that discourage or

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[2] *See* Kimberley A. Crawford, *Intentional Violations of* Miranda*: A Strategy for Liability*, Texas Justice (Aug. 1997), at 14-15 http://www.texas-justice.com/fbi/fbimiranda.htm (last visited Oct. 6, 2003). Recognizing that intentionally violating *Miranda* is a commonly used interrogation strategy, Crawford, an FBI Academy instructor, explains:

disavow the practice of questioning "outside *Miranda*" acknowledge that the problem is rampant.[3] And experts in interrogation strategies have suggested that the technique has only been refined over time.[4]

> [L]imitations on the effects of *Miranda* have encouraged some law enforcement officers to conclude that they have "little to lose and perhaps something to gain" by disregarding the *Miranda* rule. * * * Recognizing that the chances of obtaining incriminating information from counseled suspects are relatively remote, some law enforcement officers may choose to ignore invocations of the right to counsel and continue to interrogate suspects with the intention of gaining witness information or impeachment material. [*Id.* at 14-15.]

[3] *See* Thomas D. Petrowski, Miranda *Revisited:* Dickerson *v.* United States, FBI Law Enforcement Bulletin: Aug. 2001, Vol. 70, No. 8, at 29, at http://www.fbi.gov/publications/leb/2001/august2001/aug01p29.htm (last visited Oct. 6, 2003). On its website, the FBI describes the practice of questioning "outside *Miranda*," finding it so widespread as to warrant a warning to police departments against the practice:

> [P]ermissible uses of incriminating statements obtained in violation of *Miranda* have led to a practice in law enforcement of intentionally questioning in violation of *Miranda*. This practice is commonly referred to as questioning "outside *Miranda*." In fact, numerous law enforcement agencies have encouraged and provided training in this practice * * *.
>
> Departments must ensure that their officers do not interrogate "outside *Miranda*," and immediately abandon any condoned practice or policy of intentional violations of *Miranda*. * * * Departments must avoid even the appearance of intentionally conducting interrogations not in strict compliance with *Miranda*. [*Id.*]

[4] *See* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397, 461 (Dec. 1999) (relying

Law enforcement officers throughout the country receive specific training in interrogating "outside *Miranda*"—similar to the training received by Officer Hanrahan—and learn the benefits of ignoring *Miranda*'s instructions. Training materials that teach police officers how to exploit the exceptions to *Miranda*'s exclusionary rule have been circulated widely to law enforcement officers throughout the country, and have been particularly prevalent in California.

For example, a training manual that the California Department of Justice issued to law enforcement instructors contains an entire section entitled "Statements Obtained Outside of Miranda." Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 134 (1998) (hereinafter "*Saving Miranda*"). The manual informs police officers of the benefits of ignoring *Miranda* and teaches that "[n]on-coercive" questioning in violation of *Miranda* does not violate a suspect's civil or Fifth Amendment rights and "is not itself unlawful." *Id.* The manual goes on to opine boldly that "[w]hile the courts can decide that police compliance with *Miranda* is prerequisite to confession admissibility, the courts have no authority to declare that non-compliance is 'unlawful,' nor to direct the manner in which police investigate crimes." *Id.*

A bulletin published by the California District Attorneys Association in 1995 sounded the same themes. *See* Devallis Rutledge, *Questioning "Outside* Miranda*" Did You Know* * * *, at 4 (Cal. Dist. Attorneys Ass'n, Sacramento, Cal. June 1995) (quoted in *Saving Miranda*, *supra*, at 133). In that bulletin officers were informed that "outside *Miranda*" questioning was not improper and that "[a]s long

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on transcripts of interrogations to highlight two refinements to the "outside *Miranda*" technique: (i) using down-to-earth language to emphasize that the suspect's statements have no legal significance; and (ii) stressing to the suspect that talking "off the record" is in his or her best interests).

as officers avoid overbearing tactics that offend Fourteenth Amendment due process, the mere fact of deliberate non-compliance with *Miranda* does not affect admissibility for impeachment." *Id.* In short, the bulletin concluded that officers have "little to lose and perhaps something to gain" from going "outside *Miranda*." *Id.*

Similarly, widely disseminated police training videos teach officers about using the "outside *Miranda*" tactic. In one such video used by the Los Angeles Police Department, a deputy district attorney informed police officers:

> What if you've got a guy [in custody] that you've only got one shot at? This is it, it's now or never because you're gonna lose him—he's gonna bail out or a lawyer's on the way down there, or you're gonna have to take him over and give him over to some other officials—you're never gonna have another chance at this guy, this is it. And you Mirandize him and he invokes. What you can do—legally do—in that instance is go outside *Miranda* and continue to talk to him because you've got other legitimate purposes in talking to him other than obtaining an admission of guilt that can be used in his trial. * * *
>
> [Y]ou may want to go outside *Miranda* and get information to help you clear cases.* * *
>
> Or maybe it will help you recover a dead body or missing person. * * *
>
> You may be able to recover stolen property. * * *
>
> Maybe his statement "outside *Miranda*" will reveal methods—his methods of operation. * * *
>
> Maybe his statement will identify other criminals that are capering in your community. * * *
>
> Or, his statements might reveal the existence and location of physical evidence. You've got him, but you'd kinda like to have the gun that he used or the knife that he used. * * *

> [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 that will prevent him from pulling out some defense and using it at trial—that he's cooked up with some defense lawyer—that wasn't true. So if you get a statement "outside *Miranda*" and he tells you that he did it and how he did it or if he gives you a denial of some sort, he's tied to that, he is married to that. * * * [P]erfectly legitimate said both the California and U.S. Supreme Courts to use non-Mirandized statement[s] if they're otherwise voluntary. I mean we can't use them for any purpose if you beat them out of him, but if they're voluntary statements, * * * [we can] use them to impeach or rebut. So you see you've got all those legitimate purposes that could be served by statements taken "outside Miranda." [(quoted in *Saving Miranda*, *supra*, at 135-136).]

Police department officials have also endorsed the "outside *Miranda*" tactic on a number of occasions. For example, in 1998, Los Angeles Chief of Police Bernard C. Parks issued an "editorial" on the Los Angeles Police Department website indicating that the "outside *Miranda*" technique is permissible. *See* Bernard C. Parks, Editorial (Apr. 20, 1998), at http://www.lapdonline.org/press_releases/editorials/1998/ed00003.htm (last visited Oct. 6, 2003). Police Chief Parks recounted the many benefits of this approach, including the use of the suspect's statements for impeachment and several other benefits:

> Out of Miranda statements may be used as the basis for obtaining physical evidence; for other investigative purposes, such as locating contraband, locating the crime scene, identifying co-suspects, locating victims and witnesses, and clearing cases in order to re-prioritize investigative time; and putting to rest community fears. [*Id.*]

Obviously, the audience for Police Chief Parks' comments was primarily members of the Los Angeles Police Department.

Similarly, the general counsel for Riverside, California, explains in his Legal Defense Trust Training Bulletin the advantages of "the *trained* interrogation tactic of pressing the suspect after he invokes his right to silence and counsel." Michael P. Stone, General Counsel, *Ninth Circuit Holds Police May Be Sued for Intentionally Violating* Miranda, Legal Defense Trust Training Bulletin, at http://www.rcdsa.org/articles/miranda.htm (last visited Oct. 6, 2003) (emphasis in original). The bulletin describes the "typical scenario" as follows:

> In a custodial setting, a suspect says he wants a lawyer and does not want to talk. The interrogators expressly acknowledge that he has invoked his rights, and specifically note that, because of this invocation of rights, nothing that he says thereafter can be used against him, with or without the clarification, "in the case in chief." The interrogators go on to say that even though the suspect's statements "will not be used" against him, they are still interested in hearing what he has to say *before* he talks to a lawyer, because after consultation with a lawyer, they "won't trust or believe anything" he has to say. They may even offer to put it in writing that his statements "won't be used against" him. [*Id.*]

The bulletin, whose primary audience is members of the law enforcement community seeking guidance on legal issues, explains that the technique of going "outside *Miranda*" is often successful in obtaining statements that "guarantee that the suspect will never be able to testify in his own defense for fear of being impeached." *Id.* Only because of a then-recent Ninth Circuit case permitting § 1983 civil liability for a *Miranda* violation did the bulletin counsel against employing this technique. *Id.* Now, in light of this Court's decision in *Chavez*, the only factor which the bulle-

tin's author indicated impeded questioning "outside *Miranda*"—potential civil liability—has been removed.

Popular commercial training courses also promote the benefits of questioning in a way to avoid *Miranda*'s constraints. *See*, *e.g.*, Lawman Products Advanced Investigative Techniques Series, at http://lawmanproducts.com/page3.htm (last visited Oct. 6, 2003) (selling training courses that promise to "uncover[] the secrets of police interrogation," including lessons on how officers "can effectively question suspects without being hindered by *Miranda*," and "how the knowledgeable investigator can avoid being hindered by" a suspect's "constitutional rights").

Predictably, police officers have responded to their training concerning the benefits of ignoring this Court's instructions in *Miranda* and have actively employed the "outside *Miranda*" approach. According to one study, "detectives questioned suspects even after receiving an invocation" in nearly 20% of cases. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 276 (Winter 1996). In these cases, the detectives informed the suspect that his statements could not be used against him in court and were just for information purposes, but "what the detectives knew and did not tell the suspect was that although the prosecution could not use such evidence as part of its case-in-chief, any information the suspect provided to the detective nevertheless could be used in a court of law to impeach the suspect's credibility, and indirectly incriminate the suspect if he chose to testify at trial." *Id.*

Evidence of the prevalence of this practice is also seen in the numerous cases addressing the propriety of "outside *Miranda*" questioning. The Ninth Circuit first confronted the "outside *Miranda*" tactic in *Cooper* v. *Dupnik*, 963 F.2d 1220 (9th Cir.) (en banc), *cert. denied*, 506 U.S. 953 (1992). In that case, a police task force had devised a strategy for interrogating suspects: the "core of their plan was to ignore

the suspect's Constitutional right to remain silent as well as any request he might make to speak with an attorney in connection therewith, to hold the suspect incommunicado, and to pressure and interrogate him until he confessed." *Id.* at 1224. In fact, one task force member testified, " '*You know, whether he asked for an attorney or for his mommy or whatever he asked for, if he asked to remain silent, I wasn't going to stop. We decided it was going to be very clear-cut, forget his* Miranda *rights, the hell with it*.' " *Id.* at 1226 (emphasis in original).

Seven years later, in *Henry* v. *Kernan*, 197 F.3d 1021 (9th Cir. 1999), *cert. denied*, 528 U.S. 1198 (2000), the Ninth Circuit overturned a murder conviction because law enforcement officials in Sacramento "set out in a deliberate course of action to violate *Miranda*," employing "slippery and illegal tactics * * * deliberately designed to undermine [the suspect's] ability to control the time at which the questioning occurred, the subjects discussed, and the duration of the interrogation." *Id.* at 1027, 1029. That same year, in C*alifornia Attorneys for Criminal Justice* v. *Butts*, 195 F.3d 1039 (9th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000), the Ninth Circuit again dealt with "a policy of the defendant police to defy the requirements of *Miranda* v. *Arizona*. * * * The alleged policy, set forth in certain training programs and materials, was to continue to interrogate suspects 'outside *Miranda*' despite the suspects' invocation of their right to remain silent and their requests for an attorney." *Id.* at 1041 (citation deleted).

These questionable interrogation tactics are certainly limited to California or to the Ninth Circuit. In perhaps the most in-depth nationwide study of "outside *Miranda*" techniques, Professor Charles D. Weisselberg uncovered decisions from 41 states in which police officers either continued questioning suspects after they had invoked their right to silence or to counsel, or questioned a suspect without giving *Miranda*

warnings at all. *See Saving Miranda*, *supra*, at 137-138.[5] In addition, recent decisions from other states reflect the widespread nature of the "outside *Miranda*" approach. For example, the Supreme Court of Wisconsin, in its recent decision in *State* v. *Knapp*, 666 N.W.2d 881 (Wisc. 2003), considered the admissibility of evidence where it was "undisputed that [the detective] intentionally violated [the defendant's] *Miranda* rights in order to procure derivative/physical evidence." *Id.* at 899. In light of the deterrence rationale underlying *Miranda*'s exclusionary rule, the court held that the physical fruits of such an intentional violation were inadmissible. *Id.* at 900.

And in the case now before the Court, Officer Hanrahan—a police detective in Rolla, Missouri—"testified that [he] made a conscious decision to withhold *Miranda* hoping to get an admission of guilt. *Seibert*, 93 S.W.3d at 702. He explained his interrogation approach:

> Basically, you're rolling the dice. You're doing a first stage where you understand that if you're told something that when you do read the *Miranda* rights, if they invoke them, you can't use what you were told. We were fully

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[5] *See also* Elwood Earl Sanders, Jr., *Willful Violations of* Miranda*: Not a Speculative Possibility but an Established Fact*, 4 Fla. Coastal L.J. 29, 37-55 (Fall 2002) (surveying the published opinions of 12 jurisdictions and identifying 41 instances in which law enforcement officers engaged in interrogation techniques that willfully and intentionally violated *Miranda*); Wanda J. DeMarzo & Daniel de Vise, *Spotlight on False Confessions: Zealous Grilling by Police Tainted 38 Murder Cases*, Miami Herald, Dec. 22, 2002, at http://www.truthinjustice.org/Spotlight-False-Confessions.htm (last visited Oct. 6, 2003) (explaining that Broward County, Florida homicide detectives repeatedly took confessions from suspects who had asked for attorneys or invoked their right to silence, and specifically citing murder suspect Pui Kei Wong, whose confession was thrown out because it was given after invoking his right to silence).

> aware of that. We went forward with the second stage, read *Miranda* and she repeated the items she had told us. [*Id.* at 704.]

Officer Hanrahan testified that "an institute, from which he has received interrogation training, has promoted this type of interrogation 'numerous times' and that his current department, as well as those he was with previously, all subscribe to this training." *Id.* at 702.

As this evidence shows, law enforcement agencies and private training groups across the country view the *Miranda* warnings not as a constitutional safeguard, but as a legal speed bump to be avoided by exploiting the exceptions to *Miranda*'s exclusionary rule.

C. The Experience Of The California Courts Illustrates That The Practice Of Going "Outside *Miranda*" Will Continue Unless This Court Puts A Stop To It.

The experience of the California courts demonstrates that deliberate "outside *Miranda*" questioning by law enforcement will not be stopped by disapproval from the courts, unless that disapproval is backed by an exclusionary rule robust enough to remove the incentives for the practice. The California Supreme Court's repeated disapproval of such conduct, *see, e.g., California* v. *Peevy*, 953 P.2d 1212, 1225 (Cal. 1998), *cert. denied*, 525 U.S. 1042 (1998) (noting that questioning outside *Miranda* amounts to "police misconduct"), had little effect on such police training. Indeed, a bulletin prepared by the Orange County California District Attorney's office following *Peevy* described the state high court's characterization of "outside *Miranda*" questioning as illegal as "unfortunate dictum" that would "be open to serious dispute if [it] should ever form the basis of a ruling." Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 Mich. L. Rev. 1121, 1143-44 (Mar. 2001). The bulletin encouraged police to ignore the language of *Peevy* that

criticized "outside *Miranda*" questioning, continuing: "Meanwhile, like they say down home, 'If you've caught the fish, don't fret about losing the bait.' " *Id.*

Moreover, in one training video made by the Commission on Peace Officer Standards and Training (POST)—an agency within the California Department of Justice— police officers were brazenly instructed:

> [W]e 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, so they can't start shifting gears when they see how the evidence develops. * * *
>
> [O]ur 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 those are United States and California Supreme Court decisions, and we want to take advantage of that to the extent that we can, but we need to be mindful that some judges, in some recent cases have come out with language that severely frowns upon this practice, and are going to presume that that practice is eliciting involuntary statements. What that means is, that in addition to getting them to make additional statements, you also have to establish something that we can use as evidence that these statements were voluntarily made. So how do we do that? Somehow, if it can be done, you need to have the suspect to acknowledge a willingness to continue to speak even after he's invoked his *Miranda* rights.
>
> So for example, you read him his *Miranda* rights, and he invokes his right to silence. What can you do? 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?" Get him to acknowledge that it would be O.K. for you to continue to ask him those questions, or if he invokes his right to silence, you could say, "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 after setting the criteria, he acknowledges a willingness to talk or to answer some of your questions, 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, just as long as I've asked for a lawyer, you tell me you're going to get me one, O.K., while we're waiting for the lawyer to get here, sure, I'll answer a few of your questions." Again, what you've done there is you put something on the record establishing a willingness on his part, voluntariness on his part to continue to engage in some kind of a dialogue." [Daniel McNerney, Deputy District Attorney, Orange County, Cal., "Miranda*: Post-Invocation Questioning*" (July 11, 1996), at http://www.cacj.org/policy_statements/policy_statement_12.htm (last visited Oct. 6, 2003).[6]]

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[6] This video is currently available for sale as training material on POST's website. *See* POST Television Network Video Catalog (2001-02), at http://www.post.ca.gov/training/cptn/video_catalog.asp (last visited Oct. 6, 2003). Moreover, counsel for amici have copies of this and the other video broadcasts mentioned in this brief on file. Copies of these videos will be made available to the Court upon request.

And in another POST broadcast following the California Supreme Court's *Peevy* decision, a district attorney informed police of the court's disapproval of the practice of questioning "outside *Miranda*," but characterized that disapproval as "dicta" that was inconsistent with this Court's decisions. Devallis Rutledge, Deputy District Attorney, *Questioning "Outside* Miranda*" for Impeachment*, July 8, 1998, at http://www.cacj.org/policy_statements/policy_statement_12.htm (last visited Oct. 6, 2003). In light of *Peevy*, the district attorney suggested that police officers discuss the issue with legal counsel, but reminded them of the impeachment value of "outside *Miranda*" statements." *Id.*

In the wake of the unrelenting endorsement by some district attorneys and police trainers after *Peevy* and other similarly critical California Supreme Court cases, the tactic of going "outside *Miranda*" continued in California.[7] Finally, recognizing the ineffectiveness of its previous condemnations of the practice unaccompanied by real world consequences, the California Supreme Court recently reversed course in *People* v. *Neal*, 31 Cal. 4th 63 (Cal. 2003), concluding that "outside *Miranda*" statements, at least under the circumstances of that case, were involuntary and inadmissible for any purpose. *Id.* at 85. In a sharply-worded concurrence, Justice Baxter noted that "California courts have time and again noted and decried deliberate police use of tactics that violate *Miranda* standards" to no avail, and that "[i]t could not be clearer that efforts to gather court

[7] Several state legislators unsuccessfully attempted to stop the practice. The California State Senate passed a bill that would have prohibited law enforcement agencies from training officers to violate *Miranda*. *See* S.B. 1211, 2001-01 Reg. Sess. (Cal. 2001). However, the legislation was opposed by the California District Attorneys' Association, *see* Assembly Public Safety Committee Analysis (July 2, 2001), at http://info.sen.ca.gov/pub/01-02/bill/sen/sb_1201-1250/sb_1211_134918_asm_comm.html, and the bill failed to pass the California Assembly.

evidence by such means are improper." *Id.* at 90-91. Unless this Court responds similarly and excludes incriminating statements and evidence obtained after the deliberate use of "outside *Miranda*" questioning techniques, this practice will continue to spread, rendering *Miranda*, in effect, a dead letter.

II. THE LEGITIMACY OF THIS COURT'S RULINGS WILL BE THREATENED IF THE POLICE ARE ALLOWED TO IGNORE ESTABLISHED CONSTITUTIONAL RULES WITH IMPUNITY.

Allowing intentional violations of *Miranda*, like Officer Hanrahan's and the others described above, to go undeterred undermines the rule of law. Article VI of the Constitution makes clear that the Constitution itself is the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. And since the time of *Marbury* v. *Madison*, this Court has recognized that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. (1 Cranch) 137, 197 (1803). This Court did just that in *Miranda* when it held that, in the custodial interrogation setting, a suspect must be permitted a full opportunity to exercise the privilege against self-incrimination guaranteed in the Fifth Amendment. 384 U.S. at 467. The Court concluded that the protection of this sacred privilege could only be accomplished if the suspect is "effectively apprised of his rights." *Id*. This Court found this warning necessary to ensure that "what was proclaimed in the Constitution had not become but a 'form of words.' " *Id.* at 444 (quoting *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920)).

In this case and many others, the police have intentionally chosen to ignore this Court's constitutionally mandated rule. As the Missouri Supreme Court observed, this "intentional omission of a *Miranda* warning was intended to deprive Seibert of the opportunity knowingly and intelligently to waive her *Miranda* rights." *Seibert*, 93 S.W.3d at 706. Were

this Court to sanction such an "end run" around *Miranda*—a rule this Court has held is necessary to protect the Fifth Amendment rights of a suspect—"the requirement of a warning would be meaningless." *Id.* at 707.

The authority of this Court will be undermined if police departments and officers are permitted to intentionally violate the constitutional requirements this Court has mandated to protect our Fifth Amendment rights.

When faced with a similar threat from the governor of Texas, who contended that the federal courts had no power to regulate his actions once he had declared martial law, this Court refused to acquiesce and abdicate its role as the final arbiter of the Constitution's requirements. *See Sterling* v. *Constantin*, 287 U.S. 378 (1932). Instead, the Court observed that, if the federal courts had no power to uphold the Constitution once a governor declared martial law, "the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the state may at any time disclose by the simple process of transferring powers of legislation to the Governor * * * upon his assertion of necessity." *Id.* at 397-398.

Unfortunately, the Court has had other occasions to reaffirm that its exposition of the law must be followed. In *Cooper* v. *Aaron*, 358 U.S. 1 (1958), the Little Rock School Board sought a suspension of the desegregation plan that was to be implemented in its school district. The School Board's position was that, because of the extreme public hostility to the plan caused by the actions of the state governor and legislature, desegregation was impossible. The Court denied the School Board's request, and concluded that its "interpretation of the Fourteenth Amendment enunciated * * * in the *Brown* case is the supreme law of the land." *Id.* at 18. The Court reasoned that, if state legislatures could, through their actions, "annul the judgments of the courts of the United States, and destroy the rights acquired under those judg-

ments, the constitution itself becomes a solemn mockery." *Id.* (internal quotation omitted). The Court in *Cooper* refused to permit the School Board to disregard the Court's ruling in *Brown*, based on the state's own actions in inciting the public hostility. Were the Court to permit states to ignore its determination of what is required to comply with and protect the Constitution, our system of laws would become meaningless.

Now, the Court once again faces demonstrable disregard of its decisions. Here, police around the country are purposefully disregarding *Miranda* for strategic purposes, knowing full well that they are violating the Court's constitutionally mandated requirement that suspects be apprised of their rights prior to a custodial interrogation. To allow evidence to be admitted that is the fruit of law enforcement's own illegal actions is to permit the police to ignore the letter and the spirit of this Court's *Miranda* decision.

Just as the Court refused to permit the Texas governor or the Little Rock school board to ignore its explication of the Constitution, so too it should refuse to permit police to flout the requirements of *Miranda.* That remains true despite police arguments that *Miranda* announced merely a "prophylactic rule." As Justice Stevens has observed, the "argument that a rule of law may be ignored, avoided, or manipulated simply because it is 'prophylactic' is nothing more than an argument against the rule of law itself." *Michigan* v. *Harvey*, 494 U.S. 344, 369 (1990) (Stevens, J., dissenting). Thus, just as the Court did not permit Congress to ignore its "prophylactic" *Miranda* decision by passing legislation purporting to overrule it, *see Dickerson*, 530 U.S. 428, so too it should not sanction the deliberate disregard of *Miranda* by prosecutors, police forces, and individual law enforcement officers.

The integrity of the federal judiciary generally, and this Court in particular, is profoundly threatened if police continue to "end run" the requirements in *Miranda*. To allow

that continued abuse would require the Court itself "to participate in, and in effect condone, the lawless activities of law enforcement officers." *Elkins* v. *United States*, 364 U.S. 206, 220 (1960) (internal quotation omitted). In *Elkins*, the Court concluded that evidence illegally seized by state agents in violation of a suspect's Fourth Amendment rights was inadmissible in a federal criminal trial, notwithstanding that federal officials had not been involved in the illegal search. The Court observed that "the imperative of judicial integrity" required that the Court disallow such evidence. *Id*. at 222. To rule such evidence admissible, the Court concluded, would make the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Id.* at 223; *cf. McNabb* v. *United States*, 318 U.S. 332, 345 (1943) (concluding that a "conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law").

The Court reaffirmed this principle in *Mapp* v. *Ohio*, 367 U.S. 643 (1961). In holding that state courts are required to exclude evidence obtained through illegal searches and seizures, the Court noted that "the State, by admitting evidence unlawfully seized, serv[ed] to encourage disobedience to the Federal Constitution which it [wa]s bound to uphold." *Id.* at 657. In a similar context, where police deliberately ignored a defendant's Fourth Amendment rights, Justices Powell and Rehnquist concluded that "the deterrent value of the exclusionary rule is most likely to be effective and *the corresponding mandate to preserve judicial integrity* * * * most clearly demands that the fruit of official misconduct be denied." *Brown* v. *Illinois*, 422 U.S. at 611 (Powell, J., concurring) (emphasis added).

Similarly, law enforcement officials in this case deliberately disobeyed this Court's *Miranda* decision, despite their oath to uphold the Constitution and their duty to uphold the

constitutional rules enunciated by this Court. A decision by this Court permitting law enforcement to ignore *Miranda* without consequence would "undermine[] the principle that those who are entrusted with the power of government have the same duty to respect and obey the law as the ordinary citizen." *Michigan*, 494 U.S. at 369 (Stevens, J., dissenting). If evidence obtained as a result of such violations is admissible against a suspect, the Court itself will effectively have ratified the lawless actions of the police.

This concern is especially pressing in light of the Court's decision in *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003), that a suspect may not maintain a 42 U.S.C. § 1983 action against a police officer who violates *Miranda.* If questioning in violation of *Miranda* does not subject the officers or police departments to civil liability, then exclusion of evidence obtained that way is all the more critical. Otherwise, police officers will have no reason whatsoever to comply with this Court's mandate and will continue to flout *Miranda*. If the intentional violation of *Miranda* does not warrant the exclusion of the fruits of that violation, not only will the rights safeguarded by *Miranda* be in jeopardy, but so too will the authority and integrity of this Court.

CONCLUSION

For the foregoing reasons, as well as those presented in the respondent's brief, the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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