No. 21-499

IN THE
Supreme Court of the United States

CARLOS VEGA,
Petitioner,

v.

TERRENCE B. TEKOH,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether police officers who obtain a custodial statement in violation of *Miranda* may be liable under 42 U.S.C. § 1983 when the statement is foreseeably introduced against a criminal defendant in violation of the Fifth Amendment.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers is a nonprofit bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crimes.

NACDL was founded in 1958. It has a nationwide membership of thousands of members, including private criminal-defense lawyers, public defenders, military-defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defense and private criminal-defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, in cases that concern constitutional standards affecting criminal defendants, criminal defense lawyers, and the criminal justice system.

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[1] Pursuant to Rule 37.6, NACDL certifies that no counsel for a party has authored this brief in whole or part and no one other than NACDL and its counsel have made any monetary contribution to this brief. All parties have consented to its filing.

SUMMARY OF ARGUMENT

This case asks whether a police officer may be liable under § 1983 when the officer conducts a custodial interrogation in violation of *Miranda* and obtains an incriminating statement that is used against the defendant in a criminal case. This Court should hold that, in appropriate circumstances, a jury could find such an officer liable for violating the Fifth Amendment. This holding is the only one that adheres to this Court's precedents and adequately protects citizens' bedrock right to be free of compelled self-incrimination.

I. This Court has already decided that the Fifth Amendment is violated when a custodial statement is taken without *Miranda* warnings and is used in a criminal case. *Dickerson v. United States* holds that *Miranda*'s warnings are required by the Constitution and that Congress may not supersede them legislatively. 530 U.S. 428, 444 (2000). The Court in *Dickerson* considered the same arguments petitioner raises here for relegating *Miranda* warnings to sub-constitutional status, and it rejected them—with good reason. The Fifth Amendment right to be free of compelled self-incrimination is among our dearest individual liberties, and it underpins our entire criminal justice system. Moreover, *Miranda*'s rules are clear and administrable, and they are engrained in American culture perhaps more so than any other constitutional right.

II. If police officers take statements during custodial interrogations in violation of *Miranda*'s

Fifth Amendment rule that are used in a criminal case, traditional causation principles dictate that police officers may be held liable under § 1983. This Court's decisions examining the use of involuntary confessions in criminal cases consistently identify police action as the central cause of such constitutional violations. The causation analysis under § 1983 should be no different: The statutory text provides for liability whenever an official "causes to be subjected" a suspect to a Fifth Amendment violation; and long-established causation principles dictate that police officers who take statements during custodial interrogations without *Miranda* warnings may be liable for constitutional violations occurring later in the criminal case when they can reasonably foresee that their actions will cause such violations.

In this case, as in others, the police officer was the principal state actor involved at all stages. Not only did petitioner interrogate the suspect without *Miranda* warnings, but he also reported the statement, used the statement to start the criminal case, and served as the witness called to introduce the statement at the criminal trial. A jury could find that this course of events was eminently foreseeable and precisely what petitioner intended when he initially took the statement. It should make no difference that other state actors participated in the chain of causation that led to the admission of the involuntary statement in the criminal case. Here, as is common, a police officer obtained the custodial statement and was responsible for providing *Miranda* warnings; a prosecutor offered the statement as evidence in the

criminal case; and a judge admitted the evidence. This division of roles in our criminal justice system is not an absolute bar to police liability. On the contrary, this Court has recognized in § 1983 cases that an individual may be liable for constitutional violations in a criminal case even when other state actors, including prosecutors and judges, are involved.

III. While the text of § 1983, this Court's Fifth Amendment precedents, and traditional causation principles should resolve this appeal without reference to consequentialism, it is worth stressing that removing the § 1983 remedy for police violations of the Fifth Amendment would destabilize our criminal justice system. In this respect, petitioner's argument that it would wreak havoc to hold police liable in this context gets things exactly backwards. Lower courts already hold police civilly liable for Fifth Amendment violations in certain circumstances.

The current regime has not caused a landslide of litigation, or any other dire result of which petitioner warns. On the contrary, police are steeped in *Miranda* from the very start of their careers. They are well trained in the warnings, and they are adept at adhering to them in all kinds of custodial interrogations. In NACDL's experience, our criminal courts admit a huge number of incriminating statements into evidence each day, in full compliance with *Miranda*. Lawsuits under § 1983 challenging admission of a confession are unavailable unless the criminal case terminates in favor of the accused or a resulting criminal conviction is set aside—rare outcomes in a

confession case. Qualified immunity is available to police when clearly established law does not dictate that *Miranda* was violated.

But the criminal justice system currently functions with a default rule in place and a system-wide expectation that statements taken in violation of *Miranda* will not be introduced during the prosecution's case-in-chief. Removing the possibility of a civil remedy for violations of clearly established law will reduce incentives for compliance with *Miranda* in a manner that will drastically upend the way that criminal prosecutions are conducted.

ARGUMENT

I. PETITIONER'S ARGUMENT CANNOT BE SQUARED WITH *DICKERSON*

A. The Fifth Amendment Prohibits Criminal Prosecutions and Convictions By Means of Compelled Statements During Police Interrogation

At the heart of the American criminal justice system is the guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "Our forefathers, when they wrote this provision into the Fifth Amendment of the Constitution, had in mind a lot of history which has been largely forgotten to-day," this Court explained in *Ullmann v. United States*, 350 U.S. 422, 427-28 (1956). "If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it

down by the subtle encroachments of judicial opinion." *Id.*

The privilege perpetuates "principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change." *Bram v. United States*, 168 U.S. 532, 544 (1897). It enshrines as a permanent part of our criminal justice system "many of our fundamental values and most noble aspirations: . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhuman treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him . . . ; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' . . . and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent." *Withrow v. Williams*, 507 U.S. 680, 692 (1993).

Throughout its history, this Court has guarded against efforts to undermine the privilege. See *Brown v. Walker*, 161 U.S. 591, 613-14 (1896) (relating Chief Justice Marshall's 1807 rulings protecting the privilege during Aaron Burr's trial); *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964) (holding that the privilege applies with full force to state court proceedings).

An original and deeply rooted purpose of the Fifth Amendment was to outlaw an inquisitorial system of law enforcement and to prevent government officials from interrogating the accused in a manner that might result in an involuntary confession. As the Court explained more than a century ago:

> The maxim, 'Nemo tenetur seipsum accusare,' had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons . . . . [I]f an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions . . . made the system so odious as to give rise to a demand for its total abolition. . . . So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

Brown v. Walker, 161 U.S. 591, 596-97 (1896).

In *Miranda v. Arizona*, the Court held that accused persons "must be adequately and effectively apprised of [their Fifth Amendment] rights," and "the exercise of those rights must be

fully honored." 384 U.S. 436, 467 (1966). To that end, the Fifth Amendment privilege "serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Id.* at 467. *Miranda* described its warnings as "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* at 442. In the absence of such warnings, the Court held, a suspect's statement cannot be admitted into evidence without violating the Fifth Amendment. *Id.* at 444, 491-99.

B. *Dickerson* Reaffirmed That *Miranda*'s Warnings Are Constitutionally Required

This Court has already decided that the Fifth Amendment is violated under the circumstances here—that is, when a custodial statement is taken in violation of *Miranda* and then is introduced as part of the prosecution's case-in-chief. In *Dickerson*, the Court concluded unequivocally "that *Miranda* announced a constitutional rule." 530 U.S. at 428; see also *Missouri v. Seibert*, 542 U.S. 600, 609 (2004) (plurality opinion) ("*Dickerson* reaffirmed *Miranda* and held that its constitutional character prevailed against the statute."). This is the reason that federal habeas review extends to "a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by *Miranda*," *Withrow*, 507 U.S. at 683; and it is why this Court has reversed state criminal convictions where an officer testified in the criminal case about incriminating statements made by a defendant during an interrogation without

Miranda warnings, *Orozco v. Texas*, 394 U.S. 324 (1969). Petitioner's position cannot be reconciled with *Dickerson*, which controls this case.

Dickerson's holding that the Fifth Amendment is violated when an unwarned statement obtained during custodial interrogation is introduced in a criminal case was grounded in a truth that persists: The "coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements." 530 U.S. at 435. Although the *Dickerson* dissent called the premise "preposterous," *id.* at 448 (Scalia, J., dissenting), relying on the history set out above, the majority explained that "custodial police interrogation, by its very nature, isolates and pressures the individual," meaning that some procedure to mitigate the pressure is necessary to render a statement voluntary and admissible in a later criminal case. *Id.* at 435.

Petitioner harps on this Court's characterization of *Miranda* warnings as "prophylactic," in the sense that dispensing with them during custodial interrogation does not, without more, violate the Constitution. See Petr. Br. at 15-19; see also *United States v. Patane*, 542 U.S. 630, 641 (2004) (plurality opinion) (noting that the constitutional violation is not complete until the statement is introduced in the criminal case). But this case presents the situation where more did happen: the unwarned statement was used in the criminal case. And this Court in *Dickerson* considered and rejected the view that characterizations of *Miranda* warnings as "prophylactic" lessened their status as constitutional requirements. *Id.* at 437-38.

Dickerson leaves no doubt that the Constitution was violated here.

C. Adopting Petitioner's Argument Would Contradict *Dickerson* and Undermine *Miranda*

Adopting petitioner's argument in this case would not only contradict *Dickerson*, but it would also signal that the Court has retreated from enforcement of *Miranda* as a constitutional right. The Court should not take that path. It should instead reaffirm *Dickerson*'s holding that *Miranda* announced the constitutional rule that a statement taken without *Miranda*'s warnings and used in a criminal case violates the Fifth Amendment.

Adherence to precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). In *Dickerson*, the Court concluded that *Miranda*'s constitutional status should not be disturbed because *Miranda*'s clear rules were easy to administer and had been widely adopted. 530 U.S. at 442-43. *Miranda* warnings "have become part of our national culture," the Court concluded, and so a "special justification" would be required to depart from them. *Id.* at 443. There was no such special justification then, and the reasons for strictly adhering to *Dickerson* have grown stronger since.

1. *Miranda* established a workable and clear rule for police, prosecutors, defense attorneys, and

courts. Members of this Court recently explained its advantages:

> *Miranda* greatly simplified matters by requiring police to give suspects standard warnings before commencing any custodial interrogation. . . . Its requirements are no doubt rigid . . . . But with this rigidity comes increased clarity. *Miranda* provides a workable rule to guide police officers, . . . and an administrable standard for the courts. As has often been recognized, this gain in clarity and administrability is one of *Miranda*'s principal advantages.

J.D.B. v. North Carolina, 564 U.S. 261, 285-86 (2011) (Alito, J., dissenting) (citing *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring); *Berkemer v. McCarty*, 468 U.S. 420, 430 (1984); *New York v. Quarles*, 467 U.S. 649, 658 (1984); *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)).

Implementing *Miranda*'s clear rules, courts have developed an efficient system for evaluating confessions: un-*Mirandized* custodial statements are presumptively involuntary; and statements given following *Miranda* warnings are presumptively voluntary, with the criminal defendant facing an exacting burden to show inadmissibility. *E.g.*, *Berkemer*, 468 U.S. at 433 n.20 ("Cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.'"). Undermining *Dickerson* unnecessarily risks upending these established systems and disrupting the orderly administration of criminal justice.

2. In addition, the legal and factual foundation of *Miranda* remains as strong today as ever. Confession evidence remains the "gold standard" used to obtain convictions—there are few more powerful categories of evidence. And no decision of this Court has questioned the premise that law enforcement officers continue to interrogate suspects in inherently coercive custodial interrogations. *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011); *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010). That practice remains "at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself." *Miranda*, 384 U.S. at 457; *supra* Part I(A); see also *District Attorney's Office v. Osborne*, 557 U.S. 52, 73 n.4 (2009) (recognizing that "the underlying requirement at issue in [*Miranda*] that confessions be voluntary had 'roots' going back centuries"). Development of the law after *Miranda* has refined when *Miranda*'s warnings are required. But "[i]f anything, [this Court's] subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Berghuis v. Thompkins*, 560 U.S. 370, 383 (2010).

3. Finally, *Miranda* has been established constitutional law for more than half a century and there is immense reliance in this country on *Dickerson*'s holding that a suspect's constitutional rights are violated when *Miranda* warnings are not given and a custodial statement is introduced as evidence of guilt. For decades, police officers have

been trained to provide *Miranda* warnings. INBAU ET AL., CRIMINAL INTERROGATION & CONFESSIONS 220-45, 272-324 (Third Ed. 1986); INBAU ET AL., CRIMINAL INTERROGATION & CONFESSIONS 400-15 (Fifth Ed. 2013); *Withrow*, 507 U.S. at 695 ("[T]here is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements[.]"); *Quarles*, 467 U.S. at 663 ("[L]aw enforcement practices have adjusted to [*Miranda*'s] strictures[.]") (O'Connor, J., concurring in part and dissenting in part). In NACDL's experience, police officers have no problem providing *Miranda* warnings to suspects, and confessions obtained in compliance with *Miranda* are admitted routinely in criminal cases each day. *Cf. Seibert*, 542 U.S. at 618 (Kennedy, J., concurring) ("The *Miranda* rule has become an important and accepted element of the criminal justice system.").

Moreover, "for the American public, at least, *Miranda* stands for justice." Charles D. Weisselberg, *Exporting and Importing* Miranda, 97 B.U. L. REV. 1235, 1237 (2017). "This Court has recognized repeatedly that many, indeed most, Americans are aware that they have a constitutional right not to incriminate themselves by answering questions posed by the police during an interrogation[.]" *Salinas v. Texas*, 570 U.S. 178, 201 (2013) (Breyer, J., dissenting). *Miranda* warnings remain a constitutional right cemented in "our national culture." *Dickerson*, 530 U.S. at 430; see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1406 (2020) (contrasting nonunanimous verdicts with *Miranda* warnings and reiterating that the latter

are "part of our national culture"). This Court should not reverse course, contradict *Dickerson*, and alleviate police officers of their constitutional responsibility to provide *Miranda* warnings.

II. POLICE OFFICERS CAN CAUSE VIOLATIONS OF *MIRANDA*'S FIFTH AMENDMENT RULE

The Fifth Amendment is violated when police officers obtain incriminating statements during a custodial interview in violation of *Miranda* and those statements are used against the defendant in a criminal case. The question that remains is whether causation principles under § 1983 can render police officers liable for such violations, or whether liability is never possible as a matter of law.

Section 1983 provides that police officers can be held liable for such violations of criminal trial rights, in the absence of another established bar to suit, such as qualified immunity. *Thompson v. Clark*, No. 20-659, 596 U.S. ___ (slip op. at 11) (Apr. 4, 2022). Petitioner's and the United States's arguments that a police officer cannot cause a Fifth Amendment violation as a matter of law because prosecutors offer and judges admit confessions in criminal cases is untethered from this Court's cases on the Fifth Amendment, established causation principles in section § 1983 actions, and the realities of criminal procedure.

A. This Court's Criminal Procedure Precedents Uniformly Recognize Police May Cause Fifth Amendment Violations

This Court's cases analyzing whether the Fifth Amendment was violated by the admission of involuntary statements in criminal cases have long asked whether actions of police officers caused the Constitution to be violated. This is unsurprising, given that police are almost always the ones who obtain statements from criminal suspects in the first place. It would be odd in light of these precedents to fashion a new rule that police cannot ever cause a Fifth Amendment violation.

For example, in *Bram v. United States*, this Court's oldest decision declaring a confession involuntary under the Self-Incrimination Clause, the Court recognized that the circumstances of the interrogation and the "conduct of the detective towards the accused" rendered the confession involuntary and caused a Fifth Amendment violation when it was introduced in the criminal case. 168 U.S. at 561-63 (1897). There, as in nearly every criminal case since, the confession evidence was introduced at the criminal trial through the detective to whom the suspect had confessed. *Id.* at 539-40.

Or consider *Brown v. Mississippi*, 297 U.S. 278 (1936), which first overturned a state criminal conviction on the ground that involuntary confessions had been introduced at trial in violation

of the federal Constitution.[2] The court recognized that the constitutional violation at issue was based "solely upon confessions shown to have been extorted by the officers of the state by brutality and violence[.]" *Id.* at 279. The confessions were offered by the state at trial over defense objections, and the police who obtained the confessions even testified they had tortured the defendants. *Id.* at 284-85. Again, the Court focused on the actions of the officers as the cause of the constitutional violation, holding: "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Id.* at 286; see also *id.* ("Nor may a state, through the action of its officers, contrive a conviction through the pretense of a trial[.]").

In each instance, the constitutional violation was caused by the conduct of police officers who obtained the confessions. Yet there was no suggestion that prosecutors or judicial officers were solely responsible for the constitutional violation or that their actions broke the chain of causation between the illegal extraction of the confession by police and the violation of the Constitution at trial.

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[2] *Brown* focused on due process instead of self-incrimination because it predated *Malloy*, 378 U.S. 1, and incorporation.

This Court's subsequent decisions are in the same vein. Just before its decision in *Monroe v. Pape*, 365 U.S. 167 (1961), recognizing the § 1983 damages remedy, this Court emphasized in *Spano v. New York*, 360 U.S. 315, 320 (1959), that the police play a significant role when an involuntary confession corrupts a criminal case. "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness," the Court explained. *Id.* Instead, "[i]t also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Id.* at 320-21. The Court noted that "the actions of police in obtaining confessions have come under scrutiny in a long series of cases," and concluded that "law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime." *Id.* at 321; see *id.* (collecting 28 cases involving scrutinized confessions obtained by police officers and other law enforcement officials).

When this Court reversed a criminal conviction based on an involuntary confession the following Term, in *Blackburn v. Alabama*, 361 U.S. 199 (1960), it focused again on the conduct of police and the circumstances of the interrogation causing the constitutional violation. *Id.* at 207 (discussing an hours-long interrogation in a tiny room "literally filled with police officers"). A long line of cases had

established the principle that the Constitution "is grievously breached when an involuntary confession is obtained by state officers and introduced into evidence in a criminal prosecution which culminates in a conviction." *Id.* at 205 (citations omitted).

In the 60-plus years since *Blackburn*, all of this Court's cases considering whether an involuntary confession obtained in a custodial interrogation and introduced in the criminal case violated the Constitution have focused on the actions of police officers and their effect on the criminal case. This is true whether the involuntary confession is obtained by police coercion or by an officer's failure to provide *Miranda* warnings. *Withrow*, 507 U.S. at 685-95 (habeas relief appropriate where the police had placed the petitioner in custody and taken statements for a period of time without *Miranda* warnings, which were then admitted in the criminal case); *Orozco*, 394 U.S. at 325-26 (reversing conviction where the state "trial court allowed one of the officers, over the objection of petitioner's lawyer, to relate the statements made by petitioner concerning the gun and petitioner's presence at the scene of the shooting" where "the officers questioned petitioner about incriminating facts without first informing him of his right to remain silent, his right to have the advice of a lawyer before making any statement, and his right to have a lawyer appointed to assist him if he could not afford to hire one.").

Indeed, *Colorado v. Connelly* holds that police conduct is part and parcel of the Fifth Amendment violation that occurs when an involuntary

confession is introduced in a criminal case. 479 U.S. 157, 163-64 (1986). "While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct." *Id.*[3] This Court's cases therefore

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[3] Here are a portion of the Court's cases discussing how police action may cause Fifth Amendment violations: *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006) (Fifth Amendment exclusionary rule is to remedy "confessions exacted by police in violation of the right against compelled self-incrimination or due process"); *Withrow*, 507 U.S. at 693 (noting the "crucial element of police coercion" to the voluntariness inquiry); *Colorado v. Spring*, 479 U.S. 564, 574 (1987) (confession admissible because "the traditional indicia of coercion" were absent); *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-25 (1973) (voluntariness doctrine reflects "that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice"); *Darwin v. Connecticut*, 391 U.S. 346, 349 (1968) (prolonged "incommunicado" interrogation renders confession involuntary); *Greenwald v. Wisconsin,* 390 U.S. 519, 521 (1968) (reversing conviction based on confessions made following overnight police interrogations); *Haynes v. Washington*, 373 U.S. 503, 514 (1963) (confession involuntary due to "the unfair and inherently coercive context" created by police); *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (confession made only after police threatened suspect's children would be taken away if she did not confess); *Fikes v. Alabama*, 352 U.S. 191, 199 (1957) (Frankfurter, J., concurring) (conviction sustained "where the practices of

leave no doubt that when police obtain involuntary statements that are introduced against the criminal defendant at trial, they cause a violation of the Constitution.

B. The Fifth Amendment Analysis Under Section 1983 Is No Different

1. Although the cases above speak of causation in the context of criminal prosecutions, the causation analysis under § 1983 is no different. Section 1983 was enacted to enforce the Fourteenth Amendment against state action that violates federal law "whether that action be executive, legislative, or judicial[.]" *Mitchum v. Foster*, 407 U.S. 225, 240 (1972) (citing Act of April 20, 1871, 17 Stat. 13; *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

The statutory text provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, *subjects, or causes to be subjected*, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

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the prosecution, including the police as one of its agencies, do not offend what may fairly be deemed the civilized standards of the Anglo-American world").

> Constitution and laws, shall be liable to the party injured in an action at law.

42 U.S.C. § 1983 (emphasis added). A police officer is liable not only when the officer "subjects" an individual to constitutional violations, but also when that officer "causes [the individual] to be subjected" to constitutional violations. 42 U.S.C. § 1983. Reading this text, *Monell v. New York Department of Social Services* acknowledged, "Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort." 436 U.S. 658, 692 (1978). The plain language allows for an officer to be liable for violating the Fifth Amendment when the officer obtains a statement in violation of *Miranda* that is later introduced at trial. *Cf. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). A proper historical understanding of the text confirms that conclusion. *Mitchum*, 407 U.S. 238-39; see also *D.C. v. Carter*, 409 U.S. 418, 429 (1973).

The conclusion is also confirmed by *Chavez v. Martinez*, 538 U.S. 760 (2003), where a plurality decided that a § 1983 Fifth Amendment claim failed because the involuntary statement coerced by police had never been used in a criminal case. *Id.* at 766-67. "Statements compelled by police interrogations of course may not be used against a defendant at trial," the Court said," but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs." *Id.* The plurality reiterated: "'Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.'" 538 U.S. at 767 (quoting *United*

States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)).

Petitioner focuses on the fact that a *Miranda* violation is not complete unless the statement taken in the absence of warnings is introduced in the criminal case, see Petr. Br. at 15-19, but that point is not in dispute. In fact, it underscores the common-sense reality, emphasized in *Chavez,* that police conduct before a criminal trial—such as coercion of a statement or taking a statement without *Miranda* warnings—may cause a constitutional violation if the statement is later introduced in the criminal case. *Chavez* treated as uncontroversial the proposition that a police officer's actions may "cause [the suspect] to be subjected" to a constitutional violation at trial. 42 U.S.C. § 1983. The flaw in the § 1983 claim in *Chavez* was that the compelled statement was never introduced in a criminal case, and the Fifth Amendment cannot be violated without a criminal case. But *Chavez* supports respondent's argument that causation may be established where a statement is later introduced in the government's case-in-chief.

2. The conclusion that an officer causes a Fifth Amendment violation when that officer obtains a statement in violation of *Miranda* that is later introduced in the criminal case is also supported by the common-law causation principles this Court utilizes in section 1983 cases. Those principles hold that if a state actor can reasonably foresee that their conduct will cause violations of constitutional rights, then section 1983 may render them liable. *Monroe*, 365 U.S. at 187 (holding that § 1983

"should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"); see also *Owen v. Independence*, 445 U.S. 622, 654 (1980) ("Elemental notions of fairness dictate that one who causes a loss should bear the loss."). Under general tort principles firmly established in 1871 when § 1983 was enacted, if an injury is foreseeable, there may be liability. *Milwaukee & St. P.R. Co. v. Kellogg*, 94 U.S. 469, 475 (1876) (proximate cause requires "that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances").[4] If the injury

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[4] Many authorities when § 1983 was enacted provided the same. See, *e.g.*, T. SHEARMAN & A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 7 (1869) ("Negligence may, however, be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time."); C.G. ADDISON, WRONGS AND THEIR REMEDIES, BEING A TREATISE ON THE LAW OF TORTS 5 (2d ed. 1869) ("The general rule of law, however, is, that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural

was remote and unforeseeable, there may not be liability. *E.g.*, *Martinez v. California*, 444 U.S. 277, 285 (1980) (holding that parole officials are not responsible for injuries inflicted by a paroled prisoner that were not foreseeable).

The same rule applies when the chain of causation implicates multiple actors. *Staub v. Proctor Hospital* explains that proximate cause "requires only 'some direct relation between the injury asserted and the injurious conduct alleged,' and excludes only those 'link[s] that [are] too remote, purely contingent, or indirect.'" 562 U.S. 411, 419 (2011) (citing *Hemi Group, LLC v. City of*

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course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or provide their acts, causing the damage, were the necessary or legal and natural consequence of the original wrongful act."); F. HILLIARD, I THE LAW OF TORTS OR PRIVATE WRONGS 94 (1859) ("But every person, who does a wrong, is, at least, responsible for all the mischievous consequences that may be reasonable expected to result under ordinary circumstances from such misconduct So where one does an illegal or mischievous act, . . . he is answerable in some form of action for all the consequences which may directly and naturally result from his conduct.").

New York, 559 U.S. 1, 9 (2010)). When an "ultimate decisionmaker" exercises judgment between the initial actor and the injury, later in the chain of causation, the ultimate decisionmaker's exercise of judgment does not "automatically render[] the link to the [initial actor's alleged misconduct] 'remote' or 'purely contingent.'" 562 U.S. at 419-20. Instead, the later "decisionmaker's exercise of judgment is *also* a proximate cause," and it is "common for injuries to have multiple proximate causes." *Id.* (citing *Sosa v. Alvarez–Machain*, 542 U.S. 692, 704 (2004)). "Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm. A cause can be thought 'superseding' only if it is a 'cause of independent origin that was not foreseeable.'" 562 U.S. at 420 (quoting *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996)).[5]

For these reasons, the Court in *Malley v. Briggs* rejected the "no causation" argument that petitioner and the United States advance in this case, holding that an officer who submits a facially invalid affidavit can be liable for violating the Constitution even though it is a judge who later issued the arrest warrant. 475 U.S. 335, 345 n.7 (1986). "It should be clear . . . that the District Court's 'no causation' rationale in this case is inconsistent with our interpretation of § 1983," the

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[5] Justice Thomas similarly rejected the idea that a chain of causation is broken by a second decisionmaker in *Anza v. Ideal Steel Supply*, 547 U.S. 451, 469-70 (2006) (Thomas, J., dissenting).

Court said, concluding, "Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link." *Id.* The same is true of involuntary confessions. Though a prosecutor might introduce the involuntary confession in a criminal case, the constitutional violation that results is not only the foreseeable result of police illegally obtaining a confession—it is "the whole point." *Avery v. City of Milwaukee*, 847 F.3d 433, 443 (7th Cir. 2017) (Sykes, C.J.).

3. This Court's § 1983 cases demonstrate that police officers may be liable under the statute for violating core criminal trial rights, even though their conduct occurs prior to the criminal trial, and even though others subsequently complete the violation. What matters is whether the injury was foreseeable.

Just as the judge in *Malley* did not break the chain of causation between the officer's affidavit and the illegal arrest, 475 U.S. at 344 n.7, 345, the officer who fabricated evidence and caused a pretrial seizure in *Manuel v. Joliet* was potentially liable even though it was a judge who ordered the defendant detained, 137 S. Ct. 911, 918-20 (2017); see also *Thompson v. Clark*, No. 20-659, 596 U.S. ___. Likewise, an officer who fabricates evidence before trial may be liable when that evidence is later used at trial, even though the evidence is necessarily introduced via an immunized act and by immune witnesses, see *Rehberg v. Paulk*, 566 U.S. 356, 370 n.1 (2012); see also *McDonough v. Smith*, 139 S. Ct. 2149, 2153-54 (2019); *Michaels v. McGrath*, 121 S. Ct. 873, 873-74 (2001) (Thomas, J.,

dissenting from the denial of certiorari). The same is true when a prosecutor introduces an involuntary confession via the testimony of the officer who took the confession. In each instance, there may be multiple proximate causes.

So, too, where a state actor and municipality both proximately cause a single injury. *City of Canton v. Harris*, 489 U.S. 378, 385-92 (1989); *Monell*, 436 U.S. at 694-95. Or where a private actor is liable for civil rights violations after conspiring with the police and causing an arrest that the police execute. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). Or where an individual is liable for conspiring with a judge who illegally enters a court order, even though the judge is the only one with the power to enter the order and is immune from suit. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980).

The conclusion drawn from these cases is straightforward: "If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him." *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) (Posner, J.).

4. Holding that police may be liable under § 1983 for causing Fifth Amendment violations is also consistent with everyday practice in American criminal cases. In most cases involving a confession, police obtain the incriminating statement, a prosecutor offers it as evidence, and a judge admits it. Police action may foreseeably result in the admission of the statement in a

criminal case. Police officers apprehend suspects, conduct the interviews, memorialize the circumstances of interrogations in reports, reduce confessions to writing or recording, and set the criminal case in motion by communicating the confession as affiants or witnesses in pretrial proceedings.

Although a confession introduced in a criminal case may take many forms, its admission often depends upon the officer to provide foundation for admission, to relate the content, or to explain the origin and circumstances of the confession. At trial, a confession is often in whole or in part an account provided by a police officer, who may testify about an oral confession. This is true even in cases where the confession has been memorialized in a later recording or writing.[6] Unlike other types of documentary, physical, or testimonial evidence used in criminal cases, police are connected at all

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[6] That was the case in *Miranda* itself, where "the written confession was admitted into evidence over the objection of defense counsel, and the officers testified about a prior oral confession made by Miranda during the interrogation." 384 U.S. at 492; *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (affirming admission of oral confession made following *Miranda* warnings); *Lynumn*, 372 U.S. at 530 ("The officers testified to this oral confession at the petitioner's trial, and it is this testimony which, we now hold, fatally infected the petitioner's conviction."); *Culombe v. Connecticut*, 367 U.S. 568, 615 (1961).

stages of a criminal prosecution to the existence of a confession and its introduction in the criminal case.

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This Court should hold that a police officer may be liable under § 1983 when the officer takes a custodial statement in violation of Miranda and the statement is used against the defendant in a criminal case. Under such circumstances, a jury may in some cases find that the officer caused a violation of the Fifth Amendment.

That is not to say that liability will *always* attach. Only that it *may*. The causation question always will be fact bound. *Milwaukee & St. P.R. Co. v. Kellogg*, 94 U.S. 469, 474 (1876) ("[W]hat is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."). For example, the officer may have attempted to prevent the introduction of the tainted confession at trial. Moreover, an officer might not be liable because there is failure of proof on some other element of the constitutional tort. Or the officer might have acted in the face of unclear law, such that there is an entitlement to qualified immunity.

But to hold that police officers who forgo *Miranda* warnings and obtain involuntary confessions that are used in a criminal case *cannot* be liable for violating the Fifth Amendment as a matter of law, simply because their conduct occurs before the start of the criminal case, would be antithetical to the statutory text and the common-

law causation principles relied upon by this Court in countless cases.

III. REMOVING CIVIL REMEDIES FOR FIFTH AMENDMENT VIOLATIONS WILL HARM THE CRIMINAL JUSTICE SYSTEM

It would rework the way criminal investigations and prosecutions are conducted and harm the criminal justice system if the Court were to hold that police can never be liable when they take custodial statements in violation of *Miranda* that are used in criminal cases. That holding would eliminate a principal incentive that is currently in place for adhering to *Miranda*.

Petitioner suggests that holding police officers accountable for Fifth Amendment violations would represent a shift, but the opposite is true. Courts of appeals covering a majority of the states have long acknowledged that state actors may be liable under § 1983 for Fifth Amendment violations.[7] Along with the suppression remedy in the criminal case, the availability of this civil suit imposes an incentive

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[7] See *Johnson v. Winstead*, 900 F.3d 428 (7th Cir. 2018); *Vogt v. Hays*, 844 F.3d 1235 (10th Cir. 2017); *Jackson v. Barnes*, 749 F.3d 755 (9th Cir. 2014); *Sornberger v. Knoxville*, 434 F.3d 1006 (7th Cir. 2006); *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005); *McKinley v. Mansfield*, 404 F.3d 418 (6th Cir. 2005); *Weaver v. Brenner*, 40 F.3d 527 (2d Cir. 1994).

for police to provide *Miranda* warnings during custodial interrogations. And as a result, *Miranda* warnings are ubiquitous in police practice, and are routinely a central feature of police trainings. INBAU ET AL., *supra*, 400-15. There is a default rule in place and an expectation across our criminal justice system that *Miranda* warnings will be provided, absent some important exception. This Court's decision in this case will either adhere to precedents and reinforce the existing system, or it will revise the rules in a manner that destabilizes the criminal justice system.

1. In the current system, "giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility," dramatically simplifying litigation about the voluntariness of a custodial interrogation. *Seibert*, 542 U.S. at 608-09. "To point out the obvious," the Court has observed, "this common consequence would not be common at all were it not that *Miranda* warnings are customarily given under circumstances allowing for a real choice between talking and remaining silent." *Id.* at 609.

Existing deterrents and customs establish a system that imposes the lowest possible costs on our justice system. Police are generally not sued for violating *Miranda* because they routinely provide warnings during custodial interrogations (and because favorable termination of the criminal case

is a prerequisite to the § 1983 suit).[8] Our criminal justice system is more efficient in the adjudication of whether confessions are admissible in criminal cases. The rules are clear to all involved. And citizens are informed of their rights in the stationhouse and can make an informed choice about whether to exercise them.

A decision that signals to law enforcement that they need not provide *Miranda* warnings would disturb the current incentive structure. If officers are not accountable for constitutional violations when statements they obtain in violation of *Miranda* are introduced in criminal cases, they will have less incentive to provide *Miranda* warnings and will be less likely to give them. The downstream effect would be to complicate litigation about the voluntariness of custodial statements in the many criminal cases each year where *Miranda* warnings would no longer be given routinely.

2. Moreover, over time this Court has recognized many exceptions to *Miranda*'s general rule that unwarned statements cannot be introduced in a criminal case. *Miranda* applies only to custodial statements. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (*per curiam*). A suspect not in custody need not be warned when officers ask questions to collect "biographical data necessary to complete booking or pretrial services." *Pennsylvania v. Muniz*, 496 U.S.

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[8] *McDonough v. Smith*, 139 S. Ct. 2149 (2019).

582, 601 (1990). Nor when undercover officers pose as a friend or fellow inmate and obtain a statement. *Illinois v. Perkins*, 496 U.S. 292 (1990). Unwarned statements can be used for impeachment, *Harris v. New York*, 401 U.S. 222 (1971). There is an exception to *Miranda* for circumstances "presenting a danger to the public safety." *New York v. Quarles*, 467 U.S. 649, 660 (1984). Physical evidence obtained as the result of unwarned statements is admissible. *Patane*, 542 U.S. 630. Same for witness statements. *Michigan v. Tucker*, 417 U.S. 433 (1974). Custodial questioning before warnings are given does not necessarily render inadmissible statements made following warnings. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985); *Seibert*, 542 U.S. 600.

The exceptions "reduce[] the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling[.]" *Berghuis*, 560 U.S. 370, 383 (2010). This balance of competing purposes would be upset if this Court removes incentives that make providing *Miranda* warnings the default rule. Police officers will be encouraged to fit cases within the exceptions to the rule—even when the exception may not be the appropriate law to apply—and litigation in criminal cases about the exceptions will become the new default. That, too, will increase litigation in an already burdened criminal justice system.

3. Finally, there is a pronounced concern that weakening the obligation to provide *Miranda* warnings would create new opportunities for the government to use unlawfully obtained statements outside of trial during plea-bargaining. The mere

existence of a statement, whether warned or not, gives the government significant leverage to obtain a plea, to suggest a defendant plead to a higher sentence than they otherwise might if the statement did not exist, or to prevent defendants from testifying at trial, weakening their defense and encouraging pleas in that way, too. The existence of a confession has a significant impact on sentences as well. Redlich et al., The Influence of Confessions on Guilty Pleas and Plea Discounts, 28 PSYCH., PUB. POLICY, & L. 143, 154-56 (2007).

This Court can avoid these negative consequences to the criminal justice system by holding that a jury may find a police officer liable for a Fifth Amendment violation under § 1983 when the officer conducts a custodial interrogation in violation of *Miranda* and obtains an incriminating statement that is used against the defendant in a criminal case. And that holding is the only one that adheres to the text of § 1983, established causation principles, and this Court's Fifth Amendment precedents.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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