No. 08-1175

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER

v.

KEVIN DEWAYNE POWELL

ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DAVID A. O'NEIL
Assistant to the Solicitor General
DANIEL S. GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), a suspect is adequately informed of the right to the presence of counsel during custodial interrogation when he is told, "You have the right to talk to a lawyer before answering any of our questions" and "You have the right to use" that right "at any time you want during this interview."

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INTEREST OF THE UNITED STATES

This case concerns the standards for reviewing the constitutional adequacy of *Miranda* warnings and the precision with which such warnings must be stated. The United States has a substantial interest in those questions. As a matter of practice, federal law enforcement agents explicitly advise suspects of the right to the presence of counsel during questioning and do not employ the formulation of the warnings challenged here. Nevertheless, departures from routine practice occur from time to time. Moreover, the federal government often accepts for prosecution cases referred by state and local authorities, in which suspects have already been interrogated. The Court's analysis and resolution of the question presented in this case will therefore affect the ad-

missibility of defendants' statements in federal prosecutions.

STATEMENT

Following a jury trial, respondent was convicted in Florida Circuit Court of one count of possessing a firearm as a convicted felon, in violation of Fla. Stat. Ann. § 790.23(1) (West 2007). Fla. Dist. C.A. App. 41. He was sentenced to ten years of imprisonment. *Id.* at 44. The Florida Second District Court of Appeal reversed respondent's conviction on the ground that his confession should have been suppressed because of a deficient *Miranda* warning. J.A. 133-149. The Florida Supreme Court affirmed that decision. J.A. 150-181.

1. On August 10, 2004, Tampa police officers went to an apartment looking for respondent in connection with a robbery investigation. J.A. 151; Fla. Dist. C.A. App. 6. Officers saw respondent in an upstairs hallway coming from a bedroom and, inside the bedroom, they discovered a loaded nine-millimeter handgun. J.A. 20-22, 151-152.

The officers arrested respondent and transported him to the Tampa Police headquarters. J.A. 152. Before asking respondent any questions, one of the officers read him the applicable portion of the standard Tampa Police Department Consent and Release Form 310 (Form 310) (reprinted at J.A. 3). J.A. 152; see J.A. 22-25, 62-63. That form provides in relevant part:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any question-

> ing. You have the right to use any of these rights at any time you want during this interview.

J.A. 3. Respondent signed the form, acknowledging that the officer had read him his rights, that he "underst[oo]d them," and that he was "willing to talk to" the officers. *Ibid*. Respondent then admitted that he owned the firearm found in the apartment. He stated that although he had purchased the firearm and carried it for his protection, he knew he was not permitted to possess the gun because he was a convicted felon. J.A. 29.

2. On August 31, 2004, respondent was charged in the Circuit Court of Florida with one count of unlawfully possessing a firearm after having been convicted of a felony offense, in violation of Fla. Stat. Ann. § 790.23(1) (West 2007). Fla. Dist. C.A. App. 7. At his jury trial, respondent testified that he had signed the Form 310 waiver at the police station and acknowledged that, in doing so, he understood that he was waiving his right "to have an attorney present during [his] questioning" by the police officers. J.A. 80. Respondent also admitted that he had told the officers that he owned the firearm found in the apartment, J.A. 80-81, but claimed that he had lied in order to protect his girlfriend from criminal charges arising from possession of the gun, J.A. 81-82. Respondent conceded, however, that he had no reason to believe that his girlfriend could not legally possess a firearm. J.A. 88-89. The jury found respondent guilty, and, after the State agreed not to seek a "habitual offender" enhancement based on his ten previous felony convictions, the court sentenced respondent to ten years of imprisonment. J.A. 8-9, 129-131; Fla. Dist. C.A. App. 37, 44.

3. The Second District Court of Appeal reversed respondent's conviction in a divided opinion. J.A. 133-149.

Over a dissent, J.A. 148-149, the court concluded that respondent's confession should have been suppressed because the *Miranda* warnings he received did "not unequivocally inform[] [him] that he had the right to the presence of an attorney during questioning," J.A. 142. Viewing the issue as one of "great public importance," the court certified to the Florida Supreme Court the following question: "Does the failure to provide express advice of the right to the presence of counsel during questioning vitiate *Miranda* warnings which advise of both (A) the right to talk to a lawyer 'before questioning' and (B) the 'right to use' the right to consult a lawyer 'at any time' during questioning?" J.A. 137.

4. The Florida Supreme Court accepted jurisdiction and "answer[ed] the [certified] question in the affirmative." J.A. 151. After reviewing federal and state decisions addressing "the necessity for express warnings of the right to have counsel present during interrogation," J.A. 161, the court concluded that the warnings provided to respondent were invalid under *Miranda*. J.A. 170. The court reasoned that the warnings stated only that respondent could "talk with a lawyer before questioning" and "did not expressly indicate that [respondent] had the right to have an attorney present during questioning." *Ibid*. The court considered the language of the warnings "misleading" because, by negative implication, it suggested that the suspect "can only consult with an attorney before questioning" and not after the interview has begun. J.A. 171. The court also rejected the State's argument that the final sentence of the warning, informing respondent that he could use any of the stated rights "at any time * * * during this interview," reasonably conveyed the right to have counsel present during questioning. In the court's view, the final sentence

could "not supply the missing warning" because "a right that has never been expressed cannot be reiterated." J.A. 171-172.[1]

Justice Wells dissented. J.A. 177-180. In his view, the court "stretche[d] the plain language of the warning given in this case and ignore[d] the simple, straightforward requirements for a warning set out in *Miranda*." J.A. 178. Justice Wells asserted that the warnings provided to respondent would reasonably convey to "a person of ordinary intelligence that he or she had a right to talk to an attorney at any point during the interrogation." J.A. 179. He deemed it "patently unreasonable to conclude" that a suspect "would interpret the invitation to use 'any of these rights at any time you want *during* this interview' * * * to mean that the right to talk with counsel could only be invoked before answering the first question posed by law enforcement." J.A. 179-180. The court's contrary interpretation, Justice Wells argued, reflected "an extreme technical adherence to language * * * that has no connection with whether the [suspect] understood his or her rights." J.A. 180.

SUMMARY OF ARGUMENT

The warnings respondent received were constitutionally adequate, and the Florida Supreme Court therefore erred in ordering the suppression of his statements.

A. This Court has recognized that the *Miranda* framework affords significant benefits to the criminal justice system, and that, among its virtues, *Miranda*

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[1] Three Justices concurred in a separate opinion, J.A. 175-177, to urge the State Attorney General "or some other statewide law enforcement organization to create standard *Miranda* forms for use by police departments throughout the state that will withstand legal scrutiny." J.A. 176.

provides police and prosecutors concrete guidance about how to conduct interrogations constitutionally. *Miranda* is of greatest benefit to law enforcement when agencies routinely provide warnings in conventional and precisely articulated language. Because administering warnings in that manner serves the interests of law enforcement, all federal agencies do so as a matter of practice. For the same reason, state and local jurisdictions would be well advised to model their *Miranda* warnings on the federal formulation.

There is no basis, however, for suppressing any statement resulting from a *Miranda* warning that departs from a single standard form. Such a rule would increase the costs of the *Miranda* rule, requiring suppression in the significant number of cases where, for any one of several reasons, warnings vary from or contain less detail than the conventional phrasing. When the warnings reasonably convey the substance of *Miranda* despite such deviations, suppression of the suspect's voluntary statements has no basis in the purposes of *Miranda* and would impose serious obstacles to ascertaining the truth in criminal cases.

The goal of encouraging police to use conventional and precise warnings cannot justify suppression simply because warnings deviate from that pattern. Police already have ample incentives to use such warnings and no appreciable incentive not to do so. Thus, even without a rigid constitutional prohibition, law enforcement agencies have little reason to assume the litigation risk of experimenting with novel *Miranda* formulations. The federal experience confirms that logical conclusion. Although this Court and others have upheld variant warnings, federal law enforcement agencies have not responded by relaxing their *Miranda* practices.

B. The correct constitutional analysis thus looks to the substance of the warnings, not to their compliance with a particular form. This Court has prescribed a flexible, non-technical approach to evaluating the adequacy of the warnings provided. Under *California* v. *Prysock*, 453 U.S. 355 (1981) (per curiam), and *Duckworth* v. *Eagan*, 492 U.S. 195 (1989), the controlling inquiry is whether the warnings, read in their totality, reasonably convey the suspect's rights under *Miranda.* In evaluating whether an advice of rights accomplishes that objective, courts should not "examine *Miranda* warnings as if construing a will or defining the terms of an easement." *Id.* at 203. Rather, courts should make a realistic judgment about how a suspect hearing the warnings would understand his options in the actual setting of interrogation.

C. The warnings in this case reasonably conveyed all of the *Miranda* rights. On the right to counsel, the warnings stated: "[y]ou have the right to talk to a lawyer before answering any of our questions," and "[y]ou have the right to use any of these rights at any time you want during this interview." J.A. 3. A suspect who hears those warnings would naturally conclude that he can talk to a lawyer before speaking to the police and that he can turn to his lawyer for help at any time during the interview before answering a question. The suspect would understand, in short, that he has a right to the presence of counsel during questioning.

The Florida Supreme Court's invalidation of these warnings resulted from two principal errors. First, the court subjected the warnings to the type of close textual parsing that this Court has rejected. Contrary to the decision below, a suspect hearing the warnings concerning his right to counsel would not infer any restriction

on his access to a lawyer during the interrogation. Rather, as courts that have applied a sensible approach to similar warnings have concluded, the suspect would understand that he has an unqualified right to counsel that continues throughout questioning, *i.e.*, that can be exercised "at any time you want during this interview."

Second, the court erroneously held that the warnings were inadequate because they did not include explicit advice of the right to the presence of counsel during questioning. A requirement of such explicitness cannot be squared with this Court's precedents. *Miranda* itself did not state the warnings with such detail, and it specifically approved a Federal Bureau of Investigation (FBI) formulation that advised the suspect of his right to counsel in general terms. In addition, *Duckworth* and *Prysock* rejected the analogous argument that warnings were inadequate because they failed to explicitly inform the suspect of a different feature of the right to counsel. Under the correct standard, the warnings provided in this case were sufficiently specific to satisfy *Miranda*.

ARGUMENT

THE *MIRANDA* WARNINGS IN THIS CASE ADEQUATELY INFORMED RESPONDENT OF HIS RIGHT TO THE PRESENCE OF AN ATTORNEY DURING QUESTIONING

The conventional phrasing of *Miranda* warnings, employed with minor variations by all federal law enforcement agencies, informs the suspect, "You have the right to talk to a lawyer for advice before we ask you any questions," and "You have the right to have a lawyer with you during questioning."[2] The warnings in this

[2] FBI, U.S. Dep't of Justice, *No. FD-395, Advice of Rights* (Nov. 5, 2002) (*FBI FD-395*).

case conveyed those same rights by advising the suspect, "You have the right to talk to a lawyer before answering any of our questions," and "You have the right to use" that right "at any time you want during this interview." J.A. 3.

Federal law enforcement agencies adhere, as a matter of policy, to the conventional phrasing of the *Miranda* rights, thereby avoiding the kind of protracted litigation over warnings that occurred here. Federal agencies have adopted that policy because it represents sound law enforcement practice and fulfills the purposes of *Miranda* in the most efficient and effective manner. As many already do, state and local jurisdictions would similarly benefit from the adoption of conventional warnings along the lines used by federal agencies.

As a constitutional matter, however, the warnings read to respondent adequately advised him that he had the right not only to speak with counsel before questioning, but also to turn to his lawyer for help at any time, including during the interview. The warnings therefore fulfilled *Miranda*'s purpose of safeguarding the suspect's ability to exercise his right against compelled self-incrimination during custodial interrogation. Because the warnings were constitutionally sufficient, the Florida Supreme Court erred in ordering the suppression of respondent's confession.

A. Providing Suspects With Conventional And Precise *Miranda* Warnings Is A Sound Law Enforcement Practice, But Not A Constitutional Mandate

1. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court established a prophylactic rule to protect the right of an individual, under the Fifth and Fourteenth Amendments, to be free from compelled self-incrimina-

tion. Under that now-familiar rule, to generate statements admissible in the government's case-in-chief, any custodial interrogation must be preceded by four basic warnings: that the suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479. Unless police provide those warnings or a "fully effective equivalent" and obtain a valid waiver, *id.* at 476, the suspect's statements are deemed involuntary and therefore inadmissible in the prosecution's direct case. *Dickerson* v. *United States*, 530 U.S. 428, 443-444 (2000).

The *Miranda* framework not only safeguards the rights of suspects, but also yields significant benefits to the criminal justice system. Before *Miranda*, courts evaluated the admissibility of confessions using an indeterminate test that turned on the totality of the particular circumstances. See *Dickerson*, 530 U.S. at 432-433 (describing pre-*Miranda* doctrine). *Miranda* replaced that fact-intensive inquiry with an easily applied, bright-line rule that, as this Court has repeatedly recognized, preserves judicial resources by promoting efficient resolution of admissibility disputes. See, *e.g.*, *Moran* v. *Burbine*, 475 U.S. 412, 425-426 (1986) (noting that "'[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application") (brackets in original) (citation omitted).

Miranda offers particular benefits to law enforcement by "'informing police and prosecutors with specificity' as to how a pretrial questioning of a suspect must be conducted." *Colorado* v. *Spring*, 479 U.S. 564, 577 n.9 (1987) (quoting *Fare* v. *Michael C.*, 442 U.S. 707, 718

(1979)); *Missouri* v. *Seibert*, 542 U.S. 600, 601 (2004) (plurality opinion) (noting that compliance with *Miranda* "produces a virtual ticket of admissibility"). Those benefits come at little administrative cost, because the basic warning/waiver requirement of *Miranda* is generally easy to apply. See *Withrow* v. *Williams*, 507 U.S. 680, 695 (1993) (since *Miranda*, "law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements"). Indeed, the *Miranda* doctrine "has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson*, 530 U.S. at 443. And, in the more than four decades since *Miranda* was decided, no compelling evidence has emerged establishing that its requirements significantly hinder the ability of law enforcement to obtain valuable confessions. See U.S. Br. at 32 n.23, *Dickerson*, *supra* (No. 99-5525) (acknowledging "lively debate" over *Miranda*'s impact on prosecution and conviction rates but noting that the social scientific evidence is "at best inconclusive").

Miranda is of greatest benefit to law enforcement when agencies train their officers to use standardized warnings that explicitly refer to each aspect of the suspect's rights. By using a conventional and precise formulation of the warnings, police can significantly reduce the risk that a court will later suppress the suspect's statement on the ground that the advice was inadequate. See, *e.g.*, *Berkemer* v. *McCarty*, 468 U.S. 420, 433 n.20 (1984) (noting that "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"). In addition, by instructing officers routinely to administer such warnings in the prescribed form, law enforcement agencies can minimize the incidence of error and avoid burdensome litigation about the validity of the unique formulation provided in any particular case.

The use of conventional *Miranda* warnings is thus a desirable police practice, and one that is in law enforcement's own interest to employ. For that reason, all of the forms used by the various federal law enforcement agencies explicitly advise the suspect of the full contours of each right, including the right to the presence of counsel during questioning.[3] State and local law en-

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[3] *FBI FD-395* ("You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning."); IRS, U.S. Dep't of the Treasury, *Doc. No. 5661-A, In-Custody Statement of Rights* (Mar. 2001) ("You have the right to consult an attorney before making any statement or answering any question, and you may have an attorney present with you during questioning."); Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Dep't of Justice, *ATF Form No. 3200.4, Statement of Rights* (Sept. 2005) ("You have the right to talk to a lawyer before we ask you any questions and to have a lawyer with you during questioning."); DEA, U.S. Dep't of Justice, *DEA-13A, Oral Miranda Warnings Card*) ("You have the right to talk to a lawyer for advice before we ask you any questions, and to have him or her with you during the questioning."); U.S. Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, *Statement of Rights* ("You have the right to consult an attorney before making any statement or answering any questions. You have the right to have an attorney present with you during questioning."); U.S. Postal Inspection Service, USPS, *IS Form No. 1067, Warning and Waiver of Rights* (Mar. 2009) ("You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.").

forcement agencies would be well advised to adopt similarly precise and standardized warnings.[4]

2. Although "[t]his Court and others have stressed as one virtue of *Miranda* the fact that the giving of the warnings obviates the need for a case-by-case inquiry into the actual voluntariness" of a statement," "[n]othing in these observations suggests any desirable rigidity in the *form* of the required warnings" as a constitutional matter. *California* v. *Prysock*, 453 U.S. 355, 359 (1981) (per curiam) (first emphasis omitted). Such a hardening of *Miranda*, with a consequential expansion of its exclusionary rule, would increase the costs of the *Miranda* framework without yielding any constitutionally based benefit.

a. Notwithstanding the general policies of law enforcement agencies, variations from the conventional *Miranda* warnings arise in a significant number of cases. That is so for several reasons. First, as this Court has recognized, agents not infrequently make mistakes, deviating from or omitting certain language in the prescribed formulation. "*Miranda* has not been limited to station house questioning, and the officer in the field

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[4] A cross-jurisdictional study of *Miranda* warnings recently concluded that the standard formulations used by local law enforcement agencies vary significantly in vocabulary, syntax, and length. See Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication And Vocabulary Analysis*, 32 Law & Hum. Behav. 124 (2008). But that study also appears to indicate that, despite such linguistic variations, the large majority of jurisdictions use warnings that explicitly articulate each aspect of the *Miranda* rights—including specifically the right to counsel during questioning— with at least as much precision and detail as the federal warnings. *Id.* at 131 (indicating that nearly 97% of standard warnings surveyed specifically included advice about the right to counsel "during questioning" or "before and during questioning").

may not always have access to printed *Miranda* warnings, or he may inadvertently depart from routine practice, particularly if a suspect requests an elaboration of the warnings." *Duckworth* v. *Eagan*, 492 U.S. 195, 203 (1989) (citation omitted). Second, presumably to a greater extent than when *Miranda* was decided, warnings must often be translated into a wide range of languages for non-English speaking suspects. Errors in translation are inevitable. Compare, *e.g.*, *United States* v. *Yunis*, 859 F.2d 953, 958-959 (D.C. Cir. 1988) (upholding admissibility of statements despite omissions in Arabic translation of *Miranda* warnings), with, *e.g.*, *United States* v. *Perez-Lopez*, 348 F.3d 839, 847-848 (9th Cir. 2003) (holding statements inadmissible on the ground that, because of linguistic variations resulting from Spanish translation, the *Miranda* warnings were "susceptible to equivocation"). And third, *Miranda* warnings are now administered in circumstances that this Court likely did not anticipate when it issued that decision—particularly, in overseas interrogations. See, *e.g.*, *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 177, 198-209 (2d Cir. 2008) (assuming that *Miranda*'s "warning/waiver" framework applies to interrogation by U.S. authorities of a suspect held overseas in foreign custody, and suggesting that warnings be tailored to that context by advising that local law might not permit the presence of counsel), cert. denied, 129 S. Ct. 2765, and 129 S. Ct. 2778 (2009).[5]

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[5] The warnings in this case were accurately read from the standard card issued by the Tampa police department. See pp. 2-3, *supra*. That fact, however, does not alter the analysis. The adequacy of a *Miranda* warning has never depended on whether the particular formulation was inadvertent or intentional, and the analysis the Court applies in this case therefore will also govern challenges to accidental deviations from

When, for any of these reasons, a particular advice of rights deviates from the conventional formulation either in content or specificity, there is no sound reason to suppress a suspect's statements as long as the warnings reasonably conveyed the essence of the rights under *Miranda*. Focusing on the precise wording of the warnings, at the expense of their substance, tends to obscure the basic point of *Miranda*: to ensure that a suspect is apprised of his rights so that he can make a knowing and intelligent decision whether to exercise them. See *United States* v. *Sanchez*, 859 F.2d 483, 485 (7th Cir. 1988) (noting that variations in the language used "are far less important than whether the differences threaten achievement of the purpose of the warnings"), cert. denied, 489 U.S. 1021 (1989). If the warnings accomplish that purpose in the basic manner *Miranda* requires, no basis "exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." *Oregon* v. *Elstad*, 470 U.S. 298, 312 (1985).

b. The laudable goal of promoting uniformity and precision in the warnings cannot justify enlisting *Miranda*'s exclusionary rule to enforce a rigid adherence to a single script by the police. As explained above, police and prosecutors already have ample incentives to use precisely articulated warnings in a standardized format because of the safe harbor such warnings provide. And police have little countervailing incentive to deviate from the standard form, because doing so is unlikely to increase the confession rate. An adequate *Miranda* for-

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a conventional warning. See *Moran*, 475 U.S. at 423 ("[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights.").

mulation must inform the suspect of all his options in the interrogation room, see p. 18, *infra;* varying the specificity or form of the advice therefore presumably will not have a significant effect on the willingness of a suspect to waive his rights.[6] Thus, even without a rigid rule dictating the content of the warnings, police have strong reason to avoid the litigation risks associated with the adoption of novel *Miranda* formulations. *McNeil* v. *Wisconsin*, 501 U.S. 171, 181-182 (1991) (declining to adopt a constitutional rule for the sake of providing police with "a 'clear and unequivocal' guideline"; "police do not need our assistance to establish such a guideline; they are free, if they wish, to adopt it on their own.").

The federal experience has borne out this conclusion. As explained below, this Court in *Duckworth* and *Prysock* rejected any constitutional requirement of rigidity in the form of the warnings and upheld advice that differed from the conventional formulation. See pp. 17-20, *infra*. Federal law enforcement agencies, however, did

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[6] Nothing in the record suggests that the Tampa police department adopted the particular warnings at issue here for the purpose of undermining the protections of *Miranda*. The inclusion of a broad, "catch-all" warning, J.A. 172, advising the suspect that he may "use any of these rights at any time you want during this interview," J.A. 3, is not the type of language a law enforcement agency would use if its aim were to encourage the suspect's waiver of his rights. This case therefore does not present the type of situation at issue in *Seibert*, in which a majority of the Court concluded that the challenged practice was deliberately designed to skirt *Miranda* and was gaining in popularity because it had proved effective in achieving that goal. See *Seibert*, 542 U.S. at 609-613 (plurality opinion); *id*. at 618 (Kennedy, J., concurring in the judgment).

not alter their *Miranda* practices in response to those decisions.[7]

B. Warnings Are Constitutionally Adequate When, Read In Their Totality, They Reasonably Convey The Substance Of The *Miranda* Rights

Because *Miranda* warnings need to convey the substance of a suspect's rights, rather than conform to a particular phrasing, the constitutional adequacy of the warnings given to respondent should not turn on whether they explicitly mirrored the language in the *Miranda* opinion. Rather, the adequacy of the warnings should be evaluated under this Court's flexible and common-sense approach.

1. This Court has held that the warnings required by *Miranda* need not "be given in the exact form described in that decision." *Duckworth*, 492 U.S. at 202. *Miranda* itself disavowed any such requirement, explaining that the warnings it prescribed could be satisfied by a "fully effective equivalent." 384 U.S. at 476; see *id.* at 479; *Rhode Island* v. *Innis*, 446 U.S. 291, 297 (1980) (referring to "the now familiar *Miranda* warnings * * * or their equivalent"). The Court confirmed that understanding in *Prysock*, summarily reversing a state-

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[7] In *Dickerson*, the government argued that overruling *Miranda* entirely could pose the risk that some law enforcement agencies or personnel might relax their practices, modify the warnings, or even fail to warn at all. U.S. Br. at 37, *Dickerson*, *supra* (No. 99-5525). The same risk is not implicated when warnings that touch all the bases of *Miranda* and adequately inform the suspect of his rights remain mandatory. Under that rule, law enforcement agencies generally have little incentive to replace the conventional warnings with some other phrasing because doing so would increase both the risks of suppression and the litigation costs of defending any statement, but would not enhance the prospects of securing a confession.

court decision that "essentially laid down a flat rule requiring that the content of *Miranda* warnings be a virtual incantation of the precise language contained in the *Miranda* opinion." 453 U.S. at 355. Noting that the specific language in *Miranda* carried no "talismanic" significance, the Court explained that "the 'rigidity' of *Miranda*" does not "exten[d] to the precise formulation of the warnings given a criminal defendant." *Id.* at 359. See *Dickerson*, 530 U.S. at 441 n.6 ("[T]he Constitution does not require police to administer the particular *Miranda* warnings.").

Instead of requiring a "verbatim recital" of *Miranda*'s text, *Prysock*, 453 U.S. at 360, this Court has established a flexible standard for determining the constitutional sufficiency of a particular advice of rights. A reviewing court should focus on the basic substance of the advice and should not demand the use of specific words. "The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*." *Duckworth*, 492 U.S. at 203 (brackets, internal quotation marks and citations omitted).

2. This Court's decisions indicate that, in determining whether a warning reasonably conveys the *Miranda* rights, courts should approach the inquiry in a commonsense manner, rather than by parsing the text in search of potential ambiguities. That approach is exemplified by *Prysock* and *Duckworth*, in which the Court squarely rejected efforts to subject *Miranda* warnings to the type of close textual analysis ordinarily reserved for statutory interpretation.

The warnings in *Prysock* informed the juvenile suspect that he had the right to counsel during questioning and the right to have counsel appointed if necessary, but between the description of those two rights, police also

informed the suspect of his right to have his parents present at the interview. 453 U.S. at 356-357. The lower court concluded that, because of the sequence of the warnings, the suspect was "not given the crucial information that the services of the free attorney were available *prior to the impending questioning*." *Id.* at 363 (Stevens, J., dissenting) (quoting Pet. App. at A15, *Prysock*, *supra* (No. 08-1846)). Similarly, in *Duckworth*, the defendant was warned that he had the right to the presence of counsel, but he was told that an attorney "will be appointed for you, if you wish, if and when you go to court." *Duckworth*, 492 U.S. at 198 (emphasis and citation omitted). Based on that language, the defendant contended that he "believed that he could not secure a lawyer *during* interrogation" and that nothing in the warnings explicitly informed him that he could. *Id.* at 200 (emphasis added) (citation omitted).

The Court rejected these arguments and upheld both of the challenged warnings. Emphasizing that *Miranda* was never intended to require any particular form of words, the Court explained that "[r]eviewing courts * * * need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." *Duckworth*, 492 U.S. at 203. The Court in *Duckworth* disagreed with the lower court's conclusion that the warnings were inadequate because of possible ambiguities in the literal text, *id.* at 203, and cited the dissenting judge's description of that analysis as "formalistic, technical, and unrealistic," *id.* at 200. And in both cases, the Court rejected the contention that the warnings were inadequate because they failed to "explicitly inform[]" the suspect of each specific aspect of the right to counsel. *Prysock*, 453 U.S. at 359; see *Duckworth*, 492 U.S. at 200-201 (rejecting the court of appeals' conclu-

sion that the challenged warning was inadequate because it "denies an accused indigent a clear and unequivocal [reference to] the right to appointed counsel before any interrogation"). Because the warnings in each case "reasonably 'convey[ed]'" the substance of the *Miranda* rights, *id.* at 203 (quoting *Prysock*, 453 U.S. at 361), and "touched all of the bases" of that decision, *ibid.*, the Court held both sufficient.

Prysock and *Duckworth* thus establish the basic principles governing a challenge to the admissibility of a statement based on a purported omission in the *Miranda* warnings. The defendant may not prevail solely by showing a deviation from "the precise language contained in the *Miranda* opinion." *Prysock*, 453 U.S. at 355. The relevant question is instead whether the warnings "touched all of the bases" of *Miranda*, such that a suspect in the actual setting of custodial interrogation would realistically understand his options. *Duckworth*, 492 U.S. at 203. That assessment requires that the reviewing court consider the warnings "in their totality," *id.* at 205, rather than parsing the possible meaning of each component in isolation. And although the suspect must be alerted to all of the rights identified in *Miranda*, including the right to the presence of counsel during questioning, the warnings need not explicitly state such a right when, construed as an integrated whole, they "reasonably convey" that meaning. *Id.* at 203 (brackets and citation omitted).

C. The Warnings In This Case Reasonably Conveyed The Right To The Presence Of Counsel During Questioning

Under the flexible approach exemplified by *Duckworth* and *Prysock*, the warnings in this case reasonably conveyed the substance of *Miranda* and therefore adequately safeguarded respondent's rights under the Fifth Amendment.

A reasonable suspect would understand from the warnings administered in this case that he was entitled to have counsel with him while he was being questioned. The warnings stated: "You have the right to talk to a lawyer before answering any of our questions," and "[y]ou have the right to use any of these rights at any time you want during this interview." J.A. 3. The first statement informed the suspect that he could talk with a lawyer before he answered any question posed to him, and the second statement confirmed that he could exercise that right at any time during the interview. A suspect who hears those warnings would naturally conclude: "I can talk to a lawyer before I talk to the police, and I can turn to my lawyer for help at any time during the interview before I answer a question." The suspect would understand, in short, that he has a right to the presence of counsel during questioning. Read "in their totality," the warnings therefore "reasonably convey[ed]" the information required by *Miranda*. *Duckworth*, 492 U.S. at 203, 205 (citation omitted).

The Florida court's decision invalidating the warnings resulted from two principal errors. First, the court parsed the text of the warnings in a formalistic and technical manner, rather than making a realistic judgment about how a suspect would comprehend the advice in the context of interrogation. Second, the court deemed the warnings deficient because they did not contain explicit

advice of the right to the presence of counsel during questioning. These two errors produced a counterintuitive interpretation of the warnings that bears little relationship to the meaning they would actually convey to a suspect.

1. Although the court purported to frame its review from the perspective of "a reasonable person in the suspect's shoes," J.A. 170, the court's actual analysis resembled the approach this Court rejected in *Prysock* and *Duckworth*. The court began by viewing the third sentence of the warnings in isolation and concluded that the advice to the suspect of his "right to talk to a lawyer before answering any of our questions" was "misleading." J.A. 171. According to the Court, that statement suggested, by negative implication, that the suspect had the right to counsel only until the police asked him any questions and lost that right as soon as the interview began. *Ibid.* Based on that interpretation, the court separately evaluated and dismissed the final sentence of the warnings, which advised the suspect that he had "the right to use any of these rights at any time you want during this interview." The court reasoned that this sentence made no substantive contribution to the warnings because "a right that has never been expressed cannot be reiterated." J.A. 172. In other words, the court gave an artificially narrow reading to the initial warning concerning the right to speak to a lawyer, which restricted such a right to the time before questioning; and the court then reasoned that the concluding warning that the suspect could use his rights "at any time" could not "cure the deficiency" because a suspect could not use "at any time during an interrogation a right he did not know existed." J.A. 171-172.

a. The court's textual analysis fails even on its own terms. The court misread the language it deemed most critical to its interpretation: The third sentence states that the suspect has "the right to talk to a lawyer before answering *any* of our questions," J.A. 3 (emphasis added); it does not state that the suspect has the right to talk to a lawyer "before questioning," J.A. 171. The difference is significant because the court concluded that "the 'before questioning' warning" implied a temporal restriction on when access to counsel was permitted—*i.e.*, during the period "before questioning" but not after questioning began. *Ibid.* ("The 'before questioning' warning suggests * * * that [the suspect] can *only* consult with an attorney before questioning.") (emphasis added). But the actual text of the warning contains no such limitation. By advising the suspect that he may talk to his lawyer "before answering any of our questions," the warning conveyed that the suspect could talk to his lawyer before providing an answer to any particular question. That right applies while the interrogation is underway.

In any event, the final sentence refutes any "implication—unreasonable as it may be—that advice concerning the right to counsel *before* questioning conveys the message that access to counsel is foreclosed *during* questioning." *M.A.B.* v. *State*, 957 So. 2d 1219, 1227 (Fla. Dist. Ct. App.) (per curiam) (en banc), review granted, 962 So. 2d 337 (Fla. 2007) (Table). That sentence confirms that the suspect can "use any" of the rights previously stated "at any time [he] want[s] during this interview." J.A. 3. The only reasonable interpretation of that language is that the suspect "could *at any time* during interrogation avail himself of the right to remain silent, the right to talk to a lawyer, and the right to ap-

pointment of counsel." *M.A.B.*, 957 So. 2d at 1227. That reading fulfills the court's obligation to read the warnings "in their totality." *Duckworth*, 492 U.S. at 205; see *M.A.B.*, 957 So.2d at 1227 n.6 ("There is a natural and logical progression from the *before* phrase of the warning to the *at any time* phrase—a progression from advising the suspect that he may invoke his right to counsel immediately to further advising him that he also can invoke the right to counsel after interrogation has begun."). Even the court's literal analysis is thus contrary to the plain meaning of the warning's text.

b. The more basic flaw in the court's approach, however, is that its textual interpretation of the warnings produces a result at odds with common sense. The Florida court's textual analysis yields the conclusion that, upon hearing the warnings in this case, a suspect would conjure one of two scenarios: either that he can talk to a lawyer at any time during the interrogation but must leave the interview room to do so (because the suspect has no right to the "presence" of an attorney); or that the lawyer, once provided, would be taken away before or immediately after the first question was asked (because the suspect has no right to counsel "during questioning"). Neither of those counterintuitive scenarios is likely to occur to a lay suspect told that he "has the right to talk to a lawyer before answering any of our questions" and that he can use that right "at any time [he wants] during this interview." Such a suspect would instead understand from those warnings, consistent with *Miranda*, that he has the right to turn to his lawyer for help as he is called upon to answer questions. And such a suspect thus has the basic information necessary under *Miranda* for him to make a knowing and intelligent

decision whether to exercise his Fifth Amendment rights.

Courts that have applied the sensible and realistic approach exemplified by *Prysock* and *Duckworth* have recognized the implausibility of the Florida court's reading. In *People* v. *Wash*, 861 P.2d 1107, cert. denied, 513 U.S. 836 (1994), the California Supreme Court addressed similar warnings that, in an inadvertent departure from the prescribed form, advised the suspect that he had "the right to have an attorney present before any questioning." *Id.* at 1118. Like respondent, the defendant in that case challenged the warnings as "inadequate because they failed to inform him that he was entitled to counsel during questioning." *Ibid.* The court recognized that under *Miranda* "a suspect must be apprised, inter alia, that he has the right to the presence of an attorney during questioning," but the court concluded that the "warnings given defendant here 'reasonably conveyed'" that right. *Id.* at 1119. The court explained:

> Although the warning given to defendant here deviated from the standard form in failing to expressly state that defendant had the right to counsel both before and *during* questioning, we are not persuaded—as defendant's argument implies—that the language was so ambiguous or confusing as to lead defendant to believe that counsel would be provided before questioning, and then summarily removed once questioning began.

Id. at 1118-1119. See, *e.g.*, *People* v. *Lujan*, 112 Cal. Rptr. 2d 769, 778-779 (Ct. App. 2001) ("It is unreasonable to conclude that if counsel was present before questioning that the attorney would be excluded from the interrogation room once the interview began"; the infer-

ence "that the right to counsel exists only before but not during questioning would be unreasonable to say the least."); *People* v. *Valdivia*, 226 Cal. Rptr. 144, 148 (Ct. App. 1986) ("While the warning * * * deviated somewhat from the accepted form, we are unpersuaded that the words were facially ambiguous or would have caused most people to believe counsel would only be provided before questioning and then whisked away once it began. A far more reasonable interpretation of the disputed language is that [the suspect] had the unfettered right to consult with and have counsel physically present before and at the interrogation.").

The warnings at issue here are even stronger than those in *Wash* for two reasons. First, these warnings stated that the suspect had the right to consult with counsel "before answering any of our questions," rather than "before any questioning," and therefore could not plausibly be construed as implicitly dividing the interrogation process into two distinct phases (before and during interrogation) and restricting the right to counsel only to the first phase. Second and more importantly, the warnings here specifically included a statement that the suspect could "use any of these rights"—including the right to consult with counsel—"at any time you want during this interview." J.A. 3. That warning eliminated any inference that counsel could not be present after the interview commenced.[8] The Florida Supreme Court

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[8] For the same two reasons, the warnings here are more robust than those at issue in *Bridgers* v. *Texas*, 532 U.S. 1034 (2001) (Breyer, J., respecting the denial of the petition for a writ of certiorari). The *Bridgers* warnings, which three Members of this Court suggested were insufficient under *Miranda*, advised the suspect that he had "the right to the presence of an attorney/lawyer prior to any questioning" and did not

thus erred in holding that these warnings failed to convey a right to the presence of counsel that continued through questioning.

2. The Florida court erred in a second respect by insisting on an unduly high level of precision in the *Miranda* warnings. The court held that the warnings in this case were inadequate in part because they did not state in explicit terms that the right to counsel specifically includes the right to have counsel present during interrogation. Such a requirement conflicts with decisions of this Court—most notably *Miranda* itself—that indicate that pre-interrogation warnings can convey the full content of the right to counsel without expressly referring to each of its components.

a. The decision below appears to presuppose that *Miranda* warnings must include language specifically advising the suspect of the "presence-during-questioning" aspect of the right to counsel. The question certified for the court's resolution was whether the challenged warnings violated *Miranda* because they "fail[ed] to provide express advice of the right to the presence of counsel during questioning." J.A. 150-151. The court "answered th[at] question in the affirmative." J.A. 151. Numerous times in its decision, the court framed the relevant issue as "whether *Miranda* requires that an individual be expressly informed of his right to the presence of counsel during custodial interrogation." J.A. 164; see J.A. 165 (addressing defendant's argument that the "warnings did not specifically inform [him] of the right to have counsel present during police questioning"); J.A. 161 (noting split of authority about

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include any statement about the use of that right during the interview. *Ibid.* (citation omitted).

"the necessity for express warnings of the right to have counsel present during interrogation"); *ibid.* (discussing cases addressing whether "a suspect is entitled to be expressly informed of the right to have counsel present during questioning"); J.A. 162, 163; J.A. 166 (stating that the issue is "whether an individual must be expressly informed of his right to the presence of counsel during custodial interrogation"). While the court's invalidation of the warnings in this case rested largely on the conclusion that the warnings were "misleading" because of the purported negative implication of the "'before questioning' warning," J.A. 171, see pp. 22-24, *supra*, the court also indicated that the warnings were inadequate because they "did not expressly indicate that [respondent] had the right to have an attorney present during questioning," J.A. 170.

b. This Court's precedents refute any requirement that advice about the right to counsel must specifically refer both to the attorney's "presence" and to the suspect's ability to secure the assistance of counsel "during questioning." *Miranda* itself did not mandate such detail. In the critical portion of that decision, the Court explained that the suspect must be told, *inter alia*, that he has "the right to the presence of an attorney," without any elaboration that the right applies both before and during interrogation. *Miranda*, 384 U.S. at 479. See *Dickerson*, 530 U.S. at 435 (stating the "four warnings" that "have come to be colloquially known as '*Miranda* rights'[] are: * * * that [the suspect] has the right to the presence of an attorney").

The decision in *Miranda* also specifically recognized the adequacy of warnings that referred neither to the "presence" of the attorney nor to the applicability of that right "during questioning." The Court discussed at

length the FBI's longstanding practice of advising suspects of their constitutional rights before interrogation and concluded that discussion by approving of the way in which the FBI formulated its warnings. *Miranda*, 384 U.S. at 483-484. Quoting a letter submitted by the Solicitor General reporting the practice of the FBI, the Court explained that "[t]he standard warning long given by Special Agents of the FBI * * * is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court." *Id.* at 484; *ibid.* (noting that in 1964 the FBI also began advising the person "of his right to free counsel if he is unable to pay").[9] Notwithstanding the generality of that advice of the right to counsel, the Court specifically stated that this description of the FBI warnings "makes it clear that the present pattern of warnings * * * followed as a practice by the FBI is consistent with the procedure which we delineate today." *Id.* at 483-484.

Duckworth and *Prysock* confirm the principle that warnings about the right to counsel need not specifically refer to each aspect of that right. In both of those decisions, the Court rejected the contention that the warn-

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[9] The Solicitor General's letter quoted answers provided by the FBI concerning the warnings given, in which the FBI stated that examples of its warnings appeared in *Westover* v. *United States*, 342 F.2d 684 (9th Cir. 1965), and *Jackson* v. *United States*, 337 F.2d 136 (D.C. Cir. 1964). See *Miranda*, 384 U.S. at 484. In *Westover*, the court of appeals stated that the FBI advised the suspect "that he had the right to consult an attorney." 342 F.2d at 685. (The actual text of the advice in *Westover* stated, in language similar to the warnings at issue here, that the suspect "had a right to see an attorney before he made the statements." U.S. Br. at 9, *Westover* v. *United States*, 384 U.S. 436 (1966) (No. 761)). In *Jackson*, the warning informed the suspect that he "was entitled to an attorney." 337 F.2d at 138.

ings were inadequate because the suspect "was not explicitly informed" of one feature of the right to counsel—that he was entitled to "have an attorney appointed *before questioning.*" *Prysock*, 453 U.S. at 359 (emphasis added); see *Duckworth*, 492 U.S. at 200 (rejecting the court of appeals' conclusion that the challenged formulation "denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation") (citation omitted). The decision below deemed the warnings inadequate on the analogous ground that they failed to "explicitly inform" the suspect of a different feature of the right to counsel—that he could have counsel present *during* questioning. That reasoning conflicts with *Duckworth*'s instruction that the relevant question is whether the warnings "reasonably convey" the *Miranda* rights, not whether they explicitly do so.[10]

c. Under these principles, the warnings in this case more than satisfied minimum constitutional requirements. If the simple advice that the suspect has a "right

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[10] This Court did not establish a different standard in *Fare*, *supra*, by referring to *Miranda* as requiring the State to "warn the accused * * * of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation." 442 U.S. at 717. In *Fare*, the adequacy of *Miranda* warnings was not at issue. That case instead concerned the question whether a juvenile defendant validly invoked his right to silence or counsel by asking to speak to a probation officer. *Id.* at 723-724. The Court mentioned the *Miranda* warnings only to contrast the invocation of the right to counsel with the request for some other "trustworthy" figure, *id.* at 717, 723, and therefore did not purport to address or establish the specific language that must be used to convey the suspect's *Miranda* rights. In any event, even if *Fare* were read to suggest such a requirement of explicitness in the warnings, that rule would not withstand this Court's subsequent decisions in *Prysock* and *Duckworth*.

to counsel" is sufficiently specific to convey the suspect's rights under *Miranda*, then the warnings here cannot be deemed too general. For the reasons explained above, there is no basis to distinguish the warnings in this case from a general "right-to-counsel" statement on the ground that they imply a temporal qualification on the lawyer's presence. See pp. 22-27, *supra*. To the contrary, the warnings at issue are distinguishable from the FBI formulation approved in *Miranda* only because they are substantially more specific, detailed, and informative. By advising the suspect both that he can "talk to a lawyer before answering any of our questions" and that he can use that right "at any time you want during this interview," the warnings specifically link the assistance of counsel to the interrogation process. The Florida Supreme Court therefore erred in deeming these warnings deficient for failing explicitly to advise the suspect of the right to the presence of counsel during questioning.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DAVID A. O'NEIL
Assistant to the Solicitor General
DANIEL S. GOODMAN
Attorney

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