No. 08-1175

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER

v.

KEVIN DEWAYNE POWELL, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation founded in 1958 with over 13,000 subscribed members—including military defense counsel, public defenders, private practitioners, and law professors—and an additional 35,000 state, local, and international affiliate members. NACDL seeks to encourage the integrity, independence, and expertise of defense lawyers in criminal cases, to ensure justice and due process for persons accused of crimes, to promote the proper and fair administration of criminal justice, and to preserve, protect, and defend the U.S. Constitution—not least, the right to counsel during police interrogations. NACDL has filed numerous amicus briefs in cases before this Court implicating that right, including in *Missouri* v. *Seibert*, 542 U.S. 600 (2004) and *Dickerson* v. *United States*, 530 U.S. 428 (2000).[1]

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD's members represent many defendants who have been subjected to custodial interrogation,

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party other than the *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

whether at the state or federal level, and who will be directly affected by the Court's decision in this case.

INTRODUCTION

More than forty years ago, this Court held that a confession obtained in custodial interrogation is inadmissible if the confessing suspect was not properly informed of his right to the presence of counsel during that interrogation. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Just nine years ago, the Court reaffirmed that principle and confirmed its constitutional status. *Dickerson*, 530 U.S. 428 (2000). In the decades that passed from *Miranda* through *Dickerson* and to the present day, the *Miranda* rule has garnered nearly universal compliance. As the Solicitor General's brief acknowledges, 97% of U.S. jurisdictions employ *Miranda* warnings that expressly inform a suspect of his right to have counsel present during his interrogation.

The City of Tampa, however, does not. Several years ago, the City made a carefully calculated policy decision to adopt a standard-form *Miranda* warning that *does not* describe the right to the presence of counsel during the interrogation. Although every Florida court to consider Tampa's warning has found it to be constitutionally deficient *in substance*, not just form, the State itself (with the support, if not quite the active encouragement, of the United States) now seeks reversal of its own judiciary's rulings, asking this Court to declare Tampa's defective warning to be permissible under the Fifth Amendment.

If this Court were to uphold the Tampa warning as constitutionally adequate under *Miranda*, its decision would upset forty years of established *Miranda* jurisprudence, as well as the police practices adopted

almost uniformly nationwide to implement *Miranda*'s core protections. As the Solicitor General points out, the Fifth Amendment values embodied in *Miranda* are best served when law enforcement agencies employ standardized warnings that expressly describe all the rights afforded suspects by the Fifth Amendment. See U.S. Br. at 6, 11-12. All federal agencies do so as a matter of policy, and, according to a recent study, so do the overwhelming majority of non-federal jurisdictions. See Richard Rogers *et al.*, *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 10, Table 7 (2008). Tampa is one of a handful of extreme outliers that have consciously chosen to depart from *Miranda* and the explicit warnings it prescribes.

If the Petitioner prevails here, however, this will all change. At stake in this case is not only the constitutional deficiency of Tampa's alternative pre-interrogation warning, but a much larger issue: whether law enforcement agencies may systematically depart from *Miranda* and provide less than what it plainly requires.

If this Court were to approve the non-compliant form warning in this case, jurisdictions across the nation would have every incentive to adopt a similar warning themselves. Thus the inferior warning that the Petitioner admits is a "deviation" will almost certainly become the new standard warning. And why stop there? More and more jurisdictions would adopt their own non-compliant warnings, reassured that even if they expressly advise their officers to omit or obscure one or more of *Miranda*'s signal protections, the resulting warning will be given a "flexible" and forgiving reading by the courts. A "race to the bot-

tom" would inevitably ensue, as States and municipalities test the limits again and again with their form warnings, in an effort to skirt the edges of the Fifth Amendment while still minimizing the presence of lawyers who they believe may interfere with their information-gathering function. The result would be the same sort of abuses that led this Court to adopt *Miranda* in the first place.

Just as important—and perhaps more so—is the effect that reversal here would have on the *Miranda* rule as it is applied by the courts. As it now exists, *Miranda* provides a predictable, "bright line" rule. If a confession follows a valid *Miranda* warning and waiver, it is presumptively admissible. If not, it is inadmissible. The simplicity of that bright-line rule is not merely an administrative convenience; it is a key element of the constitutional protection itself. Indeed, one of *Miranda*'s virtues is its predictability. For decades, it has provided a standard framework that protects the rights of suspects while enabling law enforcement to conduct investigations in a fashion that minimizes the risk that critical evidence will later be excluded from trial. To permit individual jurisdictions to craft their own, substantively different *Miranda* warnings would severely undermine the predictability of the rule—encouraging experimentation by law enforcement, increasing litigation over interrogations, and ultimately (and most importantly) sacrificing the constitutional rights of those being questioned. The result would be a death spiral for *Miranda* and its protections.

NACDL and NAFD urge this Court not to pursue that course. The decision of the Supreme Court of Florida should be affirmed.

STATEMENT OF THE CASE

The details of Powell's arrest, interrogation, and conviction are amply set forth in the Respondent's brief and the decision below. The constitutional issues presented by those events revolve around the pre-interrogation warning read to Powell prior to his confession. The key features of that warning are its provenance and its substance. First, the warning was not an *ad hoc* statement but a standardized form, adopted and used systematically by the Tampa police. Second, the warning departed in significant respects from the full-form warnings described in *Miranda*, which inform suspects explicitly of all the applicable Fifth Amendment rights.

The standard-form pre-interrogation warning employed by Tampa was as follows:

> 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 questioning. You have the right to use any of these rights at any time you want during this interview. JA 3.

That language is broadly similar to the language of pre-interrogation warnings used by police all over the country—with one glaring exception. Whereas the overwhelming majority of jurisdictions—97% of them, according to a recent study—expressly advise suspects of their right to the *presence* of an attorney *during* the interrogation, the Tampa warning completely omits any mention of that right. At best, as

argued by the State, the last sentence of the warning apprises the suspect that he may invoke previously described rights "at any time * * * during the interview." But the only right to counsel previously described is the right to talk to a lawyer "before answering any of our questions." So even if the suspect listens closely and is clever enough to parse the warning just as the State describes it, *at most* what the suspect could understand is that he may *exit* the interview following a question, consult with his lawyer, and then *return* to the interview to provide his answer. No one familiar with the English language could read the Tampa warning as advising a suspect that he may have his lawyer present with him in the room *while the police are actually questioning him* and while he is giving his answers.

Presented with that departure from the basic requirements of *Miranda*, Florida's Second District Court of Appeal reversed Powell's conviction on the ground that the warning read to him violated his Fifth Amendment rights as articulated and guaranteed by this Court in *Miranda*. Specifically, that court concluded that because the Tampa warning on its face did not advise suspects of their right to the presence of counsel "throughout interrogation," it was not a "functional equivalent of the required *Miranda* warning." JA 146 (*Powell* v. *State*, 969 So. 2d 1060, 1063 (Fla. 2d Dist. Ct. App. 2007)).

The Florida Supreme Court agreed to hear the case and affirmed the Court of Appeal. Acknowledging this Court's oft-recited rule that "there is no talismanic fashion in which [warnings] must be read or a prescribed formula they must follow," it nevertheless concluded that the general policy of flexibility in the specific language of pre-interrogation warnings

did not apply to warnings that were actually "misleading." JA 171. The Tampa warning was "misleading," the court concluded, for the straightforward reason that the right to "talk to" a lawyer "*before* questioning" cannot reasonably be said to inform the suspect that he is entitled to the presence of that lawyer *during* questioning. "Before" does not imply "during," any more than "above" implies "between."

One of the six justices dissented, arguing in part that the Tampa warning could be parsed so as to "avoid[ ] the implication * * * that advice concerning the right of access to counsel before questioning conveys the message that access to counsel is foreclosed during questioning." Taking the view that a *Miranda* warning need only "reasonably convey" a suspect's rights, the dissent concluded that the warning satisfied that standard. The dissent—like both the Petitioner and the Solicitor General here—relied heavily on the warning's final clause, which states that the suspect possessed "the right to use any of these rights at any time you want during this interview." Noting that the final clause referred to "any" of the rights previously disclosed, the dissent concluded that this clause essentially converted the limiting preposition "before" into the non-limiting prepositional phrase "at any time." JA 179-80.

SUMMARY OF ARGUMENT

The rule of *Miranda* is simple and concrete: a suspect's confession is presumptively admissible (in the absence of other evidence suggesting coercion) only if he was previously given either (a) the warnings expressly prescribed in *Miranda* itself, or (b) some "fully effective equivalent" to those warnings.

If these warnings were not given, the confession must be excluded.

Here, it is undisputed that the standard-form warning given to Powell did not include the full *Miranda* warning, because it omitted his right to have an attorney present during the interrogation. Neither the Petitioner nor the United States has attempted to argue that the Tampa form warning was a "fully effective equivalent." Nor could they credibly do so: it would defy reason to claim that a warning that wholly omitted mention of the right to have counsel *present during questioning*—and instead at most advised Powell that he could consult with counsel before answering any questions—was a "fully effective equivalent" to a warning that explicitly advised Powell he could have his lawyer at his side during the entire interrogation.

Rather than defending the Tampa warning as "fully effective," the Solicitor General argues for a weaker standard, claiming that the deficient warning was constitutionally sound because it "reasonably conveyed" the substance of Powell's *Miranda* rights. But the more forgiving "reasonably conveyed" standard is based on a single snippet of language from a twenty-year-old decision, unsupported by any discussion or analysis. There is no basis for the conclusion that this Court ever intended to lower the bar of *Miranda* compliance from "fully effective equivalent" to a mere "reasonableness" standard that could be met even when the suspect was *not* expressly advised of the right in question. Under the correct standard, there is no serious dispute that the Tampa warning is constitutionally deficient.

Moreover, even if "reasonably conveys" were the correct standard, the Tampa warning would fail it. As a matter of law, a law enforcement agency's policy decision to depart systematically from the explicit warnings required by *Miranda* is dispositive evidence that its alternative warning does not "reasonably convey" the substance of a suspect's *Miranda* rights. At least in the absence of some other legal basis for departing from *Miranda*, the mere fact of the departure—given the ready availability of long-established, constitutionally acceptable warnings—suggests that its purpose is precisely to dilute the effectiveness of the warning. Under this Court's decision in *Seibert*, 542 U.S. at 617, police strategies with the purpose or effect of "thwart[ing] *Miranda*'s purpose" render any confession obtained thereby inadmissible under the Fifth Amendment.

Finally, reversal of the decision below would effectively authorize individual jurisdictions to "experiment" with their *Miranda* warnings, in the hope of crafting a warning that nominally "touches all the bases" of *Miranda* while omitting, altering, or distorting the substance of the warning in ways likely to mislead or confuse suspects about their constitutional rights. That result would trigger a classic "race to the bottom," in which law enforcement agencies across the country would adopt what they understood to be minimally acceptable pre-interrogation warnings, pushing the limits each time a new limit is set. Not only would that outcome dilute the constitutional rights of suspects, but it would also distort the "bright line" that has long characterized the *Miranda* rule—and in so doing, would destroy the consistency and predictability that are among *Miranda*'s great virtues.

ARGUMENT

I. Contrary To The Solicitor General's Claim, "Providing Suspects With Conventional And Precise *Miranda* Warnings" *Is* A Constitutional Mandate, Unless The Government Proves That The Warning Actually Used Was "At Least As Effective" As The *Miranda* Warning.

The Solicitor General devotes a substantial portion of her brief to the proposition that "conventional and precise" *Miranda* warnings are desirable but not constitutionally required. U.S. Br. at 9-17. That proposition is wrong. While it is true that "verbatim recitals" of *Miranda*'s precise language are not constitutionally required, it is equally true that the substance of that language—or its "fully effective equivalent"—*is* constitutionally required. And because the *Miranda* regime is based on warnings, it is impossible to completely divorce the substance of those warnings from the words used to convey them. One need not afford "talismanic significance" to the literal words of *Miranda* to conclude that a warning that simply omits mention of a constitutionally guaranteed right is not a "fully effective equivalent" of the *Miranda* warning identifying that right.

The Solicitor General convincingly lays out the virtues of full-form *Miranda* warnings, in which the interrogator informs the suspect of each of *Miranda*'s elements expressly. See U.S. Br. at 9-12. NACDL and NAFD shares the Solicitor General's conviction about those virtues. NACDL and NAFD part ways with the Solicitor General, however, when she articulates the legal status of those virtues. While she acknowledges—and even lauds—the value of prescrib-

ing "standardized warnings that explicitly refer to each aspect of the suspect's [*Miranda*] rights," she insists that such warnings are not a "constitutional mandate." U.S. Br. at 9. We disagree, and so—we believe—does this Court.

In *Miranda* itself, the Court stated emphatically that "unless *other fully effective means* are adopted to notify" the suspect of his Fifth Amendment rights * * * the following measures are *required*: He "*must* be warned prior to any questioning" that (1) "he has the right to remain silent, that anything he says can be used against him in a court of law"; (2) "he has the right to the presence of an attorney"; and (3) "if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479 (emphasis added); see also *id.* at 444.

The rule of *Miranda* is simple: once in custodial interrogation, suspects must be given either the explicit warnings delineated in *Miranda* or equivalent warnings that are "*at least* as effective." *Id. at* 467; see also *id.* at 444 (requiring "other fully effective means"), 476 ("fully effective equivalent"), 479 ("other fully effective means"). This Court has never retreated from that principle. To the contrary, it has embraced it as necessary to any "reasonable and faithful interpretation of the *Miranda* opinion." *Michigan* v. *Mosley*, 423 U.S. 96, 103 (1975); see also *California* v. *Prysock*, 453 U.S. 355, 359-60 (1981) (quoting with approval *Miranda*'s statement that "[t]he warnings required and the waiver necessary in accordance with [the *Miranda* opinion] are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant") (emphasis added in *Prysock*); *Withrow* v. *Wil-*

liams, 507 U.S. 680, 689 (1993) (describing *Miranda* as prescribing, "absent other fully effective means," the warnings set forth in that opinion) (quotation omitted); *Dickerson*, 530 U.S. at 429 (reciting *Miranda*'s holding that any alternative to the basic *Miranda* warning "must be at least as effective in apprising accused persons of their right to silence") (quotation omitted).

In short, the core principle announced in *Miranda* remains fully vital: for a confession to be voluntary and admissible, the suspect must receive either the warnings expressly described in *Miranda* or some "fully effective equivalent" thereof.

II. The Tampa Warning Is Manifestly Not A "Fully Effective Alternative" To A Standard *Miranda* Warning, And Neither The Petitioner Nor The Government Has Argued Otherwise.

There is no serious question in this case about the inadequacy of the Tampa warning under this standard: the Tampa warning is simply not a "fully effective equivalent" to the warning delineated in *Miranda*. The warning prescribed in *Miranda* explicitly describes the suspect's right to have counsel present during questioning; the Tampa warning does not. Nor can the Tampa warning reasonably be read to *imply* that right—even under the kind of "close textual parsing" that the Solicitor General openly concedes is not appropriate in this context.[2] As shown above, there is no way to read the rule as stating, implying, or even vaguely suggesting, that the suspect is entitled to have a lawyer *physically present*

[2] See, *e.g.*, U.S. Br. at 8, 18, 20, 21.

with him during the interrogation process. At best, the Tampa warning might be read—putting the last sentence together with the second—as advising a suspect that he may consult with a lawyer after a question, and before answering it. Nowhere does the warning advise the suspect that he has a right to have a lawyer at his side throughout questioning, whether he ultimately chooses to consult with the lawyer or not. Because the Tampa warning omits mention of that foundational *Miranda* protection, it necessarily is not "at least as effective" as explicit notice of that right.

Tellingly, the Solicitor General has not even attempted to argue otherwise. Instead, she avoids the issue, addressing her arguments to two wholly different inquiries.

First, she argues that although "law enforcement agencies would be well advised to adopt * * * precise and standardized warnings," they are not *required* to do so because *Miranda* does not prescribe "rigidity in the *form* of the required warnings." U.S. Br. at 13 (quoting *Prysock*, 453 U.S. at 359) (emphasis in U.S. Br.). This is a red herring: the decision below excluded Powell's confession not because the "form" of Tampa's warning was inadequate, or because its "precise wording" deviated from some "conventional formulation," *id*. at 14-15, but because the warning's *substance* was so obviously constitutionally deficient. The warning "did not effectively convey to Powell his right to the presence of counsel before and during police questioning" and was in fact "misleading" as to the existence of that right. *Florida* v. *Powell*, 998 So. 2d 531, 541 (2008).

Thus, the Florida Supreme Court's decision turned, not on semantic or technical considerations, but rather on established principles of constitutional law. If a pre-interrogation warning is "likely to mislead and depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights," any resulting confession is inadmissible under the Fifth Amendment. *Missouri* v. *Seibert*, 542 U.S. 600, 613-14 (2004) (quotation omitted). The Solicitor General's extensive arguments against "enforc[ing] a rigid adherence to a single script by the police" are attacks on a strawman. U.S. Br. at 15.

Second, the Solicitor General argues that the standard for assessing a *Miranda* warning is whether, "read in [its] totality," it "reasonably conveys the substance" of the *Miranda* rights." U.S. Br. at 17-21. But a warning that "reasonably conveys" the substance of those rights still may not be a "fully effective equivalent" to the full *Miranda* warnings—and the latter is the governing standard. See *supra* at 10-12.

The "reasonably conveys" language entered this Court's jurisprudence in *Duckworth* v. *Eagen*, 492 U.S. 195, 203 (1989), without discussion or analysis. Indeed, the passage in question simply quotes *Prysock* while swapping out the word "fully" in favor of "reasonably," such that *Prysock*'s conclusion that "the police in this case *fully* conveyed to respondent his rights as required by *Miranda*," when repeated in *Duckworth,* became the requirement that "the warnings *reasonably* 'conve[y] to [a suspect] his rights as required by *Miranda*'" (emphasis added). Compare *Prysock*, 453 U.S. at 361 with *Duckworth*, 492 U.S. at 203. *Prysock* is consistent with the exacting standard set forth in *Miranda*; if *Duckworth*'s snippet of lan-

guage were taken literally, *Duckworth* would not be. And in the absence of any analysis or discussion suggesting that the *Duckworth* Court affirmatively intended to change the long-standing standard for *Miranda* compliance, we can only conclude that there was no such intention.[3] This is particularly true given the Court's continuing reliance, long after *Duckworth*, on *Miranda*'s more stringent standard. See*, e.g., Dickerson*, 530 U.S. at 429 (stating that an alternative to the basic *Miranda* warning "must be 'at least as effective in apprising accused persons'" of their Fifth Amendment rights).[4]

By declining even to assert that the Tampa warning is a "fully effective equivalent," the Solicitor General has all but conceded that under the established standard for *Miranda* compliance, the Tampa warning is constitutionally deficient. The same is true for the Petitioner: its *Miranda* analysis is explicitly based on the "reasonably conveys" standard and never addresses (but merely quotes) the requirement

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[3] Neither the parties nor the United States as *amicus curiae* in *Duckworth* argued for a "reasonably conveys" standard, or for any reduction in the rigor of traditional *Miranda* analysis. The phrase seems to have appeared unbidden in the Court's opinion.

[4] Even if there were some basis for concluding that *Duckworth*'s "reasonableness" formulation was consciously designed to ease the prosecution's burden in proving compliance with *Miranda*, that formulation still would not govern. The Court's use of the "reasonably conveys" language was expressly linked to its conclusion that "[t]he prophylactic *Miranda* warnings are not themselves rights protected by the Constitution." *Duckworth*, 492 U.S. at 203 (quotation omitted). That conclusion, to the extent it was ever valid, was squarely rejected by a seven-member majority of this Court in *Dickerson*. See 530 U.S. at 428, 440 (holding that "*Miranda* is constitutionally based").

of a "fully effective equivalent." See Pet. Br. at 10, 16 (applying "reasonably conveys" standard).

III. Under Any Standard, A Law Enforcement Agency's Adoption Of A Form Warning That Systematically Omits Mention Of A Core Fifth Amendment Right Cannot Pass Constitutional Muster.

Even if the Solicitor General were correct to rely on the "reasonably conveys" language employed in *Duckworth*, the Tampa warning still fails. This kind of systematic police departure from *Miranda* strongly suggests an institutional strategy to dilute the effectiveness of constitutionally required warnings. As such, it triggers the rule announced by this Court in *Seibert*: where police employ a "strategy adapted to undermine the *Miranda* warnings," confessions elicited by that strategy are involuntary and inadmissible. *Seibert*, 542 U.S. at 616.

As we have demonstrated, the Government's reliance on the "reasonable conveyance" standard is misplaced: the correct standard for assessing deviations from the full *Miranda* warnings is the "fully effective equivalent" standard. But even if the "reasonable conveyance" standard governed here, the Tampa warning would fail it. As a matter of law, a law enforcement agency's policy decision to depart *systematically* from the explicit warnings required by *Miranda* is *prima facie* evidence that its alternative warning does not "reasonably convey" the substance of a suspect's *Miranda* rights.

This conclusion follows directly from this Court's decision in *Seibert*, 542 U.S. at 611-17. In that case, the Court assessed the admissibility of confessions extracted through so-called "question first" interroga-

tion—an interrogation method advocated by many law enforcement agencies in which a suspect is initially questioned without a *Miranda* warning and encouraged to confess; after the confession occurs, she is "Mirandized" and asked to repeat her previous (unwarned) statement. *Id*. at 605-06. The Court ruled that confessions obtained using the "question first" tactic are inadmissible, concluding that the "manifest purpose" of the tactic was "to get a confession the suspect would not make if he understood his rights at the outset." *Id*. at 613. Distinguishing its decision in *Oregon* v. *Elstad*, 470 U.S. 298 (1985), as an example of a "good-faith *Miranda* mistake * * * posing no threat to warn-first practice generally," the Court strongly rejected the systematic "question first" tactic as "a police strategy adapted to undermine the *Miranda* warnings." *Seibert*, 542 U.S. at 616. By "threaten[ing] to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted," the Court held, such strategies require the conclusion that the warnings did not "serve[ ] their [constitutional] purpose." *Id*. at 617. Confessions obtained through such strategic police measures are therefore inadmissible.[5]

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[5] The *Seibert* Court expressly disclaimed any implication that evidence of the interrogator's subjective intent to undermine *Miranda* was relevant to its analysis, noting that the focus should remain on "facts apart from intent that show the question-first tactic at work." There is thus no need to inquire into the subjective intent of the Tampa police department in adopting its warning. Even if there were, however, there is substantial evidence that Tampa did, in fact, affirmatively seek to dilute its *Miranda* warnings to produce more confessions. See generally Brief for Professor Richard A Leo as *Amicus Curiae* in Support of Respondent.

The same analysis governs here. The decision by the Tampa police to employ a standard-form warning that omitted any express reference to a core *Miranda* right—the suspect's right to the presence of an attorney during questioning—itself requires the inference that the warning is intended to "deprive[e] a defendant of knowledge essential to his ability to understand the nature of his rights." *Seibert*, 542 U.S. at 613-14 (quoting *Moran* v. *Burbine*, 475 U.S. 412, 424 (1986)). There is simply no basis for any other conclusion. As the Solicitor General notes, a recent study of *Miranda* warnings found that 97% of the warnings in use today expressly refer to the suspect's right to the presence of an attorney during questioning. U.S. Br. at 13 n.4 (citing Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124 (2008)). This virtual consensus nationwide appears to be consistent with the trend in Florida as well. See *Roberts* v. *State*, 874 So. 2d 1225, 1227 (Fla. 4th Dist. Ct. App. 2004) (taking notice that 89 of 90 *Miranda* forms used in Florida "contained the warning that the accused is entitled to an attorney during questioning, or words to that effect"); see also *Rigterink* v. *State*, 2 So. 3d 221, 254 (Fla. 2009), (per curiam) (noting that the "pervasive use [in Florida jurisdictions] of *Miranda* warnings that fully inform a person of his or her right to an attorney prior to and *during* questioning confirms that our holding in *Powell* does not unnecessarily burden the proper investigation of crime.") [*petition for cert. filed* 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1229)]. Having chosen to make itself an outlier against such a universal position, Tampa should bear the burden of showing that its warning does nothing

to undermine the efficacy of the *Miranda* warning. It cannot do so.

In attempting to justify the Tampa warning's systematic departure from the *Miranda* standard, the Solicitor General offers a lengthy defense of what it calls "variations from the conventional *Miranda* warnings." U.S. Br. at 13-16. But that defense only highlights the deficiency of the Tampa warning. The Solicitor General essentially argues for a "flexible" approach to *Miranda* warnings to guard against *inadvertent* departures from the standard: she points out that "agents not infrequently make mistakes" in giving the warnings, and that the challenges of translation and administration of the warnings require a lenient, non-technical approach to determining their adequacy. *Ibid*.

None of that matters here. This case does not involve an agent's inadvertent mistake, or a minor error in translation, or a warning administered in an "overseas interrogation[ ]." *Id*. at 14. To the contrary: this case involves a calculated decision by a law enforcement agency to design and employ a pre-interrogation warning that omits any reference to one of the core constitutional rights protected by *Miranda*—the right not just to consult with a lawyer before answering a given question, but to have a lawyer present throughout the questioning process. For that reason, it is the rigorous analysis of *Seibert*, not the relaxed inquiry favored by the Solicitor General, that must govern here.

IV. Approval Of Tampa's Warning By This Court Would Trigger A "Race To The Bottom" And Undermine The Clarity And Predictability That Are The Hallmark Of *Miranda*.

In the end, the continued vitality of *Miranda* and the rights it protects require that the Court affirm the decision below. A reversal in this case would undermine the bright-line rule announced by *Miranda* and would trigger a "race to the bottom" as law enforcement agencies contrive new, more equivocal warnings that emasculate *Miranda's* protective effect.

Reversal here would not merely constitute this Court's approval of Tampa's particular *Miranda* deviation; more important, it would signal that *other* jurisdictions are also free to adopt alternative warnings that—like this one—simply omit reference to an acknowledged Fifth Amendment right, or that otherwise seek to obfuscate suspects' rights. The result would be a classic race to the bottom. In fact, even if each individual *Miranda* alternative ultimately passed constitutional muster, the proliferation of different standards would undermine the benefits of clarity and predictability secured by *Miranda*'s "bright line" rule.

The erosion of *Miranda* would not be merely an administrative inconvenience: it would undermine the *Miranda* rights themselves, which are meaningful and effective only to the extent the "bright line" exists to give "concrete constitutional guidelines" to courts, and in turn to incentivize police to protect suspects' rights under the Self-Incrimination Clause. By creating the bright-line analysis, *Miranda* offers

what is essentially a rule of decision—a decisional framework within which courts may give adjudicative effect to core constitutional rights including against self-incrimination, the real-world parameters of which are difficult to define. See*, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004). As such, its value as a constitutional rule depends upon what this Court has called the "ease and clarity of its application": the more ambiguous or multivariate the rule, the less effectively it will encourage police to adhere to constitutional standards, and the less protection it will afford to suspects and their Fifth Amendment rights. *Moran*, 475 U.S. at 425-26.

The Solicitor General devotes some energy to resisting the "race to the bottom" scenario—but her arguments are pure *ipse dixit*, unsupported by the record, the law, or common sense. She claims, for example, that "police and prosecutors already have ample incentives to use precisely articulated warnings in a standardized format because of the safe harbor such warnings provide." U.S. Br. at 15. Obviously, Tampa itself was not persuaded by any such incentives. But more important, the "ample incentives" to which the Solicitor General refers are the decisions of this Court holding that deviation from the substance of the *Miranda* warning will result in exclusion of the confession. If this Court upholds the Tampa warning as constitutionally adequate, police and prosecutors will have *no* incentive to adhere to the familiar warning—which unambiguously advises suspects that they may have a lawyer present during questioning—and *every* incentive to adopt a warning like Tampa's, which advises suspects at most that they can go talk to a lawyer between questions if they wish. Nobody

with passing familiarity with police practices could believe that law enforcement agencies will readily forgo the chance to interrogate suspects without a lawyer physically present in the room.

In short, contrary to the assertions by the Solicitor General, the best way to ensure that "police and prosecutors * * * have adequate incentives" to use full-form *Miranda* warnings is to affirm the decision below and thus confirm that this kind of systematic departure from *Miranda* is not worth the "litigation risks" it creates.

Just as important as the effect of this case on law enforcement incentives is its effect on the courts. As explained above, the decisional framework provided by *Miranda* is a significant source of its constitutional value. It is only because of the "ease and clarity of its application" by courts that the rule of *Miranda* creates the necessary incentives for police to respect Fifth Amendment rights. A more vague, less determinate rule would increase the likelihood that a reviewing court would not bar a confession resulting from an inadequate warning—and thus would encourage police to push the boundaries of *Miranda*, rather than comply strictly to it. See *supra* at 21.

To encourage departures like the one at issue here—and to permit them is to encourage them—is to begin the erosion of that "ease and clarity." Once attention to the words themselves is forsaken in favor of the "totality of the warning" inquiry, the bright line of *Miranda* will become increasingly dim. What, after all, does the totality of the warning include? Reversal here would convey that law enforcement can obscure the required warnings—or omit language making them clear—as long as the warning can still

arguably be read to *imply* the existence of the right. What else the totality of the warning might include is anybody's guess. The inquisitor's tone of voice? The physical circumstances in which the warning is given? Once started down that road, it is no great distance to the hopelessly fact-dependent, non-administrable "voluntariness" inquiry to which *Miranda* was a necessary antidote.[6] See *Prysock*, 453 U.S. at 359 (describing 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 confession).

The literal words of *Miranda* may not be "talismanic," and there may be no magic words—apart from *Miranda*'s own—that actually make or break a warning's compliance with the Fifth Amendment. But the Solicitor General is wrong to suggest that the words of a *Miranda* warning can be coherently divorced from its substance. *Miranda*, after all, is about the necessity of an explicit verbal warning—and the words of a warning *are* its substance. This Court has held that *Miranda* permits some linguistic flexibility, but it does not follow that a law enforcement agency should be permitted to exploit that flexibility to adopt a calculated, systematic departure from the substance of *Miranda*'s protection, or even a calculated, systematic effort to obfuscate those protections through clever word-play. To hold otherwise

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[6] Of course, if a confession was involuntary, it is inadmissible regardless of the adequacy of the *Miranda* warning. But the failure to administer a fully effective warning gives rise to an irrebutable "presumption of coercion." *United States* v. *Patane*, 542 U.S. 630, 639 (2004).

is to doom *Miranda* to death by a thousand cuts. The Court should not countenance that result.

CONCLUSION

For all these reasons, NADCL and NAFD respectfully ask that this Court affirm the judgment of the Supreme Court of Florida.

Respectfully submitted,

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