No. 08-1470

IN THE

Supreme Court of the United States

MARY BERGHUIS, WARDEN,

Petitioner,

v.

VAN CHESTER THOMPKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

STATEMENT 3

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THOMPKINS NEVER WAIVED HIS RIGHT TO SILENCE 8

A. Any Waiver Must Precede The Start Of Interrogation 8

B. If "Implied Waiver" After Interrogation Begins Is Ever Permissible, It Must Occur Much More Quickly Than The Purported Waiver Here 15

II. THOMPKINS INVOKED HIS RIGHT BY REMAINING SILENT IN THE FACE OF INVESTIGATIVE QUESTIONS 26

A. Thompkins' Silence Was Sufficient On These Facts To Invoke The Right To Silence 26

B. The Court Should Reject Petitioner's Request For A Two-Pronged Expansion Of The *Davis* Rule 28

III. THE RULES PETITIONER ADVOCATES CONTRADICT POLICE PRACTICES ON THE GROUND 32

CONCLUSION 35

TABLE OF AUTHORITIES

Page

Cases:

Ashcroft v. *American Civil Liberties Union*, 535 U.S. 564 (2002) 9

Colorado v. *Spring*, 479 U.S. 564 (1987) 10

Davis v. *United States*, 512 U.S. 452 (1994) ..... *passim*

Dickerson v. *United States*, 530 U.S. 428 (2000) 3

Fare v. *Michael C.*, 442 U.S. 707 (1979) 10, 27

Johnson v. *New Jersey*, 384 U.S. 719 (1966) 28

Medina v. *Singletary*, 59 F.3d 1095 (11th Cir. 1995) 31

Michigan v. *Mosley*, 423 U.S. 96 (1975) 12

Miranda v. *Arizona*, 384 U.S. 436 (1966) ..... *passim*

Missouri v. *Seibert*, 542 U.S. 600 (2004) 2, 9, 12

TABLE OF AUTHORITIES—Continued

Page

Moran v. *Burbine*,
475 U.S. 412 (1986) 27

North Carolina v. *Butler*,
441 U.S. 369 (1979) ..... *passim*

Panetti v. *Quarterman*,
551 U.S. 930 (2007) 22

Rhode Island v. *Innis*,
446 U.S. 291 (1980) 7, 14, 20, 28

Smith v. *Illinois*,
469 U.S. 91, 98 (1984) 26

Solem v. *Stumes*,
465 U.S. 638 (1984) 27

Constitution:

U.S. Const. amend. V 3, 19

Statute:

28 U.S.C. § 2254(d) 15

Rule:

S. Ct. R. 37.6 1

TABLE OF AUTHORITIES—Continued

Page

Other Authorities:

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TABLE OF AUTHORITIES—Continued

Page

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R. Thomas Jr., *Fred Inbau, 89, Criminologist Who Perfected Interrogations*, N.Y. Times, May 28, 1998 11

Webster's Third New International Dictionary (1986) 27

C. Weisselberg, *Mourning Miranda*, 96 Cal. L. Rev. 1519 (2008) 18, 33

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STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers ("NACDL") and the American Civil Liberties Union ("ACLU") respectfully submit this brief as *amici curiae* in support of respondent Van Chester Thompkins.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made such a monetary contribution. This brief is filed with the consent of all the parties.

The NACDL, founded in 1958, is a non-profit corporation with more than 12,000 direct members nationwide and in 28 countries, and more than 40,000 affiliate members in 90 state, provincial and local affiliate organizations. NACDL members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges.

Among the NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. The NACDL files approximately fifty *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues. The NACDL has participated as an *amicus* in a number of cases addressing the scope of this Court's opinion in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *See, e.g.*, *Missouri* v. *Seibert*, 542 U.S. 600 (2004); *Dickerson* v. *United States*, 530 U.S. 428 (2000).

The ACLU is a nationwide, non-profit, non-partisan organization with over 500,000 members. Since 1920, the ACLU has been dedicated to preserving the principles of liberty and equality embodied in the Constitution and the civil rights laws of this country. Many of the ACLU's efforts have focused on enforcing those portions of the Bill of Rights having to do with the administration of criminal justice, including participation as *amicus curiae* in *Seibert*, *Dickerson*, and *Miranda* itself.

Proper resolution of this case is a matter of concern to *amici* and their members. As we explain below, the positions advocated by petitioner conflict irreconcilably with this Court's pronouncements. They likewise conflict with current police practice and, if

adopted, would undermine the settled practices of law enforcement officers across the country. Finally, and fundamentally, they would have the effect of nullifying *Miranda*'s waiver requirement. If a suspect's eventual inculpatory statement suffices to show waiver, then there will *always* be waiver; no *Miranda* case would ever be litigated in the absence of an inculpatory statement. Under a proper reading of the Fifth Amendment and this Court's cases, the petitioner's newly-minted rules should be rejected and the decision of the Sixth Circuit affirmed.

STATEMENT

The procedural history and facts have been laid out by the parties. *Amici* offer this Statement to clarify certain details regarding respondent's interrogation.

Detectives Christopher Helgert and Dave Doweling interrogated respondent Thompkins at an Ohio jail on February 22, 2001. J.A. 8a. At the outset, Helgert read Thompkins his *Miranda* rights from a preprinted sheet. *Id.* Helgert then asked Thompkins to sign the sheet to indicate that he understood his rights. J.A. 9a. Thompkins refused to do so. J.A. 9a. Helgert offered conflicting testimony about whether he ever asked Thompkins orally if Thompkins understood his rights. At a pre-trial suppression hearing, Helgert testified: "I believe I asked him if he understood the [r]ights, and I think I got a verbal answer to that as a 'yes.' " J.A. 9a. However, at trial, when asked whether he inquired if Thompkins understood his rights, Helgert testified: "I don't know that I orally asked him that question." J.A. 148a.[2]

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[2] As the Solicitor General correctly observes, the Michigan Court of Appeals resolved this conflict in favor of Helgert's

What *is* clear from the record is that the detectives chose not to seek an express *Miranda* waiver. The form the detectives presented to Thompkins only asked him to acknowledge that he *understood* his rights. Pet. Br. 60. It was not a waiver form. And importantly, the detectives made a strategic choice not to ask Thompkins whether he would be willing to waive his rights, or whether he would be willing to talk about the case, presumably because doing so risked invocation. Instead, they immediately commenced a lengthy interrogation. J.A. 10a, 15a.

Helgert described the interrogation as "nearly a monologue," during which he and Doweling repeatedly returned to the theme that Thompkins "was involved [in the crime] and that * * * this was his opportunity to explain his side." J.A. 17a, 10a. Helgert testified that Thompkins was "uncommunicative" throughout the interrogation, that he "sat there and listened to our speech," and that he "spent a lot of his time * * * simply holding his head looking down." J.A. 10a, 22a, 152a. The detectives used a variety of "themes" during the interrogation, all in an attempt to get Thompkins to talk, but the effort "wasn't productive." J.A. 151a, 152a. Asked whether Thompkins "consistently exercised his right to remain substantively silent," Helgert replied in the affirmative. J.A. 20a.

Helgert did testify that Thompkins offered "very limited verbal responses" during the hours of interrogation, that he occasionally said, "yeah," "no," or "I don't know," and that he occasionally made eye

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initial testimony, finding that Thompkins "verbally acknowledged that he understood [his] rights," Pet. App. 75a, and Thompkins has not challenged that finding. *See* U.S. Br. 3 n.2.

contact with the detectives. J.A. 10a, 21a, 23a-24a. But the record demonstrates that none of those limited responses came in reaction to substantive questions about the crime. Helgert twice testified that Thompkins had no "significant response" to any of the detectives' attempts to convince him to discuss the crime. J.A. 149a, 150a. He likewise testified that his prolonged attempt to get Thompkins to tell his side of the story "did * * * not [e]licit any admissions or denials; for that matter, it didn't really [e]licit any sort of reaction." J.A. 152a. Helgert testified that Thompkins' eventual inculpatory statement was "[t]he only thing" Thompkins said during the interrogation "relative to his involvement" in the crime. J.A. 10a-11a. And when he tried to recount what Thompkins *did* say during the interrogation, Helgert could point to only two statements: that Thompkins said he "didn't want a peppermint that my partner offered him, and [that] the chair that he was sitting in was hard." J.A. 152a. Finally, as for the eye contact, Helgert testified that Thompkins looked at him only a "few times" during the entire interrogation, J.A. 11a, and that Thompkins did so when Helgert commanded it. J.A. 149a ("[H]e would look down or look away and I would * * * have to call him back and ask him to, you know, look at me and pay attention.").

After nearly three hours straight spent questioning a silent Thompkins, Helgert changed tactics. He asked Thompkins whether he believed in God, and Thompkins' eyes "well[ed] up with tears." J.A. 11a. Helgert asked whether Thompkins prayed, and Thompkins answered in the affirmative. J.A. 11a. Finally, Helgert asked Thompkins: "Do you pray to God to forgive you for shooting that boy down?" J.A.

153a. Thompkins said "Yes." J.A. 153a. The interrogation ended soon after. J.A. 11a.

SUMMARY OF ARGUMENT

This case presents questions about the scope of two of *Miranda*'s fundamental safeguards: first, the waiver of rights that is a "prerequisite[ ] to the admissibility of any statement made by a defendant," 384 U.S. at 476, and second, the defendant's power to invoke his rights at any time and "cut off questioning." *Id.* at 474. The Sixth Circuit may be affirmed on either ground.

Thompkins never waived his right to remain silent. Under *Miranda* and its progeny, police must obtain a waiver before they interrogate, and the detectives did not do that here. *Miranda*'s "waiver first" rule is the most effective way to avoid the very evil that case sought to address—namely, that the highly coercive and intimidating custodial environment compels unwilling suspects to speak. If a suspect waives his rights prior to interrogation, then the waiver presumably[3] is made out of the suspect's uncoerced volition. If not, then a "waiver by confession" hours later is presumed to be the product of the interrogation environment—just the sort of coerced "waiver" *Miranda* sought to prevent.

Moreover, even if the Court sees fit to allow interrogation to begin without a waiver, the government still must shoulder a heavy burden to prove that waiver occurred at a later time. The Court estab-

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[3] It is possible, of course, that a suspect could be coerced into waiver through pre-interrogation threats or deception. Those issues are not presented by this case.

lished in *Miranda*, and subsequently reiterated in the very case on which petitioner chiefly relies, that the government's burden to prove a valid, voluntary waiver is "great." *North Carolina* v. *Butler*, 441 U.S. 369, 373 (1979). Given *Miranda*'s concern with the coercive pressures of lengthy interrogation, the government cannot meet that "great" burden unless the suspect begins responding to police shortly after interrogation begins. And the government certainly cannot meet its burden on this record.

In any event, Thompkins affirmatively invoked his right to silence by remaining silent during extended interrogation. That Thompkins occasionally made eye contact or offered one-word responses to nonsubstantive inquiries does not change that fact, because the record indicates that he was not responding to interrogation—*i.e.*, to "words or actions * * * reasonably likely to elicit an incriminating response." *Rhode Island* v. *Innis*, 446 U.S. 291, 301-302 (1980). A suspect who responds to an interrogator's basic pleasantries, but says absolutely nothing and stares at the floor for hours in response to investigative questions, invokes his right with all the clarity that *Miranda* requires.

The petitioner and the Solicitor General advocate contrary rules for both waiver (arguing that "waiver by confession" after hours of interrogation is acceptable) and invocation (arguing that only an oral statement will suffice). Those proposed rules would overturn this Court's clearly established holdings. They also fly in the face of actual police practice. This Court should reject the invitation to eviscerate *Miranda* in a way that will only create uncertainty for officers trained under the current regime.

ARGUMENT

I. THOMPKINS NEVER WAIVED HIS RIGHT TO SILENCE.

A. Any Waiver Must Precede The Start of Interrogation.

Miranda and its progeny make clear that waiver is a condition precedent to interrogation; a suspect must be read his *Miranda* rights, and must waive them, before interrogation can begin. There is no claim in this case that the detectives sought such a pre-interrogation waiver or that Thompkins gave one. For that reason alone the Sixth Circuit should be affirmed.

1. Waiver must precede interrogation. The *Miranda* Court explained that warnings are to be given "[a]t the outset, if a person in custody is to be subjected to interrogation," 384 U.S. at 467, and that warnings and waivers go together: "After * * * warnings have been given, and such opportunity [to invoke the *Miranda* rights] afforded * * *, the [suspect] may knowingly and intelligently *waive these rights and agree to answer questions* or make a statement." *Id.* at 479 (emphasis added). This sentence clearly contemplates that the suspect first will be warned and asked if he wants to invoke or waive his rights. At that point he can "agree to answer questions"—*i.e.*, undergo interrogation. Absent waiver, the suspect's rights remain intact.

That understanding of *Miranda* makes good sense given the Court's concern with the compulsion inherent in custodial interrogation. The *Miranda* Court recognized that "[t]he circumstances surrounding in-custody interrogation can operate very quickly to

overbear the will of one merely made aware of his privileges by his interrogators." 384 U.S. at 469. Thus, it explained, "the fact of lengthy interrogation * * * before a statement is made is strong evidence that the accused did not validly waive his rights," but instead eventually succumbed to "the compelling influence of the interrogation." *Id.* at 476. It would not have made sense for the Court to permit waiver at the tail end of an interrogation given its conclusion that a waiver triggered by the interrogation process itself is invalid.

The Court reiterated *Miranda*'s "waiver first" principle in subsequent cases. In *Davis* v. *United States*, 512 U.S. 452 (1994), for example, the Court explained that "[i]f the suspect effectively waives his right to counsel after receiving the Miranda warnings, law enforcement officers are free to question him." *Id.* at 458. Likewise, in *Seibert*, *supra*, (plurality op.), the Court explained that "failure to give the prescribed warnings and obtain a waiver of rights *before custodial questioning* generally requires exclusion of any statements obtained." 542 U.S. at 608 (emphasis added). These statements can only be understood to contemplate that waivers are to occur prior to interrogation. No such pre-interrogation waiver occurred here.[4]

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[4] The Solicitor General argues that the statement in *Davis* "merely reflects the facts of *Davis*," and that the statements in *Seibert* are dicta because *Seibert* "did not involve a question of waiver after prior warnings." U.S. Br. 22. But the statements in *Miranda* itself disapproving waivers triggered by the interrogation process were not dicta; they were a "rationale for the holding of the case." *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 594 (2002) (Kennedy, J., concurring). And the Court in *Davis* and *Seibert* chose to frame its understanding

2. Even putting *stare decisis* aside, there are three reasons why the Court should not overturn the well-established "waiver first" rule. First, it aligns with *Miranda*'s understanding of the interrogation process. The *Miranda* Court accepted as a basic premise that "the compelling influence of the interrogation" could eventually "force[ ]" a suspect to make a statement even if he never intended "voluntary relinquishment of the privilege." 384 U.S. at 476. The Court accordingly held that "the fact of lengthy interrogation * * * before a statement is made is strong evidence that the accused did not validly waive his rights." *Id.* Those principles are honored if the waiver is obtained at the outset, before interrogation exerts its "compelling influence."

Second, "waiver first" provides a bright line that police can easily follow. *See Colorado* v. *Spring*, 479 U.S. 564, 577 n.9 (1987) (lauding "the *Miranda* rule's important 'virtue of informing police and prosecutors with specificity' as to how a pretrial questioning of a suspect must be conducted") (quoting *Fare* v. *Michael C.*, 442 U.S. 707, 718 (1979)). If investigators are instructed to affirmatively seek a waiver at the outset (and many already are, as discussed below), it will usually be clear whether the suspect has waived his rights. Law enforcement officials will not be put in a position of trying to later decide whether ambiguous signals from the suspect during the course of a long subsequent interrogation add up to waiver. Instead, the suspect will either agree at the com-

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of *Miranda* in terms that confirm a "waiver first" regime. Moreover, the only snippet of authority to which the Solicitor General points for her preferred contrary rule is itself classic obiter dictum—not just unnecessary to the holding, but also conditional and phrased in the negative. *See infra* at 14.

mencement of an interrogation to talk about the case—or he will not.

Last but not least, the "waiver first" rule is beneficial because it conforms to the current guidance offered by many (though not all)[5] leading police-training resources. These manuals have long understood *Miranda* to require waiver prior to interrogation, and have instructed law enforcement officials accordingly. For example, Inbau & Reid's *Criminal Interrogation and Confessions*—the "undisputed bible of police interrogation,"[6] cited in *Miranda* and nine other decided cases of this Court—instructs that "[t]he only time a police interrogation may be conducted of a suspect who is in custody * * * is after he has received the required warnings *and after he has indicated a willingness to answer questions. Once that waiver is given, the police may proceed with the interrogation.*" F. Inbau *et al.*, *Criminal Interrogation & Confessions* 491 (4th ed. 2001) (emphasis added) (hereinafter "Inbau Treatise"). Likewise, a modern handbook for police interrogators instructs police to ask a suspect at the outset: "Do you understand each of these rights that I have explained to you? Having these rights in mind, are you willing to waive them and answer my questions?" and offers the following "tip": "Always ask yourself, 'after

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[5] As we discuss below, some training programs instruct police that they may seek implied waivers after interrogation has begun, and there is no doubt many police officers do so. But even that more aggressive approach to waiver usually requires that the suspect begin talking quickly after interrogation commences; it is rarely taken to the lengths advocated by the petitioner here. *See infra* at 18-19, 32-34.

[6] R. Thomas Jr., *Fred Inbau, 89, Criminologist Who Perfected Interrogations*, N.Y. Times, May 28, 1998, at B9.

giving the warning, did I make sure to secure an affirmative waiver?" J. Stephen *et al.*, *Officer's Interrogation Handbook* 67-68 (2004). The U.S. Department of Homeland Security's handbook is to the same effect. It states the point succinctly: "Once an individual taken into custody has been given the proper *Miranda* warnings, there is one more requirement *before any interrogation. Prior to questioning*, the suspect must make a voluntary, knowing and intelligent waiver of his rights under *Miranda*." Department of Homeland Security, *Legal Division Handbook* 491 (2009) (emphasis added). Leading training resources, in short, understand the Court to have meant what it said in *Davis* and *Seibert*: Police must "obtain a waiver of rights before custodial questioning." *Seibert*, 542 U.S. at 608.

3. Seeking to overturn settled law, petitioner and the Solicitor General assert that if a suspect "take[s] no action to invoke or waive his rights, * * * the police may conduct interrogation." U.S. Br. 19. Their briefs point to no real authority for the proposition. The Solicitor General's brief largely relies on a narrow construction of *Miranda*'s purpose: It asserts that "[t]he primary protection" afforded by *Miranda* "is the *Miranda* warnings themselves" and that the "critical safeguard" provided by *Miranda* is the "right to cut off questioning."[7] From this premise it draws the strangely restrictive conclusion that *Miranda* does not also require pre-interrogation waivers. But that is illogic. The fact that this Court has described the warnings, and the right to invoke them, as "primary" protections of *Miranda* hardly

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[7] U.S. Br. 20 (quoting *Davis*, 512 U.S. at 460, and *Michigan* v. *Mosley*, 423 U.S. 96, 103 (1975), respectively).

negates the fact that *Miranda* also described the waiver process as "fundamental." 384 U.S. at 476.

The Solicitor General also relies on *Miranda*'s statement that a defendant has the "right to choose between silence and speech * * * *throughout the interrogation process*." U.S. Br. 21 (quoting *Miranda*, 384 U.S. at 469) (emphasis and alteration in Solicitor General's brief). That excerpt has nothing at all to do with the appropriate timing of waivers. It is about subsequent *invocation* of the *Miranda* rights—and there is no dispute that a suspect can invoke his rights "throughout the interrogation process," once he has initially waived them.

Other than *Miranda*—which offers the petitioner and her *amicus* no help—the only case to which they point is *Butler*, *supra*, in which the Court suggested that a "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may * * * support a conclusion that a defendant has waived his rights." 441 U.S. at 373. *See* Pet. Br. 40-43; U.S. Br. 20-22. The Solicitor General argues that this passage must mean waivers can occur after interrogation begins, because otherwise there would be no opportunity for a suspect's "course of conduct" to manifest itself. U.S. Br. 21. Not so.

To begin with, the quoted statement is pure dictum. The defendant in *Butler* was read his rights, immediately stated, "I will talk to you, but I am not signing any form," and "then made inculpatory statements." *Butler*, 441 U.S. at 370-371. The Court held that that initial statement—"I will talk to you, but I am not signing any form," an assertion far more explicit than anything Thompkins said or did—*might*

constitute a waiver. *See id.* at 376 (vacating and remanding for further proceedings). The Court's observation about "course of conduct" thus was unnecessary to the outcome. It also was conditional and phrased in the negative. *See id.* at 373 (stating that *Miranda*'s "mere silence is not enough" rule "does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights.").

Moreover, even if the Solicitor General's favored *Butler* dictum were the law, it would not require rejection of the "waiver first" rule. The Solicitor General's argument relies on the premise that all interaction between police and suspects after warnings are administered must constitute "interrogation," and therefore that a suspect's post-warning "course of conduct" must occur, by definition, after interrogation has begun. If that were accurate, then *Butler*'s dictum would indeed be irreconcilable with the "waiver first" rule. But it is not accurate. In fact, "interrogation" means only "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 301-302 (emphasis deleted). Thus the police could read a suspect his rights, ask him non-investigative questions—"will you speak to us? Do you understand your rights?"—and observe in response to those questions a "course of conduct indicating waiver." *Butler*, 441 U.S. at 373. The suspect, for example, could nod in response to questions about whether he will speak to the police. Or, of course, the suspect could simply begin speaking to the police about the crime. Either of these responses could "indicat[e] waiver," and both

would have occurred before interrogation began. It is not necessary to relocate the waiver process to the interrogation's interior to make sense of *Butler*.

For all of these reasons, the rule advocated by petitioner and her *amicus* contradicts this Court's precedents and would require an overhaul of many of the leading police interrogation resources. That approach should be rejected. The Sixth Circuit should be affirmed on the ground that Thompkins did not waive his *Miranda* rights before interrogation began—and therefore never validly waived them at all.

B. If "Implied Waiver" After Interrogation Begins Is Ever Permissible, It Must Occur Much More Quickly Than The Purported Waiver Here.

This Court can also affirm the Sixth Circuit on a narrower ground—namely, that even assuming *dubitante* that interrogation may begin without a waiver, the "clearly established" law of this Court, 28 U.S.C. § 2254(d), sets a threshold for valid waiver that the facts of this case do not even approach. *Miranda*'s concerns about the coercive nature of lengthy interrogation require that, if implied waiver is ever permissible, it can only be found where a suspect responds to the officers' *initial* investigative questions. By contrast, where a suspect inculpates himself only after hours of silence in the face of interrogation—the facts here—the government cannot carry its heavy burden to prove that the waiver was voluntary and not the product of the lengthy grilling.

1. Under *Miranda* and its progeny, "a heavy burden rests on the government to demonstrate that the

defendant knowingly and intelligently waived his privilege against self-incrimination." *Miranda*, 384 U.S. at 475; *accord Butler*, 441 U.S. at 373 ("[T]he prosecution's burden is great."). The *Miranda* Court explained that "[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." 384 U.S. at 475. But the Court also has made quite clear what *cannot* constitute a valid waiver. "[A] valid waiver will not be presumed simply from * * * the fact that a confession was in fact eventually obtained." *Id.* Likewise, a valid waiver will not be presumed "simply from the silence of the accused after warnings are given." *Id.*; *accord Butler*, 441 U.S. at 373 (reiterating that "mere silence is not enough"). The passage of time also undercuts any attempt by the government to demonstrate waiver: Given the compelling nature of custodial interrogation, "the fact of lengthy interrogation * * * before a statement is made is strong evidence that the accused did not validly waive his rights." *Miranda*, 384 U.S. at 476. "In these circumstances, the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so." *Id.*

The *Miranda* Court's empirical conclusions remain valid today. The vast majority of police officers are trained in interrogation techniques,[8] and leading training resources describe interrogation as an

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[8] *See* S. Kassin *et al.*, *Police Interviewing & Interrogation: A Self-Report Survey of Police Practices & Beliefs*, 31 Law & Hum. Behav. 381, 388 (2007) (Eighty-two percent of experienced investigators reported receiving specialized interview and interrogation training in recent survey).

accusatory process and teach officers how to "dominate" the interrogation session. *See, e.g.*, Inbau Treatise at 7-8. The treatises also instruct officers how to convince the suspect to inculpate himself using tried-and-true interrogatory "themes," *id.* at 232-303, including telling the suspect that the officers are only there to hear his side of the story[9] and suggesting that his alleged crime was committed in self-defense.[10] The *Miranda* Court described these very tactics in support of its conclusion that custodial interrogations contain inherently compelling pressures. *See* 384 U.S. at 451-52 (citing Inbau Treatise and discussing "self-defense" tactic). And the detectives in this case employed them to the letter: They dominated the interrogation, J.A. 17a; they repeatedly testified that they tried to get Thompkins to respond to "themes," *e.g.*, J.A. 13a-17a; they told Thompkins they just wanted to hear his side, J.A. 14a, 16a-17a; and they suggested that he may have acted to protect himself, J.A. 16a. As this case amply demonstrates, time has not eroded the wisdom of presuming that waivers obtained after "lengthy interrogation," *Miranda*, 384 U.S. at 476, are involuntary and invalid.

2. To be sure, the fact that "lengthy interrogation" before confession is inconsistent with a valid waiver does not by itself doom *all* implied waivers. A different situation is presented where a suspect begins discussing the crime in response to the interrogating officers' initial post-warning questions. In that circumstance (and assuming no "waiver first" rule)

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[9] *See* Inbau Treatise at 291; *accord* R. Leo, *Police Interrogation & American Justice* 129 (2008).

[10] *See* Inbau Treatise at 285.

the suspect's statements might constitute a valid waiver, because the "compelling influence" of "lengthy interrogation" has not yet set in.

No doubt that is why, as petitioner observes, a number of lower courts have held that suspects who acknowledge their rights and then quickly answer investigative questions have impliedly waived. Pet. Br. 26-27. Reflecting those holdings, police departments in some jurisdictions have embraced the strategic use of valid waivers: They teach their officers that "every prosecutor prefers an express waiver, but it is not always possible to obtain one," and that "[w]hether to seek an express waiver" accordingly "depends on the investigator's judgment as to whether the suspect will waive or not." C. Weisselberg, *Mourning Miranda*, 96 Cal. L. Rev. 1519, 1585 (2008).[11] And while "[t]here is no empirical evidence indicating the frequency" with which officers in the departments Professor Weisselberg studied resorted to implied waivers, "a 2004 training document from the Los Angeles County District Attorney's office states that while express waivers are preferred, a 'problem' is that 'most police do not use' them." *Id.* at 1586 (quoting Hyatt Seligman, *Miranda & More*, Los Angeles District Attorney's Office Training Division (2004)).

However, the fact that implied waiver practices appear to have gained a foothold in some places (*but see supra* at 11-12) hardly means the practice should have no limits. On the contrary, it only underscores the need for this Court to ensure that such practices—if accepted at all—conform to the basic princi-

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[11] Citing, *e.g.*, POST Telecourse, *Interrogation/Confessions: Legal Issues* (Aug. 1995).

ples of the Fifth Amendment. Without such limits, police can eviscerate *Miranda* by avoiding any discussion of waiver, launching straight into lengthy questioning, and relying on the compelling pressures of interrogation to produce an involuntary waiver they otherwise could not have obtained. Indeed, that is just what happened here.

This Court can solve the problem by holding that if an officer decides for strategic reasons to administer warnings and immediately begin questioning, a waiver may be implied only if the suspect responds to the officer's *initial* investigative questions.[12] If the suspect does not immediately respond—in other words, if the suspect remains silent or otherwise indicates that he does not wish to speak about the crime—there has been no waiver and the interrogation must cease. Finally, if the officer is unsure of the meaning of the suspect's response, the officer may elect to clarify by seeking an express waiver. Assuming no "waiver first" rule for present purposes, such a holding would be consistent with *Miranda* and its progeny. After all, if the "compelling influence" of "lengthy interrogation" has not yet taken hold, *Miranda*, 384 U.S. at 476, the *Miranda* Court's animating concern—that waiver will be coerced—is alleviated.

But that, of course, is not this case. Where, as here, a suspect maintains his silence for hours, only to succumb to sophisticated techniques that this Court has found to impart compelling pressures, the

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[12] Of course, the suspect's response would still have to allow for a clear inference of waiver; otherwise the government could not carry its burden. Responding to innocuous police questions unrelated to the crime is not enough. *See infra* at 20-22.

State cannot carry its "heavy burden" to prove a valid, voluntary waiver. There can be no conclusion but that the compelling influences of the interrogation finally forced Thompkins to speak.

3. The petitioner appears to advance two separate contrary arguments: first, that Thompkins waived his right to silence by sporadically making eye contact with, and offering one-word verbal responses to, his interrogators; and second, that Thompkins waived his rights when he inculpated himself at the very end of the interview. We address them in turn.

a. Thompkins very clearly did not waive his *Miranda* rights by dint of his "very limited verbal responses," J.A. 10a, prior to the inculpatory statements. The government's own testimony establishes that Thompkins was "uncommunicative," that he "sat there and listened to [the detectives'] speech," and that he "spent a lot of his time * * * simply holding his head looking down." J.A. 10a, 22a, 152a. While the detective testified that Thompkins occasionally offered a "yeah," "no," or "I don't know," J.A. 23a, the record contains no evidence that *any* of these responses came in reaction to an actual interrogation question—*e.g.*, a question "reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 301-302. On the contrary, the detective's other testimony—that his interrogation questions "didn't really [e]licit any sort of reaction," J.A. 152a, and that Thompkins' eventual inculpatory statement was "[t]he only thing" Thompkins said during the interrogation "relative to his involvement" in the crime, J.A. 10a—establishes that Thompkins' interjections could *not* have come in response to substantive interrogation questions. Likewise, any eye contact

Thompkins made was commanded by the detectives themselves. *See* J.A. 149a. And of course, the only verbal statements Detective Helgert could actually remember Thompkins making were that he "didn't want a peppermint" and that "the chair that he was sitting in was hard." J.A. 152a.

This evidence does not come close to carrying the government's "heavy burden" of proving that Thompkins intended to waive his right to silence. *Miranda*, 384 U.S. at 475. Thompkins' generally silent mien is not enough to establish a "clear[ ]" implication of waiver. *Butler*, 441 U.S. at 373. Were it otherwise, a police officer could always trick a suspect into waiving by asking mundane questions—"are you feeling OK?" "Are you comfortable?" "Would you like a peppermint?"—or by demanding that the suspect make eye contact. On the State's theory, once the suspect responds to the peppermint request and meets a detective's eyes, waiver may be presumed.

Moreover, any ambiguities about what Thompkins said stem from the detectives' own strategic choices. The detectives chose not to seek an express waiver, presumably because they did not think Thompkins would waive his rights. The detectives likewise chose not to record the interrogation session, even though they had planned it in advance and easily could have arranged to do so. J.A. 160a. The ambiguities that resulted from these choices must be resolved against the government given its burden to prove waiver.

Perhaps recognizing the weakness of her argument on this point, petitioner advances it only half-

heartedly.[13] Indeed, her brief never tries to explain why Thompkins' occasional "yeahs" and "nos" could amount to waiver; she instead retreats to the *habeas* standard and argues that clearly established law does not favor Thompkins because this Court has never examined the effect of a suspect's isolated verbalizations. Pet. Br. 26-28. But "AEDPA does not require * * * courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007) (quotation marks & citation omitted). "The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Id.* A holding that Thompkins' behavior amounted to waiver would unreasonably apply the "general standard" announced in *Miranda* and *Butler*.

b. Petitioner—this time joined by the Solicitor General—also advance a second waiver argument: Swinging for the fences, they contend that even if Thompkins were silent throughout the interrogation, his eventual inculpatory statements *themselves* supply the requisite waiver. *See* Pet. Br. 28, 34; U.S. Br. 23-31. This remarkable argument contradicts the clear holdings of both *Miranda* and its progeny.

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[13] Notably, the Solicitor General's brief *never* advances it. U.S. Br. 23-31. On the contrary, her brief appears to undermine the argument's factual premise and steer the Court away from any reliance on Thompkins' unexplained "yeahs" and "nos." *See id.* at 10 ("For much of the interview, *respondent was silent*, but when the police appealed to his religious beliefs, respondent answered a series of questions.") (emphasis added); *id.* at 25 (arguing that the only "relevant question" is whether Thompkins waived his rights when he inculpated himself at the interrogation's close).

If accepted, it would have the effect of nullifying *Miranda*'s waiver requirement in all but the exceptional case. After all, *Miranda* waiver cases would never be litigated if the suspect did not make an inculpatory statement—and yet under petitioner's formulation, an inculpatory statement (and proof that the suspect received and understood the warnings) is all that is required to prove that the waiver was valid.

i. The "confession equals waiver" argument is foreclosed several times over by *Miranda* itself. The *Miranda* Court (and the cases that followed) explained that a valid waiver cannot " 'be presumed simply from the silence of the accused after warnings are given *or simply from the fact that a confession was in fact eventually obtained.*' " *Butler*, 441 U.S. at 373 (quoting *Miranda*, 384 U.S. at 475) (emphasis added). *Miranda* also held that "any evidence that the accused was * * * cajoled into a waiver" renders the waiver involuntary, 384 U.S. at 476—a holding that cannot be reconciled with petitioner's argument because if confession equals waiver, then interrogation aimed at cajoling the suspect into *confessing* is also aimed at cajoling the suspect into *waiving*.

The rule espoused by petitioner and the Solicitor General flies in the face of these holdings. Under their rule, waiver would be established precisely from "the silence of the accused" and "the fact that a confession was in fact eventually obtained." *Butler*, 441 U.S. at 373. The Solicitor General's brief puts the conflict in stark relief. It argues: "Respondent *listened to police questions for a time*, without either invoking or waiving his rights, *but he ultimately decided to speak*. That course of conduct evidenced a

knowing, intelligent, and voluntary waiver of his Miranda rights[.]" U.S. Br. 7 (emphases added). That argument—which, it should be noted, is the lone contention the Solicitor General advances for reversal of the Sixth Circuit's waiver holding—simply cannot be reconciled with *Miranda* and its progeny.[14]

ii. In support of her newly minted rule, petitioner argues that Thompkins "indicated his desire to forego his rights"—and therefore waived them—because he knew that he could end the interview at any time but he eventually answered questions anyway. Pet. Br. 40. For this proposition petitioner relies on cases indicating that "[t]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." Pet. Br. 37 (quoting *Davis*, 512 U.S. at 460). According to petitioner, these cases compel the conclusion that so long as a suspect is "able to make a knowing decision about whether to exercise [his] rights," Pet. Br. 35, no more is required, and any subsequent inculpatory statement is automatically a valid waiver.

But this argument is doubly flawed. First, it favors only some elements of *Miranda* while ignoring others. The Court in *Miranda*—again—was concerned not just with warnings, but also with the "compelling influence" associated with custodial

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[14] It also is inconsistent with the lower-court cases (*see* Pet. Br. 26-27) approving implied waivers. As respondent explains in his merits brief (Br. 21-22), these cases all involve "a refusal to sign a waiver of rights form followed *shortly thereafter* by a confession." (emphasis added). Cases with those facts certainly do not suggest judicial approval of "waiver" by way of endless interrogation that finally triggers confession.

interrogation. *Miranda*, 384 U.S. at 476. That is precisely why it held that "the fact of lengthy interrogation * * * before a statement is made * * * is consistent with the conclusion that the compelling influence of the interrogation finally forced" the suspect into a waiver, and that such interrogation "is strong evidence that the accused did not validly waive his rights." *Id.*; *see supra* at 9-10. In the face of such "strong evidence" against valid waiver, the government cannot carry its "great" burden, *Butler*, 441 U.S. at 373, to demonstrate that the waiver was valid.

Second, petitioner's (and the Solicitor General's) approach has no stopping point. Under petitioner's view of things, a suspect could sit in complete silence for hours or days of interrogation, yet be held to have "voluntarily" waived his right to silence if and when he is eventually worn down and finally makes an inculpatory statement. Such a rule not only flies in the face of common sense; it also flouts *Miranda*'s observation about "the compelling influence of the interrogation"—not to mention *Miranda*'s command never to find waiver based on silence followed by confession.[15]

It is no answer to say the suspect could invoke his rights and stop such an interrogation. As an initial matter, an extended period of silence should be understood as just such an invocation. *See infra* at 26-32. But in any event, "[i]nvocation and waiver are entirely distinct inquiries, and the two must not be

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[15] By contrast, a rule that implied waiver may be found where the suspect is Mirandized and then responds to his interrogators' initial questions does not contradict these basic tenets of *Miranda*. *See supra* at 19.

blurred by merging them together." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984). It is black-letter law that the government must prove that a suspect first waived his *Miranda* rights, regardless of whether he later invoked them.

II. THOMPKINS INVOKED HIS RIGHT BY REMAINING SILENT IN THE FACE OF INVESTIGATIVE QUESTIONS.

The Sixth Circuit determined that Thompkins did not waive his right to silence, and it therefore did not reach the separate question whether he affirmatively *invoked* that right, such that the detectives should have ceased their questioning. This Court can and should follow that sensible approach. However, if it reaches the question of invocation, the Court should hold that Thompkins invoked his right to silence by refusing, for nearly three hours of interrogation, to say anything at all about the crime of which he was accused.

A. Thompkins' Silence Was Sufficient On These Facts To Invoke The Right To Silence.

1. This Court explained in *Miranda*, and has since reaffirmed, that if a suspect "*indicates in any manner*, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-474 (emphasis added); *accord Moran* v. *Burbine*, 475 U.S. 412, 420 (1986) (same); *Fare*, 442 U.S. at 709 (same). "Indication" is a broad concept, denoting "something (as a signal, sign, suggestion) that serves to indicate." *Webster's Third New International Dictionary* 1150 (1986).

Plainly, one "sign" a suspect can offer that he "wishes to remain silent" is to do just that—remain silent.

Indeed, this is the only reasonable interpretation of the "indicates in any manner" standard. The reasonable individual, told that he has the right to remain silent, is going to assume that by remaining silent during interrogation he has invoked the right. It would be curious, to say the least, if he were required to speak to demonstrate that he wishes to remain silent. This Court understood as much when, in *Miranda*, it clearly established that invoking the right to silence only requires an "indica[tion]" of that desire, 384 U.S. at 473, as opposed to, say, a "statement." Thompkins' categorical refusal to answer investigative questions over the course of several hours of questioning was just such an "indicat[ion.]"

2. The Solicitor General argues that "this case does not present the question of whether a suspect who remains mute invokes his right to silence * * * because respondent did not remain mute in the face of police questioning. Rather, he 'continued to talk' with the officers, albeit 'sporadically.'" U.S. Br. 18 (quoting J.A. 9a). But that is an inappropriately selective description of the facts. The record shows that while Thompkins may have said "yeah" or "no" sporadically, he did not do so in response to questions about his alleged crime. *See supra* at 20-21. He therefore exercised his right not to "respond[ ] to interrogation." *Solem* v. *Stumes*, 465 U.S. 638, 645 n.5 (1984) (quoting *Johnson* v. *New Jersey*, 384 U.S. 719, 729-730 (1966)); *see Innis*, 466 U.S. at 301-302 (defining interrogation as statements "reasonably likely to elicit an incriminating response"). By offering cursory responses to non-substantive ques-

tions while remaining silent as to investigative ones, Thompkins offered the requisite sign that he wished to invoke his rights.

B. The Court Should Reject Petitioner's Request For A Two-Pronged Expansion Of The *Davis* Rule.

Perhaps recognizing the breadth of *Miranda*'s "indicate[ ] in any manner" invocation standard, petitioner and the Solicitor General ask the Court to extend the holding of *Davis* v. *United States*, *supra*, to this case. The Court should reject the invitation.

1. In *Davis*, the Court held that if a suspect who has waived the right to counsel later wishes to invoke that right, he must do so "unambiguously," by "articulating his desire * * * sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." 512 U.S. at 459. *Davis*, however, differed from this case in two fundamental ways: first, it involved a suspect who had already waived his right in the first instance; and second, it involved the right to counsel, not the right to silence.

a. The defendant in *Davis* "waived his rights to remain silent and to counsel, both orally and in writing," and then some 90 minutes later—well into the interrogation—said: "Maybe I should talk to a lawyer." 512 U.S. at 455. The *Davis* Court made clear that prior waiver was central to its rationale:

> A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although [our cases] provide[ ] an additional protection—if a

> suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.

Id. at 460-461; *see also id.* at 461 ("We therefore hold that, *after a knowing and voluntary waiver* of the *Miranda* rights, law enforcement officers may *continue* questioning until and unless the suspect clearly requests an attorney.") (emphases added).

That holding makes sense. Where a suspect has expressly said he does not want counsel and is willing to talk, police are entitled to interrogate him. The *Davis* rule thus merely requires clarity for a suspect to resurrect a privilege he has already surrendered. But cases where there has been no waiver stand in a different stead for two reasons. First, where the suspect has not yet waived his right to silence, the police should not be interrogating him at all. *See supra* at 8-12. The opportunity for ambiguity accordingly should never arise, and *Davis* has no application. In the words of *Davis,* police cannot "continue" interrogating a suspect if the interrogation has never begun.

Second, the fact of the matter is that many suspects, due to their own educational and linguistic limitations and the coercive nature of interrogation, simply will not have the wherewithal to forcefully present an oral invocation of their *Miranda* rights. *See, e.g.*, M. Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, 17 William & Mary Bill of Rights J. 773, 774 (2009) (collecting scholarship finding that "people use hedges * * * as a means of expressing politeness or being deferential."). The Court has recognized as much, observing in *Davis* that "some

suspects * * * because of fear, intimidation, lack of linguistic skills, or a variety of other reasons * * * will not clearly articulate their right to counsel although they actually want to have a lawyer present." 512 U.S. at 460. The *Davis* Court declined to soften its rule in response to that reality—but it did so on the rationale that a suspect who has "knowingly and voluntarily waive[d] his right to counsel" must "affirmatively invoke" that right to halt the questioning he had previously authorized. *Id.* That rationale does not apply in the pre-waiver context.

b. *Davis* involved not the right to remain silent, but the right to counsel. The Court there held that a suspect must invoke the right to counsel "unambiguously," *Davis*, 512 U.S. at 459, and that he must do so by means of an oral "statement." *Id.* If the first requirement applies to the right to silence, Thompkins meets it. After all, he sat for nearly three hours, head down, and apparently refused to answer any questions about the case. There is nothing ambiguous about that signal.

Davis' second requirement—an oral invocation "statement" requesting counsel—makes little sense in the right-to-silence context and should not be extended to that context. Such a "statement" is required with respect to the right to counsel simply because there is no other way to invoke that right. It is difficult to imagine how a suspect could signal that he wants to invoke his right to a lawyer without saying, "I want a lawyer" (or some variant). But that is not the case in the context of silence. As discussed above, a suspect can very easily "indicate[ ]" that he wishes to remain silent by remaining silent. There is

no reason in law or logic to require that the suspect speak in order not to speak.[16]

Petitioner and her *amicus* argue that there *is* a reason for such a requirement—namely, it makes it easy for the police to recognize when a suspect has invoked his rights. *See* U.S. Br. 13. But that concern for ease of application is overblown in this instance, because police could just as easily understand and apply the rule that follows from *Miranda*'s holding: If a suspect does not respond to initial interrogation, he has invoked his right to silence "in any manner."[17] And if the police are not sure whether the suspect is invoking his rights through silence, they can certainly ask.[18]

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[16] Petitioner correctly notes that "[m]any circuits" have applied *Davis* to the right to silence. Pet Br. 44. But most appear to have done so without examining the differences between the rights to counsel and silence. *See, e.g., Medina* v. *Singletary*, 59 F.3d 1095, 1100-01 (11th Cir. 1995) (applying *Davis* to right to remain silent without examination).

[17] Of course, there is another bright-line rule that kicks in earlier in the process: The defendant cannot be interrogated unless and until he waives his right to silence. *See supra* at 8-12. Our discussion of the proper invocation rule assumes that the suspect in question has previously waived his rights.

[18] The *Davis* Court observed that clarifying questions are "good police practice." 512 U.S. at 461. And while it declined to *require* police to ask such questions where the suspect's invocation of the right to counsel is facially "ambiguous," silence in the context of the right to silence admits of no ambiguity.

III. THE RULES PETITIONER ADVOCATES CONTRADICT POLICE PRACTICES ON THE GROUND.

Petitioner and the Solicitor General present their proposed rules as inescapably necessary to effective law enforcement. The Solicitor General, for example, argues that "presuming an invocation after some initial period of silence" would "create an impossible situation for the police, who would have no clear guidelines on their conduct when a suspect initially says nothing but appears receptive to listening." U.S. Br. 18-19. But these high-volume assertions are belied by actual police practice. In fact, current police training manuals and videos reveal that police are taught *not* to engage in prolonged interrogation of a suspect who fails to respond to initial questioning.

1. The available police training materials, state and federal, overwhelmingly suggest that what the detectives did in this case—namely, keep after Thompkins in the face of his extended silence—departed substantially from standard police practice. The widely-used Inbau Treatise, for example, teaches that "[a] custodial suspect who * * * indicates (even by silence itself after receiving the *Miranda* warnings) that he is unwilling to be questioned has obviously exercised his constitutional privilege against self-incrimination." Inbau Treatise at 498. Likewise, a training video created by the Federal Law Enforcement Training Center—which "is responsible for delivering * * * legal training to over 85 federal law enforcement agencies," including the Secret Service; the Bureau of Alcohol, Tobacco, and Fire-

arms; and the Internal Revenue Service[19]—offers the following training to federal agents: *"[I]f the suspect just stays quiet * * * the police should go away for at least two hours.* After two hours, they can then come back, re-advise him of his rights and try again." Federal Law Enforcement Training Center, *Self-Incrimination: Miranda Waivers and Invocations PODCAST* (emphasis added).[20]

The training offered to police in California is to the same effect. The state has an organ, the California Commission on Peace Officer Standards and Training ("POST"), that "sets standards for basic and advanced police training" and "certifies courses for law enforcement officers." *Mourning Miranda, supra*, at 1524. A POST training video on *Miranda* invocation teaches the state's law enforcement officials that even after a valid waiver has been obtained, "lengthy periods of silence" constitute an "invocation of the right to silence." POST, *The Case Law Today: Miranda Invocation of Right to Silence* (July 2009).[21] And a sourcebook for California law enforcement officers offers similar instruction with respect to waiver: It teaches that "silence * * * followed by grudging responses to leading questions"

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[19] Federal Law Enforcement Training Center Website, *available at* http://www.fletc.gov/training/programs/legal-division.

[20] *Transcript available at* http://www.fletc.gov/training/programs/legal-division/podcasts/fletc-legal-division-self-incrimination-roadmap-podcasts/self-incrimination-roadmap-podcasts-transcripts/miranda-waiver-podcast-transcript.html/?searchterm=interrogation.

[21] Counsel for *amici* have copies of this and the other video broadcasts mentioned in this brief on file. Copies of these videos will be made available to the Court upon request.

would be unlikely to establish a valid implied waiver of the right to silence. California Department of Justice, *California Peace Officers Legal Sourcebook* § 7.24b (Rev. Sept. 2008).

Current law enforcement practice, in short, undermines any claimed need for the petitioner's proposed rules.[22] It also suggests that, if adopted, those rules would subvert the settled practices of the nation's police.

* * *

In the final analysis, petitioner and the Solicitor General seek from this Court two new rules: first, that confession during lengthy interrogation suffices to prove waiver of the right to remain silent, and second, that a suspect must offer a clear and unambiguous *oral* invocation in order to cut off questioning. The combination of these two rules would dramatically reshape the law of custodial interrogation by forcing the defendant to prove that he invoked his rights, instead of forcing the government to prove that he waived them. The Court should decline this invitation to upset the balance *Miranda* carefully created.

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[22] To the extent the petitioner and the Solicitor General press such a need as the reason to change settled law, they have offered no evidentiary support. The Solicitor General's brief presents mere rhetoric; there is no empirical evidence of which we are aware—and the brief offers none—suggesting that the current rules pose any problems for effective law enforcement.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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