No. 15-1086

In the Supreme Court of the United States

JOSEPH H.,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF AMICUS CURIAE HUMAN RIGHTS WATCH IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Human Rights Watch ("HRW") is a non-profit, non-governmental organization established in 1978. HRW investigates and reports on violations of fundamental human rights in over 70 countries worldwide, with the goal of securing respect for the rights of all persons. It is the largest international human-rights organization based in the United States. HRW does extensive work on children's rights, including advocating for the rights of children in the U.S. criminal justice system. It has filed amicus briefs before many judicial bodies, including this Court, the U.S. Courts of Appeals, and various international tribunals.[1]

SUMMARY OF ARGUMENT

In his petition for writ of certiorari, Joseph H. ("Joseph" or "Petitioner") asks this Court to review the California courts' conclusion that he voluntarily, knowingly, and intelligently waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Joseph's petition raises not only serious questions about the validity of his waiver and therefore of his conviction, but also important constitutional issues that have

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[1] Pursuant to Rule 37.6, *Amicus* hereby states no counsel for any party authored the brief in whole or in part and no person or entity, other than *Amicus*, its members, or its counsels, made any monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the requisite consent letters have been filed with the Clerk of this Court.

import far beyond his particular case. Each year, hundreds of thousands of children are arrested in the United States.[2] Indeed, nearly twenty percent of American children will be arrested before they turn eighteen.[3] Many of these children, like Joseph, are arrested for serious crimes that carry significant consequences; and many, like Joseph, may be subjected to custodial questioning and faced with complex legal decisions with potentially devastating consequences. As Joseph explains in his Petition, modern scientific data show a scientific consensus that these children are incapable of exercising judgment and understanding the consequences of their actions in the same way as adults. *See* Petition at 1-2, 20-24 (citing articles articulating a scientific consensus regarding children's diminished cognitive capacity compared to adults). In his Petition, Joseph cites substantial scientific authority demonstrating that, as a result of their incomplete cognitive development, children "manifest[] significantly inferior comprehension of the meaning and importance of the *Miranda* warnings," *id.* at 21, and lack the capacity to understand the "tactical and strategic ramifications of relinquishing rights," such as the rights guaranteed by *Miranda*, *id.* at 21-22.

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[2] *See, e.g.*, United States Department of Justice, Federal Bureau of Investigation, Crime in the United States, 2014, Table 38, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-38 (last visited Mar. 23, 2016).

[3] Robert Brame, et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 Pediatrics 21, 25 (2012).

Indeed, this Court has recognized the scientific data showing children's diminished cognitive capacities in other areas of criminal law. *See, e.g.*, *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011); *Miller v. Alabama*, 132 S. Ct. 2455, 2464, 2468 (2012); *Graham v. Florida*, 560 U.S. 48, 74 (2010); *Roper v. Simmons*, 543 U.S. 551, 568 (2005)). Yet this Court has never in the modern era considered how this scientific data should apply to a child's waiver of his *Miranda* rights, and a child's *Miranda* waiver is still considered under the same test as that used for adults.

Legislation and judicial decisions at the state level reflect some recognition of children's lack of capacity, by themselves, to knowingly and voluntarily waive their *Miranda* rights. For example, some states bar the admission of confessions by children under a certain age, and several states require the presence or advice of a parent, guardian, or attorney before a child may waive his *Miranda* rights. But too few states have such safeguards and too many children fall outside their protections. Moreover, at the same time that some states are moving toward greater protection for children facing custodial interrogation, others are moving in the opposite direction, repealing protections that previously regulated the custodial interrogation of children or severely limiting the effect of those protections that remain in place. The result is an inconsistent and inadequate morass of laws, in which the vast majority of children do not receive the special protections that scientific data show they need. Too often the youngest of adolescents are convicted for serious crimes based on statements made after

waiving a right they were too young to understand. *See, e.g.*, *State v. Doe*, 50 P.3d 1014, 1019 (Idaho 2002) (12-year-old child convicted of aggravated battery based on purported waiver); *W.M. v. State*, 585 So. 2d 979, 981 (Fla. Dist. Ct. App. 1991) (10-year-old child convicted of burglary based on purported waiver). This case presents an opportunity for this Court to announce a rule that will resolve this inconsistency and protect the Fifth Amendment rights of all children across the nation, regardless of the state in which they happen to live. HRW respectfully urges this Court to seize that opportunity by granting review.

ARGUMENT

I. This Case Affects the Rights of Hundreds of Thousands of Children Arrested Every Year

In 2011, the year Joseph was arrested, more than a million children under the age of eighteen were arrested in the United States.[4] A striking number—520,919—of those children were under the age of sixteen[5]—those who are particularly

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[4] United States Department of Justice, Federal Bureau of Investigation, Crime in the United States, 2011, Table 38, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-38 (last visited Mar. 23, 2016). The Bureau for Justice Statistics ("BJS"), which also releases nationwide arrest statistics, uses a formula that results in slightly higher estimates of the number of arrests across all categories. For consistency, this brief will rely on the statistics in the FBI's annual report, rather than the BJS statistics.

[5] *Id.*

vulnerable to the pressures of custodial interrogation. Of those, 213,055 were fifteen, 233,431 were thirteen to fourteen, 67,193 were ten to twelve, and 7,240 were not even ten years old.[6] Moreover, many of these children faced prosecution for serious crimes that carried lengthy sentences. In 2011, more than 300,000 children were arrested for crimes the FBI designates as the most serious: homicide, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson (what the FBI identifies as "Part I crimes").[7] Nearly half of those children were under sixteen and tens of thousands were under fifteen.[8]

Each year since, hundreds of thousands of children have again been arrested, potentially subject to custodial interrogation, and faced with the complex and confusing legal decision that confronted Joseph: Law enforcement agencies arrested 1,020,334 children in 2012;[9] 875,262 in 2013;[10] and 804,104 in

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6 *Id.*

7 *Id.*

8 *Id.*

9 United States Department of Justice, Federal Bureau of Investigation, Crime in the United States, 2012, Table 38, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/38tabledatadecoverviewpdf (last visited Mar. 23, 2016).

10 United States Department of Justice, Federal Bureau of Investigation, Crime in the United States, 2013, Table 38, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-38 (last visited Mar. 23, 2016).

2014, the last year for which the FBI has released data.[11] As in 2011, hundreds of thousands of these children were in the youngest and most vulnerable age groups. In 2014, for example, law enforcement agencies arrested 151,543 fifteen-year-olds, 169,380 thirteen-to-fourteen year-olds, 48,376 ten-to-twelve year olds, and 6,458 children under ten.[12] And, as in 2011, hundreds of thousands of these children were arrested for the most serious crimes that carry the most severe consequences. In 2014, for example, 226,944 children under eighteen were arrested for Part I crimes, and more than 100,000 of those were fifteen or under.[13]

These statistics show the stark reality that hundreds of thousands of children each year are affected by this nation's *Miranda* waiver doctrine. Thus, the question raised in this appeal affects not only Joseph but hundreds of thousands of children like him—*every year*. But the yearly figures tell only part of the story. Recent research shows that nearly twenty percent of Americans will be arrested before they turn eighteen.[14] That is, more than 1 in 6 children will be arrested and potentially faced with

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[11] United States Department of Justice, Federal Bureau of Investigation, Crime in the United States, 2014, Table 38, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-38 (last visited Mar. 23, 2016).

[12] *Id.*

[13] *Id.*

[14] Brame, *supra* note 3, at 25 (estimated 17.8 percent of children will be arrested before they turn 18).

custodial interrogation before the age of eighteen. The chance that a child will be arrested remains high among younger age groups as well: About 1 in 8 children will be arrested before they turn seventeen and more than 1 in 10 children will be arrested before they turn sixteen.[15] The sheer number of children arrested and potentially subject to custodial questioning provides a compelling reason for this Court to grant review and announce a prophylactic rule that will protect the Fifth Amendment rights of these children. This case raises important issues with far-reaching consequences for hundreds of thousands of children and warrants review by this Court.

II. Existing Laws Fail to Safeguard Children's *Miranda* Rights

State-level efforts to protect the rights of these hundreds of thousands of children have resulted in an inconsistent patchwork of laws that fail to adequately protect children's Fifth Amendment rights. While some states have made commendable efforts to enact safeguards for children subject to custodial questioning, too few states have done so and, in many cases, the laws are too limited or weak to truly protect children against involuntary waiver of their Fifth Amendment rights. More troubling, some state courts have reversed laws that had offered much needed protections to children or have undermined legislative efforts to enforce prophylactic measures by limiting the reach of those measures or

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[15] *Id.*

the available remedies. As a result, state laws governing custodial interrogations protect only a small fraction of the hundreds of thousands of children arrested each year. Indeed, by reason of age or geography, the majority of children do not receive any special safeguards to protect them against involuntary waiver of their Fifth Amendment rights, despite scientific consensus demonstrating that such protections are necessary.

To date, only a handful of states have enacted specific statutes regulating custodial interrogation of children. Seventeen states have specific statutes regulating in some form the custodial interrogation of children. The remaining thirty-three states and the District of Columbia have no specific regulations and instead use the same totality-of-the-circumstances test that applies to adults. These thirty-four jurisdictions include many of the most populous states in the nation, such as New York, California, and Florida, and are home to more than two-thirds of the U.S. population.[16] But, more importantly, over 75 percent of the children arrested each year are arrested in these jurisdictions. In 2014, for example, 613,245 of the 804,104 children arrested—76.2 percent—were arrested in these thirty-four jurisdictions.[17] Statistics from previous years are

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[16] *See* Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2015, available at https://www.census.gov/popest/data/state/totals/2015/index.html (last visited Mar. 23, 2016).

[17] United States Department of Justice, Federal Bureau of Investigation, Crime in the United States, 2014, Table 69, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/

(footnote continued)

similar.[18] Thus, most children who are arrested each year—and the majority of all children in the country—live in jurisdictions where they receive no special protections from the involuntary waiver of their Fifth Amendment rights.

What is more, states that have enacted legislation aimed at protecting children's Fifth Amendment rights have reached different conclusions about the age at which children need such protections and what prophylactic measures are appropriate. A handful of states offer legislative protections to all children under the age of eighteen, drawing no lines between children of different ages. *See, e.g.*, Colo. Rev. Stat. § 19-2-511 (requiring parental presence for all children under eighteen); Ind. Code § 31-32-5-1 (parental consent required for all children under

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crime-in-the-u.s.-2014/tables/table-69 (last visited Mar. 23, 2016).

[18] *See* United States Department of Justice, Federal Bureau of Investigation, Crime in the United States, 2013, Table 69, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-69/table_69_arrest_by_state_2013.xls (last visited Mar. 23, 2016) (76.1 percent of arrests occurred in these thirty-four jurisdictions); United States Department of Justice, Federal Bureau of Investigation, Crime in the United States, 2012, Table 69, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/69tabledatadecpdf (last visited Mar. 23, 2016) (72.1 percent); United States Department of Justice, Federal Bureau of Investigation, Crime in the United States, 2011, Table 69, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table_69_arrest_by_state_2011.xls (last visited Mar. 23, 2016) (74.4 percent).

eighteen). Most state statutes dealing with custodial interrogation of children, however, draw lines between children of different ages, offering protections only to the youngest of adolescents and pre-adolescents. Further, even these lines are drawn differently from state to state, as states have reached different conclusions regarding the age at which to apply such protections.

New Mexico, for example, has established one of the strictest prohibitions against the admission of juvenile statements, forbidding the introduction of confessions, statements, or admissions by children under the age of thirteen and establishing a rebuttable presumption that any confession, statement, or admission made by a child aged thirteen or fourteen to a person in a position of authority is inadmissible. N.M. Stat. Ann. § 32A-2-14(F). But fifteen, sixteen, and seventeen-year-olds receive no specific protections. Several states have enacted statutes requiring the presence of a parent, guardian, or attorney during a custodial interrogation or mandating that children of certain ages consult with a parent or attorney before waiving their *Miranda* rights, but most of those statutes apply only to some children. Illinois, for example, provides that children under thirteen who are charged with certain crimes must be represented by counsel during the entire custodial interrogation, but it provides no specific protections to children thirteen and older. 705 Ill. Comp. Stat. 405/5-170. Connecticut, too, provides that statements by children under sixteen are inadmissible unless made in the presence of a parent, but provides no protections to children over sixteen. Conn. Gen. Stat. § 46b-137(a).

The inconsistency in these state efforts alone provides sufficient reason for this Court to grant review. But even more troubling than the inconsistency among state laws are the trend by some state courts to undermine or reverse Fifth Amendment protections for children and the fact that thirty-four states have no special regulations whatsoever. In several states that have regulated the custodial interrogation of juveniles, state courts have seriously blunted the laws' effectiveness by limiting their application or the remedies available when they are violated. A Connecticut statute, for example, provides that a statement by a child under sixteen is inadmissible in delinquency proceedings unless made in the presence of a parent, and statements by children sixteen and seventeen are inadmissible in such proceedings unless efforts have been made to reach the child's parent. Conn. Gen. Stat. § 46b-137(a)-(b). But the Connecticut Supreme Court has determined that this rule applies only to children tried in juvenile court and not to children who are prosecuted as adults in criminal court. *See State v. Ledbetter*, 818 A.2d 1, 17-18 (Conn. 2003). As a result, children tried in adult criminal court receive no special protections during custodial interrogation; they do not even receive the same protections as children of the same age who are prosecuted in juvenile court, despite the state legislature's recognition that children need these additional protections and despite the fact that these children face even more severe consequences for an uninformed *Miranda* waiver. Moreover, whether a child is tried in adult criminal court is based on considerations unrelated to the concerns underlying *Miranda*. Under Connecticut law, a child's case must

be automatically transferred from the juvenile docket to the adult criminal docket if the child is at least fifteen years old and is charged with certain crimes. Conn. Gen. Stat. § 46b-127. Thus, a child who is charged with one crime will be automatically transferred to adult criminal court—where the special rules regarding custodial interrogation of minors will not apply—while another child of the same age who is charged with a different crime will remain in juvenile court and receive the statutory protections. The degree to which a child's Fifth Amendment right is protected should not turn on the crime for which he is charged. Indeed, an adult's right to exercise his Fifth Amendment rights does not turn on the crime for which he is charged, and the Court has never drawn such a line in its *Miranda* jurisprudence.

In other states, courts have undermined legislators' efforts to provide additional protections for children by declining to provide any meaningful remedy for violations of statutes involving children's Fifth Amendment rights. For example, a New York statute provides that a parent must be notified when a child is taken into custody, *see* N.Y. Fam. Ct. Act § 305.2, but the New York Court of Appeals has held that violation of this prescription does not render a child's statement inadmissible and is only a factor to be considered in determining whether the child's waiver is voluntary. *In re Jimmy D.*, 938 N.E.2d 970, 973 (N.Y. 2010). Courts in Kentucky, Michigan, Missouri, and Nevada have reached similar conclusions about statutory protections. *See Shepherd v. Commonwealth,* 251 S.W.3d 309, 319-20 (Ky. 2008) (holding that a violation of a state statute

regulating the circumstances under which a child may be held in custody does not render inadmissible statements made while the child is in custody); *Ford v. State*, 138 P.3d 500, 504-05 (Nev. 2006) (holding that a statute requiring parental notification when a child is taken into custody does not prevent law enforcement from interrogating a child without notifying the parent and offers "no remedy" when officers conduct such an interrogation); *People v. Hall*, 643 N.W.2d 253, 266-67 (Mich. 2002) (holding that statements made in violation of statute governing the arrest, interrogation, and custody of juveniles are not rendered inadmissible by virtue of the violation); *State v. Barnaby*, 950 S.W.2d 1, 3 (Mo. Ct. App. 1997) (holding that statements made in violation of a statute providing that children have a right to have a parent present during questioning did not render statements inadmissible but was a factor in the totality-of-the-circumstances test for voluntariness).

Finally, some courts have gone further and eliminated previously existing protections altogether, at the very time that a scientific consensus has emerged that such protections are necessary to protect children's Fifth Amendment rights. For example, courts in both Louisiana and Pennsylvania have reversed rules that had provided important protections for children's Fifth Amendment rights. From 1978 through 1998, Louisiana law required that a child's *Miranda* waiver was effective only if made after the child had consulted with a parent or attorney. *See State v. Fernandez*, 712 So. 2d 485, 489-90 (La. 1998) (explaining the rule announced in *State in the Interest of Dino*, 359 So. 2d 586 (La.

1978)). But, in 1998, the Louisiana Supreme Court reversed that rule, eliminating the special protections it had provided to children and adopting a totality-of-the-circumstances test. *Id.* at 490. In 1977, the Pennsylvania Supreme Court introduced a rule prohibiting the admission of statements by children unless they were made after the child had an opportunity to consult with an attorney, parent, or interested adult. *Commonwealth v. Smith*, 372 A.2d 797, 800 (Pa. 1977). Over the next several years, the state courts nullified that protection, first by reducing the prohibition to a rebuttable presumption, *Commonwealth v. Christmas*, 465 A.2d 989, 992 (Pa. 1983), and then eliminating the requirement altogether, *Commonwealth v. Williams*, 475 A.2d 1283, 1288 (Pa. 1984).

The picture that emerges from this survey of state laws is of a patchwork of inconsistent, inadequate, and unpredictable rules that cries out for guidance from this Court. Those states that have enacted specific measures aimed at protecting children's Fifth Amendment rights have drawn different conclusions about the age at which such measures are required and the type of prophylactic measures that are necessary. And, at the same time that scientific evidence has conclusively demonstrated the need for such prophylactic measures, some states are reversing or limiting legislative or common-law protections. This Court, as the interpreter of the Constitution, should not leave to the states decisions of such constitutional import as the protections offered by the Fifth Amendment, especially when, as here, state laws are failing to adequately protect children's rights. *See Obergefell v.*

Hodges, 135 S. Ct. 2584, 2598 (2015) (recognizing the Court's duty to step in when the democratic process abridges individual's Constitutional rights); *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

But nothing shows the need for guidance from the Supreme Court more than the many examples from states across the country in which courts have found that children as young as ten, eleven, and twelve have intelligently, knowingly, and voluntarily waived their Fifth Amendment rights and have then convicted these young children for serious crimes based on statements they made after the purported waiver. *See, e.g.*, *In re L.A.W.*, 226 P.3d 60, 66 (Or. Ct. App. 2010) (12-year-old); *State v. Doe*, 50 P.3d 1014, 1019 (Idaho 2002) (12-year-old); *In re Goins*, 738 N.E.2d 385, 389-90 (Ohio Ct. App. 1999) (11-year-old); *People v. Abraham*, 599 N.W.2d 736, 652 (Mich. Ct. App. 1999) (11-year-old); *Ingram v. State*, 918 S.W.2d 724, 728 (Ark. Ct. App. 1996) (12-year-old); *W.M. v. State*, 585 So. 2d 979, 981 (Fla. Dist. Ct. App. 1991) (10-year-old). These cases should be anomalies, but they are not. *Amicus* could fill an entire brief with citations to such cases. These cases are contrary to modern scientific data regarding adolescent's brain development and, like Joseph's story, show the tragic

result of the current state of the *Miranda* doctrine as it applies to children. That these cases exist—that existing doctrine permits so many very young children to routinely waive their Fifth Amendment rights, despite scientific consensus that they are not capable of making such decisions knowingly and voluntarily—should persuade this Court that a specific prophylactic rule protecting children subject to custodial interrogation is necessary. Scientific data supports, at a minimum, a rule requiring that a child consult with an attorney before waiving his Fifth Amendment rights. *See* Petition at 24-25 (citing scholarship on children's need for guidance when waiving their Fifth Amendment rights and noting that "many commentators argue that only a mandatory appointment of an attorney can supply the required safeguards"). Modern scientific data would also support other prophylactic measures, such as the presence of an attorney during the entire custodial interrogation or a complete exclusion of children's custodial statements. The Court need not decide now what form a prophylactic rule would take. But the Court should decide now to grant review and announce a rule that will ensure that all children nationwide are adequately protected against involuntary waiver of their Fifth Amendment rights and to prevent states from further dismantling such protections.

CONCLUSION

For the reasons discussed above, *Amicus* HRW respectfully requests that this Court grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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