STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NUMBER PEN-21-256

STATE OF MAINE,
APPELLEE

v.

DERRIC MCLAIN,
APPELLANT.

ON APPEAL FROM THE PENOBSCOT COUNTY UNIFIED CRIMINAL DOCKET

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF MAINE IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Maine ("ACLU of Maine") is a nonprofit, nonpartisan organization founded in 1968 to protect and advance the civil rights and civil liberties of all Mainers. ACLU of Maine strives to protect and defend the rights secured by the Maine and United States Constitutions, including the rights guaranteed to people in all stages of the criminal legal system.

ACLU of Maine actively works to safeguard the constitutional rights of individuals accused in criminal cases. For example, ACLU of Maine is currently lead counsel in *Robbins, et al. v. MCILS, et al.*, No. KENSC-CV-22-54, a class-action lawsuit seeking to ensure effective assistance of counsel under the Sixth Amendment for indigent criminal defendants in Maine. ACLU of Maine is also amicus curiae before this Court in the matter of *Dennis Winchester v. State of Maine,* Dkt. No. Aro-21-312, which concerns the guarantee of a speedy trial under the Maine and federal constitutions.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus Curiae adopts the Statement of Facts and Procedural History as set forth in the Brief of Appellant.

STATEMENT OF THE ISSUES

The Court has invited amicus curiae briefing on the following questions:

1. Does Maine law, as opposed to federal law, require that the accused be notified of his or her right to counsel, and that it be waived, before being interrogated in a custodial setting?
2. If the answer to question #1 is yes, is this duty to notify the accused of the right to counsel required under article I, section 6 or any other provision of the Maine Constitution?
3. If a warning is provided, and the accused then invokes his or her right to counsel but does so ambiguously, under Maine law may the authorities continue to question the person or must they stop all questioning except to clarify whether the accused is unequivocally waiving or invoking the right to counsel?

SUMMARY OF THE ARGUMENT

Miranda warnings are designed to protect critical rights in an inherently unfair setting: police custody. The vast majority of police officers are trained in interrogation techniques, which teach officers how to "dominate" the interrogation session. *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); Inbau et al., Criminal Interrogation & Confessions, 491 (4th ed. 2001). This training includes techniques for convincing a suspect to inculpate himself, such as telling the suspect that the officers are only there to hear their side of the story and suggesting that any alleged crime was committed in self-defense. *See* Criminal Interrogation & Confessions at 285.

In contrast, people on the receiving end of these techniques are likely to be less educated than members of the general population. *See* Charles D. Weisselberg, *Mourning Miranda*, 96 Calif. L. Rev. 1519, 1569 (2008) (observing that, in a 2002 Bureau of Justice Statistics survey, 12.3% of the jail population had not gone beyond the 8th grade in schooling, and 31.6% did not have a high school diploma). And, these individuals are significantly more likely to have a cognitive disability (19.5% of state and federal prisoners) than members of the population at large (4.8%). *See* Bureau of Justice Statistics, U.S. Department of Justice, Disabilities Among Prison and Jail Inmates 2011–12 tbl.1 (2015), *available at* https://bjs.ojp.gov/content/pub/pdf/dpji1112.pdf.

Important constitutional rights exist to provide balance in this setting, but those rights are only meaningful if people understand them and are able to exercise

them. In this context, this Court is called upon to evaluate whether the Maine Constitution requires greater safeguarding of the rights of individuals than current federal constitutional jurisprudence.

Whenever a party raises arguments that sound in both state and federal constitutional law, this Court first examines the merits of the state constitutional claim, "independently of the federal constitutional claim," *State v. Athayde*, 2022 ME 41, ¶ 20, 277 A.3d 387, to avoid unnecessary federal rulings and give primacy to the Maine Constitution as the "primary protector of the fundamental liberties of Maine people since statehood was achieved." *State v. Larrivee*, 479 A.2d 347, 349 (Me. 1984).[1] In analyzing the Maine Constitution, this Court considers the interpretations of other courts (including the United States Supreme Court) only to the extent that such interpretations are persuasive. *State v. Reeves*, 2022 ME 10, ¶ 41, 268 A.3d 281.

When it comes to the fundamental protection of the rights to counsel and against compelled self-incrimination, interpretations of other courts are only persuasive when they are in accord with Maine's historic precedents and deep commitment to principles of autonomy and freedom from coercion. *See, e.g., State v. Collins*, 297 A.2d 620, 626 (Me. 1972). The analyses from the highest courts of a number of other states, including Massachusetts and Connecticut, are in accord

[1] Unless otherwise noted, all emphasis is added and all internal citations are omitted.

with Maine's commitment to freedom from coercion: these courts hold, under the respective state constitutions, that once the accused even ambiguously invokes (or reinvokes) their right to counsel or to remain silent, police interrogation must cease (except for narrow questions to clarify individual's intentions). *See, e.g., Massachusetts v. Clarke*, 461 Mass. 336, 960 N.E.2d 306 (2012); *Connecticut v. Purcell*, 331 Conn. 318, 203 A.3d 542 (2019).

On the other hand, the United States Supreme Court's decisions restricting the scope of *Miranda* are inconsistent with Maine's deep commitment to freedom from coercion: these decisions hold, under the U.S. Constitution, that police interrogation can continue unless an accused "unambiguously" invokes their right to counsel. *See Davis v. United States*, 512 U.S. 452, 459 (1994); *Berghuis v. Thompkins*, 560 U.S. 370 (2010); *Salinas v. Texas*, 570 U.S. 178, 181 (2013). Because federal Supreme Court jurisprudence has effectively undermined *Miranda* protections, this Court should reject its approach and instead find, consistent with the Maine Constitution's values and this Court's prior precedents, that the right to counsel need not be unambiguously invoked to have effect.

ARGUMENT

1. Maine law requires that the accused be notified of their right to counsel, and that interrogation in a custodial setting not take place unless the right is unambiguously waived.

The rule that no interrogations may take place unless the accused knowingly waives their rights to remain silent and to counsel protects against a very real evil: that a highly coercive and intimidating custodial environment, coupled with highly skilled and trained interrogators, compels an unwilling suspect to speak. Police may engage in interrogation only if the suspect "voluntarily, knowingly and intelligently" waives their right to counsel and to remain silent, after having been advised of those rights and having been given an opportunity to exercise them. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

Requiring that a person be informed of their right to assistance of counsel during police interrogation ensures that "the individual's right to choose between speech and silence remains unfettered throughout the interrogation process." *Id.* at 469. Though framed in reference to the right to counsel, *Miranda*'s protections go well beyond assuring that the accused is ably assisted in their defense: they include the right to speak, the right not to speak, and the right against self-incrimination—all of which are independently protected by the Maine Constitution.

This Court has long recognized that a person subject to interrogation while in custody "must first be given a *Miranda* warning," or else statements made by

the person "will not be admissible." *State v. Holloway*, 2000 ME 172, ¶ 13, 760 A.2d 223, 228. Prior to *Holloway*, this Court passed on an opportunity to delineate whether this right is a matter of state or federal constitutional protection. *State v. Gardner*, 509 A.2d 1160, 1162-63 & n.2 (Me. 1986). To the extent later decisions of this Court have suggested that *Miranda* warnings are not required as a matter of state constitutional law,[2] those decisions are flatly inconsistent with Maine's longstanding policy to provide *more* protection against self-incrimination under state law than under federal law, not less.

When it comes to the protection of individual liberties against unjustified governmental intrusions, the federal Constitution sets the floor and states are free to "adopt a higher standard." *Collins*, 297 A.2d at 626. Maine has, in fact, expressly adopted more protective standards for individuals subject to police interrogation, based on the deep value our state places on the constitutional freedom from self-condemnation:

> Since this value has been endowed with the highest proprity by being embodied in a constitutional guarantee—the constitutional privilege against self-incrimination—we believe that it must be taken heavily into account in the formulation of the public policy of this State… . It reflects a high priority commitment to the principle that excluded as available to government is any person's testimonial self-condemnation of crime unless such person has acted 'voluntarily' i. e., unless he has 'waived' his constitutional privilege against self-incrimination by choosing, freely and knowingly, to provide criminal self-condemnation by utterances from his own lips.

[2] *See, e.g., State v. McKechnie*, 1997 ME 40, 690 A.2d 976, 978 n. 1 ("We have never required the *Miranda* warnings as a matter of state constitutional law.")

Id. at 627 (adopting beyond-reasonable-doubt standard for proof of voluntariness of incriminating statements under Maine Constitution).

In sum, Maine has long emphasized its "high priority commitment" to ensuring that any statements made during interrogation are made "freely and knowingly," and has expressly chosen to adopt more protective standards under article I, § 6 of the Maine Constitution than is provided by the federal constitutional floor. *Id.* If this Court were to hold that section 6 is *less* protective than federal constitutional law in that it allows custodial interrogation to proceed even absent a valid *Miranda* waiver, that would dramatically undercut our state's values and public policy. Maine law, separate and apart from federal law, requires that the accused be notified of their right to counsel and that this right be waived before custodial interrogation can proceed.

2. The duty to notify the accused of the right to counsel is required under article I, sections 6 and 6-A, in furtherance of values embodied throughout the Maine Constitution's Declaration of Rights.

A. The duty to notify the accused of the right to counsel is rooted in the protections for the accused guaranteed by section 6 of the Declaration of Rights, which this Court has long construed as broader than its federal counterpart.

The duty to notify the accused of their constitutional right to counsel is rooted in article I, section 6 of the Maine Constitution, "Rights of persons

accused," which provides that, "In all criminal prosecutions, the accused shall have a right to be heard by the accused and counsel to the accused, or either, at the election of the accused. . . The accused shall not be compelled to furnish or give evidence against himself or herself. . . ." No words or conduct on the part of the accused is required to activate these fundamental rights. Rather, the rights accompany the accused into the custodial setting, and the accused is free to rely on them or purposefully waive them.

Over the past half-century, Maine has repeatedly and definitively construed section 6 more broadly than its closest federal corollary, the Sixth Amendment. Just two years ago, this Court concluded in *Fleming* that section 6's right to an impartial jury requires more than the corollary federal right, and emphasized that "[t]o the extent that the federal counterparts to Maine's requirement of an impartial jury, found in art. I, § 6 of the Maine Constitution, are deemed not to impose the inquiry we mandate today, we conclude that the Maine Constitution demands more." *State v. Fleming*, 2020 ME 120, n. 9, 239 A.3d 648. This is only the most recent in this Court's long history of construing section 6 state rights independently of, and more broadly than, federal rights under the Sixth Amendment. *See, e.g., State v. Sklar*, 317 A.2d 160, 171 (Me. 1974) (construing right-to-jury-trial guarantee in section 6 to apply to all criminal prosecutions, even though federal jury-trial right extended only to serious or non-petty crimes).

Turning to the precise right at issue here, the plain text of section 6 provides the accused with more robust protections against coerced speech than does its federal corollary. Section 6 contains language that appears nowhere in the federal Bill of Rights: it promises that the accused has the right to be heard "by the accused and counsel to the accused, or either, *at the election of the accused*." The phrase "election of the accused" means, at minimum, that the choice of whether or not to speak must be truly voluntary, free from any coercion or interference. In addition, section 6's guarantee that a person must not be "compelled to furnish or give evidence against himself or herself," and section 6-A's guarantee of "due process," together require that decisions made by the accused in their dealings with law enforcement will not be subject to coercion or influence. As the Court observed in *State v. Hunt*, the protections against compulsion in section 6 require the exclusion of statements that were "forced out" of a defendant, and the protections in sections 6 and 6-A require the exclusion of statements when "their admission would otherwise create an injustice." *State v. Hunt*, 2016 ME 172, ¶ 19, 151 A.3d 911, 917. Statements by the accused are inadmissible whenever they are made under circumstances that offend "fundamental values of social policy and constitutional law." *See id.* 2016 ME 172, ¶ 20, 151 A.3d at 917.

Section 6 should be interpreted in light of the Maine Constitution's general antipathy to coercion. In *Collins*, this Court rejected the federal "preponderance of

the evidence" standard announced in *Lego v. Twomey*, 404 U.S. 477 (1972), in favor of a more protective "beyond a reasonable doubt" standard. *Twomey* was a 4-3 decision (Justice Rehnquist and Justice Powell were recused), and the majority reasoned that the sole purpose of excluding confessions obtained through duress was to discourage coercive police tactics, which the "preponderance of the evidence" standard could accomplish. *Twomey*, 404 U.S. at 485-86. Three justices disagreed, arguing that requiring the government to "prove that the defendant's confession was voluntary beyond a reasonable doubt" was necessary because coerced self-incrimination is "alien to the American sense of justice" and applying a heightened standard is "an expression of the American commitment to the moral worth of the individual." *Id.* at 494-95 (1972) (Brennan, J. dissenting). In *Collins*, this Court found the dissenters' view more persuasive because it was consistent with the Maine Constitution's commitment to ensuring "the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances." *Collins*, 297 A.2d at 626 (quoting Justice Brennan's dissent).

The values that animated this Court's holding in *Collins* are the same values that ought to guide the Court's decision in this case: Maine's "high priority commitment" to the principle that statements by the accused must be made "voluntarily," free from any coercive circumstances. *Id*. at 627. That commitment

to preserving the accused's autonomy and freedom from coercion means nothing if police are free to credit ambiguous waivers, and ignore ambiguous invocations, of those rights. *Miranda* rights are only meaningful if people understand them and are able to exercise them.

B. The duty to notify the accused of their rights is grounded in the values of autonomy and freedom from government coercion embodied throughout the Declaration of Rights.

Though section 6 expressly concerns the rights of individuals facing criminal charges by the state, the values of individual autonomy and freedom from unjustified coercive governmental actions saturate the Maine Constitution's Declaration of Rights. Expressions of these values can be found in section 1's recognition that "All people are born equally free and independent;" section 3's safeguarding of freedom of belief "according to the dictates of their own conscience;" section 4's guarantee of the right to "freely speak. . . on *any* subject," and section 6-A's promise that no person shall be "denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof."

Taken together, these protections inform our understanding of the values of individual autonomy and freedom embodied in the Declaration of Rights. These rights are anti-coercive, whether concerning religious exercise (section 3) or speech (section 4). These rights are affirmative: section 1 recognizes that people are "born equally free" and section 4 guarantees the right to "speak freely"—as

compared to the negative conception of rights in the federal constitution's Bill of Rights, which are primarily framed using the prohibition, "Congress shall make no law abridging. . . ." *See City of Portland v. Jacobsky*, 496 A.2d 646, 653 (Me. 1985) (Scolnik, J., concurring in part) (observing that section 4's "affirmative grant" distinguishes it from the First Amendment).

These rights show how freedom can be made manifest in words spoken or unspoken: section 3 protects "religious professions or sentiments" and prohibits religious tests; section 4 protects of free speech, which has long embraced the freedom not to speak, *see Opinion of The Justices*, 306 A.2d 18, 20 (Me. 1973) (opining that compelling newspapers to affirmatively identify the authors of editorials would violate freedom of speech); and section 6 places the decision of whether to speak at all or through counsel "at the election of the accused."

And reinforcing all these values, section 6-A promises that the government will not deny any of these rights or seek to interfere with them in any way. Article I, section 6-A ("No person shall . . . be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof.") In addition, section 6-A's guarantee of due process provides at least as much protection for the right to counsel as that found in the Sixth Amendment to the Federal Constitution. *See State v. Cook*, 1998 ME 40, ¶ 6, 706 A.2d 603, 605 (adopting a harmonious view of the state and federal Constitutions' protections of the right to counsel).

Resolution of this case turns, then, not simply on section 6's requirement that individuals be informed of their right to counsel, but on the whole range of "fundamental values" secured by the Maine Constitution's Declaration of Rights.

3. Under Maine law, if the accused invokes their right to counsel ambiguously, the authorities must stop all questioning except to clarify whether the accused is waiving the right to counsel.

The Maine Constitution guarantees the accused greater protection against coercion than the constitutional minimum provided by current federal jurisprudence. It requires that unless the accused clearly waives their right to counsel, police interrogation cannot proceed, and if the accused even ambiguously asserts their right to counsel, interrogation must cease (except to, at most, ask narrow, non-coercive questions designed to clarify the intent of the individual).

This result is mandated by this Court's historic precedents honoring even equivocal invocations of the right to counsel, and our state's long-held values of preserving autonomy and safeguarding against coercion. To uphold Maine's historic precedents and values, we urge this Court not to borrow from recent federal case law allowing police interrogation to continue unless the accused "unambiguously" invokes their right to counsel, because it is unpersuasive and contradicts Maine's fundamental values and law. Instead, we urge the Court to look to other states' highest courts for persuasive constitutional analyses, in order

to uphold Maine's commitment to the accused's right to remain silent and to an attorney.

A. This Court has a long tradition of upholding the rights of people in custody and honoring even ambiguous invocations of the right to counsel and to remain silent.

Historically, this Court has scrupulously guarded the rights of people in custody by recognizing that there is no particular mechanism or formula necessary for an individual to invoke their right to remain silent and to an attorney.

Before the U.S. Supreme Court started down the road of restricting *Miranda* rights,[3] this Court repeatedly held that an ambiguous or equivocal invocation of the right to remain silent was sufficient to cut off police interrogation, even if that invocation was made after the accused had initially waived their *Miranda* rights. *See State v. Ladd*, 431 A.2d 60, 62-63 (Me. 1981); *State v. Ayers*, 433 A.2d 356, 360 (Me. 1981). Even when the accused ambiguously asserts the "right to cut off questioning," the police may make only a limited inquiry to clarify whether the individual is, indeed, invoking the right to remain silent. *Ladd*, 431 A.2d at 63; *Ayers*, 433 A.2d at 360. The Court employed this same rule concerning assertion of the right to counsel, holding that "[e]ven an ambiguous reference by a suspect of the right to have an attorney present" requires that police interrogation cease,

[3] *See Davis v. United States*, 512 U.S. 452, 459 (1994); see discussion below at pp. 17-19.

except for "further inquiry" to "insure that he is not requesting an attorney and desires to continue the interrogation. *State v. McCluskie*, 611 A.2d 975, 977 (Me. 1992).

Similarly, before the U.S. Supreme Court further undermined *Miranda* rights in *Berghuis*,[4] this Court repeatedly held that if the accused had not yet waived their *Miranda* rights, an ambiguous invocation of the right was sufficient to cut off police interrogation. In *State v. Holloway*, an individual who tried to "end the interrogation so he could contact an attorney" and who told detectives that he had "nothing else to say" had made a "sufficiently clear invocation of his rights." *Holloway*, 2000 ME 172, ¶¶ 7, 12, 760 A.2d 223, 226-28. The Court squarely rejected the government's invitation to "extend" the Supreme Court's holding in *Davis* "to require an unambiguous invocation of the right to remain silent and the right to an attorney in the absence of a prior waiver." *Id.* at ¶ 12. Similarly, in *State v. Lockhart*, this Court reaffirmed that "[w]hen an individual has not yet made a valid waiver of the Miranda rights and invokes, even ambiguously, the right to remain silent or the right to an attorney, he or she has invoked the *Miranda* rights." 830 A.2d 433, 443 (Me. 2003) (citing *Holloway*).

Individuals in police custody are guaranteed the right to remain silent and the right to speak, if at all, through counsel. Individuals do not need to fill out any

[4] *See Berghuis v. Thompkins*, 560 U.S. 370, 384-85 (2010); see discussion below at pp. 17-19.

special form or take any particular action to obtain or activate these rights: they exist whenever a person is taken into police custody. Only if a person "knowingly, understandingly, and voluntarily" waives these rights may the police engage in interrogation.[5] *State v. Leone*, 581 A.2d 394, 397 (Me. 1990); *Miranda*, 384 U.S. at 444.

B. Recent federal decisions permitting police interrogation unless the accused "unambiguously" invokes their right to counsel are unpersuasive and contradict Maine's values.

This Court should not follow recent federal decisions requiring the accused to "unambiguously" assert their right to counsel, because the federal analysis is

[5] It is worth contemplating whether a knowing, understanding waiver of the right to remain silent and the right to an attorney is truly possible. The requirement that the government provide counsel to people facing a loss of liberty is premised on the recognition that even "the intelligent and educated" person with no training in criminal law will be at a loss for how to navigate the criminal justice process and, therefore, "requires the guiding hand of counsel at every step" in order to be assured of fair treatment. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). If a person in custody were accompanied by counsel with adequate training in criminal law, it is impossible to imagine that counsel advising that individual to speak with law enforcement. After all, law enforcement is not able to offer anything of value to the individual, because such an offer would constitute impermissible coercion. *See, e.g., State v. Wiley*, 2013 ME 30, ¶ 17, 61 A.3d 750, 756 (holding that a confession was not voluntary when it was made in response to the "suggestion of leniency"). The only thing that an officer can offer is a speedy condemnation, which may serve the government's interest but does not benefit the individual. An informed rational mind, even an extremely civic-minded one, would never make that decision. And there is good reason to believe that the individuals in custody most in need of an explanation of their rights are least likely to understand the explanation that police typically provide. *See* Richard Rogers, et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 Law & Hum. Behav. 124, 135 (2008) (documenting that many versions of *Miranda* warnings given across the country are too complex to be readily understood by people with limited education).

unpersuasive and inconsistent with the values and public policy that animate the Maine Constitution.

While the U.S. Constitution formerly imposed a "heavy burden" on the government to prove that a valid waiver had been made, *see Togue v. Louisiana*, 444 U.S. 469, 470-71 (1980), recent Supreme Court decisions have lightened that burden to the point of diaphanousness. Now, under the federal Constitution, the burden has shifted to the individual in custody to audibly, unambiguously, and unequivocally assert their rights to the satisfaction of their interrogators, and any stray comment may be deemed an "implicit waiver" of the rights at issue. *See Berghuis v. Thompkins*, 560 U.S. 370, 384-85 (2010) (requiring individual to break his silence in order to assert his right to silence); *see also Salinas v. Texas*, 570 U.S. 178, 181 (2013) (finding that an individual in custody bore the burden to "vocally invoke" the right to remain silent); *Davis v. United States*, 512 U.S. 452, 459 (1994) ("if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.").

Placing the burden on individuals in custody to unambiguously and vocally invoke the right to counsel and the right to remain silent erases the protections that *Miranda* and its progeny erected. Shifting the burden to the accused fatally

undermines the recognition that "without proper safeguards, the possibility of coercion inherent in custodial interrogations unacceptably raises the risk that a suspect's privilege against self-incrimination might be violated." *United States v. Patane*, 542 U.S. 630, 639 (2004). Even as a matter of federal law, *Davis*, *Berghuis* and *Salinas* were wrongly decided, "flatly contradicting" longstanding constitutional precedent that waivers will not be presumed and that the government bears the burden of showing that a waiver was obtained. *See Berghuis*, 560 U.S. at 402 (Sotomator, J. dissenting); *see also Salinas*, 570 U.S. at 202 (Breyer, J. dissenting) (observing that imposing an express vocal invocation burden on individuals poses a "serious obstacle" for individuals who unquestionably wish to invoke their rights). These decisions lack persuasive power, and the Court should not look to them for guidance.

But even if the U.S. Supreme Court's more recent, stringent standards for invoking the right to counsel were correct as a matter of federal law, they would not govern this Court's interpretation of the Maine Constitution. This is particularly true when these federal decisions fail to serve Maine's historic precedents and longstanding constitutional values—the values against involuntary self-condemnation and coercive interrogation, recognized by this Court five decades ago in *State v. Collins*, 297 A.2d 620 (1972) and re-affirmed repeatedly in the years since. *See* discussion, *supra*, at pp. 7-8, 10-12.

C. Decisions from other states' highest courts offer persuasive constitutional analyses that are in accord with Maine's commitment to the accused's right to remain silent and to an attorney.

Unlike *Davis*, *Berghuis*, and *Salinas*, recent state court decisions offer persuasive analyses safeguarding the right of the accused to remain silent and the right to an attorney—analyses that uphold the values embodied in Maine's Constitution.

In *Commonwealth of Massachusetts v. Clarke*, the Massachusetts Supreme Judicial Court was called upon to evaluate whether an individual had validly and unambiguously waived their right to counsel and right to remain silent, when they silently shook their head but then subsequently answered police questions. *Clarke*, 461 Mass. at 337, 960 N.E.2d at 310. The government argued that an individual "must actually speak to invoke the right to remain silent." 461 Mass. at 343, 960 N.E.2d at 315. The Court began by observing that, even under the Federal Constitution's more stringent requirements, "a reasonable police officer in the circumstances" would have understood what the individual meant by their head shake. 461 Mass. at 344, 960 N.E.2d at 315. Because the police did not "immediately cease questioning" following the individual's non-verbal response, all statements made pursuant to that questioning were necessarily excluded. 461 Mass. at 345, 960 N.E.2d at 316.

But the Massachusetts court did not "rest" even after they had "afforded their citizens the full protections of the [F]ederal Constitution." *Id.* (*quoting* Hon. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L.Rev. 489, 491 (1977)). Instead, they proceeded to analyze whether the officer's behavior comported with the protections guaranteed by Article 12 of the Massachusetts Constitution, which provides (in relevant part): "No subject shall. . . be compelled to accuse, or furnish evidence against himself." They concluded that, "even if" the individual had not comprehensively and verbally invoked their right to remain silent under the federal standard announced in *Berghuis*, "the defendant acted with sufficient clarity to invoke his art. 12 right to remain silent." 461 Mass. 336 at 350, 960 N.E.2d at 320. Requiring suspects to vocally invoke their right to remain silent "turns *Miranda* upside down," 461 Mass. at 351, 960 N.E.2d at 320 (*quoting Berghuis*, 560 U.S. at 412 (Sotomayor, J., dissenting), and the Massachusetts court was unwilling to see such a venerable precedent subjected to such contortion.

There is no "burden of clarity" on individuals in police custody in Massachusetts to assert their rights; if there is any confusion regarding the intention of the person in custody, then the police must "stop questioning on any other subject" and seek clarification. 461 Mass. at 352, 960 N.E.2d at 321. Police may not, in pursuit of that clarification, "create ambiguity in a defendant's desire

by continuing to question him or her about it," nor may they engage in "badger[ing] or 'overreaching'—explicit or subtle, deliberate or unintentional—[that] might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request." 461 Mass. at 352–53, 960 N.E.2d at 321.

The Connecticut Supreme Court reached a similar conclusion in *State of Connecticut v. Purcell*, 331 Conn. 318, 203 A.3d 542 (2019), though they framed their analysis around the question of whether the Connecticut Constitution required the court "to adopt an additional layer of prophylaxis" in order "to prevent a significant risk" of constitutional violations, rather than as a question of whether the Connecticut Constitution "provides a broader constitutional *right* than that afforded under the federal constitution." 331 Conn. at 342, 203 A.3d at 556. In *Purcell*, an individual was taken into custody and subjected to repeated efforts by law enforcement to coerce him to answer questions; to these, he replied, "*See*, *if my lawyer was here, I'd, then I'd, we could talk. That's, you know, that's it*." and "*I'm supposed to have my lawyer here. You know that.*" 331 Conn. at 326, 203 A.3d at 547. The Connecticut Court concluded that the federal Constitution's regimen, as announced in *Davis* and *Berghuis*, no longer provided adequate protection for the values underlying *Miranda* in the first instance: ensuring that individuals, especially those most in need of the guiding hand of counsel, have an "accurate

understanding of the protections afforded" and an appreciation that "interrogators are prepared to recognize his privilege should he choose to exercise it." 331 Conn. 318, 359-60, 203 A.3d 542, 566.

To safeguard those interests, the Court announced that the Connecticut Constitution requires that "if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel." 331 Conn. at 362, 203 A.3d at 567. Under this rule, statements such as, "if my lawyer was here, we could talk" or "I'm supposed to have my lawyer here" should have terminated the interrogation, and the police should have refrained from attempting to convince the individual that speaking to the police outside of the presence of counsel was in the individual's best interest. *See* 331 Conn. at 362, 203 A.3d at 568.

Alongside Massachusetts and Connecticut, a number of other states have refused to follow the Supreme Court's crabbed rule that the accused bears the burden to invoke their right to counsel vocally and unambiguously. Instead, these courts have adopted broader protections under their state constitutions, holding that even an ambiguous invocation of the right to counsel requires the police to cease interrogation and engage in clarifying questions. In *Downey v. State*, for example, the Mississippi Supreme Court required police to pause interrogation and ask

"appropriate" clarifying questions if a request for counsel was ambiguous, 144 So. 3d 146, 151 (Miss. 2014). The court expressly rejected the federal constitutional standard set by *Davis*, noting that "*Davis* does not require Mississippi to follow the minimum standard that the federal government has set for itself. We are empowered by our state constitution to exceed federal minimum standards of constitutionality and more strictly enforce the right to counsel during custodial interrogations." *Id*. Similarly, in *State v. Risk*, Minnesota's high court adopted a "more expansive" rule under their state constitution than under the Federal Constitution, holding that police must cease questioning an individual who has made an ambiguous invocation, and permitting only narrow questions intended to clarify the defendant's intent. 598 N.W.2d 642 (Minn. 1999). *See also Steckel v. State*, 711 A.2d 5 (Del. 1998) (holding that Delaware's state constitution requires police to clarify ambiguous references to the right to counsel and noting that this was a majority rule prior to *Davis*); *State v. Hoey*, 77 Haw. 17, 881 P.2d 504 (1994) (under the Hawaii state constitution, if the defendant makes an equivocal invocation, police must clarify it before proceeding further).

We urge this Court to follow the well-reasoned, persuasive decisions of the highest courts of other states across the country, including Massachusetts and Connecticut. Following the path set by these courts will enable Maine to uphold its "high priority commitment" to constitutional rights to remain silent, to counsel,

and to freedom from self-incrimination. *Collins*, 297 A.2d at 627. A right that can be accidentally waived by an innocuous comment is no right at all.

CONCLUSION

For the foregoing reasons, the Superior Court's decision denying Appellant Derric McLain's motion to suppress should be reversed.

Respectfully submitted,
this 18th day of October, 2022

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that, on October 18, 2022, he caused to be sent by regular and electronic mail a copy of this Brief of Amicus Curiae ACLU of Maine to all counsel of record in this matter, by mailing two physical copies and one electronic copy to them at their respective addresses:

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