No. 17-2417

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

VICTORIA SPECTOR,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

TEAM 30
Attorneys for Petitioner

QUESTIONS PRESENTED

I. The Confrontation Clause of the Sixth Amendment prohibits the admission of out-of-court, testimonial statements in a criminal trial, unless the defendant is afforded a prior opportunity to cross-examine the declarant of the statement. The translator that interpreted Ms. Spector's statements during an interview is unavailable to testify at Ms. Spector's trial. Does admitting the translation without providing Ms. Spector a prior opportunity for cross-examination violate her Sixth Amendment right to confrontation?

II. Under the Fifth Amendment, immunity is provided at a defendant's criminal trial for use and derivative use of their compelled statements. After Ms. Spector was compelled to speak to Remsen officials, a recording of the interrogation was released to the public, which helped aid the FBI's investigation. Is Ms. Spector entitled to derivative use immunity and must a *Kastigar* hearing be held?

III. The Fifth Amendment states that no person shall be compelled to be a witness against themselves through the privilege against self-incrimination. Ms. Spector had the right to remain silent when an FBI agent made accusatory statements to her after she was arrested, but before her *Miranda* rights were read. Should the Government be allowed to use Ms. Spector's pre-*Miranda* custodial silence to prove guilt?

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STANDARD OF REVIEW

This Court reviews evidentiary rulings that implicate constitutional rights *de novo* because they are issues of law. *See e.g.*, *Pierce v. Underwood*, 487 U.S. 552, 558 (1998).

STATEMENT OF THE CASE

Statement of Facts

In March 2014, the Federal Bureau of Investigation ("FBI") began investigating Bank Plaza after it received a tip that Victoria Spector was directing the bank to funnel funds to DRB, a Remsen terrorist group. (R. 13.) The FBI alleges that Ms. Spector, as CEO of Bank Plaza for the United States division of the National Bank of Remsen, made the transfers appear to be legitimate charity donations. (R. 12-13.) However, Ms. Spector explained that the charitable operations were purely to "help the [poor] Remsi people" and not aid the DRB. (R. 19-20.)

On June 25, 2014, Ms. Spector agreed to do an interview with FBI Special Agent Serg Beda. (R. 13.) Because Ms. Spector's native language is Remsi,[1] the FBI arranged for Erik Multz, a Remsen interpreter, to translate her statements. (R. 13.) As many witnesses explained, Remsi is an extraordinarily difficult language that requires a translator to use their subjective understanding of Remsi to translate. (R. 17, 21.) Despite the difficulty translating Remsi, the interview was not recorded. (R. 13.) Instead, the transcript was made from the Agent's interview notes. (R. 13.) Interestingly, the FBI is unable to locate Mr. Multz; it is believed that he returned to Remsen, his home country. (R. 3, 13.) The FBI seeks to offer this transcript into evidence despite the fact that Ms. Spector never cross-examined Mr. Multz. (R. 19-20.)

[1] The record is unclear as to Ms. Spector's citizenship. However, this Court has long held that whatever a person's status is under immigration laws, they are entitled to the "safeguards of the Constitution, and to the protection of the laws . . . ." *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893).

After this interview, Ms. Spector traveled to Remsen. (R. 13.) While there, Ms. Spector was interrogated by the Remsen National Security Agency (the "RIA"). (R. 31). The RIA told her that if she refused to submit to the interrogation, she would be unable return to the United States. (R. 31.) This interview was incredibly probing and required Ms. Spector to tell the RIA about every aspect of her business dealings. (R. 32.) And, because of threat of contempt, Ms. Spector gave statements far more detailed than she gave the FBI. (R. 33.) These statements included confidential information about Bank Plaza email servers and storage units. (R. 33.)

Months later, a video recording of the RIA's interview, with English subtitles, was leaked to the press and posted online. (R. 3, 14.) Given the notoriety of DRB and Remsen, the recording was widely reported by all major media outlets in the United States. (R. 16.) Millions of people watched the video of the interrogation. (R. 15.) While Special Agent Beda states that he and other agents working on the investigation avoided watching the leaked interrogation, he maintains that other agents and witnesses interviewed by the FBI did see the recording "because the media coverage was so widespread." (R. 14.) Importantly, these witnesses helped the FBI develop evidence that Ms. Spector, allegedly, participated in funneling funds to DRB. (R. 14.)

On April 14, 2016, the government obtained a warrant to search Ms. Spector's home and to arrest her. (R. 15.) The next day, the FBI arrived at Ms. Spector's home, while she was hosting an intimate dinner party with family and friends. (R. 42.) The agents announced they were there to search Ms. Spector's home and to arrest her. (R. 15.) Ms. Spector was moved to a chair, away from her friends and family, and placed into custody. (R. 15.) While sitting there, FBI Agent Maria Amaray turned to Ms. Spector and said, "It's disgusting that you would help funnel money to terrorists who kill their own people and who hate the United States and would use that money to attack us. This country has done so much for you. Look at the life you and

your family have here. It's just shameful." (R. 15.) Agent Amaray spoke loudly enough for others present to hear. (R. 4). Ms. Spector continued looking straight ahead and remained silent. (R. 15.) She was then advised of her *Miranda* rights. (R. 15.)

Procedural History

On April 11, 2016, Defendant Victoria Spector ("Ms. Spector"), was indicted on one count of conspiring to provide, and one count of providing, material support to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B(a)(1). (R. 11.)

On August 1, 2016, Ms. Spector filed three motions *in limine* in the District Court for the Eastern District of Boerum to: (1) exclude an FBI interview transcript with translated statements attributed to Ms. Spector on the ground that she did not have the opportunity to cross-examine the interpreter; (2) require that the Government establish, at a *Kastigar* hearing, an independent source for all evidence it intended to offer against Ms. Spector at trial in light of the widespread viewing of her RIA interrogation; and (3) exclude evidence from the Government's case-in-chief that Ms. Spector remained silent when an arresting FBI agent made accusatory statements to her after she was placed into custody, but before she received *Miranda* warnings. (R. 22-46.) The District Court granted all three motions. (R. 48.) The Government appealed to the United States Court of Appeals for the Fourteenth Circuit. (R. 48.)

First, the Fourteenth Circuit rejected the "language-conduit theory" and concluded that the admission of the translated statements would violate Ms. Spector's confrontation rights because translation "requires an interpreter to exercise independent judgement." (R. 4.) Second, the court found that the Fifth Amendment privilege against self-incrimination required that the compelled RIA statements and all derivative evidence from that interrogation be suppressed. (R. 5.) Accordingly, the court held a *Kastigar* hearing was required to ensure that court proceedings

were not "tainted" by the compelled statements. (R. 5.) Finally, the court concluded that a defendant's custodial, pre-*Miranda* silence may not be offered by the Government in its case-in-chief as substantive evidence of guilt because it violates the Fifth Amendment. (R. 6.) Hence, the Fourteenth Circuit affirmed all the District Court's ruling. (R. 4, 5, 6.)

This Court granted Writ of Certiorari on October 16, 2017. (R. 1.)

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's decision because (1) admitting Mr. Multz's translation violates Ms. Spector's Sixth Amendment confrontation rights under *Crawford v. Washington* and its progeny; (2) the government cannot use or derivatively use Ms. Spector's compelled testimony per the Fifth Amendment; and (3) admitting Ms. Spector's pre-*Miranda* custodial silence to prove guilt violates her privilege against self-incrimination.

The Fourteenth Circuit correctly held that the Sixth Amendment commands that Ms. Spector have a prior opportunity to cross-examine Mr. Multz before his out-of-court translations are admissible. In *Crawford*, this Court recognized that the Confrontation Clause demands not that testimonial statements be reliable, but that they be tested by cross-examination. This Court has routinely affirmed *Crawford*'s holding in cases like *Melendez-Diaz v. Massachusetts* and *Bullcoming v. New Mexico*. For this reason, the language conduit theory, which denies a defendant the chance to cross-examine his translator, is in great tension with this Court's Confrontation Clause jurisprudence. Moreover, because translations often diverge significantly from what the original speaker intended to convey, cross-examination is especially necessary to determine whether the interpreter made any mistakes. Lastly, even under the language conduit theory, the translation is inadmissible.

Next, the Fifth Amendment privilege against self-incrimination prevents the government from using or derivatively using Ms. Spector's compelled statements, even though a foreign sovereign was the source of compulsion. As this court noted in *United States v. Hubbell*, use and derivative use immunity ensure that compelled statements do not taint court proceedings. Thus, the use of such tainted statements is offensive to the self-incrimination privilege. While the government argues that derivative use immunity is inapplicable because Remsen, rather than the United States, compelled Ms. Spector to speak, that argument fails to take into account *Bram v. United States*. There, this Court held that statements compelled by foreign agents may not be used in American courts. As *United States v. Allen* noted, if foreign compelled statements may not be used, then the derivative use of those statements must also be prohibited. Moreover, the government's argument that use immunity here would allow foreign governments to interfere in United States prosecutions lacks merit because, under the status quo, that can already happen.

Finally, evidence of Ms. Spector's pre-*Miranda* custodial silence was properly excluded because allowing it to prove guilt would compel Ms. Spector to be a witness against herself in violation of the self-incrimination privilege. The circuit courts that prohibit the use of a defendant's pre-*Miranda* custodial silence to prove guilt correctly apply this Court's silence jurisprudence. Specifically, they acknowledge that the privilege against self-incrimination, as guaranteed by the Fifth Amendment, exists independently of the *Miranda* warnings. Thus, Ms. Spector had a right to remain silent regardless of whether they were read. Moreover, the circuit courts that have allowed its use improperly conflate impeachment evidence and substantive evidence, and as such, should be disregarded. Lastly, policy compels the prohibition of using a defendant's pre-*Miranda* custodial silence to prove guilt, because of the ambiguity of silence, and the incentives it would create for law enforcement to delay the Mirandizing of suspects.

ARGUMENT

I. THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT ADMITTING THE TRANSLATION VIOLATES THE CONFRONTATION CLAUSE BECAUSE *CRAWFORD* MANDATES THAT MS. SPECTOR BE ABLE TO TEST THE ACCURACY OF THE TRANSLATION VIA CROSS-EXAMINATION.

In all federal criminal trials, the accused "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. AMEND. VI. Testimonial hearsay—an out-of-court statement offered to prove the truth of the matter asserted—is generally inadmissible. *Crawford v. Washington*, 541 U.S. 36, 53 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1990) (holding that "reliable" hearsay does not violate the Confrontation Clause); FED. R. EVID. 801(c). While the ultimate goal of the Confrontation Clause is to ensure reliability, it commands not that evidence be reliable, but that reliability be assessed via the "crucible of cross-examination" to ensure that trial by affidavit does not occur.[2] *Crawford*, 541 U.S. at 54, 62. Thus, in order to admit testimonial hearsay, the unavailability of the declarant and a *prior opportunity to cross-examine* the declarant are "limitations required to satisfy the Sixth Amendment." *Id.*

Despite *Crawford*, some circuits still treat a "reliable" translator as the defendant's "language conduit" for purposes of the Confrontation Clause. *See e.g.*, *United States v. Orm Hieng*, 697 F.3d 1131, 1139 (9th Cir. 2012) ("a defendant and an interpreter are treated as identical for testimonial purposes if the interpreter acted as a 'mere language conduit'"). The "language conduit theory" looks to four factors: (1) which party supplied the interpreter; (2) whether the interpreter had a motive to mislead or distort; (3) the interpreter's qualifications and language skills; and (4) whether actions taken subsequent to the conversation were consistent with the statements translated. *See e.g.*, *United States v. Vidacak*, 553 F.3d 344, 352 (4th Cir.

[2] As Justice Scalia noted, Sir Walter Raleigh's trial was "by the Spanish Inquisition." *Crawford*, 541 U.S. at 44. Thus, the principle evil that the Confrontation Clause is aimed at is the use of *ex parte* examinations. *Id.* at 50.

2009). If the court finds that the translation is reliable, then it is deemed non-hearsay per FRE 801(d)(2)(C) or (D).[3] *United States v. Nazemian*, 948 F.2d 522, 527-28 (9th Cir. 1991).

Here, it is undisputed that Mr. Multz's translations are testimonial hearsay.[4] (R. 48.) It is also undisputed that Ms. Spector did not have an opportunity to cross-examine Mr. Multz, and that he is unavailable for cross-examination at trial. (R. 49.) And, because translation is subjective, it should be undisputed that per this Court's jurisprudence, a defendant and an interpretation are *separate* declarants. Thus, for the foregoing reasons, this Court, should affirm the Fourteenth Circuit's conclusion that the translation is not admissible.

A. This Court's Confrontation Clause Jurisprudence Supports Rejecting the "Language Conduit Theory."

The Fourteenth Circuit's opinion correctly noted that the rejection of the "language conduit theory" is "virtually compelled by [this Court's] reasoning in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011)." As stated, in order to admit testimonial hearsay, the defendant must have had a prior opportunity to cross-examine the unavailable declarant. *Crawford*, 541 U.S. at 53.

Before *Crawford*, this Court allowed judges to assess the reliability and admissibility of testimonial hearsay. *Crawford*, 541 U.S. at 62 ("the *Roberts* test allows a jury to hear evidence . . . based on a mere judicial determination of reliability."). In *Roberts*, out-of-court statements were permissible so long as they fell under a "firmly rooted hearsay exception" or were reliable. *Id.* at 42. In reversing that holding, this Court declared that "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability." *Crawford*, 541 U.S. at 61. Indeed, admitting statements deemed reliable by a judge is fundamentally at odds with the confrontation right. *Id.*

[3] Rules 801(d)(2)(C)-(D) exempt from hearsay statements authorized admissions. FED. R. EVID. 801(d)(2)(C)-(D).
[4] Statements "taken by police [during] interrogations are definitively testimonial" and thus within the Confrontation Clause. *United States v. Baker*, 432 F.3d 1189, 1204 (11th Cir. 2005) (citing *Crawford*, 541 U.S. at 52).

In *Bullcoming*, this Court reiterated that the Confrontation Clause demands reliability be assessed by "the crucible of cross examination." 564 U.S. at 661. There, the government offered certified results of the defendant's blood alcohol test, but called a different analyst for cross-examination. *Id* at 651. This Court rejected the government's argument that a substitute analyst satisfied the Confrontation Clause because the surrogate's testimony was "reliable." *Id.* at 661. The testimony was inadequate because it could not "expose any lapses or lies" or reveal any "incompetence, evasiveness, or dishonesty" of the original analyst. *Id.* at 662. Moreover, after *Roberts*, "reliability" does not dispense with the Confrontation Clause. *Id.* at 661. Thus, the clause demanded the original analyst be subject to cross-examination. *Id.* at 652.

Admitting the translation to prove that Ms. Spector was solely in charge of the charity donation process is analogous to having a third-party analyst testify to the accuracy of a defendant's forensic test. (R. 19-20.) In both cases, the original witness (the interpreter or the certifying analyst) is absent and replaced by a "surrogate." Here, that surrogate is the agent who witnessed the interview and prepared the transcript. (R. 13.) But, if Ms. Spector is only able to cross-examine that agent, cannot expose Mr. Multz's "incompetence, evasiveness, or dishonesty" through the "crucible of cross-examination." Moreover, because Mr. Multz may have translated in a way that favored the government, cross examination is vital. (R. 18.)

1. *The government's argument is in tension with the Confrontation Clause.*

The Ninth Circuit acknowledged in *Orm Hieng* that there is "tension" between its language conduit jurisprudence and the *Crawford* line of cases. 679 F.3d at 1141; *see also id.* at 1149 (Berzon, J., concurring) (the majority's conclusion that a translator need not be cross-examined is in great tension with this Court's Confrontation Clause jurisprudence). The majority opinion noted that *Crawford*'s reversal of *Roberts* can be read as "essentially divorcing Sixth

Amendment analysis from the law of evidence." *Id.* at 1139-40. However, because *Crawford* and its progeny "continue[d] to use vocabulary of the law of evidence," the majority opted to follow *stare decisis* and wait for a "further pronouncement from [this] Court." *Compare id.* at 1139-40; *with id.* at 1149 (Berzon, J., concurring) (noting that precedent supporting the majority's holding rests on "a pre-*Crawford* understanding of the unity between hearsay concepts and Confrontation Clause analysis."). The Ninth Circuit's majority opinion cannot stand because, as the Fourteenth Circuit noted, if the Confrontation Clause requires that a laboratory analyst testify at trial, it "surely affords a defendant the opportunity to cross-examine an interpreter," especially because "[t]ranslation from one language to another is much *less* of a science . . . and so much more subject to error and dispute*." Id.* at 1149; (R. 4.).

Further, the government's use of *United States v. Shibin* is misleading because the Fourth Circuit did not condone the use of language conduit theory in the context of a Confrontation Clause challenge. 722 F.3d 233, 248-49 (4th Cir. 2013). There, a FBI agent interviewed a witness with the help of a translator. *Id.* at 248. The agent was called to rebut the witness's testimony using his prior inconsistent interview statements. *Id.*; *see also* FED. R. EVID. 613(b) (a witness's prior inconsistent statement as reputation evidence is admissible). Because *Crawford* only applies to testimonial statements used to prove the truth of the matter asserted and not those to rebut a witness, the court did not find a Confrontation Clause violation. *Shibin*, 722 F.3d at 248 (quoting *Crawford*, 541 U.S. at 59 n.9). Thus, the opinion is irrelevant to the question of whether the conduit theory can survive a Confrontation Clause challenge when the testimonial statements are offered to prove the truth of the matter asserted. *Shibin*, 722 F.3d at 248.

As the Ninth Circuit noted, the language conduit theory's assessment of *reliability* is in tension with *Crawford*. *Orm Hieng*, 679 F.3d at 1141. *Crawford* explained that reliability is an

"amorphous . . . subjective concept" and rejects leaving subjective determinations to a judge. 541 U.S. at 61, 63. Yet, despite that, the conduit theory's second factor, whether the translator had any motive to lie, designates the reliability determination solely to the judge. The clause rejects that designation because in-person confrontation lets the fact-finder actually assess a translator's subtle biases and determine the credibility that the translator ought to be afforded.

Moreover, as noted above, cases involving interpreters demand even stronger *Crawford* protection because interpretation is error-prone. *Orm Hieng*, 679 F.3d at 1149 (Berzon, J., concurring); *see also United States v. Charles* 722 F.3d 1319, 1324 (11th Cir. 2013) (interpreters often must take an active role in translation). Finally, because the government employed Mr. Multz, he may have felt pressure to "alter the evidence in a manner favorable to the prosecution." *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009) ("A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence . . . ."). Hence, using the language conduit test when testimonial hearsay is involved, is inconsistent with this Court's Confrontation Clause jurisprudence.

2. *The "language conduit theory's four factor test yields inconsistent results.*

Finally, factored tests, unlike bright line, categorical rules, are inconsistent. For instance, the conduit theory's third factor, which evaluates the interpreter's qualifications and language skill, is unclear. *See e.g.*, *Orm Hieng*, 689 F.3d at 1139. Certain courts may find a "degree of language translations sufficient despite little practical experience, while others may find a certified translator who recently obtained his license unqualified." Tom S. Xu, *Confrontation and the Law of Evidence: Can the Language Conduit Theory Survive in the Wake of Crawford*?, 67 VAND. L. REV. 1497, 1522 (2014). *Crawford* eliminates the risk of judicial inconsistency by creating a categorical test that dictates when cross-examination is necessary. Therefore, this

Court should reject the language conduit theory and find, per its own jurisprudence, that admitting the translation would violate Ms. Spector's Sixth Amendment confrontation rights.

B. For Purposes of the Confrontation Clause, Mr. Multz and Ms. Spector are Separate Declarants Because Verbatim Translation of Remsi is Impossible.

Translating is more akin to "interpretation" because most languages have material differences. U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook: What Interpreters and Translators Do* (2012-13 ed.), https://www.bls.gov/ooh/media-and-communication/interpreters-and-translators.htm#tab-2. Indeed, translators do not interpret words, they interpret concepts. *Id; see also* Cassandra L. McKeown & Michael G. Miller, *Say What? South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 43 (2009) ("The parties involved, the setting and the social context change the meaning [and] connotation . . . [of] language.").

In *Charles*, the Eleventh Circuit rejected the language conduit theory and held that the interpreter was the declarant of his out-of-court testimonial translations. 722 F.3d at 1324. There, Charles, a Haitian national, was charged with fraudulently altering a travel document. *Id.* at 1320. Charles did not speak English and used an interpreter during an interview with the Customs and Border Protection ("CBP"). *Id.* At trial, a CBP officer testified to the truth of the interpreter's translated statements. *Id.* at 1321. The government never called the interpreter to testify. *Id.* Charles argued on appeal that admitting the officer's testimony violated her Sixth Amendment right to confront and cross-examine the interpreter. *Id.* at 1322.

The *Charles* court reasoned that Charles and the translator were separate declarants because, given the nature of language interpretation, the interpreter's translations and Charles' statements were "not one and the same" as interpreters do not translate "word for word." *Id.* at 1324. What is more, external forces such as regional dialects and unfamiliarity with colloquial

expressions, often frustrate the interpretation of semantic meaning. *Id.* Language interpretation is subjective because it requires the interpreter to understand "the contextual, pragmatic meaning of a specific language" so that "much of the inference required to determine the speaker's meaning is not contained in the words of the speaker, *but supplied by the listener*." *Id.* at 1324-25 (quoting Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1036 (2007) (emphasis added)). Accordingly, because translation is subjective, the court held that Charles had a right, per *Crawford*, to confront the translator in order to query the translation's accuracy. *Charles*, 722 F.3d at 1325.

In so holding, the court rejected the government's argument that precedent supported a finding that Charles and the translator were the same declarant. *Id.* at 1325 (citing *United States v. Da Silva*, 725 F.2d 828 (2d Cir. 1983); *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985)). Per *Da Silva* and *Alvarez*, a translator is simply the agent of the defendant because neither used Rule 801(d)(2)(A).[5] *Charles*, 722 F.3d at 1326. The failure to use this Rule meant that those courts only held that an interpreter is the agent of a defendant, rather than the *same* declarant. *Id.* at 1326. Moreover, the characterization of an interpreter as a language conduit for purposes of hearsay is irrelevant to a Confrontation Clause challenge because, in those cases, the use of the language conduit theory depended on "the interpreter's reliability." *Id.* at 1327. Although a statement's reliability may be sufficient to exclude it from the rule against hearsay, reliability is "too narrow a test for protecting against Confrontation Clause violations." *Id.* Therefore, neither *Alvarez* nor *Da Silva* are applicable to this case.

Notably, Mr. Multz was not Ms. Spector's agent because she did not hire him. (R. 13.) Moreover, per *Charles*, Ms. Spector's statements must be treated as separate from Mr. Multz's

[5] Rule 801(d)(2)(A) permits a statement made *by the party in an individual or representative capacity* to be admitted against the party. FED. R. EVID. 801(d)(2)(A) (emphasis added).

translations because, as prominent scholars and the Fourteenth Circuit note, "verbatim" translation is impossible. (R. 4.) Professor Ana Ruma, a Distinguished Professor of Linguistics, explained Remsi does not neatly translate into English.[6] (R. 21.) To translate Remsi to English, the translator must "hear the words in Remsi, derive meaning from those words, and find the right words to portray that meaning in English." (R. 21.) For example, Remsi has four words that "differ based on gender, age, and closeness of relationship." (R. 21.) Additionally, English has distinct words for "I" and "we," while Remsi has just one word that depends on context. (R. 21.) This means that a Remsi translator must subjectively interpret the speaker's words. Such a subjective interpretation is "shaped by the interpreter's cultural background and personal experiences." (R. 21.) Thus, for Remsi, cross-examination of the original translator is especially necessary to determine whether the interpreter "made any mistakes," "used sound judgement," and "to investigate . . . any biases that may have impaired the interpreter's judgment." (R. 4.)

Ms. Spector is reported to have said in her interview, "I [Ms. Spector] had to give OK" to all donations being issued. (R. 19.) But, when Agent Malone followed up and asked if Ms. Spector "oversaw which charities the bank worked with and approved all charitable contributions the bank made," she responded by saying, "Yes, *we* did." (R. 19.) When asked how the charities were selected, she responded, "*I* made sure to very closely examine the charities to ensure that *I* was making contributions only to the best and hardest working. *I* knew the ins and outs of those charities. There is not a fact that slipped by *us.*" (R. 19.) Through the transcript, there are other inconsistent uses of "I" and "we." (R. 19-20). Because of the confusion of pronouns, it is not clear whether Ms. Spector personally oversaw the charities. The difference between "I" and

[6] Remsi's alphabet is a "distant cousin of Cyrillic." (R. 33.) Cyrillic, like Remsi, does not neatly translate into English. Cyrillic is the Russian alphabet and has a number of words that simply do not translate to English. *See* Christina Sterbenz, *9 Incredibly Useful Russian Words With No English Equivalent*, BUSINESS INSIDER (Apr. 18, 2014) http://www.businessinsider.com/untranslatable-russian-words-2014-4.

"we" is colossal, one places sole blame for the DRB-diversion on Ms. Spector, while the other offers proof that someone else may have diverted the funds. Indeed, as the district court found, these "material inconsistences" are relevant to "whether the defendant admitted her own personal knowledge of and involvement" in the DRB scandal. (R. 49.) Without the opportunity to cross-examine Mr. Multz, Ms. Spector will be unable to question the accuracy of the translation.

Accordingly, this Court should find that because Remsi-translations are subjective interpretations, Ms. Spector must be given the opportunity to cross-examine Mr. Multz.

C. Even if this Court Adopts the "Language Conduit Theory," It Should Still Find that the Translation is Not Admissible.

Courts that use the "language conduit theory" consider four factors: "(1) which party supplied the interpreter, (2) whether the interpreter had any motive to mislead or distort, (3) the interpreter's qualifications and language skill, and (4) whether actions taken subsequent to the conversation were consistent with the statements as translated." *United States v. Romo-Chavez*, 681 F.3d 955, 959 (9th Cir. 2012). As stated, the "language conduit theory" finds that an interpreter is not an independent declarant. *Id.* at 961. Importantly, application of the theory is done on a case-by-case basis." *United States v. Garcia*, 16 F.3d 341, 342 (9th Cir. 1994).

The first factor, which party supplied the translator, weighs in favor of Ms. Spector. At common law, an interpretation was not considered the statement of the accused unless the accused personally selected the interpreter. 6 Wigmore § 1810 (Chadbourn rev. 1976). Indeed, when the interpreter is not chosen by the accused, courts have long recognized that the translator's statements may not be conflated with those of the accused. *See, e.g.*, *Kalos v. United States*, 9 F.2d 268, 271 (8th Cir. 1925); *New York v. Chin Sing*, 242 N.Y. 419 (1926); *United States v. Ghailani*, 761 F.Supp.2d 114 (S.D.N.Y. 2010). Here, Ms. Spector did not select Mr.

Multz to be her translator. (R. 13.) Additionally, not only did the FBI provide the interpreter, but it also provided the transcript. (R. 13.) Hence, the first factor weighs in Ms. Spector's favor.

The second factor, whether or not the interpreter has motive to mislead or was biased, also weighs in favor of Ms. Spector. In *Romo-Chavez*, Romo-Chavez presented no evidence that his translator was biased. 681 F.3d at 960. Courts do not presume bias. *United States v. Martinez-Gaytan*, 213 F.3d 890, 892 (5th Cir. 2000); *but see Melendez-Diaz*, 557 U.S. at 318 ("A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence."). Unlike *Romo-Chavez*, Ms. Spector has presented ample evidence to show that Mr. Multz had motive to mislead and distort the truth. There is evidence that Mr. Multz was forced to leave Remsi because of the oppression he faced by the DRB, the very group that Ms. Spector is accused of funding. (R. 18; 30.) This shows that Mr. Multz was biased, either consciously or sub-consciously, and may have translated in a way that favored the Government. What is more, Mr. Multz has literally disappeared. Indeed, the FBI, one of the most powerful American agencies—the very agency that helped track notorious terrorists like Osama Bin Laden—cannot find him. *Most Wanted Terrorist Dead: Bin Laden Killed in 'Targeted Operation*,' FBI (May 2, 2011) https://www.fbi.gov/news/stories/bin-laden-killed. Therefore, the second factor weighs for Ms. Spector.

The third factor, the skill of the translator, also weighs in favor of Ms. Spector. Whether an individual speaks a foreign language with sufficient fluency to act as a translator is a question of fact. *Romo-Chavez*, 681 F.3d at 960. A court of appeals may only reverse a district court's finding of fact if it concludes that the finding is "clearly erroneous." *Pullman-Standard, Div. of Pullman v. Swint*, 456 U.S. 273, 290 (1982); *Teva Pharms.USA, Inc. v. Sandoz, Inc.*, 135 S.Ct. 831, 838 (2015). The district court found that were "material inconsistences in the translation."

(R. 49.) This shows that Mr. Multz did not speak Remsi sufficiently to be a translator. Thus, the Government's argument that Mr. Multz spoke Remsi regularly and translated for a reputable company are irrelevant as it does not establish that the district court's findings were "clearly erroneous." Rather, there is ample evidence to support the finding that even though Mr. Multz spoke Remsi, he did not speak with sufficient fluency to translate. (R. 18, 21.) He also only briefly worked for the translation agency. (R. 13.) Thus, the third factor weighs for Ms. Spector.

Finally, the fourth factor, whether post-translation actions were consistent with the translated statements, is not relevant to this case. *See, e.g.*, *Garcia*, 16 F.3d at 344 (the delivery of the same amount of drugs discussed by the translator showed translation was reliable); *Nazemian*, 948 F.2d at 528 (repeated meetings with the translator indicated consistency).

As demonstrated, the four-factor test weighs for Ms. Spector. Thus, even if this Court adapts the "language conduit theory," it still should find the translation is not admissible. Moreover, because the essential focus of the four-factor test is "reliability," the test is contrary to *Crawford* and its progeny. Accordingly, the decision of whether or not Mr. Multz's translation is "reliable" is a question that must be decided by the jury *after* Ms. Spector has an opportunity to cross-examine him about the inconsistences in his translation.

For the above reasons, Respondent respectfully requests this Court to affirm the Fourteenth Circuit's holding that admitting the translation violates the Confrontation Clause.

II. THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT A *KASTIGAR* HEARING WAS NECESSARY BECAUSE THE FIFTH AMENDMENT PROHIBITS THE USE OR DERIVATIVE USE OF STATEMENTS COMPELLED BY A FOREIGN GOVERNMENT IN AMERICAN TRIALS.

The Self-Incrimination Clause states: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. AMEND V. This Court has long held that when an individual is compelled to speak, the Fifth Amendment prohibits the "us[e] [of the]

compelled testimony in any respect." *Kastigar v. United States*, 406 U.S. 441, 453 (1972). Hence, evidence that flows directly or indirectly from compelled testimony may not be used. *Id; see also United States v. North*, 910 F.2d 843, 854 (D.C. Cir. 1990) (noting that a trial court must hold a *Kastigar* hearing whenever it seeks to use evidence that flows directly or indirectly from compelled testimony). "Use" includes "obtaining [an] indictment" and "preparing [a] case for trial." *United States v. Hubbell*, 530 U.S. 27, 41 (2000). Thus, when a Government witness is exposed to a defendant's compelled statements, the Government bears the burden of proving that the witness was unaffected by his review of those statements. *United States v. Poindexter*, 951 F.2d 369, 376 (D.C. Cir. 1991); *see also Hubbell*, 530 U.S. at 40 (a *Kastigar* hearing ensures that compelled statements do not taint court proceedings).

In 2015, Ms. Spector was forced, under threat of contempt, to speak with the RIA.[7] (R. 32.) Ms. Spector was forced to: (1) go into specific detail about her dealings facilitating donations to Remsen charities, (2) identify Bank Plaza email servers, (3) name the location of certain Bank Plaza computers, and (4) disclose the whereabouts of several extra storage units. (R. 32-33). Halfway through the FBI's investigation, the DRB stole the video, added English subtitles, and widely publicized it to "expose Spector as an ally of Western hedonism and corruption." (R. 16). Because the video has been viewed more than one-million times, agents and witnesses interviewed by the FBI "likely did see the recording of the interview" since "coverage was so widespread." (R. 14, 16). These witnesses helped the FBI develop evidence that Ms. Spector diverted funds to the DRB. (R. 14.) Indeed, after the leak, the FBI identified "twenty-five purportedly charitable organizations," likely because Ms. Spector was compelled to

[7] Thus, because her statements were involuntary, the government's Miranda argument is unpersuasive. (R. 40.)

identify those *exact* organizations. (R. 14.) Thus, the FBI derived use from Ms. Spector's compelled testimony, and as such, a *Kastigar* hearing was required.

A. The Source of Compulsion of Ms. Spector's Testimony is Irrelevant.

The Fifth Amendment guards against any use of compelled statements. *See Bram v. United States*, 168 U.S. 532, 565 (1897) (Fifth Amendment precludes use of involuntary statements coerced by foreign authorities); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 177, 201 (2d Cir. 2008) (foreign nationals interrogated abroad but tried in the United States are protected by the Self-Incrimination Clause); *Brulay v. United States*, 383 F.2d 345, 349 (9th Cir. 1967) (Fifth Amendment applied to a defendant's involuntary statements made to foreign officers). Unlike the Fourth Amendment, which only applies to United States officials, the Fifth Amendment applies to foreign actors because it is violated only when compelled testimony is actually used in a United States prosecution. *United States v. Allen*, 864 F.3d 63, 81 (2d Cir. 2017) (citing *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) ("[I]t is not until [a statement's] use in a criminal case that a violation of the Self-Incrimination Clause occurs."); *see also In re Terrorist Bombings*, 552 F.3d at 188 (a Fifth Amendment violation occurs not at the moment of coercion, but "when a defendant's involuntary statements are actually used against him at an American criminal proceeding."). Thus, the point of coercion is not relevant to the Self-Incrimination Clause because once involuntary statements are *used* against a criminal defendant, he is "compelled . . . to be a witness against himself." U.S. CONST. AMEND. V.

In *Bram*, this Court held that involuntary statements made to foreign agents may not be used in an American prosecution. 168 U.S. at 565. There, Bram was convicted of murdering his ship captain, and upon docking in Halifax, Nova Scotia, Bram was stripped of his clothing and questioned by Halifax agents. *Id.* at 543, 539. His interview-statements were admitted in his

American trial. *Id.* at 537. But, this Court found that admitting the statements violated his Fifth Amendment rights because they were not made "freely, voluntarily and without compulsion or inducement of any sort." *Id.* at 548. Thus, this Court has long held that involuntary statements, regardless of the source of compulsion, are not admissible. *Id.* at 565.

In *Allen*, the Second Circuit extended *Bram* to hold that the Fifth Amendment also prohibits the *derivative* use of testimony compelled by a foreign sovereign. 864 F.3d at 68. There, the defendants were suspected of bank fraud, and in an interrogation, a U.K. enforcement agency compelled them to speak. *Id.* 67-69. During their American trial, one of the government's witnesses had "read . . . marked up, and drafted notes regarding, [the] Defendants' compelled testimony." *Id.* at 79. The Second Circuit found that the Self-Incrimination Clause still applied to the defendants, even though the U.K. was the source of compulsion, because the prohibition on the use of compelled testimony "arises from the text of the Constitution itself, and directly addresses what happens in American courtrooms." *Id.* at 82. Thus, even when a foreign sovereign compels testimony, the Fifth Amendment flatly prohibits its use. *Id.*

The reasoning of *Bram* and *Allen* show that the Fifth Amendment bars the use of any compelled testimony, regardless of the source of compulsion. Much like these two cases, Ms. Spector did not voluntarily speak to the RIA—she was forced under penalty of contempt to submit to extensive questioning. (R. 32.) Thus, the Fourteenth Circuit correctly held that the source of compulsion is irrelevant for derivative use of compelled testimony. Accordingly, this Court should affirm the Fourteenth Circuit's holding that a *Kastigar* hearing is required.

B. The Government's Policy Concerns Against Conducting a *Kastigar* Hearing Are Unfounded.

Constitutional rights are not qualified by convenience. *See e.g.*, *Melendez-Diaz*, 557 U.S. at 325 ("The Confrontation Clause may make the prosecution of criminals more burdensome, but

that is equally true of . . . the privilege against self-incrimination. The Confrontation Clause—like [other] constitutional provisions—is binding, and we may not disregard it at our convenience."). This principle applies in full force to the privilege against self-incrimination, a right that is deeply rooted in the "development of our liberty." *Kastigar*, 406 U.S. at 444. Yet, despite the primacy of the privilege, the government seeks to retract it by citing unfounded concerns that a *Kastigar* hearing is too burdensome and that such a requirement may permit "foreign powers to jeopardize prosecutions pending in the United States." (R. 6.) However, for the foregoing reasons, these purported "concerns" are groundless.

The government bears the burden to prove criminal convictions, without the use of tainted evidence, beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361 (1970). In contrast, the *Kastigar* burden requires only that the government prove by a preponderance of the evidence that an independent source exists for its evidence. *Allen*, 864 F.3d at 92. This burden is not so heavy, as the government contends, to justify rescinding a criminal defendant's privilege against self-incrimination. (R. 41.); *see Melendez-Diaz*, 557 U.S. at 307 (constitutional rights "may not be relaxed because they make the prosecution's task burdensome."). In fact, as the *Allen* court noted the government must only provide more than "bare, self-serving" and conclusory denials" to show that an independent source exists. *Allen*, 864 F.3d at 92; *see also North*, 920 F.2d at 951 ("This 'very substantial protection,' was not meant to make the prosecution's burden an impossible one."). Thus, if the government cannot meet the lower *Kastigar* burden, it should not be able to use the testimony to meet its higher conviction burden.

As stated, constitutional requirements may not be relaxed simply because they make the prosecution's task more burdensome. Indeed, constitutional protections are, in some sense, intended to make convictions harder to achieve to ensure only the guilty are convicted. Hence,

judicial efficiency may never trump constitutional rights because "our constitutional scheme presupposes that the exercise of Fifth Amendment rights may make it more difficult to discover whether the defendant is guilty as charged." *U.S. v. Robinson*, 485 U.S. 25, 44 (1988) (Blackmun, J., dissenting). Thus, while a *Kastigar* hearing may make the prosecution more burdensome, that burden is irrelevant to the calculus of whether or not the hearing is necessary.

Additionally, the government's concern that requiring a *Kastigar* hearing would allow foreign governments to obstruct the American legal system disregards the current state of our nation. This possibility "already exists within our constitutional structure" because state and federal Congress, not the DOJ, control the granting or handling of witness immunity. *Allen*, 864 F.3d at 87; *see also Younger v. Harris*, 401 U.S. 37, 44 (1971) (separation of powers). Current jurisprudence already holds that a witness exposed to compelled testimony is tainted "irrespective of the prosecution's role in the exposure." *See North*, 920 F.2d at 942. Indeed, *Kastigar* allows foreign governments to interfere with U.S. prosecutions because the Fifth Amendment is violated "whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of *how or by whom* he was exposed to that compelled testimony." *North*, 920 F.2d at 942. Not only does this affirm the proposition that the source of compulsion is irrelevant, but it renders the government's "concern" moot.

Foreign developments "need not affect the fairness of our trial at home." *Allen*, 864 F.3d at 90. A defendant's constitutional guarantees outweigh unsupported fears of national security. *See* George Miller, COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, 102D CONG., 2D SESS., PERSONAL JUSTICE DENIED 88-92 (Comm. Print 1992) (the cause of the Japanese internment was racial prejudice and war hysteria, not military necessity). The government is unable to produce any evidence to support its claim that the release of the RIA

interview was intended to undermine the American legal system. In fact, given that the tapes of her testimony were stolen, it appears that the DRB released the video to target Ms. Spector, not th United States, and expose her "as an ally of Western hedonism and corruption." (R. 16.)

Finally, the Fourteenth Circuit noted: "[a] holding that compulsion by a foreign government raises no Fifth Amendment concerns might encourage our government to coordinate its investigations with those of other sovereigns." (R. 5). Such a holding would allow the government to ignore constitutional protections. *See United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008) (when the government pressures private entities to cooperate, constitutional protections can be violated). The concern that our government might coordinate with a foreign nation is a very real concern. See *U.S. v. Maturo*, 982 F.2d 57, 60 (2d Cir. 1992) (discussing cooperation between Turkish National Police and Drug Enforcement Agency ("DEA")); *U.S. v. Abu Ali*, 528 F.3d 210, 228 (4th Cir. 2008) (U.S. officials pressured Saudi Arabian officials to ask certain questions during an interrogation); *United States v. Emery*, 591 F.2d 1266, 1268 (9th Cir. 1978) (American DEA agents contacted Mexican officials to coordinate surveillance). If this Court reverses the Fourteenth Circuit, it will indicate that our government can collude with foreign governments to the detriment of constitutional protections.

III. THE FOURTEENTH CIRCUIT PROPERLY EXCLUDED THE EVIDENCE OF MS. SPECTOR'S PRE-*MIRANDA* CUSTODIAL SILENCE TO PROVE GUILT BECAUSE ADMITTING IT WOULD COMPEL HER TO BE A WITNESS AGAINST HERSELF IN VIOLATION OF THE FIFTH AMENDMENT.

To give full effect to the Fifth Amendment, this Court held that "it forbids. . . comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). A year later, this Court extended the Fifth Amendment protection beyond the courtroom in the seminal case *Miranda v. Arizona*, 384 U.S. 436 (1966). This Court further established that the Fifth Amendment prohibits

a defendant from being impeached with post-arrest, post-*Miranda* silence, *Doyle v. Ohio*, 426 U.S. 610 (1976), or from having that silence admitted in the government's case-in-chief. *Wainwright v. Greenfield*, 474 U.S. 284 (1986).

The Fifth Amendment, as it pertains to a defendant's silence, may have evolved, but the fundamental assurance that no person shall be compelled in any criminal case to be a witness against himself has remained steadfast. U.S. CONST. AMEND. V. Ms. Spector's position that her silence cannot be used against her thus represents a straightforward reading of the controlling law because the prosecution's charge that Ms. Spector's silence proves guilt, forces her to speak. *See also Mitchell v. United States,* 526 U.S. 314, 338 n. 2 (1999) (Scalia, J., dissenting) (noting that the Supreme Court "did say in *Miranda v. Arizona* that a defendant's post-arrest silence could not be introduced as substantive evidence against him at trial."). Accordingly, Ms. Spector respectfully requests that this Court affirm the Fourteenth Circuit's holding that admitting her pre-*Miranda* custodial silence in the government's case-in-chief violates her privilege against self-incrimination under the Fifth Amendment.

A. The Circuit Court Opinions Prohibiting the Use of a Defendant's Pre-*Miranda* Custodial Silence to Prove Guilt Correctly Apply this Court's Silence Jurisprudence.

Although this Court has vigorously protected a defendant's privilege against self-incrimination and post-*Miranda* silence, this Court has never squarely addressed whether admitting a defendant's pre-*Miranda* custodial silence to prove guilt violates the privilege against self-incrimination. *Greenfield*, 474 U.S. at 291. Accordingly, a divergence of opinion exists among the federal circuit courts. Specifically, the Seventh, Ninth and District of Columbia ("D.C.") Circuits have unequivocally held that a defendant has a Fifth Amendment right to not

have his pre-*Miranda* custodial silence used as substantive evidence of guilt.[8] In contrast, the Fourth, Eighth, and Eleventh Circuits have held that the government's substantive use of a defendant's pre-*Miranda* custodial silence is constitutionally permissible. However, this Court should adopt the Seventh, Ninth, and D.C. Circuit's rule that a defendant's pre-*Miranda* custodial silence to prove guilt violates the Fifth Amendment because admitting this silence unconstitutionally burdens the privilege against self-incrimination.

In *U.S. v. Velarde-Gomez*, the Ninth Circuit held that use of a defendant's pre-*Miranda* custodial silence violates the Fifth Amendment because "once the government places an individual in custody, that individual has a right to remain silent . . . regardless of whether the *Miranda* warnings are given." 269 F.3d 1023, 1029 (2001). There, Velarde's car was searched and large amounts of marijuana were discovered. *Id.* at 1026. At trial, despite a motion *in limine* to exclude the evidence, the judge allowed the prosecutor to elicit this line of questioning: "Q: [W]hat was his response when you told him there was marijuana in the vehicle? A: There was no response. He didn't look surprised or upset or whatever." *Id.* at 1027.

However, on appeal, the Ninth Circuit, drew from this Court's jurisprudence to hold that allowing such evidence violated Velarde's Fifth Amendment rights. *See Griffin*, 380 U.S. at 614. In so holding, the court acknowledged the "Catch 22" that allowing the government to use a defendant's custodial, pre-*Miranda* silence would put him in:

> if he remained silent, the government could use, as it did, his silence as powerful and persuasive evidence that Velarde was the consummate drug carrier . . . . If, on the other hand, Velarde denied the existence of the drugs, a response wholly consistent with innocence, the government would be able to impeach him with the physical or other evidence tending to discredit him.

[8] In line with this reasoning, but in the pre-arrest context, both the First, Sixth and Tenth Circuits have prohibited the use of pre-*Miranda* silence as substantive evidence of guilt. *See Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989), *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000), *United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991).

Velarde-Gomez, 269 F.3d at 1027. Accordingly, the court rejected the government's argument that Velarde's silence was demeanor evidence, and excluded it because "it is the self-incriminating nature of this evidence that the Fifth Amendment protects against." *Id.*

In line with *Velarde's* reasoning, the Ninth Circuit has methodically upheld a defendant's right to remain silent throughout the arresting process. *See e.g.*, *Douglas v. Cupp,* 578 F.2d 266, 267 (9th Cir.1978) (purposeful elicitation of "the fact of silence in the face of arrest" to prove guilt violated the Fifth Amendment regardless of whether *Miranda* warnings were given); *United States v. Whitehead*, 200 F.3d 634, 638–39 (9th Cir. 2000) (admitting pre-*Miranda* custodial silence "plainly infringed" on the privilege against self-incrimination.").

In *United States v. Moore*, the D.C. Circuit drew from this Court's silence jurisprudence to prohibit a defendant's pre-*Miranda* custodial silence from being used as substantive evidence of guilt. 104 F.3d 377, 385 (D.C. Cir. 1977). In *Moore*, police officers found contraband inside Moore's car while he stood by and remained silent. *Id.* During trial, the prosecution inquired into Moore's silence by stating that if Moore "didn't know the stuff was underneath the hood, . . . [he] would at least [have] said, Well, I didn't know it was there." *Id.* (internal quotations omitted). The court ruled that the prosecutor's actions unduly burdened Moore's privilege against self-incrimination because this Court, in *Miranda* and its progeny, made clear that "the protection extends backward at least to the time of custodial interrogation." *Id.* at 365. The court noted that although interrogation had not per se begun, "neither *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning." *Id.* Instead, the court concluded that custody is the "triggering mechanism" for the right of *Miranda* silence and, as such, "the defendant who stands silent must be treated as having asserted it." *Id.*

As it did in *Moore*, the government again seeks to use the fact that the defendant "did not deny the agent's accusations or attempt to defend herself" as probative evidence of the defendant's guilt. (R. 44.) This puts Ms. Specter in the "Catch 22" mentioned above: she is condemned if she stays silent and compelled to incriminate herself if she speaks. (R. 51-52.) If she responded to the officer's accusation, her statements would be admissible under FRE 801(d)(2)(A). Likewise, if silence is admissible, then her silence may also be used as evidence of guilt. (R. 52.) To require Ms. Spector to make that decision is to "force her to become a witness against herself, which is exactly what the Fifth Amendment proscribes." *Id.*; *see also Lefkowitz v. Cunningham*, 431 U.S. 801, 810 (1977) (the government has the burden of proving a defendant's guilt without resorting to an inquisition of the accused) (Stevens, J., dissenting).

Similarly, the Seventh Circuit held, in *United States v. Hernandez*, that the prosecution's inquiry into the defendant's pre-*Miranda* custodial silence violated the defendant's privilege against self-incrimination, even if the defendant later waived his *Miranda* rights. 948 F.2d 316, 322-23 (7th Cir. 1991). Like the Ninth Circuit, the Seventh Circuit adamantly protects the privilege against self-incrimination. *See United States v. Ramos,* 932 F.2d 611, 616 (7th Cir.1991) (government's use of defendant's refusal to talk to police violated privilege); *United States ex rel. Savory v. Lane,* 832 F.2d 1011, 1017-18 (7th Cir.1987) (right to remain silent applied equally to a defendant's silence before trial and before the arrest). Accordingly, this Court should affirm the Fourteenth Circuit and adopt the Seventh, Ninth and D.C. Circuits opinions prohibiting the substantive use of a defendant's pre-*Miranda* custodial silence.

B. The Circuit Courts Allowing Pre-*Miranda* Custodial Silence as Substantive Evidence of Guilt Unconstitutionally Burden the Fifth Amendment.

The Fourth, Eighth and Eleventh Circuits have restricted a defendant's right against self-incrimination by allowing the prosecution to use pre-*Miranda* custodial silence as substantive

evidence of guilt. *See United States v. Love*, 767 F.2d 1052 (4th Cir. 1985); *United States v. Frazier*, 394 F.3d 612 (7th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991). However, this Court should reject the reasoning from these circuits because they disregard this Court's silence jurisprudence and are factually distinguishable from this case.

In *Frazier*, the Eighth Circuit narrowly held that admitting Frazier's pre-*Miranda* silence did not violate the Fifth Amendment because it determined that the government did not induce his silence. 394 F.3d at 619-20. The court framed the issue by asking whether Frazier was under "government-imposed compulsion to speak" because an "arrest by itself is not governmental action that implicitly induces a defendant to remain silent." 394 F.3d at 620. Likewise, the government uses *Frazier* to support the proposition that because Ms. Specter has not been read her *Miranda* rights, there was no governmental action inducing her silence. (R. 44.) However, *Frazier* is distinguishable because Ms. Spector was not just arrested, but was additionally confronted with an officer's accusatory statements. This is governmental action that induced her to remain silent even if it is not as explicit as "anything you say can, and will, be used against you." Furthermore, the *Frazier* court limited its holding to the specific facts of that case, and thus *Frazier* holds no precedential value.

Likewise, *Love* and *Rivera* are inapplicable to this case. The Fourth Circuit, in *Love*, allowed testimony concerning the defendant's failure to respond when the arresting agent told the defendants they could leave if they were not involved in the crime. 767 F.2d at 1058. The court denied the defendants' motion for mistrial but did not state the constitutional basis for its reasoning or whether the testimony was used for impeachment purposes or evidence of guilt. *Id.* at 1063. This Court should also reject the Eleventh Circuit's *Rivera* holding because the court never clarified whether the testimony touched on the defendant's silence, and the testimony was

challenged under the Due Process Clause, not the Self-Incrimination Clause. 944 F.2d at 1567-69. Thus, *Love* and *Rivera* are inapplicable.

Furthermore, each of the circuits admitting the pre-*Miranda* custodial silence improperly relied on this Court's reasoning in *Doyle v. Ohio* and its progeny. *Frazier*, 394 F.3d at 619-20 (relying on *Fletcher v. Weir*, 455 U.S. 603 (1982) and *Jenkins v. Anderson*, 447 U.S. 231 (1980)); *Rivera*, 944 F.2d at 1568 (relying on *Fletcher* and *Jenkins*); *Love*, 767 F.2d at 1063 (relying on *Fletcher* and *Doyle*). However, *Doyle* permitted the use of a criminal defendant's pre-*Miranda* silence for *impeachment* purposes, not to prove guilt. Moreover, the Seventh, Ninth and D.C. Circuits took a more comprehensive approach to determining whether this Court's jurisprudence permitted pre-*Miranda* custodial silence as evidence of guilt. Specifically, these circuits considered, but rejected the reasoning *Doyle* and its progeny, whereas *Love* and *Rivera* used impeachment and substantive evidence interchangeably. Accordingly, this Court should disregard the circuits that allow the use of pre-*Miranda* custodial silence.

1. *Pre-Miranda custodial silence is inadmissible because the protections against self-incrimination imbedded in the Fifth Amendment exist independently from the reading of the Miranda rights*.

The government contends that because Ms. Spector had not been read her *Miranda* rights as the time of her arrest, anything she said or refrained from saying could be used as substantive evidence of guilt, but "[i]t simply cannot be the case that a citizen's protection against self-incrimination only attaches when officers recite a certain litany of his rights." *Moore*, 104 F.3d at 387; (R. 44.) *Miranda* was, and remains, "a prophylactic device designed to protect the exercise of Fifth Amendment rights by criminal defendants." *United States v. Booth,* 669 F.2d 1231, 1237 (9th Cir. 1981). Accordingly, Ms. Specter's privilege against self-incrimination is guaranteed by the Fifth Amendment regardless of a *Miranda* warning.

This Court has repeatedly emphasized that *Miranda* warnings are merely "a prophylactic means of safeguarding Fifth Amendment rights," *Doyle,* 427 U.S. at 617, "they are not the genesis of those rights." *Velarde-Gomez*, 269 F.3d at 1029; *see also Connecticut v. Barrett,* 479 U.S. 523, 528 (1987) (*Miranda* 's warning is "not itself required by the Fifth Amendmen[t] . . . but is instead justified only by reference to its prophylactic purpose"); *Michigan v. Tucker,* 417 U.S. 433, 444 (1974) (*Miranda's* safeguards "were not themselves rights protected by the Constitution but were instead measures to ensure that the right against compulsory self-incrimination was protected."). The words within the *Miranda* rights do not trigger a defendant's Fifth Amendment protections, they merely ensure that suspects are aware of their rights before invoking or waiving them. Accordingly, "because the right to remain silent derives from the Constitution and not from the *Miranda* warnings themselves, regardless of whether the warnings are given, absent waiver, comment on the defendant's exercise of his right to silence violates the Fifth Amendment." *Velarde-Gomez*, 269 F.3d at 1029.

The district court correctly acknowledged that Ms. Spector "did nothing more than what every American knows to do when under arrest. And that's to keep your mouth shut." (R. 44-45.) And so, Ms. Spector should not be punished for following common knowledge and remaining silent. The Sixth Circuit has aptly summarized the ubiquity of the *Miranda* rights in our society: "[s]imply stated, many if not most persons under arrest know of their right to remain silent and exercise that right . . . . We do not think that persons who are exercising their right to remain silent should be penalized for it." *Weir v. Fletcher*, 658 F.2d 1126, 1131 (6th Cir. 1981).

2. *Evidence admissible to impeach should not be conflated with evidence admissible to prove guilt.*

The government improperly relies on *Fletcher v. Weir,* which held that a defendant's pre-*Miranda* custodial silence is admissible for impeachment. 455 U.S. at 607. However, this ruling

does not show that such evidence is substantively admissible. This Court has recognized since 1926 the "distinction between the prosecution's affirmative use of the defendant's prior silence and the use of prior silence for impeachment purposes." *Doyle*, 426 U.S. at 628 (citing *Raffel v. United States*, 271 U.S. 494, 499 (1926)). In fact, "the general rule regarding a defendant's silence is that it cannot be used." *Moore*, 104 F.3d at 387. When a defendant testifies, he "creates an exception allowing the testimony to be used for the purpose of impeachment." *Id.*

It is well-established that "it is not proper . . . for the prosecutor to ask the jury to draw a direct inference of guilt from silence." *Doyle*, 426 U.S. at 634-35. This Court has allowed post-arrest statements to be used for impeachment purposes, but found the evidence inadmissible in the government's case-in-chief because of *Miranda*. *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hass*, 420 U.S. 714 (1975). Implicit in this holding is the important distinction between impeachment and substantive evidence, especially when the Fifth Amendment is implicated. Furthermore, *Fletcher* court neither relied on, or discussed, the privilege against self-incrimination, but instead grounded its holding in the Due Process Clause. This distinction prohibits the government from making a leap in both logic and precedent that pre-*Miranda* custodial silence is admissible under the Fifth Amendment simply because it does not violate due process when admitted to impeach. *Fletcher*, 455 U.S. at 607.

This important distinction is replicated in the Federal Rules of Evidence. (R. 7); *see* FED. R. EVID. 609 (prior conviction only admissible to impeach); FED. R. EVID. 613 (prior inconsistent statements generally admissible only for impeachment). Prior inconsistent statements are typically admissible only for impeachment purposes. Only when a statement is made under oath at a prior trial, hearing or other proceeding is it is admissible for substantive purposes because of its reliability. FED. R. EVID. 801(d)(1). Lastly, the government's plan to use Ms. Spector's

silence as an 801(d)(2) admission fails because it disregards the catch-all Rule that evidence is inadmissible if it conflicts with the Constitution. FED. R. EVID. 1101(e). Accordingly, impeachment and substantive evidence cannot be conflated and *Fletcher* is thus "restricted to use of silence for impeachment purposes." *Frazier*, 394 F.3d at 619.

C. Both the Ambiguity of Silence and the Need to Guide Law Enforcement Provide Strong Policy Justifications for Prohibiting the Government's Use of a Defendant's Pre-*Miranda* Custodial Silence to Prove Guilt.

Neither the government nor the dissent have given any policy reasons that would compel using a defendant's pre-*Miranda* silence as evidence of guilt. In contrast, affirming the Fourteenth Circuit's holding ensures that all defendants truly have the right to remain silent.

1. *Prohibiting pre-Miranda silence incentivizes law enforcement to Mirandize suspects sooner.*

This Court's Fifth Amendment jurisprudence plays a critical role in guiding law enforcement in the field. But, as it currently stands, the lack of a bright line rule concerning pre-*Miranda* custodial silence may create perverse incentives for law enforcements to delay Mirandizing suspects. *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) "[r]equiring Miranda warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right."). This Court has held that *Miranda* requires that a person taken into custody "be advised immediately" of his rights *prior* to any questioning. *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011).

Even though the arresting officer did not explicitly ask Ms. Spector a question, this Court's jurisprudence stands for the proposition that she was still under interrogation. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (interrogation under *Miranda* also refers to any words or actions on the part of the police that they should know are likely to elicit an incriminating response). There are few situations more incriminating than having an officer, after you have

been arrested, throw accusatory statements, in your home, at you in front of your friends and family. Therefore, the agents should have read Ms. Spector her *Miranda* rights immediately after the arrest. Thus, for all intents and purposes, she was already protected by *Miranda*. *See Moore*, 386 104 F.3d at 386 (to hold that failure to *Mirandize* allows a defendant's silence to be used against him "turns a whole realm of constitutional protection on its head.").

At best, Agent Amaray's intent may have been to express her personal grievance towards Ms. Spector. At worst, Agent Amaray may have consciously delayed *Mirandizing* Ms. Spector in hopes of exuding enough pressure to elicit incriminating evidence– this flies in the face of the privilege against self-incrimination. *See United States v. Nunez-Rios*, 622 F.2d 1093, 1101 (2d Cir. 1980) (absent a rule that "[encourages law enforcement officials to give Miranda warnings promptly], police might have an inventive to delay *Miranda* warnings."). The latter appears most likely given that Sergeant Beda waited until after Agent Amaray finished accusing Ms. Spector to read her the *Miranda* rights. (R. 15.); *See Miranda*, 384 U.S. at 453 (police officers trained to induce confessions by pointing out the incriminating significance of the suspect's silence). This goes to the core of what the privilege against self-incrimination prohibits. Thus, prohibiting the government from using Ms. Spector's pre-*Miranda* silence deters any incentive law enforcement may have in delaying the Mirandizing of suspects.

2. *Silence is inherently ambiguous.*

Despite this Court's warning that silence is ambiguous, the Government makes the dangerous assumption that "an innocent person would [do] everything she could to rebut or deny the agent's charge, especially in front of her family and friends." (R. 4); *United States* v. *Hale*, 422 U.S. 171, 176 (1975). However, the privilege against self-incrimination "was intended to shield the guilty and imprudent as well as the innocent and foresighted." *Marchetti v. United*

States, 390 U.S. 39, 51 (1968). Furthermore, the government offers no proof that an innocent person would have responded to Agent Amaray. In fact, during an arrest, the "innocent and guilty—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute." *Hale*, 422 U.S. at 177; *see also Salinas v. Texas*, 133 S. Ct. 2174, 2013 (a defendant's reasons for remaining silent are irrelevant to his constitutional rights to do so).

Furthermore, the inference between silence and guilt is a "fairly weak one" in which the "encroachment upon the privilege against self-incrimination seems inescapably to be involved." FED. R. EVID. 801 advisory comm. nn. (West 2011); *see also Hale*, 422 U.S. at 173 (the probative value in using the silence is "far outweighed" by its prejudicial impact). The committee further noted that silence may be motivated by the realization that anything you say can be used against you, but did not specify whether this was because of common knowledge or reading of the *Miranda* warnings. FED. R. EVID. 801 advisory comm. nn. (West 2011). Thus, the law is plain that the prosecution cannot, consistent with the Constitution, use a defendant's silence against him as evidence of his guilt.

CONCLUSION

For the foregoing reasons, Ms. Spector respectfully requests this Honorable Court to **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold: (1) admitting the translation violates Ms. Spector's Sixth Amendment confrontation rights; (2) a *Kastigar* hearing is required; and (3) admitting Ms. Spector's pre-*Miranda* custodial silence violates her privilege against self-incrimination.

Respectfully Submitted,

Team 30
Counsel for Respondent

Dated: February 8, 2018

APPENDIX

1. **U.S. Const. Amend. V:**

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. **U.S. Const. Amend. VI:**

   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. **Fed. R. Evid. 609(a):**

   (a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction.

4. **Fed. R. Evid. 613(b):**

   (b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

5. **Fed. R. Evid. 801(c):**

   (c) Hearsay. "Hearsay" means a statement that:

      (1) the declarant does not make while testifying at the correct trial or hearing;

      (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

6. **Fed. R. Evid. 801(d)(1)(A):**

(d) **Statements That Are Not Hearsay.** A statement that meets the following condition is not hearsay:
(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding in a deposition.

7. **Fed. R. Evid. 801(d)(2)(A)-(D):** a statement that meets the following conditions is not hearsay:

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and white it existed;