Team R8 - Original

Docket No. 19-2417

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

STEPHANIE SILVER,

Respondent.

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

BRIEF FOR THE RESPONDENT

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether the Government's warrantless and continuous video surveillance of Ms. Silver's residence over a seven-month period constituted a search in violation of the Fourth Amendment.

II. Whether a continuous seizure in violation of the Fourth Amendment occurred when Ms. Silver yielded to the officers' show of authority, answered their questions, and then fled.

III. Whether Agent Montague violated Ms. Silver's Fifth Amendment right against self-incrimination when she repeatedly asked for Ms. Silver's address before administering *Miranda* warnings.

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The District Court's Bench Opinion appears in the record at pages 22-53. The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 54-62.

CONSTITUTIONAL PROVISIONS

The text of the following constitutional provisions are provided below:

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Fifth Amendment provides:

> 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 offense 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.

U.S. Const. amend. V.

STATEMENT OF THE CASE

I. Factual History

The facts giving rise to Stephanie Silver's arrest and criminal prosecution began approximately eight months prior to the bombing of the Boerum Municipal Fountain. R. at 4. On January 2, 2018, Sidney Aitken contacted Special Agent Melanie Montague of the Federal Bureau of Investigation (FBI) to provide information concerning a dissident political organization known as the Anti-Consumerist Brigade (ACB). *Id*. Aitken, a former member of the ACB, provided Agent Montague with the name and address of ACB leader, George Hoyt. *Id*. Aitken claimed that Hoyt

was planning to manufacture home-made explosive devices. *Id*. Hoyt allegedly discussed his intent to use the explosives as part of an ACB demonstration to draw attention to their cause. *Id*. She informed Agent Montague that ACB meetings were held on a bi-weekly basis at a residential home leased by Hoyt at 594 Atlantic Place, Boerum City, Boerum. *Id*.

Based on the information provided by Aitken, Agent Montague contacted a private utility company, Pro Ed, to install a surveillance camera outside the home. *Id*. at 5. Pro Ed attached the camera to a utility pole across the street. *Id*. The camera, equipped with zoom and pan capabilities, faced the entryway of 594 Atlantic Place. *Id*. Agents could remotely control the camera which provided a twenty-four-hour, live video feed of the home. *Id*. The recording could be accessed from the FBI task force office or on a mobile device. *Id*. Agents could view the footage live or rewind the feed for closer examination. *Id*. The software also allowed agents to capture still images of the video. *Id*. Agent Montague intended to use the camera outside the home to surveil the private activities of ACB members. *Id*. She did not obtain a warrant to conduct this surveillance. *Id*. at 57.

Over the next seven months, agents surveilled the home. *Id*. at 11-18. The agents documented who came and went from the home, what time those individuals arrived, how long they stayed, and what the individuals carried in and out of the home. *Id*. The agents also enhanced the video to capture license plate numbers of vehicles parked in the driveway. *Id*. On at least twenty separate occasions, agents watched Hoyt and an unidentified individual with short blue hair entering and exiting the residence. *Id*. Agents viewed the blue-haired woman using a key to access the residence and observed that she began staying overnight with increasing regularity. *Id*.

On August 25, 2018, a bomb detonated at the Boerum Street Fair. *Id*. at 6. In response, the FBI dispatched a Joint Task Force which included members of the local police. *Id*. At approximately 5:00 p.m., Officer Smith of the Boerum Police and Agent Johnson of the FBI (the

officers) noticed Ms. Silver walking away from the center of the fair and decided to stop her for questioning. *Id*. They had no reasonable suspicion or probable cause for the stop. *Id*. at 25-26. The officers maneuvered their patrol car in order to block her route of travel by parking in a driveway and obstructing the sidewalk. *Id*. at 6. They called out from the vehicle and commanded Ms. Silver to "wait." *Id*. The officers abruptly exited the vehicle and surrounded Ms. Silver. *Id*. They then interrogated Ms. Silver about her whereabouts that day, what she was doing, and demanded any information she had about the bombing at the street fair. *Id*. Ms. Silver answered each of the officers' questions. *Id*.

Approximately one minute after she was stopped, Ms. Silver turned away from the officers and fled. *Id*. As the officer's gave chase, they noticed Ms. Silver discard a flip-phone from her pocket into the bushes near the sidewalk. *Id*. Agent Johnson eventually succeeded in capturing Ms. Silver and placed her under arrest. *Id*. The officers recovered the phone discarded by Ms. Silver which had flipped open to reveal an outgoing call placed around the time of the bombing. *Id*. The phone was later used as evidence against Ms. Silver. *Id*. at 23.

After her arrest, officers transported Ms. Silver to the FBI Task Force headquarters for processing and interview. *Id*. at 37. When Ms. Silver arrived, Agent Montague noticed Ms. Silver's short blue hair—similar to the unidentified blue haired female she observed residing at 594 Atlantic Place. *Id*. at 41. Agent Montague processed Ms. Silver while another agent fingerprinted her. *Id*. at 38. Prior to reading Ms. Silver her *Miranda* rights, Agent Montague asked Ms. Silver several questions for booking purposes. *Id.* After asking for Ms. Silver's name, Agent Montague asked her where she lived. *Id.* Ms. Silver responded that she stayed at her mother's house at 25 St. Anne's Street in Clinton City. *Id.* Unsatisfied with her answer, Agent Montague pressed Ms. Silver with two additional questions, asking: "Okay, you stay with your mom sometimes, but is that

where you live? Is that the only place you live?" *Id.* Ms. Silver responded that she "also stays sometimes at 594 Atlantic Place in Boerum City," but that she also regularly stayed at her mother's address. *Id*. at 39. Agent Montague intended to use Ms. Silver's response as evidence against her at trial to corroborate the fact that she was the individual with blue hair seen exiting the home on the surveillance footage. *Id*. at 41.

II. Procedural History

The Federal Government indicted Ms. Silver for Conspiracy to Bomb a Place of Public Use and Attempted Bombing of a Place of Public Use in violation of 18 U.S.C. §§ 2332f(a)(1) and 3551 *et seq*. *Id*. at 2-3. Following her indictment, Ms. Silver moved before the District Court to suppress the following evidence at her criminal trial: (1) information obtained from the discarded phone; (2) surveillance footage obtained from the pole camera; and (3) her statements to Agent Montague providing her address at 594 Atlantic Place. *Id*. at 54. The District Court ruled in favor of Ms. Silver on all three issues. *Id*. at 53. Pursuant to 18 U.S.C. § 3731, the Government filed an interlocutory appeal to the United States Court of Appeals for the Fourteenth Circuit. *Id*. at 54. The Fourteenth Circuit granted the Government's request for interlocutory review and affirmed the District Court's ruling on all three issues. *Id*. The Government then petitioned to this Court for a writ of certiorari which was granted on December 19, 2019. *Id*. at 63.

SUMMARY OF THE ARGUMENT

The Government's warrantless video surveillance of Ms. Silver's home was an unreasonable search. This type of surveillance severely intrudes into the privacies of life. Recorded video footage perfectly captures the entirety of a person's private associations and activities at the footsteps of her private retreat. Ms. Silver had a reasonable expectation that the Government would not secretly and continuously monitor the whole of her movements and associations on the

curtilage of her home. Continuous video surveillance also dramatically reduces the level of privacy afforded at the time of the Framers and is inimical to the purposes of the Fourth Amendment. It is the duty of this Court to readdress the Fourth Amendment and articulate its bounds when confronted with new surveillance techniques that circumvent traditional limitations on law enforcement. Here, the Court must require the Government to obtain a warrant before conducting covert video surveillance of a home in order to strike the appropriate balance between law enforcement's investigatory interests and an individual's privacy interests.

Ms. Silver's interaction with law enforcement constituted an illegal seizure within the meaning of the Fourth Amendment. Ms. Silver was confronted with an undisputed show of authority and acquiesced to its power. The officers forced her to stop walking, physically approached her, and questioned her. She answered each of the officers' questions and remained stationary until her subsequent flight. Ms. Silver's response to the officers' show of authority falls squarely within the requirements of seizure set forth by this Court. Under these circumstances, Ms. Silver's subsequent flight should have no bearing on her initial submission to the officers' coercive show of authority. The illegality of the initial seizure tainted the entire interaction. Therefore, any evidence obtained must be suppressed.

Agent Montague's questions about Ms. Silver's address were reasonably likely to elicit an incriminating response and thus required *Miranda* warnings. This Court should definitively adopt the objective test first discussed in *Innis* to determine whether an interrogation has occurred for *Miranda* purposes. The objective test upholds the integrity of the Fifth Amendment and *Miranda* by focusing on the defendant's perceptions rather than the subjective intent of police. To hold that a subjective, intent-based test applies to the routine booking exception to *Miranda* would contravene this Court's well-established precedent. This Court has stringently protected the

constitutional rights of criminal suspects by deliberately pulling the focus from the intentions and motivations of police. Accordingly, the proper test in the context of the routine booking exception to *Miranda* is an objective one.

ARGUMENT

I. THE GOVERNMENT VIOLATED MS. SILVER'S FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES WHEN IT INSTALLED A SURVEILLANCE CAMERA OUTSIDE HER HOME WITHOUT A WARRANT.

The Fourth Amendment guarantees individuals the "right … to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Government searches, "conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable[.]" *Katz v. United States*, 389 U.S. 347, 357 (1967); *see generally Riley v. California*, 573 U.S. 373, 382 (2014) ("Such a warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948))). A search occurs within the meaning of the Fourth Amendment when the Government obtains information by either (1) physically trespassing upon private property or (2) intruding upon a sphere where an individual has a reasonable expectation of privacy. *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). Here, the Government infringed upon the latter protection—Ms. Silver's reasonable expectation of privacy.

1. Ms. Silver Has A Reasonable Expectation That The Government Will Not Secretly And Continuously Monitor The Whole Of Her Movements And Associations On The Curtilage Of Her Home.

The Fourth Amendment provides the most protection to the home and the curtilage: "the area 'immediately surrounding and associated with the home.'" *Florida v. Jardines*, 569 U.S. 1, 6

(2013) (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Jardines*, 569 U.S. at 6 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). "To give full practical effect to that right, the Court considers curtilage… to be 'part of the home itself for Fourth Amendment purposes.'" *Collins v. Virginia*, 138 S. Ct. 1663, 1671 (2018) (quoting *Jardines*, 569 U. S. at 6). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986).

This expectation of privacy does not extend to naked-eye observations of the curtilage. *Id*. at 213. Indeed, "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id*. When viewed in isolation, "objects, activities, or statements [exposed] to the 'plain view' of outsiders are not 'protected'" if an individual does not exhibit an intention to keep them private. *Id*. at 215 (quoting *Katz*, 389 U.S. at 361)

However, people retain a reasonable expectation that the whole of their physical movements will remain private. *Carpenter*, 138 S. Ct.. at 2219. The information gleaned from dragnet surveillance is recognized as a privacy invasion distinct from individual, disconnected public movements. *Id*. at 2219-20. The Government may not rely on the "plain view" reasoning when it passively aggregates the whole of one's public movements. *Id*. As such, the Government's warrantless, surreptitious, and long-term video surveillance of the area surrounding the residence at 594 Atlantic Place invaded Ms. Silver's reasonable expectation of privacy in the whole of her physical movements on the curtilage of her home.

This Court must continually readdress and clarify Fourth Amendment protections when confronted with "new phenomenon" in law enforcement practices. *Id*. at 2218. As society and technology have progressed, law enforcement has gained immense capability to acquire more information passively, inexpensively, and covertly. *Id*. at 2218. These practices at times come at the cost of traditionally protected spheres of privacy. *See id*. at 2217. Long-term video surveillance is a relatively new and unique capability for law enforcement, not yet addressed by this Court. As opposed to traditional physical police surveillance, the live camera feed allows law enforcement to continuously surveil a home undetected and without employing considerable resources. These recordings provide the Government with a complete and enhanced documentation of all happenings at the foot of one's private home. This warrantless surveillance presents a unique intrusion into traditionally protected privacies of life.

Carpenter v. United States provides guidance in determining when similarly passive and dragnet law enforcement surveillance intrudes upon a Fourth Amendment reasonable expectation of privacy. The Court addressed the Government obtaining the defendant's cell site location information (CSLI) from the defendant's cell phone provider without a warrant. *Id*. at 2211. The CSLI data enabled the government to track the defendant's movements over 127 days. *Id*. at 2212. These movements were largely in the public sphere, visible to any passerby, and entirely shared with his cell phone provider. *Id*. at 2219-20. Nonetheless, building on *United States v. Jones* and other Fourth Amendment cases, the Court reasserted that an individual does not relinquish all privacy protections by leaving her home. *Id*. at 2217. The Court clarified that the "Third Party Doctrine" and "Plain View" exceptions to the warrant requirement ought not be mechanically applied to forfeit protection in any shared information. *Id*. at 2219-20. The Court struck down the

warrantless use of CSLI data because the surveillance contravened society's expectation that the whole of their physical movements would remain private. *Id*. at 2219.

To determine whether an expectation of privacy is one society is prepared to recognize as reasonable, the Court considered (1) historical understandings of privacy protections and (2) the information's level of intrusiveness into the privacies of life. *Id*. at 2215-19. This *Carpenter* framework provides the proper Fourth Amendment analysis to employ to the case at hand.

A. Historical guideposts inform society's reasonable expectation that the government will not conduct dragnet video surveillance of the home.

Society's expectations of privacy are informed by the historical context surrounding the framing of the Fourth Amendment. This Court has repeatedly held that Fourth Amendment protections should track the level of privacy afforded to individuals at the time the Fourth Amendment was adopted. *Id*. at 2214. (citing *Carrol v. United States*, 267 U.S. 132, 149 (1925)); *Kyllo v. United States*, 533 U.S. 27, 43 (2001); *United States v. Jones*, 565 U.S. 400, 404, 411 (2012). Two "basic guideposts" frame the Court's Fourth Amendment review:

> First, that the Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd v. United States*, 116 U.S. 616, 630 (1886). Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re*, 332 U.S. 581, 595 (1948).

Id. at 2214.

Long-term surveillance contravenes the Framer's practical expectation that the Government would not conduct continuous surveillance over an extended period of time. *Id*. at 2217. At the time of the framing, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual[ ] for a very long period." *Id*. (quoting *Jones*, 565 U.S. at 430). This use of video surveillance circumvents traditionally protected spheres of privacy by

entirely eliminating the "the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring) (quoting *Illinois v. Lidster*, 540 U.S. 419, 426). To surveil a residential home continuously for seven months using traditional physical surveillance would be cost prohibitive and met with neighborhood friction.

Here, a pole camera enabled the government to watch over a home undetected, without a judicial determination of probable cause, and later use this secretive footage to go back in time to uncover incriminating evidence. The video recording provided officers with enhanced, unforgiving, dragnet surveillance, unlike naked-eye observation or photographs taken by a live officer. The all-encompassing surveillance employed by the pole camera allowed the Government to passively and inexpensively be anywhere at any time, with enhanced senses and perfect memory. Video footage provided officers with the ability to effectively travel back in time and examine Ms. Silver's every movement and association if it piqued their interest.

The Fourth Amendment's Framers assumed a reality where the Government did not have these god-like abilities to constantly watch over citizens. *See Carpenter*, 138 S. Ct. at 2217. Allowing law enforcement to use pole cameras to monitor a person's home without a warrant dramatically reduces the level of privacy protection afforded at the time of the Framing. Until relatively recent technological advancements, Americans felt secure that the Government could not conduct such invasive surveillance.

People are not at the "mercy of advancing technology[.]" *Carpenter*, 138 S. Ct. at 2214 (quoting *Kyllo*, 533 U.S. at 35). As technology progresses and provides the Government greater capacity to intrude upon the privacies of individuals, "'[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" *Coolidge*

v. New Hampshire, 403 U.S. 443, 454 (1971) (citing *Boyd*, 116 U.S. at 635). "The government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." *Jones*, 565 U.S. at 416. The Fourth Amendment must require law enforcement to get a warrant for video surveillance of a home to maintain an individual's traditionally protected privacy interests.

B. Continuous video surveillance of the home reaches a level of intrusiveness that contravenes society's expectations of privacy.

The "reasonable expectation of privacy" test requires the Court to also assess the level to which the alleged search intrudes upon the privacies of life. *See Carpenter*, S. Ct. 2214, 2217-18. The Court in *Carpenter* expressed significant and well-founded concerns with the information gleaned from long-term monitoring of one's physical movements. *Id*. at 2218. Long-term tracking of an individual "reveal[s] not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Id*. at 2217-18. The surveillance allows law enforcement to peer through an intimate window into a person's life. *Id*. This window allows law enforcement to ascertain when and who a person affiliates with, when she visits a political gathering, a psychiatrist's office, a criminal defense attorney, or other revealing locale. *See Id*. at 2218.

Long-term, continuous video surveillance of a home raises an equally, if not more, severe intrusion into the privacies of life than that of location data. Several courts agree. *See United States v. Moore-Bush*, 381 F.Supp.3d 139, 150 (D.Mass. 2019) (holding that *Carpenter*'s Fourth Amendment principles dictate that eight month video surveillance of the defendant's curtilage constituted a search); *accord Colorado v. Tafoya*, 2019 WL 6333762, at *8 (Colo. App. 2019) (holding the same); *see United States v. Vargas*, 2014 U.S. Dist. LEXIS 18462, at *8 (E.D. Wash. 2014) (holding continuous and covert video recording of defendant's front yard for six weeks contravened his reasonable expectation of privacy); *see United States v. Cuevas-Sanchez*, 821 F.2d

248, 521 (5th Cir. 1987) ("[Defendant's] expectation to be free from this type of video surveillance in his backyard is one that society is willing to recognize as reasonable."); *see Shafer v. City of Boulder,* 896 F.Supp.2d 915, 918 (D. Nev. 2012) (holding continuous video surveillance of defendant's backyard violated the Fourth Amendment); *see South Dakota v. Jones,* 903 N.W.2d 101, 113 (S.D. 2017) ("[W]arrantless use of a pole camera, specifically installed to chronicle and observe Jones's activities outside his residence… constituted a search under the Fourth Amendment—its use violates an expectation of privacy that society is prepared to recognize as reasonable.") Much like location tracking, video monitoring of a home generates a wealth of detail about the home occupant's familial, political, professional, religious, and sexual associations. Several courts observe that "[c]ontinuous video surveillance of an individual's front yard 'provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the specter of the Orwellian state.'" *Cuevas-Sanchez,* 821 F.2d at 521. While location data discloses to the government where a person goes, and how long she remains, monitoring a person's residence "chronicles and informs the 'who, what, when, why, where from, and how long' [] a person's activities and associations unfold[] at the threshold adjoining one's private and public lives." *Moore-Bush,* 381 F.Supp.3d at 15-16 (quoting *United States v. Garcia-Gonzales,* 2015 WL 5145537, at *8 (D.Mass. 2015) (quoting *Jones,* 565 U.S. at 414) (Sotomayor, J., concurring)).

The recording here captured all types of intimate details focused on the home at 594 Atlantic Place. The officers saw who came and went from the home. They enhanced the video to capture license plate numbers of guests. They identified when the home was used for political organizing, who attended, and how long they stayed. Officers recognized frequent visitors and infrequent visitors. They ascertained who lived at the home and when a visitor stayed overnight. They watched as Ms. Silver began staying overnight with enough regularity to support their

presumption she lived at the home. They saw personal items people carried in and out, which cars items came from, and in which cars items left. All of this and more, officers watched and recorded twenty-four hours a day for seven months. Unlike a nosey neighbor, the Government peered with perfect memory and sleepless nights. Unlike a passerby, the Government traveled back in time to peer again—to revisit innocuous activity later determined to be inculpatory evidence. The Government essentially argues it is entitled—without any measure of suspicion or judicial oversight—to record the intimate details of every American citizen's life at the footsteps of her private retreat. This cannot stand.

i. California v. Ciraolo *addresses a nonintrusive surveillance technique not analogous to dragnet video surveillance of the home.*

Lower courts have addressed warrantless video surveillance of the curtilage before and after the *Carpenter* decision. Some pre-*Carpenter* courts upheld residential video surveillance because any passerby could have seen the activities recorded. *United States v. Cantu*, 684 Fed. Appx. 703, 705 (10th Cir. 2017); *United States v. Houston*, 813 F.3d 282, 287-88 (6th Cir. 2016); *United States v. Wymer*, 654 Fed.Appx. 735, 743-44 (6th Cir. 2016). Notably, each of these decisions cite *California v. Ciraolo* to support their conclusion. *Id*. In *Ciraolo*, officers flew a private plane over the defendant's home to identify and photograph marijuana plants growing in the defendant's backyard. *Ciraolo*, 476 U.S. at 209-10. The Court held that the defendant did not have a reasonable expectation of privacy in his backyard from this single flyover. *Id*. at 213-15. The law enforcement technique was a physically nonintrusive observation, which "any member of the public flying in the airspace who glanced down could have seen." *Id* at 213-14.

Extended video surveillance, on the other hand, is not akin to the plain-view observation the Court addressed in *Ciraolo*. *Moore-Bush*, 381 F.Supp.3d at 149-50; *accord Cuevas-Sanchez*, 821 F.2d at 551 (holding the government's video camera recording defendant's curtilage

constituted a search and "unlike in *Ciraolo*, the government's intrusion [was] not minimal"). The Court in *Carpenter* agreed, striking down a similar argument made by the Government. *Carpenter*, 138 S. Ct.. at 2219-20. Although an individual may voluntarily convey his public movements to anyone who wants to look, more pervasive tracking implicates greater privacy concerns. *Id*. When an individual steps outside, she reasonably understands the risk that the government or a neighbor will see her movements at that point in time. But that risk cannot be stretched to cover the Government's ability to passively and secretly catalogue each time she steps outside for a period of seven months. Had officers in *Ciraolo* continuously and secretly recorded the defendant's backyard activities and associations for an extended period of time, the Court would have addressed a fundamentally different type of surveillance and level of intrusion. Chronicling an individual's activities, associations, and habits on the curtilage of their home provides an intimate window into an individual's life far greater than that of real time observation.

ii. A pole camera is not analogous to the security camera acknowledged in Carpenter.

Carpenter qualifies its decision, stating "[w]e do not… call into question conventional surveillance techniques and tools, such as security cameras." *Carpenter*, 138 S. Ct.. at 2220. Since *Carpenter*, some district courts have erroneously upheld pole camera surveillance of homes by relying on *Carpenter's* security camera blessing. *United States v. Kubasiak*, 2018 WL 6164346, *3 (E.D. Wis. 2018); *United States v. Tuggle*, 2018 WL 3631881, at *3 (E.D. Wis. 2018); *United States v. Tirado*, 2018 WL 3995901, at *2 (E.D. Wis. 2018). *Carpenter*'s security camera qualification, however, is a recognition of practical societal expectations of security cameras rather than a blanket authorization of all types of video surveillance. *Moore-Bush*, 381 F.Supp.3d at 145; *Tafoya*, 2019 WL 6333762, at *7-8. *Moore-Bush* and *Tafoya* recognize this distinction. *Id*. A "[p]ole [c]amera is not a security camera by any stretch of the imagination." *Moore-Bush*, 381

F.Supp.3d at 145; *see Tafoya*, 2019 WL 6333762, at *7-8. Security cameras are commonplace in public spaces and society has perhaps come to accept a significant level of video surveillance in places such as public parks, stores, government buildings, schools, banks, and the like. *Id.* Moreover, security cameras are, by definition, utilized to guard against crime. *Id.* They are installed in plain view and often accompanied by warning signs to deter wrongdoers. *Id*. A pole camera, on the other hand, is installed to investigate suspects or surreptitiously observe potential criminal activity. *Id*. The Government did not install the camera to warn and deter wrongdoers. Here, the Government hid the camera in order to surveil its suspects undetected and track their travels, associations, and activities. The *Carpenter* decision does not condone the use of pole cameras, and its Fourth Amendment rationale contradicts analogizing them with typical security cameras.

2. This Court Must Require The Government To Procure A Warrant Before Conducting Dragnet Video Surveillance To Strike The Appropriate Balance Between Law Enforcement and Privacy Interests.

The seven-month video surveillance and recording of 594 Atlantic Place contravened society's reasonable expectation that the whole of their movements and associations on the curtilage of their homes will remain private. Competing interests between law enforcement and citizens' privacy interests are at the core of the Fourth Amendment. A warrant strikes the appropriate balance between law enforcement's interest in ferreting out crime, and society's interest in security and freedom from surveillance. "When the right of privacy must reasonably yield to the right of a search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). Upholding warrantless pole camera surveillance of an individual's home would allow the government to use this tool to monitor the comings and goings from anyone's residence, anywhere, anytime, at all

times, with no requisite measure of prior suspicion of criminal activity. Such a holding affects everyone, from ordinary citizens to prominent businesspersons to leaders of social movements. The idea that the government may be watching chills associational freedoms, is susceptible to abuse, and demonstrates why the Framers drafted Fourth Amendment.

II. OFFICERS ILLEGALLY OBTAINED MS. SILVER'S CELL PHONE IN VIOLATION OF HER FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEIZURES.

1. Ms. Silver Was Illegally Seized.

The Fourth Amendment provides that: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. The Fourth Amendment requires that all seizures of the person be founded upon an objective justification. *United States v. Mendenhall*, 446 U.S. 544, 551 (1980). A seizure of the person which is not based upon the "clear and unquestionable authority of law" is unreasonable and a violation of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 9, (1968). The language of the amendment, therefore, was designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and security of individuals." *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)). This Court has long espoused the idea that "[n]o right is held more sacred" than the individual's right of freedom from unreasonable government intrusion. *Terry*, 392 U.S. at 9.

On the afternoon of August 25, 2018, law enforcement officials violated Ms. Silver's Fourth Amendment right to be free from unlawful seizure. In an overwhelming display of authority, the officers used their patrol car to force Ms. Silver to a halt as she walked down a public sidewalk. The officers exited their vehicle and demanded that Ms. Silver stop walking and wait for them. She complied. The officers approached Ms. Silver and interrogated her about her whereabouts and her possible involvement in criminal activity. She answered all their questions.

Ms. Silver was unreasonably seized because (1) she did not feel free to leave; (2) the officers exhibited a show of authority and Ms. Silver yielded in response; and (3) the officers lacked even a reasonable suspicion for their stop.

A. Ms. Silver did not feel free to leave.

Not all public interactions between civilians and police qualify as seizures. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). If, during the course of the interaction, a reasonable person would feel free to "disregard the police and go about his business," the interaction is deemed consensual and the implications of the Fourth Amendment do not apply. *Id*. (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). However, a Fourth Amendment analysis is required if the interaction is such that a reasonable person would not feel free to leave. *Bostick*, 501 U.S. at 434. This is true of all seizures, including those short of a traditional arrest, which might take place during the investigatory phase. *Delgado*, 466 U.S. at 215.

The Government concedes that a reasonable person in Ms. Silver's position would not have felt free to disregard the officers and go about her business. This was not a polite request for an interview. Nor did the officers merely approach Ms. Silver on the street and ask if she was willing to answer some of their questions. Rather, the officers engaged in an undisputed show of authority. Ms. Silver's cooperation in the face of this arbitrary and oppressive show of authority was nonconsensual. A nonconsensual encounter with the government necessitates a Fourth Amendment analysis.

B. Ms. Silver yielded to the officers' show of authority, rendering her seized within the meaning of the Fourth Amendment.

In *California v. Hodari D.* this Court held the fact that a reasonable person would not feel free to leave creates a "necessary, but not sufficient, condition for seizure." *Hodari D.*, 499 U.S. at 628. *Hodari D.* A seizure which implicates the protections of the Fourth Amendment is

effectuated in one of two ways. *Id*. at 626. The first is the use of physical force by an officer to restrain the movement of a suspect. *Id*. The second is through the suspect's submission to the officer's show of authority. *Id*. While submission to an officer's show of authority typically involves an affirmative acknowledgment that the suspect is submitting, submission may also take the form of "passive acquiescence." *Brendlin v. California*, 551 U.S. 249, 255 (2007). In cases involving only an officer's show of authority, the suspect must "yield" to the officer's command in order to complete the seizure. *Hodari D.*, 499 U.S. at 626.

Ms. Silver clearly yielded to the officers' show of authority. By pulling their patrol car onto the sidewalk in front of Ms. Silver's path, the officers gave her no choice but to yield. The Fourteenth Circuit's opinion recounts that Ms. Silver was "stopped in her tracks." Using the patrol car to block her route of travel, the officers abruptly exited the vehicle and surrounded Ms. Silver. They peppered her with questions about her whereabouts that day, what she was doing, and demanded any information she had about the bombing at the street fair. Ms. Silver yielded and complied. She answered each of the officers' questions and remained stationary until her subsequent flight. Ms. Silver's response to the officers' show of authority falls squarely within the requirements of seizure set forth by this Court in *Hodari D*.

C. Ms. Silver's seizure was unreasonable.

In order to comply with the requirements of the Fourth Amendment, seizures of the person must be reasonable. *Terry*, 392 U.S. at 9. To effectuate a reasonable seizure, the Government must satisfy one of three requirements. *See Id*. at 19-30. Those requirements include: procuring a warrant, articulating probable cause, or developing reasonable suspicion. *Id*. Absent these circumstances, any seizure of a person is unreasonable and a violation of the Fourth Amendment. *Id*. at 9. The officers procured no arrest warrant for Ms. Silver, nor did probable cause exist within the context of their encounter on the street. The Government further concedes that the officers

lacked even a reasonable suspicion that Ms. Silver was involved in criminal activity. Her seizure was therefore unreasonable. The officers' coercive and oppressive show of authority was entirely arbitrary. The Fourth Amendment demands protection from exactly this type of conduct.

2. Ms. Silver Was Continuously Seized And Her Subsequent Flight Did Not Negate Her Initial Submission To The Officers' Show Of Authority.

This Court's holding in *Hodari D.* categorically determined that when a suspect is faced with an officer's show of authority and *never* indicates any sort of submission, the suspect has not been seized. *Hodari D.*, 499 U.S. 621 at 627. However, in the wake of that decision, lower courts have differed in their determinations as to whether a subsequent flight negates an initial submission to authority. *See generally* Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.4(d) (5th ed. 2012) (detailing numerous distinctions between the federal circuits on this question). The dichotomy in these holdings revolves around cases in which a suspect is confronted by an officer's unambiguous show of authority, momentarily complies, and sometime thereafter flees. *Id*. This Court has not revisited the issue. However, several federal circuits have recognized the legitimacy of the continuous seizure doctrine which faithfully adheres to the Fourth Amendment's constitutional principles and should be applied to this case.

A. Several courts have correctly held a suspect's initial submission to authority does not negate subsequent acts of noncompliance.

In *United States v. Brodie*, the United States Court of Appeals for the District of Columbia held that "[l]ater acts of noncompliance do not negate a defendant's initial submission" to an officer's show of authority. *United States v. Brodie*, 742 F.3d 1058, 1061 (D.C. Cir. 2014). In facts strikingly similar to this case, officers witnessed the defendant exiting a house they intended to search. *Id*. at 1060. Suspecting the defendant might be linked to criminal activity, the officers pulled their car parallel to his path along the sidewalk in order to identify him. *Id*. One officer exited the patrol car and commanded the defendant to place his hands on a nearby vehicle. *Id*. The

defendant complied. *Id*. As the officer turned away from the defendant to give instructions to his partner, the defendant fled. *Id*. He was subsequently apprehended and later moved to exclude evidence obtained at the scene on grounds he was illegally seized. *Id*. The issue before the court was whether the defendant had been seized at the time he complied with the officers' command, and if so, whether his subsequent flight negated the prior seizure. *Id*. at 1061.

Finding all other preconditions of seizure were met, the court held that the defendant had been seized during his momentary compliance. *Id*. The defendant's compliance with the officer's initial order to put his hands on the car constituted a full submission to a show of authority. *Id*. He had no ulterior motive for complying with the order other than to show he was submitting to the officer. *Id*. Nor were his actions an insincere form of compliance in an effort to effectuate his later escape. *Id*. The court succinctly disposed of the government's argument in stating, "the short duration of [the defendant's] submission means only that the seizure was brief, not that no seizure occurred." *Id*.

The defendant's momentary acts of submission followed by later acts of noncompliance did not negate his initial submission and satisfied the requirements of seizure set forth in *Hodari D*. *Id*. The court bolstered this holding with the conclusions of two other federal circuits to the same effect. *United States v. Brown*, 448 F.3d 239, 246 (3d Cir. 2006) ("[defendant's] initial submission is not undercut by any subsequent attempt to flee."); *United States v. Brown*, 401 F.3d 588, 595 (4th Cir. 2005) (later acts of noncompliance "did not nullify the fact that [defendant] had initially submitted.").

Multiple other courts have reached the same conclusion under similar circumstances. *See United States v. Stover*, 808 F.3d 991, 998 (4th Cir. 2015) ("A defendant does not have to remain frozen in order to submit."); *United States v. Camacho*, 661 F.3d 718, 726 (1st Cir. 2011)

("[Defendant] submitted to [the officer's] show of authority by responding to his questions, at which point his liberty had been restrained and he was seized[.]"); *United States v. Coggins,* 986 F.2d 651, 654 (3d. Cir. 1993) ("The facts clearly show that [defendant] initially yielded to [the officer's] authority by sitting back down [after asking to leave the stairwell.]"); *United States v. Wilson*, 953 F.2d 116, 123 (4th Cir. 1991) ("Physical movement alone does not negate the possibility that a seizure may nevertheless have occurred."); *United States v. Morgan,* 936 F.2d 1561, 1567 (10th Cir. 1991) ("[S]ince [d]efendant, at least momentarily, *yielded* to the Officer's apparent show of authority, we find [defendant] was seized.") (emphasis in the original).

These holdings are consistent with the principles of the Fourth Amendment and the requirements set forth by this Court in *Hodari D*. In recognition of the Fourth Amendment's protection against arbitrary and oppressive interference, these courts have held that yielding may take many forms, including "passive acquiescence." *Brendlin*, 551 U.S. at 255. More importantly, the underlying policy that unites this Court's jurisprudence is that "the character of the citizen's response should not govern the constitutionality of [police] conduct." *Hodari D.,* 499 U.S. at 637 (Stevens, J., dissenting). Arguments to the contrary misconceive the very purpose of the Fourth Amendment: a restraint upon the powers of government rather than a requirement forced upon citizens. It is the "essential teaching" of this Court's Fourth Amendment jurisprudence that "an individual's right to personal security and freedom must be respected even in encounters with the police that fall short of full arrest." *Delgado*, 466 U.S. at 227. To hold otherwise would be to remain indifferent to the threatening power dynamic inherent in an officer's initial pursuit and subsequent intimidation during nonconsensual encounters. *See* Ronald J. Bacigal, *The Right of the People to be Secure*, 82 Ky.L.J. 145, 146 (1993).

Here, the coercive actions of the officers and Ms. Silver's response fall squarely within the confines of a Fourth Amendment seizure as contemplated by numerous federal circuits. None of Ms. Silver's actions preceding her flight can be characterized as anything other than full compliance with the officers' show of authority. No facts in the record suggest her compliance was based on an ulterior motive to elude capture or effectuate her later escape. Nothing indicates her answers to the officers' questions were insincere. She was met with a show of authority and yielded to its force. In a word, she was seized. The duration of the encounter means only that the seizure was brief, not that no seizure occurred.

B. Under distinguishable circumstances, other courts have held subsequent acts of noncompliance may negate a suspect's initial submission to authority.

In *United States v. Huertas*, the United States Court of Appeals for the Second Circuit held the defendant had not submitted to an officer's show of authority when he merely replied to a few of the officer's questions to effectuate his plan to flee. *United States v. Huertas*, 864 F.3d 214, 215 (2d Cir. 2017). Responding to a tip claiming an armed man was present in the area, an officer spotted the defendant as someone matching the tip's description. *Id*. The officer parked his patrol car alongside the defendant, who was standing stationary on the sidewalk, and began asking him questions from the window of the patrol car. *Id*. The defendant remained in a fixed position on the sidewalk and answered "a few" of the officer's questions. *Id*. As the officer exited the patrol car to approach the defendant, the defendant fled. *Id*. He was subsequently apprehended and moved to suppress evidence obtained at the scene on the grounds he had been illegally seized. *Id*.

The court held that, all circumstances considered, the defendant had not been seized. *Id*. at 216-17. Answering a few of the officer's questions before the officer exited the vehicle constituted a plan by the defendant to evade, rather than comply with, the officer's authority. *Id*. at 216. In an attempt to "maximize his chance of avoiding arrest" the defendant feigned compliance to lull the

officer into leaving the scene. *Id*. The officer was never close enough in proximity to physically restrain the defendant, and the entire interaction was designed by the defendant to "quiet suspicion." *Id*. at 217. Under these circumstances, no seizure occurred. *Id*. at 215.

In *United States v. Hernandez*, the United States Court of Appeals for the Ninth Circuit held that the defendant's brief eye contact with an officer in response to his request did not constitute a submission to authority. *United States v. Hernandez*, 27 F.3d 1403, 1407 (9th Cir. 1994). When the officer called out in an attempt to speak with the defendant, the defendant turned his head to acknowledge the officer before immediately fleeing. *Id*. at 1405. After examining all the factors, the court held that his momentary hesitation, lack of verbal response, and immediate flight, all indicated the defendant's actions did not constitute a submission. *Id*. at 1407. *See also United States v. Valentine*, 232 F.3d 350, 350, 359 (3d Cir. 2000) (holding the lack of even momentary compliance by the defendant, when he turned to acknowledge the officer and immediately fled, did not constitute a submission to authority).

The instant case is remarkably dissimilar to the cases cited above. Ms. Silver did not merely remain in her stationary position and wait for the officers to approach her. She was ordered to stop walking and talk with them. She complied. Ms. Silver's response was unquestionably more than mere eye contact or a fleeting acknowledgement of the officers' presence. Ms. Silver stopped in her tracks and obeyed the officers' commands to wait while they questioned her. Her compliance was not feigned. Nor were her actions designed to quiet the officers' suspicion or lull them into leaving the scene. Rather, her actions and demeanor indicated a full submission to their show of authority.

In sum, the Fourteenth Circuit correctly held that Ms. Silver's actions constituted a submission. Under these circumstances, Ms. Silver's subsequent flight should have no bearing on

her initial submission to the officers' coercive show of authority. The Fourth Amendment was designed to protect citizens from exactly these types of intimidating and arbitrary displays of government power. And it is this Court's incumbent duty to ensure that this protection does not surrender in the face of errant calls for a per se rule to the contrary. Ms. Silver's seizure was an unreasonable violation of her Fourth Amendment rights and justifies the exclusion of all evidence thereby obtained.

III. AGENT MONTAGUE VIOLATED MS. SILVER'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WHEN SHE ASKED QUESTIONS REASONABLY LIKELY TO ELICIT AN INCRIMINATING RESPONSE.

The Fifth Amendment provides that "[n]o person shall…be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This Court's leading case interpreting this right against self-incrimination is *Miranda v. Arizona*. In *Miranda,* this Court held that the government may not use any statements stemming from custodial interrogation of a defendant "unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Those safeguards, the "*Miranda*" warnings, require that the defendant in a criminal case be advised of (1) the right to remain silent, (2) the right to have an attorney present, and (3) the right to a court-appointed attorney if she cannot afford an attorney. *Id.* at 479. The *Miranda* warnings only apply to "custodial interrogation." *Id*. at 444. Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id*. *Miranda* seeks to mitigate the danger of coercion resulting from "the interaction of custody and official interrogation." *Illinois v. Perkins,* 496 U.S. 292, 296 (1990).

Ms. Silver was in custody at the time of the events in question, as the Government concedes she was under arrest, in handcuffs, and not free to leave. The more complex area of analysis arises

in determining what constitutes "interrogation" under *Miranda*, as not all statements obtained by police while a person is in custody are considered the product of interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980). We urge this Court to adopt the objective test, first discussed in *Rhode Island v. Innis*, to determine whether an interrogation for *Miranda* purposes has occurred. This objective test upholds the integrity of *Miranda* by focusing on the defendant's perceptions rather than the subjective intentions of police. *Id.* at 301. The objective test also adheres to the purpose of *Miranda* in safeguarding a criminal defendant's constitutional rights against police coercion. *Id.* Accordingly, this Court should definitively adopt the objective test as the proper standard.

Interrogation, for purposes of *Miranda*, must go above and beyond the level of compulsion already inherent in custody itself. *Innis*, 446 U.S. at 300. This Court held in *Innis*, that the *Miranda* warnings are required where an individual in custody is "subjected to either express questioning or its functional equivalent." *Id.* at 300-01. Accordingly, the term "interrogation" encompasses both express questioning and any words or actions that "the police should know are reasonably likely to elicit an incriminating response." *Id.* at 301. The latter part of this definition "focuses primarily upon the perceptions of the *suspect*, rather than the intent of the police." *Id.* (emphasis added). Because the safeguards in *Miranda* exist to vest a criminal suspect with added measures of protection against police coercion, the underlying intent of police is less important. *Id.* Moreover, the focus upon the perceptions of the suspect rather than the police reflects the core purpose of *Miranda*: protecting criminal suspects against coercive police practices while in custody. *Id.* Ultimately, the *Innis* Court acknowledged in dicta that "a practice that the police *should know* is reasonably likely to evoke an incriminating response from a suspect…amounts to interrogation." *Id.* (emphasis added).

Ten years after the *Innis* decision, this Court reviewed the concept of custodial interrogation in the context of the "routine booking exception". *Pennsylvania v. Muniz*, 496 U.S. 582, 585-86 (1990) (plurality). In *Pennsylvania v. Muniz*, the defendant was arrested for driving under the influence and taken to a booking center. *Id.* Without administering *Miranda* warnings, a police officer asked the defendant during videotaped proceedings for his name, address, height, weight, eye color, date of birth, and age. *Id.* The defendant moved to suppress the videotape containing the booking information, as some of his answers were incriminating and given prior to receiving his *Miranda* warnings. *Id.* at 587.

The Court disagreed with the defendant based on the routine booking exception to *Miranda* which exempts from *Miranda*'s coverage questions to secure "the biographical data necessary to complete booking or pretrial services." *Id.* at 601-02 (quoting *United States v. Horton*, 873 F.2d 180, 181 (8th Cir. 1989)). The plurality also disagreed with the government's blanket assertion that certain booking questions could never qualify as custodial interrogation merely because those questions were not intended to elicit incriminating responses. *Id.* at 601. Rather, the *Muniz* plurality followed the reasoning in *Innis*, and focused on the perceptions of the *suspect* at the time of questioning. *Id.* The plurality ultimately held that the questions posed to the defendant fell within the routine booking exception because the booking questions were requested for record-keeping purposes only and were reasonably related to the police's administrative concerns. *Id.* at 601-02.

In footnote fourteen of the *Muniz* plurality opinion the Court mentions, in dicta, that "police may not ask questions, even during booking, that are *designed* to elicit incriminatory responses." *Id.* n.14. (emphasis added) (citing *United States v. Avery*, 717 F.2d 1020, 1024-25 (6th Cir. 1983)). Curiously, some circuits have adopted this language and thus hold there is an interrogation only if police, by design, intended to elicit an incriminatory response. *See United States v. Parra*, 2 F.3d

1058, 1068 (10th Cir. 1993). Those circuits that apply this subjective test erroneously interpret the Court's language in *Innis* and afford undue weight to a "test" that is mentioned solely in a plurality footnote.

The underlying rationale behind the routine booking exception is that, generally, administrative booking questions do not constitute interrogation because they typically do not elicit incriminating responses. *See Parra*, 2 F.3d at 1068; *United States v. Monzon*, 869 F.2d 338, 342 (7th Cir. 1989). Importantly, there are two caveats to this exception. *Miranda* is required either (1) if police know of a defendant's particular susceptibility to the questioning, or (2) if booking questions elicit incriminatory responses. *United States v. Clark*, 982 F.2d 965, 968 (6th Cir. 1993); *see also Innis*, 446 U.S. at 301; *Avery*, 717 F.2d at 1025. The only types of questions that are permissible during booking are those which "appear reasonably related to the police's administrative concerns." *Rosa v. McCray*, 396 F.3d 210, 221 (2d Cir. 2005). Not every question posed during booking fits this description. Courts have recognized that even "relatively innocuous" questions can be reasonably likely to elicit an incriminating response. *Avery*, 717 F.2d at 1024-25; *accord United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983). If the booking exception does not apply and the statements were made prior to the administration and voluntary waiver of the *Miranda* warnings, the statements are "irrebuttably presumed involuntary" and require suppression. *United States v. Pacheco-Lopez*, 531 F.3d 420, 424 (6th Cir. 2008) (quoting *United States v. Mashburn*, 406 F.3d 303, 306 (4th Cir. 2005)). This case provides an opportunity for this Court to unequivocally reassert the objective test as appropriate in the context of exceptions to *Miranda.*

1. The Objective Test Preserves The Goals Of *Miranda* By Focusing On The Perceptions Of The Suspect Rather Than The Subjective Intent Of Police.

Federal courts of appeal, such as the First, Second, Eighth, and Ninth Circuits, have implemented the objective test. *See United States v. Williams*, 842 F.3d 1143, 1147 (9th Cir. 2016) ("[T]he ultimate test… is whether, in light of all the circumstances, the police should have known that a question was reasonably likely to elicit an incriminatory response[.]"); *United States v. Downing*, 665 F.2d 404, 407 (1st Cir. 1981) ("[W]e think the questions about appellee's keys and airplane were 'reasonably likely to elicit an incriminating response[.]'"); *Rosa*, 396 F.3d at 222 ("[T]o determine whether the police abused the gathering of pedigree information in a manner that compels *Miranda* protection requires an objective inquiry[.]"); *United States v. Brown*, 101 F.3d 1272, 1274 (8th Cir. 1996) ("Only if the government agent should reasonably be aware that the information sought… is directly relevant to the substantive offense charged, will the question be subject to scrutiny[.]").

Because the *Miranda* warnings are designed to safeguard a suspect's Fifth Amendment rights in a coercive, police-dominated atmosphere, it would be nonsensical to evaluate whether an interrogation occurred by analyzing the subjective intent of police. This Court in *Innis* explicitly intended for the objective test to apply in order to best comport with the objectives of *Miranda*. *See Innis*, 446 U.S. at 301. The *Innis* Court articulated that this definition of "interrogation" is meant to safeguard a criminal suspect's constitutional rights regardless of the subjective intentions of police. For this reason, the subjective test is incorrect.

In addition, the objective test in *Innis* is easier to apply than the subjective test. Under the objective test, courts need only determine whether the questioning officer should have known, in light of the circumstances, that the questions were reasonably likely to elicit an incriminating response. Conversely, the subjective test calls upon courts to delve into the officer's state of mind

at the time of questioning. This method makes finding an interrogation less likely and has the effect of protecting the officer rather than the suspect, which directly contradicts *Miranda.* Simply put, the subjective test places even more power in the hands of police in an already police-dominated, coercive atmosphere. This is the opposite result that this Court in *Miranda* and *Innis* intended.

A. The objective test dispenses with the issue of investigatory questions disguised as booking questions.

The objective test eliminates the risk that police may ask investigatory questions under the guise of booking questions. *See United States ex rel. Hines v. LaVallee*, 521 F.2d 1109, 1112 (2d Cir. 1975). In *United States ex rel. Hines v. LaVallee*, the Second Circuit discussed how even a seemingly innocuous line of questioning may elicit incriminating information. *Id.* Importantly, the court mentioned that a person's name, age, address, and similar data, while usually nonincriminatory, "may in a particular context provide the missing link required to convict." *Id.; See also United States v. Gotchis*, 803 F.2d 74, 78 (2d Cir. 1986). Since *Hines,* most circuits have recognized that, although most booking questions will not generally elicit incriminating responses, the potential exists for abuse. *See United States v. Booth*, 669 F.2d 1231, 1238 (9th Cir. 1981).

Several circuits have applied the objective test when considering this danger for "disguised" investigatory questions. In *United States v. Mata-Abundiz*, the Ninth Circuit applied the objective test, holding that an investigator's question regarding defendant's citizenship was "highly likely" to elicit an incriminating response. *Mata-Abundiz*, 717 F.2d at 1280. The court further emphasized that the relationship of the question asked to the crime suspected is "highly relevant" in determining whether an officer's questions are reasonably likely to elicit an incriminating response. *Id.* (citing *Booth*, 669 F.2d at 1238).

Additionally, the Ninth Circuit in *United States v. Disla* held that questions about the defendant's address were reasonably likely to elicit an incriminating response. *United States v.*

Disla, 805 F.2d 1340, 1347 (9th Cir. 1986). The officer in *Disla* knew that large amounts of cocaine and cash had been found at the apartment in question, and that the residents of the apartment had not been identified. *Id.* When the officer saw the defendant and his brother approach the apartment, he arrested them and proceeded to ask so-called booking questions without administering *Miranda* warnings. *Id*. Because of his involvement in the investigation and his desire to identify the residents of the apartment, the officer's question regarding defendant's address did not fall within the routine booking exception. *Id.*

The Sixth Circuit in *United States v. Pacheco-Lopez* determined that a defendant's pre-*Miranda* statements were the product of an interrogation after applying the objective test. *Pacheco-Lopez*, 531 F.3d at 424. In *Pacheco-Lopez*, officers located the defendant at a home connected to a drug deal. *Id.* at 422. Before administering *Miranda*, an officer questioned the defendant about "where he was from, how he had arrived at the house, and when he had arrived." *Id.* at 424. The court held that, under the circumstances, the officer's questions were reasonably likely to elicit an incriminating response, and thus required *Miranda* warnings. *Id.* In its reasoning, the court emphasized that "asking questions about when and how Lopez arrived at a household ostensibly linked to a drug sale" is investigatory questioning, not the type used only to identify the defendant. *Id.*

Applying the objective test, Ms. Silver's statements should be suppressed as violative of the Fifth Amendment. Under the objective test, this Court need not take the time to decipher Agent Montague's intent in questioning Ms. Silver. Instead, this Court should look to the surrounding circumstances in determining whether Agent Montague should have known that her questions about Ms. Silver's address were reasonably likely to elicit an incriminating response. Under the circumstances, a reasonable officer in Agent Montague's position should have known that her

questions were likely to elicit an incriminating response from Ms. Silver. Agent Montague therefore should have administered *Miranda* warnings before pressing her repeatedly for her address.

Agent Montague had special knowledge of the facts in this case and a desire to locate the unidentified individuals who frequented 594 Atlantic Place. Agent Montague was the lead investigator into the ACB and had been conducting surveillance on the residence for seven months prior. She and the other investigators had not yet identified the individuals, other than George Hoyt, who resided at 594 Atlantic Place. In the footage, Agent Montague repeatedly observed a blue-haired female coming and going from the residence. *Id*. Upon arresting Ms. Silver, agents noticed that she had blue hair. *Id*. When Agent Montague questioned Ms. Silver persistently about her address—pressing her to give a more specific answer—Agent Montague reasonably should have known that her question was likely to elicit an incriminating response. Under the objective test, Agent Montague's intent is not determinative, and this Court need not investigate whether her question was *designed* to elicit an incriminating response. Considering the content and context of Agent Montague's questioning, Ms. Silver's statement does not fall into the routine booking exception and should be suppressed.

B. This Court should remain consistent with *Quarles* and apply an objective test when analyzing *Miranda* exceptions.

This Court has traditionally used an objective test to determine whether other exceptions to *Miranda* apply. In *New York v. Quarles*, this Court addressed a "public safety exception" to *Miranda*. *New York v. Quarles*, 467 U.S. 649, 657 (1984). Importantly, the *Quarles* Court held that the exception does not depend upon the "motivation of the individual officers involved," as those motivations are often "largely unverifiable." *Id.* at 656. There, this Court required officers

to objectively distinguish between questions necessary to ensure public safety and those that will elicit testimonial evidence from a suspect. *Id.*

Additionally, this Court has consistently proclaimed its fervent aversion to subjective tests focused on the intentions of police officers. *See Whren v. United States*, 517 U.S. 806, 812 (1996). Although the case arose in the Fourth Amendment context, this Court in *Whren v. United States* emphasized that it has never held, outside of a few narrow contexts, that an officer's subjective intent plays a role in objective reasonableness tests. *Id.* at 812-13; *see also Missouri v. Seibert*, 542 U.S. 600, 611 (2004) (upholding an objective reasonableness test in determining whether *Miranda* warnings are reasonably conveyed to a suspect). Similarly, in the *Miranda* context, this Court held in *Moran v. Burbine* that "events occurring outside the presence of the suspect and entirely unknown to him" cannot determine whether he voluntarily relinquished a constitutional right. *Moran v. Burbine*, 475 U.S. 412, 422 (1986). This demonstrates this Court's opposition to consider the intentions or motivations of police in the *Miranda* context. This Court has stringently protected criminal suspects' constitutional rights by deliberately pulling the focus from the intentions and motivations of police. Accordingly, the proper test in the context of the routine booking exception to *Miranda* is an objective one.

2. Even If This Court Applies A Subjective Test, Ms. Silver's Statements Should Be Suppressed Because Agent Montague's Questions Were Designed To Elicit An Incriminating Response.

Under the subjective test, derived from a footnote in the plurality *Muniz* opinion, an officer's questions during booking only fall outside the booking exception if they are *designed* to elicit incriminatory admissions. *Avery*, 717 F.2d at 1024-25. Some circuits have adopted this subjective test focused on the questioning officer's intent. *See United States v. Virgen-Moreno*, 265 F.3d 276, 293-94 (5th Cir. 2001) ("[Q]uestions designed to elicit incriminatory admissions are

not covered under the routine booking question exception."); *United States v. Glen-Archila*, 677 F.2d 809, 815 (11th Cir. 1982) (holding the same); *United States v. D'Anjou*, 16 F.3d 604, 608 (4th Cir. 1994) (holding the same). In applying this test, these circuits erroneously interpret this Court's intent in *Innis* and mistake the plurality footnote in *Muniz* as binding precedent.

However, even if this Court chooses to adopt the subjective test, Ms. Silver's statements should nonetheless be suppressed because Agent Montague's inquiry into Ms. Silver's address was designed to elicit an incriminating response. There is ample evidence in the record to indicate that Agent Montague engaged in exactly the type of "disguised questioning" that first concerned the *Hines* court. In asking Ms. Silver about her address—and following up with two more questions even after Ms. Silver provided an answer—Agent Montague disguised the question as a booking question, when her true motive was to elicit an incriminating response. Agent Montague intended to identify Ms. Silver as the blue-haired female coming and going from 594 Atlantic Place. Accordingly, even under the subjective test, Agent Montague's questions violated Ms. Silver's right against self-incrimination and should be suppressed.

CONCLUSION

For the foregoing reasons, Respondent, Ms. Stephanie Silver, respectfully requests that this Court affirm the Fourteenth Circuit Court of Appeals.

Respectfully submitted,

Team 8R
Counsel for Respondent