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
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM 12
COUNSEL FOR THE PETITIONER

ORIGINAL BRIEF

QUESTIONS PRESENTED

I. Whether the continuous seizure doctrine should apply under the Fourth Amendment, absent a suspect's unequivocal submission to police authority, where a suspect momentarily engages with law enforcement officers and then subsequently flees to discard evidence?

II. Whether a warrant is required under the Fourth Amendment prior to installation of a pole camera to observe an area exposed to the public?

III. Whether the appropriate standard under the Fifth Amendment to determine whether police questioning falls under the routine booking question exception to the *Miranda* requirements is a subjective standard, which focuses on the intent of the officer, or an objective standard, which focuses on what the officer reasonably should have known?

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

United States Supreme Court Cases:

United States Court of Appeals Cases:

United States District Court Cases:

State Cases:

United States Constitution:

Statutory Provisions:

Secondary Authorities:

OPINIONS BELOW

The decision of the Court of Appeals for the Fourteenth Circuit has not been published at the time of filing this Brief, but the decision is reproduced in the record on pages 54-62. *United States v. Silver*, No. 19-1120 (14th Cir. 2019). The oral ruling of the United States District Court for the Eastern District of Boerum on Respondent's motion to suppress has not been published at the time of filing this Brief, but the decision is reproduced in the record on pages 49-53. *United States v. Silver*, No. 18-3023 (E.D. Boerum 2019).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment

The Fourth Amendment to the United States Constitution 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."

Fifth Amendment

The Fifth Amendment to the United States Constitution 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 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."

STATEMENT OF THE CASE

Stephanie Silver ("Respondent") was indicted with conspiracy to bomb a place of public use and attempt to bomb a place of public use, in violation of 18 U.S.C. § 2332f(a)(1), (2). R. at 1-3. Respondent filed a motion to suppress to exclude: (1) a discarded flip-phone; (2) evidence obtained from pole camera surveillance footage; (3) statements made in response to routine booking questions. R. at 22-48. The United States District Court for the Eastern District of Boerum ("District Court") granted Respondent's motion to suppress on all three pieces of evidence. R. at 53. Subsequently, the United States of America ("Petitioner") filed an interlocutory appeal pursuant to 18 U.S.C. § 3731 with the United States Court of Appeals for the Fourteenth Circuit ("Fourteenth Circuit"). R. at 54. On appeal, Petitioner argued that: (1) the continuous seizure doctrine is inconsistent with this Court's jurisprudence; (2) the Fourth Amendment does not preclude installation of a pole camera absent a warrant; (3) a subjective test should be used to determine whether the routine booking question exception to *Miranda* applies. R. at 54. In affirming the District Court, the Fourteenth Circuit disregarded consequential constitutional standards. Accordingly, this appeal follows. R. at 63.

A. Statement of the Facts

Respondent is a member of the Anti-Consumerist Brigade ("ACB"), which is an anti-consumerist organization opposed to the "continual buying and consuming of material goods." R. at 1. Purportedly, Respondent lives at the ACB headquarters located at 594 Atlantic Place, Boerum City, Boerum. R. at 1, 39. On December 27, 2017, the ACB held a meeting at its headquarters where its members planned public demonstrations and researched homemade explosive devices. R. at 4. During this meeting, ACB leader George Hoyt ("Hoyt"), "discussed building and using an explosive device to make a statement sometime in the near future." R. at 4.

On January 2, 2018, Sidney Aitkens ("Aitkens"), an ACB member, contacted FBI Special Agent Melanie Montague ("Agent Montague") to report the increasingly alarming and hostile behavior of the ACB. R. at 4. Specifically, Aitkens informed Agent Montague of the December 27 meeting where the ACB discussed plotting an attack. R. at 4. Because of the ACB's terroristic threats, on January 22, 2018, Agent Montague arranged for a camera to be installed on a public utility pole across the street from ACB headquarters. R. at 5.

The pole camera faced the entry way of the ACB headquarters, which was "surrounded by a decorative three-foot split rail fence." R. at 5. The camera could not view the front door of the ACB headquarters because it was obstructed by a large tree. R. at 5. The camera could be remotely controlled, panned slightly from side-to-side, and had minimal zooming capabilities. R. at 5. The camera provided "a twenty-four-hour live feed" that could be accessed at the station and through software installed on a mobile device. R. at 5. The pole camera did have its deficiencies, however: it could not record audio, it could not view inside the home, it could not view the outer windows of the home, it could not view outer doorways of the home, and it did not have nighttime capabilities. R. at 5.

From January 22, 2018 until August 25, 2018, the day of the bombing, FBI agents monitored the exterior of ACB headquarters. R. at 11-18. During this period the camera showed a blue-haired woman, later determined to be Respondent, entering and exiting the home and staying overnight at ACB headquarters. R. at 11-18. On the morning of August 25, 2018, Respondent was recorded accepting a flip-phone from ACB leader, Hoyt, and placing it in her pocket. R. at 9. At approximately 8:02 a.m. on August 25, 2018, the pole camera captured Respondent leaving ACB headquarters alone in a sedan with a flip-phone and a backpack. R. at 9. At approximately 3:00 p.m. on August 25, 2018, "a bomb had partially detonated in the

Boerum Municipal Fountain during the Boerum Street Fair" destroying the World War II Veterans Memorial Statute. R. at 6, 36. Subsequently, a forensic examination of the bomb "determined that it had been activated remotely using a mobile phone." R. at 10.

Following the detonation of the bomb, two members of the Joint FBI Task Force, Officer Smith and Special Agent Johnson, were assigned to patrol the surrounding area and question any and all individuals about suspicious activity they may have witnessed. R. at 6. Around 5:00 p.m., Officer Smith and Special Agent Johnson were patrolling in their vehicle and noticed Respondent, who was wearing a dark colored hooded sweatshirt with the hood pulled over her head, "walking rapidly away from the center of the Fair[.]" R. at 6. As Respondent walked along the sidewalk toward Officer Smith and Special Agent Johnson's vehicle, Special Agent Johnson pulled the vehicle into the driveway of a house in front of Respondent. R. at 6.

Officer Smith and Special Agent Johnson exited the vehicle, and Special Agent Johnson, consistent with his questioning of other individuals in the area, called out to Respondent. R. at 6. Officer Smith asked Respondent, "[a]re you coming from the block party?" R. at 6. Respondent replied, "[y]es." R. at 6. Then, Officer Smith asked, "[c]an we ask you some questions?" R. at 6. To which Respondent answered, "[a]bout what?" R. at 6. Special Agent Johnson replied, "[t]he bombing that occurred earlier." R. at 6. Respondent exclaimed "I don't know anything about that" and contemporaneously ran in the opposite direction. R. at 6. This entire interaction, prior to Respondent's flight, "lasted about one minute." R. at 6.

Consequently, Officer Smith and Special Agent Johnson pursued Respondent on foot. R. at 6. As Respondent was fleeing, Special Agent Johnson observed "her toss a flip-phone from her sweatshirt pocket into the bushes along the sidewalk." R. at 6. Eventually, Special Agent Johnson managed to catch Respondent and placed her under arrest while Officer Smith retrieved

the abandoned flip-phone from the bushes. R. at 6. Because Respondent tossed the phone, it was flipped open to a screen that read "Recent Outgoing Calls" which displayed a three-second phone call to an "unknown" number at 2:59 p.m. R. at 6. Officer Smith inventoried the phone and placed it in a sealed plastic bag, and both Officer Smith and Special Agent Johnson transported Respondent to the FBI Task Force offices. R. at 7.

At the FBI Task Force offices, Agent Montague processed Respondent. R. at 37. Processing an arrestee consists of safeguarding evidence, fingerprinting, and obtaining routine booking information such as name, address, and date of birth. R. at 37. Appropriately, Agent Montague vouchered Respondent's flip-phone, fingerprinted Respondent, and obtained routine booking information. R. at 38. When Agent Montague asked for Respondent's address, Respondent superficially replied "I stay at my mom's." R. at 38. To clarify, Agent Montague responded "[o]kay, you stay with your mom sometimes, but is that where you live?" R. at 38. Respondent then answered that she "sometimes" resides at 594 Atlantic Place in Boerum City, ACB headquarters. R. at 39. After Agent Montague completed the routine booking procedures, Respondent was placed in an interview room for subsequent questioning. R. at 39.

B. Procedural History

Respondent was indicted on two charges—conspiracy to bomb a place of public use and attempt to bomb a place of public use. R. at 1-3. Following her indictment, Respondent moved before the District Court to suppress: (1) evidence from her discarded flip-phone; (2) evidence obtained from the pole camera at 594 Atlantic Place, ACB headquarters; (3) statements made to Agent Montague during routine booking procedures. R. at 55. The District Court ruled in favor of Respondent, holding that: (1) the continuous seizure doctrine precluded presenting evidence of her discarded flip-phone; (2) the Fourth Amendment prohibited introduction of evidence

obtained by the pole camera; (3) an objective approach to the routine booking question exception to *Miranda* excluded evidence of Respondent's statement made to Agent Montague. R. at 50. Petitioner subsequently filed a timely interlocutory appeal to the Fourteenth Circuit. R. at 54.

The Fourteenth Circuit affirmed the District Court's decision, finding that: (1) the continuous seizure doctrine should be applied; (2) a warrant is required prior to installation of a pole camera; (3) an objective test should be used to determine whether statements are admissible under the routine booking question exception to *Miranda*. R. at 54. Petitioner appealed to this Court, which granted certiorari. R. at 63.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's holding because: (1) the continuous seizure doctrine is inconsistent with this Court's precedent and effectively circumvents the purpose of the exclusionary rule; (2) a warrant is not required prior to installation of a pole camera to view activities exposed to the public; (3) a subjective test, not an objective test, is the appropriate standard for determining whether statements are admissible under the routine booking question exception to *Miranda*.

First, this Court should reverse the Fourteenth Circuit's holding that the continuous seizure doctrine should apply where a suspect temporarily acknowledges an officer's presence but then subsequently flees. The Fourteenth Circuit erred in three ways. First, the court ignored that this Court declined to adopt the continuous seizure doctrine because it unreasonably treats every police-citizen encounter as a seizure under the Fourth Amendment. Second, in defiance of this Court's Fourth Amendment jurisprudence, the Fourteenth Circuit ignored that for a seizure to occur the suspect must unequivocally submit to a show of authority. By holding that temporary acknowledgement of police authority equates to a submission, the Fourteenth Circuit precluded evidence obtained prior to a complete submission to police authority. Third, by adopting the continuous seizure doctrine, the Fourteenth Circuit unreasonably expanded the exclusionary rule. Instead of deterring unlawful government behavior, the continuous seizure doctrine encourages suspects to flee and discard evidence to prevent the discarded evidence from being used against them at trial. Thus, the evidence of the discarded flip-phone should be admitted.

Second, this Court should reverse the Fourteenth Circuit's holding that a warrant is required prior to installation of a pole camera to surveil areas exposed to the public. The

Fourteenth Circuit erred by misconstruing the application of *Carpenter v. United States* and failing to determine whether Respondent maintained a reasonable expectation of privacy. The court erroneously expanded the holding of *Carpenter*, that the use of cell site location to track an individual's location constituted a search, to apply to video surveillance. The Fourteenth Circuit also failed to apply this Court's two-part inquiry to determine whether an individual has a reasonable expectation of privacy: (1) whether the individual manifested a subjective expectation of privacy; (2) whether society is willing to recognize that expectation as reasonable. The use of a pole camera to view Respondent's unprotected activities in an unguarded area does not constitute a search. Thus, evidence obtained from the pole camera should be admitted.

Third, this Court should reverse the Fourteenth Circuit's holding that an objective test should be used to determine whether law enforcement questioning falls under the routine booking question exception to the *Miranda* requirements. The Fourteenth Circuit erred by applying an objective test because it is inconsistent with this Court's precedent. The objective test creates an unworkable standard for courts to apply and hinders law enforcement's ability to perform essential administrative functions. By applying the objective test, the Fourteenth Circuit ignored *Pennsylvania v. Muniz*, where this Court acknowledged that a subjective inquiry applies to the routine booking question exception. The subjective test focuses on whether a law enforcement officer actually intended to elicit incriminating information. The subjective test is preferable to the objective test because it allows courts to focus on the intent of the law enforcement officers and better promotes the fundamental purpose of the routine booking question exception. Thus, under the appropriate subjective test, Respondent's answers to Agent Montague's routine booking questions should be admitted.

ARGUMENT

I. THE FOURTEENTH CIRCUIT DISREGARDED THIS COURT'S PRECEDENT AND ERRONEOUSLY APPLIED THE CONTINUOUS SEIZURE DOCTRINE, IMPROPERLY EXPANDING THE EXCLUSIONARY RULE.

This Court should reverse the Fourteenth Circuit's holding that Respondent was seized prior to her subsequent flight because the continuous seizure doctrine is inconsistent with this Court's Fourth Amendment jurisprudence. Further, the Fourteenth Circuit disregarded this Court's holding in *California v. Hodari D.*, 499 U.S. 621 (1991). Respondent did not unequivocally submit to Officer Smith's and Special Agent Johnson's show of authority. Therefore, there was no seizure during the initial encounter, the flip-phone should be admissible, and the Fourteenth Circuit's suppression ruling should be reversed.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The right to be free from unreasonable seizures "belongs . . . to the citizen on the streets of our cities[.]" *Terry v. Ohio*, 392 U.S. 1, 9 (1968). Law enforcement officers do not seize every citizen whom they approach, because as long as a reasonable person would feel free "to disregard the police and go about his business," the encounter does not result in a seizure. *Hodari D.*, 499 U.S. at 628. A police-citizen encounter "will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). This Court has unwaveringly acknowledged that a seizure only occurs at the point in time when there is an unequivocal termination of freedom of movement. *See e.g.*, *Hodari D.*, 499 U.S. at 626 (1991); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion).

A. The Continuous Seizure Doctrine Is Inconsistent With This Court's Fourth Amendment Precedent.

The Fourteenth Circuit erroneously applied the continuous seizure doctrine. This Court rejected the continuous seizure doctrine in *Hodari D.*, where a suspected drug dealer fled from police after he saw police drive by in an unmarked car. 499 U.S. at 623. The police then cornered the suspect and a chase ensued. *Id*. As the suspect fled, he discarded drugs and seconds later, he was tackled to the ground and placed under arrest. *Id*. The suspect argued that a seizure occurred when he was cornered, and as such the discarded drugs should be suppressed. *Id*. This Court rejected the suspect's argument and determined that for a seizure to occur, the police must apply physical force to the person being seized or, where force is absent, the person must submit to a show of police authority. *Id*. Consequently, if the police make a show of authority and the suspect flees, there is no seizure until the suspect is physically subdued. *Id*. at 626 (ruling that suspect was not seized until he was tackled). Accordingly, *Hodari D.* stands for the proposition that a seizure occurs at a discrete point in time when an order to stop is unequivocally obeyed or physically enforced, for "there is no seizure without actual submission." *Brendlin v. California*, 551 U.S. 249, 254 (2007).

The continuous seizure doctrine departs from this Court's longstanding Fourth Amendment jurisprudence. The continuous seizure doctrine holds that if a suspect initially engages with an officer momentarily and then eventually yields to a show of authority or physical apprehension, the seizure begins upon the initial encounter and continues until the suspect is apprehended. *United States v. Griffin*, 652 F.3d 793, 799 (6th Cir. 2011) (rejecting suspect's continuous seizure argument). It stands for the proposition that a seizure occurs if an individual interacts with a law enforcement officer, regardless of the substance of the interaction. The continuous seizure doctrine considers a seizure to be an ongoing event rather than a distinct

point in time. *Griffin*, 652 F.3d at 799. This stands in direct contrast with *Hodari D.*, when this Court reiterated that a "seizure is a single act, and not a continuous fact." 499 U.S. at 625 (internal quotations omitted).

The Fourteenth Circuit's depiction of the application of the continuous seizure doctrine is misleading. R. at 56-57. Every circuit court since *Hodari D.*, except the Third and Tenth Circuits, has held the continuous seizure doctrine inconsistent with this Court's precedent. *See, e.g., United States v. Baldwin*, 496 F.3d 215 (2d Cir. 2007) (rejecting argument that momentary compliance with police authority constituted a seizure); *United States v. Bradley*, 196 F.3d 762 (7th Cir. 1999) (recognizing that the show of authority must cause the fleeing suspect to definitively cease); *United States v. Hernandez*, 27 F.3d 1403 (9th Cir. 1994) (declining to adopt continuous seizure doctrine); *United States v. Washington*, 12 F.3d 1128 (D.C. Cir. 1994) (concluding that momentary submission to authority did not constitute a seizure). Even in the Third and Tenth Circuits, it is not clear whether the continuous seizure doctrine was applied. Nevertheless, the circuits that arguably recognized the continuous seizure doctrine are distinguishable from the case at hand. *See United States v. Coggins*, 986 F.2d 651 (3d Cir. 1993) (determining that a seizure occurred when officers denied the suspect's request to leave); *United States v. Morgan*, 936 F.2d 1561 (10th Cir. 1991) (reasoning that a seizure occurred when the suspect complied with an officer's order to "hold up").

In recognizing the continuous seizure doctrine, the Fourteenth Circuit effectively circumvented this Court's requirement that a seizure only occurs at the single point in time: when an officer makes a show of authority and a suspect unambiguously yields to the officer's authority. *Hodari D.*, 499 U.S. at 626. It is well established that officers are allowed to ask questions of anyone without having any evidence creating suspicion, and such "police

questioning does not constitute a seizure." *Bostick*, 501 U.S. at 434. But, under the continuous seizure doctrine, a brief police-citizen encounter constitutes a seizure if the suspect subsequently flees, and thus any evidence the suspect discards during flight is inadmissible as fruit of the poisonous tree. *Griffin*, 652 F.3d at 799.

This Court's precedent establishes that a person is seized by the police, and thus entitled to challenge the government's action under the Fourth Amendment when the officer, "by means of physical force or show of authority," terminates or restrains his freedom of movement. *Bostick*, 501 U.S. at 434. Thus, a Fourth Amendment seizure consists of two elements: first, there must be a show of authority; and second, the suspect must unequivocally submit to the show of authority. *Hodari D.*, 499 U.S. at 628. A show of authority is only "a necessary, but not a sufficient, condition for seizure[,]" and here Respondent did not unequivocally submit to the officer's show of authority. *Hodari D.*, 499 U.S. at 628.

B. Respondent's Momentary Compliance Did Not Rise To The Level Of A Complete Submission, Therefore She Was Not Seized.

The Fourteenth Circuit erred in holding that a momentary pause constitutes a complete submission to police authority. During Respondent's initial encounter with Officer Smith and Special Agent Johnson, Respondent did not unequivocally submit to a show of authority, and therefore no seizure occurred. A seizure "requires either physical force . . . or, where that is absent, submission to the assertion of authority." *Id*. at 626. When a law enforcement officer makes a show of authority a seizure only occurs if the suspect unambiguously and continuously yields because a show of authority must produce a stop. *Id*. at 628. Consequently, temporary compliance with an officer's show of authority does not amount to a seizure. *Id*.

This Court has made "clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Bostick*, 501 U.S. at 434. Therefore, "mere

police questioning does not constitute a seizure." *Id*. A person must do more than momentarily stop at the request of law enforcement officers to be seized because without actual submission "there is at most an attempted seizure[,]" *Brendlin*, 551 U.S. at 254, and "[a]ttempted seizures of a person are beyond the scope of the Fourth Amendment." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 n.7 (1998). This Court explained, "what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." *Brendlin*, 551 U.S. at 262.

This Court's precedent reflects the necessity of complete submission, either caused by physical apprehension or a stop in response to a show of authority, in order for a seizure to occur. *See Brower v. Inyo County*, 489 U.S. 593 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988). This Court explained in *Brower* that a show of authority must cause the suspect to stop for a seizure to occur. 489 U.S. at 596. In *Brower*, police cars, with their lights flashing, were in pursuit of a suspect for twenty miles. *Id*. Subsequently, the suspect fatally crashed into a police blockade. *Id*. This Court explained while the twenty-mile pursuit constituted an adequate show of authority, the pursuit did not cause the suspect to stop, the blockade did. *Id*. Accordingly, because the officers' show of authority did not cause the suspect to stop, the suspect's death was not held to be the result of an unlawful seizure. *Id*. at 597.

Similarly, in *Chesternut*, this Court recognized that a suspect was not seized until he completely submitted to police authority. 486 U.S. at 570. In *Chesternut*, the suspect was standing on a curb when he saw a police cruiser approach him. *Id*. at 569. After seeing the police cruiser, the suspect fled and police pursued. *Id*. As the suspect was fleeing, he discarded "packets" on the ground. *Id*. The suspect eventually came to a stop, and before the officers

approached the suspect, they identified the discarded packets as codeine pills. *Id*. Then, the police officers placed the suspect under arrest. *Id*. The suspect argued that he was unlawfully seized when he was being "chased" prior to discarding the drugs. *Id*. This Court rejected the suspect's argument and held that the Fourth Amendment is not implicated until a suspect unequivocally stops in response to a show of authority. *Id*. at 574.

Momentary compliance with law enforcement questioning, through acknowledging the presence of an officer or fleeting hesitation and eye contact, does not equate to a submission. When a law enforcement officer, "without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore" the officer and continue about his business or respond. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). However, "unprovoked flight" by the individual is neither ignoring nor responding to a law enforcement inquiry, and at the very moment of unprovoked flight, officers have probable cause to pursue the individual. *Id*. at 125.

The majority of circuit courts recognize that a suspect must do more than stop momentarily in response to a show of authority to be considered to have submitted to police authority. *See generally, United States v. Huertas*, 864 F.3d 214 (2d Cir. 2017) (determining that suspect's conversation with police officer that lasted roughly one minute did not constitute submission to police authority); *United States v. Valentine*, 232 F.3d 350 (3d Cir. 2000) (holding that suspect did not submit to police authority, by giving his name and speaking with the officer); *Bradley*, 196 F.3d at 768 (recognizing that an officer's show of authority must cause the suspect to completely submit to that authority for a seizure to occur); *Hernandez*, 27 F.3d at 1407 (declining "to adopt a rule whereby momentary hesitation and direct eye contact prior to flight constitute submission to a show of authority"); *Washington*, 12 F.3d at 1132 (reasoning that

suspect was not seized when he momentarily complied with order to pull the vehicle over but then sped off before officers were able to approach the vehicle).

Respondent's temporary acknowledgment of Officer Smith and Special Agent Johnson was not a submission to a show of authority. Here, Officer Smith and Special Agent Johnson approached Respondent in an open public area. R. at 6. Respondent could have ignored the officers and continued walking, and this refusal to engage would not be sufficient to pursue. R. at 6; *see Royer*, 460 U.S. at 498. Upon Respondent's momentary pause the officers only asked two questions, and the interaction lasted about one minute. R. at 6. In response to the second question, Respondent said she did not know anything about the bombing and immediately ran in the opposite direction. R. at 6. Respondent's unprovoked flight gave the officers a justifiable interest to investigate further. *Wardlow*, 528 U.S. at 125. Not until Special Agent Johnson tackled Respondent was Respondent seized for Fourth Amendment purposes. *Id.* Accordingly, the officers obtained the flip-phone after Respondent discarded it during an unprovoked flight, creating probable cause for a lawful seizure. R. at 6; *see Wardlow*, 528 U.S. at 125.

If transient acknowledgement of an officer's presence constitutes a submission to a show of authority, then every police-citizen interaction would be deemed a seizure. *See Hodari D.*, 499 U.S. at 625. Consequently, not only would this rule purge this Court's longstanding Fourth Amendment precedent, "[s]uch a rule would encourage suspects to flee after the slightest contact with an officer in order to discard evidence, and yet still maintain Fourth Amendment protections." *Hernandez*, 27 F.3d at 1407.

C. The Fourteenth Circuit's Decision Undermines The Functionality Of The Exclusionary Rule.

In holding that Respondent was seized prior to her flight, and therefore excluding evidence obtained from her discarded flip-phone, the Fourteenth Circuit abandoned the

constitutional foundation behind the exclusionary rule. Instead of deterring unlawful government behavior, expanding the exclusionary rule by adopting the continuous seizure doctrine would encourage suspects to submit to police authority with the intent to flee the scene and discard evidence to prevent that evidence from being used against them at trial. *See Hodari D.*, 499 U.S. at 627. Even if it is determined that Respondent was seized prior to her flight, the evidence obtained from the discarded flip-phone should not be suppressed.

The continuous seizure doctrine is inconsistent with the fundamental purpose of the exclusionary rule. The purpose of the exclusionary rule is to deter unlawful government behavior. *See Hudson v. Michigan*, 547 U.S. 586, 609 (2006). The exclusionary rule is a "judicially created remedy to safeguard Fourth Amendment rights through its deterrent effect," and its application "must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence." *United States v. Leon*, 468 U.S. 897 (1984). Therefore, the rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

This Court has always been "cautious against expanding" the exclusionary rule as suppression of evidence serves as a "last resort, not [a] first impulse." *Hudson*, 547 U.S. at 591. (internal quotations omitted). The rule is only applicable "where its deterrence benefits outweigh its 'substantial social costs.'" *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) (quoting *Leon*, 468 U.S. at 907). The deterrence rationale of the exclusionary rule is not served if it is applied to government officers acting in good faith because the "deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct[.]" *Michigan v. Tucker*, 417 U.S. 433, 447 (1974). The

societal costs of excluding the discarded flip-phone insurmountably outweigh the benefits of deterrence. *Hodari D.*, 499 U.S. at 627. In *Hodari D.*, this Court explained,

> Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed.

Id. (emphasis original).

The Fourteenth Circuit ignored the readily apparent consequences of applying the exclusionary rule to the present case. First, it will discourage government officers from engaging in investigatory conduct in a timely fashion near the scene of a crime. Officers are taught to control and identify individuals near a scene of a crime to preserve evidence, maintain the integrity of the investigation, and above all else, guarantee public safety. United States Department of Justice, *A Guide for Explosion and Bombing Scene Investigation* (June 2000), https://www.ncjrs.gov/pdffiles1/nij/181869.pdf. Specifically, the United States Department of Justice published a handbook on explosion and bomb scene investigation which explicitly instructs officers investigating a bomb site to: identify individuals on or around the scene, ascertain individuals' "relationship to or association with the scene[,]" establish individuals' "basis of knowledge[,]" and obtain statements from these individuals. *Id*.

Second, "characterizing every street encounter between a citizen and the police as a 'seizure,' . . . would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Doing so would arbitrarily remove "police questioning as a tool in the effective enforcement of the criminal laws." *Id*. Third, excluding this evidence would have insurmountable policy repercussions. Omitting the evidence from the discarded flip-phone entails the risk of releasing an inherently

dangerous individual back into society. Accordingly, suppression of this evidence amounts to a "a get-out-of-jail-free card." *Hudson*, 547 U.S. at 595. Precluding this evidence would only discourage law enforcement officers from engaging in lawful interactions with individuals in public areas—decreasing the number of meaningful police-citizen interactions that are needed to secure public safety.

Therefore, Officer Smith's and Special Agent Johnson's good faith conduct during the initial encounter coupled with Respondent's momentary pause does not support suppression. Respondent was not seized until after she discarded the flip-phone when Special Agent Johnson tackled her. Further, the societal costs of suppressing the evidence from the discarded flip-phone outweigh the deterrent purpose of the exclusionary rule, such that the evidence from the discarded flip-phone should be admissible. Regardless of whether this Court recognizes the continuous seizure doctrine and finds that Respondent was seized prior to discarding the flip-phone, the purpose of the exclusionary rule is not served through suppression.

II. THE FOURTH AMENDMENT DOES NOT PRECLUDE THE GOVERNMENT FROM OBTAINING THE ASSISTANCE OF TECHNOLOGY TO OBSERVE AREAS AND ACTIVITIES EXPOSED TO THE PUBLIC.

This Court should reverse the Fourteenth Circuit's holding disallowing evidence obtained from pole camera surveillance because the installation of a pole camera absent a warrant does not violate the Fourth Amendment. The Fourteenth Circuit misconstrued *Carpenter v. United States*, 138 S. Ct. 2206 (2018) by erroneously expanding its application beyond its explicitly intended bounds. The Fourteenth Circuit also failed to conduct the appropriate Fourth Amendment analysis under this Court's precedent pursuant to *Katz v. United States*, 389 U.S. 347 (1967).

The Fourth Amendment protects individuals "against unreasonable searches[.]" U.S. Const. amend. IV. Relevant to a search, "[t]he touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring). Accordingly, a search occurs when the government intrudes on an individual's "reasonable expectation of privacy." *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

In assessing whether the use of technology to gather information constitutes a "search" under the Fourth Amendment, it is necessary to identify "precisely the nature of the state activity that is challenged[,]" *Smith v. Maryland*, 442 U.S. 735, 741 (1979), then to examine the relationship between that activity and the expectations of privacy that the Fourth Amendment protects. *Katz*, 389 U.S. at 352.

A. The Fourteenth Circuit Misconstrued The Application Of *Carpenter* And Erroneously Expanded The Holding Beyond Its Limited Scope.

The Fourteenth Circuit erred by expanding the scope of this Court's decision in *Carpenter*. This Court's reasoning in *Carpenter* does not apply to traditional surveillance techniques, such as pole camera observations. Unlike the invasive technology used in *Carpenter*, the nature of the state activity in this case does not rise to the same level of intrusiveness. In *Carpenter*, this Court addressed whether the government's retroactive use of cell-site location information ("CSLI"), tracking an individual's prior movements based on the location of their cell phone, constituted a search under the Fourth Amendment. *Carpenter*, 138 S. Ct. at 2211-2212. This Court stated that an individual "maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Id.* at 2218. (reasoning that CSLI followed individuals beyond the observable public sphere, including into "private residences, doctor's offices, political headquarters, and other potentially revealing locales.") Ultimately, this

Court held that the government's use of CSLI constituted a search and therefore the government was required to obtain a warrant prior to examining CSLI. *Id.* at 2220-2221. However, this Court stated this holding was "a narrow one" and explicitly declined to "call into question conventional surveillance techniques and tools, such as security cameras." *Id.* at 2220.

In accordance with *Carpenter*, the Fourth Amendment does not prohibit law enforcement from using technology to surveil individuals. Law enforcement may use technology to augment "the sensory faculties bestowed upon them at birth" without violating the Fourth Amendment. *United States v. Knotts*, 460 U.S. 276, 282 (1983). This Court has "never equated police efficiency with unconstitutionality[.]" *Id*. at 284. Rather, this Court has consistently recognized an assortment of technologies that may be used, absent a warrant, that do not violate the Fourth Amendment. *Florida v. Riley*, 488 U.S. 445 (1989) (helicopter flyover); *Ciraolo*, 476 U.S. 207 (airplane flyover); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (aerial photography); *Knotts*, 460 U.S. 276 (beeper to track car). Accordingly, the use of technology to record activity visible to the naked eye does not constitute a search under the Fourth Amendment. *Dow Chemical Co.*, 476 U.S. 227.

Post-*Carpenter*, the use of CSLI is factually distinct from the use of video surveillance because video surveillance does not track "the totality of [a] defendant's movements." *United States v. Kelly*, 385 F. Supp. 3d 721, 727 (E.D. Wis. 2019) (recognizing that a video camera only captures limited information, such as arrivals and departures). The use of a pole camera to observe an individual's movements is distinguishable from the use of CSLI because the camera "does exactly what a human law enforcement agent could do." *Id.* at 728. Thus, information gathered from pole cameras does not rise to the invasive level that the Fourth Amendment is intended to protect against. *See United States v. Cantu*, 684 Fed. App'x 703 (10th Cir. 2017);

United States v. Wymer, 654 Fed. App'x 735 (6th Cir. 2016). Specifically, where the view from the street and the pole camera were equally obscured by a tarp and foliage, the Sixth Circuit held that this did not violate the Fourth Amendment because "the camera recorded the same view of the [area] as that enjoyed by passersby on public roads." *United States v. Houston*, 813 F.3d 282, 285 (6th Cir. 2016); *see also Ciraolo*, 476 U.S. 207.

The purpose of the Fourth Amendment is not to "punish law enforcement for using technology to more efficiently conduct their investigations." *Houston*, 813 F.3d at 288. Even if traditional surveillance over an extended period of time would require a large amount of resources and personnel, this Court has recognized such surveillance as constitutionally permissible. *United States v. Jones*, 565 U.S. 400, 412 (2012). This Court has also recognized that using technology to accomplish the same objectives as traditional surveillance is constitutionally permissible. *Ciraolo*, 476 U.S. at 218. Appropriately, courts have held that long-term surveillance using pole cameras does not violate an individual's reasonable expectation of privacy under the Fourth Amendment. *See United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009) (eight months), *United States v. Tuggle*, No. 16-cr-20070-JES-JEH, 2018 WL 3631881 at *11 (C.D. Ill. July 31, 2018) (eighteen months), *United States v. Mazzara*, 16 Cr. 576 (KBF), 2017 WL 4862793 (S.D.N.Y. Oct. 27, 2017) (twenty-one months). In *Houston*, the court recognized that "if law enforcement were required to engage in live surveillance without the aid of technology in this type of situation, then the advance of technology would one-sidedly give criminals the upper hand." 813 F.3d at 290. When determining whether the use of technology is a violation of the Fourth Amendment, "it is only the possibility that a member of the public may observe activity from a public vantage point—not the actual practicability of law enforcement's doing so without technology[.]" *Id*. at 289.

The Fourteenth Circuit incorrectly interpreted *Carpenter*'s narrow holding to apply to conventional surveillance techniques. In doing so, it agreed with the reasoning in *United States v. Moore-Bush*, a district court opinion currently on appeal before the First Circuit. 381 F. Supp. 3d 139 (D. Mass. 2019) (*appeal docketed*, No. 19-1625 (1st Cir. June 21, 2019)). The court in *Moore-Bush* incorrectly expanded this Court's holding in *Carpenter* by failing to recognize that pole cameras are factually distinct from CSLI. *See Moore-Bush*, 381 F. Supp. 3d at 146, R. at 57-58. The *Moore-Bush* court and the Fourteenth Circuit incorrectly equated the use of a pole camera to collect limited data with the use of CSLI to collect a more expansive set of data. *Moore-Bush*, 381 F. Supp. 3d at 146, R. at 57-58. Consequently, applying the Fourteenth Circuit's reasoning would result in the prohibition of any type of technological surveillance without a warrant, disregarding the applicable constitutional analysis under *Katz*.

B. The Use Of Technology To Observe An Area Exposed To The Public Is Not A Search Because Private Areas And Activities Were Not Observed.

This Court should reverse the Fourteenth Circuit's holding that pole camera surveillance absent a warrant violates the Fourth Amendment because a reasonable expectation of privacy is not invaded when the government observes an area exposed to the public. Respondent failed to exhibit a subjective or objective expectation of privacy in the limited area or activities which the pole camera observed. Technological observations of areas outside the home only implicate Fourth Amendment protections when a reasonable expectation of privacy is violated. Further, activity a person knowingly exposes to the public is not protected by the Fourth Amendment. *See Katz*, 389 U.S. at 351. In *Katz*, this Court established a two-part inquiry to determine whether an individual has a reasonable expectation of privacy: first, whether the individual manifested a subjective expectation of privacy; second, whether society is willing to recognize that expectation as reasonable. *Ciraolo*, 476 U.S. at 211.

1. Respondent did not manifest a subjective expectation of privacy in the limited area that was surveilled.

The Fourteenth Circuit erred in holding that Respondent maintained a subjectively reasonable expectation of privacy. The first part of the *Katz* inquiry focuses on whether the individual exhibited a subjective expectation of privacy. *Id*. In *Riley*, this Court recognized that an individual could meet the test of manifesting a subjective expectation of privacy by taking precautions, such as building a tall fence. 488 U.S. at 454. There, an individual would be deemed to have taken "normal precautions to maintain his privacy." *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980). However, if an individual failed to take such precautions, "they cannot reasonably expect privacy from public observation." *Riley*, 488 U.S. at 454.

Consistently, this Court has recognized that a suspect must take affirmative measures to demonstrate a subjectively reasonable expectation of privacy. In *Ciraolo*, this Court recognized that the erection of a ten-foot fence demonstrated the defendant's manifestation of a subjective expectation of privacy. 476 U.S. at 211. Similarly, in *Riley*, this Court held that the defendant exhibited a subjectively reasonable expectation of privacy in his greenhouse because it was enclosed and protected from a ground level view. 488 U.S. at 445. Where a pole camera has limited capabilities and can only observe what "a passerby could observe[,]" there is no subjective expectation of privacy. *Cantu*, 684 Fed. App'x at 705.

In this case, the pole camera had similar capabilities to the camera at issue in *Cantu*—both cameras could zoom and pan, but neither camera had audio capabilities and neither camera could view the inside of the house. *Id.*; R. at 5. Respondent failed to take any protective actions to manifest a subjective expectation of privacy in her actions and in the area around the ACB headquarters exposed to the public. R. at 9. *See Riley*, 488 U.S. at 445; *Ciraolo*, 476 U.S. at 211. Additionally, all of Respondent's recorded activities—accepting the flip-phone, carrying a

backpack, and driving away alone—were completed out in the open where any passerby could have witnessed her actions. R. at 9. Thus, Respondent failed to manifest a subjectively reasonable expectation of privacy because she did not take any affirmative action to shield her activities from the public eye and all of her activities took place in public.

2. Society is unwilling to recognize an expectation of privacy in areas that can be readily observed by any onlooker.

The Fourteenth Circuit erred in holding that society is willing to accept a reasonable expectation of privacy in areas exposed to the public. The second part of the *Katz* inquiry focuses on "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 182–83 (1984). Specifically, it "considers the objective reasonableness of [an individual's] subjective expectation of privacy." *Shafer v. City of Boulder*, 896 F. Supp. 2d. 915, 930 (D. Nev. 2012). This Court has reasoned that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. Correspondingly, an objective expectation of privacy in a dwelling does not extend to visual observations of exterior areas or actions exposed to the public. *Knotts*, 460 U.S. 276.

The Fourth Amendment does not prevent law enforcement officers from viewing that which is exposed to the public eye, *Kelly*, 385 F. Supp. 3d at 727, and the government may use technology to monitor a suspect's activities in an area exposed to the public. *See Kyllo v. United States*, 533 U.S. 27, 32 (2001) (noting "that visual observation is no 'search' at all"); *Riley*, 488 U.S. 445 (emphasizing that the police may view areas exposed to the public); *Ciraolo*, 476 U.S. 211 (upholding surveillance where suspect's activities were exposed to the public). In *Ciraolo*, this Court held that the defendant manifested a subjectively reasonable expectation of privacy by erecting a ten-foot fence, but the suspect's manifestation was not one that society was willing to

accept as reasonable because "[a]ny member of the public flying in this airspace" could have observed what the officers observed. 476 U.S. at 213-14. This Court explained that "[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*. at 213. Even if an individual has taken steps to restrict the view of any casual onlooker, "it does not preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." *Id*.

Here, the law enforcement officers only observed what Respondent made public to any person roaming on the streets surrounding ACB headquarters. R. at 5. For instance, the pole camera could not view the doorway but any member of the public walking down the street would have been able to see the doorway. R. at 5. Additionally, Respondent failed to take any precautions to shield her actions from the public sphere, and society is unwilling to recognize a reasonable expectation of privacy in actions conducted in public. Thus, the use of a stationary pole camera to surveil an area exposed to the public did not violate Respondent's rights under Fourth Amendment.

The Fourth Amendment does not preclude the government from procuring the assistance of substandard technology to observe an area, less than what is exposed to a casual onlooker, that is exposed to the public, especially when the technology does not permit the government to view private activities in intentionally discernable private areas. The use of a pole camera to view Respondent's unprotected activities in an unguarded area does not constitute a search. Therefore, this Court should reverse the decision of the Fourteenth Circuit and admit the evidence obtained from the pole camera.

III. THE SUBJECTIVE TEST IS THE PROPER STANDARD TO DETERMINE WHETHER POLICE QUESTIONS FALL UNDER THE ROUTINE BOOKING QUESTION EXCEPTION IN ACCORDANCE WITH THIS COURT'S PRECEDENT.

The Fourteenth Circuit erred in adopting an objective test for the routine booking question exception because the objective test creates uncertainty for courts and ignores this Court's more recent decision in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. However, "[t]he Fifth Amendment itself does not prohibit all incriminating admissions; '[absent] some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.'" *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977)). This Court's decision in *Miranda v. Arizona* prevents law enforcement officers from extracting incriminating information during a custodial interrogation in the absence of warning a person that they have the right to remain silent, anything they say may be used against them, and they have the right to an attorney. 384 U.S. 436, 484-485 (1966). *Miranda* warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Tucker*, 417 U.S. at 444.

Miranda warnings are required before an interrogation, which "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response[.]" *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). However, this Court has recognized an exception to the *Miranda* rule for routine booking questions "to secure the biographical data necessary to complete booking or pretrial services" when the questions are "requested for record-keeping purposes only." *Muniz*, 496 U.S. 582, 601 (1990) (internal

quotations omitted). The routine booking question exception covers questions relating to a suspect's "name, address, height, weight, eye color, date of birth, and current age." *Muniz*, 496 U.S. at 601 (1990).

While courts agree that the routine booking question exception exists, there are three different tests for whether the exception applies: (1) the objective test; (2) the subjective test; (3) the legitimate administrative purpose test.[1] *See* George C. Thomas III, *Lost in the Fog of Miranda*, 64 Hastings L.J. 1501 (2013). There is currently a circuit split over which test should be applied. *Id.* (recognizing that courts in the First, Second, Sixth, Eighth, and Ninth Circuits apply an objective test; courts in the Fourth, Fifth, Tenth, and Eleventh Circuits apply a subjective test; and the D.C. Circuit applies the legitimate administrative purpose test). Here, in accordance with this Court's precedent, the subjective test is the appropriate standard.

A. The Fourteenth Circuit Erroneously Applied The Objective Test.

The Fourteenth Circuit erred in adopting the objective test because it is unworkable and is inconsistent with this Court's precedent. The objective test was first articulated in dicta in *Innis*. 446 U.S. at 301-302. The objective test asks, "whether the questions and circumstances were such that the officer should reasonably have expected the question to elicit an incriminating response." *United States v. Reyes*, 225 F.3d 71, 77 (1st Cir. 2000). Under this test, the focus is on whether law enforcement officers ask questions "that they *should have known* were reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 302 (emphasis original). In applying the objective test, courts have looked at factors such as whether the question asked necessitated a response "directly relevant to the substantive offense charged," *United States v. Brown*, 101 F.3d

[1] The two predominant tests are the objective test and the subjective test, and the certified question before this Court is whether the objective or subjective test should apply. Accordingly, the legitimate administrative purpose test is inapplicable here.

1272, 1274 (8th Cir. 1996), whether the questions are derived from a standard booking form and the questioning occurred in accordance with "legitimate, routine booking interviews[,]" *Reyes*, 225 F.3d at 77, and whether the questioning occurred at a police station or at another location. *United States v. Pacheco-Lopez*, 531 F.3d 420, 425 (6th Cir. 2008). Even when applying the objective test, "the subjective intent of the agent is relevant[.]" *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983).

The Fourteenth Circuit inappropriately relied on *Whren v. United States*, 517 U.S. 806, 813 (1996), *Quarles*, 467 U.S. at 656, and Justice O'Connor's dissent in *Missouri v. Seibert*, 542 U.S. 600, 625-626 (2004) (O'Connor, J., dissenting) for the proposition that this Court prefers an objective approach for criminal procedure questions. R. at 59. However, these cases are distinguishable because public safety is not at issue for routine booking questions, *Quarles*, 467 U.S. at 655, the deliberate withholding of *Miranda* warnings is not at issue, *Seibert*, 542 U.S. at 617, and routine booking questions are not analogous to the reasonableness of traffic stops. *Whren*, 517 U.S. at 813. Applying an objective test to the routine booking question exception makes it more difficult for law enforcement officers to perform essential administrative functions, and it would be unreasonable to ask law enforcement officers to "forego all routine procedures" and detain individuals "without knowing anything about [them.]" *Reyes*, 225 F.3d at 77. Additionally, in applying the objective test, the Fourteenth Circuit relied exclusively on *Innis*, and ignored this Court's decision in *Muniz*.

However, even if this Court were to adopt the objective test, Respondent's statements regarding her address would still be admissible because Agent Montague did not reasonably know that her questions were likely to elicit an incriminating response. Under the objective test, when a response to a booking question is incidental to the offense charged, the response is what

creates the incriminating element, not the question. *Brown*, 101 F.3d at 1274. Where the question is not "investigative in nature" the response falls under the routine booking exception under the objective test. *Id.* Furthermore, courts look to factors such as where the booking interview is conducted and whether the interview was conducted in accordance with a typical procedure. *Reyes*, 225 F.3d at 77, n.2 (stating that where the booking was conducted in accordance with procedure there was no danger of the type of coercion that *Miranda* was designed to prevent); *Pacheco-Lopez*, 531 F.3d at 425. Under the objective test, "it would be a rare case indeed" that a routine booking question would violate *Miranda*. *Reyes*, 225 F.3d at 77.

Here, the Fourteenth Circuit improperly applied the objective test and concluded that Agent Montague "reasonably should have known that her questions" about where Respondent lived "were likely to elicit an incriminating response." R. at 59. However, under the objective test, Respondent's statements should not be suppressed. First, Agent Montague testified that the process of arresting a suspect entails obtaining "routine pedigree information, such as name, address, date of birth, telephone numbers, place of employment, etc." R. at 37. *Reyes*, 225 F.3d at 77. Second, Agent Montague did not obtain Respondent's routine pedigree information in a holding cell. R. at 39. *See Pacheco-Lopez*, 531 F.3d at 425. Third, while Agent Montague reviewed surveillance from the camera placed outside ACB headquarters, there was no way for her to conclusively identify Respondent from the surveillance footage. R. at 41. Fourth, Respondent was charged with "conspiracy to bomb a place of public use and attempt to bomb a place of public use[.]" R. at 54. Respondent's address is not an element of either of those crimes. *See Brown*, 101 F.3d at 1274. Similar to the situation in *Brown*, it was Respondent's answer, not Agent Montague's questions, that created the incriminating element. *Id.* Thus, under the objective test Respondent's statements are admissible because Agent Montague reasonably

believed that she was asking an administrative question that was necessary to complete the booking form.

B. The Subjective Test Articulated In *Pennsylvania v. Muniz* Is The Correct Test.

The Fourteenth Circuit should have applied the subjective test to determine whether Respondent's statements were admissible. This Court's precedent requires the application of the subjective test because this test preserves individual Fifth Amendment rights while promoting the efficient administration of justice. This Court has most recently recognized that the subjective test is the appropriate standard under which to evaluate the routine booking question exception. *Muniz*, 496 U.S. at 601. The subjective test focuses on whether the questions "are designed to elicit incriminatory admissions." *Id.* at 602 n.14. This exception exists because routine booking questions "do not normally elicit incriminating responses[,]" and such questions are necessary for law enforcement's completion of booking and pretrial services. *United States v. Parra*, 2 F.3d 1058, 1067-1068 (10th Cir. 1993). Thus, only when a routine booking question is "designed to elicit incriminating information" does the questioning violate the principles articulated in *Miranda*. *Id.* at 1068.

Under the subjective test, if a law enforcement officer intends to "secure routine booking information[,]" the response to the question is admissible. *United States v. Sweeting*, 933 F.2d 962, 965 (11th Cir. 1991). When information is sought "for the non-interrogative purpose of identification" and not for the purpose of eliciting incriminating information, the exception applies. *United States v. Sims*, 719 F.2d 375, 379 (11th Cir. 1983). A response to a routine booking question is not inadmissible simply because it becomes incriminating. *Sweeting*, 933 F.2d at 965. If the incriminating element of the answer is created by the individual's non-truthful

response, and not the nature of the question, then the answer is admissible under the exception. *United States v. D'Anjou*, 16 F.3d 604, 609 (4th Cir. 1994).

When determining whether a booking question is designed to elicit incriminating information, courts look to whether it is the answer, not the question, that produces the incriminating information, *Id.*, whether the information is requested for the "non-interrogative purpose of identification[,]" *Sims*, 719 F.2d at 377, and whether the question is asked for the "direct and admitted purpose" of eliciting an incriminating statement. *Parra*, 2 F.3d at 1068. Responses to questions are admissible unless the questions go beyond the scope of routine booking questions. *United States v. Virgen-Moreno*, 265 F.3d 276, 294 (5th Cir. 2001) (finding that "persistent" questioning designed to elicit incriminating information went beyond the scope of routine booking questions). A response to a question is not subject to exclusion simply because the response was incriminating. *Sweeting*, 933 F.2d at 965. Additionally, "[a]sking a person, about to be charged with a crime and booked by the police, his name and address is both proper and necessary." *People v. Stewart*, 406 N.E.2d 53, 56 (Ill. App. Ct. 1980).

Here, the Fourteenth Circuit erroneously applied the objective test. The purpose of the routine booking question exception is to aid law enforcement officers in performing administrative functions vital to the administration of justice. *Parra*, 2 F.3d at 1067-1068. The subjective test better promotes the fundamental purpose of the routine booking question exception because it allows courts to focus on the actual intent of law enforcement officers. *Id.* Alternatively, the objective test restricts the ability of law enforcement officers to perform administrative functions when a suspect's answer to a routine booking question turns out to be incriminating. *See generally Sweeting*, 933 F.2d at 965. By adopting the objective test, the Fourteenth Circuit ignored this Court's precedent in *Muniz* and created uncertainty for law

enforcement officers with even a rudimentary understanding of the surrounding circumstances of an individual's arrest.

Agent Montague's routine booking questions were not designed to elicit an incriminating response, therefore Respondent's answers should not be suppressed. Agent Montague testified that asking for an individual's address was part of the routine booking procedure after arrest. R. at 37. During the booking procedure, after asking for Respondent's full name, Agent Montague asked where Respondent lived. R. at 38. In response to Agent Montague's question, Respondent replied that she stayed at her mom's in Clinton City. R. at 38. Agent Montague then asked Respondent if that was the only place that she lived, as a follow-up question intended to clarify Respondent's answer. R. at 38. In response to this question, Respondent answered that she stays "sometimes at 594 Atlantic Place in Boerum City" as well as her mom's residence. R. at 39. Given Respondent's non-responsive answer to Agent Montague's initial question, Agent Montague's follow-up question was reasonable because she needed to know Respondent's address to complete the booking form, an important administrative function of the criminal justice system. Agent Montague's questions were not outside the scope of routine booking questions and were for the non-investigative purpose of obtaining routine pedigree information. Notably, it was Respondent's answer to the question, not the question itself, that made the statement incriminatory.

Thus, the Fourteenth Circuit erred by applying the objective test. This Court should apply the subjective test and find that Agent Montague's questions were not intend to elicit an incriminating response, but even if this Court applies the objective test, this Court should find that Agent Montague could not have reasonably known that her questions were likely to elicit an incriminating response. Therefore, Respondent's statements are admissible under either test.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the decision of the Court of Appeals for the Fourteenth Circuit, and hold: (1) that the evidence of Respondent's flight and the discarded flip-phone are admissible; (2) that the pole camera footage is admissible; (3) that Respondent's answer to the routine booking question is admissible.

Dated: February 7, 2020

Respectfully Submitted,

TEAM 12
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