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7102-02026

IN THE

Supreme Court of the United States

NOVEMBER TERM, 2020

UNITED STATES OF AMERICA,

PETITIONER,

v.

PENNY PARKER,

RESPONDENT,

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE ISSUES PRESENTED

I. Whether Officer Degg's modified *Miranda* warning was sufficient under the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966), and whether this warning tainted later statements made to Agent Mulder.

II. Whether *Miranda* deficient statements presented in pre-trial proceedings qualify as "use in a criminal case," under *Chavez v. Martinez*, 538 U.S. 760 (2003).

STATEMENT OF THE FACTS

Penny Parker is a popular social media "influencer" and journalist. R. at 1. Her most recent video, posted on January 25, 2020, featured Santa Jueves Police Department ("SJPD") officers turning off their body cameras. R. at 2. In one month, the video garnered over two million views and caught the attention of the SJPD. R. at 2. An SJPD Union representative sought to discredit Ms. Parker by claiming that she had "digitally manipulated" the video and warned that she would be "under scrutiny" in the future. R. at 2.

Ms. Parker's video had a resurgence in popularity that summer due to a nationwide movement decrying police violence. R. at 2. She joined the movement and was covering a protest on June 1 in Santa Jueves when police drove into a crowd and injured several people. R. at 2. In protest, many individuals stormed a nearby bank at 11:30 PM that night. R. at 2.

Security footage from that evening shows Parker near the front of a crowd before it stormed the bank, flipped ATMs, and stole the cash. R. at 2. Ms. Parker filmed the event and anonymously interviewed several people who stole money. R. at 2. Though Ms. Parker did not post images of herself from that evening, a fan posted an image at 11:38 PM with the caption, "smashing the banks with #PennyParker!!" R. at 2. Police regained control of the bank at 12:30 AM on June 2 after $200,000 had been stolen. R. at 2.

On June 3 at 4:00 AM, Ms. Parker posted her video from the protests on June 1. R. at 3. At this point, the FBI suspected that the amount of money stolen indicted coordination. R. at 3. Because of Ms. Parker's videos, and other indications that she was at the bank on June 2, the FBI arrested her in connection with suspected incitement of a riot and bank robbery. R. at 3.

On June 3 at 6:00 AM, SJPD Officer Brad Degg and FBI Agent Jerek Derringer arrested Ms. Parker and drove her in an FBI car to the police station. R. at 3. On the way to the station,

Officer Degg stopped the car for an hour and began questioning Ms. Parker. R. at 3. Agent Derringer reminded Officer Degg to give a *Miranda* warning. R. at 3. After claiming it was "pointless," Officer Degg read: "sure, you have the right to remain silent, anything you say will be used against you, you can get an attorney, we'll appoint one for you, yadda yadda." R. at 3. Ms. Parker then asserted her innocence and said, "I know my rights." R. at 3.

After arriving at the police station, Ms. Parker was placed in an interrogation room at around 8:00 AM. R. at 4. In a search incident to arrest, police found a deposit receipt, whose account number was illegible, but which showed a $500 deposit from the morning of June 2. R. at 4. At around 9:00 AM, Ms. Parker asked to use the restroom. R. at 4. Officer Degg denied her request and continued to question her. R. at 4. Eventually, Ms. Parker responded to an accusation by saying, "sure, I incited a riot. So can I go or should I piss myself on your ten dollar shoes, Degg?" R. at 4. Officer Degg did not relent and told Ms. Parker that she could use the bathroom when she offered a complete confession. R. at 4. At this point, Ms. Parker said, "so what if I did pick some [money] up," but maintained that the receipt was not hers. R. at 4. During this time, Ms. Parker was not permitted use the restroom. R. at 4.

After 14 hours of interrogation, FBI Agent Redd Mulder arrived to question Ms. Parker. R. at 4. He finally allowed her to use the restroom. R. at 4. Then, prior to questioning, he mentioned that her first interrogation "was not consistent with typical procedure" and left to make sure the police "don't screw anything else up." R. at 4. After 20 minutes, Agent Mulder read Ms. Parker her rights from a *Miranda* card and continued the interrogation by saying, "just some closing questions." R. at 5. During the interrogation, Agent Mulder elicited confessions from Ms. Parker that overlapped with statements given to Officer Degg, including that she deposited money on June 2, R. at 32, and that she "really did smash that bank." R. at 5.

Procedural History

On June 4, Ms. Parker was charged with one count of inciting a riot under 18 U.S.C. § 2101, and one count of bank robbery under 18 U.S.C. § 2113(a). R. at 5. Ms. Parker's lawyer, Polly Prudence, filed a timely Rule 12 Pretrial Motion to Suppress. R. at 5. This motion challenged the use of Ms. Parker's statements to Officer Degg and Agent Mulder in the probable cause hearings, the preliminary hearing, and the ensuing trial. R. at 5.

The United States District Court for the Southern District of New Arintero denied the motion. R. at 9. Ms. Parker's case then proceeded to trial where she was convicted on both counts. R. at 11. Ms. Parker appealed the District Court's denial of the motion to suppress and her conviction. R. at 11. The Fourteenth Circuit reversed the District's Court's decision. R. at 11. The United States Government appealed, and this Court granted certiorari.

SUMMARY OF THE ARGUMENT

This Court should affirm the holding of the Court of Appeals for the Fourteenth Circuit. Officer Degg violated Ms. Parker's Fifth Amendment right against self-incrimination when he interrogated her after the administration of an insufficient *Miranda* warning. His warning failed to convey to Ms. Parker when she could exercise her rights and entirely omitted her right to free counsel. Officer Degg's unclear administration of the warning and failure to clarify whether Ms. Parker had waived her rights further exacerbated these deficiencies. Moreover, Officer Degg's coercive tactics then compelled Ms. Parker to make statements in violation of her Fifth Amendment right against self-incrimination.

Officer Degg's insufficient warning caused Ms. Parker to make involuntary statements that tainted her interrogation with Agent Mulder. Even though law enforcement knew that Ms. Parker's first round of statements was inadmissible, they engaged in a deliberate two-step

interrogation without taking curative steps to apprise Ms. Parker of her rights. As there was also an insufficient break in time or change in location between the interrogations, the coercive atmosphere of the first interrogation tainted the second. Thus, Ms. Parker's statements to Agent Mulder must be excluded as a violation of her Fifth Amendment right against self-incrimination.

Introduction of *Miranda* deficient statements at probable cause hearings violates the Fifth Amendment right against self-incrimination. Textual analysis of "criminal case" in the Fifth Amendment's Self-Incrimination Clause shows that its protections are not limited to trial. The plain meaning and consistent usage of "case" throughout the Constitution necessitate a broad reading. The Fifth Amendment's purpose to protect against the evil of self-incrimination likewise supports application beyond trial. Recognition that the Self-Incrimination Clause applies not just to trial, but also to probable cause hearings, would shield criminal defendants from the harmful effects of pretrial detention and would not hinder the criminal justice system.

STANDARD OF REVIEW

On a motion to suppress, this Court reviews legal conclusions *de novo* and the district court's factual findings for clear error. *Ornelas v. United States*, 517 U.S. 690, 691 (1996).

ARGUMENT

I. THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT OFFICER DEGG'S MODIFIED *MIRANDA* WARNING WAS NOT ONLY INSUFFICIENT UNDER *MIRANDA V. ARIZONA* AND THE FIFTH AMENDMENT, BUT ALSO TAINTED LATER STATEMENTS MADE BY MS. PARKER TO AGENT MULDER.

The blood of the accused is not the only hallmark of an unconstitutional inquisition. *Blackburn v. State of Ala.*, 361 U.S. 199, 206 (1960). In *Miranda v. Arizona*, this Court determined that mental coercion can be just as powerful as physical coercion and held that a defendant's confessions are inadmissible unless the prosecution shows the use of safeguards to protect the right against self-incrimination. 384 U.S. 436, 444 (1963). These procedural safeguards are now a

cornerstone of the criminal justice system and are called "*Miranda* warnings." A serious defect in the administration of these warnings not only renders subsequent statements inadmissible but also taints later statements made after a proper warning. *Id.*

As both federal and state law enforcement agencies have an interest in obtaining admissible confessions, there is no excuse for failing to administer an adequate *Miranda* warning. Here, the tactics exhibited by law enforcement are exactly those that *Miranda* sought to eliminate. After establishing that Officer Degg's interrogation of Ms. Parker required the administration of a *Miranda* warning, this Court must condemn his coercive tactics and hold that Officer Degg's warning was insufficient under *Miranda*, insufficient under the Fifth Amendment, and that it tainted Ms. Parker's later statements to Agent Mulder.

A. Officer Degg's interrogation of Ms. Parker required a *Miranda* warning.

Prior to assessing the sufficiency of Officer Degg's modified *Miranda* warning, this Court must determine whether he was required to administer such a warning. *Miranda* warnings are necessary when questioning (1) occurs in a custodial setting and (2) qualifies as an interrogation. *Miranda*, 384 U.S. at 457. This case meets both requirements.

As to the first requirement, Ms. Parker was in custody when questioned by Officer Degg. A criminal suspect is in custody when law enforcement limits her freedom in any meaningful way. *Id.* at 477. When a criminal suspect is under arrest and in a police car, it is reasonable for her to believe that she has been deprived of her freedom. *See, e.g.*, *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980); *United States v. Lee*, 699 F.2d 466, 468 (9th Cir. 1982). As Ms. Parker was arrested before she was placed in an FBI car and driven to the station, R. at 3, a reasonable person would not have felt free to leave. Therefore, Ms. Parker was in custody.

As to the second requirement, Officer Degg interrogated Ms. Parker. Questioning constitutes an interrogation when the defendant perceives the questions as designed to elicit an incriminating response. *Innis*, 446 U.S. at 301. When Ms. Parker stopped speaking after Officer Degg mentioned criminal charges, R. at 3, she did so in recognition of the potential to incriminate herself. Because Officer Degg's interview constituted an interrogation and took place in a custodial setting, he was required to administer a *Miranda* warning.

B. Officer Degg's warning was insufficient under *Miranda*.

Though *Miranda* warnings are common practice, Officer Degg, a 20-year police veteran, failed to administer an adequate warning. His warning was insufficient for three reasons: (1) it did not clearly convey Ms. Parker's rights under *Miranda*, (2) it downplayed the significance of those rights, and (3) he failed to clarify whether Ms. Parker had waived her rights.

1. Officer Degg's warning did not reasonably convey Ms. Parker's rights.

A modified warning fails to satisfy *Miranda* when it does not "reasonably convey" equivalent rights. *Duckworth v. Eagan*, 492 U.S. 195, 195 (1989). A standard *Miranda* warning includes these rights: the right to remain silent, that anything she says can be used against her in a court of law, that she has the right to an attorney prior to and during questioning, and that if she cannot afford an attorney, one will be appointed for her. *Miranda*, 384 U.S. at 479. Law enforcement must also warn a defendant that she may exercise these rights at any time, and before proceeding to questioning, they must request a waiver of these rights. *Id.* A warning that fails to convey this information is not equivalent to the warning outlined in *Miranda*.

Here, Officer Degg's statement, "you have the right to remain silent, anything you say will be used against you, you can get an attorney, we'll appoint one for you, yadda yadda," did not clearly convey Ms. Parker's *Miranda* rights. R. at 3. The warning (i) failed to notify Ms. Parker

when she could exercise her rights and (ii) did not mention that she had the right to an attorney even if she could not afford one. Each deficiency independently rendered Officer Degg's warning insufficient under the standard set by *Miranda*. *See, e.g.*, *Florida v. Powell*, 559 U.S. 50, 60 (2010); *Duckworth*, 492 U.S. at 203.

i. The warning did not notify Ms. Parker when she could exercise her rights.

In *Powell*, this Court determined that a warning which includes, "you have the right to talk to a lawyer *before* answering any of our questions" and "you have the right to use any of these rights at *any* time you want during this interview" satisfies *Miranda.* 559 U.S. at 54 (emphasis added). This warning was upheld because it did not imply that the right to counsel was available only *before* questioning. *Id.* at 62. The closing phrase, "at any time during the interview," cured any possible confusion regarding when counsel was available. *Id.* Even though the standard *Miranda* card includes catch-all phrases like this one, R. at 20, Officer Degg's warning included no such phrase. As a result, his warning that Ms. Parker could "get an attorney," did not properly notify her of the right to counsel *prior to* and *during* questioning. *See* R. at 3. In these circumstances, a defendant improperly believes that rights not immediately exercised are lost, thereby undermining the purpose of *Miranda*.

ii. "We'll appoint one for you" is not equivalent to the right to free counsel.

Law enforcement must clearly inform a criminal suspect that she has the right to free counsel. *See Miranda*, 384 U.S. at 473. For example, a warning that states "if you wish to have an attorney present during questioning you can have one if you so desire," fails to convey the right to free counsel. *United States v. Gooch*, 915 F. Supp. 2d 690, 722 (W.D. Pa. 2012). Likewise, Officer Degg's statement, "you can get an attorney, we'll appoint one for you, yadda yadda," omitted Ms. Parker's right to free counsel. R. at 3. Therefore, his warning is inadequate.

2. Officer Degg's administration of the warning obscured its meaning.

When law enforcement interrogates an individual in a custodial setting, they must clearly inform her of her rights. *See Miranda*, 384 U.S. at 471. A warning that deviates from the suggested wording of *Miranda* and follows a lengthy preamble does not clearly convey an individual's rights. *Doody v. Ryan*, 649 F.3d 986, 1003 (9th Cir. 2011) (holding a warning insufficient when it was given over the course of 15 minutes, omitted sections of the standard warning, and downplayed the significance of the rights). Here, Officer Degg began his warning by calling it "pointless" and ended it by telling Ms. Parker that "none of this matters." R. at 3. Furthermore, he hid his 10-second warning at the end of a 15-minute rant about his police tenure. *See* R. at 23. Even if this Court finds that Officer Degg's warning sufficiently conveyed her *Miranda* rights, his lengthy introduction, coupled with his reckless attitude, prevented Ms. Parker from understanding these rights. *See* R. at 3. As a result, Ms. Parker's did not have the benefit of an adequate warning, and this Court must find that her unwarned statements are inadmissible.

3. Ms. Parker did not waive her Fifth Amendment Rights.

A waiver of the Fifth Amendment right against self-incrimination is sufficient only if the waiver is made knowingly and intelligently. *Miranda*, 384 U.S. at 445. An individual must be fully aware of her rights before she can waive them. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Because Officer Degg's warning was insufficient under *Miranda*, Ms. Parker could not have been fully aware of her rights. Thus, this Court need not consider the question of waiver.

Even if this Court finds that Officer Degg's warning was sufficient, it must nonetheless determine that Ms. Parker did not waive her rights. Here, the Government asserts that Ms. Parker's statement, "I know my rights," pre-empted the waiver. R. at 4. This position is incomprehensible. The Government bears a "heavy burden" to establish a waiver, and if there is ambiguity in the

defendant's statement, the interrogating officer has a duty to clarify. *United States v. Rodriguez*, 518 F.3d 1072, 1080 (9th Cir. 2008). Here, Ms. Parker's statement that she knew her rights did not follow Officer Degg's warning, but instead followed her assertion of innocence. R. at 4. Therefore, it is unclear whether her statement was in response to Officer Degg's warning or was simply a reaction to his accusations of criminal wrongdoing. Given this ambiguity, Officer Degg needed to clarify the meaning of Ms. Parker's statement before starting his interrogation. *See Rodriguez*, 518 F.3d at 1080. As he failed to take this step, this Court must find that Ms. Parker did not knowingly waive her rights.

C. Officer Degg's warning was insufficient under the Fifth Amendment.

Regardless of whether Officer Degg administered a sufficient warning, his coercive tactics nonetheless violated the Fifth Amendment, and Ms. Parker's involuntary confessions must be found inadmissible. *Miranda*, 384 U.S. at 479. Confessions are involuntary and obtained in violation of the Fifth Amendment when there is evidence of coercive police activity that breaks a defendant's will. *Dickerson v. United States*, 530 U.S. 428, 434 (2000). Here, the circumstances of Officer Degg's coercive interrogation broke Ms. Parker's will and compelled her to make involuntary statements.

Threats, length of interrogation, deprivation of sleep, and repeated questioning are some examples of coercive tactics. *See Colorado v. Connelly*, 479 U.S. 157, 163 n.1 (1986). Here, Officer Degg began his interview by insulting Ms. Parker, belittling her career, and promising her lesser charges in exchange for personal favors. *See* R. at 3. He also deliberately administered an insufficient *Miranda* warning and questioned her continuously for over 12 hours. *See* R. at 3-4. Most significantly, Officer Degg did not allow Ms. Parker to use the bathroom until 8:30 PM, even

though she first made the request at 9:00 AM—nearly 12 hours earlier. R. at 4. The totality of these circumstances reveals that Officer Degg used coercive tactics.

The relationship between Officer Degg and Ms. Parker made her particularly susceptible to his coercive tactics and broke her will. *See Miller v. Fenton*, 474 U.S. 104, 109 (1985) (opining that certain interrogation techniques should be considered "as applied to the unique characteristics of a particular suspect . . . ."). Before her arrest, Ms. Parker posted a video that depicted SJPD members, including Officer Degg, turning off their body cameras while on duty. In response, a union representative later claimed that she was "inciting unrest" and announced that she would be "under scrutiny" in the future. *See* R. at 2. During Ms. Parker's arrest, Officer Degg admitted personal animus when he offered lower charges in exchange for an admission that Ms. Parker doctored the body camera video. R. at 3. Given his personal stake in this case, Ms. Parker felt particularly threatened by Officer Degg. As a result, she was more susceptible to his coercive tactics, which broke her will and compelled an inadmissible confession.

D. Officer Degg's insufficient warning tainted later statements to Agent Mulder.

Ms. Parker's statements to Agent Mulder are tainted for two reasons: (1) law enforcement engaged in an unlawful two-step interrogation and (2) the coercive atmosphere of the first interrogation tainted the second interrogation.

1. <u>The deliberate two-step interrogation tainted Ms. Parker's statements to Agent Mulder.</u>

The deliberate practice of soliciting unwarned statements from a defendant, only to administer a midstream *Miranda* warning and encourage repetition of these same, now admissible statements, violates the Fifth Amendment. *Missouri v. Seibert*, 542 U.S. 600, 621 (2004) (Kennedy, J., concurring). Application of a six-factor test to deliberate two-step interrogations determines whether midstream *Miranda* warnings effectively apprise a defendant of her rights.

See, e.g., *United States v. Carter,* 489 F.3d 528, 535 (2d Cir. 2007); *United States v. Williams*, 435 F.3d 1148, 1160 (9th Cir. 2006) (determining that Kennedy's concurrence narrows the plurality opinion and adds both a deliberateness requirement and a sixth factor to the plurality test). These factors include: (1) the completeness and detail of the questions and answers in the first interrogation, (2) the overlapping content of the statements, (3) the time and place of the interrogations, (4) the continuity of police personnel, (5) whether the interrogator's questions treated rounds as continuous, and (6) whether curative actions were taken between interrogations. *Williams*, 435 F.3d at 1160. Assessment of Officer Degg's and Agent Mulder's conduct under this test shows that their interrogation strategy is exactly the type that *Seibert* sought to prevent, and that any statements made by Ms. Parker to Agent Mulder are tainted.

Officer Degg's and Agent Mulder's conduct meets the threshold requirement of deliberate intent. A two-step interrogation is deliberate when the omission of the first *Miranda* warning is not the result of a "rookie mistake" or exigent circumstance. *See United States v. Naranjo*, 426 F.3d 221, 232 (3d Cir. 2005). Here, despite Officer Degg's ample experience, he gave a warning that was both delayed and extremely abbreviated. R. at 3. His subsequent decision not to give a second, more complete warning at the police station further indicates that he deliberately conducted an unwarned interview. *See* R. at 4. Given this threshold finding of deliberate intent, an application of the six-factor *Seibert* test shows that Agent Mulder's midstream *Miranda* warning did not apprise Ms. Parker of her rights.

i. The questions asked by Officer Degg and the statements made by Ms. Parker in the first interrogation were complete and detailed.

An unwarned interrogation that is systematic and exhaustive taints a later interrogation. *See Seibert*, 542 U.S. at 616. During Officer Degg's first round of questioning in the FBI car and

police station, he repeatedly demanded answers to the same questions, which resulted in Ms. Parker admitting to inciting a riot and taking money from the bank. R. at 3-4.

ii. Ms. Parker's statements in both interrogations overlapped.

When questions during an unwarned interrogation are posed again after a warning, suspects are left confused as to whether they must repeat their previous answers. *Seibert*, 542 U.S. at 616. Furthermore, repetition of questions from an unwarned interview implicitly conveys that the second confession is not independently incriminating. *Id.* Here, the record does not show explicitly what questions Agent Mulder asked. R. at 5, 31. However, in the second interrogation Ms. Parker mentioned that she probably deposited money on June 2, that the receipt might be hers, and that she "really did smash that bank"—three statements she might not have made had she realized her earlier statements were inadmissible. R. at 32.

iii. The interrogations were close in time and occurred in the same setting.

Only a considerable break in time and change in location between a warned and unwarned interrogation will disrupt a defendant's perception of continuous questioning. *Miranda*, 384 U.S. at 496; *see also United States v. Capers*, 627 F.3d 470, 484 (2d Cir. 2010) (holding that even a 90-minute break between two interrogations conducted in different locations was not adequate to break the continuous nature of questioning). Here, only about 20 minutes separated the two interrogations. R. at 4. However, as Officer Degg had consistently left Ms. Parker alone, she would not have recognized this 20-minute reprieve as a 'break' between interrogations. R. at 4. Finally, as she remained in the same room, Ms. Parker would have felt as though she underwent one continuous interrogation. R. at 3-4.

iv. FBI Agents were present during both interrogations.

When personnel coordinate to conduct a continuous interview, there is no appreciable change in atmosphere. *See Seibert*, 542 U.S. at 601. Here, Ms. Parker was arrested by an FBI Agent along with a state police officer and placed in an FBI vehicle. R. at 3. Accordingly, though Ms. Parker had not encountered Agent Mulder prior to the second interrogation, she was accustomed to the presence of federal agents. Furthermore, Agent Mulder began his interview with, "as you know, the feds are involved," which affirmed the ongoing presence of the FBI. R. at 31. Therefore, Ms. Parker would not have considered him a significant change in personnel.

v. Agent Mulder's questions continued the first interrogation.

When law enforcement's questions treat the second round of interrogation as continuous with the first, defendants feel compelled to repeat what has already been said. *Seibert*, 542 U.S. at 617. Here, Agent Mulder treated his interrogation as a continuation of the first when he opened with the statement, "just some closing questions." R. at 5. By beginning his interrogation as though he was just wrapping up an existing one, he gave Ms. Parker the impression that he and Officer Degg were conducting one continuous interrogation.

vi. Agent Mulder failed to take curative steps between the interrogations.

Statements made in the second half of a deliberate two-step interrogation are inadmissible unless curative steps enable a defendant to recognize the significance of the midstream *Miranda* warning. *Id.* at 622 (Kennedy, J., concurring). Here, Agent Mulder told Ms. Parker that Officer Degg's interrogation was not consistent with procedure. R. at 4. Furthermore, prior to his interrogation, he told Ms. Parker that he needed to make sure the police "don't screw anything else up." R. at 4. At neither point did Agent Mulder explain to Ms. Parker the effect these failures would have on the admissibility of her testimony. This indicates not only that Agent Mulder was

fully aware of Officer Degg's unwarned interrogation, but also that he deliberately chose not to explain the significance of these shortcomings. In the absence of these curative steps, Agent Mulder's *Miranda* warning did not punctuate the questioning such that Ms. Parker could realize the second interrogation had taken a new turn. *See Seibert*, 542 U.S. at 622. As a result, this Court must find that Agent Mulder's midstream *Miranda* warning did not effectively apprise Ms. Parker of her rights, and thus exclude her statements from the second interrogation.

2. The first interrogation's coercive atmosphere tainted the second interrogation.

Even if this Court determines that Ms. Parker's testimony was not the result of a deliberate two-step interrogation, it should nonetheless hold that Ms. Parker's statements to Agent Mulder were tainted by a continuous atmosphere of coercion. Here, the Government argues that Agent Mulder's friendly attitude caused the atmosphere to dissipate. However, his interrogation techniques were independently coercive and strengthened the atmosphere from the first interrogation. Thus, Ms. Parker's statements were tainted.

A longer break between the interviews or a significant change in location might have resulted in a second, untainted interview. *See, e.g.*, *United States v. Bayer*, 331 U.S. 532, 540 (1947). Here, however, only 20 minutes separated the rounds of questioning and both took place in the same room. R. at 4. This continuity led Ms. Parker to believe that she was in the midst of one interrogation, and that Agent Mulder's questioning was tacked on to the end of a nearly 15-hour interrogation process. *See Miranda*, 384 U.S. at 496.

Agent Mulder's false friend interrogation technique strengthened this coercive atmosphere. *State v. Rettenberger*, 984 P.2d 1009, 1016 (Utah 1999). This tactic allowed Agent Mulder to build rapport with Ms. Parker and convince her that he was acting in her best interest, as evidenced by the promise that he could "make this go away" if she cooperated. R. at 5, 31. Taken alone, this

tactic generally does not indicate coercion. *State v. Baker*, 465 P.3d 860, 880 (Haw. 2020). However, at the end of a long interrogation, his façade of trustworthiness and assurance that Ms. Parker would benefit by confessing, broke her will. Accordingly, this Court must find that Ms. Parker's involuntary statements to Agent Mulder, like those made to Officer Degg, are the products of coercion. *See supra* Part I.C. Because Ms. Parker's statements were compelled in violation of the Fifth Amendment, this Court must hold that they are inadmissible.

II. THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT *MIRANDA* DEFICIENT STATEMENTS PRESENTED IN PRE-TRIAL PROCEEDINGS QUALIFY AS "USE IN A CRIMINAL CASE" UNDER *CHAVEZ V. MARTINEZ*.

The Fifth Amendment protects criminal defendants from the evils of self-accusation, perjury, and contempt. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). The right against self-incrimination is embedded in the Fifth Amendment and reads, "[n]o person . . . shall be compelled in any *criminal case* to be a witness against himself . . . ." U.S. CONST. amend. V. (emphasis added). While one would expect the Constitution to apply uniformly, because "criminal case" is interpreted differently throughout the nation's courts, Fifth Amendment protections are applied unequally. This variability was aggravated by *Chavez v. Martinez*, which failed to delineate when a criminal case and the right against self-incrimination begin. 538 U.S. 760, 767 (2003). Permitting these different interpretations of the Fifth Amendment propagates uncertainty and undermines predictability in criminal cases.

Uniform application of federal law is at the heart of this Court's purpose. *See Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923). Accordingly, to best protect Ms. Parker's and other defendants' rights against self-incrimination, this Court must find that the "criminal case" begins with the probable cause hearing. This position is supported by the textual analysis of the Fifth Amendment, its legislative history and purpose, and the need to maintain the

balance of power between prosecutors and criminal defendants—which is currently threatened by the uncertain definition of "criminal case."

A. Textual analysis of the Self-Incrimination Clause supports the understanding that "criminal case" begins at the probable cause hearing.

The proper interpretation of "criminal case" starts with the text of the Fifth Amendment. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 690 (1990). As textual interpretation presumes that definitions are used conventionally, beginning with the text gives deference to the words chosen by the Founders. *Id*. at 648.

The specific usage of the words "case" and "trial" in the Fifth Amendment require that its protections begin with the probable cause hearing. Textual analysis of the Fifth Amendment shows that (1) the dictionary definition of "case" is broad and not limited to trial, (2) other instances of "trial" and "case" throughout the Constitution underscore the differences between the two terms, and (3) that the Fifth Amendment's text lands between the sweeping language of the Fourth Amendment and the restrictive language of the Sixth Amendment.

1. The dictionary definition of "case" illustrates that the right against self-incrimination is not limited to trial.

The dictionary definition of "case" provides the basis for Ms. Parker's claim that her protection against self-incrimination begins at the probable cause hearing. Dictionary definitions begin the plain meaning inquiry. *See, e.g.*, *Yates v. United States*, 574 U.S. 528, 538 (2015). Furthermore, this Court has stated that the Oxford English Dictionary ("OED") is one of the most authoritative for the English language. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 569 (2012). Definitions from the OED support a finding that the word "case" is not synonymous with "trial." Rather, it serves as a non-specific way to reference a legal matter. The OED defines "case" as "a legal action, *esp.* one to be decided in a *court* of law." *Case*, OXFORD ENGLISH DICTIONARY

(3d ed. 2013) (emphasis added). There are two relevant parts to this definition. First, in the criminal context, "legal action" commonly refers to the entirety of the proceedings. This understanding is consistent with that offered in *Chavez*: the case does not begin with a police investigation because that process is not legal. *Chavez*, 538 U.S. at 766. Second, the definition's use of the passive infinitive, "to be decided," indicates that "case" refers to a future court proceeding. Although trials are held in court, so too are probable cause hearings. This fact challenges the notion that trial is the only part of the "case" in court.

In the past, this Court has explicitly equated the meanings of "case" and "cause," finding that neither is synonymous with "trial." *See Blyew v. United States*, 80 U.S. 581, 595 (1871). In *Blyew*, this Court explained that there was no substantive difference between "case" and "cause," because both meant "a proceeding in court, a suit, or action." *Id.* The OED supports this analysis and defines "cause" as "a subject of litigation," which encapsulates the entire action. *Cause*, OXFORD ENGLISH DICTIONARY (3d ed. 2013). Conversely, "trial" is defined as "the examination and determination of a *cause* by a judicial tribunal," this lends support to the idea that a trial is just one part of the case. *Trial*, OXFORD ENGLISH DICTIONARY (3d ed. 2014) (emphasis added). Though the OED is not dispositive, *Blyew* grounds the word "cause" in a legal proceeding. This distinction illustrates that, in addition to relying on the strength of dictionary definitions, this Court may also look to precedent to support the contention that "case" includes the probable cause hearing. *Blyew*, 80 U.S. at 595.

2. <u>The presumption of meaningful variation precludes a narrow reading of "case."</u>

Consistent usage of the words "case" and "trial" throughout the Constitution supports a broad interpretation of the Self-Incrimination Clause. Consistent usage informs the interpretation of a text that contains a word that appears many times. *See Powerex Corp. v. Reliant Energy Servs.,*

Inc., 551 U.S. 224, 232 (2007) (noting that "identical words and phrases . . . should normally be given the same meaning"). Here, this consistent usage directs that "case" retain the same meaning throughout the Constitution. "Trial" must be also be interpreted consistently. As both of these words appear at various points throughout the Constitution, the presumption of meaningful variation indicates that they represent distinct ideas.

First, Article III, which vests in Congress the power to create the federal judiciary, states that "the judicial power shall extend to all *cases*…the *trial* of all crimes, except in *cases* of impeachment, shall be by jury." U.S. CONST. art. III, § 2 (emphasis added). While both "case" and "trial" appear repeatedly throughout the Constitution, Article III is particularly noteworthy for its use of both words in the same sentence. *Id.* The presumption of meaningful variation gives these words distinct value and provides for a clear reading. "Case," as it is understood here, extends the power of the judiciary to both civil and criminal causes of action. Whereas "trial" specifies just one particular function of the judiciary. Reading these terms synonymously undermines the distinctly different concepts that they represent.

"Case" and "trial" are also used together in Article I, which states, "judgment in *cases* of impeachment shall not extend further than to removal from office . . . but the party convicted shall nevertheless be liable and subject to indictment, *trial*, judgement and punishment . . . ." U.S. CONST. art. I, § 3 (emphasis added). Here, "case" is plainly read to mean the entire cause of action, specifically related to impeachment. Conversely, "trial" denotes a particular phase of a future legal proceeding following indictment. If "case" is just another word for "trial," this clause does not make sense; it would effectively make the "case" a phase of criminal procedure that follows indictment. These readings of Articles I and III import meaning to the Constitution that is totally divorced from the text—a proposition this Court cannot support.

3. The Fifth Amendment's location in the Bill of Rights signals its application beyond trial.

The Bill of Rights places the Fifth Amendment between the sweeping Fourth Amendment and the more limited Sixth Amendment. This placement supports Ms. Parker's position that Fifth Amendment protections extend to probable cause hearings. The Fourth Amendment's language does not specify when its protections apply, which indicates that it protects broadly. Whereas the Sixth Amendment specifies that it applies in "criminal prosecutions," which, from its plain meaning, limits its application to trial. The Fifth Amendment, however, strikes a balance. Unlike the Fourth, its text attaches protections against self-incrimination to a criminal case but does not go so far as the Sixth to limit this right to trial.

Fourth Amendment rights against unreasonable search and seizure are perpetually subject to violation. Accordingly, the Fourth Amendment simply states that "the right of the people . . . shall not be violated." U.S. CONST. amend. IV. It's language sweeps more broadly than the Fifth Amendment and reflects the societal concern that each individual be left alone. *Tehan v. United States ex. rel. Shott*, 382 U.S. 406, 416 (1966). Unlike the broad provision of rights in the Fourth Amendment, the Sixth Amendment uses more precise language. It states, "in all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public *trial* . . . ." U.S. CONST. amend. VI. (emphasis added). The Sixth Amendment's use of the phrase "criminal prosecution," as opposed to "criminal case" in the Fifth, specifies its narrow scope. Furthermore, use of the word "trial" in the Sixth Amendment reflects Congress's understanding that it is distinct from both "case" and "prosecution." *See Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

The Fifth Amendment's scope lands in the middle of the spectrum created by the Fourth and Sixth Amendments. The Fifth Amendment specifies that no person "shall be compelled in any *criminal case*." U.S. CONST. amend. V. (emphasis added). Contextualizing the Fifth

Amendment amongst its neighbors provides relevance to the dictionary definitions offered above and strengthens the plain meaning understanding. The dictionary definition of "case," without context, renders the Fifth Amendment as boundless as the Fourth Amendment. The Sixth Amendment's use of "criminal prosecution" (as opposed to "criminal case") implies a definition with greater limitations than the Fifth. *See Counselman*, 142 U.S. at 563. Whereas the Fifth and Sixth Amendments have qualifiers, "case" and "prosecution," respectively, the Fourth has none. This distinction, particularly given their proximity in the Bill of Rights, establishes their uses relative to one another. However, it also indicates that if the Fifth Amendment was meant to be a trial right, it would follow the narrow language of the Sixth Amendment.

B. The purpose and history of the Fifth Amendment prompt a broad reading.

Plain meaning analysis lays the foundation upon which the purpose analysis builds. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 416 (1989). As analyzed through its placement in the Bill of Rights, the text of the Fifth Amendment was selected in accordance with its noble purpose: to cure the evil of self-incrimination. *See Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). The risk of self-incrimination begins much earlier than trial. Both Congress's revisions and the need to inhibit self-incrimination support a broad interpretation of "criminal case" that includes probable cause hearings.

1. <u>The revisions that Congress made to the Fifth Amendment prior to ratification do not prevent its application in probable cause hearings.</u>

In 1789, Congress revised the Fifth Amendment to limit its scope to criminal cases. The initial draft did not include "criminal case," but Congress saw fit to add it. 1 ANNALS OF CONG. 434 (1789). This change represented the desire to explicitly protect criminal, rather than civil, defendants from self-incrimination. However, the revision was not meant to limit the right to any one phase of the case, such as trial. *See Ullman v. United States*, 350 U.S. 422, 438-39 (1956).

Interpreting "criminal case" in this way limits the Fifth Amendment's scope and fails to achieve Congress's goal of eliminating the ramifications of self-incrimination in criminal cases.

Reading the Fifth Amendment as a trial-only right is the equivalent of hiding an elephant in a mousehole. *See Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001). Not once while discussing the addition of "criminal case" did Congress mention limiting the self-incrimination right to trial. 1 ANNALS OF CONG. 434 (1789). The absence of such a discussion shows that Congress did not intend such a far-reaching limitation. *Id.*

Here, Ms. Parker was detained and questioned without the benefit of a sufficient *Miranda* warning. *See* R. at 3. Her statements were then used in a probable cause hearing and against her in a criminal trial. R. at 5. Not only was Ms. Parker's compelled testimony relied upon to build the case against her, it was also used to convict her of both crimes; she now faces the exact evil that Congress sought to remedy through broad application of the Fifth Amendment. Permitting such an intrusion of one's liberty undermines Congress's purpose in specifying the right against self-incrimination in criminal cases. *Tehan*, 382 U.S. at 416. Instead, this Court must accept Ms. Parker's position, which is consistent with the Fifth Amendment's intended purpose—that protections against self-incrimination include probable cause hearings.

2. The Framer's understanding of criminal procedure from the common law tradition supports the Fifth Amendment's application outside of trial.

William Blackstone's "Commentaries on the Laws of England" provides the basis for the Founders' understanding of criminal procedure in the common law tradition and relegates trial to one of twelve elements of a case. 4 WILLIAM BLACKSTONE, COMMENTARIES *289. Blackstone's Commentary was published just before the Constitutional Convention and discusses the common law traditions of England, many of which were incorporated into the Constitution. Antonin Scalia, *Originalism: The Lesser Evil*, 50 U. CIN. L. REV. 849, 859 (1989). In defining a criminal

proceeding, Blackstone names twelve distinct parts, trial being the seventh of twelve. 4 WILLIAM BLACKSTONE, COMMENTARIES *289. Because trial is just the one part of a criminal proceeding, the Founders would not have conflated "trial" with "case."

Blackstone's twelve phases of criminal proceedings remain in force as part of the Federal Rules of Criminal Procedure. The Federal Rules govern the entirety of criminal cases including pretrial, trial, and posttrial proceedings. FED. R. CRIM. P. 1(a)(1). Thus, the Federal Rules consider pretrial proceedings to be a part of the case. Only one of nine titles in the Federal Rules concerns trial, while three of nine address various pretrial proceedings. Here, Ms. Parker's coerced confession was used at both her probable cause hearing and her trial. R. at 5. Under the Government's reading of the Fifth Amendment, using this compelled testimony would be impermissible at only *one* of these two hearings. This is an irreconcilable proposition. To restrict the right against self-incrimination to trial renders it toothless because the defendant, as is the case here, would already have incriminated herself at the probable cause hearing.

C. Excluding compelled testimony at the probable cause hearing does not impede law enforcement and best protects criminal defendants.

Constitutional protections do not disappear once law enforcement charge an individual with a crime. This Court has opined that our methods of enforcing criminal law are the measures by which the quality of our society may be judged. *Coppedge v. United States*, 369 U.S. 438, 449 (1962). Nowhere is this sentiment more sacred than protecting the right against self-incrimination, the bedrock of our adversarial system of justice. Limiting the application of this right to trial would irreparably damage the family relationships, careers, and financial stability of criminal defendants, thereby undermining the very quality of our civilization.

Here, law enforcement subjected Ms. Parker to multiple coercive interrogations, several pretrial hearings, a public trial, and now a lengthy appeal. The Government's case against Ms.

Parker was predicated on her confession. R. at 23. If this Court accepts that Officer Degg's warning was insufficient, and that it further tainted Ms. Parker's statements to Agent Mulder, then it must find that the introduction of her confession at trial violated her Fifth Amendment rights. This Court must also protect future criminal defendants from the sort of uncertainty, injustice, and fear that Ms. Parker faced, and it must determine that probable cause hearings are subject to Fifth Amendment protections. This position does not impact the ability of law enforcement to do its job, and best protects the rights of criminal defendants.

1. Defining the right against self-incrimination as inclusive of probable cause hearings does not impede the functions of the criminal justice system.

The Government argues that an extension of the Self-Incrimination Clause would impair the ability of law enforcement to effectively police. This is untrue for two reasons. First, holding that "criminal case" includes the probable cause hearing is not a fundamentally new idea. *See Chavez v. Martinez*, 538 U.S. 760, 795 (2003) (Ginsburg, J., dissenting). Indeed, the text and purpose of the Fifth Amendment, *see supra* Part II.A, II.B, suggest that the right against self-incrimination includes probable cause hearings. Ms. Parker asks only that this Court formalize this understanding and explicitly define that the right against self-incrimination begins at the probable cause hearing.

Second, extracting confessions through coercion has been improper since the inception of *Miranda v. Arizona*, 384 U.S. 436 (1966). As the government has a strong interest in obtaining admissible confessions, modern police practices aim to avoid coercive techniques. However, prosecutors often use otherwise inadmissible confessions in probable cause hearings which tilts the balance of power too far in the government's direction. *See* Andrew M. Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1312-13 (2018). To improve conviction rates, prosecutors manufacture cases by stacking charges, inflating evidence, and slicing years off plea

bargains in order to influence a defendant to accept the offer and sacrifice their freedom. *Id.* As a result, only 2% of federal criminal cases go to trial whereas 90% end in a plea bargain. John Gramlich, *Only 2% of Federal Criminal Defendants Go To Trial, and Most Who Do are Found Guilty*, PEW RESEARCH CENTER (June 11, 2019), https://pewrsr.ch/2F1Qxn7. Excluding the Self-Incrimination Clause's protection from probable cause hearings worsens the impact of compelled statements by using that testimony to skew one's perception of their likelihood of success at trial. This Court cannot permit such predatory law enforcement tactics to continue.

2. Limiting the use of manufactured charges against criminal defendants protects family relationships and economic stability.

Finding in favor of Ms. Parker will protect criminal defendants from the detrimental effects of pretrial detention by disposing of cases based on compelled confessions. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (opining that the downstream effects of pretrial detention, such as loss of children or employment, continue to impact defendants long after the criminal proceeding ends). Protecting defendants' rights against self-incrimination reduces the financial and social costs imposed by pretrial detention.

First, a finding in favor of Ms. Parker will better serve the families of criminal defendants by more rapidly disposing of manufactured claims. Pretrial detention disrupts the family unit by causing parents to either relocate their children or pawn full custody off on the other parent. *See* Julie Poehlmann-Tynan et al., *Children's Contact with their Incarcerated Parents*, 65 AM. PSYCHOLOGIST J. 575, 595 (2010). Engendering resentment among parents who are tasked with greater responsibilities during incarceration risks creating developmental issues for young children. *Id*. By prohibiting compelled testimony at the probable cause hearing, this Court can prevent prosecutors from manufacturing charges that lead to such lengthy pretrial detentions and disruptions in families.

Second, prohibiting compelled testimony at probable cause hearings ensures that the economic stability of criminal suspects is not unduly affected by coerced confessions. Criminal defendants face reputational damage that greatly affects public perception and can lead to the loss of an existing job or difficulty finding a new one. Additionally, criminal defendants facing pretrial detention who cannot pay bail are further disadvantaged by loans and payments to bail bondsmen. Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment*, 108 AM. ECON. REV. 201, 207 (2018). As a result, indigent criminal defendants are particularly vulnerable to manufactured charges. *Id.* at 201. Although Ms. Parker is self-employed, and does not have a job to lose, this concern should nonetheless bear on this Court's decision. Permitting such practices by refusing to exclude compelled testimony at probable cause hearings risks defendants losing jobs or taking out loans. Here, justice requires this Court hold that the Fifth Amendment's "criminal case" applies to probable cause hearings.

CONCLUSION

For the foregoing reasons, the judgement of the United States Court of Appeals for the Fourteenth Circuit should be affirmed as to both issues.

Respectfully submitted,

/s/ R20

R20

Counsel for the Respondent