Team 6

No. 7102-02026

IN THE

SUPREME COURT OF THE UNITED STATES

FALL 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 PETITIONER

October 8, 2020

COUNSEL FOR PETITIONER

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ISSUES PRESENTED FOR REVIEW

I. Whether Officer Degg's warnings that conveyed the four basic prongs of *Miranda* satisfied the Fifth Amendment and *Miranda v.* Arizona, 384 U.S. 436 (1966), and whether Parker's statements made after Agent Mulder's warnings were tainted without a coercive atmosphere.

II. Whether a defendant's unwarned statements are admissible in pre-trial proceedings even where this Court, in *Chavez v. Martinez*, 538 U.S. 760 (2003), did not preclude admission of such statements before trial.

STATEMENT OF THE CASE

Statement of the Facts

On June 1, 2020, Respondent, Penny Parker, incited a riot and robbed a bank during a protest in Santa Jueves. R. at 2. With Parker at the front of the crowd, the protest turned angry and stormed a nearby bank. R. at 2. Parker and other rioters broke into the bank, flipped several ATMs, and stole $200,000 from the machines. R. at 2. The Federal Bureau of Investigation ("FBI") was already monitoring Parker, a popular vigilante journalist, due to previous instances of inciting unrest, trespassing, and a fraudulent video in which she digitally manipulated footage of Santa Jueves Police Department ("SJPD") officers turning off their body cameras. R. at 3; R. at 22. Upon noting her presence at the bank robbery through social media, the FBI obtained a warrant to search and arrest Parker in connection with suspected incitement of a riot and the subsequent bank robbery. R. at 2. It was also around this time that the FBI suspected that this large amount of money stolen pointed to a broader criminal conspiracy. R. at 3.

Early in the morning on June 3, 2020, Parker posted a heavily edited video of the riot, which made it impossible to identify individuals at the scene. R. at 3. Later that morning at 6:00 a.m., SJPD officers and FBI agents arrested Parker pursuant to the warrant, put her in an FBI-owned car, and drove her to the station. R. at 1. Federal Agent Jerek Derringer and SJPD Officer Brad Degg, who has dedicated his career to the SJPD, accompanied Parker to the station. R. at 3; R. at 23. However, along the way, Parker called the officers names like "pigs," shouted that they should stop at Eatin' Donuts, and began thrashing around in the back seat. R. at 22-23. At that point, Officer Degg had to stop the car. R. at 23. During the roughly forty-five minute stop, Officer Degg asked Parker if she knew where the bank's stolen money was. R. at 3. Without a response from Parker, Officer Degg proceeded to talk for roughly ten minutes about

his tenure on the force and made some comments about how the *Miranda* warning procedure was, as far as he was concerned, "pointless" and a "formality." R. at 3; R. at 23.

With the SJPD *Miranda* card in hand, Officer Degg then turned to Parker and advised "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" from his memory. R. at 3. Officer Degg, who employed a 'tough love' interrogation style, explained that they already had photos placing her at the scene. R. at 3; R. at 27. However, he stated that if she provided names and information about who stole money from the bank and owned up to her fraudulent video, he would try to lessen her charges. R. at 3. Parker laughed in Officer Degg's face, responded, and explicitly stated, "I know my rights." R. at 3-4. Throughout the rest of the car ride, Parker remained silent. R. at 4.

Upon arrival at the SJPD station, Parker was placed in an interrogation room. R. at 4. Officer Degg went into the room at hourly intervals to ask Parker questions which were directed at obtaining information about the broader criminal conspiracy. R. at 4; R. at 27. Even though there was likely a toilet in the interrogation room as there usually is, Parker requested to use the restroom, but Officer Degg deemed that the interrogation took precedent. R. at 4; R. at 25.

At around 8:30 p.m., FBI Agent Redd Mulder arrived to question Parker in connection with the ATM incident. R. at 4. He apologized to Parker about her previous treatment until that point and stated that the previous interrogation was "not consistent with typical procedure." R. at 4. After a brief argument about jurisdiction, the attending SJPD officer and Agent Mulder allowed Parker to relieve herself. R. at 4. Agent Mulder again apologized and left Parker alone for roughly twenty minutes. R. at 4. When Agent Mulder returned, he read Parker her *Miranda* rights from a standard *Miranda* card. R. at 5. Agent Mulder asked if she understood the rights and wanted to speak to him, to which she ultimately replied yes. R. at 5.

Agent Mulder employed an interrogation style that was primarily aimed at trust building. R. at 5. He asked a few questions regarding the ATM incident before Parker requested an attorney. R. at 5. Agent Mulder then said "of course" and complimented Parker on her video to which she replied, "we really did smash that bank." R. at 5. Agent Mulder did not believe that his comment or her response was a part of the investigation. R. at 5; R. at 32. He then called the Public Defender who instructed Parker not to say anything further to police. R. at 5.

Procedural History

Parker was charged with one count of bank robbery and one count of inciting a riot. R. at 1. She filed two motions to suppress her statements made to Officer Degg and to Agent Mulder, both of which the district court denied. R. at 1; R. 11.

Parker's statements were admitted at the probable cause hearing and at trial. R. at 14. She was convicted of both charges, which she timely appealed. R. at 9; R. at 11. The Court of Appeals for the Fourteenth Circuit reversed the district court's decision, finding that Parker's statements were improperly admitted because she was not adequately provided her rights and that the privilege against self-incrimination applies to pre-trial proceedings. R. at 10. This Court granted the State's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The Fifth Amendment protects criminal defendants from compulsory self-incrimination in a criminal case; however, defendants may only assert such a violation when statements are in fact compelled and are admitted at trial. Here, Parker's statements made to Officer Degg and Agent Mulder were properly admitted because Officer Degg's *Miranda* warnings were adequate. Officer Degg's warnings reasonably conveyed to Parker her rights under *Miranda v. Arizona* and

its progeny. Further, her subsequent statements to Agent Mulder were not tainted from Officer Degg's interrogation because there is no evidence of a coercive atmosphere.

Even if this Court finds that Officer Degg's *Miranda* warnings were inadequate, this Court's holding in *Chavez* properly limits the privilege against self-incrimination only to trial. Parker's statements are admissible in pre-trial proceedings. Therefore, Parker cannot claim a Fifth Amendment violation and her statements are entirely admissible.

STANDARD OF REVIEW

The issues presented in this case relate to the Fifth Amendment. Therefore, they concern questions of law and are reviewed *de novo*. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

ARGUMENT

I. OFFICER DEGG'S ADEQUATE *MIRANDA* WARNINGS SATISFIED THE FIFTH AMENDMENT AND *MIRANDA V. ARIZONA*, AND PARKER'S LATER STATEMENTS MADE TO AGENT MULDER WERE NOT TAINTED.

Parker's statements were properly admitted because Officer Degg provided adequate *Miranda* warnings, and her later statements to Agent Mulder were not tainted. To reinforce a criminal defendant's Fifth Amendment privilege against compulsory self-incrimination, this Court in *Miranda v. Arizona* established certain procedural safeguards, requiring that police warn suspects of their rights prior to a custodial interrogation. 384 U.S. 436, 444 (1966). This Court prescribed four warnings, or their functional equivalent, to inform the suspect that:

> [H]e has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479; *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980).

The *Miranda* warnings themselves are not rights protected by the Constitution, but rather are prophylactic measures designed to protect a criminal defendant's privilege against

self-incrimination. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). However, this Court has never required that the warnings must be provided in a precise form, asserting that there is *no* "talismanic incantation . . . required to satisfy its strictures." *California v. Prysock*, 453 U.S. 355, 359 (1981). Therefore, the controlling inquiry is whether an officer's warnings reasonably convey the substance of the *Miranda* rights. *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989).

If a court finds that an officer's *Miranda* warnings are inadequate, law enforcement is not necessarily precluded from interrogating the suspect again following adequate *Miranda* warnings. *Miranda*, 384 U.S. at 496. The circumstances surrounding unwarned statements may carry over to the second interrogation and taint subsequent warned statements. *Oregon v. Elstad*, 470 U.S. 298, 310 (1985). However, subsequent voluntary statements are not inherently tainted and will be admissible in a criminal trial absent deliberately coercive or improper tactics in obtaining the initial statement. *Id.* at 313. Here, Parker's statements made to Officer Degg and Agent Mulder are admissible, first, because Officer Degg's *Miranda* warnings were adequate and, second, because the warnings did not taint later statements made to Agent Mulder.

A. Officer Degg's *Miranda* Warnings Were Adequate Because They Reasonably Conveyed to Parker Her Rights as Required by *Miranda*.

Officer Degg's warnings satisfied *Miranda* because they reasonably conveyed to Parker the substance of the *Miranda* rights. To determine the sufficiency of an officer's *Miranda* warnings, the inquiry is merely whether the warnings, in their totality, reasonably convey to a suspect the substance of the *Miranda* rights. *Duckworth*, 492 U.S. at 203. Although an officer's warnings may deviate from the verbatim wording in *Miranda,* the warnings are still fully consistent with *Miranda* and its progeny so long as they reasonably convey to the suspect their rights. *See id.* The present case is no exception. Officer Degg's warnings were provided to Parker in a custodial interrogation and reasonably conveyed her *Miranda* rights.

1. Officer Degg provided Parker her *Miranda* warnings because she was subjected to a custodial interrogation.

Officer Degg was required to provide Parker the *Miranda* warnings because she was subjected to a custodial interrogation. *Miranda* requires law enforcement to advise a suspect of their rights only when the suspect is in custody and is being interrogated. *Innis*, 446 U.S. at 297. A suspect is in custody if they are formally under arrest or otherwise deprived of their freedom of action in any significant way. *Berkemer v. McCarty*, 468 U.S. 420, 434 (1984) (holding that the defendant was in custody when he was formally arrested and instructed to get into a police car). An interrogation is either direct questioning or any practice that police should know is reasonably likely to evoke an incriminating response from a suspect. *Innis*, 446 U.S. at 301.

Accordingly, Parker was subjected to a custodial interrogation, implicating the *Miranda* rights. First, Parker was indisputably in custody from the moment she was lawfully arrested and put into the FBI-owned car. *See* R. at 3. Second, she was under interrogation in the car when Officer Degg gave Parker her *Miranda* warnings and then proposed the option to lessen her charges if she provided information about the broader criminal conspiracy or her fraudulent video. *See* R. at 3. This does not constitute direct questioning, but rather a lawful strategy Officer Degg employed, knowing it was reasonably likely to elicit an incriminating response. *See* R. at 3. Officer Degg's interrogation continued throughout the car ride and at the SJPD station. R. at 4. Therefore, Officer Degg was required to give Parker *Miranda* warnings because she was subjected to a custodial interrogation, and adequately did so as required by *Miranda*.

Respondent might argue that because *Miranda* warnings must precede a custodial interrogation, Officer Degg's warnings were inadequate because he asked Parker a question first. However, Parker did not respond to his question and thus, her Fifth Amendment rights are still fully intact. *See* R. at 3. A failure to issue the warnings does not automatically violate a

suspect's constitutional rights because the rights are abridged only when the unwarned statements are used in a criminal case. *Tucker*, 417 U.S. at 444; *Chavez v. Martinez*, 538 U.S. 760, 767 (2003). Parker's statements that she seeks to suppress were made *after* Officer Degg issued the warnings. R. at 3. Because she did not answer Officer Degg's question, and therefore has no statement to suppress, the adequacy of his warnings was unaffected.

2. The adequacy of Officer Degg's *Miranda* warnings was unaffected by his preamble and comments.

Officer Degg's preamble and comments claiming the *Miranda* warnings are a "formality" and "pointless" are irrelevant in determining the adequacy of his warnings. First, the Fourteenth Circuit erred in relying on *Doody v. Ryan* to reason that Officer Degg's ten to fifteen minute preamble about his tenure on the police force somehow diluted his subsequent *Miranda* warnings. *See* R. at 12. In *Doody*, Detective Riley advised the juvenile defendant, who had never heard the *Miranda* warnings before, of his four basic *Miranda* rights, but deviated significantly from the agency's single-page *Miranda* form. *Doody v. Ryan*, 649 F.3d 986, 991-92 (9th Cir. 2011). Detective Riley's *Miranda* warnings took approximately fifteen to twenty minutes and consumed twelve pages of transcript. *Id.* at 1000. Throughout providing the warnings, he emphasized that Doody should not take the warnings out of context, implied that they were just formalities, and assured Doody that they did not suspect him of any wrongdoing. *Id.* at 1002. The court ultimately held that these warnings were inadequate. *Id.* at 1003.

Unlike in *Doody*, there is no evidence that Officer Degg instructed Parker not to take the warnings out of context. Parker is not a juvenile and has presumptively heard of the familiar *Miranda* warnings, whereas Doody was a juvenile that had never heard of the warnings before. *Id.* at 991. Further, Officer Degg implied to Parker that her guilt was already proved because they had evidence placing her at the scene. *See* R. at 3.

The distinction between *Doody* and the case at bar is that Officer Degg's preamble and comments did not affect the substance of the four basic *Miranda* rights he reasonably conveyed. For example, unlike Detective Riley, who unnecessarily elongated the warnings and downplayed their purpose *throughout* his twelve-page exposition, Officer Degg's preamble and comments were *separate* from the *Miranda* warnings he issued to Parker. *See Doody*, 649 F.3d at 1005. Officer Degg's warnings came after his preamble and comments, and were not intertwined throughout the warnings. R. at 3. His warnings presumptively took no longer than twenty seconds, whereas the detective in *Doody* took nearly twenty minutes of explanation. *Doody*, 649 F.3d at 1000. This difference is further demonstrated by the fact that Officer Degg, who was sitting in the driver's seat, actually turned to Parker, who was sitting in the backseat, in order to issue Parker her *Miranda* warnings. *See* R. at 3. This indicated a break between what he was previously talking about and the *Miranda* warnings.

Further, *Doody* involved a situation where an officer instructed a juvenile how to think about and effectuate his *Miranda* rights by implying that the warnings were a mere formality. *See Doody*, 649 F.3d at 1000. This diluted the purpose of *Miranda*, which is to apprise the suspect of their rights. However, here, Officer Degg merely commented on his *opinion* of the *Miranda* warnings, based on his tenure on the force, to an adult suspect. *See* R. at 3. If anything, Officer Degg's preamble about war stories during his tenure on the force further illustrated to Parker what this Court intended the *Miranda* warnings to do—to make the suspect "more acutely aware that he is faced with a phase of the adversary system." *Miranda*, 384 U.S. at 469.

The purpose of the *Miranda* warnings is not to mandate a police code of behavior, but rather to dissipate the compulsion inherent in the custodial interrogation. *See Moran v. Burbine*, 475 U.S. 412, 425 (1986). *Miranda* warnings that provide "full comprehension of the rights to

remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process . . ." *Moran,* 475 U.S. at 427. Officer Degg provided Parker the warnings without explanation, without downplaying the rights as he was giving them, and with the requisite clarity. Upon issuing the warnings, any compulsion inherent in the custodial interrogation dissipated, as this Court intended. Therefore, the adequacy of Officer Degg's *Miranda* warnings was unaffected by his preamble and comments.

3. Officer Degg's *Miranda* warnings were fully consistent with *Miranda* and its progeny.

Officer Degg's *Miranda* warnings were adequate because they are fully consistent with *Miranda* and its progeny. While the *Miranda* warnings are invariable, in *Prysock*, *Duckworth*, and *Powell*, this Court explicitly and repeatedly held that there is no precise formulation of the warnings necessary to meet the *Miranda* requirements. *See Prysock*, 453 U.S. at 359; *Duckworth*, 492 U.S. at 202; *Florida v. Powell*, 559 U.S. 50, 60 (2010). There is no constitutional basis that an officer's *Miranda* warnings are fully inadequate when they slightly deviate from the verbatim rights enunciated in *Miranda* or from their respective agency's standard formulation. *See Duckworth*, 492 U.S. at 202-03. In fact, an officer's warnings must only reasonably convey to the suspect the substance of their *Miranda* rights. *Prysock*, 453 U.S. at 361. Here, Officer Degg's *Miranda* warnings reasonably conveyed to Parker her rights in accordance with *Miranda* and its progeny.

First, there is no discernable issue with Officer Degg's statement "you have the right to remain silent." *See* R. at 3. Although not required, Officer Degg spoke the verbatim language in *Miranda*. *See Duckworth*, 492 U.S. at 202.

Second, Officer Degg's statement that "anything you say will be used against you" reasonably conveys this prong's intended purpose—that there are consequences to forgoing the

right to remain silent. *Miranda*, 384 U.S. at 469; *see* R. at 3. Officer Degg's modification of the verbatim language in *Miranda* is simply a deviation without difference. *See e.g. Finley v. Roger*, 116 Fed.Appx 630, 637 (6th Cir. 2004) (holding that the *Miranda* warnings were adequate where the police stated "[a]nything that you say will be used against you in court."). The modified language, "will" instead of "can," in no way affects the purpose of the warning—to make the suspect aware of what will happen if they do speak. *See Miranda*, 384 U.S. at 469. In reality, Officer Degg's language reinforced that it was in Parker's best interest to stay quiet.

By the same token, it is irrelevant that Officer Degg did not state that anything Parker said would be used against her in a "court of law." *See United States v. Frankson*, 83 F.3d 79, 82 (4th Cir. 1996) (holding that an officer's omission of where the statements could be held against the defendant was inconsequential to the conveyance of this *Miranda* prong). Officer Degg's warning clearly conveyed that all of Parker's statements would be used against her "anytime, anywhere, including a court of law, a broader warning than *Miranda* actually requires." *See id.* Officer Degg's general warning fulfills the requirements of *Miranda* and its progeny, which makes it clear that officers are not required to provide highly particularized warnings so long as the warnings do not tamper its substance. *See Prysock*, 453 U.S. at 359; *Duckworth*, 492 U.S. at 202; *Powell*, 559 U.S. at 60. Additionally, requiring an officer to accurately list all possible circumstances where a suspect's statements may be used against them is an onerous burden on law enforcement. *See Frankson*, 83 F.3d at 82.

Third, Officer Degg's statement "you can get an attorney" reasonably conveyed to Parker her right to an attorney in general. *See* R. at 3. This Court established that the right to an attorney only needs to be conveyed in a general sense. *See Prysock*, 453 U.S. at 359. For example, in *Prysock*, this Court held that the officer "clearly conveyed [to the suspect his] rights

to a lawyer *in general*" even when he failed to mention that an attorney could be appointed to the suspect before questioning. *Prysock*, 453 U.S. at 61 (emphasis added). This Court reaffirmed that there is no need for highly particularized warnings in *Duckworth* when an officer told a suspect that an attorney would be appointed "if and when you go to court." *Duckworth*, 492 U.S. at 203-04. Again in *Powell*, this Court held that an officer's warnings clearly conveyed the right to counsel when the officer only told the suspect he had a right to talk to an attorney before answering any questions. *Powell*, 559 U.S. at 63. In each of these cases where the officers attached a temporal element to the suspects' right to counsel, this Court held that the warning did not vitiate the substance of the general right.

Echoing this Court's precedent, the Second, Third, Fourth, Seventh, and Eighth Circuits all agree that "you have the right to an attorney" adequately conveys this right to satisfy *Miranda*; police are not required to state that the suspect holds this right before, during, and after questioning. *United States v. Burns*, 684 F.2d 1066, 1074 (2nd Cir. 1982); *United States v. Warren*, 642 F.3d 182, 185-86 (3rd Cir. 2011); *Frankson*, 83 F.3d at 82; *United States v. Adams*, 484 F.2d 357, 361 (7th Cir. 1973); *United States v. Caldwell*, 954 F.2d 496, 502 (8th Cir.1992).

Certainly, if this Court found that warnings which include a temporal element do not limit a suspect's general right to an attorney, then a general warning of the right to counsel likewise satisfies *Miranda*. *See Prysock*, 453 U.S. at 359; *Duckworth*, 492 U.S. at 202; *Powell*, 559 U.S. at 60. Officer Degg's warning communicated that Parker's "right to an attorney began immediately and continued forward in time without qualification." *See Frankson*, 83 F.3d at 82. Therefore, Officer Degg's iteration of the third prong of the *Miranda* warnings was adequate.

Lastly, Officer Degg's statement "we'll appoint one for you" also reasonably conveyed the substance of the fourth prong of the *Miranda* warnings. R. at 3. In *Miranda*, this Court

explained that the fourth prong is meant to expand on the right to an attorney, and when the third and fourth prongs are read together, the indigent is ensured that he is covered too. *Miranda*, 384 U.S. at 473. In their totality, the third and fourth prongs of Officer Degg's warnings reasonably conveyed that Parker could get an attorney for herself if she wanted to, and if she could not, one would be assigned to her. *See Duckworth*, 492 U.S. at 205.

Respondent might argue that this Court should take into account that Officer Degg had motive to provide inadequate *Miranda* warnings. However, an officer's subjective motivation for not providing highly particularized warnings is irrelevant to the warning's adequacy. *See Moran*, 475 U.S. at 423. Law enforcement agencies have little incentive to intentionally deviate from the verbatim *Miranda* language because it puts a suspect's statements at risk of suppression. *Powell*, 559 U.S. at 64. Therefore, it is failed reasoning to argue that Officer Degg would intentionally provide inadequate *Miranda* warnings in order to elicit incriminating statements from Parker because such statements would have a high risk of being suppressed.

Although Officer Degg's warnings were not a verbatim recitation of the SJPD *Miranda* card or the warnings in *Miranda* itself, they did not need to be. *Powell*, 559 U.S. at 60. This Court never intended to create a "constitutional straitjacket" through *Miranda*, which is why reviewing courts are not required to assess an officer's warnings as if construing a will or defining the terms of an easement. *Miranda*, 384 U.S. at 467; *Duckworth*, 492 U.S. at 203. Reversing the Fourteenth Circuit's decision would reinforce this well-established view that equally balances a defendant's self-incrimination privilege with the prosecution's interest in effectively trying guilty criminals to ensure community safety. *Moran*, 475 U.S. at 424.

Requiring an officer to provide highly particularized warnings would not only contravene controlling precedent but would also create an "undue burden" on law enforcement during the

interrogation process. *See Miranda*, 384 U.S. at 481. Police officers may deviate from or omit specific words in a precise formulation that results in a harmless mistake. *See Duckworth*, 492 U.S. at 203 ("*Miranda* has not been limited to station house questioning, and the officer in the field may not always have access to printed *Miranda* warnings, or he may inadvertently depart from routine practice . . ."). Affirming the Fourteenth Circuit's holding would incite excessive amounts of litigation and the exclusion of highly probative evidence. Therefore, it is unreasonable to suppress otherwise voluntary statements due to harmless deviation from the verbatim *Miranda* language. As such, Officer Degg was only required to reasonably convey to Parker the substance of the *Miranda* warnings, and adequately did so.

4. Officer Degg was not required to obtain an explicit waiver from Parker, and Parker effectively waived her rights.

Officer Degg's warnings remain adequate because he was not required to explicitly ask Parker if she waived her *Miranda* rights prior to the interrogation. After *Miranda* warnings are provided, the suspect can, at any time, claim that they wish to remain silent or request an attorney, at which point the interrogation must stop. *Miranda*, 384 U.S. at 473-74. However, police are not required to obtain an express waiver from the suspect before proceeding with the interrogation. *Berghuis v. Thompkins*, 560 U.S. 370, 387 (2010). In fact, this Court rejected the rule proposed by the *Butler* dissent which would require police to obtain an express waiver before questioning the suspect. *North Carolina v. Butler*, 441 U.S. 369, 375 (1979). Therefore, Officer Degg's omission of the waiver section on SJPD's *Miranda* card was irrelevant because he was not required to obtain such a waiver.

Nonetheless, Parker voluntarily, knowingly, and intelligently waived her *Miranda* rights when she responded to Officer Degg's questions, and at no point invoked her rights. To invoke the right to remain silent, a suspect must do so unambiguously. *Berghuis*, 560 U.S. at 382. Mere

silence is not enough to invoke your *Miranda* rights. *Miranda*, 384 U.S. at 475. A suspect can waive their rights expressly or implicitly, but the suspect must do so voluntarily, knowingly, and intelligently. *Butler*, 441 U.S. at 373. A waiver can be inferred from the suspect's actions or words. *Id*. Therefore, "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Berghuis*, 560 U.S. at 384.

In the present matter, Parker waived her *Miranda* rights. *See* R. at 4. Parker never unambiguously invoked her right to remain silent during the interrogation with Officer Degg. Her silence in the car ride and throughout the interrogation was not enough to invoke her rights. *See* R. at 4. Parker waived her rights explicitly when she claimed "I know my rights" after Officer Degg issued the warnings, and implicitly when she provided statements to Officer Degg. *See* R. at 4. Aside from this unambiguous waiver, it is reasonable to conclude that Parker, a "vigilante" journalist, understood her *Miranda* rights. R. at 1-3. In finding that Parker did not waive her rights, the Fourteenth Circuit diluted this Court's proposition that "[a]dmissions of guilt, resulting from valid *Miranda* waivers 'are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (quoting *Moran*, 475 U.S. at 426). Therefore, in line with this Court's precedent, Parker effectively waived her rights.

B. Even if Officer Degg's *Miranda* Warnings Were Inadequate, Parker's Voluntary Statements Made After Agent Mulder's *Miranda* Warnings Were Not Tainted.

Parker's voluntary statements made after Agent Mulder's subsequent *Miranda* warnings were not tainted even if this Court finds that Officer Degg's warnings were inadequate. A mere failure to administer adequate *Miranda* warnings is not a Fifth Amendment violation in itself, rather it creates a presumption of compulsion. *Elstad*, 470 U.S. at 306-07. However, the

Miranda presumption of compulsion "does not require that the statements and their fruits be discarded as inherently tainted." *Elstad*, 470 U.S. at 306-07. Therefore, if a suspect is subsequently provided their *Miranda* warnings in a later custodial interrogation, those warned statements are admissible when they are made knowingly and voluntarily. *Id.* at 309. To determine whether statements were made knowingly and voluntarily, a court will look at the entire course of police conduct, including the first interrogation. *Id.* at 318. Absent deliberately coercive or improper tactics in obtaining the initial statements, later statements are made knowingly and voluntarily, and therefore, are not tainted. *Id.* at 299. In the present matter, Parker voluntarily and knowingly made statements to Agent Mulder after he provided subsequent *Miranda* warnings, and thus, are not tainted from Officer Degg's previous interrogation.

There is no evidence that indicates Officer Degg and Agent Mulder executed a concerted strategy to elicit incriminating statements from Parker. When police officers intentionally employ a question-first strategy, the suspect's statements made in the subsequent interrogation are inadmissible. *Missouri v. Seibert*, 542 U.S. 600, 617 (2004). For example, in *Seibert*, police conducted a custodial interrogation without providing *Miranda* warnings. *Id.* at 616-17. After obtaining incriminating statements in the first interrogation, police then issued *Miranda* warnings and elicited the same statements from the suspect. *Id.* This Court held that the subsequent statements were tainted from this deliberately coercive strategy, finding that both interrogations were a part of a single, concerted effort. *Id.* This strategy defies the purpose of *Miranda* by employing a coercive tactic that renders the second statements involuntary. *Id.* at 617. This Court distinguished the circumstances in *Seibert* with those in *Elstad,* in which the subsequent statements were not tainted because the initial interrogation was not coercive. *Id.* at 615.

Unlike in *Seibert* and analogous to *Elstad*, the officers here did not employ a coercive question-first strategy. The case at bar is distinguishable from *Seibert* because Officer Degg provided *Miranda* warnings, at least in part, during the first interrogation. *See* R. at 3. Even if Officer Degg's warnings were inadequate, a *Seibert* situation involves an initial interrogation where the officer does not attempt to warn the suspect at all. *Seibert*, 542 U.S. at 613. More importantly, this case is unlike *Seibert* because there is no evidence of a coercive strategy between the two interrogations. Officer Degg and Agent Mulder questioned Parker about separate crimes. *See* R. at 4; R. at 27. Officer Degg asked Parker questions primarily about the broader criminal conspiracy SJPD was investigating. R. at 4; R. at 27. On the other hand, Agent Mulder's questions concerned Parker's specific involvement in the bank robbery. *See* R. at 4; R. 31-32. The officers were concerned with different ongoing investigations. Unlike *Seibert*, where the second interrogation was practically a reiteration of the first, Agent Mulder did not confront Parker with the statements she made in the previous interrogation. *See Seibert*, 542 U.S. at 604. This demonstrates that these were two separate interrogations without a concerted strategy.

There is also no evidence that there was a coercive atmosphere from Officer Degg's interrogation that carried over to Agent Mulder's interrogation. When an unwarned interrogation and a warned interrogation create a continuous period of questioning, the taint will carry over to the second interrogation. *Seibert*, 542 U.S. at 615. However, there are several factors that will dissipate taint from the initial interrogation, creating a "new and distinct experience" for the suspect. *Bobby v. Dixon*, 565 U.S. 23, 32 (2011).

For example, the passage of time between the unwarned and warned statements can dissipate taint that may carry over to the subsequent interrogation. *Elstad*, 470 U.S. at 298. This

Court has demonstrated that there is no dispositive amount of time required to dissipate taint. *United States v. Bayer*, 331 U.S. 532, 541 (1947) (finding that a six-month period was enough to dissipate taint)*; Dixon*, 565 U.S. at 29 (finding that a four-hour time period was a "significant break in time"). Here, this Court should find that a roughly thirty-minute break between the two interrogations was enough to dissipate taint, especially when coupled with other factors.

Additionally, taint can dissipate when a different officer conducts the second interrogation. *Elstad*, 470 U.S. at 310. Here, not only did two different people interrogate Parker, but both officers are from two separate and distinct entities, SJPD and the FBI. R. at 2; R. at 4-5. If there was any confusion as to the difference in where the two officers worked, it was cleared up when Agent Mulder disputed jurisdiction with a SJPD officer in front of Parker. *See* R. at 4. Parker was thereafter reasonably informed that Officer Degg and Agent Mulder worked at two different agencies. Agent Mulder also employed a completely different interrogation style of trust building which departed from Officer Degg's style of tough love, further demonstrating the change in identity. *See* R. at 5; R. at 27.

Moreover, a court will look at the degree to which the second interrogator treated the second interrogation as a continuum of the first. *Seibert*, 542 U.S. at 602. The second interrogation here was a distinct experience based on Agent Mulder's own words. He explained to Parker that he did not condone the previous treatment, apologized to Parker for the treatment, and left the interrogation room to "make sure these guys don't screw anything else up." R. at 4. Therefore, this interaction indicated to Parker that the first interrogation was over and that the second interrogation was about to begin.

The Fourteenth Circuit erred in reasoning that Parker was interrogated in a coercive environment which tainted her later statements made to Agent Mulder. *See* R. at 13. In finding

that the interrogations were coercive, the court analogizes *Westover*, that involved a fourteen-hour interrogation, to Parker's interrogation, which lasted roughly twelve hours. *Westover*, 384 U.S. at 496; R. at 13. However, the Fourteenth Circuit disregards "[t]he cardinal fact of *Westover*—the failure of the police officers to give any warnings whatsoever to the person in their custody before embarking on an intense and prolonged interrogation of him." *Michigan v. Mosley*, 423 U.S. 96, 107 (1975). Unlike *Westover*, there was no coercive environment here because Officer Degg attempted to administer the warnings to Parker before the interrogation.

Further, there was no evidence of a coercive environment during the interrogations. Parker was given several breaks as Officer Degg left and returned to the interrogation room at hourly intervals. R. at 4. There is no evidence that she was physically tortured or deprived of water, sleep, or food. *Dixon*, 565 U.S. at 29 (finding that statements were voluntary when the suspect received breaks, was given water and food, and was not physically tortured). Although the Fourteenth Circuit opined that Parker was unable to go to the bathroom, this inference ignores the fact that she likely had a toilet in the interrogation room, as most rooms at the SJPD station do. *See* R. at 25. She could have relieved herself at any point the officers left the room.

Respondent might argue that Officer Degg's tactics were particularly coercive because he had an intense demeanor, was offering to lessen her charges if she provided information, and stopped the car for roughly forty-five minutes. *See* R. at 3-4. However, this is not dispositive because police are allowed to use deceptive strategies to elicit voluntary statements from suspects. *See Moran*, 475 U.S. at 423. Additionally, Parker's unmanageable behavior throughout the car ride and at the station contributed to the intense situation. *See* R. at 25. She was thrashing around in the back seat, name-calling, and fighting with the officers. R. at 4.

Lastly, Respondent might erroneously argue that Agent Mulder's compliment to Parker after she requested an attorney contributed to a coercive environment. *See* R. at 5. Once the suspect invokes their right to counsel, the interrogation must cease "unless the accused himself initiates further communications, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 485 (1981). Here, Agent Mulder's interrogation ceased after Parker requested counsel. *See* R. at 5. As he testified, Agent Mulder's compliment to Parker was not a part of the interrogation and he did not think that she would forthrightly provide such information in her response. R. at 32. His compliment to Parker was merely a casual, "off hand" statement that was not reasonably likely to elicit an incriminating response. *See Innis*, 446 U.S. at 303. Therefore, Parker's statement "we really did smash that bank" was not elicited from coercive measures but was voluntarily provided, and is likewise admissible. *See* R. at 5.

Even where an officer employs a deliberately coercive strategy, the second statements may still be admissible if curative measures are taken prior to the second interrogation. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). For example, an officer can provide an additional warning explaining that the suspect's previous statements will not be used against them. *Id.* Even if this Court finds that a coercive strategy was at play, Agent Mulder directly condemned Officer Degg's interrogation and apologized for her previous treatment "until this point" which constituted a curative measure. *See* R. at 4-5. Overall, Parker's subsequent statements are admissible because they were not tainted by any deliberately coercive or improper tactics.

II. EVEN IF PARKER'S STATEMENTS WERE INADMISSABLE AT TRIAL, HER STATEMENTS WERE PROPERLY ADMITTED AT PRE-TRIAL PROCEEDINGS UNDER *CHAVEZ V. MARTINEZ.*

Even if Parker's statements were improperly admitted at trial, the Fourteenth Circuit erred in interpreting *Chavez* to preclude Parker's statements from pre-trial proceedings. The

Self-Incrimination Clause in the Fifth Amendment requires that "no person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. A defendant's Fifth Amendment privilege against self-incrimination is only violated when their compelled statements are used against them in a criminal case. *Chavez*, 538 U.S. at 766. However, in *Chavez*, this Court declined to define the parameters of a criminal case, which created a circuit split on whether a defendant's unwarned statements are admissible in pre-trial proceedings. *Id.* Here, Parker's statements were properly admitted at pre-trial proceedings, first, because *Chavez* does not extend the Fifth Amendment privilege to pre-trial and, second, because extending this privilege would drastically alter the criminal justice system.

A. This Court's Decision in *Chavez* Properly Limits the Fifth Amendment Privilege Against Self-Incrimination Exclusively to Trial.

This Court has already ruled on the limits of the Self-Incrimination Clause when it declined to extend the privilege to pre-trial proceedings in *Chavez*. *Chavez* 538 U.S. at 766. In *Chavez*, this Court found that the suspect was subjected to a coercive interrogation because police questioned him while being treated for life-threatening injuries. *Id.* at 764. Although there were ultimately no charges filed against the suspect, he filed suit under 42 U.S.C. section 1983 alleging that police had violated his privilege against self-incrimination. *Id.* at 765. The suspect argued that his self-incrimination privilege included the entire criminal investigatory process. *Id.* However, this Court declined to extend the privilege to pre-trial proceedings in *Chavez*, citing its two prior decisions. *Id.* at 767; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is *a fundamental trial right* of criminal defendants . . . *a constitutional violation occurs only at trial.*"); *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (holding that the Fifth Amendment is a "trial right"). Ultimately, this Court held that the suspect's Fifth Amendment rights were not

violated because he was never compelled to be a witness against himself in a criminal trial. *Chavez* 538 U.S. at 766. This Court reaffirmed the *Chavez* decision one year later in *United States v. Patane*, holding that "potential [Fifth Amendment] violations occur if, at all, only upon the admission of unwarned statements into evidence at trial." 542 U.S. 630, 641 (2004).

Despite this Court's decision in *Chavez* and *Patane*, the circuit courts have yielded inconsistent decisions as to the precise moment a "criminal case" begins, and therefore, when the privilege against self-incrimination attaches. The Third, Fourth, and Fifth Circuits properly apply *Chavez* and *Patane* in maintaining that the privilege against self-incrimination is strictly a trial right. Nonetheless, the Second, Seventh, Ninth, and Tenth Circuits misconstrue *Chavez* and disregard *Patane* by extending the privilege against self-incrimination to pre-trial proceedings.

The Third, Fourth, and Fifth Circuits properly apply *Chavez* to determine that the self-incrimination privilege is inapplicable to pre-trial proceedings. Relying on *Chavez*, the Third Circuit held that the privilege is solely a trial right, and the defendant's unwarned statements were admissible in his probable cause hearing. *Renda v. King*, 347 F.3d 550, 559 (3rd Cir. 2003). The court held that the *Miranda* rights are prophylactic measures intended to safeguard the privilege against self-incrimination, but such measures "do not expand the scope of the constitutional rights themselves." *Id.* Therefore, the Third Circuit found no violation because the privilege against self-incrimination can only be violated at trial. *Id.* at 559.

Two years later, the Fifth Circuit held in *Murray v. Earle* that a criminal defendant's Fifth Amendment right can only be violated when two prerequisites are met. 405 F.3d 278, 290 (5th Cir. 2005). The first prong requires that police elicited statements from the defendant in violation of *Miranda*, and the second prong is met when the unwarned statements are used against the defendant *at trial*. *Id.* at 289. In *Murray*, the Fifth Circuit held that the defendant's

self-incrimination privilege was ultimately violated, but the violation only occurred when the compelled statements were used at trial. *Murray*, 405 F.3d at 289. The court explicitly maintained that the defendant's Fifth Amendment rights were still intact even when his compelled statements were used during pre-trial proceedings. *Id.* at 290.

Similarly, the Fourth Circuit held that the privilege against self-incrimination does not extend to legal proceedings before trial because this Court declined to do so in *Chavez*. *Burrell v. Virginia*, 395 F.3d 508, 513 (4th Cir. 2005). In *Burrell*, the defendant was charged with obstruction of justice during a traffic accident, but he alleged that police violated his self-incrimination privilege by forcing him to produce insurance documents. *Id.* at 512. Although the proceeding took place in traffic court, the defendant's Fifth Amendment claim failed because the statements at issue were not used against him at *trial*. *Id.* at 516. After correctly analyzing *Chavez*, the Fourth Circuit held that the self-incrimination privilege is solely a trial right. *Id.*

The Third, Fourth, and Fifth Circuits' holdings properly balance a defendant's privilege against self-incrimination and the government's vital interest in ensuring an effective and procedurally efficient prosecution to ensure community safety. *See* Samantha Ruben, *Clarifying the Scope of the Self-Incrimination Clause: City of Hays v. Vogt*, 94 CHI.-KENT L. REV. 137, 149 (2019). This Court should reaffirm the Third, Fourth, and Fifth Circuits which correctly decline to extend the self-incrimination privilege to pre-trial proceedings.

B. The Fourteenth Circuit Defied This Court's Precedent in Over-Extending the Self-Incrimination Privilege to Pre-Trial Proceedings.

The Fourteenth Circuit wrongly held that Parker's statements were inadmissible in pre-trial proceedings by relying on the Second, Seventh, Ninth, and Tenth Circuit Courts holdings that contravene this Court's precedent. These circuit courts misinterpret this Court's decision in *Chavez* and inappropriately assert the privilege against self-incrimination to pre-trial

proceedings. The Tenth Circuit relies on the canons of construction and interpretive tools to defy this Court's precedent. Applying an originalist approach, the Tenth Circuit argues that at the time the Fifth Amendment was constructed, the Founders of the Constitution understood "[criminal] case" to encompass more than just trial. *Vogt v. City of Hayes*, 844 F.3d 1235, 1243 (10th Cir. 2017). Despite this Court's more recent decisions in *Chavez* and *Patane*, the Tenth Circuit erred in reaching its conclusion through heavy reliance on a founding era dictionary. *Id*. In doing so, the Tenth Circuit found that the defendant's privilege against self-incrimination was violated where unwarned statements were used in a probable cause hearing, although probable cause was not ultimately established. *Id.* at 253.

The Second Circuit wrongly held that a Fifth Amendment violation occurs when the officer "could have reasonably foreseen that a coerced confession would be used against [the suspect]." *Higazy v. Templeton*, 505 F.3d 161, 180 (2nd Cir. 2007). This directly contradicts *Chavez* and *Patane* which establish a Fifth Amendment violation occurs when coerced statements are used against the defendant at trial. *See Chavez* 538 U.S. at 777; *Patane* 542 U.S. at 641. The Second Circuit created an onerous rule that heavily burdens law enforcement during an interrogation by requiring officers to foresee the results of a criminal prosecution.

Additionally, the Seventh and Ninth Circuits unnecessarily created rules that are contrary to what this Court demonstrated in *Chavez*. For example, in *Sornberger v. City of Knoxville*, the Seventh Circuit held that because the criminal trial stemmed primarily from the unwarned statements, the suspect was compelled to be a witness against herself. 434 F.3d 1006, 1027 (7th Cir. 2006). Even where the suspect's charges were dropped before the case reached trial, the Seventh Circuit held that this constituted a Fifth Amendment violation because her criminal case commenced from the unwarned statements. *Id.* at 1026.

The Ninth Circuit even more drastically extends the self-incrimination privilege. In *Stoot v. City of Everett*, the Ninth Circuit ruled that a suspect's Fifth Amendment rights are violated when their unwarned statements allow the criminal process to proceed. 582 F.3d 910, 923 (9th Cir. 2008). In *Stoot*, the defendant's unwarned statements were used against him at his arraignment. *Id.* at 923. The court held that the defendant's Fifth Amendment rights were violated because the prosecution used his unwarned statements to file charges against him, and thus, the use of such statements allowed the "prosecution to proceed." *Id.* at 925.

The decisions from these circuits not only defy this Court's precedent, but also negatively and fundamentally change the nature of pre-trial and trial proceedings. *See* Samantha Ruben, *Clarifying the Scope of the Self-Incrimination Clause: City of Hays v. Vogt*, 94 CHI.-KENT L. REV. 137, 149 (2019). First, if this court were to find that the Fifth Amendment precludes unwarned statements from pre-trial proceedings, lower courts will have to resolve admissibility issues before trial. *Id.* In effect, "courts would have to adjudicate fact-intensive suppression questions" before having the chance to resolve the many preliminary issues. *Id.* This is impractical because pre-trial proceedings act on a fast timeline, taking place soon after charges have been filed. Erin Hughes, *Pretrial and Error: The Use of Statements Inadmissible at Trial in Preliminary Proceedings*, 15 DUKE J. CONST. L & PUB. POL'Y SIDEBAR 145, 172 (2020).

Second, these circuits propose a rule that is counterintuitive to what the Self-Incrimination Clause protects—a defendant's involuntary, incriminating statements will not be used against them in trial. A Self-Incrimination Clause violation requires that the statement actually be "incriminating and would establish a defendant's criminal responsibility." *Id.* Trial is the only stage in the criminal process where criminal guilt or innocence is determined. *Id.*

Therefore, the privilege against self-incrimination is not applicable to the pre-trial stage where a defendant is not yet facing a determination of guilt beyond a reasonable doubt.

Third, although the privilege against self-incrimination is guarded by prophylactic *Miranda* warnings, a deficiency in these warnings does not automatically render a Fifth Amendment violation. Geoffrey B. Fheling, *Verdugo, Where'd You Go?: Stoot v. City of Everett and Evaluating Fifth Amendment Self-Incrimination Civil Liability Violations*, 18 GEO. MASON L. REV. 481, 483 (2011). Therefore, a procedural *Miranda* violation is fundamentally different than a violation of the privilege against self-incrimination. *Id.* The violations are also inherently different. Reliance on unwarned statements at an arraignment or an evidentiary hearing does not lead to the same infliction of penalties compared to when those statements are produced in front of a jury at trial. *Id.* (arguing that trial is where a defendant's Fifth Amendment right can be violated). Thus, reading pre-trial violations into the Self-Incrimination Clause "needlessly blurs the line between constitutional and procedural rights under the Fifth Amendment." *Id.* at 519.

In conclusion, this Court should find that Parker's unwarned statements were properly admitted during her pre-trial proceedings because such a rule maintains this Court's precedent and reinforces the limits of the Self-Incrimination Clause.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court REVERSE the ruling of the Fourteenth Circuit Court of Appeals.

Dated: October 8, 2020

Respectfully submitted,

Team 6

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