No.:_____

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IN THE
SUPREME COURT OF THE UNITED STATES

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JOHN DOE, *Petitioner*

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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# PETITION FOR WRIT OF CERTIORI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming the district court's error of admitting the 795-SSA form through the business records exception to the hearsay rule where the documents were prepared in furtherance of a potential criminal prosecution.

2. Whether the Court of Appeals erred in affirming the district court's error of allowing testimony of statements obtained during interrogation without Miranda waiver under the booking exception.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the First Circuit Court of Appeals in this case.

## OPINION BELOW

The opinion of the United States Court of Appeals appears at Appendix A to this Petition and is reported at Case No. 19-1953 (1st Cir. January 20, 2022).

## JURISDICTION

The United States District Court for the District of Massachusetts had jurisdiction pursuant to 18 U.S.C. §3231. On June 12, 2019, the Defendant ("Mr. Doe") was convicted of use of a passport obtained through false statements in violation of 18 U.S.C. § 1542, two counts of misuse of a social security number in violation of 42 U.S.C. § 408(a)(7)(B), theft of public funds in violation of 18 U.S.C. § 641, and two counts of aggravated identity theft in violation of 18 U.S.C. § 1028A. The Defendant appealed his conviction to the United States Court of Appeals for the First Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. §1254.

## CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The exception to the hearsay rule contained in the Federal Rules of Evidence, Rule 803(6) provides, in part, to allow into evidence records that would otherwise be hearsay if:

> "(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification . . . and (E) the opponent does not show that the source of

information or the method or circumstances of preparation indicate a lack of trustworthiness." Fed. Rule Evid. 803(6).

The Fifth Amendment to the Consititution states, in part, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V.

## STATEMENT OF THE CASE

On July 19, 2018, an indictment charged Mr. Doe with Using a Fraudulently Obtained Passport, in violation of 18 U.S.C. § 1542 (Count One); Misuse of a Social Security Number, in violation of 42 U.S.C. § 408(a)(7)(B) (Counts Two and Three); Theft of Public Funds, in violation of 18 U.S.C. § 461 (Count Four); and Aggravated Identify Theft, in violation of 18 U.S.C. § 1028(A) (Counts Five and Six). RA/19.[1] Mr. Doe was tried by a jury on June 5, 6, 10, 11, and 12 of 2019. RA/117-828. The jury found Mr. Doe guilty on all charges of the indictment. RA/814. On September 18, 2019, the court sentenced Mr. Doe to thirty-six months (36) imprisonment (twelve months for Counts One, Two, Three, and Four concurrently, and twenty-four months for Counts Five and Six concurrently with each other and consecutive to Counts One through Four) and three (3) years of supervised release with standard and special conditions. RA/2. Mr. Doe was also ordered to pay Restitution in the amount of $16,762.00. RA/2.

## STATEMENT OF FACTS

According to the United States government, Mr. John Doe is not a United States citizen, and he entered the United States using someone else's passport. Tr. 2/11-13.[2] This is not the first time the government believed Mr. Doe entered the United States illegally. Tr. 2/92. Previously, in 1985, upon arriving at Miami, Florida, from an overseas visit, Mr. Doe was detained and questioned by U.S. immigration officials who suspected him to be an illegal immigrant. Tr. 2/92. Mr.

[1] The Record Appendix, attached hereto as Appendix B, will be cited as follows: RA/Page No.
[2] The transcript from the jury trial will be cited as follows: Tr. Volume No. /Page No.

Doe was subsequently released as the U.S. government could not find sufficient evidence to show he was not a U.S. citizen. Tr. 2/93. In the following years, the investigation into Mr. Doe was reopened as his cases of fraud and use of his SSN remained open. Tr. 4/116.

At Mr. Doe's trial, the government presented documentary evidence, testimony relevant to his application for housing, and documents from the Social Security Administration. Tr. 2/121; Tr. 3/15-16, 61, 83. The government's case was primarily established by documentary evidence that was admitted over the defendant's hearsay objections. Tr. 4/9-10, 12. The government also introduced testimony, over Mr. Doe's objection, of statements Mr. Doe made during a custodial interrogation. Tr. 2/93. The court, after hearing testimony and argument about the circumstances under which the statements were made, ruled the statements were admissible under the routine booking exception. SH. 51, 57-58.[3] The defendant's appeal focuses on the suppression issue and the admission of the documents. Tr. 4/23; SH. 51, 57-58.

The parties stipulated to the following facts: on June 28, 1985, Mr. Doe traveled from the United States to the Dominican Republic to visit his in-laws. Tr. 2/92. On July 13, Mr. Doe flew back to Miami International Airport and was identified by two immigration officials, one of them being Mr. José DeChoudens. Tr. 2/92. They placed Mr. Doe in administrative custody because of suspicions that he was making a false claim of U.S. citizenship. Tr. 2/92. Mr. Doe presented a passport, a birth certificate, and a Social Security card and accompanying document. Tr. 2/93. On August 8, 1985, the INS determined such documents were insufficient to show Mr. Doe was not a U.S. citizen and he was released from custody and admitted to the United States as a returning citizen. Tr. 2/93.

[3] Transcript of the hearing on Mr. Doe's motion to suppress took place on June 3, 2019 will be cited as follows: SH. Page No.

At trial, the government called José DeChoudens as a witness, who was a special agent for the U.S. Immigration Service in Miami, Florida for 21 years, which is now known as Immigration and Customs Enforcement (ICE). Tr. 2/89-90, 100. Mr. DeChoudens testified as to what took place back in 1985. Tr. 2/93. He stated he and his partner Mr. Alberto Pierluissi, who is now deceased, questioned Mr. Doe at the airport. Tr. 2/93, 106. Their goal was to bring Mr. Doe to admit he was not born in Puerto Rico as he claimed in his US passport application. Tr. 2/93-94.

Over Defendant's objection, Mr. DeChoudens testified that Mr. Doe's accent sounded like a Dominican accent. Tr. 2/93. Mr. DeChoudens also testified about Mr. Doe's statements regarding schooling in Puerto Rico. Tr. 2/94. Mr. DeChoudens testified that Mr. Doe stated that he attended Republic de Columbia up to seventh grade. Tr. 2/94. Mr. DeChoudens also testified that his sister attended the same school and he believed the school served grades 10, 11, and 12, but that the school across the street was a primary school. Tr. 2/94. Mr. Dechoudens' testimony was a subject of pre-trial trial motion to suppress which the court denied after a hearing. SH. 51.

At the suppression hearing held two days before the trial or June 3, 2019, Mr. Doe argued that two of Mr. DeChoudens' statements should be suppressed: that Mr. Doe had a Dominican accent and that Mr. Doe said he attended Republic de Columbia in Puerto Rico. SH. 4. Mr. Doe argued the nature of the questioning amounted to a custodial interrogation. SH. 5. The room where Mr. Doe was questioned was described as an office with no windows and approximately 8 feet by 8 feet. SH. 14-15. There was a "main interrogator" in the room with Mr. DeChoudens and Mr. Doe. SH. 14. They asked Mr. Doe questions about where he went to school to find out if he was born in Puerto Rico. SH. 16, 18. The agents had Mr. Doe's passport, he was not free to leave until questioning was terminated. SH. 22, 27. Another INS agent was stationed at the exit of the waiting room, and Mr. Doe was separated from his nine-year-old son. SH. 22, 27, 29. Mr. Doe was in custody from July 13, 1985, to August 8, 1985. SH. 41. The judge denied the motion

to suppress citing the "booking exception" which establishes that Miranda rights do not apply where a law enforcement officer is asking for a suspect's background information. SH. 51, 57-58.

Mr. Doe's second challenge focused on the admission of documents from the Social Security Administration through the business records exception under the hearsay rule. Tr. 4/11. The records were created by one, Jeisa Rincon, who worked as a claims specialist for Social Security in 2014. Tr. 4/6-7. Ms. Rincon testified to a SSA-795 Statement, Statement of Claimant or Other Person pertaining to José Rodriguez and signed on April 22, 2014. Tr. 4/9-10, 12. The form is used when an individual makes an allegation pertaining to their Social Security Number (SSN). Tr. 4/10.

Defense counsel objected to the admission of the SSA-795 form arguing that the proper foundation for a business record had not been laid and to Ms. Rincon as a witness because her testimony was not disclosed until trial began in violation of Rule 16. Tr. 4/11. The record at issue was a statement taken in Spanish and translated to English. Tr. 4/11.

The court allowed a *voir dire* examination of Ms. Rincon prior to admitting the records. Tr. 4/17. At the *voire dire* hearing, Ms. Rincon testified that day was not a typical day as she was informed by the assistant district manager for the Social Security office, Mr. Christopher Forrant, that the individual subject to the SSA-795 form was being investigated by the Office of the Inspector General. Tr. 4/17-18. Mr. Forrant instructed Ms. Rincon to gather as much detailed information as possible. Tr. 4/19. Mr. Doe continued to object to the admission of the SSA-795 form as a business record, but the court overruled his objections. Tr. 4/23.

Ms. Rincon testified that Mr. Doe went to the Social Security Administration because he was having difficulties applying for benefits due to an issue with his SSN. Tr. 4/25. Ms. Rincon testified to Mr. Doe's statements concerning his work history, previous addresses, family, SSN and identity issues, travel, children,

divorce, on the 795-form. Tr. 4/27-28, 29-30, 31, 33, 35, 37, 38. Ms. Rincon was also allowed to testify that she thought Mr. Doe had a Dominican accent. Tr. 4/40.

Ms. Rincon testified that she created the SSA-795 document while questioning Mr. Doe in Spanish and typing the answers in English. Tr. 4/13-14. Ms. Rincon did not translate the document back into Spanish for Mr. Doe, but she did read the document back to him in Spanish. Tr. 4/14-15. Everything on the document including the attestation was in English. Tr. 4/15.

## REASON FOR GRANTING THE PETITON

The Supreme Court should grant this petition to correct the misapplication by the First Circuit Court of Appeals of the Business Records Exception to the Hearsay Rule and to clarify that records created for purposes of investigation do not fall under that exception. The First Circuit, in its opinion below, impermissibly expanded the business records exception to the hearsay rule and the Honorable Court should grant this petition to prevent the erosion of the hearsay rule in regards to business records.

### I. The District Court Erred In Admitting The Record Prepared For Purposes Of Investigating Mr. Doe Under The Business Records Exception To The Hearsay Rule

#### A. Standard of Review

Appellate courts review evidentiary determinations for abuse of discretion. *Bricklayers and Travel Trades Int'l Pension Fund v. Credit Suisse Secs. (USA) LLC*, 752 F.3d 82, 91 (1st Cir. 2014). "This standard is not monolithic; within it, embedded findings of fact are reviewed for clear error, questions of law are reviewed de novo, and judgment calls are subjected to classic abuse-of-discretion review." *Id.* (Quoting *Ungar v. Palestine Liberation Org.,* 699 F.3d 79.83 (1st Cir. 2010)).

**B. The 795-SSA form was not made in the regular course of business as the statements were taken in with an eye towards litigation**

The district court erred in admitting the 795-SSA form into evidence through the business records exception as the form is inherently unreliable because the recorded statement was not made in the regular course of business. Hearsay evidence may be admitted if it is offered through a business record of an act, event, condition or opinion and (1) "the record is made at or near the time by - or from information transmitted by - someone with knowledge"; (2) "the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling"; (3) "making the record was a regular practice of that activity"; (4) "all of these conditions are shown by the testimony of the custodian or another qualified witness, or by certification"; and (5) "the opponent does not show that the source of the information or the method or circumstance of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6). Records created for purposes of litigation do not fall under the business record exception. *See Palmer v. Hoffman,* 318 U.S. 109 (1943).

In *Palmer*, the Court ruled that the trial court erroneously admitted an accident report into evidence, as it was procured in preparation for litigation and was not made in the regular course of business. *Palmer,* 318 U.S. at 115. The accident report may have affected business in the sense that it affords information on which management may act. *See Palmer*, 318 U.S. at 113. However, the report is not a typical entry made as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. *Id.* The Court reasoned that the mere fact that a company makes a business out of recording its employees' versions of their accidents, does not put those statements in the class of records made 'in the regular course' of the business. *Palmer*, 318 U.S. at 113.

Additionally, business records prepared specifically to assist in imminent litigation are unreliable, because they are likely to be self-serving in a way that

cannot be scrutinized by cross-examination at trial. *See Echo Acceptance Corp. v. Household Retail Services, Inc.* 267 F.3d 1068 (10th Cir. 2001). However, the test is not the motivation of the employee preparing the record, but the function served by the records in the operation itself. *See United States v. Baxter,* 429 F.2d 150 (9th Cir. 1973).

Here, as in *Palmer*, the SSA-795 form was not made in the regular course of business. Here, the interview was conducted in furtherance of a pending investigation. Tr. 4/9. The Social Security Administration intended to use the statements to supplement the previously opened investigation that may form the basis for referral for criminal prosecution. Tr. 4/10.

In addition, SSA-795 is more like an accident report than a business record. Ms. Rincon testified that the SSA-795 form was not necessarily kept in the normal course of business Tr. 4/10. The SSA-795 forms are only used when an individual seeks to make an allegation pertaining to their SSN to the Social Security Administration. Tr. 4/10. Much like the accident reports in *Palmer,* the SSA-795 forms are created upon specific instances to address an issue before the Social Security Administration and record allegations. It is not a business record systematically created or kept in the normal course of business, rather the Social Security Administration creates the records in response to an individual experiencing issues with their SSN. The fact that the Social Security Administration records an individual's versions of their life story does not put those statements in a class of records made 'in the regular course' of the business. Like the accident reports in *Palmer*, the mere fact that the allegation is recorded by someone in the administration should not render the statements as a record made in the regular course of business. *See Palmer*, 318 U.S. 109 (1943).

Moreover, the records in this case were created not in the course of regular business but, quite to the contrary, in deviation from it. Ms. Rincon testified that she received instructions from her supervisor to treat her interview of Mr. Doe

differently. Unlike the regular interviews she conducted, she was directed to engage in a more searching and expansive interrogation of Mr. Doe. As a result, the interview transcripts were inherently unreliable.

Ms. Rincon interviewed Mr. Doe after learning from Mr. Forrant, her supervisor, that Mr. Doe was previously investigated by the OIG. Tr. 4/21. Mr. Forrant knew that the OIG had been investigating Mr. Doe in 2013 and 2014. Tr. 4/20. He gave Ms. Rincon specific instructions on how to interview Mr. Doe. Tr. 4/20. Mr. Forrant asked Ms. Rincon to grab as much detail as possible about Mr. Doe's life during the interview. Tr. 4/20. Ms. Rincon testified that recording Mr. Doe's statements was not a normal practice of her job. Tr. 4/10. Although there was not a legally authorized investigation into Mr. Doe by the Social Security Administration, the circumstances surrounding the interview indicate that the business record was recorded with the intent to gather evidence with an eye towards litigation. While Mr. Doe was not aware of the OIG's interest in interviewing him at the time, Mr. Forrant could reasonably foresee the interview with Ms. Rincon assisting with bringing criminal charges against Mr. Doe. Tr. 4/20. Business records created for purposes of litigation do not fall under the business record exception. *See Palmer*, 318 U.S. 109 (1943). The SSA-795 form, in this context, should not have been admitted as a business record, as the form was created with the understanding that the information may be used in an imminent litigation.

The district court improperly allowed the SSA-795 form to enter evidence as the form was not prepared in the regular course of business and the statements were taken in consideration of a potential criminal investigation. The fact that the SSA records individuals' allegations pertaining to their SSN does not make the form a regularly conducted business record. The SSA-795 forms lack the requisite indicia of reliability to be admitted under the business records exception.

### C. The source of the information of the 795-SSA form is an outsider to the business

The SSA-795 form was created solely with Mr. Doe's provided information and as such did not qualify as a business record. Business records typically have a high degree of accuracy because the records are customarily checked for correctness, and because recordkeepers are trained in habits of precision. *See United States v. Baker* 693 F.2d 183 (C.A.D.C., 1982). However, if the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. *See Bradley v. Sugarbaker,* 891 F.3d 29 (1st Cir. 2018); *United States v. Davis,* 571 F.2d 1354 (5th Cir. 1978). The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have. *See Bradley v. Sugarbaker,* 891 F.3d 29 (1st Cir. 2018); *Wilson v. Zapata Off-Shore Co.* 939 F.2d 260 (5th Cir. 1991); *United States v. Davis,* 571 F.2d 1354 (5th Cir. 1978). Further, in *Petrocelli,* this Court held that hospital records that merely relay what the patient or his wife told the reporting physicians when providing medical history would not be admissible solely under rule relating to business records. *See Petrocelli v. Gallison,* 679 F.2d 286 (1st Cir. 1982).

Here, Mr. Doe, as an outsider to the business, was the sole source of information contained in the SSA-795 form. Tr. 4/21. Ms. Rincon did not include government records or other information in the business record. The SSA-795 form is essentially a written statement of Mr. Doe's biographical background. While business records typically have a high degree of accuracy, the same cannot be said when the business record is prepared with outsider information. The mere fact that Ms. Rincon transcribed Mr. Doe's statements about his life does render the statements sufficiently trustworthy as is required for the business record exception.

Like in *Petrocelli*, the district court should not have been admitted the SSA-795 form as recording one's statements does not provide sufficient indicia of

reliability for the business records exception. *See Petrocelli,* 679 F.2d 286 (1st Cir. 1982). Mr. Doe's statements do not have the presumption of accuracy that statements made during the regular course of business have. Ms. Rincon recording an outsider's statements on a business form do not render the statements any more reliable or trustworthy as required by the business records exception. The district court erred by admitting the SSA-795 form into evidence through the business records exception without relying on an additional exception for Mr. Doe's statements.

### D. The methods and circumstances of preparation of the SSA-795 form indicate a lack of trustworthiness.

The SSA-795 form is untrustworthy due to the methods and circumstances of preparation by Ms. Rincon. The business records exception provides that hearsay evidence may be admitted when, "neither the source of the information nor the method or circumstance of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6). Business records may be denied into evidence if the source of the information or the method or circumstance of preparation indicate a lack of trustworthiness. *See United States v. Vigneau,* 187 F.2d 70 (1st Cir. 1999).

The circumstances surrounding the preparation and method of the interview do not meet the requisite level of indicia of reliability and indicate a lack of trustworthiness. The SSA-795 form omits Ms. Rincon's questions and only states Mr. Does replies. Tr. 4/19. Without knowing what Ms. Rincon asked, it's difficult to ascertain whether the interview was regularly conducted. Ms. Rincon stated that she selected the questions and questioned Mr. Doe in as much detail as possible. Tr. 4/20. Additionally, without a transcript of her questions, it is unclear how Ms. Rincon decided to gather the information and question Mr. Doe. Ms. Rincon's testimony does little to help to ensure that the interview was conducted regularly, rather it opens the door to further question the manner of questioning and trustworthiness of the interview.

Additionally, due to the omission of Ms. Rincon's questions, the defendant and his counsel could not properly scrutinize the manner in which the information was obtained on cross-examination. The business record exception relies upon the understanding that business records created in a regularly conducted manner carry sufficient indicia of reliability and trustworthiness. *See United States v. Snyder,* 787 F.2d 1429 (10th Cir. 1986); *United States v. Baker,* 693 F.2d 183 (C.A.D.C., 1982). However, if the source of the information or the method or circumstance of preparation indicate a lack of trustworthiness, the business records may be denied into evidence. *See United States v. Vigneau,* 187 F.2d 70 (1st Cir. 1999).

The methods and circumstances of preparation of the SSA-795 form by Ms. Rincon raise questions of regularity and trustworthiness. By not including her questions in the transcript, Ms. Rincon effectively prevented the defendant from scrutinizing whether the records were created in a regular manner. The SSA-795 form offers no indication that Ms. Rincon questioned Mr. Doe in a regular manner. Ms. Rincon was given irregular instructions on how to interview Mr. Doe from Mr. Forrant. Tr. 4/20. Mr. Forrant asked Ms. Rincon to conduct the interview to gather as much detail about Mr. Doe's life as possible. Tr. 4/20. This was not a normal request before Ms. Rincon recorded an individual's statements on a SSA-795 form. Additionally, the SSA-795 form omits the necessary information to ensure the interview was regularly conducted. Tr. 4/20. In short, Mr. Forrant's directions to Ms. Rincon impacted the manner in which the form was created.

The numerous translations between English and Spanish in preparation of the business record give rise to issue of reliability and trustworthiness. Ms. Rincon testified that she interviewed Mr. Doe in Spanish. Tr. 4/18. While questioning Mr. Doe in Spanish, Ms. Rincon would simultaneously translate and transcribe his answers in Spanish to English on the SSA-795 form. Tr. 4/19. Throughout the interview, Ms. Rincon would take a moment to read the English transcript to Mr. Doe in Spanish. Tr. 4/32. Mr. Doe signed off on the documents although he was unable to actually read the statements he was attesting to. Tr. 4/28, 31, 32, 35, 36,

37, 38, 39. This process continued until Mr. Doe's SSA-795 form was complete. Tr. 4/39.

Here, the SSA-795 form was not created in a regular or routine manner. Business records are typically treated as reliable because they are created in a regular or routine manner. Fed. R. Evid. 803(6). The numerous translations back and forth between English and Spanish, at the sole discretion of Ms. Rincon, were not established as a regular or routine practice. Additionally, Mr. Doe was continuously asked to attest to documents and statements that he could not actually read. There was no testimony offered by Ms. Rincon that this was a regular practice when an individual filled out a SSA-795 form in a language other than English. In sum, the SSA-795 form lacks the requisite indicia of reliability and trustworthiness that is necessary for the business record exception to hearsay and should not have been accepted into evidence by the trial court.

## II. The District Court Erred In Admitting Hearsay Statement Elicited During Interview Of Mr. Doe Through The Routine Booking Exception.

### A. Standard of Review

"[T]he determination as to whether police 'interrogation' occurred . . . depends on the totality of the circumstances, a balancing analysis commonly considered amenable to plenary review." *See United States v. Davis,* 773 F.3d 334, 338 (1st Cir. 2014) (quoting United States v. Taylor, 985 F.2d 3 (1st Cir. 1983)). The standard of review regarding denial of a motion to suppress concerns questions of law which are subject to *de novo* review. In scrutinizing a district court's denial of a suppression motion, the court of appeals will review findings of fact for clear error, while at the same time subjecting the trial court's ultimate constitutional conclusions to plenary oversight. *See United States v. Sanchez,* 943 F.2d 110, 112 (1st Cir.1991).

### B. The statements were made during an interrogation without a valid waiver of Miranda rights.

The court erred in admitting statements obtained during a custodial interrogation without a showing of a valid Miranda waiver. The interviewing agents should have known the nature of the questioning and circumstances surrounding the investigation were reasonably likely to elicit an incriminating response from Mr. Doe.

In *Miranda*, the Court held that certain warnings regarding the right to remain silent and the right to counsel are required before the police may engage custodial interrogation or in any questioning reasonably likely to elicit an incriminating response. *See Miranda v. Arizona,* 384 U.S 436 (1966); *United States v. Molina-Gomez,* 781 F.3d 13, 21 (1st Cir. 2015). As a result, "*Miranda* warnings must be communicated to a suspect before he is subjected to custodial interrogation." *Molina-Gomez* 781 F.3d at 21-22. For the obligation to give such warnings to arise, both custody and interrogation must be present. *Id.* at 22. "Interrogation" for purposes of *Miranda* includes "either express questioning or its functional equivalent." *Rhode Island v. Innis* 446 U.S. 291, 300-01 (1980). "The 'functional equivalent' of questioning is 'any words or action on the part of the police, that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " *See Davis*, 773 F.3d at 339 (quoting *Innis*, 446 U.S. at 301).

On the other hand, a well-established line of case law authority has created an exception to the *Miranda* rule for "routine booking interrogation," involving questions, for example, about a suspect's name, address, and related matters. *See United States v. Sanchez,* 817 F.3d 38 (1st Cir. 2016); *United States v. McLean,* 409 F.3d 492, 498 (1st Cir. 2005); *United States v. Doe,* 878 F.2d. 1546 (1st Cir. 1989). Even if a routine booking exception to Miranda were warranted, that exception should not extend to any booking question that the police should know is reasonably likely to elicit an incriminating response, regardless of whether the question is "designed" to elicit an incriminating response. *See Rhode Island v. Innis*, 446 U.S. 291 (1980); *United States v. Mata–Abundiz,* 717 F.2d 1277 (9th Cir. 1983) ("If,

however, the questions are reasonably likely to elicit an incriminating response in a particular situation, the exception does not apply."). Although the police's intent to obtain an incriminating response is relevant to this inquiry, the key components of the analysis are the nature of the questioning, the attendant circumstances, and the perceptions of the suspect. *See Rhode Island v. Innis*, 446 U.S. at 301; *See also United States v. Reyes,* 225 F.3d 71 (1st Cir. 2000) (finding the booking exception applied in large part because (a) "[t]he booking interview was conducted separate from any substantive interrogation, by a different officer and in a separate room at a separate time" and (b) the booking officer "asked only" standard police questions, "with no reference whatsoever to the offense for which appellant had been arrested").

In *Reyes*, this Court held that although an interviewing agent suspected the defendant may not be a United States citizen, requesting his name, date of birth, and social security number fall within the booking exception. *See United States v. Reyes*, 225 F.3d 71 (1st Cir. 2000). This Court reasoned that the interviewing agent only questioned the appellant for what was necessary to complete the personal history form. *See Id* at 76-77. Further, this Court reasoned that if the requested information is so clearly or directly linked to the suspected offense such that a reasonable officer would foresee their questions might elicit an incriminating response from the individual being questioned, then the routine book exception shall not apply. *See Id* at 77.

Here, Mr. Doe was detained immediately after arriving to the United States from the Dominican Republic. Tr. 2/92. The authorities suspected that he was attempting to illegally enter the United States. Tr. 2/92. Mr. Doe was separated from his 9-year-old child and subsequently brought to a room for questioning. Mr. Doe provided documents to verify that he was legally entering the United States. Tr. 2/93. Mr. Doe at this point, could easily infer that the agents suspected him of attempting to illegally enter the United States.

Mr. DeChoudens worked for the U.S. Immigration Service and questioned Mr. Doe. Tr. 2/93. Mr. DeChoudens testified that he suspected Mr. Doe was from the Dominican Republic because of his accent. SH. 15. Mr. Doe informed the agent that he lived in Puerto Rico prior to moving to the United States. Tr.2/94. Upon the suspicion that Mr. Doe's accent did not sound like a typical Puerto Rican accent, Mr. DeChoudens asked Mr. Doe questions that on their face may seem to be asking for background information but in actuality, sought to elicit an incriminating response. Specifically, Mr. DeChoudens asked Mr. Doe about his upbringing and where he attended school as a youth in Puerto Rico. Tr. 2/94. Mr. DeChoudens was familiar with the school systems in Puerto Rico as his sister attended high school there. Tr. 2/94. Mr. Doe answered that he attended Republic de Columbia until the 7th grade, to which Mr. DeChoudens grew further suspicious as he believed that the school did not accommodate the grade level Mr. Doe claimed. Tr. 2/94. While Mr. DeChoudens testified that the questions he asked were standard for someone who said that they were from Puerto Rico, Mr. DeChoudens should have reasonably expected that the background questions may incriminate Mr. Doe. SH. 45. Mr. DeChoudens was essentially testing Mr. Doe to catch him in a lie. At this point, Mr. DeChoudens, under the guise of asking for background information, elicited the incriminating information he sought to further advance the criminal investigation.

The routine booking exception to *Miranda* cannot apply to questions that are clearly and directly linked to the suspected offense. *See Rhode Island v. Innis*, 446 U.S. 291 (1980). Here, based on the sequence of events after being detained, separated from his child, and asked to present documents verifying his legal entry to the United States, Mr. Doe could reasonably infer that the authorities suspected him of illegally entering the United States. Additionally, the background information that is typically allowed under the routine booking exception could have been gathered from the identification he provided the interviewing agents. Although standard questions, the line of questioning Mr. DeChoudens engaged in sought to get Mr. Doe to incriminate himself by showing a lack of knowledge of

Puerto Rico. Mr. DeChoudens should have been reasonably aware that questions pertaining to the upbringings of a suspected illegal immigrant may incriminate that suspect as the questions are so clearly and directly tied to the suspected offense. Mr. Doe was subjected to questioning in violation of *Miranda* and the district court erred in allowing Mr. DeChoudens testimony under the routine booking exception.

### C. The nature and circumstances surrounding the questioning were sufficient for custodial interrogation and should have required a Miranda warning

The routine booking exception should not apply as the questioning of Mr. Doe was reasonably foreseeable to result in him eliciting incriminating information to government officials during a custodial interrogation. In *Reyes*, the court held the routine booking exception applied to standardized DEA form questioning because the booking interview was conducted separate from any substantive interrogation, by a different officer, in a separate room, at a separate time, and the booking officer asked only standard police questions, with no reference whatsoever to the offense for which appellant had been arrested. *See Reyes,* 225 F.3d 71 (1st Cir. 2000).

Here, Mr. DeChoudens interrogated Mr. Doe in a custodial setting. Leading up to the question, the government agents took Mr. Doe's passport, separated him from his nine-year-old son, told him he was not free to leave until questioning terminated, placed an INS agent at the exit of the waiting room, and was brought to an eight-foot by eight-foot interrogation room to be questioned by two government agents. SH. 22, 27, 29. At this point, Mr. Doe was in custody and interrogated. Further, Mr. DeChoudens testified that he intended to have Mr. Doe admit he was not a United States citizen. Tr. 2/93.

Unlike *Reyes,* Mr. Doe's booking information was taken before his interaction with the government officials. Prior to the second interview, Mr. DeChoudens received all of Mr. Doe's paperwork, including his passport and application for admission. Tr. 2/93. Mr. Doe encountered Mr. DeChoudens in the interrogation room and already had Mr. Doe's booking information from the documents he

previously provided. SH. 48. Mr. DeChoudens testified that he asked Mr. Doe a series of standard questions for someone from Puerto Rico and he believed Mr. Doe to be from the Dominican Republic. SH. 45. However, Mr. Dechoudens' questions far exceeded what was necessary for police booking and administrative purposes. At this time, Mr. DeChoudens could have easily read Mr. Doe his *Miranda* rights before proceeding with the custodial interrogation. Particularly because Mr. DeChoudens testified that the purpose of the questioning was to bring Mr. Doe to admit that he was not a United States citizen. Tr. 2/93.

The routine booking exception cannot apply where a law enforcement officer, in the guise of asking for background information, seeks to elicit information that may incriminate the suspect. *See United States v. Doe,* 878 F.2d 1546, 1551 (1st Cir.1989). Here, Mr. DeChoudens' purpose was exactly that. The questions were unnecessary for routine police booking purposes. Mr. DeChoudens' questions on their face may not seem inculpatory, however given the circumstances and suspicion, Mr. DeChoudens reasonably knew that his questions may elicit an incriminating response from Mr. Doe. The routine booking exception does not apply when the questioning officer should have reasonably known that the questions may be incriminating. Here, Mr. Doe was subjected to custodial interrogation, without a *Miranda* warning, and questioned by an officer who sought to elicit a confession. It was improper for Mr. DeChoudens to question Mr. Doe in a custodial setting with the intent to elicit incriminating information without first giving a proper *Miranda* warning. The district court erred in allowing the unmirandized statements to enter the trial and be used against Mr. Doe.

## CONCLUSION

For all of the forgoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

*/s/ Derege B. Demissie*

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Dated: April 13, 2022

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN DOE, *Petitioner*

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORI TO*
*THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## PROOF OF SERVICE

I, Derege B. Demissie, do swear or declare that on this 14th day of April of the year 2022, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. The name and addresses of those served are follows:

Office of the Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

I declare under penalty of perjury that the forgoing is true and correct.

*/s/ Derege B. Demissie*
Derege B. Demissie, Esquire

APPENDIX

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