No. 21-7703

IN THE

Supreme Court of the United States

TYRONE WORTHAM,

Petitioner,

v.

NEW YORK,

Respondent.

On Petition for Writ of Certiorari
to the Court of Appeals of New York

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. Founded in 1958, NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice and frequently appears as *amicus curiae* in this Court and other federal and state courts, seeking to provide assistance in cases that raise issues of importance to criminal defendants, criminal defense attorneys, and the criminal justice system as a whole.

The question the Petition presents is important to NACDL and the clients its attorneys represent because of the ubiquity of questioning during routine bookings and the manifest inconsistency among jurisdictions as to when law enforcement strays into the realm of investigatory interrogation. Given NACDL's expertise in these matters, NACDL submits that its perspective on the importance of this Petition and whether to grant

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief, in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Due to late retention as counsel, notice was given less than ten days prior to the filing date under Supreme Court Rule 37.2, but the parties have consented to the filing of this brief.

certiorari will be of "considerable help" to the Court. Sup. Ct. R. 37.1.

SUMMARY OF THE ARGUMENT

The New York Court of Appeals held that law enforcement may question an individual in custody regarding "pedigree" information without violating *Miranda* if the questions asked are not "a disguised attempt at investigatory interrogation." Pet. App. 7a. As the Petition explains, the Court should review this holding because it reinforces a deep and abiding conflict of authority regarding the scope of the "booking exception" to *Miranda*, Pet. 7-12, and because the New York Court of Appeals erred in its approach to that exception, Pet. 12-15.

The question presented is important. Every day, law enforcement officers across the Nation pose questions regarding what the New York Court of Appeals called "pedigree" information to people in custody. It is fundamentally unfair if asking the same questions in the same circumstances results in different applications of the *Miranda* exclusionary rule depending on the jurisdiction where that questioning occurred. What is more, it is critical that in bringing much needed clarity to the law that the Court not allow the exception to swallow the rule. The rule, as set forth in *Miranda v. Arizona*, is that for a suspect's statement made during a custodial interrogation to be admissible in court, law enforcement must first advise the suspect "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. 436, 444 (1966). The Fifth

Amendment values at the heart of *Miranda* dictate that any exception to that clear and categorical rule be drawn narrowly. The expansive approach to the booking exception taken by the New York Court of Appeals in this case is at odds with that straightforward principle. It permits a type of gamesmanship regarding custodial interrogation that the Fifth Amendment and *Miranda* simply cannot tolerate.

ARGUMENT

I. This Case Presents An Important Issue Impacting Millions Of Ordinary Citizens.

As the Petition explains, although courts are nearly unanimous following this Court's decision in *Pennsylvania v. Muniz* that there is an exception to the *Miranda* rule for questions asked during "routine booking[s]," 496 U.S. 582, 601 (1990) (opinion of Brennan, J.), courts are deeply divided over the test for applying the so-called "booking exception." This case puts that division squarely before the Court.

The Eleventh Circuit and courts in New Hampshire and Oklahoma apply a "subjective" test to determining whether a question posed during a custodial interrogation violates *Miranda*. *United States v. Sweeting*, 933 F.2d 962, 965 (11th Cir. 1991); *State v. Chrisicos*, 813 A.2d 513, 515-16 (N.H. 2002); *Gilbert v. State*, 951 P.2d 98, 112 (Okla. Crim. App. 1997). Under this approach, the relevant question is whether the "purpose of the questions was merely to obtain background information and not to elicit incriminating responses." *E.g.*, *Gilbert*, 951 P.2d at 112. The First and Sixth Circuits, however, apply an "objective" test in which the inquiry asks "whether the questions and

circumstances were such that the officer should reasonably have expected the question to elicit an incriminating response." *United States v. Reyes*, 225 F.3d 71, 76-77 (1st Cir. 2000); *United States v. Pancheco-Lopez*, 531 F.3d 420, 424 (6th Cir. 2008). The Second, Fifth, Seventh and Ninth Circuits, as well as a bevy of state courts, apply a "hybrid" approach, in which the test ultimately is objective, but subjective intent "is relevant but not conclusive to that inquiry." *Rosa v. McCray*, 396 F.3d 210 (2d Cir. 2005); *United States v. Arellano-Banuelos*, 912 F.3d 862 (5th Cir. 2019); *United States v. Smith*, 3 F.3d 1088, 1097 (7th Cir. 1993); *United States v. Williams*, 842 F.3d 1143, 1147 (9th Cir. 2016); *see, e.g.*, *State v. Griffin*, 814 A.2d 1003, 1005 (Me. 2003); *State v. Walton*, 41 S.W.3d 75, 84 n.6 (Tenn. 2001); *Franks v. State*, 486 S.E.2d 594, 597 (Ga. 1997); *Hughes v. State*, 695 A.2d 132, 137-38 (Md. 1997); *State v. Banks*, 370 S.E.2d 398, 403 (N.C. 1988). And the D.C. Circuit, as well as courts in Iowa and Texas, ask whether the "question reasonably relates to an administrative concern." *State v. Cruz*, 461 S.W.3d 531, 542 (Tex. Crim. App. 2015); *United States v. Gaston*, 357 F.3d 77, 82 (D.C. Cir. 2004); *State v. Sallis*, 574 N.W.2d 15, 18 (Iowa 1998).

Plainly, this division of authority is deep and longstanding. The need for the Court to harmonize the standard nationally comes from the frequency with which this issue is implicated. Every single day, law enforcement officials ask individuals in custody for what the New York Court of Appeals called "pedigree" information. As the depth of precedent listed above indicates, all too often that occurs without the warning that *Miranda* requires. In a jurisdiction following the subjective approach, a statement acquired via such an

interaction would be admissible at trial if the police officer did not view the purpose of the questioning as investigatory. That same statement, however, could be inadmissible in a jurisdiction that applies the objective test if the nature of the question asked, given all the surrounding circumstances, would suggest to a reasonable law enforcement officer that a response was likely to elicit inculpatory information. And in a jurisdiction applying the administrative concern approach, admissibility would turn on the reason the information was sought in the first place, regardless of the questioner's subjective intent or objectively reasonable expectations. It therefore is not difficult to imagine that a criminal defendant's guilt or innocence could hinge on *where* a person went into custody, as location may well dictate the admissibility of critical evidence.

The effect on individual defendants of finding these sorts of statements admissible at trial, notwithstanding that they were provided without the *Miranda* warnings, is potentially stark given the criminal sanctions they can trigger. For example, in *United States v. Sweeting*, a statement obtained during a custodial interrogation acknowledging the location of the defendant's residence was admitted at a trial in which the charge was for firearms possession under the subjective test and the defendant ultimately was sentenced to four years imprisonment. 933 F.2d at 964. Had that case arisen in a jurisdiction applying the objective test, the result may well have been different. Or, as another example, in *Alford v. State*, a statement acknowledging ownership of a thumb drive, which was found in the backseat of a patrol car in a plastic bag with a controlled substance,

was deemed admissible under the administrative concern test in a criminal trial for possession of a controlled substance after which the defendant was sentenced to five years' imprisonment. 358 S.W.3d 647, 652 (Tex. Crim. App. 2012); *see* Tex. Health & Safety Code § 481.116(d) (defining possession of controlled substance of between 4 and 400 grams as a class 2 felony); Tex. Penal Code § 12.33 (making class 2 felonies punishable by imprisonment of "not more than 20 years or less than 2 years"). Again, a court in a jurisdiction applying the objective approach, or even the subjective approach, may well have reached a different conclusion.

What these examples illustrate is how consequential the admission of such evidence can prove to be in specific cases. They also demonstrate how inequitable it is to have a rule that impacts criminal defendants so greatly vary solely by the happenstance of geography. Review from this Court is necessary to bring badly needed consistency to the law.

II. This Case Presents An Important Question Regarding Exceptions To The *Miranda* Rule.

This Court also should grant review to ensure that the booking exception is applied in a way that properly effectuates *Miranda* and, more fundamentally, the Fifth Amendment right against self-incrimination.

This Court recognized in *Miranda* that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." 384 U.S. at 455. Thus, to protect the individual's Fifth Amendment right against self-incrimination in that inherently hostile environment, this Court made clear, in no uncertain terms, that

"*[p]rior to any questioning*, the person *must be warned* that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444 (emphases added). The Court reaffirmed that this is the whole point of *Miranda*—it "requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored." *Dickerson v. United States*, 530 U.S. 428, 442 (2000); *see Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) (noting that one of *Miranda*'s virtues "lies in the clarity of its command and the certainty of its application").

That is not to say the Court has never recognized an exception to *Miranda* where exigencies required it. But those exceptions are few and far between. The most prominent of those exceptions was recognized in *New York v. Quarles*, where the Court described a "public safety" exception to the *Miranda* rule for situations where "posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." 467 U.S. 469, 657 (1984).[2] But this Court was careful in

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[2] *See also Harris v. New York*, 401 U.S. 222 (1971) (holding that voluntary statements made before *Miranda* warning admissible for impeachment, but not in prosecutor's case-in-chief); *Michigan v. Tucker*, 417 U.S. 433 (1974) (permitting testimony of witness first identified by defendant in statement given without *Miranda* warning); *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (holding that failure to give *Miranda* warning before one statement does not necessarily bar admission of subsequent statement given after adequate warning).

Quarles to emphasize the "narrow[ness] of this exception to the *Miranda* rule. Indeed, the Court highlighted the importance of having the *Miranda* rule strictly enforced and observed that exceptions to it by their very nature "lessen the desirable clarity of that rule." 467 U.S. at 657 (proposing that efficacy of *Miranda* preserved by exception because of clarity "between questions necessary to secure [police officer] safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect"). The Court has not strayed from that commonsense approach to *Miranda* exceptions. *E.g.*, *Oregon v. Elstad*, 470 U.S. 298, 317 (1985) ("The Court has carefully adhered to [*Miranda*], permitting a narrow exception only where pressing public safety concerns demanded.").

The Court should take the same approach to the booking exception that it took as to the public safety exception in *Quarles*. That means limiting the booking exception to questions asked at a precinct or stationhouse that are "necessary to completing booking or pretrial services," *Muniz*, 496 U.S. at 584, and to questions a law enforcement officer could not "reasonably" anticipate would be "likely to elicit an incriminating response," *id.* at 601. The New York Court of Appeals decision flunks that test. The questioning in this case occurred at the scene, while executing a search warrant, and had nothing to do with the booking process. *See* Pet. App. 4a. The questions asked—regarding where Mr. Wortham lived—were ones an objectively reasonable law enforcement official would reasonably anticipate would be likely to elicit an incriminating response given that establishing Mr. Wortham's

residence was critical to connecting him to the contraband inside.

Effectuating the Fifth Amendment right against self-incrimination requires clear rules designed to minimize circumstances in which an accused who has not knowingly and voluntarily waived his or her rights is asked to make incriminating testimonial statements. Conversely, the more expansive the exceptions to *Miranda*, the hollower its promise becomes. By permitting the booking exception to reach so far as to encompass questions posed on the scene that are directly relevant to an individual's guilt, the New York Court of Appeals has endorsed a potentially powerful loophole to the reach of *Miranda*.

Indeed, the sweeping approach of the New York Court of Appeals is unmoored from the rationale for having the exception. Unlike the general public policy rationale for the public safety exception, the interest for the booking exception is narrow and parochial—the practical need for law enforcement to complete the purely administrative task of booking a suspect. In that context, there simply is no justification for conducting such an interrogation at any location other than the stationhouse. Moreover, unlike the need for split-second decisionmaking that is the driving force behind the public safety exception, officials conducting a stationhouse interrogation for the administrative purpose of booking a suspect have no exigency. There are no obstacles to providing a *Miranda* warning, nor is it impractical to limit the information sought where appropriate given the nature of the alleged criminal conduct. There simply is no justification for an expansive

and far-reaching exception, yet that is the exception that the New York Court of Appeals crafted.

In short, because the rule adopted by the New York Court of Appeals in this case is at odds with the strict and narrow approach to *Miranda* exceptions that this Court applies, the Court should grant the Petition and, after briefing and argument, reverse the holding of the New York Court of Appeals.

CONCLUSION

For the foregoing reasons, as well as those expressed in the Petition, *amicus curiae* the National Association of Criminal Defense Lawyers urge this Court to grant the Petition for a Writ of Certiorari.

June 9, 2022

Respectfully submitted,

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