No. 12-246

IN THE
Supreme Court of the United States

GENOVOVO SALINAS,
Petitioner,
v.
TEXAS,
Respondent.

On Petition for a Writ of Certiorari
to the Texas Court of Criminal Appeals

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 40,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.2.

defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights.

INTRODUCTION

Amicus agrees with Petitioner that a writ of certiorari should be granted in this case. Amicus submits this brief to elaborate on the reasons why, in its view, the conflict among the circuits and state courts on when the Fifth Amendment protects a defendant's refusal to answer law enforcement questioning is an important issue that merits resolution by this Court.

It often is in the best interest of a suspect questioned by law enforcement to decline to answer questions. Justice Jackson put it more strongly: "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). Every day, NACDL lawyers advise countless clients—rich or poor, innocent or guilty—not to make statements to law enforcement. This simple advice helps to protect a suspect's constitutional rights under the Fifth and Sixth Amendments and puts the burden on the

Government to establish any guilt beyond a reasonable doubt at trial.

Yet the Fourth, Eighth, and Eleventh Circuits, along with the States of Minnesota, Missouri, and Texas, have held that a defendant's pre-arrest silence may be commented on by prosecutors and used as evidence of guilt at trial. Pet. at 9–10. It is common ground that silence after arrest is protected, and prosecutors cannot argue at trial that an innocent man would have talked to the police after he was arrested.[2] These courts hold, however, that any right to remain silent attaches only after arrest and that a suspect's silence before he is in custody can be converted at trial into an implied admission of guilt.

This is entirely inconsistent with fundamental constitutional interests. The Fifth Amendment protects against compulsion to be a witness against oneself, but the decision below approves exactly such compulsion. There is nothing voluntary about a decision to answer police questions when a failure to answer can be evidence of guilt at trial. In short, the decision below is intolerable and should not be allowed to stand.

Of particular concern to NACDL, the lack of uniformity among the circuits and the states on this issue leads to deep uncertainty as lawyers consider

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[2] *See, e.g.*, Pet. at 5 (describing the prosecutor's closing argument telling the jurors what "[a]n innocent person is going to say" to law enforcement rather than refusing to answer).

whether it is truly best to advise their clients to make no statement to police. This Court's review is necessary both to clarify the law and to uphold the longstanding principles of the Fifth Amendment privilege against self-incrimination.

ARGUMENT

I. IF PROSECUTORS CAN USE PRE-ARREST SILENCE AS EVIDENCE OF GUILT, SUSPECTS QUESTIONED BY POLICE ARE SUBJECT TO A "CRUEL TRILEMMA."

The Court has previously described the injustice of using a suspect's post-arrest silence against him, in a narrative that applies with equal force to pre-arrest silence. *Miranda v. Arizona*, 384 U.S. 436, 454 (1966). Consider this scenario, adapted to the pre-arrest context:

A crime has been committed, and the police think they know who might have done it. They have some evidence but know that a confession would seal their case. So the officers go to the suspect's home, ask to speak with him, and confront him with difficult questions. He is not under arrest. The suspect, however, refuses to answer the questions, perhaps even asserting a right to remain silent or saying that he wants to speak with his lawyer.

The officer, however, then "point[s] out the incriminating significance of the suspect's refusal to talk:

> 'Joe, you have a right to remain silent. That's your privilege and I'm the last

> person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over.'"

Miranda, 384 U.S. at 454 (quoting Fred E. Inbau & John E. Reid, *Criminal Interrogation and Confessions* (1962), a manual for police interrogators). As this Court found, "[f]ew will persist in their initial refusal to talk . . . if this monologue is employed correctly." *Id.*

The rationale of the decision below would allow for an even higher level of coercion. Suppose the officer continues, "Joe, you don't have to answer my questions, but if you don't, then that's going to be used as evidence that you're guilty. The prosecutor is going to stand in front of that jury and tell them that an innocent man would answer my questions. So you don't need to talk to your lawyer, you need to answer my questions right now."

Many would find this police conduct shocking and abusive. But the officer in this example is doing nothing more than correctly stating the law of the three circuits and three states which hold that there

is no Fifth Amendment right to remain silent prior to arrest and that prosecutors can use a suspect's silence as substantive evidence of guilt at trial.

Under this regime, the suspect finds himself in an impossible situation. He can answer the police questions truthfully, possibly incriminating himself in this or other crimes. He can lie to law enforcement, itself often a crime.[3] Or he can remain silent and risk that his silence will be used against him as evidence of his guilt.

The suspect's predicament is a variant of the "cruel trilemma" described in *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964). The classic "trilemma" prohibited by the Fifth Amendment is of "self-accusation, perjury or contempt." *Id.* "[A] suspect is 'compelled . . . to be a witness against himself' at least whenever he must face the modern-day analog of the historic trilemma." *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990) (ellipsis in original) (citation omitted). Such analogs apply whenever there is a compulsion to answer, such as in custodial interrogations, *id.* at 596 n.10, or when there is any threat of a penalty for silence, such as a forfeiture of goods, *Boyd v. United States*, 116 U.S. 616, 634 (1886), losing one's government job, *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967),[4] disbarment, *Spevack v. Klein*, 385

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[3] *See* 18 U.S.C. § 1001.

[4] *Garrity* addressed an inquiry and investigation by the New Jersey Attorney General for a report to the court. 385 U.S. 493, 494 (1967). The questioning in that case was not post-arrest or

U.S. 511, 515–16 (1967), or a loss of government contracts, *Lefkowitz v. Turley*, 414 U.S. 70, 83–85 (1973).

What matters for these cases is not the time when the privilege is asserted, but rather whether an individual "was deprived of his free choice to admit, to deny, or to refuse to answer" by the penalty imposed by the Government. *Garrity*, 385 U.S. at 496. For if the Government imposes a penalty upon an individual's silence, then no "free choice" exists and the suspect is compelled, in violation of the Fifth Amendment, to be a witness against himself. *Id.*

Under the regime imposed by the Texas courts below, a suspect undergoing police questioning faces the same compulsion through a cruel trilemma of self-incrimination, lying to police, or an implied admission of guilt. "Any time an individual is questioned by the police, that individual is compelled to do one of two things—either speak or remain silent. If both a person's prearrest speech and silence may be used against that person . . . [he] has no choice that will prevent self-incrimination." *See Wisconsin v. Fencl*, 325 N.W.2d 703, 711 (Wis. 1982)).

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before a court or legislative committee, and thus was similar to pre-arrest investigatory questioning by police.

II. THE COURT SHOULD CLARIFY THIS ISSUE, AS THE CURRENT UNCERTAINTY HAS SERIOUS CONSEQUENCES FOR PERSONS QUESTIONED BY LAW ENFORCEMENT.

A. Police Can Manipulate Suspects into Incriminating Themselves Through Silence.

Allowing pre-arrest silence to be used as evidence of guilt encourages police officers to generate additional incriminating evidence—entirely lawfully, according to the Texas court—by questioning the defendant and inducing a refusal to speak. Courts have recognized that because police determine the timing of arrest, a holding that the Fifth Amendment does not apply pre-arrest "would encourage delay in reading *Miranda* warnings so officers could preserve the opportunity to use the defendant's pre-arrest silence as evidence of guilt." *Washington v. Easter*, 922 P.2d 1285, 1290 (Wash. 1996) (en banc); *see also Ohio v. Leach*, 807 N.E.2d 335, 341 (Ohio 2004) (finding that it "would encourage improper police tactics, as officers would have reason to delay administering *Miranda* warnings so that they might use the defendant's pre-arrest silence to encourage the jury to infer guilt").

Condoning self-incrimination by pre-arrest silence would also incentivize police to employ other strategies to elicit a refusal to answer, rather than a truthful answer, from a suspect. For example, officers may ask questions in a hostile or discomfiting manner in the hope that the suspect

will refuse to answer. Or they can adopt a strategy of surprise. In this case, officers interviewed Petitioner for an hour about other individuals at the party and their motivations before turning the investigation squarely onto Petitioner by asking whether the shotgun from his home would match the shells found at the murder scene. Pet. at 3. Petitioner was silent, and the prosecutor used this to argue that an "innocent person is going to say" something rather than be silent. Pet. at 5. Just as there are psychological tactics for police to try to get confessions, *see Miranda*, 384 U.S. at 448–54, there are likewise tactics which can be employed to get suspects to refuse to answer.

B. Self-Incrimination by Pre-Arrest Silence Disadvantages Citizens for Relying on a Right To Remain Silent.

Allowing the government to introduce evidence of pre-arrest silence is a trap for the innocent and unwary. Virtually all citizens now recognize a right to remain silent and may unwittingly provide police with substantive evidence of their guilt simply by refusing to talk.

The "Right to Remain Silent" is so well known to members of the public that it is "implausible" "[i]n the modern age of frequently dramatized 'Miranda' warnings" that a "person under investigation may be unaware of his right to remain silent." *Brogan v. United States*, 522 U.S. 398, 405 (1998); *see also Leach*, 807 N.E.2d at 342 ("With the proliferation of movies and television shows portraying the criminal justice system, it would be difficult to find a person

living in America who has not heard of *Miranda* warnings."). Individuals who believe they have a "right to remain silent" may not understand that—at least in some jurisdictions—no such right exists prior to arrest, and so may unwittingly provide police and prosecutors with an implied admission of guilt. *See Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000) (finding that one of the reasons a defendant may remain silent before arrest is "knowledge of his *Miranda* rights").

Innocent persons may decline to speak to law enforcement (or wish to speak to their lawyers first) for a variety of legitimate, innocent reasons, including: "fear of police, threats from another person not to speak with police, embarrassment about a relationship or course of conduct that is not necessarily criminal, or the belief that explaining his or her conduct is futile." *Leach*, 807 N.E.2d at 342. Yet prosecutors sometimes try to use a defendant's refusal to confess, *see Coppola v. Powell*, 878 F.2d 1562, 1564 (1st Cir. 1989), or his request to talk to a lawyer, *see Combs*, 205 F.3d at 279; *see also Leach*, 807 N.E.2d at 339; *Fencl*, 325 N.W.2d at 710, as substantive evidence of guilt. Absent this Court's review, courts in many jurisdictions will allow such evidence and argument, and the "right to remain silent" will be illusory.

C. Allowing Prosecutors To Use Pre-Arrest Silence Chills Exercise of Fifth Amendment Rights at Trial.

When a prosecutor uses pre-arrest silence as evidence of guilt, there is little the defendant can do

to respond. There is no alibi witness or physical evidence that the defendant can offer to answer such attacks. The defendant has only two options. He can allow the attack and hope that the jury won't judge him too harshly for not speaking to the police. Or, he can waive his Fifth Amendment right and testify in his own defense, trying to explain the reason why he chose not to speak to the police in the first place. *See Leach*, 807 N.E.2d at 341 ("Use of pre-arrest silence in the state's case-in-chief would force defendants either to permit the jury to infer guilt from their silence or surrender their right not to testify and take the stand to explain their prior silence.").

Only the defendant himself can answer the question of why he did not talk to police in the first instance. It may be for any of the entirely legitimate and innocent reasons discussed above, but in order to explain that, the defendant must waive all of the Fifth Amendment's protections and expose himself to questioning not just on his refusal to answer, but also to the substance of the alleged crime itself, as well as any prior convictions or criminal conduct that may be admissible under the Rules of Evidence. In the words of the Sixth Circuit, the defendant is "under substantial pressure to waive the privilege against self-incrimination . . . at trial in order to explain the prior silence." *Combs*, 205 F.3d at 285.

Allowing use of pre-arrest silence thus shifts the burden in the Government's favor. It "actually lessens the prosecution's burden of proving each element of the crime," *id.* at 285, and hollows the promise of the Self-Incrimination Clause. *See*

Slochower v. Board of Higher Educ., 350 U.S. 551, 557–58 (1956) ("The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent . . . to a confession of guilt . . . .").

D. Use of Pre-Arrest Silence Unfairly Skews the Balance Between Prosecution and Individuals.

A prosecutor's need for evidence is reduced if she can argue that the defendant would have come clean to the police if he were innocent. This kind of evidence "substantially impairs the sense of fair play," *Combs*, 205 F.3d at 285, which requires that the Government "shoulder the entire load" in order to maintain a "fair state-individual balance." *Miranda*, 384 U.S. at 460; *Murphy*, 378 U.S. at 55.

It is an unfortunate fact that many residents of the highest crime neighborhoods—often minorities and many of our most impoverished citizens—have deep suspicions of the police. *See, e.g.*, Robert J. Sampson & Dawn J. Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 Law & Soc'y Rev. 777 (1998); *see also United States v. Giraldo*, 743 F. Supp. 152, 154 (E.D.N.Y. 1990) (taking "judicial notice of the suspicion with which the police . . . are regarded in many poor urban communities."). There is little desire in these communities to cooperate with police or to answer their questions. Such apprehension may have very little to do with whether an individual is guilty of any crime, and far more to do with community fear

or distrust of the police. Allowing prosecutors to use a refusal to cooperate as an implied admission of guilt may well have the most severe impact on defendants in these communities.

But one should not discount the impact of a regime of pre-arrest self-incrimination in "white collar" criminal cases. Suspects in such cases—often sophisticated businesspersons—commonly refuse to speak to law enforcement without a lawyer present. Such a refusal or "lawyering up" can be evidence of consciousness of guilt under the reasoning of the Texas court below. Additionally, white-collar investigations often take months or years without any arrest or indictment. During that time, prosecutors and police frequently request to interview persons of interest in the investigation, and those persons—often on advice of counsel—routinely decline to be interviewed or insist on immunity. Allowing pre-arrest self-incrimination by silence turns this system upside down. An attorney's proper advice to his client to decline to meet with prosecutors could boomerang into evidence of the client's consciousness of guilt.

Finally, and perhaps most importantly for the majority of criminal defendants, pre-arrest silence as evidence of guilt gives prosecutors significantly greater leverage in plea bargaining. Roughly 90% of criminal cases end with a defendant's plea.[5] For

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[5] *See* George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 223 (Stanford Univ. Press 2003); *see also Sourcebook of Criminal Justice Statistics Online*, Table 5.22.2010, available at http://www.albany.edu/sourcebook/pdf/t5222010.pdf (last

cases where prosecutors would otherwise have a weak case, and where criminal defendants would be willing to risk a jury trial, prosecutors have a powerful tool to convince defendants to accept a plea bargain. The simple fact that a defendant did not answer police questions can be evidence that may persuade many defendants to plead guilty—and many lawyers to advise such a plea—for reasons that may have nothing to do with their innocence or guilt.

This Court should reject such a penalty for silence, and reject any pre-arrest compulsion of defendants to choose between self-incrimination through speech and self-incrimination through silence. Such a choice is antithetical to the policies and principles underlying the Fifth Amendment, and has no place in our accusatorial system of justice which puts the full burden on the Government of establishing beyond a reasonable doubt that the defendant has committed a crime.

CONCLUSION

For the foregoing reasons, amicus curiae National Association of Criminal Defense Lawyers supports Petitioner Salinas's petition for certiorari, and respectfully requests that the petition be granted.

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visited Sept. 25, 2012) (showing that in 2010, 88.9% of all criminal defendants in federal court were convicted by a plea of guilty or *nolo contendere*).

Respectfully submitted,

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