No. 12-246

In The Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

v.

TEXAS,

Respondent.

On Writ of Certiorari to the
Texas Court of Criminal Appeals

BRIEF OF THE RUTHERFORD INSTITUTE AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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* warnings.

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INTEREST OF *AMICI*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. Because the instant case raises important questions about the Bill of Rights and the scope of prosecutorial power, the case is of central concern to the Cato Institute.

SUMMARY OF THE ARGUMENT

Amici submit that prosecutorial comment on pre-arrest silence runs counter to the guarantees of

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* certify that no counsel for a party to this action authored any part of this *amici curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have filed a letter with this Court consenting to *amicus curiae* briefs on behalf of either party.

the Constitution's Fifth Amendment. The justification for allowing the prosecution to comment on a defendant's refusal to answer law enforcement questions before he has been arrested is the product of an overly simplified and fundamentally flawed premise – that silence in the face of police accusations is probative of a suspect's guilt – that does not stand up to scrutiny. Moreover, such comments can be used against individuals who honestly believe that they have the right to remain silent when confronted with pre-arrest questioning. Recognition of these truths by sustaining the Petitioner's request for reversal of the judgment below is the most faithful reading of the Fifth Amendment's Self-Incrimination Clause and is required to protect citizens for unwarranted convictions based upon invocation of the right to remain silent.

ARGUMENT

I. Prosecutorial Comment on Pre-Arrest Silence is Impermissible, Counter to the Purposes of the Fifth Amendment, and Based on a Faulty Premise.

The idea of a right or privilege against self-incrimination dates back at least to the early seventeenth century's *ius commune* maxim of *nemo tenetur prodere seipsum* (no man is bound to accuse himself).[2] The right is enshrined in the United

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[2] *See* R. H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 185 (1997). The *ius commune* was "the law applied throughout the European continent and in the English prerogative and ecclesiastical courts." *Id.*

States Constitution's Fifth Amendment, which provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The right has been recognized, in the words of Justice Douglas, as "one of the great landmarks in man's struggle to be free of tyranny, to be decent and civilized."[3]

Encompassed within the Fifth Amendment's self-incrimination clause is the right to remain silent after arrest. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Furthermore, the State may not use a defendant's failure to testify or to respond to custodial questioning at trial. *Griffin v. California*, 380 U.S. 609, 615 (1965). The basis for this "essential feature of our legal tradition," *Mitchell v. United States*, 526 U.S. 314, 330 (1999), is as equally applicable to prosecutorial comment on a defendant's pre-arrest silence as it is to his post-arrest silence because it implicates the same concerns. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 193 (2004) (Stevens, J., concurring) ("[T]here is no reason why the subject of police interrogation based on mere suspicion, rather than probable cause, should have any lesser [Fifth Amendment] protection."). Regardless of whether an individual has been formally arrested or not, the principle remains the same: it is a "settled principle" that "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969). *See also United States v. Drayton*, 536 U.S. 194, 197 (2002)

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[3] WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY 238 (1954).

(recognizing the "right not to cooperate" with law enforcement).

Respondent's position, that the State may comment on pre-arrest silence, effectively nullifies these time-honored principles and guts to right not to cooperate. If pre-arrest silence is admissible as substantive evidence, an individual can remain silent (and risk that his silence will be used against him), or he can talk. Such a choice is constitutionally impermissible. As the Court of Appeals for the Seventh Circuit recognized more than a quarter of a century ago, "there is . . . a constitutional right to say nothing at all about the allegations," and the use of a defendant's silence to imply guilt is "nothing short of incredible, given the language of our constitution and the interpretation it has consistently been given." *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1018 (7th Cir. 1987). Moreover, it is illogical that prosecutors should have greater leeway to comment on an individual's silence during pre-arrest questioning when there is less than probable cause for an arrest than when probable cause exists.[4]

In addition to the constitutional infirmities of prosecutorial comment on pre-arrest silence, the purported justification for such comment is misplaced and stems from the fundamentally flawed premise that pre-arrest silence is somehow indicative of guilt. Respondent's theory goes that

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[4] This Court has observed that the government's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

when an individual is faced with a question that might incriminate him, an innocent individual will always say something in response. But this is simply not the case. As Chief Justice Burger stated, it is not any more probable that the innocent rather than the guilty protest their innocence. *See United States v. Hale*, 422 U.S. 171, 181 (1975) (Burger, J., concurring) ("It is no more accurate than to say, for example, that the innocent, rather than the guilty, are the first to protest their innocence. There is simply no basis for declaring a generalized probability one way or the other."). Such a view also ignores the fact that the Fifth Amendment "serves as a protection to the innocent as well as the guilty." *Ullman v. United States*, 350 U.S. 422, 427-28 (1956) (internal citation omitted).

Indeed, there are numerous reasons why an individual questioned by law enforcement may choose to remain silent, many of which are consistent with innocence. For example, as this Court recognized over a century ago, a defendant who is "entirely innocent of the charge against him" may choose not to speak due to "[e]xcessive timidity," "nervousness when facing others and attempting to explain transactions of a serious character," or that answering would "confuse and embarrass him to such a degree as to increase rather than remove prejudices against him." *Wilson v. United States*, 149 U.S. 60, 66 (1893).[5] Alternatively, the invocation of silence may have nothing to do with the

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[5] For cases discussing the numerous reasons a defendant might remain silent for reasons that are not incriminating, *see, e.g.*, *Hale*, 422 U.S. at 177, and *Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000).

defendant's individual wish. *See Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring) ("[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."). Because of this, "[i]n most cases, it is impossible to conclude that a failure to speak is more consistent with guilt than with innocence." *People v. De George*, 541 N.E.2d 11, 13 (N.Y. 1989). Consequently, the "underlying premise, that an innocent person *always* objects when confronted with a baseless accusation, is inappropriately simple, because it does not account for the manifold motivations that an accused may have when, confronted with an accusation, he chooses to remain silent." *Ex parte Marek*, 556 So. 2d 375, 381 (Ala. 1989).

Recognizing these concerns, this Court has held that silence during and after arrest is ambiguous and irrelevant to establish an inference of guilt. *Doyle v. Ohio*, 426 U.S. 610, 617 (1976). However, silence is no more probative of guilt because it takes place before – in some instances, by a matter of seconds – an individual is read his *Miranda* rights, and frequently these same motivations to remain silent are just as inherent during the pre-arrest stage as the post-arrest stage. It therefore follows that pre-arrest silence is as "insolubly ambiguous" as post-arrest silence. *Id.* Put simply, the *Miranda* warning "makes it a poor dividing line for determining the admissibility of silence."[6]

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[6] Note, *Manipulating* Miranda*:* United States v. Frazier *and the Case-in-Chief Use of Post-Arrest, Pre-*Miranda *Silence*, 92 CORNELL L. REV. 1013, 1034 (2007).

If the ambiguity of pre-arrest silence and the unknown reason(s) for a defendant's silence make it untrustworthy as evidence is not troubling enough, the harm to defendants is multiplied because juries are likely to attach disproportionate and prejudicial weight to a prosecutor's comments concerning a defendant's pre-arrest silence. For example, in *Hale*, the Court held that use of the defendant's silence for impeachment purposes was improper because of the risk the jury would assign much more weight to it than was warranted. 422 U.S. at 180. Even where a defendant's silence is innocent, "[t]he layman's natural first suggestion would probably be that the resort to [silence] in each instance is a clear confession of crime." *Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978).[7] This concern is by no means hypothetical, but is supported by empirical studies that illustrate that juries do not distinguish between silence as evidence of the untrustworthiness of a defendant's exculpatory trial testimony and silence as substantive evidence of guilt.[8] Consequently, "[t]his uncontrollable and immeasurable inference of guilt makes the use of prearrest silence inherently prejudicial, outweighing any possible relevance prearrest silence may possess."[9]

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[7] *See also Mitchell*, 526 U.S. at 329 ("Too many, even those who should be better advised . . . too readily assume that those who invoke [the right to remain silent] are either guilty of crime or commit perjury in claiming the privilege.") (quoting *Ullman*, 350 U.S. at 426).

[8] *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 127-28, 177-80 (1966).

[9] Debra M. Williamson, *What You Do Not Say Can and Will Be Used Against You: Prearrest Silence Used to*

In sum, not only is the logic in allowing prosecutorial comment on pre-arrest silence overly simple and fundamentally flawed, it is incompatible with the premise that a defendant is innocent until proven guilty. Because of the weight jurors are likely to attach to such comments, it enhances the risk of wrongful convictions.

II. Individual Reliance on Pre-Arrest Silence Has Become an Entrenched Norm.

Respecting our citizenry's deeply entrenched understanding of the right to remain silent provides further support for prohibiting prosecutorial comment on pre-arrest silence. The right to remain silent is perhaps the Constitution's most widely known (or at least widely quoted) right. American citizens are exposed to it on a daily basis through numerous police and law dramas. Indeed, the Court of Appeals of Maryland recognized that the public understands "that any statement made in the presence of police 'can and will be used against you in a court of law.'" *Weitzel v. State*, 863 A.2d 999, 1004 (Md. 2004). *Miranda*'s ubiquity means that "[i]t is unlikely that suspects today hear the *Miranda* rights for the first time" from an arresting officer.[10] One study from the mid-1990s found that 80 percent of American knew that they had a right to remain silent before they were given *Miranda*

Impeach a Defendant's Testimony, 16 VAL. U. L. REV. 537, 561 (1982).

[10] Richard A. Leo, *Criminal Law: The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 651 (1996).

warnings.[11] Consequently, "the average citizen is almost certainly aware that any words spoken in police presence are uttered at one's peril. While silence in the presence of an accuser or non-threatening bystanders may indeed signify acquiescence in the truth of the accusation, a defendant's reticence in police presence is ambiguous at best." *Id.* at 1005. However, although a basic understanding of *Miranda* warnings has become entrenched in American culture, many citizens are unlikely to appreciate the distinction between pre- and post-arrest silence, instead believing that any interaction with law enforcement personnel triggers the right to remain silent.[12] Respecting such entrenched norms is especially important when an individual's liberty is at stake.

Not only does respecting this entrenched cultural norm represent a fair social contract, it chimes with the original meaning of the Fifth Amendment's pro-defendant protections.[13] The original understanding of the right to remain silent was that it first attached "not upon the reading of a *Miranda*-like incantation, but when the defendant

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[11] *See* Note, *The Original Public Meaning of the Fifth Amendment and Pre-*Miranda *Silence*, 98 VA. L. REV. 897, 908 n.6 (2012) (citing SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990, at 51 (1993)).

[12] *See* Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 142 (2001).

[13] *See* Note, *The Original Public Meaning of the Fifth Amendment*, *supra* note 11, at 902-03 ("Perhaps surprisingly, the original meaning [of the Fifth Amendment] was highly protective of potential criminal defendants.").

reasonably believed that her statement might be used against her at a criminal trial or lead the investigator to inculpatory evidence."[14] Indeed, the Framers embraced the right to "refus[e] to answer" pretrial inquiries "without formal prejudice or penalty."[15]

The same concerns that undergirded the original meaning are equally applicable today. Upon interaction with law enforcement personnel, many citizens are likely to be wary that anything they say can be used against them in subsequent criminal proceedings and are therefore likely to remain silent. What they are less likely to be familiar with, however, is that their pre-arrest silence can be used against them at trial.[16] Because many individuals likely believe that they have "the right to remain silent" upon interaction with law enforcement personnel, permitting prosecutors to comment on pre-arrest silence would dramatically alter the status quo. Allowing prosecutorial comment on pre-arrest silence also creates a perverse incentive for law enforcement personnel to delay the time before *Miranda* warnings are given in order to allow the

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[14] *Id.* at 901.

[15] LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 313 (1968).

[16] *See* Note, *Manipulating* Miranda, *supra* note 6, at 1035-36 ("[I]t seems erroneous to believe that suspects are aware of or may exercise their right to remain silent only at the point the police actually advise them of that right. In a sense, popular culture has given most Americans their *Miranda* warnings well in advance of their arrest.").

admission at trial of prejudicial pre-arrest silence.[17] This is particularly disconcerting when, as here, an individual's liberty is at stake.

CONCLUSION

As this Court held in *Miranda*, "[t]he prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation." *Miranda*, 384 U.S. at 468 n.37. The same principles applied nearly half a century ago are equally applicable here. Prohibiting the use of a defendant's silence during the State's case-in-chief, but allowing it for impeachment purposes, balances the rights of defendants and the Government's need to try cases effectively. To hold otherwise would eviscerate the constitutional protections that our nation's citizens are entitled to and have come to rely upon.

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[17] *See id*. at 1036-37 ("Under the current system [allowing prosecutorial comment on pre-arrest silence], an enterprising officer may expand the time window during which silence is admissible by delaying custodial interrogation and thus delaying the need to administer *Miranda* warnings.").

Respectfully submitted,

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