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 FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* SUPPORTING PETITIONER

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10025
(212) 549-2500

AARON D. VAN OORT
Counsel of Record
TRINA K. TAYLOR
ERIN L. HOFFMAN
JEFFREY P. JUSTMAN
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South 7th Street
Minneapolis, MN 55402
aaron.vanoort@faegrebd.com
(612) 766-8138

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. It is committed to protecting the effectiveness of the Fifth Amendment's privilege against self-incrimination and has participated for decades as an *amicus* in this Court's decisions shaping that privilege, including *Slochower v. Bd. of Higher Educ. of New York*, 350 U.S. 551 (1956); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Spevack v. Klein*, 385 U.S. 511 (1967); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Wainwright v. Greenfield*, 474 U.S. 284 (1986); *Dickerson v. United States*, 530 U.S. 428 (2000); *Chavez v. Martinez*, 538 U.S. 760 (2003); and *Missouri v. Seibert*, 542 U.S. 600 (2004).

STATEMENT OF THE CASE

1. Petitioner Genovevo Salinas was twice tried for first-degree murder. The first trial ended in a hung jury; the second trial resulted in a conviction. During the retrial, prosecutors relied heavily on

[1] The parties have submitted blanket letters of consent to the filing of *amicus* briefs in this case. No counsel for a party has written this brief in whole or in part, and no one other than *amicus*, its members, or its counsel has made a monetary contribution for the preparation or submission of this brief.

Petitioner's pre-arrest, pre-*Miranda* silence in response to police questioning as substantive evidence of his guilt. *Salinas v. State*, 369 S.W.3d 176, 176-77 (Tex. Crim. App. 2012) (*Salinas II*). The issue before the Court is whether a criminal defendant's pre-arrest, pre-*Miranda* silence in response to police questioning may be used against him as substantive evidence of guilt – uniquely among all silence protected by the Fifth Amendment's privilege against self-incrimination.

2. In December 1992, Houston police discovered two homicide victims in their apartment. A witness informed officers that he heard shots fired early that morning and saw a man run from the apartment to a "dark-colored Camaro or Trans Am." *Salinas v. State*, 368 S.W.3d 550, 552 (Tex. App. 2011) (*Salinas I*). Officers also found shotgun shell casings in the apartment.

Petitioner became a subject of investigation when police learned that he had attended a party at the victim's home the night before the murder. *Salinas II*, 369 S.W.3d at 177. After voluntarily accompanying the police to the stationhouse and answering their questions for nearly an hour, he remained silent when asked whether the shotgun shells found at the scene would match a shotgun owned by Petitioner's father. A ballistics report later matched the discarded shells with the shotgun. Petitioner was not charged with the crime, however, until another witness came forward and told police that Petitioner had confessed to the murder. (The witness explained that his

decision to come forward was prompted by a dream in which he saw the victims' ghosts.)

3. The prosecution's closing argument at Petitioner's first trial urged the jury to convict Petitioner based on the ballistics report, the witness's statement regarding Petitioner's alleged confession, and Petitioner's effort to elude arrest. The prosecution referred to Petitioner's silence only in passing. The jury could not reach a verdict, and the judge declared a mistrial.

On retrial, Petitioner's silence became a much more prominent feature of the prosecution's case. It was discussed during testimony, over Petitioner's objection, and then highlighted by the prosecution during its closing argument as strong evidence of guilt. According to the prosecutor, an innocent person would surely have denied any connection between the shotgun found in his home and the shell casings found at the murder scene. In the prosecutor's words:

> The police officer testified that he wouldn't answer that question. He didn't want to answer that. Probably the first time he realizes you can do that. What? You can compare those? You know, if you asked somebody – there is a murder in New York City, is your gun going to match up the murder in New York City? Is your DNA going to be on that body or that person's fingernails? Is [sic] your fingerprints going to be on that body? You are going to say no. An innocent person is going to say: What are you talking about? I

> didn't do that. I wasn't there. He didn't respond that way. He didn't say: No, it's not going to match up. It's my shotgun. It's been in our house. What are you talking about? He wouldn't answer that question.

Salinas I, 368 S.W.3d at 557 (alteration in original). The jury found Petitioner guilty of murder.

4. The Texas Court of Appeals and the Texas Court of Criminal Appeals both affirmed. Noting a "conspicuous" circuit split among federal appellate courts and a "lack of guidance from the Supreme Court," the Texas Court of Criminal Appeals held that "pre-arrest, pre-*Miranda* silence is not protected by the Fifth Amendment right against compelled self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies." *Id.* at 178-79. One judge dissented.

SUMMARY OF ARGUMENT

In every previous circumstance in which the Court has found the Fifth Amendment privilege against self-incrimination to exist, it has also held that prosecutors cannot use the defendant's rightful silence as substantive evidence of guilt. This protection was applied first to silence at trial, then to silence in response to custodial interrogation, and most recently to silence at sentencing after a guilty plea. Now the Court is presented with the question of whether rightful silence in response to pre-arrest, pre-*Miranda* questioning should also be protected.

As Petitioner has demonstrated in his opening brief, the doctrinal principle that explains those earlier cases necessarily extends to this context as well. We submit this brief to emphasize that withholding protection from pre-arrest, pre-*Miranda* silence would undermine existing Fifth Amendment safeguards, impair the truth-seeking function of criminal proceedings, and negatively affect individual liberty.

First, leaving pre-*Miranda*, pre-arrest silence unprotected would create a perverse incentive for the police to delay the delivery of *Miranda* warnings in order to manufacture substantive evidence of guilt. In 1974, then-Justice Rehnquist wrote for the Court that "an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage." *Michigan v. Tucker*, 417 U.S. 433, 440-41 (1974). That is a compelling reason to protect the privilege against self-incrimination here. If pre-*Miranda* silence becomes more valuable to prosecutors than post-*Miranda* silence, police will delay arrest to avoid *Miranda*, thus undermining *Miranda* and the privilege against self-incrimination.

Second, withholding protection here would allow introduction of prejudicial police testimony about silence into the criminal trial – even though scholarship shows that widespread knowledge of *Miranda*, distrust of police, unfamiliarity with the language, and many other factors make pre-arrest, pre-*Miranda* silence particularly *un*probative of guilt.

Finally, leaving this silence uniquely unprotected would reduce individual liberty by confusing defendants about the consequences of exercising their constitutional rights.

ARGUMENT

I. IN EACH CIRCUMSTANCE WHERE THE COURT HAS FOUND THE PRIVILEGE AGAINST SELF-INCRIMINATION TO EXIST, IT HAS PROTECTED IT BY FORBIDDING PROSECUTORS FROM USING THE DEFENDANT'S RIGHTFUL SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT.

Ingrained in this Court's Fifth Amendment jurisprudence is the basic principle that, when the privilege against self-incrimination exists, the rightful silence that results from exercising the privilege cannot be used by the prosecution as substantive evidence of guilt. *See Griffin v. California*, 380 U.S. 609 (1965); *Miranda v. Arizona*, 384 U.S. 436 (1966).[2]

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This guarantee includes "the right of a person to remain

[2] The situation is different when a defendant chooses to testify and the prosecution thereafter uses the defendant's prior silence to impeach him. Petitioner addresses the distinction in his brief, and *amicus* need not repeat the argument here. Br. of Pet. 33-37.

silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty" for such silence. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The privilege against self-incrimination afforded by the Fifth Amendment "registers an important advance in the development of our liberty – one of the great landmarks in man's struggle to make himself civilized." *Ullmann v. United States*, 350 U.S. 422, 426 (1956) (quotation omitted). It provides "assurance that a person will not be compelled to testify against himself in a criminal proceeding and a continuing right against government conduct intended to bring about self-incrimination." *Chavez v. Martinez*, 538 U.S. 760, 791 (2003) (Kennedy, J., concurring and dissenting).

In *Griffin v. California*, the Court recognized that the right to remain silent necessarily carries with it the right not to have the prosecution use the defendant's rightful silence as substantive evidence of guilt. 380 U.S. at 615.[3] Without the corollary protection against prosecutorial use, a defendant would be put directly back into the "cruel trilemma of self-accusation, perjury or contempt" that the privilege was meant to eliminate. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). Absent the *Griffin* rule, the defendant could be effectively compelled to testify against himself regardless

[3] This principle had already been embraced by nearly every state at the time *Griffin* was decided. *See Mitchell v. United States*, 526 U.S. 314, 330 (1999).

of the existence of the privilege because – one way or the other, through testimony or silence – he would be compelled to present evidence against himself. The practice of drawing adverse inferences would thus "cut[ ] down on the privilege by making its assertion costly." *Griffin*, 380 U.S. at 614.

Griffin protected silence at trial, but its logic was quickly applied to protect silence in response to custodial questioning as well. In the Court's landmark decision in *Miranda v. Arizona*, the Court required the government to use "procedural safeguards effective to secure the privilege against self-incrimination" in the context of custodial interrogation. 384 U.S. at 444. As a necessary corollary, the Court also made clear that, because the defendant's silence was protected by the Fifth Amendment, prosecutors "may not, therefore, use at trial the fact that [a defendant] stood mute or claimed his privilege in the face of accusation." *Id.* at 468 n.37. This holding was based not on "an innovation in [this Court's] jurisprudence," but rather on "an application of principles long recognized and applied in other settings." *Id*. at 442. The Court explained:

> To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel,

> simple expedient of compelling it from his own mouth.

Id. at 460 (citations omitted).

Time after time, the Court has reaffirmed *Griffin*'s fundamental rule that rightful silence protected by the Fifth Amendment cannot be used as substantive evidence of guilt. In *Carter v. Kentucky*, the Court reiterated that *Griffin* "stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify," and held that a trial court must instruct the jury not to draw an adverse inference from silence when the defendant so requests. 450 U.S. 288, 301 (1981). Reasoning that an instruction informing a jury of a defendant's Fifth Amendment rights is perhaps the most important instruction of all, *id*. at 302, the Court concluded that "failure to limit the jurors' speculation on the meaning of [a defendant's] silence . . . exacts an impermissible toll on the full and free exercise" of a defendant's exercise of her privilege against self-incrimination, *id*. at 305.

Most recently, the Court applied the rule of *Griffin* to protect a defendant from the adverse use of rightful silence in a sentencing hearing after a guilty plea. *See Mitchell v. United States*, 526 U.S. 314, 316-17 (1999). The Court rejected the government's argument that a guilty plea waived the privilege against self-incrimination for purposes of the sentencing phase of the proceeding, *id*. at 321, then easily concluded that, because the privilege remained, the sentencing court could not draw an adverse inference

from the defendant's silence to determine facts impacting the sentence, *id*. at 328-30. "[T]here can be little doubt," the Court wrote, "that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition." *Id.* at 330. "The Government retains the burden of proving facts relevant to the crime at the sentencing phase and *cannot enlist the defendant in this process at the expense of the self-incrimination privilege*." *Id.* (emphasis added).

In no circumstance in which the Court has held the Fifth Amendment privilege to exist has it allowed prosecutors to use a defendant's rightful silence as substantive evidence of guilt.

II. THE COURT SHOULD NOT UNIQUELY WITHHOLD PROTECTION FROM RIGHTFUL SILENCE IN RESPONSE TO PRE-ARREST, PRE-*MIRANDA* QUESTIONING.

The Court should not uniquely withhold protection from a defendant's rightful silence in response to pre-arrest, pre-*Miranda* questioning by the police. Not only would such a holding be inconsistent with the Court's doctrine, *see* Br. of Pet. 12-23, but withholding protection would undermine existing Fifth Amendment protections, injure the truth-seeking purpose of criminal trials, and negatively impact individual liberty.

A. Withholding protection will undermine existing protections by encouraging police to manipulate the delivery of *Miranda* warnings and pressuring defendants to testify at trial.

The immediate, first consequence of withholding protection from a defendant's silence in response to pre-arrest, pre-*Miranda* questioning will be to make that silence artificially more valuable to prosecutors than later, protected silence – and thus induce police to develop tactics to manipulate the delivery of *Miranda* warnings to create unprotected silence. This perverse incentive will severely undermine the critical protections that currently exist for criminal defendants.

"The fundamental purpose of the Court's decision in *Miranda* was 'to assure that the *individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.'" *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (quoting *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)). As legal commentators have noted, however, "*Miranda*'s safeguards provide very limited restraints on police interrogators." Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 Mich. L. Rev. 1211, 1212 (2001). Indeed, police have learned to "work *Miranda* to their advantage – i.e., to issue *Miranda* (or avoid having to issue) warnings in strategic ways that will result in legally accepted waivers." Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 Mich. L. Rev. 1000, 1016 (2001) (quotation marks omitted).

The Court has already had to act once to prevent law enforcement officers from manipulating their interrogation tactics to evade *Miranda*. After the Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings," *Oregon v. Elstad*, 470 U.S. 298, 318 (1985), some police departments taught investigators to employ a question-first method where they did not advise a suspect of his *Miranda* rights until he had already confessed, at which point the investigator would recite *Miranda* warnings and ask the suspect if he would waive his rights. The Court responded by prohibiting the tactic in *Missouri v. Seibert*, 542 U.S. 600, 616 (2004), with a plurality concluding that it was "by any objective measure . . . a policy strategy adapted to undermine *Miranda* warnings." This was not an isolated incident, either. *See generally* Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109 (1998) (describing how police officers in some jurisdictions are "systematically trained to violate *Miranda*").

If the Court were to adopt a rule in this case withholding protection from pre-arrest, pre-*Miranda* silence, it would invite the very type of manipulation that the Court prohibited in *Seibert*. For if the government were permitted to introduce pre-*Miranda* silence as substantive evidence of guilt, law-enforcement officers would have every reason to begin questioning before arrest and before the delivery of *Miranda* warnings precisely to obtain silence to be

used at trial. If the suspect later was given warnings and confessed, so much the better – but every case would start with a threshold showing of guilt through silence.

The threat to *Miranda* posed by withholding protection from pre-arrest, pre-*Miranda* silence is itself a sufficient reason to apply the *Griffin* rule here. *See, e.g.*, *State v. Easter*, 922 P.2d 1285, 1290-91 (Wash. 1996) (citing the concern for manipulation of *Miranda* timing by police if pre-arrest, pre-*Miranda* silence is not protected from use as substantive evidence); *State v. Leach*, 807 N.E.2d 335, 341 (Ohio 2004) (same).

Furthermore, allowing police to comment at trial on pre-arrest, pre-*Miranda* silence will increase pressure on the defendant to testify at trial to explain his prior silence. "Because in the case of substantive use a defendant cannot avoid the introduction of his past silence by refusing to testify, the defendant is under substantial pressure to waive the privilege against self-incrimination either upon first contact with police or later at trial in order to explain the prior silence." *Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000). His necessary decision then – to waive the privilege against self-incrimination at a later stage to explain exercise of the privilege earlier – would undermine the right against self-incrimination.

B. Allowing the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt will impede the truth-seeking function of criminal trials.

What is worse, a suspect's silence in response to police questioning before the delivery of *Miranda* warnings has little or no probative value, yet the prejudicial inference prosecutors would urge juries to draw has been demonstrated to influence verdicts beyond all proportion to its relevance. Withholding protection from pre-arrest, pre-*Miranda* silence would not advance the truth-seeking function of criminal trials – it would impede it.

1. Pre-arrest, pre-*Miranda* silence has very little or no probative value for indicating guilt.

This Court long ago recognized that evidence of a suspect's silence during custodial police questioning holds little probative value. *See United States v. Hale*, 422 U.S. 171, 176-77 (1975). The many reasons why an innocent defendant may remain silent – a pre-existing knowledge of *Miranda* rights, unfamiliarity with the language, fear of police manipulation – apply with equal force to pre-arrest, pre-*Miranda* questioning.

The first reason that silence is consistent with innocence is that, "[a]t this point in our history, virtually every schoolboy is familiar with the concept, if not the language, of the provision that reads: 'No

person . . . shall be compelled in any criminal case to be a witness against himself . . . .'" *Michigan v. Tucker*, 417 U.S. 433, 439 (1974). The Court made that comment in 1974. In 1980, Justice Marshall noted that "we cannot assume that in the absence of official warnings individuals are ignorant of or oblivious to their constitutional rights." *Jenkins v. Anderson*, 447 U.S. 231, 247 (1980) (Marshall, J., dissenting). In 1998, Justice Scalia found it "implausible" that any individual under investigation would be unaware of his right to remain silent "[i]n the modern age of frequently dramatized '*Miranda*' warnings." *Brogan v. United States*, 522 U.S. 398, 405 (1998). In 2000, Chief Justice Rehnquist stated that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). And in 2001, researchers found that 81% of people surveyed recognized that criminal suspects have the right to remain silent. Richard Rogers et al., "*Everyone Knows Their* Miranda *Rights": Implicit Assumptions and Countervailing Evidence*, 16 Psychol. Pub. Pol'y & L. 300, 302 (2010) (citing Belden, Russonello & Stewart, The Open Soc'y Inst. & Nat'l Legal Aid & Defender Assoc., *Developing a National Message for Indigent Defense: Analysis of National Survey* 4 (2001)). Now, in 2013, pre-arrest, pre-*Miranda* silence is just as likely to be attributed to pre-existing knowledge of *Miranda*'s rights as to any other reason – precluding any probative value of the silence to prove guilt.

Pre-existing knowledge of *Miranda* is only the first in a long list of reasons why an innocent defendant may remain silent in the face of police questioning. In *Hale*, this Court identified the following, additional reasons: not hearing or understanding a question; a "fear or unwillingness to incriminate another"; or simple intimidation. 422 U.S. at 177. *Hale* involved post-arrest silence, but each of the reasons it listed – as well as those cited by other courts – applies equally to pre-arrest questioning. *See, e.g.*, *Ex parte Marek*, 556 So. 2d 375, 381 (Ala. 1989) (anger or fright); *People v. Conyers*, 420 N.E.2d 933, 935 (N.Y. 1981) ("a mistrust for law enforcement authority"); *O'Hearn v. State*, 113 N.W. 130, 134 (Neb. 1907) ("fear that the worst possible interpretation would be placed upon" a statement). Pre-arrest silence is no more probative of guilt than the post-arrest silence this Court discarded in *Hale*.

Scholarly research since *Hale* only supports this Court's skepticism regarding the connection between silence and guilt. *See generally* Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. Louisville L. Rev. 21 (2008); Jane Elinor Notz, *Prearrest Silence as Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, 64 U. Chi. L. Rev. 1009 (1997). Borrowing from extensive research across multiple disciplines, one scholar has highlighted twenty potential meanings conveyed by silence. *See* Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 Or. L. Rev. 199, 203 (2001). By

remaining silent, an individual may be asserting power, strategically maintaining interpersonal distance, demonstrating intense anger or resentment, or simply reflecting an inability to understand or communicate effectively. Krieger, *supra*, at 225-31; Thompson, *supra*, at 47-49. This research confirms a proposition embraced by *Hale*: that silence of *any kind*, and at any stage, may mean any number of things other than an admission of guilt.

Often, a suspect's silence may suggest nothing more than distrust of law enforcement – a message that may be reinforced by counsel. "[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 and dissenting). And for good reason. "[P]olice questioning now consists of subtle and sophisticated psychological ploys, tricks, stratagems, techniques, and methods that rely on manipulation, persuasion, and deception for their efficacy." Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, *in The Miranda Debate: Law, Justice, and Policing* 65 (Richard A. Leo & George C. Thomas III eds., 1998), *quoted in* Thompson, *supra*, at 45.

Others, particularly minorities, may avoid talking to police investigators because they perceive that the American criminal justice system is biased against them. *See generally* Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 Soc. Forces 1009, 1017 (2005).

Studies have consistently confirmed this phenomenon, noting that minorities tend to be "more negative and suspicious of the police" than whites. Scot Wortley, John Hagan & Ross Macmillan, *Just Des(s)erts? The Racial Polarization of Perceptions of Criminal Injustice*, 31 Law & Soc'y Rev. 637, 647 (1997); *see also* Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 Soc. Probs. 305, 316 (2004) (finding that "blacks are three to five times more likely to believe that [police] misconduct frequently occurs in their city" than whites). Such perceptions may lead innocent minorities to remain silent in the face of police scrutiny. *See, e.g.*, *People v. DeGeorge*, 541 N.E.2d 11, 13 (N.Y. 1989); *Conyers*, 420 N.E.2d at 935. Allowing pre-arrest, pre-*Miranda* rightful silence to be used as substantive evidence of guilt thus could disproportionately affect vulnerable populations.

For the foregoing reasons, a suspect's silence in response to police questioning is "insolubly ambiguous," *Doyle v. Ohio*, 426 U.S. 610, 617 (1976), whether it arises under the custodial interrogation in *Hale* and *Doyle* or the pre-*Miranda* questioning at issue here.

2. Inferences from a defendant's silence can prejudicially influence a jury out of all proportion to their probative value.

As an empirical matter, silence in response to pre-arrest, pre-*Miranda* police questioning may mean nothing – but that is not how juries react to it.

As this Court has previously concluded, "[t]he danger is that [a] jury is likely to assign much more weight to [a] defendant's previous silence than is warranted." *Hale*, 422 U.S. at 180; *see also Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978) (noting that inferences from silence "may be inevitable"). Indeed, "[t]he layman's natural first suggestion would probably be that the resort to privilege . . . is a clear confession of crime." 8 J. Wigmore, Evidence § 2272 at 426 (McNaughton rev. 1961), *quoted in Lakeside*, 435 U.S. at 340 n.10. Accordingly, the Court has recognized that "the rule against adverse inferences from a defendant's silence in criminal proceedings . . . is of proven utility." *Mitchell v. United States*, 526 U.S. 314, 329 (1999).

Empirical evidence suggests that the Court's concern is warranted. In one survey examining perceptions of a defendant's silence at trial, roughly one in five jurors found it relevant that the defendant did not testify, and one in six admitted that "the defendant not testifying made it more likely that he/she would be found guilty." Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 Lewis & Clark L. Rev. 237, 264-65 (2006). Other surveys have reached similar conclusions. *See* Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 Mich. L. Rev. 597, 622-24 (2012).

Defendants face the same kind of "intolerably prejudicial impact," *Hale*, 422 U.S. at 180, when the

government introduces their pre-arrest silence in response to police questioning as substantive evidence of guilt. This case demonstrates the point. The jury in Petitioner's first trial, hearing little evidence of his silence in response to police questioning, failed to reach a verdict. Respondent garnered a conviction in Petitioner's second trial only after heavily emphasizing Petitioner's rightful silence in response to police questioning – silence that as an empirical matter proves nothing.

3. Failing to protect pre-arrest, pre-*Miranda* silence would raise deep concerns under the Due Process Clause.

One more consequence flows from the near-universal knowledge of *Miranda*'s rights – a fundamental unfairness rising to the level of a due process violation if a defendant's rightful silence may be used against him as substantive evidence of guilt at trial. In *Doyle v. Ohio*, the Court recognized that, "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." 426 U.S. at 618. The Court therefore held that "it would be fundamentally unfair and a deprivation of due process" to allow the prosecution to impeach the defendant's trial testimony by pointing to his prior silence in response to police questioning. *Id.* Now that *Miranda*'s "warnings have become part of our national culture," *Dickerson*, 530 U.S. at 443, it

would be wholly artificial to make the *delivery* of those warnings the line between silence that can and cannot be used as substantive evidence of guilt at trial. If defendants have the right to remain silent, and if they know that they have the right, it is fundamentally unfair to allow their silence to be used as testimony against them.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

AARON D. VAN OORT
Counsel of Record
TRINA K. TAYLOR
ERIN L. HOFFMAN
JEFFREY P. JUSTMAN
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South 7th Street
Minneapolis, MN 55402
aaron.vanoort@faegrebd.com
(612) 766-8138

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10025
(212) 549-2500