No. 12-246

IN THE
Supreme Court of the United States

GENOVEVO SALINAS,
Petitioner,
v.
TEXAS,
Respondent.

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

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION 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* rights.

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INTEREST OF AMICI 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 amici state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their 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 37.3.

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.

The Texas Criminal Defense Lawyer's Association ("TCDLA") is an affiliate member of NACDL and the largest state association for criminal defense lawyers in the country, with more than 3200 members.

NACDL's and TCDLA's (collectively "Amici'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 AND SUMMARY OF THE ARGUMENT

The State of Texas obtained Petitioner's conviction at trial based, in significant part, on evidence of his silence in response to police questioning. This result is antithetical to the Fifth Amendment, and Amici agree with Petitioner that the Texas Court of Criminal Appeals' judgment should be reversed. Amici submit this brief to elaborate on the reasons why the Fifth Amendment protects a defendant's refusal to answer law enforcement questioning, whether before or after he has been arrested.

There is no question under this Court's precedent that individuals have a constitutional right to remain silent when questioned by police. *See Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Kastigar v. United States*, 406 U.S. 441, 445 (1972). The Texas court's decision would punish exercise of that right by allowing the government to use the defendant's silence against him. This result, if allowed to stand, would empower the state to "overcome[] the mind and will of the person under investigation and depriv[e] him of the freedom to decide whether to assist the state in securing his conviction." *In re Gault*, 387 U.S. 1, 47 (1967).

In fact, the decision below allows the suspect no real alternative to "assist[ing] the state in securing his conviction." *Id.* His options are to speak—and the state may use his words to incriminate him at trial—or to stay silent—and the state may use that silence against him. In that case, the state need not seek the truth, and may instead rely on the layman's instinct that a refusal to answer "is a clear confession of crime." *Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978) (internal quotation marks omitted). That is precisely what the prosecutor did in this case, when he argued to the jury that "[a]n innocent person is going to" answer police questions. Pet. at 6.

Every day, NACDL and TCDLA lawyers advise countless clients—rich or poor, innocent or guilty—not to make statements to law enforcement. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part) ("[A]ny lawyer worth his salt will tell the suspect in no

uncertain terms to make no statement to police under any circumstances."). 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.

The decision below would call this advice into question, as a suspect who declines to assist the police may be deemed presumptively guilty at trial. This Court should reverse the Texas Court of Criminal Appeals' decision and clarify that the Fifth Amendment prohibits using the defendant's pre-arrest silence as evidence of his guilt at trial.

ARGUMENT

I. THE FIFTH AMENDMENT APPLIES PRIOR TO ARREST.

The Court has held repeatedly that the Fifth Amendment broadly applies when the government questions an individual, without regard to the timing of the questioning or to the individual's status as a suspect, arrestee, or criminal defendant. "[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar v. United States*, 406 U.S. 441, 444 (1972). "The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him

in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The Fifth Amendment applies not only to formal proceedings but to "informal," "investigatory" matters. *See, e.g., Garrity v. New Jersey*, 385 U.S. 493, 497 (1967) (applying the Fifth Amendment to investigatory questioning by the New York Attorney General's office).

The Court has applied the Fifth Amendment in numerous pre-arrest settings. These include grand jury questioning (even when a witness is not a suspect), *United States v. Calandra*, 414 U.S. 338, 346 (1974), questioning in civil cases, *Pillsbury Co. v. Conboy*, 459 U.S. 248, 263–64 (1983), congressional inquiries, *Quinn v. United States*, 349 U.S. 155, 162–63 (1955), government forms, such as tax returns, *see, e.g.*, *Garner v. United States*, 424 U.S. 648, 656 (1976), and administrative investigations and questioning, *see In re Groban*, 352 U.S. 330, 333 (1957) ("This is a privilege available in investigations as well as in prosecutions.").

In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), the petitioner refused to provide his name to a police officer investigating a possible assault. *Id.* at 180. Hiibel was arrested for that refusal under a Nevada "stop and identify" statute. *Id.* at 181–82. Even though the questioning occurred prior to any arrest, the Court considered the Fifth Amendment, and upheld the arrest and conviction only because the information sought—Hiibel's identity—was not incriminatory, and thus

not protected by the privilege. *Id.* at 189–91.[2] No member of the Court found the Fifth Amendment inapplicable pre-arrest or suggested that Hiibel could be arrested based on his failure to provide information that, unlike his name, might incriminate him.

Respondent relies heavily on Justice Stevens's concurrence in *Jenkins v. Anderson*, 447 U.S. 231, 241 (1980), to argue that the Fifth Amendment does not apply pre-arrest. *See* Respondent Pet. Br. at 13. The Texas Court of Criminal Appeals also cited the *Jenkins* concurrence for that proposition. *Salinas v. Texas*, 369 S.W.3d 176, 179 & n.10 (Tex. 2012). This misconstrues Justice Stevens's views. His concurrence accepted as "fact that a citizen has a constitutional right to remain silent when he is questioned." *Jenkins*, 447 U.S. at 243 (Stevens, J., concurring). Justice Stevens's observation that the privilege "is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak," *id.* at 241, referred to the facts of *Jenkins*, where the "silence" that was used against the petitioner was his *flight from the police*. Jenkins was not silent in response to any police questioning of any kind.

Justice Stevens's later dissent in *Hiibel* proves the point. There, he opined clearly that a suspect

[2] The Court left open the possibility that a suspect's identity could be incriminatory in some "unusual circumstances." 542 U.S. at 191.

may refuse to answer questioning and his silence cannot be used against him.

> The protections of the Fifth Amendment are directed squarely toward those who are the focus of the government's investigative and prosecutorial powers. In a criminal trial, the indicted defendant has an unqualified right to refuse to testify and may not be punished for invoking that right. . . . *There is no reason why the subject of police interrogation based on mere suspicion . . . should have any lesser protection.*

Hiibel, 542 U.S. at 193 (Stevens, J., dissenting) (emphasis added).

II. USING SILENCE AS EVIDENCE OF GUILT COMPELS A SUSPECT TO INCRIMINATE HIMSELF.

Once it is accepted that the Fifth Amendment applies prior to arrest, it follows that the government cannot use a suspect's pre-arrest silence as evidence of his guilt. Any other result would undermine the Fifth Amendment's protections and punish its exercise.

A. If Silence Were Evidence of Guilt, Police Officers Could Unjustly Compel a Suspect's Incriminating Testimony.

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."

After this, very few could or would continue in their initial refusal to speak to the police in light of the damning consequences of their continued silence. Most people would find this police conduct shocking and abusive. But the officer in this example is doing nothing more than correctly stating the law as expressed by the Texas courts below.

B. If Silence Were Evidence of Guilt, Suspects Would Be Subjected to a "Cruel Trilemma."

Even without explicit police coercion, a suspect questioned by the police faces an impossible quandary under the Texas courts' ruling. 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. at 494. The questioning in that case was not post-arrest or before

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

What matters 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 (internal quotation marks omitted). For if the Government imposes a penalty upon an individual's silence, there is no "free choice" and the suspect is compelled, in violation of the Fifth Amendment, to be a witness against himself. *Id.* *Miranda* itself made clear that the state cannot use at trial the defendant's silence in response to custodial police questioning:

> [I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

Miranda, 384 U.S. at 468 n.37.

Under the regime imposed by the Texas courts, a suspect undergoing police questioning faces

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

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).

C. This Court's Precedent Establishes that There Should Be No Punishment for Refusing To Answer Pre-Arrest Police Questions.

The Court has often stated that an individual has the right to refuse to answer police questions, and that this refusal to cooperate does not furnish even minimal justification for punishment. *See Florida v. Bostick*, 501 U.S. 429, 437 (1991) ("[A]n individual may decline an officer's request without fearing prosecution. We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." (citation omitted)); *Berkemer v. McCarty*, 468 U.S. 420, 439–40 (1984) ("[T]he detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released." (footnote omitted)); *see also Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring) ("Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest . . . .").

Just as a suspect's silence provides no basis for his arrest, it cannot establish the suspect's guilt at trial. Indeed, the reason these cases forbid using a suspect's silence as justification to arrest, detain, or search a suspect is because that use would punish the suspect's refusal to answer, would render the encounter with police non-consensual, and would in effect compel the suspect's cooperation. The United States, in its *amicus* brief in *Florida v. Bostick*, explained:

> [I]t is clear that law enforcement officers may draw no inference justifying a search or seizure from a refusal to cooperate. That is, officers lacking legal justification to detain a person may not bootstrap noncompliance into justification for a detention, because in that event a citizen would in effect have no way of declining to participate in a "consensual" encounter with the police.

Brief for the United States as Amicus Curiae Supporting Petitioner, *Florida v. Bostick*, (No. 89-1717) 1990 WL 10013126, at *25 (cited approvingly in *Bostick*, 501 U.S. at 437).

A suspect must be free to choose whether or not to cooperate with the police, or his answer by definition is compelled. *See Garrity*, 385 U.S. at 496. Yet when non-cooperation leads to evidence of his guilt—which may itself lead to his arrest—then

there is no free choice and the suspect is compelled to be a witness against himself.

III. THE RIGHT TO REMAIN SILENT PROTECTS THE INNOCENT.

Any use of a defendant's silence as evidence of guilt rests on a fallacy that is anathema to the Fifth Amendment: It presumes that only the guilty would exercise a right to remain silent. That is exactly how the State used Petitoner's silence below, arguing to the jury that, if Petitioner had been innocent, he would have answered the police's questions.

The Court consistently has rejected this pernicious fallacy, stating unequivocally that "one of the Fifth Amendment's basic functions is to protect innocent men who otherwise might be ensnared by ambiguous circumstances." *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (emphasis, ellipses, and internal quotation marks omitted); *Grunewald v. United States*, 353 U.S. 391, 421 (1957) (finding that "no implication of guilt could be drawn from . . . invocation of . . . Fifth Amendment privilege before the grand jury."). "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States." *Ullmann v. United States*, 350 U.S. 422,426–27 (1956) (footnote omitted).

There are many reasons why an innocent person might choose to remain silent in the face of police questions or accusations. That is why the Court has opined that "[i]n most circumstances silence is so ambiguous that it is of little probative force." *United States v. Hale*, 422 U.S. 171, 176 (1975); *see also* Charles W. Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe for Abandonment*, 14 Ga. L. Rev. 27 (1979) (explaining why silence is not a reliable equivalent of an admission of guilt). *Hale* noted several reasons why an arrestee may choose to remain silent, and many of those reasons apply just as strongly to the pre-arrest situation when an innocent person is questioned by police. Under these circumstances,

> innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. . . . [A] suspect may not have heard or fully understood the question, or may have felt there was no need to reply. He may have maintained silence out of fear or unwillingness to incriminate another. Or [he] may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere . . . .

Hale, 422 U.S. at 177 (citation omitted); *see also Marek v. Alabama (Ex parte Marek)*, 556 So. 2d 375, 381 (Ala. 1989) ("Confronted with an accusation of a crime, the accused might well remain silent because

he is angry, or frightened, or because he thinks he has the right to remain silent that the mass media have so well publicized."). Petitioner's case is instructive: The police officers' questions, at first seemingly innocuous, "abruptly pivoted" to focus on Salinas as a suspect. *See* Pet. at 3.

A variety of other innocent reasons may explain a person's silence. One may decide not to respond to police questioning because he is aware of *Miranda* and believes he has a right to remain silent. This right 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 Ohio v. Leach*, 807 N.E.2d 335, 342 (Ohio 2004) ("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."); *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").

Others may stay silent because they do not trust the police. For example, there is little desire in many indigent communities to cooperate with police or to answer their questions. *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"). 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.

While innocent of a crime, some may fear that the police would misinterpret their truthful answers. "Often, for example, more than one person may have had a motive to kill the victim in a homicide case, even when only one person has actually killed him." Sherry F. Colb, *The Fifth Amendment Rights of the Innocent*, Findlaw (Mar. 28, 2001) http://writ.news.findlaw.com/colb/20010328.html (last accessed Feb. 26, 2013). Yet providing police with a possible motive would be self-incriminating and could help the police to build their case against an innocent man. *See Reiner*, 532 U.S. at 21 ("[T]ruthful responses of an innocent witness . . . may provide the government with incriminating evidence from the speaker's own mouth.").

Individuals may also choose to stay silent for fear that, no matter what they may say to the police, any contradictions or even perceived contradictions could be used to destroy their credibility if charged with a crime. This is one of the reasons that Professor James Duane advises never to speak to police under any circumstances. *See* James Duane, *Don't Talk to Police (Under ANY Circumstances)* (uploaded Feb. 25, 2012), *available at* http://www.youtube.com/watch?v=CkZf6_jK3Zs (last accessed Feb. 26, 2013). Professor Duane gives the example of an individual who was in another state

the day of a crime, but an eyewitness mistakenly says they saw him in town. *Id.* Even though answering truthfully and completely innocent of any crime, their credibility is now in serious question during any criminal trial. *See also* Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. Sch. L. Rev. 911, 927 (2011) ("Once the defendant puts his credibility on the line by providing a statement and once his credibility is impeached—*whether correctly or not*—the likelihood of conviction soars.").

Individuals also may refuse to answer police questions because the answers may be embarrassing or incriminating with respect to unrelated offenses. *Leach*, 807 N.E.2d at 342 (noting that innocent persons may decline to speak to law enforcement due to "embarrassment about a relationship or course of conduct that is not necessarily criminal"). And some individuals may simply feel that their lives are "none of the officer's business," *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 190 (2004).

IV. USE OF PRE-ARREST SILENCE ALLOWS FOR POLICE ABUSE AND SKEWS THE BALANCE BETWEEN THE INDIVIDUAL AND THE STATE.

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 (internal quotation marks omitted), 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. By using a suspect's silence as evidence of guilt, the government need not work as hard to develop other evidence, and can instead seek to rely on a jury's readiness to assume—as the prosecutor in this case argued—that an innocent man should be willing to speak to the police.

A. If Silence Were Evidence of Guilt, Police Could Seek To Manipulate Suspects into Incriminating Themselves.

Allowing pre-arrest silence to be evidence of guilt encourages police officers to generate incriminating evidence—entirely lawfully, according to the Texas courts—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 Leach*, 807 N.E.2d at 341 (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 also would 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 6. Just as police have been known to use psychological methods to get confessions, *see Miranda*, 384 U.S. at 448–54, the Texas courts' decision would allow such tactics to trigger incriminating silence.

B. Allowing Prosecutors To Use Pre-Arrest Silence Discourages Access to Counsel.

In addition to the entirely innocent reasons for refusing to answer police questions, many individuals choose not to answer questions until they have consulted with a lawyer or have a lawyer present. As just one example, suspects in "white collar" criminal cases are often confronted by law-enforcement when a subpoena is first served. They commonly refuse to answer police questions until they have the chance to confer with an attorney.

But if refusing to answer questions and "lawyering up" results in the police having substantive evidence of guilt, then a suspect will have a strong incentive to answer the police

questions before meeting with his lawyer. As Justice Jackson correctly pointed out: "Any lawyer who has ever been called into a case after his client has 'told all' and turned any evidence he has over to the Government, knows how helpless he is to protect his client against the facts thus disclosed." *Watts*, 338 U.S. at 59.

Even if advising a client in advance, the lawyer will be in a difficult position. No criminal defense lawyer wants her client to speak with police before receiving legal advice. But at the same time, no lawyer wants her client to provide police with substantive evidence of guilt simply by refusing to answer questions.

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 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, *see supra* Part III, 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 on 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.*, and hollows the promise of the Self-Incrimination Clause. *See Slochower v. Bd. 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. If Pre-Arrest Silence Were Evidence of Guilt, Prosecutors Would Have Significant Additional Leverage in Plea Negotiations.

Finally, and perhaps most importantly for the majority of criminal defendants, using 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] In cases where the evidence is not overwhelming, and where criminal defendants otherwise might be willing to risk a jury trial, prosecutors would have a powerful new 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 some defendants to plead guilty—and some lawyers to advise such a plea—for reasons that may have nothing to do with their innocence or guilt.

The Court should reject such a penalty for silence, and reject any pre-arrest compulsion to choose between self-incrimination through speech and self-incrimination through silence. Such a choice cannot be reconciled with the policies and

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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 accessed Feb. 26, 2013) (showing that in 2010, 88.9% of all criminal defendants in federal court were convicted by a plea of guilty or *nolo contendere*).

principles underlying the Fifth Amendment. It has no place in our system of justice, which places on the Government the burden of establishing beyond a reasonable doubt that the defendant is guilty of the charged offense.

CONCLUSION

For the foregoing reasons, amici curiae National Association of Criminal Defense Lawyers and Texas Criminal Defense Lawyers Association respectfully request that the decision of the Texas Court of Criminal Appeals be reversed.

Respectfully submitted,

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