

No. 21-125

IN THE
Supreme Court of the United States

AUSTIN CODA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit

PETITIONER'S BRIEF ON THE MERITS

TEAM 16
Counsel for Petitioner

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QUESTIONS PRESENTED

- I. Whether the prosecution's preindictment delay violates a defendant's right to due process when such delay causes actual and substantial prejudice to the defense.
- II. Whether the prosecution's use of a defendant's post-arrest, pre-*Miranda* silence violates the Fifth Amendment's protection against self-incrimination.

STATEMENT OF THE CASE

I. **Statement of the Facts**

In January 2002, Austin Coda (“Coda”) founded his small business, a hardware store (“the Store”), in Plainview, East Virginia. R. at 1. However, like many businesses following the Great Recession of 2008, Coda’s business began to falter. R. at 1. By 2010, Coda’s low profits placed him into dire financial straits and caused the Store’s building to fall into disrepair. R. at 1.

Unfortunately, in December 2010, an unexpected explosion destroyed Coda’s business. R. at 2. Following an immediate investigation by the Federal Bureau of Alcohol, Tobacco, and Firearms (“ATF”), evidence suggested that cold weather caused an old, faulty gas line to leak, which then destroyed the dilapidated building. R. at 2. Not long after, the Federal Bureau of Investigation (“FBI”) received a tip from Coda’s neighbor, Sam Johnson (“Johnson”), who claimed to have information regarding the explosion. R. at 2. Johnson alleged that during Coda’s financial struggles, Coda had become “very anxious and paranoid,” and that an insurance policy covered the Store. R. at 2. Considering solely Johnson’s claims, and contrary to evidence provided by ATF, the FBI informed the United States Attorney’s Office that Coda might be responsible for the explosion. R. at 2.

The U.S. Attorney’s Office labeled Coda’s case as “low-priority,” and took no further action, nor increased the priority designation during the period between the FBI’s tip in December 2010, to April 2019. R. at 2. Finally, in April 2019, the Assistant U.S. Attorney then assigned to Coda’s case realized the statute of limitations was about to expire, and subsequently rushed to indict him. R. at 2. The FBI arrested Coda under 18 U.S.C. § 844(i), on April 23, 2019. R. at 3, 7. When Special Agent Park of the FBI arrested Coda and informed him of the charges, Coda remained silent. R. at 7. The FBI informed Coda of his *Miranda* rights only after bringing him to a detention center, but before the FBI was ready to interrogate him. R. at 7.

Coda filed a motion to dismiss alleging an unconstitutional preindictment delay. R. at 1. During the hearing on said motion, Coda testified that he had critical witnesses for an alibi defense. R. at 3. However, as a result of the prosecution’s nearly ten-year preindictment delay, each witness had either passed away or had been diagnosed with a debilitating illness before his indictment. R. at 3. Further, Coda revealed that the digital travel records corroborating Coda’s whereabouts on the night of the explosion were erased after three years. R. at 3. During this nearly ten-year delay, the government took no timely action to contact any of the aforementioned witnesses, nor to obtain the travel records before they were erased, effectively destroying Coda’s defense. R. at 3, 5.

In defense of its preindictment delay, the government offered two justifications: (1) the inconvenience of transporting Coda back and forth while he faced unrelated state charges—charges that concluded during the preindictment delay—and; (2) political pressure to prioritize other types of offenses, which led to high turnover in the U.S. Attorney’s Office and caused Coda’s case to “pass from one Assistant U.S. Attorney to another.” R. at 2. Following the denial of Coda’s motion, his case moved to trial. R. at 1.

II. **Proceedings Below**

This criminal action was filed in the U.S. District Court for the District of East Virginia in May 2019, following Coda’s arrest in April 2019. R. at 2–3. Before trial, Coda filed a motion to dismiss the indictment on the grounds that his Fifth Amendment right to due process had been violated due to an unconstitutional preindictment delay. R. at 1. The trial court chose to evaluate Coda’s due process claim under a “two-prong” analysis, not the “balancing test” Coda advocated for. R. at 5. The trial court found Coda suffered “actual and substantial prejudice to his defense,” but ultimately found no constitutional violation because the government’s conduct amounted “only to negligence.” R. at 6. Additionally, Coda filed a second pre-trial motion to suppress evidence of his post-arrest, but pre-*Miranda* silence. R. at 7. The trial court found that Coda’s silence fell into

a legal “gray area” and thus denied his motion. R. at 7, 8. Coda’s silence was used at trial to convict and sentence him to ten years in federal prison. R. at 11. Coda appealed to the Thirteenth Circuit, which held oral arguments in August 2020. R. at 11. The Thirteenth Circuit affirmed the trial court’s decision and subsequently affirmed his conviction—as well as the denial of both Coda’s pre-trial motions. R. at 12. In July 2021, this Court granted Coda’s petition for a Writ of Certiorari. R. at 16.

SUMMARY OF THE ARGUMENT

Coda respectfully requests this Court reverse the ruling of the Thirteenth Circuit. First, Coda’s right to due process was violated for the following reasons: (1) the government eliminated Coda’s ability to defend himself at trial by negligently delaying its decision to file an indictment for almost a decade; and (2) had the trial court used the balancing test, it would have found that Coda’s defense was irreparably damaged—thus violating his Fifth Amendment right—and would have dismissed the charges against him. Second, the use of Coda’s post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment’s protection against self-incrimination. Not only does Fifth Amendment jurisprudence demonstrate that this use is unconstitutional, but holding otherwise creates perverse incentives for law enforcement and forces individuals under arrest into a lose-lose scenario while waiting to be read their *Miranda* warnings.

According to the record, the government waited eight years and five months to indict Coda for allegedly committing a federal crime. Due to this delay, Coda’s only witnesses either died or otherwise became unable to corroborate his alibi. The decision to wait so long can only be described as “negligence” because the reasons the government proffered for the delay are neither what this Court has categorized as a permissive investigative delay, nor an intentional attempt to gain a tactical advantage over Coda. Before Coda’s case, the question of whether such negligence

violates the Fifth Amendment was an issue of first impression for the Thirteenth Circuit. Due to this lack of precedent, the trial court was free to adopt any test it desired to use. Instead of choosing the fairer balancing test used by other courts, it chose to adopt the two-prong test. This test places an insurmountable burden on the defendant by requiring him to prove that his legal defense was actually and substantially prejudiced, and that the government delayed indicting him in bad faith. As a result of the trial court's choice to apply the two-prong test in Coda's case, both his conviction—and his ten-year federal prison sentence—were affirmed.

Finally, there is extensive jurisprudence establishing that this Court has understood the Fifth Amendment to protect all post-arrest silence from being used as substantive evidence of guilt. The Thirteenth Circuit has misinterpreted this Court's reasoning in several cornerstone Fifth Amendment opinions, and has glossed over significant Fifth Amendment precedent. In addition, allowing the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt creates the incentive for officers to wait as long as possible before reading arrested suspects their *Miranda* warnings. This would only add to the unbalance of power the government already wields over the average citizen. And finally, allowing the use of post-arrest, pre-*Miranda* silence creates a catch-22 for those arrested; such arrestees, without being informed of their rights, would have to choose between whether to speak or to remain silent, when both decisions are likely to be used against them at trial. For the foregoing reasons, Coda now humbly asks this Honorable Court to reverse the rulings of the Thirteenth Circuit.

ARGUMENT

I. **The Government’s Negligent, Prejudicial Preindictment Delay Violates Due Process; These Violations Should Be Adjudicated Under the More Appropriate Balancing Test, Not the Two-Prong Test Endorsed by the Thirteenth Circuit.**

In the landmark case of *United States v. Marion*, this Court recognized the possibility that a preindictment delay gives rise to a due process violation when a defendant cannot receive a fair trial. 404 U.S. 307, 326 (1971). After *Marion*, however, the lower courts became unsure of the proper method to evaluate whether a defendant’s right to a fair trial had been violated. The Court declined to fully illustrate how a prosecution’s delay violates due process. *See United States v. Lovasco*, 431 U.S. 783, 796 (1977) (“In *Marion* we conceded that we could not determine in the abstract the circumstances in which pre-accusation delay would require dismissing prosecutions[.]”). Today, a majority of the federal circuits use a two-prong test which requires a defendant to prove both actual prejudice and some improper prosecutorial motive behind the delay. Michael J. Cleary, *Pre-Indictment Delay: Establishing a Fairer Approach Based on United States v. Marion and United States v. Lovasco*, 78 Temp. L. Rev. 1049, 1051–52 (2005). A minority of the federal circuits use a balancing test where the court weighs the extent to which the defendant’s case is prejudiced against the government’s reason for the delay. *Id.* Coda respectfully submits this Court should, henceforth, adopt the balancing test.

A. The Language Used in Both *Marion* and *Lovasco* Suggests that a Balancing Test is the Ideal Device to Protect Individuals’ Due Process Rights.

To be clear, this Court has yet to make a definitive ruling on which test should be applied to cases where unconstitutional preindictment delay is alleged. In *Lovasco*, however, this Court clarified *Marion* to require “the due process inquiry *must* consider the reasons for the delay as well as the prejudice to the accused.” *Lovasco*, 431 U.S. at 790 (emphasis added). This describes a balancing test; the court “considers” the testimony and other evidence proffered by the parties, and

then decides whether the prejudice to the defendant outweighs the government's alleged reasons for the delay. Additionally in *Marion*, this Court expressed that "accommodat[ing] the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment *based on the circumstances of each case.*" *Marion*, 404 U.S. at 325 (emphasis added). Therefore, it logically follows that this Court endorsed a balancing test which should be the universal method to evaluate all due process challenges to prejudicial preindictment delays.

Notwithstanding such logic, the trial court concluded that the balancing test is inherently flawed, partially because the actual prejudice to the defendant and the government's reason for delay "are two distinct considerations." R. at 5. In support of this conclusion, the trial court cited *United States v. Crouch*, wherein the court opined the balancing test as seeking to "compare the incomparable." 84 F.3d 1497, 1512 (5th Cir. 1996). The Fifth Circuit reasoned the abstract concept of actual prejudice does not have a "common denominator" with a concrete reason for the government's preindictment delay, thus preventing any court from possibly comparing the two. *Id.* This position, however, disregards the volume of jurisprudence which balances abstract concepts with situational circumstances, and are without a common denominator.

Perhaps the most prominent example of such a balancing test can be found in *Int'l Shoe Co. v. Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945). In *International Shoe*, this Court established a test to determine whether a state could exercise personal jurisdiction over a foreign entity, thereby subjecting it to a civil suit. *Id.* at 319. This Court ruled that the standard would thereafter be: whether the defendant's minimum contacts with the forum state were sufficient to avoid "offend[ing] traditional notions of fair play and substantial justice." *Id.* at 316. Like the balancing test in the instant case, the legal test in *International Shoe* involved both an abstract concept, traditional notions of fair play and substantial justice, and

actual facts, the minimum contacts of the defendant within the forum state. But like in other areas of the law, *International Shoe* did not contain a common denominator to weigh the two against one another. Therefore, the trial court's conclusion contradicts the referenced example of such balancing tests embodied in modern jurisprudence.

Next, the trial court also concluded “[t]here are *no clear standards* for a court to determine whether the government's justification outweighs the defendant's prejudice.” R. at 5 (emphasis added). To the contrary, however, case law that defines both the standard and its application is ubiquitous. Following this Court's decision in *Lovasco*, the Fourth, Seventh, and Ninth circuits have since adopted the unified standard: whether requiring a defendant to stand trial violates “fundamental conceptions of justice” and the “community's sense of fair play and decency.” *Lovasco*, 431 U.S. at 790. *See also United States v. Gregory*, 322 F.3d 1157, 1160 (9th Cir. 2003); *Wilson v. McCaughtry*, 994 F.2d 1228, 1239 (7th Cir. 1993); *United States v. Walker*, 601 F.2d 1051, 1056 (4th Cir. 1979). Hence, the trial court's finding that there are “no clear standards” for applying the balancing test to a due process challenge is unsubstantiated.

B. The Balancing Test is Most Appropriate Because It Preserves Congressional Intent and Protects the Government's Discretion to Prosecute While Adhering to This Court's Precedent in Safeguarding Due Process.

As aforementioned, the landmark cases of *Marion* and *Lovasco* are both compelling insofar as their subtle, yet clear, endorsements of a balancing test. However, even if the cited language set forth in *Marion* and *Lovasco* alone does not persuade this Court to adopt the balancing test, there are also public policy justifications. Particularly, by adopting the balancing test, each branch of government would still be able to freely exercise its Constitutional power—while simultaneously preserving the Fifth Amendment rights of the accused.

First, the balancing test is transparent enough to keep the legislative intent behind the applicable statutes of limitations intact. The Thirteenth Circuit recognized the general principle that courts should give great deference to Congress, and thus, are reluctant to question its decisions regarding unambiguous provisions of legislation. R. at 5. The Thirteenth Circuit then rebuked the balancing test in fear that legislative intent would be undermined. R. at 5. On the contrary, the circuits that utilize the balancing test are not questioning the length of time Congress has provided for the applicable statutes of limitations. Rather, the courts consider only whether the prosecution’s preindictment conduct creates a due process violation. “The statute of limitations is [] always the primary safeguard from the bringing of overly stale charges, but where there is no justifiable reason to delay the indictment, there must be a point where the delay offends the interest of justice.” Danielle M. Rang, *The Waiting Game: How Preindictment Delay Threatens Due Process and Fair Trials*, 66 S.D. L. Rev. 143, 163 (2021). Therefore, if this Court were to adopt the balancing test, Congress would retain its deference, while the courts may best protect Fifth Amendment rights.

Second, the balancing test does not diminish prosecutorial discretion. The test merely requires the government to justify delays resulting in actual prejudice to a defendant’s case. This assures criminal defendants their due process right to a fair trial has not been violated, while not stonewalling the government from conducting its own investigations. This approach still leaves prosecutors with the ability to indict and charge criminal defendants in whatever manner they please, so long as the reasons for prejudicial delay do not substantially deprive the defendant of his right to defend himself at trial—regardless of prosecutorial motive.

Third, as a matter of fairness, the party that impairs the other side’s case should be the party to prove how it did not run afoul in doing so. The two-prong test which requires the defense to prove bad faith in addition to actual prejudice ignores this idea. “No matter how egregious the

prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion . . . would violate fundamental conceptions of justice. . . .” *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). Indeed, while it may be true that the government has since disclosed its reasons for the delay, R. at 2, it did not—and should not need to—grant Coda full access to the U.S. Attorney’s internal operations for him to ascertain these justifications. Coda stood unaware of his alleged crimes for nearly ten years. R. at 11. Those like Coda will *always* be one step behind a government who has been building a case against him. Thus, requiring a defendant to then prove that bad faith drove the government to delay its indictment is shamelessly one-sided and favors the prosecution in all respects.

Fourth, the balancing test is the better instrument for ensuring due process rights because it grants the accused a lifeline by allowing the courts to play a role in the evaluation of his claim. The two-prong test, on the other hand, deprives the courts of any chance to decide whether the government strayed too far in delaying the indictment; it merely quizzes the court to see if it can define which level of mens rea the prosecution acted with when it prejudiced the defendant.

Moreover, constitutional law is precisely the type of law that is most appropriately adjudicated through the application of balancing tests. The processes that foster our understanding of the U.S. Constitution, are best transcended by judges who have substantial discretion to weigh different conceptual factors against one another. This is, perhaps, the thing that courts do best. Legal tests involving weighable factors are commonly found within the vast sphere of constitutional adjudication. For example, the legal test to determine whether an administrative act violates procedural due process utilizes a balancing test. In the landmark case of *Mathews v. Eldridge*, this Court developed a three-factor balancing test wherein the government’s interest

in sustaining an administrative act was weighed against the private citizen's interest in altering the act. 424 U.S. 319, 348 (1976). Additionally, this Court considered the risk of the government's "erroneous deprivation" of the citizen's right as a quasi-outcome determinative factor. *Id.* at 335.

To this day, this constitutional test is referred to as "the *Mathews* balancing test." This balancing test joins a litany of others applied by this Court to adjudicate violations of Constitutional rights. For example, "First Amendment interests are weighed against reputation or bureaucratic efficiency. Fourth Amendment interests are weighed against the societal need to see how public funds are spent." T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 977 (1987). It follows that these balancing tests have proved to serve as reliable formulas for resolving questions of constitutional law; the balancing test in the instant case is no different. The case at bar exemplifies the compelling need to apply a balancing test to situations with such substantial competing interests. Therefore, this Court should favor the balancing test over the two-prong test, because the two-prong test eliminates the court's ability to truly determine whether a defendant has been deprived of his right to a fair trial; thus, blocking a court from resolving any question other than the presence of bad faith. The government's interest in prosecuting criminal suspects matters—Coda's right to due process also matters. For these reasons, Coda respectfully requests this Court discard the two-prong test, and hereby select the balancing test as the proper tool to adjudicate disputes involving prejudicial preindictment delays.

C. The Prosecution's Negligent Preindictment Delay Violates Due Process and is the Equivalent of Prejudice Suffered Due to an Intentional Bad Faith Delay.

This Honorable Court has previously addressed preindictment delays, and in doing so, has laid out two categories. The first category, investigative delay, has long been held as permissible; the second category, an intentional, bad faith preindictment delay, has long been held as unconstitutional. *Lovasco*, 431 U.S. at 795. These two types of delays, however, are not dispositive

of the issues that may arise from preindictment delay. Restricting delays to these two categories alone would administer justice with an eyes-wide-shut approach, practically ignorant of the fallacies prosecutors, like all people, may possess. It follows then, that the crux of the issue at hand is not whether the prosecution's *intentions* caused substantial unfair prejudice. Instead, the issue here is whether the prosecution's *actual conduct* led to substantial prejudice against the defendant—in Coda's case, the answer is a definitive yes. Accordingly, this Court must recognize that when a prosecution's negligent conduct produces the same unfair prejudicial result as intentional, malicious conduct, a grave violation of the Fifth Amendment exists.

1. *The Government Fails to Justify Its Preindictment Delay.*

In recognition of the precedent established by the Fourth, Seventh, and Ninth circuits, this Court should adopt the view that requiring a defendant to prove the government's bad faith, intentional delay is a practically impossible feat. According to the record, Coda has already met the "actual and substantial prejudice" requirement of both the two-prong test and the balancing test. R. at 6. The Seventh Circuit aptly described this defendant's challenging requirement as the "monumental hurdle of proving prejudice." *United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994). Seeing as this prong has been met, the Thirteenth Circuit now contends that Coda must explain how the government acted with bad faith. This cannot be so. Instead, through utilization of the balancing test, courts can better evaluate whether a prosecution conducted themselves so recklessly, or so negligently, that a defendant was substantially prejudiced. In the case at hand, the answer is clear: Coda's alibi defense was completely eliminated as a result of prosecutorial negligence, indicative of a grave constitutional violation.

To begin, both prosecutorial recklessness and negligence have been previously recognized as impermissible justifications for substantial, prejudicial delay. *Lovasco*, 431 U.S. at 795 n.17 (finding that a due process violation may exist when reckless disregard of circumstances, known

to the prosecution, incurs a delay which would impair the ability to mount an effective defense); *Howell*, 904 F.2d at 895 (4th Cir. 1990); *United States v. Automated Med. Lab'ys Inc.*, 770 F.2d 399, 404 (4th Cir. 1985). For example, in *Howell*, the Fourth Circuit adjudicated a robbery case where the defendant had proven actual prejudice as a result of preindictment delay—thus progressing the claim into a stage “ripe for adjudication.” 904 F.2d at 895. This stage accordingly weighed the prosecution’s justifications for delay against the defendant’s prejudice suffered. *Id.* The State of North Carolina “unequivocally” admitted it was “negligent” in failing to prosecute the defendant earlier and conceded its reason for preindictment delay as “mere convenience.” *Id.* Additionally, North Carolina failed to demonstrate its delay as either investigative or so complex as to require additional time. *Id.* In light of these facts, the Fourth Circuit held the prosecution’s negligent delay as unconstitutional in the face of such glaring, invalid justifications. *Id.*

Coda amply proves the prosecution’s failure to justify its negligent preindictment delay. As the trial court stated, there is no doubt that the government’s delay caused actual and substantial prejudice to Coda’s defense. R. at 6. Accordingly, like the prejudice suffered by the defendant in *Howell*, Coda’s case is ripe for adjudication. In turn, the government offers two reasons for its “low-priority” designation and preindictment delay: (1) the inconvenience of transporting Coda back and forth while he faced unrelated state charges; and (2) political pressure to prioritize other types of offenses that led to both high turnover in the U.S. Attorney’s Office and caused Coda’s case to “pass from one Assistant U.S. Attorney to another.” R. at 2.

Furthermore, courts have long recognized prosecutorial discretion, particularly when an ongoing state charge exists; this principle remains unchallenged. *Lovasco*, 431 U.S. at 795; *e.g.* *United States v. Koller*, 956 F.2d 1408, 1416 (7th Cir. 1992). However, “shortly after” December 2010, the FBI informed the U.S. Attorney of its belief that Coda “might be responsible” for the

explosion. R. at 2. It would take the government nearly a decade to bring about its indictment, only doing so in April 2019. R. at 2. In the period between December 2010 and April 2019, Coda's state proceedings concluded, and the government had ample time and convenience to begin transporting Coda in furtherance of its investigation. If the government fails to act when becoming aware of reasonable transportation opportunities, then the government expresses a reckless disregard for its investigation's progression. Here, the record demonstrates that the government took no such action until April 2019, when the Assistant U.S. Attorney then assigned to Coda's case realized the statute of limitations was about to run. R. at 2. This prosecutorial conduct is precisely what the *Lovasco* Court warned of, and it is here the prosecution starts down a path of questionable and constitutionally problematic behavior. Again, Coda does not challenge the government's general investigative discretion. Nevertheless, when Coda suffered substantial prejudice due to no fault of his own—but rather as a consequence of the prosecution's improper conduct—this Court must find a serious constitutional violation.

Next, the government contends that political pressures and high staff turnover excuse its negligent conduct—it does not. Like the prosecution's claims in *Howell*, the government's position is not exemplary of a proper investigative delay, nor an indication of a crime so complex as to necessitate additional time. The government alleges that Coda intentionally destroyed his property in violation of 18 U.S.C. § 844(i). R. at 3. There is no question that such an accusation may, at times, require complex preliminary investigation resulting in a lengthy delay. In the case at bar, however, such complexity is entirely absent. Coda's charges concern a small business owner brought before the government due to the suspicion of a neighbor, and the financial straits Coda has found himself in. R. at 1–2. Curiously, the government relied on this neighbor's word, even though ATF previously found evidence suggesting a gas line leak, caused by cold weather, sparked

the explosion. R. at 2. Instead of acting with any sort of prosecutorial diligence, such as inquiring into Coda's location at the time of the explosion, the government did nothing for the better part of a decade. R at 2–3.

Now, when pressed to explain such delay, the government points the metaphorical “finger” to political pressure. Again, in further similarity to *Howell*, the prosecution's conduct is one of negligence and “mere convenience.” Indeed, the trial court here found the government's inadequacies did amount to negligence. R. at 6. In the interest of civil liberties, it is inconceivable to suggest that political pressure can justify a negligent prosecution, especially when the conduct was substantially detrimental to a defendant. A core principle within our republic is the idea that justice is a bulwark, independent of politics. Justice does involve itself in the ebbs and flows of partisan battles, but instead, hears only the immediate issue presented before it. It follows then, that when the republic's prosecution negligently delays investigation because of the politics of the day, it is not the fault of the citizen—like Coda—who can no longer defend himself. Instead, the error lays exclusively in the lap of the government and violates the protections afforded to citizens. Consequently, this Honorable Court, like the *Howell* court, should find the government's negligent delay as unconstitutional when evaluating the prosecution's unacceptable justifications.

2. *Negligent Prosecution Which Substantially Damages a Defendant's Case Cannot be Permitted in the Interest of Justice.*

Furthermore, public policy demands that a delay between an offense and prosecution cannot be allowed to create prejudice so oppressive as to constitute a denial of due process. *Nickens v. United States*, 323 F.2d 808, 810 n.2 (D.C. Cir. 1963). Previously, this Court has discussed the public policy interests at stake in negligent prosecution, as well as the ramifications of negligent delays: “. . .[g]overnmental delay that is ‘purposeful or oppressive,’ is unjustifiable. . . . The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in

origin.” *Marion*, 404 U.S. at 334 (Brennan, J., concurring). Further, “[a] negligent failure by the government to ensure speedy trial *is virtually as damaging* to the interests protected by the right as an intentional failure. . . .” *Id.* (emphasis added).

While this discussion refers to one’s right to a speedy trial, this Court gave additional weight to these concerns in relation to one’s right to due process, clarifying that “[t]he right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pre-indictment delays as it is to post-indictment delays.” *Id.* at 328 (Douglas, Brennan, & Marshall, JJ., concurring). Collectively, the admonitions of these Honorable Justices lead to one logical and appropriate conclusion: although a prosecution may not have intended to cause unfair prejudice, intentional or negligent conduct may nonetheless produce markedly similar results, and thus, give rise to a constitutional violation. In *Marion*, this Court found that the government did not violate the Due Process Clause, but noted its analysis was crucially dependent on the fact that no actual prejudice to the defendant was ever alleged or proved. *Id.* at 326 (majority opinion).

Additionally, this Court’s firm categorization of prosecutorial negligence as bad faith minimally impacts the adjudication of due process claims, but substantially protects defendants from improper prosecutorial conduct. *See Sowa*, 34 F.3d at 450; *Howell*, 904 F.2d at 895; *See also United States v. Doe*, 149 F.3d 945, 949 (9th Cir. 1998). Though each of these circuit courts applied the balancing test, only the *Sowa* and *Howell* courts found the defendant suffered from actual prejudice as result of a preindictment delay. *Sowa*, 34 F.3d at 450; *Howell*, 904 F.2d at 895. Seeing no permissible reason for delay, the *Howell* court easily identified the due process violation. *Id.* The *Sowa* court, on the other hand, found the government’s reasons for delay to be valid under investigative delay. *Sowa*, 34 F.3d at 451. In contrast, the *Doe* court determined no actual prejudice existed and, accordingly, did not progress to reviewing the prosecution’s conduct. *Doe*, 149 F.3d

at 949. While the *Doe* court disapproved of the government's improper preindictment delay, the court held that no due process violation was present. *Id.* In each of the aforementioned cases, the due process analysis remained pointedly untouched. However, the courts' acknowledgment of negligence served as an effective safeguard when improper prosecutorial conduct rose to a degree causing substantial prejudice to a defendant.

In Coda's case, there is no indication that the due process analysis is detrimentally impacted through the recognition of prosecutorial negligence as bad faith. Indeed, like the *Sowa*, *Howell*, and *Doe* courts, this Court's recognition of negligence as bad faith safeguards unfairly prejudiced defendants, like Coda, from improper prosecutorial conduct. For nearly a decade, the prosecution delayed its investigation due to prosecutorial negligence. R. at 2. Yet, Coda was unaware he was under investigation; even if Coda were aware, it would neither be appropriate, nor in the interests of his own liberty, for him to have requested the prosecution hasten its investigation. In other words, there was no action Coda could have taken to prevent the demise of his own defense. How, then, could the prosecution's conduct be seen as anything other than grossly improper? This is the error that the trial court strikingly overlooks. As previously discussed, the government's conduct is far removed from the acceptable parameters of investigative delay, thus distinguishing Coda from *Sowa*. Furthermore, Coda's unfair prejudice is unquestioned, differentiating this case from *Doe*, and instead, falling into the realm of *Howell*—where due process was violated. There is nothing to suggest that this Court, among the others who have considered the consequences of prosecutorial negligence, would require new analyses or challenge existing jurisprudence.

Lastly, under Coda's circumstances, gross prosecutorial negligence was plentifully exemplified—yet Coda stands imprisoned. R. at 11. Are we to believe that justice was fairly administered when Coda's entire defense was substantially, if not entirely, erased because of

prosecutorial negligence? Does our moral compass, our universal sense of fairness, find no inexcusable error in the result of the prosecution's conduct? The very same concerns warned of by Justices Brennan, Douglas, and Marshall—government failures causing substantial damages to a defendant's interests—have actually been put on display in Coda's case; nonetheless, Coda remains in a prison cell. R. at 11. To grant tacit approval upon this degree of gross negligence undermines the core principles of justice that our republic promulgates. This sets a dangerous precedent that would loom over citizens who find themselves in crises similar to Coda's. Accordingly, Coda now humbly asks this Court to rule that his Fifth Amendment right was violated by prosecutorial misconduct so offensive to our fundamental conceptions of justice.

II. Allowing Prosecutors to Use Post-Arrest, Pre-Miranda Silence as Substantive Evidence of Guilt Betrays the Intent of the Fifth Amendment, Creates Perverse Incentives for Law Enforcement, and Forces Individuals into a Catch-22.

The violation of Coda's right to due process is not the only Fifth Amendment issue this Court faces. There are many today, including the Thirteenth Circuit, who too readily assume the maxim "qui tacet consentire videtur"—who is silent seems to agree. Common law ultimately rejected the notion, yet many still argue that "common sense" should take the opposite approach. The Thirteenth Circuit opines, "common sense suggests that Coda remained silent because he did not have an alibi." R. at 9. In reality, there are a host of reasons why an individual would not wish to speak to law enforcement. Regardless, the Framers of the Constitution did not require an explanation; "[they] made a judgment, and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." *Ullmann v. United States*, 350 U.S. 422, 427 (1956). This Court has stated that "[i]f it be thought

that the privilege is outmoded . . . the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion.” *Id.* at 427–28.

As hinted earlier, and long recognized by this Court, the power and resources governments, law enforcement, and prosecutors wield over the average citizen is immense. *See e.g. Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *Hoffman v. United States*, 341 U.S. 479, 485–87 (1951); *Chambers v. Florida*, 309 U.S. 227, 235–38 (1940). In order to achieve a “fair state-individual balance,” this Court has determined the government must “shoulder the entire load,” by producing evidence of its own independent labor, instead of relying on an individual to unknowingly become a witness against himself. *Miranda*, 384 U.S. at 460. Therefore, to safeguard against the abuses of power the Fifth Amendment seeks to prevent, this Court has warned that the privilege against self-incrimination must be strewn liberally. *Id.* 461; *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 81 (1965); *Quinn v. United States*, 349 U.S. 155, 162 (1955); *Hoffman*, 341 U.S. at 486.

The Thirteenth Circuit used *Salinas v. Texas* to justify its erosion of Fifth Amendment protections; but the circuit’s decision is not supported by *Salinas*, or any Supreme Court precedent. 570 U.S. 178 (2013). In order to honor the intent of the Fifth Amendment, and protect the interests of justice, Coda respectfully requests this Court overturn the Thirteenth Circuit by formally adopting the majority circuits’ holding¹—the use of post-arrest, pre-*Miranda* silence to prove

¹ The First, Second, Seventh, Ninth, Tenth, and D.C. Circuits prohibit the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt. *United States v. Whitehead*, 200 F.3d 634, 638 (9th Cir. 2000); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991); *United States v. Hernandez*, 948 F.2d 316, 322–24 (7th Cir. 1991); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989); *United States v. Flecha*, 539 F.2d 874, 877–78 (2d Cir. 1976). Meanwhile, the Fourth, Fifth, Eighth, and Eleventh Circuits permit the prosecution to use all pre-*Miranda* silence as substantive evidence of guilt. *United States v. Wilchcombe*, 838 F.3d 1179, 1190 (11th Cir. 2016); *United States v.*

substantive guilt is unconstitutional. This Court must heed its own warning and prevent the “whittling away” of this crucial protection. First and foremost, simply because neither the holding of *Salinas*, nor any other Supreme Court decision, supports the Thirteenth Circuit’s conclusion. Second, because allowing for the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt creates perverse incentives for police officers. And finally, because allowing the use of this silence in the prosecution’s case-in-chief creates a catch-22 for individuals in custody.

A. The Thirteenth Circuit Erroneously Interpreted the Holding of *Salinas*, and Other Supreme Court Precedent, in Order to Justify the Violation of Coda’s Fifth Amendment Rights.

The case of *Salinas* was never meant to be a catalyst for eroding the protections of the Fifth Amendment. It was a narrow decision, only serving as precedent that individuals must actively claim their Fifth Amendment rights in order to protect their post-arrest silence. *Salinas*, 570 U.S. at 191. Neither the plurality opinion, nor the concurrence or dissent, suggests that *Salinas*’s holding should extend to those who are already in custody—and for good reason. Such a decision cannot be justified by prior Supreme Court precedent and the intent of the Fifth Amendment. This Court has recognized individuals in custody face heightened risks compared to those labeled as merely “witnesses,” or those who are free to walk away from law enforcement at any time. This precedent and the heightened risks are what causes the Thirteenth Circuit’s reasoning to ultimately fail.

1. *The Thirteenth Circuit Misinterprets the Holdings of Salinas and Miranda, and Ignores Substantial Fifth Amendment Jurisprudence.*

This Court has stated “the fifth amendment . . . forbids [] comment by the prosecution on the accused’s silence” *Griffin v. California*, 380 U.S. 609, 615 (1965). *Griffin* involved the

Garcia-Gil, 133 Fed.App’x 102, 107–08 (5th Cir. 2005); *United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985).

silence of an individual already in custody, and, since this decision, there has been an ongoing debate over whether *Griffin* should be extended to protect pre-arrest silence. *Id.* at 609–10; *see Salinas*, 570 U.S. at 193 (Thomas & Scalia, J.J., concurring). *Salinas* has been the closest decision by this Court to date on the subject. But Coda’s silence did not occur when he was a mere witness, free to leave at any time. R. at 7. Coda’s silence occurred “*after* FBI Special Agent Park arrested [him].” R. at 7 (emphasis added). Coda is not arguing for an extension of precedent; rather, Coda is merely asking this Court to expressly state what has been presumed all along—the Fifth Amendment prevents the use of all post-arrest silence to be used as substantive evidence of guilt.

First, the Thirteenth Circuit is correct: this Court has never specifically addressed the circumstance of post-arrest, pre-*Miranda* silence. However, this should hardly be called a “gray area” which implies there is no discernable intent from Fifth Amendment jurisprudence. R. at 8. Since as early as 1892, this Court has emphasized that Fifth Amendment protections “should be liberally construed.” *Counselman v. Hitchcock*, 142 U.S. 547, 582 (1892), *overruled in part by Kastigar v. United States*, 406 U.S. 441 (1972). This Court reaffirmed that sentiment in 1965 with *Miranda*, 384 U.S. at 461. Since then, there has been no Supreme Court ruling that sought to limit this right of those in custody.

The Thirteenth Circuit attempts to reason that the defining characteristic of *Salinas* was the fact the defendant had not yet received his *Miranda* warnings, and it is only at that point when Fifth Amendment protections apply without question; but this simply cannot be the case. R. at 8, 9. The reading of *Miranda* warnings does not create the right—it exists independently from the requirement—so why should courts wait to unequivocally apply the right until then? *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997) (“[N]either *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of

questioning as opposed to custody.”). In *Miranda*, this Court stated that “there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect *persons in all settings in which their freedom of action is curtailed in any significant way* from being compelled to incriminate themselves.” *Miranda*, 384 U.S. at 467 (emphasis added). The point at which an individual’s freedom is curtailed, is the point of arrest; this is the same point which was central to this Court’s holding in *Salinas*. *United States v. Wilchcombe*, 838 F.3d 1179, 1191 (11th Cir. 2016) (“The fact that the *Salinas* defendant was not in *custody* at the time of his silence was *central* to the Court’s determination that his silence could be used as substantive evidence of guilt.”) (emphasis added). And it is at that moment, the point of arrest, in which Fifth Amendment protections apply unequivocally.

The Thirteenth Circuit cites *Miranda* in effort to prove Fifth Amendment rights attach without any express claim by an individual, only after the *Miranda* warnings have been read. R. at 9. However, the court misstates the purpose of the *Miranda* holding. The mere fact that *Miranda* warnings are not required until interrogation is irrelevant to the second certified question of this case, because *Miranda* warnings are meant only to safeguard rights, not to trigger them. *Moore*, 104 F.3d at 386–87. The Thirteen Circuit is correct in that the *Miranda* warnings are specifically required to protect individuals from the “inherently compelling pressures” of police interrogation. *Miranda*, 384 U.S. at 467. The mere fact that *Miranda* is meant to be a specific protection does not limit the broad application of Fifth Amendment rights. Even Justice Scalia, who staunchly opposed *Griffin*,² admitted that *Miranda* held “a defendant’s *postarrest* silence could not be introduced as substantive evidence against him at trial.” *Mitchell v. United States*, 526 U.S. 314,

² Although, he maintained that “*Griffin* was a wrong turn,” he also admitted that there is “not cause enough to overrule it.” *Mitchell* 526 U.S. at 336 (1999) (Scalia, J., dissenting).

336 n.2 (1999) (Scalia, J., dissenting) (emphasis added). Therefore, it is evident the Fifth Amendment applies to *all* individuals whose freedom is curtailed and who reside under the control of law enforcement—not just those who make it to the point of interrogation.

2. *The Thirteenth Circuit Applies Faulty Reasoning in Requiring Coda to Affirmatively Claim His Fifth Amendment Rights.*

Additionally, the Thirteenth Circuit cites *Brecht v. Abrahamson*, *Berghuis v. Thompkins*, and *Minnesota v. Murphy*, in an attempt bolster its decision and reason that Coda was required to affirmatively claim his Fifth Amendment rights. *Berghuis v. Thompkins*, 560 U.S. 370 (2010); *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Minnesota v. Murphy*, 465 U.S. 420 (1984); R. at 8. However, the Thirteenth Circuit misapplies these decisions. First and foremost, the court overstates the holding of *Brecht* because this Court did *not* hold that all “post-Miranda silence is admissible as impeachment evidence.” R. at 8. *Brecht* held the use of post-Miranda silence was indeed a violation of the Fifth Amendment as set forth in *Doyle v. Ohio*, 426 U.S. 610 (1976). *Brecht*, 507 U.S. at 639. However, in that specific circumstance, the violation turned out to be harmless error which did not call for a reversal. *Id.* The only notable aspect of *Brecht* is the differentiation between pre-Miranda and post-Miranda silence, which still bears no relevance for Coda’s case because *Brecht* was in the context of using silence as evidence to impeach, not as substantive evidence of guilt. *Id.* at 639.

It is easy to distinguish the reason as to why pre-Miranda silence may be used to impeach while post-arrest, pre-Miranda silence may not be used in the prosecution’s case-in-chief. The use of silence to impeach is an exception to the general rule that silence may not be used at trial; this exception is created when a defendant voluntarily takes the stand, because at that point, “[defendant] was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.” *Harris v.*

New York, 401 U.S. 222, 225 (1971). The holding of *Doyle*, in which the Supreme Court distinguished the use of pre-*Miranda* and post-*Miranda* silence, is essentially an exception to the exception. *Moore*, 104 F.3d at 387. The reason the prosecution cannot use post-*Miranda* silence, even to impeach, is because the issuance of *Miranda* rights creates a form of estoppel, where the reading of rights acts as an implied promise that an individual's silence cannot be used against them, in any form. *Id.* As far back as 1926, this Court has recognized the importance of this distinction between the use of silence for impeachment, and its use as substantive evidence of guilt. *Doyle*, 426 U.S. at 628 (Stevens, J., dissenting) (referencing *Raffel v. United States*, 271 U.S. 494 (1926)). Even the government in *Doyle* accepted this distinction, as “[t]he State [did] not suggest [defendant’s] silence could be used as evidence of guilt[.]” *Id.* at 617.

Second, in citing *Berghuis* and *Murphy*, the Thirteenth Circuit argued that Coda was required to actively claim his Fifth Amendment rights if he intended to protect his silence. R. at 9. However, neither of these cases, nor any other Supreme Court precedent requiring a defendant to claim his right, apply to Coda’s circumstance. First, while the case of *Berghuis* is cited by this Court in *Salinas*, it is hardly dispositive. *Berghuis* involved a defendant attempting to argue that his *statements*, not his silence, were improperly admitted into evidence. *Berghuis*, 560 U.S. at 378. At no point in the holding was there any argument or discussion as to whether the “2 hours and 45 minutes” of silence would be admissible as substantive evidence of guilt—there was no doubt that it was not. *Id.* at 376. In stating that the defendant was required to actively claim his right, this Court was not implying he need claim it to protect the actual silence, but rather to “cut off questioning” by the police. *Id.* at 382. This Court stated, “the requirement of an unambiguous invocation of *Miranda* rights” is necessary to the extent that this requirement “‘avoid[s] difficulties of proof and ... provide[s] guidance to officers’ on how to proceed in the face of ambiguity.” *Id.* at

381. If officers had to guess as to whether they could continue an interrogation, they may be faced with the “[s]uppression of a voluntary confession.” *Id.* at 382. This line of rationale clearly demonstrates that the main concern was regarding the actual statements made and the point at which police questioning must cease. There is no concern for ambiguity in regard to silence because there is already a clear point at which it may no longer be used—that is the point of arrest.

Murphy’s holding is even less relevant to Coda’s circumstance because the individual in *Murphy* sought to suppress statements and, most importantly, was not in custody at the time the statements were made. *Murphy*, 465 U.S. at 424–25. Coda does not deny or argue with the fact that this Court has long required mere “witnesses” to actively assert their Fifth Amendment rights before receiving Fifth Amendment protections. *E.g. Salinas*, 570 U.S. 178; *Murphy*, 465 U.S. 420; *Roberts v. United States*, 445 U.S. 552 (1980); *Quinn*, 349 U.S. 155; *United States v. Monia*, 317 U.S. 424 (1943); *U.S. ex rel. Vajtauer v. Comm’r of Immigr.*, 273 U.S. 103 (1927). The difference is simply that Coda is not a mere witness; Coda was in police custody during the point of silence which the government seeks to admit. R. at 7. Prior to being placed in custody, an individual is not required to face law enforcement. They do not feel the same weight and pressure as those who are completely under the government’s control. These individuals have the option to exercise their Fifth Amendment rights, but they do not even need to go that far—they can simply walk away. This Court in *Murphy* even stated that a “[c]ustodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers' will and to confess.” *Murphy*, 465 U.S. at 433 (citing *Miranda*, 384 U.S. at 456–57). This same pressure is not felt by mere witnesses; therefore, it is crucial to offer broader protections to those who are in custody.

3. *The Minority Circuits, with Whom the Thirteenth Circuit Sides, have also Misinterpreted Fifth Amendment Jurisprudence or Conceded this Court's Precedent Does Not Support Their Holding.*

Finally, only a small minority, the Fourth, Fifth, Eight and Eleventh circuits, currently allow the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt. *Wilchcombe*, 838 F.3d 1179; *United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005); *United States v. Garcia-Gil*, 133 F. App'x 102 (5th Cir. 2005); *United States v. Love*, 767 F.2d 1052 (4th Cir. 1985). However, the Fourth, Fifth, and Eighth circuits have also misinterpreted Supreme Court precedent and glossed over much of the Fifth Amendment's jurisprudence. The last circuit, the Eleventh, has outright conceded that this Court's reasoning does not support its current holding on the issue.

First, the Thirteenth Circuit cites *Love*, from the Fourth Circuit, to bolster its holding. R. at 9. *Love* was the first time the Fourth Circuit addressed the question of whether post-arrest, pre-*Miranda* silence is admissible as substantive evidence of guilt. *Love*, 767 F.2d at 1036. In deciding that the use of this silence in such a manner is permissible, the Fourth Circuit relies entirely on the case of *Fletcher v. Weir*, 455 U.S. 603 (1982). However, the Fourth Circuit makes the same crucial mistake as the Thirteenth Circuit: it failed to differentiate between the use of silence as impeachment evidence, and the use of silence in the prosecution's case-in-chief. *Fletcher* involved only the use of silence to impeach. *Id.* at 607. As differentiated above, the use of silence as evidence to impeach does not offend the Fifth Amendment. Even though this right is meant to protect individuals from being coerced into becoming a witness against themselves, "that privilege cannot be construed to include the right to commit perjury." *Harris*, 401 U.S. at 225.

Next, the Fifth and Eighth circuits' decisions also rely on faulty reasoning. The Fifth Circuit relies entirely on its prior decision, *United States v. Zanabria*, in allowing post-arrest, pre-*Miranda* silence to be used as substantive evidence of guilt. *Garcia-Gil*, 133 F. App'x at 107-08;

United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996). But *Zanabria* involves the use of pre-arrest silence, not post-arrest; as explained earlier these two points are undeniably distinguishable. *Zanabria*, 74 F.3d at 591; *see Miranda*, 384 U.S. at 467. Likewise, the Eighth Circuit’s decision in *Frazier* fails to acknowledge the pressures faced by those under arrest in determining that post-arrest, pre-*Miranda* silence should be treated no differently than pre-arrest silence. 408 F.3d at 1111; *see Murphy*, 465 U.S. at 433.

Finally, the Eleventh Circuit takes a very unique approach. In *Wilchcombe*, the court held for the government in reaffirming its circuit precedent that post-arrest, pre-*Miranda* silence is admissible in the prosecution’s case-in-chief. 838 F.3d at 1191. However, the circuit goes on to state that the key to the *Salinas* holding was “the fact that the [] defendant was not in custody[.]” *Id.* The court then concedes that “[w]here, as here, a suspect is in custody, he ‘cannot be said to have voluntarily forgone the privilege [against self-incrimination] unless he fails to claim it after being suitably warned.’ . . . *Salinas* therefore *does not provide support* for the prosecution’s comments in this case.” *Id.* (emphasis added). Thus, the Eleventh Circuit knows its decision is not supported by this Court’s reasoning.

B. In Ruling for Coda, This Court Eliminates Police Incentive to Withhold *Miranda* Warnings—Without Infringing Upon Law Enforcement’s Ability to Prosecute.

Under current precedent, law enforcement is not required to give *Miranda* warnings until the moment before the officer uses any “words or actions that [he] should know are reasonably likely to elicit an incriminating response.” *United States v. Head*, 407 F.3d 925, 928 (8th Cir. 2005). The use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt only incentivizes officers to wait as long as possible before interrogating an individual. *See Moore*, 104 F.3d at 385; Marc Scott Hennes, *Manipulating Miranda: United States v. Frazier and the Case-in-Chief Use of Post-Arrest, Pre-Miranda Silence*, 92 Cornell L. Rev. 1013, 1036–37 (2007). By

doing so, the government forces the individual to either remain silent—therefore creating “evidence” of guilt—or, to start spontaneously talking, giving the government ammunition to use against him at trial. On top of this, according to the Thirteen Circuit’s “common sense,” the longer the individual sits in silence, the guiltier the individual appears. R. at 9. Ignoring the valid reasons innocent individuals choose to remain silent, the simple fact is the prosecution would be unharmed by eliminating this incentive. The only effect of allowing it would be to place individuals in custody, who are facing the full force of the criminal justice system, in an even more dire predicament. These heightened risks, as explained above, are exactly why the narrow holding of *Salinas* is meant to be distinguished from post-arrest cases, such as *Coda*’s.

Law enforcement is not harmed because there are many ways officers and prosecutors are still able to use silence during their investigations, and even at trial. First, since *Salinas* never reached the constitutional issue of whether pre-arrest silence is even protected by the Fifth Amendment, it is still up to the circuits to decide whether the use of pre-arrest silence may be used as substantive evidence of guilt. Currently, only the First, Second, Sixth, and Seventh circuits have explicitly prohibited the use of pre-arrest silence in the prosecution’s case-in-chief. *United States v. Okatan*, 728 F.3d 111, 120 (2d Cir. 2013); *Ouska v. Cahill–Masching*, 246 F.3d 1036, 1049 (7th Cir. 2001); *Seymour v. Walker*, 224 F.3d 542, 560 (6th Cir. 2000); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989). Three circuits, the Fifth, Ninth, and Eleventh, have explicitly held that the prosecution may use pre-arrest silence as substantive evidence of guilt. *United States v. Whitehead*, 200 F.3d 634, 639 (9th Cir. 2000); *Zanabria*, 74 F.3d 590 at 593; *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991). The remaining circuits have yet to explicitly hold one way or the other. However, even in the four circuits expressly protecting pre-arrest silence, this protection is only valid if the individual actively claims his Fifth Amendment privileges; if he

does not, the silence is not protected, and law enforcement may use it as substantive evidence of guilt. *Salinas*, 570 U.S. at 191.

Second, this Court has already made it clear all pre-*Miranda* silence may be used to impeach a defendant who ultimately chooses to take the stand. *Brecht*, 507 U.S. at 639. This is true even if the defendant actively claimed his Fifth Amendment rights prior to trial; because, in order to preserve the truth-seeking function of the court, once “a defendant takes the stand, his credibility may be assailed like that of any other witness.” *Portuondo v. Agard*, 529 U.S. 61, 61–62 (2000); *Raffel*, 271 U.S. at 496–97.

Finally, and most significantly, this Court recognizes the doctrine of “harmless error,” in which a violation of a constitutional right does not automatically subject the conviction to reversal. *Neder v. United States*, 527 U.S. 1, 8 (1999). Instead, in order to overturn a conviction, a court must determine, beyond a reasonable doubt, that the conviction relied substantially on the constitutional violation. *Id.* 8–9. So much so, that the error was material to the case. *Id.* By ruling in favor of Coda, this Court would not condemn law enforcement's efforts in building its entire case if this form of silence is accidentally admitted. Likewise, Coda is not asking this Court to throw out other admissible evidence in the prosecution's case. However, if the government's case-in-chief rests entirely on convincing a jury that Coda's silence proves he is guilty—essentially forcing Coda to become the *sole* witness against himself—then, and only then, would the government's violation of the Fifth Amendment result in an overturned conviction.

C. Using Post-Arrest, Pre-*Miranda* Silence as Substantive Evidence of Guilt Forces Uninformed Individuals to Make the Impossible Decision of Choosing Whether or Not to Speak, When Both their Silence and Speech Will Be Used Against Them.

Not only would holding for the government create perverse incentives for officers, but such a determination contravenes the interests of justice. Doing so would allow the police to

manufacture silence and force every individual under arrest into a catch-22 trap, while waiting to be read their rights. This situation creates the scenario, where either the individual remains silent, in which his silence will be used against him as evidence of guilt, or he speaks, in which anything he says voluntarily may be twisted for the use of the prosecution. *See Hennes, supra*, at 1034–35.

When individuals make statements, especially incriminating statements, before receiving *Miranda* warnings, they are more likely to waive their *Miranda* rights. *See e.g. Missouri v. Seibert*, 542 U.S. 600 (2004); *Oregon v. Elstad*, 470 U.S. 298 (1985). Moreover, police are trained to use any tactics necessary, including deceit and fraud, to elicit confessions from individuals. *See Oregon v. Mathiason*, 429 U.S. 492 (1977) (holding that police are allowed to lie about finding defendant’s fingerprints at the crime scene); *Frazier v. Cupp*, 394 U.S. 731 (1969) (holding that police may lie about an accomplice’s confession); Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. of Am. Acad. Psychiatry L. 332, 332 (2009) (stating that in 15-20 percent of DNA exonerations, “police-induced false confessions” were the primary cause of wrongful conviction). This makes it even more important for this Court to protect the silence of those individuals, so they are not forced to have to choose between manufacturing evidence of guilt or being coerced into speaking to police.

The Thirteenth Circuit presumes this is not an issue because individuals may assert their rights at any time, therefore avoiding this predicament. R. at 9. But this Court presumes no citizen is aware of his rights until they have received *Miranda* warnings. *Miranda*, 384 U.S. at 471–72. Why, is it logical then, for the Thirteenth Circuit to expect an individual, not yet informed of his rights, has enough knowledge to “unambiguously assert” these rights sooner? Again, there is an appropriate distinction between requiring a mere witness to actively claim the right due to a

difference in circumstance. However, once an individual comes under the control of the government, his rights must be protected without exception.

This Court has declared that “the Constitution [prescribes] the rights of the individual *when confronted with the power of government* when it [provides] in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.” *Miranda*, 384 U.S. at 479 (1966) (emphasis added). The moment of arrest is the moment Fifth Amendment rights apply, without any affirmative action necessary on behalf of the individual, because it is at that moment he has been targeted by the government and confronted with the full force of the criminal justice system. These individuals no longer have the freedom to walk away, and thus, must be granted the broadest Constitutional protections in order to maintain the individual-state balance. Therefore, Coda respectfully pleads this Court expressly hold that the Fifth Amendment prohibits the use of all post-arrest silence as substantive evidence of guilt.

CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that this Court reverse the holding of the Thirteenth Circuit on both issues and find that Coda’s Fifth Amendment right to due process and protection against self-incrimination have been violated.

TEAM 16

Counsel for Petitioner

SEPTEMBER 12, 2021