

No. 21-125

In the Supreme Court of the United States

AUSTIN CODA

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT*

BRIEF FOR PETITIONER

TEAM 31
Counsel for Petitioner
Oral Argument Requested

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QUESTIONS PRESENTED

1. Whether pre-indictment delay that causes the accused actual and substantial prejudice violates the Due Process Clause of the Fifth Amendment even absent a showing of bad faith on the part of the government where this Court has mandated a case-by-case inquiry that considers both the prejudice to the accused and the government's reason for the delay, and when it is practically impossible for a defendant to prove government intent?
2. Whether allowing admission of an accused's post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of guilt violates the Fifth Amendment's protection against self-incrimination when doing so would create perverse incentives for law enforcement and a majority of courts of appeals extend the protection even further?

STATEMENT OF THE CASE

Austin Coda (Petitioner) owned and operated a hardware store in Plainview, East Virginia, on the border between East Virginia and North Carolina. R. at 1. While initially successful, Petitioner's business was negatively impacted by the 2008 recession and the opening of a large chain store nearby in 2009, and he lost a significant portion of his customer base. *Id.* By 2010, his revenue was so low that he was unable to maintain proper upkeep of the building. *Id.* On December 22, 2010—Petitioner's birthday—an explosion occurred at the hardware store, totally destroying the premises. R. at 2. Local fire investigators and Federal Bureau of Alcohol, Tobacco, and Firearms agents gathered evidence that suggested that cold weather caused an old, faulty gas line to leak and destroy the building. *Id.*

Sometime thereafter, the Federal Bureau of Investigation (FBI) received a tip from one of Petitioner's neighbors indicating that he thought Petitioner may have destroyed the store himself to collect on an insurance policy. *Id. Id.* The FBI informed the United States Attorney's Office (USAO), which opened a case on Petitioner. *Id.* The USAO marked Petitioner's case as low-priority, initially claiming it would be inconvenient to transport him back and forth while he was being prosecuted for unrelated state charges. *Id.* After the state proceedings concluded, however, the USAO was evidently under political pressure to focus on other cases, and Petitioner's case continued to languish. *Id.* This political pressure also caused high turnover within the USAO, causing Petitioner's case to get passed from one prosecutor to another. *Id.*

No progress was made on Petitioner's case until April 2019, when the Assistant U.S. Attorney then assigned to his case noticed that the ten-year statute of limitations was about to run. *Id.* Petitioner was finally arrested on April 23, 2019, and indicted in May 2019 under 18 U.S.C. § 884(i). R. at 3. When the FBI agents arrested Petitioner, read the charges against him, and took

him into custody, he elected to remain silent. R. at 7. Petitioner filed two motions after being indicted: one to dismiss the indictment for pre-indictment delay, and another to suppress his post-arrest silence. R. at 1; R. at 7.

At the evidentiary hearing, Petitioner testified that he was in New York on the night of the explosion celebrating his birthday with family, as he had done every year until 2015. R. at 3. He further testified that four out of the five family members he visited that night in December 2010 had died—two from chronic disease in 2015 and 2017, and two in a car accident in 2018. *Id.* The fifth family member was diagnosed with dementia and cannot remember whether he saw Petitioner on December 22, 2010. *Id.* Furthermore, Petitioner was unable to produce his Greyhound bus records from the trip, as they are only stored electronically for three years. *Id.* The district court held that this testimony established that his defense was actually and substantially prejudiced by the government’s pre-indictment delay. R. at 6. The government also sought to introduce evidence of Petitioner’s post-arrest, pre-*Miranda* silence as substantive evidence of Petitioner’s guilt, seemingly arguing that any reasonable person with an alibi defense would blurt it out upon being arrested. R. at 7.

The district court denied Petitioner’s motion to dismiss for pre-indictment delay, reasoning that his claim must fail because he could not demonstrate bad faith on the part of the government in waiting so long to indict him. R. at 6. The district court also dismissed his motion to suppress his post-arrest, pre-*Miranda* silence, reasoning that this Court’s precedent in *Salinas v. Texas* mandated such a result. R. at 10.

The United States Court of Appeals for the Thirteenth Circuit, over a vigorous dissent, affirmed on the basis of the district court’s findings. R. at 12. Petitioner appealed to this Court, which granted certiorari. R. at 16.

SUMMARY OF THE ARGUMENT

This case concerns the scope of two provisions of the Fifth Amendment to the United States Constitution: the Due Process Clause and the right against self-incrimination. Although Petitioner was able to prove that he suffered actual and substantial prejudice from a nearly ten year delay between being indicted and the alleged crime occurring, and even though the government advanced no compelling reason for the delay beyond the fact that Petitioner's case was "low-priority," the district court denied Petitioner's motion to dismiss for pre-indictment delay because he could not show that the delay was caused by bad faith on the part of the government. The court of appeals affirmed this conclusion.

Additionally, when FBI agents finally did arrest Petitioner and informed him of the charges against him, he elected to remain silent even before he had been read his *Miranda* rights, relying on his Fifth Amendment right against self-incrimination. The government, with the approval of the district court and court of appeals, seeks to use this post-arrest but pre-*Miranda* silence as substantive evidence of Petitioner's guilt.

This Court should reverse the judgment of the court of appeals on both issues and hold that the government's reasons for the pre-indictment delay must be weighed against the actual and substantial prejudice suffered by Petitioner, and that the Fifth Amendment prohibits the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt.

I.

This Court's precedent in *United States v. Marion* and *United States v. Lovasco* makes clear that the Due Process Clause protects individuals who suffer actual and substantial prejudice from pre-indictment delay even absent bad faith on the part of the government. The Court in *Marion* held that if a defendant can demonstrate actual prejudice, the courts must then undertake

“a delicate judgment based on the circumstances of each case” to determine whether “the rights of the defendant to a fair trial” have been violated such that due process requires the dismissal of the indictment against him. *Lovasco* reaffirmed this conclusion, recognizing that “proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.” Specifically, the Court stated that the due process inquiry should analyze the government’s conduct by reference to whether it “violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community’s sense of fair play and decency.” If so, due process requires that the prosecution be dismissed.

The majority of courts of appeals, however, have misinterpreted this Court’s precedent, reading *Marion* and *Lovasco* narrowly to require defendants levying a due process challenge to pre-indictment delay to prove bad faith on the part of the government. This confusion stems primarily from one sentence in the Court’s opinion in *Marion*, where Justice White conceded that “the Due Process Clause of the Fifth Amendment would require the dismissal of the indictment if it were shown at trial that the pre-indictment delay . . . was an intentional device to gain tactical advantage over the accused.” However, far from creating a bright-line rule that defendants must prove that the government delayed to gain a tactical advantage, this simply established the outer contour of unconstitutional preindictment delay, and must be read in light of the Court’s entire opinion which mandated a case-by-case inquiry. The Fourth, Seventh, and Ninth Circuits have recognized this, and hold consistent with *Marion* and *Lovasco* that once the defendant proves actual and substantial prejudice, the burden shifts to the government to provide reasons for the delay that are then balanced against the defendant’s prejudice to determine whether the defendant has been denied due process. The Fourth Circuit correctly recognized that the majority’s narrow

interpretation inevitably means that “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,” a conclusion which, “on its face, would violate fundamental conceptions of justice, as well as the community’s sense of fair play.”

This balancing test is not only the correct approach as a matter of law, but also of policy. Criminal defendants have limited access to the inner workings of a federal prosecutor’s office, and even if they did, courts would be left to psychoanalyze the government’s true intentions, which is something judges should avoid. Courts also routinely engage in balancing tests of this kind, specifically in the related Sixth Amendment speedy trial context. Finally, a balancing test is still a high bar for defendants to clear, and *Lovasco* made clear that delays undertaken for investigative or other legitimate law enforcement reasons are presumptively valid. This Court has recognized that due process plays a limited role in protecting defendants from pre-indictment delay, but it does play some role, and requiring a showing of bad faith effectively forecloses any successful due process challenge to pre-indictment delay.

II.

This Court has never decided whether post-arrest but pre-*Miranda* silence is admissible, and doing so would be a natural extension of this Court’s jurisprudence. This Court’s decisions in cases like *Bram v. United States*, *Griffin v. California*, *Miranda v. Arizona*, *Doyle v. Ohio*, and *Brecht v. Abrahamson* have continually expanded the Fifth Amendment’s right against self-incrimination to new circumstances, and deciding in this case that the right also extends to post-arrest, pre-*Miranda* silence would fit logically within this sequence.

While the district court and court of appeals held that this Court’s decision in *Salinas v. Texas* settled the issue, that case is not directly on point and there are several important differences

that make that case inapplicable to the case at bar. The holding of *Salinas* was that pre-custodial silence is admissible as substantive evidence of guilt. In that case, however, the defendant had not been arrested or placed into custody, voluntarily went to the police station to answer questions, knew he was free to leave or terminate the interview at any time, and was voluntarily answering the police's questions without having been Mirandized when he decided to remain silent in response to a question he felt was potentially incriminating. The Court held that, under those circumstances, his silence in response to that question was admissible as substantive evidence of his guilt. In this case, however, the silence the Government seeks to admit coincided with the Petitioner's arrest and the reading of the accusation against him, and he knew that he was being taken to jail no matter what he said. The Government contends that any reasonable person with an alibi defense would have blurted it out, but this is simply not true: most reasonable people know that they have the right to remain silent, that they should not talk to the police, that they should call an attorney in such a situation, and that the FBI is not going to remove the handcuffs and tell them to go on their way if they assert an alibi defense while being arrested. Silence under such circumstances is plainly an unequivocal invocation of the Fifth Amendment. The case at bar is readily distinguishable from the situation in *Salinas* and as such that case does not control.

Additionally, a majority of the courts of appeals hold that post-arrest, pre-*Miranda* silence is inadmissible as substantive evidence of guilt. This is the position taken by the Ninth Circuit and the D.C. Circuit, but, importantly, five other circuits go even further in protecting the right against self-incrimination: the First, Second, Sixth, Seventh, and Tenth Circuits all prohibit the use of not only post-arrest, but pre-arrest silence as substantive evidence of guilt. This is the correct approach, and the Court should take this opportunity to bring the remaining circuit courts in line by protecting the fundamental guarantees of the Fifth Amendment.

Finally, prohibiting the use of post-arrest, pre-*Miranda* silence is the correct approach as a matter of public policy. The right against self-incrimination is an enumerated Constitutional right that this Court and the common law have a rich history and tradition of protecting as a check against governmental abuse and overreach. Allowing a circuit split to percolate on such an important constitutional issue risks further confusion at the expense of the rights of American citizens. A holding to the contrary would also create gross misincentives for law enforcement by encouraging law enforcement officers to delay interrogating and Mirandizing arrestees. During this post-arrest but pre-*Miranda* period, arrestees would be faced with a catch-22: either remain silent and risk that silence being introduced as substantive evidence of guilt at trial, or talk and risk self-incrimination. This is exactly the situation that the Fifth Amendment seeks to protect against, and as such this Court should make clear that post-arrest, pre-*Miranda* silence is not admissible as substantive evidence of guilt.

ARGUMENT

I. The Due Process Clause of the Fifth Amendment Protects Individuals Who Suffer Actual and Substantial Prejudice Resulting From Pre-Indictment Delay Even Absent Bad Faith on the Part of the Government

“[T]he Due Process Clause always protects defendants against fundamentally unfair treatment by the government in criminal proceedings.” *Doggett v. United States*, 505 U.S. 647, 666 (1992) (Thomas, J., dissenting). Even though certain other enumerated protections for criminal defendants may not apply at the pre-indictment stage of a case—the Sixth Amendment right to a speedy trial, for example—“the statute of limitations does not fully define [defendants’] rights with respect to the events occurring prior to indictment,” and “the Due Process Clause has a limited role to play in protecting against oppressive delay.” *United States v. Marion*, 404 U.S. 307, 324 (1971); *United States v. Lovasco*, 431 U.S. 783, 789 (1977). This case concerns the parameters of that limited role that the Due Process Clause plays in protecting defendants from oppressive pre-indictment delay by the government. This Court should take the opportunity to make clear that its prior jurisprudence has established that, if a defendant can prove actual and substantial prejudice resulting from pre-indictment delay, the Due Process Clause requires the dismissal of the indictment if such a delay violates “those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community’s sense of fair play and decency,” regardless of whether the defendant can prove bad faith on the part of the government. *Lovasco*, 431 U.S. at 790 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Rochin v. California*, 342 U.S. 165, 173 (1952)) (internal cites and quotes omitted). In so clarifying its precedent, the Court will put an end to a circuit split that has denied defendants in too many jurisdictions the full constitutional protections to which they are entitled, and will advance important public policy indispensable to our system of limited government.

A. This Court Has Mandated a Case-By-Case Approach in Marion and Lovasco

Nearly half a century ago, this Court decided two cases—*United States v. Marion* (1971) and *United States v. Lovasco* (1977)—considering the circumstances “in which the Constitution requires that an indictment be dismissed because of delay between the commission of an offense and the initiation of prosecution.” *Lovasco*, 431 U.S. at 784. Both *Marion* and *Lovasco* made clear that the Due Process Clause of the Fifth Amendment, in certain situations, protects defendants against oppressive pre-indictment delay by the government. In *United States v. Marion*, the Court considered the defendants’ argument that the indictment against them should be dismissed because three years had passed between the occurrence of the alleged crimes and the filing of the indictment. *Marion*, 404 U.S. at 309. The defendants argued that because “the indictment required memory of many specific acts and conversations occurring several years before,” this delay violated their Fifth and Sixth Amendment rights. *Id.* at 310. They contended that the delay was “due to the negligence or indifference of the United States Attorney in investigating the case and presenting it to a grand jury,” and did not claim any specific prejudice other than the passage of time. *Id.* Writing for the Court, Justice White held first that the Sixth Amendment’s speedy trial provision was not intended to apply to the pre-indictment stage of a case. *Id.* at 321. He then observed that “the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges,” and said that because the defendants “rel[ie]d only on potential prejudice and the passage of time between the alleged crime and the indictment,” their petition for relief must fail. *Id.* at 323.

Critically, however, Justice White did not stop there. He wrote that because the Court’s ruling in the case would likely result in a criminal trial in which the defendants may claim actual as opposed to potential prejudice, “it is appropriate to note here that the statute of limitations does

not fully define the [defendants'] rights with respect to the events occurring prior to indictment.” *Id.* at 324. With this statement, the Court acknowledged that the Constitution may have a role to play in protecting defendants pre-indictment, if they could first demonstrate actual prejudice. Next, in a sentence that has confused lower courts for fifty years, Justice White agreed with the Government’s concession in the case that “the Due Process Clause of the Fifth Amendment would require the dismissal of the indictment if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice to [defendants'] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” *Id.* While Justice White made explicit that he was simply affirming a concession the Government had made in that case, and by doing so identifying one clear example of due process abuse, several courts of appeals have interpreted his statement to impose a dual requirement on defendants requesting dismissal due to pre-indictment delay to show that the delay caused (1) actual and substantial prejudice, and (2) was intentional on the part of the government to gain a tactical advantage.

This reading is foreclosed, however, by the very next statement from the Court:

However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution. . . . To accommodate 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. It would be unwise at this juncture to attempt to forecast our decision in such cases.

Id. at 324–325. The crux of the Court’s observation about pre-indictment delay in *Marion*, therefore, is that if a defendant can first show actual prejudice, the courts must then undertake “a delicate judgment based on the circumstances of each case” to determine whether “the rights of the defendant to a fair trial” have been violated such that due process requires the dismissal of the indictment against him. *Id.* This necessarily requires in each case a balancing of the prejudice

suffered by the defendant against the reasons asserted by the government for the delay. If this balance tips in favor of the defendant and against his right to a fair trial, the prosecution must be dismissed. There is no requirement—and indeed practically there could not be—that the defendant prove bad faith on the part of the government to prevail in such a balancing exercise.

The Court took up the issue again six years later in *United States v. Lovasco*, reaffirming the case-by-case inquiry mandated in *Marion*. There, the defendant argued that he was prejudiced by a delay of more than eighteen months between the alleged crimes having been committed and the filing of the indictment against him, claiming that two witnesses material to his defense had died during that period. *Lovasco*, 431 U.S. at 785. Accepting *arguendo* the Eighth Circuit’s conclusion that he had suffered actual and substantial prejudice due to the death of these two witnesses, the Court nevertheless held that because the government had delayed indicting him for investigative reasons, due process did not mandate dismissal of the prosecution. *Id.* at 791.

Writing for the Court, Justice Marshall reiterated that *Marion* established that “proof of actual prejudice makes a due process claim concrete and ripe for adjudication, not that it makes the claim automatically valid,” and that “proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry *must consider the reasons for the delay as well as the prejudice to the accused.*” *Id.* at 789–790 (emphasis added). Instead of substituting the judiciary’s judgment for the government’s as to when the prosecution has sufficient evidence to proceed with an indictment, Justice Marshall admonished that courts are only to judge the government’s conduct by reference to whether it “violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community’s sense of fair play and decency.” *Id.* at 790 (internal cites and quotes omitted). In doing so, Justice Marshall provided a rubric for courts to use in conducting case-by-case inquiries

into whether the prejudice to the accused outweighs the government's reasons for a pre-indictment delay and thus whether due process mandates the dismissal of the prosecution. The Court went on to say at the end of the opinion—perhaps in recognition that its holding in *Marion* was being read too narrowly by lower courts—that:

In *Marion* we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions. More than five years later, that statement remains true. . . . We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed *to the particular circumstances of individual cases*.

Id. at 796–797 (emphasis added).

Marion and *Lovasco* thus establish a two-part inquiry into whether the Due Process Clause of the Fifth Amendment requires dismissal of a prosecution for pre-indictment delay. First, the defendant must demonstrate that he has suffered actual and substantial prejudice from the delay. This is admittedly a high bar. If the defendant can clear this hurdle, then the court is to weigh the government's reasons for the delay against the prejudice suffered by the defendant, with reference to “those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency.” *Id.* at 790 (internal cites and quotes omitted). To be sure, a showing of bad faith on the part of the government in delaying indictment would weigh heavily in favor of dismissing the prosecution. But nowhere in this Court's precedent has such a showing been held to be a necessary ingredient in finding a due process violation. Instead, this Court has counseled that courts must undertake “a delicate judgment based on the circumstances of each case” to determine whether a defendant's due process rights have been violated as a result of pre-indictment delay. *Marion*, 404 U.S. at 324.

B. Despite This Court’s Unambiguous Jurisprudence, the Majority of Circuits Have Abdicated Their Responsibility to Safeguard Individual Rights

Even though this Court was clear that the principles of due process must be applied to “the particular circumstances of individual cases” in deciding whether the Due Process Clause has been violated by a pre-indictment delay, a majority of courts of appeals have clung to Justice White’s concession in *Marion* that “the Due Process Clause of the Fifth Amendment would require the dismissal of the indictment if it were shown at trial that the pre-indictment delay . . . was an intentional device to gain tactical advantage over the accused,” reading that decision narrowly to require a showing of bad faith on the part of the government for a due process challenge to pre-indictment delay to succeed. *Lovasco*, 431 U.S. at 797; *Marion*, 404 U.S. at 324. This interpretation is wrong, and has meant that in a majority of circuits, “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.” *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). Indeed, “[t]his conclusion, on its face, would violate fundamental conceptions of justice, as well as the community’s sense of fair play.” *Id.* This Court should take the opportunity to make explicit that its precedent has never required a showing of bad faith on the part of the government, and affirm that the minority’s case-by-case balancing approach is correct as a matter of law and policy.

1. The Majority’s Narrow Interpretation of Marion and Lovasco is Wrong

A majority of courts of appeals, including the Thirteenth Circuit below, read this Court’s decisions in *Marion* and *Lovasco* to require defendants to prove (1) actual and substantial prejudice and (2) that the delay was the product of a deliberate act by the government to gain a tactical advantage over the accused. Flatly, this conclusion is wrong, and stems from a narrow reading of *Marion* that places too much weight on one sentence and removes that sentence from the context

of the opinion as a whole. As discussed previously, Justice White’s acknowledgement in *Marion* that “the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown . . . that the delay was an intentional device to gain tactical advantage over the accused,” was, by his own admission, simply a concession that using pre-indictment delay to gain tactical advantage would violate due process. *Marion*, 404 U.S. at 324. As the Fourth Circuit noted in *Howell*, the Court’s statements in *Marion* and *Lovasco* about intentional delay to gain an advantage over the defendant “established the outer contour of unconstitutional preindictment delay.” *Howell*, 904 F.2d at 894. The Ninth Circuit understands this as well, noting in its decision in *United States v. Moran* that “[t]he language from [*Marion* and *Lovasco*] merely acknowledges governmental concessions that intentional or reckless conduct would or might be considered violations of the due process clause if actual prejudice had been shown.” *United States v. Moran*, 759 F.2d 777, 781 (9th Cir. 1985). Both of those courts refuse therefore to read *Marion* so narrowly as to require a showing of bad faith on the part of the government, instead heeding the admonishments of the Court in both *Marion* and *Lovasco* to undertake “a delicate judgment based on the circumstances of each case” and apply “settled principles of due process . . . to the particular circumstances of individual cases.” *Marion*, 404 U.S. at 324; *Lovasco*, 431 U.S. at 797.

Indeed, Chief Judge Martz, dissenting from the opinion of the Thirteenth Circuit in this case, correctly points out that, in distinguishing between delay undertaken by the government solely to gain a tactical advantage over the accused in *Moran* and investigative delay in *Lovasco*, this Court “merely defined two ends of a spectrum, leaving to the lower courts to apply a balancing test to resolve different factual scenarios.” R. at 13. Additionally, Judge McKay of the Tenth Circuit, writing in dissent in *United States v. Radmall*, explained the problems with the narrow

interpretation of *Marion* and *Lovasco* adhered to by his and other circuit courts of appeal, noting that their “excessively narrow interpretation of the *Marion* standard . . . seems to be removed from the underpinnings of *Marion* itself.” *United States v. Radmall*, 591 F.2d 548, 552 (10th Cir. 1978) (McKay, J., dissenting). He considered Justice White’s statement about tactical advantage in *Marion* and concluded that his “discussion does not indicate that the Government’s concession was to be taken as the minimum standard for due process violation [but] represents only a flagrant example of due process abuse.” *Id.* He then considered the Court’s statement at the end of the *Lovasco* opinion that “so few defendants have established that they were prejudiced by the delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay,” reasoning that “[t]he obvious implication of this comment is that, in the view of the Supreme Court, there may be constitutionally significant reasons for delay other than to harass the defendant or to obtain a tactical advantage over him.” *Id.* at 553. Having assailed the majority’s narrow interpretation of *Marion* on textual grounds, he then explained why requiring a showing of bad faith on the part of the government is the wrong approach as a matter of policy:

[T]he rule binds us to a standard that is extremely difficult for a defendant to meet. Not only must the defendant show actual prejudice, but he must demonstrate that the Government was subjectively motivated by the sort of personal animus inherent in harassment or the kind of Machiavellian machinations involved in obtaining tactical advantage. Given the practical difficulties in showing such motivations, our narrow rule takes on the trappings of a literary curiosity fit more for ritual invocation than practical application.

Id. The majority’s narrow reading of this Court’s precedent is not only foreclosed by the letter of *Marion* and *Lovasco*, therefore, but also has the practical effect of all but denying defendants the protection of the Due Process Clause during the pre-indictment phase of a case to which they are

constitutionally entitled. This Court should make clear that the approach taken by the Fourth, Seventh, and Ninth Circuits is correct, and reaffirm that its decisions require a case-by-case balancing approach.

2. The Fourth, Seventh, and Ninth Circuits Have Correctly Applied *Marion* and *Lovasco*

Three courts of appeals—the Fourth, Seventh, and Ninth Circuits—have correctly interpreted *Marion* and *Lovasco* to not require a showing of bad faith on the part of the government, and instead balance the prejudice suffered by the defendant against the government’s reason for the delay as required by this Court’s precedent. The Fourth Circuit in *Howell v. Barker*, noting that this Court has eschewed any “black-letter test for determining unconstitutional preindictment delay,” observed that “the Supreme Court made it clear that the administration of justice, vis-à-vis a defendant’s right to a fair trial, necessitated a case-by-case inquiry based on the circumstances of each case.” *Howell*, 904 F.2d at 895. Rejecting the State of North Carolina’s argument that the defendant had to prove improper prosecutorial motive before securing a due process violation, the court stated that “[t]he better position . . . is to put the burden on the defendant to prove actual prejudice. Assuming the defendant can establish actual prejudice, then the court must balance the defendant’s prejudice against the government’s justification for the delay.” *Id.* Quoting *Lovasco*, the court said that in doing so, “[t]he basic inquiry then becomes whether the government’s action in prosecuting after substantial delay violates ‘fundamental conceptions of justice’ or ‘the community’s sense of fair play and decency.’” *Id.* This is a much better reading of this Court’s precedent and still places a substantial burden on defendants to prove that they have been actually prejudiced by any delay.

Likewise, in *United States v. Sowa*, the Seventh Circuit read *Marion* and *Lovasco* as establishing that “once the defendant has proven actual and substantial prejudice, the government

must come forward and provide its reasons for the delay. The reasons are then balanced against the defendant's prejudice to determine whether the defendant has been denied due process." *United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994). The court acknowledged that this result was "commanded not only by precedent, but by logic. Once the defendant has cleared the monumental hurdle of providing prejudice, the government should explain its reasons." *Id.* Finally, the court noted that this requirement places no onerous burden on the government, as "their standard practice in responding to motions to dismiss for pre-indictment delay is to explain the delay. And, as indicated by *Lovasco*, if the cause of the delay is legitimately investigative in nature, a court will not find a due process violation." *Id.* The Seventh Circuit thus highlighted how narrow of a rule this really is: defendants must first clear the "monumental hurdle" of proving prejudice, the government already routinely explains its reasons for pre-indictment delays, and those delays are presumptively valid if undertaken for legitimate law enforcement or investigative reasons.

Finally, the Ninth Circuit in *United States v. Moran* rejected the strict approach taken by the majority of circuits, noting that "[t]he *Lovasco* court did not set out intent or recklessness as required standards of fault," and that the government's assertion in that case "that *Lovasco* overrules the possibility that due process might be violated upon a negligent delay by the government is not supported by the cited cases." *Moran*, 759 F.2d at 781. Instead, "[t]he *Lovasco* court simply held that after proof of prejudice is shown, 'the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.'" *Id.* (internal cites omitted). As such, "[t]he determination of whether a pre-indictment delay has violated due process is essentially decided under a balancing test, and we do not find that intent or reckless behavior by the government is an essential ingredient in the mix," but, consistent with a balancing approach, "[i]f mere negligent conduct by the prosecutors is asserted, then obviously the delay and/or prejudice

suffered by the defendant will have to be greater than that in cases where recklessness or intentional government conduct is alleged.” *Id.*

The Fourth, Seventh, and Ninth Circuits thus read *Moran* and *Lovasco* correctly as requiring a case-by-case inquiry, balancing the actual prejudice to the defendant against the reasons for the delay asserted by the government. It is important to note that each of these courts has emphasized the narrow role that the due process clause plays in protecting defendants from pre-indictment delay, and although that role is narrow, it still exists. Requiring a showing of bad faith by the government would mean that “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.” *Howell*, 904 F.2d at 895. The majority’s approach of requiring a showing of bad faith by the government thus is not only unsupported by this Court’s precedent, but is also wrong as a matter of public policy.

C. A Balancing Test is the Correct Approach as a Matter of Public Policy

Because requiring defendants to prove bad faith by the prosecution is a nigh-impossible hurdle to clear, weighing the prejudice to the defendant against the government’s asserted reason for the delay in determining whether due process requires dismissal of an indictment due to pre-indictment delay is the correct approach as a matter of public policy. As Chief Judge Martz noted below, “criminal defendants have limited access to the inner workings of a federal prosecutor’s office, which will disable them from effectively proving the government’s intent. And if the government has already delayed in bad faith, it is likely they would continue to act in bad faith to conceal that fact.” R. at 13. To make matters worse, many documents that might aid a defendant in proving the government’s intent are protected from discovery, such as attorney work product. Proving malintent by the government would require “demonstrat[ing] that the Government was

subjectively motivated by the sort of personal animus inherent in harassment or the kind of Machiavellian machinations involved in obtaining tactical advantage.” *Radmall*, 591 F.2d at 552 (McKay, J., dissenting). Not only is this exceptionally hard for a defendant to do, but it would “leave[] the court in the difficult if not impossible position of psychoanalyzing the government’s true intentions,” something courts should avoid if at all possible. R. at 13.

Furthermore, courts routinely engage in balancing tests of this kind, specifically in the related Sixth Amendment speedy trial context. In *Barker v. Wingo*, this Court refused to recognize an “inflexible approach[]” to speedy trial claims, instead requiring courts to weigh (1) the length of the delay in bringing the defendant to trial, (2) the reason for delaying the defendant’s trial, (3) whether the defendant asserted his right to a speedy trial, and (4) the prejudice that the delay caused to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The Court noted that the factors do not have any “talismanic qualities” and left it to the lower courts to engage “in a difficult and sensitive balancing process . . . carried out with full recognition that the accused’s interest in a speedy trial is specifically affirmed in the Constitution,” just like the accused’s due process rights. *Id.* at 533. Thus, the Fifth Circuit’s assertion, adopted by the lower courts in this case, that a pre-indictment delay balancing test “seeks . . . to compare the incomparable” is without merit. R. at 5 (citing *United States v. Crouch*, 84 F.3d 1497, 1512 (5th Cir. 1996) (en banc)). Courts cannot simply choose to relegate certain rights to second-tier status because enforcement of those rights might be difficult and delicate.

Finally, it is worth repeating that even using a balancing approach, it is still exceptionally difficult for defendants to establish that their prosecution should be dismissed for pre-indictment delay. Establishing actual and substantial prejudice as the result of a pre-indictment delay is a very high bar to clear. And this Court’s precedent in *Lovasco* makes clear that delays undertaken for

legitimate law enforcement and investigative reasons are presumptively valid. Courts will not step in to second-guess prosecutors in their judgment as to when they have enough evidence to prove their case beyond a reasonable doubt and thus choose to indict. Prosecutors may delay indictment to gather more evidence on accomplices, protect undercover sources, or any number of other reasons, and their prerogative to do so remains unchallenged under a case-by-case balancing approach. What this Court’s precedent makes clear, however, is that if a defendant can clear the hurdle of proving substantial and actual delay, the burden then shifts to the government in explaining that delay. While a showing of bad faith on the part of the government certainly weighs against them, there is no requirement that defendants prove bad faith. Intent, recklessness, or even gross negligence as occurred in this case, are all potentially enough to offend due process, keeping in mind “those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community’s sense of fair play and decency.” *Lovasco*, 431 U.S. at 790 (internal cites and quotes omitted). Petitioner respectfully asks this Court to clarify as such in ruling on the case at bar.

II. Admission of an Accused’s Post-Arrest but Pre-Miranda Silence as Substantive Evidence of Guilt Violates the Fifth Amendment

The Fifth Amendment to the United States Constitution establishes that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. As this Court has long stated, this enumerated right “registers an important advance in the development of our liberty—one of the great landmarks in man’s struggle to make himself civilized.” *Ullmann v. United States*, 350 U.S. 422, 426 (1956). But most importantly, the right against self-incrimination reflects “our unwillingness to subject those suspected of a crime to the cruel trilemma of self-accusation, perjury or contempt.” *Murphy v. Waterfront Comm’n of N.Y.C. Harbor*, 378 U.S. 52, 55 (1964). The right against self-incrimination underpins the dispute now

before this Court. Specifically, this dispute involves the circumstances under which an accused's silence may be used as substantive evidence of his guilt at trial and whether such admission would violate the protections guaranteed by the Fifth Amendment. In response, the Government argues that this Court should authorize the use of Petitioner's post-arrest but pre-*Miranda* silence as substantive evidence of his guilt. However, the Government treads on hallowed grounds in this case, and it requests that this Court contravene established American legal heritage regarding the right against self-incrimination. For this reason, the Petitioner requests this Court to adopt an outright prohibition on the government's use of an accused's post-arrest but pre-*Miranda* silence as substantive evidence of guilt in an effort to continue the expansion of the heralded right against self-incrimination.

A. This Court Has Never Decided Whether Post-Arrest but Pre-Miranda Silence is Admissible and Doing so Would be a Natural Extension of The Court's Jurisprudence

The issue in this case lies in an unsettled grey area that has yet to be addressed by this Court. This Court has established that pre-custodial silence is admissible as substantive evidence of guilt. *Salinas v. Texas*, 570 U.S. 178, 186–91 (2013) (plurality opinion). However, this Court has also held that post-*Miranda* silence is inadmissible as substantive evidence of guilt but is admissible only as impeachment evidence. *See Brecht v. Abrahamson*, 507 U.S. 619, 622–23 (1993); *see also Doyle v. Ohio*, 426 U.S. 610, 616–20 (1976). Furthermore, this Court strengthened the Fifth Amendment's protection against self-incrimination in *Griffin v. California*, where it held, "the Fifth Amendment . . . forbids . . . comment by the prosecution on the accused's silence." *Griffin v. California*, 380 U.S. 609, 615 (1965). Although *Griffin* was in the context of a defendant's refusal to testify at trial, this Court has stated that "the prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation."

Miranda v. Arizona, 384 U.S. 436, 471 n.37 (1966). This case involves the grey area in between the questions that this Court has answered: whether the government may introduce Petitioner's post-arrest but pre-*Miranda* silence as substantive evidence of his guilt at trial.

1. The Government and Lower Courts' Reliance on Salinas is Misplaced

The lower courts erred in adopting the Government's argument in this case because *Salinas* should not control. *Salinas* is the only decision from this Court that comes close to the question presented by the case at bar but is inapposite for several reasons. The Government's reliance on *Salinas* attempts to take this Court's precedent and extend it far beyond what was intended. In *Salinas*, the defendant had not been placed into custody, had not been arrested, and had not received any *Miranda* warnings. 570 U.S. at 181. Here, Petitioner had been placed into custody via formal arrest. R. at 7. In his majority opinion, District Judge Maddrey agreed with the Government that because Petitioner's silence coincided with his arrest, *Salinas* should control. R. at 8. However, under this logic, the defendant's silence in *Salinas* would be inadmissible as substantive evidence of guilt because he was not formally arrested until after he fell silent to questioning from law enforcement. *Salinas*, 570 U.S. at 181. Indeed, the Government and the district court misread *Salinas* and this Court's precedent.

Additionally, the defendant in *Salinas* chose to voluntarily answer a police officer's questions, and only after this did he attempt to invoke his right to remain silent. *Salinas*, 570 U.S. at 181. By contrast, Petitioner unequivocally remained silent throughout his entire interaction with police. R. at 7. Finally, the defendant in *Salinas* agreed to accompany officers to the police station and was even free to leave at any time during the interview, throughout which he knowingly subjected himself to potential incrimination. *Salinas*, 570 U.S. at 185. Conversely, the record reveals that Petitioner did no such thing. R. at 7–8.

Given that *Salinas* is easily distinguishable from the case at bar, the Government's justification for its actions is insufficient. Meaning, the Government no longer has any shadow of this Court's precedent to support its argument, and thus, its actions contravened Petitioner's Fifth Amendment right against self-incrimination. As a last-ditch justification, the Government argues that any reasonable person with an alibi defense would assert that defense in the face of federal agents reading accusatory charges to them. This argument is speculative and incorrect. The Petitioner, or any person similarly situated to him, should not be expected to make any statements in the face of accusations by the government. Additionally, Petitioner was undoubtedly shocked that he was taken into custody at all given that the offense pertaining to that arrest occurred nearly ten years before that moment. His silence in such a situation constituted an unambiguous invocation of his Fifth Amendment rights.

Furthermore, the dissent in *Salinas*, which commanded four votes, further demonstrates the reasons that this Court should now prohibit the Government from introducing post-arrest, pre-*Miranda* silence as substantive evidence of guilt. *Salinas*, 570 U.S. at 193 (Breyer, J., dissenting). Writing for the dissent in that case, Justice Breyer stated, "[t]he Fifth Amendment prohibits prosecutors from commenting on an individual's silence where that silence amounts to an effort to avoid becoming a witness against himself." *Id.* (internal cites omitted). Justice Breyer continued:

Thus, where the Fifth Amendment is at issue, to allow comment on silence directly or indirectly can compel an individual to act as a witness against himself . . . And that is similarly so whether the questioned individual, as part of his decision to remain silent, invokes the Fifth Amendment explicitly or implicitly, through words, through deeds, or through reference to surrounding circumstances.

Id. When Petitioner was read the charges against him, he elected not to speak to avoid anything he said being used against him, exactly what the Fifth Amendment protects. R. at 7. The dissent

reasoned that Salinas need not have expressly invoked his Fifth Amendment right because he was facing a criminal investigation, and the police made clear that he was a suspect in that criminal investigation. Therefore, “these circumstances give rise to a reasonable inference that Salinas’s silence derived from an exercise of his Fifth Amendment right.” *Id.* at 201. The dissent pointed out that because Salinas was a suspect in a criminal investigation, the government should not have been able to use his silence against him. *Id.* Here, Petitioner was not just a suspect in a criminal investigation. Instead, he had already been formally arrested and taken into custody. If the Fifth Amendment right against self-incrimination is to apply with full force at any point in a criminal investigation, it must be at the moment of custody and arrest, when the threat of coercion and intimidation is at its zenith. Therefore, there is no doubt that there are stark differences between *Salinas* and this case, and this Court should recognize a heightened protection, especially where a defendant has already been taken into custody and read the charges pending against him.

B. The Majority of Circuit Courts Have Held That Post-Arrest, Pre-Miranda Silence is Not Admissible

Because this Court has never spoken directly on the issue of whether post-arrest but pre-*Miranda* silence is admissible at trial to prove guilt, a split has emerged among the circuits. The Ninth and D.C. Circuits have held that silence post-arrest, pre-*Miranda* may not be used as substantive evidence of an accused’s guilt. *United States v. Velarde-Gomez*, 269 F.3d 1023, 1033 (9th Cir. 2001); *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997). Five more circuits, the First, Second, Sixth, Seventh, and Tenth all recognize an even more comprehensive Fifth Amendment protection and completely prohibit the use of pre-arrest and post-arrest silence as substantive evidence of guilt. *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989); *United States v. Okatan*, 728 F.2d 111, 115 (2d Cir. 2013); *Seymour v. Walker*, 224 F.3d 542, 560 (6th Cir. 2000); *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1049 (7th Cir. 2001); *United States v.*

Burson, 952 F.2d 1196, 1200 (10th Cir. 1991). Meaning, these circuits have extended the threshold for Fifth Amendment protection beyond what Petitioner is respectfully requesting this Court to recognize in the case at bar.

Only the Fourth, Fifth, Eighth, and Eleventh Circuits permit the government to comment on the defendant's silence at any time prior to the issuance of *Miranda* warnings. *United States v. Cornwell*, 418 F. App'x 224, 227 (4th Cir. 2011); *United States v. Salinas*, 480 F.3d 750, 758–59 (5th Cir. 2007), *cert. denied*, 552 U.S. 990 (2007); *United States v. Osuna-Zepeda*, 416 F.3d 838, 844 (8th Cir. 2005); *United States v. Wilchombe*, 838 F.3d 1179, 1191 (11th Cir. 2016). These circuits encroach on the Constitution, Fifth Amendment, and the right against self-incrimination and by doing so perpetuate confusion and facilitate government overreach. This Court should adopt the standard that post-arrest, but pre-*Miranda* silence is inadmissible because it is the correct approach already adhered to by a majority of the courts of appeals.

In *United States v. Moore*, the D.C. Circuit held that the government's use of silence post-arrest, but pre-*Miranda* was a violation of an accused's Fifth Amendment right against self-incrimination. In that case, the government violated the defendant's Fifth Amendment right against self-incrimination by commenting about the defendant's silence as agents searched the hood of his vehicle for contraband, which the government argued was indicative of his guilt. *Moore*, 104 F.3d at 384. That court held that "although in the present case, interrogation per se had not begun, neither *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." *Id.* at 385. The court further stated that "[w]hile a defendant who chooses to volunteer an unsolicited admission or statement to police before questioning may be held to have waived the protection of the right, the defendant who stands silent must be treated as having asserted it." *Id.* The D.C. Circuit reasoned

that allowing prosecutorial comment upon the assertion of silence would “unduly burden the Fifth Amendment privilege.” *Id.* The D.C. Circuit in *Moore* held that it was the correct approach to make custody, not interrogation, the triggering mechanism for the right of pretrial silence under *Miranda*. The court’s reasoning in that case is the correct approach as a matter of law and policy. The court recognized that “any other holding would create an incentive for arresting officers to delay interrogation in order to create an intervening silence that could then be used against the defendant.” *Id.*

The court in *Moore* struck down the government’s use of Moore’s pre-trial silence on the basis that this admission violated Moore’s Fifth Amendment right against self-incrimination. The D.C. Circuit also relied on this Court’s precedent, *Doyle* and its progeny, to reject the exact same argument posited by the Government in the case at bar. The court reasoned that “neither *Doyle* nor any other case stands for the proposition advanced by the prosecution that the defendant’s silence can be used against him so long as he has not received his *Miranda* warnings. Logically, none could.” *Id.* at 386. In *Moore*, the D.C. Circuit was clear that any argument similar to the one the Government presents to this Court in this case contravenes the very purpose of the Fifth Amendment.

Similarly, the Ninth Circuit in *United States v. Velarde-Gomez* stated that, “[o]nce the government places an individual in custody, that individual has a right to remain silent in the face of government questioning, regardless of whether the *Miranda* warnings are given. Moreover, the government may not burden that right by commenting on the defendant’s post-arrest silence at trial.” 269 F.3d at 1029 (citing *Griffin*, 380 U.S. at 614). In that case, the trial court admitted a police officer’s testimony about the defendant’s silence and lack of physical or emotional reaction when he was confronted with a large amount of marijuana in the gas tank of his vehicle. *Velarde-*

Gomez, 269 F.3d at 1026. As a result, the Ninth Circuit held the trial court’s admittance of that testimony violated the defendant’s right against self-incrimination. *Id.* at 1033. In doing so, the Ninth Circuit relied heavily on this Court’s decisions in *Griffin*, *Miranda*, and *Doyle* to hold that post-arrest, but pre-*Miranda* silence may not be admitted by the government as substantive evidence of a defendant’s guilt. *Id.* The Ninth Circuit specifically noted that because the right to remain silent derives from the Constitution and not from *Miranda* warnings, regardless of whether the warnings are given, comment at trial on a defendant’s choice to remain silent violates the Fifth Amendment. *Id.*

Importantly, the Ninth Circuit in *Velarde-Gomez* relied heavily upon its own precedent from *United States v. Whitehead*. *Velarde-Gomez*, 269 F.3d at 1029. And *Whitehead* is nearly factually analogous to the case at bar. *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000), *cert. denied*, 531 U.S 885 (2000). In *Whitehead*, the defendant and his brother were arrested and escorted into custody, but Whitehead remained silent. *Id.* at 638. He was not read any *Miranda* warnings, and during the government’s case-in-chief, the prosecutor pointed out that Whitehead remained silent at that time. *Id.* The court in *Whitehead* held that “regardless of whether the *Miranda* warnings [are] actually given, comment on the defendant’s exercise of his right to remain silent is unconstitutional.” *Velarde-Gomez*, 269 F.3d at 1030 (internal quotes omitted). The Ninth Circuit relied on *Whitehead* and affirmed its reasoning in deciding *Velarde-Gomez*, holding that “the district court erred by allowing the government to comment on Velarde’s post-arrest, pre-*Miranda* silence.” *Id.* at 1033. In deciding *Velarde-Gomez*, the Ninth Circuit premised much of its justification on *Whitehead* because *Whitehead* offered a clear factual scenario when the government’s conduct clearly violated the right against self-incrimination: a factual scenario that is nearly identical to the case at bar.

These circuits properly interpreted this Court's precedent and the Fifth Amendment by prohibiting government comment on post-arrest, pre-*Miranda* silence as substantive evidence of guilt. In addition, there are still five other circuits that extend Fifth Amendment protection beyond the Petitioner's request in this case and apply the right against self-incrimination even prior to arrest where the defendant remains silent. In total, seven circuits have recognized the legitimacy of the Fifth Amendment and the right against self-incrimination in the post-arrest, pre-*Miranda* context, and Petitioner respectfully requests this Court to hold the same way. This Court should follow the majority of the circuits in holding that post-arrest, but pre-*Miranda* silence cannot be used by the government as substantive evidence of a defendant's guilt.

C. This Court Should Prohibit the Use of Post-Arrest, Pre-Miranda Silence as Substantive Evidence of Guilt as a Matter of Public Policy

The protections of the Fifth Amendment's right against self-incrimination are vital to the American criminal justice system. Nations look to the United States and its justice system because of this Court's gracious extension of equity to even those facing social condemnation via criminal prosecution. In its first decision on the right against self-incrimination, *Bram v. United States*, this Court laid out the policy behind this important right. *Bram v. United States*, 168 U.S. 532, 544 (1897). This Court discussed how the right against self-incrimination is rooted in the principles of civil liberty and humanity, and that it originated from protest against the inquisitorial and manifestly unjust methods of interrogating accused persons. *Id.* The Court in *Bram* further spoke about the use a suspect's silence to make inferences about his guilt because many states allowed its admission during that time. *Id.* at 563.

Similarly, in 1965, this Court decided *Griffin v. California*, which was the next canonical case regarding the right against self-incrimination. *Griffin*, 380 U.S. at 609. The *Griffin* Court held that the Government may not comment on a defendant's right not to testify. Then, in 1966, this

Court decided the landmark decision of *Miranda v. Arizona*, where this Court announced a procedural safeguard in the form of the right to remain silent. 384 U.S. at 467–68. Several other decisions have followed regarding when silence may be admitted as substantive evidence of guilt. The progression of this Court’s jurisprudence regarding the right against self-incrimination is clear. The Fifth Amendment must not be trifled with, and the Government argues that this Court should reverse the natural progression of this fundamental right. This Court scathed the issue of government comment on post-arrest, pre-*Miranda* silence in *Salinas*. But the proper result was left in the ethereal for lower courts to decide in potential violation of *Salinas*.

As a result, circuit courts are split on this issue, and factions in each court are citing the separate opinions of *Salinas* in an effort to justify an expansion or contraction of the right against self-incrimination. Given that the rationale of the holding in *Salinas* only commanded a plurality, this Court should take the case at bar as an opportunity to establish concrete precedent on an unsettled legal issue of great importance.

If this Court fails to clarify the Fifth Amendment’s protection of the right to silence, there will continue to be a jurisprudential entanglement, furthering blurred lines and confusion amongst judges and practitioners alike. As the issue stands, a federal district court judge would be no more entitled to advise a defendant about the scope of the right against self-incrimination than a criminal defense practitioner. The scope of a criminal defendant’s right against self-incrimination is of utmost importance as a matter of law and of policy. The boundaries of this right must be made clear, and it must be resolved in favor of the protections of the Constitution.

If this Court holds that defendants may only be protected by the Fifth Amendment after *Miranda* warnings are issued, this will set a very dangerous precedent. As Chief Judge Martz in the Thirteenth Circuit’s dissent stated, “[i]f police understand that an accused’s silence can be used

against him before interrogation, it gives police an incentive to delay interrogating arrestees.” R. at 14. For this Court to hold that an accused is only protected by the Fifth Amendment after being Mirandized is to all but strip the defendant entirely of the amendment’s protection. The Government could virtually circumvent *Miranda* in its entirety by fully mobilizing a defendant’s silence against him. Indeed, by the time that the Government actually complies with this Court’s precedent and Mirandizes a suspect, the prosecution’s case-in-chief would be all but completely planned as an agent must simply testify about a defendant’s silence in the face of allegations. This practice would return criminal investigation practices back in time to the coercive and inquisitorial days of medieval justice. This is not what the foundations of the Fifth Amendment seek to protect, and it is only by allowing the accused the right to silence once accusations are read against them that stays true to the Fifth Amendment’s protection. Petitioner respectfully requests this Court to clarify and untangle the circuit split created by the lower courts and this Court’s precedent in *Salinas* and provide protection against the government’s blatantly unfair advantage of using an accused’s silence as substantive evidence of his guilt. This Court should honor the constitutional bounds created by the Fifth Amendment and hold in favor of Petitioner that post-arrest, pre-*Miranda* silence may not be admitted against him as evidence of his guilt.

CONCLUSION

This Court should REVERSE the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

TEAM 31
ATTORNEYS FOR PETITIONER