No. 18-5003

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IN THE SUPREME COURT OF THE UNITED STATES

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ROLANDO MULET, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly determined that the admission at trial of petitioner's volunteered statement to police -- made after being provided a copy of a search warrant, but before petitioner was arrested and was read his Miranda rights -- that he "had nothing to say" did not violate petitioner's Fifth Amendment right against compelled self-incrimination.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not published in the Federal Reporter but is reprinted at 729 Fed. Appx. 697.

## JURISDICTION

The judgment of the court of appeals was entered on March 27, 2018. The petition for a writ of certiorari was filed on June 25, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and four counts of encouraging an alien to reside unlawfully in the United States, in violation of 8 U.S.C. 1324(a)(1)(A)(iv), (v)(II), and (B)(i). Judgment 1. He was sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-11.

1. a. Petitioner and Odalys Marrero owned and operated Tita's Tramite & Travel (Tita's), a Florida business that provided immigration services. Pet. App. 2. From 2009 to 2014, petitioner and Marrero arranged fake marriages between non-Cuban aliens and Cuban citizens, for the purpose of deceiving the federal government into granting the non-Cuban aliens legal permanent residency in the United States. Id. at 3-6; see id. at 3 n.2 (explaining that, under the Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161, a Cuban citizen's status may be adjusted to lawful permanent resident after living in the United States for more than one year, and that the Cuban citizen's spouse's status may also be adjusted to lawful permanent resident); Gov't C.A. Br. 4.

Manuel Andres Gomez, Natacha Perera, and Okyvi Olmar Yoll Mesa are Venezuelan citizens who were living in the United States and seeking lawful permanent residency. Pet. App. 3-4. Each met

with petitioner and Marrero at Tita's in order to "fix" his or her immigration status. Id. at 4. Marrero told them that she was experienced in "getting [immigration] papers," and she explained that marrying a Cuban national would allow them to obtain "green cards," i.e., to obtain lawful-permanent-resident status. Ibid. (brackets in original). Marrero's fee for arranging such a marriage ranged from $16,000 to $21,000. Ibid. Marrero specified that all payments had to be in cash and that everything was to be discussed either in person with her or petitioner or over the phone using code words. Ibid.

Once Gomez, Perera, and Yoll made the initial payments, Marrero introduced them to their ersatz future spouses, Cuban citizens whom petitioner and Marrero procured and paid. Pet. App. 4. Gomez, Perera, and Yoll all were then "'married'" to their Cuban spouses in "sham" weddings. Id. at 4 & n.4. The "marriages" all took place at Tita's, and petitioner signed and notarized the marriage licenses. Id. at 4; Gov't C.A. Br. 14. At Marrero's instructions, the couples took photographs at the weddings and at various other locations to make their marriages appear real. Pet. App. 4. In fact, none of the marriages was legitimate. Ibid.

Petitioner subsequently helped Gomez, Perera, and Yoll complete their applications for lawful permanent residency. Pet. App. 5. Petitioner or Marrero also provided to each of them and their purported spouses questionnaires listing questions frequently asked at immigration interviews. Ibid. Petitioner and

Marrero met two or three times with Gomez and his new wife to conduct mock interviews. Ibid. Ultimately, Perera obtained lawful permanent residency; Gomez's and Yoll's applications were denied. Ibid.

b. Gomez later met with Agent Mildred Laboy, a criminal investigator for the United States Department of Homeland Security. Pet. App. 5. Gomez admitted his fraud and told Agent Laboy that Tita's was arranging sham marriages between Cubans and non-Cubans so that the non-Cuban aliens could obtain green cards. Ibid. At Laboy's request, Gomez went to Tita's three times with a recording device and recorded conversations involving himself, Marrero, and petitioner. Ibid. During the first conversation, Marrero offered to "fix [Gomez's] situation" in return for another $25,000. Ibid. (brackets in original). At the third meeting, Marrero was "very angry" and upset because Gomez had spoken to an attorney about his situation, and Marrero said she did not want others to know that Gomez had made "this sort of a deal" with her. Ibid.

Law-enforcement agents executed a search warrant at Tita's and found evidence reflecting fraudulent marriages. Pet. App. 6; Gov't C.A. Br. 8. Agents seized over 100 applications for adjustment of immigration status based on marriages of non-Cubans to Cubans, along with others of different nationalities. Gov't C.A. Br. 8. In almost 100 of those applications, petitioner had notarized the marriage certificates. Ibid.

Petitioner and Marrero were not at Tita's when the search began. Pet. App. 6. But while the search was underway, petitioner and Marrero arrived, and Agent Laboy provided them with a copy of the search warrant and told them about the allegations against them. Ibid. Marrero denied the allegations, and petitioner stated that "he had nothing to say about that." Ibid.

2. A grand jury in the Southern District of Florida returned an indictment charging petitioner with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and six counts of encouraging an alien to reside unlawfully in the United States, in violation of 8 U.S.C. 1324(a)(1)(A)(iv), (v)(II), and (B)(i). Indictment 1-8. At trial, the government's evidence included testimony by Gomez, Perera, Yoll, and one of the Cuban spouses, all of whom had pleaded guilty and were cooperating with the government; the recorded conversations involving Gomez, Marrero, and petitioner; and the physical evidence seized during execution of the search warrant at Tita's. Gov't C.A. Br. 4-5.

Agent Laboy also testified at trial, describing his encounter with petitioner and Marrero during the execution of the search warrant. See 6/29/16 Tr. 62-63, 65. Agent Laboy testified that she had provided a copy of the warrant to Marrero and "told her the allegations against her and [petitioner] and the business," and that Marrero had "denied the allegations." 6/30/16 Tr. 52. With respect to petitioner, Laboy testified, "[A]gain, I gave him

a copy of the search warrant, told him the allegations. And he said he had nothing to say about that." Ibid.

Petitioner objected and moved for a mistrial on the ground that the testimony about his statement during execution of the search warrant constituted a comment on petitioner's exercise of his constitutional right to remain silent. 6/30/16 Tr. 52, 55-56. The district court overruled petitioner's objection and denied the motion for a mistrial, finding that petitioner's statement was voluntary and made before any detention or any circumstances requiring warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). 6/30/16 Tr. 52, 57-58. The government did not mention petitioner's comment to Agent Laboy during its closing argument. 7/15/16 Tr. 21-51, 123-134.

The district court granted a motion for judgment of acquittal on two of the counts of encouraging an alien to reside unlawfully in the United States. 15-cr-20579 Docket entry No. 445 (July 11, 2016). The jury subsequently found petitioner guilty of the remaining charges. D. Ct. Doc. 470 (July 18, 2016). Petitioner was sentenced to 48 months of imprisonment. Judgment 2.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-11. As relevant here, the court rejected petitioner's contention that the district court should have granted his motion for a mistrial following Laboy's testimony recounting petitioner's pre-arrest statement that he "had nothing to say about" the allegations against him. Id. at 9. The court of appeals relied

on its prior decision in United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991), which had "stated that the government may comment on a defendant's silence under these circumstances." Pet. App. 9 (citing Rivera, 944 F.2d at 1568); see Rivera, 944 F.2d at 1568 (stating that "[t]he government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his Miranda warnings"). The court noted that, "[e]ven if Rivera was wrongly decided, which we do not think is the case, we have no authority to overrule it." Pet. App. 9.

ARGUMENT

Petitioner contends (Pet. 5-8) that the admission of his statement to Agent Laboy that he "had nothing to say" when Agent Laboy provided him a copy of the search warrant and told him the allegations against him violated his Fifth Amendment right against compelled self-incrimination. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The Self-Incrimination Clause reflects "a judgment . . . that the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." Doe v. United States, 487 U.S. 201, 212 (1988)

(citations and emphasis omitted; brackets in original). The touchstone of the Clause is therefore compulsion: "the Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions put by government officials." United States v. Washington, 431 U.S. 181, 186 (1977). Rather, the Amendment "proscribes only self-incrimination obtained by a 'genuine compulsion of testimony.'" Id. at 187 (citation omitted); see Michigan v. Tucker, 417 U.S. 433, 448 (1974).

The Court accordingly has concluded that "[v]olunteered statements of any kind are not barred by the Fifth Amendment." Miranda v. Arizona, 384 U.S. 436, 478 (1966). In Miranda, the Court held that, absent specified warnings, the government generally may not introduce statements taken in custodial interrogation as part of its case in chief. Id. at 444. For purposes of Miranda, "interrogation" is "express questioning or its functional equivalent," i.e., "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980) (footnote omitted). But Miranda made clear that "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U.S. at 478. As Miranda explained, "[t]here is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or

a person who calls the police to offer a confession or any other statement he desires to make." Ibid. (citation omitted).

2. The court of appeals correctly determined that admission of petitioner's statement to Agent Laboy during the search that petitioner "had nothing to say" did not violate the Self-Incrimination Clause. Pet. App. 9-10. Petitioner's statement was "admissible in evidence" in the government's case in chief because it was "given freely and voluntarily without any compelling influences," Miranda, 384 U.S. at 478.

When petitioner arrived Tita's during execution of the search warrant, law-enforcement agents did not ask him any questions. Agent Laboy simply gave petitioner a copy of the search warrant, in accord with Federal Rule of Criminal Procedure 41(f)(1)(C), and "told [petitioner] the allegations," 6/30/16 Tr. 52. Such routine steps are not "words or actions" that a law-enforcement agent should know are "reasonably likely to elicit an incriminating response." Innis, 446 U.S. at 301; see Pennsylvania v. Muniz, 496 U.S. 582, 603-604 (1990) (police instructions on physical sobriety test are not the functional equivalent of interrogation); South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983) (police inquiry whether suspect would submit to blood-alcohol test is not interrogation under Miranda).

Lower courts have specifically recognized that providing a copy of a search warrant to show that the search is authorized does not constitute the functional equivalent of interrogation.

See United States v. Johnson, 680 F.3d 966, 978 (7th Cir.), cert. denied, 568 U.S. 1036 (2012), overruled on other grounds by Fowler v. Butts, 829 F.3d 788 (2016); United States v. Morris, 977 F.2d 677, 682-683 (1st Cir. 1992), cert. denied, 507 U.S. 988 (1993); Carruthers v. Georgia, 528 S.E.2d 217, 224 (Ga.), cert. denied, 531 U.S. 934 (2000), overruled on other grounds by Vegora v. State, 657 S.E.2d 863 (Ga. 2010); People v. Canet, 578 N.E.2d 1146, 1152 (Ill. App. Ct.), appeal denied, 584 N.E.2d 132 (1992). Similarly, courts have recognized that informing a suspect of the charges or evidence against him does not constitute interrogation for Miranda purposes. See United States v. Vallar, 635 F.3d 271, 285 (7th Cir. 2011); United States v. Blake, 571 F.3d 331, 340-341 (4th Cir. 2009), cert. denied, 558 U.S. 1132 (2010); United States v. McGlothen, 556 F.3d 698, 701-702 (8th Cir.), cert. denied, 557 U.S. 913 (2009); United States v. Moreno-Flores, 33 F.3d 1164, 1169-1170 (9th Cir. 1994); People v. Patnode, 126 P.3d 249, 257 (Colo. App. 2005), cert. denied, No. 05SC689, 2006 WL 350013 (2006); Gates v. Commonwealth, 516 S.E.2d 731, 733 (Va. Ct. App. 1999). Because petitioner's comment that he "had nothing to say" was volunteered, rather than a response to any sort of interrogation, it was admissible as substantive evidence. See Miranda, 384 U.S. at 478.

3. Petitioner contends (Pet. 4-5) that review is warranted to resolve a conflict among the courts of appeals on whether and in what circumstances a defendant's silence during a pre-arrest, pre-Miranda-warnings police interview may be admitted as

substantive evidence. As petitioner observes (Pet. 5), in Salinas v. Texas, 570 U.S. 178 (2013), the Court granted certiorari to address that question but ultimately decided the case on other grounds. Id. at 183; see id. at 183-191 (plurality opinion); id. at 191-193 (Thomas, J., joined by Scalia, J., concurring in the judgment).

Although the court below relied on precedent on that issue to reject petitioner's Fifth Amendment claim, this case does not squarely present that issue and would thus be an unsuitable vehicle for addressing it. In the cases cited by petitioner in which courts have held that a defendant's pre-arrest, pre-warnings silence is not admissible, the defendant reacted to law-enforcement officers' attempts to question him. See United States v. Okatan, 728 F.3d 111, 113 (2d Cir. 2013) (border patrol agent "initiated an interview"); Ouska v. Cahill-Masching, 246 F.3d 1036, 1041 (7th Cir. 2001) (detective "asked [the defendant] questions regarding the murder at the police station"); Combs v. Coyle, 205 F.3d 269, 278-279 (6th Cir.), cert. denied, 531 U.S. 1035 (2000) (officer twice asked defendant what had happened); United States v. Burson, 952 F.2d 1196, 1200 (10th Cir. 1991), cert. denied, 503 U.S. 997 (1992) (investigators told defendant they would like to talk to him in connection with criminal investigation); Coppola v. Powell, 878 F.2d 1562, 1567 (1st Cir.), cert. denied, 493 U.S. 969 (1989). None of those cases addressed

a situation where, as here, a defendant spontaneously and voluntarily announced his refusal to speak to police.

4. In any event, this case would be an unsuitable vehicle to address the question presented for the further reason that any error in admitting petitioner's statement was harmless. See Chapman v. California, 386 U.S. 18, 24 (1967). The government elicited testimony about petitioner's statement only once, and it did not refer to the statement in closing argument. See pp. 5-6, supra. And as the court of appeals noted, the evidence of petitioner's guilt was "overwhelming." Pet. App. 8. The evidence included testimony by cooperating witnesses that petitioner and Marrero arranged fraudulent marriages in exchange for large sums of money and then assisted aliens in their applications for lawful permanent residency. Gov't C.A. Br. 9-20. The witnesses' testimony was corroborated by the recorded conversations of the meetings involving Gomez, Marrero, and petitioner and by the physical evidence seized from Tita's. Id. at 8, 18-20. The single reference to petitioner's pre-arrest statement that he "had nothing to say" accordingly did not affect the outcome.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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