No. 19-1195

In the Supreme Court of the United States

ADALBERTO FRICKSON PALACIOS-SOLIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether evidence about petitioner's silence during the Coast Guard's right-of-visit boarding of his vessel violated his Fifth Amendment privilege against compulsory self-incrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-96a) is reported at 949 F.3d 567. The order of the district court (Pet. App. 107a-108a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2020. The petition for a writ of certiorari was filed on March 31, 2020. 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 of conspiring to possess with intent to distribute and possessing with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a)(1) and 70506(b). Pet. App. 2a. The

district court sentenced petitioner to 360 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-96a.

1. a. On the night of October 24, 2016, United States Coast Guard personnel in a marine patrol aircraft observed petitioner and two confederates aboard a go-fast vessel traveling northbound off the coast of Central America. Pet. App. 3a. The aircraft notified a Coast Guard cutter, which dispatched a helicopter and two smaller boats—an "over-the-horizon" boat and a "long-range interceptor"—to intercept the target vessel. *Id.* at 4a-5a.

While in pursuit, officers aboard the helicopter received authorization from Coast Guard headquarters to request that the go-fast vessel stop and, if necessary, to fire warning and disabling shots. Pet. App. 5a. The officers located the vessel, flashed the helicopter's law enforcement lights, broadcast orders in English and Spanish for the vessel to stop, and ordered the passengers to put their hands up and move to the front of the vessel. *Id.* at 5a-6a. The go-fast vessel's crew disregarded the orders and attempted to evade the helicopter. *Id.* at 6a. After the helicopter fired warning shots, petitioner and his confederates began jettisoning packages. *Ibid.* Following another round of warning shots, the passengers moved toward the front of the vessel. *Ibid.* Still, the helicopter could not safely fire disabling shots at the vessel's engine, and eventually had to call off the chase to refuel. *Id.* at 6a-7a.

The Coast Guard cutter was able to reacquire the go-fast vessel's location via radar. Pet. App. 7a. Using infrared video technology, officers aboard the cutter observed that the vessel was stopped in the water, with

one passenger frantically attempting to fix the engine. *Ibid.* The cutter redirected the over-the-horizon boat to the go-fast vessel's position. *Ibid.* While en route, the over-the-horizon boat recovered a 20-kilogram bale of cocaine floating in the water, along with a buoy tied to a black line. *Ibid.*

b. Meanwhile, the Coast Guard's long-range-interceptor boat reached the go-fast vessel. Pet. App. 8a. Still dead in the water, the vessel had no navigation lights and was more than 200 miles from the nearest land mass. *Ibid.* The Coast Guard officers announced over a loudspeaker, in both English and Spanish, "United States Coast Guard, put your hands in the air and move towards the front of the vessel." *Ibid.* Petitioner and his confederates complied. *Ibid.*

The Coast Guard officers received authorization to conduct a right-of-visit boarding to determine the vessel's nationality. Pet. App. 8a. The "right-of-visit" or "right-of-approach" is a doctrine of maritime common law that allows a warship, such as a Coast Guard vessel, to board an unidentified vessel to determine its nationality. See D. Ct. Doc. 172, at 58-59, 87-88 (Nov. 6, 2017); *United States* v. *Romero-Galue*, 757 F.2d 1147, 1149 n.3 (11th Cir. 1985). While conducting an initial safety sweep, the boarding team observed that the go-fast vessel had been wiped down with fuel, which is used to hide evidence of drugs. Pet. App. 8a, 49a. The vessel was not flying a flag and bore no other indicia of nationality. *Id.* at 9a.

The boarding team, which included a Spanish translator, asked twice if anyone wished to make a claim of nationality for the vessel, but the passengers did not respond. Pet. App. 9a. The team then asked the passengers to identify the master of the vessel, but again, the

passengers did not respond. *Ibid.* When asked a second time to identify the master, petitioner and one of his confederates pointed at the third passenger, who in turn pointed at petitioner. *Ibid.* The team asked petitioner and the third passenger once more if either was the master, but they merely continued pointing at each other. *Ibid.*

The boarding team then asked about the vessel's last port of call. Pet. App. 9a. Petitioner responded that it was Manta, Ecuador. *Ibid.* When asked when the passengers had left Ecuador, petitioner responded that he and his confederates had left on a fishing trip but had been lost at sea for 32 days. *Ibid.* They showed no signs of malnourishment, dehydration, or extended exposure to the elements, however, and they did not appear happy to see the Coast Guard arrive. *Id.* at 9a, 15a.

The boarding team relayed to the Coast Guard cutter that the last port of call was in Ecuador, and that the vessel bore an Ecuadorian maker's mark. Pet. App. 10a. The Coast Guard contacted Ecuador to obtain a statement of no objection that would permit the Coast Guard to conduct a full law enforcement boarding. *Ibid.* Ecuador provided its statement of no objection, after which the boarding team detained the passengers and transferred them to the long-range-interceptor. *Ibid.*

c. The Coast Guard team then conducted a full boarding, which entailed searching the vessel and swabbing its surfaces and the passengers' hands for traces of drugs. Pet. App. 10a. The team recovered, among other things, a buoy and black line matching those attached to the bale of cocaine recovered by the crew of the over-the-horizon boat as well as packing tape identical to the tape that was wrapped around the bale. *Id.* at 10a-11a. The team did not find any bait or fish in the

vessel, and although they did find fishing lines, the lines appeared unusable. *Id.* at 11a. The team also found fresh food that did not appear to be 32 days old, and the bottom of the vessel was free from growth, which would have been unusual for a boat adrift for 32 days. *Ibid.* Swab samples from the vessel's surface and one of the passengers' hands contained trace amounts of cocaine. *Id.* at 10a.

The next day, after conducting a drift analysis, Coast Guard officers recovered 24 additional bales of high-purity cocaine, along with buoys equipped with GPS trackers. Pet. App. 11a-12a. The 25 recovered bales collectively weighed 614 kilograms, which would amount to a wholesale value of more than $10 million. *Id.* at 12a. The GPS trackers indicated that the bales had departed from Ecuador less than ten days before they were recovered. *Ibid.*

2. In December 2016, a federal grand jury in the Southern District of Florida charged petitioner and his confederates with conspiring to possess with intent to distribute and possessing with intent to distribute five kilograms or more of cocaine while on a vessel subject to the jurisdiction of the United States, in violation of the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 *et seq.* Pet. App. 15a-16a; Indictment 1-2. The government invoked subject matter jurisdiction under 46 U.S.C. 70502(c)(1)(A) and (d)(1)(B) on the ground that the defendants' boat was interdicted in international waters and none of the defendants had claimed nationality for it. Pet. App. 16a. A first jury trial resulted in a mistrial when the jury was unable to reach a unanimous verdict. *Ibid.*

In advance of a second trial, petitioner filed a motion in limine to exclude, among other things, any evidence

or argument concerning the defendants' silence before they were provided warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Pet. App. 18a; D. Ct. Doc. 87, at 1 (July 12, 2017). In particular, petitioner sought to exclude evidence of the defendants' silence while on board the Coast Guard cutter. D. Ct. Doc. 87, at 2. Petitioner conceded, however, that this argument was foreclosed by *United States* v. *Wilchcombe*, 838 F.3d 1179 (11th Cir. 2016), cert. denied, 137 S. Ct. 2265 (2017). Pet. App. 18a; D. Ct. Doc. 87, at 3. In response, the government stated that it did not intend to include in its case-in-chief any silence or statements other than the defendants' responses to questions during the initial right-of-visit boarding of the go-fast vessel to establish its nationality. Pet. App. 18a-19a; D. Ct. Doc. 96, at 1-2 (July 14, 2017). But the government reserved the right to use any other silence or statements during the defense case and in rebuttal. The district court denied the motion as moot, observing that the government intended to introduce only responses to right-of-visit questions, and finding those responses admissible. Pet. App. 19a, 108a.

At the second trial, as in the first trial, see, *e.g.*, D. Ct. Doc. 59, at 7-9 (Mar. 22, 2017), petitioner's defense was that he and his confederates had gotten lost at sea during a fishing voyage. See, *e.g.*, D. Ct. Doc. 172, at 42-44. In its case-in-chief, the government called seven witnesses: six Coast Guard members who participated in various phases of the interdiction aboard various Coast Guard vessels, and a forensic chemist who tested the seized cocaine. Pet. App. 20a. The government elicited testimony about petitioner's silence in response to questioning only once, when a Coast Guard officer testified about the right-of-visit boarding and

stated that petitioner and his confederates did not answer when asked if they would like to make a claim of nationality. D. Ct. Doc. 172, at 89.

During the defense case, petitioner testified that he and his confederates were lost at sea for 27 to 30 days, that he was the captain of the boat, and that he was happy to see the Coast Guard arrive. D. Ct. Doc. 173, at 202, 205 (Nov. 6, 2017). On cross-examination, petitioner claimed that he "did not reply" when asked who was the master of the vessel. *Id.* at 229. The government did not refer to the defendants' silence in its closing argument. After petitioner's attorney argued in closing that petitioner and his confederates had been adrift at sea, D. Ct. Doc. 174, at 40, 47 (Nov. 8, 2017), the government, in its rebuttal argument, noted that the defendants were "not happy" when they were found, did not answer questions about the boat's nationality, and pointed at one another when asked who was the boat's master, *id.* at 72.

The jury found petitioner and his codefendants guilty on all charges. Pet. App. 22a. Petitioner filed a post-trial motion for judgment of acquittal, arguing (1) that the government at trial had failed to establish subject matter jurisdiction under 46 U.S.C. 70502(c)(1)(A) and (d)(1)(B); (2) that the evidence was insufficient to support his convictions; and (3) that the government's introduction of post-arrest, pre-*Miranda* silence violated his Fifth Amendment right against self-incrimination. Pet. App. 22a; D. Ct. Doc. 122 (July 31, 2017). The district court denied the motion and sentenced petitioner to 360 months of imprisonment, to be followed by five years of supervised release. Pet. App. 22a; Judgment 2-3.

3. The court of appeals affirmed. As relevant here, the court first determined that, given the evidence at trial that none of the defendants responded when asked if they wanted to make a claim of nationality for their boat, the vessel was stateless for purposes of 46 U.S.C. 70502(c)(1)(A) and (d)(1)(B), the MDLEA's jurisdictional provisions. Pet. App. 29a-32a. Second, the court of appeals rejected petitioner's claim that the district court erred in denying his motion in limine to preclude the government from referring to the defendants' post-arrest, pre-*Miranda* silence. *Id.* at 42a-43a. It observed that petitioner had acknowledged that the issue was foreclosed by circuit precedent, which determined that the government may use a defendant's post-arrest, pre-*Miranda* silence in its case-in-chief to prove the defendant's guilt. *Id.* at 43a (citing *Wilchcombe*, 838 F.3d at 1190-1191; *United States* v. *Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991)). Finally, the court of appeals rejected petitioner's challenge to the sufficiency of the evidence, finding "ample evidence" to establish petitioner's guilt even without evidence of the defendants' silence in response to right-of-visit questions. *Id.* at 46a-51a & n.28.

Judge Rosenbaum concurred. Pet. App. 83a-96a. As relevant here, she expressed her disagreement with circuit precedent allowing the government to present evidence of or argument about a defendant's post-arrest, pre-*Miranda* silence, but she determined, however, that the use of the defendants' silence in this case did not "affect the outcome." *Id.* at 91a-94a. She first observed that reliance on the defendants' silence to satisfy the MDLEA's jurisdictional provisions did not "implicate the Fifth Amendment" because it had "nothing to

do with proving that the [defendants] substantively violated the MDLEA." *Ibid.* She further observed that, to the extent that the government used the defendants' silence as evidence of their guilt, any constitutional error was harmless beyond a reasonable doubt given the "torrent of other evidence the government presented." *Id.* at 96a.

ARGUMENT

Petitioner contends (Pet. 14-16) that trial testimony about the defendants' silence during right-of-visit questioning violated his Fifth Amendment privilege against compelled self-incrimination. The court of appeals correctly affirmed petitioners' convictions, and—although the circuits have taken different approaches to the question whether and under what circumstances the government may use post-arrest, pre-*Miranda* silence as substantive evidence of guilt—this case would not be an appropriate vehicle in which to resolve the disagreement. The disagreement is not implicated here, and this Court recently denied review of a petition for a writ of certiorari presenting the same question, see *Wilchcombe* v. *United States*, 137 S. Ct. 2265 (2017) (No. 16-1063). That same result is warranted in this case.

1. a. This Court has held that, in some circumstances, the government may not comment on or introduce evidence of a criminal defendant's silence. Those decisions rest on two distinct rationales.

First, in *Griffin* v. *California*, 380 U.S. 609, 615 (1965), this Court held that the Self-Incrimination Clause of the Fifth Amendment prohibits the prosecution from commenting on a defendant's failure to testify at trial. As the Court later explained, *Griffin* held that "[t]he defendant's right to hold the prosecution to proving its case without his assistance is not to be impaired

by the jury's counting the defendant's silence at trial against him." *Portuondo* v. *Agard*, 529 U.S. 61, 67 (2000).

A second line of cases arises not from the Self-Incrimination Clause, but from due process principles and this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Court held that absent other safeguards to protect Fifth Amendment rights, the government may not introduce statements obtained during custodial interrogation as evidence of the defendant's guilt unless it has warned a suspect of his right to remain silent, his right to counsel, and of the fact that any statement made can be used against him at trial. *Id.* at 479. In *Doyle* v. *Ohio*, 426 U.S. 610 (1976), the prosecutor sought to impeach the defendant's testimony at trial by eliciting evidence that the defendant had remained silent after receiving *Miranda* warnings and had therefore failed to provide the same story following his arrest that he had told at trial. *Id.* at 611. The Court held that the prosecution's use of the defendant's post-*Miranda* silence as impeachment at trial was "fundamentally unfair and a deprivation of due process." *Id.* at 618. The due process violation arose, the Court explained, because *Miranda* warnings contain implicit assurances that a defendant's exercise of his "right to remain silent" will not carry with it a penalty. *Id.* at 619 n.10.

In *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), the Court held that the Self-Incrimination Clause and the Due Process Clause do not prohibit the prosecution from impeaching a testifying defendant with his pre-custody, pre-*Miranda* silence. *Id.* at 238-239. The Court concluded that *Doyle*'s reasoning was inapposite

because "no governmental action induced [the defendant] to remain silent." *Id.* at 240. In *Fletcher* v. *Weir*, 455 U.S. 603 (1982) (per curiam), the Court applied that same analysis in a case involving impeachment with post-arrest, pre-*Miranda* silence. The Court explained that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id.* at 607; accord *Brecht* v. *Abrahamson*, 507 U.S. 619, 628 (1993) (explaining that the *Doyle* line of cases "rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial'") (quoting *Wainwright* v. *Greenfield*, 474 U.S. 284, 291 (1986)); *Greer* v. *Miller*, 483 U.S. 756, 763-764 (1987) (same).

b. In *Salinas* v. *Texas*, 570 U.S. 178 (2013), this Court granted review "to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief." *Id.* at 183 (plurality opinion). But the plurality found it "unnecessary to reach that question" because the defendant had not "invoke[d] the privilege during his interview" and therefore was not entitled to rely on it. *Ibid.*

This Court has "long held that a witness who 'desires the protection of the privilege . . . must claim it' at the time he relies on it." *Salinas*, 570 U.S. at 183 (plurality opinion) (quoting *Minnesota* v. *Murphy*, 465 U.S. 420, 427 (1984)). The express-invocation requirement "en-

sures that the Government is put on notice when a witness intends to rely on the privilege" and "gives courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing the witness' reasons for refusing to answer." *Id.* at 183-184. This Court has recognized only "two exceptions to the requirement that witnesses invoke the privilege," neither of which applied in *Salinas*. *Id.* at 184.

First, in *Griffin*, the Court held "that a criminal defendant need not take the stand and assert the privilege at his own trial." *Salinas*, 570 U.S. at 184 (plurality opinion) (citing *Griffin*, 380 U.S. at 613-615). A defendant has "an 'absolute right not to testify'" at his own trial, so "requiring that he expressly invoke the privilege would serve no purpose." *Ibid.* (citation omitted). But because the defendant in *Salinas* "had no comparable unqualified right during his interview with police, his silence f[ell] outside the *Griffin* exception." *Ibid.*

Second, this Court has "held that a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary." *Salinas*, 570 U.S. at 184 (plurality opinion). In *Miranda*, for example, the Court reasoned that "a suspect who is subjected to the 'inherently compelling pressures' of an unwarned custodial interrogation need not invoke the privilege" because of "the uniquely coercive nature of custodial interrogation." *Id.* at 184-185 (quoting *Miranda*, 384 U.S. at 467). The defendant in *Salinas* could not "benefit from that principle because it [wa]s undisputed" that he was not in custody when he was interviewed. *Id.* at 185.

Having found the two recognized exceptions inapplicable, the *Salinas* plurality declined to create a "new

exception to the 'general rule' that a witness must assert the privilege to subsequently benefit from it." *Salinas*, 570 U.S. at 186 (plurality opinion) (quoting *Murphy*, 465 U.S. at 429). And because the defendant in *Salinas* failed to invoke the privilege against self-incrimination during his pre-arrest, pre-*Miranda* interview, the plurality concluded that the prosecution's use of his silence during that interview as evidence of guilt did not violate the Self-Incrimination Clause. *Id.* at 191.[1]

2. Petitioner correctly observes (Pet. 9-11) that courts of appeals have reached different conclusions as to whether and under what circumstances the prosecution may use a defendant's post-arrest, pre-*Miranda* silence as evidence of guilt in its case-in-chief. The Fourth and Eleventh Circuits have determined that such silence may be used as evidence of guilt even if the defendant was subject to custodial interrogation. See *United States* v. *Love*, 767 F.2d 1052, 1063 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986); *United States* v. *Rivera*, 944 F.2d 1563, 1567-1568 (11th Cir. 1991).

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[1] Justice Thomas, joined by Justice Scalia, concurred in the judgment. *Salinas*, 570 U.S. at 191-193. In Justice Thomas's view, the defendant's claim "would [have] fail[ed] even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony." *Id.* at 192. Justice Thomas explained that he viewed *Griffin*'s rule against prosecutorial comment on a defendant's failure to testify at trial as "impossible to square with the text of the Fifth Amendment" and that he therefore would not "extend [*Griffin*] to a defendant's silence during a precustodial interview." *Ibid.* Because Justice Thomas would have rejected the defendant's claim on a broader ground, the plurality's narrower rationale "constituted the holding of the Court." *Marks* v. *United States*, 430 U.S. 188, 194 (1977).

The Eighth Circuit also upheld the admission of post-arrest, pre-*Miranda* silence, but in a decision addressing a defendant who was not asked any questions before he was given *Miranda* warnings. See *United States* v. *Frazier*, 408 F.3d 1102, 1111 (2005) (emphasizing that "[i]t is not as if [the defendant] refused to answer questions in the face of interrogation"), cert. denied, 546 U.S. 1151 (2006).

Other courts of appeals have concluded that the use of a defendant's post-arrest, pre-*Miranda* silence violated the Self-Incrimination Clause. The Ninth Circuit has applied that rule in cases involving "custodial interrogation." *United States* v. *Hernandez*, 476 F.3d 791, 796, cert. denied, 552 U.S. 913 (2007); see *United States* v. *Velarde-Gomez*, 269 F.3d 1023, 1028-1031 (9th Cir. 2001) (en banc). The Ninth and D.C. Circuits also have applied the rule in cases in which the defendant was not under interrogation. See *United States* v. *Whitehead*, 200 F.3d 634, 637-639 (9th Cir.), cert. denied, 531 U.S. 885 (2000); *United States* v. *Moore*, 104 F.3d 377, 384-389 (D.C. Cir. 1997).[2] And the Sixth Circuit has suggested that it would take a similar approach to custodial silence in a case that principally concerned the admissibility of pre-arrest, pre-*Miranda* silence. See *Combs* v.

[2] Petitioner correctly notes (Pet. 9-10) that state courts have also reached inconsistent results on the admissibility of evidence of post-arrest, pre-*Miranda* silence. Compare *State* v. *Fisher*, 373 P.3d 781, 790 (Kan. 2016) (permitting use of such evidence), and *State* v. *Mitchell*, 876 N.W.2d 1, 11-12 (Neb. Ct. App. 2016) (same), aff'd, 884 N.W.2d 730 (Neb. 2016), with, *Hartigan* v. *Commonwealth*, 522 S.E.2d 406, 409-410 (Va. Ct. App. 1999) (barring the use of such evidence in the prosecution's case-in-chief), aff'd on reh'g en banc, 531 S.E.2d 63 (Va. Ct. App. 2000), and *Akard* v. *State*, 924 N.E.2d 202, 209 (Ind. Ct. App. 2010) (same), rev'd in part on other grounds, 937 N.E.2d 811 (Ind. 2010).

Coyle, 205 F.3d 269, 283-284 & n.9 (6th Cir.), cert. denied, 531 U.S. 1035 (2000).

In the government's brief in opposition to certiorari in *Wilchcombe*, *supra*, (No. 16-1063), it observed that review of this apparent conflict was not warranted because most of the relevant cases were decided before this Court's decision in *Salinas*. That decision may prompt the courts that have previously precluded the use of all post-arrest, pre-*Miranda* silence to revisit their analysis. For example, in *Moore*, the D.C. Circuit asserted that an individual who volunteers a statement after arrest "may be held to have waived the protection" of the Fifth Amendment, but that "the defendant who stands silent must be treated as having asserted it." 104 F.3d at 385; see *id.* at 387 (drawing an analogy to *Griffin*). In *Salinas*, however, the plurality emphasized that a person may be treated as having asserted the Fifth Amendment privilege, without expressly invoking it, only in two contexts (at trial, under *Griffin*, and pretrial, in the face of "governmental coercion"). 570 U.S. at 184. The analytical framework in *Salinas*, and its explanation of the distinctive trial context of *Griffin*, suggests that a bar on the use of post-arrest silence, when the defendant has not asserted the Fifth Amendment privilege, requires a justification beyond a mere assumption that a silent arrestee must be deemed to be asserting the privilege.

This Court denied certiorari in *Wilchcombe*, 137 S. Ct. 2265, and petitioner does not suggest that the relevant courts of appeals have had an opportunity to conduct the post-*Salinas* analysis since then. Nor does petitioner assert that the disagreement has deepened. Instead, he contends (Pet. 10-11) that the fact that few

courts have considered the matter since *Salinas* indicates that *Salinas* is unlikely to resolve the disagreement. But petitioner points to no evidence that the courts that preclude the use of post-arrest, pre-*Miranda* silence have declined to change their position in light of *Salinas*; he merely observes that they have not issued post-*Salinas* decisions on the matter at all. That does not suggest that the circuits' positions will be unaffected by *Salinas* if and when the question arises; it instead simply indicates that the question presented arises infrequently. That is a reason to deny a writ of certiorari, not to grant it.

3. Even if the disagreement petitioner identifies otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to resolve it. As a threshold matter, the Coast Guard's routine questions regarding the ship's nationality posed during a right-of-visit boarding did not amount to custodial interrogation. See, *e.g.*, *United States* v. *Li*, 206 F.3d 78, 83 (1st Cir.) ("[N]otwithstanding any suspicion that the [vessel in question] was smuggling aliens into the United States, the Coast Guard's routine stop, boarding, and inspection of a vessel on the high seas is not considered 'custodial.'"), cert. denied, 531 U.S. 956 (2000); *United States* v. *Rioseco*, 845 F.2d 299, 303 (11th Cir. 1988) (per curiam) (questioning during Coast Guard boarding of vessel is not custodial interrogation); *United States* v. *Gray*, 659 F.2d 1296, 1301 (5th Cir. Unit B Oct. 1981) (similar); *cf. Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980) (questions "normally attendant to arrest and custody" are not "'interrogation'"). He would therefore not be entitled to relief even if the Court resolved the question presented in the petition in his favor. At a minimum, resolution of whether the

circumstances of this case involve the "inherently compelling pressures" of custodial interrogation, *Salinas*, 570 U.S. at 184 (plurality opinion) (citation omitted), could impede this Court's review.[3]

Furthermore, each of the federal appellate decisions on which petitioner relies (Pet. 9) to support his position involves the use of silence where a defendant did not testify at trial. Compare *Combs*, 205 F.3d at 286 (defendant did not testify), and *Whitehead*, 200 F.3d at 637 (same), and *Moore*, 104 F.3d at 389 (same), with *United States* v. *Lopez*, 500 F.3d 840, 844-845 & n.2 (9th Cir. 2007) (observing, in a case in which the defendant testified, that "[c]omments referring to post-arrest, pre-*Miranda* silence are * * * permissible"), cert. denied, 552 U.S. 1129 (2008). Here, petitioner took the stand in his own defense, which would complicate any further review, as this Court has already held that the government may use post-arrest, pre-*Miranda* silence to impeach or rebut a defendant's testimony, *Fletcher*, 455 U.S. at 605.

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[3] Petitioner asserts (Pet. 13) that there is "no question" that his "silence came after he had been arrested" because the Government's court of appeals briefing invoked, and the court of appeals' decision relied on, Eleventh Circuit precedent approving the use of post-arrest, pre-*Miranda* silence. But the government never conceded that petitioner's silence came "'post-arrest'"; it had no need to address the issue because petitioner had "acknowledge[d]" that binding precedent foreclosed his contention that the government was barred from using his silence, even if it occurred "'post-arrest'" and pre-*Miranda*. Gov't C.A. Br. 37-38 (citation omitted). And, "as respondent," the government "is entitled to rely on any legal argument in support of the judgment below," *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994), even one "not earlier aired," *Greenlaw* v. *United States*, 554 U.S. 237, 250 n.5 (2008).

Finally, any error in the introduction of petitioner's silence in response to the right-of-visit questions was harmless and thus would not entitle petitioner to reversal of his conviction. Even Judge Rosenbaum, who wrote a concurrence endorsing petitioner's position, nonetheless found that this case did not present an appropriate opportunity for the court of appeals to revisit its position en banc. Pet. App. 83a. She explained that the resolution of the constitutional question did not "affect[ ] the ultimate outcome here," *ibid.*, both because the government used petitioner's silence primarily to establish a contested jurisdictional prerequisite rather than guilt, *id.* at 94a, and because the "record is rife with" evidence of petitioner's guilt, such that any error in the admission of his silence was "harmless beyond a reasonable doubt," *id.* at 95a. She observed, for example, that the condition and contents of the go-fast vessel belied petitioner's claim that he was a fisherman lost at sea for weeks, and she further pointed to the presence of traces of cocaine in the vessel and the 25 bales of cocaine officers later recovered, *ibid.* Because of this "torrent of other evidence" establishing guilt, she recognized that even a finding for petitioner on the constitutional question "would not require reversal." *Id.* at 96a. No further review in this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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