No. 19-1195

IN THE

Supreme Court of the United States

ADALBERTO FRICKSON PALACIOS-SOLIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

The Government acknowledges that the Court of Appeals below squarely addressed an important question of constitutional law that has deeply divided the Courts of Appeals—whether the prosecution violates the Self-Incrimination Clause of the Fifth Amendment when it adduces post-arrest, pre-*Miranda* silence in its case-in-chief as evidence of guilt.

Seeking to avoid review, the Government comes up with meritless evasions, primarily opposing certiorari on the basis of supposed vehicle problems. But the Government's vehicle objections are all answered by the simple fact that the Eleventh Circuit did not have an alternate ground for its ruling and instead squarely decided the issue presented here. And although the Government states that further percolation is warranted in light of *Salinas* v. *Texas*, that case was decided *seven years* ago, it addressed an entirely different issue, and the Courts of Appeals and state courts remain deeply entrenched in their opposite positions. This Court's intervention is therefore appropriate in this case, and necessary to ensure uniformity on an important question of law.

ARGUMENT

1. The Government agrees 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"—*i.e.*, the question presented here. Opp. 13. And as the Government explains at length (Opp. 9-13), this question implicates the meaning and scope of this Court's foundational decisions—including *Griffin* v. *California* and *Miranda*

v. *Arizona*, among others. The result is, as the Government states, that in some jurisdictions "post-arrest, pre-*Miranda* silence" "may be used as evidence of guilt even if the defendant was subject to custodial interrogation," while in other jurisdictions courts deem "the use of [such] silence [to] violate[] the Self-Incrimination Clause." Opp. 13-14.

In short, it is common ground that the question presented (1) is the subject of a deep and acknowledged split, (2) concerns fundamental precepts in this Court's Fifth Amendment jurisprudence, and (3) results in the disparate use of evidence across jurisdictions in adjudicating criminal defendants' guilt.

2. The Government claims that there are vehicle problems, but these are illusory. The Government does not dispute that the Eleventh Circuit addressed Palacios-Solis's Fifth Amendment argument on the merits and "rejected" it based on "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." Opp. 8; see App. 42a-43a. The Eleventh Circuit identified no alternate basis for its holding on this issue.[1] Thus, the issue is squarely presented for the Court's review.

In light of that critical point, the Government's vehicle objections all lack merit. For instance, the Government claims that, because Palacios-Solis chose to

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[1] The lack of an alternate holding renders the *Wilchcombe* disposition inapposite. See *United States* v. *Wilchcombe*, 838 F.3d 1179, 1191 (11th Cir. 2016) (panel opinion holding, with respect to the question presented there and here, that "any such error would have been harmless in light of the ample evidence of his guilt that was presented at trial"), *cert. denied*, 137 S. Ct. 2265 (2017). The Government ignores this crucial distinction.

take the stand in his own defense, his silence may have actually been used by the prosecution to impeach him. Opp. 17 (arguing that Palacios-Solis's choice to testify "would complicate any further review"). But the Government also acknowledges that Palacios-Solis's silence was adduced before he testified, and *during the prosecution's case-in-chief*. Opp. 6 ("In its case-in-chief, the government . . . . elicited testimony about petitioner's silence . . . .").[2] More to the point, the Eleventh Circuit decided the question presented here on the merits.

What the Government also ignores is that Palacios-Solis's decision to testify may well have been prompted by the very invocation of his silence itself, which *without* his testimony would call "further attention to the fact that he has not arisen to remove whatever taint the . . . silence may have spread." *United States* v. *Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997); Pet. 16. That is all the more reason to grant certiorari; it exemplifies that the use of post-arrest, pre-*Miranda* silence burdens the defendant's right to remain silent *during trial*. Cf. *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964) (a defendant should "suffer no penalty . . . for . . . silence" at trial).

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[2] The Government asserts that the prosecution did so "only once," but that ignores a separate instance in which the Coast Guard officer testified during the prosecution's case-in-chief that Petitioner and his co-defendants were not "jumping for joy" to see the Coast Guard when they boarded the ship, yet another reference to Palacios-Solis's silence. Pet. 4 (quoting No. 16-cr-10050, Dkt. 172 at 93 (S.D. Fla. July 18, 2017)). Moreover, the prosecutor also invoked the silence at closing, asking the jury "[w]hy" Palacios-Solis was silent "if [he] ha[s] nothing to hide." Pet. 4-5.

The Government also argues that Palacios-Solis was not subject to "custodial interrogation," either because the Coast Guard's right-of-visit boarding was not custodial or else because its questioning was not interrogatory. Opp. 16-17. But, again, the Eleventh Circuit addressed Petitioner's Fifth Amendment argument on the merits and rejected it. It did not issue an alternate holding based on an absence of custodial interrogation or anything else.[3]

Finally, the Government argues that because one of the three judges on the panel concluded that the other evidence against Palacios-Solis was "overwhelming," any error was "harmless." Opp. 18; App. 95a. The fact that only one of the judges so concluded, and the others did not join, is the point here. As noted in the petition and above, the panel decision undertakes no harmlessness analysis, and there is no basis for its decision other than the question of law presented here. And because Petitioner's first trial ended in a mistrial, there is strong reason to doubt that, on remand from this Court, the Court of Appeals would find the evidence against him "overwhelming." Pet. 14 & n.6.

3. The Government's argument that this Court should allow further percolation in light of *Salinas* lacks merit. First, *Salinas* addressed only *pre*-arrest silence; this case concerns *post*-arrest silence. Thus,

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[3] In any case, the Government is wrong that Palacios-Solis was not in "custody." As the Government's cases explain, the "'custody' determination employs an objective test; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *United States v. Li*, 206 F.3d 78, 83 (1st Cir. 2000). Here, given the Coast Guard's high-speed pursuit and its use of warning shots (Pet. 2), a reasonable person would have understood that he was under arrest.

the Courts of Appeals are unlikely to conduct the "post-*Salinas* analysis" that the Government envisions, no matter how long the circuits remain split.[4]

Second, and in any event, the Courts of Appeals that have addressed the question presented post-*Salinas* have stuck to their pre-*Salinas* positions. See Pet. 10-11. It has already been seven years since *Salinas* was decided and the circuit split remains as entrenched as before.

Because the split is entrenched, and the circuits' respective positions on the issue are staked out, it stands to reason that decisions addressing the question will be rare. Prosecutors in those jurisdictions barring the use of post-arrest, pre-*Miranda* silence will not seek to use that silence as evidence of guilt (and potentially risk a mistrial). And defendants in those jurisdictions allowing that silence to be used will generally not preserve the issue simply to lose on appeal and in the hopes of obtaining Supreme Court review (Palacios-Solis's trial counsel preserved the issue specifically to permit this Court's review).

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[4] Of course, individual panels of the Courts of Appeals are generally bound to follow prior circuit precedent unless an "intervening Supreme Court decision is 'clearly on point.'" *Atl. Sounding Co.* v. *Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007). *Salinas* is not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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