No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ABRAHAN GARCIA-MORALES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

When a defendant declines to answer some—but not all—of the questions posed to him during a custodial interrogation, does the prosecutor's use of this "partial silence" at trial violate the Fifth Amendment?

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Petitioner Abrahan Garcia-Morales respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on July 31, 2020.

INTRODUCTION

In *Doyle v. Ohio*, 426 U.S. 610 (1976), this Court considered whether a prosecutor may use a defendant's post-arrest silence against him at trial. The Court concluded that the prosecutor may not, enshrining the principle that a person's "silence, as well as his words," is inadmissible as evidence of guilt. *Id.* at 619.

But as a practical matter, many defendants in custodial interrogations initially agree to talk but then decide to remain silent in response to a particular question or questions. In such cases, the Fourth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits hold that the Fifth Amendment prevents prosecutors from relying on this "partial" or "selective silence" at trial. Yet the First, Second, Third, Fifth,

Eighth, and Ninth Circuits take the opposite view, opining that once a defendant decides to speak, "what he says *or omits*" is fair game as proof of his guilt. *United States v. Goldman,* 563 F.2d 501, 503 (1st Cir. 1977) (emphasis added).

Resolution of this well-recognized split is long overdue. This Court's clarification of the scope of the Fifth Amendment will allow defendants to fully understand the consequences of waiving their *Miranda* rights and assist prosecutors in avoiding allegations of trial misconduct. Mr. Garcia's case also provides a strong vehicle to resolve this split because the published opinion of a divided panel perfectly preserved this purely legal issue for review. And because the Court's existing precedent, as well as sound practical and policy considerations, lead to the conclusion that *Doyle* extends to all types of silence, the Court should move swiftly to reconcile these disparate approaches.

OPINION BELOW

Over a dissent from Judge Bea, the Court of Appeals affirmed Mr. Garcia's conviction in a published opinion. *See United States v. Garcia-Morales,* 942 F.3d 474 (9th Cir. 2019) (attached here as Appendix A). The Ninth Circuit then denied Mr. Garcia's petition for panel rehearing and rehearing en banc (attached here as Appendix B).

JURISDICTION

On October 31, 2019, the Court of Appeals denied Mr. Garcia's appeal and affirmed Mr. Garcia's conviction. *See* Appendix A. Mr. Garcia then filed a petition for panel rehearing and rehearing en banc, which the Court of Appeals denied on

July 31, 2020. *See* Appendix B. This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution states that "[n]o person … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

STATEMENT OF FACTS

A Border Patrol agent arrested Abrahan Garcia-Morales on suspicion of smuggling immigrants near a wilderness preserve north of the U.S./Mexico border. The agent transported Mr. Garcia to a nearby station, read him his *Miranda* rights, and informed him that he had the right to stop answering questions at any time. The agent then began videotaping the interrogation.

Mr. Garcia answered most of the agent's questions. He described how, earlier in the week, a different Border Patrol agent had asked him to work as an informant. Mr. Garcia explained that he had decided to take the agent up on his offer and was planning to pick up several undocumented people that day and turn them over to Border Patrol. Mr. Garcia also told the agent details of some of the arrangements he had made with his smuggling contacts.

But when the agent pressed Mr. Garcia to identify the smugglers he had worked with, Mr. Garcia did not want to name names:

> Q: Who approached you and asked you to pick up these aliens?
>
> A: See, like I said, I ain't feeling cool with that camera, see [unintelligible].

Q: Why don't you just give me a name?

A: I don't . . . [shaking head, 'no'].

The agent pressed on, telling Mr. Garcia, "Give me, give me some idea." Mr. Garcia nervously bit his nails and said nothing. The agent then said, "Alright, well, later on we'll turn off the camera and we'll, you can tell me. You can tell me a little bit more." At some point during this statement, Mr. Garcia nodded.[1] The agent switched topics, and Mr. Garcia resumed answering a different line of questions. The government later charged Mr. Garcia with attempting to smuggle noncitizens under 8 U.S.C. § 1324(a)(1)(A)(ii).

At trial, Mr. Garcia's defense was that he lacked the requisite *mens rea* to commit attempted smuggling. Specifically, Mr. Garcia argued that he did not intend to smuggle the noncitizens because he was planning to turn them over to Border Patrol as part of his role as an informant.

To try to undermine this defense, the prosecutor pointed to Mr. Garcia's unwillingness to provide the identities of his smuggling contacts. During the government's case-in-chief, the prosecutor asked the Border Patrol agent to explain how the agent had asked Mr. Garcia to provide the names of his smuggling contacts on video and Mr. Garcia had declined to do so. The prosecutor also had the agent

[1] A factual dispute exists over whether Mr. Garcia nodded *before* the agent said "[y]ou can tell me a little bit more" and thus whether he ever agreed to provide the names of his co-conspirators. But because this fact does not change the nature of the constitutional violation, Mr. Garcia assumes for the purposes of this petition that he agreed to provide the names after the camera was turned off.

testify that Mr. Garcia had refused to provide any names or other information about his co-conspirators even after the videotaping had ended.

In his initial closing argument, the prosecutor discussed Mr. Garcia's silence at length with the jury, arguing that the theory of defense was not credible because if Mr. Garcia had truly intended to turn over the noncitizens, he would have identified his smuggling contacts. His unwillingness to answer these questions or provide their identities at a later date, the prosecutor argued, showed that Mr. Garcia was "evasive" and had never intended to cooperate with Border Patrol at all. The prosecutor again relied on Mr. Garcia's silence in his closing rebuttal. Soon after, the jury found Mr. Garcia guilty of the smuggling charge.

On appeal, Mr. Garcia argued that the prosecutor violated due process by using Mr. Garcia's silence against him. Mr. Garcia explained that in *Doyle v. Ohio*, 426 U.S. 610 (1976), this Court forbade the same type of prosecutorial comment on a defendant's exercise of his Fifth Amendment right to silence. And because the government had heavily relied on this silence during its case-in-chief and in closing arguments, he contended that the error caused him prejudice.

In a published opinion, a divided panel of the Ninth Circuit affirmed the conviction. *See United States v. Garcia-Morales*, 942 F.3d 474 (9th Cir. 2019) (Appendix A). The majority found no error, holding that Mr. Garcia had *not*, in fact, been "silent in response to [the agent's] questioning on the topic of his co-conspirators" because he indicated that he would be "willing to continue talking about the subject later." *Id.* at 476–77. Even though Mr. Garcia never provided the

names of any co-conspirators, the majority nevertheless concluded that this was "not error for the prosecution to introduce evidence of, and comment on" his reluctance to implicate his co-conspirators. *Id*. at 477.

Judge Bea dissented. Quoting *Doyle*, Judge Bea explained that a prosecutor violates due process when they "'call attention to [the defendant's] silence'" and urge the jury to draw an "unfavorable inference" from this silence, which is "exactly what the prosecution did in this case." *Id*. at 478 (quoting *Doyle*, 426 U.S. at 619). Judge Bea refuted the majority's conclusion that "Garcia's refusal to name his co-conspirators *was not silence*," contending that "[t]he prosecution's reference to Garcia's silence as evidence of his guilt in this context was a *Doyle* violation, plain and simple." *Id*. at 479 (emphasis in original). Judge Bea also found that the prosecutor's "flagrant and repeated use of Garcia's post-arrest silence against him at trial" satisfied even plain-error review because it went to Mr. Garcia's *mens rea*—"the only disputed element at trial," which was otherwise supported by only "thin and circumstantial" evidence. *Id*. at 480.

Mr. Garcia filed a petition for panel rehearing and rehearing en banc, which the Ninth Circuit denied. See Appendix B. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I.

The Courts of Appeals Are Evenly Divided on Whether Prosecutors May Use a Defendant's "Partial Silence" Against Him at Trial.

Nearly fifty years ago, this Court in *Doyle v. Ohio*, 426 U.S. 610 (1976), held that "use of the defendant's post-arrest silence" as evidence against him at trial violated the Due Process Clause of the Fifth Amendment. The Court noted that under *Miranda v. Arizona*, 384 U.S. 436 (1966), a person taken into custody must "be advised immediately that he has the right to remain silent." *Id*. at 617. While these warnings contain no "express assurance" that his silence will not carry a penalty, "such assurance is implicit to any person who receives the warnings." *Id*. at 618. Given this assurance, the Court concluded that it would be "fundamentally unfair" and a "deprivation of due process" to allow prosecutors to use an arrestee's decision not to talk to an interrogator as evidence of his guilt at trial. *Id*.

But in the years since *Doyle*, both federal and state courts have sharply diverged on a closely-related question—whether a suspect who *initially* speaks to an interrogator but *later* exercises his right to remain silent in response to a specific question or questions enjoys the same protection. This use of "partial" or "selective" silence at trial has "never been directly addressed by the United States Supreme Court." *Bartley v. Commonwealth*, 445 S.W.3d 1, 10 (Ky. 2014). What's more, "[t]he federal Courts of Appeals that have addressed the issue are split." *Id. See also State v. Galvan*, 156 Idaho 379, 386 (Ct. App. 2014) ("[A]s to this 'partial silence,' there is a federal circuit split."); *McBride v. Superintendent, SCI Houtzdale*, 687 F.3d 92, 104

(3d Cir. 2012) (collecting cases on the "differing views" of courts of appeals in regards to "partial or selective silence"); *Jackson v. Biter*, No. 214CV2268MCEDBP, 2020 WL 3510839, at *18 n.4 (E.D. Cal. June 29, 2020) (same); *Shultz v. Terry*, No. 2:18-CV-00899, 2019 WL 2577970, at *27 (S.D.W. Va. Feb. 8, 2019) (noting that the issue has "never been directly addressed by the Supreme Court" and "circuit courts remain divided"); *Whitehead v. Byrd*, No. 3:08CV05 WHB-LRA, 2011 WL 1099880, at *5 (S.D. Miss. Jan. 25, 2011) ("Many courts characterize this issue as partial or selective silence and are divided on its admissibility.").

On one side of this split are the Fourth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits, which hold that a defendant may "refuse to answer certain questions, and still be confident that *Doyle* will prevent the prosecution from using his silence against him." *United States v. Scott,* 47 F.3d 904, 907 (7th Cir. 1995). *See also United States v. Ghiz*, 491 F.2d 599, 600 (4th Cir. 1974) (holding that evidence of a defendant "declining to answer certain questions" is inadmissible); *United States v. Williams*, 556 F.2d 65, 66 (D.C. Cir. 1977) ("Of course, the prosecution may not draw attention to the exercise of the right to become silent after speaking some."). Echoing *Doyle*, the Sixth Circuit explained that it is "fundamentally unfair" to present evidence of a suspect's refusal to answer certain questions because "the *Miranda* warning implicitly assures that silence will carry no penalty." *United States v. Williams*, 665 F.2d 107, 110 (6th Cir. 1981). So a defendant's "partial

silence does not preclude him from claiming a violation of his due process rights under *Doyle*." *United States v. May,* 52 F.3d 885, 890 (10th Cir. 1995).[2]

On the other side of this split are the First, Second, Third, Fifth, Eighth, and Ninth[3] Circuits, which hold that "[a] defendant cannot have it both ways" because "[i]f he talks, what he says *or omits*" may be presented as evidence against him at trial. *United States v. Goldman,* 563 F.2d 501, 503 (1st Cir. 1977) (quotations omitted) (emphasis added). These courts of appeals have held that by answering questions after receiving *Miranda* warnings, a defendant waives his right to exclude "the entire conversation, including the implicit references to his silence contained therein," as substantive evidence of his guilt. *United States v. Pando Franco,* 503 F.3d 389, 397 (5th Cir. 2007). *See also United States v. Pitre*, 960 F.2d 1112, 1126 (2d Cir. 1992). At a minimum, these courts have held that "clearly established Federal law, as determined by the Supreme Court of the United States," does not

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[2] While the Eleventh Circuit generally holds that a prosecutor's "specific inquiry or argument" about any post-arrest silence violates due process, a single mention of such silence "in passing" may not rise to the level of a mistrial. *United States v. Baker*, 432 F.3d 1189, 1222 (11th Cir. 2005).

[3] Previously, the Ninth Circuit had held that a suspect "may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial." *Hurd v. Terhune,* 619 F.3d 1080, 1087 (9th Cir. 2010). But as Judge Bea noted, the majority created a gaping exception to this rule for silence that is "accompanied by a suggestion that the defendant might be willing to answer the question at another time, or under different circumstances, even if he never follows through." *Garcia-Morales*, 942 F.3d at 479. Because this exception effectively swallows the rule for defendants like Mr. Garcia, the Ninth Circuit as a practical matter aligns with other circuits that do not guarantee *Doyle* protection.

"prevent[] a defendant's selective silence from being used against that defendant at trial." *McBride*, 687 F.3d at 105.

This split at the federal level has provided insufficient guidance to state courts, which leads them to suffer similar divisions. Many states agree with the Fourth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits that selective silence "generally may not be used by the People during their case-in-chief." *People v. Williams*, 31 N.E.3d 103, 108 (N.Y. 2015). *See also State v. Guerra*, 161 Ariz. 289, 296 (1989) (same); *State v. Beaudet-Close*, 148 Haw. 66, 72 (2020) (same); *State v. Clark,* 223 Kan. 83, 89 (1977) (same); *Griffith v. State*, 385 P.3d 580 n.5 (Nev. 2016) (same); *State v. Fischer*, 210 Vt. 271, 275 (2019) (same); *State v. Silva*, 119 Wash. App. 422, 430 (2003) (same). But other states agree with the First, Second, Third, Fifth, Eighth, and Ninth Circuits that "failure to answer *some* questions" is "not an affirmative invocation of his right to remain silent." *People v. McReavy*, 436 Mich. 197, 222 (1990). *See also People v. Rogers*, 68 P.3d 486, 492 (Colo. App. 2002) (same); *Thomas v. State,* 726 So.2d 357, 358 (Fla. App. 1999) (same); *State v. Talton*, 197 Conn. 280, 295 (Conn. 1985) (same); *State v. Smart*, 756 S.W.2d 578, 580–581 (Mo. App. 1988) (same); *State v. Correia*, 707 A.2d 1245, 1248 (R.I. 1998) (same). Because it is difficult to imagine a more pronounced division of authority, the Court should grant a writ of certiorari to bring harmony to this longstanding division.

II.

Both Defendants and Prosecutors Deserve Clarity on the Scope of the Fifth Amendment's Protection.

Because both federal and state courts are sharply split on this question, the Court's resolution of this issue carries important implications for both defendants and prosecutors.

First, defendants deserve to know whether initially waiving their *Miranda* rights will permanently forfeit a claim that later assertions of silence cannot be used against them. Half of all federal courts hold that once a defendant agrees to answer questions, any later refusal to answer a particular inquiry is admissible because "[a] defendant cannot have it both ways"—i.e., by both choosing to talk and refusing to talk. *Goldman,* 563 F.2d at 503. But as *Doyle* explained, *Miranda* warnings carry an "implicit" assurance that a person will not be penalized for their silence. 426 U.S. at 618. If exceptions to this rule exist, the Court should make them plain so defendants can fully understand the consequences of waiving their *Miranda* rights at the *outset* of an interrogation—rather than after it is too late.

Prosecutors deserve the same notice. If the Fifth Amendment always guarantees defendants the right not to have their silence used against them at trial, any use of such silence in the government's case-in-chief, on cross-examination, or in opening or closing arguments will constitute prosecutorial misconduct. *See Marshall v. Hendricks*, 307 F.3d 36, 63 (3d Cir. 2002) (explaining that *Doyle* violations are a type of prosecutorial misconduct). Not only can this lead to reversal on appeal, it could have disciplinary consequences for federal prosecutors within the

Department of Justice. So jurisprudential clarity on the Fifth Amendment will allow prosecutors to avoid unintentional constitutional violations and defendants to make more knowing and intelligent *Miranda* waivers.

Furthermore, this fact pattern is extremely common. Suspects in a custodial interrogation frequently waive their *Miranda* rights and agree to answer questions at the outset of an interview "out of fear of appearing guilty by remaining silent." Evelyn A. French, *When Silence Ought to Be Golden: Why the Supreme Court Should Uphold the Selective Silence Doctrine in the Wake of Salinas v. Texas*, 48 Ga. L. Rev. 623, 653 (2014). But a significant number of defendants later decline to answer certain questions during that interrogation, as the law allows them to do. *See Miranda*, 384 U.S. at 445 (explaining that "[t]he mere fact that [a defendant] answered some questions ... does not deprive him of the right to refrain from answering any further inquiries"). The Court should thus move swiftly to clarify whether prosecutors may nevertheless rely on this silence as evidence of guilt at trial.

III.

Mr. Garcia's Case Provides a Strong Vehicle to Resolve This Issue.

At trial, Mr. Garcia did not object to the prosecutor's reliance on his silence, so the Ninth Circuit applied plain error review. *See Garcia-Morales*, 942 F.3d at 479. But on appeal, Mr. Garcia squarely presented this issue at every stage of review. Moreover, Judge Bea found that the prosecutor's "flagrant and repeated use of Garcia's post-arrest silence against him at trial" satisfied "all four plain-error

prongs." 942 F.3d at 480. Not only was the prosecutor's use of silence "a clear constitutional violation under *Doyle*," Judge Bea explained, it was "critical to defeating Garcia's sole defense theory" because the prosecutor's remaining evidence on the element of *mens rea* was "both thin and circumstantial." *Id.* Judge Bea also found that this violation satisfied the fourth prong of plain error review because it implicated "the right to remain silent, and the implicit guarantee that exercising that right will carry no penalty at trial." *Id.*

The majority did not disagree with Judge Bea's prejudice analysis or hold in the alternative that Mr. Garcia could not satisfy plain error review. *See id.* at 477–78. Instead, the majority confined itself to the purely legal question of whether *Doyle* error occurred, concluding that "it was not error for the prosecution to introduce evidence of, and comment on, that part of the interrogation … characterizing Garcia as being evasive about other people involved in smuggling." *Id.* at 477. Thus, this Court need only consider the legal question of whether a prosecutor's reliance on the defendant's later-invoked silence at trial is admissible. Should the Court find *Doyle* error, it can then remand to the Ninth Circuit for a determination on whether Judge Bea's prejudice analysis is correct. Accordingly, Mr. Garcia's case provides a strong and clean vehicle to resolve this circuit split.

IV.

The Fifth Amendment Prevents Any Reliance on a Defendant's "Partial" or "Selective" Silence at Trial.

The Court should also grant certiorari because the Court's own precedent, as well as practical and policy considerations, weigh in favor of excluding any reliance on a defendant's "partial" or "selective" silence at trial.

First, this Court's precedent all but resolves the issue. As previously noted, *Miranda* itself explained that "[t]he mere fact that [a defendant] answered some questions ... does not deprive him of the right to refrain from answering any further inquiries." 384 U.S. at 445. Thus, when a defendant "ceases to answer questions there is a distinct possibility that he is relying on this right." *Protecting Doyle Rights After Anderson v. Charles: The Problem of Partial Silence,* 69 Va.L.Rev. 155, 166 (1983). Citing this law review article with approval, the Court has reiterated *Doyle*'s concern that, given the "insolubly ambiguous" character of post-*Miranda* silence, fundamental fairness requires that the government not breach its "implied assurances" that silence will not be used against the defendant. *Wainwright v. Greenfield,* 474 U.S. 284, 293–94, 294 n.12 (1986).

Second, preventing reference to a defendant's "partial silence" at trial carries important practical and policy benefits. For instance, it encourages people to speak more freely with law enforcement. A person who believes that an initial waiver of *Miranda* rights will permanently open the door to any later silence being used against them at trial will be more reluctant to speak to law enforcement at the outset of an interrogation. Additionally, if evidence of a defendant's later-invoked

silence were admissible, it would "greatly disincentivize criminal suspects from using police services in bona fide emergency situations" since this would "sacrific[e] their right to silence and invit[e] police to have another bite at the interrogation apple." *Bartley v. Commonwealth*, 445 S.W.3d 1, 12 (Ky. 2014).

Furthermore, juries are "likely to draw a strong negative inference from a defendant's failure to immediately tell the police what happened." *United States v. Hampton*, 843 F. Supp. 2d 571, 583 (E.D. Pa. 2012). And the potential risk of prejudice from selective silence is even greater than that of total silence because "[j]urors are more likely to construe a defendant's refusal to answer certain questions as an admission of guilt if the defendant has otherwise willingly answered other police inquiries." *People v. Williams*, 31 N.E.3d 103, 108 (N.Y. 2015). So adopting the rule of the Fourth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits would prevent juries from drawing improper inferences while simultaneously encouraging defendants to cooperate with law enforcement without unknowingly waiving their Fifth Amendment rights.

CONCLUSION

To resolve the entrenched split over a defendant's right not to have his "partial silence" used against him at trial, the Court should grant Mr. Garcia's petition for a writ of certiorari.

Respectfully submitted,

Date: October 28, 2020

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