No. 25-____

In the Supreme Court of the United States

STATE OF ALABAMA,
Petitioner,
v.
MICHAEL ANTHONY POWELL,
Respondent.

On Petition for Writ of Certiorari to the
Alabama Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Michael Powell was convicted of capital murder for shooting a gas-station clerk, Tracy Algar, in the head during a robbery. While awaiting trial, Powell tried to frame another man by forging a confession letter. Among other things, the letter said, "I hid the gun" and "told [Powell] where to find [it]."

Powell's counsel argued there is "doubt all over the place" because the State had "no gun." Again: "This case is riddled with doubt" because there's "no gun." In rebuttal, the prosecutor responded: "[T]here is only one person in this room who knows where the gun is. One person, he is sitting over there." Powell objected. At a sidebar, the prosecutor explained his inference based on the letter, adding: "I am not going to say he didn't tell us."

In context, the remark was "perfectly proper." *United States v. Robinson*, 485 U.S. 25, 33 n.5 (1988). But the lower court ignored the context and held that *any* "direct comment" on the choice not to testify violates the right against self-incrimination under *Griffin v. California*, 380 U.S. 609 (1965). It added that any uncured *Griffin* error "requires" reversal (App.24a) despite this Court repeatedly rejecting "a *per se* rule" of "automatic reversal," *United States v. Hasting*, 461 U.S. 499, 508 (1983) (applying *Chapman v. California*, 386 U.S. 18 (1967)). The Court should summarily reverse on this question presented:

1. Whether courts must reverse for *Griffin* error without examining a prosecutor's comment in context and without finding prejudice.

Or the Court should grant the petition to decide:

2. Whether *Griffin* should be overruled.

LIST OF PROCEEDINGS

Supreme Court of Alabama, No. SC-2024-0529, *Ex parte State of Alabama*, order Sept. 12, 2025 (denying petition for writ of certiorari).

Court of Criminal Appeals of Alabama, No. CR-20-0727, *Powell v. State*, order Aug. 9, 2024 (denying rehearing), order May 3, 2024 (reversing and remanding for new trial).

Circuit Court of Shelby County, No. CC-16-942, *State v. Powell*, order June 24, 2021 (sentencing).

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PETITION FOR WRIT OF CERTIORARI

I. In *Griffin v. California*, the Court announced that prosecutors violate the Self-Incrimination Clause if they "comment … on the accused's silence." 380 U.S. 609, 615 (1965). Since then, the Court has repeatedly clarified both the scope of the rule and the remedy.

First, not all comments on silence violate *Griffin*, which held that prosecutors may not use silence "as substantive evidence of guilt." *United States v. Robinson*, 485 U.S. 25, 34 (1988). Other remarks on the choice not to testify "may, in context, be perfectly proper." *Id.* at 33 n.5.

Second, not all *Griffin* errors require reversal. In *Chapman v. California*, the Court held that while some trial protections are so fundamental "that their infraction can never be treated as harmless," *Griffin* is not one of them. 386 U.S. 18, 23 (1967). The Court "rejected a *per se*" or "automatic reversal" rule and held that "a reviewing court must ask" whether the *Griffin* error prejudiced the defendant. *United States v. Hasting*, 461 U.S. 499, 508, 510 (1983).

I.A. The court below flatly defied *Robinson* when it held that the statement "only one person … knows where the gun is" was a "*direct* reference" that is "impermissible" and "forbidden under the Constitution." App.23a-24a. *Robinson* rejected "the view that any 'direct' reference" is improper, upholding the "principle that prosecutorial comment must be examined in context." 485 U.S. at 31, 33. Twelve federal courts of appeals and most state courts apply a contextual standard that makes no reference to the "directness" of the challenged remark—an antiquated criterion that did not survive *Robinson*. Accordingly, many courts have examined comments about "who knows" the location

of a murder weapon and found them perfectly proper. Because the Alabama appellate courts refuse to apply *Robinson*, this Court should vacate and remand or summarily reverse on the ground that a prosecutor's "fair response" does not violate *Griffin*. 485 U.S. at 34.

I.B. The court below also refused to apply any standard for prejudicial error. In its view, some trial errors are "subject to harmless-error review," App.62a, but not *Griffin* violations, which "requir[e]" reversal, App.24a. That's wrong. A prosecutor's reference to the defendant's silence is not structural; it does not render the trial automatically unfair. Because the court below failed to review for prejudicial error, the Court should vacate and remand or summarily reverse on the ground that the alleged *Griffin* violation was not reversible in light of the overwhelming evidence that Powell is guilty.

II. Although both errors should have been avoided, the root of the problem is *Griffin*. Ever since the Court declared that a prosecutor's mere *comment* is tantamount to *compulsion*, courts have struggled. Finding the line between proper and improper argument is impossible because *Griffin* "lacks foundation" in "text, history, or logic." *Mitchell v. United States*, 526 U.S. 314, 332 (1999) (Thomas, J., dissenting); *see id.* at 336 (Scalia, J., dissenting); *Salinas v. Texas*, 570 U.S. 178, 192 (2013) (Thomas, J., dissenting); *Lakeside v. Oregon*, 435 U.S. 333, 344-45 & n.5 (1978) (Stevens, J., dissenting). The rule is not workable, its contours remain ill defined, and its offspring for too long have "throttle[d]" "our machinery of justice." *Brooks v. Tennessee*, 406 U.S. 605, 617 (1972) (Burger, C.J., dissenting). *Griffin v. California* should be overruled.

The State of Alabama respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

PRIOR OPINIONS AND ORDERS

The Alabama Court of Criminal Appeals decision is available at 2024 WL 1947990 and App.1a-82a. The order denying rehearing is available at App.83a. The Alabama Supreme Court's order denying the State's petition for writ of certiorari is available at App.84a.

JURISDICTION

Jurisdiction arises under 28 U.S.C. §1257(a). The judgment below was entered on September 12, 2025. The State received an extension to January 10, which made this petition due January 12, Sup. Ct. R. 30.1.

PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides: "[N]or shall any person … be compelled in any criminal case to be a witness against himself."

STATEMENT

A. Constitutional Background

In *Wilson v. United States*, the Court considered a prosecutor's statement inviting the jury to infer guilt from the defendant's failure to take the stand. 149 U.S. 60, 66-67 (1893). Applying a federal statute (since codified at 18 U.S.C. §3481), this Court reversed, reasoning that the remark "tended to [the defendant's] prejudice." *Id.* at 68. The trial court should have sustained defense counsel's objection and instructed the jury not to "attach to the failure [to testify] any importance whatever as a presumption against the

defendant." *Id.* at 67. In *Bruno v. United States*, the Court interpreted the same statute to require a jury instruction, when requested, that the defendant's failure to take the stand cannot weigh against him. 308 U.S. 287, 293-94 (1939).

In the mid-20th century, the Court effectively applied the federal statutory regime to the States. In what Justice Scalia later called "a breathtaking act of sorcery," *Griffin v. California* "simply transformed legislative policy into constitutional command," insisting that 18 U.S.C. §3481 reflected the "spirit" of the Fifth Amendment. *Mitchell v. United States*, 526 U.S. 314, 336 (1999) (Scalia, J., dissenting); *accord id.* at 343 n.* (Thomas, J., dissenting). According to the *Griffin* majority, "comment on the refusal to testify … cuts down on the [Fifth Amendment] privilege by making its assertion costly." 380 U.S. 609, 614 (1965). While Griffin's conviction had been procured with the aid of judicial *instruction* to take silence as evidence, *id.* at 613, the Court barred not only such "instructions by the court" but also "comment by the prosecution on the accused's silence," *id.* at 615.

Griffin's rule supplanted earlier state law dealing with prosecutorial comments on silence. *See, e.g.*, *Padgett v. State*, 223 So. 2d 597, 603 (Ala. Ct. App. 1969) ("*Griffin v. California*, supra, has taken over [Ala. Code §] 305, supra, and even perhaps overturned *Broadway v. State*, [60 So. 2d 701 (Ala. 1952)].").[1] "It

[1] Alabama's pre-*Griffin* regime required defendants to object at trial, *Stone v. State*, 17 So. 114, 118 (Ala. 1895), and request a jury instruction, *Arant v. State*, 167 So. 540, 543 (Ala. 1936). To be reversible, a comment had to be "so grossly improper

is thus" based on an interwoven analysis, including the "federal constitutional aspect" of the privilege, as "spoken to by [this] Court in *Griffin v. California*" that Alabama courts will reverse based on an uncured and "direct comment on defendant's failure to testify." *Whitt v. State*, 370 So. 2d 736, 738-39 (Ala. 1979).

But not all *Griffin* violations are reversible. In *Chapman v. California*, the Court contrasted errors that "automatically call for reversal" with those that "in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." 386 U.S. 18, 22-23 (1967). Even "highly prejudicial" comments that violate *Griffin* can still be "harmless" if they "did not contribute to the verdict obtained." *Id.* at 24.

The Court reaffirmed *Chapman* in *United States v. Hasting*, rejecting the view that "*Griffin* error was *per se* error requiring automatic reversal." 461 U.S. 499, 508 (1983). Rather, *Griffin* violations must be treated like "most constitutional violations," which courts have a "duty … to ignore" if "harmless." *Id.* at 509. Even a "clear" violation does not mandate reversal if there is "overwhelming evidence of guilt" and "scanty evidence" for the defense. *Id.* at 510, 512; *cf. United States v. Robinson*, 285 U.S. 25, 29-30 (1988) (noting plain-error standard for unpreserved *Griffin* claims).

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and highly prejudicial as to have been ineradicable." *Id.* "[C]overt references [were] construed against the defendant … no matter what the jury might infer[.]" *Padgett*, 223 So. 2d at 602 (collecting cases "at variance with [some] interpretation[s] of *Griffin*").

B. Procedural Background

1. The State proved overwhelmingly that Powell murdered Tracy Algar.

The morning of Sunday, October 30, 2016, Michael Powell walked from his apartment to a gas station, forced clerk Tracy Algar into the bathroom at gunpoint, and shot her point-blank in the head. He stole $265. A customer found Tracy's body soon after and called the police. Powell was arrested five days later.

Police ascertained the murderer's identity from surveillance video and witness reports. Using the time stamp on a "no-sale" receipt at the gas station and surveillance footage from nearby businesses, police found a suspect and tracked his path. R.1417-18, 1421, 1452-56.[2] Police released a person-of-interest photograph, and two women recognized Michael Powell, a tenant in the apartment where they worked. R.1582-85, 1808. A third woman, Sarah Knighten, informed police that she had seen a man running down Highway 31, described him, and later identified Powell from a photographic lineup. R.1386-87. Police pieced together Powell's trip from his apartment to the gas station and back, using video footage and witness reports. R.1635-36, 1644-56.

Two days after the robbery-murder, Powell paid a $243 fee for a civil suit, R.1339, 2159-62, in which he had requested (but been denied) a fee waiver for financial hardship, 2d.Supp.C.327-28. Police searched his apartment and found clothing like the suspect wore. R.1554, 1560, 1723. Police also searched the residence

[2] "R.__" refers to the reporter's transcript of court proceedings. "C.__" refers to the clerk's compilation of case documents.

of Elsie Johnson, Powell's girlfriend, and discovered a locked box with ammunition matching a shell casing found at the scene. R.1481. They found the box's key at Powell's apartment on his keychain. R.1829.

Powell was indicted two weeks after his arrest and charged with capital murder during the course of a robbery. C.26. After his arrest, Powell asked fellow inmate David Jackson to help him write a confession letter. Unbeknownst to Jackson, *his* name was signed, and the letter was sent to the district attorney's office. C.410-11. The fabricated letter claimed that the victim was a participant in a staged robbery scheme, that a man named James Moore was the triggerman, and that Powell was innocent. Notably, the letter stated, "I hid the gun and left," and, "I also told [Powell] where to find [the] gun." App.6a-7a. Jackson provided testimony about his interactions with Powell and the drafting of the letter, and jail surveillance video supported that testimony. C.400-43.

Powell also made incriminating statements to inmate Kelvin Hines, who testified at trial. R.2175-83. Powell told Hines that "there was no way [Sara Knighten] could have identified him" in a photo array with how fast she was driving. R.2177. He also told Hines that he would arrange for someone to offer false testimony about the box of ammunition found by police. R.2178. When Powell learned that Hines had spoken to the State, he threatened Hines, who had to be moved to a different cell for his safety and eventually to a different facility. R.2172-74.

Powell had phone conversations asking Johnson, his girlfriend, to gather alibi witnesses who would say that they saw him in another city on the day of the

murder, R.1884-89, but his cell data would prove he had not left town the day before or the day of the murder, C.314; R.1761. Powell encouraged Johnson not to testify. C.315. Powell also discussed the surveillance videos with Johnson, stating: "[N]one of the pictures show my face clearly." C.315.

2. Powell was convicted of capital murder and sentenced to death.

Trial commenced on April 12, 2021. R.339. Before hearing any evidence, the jury was instructed on the defendant's right not to testify. R.646, 1149-50, 1209-10. Defense counsel also "broached" the subject during voir dire and opening statements. R.2233-34. Before closing arguments, the trial court stated:

> I fully expect that each party is going to zealously represent their respective interests in this case, and the law requires nothing less of them. Generally it is not necessary for one party or the other to interpose objections during this because it is understood to be argument and not evidence.

R.2337. The prosecutor gave an extensive first closing, including discussion of the phony Jackson letter: "It is actually a confession letter. It is just not David Jackson's. It is Michael Powell's. All of the evidence from that letter came from Michael Powell, and after [he] received that letter again, he included additional statements. It is a confession letter." R.2360.

For defense counsel's closing, counsel reminded the jury about Powell's right not to testify:

> Now, the judge has charged you that a defendant has a right to remain silent. Michael

> exercised his right to remain silent in this particular case. You swore that you would not hold that against him. That is what we are going to ask you to do right now. You heard the evidence. You heard things that are going on in this case, but we are going to ask you to not hold it against [him] because he exercised his right to remain silent that we all have.

R.2369-70. Defense counsel then argued that the State had failed to satisfy its burden of proof, casting doubt on the witness identifications, the surveillance footage, the lack of DNA evidence, and, repeatedly, the State's inability to produce the murder weapon. R.2375-92. Counsel posited that the real murderer was "still out there," R.2379, and insinuated that Powell was targeted because he had sued the local police department, R.2378-79.

In rebuttal, the prosecutor responded: "[T]here is only one person in this room who knows where the gun is. One person, he is sitting over there. That guy knows where the gun is." R.2393-94. Defense counsel objected, and the attorneys approached the bench. R.2394. Prompted to finish his thought, the prosecutor stated: "It is within the David Jackson letter that David Jackson told [Powell] where the gun is. That is it, I am not going to say he didn't tell us or anything like that." *Id*. The court agreed: "That bell hasn't been rung yet. I don't find that to be improper depending on what comes next of course. We will resume." R.2395. The prosecutor continued: "There is one man in this courtroom who knows where that gun is, one man and he is sitting right over there next to that jury box. You remember that letter from David Jackson? I

have one copy right here, State's 1001. You have the original, State's Exhibit 223." *Id.*

Defense counsel renewed his objection, which the court overruled. *Id.* The prosecutor continued: "This letter, I am on page three for reference, 'I apologize to Mr. Powell for … being wrongly accused for something that I was involved in, I also told him where to find Mr. James Moore's gun." *Id.*

In its charge to the jury, the court instructed that the defendant had no burden of proof and was presumed innocent. R.2441. The court also instructed that "the defendant is not required to testify, and his choice not to testify cannot be used against him in any way, nor can any inference or conclusion be drawn from the fact that he chose not to testify, nor should this fact have any weight whatsoever with you in reaching a verdict in this case." R.2450. The jury found Powell guilty and recommended a death sentence, which the court imposed. R.2492, 2680, 2707.

3. The court of appeals reversed based on the allegedly "direct reference" to Powell's decision not to testify.

The Alabama Court of Criminal Appeals reversed. The lead opinion garnered only one vote, as two judges concurred in the result only, and two judges dissented. The lead opinion argued that the prosecutor's rebuttal remark was a "direct comment" on the choice not to testify, which "requires" reversal. App.24a. Although the State had argued that the comment was (1) fair rebuttal to "defense counsel's argument that the State had the wrong person," and (2) a proper inference from the evidence—*viz.*, Powell's own letter expressly stating that he knew the gun's location—the lead

opinion concluded, "however," that the "comment was still an impermissible *direct* reference to Powell's failure to explain where the gun is, as Powell is the only person who could have testified as to the whereabouts of the gun. This is precisely the type of comment that is forbidden under the Constitution." App.23a-24a.

Judge McCool authored a dissenting opinion joined by Presiding Judge Windom. The lead opinion erred, he wrote, "by simply examining the bare statements and comparing them to the bare statements in prior cases, ultimately failing to properly evaluate and weigh the context in which these statements are made." App.72a. The "context demonstrates that the State was not commenting on the failure of the defendant to testify; rather, the State was arguing the reasonable inferences from the evidence." App.77a. It cannot be, the dissent continued, that Powell can "arrange for someone to write a bogus confession letter that states that Powell knows where the gun is and then prohibit the State from commenting on that evidence during closing argument." *Id*.

The dissent also viewed the prosecutor's comment as a fair response "to defense counsel's argument that the State had failed to meet its burden of proof because it had not produced the murder weapon." App.78a. The comment was not intended to be, nor would it have necessarily been taken, as a remark on Powell's failure to testify, but it "simply relayed the message that law enforcement had not recovered the murder weapon because Powell had disposed of it." App.80a (citation modified) (quoting *Mitchell v. State*, 84 So. 3d 968, 980 (Ala. Crim. App. 2010)).

REASONS TO GRANT THE WRIT

I. The Decision Below Defies This Court's Clear Precedents And Conflicts With Numerous Decisions Of Other State And Federal Courts.

Following *Griffin*, Alabama courts developed a rule distinguishing "direct" from "indirect" remarks on the defendant's decision not to testify. *See, e.g.*, *Whitt v. State*, 370 So. 2d 736, 739 (Ala. 1979); *Beecher v. State*, 320 So. 2d 727, 733 (1975). Under this interpretation, any "direct comment" by the prosecutor violates the right against compelled self-incrimination. And if the comment does not prompt an immediate curative jury instruction, it "mandates the reversal of the defendant's conviction." App.18a.

Purporting to be "[c]onsistent with th[e] reasoning" of "federal courts," App.17a-18a (citing *Griffin*) about what "is forbidden under the Constitution," App.24a, the Alabama courts have badly misconstrued the Fifth Amendment. Applying its "direct comment" framework from the 1970s and declaring *any* uncured "direct comment" to be reversible, the court below committed two unmistakable errors. First, as nearly every jurisdiction has recognized, this Court has rejected a rule that "directness" can be dispositive regardless of the context in which the prosecutorial comment occurs. Second, as the Court has repeatedly explained in the very context of *Griffin*, an improper prosecutorial comment does not warrant automatic reversal; instead, courts *must* apply *at least* harmless-error review, giving the State the opportunity to prove the verdict would have been obtained anyway. Because the decision below neither evaluated the prosecutor's remark in context nor assessed whether

it was prejudicial, the Court should summarily reverse or at least vacate and remand for proceedings consistent with *United States v. Robinson*, *Chapman v. California*, and *United States v. Hasting*.

A. The rule that any "direct comment" on silence violates *Griffin* is the same error this Court reversed in *Robinson*.

1. Nearly forty years ago, the Court explained that *Griffin* stands for the narrow rule "that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt." *United States v. Robinson*, 485 U.S. 25, 34 (1988). The Court firmly rebuked the notion "that because the prosecution's reference to respondent's failure to testify had been 'direct,' it did not matter that it was made in response to remarks by defense counsel." *Id.* at 29. Rather, the Court explained that to identify *Griffin* error, the challenged "prosecutorial comment must be examined in context." *Id.* at 33. The Court adopted this contextual approach for three reasons.

First, "the view that any 'direct' reference … violates the Fifth Amendment" would require a very "broad reading" of *Griffin* and "expand" it. *Id.* at 31, 34. In *Griffin*, the Court reminded, the prosecution had repeatedly and "*baldly* stated to the jury that the defendant *must* have known what the disputed facts were, but that he had *refused* to take the stand to deny or explain them." *Id.* at 31 (emphases added). There is a "considerable difference" between those "sorts of comments" and ones that fairly respond to defense counsel's argument. *Id.* at 32.

Second, the Court explained that a rule prohibiting any "direct comment" "would be quite inconsistent

with the Fifth Amendment, which protects against compulsory self-incrimination." *Id.* at 31-32. At its core, *Griffin* bars the prosecution from offering "silence as substantive evidence of guilt" "on his own initiative," "ask[ing] the jury to draw an adverse inference from a defendant's silence." *Id.* at 32. Anything more would transform the Amendment's "protective shield … into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." *Id.* (quoting *United States v. Hasting*, 461 U.S. 499, 515 (1983) (Stevens, J., concurring)). And treating the privilege as a sword fits poorly in our adversarial system, which requires that "both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *Id.* at 33; *cf. Doyle v. Ohio*, 426 U.S. 610, 628 (1976) (Stevens, J., dissenting) (describing *Griffin* as the rule that silence cannot be used in the "case in chief").

Third, the Court noted that considering the context of a prosecutorial remark would bring *Griffin* in line with other caselaw on prosecutorial argument. Under the familiar *Donnelly* test, a remark must "so infect[] the trial with unfairness" to rise to the level of a constitutional violation. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Courts do "not lightly infer … the most damaging meaning" from an ambiguous remark, nor assume that a jury would. *Id.* at 647. "Isolated" comments are unlikely to "have a significant impact on the jury's deliberations," *id.* at 646, and "must be judged in the context in which they are made," *Boyde v. California*, 494 U.S. 370, 385 (1990); *accord Darden v. Wainwright*, 477 U.S. 168, 179 (1986) ("It is helpful … to place these remarks in

context."); *United States v. Young*, 470 U.S. 1, 16 (1985) ("[A]ppellate courts [are] to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure."). Thus, emphasizing in *Robinson* that the challenged remark was "made in response," 485 U.S at 29, the Court adhered to prior precedent that a prosecutor's comments "must be evaluated in light of the defense argument that preceded it," *Darden*, 477 U.S. at 179.

2. The requirement to examine prosecutorial comments in context involves more than reviewing the trial transcript for forbidden words or mechanically labeling comments as "direct" or "indirect." *See, e.g.*, *Ragland v. Commonwealth*, 191 S.W.3d 569, 589 (Ky. 2006) ("Historically, courts drew distinctions between 'direct' comments … usually held to be improper and prejudicial, and 'indirect' comments, which were usually found not to warrant reversal. … Now, however, a less formalistic rule governs[.]" (citation modified) (quoting *Moore v. State*, 669 N.E.2d 733, 737 (Ind. 1996))); *United States v. Wing*, 104 F.3d 986, 990 (7th Cir. 1997) (describing "debate over … directness" as "unproductive" and not "the central issue").

The central issue is not "the language used" by the prosecutor but whether that language asked the jury to *infer guilt* from the choice not to testify. *See Knowles v. United States*, 224 F.2d 168, 170 (10th Cir. 1955) (citing *Morrison v. United States*, 6 F.2d 809 (8th Cir. 1925)). Twelve federal courts of appeals apply a test derived from *Knowles*, which focuses on the *intent* of the prosecutor or the *effect* on the jury, not a

list of words that constitute "direct" comment.[3] Most state courts take the same functional approach.[4] So even a "direct" comment may be unobjectionable—for example, if it is "a fair response to a claim made by

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[3] *E.g.*, *United States v. Sepulveda*, 15 F.3d 1161, 1187 (1st Cir. 1993); *United States v. Knoll*, 16 F.3d 1313, 1323 (2d Cir. 1994); *United States v. Brennan*, 326 F.3d 176, 187 (3d Cir. 2003); *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973); *Samuels v. United States*, 398 F.2d 964, 968 (5th Cir. 1968); *Bowling v. Parker*, 344 F.3d 487, 514 (6th Cir. 2003); *United States v. Tanner*, 628 F.3d 890, 899 (7th Cir. 2010); *United States v. Gardner*, 396 F.3d 987, 989 (8th Cir. 2005); *Hovey v. Ayers*, 458 F.3d 892, 912 (9th Cir. 2006); *United States v. Hooks*, 780 F.2d 1526, 1533 (10th Cir. 1986); *United States v. Thompson*, 422 F.3d 1285, 1299 (11th Cir. 2005); *United States v. Williams*, 521 F.2d 950, 953 (D.C. Cir. 1975).

[4] *E.g., Seigle v. State*, No. A-13725, 2025 WL 326144, at *5 (Alaska Jan. 29, 2025); *State v. Cook*, 821 P.2d 731, 742 (Ariz. 1991); *State v. Outlaw*, 324 A.3d 107, 131 (Conn. 2024); *Shelton v. State*, 744 A.2d 465, 502 (Del. 2000); *Pyne v. State*, 906 S.E.2d 755, 764 (Ga. 2024); *State v. Tsujimura*, 400 P.3d 500, 515 (Haw. 2017); *State v. Bishop*, 387 N.W.2d 554, 562 (Iowa 1986); *State v. Ninci*, 936 P.2d 1364 (Kan. 1997); *Ragland*, 191 S.W.3d at 589; *State v. DeRosier*, 695 N.W.2d 97, 107 (Minn. 2005); *Evans v. State*, 226 So. 3d 1, 32 (Miss. 2017); *State v. Gonyea*, 730 P.2d 424, 427 (Mont. 1987); *Flowers v. State*, 456 P.3d 1037, 1051 (Nev. 2020); *State v. Kenison*, No. 2017-0073, 2018 WL 4940744, at *4-5 (N.H. Sept. 17, 2018); *State v. DeGraff*, 131 P.3d 61, 65-66 (N.M. 2006); *State v. Hanson*, 987 N.W.2d 655, 657 (N.D. 2023); *State v. Gapen*, 819 N.E.2d 1047, 1067 (Ohio 2004); *State v. Marizan*, 185 A.3d 510, 517 (R.I. 2018); *State v. Ball*, 675 N.W.2d 192, 200 (S.D. 2004); *State v. Jackson*, 444 S.W.3d 554, 588 (Tenn. 2014); *Sandoval v. State*, 665 S.W.3d 496, 550 (Tex. Crim. App. 2022); *State v. Hales*, 652 P.2d 1290, 1291 (Utah 1982); *State v. Hamlin*, 499 A.2d 45, 50 (Vt. 1985); *Powell v. Commonwealth*, 552 S.E.2d 344, 360 (Va. 2001); *State v. Barry*, 352 P.3d 161, 167 (Wash. 2015); *State v. Mills*, 566 S.E.2d 891, 901 (W.Va. 2002); *State v. Hoyle*, 987 N.W.2d 732, 741 (Wis. 2023).

defendant or his counsel." *Robinson*, 485 U.S. at 32; *see, e.g.*, *People v. Fields*, 538 N.W.2d 356, 365 (Mich. 1995) (permitting "fair response" because "contextual analysis is the proper approach" under *Robinson*). Similarly, a prosecutor may "legitimate[ly] comment" "on the weaknesses in the defense case." *Robinson*, 485 U.S. at 32; *see, e.g.*, *Wright v. State*, 958 So. 2d 158, 164, 166 (Miss. 2007) (applying *Robinson* to permit comment "based on the status of the record at the time the comments were made in closing").

To be sure, neither *Robinson* nor any other case since *Griffin* offered a full "framework for deciding if a statement is a comment on a defendant's silence" and, if so, "whether [it] is adverse." *Hoyle*, 987 N.W.2d at 739; *see also Freeman v. Lane*, 962 F.2d 1252, 1260 (7th Cir. 1992) (observing lack of "direct … guidance"). As a result, lower courts have generally struggled to develop uniform rules. *See infra* §II; *see, e.g.*, *United States v. Griggs*, 735 F.2d 1318, 1321 (11th Cir. 1984) ("[T]he line of demarcation between permissible and constitutionally unacceptable commentary is quite difficult to draw."). But at least one thing is crystal clear: whether a prosecutor's remark is "perfectly proper," on the one hand, or compelled self-incrimination in violation of *Griffin*, on the other, always depends on context. *Robinson*, 485 U.S. at 33 n.5. Courts nationwide have internalized that lesson.

3. But not in Alabama. While Alabama courts often recite a more contextual standard, in practice they make the "direct" label dispositive. Relying on *Griffin* and *Donnelly*, the state high court declared in 1975 that "[w]here there has been direct comment on defendant's failure to testify" without a prompt curative

instruction, "the conviction must be reversed." *Beecher v. State*, 320 So.2d 727, 733 (Ala. 1975); *see Meade v. State*, 381 So. 2d 656, 657 (Ala. Crim. App. 1980); *Whitt v. State*, 370 So. 2d 736, 738 (Ala. 1979) ("Direct comment on the defendant's failure to testify … [is] error [under] *Beecher*[.]").

Decades later, even with the benefit of *Robinson*, Alabama courts reverse after finding a "direct" and uncured comment on silence—"no[] matter" what, *contra Robinson*, 485 U.S. 29. *See, e.g.*, *Witherspoon v. State*, 596 So. 2d 617, 619 (Ala. Crim. App. 1991) (despite citing *Robinson*); *Ex parte Wilson*, 571 So. 2d 1251, 1265 (Ala. 1990) (same). Contemporaneously with this petition, the State is seeking certiorari in *Sykes v. State*, a case in which the lower court held that because a "remark was a direct comment on [the] decision not to testify" and the trial court "failed to take prompt curative action, [the court] must reverse." *Sykes v. State*, No. CR-2022-0546, 2024 WL 1947829, at *9 (Ala. Crim. App. May 3, 2024). These decisions are not compatible with *Robinson*.

Nor was the decision below, which was premised entirely on the "directness" of the challenged remark, not the context in which it occurred. Addressing the State's defense of the comment as a fair "refutation of defense counsel's argument," App.23a, the lead opinion held that regardless of the context, the "comment was still an impermissible *direct* reference to Powell's failure to explain where the gun is." App.23a-24a. This "type of comment" was deemed "forbidden under the Constitution." App.24a. The court's unsupported conclusion squarely conflicts with *Robinson*, which "rejected the argument that 'any direct reference by

the prosecutor to the failure of the defendant to testify violates the Fifth Amendment as construed in *Griffin*.'" *Thompson*, 422 F.3d at 1298 (quoting *Robinson*, 485 U.S. at 31).

The Court should summarily reverse. *Robinson* makes clear that the prosecutor's statement did not violate *Griffin*. When the parties gave their closing arguments, the jury had already heard decisive evidence of Powell's guilt. *Supra* Statement §B.1. Defense counsel was left to poke holes, arguing that the State's case failed for want of a murder weapon: "no gun," he repeated. R.2387, 2392. To address this perceived flaw, the prosecutor's rebuttal began with evidence the State *did* have about the murder weapon—evidence that the defendant "knows where the gun is." R.2394. The prosecutor then explained how Powell had Jackson write that he (Jackson) had told Powell the location of the gun. R.2394-95. In context, that was not a direct comment on the defendant's silence, and even if it were, it was a more than "fair response to a claim made by defendant or his counsel." *Robinson*, 485 U.S. at 32.

The prosecutor simply answered the question raised by defense counsel: Where is the gun? To rebut the misimpression that the State had no evidence about the murder weapon, the prosecutor accurately *restated*—not based on Powell's silence, but based on his own words—that the record contained *evidence* from which the jury could infer that Powell knew the gun's location: Powell had *admitted* that he "hid" it. App.6a. The prosecutor's inference "added nothing to the impression that had already been created" by the letter. *Cf. Lockett v. Ohio*, 438 U.S. 586, 595 (1978);

Robinson, 485 U.S. at 33 (same); *United States v. Ivory*, 532 F.3d 1095, 1101 (10th Cir. 2008) (citing context and "unfair[ness]" in forbidding "the prosecutor to explain why the government produced no witness" on a particular issue); *State v. Reineke*, 337 P.3d 941, 947 (Or. 2014) (observing right "to rebut any misimpressions created by the defendant"). Put differently, "the prosecutor was not suggesting that if [Powell] were innocent, he would have testified to [the location of the gun]. That would be absurd." *State v. La Madrid*, 943 P.2d 110, 115 (N.M. Ct. App. 1997). The remark reiterated a fair and natural inference the jury could draw from the evidence, not an adverse inference from Powell's silence.

Courts applying a contextual standard have allowed almost identical comments. In *Solomon v. Kemp*, the Eleventh Circuit rejected a challenge to the comment "We don't know which defendant had which gun. The only person who can tell us that is Van Solomon." 735 F.2d 395, 401 (11th Cir. 1984). "[T]aken in context," the court correctly recognized the comment as "an attempt to explain why the state could not match each defendant with one specific gun and to stress that this fact was not crucial to the state's case." *Id.* So too here: the prosecutor was explaining why the State had "no gun." Indeed, numerous courts have affirmed convictions despite utterances just like the one at issue here.[5] Yet in Alabama, pointing out that

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[5] *See also, e.g.*, *State v. Mitchell*, 779 So. 2d 698, 702 (La. 2001) ("Taken in [proper] context, the words 'Where's the weapon? One person knows where the weapon is. One person.' do not necessarily focus upon the defendant's failure to take the

the defendant knows the location of the murder weapon is a "*direct* reference" to silence and thus always "impermissible." App.23a-24a.

The Court should reverse. Where federal law calls for a "fact-dependent and context-sensitive approach," lower courts are not free to adopt a rule that "prevents that sort of attention to context." *Cf. Barnes v. Felix*, 605 U.S. 73, 81-82 (2025). At a minimum, the Court should vacate and remand for the Alabama courts to apply *Robinson* in the first instance.

B. The rule that any "direct comment" on silence requires automatic reversal squarely conflicts with *Chapman* and *Hasting*.

1. Wholly apart from its reliance on the "direct" label identifying *Griffin* error, the court below defied clear precedent when it held that any uncured "direct comment" on the choice not to testify *mandates* reversal. The lead opinion could not have been clearer that any comment "forbidden under the Constitution" "crosse[s] [a] line, requiring [the court] to reverse." App.24a; *see also* App.22a-23a (citing cases approving

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stand. Nor do they support the likelihood that the prosecutor intended to do so. The comment comes across as an explanation for the State's inability to introduce the murder weapon because the defendant threw the weapon away[.]"); *People v. Moore*, 576 N.E.2d 900, 905-06 (Ill. App. Ct. 1991) (allowing "Where are the guns? … I know one guy who knows" as rebuttal to "… did they find guns? No."); *Francisco Mascorro v. State*, 627 S.W.2d 523, 523 (Tex. Ct. App. 1982) (allowing "there is only one person who knows where that gun is"); *Porter v. State*, No. 06-06-00220-CR, 2008 WL 623226, at *5-6 (Tex. Ct. App. Mar. 10, 2008) (similar); *Sanchez v. Commonwealth*, No. 2003-CA-002137, 2005 WL 119833, at *3 (Ky. Ct. App. Jan. 21, 2005) (similar).

the rule that "a direct comment on the failure of the defendant to testify … constitute[s] error to reverse"). The court did not apply an abuse-of-discretion standard, as the State had first urged, nor did it address the State's argument on application for rehearing that at best for Powell, *Chapman*'s harmless-error standard should apply. App.104a-105a.

Under *Chapman v. California*, most trial errors, including *Griffin* errors specifically, do not justify automatic reversal. 386 U.S. 18, 21 (1967). "Just because a constitutional error took place at trial does not necessarily mean a new one must be held." *Pitts v. Mississippi*, No. 24-1159 (U.S. Nov. 24, 2025) (slip op., at 5); *accord, e.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

Soon after *Griffin* was decided, the Court began applying *Chapman*'s standard to *Griffin* claims. *See, e.g.*, *Anderson v. Nelson*, 390 U.S. 523, 525 (1968). In *United States v. Hasting*, the Court reiterated that it had "affirmatively rejected a *per se* rule" of reversal. 461 U.S. 499, 508 (1983). Asked "whether … a reviewing court may ignore the harmless error analysis of *Chapman*," the Court deemed "automatic reversal[]" to be a "retreat" from judicial "responsibilities." *Id.* Rather, the Court held that in every case in which the alleged constitutional error is not structural—*i.e.*, one that implicates the fundamental fairness of the trial—a reviewing court must *at least* ascertain if the State's evidence was such that "the error complained of did not contribute to the verdict" "beyond a reasonable doubt." *Chapman*, 386 U.S. at 24.

Alabama courts are not alone in failing to apply a prejudicial-error standard to *Griffin* clams. For at

least some violations, several courts have effectively elevated *Griffin* to the status of structural error.[6] But by and large, most courts faithfully apply *Chapman* and *Hasting*,[7] which leave no room for a special set of *Griffin* violations that merit automatic reversal. Courts must consider "what effect [the error] had upon the guilty verdict in the case at hand." *Sullivan*, 508 U.S. at 279. By labeling "direct" comments *per se* prejudicial, Alabama courts do not address "*this* trial" in particular. *Id.* They have elevated *Griffin* errors to "structural defects" akin to "total deprivation" of a constitutional right. *Id.* at 279, 281.

The Court should summarily reverse because *Griffin* errors do not void a conviction automatically. As it did in *Hasting*, the Court should apply the proper standard and conclude that the alleged *Griffin* error made no difference to the verdict. The Court has at its disposal the lower court's extensive recitation of the evidence—overwhelming proof that Powell murdered Tracy Algar. From surveillance footage and civilian reports, law enforcement traced the murder suspect to

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[6] *See, e.g.*, *State v. Tarbox*, 158 A.3d 957, 962 (Me. 2017) (holding that a preserved challenge to an "unambiguous[]" comment on silence is "prejudicial as a matter of law"); *Patterson v. State*, 565 P.3d 692, 700 (Wyo. 2025) ("Prejudice is not relevant to the question of whether there has been an improper comment on the right to silence which is prejudicial per se.").

[7] *See State v. Ramos*, 330 P.3d 987, 993 (Ariz. Ct. App. 2014) ("Subsequent development of the law … persuades us that a prosecutor's comment on a defendant's failure to testify does not necessarily require reversal of the defendant's conviction."); *People v. Miller*, 113 P.3d 743, 748 (Colo. 2005) (overruling cases holding that constitutional error must be harmless beyond a reasonable doubt even where no objection raised as "inconsistent with the current direction from the [U.S.] Supreme Court").

the apartments where Powell lived. R.1444-45. Two employees who were familiar with Powell identified him from the surveillance video. R.1585, 1808. A woman identified Powell as the man she saw running down the highway near the gas station. R.1386-87. The day of the murder, Powell's cellphone did not ping any towers more than a mile and a half away from the gas station. R.1761. At Powell's apartment, police found clothing like what they had seen the suspect wearing in the surveillance video. R.1554, 1560, 1717, 1723, 1725. At another address associated with Powell, police found ammunition consistent with that found at the scene. R.1481. The ammunition was in a locked box, and the key to the box was on Powell's keychain. R.1827, 2047-48. Two days after stealing $265 from the gas station, Powell paid a court fee (that he previously could not afford) with $243 cash. R.2161-62. After his arrest, Powell had an inmate, David Jackson, write a "confession," which Powell had his attorney send to the DA's office, adding *Jackson* as the confessor. C.410-11. In county jail, Powell had phone conversations asking his girlfriend to gather alibi witnesses. R.1884-89. Powell recounted numerous non-public details about the murder to fellow inmate Kelvin Hines. R.2175-83. "In the face of this overwhelming evidence of guilt," Powell had "scanty evidence." 461 U.S. at 510, 512. The single alleged *Griffin* error must be ignored and Powell's conviction, affirmed.

At a minimum, the Court should vacate and remand for the Alabama courts to apply the proper standard of review. Just this Term, when the Court identified a violation of the Confrontation Clause, it remanded to give the State the opportunity to argue harmless error. *Pitts*, No. 24-1159 (slip op., at 5). Here,

the State *did* argue that the case does not warrant a new trial either under an abuse-of-discretion standard or harmless-error review, App.104a-105a.

II. The Court Should Overrule *Griffin*.

A. *Griffin v. California* was "gravely mistaken" and "unmoored" from the start. *Cf. Ramos v. Louisiana*, 590 U.S. 83, 106 (2020). As four Justices recognized a quarter century ago, *Griffin* "did not even pretend to be rooted in a historical understanding of the Fifth Amendment." *Mitchell v. United States*, 526 U.S. 314, 336 (1999) (Scalia, J., dissenting). After all, the Self-Incrimination Clause protects only against being "compelled" to testify. *See Lakeside v. Oregon*, 435 U.S. 333, 339 (1978) ("By definition, 'a necessary element of compulsory self-incrimination is some kind of compulsion.'"). But a mere reference to the defendant's silence "does not 'compel.'" *Mitchell*, 526 U.S. at 331 (Scalia, J., dissenting); *accord Griffin*, 380 U.S. at 621 (Stewart, J., dissenting) ("[C]omment by counsel and the court does not compel testimony[.]").

Nor does a prosecutorial comment "truly 'penalize' a defendant" in any way bearing "constitutional significance." *Mitchell*, 526 U.S. at 342 (Thomas, J., dissenting); *see also Carter v. Kentucky*, 450 U.S. 288, 306 (1981) (Powell, J., concurring). Until the innovations of the 1960s, the Fifth Amendment was "never … thought to forbid all pressure," *Miranda v. Arizona*, 384 U.S. 436, 512 (1966) (Harlan, J., dissenting), which is to some degree inevitable, *Raffel v. United States*, 271 U.S. 494, 499 (1926) ("We need not close our eyes to the fact that every person accused of crime is under some pressure to testify[.]"); *Brooks v. Tennessee*, 406 U.S. 605, 614 (1972) (Burger, C.J.,

dissenting) (noting "the compulsion faced by every defendant who chooses not to take the stand"); *cf. Hasting*, 461 U.S. at 515 (Stevens, J., concurring in judgment) ("[The] election not to testify is almost certain to prejudice the defense[.]" (citation modified)).

Rather, the common-law principle animating the privilege was much more specific: It was "thought to ban only testimony forced by compulsory oath or physical torture." *Mitchell*, 526 U.S. at 333 (Scalia, J., dissenting). "Our hardy forebears, who thought of compulsion in terms of the rack and oaths forced by the power of law, would not have viewed the drawing of a commonsense inference as equivalent pressure." *Id.* at 335; *cf., e.g.*, *Dickerson v. United States*, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting) ("what the Constitution abhors[] [is] *compelled* confession"); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (citing purpose of Fifth Amendment to prohibit testimony compelled by "inhumane treatment and abuses"). Thus, because the "sole concern of the Fifth Amendment" is "coercion," *Colorado v. Connelly*, 479 U.S. 157, 170 (1986), and there is no coercion in a mere reference to the defendant's silence, "*Griffin* is impossible to square with the text of the Fifth Amendment," *Salinas v. Texas*, 570 U.S. 178, 192 (2013) (Thomas, J., concurring in judgment).

"*Griffin*'s [historical] pedigree is equally dubious." *Mitchell*, 526 U.S. at 332 (Scalia, J., dissenting). At common law, a defendant could not testify but was still "expected to speak rather extensively" at trial. *Id.* If "he did not," the jury would "draw[] an adverse inference" and "very likely … convict[]," which "strongly suggests that *Griffin* is out of sync with the historical

understanding of the Fifth Amendment." *Id.* at 332-33. "No one" in the founding era "seemed to think this system inconsistent" with the right against compulsory self-incrimination. *Id.* at 334; *accord* J. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1052-55, 1065-66, 1075-76 (1994); *id.* at 1083-85 & n.160 (concluding that the privilege has "changed character profoundly" from the "original" to the "modern" and "controversial" rule of *Griffin*); *cf. Portuondo v. Agard*, 529 U.S. 61, 65-67 (2000); *contra Griffin*, 380 U.S. at 614 (incorrectly asserting that any comment on silence "is a remnant of the 'inquisitorial system of criminal justice'").

B. *Griffin* contains no workable standard, which immediately led to sharp divisions in its application. *See, e.g.*, *Padgett v. State*, 223 So. 2d 597, 602 (Ala. Ct. App. 1969) (citing split among courts in Alabama, Connecticut, Kentucky, and New Jersey over whether prosecutor can remark on "uncontradicted" evidence when only the defendant could contradict it). Sixty years later, the line between lawful argument and constitutional violation is not much clearer. This "Court has not established a framework for deciding if a statement is a comment on a defendant's silence and whether such comment is adverse." *State v. Hoyle*, 987 N.W.2d 732, 739 (Wisc. 2023). As a result, guilty defendants receive new trials—undeserved windfalls—simply due to the vagueness of *Griffin*'s command.

Chief among the obstacles to uniform enforcement has been the quest to categorize comments on silence as "direct" or "indirect," "advertent" or "inadvertent," "emphasized" or "casual," "clear" or "ambiguous," and

the like. *State v. DiGuilio*, 491 So. 2d 1129, 1136 (Fla. 1986). It is doubtful that any "bright line *can* be drawn" on such grounds. *Id.* (emphasis added). Thus, it was a welcome development when this Court in *Robinson* rejected the view that "any 'direct' reference" to silence violates *Griffin*. 485 U.S. at 31.

But the absence of a bright-line rule cuts in two directions. While some "direct" comments are constitutionally permissible, some merely "indirect" comments are deemed forbidden. Inevitably, courts grasp for new rules and new doctrines to identify violations. *See, e.g.*, *Robertson v. State*, 596 A.2d 1345, 1357 (Del. 1991) (asking whether indirect comment had "substantial" or "attenuated" impact on fairness); *State v. Libby*, 410 A.2d 562, 563 (Me. 1980) (violation if indirect comment lacked "equivocation or ambiguity" in urging jury to accept undenied evidence); *Evans v. State*, 226 So. 3d 1, 32 (Miss. 2017) (violation by "innuendo and insinuation"); *Mata v. State*, 489 P.3d 919 (table), 2021 WL 2910972, at *2 (Nev. July 9, 2021) (harmless violation if "mere passing reference"); *United States v. Murra*, 879 F.3d 669, 683 (5th Cir. 2018) (contrasting the "egregious" from the "benign"); *Gongora v. Thaler*, 710 F.3d 267, 278 (5th Cir. 2013) (contrasting "episodic violations" from "repeated and direct" ones).

Robinson merely moved the bump in the rug, and *Griffin*'s ineradicable line-drawing problem remains. Consequently, some state courts err on the side of extreme caution—asking if the prosecutor said something even "subject to interpretation" as a comment on silence. *Moore v State*, 669 N.E.2d 733, 738 (Ind. 1996); *see also Simpson v. State*, 112 A.3d 941, 949

(Md. 2015); *Ragland v. Commonwealth*, 191 S.W.3d 569, 589 (Ky. 2006); *State v. Ellsworth*, 855 A.2d 474, 477 (N.H. 2004); *DiGuilio*, 491 So. 2d at 1135.[8] Thus, remarks neither intended to comment on silence nor expressly doing so—such as simply noting that some piece of the State's evidence went unrebutted—can lead to reversal in many courts. *See, e.g.*, *State v. Scutchings*, 759 N.W.2d 729 (N.D. 2009); *State v. McMurry*, 143 P.3d 400 (Idaho 2006). *Griffin* doctrine is still so ambiguous after sixty years that state courts force retrial out of an abundance of caution; the rule is not workable.

C. Beyond the problems interpreting and applying *Griffin* itself, the decision has caused mischief in other areas of criminal procedure. By deeming prosecutorial remarks unconstitutional because of the "cost[]" or "penalty" they add to the choice to remain silent, 380 U.S. at 614, some courts—including this one—took any conceivable cost to violate the Fifth Amendment. For example, Tennessee's statute "requiring the defendant to testify first," a rule well rooted in history and "tradition[]," had to give way. *Brooks*, 406 U.S. at 607; *see id.* at 617 (Burger, C.J., dissenting) (lamenting "the faltering condition of our machinery of justice"); *id.* at 618-20 (Rehnquist, J., dissenting) (criticizing the majority for "stand[ing] [tradition] on its head"). Not only did the Court give defendants the right to testify after hearing every other witness; for

[8] *But see, e.g.*, *Sandoval v. State*, 665 S.W.3d 496, 550 (Tex. Crim. App. 2022) (no violation from a comment "reasonably construed as merely an implied or indirect allusion"); *United States v. Wells*, 623 F.3d 332, 338-39 (6th Cir. 2010) (no violation if there are plausible alternative interpretations).

decades thereafter, lower courts prohibited prosecutors from merely remarking on this tremendous advantage. *See Agard*, 529 U.S. at 67 (collecting cases and observing that *Griffin* had "sparked" this novel theory). Again, the Court had to intervene and reject an "exten[sion of] *Griffin*" (*id.* at 65) that had already done serious damage for years. *Accord Robinson*, 485 U.S. at 34 ("declin[ing] to expand *Griffin*" and observing that the Fifth Amendment must tolerate "some 'cost'" to remaining silent).

For another example, *Griffin* was the backbone of footnote 37 in *Miranda v. Arizona*, which declared that a prosecutor may not "use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation" during a custodial interview. 384 U.S. at 468 n.37. The Court then expanded the rule to bar the prosecution's use of post-arrest silence for impeachment purposes too. *See Doyle v. Ohio*, 426 U.S. 610, 616-19 (1976); *id.* at 628 (Stevens, J., dissenting). And then it took until 2013 to stop lower courts from barring the use of *pre-arrest* silence, an expansion of *Griffin* that at least ten jurisdictions had endorsed. Pet. for Writ of Cert. at 8-10, *Salinas v. Texas*, No. 12-246 (Aug. 24, 2012). These and other problems will proliferate as long as *Griffin*'s vague and ahistoric reasoning remains on the books.

* * *

Overruling *Griffin* is the solution. In *Mitchell*, the United States did not ask for *Griffin* to be overruled, yet four Justices agreed that it was wrongly decided "[a]s an original matter." 526 U.S. at 331 (Scalia, J., dissenting). The best the majority could muster in *Griffin*'s defense was its "utility" as an "instrument for

teaching that the question in a criminal case … is whether the Government has carried its burden." *Id.* at 330. The *Salinas* dissenters likewise reasoned from the spirit of the Fifth Amendment, asserting that the accused would face a "predicament" without *Griffin*. 570 U.S. at 195 (Breyer, J., dissenting). Yet for nearly two centuries, the "predicament" occasioned by a stray remark on silence, even by an overt invitation to infer *guilt* from silence, had no constitutional import. Accordingly, no Member of the Court has seriously defended *Griffin* as consistent with original meaning, and even fifty years ago, "the roster of scholars and judges with reservations about expanding the Fifth Amendment privilege read[] like an honor roll of the legal profession," *Lakeside*, 435 U.S. at 345 n.5 (Stevens, J., dissenting); *see generally* Off. Leg. Pol'y, U.S. Dep't of Just., *Report to the Attorney General on Adverse Inferences from Silence*, 22 U. Mich. J.L. Reform 1005 (1989). Since then, the doctrine has evolved erratically, and it is unlikely there will ever be a uniform "framework" for violations, *Hoyle*, 987 N.W.2d at 739. If the Court does not summarily reverse, *supra* §I, it should abandon *Griffin*'s misadventure and restore the original meaning of the right against "compelled" self-incrimination.

CONCLUSION

The Court should grant the petition and reverse.

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