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IN THE SUPREME COURT OF THE UNITED STATES

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GENOVEVO SALINAS, :

Petitioner : No. 12-246

v. :

TEXAS :

- - - - - x

Washington, D.C.

Wednesday, April 17, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

JEFFREY L. FISHER, ESQ., Stanford, California; on behalf of Petitioner.

ALAN K. CURRY, ESQ., Assistant District Attorney, Houston, Texas; on behalf of Respondent.

GINGER D. ANDERS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 12-246, Salinas v. Texas.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Thank you, Mr. Chief Justice, and may it please the Court:

The Fifth Amendment prohibits using a person's silence during a noncustodial police interview against him at trial, and nothing about the specific facts of this case give this Court cause to refrain from applying that rule here.

To the contrary, the State's closing argument in this case urging the jury to find Mr. Salinas guilty because, quote, "an innocent person would have denied law enforcement's accusations," strikes at the core of everything the Griffin rule and, indeed, the Fifth Amendment is designed to prohibit.

It evokes an inquisitorial system of justice. It effectively shifts the burden of proof onto the defendant, and it demeans individual dignity by conscripting the defendant as a product of his own demise.

1                   Now, the Texas Court of Criminal Appeals  
2 resisted this logic and held the Fifth Amendment didn't  
3 apply because there was supposedly no compulsion in this  
4 case in the sense that there was no physical or  
5 psychological coercion of the kind that's inherent in  
6 custody.

7                   But the Texas Court of Criminal Appeals  
8 simply misunderstood the nature of a Griffin claim and  
9 the nature of the compulsion. The compulsion that  
10 Mr. Salinas faced was when the police asked him the  
11 question about ballistics evidence, there was nothing he  
12 could do to avoid supplying the State with incriminating  
13 evidence that it could use against him.

14                   If he answered the question --

15                   JUSTICE GINSBURG: Why isn't it -- why isn't  
16 it like the -- is it Berghuis case? There was a case of  
17 someone who was given Miranda warnings, and, even so,  
18 the Court said he was silent. He didn't invoke the  
19 Fifth Amendment; therefore, his silence can be commented  
20 on.

21                   MR. FISHER: No, that's not the holding of  
22 the Berghuis case, with all due respect. The Berghuis  
23 case was about whether his subsequent statements could  
24 be used against him. This Court didn't hold that his  
25 silence that preceded those statements could be used

1 against him, and, indeed, that would be contrary to  
2 Miranda itself in footnote 37, where the Court said, if  
3 somebody stands mute in a custodial setting in the face  
4 of law enforcement accusations, they may not be --

5 JUSTICE BREYER: Then what's the law? What  
6 is -- I mean, Joe Smith leaves a -- a blank in part of  
7 his tax return. The IRS gets it. Later, it turns out  
8 to be relevant, and the prosecutor wants to say, hey, he  
9 left this blank. Okay?

10 Now, Griffin doesn't apply, right.

11 MR. FISHER: If the --

12 JUSTICE BREYER: I mean, isn't it -- you're  
13 not going to say that any -- any time you refuse to tell  
14 the government anything and, later on, it turns out to  
15 be relevant to a criminal prosecution, that that's taken  
16 as an invocation of the Fifth Amendment. I mean, do you  
17 want to go that far?

18 MR. FISHER: No, I don't need to.

19 JUSTICE BREYER: Okay. Then you need a  
20 line.

21 MR. FISHER: This case is --

22 JUSTICE BREYER: Then what is -- then you  
23 need a line. So where is -- there's the tax case; then  
24 we have a case they're selling tickets to the  
25 policeman's ball, and somebody comes to the door, and

1 the policeman says, hey, I haven't seen you around  
2 before, and he doesn't answer. Okay? Now, that's  
3 probably not an invocation.

4 And then we have the clear line, which, in  
5 custody, and, now, you want to extend that line. And so  
6 what I want to know if we -- if I follow you and extend  
7 it, what line do I draw?

8 MR. FISHER: Well, it's sufficient to decide  
9 this case to say that a noncustodial police interview  
10 during the investigation of a crime, where they're  
11 interviewing somebody about --

12 JUSTICE BREYER: So then --

13 MR. FISHER: -- who is -- who is, as the  
14 State concedes, a suspect in a crime. Now, it may well  
15 be that Griffin extends a little bit further, and,  
16 remember, the Solicitor General at least agrees that  
17 Griffin applies in a noncustodial setting.

18 JUSTICE KENNEDY: Well, but it's -- it's  
19 well settled that, when you're -- wherein you're  
20 examining the witness and he takes -- and he suddenly  
21 says, I don't want any more questions, that  
22 that's -- he's waived if you're in court, if you're  
23 examining a witness on the stand.

24 So, against that background, suppose, in  
25 this case, the facts were just about the same, and he

1 said what -- the police said, what would you do if we  
2 matched the shotgun shells? And he said -- he said,  
3 "Well" -- and then he starts to cry. He said one word,  
4 "Well," and he started to cry. Admissible?

5 MR. FISHER: I think that would be  
6 admissible, but it would be forbidden for the --

7 JUSTICE KENNEDY: Because he said, "Well"?

8 MR. FISHER: Yes. That word would be  
9 admissible if the State had --

10 JUSTICE KENNEDY: But -- but could the  
11 police officer also testify that and then he started to  
12 cry?

13 MR. FISHER: Perhaps. But the State -- what  
14 the State would not be able to do would be to argue that  
15 his silence and refusal to answer the question  
16 demonstrated his guilt.

17 JUSTICE KENNEDY: Or the prosecution could  
18 say, Well, he said, well, and started to cry, and he  
19 never told us anything else. That -- that final  
20 sentence that I used is impermissible?

21 MR. FISHER: I think that may well cross the  
22 line. You have the exact issue that arises already in  
23 custodial settings, where, under Doyle and footnote 37  
24 of Miranda, you've held that silence can't be used  
25 against a criminal defendant.

1           So, Justice Kennedy, you're right, that  
2 questions will arise in two ways: One is whether words  
3 that the defendant uses are tantamount to refusing to  
4 answer the question, and then there is a second question  
5 about physical demeanor evidence.

6           The law is already sorted out on this in the  
7 lower courts, and I think it's a very workable test.  
8 The Solicitor General agrees with what it is, and the  
9 reason why this Court hasn't seen a case or -- itself,  
10 seen a case like that is because, once the rule is  
11 established that the prosecution can't use silence  
12 against the defendant, the temptation drops away to try  
13 to introduce that evidence for some, supposedly,  
14 different purpose.

15           JUSTICE GINSBURG: Mr. Fisher, but then --  
16 do -- do I understand correctly that you're saying  
17 demeanor is different, so, although it was impermissible  
18 to comment on silence, it was okay to say he looked  
19 down, he seemed to be sweating, he was very nervous, he  
20 was shuffling his feet.

21           MR. FISHER: Insofar as demeanor evidence  
22 that the State offers has communicative values and the  
23 State argues that it has communicative value,  
24 independent of, simply, what the defendant looked like  
25 when he remains silent, then it -- then it may well be

1 able to introduce that evidence.

2 Now, as I said, as I was just finishing up  
3 telling Justice Kennedy, you're not going to have hard  
4 cases in this respect because, once the temptation --  
5 once it's clear that silence can't be used, then the  
6 prosecution, I think, has little motivation to try to  
7 walk that line.

8 And, indeed, I think it would be appropriate  
9 in a case, if the prosecution said, look, the fact that  
10 the defendant started crying, we think, is relevant for  
11 some reason independent of what he -- of failing to  
12 answer the question. The jury could be instructed, as  
13 they are in Griffin -- Griffin settings already, that  
14 you aren't to consider the defendant's refusal to answer  
15 the question against him, but --

16 JUSTICE SOTOMAYOR: Mr. Fisher, I -- I have  
17 a number of problems. The first is your rule would be  
18 seen to be giving noncustodial defendants more rights  
19 than those defendants in custody because you're arguing  
20 that -- I think -- that a greater degree of expression,  
21 other than silence, would be needed to show the  
22 invocation of the privilege against self-incrimination.

23 MR. FISHER: No.

24 JUSTICE SOTOMAYOR: Or are you trying to  
25 equate the rights that a defendant has to custodial and

1 noncustodial, with respect to invocation?

2 MR. FISHER: No. And I -- and this is where  
3 Justice Ginsburg's question came from, so I think it's  
4 very important for me to be clear on this.

5 A person in a noncustodial setting still has  
6 fewer rights than a person in a custodial setting. What  
7 the Court held in *Berghuis* is that, if the defendant  
8 wants to exercise his prophylactic right under *Miranda*  
9 to cut off police questioning -- those are the words  
10 this Court used -- that has to be expressly invoked in  
11 some manner during the interrogation.

12 JUSTICE SOTOMAYOR: The problem -- I have an  
13 easier problem understanding this argument with  
14 respect -- and I'm going to ask your adversaries -- with  
15 respect to the situation in which someone is approached  
16 by the police and said, come in and talk to us. I have  
17 a hard time understanding how the refusal to come talk  
18 to them could be held against them. There, I understand  
19 it.

20 But, here, your defendant went in and  
21 talked. So, once he chose to do that, why does he get  
22 more rights than *Berghuis* did, who remained silent for  
23 2-and-a-half hours? The Court wasn't willing to find  
24 that that was an invocation of the privilege against  
25 self-incrimination. Why would it find the refusal to

1 ask one -- answer one question indicative of the  
2 privilege against silence -- or the privilege for  
3 silence?

4 MR. FISHER: Let me -- if I may, let me  
5 focus on the Berghuis question.

6 JUSTICE SOTOMAYOR: I know --

7 MR. FISHER: And then turn to the selective  
8 silence point. The reason why he doesn't have --  
9 Mr. Salinas doesn't have the right that Mr. Berghuis had  
10 to cut off questioning. That's the right that has to be  
11 expressly invoked, and it, indeed, can only be  
12 effectuated in this setting.

13 There was no issue in Berghuis, I don't  
14 think, that his silence could be used against him. The  
15 State never argued in the Berghuis case that, because he  
16 failed to answer for 2 hours, that shows he's guilty.  
17 What the State argued in Berghuis was the fact that he  
18 later confessed is what shows that he is guilty.

19 JUSTICE KENNEDY: Is -- I don't want -- are  
20 you saying that, before the Miranda warning is required,  
21 you cannot invoke the Fifth Amendment?

22 MR. FISHER: No. You can.

23 JUSTICE KENNEDY: I mean -- that's my --  
24 that's how I understood that.

25 MR. FISHER: You can. There's two

1 different rights --

2 JUSTICE KENNEDY: I know you're not arguing  
3 that, but that's why I'm --

4 MR. FISHER: Let me separate two rights.  
5 One is the prophylactic right under Miranda to have  
6 police cease asking you questions. That's one right,  
7 and that right has to be expressly invoked in some  
8 manner during the interrogation, after you've been  
9 warned, in order to effectuate it.

10 There is a separate right, which is the  
11 genuine Fifth Amendment right to remain silent. And  
12 this Court said, in Miranda itself and it's never  
13 questioned since, that that right doesn't have to be  
14 expressly invoked. So the question is --

15 JUSTICE KENNEDY: Well, but it can be  
16 invoked, and that might make a big difference. In  
17 your -- in your brief, you acknowledge that most  
18 citizens know they have a Fifth Amendment right.

19 MR. FISHER: Right. So, I think, Justice  
20 Kennedy --

21 JUSTICE KENNEDY: And so if there's -- if  
22 questions are somehow troublesome, you say, I'm invoking  
23 my Fifth Amendment right; go away, even if you're not in  
24 custody, even if Miranda doesn't apply.

25 MR. FISHER: Right.

1 JUSTICE KENNEDY: And your client didn't do  
2 that here.

3 MR. FISHER: He didn't. And so the  
4 question -- I think, unless the Court's prepared to hold  
5 that even an expressed invocation could be used against  
6 him, then it reduces the question you framed, Justice  
7 Kennedy. And so ask yourself whether there's any good  
8 reason to require an express invocation in that setting.

9 Mr. Salinas, remember, did expressly invoke  
10 his right to -- Fifth Amendment right to remain silent,  
11 at trial, in a timely manner, asking for the evidence to  
12 be excluded. So the question is whether there's a  
13 reason to ask him to do it sooner. And our argument is  
14 it's unnecessary, unfair, and a rule like that would be  
15 unadministrable. So let me walk through those, if I  
16 can.

17 It's unnecessary because all the cases the  
18 Solicitor General cites for an express invocation  
19 principle involve a scenario where the government has no  
20 good reason to know that it's seeking incriminatory  
21 information.

22 And, Justice Breyer, this is the limiting  
23 principle that you were searching for in the tax cases  
24 and the like. If the government doesn't know or have  
25 good reason to know that the defendant who is silent is

1 likely to be exercising his right, then the government  
2 needs to be put on notice because the government may --  
3 may well challenge, may well go seek a court order. It  
4 may well decide to grant immunity. It may do a number  
5 of things.

6 But, here, the government would do  
7 absolutely nothing different. Police would have done  
8 absolutely nothing different. Indeed, look at the  
9 record in this case. What the Solicitor General says is  
10 that Mr. Salinas should have said, "I refuse to answer  
11 that question," and, if he had said that, everything  
12 would be different.

13 But look at what the State argued at trial  
14 and what the officer testified. The officer testified,  
15 when we asked him that question, he wouldn't answer.  
16 The prosecution argued to the jury, he refused to answer  
17 that question. So there is no ambiguity in the setting,  
18 whether he was remaining silent.

19 JUSTICE BREYER: Well, yes, there's no doubt  
20 he was remaining silent, but the issue is whether he was  
21 trying to raise his Fifth Amendment right.

22 Now, suppose your rule were, whatever the  
23 situation, where either the individual expressly raises  
24 his right or, at the least, it's a fair implication from  
25 the circumstance that he was trying to assert his right,

1 would that be a sensible rule?

2 And, if so, how would your case stack up?

3 MR. FISHER: Yes. I think, as long as the  
4 latter part of that test, Justice Breyer -- can be  
5 satisfied by exercising the right, that is remaining  
6 silent --

7 JUSTICE BREYER: It depends on the  
8 circumstance.

9 MR. FISHER: -- in a setting in which -- in  
10 a setting in which the government has every good reason  
11 to know that the person is most likely to be relying on  
12 the Fifth Amendment. And, here, where they are  
13 investigating a murder and bringing in somebody as a  
14 suspect and asking him, basically, did you commit the  
15 crime, I think it's a fair assumption -- at least absent  
16 any clarification by the police -- remember, when he was  
17 silent, the police would have had every right to say,  
18 Mr. Salinas, why aren't you answering the question?

19 And so the police could clarify. But,  
20 absent any clarification from either the police or the  
21 suspect, the more likely than not scenario -- and that's  
22 the test the Solicitor General agrees should be used --  
23 the more likely than not conclusion there is that he is  
24 exercising the right. Now --

25 JUSTICE SOTOMAYOR: How would you deal with

1 another common situation where a defendant meets up with  
2 the police, gives a story, and then, later, changes the  
3 story. And the question is asked at trial, you never  
4 volunteered that story to the -- to the police when they  
5 questioned you.

6           Would that be silence, to you? Would that  
7 be an invocation of his right not to incriminate  
8 himself? Or would you -- would the prosecutor be barred  
9 from arguing to the jury, as often is done, he chose to  
10 say this, but not that, so this is a made-up story.

11           MR. FISHER: No, Justice Sotomayor, for two  
12 reasons: One is, if I understood your hypothetical, it  
13 sounded like the defendant may have been on the stand,  
14 and that would be an impeachment scenario that's  
15 entirely different. But even --

16           JUSTICE SOTOMAYOR: Now, sometimes, they  
17 come back and later do a different confession.

18           MR. FISHER: Right. So but -- but even if  
19 that were the case, then that would be basically using  
20 his statement against him. And so a material omission  
21 from a statement is not the same as silence. Here,  
22 Mr. Salinas was silent.

23           Now, it's also not just that there's no good  
24 reason to require some sort of magic words to be spoken  
25 by the suspect, but it's unfair. Remember, the States

1 tell you, in their amicus brief, that, if you affirm in  
2 this case and adopt the rule they're asking you for,  
3 police officers are going to tell people in its custody,  
4 which would be nothing more than an accurate statement  
5 of the law, sir, if you are silent in response to any of  
6 our questions, the prosecution is going to argue that  
7 that -- that shows that you're guilty.

8           They're also going to have every good reason  
9 to bring people in. I think this goes a little bit to  
10 Justice Kennedy's question and -- and perhaps just yours  
11 as well, the fact that Mr. Salinas did agree to commence  
12 this interview. Remember, he agreed --

13           CHIEF JUSTICE ROBERTS: Well, he's not in  
14 custody. So let's say he's answering the questions.  
15 All of a sudden, he gets a particular question, and he  
16 says, you know, it's getting late, I think I'm done, and  
17 going to go home. Is that an invocation of the Fifth  
18 Amendment right?

19           MR. FISHER: I think you'd have to ask that  
20 to the Solicitor General. I don't -- I'm not the one  
21 requiring an invocation. And that is part of the  
22 administrability problem that the rule raises. I have  
23 no idea of all the permutations, one of which you've  
24 raised --

25           CHIEF JUSTICE ROBERTS: Well, is that

1 something --

2 MR. FISHER: -- but you can imagine many  
3 more.

4 CHIEF JUSTICE ROBERTS: Is that something  
5 that could be used against him at trial?

6 MR. FISHER: It can be introduced. It's  
7 hard to understand how that is probative, the fact that  
8 he said, I have to leave now, it's time to go.

9 CHIEF JUSTICE ROBERTS: Well, it's probative  
10 if that he says that -- he's answering all the  
11 questions, they're fine. All of a sudden, they say,  
12 well, is your shotgun going to match the shell?

13 MR. FISHER: Yeah.

14 CHIEF JUSTICE ROBERTS: Then he goes, gosh,  
15 it's late, I'm going to go home. That seems as --

16 (Laughter.)

17 MR. FISHER: Well --

18 CHIEF JUSTICE ROBERTS: That seems as  
19 probative as the silence.

20 MR. FISHER: Well -- and so -- what the  
21 State cannot do is what it did in this case and sort of  
22 transform that into he refused to answer, and,  
23 therefore, it shows he's guilty.

24 And, if I could go back to the part of the  
25 unfairness and the difficulty here, it's not -- it's

1 just that -- yes, Mr. Salinas did come to the police  
2 station, but remember why he came to the police station,  
3 because they said, we want to bring you in to clear you  
4 as a suspect, to get elimination prints.

5 So he was effectively told to come in, so  
6 that we can clear you as a suspect, asked perfectly  
7 innocuous questions at the beginning of the interview,  
8 and then everything shifted on a dime to this one  
9 "gotcha" question.

10 And I think it's perfectly reasonable and  
11 customary in out-of-court settings, where the defendant  
12 isn't on the stand and so telling some story, now,  
13 trying to backtrack it, but out of court, to be able to  
14 selectively exercise your right to silence, when you  
15 feel, now, law enforcement is turning against me.

16 And, remember -- this is the other part  
17 about, Justice Kennedy, your question. Of course,  
18 people know they have a right to remain silent, so why  
19 not -- why not ask them to invoke it?

20 Remember, people in this setting generally  
21 don't have lawyers. They don't have a right to lawyers.  
22 What does the layperson know? The layperson knows, I  
23 have a right to remain silent. That's what the  
24 layperson knows. The layperson doesn't know I have to  
25 say some sort of magic words.

1                   And the police, believe me, aren't going to  
2 tell him that he does, in order to --

3                   JUSTICE ALITO: Would you draw a distinction  
4 between Mr. Salinas's situation and someone who's  
5 questioned in the home -- in the person's home or on the  
6 street?

7                   MR. FISHER: No, I don't think there is a  
8 relevant distinction there, Justice Alito, as long as an  
9 investigatory interview -- and this Court has said, time  
10 and again, whether it's Berkemer in a traffic stop or --  
11 or Royer, that the police can try to initiate consensual  
12 encounters. And the Court has said, time and again,  
13 that people don't have to participate in them, and they  
14 can cut them off at any time.

15                   And it would be odd --

16                   JUSTICE ALITO: And what if -- what if the  
17 person -- what if the person was totally unknown to the  
18 police, but called up the police and said they want --  
19 and wants to talk to them for some purpose. You  
20 wouldn't draw a distinction between that situation?

21                   MR. FISHER: In -- well, if he wants to talk  
22 to them --

23                   JUSTICE ALITO: He wants to talk to them  
24 and --

25                   MR. FISHER: -- I'm not sure he has the

1 right to remain silent, no.

2 JUSTICE ALITO: He wants to talk to them,  
3 and then, in the course of this conversation, the same  
4 thing happens that happened here.

5 MR. FISHER: I think that might, depending  
6 on the precision of the hypothetical, be a little bit of  
7 a difficult -- different case. But, if the person said,  
8 I want to talk to you about criminal activity, started  
9 giving statements about a -- about a past crime, so it  
10 was an investigatory interview, I think it may well  
11 apply.

12 JUSTICE KENNEDY: You're -- you're giving us  
13 Miranda, not Miranda, custody, not custody, gray area.  
14 That -- that's what you're arguing. You want a gray  
15 area opinion to be written?

16 MR. FISHER: No, I don't want a gray area  
17 opinion. Remember, Justice Kennedy, at least the  
18 Solicitor General -- and I'll let the State speak for  
19 itself -- but the Solicitor General agrees that Griffin  
20 rule applies in a noncustodial setting.

21 I -- I totally understand there's a bright  
22 line between custody and noncustody, and so a custodial  
23 suspect is in a different situation than a noncustodial  
24 suspect.

25 But all I'm saying is, again, in agreement

1 with the Solicitor General, whereas all we disagree on  
2 is whether the magic words need to be spoken, that a  
3 person who is at least in a police investigatory  
4 setting, and so the police would reasonably expect that  
5 a failure to speak or answer your question was relying  
6 on a Fifth Amendment --

7 JUSTICE SOTOMAYOR: I -- I'm assuming, now  
8 that I'm thinking about your argument, you would argue  
9 that, even in a custodial setting, a prosecutor couldn't  
10 say, I asked him, did he shoot his wife, and the  
11 prosecutor can't argue that, because he refused to  
12 answer, that makes him guilty.

13 MR. FISHER: That's precisely what the Court  
14 said already in Footnote 37 in Miranda, what the lower  
15 courts have depended on for a generation now, and I  
16 don't think my opponents are even arguing to the  
17 contrary.

18 JUSTICE SOTOMAYOR: Well, in fact, at most  
19 trials, district court judges tell juries the evidence  
20 is not the unanswered question. It's the question plus  
21 the answer.

22 MR. FISHER: Right. Right. Fair enough. I  
23 think that's perfectly well-established law. And so the  
24 reason is, is there any reason to distinguish for  
25 purposes of the Griffin rule -- I understand there's

1 reasons to distinguish in the -- in the settings that  
2 Berghuis raises, but, for purposes of the Griffin rule,  
3 is there any reason to distinguish between a custodial  
4 and a noncustodial setting?

5 JUSTICE BREYER: Yes. Well, but, yes. The  
6 answer is going to be yes because we're going to hear it  
7 in one minute because, as you say, it follows a fortiori  
8 for Berghuis, you know, it's -- if you're going to have  
9 to make an explicit statement to invoke your Fifth  
10 Amendment right, when you're not in an inherently  
11 coercive setting, I mean, that's going to be the  
12 argument.

13 MR. FISHER: No, but -- but --

14 JUSTICE BREYER: You're not in an inherently  
15 coercive setting, as you are in the Miranda situation,  
16 you're not at trial, and, outside those two situations,  
17 you have to say explicitly, I'm invoking the Fifth  
18 Amendment --

19 MR. FISHER: No.

20 JUSTICE BREYER: -- or tap on the  
21 Constitution or something in order to indicate --

22 MR. FISHER: No.

23 JUSTICE BREYER: -- that's what's at issue  
24 and that's what --

25 MR. FISHER: Justice Breyer, this is

1 crucial.

2 JUSTICE BREYER: Yes.

3 MR. FISHER: If Mr. Salinas had been in a --  
4 if everything about the case was identical, but he'd  
5 been in custody, there would be no argument that his  
6 silence could be used against him.

7 JUSTICE BREYER: Right. And that's saying  
8 because, there, we have a line. It's called the  
9 in-custody line. Once you get outside of custody --

10 MR. FISHER: But it's not because of the  
11 physical or inherent pressures of custody because what  
12 the Court has said, time and again, is that, after  
13 somebody receives their Miranda warnings, they have a  
14 free and deliberate choice whether to talk. And so --

15 JUSTICE BREYER: Well, I don't want to make  
16 the government's argument for them. They'll make it  
17 very well.

18 MR. FISHER: Well, no, but I do want -- I do  
19 want to make sure that the Court understands the  
20 critical difference between the express invocation  
21 requirement that this Court established in *Berghuis* and  
22 what I'm asking for today.

23 And the express invocation requirement in  
24 *Berghuis* is the -- is -- is to administer the Miranda  
25 prophylactic rule, that the police have to stop asking

1 somebody questions when they invoke their rights, the  
2 rights they've just been advised of, remember.

3           It didn't hold in Berghuis and it -- and  
4 it's never held that, if somebody is Mirandized -- and  
5 let's say Mr. Berghuis was Mirandized and just remained  
6 silent for two hours, and then the police said to  
7 themselves, oh, this guy is never going to talk, we end  
8 the interview, there would have been no argument the  
9 State could have made in that case, that his silence  
10 could be used against him.

11           And so I understand that -- that -- you  
12 know, I'm -- that custody is different, but, in terms of  
13 the express invocation requirement, there's no express  
14 invocation requirement in custody, and there's no reason  
15 for it here.

16           JUSTICE BREYER: So I think the argument  
17 will be, I think -- it is, at least in my mind, that if,  
18 after sitting there for 45 minutes -- or maybe it was an  
19 hour and 45 minutes -- without saying anything, I'm --  
20 I'm maybe taking a dissenting position, but, if -- when  
21 he answers -- doesn't answer over that long period of  
22 time, but doesn't say, I want to remain silent, if that  
23 long period of behavior is insufficient without the  
24 express statement to show that he wanted to remain  
25 silent, so, outside custodial setting, should it be

1 insufficient to simply remain silent to show that -- you  
2 see, it's argument by analogy, I think --

3 MR. FISHER: I understand, but his silence  
4 wasn't able to be used against him in Berghuis; his  
5 state -- his later statements were. And so, yes, you  
6 could have a scenario --

7 JUSTICE KAGAN: Isn't the -- isn't the  
8 point, Mr. Fisher --

9 MR. FISHER: Pardon?

10 JUSTICE KAGAN: The question is: What is it  
11 insufficient for? In Berghuis, it was insufficient for  
12 the purpose of cutting off police questions.

13 MR. FISHER: Exactly.

14 JUSTICE KAGAN: That's not the case here.  
15 The question here is whether it's sufficient or  
16 insufficient for the purpose of allowing his -- his  
17 silence to be used against him at trial.

18 MR. FISHER: Precisely.

19 JUSTICE KAGAN: That's an entirely different  
20 question, isn't it?

21 MR. FISHER: That's exactly my point. And  
22 remember, again, the layperson in this setting who  
23 knows -- if there's one thing the layperson knows and  
24 most every American knows, is that they have a right to  
25 remain silent. So somebody nervous in this setting,

1 without a lawyer, the one sanctuary they have is simply  
2 not to talk.

3           If you issue an opinion that says, as the  
4 Solicitor General would like, you have to pronounce some  
5 sort of magic words, it's terribly unfair and terribly  
6 misleading and, again, for no good reason. And it  
7 raises all kinds of administrability problems. The  
8 Court is going to have an absolute, I think, flood of  
9 cases of all the permutations of somebody under  
10 different kind of police warnings or the other that may  
11 be given ahead of time and different kind of verbal  
12 formulations.

13           Maybe he says, I'd like to talk about  
14 something else. Maybe he says, as the Chief Justice  
15 explained, I'm going to leave now. Maybe he actually  
16 just doesn't show up for the interview. There is  
17 innumerable permutations. The easy rule --

18           JUSTICE ALITO: Unless you're going to argue  
19 that -- that silence cannot be -- can never be commented  
20 on in any noncustodial situation -- and I didn't think  
21 you were willing to go that far when I was questioning  
22 you previously -- you're going to have the same kind of  
23 line-drawing questions, aren't you?

24           MR. FISHER: No.

25           JUSTICE ALITO: Where was it held? What was

1 the nature? Who initiated it? Was the person really  
2 under suspicion? What was the purpose of the -- of the  
3 questioning?

4 MR. FISHER: So as to where -- as to where  
5 you draw the line, if I understand your question, as to  
6 where an express invocation before trial would be  
7 required, you are going to have to draw a line. I think  
8 it's very easy to draw the line and just say a police  
9 investigatory interview because that's the setting where  
10 the police have every reason to believe that silence is  
11 an exercise of the right.

12 All the other settings, whether they be tax  
13 settings, whether they be immigration cases, all the  
14 totally disparate settings the Solicitor General cites  
15 cases involving, it's perfectly reasonable to require an  
16 advance invocation there.

17 But, remember, the Court said in Chavez that  
18 the Fifth Amendment is a trial right, and so invoking it  
19 at trial is perfectly timely in the ordinary setting.  
20 The only question is whether you should have some sort  
21 of special requirement for special reason. We think  
22 there is no good reason, and it would be very unfair.

23 I'd like to --

24 JUSTICE SOTOMAYOR: I guess, as I understand  
25 your rule -- I'm sorry. I'll ask it on rebuttal.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. Curry.

3 ORAL ARGUMENT OF ALAN K. CURRY

4 ON BEHALF OF THE RESPONDENT

5 MR. CURRY: Mr. Chief Justice, and may it  
6 please the Court:

7 Absent an invocation, a defendant's failure  
8 to answer a question during a noncustodial, voluntary  
9 interview should not be protected by the Fifth  
10 Amendment. It should be --

11 JUSTICE SOTOMAYOR: But why, counsel? I  
12 mean, really, what you're saying is, merely because I  
13 asked you the question and you choose not to answer, it  
14 makes you guilty.

15 MR. CURRY: Well --

16 JUSTICE SOTOMAYOR: It -- no problem. Here,  
17 you're asking about the crime of investigation. But you  
18 could have asked him, did you kill Joe Blow on another  
19 street, and, if he had remained silent, you would be  
20 arguing that proves he is guilty, I could introduce that  
21 at trial.

22 And you would be arguing it would be  
23 sufficient to convict him, that you merely asked the  
24 question and he remained silent about it shows his  
25 guilt.

1 MR. CURRY: Yeah, I don't know that that  
2 would be sufficient to convict him. And that -- that  
3 hypothetical might suggest that the probative value of  
4 that particular failure to answer a question was less --

5 JUSTICE SOTOMAYOR: It's a little scary to  
6 me that an unanswered question is evidence of guilt.

7 MR. CURRY: Well --

8 JUSTICE SOTOMAYOR: He is not arguing that  
9 the physical response is not admissible. He is just  
10 arguing that the mere asking of a question and a failure  
11 to answer it, you can't argue, as a prosecutor, that  
12 that shows someone is guilty.

13 MR. CURRY: I think one of the things we are  
14 asking the Court to do, Justice Sotomayor, is to  
15 recognize that silence, certainly, as occurred in this  
16 case, doesn't always occur in a vacuum. And the  
17 defendant's failure to answer this question, accompanied  
18 by things that he did, along with or contemporaneously  
19 with -- you know, the shuffling of the feet, the biting  
20 of the bottom lip -- revealed a guilty conscience on his  
21 part.

22 JUSTICE SCALIA: Well, it would be up to the  
23 jury, wouldn't it? The jury might well agree with  
24 Justice Sotomayor, that it doesn't prove anything that  
25 he answered a question, right?

1 MR. CURRY: Right. I mean --

2 JUSTICE SCALIA: The question is whether you  
3 can ask the jury to consider that.

4 MR. CURRY: Correct. And I think that's --  
5 I think that's the import of our argument. And we've  
6 referenced this Court's language in Baxter, to that  
7 extent, that a jury can give what weight they wish to  
8 give it, but the --

9 JUSTICE SOTOMAYOR: Your -- my hypothetical  
10 that I posed earlier, if the police call you and say,  
11 come in for questioning, and you ignore them, is that an  
12 invocation of the right to silence or not?

13 MR. CURRY: I don't know that that's an  
14 invocation, Your Honor, but I don't know --

15 JUSTICE SOTOMAYOR: Why -- why could you  
16 argue that that's --

17 MR. CURRY: Number one, I don't think a  
18 prosecutor ever would argue that because that's  
19 ambiguous and not probative, and I think -- not  
20 probative for someone just to not come in when police  
21 offer them a chance to come in.

22 JUSTICE SOTOMAYOR: They -- then they're  
23 arguing what the legal theory of guilt is in that  
24 situation.

25 MR. CURRY: Right. The legal theory of

1 guilt in that situation would be lessened than it is in  
2 this case because there is no -- there is nothing to  
3 suggest that that defendant was guilty, necessarily,  
4 because he decided not to show up to the police.

5 But, here, in this situation, the  
6 defendant's failure to answer the question, accompanied  
7 by the other things that he did, did reveal a guilty  
8 conscience on his part. And it was nothing to reflect  
9 that he was trying --

10 JUSTICE SOTOMAYOR: All right. So why is  
11 it -- would it be admissible that someone decides --  
12 someone comes in, and they say -- police say to him or  
13 her, we are investigating this crime, help us. They  
14 start asking questions, and it's clear from the first  
15 question -- there is a waiver of Miranda, and, from the  
16 first question, the first question is, did you kill this  
17 person?

18 The guy remains silent. They ask a whole  
19 bunch of other questions, and he remains silent. Had --  
20 has he invoked his right?

21 MR. CURRY: I don't believe he has, Your  
22 Honor. I mean, if he -- you said he was provided  
23 Miranda rights, so maybe they feel he is in custody or  
24 not, but --

25 JUSTICE SOTOMAYOR: So a prosecutor could go

1 into the jury and say, he waived his Miranda rights, and  
2 he is guilty because he refused to answer our questions?

3 MR. CURRY: He is guilty if he revealed a  
4 guilty conscience, Your Honor.

5 JUSTICE SCALIA: He wouldn't say that. He  
6 would say one of the indications of his guilt is that he  
7 refused to answer the question. No prosecutor would  
8 argue that, that alone, would support a conviction,  
9 right?

10 MR. CURRY: Correct, Your Honor. And that's  
11 not what we're -- that's not what we are asking the  
12 Court to do here. We're not asking the Court to say  
13 that, every time silence occurs, that's necessarily  
14 going to be probative, and every time silence occurs,  
15 that's necessarily going to be something that we  
16 utilize.

17 We're merely saying that, in this particular  
18 situation, the defendant needs to tell something to the  
19 police in order to reveal that he is relying on a  
20 constitutional right and not merely having --

21 JUSTICE KAGAN: I'm sorry. Just to nail  
22 that down because your first three words were "absent an  
23 invocation."

24 MR. CURRY: Yes, Your Honor.

25 JUSTICE KAGAN: Are you -- are you, now,

1 adopting the Solicitor General's argument? Because your  
2 brief goes further. So are you, now, saying that the  
3 crucial thing is the invocation?

4 MR. CURRY: I believe that has been our  
5 position, Your Honor. I believe -- we do have some  
6 alternative argues, as well, based upon this Court's  
7 jurisprudence. But I think the government and we both  
8 agree that the defendant in this particular situation  
9 would need to invoke.

10 And that is the basis upon which we proceed.  
11 And we are not proceeding just upon *Berghuis v.*  
12 *Thompkins*.

13 JUSTICE KAGAN: And so you would agree with  
14 the government that, if he had invoked, that the Fifth  
15 Amendment right would come into play?

16 MR. CURRY: We would not attempt to -- we  
17 would not attempt to introduce anything, for example "I  
18 plead the Fifth," "I don't want to talk any more,"  
19 something like that, No, we would not be introducing  
20 that. I do believe that would be a rule -- you know, a  
21 violation of the rule --

22 JUSTICE SCALIA: That's the line you're  
23 drawing, between his -- his just not answering and his  
24 saying, I don't want to answer?

25 MR. CURRY: Correct, if I understand your

1 question.

2 JUSTICE SCALIA: The latter can't be  
3 introduce to the jury, but the former can?

4 MR. CURRY: Correct. That's the rule --

5 JUSTICE SCALIA: Why would you -- why would  
6 you draw that -- that line?

7 MR. CURRY: I think, Your Honor, I would not  
8 want to -- I would not want to introduce a statement  
9 that a defendant was relying on a constitutional right  
10 by saying, "I don't want to talk any more," as opposed  
11 to the mere silence, which might be probative, in  
12 conjunction with other evidence.

13 JUSTICE SCALIA: Doesn't the mere silence  
14 suggest, "I don't want to talk anymore"?

15 MR. CURRY: It might, but it also might  
16 suggest that he's having difficulty coming up with an  
17 exculpatory response. It might suggest that he can't  
18 think of a good answer. It might suggest that he is  
19 worried about the question and he is thinking more about  
20 how worried he is about the question than how he wants  
21 to respond to it.

22 CHIEF JUSTICE ROBERTS: Particularly since  
23 he did want to talk some more, right?

24 MR. CURRY: Correct. He continued to  
25 respond -- you know, several questions thereafter,

1 continuing to provide exculpatory responses.

2 JUSTICE GINSBURG: But isn't the most  
3 logical inference from the silence not that he isn't  
4 quick enough to come up with an exculpatory answer, but  
5 that it would incriminate him if he answered?

6 MR. CURRY: Yes, Your Honor. That may be --  
7 that may be a permissible inference, but I do not  
8 believe that that necessarily means that he was invoking  
9 his -- his Fifth Amendment right because he did continue  
10 to talk. He already knew what the police were  
11 investigating.

12 JUSTICE GINSBURG: But he could -- he could  
13 invoke the Fifth Amendment with respect to one set of  
14 questions and not another, and what's disturbing me  
15 about your position, if it's -- if you have -- someone  
16 being interrogated, who is savvy, will say, "I plead the  
17 Fifth." And somebody who is not that smart is just  
18 silent. To make a difference between those two people  
19 on whether comment can be made on the failure to respond  
20 is troublesome.

21 MR. CURRY: Your Honor, I think that would  
22 be consistent with this Court's jurisprudence to -- to  
23 allow the use of evidence, if there was no invocation  
24 involved. In *Jenkins v. Anderson*, Justice Stevens  
25 recognized the importance of an invocation, even in --

1 even in that type of situation.

2 This Court -- it's not just *Berghuis v.*  
3 *Thompkins* that we're relying upon, where the Court has  
4 recognized the necessity of an invocation. *Garner v.*  
5 *United States* says the same thing, that -- that an  
6 invocation is necessary for Fifth Amendment rights.

7 And I know that we don't have a case that is  
8 squarely on -- on four with this one. But all the  
9 defendant would have to say is, I don't want to talk  
10 anymore, or I don't want to answer that question, and  
11 then we would be in a completely different posture at  
12 this point.

13 But, here, the -- the defendant failed to  
14 answer a question and did other things that revealed a  
15 guilty conscience on his part. And that is precisely  
16 the type of evidence that we believe that we can  
17 introduce.

18 JUSTICE KAGAN: But, Mr. Curry, in a case  
19 like *Berghuis*, which is in a custodial setting, if the  
20 defendant there had not ever said anything, had gone  
21 through the entire interview and, really, never said a  
22 word, so that the police kept asking him questions, but  
23 he never said anything, the prosecutors could then not  
24 go in and say, look, for 3 hours, we asked him  
25 questions, and he didn't talk.

1                   That would be off limits. And the question  
2 is, if that's off limits, why shouldn't this be off  
3 limits as well? If there's no invocation necessary  
4 there, for some of the reasons that Justice Ginsburg was  
5 saying, why should there be an invocation requirement  
6 here?

7                   MR. CURRY: Well, number one, because the  
8 hypotheticals are different. In -- in our particular  
9 situation, the defendant did answer questions and only  
10 did -- you know, fail to answer one particular question.

11                  JUSTICE KAGAN: Yes. I -- I understand  
12 that, in your case, there happens to be a kind of  
13 selective answering sort of question, but let's say --  
14 let's take that out of the picture, all right? And just  
15 say -- you know, he just didn't want to answer  
16 questions, all right? So then the question is, why  
17 would that case be any different from the case that I  
18 posited?

19                  MR. CURRY: Okay. In -- in *Berghuis v.*  
20 *Thompkins*, this Court looked at the ambiguous nature of  
21 whether or not the invocation had occurred. If, in your  
22 hypothetical, the defendant failed to answer any  
23 questions whatsoever --

24                  JUSTICE KAGAN: He -- he didn't invoke. He  
25 just didn't answer.

1                   MR. CURRY: But it could be a suggestion  
2 where he was attempting to exercise the -- the right  
3 because he never answered anything. But, in our  
4 situation, the defendant can't be said to have been  
5 doing that. He can't be said to have been exercising  
6 the right because he failed to answer a question, but  
7 answered several other questions.

8                   JUSTICE KAGAN: Okay. So you're pinning  
9 your argument really, on the fact that he did a lot of  
10 answering.

11                   MR. CURRY: That's one of the reasons, Your  
12 Honor.

13                   JUSTICE KAGAN: On this -- on this, you  
14 know, you can't pick and choose kind of argument.

15                   MR. CURRY: Well, we're saying that you  
16 cannot infer an assertion of a Fifth Amendment right  
17 based upon this. We cannot infer that he was  
18 necessarily asserting his Fifth Amendment right, whether  
19 to cut off questioning or stop talking altogether,  
20 or -- you know --

21                   JUSTICE KAGAN: So would it be fair to say  
22 that your argument is, look, you can't just like keep  
23 talking and talking and talking and -- and, at that  
24 point, you have to invoke? If -- if you've been doing a  
25 lot of talking and then decide you want to stay silent,

1 at that point, you have to invoke. But that's not to  
2 say that you have to invoke in every noncustodial  
3 encounter. Is that your argument?

4 MR. CURRY: No. I think you need to invoke  
5 in every -- every noncustodial encounter if -- if you do  
6 not want the things that you say to be utilized against  
7 you. If you -- if you want to -- you know, if you want  
8 to be prevented from that evidence being utilized, you  
9 have to say, I don't want to talk anymore, or I plead  
10 the Fifth, or whatever the words --

11 JUSTICE SCALIA: But I thought you said he  
12 didn't have to do that, if he didn't answer any  
13 questions, didn't you? Isn't that what you said?

14 JUSTICE KAGAN: You took the words out of my  
15 mouth.

16 MR. CURRY: No, no. If he didn't answer any  
17 questions, then -- then it would be drawn closer  
18 to -- to *Berghuis v. Thompkins*, in which this --

19 JUSTICE KENNEDY: Well, but, in *Berghuis*, we  
20 found no implication.

21 MR. CURRY: Correct. Correct. But if --

22 JUSTICE KENNEDY: So -- so Justice Kagan's  
23 question stands.

24 MR. CURRY: But -- but the defendant in  
25 *Berghuis* did answer some questions, Your Honor, and

1 that's what makes it different from Berghuis. In -- in  
2 that -- in that case, the defendant did ultimately --

3 JUSTICE KENNEDY: Well, a few, as I recall.

4 MR. CURRY: Correct. He --

5 JUSTICE KAGAN: Mr. Curry, Berghuis is  
6 different for a different reason. Berghuis is different  
7 because the question in Berghuis is what do you have to  
8 do to make the police go away. Here, the police were  
9 not going away. There was no -- there's no question of  
10 that. But the question is what do you have to do in  
11 order to bar the prosecutor from introducing your  
12 silence at trial.

13 So that's a really different question, isn't  
14 it?

15 MR. CURRY: Well, it is a different  
16 question, but, here, I think the police were,  
17 quote-unquote, "going away." I mean, they -- they  
18 finished their questioning at some point. And --

19 JUSTICE KAGAN: Exactly. That's why  
20 Berghuis is irrelevant here because Berghuis said at a  
21 certain point -- you know, you need to invoke in order  
22 to stop questioning. But -- but that's not what's at  
23 issue here.

24 MR. CURRY: But this Court's case law still  
25 requires an invocation. And the rule we're asking this

1 Court to adopt would, essentially, settle the split that  
2 largely exists in --

3 JUSTICE BREYER: What is that? That is what  
4 I'm -- I'm uncertain about this. And they cite page  
5 468, note 37, of Miranda.

6 All right. What is the law, in your opinion  
7 now, in respect to -- and what case would support this?  
8 A defendant comes in, he is warned and given his Miranda  
9 rights. He says, fine, and then he proceeds to answer a  
10 whole bunch of questions.

11 Then they ask question number 432. He says  
12 nothing. You then go on to 433, 434, et cetera, and he  
13 answers them all. Okay? At the trial, the lawyer --  
14 the prosecutor wants to comment on the fact that, in the  
15 face of that single question -- though answering many,  
16 many more -- he remained silent.

17 Does Griffin say he can -- the prosecutor  
18 can make that comment, yes or no? And I'd appreciate  
19 the government answering this question, too, because  
20 they're -- if they -- are they speaking here? Or are  
21 you doing the whole argument?

22 MR. CURRY: No, the government is also  
23 arguing as well, Your Honor.

24 JUSTICE BREYER: Well, that's -- I'd like to  
25 get the same answer.

1 MR. CURRY: Yes.

2 JUSTICE BREYER: Because I -- well, now,  
3 they cite for the proposition, I think, that it -- that  
4 the prosecutor is forbidden to make that comment, note  
5 37 of Miranda. Okay. I just read it.

6 MR. CURRY: Correct.

7 JUSTICE BREYER: And I -- may be ambiguous  
8 on the point. It says you have the right to maintain  
9 immunity in the face of an accusation.

10 MR. CURRY: Right. I think the reliance of  
11 on the footnote is -- is --

12 JUSTICE BREYER: No, fine. But what's your  
13 opinion? I mean, what is the law in respect to that  
14 single point? And at least to me, I'd -- I'd like to  
15 know your opinion on that.

16 MR. CURRY: Your Honor, I do not believe  
17 that this Court has extended Griffin to this particular  
18 type of fact situation, and Griffin wouldn't apply to  
19 that.

20 JUSTICE BREYER: Is there any authority, or  
21 is it just your opinion that we have to go on?

22 MR. CURRY: Well, I believe this Court would  
23 have had the opportunity to extend Griffin, for example,  
24 Doyle v. Ohio. Basically, the Court did not do that.  
25 This Court had the -- the opportunity to extend Griffin

1 in Fletcher v. Weir and did not do that.

2 So I do not believe this Court has  
3 necessarily -- you know, sought to always attempt to  
4 extend Griffin in that situation. Now, we -- I see some  
5 ambiguity in the standing mute phrase from footnote 37.  
6 Does that mean not talking at all? Does that mean not  
7 answering one particular question?

8 In your hypothetical, if it was as probative  
9 as it was in our case -- you know, that might be  
10 something the prosecution would want to use without  
11 violating the Fifth Amendment right because there's no  
12 clear indication that the defendant did, in fact, rely  
13 upon his Fifth Amendment right.

14 Now, I don't want to -- you know, misread  
15 footnote 37, but that's how we read footnote 37 because  
16 in the absence of -- there's many, many cases cited  
17 there, and it's not clear that it's attempted to apply  
18 an -- an extension of Griffin in that situation.

19 The rule we're -- we're offering here would  
20 not -- would not change the law with regard to how it  
21 exists in much of the Federal Circuits. In much of the  
22 Federal Circuits, these defendants where -- where the  
23 courts have held that we cannot utilize this evidence,  
24 those defendants have, in fact, done something to  
25 invoke.

1           So I think the -- the rule that we're asking  
2 the Court to adopt would allow for these -- that case  
3 law to stand; i.e., if a defendant says, I don't want to  
4 talk anymore, I plead the Fifth -- you know, we're not  
5 asking this Court to issue a rule that says that we can  
6 introduce that.

7           All we're asking this Court to -- to  
8 introduce is consistent with this Court's case law that  
9 would require an invocation -- or some invocation that  
10 the Fifth Amendment right was being relied upon and not  
11 just a difficulty with the question or I can't think up  
12 an exculpatory answer for that particular question, so I  
13 don't know what to say.

14           I mean, there, the defendant is not relying  
15 upon a constitutional right. And I think we're asking  
16 this Court to -- to look at whether an inference has to  
17 be made that the Fifth Amendment right is being done, or  
18 perhaps another inference can be -- can be provided.  
19 And *Baxter v. Palmigiano* allows for acquiescence -- you  
20 know, to -- to be something that we can utilize against  
21 a defendant.

22           Here, the jury --

23           JUSTICE SOTOMAYOR: Where does the  
24 compulsion line come in? Your adversary points out  
25 that, under this scenario, the police can ask you

1 questions and say to you -- you know, if you stay quiet  
2 in this question, I'm going to use it against you at  
3 trial, that police will actually to that, that they'll  
4 actually come in and tell defendants who are telling the  
5 story -- you know, either answer or it'll be used  
6 against you.

7 MR. CURRY: I could perceive then, Your  
8 Honor, the -- the trial court upholding a claim by the  
9 defendant that he was coerced at that point, that, at  
10 that point, the officer --

11 JUSTICE SOTOMAYOR: So why can't you say  
12 that a call from a police officer to someone who says,  
13 come in and talk, that that can't be used against them  
14 at trial as -- you gave me a different answer. You said  
15 it wasn't probative, but you didn't say Griffin would  
16 protect that.

17 MR. CURRY: No, if -- no, if -- I don't know  
18 that I would say Griffin is protecting it, but what I  
19 would say is this Court's penalty jurisprudence would  
20 say that, when a penalty flows directly from something  
21 the defendant is -- you know, either saying or not  
22 saying -- you know, that could be a problem.

23 So when an officer says -- you know, I'm  
24 going to hold -- hold against you your failure to answer  
25 a question -- you know, that can be something where the

1 court might utilize as -- as -- for some sort of  
2 penalties flown.

3 Justice -- Justice Stevens said, in his  
4 dissenting opinion, in McKune v. Lile, that there is an  
5 appreciable difference between some sort of sanction --  
6 official sanction being placed upon a -- you know, of  
7 essentially disobeying of an order, as opposed to a  
8 voluntary choice arising from -- from just a possible  
9 adverse consequence.

10 And, here, I think, the fact situation that  
11 confronts this Court in this case is just the risk of an  
12 adverse consequence and not something that necessarily  
13 is going to occur.

14 However, if an officer says, I'm necessarily  
15 going to use this against you, the adverse consequence  
16 may become more -- more tangible at that point. That  
17 isn't the facts of this particular case.

18 I also want to disagree with Mr. Fisher with  
19 regard to his suggestion that the police essentially  
20 manipulated this. If you look on the Joint Appendix,  
21 page 14, lines 9 and 10, the officer clearly says that  
22 he wants Mr. Salinas to come down to the police station  
23 and talk, as well as do elimination fingerprints.

24 The officer had already been questioned.  
25 These people knew we were investigating a double murder.

1 These people knew that they were looking for a shotgun.  
2 They now have a shotgun that they got from the  
3 defendant. So this defendant was not -- you know, all  
4 of a sudden, sprung on him the idea that they  
5 were -- you know, looking for him as a possible suspect  
6 at that point when they asked a ballistics question.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
8 Ms. Anders.

9 ORAL ARGUMENT OF GINGER D. ANDERS,  
10 FOR UNITED STATES, AS AMICUS CURIAE,  
11 SUPPORTING THE RESPONDENT

12 MS. ANDERS: Mr. Chief Justice, and may it  
13 please the Court:

14 In Minnesota v. Murphy, this Court applied  
15 the general rule that the Fifth Amendment privilege is  
16 not self-executing and that a suspect must invoke it in  
17 order to claim its protection to a noncustodial  
18 interview in which the -- the probation officer doing  
19 the questioning was aware that the questions that she  
20 asked could be incriminating.

21 The Court there held that because the  
22 suspect had not invoked his Fifth Amendment rights, his  
23 statements could be used against him as evidence at  
24 trial. A suspect's silence should similarly be  
25 admissible against him when he fails to expressly invoke

1 the privilege. Requiring invocation --

2 JUSTICE SOTOMAYOR: That is such a radical  
3 position, that silence is an admission of guilt. That's  
4 really what the argument is. I certainly understand  
5 that speaking can implicate you, and, if you choose to  
6 speak, clearly, whatever you say can be used against  
7 you, unless you're in custody and unless you've invoked  
8 the right before.

9 But this is radically different. We are --  
10 we are -- you're trying to say acts of commission and  
11 omission are the same, but statements are different than  
12 silence because, then, you're making the person who is  
13 asking this question your -- your admission. You are  
14 saying you're adopting their statement as true.

15 MS. ANDERS: Well, I think the Court has  
16 repeatedly recognized that, when a citizen is  
17 voluntarily interacting with the police and there --  
18 there is no coercion because it's not a custodial  
19 situation, we expect that person to be treated as fully  
20 capable of deciding whether or not to assert his rights.

21 This is what the Court said in *United States*  
22 *v. Drayton* in an analogous context, which is whether  
23 someone has voluntarily consented to a search. The  
24 person, even if he is not told that -- that he can  
25 refuse to -- to consent, we still assume that he knew

1 that he could refuse to consent, and, therefore, it was  
2 a voluntary choice.

3 And I think you can draw the same inference  
4 here, that, when someone -- we -- I think we all agree  
5 that most people know -- people know what their Fifth  
6 Amendment rights are, and, therefore, they can assert  
7 them when they don't face any coercive pressure.

8 JUSTICE KAGAN: Ms. Anders --

9 MS. ANDERS: And so when the person does not  
10 do that --

11 JUSTICE KAGAN: I'm sorry. We don't require  
12 invocation at trial, and we don't require invocation in  
13 a custodial setting. And you might think, well,  
14 custodial, that's very different because, after all,  
15 custodial is inherently coercive, but that's the whole  
16 point of Miranda warnings, is that, once we give Miranda  
17 warnings, that coercion is dispelled and the custodial  
18 setting, essentially, becomes like a noncustodial  
19 setting.

20 So, if we don't require invocation, even  
21 after Miranda warnings are given in a custodial setting,  
22 why should we require invocation here?

23 MS. ANDERS: Well, I think the reason that  
24 we don't require invocation in the Miranda setting, I  
25 think, highlights the fundamental difference between

1 custodial interrogation and noncustodial interrogation.  
2 So, in the custodial setting, the Court has said  
3 that -- that the suspect faces inherent coercive  
4 pressures to confess --

5 JUSTICE KAGAN: Yes, but then --

6 MS. ANDERS: -- and, therefore --

7 JUSTICE KAGAN: -- you're given the  
8 warnings, and then that's gone.

9 MS. ANDERS: Exactly. That's why we give  
10 the warnings. And, in the warnings, we promise the  
11 suspect that his silence will not be used against him.  
12 And so this is what the Court said in *Doyle v. Ohio*,  
13 that, because of that promise, the suspect does not have  
14 to expressly invoked, and his silence can't be used  
15 against him.

16 But, in the voluntary situation, we presume  
17 that the suspect knows his rights, and, because he is  
18 not facing any pressure, he can simply say, I don't want  
19 to answer that question. And so when he doesn't say  
20 that --

21 JUSTICE GINSBURG: You've -- you've said in  
22 your brief that there might be a whole other -- many  
23 other reasons for remaining silent, and I -- I suggested  
24 that the -- in -- in this kind of scenario, the most  
25 likely reason that the suspect will clam up is that he

1 fears incrimination.

2           But what -- what obvious other reasons  
3 unrelated to the Fifth Amendment, why a defendant might  
4 remain silent? I mean, the Griffin rule is he doesn't  
5 have to say, I plead the Fifth, because we assume that,  
6 when he doesn't take the stand, he is doing so because  
7 he doesn't want to incriminate himself.

8           MS. ANDERS: That's right. The -- the  
9 Griffin rule says -- or it's premised on the idea that,  
10 when you fail to testify at trial, you're inherently  
11 exercising your Fifth Amendment right.

12           But I think, when you're looking at a -- a  
13 noncustodial interrogation, the question whether the  
14 person is trying to exercise his Fifth Amendment right,  
15 I think the operative question is not whether he wants  
16 to avoid inculcating himself, it's whether he wants to  
17 refuse to answer as a matter of right.

18           And I think we know that because, if you  
19 look at the interview as a whole, presumably, his  
20 overarching motivation is not to inculcate himself.  
21 That's why his statement -- his statements can be used  
22 against him at trial because those statements we --  
23 we've -- the Court held in *Minnesota v. Murphy*, those  
24 statements are inconsistent with a desire to refuse to  
25 answer as a matter of right.

1 JUSTICE BREYER: Are you -- are you  
2 conceding the -- the point that they make? I -- that --  
3 that even if in the custodial setting he waives his  
4 Miranda right, he answers 500 questions, but doesn't  
5 answer one of the 500, that the prosecutor cannot  
6 comment on that fact that he didn't answer that one?

7 MS. ANDERS: I think that raises a  
8 different --

9 JUSTICE BREYER: Does it? What do you  
10 think? He says, no, you can't, and he quotes Miranda.  
11 Okay? What do you think?

12 MS. ANDERS: Well, there is -- there is a  
13 circuit split on that, and -- and I think the circuit  
14 split shows that it raises a different analytical  
15 question that the Court doesn't have to get into here.  
16 The circuit split is that some courts say, as I  
17 understand it, that, even after the person waives his  
18 Miranda rights, Doyle still applies, and so you can't  
19 use his silence against him.

20 And some of those other courts say, no, once  
21 he has waived his Miranda rights, he is essentially in  
22 the same situation as he would be, if he weren't in  
23 custody --

24 JUSTICE BREYER: And do you have a view  
25 on it?

1 MS. ANDERS: I -- I think we think that the  
2 better view is that Doyle probably does not apply, but I  
3 think there is a serious question there. And I think  
4 the Court doesn't have to resolve it here because,  
5 again, that highlights a distinction between custodial  
6 and noncustodial interrogation, that, once the suspect  
7 has been promised, that --

8 JUSTICE KENNEDY: Well, what is your answer  
9 to Justice Kagan's earlier question to -- of the  
10 hypothetical of the defendant that says nothing for 20  
11 questions?

12 MS. ANDERS: Well, I -- I think the  
13 standard --

14 JUSTICE KENNEDY: Then there's no -- and  
15 there's no Miranda warning and no custody.

16 MS. ANDERS: Right. So like this case,  
17 except 20 questions.

18 Well, I think the standard is whether the --  
19 the suspect has done something that reasonably can be  
20 construed as invocation. This is the standard that the  
21 Court announced in *United States v. Quinn* a long time  
22 ago, but it's also the same formulation that the Court  
23 used in *Davis* and *Berghuis*.

24 JUSTICE KAGAN: What -- what does that mean?  
25 Does he just -- how about if he just says, you know, I

1 don't really want to answer that question?

2 MS. ANDERS: I think, if he expresses the  
3 desire not to answer the question, that is sufficient  
4 because he is saying, I'm not going to answer that, and,  
5 implicitly, he has a right not to do that. I think the  
6 20 questions hypothetical that Justice Kennedy proposed,  
7 probably that would not be sufficient by -- by analogy  
8 to Thompkins, where the suspect sat silent for two  
9 hours.

10 JUSTICE GINSBURG: Okay. But -- but I don't  
11 think you -- you were going to tell me this great deal  
12 of conduct, what silence could mean other than, I fear  
13 incrimination. What else is --

14 MS. ANDERS: Absolutely. I think -- I think  
15 there are several types -- there are several mental  
16 states that silence can reflect that are both probative  
17 of guilt and not consistent with the desire to refuse to  
18 answer the question as a matter of right. So, for  
19 instance, the suspect could want to answer the question,  
20 but have trouble coming up with an exculpatory answer.

21 He could strategically decide that he is  
22 just going to sit silent for a bit, to see what else the  
23 prosecution -- or, I'm sorry -- the police say, in order  
24 to spin it out, see what they know. He could be  
25 dismayed or shocked, momentarily, because the question

1 reveals that the police have more evidence than he  
2 thought they did.

3           So I think, in all of those situations,  
4 those -- those mental states are not consistent with the  
5 desire to invoke the privilege, and that's why  
6 Petitioner's rule is, essentially, a prophylactic rule  
7 that would protect a great deal of conduct that has  
8 nothing to do with the desire to exercise the Fifth  
9 Amendment right.

10           I think -- you know, this case is a good  
11 example of that, where you have a -- a suspect who  
12 speaks for -- you know, several minutes -- you know,  
13 half an hour, whatever, and he's answering questions in  
14 an exculpatory manner. He's suddenly silent in response  
15 to one question, and so I think the inference that could  
16 be drawn there is that he was surprised by the question  
17 and didn't know how to answer it in the most exculpatory  
18 manner.

19           JUSTICE KAGAN: Well, Ms. Anders, suppose --  
20 you know, he thinks that the interview is going to be  
21 one thing, and then it turns out that the interview was  
22 something else. He realizes, it dawns on him, that the  
23 police really do see him as a suspect. And he says to  
24 himself, I better stop answering, right?

25           So he says, okay -- he's answered a bunch of

1 questions already, but -- but, now, he's -- you know, I  
2 don't want to answer any more questions. Is that an  
3 invocation?

4 MS. ANDERS: I think that would be  
5 sufficient, yes, to say, I don't want to answer any more  
6 questions. And I think --

7 JUSTICE KAGAN: Or, if he says, I don't want  
8 to answer questions about a particular topic; is that an  
9 invocation?

10 MS. ANDERS: I think that would be  
11 sufficient to invoke with respect to questions on that  
12 topic. And I think, as -- as in Thompkins, I think it's  
13 important to have a clear rule here because invocation  
14 does affect --

15 JUSTICE KAGAN: That doesn't sound like a  
16 clear rule. I mean -- you know, as -- as between -- you  
17 know, I don't want to answer those questions on a  
18 particular topic, I don't want to answer that question,  
19 or just like could we go on to a different question  
20 or -- or I don't know. Why is that different?

21 MS. ANDERS: Well, I think it's -- it's an  
22 objective standard, and it's the same formulation that  
23 the Court has already adopted in Berghuis and in  
24 Thompkins and in Davis. So, in the Miranda context, the  
25 Court has already faced this problem, how do we know

1 when the defendant has invoked his rights and what  
2 should the standard be?

3 And it has said that it is an objective  
4 standard, it's what's reasonably perceived as an  
5 invocation, and so -- you know, the lower courts are  
6 very used to applying that. I think it's very  
7 administrable because --

8 JUSTICE SOTOMAYOR: What's not administrable  
9 about telling the police you just can't argue to a jury  
10 that merely not asking a question is guilt? What --  
11 what lacks administrable?

12 MS. ANDERS: Well, I -- I think there are a  
13 variety of circumstances in which, as I said before,  
14 silence is probative of guilt. And so the question is  
15 whether you want a broad, prophylactic rule that will  
16 protect a great deal of conduct that -- that has nothing  
17 to do with the exercise of the right.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Fisher, you have four minutes remaining.

20 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

21 ON BEHALF OF THE PETITIONER

22 MR. FISHER: Thank you. I'd like to make  
23 three points.

24 First, Justice Breyer, your question about  
25 the state of the law, with respect to question number

1 432, In our reply brief, at page 4, we cite cases that  
2 are all Fifth Amendment cases, and Canterbury, also,  
3 which is a Tenth Circuit case cited elsewhere in our  
4 brief, uniformly holding that the Fifth Amendment  
5 applies.

6 The Solicitor General, when they speak about  
7 a circuit split with relation to Doyle, they're talking  
8 about impeachment cases. Remember, Doyle and Jenkins,  
9 which are the cases the State cited to you in response  
10 to your question are impeachment cases that are entirely  
11 different.

12 Second, if I -- we can look at the  
13 transcript this afternoon, but I believe both the State  
14 and the Solicitor General said to you, today, if  
15 Mr. Salinas would have said, I don't want to answer that  
16 question, then he would win, then Griffin would apply.  
17 But, because it was somehow ambiguous, that it  
18 shouldn't, that is ridiculous. If you look at the  
19 transcript in this case, what did the officer testify  
20 when he said -- he asked him the question, he said he  
21 did not answer.

22 What did the prosecutor argue to the jury in  
23 closing? Verbatim of what the State is telling you  
24 today is all Mr. Salinas had to say. At closing, the  
25 State said, the police officer testified that he

1 wouldn't answer that question. He didn't want to answer  
2 that.

3           So the whole principle behind express  
4 invocation jurisprudence is to put the State and the  
5 police on fair notice that somebody is exercising the  
6 right to remain silent. There was zero ambiguity in  
7 this case that was going on.

8           So it explains why the rule that the State  
9 and the Solicitor General have fallen back on in court  
10 today is formalism of the absolute worst kind, and the  
11 only thing that this formal requirement of saying some  
12 sort of magic words -- and I agree with Justice Kagan, I  
13 don't know what they are -- but whatever they are,  
14 what -- exactly what the State argued to the jury  
15 apparently would have been enough, is just nothing more  
16 than a trap for the unwary, who is told, through culture  
17 and learning, that he has a right to remain silent.

18           And he does the one thing that is consistent  
19 with his right, which is exercising it, and, somehow,  
20 the State is telling you that it can walk into court and  
21 say, because he remains silent, he's guilty of a crime;  
22 jury, you should conclude he's guilty of a crime.

23           And, Justice Sotomayor, when you asked the  
24 State, well, what about an officer that tells the  
25 defendant, as he will have every incentive to do, in

1 South Carolina v. Neville, in a roughly comparable  
2 situation, that law enforcement actually admitted they  
3 were already doing it, but the States tell you they'll  
4 do it here, when the officer says, if you don't answer,  
5 we're going to use that against you, the State said that  
6 would be coercion. But the officer would be doing  
7 nothing more than stating the rule the Court is asking  
8 you to announce today.

9                   So wouldn't the defendant know the law?  
10 Don't we assume that the suspect knows the law? And the  
11 State's telling you, well, if the officer tells the  
12 person what the law is, it's coercion.

13                   So, really, what we're asking today is  
14 nothing radical. It's nothing of a departure of our  
15 deepest traditions, which require the government to  
16 shoulder the load itself, to prove the case itself, and  
17 not to enlist the defendant as an instrument in his own  
18 demise.

19                   People's silence -- it is the time-honored  
20 concept of the Fifth Amendment, which, remember, was  
21 created for out-of-court questioning by law enforcement  
22 authorities, that people who remain silent could not  
23 have that used against them at trial.

24                   And, finally, I hope the -- the confusion  
25 with respect to the Berghuis, as related to this case,

1 has been dispelled. I think Justice Kagan got it  
2 exactly right. But, remember, another way to make it  
3 clear is that, if Mr. Salinas had said, in response to  
4 the question, I'd like for you to stop asking me  
5 questions, the police wouldn't have had to honor that.

6           Somebody not in custody doesn't have a right  
7 to have questioning cut off, so the police could have  
8 kept asking him questions. That's the only right that a  
9 custodial suspect has and needs to expressly invoke.  
10 The right to remain silent is not something that's ever  
11 had to be expressly invoked by somebody in custody or  
12 not in custody, and there's no good reason to require it  
13 to be invoked here.

14           If the Court has any further questions, I'd  
15 be happy to entertain them. Otherwise, I'll submit the  
16 case.

17           JUSTICE SOTOMAYOR: I'll like to go back to  
18 what Justice Ginsburg argued because there is an  
19 argument here that there wasn't an invocation of the  
20 right, that, by physical conduct, there was a statement.  
21 Would you have had a problem if the prosecutor had  
22 argued at trial -- you know, when he was asked about  
23 this testing, he didn't remain silent, he got nervous?

24           MR. FISHER: No, that would be --

25           JUSTICE SOTOMAYOR: And that shows his

1 guilt.

2 MR. FISHER: That would be an entirely  
3 different case. And we wouldn't have a problem with the  
4 State making legitimate arguments based on demeanor  
5 evidence that is, itself, communicative, as opposed to  
6 what it did in this case, which is argue that his  
7 silence demonstrated his guilt.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
9 The case is submitted.

10 (Whereupon, at 12:16 p.m., the case in the  
11 above-entitled matter was submitted.)

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