No. 12-246

IN THE

Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

v.

TEXAS,

Respondent.

On Writ Of Certiorari
To The Texas Court Of Criminal Appeals

BRIEF OF *AMICUS CURIAE* THE AMERICAN BOARD OF CRIMINAL LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

The American Board of Criminal Lawyers ("ABCL") was founded in 1978 as a national legal honorary society for highly accomplished criminal defense trial lawyers. Admission is by invitation only and requires both substantial, successful major felony trial experience and exceptional recommendations from distinguished jurists and current Fellows attesting to the candidate's high ethics and litigation skills. ABCL Fellows have extensive experience in both white-collar and other complex criminal cases. The primary goal of ABCL is the preservation and free exercise of fundamental freedoms for all those accused of criminal conduct.

Allowing a prosecutor to comment on silence in response to government questioning or to use it as substantive evidence of guilt unconstitutionally penalizes the exercise of an individual's Fifth Amendment right to remain silent. *Amicus* submits this brief to underscore the particular costs imposed by such a constitutional violation and its potential for unfair abuse in white-collar criminal cases.

SUMMARY OF ARGUMENT

The Fifth Amendment secures to individuals a right to remain silent to protect them from the compelled self-incrimination it bars. Prosecutorial

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[*] Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* has made a monetary contribution to the preparation or submission of this brief. The parties' letters of consent to the filing of this brief are on file with the Clerk.

comment on pre-arrest, pre-*Miranda* silence and its use as substantive evidence of guilt strip away this protection by using individuals' exercise of the right against them, thus imposing an unconstitutional penalty on the exercise of that right. The harsh costs and Catch-22 choice imposed by that penalty on individuals targeted in white-collar investigations underscore the problem with the rule adopted by the court below.

To begin with, there is no doubt that the right to remain silent applies during a government investigation. The question is whether the government's use of an individual's silence as substantive evidence against him penalizes exercise of the right such that it no longer affords the individual the protection from compelled self-incrimination the Fifth Amendment demands. When looking at the particular category of white-collar cases, the enormity of the costs imposed by the rule below is apparent in two respects.

First, using silence as evidence of guilt increases the likelihood of prosecution and conviction. The costs for each are particularly high in the white-collar context. For one thing, the scope of white-collar investigations increases the threat, as a variety of agencies can engage in multiple interviews with a defendant and his colleagues to manufacture more "guilt-by-silence" evidence. For another, the harm to the defendant arises long before conviction, because even an indictment can create reputational and financial harm from which he cannot recover, regardless of the ultimate outcome in a trial. Indeed, the implication of individuals in white-collar crimes can lead to severe, even disastrous, consequences for

not only the individual targeted, but also for companies and stakeholders.

Second, the rule adopted by the court below also places particular pressure on targets in white-collar cases to risk self-incrimination by speaking to investigators. Such individuals, although sophisticated in business matters, often have little experience with the criminal justice system and could be more easily intimidated, especially if told by the investigator that silence could be used against them. However, even for the innocent, speaking carries great risks in white-collar cases given the complexity of the facts and breadth and vagueness of the statutes and regulations involved. Whether they choose to speak or remain silent, then, individuals targeted in white-collar investigations are left with no choice but to provide the government potentially incriminating evidence against themselves and are thus bereft of the protection against compelled self-incrimination provided by an unfettered right to remain silent.

Furthermore, using silence during government questioning as evidence of guilt subverts the basic principle—also protected by the Fifth Amendment—that the government alone must shoulder the burden to prove its case. The rule adopted by the court below effectively requires an individual—either through his speaking or his silence—to aid the government in building a case against himself. The length and breadth of white-collar investigations increases the likelihood of abuse of guilt-by-silence evidence, and investigators can further extract assistance based on multiple threats to use an individual's silence against him. The generally ambiguous nature of silence,

especially given the numerous reasons for remaining silent in white-collar investigations, only sharpens the unfairness of providing this tool to the government for bolstering or even manufacturing a case against an individual.

ARGUMENT

I. USING SILENCE DURING GOVERNMENT QUESTIONING AS SUBSTANTIVE EVIDENCE WOULD UNCONSTITUTIONALLY PENALIZE WHITE-COLLAR SUSPECTS' EXERCISE OF THE RIGHT TO REMAIN SILENT.

A. Using Silence During Government Questioning As Substantive Evidence Of Guilt Unconstitutionally Penalizes A Suspect's Exercise Of The Right To Remain Silent.

The Fifth Amendment prohibits the government from compelling a person "to be a witness against himself." U.S. Const. amend. V. To guarantee individuals a safe harbor when in danger of self-incrimination, the provision secures against government infringement "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty … for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *see also Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (citing *Malloy*). Put simply, if an individual "has reasonable cause to apprehend danger [of self-incrimination] from a direct answer" to a government agent's question, he has a constitutional right not to answer it. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

To preserve the protection against compelled self-incrimination this constitutional right to remain silent provides, this Court has recognized that government conduct that erodes the right's protection by penalizing its exercise is a form of compelled self-incrimination prohibited by the Fifth Amendment. In *Griffin v. California*, 380 U.S. 609 (1965), the Court recognized prosecutorial comment on the defendant's silence as one such unconstitutional penalty. Allowing a prosecutor to comment on the defendant's silence at trial impermissibly "cuts down on the privilege by making its assertion costly." *Id.* at 614. Indeed, under the rule rejected in *Griffin*, a defendant who opted for the safe harbor of silence to avoid possible self-incrimination would find that, perversely, doing so provided the government with evidence it could use to incriminate him. Not every burden on the exercise of Fifth Amendment rights is a constitutionally impermissible one. But *Griffin* makes clear that treating an individual's silence as a confession of guilt constitutes an unconstitutional penalty on the exercise of the right to remain silent that strips away the protection against compelled self-incrimination it is supposed to afford. *See also Slochower v. Bd. of Higher Educ. of New York City*, 350 U.S. 551, 557 (1956) ("The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.").

This critical protection from compelled self-incrimination extends beyond the courtroom; an individual possesses the same constitutional right to remain silent during an investigation as he does at trial. *See Kastigar v. United States*, 406 U.S. 441,

444 (1972); *Watkins v. United States*, 354 U.S. 178, 188 (1957) ("The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves."). The right's availability springs from potential the danger of self-incrimination, independent of the context in which the government asks the questions. *See Hoffman*, 341 U.S. at 486. Recognizing this fact, this Court has protected the right to remain silent, *e.g.*, during a noncustodial investigation by a state attorney general's office, *Garrity v. New Jersey*, 385 U.S. 493, 494 (1967); during noncustodial questioning by a U.S. Senate investigating committee, *Slochower*, 350 U.S. at 553, 557–59; and even in response to a government request for information prior to any investigation at all, *Marchetti v. United States*, 390 U.S. 39, 60 (1968).

Accordingly, constitutional restrictions on government action inconsistent with the right to remain silent must also go beyond the courtroom. The penalty imposed by allowing the prosecution to comment on silence and use it as substantive evidence of guilt cancels out the right's protection against compelled self-incrimination whether the silence comes in the form of a refusal to take the stand at trial or a refusal to answer questions posed by government agents in an investigation. Under the rule below, if the individual questioned by government agents chooses to rely on his Fifth Amendment right not to answer them, he is nevertheless forced to "give" them his silence, which the prosecution can use as substantive evidence to more easily secure an arrest, indictment, or conviction. Knowing his silence can be used against

him also pressures the individual to speak, either during the investigation or later at trial—and even innocent parties risk self-incrimination or exposure to cover-up crimes like obstruction or perjury by doing so. Either way, the government impermissibly conscripts the individual into helping it "shoulder the … load" to prove a case against him. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964); *see also Portuondo v. Agard*, 529 U.S. 61, 67 (2000) (referring to "[t]he defendant's right to hold the prosecution to proving its case without his assistance"). In sum, if an individual's silence during a criminal investigation can be used substantively against him later, it unconstitutionally blocks the safe harbor the Fifth Amendment requires to protect him from compelled self-incrimination.

B. Using Silence During Government Questioning As Substantive Evidence Of Guilt Would Impose Wide-Ranging And Unfair Costs On Targets Of White-Collar Investigations.

While the use of silence during government questioning as evidence of guilt would place an unconstitutional penalty on the right to remain silent for defendants generally, the particular costs imposed by that penalty in white-collar cases underscore the problem with the rule adopted by the court below. In all cases, that rule would allow the government to use an individual's own silence during an investigation to later incriminate the individual, both by introducing his silence as substantive evidence of guilt and by telling the jury to draw an adverse inference from that evidence. The availability of such evidence and argument could increase the likelihood

of not just conviction, but also indictment or arrest (for which the silence might provide probable cause). When it comes to white-collar investigations, these legal consequences can quickly generate permanent, devastating, and far-reaching costs. This makes allowing prosecutors to use silence against targeted individuals in white-collar investigations an especially serious constitutional violation.

First, the corporate context of white-collar crimes—*e.g.*, insider trading, accounting fraud, securities fraud, banking crimes, bribery, price-fixing, and extortion—means that the costs of being implicated in a crime extend far beyond the targeted individual. When an officer or employee of a company is accused or convicted of criminal activity involving or implicating the firm, the financial consequences to the business and its stakeholders can be substantial. Values of stock or ownership interests plummet, creditworthiness takes a hit, access to capital markets is threatened, and current and potential customers look elsewhere. The costs of hiring lawyers to combat the allegations, and public relations firms to mitigate damage to reputation and goodwill, are also significant. As a result, investors, customers, advertisers, officers, employees, and other stakeholders (including and especially the targeted individuals) are all subjected to financial and reputational harm. Under the rule below, all of these wide-ranging consequences (for the individual, other officers or employees, or the company itself) would fall in part on the shoulders of any individual who remains silent during a white-collar investigation; simply by attempting to avail himself of the protection against compelled self-incrimination the right to silence is supposed to secure, the individual

could in fact provide enough "evidence" against himself to trigger financial and reputational ruin for everyone involved.

Second, these potential costs of refusing to answer questions by the government often arise early on in white-collar criminal investigations. Again, the government could use such guilt-by-silence evidence not only to support conviction, but also as probable cause for arrest or indictment. And even suspicion of criminal activity connected with a company can cause all of the just-discussed consequences for its investors, officers, employees, and other stakeholders.

In fact, the collateral consequences of implication in criminal activity can arise as soon as a criminal investigation becomes public: "[F]inancial and business markets react to news of the investigation—and to leaks regarding its progress. Investors sell, shareholders sue, clients withdraw, advertisers bail, and targeted firms soon encounter financial difficulties." Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law*, 43 Hous. L. Rev. 591, 594 (2006). For instance, between the time the investigation of Martha Stewart started and her conviction, her company lost 17 percent in revenues and 68.5 percent in earnings from publications. *Id.* Shareholders also filed thirteen suits against her and her company, and Stewart had to step down as CEO and Chairwoman even before she went to trial. *Id.* at 595.

The demise of Arthur Andersen was even more striking. Before its criminal trial even started, Enron's accounting firm was "all but dead." Kurt Eichenwald, *Enron's Many Strands: The*

Accountants; Miscues, Missteps and the Fall of Andersen, N.Y. Times, May 8, 2002, at C1. After massive losses of goodwill, clients, and revenue as a result of its indictment, the firm's eventual victory in the Supreme Court was pyrrhic; as one op-ed put it, "Andersen was destroyed when it was indicted. No exoneration at trial and no ruling by the Supreme Court will cause it to rise, Lazarus-like, from the dead." Joseph A Grundfest, Op-Ed., *Over Before It Started*, N.Y. Times, June 14, 2005, at A23. Of course, nearly everyone connected to Arthur Anderson took substantial and permanent hits to reputation, finances, or both.

Third, targeted individuals already face other penalties, also effectively imposed by the government, for remaining silent during an investigation. While state practices vary, federal agencies place a great deal of importance on a company's perceived overall cooperation with an investigation when determining whether to pursue criminal or civil charges. *See, e.g.*, U.S. Attorney's Manual, tit. 9, ch. 9–28.700. Part of this cooperation historically included substantial pressure to "withdraw financial support from embattled employees," including by firing them and refusing to pay their legal fees. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 336 (2007); *see also* Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees; As Sentencing Rules Stiffen, KPMG Axes Tax Partners, Won't Pay Their Legal Costs; What 'Cooperation' Entails*, Wall St. J., June 4, 2004, at A1. Despite current stated DOJ policy restrictions on these practices after the KPMG debacle, the pressure

still remains, though prosecutors and regulators exercise it more subtly than before. This withdrawal of support by the company only adds to the costs of remaining silent while under investigation by the government.

Fourth, the nature of white-collar criminal investigations increases the probability that the government will be able to acquire and use guilt-by-silence evidence to arrest, indict, or convict targeted individuals or corporations. To begin with, investigators may approach an individual at the office or at home with little or no notice and, with no mention of *Miranda*, pepper the individual with questions. Given the complex conduct and transactions that are generally the subject of white-collar investigations, *see* Moohr, *supra*, at 596, targeted individuals would likely consider refusing to answer merely based on surprise and ill-preparedness to answer complex questions. The prevalence of this type of situation in white-collar investigations would give the government a better-than-usual chance of securing individuals' silence as evidence to use against them later.

Moreover, the government will likely have numerous opportunities to procure guilt-by-silence evidence it can use against both the company and targeted individuals. Unwinding of the complicated transactions and conduct prevalent in modern business requires lots of time, and this complexity gives investigators reason to interview a wide range of potentially connected individuals, often on multiple occasions. In addition, overlapping jurisdiction among federal and even state agencies is commonplace. For example, Martha Stewart,

investigated for a relatively simple and isolated case of insider trading, was interviewed twice by three different sets of federal agents from the FBI, the SEC, and the U.S. Attorney's office. *Id.* at 593. For allegations of crimes of broader scope and greater complexity, the number of interviews and persons of interest only grows.

At bottom, in a garden-variety criminal trial, the prosecutor might point to the accused's refusal to answer one question in one interview as evidence of his guilt. Given the scope of a white-collar investigation, the prosecutor would likely be able to bludgeon a defendant with multiple pre-arrest, pre-*Miranda* interviews in which the defendant was silent about multiple issues (and thus, according to the prosecution, likely guilty). It could also offer up the silence of numerous other officers or employees as additional evidence of criminal activity. In short, the threat of one piece of guilt-by-silence evidence in a typical case becomes the threat of a stack of such evidence (and associated adverse inferences) in a white-collar prosecution.

C. The Threat Of Use Of Silence As Substantive Evidence Of Guilt Would Pressure Individuals To Speak Despite Substantial Risks Of Incrimination.

By allowing the prosecution to use an individual's silence as incriminating evidence rather than protecting it as a safe harbor against potential self-incrimination (as the Fifth Amendment requires), the rule adopted below pressures the individual to risk incriminating himself by speaking instead. If exercising his right to silence no longer protects him

from providing evidence against himself (and causing the just discussed consequences), he might ask, why not try to talk his way out of it? The short answer is, of course, that this choice is no safer. The right to remain silent exists precisely because speaking risks self-incrimination, even for the innocent. *See Ohio v. Reiner*, 532 U.S. 17, 21 (2001) ("[T]ruthful responses of an innocent witness … may provide the government with incriminating evidence from the speaker's own mouth."). Thus, under the rule below, speaking is merely the second of two forms of potential self-incrimination available to an individual questioned by investigators: He can remain silent, allowing the government to use the silence against him, or he can give in to the pressure that threat creates and risk self-incrimination by speaking. Either way, every time investigators question an individual, they force him to risk self-incrimination.

Individuals targeted in white-collar investigations may be particularly tempted to give in to this pressure to speak. Such individuals often have no personal experience with the criminal justice system and are overconfident based on their education and business expertise. Under the threat of having their silence used against them (and especially given the devastating consequences of prosecution), they are therefore more likely to speak to investigators than are street-crime suspects who may have had repeated negative encounters with law enforcement. *See* Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their* Miranda *Rights: The Power of Innocence*, 28 L. & Human Behavior 211, 212 (2004) ("[Researchers] found that people who have no prior felony record are far more likely to waive their rights than are those with criminal justice 'experience.'"). Cases like those

of Roger Clemens and Martha Stewart already evince the troubling yet common belief that exercising the right to remain silent is a worse decision than waiving it and "talking your way out of it."

That belief is as misguided in white-collar criminal investigations as in any other. In a white-collar investigation, speaking to investigators is akin to navigating a minefield of potential self-incrimination, even for parties innocent of the crime under investigation. For one thing, the facts in these cases can be extraordinarily complicated. Modern businesses are complex entities, often encompassing multiple divisions, utilizing decentralized decision making, and engaging in increasingly elaborate transactions—both domestic and cross-border. The conduct and transactions at issue may involve many people and span decades, geographic locations, and massive amounts of physical and electronic material. For another, white-collar criminal statutes and regulations capture an expansive yet vague range of conduct and transactions. In such circumstances, a targeted individual cannot know, correctly recall, or even locate every detail of the relevant conduct and transactions, much less understand the full range of legal ramifications.

Aware of these complexities and the potential for self-incrimination they create, attorneys who handle white-collar investigations generally advise their clients not to speak to investigators, especially before consultation with both company and personal attorneys and careful review of the documents, deals, conduct, or events in question. But under the rule below, not speaking could be just as incriminating, making individuals less likely to heed the advice.

Those individuals risk self-incrimination either by getting the facts wrong, unwittingly misleading investigators, or even giving a false exculpatory "no" simply because the individual is not adequately prepared. Specifically, these common mistakes can lead to two equally costly consequences: (1) self-incrimination with respect to the crime under investigation, or (2) simultaneous creation of and self-incrimination with respect to a so-called "cover-up" crime like obstruction or false statements to government agents.

1. The first risk—that a targeted individual will inadvertently incriminate himself with respect to the crime under investigation—is a function of mixing the complexities of the typical firm with the expansive and often indeterminate reach of many white-collar statutes and regulations. Generally speaking, federal white-collar criminal laws "use broad, undefined terms that can be applied to a wide range of conduct." Moohr, *supra*, at 604. For instance, most types of securities fraud, including insider trading, are generally charged under a single provision, section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and the SEC rule promulgated thereunder, Rule 10b-5, 17 C.F.R. § 240.10b-5. Section 10(b) broadly makes it "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange … [t]o use or employ, in connection with the purchase or sale of any security … any manipulative or deceptive device or contrivance in contravention of" SEC rules. 15 U.S.C. § 78j(b). Rule 10b-5 is equally expansive in scope. *See* 17 C.F.R. § 240.10b-5. Moreover, both the

statute and the rule leave it to the courts to define the key terms, including "deceptive device," and judicial interpretations have both varied by jurisdiction and changed over time.

The mail and wire fraud statutes are similarly capacious. *See* 18 U.S.C. §§ 1341, 1343, 1346. The mail fraud statute was initially passed simply to "secur[e] the integrity of the United States Postal Service." William M. Sloan, *Mail and Wire Fraud*, 48 Am. Crim. L. Rev. 905, 906 (2011). Over time, though, the government has used that statute and the similar wire fraud statute to capture an increasingly wide range of conduct, including fraud of almost any kind, blackmail, money laundering, and RICO violations. *Id.* at 906–07. These statutes are particularly dangerous traps because prosecutors use them as a "stopgap device" to charge individuals for "new" types of fraud even before Congress has passed a law to criminalize the specific conduct in question. *See United States v. Maze*, 414 U.S. 395, 405–06 (1974) (Burger, C.J., dissenting). Prosecutors famously used one mail and wire fraud statute in particular, the honest-services statute, 18 U.S.C. § 1346, as a catchall for any scheme or conduct they could not otherwise charge until this Court narrowed the statute's reach to bribery and kickbacks in *Skilling v. United States*, 130 S. Ct. 2896, 2932–33 (2010). *See also id.* at 2935 (Scalia, J., concurring) (reasoning that the honest-services statute is unconstitutionally vague).

It gets even worse. If these broad statutes do not cast a wide enough net, a charge of conspiracy or aiding and abetting often will. *See, e.g.*, 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 2 (aiding and abetting).

An individual may be charged with conspiracy to commit an underlying white-collar crime even without being present or engaging in the conduct at issue. *See, e.g.*, *Pinkerton v. United States*, 328 U.S. 640, 645–47 (1946). Even absent a conspiracy, an individual may be accused of aiding and abetting if the prosecution can assert that he "in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishes to bring about, [and] that he [sought] by his action to make it succeed." *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). In SEC enforcement actions, such liability may attach even if the defendant was not a proximate cause of the securities fraud at issue. *See SEC v. Apuzzo*, 689 F.3d 204, (2d Cir. 2012) (noting that the federal statute proscribing aiding and abetting securities fraud "was passed … precisely to allow the SEC to pursue aiders and abettors who … were not the themselves involved in the making of the false statements that proximately caused the plaintiffs' injuries").

In sum, these sweeping statutes governing white-collar criminal law "often prohibit such exceedingly broad ranges of conduct, in language that is vague and imprecise, that few lawyers, much less non-lawyers, could determine what specific conduct they prohibit and punish." The Heritage Foundation & the Nat'l Assoc. of Crim. Def. Lawyers, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement In Federal Law* 9 (2010). And the conduct they criminalize is variable by jurisdiction and over time. This makes speaking to investigators risky. It is almost impossible for a targeted individual unfamiliar with the intricacies of such laws to know whether something he says to

government investigators could incriminate him, other employees, or his company. Predicting the effect of a particular statement becomes even trickier when prosecutors charge individuals under novel theories that nevertheless could fit within the vague language of provisions like section 10(b), as the prosecution did in Martha Stewart's case. Moohr, *supra*, at 602–07 (discussing the prosecution's "novel" theory that Stewart fraudulently misled investors in her own company by maintaining her innocence with regards to personal, low-value trades on another company's stock). And again, indictment alone is enough to cause significant and permanent financial and reputational consequences, even if a court later throws out the charge. The rule adopted below, however, by treating an individual's silence as evidence against him, pressures a targeted individual to venture into this quagmire of potential white-collar criminal (and parallel civil) liability. In this way, the rule would further erode the protection against compelled self-incrimination.

2. Beyond possible incrimination with respect to the crime under investigation, individuals targeted in white-collar investigations risk an even more treacherous pitfall by speaking to investigators: exposure to liability for cover-up crimes. Obstruction and false statements, the cover-up offenses relevant during criminal investigations, "capture a wide range of conduct," Moohr, *supra*, at 608, making them effective traps for the unwary individual targeted in a white-collar criminal investigation. The main obstruction statutes provide for criminal punishment of "[w]hoever corruptly … influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede" justice. 18 U.S.C. § 1503; *id.* § 1505. This is

language susceptible to wide application, particularly given that an individual need only "endeavor" to obstruct justice. *See* Jessica Pettit et al., *Obstruction of Justice*, 49 Am. Crim. L. Rev. 1037, 1046–47 (2012). Even the mens rea element, "corruptly," has been watered down, *see* Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of "Corruptly" Within the Federal Criminal Law*, 31 J. Legis. 129, 141–66 (2004), and its meaning varies significantly from circuit to circuit, *see* Pettit, *supra*, at 1044–46.

The general false statements statute is even broader, covering anyone who "knowingly and willfully … falsifies, conceals, or covers up by any trick, scheme, or device a material fact" or who "makes any materially false, fictitious, or fraudulent statement or representation." 18 U.S.C. § 1001(a)(1)–(2). To expose himself to false statements liability, a suspect need not know about or intend to cover up any particular crime; it is enough that he knowingly and willfully conceals information, even if for perfectly understandable and legitimate reasons. Conviction for a false statement can even be secured based on a simple false exculpatory "no" that "misled no one." *Brogan v. United States*, 522 U.S. 398, 410 (1998) (Ginsburg, J., concurring).

These statutes have proven particularly useful for prosecutors looking to improve the probability of a conviction in a given case: "It is increasingly the statements made during an investigation, rather than the alleged misconduct that triggered the investigation, that form the basis for criminal liability." Griffin, *supra*, at 333. Such crimes "are typically cheaper to prosecute, more comprehensible

to the jury, and less subject to subtle nuances in proof" than underlying cases of, *e.g.*, insider trading or accounting fraud. Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 Am. Crim. L. Rev. 9, 36–37 (2005). Thus, if the prosecution is having trouble gathering enough evidence to charge the accounting or securities fraud under investigation, it can instead look to the statements of targeted individuals during the investigation for lies, misstatements, or concealment on which to base charges for false statements or obstruction instead. For instance, Martha Stewart was never charged with the insider trading that spurred the investigation; she was instead charged with obstruction and making false statements, and she was convicted on four counts of obstruction. *See* Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 Buff. Crim. L. Rev. 165, 176–77 (2004).

Innocent targets are no safer. As Justice Ginsburg pointed out in *Brogan*, the false statements statute could "be used to 'escalate completely innocent conduct into a felony.'" 522 U.S. at 411. An individual who fears the substantial consequences of prosecution for white-collar crimes could make punishable false statements or be charged with obstruction even if the conduct or transaction he covers up is not a crime at all. Or, the individual could lie or conceal information for other reasons: protecting what he views as confidential or privileged information (whether it is or not), a sense of loyalty to the company or associates, or simple mistrust of investigators based on prior experience with regulators. None of these scenarios involve any

underlying crime; all make the targeted individual vulnerable to cover-up charges.

Again, knowing these substantial consequences lie in wait for those who speak to investigators in a white-collar criminal investigation, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to [investigators] under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). But under the rule fashioned by the court below, taking that advice would provide the prosecution with substantive evidence against the targeted individual that could adversely affect him both in the charging decision and at trial. In short, if the prosecution can comment on a targeted individual's pre-arrest, pre-*Miranda* silence and use it as substantive evidence of guilt, the individual truly has no good option left; whether he answers an investigator's question or remains silent, he is forced to help the government build a case against him, subjecting himself and others to the severe and far-reaching consequences of white-collar prosecutions.

II. USING SILENCE DURING GOVERNMENT QUESTIONING AS SUBSTANTIVE EVIDENCE OF GUILT WOULD UPSET THE STATE-INDIVIDUAL BALANCE AND ESTABLISH A SYSTEM RIPE FOR ABUSE IN WHITE-COLLAR INVESTIGATIONS.

It is a bedrock principle of our criminal law that an individual remains innocent unless and until the government proves his guilt beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 363–64 (1970). The Fifth Amendment's bar on compelled

self-incrimination does its part to further this principle by keeping the government from enlisting the defendant to shoulder any part of this burden; every defendant has the "right to hold the prosecution to proving its case without his assistance." *Portuondo*, 529 U.S. at 67; *see also Murphy*, 378 U.S. at 55 (listing as a "fundamental value" protected by the Fifth Amendment "our sense of fair play which dictates … 'requiring the government in its contest with the individual to shoulder the entire load'"). Allowing prosecutors to comment on pre-arrest, pre-*Miranda* silence or to use it as substantive evidence against an individual would gut this right: "The result would be to enlist the defendant as an instrument in his or her own condemnation, undermining the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power." *Mitchell v. United States*, 526 U.S. 314, 325 (1999). In white-collar criminal investigations, it would further provide the prosecution with an unfair structural advantage ripe for abuse.

First consider a white-collar investigation in which the government cannot rely on using a targeted individual's silence as substantive evidence later on: In such an investigation, the government has to put in the work to discover the evidence it needs, if it exists, to prove each element of the crime in question. If it suspects a particular individual has engaged in securities fraud, for example, the prosecution may subpoena documents and interview anyone it wants to gather evidence to support its belief that the suspect employed a "deceptive device or contrivance"

to defraud investors in violation of Rule 10(b). 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. The government may even interview the suspect in this quest for evidence. But in this scenario, the suspect retains the right to make the government find any incriminating evidence without his help—a right he can exercise simply by remaining silent when investigators ask him questions. His choice here is simple: speak to investigators and risk incrimination, or remain silent and force the government to prove its case on its own.

That calculus unfairly shifts in the government's favor if a prosecutor can use the suspect's silence during the investigation as substantive evidence against him in the charging decision or at trial. Given the same scenario, the suspect questioned by the government would have no choice but to provide substantive evidence against himself. Let us say the government thinks the suspect helped further a pump-and-dump scheme. When an investigator asks about particular conduct—"Did you post this message online urging investors to purchase Company X stock?"—the suspect may still refuse to answer, thus avoiding the risk of incurring cover-up charges, *e.g.*, with a false exculpatory "no." But even by remaining silent, the suspect provides substantive evidence from which the government can ask a grand or petit jury to infer guilt. No longer does the suspect have the choice to make the government prove its case by other means than acquiring evidence from the suspect himself; whatever he does, he is forced to drive a nail into his own coffin. And the fact that his silence can be used against him adds government-created pressure to make the equally dangerous choice of speaking to the investigators—risking self-

incrimination with respect to the underlying securities fraud or cover-up crimes newly created by his statements.

This new advantage for government investigators would hold true in any criminal investigation. The wider scope and longer timeframe of white-collar investigations, however, would likely turn an already significant advantage into an abusive tactic. Again, targeted individuals in white-collar investigations can often expect to face multiple, lengthy interviews conducted by more than one government agency (*e.g.*, FBI, SEC, DOJ, state attorneys general). This provides the government the opportunity to ask the same or similar questions numerous times throughout the investigation. If the individual relies on his right to remain silent, he is effectively forced to improve the government's case against him each time he simply chooses not to respond to a question. For example, simply by asking the right questions, the government could generate a significant quantity of circumstantial guilt-by-silence proof of the *mens rea* element of white-collar crimes. On the other hand, if the specter of a mountain of guilt-by-silence evidence pressures the individual to answer these questions, he risks exposing himself to count after count of obstruction or false statements with each question he answers.

This rule could significantly and unfairly shift part of the prosecution's burden in a case to the defendant. Under this rule, the government need only think up incriminating questions and ask them; even if it fails to elicit answers, it would still further its case with guilt-by-silence evidence. And the more questions asked, the better the chances of indictment

or conviction. There is little reason to doubt that prosecutors and law enforcement agents will seize every opportunity to conscript the suspect into building the prosecution's case against him in this way.

Threatening to use a suspect's silence in a white-collar investigation as substantive evidence against him would be an especially troubling tactic for manufacturing cover-up offenses during questioning. Again, the government has increasingly turned to these crimes to secure convictions because they are generally much cheaper and simpler to prove and explain than are complex accounting or securities fraud. Green, *supra*, at 36–37. The rule adopted by the court below would give prosecutors a seductively simple and effective way to create cover-up liability. Investigators could ramp up the pressure to answer their questions by reminding a targeted individual each time he fails to answer that the prosecution can and will tell the jury to infer guilt from his silence—*e.g.*, "Surely an individual with nothing to hide would have cooperated fully with investigators rather than clamming up when investigators asked the tough questions." Then, when the individual caves, speaks up, and slips up, the prosecution can charge a cover-up offense. An individual—particularly with no lawyer present—will almost inevitably make some chargeable or damaging statement by speaking up during a white-collar investigation; the transactions and conduct of a modern firm are simply too complex for an individual to provide a fully complete and detailed account, and even innocent individuals will be tempted to conceal or lie at some point out of fear of the wide-ranging potential consequences of indictment or prosecution. *See Brogan*, 522 U.S. at

410–11 (Ginsburg, J., concurring). And the prolonged timeline, broad scope, and overlapping jurisdiction inherent in a white-collar criminal investigation would only exacerbate the potential for abuse of this tactic.

The government may use the same threat to start a cascade of cooperation. Investigators could extract assistance based on threats to use an individual's silence against him substantively. Once they flip one individual, they can use any evidence procured to target another individual, and simply rinse and repeat. In this way, investigators can pressure an entire organization into cooperation based largely on threats to use individuals' constitutionally protected silence against them.

All of these tactics are unfair and abusive on their own because they force individuals to help the government prove its case against them. The unfairness comes into sharper relief when one considers that an individual's silence during government questioning—the key cog the government uses as either threat or evidence—is insolubly ambiguous, not probative of guilt. To begin with, it has long been a basic principle that silence is valued and honorable, *see, e.g.*, Benjamin Franklin, *The Autobiography of Benjamin Franklin* 214–15 (listing silence as a virtue), not indicia of guilt. More specifically, an individual has plenty of innocent reasons to refuse to answer questions in a criminal investigation, including suspicion of government agents, memory deficits, righteous indignation, embarrassment, or fear of making mistaken statements. *See* Pet'r's Br. at 21–23. On top of these reasons, company or personal lawyers—well aware of

the complexities of modern firms and white-collar criminal law, *see supra* p. 10, and the staggering consequences of implication in criminal activity—will advise a businessperson not to answer any questions, especially if caught unprepared by an investigator or without the lawyers present. An individual could even refuse to answer questions based simply on his misunderstanding of an *Upjohn* warning from company lawyers, *i.e.*, that his interview with company lawyers was "privileged" and he is not supposed to talk to law enforcement about the subject matter discussed with the lawyers. Even without a specific warning, many businesspersons deal with in-house counsel and compliance officers on a regular basis and may instinctively refer investigators to these people rather than talking to investigators themselves. There are, of course, countervailing pressures on officers and employees to speak. *See supra* pp. 12–13. But an individual's successful resistance to those pressures to speak says nothing about his actual guilt or innocence—and yet the Texas court's rule would allow prosecutors to bolster or even manufacture a case against an individual by using such silence as substantive evidence against him.

In the end, allowing the prosecution to comment on silence during an investigation or use it as substantive evidence of guilt would provide the government with a powerful tool for unfairly conscripting a targeted individual into helping it build a case against him. That tool would be prone to government abuse or overreaching in white-collar criminal investigations, in which it could be especially effective for manufacturing evidence and

cover-up liability in an otherwise weak or non-existent case against innocent targets.

CONCLUSION

For the above reasons, *amicus curiae* American Board of Criminal Lawyers agrees with Petitioner Salinas that this Court should reverse the judgment below.

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