No. 16-1063

In the Supreme Court of the United States

MARIO WILCHCOMBE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
KENNETH A. BLANCO
Acting Assistant Attorney General
STEVEN L. LANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether evidence and prosecutorial comments about petitioners' silence after they were taken into custody by the United States Coast Guard but before they received warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), violated their Fifth Amendment privilege against compulsory self-incrimination.

2. Whether in a prosecution under the Maritime Drug Law Enforcement Act, 46 U.S.C. 70501 *et seq.*, for a drug offense committed on a vessel in international waters, the Due Process Clause of the Fifth Amendment requires the government to prove a nexus between the offense and the United States.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 838 F.3d 1179.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2016. On December 28, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 3, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiring to possess with intent to distribute and possessing with intent to distribute five kilograms or more of cocaine and 100 kilograms or more of marijuana while onboard a vessel subject to

the jurisdiction of the United States, in violation of 46 U.S.C. 70503(a) and (b), 46 U.S.C. 70506(a), 21 U.S.C. 960(b)(1)(B) and (2)(G), and 18 U.S.C. 2. Petitioner Rolle was also convicted of failing to obey an order to "heave to" a vessel, in violation of 18 U.S.C. 2237(a)(1). Petitioners Wilchcombe and Beauplant were sentenced to 120 months of imprisonment. Rolle was sentenced to 135 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-32a.

1. On May 3, 2014, the United States Coast Guard received a tip that a boat carrying drugs had left Haiti. Shortly thereafter, a Coast Guard cutter began tracking a vessel traveling northbound from Haiti in international waters. Several crewmen left the cutter to pursue the vessel in a chase boat. As the chase boat approached, the target vessel, which was traveling without lights, increased its speed. The chase boat's crew activated the boat's emergency lights and siren and ordered the target vessel to stop. The pilot, later identified as petitioner Rolle, instead made evasive turns while other men threw large packages overboard. Pet. App. 3a-4a.

The target vessel eventually stopped, and the chase boat came alongside. Pet. App. 4a. In response to the chase boat crew's questions, Rolle stated that he was from the Bahamas and owned the vessel, which was registered in the Bahamas. Gov't C.A. Br. 6-7. Rolle claimed to be traveling between Bahamian islands and stated that two of the other four men on the boat (later identified as petitioner Wilchcombe and Keno Wade Russell) were Bahamian and that the others (later identified as petitioner Beauplant and Pepe Henri) were Haitian. Pet. App. 5a.

The Coast Guard contacted the Bahamian government to request a "statement of no objection" that would allow the Coast Guard to board Rolle's vessel. Pet. App. 5a. After a wait of approximately two hours, the Bahamian government confirmed that the vessel was registered in the Bahamas and provided the requested statement of no objection. *Ibid.* Members of the chase boat crew then searched the vessel and took the men on board into custody. *Id.* at 5a-6a. In the meantime, the Coast Guard cutter recovered 40 packages and two duffel bags that had been thrown overboard during the chase. *Id.* at 6a. The packages and duffel bags contained 860 kilograms of marijuana and 35 kilograms of cocaine. *Ibid.*

The Coast Guard held petitioners and Russell for several days and ultimately transported them to Miami. Pet. App. 6a. Henri, a minor, was repatriated to Haiti. *Ibid.*; see Gov't C.A. Br. 10. While in Coast Guard custody, petitioners were neither provided warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), nor interrogated. Pet. App. 6a-7a.

2. Petitioners and Russell were charged with conspiring to possess with intent to distribute and possessing with intent to distribute five kilograms or more of cocaine and 100 kilograms or more of marijuana while on a vessel subject to the jurisdiction of the United States, in violation of the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 *et seq.* Petitioner Rolle was also charged with failing to obey an order to "heave to" a vessel, in violation of 18 U.S.C. 2237(a)(1). Russell pleaded guilty to conspiracy to possess with intent to distribute cocaine and marijuana and agreed to testify at petitioners' trial. Pet. App. 7a.

a. The MDLEA makes it unlawful for any person to possess a controlled substance with the intent to distribute it, or to attempt or conspire to do the same, on "a vessel subject to the jurisdiction of the United States." 46 U.S.C. 70503(a) and (e)(1), 70506(b). Congress enacted the MDLEA because it found that "trafficking in controlled substances aboard vessels is a serious international problem, is universally condemned, and presents a specific threat to the security and societal well-being of the United States." 46 U.S.C. 70501(1). Congress accordingly provided that the MDLEA would apply to any "vessel subject to the jurisdiction of the United States," 46 U.S.C. 70503(e)(1), "even though the act is committed outside the territorial jurisdiction of the United States," 46 U.S.C. 70503(b). As relevant here, the MDLEA defines a "vessel subject to the jurisdiction of the United States" to include "a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States." 46 U.S.C. 70502(c)(1)(C).

Before trial, the government filed a motion for a determination that Rolle's boat was a "vessel subject to the jurisdiction of the United States" because the Bahamian government had consented to the enforcement of United States law. Gov't C.A. Br. 26. Petitioners responded in part by arguing that the government should be required to prove a nexus between their offenses and the United States. *Ibid.* The district court granted the government's motion without requiring proof of a nexus. *Id.* at 27.

b. Beginning with their opening statements, petitioners' defense at trial was that Russell had forced Rolle and Wilchcombe at gunpoint to transport drugs

from Haiti to the Bahamas and that he had also threatened to kill Beauplant, who was allegedly a stowaway discovered during the voyage. See, *e.g.*, Rolle C.A. App. Ex. 3 at 172-176, 180.

Several Coast Guard witnesses testified in the government's case-in-chief. Gov't C.A. Br. 3-11. The officer in charge of the chase boat testified that petitioners provided biographical information after being taken aboard the Coast Guard cutter but did not otherwise say anything or ask to speak to the Coast Guard crew in private. *Id.* at 42. Rolle objected to this testimony, and petitioners later moved for a mistrial on the ground that the government had improperly commented on their silence. *Id.* at 42-43. The district court denied the motions. *Id.* at 43.

Thereafter, another officer testified that petitioners had not attempted to talk to him during their detention. Gov't C.A. Br. 43. Petty Officer Michael Irigoyen testified that none of the occupants of the vessel had made "any statements" during the two hours the Coast Guard had waited for the statement of no objection from the Bahamian government, other than to ask for food and water. *Id.* at 43-44. Irigoyen also testified, however, that after petitioners had been transferred to the Coast Guard cutter, Rolle confided in Irigoyen that he had made a "big mistake" and, on another occasion, asked Irigoyen to "cut [him] a break." *Id.* at 11.

Rolle testified in his own defense that Russell had forced him and Wilchcombe to transport the drugs from Haiti to the Bahamas. Gov't C.A. Br. 18-19. He further testified that Beauplant and Henri were stowaways on the vessel and that Russell had threatened to kill them after they were discovered. *Id.* at 19.

During cross-examination, the prosecutor asked Rolle why he never told the Coast Guard that Russell had threatened him. *Id.* at 44. And, during closing arguments, the government stated that petitioners had never told the Coast Guard that Russell had threatened them or otherwise sought help. *Ibid.*

c. Petitioners were convicted on all charges. The district court sentenced Beauplant and Wilchcombe to 120 months of imprisonment and Rolle to 135 months of imprisonment. Pet. App. 8a.

3. The court of appeals affirmed. Pet. App. 1a-32a.

a. As relevant here, the court of appeals first rejected petitioners' claim that "the MDLEA violates the Due Process Clause because it does not require proof of a nexus between the United States and a defendant." Pet. App. 8a. The court explained that petitioners' claim was foreclosed by *United States* v. *Campbell*, 743 F.3d 802, 810 (11th Cir.), cert. denied, 135 S. Ct. 704 (2014). Pet. App. 8a. The court added that "[t]he Constitution and principles of international law support [*Campbell*'s] interpretation of the MDLEA" and that petitioners had made "no convincing arguments to the contrary." *Id.* at 9a

b. The court of appeals also rejected Rolle's and Beauplant's contention that they were entitled to a new trial because of "the government's comments at trial on their silence after they were taken into custody." Pet. App. 16a. The court explained that the claim was foreclosed by circuit precedent "permit[ting] the prosecution to use a defendant's post-arrest, pre-*Miranda* silence as direct evidence that may tend to prove the guilt of the defendant." *Id.* at 17a (citing *United States* v. *Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991)).

The court of appeals further held, in the alternative, that "any error caused by the government's comment on Beauplant's and Rolle's pre-*Miranda* silence that might have occurred would not warrant reversal." Pet. App. 19a. "As to Beauplant," the court held that "any such error would have been harmless in light of the ample evidence of his guilt that was presented at trial." *Id.* at 19a-20a. And as to Rolle, the court explained that this Court's decision in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), authorized the government "to use his pre-*Miranda* silence to impeach his trial testimony to the effect that Russell had coerced him into carrying the drugs." Pet. App. 20a (citing *Brecht*, 507 U.S. at 628).

c. Judge Jordan, joined by Judge Walker, concurred. Pet. App. 24a-32a. Judge Jordan recognized that the panel was "bound by *Rivera*" but asserted that *Rivera* "should be reconsidered en banc in an appropriate case." *Id.* at 24a. In his view, "the Fifth Amendment's privilege against self-incrimination d[oes] not permit the government to use the post-arrest silence [of defendants who do not testify at trial] as substantive evidence of their guilt in its case-in-chief." *Id.* at 32a. But Judge Jordan also explained that, "[g]iven the other evidence presented against" petitioners, this case was not "a good vehicle for en banc reconsideration of *Rivera*." *Id.* at 32a n.3.

ARGUMENT

1. Petitioners first contend (Pet. 9-22) that trial testimony and prosecutorial argument about their post-arrest, pre-*Miranda* silence violated their Fifth Amendment privilege against compelled self-incrimination. Although courts of appeals have taken different approaches to the question whether and

under what circumstances the government may use such silence as substantive evidence of guilt, this case would not be an appropriate vehicle in which to resolve that disagreement for several reasons. This Court's recent decision in *Salinas* v. *United States*, 133 S. Ct. 2174 (2013), may prompt courts to revisit this issue and resolve any conflict without the need for this Court's intervention. The factual circumstances of this case, in which the use of silence was a response to the factual theory of defense, provides an independent rationale for upholding the judgment. And, critically, petitioners would not be entitled to relief even if they prevailed on the question presented because the court of appeals held, in the alternative, that any error "would not warrant reversal." Pet. App. 19a. Petitioners do not seek this Court's review of that factbound alternative holding, which fully supports the decision below.

a. This Court has held that, in some circumstances, the government may not comment on or introduce evidence of a criminal defendant's silence. Those decisions rest on two distinct rationales.

First, in *Griffin* v. *California*, 380 U.S. 609, 615 (1965), this Court held that the Self-Incrimination Clause of the Fifth Amendment prohibits the prosecution from commenting on a defendant's failure to testify at trial. As the Court later explained, *Griffin* held that "[t]he defendant's right to hold the prosecution to proving its case without his assistance is not to be impaired by the jury's counting the defendant's silence at trial against him." *Portuondo* v. *Agard*, 529 U.S. 61, 67 (2000).

A second line of cases arises not from the Self-Incrimination Clause, but from due process principles

and this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Court held that absent other safeguards to protect Fifth Amendment rights, the government may not introduce statements obtained during custodial interrogation as evidence of the defendant's guilt unless it has warned a suspect of his right to remain silent, his right to counsel, and of the fact that any statement made can be used against him at trial. In *Doyle* v. *Ohio*, 426 U.S. 610 (1976), the prosecutor sought to impeach the defendant's testimony at trial by eliciting evidence that the defendant had remained silent and had failed to provide the same story after receiving *Miranda* warnings following his arrest. The Court held that the prosecution's use of the defendant's post-*Miranda* silence as impeachment at trial was "fundamentally unfair and a deprivation of due process." *Id.* at 618. The due process violation arose, the Court explained, because *Miranda* warnings contain implicit assurances that a defendant's exercise of his "right to remain silent" will not carry with it a penalty. *Id.* at 519 n.10.

In *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), the Court held that the Self-Incrimination Clause and the Due Process Clause do not prohibit the prosecution from impeaching a testifying defendant with his pre-custody, pre-*Miranda* silence. *Id.* at 238-239. The Court concluded that *Doyle*'s reasoning was inapposite because "no governmental action induced [the defendant] to remain silent." *Id.* at 240. In *Fletcher* v. *Weir*, 455 U.S. 603 (1982) (per curiam), the Court applied that same analysis in a case involving impeachment with post-arrest, pre-*Miranda* silence. The Court explained that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda*

warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id.* at 607; accord *Brecht* v. *Abrahamson*, 507 U.S. 619, 628 (1993) (explaining that the *Doyle* line of cases "rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial'") (quoting *Wainwright* v. *Greenfield*, 474 U.S. 284, 291 (1986)); *Greer* v. *Miller*, 483 U.S. 756, 763-764 (1987) (same).

b. In *Salinas*, this Court granted review "to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief." 133 S. Ct. at 2179 (plurality opinion). But the plurality found it "unnecessary to reach that question" because the defendant had not "invoke[d] the privilege during his interview" and therefore was not entitled to rely on it. *Ibid.*

This Court has "long held that a witness who 'desires the protection of the privilege . . . must claim it' at the time he relies on it." *Salinas*, 133 S. Ct. at 2719 (plurality opinion) (quoting *Minnesota* v. *Murphy*, 465 U.S. 420, 427 (1984)). The express-invocation requirement "ensures that the Government is put on notice when a witness intends to rely on the privilege" and "gives courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing the witness' reasons for refusing to answer." *Ibid.* This Court has recognized only "two exceptions

to the requirement that witnesses invoke the privilege," neither of which applied in *Salinas*. *Ibid.*

First, in *Griffin*, the Court held "that a criminal defendant need not take the stand and assert the privilege at his own trial." *Salinas*, 133 S. Ct. at 2179 (citing *Griffin*, 380 U.S. at 613-615). A defendant has "an 'absolute right not to testify'" at his own trial, so "requiring that he expressly invoke the privilege would serve no purpose." *Ibid.* (citation omitted). But because the defendant in *Salinas* "had no comparable unqualified right during his interview with police, his silence f[ell] outside the *Griffin* exception." *Id.* at 2179-2180.

Second, this Court has "held that a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary." *Salinas*, 133 S. Ct. at 2180 (plurality opinion). In *Miranda*, for example, the Court reasoned that "a suspect who is subjected to the 'inherently compelling pressures' of an unwarned custodial interrogation need not invoke the privilege" because of "the uniquely coercive nature of custodial interrogation." *Ibid.* (quoting *Miranda*, 384 U.S. at 467-468). The defendant in *Salinas* could not "benefit from that principle because it [wa]s undisputed" that he was not in custody when he was interviewed. *Ibid.*

Having found the two recognized exceptions inapplicable, the *Salinas* plurality declined to create a "new exception to the 'general rule' that a witness must assert the privilege to subsequently benefit from it." 133 S. Ct. at 2181 (quoting *Murphy*, 465 U.S. at 429). And because the defendant in *Salinas* failed to invoke the privilege against self-incrimination during his pre-arrest, pre-*Miranda* interview, the plurality

concluded that the prosecution's use of his silence during that interview as evidence of guilt did not violate the Self-Incrimination Clause. *Id.* at 2183-2184.[1]

c. In cases decided before *Salinas*, the courts of appeals reached varying conclusions on the question whether and under what circumstances the prosecution may use a defendant's post-arrest, pre-*Miranda* silence as evidence of guilt in its case-in-chief. The Fourth and Eleventh Circuits held that such silence could be used as evidence of guilt even if the defendant was subject to custodial interrogation. See *United States* v. *Love*, 767 F.2d 1052, 1063 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986); *United States* v. *Rivera*, 944 F.2d 1563, 1567-1568 (11th Cir. 1991). The Eighth Circuit also upheld the admission of post-arrest, pre-*Miranda* silence, but in a decision addressing a defendant who was not interrogated. See *United States* v. *Frazier*, 408 F.3d 1102, 1111 (2005) (emphasizing that "[i]t is not as if [the defendant] refused to answer questions in the face of interrogation"), cert. denied, 546 U.S. 1151 (2006).

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[1] Justice Thomas, joined by Justice Scalia, concurred in the judgment. *Salinas*, 133 S. Ct. at 2184-2185. In Justice Thomas's view, the defendant's claim "would [have] fail[ed] even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony." *Id.* at 2184. Justice Thomas explained that he viewed *Griffin*'s rule against prosecutorial comment on a defendant's failure to testify at trial as "impossible to square with the text of the Fifth Amendment" and that he therefore would not "extend [*Griffin*] to a defendant's silence during a precustodial interview." *Ibid.* Because Justice Thomas would have rejected the defendant's claim on a broader ground, the plurality's narrower rationale "constituted the holding of the Court." *Marks* v. *United States*, 430 U.S. 188, 194 (1977).

As petitioners observe (Pet. 10), other courts of appeals held that the use of a defendant's of post-arrest, pre-*Miranda* silence violated the Self-Incrimination Clause. The Ninth Circuit applied that rule in cases involving "custodial interrogation." *United States* v. *Hernandez*, 476 F.3d 791, 796, cert. denied, 552 U.S. 913 (2007); see *United States* v. *Velarde-Gomez*, 269 F.3d 1023, 1028-1031 (9th Cir. 2001) (en banc). The D.C. Circuit held that evidence of a defendant's post-arrest silence may not be admitted even in a case in which the defendant was not being interrogated. See *United States* v. *Moore*, 104 F.3d 377, 384-389 (1997).[2]

d. Even if the disagreement petitioners identify otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to resolve it for three independent reasons.

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[2] Petitioners correctly note (Pet. 10, 12-13) that state courts have also reached inconsistent results on the admissibility of evidence of post-arrest, pre-*Miranda* silence. Compare, *e.g.*, *State* v. *Fisher*, 373 P.3d 781, 790 (Kan. 2016) (permitting use of such evidence), and *State* v. *Mitchell*, 876 N.W.2d 1, 11-12 (Neb. Ct. App.) (same), aff'd, 884 N.W.2d 730 (Neb. 2016), with, *e.g.*, *Hartigan* v. *Commonwealth*, 522 S.E.2d 406, 409-410 (Va. Ct. App. 1999) (barring the use of such evidence in the prosecution's case-in-chief), aff'd on reh'g en banc, 531 S.E.2d 63 (Va. Ct. App. 2000), and *Akard* v. *State*, 924 N.E.2d 202, 209 (Ind. Ct. App.) (same), rev'd in part on other grounds, 937 N.E.2d 811 (Ind. 2010).

Petitioners also cite (Pet. 10-11) decisions addressing the distinct question whether and under what circumstances *pre*-custody, pre-*Miranda* silence is admissible. That question is not presented here. And, as petitioners acknowledge (Pet. 10-11 & n.5), some of the cited decisions relied on state constitutional law, and many were decided before this Court made clear in *Salinas* that the Fifth Amendment does not bar evidence of unwarned pre-custody silence when the defendant failed to expressly invoke the privilege.

First, although petitioners cite cases holding that the Fifth Amendment prohibits the use of post-arrest, pre-*Miranda* silence, most of those cases were decided before Court's decision in *Salinas*. That decision may prompt the courts that issued those holdings to revisit their analysis. For example, in *Moore,* the D.C. Circuit asserted that an individual who volunteers a statement after arrest "may be held to have waived the protection" of the Fifth Amendment, but that "the defendant who stands silent must be treated as having asserted it." 104 F.3d at 385; see *id.* at 387 (drawing an analogy to *Griffin*). In *Salinas*, however, the plurality emphasized that a person may be treated as having asserted the Fifth Amendment privilege, without expressly invoking it, only in two contexts (at trial, under *Griffin,* and pretrial, in the face of "governmental coercion"). 133 S. Ct. at 2179-2184. That analysis may be significant here. While *Salinas* involved a voluntary police interview and this case involves custody (but not interrogation), the analytical framework in *Salinas*, and its explanation of the distinctive trial context of *Griffin*, suggests that a bar on the use of post-arrest silence, when the defendant has not asserted the Fifth Amendment privilege, requires a justification beyond a mere assumption that a silent arrestee must be deemed to be asserting the privilege. The lower courts should be afforded the opportunity to undertake that post-*Salinas* analysis in the first instance before this Court intervenes.[3]

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[3] In addition, here, petitioners were not silent in the face of interrogation, so this case does not raise any argument that interrogation (in combination with custody) might exert compelling pressures on a suspect to speak. The Coast Guard asked petitioners "right of approach" questions when the chase boat first pulled

Second, this case would be a poor vehicle for review because an independent rationale supports the use of petitioners' silence. This Court has made clear that even where prosecutorial references to a defendant's silence would otherwise violate the privilege against compelled self-incrimination, such references are permissible when they are a "fair response to a claim made by defendant or his counsel." *United States* v. *Robinson*, 485 U.S. 25, 32 (1988). In *Robinson*, the Court held that the prosecutor's comments during summation that the defendant could have taken the stand did not violate the Fifth Amendment because those comments followed defense counsel's assertion that the government had not allowed the defendant to explain his side of the story. *Ibid.*; see, *e.g.*, *United States* v. *Norwood*, 603 F.3d 1063, 1070 (9th Cir.) (citing *Robinson* and holding that prosecutor's comment on the defendant's pre-*Miranda* silence was a fair response to defense counsel's "implication of investigative misconduct"), cert. denied, 562 U.S. 952 (2010); *United States* v. *Smith*, 41 F.3d 1565, 1569 (D.C. Cir. 1994) ("[T]he prosecutor's remarks [on the defendant's silence] amounted to nothing more than a challenge to [the defendant's] innocent bystander

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alongside Rolle's vessel and routine booking questions when petitioners were transferred to the Coast Guard cutter. Pet. App. 5a-6a; Gov't C.A. Br. 47. Neither form of questioning constituted custodial interrogation. See *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980) (questions "normally attendant to arrest and custody" are not "interrogation"); *United States* v. *Rioseco*, 845 F.2d 299, 302-303 (11th Cir. 1988) (questioning during Coast Guard boarding of vessel is not custodial interrogation). That uncharacteristic factual circumstance further detracts from the appropriateness of this case as a vehicle for considering the use of post-arrest silence.

defense and as such constituted 'a fair response to a claim made by defendant or his counsel.'") (quoting *Robinson*, 485 U.S. at 32)).

The same principle applies here. Petitioners' defense at trial was that Russell coerced Rolle and Wilchcombe at gunpoint to transport drugs, and that Beauplant was a stowaway who Rolle had likewise threatened at gunpoint. That defense was the focus of petitioners' opening statements, see Rolle C.A. App. Ex. 3 at 172-176, 180, and was reaffirmed in Rolle's testimony, see Gov't C.A. Br. 18-21. The government's presentation of evidence and argument that petitioners did not react during their detention in a manner consistent with their claim of coercion was a "fair response" to petitioners' defense. *Robinson*, 485 U.S. at 32-33.

Third, and critically, petitioners would not be entitled to relief even if they prevailed on the question presented because the court of appeals held, in the alternative, that "any error caused by the government's comment on Beauplant and Rolle's pre-*Miranda* silence that might have occurred would not warrant reversal." Pet. App. 19a. Because Rolle testified at trial, the court concluded that the government was permitted "to use his pre-*Miranda* silence to impeach his trial testimony." *Id.* at 20a; see *Brecht*, 507 U.S. at 628. And although Beauplant did not testify, the court of appeals held that any error was "harmless in light of the ample evidence of guilt that was presented at trial." Pet. App. 20a.

Petitioners assert (Pet. 18) that "the panel did not identify any reason why the error was * * * harmless with respect to Mr. Wilchcombe." But that appears to be because the panel did not understand Wilchcombe to

have raised the issue at all. See Pet. App. 16a (stating that "Beauplant and Rolle," but not Wilchcombe, raised this issue on appeal); see also Pet. 17 n.10 (acknowledging that Wilchcombe did not raise the issue in his brief and only later adopted arguments made by the other petitioners). In any event, any error would have been harmless as to Wilchcombe for the same reason it would have been harmless as to Beauplant: the government presented "ample evidence" of guilt apart from petitioners' silence. Pet. App. 20a. Indeed, two members of the panel made that point explicit, stating that "the other evidence presented against Mr. Wilchcombe and Mr. Beauplant" made this case an inappropriate vehicle for rehearing en banc. *Id.* at 32a n.3 (Jordan, J., concurring).

Petitioners do not seek this Court's review of the court of appeals' factbound alternative holding, which independently supports the decision below. See Pet. i.[4] Accordingly, petitioners would not be entitled to relief even if this Court granted certiorari and resolved the question presented in their favor. That by itself is a sufficient reason to deny review.

2. Petitioners also renew their contention (Pet. 31-34) that the Due Process Clause of the Fifth Amendment required the government to prove a nexus between their conduct and the United States in order to prosecute them under the MDLEA. The court of appeals correctly rejected that contention, as have

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[4] Petitioners do challenge the court of appeals' alternative holdings in the body of the petition (Pet. 18-20). That discussion is insufficient to preserve the issue for this Court's review, see Sup. Ct. R. 14.1(a); *Wood* v. *Allen*, 558 U.S. 290, 304 (2010), and the court of appeals' case-specific harmless-error analysis would not warrant this Court's review even if the issue were properly raised.

several other circuits. The Ninth Circuit has adopted a different view, but that disagreement has not been of practical consequence to date and thus does not merit this Court's review. The Court has recently and repeatedly denied petitions for writs of certiorari raising the same question. See, *e.g.*, *Cruickshank* v. *United States*, No. 16-7337 (Apr. 3, 2017); *Campbell* v. *United States*, 135 S. Ct. 704 (2014) (No. 13-10246); *Al Kassar* v. *United States*, 132 S. Ct. 2374 (2012) (No. 11-784); *Tam Fuk Yuk* v. *United States*, 565 U.S. 1203 (2012) (No. 11-6422); *Brant-Epigmelio* v. *United States*, 565 U.S. 1203 (2012) (No. 11-6306); *Sanchez-Salazar* v. *United States*, 556 U.S. 1185 (2009) (No. 08-8036); *Aguilar* v. *United States*, 556 U.S. 1184 (2009) (No. 08-7048). The same result is appropriate here.

a. With the exception of the Ninth Circuit, the courts of appeals to address the issue have held that the government is not required to demonstrate a nexus between the offense conduct and the United States in order to support a prosecution under the MDLEA. See, *e.g.*, *United States* v. *Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003), cert. denied, 541 U.S. 1035 (2004); *United States* v. *Suerte*, 291 F.3d 366, 370-375 (5th Cir. 2002); *United States* v. *Cardales*, 168 F.3d 548, 552-553 (1st Cir.), cert. denied, 528 U.S. 838 (1999); *United States* v. *Martinez-Hidalgo*, 993 F.2d 1052, 1056 & n.6 (3d Cir. 1993), cert. denied, 510 U.S. 1048 (1994). That view is correct.

Application of the MDLEA to individuals trafficking drugs on a foreign-flagged vessel, where the flag nation has consented to enforcement by the United States, is not arbitrary or fundamentally unfair without proof of a nexus between the specific defendant or offense and the United States. In enacting the

MDLEA, Congress specifically found that "trafficking in controlled substances aboard vessels is a serious international problem [and] is universally condemned." 46 U.S.C. 70501(1). "Inasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, * * * it is [not] 'fundamentally unfair' for Congress to provide for the punishment of persons apprehended with narcotics on the high seas." *Martinez-Hidalgo*, 993 F.2d at 1056. Moreover, Congress found that such trafficking aboard vessels "presents a specific threat to the security and societal well-being of the United States," 46 U.S.C. 70501, which renders application of the MDLEA reasonable under the international-law principle of protective jurisdiction. See, *e.g.*, *Rendon*, 354 F.3d at 1325.

In addition, prosecution under the MDLEA is often (as in this case) pursued with the consent of the flag nation, which has unquestioned authority over the vessel and its crew. See, *e.g.*, *Suerte*, 291 F.3d at 375-376. As the Fifth Circuit has noted, "[t]hose embarking on voyages with holds laden with illicit narcotics, conduct which is contrary to laws of all reasonably developed legal systems, do so with awareness of the risk that their government may consent to enforcement of the United States' law against the vessel." *Id.* at 372 (emphasis and internal quotation marks omitted); see *Cardales*, 168 F.3d at 553 n.2; *United States* v. *Robinson*, 843 F.2d 1, 5-6 (1st Cir.) (Breyer, J.), cert. denied, 488 U.S. 834 (1988).

b. The Ninth Circuit has read into the MDLEA a nexus requirement with respect to foreign-registered vessels, not as an element of the substantive offense but as a "judicial gloss" on MDLEA prosecutions even when the flag government consents to the search,

arrest, and prosecution. *United States* v. *Zakharov*, 468 F.3d 1171, 1177 (2006) (quoting *United States* v. *Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998), cert. denied, 528 U.S. 842 (1999)); see *United States* v. *Perlaza*, 439 F.3d 1149, 1168 (9th Cir. 2006). In the Ninth Circuit's view, the Due Process Clause requires "a sufficient nexus * * * between the defendant and the United States" to ensure that application of the MDLEA would not be "arbitrary or fundamentally unfair." *United States* v. *Davis*, 905 F.2d 245, 249 n.2 (1990), cert. denied, 498 U.S. 1047 (1991). Because the nexus requirement is not an element of the offense, the Ninth Circuit does not require that the connection be proved to the jury beyond a reasonable doubt. Rather, it has held that the nexus issue is to be decided by the district court under a preponderance standard. *United States* v. *Medjuck*, 156 F.3d 916, 918 (1998), cert. denied, 527 U.S. 1006 (1999).

c. Certiorari is not warranted to address the Ninth Circuit's longstanding divergence from the majority view because that divergence has yet to be of serious practical significance. See *Martinez-Hidalgo*, 993 F.2d at 1056 (identifying conflict in 1993). The Ninth Circuit has held that a sufficient nexus exists if the "attempted transaction is aimed at causing criminal acts within the United States" and if "the plan for shipping the drugs was likely to have effects in the United States." *Klimavicius-Viloria*, 144 F.3d at 1257 (citations omitted). It has further recognized that the transportation of a large quantity of drugs, the location of the vessel, the types of navigational charts on board, and markings on drug packages like those previously found in the United States may be used to show a nexus. *Zakharov*, 468 F.3d at 1179.

Under that approach, the Ninth Circuit has not yet found the evidence of a nexus in any particular case insufficient to sustain a prosecution. See, *e.g.*, *Zakharov*, 468 F.3d at 1178-1179; *Klimavicius-Viloria*, 144 F.3d at 1258-1259; *Davis*, 905 F.2d at 249. In this case, too, the evidence showed that petitioners' conduct had a nexus to the United States. For example, Russell, the cooperating witness apprehended with petitioners, testified that he believed that the drugs petitioners were transporting were intended for distribution in the United States because the quantity of drugs was too large to sell in the Bahamas. Gov't C.A. Br. 15. And an agent with the Drug Enforcement Administration testified that "most of the cocaine coming through the Bahamas is destined for South Florida." *Id.* at 15-16 (brackets and citation omitted). That evidence would have satisfied the Ninth Circuit's nexus requirement. Cf. *Medjuck*, 156 F.3d at 919 (nexus found when "both economics and geography dictate that at least some portion of the [drugs] would at some point be found in the United States") (citation omitted). Accordingly, although practical considerations stemming from the Ninth Circuit's incorrect view could conceivably cause sufficient impediments to enforcement of the MDLEA to warrant review in the future, review is not warranted at this time—particularly in a case in which the government would have prevailed even if a nexus with the United States had been required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
KENNETH A. BLANCO
Acting Assistant Attorney General
STEVEN L. LANE
Attorney

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