No. 21-125

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

AUSTIN CODA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Counsel for Respondent
Team 6.

September 13, 2021

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QUESTIONS PRESENTED

I. Did the district court abuse its discretion when denying Petitioner's motion to dismiss based on preindictment delay, with no showing of actual prejudice nor evidence of bad faith?

II. Did the court of appeals correctly affirm the trial court's denial of Petitioner's motion to suppress based on the Self-Incrimination Clause, with no showing of compulsion to trigger the Fifth Amendment?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioner opened a hardware store in Plainview, East Virginia in January 2002. R. at 1. Initially, the store was profitable. *Id.* However, after the 2008 recession, the business quickly encountered financial difficulties; by 2010, Petitioner was barely able to keep the business open and the building properly maintained. *Id.*

On December 22, 2010, there was an explosion at the hardware store and the building was entirely destroyed. R. at 2. The Federal Bureau of Alcohol, Tobacco, and Firearms opened an investigation into the cause of the explosion, as did local fire investigators. *Id.* Initially, it appeared that an old gas line leaked due to cold weather, which eventually led to the explosion. *Id.*

However, around that same time, the Federal Bureau of Investigation (FBI) received a tip about the explosion from Sam Johnson, Petitioner's close friend and neighbor. *Id.* Johnson told the FBI that Petitioner was in financial trouble and maintained an insurance policy on the hardware store that would cover a total loss. *Id.* Johnson explained that Petitioner seemed "very anxious and paranoid" when the two spoke before the accident. *Id.* The FBI determined that Petitioner may have intentionally caused the explosion. *Id.* The FBI then relayed the information to the United States Attorney's Office. *Id.*

Upon receiving this information from the FBI, the U.S. Attorney's Office ("the Office") did not immediately indict Petitioner. *Id.* At the time, the case was considered "low-priority," in part because East Virginia was prosecuting Petitioner for unrelated charges and it would be inconvenient to transport Petitioner while that case was ongoing. *Id.* Once the state case concluded, the case remained "low-priority." *Id.* The Office focused on prosecuting drug trafficking and related offenses during that time because political pressure prioritized those

offenses. *Id.* At the same time, there was high attorney turnover in the Office, also due to political pressure. *Id.* Petitioner's case was assigned to several Assistant U.S. Attorneys during this time, remaining a "low-priority" case until April 2019. *Id.*

On April 23, 2019, the government arrested Petitioner. R. at 7. FBI Special Agent Park made the arrest and informed Petitioner of the charges. *Id.* In response, Petitioner remained silent, choosing not to raise any defenses, including a possible alibi. *Id.* The FBI agents read Petitioner his *Miranda* rights when they reached the detention center, prior to questioning. *Id.*

II. PROCEDURAL HISTORY

Petitioner Austin Coda was convicted under 18 U.S.C. § 844(i) and sentenced to ten years in prison for maliciously destroying property with an explosive. R. at 11. Petitioner was indicted for this crime in April 2019, within the statute of limitations provided by 18 U.S.C. § 3295. R. at 3. Petitioner then brought a motion to dismiss the indictment for preindictment delay, arguing the delay violated the Fifth Amendment Due Process Clause because he was no longer able to produce certain evidence in support of his alleged alibi. *Id.* The United States District Court for the District of East Virginia denied Petitioner's motion after an evidentiary hearing. R. at 1. Petitioner later also brought a motion to suppress his post-arrest, pre-*Miranda* silence, again alleging a Fifth Amendment violation. R. at 7. The district court denied Petitioner's motion. *Id.*

Petitioner appealed the district court's denial of both motions to the United States Court of Appeals for the Thirteenth Circuit. R. at 11. The Court of Appeals affirmed the district court's denial of the motions and adopted the lower court's analysis of both issues. *Id.* Petitioner appealed and this Court granted his Writ of Certiorari on July 9, 2021. R. at 16.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion when it denied Petitioner's motion to dismiss for pre-indictment delay. The Due Process Clause of the Fifth Amendment protects defendants against pre-indictment delay, but its role is limited to delays that are unfair and actually prejudicial. To succeed on his motion to dismiss, Petitioner was required to show (1) actual prejudice with specific, non-speculative evidence, and (2) bad faith by demonstrating that the government delayed indictment to gain a tactical advantage.

Petitioner failed to meet his burden. He only provided speculative evidence that the unavailable witnesses and the loss of the bus ticket would have corroborated his alibi. He did not specifically state what that evidence would have shown if it was available nor how his defense was impaired by the loss of evidence. Because Petitioner failed to establish actual prejudice, the Court's analysis should end, as actual prejudice is the threshold question. However, even if the Court finds actual prejudice, the motion to dismiss was properly denied because Petitioner failed to show bad faith. Petitioner was required to demonstrate that the Government delayed indictment to gain a tactical advantage but he did not. Instead, the Petitioner only showed that his case was considered low-priority and that, once the prosecutor assigned to the case realized it was not proceeding, the Government promptly brought the indictment. Because Petitioner could not show actual prejudice nor bad faith, the district court did not abuse its discretion when it denied his motion to dismiss.

Additionally, the district court did not err when it denied Petitioner's motion to suppress his post-arrest, pre-*Miranda* silence. As both the Fifth Amendment's text and this court's landmark *Miranda v. Arizona* decision demonstrate, the right to pretrial silence is limited to instances in which a criminal defendant is *compelled* to speak or testify. Custody alone is insufficient to trigger this right, as the defendant is not coerced to answer any questions or

otherwise self-incriminate. Overly prejudicial pretrial silence may still be properly excluded under the applicable evidentiary rules, but it should not be excluded under the Fifth Amendment absent compulsion. Because Petitioner's voluntary silence was not compelled, the district court did not err when it denied Petitioner's motion to suppress.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE MOTION TO DISMISS FOR PRE-INDICTMENT DELAY BECAUSE PETITIONER FAILED TO SHOW ACTUAL PREJUDICE AND THAT THE GOVERNMENT ACTED IN BAD FAITH.

The District Court properly denied Petitioner's motion to dismiss based on pre-indictment delay. The denial of a motion to dismiss based on pre-indictment delay is reviewed under the abuse of discretion standard under the Fifth Amendment Due Process Clause. *United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005). Courts may only grant a dismissal under the Due Process Clause when the defendant has shown that the delay "was a deliberate device to gain an advantage over him and that it caused actual prejudice in presenting his defense." *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985).

This Court has firmly established that proof of actual prejudice is a "generally necessary but not sufficient element of a due process inquiry," thus courts must also consider the reasons for the pre-indictment delay; most circuit courts perform this analysis through the use of a two-prong test. *United States v. Lovasco*, 431 U.S. 783, 790 (1977); *United States v. Marion*, 404 U.S. 307, 324-25 (1971). This test requires Petitioner to show the delay (1) actually prejudiced his defense, and (2) was undertaken in bad faith as "the product of deliberate action by the government." *United States v. Corbin*, 734 F.2d 643 (11th Cir. 1984)..

The two-prong test is the proper test for this Court to adopt. While some courts use a balancing test rather than the two-prong test, the balancing test applies the same two factors. *Jones v. Angelone*, 94 F.3d 900, 904 (4th Cir. 1996). Moreover, the two-prong test is the proper test as it provides greater deference to prosecutorial discretion while providing the proper level of pre-indictment protections to the accused. *See e.g., United States v. Pallan*, 571 F.2d 497, 500 (9th Cir. 1978), *cert denied*, 436 U.S. 911. Regardless of the test chosen by this Court, Petitioner

has failed to demonstrate the Government's delay actually prejudiced his defense and that the Government delayed indictment in bad faith.

A. The Government's delay did not actually prejudice Petitioner's defense because the loss of potential witnesses and evidence did not meaningfully impair his defense.

The Government's delay in indictment did not cause actual prejudice to Petitioner. This Court has established that for issues of a constitutional violation, the threshold question is whether the Government caused actual prejudice to the defendant. *Marion*, 404 U.S. at 323-26; *United States v. Manning*, 56 F.3d 1188, 1193-94 (9th Cir. 1995). Such prejudice must be specific and non-speculative. *Pallan*, 571 F.2d at 500. To succeed on his claim of actual prejudice, Petitioner must show that the loss of witness testimony and the bus ticket meaningfully "impaired his ability to defend himself," and demonstrate, through specific and non-speculative evidence, how the loss was prejudicial to his case. *United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007). In this case, Petitioner failed to meet this heavy burden. *See id.* (stating that "establishing prejudice is a 'heavy burden' that is rarely met").

1. The loss of witness testimony was not actually prejudicial because Petitioner did not provide the specific exculpatory testimony the witnesses would have provided.

The loss of witness testimony is not a valid claim of actual prejudice in this case because Petitioner did not show the specific exculpatory testimony the witnesses would have provided. The mere loss of witness testimony does not rise to the level of actual prejudice to the defendant, as it incidentally occurs within the statute of limitations period, regardless of pre-indictment delay. *See Marion*, 404 U.S. at 321-22. While the death of witnesses during the pre-indictment period may actually prejudice the defendant, the defendant must provide the specific exculpatory testimony the witness would have provided. *Corona-Verbera*, 509 F.3d at 1113.

This Court explained in *United States v. Marion* that the loss of a witness or their testimony does not constitute actual prejudice. 404 U.S. at 321. The court explained that the "passage of time . . . may impair memories, . . . [or] deprive the defendant of witnesses," but that the loss of witness testimony amounts only to possible, not actual, prejudice. *Id.* at 321-22. In *United States v. Lovasco*, this Court built upon *Marion* and held that the death of two possible witnesses during the pre-indictment delay did not actually prejudice the defendant; the court decided this because the defendant did not show proof of how the witnesses' testimony would aid his defense. 431 U.S. at 785-86, 790. Together, *Marion* and *Lovasco* establish that a defendant must provide specific, non-speculative proof to demonstrate how the witness's testimony would aid his defense in order to show actual prejudice. *See, e.g.*, *Corona-Verbera*, 509 F.3d at 1113.

For example, in *United States v. Corona-Verbera*, the United States Court of Appeals for the Ninth Circuit assessed the actual prejudice and determined that the defendant was not actually prejudiced by the loss of witnesses who died during the pre-indictment delay. *Id.* at 1112. The defendant in that case was sentenced to four concurrent eighteen-year sentences for various drug crimes. *Id.* at 1109-10. He argued he suffered actual prejudice as the pre-indictment delay prevented him from locating and calling witness who died during that period of time. *Id.* at 1112. He alleged these witnesses would have supported "his 'mere presence' defense." *Id.*

The court in *Corona-Verbera* held that the defendant's claim of prejudice failed for two reasons; first, because the indictment was brought within the statute of limitations, and second, because his arguments were based on "generalized speculation." *Id.* at 1113. For the first reason, the court explained that losing testimony is an expected occurrence within the statute of limitations set by the legislature. *Id.* (quoting *United States v. Sherlock*, 962 F.2d 1349, 1354 (9th

Cir. 1992)). For the second reason, the court explained that defendants must "make a specific showing as to what a deceased witness would have said," and, if not, prejudice cannot be found. *Id.* (citing *United States v. Manning*, 56 F.3d at 1194). Thus, to successfully show that his case was actually prejudiced by the government's pre-indictment delay, the defendant was required to provide non-speculative proof showing how the loss of the witnesses was prejudicial. *Id.* However, the defendant in that case did not offer any "affidavits nor any non-speculative proof," so the court held that the defendant had not established the loss of witnesses impaired his ability to defend himself. *Id.* Therefore, the pre-indictment delay did not cause actual prejudice to the defendant. *Id.*

Similarly, in *United States v. Corbin*, the United States Court of Appeals for the Eleventh Circuit held that the defendants failed to show the death of potential witnesses and the faded memories of other witnesses actually prejudiced their defense. *Corbin*, 734 F.2d at 647-48. The court reiterated that faded memories alone are not sufficient to prove actual prejudice. *Id.* at 648. However, the court explained that the death of witnesses may actually prejudice a defendant, but the defendant must also show that the lost evidence cannot "be obtained through other means." *Id.* The defendants in that case failed to do so; the defendants merely listed the names of the witnesses who died during the pre-indictment delay, without providing any indication of what the witnesses would have testified to nor provided any indication that the "substance of that testimony was otherwise unavailable." *Id.* Therefore, the court held the defendants did not meet their burden of demonstrating actual prejudice. *Id.*

In this case, Petitioner alleges he was in New York visiting family on the night of the explosion and planned to raise an alibi defense. R. at 3. However, he claims he was unable to do so because four of the five family members he visited had died, and the fifth family member had

been diagnosed with dementia and cannot remember the visit in 2010. *Id.* The record indicates that Petitioner testified that if his family members could testify, they would corroborate his alibi. R. at 5. However, this testimony is insufficient to meet the standard required to demonstrate actual prejudice. *See Lovasco*, 431 U.S. at 785-86, 790.

To establish actual prejudice, Petitioner is required to show that the testimony the witnesses would have provided cannot "be obtained through other means." *See Corbin*, 734 F.2d at 648. Like the defendant in *Corona-Verbera*, Petitioner simply alleges that the now-deceased witnesses would provide testimony to support his alibi defense and bases his argument on general speculation. *See* 509 F.3d at 1112. Petitioner has not made any specific, non-speculative showing of what his witnesses would testify, which, according to the court in *Corona-Verbera*, "is pure conjecture." *Id.* at 1113. Instead, the record indicates that Petitioner merely testified to what he believed the witnesses would say; such testimony is mere assumptions and does not meet the standard to demonstrate actual prejudice.

Furthermore, there is nothing in the record indicating that Petitioner alleged there is no other source or evidence for the corroboration he desires. Petitioner has simply stated that his witnesses would have corroborated his alibi, but he has not demonstrated that the "substance of that testimony was otherwise unavailable." *Corbin*, 734 F.2d at 648. While the district court may have accepted Petitioner's statement that the witnesses would have testified he was in New York and found actual prejudice, that is not the standard for actual prejudice. When a witness is unavailable to testify, a finding of actual prejudice requires the defendant to provide specific, non-speculative proof demonstrating how the witness's testimony would aid his defense; when the witness has died, the defendant must show the substance of their testimony is unavailable. In

this case, Petitioner failed to meet this standard. Therefore, the loss of witness testimony did not actually prejudice Petitioner's defense.

2. Petitioner failed to show through non-speculative and specific evidence that the loss of the bus ticket caused him actual prejudice.

The mere loss of the bus ticket is insufficient to establish actual prejudice. As with witness testimony, the mere loss of evidence does not actually prejudice the defendant because it is the type of issue that incidentally occurs within the statute of limitations period. *See Marion*, 404 U.S. at 321-22. To demonstrate that his defense was actually prejudiced by the pre-indictment delay, Petitioner must specifically state what the records would show. *Manning*, 56 F.3d at 1194. Generalized assertions are insufficient. *Id.*

The United States Court of Appeals for the Ninth Circuit applied this standard in *United States v. Manning*. *Id.* The defendant in that case was sentenced to life imprisonment after mailing a bomb which killed the intend recipient's secretary. *Id.* at 1193. The defendant challenged a seven-year pre-indictment delay, arguing it was unconstitutional because he lost access to his credit card records which "could have explained his location at the time of the killing," among other things. *Id.* The court in that case held that there was not actual prejudice because the assertion was "too speculative." *Id.* The defendant did not specifically state what the records would show, instead he merely speculated that they could explain his location at the time of the crime. *Id.* Because the defendant's argument was "pure conjecture," the court determined that there was not actual prejudice. *Id.*

Similarly, the court applied the same reasoning in *Corona-Verbera*, when it assessed a claim that financial records no longer available could have supported defendant's argument that he had a lawful income. 509 F.3d at 1112-13. The court held that this was insufficient to

demonstrate actual prejudice. *Id.* The court explained that the records would not have been sufficient to show that the defendant "had no unlawful income." *Id.* at 1113.

In this case, Petitioner alleges he took a Greyhound bus to visit his family in New York the day of the explosion. R. at 3. However, Petitioner is unable to produce his bus ticket or a record from his bus trip because Greyhound only stores the information online for three years, and his last trip was in 2015. *Id.* He testified that that if the records were available, they would be "favorable to his defense." R. at 5. However, this testimony is insufficient to demonstrate actual prejudice, as it is merely speculative. *See Manning*, 56 F.3d at 1194.

The mere absence of records alone does not establish actual prejudice; Petitioner must specifically state what the record would show. *See id.*; *see also Corona-Verbera*, 509 F.3d at 1112-13. If the records of his bus ticket from 2010 had not been deleted and Petitioner had been able to produce them, it still would be insufficient to show actual prejudice to his defense. *See Corona-Verbera*, 509 F.3d at 1112-13. The mere existence of the bus ticket does not establish that it was the defendant's, that he bought it for himself, or that he boarded the bus the day of the explosion. Further, if the defendant planned to destroy the property, it would have been prudent for him to purchase a bus ticket he could point to as corroborating evidence of his alleged alibi. *See id.* at 1113 ("Anyone designing an illegal drug tunnel would be unlikely to include drawings of such a tunnel on plans submitted to a government agency.").

To show actual prejudice here, Petitioner would have to *specifically* state what the bus ticket would show. While the district court accepted Petitioner's testimony that the bus ticket would be favorable to his defense, that testimony is speculative. Like the credit card records at issue in *Manning*, the bus ticket would not explain where Petitioner was. *See* 56 F.3d at 1194.

The bus ticket would simply show that Petitioner purchased a ticket to take the Greyhound to New York; any argument that the bus ticket would show more is speculation. *See id.*

The loss of the bus ticket does not actually prejudice Petitioner's defense. This loss is the sort of incidental loss that occurs within the statute of limitations period. *See Marion*, 404 U.S. at 321-22. Petitioner has only provided general assertions about the ticket, which is insufficient to establish actual prejudice.

Petitioner has failed to show that the loss of witness testimony and the loss of his bus ticket actually prejudiced his defense. Without a showing of actual prejudice, there is no due process claim and this Court's analysis should end here. However, if this Court were to determine there was actual prejudice, the Petitioner's Due Process claim still fails because the Government did not delay indictment in bad faith.

B. The Government did not delay the indictment in bad faith.

The Government did not act in bad faith when it delayed indictment. The government cannot intentionally delay the indictment for a tactical advantage over the defendant. *Id.* at 324. However, courts give great deference to the timing of decisions of prosecutorial indictments and recognize a number of factors influence the timing of charging an individual. *See Lovasco*, 431 U.S. at 790. Such factors include the length of the investigation, the availability of manpower, and the sufficiency of evidence available at the time. *See id.*; *Pallan*, 571 F.2d at 500.[1] To succeed on his Due Process claim under the two-prong test, Petitioner must show the

[1] *Pallan* is a Ninth Circuit decision, and thus utilizes the balancing test which does not require bad faith, but weighs actual prejudice against the government's reason for delay; thus, even though it is a Ninth Circuit decision, it is still relevant to a discussion of determination of bad faith for the two-prong test. *See* Nolan S. Clark, *A Circuit Split on the Proper Standard for Pre-Indictment Delays With Governmental Negligence*, 50 CUMB. L. REV. 529, 545-46, 552-555, 561-62 (2020).

Government delayed indictment in bad faith. *United States v. Lindstrom*, 698 F.2d 1154, 1158 (11th Cir. 1983).

In *United States v. Lovasco*, this Court explained that the courts may not dismiss criminal prosecutions "simply because they disagree with a prosecutor's judgment as to when to seek an indictment." 431 U.S. at 790. This Court highlighted the fact that prosecutors are "under no duty to file charges" as soon as they can. *Id.* at 791. The Court noted that "such a requirement is unwise because it would cause scarce resources to be consumed on cases that prove to be insubstantial . . . . ." *Id.* at 791-92.

The United States Court of Appeals for the Ninth Circuit built upon this Court's reasoning in *United States v. Pallan*. 571 F.2d at 500. That court explained that there are many reasons a prosecutor may delay bringing a case before a grand jury. *Id.* The court considered the ability of prosecutors to filter out cases that should not be brought to trial as the most significant reason. *Id.* In 1976, "United States attorneys received some 171,518 criminal matter," but only 23,735 cases went before a grand jury. *Id.* Thus, any rule that would reduce the amount of time between referral to the prosecutor would result in unnecessary proceedings and wasted resources. *Id.* The court did not reach the question of whether the government acted in bad faith because the defendant did not show actual prejudice, but the court noted that the defendant was indicted within the statute of limitations and that the government's decisions to wait for the state proceedings to conclude did not prejudice the defendant. *See id.*

Generally, the courts do not need to consider whether the government acted in bad faith because it is very difficult for a defendant to prove the threshold question of actual prejudice. *See, e.g., Corona-Verbera*, 509 F.3d at 1113, n. 2. The United States Court of Appeals for the Third Circuit actually reached the question of bad faith in *United States v. Sebeitch* and held that

the defendant failed to show the government acted in bad faith. 776 F.2d at 430. The court explained that the defendant failed to produce any "evidence tending to suggest that the delay was a deliberate tactical maneuver by the government." *Id.* (quoting *Lindstrom*, 698 F.2d at 1158). Instead, the delay was "the result of a mix-up" and once the government realized the case was not proceeding, it "reopened its investigation of the case and returned the indictment." *Id.* The court explained that this was not the type of situation where the delay was designed to be a tactical advantage over the defendant. *Id.*

In this case, Petitioner argues that the Government acted in bad faith because it was negligent in not bringing his case sooner. The Government considered Petitioner's case as a low priority for several reasons, including the fact that Petitioner was being prosecuted for state charges at the time. R. at 2. While the Government may have focused on and prioritized other cases, once the Government realized Petitioner's case was not proceeding, the Government took action and indicted Petitioner in 2019, within the statute of limitations period. R. at 2-3. The evidence Petitioner has presented does not show the government intentionally delayed prosecuting his case to gain an unfair advantage. *See id.* at 430.

The Government has discretion to decide when to bring indictments. *See Lovasco,* 431 U.S. at 790. Here, the Government chose not to immediately indict Petitioner because it would be inconvenient to transport him back and forth and because it would be difficult on Petitioner to juggle simultaneous state and federal prosecutions. R. at 2. As the relevant factors the Ninth Circuit indicated in *Pallan*, such a delay is not bad faith; it is a prosecutorial decision within the Government's discretion. *See* 571 F.2d at 499-500 (noting the statute of limitations are the primary protection against governmental delay in indictment and that "[s]uch statutes represent

legislative assessments of relative interests of the state and the defendant in administering and receiving justice . . . .").

Furthermore, it is not up to the courts to dictate how prosecutorial resources should be divested nor how the manpower of the office should be divided and focused. *See id.* This particular United States Attorney's Office went through a series of changes in human resources which undoubtedly reshuffled the priority of certain cases and limited the manpower available to work on other cases. While these administrative delays "may have somewhat enhanced the government's case," *id.*, there was no intent to gain a tactical advantage in this case. As soon as the recent prosecutor assigned to the case realized the case had not proceeded, the Government took action and indicted Petitioner. This is very similar to the mix-up at issue in *Sebetich*, which the court determined was not the type of situation where the government acted intentionally and in bad faith. *See* 776 F.2d at 430.

Petitioner has failed to show that the government acted in bad faith. He has not presented any evidence to establish that the government intentionally delayed his case to gain a tactical advantage. This Court has made it clear that in order to prevail, Petitioner must show the Government acted in bad faith. *See Lovasco*, 431 U.S. at 790. Petitioner has failed to meet his burden.

Because Petitioner has failed to produce evidence showing the Government acted in bad faith, his Due Process claim based on pre-indictment delay must fail. Petitioner has failed to overcome the threshold showing of actual prejudice. Even if this Court determined he had made the requisite showing of prejudice, his claim must fail because he has not shown the Government intentionally delayed indictment to gain a tactical advantage. He has failed to satisfy the two-prong test.

Finally, if this Court chooses to apply the balancing test, his claim still fails because the balancing test solely balances amount of actual prejudice and reason for the delay; it is already established that Petitioner did not suffer actual prejudice, and the reason for delay was justifiable, so this Court should still find Petitioner's claim fails. *See* Nolan S. Clark, *A Circuit Split on the Proper Standard for Pre-Indictment Delays With Governmental Negligence*, 50 CUMB. L. REV. 529, 545-46, 552-555, 561-62 (2020).

For example, the United States Circuit Court of Appeals for the Fourth Circuit in *Howell v. Baker* used a balancing test for actual prejudice against governmental reason for delay. 904 F.2d 889, 895-96 (4th Cir. 1990) (noting the defendant did not meet the burden necessary for a showing of actual prejudice so there was no constitutional violation). In that case, the court noted that "mere convenience" and "negligence" by the government would serve as insufficient justification for delay. *Id.* However, the governmental reason for delay in this case is not mere negligence. The U.S. Attorney's Office experienced several human resource changes. *See Pallan*, 571 F.2d at 499-500. Furthermore, the initial delay in indictment because of the state charges is similar to the indictment delay in *Pallan*, where the Court noted that waiting for state charges to resolve "may have somewhat enhanced the government's case" in terms of impeachment, but did not "unfairly impair his ability to defend himself." *Id.* at 498-500. Thus, the Government's delay in this case was justified and supported by prosecutorial discretion. Therefore, even if actual prejudice was found and the balancing test was utilized, the Government's reasons for delay do not offend "the community's sense of fair play and decency," so Petitioner's argument for unconstitutional pre-indictment delay cannot stand. *Id.* at 500 (quoting *Rochin v. California*, 342 U.S. 165, 173 (1952)).

II. THE DISTRICT COURT DID NOT ERR WHEN IT DISMISSED PETITIONER'S MOTION TO SUPPRESS BECAUSE HIS VOLUNTARY POST-ARREST, PRE-*MIRANDA* SILENCE DID NOT TRIGGER THE FIFTH AMENDMENT.

The Fifth Amendment Self-Incrimination Clause does not protect post-arrest, pre-*Miranda* silence. As this Court explained in the landmark *Miranda v. Arizona* decision, the right against self-incrimination extends to "custodial interrogation," where a criminal may be compelled to respond to incriminating questions. 384 U.S. 436, 467 (1966). Since then, this Court has never extended this right pre-interrogation, during which criminal defendants are under no compulsion to speak. *See Salinas v. Texas*, 570 U.S. 178, 184 (2013). More specifically, custody or arrest alone does not compel a criminal defendant to self-incriminate. *Fletcher v. Weir*, 455 U.S. 603, 606 (1982). Thus, in the case of Petitioner and similarly-situated criminal defendants, there is no element of compulsion to trigger Fifth Amendment scrutiny. Lastly, if post-arrest, pre-*Miranda* silence would be overly prejudicial, it should be excluded under the applicable evidentiary rules. The Fifth Amendment right to pretrial silence extends only to compelled silence, not Petitioner's voluntary silence.

A. Post-Arrest, Pre-*Miranda* silence does not fall within this Court's categories of protected pretrial silence.

Post-arrest, pre-*Miranda* silence does not fall within this Court's recognized Fifth Amendment categorical protections. Originally protecting only a criminal defendant's right not to testify, the Self-Incrimination Clause has been extended in recent decades, acknowledging that the risk of self-incrimination exists outside the courtroom walls. Following *Miranda v. Arizona*, this Court has established a right to pretrial silence in the limited instances in which a criminal defendant is coerced or compelled to self-incriminate. *See, e.g.*, *Doyle v. Ohio*, 426 U.S. 610, 617 (1976). However, this Court has not expanded the scope of the Self-Incrimination Clause before a criminal defendant has been read his or her *Miranda* rights or otherwise expressly

invoked them, irrespective of evidentiary purpose or arrest status. *Cf. Fletcher*, 455 U.S. at 607 (holding the use of post-arrest, pre-*Miranda* silence was permissible for impeachment purposes). Thus, Petitioner's post-arrest, pre-*Miranda* silence is not protected under this Court's existing jurisprudence.

Historically, the right against self-incrimination stems from British protests against tyrannical, inquisitorial criminal trials. *See Miranda*, 384 U.S. at 442-43 (citing *Brown v. Walker*, 161 U.S. 591, 596-97 (1896)). During these trials, criminal defendants were required to take an *ex officio* oath, promising to answer all questions on all subjects at trial. *Id.* at 459. Those who refused faced severe, potentially physical punishment. *Id.* at 443; *see also* Jan Martin Rybnicek, *Damned If You Do, Damned If You Don't?: The Absence of A Constitutional Protection Prohibiting the Admission of Post-Arrest, Pre-Miranda Silence*, 19 GEO. MASON U. CIV. RTS. L.J. 405, 409 (2009). Public outcry ultimately prompted the British Parliament to abolish the *ex officio* oath and give rise to the maxim nemo tenetur seipsum accusare ("no man is bound to accuse himself"). *Miranda*, 384 U.S. at 442. The American colonies followed suit centuries later, drafting: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. AMEND. V.

For nearly two hundred years, this Court held that the Fifth Amendment Self-Incrimination Clause only applied when the government attempted to coerce a criminal defendant to testify. Rybnicek, *supra*, at 428. Up to this point, the Court perceived silence at trial and pretrial as "fundamentally different," *Jenkins v. Anderson*, 447 U.S. 231, 241 (1980) (Stevens, J., concurring), only going the extra step of prohibiting the prosecution from commenting on the defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 613 (1965). However, in the landmark *Miranda* case, this Court expanded the scope of the Self-

Incrimination Clause to encompass pretrial, custodial interrogation. *Miranda*, 384 U.S. at 467-68. There, criminal defendant Ernesto Miranda was placed in an interrogation room and underwent two hours of intense police questioning, ultimately confessing to kidnapping and rape. *Id.* at 491-92. Despite the interrogations occurring prior to trial, the Court threw out the confession, reasoning that the Fifth Amendment extends to all settings where criminal defendants may be compelled to self-incriminate. *Id.* at 467. Specifically, the Court reasoned that custodial interrogation presented psychological pressures akin to the physical ones seen in the precolonial era, compelling individuals like Ernesto to speak when they would otherwise remain silent. *Id.* Thus, the Court required the colloquial *Miranda* rights prior to such pretrial interrogations to ensure that a defendant's statements are voluntary and not compelled. *Id.* at 469.

In line with the reasoning set forth in *Miranda*, this Court has sought to categorize what kinds of pretrial silence are admissible. Beginning in *Doyle v. Ohio*, this Court has consistently held that after a defendant has been read his or her *Miranda* rights, the prosecution may not then turn-around and use his or her "post-*Miranda*" silence for any evidentiary purpose. 426 U.S. at 619; *see also Wainwright v. Greenfield*, 474 U.S. 284, 292 (1986) (dismissing prosecution's argument that use of defendant's post-*Miranda* silence to prove insanity is distinct from using it in the case-in-chief). Conversely, *before* the defendant has been read his or her *Miranda* rights, this Court has held just the opposite, permitting admission of "pre-*Miranda*" silence, whether for impeachment, *see Jenkins*, 447 U.S. at 231, or substantive evidence of guilt, *see Salinas v. Texas*, 570 U.S. at 189, even post-arrest, s*ee Fletcher*, 455 U.S. at 604 (permitting admission of post-arrest, pre-*Miranda* silence for impeachment purposes). This difference is because prior to reading a defendant's *Miranda* rights, he or she is not exposed to the "inherently compelling

pressures" of either custodial interrogation or trial. *See Salinas*, 570 U.S. at 184 (quoting *Miranda*, 384 U.S. at 467). Thus, the self-incrimination concerns raised in *Miranda* are not implicated, and a defendant may only claim the Fifth Amendment privilege by expressly invoking it. *Id.* at 183.

In sum, the Court has expanded the right against self-incrimination in recent decades. Yet, this categorical expansion of the Self-Incrimination Clause has been tethered to the issue of compulsion, consistent with both the Court's reasoning in *Miranda* and the Fifth Amendment's historical foundations. *See id*. at 184. Post-arrest, pre-*Miranda* silence lacks the same psychological pressures existent in *Miranda*, *Doyle*, and other post-*Miranda* silence cases. Therefore, this Court has refused to grant such silence the same level of protection. *See Fletcher*, 455 U.S. at 604.

Petitioner's post-arrest, pre-*Miranda* silence does not fall within this Court's categorical silence jurisprudence. As mentioned, pre-*Miranda* silence, whether for impeachment or substantive evidence of guilt, lacks the Fifth Amendment compulsion element present in custodial interrogation and criminal trials. *See id*. at 189**;** *Jenkins*, 447 U.S. at 231. Absent express invocation or "government coercion [that] makes [a defendant's] forfeiture of the privilege involuntary," a court shall not reject silence as evidence on Fifth Amendment grounds. *Salinas*, 570 U.S. at 184.

In this case's limited set of facts, there is nothing to indicate that Petitioner's silence falls under Fifth Amendment scrutiny. His silence was pretrial. R. at 7. His silence was voluntary and not in response to any questions from the arresting agent. *Id.* During this period of silence, he had not been read his *Miranda* rights. *Id.* He had not been questioned, interrogated, or in any way coerced or compelled into speaking. *Id.* Finally, he never expressly invoked his Fifth

Amendment rights. *Id.* In short, there are no facts that to suggest this Court should deviate from its jurisprudential framework. Petitioner's silence, as post-arrest, pre-*Miranda* silence, lacks the element of compulsion necessitating Fifth Amendment protection during custodial interrogation and criminal trials.

C. Interrogation is the proper triggering mechanism for the right to pretrial silence.

The limited right to pretrial silence begins upon interrogation, because this is the point in time that a criminal defendant may be compelled to speak. More specifically, an interrogation trigger is the proper interpretation of *Miranda*, which explicitly extended the right against self-incrimination to "custodial interrogation[s]." *Miranda*, 384 U.S. at 444. An alternative arrest or custody trigger sets an arbitrary standard, disconnected from the compulsion issue and overly burdensome towards government investigations. *Cf. Fletcher*, 455 U.S. at 606. An interrogation trigger most appropriately delineates compelled silence from voluntary silence, as in Petitioner's case.

1. *Interrogation is the proper trigger for the Fifth Amendment issue of compulsion outlined in Miranda.*

An interrogation trigger, as opposed to an arrest or custody trigger, accurately distinguishes compelled silence from voluntary silence, getting to the heart of this Court's Fifth Amendment jurisprudence. The Fifth Amendment's Self-Incrimination Clause reads: "No person ... shall be *compelled* in any criminal case to be a witness against himself." U.S. Const. amend. V (emphasis added). Originally limited in application to a criminal defendant's testimony, the *Miranda* Court reasoned that the right against self-incrimination extends beyond the courtroom, in instances in which a criminal defendant faces psychological pressures akin to the physical ones used in British common law courts. 384 U.S. at 467. Therefore, the Court held that prior to

"custodial interrogation," criminal defendants must be informed of their Fifth Amendment rights to ensure their statements are voluntary and not compelled. *Id.* at 469.

This element of compulsion in pretrial police questioning is what "triggers" Fifth Amendment scrutiny. Prior to questioning, arrested individuals are not coerced, compelled, or even asked to make any comments related to the criminal activity at issue. *See United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005). Yet, several lower courts have misinterpreted the *Miranda* Court's reasoning for applying the Self-Incrimination Clause to "custodial interrogation," arguing that "custody" is the proper trigger for the right to pretrial silence, as opposed to the actual interrogation or questioning. *See, e.g.*, *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997) ("[C]ustody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda.*"); *United States v. Hernandez*, 476 F.3d 791, 796-97 (9th Cir. 2007). Apart from the basic syntax argument—the words "custodial" and "in-custody" in *Miranda* modify the word "interrogation"—the D.C. Circuit and other circuit courts miss the Fifth Amendment reasoning for expanding the right to silence to limited pretrial situations in the first place. The *Miranda* Court did not create a right to silence for all defendants under arrest or in custody. Rather, they created a limited right in instances of intense "custodial *interrogation*" like Ernesto Miranda faced. *Miranda*, 384 U.S. at 491-92 (emphasis added).

In 2013, the *Salinas* Court explained that *Miranda* extended the Self-Incrimination Clause to custodial interrogations because of their "inherent compelling pressures," borrowing the language of the *Miranda* ruling itself. *Salinas*, 570 U.S. at 184. In addition, the *Salinas* Court borrowed language from another Supreme Court case, noting that the common element in cases necessitating Fifth Amendment scrutiny is compulsion that denies a criminal defendant the "free choice to admit, to deny, or to refuse to *answer*." *Id.* at 185 (quoting *Garner v. United States*, 424

U.S. 648, 656-57 (1976)) (emphasis added). Given that there is no compulsion to answer absent an initial question, it follows that the Fifth Amendment Self-Incrimination Clause is irrelevant prior to interrogation. *See Jenkins*, 447 U.S. at 241 (Stevens, J., concurring).

Though some lower courts have misinterpreted *Miranda*, others have correctly held that post-arrest, pre-*Miranda* silence is admissible. *See, e.g.*, *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985). For example, three circuits have separately held pre-*Miranda* silence is admissible based on the Court's ruling in *Doyle*, reasoning that prior to reading a criminal defendant's *Miranda* rights, a defendant has no implicit promise that his or her silence will be privileged. *Id.*, *United States v. Salinas*, 480 F.3d 750, 757 (5th Cir. 2007); *United States v. Rivera*, 944 F.2d 1563, 1568 n.12 (11th Cir. 1991). In this line of cases, the *Miranda* warning itself serves as the trigger for the right to pretrial silence. This trigger is a close approximation of the proper interrogation trigger, because in order to begin "custodial interrogation," officers are required to read to the criminal defendant his or her *Miranda* rights. *Miranda*, 384 U.S. at 469. In this way, the *Miranda* warning trigger serves as a proxy for the more precise interrogation trigger. *Frazier*, 408 F.3d at 1111. Therefore, the criticism that the *Miranda* warning itself is a "means of safeguarding Fifth Amendment rights" and not the "genesis of those rights," though technically accurate, misses the bigger picture. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1028-29 (9th Cir. 2001) (quoting *Doyle*, 426 U.S. at 617).

The proper trigger is the one that most precisely delineates compulsory silence from voluntary silence and thereby follows the Court's reasoning in *Miranda*. The United States Court of Appeals for the Eighth Circuit properly described this issue of compulsion in *United States v. Frazier*, a case with facts analogous to the case at bar. 408 F.3d at 1110-11. In that case, the defendant was arrested for transporting controlled substances in a U-Haul truck. *Id.* at 1106-07.

Following his arrest, the defendant was transported to the state patrol's traffic office, where he was subsequently read his *Miranda* rights prior to a custodial interrogation. *Id.* at 1107. During this post-arrest, pre-*Miranda* period, Frazier remained silent, and the prosecution attempted to use this silence as substantive evidence of Frazier's guilt. *Id.* at 1107, 1110. Ultimately, the court held that the admission of an accused's post-arrest, pre-*Miranda*, and pre-interrogation silence as substantive evidence of guilt did not violate Frazier's Fifth Amendment right against self-incrimination. *Id.* at 1111.

There, the court rejected its own prior holding that the *Miranda* warning is the trigger for the right to pretrial silence, *see Vick v. Lockhart*, 952 F.2d 999, 1003 (8th Cir. 1991), explaining that whether Frazier was compelled to speak was "the more precise issue*." Frazier*, 408 F.3d at 1111. Quoting Justice Steven's concurrence in *Jenkins*, the court added that the "privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak." *Id.* at 1110 (quoting *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring)). Thus, because Frazier was merely under custody and had not yet been interrogated, the court concluded that there was no compulsion implicating his right to pretrial silence. *Id.* at 1111; *see also United States v. Osuna-Zepeda*, 416 F.3d 838, 844 (8th Cir. 2005) (holding that a criminal defendant's post-arrest, pre-*Miranda* silence could be admitted as substantive evidence of his guilt because questioning had not begun). Interrogation is the proper trigger for the right to pretrial silence because it properly addresses the issue of compulsion explicitly written in both *Miranda* and the Fifth Amendment's text.

2. An arrest or custody trigger is arbitrary and disconnected from the issue of compulsion.

Unlike an interrogation trigger, an arrest or custody trigger sets an arbitrary line between compulsory silence and voluntary silence and overly burdens legitimate government

investigatory interests. As this Court plainly stated in *Fletcher*, custody alone is insufficient governmental action to coerce a criminal defendant to speak. 455 U.S. at 606; *see also Frazier*, 408 U.S. at 1111. To trigger the right to pretrial silence, there needs to be sufficient governmental action to "elicit an incriminating response from the suspect," specifically "express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). In the case of mere arrest or custody, the element of compulsion is utterly missing.

Yet, for this case, the United States Court of Appeals for the Thirteenth Circuit's dissenting opinion cites *United States v. Moore* for the proposition that custody is the proper trigger, and that a *Miranda* warning trigger is truly the arbitrary line. R. at 12 (Martz, C.J., dissenting). In *Moore*, the D.C. Circuit applied both *Griffin* and *Miranda* to posit that the right against self-incrimination is triggered upon arrest, and that a defendant's silence in a post-arrest, pre-*Miranda* period acts as an implicit invocation of his or her Fifth Amendment privilege. *Moore*, 104 F.3d at 385. Yet, this older holding flies in the face of the more recent *Salinas* case, in which this Court explicitly required a defendant to expressly invoke his rights absent a showing of government coercion. 570 U.S. at 184. Perhaps more importantly, this arbitrary trigger significantly burdens government officials and their legitimate investigatory interests. *See Jenkins*, 447 U.S. at 238 (stating courts should consider governmental interests when faced with claims of constitutional violations). These interests include "obtaining testimony and criminal activity*," Salinas*, 570 U.S. at 186, as well as "enhanc[ing] the reliability of the criminal process." *Jenkins*, 447 U.S. at 238. Therefore, a custody trigger encapsulates more pretrial silence than what is constitutionally required or even preferrable.

Furthermore, the *Moore* court's alternative criticisms against an interrogation trigger lack merit. First, the court argues that such a trigger would incentivize officers to withhold

interrogation in order to manufacture incriminating, post-arrest silence. *Moore*, 104 F.3d at 385. This would not work, because arresting officers are already explicitly prohibited from delaying a criminal defendant's *Miranda* warnings in an effort to circumvent the warning's intent. *See Missouri v. Seibert*, 542 U.S. 600, 616-17 (2004) (plurality opinion) (striking down bad faith practice of delaying *Miranda* warnings to obtain an inadmissible confession, and then obtaining the same confession moments later after providing the warnings). In addition, judicial courts are still permitted to suppress post-arrest, pre-*Miranda* silence that is overly prejudicial under the applicable evidentiary rules. *See, e.g.*, Fed. R. Evid. 403.

Second, the *Moore* court suggests that using post-arrest, pre-*Miranda* evidence as substantive evidence of guilt is distinguishable from using it for the purpose of impeachment. 104 F.3d at 385 ("It is plain that the significance of the *Miranda* warnings in establishing the ability of the prosecution to use the defendant's silence is limited to impeachment."). Again, this Court has said otherwise. *Wainwright*, 474 U.S. at 292. In *Wainwright*, this Court dismissed the argument that the admissibility of pretrial silence is conditional on the government's evidentiary purpose, reasoning that any purpose is impermissible after the officers have read the defendant's *Miranda* rights. *Id.* In other words, whether the prosecution is building its case-in-chief or challenging the accuracy of the defendant's testimony is immaterial in respect to the Fifth Amendment. Instead, the material issue is whether the government's use of the defendant's silence—for whatever purpose—compels the defendant to speak when they would otherwise remain silent.

Therefore, this Court should apply an interrogation trigger to Petitioner's case. Here, Petitioner was merely arrested and informed of the charges against him. R. at 7. At no point did the FBI agent compel him to speak, either through words or actions. *Id.* He was never asked any

questions until arriving at the detention center, at which point the FBI properly read him his *Miranda* rights prior to initiating custodial interrogation. *Id.* In this way, Petitioner's case is a lot like *Frazier*, where the defendant was arrested and remained silent while being transported to the state patrol's traffic office. Conversely, Petitioner's case is distinguishable from *Miranda* and *Griffin*, both of whom were compelled to speak or testify, respectively. *Moore*, 104 F.3d at 385. Petitioner was never interrogated or otherwise compelled to self-incriminate in a way that would trigger Fifth Amendment scrutiny. *See generally* Ian Kerr, *Beyond Salinas v. Texas: Why an Express Invocation Requirement Should Not Apply to Post-Arrest Silence*, 116 COLUM. L. REV. 489, 508-09 (2016) (describing hypothetical post-arrest silence scenarios that would not trigger the Fifth Amendment).

D. The Court should defer to the Legislature to properly address pretrial silence.

Instead of reading a right to post-arrest, pre-*Miranda* silence into the Constitution, this Court should defer to federal and state legislatures to draft evidentiary rules that appropriately protect pretrial silence. Though post-arrest, pre-*Miranda* silence is admissible under the Fifth Amendment, most courts are still permitted to suppress such evidence if its potential for prejudice substantially outweighs its probative value. Fed. R. Evid. 403.[2] This Court has acknowledged that pretrial silence ordinarily has minimum probative value, but that its value could vary depending on the factual circumstances. *See United States v. Hale*, 422 U.S. 171, 176 (1975). After all, there are a plethora of reasons why a criminal defendant may remain silent, some innocent and others not. *See id.* at 177. By using the evidentiary rules, courts are able to

[2] Some legal scholars argue that Rule 403 would categorically suppress most post-arrest, pre-*Miranda* silence evidence. *See, e.g.*, Marty Skrapka, *Silence Should Be Golden: A Case Against the Use of A Defendant's Post-Arrest, Pre-Miranda Silence As Evidence of Guilt*, 59 OKLA. L. REV. 357, 388-89 (2006).

make proper case-by-case admissibility determinations. Were this Court to create a rigid rule barring all post-arrest, pre-*Miranda* silence, judges would not be able to balance the prosecution's truth-seeking interests with the defense's prejudicial concerns.

As this Court has repeated, if there are unique policy concerns attached to pre-*Miranda* silence that warrant additional protection, federal and state jurisdictions are free to structure their respective evidentiary rules accordingly. *See Fletcher*, 455 U.S. at 607; *Jenkins*, 447 U.S. at 230. And in fact, several state jurisdictions have done just that. *See, e.g., Wills v. State*, 82 Md. App. 669, 677-78 (1990) (finding that use of criminal defendant's post-arrest, pre-*Miranda* silence for impeachment purposes was overly prejudicial under its own rules of evidence). This is the proper approach to handling the prejudicial concerns of admitting pretrial silence. Rather than extend the Fifth Amendment beyond its historical and textual foundations, this Court should defer to federal and state legislatures to determine the admissibility of post-arrest, pre-*Miranda* silence.

The right to pretrial silence does not extend to Petitioner's post-arrest, pre-*Miranda* situation. During this transitory period, Petitioner and similarly-situated criminal defendants are merely in custody, and they are not compelled to speak or testify in any way that would trigger Fifth Amendment scrutiny. *See Fletcher*, 455 U.S. at 606. Absent additional governmental action that would compel Petitioner to incriminate himself, his silence should be admitted or excluded based solely on the Federal Rules of Evidence. That is, admission of his silence does not violate the Fifth Amendment.

CONCLUSION

The district court correctly denied both Petitioner's motion to dismiss based on pre-indictment delay and his secondary motion to suppress based on the Self-Incrimination Clause. Regarding the former motion, Petitioner did not have a valid Due Process claim under the Fifth Amendment because under the applicable two-prong test, he demonstrated neither his defense was impaired by the government delay, nor that the Government intentionally delayed his indictment to gain a tactical advantage. For the latter motion, Petitioner's post arrest, pre-*Miranda* silence lacks the element of compulsion necessary to trigger Fifth Amendment scrutiny.

For the foregoing reasons, the Government respectfully asks this Honorable Court to uphold the Court of Appeals' decision to affirm the district court's holdings. Specifically, the Government asks this Court hold that the Government's pre-indictment delay did not violate the Due Process Clause and that the use of his post-arrest, pre-*Miranda* silence did not violate the Self-Incrimination Clause.

Respectfully submitted,

/s/ Team 6

TEAM 6

COUNSEL FOR RESPONDENT

September 13, 2021.