No. 24-557

IN THE

Supreme Court of the United States

DAVID ASA VILLARREAL,

Petitioner,

v.

TEXAS,

Respondent.

On Writ of Certiorari to the
Court of Criminal Appeals of Texas

BRIEF OF LEGAL ETHICS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MATTHEW S. HELLMAN
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001

DAVID A. STRAUSS
SARAH M. KONSKY
Counsel of Record
JENNER & BLOCK
SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
(773) 834-3190
konsky@uchicago.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are leading legal ethics scholars with expertise regarding the rules, precedents, and other authorities regarding the professional responsibility and legal ethics obligations of lawyers. While this case involves protection of crucial Sixth Amendment rights of criminal defendants, it also implicates the professional responsibility and legal ethics obligations of attorneys representing clients at trial.

Amici have a professional interest in ensuring that the Court is fully informed of the important professional responsibility and legal ethics issues in this case. Specifically, *amici* submit this brief to explain that the trial court's order in this case creates significant and serious problems for attorneys attempting to satisfy their professional responsibility and legal ethics obligations under relevant authorities.

The *amici*[2] are:

Professor Benjamin Barton, Helen and Charles Lockett Distinguished Professor of Law, The University of Tennessee College of Law

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or part by counsel for any party and that no person or entity other than *amici curiae* or their counsel made a monetary contribution to preparation or submission of this brief.

[2] All *amici* join in their personal capacities only. The views expressed herein are not authorized by, nor should be construed as reflecting on, *amici*'s respective institutions, which did not provide any resources used in the preparation of this brief.

Professor Susan Carle, Professor of Law, American University Washington College of Law

Professor Scott L. Cummings, Robert Henigson Professor of Legal Ethics and Faculty Director of the Program on Legal Ethics and the Profession, UCLA School of Law

Professor Bruce Green, Louis Stein Chair of Law, Director of the Louis Stein Center for Law and Ethics, Fordham University School of Law

Professor Stephen Gillers, Elihu Root Professor of Law Emeritus, New York University School of Law

Professor Renee Knake Jefferson, Doherty Chair in Legal Ethics & Professor of Law, University of Houston Law Center

Professor Leslie Levin, Hugh Macgill Professor of Law, University of Connecticut School of Law

Professor David J. Luban, Distinguished University Professor, Professor of Law and Philosophy, Georgetown University Law Center

Professor Russell G. Pearce, Edward & Marilyn Bellet Chair in Legal Ethics, Morality, and Religion, Fordham University School of Law

Professor Abbe Smith, Scott K. Ginsburg Professor of Law, Georgetown University Law Center

Professor Ann Southworth, Professor of Law, University of California, Irvine, School of Law

Professor Eli Wald, Charles W. Delaney Jr. Professor of Law, University of Denver Sturm College of Law

SUMMARY OF ARGUMENT

As Mr. Villarreal's opening brief correctly explains, the trial court's order prohibiting Mr. Villarreal and his counsel from discussing his testimony during an overnight recess in the trial violated Mr. Villarreal's Sixth Amendment right to counsel. *See* Pet'r Br. at 13–40. The trial court's order also is problematic for a distinct, but related, reason: it interferes with and chills counsel's ability to fulfill their professional responsibility and legal ethics obligations.

1. Criminal defense lawyers have a multitude of professional responsibility and ethical duties to their clients *during* a criminal trial. These duties span from advising clients about developments in the case, to consulting with clients about strategy issues, to addressing false statements in the clients' testimony. These professional responsibility and ethical duties are set forth in a multitude of rules, precedents, and other authorities.

2. As this Court has recognized, an overnight recess during a criminal trial is a particularly crucial juncture for lawyers' duties to their clients. "[Overnight] recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed . . . . At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events." *Geders v. United States*, 425 U.S. 80, 88 (1976).

3. A trial court's order prohibiting lawyers and their client from discussing the client's testimony during an overnight recess raises significant legal ethics and

professional responsibility problems. Such an order both impedes and chills required communications between lawyers and their clients, including time-sensitive communications pertinent to case development and strategy. Moreover, for the trial court's order to have any teeth, courts would need to examine confidential and privileged conversations between lawyers and their clients. As such, it also threatens the confidentiality of privileged conversations between lawyers and their clients.

There is not a clear dividing line between attorney-client conversations about ongoing testimony and attorney-client conversations about other trial preparation. Rather, in practice, discussions about trial strategy and evidentiary developments often bleed into conversations about a client's testimony. As a result, an order like the one in this case could deter lawyers from having important conversations that are ethically permitted or even required—from conversations about the effect of the testimony on trial strategy, to conversations about new information raised in the testimony. A rule that fails to account for the intertwined nature of testimony and other subjects therefore risks chilling important communication, leaving lawyers in a difficult position as they attempt to comply with their professional obligations in the high-pressure setting of an ongoing trial.

4. The trial court's categorical order in this case is neither necessary nor appropriate to meet its stated objectives of preventing coaching or improper influence on testimony. As this Court explained in *Geders*, an attorney already is required to "observe the ethical

limits on guiding witnesses," 425 U.S. at 90, and "must respect the important ethical distinction between discussing testimony and seeking improperly to influence it," *id.* at 90 n.3.

And as the facts of this case illustrate, specific concerns about coaching or improper influence on testimony can be addressed by far less restrictive means that do not raise the same legal ethics problems. The defendant in this case began his direct testimony just before noon, but about an hour later (while the direct testimony was still ongoing), the trial court recessed the case until the next day. *See* Pet. App. 5a. The trial court could have, for example, scheduled the defendant's testimony to proceed without interruption, or reminded counsel of their professional responsibility and legal ethics obligations during breaks in testimony. And the prosecution remained free to challenge the defendant's testimony on cross-examination.

The overnight recess is a structural feature of an adversarial trial—not a luxury. When courts interfere with attorney-client communication during this period, they compromise the integrity of the defense function at precisely the moment when it is most needed.

ARGUMENT

I. Banning Discussion of Testimony During an Overnight Recess Jeopardizes the Attorney's Ability to Comply with Core Professional Responsibilities.

Overnight breaks in a criminal trial—like the approximately 24-hour overnight break in this case, *see* Pet. App. 5a, 8a—serve as critical windows during which defense counsel must carry out significant professional duties to their client. The Supreme Court recognized the unique importance of such recesses in *Geders*:

> It is common practice during [overnight] recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events.

425 U.S. at 88. Moreover, such exchanges during trial are particularly critical because defendants are ordinarily "ill-equipped to understand and deal with the trial process without a lawyer's guidance." *Id.*

Beyond the concerns raised by any restriction on attorney-client communication during an overnight recess, a specific ban on discussing testimony strikes at the core of a defense lawyer's professional obligations.

Of course, as discussed further below, lawyers have an ethical duty not to "coach" a witness, and that duty applies both before and during the witness's testimony. *See* Section III *infra*. But at the same time, lawyers have critical responsibilities that require or may require discussion of testimony. Conversations about testimony are intertwined with lawyers' responsibilities to advise their client, adapt trial strategy, and correct errors. Forcing lawyers to avoid discussion pertaining to testimony prevents and chills them from fulfilling key duties under the applicable rules of legal ethics and professional responsibility, as exemplified by the American Bar Association Model Rules of Professional Conduct (Am. Bar Ass'n 2025) ("Model Rules").

1. *Duty of Zealous Advocacy*. First and foremost, the kind of ban at issue here impedes a lawyer's duty to act as a zealous advocate. As the Preamble to the Model Rules makes clear, a lawyer is expected to "zealously assert[] the client's position" and "protect and pursue [their] legitimate interests." Model Rules, Preamble ¶¶ 2, 9. This responsibility is codified in Rule 1.3, which requires that lawyers "act with reasonable diligence and *promptness* in representing a client." Model Rule 1.3 (emphasis added); *see also* ABA, *Criminal Justice Standards for the Defense Function* 4-1.3(d), (f) (4th ed 2017) (ongoing duties of defense counsel to "communicate and keep the client informed and advised of significant developments and potential options and outcomes" and "continually evaluate the impact that each decision or action may have at later stages, including trial, sentencing, and post-conviction review"). And the comments to Model Rule 1.3 further reiterate

that a lawyer must act "with zeal in advocacy upon the client's behalf." Model Rule 1.3 cmt. [1].

As Rule 1.3 recognizes, trial advocacy is interactive and reactive. Lawyers rely on overnight recesses to assess the events of the day and determine how best to proceed. These assessments cannot be made in a vacuum. They require input from the client and communication that will inevitably touch on testimony.

Discussions about case facts and strategy can often overlap with matters raised in testimony, making it difficult to draw clean, real-time lines between the two. As Judge Yeary's concurrence below aptly highlights, "[t]he line between defense counsel conferring with his client about the content and direction of his ongoing testimony and conferring about the derivative effects of that ongoing testimony is a nebulous one at best." Pet. App. at 19a (alteration and internal quotation marks omitted); *see also Mudd v. United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986) (Mikva, J.) ("Consultation between lawyers and clients cannot be neatly divided into discussions about 'testimony' and those about 'other' matters."). Thus, "an order such as the one in this case can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive." *Mudd*, 798 F.2d at 1512.

Suppose the defendant makes a statement on the stand that diverges from prior accounts or provides information that is new to his counsel. To be an effective advocate, counsel must seek clarification and determine whether additional facts need to be developed or explained the next day. Without that opportunity,

counsel cannot respond to shifting terrain to best represent his client. Moreover, facts raised in testimony can prompt further investigation or adjustments to the defense theory. This kind of preparation is part and parcel of the lawyer's role in preparing the case at trial, as well as preparing his witnesses to give accurate testimony. In addition, as discussed further below, if the defendant has presented testimony that counsel knows or suspects to be untrue, counsel may be obligated to discuss that testimony with his client. *See* Model Rule 3.3. When a lawyer is prohibited from discussing these critical matters for a full 24 hours while the trial is ongoing, a lawyer cannot fulfill the promise of diligent and prompt representation to the client.

Thus, as the Fourth Circuit has explained:

> To remove from [the defendant] the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerate[s] his ability to discuss and plan trial strategy. To hold otherwise would defy reason. How can competent counsel not take into consideration the testimony of his client in deciding how to try the rest of the case?

United States v. Cobb, 905 F.2d 784, 792 (4th Cir. 1990) ("We have no difficulty in concluding that the trial court's order, although limited to discussions of [the defendant's] ongoing testimony, effectively denied him access to counsel.").

2. *Duty of Competent Representation.* The ethical conundrum created by the trial court's order also implicates a lawyer's core duty of competent

representation under Model Rule 1.1. *See also* Model Rule 1.1 cmt. [5] (discussing duties of thoroughness and preparation).

Testimony is the centerpiece of many defense strategies. Per the American Bar Association, "[p]reparing a witness or a client to testify . . .—*or in some situations providing a client or witness with midstream guidance during the testimonial process*—is such a familiar component of a lawyer's trial-advocacy repertoire that it needs little introduction or explanation." ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, *Formal Opinion 508: The Ethics of Witness Preparation* 1–2 (Aug. 5, 2023) ("*Formal Opinion 508*") (emphasis added); Roberta K. Flowers, *Witness Preparation: Regulation of the Profession's 'Dirty Little' Secret*, 38 HASTINGS CONST. L.Q. 1007, 1007–08 (2011) ("Witness preparation is considered by most criminal attorneys—prosecutors and criminal defense attorneys alike—to be an essential part of trial advocacy." (footnotes omitted)). As a result, "a lawyer's failure to prepare and guide a witness would in many situations violate the ethical duties of competence and diligence." *Formal Opinion 508* at 11; *see also* Adam Liptak, *Crossing a Fine Line on Witness Coaching*, N.Y. TIMES (Mar. 16, 2006) ("[L]awyers often spend hours preparing witnesses to testify, a practice that is not only accepted but also generally considered necessary. Lawyers have been punished for incompetent representation for failing to interview and prepare witnesses.").

Discussions about testimony thus form the cornerstone of a lawyer's witness preparation

responsibilities. American Jurisprudence's encyclopedia on witness preparation, for example, catalogs nearly 100 granular issues a lawyer is ethically required or encouraged to discuss with witnesses regarding trial testimony. *See Witness Preparation*, 61 Am. Jur. *Trials* 269, §§ 60–147; *see also Restatement (Third) of the Law Governing Lawyers* § 116 cmt. b (2000). While attorneys always are obligated to draw the line between impermissible coaching and required preparation, attorneys may encounter situations in which applicable rules require them to revisit required preparation over a long recess—for example, to remind a client of his or her duty to tell the truth while testifying, or to warn to the client of questions that could raise self-incrimination concerns or lead to the mention of excluded evidence. *See, e.g.*, *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000) (Posner, J.); *Mudd*, 798 F.2d at 1512.

When courts prohibit attorneys from discussing testimony with their clients for a full 24-hour period, they prevent them from fulfilling a multitude of responsibilities essential to competent and diligent representation. Such a prohibition also creates a nonsensical result: an attorney's ethical preparation of his client can occur in the days or hours before the start of direct testimony, but not in the days or hours before the resumption of direct testimony. This transforms defense counsel from advocate to bystander.

3. *Duty to Provide Information and Consult*. By cutting off communication about testimony, the trial court's order also interferes with Rule 1.4's mandate that lawyers keep clients reasonably informed and consult with them about significant decisions. Model

Rule 1.4 cmt. [1] ("Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation."). Rule 1.4 states, for example, that a lawyer "shall" "promptly comply with reasonable requests for information" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Model Rule 1.4(a)(4), (b). Rule 1.2 further explains that a lawyer is obligated to "consult with the client" regarding the client's critical decisions in a criminal case—including the objectives of the representation and whether to enter a guilty plea. Model Rule 1.2; *see also* Model Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.").

A lawyer may be obligated to use an overnight recess to discuss with the client new concerns and tactical considerations brought about by the day's proceedings; imposing a testimony-specific gag order deters this form of "reasonable communication" required under Rules 1.2 and 1.4. Substantive exchanges between lawyer and client may be necessary so that defense counsel can, for example, "obtain from his client information made relevant by the day's testimony" and "pursue inquiry along lines not fully explored earlier." *Geders*, 425 U.S. at 88.

As this Court further explained in *Perry v. Leeke*, "normal consultation" between an attorney and client during an overnight recess includes "matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of

negotiating a plea bargain." 488 U.S. 272, 284 (1989). The Court acknowledged "such discussions will inevitably include some consideration of the defendant's ongoing testimony." *Id.* Indeed, it is difficult to see how a diligent lawyer could competently carry out his trial obligations without any discussion of testimony. *See United States v. Sandoval-Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006) ("Indeed, it is hard to see how a defendant's lawyer could ask him for the name of a witness who could corroborate his testimony or advise him to change his plea after disastrous testimony, subjects *Perry* expressly says a defendant has a right to discuss with his lawyer during an overnight recess, without discussing the testimony itself."); *see also Mudd*, 798 F.2d at 1515 (Scalia, J., concurring) ("I agree with the majority that the District Court's order prohibiting defendant from discussing his testimony with his attorney during a weekend recess was not significantly less invasive of sixth amendment rights than the order prohibiting all contact between a defendant and his attorney during an overnight recess in *Geders v. United States*." (internal citation omitted)).

4. *Duty of Candor.* The extended ban on conferring about testimony also raises concerns about a lawyer's duty of candor to the tribunal. Per Rule 3.3, if a lawyer's client "has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures . . . ." Model Rule 3.3(a)(3). In such cases, the Model Rules note that "the advocate's proper course is to remonstrate with the client *confidentially*, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false

statements or evidence." Model Rule 3.3 cmt. [10] (emphasis added). Only when these remedial efforts fail may a lawyer "reveal information that otherwise would be protected" under the duty of confidentiality. *Id.*

The rules thus contemplate that a lawyer's first responsibility when faced with potentially false testimony is to discuss that testimony with the client. While a brief recess may not provide sufficient time to assess falsity and persuade a client to correct the record, a 24-hour recess certainly can. Prohibiting testimony-related communication during an extended break thus impairs the lawyer's ability to take reasonable remedial measures, placing her in conflict with her duties to the court under Rule 3.3.

II. The Order Undermines the Attorney-Client Privilege and Duty of Confidentiality by Chilling Full and Frank Communication.

Prohibiting defense counsel from discussing testimony with his client during an overnight recess also undermines the attorney-client privilege in both principle and practice. As the Supreme Court emphasized in *Upjohn Co. v. United States*, the purpose of the privilege is to "encourage full and frank communication between attorneys and their clients." 449 U.S. 383, 389 (1981). There, the Court warned that "an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393. As a prophylactic rule, the attorney-client privilege thus accepts the risk of error and injustice in individual cases in favor of the values that the privilege protects. *See Swidler & Berlin v. United States*, 524 U.S. 399, 403–11

(1998) (holding that the attorney-client privilege survives a client's death, even if another defendant is deprived of exculpatory evidence).

The privilege protects all communications between privileged persons, made in confidence, for the purpose of seeking or rendering legal advice. *Restatement (Third) of the Law Governing Lawyers* § 68 cmt. c (2000). This will almost invariably reach conversations between an attorney and his client during a 24-hour recess.

To start, a trial court's attempt to enforce the order in this case could implicate the confidentiality of privileged communications. For example, a trial court's questions to an attorney about his overnight communications with his client are likely to implicate communications that are privileged and confidential, especially given that discussions of trial strategy cannot be neatly cordoned off from statements that might in some way implicate the defendant's testimony. This could raise a multitude of questions about the extent to which, and the grounds upon which, privileged and confidential attorney-client communications could be subject to disclosure. *See, e.g.*, *United States v. Zolin*, 491 U.S. 554, 574–75 (1989) (*in-camera* review to assess whether allegedly privileged communications fell within federal crime-fraud exception). But in any event, for the trial court's order in this case to have any teeth, the trial court would need to engage in the very scrutiny of client communications that the privilege is meant to ward off. While Texas argues that "the trial court [in this case] assured counsel that petitioner's 'attorney-client privilege is safe,'" Brief in Opp. at 27, *citing* Pet. App. 8a,

that "assurance" is not easily reconciled with the trial court's order.

Even if the trial court does not ultimately compel disclosure of privileged communications, the mere risk that such conversations may be scrutinized in court chills open communication and compromises the attorney's ability to provide effective assistance. By opening the door to possible exposure of these communications in court, client and counsel alike are left uncertain about what they can safely share. This kind of self-censorship is precisely what the attorney-client privilege seeks to prevent. As this Court has explained, rules that create uncertainty about the privilege's scope undermine its function even when the client cannot show prejudice. *Swindler*, 524 U.S. at 406–10. The harm stems from the mere existence of a rule that places attorneys in conflict with their ethical duties and causes clients to second-guess what information they choose to disclose. And defense counsel thus faces an impossible choice between complying with court demands and upholding ethical obligations to his client.

The Model Rules of Professional Conduct have codified these same principles. Rule 1.6 states that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ." Model Rule 1.6(a). While disclosure of confidential information *may* be permitted pursuant to a court order, the Rules make clear that this does not absolve the lawyer of the duty to resist disclosure. To the contrary, the comments to Rule 1.6 instruct lawyers to still "assert on behalf of the client all nonfrivolous claims that the order is not authorized by

other law or the information is protected against disclosure by the attorney-client privilege." Model Rule 1.6 cmt. [15]. By urging lawyers to defend confidentiality even when exceptions apply, the Model Rules underscore that protecting client confidences is an unshakeable ethical mandate.

Texas also claims that *Perry v. Leeke*, 488 U.S. 272 (1989), forecloses any privilege concerns, arguing that there is "no logical reason why the attorney-client privilege would be safe in [a brief recess] but imperiled during longer ones." Brief in Opp. at 27–28. But courts could enforce *Perry*'s conferral ban without prying into the contents of any conversation between attorney and client, because the ban in that case was a complete restriction on all communications. Because the attorney-client privilege only protects the substance of a discussion, the privilege would not have shielded the underlying fact of whether a discussion took place. *See, e.g.*, *Restatement (Third) of the Law Governing Lawyers* § 69 cmts. d, g (2000). Here, in contrast, enforcing a testimony-specific restriction requires the court to determine whether the attorney and client discussed a particular subject matter, necessarily revealing the contents of their communications.

In short, the sanctity of the attorney-client relationship depends on a zone of trust where clients can speak freely. The trial court's order in this case erodes that trust and, at a minimum, chills protected communications.

III. Concerns Underpinning the Trial Court's Order Could Be Addressed by Other Means that Do Not Encroach on a Lawyer's Professional Responsibility Obligations.

Texas asserts that the trial court's order in this case is necessary to "protect the truth-seeking function." *See, e.g.*, Brief in Opp. at i, 22. The applicable rules of professional responsibility underscore that this is wrong.

1. The rules of professional responsibility already protect the truth-seeking function by prohibiting witness coaching, whether it occurs before or during a witness's testimony. "Counseling a witness to give false testimony or assisting a witness in offering false testimony, for example, is a violation of at least Model Rule 3.4(b)." *Formal Opinion 508* at 1. "Such conduct might also constitute assisting the client to engage in conduct that the lawyer knows is criminal, i.e., perjury, in violation of Model Rule 1.2(d), as well as offering false evidence in violation of Model Rule 3.3(a)(3)." *Id.* at 4 n.16.

Indeed, this Court in *Geders* recognized that rules governing attorney professional responsibility already address attorneys' improper attempts to influence witnesses' testimony. *Geders*, 425 U.S. at 90 n.3. The Court explained that violating these rules would constitute "a most serious breach of the attorney's duty to the court." *Id.* And as Justice Marshall further explained in his concurring opinion in *Geders*, "[t]he Court holds that the fear of unethical conduct is not a sufficient ground for an order barring overnight communication between a defendant and his attorney,"

in part, because our adversary system presumes that "an attorney will observe his responsibilities to the legal system, as well as to his client." *Id.* at 93 (Marshall, J., concurring) ("I find it difficult to conceive of any circumstances that would justify a court's limiting the attorney's opportunity to serve his client because of fear that he may disserve the system by violating accepted ethical standards."); *see also Beckham v. Commonwealth*, 248 S.W.3d 547, 555 (Ky. 2008) (Noble, J., concurring in part and dissenting in part) ("[T]o presume by default that an attorney would first choose this prohibited conduct [of coaching a client to present false testimony] demonstrates a lack of faith in counsel that is unwarranted, given the grave consequences that follow such conduct, including possibly being disbarred.").

2. Moreover, this Court explained in *Geders* that "[t]here are other ways to deal with the problem of possible improper influence on testimony or 'coaching' of a witness short of putting a barrier between client and counsel for so long a period as 17 hours." 425 U.S. at 89. Those less restrictive alternatives underscore that the burdens on counsels' ethical and professional duties were unnecessary here.

First, as this Court recognized in *Geders*, the trial judge retains the discretion to direct the witness testimony to continue without interruption if the judge is concerned about the defense counsel's adherence to ethical obligations. *Id.* at 90–91 ("In addition the trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without

interruption until completed." (footnote omitted)). In this case, for example, the trial court allowed the defendant's direct testimony to start at around noon—but then just around an hour later, called a recess until the next day. *See* Pet. App. 5a. The trial court could instead have postponed the start of the defendant's testimony until the next day, so that it was not interrupted by an overnight recess.

Second, as this Court also explained in *Geders*, the prosecutor may wield cross-examination as one of its "weapons to cope with 'coached' witnesses." 425 U.S. at 90–91. Again, the overnight recess in this case occurred just an hour or so into defendant's *direct* testimony—and as a result, the state had its full cross examination still available to it.

Third, a trial court in this situation could remind counsel of their ethical obligations—including their ethical obligations not to engage in prohibited coaching—during the recess. *See, e.g.*, *Santos*, 201 F.3d at 965. This serves to reinforce that the same witness coaching that was impermissible before the direct examination would remain impermissible on an overnight recess during the direct examination.

These alternatives demonstrate that the trial court's categorical attorney-client communication bar was an unnecessarily blunt way of dealing with a situation that, if it presented a problem at all, could have been addressed in far less costly ways.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

June 10, 2025

Respectfully submitted

MATTHEW S. HELLMAN
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001

DAVID A. STRAUSS
SARAH M. KONSKY
Counsel of Record
JENNER & BLOCK
SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
(773) 834-3190
konsky@uchicago.edu