No. 24-557

In the Supreme Court of the United States

DAVID ASA VILLARREAL,

Petitioner,

v.

TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF OF AMICI CURIAE STATE OF OHIO AND 14 OTHER STATES IN SUPPORT OF RESPONDENT

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STATEMENT OF AMICI INTEREST

The American trial system relies on the adversarial process to seek the truth, and state courts are right to protect that process from improper influence. When defendants take the stand, they are witnesses expected to testify based on their genuine recollection. They are not boxers who should seek the advice of the coach in their corner and adjust their answers to better land the punch. That principle holds even during routine overnight recesses, where defendants and their counsel may freely discuss topics other than their ongoing testimony.

That is so because the right to counsel is a key facet of the American guarantee of a fair trial, even though *it is not the only one*. States exercise their authority over criminal trials by prescribing procedures to protect the integrity, reliability, and fairness of their trials. Untainted testimony—especially cross-examination—is the gold standard for truth-seeking. State courts maintain that standard by instructing witnesses not to discuss their testimony with others during trial. The same goes for defendants who choose to testify as witnesses. State courts can instruct defendants not to discuss their ongoing testimony with anyone—including counsel—during mid-testimony recesses. Such instructions in state courts have not prejudiced the constitutional rights of defendants.

Indeed, these instructions are consistent with the Sixth Amendment right to counsel because they reflect a constitutional and common-sense balance between two legitimate purposes: protecting defendants' right to counsel and preserving the reliability of trial testimony. Holding otherwise would run afoul of two foundational principles. The first is federalism.

States have the sovereign prerogative to design their own criminal procedures without superintendence by novel and ever-expanding judicial gloss on the Sixth Amendment. The other is common sense. Many fundamental constitutional values properly stand in tension with each other, and the way forward is to maximize both values rather than choosing one and extinguishing the other.

The Amici States—several of whom have already permitted trial courts the discretion to issue qualified conferral prohibitions—write in support of Texas because of their shared interest in preserving a rightful tool of truth-finding.

SUMMARY OF ARGUMENT

I. State courts sometimes protect the fairness and integrity of their trials through qualified limits on defendants' conferral with counsel. Sometimes they restrict the *time* of conferral to prevent trial disruptions—such as when defendants request to pause the trial and confer mid-testimony. Other times, they restrict the *topic* of discussion to prevent taint during a recess in the defendant's ongoing testimony. Both limits serve important trial interests and benefit all parties, including defendants.

II. These limits on conferral accord with the Sixth Amendment. As originally understood, the Sixth Amendment was not designed to hamper the truth-finding function of a criminal trial, but to bolster it through the adversarial process. A complete ban on communication with counsel would conflict with the Sixth Amendment. But reasonable limits on time or topic of consultation designed to protect the integrity of testimony do not.

ARGUMENT

I. State courts limit attorney-client conferral when necessary to protect trial integrity.

"From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today." *Kansas v. Garcia*, 589 U.S. 191, 212 (2020). States execute that responsibility by establishing rules and procedures to govern their criminal justice systems. Enforcing those procedures is part of administering justice. Qualified limits on mid-testimony conferral with counsel are

one tool States have historically used to preserve the orderliness of trials and protect the search for truth.

Ensuring this tool remains in trial courts' kit makes everyone better off. Besides promoting the very purpose of a trial—determining what actually happened—these limiting orders free trial courts to organize and schedule trials in ways that are more convenient for defendants and prosecutors alike.

A. State courts may appropriately limit the timing and topic of conferral between testifying defendants and their counsel.

Under our federal system, enforcing the criminal law is primarily the prerogative of the States. "The power to convict and punish criminals lies at the heart of the States' 'residuary and inviolable sovereignty.'" *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022) (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison)). That means that States "possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). Doing so requires them to create and apply the procedures that will govern criminal trials, and these procedures may deviate from the federal government's and from each other's. Though the search for truth is universal, trial procedures among the States need not be. In the end, all these differences are acceptable—even desirable. *See generally* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2008).

The twin goals of criminal procedure are to facilitate the search for truth and to protect the constitutional presumption of innocence until the verdict. To pursue those goals, a trial court exerts "substantial

control" over its trials—from "refus[ing] to allow cumulative, repetitive, or irrelevant testimony" to "determin[ing] generally the order in which parties will adduce proof." *Geders v. United States*, 425 U.S. 80, 86–87 (1976). Of particular note here, courts go to great lengths to preserve untainted cross-examination because it uniquely protects "the accuracy of the truth-determining process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (quotation omitted). The "denial or significant diminution" of robust cross-examination "calls into question the ultimate integrity of the fact-finding process," *id.* (quotation omitted), because of the lost opportunity for "exposing falsehood and bringing out the truth," *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

Federal Rule of Evidence 615 illustrates the strength of the interest in truth-finding by requiring, upon motion of a party, the exclusion of witnesses from the public courtroom during testimony. "The two purposes of excluding prospective witnesses from trial are to prevent them from tailoring their testimony to that of earlier witnesses and to facilitate the exposure of false testimony and other credibility problems." *United States v. Graham*, 123 F.4th 1197, 1257 (11th Cir. 2024). That is why Rule 615 allows the trial judge to also prohibit disclosure of courtroom testimony to an excluded witness, and to prevent those witnesses from accessing the testimony, *see* Fed. R. Evid. 615—thus recognizing the role of the court in managing the progress of the trial and protecting its truth-finding function.

Similarly, limits on conferring with counsel are one method that some state courts have used to prevent tainted testimony. These limits sometimes come in response to a defendant seeking a special exception to

ordinary trial procedure. For example, a defendant may request to confer with counsel at an unusual time (such as the middle of the defendant's testimony) or about a forbidden topic (such as coaching on answers to questions). Other times, courts impose limits in response to unique situations where counsel's disclosure of certain facts may imperil trial integrity, human life, or even national security. In situations like these, several States have recognized that the defendant's right to confer with counsel is not absolute, and they have accordingly limited conferral.

State courts may need to limit the *timing* of conferral with counsel. For example, in a Rhode Island trial, a defendant requested permission to confer with his attorney about his cross-examination *during* his cross-examination. *Pope v. State*, 440 A.2d 719, 723 (R.I. 1982). The court denied the request, and the State's highest court affirmed that decision. It explained that "[f]ew things could be more disruptive of 'the orderly and expeditious progress of the trial' than a break in the middle of the taking of testimony." *Id.* at 724. To be sure, the Ocean State had already recognized a right to confer with counsel over a weekend-long recess. *Id.* (citing *Mastracchio v. Houle*, 416 A.2d 116 (R.I. 1980)). Yet the court recognized that the trial judge had the discretion to determine that mid-testimony conferral was "indeed disruptive of the trial," and if so, to prevent the disruption. *Id.* Intermediate courts in Illinois and California have likewise denied mid-testimony conferral with counsel. They recognized that trial judges must protect "orderly trial procedure," *People v. Lewis*, 53 Ill. App. 3d 89, 95 (Ct. App. 1977), and that the defendant has no "right to obstruct the orderly progress of a trial" in order to

confer with counsel whenever he wants, *People v. Miller*, 185 Cal. App. 2d 59, 78 (Ct. App. 1960).

State courts may also need to limit the *topic* of conferral with counsel. For example, the Ohio Supreme Court approved an instruction that a defendant not discuss his testimony with anyone during an overnight mid-testimony recess. *State v. Conway*, 108 Ohio St. 3d 214, 231–32 (2006). The court acknowledged the defendant's right to consult with counsel about other topics, and also a right to confer about his testimony before taking the stand, but it held that he had "no constitutional right to consult with his attorney about his testimony while testifying." *Id.* at 232. Kentucky has approved the same practice, permitting courts to use limits on conferral to "protect the integrity of the proceedings" as long as the instructions do not "impermissibly limit all attorney-client contact." *Beckham v. Commonwealth*, 248 S.W.3d 547, 554 (Ky. 2008). The same rule holds in Delaware. *Webb v. State*, 663 A.2d 452, 458 (Del. 1995). The Delaware Supreme Court explained that a testifying defendant "assumes two separate but concurrent roles—that of a 'defendant' and that of a 'defendant-witness.'" *Id.* That requires courts to balance the right to confer with counsel and the need for a limited instruction prohibiting the defendant—like any other witness—from discussing his ongoing testimony with anyone. *Id.* After all, those rules apply to midday recesses, and "[t]he fortuitous intervention of an overnight recess during the cross-examination of a defendant should not be an occasion for coaching which could not otherwise occur." *Id.* at 460.

Some federal courts have similarly circumscribed the subjects of discussion between the defendant and his counsel in certain circumstances. The Fourth

Circuit upheld a trial court's ruling that counsel could not discuss certain classified evidence with his client. *United States v. Moussaoui*, 591 F.3d 263, 288–90 (4th Cir. 2010), *as amended* (Feb. 9, 2010). Likewise, the Second Circuit upheld an overnight partial prohibition: the state trial court forbade an attorney to tell his client that his client's attempted witness intimidation had not worked and that the targeted witness would appear at trial the next day. *Morgan v. Bennett*, 204 F.3d 360, 368 (2d Cir. 2000). Such judicial orders not only protect the truth-seeking of the trial, but also the safety of the truthtellers.

In sum, several States have limited a defendant's ability to confer with counsel—either at an inappropriate time or about an off-limits topic—because of the threat of disruption of the trial or its truth-finding mission, or some other danger.

B. Trial court discretion to limit the time and topic of conferral generally benefits everyone.

Limiting the defendant's conferral with counsel can serve many interests, and not all redound to the benefit of the State. To be sure, protecting the search for truth is theoretically in everyone's best interest. But beyond that, defendants stand to gain from the court's flexibility to limit conferral during a recess.

Consider a world where no trial court had authority to limit conferral during a recess. A "trial court has complete discretion in the granting of and duration of trial recesses." *Bova v. State*, 410 So. 2d 1343, 1345 (Fla. 1982). So if a court wants to prevent taint of the defense testimony, but it cannot order a limit on conferral with counsel, it has no choice but to deny a request to recess during the defendant's testimony.

Extending a defendant's time on the stand into a jury's dinner hour may work to prevent witness coaching, but at the expense of the testifying defendant. There is no reason to think that this solution makes defendants better off in any way. Rather, it could perversely transform the Sixth Amendment conferral right from boon to burden.

In addition, qualified conferral limits are self-enforcing. They often align with the ethical obligations that a lawyer is expected to maintain when the defendant takes the stand as a witness. *See Perry v. Leeke*, 488 U.S. 272, 282 (1989). And in the interest of witness credibility, able defense counsel must avoid the inference of witness coaching already; juries may easily detect a sudden change in a defendant's tenor or testimony. And should defense counsel violate a conferral limit but the defendant is nonetheless convicted, the former client will have every incentive to later cry ineffective assistance of counsel on the basis of the violation.

II. The States' qualified conferral limit practices are consistent with the Sixth Amendment.

The federal Constitution plays an important role in the States' court systems, including protecting the right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). At the same time, the Sixth Amendment does not dictate trial procedures or displace state courts' sovereign prerogatives as the primary fora of criminal trials. Even when other procedures may seem the better practice, the Constitution is "not an all-purpose tool for judicial construction of a perfect world." *Padilla v. Kentucky*, 559 U.S. 356, 388 (2010) (Scalia, J., dissenting).

All would agree that total bans on communication between defendant and counsel violate the right to confer. But that does not mean that States cannot protect the right to confer with counsel and the orderly administration of justice at the same time. The Counsel Clause permits States to prevent trial disruptions or taint that would occur if the right to confer with counsel were truly absolute. State limits on conferral with counsel do not violate the Sixth Amendment, either as originally understood or further expounded by this Court's precedents.

A. The right to counsel is fundamental but not all-consuming.

The right to counsel has taken on a broader meaning over time. Originally, the American right to counsel was a deliberate break with the English practice of prohibiting counsel for defendants accused of treason or felonies. William M. Beaney, The Right to Counsel in American Courts 8–9 (1955); 1 Frederick Pollock & Frederic William Maitland, The History of the English Law 211 (2d ed. 1898). Many young States viewed the denial of counsel as an afront to the administration of a fair trial and opted to protect defendant's right to counsel in their state charters and constitutions. Beaney, The Right to Counsel at 14–22; *Faretta v. California*, 422 U.S. 806, 828–30 (1975); *Betts v. Brady*, 316 U.S. 455, 465–66 (1942) (overruled on other grounds by *Gideon*, 372 U.S. at 345); *Powell v. Alabama*, 287 U.S. 45, 61–64 (1932). The right to assistance of counsel, originally understood, protected the defendant's right "to employ counsel, or to use volunteered services of counsel." *Padilla*, 559 U.S. at 389 (Scalia, J., dissenting).

In the years since ratification, the Court has expanded the defendant's right to counsel to include broader protections in "ever-growing right to-counsel precedents" interpreting the Sixth Amendment. *Garza v. Idaho*, 586 U.S. 232, 263(2019) (Thomas, J., dissenting). Those include the right to appointment of free counsel, *Gideon*, 372 U.S. 335, the right to a certain quality of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), and the right to "effective" counsel anytime "a plea bargain has been offered," *Lafler v. Cooper*, 566 U.S. 156, 168 (2012). Most relevant here, this Court explained in *Geders* that defendants have a right to consult with their counsel about certain trial matters during an overnight recess. 425 U.S. at 91.

Even as the Court has expanded the meaning of the Sixth Amendment beyond the original understanding of its text, it has never treated the right to counsel as absolute. For example, defendants have the right to represent themselves if they desire. *Faretta*, 422 U.S. at 807. But courts can sometimes limit self-representation—for example, if the trial has already started with counsel or if the defendant obstructs the trial while acting pro se. 3B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, §733 (4th ed. updated May 20, 2025). There can be "some tension" between even basic constitutional values. *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013). When important principles threaten to clash, Courts are charged with "balancing" the defendant's "right to prepare his defense" with the countervailing interest; there is "no fixed rule" that can solve every case. *Roviaro v. United States*, 353 U.S. 53, 61–62 (1957).

When interpreting the Sixth Amendment, a fair trial that pursues justice is the original touchstone.

The right to counsel "has been accorded … not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (quotation omitted). And ultimately, protecting the defendant's ability to "put his case effectively in court" serves the trial court's purpose to promote "evidence and truth." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (quotation omitted). When a claimed right to confer would conflict with a fair trial that gets to the truth, that signals a possible overreading of the right to confer.

If it were true that a defendant's right to counsel is "absolute" at "every essential step of the proceeding," *Bova*, 410 So.2d at 1345, there is no reason that any trial procedure or interest could counterbalance a conferral request. Taken seriously, that would mean defendants *do* have the right to pause their testimony to confer, or to discuss any information that counsel knows, even if classified—even after each question. This Court has already rejected that absolutist view. *Perry*, 488 U.S. at 282.

Regardless of the winding path that Sixth Amendment precedent has taken since the founding, courts "should resolve questions about the scope of those precedents in light of and in the direction of the constitutional text and constitutional history." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part, and remanded*, 561 U.S. 477 (2010). That framework weighs against extending the right to counsel even further past its original domain and into the role of state-trial superintendent.

B. The right to counsel does not require unlimited conferral on demand.

This Court has roughed-in two boundaries on the right to confer with counsel during trial. The first was *Geders*, which explained that when the defendant becomes a witness, he does not shed his Sixth Amendment rights. 425 U.S. at 88, 91. He is still the accused, and trial procedures that apply to others may "affect[] a defendant in quite a different way from the way it affects a nonparty witness." *Id.* at 88. For that reason, a complete bar on talking with counsel during an overnight recess violates the right to confer. *Id.* at 91.

On the other hand, *Perry* acknowledged that the right to confer does not create a right to exemptions from all the rules designed to protect the trial's integrity. 488 U.S. at 281. The defendant is exempt from complete sequestration, but "the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well." *Id.* at 282. For that reason, a total ban on conferral during a fifteen-minute recess is acceptable. *Id.* at 280–84.

While the facial difference between *Geders* and *Perry* was the number of minutes in the recess, both precedents make clear that the length of time was only a proxy for the content of the conferral. The Court in *Geders* assumed that the conferral during the overnight recess would involve discussing "tactical decisions to be made and strategies," which the defendant could not discuss under the blanket non-conferral order. 425 U.S. at 88. And the Court in *Perry* surmised that, during a short mid-trial recess, "nothing

but the testimony will be discussed." 488 U.S. at 284. But the Court stressed that discussing "matters that go beyond the content of the defendant's own testimony," such as "the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain" are "matters that the defendant does have a constitutional right to discuss with his lawyer." *Id.*

In other words, when the court is in recess, the right to confer depends on the *topic* of conferral. If the conferral covers matters of managing and mounting the defense, conferral is protected. But if the conferral is to discuss ongoing testimony, the defendant has "no constitutional right to consult with his lawyer while he is testifying," and "the rules that generally apply to other witnesses" apply to the defendant. *Id.* at 281–82. This rule not only harmonizes this Court's existing precedent with itself; it protects the integrity of cross-examination. *Id.* at 282. No other witness gets the opportunity to "regroup and regain a poise" in the middle of cross-examination, for the simple reason that "uninfluenced testimony on cross-examination" is "more likely to lead to the discovery of truth." *Id.* at 282–83 (quotation omitted). That interest goes to the heart of the States' interest in conducting their criminal trials.

* * *

The Sixth Amendment protects a defendant's right to confer, but it does not override all rules designed to protect the fairness and integrity of the trial. Defendants who elect to testify cannot claim a right to discuss their ongoing testimony with counsel in a way that no other witness could. Consistent with its prior precedents, this Court should explain that State courts

have the authority to limit defendants' conferral with counsel over times and topics that undermine the integrity of the trial.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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