

No. 12-246

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IN THE  
**Supreme Court of the United States**

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GENOVEVO SALINAS,  
*Petitioner,*

*vs.*

THE STATE OF TEXAS,  
*Respondent.*

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

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**BRIEF *AMICUS CURIAE* OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF RESPONDENT**

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## **QUESTION PRESENTED**

When a person who is suspected of a crime but not under arrest voluntarily chooses to speak to the police, is the use at trial of his silence in response to a single question a violation of his Fifth Amendment right not to “be compelled in any criminal case to be a witness against himself . . . .”

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**BRIEF *AMICUS CURIAE* OF THE  
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IN SUPPORT OF RESPONDENT**

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**INTEREST OF *AMICUS CURIAE***

The Criminal Justice Legal Foundation (CJLF)<sup>1</sup> is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, petitioner seeks to create yet another federal constitutional rule excluding valid, probative

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1. Both parties have filed blanket consents for *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

evidence that would have been admissible under the Constitution as originally understood, based on an extrapolation from the Fifth Amendment privilege. This interference with the truth-finding function of criminal trials is contrary to the interests of victims that CJLF was formed to protect.

### **SUMMARY OF FACTS AND CASE**

On December 18, 1992, brothers Juan and Hector Garza were shot with a shotgun in Hector's Houston, Texas, apartment. Juan died at the scene, and Hector was later pronounced dead at the hospital. See *Salinas v. State*, 368 S. W. 3d 550, 552 (Tex. App. 2011). The crime scene investigator recovered six shotgun shells from the scene. See *ibid.*

Police went to the home of Genovevo Salinas's parents, where he also lived. "Salinas's father tendered a shotgun to the police. Salinas agreed to voluntarily accompany the officers to a police station for questioning." *Ibid.* Salinas voluntarily answered every question but one. See J. A. 19 (interviewing officer's testimony). When asked if the shotgun his father handed over would match the shells found at the scene, he did not answer verbally. J. A. 17. He "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up." J. A. 18. Salinas did not terminate the interview but continued answering other questions. J. A. 18.

"Salinas's first trial resulted in a mistrial, but the jury in his second trial found him guilty and sentenced him to twenty years' imprisonment and a \$5,000 fine." *Salinas*, 368 S. W. 3d, at 554. "Salinas appeal[ed] his conviction contending that: (1) his attorney rendered ineffective assistance at trial by failing to object to improper opinion testimony regarding Salinas's truth-



fulness, and (2) the trial court improperly admitted evidence of Salinas's silence during a pre-arrest interview. [The intermediate appellate court] affirm[ed]." *Id.*, at 551.

The Texas Court of Criminal Appeals, the state court of last resort for criminal cases, "granted the appellant's petition for discretionary review on one ground: whether the Court of Appeals erred in holding that the Fifth Amendment right against compelled self-incrimination does not apply to pre-arrest, pre-*Miranda* silence used as substantive evidence of guilt in cases in which a defendant does not testify." *Salinas v. State*, 369 S. W. 3d 176, 177 (2012) (footnote omitted). The court answered that question in the negative while noting the extensive split of authority nationwide and inviting guidance from this Court. See *id.*, at 178-179. This Court granted certiorari.

## SUMMARY OF ARGUMENT

This case is about suppression of evidence. Suppression is so fundamentally unfair that it violates due process of law in many circumstances when the suppression runs against the defendant. The people are also entitled to due process of law, and rules suppressing evidence should be made only when clearly required by the Constitution or when supported by powerful justification.

*Miranda* notwithstanding, there is no "right to remain silent" in the Constitution. The Fifth Amendment guarantees a right not to be compelled to be a witness against oneself in a criminal case, which is not the same thing. A defendant's choice to be a witness is binary, yes or no. There is no right to pick and choose, being a witness on some questions and not others. Cases where a person is compelled to testify in a pro-

ceeding other than a criminal case against himself, and must assert the privilege only against incriminating questions, are distinguishable. Assuming that making an unsworn statement to investigating officers is being a witness, Salinas voluntarily chose to be a witness. His lack of a verbal answer to a single question and accompanying body language were admissible at trial and not a violation of his right against compulsion.

Under the circumstances of this case, there is no compelling policy argument against admission of this evidence. Whether a complete refusal to speak to police at all would be forbidden as a constitutional mandate (as opposed to an application of Rule 403) is a question that should be decided in a case that presents it.

## ARGUMENT

### **I. Rules excluding probative evidence operate to defeat justice and should be confined to the limits of original understanding or compelling justification.**

When the prosecution seeks to exclude evidence proffered by the defendant, this Court has long recognized that fundamental fairness places constitutional limits on exclusion.

“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. [Citations.] This right is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve. [Citations.]” *Holmes v. South Carolina*, 547

U. S. 319, 324 (2006) (internal quotation marks omitted).

Similarly, when the prosecution suppresses evidence by failure to disclose exculpatory evidence in its possession, this misconduct calls forth denunciations of the injustice, using the word “suppression” as a grave charge, as indeed it is. See, *e.g.*, *Cone v. Bell*, 556 U. S. 449, 451 (2009). Yet every day in courtrooms throughout America, defense lawyers make motions to suppress evidence, and this is accepted as routine. Suppression is suppression, and it defeats justice in both directions.

Criminal procedure is not, of course, completely symmetrical, and the fact that a practice would not be allowed against the defendant does not necessarily mean it is impermissible when employed against the prosecution. However, if a practice is thought to be so fundamentally unfair as to constitute a violation of the constitutional guarantee of due process of law, then great caution is in order before declaring that a practice constitutionally forbidden in one direction is constitutionally required in the other. “The people of the State are also entitled to due process of law.” *Stein v. New York*, 346 U. S. 156, 197 (1953), overruled on other grounds, *Jackson v. Denno*, 378 U. S. 368, 391 (1964). Just as the defendant’s right to due process of law is violated when evidence is suppressed by nondisclosure or arbitrary rules of evidence, so the people’s right to due process of law is violated when rules of exclusion are created out of whole cloth or extended beyond their necessary scope.

When a clear rule is written into the text of the Constitution, there is no place for judicial balancing of interests. For example, courts cannot substitute other methods of assuring reliability of evidence where the Constitution requires confrontation. See *Crawford v. Washington*, 541 U. S. 36, 61-62 (2004). The present

case does not involve such a clear rule. The question presented in this case is considerably removed from the core meaning of the pertinent clause of the Fifth Amendment, as discussed in Part II, *infra*, and an extension of that clause to exclude this evidence requires compelling justification.

Undeniably, an accurate verdict is not the only interest at stake in a criminal trial. The trial must be conducted with due observance of the defendant's rights. The definition of how far those rights should extend beyond the clear meaning and original understanding of the provision in question, however, must be determined with due consideration of competing interests.

“All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those in which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.” *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355 (1908) (Holmes, J.).

The accuracy of the verdict is a paramount interest, and, to that end, modern rules of evidence declare all relevant evidence to be admissible unless excluded by a particular rule. See, *e.g.*, Fed. Rule Evid. 402. A rule excluding evidence that has probative value and would permit the trier of fact to make a more accurate determination of guilt or innocence generally requires an assessment of the weighty interest of accuracy against the purpose that the exclusionary rule is thought to serve, as well as an assessment of how well it actually serves the interest.

Exclusion of evidence in state trials on federal constitutional grounds was once rare, reserved for

extreme circumstances. See, e.g., *Brown v. Mississippi*, 297 U. S. 278, 279 (1936) (confession beaten out of defendant). In the 1960s, with *Mapp v. Ohio*, 367 U. S. 643, 656-657 (1961), *Massiah v. United States*, 377 U. S. 201, 206 (1964), *Miranda v. Arizona*, 384 U. S. 436 (1966), and their multitudinous progeny, motions to suppress evidence on federal constitutional grounds having little or nothing to do with the reliability of the evidence became a routine feature of criminal practice.

This Court soon recognized that the costs of these extrapolations from constitutional rights exceeded the benefits in many circumstances and made exceptions to the rules of exclusion in cases where the cost/benefit imbalance was most apparent. See, e.g., *Wong Sun v. United States*, 371 U. S. 471, 491 (1963) (attenuated connection); *Brown v. Illinois*, 422 U. S. 590, 608-609 (1975) (Powell, J., concurring in part) (cost/benefit basis of *Wong Sun*); *Harris v. New York*, 401 U. S. 222, 226 (1971) (*Miranda* noncompliant statements for impeachment); *New York v. Quarles*, 467 U. S. 649, 657-658 (1984) (public safety exception to *Miranda*, “outweighs the need for a prophylactic rule”); *United States v. Leon*, 468 U. S. 897, 922 (1984) (good-faith reliance on issuing magistrate, cost outweighs benefit).

The cost in these cost/benefit analyses is the heavy cost of a miscarriage of justice. Judge Cardozo’s classic example of an unjust suppression of evidence was the suppression of the body of a murder victim, allowing the murderer to go free. See *People v. Defore*, 242 N. Y. 13, 23-24, 150 N. E. 585, 588 (1926). In an age when common sense counted for more than it does today, the grotesque injustice of such a horrible result was sufficient to refute the argument for a universal exclusionary rule. That nightmare nearly came true in a *Massiah* case, *Brewer v. Williams*, 430 U. S. 387, 416-417, and n. 1 (1977) (Burger, C. J., dissenting), and the retrial was

saved only by application of the inevitable discovery doctrine to some fortuitous facts. See *Nix v. Williams*, 467 U. S. 431, 449-450 (1984).

The injustices resulting from excluding evidence take a toll in terms of public confidence in the judiciary as well. Public confidence is important for every branch of government, but particularly for the one with “neither Force nor Will but merely judgment . . . .” The Federalist No. 78, p. 523 (J. Cooke ed. 1961) (A. Hamilton). The *Miranda* decision was extremely controversial, and it was soon repudiated by Congress. See 18 U. S. C. § 3501. This Court eventually struck down this statute and upheld *Miranda*, *Dickerson v. United States*, 530 U. S. 428, 443-444 (2000), because *Miranda* was by then too deeply ingrained to overrule, not because it was correctly decided in the first place. Congress’s repudiation of *Miranda* remains as an admonition against excessively expansive rules excluding evidence, even if it is too late to enforce according to its terms. *Mapp v. Ohio*, 367 U. S., at 651-652, pointed to California and its adoption of a state search-and-seizure exclusionary rule, but the people of California have since adopted by direct vote a sweeping repudiation of such rules, recognizing in the State Constitution the right of victims of crime to truth in evidence. See Cal. Const., Art. I, § 28(f)(2); see also *California v. Greenwood*, 486 U. S. 35, 44-45 (1988).

The people know injustice when they see it. Rules excluding evidence, “if applied indiscriminately, may well have the opposite effect of generating disrespect for the law and the administration of justice.” *Stone v. Powell*, 428 U. S. 465, 491 (1976).

As a general principle, then, any argument for extending a constitutional rule excluding evidence beyond the core meaning of the provision in question must carry a heavy burden. Absent a compelling

justification, relevant evidence should be admissible, and facts should not be concealed from the finder of fact.

**II. Consideration of the selective silence  
of one who voluntarily chooses to speak  
does not violate the right not to  
“be compelled . . . to be a witness . . . .”**

In *Miranda v. Arizona*, 384 U. S. 436, 444 (1966), this Court directed police officers to warn an arrested person before questioning that “he has a right to remain silent . . . .” No such right appears in the text of the Fifth Amendment. The actual constitutional right is not to “be compelled in any criminal case to be a witness against himself . . . .” U. S. Const., Amdt. 5. That is a different right. See Alschuler, A Peculiar Privilege in Historical Perspective: The Right to Remain Silent, 94 Mich. L. Rev. 2625, 2625-2631 (1996). Although Fifth Amendment jurisprudence is replete with discussions of “waiver,” see, e.g., *Miranda*, *supra*, at 444, that usage is incorrect. If a person chooses to be a witness, his right not to be compelled remains intact, having been neither violated nor waived. See Alschuler, *supra*, at 2627.

In recent cases involving the Confrontation Clause of the Sixth Amendment, this Court has focused on what it means to be a “witness.” See *Crawford v. Washington*, 541 U. S. 36, 51 (2004); *Davis v. Washington*, 547 U. S. 813, 821 (2006). There is much discussion of old English abuses and early American practice in order to ascertain what the clause means and how to apply it to contemporary procedure. See *Crawford*, *supra*, at 43-50 (the Marian statutes, infamous English trials, and early American authorities); *Davis*, *supra*, at 831, n. 5 (police questioning as equivalent of Marian

magistrate examination). Renewed attention to the text and original understanding is similarly in order with regard to the Fifth Amendment.

Petitioner contends, citing *Crawford* and *Davis*, that use of noncustodial police questioning of a suspect makes him a “witness against himself.” See Brief for Petitioner 30. The historical record is contrary. Committing magistrates regularly took statements from arrestees, and these statements were admissible at trial, with the magistrate himself as the witness, provided the statement was unsworn. See Langbein, *Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1060-1062 (1994). While the English pretrial procedure was the subject of some controversy in the early American republic, no one thought it violated the Fifth Amendment. See Alschuler, 94 Mich. L. Rev., at 2659-2660.

The question of whether “witness” has the same meaning for the Fifth Amendment that it has under *Crawford* need not be resolved in the present case, however. Even assuming that Salinas’s prearrest interview with the police amounted to being a witness, he was not *compelled* to be a witness.

The choice of whether to be a witness is a binary one, yes or no. At trial, the defendant has the right to not be a witness under the Fifth Amendment or the right to be one under the Due Process and Compulsory Process Clauses. See *Rock v. Arkansas*, 483 U. S. 44, 51-52 (1987). He does not have the right to pick and choose which questions he will answer. While there is language in this Court’s opinions justifying this rule at trial on the need of the adversary system to prevent the defendant from testifying to a half-truth, see *Brown v. United States*, 356 U. S. 148, 156 (1958), other cases state this as an aspect of the privilege itself. “The immunity from giving testimony is one which the



defendant may waive by offering himself as a witness.” *Raffel v. United States*, 271 U. S. 494, 496 (1926). “His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.” *Id.*, at 497. “The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do.” *Id.*, at 499.

The binary nature of the privilege is a better basis for this rule than a policy-based assessment of the needs of the adversary system. If the question were one of policy, an argument could be made for scrapping the privilege altogether and adopting measures more tailored to the underlying rationales. See 8 J. Wigmore, *Evidence* § 2251, pp. 295-318 (J. McNaughton rev. ed. 1961). But the question is not merely one of policy. If the Fifth Amendment privilege really did grant a right to selectively “be a witness” or not on a question-by-question basis, no considerations of policy could abrogate that right without a constitutional amendment. See *supra*, at 5. It is far more sound as a matter of constitutional jurisprudence to base the rule on *Raffel*’s understanding of the nature of the privilege—a yes or no choice to be a witness or not.

Petitioner attempts to brush off the selective silence problem in a footnote. See Brief for Petitioner 36, n. 5. The authorities he cites are easily distinguishable. In *Hoffman v. United States*, 341 U. S. 479, 481 (1951), the underlying proceeding was a wide-ranging grand jury investigation. In *Quinn v. United States*, 349 U. S. 155, 157-158 (1955), it was a congressional hearing. Neither was “a criminal case,” the proceeding to which the constitutional privilege applies. In both, the witness had been summoned and had no privilege to refuse to testify altogether. There is a long history of allowing

witnesses in civil cases and witnesses other than the defendant in criminal cases to invoke the privilege only as to questions that incriminate them. “Once a witness was sworn, he was subject to compulsion, and his only protection lay in the ability to decline to answer specific questions. The protection of common law defendants, by contrast, lay in not being sworn at all.” Alschuler, 94 Mich. L. Rev., at 2659.

Petitioner’s third authority for selective silence, *Edwards v. Arizona*, 451 U. S. 477 (1981), does not directly involve the real Fifth Amendment privilege at all. *Edwards* is a “second layer of prophylaxis,” *McNeil v. Wisconsin*, 501 U. S. 171, 176-177 (1991), empowering a suspect in custody to require the police to terminate the interrogation and not approach him for a waiver again until counsel has been provided. See also *Maryland v. Shatzer*, 559 U. S. 98, 130 S. Ct. 1213, 1220, 175 L. Ed. 2d 1045, 1053 (2010). Whatever the merits of *Edwards*, it has no application to a person who has not been in custody at any relevant time in the case. See *id.*, 130 S. Ct., at 1223, 175 L. Ed. 2d, at 1057 (prophylactic rule terminates 14 days after release from custody).

If we assume that making an unsworn statement to the police constitutes being a witness for the purpose of the Fifth Amendment, then Salinas chose to be a witness when he chose to speak to the police about the murder of Juan and Hector Garza. His choice to be a witness was not compelled. In these circumstances, the use at trial of his answers, nonanswers, and body language is not a violation of his right not to be compelled to be a witness, the right *actually* protected by the Fifth Amendment.

**III. There is no justification for extending existing prohibitions on use of silence to the circumstances of this case.**

As discussed in Part II, *supra*, the evidence in this case does not come within the prohibition of the Fifth Amendment, as properly understood. As discussed in Part I, *supra*, any proposal to extend constitutional rules excluding evidence beyond their core requires powerful justification. Neither petitioner nor supporting *amici* offer any significant justification, much less a powerful one, for extending an exclusionary rule to the circumstances of this case. The justification they offer is for other cases and may be considered when such a case arises.

Petitioner protests that allowing use of a suspect's prearrest silence "would leave the person no way to avoid creating evidence against himself." Brief for Petitioner 10. That is an argument against a rule that allows a suspect's simple refusal to speak to the police at all—refusal to "be a witness"—to be used against him. *Amici* supporting the petitioner make similar arguments. See Brief for American Board of Criminal Lawyers as *Amicus Curiae* 12-13; Brief for National Association of Criminal Defense Lawyers and Texas Criminal Defense Lawyers Association as *Amici Curiae* 3-4.

The case these arguments envision is not the case presently before the Court. Salinas did not refuse to speak to the police. He did not decline to "be a witness." He voluntarily participated in the interview, see J. A. 14, and he verbally answered every question but one. See J. A. 19. The option that petitioner insists must be preserved, refusing to speak to the police at all, was available to him, but he did not exercise it.

Petitioner insists that there are circumstances where silence has limited probative value, and there is a danger of prejudice from jurors giving silence more weight than it deserves. Brief for Petitioner 22-23. These problems exist for many kinds of evidence, and they are highly dependent on the circumstances of the individual case. That is why we have one of the most basic rules of evidence to enable the trial judge to deal with the problem case by case. “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. Rule Evid. 403; see also *Old Chief v. United States*, 519 U. S. 172, 182-185 (1997) (importance of context). Most states have similar rules. See, e.g., Tex. Rule Evid. 403; see also R. Park, et al., *Evidence Law 12* (3d ed. 2011) (42 states pattern evidence rules on federal model); *Jenkins v. Anderson*, 447 U. S. 231, 239, and n. 5 (1980) (probative value as matter of evidence law).

The present case is a counter example. The various reasons other than guilt why a person might refuse to speak to the police at all are not applicable here, because Salinas did not refuse to speak to the police. In the circumstances of this case, Salinas’s lack of a verbal answer to a single question and his body language have substantial probative value for guilt and no good alternative explanation.

The case has not been made for a sweeping rule prohibiting all use of prearrest silence against a nontestifying defendant in a criminal case. An argument might be made for a more limited rule against use of particular refusals to speak, such as a refusal to speak to the police at all or a termination of an interview by a person who did not know he was suspected

and terminated upon learning that he was. If such a rule is to be made on a constitutional basis, it should be made only in a case that actually presents the question. See *Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885). The case presently before the Court does not.

### **CONCLUSION**

The decision of the Texas Court of Criminal Appeals should be affirmed.

March, 2013

Respectfully submitted,

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