

Nos. PD-0745-23, PD-0746-23, PD-0747-23

IN THE COURT OF CRIMINAL APPEALS FOR  
THE STATE OF TEXAS

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Nos. PD-0745-23, PD-0746-23, PD-0747-23  
ON APPEAL FROM THE COURT OF APPEALS  
FOR THE SECOND DISTRICT OF TEXAS AT FT. WORTH

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**EMANUEL OCHOA,**  
**Appellant,**

**v.**

**THE STATE OF TEXAS,**  
**Respondent.**

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Cause Nos. CR19-00054; CR19-00056; CR19-00057  
In the 235th District Court of  
Cooke County, Texas

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**BRIEF OF AMICI CURIAE THE AMERICAN  
CIVILLIBERTIES UNION AND THE AMERICAN CIVIL  
LIBERTIES UNION OF TEXAS  
IN SUPPORT OF APPELLANT EMANUEL OCHOA**

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## INTEREST OF AMICI CURIAE

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to protecting the principles embodied in the state and federal Constitutions and our nation’s civil rights laws. The American Civil Liberties Union of Texas Foundation (“ACLU of Texas”) is a state affiliate of the national ACLU with thousands of members and supporters across the State. The ACLU of Texas works with communities, at the State Capitol, and in the courts to fulfill the promises of the Constitution for every Texan, no exceptions. From Amarillo to Brownsville and Beaumont to El Paso, we believe in a Texas that works for all of us—a Texas where each person has an equal say in the decisions that shape our future and everyone can build a good life.

The ACLU and the ACLU of Texas have a longstanding interest in defending the rights of the accused and convicted, including juveniles. Through direct representation, amicus briefs, and advocacy, the ACLU and the ACLU of Texas actively work to advance these principles in Texas and the nation.

Amici were not paid any fee for the preparing of this brief, nor is any fee expected to be paid. *See* Tex. R. App. Proc. 11(c).

## INTRODUCTION

Two and a half hours into his grueling interrogation of 14-year-old Emanuel Ochoa, Texas Ranger James Holland told Ochoa that if he confessed, he would “not [be] going off to prison,” but that if he did not confess “this could go bad.” SX2 at 8:18:20. That pledge was the culmination of a pressure campaign during which Holland repeatedly said he was there to “help” Ochoa, and that Ochoa could move on with his life if he confessed. After Holland told Ochoa he was “not going off to prison,” Ochoa did confess—to a brutal crime against another child. The trial court denied Ochoa’s motion to suppress his confession, and Ochoa was convicted of three charges and sentenced to 55 years’ imprisonment.

The Court of Appeals affirmed. It acknowledged that a confession is involuntary, and therefore inadmissible, if it arises from police overreach that overcomes the suspect’s will. *Ochoa v. State*, 675 S.W.3d 793, 807, 810 (Tex. App. 2023). But the Court of Appeals reasoned that Ochoa’s statements had been voluntary because “Holland did not make an unqualified promise to Ochoa.” *Id.* at 810.

For two reasons, that holding is incorrect. First, Holland’s tactics rendered Ochoa’s statements involuntary and thus inadmissible under the Family Code. Section 51.095 of that Code requires a showing that “the child knowingly, intelligently, and voluntarily waive[d]” his rights. Tex. Fam. Code Ann. § 51.095(a)(1)(C). Even if that language were construed to mean that a child’s statement is voluntary unless induced by a “positive promise”—a test this Court uses for *adult* suspects under another statute—Ochoa could make that showing because Holland flat-out told him he would not go to prison if he confessed. But, of course, section 51.095 nowhere requires proof of a promise. *See id.* Instead, it broadly protects children from coercive interrogations. Because Holland attempted to convince Ochoa that confessing would bring him help, not prison, Ochoa’s confession was involuntary under section 51.095.

Second, Ochoa’s confession was also involuntary under the Fifth and Fourteenth Amendments to the U.S. Constitution and article I, section 10, of the Texas Constitution. Far from requiring proof of an unequivocal or positive promise to render a confession involuntary, the constitutional tests look to the totality of the circumstances, which can include implied promises and the suspect’s age. Here, under the totality

of the circumstances, Holland’s intense, sustained campaign to persuade a child that confessing would bring him help, not imprisonment, rendered that child’s confession involuntary, and the use of that confession at trial unconstitutional.

## **FACTS**

In 2018, five-year-old M.G. went missing and was eventually found, partially clothed and severely harmed, under a mobile home. 3 RR 43:2–3.<sup>1</sup> Fourteen-year-old Ochoa, who had been living in the same household as M.G., was taken to a police station, where Texas Ranger James Holland questioned him for three hours. During the interrogation, Holland promised Ochoa that because he was fourteen, he was “not going off to prison or any horrible thing like that,” and that he would be okay, would get help, and would move on from this “bump in the road.” *See* State’s Exhibit 2 (“SX2”) at 8:17:00, 8:18:23.

### **I. Beginning of the interrogation.**

Holland is six-foot-three. 7 RR 45:18–19. While questioning Ochoa, he wore a firearm at his side and a Texas Ranger badge on his shirt. 7 RR 45:12–17.

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<sup>1</sup> Citations are to the clerk’s record in CR19-00054.

Holland started the interrogation by talking about the Texas Rangers, the “most elite law enforcement agency in the world.” SX2 at 5:49:10. Holland said that he was part of a more elite group of senior Rangers who reported to the Governor. *Id.* at 5:49:55. He falsely told Ochoa that the governor of Texas had personally asked him to drop what he was doing and solve this case. *Id.* at 5:51:35.

Holland then told Ochoa that he was not under arrest, *id.* at 5:52:55 that he was free to leave, *id.* at 5:53:04, and that he was being questioned because he lived in the same house as M.G. *Id.* at 5:53:57. He also told Ochoa that he could remain silent, *id.* at 5:54:53, but that “normally, like 99.999 percent of the time, people that are witnesses help me to solve my case.” *Id.* at 5:55:18.

At first, Ochoa denied knowing what happened to M.G. *Id.* at 5:57:36. After about five minutes, Holland told Ochoa that he was “not a suspect,” *id.* at 5:59:01, and that Ochoa should tell him if “anything weird, or strange, or crazy . . . happened,” because “I’m not going to get mad at you, I’m not going to go tell your mom what you said or anything like that[.]” *Id.* at 5:59:20. Instead, Holland said, “it’s our conversation.” *Id.*

After some additional questioning, Holland asked, “what do you think happened to her,” to which Ochoa responded “uh, hopefully, you know, she did not get raped.” *Id.* at 6:17:01. Holland responded to this by saying, “Sometimes when people do things, right, there’s something called a Freudian slip.” *Id.* at 6:18:13.

## **II. Holland says children who confess avoid punishment.**

Soon after what he called a Freudian slip, Holland told Ochoa that “when a good person makes a mistake, he says that I’m sorry and he moves on down the road and he makes amends. When a bad person makes a mistake, they don’t ever take responsibility for it[.]” *Id.* at 6:19:50. Such people, Holland said, are “like a whole sub-species.” *Id.* at 6:20:12.

Holland then said that “[a] lot of people think that law enforcement officers are” are always trying to “put[] someone in jail,” but that was “not the case.” *Id.* at 6:20:29. To the contrary, Holland said:

Especially someone, like, your age, you’re so young, right, you have your whole life in front of you, and if you make a mistake . . . you have time to recover from that mistake if you make amends, if you say you’re sorry and made a mistake, and then, you know, people help you. I help you.

*Id.* at 6:20:57. Holland continued, “[i]t’s not my job to throw a 14-year-old in jail, okay? I don’t do that, that’s not me, alright? I’m here to help people.” *Id.* at 6:21:17.

Holland then told Ochoa that he had a young son who “screws up,” but that when his son takes accountability, Holland usually does not “even punish him.” *Id.* at 6:22:04, 6:22:57. But when his son is not honest about his mistakes, Holland said, he gets punished. *Id.* at 6:23:13. Holland continued: “I think that maybe you made a mistake, and that I need to help you through this.” *Id.* at 6:27:48. Ochoa denied this. *Id.* at 6:28:05, 6:32:02.

In response to Holland’s questioning, Ochoa “pulled his hoodie over his head and bent over, covering his eyes with his hands.” State’s Br. at 9. Holland leaned in, put his hands on Ochoa’s knees, and told him to “look at me” and “come here.” *Id.* He told Ochoa he already knew Ochoa was lying because of the smell of Lysol on Ochoa and his “Freudian slip.” SX2 at 6:32:30.

### **III. Holland promises to help Ochoa.**

Holland made a series of commitments to Ochoa. One was an explicit “promise[]” that, if Ochoa made amends, Holland would “help

him through it.” *Id.* at 6:33:00. He then said, “I’m not here to go tell anyone or do anything else, I’m here with you right now to help you.” *Id.* at 6:33:29.

At 6:35 p.m., forty-five minutes into the interview, Holland told Ochoa that he “want[ed] this to end,” saying “I don’t wanna beat you up . . . I want to get you help” because “you still got your whole life ahead of you.” *Id.* at 6:35:07. He told Ochoa he needed to admit his mistake to “get on with [his] life.” *Id.* at 6:35:29. When Ochoa did not respond, Holland raised his voice and repeatedly told Ochoa to “look at me.” *Id.* at 6:35:37. He also repeatedly told Ochoa that because he is so young, he had to confess and move on. *Id.* at 6:36:36. Holland told Ochoa that he was the “one person” who could “help” him. *Id.* at 6:40:15. Holland added: “You gotta trust me, alright? There’s one person in this world that you need to trust right now, and there’s one person that can help you.” *Id.* at 6:40:30.

Holland also told Ochoa that if he “walked out th[e] door” without confessing his life would get “worse,” but that because he was “not an adult” he could “recover from this” if he would just “admit that [he] made a mistake.” *Id.* at 6:45:20.



At 6:47 p.m., Holland left the room for about 10 minutes. When he returned, he told Ochoa he was going to bring someone in to help him. *Id.* at 6:59:39. He also said that Ochoa could do or be anything once he got past this, saying he could “go to college” to pursue his dreams of becoming an actor. *Id.* at 7:02:16. He told Ochoa again and again that this was just “a bump in the road.” *Id.* at 7:04:35, 8:17:00, 8:24:40, 8:34:03.

#### **IV. The magistration.**

At 8:01 p.m., over two hours into the interrogation, Judge Carroll Johnson and Ochoa’s mother entered the room. Johnson told Ochoa that he was there to explain his rights, and that Ochoa was there “as a witness.” *Id.* at 8:02:44.

Johnson then purported to explain Ochoa his right to remain silent, but without ever telling Ochoa that his statements would or even could be used *against* him:

Any statement that you make could possibly be used as evidence sometime in the future. I’m not saying that it would, you just have to be aware that anything that you say could come back—you could be asked to talk about it or verify it at a later point in time.

*Id.* at 8:04:45.

Johnson also told Ochoa that he had a right to an attorney but suggested that this right only “comes in . . . if you are charged with . . . any kind of a crime.” *Id.* at 8:05:06, 8:05:29.

Ochoa signed an acknowledgment concerning his rights. Shortly after Johnson left, Ochoa’s mother left, and Ochoa was alone in the room.

**V. Holland tells Ochoa he won’t go to prison if he confesses.**

Holland returned at 8:15 p.m. He told Ochoa that he knew when he was lying to him, *id.* at 8:16:15, 8:16:33, and that “the worst possible thing that can happen to you is you make a mistake and you don’t recognize it.” *Id.* 8:17:19. Holland then made another commitment to Ochoa:

You’re a juvenile. There’s no reason on this deal that you shouldn’t be adjudicated as a juvenile, okay? And basically what that means is they’re gonna get you help, okay? *You’re not going off to prison or any horrible thing like that.* But there’s a Z on this, there’s always an A to Z, okay? And I don’t want to threaten you or anything like that, but the Z is the people in the district attorney’s office who deal with these things see that there’s no remorse, in other words if you’re not sorry for it, then they don’t look at you as a fourteen-year-old kid, right? So, this could go bad.

*Id.* at 8:18:13 (emphasis added).

Holland then told Ochoa that he had “the opportunity” to fix his mistakes. *Id.* at 8:19:55. On the one hand, he could “let these people know you’re sorry,” because they “are going to make a determination as to what happens,” and “[y]ou’re a juvenile, you need to keep it that way.” *Id.* at 8:20:16. If he chose this option, Holland said, Ochoa would “get down the road and get on with [his] life.” *Id.* at 8:20:25. On the other hand, Holland said “if you’re not sorry, what happens happens.” *Id.* at 8:20:28. Ochoa did not respond. Holland again told Ochoa he knew Ochoa was lying. *Id.* at 8:20:53.

As Ochoa remained silent, Holland made additional representations. He said “there’s help out there for you.” *Id.* at 8:21:45. He said “[y]ou’re going to come to the conclusion that you have no choice [but to confess] at the end of the day.” *Id.* at 8:24:05. He told Ochoa that he had to decide whether this was “a game-ender,” if he stayed silent, or “a bump in the road,” if he confessed. 8:24:40. And he said “[t]his may seem bad to you, but it can be fixed.” *Id.* at 8:25:25.

Eventually, Ochoa spoke. He asked Holland “how are they gonna help me?” *Id.* at 8:26:30, 8:26:40. Holland said that Ochoa would sit down with counselors to “work through” his mental health issues and perhaps

get him prescription medicine. *Id.* at 8:26:45. Holland told him if it happened again he would be in trouble, so it was up to him to decide if he wanted that outcome, or instead help. *Id.* at 8:27:05, 8:27:48, 8:28:57. Holland represented that there were “people” who would help Ochoa “work through” the chemical changes in his body. *Id.* at 8:27:19, 8:28:37. “But,” Holland continued, “you need help through that.” *Id.* at 8:28:55. Holland encouraged Ochoa to “think about the future,” *id.* at 8:29:42, and reiterated that Ochoa “[didn’t] need to pay for [his] mistake for the rest of [his] life. . . . But you gotta reach out for help.” *Id.* at 8:29:51.

At this point, Ochoa cried out that he felt “like a monster.” *Id.* at 8:30:36. For five more minutes, Holland encouraged Ochoa to confess, promising him that he will be okay: “You’re gonna be okay, alright? I’m gonna get you help. I’m gonna get you help buddy, okay? Look at me. Pick your head up, look at me. Look in my eyes for a second. You’re gonna be okay. Okay? I’m gonna help you.” *Id.* at 8:31:20.

Finally, at 8:34 p.m., almost three hours into the interrogation, Holland says “Look at me. I want you to know this is honesty right here. This isn’t the end of your life. This is a bump in the road. Okay? A bump.

You got so much living to do man, you got so much living to do.” *Id.* at 8:34:03. At 8:35 p.m., Ochoa began confessing. *Id.* at 8:35:20.

## ARGUMENT

State law prohibits the admission of involuntary statements in criminal trials. So do the constitutions of the United States and of Texas. And in this case, both statutory and constitutional law demonstrated that Ochoa’s confession was involuntary and therefore inadmissible.

### **I. Ochoa’s confession is inadmissible under the Family Code.**

A child’s statement is inadmissible unless made under conditions satisfying section 51.095 of the Family Code. Section 51.095 requires a showing that “the child knowingly, intelligently, and voluntarily waive[d]” various rights, including the right to remain silent. Tex. Fam. Code Ann. §51.095(a)(1)(C). This Court has not articulated a test for assessing whether a child’s statement was knowing, intelligent, and voluntary under section 51.095. But, under any conceivable test, Ochoa’s confession was involuntary. First, even under the “positive promise” test for assessing the voluntariness under Article 38.21 of the Code of Criminal Procedure—a test for *adults*—Ochoa’s confession is inadmissible because Ranger Holland made multiple positive promises.

Second, for statements by children, the “positive promise” standard should at a minimum be adapted to reflect the susceptibility of children to law enforcement influence. Any such adaptation would confirm that Ochoa’s confession was not knowing, intelligent, and voluntary under section 51.095.

**A. Ochoa’s confession was involuntary because it was induced by Holland’s positive promises.**

Ochoa can meet the positive-promise standard this Court applies to adults who allege that their statements to law enforcement were involuntary. For *adults*, the Texas Code of Criminal Procedure provides that “[a] statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion.” Article 38.21. This Court applies Article 38.21 using a four-part “positive promise” test, under which the promise must have been: (1) “positive”; (2) “made or sanctioned by someone with apparent authority”; (3) “of some benefit to the defendant”; and (4) “of such a character as would likely cause a person to speak untruthfully.” *Garcia v. State*, 919 S.W.2d 370, 388 (Tex. Crim. App. 1994), *on reh’g* (Mar. 27, 1996). This case meets all four requirements.

*First*, during his unrelenting interrogation of Ochoa, Holland made at least two positive promises—in fact, two *groups* of promises. One group was Holland’s explicit “promise,” which he reiterated again and again, that he would “help” Ochoa if he confessed. *See, e.g.*, SX2 at 6:20:57, 6:32:44, 6:40:15, 8:31:22. In fact, Holland positioned himself as the “one person that [could] help” Ochoa. *Id.* at 6:40:30. The second group was Holland’s statement that Ochoa would not “go[] off to prison” if he confessed, *id.* at 8:18:13, which Holland buttressed with numerous statements and anecdotes stating or implying that Ochoa would only face severe punishment if he did *not* confess. *See, e.g., id.* at 6:21:17 (“It’s not my job to throw a fourteen-year-old kid in jail, alright?”), 6:22:04 (telling Ochoa that Holland does not punish his own son when he confesses), 6:45:20 (telling Ochoa that things would get “worse” if he did not confess but that Ochoa could “recover from this” if he “admit[ted]” what happened), 8:20:08 (telling Ochoa that if he said he was sorry he could “move on with [his] life”).

Contrary to the Court of Appeals’ statement, this Court’s case law does not require proof of an “unqualified” promise. Although the positive-promise standard requires the promise to “be ‘positive’ rather than

equivocal,” a positive promise can take the form of conditional statements. *See Washington v. State*, 582 S.W.2d 122, 124 (Tex. Crim. App. 1979). For example, a positive promise includes telling a suspect that *if* they cooperate, *then* they will not be prosecuted, *Sossamon v. State*, 816 S.W.2d 340, 345 (Tex. Crim. App. 1991), or promising a chance to take a polygraph test *if* the suspect confesses. *Washington*, 582 S.W.2d at 124.

To be sure, a positive promise may be absent when officers speak only in vague terms and—unlike Holland—avoid dangling lenient prosecutorial treatment. Thus, when an officer “indicat[ed]” that the defendant “could not hope to obtain mercy” if he withheld the truth, this Court held that the officer had not made a positive promise because he “spoke of mercy in philosophical terms and never told the [defendant] that mercy would entail lenient treatment from the authorities.” *Jackson v. State*, No. AP-75,707, 2010 WL 114409, at \*3 (Tex. Crim. App. Jan. 13, 2010). This Court has similarly held that telling the defendant he “needed to do what was right” so he didn’t “lose the respect of his community and embarrass his mother” were not positive promises. *Storey v. State*, No. AP-76,018, 2010 WL 3901416, at \*10 (Tex. Crim. App.



Oct. 6, 2010); *cf. Muniz v. State*, 851 S.W.2d 238, 253 (Tex. Crim. App. 1993) (en banc) (declining to find positive promises when an officer uses qualifying language such as “if suspects give a statement, yes, *sometimes* there are leniencies”) (emphasis added).

But Holland’s promises were not vague, and they did not avoid giving Ochoa the impression that confessing would earn him leniency. They *counted* on giving Ochoa that impression. Holland told Ochoa that if he confessed, there was “no reason”—none—why he would not be treated as a juvenile and avoid “going off to prison.” SX2 at 18:18:13. Holland “promise[d]” Ochoa that, if he made amends, Holland would “help [him].” *Id.* at 6:33:00. These promises were “qualified” only in the sense that they told Ochoa he could secure certain benefits only if he confessed. But that pledge—“if you confess, you’ll get leniency”—is a quintessential positive promise. *See Sossamon*, 816 S.W.2d at 345; *Washington*, 582 S.W.2d at 124.

*Second*, Holland had apparent authority to deliver on his promises. The test for apparent authority “is whether the accused was likely to view the promise as authoritative, and this test is to be determined by the standard of the person confessing.” *Wayne v. State*, 756 S.W.2d 724, 729

(Tex. Crim. App. 1988) (quoting *Fisher v. State*, 379 S.W.2d 900, 902 (Tex. Crim. App. 1964)). Here, Ochoa was overwhelmingly likely to view Holland as having the authority to deliver on his promise of help rather than imprisonment. For starters, Holland was an officer wearing a badge and a gun. See *Hardesty v. State*, 667 S.W.2d 130, 134 n.8 (Tex Crim. App. 1984) (noting that “[l]aw enforcement officers have been held to be persons in such a position of authority” and collecting cases). Holland also told Ochoa that he was part of an elite Texas Rangers division, SX2 at 5:49:46, and that the Governor had personally asked Holland to investigate. *Id.* at 5:51:30. Holland even told Ochoa that the district attorney would ask Holland whether Ochoa was “sorry.” *Id.* at 8:22:10. Finally, Holland explicitly told Ochoa that he was the “one person in the world that” Ochoa “needed to trust right now,” and the “one person that [could] help” him. *Id.* at 6:40:30.

*Third*, Holland’s promises offered an enormous benefit to Ochoa. They amounted to a commitment that, if Ochoa confessed, he would avoid prison and instead receive mental health services. Just as important, they indicated that remaining silent would garner punishment.

*Fourth*, Holland’s promise to Appellant was of such a character as would likely cause a person to speak untruthfully. The inquiry here is the likely influence of Holland’s behavior, “and not whether, the defendant in fact spoke untruthfully.” *Martinez v. State*, 127 S.W.3d 792, 795 (Tex. Crim. App. 2004); *see also Smith v. State*, 779 S.W.2d 417, 428 (Tex. Crim. App. 1989) (promises render confessions involuntary when “the influence applied was such as to make [the defendant] believe his condition would be bettered by making a confession, true or false”). Whether the defendant in fact confessed falsely is “irrelevant,” because “it is the methods used to extract an involuntary confession” that are at issue. *Martinez*, 127 S.W.3d at 795 (citing *State v. Terrazas*, 4 S.W.3d 720, 723–24 (Tex. Cr. App. 1999)).

If, as Holland did here, law enforcement officers are permitted to tell children that silence will be punished and confessions will be rewarded with “help,” they will induce false confessions. That is especially true where, as here, the interrogating officer indicates that he is convinced of the suspect’s guilt and unwilling to accept silence. When Ochoa attempted to withdraw by leaning back and pulling his hoodie over his face, Holland leaned in, pulled his hoodie down, and told him to “look

at me.” *See, e.g.*, SX2 at 6:32:24, 6:35:45, 6:40:10, 6:43:00, 7:00:36, 8:31:35. The message was clear: the only way to end the interrogation and avoid prison was to confess.

\* \* \*

Because Holland, someone with apparent authority, made a positive promise to Ochoa that if he confessed he would not go to prison, Ochoa’s statement was improperly coerced and involuntary and must be excluded even if, in applying section 51.095 of the Family Code, this Court imports the voluntariness test for adults under Texas Code of Criminal Procedure Article 38.21.

**B. The positive-promise standard should be modified when assessing the admissibility of child statements under the Family Code.**

Although in this case the positive-promise test demonstrates that Ochoa’s confession was involuntary, the test is not, in fact, appropriate for children. Instead, any test for assessing whether a child’s statement was knowing, voluntary, and intelligent for purposes of section 51.095 of the Family Code should, at a minimum, expressly account for the child’s age and the unique complexities of juvenile defendants.

This conclusion follows straightforwardly from the Family Code itself, which tightly controls the circumstances under which children can waive their rights—including their right to remain silent—and make statements to law enforcement. *See* Tex. Fam. Code. Ann. § 51.095(a)(1). The Family Code specifies that a child cannot waive their rights unless “the waiver is voluntary.” Tex. Fam. Code. Ann. § 51.09(3). Then, in section 51.095, the Family Code carefully delineates numerous requirements that must be met for a child’s statement to be admissible, including the extensive involvement of a magistrate and a showing that “the child knowingly, intelligently, and voluntarily waive[d]” his rights. Tex. Fam. Code. Ann. § 51.095(a)(1)(C)-(D). This highly reticulated statute recognizes the special vulnerabilities of children, and its protections for children are absent from the Code of Criminal Conduct.

It would therefore be surprising if these two very different systems—the Family Code for children, and the Criminal Code for adults—gave rise to the very same test for voluntariness. Indeed, if law enforcement officers could use the same tactics they use against adult suspects when they wish to coax waivers of rights from children, then the protections of the Family Code would quickly come to mean very little.

This is because children are not lawyers. Here, Holland's unmistakable message to Ochoa was that remaining silent would be punished and confessing would earn Ochoa help. Even assuming for the sake of argument that a reviewing court (comprised of lawyers) would conclude that this message was not *technically* a positive promise, it was likely to, and did, trick a child into believing that confessing was the only way to avoid prison. This trick was particularly likely to work not only due to Ochoa's age, but also due to the magistrate's failure to inform Ochoa's that his statements could be used *against* him. SX2 at 8:04:45. Those facts—a child's susceptibility to near-promises, and the magistrate's failure to mention the heart of the *Miranda*<sup>2</sup> warning—are relevant to the application of section 51.095, regardless of whether they fit neatly into the existing positive-promise test.

Thus, the positive-promise standard should not be lifted wholesale from the Criminal Code and applied to children protected by the Family Code. At a minimum, section 51.095 requires viewing voluntariness from the standpoint of a child. It also requires considering the constitutional principles discussed below.

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<sup>2</sup> See *Miranda v. Arizona*, 384 US 436 (1966).

## **II. Ochoa's confession is inadmissible under the U.S. and Texas Constitutions.**

Both the U.S. and Texas Constitutions mandate that a juvenile's statement must have been "voluntary" to be admissible. *Lopez v. State*, 610 S.W.3d 487, 494 (Tex. Crim. App. 2020). This requirement arises from the due process protections of the Fifth and Fourteenth Amendments, the Fifth Amendment privilege against self-incrimination, and article I, section 10 of the Texas Constitution. *See Dickerson v. United States*, 530 U.S. 428, 433 (2000); *Chapman v. State*, 115 S.W.3d 1, 5–6 (Tex. Crim. App. 2003). As discussed below, the constitutional standard looks to the totality of the circumstances, including but not limited to whether "a confession [was] given as the result of a direct *or implied* promise." *Horn v. Quarterman*, 508 F.3d 306, 326 (5th Cir. 2007) (emphasis added). Under this flexible standard, Ochoa's confession is inadmissible under both the U.S. and Texas Constitutions.

### **A. The U.S. Constitution prohibits the admission of statements arising from implied promises to juveniles.**

The U.S. Constitution prohibits the admission of statements resulting from "intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *United States v. Cardenas*, 410 F.3d 287, 293 (5th Cir. 2005). This "voluntariness determination is made on a case-by-

case basis and is viewed under the totality of the circumstances surrounding the interrogation.” *Cardenas*, 410 F.3d at 293; *see Haynes v. Washington*, 373 U.S. 503 (1963); Wayne R. LaFave et al., 2 *Criminal Procedure* § 6.2(c) (4th ed. 2023). Relevant circumstances include whether law enforcement deployed coercion, deception, or promises, plus the defendant’s maturity, age, and mental health. *Cf.* Wayne R. LaFave et al., 2 *Criminal Procedure* § 6.2(c) (4th ed. 2023). Three aspects of this totality-of-the-circumstances test warrant emphasis here.

First, constitutional law takes into account *implied* promises that would not qualify as “positive promises” under this Court’s statutory case law. Although the constitutional test considers the totality of the circumstances, and thus the presence or absence of a law enforcement promise is never the sole consideration, *see Arizona v. Fulminante*, 499 U.S. 279, 285–86 (1991), the case law is clear that even an “implied promise” can contribute to a conclusion that the suspect’s statement was “legally involuntary.” *Horn*, 508 F.3d at 326 (5th Cir. 2007); *see e.g., United States v. Monteer*, 83 F.4th 1119, 1123 (8th Cir. 2023) (“[A] statement is involuntary when it was extracted by . . . express or implied promises.”); *United States v. Restrepo*, 994 F.2d 173, 184 (5th Cir. 1993)



(“Promises *or inducements* can taint the voluntariness of a confession.”) (emphasis added).

Second, and again contrary to the positive-promise standard, constitutional law does not require proof of tactics that “would likely cause a person to speak untruthfully.” *Garcia*, 919 S.W.2d at 388. The Fifth Amendment to the U.S. Constitution protects against compelling anyone “to be a witness against himself,” which means it prohibits not only law enforcement tactics that would compel *false* self-incrimination but also tactics that would compel *truthful* self-incrimination. *See, e.g., New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (“The Fifth and Fourteenth Amendments provide a privilege against *compelled* self-incrimination, not merely against unreliable self-incrimination.”).

Third, constitutional law requires considering the suspect’s age. The U.S. Supreme Court has cautioned that “the greatest care must be taken to assure that” a juvenile’s statement “was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.” *In re Gault*, 387 U.S. 1, 55 (1967). Thus, courts have a “duty” to scrutinize child confessions “with special care.” *Rone v. Wyrick*, 764 F.2d 532, 534–

35 (8th Cir. 1985) (citing *Haley v. Ohio*, 332 U.S. 596, 599 (1948)); *see also* *Edmonds v. Oktibbeha Cnty.*, 675 F.3d 911, 915 (5th Cir. 2012) (“Police must take special care to ensure the voluntariness of a minor suspect’s confession,” particularly if counsel was not present); *cf.* *J.D.B. v. North Carolina*, 564 U.S. 261, 273–75 (2011) (courts must consider a suspect’s age when deciding if they are in custody for *Miranda* purposes).

The reason for this special care is that children are highly susceptible to coercion and manipulation at the hands of law enforcement. Children, particularly those under the age of 16, are significantly more likely to falsely confess than adults are.<sup>3</sup> Children are significantly overrepresented in identified false confession cases. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004). In one study of 340 exonerations, researchers found that only 13% of the exonerated adults had falsely

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<sup>3</sup> See Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Human Behav. 141 (2003); Jodi L. Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 L. & Human Behav. 253 (2005); Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 L. & Psych. Rev. 53, 54–61 (2007) (collecting literature); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Human Behav. 3, 19–20 (2010) (detailing decades of research evidencing “that juveniles are at risk for involuntary and false confessions in the interrogation room”).

confessed, compared to 42% of exonerated juveniles and 69% of exonerated juveniles between ages 12 and 15. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2005). And children are also less likely to competently understand their *Miranda* rights. Allison D. Redlich et al., *Pre-Adjudicative and Adjudicative Competence in Juveniles and Young Adults*, 21 Behav. Sci. L. 393 (2003); Scott-Hayward, *supra* at 62–66.

**B. The Texas Constitution may offer broader protection than the U.S. Constitution.**

Because the Texas Constitution “has independent vitality,” both this Court and the Texas Supreme Court have “decline[d] to limit the liberties of Texans to those found in the Federal Constitution.” *Davenport v. Garcia*, 834 S.W.2d 4, 11–12 (Tex. 1992); *see id.* at 14 (discussing this Court’s reliance on the state constitution independent of the federal constitution). The Texas Constitution is particularly ripe for independent analysis, as it was “one of the few state constitutions that were derived from its own independent, national constitution.” *Id.* at 15 (citing M.P. Duncan III, *Terminating the Guardianship: A New Role for State Courts*, 19 St. Mary’s L.J. 809, 839 (1988)).

Consistent with those principles, this Court has held that article I, section 10, may sometimes “be more protective than the Fifth Amendment.” *Thomas v. State*, 723 S.W.2d 696, 702 (Tex. Crim. App. 1986) (en banc). In a particular case, whether section 10 is broader than the Fifth Amendment may depend on “an independent examination of the history, policy, and precedent surrounding relevant state law.” *Id.* But this Court has made clear that section 10, which grants individuals the right to “not be compelled to give evidence against himself,” is a fundamental liberty of Texans. In 1930, the Court noted that section 10 “is not a cluster of high-sounding words,” but “a demand of the common people so universal and imperative that it crystalized into a rule of law.” *Hoobler v. State*, 24 S.W.2d 413, 415 (Tex. App. 1930). The right is “a measure of protection for the weak and helpless,” and “this [C]ourt will not tolerate a violation of this rule.” *Id.*

For example, while this Court has held that section 10 prohibits the State from using the defendant’s post-arrest, pre-*Miranda* silence to impeach the defendant, *Sanchez v. State*, 707 S.W.2d 575, 580 (Tex. Crim. App. 1986), the U.S. Supreme Court has not reached that conclusion about the Fifth Amendment. *See Fletcher v. Weir*, 455 U.S. 603 (1982).

Similarly, in the context of statements by children, section 10 also could be construed to provide protections going beyond the floor set by the U.S. Constitution.

**C. Ochoa's confession was involuntary under both the U.S. and Texas Constitutions.**

Taking into account the totality of the circumstances, Ochoa's confession was involuntary under the federal and Texas Constitutions.

Most important, Ochoa's confession was induced by Holland's implicit and explicit promises. For over an hour, fourteen-year-old Ochoa was told that things would be okay if he confessed, that he needed to admit his mistake so he could "get on with his life." *See supra* pages 13–21. He was told that he had his "whole life ahead" of him, SX2 at 6:35:15, and repeatedly assured that if he confessed he would receive help, whereas if he kept silent things would be worse for him. *See, e.g., id.* at 6:20:57, 6:33:00, 6:35:10, 8:18:13, 8:28:05. And he was told, by a Texas Ranger, that if he confessed he could expect to be treated as a juvenile, which would mean "not going to prison." *Id.* at 8:18:13. These coercive promises weigh heavily towards a finding of involuntariness.

Ochoa's age exacerbated Holland's coercion. Ochoa was in the seventh grade. Holland's pressure, tactics, and assurances would have

been significant for an adult suspect, let alone a middle schooler. As the Supreme Court of the United States has explained, children like Ochoa are the “most susceptible to influence” and “outside pressures.” *J.D.B.*, 564 U.S. at 275 (citations omitted). Children like Ochoa may also be unable to parse statements by law enforcement officers for the subtle differences between a “positive promise” and something that an officer intended to *sound like a promise*. But case law on voluntariness should not encourage police officers to play word games against children.

Thus, even if the Court of Appeals had been right to conclude that Holland’s statements “did not constitute a positive promise,” what matters under the totality-of-the-circumstances test is that the Court of Appeals had “some concerns about Holland’s telling Ochoa that there was no reason why he could not be adjudicated as a juvenile.” *Ochoa*, 675 S.W.3d at 811. This Court should, too.

These problems were further exacerbated by the magistrate’s failure to ensure that Ochoa understood his rights. As noted above, the magistrate simply did not tell Ochoa that a confession could be used *against* him. Although the magistrate indicated that his statements could perhaps “be used as evidence,” that vague statement gave Ochoa

no reason to doubt Holland's representation that a confession would be used *to get him help*. SX2 at 8:04:45. The magistrate also suggested that Ochoa's right to an attorney would not become relevant until Ochoa was charged with a crime. *Id.* at 8:05:29. Together with Holland's interrogation and Ochoa's age, the magistrate's statements left Ochoa with no one to disabuse him of the belief that confessing would secure help rather than punishment.

But there is more. The interrogation lasted almost three hours. Ranger Holland appeared unwilling to accept Ochoa's silence; when Ochoa looked away or withdrew physically, Holland leaned in, placed his hands on him, pulled Ochoa's hoodie down, and repeatedly told Ochoa to "look at" him. Lastly, Ochoa was clearly exhausted, as he fell asleep in the interrogation room while waiting for the magistration. Considering the totality of the circumstances, Ochoa's confession was involuntary.

## **CONCLUSION**

For the reasons stated above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of this Amicus Brief has been served on counsel of record via e-service on April 10, 2024.

*s/Adriana Pinon*  
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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 9.4(i)(3), the undersigned counsel certifies that the total number of words in this Amicus Brief, exclusive of matters designated for omission, is 6,422 words as counted by Microsoft Word Software.

*s/Adriana Pinon*  
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