**No. 19-_____**

IN THE

# Supreme Court of the United States

**JUSTO SANTOS,**
***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**
***Respondent*.**

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

**MICHAEL CARUSO**
***Federal Public Defender***
**ANSHU BUDHRANI**
***Assistant Federal Public Defender***
***Counsel of Record***
**150 West Flagler Street**
**Suite 1700**
**Miami, FL 33130**
**305-530-7000**

***Counsel for Petitioner***

## QUESTION PRESENTED

The lower court in this case admitted into evidence an immigration officer's handwritten notes and checkmarks on a naturalization application, made during a naturalization interview where Petitioner was placed under oath and directed to sign the application under penalty of perjury, and where his alleged oral misstatements were then used as the basis of a criminal prosecution against him.

The question presented is whether those handwritten notes and checkmarks are "testimonial," rendering the immigration officer a "witness" subject to Petitioner's right of confrontation under the Sixth Amendment.

## PARTIES TO THE PROCEEDINGS

The case caption contains the names of all parties to the proceedings.

## RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

- *United States v. Santos*, No. 1:15-cr-20865-JAL (S.D. Fla.) (Judgment entered Oct. 31, 2016), *granted, vacated, and remanded*, *United States v. Santos*, No. 16-16858 (11th Cir. Aug. 17, 2017) (unpublished).
- *United States v. Santos*, No. 1:15-cr-20865-KMM (S.D. Fla.) (Judgment entered Oct. 26, 2018), *aff'd*, *United States v. Santos*, No. 18-14529 (11th Cir. Jan. 9, 2020) (published).

## TABLE OF CONTENTS

## TABLE OF APPENDICES

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**



**Constitutional Provisions**

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

---

No: 19-_____

JUSTO SANTOS,
*Petitioner*

v.

UNITED STATES OF AMERICA,
*Respondent*.

---

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

---

**PETITION FOR A WRIT OF CERTIORARI**

---

Justo Santos ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

**OPINION BELOW**

The Eleventh Circuit's opinion is reported at 947 F.3d 711, and is included in the Appendix at App. A.

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Eleventh Circuit entered judgment on January 9, 2020. Then, due to the ongoing public health concerns relating to COVID-19, the Court ordered that the deadline to file a petition for a writ of certiorari be extended to 150 days from the date of the lower court judgment, making it due on or before June 8, 2020. Thus, the petition is timely filed.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**U.S. Const. amend. VI**

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

**18 U.S.C. § 1425**

> (a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship . . . Shall be fined under this title or imprisoned not more than 25 years

**18 U.S.C. § 1423**

> Whoever knowingly uses for any purpose any order, certificate, certificate of naturalization, certificate of citizenship, judgment, decree, or exemplification, unlawfully issued or made, or copies or duplicates thereof, showing any person to be naturalized or admitted to be a citizen, shall be fined under this title or imprisoned not more than five years, or both.

## INTRODUCTION

The Confrontation Clause guarantees criminal defendants the right to be confronted with the "witnesses" against them—"in other words, those who bear testimony." *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (internal quotation marks omitted). And these testimonial statements can take many forms, including, but not limited to, "*ex parte* in-court testimony or its functional equivalent," "extrajudicial statements . . . contained in formalized testimonial materials," or "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51–52. "These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it." *Id.* at 52. That is, they exemplify a few, but not all, of the ways statements may trigger the protections of the Confrontation Clause—the right to confront one's accuser face-to-face.

In cases following *Crawford*, this Court has delved deeper into the various "core class[es]" of testimonial statements outlined in *Crawford*. For example, in *Davis v. Washington*, 547 U.S. 813 (2006), the Court explored the contours of a specific class of testimonial statement outlined in *Crawford*—statements taken by police officers in the course of an interrogation. Confusion had arisen regarding interactions with law enforcement—specifically, statements made to law enforcement personnel during a 911 call or at a crime scene—and the Court granted certiorari to clarify when a statement made during the course of a police interrogation is testimonial. It was

in this unique context of statements made during police interrogations that the primary purpose test was born. *Davis*, 547 U.S. at 822.

Since this Court issued its narrow opinion in *Davis*, parsing the details of one very specific class of testimonial statements, however, confusion among the lower courts has ensued. Today, the lower courts, including the Eleventh Circuit, broadly apply the primary purpose test as the gatekeeper to the Confrontation Clause in all cases, even those outside of the police interrogation context. In so doing, the lower courts have diverged from faithfully applying this Court's precedents, and instead wield the primary purpose test as a sword against a criminal defendant's Sixth Amendment right to confront the witnesses against him.

This Court's immediate action is necessary to correct this grievous wrong, especially given the number of criminal prosecutions that germinate from civil actions outside of the police interrogation context. *Crawford* recognized a broad, nonexhaustive "core class" of testimonial statements that trigger the protections of the Confrontation Clause—including "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52. But that class and others have been diminished by the lower court's incorrect interpretation and application of the primary purpose test, which itself is an analytical tool developed to parse between statements made to law enforcement, just one of the many "core class[es]" of testimonial statements identified in *Crawford*.

## STATEMENT OF THE CASE

On May 24, 2016, a federal grand jury sitting in the Southern District of Florida returned a two-count superseding indictment against Petitioner, charging him with procuring citizenship or naturalization unlawfully, in violation of 18 U.S.C. § 1425(a) (Count 1), and misusing evidence of citizenship or naturalization, in violation of 18 U.S.C. § 1423 (Count 2). More specifically, the government alleged that Petitioner failed to disclose in his application for naturalization filed on July 26, 2007, and in a subsequent January 26, 2009 interview with immigration authorities, that he had been arrested, convicted, and incarcerated in the Dominican Republic. And that, thereafter, on March 7, 2009, after he became a naturalized citizen, he used his certificate of naturalization to obtain a United States passport.

Petitioner proceeded to trial for the first time in July 2016. The trial lasted five days, and Petitioner was found guilty on both counts of the superseding indictment. He was sentenced to fifteen months' imprisonment to be followed by a two-year term of supervised release. Additionally, his citizenship was revoked, set aside, and declared void, and his certificate of naturalization cancelled. Petitioner appealed his conviction, and while the appeal was pending before the Eleventh Circuit, this Court issued its opinion in *Maslenjak v. United States*, 137 S. Ct. 1918 (2017), prompting both Petitioner and the government to file a joint motion for summary reversal. The Eleventh Circuit granted the parties' motion for summary reversal, vacated the order revoking Petitioner's citizenship, and remanded the case for further proceedings.

Petitioner proceeded to trial for the second time on September 17, 2018. At trial, the government introduced into evidence, over Petitioner's Confrontation Clause and hearsay objections, Petitioner's completed N-400 Application for Naturalization ("N-400 Application"), inclusive of the handwritten notes and checkmarks made in red ink by United States Citizenship and Immigration Services ("USCIS") Officer Lucas Barrios during his interview of Petitioner.

Lucas Barrios interviewed Petitioner on January 26, 2009. (App. A at 2a.) During that interview, Officer Barrios annotated in red ink Petitioner's N-400 Application with handwritten checkmarks and comments. (App. A at 2a.) Officer Barrios checked in red ink each of Petitioner's answers regarding his criminal history and wrote "claims no arrest[,] no offense[,] no DUI." (App. B at 28a.) Officer Barrios also checked in red ink Petitioner's answers regarding his history of trips outside the United States and wrote "claims no others." (App. B at 24a.) Petitioner signed his N-400 Application "under penalty of perjury" twice: first on July 26, 2007 when he filed the N-400 Application, and then again, allegedly after his interview. (App. B at 30a.) The N-400 Application was also signed by Lucas Barrios. (App. B at 30a.)

Officer Barrios did not testify at the trial. (App. A at 4a.) Instead, the government introduced his handwritten notes and checkmarks on Petitioner's N-400 Application through the testimony of USCIS Officer Natalie Diaz, a lay witness and records custodian. (App. A at 4a.) Officer Diaz testified generally about the process by which USCIS adjudications officers approve or deny naturalization applications, which included an explanation of the naturalization interview process. (App. A at

4a.) Typically, during the interview, the adjudications officer places the applicant under oath and reviews the N-400 Application answers with the applicant, marking in red ink the answers the officer confirms and any changes or corrections made. (App. A at 4a.) Adjudications officers are required by USCIS policy to use checkmarks when they confirm answers and, at the end of the interview, they must have the applicant sign the N-400 Application a second time, agreeing to the changes made, under penalty of perjury. (App. A at 4a.) Providing false testimony under oath during the interview is a ground for an applicant's ineligibility to naturalize, regardless of whether the lie is about something material to obtaining naturalization. (App. A at 4a.)

Of note, Officer Diaz conceded that she did not personally adjudicate Petitioner's N-400 Application, nor was she in the room for his interview. Therefore, she did not know: (1) how long the interview took; (2) what questions Officer Barrios, the adjudicator, asked; (3) what Petitioner asked for help in understanding; (4) how Officer Barrios explained the process to Petitioner; (5) how Petitioner responded to Officer Barrios's explanations; (6) what documents Petitioner brought with him to the interview; (7) what documents Petitioner showed to Officer Barrios; and (8) what questions were specifically asked with regard to those documents. (Dist. Ct. Dkt. No. 251 at 183–85, 192–93.) Most importantly, Officer Diaz did not know whether Officer Barrios fully followed USCIS policies and procedures. (Dist. Ct. Dkt. No. 251 at 193.) She could not say for sure when Petitioner signed the application, nor the order in which the interview proceeded. (App. A at 5a.) She conceded that Officer Barrios

could have placed his markings on the application without having asked any questions at all. (Dist. Ct. Dkt. No. 251 at 193.)

After a multi-day trial, Petitioner was found guilty of both counts of the indictment. He was sentenced on October 26, 2018 to a term of imprisonment of time-served, to be followed by two years of supervised release. The district court also entered an order revoking, setting aside, and declaring void Petitioner's citizenship, cancelling his certificate of naturalization, and ordering him to surrender and deliver the certificate of naturalization to the government.

Petitioner timely appealed both his conviction and the court's order revoking, setting aside, and declaring void his citizenship and cancelling his certificate of naturalization. On appeal before the Eleventh Circuit, Petitioner argued that his Sixth Amendment right to confront the witnesses against him was violated when his N-400 Application inclusive of Officer Barrios's handwritten notes and checkmarks was introduced into evidence and read to the jury through the testimony of Officer Diaz, who did not make the notes and checkmarks, and who was not present at his interview when the markings were made.

More specifically, Petitioner argued that the handwritten notes and checkmarks were testimonial because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." (Pet'r C.A. Br. 33 (quotation marks omitted).) The practice of placing an applicant under oath prior to the start of the interview, recording the applicant's responses on the N-400 Application, and then having the

applicant "swear (affirm) and certify under penalty of perjury" that his answers are "true and correct" opens the applicant up to a number of criminal consequences—including prosecution for naturalization fraud and making a false statement under oath—for which the sole evidence of the crime derives from the adjudicator's handwritten notes and checkmarks. (Pet'r C.A. Br. 33–34.)

The Eleventh Circuit heard oral argument in the case before issuing a published opinion affirming the conviction and the order revoking, setting aside, and declaring void Petitioner's citizenship, and cancelling his certificate of naturalization. The Eleventh Circuit first noted that that the "annotated Form N-400 Application . . . is a nontestimonial public record produced as a matter of administrative routine and for the primary purpose of determining [Petitioner's] eligibility for naturalization." (App. A at 10a (quotation marks omitted).) Additionally, per *Davis*, because the "primary purpose" of the interview is to "review the Form N-400 with the applicant and verify the applicant's answers so that a determination can be made as to the applicant's eligibility for naturalization," and the markings are not made for later criminal prosecution, the annotations are not testimonial and therefore admissible without violating the Confrontation Clause. (App. A at 10a–11a.) The Eleventh Circuit also noted, in a footnote, that "even assuming arguendo that Officer Barrios's red marks (making corrections based on [Petitioner's] responses) were testimonial, [Petitioner] adopted them as true and correct, which eliminates any Confrontation Clause problem." (App. A at 15a.)

## REASONS FOR GRANTING THE PETITION

### I. The Eleventh Circuit's Application of the Primary Purpose Test As A Condition Precedent To The Confrontation Clause's Protections Improperly Narrows The Confrontation Clause's Reach

The Confrontation Clause gives force to "the Framers' preference for face-to-face accusation," *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated on other grounds*, *Crawford v. Washington*, 541 U.S. 36 (2004), so that the accused "has an opportunity, not only of testing the recollection and sifting the conscience of the witness," but of also "compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief," *Mattox v. United States*, 156 U.S. 237, 242–43 (1895). The importance of cross-examining a witness on the stand, in the presence of the jury, cannot be overstated. But, the ability to so do turns on whether the statements sought to be admitted are "testimonial;" a definition that has eluded many judges and jurists alike.

#### *A. Under Supreme Court Jurisprudence, the Primary Purpose Analysis is Not a Condition Precedent to Every Application of the Confrontation Clause*

In *Crawford*, this Court explored the "core class of 'testimonial' statements" covered by the Confrontation Clause, but "le[ft] for another day" the spelling out of a "comprehensive definition of 'testimonial.'" 541 U.S. at 51, 70. Included in this "core class" of testimonial statements were: (1) "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial

statements that declarants would reasonably expect to be used prosecutorially"; (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51–52. The Court then noted that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68.

The Court next discussed the Confrontation Clause and the meaning of "testimonial" in *Davis v. Washington*, which specifically addressed "when statements made to law enforcement personnel during a 911 call or at a crime scene are 'testimonial' and thus subject to the requirements of the Sixth Amendment's Confrontation Clause." 547 U.S. 813, 817 (2006). Importantly, the Court acknowledged the various formulations of the core class of testimonial statements set forth in *Crawford*, but again "found it unnecessary to endorse any of them because some statements qualify under any definition." *Davis*, 547 U.S. at 822. Among those, the Court focused on "statements taken by police officers in the course of interrogations," and set about "determin[ing] more precisely which police interrogations produce testimony." *Id.*

It is against this backdrop that the primary purpose test was born; to parse between the various circumstances involving police interrogation. Ultimately, the Court held that statements "when made in the course of police interrogation under

circumstances objectively indicating that the *primary purpose of the interrogation* is to enable police assistance to meet an ongoing emergency" are nontestimonial, whereas statements made in "circumstances objectively indicat[ing] that there is no such ongoing emergency, and that the *primary purpose of the interrogation* is to establish or prove past events potentially relevant to later criminal prosecutions" are testimonial. *Id.* (emphasis added). The Court specifically noted that the rule it adopted was specific to the "narrow situations" addressed: "We have acknowledged that our holding is not an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation . . . but rather a resolution of the cases before us and those like them. For *those* cases, the test is objective and quite workable." *Id.* at 830 n.5 (internal quotation marks and citations omitted) (emphasis in original).

The Court further refined the primary purpose test in *Michigan v. Bryant*, 562 U.S. 344 (2011)—again, within the realm of police interrogations. The Court considered whether a dying victim's statements to police officers regarding the circumstances surrounding his shooting were testimonial, and held that they were not, because "the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency." *Bryant*, 562 U.S. at 349 (quotation marks omitted). In so holding, the Court specifically noted that it was "provid[ing] additional clarification with regard to what *Davis* meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'" *Id.* at 359 (citing *Davis*, 547 U.S. at 822). The goal is to "[o]bjectively ascertain[ ] the

*primary purpose of the interrogation*" as a whole in determining whether the statements made to police are testimonial. *Id.* at 370 (emphasis added). After all, as the late Justice Scalia noted, "[i]n *Davis*, [the Court] explained how to identify testimonial hearsay *prompted by police questioning in the field*." *Id.* at 380 (Scalia, J., dissenting) (emphasis added).

In line with its narrow holding in *Davis*, and in light of the broader "core class" of testimonial statements outlined in *Crawford*, this Court has looked beyond the primary purpose test when considering statements made outside of the police interrogation context. In *Melendez-Diaz v. Massachusetts*, the Court held that forensic analysts' affidavits are testimonial statements, and the analysts "witnesses" for purposes of the Sixth Amendment, because affidavits clearly "fall within the core class of testimonial statements" described in *Crawford*. 557 U.S. 305, 310–11 (2009) (quotation marks omitted). The Court also noted that, "moreover, . . . the affidavits [were] 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* at 311 (citing *Crawford*, 541 U.S. at 52). That is, in line with *Crawford*, the Court first considered the multiple types of testimonial statements that form the "core class" before determining that forensic analysts' affidavits are testimonial for purposes of the Confrontation Clause. The Court did not consider itself bound by the primary purpose test in determining whether the affidavits were testimonial.

Similarly, in *Bullcoming v. New Mexico*, the Court considered whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory

report containing a testimonial certification through the in-court testimony of a scientist who did not sign the certification or perform the test, and a plurality held that "surrogate testimony of that order does not meet the constitutional requirement." 564 U.S. 647, 652 (2011). In so holding, the plurality relied upon *Melendez-Diaz*, finding that the report "fell within the core class of testimonial statements described in th[e] Court's leading Confrontation Clause decision." *Bullcoming*, 564 U.S. at 665. Justice Ginsburg noted, in footnote 6, that "[t]o rank as 'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution,'" *id.* at 659 n.6 (citing *Davis* and *Bryant*), but her application of the primary purpose test was not the mode of analysis adopted by the Court's majority. It was specifically rejected by Justice Thomas.

In fact, in *Williams v. Illinois*, 567 U.S. 50 (2012), both Justices Thomas and Kagan decried reliance on the primary purpose test as a means of limiting the protections afforded by the Confrontation Clause. Justice Thomas recognized that often, statements have multiple purposes, and "[t]he primary purpose test gives courts no principled way to assign primacy to one of those purposes." *Williams*, 567 U.S. at 114 (Thomas, J., concurring in the judgment). He also rang the alarm in response to "the reformulated version" of the primary purpose test announced by the plurality, which "asks whether an out-of-court statement has the primary purpose of accusing a targeted individual engaging in criminal conduct." *Id.* (quotation marks omitted). In that same vein, Justice Kagan noted the origins of the plurality's

primary purpose test "derive[ ] neither from the text nor from the history of the Confrontation Clause . . . . And it has no basis in [the Court's] precedents." *Id.* at 135 (Kagan, J., dissenting).

Thereafter, in *Ohio v. Clark*, 576 U.S. 237, 135 S. Ct. 2173 (2015), the Court once again waded into the issues surrounding whether a statement is testimonial, and reaffirmed that the "primary purpose test" was born out of the police interrogation context to help determine when statements to the police are testimonial. *Clark*, 135 S. Ct. at 2179–80. The test has been continuously expounded upon, but always within the realm of interrogations. *See id.* at 2180 (noting that in *Bryant*, the Court "further expounded on the primary purpose test" to "consider all of the relevant circumstances" of an interrogation). So, although the Court did note that "a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial," *id.*, it did so against the backdrop of its own jurisprudence explaining the purpose of the primary purpose test and its limited applicability to interrogation-like circumstances.

The late Justice Scalia's concurrence clarifies the purpose of the primary purpose test, as well as the importance of the constitutional protection at stake. Justice Scalia took aim at the notion that the primary purpose test is a "condition[ ] ('necessary, but not always sufficient') that must be satisfied before the [Confrontation] Clause's protections apply," noting that such a conclusion "has no support in [the Court's] opinions." *Id.* at 2184–85 (Scalia, J., concurring). Importantly:

> The Confrontation Clause categorically entitles a defendant *to be confronted with the witnesses against him*; and the primary-purpose test sorts out, among the many people who interact with the police informally, *who is acting as a witness and who is not*. Those who fall into the former category bear testimony, and are therefore acting as "witnesses," subject to the right of confrontation. There are no other mysterious requirements that the Court declines to name.

*Id.* at 2185 (emphasis in original). That is, the primary purpose test is *not* a condition precedent for the protections of the Confrontation Clause to take effect.

### *B. The Eleventh Circuit Incorrectly Applied the Primary Purpose Test as a Condition That Must be Satisfied Before the Confrontation Clause's Protections Apply, in Direct Contravention of This Court's Precedent*

The Eleventh Circuit's application of the primary purpose test as the gatekeeper of all relief under the Confrontation Clause mistakenly allowed testimonial statements that formed the basis of a criminal prosecution against Petitioner to be used as evidence against him, stripping him of his citizenship and his constitutional right to confront the witnesses against him. The Eleventh Circuit's distortion of the Confrontation Clause's reach finds no support in the text of the clause, nor in this Court's precedent.

Here, Petitioner objected to the admission of his N-400 Application inclusive of USCIS Officer Barrios's handwritten notes and checkmarks through the testimony of USCIS Officer Diaz, who did not make the notes or checkmarks and could not speak to the particular circumstances of their making. In so objecting, Petitioner relied upon the Confrontation Clause because Officer Barrios's handwritten notes and checkmarks were testimonial—they "were made under circumstances which would

lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial," *Crawford*, 541 U.S. at 51–52—and were, in fact, heavily relied upon at trial. In fact, it is undisputed that Officer Barrios's handwritten notes and checkmarks in Petitioner's N-400 Application formed the basis of the criminal charges brought against him—they were proof, the government alleged, that Petitioner provided false oral testimony, rendering him ineligible to naturalize, and thus guilty of naturalization fraud.

But the lower courts disagreed, mistakenly relying upon the primary purpose test to deny Petitioner his constitutional right to confront the witness against him. The Eleventh Circuit correctly recognized the "core class" of testimonial statements listed in *Crawford*, but then incorrectly wielded the admittedly narrow primary purpose test announced in *Davis* to withhold relief. (App. A at 10a–11a.) That is, per the Eleventh Circuit, "the circumstances of the naturalization interview objectively indicate that the primary purpose of the interview is to review the Form N-400 with the applicant and verify the applicant's answers so that a determination can be made as to the applicant's eligibility for naturalization . . . . USCIS officers are not conducting the interviews because they suspect the applicants of crimes and are not making the red marks on the Form N-400's for later criminal prosecution." (App. A at 10a.)

In so holding, however, the Eleventh Circuit ignored this Court's precedents, and fell into the trap of which Justice Thomas warned—expansive application of the primary purpose test even though statements can have multiple purposes, and courts

are ill-equipped "to assign primacy to one of those purposes." *Williams*, 567 U.S. at 114 (Thomas, J., concurring in the judgment). The Eleventh Circuit also completely ignored the other members of the "core class" of testimonial statements outlined in *Crawford*, which includes "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51–52. By narrowing the reach of the Confrontation Clause, the Eleventh Circuit denied Petitioner the ability to confront a witness—Officer Barrios—who bore testimony against him. In so doing, Petitioner was effectively denied the chance to confront the witness who supplied a foundational piece of evidence in his conviction.

## II. The Question Presented Is Recurring And Important

The use of the primary purpose test as a screening tool antecedent to the Confrontation Clause's application in every case dilutes the crucibles of adversarial testing and cross-examination upon which our criminal justice system depends. And, it negates the Constitution's promise to every person accused of a crime that he will be able to confront his accusers face-to-face in court.

The last time the Court substantively addressed the Confrontation Clause outside of the police interrogation context was in 2012—almost eight years ago—in *Williams*, itself a fraught and confusing decision. *See Stuart v. Alabama*, 139 S. Ct. 36 (Mem.) (2018) (Gorsuch, J., dissenting) ("This Court's most recent foray in this field, *Williams* . . . yielded no majority and its various opinions have sown confusion in courts across the country."). And this Court has yet to address application of the

Confrontation Clause to prosecutions based upon, or initiated by, multifunction agencies that partake in both civil and criminal enforcement duties (*e.g.*, USCIS, Customs and Border Patrol, Securities and Exchange Commission, Environmental Protection Agency, Drug Enforcement Agency, Transportation Security Administration, Food and Drug Administration).

Confusion over what is testimonial will only grow, especially as criminal prosecutions continue to germinate from encounters the "primary purpose" of which was not to obtain evidence for a criminal prosecution. That is especially true in the immigration context, where the Department of Justice has created an entire section committed to denaturalization cases, *see* Press Release, The Department of Justice Creates Section Dedicated to Denaturalization Cases (Feb. 26, 2020), available at https://www.justice.gov/opa/pr/department-justice-creates-section-dedicated-denaturalization-cases, and continues to criminally charge undocumented immigrants with the crimes of illegal entry and reentry, *see, e.g.*, Mem. from U.S. Att'y Gen. Jeff Sessions, U.S. Dep't of Justice, to All Fed. Prosecutors (Apr. 11, 2017), available at https://www.justice.gov/usao/page/file/986131/download, both based upon proof primarily gathered in the civil immigration context for the enforcement of civil immigration laws.

Between 1990 and 2017, the Department of Justice filed a total of 305 denaturalization cases, and since January 2017, USCIS has identified approximately 2,500 cases to be examined for possible denaturalization. *See* Nat'l Immigration Forum, Fact Sheet on Denaturalization (Oct. 2, 2018), available at

https://immigrationforum.org/article/fact-sheet-on-denaturalization/. Additionally, as of the end of August 2018, USCIS has referred at least 110 denaturalization cases to the Department of Justice for prosecution. *Id.* In these cases, it is increasingly more difficult for immigration officers to claim ignorance of the fact that their statements and observations may be used at a later criminal trial. And though the statistics out of the immigration realm are staggering, the issue will inevitably arise in large numbers in other non-immigration contexts as well, given the expansive administrative state.

The question presented is thus one of great public importance with far reaching implications that warrants review by this Court.

## III. This Is An Ideal Vehicle

This case presents the perfect opportunity for the Court to lend clarity to its Confrontation Clause jurisprudence, especially concerning when a statement is testimonial outside of the interrogation context. Procedurally, the Confrontation Clause question is squarely presented here. And factually, this case is ideal because the lower court's erroneous application of the primary purpose test to obstruct access to the Confrontation Clause resulted in constitutional error that merits reversal.

Both in the district court and on appeal, Petitioner objected to the admission of Officer Barrios's handwritten notes and checkmarks on Petitioner's N-400 Application. Petitioner specifically objected to the Application's admission on Confrontation Clause grounds at trial, which the district court overruled. (Dist. Ct. Dkt. No. 251 at 125, 128.) Petitioner then raised the objection again on appeal, both

in his briefing and during oral argument. The Eleventh Circuit brushed off Petitioner's Confrontation Clause concerns, finding itself erroneously bound by the primary purpose test announced in *Davis*. (App. A at 9a–11a.) Though the Eleventh Circuit correctly situated the primary purpose test within its intended narrow circumstance—police interrogations—the court broadly applied it to deny Petitioner's Sixth Amendment challenge. In support, the court cited to precedents—both from within the Eleventh Circuit and from sister circuits—that incorrectly applied the primary purpose test to deny defendants the protections afforded by the Confrontation Clause. (App. A at 10a.)

Factually, too, this case is an ideal vehicle because of the significance of the erroneously admitted handwritten notes and checkmarks. Officer Barrios's checkmarks and handwritten notes were used to demonstrate that Petitioner had provided false oral testimony under oath, and therefore would have been denied naturalization because he lacked "good moral character." And, as admitted, the evidence was unimpeachable because the government did not call Officer Barrios to testify at trial. Instead, they relied upon the testimony of Officer Diaz, who was not in the interview room when Petitioner was interviewed and had no personal knowledge of how long the interview took, what questions Officer Barrios asked, how well Officer Barrios explained the questions to Petitioner, how Petitioner responded to the questions asked, and most importantly, whether Officer Barrios followed USCIS policies and procedures.

The benefit to the government of admitting Officer Barrios's essentially unimpeachable testimony was made crystal clear during the government's closing argument: "Take a look at the application, ladies and gentleman. This is Adjudicator Lucas Barrios. He followed the policy. He had the right stamps. He had the right notations. He had the right numbers. And most importantly, the defendant, himself, signed at the end of the process saying yes, everything in here is true including claims no arrest, no offense on criminal history." (Dist. Ct. Dkt. No. 252 at 199.) The government was able to bolster its case by relying upon Officer Barrios's credibility without actually having to expose him to the rigors of cross-examination. Officer Barrios's handwritten notes and checkmarks were used to form the basis of a criminal prosecution against Petitioner—to prove facts necessary for Petitioner's conviction—and yet Petitioner was unable to face his accuser. "The engine of cross-examination was left unengaged, and the Sixth Amendment was violated." *Stuart*, 139 S. Ct. at 36 (Gorsuch, J., dissenting).

The Confrontation Clause concern is starkly presented in this case. Granting this petition would afford the Court an opportunity to lend clarity to, and expand upon, its Confrontation Clause jurisprudence. The Court will be able to address the growing Confrontation Clause concerns surrounding criminal prosecutions that germinate from multifunction agencies with mixed civil and criminal enforcement duties.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: /s/ *Anshu Budhrani*
Anshu Budhrani
Assistant Federal Public Defender
*Counsel of Record*
150 West Flagler Street
Suite 1700
Miami, FL 33130
(305) 530-7000

*Counsel for Petitioner*

Miami, Florida
June 5, 2020