No. 20-637

IN THE
# Supreme Court of the United States

DARRELL HEMPHILL,
*Petitioner*,
v.
STATE OF NEW YORK,
*Respondent*.

**On Petition for a Writ of Certiorari to the Court of Appeals of New York**

## BRIEF *AMICI CURIAE* OF EVIDENCE AND CRIMINAL PROCEDURE PROFESSORS JOHN H. BLUME, TAMARA RICE LAVE, ROBERT P. MOSTELLER, ERIN E. MURPHY, ANNA ROBERTS, AND ANDREA ROTH IN SUPPORT OF PETITIONER

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## STATEMENT OF INTEREST

*Amici curiae* respectfully submit this brief in support of Petitioner.[1]

*Amici* are evidence and criminal procedure professors who have studied, taught, and published on the interaction between the Confrontation Clause and the rules of evidence. This case involves a critical issue at

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici curiae*'s intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief.

that juncture: Whether a criminal defendant "opens the door" to admission of unconfronted testimonial hearsay merely because such evidence, if true, rebuts the defendant's presentation of his case. *Amici* have a stake in ensuring that Confrontation Clause doctrine is not based on misunderstandings of the history and meaning of the Clause or of long-standing principles of evidence law.

## SUMMARY OF ARGUMENT

The New York Court of Appeals' decision is fundamentally inconsistent with the Sixth Amendment. The court below held that under state evidentiary law, where a defendant presents his case through *admissible* evidence, the prosecution is entitled to rebut that case through *otherwise inadmissible* unconfronted, testimonial hearsay, on the theory that the defense case "opens the door" to such inadmissible evidence simply by offering evidence or argument inconsistent with evidence the state seeks to introduce. Such a broad, free-floating forfeiture rule was unknown at common law, is inconsistent with this Court's confrontation cases, and undermines the very nature of an adversarial trial by treating a vigorous defense as forfeiture of the confrontation right. This Court should grant certiorari and reverse.

I. *The New York Court of Appeals' rule has no basis in traditional forfeiture principles.* The Sixth Amendment provides a criminal defendant with "the right * * * to be confronted with the witnesses against him." U.S. Const. amend. VI. At common law, unconfronted testimony could be introduced at trial only if the defendant was able to conduct cross-examination at the time the statement was given and the witness was unavailable to testify. The one exception was for

dying declarations. A defendant could also forfeit the right of confrontation by preventing a witness from testifying, with the intent to interfere with the judicial process, and other misconduct. None of these situations is at issue here.

Instead, the doctrine that comes closest to the fairness-based forfeiture rule created by the New York court is the "rule of completeness." At common law, this evidentiary rule allowed a party to introduce part of a person's statement, even if otherwise inadmissible, when the other party first introduces a part of the same statement that creates a misleading impression about the statement's overall meaning or tenor. The classic example would be if one party introduced the statement, "There is no God," as proof that the declarant is an atheist, where the entire statement actually shows the declarant claimed the opposite: "The fool hath said in his heart, 'There is no God.' " 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 2094 (1904) (quoting *Algernon Sidney's Trial* (1683) 9 How. St. Tr. 817, 829, 868). Given this long-established principle, it may be arguable whether a criminal defendant forfeits confrontation of testimonial hearsay by introducing a statement fragment that distorts the statement's full meaning or tenor.

But such a narrow forfeiture rule, were it to exist, would not justify admission of unconfronted testimonial hearsay where a defendant introduces a fragment of a testimonial statement that does *not* distort the statement's meaning—exactly what several lower courts appear to have done. And it certainly is not triggered where a defendant offers a statement *separate and distinct* from a testimonial statement the

prosecution seeks to admit, much less where the defendant simply offers *argument* as to his theory of the case that contradicts a testimonial statement the prosecution seeks to admit. That a trial judge might view defense evidence or argument as "misleading" because it is inconsistent with the state's narrative, or with evidence the state might want to present, cannot justify introduction of a testimonial statement in violation of the Confrontation Clause. In fact, common-law courts understood that protecting the confrontation right is most critical precisely where a defendant's evidence is "in competition with" adverse out-of-court testimony. 1 Thomas Starkie, *Practical Treatise on the Law of Evidence, and Digest of Proofs, in Civil and Criminal Proceedings* 44 (4th Am. ed. 1832).

II. *The New York rule cannot be reconciled with* Crawford*, nor any conception of the Confrontation Clause's meaning.* Because the New York rule has no basis in confrontation exceptions or forfeiture doctrines that existed at the Founding, it cannot be reconciled with the holding of *Crawford* v. *Washington* that the Confrontation Clause incorporates "the right of confrontation at common law, admitting only those exceptions established at the time of the founding." 541 U.S. 36, 54 (2004).

More fundamentally, New York's rule is inconsistent with any conception of that Clause, under *Crawford* or otherwise. If the prosecution could introduce testimonial hearsay whenever the defense presents evidence or argument that the state, or trial judge, disbelieves, then unconfronted hearsay would be admissible in a high number of criminal cases. Not only would such a rule leave the confrontation right subject to the vagaries of individual judges' views of

the evidence—a result *Crawford* sought to avoid—but it would render superfluous or nonsensical a number of this Court's holdings excluding testimonial hearsay in cases where such hearsay was offered to rebut defense argument or evidence.

The petition should be granted.

## ARGUMENT

### I. NEW YORK'S BROAD "OPEN THE DOOR" RULE HAS NO BASIS IN ANY HISTORICALLY RECOGNIZED DOCTRINE ESTABLISHING AN EXCEPTION TO, OR FORFEITURE OF, THE RIGHT OF CONFRONTATION.

The Sixth Amendment right of confrontation is a categorical right to assess the credibility of witness accounts in a particular way: through the crucible of cross-examination and physical confrontation at trial. *See Crawford*, 541 U.S. at 61, 67 (describing confrontation right as a "categorical constitutional guarantee[]"). As this Court has held, the "text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 54. Instead, "the right to be confronted with the witnesses against him" set forth in the Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* (internal quotation marks and ellipses omitted).

The New York Court of Appeals' decision in this case strays far from the common law, which upheld the right of confrontation in nearly all circumstances—

and which would not have permitted the kind of evidence admitted in this case.

### A. At The Founding, The Only Exception To The Common-Law Right Of Confrontation Was For Dying Declarations.

The common-law right to confront adverse witnesses was absolute, with a lone exception for dying declarations.

At common law, out-of-court testimony could be introduced against a criminal defendant at trial only if the defendant was able to cross-examine when the out-of-court statement was given *and* the witness was unavailable to testify. *See Giles* v. *California*, 554 U.S. 353, 358 (2008); *see also Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 309 (2009). As one founding-era treatise explained, ex-parte depositions and affidavits "could not be received as any evidence at all, because there the party would have no opportunity of cross examination." Thomas Peake, *A Compendium of the Law of Evidence* 45 (1804); *see also* S.M. Phillips, *A Treatise on the Law of Evidence* 8 (1816) ("[I]n criminal prosecutions, the demands of public justice supercede every consideration of private inconvenience, and witnesses are unconditionally bound to appear."); Edmund Powell, *The Practice of the Law of Evidence* 166-168 (1858) (explaining these requirements).

Common-law courts strictly enforced those requirements, "inquir[ing] scrupulously and even suspiciously into all these circumstances." Powell, *supra*, at 167. Prosecutors bore the burden to "affirmatively" show that the prisoner or his counsel "had a full opportunity of cross-examining the witness," with "sufficient time to consider what questions he would put."

*Id.* Similarly, the absent witness had to prove, typically through a "medical attendant," that his illness was "dangerous or serious enough to excuse" his absence at trial. *Id.*

The common law recognized a *single* exception to these requirements: dying declarations. "[I]f the [criminal defendant] be not present at the time of the examination, it cannot be read as a deposition taken on oath, though in cases where a party wounded was apprehensive of, or in imminent danger of death, it may be received as his dying declaration." Peake, *supra*, at 43. Such statements could be received only if the witness was about to die and knew it. *See, e.g.*, *Giles*, 554 U.S. at 363 (noting dying declarations were admissible "only if the witness 'apprehended that she was in such a state of mortality' " (quoting *King* v. *Woodcock* (1789) 168 Eng. Rep. 352, 353-354).

There were no other exceptions to a criminal defendant's right to cross-examine adverse witnesses. *King* v. *Dingler* and *King* v. *Woodcock*—two cases this Court relied on in *Giles*—illustrate that point. *See Giles*, 554 U.S. at 362-363. *Dingler* held that apart from dying declarations, "it is utterly impossible, unless the prisoner had been present, that [a] deposition[] * * * can be read" into evidence. (1791) 168 Eng. Rep. 383, 384. *Woodcock* similarly stressed that only two "species" of out-of-court statements could be introduced: dying declarations and "the deposition[] of the witnesses" against the prisoner, if it had been taken in the presence of the prisoner and the prisoner was given the "opportunity of contradicting the facts it contains." 168 Eng. Rep. at 352-353.

In short, the common law is clear: Admission of a dying declaration was the only exception to a criminal

defendant's confrontation right at the time of the Founding.

### B. At Common Law, A Party Could Forfeit The Right Of Confrontation Only In Limited Circumstances.

Common-law courts held that a party could forfeit the right of confrontation in certain circumstances. But those circumstances were extremely narrow: *First*, a party could forfeit the right to be confronted with a witness by preventing the witness from testifying, with the intent to interfere in the judicial process. The common law described this scenario as "forfeiture by wrongdoing." *Second*, under the "rule of completeness," if a party introduced a fragment of an out-of-court statement, the court could permit introduction of another part of the same statement to correct a misleading impression left by the fragment about the statement's meaning or tenor.[2]

#### 1. Forfeiture by wrongdoing

Common-law authorities accepted "the maxim that a defendant should not be permitted to benefit from his own wrong." *Giles*, 554 U.S. at 365 (citing Geoffrey Gilbert, *Law of Evidence* 140-141 (1756)). Thus, where a defendant prevented a witness from

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[2] Conceivably, there are other ways a defendant could forfeit his confrontation rights, by, for example, "conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois* v. *Allen*, 397 U.S. 337, 343 (1970). Moreover, "[a] criminal defendant may knowingly and voluntarily waive" his Sixth Amendment rights. *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995). Waiver, however, is distinct from forfeiture. *See* Pet. 3 n.2, 12 n.5. The facts of this case do not implicate waiver or any other type of forfeiture.

testifying at trial, he could forfeit his right to be confronted with that witness.

But this doctrine was exceedingly narrow, applying only where the defendant *intended* to prevent the testimony. That is, the "wrong" that forfeiture by wrongdoing penalized was "conduct *designed* to prevent a witness from testifying." *Id.*; *see also* Gilbert, *supra*, at 141. Even killing a witness before trial was insufficient in itself to forfeit the right. In *Dingler*, for example, the defendant's wife identified him as her assailant 12 days before she died from stab wounds. *Giles*, 554 U.S. at 363 (citing 168 Eng. Rep. at 383). But the court refused to admit the wife's statement because the defendant did not "have * * * the benefit of cross examination," even though "it was the best evidence that the nature of the case would afford." *Id.* (quoting 168 Eng. Rep. at 383-384). Murder, or any other "wrongful conduct," must have been intended "to prevent a witness's testimony." *Id.* at 366. In *Giles*, this Court held that a defendant must have "in [his] mind the particular purpose of making the witness unavailable." *Id.* at 367 (internal quotation marks omitted).

### 2. Rule of completeness

Common-law courts also applied a rule of completeness, which permitted introduction of out-of-court statements in limited circumstances.[3] Under that

[3] *Amici* were unable to locate any Founding-era case where a *criminal defendant's* introduction of a *testimonial* hearsay statement permitted the prosecution to introduce other parts of that same statement, nor any other evidence suggesting that the common-law rule of completeness created an exception to, or constituted forfeiture of, the right of confrontation. *Crawford*, 541 U.S.

rule, where one party puts "part of an utterance" into evidence, the opposing party may "complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." Wigmore, *supra*, § 2113. "The single purpose" of this rule is "to avoid the danger of mistaking the effect of a *fragment* whose meaning is modified by a later or prior part." *Id.* (emphasis added).

A famous example from Algernon Sidney's Trial in 1683 illustrates the purpose of this rule: There, the defendant objected to the piecemeal introduction of passages from his manuscript, arguing that "if you will take Scripture by pieces, you will make all the penmen of Scripture blasphemous. You may accuse David of saying 'There is no God,' and accuse the Evangelists of saying, 'Christ was a blasphemer and a seducer,' and the Apostles, that they were drunk." *Id.* § 2094 (quoting *Algernon Sidney's Trial*, 9 How. St. Tr. at 829, 868). "It is true," Lord Chief Justice Jeffreys acknowledged, "in Scripture it is said, 'There is no God'; and you must not take that alone, but you must say, 'The fool hath said in his heart, There is no God.' " *Id.* (quoting same).

As this example illustrates, the rule of completeness was directed at a narrow concern: the "possibilities of error" that "lie in trusting to a fragment of an utterance without knowing what the remainder was." *Id.* That rule allowed admission of the remaining

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at 56. *Amici* wish to highlight the *other* reasons that the common-law rule of completeness would not have applied in this case, as well as reasons that the Sixth Amendment right of confrontation, however defined, cannot be deemed forfeited by petitioner's actions in this case. *See infra* 10-15.

fragment to complete "the whole" of a "distinct thought." *Id.*

In line with the narrowness of this concern, the common-law rule had two significant limitations, as described by Wigmore: First, it would admit only statements from the *same utterance*—not other evidence that could call the utterance into question, or vice versa. *Id.* § 2113. [4] Even New York courts historically applied that limitation, observing that where "a statement, forming part of a conversation, is given in evidence, whatever was said by the same person in the same conversation, that would in any way qualify or explain that statement, is also admissible, but detached and independent statements, in no way connected with the statement given in evidence, are not admissible." *Rouse* v. *Whited*, 25 N.Y. 170, 174-175

[4] The common-law rule was thus narrower than Federal Rule of Evidence 106, which permits "*other* writing[s] or recorded statement[s]" to be introduced if "fairness" so requires. (emphasis added). *See also* 21A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Evidence* § 5072.1 (2d ed. 2020 update) (noting that Rule 106 does not "codif[y] the common law completeness doctrine"). Nor does this case involve "the doctrine of curative admissibility." *State* v. *Vance*, 596 S.W.3d 229, 247-248 (Tenn. 2020). "[C]urative admissibility permits the admission of inadmissible evidence by a party in response to the opposing party admitting *inadmissible* evidence." *Id.* at 248 (quoting *State* v. *Gomez*, 367 S.W.3d 237, 248 (Tenn. 2012), in turn citing 21 Wright & Miller, *supra*, § 5039.3); *see also State* v. *Gonzales*, 461 P.3d 920, 926 (N.M. Ct. App. 2019) ("[A] party cannot invoke curative admissibility to correct an admissible statement."). Curative admissibility is not at issue where, as here, the defendant relied on *admissible* evidence to make his case.

(1862) (quoting S.M. Phillips, *A Treatise on the Law of Evidence* 416 (10th Eng. ed., 4th Am. ed. 1859)).[5]

Second, no "*more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable*." Wigmore, *supra*, § 2113. Courts historically allowed admission only of those additional parts of the statement necessary to shed light on the subject described in the first part: "[I]t must be taken as settled that proof of a detached statement made by a witness at a former time does not authorize proof by the party calling that witness of all that he said at the same time, but only of so much as can be in some way connected with the statement proved." *Id.* (quoting *Prince* v. *Samo* (1838) 7 A. & E. 627). Thus, "if, during the same interview between the witness and the party, other subjects of conversation or discussion are introduced, remote and distinct from that which is the object of the inquiry or investigation, it is obvious that whatever may be said concerning them can have no tendency to illustrate, vary or explain it." *Id.* (quoting *Com.* v. *Keyes* (1858) 11 Gray 323, 325); *see also* S.M. Phillips, *supra*, at 416 (1859) (describing the rule as permitting only

[5] Although at common law "a *distinct or separate utterance* is not receivable under this principle," Wigmore, *supra*, § 2119, Wigmore acknowledges that "what is a separate utterance" is not subject to "fixed definition." *Id.* This case, however, is not in a gray area. The plea allocution, *see* Pet. 7, was clearly separate and distinct from any evidence Petitioner introduced. Indeed, Petitioner's evidence was live testimony by an entirely different witness, *see id*.—not an out-of-court statement by the same declarant who made the statement later introduced by the state.

statements that "qualify or explain" the fragment already admitted).[6]

### C. The Decision Below Has No Basis In Recognized Confrontation Exceptions Or Forfeiture Doctrines.

The decision below—and decisions from other jurisdictions that have adopted similar reasoning—have no basis in these highly circumscribed traditional doctrines. The New York Court of Appeals permitted the state to introduce a testimonial, out-of-court statement by a witness whom the defendant had no opportunity to cross-examine and who was fully available to testify. *See* Pet. App. 2a-3a; 16a-17a (authorizing prosecutor to introduce witness's plea allocution). The statement was not a dying declaration; the defendant did not intentionally prevent the witness from testifying; and the statement was not a missing fragment of a statement that the defendant had introduced, necessary to prevent a misleading impression about the whole statement. *See* Pet. App. 16a-17a.[7] Thus, admission of the statement cannot be justified by any recognized exception to, or forfeiture of, the right of confrontation.

Instead, New York has fashioned a different forfeiture-of-confrontation rule, ostensibly based on "[]fairness." *Id.* at 34a. According to the New York Court of Appeals, unconfronted testimonial statements may be

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[6] A minority rule at common law appears to have permitted admission of the entire utterance under the rule of completeness. *See* Wigmore, *supra*, § 2113. But it did not permit admission of *separate and distinct* statements on the same topic, as the New York Court of Appeals allowed in this case. *See id.*

[7] Nor did petitioner commit misconduct during trial or waive his right of confrontation. *See supra* note 2.

admitted under an "opening the door" doctrine, even if those statements are "otherwise barred by the Confrontation Clause." *People* v. *Reid*, 971 N.E.2d 353, 356-357 (N.Y. 2012) (internal quotation marks omitted). As the Court of Appeals conceived it, its "open the door" doctrine examines "whether, and to what extent, the evidence or argument" of a defendant "is incomplete or misleading," and then determines "what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression." *Id.* at 357 (internal quotation marks omitted).

In *Reid*, for example, the defendant called a witness who testified that "the police had information that [another suspect] was involved in the shooting." *Id.* The defendant also made persistent "argument[s] that the police investigation was incompetent." *Id.* The court held that those defense witnesses and arguments alone were sufficient to "open[] the door to the admission of the testimonial evidence, from his nontestifying codefendant, that the police had information that [the other suspect] was not at the shooting." *Id.* The Fifth Circuit and the New Hampshire Supreme Court have adopted similar approaches. *See United States* v. *Acosta*, 475 F.3d 677, 684-685 (5th Cir. 2007) (holding that defendant's cross-examination questions created a misleading "impression" that "opened the door" to separate testimonial statement); *State* v. *White*, 920 A.2d 1216, 1221-24 (N.H. 2007) (holding that a prosecutor is "permitted to introduce previously suppressed or otherwise inadmissible evidence to counter the [defendant's] misleading advantage").

This "opening the door" doctrine goes far beyond the limited confines of the common-law rule of

completeness. It does not require the defense to have introduced a fragment of an utterance at all, much less that the defense have introduced a fragment of the statement that creates a misleading impression of the whole statement. Instead, it merely asks whether a defendant's *evidence or arguments* are "incomplete and misleading" in the view of the trial judge, and in light of *inadmissible evidence* the state seeks to introduce. *Reid*, 971 N.E.2d at 357; *see also People* v. *Massie*, 809 N.E.2d 1102 (N.Y. 2004).

Not only does this doctrine enjoy no support in any existing confrontation exception or forfeiture doctrine, but the common law pointedly rejected the creation of different confrontation standards for rebuttal or responsive evidence. It permitted, and even anticipated, that a defendant would "contest" a prosecutor's evidence with his own "opposite Proofs." Gilbert, *supra,* at 148; *id.* at 156 (noting "contrary Proofs"). If, for example, a "Defendant [were] charged with a Tresspass," he could "prove a Proposition inconsistent with the Charge, and that he was at another Place at the Time when the Fact is supposed to be done, or the like." *Id.* at 148. The prosecution could, in turn, offer "Proof of the same Proposition totally inconsistent with what" the defendant affirmed. *Id.* Within that framework, the litigants would attack the "credibility of the [opposing] witnesses," introduce "contradict[ing]" evidence, and ask the jury to draw "inference[s] * * * from some former fact." Powell, *supra*, at 22 (internal quotation marks omitted).

"Absolutely and universally," however, testimonial statements were "inadmissible when [the defendant] has had no opportunity of controlling and explaining the evidence at the time of deposition, by cross-

examining the deponent." *Id.* at 165. Unconfronted testimony, even when offered as rebuttal or responsive evidence, was prohibited because "a mere Hearsay [was] no Evidence" at all. Gilbert, *supra,* at 152; *see also id.* at 58 ("But the voluntary Affidavit of a Stranger can by no means be given in Evidence, because the opposite Party had not the Liberty to cross-examine * * * .").

In fact, common-law courts understood that protecting the confrontation right is most critical where a defendant's evidence was "in competition with" adverse out-of-court testimony. Starkie, *supra*, at 44. When evidence conflicts, a jury is more "apt to forget how little reliance ought to be placed upon" unconfronted testimony, which—without the benefit of cross-examination—"may so easily and securely be fabricated." *Id.*

Common-law courts acknowledged that excluding unconfronted testimony was sometimes "inconvenien[t]," but concluded that "it would be dangerous to liberty to admit such evidence." *State* v. *Atkins*, 1 Tenn. (1 Overt.) 229, 229 (1807) (per curiam). For that reason, "no man" could be "prejudiced by evidence which he had not the liberty to cross examine." *State* v. *Webb*, 2 N.C. (1 Hayw.) 103, 103 (1794) (per curiam). As Gilbert explains, "nothing can be more contrary to natural Justice, than that any Body should be injured by any Determination that he was not at Liberty to controvert." Gilbert, *supra*, at 30.

The decision below departs from that fundamental principle.

## II. NEW YORK'S RULE IS INCONSISTENT WITH *CRAWFORD* AND MUST GIVE WAY TO THE CONFRONTATION CLAUSE.

### A. The Decision Below Cannot Be Squared With *Crawford* Or Any Other Conception Of The Confrontation Clause.

This Court held in *Crawford* that "[w]here testimonial evidence is at issue," the "Sixth Amendment demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68. The Court also held that the confrontation right "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* at 54. Because New York's novel "open the door" forfeiture rule did not exist at common law, the decision below squarely conflicts with *Crawford*.

Nor does the New York Court of Appeals' invocation of "[]fairness" as the rationale for its forfeiture rule bring it in line with *Crawford*. Pet. App. 34a. As this Court held in *Giles*, "the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.' " 554 U.S. at 375. The "Sixth Amendment seeks fairness indeed—but seeks it through very specific means (one of which is confrontation) that were the trial rights of Englishmen." *Id.*

Indeed, if the New York Court of Appeals were correct that the prosecution can introduce testimonial statements any time those statements rebut the defendant's case, several of this Court's precedents would have come out differently. The prosecution in

*Crawford* itself offered unconfronted testimony to rebut the defendant's self-defense theory. 541 U.S. at 40. In the prosecution's own words, its tape-recorded testimony was meant to "completely refute[]" the defendant's "claim of self-defense." *Id.* at 40-41. This Court rejected that outcome: Because "the State admitted [a] testimonial statement against petitioner," with no opportunity for cross examination, "[t]hat alone [was] sufficient to make out a violation of the Sixth Amendment." *Id.* at 68. The New York Court of Appeals would have let that rebuttal testimony in—assuming the trial judge was similarly skeptical of the defense theory.

Likewise, in *Giles*, the defendant also made a "claim of self-defense." 554 U.S. at 381 (Breyer, J., dissenting). To support that claim, the defendant presented evidence describing "the victim as jealous, vindictive, aggressive, and violent." *Id.* This Court held that the Confrontation Clause barred unconfronted rebuttal testimony from the victim "describing a history of physical abuse" that was inconsistent "with the defendant's claim that he killed her in self-defense." *Id.* at 384. The Court of Appeals, again, would have let that rebuttal testimony in.

And in *Bullcoming*, the defendant, who was charged with drunk driving, testified that he "did not drink anything between six in the morning" and the car accident "in the late afternoon." *See* State's Answer Brief at 8, *State* v. *Bullcoming*, 226 P.3d 1 (N.M. 2010) (No. 31,186), 2009 WL 7040758, at *8. Further, he testified that the "odor of alcohol" that the victim smelled "did not come from him but from others in the truck he was driving." *Id.* The prosecution sought to introduce testimony regarding the defendant's blood-

alcohol level, specifically contradicting the defendant's own testimony and arguments. But once again, this Court held that the defendant had a right to be confronted with the "analyst who made" the blood-alcohol certification. *Bullcoming* v. *New Mexico*, 564 U.S. 647, 652 (2011). That testimony, too, would have been admitted in New York.

In yet another example, in *Pointer* v. *State*, the defendant, who was accused of robbing a convenience store, raised a "defense of alibi," asserting that he was with friends on the night of the robbery. 375 S.W.2d 293, 294 (Tex. Crim. App. 1963). The lower court admitted out-of-court testimony to rebut that defense. *Id.* at 295-296. But this Court reversed, holding that "confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer* v. *Texas*, 380 U.S. 400, 404 (1965).

The list goes on. *See Davis* v. *Washington*, 547 U.S. 813, 819-820, 829-830 (2006) (Confrontation Clause violated by police officer's testimony recounting witness's description of altercation in response to defendant's position that the "argument never became physical" (internal quotation marks omitted)); *Gray* v. *Maryland*, 523 U.S. 185, 188-189 (1998) (petitioner had Sixth Amendment right to be confronted with witnesses contradicting his own testimony that he was uninvolved in the crime); *Cruz* v. *New York*, 481 U.S. 186, 189-190, 193 (1987) (Confrontation Clause violated where prosecutor introduced co-defendant's videotaped confession to rebut petitioner's argument that he was uninvolved in the murder); *Lee* v. *Illinois*, 476 U.S. 530, 538, 546 (1986) (affirming defendant's Sixth Amendment right to be confronted with witness contradicting defendant's testimony that she acted

"either in self-defense or under intense and sudden passion with respect to the stabbing").

As these examples demonstrate, the approach adopted by New York—and those jurisdictions that join it—is directly contrary to this Court's Sixth Amendment precedent.

Moreover, the New York Court of Appeals' view of confrontation is fundamentally inconsistent with another aspect of the Sixth Amendment: the right of criminal defendants to put on a complete defense and present evidence to support that defense. *E.g.*, *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986). Defendants offer their defense theories and arguments within our fundamentally "adversar[ial]" criminal justice system. *Garner* v. *United States*, 424 U.S. 648, 655 (1976); *Herring* v. *New York*, 422 U.S. 853, 857, 862 (1975) ("[t]he very premise of our adversar[ial] system" rests on "partisan advocacy on both sides"). By exercising their right to present the evidence most strongly in their favor, defendants do not forfeit their separate—and equally important—right to be confronted with the witnesses against them. To the contrary, the two guarantees reinforce one another. The confrontation right ensures a defendant is able to present his "defense theory," while also enabling jurors to "make an informed judgment as to the weight to place on [the opposing] testimony." *Davis* v. *Alaska*, 415 U.S. 308, 317 (1974).

In short, the Confrontation Clause applies equally where the defendant seeks to be confronted with a responsive or rebuttal witness. As this Court has emphasized, the "Confrontation Clause's requirements apply 'in every case, whether or not the defendant seeks to rebut the case against him or to present a

case of his own.' " *Bullcoming*, 564 U.S. at 666 (quoting *Taylor* v. *Illinois*, 484 U.S. 400, 410 n.14 (1988)).

### B. As A Rule Of Evidence, The "Opening The Door" Doctrine Must Give Way To The Constitution.

The evidence admitted below violated the Confrontation Clause. The New York Court of Appeals nevertheless allowed a state *rule of evidence* to trump the Confrontation Clause. This Court should reverse that mistaken ruling.

To be sure, state rules of evidence routinely anticipate that one party's evidence or arguments will "open the door" to responsive evidence that might otherwise be irrelevant. Wright & Miller, *supra*, § 5039.1; *see also, e.g.*, *State* v. *James*, 677 A.2d 734, 742 (N.J. 1996) ("The 'opening the door' doctrine is essentially a rule of expanded relevancy * * * ."). That is, as "parties offer relevant evidence to prove their cases, each bit of evidence opens up new avenues of refutation and confirmation that expand the realm of relevance beyond those consequential facts expressed in the pleadings." Wright & Miller, *supra*, § 5039.1; *see also People* v. *Betts*, 514 N.E.2d 865, 868 (N.Y. 1987) (referring to "assertions that open the door and render those charges relevant for contradictions and response"). Similarly, one party's evidence can "open the door" in ways that "expand the scope of cross-examination and the range of methods permissible for impeachment of the witness." Wright & Miller, *supra*, § 5039.1.

But some jurisdictions, including New York, take such commonplace rules a step further. They hold that when a party's evidence or argument "opens the door" to responsive evidence, other evidentiary rules

are effectively suspended if deemed "reasonably necessary" to correct misimpressions caused by "the evidence or argument said to open the door." *Massie,* 809 N.E.2d at 1105. Thus, over a defendant's objection, a prosecutor may present "otherwise inadmissible" evidence if responsive to misleading evidence or argument. *Id.* This "most often" occurs when "a defendant has been untruthful about a former crime or has brought up" character evidence—permitting the state to offer rebuttal evidence otherwise barred by evidentiary rules. *Larimore* v. *State*, 877 S.W.2d 570, 574 (Ark. 1994); *see also State* v. *Dunlap*, 579 S.E.2d 318, 319-320 (S.C. 2003); *Wales* v. *State*, 768 N.E.2d 513, 519 (Ind. Ct. App. 2002). But other evidentiary rules are also fair game. *E.g.*, *Bowman* v. *State*, 809 S.E.2d 232, 243-244 (S.C. 2018) (defendant "open[ed] the door to otherwise inadmissible prison condition evidence").[8]

While states are "traditionally accorded" wide latitude in crafting and applying evidentiary rules, *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973), that leeway exists only "*so long as their rules are not prohibited by any provision of the United States Constitution*." *Spencer* v. *Texas*, 385 U.S. 554, 568-569 (1967) (emphasis added). In *Washington* v. *Texas*, 388 U.S. 14 (1967), for example, Texas had enacted a statute that prohibited co-participants in the same alleged crime from testifying for one another, deeming

[8] Not all courts apply the opening-the-door doctrine in this way. Indeed, Wright and Miller endorse the opposite approach, explaining that "evidence cannot come through the open door if it is inadmissible even under the expanded realm of relevance opened by the adversary." Wright & Miller, *supra*, § 5039.1 & n.25.

such testimony categorically "unworthy of belief." *Id.* at 22. But because that evidentiary rule conflicted with a criminal defendant's Sixth Amendment right of compulsory process, this Court struck down Texas's law and reversed the defendant's conviction. *Id.* at 22-23.

Likewise, New York's rule must give way to the Confrontation Clause. The "opening the door" doctrine adopted by New York and other jurisdictions holds that a defendant can "open the door" to testimonial evidence "that would otherwise violate his Confrontation Clause rights." *Reid*, 971 N.E.2d at 356; *see also Acosta*, 475 F.3d at 684-685 (defendant "opened the door" to statements "otherwise inadmissible" under the Confrontation Clause); Pet. 13-17. But "[w]here testimonial statements are involved," the Sixth Amendment's protections are not left "to the vagaries of the rules of evidence." *Crawford*, 541 U.S. at 61.

For example, in *Crawford*, this Court vacated a conviction because Washington courts applied a hearsay exception for statements against penal interest in a way that conflicted with the defendant's Sixth Amendment confrontation rights. *Id.* at 40, 68-69. In *Melendez-Diaz*, the Court invalidated a Massachusetts statutory hearsay exception permitting admission of sworn affidavits from nontestifying state forensics analysts in criminal trials as inconsistent with the Confrontation Clause. 557 U.S. at 308-309, 329. And in *Bullcoming*, the Court upheld a defendant's Sixth Amendment right to be confronted with a forensic analyst who tested the defendant's blood sample and reported his blood alcohol level, even though New Mexico's evidentiary rules permitted the analyst's

testimony to be received through a written report and certification. 564 U.S. at 652-653, 665, 668.

The premise of the decision below—that New York's rules of evidence limit a constitutional right—is flatly inconsistent with this Court's precedents, and indeed with the Supremacy Clause itself. This Court should grant certiorari and reverse.

## CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted.

Respectfully submitted,

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**ADDENDUM**

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