No. 20-637

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of New York

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
SMITA GHOSH**
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

June 29, 2021

* Counsel of Record
** Not admitted in D.C.; supervised by principals of the firm

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Constitutional Provisions

TABLE OF AUTHORITIES – cont'd

Page(s)

Books, Articles, and Other Authorities

TABLE OF AUTHORITIES – cont'd

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Sixth Amendment of the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sixth Amendment guarantees criminal defendants the right "to be confronted with the witnesses against" them. U.S. Const. amend. VI. Interpreting this text and its history, this Court has held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004).

Because exceptions to the Confrontation Clause's guarantee "strip" defendants of "the right to have [their] guilt in a criminal proceeding determined *by a*

---

[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

jury, and on the basis of evidence the Constitution deems reliable and admissible," *Giles v. California*, 554 U.S. 353, 375 (2008), the Sixth Amendment "does not suggest any open-ended exceptions from the confrontation requirement" and contemplates "only those exceptions established at the time of the founding," *Crawford*, 541 U.S. at 54.

Notwithstanding the Sixth Amendment's stringent protections against unconfronted testimony, Petitioner Darrell Hemphill was convicted by a jury after the court, over Hemphill's objection, allowed the prosecutor to introduce a testimonial statement from a witness who was not present at trial. Pet. App. 16a. The court held that this evidence was admissible because Hemphill "created a misleading impression," which made the introduction of the unconfronted evidence "reasonably necessary" to correct that impression. *Id.* at 17a. On appeal, Hemphill's conviction was affirmed because he had, in the court's view, "opened the door" to the admission of this testimonial statement.

This nebulous "open the door" exception is at odds with the text and history of the Sixth Amendment and should not be allowed to stand.

The Framers drafted the Sixth Amendment in response to controversial practices of the colonial era, in which criminal defendants were often prosecuted without being able to confront their accusers. In light of these abuses, the Framers were insistent on protecting the common-law tradition of "live testimony in court subject to adversarial testing," *Crawford*, 541 U.S. at 43, and they adopted the Sixth Amendment to enshrine that tradition in the Constitution, *see id.* (observing that the common law was the "founding generation's immediate source" for the Confrontation Clause). Therefore, as this Court has repeatedly

recognized, the Confrontation Clause "demands what the common law required," *id.*, at 68, and "any exception" to its protections must have been "established at the time of the founding," *Giles*, 554 U.S. at 383 (internal citations omitted).

At the time of the Founding, it was a "fundamental rule" "due to every man in justice" that witnesses must give evidence against a defendant "face to face," so that the defendant "may cross-examine him who gives such evidence." *Fenwick's Case*, 13 How. St. Tr. 537, 638 (H.C. 1696); *see Raleigh's Case*, 2 How. St. Tr. 1, 16 (1603) ("The Proof of the Common Law is by witnesses and jury."); 3 William Blackstone, *Commentaries on the Laws of England* 373 (1768) ("[T]he confronting of adverse witnesses is . . . an[] opportunity of obtaining a clear discovery, which can never be had upon any other method of trial."). As one commentator put it, the "excellent Order of Trial by jury" required the "Opportunity of confronting the adverse Witnesses," which facilitated the jury's "true and clear discovery of truth." Matthew Hale, *History and Analysis of the Common Law of England* 358, 346 (1713).

The use of out-of-court statements in criminal trials was thus strictly limited to instances in which the witness who made the statement was unavailable and the defendant had a "prior opportunity to cross-examine" him. *Giles*, 554 U.S. at 358; *Crawford*, 541 U.S. at 55 (reading "the historical sources to say that a prior opportunity to cross-examine was . . . dispositive"). Some courts went so far as to hold that a witness's prior testimony was inadmissible in criminal cases even if the defendant had a previous opportunity to cross-examine the witness because the second proceeding was "another suit" and thus "require[d] persons to appear and give their testimony." *Fenwick's Case*, 13 How. St. Tr. at 592; *Finn v. Commonwealth*, 26 Va.

701, 708 (Va. Gen. Ct. 1827) (citing *Fenwick's Case* to exclude testimony that absent witness gave at defendant's earlier trial); *see also State v. Atkins*, 1 Tenn. 229 (Super. L. & Eq. 1807) (per curiam) (excluding report of prior testimony of deceased witness, even though the defendant had cross-examined him).

Because of the importance attached to in-person testimony and cross-examination, the common law recognized only two narrow exceptions to the confrontation right. First, as this Court noted in *Crawford*, dying declarations were admissible as a "general rule of criminal hearsay law." *Crawford*, 541 U.S. at 56 n.6; *Giles*, 554 U.S. at 358 (describing "declarations made by a speaker who was . . . on the brink of death"). Second, as this Court recognized in *Giles*, defendants could forfeit their confrontation rights if they "*intended* to prevent a witness from testifying" and succeeded in doing so. *Id.* at 361 (describing the "common-law doctrine" of "forfeiture by wrongdoing"). The "open the door" exception adopted by the court below is untethered from these two exceptions and the rationales that support them.

Common-law authorities justified the exception for dying declarations on the ground that such declarations were thought to carry the same solemnity as statements made under oath, *Giles*, 554 U.S. at 362, and to be admissible of "necessity" as the best and only evidence of an illegal act, *Mattox v. United States*, 156 U.S. 237, 244 (1895). Importantly, the exception was strictly limited, permitting the admission of statements only about "the cause of [the declarant's] death, and its attending circumstances." *State v. Center*, 35 Vt. 378, 386 (1862). The existence of this narrow exception provides no support for the adoption of the broad and amorphous "open the door" exception, which

would result in the admission of all manner of testimonial statements without cross-examination.

Courts adopted the forfeiture by wrongdoing exception to ensure that defendants could not benefit from their own wrongdoing if they intentionally took actions designed to make witnesses unavailable. But, once again, that logic does not support the "open the door" exception adopted by the court below. While the forfeiture by wrongdoing exception was adopted to deter wrongdoing by defendants, the "open the door" exception sweeps far more broadly, requiring no finding of intentional wrongdoing before evidence is admitted, *Reynolds v. United States*, 98 U.S. 145, 159 (1878). In other words, the "open the door" exception allows courts to disregard a defendant's Confrontation Clause right even if the defendant did not intend to do anything wrong—or indeed did not do anything wrong at all. *See* Pet. Br. 28 (noting that, even in the view of the trial court, Hemphill's third-party defense was "'appropriate,' 'fair,' and a 'necessary argument to make'" (citing Tr. of Jury Trial Proceedings, J.A. 185)).

In sum, the "open the door" exception was not recognized at the time of the Founding and bears no resemblance to the two exceptions that were. This Court should not adopt an additional exception and constrict the scope of the confrontation right guaranteed in the Sixth Amendment. The decision of the court below should be reversed.

ARGUMENT

I. The Framers Adopted the Confrontation Clause to Enshrine in the Constitution the Common-Law Protections that Were Viewed as Fundamental at the Founding.

When the Framers drafted the Confrontation Clause, they were responding to "the abuses in the

sixteenth- and seventeenth-century treason trials" in England and the demands of treason defendants to meet their accusers "face to face." Richard Friedman & Mary McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1207-08 (2002). Most famously, during the 1603 treason trial of Sir Walter Raleigh, Raleigh pleaded that he be allowed to confront his accuser—that the accuser "maintain his accusation to [his] face"—but the judges refused and Raleigh was condemned to death. *Raleigh*, 2 How. St. Tr. at 18; *see State v. Campbell*, 30 S.C.L. 124, 130 (S.C. App. L. 1844) ("Who would look to Sir W. Raleigh's . . . case for a fair trial or just judgment?"); *see also Crawford*, 541 U.S. at 52 (calling the case "a paradigmatic confrontation violation").

After Raleigh's case, English law "developed a right of confrontation" to limit the "abuses" of such trials. *Crawford*, 541 U.S. at 44. Common-law authorities fortified the conclusion that "no Evidence [wa]s to be given against a Prisoner but in his Presence." 2 William Hawkins, *A Treatise of the Pleas of the Crown* 428 (1762). As Blackstone wrote in his seminal treatise, only by "confronting adverse witnesses" in a "public and solemn tribunal" would a defendant be able to "clear[] up" the "truth." 3 Blackstone, *supra*, at 373.

Across the ocean, "[c]ontroversial examination practices" were also being "used in the Colonies," and American colonists thus came to appreciate the importance of in-person testimony and to venerate the common law's commitment to a confrontation right. *Crawford*, 541 U.S. at 47-48. In addition, because the use of public prosecutors quickly became common in the colonies and had become "standard" by the Founding era, colonists saw the confrontation right as an important limit on the government's prosecutorial power.

Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 Rutgers L.J. 77, 98-99 (1995) (explaining that in eighteenth-century England, unlike colonial America, many crimes were "personally prosecuted by ordinary citizens"); Friedman & McCormack, *supra*, at 1207 (noting that "[t]he right to counsel in felony trials developed far more quickly in America than in England, and with it rose an adversarial spirit that made . . . confrontation of adverse witnesses especially crucial").

By the Revolutionary period, the common-law right of confrontation had come to be viewed as central to American liberty. In 1776, George Mason inscribed the right "to be confronted with the accusers and witnesses" in the Virginia Declaration of Rights, *see* Virginia Declaration of Rights § 8 (1776); *see also* Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the* Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & Pol'y 349, 388 (2007), and other states included variations on that phrasing in their own precursors to the Bill of Rights, *see, e.g.*, Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Pennsylvania Declaration of Rights § IX (1776); Vermont Declaration of Rights ch. I, § X (1777); Massachusetts Declaration of Rights art. XII (1780) (using the formulation meet "face to face"); New Hampshire Bill of Rights § XV (1783) (same). So venerated was the right to confrontation at the time of the Framing that one delegate to Massachusetts' ratifying convention observed that the new nation's courts could become "little less inauspicious than a certain tribunal in Spain . . . the Inquisition" if the confrontation right were not protected in the new federal charter. 2 *The*

Debates in the Several State Conventions on the Adoption of the Federal Constitution 111 (Jonathan Elliot ed., 1836) (statement of Abraham Holmes); *Crawford*, 541 U.S. at 48-49 (discussing Founding-era history).

Thus, when the Framers enshrined the right of criminal defendants to be confronted with the witnesses against them in the Constitution, "there is little doubt" that they "intended to preserve the important elements of common-law jury trial in the Constitution and Sixth Amendment." Davies, *supra*, at 385. "Invocations of the [colonists'] right to [the English] common law," including the "common-law jury trial," were "ubiquitous during . . . the Revolutionary period," *id.*, and the right to confront witnesses was a "basic feature[]" of the common-law jury trial, *id.* at 386 n.83; *see* 3 Blackstone, *supra*, at 373-74 (describing "the English[] way of giving testimony"). As John Adams explained when defending John Hancock in the Court of Vice Admiralty, under "the Rules of the common Law . . . Every Examination of Witnesses ought to be in open Court, in Presence of the Parties, Face to Face." 1 John Adams, *Legal Papers of John Adams* 207 (1965); *see* Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 Ohio St. J. Crim. L. 209, 216 (2005) (describing the common law as one of the "intellectual seeds that would blossom into the right of confrontation when fertilized by inquisitorial abuses in the colonies").

Accordingly, as this Court has recognized, the Sixth Amendment "incorporate[s] the *common-law* right of confrontation," *Crawford*, 541 U.S. at 54 n.5, and "demands what the common law required," *id.* at 68. Thus, "any exception" to its protections must have been "established at the time of the founding." *Giles*, 554 U.S. at 383 (internal citations omitted); *see id.* at 377 (rejecting "an exception to the Confrontation

Clause unheard of at the time of the founding"); *Ohio v. Clark*, 576 U.S. 237, 248 (2015) (considering whether "[a]s a historical matter . . . there is strong evidence that [similar statements] . . . were admissible at common law" (citation omitted)). This common-law right that the Framers protected in the Sixth Amendment was a broad one that strictly limited the admission of out-of-court statements in criminal trials, as the next Section discusses.

II. English Common-Law and Early American Courts Strictly Limited the Admission of Out-of-Court Statements in Criminal Trials.

In English common-law courts, the "reliability of evidence" was ensured by face-to-face confrontation of witnesses. *Crawford*, 541 U.S. at 61. Confrontation allowed parties, judges, and juries to "beat[] and bolt[] out the Truth" of a witness's testimony, *id.* at 62 (citing Hale, *supra*, at 258), and "sift out" the witness's true meaning, 3 Blackstone, *supra*, at 373.

Because of the crucial role that in-person testimony and cross-examination played in testing the veracity of statements, common-law courts strictly limited the use of testimonial hearsay. Geoffrey Gilbert, *The Law of Evidence* 149 (1788) ("The attestation of the Witness must be to what he knows, and not to that only which he hath heard, for a mere Hearsay is no Evidence."); Henry Bathurst, *Theory of Evidence* 111 (1761) ("Hearsay is no evidence."). And some common-law commentators emphasized that such evidence deprived litigants, including "prisoners," of the "Opportunity of a cross Examination." 2 Hawkins, *supra*, at 431. Indeed, by the eighteenth century, some English courts held that the statements of an absent witness before a judicial official—even when sworn—were admissible at trial only when the defendant had been

given a prior opportunity to cross-examine the speaker. *See, e.g.*, *Fenwick's Case*, 13 How. St. Tr. at 638 (describing the "fundamental rule in our law, That . . . [a prisoner] may cross-examine him who gives such evidence" against him); *Dorset v. Girdler*, 24 Eng. Rep. 238, 238 (1720) (observing that "the other side ought not to be deprived of the opportunity of confronting the witnesses and examining them publicly, which has always been found the most effectual method for discovering of the truth").

In America, Founding-era courts took a similar approach. In "early state decisions[, which] shed light upon the original understanding of the common-law right [of confrontation]," *Crawford*, 541 U.S. at 49, courts refused to admit out-of-court testimony that had not been subjected to cross-examination, *see, e.g.*, *State v. Webb*, 2 N.C. 103, 104 (N.C. Super. L. & Eq. 1794) (refusing to "derogate from the salutary rule established by the common law" that prohibits the admission of depositions taken without cross-examination); *Dunwiddie v. Commonwealth*, 3 Ky. 290, 296 (1808) (excluding absent witness's testimonial statement to magistrate because it "withholds from the person accused an advantage which was most unquestionably his right—the benefit of a cross-examination"); *State v. Hill*, 20 S.C.L. 607, 611 (S.C. App. L. & Eq. 1835) (emphasizing "how necessary a cross[-]examination is to elicit the whole truth from even a willing witness"); *People v. Restell*, 3 Hill 289, 297 (N.Y. Sup. Ct. 1842) (describing the "great principle that the accuser and accused must be brought face to face, and that the latter shall have the opportunity to cross-examine"); *Campbell*, 30 S.C.L. at 127 (noting that the "personal examination and confronting of witnesses" should be seen as "one of the safeguards to shield the lives of men against erroneous or imaginary prejudice, or false

charges"). In other Founding-era decisions, judges connected the cross-examination requirement to the "correct administration of justice" in criminal cases, emphasizing that a defendant should not be incriminated by "mere verbal declarations, made in his absence." *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (Marshall, J.); *United States v. Robins*, 27 F. Cas. 825, 837 (D.S.C. 1799) (noting that hearsay is not admissible in cases "affecting . . . life or limb"); *The Ulysses*, 24 F. Cas. 515, 516 n.2 (C.C.D. Mass. 1800) (excluding deposition because opposing party had "no opportunity to cross-examine" on a particular point).

Common-law treatises and other Founding-era works also stressed the importance of the cross-examination requirement. *See*, *e.g.*, 1 Richard Burn, *The Justice of the Peace, and Parish Officer* 345 (8th ed., 1764) ("It is a general rule, that hearsay is no evidence; for no evidence is to be admitted but what is upon oath . . . and besides, the adverse party had no opportunity of a cross examination" (citing Bathurst, *supra*, at 111, 112)); *Conductor Generalis* 170 (N.J. 1764) ("[W]hat a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner . . . because the other side hath no opportunity of a cross-examination . . . ." (citing 2 Hawkins, *supra*, at 431)); Joseph Greenleaf, *An Abridgment of Burn's Justice of the Peace and Parish Officer* 118 (1773) ("[T]he reason why such depositions [taken by Justices of the Peace] cannot be read [i]s because the defendant was not present when they were taken, and therefore had not the benefit of cross-examination."); *see also* Davies, *supra*, at 394 n.109; *id.* at 387 n.86 (treatises were the "principal sources that informed the Framers' understanding of the law of jury trials"). These sources make clear that the confrontation right was important because it

ensured that criminal trials would proceed with the procedure most likely to produce reliable outcomes—that is, in-person testimony subject to cross-examination. *See, e.g.*, 1 Burn, *supra*, at 345 ("[I]f the witness is living, what he has been heard to say is not the best evidence that the nature of the thing will admit." (citing Bathurst, *supra*, at 111, 112)); 3 Blackstone, *supra*, at 373-74 ("Th[e] open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth . . . .").

For Founding-era practitioners, cross-examination before a jury was essential to demonstrate the "manner, appearance, temper, &c., of the witnesses," which was "so important in weighing their credit," *United States v. Moore*, 26 F. Cas. 1308, 1308 (C.C.D. Pa. 1801) (statement of defense counsel); *United States v. Smith*, 27 F. Cas. 1192, 1218 (C.C.D.N.Y. 1806) (quoting counsel's statement that "[e]very one knows that when a witness is examined in open court . . . that cross-examination may draw out more than could be obtained by studied and written answers to written interrogatories"); *Commonwealth v. Richards*, 35 Mass. 434, 439 (1836) (noting counsel's statement that "the countenance of a witness, and his manner of testifying, have a very important bearing in weighing the truth of his testimony"). And courts agreed: because of the importance attached to in-person testimony, judges admitted an absent witness's deposition or testimony from a previous case only after receiving "sufficient proof" that the witness was truly absent, *Barron v. People*, 1 N.Y. 386, 389 (1849); *see also Crawford*, 541 U.S. at 45 (describing "relatively strict rules of unavailability"), and that the defendant had an opportunity to cross-examine him, *see, e.g.*, *Johnston v. State*, 10 Tenn. 58, 58 (1821) (admitting statement made "on oath against [the defendant] in his presence,

before the magistrate" and signed by the defendant); *Kendrick v. State*, 29 Tenn. 479, 487 (1850) (admitting deposition, but emphasizing that "[t]he evidence of the deceased witness was given on oath before the committing court, in the presence of the accused, who had the right to cross-examine"); *Crawford*, 541 U.S. at 50 (collecting cases).

Indeed, so important was the right to in-person examination that some early American courts excluded deposition testimony even when a defendant *had* been present and able to cross-examine the absent witness. *See, e.g.*, *Ulysses*, 24 F. Cas. at 516 n.2 (excluding deposition of out-of-court witness and suggesting that "mutual consent," as well as cross-examination, was required to admit depositions in criminal prosecutions); *Atkins*, 1 Tenn. at 229 (invoking the Confrontation Clause and the "Magna Charta" to reject unwritten evidence of the testimony of a witness who testified at the defendant's previous trial and had since died); *Finn*, 26 Va. at 708 (noting that "[i]n a civil action, if a witness who has been examined in a former trial between the same parties, and on the same issue, is since dead, what he swore to on the former trial, may be given in evidence," but stating that "we cannot find that the rule has ever been allowed in a criminal case").

In sum, both English common-law and Founding-era American courts attached great importance to cross-examination and in-person testimony. Consistent with this view, these courts recognized only two narrow exceptions to the confrontation right. Both exceptions were strictly limited, and neither supports the "open the door" exception adopted by the court below, as the next Section explains.

III. There Were Only Two Exceptions to the Confrontation Right in the Founding Era, Neither of Which Supports Adoption of the "Open the Door" Exception.

In determining the scope of the Confrontation Clause, this Court has made clear that the only exceptions allowed are those "established at the time of the founding." *Crawford*, 541 U.S. at 54. At the time of the Founding, there were only two limited exceptions to the confrontation right, and neither supports the novel exception recognized by the court below.

A. First, Founding-era courts on both sides of the Atlantic allowed the admission of the "dying declaration of a person who has received a fatal blow." *Giles*, 554 U.S. at 358 (citing *King v. Woodcock*, 168 Eng. Rep. 352, 352-53 (1789)); *King v. Welbourn* (1792), *reprinted in* 1 Henry Hyde East, *A Treatise of the Pleas of the Crown* 360 (1806) (describing the admission of statements made while "the deceased thought herself in a dying state"). Before such declarations were admitted, courts took evidence to determine whether the speaker was "conscious he was dying" at the time the declaration was made. *See, e.g.*, *King v. Commonwealth*, 4 Va. 78, 80 (Va. Gen. Ct. 1817) (reviewing depositions concerning status of deceased); *State v. Poll*, 8 N.C. 442, 444 (1821) (observing that "[t]he latest and most authoritative cases shew that the Court is to decide . . . whether the deceased made the declaration under the apprehension of death"); *Anthony v. State*, 19 Tenn. 265, 273 (1838) (reversing because lower court "erred in admitting the dying declarations of the deceased, in the absence of any proof of their having been made in apprehension of death"); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 391 (1819) (noting that the court should decide "whether, under the circumstances of the case, the declaration

ought to be admitted"); Simon Greenleaf, *A Treatise on the Law of Evidence* § 158 (1842) (describing the declarant's "sense of impending death" as a "preliminary fact").

Dying declarations of murder victims were considered valid evidence because, in the view of English common-law courts, a victim who was conscious that he or she was about to die would be as likely to tell the truth as a person under oath. 3 William Blackstone, *Commentaries on the Laws of England* 368 (1794) (hereinafter *Commentaries* (1794)) ("In criminal cases, the declarations of a person, who relates in extremis, or under an apprehension of dying, the cause of his death, or any other material circumstance, may be admitted in evidence; for the mind in that awful state is presumed to be as great a religious obligation to disclose the truth, as is created by the administration of an oath."). Founding-era American courts shared this perspective. *See, e.g.*, *State v. Moody*, 3 N.C. 31, 31 (N.C. Super. L. & Eq. 1798) ("When no hope of life remains[,] the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath."); *Vass v. Commonwealth*, 30 Va. 786, 790 (Va. Gen. Ct. 1831) ("The law regards the apprehension of approaching death as equivalent to the judicial oath . . . ."); *Mattox*, 156 U.S. at 244 ("[T]he sense of impending death is presumed to remove all temptation to falsehood . . . .").

Dying declarations were also justified by the principle of "necessity": in cases of murder, "it frequently happen[ed] that none but the victim witnesse[d] the deed." *State v. Ferguson*, 20 S.C.L. 619, 624 (S.C. App. L. & Eq. 1835); *see* Greenleaf, *Evidence*, *supra*, § 156 (noting that dying declarations are admitted "upon the ground of the public necessity . . . [because often] there is no third person present to be an eye-witness to the

fact; and the usual witness in other cases of felony . . . is himself destroyed"); *Hill v. Commonwealth*, 43 Va. 594, 608 (Va. Gen. Ct. 1845) (observing that "[t]he rule is one of necessity"); *Mattox*, 156 U.S. at 244 (noting that dying declarations "are admitted, not in conformity with any general rule regarding the admission of testimony, but . . . simply from the necessities of the case"); *see also Woodcock*, 168 Eng. Rep. at 353 (observing that a deposition taken in the defendant's presence with an opportunity for cross-examination may only be admitted "of necessity," that is, when it is evident that the deponent "could alone have given" it and the deponent is absent).

Significantly, where admission of a dying declaration was not a "necessity"—where, for example, nonhearsay evidence of the same fact was available—many courts excluded the declaration. *See, e.g.*, *Respublica v. Langcake and Hook*, 1 Yeates 415, 416 (Pa. 1795) (holding that dying declarations were inadmissible because there was "[n]o necessity," there "having been several witnesses present at the different transactions"); *see also Jackson ex dem. Coe v. Kniffen*, 2 Johns. 31, 35 (N.Y. Sup. Ct. 1806) ("If the declarations of dying persons are ever to be received[,] it will be best to confine them to the cases of great crimes, where frequently the only witness being the party injured, the ends of public justice may otherwise, by his death, be defeated."); *People v. Glenn*, 10 Cal. 32, 36 (1858) ("As to the most material fact in the case, there was no living witness who could speak, and the dying declarations of the deceased were properly admitted."). Reflecting this necessity principle, the exception was also limited in an additional sense: it permitted the admission of statements only about "the cause of [the declarant's] death, and its attending circumstances." *Center*, 35 Vt. at 386; *United States v. Veitch*, 28 F.

Cas. 367, 368 (C.C.D.D.C. 1803) (declaration permissible only to demonstrate the "facts stated by the deceased but not as to his opinion of [the defendant's] motives, or malice"); 1 Chitty, *supra*, at 390 (describing an exception in "the case of the dying declaration of a party murdered respecting the causes which led to his situation"); Greenleaf, *Evidence*, *supra*, § 156 (noting that the exception is restricted to cases where "the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations").

The "open the door" exception adopted by the court below bears no resemblance to the exception for dying declarations. As just noted, that exception was carefully limited, allowing admission of statements only about "the cause of [the declarant's] death, and its attending circumstances," and only when necessary. By contrast, the "open the door" exception adopted by the court below permits the violation of defendants' confrontation rights simply because a trial judge concludes that a "misleading impression" has been created. Pet. Br. 17 ("New York's 'misleading impression' standard . . . permits judges to set aside the right to confrontation by assuming the very thing the Sixth Amendment sets the rules for evaluating—namely, whether the prosecution's allegations are accurate."). And it imposes no concrete limits on the subject matter of the otherwise inadmissible testimony—it does not, for example, limit the testimony to the "facts," *Veitch*, 28 F. Cas. at 368, or "circumstances," *Center*, 35 Vt. at 386, of which the declarant has special knowledge.

Moreover, while common-law courts believed that the circumstances surrounding a dying declaration created an "obligation to disclose the truth," Blackstone, *Commentaries* (1794), *supra*, at 368, there is no reason to trust the veracity of statements admitted

pursuant to an "open the door" exception. The "open the door" exception thus undermines the "ultimate goal" of the Confrontation Clause: "to ensure reliability of evidence . . . [and] that reliability be assessed . . . by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

B. Second, Founding-era courts, consistent with common-law principles, permitted admission of out-of-court statements in the case of forfeiture by wrongdoing—when a witness was "detained" or "kept away" by the actions of the defendant who was intentionally trying to prevent a witness from reaching a jury. *Giles*, 554 U.S. at 359; *see id.* at 368 (holding that defendant must have "engaged in conduct *designed* to prevent a witness from testifying"). This exception reflected the "maxim that a defendant should not be permitted to benefit from his own wrong," *id.* at 365 (quoting Gilbert, *supra*, at 140-41), and it aimed to eliminate the "intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them" in order to benefit from the witness's absence, *id.*

Much like courts considering dying declarations, courts employing the forfeiture by wrongdoing exception required proof of a defendant's wrongdoing before admitting the evidence. 1 Burn, *supra*, at 336 (evidence that the witness is "dead . . . or kept away by the means or procurement of the prisoner" must be "on oath" and "to the satisfaction of the court"); Gilbert, *supra*, at 138 (evidence can be admitted when "it can be proved on Oath, that the witness is detained and kept back from appearing by the Means and Procurement of the Prisoner"); 1 Chitty, *supra*, at 55 (evidence "cannot be received on the trial, without first proving on oath to the satisfaction of the court, that the deponent is . . . kept away by the means and contrivance of the prisoner"); *Reynolds*, 98 U.S. at 159 (defendant's

wrongdoing was a "preliminary question" to be determined before the hearsay evidence could be admitted); *see also Lord Morley's Case*, 6 How. St. Tr. 769, 776-77 (H.L. 1666) (describing Chief Justice's opinion that "if the court upon any evidence were satisfied, the witness was withdrawn by the procurement of the prisoner, the deposition ought to be read, otherwise not"). In the absence of such proof, the evidence was excluded. *See, e.g.*, *Williams v. State*, 19 Ga. 402, 403 (1856) (magistrate's examination of absent witness excluded because court was not "satisfied from the evidence, that the witness was detained by means or procurement of the prisoner"); *see also Giles*, 554 U.S. at 361-67 (observing that "[t]he manner in which the rule was applied makes plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying" (citing *Lord Morley's Case*)).

The rationale for the forfeiture by wrongdoing exception—preventing defendants from benefitting from their own malfeasance—offers no support for the "open the door" exception. Put simply, the "open the door" exception does not effectively deter wrongdoing or prevent defendants from benefitting from wrongdoing because it requires no finding of intentional wrongdoing at all. As this Court has recognized, the "purpose" requirement—that is, that a defendant *intentionally* made the witness unavailable—is an important limit on the forfeiture by wrongdoing exception, "intelligently fixed" to limit the risk of judges "depriv[ing] defendants of their fair-trial rights" on the basis of a mere presumption of alleged misconduct. *Giles*, 544 U.S. at 374. Significantly, here there is no evidence in the record that Hemphill intended to prevent a witness from testifying, nor that he intended to "mislead" the jury at all.

* * *

In the Founding era, courts hewed closely to the "rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Webb*, 2 N.C. at 104. The Framers enshrined that rule in the Constitution when they adopted the Sixth Amendment and sought "fairness" through the "very specific means . . . that were the trial rights of Englishmen," including confrontation. *Giles*, 554 U.S. at 375. The text and history of the Sixth Amendment do "not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts," *Crawford*, 541 U.S. at 54, yet that is exactly what courts that have adopted the "open the door" exception to the Confrontation Clause have done. That exception has no basis in Founding-era common law and should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
SMITA GHOSH**
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

June 29, 2021

* Counsel of Record
** Not admitted in D.C.; supervised by principals of the firm