No. 22-899

IN THE
Supreme Court of the United States

JASON SMITH,
Petitioner,
vs.
STATE OF ARIZONA,
Respondent.

On Writ of Certiorari to the
Court of Appeals of the State of Arizona, Division One

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

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QUESTION PRESENTED

Whether an expert witness's testimony violated the Confrontation Clause when he reasonably relied, in part, on a former colleague's notes and analysis from within the same crime lab to reach an independent opinion; the non-testifying expert's opinion and work-product were not admitted into evidence; and the testifying expert was subject to cross-examination.

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

INTEREST OF *AMICUS CURIAE*

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

The defendant in this case seeks to expand the application of the Confrontation Clause to strike down established rules of evidence for expert testimony in a way that is contrary to the original understanding and

1. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

not necessary or particularly effective to protect against erroneous testimony regarding scientific testing. Such a result would be harmful to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The Arizona Court of Appeals affirmed the conviction of petitioner Jason Smith for "possessing dangerous drugs, marijuana for sale, narcotic drugs, and drug paraphernalia." App. to Pet. for Cert. 3a (Court of Appeals opinion). Officers executing a search warrant on Smith's father's property found Smith inside a shed which was reeking of marijuana. Inside the shed, they found six pounds of marijuana on a drying shelf, various other amounts of marijuana, methamphetamine, and drug paraphernalia. *Id.*, at 3a-4a.

The seized substances were tested by Arizona Department of Public Safety analyst Elizabeth Rast, who took lab notes, *id.*, at 88a-126a, and wrote a report. *Id.*, 85a-87a. The lab notes include machine-produced spectra from the gas chromatograph–mass spectrometer. *Id.*, at 108a-126a.

Rast did not testify at trial. Greggory Longoni, another forensic scientist, testified instead. *Id.*, at 5a (Court of Appeals opinion). Rast no longer worked for the department, for reasons not specified. *Id.*, at 45a (Longoni testimony). Longoni testified as to his expert opinion on the identity of the substances based on "[his] knowledge and training as a forensic scientist, [his] knowledge and experience with DPS's policies, practices, procedures, [his] knowledge of chemistry, the lab notes, the intake records, the chemicals used, [and] the tests done...." *Id.*, at 46a. "The State did not offer Rast's opinions or reports as evidence." *Id.*, at 5a (Court of Appeals opinion).

In a post-trial motion, defense counsel argued that the case was governed by *Bullcoming* v. *New Mexico*, 564 U. S. 647 (2011), while the prosecution argued the case was governed by *Williams* v. *Illinois*, 567 U. S. 50 (2012). App. to Pet. for Cert. 57a-60a. The trial judge found *Bullcoming* distinguishable and denied the motion. The Court of Appeals affirmed based on its own precedent, which was informed by *Williams*. *Id*., at 11a-12a.

SUMMARY OF ARGUMENT

Crawford v. *Washington*'s definition of "witness" is ripe for reexamination. The dissent noted from the beginning that the "testimonial versus nontestimonial" distinction for out-of-court statements was "no better rooted in history than our current doctrine," i.e., *Roberts* v. *Ohio*. In subsequent cases, several members of the *Crawford* majority came to conclude that the line had jumped the historical tracks. In *Michigan* v. *Bryant*, even *Crawford*'s author declared the line a "shambles."

In addition to its lack of historical grounding, *Crawford*'s expansive definition of "witness" has failed to produce a workable rule. Comparison of *Bryant* and the two cases in *Davis* v. *Washington* leaves no clear guidance for statements taken from victims at the scene, while *Bullcoming* and *Williams* fail to produce clear guidance for expert testimony. *Williams*, in particular, produced a result supported by two inconsistent opinions, a recipe for confusion.

Crawford's historical error is made clear by the unquestioned admissibility of dying declarations in the founding era, even when they certainly came within the *Crawford* definition of "testimonial." The absence of Confrontation Clause objections to such declarations for

decades after the adoption of the Sixth Amendment and parallel state provisions, and the quick and uniform dismissal of such objections when they finally were made, prove that the line *Crawford* drew is not consistent with the original understanding.

The early cases and the early commentary are consistent with the view that the Confrontation Clause governs only actual court testimony, and the responsibility for preventing undermining of it via loose hearsay exceptions lies with those who make the rules of evidence. In a state court case, this is not a federal question.

Among the views expressed in recent years by members of this Court, Justice Thomas's concurrence in *White* v. *Illinois* comes closest to the original understanding. But even if the "primary purpose" test survives, the limitation in *Michigan* v. *Bryant* to "statements taken for use at trial" would exclude the lab notes in this case from "testimonial" status. At the time the lab notes were written, the analyst would have expected to testify if the case went to trial. Notes are taken to document work and refresh recollection and are not normally expected to be introduced in evidence. A person intending to create a written substitute for in-court testimony would produce an affidavit like the one in *Melendez-Diaz* v. *Massachusetts*. Rast's report would be borderline, but it is not at issue in this case. The notes are not even close.

ARGUMENT

I. *Crawford* v. *Washington*'s definition of "witness" is ripe for reexamination.

In *Crawford* v. *Washington*, 541 U. S. 36, 62 (2004), this Court soundly rejected the rule of *Ohio* v. *Roberts*,

448 U. S. 56 (1980), under which the right of confrontation depended on judicial assessment of whether an out-of-court statement was reliable, leaning heavily on the hearsay exceptions of contemporary law for that assessment. See *Crawford*, *supra*, at 60. That holding has not been seriously questioned in later cases. Nor has the holding that the confrontation right applies when evidence is introduced via " 'extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' " *Id*., at 51-52, quoting *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment).

The problem is the "various levels of abstraction" around the "common nucleus." *Id*., at 52. At the periphery, we see a series of divided decisions, shifting majorities, and, in the case closest to the facts of the present case, no opinion of the Court at all.

In *Crawford* itself, Chief Justice Rehnquist noted that the Court's definition of "witness" via "testimonial" versus "nontestimonial" statements was "no better rooted in history than our current doctrine," i.e., *Roberts*. *Crawford*, 541 U. S., at 69 (dissent). In subsequent cases, members of the *Crawford* majority would conclude that the *Crawford* train had jumped the historical tracks. "The Court's standard is not only disconnected from history and unnecessary to prevent abuse; it also yields no predictable results to police officers and prosecutors attempting to comply with the law." *Davis* v. *Washington*, 547 U. S. 813, 838 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part); *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305, 331 (2009) (Kennedy, J., dissenting, joined by Justice Breyer et al.) (quoting *Davis* dissent).

In *Michigan* v. *Bryant*, 562 U. S. 344 (2011), the author of *Crawford* and *Davis* denounced the Court's

refusal to expand the primary-purpose test and said, "today's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort." *Id*., at 380 (Scalia, J., dissenting). He confidently asserted that his expansive view of the Confrontation Clause is the one "that the People adopted." *Ibid*.

Williams v. *Illinois*, 567 U. S. 50 (2011), served up the dreaded scenario of a majority that agreed on the result but divided over two conflicting and irreconcilable rationales for it. This situation produces no "narrowest ground" for the rule of *Marks* v. *United States*, 430 U. S. 188 (1977) to operate on, and it leaves all the other courts of the nation adrift, not knowing what the law is. This Court cannot agree on the precedential effect of such a decision. See *Ramos* v. *Louisiana*, 590 U. S.___, 140 S. Ct. 1390, 1403, 206 L. Ed. 2d 583, 598-599 (2020) (plurality opinion) (no precedent); *id*., 140 S. Ct., at 1410-1420, 206 L. Ed. 2d, at 606-617 (Kavanaugh, J., concurring in the result) (assuming a precedent but not saying what it is); *id*., 140 S. Ct., at 1429-1430, 206 L. Ed. 2d, at 628-630 (Alito, J., dissenting) (precedent based on result). The lack of clarity and coherence raises the question of whether this part of *Crawford* should be reconsidered.

Among the important factors in deciding whether to overrule a precedent are "the quality of [the precedent's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus* v. *State, County, and Municipal Employees,* 585 U. S. ___, 138 S. Ct. 2448, 2478-2479, 201 L. Ed. 2d 924, 955 (2018).

The quality of reasoning of the *Crawford* opinion varies markedly between its expansive definition of

"testimonial statement," and hence of "witness," and the other holdings in the case. Part II of *Crawford* has an extensive historical discussion of the *ex parte* examinations that were the principal target of the Confrontation Clause. However, in Part III-A, the sources for extending "testimonial" to pretrial statements that declarants merely "reasonably expect" or "reasonably believe" might be used at trial are nothing more than the brief of the defendant and a supporting *amicus* brief by defense lawyers. See *Crawford*, 541 U. S., at 51-52. Argument is not authority.

For the analogy between questioning by police officers and examination by magistrates under the Marian statutes, *Crawford* at page 53 cites 1 J. Stephen, History of the Criminal Law of England 221 (1883). What Stephen actually says on that page is "that under the [Marian statutes] the magistrate acts the part of a public prosecutor ...." That would support an analogy between the Marian examinations and a deposition taken by the district attorney. It does not support an analogy to statements taken by a police officer, especially one taken at the scene of the crime from a freshly injured victim. Cf. *Davis* v. *Washington*, 547 U. S., at 820-821, 829-830 (*Hammon* case).

Crawford's historical analysis also failed to adequately address the discrepancy between its expansive definition of "witness" and the fact that the admissibility of dying declarations was solidly established at the time of the Founding. This point is addressed further in Part II, *infra*.

Developments since *Crawford*, as described above, demonstrate that the line of cases has failed to produce a workable rule. In *Michigan v. Bryant*, 562 U. S., 370-378, the Court conducted a detailed factual analysis of all the circumstances of the individual case to come up with a designation of one purpose as "primary"

among the purposes of police officers asking questions at the scene. Such a process will often produce results on which reasonable people can differ and offers no clear guidance to the trial judges who must make the rulings or the appellate judges who must review them. With de novo review on appeal, it will produce many reversals and many needless retrials. Even the author of *Crawford* described the result as a "shambles." *Id.*, at 380 (Scalia, J., dissenting).

Crawford's "testimonial" holding is therefore ripe for reexamination. That reexamination, *amicus* suggests, leads to the conclusion that Chief Justice Marshall, Justice Story, and Justice Harlan all had it right. The Confrontation Clause is a rule of trial procedure. The hearsay rule is a nonconstitutional rule of evidence. See *Dutton* v. *Evans*, 400 U. S. 74, 94 (1970) (Harlan, J., concurring in the result). The Sixth Amendment does not freeze the hearsay rule in its 1791 form, whether the out-of-court statements at issue meet *Crawford*'s expansive definition of "testimonial" or not. Nor does it commission the federal courts as the overseers of the state courts' interpretation of their hearsay rules.

II. *Crawford*'s definition cannot be reconciled with the original understanding of admissibility of dying declarations.

A. Dying Declarations.

The bottom line of *Crawford* v. *Washington* is this: "Where testimonial statements [as defined in *Crawford*] are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U. S., at 68-69. As a matter of the original understanding of the Sixth Amendment, that statement is manifestly false. The admissibility of dying declarations,

regardless of whether they were within the *Crawford* definition of "testimonial," see *id*., at 56, n. 6, conclusively disproves this absolute statement.

The admissibility of dying declarations as an exception to the general exclusion of hearsay was well established by the time the Bill of Rights was adopted. See Donaldson & Frederickson, Dying to Testify? Confrontation vs. Declarations *In Extremis*, 22 Regent U. L. Rev. 35, 46-56, 79 (2009). "Thus, the inability of a particular confrontation theory to accommodate the dying declaration rule reveals only deficiencies in the theory itself." *Id*., at 79. *Crawford*'s theory is seriously deficient in this respect.

Crawford is squarely premised on fidelity "to the original meaning of the Confrontation Clause...." 541 U. S., at 60. Yet it virtually ignores dying declarations, drops the discussion into a footnote, calls them a "deviation," and hints that the Sixth Amendment may require their exclusion in the future. That is an exercise in evasion. If a theory cannot be squared with the facts, the theory is wrong. The fact is that the admissibility of dying declarations was clear in the founding era, and the Sixth Amendment was understood to be consistent with that admissibility.

The Court of King's Bench explained the rule of dying declarations in the same year that Congress proposed the Bill of Rights. See *King* v. *Woodcock*, 1 Leach 500, 168 Eng. Rep. 352 (K. B. 1789). The opinion describes established law at that point, and a note indicates a precedent from 1720. See *id*., at 501, 168 Eng. Rep., at 353, n. 1. *Woodcock* is particularly interesting because it contrasts two asserted bases for admission of the same statement—one of the Marian statutes and a dying declaration.

Woodcock had beaten his wife so severely that she appeared to be dead. After she was restored to consciousness, a magistrate came to see her and took a statement under oath. See *id.*, at 500-501, 168 Eng. Rep., at 352. However, the statement was not admissible under the statute for several reasons. The circumstances were not within the scope of the statute, which is for examinations after the defendant has been arrested and is in custody. The defendant was not present, and had no opportunity for cross-examination. Finally, the magistrate was not authorized to administer an oath under these circumstances. *Id.*, at 502, 168 Eng. Rep., at 353. However, the court held that the same statement was admissible as a dying declaration. The only difficulty presented was whether Mrs. Woodcock knew she was dying, a close call that was left to the jury to decide. See *id.*, at 503-504, 168 Eng. Rep., at 354.

This statement was certainly testimonial under the *Crawford* rule as further explained in *Hammon* v. *Indiana*, the companion case to *Davis* v. *Washington*. Mrs. Woodcock's statements were a "narrative of past events ... delivered at some remove in time from" the events. Compare *Davis*, 547 U. S., at 832, with *Woodcock*, 1 Leach, at 504, 168 Eng. Rep., at 354. Yet confrontation and cross-examination are not even mentioned in this portion of the opinion, though they are just a few sentences earlier in discussing admissibility under the examination statute. Confrontation was not an issue in the admissibility of dying declarations.

The English rule was regularly followed in the three decades that followed adoption of the Bill of Rights and similar provisions in state constitutions, with no indication that the Confrontation Clause was at issue. Two cases in the D.C. Circuit Court, although sparsely reported, indicate this clearly.

James McGurk was the first person hanged in the District of Columbia. He had beaten his wife to death. See Note to Petition to Thomas Jefferson from James McGurk (1802), National Archives, https://founders.archives.gov/documents/Jefferson/01-37-02-0224 (as viewed Dec. 5, 2023). The reported decision, in its entirety, reads:

> "THE COURT permitted her dying declarations to be given in evidence. The authorities, cited upon the trial were 1 Hawk. P.C. 124; Fost. Crown Law, 138, 256, 259; Leach, 141; 4 Bl. Comm. 195; 1 Gilb. Ev. 303; 2 Hale, P.C. 289; Woodcock's Case; Leach, 437, 563, case 218; 1 Bl. Comm. 442. ¶ The prisoner was condemned, and executed October 28th, 1802." *United States* v. *McGurk*, 1 Cranch C. C. 71, 26 F. Cas. 1097 (No. 15,680) (CC DC 1802).

The authorities cited are all from England, but the court evidently considered them dispositive.

A second D.C. case the next year gave a little more detail. *United States* v. *Veitch*, 1 Cranch C. C. 115, 28 F. Cas. 367 (No. 16,614) (CC DC 1803). The Government cited two English cases, *Woodcock* and *King* v. *Drummond*, 1 Leach 337, 168 Eng. Rep. 271 (K. B. 1784). The defense's objection was a claim that the deceased did not know he was dying at the time of the declaration, not the Confrontation Clause. The court allowed the declaration as to facts but not opinions.

State cases from that period are similar. For example, *Gibson* v. *Commonwealth*, 4 Va. 111, 2 Va. Cas. 111 (1817), is similar to *Veitch*. The defendant objected only that the declarant did not know he was dying. See 2 Va. Cas., at 120. The Virginia Supreme Court found the awareness sufficiently proved and affirmed. See 2 Va. Cas., at 121. Virginia's Constitution of 1776 was in effect, with the right "to be confronted with the accus-

ers and witnesses" in section 8 of the Declaration of Rights, but no mention was made of it. The victim gave a fairly detailed statement of the fatal attack, albeit to a private person,[2] see 2 Va. Cas., at 116, at least arguably "testimonial" within *Crawford*'s broad definition.

Only in the next generation did defendants begin to claim that the admission of dying declarations violated constitutional confrontation rights, and these claims were uniformly rejected. See Donaldson & Frederickson, 22 Regent U. L. Rev., at 59-60; *Woodsides* v. *State*, 3 Miss. 655, 664-666 (1837); *Anthony* v. *State*, 19 Tenn. 265, 277-278 (1838); *Hill* v. *Commonwealth*, 43 Va. 594, 607-608 (1845).

The Tennessee and Virginia decisions note the novelty of the argument and seem to be surprised by it.

> "[A]fter more than forty years from the adoption of our first constitution, this argument against the admissibility of dying declarations, on the ground of the bill of rights, is for the first time made, so far as we are aware in our courts of justice; and if made elsewhere it does not appear to have received judicial sanction in any state." *Anthony*, 19 Tenn., at 278.

"Is such evidence contrary to the bill of rights? If his question is to be answered affirmatively, then for nearly 70 years past, the Courts of this Commonwealth have been in the constant practice of violating the bill of rights in a most important particular." *Hill*, 43 Va., at 607.

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2. Whether statements to private parties can be testimonial and whether a different standard applies is not yet resolved. See *Ohio* v. *Clark*, 576 U. S. 237, 251 (2015) (Scalia, J., concurring in the judgment).

Why was no confrontation objection raised to dying declarations for decades of the adoption of state and federal bills of rights, and why were the objections uniformly rejected when they finally were raised? Certainly it was not the testimonial versus nontestimonial nature of the declaration in the individual cases. No such distinction was raised in any of the cases that *amicus* has found. The likely answer is that the hearsay rule and the confrontation right are different albeit related rules of law, and a declarant does not become a witness merely because he is aware that his out-of-court statement might possibly be offered in evidence at some time.

B. Hearsay and Confrontation.

The English rules of confrontation and hearsay had been created by courts, either through common law rulemaking or practice under statutes that did not directly address the questions at issue here. See *Crawford*, 541 U. S., at 44. When American states and the federal government adopted constitutional guarantees of confrontation, however, whatever confrontation right was guaranteed was placed at a higher level of law. This raised at least a potential that existing and evolving hearsay exceptions might conflict with a constitutional guarantee, a conflict that did not exist in England. Yet, American courts continued to decide hearsay questions with reference to English precedents and treatises, often with no discussion of any constitutional question.

Crawford says, "Early state decisions shed light upon the original understanding of the common-law right" of confrontation. 541 U. S., at 49. Indeed they do, but that light does not support the broad rule that *Crawford* adopted. *All* of the early cases discussed by *Crawford* involved "extrajudicial statements ... [that] are contained in formalized testimonial materials, such

as affidavits, depositions, prior testimony, or confessions." *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (Thomas, J., concurring in the judgment). None of them are statements outside within that category but "made in contemplation of legal proceedings," a category that Justice Thomas correctly foresaw "would entangle the courts in a multitude of difficulties." *Id*., at 364; see part I, *supra*. See *State* v. *Webb*, 2 N. C. 103 (Super L. Eq. 1794) (deposition); *State* v. *Campbell*, 30 S. C. L. (1 Rich.) 124 (App. L. 1844) (deposition before coroner); *Finn* v. *Commonwealth*, 26 Va. 701, 708 (1827) (court testimony); *State* v. *Atkins*, 1 Tenn. 229 (Super. L. & Eq. 1807) (*per curiam*) (court testimony); *United States* v. *Macomb*, 26 F. Cas. 1132, 1132-1133 (No. 15,702) (CC Ill. 1851) (preliminary hearing); *State* v. *Houser*, 26 Mo. 431, 433, 435-436 (1858) (deposition before the examining court); *Kendrick* v. *State*, 29 Tenn. 479, 484-488 (1850) (testimony in committing court); *Bostick* v. *State*, 22 Tenn. 344, 344-346 (1842) (deposition before committing magistrates, cross-examination offered but declined); *Commonwealth* v. *Richards*, 35 Mass. 434, 436-440 (1837) (preliminary examination testimony paraphrased rather than verbatim not admissible under rules of evidence, constitutional provision held inapplicable); *State* v. *Hill*, 20 S. C. L. (2 Hill) 607, 608-610 (App. 1835) (deposition); *Johnston* v. *State*, 10 Tenn. 58, 59 (Err. & App. 1821) (deposition).

In *United States* v. *Burr*, 25 F. Cas. 187, 193 (No. 14,694) (CC Va. 1807), Chief Justice Marshall ruled on a motion to exclude hearsay testimony of a statement by an alleged co-conspirator of the defendant. He noted the connection between the confrontation right and the hearsay rule as supporting the same ultimate goal. "I know not why ... a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him." *Ibid*. This statement does not

extend the confrontation right to exclude hearsay but rather underscores the importance of enforcing the hearsay rule and being cautious with exceptions. Yet he acknowledged that some exceptions had been made. "This rule as a general rule is permitted to stand, but some exceptions to it have been introduced, concerning the extent of which a difference of opinion prevails, and that difference produces the present question." *Ibid*. He then went on to decide the issue and exclude the testimony as a matter of hearsay law, not on the basis of the Confrontation Clause. See *id*., at 193-195. The hearsay rule is important, but it is not constitutional.

In the interval between the adoption of the Bill of Rights and the Civil War, we see repeated invocations of the right to confront and cross-examine in cases of prior testimony in courts or before magistrates or coroners, while in cases of dying declarations and co-conspirator statements these rights are not at issue or the claims are easily dismissed. The answer must be that the declarant of a statement made outside of these judicial or quasi-judicial proceedings is not a "witness" within the meaning of the Sixth Amendment and the similar provisions of state constitutions, and the extension made in *Crawford* and *Davis* is indeed "disconnected from history." *Davis*, 547 U. S., at 838 (Thomas, J., dissenting in part).

C. Early Commentary.

We can also see from early commentary that the Confrontation Clause was not understood to constitutionalize the law of hearsay with regard to statements made outside of the proceedings noted above. William Rawle noted the confrontation right as an important one, but he believed that its placement in the Constitution "would appear superfluous" "to those familiar only with the habits of this country." W. Rawle,

A View of the Constitution of the United States of America 128 (2d ed. 1829). That is, the abuses in question simply did not exist in this country, but only elsewhere. See *id*., at 129. Yet the distinguished lawyer certainly knew that exceptions to the hearsay rule did exist, and, as indicated in *Burr*, *supra*, controversial new ones were evolving. The Confrontation Clause would certainly not be "superfluous" if it governed such issues. It was not understood to govern them at the time. Its purpose was to prevent adoption of the civil law mode of trial.

Justice Story took a similar view. The Sixth Amendment "does but follow out the established course of the common law in all trials for crimes.... [T]he witnesses are sworn, and give in their testimony (at least in capital cases) in the presence of the accused ...." 3 J. Story, Commentaries on the Constitution of the United States, § 1785, p. 662 (1833). As important as the confrontation right was, though, it did not govern the admission of hearsay and could be undermined by excessive hearsay exceptions.

> "Without in any measure impugning the propriety of these provisions, it may be suggested, that there seems to have been an undue solicitude to introduce into the constitution some of the general guards and proceedings of the common law in criminal trials, (truly admirable in themselves) without sufficiently adverting to the consideration, that unless the whole system is incorporated, and especially the law of evidence, a corrupt legislature, or a debased and servile people, may render the whole little more, than a solemn pageantry." *Ibid*.

This is consistent with Justice Marshall's dictum in *Burr*, *supra*. The hearsay rule is important, but it is not constitutional, and in practice those in charge of making hearsay rules could undermine the practical

value of the confrontation right. That would be a grave error in policy, but the Constitution does not prevent it.

Incorporating the law of evidence into the Constitution, of course, would not be a practical solution. That law is too complex for such incorporation, and it needs to evolve to deal with new issues, such as scientific testimony, more than the cumbersome and difficult constitutional amendment process can handle. Not all important issues are constitutional or federal. Some need to be entrusted to legislatures and states.

Nowhere in the early materials do we see anything even vaguely resembling the line between "testimonial" and "nontestimonial" as drawn by *Crawford*, *Davis*, or the defendant's position in the present case. The confrontation right applies to testimony at trial and certain earlier proceedings with some resemblance to trials, including coroners' and magistrates' examinations. While a sixteenth-century magistrate may have resembled a prosecuting attorney more than a modern preliminary hearing judge, 1 J. Stephen, History of the Criminal Law of England 221 (1883), it is absurd to extend that analogy to a first responder at the scene, see *Davis*, 547 U. S., at 830, or a laboratory technician.

A line of cases that was supposed to be a return to the original understanding has spawned an artificial rule, completely detached from history. It needs to be brought back to something close to the real original understanding, applied as closely as possible to changed conditions. Many difficult problems of scientific evidence are critically important, but they are neither constitutional nor federal, and precedents of this Court that can be changed only by this Court or by constitutional amendment are not the way to deal with them. See *Williams* v. *Illinois*, 567 U. S. 50, 93-99 (2012) (Breyer, J., concurring).

III. The lab notes used by the expert in forming his opinion do not implicate the Confrontation Clause.

The primary evidence as to the identity of the substances at issue consists of spectra produced by an instrument called a gas chromatograph–mass spectrometer with an expert opinion regarding the substances indicated by the spectra. See App. to Pet. for Cert. 37a, 46a-49a. Reference to the lab notes and intake records was necessary to identify the samples tested and procedures used. See *id.*, at 46a. This evidence was certainly not in violation of the Confrontation Clause as originally understood, see Parts I and II, *supra*, but it was also not a violation under the ahistorical "primary purpose" test of *Crawford* and its progeny if "purpose" is given a reasonable scope.

The gas chromatograph–mass spectrometer (GC-MS) is a compound of two instruments, joined together so that the output of the GC is the input of the MS. The GC separates a mixture of compounds into its constituent substances, which travel through the instrument's column at different speeds, emerging and entering the MS at different times. In the MS, the compounds are broken into fragments and given an electrical charge by an electron beam. The path that fragments follow through a magnetic field depends on their mass-to-charge ratio. Matching the spectra to a library of substances is used to identify the substances in the sample, but it is not a simple matter, and care and expertise are required. See University of Toronto, TRACES Centre, GCMS: Quick Guide to the Basics (Updated Oct. 2020), https://www.utsc.utoronto.ca/~traceslab/PDFs/GCMS_Basics.pdf.

Notes taken by a laboratory technician in the course of analyzing a sample are certainly not "formalized testimonial materials, such as affidavits, depositions,

prior testimony, or confessions." *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment). In that respect, this case is a sharp contrast with *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009), see *id*., at 329-330 (Thomas, J., concurring), and similar to *Williams* v. *Illinois*, 567 U. S. 50, 103-104 (2012) (Thomas, J., concurring in judgment). Justice Thomas's *White* v. *Illinois* standard comes closer to the original understanding than any of the other tests proposed in the *Crawford* line, as explained in Parts I and II, *supra*, and its adoption would easily resolve the present case.

Even if the Court continues to adhere to the "primary purpose" test, though, more clarity and more fidelity to the original understanding are needed with regard to what purpose activates the Confrontation Clause. In *Michigan* v. *Bryant*, 562 U. S. 344, 358 (2011), the Court said that "the basic objective of the Confrontation Clause ... is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements *taken for use at trial*." (Emphasis added.) Ongoing emergencies present one situation outside that objective, but not the only one by any means. See *ibid*. The purpose of concern is "a primary purpose of creating an out-of-court substitute for trial testimony."[3] *Ibid*. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id*., at 359.

Lab notes such as those in this case are manifestly not created with the primary purpose of serving as

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3. Whether Ms. Rast's report would qualify as testimonial would present a closer question, see Brief for Respondent 44, 48-50, but the report was not introduced directly or indirectly and is not properly at issue in this case. See *id*., at 44-45.

substitutes for trial testimony. At the time Ms. Rast tested the samples, she likely expected that if the case went to trial she would be testifying in person. Notes would be useful in refreshing recollection before testimony, see Brief for Respondent 24, but they would not be written with the expectation of being introduced in evidence.

Bryant's description of primary purpose is considerably narrower than *Davis*'s, and the difference is important. The *Hammon* portion of *Davis* included as "testimonial" statements that were merely taken as "part of an investigation into possibly criminal past conduct." See 547 U. S., at 829. That is a sweep far broader than necessary to address the core concerns of the Confrontation Clause as identified in *Bryant*.

None of this is to say that courts or legislatures should be lax in creating exceptions to the hearsay rule. The warnings of Chief Justice Marshall and Justice Story, see *supra*, at 14-17, remain as true today as they were in the early nineteenth century. But the hearsay rule as it existed in 1791 was not written into the Constitution and cast in concrete. The extent to which it should be changed and the guarantees of trustworthiness to be required in state courts are questions within the power and the duty of state legislatures and state courts to answer. They are not federal questions.

CONCLUSION

The judgment of the Arizona Court of Appeals should be affirmed.

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Respectfully submitted,

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