No. _____

In the Supreme Court of the United States

CID C. FRANKLIN, PETITIONER

v.

NEW YORK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has "variously described" the "category" of "testimonial statements" that give rise to a cross-examination right under the Sixth Amendment's Confrontation Clause. *Smith* v. *Arizona*, 144 S. Ct. 1785, 1792 (2024). In the decision below, the New York Court of Appeals recognized only one of this Court's various formulations of the test as valid: a statement is testimonial *solely* if it "was created for the primary purpose of serving as trial testimony." Pet. App. 1a. The court thus held that a post-arrest report about Petitioner prepared by a State agent to determine Petitioner's suitability for bail was properly admitted as evidence against him at his criminal trial—even though the report's author was not made available for cross-examination. That ruling conflicts with the decisions of other courts that apply different tests. It also conflicts with *Crawford* v. *Washington*, 541 U.S. 36 (2004), which held the Confrontation Clause was enacted to reach bail reports like Petitioner's, even if they were not prepared "to produce evidence admissible at trial." *Id.* at 44, 50.

The questions presented are:

1. Whether the Sixth Amendment's Confrontation Clause applies to out-of-court statements admitted as evidence against criminal defendants if, *and only if*, the statements were created for the primary purpose of serving as trial testimony.

2. Whether a post-arrest report prepared about a criminal defendant by an agent of the State for use in a criminal proceeding can be admitted as evidence against the defendant at trial, without providing a right to cross-examine the report's author.

RELATED PROCEEDINGS

State of New York Supreme Court, Queens County:

The People of the State of New York v. *Cid C. Franklin*, No. 2709/2016 (April 16, 2019)

State of New York Supreme Court, Appellate Division, Second Department:

The People of the State of New York v. *Cid C. Franklin*, No. 2019-06088 (July 6, 2022)

State of New York Court of Appeals:

The People of the State of New York v. *Cid C. Franklin*, No. APL-2023-00005 (April 25, 2024)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitution, Statutes & Court Rules

Miscellaneous

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PETITION FOR A WRIT OF CERTIORARI

Cid C. Franklin respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals in this case.

OPINIONS BELOW

The opinion of the New York Court of Appeals (Pet. App. 1a-28a) is not yet reported but is available at 2024 WL 1773244. The opinion of the New York Supreme Court, Appellate Division, Second Department (Pet. App. 29a-32a) is reported at 169 N.Y.S.3d 546.

JURISDICTION

The Court of Appeals entered judgment on April 25, 2024. On July 16, 2024, this Court extended the time within which to file a petition for a writ of certiorari to and including September 20, 2024. This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in relevant part:

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

STATEMENT

This Court's modern Confrontation Clause jurisprudence begins with *Crawford* v. *Washington*, 541 U.S. 36 (2004). Although *Crawford* did not define the class of "testimonial" statements that give rise to a confrontation right, it held that "some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing." *Id.* at 52. "Whatever else the term covers," the Court explained, "it applies at a minimum to prior testimony at a preliminary hearing … and to police interrogations." *Id.* at 68.

This case involves the admission of exactly this type of testimony at Petitioner Cid C. Franklin's criminal trial. The State's only evidence of an essential element of the charged offense was a report prepared by an agent of the State after Franklin's arrest to assist the court in determining Franklin's eligibility for bail. But even though the report contains testimony given at a preliminary proceeding, the New York Court of Appeals held that Franklin had no right to cross-examine his accuser—a right he would have enjoyed if only he had been tried in other jurisdictions.

The bail report admitted against Franklin in this case bears a "close[] kinship to the abuses at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 68. One of those abuses was the admission at trial of the common-law precursors to the report admitted in

this case—examinations conducted under the 16th-century "Marian bail and committal statutes." *Id.* at 44. Like Franklin's bail report, Marian statute bail examinations probably were not conducted for the purpose of producing trial evidence. *Id.* But they were nonetheless admitted into evidence at some trials, without cross-examination. This is one of the "principal evil[s] at which the Confrontation Clause was directed." *Id.* at 50.

The decision below allowing Franklin's bail report to be admitted at trial without cross-examination shows how far some lower courts have strayed from the Sixth Amendment's original meaning. In fairness, it is not all their fault. Since *Crawford*, this Court has "variously described" the test for identifying "testimonial" statements that give rise to a Sixth Amendment cross-examination right. *Smith* v. *Arizona*, 144 S. Ct. 1785, 1792 (2024). The lower courts apply a hodge-podge of different standards pulled from language in this Court's decisions. Several courts openly admit they cannot discern what this Court intends.

Here, the lower court held Franklin's bail report is not testimonial because it was not "created for the primary purpose of serving as trial testimony," Pet. App. 1a-2a—even though the same was true of Marian statute bail examinations, see *Crawford*, 541 U.S. at 44. Other courts apply different tests drawn from other language in this Court's opinions, under which Franklin would have had a cross-examination right—asking, for example, if it was reasonable "to believe that the statement would be available for use at a later trial." *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 311 (2009) (quoting *Crawford*, 541 U.S. at 52).

This Court should grant the petition to ensure that criminal defendants' Sixth Amendment rights do not depend on the vagaries of where they are prosecuted, and to restore the original meaning of the Confrontation Clause.

A. Legal Background

The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend VI. The amendment codifies the "right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54. Now, as then, the confrontation right prohibits "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54.

"[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. One practice of particular concern at the founding was the introduction into evidence of statements made pursuant to the 16th century "Marian bail and committal statutes," which "required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court." *Id.* at 43-44. Although "it is doubtful that the original purpose of the examinations was to produce evidence admissible at trial … they came to be used as evidence in some cases." *Id.* at 44. "It was these practices that … [the] right to confrontation was meant to prohibit; and that the founding-era rhetoric decried." *Id.* at 50. "The Sixth Amendment must be interpreted with this focus in mind." *Ibid.*

B. Factual Background

Cid C. Franklin was convicted of a felony because of a bail report—the modern-day analogue of the Marian statute bail examinations. Franklin lived in a home he shared with his son and his stepmother, Grace Mapp. Pet. App. 2a. Franklin's father, a licensed gun owner, had also lived in the home for many years until his death. Pet. C.A. Br. 11. Police responding to a call searched the home and recovered a gun from a basement closet. Pet. App. 2a. Police also found "blankets, pillows, and other miscellaneous items belonging to both Mapp and Franklin" in that closet. *Ibid.* None of the recovered items proved that Franklin lived in the basement. See C.A. App. 993.

Franklin was arrested and booked on a firearm possession charge. Pet. App. 2a, 4a. While in custody and awaiting arraignment—but before he was assigned counsel—Franklin was interviewed by an employee of the Criminal Justice Agency (CJA). "CJA is a nonprofit organization funded by the City of New York that provides pretrial services similar to those provided by probation departments in counties" elsewhere in the State. Pet. App. 2a. CJA interviews "nearly all individuals arrested" in New York City and collects information to make a pretrial release recommendation to the arraignment judge. *Ibid.*

CJA employees complete an official report that records information about an arrestee's home address, length of residence, employment status, and education, among other things. See Pet. App. 33a. These reports also list the time and date of a defendant's arrest, along with the crimes charged. See *Ibid.* CJA employees submit their report to the arraignment judge, along with a

release recommendation, and appear at the arraignment to answer questions from the court. Pet. App. 3a. As relevant here, the CJA employee recorded Franklin's home address as "117-48 168th St, BSMT," and noted the employee had "verified" that information with Mapp, Franklin's stepmother and housemate. Pet. App. 3a, 33a.[1]

This report was indispensable to the State's case. It was the State's only evidence that Franklin had "dominion and control" over the basement of his shared residence, "an element deemed essential by all parties to prove [Franklin] constructively possessed [the] weapon" found in a basement closet "in violation of the law." Pet. App. 16a. (Aarons, J., dissenting). Yet the State refused to call the CJA employee who prepared the report. Instead, the State introduced the report through a CJA supervisor "who did not interview defendant, complete the report, or have any direct knowledge as to whether [Franklin] ... lived in the basement." Pet. App. 17a.

Defense counsel objected that Franklin had a Sixth Amendment right to cross-examine the CJA employee who prepared the report and whose statements were being introduced as key evidence against Franklin. Pet. App. 3a-4a (majority opinion); C.A. App. 994. The trial court overruled the objection, holding that the Confrontation Clause did not apply because the CJA report "was not made specifically for [a] prosecution purpose," but rather "as an aid to the Judge to [determine] if any bail should be set at arraignment[.]" C.A. App. 1000. Based on the report, Franklin was convicted of second-degree criminal possession of a weapon, a Class C violent felony

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[1] The report incorrectly refers to Mapp as Franklin's "mother." Pet. App. 33a.

that carries a 3.5 year minimum sentence. Pet. App. 4a; N.Y. Penal Law §§ 265.03(3), 70.02(3)(b).

C. Decisions Below

1. The Appellate Division, New York's intermediate appellate court, unanimously reversed and ordered a new trial. Citing *Crawford*, the court held that the CJA report qualified as "testimonial evidence" subject to the Confrontation Clause because it was "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Pet. App. 31a (quoting *Crawford*, 541 U.S. at 51). Therefore, the court concluded, the trial court "violat[ed Franklin's] right of confrontation" by permitting the State to introduce the report "to establish an essential element" of the crime without "giv[ing Franklin] the opportunity to cross-examine the CJA employee" who authored it. *Ibid.*

2. A divided Court of Appeals reversed by a vote of 5 to 2.

a. The court's opinion recognized that the CJA report "was central to the People's case at trial," there being no discernable DNA or fingerprints on the gun. Pet. App. 3a. The court also noted that "[n]one of the witnesses who testified at Franklin's trial provided direct proof that [Franklin] lived in the basement," and the prosecution introduced no "evidence that any personal documents or effects of Franklin's were found there." *Ibid.*

Still, the Court of Appeals held that Franklin had no right to cross-examine his accuser, whose out-of-court statements were essential to the prosecution's case. To reach its conclusion, the Court of Appeals diverged from the Appellate Division in defining the standard for "testimonial" statements. Pet. App. 6a. It acknowledged "*Crawford*'s definition of testimony as '[a] solemn decla-

ration or affirmation made for the purpose of establishing or proving some fact.'" Pet. App. 4a-5a (quoting *Crawford*, 541 U.S. at 51). It also quoted language from *Crawford* that a statement is testimonial if "an objective witness would reasonably believe it 'would be available for use at a later trial.'" Pet. App. 8a (quoting *Crawford*, 541 U.S. at 52). But the court concluded that this Court has since "refined its Confrontation Clause analysis" to define "testimonial" to mean only a statement that, "in light of all the circumstances [and] viewed objectively," had a "primary purpose … to create an out-of-court substitute for trial testimony." Pet. App. 5a-6a (cleaned up) (quoting *Ohio* v. *Clark* 576 U.S. 237, 245 (2015)).

Applying that standard, the Court of Appeals held that the CJA report was not testimonial. Specifically, the court concluded that the CJA report is an "administrative" filing with the "objective" of "giv[ing] the arraignment judge information pertaining to a defendant's suitability for pretrial release," and that therefore its "primary purpose … was not to create an out-of-court substitute for trial testimony." Pet. App. 10a.

The Court of Appeals did not deny that applying this Court's other formulations of the test would have yielded the opposite result. It all but conceded that "an objective witness would reasonably believe" the CJA report "would be available for use at a later trial." Pet. App. 8a-9a (quoting *Crawford*, 541 U.S. at 52). After all, the report was prepared by an agent of the State in order to gather facts about Franklin (while he was in custody but before he was assigned counsel) to submit to a court in the very same prosecution that culminated in Franklin's conviction. But the Court of Appeals held that none of that made any difference. Because the CJA

report was not "created for the primary purpose of serving as trial testimony," it was not testimonial, and Franklin's conviction stands. Pet. App. 1a-2a.

b. Judge Aarons dissented. Unlike the majority, she would have held that a statement is testimonial when "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Pet. App. 15a. (quoting *Crawford*, 541 U.S. at 52). The CJA report easily qualified under that standard, Judge Aarons explained, for several reasons.

First, the CJA report was "generated for and given directly to the court during a criminal prosecution to prove facts and make conclusions about" Franklin. Pet. App. 22a. The report thus contains "pretrial statements that declarants would reasonably expect to be used prosecutorially." *Ibid.* (quoting *Crawford*, 541 U.S. at 51).

Judge Aarons further explained that, "[r]egardless of its contents," a CJA report "can be used to make any case [the State] can against a defendant's interests." Pet. App. 27a. Accordingly, "[t]he CJA report is not some kind of intake form," but "is a statement by a person standing in the shoes of a law enforcement officer working within the criminal justice system" that can be "pulled out and leveraged against a defendant at any time during the prosecution." *Ibid.*

The majority's decision, Judge Aarons concluded, undermined the Sixth Amendment's confrontation right and allowed a "lone statement of questionable provenance [to] secure[Franklin's] conviction." Pet. App. 28a.

REASONS FOR GRANTING THE PETITION

In *Crawford*, this Court "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" 541 U.S. at 68. That day still has not arrived. The lower courts apply conflicting tests drawn from this Court's decisions and reach inconsistent results. Accordingly, the Confrontation Clause currently provides different protections to different defendants.

This case vividly illustrates the problem. Under versions of the test applied in other jurisdictions, the evidence the State relied on to secure Franklin's conviction would have been inadmissible because Franklin was not permitted to cross-examine his accuser. Yet under the narrow test the New York Court of Appeals adopted in this case, Franklin stands convicted even though the evidence against him plainly would have triggered a confrontation right at common law. That narrow test also opens the door to the admission of tomes of prejudicial evidence without affording defendants a right of cross-examination. This Court should grant certiorari to clarify the test for determining whether a statement is "testimonial," restore the original meaning of the Confrontation Clause, and reverse the judgment below.

I. Decisions From This Court And The Lower Courts Are Divided Over When A Statement Is Testimonial

A. This Court Has Announced And Applied Conflicting Formulations Of The Testimonial Standard

Twenty years ago, this Court's decision in *Crawford* reaffirmed the Confrontation Clause's "bedrock procedural guarantee": the Clause categorically prohibits the prosecution from introducing into evidence any "testimonial statement[]" of an absent witness unless the witness is "unavailable to testify, and the defendant ha[s]

had a prior opportunity" for cross-examination. 541 U.S. at 42, 53-54. In doing so, this Court both retethered the confrontation right to the "original meaning of the Confrontation Clause" and endeavored to leave behind the "unpredictability" that defined the Court's prior jurisprudence. *Id.* at 60, 63. Before *Crawford*, the Court allowed "an unavailable witness's out-of-court statement [to] be admitted so long as it has adequate indicia of reliability." *Id.* at 42 (citing *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980)).

Assessing the Founding-era common-law right to confrontation, *Crawford* held that "testimonial" statements include, "at a minimum[,] … prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and … police interrogations." *Id.* at 68. At the same time, though, *Crawford* "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. The Court "acknowledge[d]" that its "refusal to articulate a comprehensive definition" of "testimonial" would "cause interim uncertainty," but promised the lingering uncertainty would not be "permanent[.]" *Id.* at 68 n.10. (emphasis omitted).

That promise remains unfulfilled. The two decades since *Crawford* have not clarified what that decision left obscure. Instead, this Court has set forth "varied formulations of the … testimonial inquiry," all of which diverge in meaningful ways. *Smith*, 144 S. Ct. at 1801-02.

One of those "formulations," *ibid.*, originated in this Court's opinion in *Davis* v. *Washington*, 547 U.S. 813 (2006), which held that "statements … made in the course of police interrogation … are testimonial when the circumstances objectively indicate that there is no … ongoing emergency, and that the primary purpose of

the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822.

In its next case addressing this issue, however, this Court did not apply (or even mention) the formulation in *Davis*. See *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305 (2009). Rather, this Court provided two additional and different versions of the testimonial inquiry. *Melendez-Diaz* first held that out-of-court statements are testimonial if the statements "are functionally identical to live, in-court testimony." *Id.* at 310-11. And the Court then held the statements in question (relating to forensic analysis) were testimonial because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 311 (quoting *Crawford*, 541 U.S. at 52). The dissenting judges below applied that latter formulation. Pet. App. 15a.

This Court's proliferation of formulations continued in *Michigan* v. *Bryant*, 562 U.S. 344 (2011), which held that a statement is "testimonial" when "procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Id.* at 358; see also *Ohio* v. *Clark*, 576 U.S. 237, 250-51 (2015) ("[W]e ask whether a statement was given with the 'primary purpose of creating an out-of-court substitute for trial testimony.'" (quoting *Bryant*, 562 U.S. at 358)). The Court of Appeals applied this formulation. Pet. App. 6a, 9a-10a.

Still more formulations abound. This Court has noted that Webster's early 19th Century dictionary defined "testimony" to mean a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (quoting 2 N.

Webster, An American Dictionary of the English Language (1828)). One member of this Court consistently applies that definition under the Confrontation Clause. See *Smith*, 144 S. Ct. at 1803 (Thomas, J., concurring in part). That is also the definition the intermediate appellate court applied in this case to unanimously reverse Franklin's conviction. Pet. App. 31a. And while the Court's precedents do not impose a solemnity requirement, this Court has parroted that definition's second half, providing that a statement is testimonial when "made for the purpose of proving a particular fact." *Bullcoming* v. *New Mexico*, 564 U.S. 647, 652 (2011).

Williams v. *Illinois*, 567 U.S. 50 (2012) further compounds the confusion. In a 4:4:1 decision, the plurality held that a statement is not testimonial unless it has "the primary purpose of accusing a targeted individual." *Id.* at 84. But a majority of the justices—one concurring in the judgment and four dissenting—rejected the plurality's view. See *id.* at 114-17 (Thomas, J., concurring in the judgment); *id.* at 135-36 (Kagan, J., dissenting).[2]

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[2] This Court has adopted yet another standard in the context of the Fifth Amendment's privilege against self-incrimination. There, compelled "testimonial" statements of the defendant—which cannot be introduced at trial—include all statements that "explicitly or implicitly … relate a factual assertion or disclose information." *Doe* v. *United States*, 487 U.S. 201, 210 (1988). This Court has never explained why the right against self-incrimination and the confrontation right should apply different standards, especially considering the text providing each right is nearly identical. Compare U.S. Const. amend V. (no criminal defendant may "be compelled … to be a *witness against himself*" (emphasis added)), with U.S. Const. amend VI. (a criminal defendant has a right "to be confronted with the *witnesses against him*" (emphasis added)).

In sum, "[a] comprehensive definition of the term 'testimonial' [still] awaits articulation." *People* v. *Amezcua*, 434 P.3d 1121, 1140 (Cal. 2019). This Court has set out at least seven different formulations of the standard, leading many to describe recent Confrontation Clause cases "as 'incoherent,' 'uncertain,' 'unpredictable,' 'a train wreck,' suffering from 'vagueness' and 'doublespeak,' and, simply put, a 'mess.'" Kevin C. McMunigal, Crawford*, Confrontation, and Mental States*, 64 Syracuse L. Rev. 219, 220 (2014) (citations omitted). This Court should grant certiorari to clarify the testimonial inquiry and to ensure that the "unpredictable and inconsistent application" that came to define the now-defunct *Roberts* framework does not befall *Crawford* as well. *Crawford*, 541 U.S. at 66.

B. This Court's Conflicting Formulations Have Created Disarray And Divergent Outcomes In Federal Courts of Appeals And State Courts Of Last Resort

Six years ago, this Court declined an invitation to settle confusion in lower courts regarding two issues: (1) the test for determining whether a statement is "testimonial" under the Confrontation Clause; and (2) when out-of-court testimony is admitted "for its truth" (another requirement to trigger a confrontation right). See *Stuart* v. *Alabama*, 139 S. Ct. 36, 36-37 (2018) (Gorsuch, J., dissenting from the denial of certiorari). Just last Term, this Court intervened to resolve the second issue. See *Smith*, 144 S. Ct. at 1794-1800. The disarray regarding the first issue—the one presented by this petition—remains as strong as ever.

This Court's conflicting formulations of the testimonial standard have created an intractable "circuit split on … what test exists for an out-of-court statement to be testimonial." Transcript of Oral Argument at 27, *Smith*,

144 S. Ct. 1785 (No. 22-899), 2024 WL 250706 (Sotomayor, J.). The same goes for state courts, which "are increasingly confronting circumstances in which they are unsure how to assess whether a statement is testimonial." *State* v. *Patel*, 270 A.3d 627, 647 n.18 (Conn. 2022), *cert. denied*, 143 S. Ct. 216 (2022).

1. Following this Court's lead, lower courts apply various conflicting standards to determine when admission of an out-of-court statement triggers a criminal defendant's Sixth Amendment right to cross-examination. Some decisions hold that statements are testimonial if "made under circumstances [that] would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," *Melendez-Diaz,* 557 U.S. at 311; *Crawford*, 541 U.S. at 52. *E.g.*, *Williams* v. *Superintendent Greene SCI*, 112 F.4th 155, 164 (3d Cir. 2024); *United States* v. *Sanchez*, 853 F. App'x 141, 143 (9th Cir. 2021); *United States* v. *McLean*, 695 F. App'x 681, 685 (4th Cir. 2017); *United States* v. *Richard*, 678 F. App'x 927, 939 (11th Cir. 2017); *United States* v. *Moore*, 651 F.3d 30, 73 (D.C. Cir. 2011), *aff'd sub nom. Smith* v. *United States*, 568 U.S. 106 (2013); *People* v. *Washington*, --- N.W.3d ----, 2024 WL 3551260, at *3 (Mich. July 26, 2024); *State* v. *Thomas*, 985 N.W.2d 87, 96 (Wis. 2023); *Zeger* v. *State*, 2022 WL 16703330, at *1 (Nev. Nov. 3, 2022); *State* v. *Tomlinson*, 264 A.3d 950, 962 (Conn. 2021); *State* v. *Sites*, 825 S.E.2d 758, 766 (W. Va. 2019); *Nicholls* v. *People*, 396 P.3d 675, 680 (Colo. 2017); *Roby* v. *State*, 183 So. 3d 857, 871 (Miss. 2016).

Other decisions define "testimonial" statements as those made "to establish or prove past events potentially relevant to later criminal prosecution," *Davis*, 547 U.S. at 822. *E.g.*, *United States* v. *King*, 93 F.4th 845, 851 (5th Cir. 2024), *petition for cert. filed*, No. 23-7592 (U.S.

May 30, 2024); *Goodloe* v. *Brannon*, 4 F.4th 445, 449 (7th Cir. 2021); *Reiner* v. *Woods*, 955 F.3d 549, 554 (6th Cir. 2020); *United States* v. *Hollingshed*, 940 F.3d 410, 416 n.4 (8th Cir. 2019); *United States* v. *Denton*, 944 F.3d 170, 184 (4th Cir. 2019) *Dickey* v. *State*, 483 S.W.3d 287, 290 (Ark. 2016); *Commonwealth* v. *Trotto*, 169 N.E.3d 883, 904 (Mass. 2021); *State ex rel. A.R.*, 188 A.3d 332, 344 n.9 (N.J. 2018); *King* v. *Commonwealth*, 554 S.W.3d 343, 362 (Ky. 2018), *overruled in part by Johnson* v. *Commonwealth*, 676 S.W.3d 405 (Ky. 2023).

Still more, like the New York Court of Appeals in this case, apply this Court's narrowest formulation: that statements are testimonial only when their "primary purpose" is to "creat[e] an out-of-court substitute for trial testimony," *Bryant*, 562 U.S. at 358; *Clark*, 576 U.S. at 250-51. *E.g.*, Pet. App. 6a, 9a-10a; *United States* v. *Lundy*, 83 F.4th 615, 620 (6th Cir. 2023); *United States* v. *Stepanets*, 989 F.3d 88, 116 (1st Cir. 2021); *United States* v. *Buluc*, 930 F.3d 383, 392 (5th Cir. 2019); *United States* v. *Kirk Tang Yuk*, 885 F.3d 57, 81 n.13 (2d Cir. 2018); *United States* v. *Klemis*, 859 F.3d 436, 444 (7th Cir. 2017); *United States* v. *Reed*, 780 F.3d 260, 269 (4th Cir. 2015); *State* v. *English*, 902 S.E.2d 385, 390 (S.C. 2024); *Commonwealth* v. *Hart*, 222 N.E.3d 455, 471 (Mass. 2023); *Wallace* v. *State*, 659 S.W.3d 267, 272 (Ark. 2023); *People* v. *Garcia*, 479 P.3d 905, 907 (Colo. 2021); *Cardosi* v. *State*, 128 N.E.3d 1277, 1288 (Ind. 2019); *State* v. *Beasley*, 108 N.E.3d 1028, 1064 (Ohio. 2018); *State* v. *Vargas*, 869 N.W.2d 150, 160 (S.D. 2015); *State* v. *Koederitz*, 166 So. 3d 981, 986 (La. 2015); *Bowling* v. *State*, 717 S.E.2d 190, 197-98 (Ga. 2011).

Some cases apply a hybrid standard. They ask, for example, "whether out-of-court statements result from

questioning, 'the primary purpose of which was to establish or prove past events potentially relevant to later criminal prosecution' *and* whether they are 'functionally identical to live, in-court testimony, made for the purpose of establishing or proving some fact' at trial.'" *United States* v. *Latu*, 46 F.4th 1175, 1180 (9th Cir. 2022) (emphasis added) (cleaned up). Others ask whether a statement "fall[s] within [a] 'core class,'" of testimonial statements, which consists only of "*[e]x parte examinations* and interrogations used as a functional equivalent for in-court testimony," *or* whether the statement "was taken with the primary purpose of creating an out-of-court substitute for trial testimony." *Lambert* v. *Warden Greene SCI*, 861 F.3d 459, 469-70 (3d Cir. 2017).

The solemnity and accusatory standards supply the rule in some states. In Maryland, Tennessee, and Illinois, the Confrontation Clause applies only to a statement that is either "formal" or "accusatory, in that it targets an individual as having engaged in criminal conduct." *State* v. *Norton*, 117 A.3d 1055, 1073 (Md. 2015) (citing *Williams*, 567 U.S. at 103-04 (Thomas, J., concurring in the judgment) and *Williams*, 567 U.S. at 83-84 (plurality opinion)); see also *Leidig* v. *State*, 256 A.3d 870, 896-98 (Md. 2021); *State* v. *Hutchison*, 482 S.W.3d 893, 910 (Tenn. 2016), *abrogated on other grounds* by *Smith*, 144 S. Ct. 1785; *People* v. *Barner*, 30 N.E.3d 271, 283-84 (Ill. 2015). And in California, a statement is testimonial only if "the primary purpose of the statement … pertain[s] in some fashion to a criminal prosecution" *and* it was made "with some degree of formality or solemnity." *People* v. *Gomez,* 430 P.3d 791, 834 (Cal. 2018).

2. These various formulations pose differences of substance, not just semantics. Take this case. The Court of

Appeals reinstated Franklin's conviction applying the "out-of-court substitute for trial testimony" standard, even while acknowledging that an "objective witness would reasonably believe" that the CJA report "would be available for use at a later trial." Pet. App. 8a-9a; see also *id.* at 15a (Aarons, J., dissenting). Franklin also would have had a confrontation right under the standard applied by the intermediate appellate court to vacate his conviction, defining testimony as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Pet. App. 31a; *Smith*, 144 S. Ct. at 1803 (Thomas, J., concurring in part). The CJA report is a formalized document, prepared and verified by an agent of the State in order to establish facts for use in a court proceeding. Pet. App. 33a. But Franklin stands convicted again because the Court of Appeals held that only statements primarily intended to be "out-of-court substitute[s] for trial testimony" are testimonial. Pet. App. 6a, 9a-10a.

Franklin is not alone. Other cases demonstrate that the Confrontation Clause's application turns on which testimonial standard a court chooses to apply. For example, the Ninth Circuit applied the "would be available for use at a later trial" standard to "easily conclude" that a confrontation right attached to a document that was not created as a substitute for trial testimony—a "Notice of Transfer/Release of Liability" that an out-of-court witness sent "to the DMV" regarding an automobile allegedly involved in a crime. *United States* v. *Esparza*, 791 F.3d 1067, 1072-73 (9th Cir. 2015). And as recently as August 2024, the Third Circuit applied the same "available for use at a later trial" standard to hold that a "Criminal Information" filed against a defendant's al-

leged co-conspirator is testimonial. *Williams* v. *Superintendent Greene SCI*, 112 F.4th 155, 164-65 (3d Cir. 2024). Had those courts applied the "substitute for trial testimony" standard championed by the New York Court of Appeals in this case, the results would have been different. Neither an official form regarding vehicle ownership submitted to the DMV nor a charging document have a "primary purpose … to create an out-of-court substitute for trial testimony." Pet. App. 9a.

Whether a defendant has the right to confront the author of an autopsy report also can depend on which of this Court's various tests a lower court chooses. Courts applying the "substitute for trial testimony" test have held that autopsy reports are "not testimonial" and are therefore admissible without cross-examination. *Ackerman* v. *State*, 51 N.E.3d 171, 175, 195 (Ind. 2016); *State* v. *Maxwell*, 9 N.E.3d 930, 950 (Ohio 2014) (same); accord *United States* v. *James*, 712 F.3d 79, 99 (2d Cir. 2013). Courts that apply solemnity or accusatory frameworks often reach the same result. See *Hutchison*, 482 S.W.3d at 910-14; *People* v. *Leach*, 980 N.E.2d 570, 590-94 (Ill. 2012); *People* v. *Dungo* 286 P.3d 442, 450 (Cal. 2012).

In contrast, courts applying the "available for use at a later trial" test have consistently found that defendants must be permitted to cross-examine the authors of autopsy reports. *United States* v. *Ignasiak*, 667 F.3d 1217, 1232 (11th Cir. 2012); *Moore*, 651 F.3d at 73; *Henriquez* v. *State*, 580 S.W.3d 421, 427-28 (Tex. Ct. App. 2019); *State* v. *Kennedy*, 735 S.E.2d 905, 915-17 (W. Va. 2012); accord *Cuesta-Rodriguez* v. *State*, 241 P.3d 214, 228 (Okla. Crim. App. 2010).

The randomness, incoherence, and unfairness that stem from this Court's conflicting formulations is perhaps best illustrated by contrasting the decision below with a Confrontation Clause case the same court decided just five months earlier: *People* v. *Ortega*, 227 N.E.3d 302, 308-09 (N.Y. 2023). In *Ortega*, the New York Court of Appeals did not apply or even mention the "substitute for trial testimony" standard it relied on in this case to reinstate Franklin's conviction. Rather, *Ortega* held that the defendant had a constitutional right to cross-examine the author of autopsy reports because the reports were "solemn declarations or affirmations made for the purpose of establishing or proving some fact" and "were also created 'under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.'" *Ibid.* (quoting *Crawford*, 541 U.S. at 51-52). Yet just months later, the same court explicitly rejected both those standards—both of which would have led to reversal of Franklin's conviction. Instead, the court held that the "substitute for trial testimony" test provides the sole standard for evaluating whether a statement is testimonial. Pet. App. 6a, 9a-10a. On that basis alone, Franklin again stands convicted of a felony without ever receiving the right to cross-examine his accuser.

All told, lower court decisions reflect "the muddled state of [the] current doctrine" on testimonial statements. *People* v. *Gonzalez*, 499 P.3d 282, 305 (Cal. 2021). This Court "owe[s] lower courts struggling to abide [by its] holdings more clarity than [it] ha[s] afforded them in this area." *Stuart*, 139 S. Ct. at 37 (Gorsuch, J., dissenting from the denial of certiorari). It owes a similar duty to criminal defendants, whose constitutional rights

currently depend on where in the country their trial occurs or sometimes which appellate panel happens to be assigned to their cases.

C. This Court's Decision In *Smith* v. *Arizona* Underscores The Problem

Last Term's decision in *Smith* highlights and perpetuates the conflict. There, this Court acknowledged that it has provided at least three "varied formulations of the standard" for the "testimonial inquiry." *Smith*, 144 S. Ct. at 1801-02; see *id.* at 1792 (quoting three conflicting formulations). *Smith*, however, expressly declined to assess whether the statements in that case were testimonial or to clear up the recognized uncertainty created by this Court's conflicting formulations. *Id.* at 1801 ("[T]hat issue is not now fit for our resolution.").

While *Smith* "offer[ed] a few thoughts" on the issue, it did not address the heart of the conflict. The Court merely observed that its "varied formulations" "focus[] on the 'primary purpose' of the statement, and in particular on how it relates to a future criminal proceeding" or if it "ha[s] 'a focus on court." *Id.* at 1801-02 (citation omitted).

That gloss only begs the question. Lower courts reading *Smith* will still be left wondering just how a statement must "relate[] to a future criminal proceeding" or "focus on court" to make it testimonial. *Ibid.* Must it have been created primarily to "substitute for trial testimony"? *Id.* at 1792 (quoting *Bryant*, 562 U.S. at 358). Is an intent "to establish or prove past events potentially relevant to later criminal prosecution" sufficient? *Ibid.* (quoting *Davis*, 547 U.S. at 822). Is a "belie[f] that the statement[] would be available for use at a later trial" enough? *Ibid.* (quoting *Melendez-Diaz,* 557 U.S. at 311).

Must the statement also bear a "requisite" level of "formality and solemnity"? *Id.* at 1803-04 (Thomas, J., concurring in part). Must it "accus[e] a targeted individual"? *Williams*, 567 U.S. at 84 (plurality opinion). And why does the Confrontation right depend on the statement's "primary purpose" at all, when the similarly worded Fifth Amendment right against self-incrimination treats statements as "testimonial" if they "explicitly or implicitly … relate a factual assertion or disclose information"? *Doe* v. *United States*, 487 U.S. 201, 210 (1988); see *Smith*, 144 S. Ct. at 1804 (Gorsuch, J., concurring in part). *Smith* simply does not say.

Smith's endorsement of an undefined "primary purpose" test raises other questions as well: "Does it focus … on the purposes an objective observer would assign to a challenged statement, the declarant's purposes in making it, the government's purposes in procuring it, or maybe still some other point of reference?" *Smith*, 144 S. Ct. at 1804 (Gorsuch, J., concurring in part) (cleaned up). "[H]ow do [courts] pick the primary [purpose] out of the several a statement might serve?" *Ibid.* These crucial questions remain unanswered.

In the end, *Smith*'s "thoughts" on the "varied formulations of the standard" for the "testimonial inquiry," *id.* at 1801-02 (majority opinion), leave courts right back where they were: without "a comprehensive definition of 'testimonial'" and with the "uncertainty" that this Court promised would be temporary, *Crawford*, 541 U.S. at 68 & n.10. Only this Court's intervention can change that.

II. The Question Of When A Statement Is Testimonial Is One Of Vital Importance To Criminal Defendants Nationwide

The Sixth Amendment's confrontation right is "all essential to the correct administration of justice." *United*

States v. *Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (Marshall, J.). It guarantees a defendant's ability to "force[] the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth.'" *California* v. *Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)). Accordingly, it is "incumbent on courts to be watchful of every inroad on a principle so truly important." *Burr*, 25 F. Cas. at 193.

This Court abides that centuries-old command. In the two decades since *Crawford*, it has heard no fewer than twelve Confrontation Clause cases. See *Smith*, 144 S. Ct. 1785; S*amia* v. *United States*, 599 U.S. 635 (2023); *Hemphill* v. *New York*, 595 U.S. 140 (2022); *Clark*, 576 U.S. 237; *Williams*, 567 U.S. 50; *Bullcoming*, 564 U.S. 647; *Bryant*, 562 U.S. 344; *Briscoe* v. *Virginia*, 559 U.S. 32 (2010); *Melendez-Diaz*, 557 U.S. 305; *Giles* v. *California*, 554 U.S. 353 (2008); *Hammon* v. *Indiana*, 547 U.S. 813 (2006); *Davis*, 547 U.S. 813. Seven of those cases—*Clark*, *Williams*, *Bullcoming*, *Bryant*, *Melendez-Diaz*, *Hammon*, and *Davis*—concerned when a statement is testimonial, demonstrating the fundamental importance of this "regularly recur[ring]" issue, *Stuart*, 139 S. Ct. at 37 (Gorsuch, J., dissenting from denial of certiorari).

This case highlights that this Court's work remains unfinished and why it is imperative to complete the job. The disarray in this Court and the lower courts on the testimonial standard leaves an individual's liberty to the vagaries of where a defendant is prosecuted and which standard a defendant happens to draw. And if this Court allows the decision below to stand, then in New York and other jurisdictions applying the same narrow test, prejudicial and inculpatory evidence will be

admitted in criminal trials without affording defendants a right to cross-examine their accusers.

A. Which Testimonial Standard Applies Means The Difference Between Freedom And Incarceration

The Court need look no further than this case to appreciate the peril of the prevailing disarray. Franklin stands convicted because the Court of Appeals chose to apply the "substitute for trial testimony" standard. Pet. App. 6a, 9a-10a. But his conviction would have been vacated if the court had held, like many others, that whether a statement is testimonial depends on either a "reasonabl[e] belie[f] … it would be available for use at a later trial" or whether it was a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Pet App. 8a; *id.* at 15a (Aarons, J, dissenting); *id.* at 31a (Appellate Division opinion).

This case also highlights how denying a right of cross-examination impedes "the discovery of truth." *Green*, 399 U.S. at 158. Recall, Franklin's conviction turned on whether he had "dominion and control" of the gun police found in the basement of the home he shared with his stepmother, Grace Mapp. Pet. App. 2a. Recall, too, that the closet with the gun contained items "belonging to both Mapp and Franklin." *Ibid.* To prove its case, the State needed to establish that Franklin, and not Mapp, had dominion over the basement. *Id.* at 3a. The State's only evidence for this essential element of the offense introduced at trial was the CJA employee's statement that Franklin lived specifically in the basement of the shared home. *Ibid.*

Had Franklin been able to cross-examine the CJA employee, he could have inquired into why the employee made this statement. The CJA employee's report specifically noted that he had "verified" Franklin's address

with Mapp, Franklin's co-tenant. Pet. App. 3a, 33a. If Mapp was the source of the information that Franklin supposedly resided in the basement, Franklin would have been able to impeach that statement on the basis that, by linking the basement closet to Franklin, Mapp avoided implicating herself in a firearms possession charge. Franklin also would likely have had a right to confront Mapp about this statement. Yet because the trial court allowed the prosecution to introduce the CJA employee's statement through his supervisor, nobody (the jury included) will ever know or be able to assess the answers to these questions. This Court should grant certiorari to explain that the Sixth Amendment does not permit this degradation of the truth-seeking process.

B. The Narrow Standard Applied By The Court Of Appeals And Other Courts Opens The Door To The Admission Of Many Damaging Out-Of-Court Statements

The decision below held that statements in a bail report prepared while the defendant was in custody, without counsel present, were admissible at trial without confrontation because the statements were not "created for the primary purpose of serving as trial testimony." Pet. App. 1a-2a. That standard threatens to unleash a torrent of prejudicial evidence against criminal defendants nationwide, without subjecting the evidence to the crucible of cross-examination.

Consider the following examples: In the federal criminal justice system, a "probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence." Fed. R. Crim. P. 32(c)(1)(A). These reports collect the probation officer's statements about numerous aspects of a defendant's history and conduct. Such reports "must … contain,"

among other things, "the defendant's history and characteristics, including: [] any prior criminal record … and[] any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment." Fed. R. Crim. P. 32(d)(2)(A). The report must also "identify any factor relevant to [] the appropriate kind of sentence, or [] the appropriate sentence within the applicable sentencing range." Fed. R. Crim. P. 32(d)(1)(D).

New York likewise requires "a pre-sentence investigation" "[i]n any case where a person is convicted of a felony." N.Y. Crim. Proc. § 390.20(1). That investigation yields a report containing "information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits." *Id.* § 390.30(1),(3). Other states have similar requirements. See, *e.g.*, N.J. Stat. Ann. § 2C:44-6; Cal. Rules of Court 4.411, 4.411.5; Tex. Code Crim. Proc. Ann. art. 42A.252-53.

Under the decision below, the Confrontation Clause might allow the introduction of statements contained in these presentence reports in subsequent trials involving a criminal defendant. After all, sentencing reports are plainly not "created for the primary purpose of serving as trial testimony." Pet. App. 1a. On the contrary, the trial has already concluded when the probation officer composes the presentence report, which is primarily, if not solely, prepared to assist the court in determining a sentence.

It's not just presentence reports that could be admitted. As former New York Court of Appeals Judge Eugene Fahey explained in an amicus brief below, states

maintain a series of "treatment" and "problem-solving courts" that "save money, reduce crime, and improve lives" of "tens of thousands of participants." C.A. Univ. at Buffalo Am. Br. 2. These courts, which do not hold trials, "are an alternative to the traditional criminal justice system for certain offenders," and, in New York, include "drug treatment courts, mental health courts, DWI courts, veterans' courts, and opioid courts." *Id.* at 12. Gaining access to and completing these specialized programs, however, often involves "a series of potentially incriminating disclosures" that may be recorded by various program staff. *Id.* at 17.

Under the Court of Appeals' myopic view, the Constitution apparently does not prevent prosecutors from introducing records and statements from these problem-solving courts in subsequent trials—even when the defendant cannot cross-examine the declarants. Like presentence reports, these records are by no means "created for the primary purpose of serving as trial testimony." Pet. App. 1a. If anything, they are meant to avoid a criminal trial. Their purpose is to help "address the underlying issue that may have caused [a defendant's] involvement with the criminal justice system." C.A. Univ. at Buffalo Am. Br. 12.

The Court of Appeals' decision could also turn this Court's recent decision in *Hemphill* into a nullity. In *Hemphill*, this Court assumed that a defendant's plea allocation was testimonial and held it could not be introduced without cross-examination in an alleged co-conspirator's trial, even if the co-conspirator had made the allocution "arguably relevant to his theory of defense." 595 U.S. at 144, 146 n.1. A plea allocution, however, is made to avoid a trial, not to "substitute for trial testimony." Pet. App. 6a, 9a.

Similarly, the Court of Appeals' standard may permit introduction of conviction records from other trials without confrontation. Such records also are not "substitute[s] for trial testimony," Pet. App. 6a, 9a, as they merely document the end result of a trial or other adjudication. Yet admitting these materials would contravene "[l]ongstanding case law" holding that "admission of" "records of conviction … violate[s a defendant's] rights under the Confrontation Clause." *Melendez-Diaz*, 557 U.S. at 314 (discussing *Kirby* v. *United States*, 174 U.S. 47, 53-55 (1899)). Accordingly, this Court's intervention is required to prevent the decision below from re-interring the bedrock confrontation right just recently "resurrected in *Crawford*." *United States* v. *Hagege*, 437 F.3d 943, 958 (9th Cir. 2006).

III. The Decision Below Conflicts With *Crawford* And The Confrontation Clause's Original Meaning.

Crawford held that "testimonial statements" include, "at a minimum[,] … prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and … police interrogations." 541 U.S. at 68. *Crawford* also instructed courts to "turn to the historical background of the [Confrontation] Clause to understand its meaning." *Id.* at 43. The decision below strays from *Crawford*'s conclusion and command.

A. Under *Crawford*, The Evidence In This Case Is Not Admissible Without Confrontation

Franklin stands convicted based on statements an agent of the State submitted to the trial court as evidence in Franklin's bail proceeding, in the very same prosecution that led to his conviction. These statements are plainly "prior testimony at a preliminary hearing." *Id.* at 68. *Crawford* holds that, "at a minimum," such

statements are testimonial and inadmissible without confrontation. *Ibid.* But the Court of Appeals missed *Crawford*'s bottom-line holding because it believed this Court had later "refined its Confrontation Clause analysis." Pet. App. 5a-6a. This Court should grant certiorari to reaffirm *Crawford*'s basic rule and to ensure other courts do not follow the same wayward path.

B. The Evidence In This Case Would Not Have Been Admissible At Common Law

The lower court's decision is also incompatible with the confrontation right that existed under common law when the Sixth Amendment was enacted in 1791. The Amendment codifies the "right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54. Accordingly, "courts [must] consult history to determine the scope of th[e] right." *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 25 (2022); see *Giles*, 554 U.S. at 358-61 (looking to founding era cases to delimit the "forfeiture by wrongdoing" exception to the confrontation right). The decision below, however, failed to consult any historical evidence and, as a result, sanctioned the admission of evidence that would have been excluded at common law.

"[T]he historical analogies here" should have been "relatively simple to draw." *Bruen*, 597 U.S. at 27. As *Crawford* explained, one practice of particular concern at the founding was the introduction into evidence of statements made pursuant to the 16th century "Marian bail and committal statutes," which "required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court." *Crawford*, 541 U.S. at 43-44. Although "it is doubtful that the orig-

inal purpose of the examinations was to produce evidence admissible at trial … they came to be used as evidence in some cases." *Id.* at 44; see also John H. Langbein, *Prosecuting Crime in the Renaissance* 24 (1974).

This case involves the modern-day analogue of those Marian statute bail and committal examinations. After Franklin's arrest and while he was in custody—but before he was assigned counsel—an agent of the State completed a report to assist the court in determining Franklin's suitability for bail. Like the Marian statute bail examinations, the "original purpose" of the CJA report was not "to produce evidence admissible at trial," but the report nonetheless "came to be used as evidence" in his case. *Crawford*, 541 U.S. at 44.

In *Crawford*, this Court explained that one of the "principal evil[s] at which the Confrontation Clause was directed" was this "use of *ex parte* examinations as evidence against the accused." *Id.* at 50. It made no difference that Marian statute bail examinations probably were not conducted to create a substitute for trial testimony. *Id.* at 44. They were nonetheless *used* as evidence at some trials. And, this Court held, the admission at trial of "testimony at a preliminary hearing" "qualif[ies]" as testimonial "under any definition." *Id.* at 52, 68.

Except now it doesn't. The court below redefined the confrontation right to exclude the very kind of evidence the Confrontation Clause was specifically enacted to reach. And the lower court allowed the CJA bail report to be admitted as evidence against Franklin at his trial solely because the report was not "created for the primary purpose of serving as trial testimony"—just like bail examinations under the Marian statutes. Pet App. 1a-2a. The confrontation right requires an opportunity

for cross-examination all the same. Only this Court's intervention can secure the Constitution's guarantee to Franklin and to defendants nationwide.

C. A Strict "Primary Purpose" Inquiry Invites The Kind Of Ahistorical Results Reflected In This Case

The Court of Appeals' "primary purpose" inquiry is fundamentally at odds with the history and original meaning of the Sixth Amendment. Through rigid application of one of this Court's various definitions of "testimonial," divorced from any founding-era principles, the Court of Appeals left unprotected the very kind of statement the Confrontation Clause targeted at the time of ratification. As applied to cases like Franklin's and countless others, the "primary purpose" inquiry has proven incapable of serving as the proper guidepost for Sixth Amendment analyses, placing criminal defendants at risk of losing a right guaranteed to them for centuries.

In this case, the CJA interview and report imitates the very civil-law practices that *Crawford* highlighted and that the Confrontation Clause resisted. See 541 U.S. at 50. That the CJA report could be deemed nontestimonial merely because its "primary purpose" was not "to create an out-of-court substitute for trial testimony," Pet. App. 9a-10a, shows that this inquiry simply cannot be right or stand as the singular touchpoint for the Sixth Amendment analysis. The CJA report prepared by a State agent for use in Franklin's bail proceeding is plainly testimonial under the Framers' conception of the confrontation right, regardless of the varying glosses this Court and others have placed on that right.

Indeed, this Court recognized in *Crawford* that "[v]ague standards" of the kind invited by the primary purpose test "are manipulable." 541 U.S. at 68. And

"[t]he Framers … would not have been content" to leave a bedrock constitutional right to the vagaries of an inquiry untethered to history or tradition. *Id.* at 67. This Court should grant certiorari to restore history and tradition to their proper place in Sixth Amendment jurisprudence.

IV. This Case Is An Ideal Vehicle

This case is an ideal vehicle for this Court to bring sorely needed clarity to the confrontation right. The questions are squarely presented and dispositive. Like examinations under the Marian statutes, the CJA report about Franklin was not created primarily to serve as evidence at his trial. But without the CJA report, the State could not have convicted him. If the report is testimonial, Franklin's conviction will be vacated. If not, his conviction will stand—but the Sixth Amendment's history and purpose will be eviscerated.

This Court should grant certiorari and reverse. In one of the most notorious uses of ex parte evidence, Sir Walter Raleigh was convicted of treason in the 17th century after the court denied his demand to confront the witness against him. See *Crawford*, 541 U.S. at 44 ("'Call my accuser before my face.'"). Sir Raleigh later received clemency from the King. Cid C. Franklin will not be so lucky.

CONCLUSION

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

Respectfully submitted.

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