

**In the Supreme Court of the United States**

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SEAN PAUL BAKER, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

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

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**REPLY BRIEF FOR PETITIONER**

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**INTRODUCTION**

The Tenth Circuit adopted a bright-line constitutional rule: the class of cases in which cross-examination is compelled by the Confrontation Clause is “restricted to those which demonstrate a theory of witness bias or motive to lie.” Pet. App. 16a–17a (citation omitted). But this hierarchy of impeachment—placing bias and motive above other theories directly relevant to a witness’s reliability—is inconsistent with both this Court’s precedent and the historical background of the Confrontation Clause. After all, the right to confrontation guarantees defendants an opportunity to

“expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.” *Davis v. Alaska*, 415 U.S. 308, 318 (1974). And “the jury, as finder of fact and weigher of credibility, has historically been entitled to assess *all* evidence which might bear on the accuracy and truth of a witness’ testimony.” *United States v. Abel*, 469 U.S. 45, 52 (1984) (emphasis added). The Tenth Circuit itself acknowledged criticism that its bright-line rule “lack[s] justification” and is “constitutionally unsupportable.” Pet. App. 19a (citing Rosanna Cavallaro, *Rape Shield Evidence and the Hierarchy of Impeachment*, 56 AM. CRIM. L. REV. 295, 296 (2019)).

For its part, the government makes no attempt to defend the court of appeals’ misguided rule. In fact, the government seems to concede that Baker’s proposed cross-examination was constitutionally protected by applying this Court’s Confrontation Clause precedent to analyze whether the district court’s restrictions on cross-examination were reasonable. But that analysis ignores the question presented and engages in an inquiry the court of appeals never undertook. The government also downplays the clear circuit split over the scope of the Confrontation Clause and raises a baseless vehicle objection. None of the government’s arguments present any obstacle to this Court granting certiorari, resolving the circuit split

on this important constitutional issue, and correcting the Tenth Circuit's ahistorical interpretation of the Confrontation Clause.

## ARGUMENT

### I. The government implicitly concedes that the Tenth Circuit's decision is wrong.

The Tenth Circuit's conclusion that the Confrontation Clause protects only theories of impeachment demonstrating a witness's bias or motive to lie is wrong. *See* Pet. 12–16. The government does not defend the Tenth Circuit's holding. Rather, the government seems to concede that Baker's cross-examination was protected by the Confrontation Clause and misconstrues the Tenth Circuit's unequivocal holding to the contrary.

1. The government does not defend the Tenth Circuit's bright-line rule that *only* cross-examination demonstrating bias or motive to lie is constitutionally compelled. *See* Pet. App. 16a–19a. Although this Court looks to the “historical background of the [Confrontation] Clause to understand its meaning,” *Crawford v. Washington*, 541 U.S. 36, 43 (2004), the government cites no historical tradition imposing a strict hierarchy of impeachment that places bias and motive above other evidence that bears on the accuracy and truth of a witness's testimony.

And the government's argument on the merits implicitly concedes that the Tenth Circuit was wrong to hold that Baker's

proposed cross-examination was not protected by the Confrontation Clause. The government argues that the “district court’s limitation on cross-examination fell within its ‘wide latitude ... to impose reasonable limits on such cross-examination.’” Opp. 11 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). But that is the test for whether limitations on cross-examination conform with the Confrontation Clause. *See Van Arsdall*, 475 U.S. at 679 (“[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination.”). The Tenth Circuit, by contrast, held that Baker’s proposed cross-examination about the YouTube videos was not even protected by the Confrontation Clause because it did not have “constitutional status.” Pet. App. 16a–19a. So the court never undertook the fact-intensive inquiry about whether the district court’s restriction on cross-examination was reasonable “based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *See Van Arsdall*, 475 U.S. at 679. There is no reason for this Court to undertake it in the first instance, and it need not do so to reach the question presented.

In any event, the government’s argument that the restriction on cross-examination was reasonable is wrong. A trial court violates

the Confrontation Clause when it “cut[s] off *all questioning*” about a topic touching on a witness’s credibility. *Id.* (emphasis added). That is exactly what happened here. The district court prohibited *any* inquiry into D.P.’s ability to craft detailed fictional stories about sex. That Baker was allowed to attack D.P.’s credibility in other ways (*see* Opp. 12–13) did not show that she had made up fictional stories about sex. And the government’s claim (Opp. 13) that Baker “used cross-examination to establish [D.P.’s] alleged ‘propensity to sexual fantasy’” is unsupported. For example, while Baker asked D.P. about writing “sexual content into a journal,” D.P. responded, “No.” C.A. R3.141. Cross-examination about the videos was the *only* way for Baker to rebut the government’s repeated arguments to the jury that it was implausible that D.P. could have “manufactured,” “crafted,” “concocted,” “invented,” or “made up” detailed fictional stories about sex. *See* C.A. R3.449, 497, 498, 500. So a “reasonable jury might have received a significantly different impression of [D.P.’s] credibility had [Baker’s] counsel been

permitted to pursue his proposed line of cross-examination.”<sup>1</sup> *See Van Arsdall*, 475 U.S. at 680.

In short, the government’s failure to either grapple with the question presented or defend the Tenth Circuit’s ahistorical constitutional rule shows that this Court’s review is warranted.

2. The government also suggests that there is a “tension” in the Tenth Circuit’s caselaw because “in other cases involving Confrontation Clause challenges to limitations on cross-examination, the court of appeals has evaluated whether the district court has imposed reasonable limits on cross-examination.” Opp. 14–15 (citing *United States v. Flaming*, 133 F.4th 1011 (10th Cir. 2025)) (cleaned up). But there is no tension. The court of appeals correctly recognizes that even when cross-examination falls within the scope of the Confrontation Clause, trial courts can “impose reasonable limits on such cross-examination.” *Flaming*, 133 F.4th at 1027 (quoting *Van Arsdall*, 465 U.S. at 679). Here, however, the court of appeals found that cross-examination about the videos was outside the scope of the Confrontation Clause. *See* Pet. App. 16a–

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<sup>1</sup> The government suggests (Opp. 13) that introducing the videos would have been “detrimental” to Baker by “allow[ing] the government to argue that any similarities between the videos and [D.P.’s] later sexual-abuse allegations indicated that petitioner’s sexual abuse of [D.P.] over the course of years had informed her storytelling.” But jurors are the “sole triers of fact and credibility,” so it is up to the jury to resolve conflicting inferences “relating to the reliability of the witness.” *Davis*, 415 U.S. at 318

19a. So the court had no occasion to consider whether the district court's limits on cross-examination were reasonable. *See supra* 4.

Thus, there is no “tension” in the Tenth Circuit's decisions that it needs to “reconcile.” *Contra* Opp. 15–16. But there is a direct conflict between the bright-line rule that the Tenth Circuit adopted below and this Court's precedent requiring a case-by-case analysis. *See* Pet. 13–14.

## **II. The government downplays the clear circuit split.**

The courts of appeals are divided over the scope of the Confrontation Clause. Several circuits have joined the Tenth Circuit in imposing a strict hierarchy of impeachment, while others have rejected a bright-line rule for a case-by-case analysis. *See* Pet. 10–12. The government does not seriously dispute the split but instead raises hypertechnical factual distinctions between this case and cases from other circuits. *See* Opp. 16–18. But the specific facts of those cases are irrelevant because those courts correctly recognize that the Confrontation Clause calls not for bright-line rules but for a “balancing of interests depending on the circumstances of the case.” *See, e.g., White v. Coplan*, 399 F.3d 18, 24 (1st Cir. 2005). This split over whether the Confrontation Clause protects only theories of bias and motive or instead calls for a more nuanced balancing test warrants this Court's review.

### III. The government's vehicle objection is baseless.

This is an ideal vehicle for addressing the question presented. The government cannot dispute that Baker raised his Sixth Amendment argument at every level and that the district court and the court of appeals each squarely addressed that issue on the merits. *See* Pet. 17–18. And the government never claims that any of its arguments would prevent this Court from reaching the merits of the purely legal question presented. Still, the government claims (Opp. 18–19) that this case would be a poor vehicle for considering the question presented, arguing that any Confrontation Clause violation was harmless. That argument is both irrelevant and wrong on the facts.

1. The government's harmless-error argument is no obstacle to this Court's review. This Court routinely resolves important substantive issues and leaves any determination of harmless error for the lower courts to make in the first instance on remand. *See, e.g., Van Arsdall*, 475 U.S. at 684 (resolving question presented about Confrontation Clause and remanding for harmless-error analysis). Indeed, that is the Court's "normal practice where the court below has not passed on the harmlessness of any error." *Neder v. United States*, 527 U.S. 1, 25 (1999). Here, the court of appeals did not address the government's harmless-error argument. So the mere possibility of harmless error—which no court has yet

examined—does not justify denying review of an important, properly preserved constitutional question.

2. In any event, the Confrontation Clause violation was *not* harmless. The government bears the burden to show that the error was “harmless beyond a reasonable doubt.” *Van Arsdall*, 475 U.S. at 684. It cannot do so here. This case turned on D.P.’s credibility, and the government’s central theory at trial was that it was implausible that she could have “manufactured,” “crafted,” “concocted,” “invented,” or “made up” detailed fictional stories about sex. *See* C.A. R3.449, 497, 498, 500. Excluding the videos harmed Baker by depriving him of critical cross-examination directly rebutting that theory. *See supra* 4–6.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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