No. 26-63

IN THE

Supreme Court of the United States

ANTHONY M. CLARK,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF OF *AMICI CURIAE* THE BETTY AND MICHAEL D. WOHL VETERANS LEGAL CLINIC AND THE NATIONAL INSTITUTE OF MILITARY JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Founded in 2015, the Betty and Michael D. Wohl Veterans Legal Clinic at Syracuse University College of Law (the "Clinic") provides pro bono legal services and community outreach to veterans and their families across New York State. Under the supervision of the Executive Director, student attorneys work year-round with clients on complex U.S. Department of Veterans Affairs ("VA") benefits claims, appeals of improper denials of benefits, military discharge upgrades for all branches of the armed services, and advocate for veterans' rights at the highest levels of government. A single case may require hundreds of hours of the Clinic's legal work. These student attorneys have successfully represented veterans before VA Regional Offices, the Board of Veterans' Appeals, the U.S. Court of Appeals for Veterans Claims, the U.S. Court of Appeals for the Federal Circuit, and as an *Amicus* before this Court.

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. Its advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but most of whom have served as military lawyers. NIMJ directors

1. No party's counsel authored this brief in part or in whole, and no person other than the *Amici Curiae*, its members, or its counsel made any monetary contribution to fund the preparation or submission of this brief. Counsel for *Amici Curiae* notified counsel of record for all parties of its intention to file this brief, as required by the Court's rule at 37.2.

and advisors have practiced before this Court, the United States Court of Appeals for the Armed Forces ("CAAF"), and have served on several Advisory Committees. NIMJ appears regularly as an *Amicus* before this Court, CAAF, and other federal courts.

The *Amici* have a particular interest in this case because it is important to ensure the uniform application of the Constitution's Confrontation Clause in both military and civilian settings, and the severity of consequences that may follow a conviction or administrative separation of a service member. NIMJ speaks for service members tried by court-martial, who hold the same Sixth Amendment right to confront the witnesses against them that this Court secured for civilian defendants in *Smith v. Arizona*, 602 U.S. 779 (2024). The Clinic speaks for the interests of former service members whose conviction or administrative separation, as a result of a positive urinalysis, can have lifelong adverse effects. This case affords the Court a vehicle to ensure uniform application of its precedent in *Smith.*

SUMMARY OF THE ARGUMENT

The military justice system effectively subjects two million service members to an unconstitutional "trial by affidavit." *United States v. Sutton*, ACM 29318, 1993 CMR LEXIS 618, 1993 WL 541345 (A.F.C.M.R. Dec. 21, 1993) (citations omitted) aff'd 42 M.J. 355 (C.M.A. 1995). Court-martial drug prosecutions routinely rely on automated laboratory testing and presented paper litigation packages – with testimony from a surrogate witness who neither performed nor observed the underlying analyses. Coupled with a permissive inference of knowing wrongful use, this model forces the accused to prove an error with an unconfrontable record of collection, testing, and validation, producing involuntary separations, and potentially, a lifelong loss of benefits. *See United States v. Bond*, 46 M.J. 86 (C.A.A.F. 1997). By converting surrogate expert testimony into an evidentiary conduit for absent analysts, this practice defies *Smith v. Arizona*, 602 U.S. 779 (2024).

Smith resolved that an expert's "basis" statements are offered for their truth, but left open which forensic statements are "testimonial." This gap has produced fragmentation in the lower courts. *Id*. at 800; *see also Stuart v. Alabama*, 586 U.S. 1026 (2018). Many courts read *Smith* to categorically bar surrogate testimony and require confrontation of the analyst who performed the testing, while others are split on whether *Smith* reaches the "technical reviewer" who signs off on another analyst's work. *See, e.g.*, *United States v. Seward*, 135 F.4th 161, 168-69 (4th Cir. 2025); *United States v. Jones*, No. 24-13220, 2026 U.S. App. LEXIS 12850 (11th Cir. May 4, 2026). Some treat the reviewer as an unconstitutional surrogate, and others admit the testimony by treating *Smith*'s silence as permission. *See United States v. Cartagena*, 172 F.4th 109 (1st Cir. 2026); *Roalson v. Noble*, 116 F.4th 661 (7th Cir. 2024).

Separately, courts also evade *Smith* by adopting incompatible definitions of "testimonial," yielding contradictory outcomes on similar forensic records and undermining uniform Confrontation Clause doctrine. *See State v. Hall-Haught*, 569 P.3d 315, 321 (Wash. 2025). The CAAF has long recognized that service members are entitled to the Sixth Amendment's Confrontation Clause in courts-martial, a principle grounded in decades of Supreme Court and military precedent. *See United States v. Jacoby*, 29 C.M.R. 244, 246–47 (C.M.A. 1960). Yet, recent CAAF decisions retreat from these foundational safeguards, weakening the constitutional protections service members are guaranteed. This erosion underscores the need for this Court's intervention to restore the Confrontation Clause's full force for all who serve in the armed forces.

Denying service members' Sixth Amendment confrontation rights leads directly to punitive discharges that impose lifelong consequences far beyond conviction itself. These discharges create severe social and economic stigma, strip veterans of official status, and block essential VA healthcare, housing, and disability benefits. *See* Elizabeth G. Kubala & Seth M. Owens, *"Band-aids Don't Fix Bullet Holes:" the Veterans Who Are Not "Veterans," the Unique Crises They Face, and Why Proactive Interagency Collaboration is Key*, 76 Syracuse L. Rev. 73 (2025) (documenting resulting increases in homelessness, mental health crises, and substance abuse).

ARGUMENT

I. The Constitutional question presented affects a vast, renewing population, and military prosecutions concentrate the effects.

The decision in *United States v. Clark*, NMCCA No. 202400217, 2025 CCA LEXIS 584, 2025 WL 3762828 (N-M. Ct. Crim. App. Dec. 30, 2025) rev. denied No. 26-0140/NA, 2026 CAAF LEXIS 365, 2026 WL 1378215 (C.A.A.F. Apr. 16, 2026), is no isolated error. *Clark* exposes a systemic vulnerability in a justice system governing over two million service members – replenished annually by 150,000 recruits – routinely subjecting them to an unconstitutional "trial by affidavit." *See* 10 U.S.C. § 802; Def. Manpower Data Ctr., U.S. Dep't of Def., *Active-Duty Accession Files*.

Military drug prosecutions follow a fixed script. The testing laboratory prepares a litigation package. The Government calls the collectors of the sample to establish that it came from the accused and to trace its handling up to mailing to the laboratory. It then calls a laboratory surrogate, who neither performed nor observed the testing, to sponsor the litigation package as a business record. From that foundation, the surrogate veers into testimonial statements and relays the absent analysts' assertions as substantive proof. That single witness routinely supplies the Government's entire case in direct defiance of *Smith*, 602 U.S. 779 (2024). *Clark* entrenches the script: an after-the-fact verification witness serves as a conduit for unconfronted paper records. *See Clark*, slip op. at 5 (App. 9); *id.* at App. 86, 113. Because ordinary judicial correction terminates at CAAF, this Court's certiorari jurisdiction provides the sole Article III remedy. *See* 10 U.S.C. § 867; 28 U.S.C. § 1259.

This Court's intervention has become necessary. First, the affected population is vast and continuously renewing, subjecting millions of service members to an evidentiary regime that dilutes core rights and drives thousands into involuntary separations. *See Demographics: Interactive Profile of the Military Community – Personnel Separations*, Military OneSource, https://demographics.militaryonesource.mil/chapter-2-active-duty-personnel/ (last accessed August 3, 2026). Second, military drug prosecutions systematically compound this harm by pairing a permissive inference of guilt with a surrogate's testimony – an unconstitutional end-run around *Smith*. *See United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001); *compare id.*, *with Smith*, 602 U.S. at 799. Only this Court can dismantle this "surrogate-as-prosecution" model and restore constitutional parity to the armed forces.

A. The affected population is vast, jurisdictionally locked, and continuously renewing.

This question concerns the constitutional rights of a vast population governed by the Uniform Code of Military Justice (UCMJ) – including 1.35 million active-duty personnel, hundreds of thousands of reservists, and over one million retirees subject to court-martial jurisdiction. *See* 10 U.S.C. § 802(a)(1), (a)(4). Under this framework, a single positive drug test triggers criminal prosecution under Article 112a – risking confinement and a punitive discharge – or mandatory administrative separation. UCMJ art. 112a, 10 U.S.C. § 912a; Para. 3.10-3.11, Dep't of Def. Instr. 1332.14. (Enlisted Administrative Separations), (Aug. 1, 2024).

This evidentiary regime creates a direct pipeline from military discipline to post-service penalty. The same forensic result that supports a court-martial conviction also drives involuntary separations, which occur at far higher rates. In 2024 alone, the armed forces executed over 148,000 total separations, more than 34,000 involuntarily, many within conduct and performance categories that encompass drug offenses. *See Demographics*, Military OneSource, https://demographics.militaryonesource.mil/chapter-2-personnel-separations (last visited August 3,

2026) (reporting 148,315 separations, 23.3% involuntary, and 18.6% for standards of conduct or military requirement/behavior). Each year, thousands are discharged through this mechanism, producing a continuously renewing population facing lifelong administrative consequences. Thus, millions remain bound to a regime that substitutes surrogate witnesses for testing analysts. *See Smith*, 602 U.S. at 792–93; *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009); *Clark*, App. 9, 86. This captive population replenishes yearly with 150,000 recruits – averaging 400 per day – swearing an oath to defend the Constitution, unaware they inherit a diluted version of that charter. *See* 10 U.S.C. § 502(a). While civilians retain the right to confront the testing analyst, service members face an ex-post surrogate sponsoring a paper litigation package. *Compare Smith*, 602 U.S. at 792–93, *with Clark*, 2025 WL 3762828, at *3.

Because service members cannot opt out of this system or seek direct Article III redress of most decisions, they rely entirely on this Court to enforce uniform constitutional protections. *See Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975). Yet, the military judiciary has departed from this Court's precedents, embedding a surrogate-witness model that leaves service members defenseless against forensic error. CAAF consistently declines review, as it did here, allowing the constitutional defect to persist and operate on every new cohort. *See* 10 U.S.C. § 867(a)(3); *Clark*, App. 1–2.

B. Structural mechanics of military drug prosecutions artificially maximize and concentrate the constitutional harm.

This petition challenges no military policy or interest in ensuring a drug-free military force. The defect lies at trial: *convictions based on unconfronted paper records*. Unlike civilian law enforcement, the Department of War tests service members by design rather than on suspicion, using automated random selection that mandates annual testing. *See* Dep't of Defense Instruction 1010.01 (Military Personnel Drug Abuse Testing Program) (Aug. 21, 2025); *United States v. Bickel*, 30 M.J. 277, 280 (C.M.A. 1990) (discussing the military "inspection" practices). Military laboratories process millions of specimens each year, leaving service members uniquely vulnerable to conviction based solely on the uncorroborated strength of paper lab packets – the bedrock of the military criminal docket.

Lacking traditional indicia of criminality like eyewitnesses, confessions, or physical contraband, routine drug prosecutions rely entirely on a single laboratory packet. Where scientific testing is the sole evidence of wrongful use, military law requires an expert to establish reliability, preventing prosecutors from merely submitting raw lab results. *See Green*, 55 M.J. 76, 80 (C.A.A.F. 2001); *United States v. Campbell*, 52 M.J. 386, 388 (C.A.A.F. 2000).

Under military law's permissive inference, a single paper litigation package – once sponsored by an expert – supplies both *actus reus* and *mens rea*. The packet provides the act, the packet provides the knowledge, and once the inference is drawn, the Government's case is complete. Because the packet stands alone, its reliability is dispositive. *See Green*, 55 M.J. at 81; *compare id.*; *with Melendez-Diaz*, 557 U.S. at 308.

Here, two mechanisms combine to evade the Constitution. Disconnected from a surrogate, the permissive inference is merely a rebuttable presumption, and expert testimony is ordinary evidence. Joined together, they produce a fatal trap: the inference supplies guilt, while the surrogate removes the sole bench analyst who could be cross-examined on testing procedures, errors, and reliability. The surrogate reviewed a printout, but neither ran nor observed the test, and cannot answer any contextual questions – including the frequency and margin of error that *Campbell* makes essential. *See Campbell*, 52 M.J. at 388.

Rather than producing the testing analyst, the Government satisfies its expert requirement with an ex-post surrogate who hand-delivers and interprets a pre-packaged litigation file. Shielding the actual tester forces the accused to prove affirmative bench error – an impossible burden on an unconfronted paper record. *See Bond*, 46 M.J. 86, 89–90 (C.A.A.F. 1997); *United States v. Harper*, 22 M.J. 157, 161–62 (C.M.A. 1986). This converts expert testimony into an unconstitutional conduit, the very practice *Smith* forbids.

By permitting surrogate witnesses to sponsor forensic results, military courts authorize prosecution via unconfronted paper records, rendering the Sixth Amendment a dead letter. *See Bullcoming v. New Mexico*, 564 U.S. 647, 663 (2011). *Clark* crystallizes this crisis: by allowing Dr. Furman – a mere ex-post verification witness – to act as a conduit for absent analysts, the military justice system executed an unconstitutional "trial by affidavit." *See Clark*, slip op. at 5 (App. 9); *id.* at App. 86. The Government takes the benefit of the permissive inference without providing the reliable proof that its own precedent demands. The cure is confrontation, and nothing more. That restoration is what *Smith* requires, and what the decision below denied. *See Smith*, 602 U.S. at 802–03.

II. CAAF and lower courts are fragmenting and evading *Smith v. Arizona* through incompatible doctrinal approaches.

More than twenty years ago, this Court declined to define the central term of its Confrontation Clause jurisprudence, and the Chief Justice warned that "the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers . . . now, not months or years from now," lest the courts that "appl[y]" these rules "every day . . . throughout the country" be "left in the dark." *Crawford v. Washington*, 541 U.S. 36, 75–76 (2004) (Rehnquist, C.J., concurring). *Smith* left them there, leaving lower courts divided over which forensic statements are testimonial. That unresolved question governs forensic evidence, a staple of proof in every criminal court in the country. *See Stuart*, 586 U.S. at 1029 (Gorsuch, J., dissenting from denial of certiorari) ("[W]e owe lower courts struggling to abide our holdings more clarity than we have afforded them in this area.")

A. *Smith* left open a fundamental question about forensic evidence that is the deciding factor in many ordinary criminal cases.

The forensic evidence rule announced in *Smith* will live almost entirely in forensic cases. *See Smith*, 602 U.S.

at 783 (the Confrontation Clause's bar "applies in full to forensic evidence"). This is crucial when the primary evidence against the accused is a laboratory test result, including drug identification, urinalysis, DNA, and blood-alcohol testing. *See e.g.*, *United States v. Downum*, 86 M.J. 200, 203–05 (C.A.A.F. 2025); *Melendez-Diaz*, 557 U.S. at 310–11; *Bullcoming*, 564 U.S. at 651–52; *United States v. Gonzalez*, 144 F.4th 396, 406–07 (2d Cir. 2025). In the prosecutions that crowd this Nation's criminal dockets, the confrontation question determines whether the accused may test the human judgment embedded in the forensic proof.

In 2020 alone, civilian crime laboratories received more than 3.3 million requests for service, roughly a third of them for controlled-substance analysis; similarly, the military toxicology labs processed almost 4 million samples in 2023. *See* Connor Brooks, Bureau of Just. Stat., U.S. Dep't of Just., *Publicly Funded Forensic Crime Laboratories, 2020*, 1–3 (2023); *see*, *e.g.*, Dep't of Defense, Drug Interdiction and Counter-Drug Activities: Fiscal Year 2024 Budget Estimates, March 2023, https://comptroller.war.gov/Portals/45/Documents/defbudget/FY2024/FY2024_Drug_Interdiction_and_Counter-Drug_Activities.pdf (last accessed August 3, 2026). In many trials, the lab result is not one exhibit among many; it is the entire case. *Id.*; *see Stuart*, 586 U.S. at 1026 (Gorsuch, J. dissenting from denial of certiorari) ("More and more, forensic evidence plays a decisive role in criminal trials. . . ."); *see also* Laird Kirkpatrick, *The Admissibility of Forensic Reports in the Post-Justice Scalia Supreme Court*, U. Chi. L. Rev. Online (Aug 27, 2019).

That most criminal cases end in pleas is no reason to discount the right to confrontation. *See Melendez-Diaz*, 557 U.S. at 325 (recognizing that "only a small fraction of those cases actually proceed to trial" because "nearly 95%" of convictions "are obtained via guilty plea"); *see also Missouri v. Frye*, 566 U.S. 134, 143 (2012) (ours "is for the most part a system of pleas, not a system of trials" (quoting *Lafler v. Cooper*, 566 U.S. 156, 170 (2012))). Plea agreements do not happen independently of a trial because their negotiation tracks the strength of the evidence each side would hold were the case tried. *See generally* Shawn D. Bushway, Allison D. Redlich & Robert J. Norris, *An Explicit Test of Plea Bargaining in the "Shadow of the Trial,"* 52 Criminology 723 (2014) (finding that the plea values prosecutors and defense attorneys advocate track the expected value of trial – probability of conviction multiplied by sentence). Permitting surrogate testimony hands prosecutors an unfair windfall: actual analysts avoid appearing, trials proceed without friction, and defendants lose all meaningful leverage to challenge the testing.

This leads to fewer trials – the predictable product of a doctrine that hands the Government evidence it may admit without ever producing a person who can be asked "what she did and how she did it and whether her results should be trusted." *Smith*, 602 U.S. at 799. The dissenters in *Melendez-Diaz* acknowledged that the right hands the defense "the formidable power to require the government to transport the analyst to the courtroom," and that counsel may "insist upon . . . a plea bargain, or a more lenient sentence in exchange for relinquishing this remarkable power." 557 U.S. at 354–55 (Kennedy, J., dissenting). The reach of a trial right cannot be measured by counting the trials it has rendered unnecessary.

B. A substantial number of lower courts read *Smith* broadly to prohibit constitutionally suspect surrogate testimony on lab reports.

Lower courts consistently recognize *Smith*'s central holding: the Confrontation Clause categorically bans surrogate testimony, guaranteeing defendants the right to cross-examine the actual testing analyst rather than a substitute expert. *Smith*, 602 U.S. at 799. Courts have routinely applied this rule across DNA analysis, drug identification, and toxicology testing – the precise forensic evidence at issue here. *See*, *e.g.*, *United States v. Seward*, 135 F.4th 161, 168–69 (4th Cir. 2025); *Commonwealth v. Gordon*, 496 Mass. 554, 575 (2025); *State v. Hall-Haught*, 569 P.3d 315, 321 (Wash. 2025); *Commonwealth v. Walker*, 350 A.3d 54, 86–89 (Pa. 2026). Collectively, these decisions confirm that substitute analyst testimony is constitutionally inadequate.

Like the Court in *Smith*, these courts have emphasized that surrogate experts necessarily assume the accuracy of the absent analyst's work before offering their own opinions. *Seward*, 135 F.4th at 168–69. While a surrogate may explain laboratory procedures or interpret reported results, the surrogate cannot answer the questions central to confrontation: what the testing analyst actually did, whether protocols were followed, and whether errors occurred during testing. *See Walker*, 350 A.3d at 88–89; *see also Ganthier v. Superintendent, Green Haven Corr. Facility*, 23-CV-414, 2025 U.S. Dist. LEXIS 165980 *67-8, 2025 WL 2452386 at *68 (E.D.N.Y. 2025) (explaining that whether the surrogate witness characterizes the testimony as "opinions" or "data" is immaterial; the defendant retains the constitutional right to confront the analyst who generated the underlying forensic evidence).

Notably, many courts have reached this conclusion without extended analysis of whether the challenged statements were testimonial or offered for their truth, two threshold requirements of Confrontation Clause application. *See Seward*, 135 F.4th at 168-69. Others expressly addressed those threshold questions and still concluded that surrogate testimony involving DNA and toxicology testing is testimonial and offered for its truth. *See*, *e.g.*, *State v. Hale*, 2024 Ohio App. LEXIS 4283, at *2–3 (Ohio Ct. App. 2024) ("The statements of the non-testifying analysts . . . constituted testimonial hearsay. Hale therefore had a constitutional right to be confronted with *those* analysts, not merely with the authors of the final reports."). Regardless of the analytical path employed, courts have consistently held that *Smith* requires confrontation of the testing analyst.

Finally, courts have relied on this categorical reading of *Smith* to correct decisions that predated *Smith*, misapplied its holding, or continued to rely on pre-*Smith* state precedent. *See*, *e.g.*, *Hall-Haught*, 569 P.3d at 323. Such decisions recognize that *Smith* announced a controlling constitutional rule that supersedes inconsistent lower-court precedent. Similarly, to the extent it conflicts with *Smith*, prior CAAF precedent permitting surrogate testimony cannot survive.

C. Courts have fractured over whether *Smith* reaches the "technical reviewer."

Smith held that a statement a surrogate conveys as the basis for an expert opinion "supports that opinion only if true," and so is offered for its truth. 602 U.S. at 785. That holding abrogated the "not for the truth" rationale of earlier precedent, but the Court declined to decide when the underlying statements are "testimonial." *Id.* at 795, 800–01. The split centers on the "technical reviewer," an analyst who reviews and signs another's work but performs none of the testing. On materially similar records, courts reach opposite results, each claiming fidelity to *Smith*.

Some courts, including the Fourth Circuit, have held that permitting a technical reviewer to supply "independent" conclusions about testing they did not perform is "no longer tenable after *Smith*." *Seward*, 135 F.4th at 168-69. Similarly, Maine and Massachusetts agree that the "relevant witness . . . in a constitutional sense, is the absent analyst." *Gordon*, 496 Mass. at 575; *State v. Thomas*, 334 A.3d 686, 703 (Me. 2025).

Despite the categorical ban on surrogate testimony embraced by many courts, the Eleventh Circuit sharply diverged in *United States v. Jones*, where the testifying analyst served only as the technical reviewer of another's DNA work. *United States v. Jones*, No. 24-13220, 2026 U.S. App. LEXIS 12850, 2026 WL 1210147 (11th Cir. May 4, 2026). In *Jones*, the court held that – because "neither *Bullcoming* nor *Smith* directly resolve[]" whether a technical reviewer who had some direct involvement in the specific case could testify – admitting the testimony of the technical reviewer was not plain error. *Jones*, 2026 U.S. App. LEXIS 12850, at *10–11. The rationale candidly treats *Smith*'s silence on the reviewer's degree of involvement as an opportunity for a shortcut.

Demonstrating the instability of this line of cases, this Court recently vacated and remanded a "technical-reviewer conviction." *Busby v. Mississippi*, No. 25-6885

(U.S. June 22, 2026) (vacating *Busby v. State*, 422 So. 3d 974 (Miss. 2025)). There, the Mississippi Supreme Court found its technical-reviewer rule consistent with *Smith*; this was only corrected when the State conceded the decision was inconsistent with *Smith*. *See* Br. in Resp. to Pet. for Writ of Cert. at 8, *Busby v. Mississippi*, No. 25-6885 (U.S. May 14, 2026). Where a State defends the practice instead, even a clean vehicle is left standing. Thus, the divergence from *Smith* is often only corrected by the grace of the party that profits from the error.

In a court-martial, the error is beyond the reach of correction altogether. Pet. Br. at 13. In *United States v. Katso*, CAAF reasoned "[i]n the absence of clear guidance from the Supreme Court," "the degree of independent analysis the expert undertook" was tied to admissibility and deemed this rule consistent with prior precedent. *United States v. Katso*, 74 M.J. 273, 283 (C.A.A.F. 2015). *Smith* has now supplied that guidance, holding that an opinion resting on an absent analyst's data is offered for the truth of that data, and calling the surrogate's conclusions "independent" does not change it. *See Smith*, 602 U.S. at 802–03. Here, the lower court allowed a surrogate witness without engaging *Bullcoming*, *Melendez-Diaz*, or the rationale *Smith* clarified, because he "formed independent conclusions after reviewing computer-generated data," though he had not performed the testing. *Clark*, No. 202400217 (N-M. Ct. Crim. App. Dec. 30, 2025). The court of last resort, empowered to reconcile the rule with Smith, denied review, so the reviewer rationale survives in the military forum. *Clark*, No. 26-0140/NA, __ M.J. __, 2026 CAAF LEXIS 365, 2025 WL 3762828 (C.A.A.F. Apr. 16, 2026).

D. Courts also evade *Smith* entirely by exploiting threshold questions the Court left unresolved.

The Court has made clear, and lower courts, including those applying *Smith* broadly, agree that *Smith* applies only to testimonial hearsay offered for its truth. 602 U.S. at 800–01. Yet, the Court repeatedly declined to define "testimonial," acknowledging its own "varied formulations" and the longstanding difficulty of crafting a comprehensive definition. *Id.*; *see, e.g.*, *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

The resulting uncertainty has produced inconsistent definitions of "testimonial" and contradictory outcomes on materially similar facts. *Compare Hall-Haught*, 569 P.3d at 321; *with Commonwealth v. Dougan*, No. 2025 EDA 2021, 2024 WL 1267674 at *6 (Pa. Super. Ct. 2024). Four different approaches can be attributed to the Court's discourse: the Primary Purpose test, Justice Thomas's Solemnity test, the "Use at Trial" approach, or the view that machine-generated outputs are not testimonial. *See Davis v. Washington*, 547 U.S. 813, 822–23 (2006); *Smith*, 602 U.S. at 816 (Thomas, J., concurring); *Franklin v. New York*, 145 S. Ct. 831, 833 (2025); *United States v. Gonzalez*, 144 F.4th 396, 408 (2d Cir. 2025). These competing approaches have left lower courts without a coherent framework, producing significant doctrinal divergence in only two years since *Smith*.

Under *Davis* and *Ohio v. Clark*, a statement is testimonial if its primary purpose is to establish or prove past events for later criminal prosecution. *See*

Davis, 547 U.S. at 822; *Clark*, 576 U.S. 237, 244–45 (2015); *Bullcoming*, 564 U.S. at 669. Although intended to avoid "an exhaustive classification of all conceivable statements," *Davis*, 547 U.S. at 822, this test has produced conflicting results on materially identical facts. *Compare Hall-Haught*, 569 P.3d at 321 (toxicology report produced following law enforcement request is testimonial) *with Dougan*, 2024 WL 1267674 at *6 (toxicology report was produced for medical reasoning and thus isn't testimonial).

Different Justices have opined on how to resolve ambiguity in the Court's holdings. Justice Gorsuch questioned the workability of the primary-purpose inquiry in *Smith*, and proposed a broader inquiry of whether the government seeks to use the witness's statement at trial in *Franklin*. *Smith*, 602 U.S. at 806–07 (Gorsuch, J., concurring); *Franklin*, 145 S. Ct. at 836. Meanwhile, Justice Thomas would limit testimonial statements to formalized materials, such as affidavits, depositions, and similarly solemn statements. *Smith*, 602 U.S. at 805 (Thomas, J., concurring). Under this test, chain-of-custody stamps, analyst initials, and instrument printouts may lack sufficient solemnity, or formality, regardless of their obvious prosecutorial purpose. *Id.* Although no court has expressly adopted this test, some have incorporated formality as a factor in the primary-purpose analysis. *See, e.g.*, *Diggs v. State*, No. 113, Sept. Term, 2023, 2025 WL 1703667 at *7 (App. Ct. Md. June 18, 2025).

Other courts bypass the threshold inquiry altogether by holding that machine-generated outputs are not human statements and thus non-testimonial. *See*, *e.g.*, *Gonzalez*, 144 F.4th at 407 (characterizing extraction reports as "raw, machine-created data"). This echoes Justice Sotomayor's observation in *Bullcoming* that reports containing "only machine-generated results" do not constitute out-of-court statements of a declarant. 564 U.S. at 673 (Sotomayor, J., concurring in part).

These competing judicial approaches yield irreconcilable outcomes on virtually identical forensic records. This Court should grant review to clarify the standard for "testimonial" evidence and restore national uniformity under the Sixth Amendment.

III. Sixth Amendment rights are guaranteed in courts-martial, and removal of those Constitutional safeguards causes longstanding, irreparable harm.

Decades of precedent establish that the Sixth Amendment's Confrontation Clause applies fully in courts-martial, guaranteeing service members the same core procedural safeguards as civilian defendants. *See Jacoby*, 29 C.M.R., at 246–47. Although lower courts have fractured over *Smith*, confrontation remains a mandatory constitutional requirement in military justice – and denying service members this bedrock protection departs from settled doctrine, producing severe, lifelong harm. *See United States v. Bench*, 82 M.J. 388, 393 (C.A.A.F. 2022); *United States v. Wheeler*, 38 C.M.R. 72, 74 (C.M.A. 1967) (calling unfavorable discharge stigma "ineradicable" and "the modern equivalent of . . . branding felons").

A. Service members have rights under the Sixth Amendment's Confrontation Clause in courts-martial.

For more than a half-century, the CAAF and its predecessor have consistently held that service members possess the constitutional safeguards guaranteed by the Sixth Amendment, including the Confrontation Clause, in courts-martial; this foundational principle has been reaffirmed repeatedly. *See Smith*, 602 U.S. 779 (2024) (ban on testimonial hearsay); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (applying the Confrontation Clause to the States); *Bench*, 82 M.J. 388 (C.A.A.F. 2022) (outlining constitutional safeguards in crucible of cross-examination); *Crawford v. Washington*, 541 U.S. 36, 42, 53–54 (2004) (describing confrontation as a "bedrock procedural guarantee" and barring testimonial hearsay absent unavailability and a prior opportunity for cross-examination); *Jacoby*, 29 C.M.R., at 249 (affirming the right to confront witnesses at courts-martial); *United States v. Dillenburger*, 85 M.J. 599, 608-10 (N-M. Ct. Crim. App. 2025) rev. denied 86 M.J. 250 (C.A.A.F. 2025) (explaining expert testimony in courts-martial); *United States v. Pack*, 65 M.J. 381 (C.A.A.F. 2007) (affirming service member Confrontation Clause rights). These cases illustrate a sustained doctrinal recognition that the Sixth Amendment Confrontation Clause applies in courts-martial. *See Smith*, 602 U.S. 779 (2024). Although there is some split in the appellate courts regarding *Smith's* applicability, the doctrinal picture remains clear: confrontation rights are constitutionally guaranteed in military proceedings and form an essential component of the protections owed to service members. Brief of Petitioner-Appellant at 7, *Clark*, No. 202400217 (N-M. Ct. Crim. App. Dec. 30, 2025).

In *Bench*, the CAAF recognized that the Confrontation Clause forbids courts to substitute judicial reliability assessments for the constitutional procedure of confrontation. *Bench*, 82 M.J. at 393. The court held that the "crucible of cross-examination," along with oath, demeanor evidence, and the accused's ability to test veracity, provides indispensable non-discretionary *constitutional safeguards*. (emphasis added) *Id.* (proposing testing procedural reliability in courts-martial is essential). Yet, CAAF now disregards those very safeguards by refusing to align its precedent with *Smith*, abandoning the constitutional procedure it previously deemed essential.

The applicability of the Sixth Amendment in courts-martial is not a novel proposition; it is a bedrock principle supported by a half-century of precedent, statute, and military evidentiary rules. *See* 10 U.S.C. § 949a; Mil. R. Evid. 608(c), 611(d), *Military Rules of Evidence, Manual for Courts-Martial, United States* (2024 ed.); *Jacoby*, 29 C.M.R., at 246–47. The Government's inference that the Sixth Amendment does not apply to military courts-martial threatens to upend decades of settled precedent and systematically denies service members the confrontation rights that civilian defendants receive as a matter of course. *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) (explaining the military exception to constitutional protections applies only where "by text or scope" a right is "plainly inapplicable" to the armed forces.); *compare* U.S. Const. amend. V (military excepted from Grand Jury Clause) *with* U.S. Const. amend. VI (no such military exception for Confrontation Clause). Under *Reid*, constitutional parity must be restored. *Reid v. Covert*, 354 U.S. 1 (1957).

Granting review allows this Court to correct a systemic failure in military justice. Lower courts' refusal to enforce *Smith* is dismantling the "bedrock procedural guarantee" of confrontation. Courts-martial need a clear rule for applying the Confrontation Clause; without one, the safeguard becomes rhetoric. Civilians litigate under settled standards. Service members do not. Depriving service members of the rights every American enjoys inflicts a lasting stigma and irreparable harm that only this Court can cure. Relying on unconfronted evidence produces adverse discharge characterizations, causing long-term damage to veterans' futures.

Failing to safeguard service members' constitutional rights produces harms extending far beyond the courtroom. Relying on unconfronted evidence in military proceedings frequently results in unfavorable discharges – stripping individuals of statutory veteran status and core protections. *See* Kevin Lonergan, *Service Discharges; DD Form 214 Explained*, U.S. Army (Feb. 8, 2012), https://www.army.mil/article/73343/service_discharges_dd_form_214_explained (explaining that service members who are charged with misconduct typically receive discharge statuses characterized as less-than-honorable) (for the purposes of this brief, Honorable or General discharges are considered "favorable," all others are considered "unfavorable"). Thousands carry this burden into civilian life, forced to navigate an administrative upgrade process that is complex, frequently unsuccessful, and often out of reach. *See supra* Part I.A.; Kubala & Owens, *supra*, at 76–77. Crucially, even a successful discharge upgrade cannot retroactively restore constitutional rights denied at trial.

1. An unfavorable discharge status based on unconfronted evidence has a severe and enduring stigma.

For many service members, an unfavorable discharge carries consequences far more severe than a court-martial conviction alone, imposing a lasting stigma that affects their "legal rights, economic opportunities, and social acceptability." *United States v. Soriano*, 20 M.J. 337, 342 (C.M.A. 1985); *see Lonergan*, *supra*, https://www.army.mil/article/73343/service_discharges_dd_form_214_explained (explaining that the most common discharge statuses for individuals in Clark's position are particularly frowned upon by civilians). Military courts have recognized that individuals with unfavorable discharges are "marked far beyond the civilian felon," deeming the characterization "ineradicable" and "the modern equivalent of the ancient practice of branding felons." *Wheeler*, 38 C.M.R. at 74. This "scarlet letter" creates internalized shame over a shattered career and erects severe barriers to civilian employment. Ali Reza Tayyeb, *The Effect of the Military Character of Discharge on Reintegration into the Civilian Community: A Phenomenological Study* 145 (2017). Interpersonal relationships suffer as society interprets the adverse discharge as a strike against "character, patriotism or loyalty." Eleanor T. Morales, *Distinction Without a Difference: Other than Honorable vs. Bad Conduct Discharge*, The Army Lawyer, at 44 (2024). Compounding this isolation, major veteran service organizations bar these former service members from joining their support communities. *See* Tayyeb, *supra*, at 159.

2. Unfavorable discharges also bar former service members from accessing life-changing and even life-saving VA benefits.

An unfavorable discharge strips service members of their statutory "veteran" status, precluding access to essential VA healthcare, housing, and disability benefits. *See* Kubala & Owens, *supra*, at 83; 38 U.S.C. § 101(2) (noting that a "*veteran*" for VA purposes must have a discharge or release under "conditions other than dishonorable"). This denial of basic support leads to dire outcomes, including increased rates of social isolation, mental health crises, substance abuse, homelessness, and suicide. *See* Kubala & Owens, *supra*, at 81. Compounding these crises, the stigma associated with homelessness drives a vicious cycle of self-isolation and self-medication. Johanna Reilly, Iris Ho & Andrea Williamson*, A Systemic Review of the Effect of Stigma on the Health of People Experiencing Homelessness*, 30 Health & Social Care in the Community 2128, 2939 (2022) (finding that stigma contributes to health disparities among people experiencing homelessness).

The fact that the petitioner himself was separated with an honorable discharge is a remarkable exception that proves the rule. The common practice this brief describes routinely produces unfavorable discharges that carry lifelong consequences, so that the confrontation defect is not a harm that ends at sentencing, but one that follows service members into civilian life. The only real remedy operates at the front end, where the evidence is offered and the analyst can be confronted, and only this Court can ensure that all service members are afforded the same Sixth Amendment confrontation rights as other Americans.

CONCLUSION

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

Respectfully submitted,

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