

(ORDER LIST: 604 U.S.)

MONDAY, MARCH 24, 2025

ORDERS IN PENDING CASES

24A730 AKERMAN, MARTIN V. MERIT SYSTEMS PROTECTION BOARD

24A731 AKERMAN, MARTIN V. MERIT SYSTEMS PROTECTION BOARD

The applications for stay addressed to Justice Thomas and referred to the Court are denied.

24M66 RICHARD, FRANK J. V. WINN, O'BELL T., ET AL.

The motion for leave to proceed as a veteran is denied.

24M67 DAVIS, NICHOLAS S. V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

24M68 INDIANA GREEN PARTY, ET AL. V. MORALES, DIEGO

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

24M69 SEALED APPELLANT V. PAUL BURGERMEISTER, ET AL.

The motion for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record is denied.

24-6367 SEKEL, NYAH V. USDC ED VA

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until April 14, 2025, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI DENIED

23-934 ESCOBAR, ARELI V. TEXAS

24-370 VALLEY HEALTH SYSTEM, ET AL. V. NLRB

24-458 WEINLEIN, LAURIE V. UNITED STATES

24-461 ISLAND INTELLECTUAL PROPERTY LLC V. TD AMERITRADE, INC., ET AL.

24-524 LIGHTING DEFENSE GROUP V. SNAPRAYS

24-535 ROGERS, GREGORY V. UNITED STATES

24-610 UNION PACIFIC R. CO. V. DeGEER, TODD

24-628 BNP PARIBAS SA, ET AL. V. KASHEF, ENTESAR O., ET AL.

24-630 UNION PAC. R. CO. V. DeFRIES, NICHOLAS

24-643 UNION PAC. R. CO. V. ZARAGOZA, ROBERT A.

24-645 JULIANA, KELSEY C. R., ET AL. V. UNITED STATES, ET AL.

24-651 QUICKWAY TRANSP., INC. V. NLRB, ET AL.

24-670 BOWERS DEV., LLC V. ONEIDA CTY. INDUS DEV., ET AL.

24-721 RODGERS, JORDAN S. V. TEXAS

24-722 PARRISH, LARRY E. V. STRONG, NANCY, ET AL.

24-727 CENTERVILLE CLINICS INC. V. JANE DOE

24-731 MICHIGAN V. WOOLLEY, MARK D.

24-742 ENOCH, VANESSA V. HAMILTON CO. SHERIFF, ET AL.

24-746 DOE, JOHN V. UNIV. OF IOWA, ET AL.

24-751 RTSKHILADZE, GIORGI V. DEPT. OF JUSTICE, ET AL.

24-752 THOMAS, PAUL V. HARDER, KATHLEEN, ET AL.

24-761 VIEHWEG, WILLIAM H. V. INS. PROGRAMS MANAGEMENT, ET AL.

24-762 PISNER, GARY V. McCARTHY, ROBERT, ET AL.

24-767 RIETH-RILEY CONSTRUCTION CO., IN V. NLRB

24-769 STORMO, JOAN V. STATE NAT. INS. CO.

24-772 CHIJIJOKE-UCHE, JEFFREY S. V. CHAPMAN CHEVROLET LLC, ET AL.

24-785 SILLOWAY, KRISTEN, ET AL. V. SAN FRANCISCO, CA

24-789 ECB USA, INC., ET AL. V. CHUBB INS. CO. OF NJ, ET AL.
24-790 AKAHOSHI, FORMER OFFICER V. OFF. OF COMPTROLLER OF CURRENCY
24-791 BYRNES, BARRY J. V. BYRNES, SYLVIA M.
24-792 REULE, CHRISTINE, ET AL. V. JACKSON, JUDGE, ET AL.
24-794 RAE, AMY V. WOBURN PUB. SCH., ET AL.
24-802 STOYANOV, ALEKSANDR J. V. HOWARD COUNTY, MD, ET AL.
24-824 RUTLAND, BERNICE M. V. REGIONS BANK
24-829 WYNN, STEVE V. THE ASSOCIATED PRESS, ET AL.
24-830 LUO, JENN-CHING V. OWEN J. ROBERTS SCH., ET AL.
24-834 PISTRAK, EVGENY V. GOLUBEVA, KSENIIA
24-835 HEALEY, SETH V. VT DEPT. OF CHILDREN, ET AL.
24-841 SUETHOLZ, DAVID W. V. UNITED STATES
24-843 SANDERS, ZACKARY E. V. UNITED STATES
24-847 STRONG, LADONIES P. V. UNITED STATES
24-851 OSTERMAN, PAUL S. V. UNITED STATES
24-854 MILLER, MARK, ET AL. V. NELSON, TX SEC. OF STATE, ET AL.
24-861 CHAVEZ-GUEVARA, ARMANDO J. V. BONDI, ATT'Y GEN., ET AL.
24-862 MACDONALD, MICHELLE V. SIMON, MN SEC. OF STATE
24-864 ESTATE OF CARSON BRIDE, ET AL. V. YOLO TECHNOLOGIES, INC.
24-879 NORMAN, JAMES T. V. UNITED STATES
24-880 NEXPOINT ASSET, ET AL. V. HIGHLAND CAPITAL MANAGEMENT
24-882 CHATMAN, DERRICK V. MISSISSIPPI
24-885 ROCKWATER, INC. V. UNITED STATES
24-900 QURESHI, PARVEZ A. V. UNITED STATES
24-907 WELLS, DeSHAUN L. V. UNITED STATES
24-911 RECHNITZ, SHLOMO, ET AL. V. HEARDEN, NANCY, ET AL.
24-916 KOSS CORP. V. BOSE CORP.
24-5494 WITHAM, BRIAN S. V. UNITED STATES

24-5553 PHILLIPS, HARRY F. V. DIXON, SEC., FL DOC
24-5947 SALAAM, ISMAIL V. UNITED STATES
24-5953 SLAUGHTER, ELLVA V. UNITED STATES
24-6038 WHARTON, ROBERT V. TERRA, SUPT., PHOENIX
24-6178 HARVEL, MICHAEL V. UNITED STATES
24-6266 MILES, JODY L. V. MARYLAND
24-6268 MORENO-CUEVAS, RAMON V. TOWN SPORTS INT'L., LLC, ET AL.
24-6270 PETERSON, TIMOTHY E. V. SALMONSEN, WARDEN
24-6275 HAMILTON, JOHNNY V. GEORGIA
24-6296 WANG, LIREN V. IVERSON, MICHAEL D., ET AL.
24-6303 LEACH, JAVARUS T. V. ILLINOIS
24-6308 GREEN, LaDON M. V. FLORIDA
24-6313 ST. GEORGE, ERIC V. LENGERICH, WARDEN, ET AL.
24-6314 LETTIERI, DAVID C. V. BINGHAMTON, NY, ET AL.
24-6315 ST. GEORGE, ERIC V. LAKEWOOD, CO, ET AL.
24-6316 BARRERA-MACKORTY, ANTONIO U. V. UNITED STATES
24-6318 CROWDER, MARCUS V. GEORGIA
24-6321 RYAN, CELESTE V. TIMMERMAN, JEFF, ET AL.
24-6324 SMITH, SAMUEL L. V. EVERETT, R.
24-6325 SMITH, SAMUEL L. V. SMITH, NATASHA K.
24-6327 JIDEANI, ONYINYE V. RIGSBY, JUDGE
24-6328 EAST, DONALD V. JACKLEY, ATT'Y GEN. OF SD
24-6336 MONTOYA, CHRISTOPHER M. V. ARIZONA
24-6338 SHOMO, HAKEEM-ALI V. OHIO, ET AL.
24-6342 A. B. V. FLORIDA DEP'T OF CHILDREN
24-6347 WARREN, DEMARIO G. V. LOUISIANA
24-6349 MITCHELL, JOSHUA W. V. GUERRERO, DIR., TX DCJ
24-6350 WENNER, CHARLES A. V. HENSLEY, GEHRID, ET AL.

24-6351 GELIN, EDSON V. UNITED STATES
24-6355 GREEN, TRAY D. V. GUERRERO, DIR., TX DCJ
24-6356 HARDY, RONALLEN V. TENNESSEE
24-6358 WATWOOD, JAMES D. V. NEWCOMER, WARDEN
24-6360 DIAZLEAL-DIAZLEAL, MAXIMO V. HAYNES, SUPT., AIRWAY
24-6361 CROUCH, ZACHARY V. CANNING, CHRISTOPHER
24-6365 GEMELLI, TIMOTHY M. V. NICOSIA, PERRY, ET AL.
24-6368 SMITH, CARLTON V. DIXON, SEC., FL DOC
24-6369 McPHERSON, CURTIS B. V. DIXON, SEC., FL DOC
24-6373 GOLDSBORO, HARRY L. V. FLORIDA
24-6380 RUST, MEGAN V. LABORATORY CORP. OF AM., ET AL.
24-6382 SMITH, CODY L. V. TEXAS
24-6384 RYAN, TIMOTHY V. UNITED STATES
24-6386 BOGGS, RICHARD E. V. UNITED STATES
24-6387 BRADLEY, RAYMOND V. FLORIDA
24-6389 CARTER, KALONTAE V. LUNEKE, WARDEN
24-6391 WARD, JOHNNER J. V. UNITED STATES
24-6403 NIXON, BRIAN D. V. TEXAS
24-6418 BOOKER, PATRICK L. V. SOUTH CAROLINA
24-6424 CLOPTON, TERRANCE L. V. ILLINOIS
24-6456 SMITH, DORAN M. V. MISSISSIPPI
24-6457 BLOUNT, DARRELL V. ADM'R, NJ STATE PRISON
24-6488 OCHOA, JORDY E. V. LUNA, SHERIFF, ET AL.
24-6504 SLACK, DANMOND J. V. SAMPSON, WARDEN
24-6509 CHARLEMAGNE, ANTONIO A. V. MILLER, SUPT., SNAKE RIVER
24-6514 GARRETT, PHILLIP J. V. KANSAS
24-6522 NEYHART, SAMUEL C. V. DAVIS, WARDEN
24-6533 SCHWEDER, JON A. V. ARIZONA

24-6544 BELLLOT, LEMACK V. UNITED STATES
24-6545 PICH, RANGSEY A. V. UNITED STATES
24-6551 WISE, WILLIAM J. V. UNITED STATES
24-6554 CORTEZ, ADRIANO V. UNITED STATES
24-6557 ROSADO, STEVE V. UNITED STATES
24-6558 GONZALEZ, MAURICIO V. UNITED STATES
24-6559 LEYVA-FRAYRE, IGNACIO V. UNITED STATES
24-6562 JONES, DEREK V. UNITED STATES
24-6565 GOMEZ, ALEX H. V. DIXON, SEC., FL DOC, ET AL.
24-6567 FLORES, LONGINO L. V. UNITED STATES
24-6571 SANCHEZ-SOSA, ROEL I. V. UNITED STATES
24-6572 RIVERA, VICTOR V. UNITED STATES
24-6575 SCARBOROUGH, MARSHALL R. V. UNITED STATES
24-6577 CUNNINGHAM, ANTHONY V. USPS, ET AL.
24-6578 BILLINGS, DONALD L. V. WISCONSIN
24-6580 SMITH, DARRELL V. UNITED STATES
24-6582 MARTIN, DAJUAN V. UNITED STATES
24-6583 AGUILAR-GUTIERREZ, GILBERTO V. UNITED STATES
24-6584 BAGOLA, COLTON V. UNITED STATES
24-6585 JONES, PATRICK V. UNITED STATES
24-6589 SANDERS, ZACKARY E. V. UNITED STATES
24-6591 SPONAUGLE, KIMBERLY V. UNITED STATES
24-6593 GUERRERO, JUAN V. UNITED STATES
24-6595 CARDIEL-RUIZ, MARTIN G. V. UNITED STATES
24-6596 SOTO, JOSE V. UNITED STATES
24-6598 BOYLES, RODNEY V. UNITED STATES
24-6601 BAUTISTA-PEREZ, GABRIELA V. UNITED STATES
24-6603 GORDON, MICHAEL L. V. UNITED STATES

24-6606 McCOY, WILLIE V. UNITED STATES
24-6612 SULLIVAN, LEIHINAHINA V. UNITED STATES
24-6614 MARSHALL, BENJAMIN D. V. UNITED STATES
24-6615 DAMM, GREGORY P. V. UNITED STATES
24-6618 SHARMA, DILESH V. UNITED STATES
24-6622 BRADLEY, JOHN V. UNITED STATES
24-6626 WALL, STANFORD V. UNITED STATES
24-6627 WASHINGTON, ANTHONY V. UNITED STATES
24-6630 CARDENAS, AMADO D. V. UNITED STATES
24-6633 WEBSTER, CLEVON V. UNITED STATES
24-6634 WOLTER, ROBERT A. V. UNITED STATES
24-6635 LEEDY, JORY V. UNITED STATES
24-6636 DIXON, KERBET V. NEW YORK
24-6637 MOSS, ROGER V. UNITED STATES
24-6638 CHAVEZ, RAQUEL D. V. UNITED STATES
24-6639 ALFARO, MARIO A. V. CALIFORNIA
24-6641 CHEEVER, CHAD A. V. OREGON
24-6644 KASALI, LOLA S. V. UNITED STATES
24-6652 KITCHEN, DAVID R. V. UNITED STATES
24-6654 HILL, WILLIE A. V. UNITED STATES
24-6655 MATA-GARDEA, RAUL H. V. UNITED STATES
24-6657 VILLAREAL, LEOPOLDO V. UNITED STATES
24-6658 VOLTZ, DONALD C. V. UNITED STATES
24-6659 SEWARD, RONNIE L. V. UNITED STATES
24-6662 WILLIAMS, FRED L. V. ARKANSAS

The petitions for writs of certiorari are denied.

24-518 PARKERVISION, INC. V. TCL INDUSTRIES HOLDINGS, ET AL.

The motion of Harris Brumfield, Trustee for Ascent Trust for

leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

24-6269 MERILIEEN, JEAN J. V. McFARLANE, WARDEN

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

24-6320 ABADI, AARON V. ADAMS, MAYOR, ET AL.

24-6385 TAAL, BABOUCAR B. V. CRONIN, JOHN, ET AL.

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8. As the petitioners have repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioners unless the docketing fees required by Rule 38(a) are paid and the petitions are submitted in compliance with Rule 33.1. See *Martin v. District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

HABEAS CORPUS DENIED

24-6375 IN RE JOHN E. DRUMMOND

24-6620 IN RE BOBBY R. REED

The petitions for writs of habeas corpus are denied.

MANDAMUS DENIED

24-6278 IN RE SHERLY CADET

24-6359 IN RE JEROME CURRY

The petitions for writs of mandamus are denied.

24-749 IN RE LORRAINE BOND

The petition for a writ of mandamus is denied. Justice Alito took no part in the consideration or decision of this

petition.

24-763 IN RE BO ZOU

24-6501 IN RE NOEL J. BENDER

The petitions for writs of mandamus and/or prohibition are denied.

REHEARINGS DENIED

23-130 SAKKAL, SAAD V. UNITED STATES

23-7644 KEITA, SEKOU V. GIANT OF MARYLAND LLC

24-459 CLARK, GORDON A. V. SANTANDER BANK, N.A.

24-600 QUIOTIS C. V. NEBRASKA

24-5123 SANCHEZ, ANGEL V. CISNEROS, WARDEN

24-5583 SANCHEZ, CARLOS V. FLORIDA, ET AL.

24-5630 SACOMAN, ERNIE V. COLE, WARDEN

24-5634 ABBOUD, CAMILLE A. V. ABBOUD, IRYNA

24-5692 HAHN, JAMIE P. V. REAVES, WARDEN, ET AL.

24-5731 IN RE JEREMY D. FOSTER

24-5732 IN RE JEREMY D. FOSTER

24-5773 SUTTON, SEDRIC Q. V. SMITH, CHARLTON, ET AL.

24-5806 CHIWANGA, JACKSON P. V. DRUMMOND, ATT'Y GEN. OF OK

24-5885 DOWDELL-McELHANEY, SHERRELL V. GLOBAL PAYMENTS INC., ET AL.

24-5917 DE JESUS, MYRNA V. DIGNITY HEALTH CORPORATION

24-5958 IN RE JEREMY D. FOSTER

24-6027 IN RE PIERRE HAOSHS

24-6191 FRANK, DAVID G. V. UNITED STATES

The petitions for rehearing are denied.

Statement of ALITO, J.

SUPREME COURT OF THE UNITED STATES

CID C. FRANKLIN *v.* NEW YORK

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

No. 24–330. Decided March 24, 2025

The petition for a writ of certiorari is denied.

Statement of JUSTICE ALITO respecting the denial of certiorari.

I agree that we should not grant certiorari in this case, but in an appropriate case we should reconsider the interpretation of the Confrontation Clause that the Court adopted in *Crawford v. Washington*, 541 U. S. 36 (2004), and has elaborated in later cases. Overturning established precedent, the *Crawford* Court claimed that its new interpretation captured the original meaning of the Confrontation Clause as revealed by then-recent scholarship, *id.*, at 60–61, and that this interpretation would avoid the “unpredictable and inconsistent” results that had occurred under the test it overturned, *id.*, at 66.

Subsequent developments have undermined these two pillars of *Crawford*’s rationale. Historical research now calls into question *Crawford*’s understanding of the relevant common law rules at the time of the adoption of the Sixth Amendment, and whatever else may be said about that decision, there can be no dispute that it has not produced predictable and consistent results. Despite repeated attempts to explain what *Crawford* meant by “testimonial statements,” our Confrontation Clause jurisprudence continues to confound courts, attorneys, and commentators.¹

¹ See, e.g., R. Allen, J. Hoffman, D. Livingston, A. Leipold, & T. Meares, *Comprehensive Criminal Procedure* 1416 (5th ed. 2020) (“astonishing”); E. Sheley, *The Dignitary Confrontation Clause*, 97 *Wash. L. Rev.* 207, 223 (2022) (“morass”); D. Tuerkheimer, *Exigency*, 49 *Ariz. L. Rev.* 801,

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Petitioner asks us to remedy this confusion by clarifying what qualifies as a “testimonial statement” under our post-*Crawford* case law. See *Smith v. Arizona*, 602 U. S. 779, 783–789, 799–802 (2024) (discussing our “varied formulations” of *Crawford*’s “testimonial inquiry”). But the real problem may be *Crawford* itself and its conclusion that the Confrontation Clause codified a well-established common law right against the use of any “testimonial” statement made out of court by a person who is available to testify and was not previously subject to cross-examination by the defendant. 541 U. S., at 68.

In order to reach this conclusion, the Court was required to hold that any person who makes a “testimonial” statement (whatever that means) is a “witness” within the meaning of the Confrontation Clause, but this gave the term “witness” a meaning that is radically different from its meaning in the neighboring Compulsory Process Clause and elsewhere in the Constitution. See A. Amar, Confrontation Clause First Principles: A Reply to Professor Friedman, 86 Geo. L. J. 1045, 1045–1047 (1998); A. Amar, Foreword: Sixth Amendment First Principles, 84 Geo. L. J. 641, 647 (1996).

832, n. 173 (2007) (“incoherent”); J. Widdison, Comment, *Michigan v. Bryant*: The Ghost of *Roberts* and the Return of Reliability, 47 Gonz. L. Rev. 219, 240 (2011) (“unstable”); A. Eichner, Note, The Failures of *Melendez-Diaz v. Massachusetts* and the Unstable Confrontation Clause, 38 Am. J. Crim. L. 437 (2011) (same); M. Spottswood, Truth, Lies, and the Confrontation Clause, 89 U. Colo. L. Rev. 565, 611 (2018) (“unnecessarily complex”); J. Ross, After *Crawford* Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness, 97 J. Crim. L. & C. 147 (2006) (“double-speak”); D. Crump, Overruling *Crawford v. Washington*: Why and How, 88 Notre Dame L. Rev. 115, 132 (2012) (“unworkable”); D. Noll, Constitutional Evasion and the Confrontation Puzzle, 56 Boston College L. Rev. 1899, 1903 (2015) (“mess” (internal quotation marks omitted)); G. Fisher, The *Crawford* Debacle, 113 Mich. L. Rev. First Impressions 17, 24 (2014) (“*inherently*, and therefore *permanently*, unpredictable” (quoting *Crawford*, 541 U. S., at 68, n. 10)).

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The Compulsory Process Clause, which follows immediately after the Confrontation Clause, gives a defendant the right “to have compulsory process for obtaining *witnesses* in his favor.” Amdt. 6 (emphasis added). And it is clear that these “witnesses” are people who are subpoenaed to appear in court and testify. The Court has understood the Clauses’ neighboring references to “witnesses” as two sides of the same coin. See *Washington v. Texas*, 388 U. S. 14, 19 (1967) (“Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense”). After *Crawford*, however, only the Compulsory Process Clause’s “witnesses” are people who must appear in court and take the stand. When a law uses the same term more than once, we presume that the term means the same thing every time it is used. See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). Thus, it is startling to hold that the term “witnesses” in two provisions separated by nothing but a semicolon have very different meanings.

Other provisions of the Constitution that use the term “witnesses” also refer to people who testify in court. The Treason Clause states that “[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” Art. III, §3, cl. 1. This provision requires two live witnesses who take the stand. See M. Hale, *Pleas of the Crown* 262 (1694); J. Langbein, *The Origins of Adversary Criminal Trial* 238–239 (2003); Amar, 86 *Geo. L. J.*, at 1047.

These powerful textual arguments were known when *Crawford* was decided, but the Court dismissed them because its study of history led it to believe that the Confrontation Clause was meant to codify a well-established common law right against the introduction of a certain category

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of what we now call hearsay. More recent scholarship, however, casts doubt on key aspects of *Crawford*'s reasoning.²

Our body of constitutional decisions would be in perpetual turmoil if we reconsidered every decision resting on an interpretation of history that is subsequently challenged in the law reviews. But as both JUSTICE GORSUCH and I recognize, the current state of our Confrontation Clause jurisprudence is unstable and badly in need of repair. If we undertake that project, we should not limit our efforts to an attempt to shore up what may be a fundamentally unsound structure.

If we reconsider *Crawford*, as I think we should, the result might be a reaffirmation of *Crawford* or the adoption of an entirely different Confrontation Clause rule. But whatever the outcome might be, reconsideration is needed.

²See, e.g., T. Davies, Not “The Framers’ Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the *Crawford-Davis* “Testimonial” Formulation of the Scope of the Original Confrontation Clause, 15 J. L. & Pol’y 349 (2007); Noll, 56 Boston College L. Rev., at 1904–1905, 1918–1950; Spottswood, 89 U. Colo. L. Rev., at 595–596; D. Sklansky, Hearsay’s Last Hurrah, 2009 S. Ct. Rev. 1, 5–6, 36–38, 46–47, 54; B. Trachtenberg, Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause, 64 Fla. L. Rev. 1669, 1677–1681 (2012); J. Bellin, The Incredible Shrinking Confrontation Clause, 92 B. U. L. Rev. 1865, 1881–1893 (2012); T. Davies, What Did the Framers Know, and When Did They Know It? Fictional Originalism in *Crawford v. Washington*, 71 Brooklyn L. Rev. 105, 106–107 (2005); R. Kry, Confrontation Under the Marian Statutes: A Response to Professor Davies, 72 Brooklyn L. Rev. 493 (2007); T. Davies, Revisiting the Fictional Originalism in *Crawford*’s “Cross-Examination Rule”: A Reply to Mr. Kry, 72 Brooklyn L. Rev. 557 (2007).

Statement of GORSUCH, J.

SUPREME COURT OF THE UNITED STATES

CID C. FRANKLIN *v.* NEW YORK

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

No. 24–330. Decided March 24, 2025

Statement of JUSTICE GORSUCH respecting the denial of certiorari.

While Cid Franklin awaited arraignment after his arrest, an employee of the Criminal Justice Agency questioned him outside the presence of counsel. That publicly funded agency interviews “nearly all individuals arrested in New York City” in order to make bail recommendations to the arraigning judge. 42 N. Y. 3d 157, 159, 242 N. E. 3d 652, 653 (2024) (internal quotation marks omitted).

Much later, prosecutors sought to make a different use of Mr. Franklin’s bail report. At trial, they introduced it as evidence of his guilt. See App. to Pet. for Cert. 33a (exhibit). And they did so without giving him a chance to cross-examine the report’s author. Relying on the report, which “was central to the People’s case at trial,” a jury convicted Mr. Franklin. 42 N. Y. 3d, at 160, 242 N. E. 3d, at 654.

On appeal, Mr. Franklin argued that this use of the bail report violated his Sixth Amendment right to confront the witnesses against him. The New York Court of Appeals disagreed. It reasoned that the Sixth Amendment only bars the use of “testimonial” out-of-court statements. *Id.*, at 161, 242 N. E. 3d, at 655 (quoting *Crawford v. Washington*, 541 U. S. 36, 51 (2004)). And a statement qualifies as “testimonial,” the court continued, only if it “was created for the primary purpose of serving as trial testimony.” 42 N. Y. 3d, at 159, 242 N. E. 3d, at 653. Applying that test, taken from this Court’s decision in *Michigan v. Bryant*, 562 U. S. 344 (2011), the Court of Appeals concluded that Mr. Franklin’s

Statement of GORSUCH, J.

bail report was written principally for “administrative” purposes and not primarily for use at trial. 42 N. Y. 3d, at 165, 242 N. E. 3d, at 658. Therefore, the court reasoned, it did not qualify as testimonial. *Ibid.*

It’s hard to fault the Court of Appeals for applying a “primary-purpose” test in assessing Mr. Franklin’s Sixth Amendment claim. After all, this Court endorsed the test just last year in *Smith v. Arizona*, 602 U. S. 779, 800 (2024). But even if that judge-made test may have some useful role to play, it seems to me that treating it as a necessary condition to relief under the Confrontation Clause can pose problems too, risking results that sit uneasily with the Clause’s original meaning. It is a concern I raised in *Smith*—and one that, to my eyes, this case highlights. *Id.*, at 806 (opinion concurring in part).

Consider briefly some of what we know about the Sixth Amendment. Beginning in the 16th century, Parliament required magistrates “to examine suspects and witnesses” before trial and to “certify the results to the court.” *Crawford*, 541 U. S., at 43–44. Apparently, an important purpose of those examinations was to ensure that the defendant and key witnesses would appear at trial, not to generate admissible evidence. See J. Langbein, *Prosecuting Crime in the Renaissance* 24 (1974). Still, prosecutors sometimes introduced those examinations at trial instead of calling live witnesses, effectively denying defendants a chance to cross-examine their accusers. See *Crawford*, 541 U. S., at 44. By the founding, the common law had largely turned against that practice. See J. Beattie, *Crime and the Courts in England 1660–1800*, pp. 270–271, 363–365 (1985). Recognizing as much, this Court in *Crawford* held that the “use of *ex parte* examinations as evidence against the accused” was one of the “principal evil[s] at which the Confrontation Clause was directed.” 541 U. S., at 50.

Now return to Mr. Franklin’s case. The Court of Appeals applied the primary-purpose test to approve something that

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looks very similar to what the Confrontation Clause was adopted to prevent—the use at trial of a pretrial examination as evidence against the accused “in lieu of live testimony” subject to cross-examination. *Id.*, at 43.

Perhaps there is some way to reconcile this apparent tension. But perhaps, too, the tension here should give us reason to ask some questions about the “primary-purpose” test itself. Start with this one: Where does it come from? The test appears nowhere in the text of the Sixth Amendment, nor have our decisions sought to justify it by reference to the Amendment’s original meaning and the historic practices that informed it. Really, where the primary-purpose test “comes from is anyone’s guess.” *Williams v. Illinois*, 567 U. S. 50, 135 (2012) (KAGAN, J., dissenting).

Seemingly, the first mention of “primary purpose” in our Sixth Amendment jurisprudence came in *Davis v. Washington*, 547 U. S. 813, 822 (2006). Even there, however, the Court did not purport to suggest that every Confrontation Clause claim must run the primary-purpose gauntlet. Instead, *Davis* used the phrase “primary purpose” merely as shorthand to describe some situations in which an out-of-court statement will qualify as “testimonial” and thus implicate the Confrontation Clause. *Ibid.* Reading any more into its discussion, *Davis* emphasized, would be a mistake, since it was not “attempting to produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial.” *Ibid.*

Admittedly, and despite that admonition, some of our later cases seized on *Davis*’s discussion of “primary purpose” and sought to transform it into a kind of “grand unified theory” for assessing Confrontation Clause claims, a test that must be satisfied in every case. *American Legion v. American Humanist Assn.*, 588 U. S. 29, 60 (2019) (plurality opinion). But even after years of toiling with that project, our cases have never quite settled on what the primary-purpose test *is*. As we candidly acknowledged last

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year in *Smith*, the Court has offered a number of “varied” and seemingly inconsistent “formulations.” 602 U. S., at 800; see also *State v. Mattox*, 2017 WI 9, ¶63, 373 Wis. 2d 122, 161, 890 N. W. 2d 256, 277 (Abrahamson, J., dissenting) (“[T]he U. S. Supreme Court has not adopted a single, definitive formulation of the primary purpose test”); *People v. Fontenot*, 509 Mich. 1073, 1079, 975 N. W. 2d 919, 925 (2022) (McCormack, C. J., concurring) (“[T]he proper formulation of the primary-purpose test is unclear”).

Consider a few examples. Perhaps the most demanding articulation of the primary-purpose test came in *Bryant*, where the Court indicated that an out-of-court statement qualifies as testimonial if it was procured “with a primary purpose of creating an out-of-court *substitute for trial testimony*.” 562 U. S., at 358 (emphasis added). More forgivingly, in *Melendez-Diaz v. Massachusetts*, the Court said that a statement qualifies as “testimonial” if it was “made under circumstances which would lead an objective witness reasonably to believe that the statement would be *available for use at a later trial*.” 557 U. S. 305, 310 (2009) (emphasis added). Differently still, *Davis* suggested that statements “made in the course of police interrogation . . . are testimonial when . . . the primary purpose of the interrogation is to establish or prove past events *potentially relevant to later criminal prosecution*.” 547 U. S., at 822 (emphasis added). And in yet another iteration, *Smith* said the relevant question is whether a statement was prepared with a “*focus on court*.” 602 U. S., at 802 (emphasis added).

It might be possible, I suppose, to harmonize these discordant variations. But lower courts have generally felt compelled to pick one version or another, and a defendant’s conviction or acquittal can hang on that choice. See, e.g., *United States v. Miller*, 982 F. 3d 412, 436 (CA6 2020) (“Were [the statements] testimonial? It might depend on which of the Supreme Court’s varied ‘primary-purpose’ tests we apply”).

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Just look again at what happened to Mr. Franklin in the Court of Appeals. There, a majority applied *Bryant*'s version of the test, asking whether the primary purpose of Mr. Franklin's bail report "was to create an out-of-court substitute for trial testimony." 42 N. Y. 3d, at 164, 242 N. E. 3d, at 657. Under that standard, the report struck the majority as nontestimonial. Meanwhile, the dissent thought the bail report testimonial because, even if it wasn't created as a substitute for trial testimony, it was created for use in court and was available for use at trial, considerations *Smith* and *Melendez-Diaz* have suggested are enough to trigger the Sixth Amendment. See 42 N. Y. 3d, at 176, 242 N. E. 3d, at 666 (Aarons, J., dissenting).

If deciding which primary-purpose test to use can pose lower courts with a challenge, applying any version of it may be no easier. *Bryant* suggested that a court must "objectively" determine an out-of-court statement's "primary purpose." 562 U. S., at 360. But how is a court supposed to do that? Must it take evidence and conduct a mini-trial about the circumstances of each utterance? See *id.*, at 370 (suggesting that courts must analyze "the statements and actions of all participants" in an out-of-court encounter). What, too, is a court supposed to do when the evidence indicates that an officer had one "primary purpose" in mind when soliciting an out-of-court statement and the declarant had another? See *id.*, at 383 (Scalia, J., dissenting). In cases like that, what is to keep an "objective" inquiry from devolving into raw judicial choice, inviting in the process different results from different judges in similar cases? See *Kennedy v. Bremerton School Dist.*, 597 U. S. 507, 533–534 (2022) (noting problems with a not-dissimilar "reasonable observer" inquiry); *Smith*, 602 U. S., at 806–807 (GORSUCH, J., concurring in part); cf. *Davis*, 547 U. S., at 841–842 (THOMAS, J., concurring in judgment in part and dissenting in part). The challenges associated with apply-

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ing the primary-purpose test only seem to compound further when one considers the immense variety of out-of-court statements that prosecutors may seek to use at trial—ranging from statements from eyewitnesses at a crime scene to bail reports to expert forensic analyses. Does each type of statement demand its own primary-purpose jurisprudence? Cf. *Smith*, 602 U. S., at 802 (distinguishing among different types of laboratory records).

To my mind, all this suggests we may need to rethink our course sometime soon. The primary-purpose test came about accidentally. It has caused considerable confusion. This Court has never sought to justify it on the basis of the Sixth Amendment’s text or original meaning. Nor, for that matter, is it easy to see how one might. The Sixth Amendment guarantees “the accused . . . the right . . . to be confronted with the witnesses against him.” What matters, as I read those words, is not the *purpose* for which an out-of-court statement was originally created, but whether the government seeks to *use* a witness’s statement at trial against a defendant in lieu of live testimony. See *Smith*, 602 U. S., at 806–807 (GORSUCH, J., concurring in part).

When it comes to vindicating many other guarantees in the Bill of Rights, we have eschewed “ambitious, abstract, and ahistorical” tests in favor of ones grounded in the constitutional text and the common law that informed it. *Kennedy*, 597 U. S., at 534 (internal quotation marks and alteration omitted) (Establishment Clause).¹ Perhaps we should

¹ See also, *e.g.*, *SEC v. Jarkesy*, 603 U. S. 109 (2024) (Seventh Amendment); *Ramos v. Louisiana*, 590 U. S. 83 (2020) (Sixth Amendment jury right); *Knick v. Township of Scott*, 588 U. S. 180 (2019) (Fifth Amendment Takings Clause); *Currier v. Virginia*, 585 U. S. 493 (2018) (Fifth Amendment Double Jeopardy Clause); *District of Columbia v. Heller*, 554 U. S. 570 (2008) (Second Amendment); *United States v. Bajakajian*, 524 U. S. 321 (1998) (Eighth Amendment Excessive Fines Clause); cf. *Carpenier v. United States*, 585 U. S. 296, 397–404 (2018) (GORSUCH, J., dissenting) (urging a similar approach for the Fourth Amendment).

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consider doing the same here. As we recognized in *Crawford*, the Sixth Amendment enshrined a pre-existing right to confront one’s accusers at trial, and its broad language “admit[s] only those exceptions established at the time of the founding.” 541 U. S., at 54. In other words, the Amendment established a presumption that prosecutors cannot use out-of-court statements against a defendant without an opportunity for cross-examination, a presumption prosecutors can overcome only by identifying some historically recognized exception to the general rule. Following that approach might sometimes present courts and counsel with difficult questions, but perhaps no more so than those they face today under the primary-purpose regime. And, in any event, it is hard to see how else we might proceed if our aim is “to honor the supreme law the people have ordained rather than substituting our will for theirs.” *United States v. Rahimi*, 602 U. S. 680, 711 (2024) (GORSUCH, J., concurring); see *Crawford*, 541 U. S., at 67.

Now may not be the moment, I concede, for the Court to take up these questions. The Court issued its latest word on the Confrontation Clause in *Smith* less than a year ago. Before weighing in again, we may benefit from the insights and further experience of our lower court colleagues. Along the way, I hope only that they pause to consider the complications surrounding the primary-purpose test and address possible alternatives we might consider. As Chief Justice Marshall observed, all of us who serve in the judiciary are charged with being “watchful of every inroad” on the rights the Confrontation Clause protects. *United States v. Burr*, 25 F. Cas. 187, 193 (No. 14,694) (CC Va. 1807).²

²JUSTICE ALITO also writes to criticize the various tests this Court has developed to determine what qualifies as a “testimonial” statement. As he observes, “the real problem may” lie not with any particular test but, more fundamentally, with the notion that the Confrontation Clause’s protections hinge on whether a statement is “testimonial.” *Ante*, at 2 (statement respecting denial of certiorari). So, for instance, one study

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cited by JUSTICE ALITO argues that “framing-era sources did not draw *any* distinction between testimonial and nontestimonial hearsay.” T. Davies, Not “The Framers’ Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the *Crawford-Davis* “Testimonial” Formulation of the Scope of the Original Confrontation Clause, 15 J. L. & Pol’y 349, 465 (2007) (emphasis added). According to that study, “framing-era evidence doctrine imposed a virtually total ban against using unsworn hearsay evidence to prove a criminal defendant’s guilt,” regardless of the statement’s original purpose. *Id.*, at 351; cf. *Crawford v. Washington*, 541 U. S. 36, 52, n. 3 (2004) (discussing evidence of a “general bar on unsworn hearsay” at the founding). If that is true, then reexamining the relevant history might well require us not only to “reaffir[m]” *Crawford*, as JUSTICE ALITO suggests, *ante*, at 4, but to broaden its protections, perhaps along the lines outlined above.