No. 24-330

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

REPLY BRIEF FOR PETITIONER

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Respondent acknowledges—as this Court has repeatedly recognized—that the lower courts are divided as to when out-of-court statements are testimonial for purposes of the Confrontation Clause. Respondent suggests that "a grant of certiorari might be appropriate" in a case involving different evidence, but opposes certiorari in this case. Opp. 20-21. Respondent misses the point: the lower courts are split because they do not know which (or how many) of this Court's "varied formulations of the standard" to apply. *Smith* v. *Arizona*, 144 S. Ct. 1785, 1801 (2024).

This case presents the ideal vehicle to resolve the conflict. The dissenting judges below applied one version of the test articulated by this Court ("available for use at a later trial") and found a Confrontation Clause violation. Pet. App. 15a. The majority applied a different

version ("substitute for trial testimony") and found the opposite. *Id.* at 9a.

To evade review, respondent attempts to inject an incorrect (and forfeited) argument into the case, repeatedly claiming that the trial court admitted not the CJA employee's statements but "petitioner's own statements." Opp. 3. But the Court of Appeals rightly understood "that *the CJA interviewer was the declarant* of the statements found on the [CJA] form for purposes of the Confrontation Clause." Pet. App. 10a (emphasis added). It expressly found respondent's argument that Franklin should be considered the declarant to be "unpreserved." *Ibid.* And because respondent prevented Franklin from cross-examining the CJA employee, there is no way of knowing why the employee stated Franklin lived specifically in the basement of the home he shared with his stepmother. Did Franklin say that to the employee? Did the information come from Franklin's stepmother—who "verified" Franklin's address and had an incentive to say Franklin, and not her, lived in the portion of the house where the firearm was found? Did the CJA employee do other research? These are precisely the questions the Confrontation Clause demands be answered and respondent did not allow Franklin to ask.

Respondent also opposes certiorari on the ground that Franklin has not "espouse[d] any specific alternative" test. Opp. 22. The CJA employee's bail report—the modern-day analogue of the Marian bail examinations discussed in *Crawford*—would "qualify [as testimonial] under any definition" and under the Constitution's original meaning. *Crawford* v. *Washington*, 541 U.S. 36, 52 (2004). That alone highlights the wayward path courts have taken and merits certiorari. As for a test, it should be enough (as the United States recently argued) that

the CJA employee's statement had "a focus on court.'" *Smith*, 144 S. Ct. at 1802 (quoting Tr. of Oral Arg. 52). The statement was made by an agent of the state in a post-arrest report about Franklin, created for and submitted to the court in the same prosecution that resulted in Franklin's conviction.

A. The Lower Courts Are Divided Over Which Of This Court's Conflicting Testimonial Standards to Apply

1. Respondent's lead argument opposing certiorari is that, after *Crawford*, courts consistently apply a singular and "firmly established primary purpose test." Opp. 2-3. If so, the courts themselves would be surprised to learn of it.

Just last Term, this Court acknowledged it has set forth no fewer than three "varied formulations" of the "testimonial inquiry." *Smith* v. *Arizona*, 144 S. Ct. 1785, 1792, 1801-02 (2024). Members of this Court have recognized that those varied formulations have left "lower courts struggling to abide [this Court's] holdings," *Stuart* v. *Alabama*, 139 S. Ct. 36, 36-37 (2018) (Gorsuch, J., dissenting from the denial of certiorari); see also Transcript of Oral Argument at 27, *Smith*, 144 S. Ct. 1785 (No. 22-899), 2024 WL 250706 (Sotomayor, J.), ("There's a circuit split on … what test exists for an out-of-court statement to be testimonial.").

This Court need not take its own word for it. Lower courts, too, have recently decried "the muddled state of [the] current doctrine" on testimonial statements, *People* v. *Gonzalez*, 499 P.3d 282, 305 (Cal. 2021), which causes "confusion in [their own courts and] many others." *Leidig* v. *State*, 256 A.3d 870, 886 (Md. 2021). As a result, "courts 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).

Even looking only to cases decided after this Court's decision last Term in *Smith* shows that respondent's narrative is a fairytale. Since *Smith*, four federal courts of appeal or state courts of last resort have held—like the dissent below—that testimonial statements include those made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *United States* v. *Johnson*, 117 F.4th 28, 48 (2d Cir. 2024); *Williams* v. *Superintendent Greene SCI*, 112 F.4th 155, 164 (3d Cir. 2024); *United States* v. *Lewis*, 2024 WL 3355373, at *7 (11th Cir. July 10, 2024); *People* v. *Washington*, 2024 WL 3551260, at *3 (Mich. July 26, 2024). Three others defined testimonial statements as those whose "primary purpose is to establish or prove past events potentially relevant to later criminal prosecution." *United States* v. *Holguin*, 2024 WL 4625285, at *1 (5th Cir. Oct. 30, 2024); accord *United States* v. *Riggs*, 2024 WL 3949101, at *1 (9th Cir. Aug. 27, 2024); *Green* v. *State*, 2024 WL 4111147, at *3 (Del. Sept. 9, 2024). And, as respondent admits (Opp. 19), the Michigan Supreme Court, after *Smith*, "rejected application of the 'primary purpose' test outside of an emergency context." *Washington*, 2024 WL 3551260, at *4.

The Second Circuit's post-*Smith* opinion also held that a primary purpose inquiry supplements, not supplants, the "core class of 'testimonial' statements" *Crawford* identified. *Johnson*, 117 F.4th at 48; see also *Lambert* v. *Warden Greene SCI*, 861 F.3d 459, 469-70 (3d Cir. 2017) (same). The court below in this case held the opposite. See Pet. App. 9a (holding that "the primary pur-

pose test" applies "to statements falling within *Crawford*'s 'core class' … to determine whether they were testimonial").

2. Respondent's answer is that this Court should overlook the widely acknowledged disarray because many courts have applied what respondent describes as "the primary purpose test." Opp. 16-18.

But there is no such thing as "*the* primary purpose test." Rather, this Court has explained there are at least three "varied formulations" of a primary purpose inquiry. *Smith*, 144 S. Ct. at 1801. One of those formulations does not reference the statement's primary purpose at all. *Id.* at 1792 (statements "created 'under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial'") (cleaned up).

As Franklin's petition explained, the federal and state reporters contain no shortage of cases (like this one) where courts have applied only one of the three formulations, to the exclusion of the others. See Pet. 14-16. Three states also apply a fourth variant, asking whether a statement primarily "target[s] an individual as having engaged in criminal conduct." See Pet. 17. These states draw this "accusatory" standard from *Williams* v. *Illinois*, 567 U.S. 50 (2012), see Pet. 17, a case respondent concedes cannot be reconciled with this Court's other post-*Crawford* jurisprudence, see Opp. 13 n.2.[1] Some cases apply still other standards, including asking whether a statement was solemn in nature. Pet. 16-18. That respondent can cite cases where some of the same courts apply different standards than those identified in Franklin's petition only highlights the disarray in the

[1] Puzzlingly, respondent nonetheless says these states adopt "the primary purpose test" respondent supports. Opp. 18 & n.6.

lower courts and underscores the need for this Court's review.

B. The Questions Presented Are Of Vital Importance

1. Contrary to respondent's assertion, different formulations of the testimonial standard "establish … more than linguistic differences." Opp. 18-19. They make criminal defendants' confrontation rights—and liberty—depend on which formulation a court happens to choose.

This petition is case in point: The intermediate appellate court applied a solemnity standard to hold the CJA report testimonial and reversed Franklin's conviction. Pet. App. 31a. The dissent in the Court of Appeals reached the same conclusion applying the "use at a later trial" test. *Id.* at 15a. Yet the Court of Appeals majority explicitly rejected both those standards and reinstated Franklin's conviction applying the "substitute for trial testimony" test. *Id.* at 9a.

Respondent freely admits the varied formulations of the testimonial standard "result in irreconcilable outcomes" in some cases. Opp. 3; see also *id.* at 20 (acknowledging "inconsistent results" as to autopsy reports). The disparate results cannot be squared with the narrow test the lower court adopted in this case. Courts deem evidence testimonial when it was *not* created to substitute for trial testimony. See *Williams*, 112 F.4th at 164-65 (criminal information); *United States* v. *Esparza*, 791 F.3d 1067, 1072-73 (9th Cir. 2015) ("Notice of Transfer/Release of Liability" sent "to the DMV"). And courts find evidence was not testimonial when it *was* created to stand in for trial testimony. See *State* v. *Wilson*, 152 A.3d 930, 940 (N.J. 2017) (map "created to be later used

against those charged with" crimes was *not* testimonial). The bedrock constitutional rights guaranteed to criminal defendants should not be so fickly applied.

2. As Franklin explained, many other materials might be admitted without confrontation under the lower court's test. Not just bail reports but presentence reports, records from specialized treatment courts, plea allocutions, and other defendants' records of conviction could all be fair game. These materials—which are integral to the effective administration of the criminal justice system, see RFK Human Rights Am. Br.—are not created to substitute for trial testimony any more than the CJA report in this case.

Respondent does not dispute that the decision below would place these materials outside the Sixth Amendment's ambit. Instead, respondent implores the Court to look the other way because the petition's "hypotheticals … have simply never come to pass." Opp. 29. This Court should not be so easily distracted.

For starters, respondent is factually incorrect. Just two years ago this Court decided *Hemphill*, in which the New York courts admitted into evidence an alleged co-conspirator's plea allocution without confrontation. See *Hemphill* v. *New York*, 595 U.S. 140, 144-45 (2022). Courts also regularly admitted plea allocutions without cross-examination before *Crawford*. 541 U.S. at 64-65 (collecting six examples). There is every reason to think the same practice will recur under the Court of Appeals decision here, holding the Confrontation right was "refined" after *Crawford* to reach only statements created primarily to substitute for trial testimony. Pet. App. 5a-6a.

The potential for abuse with conviction records is already afoot. Many courts have concluded this Court's

post-*Crawford* jurisprudence allows the government to introduce alleged co-conspirators' records of conviction without cross-examination, even though this Court held the opposite in *Kirby* v. *United States*, 174 U.S. 47, 53-55 (1899). See *People* v. *Herrera*, 2017 WL 3306711, at *5-7 (Cal. Ct. App. Aug. 3, 2017); *People* v. *Reyes*, 2020 WL 993940, at *7-8 (Cal. Ct. App. Mar. 2, 2020); *State* v. *Phillips*, 2015 WL 5168151 (Del. Super. Ct. Sept. 2, 2015).

As for presentence reports and treatment court records, respondent assures this Court that state confidentiality laws will prevent the abuses the petition portends. But the Framers did not outsource the Sixth Amendment's protection to the vagaries of local rules and regulations. This case demonstrates why. As respondent notes, the CJA report's "legend indicated that it was not to be used as evidence of petitioner's guilt or innocence." Opp. 27. Yet the prosecution blew right by that limitation when it found it needed the report to secure Franklin's conviction—without cross-examination.

C. The Decision Below Is Incorrect

As Franklin explained, the decision below cannot be reconciled with *Crawford* or the Constitution's original meaning. Pet. 28-32. The CJA employee's statement that Franklin lived in the basement of his shared home was "prior testimony at a preliminary hearing," which *Crawford* holds is "testimonial." 541 U.S. at 68. The bail report in this case is also the modern-day analogue of Marian bail examinations, the very evidence the founding-era "right to confrontation was meant to prohibit." *Id.* at 50.

Respondent contends neither *Crawford* nor the common law confrontation right applies here because this case supposedly concerns the admission of Franklin's

"own statements." Opp. 23. Not so. The Court of Appeals unambiguously stated "the CJA interviewer was the declarant of the statements found on the form for purposes of the Confrontation Clause." Pet. App. 10a. And because the CJA employee did not testify, nobody can know why the employee said Franklin lived in the basement of his shared home. See Pet. 24-25. Respondent asks this Court to assume the answer to the very question respondent prevented Franklin from asking when it denied Franklin his constitutional right to cross-examination. See Pet. App. 16a-17a ("[I]t is critical to this case to know who said that [Franklin] lived in the basement, when, and under what conditions.").[2]

Respondent also argues that Marian examinations, unlike CJA reports, involved "collect[ing] and evaluat[ing] evidence of the arrestee's guilt." Opp. 24. Why that matters, respondent does not say. Marian bail examinations—like Franklin's bail report—were prepared for the court in connection with the prosecution but probably were not created "to produce evidence admissible at trial." *Crawford*, 541 U.S. at 44. When they nonetheless "came to be used as evidence in some cases," it was this abuse that the "right to confrontation was meant to prohibit." *Id.* at 44, 50. So it cannot be (as the court below held) that the sole measure of the confrontation right is whether evidence was primarily created to substitute for trial testimony, because Marian bail examinations would flunk that test for the same reasons Franklin's CJA report did.

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[2] For reasons unexplained, respondent mentions that Franklin approved redactions to the CJA report at trial. Opp. 24. But Franklin could redact only material that "ha[d] no relevancy to the case." C.A. App. A1001. He could not have redacted information about his address.

Respondent tellingly does not attempt to reconcile the "substitute for trial testimony" standard with *Crawford*. Instead, respondent insists the lower court "did not suggest that this particular linguistic formulation … was a straightjacket or that the Court would not consider any linguistic variation of the test." Opp. 32.

Except that's exactly what the lower court held. In reinstating Franklin's conviction, the Court of Appeals specifically refused to assess whether "an objective witness would reasonably believe [the CJA report] would be available for use at a later trial." Pet. App. 8a (cleaned up). It also held the intermediate appellate court erred in "rel[ying] on *Crawford*'s definition of testimony as '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 4a-5a. The only question the court below asked was whether the CJA report's "primary purpose was to create an out-of-court substitute for trial testimony." *Id.* at 9a. That rigid test cannot be squared with *Crawford* or the Constitution's original meaning.

D. This Case Is An Ideal Vehicle

This case tees up the question perfectly. The formulation of the testimonial standard is outcome dispositive. While the CJA report was not "created for the primary purpose of serving as trial testimony," Pet. App. 1a-2a, it certainly was created "under circumstances which would lead an objective witness reasonably to believe that the [report] would be available for use at a later trial," *id.* at 15a (Aarons, J., dissenting). The intermediate appellate court held that Franklin had a confrontation right applying the "solemn declaration or affirmation" standard, *id.* at 31a, and the CJA report—which was prepared by a state agent to assist a judge at

arraignment—undeniably had "a focus on court," *Smith*, 144 S. Ct. at 1802.

Respondent's purported vehicle problems are illusory. No "insufficient record" concern exists in this case. Opp. 4. Respondent claims the record is inadequate because no party "elicited testimony from the CJA supervisor regarding CJA employees' expectations" as to whether their reports "would be 'available for later use at trial.'" Opp. 4. But CJA employees' subjective expectations are irrelevant. The Confrontation Clause demands "an objective" analysis, not a subjective one. *Crawford*, 541 U.S. at 52.

Nor was the trial court's admission of the CJA report without confrontation "harmless error." Opp. 25. Respondent admitted as much below. See Pet. App. 15a ("The People concede that, if the trial court erred, that error would not be harmless, necessitating a new trial."). Regardless, the Court of Appeals' opinion forecloses a harmless error argument. The CJA report, the court held, "was central to the People's case at trial." Pet. App. 3a; see also *id.* at 31a (intermediate appellate court decision) ("The error in admitting the CJA form was not harmless.").

Respondent claims CJA reports are "very rarely used at trial" anyway. Opp. 25. Even if true, this Court's guidance on the Confrontation Clause will not apply solely to the evidence admitted in this case. The lower courts reach inconsistent results because they do not know how to determine whether *any* evidence (not just a CJA report) is testimonial. Courts, prosecutors, and defendants still await the clarity *Crawford* promised two decades ago.

As for an answer, it should be enough for a statement to have "a focus on court." *Smith*, 144 S. Ct. at 1802.

That standard rightfully guards against "the principal evil at which the Confrontation Clause was directed": the "use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. Statements made with a focus on court also are likely to bear the level of "formality and solemnity" associated with the term "testimony" at the founding. *Smith*, 144 S. Ct. at 1803-04 (Thomas, J., concurring in part). In sum, a "focus on court" standard would clarify the confusion in lower courts, return history and tradition to their rightful place in Sixth Amendment jurisprudence, and restore the Confrontation Clause's "bedrock procedural guarantee," *Crawford*, 541 U.S. at 42, to criminal defendants nationwide.

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The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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NOVEMBER 2024