No. 20-637

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

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

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, or under what circumstances, a criminal defendant who opens the door to responsive evidence also forfeits his right to exclude evidence otherwise barred by the Confrontation Clause.

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INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil-rights laws. Since its founding more than 100 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as amicus curiae. The **New York Civil Liberties Union (NYCLU)** is a statewide affiliate of the national ACLU.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by the Constitution and laws of the United States.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici curiae states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Constitution requires that defendants be afforded certain specific trial procedures—including the right to be confronted with witnesses against them—and courts may not dilute these guarantees or deviate from prescribed procedures on a case-by-case basis because they deem their application unfair or unnecessary. The New York Court of Appeals, however, has developed a doctrine that permits just that. Under the rule created in *People v. Reid*, 19 N.Y.3d 382 (2012), and applied in this case, a trial court may determine that a criminal defendant has "opened the door" to the admission of evidence otherwise barred by the Confrontation Clause if the court determines, in its discretion, that such evidence is "reasonably necessary to correct" an "incomplete and misleading" impression created by the defendant's evidence or argument. *Id.* at 388 (internal quotation marks and citation omitted). This exception, which is grounded only in subjective judicial notions of fairness, is supported by neither the text of the Confrontation Clause nor the scope of the confrontation right at the time of the founding. *Id.* Such an open-ended, discretionary standard, based on the judge's own assessment of the facts, violates the core purpose of the Confrontation Clause, and risks penalizing defendants simply for contradicting the prosecution's case.

Where the Constitution requires a trial to proceed in a particular manner, "[i]t is not the role of courts to extrapolate from the words of the [Constitution] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Giles v. California*, 554 U.S. 353, 376 (2008). Instead, courts must apply

the Constitution as written. New York's "opening the door" rule fails to do so. It conflates two very different classes of criminal trial rights: those required by the Constitution's text on the one hand, and those created by judges as prophylactic or remedial measures on the other. Only the latter class of judge-made trial rights may, in certain circumstances, be subjected to judge-made equitable exceptions.

This Court has recognized only two narrow exceptions to the otherwise categorical right of confrontation: dying declarations and forfeiture when the defendant engages in conduct designed to prevent the witness from testifying. Both exceptions existed at the time of the founding, and thus are part of the right as originally understood, rather than being founded on judges' subjective sense of equity. New York's judge-made rule falls into neither of these categories. It permits judges to override the Confrontation Clause whenever they believe doing so is "reasonably necessary" to correct a misleading defense presentation. *Reid*, 19 N.Y.3d at 387. As such, it strikes at the heart of the Confrontation Clause, replacing a predictable, specific procedure for assessing reliability through cross-examination and jury factfinding with ad hoc and standardless judicial determinations of "fairness." *Id.* at 388. Accordingly, the *Reid* rule is unconstitutional, and the Court should reverse the decision below.

ARGUMENT

I. Courts Have No Authority to Devise Equitable Exceptions to Textually Mandated Constitutional Trial Rights

When the Constitution's text guarantees a particular trial right, courts lack authority to create judge-made equitable exceptions, ungrounded in text or history, simply because they deem the resulting trial "unfair" or "misleading." The Confrontation Clause guarantees a defendant the right to be confronted with the witnesses against him, and leaves no room for courts to limit that right based on their own sense of equity. Yet New York's approach effectively rewrites the constitutional guarantee, making it subject to atextual and open-ended judicial discretion.

The court below employed a judge-made equitable doctrine to override Petitioner Darrell Hemphill's Confrontation Clause right. On trial for murder, Mr. Hemphill sought to introduce evidence implicating another individual, Nicholas Morris, as the true perpetrator. J.A. 90, 132–34. The trial court responded by permitting the State to introduce that suspect's plea allocution, in which he purported—as part of a plea deal in which he received a sentence of time served—to admit to facts inconsistent with his own guilt, and implicating Mr. Hemphill, even though the suspect did not testify at trial. *Id.* at 184. The court justified its ruling only by saying that "a significant aspect of the defense in this case is that Morris, who [was] originally prosecuted for this homicide, was, in fact, the actual shooter," and Mr. Morris's allocution was "evidence contrary to the [defense's] argument . . . that Hemphill may have possessed a different firearm than Morris

and that Morris' firearm cannot be connected to this shooting." *Id.* The Appellate Division affirmed, acknowledging that Mr. Morris's testimonial statement "would normally be inadmissible" under the Confrontation Clause, but holding that it could be admitted in this case based on the equitable exception created by the New York Court of Appeals in *People v. Reid*. Pet. App. 16a–17a.

Reid held that "a defendant can open the door to testimony that would otherwise violate his Confrontation Clause rights" by putting on a defense that creates a "misleading impression," including through "defense counsel's questioning of witnesses" or arguments to the jury. 19 N.Y.3d at 387–88. Such an open-ended invitation for judges to set aside a textually guaranteed constitutional trial right when they conclude it would be unfair to honor the right is contrary to the text and purpose of the Confrontation Clause.

Trial rights expressly required by the text of the Constitution are not subject to free-floating equitable exceptions. Several provisions of the Constitution command "not that a trial be fair, but that a particular guarantee of fairness be provided." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006); *see also Giles*, 554 U.S. at 375 (The Constitution "seeks fairness . . . through very specific means . . . that were the trial rights of Englishmen."). Thus, the Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Confrontation is a "categorical" right, which "commands" that the reliability of testimonial evidence be assessed through the cross-examination of witnesses.

Crawford v. Washington, 541 U.S. 36, 61, 67 (2004). Such explicit trial "rights can[not] be disregarded," even if "the trial is, on the whole, fair." *Gonzalez-Lopez*, 548 U.S. at 145. Yet that is precisely what the New York Court of Appeals has done, determining that it will not enforce the confrontation right when it deems doing so unfair or "misleading."

In contrast, rules of criminal procedure that judges have devised as prophylactic or remedial rules to protect constitutional rights, but that are not themselves expressly guaranteed by the text of the Constitution—such as the exclusion from trial of a defendant's statements to law enforcement without *Miranda* warnings—are subject to judicial exceptions that are tailored to the purposes of those rules. Courts can create exceptions to rules that they have created. But courts cannot flout express constitutional guarantees by devising "equitable" exceptions.

A. Constitutional Provisions Mandating Specific Trial Rights Must Be Enforced as Written

The New York Court of Appeals has created a novel exception to the Confrontation Clause based on its own assessment that applying the Clause as written would result in "unfairness" and frustrate "truth-seeking goals." *Reid,* 19 N.Y.3d at 388. The rule adopted in *Reid*, and applied in this case, allows trial courts to admit testimonial evidence that otherwise violates the Confrontation Clause if the court deems its admission "reasonably necessary" to "correct" a "misleading" or "incomplete" impression created by other evidence adduced at trial, or even by defense counsel's argument. *Id.*

Such open-ended second-guessing of textually mandated constitutional rights is impermissible. This Court has long recognized that where the Constitution requires certain trial rights, judges may not deviate from them based on their own notions of fairness. Courts may not "extrapolate from the words of the [Constitution] to the values behind it, and then . . . enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Giles*, 554 U.S. at 375. Rather, a court must apply the Constitution's basic trial guarantees as written.

Nowhere is this principle clearer than with respect to the Confrontation Clause. Because the Constitution's text "prescribes a procedure for determining the reliability of testimony in criminal trials," federal courts, "no less than the state courts, lack authority to replace it with one of [their] own devising." *Crawford*, 541 U.S. at 67. Consequently, in *Giles v. California*, the Court rejected a judicially devised exception to the Confrontation Clause. *Giles* invalidated a California rule of evidence that permitted admission of hearsay describing the infliction or threat of physical injury on a declarant. 554 U.S. at 357. After concluding that the rule was not based on the exceptions to the confrontation right recognized at the founding, *id.* at 366, the Court struck it down, explaining that "the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair,'" *id.* at 375.

Other textually guaranteed trial rights are similarly immune from judicially crafted equitable exceptions. For example, the Sixth Amendment protects a defendant's right to a jury trial. There are doubtless

cases where the technical nature of the evidence might render a jury trial unfavorable to the prosecution. *See Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) (noting "juries' tendency to become confused over legal standards and to be influenced by emotion or philosophical predisposition"). But a defendant could not be denied a jury trial because the defense he presented was unduly complicated.

Likewise, courts may not invent equitable exceptions to the defendant's Sixth Amendment right to a trial in "the State and district wherein the crime shall have been committed." U.S. Const. amend. VI; *see also* U.S. Const. art. III, § 2, cl. 3. A court could not move a criminal trial to another State or district on the ground that the jury pool was too favorable to the defendant or confused about the case. *See United States v. Stratton*, 649 F.2d 1066, 1077 (5th Cir. Unit A July 1981) (rejecting judge's transfer of trial over defendant's objection on ground that different venue was the "fairest place" for trial). Indeed, the Federal Rules of Criminal Procedure do not permit the Government to seek such an exception. *See* Fed. R. Crim. P. 21 advisory committee note (1944) ("The rule provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution, since the defendant has a constitutional right to a trial in the district where the offense was committed.").

The same is true for the Sixth Amendment right to counsel. Like the Confrontation Clause, the Sixth Amendment's guarantee that a defendant "shall enjoy the right . . . to have the Assistance of Counsel for his defence" requires that "a particular guarantee of fairness be provided." *Gonzalez-Lopez*, 548 U.S. at 144,

146 (quoting U.S. Const. amend. VI). A court could not refuse to allow a defendant to have the assistance of counsel at trial, no matter how "fair" the court deemed the resulting trial to be. *See Powell v. Alabama*, 287 U.S. 45, 69 (1939).

Similarly, the Fifth Amendment's prescription that no person "shall be compelled in any criminal case to be a witness against himself" prohibits "*any* criminal trial use against a defendant of his *involuntary* statement." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (emphasis in original); *see also New Jersey v. Portash*, 440 U.S. 450, 459 (1979) ("[A] defendant's compelled statements, as opposed to statements taken in violation of *Miranda,* may not be put to any testimonial use whatever against him in a criminal trial."). A court could not apply the equivalent of the *Reid* rule and allow the State to introduce a defendant's compelled statement, or force the defendant to take the stand, because the court found the defendant's case misleading or incomplete. Because the right against self-incrimination is express in the Constitution's text, "[b]alancing" the need to protect a defendant's rights with fairness to the State or a trial's truth-seeking function "is not simply unnecessary. It is impermissible." *Portash*, 440 U.S. at 459; *see also Kansas v. Ventris*, 556 U.S. 586, 590 (2009) ("The Fifth Amendment guarantees that no person shall be compelled to give evidence against himself, and so is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise.").

These express textual rights are not meant to create equipoise between the prosecution and defendant. They "seek[] fairness indeed—but seek[] it

through very specific means (one of which is confrontation) that were the trial rights of Englishmen." *Giles*, 554 U.S. at 375. Efforts to "create the exceptions that [a court] thinks consistent with the policies underlying the . . . guarantee, regardless of how that guarantee was historically understood," therefore, are contrary to the constitutional text, its original meaning, and its purpose. *Id.* at 374. Accordingly, the Court has rejected "a line of reasoning that 'abstracts from the right to its purposes, and then eliminates the right.'" *Gonzalez-Lopez*, 548 U.S. at 145 (quoting *Maryland v. Craig*, 497 U.S. 836, 862 (Scalia, J., dissenting)). It has instead required that courts apply the rule spelled out in the Constitution's text.

To be sure, a defendant must invoke these constitutional guarantees consistent with the trial's procedural rules. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327 (2009). Accordingly, courts can require decorum in the courtroom, and can remove a defendant who "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois v. Allen*, 397 U.S. 337, 343 (1970). Likewise, although the Sixth Amendment's Compulsory Process Clause protects a defendant's right to call defense witnesses, courts can require the defendant to identify those witnesses before trial. *Taylor v. Illinois*, 484 U.S. 400, 411 (1988) ("The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony."). But while "[i]t is true enough that the necessities of trial and the adversary process limit the *manner* in which Sixth Amendment rights

may be exercised, and limit the *scope* of Sixth Amendment guarantees to the extent that scope is textually indeterminate," those prudential considerations "cannot alter the constitutional text." *Craig*, 497 U.S. at 863–64 (Scalia, J., dissenting) (internal quotation marks and citation omitted) (emphasis in original).[2]

Rather than setting out predictable limits on exercising a constitutional trial right, New York's *Reid* rule strikes at the heart of the confrontation right itself, and permits courts to circumvent the Confrontation Clause altogether based entirely on judicial assessments of the facts of a defendant's case.

B. Only Judge-Made Rules, Not Mandated by the Constitution, May Be Subject to Judge-Made Equitable Exceptions Not Grounded in Text or Original Meaning

In creating the "opening the door" exception to the Confrontation Clause, *Reid* improperly relied on case law relating to judge-made prophylactic or remedial rules not mandated by constitutional text. *Reid* analogized its rule to "precedent that statements

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[2] The textual clarity of the Confrontation Clause and the other rights discussed *supra* distinguish them from, for example, the Sixth Amendment's guarantee of a "speedy" trial, an indeterminate term that can be applied only through "a difficult and sensitive balancing process." *Barker v. Wingo*, 407 U.S. 514, 533 (1972); *see also id.* at 521–22 ("[T]he right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. . . . [A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case.").

taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), are admissible if a defendant opens the door by presenting conflicting testimony." 19 N.Y.3d at 388.

That analogy was flawed. Where judges have created rules of criminal procedure to remedy out-of-court constitutional violations or as prophylactic means of protecting constitutional rights, they may adjust those rules based on policy-driven considerations. The development and application of such rules often involves balancing multiple factors, including considerations of fairness and equity. "No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it," and accordingly "the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision." *Dickerson v. United States*, 530 U.S. 428, 441 (2000). The Court has, however, carefully distinguished such rules from procedures compelled by the Constitution's text, like the confrontation right.

Take, for example, the exclusion of evidence obtained in violation of the Fourth Amendment. "The Fourth Amendment . . . guarantees that no person shall be subjected to unreasonable searches or seizures, and says nothing about excluding their fruits from evidence; exclusion comes by way of deterrent sanction rather than to avoid violation of the substantive guarantee." *Ventris*, 556 U.S. at 590–91. Because courts devised the exclusionary rule in the first place, they may make exceptions as appropriate consistent with the rule's purposes. Thus, in *James v. Illinois*, the Court held that illegally obtained evidence may be used to impeach a defendant's testimony, but not to

impeach the testimony of other defense witnesses. 493 U.S. 307, 319–20 (1990). The Court determined that making an exception in the former case but not the latter struck an appropriate balance between the values of fairness to the defendant, protection of the right to privacy, the need to deter false testimony, and the criminal trial's truth-seeking function. *Id.* at 313–19

That sort of judicial policymaking is appropriate where a trial procedure itself is judge-made. *See United States v. Leon*, 468 U.S. 897, 906 (1984) ("The [exclusionary] rule . . . operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." (internal quotation marks and citation omitted)). Because such rules are "policy driven" to begin with, a court may decide "that policy is being adequately served through other means," or that the costs of applying the rule outweigh its benefits. *Montejo v. Louisiana*, 556 U.S. 778, 795–96 (2009).

For the same reason, the Court has permitted judges to develop equitable exceptions to the exclusion of voluntary statements made by an arrestee who has not received *Miranda* warnings, *e.g.*, *Oregon v. Hass*, 420 U.S. 714, 722 (1975), and to the exclusion of statements drawn from the interrogation of a defendant outside the presence of counsel, *e.g.*, *Ventris*, 556 U.S. at 592. A fundamental premise of these holdings, however, is that the procedural rules at issue "are 'not themselves rights protected by the Constitution,' . . . but are instead measures designed to ensure that constitutional rights are protected." *Michigan v.*

Harvey, 494 U.S. 344, 351 (1990) (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).

In stark contrast to these exclusionary rules, the right of a defendant to be confronted with the witnesses against him at trial is not a judicially crafted prophylactic rule; it is a textual mandate. Judges may not weigh the pros and cons of admitting evidence that violates the Confrontation Clause's terms. Rather, "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68.

II. New York's Judge-Made Equitable Exception to the Confrontation Clause Is Unconstitutional

A. The "Opening the Door" Exception to the Confrontation Clause Lacks Any Grounding in the Founding Era

New York's "opening the door" rule is impermissible because it is admittedly based on the *Reid* court's conception of equity, rather than the scope of the confrontation right at the time of the founding. *Reid*, 19 N.Y.3d at 388. This Court explained in *Crawford* that the Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, *admitting only those exceptions established at the time of the founding*." 541 U.S. at 54 (emphasis added). Expanding on this holding in *Giles*, the Court held that only "a founding-era exception to the confrontation right" is permissible. 554 U.S. at 358. Applying that principle, the Court rejected a rule permitting the in-

troduction of testimonial hearsay whenever a judge determined that a wrongful act by the defendant made the witness unavailable to testify at trial. *Id.* at 377. Such an exception, the Court concluded, lacked a "historical pedigree in the common law." *Id.* at 367. The same is true here.

The Court has recognized only "two forms of testimonial statements [that] were admitted at common law even though they were unconfronted." *Id.* at 358. The first category is dying declarations—unconfronted out-of-court statements that could be admitted if "made by a speaker who was both on the brink of death and aware that he was dying." *Id.* The second category is statements "of a witness who was . . . kept away by the . . . defendant," "when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Id.* at 358–59 (internal quotation marks omitted) (emphasis in original).

The rule announced in *Reid*, by contrast, has no basis in the text or the original understanding of the Confrontation Clause. Rather, it is a free-floating exception, whereby "a defendant can open the door to testimony that would otherwise violate his Confrontation Clause rights" by putting on a defense that creates, in the judge's view, a "misleading impression," including "by the defense counsel's questioning of witnesses." *Reid*, 19 N.Y.3d at 387–88. The New York Court of Appeals did not even purport to consider any founding-era sources in announcing its "opening the door" rule. It asserted only that the rule was adopted "[t]o avoid . . . unfairness and to preserve the truth-seeking goals of our courts," and cited only modern-day cases from various federal circuit courts—most of which do

not even endorse a broad "opening the door" rule like the one in *Reid*, and none of which includes any analysis of founding-era exceptions to the confrontation right. *Id.* at 388 (citing *United States v. Holmes*, 620 F.3d 836, 843–44 (8th Cir. 2010); *United States v. Lopez-Medina*, 596 F.3d 716, 733 (10th Cir. 2010); *United States v. Cruz-Diaz*, 550 F.3d 169, 178 (1st Cir. 2008); *United States v. Acosta*, 475 F.3d 677, 683–84 (5th Cir. 2007)); *see also* Cert. Pet. at 16–17 & n.6.

B. The "Opening the Door" Exception to the Confrontation Clause Contravenes the Text and Purpose of the Clause

New York's "opening the door" rule is flatly inconsistent with the text and purpose of the Confrontation Clause. It subverts the "irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence at trial.'" *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (emphasis in original) (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)); *see also Crawford*, 541 U.S. at 51 (determining that "'witnesses' against the accused" refers to "those who 'bear testimony,'" with "'testimony'" referring to a "'solemn declaration . . . made for the purpose of establishing or proving some fact'" (citing *Webster, An American Dictionary of the English Language* (2d ed. 1828))); *Green*, 399 U.S. at 157 ("Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause."); *Craig*, 497 U.S. at 864 (Scalia, J., dissenting) ("'[T]o confront' plainly means to encounter face-to-face.").

This Court's "cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59. But New York's rule permits exactly what the constitutional text prohibits, by allowing the State to introduce out-of-court testimonial statements that are not subjected to cross-examination any time a judge deems such evidence necessary to correct a "misleading" impression created by the defense's case. *Reid*, 19 N.Y.3d at 387–88.

New York's rule flouts the Confrontation Clause's requirement "that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. "The [Confrontation] Clause . . . reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." *Id.* As the Court explained in *Crawford*, "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.* In fact, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 54. The Sixth Amendment does not simply aim for reliability regardless of the method for attaining it; it guarantees a specific process by which a criminal defendant may ensure that the jury assesses the reliability of evidence—cross-examination. *Id.* at 61.

The Court has emphasized this point repeatedly. "The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process" because "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (internal quotation marks omitted). "Indeed, the Court has recognized that cross-examination is the greatest legal engine ever invented for the discovery of truth." *Id.* (internal quotation marks omitted); *see also Coy*, 487 U.S. at 1019–20 ("[T]he right to face-to-face confrontation serves much the same purpose as . . . the right to cross-examine the accuser; both ensure the integrity of the fact-finding process." (internal quotation marks, citation, and alterations omitted)).

For that reason, the Confrontation Clause specifically assigns the task of assessing credibility to the jury:

> The primary object of the [Clause] was to prevent depositions or ex parte affidavits . . . [from] being used against the prisoner in lieu of personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he

> gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242–43 (1895); *see also Green*, 399 U.S. at 154 ("[The Clause] permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.").

Yet New York's rule allows trial courts, not juries, to assess the credibility and veracity of testimony. Under New York's approach, courts must determine "whether, and to what extent, the [defendant's] evidence . . . is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression." *Reid*, 19 N.Y.3d at 388 (internal quotation marks and citation omitted). If, after conducting its own assessment of the evidence's credibility and veracity, the trial court determines that the defendant created an "incomplete and misleading" impression, it can admit otherwise inadmissible evidence in violation of the Confrontation Clause. *Reid* thus conditions the defendant's confrontation right on the trial court's assessment of the evidence, contravening the text of the Constitution and undermining one of the Clause's core purposes. *See Craig*, 497 U.S. at 864 (Scalia, J., dissenting) ("The necessities of trial and the adversary process are irrelevant [to the confrontation right], since they cannot alter the constitutional text." (internal quotation marks omitted)).

The Confrontation Clause was intended to constrain judicial discretion. *Crawford*, 541 U.S. at 67–

69. The Framers were "loath to leave too much discretion in judicial hands," *id.* at 67, knowing "that judges, like other government officers, could not always be trusted to safeguard the rights" of the accused, especially in "politically charged cases . . . where the impartiality of even those at the highest levels of the judiciary might not be so clear," *id.* at 67–68. "[R]eplacing categorical constitutional guarantees with open-ended balancing tests" does "violence to [the Framers'] design." *Id.*

New York's rule is exactly the type of "open-ended balancing test" this Court rejected in *Crawford*. Both the determination that a defendant's case has created an "incomplete and misleading" impression and the determination of what evidence is "reasonably necessary" to correct that impression are subjective inquiries.

Unsurprisingly, New York courts have interpreted "incomplete and misleading" in sharply different ways, replicating the "unpredictable" and "amorphous, if not entirely subjective" standards that characterized the pre-*Crawford* regime. *Crawford*, 541 U.S. at 63. For example, in this case the New York courts held that presenting a theory that a third party committed the crime "opened the door" to out-of-court testimonial statements by that other individual suggesting his innocence. Pet. App. 16a–17a. But in *People v. Richardson*, 95 A.D.3d 1039, 1040 (2d Dep't 2012), another New York appellate court reached the opposite conclusion, holding that presenting a theory inconsistent with the State's theory of the case was not misleading and thus did not "open the door" to out-of-

court testimonial evidence. Under the New York approach, trial courts have nearly boundless discretion to determine the reliability of the defendant's evidence, and to permit textually inadmissible evidence on that basis.

This regime can chill defendants from presenting any defense at all, because doing so will create a risk that the trial judge will deem any evidence adduced in defense misleading or incomplete. Indeed, the Appellate Division held in this case that Mr. Hemphill "opened the door" to the out-of-court testimonial evidence simply by contradicting the State's case. Pet. App. 16a–17a. Because Mr. Hemphill introduced evidence that the police had found a 9-millimeter cartridge matching the murder weapon in the home of the original suspect, Nicholas Morris, the trial court allowed the State to enter evidence of Mr. Morris's plea to possessing a .357 at the scene of the shooting, without calling Mr. Morris to testify and be subject to cross-examination. *Id.*

The trial court's determination that Mr. Hemphill's effort to shift blame to Mr. Morris was misleading was necessarily predicated upon its belief that Mr. Morris's plea allocution was truthful, that Mr. Morris could not have been the shooter, and that Mr. Hemphill's efforts to suggest otherwise would lead the jury astray in an "unfair" manner. The court reached that conclusion without giving Mr. Hemphill any ability to test Mr. Morris's credibility or the truth of his testimony through cross-examination. That likely would have made a difference for the jury, as there was persuasive material to impeach Mr. Morris's credibil-

ity and truthfulness. Mr. Morris pleaded guilty to possessing a .357 handgun as part of a plea deal in which he received a time-served sentence, and avoided prosecution for murder. J.A. 30–31.

These circumstances raise obvious questions about Mr. Morris's motive to lie, which went unexplored without an opportunity for cross-examination. *See Davis v. Alaska*, 415 U.S. 308, 316–17 (1974) ("[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."). Mr. Hemphill was also denied the opportunity to challenge factual issues with Mr. Morris's testimony, such as whether Mr. Morris actually possessed a .357 and the circumstances under which Mr. Morris came to possess the 9-millimeter cartridge that was recovered in the search of his apartment—despite the fact that the State acknowledged at the time of Mr. Morris's allocution that it did not have enough evidence to indict him for possessing the .357 unless he admitted to it. J.A. 30, 148–49. Instead, because the judge determined Mr. Hemphill's evidence was "misleading" and Mr. Morris's allocution was "necessary," Mr. Hemphill's express constitutional rights fell by the wayside.

Neither the Framers' understanding of the confrontation right nor this Court's precedent interpreting the Confrontation Clause allows this result. The Court should reaffirm that courts do not have a free-floating equitable authority to water down the Constitution's textual guarantee of confrontation whenever they think a defense is misleading or incomplete. The New York rule fundamentally erodes the right to trial by jury, and it should be struck down.

CONCLUSION

For the foregoing reasons, the Court should reject the rule of *People v. Reid* and reverse the judgment below.

Respectfully submitted,

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