No. 21-124601-S

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IN THE SUPREME COURT OF
THE STATE OF KANSAS

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STATE OF KANSAS
Plaintiff-Appellee

vs.

KIMBERLEY S. YOUNGER
Defendant-Appellant

_____

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION (ACLU) OF KANSAS

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Appeal from the District Court of Barton County, Kansas
Honorable James R. Fleetwood, Judge
District Court Case No. 18-CR-555

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TABLE OF POINTS AND AUTHORITIES

INTEREST OF AMICUS CURAE

The American Civil Liberties Union of Kansas (ACLU of Kansas) is a nonprofit, nonpartisan organization dedicated to advancing the principles of liberty and equality embodied in the United States Constitution and Bill of Rights and the Kansas Constitution and Bill of Rights. The ACLU of Kansas has approximately 9,000 members in Kansas and is a state affiliate of the ACLU, a nationwide organization with approximately 1.7 million members. Ensuring the constitutional administration of criminal justice is central to the affiliate's mission.

STATEMENT OF FACTS

This case concerns the scope and application of Section Ten of the Kansas Bill of Rights, which guarantees criminal defendants the right to confront witnesses face-to-face. Kan. Const. Bill of Rights § 10. Kimberley Younger was convicted of aiding and abetting capital murder, conspiracy to commit first degree murder, solicitation of first degree murder, and theft. Appellant's Br. 1. She argues on appeal that the lower court violated her constitutional right to face-to-face confrontation by allowing a witness, Frank Zaitshik, to testify remotely. *Id.* at 5.

The State prosecuted Ms. Younger on the theory that she impersonated Mr. Zaitshik to orchestrate the murders. *Id.* at 18. Ms. Younger testified to the contrary. *Id.* Only Mr. Zaitshik could dispel her defense in full. *Id.*; *see also* Appellant's Reply Br. 4 (noting that the State did not dispute this contention). The State moved for a pretrial order to allow Mr. Zaitshik to testify remotely pursuant to the court's COVID-19 Administrative Orders (allowing "use of remote, two-way video 'notwithstanding any other provision of law' and

'[s]ubject to constitutional limitations.'"). Appellant's Br. 6. The court heard Mr. Zaitshik's testimony on the motion, during which he expressed hesitance to travel and appear in person because of health risks posed by potentially contracting COVID-19. *Id*. Defense counsel contemporaneously objected on federal and state confrontation clause grounds *Id.* at 7–8. The court ultimately ruled that Mr. Zaitshik could testify remotely based on his concerns about COVID-19. *Id.* at 7.

SUMMARY OF ARGUMENT

The Confrontation Clause of the Sixth Amendment to the United States Constitution affords criminal defendants the right to confront and cross-examine adverse witnesses. *State v. Terry*, 202 Kan. 599, 600 (1969). The Kansas Constitution makes these rights even more plain. In contrast to the Confrontation Clause, Section Ten of the Kansas Bill of Rights explicitly guarantees defendants the right to "meet the witness face to face." Kan. Const. Bill of Rights § 10. Appellant proposes a broad interpretation of § 10: that the accused has a fundamental right to confront adverse witnesses face-to-face before the jury.

This Court should endorse Appellant's view. The text and purpose of § 10 are well-served by such a construction. Interpreting § 10 as Appellant proposes safeguards the liberty interests that the right to confrontation is designed to protect. Such a result is also consistent with how other state supreme courts have interpreted face-to-face guarantees in their state constitutions; courts are in agreement that such provisions embrace rights separate and beyond those guaranteed by the United States Constitution.

Pursuant to its authority to independently analyze the Kansas Constitution, this Court should interpret § 10 of the Kansas Constitution Bill of Rights to encompass a right

to face-to-face confrontation that is more robust and distinct from the Sixth Amendment's Confrontation Clause.

ARGUMENT

I. Section Ten of the Kansas Bill of Rights and the Sixth Amendment to the United States Constitution are textually distinct, and those distinctions should influence the Court's interpretation of Section Ten's mandates.

Section Ten of the Kansas Bill of Rights, by its explicit terms, guarantees defendants the right to face-to-face confrontation. Such a categorical protection is not found in the United States Constitution. Thus, the Kansas Bill of Rights provides defendants with more definitive protections than does the Sixth Amendment.

A. Section Ten's text goes beyond the requirements of the Sixth Amendment.

The Confrontation Clause of the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…." U.S. Const., amend. VI. This right is "made obligatory upon the states" through the Fourteenth Amendment. *State v. Montanez*, 215 Kan. 67, 69 (1974).

Defendants have two distinct rights under the Confrontation Clause: the right to conduct cross-examination and the right to face their accusers. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (reversing a child-sex-abuse conviction because a screen that obfuscated the witness's view of the defendant violated defendant's confrontation right). Cross-

examination and physical confrontation form "the core of the values furthered by the Confrontation Clause." *California v. Green*, 399 U.S. 149, 157 (1970).

These rights protect Kansans in state and federal courts, but they are certainly not the limit of the protections afforded to criminal defendants. Kansas protects the right to confrontation with more specificity than the United States Constitution, in that it explicitly guarantees the right for confrontation to be in person. *See Terry*, 202 Kan. at 600. Section Ten of the Kansas Bill of Rights explicitly provides criminal defendants the right "to meet the witness face to face." Kan. Const. Bill of Rights § 10. This distinction is the primary basis by which this Court should interpret the Kansas right as discrete from its federal counterpart.

B. This Court can and should interpret Section Ten more broadly because of that textual difference.

This Court should interpret Section Ten as broader than its federal counterpart. This Court has the authority to independently interpret provisions of the Kansas Bill of Rights, particularly where the language between the Kansas and federal provisions differs in meaning and scope, and it should do so here.

As a threshold matter, the meaning and scope of state constitutional provisions are questions of law over which this Court exercises an unlimited standard of review. *State v. Noah*, 284 Kan. 608, 612 (2007) (exercising de novo review); *see also State v. Hughes*, 286 Kan. 1010, 1014 (2008)) (applying an unlimited standard of review).

Concomitant with this Court's "duty…to define constitutional provisions" is its authority to independently construe provisions of the Kansas Constitution. *State v. Nelson*,

210 Kan. 439, 445 (1972); *Hodes & Nauser, MDS, P.A. v. Schmidt*, 309 Kan. 610, 621 (2019) ("this [C]ourt has the authority to interpret Kansas constitutional provisions independently of the manner in which federal courts interpret corresponding provisions of the United States Constitution."); *State v. Lawson*, 296 Kan. 1084, 1090–91 (2013) (noting that this Court has the authority to "independently" construe the Kansas Constitution); *State v. Schultz*, 252 Kan. 819, 829 (1993) (stating that this Court has the authority to interpret the Kansas Bill of Rights "independently of its federal counterpart and to heighten the protection available to Kansas citizens.").

The Kansas Bill of Rights protects individual liberties that are not found in the United States Constitution. *E.g.*, *Hodes*, 309 Kan. at 621–22 (2019) (recognizing that § 1 of the Kansas Constitution Bill of Rights "describes rights that are broader than and distinct from" those articulated in the Fourteenth Amendment); *State v. McDaniel & Owens*, 228 Kan. 172, 184–85 (1980) (independently interpreting § 9 of the Kansas Constitution Bill of Rights in a manner different from the Eighth Amendment). Accordingly, this Court has construed provisions of the Kansas Bill of Rights to "afford[] separate, adequate, and greater rights than the federal Constitution." *Farley v. Engelken*, 241 Kan. 663, 671 (1987). Moreover, courts may interpret Kansas constitutional provisions to impose "greater restrictions" than those deemed necessary by federal law. *State v. Morris*, 255 Kan. 964, 981 (1994) (additional citations omitted).

This Court should interpret § 10 to confer independent rights that are more robust than those provided by the Sixth Amendment. That Section Ten closely mirrors the Sixth Amendment does not foreclose this interpretation. Provisions of the Kansas Constitution

that have "much the same effect" as portions of the United States Constitution can be construed to establish more robust rights, *Hodes*, 309 Kan. at 620, particularly where the language is more specific and exacting, as it is with § 10. Moreover, the Supreme Court has stressed that "a state court is entirely free…to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982).

Recognizing that Section Ten has independent meaning does not jeopardize any principles of interpretation. Nor do issues of consistency arise. *See State v. Nelson*, 210 Kan. 439, 445 (1972) (stressing that constitutional interpretation should strive to "achieve a consistency so that [the Kansas Constitution] shall not be taken to mean one thing at one time and another thing at another time."). To the contrary, interpreting § 10 as broader than its federal counterpart is a logical extension of this Court's analytical approach to the Kansas Bill of Rights in general. Moreover, independently analyzing the Kansas Bill of Rights provides this Court an opportunity to clarify, rather than confuse, the meaning of Section Ten.

II. Section Ten's text and history require face-to-face confrontation that cannot be satisfied by remote proceedings.

Interpreting the Kansas Bill of Rights to confer a fundamental right broader than that provided by the Confrontation Clause comports with the text and intent of Section Ten. Fidelity to these principles has informed the U.S. Supreme Court's interpretation of the federal confrontation right and should inform this Court's interpretation of § 10. *See* Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, Cato Sup.

Ct. Rev. 2003-2003, 439, 440, 452 (2004) (characterizing *Crawford v. Washington*, 541 U.S. 36 (2004), as a "paradigm shift" in which the Court "adopted an approach that better fits the meaning and intent of the Clause.").

In Kansas, constitutional interpretation follows the standard articulated in *Wright v. Noell*:

> [T]he best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing.

16 Kan. 601, 607 (1876). Historical context buttresses textual analysis—that is, courts examine the language of a constitutional provision "in connection with the general surrounding facts and circumstances" of its enactment. *State* ex rel. *Fatzer v. Anderson*, 180 Kan. 120, 127 (1956). The framers' intent is the "polestar" of historical analysis. *Hunt v. Eddy*, 150 Kan. 1, 5 (1939). Here, textual and historical analysis strongly favor a robust interpretation of § 10.

Textual analysis is the backbone of constitutional interpretation. This Court has held that "language should be interpreted to mean what the words imply to men of common understanding." *State* ex rel. *Stephan v. Parrish*, 256 Kan. 746, 751 (1994). Avoiding narrow constructions promotes the overall textual integrity of the document. *Id.* Seldom are constitutional rights so textually explicit. *See* Friedman, *supra*, at 468 ("The Constitution does not always speak in terms of categorical guarantees, but when it does, as in the case of the Confrontation Clause, it should be heeded.").

The text of § 10 is unambiguous: "In all prosecutions, the accused shall be allowed…to meet the witness face to face." Kan. Const. Bill of Rights § 10. A plain reading of this provision supports the conclusion that Kansas confers a confrontation right that is distinct from and broader than the federal right. The latter only allows defendants "to be confronted with the witnesses against him." U.S. Const., amend. VI.

Though this Court typically adopts the United States Supreme Court's construction of corresponding constitutional provisions as the meaning of the Kansas Constitution, this Court has regularly opted to "independently construe our own constitution, regardless of what we may have said to the contrary." *Lawson*, 296 Kan. at 1092–93 (citing *McDaniel*, 228 Kan. 172) (describing the *McDaniel* Court's "refus[al] to follow" the Supreme Court's interpretation of the Eighth Amendment in *Rummel v. Estelle*, 445 U.S. 263 (1980), when construing § 9 of the Kansas Constitution Bill of Rights). Here, the Kansas provision is facially more robust than its federal counterpart. The textual difference is straightforward, and the specificity in § 10 merits fidelity to its clear terms.

A. State supreme courts in other states with explicit face-to-face guarantees have construed the text of these provisions to confer rights distinct from those guaranteed by the Sixth Amendment.

Other states with unambiguous face-to-face guarantees have construed their constitutions to protect rights not found in the United States Constitution. As should be the case with § 10, textual differences form the basis for those courts' distinction between the rights guaranteed by the Sixth Amendment and those guaranteed under their more specific state constitutions. *See*, *e.g.*, *Commonwealth v. Ludwig*, 594 A.2d 281, 284 (Pa. 1991) ("Unlike its federal counterpart…[the face-to-face provision of the] Pennsylvania

Constitution does not reflect a 'preference' but clearly, emphatically and unambiguously requires a 'face to face' confrontation."). In many cases, the textual difference between state constitutional provisions and their federal counterparts "merits viewing the state constitution both separately and more protectively." Daniel E. Monnat & Paige A. Nichols, *The Loneliness of the Kansas Constitution (Part 2)*, 18 J. Kan. Ass'n for Just. 18, 20, 22 n.19 (2011) (collecting cases from Illinois, Indiana, Pennsylvania, Montana, and Massachusetts in which state supreme courts have construed "face-to-face" guarantees as distinct from the federal confrontation right).

This Court should follow suit. Because the "best and only safe" way to effectuate the drafters' intent is to "abide by the language they have used," Section Ten should be read to provide heightened protection to criminal defendants. *Wright*, 16 Kan. at 607.

B. Construing Section Ten as a fundamental right conforms with the history of confrontation as a procedural right.

Though the text itself is a touchstone, courts may resolve textual ambiguities by consulting the historical record. *State v. Albano*, 313 Kan. 638, 645 (2021). The paramount concern of this inquiry is the "intention of the makers and adopters." *Hunt*, 150 Kan. at 5.

Courts often consult historical records to interpret the scope of the Confrontation Clause. In *Crawford v. Washington*, for instance, the Supreme Court scoured historical sources to determine that "the Framers would not have allowed" admission of testimony from an absent witness unless they were unavailable to testify and the defendant had had a prior opportunity for cross-examination. 541 U.S. 36, 51, 53–54 (2004). Overturning *Ohio v. Roberts*, 448 U.S. 56 (1980), the *Crawford* Court found that "[the *Roberts* test] did not

reflect a historically accurate view of the intent of the Constitution's framers." *State v. Laturner*, 289 Kan. 727, 731 (2009) (citing *Crawford*, 541 U.S. at 61–69).

The historical record surrounding the federal Confrontation Clause does not settle whether the founders intended to codify a face-to-face guarantee. Undoubtedly, defendants' right to confront their accusers has deep historical roots. *E.g.*, *Lilly v. Virginia*, 527 U.S. 116, 140 (1999) (additional citations omitted) ("The right of an accused to meet his accusers face-to-face is mentioned in, among other things, the Bible, Shakespeare, and 16th and 17th century British statutes, cases, and treatises."). This right has long been recognized at common law. *E.g.*, *Salinger v. United States*, 272 U.S. 542, 548 (1926) ("The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right."). But the common law decisions upon which the Supreme Court has relied to interpret the framers' intent "rarely if ever use the term 'confrontation' or speak of a right to face or to challenge one's accuser in court." David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 Sup. Ct. Rev. 1, 46 (2009). Indeed, the record for ascertaining which rights the framers intended the Confrontation Clause to enshrine is "skimpy, diffuse, and potentially contradictory." Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk"*, 14 Widener L. Rev. 427, 430 (2009).

While the Court has construed the Confrontation Clause "to incorporate and to codify common-law strictures," little historical evidence supports the conclusion the Confrontation Clause was intended or understood to secure a right to face-to-face confrontation. Sklansky, *supra*, at 46 (characterizing such a conclusion about the Confrontation Clause's posture towards testimonial hearsay as a "leap of faith"); *see also*

Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 Rutgers L.J. 77, 116 (1995) (describing colonial records, comments in the constitutional debates, and early judicial decisions as "admittedly [] too fragmentary to be definitive.").

Whereas the Confrontation Clause "lacks the kind of legislative history that would throw appreciable light on its meaning," the meaning of Section Ten of the Kansas Bill of Rights is clear-cut from the historical record. Sklansky, *supra*, at 46. The Kansas framers intended to create "a forward-looking state constitution—a collection of rights that would have independent force apart from the federal constitution…." Daniel E. Monnat & Paige A. Nichols, *The Loneliness of the Kansas Constitution*, 34 J. Kan. Ass'n for Just. 10, 10 (2010). This much is evident from the framers' cardinal rejection of slavery in the Kansas Territory. *See Hodes & Nauser*, 309 Kan. at 628.

Amidst deliberations about slavery and suffrage, the Kansas framers initially adopted and ultimately enshrined the right to face-to-face confrontation in the state constitution. Between 1855 and 1858, freestaters and pro-slavery factions fiercely debated the terms on which Kansas would enter the Union. They produced three draft constitutions before a fourth and final was adopted and approved for statehood admission by Congress in 1860. *See generally* Alfred Theodore Andreas, *History of the State of Kansas* 165–69 (photo. report. 1973) (1883). In their first attempt to draft a constitution, delegates approved a face-to-face confrontation right for criminal defendants. Kan. Const. of 1855 (Topeka Constitution), art. I, § 10. The Lecompton Constitution omitted this right. Kan. Const. of 1857 (Lecompton Constitution), art. I, § 10; *see also* H.R. Rep. No. 35-377 (1858) (explaining that the drafters of the Lecompton Constitution submitted it and the slavery

question to a popular vote). Freestaters refused to participate in the initial vote on the Lecompton Constitution; they formed a free state legislature in October 1857, convened in December, and voted down the Lecompton Constitution in January 1858. *See Andreas*, supra, at 165–67. Five months later, they produced and ratified the Leavenworth Constitution, which reinstated the face-to-face confrontation right. Kan. Const. of 1858 (Leavenworth Constitution), art I, § 10.

The fruits of these labors culminated in the Wyandotte Constitution, ratified in 1859 on the precipice of the Civil War, which forever cemented Kansas as a free state. And finally, Kansans definitively procured the right confront witnesses face-to-face at criminal trials. Kan. Const. Bill of Rights § 10. The framers' rejection of the federal confrontation language in favor of the face-to-face guarantee should be read as purposeful. Monnat & Nichols, *supra*, at 19.

III. Broadly interpreting Section Ten serves the underlying purposes of the constitutional right to confrontation.

Confrontation serves three distinct purposes. First, confrontation helps all parties seek truth in criminal prosecutions. Second, confrontation symbolizes the criminal justice system's commitment to fair and just proceedings. Finally, confrontation protects defendants' liberty interests from unjust infringement. Interpreting Section Ten broadly serves all these purposes.

First, confrontation is a powerful procedural mechanism for discovering truth. The Confrontation Clause ensures that evidence admitted is reliable by subjecting evidence to "the rigorous adversarial testing that is the norm of Anglo-American criminal

proceedings." *Maryland v. Craig*, 497 U.S. 836, 846 (1990). As a procedural mechanism, confrontation is designed to "advance the accuracy of the truth determining process in criminal trials." *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (citing *Dutton v. Evans*, 400 U.S. 74, 89 (1970)). Caselaw abounds with exhortations to that effect. *E.g.*, *Green*, 399 U.S. at 158 (describing cross-examination as the "greatest legal engine ever invented for the discovery of truth."); *Dutton*, 400 U.S. at 89 ("The mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials….").

Interpreting § 10 to confer a fundamental right to face-to-face confrontation ensures that the truth-seeking mission of confrontation is deeply felt, rather than merely hortatory. Its face-to-face guarantee taps into "something deep in human nature"—an innate and profound responsibility to tell the truth. *Coy*, 487 U.S. at 1017–20. Requiring witnesses to testify in person underscores the gravity of this responsibility. Juries, too, benefit from an in-person testimonial requirement. Juries assess a witness's credibility in part by observing their demeanor and mannerisms, such as slight physical and verbal cues perceptible only in person. *See Green*, 399 U.S. at 158, 161 (noting that face-to-face confrontation "permits the jury that is to decide the defendant's fate…[to] assess his credibility."). By encouraging witnesses to be truthful and aiding the jury in its fact-finding mission, a broad interpretation of §10 furthers the truth-seeking purpose of confrontation.

Second, in-person confrontation serves important symbolic goals. *Craig*, 497 U.S. at 852. At its core, confrontation promotes a system of criminal justice in which the "perception as well as the reality of fairness prevails." *Lee v. Illinois*, 476 U.S. 530, 540

(1986). Face-to-face confrontation is particularly symbolic of the legal system's commitment to fairness. *Coy*, 487 U.S. at 1017 ("There is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'") (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)). Specifically, a face-to-face confrontation right protects "society's interest in having the accused and accuser engage in an open and even contest in a public trial." *Lee*, 476 U.S. at 540.

Finally, procedures guaranteed to the defendant by the Confrontation Clause necessary limit the power of the State and are fundamental to the ability to put on a robust defense. So "staunch and rigid [are] its restraints upon governmental powers" that the right to confrontation comprises "the right…to make a defense as we know it." *State* ex rel. *Donaldson v. Hines*, 163 Kan. 300, 301 (1947); *Faretta v. California*, 422 U.S. 806, 818 (1975).

The liberty interests at stake in criminal trials deserve the utmost protection from state infringement. Interpreting § 10 to confer a fundamental right furthers this overarching and important goal.

CONCLUSION

Section Ten of the Kansas Constitution expressly guarantees face-to-face confrontation. In doing so, it provides more robust and distinct rights than found in federal law. This Court should adopt Appellant's view and construe § 10 to secure a fundamental right to confront adverse witnesses face-to-face before the jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed on August 1, 2023, via the court's electronic filing system, which will serve an electronic copy on all registered participants.

/s Sharon Brett
Sharon Brett