Two Rules of Completeness

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I. INTRODUCTION

The evidentiary rule of completeness is a common law and statutory rule of fairness that prevents one party from creating a distorted picture out of partial evidence at trial.[1] If a prosecutor admits one part of a defendant's confession, "The murder weapon was mine," the rule of completeness permits the admission of the second, "but I had sold it months earlier."[2] The version of the rule of completeness codified in Federal Rule of Evidence ("FRE") 106 states:

> If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part—or any other statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.[3]

Thus, the rule of completeness is a powerful rule of inclusion that, while still subject to some rules of exclusion, can trump a hearsay objection.[4]

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1. *See generally* Louisa M. A. Heiny & Emily Nuvan, *Toward a More Perfect Trial: Amending Federal Rules of Evidence 106 and 803 to Complete the Rule of Completeness*, 111 J. CRIM. L. & CRIMINOLOGY 839 (2021); Daniel J. Capra & Liesa L. Richter, *Evidentiary Irony and the Incomplete Rule of Completeness: A Proposal to Amend Federal Rule of Evidence 106*, 105 MINN. L. REV. 901 (2020); Harold F. Baker, *Completing the Rule of Completeness: Amending Rule 106 of the Federal Rules of Evidence*, 51 CREIGHTON L. REV. 281 (2018); Michael A. Hardin, Note, *This Space Intentionally Left Blank: What to Do When Hearsay and Rule 106 Completeness Collide*, 82 Fordham L. Rev. 1283 (2013); Dale A. Nance, *A Theory of Verbal Completeness*, 80 IOWA L. REV. 825 (1995).

2. FED. R. EVID. 106 advisory committee's note to 2023 amendment.

3. FED. R. EVID. 106.

4. *E.g.*, United States v. Fawwaz, 691 F. App'x 676, 678 (2d Cir. 2017).

But more difficult is the question of the rule's scope, the question of how closely connected the completeness evidence must be to be admissible. It could be that the rule makes admissible any relevant statement that gives context to the jury, or it could be that the rule admits only so much of the second statement as necessary to clarify the first.

Two common law schools of thought regarding the scope of the rule of completeness—one broader, the other narrower—persist in U.S. jurisprudence, though the distinction has been rarely discussed in scholarship.[5] This Note argues that state courts should adopt the broad standard, which is increasingly accepted in federal courts, consistent with principles of fairness in other rules of evidence, necessary for the practice of judicial discretion, and required for the preservation of judicial candor.[6] This is the right moment to reconsider the broad standard of completeness, now that FRE 106 has been liberalized by a 2023 amendment—with at least two state courts following suit—and after the U.S. Supreme Court has declined to narrow the application of FRE 106 against criminal defendants in *Hemphill v. New York*.[7]

Part II of this Note traces the common law history of the rule of completeness and the different applications of the two standards for completeness. Part III discusses the minority of jurisdictions that have adopted the broad standard. Then Part IV analyzes the U.S. Supreme Court's recent treatment of the rule, analogous federal rules of evidence, and the need for judicial candor in the pursuit of judicial legitimacy to find that the broad standard is now welcome in the federal system.

II. DEVELOPMENT OF THE TWO STANDARDS

The rule of completeness has been adopted into state evidence rules and into FRE 106 from the common law. One version of the common law rule, as stated by the New York Supreme Court of Judicature in 1840, provides that "where the defendant's admission is

5. This is true despite the fact that FRE 106 is discussed, by one count, 67% more often by professors than by judges. *See* Jeffrey Bellin, *The Superfluous Rules of Evidence*, 76 VAND. L. REV. 1769, 1773, 1777 tbl. 2 (2023).

6. *See infra* Part III.

7. 595 U.S. 140, 155–56 (2022).

resorted to as evidence against him, he is entitled to have the whole conversation . . . disclosed."[8]

Two general interpretations of the scope of the rule emerge from its common law formation.[9] The first is a broad standard that admits additional statements whenever needed "to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion."[10] The other is a narrow standard that limits completeness evidence to only so much of a statement as is relevant to clarify the portions already admitted.[11] Although U.S. common law has exhibited a preference for the narrow standard, the nonetheless-vibrant tradition of the broad standard persists in some jurisdictions, as evidenced by the Military Rules of Evidence and the Georgia Rules of Evidence. The application of the broad standard in these jurisdictions and in federal courts provides a model after which more state courts can pattern their own rule of completeness.

A. The Common Law Rule of Completeness

The common law rule of completeness is a rule of fairness providing that "the opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the *total tenor and effect* of the utterance."[12] The rule addresses two concerns. First, it addresses the "concern that the court not be misled because

8. Garey v. Nicholson, 24 Wend. 350, 351 (N.Y. Sup. Ct. 1840).

9. Recent scholarship has not focused on this broad-to-narrow axis of completeness. Instead, the focus has been on alternative court splits regarding (1) whether courts allow the rule of completeness to trump a hearsay objection and (2) whether oral statements are admissible. Both questions were explicitly solved by the December 2023 amendment to FRE 106. *See*, *e.g.*, Heiny & Nuvan, *supra* note 1, at 879–82, 884; Capra & Richter, *supra* note 1, at 927 (quoting United States v. Castro, 813 F.2d 571, 576 (2d Cir. 1987)).

10. *E.g.*, United States v. Gonzalez, 399 F. App'x 641, 645 (2d Cir. 2010) (quoting United States v. Castro, 813 F.2d 571, 576 (2d Cir. 1987)).

11. *E.g.*, United States v. Green, 83 F.4th 696, 704 (8th Cir. 2023).

12. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171 (1988) (emphasis added) (quoting 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2113, at 653 (James H. Chadbourn rev. 1978)).

portions of a statement are taken out of context."[13] Second, "the rule has also addressed the danger that an out-of-context statement may create such prejudice that it is impossible to repair by a subsequent presentation of additional material."[14]

The broad common law rule extended beyond the previous version of FRE 106 in three ways, before it was revised in December 2023.[15] First, the common law rule applied to "an utterance" without distinguishing between written and oral statements.[16] In fact, it applied to "every kind of utterance without distinction,"[17] including even "acts, declarations, and conversations."[18] Second, it included a "trumping function" that allowed it to survive an objection of hearsay or other exclusionary rules.[19] Third, it lacked an "acceleration clause" that would have allowed an opposing party to immediately require the remainder of a statement to be read into evidence without waiting for their own case-in-chief or rebuttal to present that evidence.[20] The ability to accelerate evidence earlier in the trial, however, was an innovation of FRE 106 beginning in 1973 that broke from the common law tradition, now allowing "an adverse party [to] require the introduction" of the remainder "*at that time*."[21]

FRE 106's introduction of that acceleration function points to a shift in U.S. evidence law that put more trust in jurors living in a complex society to understand increasingly complex matters. Whereas the common law rule of completeness would have required a defendant not to interrupt a prosecutor's case in chief with his own completeness evidence, FRE 106 allowed for a potentially confusing interruption. Common law assumed that "jurors in a less sophisticated time were ill-equipped accurately to assess the relevance and reliability (the

13. *Id.* at 171 n.14.

14. *Id.* (emphasis omitted).

15. Heiny & Nuvan, *supra* note 1, at 845–46.

16. 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2113, at 653 (James H. Chadbourn rev. 1978).

17. *Id.* at 654.

18. Heiny & Nuvan, *supra* note 1, at 846.

19. Heiny & Nuvan, *supra* note 1, at 845.

20. Heiny & Nuvan, *supra* note 1, at 849.

21. FED. R. EVID. 106 (emphasis added).

probative worth) of some classes of evidentiary material."[22] Additionally, evidence admitted out of order in a case was expected to confuse jurors.[23]

But the recent trend has been to trust jurors more, not less. For example, in 2023, in the unrelated issue of whether jurors can follow complex jury instructions to disregard one co-defendant's confession as it relates to other co-defendants, the Supreme Court rejected the Court's former mistrust of jurors by "refusing to assume that they are either 'too ignorant to comprehend, or were too unmindful of their duty to respect, instructions' of the court."[24] In recent decades and in other areas, modern courts have had to adapt to evidentiary changes concomitant with a changing society. For example, the inundation of electronic discovery pre-trial led to the adoption of FRE 502 in 2008, requiring parties to disclose non-privileged documents whenever they "concern the same subject matter" and "they ought in fairness to be considered together."[25] Not only do these trends explain why the Federal Rules of Evidence innovated with a new "acceleration function" for FRE 106, but they also point to the availability of a broad standard of evidence that could have offended the caution of common law treatise writers.

B. Two Common Law Standards for the Rule of Completeness in the Nineteenth Century

Although writers of common law treatises, especially John Henry Wigmore, preferred a narrower scope for the admissibility of evidence, in practice, the line between the narrow and broad standards is fuzzy. U.S. common law received two distinct British common law traditions for the correct scope of the rule of completeness, one broader and one narrower. One common law tradition, more commonly recognized in opinions in the nineteenth century, is that of a broad standard of completeness, allowing that "[w]here an oral admission of

22. Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U.L. REV. 1097, 1097 (1984).

23. *Cf. id.* ("[C]ertain types of evidence might confuse jurors or ignite their irrational prejudices.").

24. Samia v. United States, 599 U.S. 635, 647 (2023) (quoting Pennsylvania Co. v. Roy, 102 U.S. 451, 459 (1880)).

25. FED. R. EVID. 502(a).

a party has been shown, he is entitled to show *the entire statement* which was made at the same time."[26] Under the broad standard, it is sufficient if the completeness evidence merely "relates to the *subject-matter* of the suit."[27] The alternative, narrow-standard tradition, on the other hand, allows only so much evidence as "would in any way qualify or explain that statement"[28] without adding "any independent history of transactions wholly unconnected with it."[29]

Under either the broad or narrow standard, some courts further require that the remainder statements be made proximate in time to the original evidence.[30] This distinction is likely less salient today, when relevant and reliable pieces of a conversation might be recorded in emails or voice messages, without being contemporaneous. Further, this temporal requirement was easily overcome by an argument that one statement was implicitly or explicitly referenced in the other, and therefore necessary for completeness.[31] Finally, the Advisory

26. State v. Everhart, 316 Mo. 195, 202 (Mo. 1926) (emphasis added) (quoting 22 C.J.S. *Evidence* § 497 (1920)); *see also* Rouse v. Whited, 25 N.Y. 170, 173 (N.Y. 1862) ("[I]f a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said *by his client* in the same conversation . . . not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, *provided only that it relate to the subject-matter of the suit*, because it would not be just to take part of a conversation as evidence against a party[,] without giving to the party[,] at the same time[,] the benefit of the entire residue of what he said on this occasion." (emphasis added) (quoting *The Queen's Case* (1820) 22 Eng. Rep. 671, 674; 2 Brod. & Bing. 294, 298)).

27. *Rouse*, 25 N.Y. at 173 (quoting *Queen's Case*, 22 Eng. Rep. at 674).

28. *Id.* at 175 (quoting Prince v. Samo (1838) 45 Eng. Rep. 783, 787; 7 A. & E. 627, 632).

29. Lyon v. Batz, 42 Mo. App. 606, 611 (Mo. Ct. App. 1890) (quoting *Prince*, 45 Eng. Rep. at 787); *see also* United States v. Williston, 862 F.3d 1023, 1038 (10th Cir. 2017) ("Only the portions of a statement that are relevant to an issue in the case and necessary to explain or clarify the already-admitted portions need be admitted.") (citing United States v. Lopez-Medina, 596 F.3d 716, 735 (10th Cir. 2010)).

30. *See* State v. Archer, 25 A.3d 103, 109 (Me. 2011) ("[T]he rule of completeness does not extend to allow a party to seek admission of separate statements made at separate times before or after the statement admitted into evidence in order to achieve completeness.").

31. *See* Nance, *supra* note 1, at 832 n.18 ("The most conspicuous exception routinely recognized at common law was when the part of the utterance introduced contained an explicit or implicit reference to another utterance.").

Committee's note to FRE 106 suggest that the element of timing is not of great importance.[32]

U.S. courts have generally preferred the narrow standard that allows only clarifying statements to be admitted into evidence, not statements merely providing a broader context.[33] John Henry Wigmore believed the narrow standard for completeness was required "so that the opponent shall not, under cloak of this conceded right, put in utterances which do not come within its principle and would be otherwise . . . inadmissible."[34]

But the exercise of line-drawing between what is necessary to explain a previous statement and what is not is inherently challenging. Wigmore himself expounded on the confusion surrounding the meaning of "completeness" with a rather confusing digression:

> But what is the whole of the utterance? No doubt this principle of entirety is flexible in its application. A simple thought requires but a simple utterance; a complex thought, a complicated utterance. When, therefore, we obey the canon that the whole of the utterance must be considered, the scope of our survey may be very variable, so far as concerns the mere number of words, sentences, or paragraphs. The whole that is to be considered is obviously not the whole of a phrase or a paragraph, any more than it is the whole of the printer's line or page, but the whole of thought—that is, such a quantity of

32. FED. R. EVID. 106 advisory committee's note to 2023 amendment ("The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106. So, for example, the mere fact that a defendant denies guilt before later admitting it does not, without more, mandate the admission of his previous denial.").

33. *See* Nance, *supra* note 1, at 831 n.16 ("The broader view of wholeness seems not even to have gained much of a foothold in this country with respect to utterances other than those of a criminal defendant."). *But see, e.g.*, Rokus v. Bridgeport, 191 Conn. 62, 69 (Conn. 1983) ("When a portion of a party's out-of-court admission is placed in evidence by an opponent, the party has a right to introduce other relevant portions of the conversation from which it was excerpted, irrespective of whether it is self-serving or hearsay.").

34. 7 WIGMORE, *supra* note 16, at 656. *But see* Nance, *supra* note 1, at 832 n.17 ("One should note, however, that Wigmore acknowledged the use of a broader idea in some cases, and even conceded that no great harm comes therefrom.").

> utterance as the utterer has indicated to be distinct and entire in itself, for the purpose of representing a distinct thought . . . . Thus[,] the possibilities are infinite and the boundaries indefinite in this search for entirety of utterance. It will be difficult for the law, in applying the principle, to employ any fixed test. Yet the law cannot be expected to be satisfied practically with the indefiniteness which in theory the conception of entirety involves; and therefore[,] the application of it is full of difficulties.[35]

And likewise, at the end of the nineteenth century, the Missouri Court of Appeals opined on the legal confusion as it then existed:

> An exhaustive examination of a number of American cases satisfies me that, while the rule is stated in a great many different ways, and in some cases is stated even broader than [in British common law authorities], it is next to impossible to deduce from the decided cases any rule, clearly formulated, which we could announce as the American rule on that subject, supported by the weight of authority.[36]

As a result of this general confusion, even those courts that have adopted the narrow standard at times allow seemingly unconnected completeness evidence, demonstrating the inherent challenge of enforcing a narrow standard.[37]

For example, in an early, seminal New York case applying the narrow standard, after the defendant's statement was admitted that certain real *property* belonged to the plaintiff, the Court of Appeals held that the trial court correctly admitted a separate statement that the *debt* on the property also belonged to the plaintiff, reasoning that the truth of the ownership of the debt affected the truth of the ownership of

35. 7 WIGMORE, *supra* note 16, at 604.

36. Lyon v. Batz, 42 Mo. App. 606, 617–18 (Mo. Ct. App. 1890).

37. *See, e.g.*, West v. State, 37 S.E.2d 799, 800–01 (Ga. 1946) (holding that the admission of a criminal defendant's inculpatory statements to officers required the admission of exculpatory statements in a previous, implicitly referenced, conversation).

the property.[38] Although the statement about the debt did not "in any way tend to *explain or qualify*" the statement about ownership, admitting the evidence was within the discretion of the trial judge regardless.[39]

More recently, in *United States v. Williston*, after the federal prosecutor admitted segments of a videotaped confession showing that the murder suspect's facial expressions had been "unnatural" and remorseless, the Tenth Circuit upheld the trial court's ruling to exclude additional segments showing the defendant crying with emotion.[40] The Court cited the narrow standard that completeness evidence is only admissible if it is "necessary to explain or clarify the already-admitted portions."[41] Nevertheless, the trial judge in that case also "offered to allow the *entire* interrogation video to be played for the jury," an action out of step with the narrow standard but completely in line with the broad standard of completeness.[42] Thus, the line between the broad and narrow standards is anything but clear and would seem at times so fact-sensitive as to defy codification.

C. Innovations Under FRE 106

With the 1975 codification of the common law rule of completeness into FRE 106, the Advisory Committee made a decision of wording that served to elide the old common law distinction between the broad and narrow standards.[43] Instead of using either broad language like "context" or narrow language like "explanation," the Committee "chose the language of 'fairness' from the many common

38. *See Rouse*, 25 N.Y. at 178 ("Certainly one statement which completely destroys the force and effect and intended use of another statement, qualifies the latter statement"). *But see Lyon*, 42 Mo. App. at 617 ("I cannot well conceive how the statement, that the debt in the execution was the plaintiffs' debt, did in any way tend to *explain* or *qualify the other statement*, namely, that the property . . . was the plaintiffs' property. It seems to me that the latter statement was rather the statement of an independent fact in the defendant's favor.").

39. *Lyon*, 42 Mo. App. at 617.

40. 862 F.3d 1023, 1038–39 (10th Cir. 2017).

41. *Id.* at 1038.

42. *Id.* at 1037 (emphasis added). The defense declined the offer to play the entire videotaped confession because of further prejudicial statements within. *Id.*

43. Act of Jan. 2, 1975, Pub. L. No. 93–595, §1, 88 Stat. 1926.

law descriptors used to limit completion."[44] Accordingly, FRE 106 allows an opposing party faced with an incomplete statement to introduce another part or another statement "that *in fairness* ought to be considered at the same time."[45] The history of the drafting of FRE 106 reveals that, although some groups pushed for explicitly spelling out a narrow standard in the rule, the final version settled on the broader "fairness" standard.

The original draft of FRE 106 lacked the "fairness" standard altogether. Intended not to replace the common law rule but to expand it, the emphasis of the draft of FRE 106 was instead to introduce an acceleration function: one party could require the other to introduce completeness evidence "at that time," without waiting till their own case-in-chief.[46] Interestingly, the first Reporter for the Advisory Committee did not include any language of "fairness," or any other standard besides relevance:

> When a writing, statement, or conversation, or part thereof, is introduced by a party, an adverse party may require him at that time to introduce any other part or related writing, statement, or conversation relevant to that introduced. Nothing herein precludes any party from introducing on his own motion any other relevant part or related writing, statement, or conversation.[47]

The Reporter rejected the "fairness" standard, reasoning that it gave judges too much discretion.[48]

And yet the Advisory Committee in the end chose to adopt the language of "fairness."[49] That standard certainly fits with the purpose of the federal rules under FRE 102 "to administer every proceeding fairly."[50] The Advisory Committee also pivoted away from claiming

44. Capra & Richter, *supra* note 1, at 912.

45. FED. R. EVID. 106 (emphasis added).

46. 21A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5071 (2d ed. 2023).

47. *Id.*

48. Comment, Prop. Evid. Rule 1–10, Reporter's Memo No. 21, General Provisions, First Draft, p. 50, EV 201, *cited in* 21A WRIGHT & MILLER, *supra* note 46.

49. 21A WRIGHT & MILLER, *supra* note 46.

50. FED. R. EVID. 102.

that FRE 106 codified the common law, instead stating that the rule of completeness was "an extension of the practice prevailing" under Federal Rule of Civil Procedure ("FRCP") 32(a)(6).[51] That rule already manifested the rule of completeness in the context of depositions: "an adverse party may require the offeror to introduce other parts that *in fairness* should be considered with the part introduced."[52]

The Department of Justice ("DOJ"), objecting to the 1975 "fairness" standard as "vague" and offering no "necessary guidance," attempted unsuccessfully to insert its own alternative language into the rule that would allow for completeness evidence only from the "same document" on the "same subject matter."[53] The fact that the DOJ advocated for a constriction of the rule, along with the pertinent fact that the DOJ's proposal was rejected by the Advisory Committee, the Judicial Conference, and the Supreme Court,[54] implies that the 1975 "fairness" standard was at least inclusive of the broad relates-to-the-subject-matter standard, if not potentially even broader, as fairness may require.[55]

D. The 2023 amendment to FRE 106

Fifty years later, after the amendment of FRE 106 in December 2023, the federal rule has moved closer to its common law ancestor because (1) the rule no longer applies only to written or recorded statements and (2) it admits evidence over a hearsay objection.[56] The new version states:

51. Advisory Committee's Note, Prop. F.R. Ev. 109, Tent. Final Draft, p. 37, EV 203, *cited in* 21A WRIGHT & MILLER, *supra* note 46. Before 1970, FRCP 32(a)(6) was styled Civil Rule 26(d). FED. R. CIV. P. 32 advisory committee's note to 1970 amendment.

52. FED. R. CIV. P. 32(a)(6) (emphasis added); *see also* FED. R. EVID. 106 advisory committee's note on proposed rules (noting that FRE 106 "is substantially a restatement" of Rule 32(a)(6) of the Federal Rules of Civil Procedure).

53. Capra & Richter, *supra* note 1, at 912 (citing 21A WRIGHT & MILLER, *supra* note 46).

54. *Id.*

55. *See* 1 CHRISTOPHER MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 1:42, at 283 (4th ed. 2015) ("The purpose [of FRE 106] is to [e]nsure that evidence of a written or recorded statement is presented in a way that reflects the statement accurately and fairly.").

56. FED. R. EVID. 106 advisory committee's note to 2023 amendment.

> If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part—or any other statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.[57]

At least two state courts have followed the lead of the federal rule to make the rule of completeness a rule of admissibility, trumping hearsay objections.[58]

In the notes accompanying the December 2023 amendment to FRE 106, the Advisory Committee expressed its goal of ending the confusion around the "partial codification" of the common law in FRE 106: "[t]he intent of the amendment is to displace the common-law rule of completeness."[59] And yet only the words of the rules themselves control the courts, not the ancillary committee notes.[60] Professor Capra, the Advisory Committee's reporter, acknowledged elsewhere that, although "[i]n principle, under the Federal Rules no common law of evidence remains," yet "[i]n reality, of course, the body of common law knowledge continues to exist" as "a source of guidance" for federal courts.[61] Further, the Committee itself rejected a

57. FED. R. EVID. 106.

58. *See In re* Amendment to Rule 106, 2024 Ala. LEXIS 142, at *2 (Ala. July 15, 2024) ("This amendment is consistent with traditional Alabama law."); Steven v. State, 539 P.3d 880, 881-82 (Alaska Ct. App. 2023) ("In prior cases, we have suggested that Rule 106 is only a rule of timing, not admissibility . . . . [W]e conclude that our prior statements . . . were dicta and that, upon closer consideration, they were incorrect.").

59. FED. R. EVID. 106 advisory committee's note to 2023 amendment. *But see* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171–72 (1988) ("The Federal Rules of Evidence have partially codified the doctrine of completeness in Rule 106.").

60. *See* Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring) ("But [the Advisory Committee Notes] bear no special authoritativeness as the work of the draftsmen, any more than the views of Alexander Hamilton (a draftsman) bear more authority than the views of Thomas Jefferson (not a draftsman) with regard to the meaning of the Constitution. It is the words of the Rules that have been authoritatively adopted—by this Court, or by Congress if it makes a statutory change.").

61. Capra & Richter, *supra* note 1, at 950 (quoting Edward Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978)).

proposed addition to FRE 106 that would have gone so far as to subsume various other concepts of completeness, drawn from other rules such as FRE 401,[62] FRE 502(a),[63] and FRE 807(a)[64] "under [the] one rule" of FRE 106.[65] The Advisory Committee's refusal to condense "as a matter of convenience" the multi-faceted common law rule of completeness under the one heading of FRE 106 suggests that the common law in fact persists even under the new codification of FRE 106.[66]

62. FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

63. FED. R. EVID. 502(a) ("When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.").

64. FED. R. EVID. 807(a) ("Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804: (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts."); *see generally* Edward K. Cheng, G. Alexander Nunn & Julia Simon-Kerr, *Bending the Rules of Evidence*, 118 NW. U.L. REV. 295 (2023) (citing both FRE 807 with FRE 106 as examples of rules that serve to admit otherwise inadmissible evidence).

65. *See* Advisory Comm. on Evidence Rules, Minutes of the Meeting of November 5, 2021, at 3 ("[A]t the Standing Committee meeting, Judge Bates had questioned the inclusion of one sentence in the proposed Advisory Committee note, expressing concern that it might be too broad. The sentence provides that 'The amendment [to Rule 106], as a matter of convenience, covers these questions [of completion] under one rule.'").

66. *See id.* ("The Reporter acknowledged that the sentence might be too broad because Rule 410 and 502 also include completion concepts . . . . Accordingly, the Reporter recommended deletion of that sentence from the Advisory Committee note and Committee members tentatively agreed.").

E. Redundancy of the Narrow Standard After Beech Aircraft Corp. v. Rainey

Not only does the broad standard persist from common law into the modern codification of FRE 106, but the Supreme Court has also rendered the narrow standard redundant. Fifteen years after the promulgation of the Federal Rules of Evidence in 1973, the U.S. Supreme Court had the opportunity to address whether those rules had fully codified the common law rules or whether FRE operated within the common law. In *Beech Aircraft Corp. v. Rainey*, in which the Supreme Court broadened the admissibility of the Rule 803(8)(c) hearsay exception for "factual findings" to include not only facts but also opinions, the Court also gave us its most thorough treatment of the rule of completeness.[67]

In *Beech Aircraft*, parties argued over whether the fatal crash of a Navy aircraft was caused by manufacturer defect or pilot error.[68] After a military investigation concluded that the likely cause was human error, plaintiff Rainey, husband of the deceased pilot and a flight instructor himself, wrote a letter to a superior officer advancing an alternate theory that the plane had suffered a mechanical loss of power.[69] At trial, Rainey was questioned by the defense about two statements in his letter that appeared favorable to the defense—first, that his late wife had been concerned that her copilot-in-training was too tired to fly, and second, that one of the two pilots had made an unexpected sharp turn in the air.[70] But when Rainey's own counsel asked him to explain his letter's main conclusion that an equipment malfunction caused the crash, the court prevented Rainey from answering because the testimony would be an inadmissible opinion.[71]

67. 488 U.S. 153, 171–72 (1988).

68. *Id.* at 156–57.

69. *Id.* at 159.

70. *Id.* at 160.

71. *Id.*

Rainey argued on appeal that the trial court had allowed the defense to create a distorted picture of his letter.[72] The remainder of the letter, regarding his belief that an equipment malfunction had caused the crash, would certainly be relevant to *qualify* or *explain* the first part, which contained his acknowledgement that pilot error might also have contributed to it. The Court accepted this argument,[73] but for a surprising reason. Because this is the very scenario in which the narrow standard of the Rule of Completeness shines,[74] the Court could have been expected to apply that narrow standard. Instead, the Court passed over FRE 106 altogether, finding that when remainder evidence is so clearly relevant to the factfinder's understanding of the case, it is already admissible under principles of relevance: "when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under Rules 401 and 402."[75] Therefore, "as the general rules of relevancy permit a ready resolution to this litigation, [the Court] need go no further in exploring the scope and meaning of Rule 106."[76] But if the narrow standard of the rule of completeness has the tendency to dissolve into simple relevance, then the rule of completeness is incomplete without recourse to a broad standard as well. The holding of *Beech Aircraft*, that remainder evidence necessary to correct a distortion is "*ipso facto* relevant" without involving Rule 106, implies that Rule 106 applies to alternative situations in which fairness requires additional context that may not be relevant. This holding makes room for a broad standard of completeness.

III. MODERN JURISDICTIONS ADOPTING THE BROAD STANDARD OF

72. *Id.* at 170.

73. *Id.* at 172.

74. *See, e.g.*, Nock v. State, 256 So. 3d 828, 833 (Fla. 2018) ("[The common-law rule of completeness] also had two limitations: (1) that the additional portions of the statement be 'relevant' to an issue in the case and (2) that the additional portions of the statement be 'necessary' to 'qualify or explain the already introduced evidence allegedly taken out of context.'" (quoting United States v. Sutton, 801 F.2d 1346, 1369 (D.C. Cir. 1986))).

75. *Beech Aircraft Corp.*, 488 U.S. at 172.

76. *Id.*

COMPLETENESS

The broad standard of completeness that was a prominent feature of the common law rule continues to find expression today in some jurisdictions, for example, in the Military Rules of Evidence and Georgia's state evidence rules. One salutary effect of the broad standard in these two jurisdictions is a regard for the rights of criminal defendants, since both jurisdictions give increased discretion to judges to admit full confessions and evidence of surrounding conversations and circumstances when judges decide that fairness requires it.[77] This position results in increased evidence for the trier of fact and fewer strictures on judges in their admission of evidence.

A. Two Rules of Completeness in the Military Rules of Evidence

Although the common law may be implicit within the Federal Rules of Evidence, elsewhere it is explicit. For criminal defendants in U.S. military courts, for example, the Military Rules of Evidence provides two rules of completeness—a version that mirrors FRE 106 and an additional, broader Rule 304(h).[78] First, Military Rule 106 states:

> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.[79]

77. *See, e.g.*, United States v. Rodriguez, 56 M.J. 336, 342 (C.A.A.F. 2002) ("Rule 304(h)(2) requires admission of the 'remaining portions of the statement' if such material falls within the criteria set forth under the rule and applicable case law."); State v. Allaben, 787 S.E.2d 711, 715–16 (Ga. 2016) ("With respect to criminal cases, '[w]here a part of a conversation, which amounts to an incriminatory admission, is admitted in evidence, it is the right of the accused to bring out other portions of the same conversation, even though it is self-serving in its nature, or exculpatory, in that it justifies, excuses, or mitigates the act.'" (quoting West v. State, 37 S.E.2d 799, 801 (Ga. 1946))).

78. MIL. R. EVID. 106, 304(h); *see also* United States v. Rosales, 74 M.J. 702, 706 (A.F. Ct. Crim. App. 2015) ("There are two 'rules of completeness' in the military justice system . . . .").

79. MIL. R. EVID. 106.

Accordingly, Military Rule 106 gives a military judge discretion to admit "any other statement which ought 'in fairness' to be considered with the offered statement regardless of when it was made."[80] But the broader Military Rule 304(h) provides:

> If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement.[81]

The latter rule has led military courts to question what constitutes a "statement," with one court ruling that even a written statement composed directly after an oral statement was admissible,[82] and another court ruling that a related statement made nine days later was inadmissible.[83] Under Military Rule 304(h), therefore, if any portion of a criminal defendant's admission or confession is admitted, the military judge must admit the entire statement if requested—an application of the broad standard of completeness.[84]

The presence of these two rules in military courts highlights the persistence of the common law rule of completeness in federal criminal law. The common law rule of completeness offers criminal defendants broad admissibility for exculpatory evidence.

B. Broad Standard in the State of Georgia

Some states have adopted a rule of completeness with a similarly wide scope. Georgia, for instance, also has two rules of completeness: Official Code of Georgia Annotated ("OCGA") section 24-1-106, which mirrors the pre-2023 version of FRE 106; and OCGA

80. *Rosales*, 74 M.J. at 707.

81. MIL. R. EVID. 304(h).

82. United States v. Gilbride, 56 M.J. 428, 430 (C.A.A.F. 2002).

83. United States v. Harvey, 25 C.M.R. 42, 50 (C.M.A. 1957).

84. *See* United States v. Rodriguez, 56 M.J. 336, 342 (C.A.A.F. 2002) ("Rule 106 provides the military judge with discretion to determine whether the additional material 'ought in fairness' be considered with the original matter, whereas Rule 304(h)(2) requires admission of the 'remaining portions of the statement' if such material falls within the criteria set forth under the rule and applicable case law.").

section 24-8-822, which broadens the scope of the evidence receivable. OCGA section 24-1-106 states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which, in fairness, should be considered contemporaneously with the writing or recorded statement.[85]

On the other hand, OCGA section 24-8-822 provides:

> When an admission is given in evidence by one party, it shall be the right of the other party to have *the whole admission* and *all the conversation* connected therewith admitted into evidence.[86]

Although Georgia's 106-style rule of completeness requires that evidence be "[]relevant to the case and to the parts of the statement introduced into evidence by the opposing party,"[87] it is closer to the common law broad standard because it does not shy away from admitting as substantive evidence an entire conversation, even at the risk of introducing additional facts.

In a Georgia murder trial, for instance, the defense impeached a witness by implying that the witness had fabricated his eyewitness testimony because in a pretrial interview he had claimed to have not seen the shooting.[88] Under the rule of completeness, the court allowed the prosecution to admit testimony of a third party who could testify that the defense had simply never asked the witness such a question in the pretrial interview, and so defendant had simply never commented

85. GA. CODE ANN. § 24-1-106 (2013).

86. GA. CODE ANN. § 24-8-822 (2013) (emphasis added). To define the limits of a "conversation," the Georgia Supreme Court found in *Jackson v. State* that two phone calls from prison were not related because they covered separate topics and were interrupted by other, unrelated phone calls. 804 S.E.2d 367, 371 (Ga. 2017).

87. Allaben v. State, 787 S.E.2d 711, 716 (Ga. 2016) (quoting Westbrook v. State, 727 S.E.2d 473, 476–77 (Ga. 2012)).

88. *Westbrook*, 727 S.E.2d at 476–77.

on the matter[89]—demonstrating that Georgia's broad rule increases judicial discretion for the sake of fairness.

Further, the Georgia rule of completeness "permits introduction only of additional material that is relevant and is necessary to qualify, explain, or *place into context* the portion already introduced."[90] A requirement that additional portions of a conversation would add context to other portions would seem a rather low evidentiary bar. Similar to the Military Rules of Evidence, Georgia's rule is especially solicitous toward completeness evidence offered by a criminal defendant.[91]

Thus, the broad standard is not only a legacy of the common law rule of completeness, but an active interpretation in U.S. state and federal military law. In light of the December 2023 amendment to the rule of completeness, which liberalized the scope of evidence admissible, it makes sense many federal courts would also accept the broad standard.

IV. THE BROAD STANDARD'S THEORETICAL FOUNDATION

Since the codification of FRE 106 in 1975, the Supreme Court has given brief but useful direction to the proper application of the rule. Under *Hemphill v. New York*,[92] the Court impliedly endorsed the broad standard of the rule of completeness and, in Justice Alito's concurrence,[93] provided a novel legal framework of implied waiver that

89. *Id.*

90. Jackson v. State, 804 S.E.2d 367, 371 (Ga. 2017) (emphasis added) (quoting United States v. Simms, 385 F.3d 1347, 1359 (11th Cir. 2004)).

91. *See Allaben*, 787 S.E.2d at 715–16 ("With respect to criminal cases, '[w]here a part of a conversation, which amounts to an incriminatory admission, is admitted in evidence, it is the right of the accused to bring out other portions of the same conversation, even though it is self-serving in its nature, or exculpatory, in that it justifies, excuses, or mitigates the act.'" (quoting West v. State, 37 S.E.2d 799, 801 (Ga. 1946))). *But see Jackson*, 804 S.E.2d at 371 (affirming trial court's admission of the latter, inculpatory part of defendant's phone call while excluding the earlier, exculpatory piece "because it did not qualify, explain, or place into context" the latter part); *see also* West v. State, 808 S.E.2d 914, 917 (Ga. Ct. App. 2017) (affirming trial court's exclusion of defendant's proffered evidence of his belief about victim's age as irrelevant "because it is not an essential element of" the crime).

92. 595 U.S. 140 (2022).

93. *Id.* at 158 (Alito, J., concurring).

serves to preserve the rule's breadth. Further, other federal rules of evidence already include a similarly broad scope to promote flexibility and judicial discretion. Finally, the broad rule of completeness best supports judicial candor because, practically speaking, judges are often forced to bend narrow rules of evidence in the pursuit of fairness.

A. Hemphill *Narrows the Scope of "Door Opening" in Criminal Trials, but Leaves Untouched the Broad Standard of the Rule of Completeness in Federal Courts*

The one aspect of the rule of completeness where a broad standard appears possibly to be foreclosed is in the context of testimonial statements under *Crawford*.[94] The Court's latest look at the concept of "opening the door" to completeness evidence is *Hemphill v. New York*,[95] a case which, although not directly addressing the rule of completeness, nevertheless examined defendants' rights to keep out additional, related statements in criminal cases under the Confrontation Clause, which, as a constitutional ruling under the Sixth Amendment, applies to both federal and state courts.

Defendant Hemphill had sought to raise a third-party culpability defense blaming a man named Morris for a killing involving a 9-millimeter handgun.[96] The State seized upon Hemphill's argument to introduce in return Morris' earlier plea allocution implying that Morris had owned only a .357-caliber weapon—the wrong gun to have committed the crime.[97] Although Morris' plea would otherwise be inadmissible hearsay in Hemphill's trial, the trial court admitted it under New York's *Reid* rule, a distant cousin of the rule of completeness.[98] Under that rule, the trial court reasoned that, once a defendant "opened the door" to inadmissible evidence, that evidence may be admitted if it is "reasonably necessary to correct [a] misleading

94. *See* Crawford v. Washington, 541 U.S. 36, 59 (2004) ("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.").

95. *Hemphill*, 595 U.S. at 144.

96. *Id.*

97. *Id.* at 144–45.

98. *Id.* at 146–47.

impression" made by the defense's "evidence or argument."[99] Assured by the State that Morris' only crime was possessing a .357-caliber handgun, the jury found Hemphill guilty of the murder.[100]

Hemphill appealed, arguing that he had been deprived of his Sixth Amendment Confrontation Right under *Crawford*.[101] After the Appellate Division affirmed his conviction, Hemphill appealed to the New York Court of Appeals, arguing that the "Appellate Division's analysis equates presenting a valid, evidence-based third-party defense with misleading the jury."[102] New York's high court affirmed.[103]

The U.S. Supreme Court reversed.[104] The Court found that, by allowing the trial judge to evaluate the reliability or credibility of Hemphill's theory, New York's *Reid* rule violated *Crawford*'s "emphatic rejection of the reliability-based approach to the Confrontation Clause guarantee."[105] The Court appeared, in the criminal context, to limit the scope of a judge's discretion with regard to FRE 106, which allows a judge, following their own sense of fairness, to admit evidence "that in fairness ought to be considered at the same time."[106] The Court further explained that, under the Confrontation Clause, "it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence."[107] Nor, under the Confrontation Clause, "was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression."[108] Rather, the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the

99. *Id.* at 146 (quoting People v. Reid, 971 N.E.2d 353, 357 (N.Y. 2012)).
100. *Id.* at 147.
101. *Id.* at 146–47*; see generally* Crawford v. Washington, 541 U.S. 36 (2004).
102. *Id.* at 148.
103. *Id.*
104. *Id.* at 156.
105. *Id.* at 152.
106. *Id.* at 151; FED. R. EVID. 106.
107. *Hemphill*, 595 U.S. at 153.
108. *Id.*

crucible of cross-examination."[109] In response to New York's argument that this holding would allow defendants to admit unreliable evidence under the aegis of the Confrontation Right, the Court replied that other "well-established rules" like the rule against hearsay in FRE 802, as well as FRE 403, would of course still "permit trial judges to exclude evidence."[110] Thus, in these circumstances, the Sixth Amendment overrides an application of the New York state rules of evidence.

The rule of completeness itself did not apply in this case because Morris' plea was not an utterance of Hemphill's that the rule could complete.[111] And on FRE 106 itself the Court remained mum: "[T]he Court does not decide today the validity of the common-law rule of completeness as applied to testimonial hearsay."[112] However, the principle stated in *Hemphill* that, under the Confrontation Clause, it is not for judges "to weigh the reliability or credibility of testimonial hearsay evidence"[113] is analogous to the broad standard of completeness. Just as the Court struck down the New York *Reid* rule when employed against criminal defendants because it is a substantive rule that "dictates what material is relevant and admissible in a case,"[114] instead of subjecting evidence to the "crucible of cross-examination,"[115] so also might the court reject a narrow standard of completeness that dictates for the trial court what is relevant and admissible. It is better that a broad standard allows the injection of context and *res gestae* background facts into a trial when fairness requires it, all of which may fairly be limited by "well-established" rules of exclusion like FRE 403.

109. *Id. at* 152 (quoting Crawford v. Washington, 541 U.S. 36, 61 (2004)); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

110. *Hemphill*, 595 U.S. at 155 (quoting Holmes v. South Carolina, 547 U.S. 319, 326 (2006)).

111. *Id.* at 155.

112. *Id.*

113. *Id.* at 152.

114. *Id.* at 152.

115. *Id.* (quoting Crawford v. Washington, 541 U.S. 36, 61 (2004)).

B. Theory of Implied Waiver in Hemphill Concurrence as a Foundation for FRE 106

It might appear that *Hemphill* not only invalidated New York's *Reid* rule for criminal trials but also weakened FRE 106 in the same contexts. After all, unless a criminal defendant effectively waives the Sixth Amendment Right to Confrontation, the defendant does not "open the door" to completeness evidence "merely by making [additional] evidence relevant."[116]

But Justice Alito's concurrence in *Hemphill* supports the role of the rule of completeness when a criminal defendant has waived the Right to Confrontation.[117] Justice Alito connects the rule of completeness to the concept of waiver and, in doing so, sketches a useful framework by which to understand the scope of the rule. In the first place, some rules of evidence are rules of reliability, others are rules of fairness arising out of equity, and still others could safeguard both reliability and fairness.[118] Justice Alito advances the theory that, although the Confrontation Clause requires cross-examination to determine the reliability of evidence, the rule of completeness is not a rule of reliability at all, but a rule of equity:

> Under the traditional rule of completeness, if a party introduces all or part of a declarant's statement, the opposing party is entitled to introduce the remainder of that statement or another related statement by the same declarant, regardless of whether the statement is

116. *Id.* at 154.

117. *Id.* at 159 (Alito, J., concurring) ("The Court emphasizes that its decision does not call into question the rule of completeness.").

118. *See Crawford*, 541 U.S. at 62 ("[There exist] exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.").

> testimonial or there was a prior opportunity to confront the declarant [to ensure reliability].[119]

As a rule of equity, the federal rule of completeness does not require that evidence be reliable, but merely its admission is necessary "in fairness."[120] Although some have defined the conclusory term "fairness" as the pursuit of evidentiary accuracy,[121] Justice Alito gives a broader footing for fairness within the concept of waiver: "[t]he rule of completeness fits comfortably within the concept of implied waiver."[122] The Justice further lays out a broad vision for the rule of completeness:

> By introducing part or all of a statement made by an unavailable declarant, a defendant has made a knowing and voluntary decision to permit that declarant to appear as an unconfronted witness. As a result, the defendant cannot consistently maintain that the remainder of the declarant's statement *or the declarant's other statements*

119. *Hemphill*, 595 U.S. at 158 (Alito, J., concurring); *see also* Rouse v. Whited, 25 N.Y. 170, 177 (N.Y. 1862) ("[T]he plainest principles of equity require, that if one of the statements is to be used against the party, all the other statements tending to explain it or to qualify this use, should be shown and considered in connection with it."), *quoted in* State v. Cabrera-Pena, 605 S.E.2d 522, 525 (S.C. 2004).

120. FED. R. EVID. 106.

121. *See* 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *supra* note 55, at 283; *see also* Nance, *supra* note 1, at 862 ("But fairness is one of those conclusory terms that calls out for explanation. The unfairness involved in the selected presentation of only parts of an utterance is that it poses a threat to accuracy of the judgment."). *But see* State v. Prasertphong, 114 P.3d 828, 834 (Az. 2005) ("The rule of completeness, like the rule of forfeiture, 'extinguishes confrontation claims essentially on equitable grounds.' Rule 106 does not permit admission of the remaining portion of a statement because that remaining portion is reliable but rather because it would be unfair to mislead the jury by admitting the redacted portion . . . ." (quoting *Crawford*, 541 U.S. at 62)).

122. *Hemphill*, 595 U.S. at 158 (Alito, J., concurring). *But see* Mitchell K. Pallaki, *The Rule of Completeness After* Hemphill, FEDSOC BLOG (March 7, 2022), https://fedsoc.org/commentary/fedsoc-blog/the-rule-of-completeness-after-hemphill ("But implied waiver might not be the right theory to capture what is going on in such a situation given a defendant's motivation for introducing an incomplete statement.").

> *on the same subject* should not be admitted due to the impossibility of cross-examining that declarant.[123]

The foundation for fairness under the rule of completeness, therefore, is one party's "knowing and voluntary decision" to introduce one statement to the exclusion of other statements made at the same time.[124] "The remainder of the declarant's statement or statements—and any other statements by the same declarant on the same subject—are *fair game*."[125]

This theory of implied waiver accords with other widely accepted doctrines, such as the doctrine of "curative admissibility."[126] Under that doctrine, one party's introduction of irrelevant or otherwise inadmissible evidence "opens the door to" admission of evidence from the opponent that is likewise inadmissible.[127] In some courts, the rule of completeness and the "curative admissibility" doctrine are viewed together as one larger, "more generic rule of law" that transcends even the rules of evidence.[128] Because it is axiomatic that trials be fair, an element of turnabout-as-fair-play is ever present in justifications of the rule of completeness.

As a rule of fairness, a broadly conceived rule of completeness gives wide latitude to judges to admit remainder evidence to provide context out of fairness, since the opposing party has waived its right to object to its admission.[129] Justice Alito's theory of implied waiver may

123. *Hemphill*, 595 U.S. at 158 (Alito, J., concurring) (emphasis added).

124. *Id.*

125. *Id*. at 159 (emphasis added); *see also* People v. McLaughlin, 530 P.3d 1206, 1212 (Colo. 2023) (interpreting the provision of Colorado Rule of Evidence 106 that the "adverse party may require [the proponent] at that time to introduce [the remainder]" to mean that the proponent, not the adverse party, must introduce the remainder, and thus its contents "by definition, are not hearsay").

126. United States v. Brown, 921 F.2d 1304, 1307 (D.C. Cir. 1990).

127. *Id.* (quoting CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 57 (Edward W. Cleary ed., 3d ed. 1984)); *see also* United States v. Winston, 447 F.2d 1236, 1240 (D.C. Cir. 1971) (noting that "curative admissibility" is permitted "only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence").

128. 30B CHARLES ALAN WRIGHT & JEFFREY BELLIN, FEDERAL PRACTICE AND PROCEDURE § 6793 (2023 ed.) (citing *Brown*, 921 F.2d at 1307).

129. *See, e.g.*, People v. Parrish, 60 Cal. Rptr. 3d 868, 876 (Cal. Ct. App. 2007) ("[R]eliability of the evidence is not a factor in determining admissibility under the

yet reinvigorate the broad standard of the rule of completeness as it plays out in lower courts.[130]

Other federal rules of evidence accord with a broad standard of admissibility under similar theories of waiver. For example, FRE 502, governing attorney-client privilege and work-product protection, allows for a party to discover undisclosed information that would complete the information already disclosed if "(1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together."[131] FRE 502 was enacted in 2008 in response to the advent of electronic discovery which had inundated litigation with electronic records, introducing the danger that a party might unintentionally waive their attorney-client privilege amid the flood of digital documents and drafts.[132] Compared to the impossibly broad scope of electronic discovery, FRE 502 significantly narrows the scope of admissibility, but as an expression of the rule or completeness, FRE 502 follows a broad standard, permitting for discovery any other evidence that "concern[s] the same subject matter" and "ought in fairness to be considered together."[133] FRE 502 differs from the rule of completeness in FRE 106, of course, because FRE 502 concerns documents produced in discovery without commenting on their admissibility, while FRE 106 governs the admissibility of evidence. But because both Rules 502 and 106 arise from theories of waiver and

rule of completeness—indeed, the evidence proffered by the defendant and the prosecution may both be unreliable.").

130. *See* 1 DANIEL D. BLINKA & EDWARD J. IMWINKELRIED, CRIMINAL EVIDENTIARY FOUNDATIONS § 2.08 (2022) ("Whether the 'fairness' standard set forth in Rule 106 (and the common law in some jurisdictions), aimed at remedying misleading impressions, is consistent with Justice Alito's notion of 'fair game' will have to be sorted out in future cases. An expansive implied waiver approach could conceivably extend beyond situations in which a party (here the defendant) offers a statement in whole or in part.").

131. FED. R. EVID. 502(a).

132. *See* Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. REV. 1873, 1896 (2019) ("Rule 502(a) eliminated the worst-case scenario of broad subject matter waivers resulting from a single inadvertent disclosure by providing that subject matter waivers would flow only from intentional disclosures and only when the disclosed and undisclosed communications 'ought in fairness to be considered together.'").

133. FED. R. EVID. 502.

fairness, they share a broad scope.[134] And that broad scope logically outlines a policy of inclusion for all electronic evidence outside of privilege too: if the relationship between two documents creates useful context such that they "ought in fairness to be considered together," then under both FRE 502 and 106, they should both be admitted. In view of the broad fairness considerations of other federal rules of evidence, practitioners might successfully argue a similarly broad standard for the rule of completeness.

C. Judicial Candor as a Further Foundation for FRE 106

Behind all the practical justifications for a broad standard for the rule of completeness lies a more fundamental, practical basis: namely, because the dictates of fairness are inherently broad, judges need as much discretion as possible to approach any possible fact pattern. To say otherwise, to assert that a narrow approach obviates the need for judicial discretion, is at base self-defeating. For it makes little sense to argue that judges can apply the rule of completeness "in fairness" while at the same time closeting their own internal perceptions of fairness, relying instead on the strict boundaries of a supposed rule of fairness.

Judges are entrusted with enormous power, arising not from any economic or military might, but merely out of society's trust in their judgment.[135] Judges must on some level defend their decisions to the public, lest that trust be eroded.[136] So when faced with difficult decisions requiring the application of personal judgment and principles of fairness, judges are incentivized to reach for the most seemingly ironclad, objective rules they can find to cast their decisions in irreversible clarity. There is the further temptation for judges not to be candid about this process.[137] To be clear, if judges grasp for clear-cut

134. *See* FED. R. EVID. 502 advisory committee's explanatory note ("The language concerning subject matter waiver—'ought in fairness'—is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.").

135. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("The judiciary . . . may truly be said to have neither FORCE nor WILL, but merely judgment . . . .").

136. *See* Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2283 (2017) ("A claim of legitimate authority almost inherently involves a claim of practical competence in making decisions . . . .").

137. LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 14 (1993).

rules to paper over inherent ambiguities in a case, it is not from a lack of character that they do so, but from a sense of responsibility "to demonstrate the fitness and firmness of the conclusions they reach."[138]

But the reality is that the law is a human institution and inherently fluid. Benjamin Cardozo called this fluidity "a curse . . . that law must bear."[139] To deny this fluidity, argues Lawrence M. Solan, not only leads to a delusion that the law is somehow automatic, but also risks "the loss of legitimacy of the entire judicial process that comes as a by-product of the lack of candor."[140]

Elsewhere in the law, the contours of legal concepts are designed to allow for give, play, and flexibility when the alternative would cause injustice. For example, take the flexible concept of the *reasonable person* against whom we measure the conduct of an alleged tortfeasor. "The conduct of the reasonable man will vary with the situation with which he is confronted," argued William Prosser.[141] "Under the latitude of this phrase, the courts have made allowance not only for external facts, but for many of the characteristics of the actor himself, and have applied, in many respects, a more or less subjective standard."[142] In addition to the *reasonable person*, other more-or-less subjective phrases such as *substantial* and *satisfactory* serve important roles in legal writing.[143]

The broad standard of the rule of completeness supports judicial candor, not because it provides a shortcut for judges to see the whole truth, but precisely because human judges can never see the whole truth in the first place.[144] To decide what scope of completeness evidence is required *in fairness*, judges must have the freedom to admit entire

138. *Id.* at 171.

139. BENJAMIN CARDOZO, THE GROWTH OF THE LAW 68 (1924), *quoted in* SOLAN, *supra* note 137.

140. SOLAN, *supra* note 137.

141. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 151 (4th ed. 1971), *quoted in* SOLAN, *supra* note 137, at 120.

142. SOLAN, *supra* note 137, at 120.

143. *Id.*

144. *See, e.g.*, William Lycan, *Representational Theories of Consciousness*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., 2023) https://plato.stanford.edu/archives/win2023/entries/consciousness-representational (last modified Oct. 19, 2023) (arguing for a representational theory of consciousness to explain how human consciousness arises from the objects around us).

conversations, previous conversations, and entire correspondence if their sense of fairness leads them to include that context.[145] For example, in a recent federal bench trial, a defendant sought to admit unredacted versions of the redacted correspondence produced by the plaintiff.[146] Without pausing to analyze whether the unredacted language explained or clarified the redacted portions, the judge simply ruled that any previously redacted portion could be admitted, to "adhere to the rule of completeness."[147] Noting that judges in bench trials are able to ignore "irrelevant evidence and evidence that may border on unfairly prejudicial" in a way that juries likely cannot,[148] the judge rightly distinguished the rule of completeness, a rule of fairness and inclusion, from FRE 403, a rule of exclusion. But the same distinction applies to jury trials too: whenever FRE 403 does not exclude a piece of completeness evidence, judges have broad discretion to include it out of their own sense of fairness.

After all, fair-minded judges will find a way to include evidence when fairness requires it.[149] Requiring a narrow standard, therefore, invites breaches of judicial candor: if judges are going to have to bend rules anyway, it would be better to give them the broad latitude to admit evidence.[150] Indeed, judges already have this broad power to render evidence *in*admissible out of a sense of fairness in the form of FRE 403, a powerful tool to exclude evidence at risk of creating substantial "unfair prejudice."[151]

145. *See* Cheng, et al., *supra* note 64, at 335 ("The rule of completeness, codified under Rule 106, for example, allows the admission of potentially inadmissible evidence for the purpose of correcting a misleading impression.").

146. Colo. Mont. Wyo. State Area Conf. of the NAACP v. Smith, No. 1:22-cv-00581-CNS-NRN, 2024 WL 2939163, at *6 (D. Colo. June 11, 2024) ("If either party attempts to introduce at trial redacted documents, the Court will allow the opposing party the opportunity to introduce the unredacted version (i.e., the complete version) of the document.").

147. *Id.*

148. *Id.* at *1.

149. *See* Cheng et al., *supra* note 64, at 299 (noting that judges regularly bend the rules of evidence whenever necessary to avoid "an untenable result.").

150. *See id.* at 333 (proposing a new, generalized residual exception for admissibility modeled on FRE 807).

151. FED. R. EVID. 403; *see also* Cheng et al., *supra* note 64, at 299 ("Notably, rule bending operates almost exclusively in favor of admitting evidence because courts already have a mechanism for excluding evidence when the circumstances are

On the other hand, the narrow standard, limiting completeness evidence to that which is relevant to "qualif[y] or explain[]" a previously admitted statement,[152] places an unnecessary burden on trial judges, often in the heat of trial, to explain how the completeness evidence *qualifies* or *explains* a previous statement—even if the judge actually believes that *fairness* alone justifies its admission.[153] Thus, only a broad standard of completeness allows judges to exercise their discretion with candor.

One formulation of the rule of completeness adopted by many federal circuits lists four purposes for the rule—three of which point to a broad standard:

> [FRE 106] permits a defendant to introduce the remainder of a statement not otherwise admissible only if it is 'necessary [1] to explain the admitted portion, [2] to *place* the admitted portion in *context*, [3] to *avoid misleading* the jury, or [4] to *ensure fair and impartial understanding* of the admitted portion.'[154]

This rule encompasses more than the narrow standard—"to explain the admitted portion"—by acknowledging three additional purposes for completeness evidence.[155] But even this formulation does not go far enough toward equipping judges to exercise the full breadth of FRE 106—to admit "any other part—or *any other statement*—that *in fairness* ought to be considered at the same time."[156] Rather, FRE 106 accords with FRE 611(a), charging judges with "exercis[ing]

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the reverse: Rule 403 and its state analogs permit courts to exclude probative evidence if its value is substantially outweighed by the risk of unfair prejudice.").

152. *E.g.*, United States v. Green, 83 F.4th 696, 704 (8th Cir. 2023).

153. *See* Lyon v. Batz, 42 Mo. App. 606, 616 (Mo. Ct. App. 1890) ("The [broad] rule . . . may not be logically correct, when subjected to the crucial test of a strict analysis, but it is certainly simple and easily understood, while the [narrow] rule . . . even though, logically, more correct, may embarrass judges when they seek practically to apply it.").

154. United States v. Gonzalez, 399 F. App'x 641, 645 (2d Cir. 2010) (emphasis added) (quoting United States v. Castro, 813 F.2d 571, 576 (2d Cir. 1987)); *see, e.g.*, U.S. v. Soures, 736 F.2d 87, 91 (3rd Cir. 1984); U.S. v. Velasco, 953 F.2d 1467, 1475 (7th Cir. 1992).

155. *Gonzalez*, 399 F. App'x at 645.

156. FED. R. EVID. 106 (emphasis added).

reasonable control" over evidence procedures to "make those procedures effective for determining the truth."[157] Thus, placing the rule of completeness under the umbrella of judicial discretion serves as a practical frame for adopting a broad standard of completeness.

V. CONCLUSION

Following the 2023 amendment to FRE 106 that expanded the rule's application nearly to the most liberal limits of its forebears, the common law history of the rule offers guidance into all that was once possible under the rule and can now be again. An early feature of the common law rule is the broad standard of the rule of completeness, which, though rarely discussed in scholarship and a minority view in U.S. courts, gives judges discretion to admit evidence for a broad spectrum of reasons, all in keeping with fairness. Whether the remainder of a statement is offered into evidence to explain the statement, to put the statement in context, to clarify the sequence of a conversation or event for the jury, or to otherwise ensure a fair understanding, any of those reasons could constitute a valid purpose in a judge's pursuit of fairness.[158]

This broad standard accords with a shift in evidence both toward a greater trust in juries to handle complex facts and toward greater control of judges over the ordering of evidence. Further, it is supported by a theory of waiver that is woven through the federal rules of evidence. Perhaps most crucially, this standard supports judicial candor in view of judges' pursuit of fairness, which leads them to bend rules when they become too restrictive.[159] This is the right time for state supreme courts to give the broad standard of completeness a fresh look.

157. FED. R. EVID. 611(a); *see also* Baker, *supra* note 1, at 301 (2018) (noting that Judge Posner also placed FRE 106 under the broad banner of judicial discretion in United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986)).

158. *Gonzalez*, 399 F. App'x at 645.

159. *See* Cheng et al., *supra* note 64, at 299.