No. 22-899

In the Supreme Court of the United States

JASON SMITH,
Petitioner,
v.
STATE OF ARIZONA,
Respondent.

On Writ of Certiorari to the
Court of Appeals of the State of Arizona, Division One

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TABLE OF CONTENTS

Page

A. The statements of the nontestifying forensic analyst introduced against Smith were testimonial. 3

B. The Confrontation Clause does not make an exception for an expert's basis evidence. 7

   1. The Rules of Evidence cannot limit the constitutional right of confrontation. 7

   2. There is no historical support for a categorical not-for-the-truth exception to the Confrontation Clause for an expert's basis evidence. 12

C. A proper application of the Confrontation Clause here would not upend expert testimony or pose an undue administrative burden 15

   1. The Confrontation Clause does not reach the vast majority of expert basis evidence. 16

   2. Practical realities and sensible procedural mechanisms limit any administrative burden. 19

D. The confrontation violation here was not harmless. 21

Table of Authorities

Page(s)

Cases

Barber v. *Page*,
390 U.S. 719 (1968) 19

Beckwith v. *Sydebotham*,
(1807) 170 Eng. Rep. 897 (K.B.) 14

Bullcoming v. *New Mexico*,
564 U.S. 647 (2011) 9, 15, 19

Carter v. *State*,
2 Ind. 617 (1851) 14

Crawford v. *Washington*,
541 U.S. 36 (2004) 3, 5, 8, 9, 12, 15–17

Davis v. *Washington*,
547 U.S. 813 (2006) 5, 6, 17

Folkes v. *Chadd*,
(1782) 99 Eng. Rep. 589 (K.B.) 13

Melendez-Diaz v. *Massachusetts*,
557 U.S. 305 (2009) 5, 9, 15, 17–19

Michigan v. *Bryant*,
562 U.S. 344 (2011) 4, 5

Ohio v. *Clark*,
576 U.S. 237 (2015) 4, 5, 6

Ohio v. *Roberts*,
448 U.S. 56 (1980) 3, 8, 9

People v. *Garton*,
412 P.3d 315 (Cal. 2018) 16

People v. *Goldstein*,
843 N.E.2d 727 (N.Y. 2005) 21

People v. *John*,
52 N.E.3d 1114 (N.Y. 2016) 20

People v. *Pushkarow*,
No. A148092, 2019 WL 1253659
(Cal. Ct. App. Mar. 19, 2019) 21

People v. *Sanchez*,
374 P.3d 320 (Cal. 2016) 17, 21

Samia v. *United States*,
599 U.S. 635 (2023) 12

State v. *Wood*,
53 N.H. 484 (1873) 14

Thornton v. *The Royal Exchange Assurance Co.*,
(1790) 170 Eng. Rep. 70 (K.B.) 13, 14

United States v. *Jackson*,
636 F.3d 687 (5th Cir. 2011) 21

Williams v. *Illinois*,
567 U.S. 50 (2012) 1, 2, 4-7, 10–12, 14, 17

Young v. *United States*,
63 A.3d 1033 (D.C. 2013) 16, 21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend VI 2, 3, 6–8, 11, 12, 14–21

RULES

Fed. R. Evid. 703 .... 2, 7–11, 13

Fed. R. Evid. 703
advisory committee's note to 2000 amendment 9, 12

Fed. R. Evid. 801(a) 16

OTHER AUTHORITIES

D. Kaye et al., *The New Wigmore: A Treatise on Evidence: Expert Evidence* (3d ed. 2022) 2, 10, 13

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The State concedes (Br. 20) that it used a substitute "expert" (Gregory Longoni) to present to the jury the out-of-court statements of the absent analyst Elizabeth Rast—the only person with firsthand knowledge of the testing of the alleged drug evidence against petitioner Jason Smith. The State does not dispute that it failed to demonstrate Rast's unavailability to testify, or that Smith had no opportunity to cross-examine her. Pet. Br. 26–29. Nor does the State attempt to defend the Arizona Court of Appeals' reasoning that it was Smith's obligation to subpoena Rast. *Id.* at 44–46. The State does attempt (Br. 39–50) to raise a new argument in this Court that Rast's statements were not testimonial. But it cannot overcome Smith's showing (Pet. Br. 18–23) that Rast's notes and report both were testimonial under the reasoning of a majority (if not all) of the Justices in *Williams* v. *Illinois*, 567 U.S. 50 (2012).

The State also embraces (Br. 11–39) the Court of Appeals' flawed reasoning that Rast's testimonial statements were not presented for the truth of the matters she asserted. But the State never plausibly explains how the jury could have understood those statements to have had any other purpose. Put differently, the State does not explain how the jury could have *rejected* the truth of Rast's statements and still accepted Longoni's testimony. That is why judges and legal commentators have repeatedly decried as "fictional" the idea that out-of-court statements underlying an expert's opinion are not offered for their truth when they support the expert's opinion only insofar as they are true. Pet. Br. 33–34; D. Kaye et al., *The New Wigmore: A Treatise on Evidence: Expert Evidence* § 5.4, pp. 272–274 (3d ed. 2022) ("*New Wigmore*"). And it is why the plurality in *Williams* recognized that it would be unrealistic to ask a jury like Smith's to hear out-of-court testimonial statements supporting an expert opinion and yet not take those statements for their truth. 567 U.S. at 72.

Remarkably, even the United States as amicus curiae does not defend the judgment below. But its proposal to have this Court simply vacate that judgment and remand for re-application of the Rules of Evidence stops far short of what the Confrontation Clause demands. Neither the State nor the United States offers any solution to the significant and recurring confrontation problem presented by substitute expert testimony, other than to suggest that trial judges may apply the balancing test of Federal Rule of Evidence 703 (or its state counterparts). That is little more than an invitation to return to a *Roberts*-era approach that "balances" the competing interests without focusing on whether out-of-court statements offered against an accused are testimonial—an approach that this Court rejected as incompatible with the Confrontation

Clause in *Crawford* v. *Washington*, 541 U.S. 36, 54–55, 61–62 (2004) (overruling *Ohio* v. *Roberts*, 448 U.S. 56 (1980)).

The State and the United States warn of an undue burden on criminal prosecutions, asserting that reversal of Smith's conviction here would mean that experts could no longer rely on others' work and that prosecutors would be forced to call "every person involved in a forensic test." U.S. Br. 7, 25; see State Br. 29–33. The governments' sky-will-fall arguments, however, mischaracterize Smith's position and ignore that the vast majority of experts' basis-of-opinion testimony does not involve *testimonial statements* implicating the Confrontation Clause at all. They also ignore the practical realities and procedural mechanisms that limit any administrative burden, as well as the empirical evidence showing that criminal prosecutions have not been significantly disrupted in those states that for years now have rejected the not-for-the-truth rationale for admitting an expert's basis evidence.

The judgment of the Arizona Court of Appeals should be reversed.

A. The statements of the nontestifying forensic analyst introduced against Smith were testimonial.

The State violated the Confrontation Clause when it used Longoni to convey Rast's testimonial statements to the jury without demonstrating that Rast was unavailable or affording Smith any opportunity to cross-examine her. The State cannot argue that it proved Rast's unavailability or that Smith had access to cross-examination, so it instead argues (Br. 39–50) that Rast's statements recounted by Longoni were not testimonial.

a. That argument is new in this Court; the State gave no hint in the proceedings below that it believed Rast's statements were anything but testimonial. The State cites only (Br. 39 n.14) a passing remark from its response to

Smith's petition for review in the Arizona Supreme Court noting that five Justices of this Court found the report at issue in *Williams* to be nontestimonial. But the State never argued below that Rast's statements failed to meet the tests articulated in *Williams*.

b. Regardless, the State's new position is wrong. The State contends (Br. 39–40) that Longoni recounted only Rast's notes (as opposed to her report), and that the notes are nontestimonial under a new test that the State formulates. The State observes (correctly) that a statement "procured with a primary purpose of creating an out-of-court substitute for trial testimony" qualifies as testimonial. *Id.* at 40 (quoting *Michigan* v. *Bryant*, 562 U.S. 344, 359 (2011); *Ohio* v. *Clark*, 576 U.S. 237, 245 (2015)). But then the State transforms that language into a new requirement that a testimonial statement must be "'quite plainly' an affidavit" or do "precisely what a witness does on direct examination." Br. 41 (citations omitted).

The State's argument is wrong both factually and legally. First, Longoni repeatedly referenced and asked to review *both* Rast's notes and report, indicating that he relied on both and treated them as a unit. See Pet. App. 39a–46a, 48a–50a. Longoni not only recounted Rast's statements in her notes about what she did and observed, but also recited verbatim Rast's conclusions *in her report* when he testified that the items Rast tested were a "usable quantity of marijuana," "a usable quantity of methamphetamine," and "a usable quantity of cannabis." Compare *id.* at 46a–47a, 49a, with *id.* at 86a–87a.

Second, and more fundamentally, this Court has not required an out-of-court statement to look and feel just like an affidavit or direct examination to be testimonial. When this Court referenced a "primary purpose of creating an out-of-court substitute for trial testimony," it

simply expressed another way of saying what the Court has oft emphasized: a testimonial statement must have a primary evidentiary purpose directed to "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." *Davis* v. *Washington*, 547 U.S. 813, 822 (2006); see also *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 309–310 (2009) (a statement has an evidentiary purpose when it is "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (quoting *Crawford*, 541 U.S. at 52)).

That is precisely the test the Court applied in *Bryant* to evaluate whether the statements there were testimonial. 562 U.S. at 357, 361, 366 (citing *Davis*, 547 U.S. at 822). Similarly, in *Clark*, the Court considered whether the statements there were "made with the primary purpose of creating evidence for [the defendant's] prosecution." 567 U.S. at 247. In *Williams*, the plurality and dissenting Justices likewise agreed that a testimonial statement must have an evidentiary purpose, although the plurality would have required that it also accuse a targeted individual. 567 U.S. at 97 (plurality op.); *id.* at 121, 135 (Kagan, J., dissenting).

Here, Rast's notes and report had a primary evidentiary purpose—one that specifically targeted and accused Smith—because her *sole* purpose in preparing them was to prove facts for use in Smith's prosecution. Pet. App. 127a. And Rast's statements served exactly that purpose at trial: Longoni conveyed Rast's statements from her documents *as evidence against Smith*, just as Rast would have done had she testified live. Pet. Br. 6–9.

The evidentiary purpose of Rast's notes was not undermined, as the State asserts (Br. 45), by the fact that she applied "a 'standard practice' at the DPS lab." That

was DPS's practice *for creating evidence* against an accused person like Smith; the fact that DPS might use the same practice for different purposes in other cases is irrelevant. Nor does it matter (State Br. 3, 46–47) that Rast used "shorthand and technical jargon" to memorialize her work. This Court rejected a similar argument in *Davis* that "the scope of the [Confrontation] Clause is limited to [a] very formal category" of documents akin to a sworn deposition, explaining that it was not "conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition." 547 U.S. at 826. It is similarly inconceivable that a policeman could evade confrontation by taking notes using shorthand that does not read like a direct examination. What matters is that the notes were prepared with the primary evidentiary purpose of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution," *id.* at 822, and in the *Williams* plurality's view, for accusing a targeted individual, 567 U.S. at 97. Rast's notes here indisputably had that purpose.

c. The State separately argues (Br. 48–51) that Rast's notes were not sufficiently formal and solemn to be testimonial under Justice Thomas's test. But that argument improperly disregards the formal nature of Rast's *process*. See Pet. Br. 22. As this Court explained in *Clark*, the formality or "informality *of the situation*" in which a statement is made is relevant to whether it is testimonial. 576 U.S. at 245 (emphasis added). Justice Thomas likewise emphasized that even statements that are not presented in formalized materials may "bear sufficient indicia of solemnity" to be testimonial "if they were obtained in 'a formalized dialogue.'" *Id.* at 255 (Thomas, J., concurring).

The context in which Rast prepared her notes and report here is significant. As Smith explained (Br. 21), the State expressly requested the testing that Rast performed, noting in its request that "[t]rial ha[d] been set" in Smith's case. Pet. App. 127a. The State's attorney also coordinated with Rast on the testing, including by providing input on which items to test. *Id.* at 99a. Thus, unlike the report in *Williams* that Justice Thomas found to be nontestimonial, Rast's notes and report resemble a "formalized dialogue" in which she prepared statements at the State's prompting to support Smith's prosecution. And Rast fully understood that she was preparing those statements as an integral part of the State's coercive machinery. That she used "shorthand and technical jargon" common to her work in her notes is irrelevant. The formalized circumstances of accusing a criminal defendant, coupled with the formal process by which Rast undertook her analyses, noted her observations, prepared her materials on official DPS letterhead, and signed each page of her report, all underscore the solemnity of her statements. Pet. Br. 21.

B. The Confrontation Clause does not make an exception for an expert's basis evidence.

1. The Rules of Evidence cannot limit the constitutional right of confrontation.

The State and the United States embrace the Arizona Court of Appeals' flawed rationale that when the prosecution purports to offer an expert's basis evidence not for its truth under Federal Rule of Evidence Rule 703 (or its state counterparts), it is categorically excluded from the Confrontation Clause. State Br. 20; U.S. Br. 19. They propose that the confrontation problem posed by a substitute expert should be left to trial judges to resolve by applying the Rules of Evidence. State Br. 19; U.S. Br. 19, 22. A trial

judge, they say, would apply those rules to "ensure" that a substitute expert's opinions are "methodologically sound" and that "any disclosure of otherwise inadmissible facts or data underlying [the] expert's opinion are not presented for their truth." U.S. Br. 17, 19 (capitalizations removed); see State Br. 19.

a. Those arguments embody the same *Roberts*-era deference to evidentiary rules that this Court disavowed in *Crawford*. 541 U.S. at 54–55, 60. Under *Roberts*, the admission of an out-of-court statement, even one that was testimonial, complied with the Confrontation Clause so long as it fell within a "firmly rooted hearsay exception" or carried "particularized guarantees of trustworthiness." *Crawford*, 541 U.S. at 60 (quoting *Roberts*, 448 U.S. at 66). This Court rejected that approach in *Crawford*, admonishing that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* at 61. "Reliability is an amorphous, if not entirely subjective, concept," the Court explained, and "[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them." *Id.* at 63. "By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design." *Id.* at 68–69.

The approach advocated by the State and the United States here invites the same violence by "balancing" competing interests without focusing on whether out-of-court statements offered against an accused are testimonial. A trial judge applying Rule 703 without the more specific command of the Sixth Amendment could easily admit through a substitute expert the very same testimonial reports that this Court held to violate the Confrontation

Clause in *Melendez-Diaz*, 557 U.S. at 311, and *Bullcoming* v. *New Mexico*, 564 U.S. 647, 661–662 (2011). Cf. *Crawford*, 541 U.S. at 63 (the "unpardonable vice of the *Roberts* test" was "its demonstrated capacity to admit core testimonial statements"). All a judge would need to do is "determine[ ] that [those reports'] probative value 'in helping the jury evaluate the opinion' substantially outweighs their prejudicial effect." U.S. Br. 19 (quoting Fed. R. Evid. 703). As Smith explained (Br. 37), that is no hypothetical concern because some lower courts (including Arizona's) already have countenanced admitting absent analysts' testimonial statements, including their reports and bottom-line opinions, through substitute experts.

b. The State and the United States also are wrong that Rule 703 is "designed so that any otherwise inadmissible facts or data that might inform an expert's opinion are 'admissible only for the purpose of assisting the jury in evaluating [that] opinion,' not for proving that the facts or data are themselves true." U.S. Br. 19 (quoting Fed. R. Evid. 703 advisory committee's note to 2000 amendment ("2000 Notes")); see State Br. 18. To be sure, Rule 703 often is used to admit hearsay statements on which an expert relies. But the admission of hearsay statements under the rule is *not* premised on the notion that the statements are not offered for their truth (and the rule itself contains no such language). Quite the opposite, Rule 703 presumes that such statements *are* offered for their truth and thus amount to hearsay that "would otherwise be inadmissible." Fed. R. Evid 703. Their admission under Rule 703 is instead premised on the judge's application of the rule's balancing test to determine that "their probative value … substantially outweighs their prejudicial effect." *Ibid.*

In other words, Rule 703 functions as "a hearsay exception, allowing some out-of-court statements to be admitted in effect *for the truth of what they assert*." Friedman Amicus Br. 16 (emphasis added). But whatever utility Rule 703 may have in various trial contexts, when applied to testimonial statements offered against an accused, its "balancing test is no substitute for a constitutional provision that has already struck the balance in favor of the accused." *Williams*, 567 U.S. at 110 (Thomas, J., concurring) (citation omitted).

c. Logic, too, undermines the governments' assertions that an expert's basis evidence admitted under Rule 703 is not offered for its truth. Jurists and legal commentators agree that when an out-of-court statement that is introduced to explain the basis of an expert's opinion would support that opinion only insofar as it is true, it is legal fiction to suppose that the statement is not offered for its truth. Pet. Br. 32–34; Friedman Amicus Br. 6–9. And as the *Williams* plurality recognized, it is especially unrealistic to expect a jury to understand that fiction. 567 U.S. at 72. That is because, to use such a statement in "evaluating the expert's testimony, the jury generally must make a preliminary judgment about whether this information is true." *New Wigmore* § 5.4.1, p. 271.

Smith's case forcefully demonstrates the point. The State concedes (Br. 20) that "Longoni disclosed … Rast's statements about which tests she performed and that she followed DPS lab policies and procedures." Longoni moreover disclosed Rast's statements that she performed those tests on the particular evidence *in Smith's case*. But the State does not explain how the jury could have plausibly understood those statements to have had any probative value other than for the truth of what Rast asserted—namely, that Rast in fact performed those specific tests on

the relevant evidence and followed lab policies and procedures. "If … true, then the conclusion based on [them] is probably true; if not, not." *Williams*, 567 U.S. at 126 (Kagan, J., dissenting).

The State repeatedly characterizes (Br. 23–26) Longoni's purported opinions as "independent" but does not explain how that affects whether Longoni conveyed Rast's testimonial statements to the jury for their truth in violation of the Confrontation Clause. The "independent" characterization derives merely from how the prosecutor carefully framed his questions to ask Longoni for his "independent opinion." Pet. App. 46a–47a, 49a. Were that sufficient, any skilled prosecutor could evade confrontation simply by framing questions to elicit an "independent opinion." It also is doubtful that Longoni truly exercised any independent judgment when he took Rast's factual statements and presented them as his own opinions. But even assuming that Longoni independently reached the same opinions as Rast based on the same facts, his opinions were not independent of *Rast's statements of those facts*, which he conveyed to the jury for their truth to support his opinions. Friedman Amicus Br. 10–12.

That is not to suggest that an expert's basis evidence could never be offered for reasons other than its truth. For example, an expert in a fraud case might opine that a defendant's assertions were misleading based on statements made to the expert by the targets of those assertions that indicate they were misled. In referencing those underlying statements, the expert would not be offering them for the truth of what they assert. Friedman Amicus Br. 8. But circumstances like those do not support a categorical rule that *all* basis evidence admitted under Rule 703 is not offered for its truth and thus is insulated from the Confrontation Clause.

d. Furthermore, it makes no difference that a judge might "give a limiting instruction upon request, informing the jury that the underlying information must *not* be used for substantive purposes." U.S. Br. 19–20 (quoting 2000 Notes); see State Br. 19. A limiting instruction presumes that a testimonial statement was introduced (and can be understood by the jury) for something *other* than its truth—which is the very proposition that the State has not established here. See *Williams*, 567 U.S. at 105 (Thomas, J. concurring) (explaining that there must be a "*legitimate*, nonhearsay purpose" to apply the not-for-the-truth rationale (citation omitted)). If the statement *is* introduced for its truth, such as when it would support an expert's opinion only insofar as it is true, then it would defy logic and common sense to instruct a jury *not* to consider it for its truth. A limiting instruction in those circumstances would not cure the confrontation violation.

2. There is no historical support for a categorical not-for-the-truth exception to the Confrontation Clause for an expert's basis evidence.

Neither the State nor the United States identifies any support from "the time of the founding" for the admission of out-of-court testimonial statements against an accused through an expert. *Crawford*, 541 U.S. at 54 (citation omitted); see also *Samia* v. *United States*, 599 U.S. 635, 655 (2023) (Barrett, J., concurring) (the relevant historical context is from the time of the founding).

a. The United States acknowledged in *Williams* that "Professor Friedman correctly observes that experts were not traditionally permitted to base opinions on inadmissible hearsay." Brief for the United States as Amicus Curiae, *Williams*, 567 U.S. 50 (2012) (No. 10-8505), 2011 WL 5094932, at *16 n.4. And as Professor Friedman explains here (Amicus Br. 4), consistent with leading

evidence treatises and legal scholarship, "Rule 703 is an innovation of the 20th century, … recognized at the time of its creation to be a departure from traditional principles." See also Pet. Br. 29–31. The rule in fact "marked a substantial expansion of the permitted basis for expert testimony" that "dramatically transformed expert evidence." *New Wigmore* § 4.6, pp. 194–195.

b. The United States tries to downplay (Br. 16) the fundamental change that Rule 703 introduced but concedes that the practice of permitting experts to base opinions on inadmissible hearsay was at most "originally a minority approach in American jurisdictions." It cites two civil (not criminal) cases from before the ratification of the Bill of Rights in 1791 to suggest that "[e]arly common law implicitly recognized that expert testimony … often would be based on information made known to the expert by others." U.S. Br. 13. Neither case addressed a defendant's confrontation right, much less lends support for a categorical exception to that right.

In *Folkes* v. *Chadd*, (1782) 99 Eng. Rep. 589 (K.B.) 591 n.(b), a trespass case about a harbor, the court held that a "m[a]n of science" could testify based in part on "facts which are not disputed [about] the situation of [harbor] banks, the course of tides, and of winds." The United States acknowledges (Br. 14) that the expert there visited the harbor himself but speculates that he must have researched the writings and reports of others. Even if that were so, such writings and reports would not have been testimonial, and nothing in the decision suggests that the expert conveyed any out-of-court statements from those materials, let alone testimonial statements.

Likewise, in *Thornton* v. *The Royal Exchange Assurance Co.*, (1790) 170 Eng. Rep. 70 (K.B.), the court allowed an "eminent shipbuilder" to opine on the seaworthiness of

a vessel based on a "survey" of the ship that had been performed by another person. But the decision nowhere suggests that the expert introduced out-of-court statements by the individual who did the survey or that those statements were testimonial.

The United States also cites a handful of post-1791 cases for the proposition that allowing experts to rely on inadmissible hearsay was at least a minority view. U.S. Br. 14–16. Among those, only *Beckwith* v. *Sydebotham*, (1807) 170 Eng. Rep. 897 (K.B.), may have involved statements that could be characterized as testimonial (a sworn *ex parte* deposition), but that civil case notably did not implicate an accused's confrontation right. And as Justice Thomas observed in *Williams*, *Beckwith* was decided "after the ratification of the Confrontation Clause, and this form of expert testimony does not appear to have been a common feature of early American evidentiary practice." 567 U.S. at 107 n.2 (Thomas, J., concurring).

Only two of the United States' cited cases are criminal cases, both from the latter half of the 19th century, and in neither was an expert permitted to recount testimonial hearsay. See *State* v. *Wood*, 53 N.H. 484, 495 (1873) (physician permitted to testify to cause of death based on study of "books alone"); *Carter* v. *State*, 2 Ind. 617, 619 (1851) (physician permitted to testify about poison's effect on "the human system[] from information derived from the writings of standard authors on the subject").

In short, there is no historical support for a categorical exception to the Confrontation Clause for an expert's basis testimony.

C. A proper application of the Confrontation Clause here would not upend expert testimony or pose an undue administrative burden.

Warning of a "sea change" and an undue burden on criminal prosecutions, the State and its amici argue that finding a confrontation violation here would mean that experts no longer would be able to "rely on the work of others who do not testify" and that "every person involved in a forensic test must testify." State Br. 29–32; U.S. Br. 7, 25. They suggest that experts would be unable to rely on even X-rays or MRIs. State Br. 17, 30; U.S. Br. 21–22, 25.

Those sky-will-fall arguments "largely repeat[] a refrain rehearsed and rejected" by this Court in *Bullcoming*, 564 U.S. at 665, and *Melendez-Diaz*, 557 U.S. at 325–328. As the Court has observed, the Confrontation Clause, like the right to trial by jury and the privilege against self-incrimination, "may make the prosecution of criminals more burdensome," but it is nonetheless "binding" and "may not [be] disregard[ed] … at our convenience." *Melendez-Diaz*, 557 U.S. at 325. And the oft-repeated "predictions of dire consequences … are dubious" at best. *Bullcoming*, 564 U.S. at 665.

Further, the State and its amici mischaracterize Smith's position and attack a strawman. The Confrontation Clause does not categorically demand that every analyst involved in a forensic test must testify, and this case does not invite such a rule. It also is well established that the Clause applies only to testimonial statements. *Crawford*, 541 U.S. at 51–52. Those constraints, along with practical considerations, limit any administrative burden, and they explain why criminal prosecutions have not been adversely affected even in the states that have rejected a not-for-the-truth exception for admitting an expert's basis evidence.

1. The Confrontation Clause does not reach the vast majority of expert basis evidence.

The Confrontation Clause does not apply to all evidence or even all statements, but only to certain hearsay statements that qualify as testimonial. *Crawford*, 541 U.S. at 51–52. Those fundamental limitations prevent the Clause from reaching the vast majority of expert evidence of the sort the State and its amici highlight.

a. That the Confrontation Clause is confined to *statements* is itself significant because much of what experts rely on are not statements. Even as broadly defined under modern evidence rules, a "'[s]tatement' means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Fed. R. Evid. 801(a). Thus, physical evidence such as fingerprints, DNA recovered from a crime, photographs, X-rays, and MRI scans are not statements at all. See *People* v. *Garton*, 412 P.3d 315, 506 (Cal. 2018) (reasoning that autopsy photographs and X-rays are not statements).

Likewise, raw data such as charts and graphs generated by lab instruments during a forensic test are themselves unlikely to comprise statements. But importantly, raw data may be (and often are) accompanied by statements (in reports or otherwise) linking those data to case-specific facts that could implicate the Confrontation Clause. See *Young* v. *United States*, 63 A.3d 1033, 1047 (D.C. 2013) (explaining that raw data may be accompanied by statements that analysts properly performed tests on the correct evidence).* "What an expert *cannot* do is

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* For example, the GC-MS graphs appended to Rast's notes are not statements themselves. But Rast's notations in the graphs that identify the samples she tested and the remarks in her notes describing what she did and observed are. Also, Rast's observations and

relate as true case-specific facts asserted in hearsay statements." *People* v. *Sanchez*, 374 P.3d 320, 334 (Cal. 2016).

b. The Confrontation Clause is further limited in that it applies only to statements that are "testimonial." *Crawford*, 541 U.S. at 51–52. As noted above, despite the Justices' differing views in *Williams*, the plurality and dissenting Justices agreed that a testimonial statement must have a primary evidentiary purpose of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution," with the plurality adding that it must accuse a targeted individual. 567 U.S. at 97 (plurality op.) (quoting *Davis*, 547 U.S. at 822); *id.* at 135 (Kagan, J., dissenting) (same).

Regardless of the particular formulation, the Clause's focus on testimonial statements dispenses with much of the State's and its amici's hyperbole. Experts are free to testify based on their general experience and knowledge, even if "learned by perusing … reports in books and journals," because such materials have no evidentiary purpose and are nontestimonial. U.S. Br. 13 (citation omitted). Likewise, most statements in "[b]usiness and public records" and "medical reports created for treatment purposes" lack an evidentiary purpose and thus are nontestimonial. *Melendez-Diaz*, 557 U.S. at 312 n.2, 324. Statements by technicians who perform X-rays and MRIs for treatment purposes, for example, will almost always be nontestimonial. And similarly, "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." *Id.* at 311 n.1.

c. Although Smith's case involves only one analyst and the Court need not address a multi-analyst scenario, the requirement of a testimonial statement also alleviates

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conclusions from her color tests and microscopic examinations are her written statements, not raw data. Pet. Br. 25.

the concern that "every person involved in a forensic test must testify." U.S. Br. 7. As the Court explained in *Melendez-Diaz*, "it is not the case" that "everyone who laid hands on the evidence" or "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." 557 U.S. at 311 n.1. "It is up to the prosecution to decide what steps" are "so crucial as to require evidence." *Ibid.* Critically, however, "what testimony *is* introduced must (if the defendant objects) be introduced live." *Ibid.* Thus, when multiple analysts are involved in a test, the prosecution need only make available those analysts whose testimonial statements it introduces.

To illustrate, the reason the Confrontation Clause demanded that the State make Rast available for cross-examination was not simply because she was "involved" in the underlying tests but because the State *introduced her testimonial statements* through Longoni. The State could have had Longoni testify generally that certain data he reviewed in the abstract reflected the presence of illicit drugs without revealing Rast's statements about what she did to generate those data. But recognizing that it needed to link those data to Smith to prove its case, the State had Longoni recount from Rast's notes and report that she performed specific tests on the evidence in Smith's case using proper procedures. Pet. Br. 7–9. That the State saw the need to do so only underscores that Rast's out-of-court statements were offered for their truth and as a critical part of the evidence against Smith. When the State made Rast a witness against Smith, it triggered his constitutional right to be confronted with her.

2. Practical realities and sensible procedural mechanisms limit any administrative burden.

"Perhaps the best indication that the sky will not fall … is that it has not done so already." *Melendez-Diaz*, 557 U.S. at 325. As noted, similar predictions of dire consequences and undue burdens were made more than a decade ago in *Melendez-Diaz*, *id.* at 328, and *Bullcoming*, 564 U.S. at 665. But those predictions never came to pass, and there are good reasons why they will not here.

a. Many states already require confrontation with the analyst who authored a testimonial statement that is introduced in court or have adopted notice-and-demand procedures, and those states have had no trouble prosecuting criminal offenses. NACDL Amicus Br. 5–9. That is not surprising given that fewer than 3% of state and federal criminal cases go to trial, while the rest overwhelmingly are resolved through pleas. *Melendez-Diaz*, 557 U.S. at 325; NACDL Amicus Br. 10–11.

Of course, the prosecution need not present forensic evidence in each case that is tried. In some cases, forensic evidence is unnecessary to prove the charges; in others, defendants stipulate to its admission or waive their right to cross-examine the testing analyst. Indeed, live analyst testimony may "highlight rather than cast doubt upon the forensic analysis." *Melendez-Diaz*, 557 U.S. at 328. Thus, stipulations and waivers have remained regular practices even as Confrontation Clause case law has evolved. NACDL Amicus Br. 13–14.

Among the few cases that do go to trial and require forensic evidence, fewer still involve scenarios where the testing analyst is truly unavailable to be called by the prosecution despite a "good-faith effort to obtain [the analyst's] presence at trial," such as through a continuance or subpoena. *Barber* v. *Page*, 390 U.S. 719, 724–725

(1968). And even in that veritably small fraction of cases, as explained above, much of the evidence is unlikely to amount to testimonial statements. Where testimonial statements *are* implicated, the expert may be able to retest the relevant substances or point to other nontestimonial evidence as support.

Those realities hold true even in drug-related and DUI cases, which most often involve forensic evidence. In 2022, for example, 97.9% of drug-trafficking cases and 99% of drug-possession cases across the federal system and 98% of DUI and felony drug cases in New York were resolved without trial. NACDL Amicus Br. 12. And nearly a decade of data from California's judicial system shows that there was no drop in the rates of prosecutions, pleas, or dismissals after that state adopted substantially the same rule petitioner proposes here. ACPD Amicus Br. 11–13. The statistics are similar in other jurisdictions. NACDL Amicus Br. 8–9, 11–12.

b. The State and the United States downplay the practical experience of jurisdictions like California and New York that have rejected the not-for-the-truth rationale and cite two cases to suggest that those jurisdictions continue to "permit experts to testify based on lab work completed by others." U.S. Br. 30; see State Br. 33–34. That misses the point. As explained above, the Confrontation Clause does not prohibit experts from relying on others' work. What experts cannot do is convey others' testimonial statements for their truth. While the governments' cited cases contemplate experts relying on others' work, they expressly recognize that California and New York law forecloses the not-for-the-truth rationale for admitting an expert's basis evidence. *People* v. *Pushkarow*, No. A148092, 2019 WL 1253659, at *4 (Cal. Ct. App. Mar. 19, 2019) (citing *Sanchez*, 374 P.3d at 333); *People* v. *John*,

52 N.E.3d 1114, 1121 (N.Y. 2016) (citing *People* v. *Goldstein*, 843 N.E.2d 727, 732–735 (N.Y. 2005)).

D. The confrontation violation here was not harmless.

Because the State relied extensively on Rast's testimony (introduced through Longoni) both "[i]n its case in chief and its closing argument," it cannot "conclusively show that the tainted evidence did not contribute" to Smith's convictions such that the Confrontation Clause error could be harmless beyond a reasonable doubt. *United States* v. *Jackson*, 636 F.3d 687, 697 (5th Cir. 2011) (citation omitted); see Pet. App 64a–65a, 83a (State's closing argument emphasizing Longoni's testimony to prove identity of alleged drug evidence). Even now, the State does not dispute that Longoni's testimony provided the *only* evidence at trial that any alleged drugs comprised cannabis or methamphetamine. See State Br. 51.

Nonetheless, the State proposes (Br. 50) that if the Court finds error here, it should remand for consideration of harmlessness. And the State previews how it would evade the Confrontation Clause on remand: it says (Br. 51) that any error in admitting Rast's underlying statements was harmless so long as "Longoni's ultimate opinions were properly admitted." This Court should reject that proposition, which would gut the confrontation right whenever an expert purports to offer an independent opinion, regardless of whether the expert conveys others' testimonial statements to support that opinion. Longoni's purported opinions here were meaningless without Rast's statements, which provided the only evidence at trial that Rast properly tested the relevant substances in Smith's case. It thus "would 'require an impossible feat of mental gymnastics' to 'disaggregate' [Longoni's] own non-hearsay conclusions from the interwoven hearsay on which [he] relied." *Young*, 63 A.3d at 1048 (citation omitted).

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The judgment of the Arizona Court of Appeals should be reversed.

Respectfully submitted,

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