No. _____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

CHRISTOPHER MILLICAN,
*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

# PETITION FOR WRIT OF CERTIORARI

KRISTI A. HUGHES
Law Office of Kristi A. Hughes
P.O. Box 141
Cardiff, California 92007
Telephone: (858) 215-3520

*Counsel for Petitioner*

## QUESTION PRESENTED

Whether the Confrontation Clause allows the admission at trial—without confrontation of the declarant—of documents created in response to a search warrant that are signed under penalty of perjury, that identify Petitioner as the suspect, that contain the same statement the declarant would make if called to testify, and that are used by the prosecution to identify Petitioner as the person who committed the offense.

## PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

## RELATED PROCEEDINGS

- *United States v. Christopher Jeorge Millican*, No. 20-cr-00040, U.S. District Court for the Eastern District of California. Judgment entered December 16, 2022.
- *United States of America v. Christopher Jeorge Millican*, No. 22-10336, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Oct. 8, 2024.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Millican respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINION BELOW

The unpublished memorandum disposition of the United States Court of Appeals is reproduced in the Appendix. *See* Pet. App.-2.

## JURISDICTION

Petitioner was convicted in United States District Court for the Eastern District of California for violations of 18 U.S.C. § 2251(a), (e), and 18 U.S.C. § 2252(a)(2). The United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment on October 8, 2024. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him.

U.S. Const. amend. VI.

## STATEMENT OF THE CASE

1. Petitioner, a married Navy servicemember with two young children, was investigated during his eight-month overseas deployment for receiving sexually explicit images of minors, and he was eventually charged with sexual exploitation of a minor, *see* 18 U.S.C. § 2251(a), and receiving a visual depiction of a minor engaged in sexually explicit conduct, *see* 18 U.S.C. § 2252(a)(2). The government alleged that Petitioner had used Snapchat—a social media app that allows users to send and receive photos and videos that disappear after viewing—to chat with underaged minors and solicit sexually explicit photos from them.

2. At trial, Petitioner's defense was that he was not the person responsible for soliciting or receiving the sexually explicit images. For instance, he argued that others could have accessed his Snapchat account or internet network, and pointed out that Snapchat allowed users to sign up for and use its service anonymously.

On this issue, the government called a law enforcement witness who described the investigation into Petitioner. He testified that the investigation began when Snapchat provided law enforcement with a "cybertip." In the cybertip, Snapchat turned over 25 prohibited images, alleged that user "tf15460" was responsible for the images, and listed an IP address that Snapchat asserted was linked to the tf15460 Snapchat account.

After receiving this cybertip, law enforcement served a subpoena on Snapchat and Comcast, the Internet company responsible for the identified IP address. From Snapchat, law enforcement sought content and user data from the tf15460 user

account, and from Comcast, it sought the subscriber information for the identified IP address.

A law enforcement witness introduced the companies' search-warrant responses at trial, over Petitioner's hearsay objection. Snapchat's response, which came from "Snap. Inc. Law Enforcement Operations," and was printed on its letterhead, stated that Snapchat conducted a "diligent search for documents and information" on its systems to find information responsive to the search warrant. The response was made "in accordance with state and federal law," and included a certificate signed by an employee under penalty of perjury. The employee averred that the Snapchat username tf15460 was associated with the identified IP address, that it used a specific email address, and that the user logged in and out of Snapchat on specific dates and times that corresponded with when the sexually explicit images were sent. The employee who drafted this response stated that she had personal knowledge of these facts and "could testify competently thereto if called as a witness."

For its part, Comcast submitted a document from its Legal Response Center, printed on company letterhead, signed by an employee under penalty of perjury, and notarized. The response stated that the identified IP address was subscribed to Petitioner at his address on the naval base, and that the account was created and disconnected on specific dates.

The prosecution relied on the Snapchat and Comcast search-warrant responses to establish that Petitioner was responsible for the sexually-explicit images. For instance, after Petitioner highlighted during cross-examination that the

Snapchat and Comcast records didn't establish whether any particular individual was using the Snapchat account at a particular time, the government on re-direct returned to the Comcast search-warrant response to underscore that Petitioner was responsible for the sexually explicit activity. It asked the law enforcement witness to explain who was assigned the IP address at issue and at which address, with the officer responding, "It was [Petitioner]," and citing Petitioner's address on the Lemoore Naval base, as provided in the search-warrant responses. Later, during closing the government explained it was "important to understand who committed the offense," and argued that the sexually explicit materials were received and saved in "the defendant's Snapchat account," relying on the Comcast search-warrant response. It claimed that Comcast's statement showed "that IP address at that time was assigned to the account holder Christopher Millican, that's this defendant, at 2900 Skyraider Court, Apartment B in Lemoore."

The government also pointed to the Snapchat response showing Petitioner's subscriber information and IP login information, arguing that it showed this was the "same IP address that had been associated with the Comcast account in [Petitioner's] name." In other words, the government used the search-warrant responses to trace the Snapchat account, which had no subscriber name or address, back to Petitioner's Comcast account, which had his name and address associated with it, and then argue to the jury that Petitioner was the one responsible for the images.

Ultimately, Petitioner was convicted and sentenced to a total term of 570 months in custody—consecutive terms of the statutory maximum of 360 months for sexual exploitation of a minor, and 210 months (slightly below the 240-month statutory maximum) for receiving child pornography.

3. Petitioner appealed to the Ninth Circuit Court of Appeals, arguing, in part, that the introduction of the Snapchat and Comcast search-warrant returns through the law enforcement witness—instead of the declarants who authored the responses—violated his constitutional right to confrontation. The Ninth Circuit, reviewing for plain error, found that "the data produced by Snapchat and Comcast were hearsay excepted business records kept in the ordinary course of business." *See* App-4. "The creation and preservation of records of messages and images sent between accounts by Snapchat, as well as IP address information by Comcast, was not done for the primary purpose of being used in a later criminal prosecution," so the search-warrant responses were not testimonial, the court reasoned. *See* App-5. Accordingly, there was no violation of the Confrontation Clause.

## REASONS FOR GRANTING THE PETITION

The admission of the search-warrant responses, in place of testimony from the company employees who prepared the responses, violated Petitioner's right to confrontation. In its decision affirming Petitioner's conviction, the Ninth Circuit not only ignored this Court's caselaw on the Confrontation Clause, but it also issued a decision in direct conflict with another court of appeals. Given the government's increasing reliance on Internet records to prove its cases, this Petition presents an important, and recurring, issue. The issue was fully briefed and addressed by the Ninth Circuit, and this Petition presents an ideal vehicle to resolve the question presented.

### I. The decision below conflicts with this Court's precedents.

The Sixth Amendment's Confrontation Clause confers upon defendants in "all criminal prosecutions, … the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. It has been twenty years since this Court decided *Crawford v. Washington* and reaffirmed that the Confrontation Clause governed out-of-court statements, required cross-examination to test reliability, and only applies to "testimonial" hearsay statements. 541 U.S. 36, 51-52 (2004). *Crawford* began the process of defining "testimonial," explaining that it applied to a "core class" of statements:

- "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial interrogations, prior testimony

that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."

- "extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and
- "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

*Id.* at 51-52.

Since *Crawford* the Court has continued to fine-tune its analysis of when documents satisfy the definition of "testimonial" and are thus subject to cross-examination as a requirement for admission. And in each instance, the Court has reaffirmed that sworn out-of-court statements made for the purpose of proving a fact are within the core class of testimonial statements.

So, for instance, in *Melendez-Diaz v. Massachusetts*, the Court extended the Confrontation Clause's protections to forensic reports. 557 U.S. 305 (2009). It explained that "certificates"—solemn declarations or affirmations made for the purpose of establishing or proving some fact—were testimonial, as they were functionally identical to live, in-court testimony, and did "precisely what a witness does on direct examination." *Id.* at 310-11. Two years later, in *Bullcoming v. New Mexico*, the Court reached the "inescapable" conclusion that a "document created

solely for an 'evidentiary purpose,' … made in aid of a police investigation, ranks as testimonial"—even if the document is unsworn. 564 U.S. 647, 664-65 (2011). Given this, the Court held, the state could not introduce one lab analyst's written findings through the testimony of another. *See id.* at 651-52.

And just last term, in *Smith v. Arizona*, the Court again reaffirmed that the prosecution may not rely on surrogate testimony about testimonial hearsay to substitute for the declarant's live, in-court testimony. 144 S. Ct. 1785 (2024). The Court held that the prosecution cannot try to avoid the Confrontation Clause's requirements by claiming the statement was not admitted "for the truth of the matter asserted." 144 S. Ct. 1785 (2024). The Court rejected the prosecution's argument that the Confrontation Clause was not offended when a lab analyst testified at trial about another, unavailable lab analyst's testing and conclusions contained in a lab report. *Id.* at 1796. Because the declarant lab analyst's statements—contained in a report concluding that the defendant possessed marijuana and methamphetamine—were admitted for their truth, the lab analyst who performed the tests and authored the report had to testify. *See id.* at 1800. It was an "end run" around the Confrontation Clause to allow a witness to testify in court about another analyst's out-of-court statements, whose accuracy and truth "propped up the whole case." *See id.*

Despite these precedents requiring the declarant to testify about forensic evidence when the declarant's out-of-court statement is admitted for its truth and is testimonial, the Ninth Circuit in Petitioner's case affirmed the admission of the search-warrant responses through a law enforcement witness. The Ninth Circuit's

decision conflicts with this Court's precedents on both of the relevant issues here—whether the search-warrant responses contained statements that were hearsay, and whether the statements were testimonial.

On the first question, under this Court's precedents, both search-warrant responses contained hearsay statements. The Comcast search-warrant response contained assertions by a declarant that the "tf15460" username was associated with a particular subscriber name, physical address in Lemoore, and IP address. And the Snapchat search-warrant response contained similar assertions that the "tf15460" username was associated with a particular email address and IP address, and that it logged in and out of Snapchat on specific dates and times. These assertions were admitted for their truth: to establish that the "tf15460" username was subscribed to Petitioner at the naval base address in Lemoore where he lived, that the IP address used to access the "tf15460" Snapchat account was the same one that was subscribed to Petitioner's name and address on base, and even that the username had logged into Snapchat on certain dates and times. After all, if these facts weren't true, there was no point in admitting them, as there would be no link between Petitioner and the data in the Snapchat account. Indeed, during closing the prosecution, explaining that it was "important to understand who committed the offense," relied on the Comcast search-warrant response to point to Petitioner, as the Comcast response showed "that IP address at that time was assigned to the account holder Christopher Millican, that's this defendant, at 2900 Skyraider Court, Apartment B in Lemoore."

As the Court explained in *Smith*, if the lab analyst authoring the report had lied about the lab results, there would be no case. *See* 144 S. Ct. at 1799-1800. Similarly here, if the Snapchat and Comcast data didn't link Petitioner to the sexually explicit photographs sent over Snapchat, there was no case against him. The "truth of the statements" admitted by the prosecution "propped up [the prosecution's] whole case," *see Smith*, *id.* at 1800, and were admitted for their truth.

On the question of whether the search-warrant responses were testimonial, this Court's precedents also establish that they were. The Court held in *Bullcoming* that a "document created solely for an 'evidentiary purpose,' …made in aid of a police investigation, ranks as testimonial." 564 U.S. at 664. Both search-warrant responses meet this definition. The search-warrant responses were drafted to reply to a law enforcement search warrant, and each company referenced the warrant in its response, indicating the declarants knew they were aiding a police investigation and serving an evidentiary purpose. Both responses provided information about the "tf15460" user, who was known to be suspected of receiving child pornography images. And each search-warrant response was provided after the companies searched their records for information responsive to the search warrant. Snapchat, in fact, said it "conducted a diligent search for documents and information" that was responsive to the warrant. This underscores that the responses were to prove "past events potentially relevant to a later criminal prosecution," *Bullcoming*, 564 U.S. at 659 n.6, and "under circumstances that would lead one to reasonably believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52.

Further, this Court has repeatedly held that the formality of the statement is a factor considered in determining whether it is "testimonial." *See Bullcoming*, 564 U.S. at 665; *Crawford*, 541 U.S. at 51-52 ("extrajudicial statements contained in formalized testimonial materials, such as affidavits" are in the "core class" of testimonial statements) (cleaned up). The search-warrant responses were formalized statements: each was contained on company letterhead; came from the companies' respective legal departments (Comcast's from its "Legal Response Center" and Snapchat's from "Snap Inc. Law Enforcement Operations"); and contained a certificate signed under penalty of perjury. Comcast's certificate was even notarized. The formality of these responses indicates each company knew that it was providing evidence against an accused as part of a criminal prosecution and that the statement would likely be available for use at a later trial. *See Crawford*, 541 U.S. at 52.

Finally, these search-warrant responses were functionally equivalent to live testimony, as they provided the "precise testimony the [declarants] would be expected to provide if called at trial." *See Melendez-Diaz*, 557 U.S. at 310; *see also Davis v. Washington*, 547 U.S. 813, 828 (2006) (noting that testimonial evidence is evidence that is a "weaker substitute for live testimony at trial," where the declarant acts like a witness and provides testimony). The search-warrant responses were used to establish that Snapchat user "tf15460" was subscribed to an IP address registered to the Petitioner at Petitioner's address, and that Snapchat user "tf15460" used an email address attributed to Petitioner. The Snapchat declarant even acknowledged she was providing the equivalent of live testimony, as she attested that she had personal

knowledge of the facts in Snapchat's response and "could testify competently thereto if called as a witness." Simply put, the search-warrant responses' primary purpose was "to create "an out-of-court substitute for trial testimony" about the "tf15460" user account data. *See Michigan v. Bryant*, 562 U.S. 344, 358 (2011). Admitting the search-warrant responses did "precisely *what a witness does* on direct examination," *Davis*, 547 U.S. at 830, and the responses were testimonial under this Court's previous decisions defining "testimonial."

Despite the fact that the search-warrant responses were testimonial hearsay admitted without confrontation, the Ninth Circuit saw no problem with their use against Petitioner at trial. In its view, the search-warrant responses were "hearsay-excepted business records kept in the ordinary course of business." *See* App-4. It disagreed that the records were created for use as evidence at a future criminal trial, instead reasoning that the "creation and preservation of records of messages and images sent between accounts by Snapchat, as well as IP address information by Comcast, was not done for the primary purpose of being used in a later criminal prosecution." *See* App-5. The search-warrant responses did not contain testimonial hearsay and instead only "delivered to law enforcement" business records from each company, which did not "change the primary purpose for which [the records] were created." *See* App-5.

But this reasoning both conflicts with this Court's precedents and also confuses the testimonial hearsay contained in the search-warrant responses for the underlying business data referenced in the responses. First, the company data that Snapchat

and Comcast searched through was not created with a primary purpose of being used in a later criminal prosecution; the Ninth Circuit is correct on that point. But that is different than the search-warrant responses each company created and turned over to law enforcement, as a result of their data searches responsive to the search warrant. The resulting search-warrant responses contain testimonial hearsay *about* the companies' searches of their data. In short, the search-warrant responses state that the companies received the search warrant, searched their data, and determined that they had identifying data in their systems that pointed to Petitioner as the culpable party. If the companies had turned over their existing reams of data in response to the search warrants, that would be a different issue. But they didn't—instead they each had an employee search company data and then draft a response that identified Petitioner as the suspect law enforcement was looking for in a pending criminal prosecution. That statement in the search-warrant responses was testimonial hearsay and not a business record, as it was created for the primary purpose of providing evidence against a defendant in a criminal prosecution. *See Bullcoming*, 564 U.S. at 659 n.6.

Second, this Court has already rejected the Ninth Circuit's reasoning, though the Ninth Circuit's decision fails to acknowledge this. In *Melendez-Diaz*, the prosecution tried to argue that the lab analysts' affidavits at issue were "akin to the types of official and business records admissible at common law." 557 U.S. at 321. The Court explained that the affidavits did "not qualify as traditional or official business records, and even if they did, their authors would be subject to confrontation

nonetheless." *See id.* That's because when a document or record is created for use "essentially in the court, not in the business," it does not qualify as a business record. *See id.* (citation omitted). When the document is the result of a business activity meant to produce evidence for use at trial, as it was in *Melendez-Diaz* and in Petitioner's case, the document is not a traditional business record, admissible without confrontation. *See id.* This is well established for certificates created by a clerk who searches through records and then drafts a document reporting the results of the search. *See id.* at 323 (finding it testimonial when a clerk creates a certificate "attesting to the fact that the clerk had searched for a particular relevant record and failed to find it."). These types of certificates are not business records, but instead contain testimonial hearsay, so they are subject to confrontation. *See id.*

In sum, this is like the "straightforward application" of *Crawford's* holding in *Melendez-Diaz*, where the Court found testimonial the formalized certificates in which an analyst attested that a substance was cocaine. 557 U.S. at 312. And yet the Ninth Circuit's decision failed to reliably and correctly apply these precedents. Here, employees at Comcast and Snapchat submitted formalized, sworn responses to a search warrant, with the Snapchat employee even stating that she could "testify competently" to the facts in her response "if called as a witness." Just as in *Melendez-Diaz*, the search-warrant responses were testimonial because they were declarations made for the purpose of establishing some fact, made under circumstances that would lead an objective witness to believe that the statement would be available for use at a later trial, and admitted in place of live testimony. *See Melendez-Diaz*, 557 U.S. at

309-11. The Ninth Circuit's affirmance of their admission at trial conflicts with this Court's precedents interpreting the Confrontation Clause, and undermines the decades of precedent affirming the importance of the right to confrontation.

## II. The decision below creates a conflict with the First Circuit's decision on the same issue.

In addition to conflicting with this Court's Confrontation Clause precedents, the Ninth Circuit's decision creates a conflict with the First Circuit about whether these types of documents created by internet companies in response to search warrants are admissible absent confrontation.

In *United States v. Cameron*, the First Circuit held that internet company records produced as part of a child pornography investigation were testimonial and that their admission at trial violated the Confrontation Clause. 699 F.3d 621 (1st Cir. 2012). The court distinguished between logs containing "data that Yahoo! [and other internet companies] collected automatically in order to further its business purposes," 699 F.3d at 641, and "CP reports" and similar documents that forwarded the subscriber information and suspected child pornography images to law enforcement. *Id.* at 644. The former were "totally unrelated to any trial or law enforcement purpose" and maintained "to provide reliable data about its customer accounts." *See id.* at 642. These were not testimonial because their primary purpose was not to establish or prove past events potentially relevant to a later criminal prosecution. *Id.* In contrast, the CP reports were prepared with the primary purpose of establishing or proving past events potentially relevant to a prosecution. *Id.* at 643-44. They were

created because someone at Yahoo!'s Legal Department determined that an account contained what appeared to be child pornography images, they referred to the user as a suspect, and they were forwarded to an agency that effectively worked as an agent of law enforcement. *Id.* at 644-45. Further, as the reports were forwarded to the agency and a receipt was kept, the reports were made under circumstances that would lead an objective witness to believe that the statement would be available for use at a later trial. *See id.* These CP reports were testimonial, and their authors needed to be cross examined at trial or they could not be admitted. *See id.* at 653-54.

If Petitioner had been prosecuted in the First Circuit, the Snapchat and Comcast search-warrant responses would have been inadmissible without the responses' authors testifying. The rule in that Circuit, consistent with this Court's precedents, is that these types of documents, created with an eye towards criminal prosecution and use in court, contain testimonial hearsay, and cannot be admitted through a law enforcement witness. Yet in Petitioner's case, the Ninth Circuit ruled these documents were traditional business records, and no confrontation was required. This was, again, against the Court's reasoning in *Melendez-Diaz*, and in conflict with the First Circuit's decision in *Cameron*.

## III. The question presented raises an important issue.

As this Court well knows, thousands of defendants are prosecuted every year not just for child pornography crimes, but for crimes involving the internet and online activity. *See*, *e.g.*, Sentenced Individuals by Type of Crime, Interactive Data Analyzer,

United States Sentencing Commission, *available at* https://ida.ussc.gov/analytics/saw.dll?Dashboard (filtered for child pornography prosecutions and indicating around 1,500 federal prosecutions a year between 2015 and 2023) (last accessed Dec. 19, 2024). And the number of prosecutions for online crimes is ever increasing, given the internet's ubiquity and its soaring influence in our lives. *See*, *e.g.*, Internet Crime Report, Internet Crime Complaint Center, Federal Bureau of Investigation (2020) (noting a 69% increase in the number of complaints of internet crimes, like fraud, in 2020 compared to 2019).

The types of search-warrant responses admitted in Petitioner's case in violation of the Confrontation Clause would be equally probative in prosecutions for online identity theft, internet fraud, or online threats or stalking. In all of these prosecutions—in the Ninth Circuit, at least—documents responsive to a law enforcement search warrant, created to identify the defendant and be used in his later criminal prosecution and trial, would be admissible without ever requiring the declarant to testify. As the number of prosecutions for internet crimes increases, and law enforcement and prosecutors rely more and more on data provided by internet companies to make their cases, the Constitutional right to confrontation will be further and further eroded. This is especially consequential when taking into account the enormous penalties defendants face for internet crimes involving child pornography, for which the types of hearsay admitted here is obviously incredibly relevant. Petitioner, as an example, is serving a sentence of almost 48 years. Considering these heavy consequences of erroneously admitting this type of

testimonial hearsay, the Court should grant this Petition to reaffirm, yet again, that the Constitution requires confrontation for testimonial hearsay.

## IV. This petition presents an ideal vehicle to resolve the question presented.

This petition presents an ideal vehicle for the Court to resolve the issue, as the issue was preserved below and would affect the outcome in Petitioner's case. Petitioner raised this issue in the Ninth Circuit, where it was fully briefed, addressed at oral argument, and ruled on by the Ninth Circuit in its memorandum decision. Petitioner's identity was the only defense raised at trial. And the main, undisputed evidence the prosecution relied on to demonstrate identity was the search-warrant responses that identified Petitioner through his IP address and subscriber information. A decision from this Court reaffirming that the search-warrant responses could not be admitted through a law enforcement witness, and instead required an employee from the internet companies to testify in court about their searches, would have affected the outcome in Petitioner's case.

## CONCLUSION

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

Date: December 20, 2024

Respectfully submitted,

KRISTI A. HUGHES
Law Office of Kristi A. Hughes
P.O. Box 141
Cardiff, California 92007
Telephone: (858) 215-3520
Counsel for Petitioner