No. 26-____

IN THE
Supreme Court of the United States

ROBERT MATTHEW CALDWELL,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Court held that statements in forensic reports prepared for use in criminal prosecutions are "testimonial" and therefore subject to the demands of the Sixth Amendment's Confrontation Clause. In this case, a technician who drew blood from a person arrested for driving under the influence signed a "certificate of withdrawal" attesting that the blood came from the defendant, that it was drawn in a particular manner, and that the technician was qualified to perform these tasks. Pursuant to state law, the certificate was transmitted "to the clerk of the court in which the charge [would] be heard," where it was "admissible . . . as evidence of the facts therein stated." Va. Code § 18.2-268.7.

The question presented is whether statements attesting to facts relating to a blood withdrawal performed to aid a criminal prosecution are "testimonial" under the Confrontation Clause.

PARTIES TO THE PROCEEDING

Petitioner is Robert Matthew Caldwell, defendant-appellant below.

Respondent is the Commonwealth of Virginia, appellee below.

RELATED PROCEEDINGS

Commonwealth v. Caldwell, No. CR23001426-1427-00 (Va. Cir. Montgomery Cnty. June 13, 2024)

Caldwell v. Commonwealth, 921 S.E.2d 231 (Va. App. Oct. 21, 2025)

Caldwell v. Commonwealth, No. 251068 (Va. June 4, 2026) (denying review)

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
RELATED PROCEEDINGS iii
TABLE OF AUTHORITIES vi
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1
INTRODUCTION 2
STATEMENT OF THE CASE 5
A. Statutory background 5
B. Factual and procedural background 7
REASONS FOR GRANTING THE WRIT 11
I. State courts are divided over whether statements attesting to the circumstances of a blood withdrawal performed to aid a criminal prosecution are testimonial 11
II. The question presented significantly impacts the administration of criminal justice 16
III. The decision of the Virginia Court of Appeals is incorrect 19
IV. This case is an excellent vehicle 27
CONCLUSION 29

APPENDIX

Appendix A, Opinion of the Court of Appeals of Virginia, October 21, 2025 ..... 1a

Appendix B, Decision and Order of the Supreme Court of Virginia (denying review), June 4, 2026..... 20a

Appendix C, Certificate of Analysis and Certificate of Blood Withdrawal for Alcohol/Drug Determination..... 23a

Appendix D, Relevant Provisions of the Virginia Code 25a

§ 18.2-268.5. Qualifications and liability of persons authorized to take blood sample; procedure for taking samples 25a

§ 18.2-268.6. Transmission of blood samples..... 26a

§ 18.2-268.7. Transmission of blood test samples; use as evidence..... 27a

§ 18.2-269. Presumptions from alcohol or drug content of blood 29a

TABLE OF AUTHORITIES

Page(s)

Cases

Armstrong v. Commonwealth,
562 S.E.2d 139 (Va. 2002) 13

Breithaupt v. Abram,
352 U.S. 432 (1957) 5, 17

Bullcoming v. New Mexico,
564 U.S. 647 (2011)
.....i, 2, 3, 11, 12, 14-16, 19-22, 26, 28, 29

City of Las Vegas v. Walsh,
124 P.3d 203 (Nev. 2005) 21, 22

City of Reno v. Howard,
318 P.3d 1063 (Nev. 2014) 3, 11, 12, 22

Commonwealth v. Dyarman,
73 A.3d 565 (Pa. 2013) 19

Crawford v. Washington,
541 U.S. 36 (2004) 2, 4, 9, 25

Davis v. Washington,
547 U.S. 813 (2006) 2, 20, 22

Exxon Shipping Co. v. Baker,
554 U.S. 471 (2008) 17

Franklin v. New York,
145 S. Ct. 831 (2025) 4, 18

Hazelwood v. State,
912 P.2d 1266 (Alaska App. 1996), *rev'd in part*, 946 P.2d 875 (Alaska 1997) 17

Jackson v. Virginia,
443 U.S. 307 (1979) 13

Khyl v. Commonwealth,
135 S.E.2d 768 (Va. 1964) 26

Lara v. State,
487 S.W.3d 244 (Tex. App. 2015) 19

Ramirez v. State,
928 N.E.2d 214 (Ind. App. 2010) 24

Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009) ..... i, 2-4, 9-16, 18-29

Milligan v. State,
116 A.3d 1232 (Del. 2015) 19

Payne v. Commonwealth,
2024 WL 4269904 (Va. App. 2024) 26

People v. Barry,
349 P.3d 1139 (Colo. App. 2015) 11, 12

People v. Lopez,
286 P.3d 469 (Cal. 2012) 13-15, 25

People v. Sanchez,
374 P.3d 320 (Cal. 2016) 14

Sheets v. Castle,
559 S.E.2d 616 (Va. 2002) 13

Shoemaker v. Commonwealth,
441 S.E.2d 354 (Va. App. 1994) 7

Smith v. Arizona,
602 U.S. 779 (2024) 2, 4, 16, 18, 24, 28

State v. Costello,
2018 WL 1322779 (N.M. App.), *cert. denied*,
2018 WL 11270129 (N.M. 2018) 15

State v. Dilboy,
48 A.3d 983 (N.H. 2012) 15

State v. Lutz,
820 N.W.2d 111 (N.D. 2012) 11, 12

State v. O'Maley,
932 A.2d 1 (N.H. 2007) 15

State v. Sorensen,
814 N.W.2d 371 (Neb. 2012) 3, 9, 11, 12

State v. Trapp,
801 S.E.2d 742 (S.C. App. 2017) 19

State ex rel. Roseland v. Herauf,
819 N.W.2d 546 (N.D. 2012) 3, 9, 11, 12

Stevens v. Commonwealth,
634 S.E.2d 305 (Va. 2006) 17

United States v. Johnson,
688 F.3d 494 (8th Cir. 2012) 19

Walton v. City of Roanoke,
133 S.E.2d 315 (Va. 1963) 5

Williams v. Commonwealth,
394 S.E.2d 728 (Va. App. 1990) 26

Williams v. Commonwealth,
565 S.E.2d 328 (Va. App. 2002) 26

Williams v. Illinois,
567 U.S. 50 (2012) 28, 29

Wright v. West,
505 U.S. 277 (1992) 13

Constitutional Provisions

Confrontation Clause, U.S. Const., amend. VI
..... i, 2-4, 9-12, 15, 16, 18, 19, 23-25, 27, 29

Statutes

28 U.S.C. § 1257(a) 1
Ark. Code § 5-65-204 16
Fla. Stat. § 316.1932 16
Fla. Stat. § 316.1933 16
Idaho Code § 18-8003 16
Ky. Rev. Stat. § 189A.103 16
Mass. Gen. Laws ch. 111, § 13 (2009) 23
Me. Rev. Stat. § 2524 16
Ohio Rev. Code § 4511.19(E) 16
R.I. Gen. Laws § 31-27-2.9 16
Va. Code § 18.2-248 8
Va. Code § 18.2-266 8
Va. Code § 18.2-268.2 5
Va. Code § 18.2-268.5 ..... 5, 8, 21
Va. Code § 18.2-268.6 ..... 5, 6, 7, 24
Va. Code § 18.2-268.7 ..... i, 6, 8, 21, 24, 28
Va. Code § 18.2-269 ..... 6, 21
Va. Code § 18.2-270 8

Other Authorities

Alsbrooks, Nathan, *No Nurse Should Be No Problem*, Tex. Prosecutor, May-June 2020 17

Boscia, Christopher, *Strengthening Forensic Alcohol Analysis in California DUI Cases: A Prosecutor's Perspective*, 53 Santa Clara L. Rev. 733 (2014) 16

National DUI Authority, *National DUI Statistics: Arrests, Convictions, and Trends*, https://perma.cc/L8P8-S4A2 16

Nordin, Nani et al., *Preanalytical Errors in Clinical Laboratory Testing at a Glance: Source and Control Measures*, Cureus 16(3) (2024)..... 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Matthew Caldwell respectfully petitions for a writ of certiorari to review the judgment of the Virginia Court of Appeals.

OPINIONS BELOW

The decision of the Virginia Court of Appeals (Pet. App. 1a-19a) is published at 921 S.E.2d 231. The order of the Virginia Supreme Court denying review (Pet. App. 20a-21a) is unpublished.

JURISDICTION

The judgment of the Virginia Court of Appeals was entered on October 21, 2025. Pet. App. 1a. The Virginia Supreme Court denied review on June 4, 2026. Pet. App. 20a. On August 12, 2026, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 1, 2026. *See* No. 26A191. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

The relevant provisions of the Virginia Code are reproduced at pages 25a to 31a of the Appendix to this petition.

INTRODUCTION

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held that this guarantee generally bars the admission of "testimonial" statements against a criminal defendant absent an opportunity for cross-examination. *Id.* at 51. Two years later, the Court explained that a statement is testimonial when its "primary purpose" is "to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). The Court has since used "varied formulations" when rearticulating this standard. *Smith v. Arizona*, 602 U.S. 779, 800 (2024). But the Court has consistently explained that the primary purpose inquiry "focuses on" how the statement "relates to a future criminal proceeding." *Id.*

Applying that framework, the Court has twice held that formalized statements in forensic reports prepared for use in criminal prosecutions are testimonial. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the prosecution introduced "certificates of analysis" in which analysts reported the composition and weight of drugs seized from the defendant. *Id.* at 308. In *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the prosecution introduced a "certificate of analyst" in which a forensic analyst similarly asserted that a sample of blood taken from the defendant contained a certain amount of alcohol. *Id.* at 653. The analyst also attested that he had "adher[ed] to a precise protocol" and that no "circumstance or condition . . . affect[ed] the integrity

of the sample." *Id.* at 660. In both cases, the Court deemed the statements testimonial because they were "'affirmation[s] made for the purpose of establishing or proving some fact' in a criminal proceeding." *Id.* at 664 (quoting *Melendez-Diaz*, 557 U.S. at 310).

In a footnote, the *Melendez-Diaz* Court also explained that the Confrontation Clause does not require "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device [to] appear in person as part of the prosecution's case." *Melendez-Diaz*, 557 U.S. at 311 n.1. The prosecution might often choose not to introduce such testimony. "[B]ut," the Court emphasized, "what testimony *is* introduced must (if the defendant objects) be introduced live." *Id.*

In the fifteen years since those decisions were issued, state courts have divided over whether signed certificates of blood withdrawal, prepared for use in criminal prosecutions, are testimonial. Several courts hold that they are. *See, e.g.*, *State v. Sorensen*, 814 N.W.2d 371, 377 (Neb. 2012); *City of Reno v. Howard*, 318 P.3d 1063, 1065 (Nev. 2014); *State ex rel. Roseland v. Herauf*, 819 N.W.2d 546, 553 (N.D. 2012). But the Virginia Court of Appeals—in line with decisions from other states—held otherwise here, distinguishing such certificates from the certificates of analysis at issue in *Melendez-Diaz* and *Bullcoming*. Pet. App. 10a-19a; *see also infra* at 13-15 (citing other cases).

This Court should grant certiorari to resolve that conflict. Forensic reports, including certificates of blood withdrawal, are a mainstay of criminal

prosecutions, especially in DUI cases. They are also prone to error, making the question whether defendants are entitled to demand cross-examination a critical one.

The facts of this case make it an excellent vehicle for resolving the conflict. After arresting petitioner for DUI, a law enforcement officer asked a nurse to draw petitioner's blood. The nurse then generated and signed a certificate of blood withdrawal, which the Commonwealth introduced against petitioner in lieu of putting the nurse on the stand. Rejecting petitioner's Confrontation Clause objection, the Virginia courts held that the certificate was nontestimonial.

Furthermore, this case affords the Court an opportunity to consider broader principles relating to the Confrontation Clause that may "warrant careful exploration." *Smith*, 602 U.S. at 806 (Gorsuch, J., concurring in part). Despite the Court's "years of toiling" with the primary purpose test, *Franklin v. New York*, 145 S. Ct. 831, 834 (2025) (Gorsuch, J., respecting the denial of certiorari), state courts continue to reach results that condone the "principal evil" the Confrontation Clause is designed to prohibit—namely, trial by affidavit, *see Crawford*, 541 U.S. at 50; *Melendez-Diaz*, 557 U.S. at 330 (Thomas, J., concurring). Perhaps the cure for this problem is simply to reaffirm the primary purpose test and to clarify how it works in this setting. Or perhaps something more would be useful. Either way, the Court should use this case to provide additional guidance on this critical guarantee that the Sixth Amendment provides.

STATEMENT OF THE CASE

A. Statutory background

Like many states, Virginia has a statutory regime—originally enacted in 1950—for producing evidence to facilitate prosecutions for driving under the influence. As relevant here, after law enforcement officers arrest someone for that offense, they may require the arrestee to submit to a blood draw to determine the drug or alcohol content of his blood. Va. Code § 18.2-268.2. In the words of the Virginia Supreme Court, "[a] chemical analysis of one's blood provides a scientifically accurate method of determining whether a person is intoxicated, removes the question from the field of speculation and supplies the best evidence for that determination." *Walton v. City of Roanoke*, 133 S.E.2d 315, 319 (Va. 1963).

That is true, however, only insofar as certain "precautions" are taken to "properly safeguard[]" the integrity of blood samples drawn for evidentiary purposes. *Breithaupt v. Abram*, 352 U.S. 432, 438-39, 438 n.5 (1957). In Virginia, therefore, a blood draw requested by law enforcement may be performed only by a medical professional or other technician who has been "designated by order of a circuit court" as qualified to perform this task. Va. Code § 18.2-268.5. To ensure the "accuracy of the test," the statutory procedure also requires the person performing the blood draw to cleanse the arrestee's arm with an antiseptic swab; draw the blood using a sterilized instrument; and place the blood in sealed vials provided or approved by the Department of Forensic Science. *Id.* §§ 18.2-268.5 to -268.6.

Under a provision of this regime added in 1992, the blood drawer must also complete a "certificate of blood withdrawal." Va. Code § 18.2-268.6. The certificate must contain at least "the name of the accused, the name of the person taking the blood sample, the date and time the blood sample was taken and information identifying the arresting or accompanying officer." *Id.* The drawer must affix the certificates to sealed vials. *Id.* "The arresting or accompanying officer shall take possession of" the vials and "shall promptly transport or mail the[m] . . . to the Department" for testing. *Id.*

Upon receipt of a blood sample, "the Department shall have it examined for its alcohol or drug [content]." Va. Code § 18.2-268.7. The analyst who conducts the test must then execute a "certificate of analysis" reporting the results. *Id.* The analyst must also "attach" the certificate of blood withdrawal to the certificate of analysis or "electronically scan" it into the laboratory's system. *Id.* At this point, both "[t]he certificate of analysis and the withdrawal certificate shall be returned or electronically transmitted to the clerk of the court in which the [criminal] charge will be heard." *Id.*

A certificate of analysis and attached certificate of withdrawal prepared in accordance with those requirements "shall . . . be admissible in any court as evidence of the facts therein stated and of the results of such analysis . . . in any criminal proceeding." Va. Code § 18.2-268.7. When admitted, certificates reporting intoxication above the legal limit create a "rebuttable presumption[]" that the accused was under the influence at the time of the offense. *Id.* § 18.2-269. By contrast, "[w]hen the Commonwealth

cannot prove that it substantially complied with the statutory procedures referred to [above], the Commonwealth is foreclosed from prosecution." *Shoemaker v. Commonwealth*, 441 S.E.2d 354, 356 (Va. App. 1994) (citation omitted).

B. Factual and procedural background

1. In June 2023, Lieutenant Donald J. Kirker, Jr., of the Montgomery County (Virginia) Sheriff's Office saw a car driving "erratically" and conducted a traffic stop. Pet. App. 2a. Under questioning, the driver, petitioner Robert Matthew Caldwell, admitted that he possessed methamphetamine and said that he had used some the previous evening. *Id.*

Lieutenant Kirker then asked petitioner to perform field sobriety tests. Deeming the results of these tests consistent with methamphetamine use, Lieutenant Kirker arrested petitioner for driving under the influence. Pet. App. 2a-3a. He then took petitioner to a hospital to obtain a blood draw. *Id.* 3a.

There, Lieutenant Kirker asked a nurse named Kelly Patteson to take blood samples from petitioner. Pet. App. 3a. According to the "certificate of blood withdrawal for alcohol/drug determination" later signed by Patteson, she used items provided by the Department of Forensic Science to draw petitioner's blood into two vials. *Id.* 23a (capitalization omitted).

In compliance with Virginia Code Section 18.2-268.6, Patteson affixed copies of the certificate to each vial. In the certificate, Patteson identified the "[o]fficer" as D.J. Kirker, the "[a]ccused" as petitioner, and the "[j]urisdiction" as Montgomery County. Pet. App. 23a. Patteson also attested to the following statement by signing her name:

> I certify that the blood in the vial to which this Certificate is attached was withdrawn from the above named accused. I am qualified pursuant to § 18.2-268.5 to withdraw blood & the blood was taken in compliance with § 18.2-268.5.

Id.; *see id.* 4a. Lieutenant Kirker then submitted the vials to a state forensic laboratory for analysis. *Id.* 4a.

About six weeks later, a forensic analyst performed an analysis and completed a "certificate of analysis" stating that petitioner's blood contained methamphetamine at 1.6 milligrams per liter ± 0.2 milligrams per liter. Pet. App. 23a. The analyst also affixed Patteson's certificate of blood withdrawal to the first page of the certificate of analysis. *Id.* She then sent the two certificates to the clerk of the General District Court of Montgomery County, which stamped them as "filed" a few days later. *See id.*

2. The Commonwealth charged petitioner with possession of methamphetamine and driving under the influence of drugs, third or subsequent offense within ten years, in violation of Virginia Code Sections 18.2-248, 18.2-266, and 18.2-270. At the ensuing bench trial, the Commonwealth introduced into evidence both the certificate of analysis and the certificate of blood withdrawal. Pet. App. 4a. It also called the forensic analyst to testify about the results of her analysis. *Id.* 4a-5a. But it did not call Patteson to testify to the facts conveyed in her certificate of withdrawal. *Id.* Nor did the Commonwealth claim she was unavailable to testify. *See id.* 5a. Instead, the Commonwealth took the position that her certificate alone could serve, in the words of Virginia law, "as evidence of the facts therein stated," Va. Code § 18.2-268.7. *See* Bench Trial Tr. 150 (Mar. 26, 2024).

Petitioner objected under "the confrontation clause" to introducing the certificate of withdrawal without putting Patteson on the stand. Bench Trial Tr. 149-51 (Mar. 26, 2024). The Commonwealth responded that Virginia's "statutory scheme" is designed to ensure that nurses who withdraw blood for DUI prosecutions "don't have to be [in court]." *Id.* 150. The trial court provisionally sided with the Commonwealth, admitting Patteson's certificate. *Id.* 156. At the same time, the court invited petitioner to brief whether admitting the certificate violated the Confrontation Clause. *Id.* 194.

In his ensuing filing, petitioner argued that the certificate of withdrawal was inadmissible without Patteson's testimony because it was "testimonial" evidence under *Crawford* and its progeny. In support of that argument, petitioner cited decisions from the Nebraska and North Dakota Supreme Courts. Reply Mem. in Supp. of Def.'s Mot. to Strike & to Exclude Blood Draw Results at 4 (citing *State v. Sorensen*, 814 N.W.2d 371, 377 (Neb. 2012); *State ex rel. Roseland v. Herauf*, 819 N.W.2d 546, 553 (N.D. 2012)). Citing footnote one of *Melendez-Diaz*, the Commonwealth argued that this Court in that case "expressly did not extend its holding to this type of testimony." Comm. Br. of Apr. 26, 2024, at 2-3. The Commonwealth also pointed to "[n]umerous state courts" it claimed supported its position. *Id.* at 3.

At the subsequent hearing, the trial court called the confrontation issue "very interesting" and "difficult." Review Hr'g Tr. 202-03 (Apr. 30, 2024). It also observed that "there is a split of authority on what the proper outcome is." *Id.* 203. The court then confirmed its decision to admit the certificate of

withdrawal into evidence. *Id.* But the court stressed that it "could have gone the other way" and "encourage[d] [petitioner] to appeal." *Id.*

Having ruled that all of the prosecution's forensic evidence was properly admitted, the court convicted petitioner on both counts. For the DUI charge, it sentenced him to two years in prison with one year and nine months suspended. Sent'g Tr. 227 (June 13, 2024).

3. The Virginia Court of Appeals affirmed in a published opinion. Pet. App. 1a-19a. As relevant here, the court recognized that a certificate of blood analysis, prepared by "the analyst who conducted testing" on the blood, is testimonial. *See id.* 14a. But it contrasted such a certificate with a certificate of blood withdrawal. The latter, the Court of Appeals stressed, is prepared by a technician who "play[s] no part in any scientific analysis of the blood." *Id.* 15a. As such, the Court of Appeals reasoned that a certificate of blood withdrawal is "not accusatory in nature" and does not have an "evidentiary purpose." *Id.* 15a, 17a. Instead, it recounts merely "preliminary step[s]" and has an "administrative purpose." *Id.* The Court of Appeals also quoted footnote one of *Melendez-Diaz*, suggesting that it exempts forensic evidence about the "authenticity of the sample" from confrontation. *Id.* 13a; *see also id.* 18a.

4. Petitioner sought discretionary review in the Virginia Supreme Court, renewing his argument that the trial court's admission of the blood withdrawal certificate violated the Confrontation Clause. Pet. for Appeal 1. After considering the parties' briefing and holding an oral argument, the Virginia Supreme Court denied review. Pet. App. 20a.

REASONS FOR GRANTING THE WRIT

State courts are divided over whether statements attesting to the circumstances of a blood withdrawal performed to aid a criminal prosecution are "testimonial." This issue significantly impacts the administration of criminal justice. The Virginia Court of Appeals erred in holding that such statements are nontestimonial. And this case is an ideal vehicle for resolving the conflict, as well as clarifying more generally how the Confrontation Clause applies to forensic evidence.

I. State courts are divided over whether statements attesting to the circumstances of a blood withdrawal performed to aid a criminal prosecution are testimonial.

In the wake of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), state courts have divided over whether statements attesting to the circumstances of a blood withdrawal performed to aid a criminal prosecution are testimonial.

1. Three state courts of last resort—the Nebraska, Nevada, and North Dakota Supreme Courts—have held that such statements are testimonial. *State v. Sorensen*, 814 N.W.2d 371, 377 (Neb. 2012); *City of Reno v. Howard*, 318 P.3d 1063, 1065 (Nev. 2014); *State ex rel. Roseland v. Herauf*, 819 N.W.2d 546, 553 (N.D. 2012); *State v. Lutz*, 820 N.W.2d 111, 116 (N.D. 2012). The Colorado Court of Appeals has reached the same conclusion. *People v. Barry*, 349 P.3d 1139, 1155 (Colo. App. 2015).

All of these decisions arose on nearly identical facts. In each, a nurse or phlebotomist drew blood

from an arrestee at the request of law enforcement. And each blood drawer signed a statement attesting to the circumstances of the draw—that the blood came from the defendant, that the blood was drawn or stored in a particular manner, and that the drawer was qualified to perform these tasks. *Sorensen*, 814 N.W.2d at 374, 377; *Howard*, 318 P.3d at 1064-65; *Herauf*, 819 N.W.2d at 548, 551-52; *Lutz*, 820 N.W.2d at 112, 116-17; *Barry*, 349 P.3d at 1146-47.

The courts reasoned that—just like the certificates of analysis in *Melendez-Diaz* and *Bullcoming*—blood withdrawal certificates are testimonial because they are prepared for the primary purpose of producing evidence for a criminal prosecution. "[T]he relative simplicity of collecting blood and the foundational purpose" for which a phlebotomist's declaration is offered have "no effect" on this analysis. *Howard*, 318 P.3d at 1068; *see also Lutz*, 820 N.W.2d at 116. The Nevada Supreme Court has also rejected the argument that footnote one of *Melendez-Diaz* displaces the primary purpose standard or otherwise categorically exempts these types of statements from cross-examination. *Howard*, 318 P.3d at 1068. That footnote, the court explained, observes that the Confrontation Clause "does not require the testimony of every person with any connection to physical evidence." *Id.* But where the prosecution decides to introduce evidence that satisfies the primary purpose test, the declarant must testify live. *See id.*

2. Decisions from several other state courts go the other way.

Start with the decision here. The Virginia Court of Appeals held that a blood withdrawal certificate is

nontestimonial. Pet. App. 19a. The Court of Appeals reasoned that the primary purpose of statements in such a certificate is "administrative," not to supply evidence for a criminal prosecution. *Id.* 17a. The Court of Appeals also relied on footnote one of *Melendez-Diaz*. Quoting only the first sentence of the footnote, the court suggested the statements here were exempt from confrontation because they concerned the "*authenticity of the sample*." *Id.* 18a.

Of course, the Virginia Court of Appeals is not a court of last resort. But in contrast to this Court's certiorari system, a denial of review from the Virginia Supreme Court constitutes a "decision on the merits." *Sheets v. Castle*, 559 S.E.2d 616, 619 (Va. 2002); *see also Wright v. West*, 505 U.S. 277, 283 (1992) (plurality opinion) (recognizing that the Virginia Supreme Court's denial of review "indicat[es] that the court found the petition without merit"); *Jackson v. Virginia*, 443 U.S. 307, 311 n.4 (1979) (same). Consequently, the Virginia Supreme Court's denial of review here, following briefing and oral argument, signals its agreement with the Court of Appeals' decision. And that decision constitutes binding precedent statewide. *Armstrong v. Commonwealth*, 562 S.E.2d 139, 143 (Va. 2002).

Adding to the divergence among state courts, the California Supreme Court has held that a statement much like those at issue here is nontestimonial. In *People v. Lopez*, 286 P.3d 469 (Cal. 2012), a blood-alcohol report requested by law enforcement contained an uncertified statement on the first page from a laboratory assistant, identifying the defendant as the source of the blood sample that had been procured for testing. *Id.* at 478-79. The court

concluded that the statement was not sufficiently formal to be testimonial. *Id.* at 479. A majority of the justices also joined a concurrence—which that court later made clear has precedential force—reasoning that the statement was nontestimonial because it "was not made with the primary purpose of creating evidence for trial." *Id.* at 480-81 (Werdegar, J., concurring); *see also id.* at 481-83 (Corrigan, J., concurring); *People v. Sanchez*, 374 P.3d 320, 339 (Cal. 2016) (explaining that the statement in *Lopez* was nontestimonial because its "primary purpose was to facilitate laboratory operations, not to produce facts for later use at trial").

Justice Liu dissented. He maintained that the notation identifying the defendant as the source of the blood sample was testimonial because "the lab's evidentiary purpose permeates even the most mundane of activities associated with the tested samples." *Lopez*, 286 P.3d at 491 (Liu, J., dissenting). And he believed the majority contravened *Melendez-Diaz* and *Bullcoming* in holding otherwise, adopting legal arguments that "have been considered and rejected by the high court." *Id.* at 492.

In response, the majority acknowledged that "certain passages" in *Melendez-Diaz* and *Bullcoming* "can be read to support the dissent's analysis." *Lopez*, 286 P.3d at 480 (Werdegar, J., concurring). But the majority submitted that this Court's decisions "should *not* be read in this manner." *Id.* "[I]nstead," the majority intoned, "we should continue the search for a workable rule that does not render it a constitutional violation whenever the prosecution fails to call to the stand everyone 'whose testimony may be relevant in establishing the chain of custody,

authenticity of the sample, or accuracy of the testing device.'" *Id.* (quoting *Melendez-Diaz*, 557 U.S. at 311 n.1). Then, applying its own conception of "a fair and practical boundary for applying the confrontation clause," the majority posited that statements like the one at issue should be exempted from the reach of the Confrontation Clause because "[n]o significant benefit" would flow from subjecting them to the adversarial process. *Id.* at 480-81.

In another case involving facts virtually identical to those here, the New Mexico Court of Appeals has also held that a phlebotomist's certification describing a blood withdrawal is nontestimonial. *State v. Costello*, 2018 WL 1322779, at *3 (N.M. App.), *cert. denied*, 2018 WL 11270129 (N.M. 2018). In a lengthy opinion paralleling the primary purpose reasoning of the Virginia Court of Appeals and California Supreme Court, the New Mexico court declared that such a certification does not have the primary purpose of creating evidence for use in a criminal prosecution. *Id.*[1]

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[1] Before this Court decided *Melendez-Diaz* and *Bullcoming*, the New Hampshire Supreme Court likewise held that a "blood sample collection form" generated for a criminal prosecution was nontestimonial. *State v. O'Maley*, 932 A.2d 1, 13 (N.H. 2007). Like the other courts just discussed, the New Hampshire Supreme Court reasoned that "the blood sample collection form did not accuse the defendant of any wrongdoing. It merely gave information about the technician who withdrew the blood and about the draw itself (*e.g.*, time drawn, cleanser used)." *Id.* In the wake of *Melendez-Diaz* and *Bullcoming*, the New Hampshire Supreme Court has expressly "decline[d] to address" whether its prior holding remains good law. *State v. Dilboy*, 48 A.3d 983, 989-90 (N.H. 2012).

II. The question presented significantly impacts the administration of criminal justice.

This Court should not allow the confusion over how the Confrontation Clause applies to statements pertaining to forensic blood withdrawals to persist.

1. The circumstances giving rise to the question presented recur frequently. Forensic analyses are a mainstay of criminal prosecutions, especially in cases involving drugs or alcohol. *See, e.g.*, *Melendez-Diaz*, 557 U.S. at 308 (drug trafficking); *Bullcoming*, 564 U.S. at 651 (driving while intoxicated); *Smith v. Arizona*, 602 U.S. 779, 789 (2024) (drug possession). There are more than one million arrests each year for DUI alone, representing ten percent of all arrests nationally. Nat'l DUI Auth., *National DUI Statistics: Arrests, Convictions, and Trends*, https://perma.cc/L8P8-S4A2 (recounting 2019 statistics). In such cases, prosecutors typically seek to establish intoxication with forensic analyses of the defendant's blood. *See* Christopher Boscia, *Strengthening Forensic Alcohol Analysis in California DUI Cases: A Prosecutor's Perspective*, 53 Santa Clara L. Rev. 733, 735 (2014) (characterizing blood test results as "the most important evidence in a DUI prosecution").

Many states (in addition to those canvassed in Part I above) have statutory schemes similar to Virginia's here to facilitate the generation and introduction of such evidence at trial. *See, e.g.*, Ark. Code § 5-65-204; Fla. Stat. §§ 316.1932-.1933; Idaho Code § 18-8003; Ky. Rev. Stat. § 189A.103; 29-A Me. Rev. Stat. § 2524; Ohio Rev. Code § 4511.19(E); R.I. Gen. Laws § 31-27-2.9. In other states, blood drawers generate, and prosecutors introduce, statements attesting to the circumstances of blood withdrawals

as a matter of local custom and practice. For instance, one district attorney's office in Texas has created a "Blood Withdrawal Procedure Form," which allows a nurse to attest that "all procedures [were] followed"—and takes the position that prosecutors can introduce that form into evidence and try "a DWI without testimony" from that nurse. Nathan Alsbrooks, *No Nurse Should Be No Problem*, Tex. Prosecutor, May-June 2020, at 31-33.

Nor is blood evidence limited to DUI and drug cases. Forensic analyses of blood draws are also used in a wide range of other prosecutions—from involuntary manslaughter, *see, e.g.*, *Breithaupt v. Abram*, 352 U.S. 432, 433 (1957); *Stevens v. Commonwealth*, 634 S.E.2d 305, 307-08 (Va. 2006), to (in the case of the captain of the *Exxon Valdez*) criminally negligent discharge of oil, *Hazelwood v. State*, 912 P.2d 1266, 1268, 1274 (Alaska App. 1996), *rev'd in part*, 946 P.2d 875 (Alaska 1997); *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 478 (2008).

2. The question presented also matters because statements in blood withdrawal certificates can be faulty, and even occasionally fraudulent. Most sources of error in blood testing arise during "the preanalytical phase." Nani Nordin et al., *Preanalytical Errors in Clinical Laboratory Testing at a Glance: Source and Control Measures*, Cureus 16(3), at 4 (2024). And over eighty-two percent of preanalytical errors are due to human mistakes. *Id.* at 6. Such errors include source misidentification, improper labeling, improper phlebotomy techniques, and improper sample handling. *Id.* at 5. Cross-examination can help identify such inaccuracies.

"And, of course, the prospect of confrontation will deter fraudulent analysis in the first place." *Melendez-Diaz*, 557 U.S. at 319.

3. Lower courts would also benefit from further guidance on how the Confrontation Clause applies to forensic evidence—as Members of this Court have already observed. Three Terms ago, the Court reviewed a drug conviction in which the prosecution proved its case in part through a forensic analysis. While the testimonial status of statements made during that process was not directly at issue, the majority paused to acknowledge that the Court has used "varied formulations" and has "variously described" the "contours" of the primary purpose test. *Smith*, 602 U.S. at 784, 800. Justice Gorsuch also expressed concern about "the confusion a 'primary purpose' test may engender" with respect to forensic evidence. *Id.* at 806 (Gorsuch, J., concurring in part). The following year, he noted that "lower courts have generally felt compelled to pick one version or another" of the test "and a defendant's conviction or acquittal can hang on that choice." *Franklin v. New York*, 145 S. Ct. 831, 835 (2025) (Gorsuch, J., respecting the denial of certiorari).

This very case exemplifies the confusion some lower courts continue to experience. Even after supplemental briefing, the trial judge called the testimonial question presented here "difficult" and "encourage[d the defense] to appeal [] because I don't know what the answer is." Review Hr'g Tr. 202-03 (Apr. 30, 2024).

In addition, this case implicates an "ongoing controversy" over whether footnote one in *Melendez-Diaz* is a "categorical limitation on the confrontation

right." *Lara v. State*, 487 S.W.3d 244, 253 (Tex. App. 2015). Some courts read that footnote as exempting any statements establishing the chain of custody or authenticity of a sample from the Confrontation Clause. *See, e.g.*, *United States v. Johnson*, 688 F.3d 494, 505 (8th Cir. 2012) ("chain of custody alone does not implicate the Confrontation Clause"); *Milligan v. State*, 116 A.3d 1232, 1239-40 (Del. 2015) (chain of custody evidence is not subject to confrontation because it "falls squarely within the scope of [footnote one's] rule"). Other courts reject this reading and hold that such statements—like any other statements—are testimonial when they satisfy the primary purpose test. *See Commonwealth v. Dyarman*, 73 A.3d 565, 571 (Pa. 2013) (concluding that the "footnote in *Melendez-Diaz* does not create a 'blanket rule of admissibility for any hearsay evidence'" that falls within the listed categories (citation omitted)); *State v. Trapp*, 801 S.E.2d 742, 752 (S.C. App. 2017) (applying the primary purpose test to "chain of custody" logs). Granting certiorari here would enable this Court to resolve this disagreement too.

III. The decision of the Virginia Court of Appeals is incorrect.

1. This Court's decisions in *Melendez-Diaz* and *Bullcoming* make clear that statements attesting to the circumstances of a blood withdrawal performed to aid a criminal prosecution are testimonial.

In *Melendez-Diaz*, police officers arrested the defendant and asked forensic analysts to determine whether substances seized from him were illegal drugs. The analysts then examined the substances and authored "certificates of analysis" stating that

the seized substances were tested and found to contain cocaine. 557 U.S. at 308. Under state law, the certificates were "prima facie evidence of the composition, quality, and the net weight of the narcotic." *Id.* at 309. The Court held that the statements were testimonial because they were, in effect, affidavits created for an "evidentiary purpose" in a criminal prosecution. *Id.* at 311.

In *Bullcoming*, police officers arrested the defendant on a DWI charge and asked a forensic laboratory to test his blood for the presence of alcohol. The forensic analyst prepared a "certificate of analyst" declaring that the defendant's blood-alcohol level was above the legal limit. *Bullcoming*, 564 U.S. at 653. The analyst also certified that he "received [the defendant's] blood sample intact with the seal unbroken"; that he performed a "particular test, adhering to a precise protocol"; and that no "circumstance or condition . . . affect[ed] the integrity of the sample or . . . the validity of the analysis." *Id.* at 660. Applying *Melendez-Diaz* and asking whether the "primary purpose" of the statements in the certificate was "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution," the Court held that the certificate was testimonial. *Id.* at 659 n.6 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)); *see id.* at 663.

The signed certificate here is the same as those in *Melendez-Diaz* and *Bullcoming* in every way that matters. A law enforcement officer arrested petitioner and asked a nurse to draw his blood to generate evidence supporting a DUI charge. Pet. App. 3a. After doing so, the nurse prepared and signed a "certificate of blood withdrawal for alcohol/drug

determination." *Id.* 23a (capitalization omitted). And the statements in that certificate mirror those in the certificate in *Bullcoming*. The nurse "certif[ied] that the blood" at issue "was withdrawn from the above named accused"; that she was "qualified pursuant to [Va. Code] § 18.2-268.5 to withdraw blood"; and that "the blood was taken in compliance with [Va. Code] § 18.2-268.5," which requires certain protocols to be followed to ensure the integrity of the sample for testing. *Id.* Just as in *Bullcoming*, these statements relating to the probative value of a purportedly incriminating blood test "are meet for cross-examination." 564 U.S. at 660.

Moreover, like the statements in *Melendez-Diaz* and *Bullcoming*, a certificate of blood withdrawal expressly serves an evidentiary purpose under state law. *See Melendez-Diaz*, 557 U.S. at 311; *Bullcoming*, 564 U.S. at 665. Virginia law requires such certificates to be sent to "the clerk of the court in which the charge will be heard" and makes them "admissible . . . as evidence of the facts therein stated . . . in any criminal proceeding." Va. Code § 18.2-268.7. Together with a certificate of analysis showing the presence of an illegal drug, a certificate of blood withdrawal creates a "rebuttable presumption[]" that the intoxication element of a DUI charge is satisfied. *Id.* § 18.2-269.

Should any doubt remain, *Melendez-Diaz* itself indicated that its holding covers blood withdrawal certificates. There, the Court cited several state-court decisions as "hav[ing] already adopted the constitutional rule we announce today." 557 U.S. at 325-26, 326 n.11. One of those decisions, *City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005), held that a

blood withdrawal certificate just like the one here was testimonial. *Id.* at 208. (As noted above, the Nevada Supreme Court continues to adhere to this position. *See Howard*, 318 P.3d at 1065 (reaffirming *Walsh* on this point).) In light of this Court's endorsement of that holding, the Virginia Court of Appeals was not at liberty here to rule otherwise.

2. The Virginia Court of Appeals did not dispute that the forensic statements here are sufficiently formal to be testimonial. It nevertheless distinguished blood withdrawal certificates from certificates of analysis like those in *Melendez-Diaz* and *Bullcoming*. But none of the purported distinctions it advanced withstands scrutiny.

a. The Court of Appeals asserted that a blood withdrawal certificate's "primary purpose" is not an "evidentiary one." Pet. App. 15a. According to the Court of Appeals, the certificate simply describes a "preliminary step" of the forensic test that was conducted, not the results of the test itself. *Id.* But that distinction does not matter. The controlling question is whether a statement is made "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. And this Court made clear in *Melendez-Diaz* that a statement can satisfy that standard even if it is "inculpatory only when taken together with other evidence." 557 U.S. at 313; *see Bullcoming*, 564 U.S. at 653, 660 (deeming statements about analysts' qualifications, integrity of the sample, and protocols to be testimonial). That precisely describes this case. The statements the nurse made identifying petitioner as the source of the blood sample and attesting to the integrity of the sample are inculpatory when

combined with the results of the forensic analysis that followed.

By the same token, the Court of Appeals was wrong to say a certificate of withdrawal is not testimonial because it is "not accusatory in nature." Pet. App. 17a. *Melendez-Diaz* squarely rejected the argument that statements must "directly accuse" the defendant of wrongdoing to be testimonial. 557 U.S. at 313. The Court explained that the Confrontation Clause contemplates only "two classes of witnesses—those against the defendant and those in his favor." *Id.* "[T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation" because their statements are not incriminating enough standing alone. *Id.* at 314.[2]

Trying one last verbal formulation, the Court of Appeals reasoned that the certificate here "serv[ed] an administrative purpose" instead of an evidentiary one. Pet. App. 17a.

Insofar as the Court of Appeals meant to suggest that "a statement made to show compliance with a statute" cannot satisfy the primary purpose test, Pet. App. 16a, that notion runs smack into *Melendez-Diaz.* In that case, Massachusetts laws directed the analyst to create and "furnish a signed certificate" of the test results to the police. Mass. Gen. Laws ch. 111, § 13 (2009) (cited in *Melendez-Diaz*, 557 U.S. at 308). And Massachusetts law dictated that the certificate constituted "prima facie evidence" of facts

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[2] In any event, Patteson's statements in the certificate here *were* "accusatory in nature." Pet. App. 17a. Patteson's certificate refers to petitioner as the "accused." *Id.* 23a.

relevant to a criminal prosecution. *Melendez-Diaz*, 557 U.S. at 309 (citation omitted). So too here. Virginia law requires nurses to create blood withdrawal certificates to aid DUI prosecutions, Va. Code § 18.2-268.6, and renders those certificates "evidence of the facts therein stated . . . in any criminal proceeding," *id.* § 18.2-268.7. Those state-law provisions are part of what make the certificates testimonial, not the reverse.

Insofar as the Court of Appeals' notion of an "administrative" purpose is meant to suggest that a blood withdrawal certificate is not testimonial because it involves mere "record-keeping," Pet. App. 17a, that reasoning fares no better. The certificate of blood withdrawal is a signed statement for transmittal to the "clerk of the court" for use as "evidence of the facts therein stated" in a "criminal proceeding." Va. Code § 18.2-268.7. Accordingly, the certificate here was not created for mere internal record-keeping reasons.[3]

b. The Court of Appeals also quoted the portion of footnote one of *Melendez-Diaz* stating that the Confrontation Clause does not require everyone who makes statements regarding the "authenticity of [a] sample" to "appear in person as part of the

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[3] The Court of Appeals' suggestion that the statements here were made for reasons of "quality control" is even farther afield. *See* Pet. App. 15a (quoting *Smith*, 602 U.S. at 802). In contrast to statements regarding the general maintenance of laboratory equipment, not tied to any particular prosecution, *see, e.g.*, *Ramirez v. State*, 928 N.E.2d 214, 219 (Ind. App. 2010), the certificate here has "a focus on court," *Smith*, 602 U.S. at 802 (citation omitted), and on a particular defendant.

prosecution's case." 557 U.S. at 311 n.1. The Court of Appeals suggested that this passage categorically exempts such evidence from *Crawford*'s testimonial framework. Pet. App. 13a. In fact, the footnote says exactly the opposite.

The rest of footnote one, which the Court of Appeals ignored, explains that "[i]t is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live." *Melendez-Diaz*, 557 U.S. at 311 n.1. In other words, footnote one merely clarifies that the prosecution has discretion to choose which testimonial statements—and therefore which live witnesses—to put before the factfinder. It does not create any exception to, or gloss on top of, the primary purpose test.

Perhaps the Court of Appeals' invocation of footnote one followed a thought process akin to the California Supreme Court's reasoning in *Lopez*. Citing footnote one, a majority of the California Supreme Court assigned itself license to fashion "a fair and practical boundary" that exempts forensic statements from the Confrontation Clause where "[n]o significant benefit" would flow from subjecting them to the adversarial process. *Lopez*, 286 P.3d at 480-81 (Werdegar, J., concurring).

Such thinking is fundamentally misguided. The core principle of this Court's ruling in *Crawford*—as reiterated in *Melendez-Diaz*—is that courts may not dispense with the right to confrontation based on "judicial determination[s] of reliability." *Crawford v. Washington*, 541 U.S. 36, 62 (2004); *see also Melendez-Diaz*, 557 U.S. at 319 n.6. Nor may courts

engage in cost-benefit analyses regarding the perceived value of cross-examination. *See Melendez-Diaz*, 557 U.S. at 325.

At any rate, statements in a certificate of withdrawal are precisely the sort that defendants should be able to test through the adversarial process. One element of a DUI offense is being under the influence of drugs. The statements here—attesting that the blood came from the defendant, that it was drawn or stored in a particular manner, and that the declarant was qualified to perform these tasks—made it more likely that petitioner was under the influence of drugs. Indeed, questions about "the integrity of the sample" or whether the vial the analyst tested "was the same vial which contained the defendant's blood" may well have required an acquittal. *Williams v. Commonwealth*, 394 S.E.2d 728, 729 (Va. App. 1990); *see also Khyl v. Commonwealth*, 135 S.E.2d 768, 770 (Va. 1964) (reversing conviction because the nurse "did not know whether the needle [she used] was sterilized"). The certificate of withdrawal here thus goes to the heart of the charged offense.[4]

Some analogies confirm that the three types of assertions in the certificate here are "meet for cross-examination," *Bullcoming*, 564 U.S. at 660:

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[4] *Williams* and *Khyl* were decided prior to Virginia's adoption of the "substantial compliance" standard for evaluating deviations from statutorily-mandated procedures. *See supra* at 6-7. But their holdings continue to be instructive under the current regime. *See, e.g.*, *Payne v. Commonwealth*, 2024 WL 4269904, at *4 (Va. App. 2024); *Williams v. Commonwealth*, 565 S.E.2d 328, 331 (Va. App. 2002).

- *Statements that evidence was taken from the defendant:* Imagine the prosecution introducing a declaration stating that "the stolen Rolex was found in the defendant's pocket" or that "I saw the defendant wearing the red sweater" that was later found to contain gunshot residue.
- *Statements attesting to the integrity of evidence:* Imagine the prosecution introducing a declaration stating that fingerprints later found to be the defendant's "were lifted from the murder weapon using the proper procedures" or that officers "sealed off the scene of the crime" to prevent contamination.
- *Statements attesting to qualifications:* Imagine the prosecution introducing a computer technician's declaration that she was "trained in how to extract files without altering them" or an eyewitness's declaration that he "has 20/20 vision."

Some might argue these statements speak only to the chain of custody, authenticity of the evidence, or other rote information. But each statement makes it more likely that the defendant is guilty. And each could be erroneous or an outright lie. The same is true here. The opportunity for confrontation in this setting is thus vital to "weed out" not only "incompetent" technicians, but any "fraudulent" ones as well. *Melendez-Diaz*, 557 U.S. at 319.

IV. This case is an excellent vehicle.

For several reasons, this case is an ideal vehicle for clarifying how the Confrontation Clause applies to the type of forensic statements at issue here.

First, the question whether the certificate of withdrawal was testimonial is squarely presented. The issue was pressed and passed upon in both the trial and appellate courts. Pet. App. 4a-6a, 10a-19a.

Second, unlike some of this Court's prior forensic evidence cases, the certificate in this case was introduced directly into evidence. Pet. App. 4a; *cf. Smith*, 602 U.S. at 790-91; *Williams v. Illinois*, 567 U.S. 50, 79 (2012) (plurality opinion). It is therefore in the record for this Court to examine. Pet. App. 23a.

Third, the question whether the certificate of withdrawal is testimonial is the *only* question presented here. Unlike the statements in *Smith*, 602 U.S. at 793-95, there is no dispute over whether the certificate was offered for a hearsay purpose. Under Virginia law, it was admitted "as evidence of the facts therein stated." Va. Code § 18.2-268.7. And unlike previous cases, there is no argument that testimony from a surrogate or expert witness satisfies any confrontation requirement. *Cf. Bullcoming*, 564 U.S. at 652; *id.* at 672-73 (Sotomayor, J., concurring in part); *Smith*, 602 U.S. at 783. This Court can therefore focus on what makes a statement testimonial and how that rule applies in this case, without any collateral issues complicating its analysis.

Fourth and finally, the certificate of withdrawal is also unquestionably formal. In Justice Thomas's view, statements in forensic reports are testimonial only when "contained in *formalized* testimonial materials." *Melendez-Diaz*, 557 U.S. at 329 (Thomas, J., concurring) (emphasis added); *see also Smith*, 602 U.S. at 804 (Thomas, J., concurring in part). The statements here, just like those in *Melendez-Diaz*

and *Bullcoming*, satisfy that standard because they are contained in a certification that was signed by the declarant and delivered to the clerk of the court. Put another way, the certification here bears "a striking resemblance" to formalized statements whose admission in lieu of live testimony "the Confrontation Clause was designed to prevent." *Williams*, 567 U.S. at 112 (Thomas, J., concurring in the judgment) (citation omitted). Accordingly, the Court is not at risk here of fracturing over formality and can instead focus on the issues that have divided the lower courts: how to interpret and apply the primary purpose test and footnote one of *Melendez-Diaz*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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