No. 07-11191

In the Supreme Court of the United States

MARK A. BRISCOE AND SHELDON A. CYPRESS,
PETITIONERS

v.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a state statute that authorizes the prosecution to introduce a certificate of a forensic laboratory analysis without presenting the live testimony of the analyst who prepared the certificate, on condition that the prosecution produce the analyst and permit the defendant to call the analyst for cross-examination on the defendant's timely request, complies with the Confrontation Clause of the Sixth Amendment.

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INTEREST OF THE UNITED STATES

This case presents the question whether a state statute that authorizes the prosecution to introduce a certificate of a forensic laboratory analysis without presenting the live testimony of the analyst who prepared the certificate, on condition that the State produce the analyst and permit the defendant to call the analyst for cross-examination on the defendant's timely request, complies with the Confrontation Clause of the Sixth Amendment. The federal government brings prosecutions in the District of Columbia, which has a statute similar to the Virginia statute at issue here. In an effort to avoid constitutional difficulties, the District's highest court has interpreted that statute to require that the prosecution question the analyst during its case-in-chief

if the defendant so demands. *Thomas* v. *United States*, 914 A.2d 1, 19-20 (D.C. 2006), cert. denied, 128 S. Ct. 241 (2007). The question presented also has implications for the conduct of federal criminal trials. The United States therefore has a significant interest in this case.

STATEMENT

1. At the time of petitioners' trials, Virginia law provided that, in any criminal trial, a certificate of forensic analysis prepared in certain state and federal laboratories was "admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein," provided that the certificate was "duly attested" and "filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial." Va. Code Ann. § 19.2-187 (Supp. 2005). Virginia law also provided defendants with "the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness," with such witness to be "summoned and appear at the cost of the Commonwealth." *Id.* § 19.2-187.1 (2000). The Commonwealth accepts that "[i]f the prosecutor fails to produce the analyst at trial based on such a demand, * * * the certificate of analysis is inadmissible." Resp. Br. 9, 16-18 (citing *Grant* v. *Commonwealth*, 682 S.E.2d 84, 89 (Va. Ct. App. 2009)).[1]

[1] Effective August 21, 2009, following this Court's decision in *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009), the Virginia legislature substantially amended the provisions here at issue to bring them in line with the "simplest form [of] notice-and-demand statutes" discussed in *Melendez-Diaz*, *id.* at 2541. See Va. Code Ann. § 19.2-187 (Adv. Code Serv. 2010). This brief refers to the pre-amendment provisions in effect at the time of petitioners' trials. Both versions are reproduced in an appendix, *infra*.

2. a. On February 10, 2005, police officers executed a search warrant at the apartment of petitioner Mark A. Briscoe. In the kitchen they found "off-white chunky solid material," scales, a razor blade, sandwich bags, and a plate. J.A. 4, 77, 189. Another "white, rock-like substance" was found in the pocket of Briscoe's shorts. *Ibid.* Briscoe told the officers that everything they had found in the search "is mine, the coke, the crack, the baggies. It was all mine." J.A. 78. Briscoe further told the officers that the rock in the sink should have weighed "around 40 grams," that he had gotten it "from my man in D.C. two weeks ago," and that there were three main people in Washington "that I get coke from." *Ibid.*

Briscoe was charged with possession with intent to distribute cocaine in violation of Va. Code § 18.2-248(C), transporting cocaine into the Commonwealth with intent to distribute, in violation of Va. Code § 18.2-248.01, and conspiring to distribute cocaine, in violation of Va. Code §§ 18.2-248 and 18.2-256.

b. On May 24, 2005, more than three weeks before Briscoe's trial began, the Commonwealth filed two certificates of analysis. J.A. 4-5, 6-7. The certificates attested that the substance found in Briscoe's pocket contained 2.573 grams of cocaine and that the items found in Briscoe's kitchen contained a total of 34.005 grams of cocaine. Both certificates were signed by Jeana J. Rodenas, a forensic scientist employed by the Division of Forensic Science of the Virginia Department of Criminal Justice Services. *Ibid.* Briscoe did not seek to have Rodenas summoned as a witness pursuant to Section 19-2.187.1.

At trial, when the government sought to admit the certificates into evidence, Briscoe's counsel objected

that, "without [the forensic scientist] here as a witness testifying, if these documents were to be admitted, it would be in violation of Mr. Briscoe's confrontation rights under the Sixth Amendment." J.A. 32. The court overruled the objection, explaining that "our statute provides that the defense shall have a right to call the witness or the preparer of the certificate and call that person as an adverse witness at the expense of the Commonwealth," J.A. 49, and that "the fact that the Defendant has the right to call the preparer of the certificate as an adverse witness protects the Defendant's rights," J.A. 51.

Briscoe did not present any evidence. J.A. 50-51, 190-191. He was convicted of possession with intent to distribute and transportation of cocaine into the Commonwealth. J.A. 69. He was sentenced to 20 years of imprisonment, with all but 68 months suspended. J.A. 73.

c. The Virginia Court of Appeals affirmed. J.A. 75-81. The court rejected Briscoe's Confrontation Clause objection to the admission of the certificates of analysis, citing *Brooks* v. *Commonwealth*, 638 S.E.2d 131 (Va. Ct. App. 2006). J.A. 76-77. In *Brooks*, the Virginia Court of Appeals had assumed certificates of analysis to be testimonial evidence under *Crawford* v. *Washington*, 541 U.S. 36 (2004), and therefore subject to confrontation under the Sixth Amendment. *Brooks*, 638 S.E.2d at 134. The court found, however, that Section 19.2-187.1 set out "a reasonable procedure to be followed in order for a defendant to exercise his right to confront a particular limited class of scientific witnesses at trial and that a defendant's failure to follow this procedure amounts to a waiver of the constitutional right to confront such witnesses." *Id.* at 136. The court of appeals in Briscoe's

case concluded that, consistent with *Brooks*, Briscoe's failure to invoke his right to confront the analyst under Section 19-2.187.1 constituted a waiver of any Confrontation Clause objections to the admission of the certificates of analysis. J.A. 77.

3. a. On June 25, 2005, a Virginia State Police trooper stopped a car for having improperly tinted windows. J.A. 93-94, 186. Petitioner Sheldon A. Cypress was the sole passenger in the car, and his cousin, Melvin Bailey, was the driver. J.A. 93-94, 126, 186. Bailey consented to a search of the car, which turned up two plastic bags, each containing a "chunky white substance." J.A. 186. Cypress later told Bailey that the drugs were his and that he had placed them under the seat. J.A. 127-128.

Cypress was charged with possession with intent to distribute cocaine in violation of Va. Code § 18.2-248(C). J.A. 88-89.

b. On November 28, 2005, more than four months before Cypress's trial began, the government filed a certificate of analysis prepared by Nicole M. Anderson, a forensic scientist employed by the Virginia Department of Forensic Science, attesting that the two plastic bags found in Bailey's car contained a total of 60.5 grams of cocaine hydrochloride. J.A. 84-87. Cypress did not seek to have Anderson summoned as a witness pursuant to Section 19-2.187.1.

At trial, when the government sought to admit the certificates into evidence, Cypress's counsel objected that admission of the certificate without Anderson present violated Cypress's confrontation rights. J.A. 109. When asked why he had not raised the objection earlier, Cypress's counsel replied that he "wanted my client in jeopardy when I raised this issue," and that requiring

him to raise the issue before trial would violate the Confrontation Clause. J.A. 110-111. The court overruled the objection on the ground that the certificate of analysis was not a testimonial statement. J.A. 112.

The court found Cypress guilty as charged. J.A. 170. Cypress was sentenced to 15 years of imprisonment, with all but five years suspended. J.A. 173.

c. The Virginia Court of Appeals affirmed. J.A. 176-180. Relying on *Brooks*, the court concluded that Cypress' failure to request that Anderson be summoned as a witness constituted a waiver of his constitutional right of confrontation. J.A. 177-178.

4. The Virginia Supreme Court consolidated the cases and affirmed. J.A. 182-233. The court assumed, *arguendo*, that the certificates of analysis were testimonial statements subject to confrontation under *Crawford*. J.A. 194. The court concluded, however, that "the procedure provided in Code § 19.2-187.1 adequately protects a criminal defendant's rights under the Confrontation Clause," and petitioners' failure to invoke their statutory right to have the analysts summoned waived their challenge to the admissibility of the certificates of analysis. J.A. 183.

The court reasoned that Section 19.2-187.1 "supplies the 'elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.'" J.A. 200 (quoting *Maryland* v. *Craig*, 497 U.S. 836, 846 (1990)). It explained that, under Section 19-2.187.1, petitioners could have guaranteed the analysts' presence at trial by asking the Commonwealth or the court to summon them; and petitioners could have then "called the forensic analysts as witnesses, placed them under oath, and questioned them as adverse witnesses," giving the "trier of fact" the "opportunity to

observe the demeanor of the witnesses." *Ibid.* "In short," the court concluded, if petitioners "had utilized the procedure in Code § 19.2-187.1, they would have had the opportunity to cross-examine the forensic analysts." J.A. 200-201.

The court rejected petitioners' challenges to the adequacy of the procedure, including their argument that Section 19.2-187.1 "shifts the burden of producing evidence and requires a criminal defendant to call the forensic analyst in order to exercise his right to confront the witness." J.A. 204. The court explained that, "[b]ecause [petitioners] did not avail themselves of the opportunity to require the presence of a particular forensic analyst at trial, they were never in the position of being forced, over their objection, to call a forensic analyst as a witness." J.A. 205.

Finally, the court held that "[t]he provisions of Code §§ 19.2-187 and 19.2-187.1 adequately inform a criminal defendant of the consequences of the failure to exercise the right to have a forensic analyst present at trial for cross-examination"—namely, "that a certificate of analysis will be admitted into evidence without testimony from the person who performed the analysis." J.A. 209, 210. The court accordingly ruled that petitioners' failure to invoke their Section 19.2-187.1 rights waived their right to be confronted with the forensic analysts. J.A. 211.

Three justices dissented. J.A. 218-233. In their view, petitioners' Sixth Amendment right "to be confronted with the witnesses against" them was violated because petitioners "were not able to subject the contents of the certificates of analysis to adversarial scrutiny before the prosecution concluded its cases in chief." J.A. 229.

SUMMARY OF ARGUMENT

The Virginia Supreme Court in this case assumed (J.A. 194), as this Court later held in *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009), that certificates of forensic analysis are testimonial statements subject to confrontation under the Sixth Amendment. The Virginia Supreme Court then correctly held that admitting the certificates in petitioners' cases did not violate the Confrontation Clause. State law gave petitioners the right to have the analysts summoned at trial, where the analysts would be fully subject to cross-examination. Because that procedure adequately protects the Sixth Amendment confrontation right, the Virginia Supreme Court correctly held that petitioners' failure to invoke the procedure waived their constitutional objection to the admission of the certificates of analysis without the analysts' live appearance at trial.

A. The Confrontation Clause of the Sixth Amendment entitles a criminal defendant to test the government's witnesses through cross-examination. Absent a prior opportunity for cross-examination, the Clause generally prohibits the government from introducing in a criminal trial a witness's out-of-court testimonial statements if the witness does not appear and thus cannot be cross-examined. When, however, the witness "appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford* v. *Washington*, 541 U.S. 36, 60 n.9 (2004) (citing *California* v. *Green*, 399 U.S. 149, 162 (1970)).

The Virginia statutes at issue in this case permit the prosecution to introduce the duly attested results of laboratory forensic analysis at trial, but on the condition that, if the defendant makes a timely request, the ana-

lyst will be produced for cross-examination. Those provisions are notably different from state laws that provide for the admission of certificates of analysis while giving the defendant only the power to subpoena the analyst if he chooses. Respondent acknowledges that defendants have not only a mechanism to hale the analyst into court, but also a right to have the certificate of analysis excluded from evidence if, on timely request, the State fails to produce the witness for cross-examination. So understood, Virginia law preserves criminal defendants' Sixth Amendment right to be confronted with a forensic analyst whose out-of-court testimonial statement is admitted as substantive evidence at trial.

B. The statutory right to cross-examine the forensic analyst meets constitutional requirements even though it does not guarantee that the prosecution will first present the analyst's direct testimony during its case-in-chief. Neither the text of the Confrontation Clause, nor its history, nor the defendant's tactical preference justifies a constitutional rule that would mandate a particular order of proof at trial. A State may have valid reasons for deviating from the traditional order of proof, and it may thus allow cross-examination at some time other than immediately following a direct examination during the prosecution's case-in-chief. Concerns about jury confusion or prejudice can be alleviated through appropriate clarifying instructions.

C. A rule that would require States to guarantee not only the right to cross-examine the analyst, but also the right to insist that the prosecution present the analyst's testimony during its case-in-chief, would have substantial costs. It would leave defendants who have no demonstrable intention of challenging forensic laboratory results free to demand the analyst's appearance simply

to test the government's ability to produce the analyst at trial. States have a legitimate interest in not being forced to pay the needless expense of bringing forensic analysts to court—and in not running the risk of having the forensic evidence excluded if the analyst is unavailable—in those cases in which the defendant will never cross-examine the analyst because he has no genuine interest in confronting her. That interest counsels against expanding the confrontation right beyond its recognized purpose: ensuring that criminal defendants have an adequate opportunity to cross-examine the witnesses against them.

ARGUMENT

THE RIGHT TO CROSS-EXAMINE FORENSIC ANALYSTS WHOSE CERTIFICATES ARE ADMITTED AT TRIAL SATISFIES THE CONFRONTATION CLAUSE

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009), this Court held that the preparer of a certificate of forensic analysis qualifies as a witness subject to confrontation. *Id.* at 2532. The Court also made clear, however, that States may validly require criminal defendants to notify the government before trial if they object to the admission of a certificate of analysis without having the opportunity to confront the analyst at trial. *Id.* at 2541.

Petitioners do not dispute that States may treat a defendant's failure to raise a timely Confrontation Clause objection in accordance with state procedural rules as a waiver of the confrontation right. See Pet. Br. 8-9. Nor do they dispute that, at the time of their trials,

Virginia law required defendants to raise any Confrontation Clause objections by summoning the analyst, or requesting that the prosecution or trial court issue a summons, so that the analyst would be available at trial for cross-examination. See J.A. 209-210. Petitioners instead argue that they could not have waived their Confrontation Clause objections by failing to comply with that procedure, because a defendant's Virginia-law right to cross-examine analysts is insufficient to safeguard the defendant's constitutional right "to be confronted with the witnesses against him."

Petitioners' argument rests in large measure on their incorrect assumption that, had they requested that the analysts appear for cross-examination and the analysts failed to appear, the state courts could nevertheless have admitted the certificates of analysis into evidence. Petitioners did not test that assumption in their own cases, and respondent disavows it. See Resp. Br. 9, 16-18.

If Virginia law is understood to place the risk of the analyst's non-appearance on the Commonwealth, it provided petitioners with precisely what the Confrontation Clause demands: an opportunity "to be confronted with the witnesses against" them. The Virginia Supreme Court correctly concluded that, by declining that opportunity, petitioners relinquished their right to object to the admission of the certificates of analysis on Confrontation Clause grounds.

A. The Confrontation Clause Entitles Criminal Defendants To Cross-Examine The Witnesses Against Them

1. The Sixth Amendment's confrontation guarantee "has long been read as securing an adequate opportunity to cross-examine adverse witnesses." *United States* v. *Owens*, 484 U.S. 554, 557 (1988). The "particular vice

that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." *California* v. *Green*, 399 U.S. 149, 156 (1970); accord *Crawford* v. *Washington*, 541 U.S. 36, 50 (2004). The Confrontation Clause thus ordinarily ensures that witnesses will face the defendant at trial, testify under oath, submit to cross-examination, and enable the trier of fact to observe their demeanor. See, *e.g.*, *Maryland* v. *Craig*, 497 U.S. 836, 845-846 (1990); see also, *e.g.*, *Coy* v. *Iowa*, 487 U.S. 1012, 1016 (1988). Its "central concern" is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Craig*, 497 U.S. at 845; accord *Crawford*, 541 U.S. at 61 ("[T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

Consistent with its origin and purposes, the Confrontation Clause forbids "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54; see *id.* at 43. Once "the declarant appears for cross-examination at trial," however, "the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at 60 n.9 (citing *Green*, 399 U.S. at 162). And the "right to confrontation may, of course, be waived, including by failure to object

to the offending evidence" in accordance with state procedural rules. *Melendez-Diaz*, 129 S. Ct. at 2534 n.3; see *id.* at 2541.

2. This Court has held, as the court below assumed, J.A. 194, that certificates of forensic analysis are "testimonial" statements that implicate the Confrontation Clause. *Melendez-Diaz*, 129 S. Ct at 2532. Although Virginia law permits the use of such certificates as substantive evidence, see Va. Code Ann. § 19.2-187 (Supp. 2005), it also provides that a criminal defendant "shall have the right to call" the analyst as a witness and "examine him in the same manner as if he had been called as an adverse witness," *id.* § 19.2-187.1 (2000).

Those provisions, as the Virginia Supreme Court explained, provide a means for criminal defendants to "insure[] the physical presence of the forensic analysts at trial," to place them under oath, and to cross-examine them. J.A. 200. By giving defendants the opportunity to cross-examine the forensic analysts face-to-face and under oath, limited only by a requirement that the defendant make a pretrial demand, see J.A. 209-210, Section 19.2-187.1 preserves criminal defendants' confrontation rights. See J.A. 200-201.

3. Petitioners' principal contention (Pet. Br. 10-13) is that the Virginia Supreme Court's conclusion cannot survive *Melendez-Diaz*, which held that the power to subpoena witnesses pursuant to state law, or under the Compulsory Process Clause, is "no substitute for the right of confrontation." 129 S. Ct. at 2540. Unlike the "subpoena scheme" (Pet. Br. 13) at issue in *Melendez-Diaz,* however, Section 19.2-187.1 adequately safeguards the right of confrontation.

a. In *Melendez-Diaz*, the Court rejected the argument that no Confrontation Clause violation occurs when

a certificate of analysis is entered into evidence, so long as the defendant has an ability to subpoena the analyst. 129 S. Ct. at 2540. The Court explained that the power to subpoena a witness, whether under state law or under the Compulsory Process Clause, is "of no use to the defendant when the witness is unavailable or simply refuses to appear." *Ibid.* And "[m]ore fundamentally," the Court explained, "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Ibid.* In short, "a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses," *ibid.*, would permit the government to admit out-of-court testimonial statements without affording the defendant an opportunity to subject the witness's testimony to adversarial testing.

b. Petitioners' reliance on *Melendez-Diaz* in this case rests largely on an assumption that Section 19.2-187.1, like the subpoena provisions at issue in *Melendez-Diaz*, provides no more than a mechanism for defendants to attempt to hale witnesses into court and offers no recourse in the event that the witness fails to appear. See Pet. Br. 17-18. Petitioners did not test that assumption in their own cases, since they never took the first step of requesting the analysts' presence at their trials. And the assumption is unfounded. The Virginia Supreme Court noted that, had petitioners invoked Section 19.2-187.1, they "could have insured" the analysts' presence at trial. J.A. 200. And although the court had no occasion to address explicitly the consequences of an analyst's failure to appear, respondent acknowledges that the consequence is the exclusion of the certificate of analysis from evidence. Resp. Br. 9, 16-18. So under-

stood, Section 19.2-187.1 does not "shift[] the consequences of adverse-witness no-shows from the State to the accused." *Melendez-Diaz*, 129 S. Ct. at 2540.

Although petitioners seek to minimize the point (Pet. Br. 13), Section 19.2-187.1 also assigns to the government the logistical burdens of producing the analyst. If a defendant chooses to summon the analyst, the statute provides that the analyst will "appear at the cost of the Commonwealth," regardless of the defendant's financial circumstances. Va. Code Ann. § 19.2-187.1 (2000). And as the court below made clear, the defendant need not undertake himself to issue the summons, but may instead "ask[] the trial court or Commonwealth to do so." J.A. 200.

Understood in that manner, Virginia law requires only that a defendant give timely notice of his wish to have the analyst produced for cross-examination at trial. See J.A. 200; see also J.A. 201-204. That is hardly an intolerable burden. As this Court has explained, "[t]he defendant *always* has the burden of raising his Confrontation Clause objection," and "[t]here is no conceivable reason why he cannot * * * be compelled to exercise his Confrontation Clause rights before trial." *Melendez-Diaz*, 129 S. Ct. at 2541.

B. The Confrontation Clause Does Not Dictate The Order Of Proof At Trial

Petitioners also contend (Pet. Br. 8, 16, 18-24) that Section 19.2-187.1 is constitutionally "inadequate" because it speaks only of the defendant's right to call the analyst as an adverse witness and not the prosecutor's duty to call the analyst to the stand first.

As respondent notes (Resp. Br. 19-24), petitioners' contention has an abstract and speculative character. Had petitioners invoked their right to have the analyst

available for cross-examination under Section 19.2-187.1, their trials may well have proceeded according to their preferred sequence of events. Section 19.2-187.1 permits a defendant to summon a forensic analyst for cross-examination, but it does not prevent the prosecution from deciding to call the witness to the stand first. A prosecutor has substantial tactical incentives to do just that; on direct examination, the prosecution can draw out the analyst's background and qualifications and highlight the strength of the evidence against the accused. And the trial courts here may have structured the order of proof in that manner. But as the court below noted, "[b]ecause [petitioners] did not avail themselves of the opportunity to require the presence of a particular forensic analyst at trial, * * * 'the trial court never had occasion to address the proper order of proof.'" J.A. 205 (quoting *Brooks* v. *Commonwealth*, 638 S.E.2d 131, 138 (Va. Ct. App. 2006)); cf. *Luce* v. *United States*, 469 U.S. 38, 42-43 (1984) (holding that, to raise and preserve a challenge to a trial court's in limine ruling permitting the government to impeach him with a prior conviction, the defendant must first testify; otherwise it is "a matter of conjecture" whether the challenged impeachment would have occurred).

Should the Court nevertheless decide to entertain petitioners' challenge, it should reject their invitation to read the Confrontation Clause as dictating a particular sequence of events at trial. Petitioners' argument finds scant support in the text or history of the provision, and it would risk transforming a wide variety of matters traditionally committed to trial judges' discretion into matters of constitutional concern.

1. The Sixth Amendment's text does not mandate a particular order of proof

1. Petitioners contend (Pet. Br. 14) that their proposed reading of the Confrontation Clause follows from the use of the passive "to be confronted" rather than the active "to confront." But they fail to explain how the use of the passive voice in the Confrontation Clause suggests anything about the order of proof at trial. To the extent the use of the passive voice has any meaning, a more natural understanding would relate to the government's duty to produce the witness for cross-examination.

In any event, the use of the passive voice in the Confrontation Clause will not bear the weight that petitioners would place on it. Several 18th-century state counterparts that "guaranteed a right of confrontation," *Crawford*, 541 U.S. at 48, use the active voice to describe the confrontation right. See N.C. Const., Declaration of Rights § 7 (1776) ("every man has a right * * * to confront the accusers and witnesses with other testimony"); Del. Const. Art. I, § 7 (1792) ("the accused hath a right * * * to meet the witnesses in their examination face to face"); Ky. Const. Art. XII, § 10 (1792) ("meet the witnesses face to face"); Mass. Const. Pt. 1, Art. 12 (1780) ("meet the witnesses against him face to face"); N.H. Const. Pt. 1, Art. XV (1783) (same); Pa. Const., Declaration of Rights § 9 (1776) ("meet the witnesses face to face"); Tenn. Const. Art. XI, § 9 (1796) (same). No historical source of which we are aware suggests that the Sixth Amendment attempted to capture a different idea.

This Court, too, has frequently used the active voice to describe the confrontation right as, for example, the right "to confront one's accusers." *E.g., Florida* v. *Nixon*, 543 U.S. 175, 187 (2004); *Crawford*, 541 U.S. at 43;

Craig, 497 U.S. at 849-850; *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). Nothing in this Court's cases indicates that the use of the passive voice in the Confrontation Clause is anything but "adventitious." Pet. Br. 14.

2. Petitioners also contend (Pet. Br. 14-15) that their reading finds support in the "sharp contrast" between a defendant's Sixth Amendment right "to be confronted with the witnesses against him" and his right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI. Again, however, petitioners do not explain how that "contrast" relates to the order of proof at trial.

This Court explained in *Melendez-Diaz* that "[t]he text of the [Sixth] Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter." 129 S. Ct. at 2534 (footnote omitted). The Court also stated that the Confrontation Clause, in contrast to the Compulsory Process Clause and to state-law subpoena provisions, "imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Id.* at 2540; see Pet. Br. 14.

A State respects the distinction between the two constitutional guarantees, however, by requiring the government to bear the burden of bringing adverse witnesses into court and to suffer the consequences if the witnesses fail to appear. See pp. 13-15, *supra*. Whether the government must not only produce the analyst at trial, but also elicit the analyst's live testimony during its case-in-chief is a different question—which the grammatical differences between the Confrontation Clause and the Compulsory Process Clause do not answer.

Petitioners note (Pet. Br. 14-15) that this Court has described most Sixth Amendment rights, in contrast to the right of compulsory process, as requiring "no action by the defendant." *Taylor* v. *Illinois*, 484 U.S. 400, 410 & n.14 (1988). That observation reflects the reality that, in order to satisfy its burden in a criminal case, the government must provide notice and trial procedures that comport with the Sixth Amendment, while the compulsory process right "is dependent entirely on the defendant's initiative." *Id.* at 410. *Taylor* does not address what procedures must be followed in order to ensure that the government's evidence satisfies the Confrontation Clause, much less hold that a state-law right of cross-examination is sufficient for Confrontation Clause purposes only if it is accompanied by a state-law guarantee that the prosecutor will question the witness first.

2. History furnishes no basis for reading the Confrontation Clause to require a particular order of proof at trial

Petitioners cite no evidence, and we are aware of none, that suggests that the Framers would have understood the Confrontation Clause to compel a particular order of proof at trial.

The right to confrontation arose as a reaction to the practice of reading official examinations at trial "in lieu of live testimony, a practice that 'occasioned frequent demands by the prisoners to have * * * the witnesses against him * * * brought before him face to face.'" *Crawford*, 541 U.S. at 43 (quoting 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 326 (1883)); see, *e.g.*, *Raleigh's Case*, 2 How. St. Tr. 1, 15-16 (1603) ("Call my accuser before my face."). Consistent with its origins, the irreducible minimum of the confrontation right is the opportunity to cross-examine. The

traditional rule governing out-of-court statements of unavailable witnesses illustrates the centrality of that right: An unavailable witness's out-of-court statements were (and are) admissible, even though the witness never appears at trial (and thus can never be called to the stand by *either* the prosecution or the defense), so long as the defendant had a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 53-54, 59.

Certainly in Sir Walter Raleigh's era, the now-familiar order of events in a criminal trial had not yet gained currency; Raleigh's trial itself consisted of an unstructured "altercation between the prisoner, the counsel for the crown, and the court." 9 W.S. Holdsworth, *A History of English Law* 227 (1st ed. 1926). Raleigh's cry of "[c]all my accuser before my face," 2 How. St. Tr. at 15-16, presumably was meant as a request to have Lord Cobham participate in the give and take of the altercation, as opposed to a request that the king's counsel question Cobham during a phase of trial denominated "the prosecution's case-in-chief" before Raleigh conducted cross-examination.

During the eighteenth century, the "rambling altercation" that had long characterized the English criminal trial began to give way to "that articulation of sequence into prosecution and defense 'cases' that so characterizes adversary procedure." John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 130-131 (1983). That development appeared to coincide with rules permitting defense counsel to play a greater role in criminal proceedings, as well as increased attention to the parties' burdens of proof. *Ibid.* But the historical record contains little suggestion that a particular order of proof

at trial was thought necessary to preserve the defendant's right to confront his accusers.

Available evidence of trial practice in the Colonies and the early Republic reinforces that conclusion. At the Boston Massacre Trial of 1770, for example, "witnesses were called out of order (Crown witnesses were called in the middle of the defense's case); [and] rebuttal witnesses were called immediately, to refute specific segments of testimony." 3 *Legal Papers of John Adams* 27 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (editorial note); see also Randolph N. Jonakait, *The Orgins of the Confrontation Clause: An Alternative History*, 27 Rutgers L.J. 77, 138 n.267 (1995) ("Witnesses were permitted to be immediately recalled in order to expose contradictions. For example, after a prosecution witness testified that a soldier had fired and had not fallen or been knocked down beforehand, the defense was permitted to immediately recall their witness to counter that testimony."). And at the 1807 treason trial of Aaron Burr, both sides repeatedly interrupted witness examinations to ask questions of their own. See, *e.g.*, 1 David Robertson, *Reports of the Trials of Colonel Aaron Burr for Treason* 473-485 (1808). Members of the jury, too, occasionally interjected with questions for the witnesses. See, *e.g.*, *id.* at 496, 517. There is little evidence that the participants in those trials attached great significance to the matters petitioners now raise.

3. Tactical considerations do not justify expanding the Confrontation Clause right to include the order of proof at trial

Petitioners assert at length (Pet. Br. 15-16, 18-24) that cross-examination is "far riskier and less attractive" without a guarantee that the prosecution will call the analyst to the stand and question her first. The Con-

frontation Clause, however, does not, and could not feasibly, guarantee the "[s]cenario" that petitioners deem necessary to make cross-examination less "risk[y]" and more "attractive." *Id.* at 18.

1. As this Court has repeatedly explained, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (per curiam); accord, *e.g.*, *Owens*, 484 U.S. at 559. Subject-matter restrictions on scope of cross-examination may unconstitutionally restrict that opportunity. See *Delaware* v. *Van Ardsall*, 475 U.S. 673, 679 (1986) (Confrontation Clause violated where a defendant was not permitted to inquire into possible bias resulting from State's dismissal of criminal charges against the witness); see also *Davis* v. *Alaska*, 415 U.S. 308, 309 (1973); *Smith* v. *Illinois*, 390 U.S. 129, 131-132 (1968). But where "defense counsel receives wide latitude at trial to question witnesses," the Court has generally considered the Confrontation Clause to be satisfied. *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 53 (1987) (plurality opinion).

This Court has never held that the Confrontation Clause provides not only latitude to cross-examine an adverse witness, but an option to insist on petitioners' preferred sequence of events at trial. On the contrary, this Court has recognized that the power to manage the order of proof at trial is a matter traditionally committed to the sound discretion of trial courts. See, *e.g.*, *Huddleston* v. *United States*, 485 U.S. 681, 690 (1988) ("The trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial."); *Geders* v. *United States*, 425 U.S. 80, 86 (1976)

("The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion."); *Goldsby* v. *United States*, 160 U.S. 70, 74 (1895) (within court's discretion to allow evidence during prosecution's rebuttal case even if it should have been adduced in opening case); see also, *e.g.*, Fed. R. Evid. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence."); 28 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6164, at 347-391 (1993) (cataloguing applications of Rule 611(a)). Trial courts frequently exercise that discretion to "permit deviations" from the "conventional order of proof where deviations can save time, avoid confusion and prejudice, or accommodate witnesses." *Id.* § 6164, at 371-372 & nn.96-101. Courts may, for example, provisionally admit evidence whose admissibility depends on later witness testimony, see, *e.g.*, *United States* v. *Newton*, 326 F.3d 253, 257 (1st Cir. 2003); permit one party to call a witness during the other side's case, see, *e.g.*, *United States* v. *Jones*, 438 F.2d 1199, 1200 (6th Cir.) (per curiam), cert. denied, 404 U.S. 913 (1971); or authorize a party to reopen its case to present new evidence, see, *e.g.*, *United States* v. *Faul*, 748 F.2d 1204, 1218 (8th Cir. 1984), cert. denied, 472 U.S. 1027 (1985).

3. Petitioners offer no valid reason to read the Confrontation Clause as an implicit limitation on trial judges' broad discretion to manage the order of proof at criminal trials.

a. Although petitioners suggest (Pet. Br. 18-19, 21) that their reading will ensure that prosecutors elicit the adverse testimony of a witness immediately before cross-examination, the Confrontation Clause can contain no such guarantee. "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 60 n.9. The prosecutor need not ask the declarant to repeat his out-of-court statement while he is on the stand. That statement is admissible even if the declarant no longer remembers its substance, see *Owens*, 484 U.S. at 559-560, or now tells a different story, see *Green*, 399 U.S. at 150, 164.

That rule has special resonance here. In many cases, a witness's recorded recollection will be superior to his present recall on the stand. Forensic analysts, for example, "perform[] hundreds if not thousands of tests each year and will not remember a particular test or the link it had to the defendant." *Melendez-Diaz*, 129 S. Ct. at 2548 (Kennedy, J., dissenting). The analyst's report is thus typically better evidence than her in-court testimony, just as out-of-court identifications are routinely thought to be more accurate than in-court showups. See *Gilbert* v. *California*, 388 U.S. 263, 272 n.3 (1967). As long as the defendant has the opportunity to cross-examine on the witness's forgetfulness or "his lack of care and attentiveness," the Confrontation Clause is satisfied. *Owens*, 484 U.S. at 559.

A right to immediate cross-examination of an out-of-court declarant, of the kind petitioners seek, would radically alter existing practice. For example, Federal Rule of Evidence 801(d)(1), as well as many state evidence codes, permits the introduction of certain prior state-

ments so long as the witness "testifies at the trial or hearing and is subject to cross-examination." In *Green*, which involved a similar state rule, a recalcitrant witness contradicted earlier statements to a police officer. 399 U.S. at 151-152. After the witness's testimony, the officer took the stand, and the witness's prior statements were admitted as substantive evidence. *Id.* at 152. That common practice of introducing the prior inconsistent statement through a later witness has not been thought to violate the Confrontation Clause, even though the declarant is not on the stand and therefore not subject to immediate cross-examination. See, *e.g.*, *United States* v. *Tran*, 568 F.3d 1156, 1161 (9th Cir. 2009). If the defendant wishes to cross-examine the declarant about an out-of-court statement admitted after she has stepped down, he may ask to recall her for cross-examination. See, *e.g.*, *United States* v. *Butterworth*, 511 F.3d 71, 75-76 (1st Cir. 2007), cert. denied, 129 S. Ct. 37 (2008).

Any demand for immediate cross-examination, as part of the constitutional confrontation right, would also ignore the reality of the trial process. A witness could be examined immediately before a lunch, overnight, or weekend recess. A witness could become ill or face an unforeseen circumstance that temporarily renders him unavailable and requires cross-examination to take place later. One witness's schedule may require the court to take his testimony out of order, interrupting the examination of a second witness. Any such common circumstance may mean that a defendant's cross-examination will be disconnected from the adverse testimony, and that testimony not so fresh in the mind of the trier of fact. But this time delay need not make the cross-examination any less effective, and in any event, "successful

cross-examination is not the constitutional guarantee." *Owens*, 484 U.S. at 560.

b. Petitioners next contend (Pet. Br. 20-22) that defense counsel's decision to call a witness to the stand may be viewed as "annoying" or "harass[ing]," may unduly "raise[] expectations," or may elevate the witness's "prominen[ce]" in the eyes of the trier of fact. The assumption that judges or juries generally will think it amiss if the defense calls a forensic analyst for cross-examination is unfounded. To the contrary, the jury may well consider the prosecution's failure to call the analyst to be suspicious, making any points that the defendant scores on cross-examination particularly effective and advantageous.

Petitioners suggest that, if a defendant were required to call a child victim of abuse to the stand in order to exercise his right to cross-examination, his action would run an intolerable risk of "inflaming the jury." Pet. Br. 20 (quoting *Lowery* v. *Collins*, 988 F.2d 1364, 1369 (5th Cir. 1993)). Trial judges, however, may respond to such concerns in particular cases by instructing the jury that it is to consider all evidence presented, whether by the government or the defense, and should not consider which side called the witness. Alternatively, the trial judge may decline to identify the party responsible for calling the witness to the stand, or may inform the jury that the witness is in fact a prosecution witness being called to the stand for purposes of cross-examination. Trial courts use instructions to mitigate other forms of potential prejudice that might arise from the conduct of the defense. See, *e.g.*, *Carter* v. *Kentucky*, 450 U.S. 288, 305 (1981) (court must, on request, instruct the jury that the defendant's failure to testify cannot support an inference of guilt). "[T]he almost in-

variable assumption of the law [is] that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206-207 (1987). And a defendant could assert that the absence of procedures to mitigate potential prejudice violated due process in a particular case. In any event, whatever concerns may arise in cases involving young or particularly vulnerable victims have little relevance in a case involving the testimony of forensic analysts, and do not justify creating an across-the-board entitlement under the Confrontation Clause to have the prosecution call the witness to the stand during its case-in-chief.

c. Finally, petitioners suggest (Pet. Br. 14, 23-24) that their proposed order of proof is necessary to permit a defendant to make "a clean, uncluttered argument that the prosecution has failed to satisfy its burden of persuasion," regardless of whether the defendant chooses to put on an affirmative case. *Id.* at 24.

But a defendant may always argue that the prosecution has not proved the defendant's guilt beyond a reasonable doubt, regardless of whether defense cross-examination immediately follows an analyst's direct testimony, and regardless of whether it occurs in a phase of the trial denominated "the prosecution's case-in-chief." And if a defendant has concerns that the jury may become confused about the prosecution's burden, he may request that the court remind the jury that the prosecution bears the burden of proof and that the analyst is being called for cross-examination in order to challenge whether the government has met this burden. In this case, none of those options was explored because petitioners elected not to request the analysts' presence.

4. Permitting the order of proof contemplated by the Virginia statute does not, as petitioners suggest (Pet. Br. 24), "work a fundamental transformation in

criminal procedure" that would "turn the heart of the trial into a presentation of affidavits," followed by cross-examination in the defense case. Well-established hearsay rules generally forbid the introduction of out-of-court statements as evidence of the matter they assert. Although States have created limited exceptions to those rules to achieve certain policy objectives, as in Section 19.2-187, see Resp. Br. 2, restrictions on the admission of hearsay remain the norm in criminal trials. The prosecution's need to carry its burden of persuasion and meet juror expectations provides a further check on the possibility of trial by affidavit.

In any event, at issue here is only whether the Confrontation Clause confers a right to a certain order of proof in every case in which the prosecution seeks to introduce an out-of-court statement, including a routine forensic laboratory report. See Pet. Br. 5 n.2. The rigid Confrontation Clause rule that petitioners demand would have little substantive effect. Even if States were required to call a witness to the stand during the prosecution's case-in-chief to admit a testimonial out-of-court statement, the Confrontation Clause (as opposed to state evidentiary law) would not forbid the prosecutor from entering or simply reading into evidence the witness's prior *ex parte* statement, asking no questions, and then turning the witness over to the defense for cross-examination. See p. 24, *supra* (explaining that the Confrontation Clause does not require a declarant to repeat the substance of his out-of-court testimony on the stand). Indeed, the prosecution could also present a forensic analyst in that manner as its final witness and could announce to the jury, after reading the analyst's report, that the prosecution's case is over. That approach would be functionally equivalent to the regime

permitted under the Virginia statute. Drawing a constitutional line between the two scenarios has no basis in the "central concern" of the Confrontation Clause, which is to afford the defendant an opportunity to confront and cross-examine a witness whose testimonial statement is admitted as evidence against him. See *Craig*, 497 U.S. at 845; accord *Crawford*, 541 U.S. at 61-62. The Clause does not seek to constitutionalize the rules of evidence, nor mandate a sequence of events at trial that makes cross-examination as risk-free and attractive as the defendant might wish. See *Fensterer*, 474 U.S. at 20.

C. States Should Have Latitude To Design Notice-And-Demand Rules To Reduce Gamesmanship While Protecting Genuine Interests In Cross-Examination

Contrary to petitioners' argument (Pet. Br. 29-35), States have legitimate reasons to enact a range of notice-and-demand statutes, including one like Virginia's, that efficiently protect defendants' right to cross-examination.

1. Laboratory reports are, as petitioners acknowledge, "an essential part of the routine of modern criminal procedure." Pet. Br. 24. Scientific evidence is a critical component of many criminal prosecutions, particularly in cases, like petitioners', that involve drug offenses. As a result, forensic scientists conduct a staggering number of laboratory analyses each year for use in criminal prosecutions. See *Melendez-Diaz*, 129 S. Ct. at 2549-2550 (Kennedy, J., dissenting).

The rules governing the admission of laboratory reports in criminal prosecutions thus have important practical implications for the operation of the criminal justice system. This Court has made clear that criminal defendants must be afforded an opportunity to test the reliability of forensic evidence "in the crucible of cross-

examination." *Melendez-Diaz*, 129 S. Ct. at 2536 (quoting *Crawford*, 541 U.S. at 61); see also *id.* at 2537 ("[A]n analyst's lack of proper training or deficiency in judgment may disclosed in cross-examination."); *id.* at 2538 (defendants may test "analysts' honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts"). The right to cross-examination, however, also provides defendants who have no intention of testing the reliability of forensic evidence with a formidable power: the power to obtain the exclusion of evidence, and possibly the dismissal of charges, in the event "the analyst cannot reach the courtroom in time to testify." *Id.* at 2556-2557 (Kennedy, J., dissenting). That power creates a substantial incentive to call the analyst away from her laboratory to court, even if the defendant has no interest in challenging the analyst's testimony.

Petitioners suggest (Pet. Br. 34-35) that States struggling with increased demand for analysts' appearance, or concerned about analyst unavailability, simply hire more forensic analysts and schedule more pre-trial depositions. Those suggestions ignore the fiscal and scheduling constraints that face forensic laboratories and prosecution agencies across the country. States have a valid interest in not being forced to pay the needless expense of bringing forensic analysts to court—and to suffer dismissal of the charges if it fails in that endeavor—in those cases in which the defendant will never cross-examine the analyst because he has no genuine interest in confronting her.

2. Petitioners argue (Pet. Br. 31-33) that what they call a "simple notice-and-demand statute"—*i.*e., one that provides that "the *prosecution* must call the author of the report" if the defendant so demands—is more than

sufficient to mitigate any undue burden on the States. In petitioners' view, such a statute "ensures that the lab technician will be required to testify subject to confrontation only when the accused has a strong enough interest in cross-examining her to be worth the cost to him of causing the technician's testimony to be presented live." *Id.* at 32.

Petitioners are correct that simple notice-and-demand statutes can mitigate some of the burden on the States. But in the government's experience, such statutes do not, as petitioners suggest, "operate[] efficiently," Pet. Br. 32, to separate those defendants who truly desire to challenge the analyst's conclusions from those who have no intention of doing so, but nevertheless raise Confrontation Clause objections before trial in the hope that "the analyst fails to appear and the government's case collapses," *Melendez-Diaz*, 129 S. Ct. at 2557 (Kennedy, J., dissenting).

For example, in the District of Columbia, the Court of Appeals recently reinterpreted the District's counterpart to Section 19.2-187.1 to mean that, if the defense so demands, the "prosecution must call the chemist in its case." *Thomas* v. *United States*, 914 A.2d 1, 19-20 (D.C. 2006), cert. denied, 128 S. Ct. 241 (2007). Before *Thomas*, chemists for the federal Drug Enforcement Administration (DEA) laboratory that analyzes controlled substances for the District were subpoenaed to testify in the local courts approximately seven to ten times per month. But after the Court of Appeals converted the District's Virginia-type statute into a simple notice-and-demand statute of the kind petitioners favor, the demand for court appearances rose to more than 50 per month as defendants exercised their newly recognized right and refused to enter pretrial stipulations. While the initial

demand has receded somewhat, in fiscal year 2009, the chemists have still been summoned to court an average of 24 times per month. As a result, the DEA laboratory has been forced to increase its turnaround time on chemical analyses, extend the laboratory's hours of operation, and pay additional overtime expenses.[2]

While the number of analyst trips to the courthouse has risen significantly under the new system, the number of actual in-court appearances has not increased nearly so much. Many defendants offer to stipulate at trial, after realizing that the analyst stands ready to testify. Even when the witness is called, whether because the defense still refuses to stipulate or because the government declines the belated stipulation, the cross-examination right in this context rarely appears to be serving any substantive purpose: District's experience (apparently like that in Michigan, see Pet. Br. App. 9-14), is that defense counsel may ask at most a handful of mundane questions of the witness, rarely taking up more than a few minutes and transcript pages.

3. Virginia law differs from a simple notice-and-demand scheme primarily by conferring no guarantee that the prosecution will question the analyst; it guarantees only that the defendant will have an opportunity to cross-examine her. Virginia's law may thus more successfully elicit a defendant's interest in cross-examination and more effectively reduce gamesmanship. In a simple notice-and-demand regime, a defendant may exercise his rights only in order to test the government's ability to produce the analyst at trial; the defendant has signaled no interest in actually cross-examining. In a cross-examination-focused regime, in contrast, a defen-

[2] See Letter from James V. Malone, Director, DEA Mid-Atl. Lab. (Oct. 30, 2009).

dant who invokes his rights presumably intends, in fact, to test the analyst's testimony through his examination. Having created that expectation, it is less likely that the defendant will want to "antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion." *Melendez-Diaz*, 129 S. Ct. at 2542. Given the potential for defense gamesmanship, States can legitimately seek to elicit whether a defendant who insists on the analyst's presence at trial does so because he wishes to cross-examine her.

Petitioners mistakenly argue (Br. 32) that "[a]ny *incremental* savings generated" by Virginia's scheme "must be the result of impairing the right of the accused to examine the lab technician." But under that scheme, petitioners had a fully adequate opportunity to cross-examine the analyst on her report. To the extent that they preferred that the analyst have repeated or summarized that report live from the stand at the prosecutor's behest before deciding whether to cross-examine, the Confrontation Clause provides no such guarantee. See p. 24, *supra*. And to constitutionalize the right to insist that the prosecution call the analyst first, even when the defendant has no interest in cross-examining, would exact a substantial price in the fair and efficient administration of criminal justice. Nothing in the Confrontation Clause requires society to pay that price.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. Section 19.2-187 of the Code of Virginia Annotated (Supp. 2005), provides:

> **Admission into evidence of certain certificates of analysis.**—In any hearing or trial of any criminal offense or in any proceeding brought pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.) of this title, a certificate of analysis of a person performing an analysis or examination, performed in any laboratory operated by the Division of Consolidated Laboratory Services or the Department of Forensic Science or authorized by such Department to conduct such analysis or examination, or performed by the Federal Bureau of Investigation, the federal Postal Inspection Service, the federal Bureau of Alcohol, Tobacco and

Firearms, the Naval Criminal Investigative Service, the National Fish and Wildlife Forensics Laboratory, the federal Drug Enforcement Administration, or the United States Secret Service Laboratory when such certificate is duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial and (ii) a copy of such certificate is mailed or delivered by the clerk or attorney for the Commonwealth to counsel of record for the accused at least seven days prior to the hearing or trial upon request made by such counsel to the clerk with notice of the request to the attorney for the Commonwealth. The request to the clerk shall be on a form prescribed by the Supreme Court and filed with the clerk at least 10 days prior to trial. In the event that a request for a copy of a certificate is filed with the clerk with respect to a case that is not yet before the court, the clerk shall advise the requester that he must resubmit the request at such time as the case is properly before the court in order for such request to be effective.

The certificate of analysis of any examination conducted by the Department of Forensic Science relating to a controlled substance or marijuana shall be mailed or forwarded by personnel of the Department of Forensic Science to the attorney for the Commonwealth of the jurisdiction where such offense may be heard. The attorney for the Commonwealth shall

acknowledge receipt of the certificate on forms provided by the laboratory.

Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it.

3. Section 19.2-187.1 of the Code of Virginia Annotated (2000), provides:

Right to examine person performing analysis or involved in chain of custody.—The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 or § 19.2-187.01 shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

4. Section 19.2-187 of the Code of Virginia Annotated (Adv. Code Serv. 2010), provides:

Admission into evidence of certain certificates of analysis.—In any hearing or trial of any criminal offense or in any proceeding brought pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.) of this title, a certificate of analysis of a person performing an analysis or examination, duly attested by such person, shall

be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the proceeding if the attorney for the Commonwealth intends to offer it into evidence in a preliminary hearing or the accused intends to offer it into evidence in any hearing or trial, or (ii) the requirements of subsection A of § 19.2-187.1 have been satisfied and the accused has not objected to the admission of the certificate pursuant to subsection B of § 19.2-187.1, when any such analysis or examination is performed in any laboratory operated by the Division of Consolidated Laboratory Services or the Department of Forensic Science or authorized by such Department to conduct such analysis or examination, or performed by a person licensed by the Department of Forensic Science pursuant to § 18.2-268.9 or 46.2-341.26:9 to conduct such analysis or examination, or performed by the Federal Bureau of Investigation, the federal Postal Inspection Service, the federal Bureau of Alcohol, Tobacco and Firearms, the Naval Criminal Investigative Service, the National Fish and Wildlife Forensics Laboratory, the federal Drug Enforcement Administration, or the United States Secret Service Laboratory.

In a hearing or trial in which the provisions of subsection A of § 19.2-187.1 do not apply, a copy of such certificate shall be mailed or delivered by the clerk or attorney for the Commonwealth to counsel of record for the accused at no charge at least seven days prior to the hearing or trial upon request made

by such counsel to the clerk with notice of the request to the attorney for the Commonwealth. The request to the clerk shall be on a form prescribed by the Supreme Court and filed with the clerk at least 10 days prior to the hearing or trial. In the event that a request for a copy of a certificate is filed with the clerk with respect to a case that is not yet before the court, the clerk shall advise the requester that he must resubmit the request at such time as the case is properly before the court in order for such request to be effective. If, upon proper request made by counsel of record for the accused, a copy of such certificate is not mailed or delivered by the clerk or attorney for the Commonwealth to counsel of record for the accused in a timely manner in accordance with this section, the accused shall be entitled to continue the hearing or trial.

The certificate of analysis of any examination conducted by the Department of Forensic Science relating to a controlled substance or marijuana shall be mailed or forwarded by personnel of the Department of Forensic Science to the attorney for the Commonwealth of the jurisdiction where such offense may be heard. The attorney for the Commonwealth shall acknowledge receipt of the certificate on forms provided by the laboratory.

Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it.

5. Section 19.2-187.1 of the Code of Virginia Annotated (Adv. Code Serv. 2010), provides:

> **Procedures for notifying accused of certificate of analysis; waiver; continuances.**—A. In any trial and in any hearing other than a preliminary hearing, in which the attorney for the Commonwealth intends to offer a certificate of analysis into evidence pursuant to § 19.2-187, the attorney for the Commonwealth shall:
>
> 1. Provide by mail, delivery, or otherwise, a copy of the certificate to counsel of record for the accused, or to the accused if he is proceeding pro se, at no charge, no later than 28 days prior to the hearing or trial;
>
> 2. Attach to the copy of the certificate so provided under subdivision 1 a notice to the accused of his right to object to having the certificate admitted without the person who performed the analysis or examination being present and testifying; and
>
> 3. File a copy of the certificate and notice with the clerk of the court hearing the matter on the day that the certificate and notice are provided to the accused.
>
> B. The accused may object in writing to admission of the certificate of analysis, in lieu of testimony, as evidence of the facts stated therein and of the results of the analysis or examination. Such objection shall be filed with the court hearing the matter, with a copy to the attorney for the Commonwealth, no more than 14 days after the certificate and notice were filed with the clerk by the attorney for the

Commonwealth or the objection shall be deemed waived. If timely objection is made, the certificate shall not be admissible into evidence unless (i) the testimony of the person who performed the analysis or examination is admitted into evidence describing the facts and results of the analysis or examination during the Commonwealth's case-in-chief at the hearing or trial and that person is present and subject to cross-examination by the accused, (ii) the objection is waived by the accused or his counsel in writing or before the court, or (iii) the parties stipulate before the court to the admissibility of the certificate.

C. Where the person who performed the analysis and examination is not available for hearing or trial and the attorney for the Commonwealth has used due diligence to secure the presence of the person, the court shall order a continuance. Any continuances ordered pursuant to this subsection shall total not more than 90 days if the accused has been held continuously in custody and not more than 180 days if the accused has not been held continuously in custody.

D. Any objection by counsel for the accused, or the accused if he is proceeding pro se, to timeliness of the receipt of notice required by subsection A shall be made before hearing or trial upon his receipt of actual notice unless the accused did not receive actual notice prior to hearing or trial. A showing by the Commonwealth that the notice was mailed, delivered, or otherwise provided in compliance with the time requirements of this section shall constitute prima facie evidence that the notice was timely re-

ceived by the accused. If the court finds upon the accused's objection made pursuant to this subsection, that he did not receive timely notice pursuant to subsection A, the accused's objection shall not be deemed waived and if the objection is made prior to hearing or trial, a continuance shall be ordered if requested by either party. Any continuance ordered pursuant to this subsection shall be subject to the time limitations set forth in subsection C.

E. The accused in any hearing or trial in which a certificate of analysis is offered into evidence shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.