No. 07-11191

In The Supreme Court of the United States

MARK A. BRISCOE AND SHELDON A. CYPRESS,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

Did the petitioners waive their Confrontation Clause rights by failing to make a demand that the prosecution produce a forensic analyst for trial?

Is the Confrontation Clause satisfied by a witness who testifies live, under oath and subject to cross examination, or does the Clause further require a particular sequence of witness examination and introduction of exhibits?

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STATEMENT OF THE CASE

Under *Virginia Code* § 19.2-187, a "duly attested" certificate of analysis by the "person performing an analysis or examination" in certain laboratories may be admitted into evidence "[i]n any hearing or trial of any criminal offense . . . as evidence of the facts therein stated and the results of the analysis or examination referred to therein." A prerequisite to admitting such a certificate of analysis is that the certificate must be "filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial." *Id.* Defense counsel can obtain a copy of the certificate of analysis by making a request to the clerk at least 10 days before trial. *Id.* If the government fails to follow the procedures set forth in the statute, the certificate of analysis will not be admitted at trial. *See Gray v. Virginia*, 265 S.E.2d 705, 706 (Va. 1980); *Bell v. Virginia*, 622 S.E.2d 751, 755-58 (Va. Ct. App. 2005); *Mullins v. Virginia*, 404 S.E.2d 237, 238-39 (Va. Ct. App. 1991).

A second statute, *Virginia Code* § 19.2-187.1, sets forth a procedure for the accused to examine the person performing the analysis or examination. It provides that

> [t]he 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.

Virginia Code §§ 19.2-187 and 19.2-187.1 were enacted in 1976. 1976 Va. Acts ch. 245. A report by the Virginia Crime Commission indicates that the legislation was introduced to "reduce the time spent by key personnel for travel and court appearances" and to "improve services, since much time now spent in court appearances can be used in direct analysis and examinations." REPORT OF THE VIRGINIA STATE CRIME COMMISSION TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA ON FORENSIC SCIENCE, H. Doc. No. 36 (1975). Of course, in addition to streamlining trials and conserving scarce state resources, these statutes benefit defendants, because they prevent the delay that would result if the limited number of analysts were required to testify every time a certificate of analysis is offered into evidence.

In Virginia, forensic analysts work for a state agency that is independent of the prosecution and the police. *Virginia Code* § 9.1-1101 et seq. The analysts specialize in drug tests and they are highly educated and trained. The tests for determining the identity of a substance are routine, simple, and scientifically validated. Therefore, as one prominent Virginia defense attorney recently noted, "[i]t will be unusual for a defense lawyer to insist on live testimony. All you are doing in those situations is emphasizing the evidence that incriminates your client." David G. Savage,

Supreme Court Ruling Shakes Up Criminal Trials, L.A. TIMES (July 26, 2009) (quoting Steven D. Benjamin).

These provisions were at issue in two separate cases. Sheldon A. Cypress was a passenger in a car stopped by police in the City of Chesapeake, Virginia, for having improperly tinted windows, in violation of *Virginia Code* § 46.2-1052. App. 95, 186. After the driver, Cypress's cousin, consented to a search of the car, the officer observed what he suspected was a marijuana cigarette in plain view. App. 95-96, 186. The officer then asked Cypress if he had any more marijuana in the car. Cypress acknowledged that he had more marijuana in his book bag. App. 97. Continuing his search, the officer found additional marijuana in Cypress's book bag, along with a digital scale and empty plastic baggies. App. 97. The officer also found two bags containing a "chunky white substance," one under Cypress's seat and the other under the driver's seat. App. 97, 186.

A test by the Division of Forensic Science determined that the substance was cocaine. App. 186. These test results were recited in a certificate of analysis, which was signed by the analyst who performed the test. App. 84-87. The analyst also attested that she had performed the analysis. App. 86-87. A certificate of analysis reflecting these results was filed in the Circuit Court for the City of Chesapeake on November 28, 2005. App. 84.

Cypress was charged with possession of cocaine with the intent to distribute, having previously

committed the offense of distribution or possession with the intent to distribute. App. 88-89, 186-87. His trial took place on April 6, 2006. App. 90.

In the 129 days between the time the certificate was filed and the trial, the defense made no request for the forensic analyst to be present at trial. At trial, however, Cypress objected to the admission of the certificate of analysis, contending that it was "testimonial" evidence that could not be admitted without the testimony of the forensic analyst who had conducted the test. App. 106, 187. The trial court overruled the objection, holding that the evidence was not testimonial. App. 112, 187. Cypress did not present any evidence. App. 153, 187. Following a bench trial, Cypress was convicted of possession of cocaine with the intent to distribute, second or subsequent offense. He was sentenced to serve 15 years, with 10 years suspended, and a fine was imposed. App. 173, 187.

The Court of Appeals of Virginia denied Cypress's appeal in an unpublished opinion. App. 176-80. Cypress appealed to the Supreme Court of Virginia, and that Court agreed to hear his appeal.

The other petitioner in this appeal is Mark A. Briscoe. During the execution of a search warrant for Briscoe's apartment in Alexandria, Virginia, police recovered suspected cocaine scattered in the kitchen area, two digital scales, a razor blade, a 100-gram weight, and a box of plastic sandwich bags. App. 24-28, 53, 189. When they searched Briscoe, police

retrieved from the front pocket of his shorts a white, rock-like substance wrapped in plastic. App. 18, 189. Briscoe later admitted that "all that s**t you guys got out of my house is mine, the coke, the crack, the baggies. It was all mine." App. 61. He further gave a detailed statement about where he purchased the cocaine and his extensive involvement in drug dealing. App. 61-65.

Police submitted the suspected drugs for testing to the Virginia Department of Criminal Justice Services, Division of Forensic Science. App. 29. A forensic analyst prepared two certificates of analysis, which stated that the substances were cocaine in an amount totaling 36.578 grams. App. 4-7, 189. The analyst signed the certificates, stated that she had performed the analyses, and recited that the certificates accurately reflected the results of the analysis. App. 5, 7. Briscoe was charged with possession of cocaine with the intent to distribute, conspiracy to distribute cocaine, and unlawful transportation of cocaine into the Commonwealth. App. 9-10, 190. The certificates of analysis were filed in the Circuit Court for the City of Alexandria on May 24, 2005. App. 6. Briscoe was tried 23 days later, on June 16, 2005. App. 11.

At no point did Briscoe make any demand that the Commonwealth produce the analyst for trial. At his bench trial, the prosecution introduced into evidence the two certificates of analysis. App. 31, 58, 190. Briscoe argued that the certificates were "testimonial" evidence under the holding in *Crawford*

v. Washington, 541 U.S. 36 (2004), and that admitting the certificates of analysis without the testimony of the forensic analyst therefore constituted a violation of his right to confront witnesses. App. 33-38, 190. The trial court overruled this objection, concluding that the statutory procedure available under *Virginia Code* § 19.2-187.1 adequately protected his right to confront the analyst. Briscoe did not present any evidence. App. 50-51, 190-91. The trial court convicted him, and he was sentenced to serve a total of 20 years in prison, with all but five years and eight months suspended. App. 71-74, 191.

The Court of Appeals of Virginia affirmed Briscoe's convictions by an unpublished *per curiam* order. App. 75-81. Briscoe then appealed to the Supreme Court of Virginia. That court granted his petition and consolidated his case with two other cases, including *Cypress v. Virginia*, detailed above.[1]

The Supreme Court of Virginia affirmed both convictions. App. 182. The Court first reasoned that it was not necessary to reach the issue of whether a certificate of analysis is testimonial evidence. App. 194. Instead, the court upheld the admission of the certificates of analysis under Virginia's statutory scheme. The court concluded that

[1] The third defendant, Michael Ricardo Magruder, whose case was consolidated with Briscoe's and Cypress's, did not seek this Court's review.

> the defendants could have insured the physical presence of the forensic analysts at trial by issuing summons for their appearance at the Commonwealth's cost, ***or asking the trial court or Commonwealth to do so.*** At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them as adverse witnesses, meaning the defendants could have cross-examined them.

App. 200 (emphasis added). "In short," the court held, "if the defendants had utilized the procedure provided in Code § 19.2-187.1, they would have had the opportunity to cross-examine the forensic analysts." App. 200-01.

The court rejected the petitioners' arguments that they could not be required to take affirmative steps to assert a right to confront witnesses. The court reasoned that States can, and frequently do, regulate the exercise of constitutional rights. App. 201-02. For example, States require defendants to provide notice when they intend to raise an alibi defense. App. 203.

The court rejected the petitioners' contention that Virginia's statutory scheme compels a defendant to call the analyst to exercise his Confrontation rights. In the court's view, these arguments were "due process concerns" rather than Confrontation Clause issues. App. 204-05. The court noted:

> [b]ecause the defendants 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. In other words, no defendant said to the respective circuit court, "the forensic analyst is here to testify but the Commonwealth must first call the witness."

App. 205. Thus, the trial court "never had occasion to address the proper order of proof." App. 205.

The court found that "[b]ased on the provisions of Code §§ 19.2-187 and 19.2-187.1, no criminal defendant can seriously contend that he is not on notice that a certificate of analysis will be admitted into evidence without testimony from the person who performed the analysis unless he utilizes the procedure provided in Code § 19.2-187.1." App. 210. Finally, the court held that the defendants could, and did, waive their confrontation rights by failing to seek the presence of the analyst at trial. App. 210.

After this Court granted certiorari, and having the benefit of a signal by this Court regarding which type of "notice and demand" statutes were constitutionally unassailable, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009), the General Assembly of Virginia convened in a one-day special session to revisit the Virginia statutes. The General Assembly amended the statutes at issue. The legislation contained an "emergency enactment

clause" and thereby went into effect immediately upon signature of the Governor, on August 21, 2009.[2]

SUMMARY OF THE ARGUMENT

1. To grant the petitioners relief, this Court would have to transgress two fundamental principles of its jurisprudence. First, the Court would have to ignore a State Supreme Court's interpretation of a state law. Second, the Court would have to render an advisory opinion on hypothetical facts not before the Court.

Contrary to the petitioners' assertion that *Virginia Code* § 19.2-187.1 is a "subpoena statute"—one that requires a defendant who wishes to confront the analyst to issue a subpoena—the Supreme Court of Virginia, in construing this statute, held that a defendant can make a demand for the prosecutor to produce the analyst for trial. If the prosecutor fails to produce the analyst at trial based on such a demand, Virginia case law makes clear, the certificate of analysis is inadmissible. The petitioners waived their right to confront the analyst because they failed to take the minimal step of asking the prosecution to produce the analyst for trial. Given the construction placed upon this Virginia statute by the Supreme Court of Virginia, the statute does not improperly

[2] *See* http://leg1.state.va.us/cgi-bin/legp504.exe?092+sum+HB5007.

conflate the right of compulsory process with the right to confrontation.

Aside from their erroneous characterization of Virginia law as a "subpoena statute," the petitioners' arguments rest upon two unfounded premises. First, they contend that had the analyst been present, Virginia law would have required them to call the analyst as part of the defense case. Second, the petitioners contend that the statutes would have allowed the prosecution to introduce the certificate of analysis into evidence before the defense had a chance to cross-examine the analyst. These contentions are both speculative. The petitioners were not forced to do either of those things, because the petitioners never asked the prosecution to ensure the presence of the analyst. The petitioners' hypothetical application of the statute amounts to a request for an advisory opinion based on facts not before the Court.

It is in fact unlikely, had the petitioners demanded that the prosecution produce the analyst for trial, that they would have been forced, over their objection, to call the analyst as part of the defense case. When faced with a demand for the analyst to testify, most prosecutors, for tactical reasons, and most trial courts, to diffuse a possible basis for reversal on an unsettled legal issue, will see to it that (1) the analyst is called as part of the prosecution's case-in-chief and (2) that the certificate of analysis is introduced into evidence after the analyst has testified. The Supreme Court of Virginia therefore

correctly held that the petitioners waived their Confrontation Clause claim.

2. If this Court nevertheless chooses to address the petitioners' hypothetical scenarios, the Confrontation Clause is not violated so long as a defendant is provided with the opportunity to cross-examine a witness who testifies under oath, face-to-face, in open court. The Virginia statutes fulfill these objectives. The petitioners contend, however, that the Confrontation Clause is not satisfied by cross-examination during the defense's case of an adverse witness. Their proposed gloss on the cross-examination right protected by the Confrontation Clause is without merit.

The text itself does not supply the answer. Therefore, the Court should turn to the historical purposes that motivated the Framers to include the Confrontation Clause in the Bill of Rights. Nothing in the history of the Confrontation Clause supports the notion that the Framers of the Clause were concerned with any particular sequence of witness examination or at what point during the trial an exhibit is introduced. The trials of colonists in the vice-admiralty courts and the historic treason trials of figures such as Sir Walter Raleigh were deficient because they permitted the use of *ex parte* affidavits with no right of cross-examination. The petitioners' view of the Confrontation Clause finds no support in the equivalent provisions of State constitutions at the time of the Framing. In fact, colonial trial practice was characterized by flexibility in the examination of

witnesses. The historical record simply does not support the argument that the Confrontation Clause requires a distinct sequence of witness examination or of introduction of exhibits.

To the extent that requiring a defendant to call a witness as adverse during the defense case raises any constitutional concerns, those are due process issues, not Confrontation Clause issues. The Due Process Clause, however, is not part of the question presented and was not part of the petitioners' arguments in the Supreme Court of Virginia. The petitioners remaining criticisms of the Virginia statute are without merit.

ARGUMENT

Under Virginia's notice and demand statutes, the petitioners could have ensured the presence of the analyst by making a demand, within a reasonable time, that the prosecution produce the analyst. They did not do so. Their contentions about what might have happened had the analyst been present rest on speculation. Beyond this, the petitioners envision a Confrontation Clause whose purpose is to obviate certain "tactical decisions" by the defense at trial and to protect a particular sequence of witnesses and evidence. Nothing in the long history of the Clause supports this conception. The Confrontation Clause was designed to ensure that a witness testifies face-to-face, under oath, and

subject to cross-examination. Virginia law satisfied these requirements.

I. THE PETITIONERS WAIVED THEIR CONFRONTATION RIGHTS BY FAILING TO DEMAND THAT THE PROSECUTION PRODUCE THE ANALYST AND NOW SEEK TO TAKE ADVANTAGE OF THAT WAIVER BY OBTAINING AN ADVISORY OPINION ABOUT WHAT MIGHT HAVE HAPPENED HAD THE ANALYST BEEN PRESENT.

A. In characterizing *Virginia Code* § 19.2-187.1 as a "subpoena statute," the petitioners ignore the construction that the Supreme Court of Virginia placed upon the law.

In *Melendez-Diaz*, this Court specifically approved of "notice and demand" statutes that regulate the exercise of confrontation rights. 129 S. Ct. at 2541. Although, as a general proposition, confrontation "arise[s] automatically on the initiation of the adversary process and no action by the defendant is necessary to make [it] active in his or her case," *Taylor v. Illinois*, 484 U.S. 400, 410 (1998), "states are free to adopt rules governing" a defendant's Confrontation Clause objection. *Melendez-Diaz*, 129 S. Ct. at 2541.

These notice and demand statutes serve important state interests. The petitioners criticize what they characterize as the "efficiency-oriented

language" of the Supreme Court of Virginia, Pet. Br. 29-30 (discussing App. 211-12 n.5), but they misconstrue the court's discussion regarding the underlying purpose of the statute. In context, it is plain this discussion addresses the compelling state interest in having a defendant state his Confrontation Clause objection prior to trial. As many other States have done, Virginia sensibly streamlined trial practice to ensure the analysts are present when their testimony genuinely is in dispute, but not otherwise.

The first component of a "notice and demand" statute is notice. The Supreme Court of Virginia concluded that the statutes at issue provided sufficient notice to a defendant. App. 209-10. *Virginia Code* § 19.2-187 makes it clear that a certificate of analysis is admissible without the testimony of the analyst. The prosecution must file the certificate with the trial court in advance of trial, and defense counsel can request a copy. *Id.* Although the statute did not provide "explicit notice outlining the consequences of failing to utilize the procedure set forth in Code § 19.2-187.1," the consequences of failing to require the presence of a particular forensic analyst at trial are plain. App. 210. Indeed, the petitioners do not complain that they lacked notice that a certificate of analysis would be introduced at trial unless they took

certain steps to ensure the presence of the analyst.[3] Virginia law satisfied the need for notice.

The petitioners' principal contention is that the "demand" provisions of the former Virginia statute are inadequate because they required a defendant to issue a "subpoena" for the analyst. In their view, *Virginia Code* § 19.2-187.1 was a "subpoena statute" of the type that this Court invalidated in *Melendez-Diaz,* 129 S. Ct. at 2540. Pet. Br. 10. This premise is simply wrong. The Supreme Court of Virginia construed *Virginia Code* § 19.2-187.1 in a way that obviated the constitutional difficulty associated with a pure "subpoena statute." The construction of a Virginia statute by the Supreme Court of Virginia is final and binding, even on this Court. *See, e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993) ("There is no doubt that we are bound by a state court's construction of a state statute.").

The statute itself is ambiguous. *Virginia Code* § 19.2-187.1 provides that the forensic "witness shall be summoned and appear at the cost of the Commonwealth." It does not specify who must subpoena the forensic analyst. Resolving this ambiguity, the Supreme Court of Virginia construed the statute to provide that a defendant can "insure[ ]

[3] To the extent a defendant was represented by an attorney who did not grasp the obvious consequences of failing to request the presence of the analyst, the remedy lies in habeas corpus, not in a declaration that the former statute was invalid.

the physical presence of the forensic analysts at trial by issuing summons for their appearance at the Commonwealth's cost, *or asking the trial court or Commonwealth to do so."* App. 200 (emphasis added).[4] So construed, the Virginia statute does not function as a pure "subpoena statute." A defendant had the option of making a demand for the prosecution to produce the analyst for trial.[5]

On September 1, 2009, the Court of Appeals of Virginia confirmed this reading of the statute. In *Grant v. Virginia*, 682 S.E.2d 84 (Va. Ct. App. 2009),

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[4] The Supreme Court of Virginia consistently has construed statutes to obviate constitutional problems. *See Virginia v. Doe*, 682 S.E.2d 906, 908 (Va. 2009) ("courts have a duty when construing a statute to avoid any conflict with the constitution. . . . [and], whenever possible, we will interpret statutory language in a way that avoids a constitutional question.") (citing cases).

[5] Virginia's former statutory scheme did not specify when a defendant must make a demand for the analyst to be present. However, "[i]t is a general rule of wide acceptation that, when no particular time is specified for the exercise of a right or privilege, the law presumes that a reasonable time was intended." *In re Edwards*, 130 So. 615, 617 (Fla. 1930). *See also Hays v. Arizona Corp. Comm'n*, 409 P.2d 282, 284 (Az. 1965); *Niles v. Boston Rent Control Adm'r*, 374 N.E.2d 296, 305 (Mass. App. Ct. 1978) ("In the absence of a time period specified by statute, the time allowed . . . is a 'reasonable time,' which 'is to be determined from the facts and circumstances of each particular case.' ") (citation omitted). There is no issue in the case at bar concerning the timing of the demand for the analyst's presence. The petitioners made no demand at all until the middle of trial, obviously too late to ensure the presence of the analyst.

the defendant was charged with driving while intoxicated. Before trial, he made a written demand that the prosecution produce the forensic analyst who had performed the analysis of his blood alcohol. *Id.* at 86. Despite this written demand, the prosecution did not produce the analyst. *Id.* When the defendant objected at trial to the introduction of the certificate of analysis, the trial court concluded that the defendant had not complied with *Virginia Code* § 19.2-187.1 "because he had not subpoenaed the breath test operator." *Id.*

On appeal, the Court of Appeals of Virginia unanimously reversed. The court held, and Commonwealth conceded, that the defendant

> [c]omplied with the requirements of Code § 19.2-187.1 and did not waive his right to confront the person who prepared the certificate. In *Magruder*, our Supreme Court clarified that a criminal defendant could insur[e] the physical presence of the forensic analysts at trial" under Code § 19.2-187.1 "by issuing summons for their appearance at the Commonwealth's cost, *or asking the trial court or Commonwealth to do so*." *Magruder [v. Virginia]*, 275 Va. [283,] 298, 657 S.E.2d [113,] 120-21 [(2008)] (emphasis added). Here, Grant notified the Commonwealth "that he desire[d] that the preparer of the certificate . . . *be summoned by the Commonwealth to appear at trial* . . . at the cost of the Commonwealth to be cross-examined in this matter." (Emphasis

> added). Grant did what our Supreme Court instructed in *Magruder*, and, accordingly preserved his right to confront the preparer of the certificate.

682 S.E.2d at 89.[6] Accordingly, the petitioners' claim that (1) "Virginia's statutory scheme shifts the consequences of adverse-witness no-shows from the State to the accused," and (2) permits the prosecution to "present the witness's testimonial statement without producing the witness at trial" is patently devoid of merit. Pet. Br. 17.

Virginia law does not improperly conflate the right of compulsory process with the right to confrontation. All a defendant must do is make a demand within a reasonable time that the prosecution produce the analyst. If the prosecution fails to do so, *Grant* shows that the prosecution will bear the consequences of its failure to produce the analyst. Here, however, the petitioners waived their right to confront the analyst because, unlike the defendant in *Grant*, they took no steps prior to trial to demand the analyst's presence. Had they done so, it would have been incumbent on *the prosecution* to have the analyst present for trial. A failure by the prosecution to produce the analyst would have resulted in the exclusion of the certificate of analysis from the evidence.

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[6] There will be no further appeals in *Grant*. The case has been remanded for a retrial.

B. The Court should decline to provide an advisory opinion based on purely hypothetical scenarios.

In addition to their erroneous characterization of the statute as a "subpoena statute," the petitioners rest their remaining arguments upon two assumptions. First, the petitioners assume that they would have been forced to examine the forensic analyst as an adverse witness during the defense case, rather than during the prosecution's case-in-chief. Pet. Br. 15-16, 20-21. Second, they assume that the prosecution would have been permitted to introduce the certificate of analysis into evidence before the defense could cross-examine the analyst. Pet. Br. 20.

These arguments are entirely speculative. The petitioners never took the first step of ensuring the presence of the analyst, either by issuing a defense subpoena or by asking the prosecution to produce the witness. As a consequence, the analyst was not present at trial. The petitioners were neither forced to cross-examine the analyst as part of the defense case, nor did the trial court have to make any ruling regarding whether the certificate of analysis could be admitted prior to the live testimony of the forensic analyst. As the Supreme Court of Virginia observed,

> [b]ecause the defendants 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. In other words, no defendant said to the respective circuit court, "the forensic analyst is here to testify but the Commonwealth must first call the witness." . . . [T]he trial court never had occasion to address the proper order of proof.

App. 205 (citation omitted).

Reinforcing the speculative nature of the petitioners' argument is the fact that once an analyst is produced, most prosecutors will call the witness as part of their case-in-chief. This is so for a variety of obvious tactical reasons. It clearly is advantageous for the prosecution to be the first to question the witness, to shape the factfinder's first impression of the witness. The prosecution will want to establish the education and experience of the forensic analyst, the straightforward nature of the scientific analysis of the drug sample or the blood sample, and the extensive safeguards that ensure the accuracy of the analysis. Furthermore, prosecutors will want to avoid the impression that they have "something to hide" by failing to call the analyst and to diffuse any points the defense might wish to make. "[T]the failure to call an available, friendly witness creates a bad impression, no matter what the technical legal result may be." Hilton Spellman, DIRECT EXAMINATION OF WITNESSES 62 (1968). *See also United States v. Brooks*, 928 F.2d 1403, 1412 (4th Cir. 1991) ("If a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the

presumption that the testimony, if produced, would be unfavorable."). This especially is true if there is any weakness that the defense might wish to exploit. "The better course, unless good reason to the contrary exists, is to recognize and dispose of the possible attack on cross-examination while the witness is still under direct examination and the party producing the witness can place the testimony of the witness in its true light and can, at the same time, deprive the cross-examiner of a means of attacking the witness." Charles W. Fricke, PLANNING AND TRYING CASES 301-02 (1957). Indeed, there is no compelling reason for a prosecutor to give defense counsel the first chance to examine the analyst.

When the prosecutor calls the forensic analyst as part of the prosecution's case-in-chief, as would likely occur if the defendant makes a timely demand for the analyst to be produced, and the defendant proceeds with cross-examination, there is no arguable constitutional violation. Although the statute *permits* the defendant to call the analyst as an adverse witness during the defense case, nothing in the statute *forbids* the prosecution from calling the analyst as part of the prosecution's case-in-chief.

Just as a prosecutor has good reasons to ensure the analyst is called during the prosecution's case-in-chief, so does the trial court. Virginia judges have "great latitude . . . as to the order in which witnesses may be called and the manner of their examination." *Williams v. Virginia*, 360 S.E.2d 361, 367 (Va. 1987). When faced with an objection by

defense counsel that the Constitution requires the prosecution to call the analyst as its witness, a trial judge likely would exercise this broad discretion and compel the prosecution to call the analyst as part of the prosecution's case-in-chief. Certainly, nothing in the statute precludes the trial court from exercising its discretion to compel the prosecution to call the analyst during the prosecution's case. In fact, doing so obviates any due process or other argument for reversal on appeal.

As for the petitioners' complaint that the certificate of analysis would have been admitted into evidence before the testimony of the analyst, the contention is again pure speculation. Sound tactical reasons and widespread Virginia practice suggest that, once a defendant has made a demand for the prosecution to produce the analyst, the prosecution will present the testimony of the analyst, who will then authenticate the exhibit. It is possible, but not likely, that the court would have allowed, over the defendant's objection, the admission of the certificate prior to the analyst's testimony. Most trial courts and prosecutors, however, will be reluctant to inject an appellate issue into the case, especially when the issue easily can be diffused by having the analyst testify before the certificate is introduced into evidence. Again, nothing in the statute prohibits the prosecution or the trial court from waiting until the

analyst has testified before allowing the certificate of analysis into evidence.[7]

This Court has declined to provide advisory opinions based on abstract, hypothetical scenarios. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). *See also Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (courts should neither "anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied"). Virginia's former statutes should not be declared invalidated because they *might have been applied* in some unconstitutional way. Reversal is warranted only if a defendant's rights actually were infringed.

Moreover, because the petitioners seek the invalidation of the statute *in toto*, they are in effect raising a facial challenge. Such challenges are "disfavored" for many reasons. *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008). Among other problems, facial challenges "often rest on speculation." *Id.* That infirmity is evident here. The petitioners raise hypothetical complaints about the factfinder's

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[7] As a textual matter, *Virginia Code* § 19.2-187 provides that a properly authenticated, timely filed certificate of analysis is admissible in court. The statute does not specify at what point in the case the certificate is admitted into evidence in the situation where the forensic analyst actually testifies in person.

perception or tactical choices the defense may have to make in a different case not before the court. Pet. Br. 18-24. The petitioners here were not forced to call the analyst as part of their defense case because the petitioners failed to take the first step of making a timely demand for the prosecution to produce the analyst. If a future litigant is forced to call an analyst as part of the defense case, after the certificate of analysis has been introduced, that litigant can properly raise an "as applied" challenge in that specific case. The petitioners' demand for facial invalidation should be rejected.

The petitioners failed to make a timely demand for the prosecution to produce the analyst. A simple demand, oral or in writing, within a reasonable time before trial was all that was required. Because the petitioners failed to make this demand, they waived their right to confront the analyst.[8]

[8] Owing to the speculative nature of these arguments and the petitioners' erroneous characterization of the statute as a subpoena statute, the Court may wish to dismiss the case as improvidently granted.

II. BY PROVIDING A DEFENDANT WITH THE OPPORTUNITY TO CROSS-EXAMINE A WITNESS WHO IS FACE-TO-FACE, UNDER OATH, VIRGINIA LAW SATISFIED THE DEMANDS OF THE CONFRONTATION CLAUSE.

For the reasons above, the Court need not reach the issue of whether the Confrontation Clause demands a particular sequence of witnesses. In the event the Court reaches the issue, however, Virginia's former statutes did not violate the Confrontation Clause. The statute at issue requires the prosecution, upon demand by the defendant, to produce the analyst. Once the analyst is produced, the defendant might be required to question the analyst during the defense's case-in-chief, or the prosecution may take the initiative and adduce the testimony during the prosecution's case-in-chief. Such a statute does not violate the Confrontation Clause.

This Court has held that the Confrontation Clause offers three distinct but interrelated protections. "[T]he traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements." *United States v. Owens*, 484 U.S. 554, 560 (1988) (citing *California v. Green*, 399 U.S. 149, 158-61 (1970)). *See also Mattox v. United States*, 156 U.S. 237, 244 (1985) ("The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him

to the ordeal of a cross-examination."). All three protections are provided by the Virginia statute. Had petitioners availed themselves of the right to demand the State to produce the analysts, and then called the analysts as adverse witnesses, the analysts would have testified under oath, been cross-examined, and had their demeanors observed by the factfinder.

More recently, in *Crawford*, this Court concluded, after a careful analysis of the roots of the Confrontation Clause, that "[t]he historical record also supports [the following] proposition: that the Framers would not have allowed 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." 541 U.S. at 53-54. *See also Crawford*, 541 U.S. at 59 n.9. ("[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."). Under Virginia's scheme, the witness *does* "appear at trial" and the defendant is given the opportunity to cross-examine the witness under oath, face-to-face.[9]

[9] Virginia does not dispute that, absent a waiver under a notice and demand statute, testimonial evidence requires live testimony by the witness. However, the Confrontation Clause does not require that this testimony come at any particular point during the trial, nor does it require that the prosecution be the first to examine the witness.

The issue then becomes whether the Confrontation Clause *additionally* requires the prosecution to present the witness's testimony during the prosecution's case-in-chief and before any exhibits associated with that witness's testimony have been introduced into evidence. *Melendez-Diaz* did not resolve these questions. To be sure, this Court noted that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Melendez-Diaz*, 129 S. Ct. at 2540. The point of that section of the opinion, of course, was to make clear that a defendant's "ability to subpoena the analyst" under the Compulsory Process Clause "is no substitute for the right of confrontation." *Id.* Therefore, the prosecution had to "present" or "produce" its witnesses to provide the defendant with an opportunity to cross-examine them, rather than falling back on the defendant's right to compulsory process. *Melendez-Diaz* did not purport to hold that permitting a defendant to cross-examine a witness before the prosecution examined the witness necessarily violated the Confrontation Clause.

A. The constitutional text alone does not resolve the issue.

The petitioners chiefly make a textual argument, contending that "the use of the passive voice in the Confrontation Clause is not adventitious." Pet. Br. 14. In their view, the Framers deliberately chose the words "*be confronted* with the witnesses against him"

to protect a particular sequence of witness examination, *i.e.,* direct examination by the prosecution, followed by cross-examination. Neither the plain language of the clause nor its drafting history support the argument that the Framers of the Sixth Amendment were concerned with a sequence of witnesses.

First, as a matter of plain language, the term "be confronted with the witnesses against him" does not clearly mean, as petitioners contend, "be presented in the prosecution's case-in-chief." Justice Harlan concluded that "[s]imply as a matter of English the clause may be read to confer nothing more than a right to meet face to face all those who appear and give evidence at trial." *Green*, 399 U.S. at 175 (Harlan, J., concurring). In the view of Justices Douglas, Brennan, and Marshall, "[t]he right 'to be confronted with the witnesses against' him—the right of confrontation in the popular sense—means a 'face-to-face' meeting." *Tacon v. Arizona*, 410 U.S. 351, 353 (1973) (*per curiam*) (Douglas, Brennan, and Marshall, J.J., dissenting).[10] In common parlance, when a person sets out to "confront" someone, it signals a face-to-face encounter. To "be confronted"

[10] *See also* Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 728 (1971) ("Like all good constitutional provisions, the crisp language of the confrontation clause turns out to be somewhat cryptic. It requires thoughtful consideration and application in the light of its historical origins.").

simply means that the prosecution must ensure the presence of the witness for the confrontation to occur; it does not signify who must first question the witness.

Second, the historical record does not support the notion that the words of the Confrontation Clause were carefully chosen with a view toward protecting a particular sequence of witness examination. As Justice Harlan famously observed, the Confrontation Clause "comes to us on faded parchment." *Green*, 399 U.S. at 174 (Harlan, J., concurring). James Madison prepared the draft of what became the Sixth Amendment. Francis H. Heller, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 29-34 (1951). Madison proposed that the accused have the right "to be confronted with his accusers and with the witnesses against him." *Id.* at 30. The only change to his proposal was the deletion of the language "with his accusers." It is not clear why this change was made, nor does the Congressional history shed any light on the precise meaning Congress attributed to these words. *Id.* at 33.

> The available information thus permits only the following limited conclusion as to the immediate genesis of the Sixth Amendment: in its basic structure, compactness of arrangement, and enumeration of rights the amendment follows the recommendation of the ratifying convention of Virginia, which in turn was but an amplification of the

> corresponding section of the Bill of Rights drawn up by George Mason.

Id. at 34.[11]

"The Constitution's text does not alone resolve this case." *Crawford*, 541 U.S. at 42. Therefore, the Court must "turn to the historical background of the Clause to understand its meaning." *Id.* at 43.[12]

B. The evils targeted by the Confrontation Clause have nothing to do with who first questions a witness or at what point during a trial an item is introduced into evidence.

In *Crawford*, the Court looked to a variety of historical sources to determine the meaning of the Confrontation Clause. Those sources—including the colonial experience with vice-admiralty courts, the notorious treason trials of Sir Walter Raleigh, state constitutions, and Framing-era treatises—revealed

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[11] Professor Howard writes that the Virginia provision was adopted for the purpose of "preventing the trial of criminal cases upon affidavits or depositions" and protects the right of the accused to be present at his trial and to cross-examine witnesses. 1 A.E. Dick Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 102, 104 (1974).

[12] Given the sparse and ambiguous text, this Court, of necessity, has turned to historical practice to ascertain the scope of the Clause in other contexts as well. *Mattox*, 156 U.S. at 244 (transcript from prior trial); *Crawford*, 541 U.S. at 56, n.6 (dying declarations and business records); *Giles v. California*, 128 S. Ct. 2678, 2683 (2008) (forfeiture by wrongdoing).

that the Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined." 541 U.S. at 61. A review of those sources further reveals that the Clause is not concerned with the structure of criminal trials and the order by which witnesses are examined. The common law confrontation right was concerned with ensuring defendants the opportunity to cross-examine witnesses against them, a right fully protected by the Virginia statute.

1. The colonial experience in the royal vice-admiralty courts does not support the petitioners' "sequence of witnesses" argument.

The experience of the colonies with the British vice-admiralty courts constitutes one of the principal moving forces for the enactment of the Confrontation Clause. Local courts often acquitted colonists charged with violating laws designed to raise revenue and restrict trade, in spite of the obvious guilt of the accused. Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 395-96 (1959). In response, the Crown shifted these trials to the vice-admiralty courts, where "trials were before judge without jury, and testimony by depositions was commonplace." *Id.* at

397. Such trials, "instituted by secret informants where adverse evidence was by deposition or given in private before the judge, reawakened in the colonists the need to assert what were considered to be the inalienable rights of Englishmen." *Id.* *See also* *Crawford*, 541 U.S. at 47-48 (discussing abuses by vice-admiralty courts).

The objection to these courts did not stem from the fact that the defense was required to first question the witness or that a written statement from the witness might be admitted prior to the witness's testimony. Rather, it was because, as the Continental Congress explained in a letter to the inhabitants of Quebec in 1774, "neither life, liberty, nor property can be taken from the possessor" until there has been a "full enquiry, face-to-face, in open court." Letter by the First Continental Congress to the Inhabitants of the Province of Quebec, October 26, 1774 (quoted in Pollitt, 8 J. PUB. L. at 398).

2. The notorious treason trials of England do not support the petitioners.

The precursors to the vice-admiralty courts were the historic treason trials of England, most notably of Sir Walter Raleigh. The problems associated with these trials do not support the notion that the Confrontation Clause requires a witness to be questioned first by the government. To the contrary, the confrontation right guaranteed to Raleigh was

that he could "require" his accuser to be "brought forth" to make the accusation in person, not that the "confrontation" happen at a particular point in the trial. *See* 1 & 2 Philip & Mary, c. 10 (1554) and 1 Eliz., c. 1 § XXXVII (1558) (quoted in Pollitt, 8 J. PUB. L. at 388 n.26). The great shortcoming in Raleigh's trial was that his accuser, Lord Cobham, could not be examined at all, despite strong indications that he may have confessed under torture or to save his life. *Crawford*, 541 U.S. at 44. Raleigh would have been delighted to have *any* opportunity to question Cobham face-to-face concerning his written confession. Similarly, the defendants in other noteworthy treason trials made demands for a "face-to-face" encounter with a witness. Sir James Fitzjames Stephen, *Criminal Procedure from the Thirteenth to the Eighteenth Century*, in 2 SELECT ESSAYS IN ANGLO AMERICAN LEGAL HISTORY 443, 506 (1908) (discussing trial of Quaker preacher John Lilburne). The flaw in these trials again was the *ex parte* use of affidavits with no opportunity to cross-examine the witness—not having the chance to cross-examine the witness only during the defense case.

3. State constitutions adopted in the wake of independence do not support the petitioners' "plain language" argument.

Following the declaration of independence, States enacted a number of provisions designed to prevent

the abuses associated with the vice-admiralty courts. Four of these constitutions protected a right to "be confronted" with witnesses. Del. Decl. of Rights § 14 (1776); Md. Decl. of Rights § 19 (1776); Pa. Const. § 9 (1776); Va. Const. § 8 (1776). In contrast, the Massachusetts clause, whose chief author was John Adams,[13] as well as New Hampshire, protected the right of an accused "to meet the witnesses against him face-to-face." Mass. Const. § 12 (1780); N.H. Const. Art. I, § 15 (1784). North Carolina's Constitution provided that "[e]very man has a right . . . to confront the accusers and witnesses with other testimony." N.C. Const., Decl. of Rights § 7 (1776).

These various formulations all took aim at the same problem. There is no indication that the wording chosen for these clauses signaled an intent on the part of the States to provide distinct procedures or protections. During the ratification debates, one critic of the proposed United States Constitution lumped these state provisions together, observing that

> [f]or the security of life, in criminal prosecutions, the bills of rights most of the states have declared, that the witnesses against him shall be brought face to face and he shall be fully heard by himself or counsel. . . . Are not provisions of this kind as

[13] Ronald M. Peters, Jr., THE MASSACHUSETTS CONSTITUTION OF 1780 13, 23 (1974).

> necessary in the general government, as in that of a particular state?

XIII THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, doc. No. 221, p. 527, Brutus No. 2, published 1787 (2003).[14] The same historical experience informed the passage of these variously worded constitutional provisions. Madison chose the "be confronted" phrasing not to distinguish the Sixth Amendment from other state constitutional provisions. Instead, he simply turned to the familiar language from the constitutional provision of his home State.

4. Contemporaneous treatises do not tie the importance of live examination of witnesses to any particular order of witnesses or sequence of introducing evidence.

Discussing civil trials, William Blackstone contrasted the inquisitorial method with the open examination of the witnesses favored in England:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth,

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[14] *Cf. Johnson v. State*, 10 Tenn. (2 Yer.) 58 (1821) (irrespective of the different wordings of North Carolina Constitution, which protected a right "to confront the accusers and witnesses" and the Constitution of Tennessee, which protected "a right to meet the witnesses face-to-face," "the expression in both means the same thing").

> than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. . . . Besides, the occasional questions of the judge, the jury and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.

3 William Blackstone, *Commentaries on the Laws of England* 373-74 (1768).

Another influential writer, Sir Matthew Hale, praised the "open Course of Evidence to the Jury in the Presence of the Judges, Jury, Parties and Council." Matthew Hale, THE HISTORY OF THE COMMON LAW OF ENGLAND 163 (Charles M. Gray ed. Univ. of Chi. Press 1971) (1713). This procedure provided "Opportunity for all Persons conern'd" to question the witness and "Opportunity of confronting the adverse Witnesses." *Id.* at 164.

There is no indication that these writers were preoccupied in the least with who first questioned a witness or at what point in the trial a documentary exhibit might be read or produced for the jury.

5. The Confrontation Clause was not designed to displace the flexibility that characterized colonial trials.

Cases around the time of the founding typically proceeded with the prosecution's witnesses, to be followed by any defense witnesses. *See, e.g.*, 3 William Blackstone, *Commentaries* 367 (describing trials as beginning with one side presenting evidence, followed by the adverse case and then a reply). However, there is no evidence that the Framers attributed any particular importance to this sequence of events. Indeed, compared to modern trial practice, "[t]he colonial trial was far more informal and dynamic." Daniel D. Blinka, *Trial by Jury on the Eve of Revolution: the Virginia Experience*, 71 UMKC L. REV. 529, 568 (2003).

> For the most part witnesses testified in "narrative" form, that is, he or she related what they "knew" about an event unimpeded by the "Q and A" characteristic of contemporary trials. The party who called the witness might ask pertinent questions, following which the opponent had the opportunity to cross-examine. Judges interceded freely, compared to their modern counterparts, often with pointed questions that revealed their predisposition about a case. It also appears that jurors occasionally asked questions, although the extent of this practice is impossible to determine.

Id. at 568-69.

The "Boston Massacre" trials of British soldiers in 1790 illustrate this flexibility. "[W]itnesses were not sequestrated, but remained in open court during the taking of other testimony; . . . 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." The Boston Massacre Trials, *in* 2 LEGAL PAPERS OF JOHN ADAMS 27 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

The treason trial of Aaron Burr, over which Chief Justice John Marshall presided, offers a further illustration of the flexibility of trial practice. 1 REPORTS OF THE TRIALS OF COLONEL AARON BURR FOR TREASON (1808). Occasionally, the first question for a prosecution witness would come from the defense. The prosecution at times would interrupt the defense's cross-examination with questions. Conversely, defense counsel, and the defendant himself, would interrupt the prosecution's direct with questions. Sometimes the jurors would ask questions. *See generally id.* at 474-91 (examination of William Eaton) and 505-14 (examination of Thomas Morgan). This procedure would be highly unusual in a modern trial. However, there is no evidence that this flexibility was viewed as problematic or that the Confrontation Clause was designed to displace the flexibility that characterized trials around the time of the framing.

6. The petitioners' expansive reading of the protections of the Confrontation Clause would take the Clause far beyond its historical moorings.

The petitioners devote a large section of their brief to the imagined evils that flow from their description of Virginia's statutory procedure. They contrast a typical modern trial with the tactical disadvantages that might flow from what they erroneously characterize as a "subpoena statute." Pet. Br. 13-29. This Court's role, however, is not to fashion the fairest or best procedures for state criminal prosecutions. *Spencer v. Texas*, 385 U.S. 554, 564 (1967) (this Court does not function "as a rule-making organ for the promulgation of state rules of criminal procedure"). The question before the Court is whether Virginia's former statutory scheme violated the Confrontation Clause. Absent an indication that the Confrontation Clause was ratified to prevent the tactical problems identified by the petitioners, these supposed problems, real or imagined, cannot result in the invalidation of a statute as unconstitutional. There is no indication that the Confrontation Clause was designed to avoid "time gaps" in testimony, Pet. Br. 18, to obviate "raising expectations," Pet. Br. 22, to afford a defendant "a clean, uncluttered argument," Pet. Br. 24, or, of all things, to prevent defense counsel from "look[ing] foolish," Pet. Br. 22. Nor is there any evidence that the Clause was designed to provide the defendant an opportunity to

argue for a directed verdict at the close of the prosecution's case. Instead, the Confrontation Clause "was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses." *Green*, 399 U.S. at 179 (Harlan, J., concurring).

If the Court accepts the petitioners' arguments, routine trial decisions would be swept into the orbit of the Confrontation Clause. For example, if a court breaks for lunch or for the day following the direct examination of a witness, does that "time gap," between direct and cross-examination create a confrontation problem? The petitioners suggest that it does. Pet. Br. 18. Or suppose that a trial court, for reasons of efficient trial management, requires a defendant to call one of his witnesses before the conclusion of the prosecution's case. Perhaps an expert witness for the prosecution is not present when expected because her flight has been delayed, or perhaps the witness is temporarily stuck in traffic. The petitioners suggest that this displaced sequence of examination injects a Confrontation Clause error into the case. Pet. Br. 20.

There is no doubt that trial procedures have benefitted from modern developments. State and federal courts have adopted rules of evidence and criminal procedure. Defendants also are afforded discovery of certain evidence. These measures make trials far more orderly. These modern rules and statutes governing the operation of trials, beneficial as they may be, do not raise the constitutional floor.

C. The petitioners' remaining criticisms of the Virginia statute are without merit.

1. The petitioners' burden of proof and fundamental fairness arguments fall within the Due Process Clause, not the Confrontation Clause.

The petitioners contend that "[i]f the accused were forced to call adverse witnesses, '[u]ltimately the effect could be to blur the presumption of innocence and the principle that the burden of proof on the prosecution 'never shifts throughout the trial.'" Pet. Br. 14 (citation omitted). *See also* Pet. Br. 24 (claiming that Virginia's scheme "work[s] a fundamental transformation in traditional criminal procedure" and "forces a defendant to abandon (or at least severely undercut) the burden-of-proof argument."); *Wigglesworth v. Oregon*, 49 F.3d 578, 581 (9th Cir. 1995) (allowing defendant to cross-examine analyst after certificate of analysis is introduced violates due process). Boiled down to its essence, the petitioners' argument is that the statutes at issue are fundamentally unfair to a defendant.

Although Virginia disagrees with this conclusion,[15] arguments about diluting the burden of

[15] Providing for the defense to first examine the analyst can actually be advantageous to a defendant. When the prosecution first examines the analyst, the direct examination will establish the analyst's credentials and experience, the scientific nature of the test, and the elaborate safeguards in place in the laboratory.

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proof and criticism of trial procedures as fundamentally unfair sound in due process, not confrontation. It is the Due Process Clause that "guarantees the fundamental elements of fairness in a criminal trial," *Spencer*, 385 U.S. at 563-64, and that ensures the burden of proof remains with the prosecution. *See, e.g., In re Winship*, 397 U.S. 358, 361-64 (1970) (Due Process Clause requires proof beyond a reasonable doubt in juvenile proceedings). In *Melendez-Diaz,* this Court addressed the improper conflation of two Constitutional guarantees: the right of compulsory process and the right of confrontation. 129 S. Ct. at 2540. Just as the Confrontation Clause should not be conflated with the distinct right of compulsory process, neither should it be conflated with the Due Process Clause.

Any due process issues that might arise when a defendant is actually forced to call the analyst during the defense case should be saved for another day. The question presented does not raise any due process issue, nor would such an issue be fairly encompassed

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At the conclusion of this examination, the factfinder will most likely have a very favorable impression of the witness and of the analysis. In contrast, when the defendant has the first opportunity to examine the witness, the defendant can hone in on specific problems in a particular case and force the prosecution to explain those away. Furthermore, given the routine nature of the scientific testing, the timing of the analyst's testimony is unlikely to make any difference to the outcome in the vast majority of the cases. This is particularly true where, as here, the factfinder is a judge rather than a jury.

within the question presented. Ordinarily, this Court will "not consider questions outside those presented in the petition for certiorari." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). This rule is prudential in nature, but the Court will disregard it "only in the most exceptional cases." *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976). There is no reason to disregard the rule here.

Moreover, the petitioners never raised any due process issue in the court below. Therefore, even if Virginia's superseded statutory scheme raised a due process concern, a point Virginia does not concede, that does not help the petitioners. "It is 'the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.'" *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987) (quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940)).

2. The prosecution established the chain of custody.

The petitioners also complain about the statutes' impact on proof of chain of custody. Pet. Br. 25. With respect to chain of custody, *Virginia Code* § 19.2-187.01 provides that the certificate of analysis is "prima facie evidence . . . as to the custody of the material described therein from the time such

material is received by an authorized agent of [a] laboratory until such material is released. . . ." This statute does not address chain of custody outside the laboratory. *Melendez-Diaz* reiterated the settled law that not every link in the chain of custody must be established. 129 S. Ct. at 2532 n.1. Instead, such questions go to the weight of the evidence, not its admissibility. *Id.*

In Cypress's case, the arresting officer explained that he sealed the evidence and locked it in the police vault. He later personally took it to the laboratory and observed as the receptionist wrote his name on the sealed package. App. 102-03. He identified the bags at trial, which contained a mixture of rice and cocaine, as the ones he seized at the scene. App. 100-01. The officer who seized the drugs in Briscoe's case also sealed the drugs in a heat-sealed plastic evidence envelope, marked it, placed the items in the police property room, and later transported them to the forensic lab. App. 28-31. The defendant's name, the police department's case number, and the forensic lab numbers on the certificate of analysis all matched the evidence seized at the scene. App. 30-31.[16] These

[16] In Virginia, when a police officer drops off suspected drugs for testing at a state laboratory, the established protocol calls for the person receiving the drugs to affix a bar-coded sticker to the container enclosing the sample. The sticker bears a unique case number from the Department of Forensic Science. An identical sticker is also affixed to the Request for Laboratory Examination (RFLE) form. The RFLE form, which includes the name(s) of the suspect(s), the date the item was received by the

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numbers were unique to this case and to these pieces of evidence. App. 30. The testimony of the officers provided all the assurance that was needed to establish that the items seized were the items tested.

Moreover, although the petitioners contend that the chain of custody is "crucial," Pet. Br. 25, they raised no issue with respect to chain of custody in their briefs to the Supreme Court of Virginia. Instead, the petitioners' argument was that they were denied the opportunity to confront the analyst. The court below was never called upon to address the propriety of Virginia's statutory scheme with respect to chain of custody. The petitioners should not be permitted to raise an issue that was neither presented nor passed upon in the court below. *Stincer,* 482 U.S. at 747 n.22.

Virginia's former statutory scheme provided the petitioners with the opportunity to cross-examine the analyst, face-to-face, under oath, in open court. To exercise those rights, all the petitioners had to do was to make a timely demand for the prosecution to produce the analyst. Nothing more was required to satisfy the Confrontation Clause.

Department of Forensic Science, and the case number assigned by the submitting law enforcement agency, is stapled to the evidence container. When the certificate of analysis bears the same unique case number, police department case number and the suspect's name as that found on the sample, the factfinder can draw a reasonable inference that the item submitted is the item that was tested.

CONCLUSION

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

Respectfully submitted,

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