No. _____

In The Supreme Court of the United States

MELVIN DAVID TOWNS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Confrontation Clause prohibit admission of required records maintained by private persons exclusively for enforcement of drug laws on forms warning of the criminal consequences of false statements?

PARTIES TO THE PROCEEDING

Melvin David Towns – Petitioner

United States of America – Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

REFERENCE TO OPINION IN THE CASE

The Opinion of the United States Court of Appeals for the Fifth Circuit *United States v. Melvin David Towns*, ___ F.3d ___ (5th Cir. 2013), is appended here as App. 1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED THAT ARE CITED IN THE APPENDIX

Sixth Amendment to the United States Constitution. 21 U.S.C. § 830(a)(1), 21 U.S.C. § 830(c)(1) and (2), 21 U.S.C. § 830(e)(1)(v), 18 U.S.C. § 1001 and Texas Health & Safety Code § 486.0146 are set out in the Appendix.

STATEMENT OF THE CASE

Towns was convicted by a jury of conspiring in 2008 to 2010 to possess and distribute pseudoephedrine, knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. § 846. He was sentenced to 120 months, 5 years supervised release, and a special assessment of $100. The Fifth Circuit affirmed his conviction in *United States v. Towns*, No. 11-50948 (5th Cir. April 30, 2013) [Judge James E. Graves dissenting], App. 1. This Petition for a Writ of Certiorari follows.

STATEMENT OF FACTS

The indictment in *Towns* alleges that in order to control the misuse of pseudoephedrine, the federal government both regulates the quantity of over-the-counter cold medications that an individual can purchase and requires the retailers who sell the medications to maintain records of the sales and purchasers. Clerk's Record USCA5 16, 96. At trial, the Government offered in evidence, as putative business records, federal and Texas mandated handwritten logs; which Towns sought to exclude on the grounds they were solely for enforcement of the drug laws and because the regulations prohibited their use for any business purpose. *See* 21 U.S.C. § 830; Texas Health & Safety Code §§ 486.014 and 486.015, Texas Atty.

Gen. Op. GA-0564[1] codified in Texas Health & Safety Code § 486.0146. Clerk's Record USCA5 116, 127-128, 135. On their face, these required records warn that information provided is subject to prosecution under the false statements statute, 18 U.S.C. § 1001, and that the penalty for that offense is five years imprisonment. 18 U.S.C. § 830(e)(1)(v).

Towns' Motion in Limine to exclude the records, also asserted that these facts made the records testimonial and, thus, inadmissible under the Confrontation Clause. Clerk's Record USCA5 117, 126.

The Government offered the records, supported by an affidavit from the home office of each retailer that maintained them. The affidavits stated that the affiant was employed by the retailer, was designated a custodian, that all of the records requested were produced, and that they were maintained by a retail employee at the time with knowledge of the matters reflected in them. Government Exhibit 1a. The Government called no live witness who observed the pseudoephedrine sales at the retail stores. In fact,

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[1] The Texas Attorney General held, in a binding opinion, that these records are not collected for business purposes: "retailers are not, collecting the data for their own use. . . ." *See* Texas Atty. Gen. Op. GA-0564, 2006 WL 2773877 (September 26, 2006). The recordkeeping statute has a "law enforcement or government purpose. . . ." and it would be "A violation of the law" for businesses to collect "the data for their own use." *Id.* This was codified in 2011 in the Texas Health & Safety Code. *See* Texas Health & Safety Code § 486.0146(c) at App. 49.

Texas Department of Public Safety investigator[2] Pieprzica collected the records and testified; but he did not visit the stores; did not know the procedure utilized by each store to obtain the information in the records; did not know what training, if any, was provided to store employees regarding maintaining the records; and did not question any employee who kept the records. Clerk's Record USCA5 230; Volume 5 USCA 5 265.

On cross-examination of Agent Pieprzica, Towns' counsel established that no witness was available for him to ask when the sales were made, who the people were that were involved in making purchases, who the clerk was that made the record, and what information was gathered to make the records regarding Towns' alleged purchases reflected in the records. Volume 5 USCA5 266-268. Counsel also explained to the Court that no witness was available for him to ask the following questions since the records served the function of a live eyewitness: Did the person who came in actually show you a photo ID? If there was no photo ID, was a supervisor contacted? Did you verify the name on the ID? Did you verify that the name on the ID was the name that the purchaser wrote in the log book? Did Mr. Towns actually make this purchase? Or did someone come in and say they were Towns with a possible fake ID? He further complained that he could not verify the date, time of sale,

[2] The Department of Public Safety is the law enforcement agency for the State of Texas. Volume 3 USCA5 48.

the name of the sales person to see and if what they recorded was correct. Volume 3 USCA5 29. Counsel complained that the records were being used to prove the elements of the charge, that Mr. Towns possessed pseudoephedrine. Volume 3 USCA5 37. *See* Indictment, Clerk's Record USCA5 15. The Court admitted the records as business records kept by private retailers over Towns' objections. Volume 3 USCA5 29-39 and Clerk's Record USCA5 205-206.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law that has not been, but should be settled by this Court.

Whether a statement or document is admitted in violation of the Confrontation Clause depends, under current opinions from this Court, on its formality, whether it is the equivalent of out-of-court testimony of an eyewitness (its purpose), and whether it is reasonably understood by the witness that it will potentially be used as evidence in an investigation or prosecution, or as proof of an element of a crime. The *Towns* case presents in its sole question, the opportunity for this Court to resolve important issues left unanswered in the areas above with regard to the admissibility of pseudoephedrine logs kept by private retailers as required by laws, which created the recordkeeping requirement for the sole purpose of enforcing drug and customs laws.

Formality

In *Crawford*, this Court established that "[a]n accuser who makes a formal statement to government officers bears testimony." *Crawford v. Washington*, 541 U.S. 36, 51 (2004). Relying on *White v. Illinois*, the Court defined formal statements as *ex parte* or extrajudicial statements "contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions." *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment). *Crawford* and its progeny have established that this list is non-exhaustive and its boundaries have yet to be defined.

Two years after *Crawford*, this Court provided a further definition of its "formality" requirement. In *Davis v. Washington*, this Court explained that statements which "do precisely what a witness does on direct examination . . . are inherently testimonial." *Davis v. Washington*, 547 U.S. 813, 830 (2006). Footnote five of that opinion noted that while "formality is indeed essential to testimonial utterance" according to this Court, those "who perform investigative and testimonial functions once performed by examining Marian magistrates" have changed over time and therefore so has the "formality" requirements of the Confrontation Clause.

In *Bullcoming v. New Mexico* and *Melendez-Diaz v. Massachusetts*, this Court held that documents used to assist in police investigations implicated the

Confrontation Clause in part because specific "formalities" found within those documents placed them "within the core class of testimonial statements." *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2717 (2011) (quoting *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2531-32; *Davis*, 547 U.S., at 830; *Crawford*, 541 U.S., at 51-52). The Court did not clarify what "formalities" were required for a statement to qualify as included in the "core class of testimonial statements." *Bullcoming*, 131 S.Ct., at 2717. In *Melendez-Diaz*, Justice Thomas, concurring, characterized testimonial statements as those "accompanied by [a] similar indicia of formality" as statements "sufficiently formal to resemble the Marian examinations." *Melendez-Diaz*, 557 U.S., at 329; quoting *Davis*, 547 U.S., at 836. As this Court explained in *Davis*, the context of Marian examinations have evolved over time.

In *Davis*, the 911 operators were civilian employees answering emergency calls for the authorities. This Court stated that "the facts of [*Crawford*] spared us the need to define what we meant by 'interrogations.' The *Davis* case today does not permit us this luxury of indecision. The inquiries of a police operator in the course of a 911 call [Footnote two] are an interrogation in one sense, but not in a sense that 'qualifies under any conceivable definition.'" *Davis*, 547 U.S., at 823.

Footnote two states: "If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct

interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Id.*

Therefore, in *Davis*, the conduct of interviews by civilian 911 operators on behalf of the authorities was deemed to have characteristics of the Marian examinations sufficient to implicate the Confrontation Clause.

Justice Thomas, concurring with the plurality in *Williams* and quoting *Davis* relaxed his strict adherence to traditional formality, in another context, stating: "because the Confrontation Clause 'sought to regulate prosecutorial abuse occurring through the use of *ex parte* statements,' it 'also reaches the use of technically informal statements when used to evade the formalized process.'" *Davis*, 547 U.S., at 838.

In *Bullcoming*, this Court reiterated that it "rejected as untenable any construction of the Confrontation Clause that would render inadmissible only sworn *ex parte* affidavits, while leaving the admission of formal, but unsworn statements 'perfectly OK.'" *Bullcoming*, 131 S.Ct., at 2717 (quoting *Crawford*, 541 U.S., at 52). Furthermore, the Court added that the "absence of notarization (did) not remove" reports from "Confrontation Clause governance." *Id*. While

the Court found it "[n]oteworthy, as well, the [Scientific Laboratory] report form contains a legend referring to municipal and magistrate courts' rules that provide for the admission of certified blood-alcohol analyses" and like *Melendez-Diaz* the document was labeled as a "report"; these specific formalities have left open what other characteristics may or may not qualify as "formal" or "informal" for the purposes of the Confrontation Clause.

Justice Thomas, concurring with the plurality, differentiated *Williams* from *Bullcoming* and *Melendez-Diaz* because the report in *Williams* did not attest to the accuracy of the statements found within the report and therefore certified "nothing." *Williams v. Illinois*, 132 S.Ct. 2221, 2260 (2012) (quoting *Bryant*, 131 S.Ct., at 1167; *see also Davis*, 547 U.S., at 813). He explained that by "certifying the truth" a statement within a document would bare "a striking resemblance to . . . the Marian practice." *Id*. This still leaves the question open as to what qualifications or characteristics are required to establish a document's formality. The required reports, here, have on their face the warning that entries made in them are subject to federal prosecution and a five-year penalty for false statements under 18 U.S.C. § 1001. Thus, the question is whether this renders them sufficiently formal under the circumstances of this case to make them testimonial under the Confrontation Clause.

Purpose

Because the documents in *Melendez-Diaz* were kept for the "sole purpose" to provide evidence under Massachusetts law, this Court stated that one could safely assume the record makers were aware of the documents' evidentiary purpose. This was especially true since this purpose was reflected on the face of the documents. *Melendez-Diaz*, 557 U.S., at 311. Justices Kagan and Sotomayor were not on the *Melendez-Diaz* Court, but embraced this principle in part III of *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2722 (2011), by joining the opinion authored by Justice Ginsburg:

> "A document created solely for an 'evidentiary purpose,' *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial."

Bullcoming, 131 S.Ct., at 2717.

The purpose of the records here are mandated pursuant to statute. Persons selling pseudoephedrine must report to the Attorney General each transaction involving an extraordinary amount of a listed chemical or other circumstances that makes the witness believe the chemical will be used in violation of the Controlled Substances Act. *See* 21 U.S.C. § 830(b)(1)(A),[3]

[3] 21 U.S.C. § 830(b)(1)(A) states:

"(b) Reports to Attorney General.

(1) Each regulated person shall report to the Attorney General, in such form and manner as the Attorney General shall prescribe by regulation –

(Continued on following page)

§ 830(c)(1) and (2) at App. 46-47. Texas law similarly limited the disclosure of this information. *See* Texas Atty. Gen. Op. GA-0564 (September 26, 2006) codified in Texas Health & Safety Code § 486.0146 at App. 49.[4] Indicating that they are for potential use as the equivalent of out-of-court testimony in a later criminal proceeding, the face of the records in *Towns* also reflect the fact that entries are made subject to a potential five-year period of imprisonment and a fine for any false statements under 18 U.S.C. § 1001. *See* 21 U.S.C. § 830(e)(1)(v).

In *Towns*, the Fifth Circuit held that the records were not testimonial because they "were not prepared specifically and solely for use at trial," since the businesses keeping them were also motivated to show their compliance with the recordkeeping requirement.[5] *United States v. Towns*, No. 10-50948, slip op.

> (A) any regulated transaction involving an extraordinary quantity of a listed chemical, an uncommon method of payment or delivery, or any other circumstance that the regulated person believes may indicate that the listed chemical will be used in violation of this title [the Controlled Substances Act]. . . .

[4] As in effect at the time of the alleged offense, Texas Health & Safety Code § 486.015 also stated:

> "The business establishment shall maintain each record made under Section 486.014(2) until at least the second anniversary of the date the record is made and shall make each record available on request by the department or the Department of Public Safety."

[5] The only other Court to consider the issue was the Eighth Circuit in *United States v. Mashek,* 606 F.3d 922 (8th Cir. 2010), where the defendant failed to raise a Confrontation

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p. 10 (5th Cir. 2013) at App. 13. Judge Graves, dissenting, disagreed. He concluded that the records were created for a law enforcement purpose and were "used to establish or prove some fact at trial, the fact that Towns and others purchased products containing pseudoephedrine." He further stated that the logs were not created for the administration of the retailers' affairs, citing *Melendez-Diaz*. *Id.*, slip op. p. 27 at App. 38.

The primary and sole purpose tests first became a part of Confrontation Clause analysis after *Crawford v. Washington*, when this Court began looking at the dynamics of police interviews in *Davis*. The Court was then determining whether the purpose of a police interview was to meet an ongoing emergency or whether the encounter had evolved to serve another purpose, to prove past events relevant to a later prosecution. In *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the majority held that statements in the course of a police investigation, are non-testimonial when circumstances objectively indicate that the primary purpose of the interrogation is to enable the police to meet an ongoing emergency. It held that they are testimonial when the primary purpose of the interrogation is to establish or prove past events potentially relevant to

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Clause challenge to the pseudoephedrine records at trial. The Court held, under a plain error analysis, that under Iowa law, the records were kept in the ordinary court of business and were non-testimonial.

later criminal prosecution. *See Davis*, 547 U.S., at 822. The majority also indicated that statements made in the absence of any interrogation are not necessarily non-testimonial. *See Davis*, 547 U.S., at Footnote one [the letter used against Sir Walter Raleigh was not the result of sustained questioning, but was a document containing voluntary statements].

In his dissent in *Davis*, Justice Thomas stated that the majority's primary purpose standard would fail to yield predictable results where "the purpose of interrogations are both to respond to an emergency situation and to gather evidence." *See Davis*, 547 U.S., at 838-39. Justice Thomas also stated that the standard adopted by the Court was neither workable nor targeted to reach the abuse forbidden by the Confrontation Clause. *See Davis*, 547 U.S., at 842. Justice Thomas discusses this further in his concurrence joining the plurality in *Williams*. There he rejects the primary purpose test altogether because statements to police often are made to serve multiple purposes and there is no principled way to assign primacy among them. *Williams v. Illinois*, 132 S.Ct. 2221, 2261 (2012) (Thomas, J., concurring with the plurality). Justice Thomas explained also that written reports or statements are produced to prosecutors days, months, or even a year after events. Thus, their purposes will never satisfy the needs of an ongoing emergency. It was for this reason that Justice Thomas found the application of the ongoing emergency purpose test inapt for a report such as in *Williams*, 132

S.Ct., at 2274. An elapse of time will always occur with the preparation and production of records.

Exploring the application of the primary purpose test to questions not yet before the Court, Justice Sotomayor noted in her concurrence in *Bullcoming*, that the case did not present the question of whether the records served an alternate primary purpose. There, Justice Sotomayor was inquiring whether blood analysis records might be used to prove an element in a DWI prosecution and also for medical providers to provide medical care. Justice Sotomayor, found that a document, whose primary purpose was to create "an out of court substitute for trial testimony," was testimonial but that *Bullcoming* was not a case where an alternate or secondary purpose had been suggested by the State. *Bullcoming*, 131 S.Ct., at 2722.

In *Towns* too, the Fifth Circuit's majority opinion stated that the records were kept by the retailers to comply with the laws that required their creation and, thus, were not "solely" prepared "with an eye toward trial." *Towns* at slip op. p. 9 at App. 13. While citing *Melendez-Diaz* for the proposition that "a document created solely for an evidentiary purpose is likely testimonial," the Fifth Circuit held the records here were non-testimonial because the business might want to show it complied with the federal and Texas recordkeeping requirements, as well as producing the records for use at trial. *Id*. Thus, the Fifth Circuit had little difficulty finding two purposes for

a document which businesses were prohibited from distributing to anyone other than law enforcement and which the retailers were prohibited by law from using for any business purpose. Despite the fact that the law creating the records so limited their use, the Fifth Circuit found that the business had another use for them, to show that it complied with the record-keeping requirement. The above suggests that a sole or primary purpose test might, in fact, be unworkable. This may be particularly true with regard to documents mandated by law. The application of a primary or sole purpose test by this Court with respect to Confrontation Clause analysis appears to be in flux. And the opinion of the Fifth Circuit, which suggests that required records will always have an alternate purpose, evades the requirements of the Confrontation Clause and provides an alternate purpose that this Court might find would swallow the right.

More recently, this Court examined whether the admission of DNA results violated Confrontation in *Williams*. Writing for a plurality, Justice Alito found that the records there were "not prepared for the primary purpose of accusing a targeted individual." *See Williams v. Illinois*, 132 S.Ct. 2221, 2243 (2012). The plurality applied this new primary purpose test to the DNA results and found that their purpose was to apprehend a dangerous offender at large, and thus, did not implicate the Confrontation Clause. That the primary purpose of a testimonial statement be

directed toward a particular, identified individual is not grounded in this Court's precedents as noted by the dissent and Justice Thomas in *Williams*, 132 S.Ct., at 2265. A statement made for the primary purpose of establishing events relevant to later criminal prosecution has always been found to violate the Confrontation Clause. This Court has never required that a testimonial statement accuse a previously identified individual. *See Id.* at 2273-74.

However, here, the records memorialize sales activity analyzed by law enforcement to investigate and prosecute criminal violations. Unlike records previously examined by this Court in *Melendez-Diaz* (drug testing); *Bullcoming* (blood alcohol testing); and *Williams* (DNA testing), the records here are made prior to any arrest. Law enforcement continuously investigates the sales records of over-the-counter medicines containing pseudoephedrine to determine when an individual has purchased over a statutorily prescribed amount, which constitutes an offense.

The records are generated by private retailers who are put on notice that the records may be relevant to later criminal prosecution, by a warning, on their face. The warning provides that entering false statements or misrepresentations, or supplying false information or identification, may subject one to criminal penalties under 18 U.S.C. § 1001. *See* 21 U.S.C. § 830. This Court has not addressed whether records of prospective criminal acts implicate the Confrontation Clause.

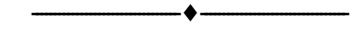
Do Records Carrying the Formality of a Criminal Penalty Lead Objective Witness Reasonably to Believe they are Testimonial?

In *Crawford,* this Court explained the classification of extrajudicial statements, noting that "various formulations of [the] core class of 'testimonial' statements exists." *Crawford*, 541 U.S., at 36, 51-52. Included in these formulations are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S., at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3.).

The retail clerks, here, were aware, from the face of the records, that the statements were made under criminal penalty and, thus, for use at a later trial. Further, the clerk's function within the transaction resembles the Marian proceedings described by Justice Thomas in *Davis*. *Davis*, 547 U.S., at 837 (Thomas, J., concurring). The purpose of the Marian proceedings was to create a systematic inquiry of the accused. Here, the retail clerk must systematically question the pseudoephedrine purchaser, according to law, to obtain information for law enforcement. Their inquiry creates statements subject to a false statements penalty. *See Crawford*, 541 U.S., at 44 ("These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court."). The interactions in *Towns* are made formal by each

record requiring a signature and displaying a notice that the recordation of false information would lead to federal criminal charges. When charges are filed, the documents kept by the clerk prove the elements of that false statement. This Court has not yet answered the question whether admission of legally required records, kept for law enforcement by private individuals under the penalty of a federal false statement offense, violates the Confrontation Clause. *See Crawford*, 541 U.S., at 61 ([The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.).

Such records bear on their face sufficient indication of the need for their "certification" or "truth" to the record maker because the statements are subject to penalties for false statements. This Court should decide whether such records, therefore, reasonably inform the witness that they are for use at a later investigation or trial.



CONCLUSION AND PRAYER

Four Justices in *Bullcoming* complain in the dissent that this Court has not yet provided a "clear vision" for the application of the Confrontation Clause and the Sixth Amendment. *See Bullcoming*, 131 S.Ct., at 2726 (Kennedy, J., dissenting, joined by Roberts, C.J., Alito, J., and Breyer, J.)

> "Like reliability, other principles have been weaved in and out of the *Crawford* jurisprudence. Solemnity has sometimes been dispositive, *see Melendez-Diaz*, 557 U.S., at ___, 129 S.Ct., at 2533; *id*., at ___, 131 S.Ct., at 1167 (Thomas, J., concurring), and sometimes not, *see Davis*, U.S., at 834-37, 841, 126 S.Ct. 2266 (Thomas, J., concurring in judgment in part and dissenting in part). So, too, with the elusive distinction between utterances aimed at proving past events, and those calculated to help police keep the peace. Compare *Davis, supra*, and *Bryant*, 562 U.S., at ___, 131 S.Ct., at 1162-66, with *id*. at ___, 131 S.Ct., at 1169-72 (Scalia, J., dissenting)."

Id. at 2725 (Kennedy, J., dissenting).

Both *Bullcoming* and *Melendez-Diaz* concern documents and were decided by a divided Court. They leave unresolved, whether the *Crawford* "testimonial" test alone controls regarding documents or whether additional analysis of a document's sole, or primary purpose, or alternate primary purpose may affect whether their admission at trial implicates the Confrontation Clause.

The four dissenting Justices in *Bullcoming*[6] argue that the analysis provided in both *Bullcoming* and *Melendez-Diaz* consist of "persistent ambiguities" that are "not amenable to sensible applications." *Bullcoming*, 131 S.Ct., at 2726 (Kennedy, J., dissenting).

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[6] Justice Kennedy authored the dissenting opinion joined by Justices Roberts, Breyer and Alito.

They further argue that the Court has "boxed itself into a choice of evils: render the Confrontation Clause pro forma or construe it so that its dictates are unworkable." *Id*. According to the dissent in both *Bullcoming* and *Melendez-Diaz*, the Court's prior decisions force trial judges to "guess what future rules this court will distill from the sparse constitutional text." *Id*. at 2726; *Melendez-Diaz*, 557 U.S., at 331 (Kennedy, J., dissenting). Additionally, the dissenting Justices in *Bullcoming* argue the majority's decision contributed to an "ongoing, continued, and systematic displacement of the States and dislocation of the federal structure" that "underscores the disruptive, long-term structural consequences of decisions." *Id*. at 2728 (Kennedy, J., dissenting).

The unanswered questions remaining in *Crawford's* progeny are, what degree of formality will characterize documents as sufficiently formal to be testimonial and what purpose must such a document serve to meet the characteristics of out-of-court testimony. Also, one questions if purpose should be a part of the inquiry regarding records (versus police interrogations) at all. These questions have never been answered by this Court in the context of required records kept by retailers exclusively for the enforcement of drug laws. Nor has this Court encountered the circumstances which characterize the records' formality here; the entries are subject to criminal penalties under the federal false statement statute.

Because the question presented is an important question of federal law that has been decided by the

Fifth Circuit Court of Appeals, but which has not been answered by this Court, Towns respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

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