No. 09-10876

IN THE

Supreme Court of the United States

DONALD BULLCOMING,
Petitioner,

v.

NEW MEXICO,
Respondent.

On Writ of Certiorari to the New Mexico Supreme Court

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JENNIFER L. MNOOKIN
Professor of Law
UCLA SCHOOL OF LAW
Box 951476
Los Angeles, CA 90095
(310) 825-4841

PAUL C. GIANNELLI
Weatherhead Professor of Law
CASE WESTERN RESERVE UNIVERSITY
11075 East Boulevard
Cleveland, OH 44120
(216) 368-2098

D. MICHAEL RISINGER
John J. Gibbons Professor of Law
SETON HALL UNIVERSITY SCHOOL OF LAW
One Newark Center
Newark, NJ 07102
(201) 642-8834

STEPHEN A. MILLER
Counsel of Record
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-4736
samiller@cozen.com

ERIN E. MURPHY
Professor of Law
NYU SCHOOL OF LAW
40 Washington Square South
New York, NY 10012
(212) 998-6672

ROBERT P. MOSTELLER
J. Dickson Phillips Distinguished Professor of Law
UNC SCHOOL OF LAW
CB 3380, 160 Ridge Road
University of North Carolina
Chapel Hill, NC 27599
(919) 962-8513

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Amici curiae respectfully submit this brief in support of Petitioner pursuant to Supreme Court Rule 37.3.[1] *Amici* urge the Court to reverse the judgment of the Supreme Court of the State of New Mexico.

[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters are on file with the Clerk's Office.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are evidence professors who have studied, taught, and published extensively on the interaction between expert testimony and the Confrontation Clause or other aspects of expert evidence and its admissibility. This case involves a critical test of Confrontation Clause jurisprudence: whether after *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court should permit a surrogate expert to introduce forensic reports prepared by a different expert. Each *amicus* has devoted a significant portion of his or her research agenda to issues surrounding the use of expert evidence, and several of the *Amici* have specifically focused on the intersection between expert evidence and the Confrontation Clause.

Jennifer L. Mnookin is Professor of Law at U.C.L.A. Law School and Founding Co-Director of the Program on Understanding Law, Science, and Evidence (PULSE). She has written extensively on expert evidence, forensic science evidence, and other topics. Her article, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J. L. & POL'Y 791 (2007), specifically examines the intersection between the Confrontation Clause and expert testimony. She is a co-author with Professors David Kaye and David Bernstein, of the treatise, THE NEW WIGMORE: EXPERT EVIDENCE (2003; 2d ed., forthcoming 2010), and has served as chair of the Evidence Section of the American Association of Law Schools. She has written numerous articles about the validity, research basis, and admissibility of forensic science evidence, and is presently a member of several forensic science commissions.

Paul C. Giannelli is the Albert J. Weatherhead III & Richard W. Weatherhead Professor of Law at Case Western Reserve University. He has authored or co-authored eleven books, including SCIENTIFIC EVIDENCE (4th ed. 2007) with Professor Edward Imwinkelried, as well as numerous articles, book chapters, reports, and columns on scientific evidence. He served as Reporter for the ABA Criminal Justice Standards on DNA Evidence; as co-chair of the ABA Ad Hoc Committee on Innocence; as a member of the National Academy of Sciences committee on the evidentiary use of bullet lead analysis; and as chair of the Evidence Section of the American Association of Law Schools.

Robert P. Mosteller is the J. Dickson Phillips Distinguished Professor of Law at the University of North Carolina School of Law. He has written on a variety of evidentiary topics, including several articles on the Confrontation Clause under *Crawford*. His articles include: Giles v. California: *Avoiding Serious Damage to* Crawford*'s Limited Revolution*, 13 LEWIS & CLARK L. REV. 675 (2009); *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917 (2007); *Confrontation as Constitutional Criminal Procedure:* Crawford*'s Birth Did Not Require that* Roberts *and* Wright *Had to Die*, 15 J. L. & Pol'y 685 (2007); *Softening of the Formality and Formalism of the "Testimonial" Statement Concept*, 19 REGENT U. L. REV. 429 (2007); Crawford's *Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411 (2005); and *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICHMOND L. REV. 511 (2005).

Erin E. Murphy is Professor of Law at the NYU School of Law. An expert on criminal law, criminal procedure, and evidence, her research focuses on questions related to new technologies and forensic evidence in the criminal justice system. She has written extensively in the area of forensic DNA typing, including *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L. J. 489 (2008); *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CALIF. L. REV. 721 (2007); *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291 (2010); and *Inferences, Arguments and Second Generation Forensic Evidence*, 59 HASTINGS L.J. 1047 (2008). She recently joined as a co-author of MODERN SCIENTIFIC EVIDENCE, a leading treatise in the field, and serves as an advisor to numerous forensic research institutes.

D. Michael Risinger is the John J. Gibbons Professor of Law at Seton Hall University School of Law. He is a past chair of the Association of American Law Schools Section on Civil Procedure, the past chair of the AALS Section on Evidence, a life member of the American Law Institute, and was for 25 years a member of the New Jersey Supreme Court Committee on Evidence, which was responsible for the current version of the New Jersey Rules of Evidence. For more than two decades he has been at the center of the debates on forensic science reliability and the law. He is the author of two chapters in FAIGMAN, KAYE, SAKS AND CHENG, MODERN SCIENTIFIC EVIDENCE ("Handwriting Identification" and "A Proposed Taxonomy of Expertise"). He is also the author of articles on a diverse range of subjects, including many articles on expert evidence issues.

SUMMARY OF THE ARGUMENT

Except in rare instances, the use of surrogate experts should be prohibited under the Confrontation Clause of the Sixth Amendment. In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), this Court properly held that certain expert reports are testimonial in character and, thus, can only be admitted at trial if the expert who wrote the report is made available for cross-examination. The Court acknowledged that compliance with this constitutional command might be inconvenient for law enforcement officials but recognized that there was no principled justification for exempting testimonial forensic science evidence from the Confrontation Clause's purview. *See* 129 S. Ct. at 2540 ("The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination.").

The instant case flows, perhaps predictably, from attempts to circumvent the Court's holding. Efforts to introduce scientific reports into evidence through the testimony of a surrogate witness—someone other than the person who actually conducted or witnessed the test at issue—seriously threaten to undermine the Court's holding in *Melendez-Diaz*. This evasion should not be countenanced by the Court, both as a matter of doctrinal consistency and because it fails adequately to protect the defendant's Confrontation right; and also because the purported burdens on law enforcement officials are not, in fact, especially severe.

Moreover, those burdens can be lessened even further because the confrontation right recognized by this Court in *Crawford v. Washington*, 541 U.S. 36 (2004) and its progeny, can include certain "safety

nets" arising from necessity. We strongly urge the Court to recognize that the testimony of surrogate experts should not be permitted as a general matter. But we also believe that, in limited circumstances, grounded in both necessity and in the adequacy of the materials on which the surrogate can rely, it is legitimate under the Confrontation Clause to employ surrogate witnesses as a "second-best solution," just as *Crawford* permits the second-best solution of using prior sworn testimony upon a sufficient showing of unavailability. Rejecting surrogates as a general matter, but permitting them in narrowly delimited circumstances, would protect the principles underlying the Confrontation requirement while simultaneously lessening the burdens imposed by *Melendez-Diaz* in a manner both manageable and consistent with the dictates of justice.

Amici urge the Court to adopt a rule in this case that both recognizes the signal importance of the confrontation right and simultaneously avoids injustice by permitting the testimony of a surrogate expert *only* if (1) the original expert is genuinely unavailable through no fault of either party; (2) re-testing or re-analyzing the materials at issue is not a feasible option; and (3) the original test conditions were documented with sufficient particularity and detail as to permit the surrogate expert to exercise substantial independent judgment in forming an expert opinion on the matter.

ARGUMENT

This Court recognized the testimonial character of certain expert certifications in *Melendez-Diaz, supra*. The reports in that case were sworn affidavits of analysis that reported that a powdery substance inside bags seized by the police was cocaine. *Id.* at

2531. An expert indisputably created the certifications for the purpose of having them available for use in legal proceedings. *Id.* Not only were the certificates both conclusory and cursory, failing even to state what specific tests were actually conducted, but they were introduced without any testimony from the analyst who conducted the tests. When the expert who created the certifications did not testify at trial, the defendant was denied any opportunity to probe the expert's bias, incompetence, or methodology, or to inquire into alternative tests or any interpretive issues surrounding either the tests or the results. In a "rather straightforward application of our holding in *Crawford*," this Court held that the expert's certifications "quite plainly" fell within the "core class of testimonial statements" barred from a trial unless the expert-declarant was available for cross-examination. *Id.* at 2533, 2532, 2531.

The Court's holding was consistent with virtually all of the available scholarship on this issue. *See, e.g.,* Edward J. Imwinkelried, *"This is Like Déjà Vu All Over Again": The Third, Constitutional Attack on the Admissibility of Police Laboratory Results in Criminal Cases*, 39 N.M. L. Rev. 303 (2008) ("Imwinkelried"); Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 504-05 (2006) ("Metzger"); Jennifer Mnookin, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J.L. & Pol'y 791, 797-801 (2007) ("Mnookin"); Recent Case, *Evidence—Confrontation Clause—Second Circuit Holds that Autopsy Reports Are Not Testimonial Evidence—United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3438 (U.S. Feb. 20, 2007) (No. 06-8777), 120 Harv. L. Rev. 1707 (2007); *see also* PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 6.04(c) n.233 (2010 Supp.);

("GIANNELLI & IMWINKELRIED") (collecting cases for the proposition that "lab reports are testimonial in nature"); DAVID KAYE, DAVID BERNSTEIN & JENNIFER MNOOKIN, THE NEW WIGMORE: EXPERT EVIDENCE § 3.10 (2009 Supp.).

Notwithstanding that several states already used procedures similar to those required by *Melendez-Diaz* and required forensic science results to be introduced by live testimony in the absence of a stipulation, the law enforcement community complained that applying *Crawford* to forensic science would create significant burdens for their forensic analysts. *See, e.g., Melendez-Diaz*, 129 S. Ct. at 2549 (Kennedy, J., dissenting) (discussing projections of "enormous costs on the administration of justice"). Given this perception, it is perhaps not surprising that, in the wake of *Melendez-Diaz*, there have been efforts by both prosecutors and other law enforcement officials to apply the Court's holding in an unjustifiably narrow manner.

New Mexico used one such tactic in the instant case: offering live expert testimony but *not* from the expert-declarant who authored the original report or certification being offered into evidence. The testifying expert had played no role in the execution of the tests at issue. In this way, the State exposed *an* expert witness to cross-examination, to be sure, but it was an expert unable to answer questions about the precise tests performed by the original expert, his possible biases, or his methodology. While the testifying employee was an employee of the laboratory that had conducted the tests, he had neither participated in nor witnessed the tests about which he testified. He could not testify to what had occurred during testing; as he acknowledged on the stand,

"you don't know unless you actually observe the analysis that someone else conducts, whether they followed th[e] protocol in every instance." JA 59.

New Mexico's use of a surrogate elevated form over substance in violation of the Confrontation Clause. Just as in *Melendez-Diaz*, the State introduced into evidence a testimonial affidavit whose creator was never subject to cross-examination. This tactic unmoored the Sixth Amendment's requirement of in-court testimony from its constitutional underpinnings; the Confrontation Clause demands in-court testimony *to permit confrontation* of any testimonial evidence, not simply to encourage testimony for its own sake.

Amici adopt Petitioner's well-developed, persuasive argument that New Mexico's evasion in this case was a denial of the Confrontation right guaranteed by the Sixth Amendment. If forensic laboratories were permitted to introduce the testimony of *any* employee about any test, a defendant's Confrontation rights would be eviscerated. As the Petitioner's brief argues, the structural underpinnings of the Confrontation right—from the ability to jury to assess demeanor, to the oath, to the ability to prove what was done by *this* examiner when conducting the specific tests in *this* case—are all best served through the testimony of the actual analyst, not simply an expert knowledgeable about how certain tests are generally conducted. Cross-examining a surrogate expert about a report that he has read is not the equivalent of cross-examining the report's actual creator, just as cross-examining a detective who took an affidavit is not equivalent to cross-examining the actual declarant. Moreover, as *Melendez-Diaz* noted, "Confrontation is designed to weed out not only the

fraudulent analyst, but the incompetent one as well." 129 S. Ct. at 2537. Cross-examining a surrogate expert who did not personally observe any of the events reported, in lieu of the actual analyst who conducted the test, will necessarily be less effective at ferreting out incompetence, fraud, and other weaknesses or limitations that might not be apparent on the face of the report. KAYE, BERNSTEIN & MNOOKIN, THE NEW WIGMORE: EXPERT EVIDENCE, § 4.10.2 (2d ed., forthcoming 2010).

Amici therefore strongly urge the Court not to accept, as a matter of course, surrogate witnesses in lieu of the actual expert-declarant who conducted the forensic tests being offered in evidence. However, we also recognize that an absolute ban on utilizing the results of scientific tests performed by a now-unavailable expert might neither be mandated by the Confrontation Clause nor be appropriate in all circumstances. We would therefore suggest that in limited instances—when the original expert is genuinely unavailable; when re-testing by an alternative, available expert is not feasible; and when the original expert recorded her processes and findings in sufficient detail both to allow a surrogate expert to exercise substantial independent judgment about the appropriate results of these tests—the use of a qualified surrogate expert would be both consistent with the Confrontation Clause and in the interests of justice. *See* Mnookin, *supra*, at 854-55; KAYE, BERNSTEIN & MNOOKIN, THE NEW WIGMORE: EXPERT EVIDENCE § 3.10 (2009 Supp) & § 4.10 (2d ed., forthcoming 2010).

In this case, importantly, there was no showing that the original expert was unavailable. Moreover, even if the expert had been unavailable, the lab's

standard procedure was to retain part of the defendant's blood sample. Re-testing by a second expert would have been feasible, in which case, this second expert could have testified consistent with the Confrontation Clause. JA 52. New Mexico did not seek re-testing and instead attempted to smuggle one expert's test results through the testimony of a different expert.

Thus, while *Amici* believe that some carefully delimited circumstances justify the use of a surrogate witness, those circumstances are clearly not present in this instance. *Amici* urge the Court in this case to craft its decision in a way that remains true to the Confrontation guarantee of the Sixth Amendment and restricts the use of surrogate experts to those limited circumstances when necessity, combined with the quality of the original documentation, makes their use both appropriate under the Confrontation Clause and in the interests of justice.

I. *CRAWFORD* RECOGNIZED THAT NECESSITY SOMETIMES COMPELS A SECOND-BEST SOLUTION TO FULL CONFRONTATION, AND SURROGATE WITNESSES MAY OFFER SUCH A SOLUTION IN LIMITED CIRCUMSTANCES.

Crawford acknowledges that necessity has a legitimate—albeit limited—role to play in Confrontation Clause analysis. In *Crawford*, the Court noted that the Confrontation Clause permitted the introduction of a now-unavailable witness's testimonial statements if the defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 54. Within *Crawford*'s schema, a prior opportunity to cross-examine the witness is a second-best solution, not a perfect replacement for cross-examination in front of

the current jury. This conclusion is both a matter of common sense and implicit in *Crawford*'s logic: If a prior opportunity to cross-examine were the evidentiary equivalent of contemporaneous cross-examination, there would be no justification for imposing an unavailability requirement before its use. Use of such prior testimony is not permitted indiscriminately, but it meets the minimum constitutional standards for confrontation only because of the necessity occasioned by the witness's unavailability at trial. *Crawford*, therefore, indicates that, at least in some circumstances in which there is a meaningful but imperfect substitute for contemporaneous cross-examination, the Constitution does not command wholesale exclusion. The prior opportunity for cross-examination will suffice but only when a present opportunity cannot be had.

We believe that analogous logic applies to the use of surrogate experts testifying about testimonial forensic science reports. *Melendez-Diaz* correctly recognized that forensic science ought not to be treated differently under the Confrontation Clause than other, non-expert forms of evidence. It cannot simply be presumed to be reliable or unbiased or otherwise outside the ambit of what might be usefully examined on cross-examination. As *Melendez-Diaz* recognized, "neutral scientific testing" may not necessarily be either neutral or reliable. 129 S. Ct. at 2536; *see also* NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, 4-8, 22-4 (2009) ("NAS Report"). Nor, for that matter, is reliability even the appropriate focus in the post-*Crawford* Confrontation Clause analysis. *See, e.g., Melendez-Diaz*, 129 S. Ct. at 2536; *Crawford*, 541 U.S. at 61-62.

Amici, of course, recognize that experts will not always have a specific memory of the forensic tests that they have conducted. The same is potentially true of nonscientific witnesses who made testimonial statements, and a declarant's failure to have a specific memory of what is memorialized in a testimonial statement does not make the Confrontation Clause inapplicable. Even if forensic experts may lack a specific memory of the underlying events more often than non-experts testifying about statements deemed testimonial, this does not justify diminishing the Confrontation right by permitting the routine use of a surrogate witness who played no part in the actual testing. While the expert who conducted the test at issue may not always have a specific memory of the tests he conducted, there is no doubt that he sometimes will. Moreover, examining his test results and/or notes may well jog his own memory of facts not included in the report. In addition, the ability to cross-examine the actual expert—not someone else with similar expertise—offers the fact-finder significantly better information about this particular expert's experience, credentials, abilities, and credibility. It allows the defense to probe the context surrounding the analyst's analysis, such as conversations the analyst had with peers or investigators about the case, or the analyst's working conditions at the time of testing. It also ensures that the expert who performed the tests will be available to explain actual, as opposed to speculative or conjectural, reasons why certain approaches were taken, methods explored, and/or conclusions drawn.

However, it is certainly true that witnesses who testified at preliminary hearings or at an earlier trial may sometimes become unavailable by the time their testimony is needed again at the trial itself. For

instance, experts may die or leave their government employment or move away from the jurisdiction or otherwise be unable to testify for a multitude of reasons unattributable to any fault of law enforcement officials. Indeed, the more time between the forensic test and its use in court, the greater the chance that the expert who conducted the test will no longer be available.

Several lower court cases, both before *Melendez-Diaz* and afterwards, wrestled, for example, with the issues surrounding the Confrontation Clause requirements for testimony relating to autopsies establishing the cause of death, conducted by a now unavailable or otherwise absent examiner. *See e.g.*, *United States v. Williams*, No. 09-0026, 2010 U.S. Dist. Lexis 110464, at *11-*13 (D.D.C. 2010); *State v. Lackey*, 120 P.3d 332, 351 (Kan. 2005), *overruled in part on other grounds by State v. Davis*, 158 P.3d 317, 322 (Kan. 2006). The original autopsy is not only likely to be the best available evidence regarding cause of death, but it is also unlikely that there will be any substitute, non-testimonial equivalent evidence to establish the facts and conclusions contained in the autopsy. In many instances, the unavailability of the original forensic expert is in no way the fault of law enforcement officials. In circumstances like these, we submit that there may be alternatives to wholesale exclusion that, while second-best, may meet the constitutional mandate for confrontation.

While we do not offer a detailed test or definition of unavailability in the context of a forensic examiner, we believe that surrogate experts should be a viable alternative only when the original expert is genuinely unavailable, not merely when it is merely

inconvenient for him to testify. An examiner who is still employed by the relevant laboratory, but who happens to be conducting other business or testifying elsewhere, certainly ought *not* to be deemed unavailable. By contrast, a deceased examiner obviously is. Precisely where to draw the line between the obvious extremes is a matter that can be worked out by the lower courts, should unavailability be established as a prerequisite for the use of a surrogate. But given that this use of a surrogate is a second-best and inferior method for vindicating the Confrontation right, the standard for a finding of unavailability should be appropriately high, going far beyond simple inconvenience to either the witness or the prosecuting authority.

Before courts permit any use such surrogate experts to testify, however, they should also establish that it is not feasible to conduct the original test again and thereby avoid the need for recourse to a surrogate. With some kinds of forensic materials—for example, fingerprint identification—re-testing will almost always be feasible (unless, for example, the exemplars at issue have been lost or damaged) and reasonably cost-free. With other kinds of forensic tests, such as DNA profiling or toxicological analyses or, as was at issue in this case, gas chromatography testing of blood samples for alcohol, the question will be whether enough of the material at issue remains for re-testing; in many instances, the answer will be 'yes,' as indeed it was the "standard" practice in New Mexico to retain an extra blood sample precisely for this purpose. JA 52. But in some circumstances—when the first test consumed all the available material, or when the material in need of testing is cannot easily be preserved—it will truly not be feasible for the relevant tests to be conducted again

by an available expert. In these circumstances, the question of the role of necessity in Confron tation Clause analysis resurfaces with particular significance.

We believe that the use of a surrogate witness can become legitimate when necessity (produced by the combined unavailability of the expert and the infeasibility of re-testing) is coupled with robust documentation of the test processes and results by the original analyst. For example, suppose that an autopsy report included bottom-line conclusions, but also incorporated photographs of critical findings, measurements, and descriptive detail of the bases to support its conclusions; or even suppose that the entire autopsy process was captured on videotape. If the documentation was thorough, substantial, and included not only the testing expert's conclusions, but also detailed both the tests conducted and the data generated by the tests, the surrogate witness would have the basis for exercising a substantial degree of independent judgment about the tests, their conclusions, and possible limitations. The Court's adoption of this position will pressure experts to generate reports that would enable a later expert, if necessary, to testify discerningly about the original expert's procedures and reasoning. Beyond focusing the Court's attention on the question of whether enough detail is present to permit a surrogate expert to exercise his independent judgment, *Amici* do not presume to prescribe a specific set of procedures to satisfy this documentation threshold, but other parties certainly will attempt to improve standardization and documentation as this iterative process evolves.

To be sure, even when he has access to substantial and thorough documentation, a surrogate interpreter of the report remains a second-best alternative, for he is necessarily still relying on the accuracy of the original testimonial report in his own assessment. He cannot go beyond the report itself, and must assume that it reports and draws attention to the appropriate findings, and that it discloses any unusual findings, ambiguities, or limitations. He cannot provide first-hand descriptions of conducting this particular autopsy, and on cross-examination, he cannot meaningfully respond to questions about the original examiner's thought process.

Thorough and substantial documentation, however, combined with the surrogate's own expertise, could permit the surrogate witness to become something more than a conduit for the absent witness's conclusions. Thorough documentation permits the surrogate to opine on the appropriateness of the tests and the soundness of the original expert's conclusions, assuming that they are accurately recounted. Defense counsel can meaningfully cross-examine him about alternative hypotheses, tests that were not conducted, or uncertainties relating to his interpretations. But at the same time, defense counsel is not able to ferret out what might have been left out of the report, nor probe any matters relating to the personal credibility of the original analyst. Furthermore, the surrogate is necessarily still relying for his independent judgment in part on the contents of the original analyst's report.

Thus, *Amici* believe that a surrogate expert who can exercise substantial independent judgment in analyzing a fully developed and documented report thus offers a second-best solution. Something of value

is lost, compared to the opportunity to cross-examine the original testing expert, but certainly some of the value of cross-examination is still retained. Cross-examination of the surrogate expert thus approximates the already-permitted second-best solution for the unavailable witnesses whom the defendant had a prior opportunity to cross-examine. In both circumstances, the claim of necessity justifies a substituted form of cross-examination that is less than optimal but nonetheless sufficiently meaningful to meet the constitutional minimums in the face of the necessity produced by unavailability.

We recognize that this framework gives necessity and unavailability a larger role in Confrontation analysis than *Crawford* expressly contemplates, but we submit that this proposal accords with *Crawford's* spirit. Just as the Court has endorsed the use of prior testimony conditioned upon unavailability, the Court ought to permit a surrogate expert to testify conditioned upon both unavailability and the adequacy of the documentation and procedures followed by the original expert. If the original expert detailed his procedures with care, a surrogate might be able both to describe the tests conducted and to evaluate the results critically.

This is, to be sure, a second-best solution, and ought therefore not to be permitted without genuine unavailability. Moreover, we believe that this unavailability exception should be limited to forensic reports and scientific findings. Forensic science can rely on regularized routines and processes which can be documented in sufficient detail to permit meaningful interpretation and evaluation by others

with appropriate expertise.[2] It is the special, data-driven nature of scientific processes and scientific practice that makes the use of a surrogate expert an adequate second-best solution when necessity demands it.

We suggest, therefore, that surrogate witnesses should be prohibited under the Confrontation Clause unless three criteria are met: (1) the original expert is genuinely unavailable through no fault of either party; (2) re-testing or re-analyzing the materials at issue is not a feasible option; and (3) the original test conditions were documented with sufficient particularity and detail as to permit the surrogate expert to exercise substantial independent judgment in forming an expert opinion on the matter.

II. THE PROPOSED TEST HAS SALUTARY EFFECTS ON BOTH FORENSIC SCIENCE PRACTICE AND EVIDENCE DOCTRINE.

In addition to comporting with *Crawford*'s recognition of a legitimate role for second-best solutions when necessity demands it, this proposed test would

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[2] To be clear, our point here is not that forensic science is especially reliable, which is largely beside the point under the post-*Crawford* Confrontation Clause analysis. Rather, it is a more regularized set of processes than many other kinds of testimonial statements tend to be, and many experts are experienced at interpreting other experts' reports. Part of a forensic expert's expertise is the ability to interpret a specific kind of data to reach a conclusion; the more data that is presented by the report, the greater the expert's ability to exercise his independent judgment. While that judgment still relies on the accuracy of the absent expert's reporting, this weakness can be exposed persuasively on cross-examination, and it also explains why, in our view, the use of surrogates must be limited to instances of absolute necessity.

have salutary effects on the quality of forensic science evidence across the board.

A. Forensic science evidence will benefit from better documentation.

First, adoption of such a test would create incentives for thorough documentation and reporting of test results. Prosecutors and experts would have the incentive to generate forensic reports that were more detailed and more informative than have frequently been the case—reports which would permit other forensic scientists to offer genuine insight into the underlying scientific analyses.[3] Historically, in contrast, many expert reports produced in criminal cases have included only bottom-line conclusions. *See* GIANNELLI & IMWINKELRIED § 3.03.

Thorough documentation would permit the use of a surrogate should necessity dictate it, but it would also likely have benefits for the criminal justice system more generally. Even when the original analyst was available to testify, his ability to recount what occurred in the case would likely benefit from the report's additional detail. Moreover, more thorough reporting would quite possibly benefit both defense attorneys and prosecutors as well. Defense attorneys would have a more detailed account of what occurred, which would permit them to understand whether the tests and the results raised concerns or warranted further inquiry. And, in many instances, the additional detail might increase defense attorneys' willingness to stipulate the forensic science findings, because they would have a

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[3] Indeed, more thorough reports would also improve the ability of *original* experts to recall and explain their decision-making processes.

clearer basis for understanding precisely what those findings were and what supported them.

B. This test provides a framework for forging a tenable relationship between Federal Rule of Evidence 703 and the Confrontation Clause.

Another benefit of this proposed test is that it provides a framework for developing a workable relationship between the Confrontation Clause and Federal Rule of Evidence 703's permissive approach to the admissibility of materials upon which experts rely.[4] On the one hand, it is well established that one expert may not simply be a conduit for another absent expert. On the other hand, modern evidence law has long permitted experts to rely upon facts and data that are not themselves admissible, so long as they are of a type reasonably relied upon by experts in the field at issue. The difficult question is the following: If Rule 703 permits an expert to rely on inadmissible evidence to reach a conclusion, may a testifying expert reach a conclusion on the basis of a testimonial report written by a non-testifying analyst?

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[4] Rule 703 states: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." New Mexico's Rules of Evidence contain the same provision. Rule 11-703 NMRA.

Some courts, even in the wake of *Melendez-Diaz*, have interpreted Rule 703 to permit a non-testifying expert to describe the contents of a testimonial report upon which he has relied, so long as the report itself is not formally introduced into evidence. *See, e.g., People v. Williams*, No. 107550, 2010 WL 2780344, at *9–10 (Ill. July 15, 2010); *People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390 (Cal. Ct. App. 2009), *rev. granted*, 102 Cal. Rptr. 3d 281 (Cal. 2009); *State v. Lui*, 221 P.3d 948, 955–56 (Wash. Ct. App. 2009), *rev. granted*, 228 P.3d 17 (Wash. 2010). If any testifying expert is not only permitted to use Rule 703 to rely on testimonial reports produced by an absent witness, but may then go further and testify about the contents of this inadmissible testimonial material, the Confrontation Clause right becomes of little import. *See* KAYE, BERNSTEIN & MNOOKIN, THE NEW WIGMORE: EXPERT EVIDENCE § 4.10.2 (2d ed., forthcoming 2010).

Other courts, including the New Mexico Supreme Court in this instance, have recognized that the Confrontation Clause must impose some limits on the use or transmittal of testimonial evidence by a surrogate. For example, at the case at bar, the New Mexico Supreme Court attempted to make a distinction between the *opinion* of a non-testifying expert, which it would have barred, and *facts or data* provided by a non-testifying expert and reasonably relied upon by experts in the field, which it deemed permissible for the testifying expert to rely upon and for the court to admit into evidence.[5] JA 17.

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[5] Some courts have attempted to justify the disclosure of reports prepared by nontestifying experts as non-hearsay, arguing that they are not being admitted for their truth, but rather to assist the jury to assess the accuracy of the expert's

This distinction is problematic. Even putting aside the difficulty of locating a boundary between fact and opinion, it is difficult to understand why the testimony of someone other than the actual analyst ought to transform any portions of a report that would clearly be testimonial, and prohibited under *Melendez-Diaz* in the absence of any accompanying testimony, into admissible evidence. If Rule 703 is interpreted to permit experts to rely upon, and subject to the balancing test, even to disclose, testimonial hearsay to the jury, it would provide a simple method by which prosecutors could subvert the Confrontation Clause's requirements. Courts ought not to permit a testifying expert to be a back door through which to smuggle a non-testifying expert's testimonial conclusions to a fact-finder.

Since *Melendez-Diaz*, numerous lower courts wrestling with the appropriate relationship between Rule 703 and the Confrontation Clause have focused on whether the testifying expert has exercised independent judgment. These courts have generally permitted testimony by an expert who is relying on the testimonial report of an absent analyst, so long as the testifying expert was engaging in meaningful interpretation, or offering independent judgment, or reanalyzing rather than simply regurgitating the information provided. *See, e.g.*, *People v. Williams*, 2010 WL 2780344, at *7 (focusing on independent

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claims. The main problem with this argument is that the fact-finder cannot use the evidence to assess the merits of the expert's claims without making a preliminary determination regarding the truth of the evidence upon which the expert relied. *See generally* Mnookin, *supra*, at 811-26; KAYE, BERNSTEIN & MNOOKIN, THE NEW WIGMORE: EXPERT EVIDENCE § 3.10.1 (supp. 2009); § 4.10.1 (2d ed., forthcoming 2010).

evaluation by testifying expert); *State v. Mitchell*, 4 A.3d 478, 490 (Me. 2010) (noting that testifying expert reached conclusion about cause of death); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009); *People v. Lovejoy*, 919 N.E. 2d 843, 864 (Ill. 2009) (medical examiner engaged in meaningful interpretation); (requiring surrogate witness to confine testimony to his own opinions, and not to recite the underlying conclusions of autopsy conducted by nontestifying expert); *Vann v. State*, 229 P.3d 197, 200 (Alaska Ct. App. 2010) (holding that testifying expert did not merely review, but reanalyzed, the report's test data); *Lui*, 221 P.3d at 956 (concluding that testifying experts "applied significant expertise to interpret and analyze the underlying data").

Amici's proposed test suggests that this approach is a step in the right direction but does not go far enough in respecting the values of the Confrontation Clause. Even if the underlying report is rich in detail, there are still ways in which the testifying expert must assume its accuracy in reaching his own decision. To the extent the underlying report interprets raw data rather than merely transmitting it, and to the extent the testifying expert takes these underlying interpretations or even raw descriptions as accurate, the testifying expert is still partially accepting—and through his conclusions, transmitting—the testimonial information of the report. Even 'raw data' in the forensic sciences often incorporates a degree of interpretive judgment and subjectivity, and the interpretive methods in use in many fields also contain a significant degree of subjectivity. *See, e.g.*, Erin Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L.J. 489 (2008);

NAS Report at 127-82. While the testifying expert may indeed be exercising independent judgment, the fact that he did not personally observe the matters at issue means that he is also relying on the report (as Rule 703 both contemplates and permits). Therefore, while the exercise of independent judgment by a testifying expert may be sufficient as a matter of evidence law for the opinion of the testifying expert to pass muster under Rule 703 it ought to be permissible under the Confrontation Clause *only in conjunction with necessity*.

III. A DECISION IN PETITIONER'S FAVOR WILL NOT UNDULY BURDEN THE CRIMINAL JUSTICE SYSTEM.

Like Respondent in *Melendez-Diaz*, the State unpersuasively claims that restricting the use of surrogate experts will have a deleterious impact on criminal prosecutions across the country. While the State's administrative and fiscal concerns are legitimate, in some respects, they cannot control the scope of the "bedrock procedural guarantee," *Crawford*, 541 U.S. at 42, provided by the Confrontation Clause. *See Melendez-Diaz*, 129 S. Ct. at 2540 ("The Confrontation Clause – like [] other constitutional provisions – is binding, and we may not disregard it at our convenience."). The fact that a safeguard guaranteed a criminal defendant is costly or time-consuming does not provide a basis for diminishing that protection.

Moreover, the State's administrative concerns should not be exaggerated. While limiting surrogate experts to the narrow circumstances we have suggested may impose some degree of burden on the prosecution, these burdens will not be so severe, especially given that only a small portion of criminal

cases even go to trial, and only a small portion of those cases require live expert witness testimony.

Indeed, our proposed approach to the issue of surrogate witnesses is an effort to find a principled balance between, on the one hand, the importance of Confrontation, and, on the other hand, the recognition that, because surrogate witnesses testifying about scientific procedures on the basis of a well-documented record can offer meaningful independent judgment, they should be allowed in the narrow circumstances when necessity makes the use of a non-surrogate expert impossible through no fault of either party. *Amici*'s proposed test, if adopted, would therefore mitigate the burdens imposed by the Confrontation Clause in precisely those cases where a total ban on surrogate expert witnesses interpreting testimonial materials would otherwise impose the greatest burdens.

A. Burdens Relating to Forensic Evidence Are and Will Continue To Be Alleviated By Stipulations and Waivers.

Confrontation rights, like many other constitutional rights, can be waived. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). There are several cost-saving mechanisms by which criminal defendants can waive the right to confront a forensic examiner, including stipulations and "notice-and-demand" statutes. As *Melendez-Diaz* recognized, both of these mechanisms preserve defendants' confrontation rights while alleviating the burdens on the government. 129 S. Ct. at 2540, fn.10, 2541.

1. Stipulations

Stipulations, which are used in criminal as well as civil cases, "take a number of forms." CHARLES ALAN

WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5194 (1978) ("WRIGHT & MILLER"). First, "[t]he parties or their counsel can agree that certain facts shall be taken as true for purposes of the litigation." *Id.* Second, the parties may stipulate "to the admission of evidence." Patrick L. McCloskey & Ronald L. Schoenberg, CRIMINAL LAW DESKBOOK (2007). Third, "[t]he agreement can take a less conclusive form, as when it is stipulated that a certain witness, if called, would have testified to particular facts." WRIGHT & MILLER § 5194.

Stipulations are routinely used in criminal cases to establish facts that are necessary to the prosecution's case that the defendant cannot effectively dispute. In particular, they are often used in the context of expert testimony concerning forensic evidence. *See, e.g., United States v. Olivares-Vega*, 495 F.2d 827, 829-30 (2d Cir. 1974) (defendant agreed not to contest "that a laboratory analysis would show that the white powder [found in his luggage] was cocaine"); *United States v. Spann*, 515 F.2d 579, 580 (10th Cir. 1975) (defendant stipulated that, if the government's chemist were called at trial, "he would testify that in his opinion the substance" confiscated "was 'marihuana.'").

Stipulations are so common because they benefit the courts, criminal defendants, and prosecutors alike. From the courts' perspective, stipulations serve the critical purpose of "judicial efficiency." WRIGHT & MILLER § 5194. With trial judges facing heavy workloads, it is hardly surprising that "the general policy of the Civil and Criminal Rules is to encourage [evidentiary] stipulations, thereby saving time and lessening the potential for error." *Id.* Prosecutors often benefit from stipulations, as well.

If the defendant is willing to stipulate a fact that the prosecution would otherwise have to prove, or to testimony that the prosecution would otherwise have needed to offer (including that of a forensic expert), the prosecution is relieved of that burden. For defendants, absent a specific basis in fact for contesting the correctness of an expert's conclusion, there is little to gain and much to lose in requiring an articulate, well-credentialed expert to appear to prove an undisputed technical detail of an alleged crime. *See* Gary Muldoon, *Use of Stipulation in Criminal Cases*, 4 ISSUES IN NEW YORK CRIMINAL LAW No. 10, *available at* http://www.mcacp.org/issue38.htm (last visited November 18, 2010) (noting that, through stipulations, criminal defendants can avoid "a parade of unfavorable witnesses called by the prosecutor," as well as the risk that the jury will "be more impressed with [a] witness's credentials than the subject matter testified to"). Instead, through a stipulation, the defendant may be able to narrow the dispute, and shift the focus of the trial to more realistic sources of reasonable doubt. By doing so, the defendant may enhance his credibility and focus greater attention on the issues that are central to a plausible defense. Various Eds., *Criminal Law Advocacy* (Matthew Bender (now Lexis Publishing)).

Confrontation of forensic science evidence serves a critical function in some criminal trials, but in many others, the defendant has no credible basis—and thus no strategic reason—for challenging facts or conclusions contained in forensic reports. For example, as was perhaps the case in *Spann* and *Olivares-Vega*, there may be no real debate over the identity or quantity of a controlled substance found upon the defendant. The defendant may therefore seek to minimize the impact of those facts, and to

fight on other, more promising battlegrounds. Hence, the defendant might agree to stipulate "the fact that drugs were sold" but contest the charges on the ground of "mistaken identity," insanity, or any number of other defenses. Various Eds., *Criminal Law Advocacy* (Matthew Bender (now Lexis Publishing)). The stipulated fact or testimony may be "totally compatible with [the defendant's] theory of the case." *Id.* Form 2A-3; *see, e.g., State v. Miller*, 790 A.2d 144, 153 (N.J. 2002) (noting that in the "vast majority" of drug cases involving forensic reports, the defendant does not oppose the admission of the laboratory certificate).

Furthermore, our proposed rule will likely *increase* the frequency of stipulations to forensic testimony by the defense. This rule will increase the incentives for careful documentation, as thorough report-writing becomes a requirement for the later use of a surrogate witness should the original analyst prove unavailable. Higher-quality forensic reports will likely decrease the times that the expert need be called to testify at all; if a forensic test inculpates the defendant, and the detailed report suggests no error or omission, it is unlikely to be in the defendant's interest to lend this report additional credibility through live testimony for which effective cross-examination is not available. To be sure, when the detailed report reveals flaws or limitations in the tests that might not have been available without the additional detail, this may spur the defendant to exercise his Confrontation rights – and appropriately so! But when the additional detail reveals no such flaws, it makes still clearer to the defendant the likely lack of benefit to result from cross-examination.

2. Notice-and-Demand Statutes

As *Melendez-Diaz* itself made clear, another mechanism for reducing the potential burden entailed by the presentation of "expert declarants" is utilization of "notice-and-demand" statutes. 129 S. Ct. at 2541. Under these statutes, if the prosecution intends to use forensic evidence at trial in lieu of live testimony from the forensic examiner, the prosecution must serve "notice" to the defense of its intent to rely on such evidence. The defendant then has the opportunity to object to the introduction of the laboratory report as evidence and to "demand" that the prosecution produce the forensic witness at trial. In this way, notice-and-demand statutes create an orderly mechanism by which prosecutors can save time and effort, while also affording the defendant a full, fair opportunity to confront his accusers.

Like stipulations, notice-and-demand statutes benefit prosecutors and defendants alike. Under these statutes, prosecutors must present live testimony from forensic examiners only if defendants timely signal their intent to exercise their confrontation rights at trial. When the defendant elects not to exercise his right, live testimony need not be presented, and the administrative and fiscal burdens on the government evaporate. To be sure, notice-and-demand procedures are more burdensome to defendants than stipulations; a defendant may lose his ability to cross-examine a forensic examiner by failing to satisfy the statutory demand obligations. *See, e.g.*, *Brooks v. Commonwealth*, 638 S.E.2d 131, 138 (Va. Ct. App. 2006) (failure to give demand until the day of trial constituted a valid waiver of confrontation rights); Metzger at 481-84 ("Legislators rely on . . . defen[dants'] failures [to satisfy the demand

requirement] to help prosecutors get cheaper convictions."). The critical point, however, is that the defendant retains the opportunity to exercise his rights under the Confrontation Clause, and to choose when and whether to waive those rights, as the Constitution permits.

Furthermore, in the surrogate expert setting, notice and demand statutes can provide law enforcement officials with advance notice regarding those situations in which it might be necessary to use a surrogate witness, or possibly to re-test. If the defendant does not "demand" the forensic witness, then there is no need to use a surrogate, even when the original analyst is unavailable.

B. Laboratory Procedures Can Be Modified to Reduce the Risk of Exclusion under the Confrontation Clause

If the Court adopts *Amici*'s proposed test and reverses the instant case, the burdens on law enforcement officials could be still further mitigated by an evolution of laboratory procedures. For example, it might be possible to develop procedures for back-up analysts to observe the tests as they were being conducted. While doubling up on analysts or observers might be more inefficient than using a single analyst, it might also enhance quality assurance in the laboratory more generally. In scientific endeavors more generally, the reproducibility of results is held in high regard as a method for enhancing accuracy. (*See*, *e.g.*, JOHN ZIMAN, RELIABLE KNOWLEDGE: AN EXPLORATION OF THE GROUNDS FOR BELIEF IN SCIENCE 63 (1978) ("[T]he reproducibility of experimental results . . . is their ultimate guarantee of . . . reliability.") Moreover, routine re-testing is already made use of in some forensic domains. In

latent fingerprint identification, for example, a routinely-used quality assurance procedure requires verification of every fingerprint identification by a second examiner. *See* CHRISTOPHE CHAMPOD, ET AL., FINGERPRINTS AND OTHER SKIN RIDGE IMPRESSIONS, 39-40 (2004). While the purpose of this requirement is not connected to the Confrontation Clause, a consequence of it is that every fingerprint match has been personally examined by at least two analysts. If one expert were to become unavailable, the second could testify without running afoul of the Confrontation Clause.

By the same token, law enforcement officials could elect to videotape or otherwise record their forensic examinations for later reference. The cost of videotaping is not high. Indeed, virtually every cellphone now contains video recording capability, and the cost of computerized storage of video recordings of forensic tests would be minimal.

Similarly, laboratories could elect to preserve more samples for re-testing than they do at present in order to assure the availability of the material for re-testing, should it prove necessary. While state laws do vary regarding whether due process requires breath tests samples in DUI cases to be preserved, most states do not require such preservation, nor is it mandated under the Constitution. *See, e.g., California v. Trombetta*, 467 U.S. 479 (1984), and cases described in LAWRENCE TAYLOR, DRUNK DRIVING DEFENSE § 10.03 (2006). In the surrogate expert context, the question becomes one of assessing costs and benefits: If the risk of an unavailable testimonial witness seemed significant enough, laboratories could elect to preserve samples to make re-testing plausible.

We do not mean specifically to recommend the routine use of double analysts, or even greater sample preservation. The point is that laboratories' procedures and designs are capable of evolution as needed. Laboratories can make reasonable and informed decisions regarding the extent of documentation they require; how to structure their analysts' work; whether to videotape forensic examinations; and myriad other issues, in ways that can decrease the risk of having forensic evidence excluded at trial, even if surrogates witnesses are permitted only in the limited circumstances we recommend. Whether these investments are sufficiently valuable for laboratories is an empirical question that we cannot presume to answer. The point is simply that laboratory procedures need not be taken as an unchanging set point, but rather, they can flexibly adapt to constitutional requirements.

CONCLUSION

Amici's proposed test alleviates the burdens of a ban on surrogates in precisely those cases where no other reasonable alternative exists. This test combines with the other mechanisms for making the Confrontation Clause's burdens manageable in the context of forensic science, including stipulations, notice and demand statutes, and the possibility for modifying laboratory procedures. These techniques, coupled with the availability of surrogate experts as a second-best measure in accordance with our recommended test, together provide mechanisms that preserve the core values of the Confrontation Clause in the forensic science arena, while achieving an appropriate balance between practicality and principle.

For the foregoing reasons, as well as those in Petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

STEPHEN A. MILLER
Counsel of Record
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-4736
samiller@cozen.com

JENNIFER L. MNOOKIN
Professor of Law
UCLA SCHOOL OF LAW
Box 951476
Los Angeles, CA 90095
(310) 825-4841

PAUL C. GIANNELLI
Weatherhead Professor of Law
CASE WESTERN RESERVE UNIVERSITY
11075 East Boulevard
Cleveland, OH 44120
(216) 368-2098

D. MICHAEL RISINGER
John J. Gibbons Professor of Law
SETON HALL UNIVERSITY SCHOOL OF LAW
One Newark Center
Newark, NJ 07102
(201) 642-8834

ERIN E. MURPHY
Professor of Law
NYU SCHOOL OF LAW
40 Washington Square South
New York, NY 10012
(212) 998-6672

ROBERT P. MOSTELLER
J. Dickson Phillips Distinguished Professor of Law
UNC SCHOOL OF LAW
CB 3380, 160 Ridge Road
University of North Carolina
Chapel Hill, NC 27599
(919) 962-8513

Counsel for Amici Curiae

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