No. 09-866

IN THE

Supreme Court of the United States

RICHARD PENDERGRASS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Indiana

BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce DNA profiles created by polymerase chain reaction and vertical gel electrophoresis, as recorded by a non-testifying lab analyst and a computer, through the testimony of the analyst's supervisor and a forensic DNA expert.

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STATEMENT OF THE CASE

Petitioner Richard Pendergrass stands convicted of two counts of molesting his teenage daughter, both class A felonies. Pet. App. at 2a, 5a; *see also* Ind. Code § 35-42-4-3. At trial, Pendergrass's daughter, C.D., testified that Pendergrass had been touching her inappropriately since she was eleven years old. Pet. App. at 2a. At the age of thirteen, C.D. discovered that she was pregnant and she believed Pendergrass to be the father of her child. *Id.* Soon after learning that she was pregnant, C.D. had an abortion. *Id.*

Two witnesses testified at trial concerning DNA evidence demonstrating the likelihood that Pendergrass was the father of the aborted fetus. Lisa Black, a supervisor at the Indiana State Police Laboratory in Lowell, Indiana, explained the process of creating DNA profiles for Richard Pendergrass, C.D., and the aborted fetus. Dr. Michael Conneally, a DNA expert who performed the paternity analysis, explained how he came to his conclusions regarding the likelihood that Pendergrass was the father of his daughter's aborted fetus. *Id.*

During the testimony of Black and Conneally, the State introduced three documents, two of which were prepared by the Indiana State Police Laboratory and the third of which was prepared by Conneally. *Id.* Pendergrass objected to the admission of all three documents on Confrontation Clause and hearsay grounds, arguing that the State must call the analyst who performed the test in the laboratory.

Id. The trial court admitted these documents over Pendergrass's objection. *Id.* at 2a-3a.

The first document, Exhibit 1, labeled "Certificate of Analysis", was prepared by Daun Powers, a forensic lab analyst for the Indiana State Police, and was admitted during the testimony of Lisa Black, Powers's supervisor. *Id.* The "Certificate of Analysis" consisted of an inventory of physical evidence submitted to the lab, a list of the DNA loci analyzed, the identity of the DNA profiles created (*i.e.* for Pendergrass, C.D., and the aborted fetus), and indications of where the evidence and the test results were sent. *Id.* at 3a, 48a-50a. It did not contain any test results or conclusions. *Id.*

Exhibit 2, also compiled by Powers and admitted during Black's testimony, was a table of the test results recorded by Powers and her computer entitled "Profiles for Paternity Analysis." *Id.* at 3a, 51a. The table did not contain any conclusions regarding paternity, only numbers in columns for each of the various DNA loci analyzed for each of the three test subjects. *Id.*

Black explained that Powers had created DNA profiles using Polymerase Chain Reaction (PCR) and vertical gel electrophoresis. Trial Tr. Vol. 1 at 124-26, 162. Powers used the PCR process to duplicate particular DNA strands from tissue samples taken from the three, and then used gel electrophoresis to sort sixteen loci from those strands. *Id.* at 124-26, 162-64. This process yielded a ladder-like visual for each DNA locus allowing Powers to record values for each per person. *Id.* at 162-64, 166-68. Powers used

a computer to confirm the raw values she observed. *Id*. at 168.

As Powers' supervisor, Black had reviewed Exhibit 2 during the original course of the State Police Laboratory's work. Pet. App. at 3a. Black performs technical, administrative, and random reviews of the work of DNA analysts at the Lowell and Ft. Wayne laboratories. *Id*. All DNA case work is reviewed by a second qualified analyst. *Id*. Black performed the technical review of Powers' tests on the evidence at issue in this case; accordingly, her initials appear next to each of the three samples on the DNA profile, indicating she "confirmed that this paperwork that Ms. Powers was providing to Dr. Conneally was an accurate representation of her results." *Id*. at 3a-4a. During her testimony, Black described the steps Powers took to develop the DNA profiles for each of the three samples as well as what types of samples were taken from the three subjects based on Powers' notes. *Id*. at 4a. Black also testified about the general procedures followed at the laboratory, including the receipt, storage, and testing of evidence. *Id*.

During Conneally's testimony, the court admitted Exhibit 3, a paternity index table that Conneally created. Conneally used the index to calculate the probability that Pendergrass was the father of his daughter's aborted fetus based on the laboratory's test results. *Id*. Based on the paternity index results, there was a 99.9999 percent likelihood that Pendergrass was the father of the fetus that C.D. aborted, or, in other words, Pendergrass was 2.8

million times more likely to be the father than a random man. *Id*. at 4a-5a.

The jury returned guilty verdicts on both counts. *Id*. at 5a. The trial court sentenced Pendergrass to consecutive terms of 40 years on Count I and 25 years on Count II. *Id*.

The Indiana Supreme Court affirmed, holding that Pendergrass was not denied his Sixth Amendment right of confrontation by having the opportunity to cross-examine the laboratory supervisor but not the laboratory processor. *Id*. at 14a, 38a; *Pendergrass v. State*, 913 N.E.2d 703, 709 (Ind. 2009). The court reasoned that *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), leaves it "up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen feature[s] live witnesses." Pet. App. at 12a. Thus, in this case, "the prosecution supplied a supervisor with direct involvement in the laboratory's technical processes and the expert who concluded that those processes demonstrated Pendergrass was the father of the aborted fetus. We conclude this sufficed for Sixth Amendment purposes." Pet. App. at 12a-13a.

REASONS FOR DENYING THE PETITION

In the wake of the Court's decision in *Melendez-Diaz* only one year ago, the States and lower courts have been implementing that decision in ways designed to conserve crime-fighting resources while protecting the rights of defendants. In that time, eight state high courts and one federal circuit have

addressed Confrontation Clause issues concerning forensic test results. *See United States v. Turner*, 591 F.3d 928 (7th Cir. 2010); *State v. Bullcoming*, 226 P.3d 1 (N.M. 2010); *Pendergrass v. State*, 913 N.E.2d 703 (Ind. 2009); *People v. Lovejoy*, 919 N.E.2d 843 (Ill. 2009); *Commonwealth v. Avila*, 912 N.E.2d 1014 (Mass. 2009); *State v. Locklear*, 681 S.E.2d 293 (N.C. 2009); *Rector v. State*, 681 S.E.2d 157 (Ga. 2009); *Smith v. State*, 28 So.3d 838 (Fla. 2009); *State v. Appleby*, 221 P.3d 525 (Kan. 2009).

Of these nine cases, however, only *Avila* and *Locklear* rejected forensic test results offered during the testimony of someone who did not conduct the test. And, as described in detail below, *Avila* and *Locklear* are distinguishable because both concerned the admissibility of a forensic pathologist's subjective autopsy conclusions rather than raw data, and in neither did the testifying witness play any role in supervising or checking the forensic test. Petitioner overgeneralizes forensic test results when asserting conflict with the decision below.

Meanwhile, Confrontation Clause issues concerning forensic test results continue to percolate in intermediate state appellate courts, wending their way to state supreme courts, which remain fully capable of resolving any conflicting decisions. *See* Pet. at 13-14 (collecting cases). If state high courts later create irreconcilable conflicts, the Court can resolve them with the benefit of more exhaustive lower-court consideration. Now, however, courts have not had enough time to create any serious fault lines in need of resolution. It would be premature for the Court to intercede.

I. No Conflict Exists Among Federal Circuits and State High Courts Regarding Testimony by Lab Supervisors or Expert Witnesses as to Raw Data Recorded by Others

Petitioner describes state high courts and federal courts of appeals as being "deeply and intractably divided" over whether the Confrontation Clause permits the government to introduce "testimonial statements" of an absent "forensic analyst" through the testimony of an analyst who did not perform the actual "laboratory analysis" described in the statements. Pet. at 8. However, rather than being in conflict with one another, the cases Pendergrass cites instead illustrate careful applications of *Melendez-Diaz* to the unique facts of each case resulting in a largely coherent—not fractured—approach to the admissibility of forensic test results.

Petitioner erroneously treats the multi-faceted series of issues surrounding the admissibility of forensic test results as if they present but one question requiring a single judicial response. This approach fails to take into account the relationship of the testifying witness to the non-testifying technician or analyst, the testifying witness's role in the original analysis, and the type of forensic test results recorded, among other factors. In the relevant cases decided so far, such material factual variations fully account for any seemingly divergent outcomes. There is, in short, no material inter-jurisdictional conflict as to the admissibility of forensic test results needing resolution.

1. First, the testifying witness's role in the forensic test accounts in large part for the cases Pendergrass alleges to be in conflict with the decision below. In the two state high court decisions cited by Pendergrass that prohibited the admission of forensic test results, the testifying witnesses were the states' chief medical examiners who were testifying regarding autopsy reports written by others. *See Commonwealth v. Avila*, 912 N.E.2d 1014, 1027 (Mass. 2009); *State v. Locklear*, 681 S.E.2d 293, 304 (N.C. 2009). In neither *Avila* nor *Locklear* had the testifying medical examiner played any role in the autopsy or in writing the report being introduced at trial. *Id.* Accordingly, both the Massachusetts and North Carolina Supreme Courts held that the medical examiners could testify as to their own opinions based on what they saw in the autopsy reports, but could not recite or otherwise testify about the conclusions of the unavailable medical examiner as contained in the autopsy reports. *Avila*, 912 N.E.2d at 1029; *Locklear*, 681 S.E.2d at 304-05.

Here, testifying lab supervisor Lisa Black played a far more substantial role in the underlying forensic test. She testified that she reviews the testing processes and oversees the general quality control of the work performed at the lab. Pet. App. 3a, 28a. With respect to this specific case, Black testified that she performed a technical review of Daun Powers's tests. *Id.*

Furthermore, Dr. Conneally, who opined as to the percentage chance that Pendergrass was the father of his daughter's aborted fetus, merely used the

results generated by Powers's DNA tests to create his own paternity index table, which in turn was the subject of his testimony. *Id*. at 34a. The courts that decided both *Avila* and *Locklear* would also apparently permit such testimony. *See Avila*, 912 N.E.2d at 1029; *Locklear*, 681 S.E.2d at 304-05. Accordingly, those cases do not conflict with this case on any level.

Furthermore, in other cases where a testifying lab supervisor has played some role in producing a forensic report, or where an expert merely renders an opinion based on the forensic report, courts have allowed the testimony. In *Rector v. State*, 681 S.E.2d 157, 160 (Ga. 2009), the testifying witness had reviewed the work of the toxicologist who originally prepared the toxicology report and had come to the same conclusion regarding the absence of cocaine in the victim's blood. The Georgia Supreme Court held that, because the testifying witness was more than a "mere conduit" for the absent doctor's findings, his testimony did not violate the Confrontation Clause: "An expert may base [his] opinions on data gathered by others." *Id*. (citation omitted).

Similarly, in *United States v. Turner*, 591 F.3d 928, 930 (7th Cir. 2010), the testifying witness was the non-testifying analyst's supervisor who, as part of his supervisory duties, had peer-reviewed the analyst's report. Neither the report nor the analyst's notes were offered into evidence. *Id*. at 933. The Seventh Circuit held that the supervisor "could testify about his personal involvement in the testing process, about the accuracy of the tests, and about

agreeing with [the non-testifying analyst] when he signed off on her report." *Id.*[1]

Here, the Indiana Supreme Court was persuaded by the testifying lab supervisor's role in the underlying DNA testing and her relationship to the non-testifying analyst. As the court observed, "[t]he laboratory supervisor who took the stand did have a direct part in the process by personally checking Powers's test results. . . . As such, she could testify as to the accuracy of the tests as well as standard operating procedure of the laboratory and whether Powers diverged from these procedures." Pet. App. 10a-11a. The court also concluded that, as a matter of hearsay law, Dr. Conneally could properly render an opinion based on data gathered by someone else. *Id.* at 13a.

This approach is allowed by *Melendez-Diaz*, which held that forensic test results could not be presented solely by affidavit, but left to prosecutors to decide the best witnesses for presenting such test results. *Melendez-Diaz*, 129 S.Ct. at 2532 n.1 ("It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the

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[1] *People v. Lovejoy*, 919 N.E.2d 843, 866 (Ill. 2009), permitted the admission of a toxicology report compiled by a non-testifying pathologist. There the testifying witness was the State medical examiner who had relied on a non-testifying analyst's toxicology report during the course of his own postmortem examination of the victim. The Illinois Supreme Court held that the medical examiner's testimony regarding the toxicology testing was elicited to show the jury the steps he took prior to rendering an expert opinion in the case, *not* to prove the truth of the underlying assertion. *Id.* at 869.

defendant objects) be introduced live."). Furthermore, *Melendez-Diaz* says nothing to suggest that an expert may not testify based on raw data gathered by a non-testifying lab analyst.

Pendergrass contends that the discretion permitted by *Melendez-Diaz* is limited to "whose testimonial statements to present," not "whom to put on the stand for purposes of admitting a particular testimonial statement." Pet. at 27. Whatever the merits of that abstract characterization, context demonstrates that the Court was contemplating prosecutorial flexibility when it comes to introducing forensic test results. The majority was responding specifically to the concern expressed in Justice Kennedy's dissent that the majority's rule would require testimony from each person who played a role in the forensic testing process in order to introduce the test results. *Melendez-Diaz*, 129 S.Ct. at 2544-45 (Kennedy, J., dissenting). The majority rejected that understanding of its decision, stating that "it is not the case[] that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Id*. at 2532 n.1.

In any event, here testimony from a witness who supervised and checked the underlying forensic test permitted cross examination as to the general lab procedures, the procedures followed in this case, and the checks performed to confirm the technician's work. And testimony from a DNA expert who relied on the raw data to draw his conclusion that Pendergrass was 99.9999 percent likely to be the

father of his daughter's aborted fetus permitted cross-examination as to the source of the data, the expert's judgment as to the reliability of the data, and the significance of the data. Pendergrass was not convicted by affidavit—he was convicted by the in-court testimony of witnesses responsible for ensuring proper forensic testing and for analyzing the data derived therefrom.

2. Second, decisions precluding the admission of forensic test results on Confrontation Clause grounds, both before and after *Melendez-Diaz*, can be explained by reference to the type of forensic test at issue. In *Avila* and *Locklear*, and the pre-*Melendez-Diaz* decision *Commonwealth v. Nardi*, 893 N.E.2d 1221 (Mass. 2008), the courts rejected testimony about autopsies by pathologists who had no involvement with the autopsies; that is, they rejected testimony concerning another's forensic *subjective conclusions* rather than *raw data*. Here, by contrast, the non-testifying lab analyst's PCR and gel electrophoresis processes yielded objectively discernible raw data, not subjective conclusions. Indeed, the data that Powers recorded from the gel electrophoresis test was also recorded by a computer to confirm what Powers had observed. *See United States v. Turner*, 591 F.3d 928, 932-33 (7th Cir. 2010) (citing *United States v. Moon*, 512 F.3d 359, 361-62 (7th Cir. 2008) (observing that raw data from a machine that conducts a forensic test is not "testimony" in any meaningful sense).

It appears that only three other post-*Melendez-Diaz* forensic-test cases decided by state high courts have involved raw data rather than subjective

conclusions, and all agree with the decision below. In *Smith v. State*, 28 So.3d 838, 855 (Fla. 2009), the Florida Supreme Court held that the Confrontation Clause does not require the lab technician who actually performed a DNA test to testify at trial as to the data generated by the test. In *State v. Appleby*, 221 P.3d 525, 551-52 (Kan. 2009), the Kansas Supreme Court concluded that population frequency data relating to specific DNA profiles was non-testimonial, such that the person who compiled that data need not be subject to cross examination at trial in order for it to be used by a DNA expert. In *State v. Bullcoming*, 226 P.3d 1, 8-9 (N.M. 2010), the New Mexico Supreme Court ruled that data from a gas chromatograph machine was admissible through the testimony of a lab supervisor rather than the technician who operated the machine because the non-testifying technician "simply transcribed the results generated by the gas chromatograph machine . . . [and] was not required to interpret the results, exercise independent judgment, or employ any particular methodology in transcribing the results."

In light of this distinction between raw data and subjective conclusions, not even pre-*Melendez-Diaz* decisions from state high courts or federal circuits conflict with the decision below. In *State v. Johnson*, 982 So.2d 672, 681 (Fla. 2008), the Florida Supreme Court disallowed admission of a report concerning the nature of an illegal substance possessed by the defendant that was prepared by a non-testifying law enforcement analyst. Again the key was that the report represented another's *subjective conclusions* and not simply *raw data*. Indeed, post *Melendez-Diaz*, the Florida Supreme Court has distinguished

Johnson on that basis. *Smith v. State*, 28 So.2d 838, 854 (Fla. 2009).

In *State v. Mangos*, 957 A.2d 89, 93 (Me. 2008), the Maine Supreme Court held that a lab supervisor could not testify as to the contents of a technician's report describing how the technician took DNA samples from articles of clothing. Such statements do not constitute raw data. They instead describe the actions of a law-enforcement official that were offered to establish chain-of-custody. The decision in *Mangos* simply does not show how the Maine Supreme Court would view the testimony of a lab supervisor or DNA expert that relayed raw data recorded by a non-testifying lab analyst (and a computer).

In *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008) and *People v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005), no forensic test results, much less raw data, were at issue. In *Mejia*, the court rejected testimony by a police gang expert as to opinions he derived from custodial interrogations of gang members. *See Mejia*, 545 F.3d at 198-99. In *Goldstein* the court held that a psychologist could not testify concerning statements made during out-of-court interviews by individuals connected with the defendant. *Goldstein*, 843 N.E.2d at 732-34. *See also United States v. Martinez-Rios*, 595 F.3d 581, 586 (5th Cir. 2010) (ruling that a Certificate of Nonexistence of Record was not admissible through the testimony of a Border Patrol Agent as a surrogate for the immigration officer who searched for the record and

prepared the CNR recounting his actions).[2] These decisions say nothing about how those courts would handle raw data introduced at trial through a lab supervisor and relied on by an expert witness.

Finally, in *Roberts v. United States*, 916 A.2d 922, 938 (D.C. 2007), the court held that an FBI DNA expert could not include in his testimony the "conclusions" drawn by other DNA lab personnel, including another analyst. Again, the court was apparently concerned about introducing into evidence the subjective thoughts of non-testifying witnesses rather than simply raw data. But even if the court in *Roberts* was equally concerned about introducing raw data from a test run by a non-testifying lab technician, it left open the possibility that in a future case a DNA expert might still draw admissible conclusions from such raw data, as long as the expert did not testify about the raw data itself. *Id.* at 939. Given that possibility, it is hard to see how *Roberts* represents any meaningful disagreement with the decision below, where the court permitted an expert to testify as to opinions based on data gathered by a non-testifying analyst.

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[2] *Amicus curiae* National Association of Criminal Defense Lawyers outlines an apparent circuit conflict relating to the admissibility of CNRs through witnesses who did not prepare them. NACDL Br. at 10 n.5. That vein of cases simply underscores the point that the Court cannot treat all *Melendez-Diaz*-related issues as one—it needs to view various applications of *Melendez-Diaz* discretely. In the circumstances presented here—DNA-test data admitted through a lab supervisor and an expert witness—there is no lower-court conflict, and no need for the Court's intervention.

II. Unless It Intends to Reconsider *Melendez-Diaz*, the Court Should Allow More Robust Percolation Before Taking Another Lab-Test Certification Case

Particularly given the variety of admissibility issues that forensic-test cases can present, state appellate courts need to implement *Melendez-Diaz* in many more cases before this Court reviews another one. Even the state high court decisions that rejected the admissibility of forensic test results have been distinguished or reinterpreted by the intermediate appellate courts of those very states. In short, the issues presented in this case are still percolating through lower courts in the wake of *Melendez-Diaz*. For the Court to jump in now would be premature.

1. Nowhere is an ongoing internal state appellate debate more evident than in California. Prior to *Melendez-Diaz*, the California Supreme Court held in *People v. Geier*, 161 P.3d 104, 139-40 (Cal. 2007), *cert. denied*, 129 S. Ct. 2856 (2009), that a DNA report was not testimonial because it was prepared as part of a non-adversarial process using standardized scientific protocol and therefore constituted a contemporaneous recordation of observable events rather than the documentation of past events. Accordingly, the court held that testimony as to the results by an expert who did not perform the test was admissible. *Id.*

Now, following *Melendez-Diaz*, California's intermediate appellate courts are split as to the validity of *Geier* in determining when the Confrontation Clause requires forensic test results to

be admitted through the testimony of the technician or analyst who conducted the test. *People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 408, 411-12 (Cal. Ct. App. 2009), relied on *Geier* and permitted testimony concerning the results of a machine-generated toxicology test conducted during an autopsy by a witness who did not conduct the toxicology test but who was an expert qualified to interpret and explain the test results and had peer-reviewed the tests and signed the final reports. *People v. Gutierrez*, 99 Cal. Rptr. 3d 369, 375 (Cal. Ct. App. 2009), similarly permitted a supervisor to testify concerning the results of a sexual-assault examination conducted by a subordinate.

Meanwhile, *People v. Dungo*, 98 Cal. Rptr. 3d 702, 713-14 (Cal. Ct. App. 2009), rejected testimony about the findings in an autopsy report by someone other than the pathologist who created the report. In *People v. Lopez*, 98 Cal. Rptr. 3d 825, 829 (Cal. Ct. App. 2009), the court determined that *Melendez-Diaz* necessarily rejected the approach of *Geier* and held that a toxicology report was inadmissible hearsay unless the analyst who actually compiled the data testified.

The California Supreme Court has granted review in all four cases, and as the NACDL notes, the California Court of Appeals in the meantime continues to generate decisions on similar issues. NACDL Br. at 10-11. The California Supreme Court, therefore, will have a variety of circumstances for developing a circumspect application of Confrontation Clause doctrine to forensic-test admissibility issues. There is no benefit for this

Court to speed ahead of the California Supreme Court in an attempt to provide guidance down one narrow alleyway of forensic-test admissibility.

This is all the more true because California is not the only state where these issues are still being fleshed out in state appellate courts. As discussed above, the North Carolina Supreme Court has rejected testimony by the state's chief medical examiner concerning the results of an autopsy and forensic dental analysis performed by non-testifying pathologists. *State v. Locklear*, 681 S.E.2d 293, 305 (N.C. 2009). However, North Carolina's appellate courts have distinguished *Locklear* in cases involving testimony about DNA and toxicology data. *State v. Mobley*, 684 S.E.2d 508, 511 (N.C. Ct. App. 2009), *review denied* 2010 WL 1019366 (N.C. Jan. 28, 2010) (distinguishing *Locklear* because the witness testified "not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data"); *State v. Hough*, 690 S.E.2d 285, 291 (N.C. Ct. App. 2010) (approving testimony that is "based on an independent review and confirmation of test results, unlike the situations presented in *Melendez-Diaz* [and] *Locklear*").

In Texas, two intermediate appellate courts have rejected the admission of autopsy reports without the testimony of the person who wrote the reports, but have said they would permit expert testimony *based on* those reports. *See Wood v. State*, 299 S.W.3d 200, 213 (Tex. App. 2009); *Martinez v. State*,

2010 WL 1067560, at *6 (Tex. App. March 24, 2010). Meanwhile, a third intermediate appellate court has held that the Confrontation Clause is not violated when a forensic lab supervisor testifies as to his "opinion[] based on data generated by scientific instruments operated by other scientists. . . ." *Hamilton v. State*, 300 S.W.3d 14, 22 (Tex. App. 2009). The Texas Court of Criminal Appeals will at some point have an opportunity to review these holdings, has not yet weighed in.

The point is that state courts are still in the process of interpreting *Melendez-Diaz* and applying it to the wide variety of cases they face. Until more state high courts have attempted to resolve a broader range of forensic-test admissibility issues in the wake of *Melendez-Diaz*, this Court's intervention would be inexpedient.

2. The only rationale for taking another forensic-test case at this point would be to reconsider *Melendez-Diaz* itself. In *Briscoe v. Virginia*, No. 07-11191, Indiana and Massachusetts, on behalf of 26 states plus the District of Columbia, urged outright reconsideration of *Melendez-Diaz*. *See* Brief of the State of Indiana, *et al*., *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010), *available at* 2009 WL 3652660. The States argued that principles of *stare decisis* permit swift reconsideration of criminal procedure precedent and that lab test results are not testimonial statements. *Id.* Ultimately, the Court merely vacated the decision of the Virginia Supreme Court and remanded the case for further consideration in light of *Melendez-Diaz*. *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010) (mem.).

Given the lack of any genuine lower-court conflict and the need for greater nationwide percolation of forensic-test admissibility issues, the opportunity to reconsider *Melendez-Diaz* really provides the only persuasive rationale for considering another forensic-test case just now. Hence, if the Court grants the petition, Indiana intends once again to make the argument for overturning *Melendez-Diaz*.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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