No. 07-11191

IN THE

Supreme Court of the United States

MARK A. BRISCOE and SHELDON A. CYPRESS
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Virginia

BRIEF OF THE STATES OF INDIANA, MASSACHUSETTS, ALABAMA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, IOWA, KANSAS, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WASHINGTON, WISCONSIN, WYOMING AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

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

2. Does the Confrontation Clause require the prosecution to present the testimony of prosecution witnesses during the prosecution's case in chief and preclude exhibits from being introduced before the witness's live testimony?

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Massachusetts, Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Iowa, Kansas, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Washington, Wisconsin, Wyoming and the District of Columbia have a compelling interest in allocating their crime-fighting resources in the most efficient and effective manner possible, particularly with respect to the prosecution of drug crimes. And while *Melendez-Diaz v. Massachusetts*, -- U.S. --, 129 S.Ct. 2527 (2009), applies to any laboratory report, the majority of the cases in which it applies will be drug prosecutions. *See id.* at 2544 (Kennedy, J., dissenting). *Melendez-Diaz* therefore threatens, among other state forensic practices, the ability of States to keep technicians in the laboratory chipping away at the historic backlog of drug analysis requests. *See* Matthew R. Durose, Bureau of Justice Statistics Bulletin, Census of Publicly Funded Forensic Crime Laboratories, 2005, Appendix Table 1 (July 2008) (the backlog exceeded 222,0000 in 2005, the most recent year for which data are available). The *amici* States are therefore interested in urging the Court to either limit or overturn *Melendez-Diaz* so that it does not unnecessarily divert taxpayer resources better spent on fighting and preventing continued drug and other crimes.

SUMMARY OF THE ARGUMENT

Melendez-Diaz was decided only a few months ago, but already data and anecdotal evidence are demonstrating an overwhelming negative impact on drug prosecutions in some states. Prosecutors are negotiating pleas to lesser charges or dropping drug prosecutions altogether because States do not have enough laboratory analysts and other resources to provide a witness in every case.

In response, States are developing a variety of methods to handle the new demand prompted by *Melendez-Diaz*. An inflexible interpretation of the Confrontation Clause threatens these solutions, such as Virginia's notice-and-demand statute, that provide a workable balance of the legitimate competing interests of the prosecution and the defense.

More specifically, interpreting the Confrontation Clause as an absolute command that the prosecution introduce, as part of its case-in-chief, the testimony of the actual lab technician who undertook a forensic test would be a particularly troubling development given that, in the vast majority of drug cases, the defendant will not genuinely contest the accuracy of forensic test results. Such a doctrine would yield dropped charges, acquittals, and reversed convictions, not because forensic test results are genuinely doubted, but because state criminal justice systems will be overwhelmed by the need to produce

in every case the very crime-lab technicians who actually tested the evidence.

The Sixth Amendment does not, standing alone or in light of *Melendez-Diaz*, permit defendants to game the system or require States to waste public funds by producing unwanted witnesses at trial. Confrontation rights are not absolute and may, in appropriate circumstances, be overridden by other legitimate trial process interests. Such circumstances exist in the context of forensic lab reports, particularly in drug cases. The combination of the high volume (and backlogs) of laboratory tests and the dearth of good-faith challenges to test results creates a situation where some regulation of the confrontation right is surely permissible.

At the very least, States may require defendants to provide timely pretrial notice of their intent to demand face-to-face confrontation of drug analysts. As long as the core Confrontation Clause requirement of an opportunity for in-person cross-examination is satisfied, States retain their traditionally broad discretion to regulate criminal trial proceedings, particularly where there is such a high risk for gamesmanship by the defense that can so easily overwhelm state criminal justice systems.

Furthermore, assuming timely demand for an analyst's presence at trial, States may adopt reasonable procedural rules governing when drug analysis certificates may be admitted into evidence and when cross-examination of analysts may occur.

In this regard, admitting lab test results may well present a special circumstance that does not implicate other forms of police testimony. The difference is that a small number of lab technicians are able to generate test results in thousands of cases, as long as they do not have to testify in court as to *all* of them. The same is not true with respect to ordinary police work. States and localities hire far more officers than lab technicians, and each officer's caseload is far more limited than an average lab technician. Requiring officers and detectives to testify at trial during the prosecution's case-in-chief (rather than merely present testimony by affidavit subject to defense demand) does not threaten a dramatic impact on the remainder of the officer's caseload, much less on the entire crime-detection system. That is why states already have special procedures for admitting lab certificates but not police officer testimony.

Finally, the Court should, at this first opportunity, consider overruling *Melendez-Diaz* before it thoroughly wreaks havoc on State criminal justice systems. In his dissent to *Melendez-Diaz*, Justice Kennedy predicted that "[t]he Court purchases its meddling with the Confrontation Clause at a dear price, a price not measured in taxpayer dollars alone. Guilty defendants will go free, on the most technical grounds, as a direct result of [this] decision, adding nothing to the truth-finding process." *Melendez-Diaz*, 129 S.Ct. at 2550 (Kennedy, J., dissenting).

Melendez-Diaz unnecessarily stymies prosecutors and cripples crime labs while providing criminal defendants with little more than a windfall procedural advantage unrelated to guilt or innocence. At the time of the framing, documents created by copyists were admissible without the copyist's live testimony because the copyist himself could not usefully be cross-examined as to the truthfulness of the statements in the copied document. The same is true with respect to laboratory tests run by machines, where the lab technician merely copies and certifies the results for use in court but does not independently "witness" anything implicating the defendant's guilt or innocence. In these circumstances, the Confrontation Clause represents a formalistic procedural hurdle rather than a genuinely useful tool for arriving at the truth.

ARGUMENT

I. States Need to Balance Lab-Analyst Confrontation Demands with the Efficient Allocation of Scarce Resources

A. The sheer volume of drug cases requires special attention to the pitfalls of strict confrontation rights

Since 2000, state and federal law enforcement officials have arrested more than 11 million persons for possessing or trafficking illegal narcotics. *See* Uniform Crime Report, Crime in the United States

2000-2008, Table 29. As the number of arrests escalates, so does the burden on the state and local laboratories charged with analyzing the substances recovered:

Year	Persons Arrested	Substances Analyzed
2000	1,579,566	532,412
2001	1,586,902	1,894,610
2002	1,538,813	1,798,045
2003	1,678,192	1,715,598
2004	1,745,712	1,734,658
2005	1,846,351	1,749,275
2006	1,889,810	1,935,788
2007	1,841,182	1,808,810
2008	1,702,537	1,768,886

See id.; National Forensic Laboratory Information System, Years 2000-2008 Annual Report, Table 1.1. As these numbers show, the war on drugs is far from over.

Nor is it cheap. In 2005 alone, the States spent $135.8 billion—15.7% of our annual budgets—fighting "substance abuse and addiction." The National Association on Addiction and Substance Abuse, Shoveling Up II: The Impact of Substance Abuse on Federal, State and Local Budgets 2 (2009). Of this amount, $8.1 billion was spent in the state courts, $4.5 billion of which funded drug-related criminal cases. *Id.* at 31. *Melendez-Diaz* therefore impacts a high-volume, high-cost subset of criminal prosecutions.

B. After *Melendez-Diaz*, States face the potential for exponentially more expensive drug prosecutions

Melendez-Diaz threatens to dramatically increase the costs of drug prosecutions. The impact in Virginia was swift and certain: the number of subpoenas to the Virginia Department of Forensic Science in drug cases jumped from 43 in July 2008 to 925 in July 2009. Ben Conery, *States Scramble to Keep Techs in Labs, Out of Courts*, Washington Times, Aug. 31, 2009, at A1. The increase in subpoenas leads to increased time that lab technicians spend in court, which in turn increases the Virginia lab's backlog of drug cases, which stood at 6,100 cases by the end of July 2009. *Id.*

Massachusetts also faces daunting volumes of cases to manage in the wake of *Melendez-Diaz*. During the past fiscal year, more than 20,000 drug cases were prosecuted in Massachusetts trial courts, and many thousands more await trial. Since *Melendez-Diaz*, Massachusetts state prosecutors have asked defendants to stipulate to the results of drug analysis. Defendants, however, have routinely declined to do so, instead insisting on their right to demand an analyst's presence at trial. Securing an analyst's presence at trial has resulted in numerous continuances and trial delays. It also has imposed substantial burdens on the 35 chemists currently employed by the state's drug laboratories. In fact, following *Melendez Diaz*, the average turnaround for drug analysis performed by the State Department of

Public Health has more than doubled, from 83 days in July 2008 to 169 days in July 2009. *Compare* July 2008 Drug Lab Report *with* July 2009 Drug Lab Report.

Rather than attending to essential laboratory work, these analysts must now travel to courtrooms to testify. Once there, analysts often must wait hours for their testimony. And, only then, will some defendants belatedly agree to stipulate to the test results. The more frequent scenario is that, after the analyst testifies on direct examination, defendants forego any cross-examination at all or ask only a few perfunctory questions about the test methods or laboratory certification.

In Indiana, two labs handle forensic testing for the entire state. In 2008, these two labs received several tens of thousands of items in 27,568 cases, but were able to complete the analysis in only 26,349 cases. Indiana State Police, 2008 Annual Report 51; Indianapolis-Marion County Forensic Services Agency, 2008 Annual Report 4-9. Specifically related to drugs, these labs received 13,903 cases, but had a backlog of 1,013 cases. Indianapolis-Marion County Forensic Services Agency, 2008 Annual Report 7; ISP Laboratory Division, 2008 Annual Report 2. Between them, these two labs have only 24 drug chemists. Indianapolis-Marion County Forensic Services Agency, 2008 Annual Report 7; Indiana State Police Laboratory, 2008 Annual Report 6.

The labs' backlogs will only grow following *Melendez-Diaz* unless the labs are able to increase exponentially their budgets for hiring technicians—an unlikely development even in good economic times. Outsourcing is also not a viable option. The State Police lab already outsources DNA tests owing to high volume, but now must strictly limit that practice because of the high cost of producing witnesses from outside labs at trial. In one case, Indiana officials must pay about $5,000 to produce two lab analysts whose DNA tests identified an unknown suspect in a rape case, but who left the employ of the lab where they conducted the tests several years earlier.

Other states experience similar problems. In Michigan, for example, State Police scientists have been logging, in the wake of *Melendez-Diaz*, 15 hours of overtime per week trying to reduce a backlog of forensic evidence. Rebecca Waters, *Supreme Court Requires Lab Analysts to Testify: Now What?*, Forensic Magazine, July 24, 2009. And in North Carolina, "with regard to blood or urine tests, the State is in a particularly egregious situation as there are only 8 to 12 analysts handling blood and urine tests for all 100 counties in the State[.]" *Supreme Court Ruling in Melendez-Diaz Requires the State to Produce the Chemical Analyst in All DWI Prosecutions*, Carolina Newswire, Aug. 7, 2009.

In New York, the Manhattan medical examiner's office experiences such high personnel turnover that in many cases the pathologist who performs an

autopsy is no longer employed at the office when the case goes to trial. Tom Jackman, *Prosecutors Worried By High Court Ruling on Lab Evidence*, Washington Post, July 15, 2009. As a consequence, prior to *Melendez-Diaz*, the accepted practice for Manhattan criminal courts was to admit autopsy reports without testimony from the analyst. *Id.* Further, it is New York's practice to use an assembly-line-like rotation system for DNA analysis, sometimes involving up to 40 analysts per case. Following *Melendez-Diaz*, this practice raises difficult questions regarding who must testify as to the results of any given DNA test.

In some states, the main problem is not the volume of cases so much as the distance from the lab to the courtroom. Because of this, Oregon district attorneys sometimes do not even bother to bring lower-level drug charges because they know it will be too difficult to produce a lab-technician. Ben Conery, *States Scramble to Keep Techs in Labs, Out of Courts*, Washington Times, Aug. 31, 2009, at A1. Similarly, in some South Dakota counties, a "round trip (for the lab analyst) is going to be 10 to 12 hours to testify." Tom Jackman, *Prosecutors Worried By High Court Ruling on Lab Evidence*, Washington Post, July 15, 2009. Even if prosecutors are willing to undertake that expense, lab analysts who devote that much time to testifying in court will inevitably leave behind an ever-growing backlog of testing.

These experiences are a few examples of how States are seeing, in the wake of *Melendez-Diaz*, the

potential for skyrocketing costs associated with drug and other forensic-evidence prosecutions. What the States have learned is that the need for flexibility in dealing with confrontation demands involving lab analysts in drug cases is particularly acute. Petitioner's interpretation of the Confrontation Clause would threaten—if not destroy—many workable solutions for balancing the needs of prosecutors against the often-frivolous demands of defendants who, even when the lab analyst testifies as part of the case-in-chief, have no realistic prospects for successfully challenging the validity of lab results.

C. States have been exploring a variety of ways to manage demands to confront lab analysts in court

States differ in how they investigate and prosecute drug crimes, including with respect to how they have been responding to *Melendez-Diaz*. As described below, some have had in place, even prior to *Melendez-Diaz*, statutes and practices that balance confrontation rights with the need to avoid wasteful production of unwanted witnesses. Others have been looking to sister states for procedural models or have been devising practices of their own. The States' objectives in developing these procedures is to control the high cost of producing lab technicians to testify in every drug case, either by winnowing frivolous confrontation demands or by making the means of securing analyst testimony more efficient (such as by allowing qualified

surrogates to testify or by allowing testimony by video conference). If the Court were to adopt Petitioners' absolutist approach to in-court lab-analyst confrontation, however, all States would struggle even more with the overwhelming cost of producing analysts to testify in the case-in-chief at every drug (and other forensic-evidence) trial.

1. *Notice-and-Demand Procedures*

As the name implies, a notice-and-demand statute requires (1) the State to give notice of its intent to introduce a certificate of analysis *in lieu* of live testimony, and (2) the defendant to then demand the technician's presence at trial. *See Melendez-Diaz*, 129 S.Ct. at 2527, 2541 ("In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial.").

The objective of notice-and-demand statutes is to winnow the number of cases where analyst testimony will be necessary. Without a notice-and demand rule, the prosecution must introduce analyst testimony on every case where it seeks to introduce a certificate of the analyst's test results. The theory behind having such a rule is that, if defendants bear some burden to assert their lab-analyst confrontation rights in advance of trial, there will

ultimately be appreciably fewer cases where analysts must appear at trial.

Virginia: Here, the Court has been asked to review Virginia's notice-and-demand statute, which provides that a certificate of analysis may be admitted into evidence if filed with the clerk at least seven days prior to the hearing or trial. Va. Code Ann. § 19.2-187. Defense counsel can obtain a copy of the certificate by making a request to the clerk at least 10 days before trial. *Id.* The defendant then has the right to call the analyst and "examine him in the same manner as if he had been called as an adverse witness." Va. Code § 19.2-187.1. The Supreme Court of Virginia interpreted this as a notice-and-demand statute. *Magruder v. Commonwealth*, 657 S.E.2d 113, 120 (Va. 2008).

Massachusetts: After the Court's decision in *Melendez-Diaz*, the Governor of Massachusetts, at the request of the Attorney General and district attorneys, submitted proposed legislation to formalize the procedures governing admission of drug analysis certificates at trial. The proposed legislation is modeled on the standard notice-and-demand statutes cited in the majority's decision in *Melendez-Diaz*, 129 S.Ct. at 2541, and is currently pending before the Massachusetts legislature.

Ohio: Prior to *Melendez-Diaz*, Ohio required a prosecutor to serve a copy of the lab report on the defendant before trial with an explanation of the defendant's right to demand confrontation and the

manner in which to make that demand. *See* Ohio Rev. Code Ann. § 2925.51(B), (D). The State must produce at trial the individual who signed the report if, within seven days of receiving notice, the defendant so demands. *Id.* at § 2925.51(C). Ohio courts have not yet evaluated this statute in light of *Melendez-Diaz*.

Texas: If the prosecutor wishes to avoid producing the analyst in court, Texas requires the State to file a copy of the certificate to be introduced with the clerk of the court and to deliver a copy to the defendant at least twenty days in advance of trial. *See* Tex. Code Crim. Proc. Ann art. 38.41. The certificate is not admissible, and the analyst will be required to appear, if the defendant files a written objection to the use of the certificate at least ten days before trial. *See id.*

2. *Anticipatory Demand Requirements*

Anticipatory demand statutes require the defendant to demand analyst testimony, but they do not require the State to provide notice of intent to introduce a certificate of analysis; rather, they operate on the premise that certificates of analysis are invariably produced during pre-trial discovery anyway.

Colorado: Colorado allows admission of a certificate of analysis *in lieu* of live testimony unless a defendant demands cross-examination "at least ten

days before the date of such criminal trial." *See* Colo. Rev. Stat. Ann. § 16-3-309.

Oregon: Oregon requires a defendant to file written notice with the court and the district attorney of his intent to object to a report's findings "not less than 15 days prior to trial." Or. Rev. Stat. § 475.235(5). The Court of Appeals of Oregon determined that, pursuant to *Melendez-Diaz*, a prior version of its statute (requiring defendants to subpoena the analyst if they wanted to object to the report) violated the Sixth Amendment. *State v. Willis*, 213 P.3d 1286, 1289 (Or. Ct. App. 2009). The anticipatory demand statute, however, has not been similarly invalidated.

3. *Video Conferencing*

Louisiana: Louisiana has recently passed legislation allowing laboratory employees, coroners, forensic pathologists and other people in the forensics field to testify via "simultaneous transmission through audiovisual equipment." 2009 La. Sess. Law Serv. Act 272 (H.B. 119). Testimony may be so provided so long as the opposing party receives thirty-days notice prior to the testimony. *Id*. Either party may still subpoena the witness for in-person testimony, but the defendant or his attorney must certify that they intend to perform, in good faith, cross-examination of the witness. *Id*.

Michigan: The Michigan State Police have created a video testimony program where analysts

may testify from their own labs. Rebecca Waters, *Supreme Court Requires Lab Analysts to Testify: Now What?*, Forensic Magazine, July 24, 2009. This rule allows the analysts to testify multiple times on the same day. *Id*. Michigan estimates that this program has reduced both their blood alcohol and drug testing backlogs, and saves analysts on average thirteen-and-a-half hours when compared to traditional in-court testimony. *Id*.

Montana: Similarly, the practice in Montana is for prosecutors to call crime lab analysts to testify via the Montana Judicial Video Network, a program that has interconnected many of the courts in the state to each other and various other entities, including the state crime lab. *See* Montana Supreme Court—Information Technology, http://www.montanacourts.mt.gov/cao/technology/it_video_confer.asp.

4. *Testimony by Surrogates*

Indiana: As in many states, prior to *Melendez-Diaz* the Indiana Rules of Evidence permitted prosecuting attorneys to admit certificates of analysis to prove the results of forensic laboratory testing as part of their cases-in-chief. Ind. Rule. Evid. 803. The State's implicit default rule in the wake of *Melendez-Diaz* has been for prosecutors to present lab analysts during their cases-in-chief, regardless of whether the defendant has expressed any desire to cross-examine the analyst. A recent Indiana Supreme Court decision may help ease that burden insofar as it allowed, in a DNA testing case,

the testimony of a lab supervisor rather than the actual testing technician. *See Pendergrass v. State*, 913 N.E.2d 703, 708-09 (Ind. 2009).

New Hampshire: Prior to *Melendez-Diaz*, the New Hampshire Supreme Court determined that a toxicologist may testify concerning lab reports because the preparing analyst probably would not remember the specific test and thus "[a]ny such analyst's testimony would have been identical to [the expert's] testimony 'as it would concern . . . general knowledge of the [laboratory's] test procedures and protocols, quality control measures, specific levels of review and chain of custody matters.'" *State v. Silva*, 960 A.2d 715, 720-21 (N.H. 2008) (quoting *State v. O'Maley*, 932 A.2d 1, 13 (N.H. 2007)).[1]

California: A majority (but not all) of California's courts have found that if a contemporaneous report is prepared at the time of testing, and live testimony, not necessarily by the preparer, accompanies the report, the resulting testimony is not in violation of *Melendez-Diaz*, because the reports were not "near-contemporaneous[,]" and thus are non-testimonial. *People v. Gutierrez*, 99 Cal. Rptr. 3d 369, 376-77 (Cal. Ct. App. 2009); *see also People v. Geier*, 161 P.3d 104 (Cal. 2007).

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[1] New Hampshire also allows analysts to testify via video teleconference if notice is given and the defendant does not object. N.H. Rev. Stat. Ann. § 516:37.

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The *amici* States are not advocating a particular statute or practice for admitting forensic laboratory test results into evidence. The States merely request that the Court reject Petitioner's overly restrictive interpretation of what the Confrontation Clause requires. The States should be allowed flexibility to develop rules that both protect the opportunity to cross-examine guaranteed by the Sixth Amendment and conserve scarce state crime-fighting resources.

II. The Confrontation Clause's Core Purposes Are Fulfilled if States Make Analysts Available for Cross-Examination at Trial

"The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (citing *Delaware v. Fensterer,* 474 U.S. 15, 18-19 (1985) (*per curiam*)); *see also Mattox v. United States,* 156 U.S. 237, 244 (1895) ("the substance of the constitutional protection is . . . seeing the witness face to face, and . . . subjecting him to the ordeal of a cross-examination"). These rights, however, are "not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *see also Maryland v. Craig*, 497 U.S. 836, 850 (1990) ("the face-to-face confrontation requirement is not

absolute"). Thus, although "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," that preference "must occasionally give way to considerations of public policy and the necessities of the case." *Craig*, 497 U.S. at 849 (emphasis in original) (citations omitted).

Similarly, although "the main and essential purpose of confrontation is *to secure for the [defendant] the opportunity for cross-examination*," *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (quoting *Davis v. Alaska,* 415 U.S. 308, 315-16 (1974) (emphasis in original)), a defendant has no right to "cross-examination that is effective in whatever way, and to whatever extent, the defense may wish." *Id.* at 679 (quoting *Fensterer*, 474 U.S. at 20).

Like other Sixth Amendment rights, the Confrontation Clause "must also be interpreted in the context of the necessities of trial and the adversary process." *Craig*, 497 U.S. at 850. As such, it is subject to reasonable state regulation. *See Melendez-Diaz v. Massachusetts*, -- U.S. --, 129 S.Ct. 2527, 2541 (2009) ("States are free to adopt procedural rules governing" defendant's assertion of Confrontation Clause rights); *Van Arsdall*, 475 U.S. at 679 ("trial judges retain wide latitude insofar as the Confrontation Clause is concerned"). So long as the "defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the

factfinder the reasons for giving scant weight to the witness' testimony," the Confrontation Clause's core purposes are "generally satisfied." *Fensterer*, 474 U.S. at 22.

Respondent's statutory scheme governing the admission of drug analysis certificates at trial satisfies these core constitutional requirements. As interpreted by the Virginia Supreme Court, it provides defendants with the right to demand that the State produce an analyst for face-to-face confrontation. *Magruder v. Commonwealth*, 657 S.E.2d 113, 120-21 (Va. 2008) ("the defendants could have insured the physical presence of the forensic analysts at trial by issuing a summons for their appearance at the Commonwealth's cost, *or asking the trial court or Commonwealth to do so*.") (emphasis added). Moreover, assuming timely demand is made, defendants have a full and fair opportunity to cross-examine an analyst at trial. *See id.* at 121 (noting that, had demand for the analyst been made, "defendants could have cross-examined them"). The Confrontation Clause requires nothing more. *Fensterer*, 474 U.S. at 22.

The Confrontation Clause does not preclude States from requiring defendants to provide timely pretrial notice of their intent to demand face-to-face confrontation with the drug analysts. Nor, assuming timely demand is made, does the Confrontation Clause preclude States from adopting reasonable procedural rules governing when drug analysis certificates may be admitted into evidence or when

cross-examination of analysts may occur. *See Taylor v. Illinois*, 484 U.S. 400, 411 (1988) ("The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence.").

A. Statutes requiring defendants to demand an analyst's presence at trial impose no impermissible burden on Confrontation Clause rights

The Court already has recognized that "[t]here is no conceivable reason why [a defendant] cannot . . . be compelled to exercise his Confrontation Clause rights before trial." *Melendez-Diaz*, 129 S.Ct. at 2541. As the Court explained: "The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so." *Id.* (emphasis in original). States "are free to adopt procedural rules" governing when notice of a Confrontation Clause objection must be provided and, further, to deem any such objection waived should defendant fail to comply with those rules. *Id.* (citing *Wainright v. Sykes*, 433 U.S. 72, 86-87 (1977)); *see also Taylor v. United States*, 414 U.S. 17, 19 (1973) (Confrontation Clause rights may be waived).

The Court has upheld similar pretrial notice provisions in a variety of contexts. In *Michigan v. Lucas*, 500 U.S. 145, 150 (1991), for instance,

defendant was precluded from presenting evidence of his own past sexual conduct with a rape victim because he failed to give advance notice of this defense as required by the State's rape-shield statute. The statute's notice provisions, the Court noted, "represent[ed] a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. The statute also protect[ed] against surprise to the prosecution." *Id.* Thus, there was no constitutional barrier to the State's enforcement of those notice provisions.

Similarly, in *Williams v. Florida*, 399 U.S. 78, 79 (1970), the Court upheld a State rule that required defendants to provide pretrial notice of any alibi defense. The Court observed that this notice requirement "by itself in no way affected [defendant's] crucial decision to call alibi witnesses. . . . At most, the rule only compelled [defendant] to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that [he] planned to divulge at trial." *Id.* at 85.

The Virginia Supreme Court properly concluded that Respondent's notice-and-demand statute promotes similar state interests by "protecting against surprise, harassment, and undue delay." *Magruder*, 657 S.E.2d at 121 (quoting *Lucas*, 500 U.S. at 152-53). These are not fanciful concerns, particularly in the wake of the Court's decision in *Melendez-Diaz.*

In the vast majority of drug cases, defendants do not contest the results of drug analysis. *See Melendez-Diaz*, 129 S.Ct. at 2542 (quoting Brief for the District Attorneys in Support of the Commonwealth in No. SJC-09320 (Mass.), p.7). Instead, the primary contested issues in drug cases usually revolve around whether the evidence sufficiently links defendant to the drugs, not the accuracy of the scientific testing confirming that the substances are, in fact, drugs. *See, e.g., id.* at 2547-48 (Kennedy, J., dissenting). Given these practical realities, the *Melendez-Diaz* majority thought it "unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis." *Id.* at 2542.

Unfortunately, the majority's assumptions have not been borne out in the day-to-day practice of State trial courts. Emboldened by the Court's holding in *Melendez-Diaz*, defendants and their counsel have been increasingly unwilling to stipulate to the admission of drug analysis certificates, even when they have no intention or motivation to dispute the accuracy of that evidence. Defendants and their counsel have instead adopted a wait-and-see strategy, insisting on the defendant's constitutional right to confrontation and hoping that the State will be unable to produce a qualified analyst to testify at trial. If not, the prosecution is forced either to seek a continuance to secure an analyst's presence at trial, present substitute evidence to prove the composition and weight of the drugs, or agree to reduce, or even

dismiss, the charges against the defendant. *See id.* at 2557 (Kennedy, J., dissenting) (observing that defendants "will insist upon concessions: a plea bargain, or a more lenient sentence in exchange for relinquishing" the right to demand an analyst's presence at trial).

"Given the prospect of such a windfall (which may, in and of itself, secure an acquittal)," there is no downside to defendants in undertaking this gamble. *See id.* at 2557 (Kennedy, J., dissenting). At worst, the State will succeed in securing an analyst's presence at trial: only then will a defendant belatedly stipulate to the analyst's testimony or (more likely) simply forego the opportunity for cross-examination altogether. By that point, however, the State will have needlessly expended substantial time, effort, and money to secure an analyst's presence at trial.

Requiring analysts to appear in court, even when the substance of their testimony is not contested, imposes other needless burdens on States as well. It diverts analysts from their primary responsibilities of conducting scientific testing on drug samples, increases the already substantial backlog of cases awaiting forensic testing, delays the scheduling of drug cases for trial, and, in some circumstances, results in "[g]uilty defendants [going] free." *See id.* at 2550 (Kennedy, J., dissenting). States have a substantial interest in avoiding these threats to the fair and efficient administration of justice. If defendants do not contest the validity of the

underlying scientific analysis, drug analysis certificates should be admitted without requiring the "formalistic and pointless" presence of an analyst as a witness at trial. *See id.* at 2547 (Kennedy, J., dissenting).

Notice-and-demand statutes, like that enacted by Virginia, are intended "to protect the defendant's constitutional rights and yet relieve the prosecution of producing the analyst when scientific proof *is not a contested issue* in the case." *State v. Miller*, 790 A.2d 144, 152 (N.J. 2002) (emphasis in original) (quoting Paul Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L. J. 671, 700 (1988)). By requiring defendants to give advance notice of their objections to the admission of drug analysis certificates, notice-and-demand statutes help "weed out prior to trial those cases in which there is a contest over the scientific proof and with respect to which the State will be required to produce a witness or prove why one is not necessary." *Miller*, 790 A.2d at 156. In addition, pretrial notice provisions avoid the prospect of States being unfairly surprised by an "eleventh-hour defense" and the delays in trials that invariably result from such last-minute defense tactics. *See Taylor*, 484 U.S. at 412.

Requiring a defendant to provide pretrial notice of a Confrontation Clause objection to the admission of drug analysis certificates "does not deny a defendant the opportunity to cross-examine the

[analyst], but simply requires that the defendant decide prior to trial whether he will conduct a cross-examination. The statute provides the opportunity for confrontation—only the timing of defendant's decision is changed." *Magruder*, 657 S.E.2d at 125 (quoting *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007)).

Moreover, compliance with State pretrial notice provisions imposes no impermissible burden on defendant's exercise of Confrontation Clause rights. *See Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992) ("not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right"); *cf. Crawford v. Marion County Election Bd.*, -- U.S. --, 128 S.Ct. 1610, 1621 (2008) (requiring voters to present identification "does not qualify as a substantial burden on the right to vote"). "Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial. The burden of identifying them in advance of trial adds little to these routine demands of trial preparation," *Taylor*, 484 U.S. at 415-16, and is easily justified by the States' legitimate interests in promoting the "orderly conduct of a criminal trial." *Id.* at 411.

B. Statutes providing defendants with an opportunity to cross-examine an analyst during the defense case are likewise constitutionally permissible

Petitioners next contend that the Confrontation Clause requires that cross-examination of a government witness, like an analyst, may only occur during the prosecution's case-in-chief and that requiring a defendant to cross-examine an analyst during the defense case amounts to improper burden shifting. *See* Pet'r.'s Br. 15-16, 20-21. As noted in Respondent's Brief, these arguments are entirely speculative because Petitioners never demanded an analyst's presence at trial and, thus, the "trial court never had occasion to address the proper order of proof." Resp't.'s Br. 16 (quoting *Magruder*, 657 S.E.2d at 122).

Assuming, however, this were a live issue, it does not implicate any Confrontation Clause rights. In the usual case, when a timely demand for an analyst's testimony is made, the witness will be called as part of the prosecution's case and cross-examination will take place at that stage of the trial. Thus, both of the core rights secured by the Confrontation Clause—face-to-face confrontation and cross-examination—are protected. In some circumstances, however, an analyst may not be available to testify during the prosecution's case-in-chief because of scheduling or other constraints. Rather than delaying the trial to secure an analyst's presence or directing a verdict for the defense, States

may meet their burden of proof by introducing certificates of analysis through another witness, *e.g.*, the arresting officer, subject to producing an analyst for cross-examination at a later stage of the trial. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (the Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it").

Nothing in the Confrontation Clause's text or history suggest that it is in any way concerned with controlling the order of proof at trial. So long as defendant is provided with an opportunity to confront and cross-examine an analyst at trial, the Confrontation Clause is satisfied. *See Fensterer*, 474 U.S. at 22; *see also United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1371 (11th Cir. 1994) ("Neither the Confrontation Clause nor the Due Process Clause restricts a trial judge's broad discretion to exercise reasonable control over the order in which litigants interrogate witnesses and present evidence."). It is offended only when a certificate of analysis is admitted into evidence, without affording defendant an opportunity to confront an analyst and, through cross-examination, to test the analyst's "honesty, proficiency, and methodology." *Melendez-Diaz,* 129 S.Ct. at 2538; *see also Van Arsdall*, 475 U.S. at 678-79 ("exposure of a witness' motivation for testifying is a proper and important function of the constitutionally protected right of cross-examination") (quoting *Davis*, 415 U.S. at 316-317).

Whether this opportunity for cross-examination of the analyst occurs during the prosecution case, the defense case, or rebuttal is constitutionally irrelevant because, regardless of when the cross-examination occurs, the jury will be able to assess the analyst's demeanor and evaluate what weight, if any, to give his testimony. That is all the Confrontation Clause requires. *See Craig*, 497 U.S. at 846; *Fensterer*, 474 U.S. at 22.

This result is consistent with the common law view that "an *alteration of the prescribed customary order* [for presentation of witnesses and evidence] is always allowable in the *discretion of the trial court*." 6 John H. Wigmore, *Evidence in Trials at Common Law* § 1867 (Chadbourn ed. 1976) (emphasis in original). Indeed, the Court has recognized that trial judges have broad discretion to determine "the order of introducing evidence, and the times when it is to be introduced[.]" *Philadelphia & Trenton R.R. Co. v. Stimpson*, 39 U.S. 448, 463 (1840); *see also Geders v. United States*, 425 U.S. 80, 86 (1976) ("The trial judge must meet situations as they arise and . . . [t]o this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion."); *Goldsby v. United States*, 160 U.S. 70, 74 (1895) (even assuming testimony "should have been more properly introduced in the [prosecution's] opening [case], it was purely within the sound judicial discretion of the trial court to allow it [during the prosecution's rebuttal case], which discretion, in the absence of gross abuse, is not reviewable here").

Parties historically have had no "strict right"—under the Confrontation Clause or otherwise—to insist on any particular order of proof at trial. *See Wood v. United States*, 41 U.S. 342, 361 (1842) ("the order in which the proof should be brought to establish [a claim], was rather a matter in the discretion of the court, than of strict right in the parties").

Rule 611(a) of the Federal Rules of Evidence reflects this common law approach to the order of proof. It likewise confers discretion on trial courts to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence[.]" Fed. R. Evid. 611(a). Numerous states have adopted substantively identical evidentiary rules. *See, e.g.,* Ala. R. Evid. 611(a); Alaska R. Evid. 611(a); Ariz. R. Evid. 611(a); Ark. R. Evid. 611(a); Colo. R. Evid. 611(a); Del. R. Evid. 611(a); Haw. R. Evid. 611(a); Idaho R. Evid. 611(a); Ind. R. Evid. 611(a); Ky. R. Evid. 611(a); La. Code Evid. Ann. art. 611(a); Me. R. Evid. 611(a); Mich. R. Evid. 611(a); Minn. R. Evid. 611(a); Miss. R. Evid. 611(a); Mont. R. Evid. 611(a); N.C. Gen. Stat. § 8C-1, Rule 611(a); N.D. R. Evid. 611(a); Ohio R. Evid. 611(a); S.C. R. Evid. 611(a); S.D. Codified Laws § 19-14-18; Tex. R. Evid. 611(a); Utah R. Evid. 611(a); Vt. R. Evid. 611(a); Wash. R. Evid. 611(a); W. Va. R. Evid. 611(a); Wyo. R. Evid. 611(a). Relying on these evidentiary rules, state and federal courts "frequently have exercised their discretion . . . to permit deviations from [the] conventional order of proof." 28 Charles

A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6164 (1993) (collecting cases).

Notice-and-demand statutes, like the Virginia statute here, are merely a variation on this theme. They permit (but do not require) certificates of analysis to be admitted during the prosecution's case-in-chief so long as the State makes an analyst available for cross-examination before the close of all the evidence. In this way, States preserve the traditional flexibility that courts have exercised with regard to the order of proof at trial.

Maintaining this flexibility is particularly important in drug prosecutions, given the volume of cases pending in state courts and the increasing demands placed on analysts to complete scientific testing on thousands of samples in a timely manner and appear in court whenever defendants demand it. States have a substantial interest in ensuring that their continued ability to prosecute drug offenses will not be compromised by Petitioners' overly-rigid interpretation of the Confrontation Clause. *See Taylor*, 484 U.S. at 411; *see also Stimpson*, 39 U.S. at 463 (recognizing that Congress has authority to "prescribe some fixed, general rules" regarding the mode of conducting trials, including the order of interrogation and presentation of evidence).

Moreover, allowing cross-examination of a prosecution witness to take place during the defense case does not impermissibly conflate the Confrontation Clause with the Compulsory Process

Clause. *See* Pet'r.'s Br. at 20-21. Once a timely demand for the analyst is made, the burden of producing the analyst falls squarely on the prosecution, not the defense. Thus, the "consequences of adverse-witness no-shows" is not improperly shifted from the "State to the accused." *See Melendez-Diaz*, 129 S.Ct. at 2540. Rather, the prosecution retains the burden of producing all adverse witnesses; the defendant is not required to "bring those adverse witnesses into court." *See id.* In order to eliminate any potential confusion raised by changing the customary order of proof, trial judges can issue appropriate jury instructions.

III. The Court Should Consider Overruling *Melendez-Diaz*

Overruling a case only a few months after it was decided is hardly common, but the Court should consider that option here. For the reasons given by Justice Kennedy in his *Melendez-Diaz* dissent, it follows from neither history nor precedent that Sixth Amendment confrontation rights apply to technicians who compile forensic lab reports from tests conducted by machines. If there is any possibility that the Court might ever reconsider *Melendez-Diaz*, it is far better to do it now rather than wait for state criminal justice systems to be overwhelmed with demands for lab technicians to testify (needlessly) at trial.

A. *Stare decisis* permits reconsideration of criminal procedure rights

"*Stare decisis* is not an inexorable command[.]" *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (quoting *Payne v. Tennessee,* 501 U.S. 808, 828 (1991)). Rather, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106 (1940), overruling *Helvering v. St. Louis Trust Co.*, 296 U.S. 39 (1935); *Becker v. St. Louis Trust Co.*, 296 U.S. 48 (1935).

"Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Payne,* 501 U.S. at 828 (citations omitted). Indeed, "[t]he doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law[.]" *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result)).

It bears mentioning that the Court's recent Confrontation Clause cases are themselves products of a willingness to overturn prior holdings. *See Crawford*, 541 U.S. 36 (2004) (overturning *Ohio v. Roberts*, 448 U.S. 56 (1980)). The *Crawford* Court

stated that even though the case could have been decided under the existing line of cases, "we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." *Id.* at 67.

The relative youth of the precedent being revisited does not preclude overturning it. This Court has, on many occasions, reversed itself in short order when necessary. *See Knox v. Lee (Legal Tender Cases)*, 79 U.S. 457, 554 (1871), *overruling Hepburn v. Griswold*, 75 U.S. 603 (1870) ("Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made"); *see, e.g.*, *Daniels v. Williams*, 474 U.S. 327 (1986), *overruling Parratt v. Taylor*, 451 U.S. 527 (1981) (concerning lack of due care in Fourteenth Amendment cases); *United States v. Rabinowitz*, 339 U.S. 56, 65 (1950), *overruling Trupiano v. United States*, 334 U.S. 699 (1948) (concerning reasonableness of warrantless searches); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *overruling Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (concerning saluting the flag during the pledge of allegiance).

The fact that *Melendez-Diaz* is a recent decision actually makes overruling it even less problematic

because its holding is not yet fully entrenched in statutes and case law. States, for the most part, still have pre-*Melendez-Diaz* statutes in place, so overruling it would not disrupt established practices. *See generally Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 382 (1977), overruling *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) (finding that "[s]ince one system of resolution of property disputes has been adhered to from 1845 until 1973, and the other only for the past three years, a return to the former would more closely conform to the expectations of property owners than would adherence to the latter."). In that respect, *Melendez-Diaz* is different from *Miranda v. Arizona*, 384 U.S. 436 (1966), which the Court refused to overrule because it "has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 433 (2000). *See also Crawford*, 541 U.S. at 75-76, (Rehnquist, C.J., concurring in the judgment) (questioning the decision to overturn *Roberts*—"a case decided nearly a quarter of a century ago").

Furthermore, *Melendez-Diaz* is already proving unworkable. As described in Part I, *supra*, States face the potential for exponentially more expensive drug prosecutions. Also, state courts have reached widely divergent results as to whether there are limits to what *Melendez-Diaz* holds. In three of the nation's most populous states, California, New York and Texas, courts have struggled to apply *Melendez-Diaz* in a consistent manner. A few courts read

Melendez-Diaz to require the lab technician who conducted a forensic test to testify as to the accuracy of the test before the court. *See People v. Lopez*, 98 Cal. Rptr. 3d 825, 829 (Cal. Ct. App. 2009); *Cuadros-Fernandez v. State*, 2009 WL 2647890 at *9-10 (Tex. Ct. App. Aug. 28, 2009); *People v. Heyanka*, 2009 WL 2951011 at * 2 (N.Y. Dist. Ct. Aug. 19, 2009). Others find lab reports not to be "testimonial" if created contemporaneously with the test. *See People v. Gutierrez*, 99 Cal. Rptr. 3d 369, 376-77 (Cal. Ct. App. 2009) (permitting surrogate testimony to accompany a lab report created at the time of testing); *People v. Palmer*, 885 N.Y.S. 2d 621 (N.Y. App. Div. 2009) ("the admission into evidence of a laboratory report containing DNA profile data prepared by a laboratory analyst who did not testify at trial did not violate [the defendant's] Sixth Amendment right to confrontation . . . as the report did not constitute a testimonial statement").

While the Court may ultimately resolve these disagreements, the more important point is what the decisional conflicts reflect: a need for criminal trial courts to cope with *Melendez-Diaz* without quashing substantial swaths of forensic-evidence-based prosecutions. That need in itself suggests something deeply amiss with regard to *Melendez-Diaz*. The upshot is that *Melendez-Diaz* so drastically upends longstanding state criminal procedures, and for such dubious legitimate benefits to defendants, that the Court should revisit whether, in the context of forensic lab tests conducted by machines, there

really is a witness whose confrontation is guaranteed by the Sixth Amendment.

B. For confrontation purposes, there are meaningful differences between lab analysts and conventional witnesses

The Court's holding in *Melendez-Diaz* that crime-lab certificates are "testimonial statements" and that lab analysts are "'witnesses' for purposes of the Sixth Amendment" is not a "straightforward application" of *Crawford*. *Melendez-Diaz*, 129 S.Ct. at 2532, 2533. *Crawford*, *Davis*, and *Hammon* all "dealt with ordinary witnesses—women who had seen, and in two cases been the victim of, the crime in question." *Id.* at 2543 (Kennedy, J., dissenting). Those cases say nothing about whether a report from a test conducted by a machine is "testimonial."

As Justice Kennedy observed, the majority in *Melendez-Diaz* "ma[de] no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses—'witnesses' being the word the Framers used in the Confrontation Clause." *Id.* There is an inherent and obvious difference between "conventional witnesses—one who has personal knowledge of some aspect of the defendant's guilt—" and analysts who test substances and prepare scientific reports showing their findings. *Id.* As he explained, the Confrontation Clause does not "refer[] to a kind of out-of-court statement—namely, a testimonial statement—that must be excluded from

evidence. . . . Nor does the Clause contain the word 'testimonial.' The text, instead, refers to kinds of persons, namely, to 'witnesses against' the defendant." *Id.* at 2550.

A type of witness similar to the lab technicians at issue here existed at the time of the Founding—the copyist. *Id.* at 2552. Before photocopies, prosecutors relied on copyists to transcribe important records for trial. "If the copyist falsifie[d] a copy, or even misspell[ed] a name or transpose[d] a date, those flaws could lead the jury to convict. Because so much depend[ed] on his or her honesty and diligence, the copyist often prepare[d] an affidavit certifying that the copy [wa]s true and accurate." *Id.* at 2553. This certificate would certainly be a "testimonial statement" under *Melendez-Diaz*, but was "accepted without hesitation by American courts" at the time of the Founding. *Id.* (citing, *e.g.*, *United States v. Percheman*, 7 Pet. 51, 85, 8 L.Ed. 604 (1833)). Therefore, it is clear that "the framing generation, in contrast to the Court today, did not consider the Confrontation Clause to require in-court confrontation of unconventional authors of testimonial statements." *Id.*

This history is significant because it underscores the "primary object" of the Confrontation Clause, which is to terminate the admissibility of *ex parte* examinations, "the principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50. That is, the Confrontation Clause provides a defendant with the opportunity, "not only

of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States,* 156 U.S. 237, 242-43 (1895); *see also California v. Green*, 399 U.S. 149, 156 (1970) (the "particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates"). The Confrontation Clause thus protects defendants from out-of-court statements made by "human witnesses," who observed the crime or actions related to the crime. *Melendez-Diaz*, 129 S.Ct. at 2551 (Kennedy, J., dissenting). In that regard, when applied to human witnesses who must recall "potentially criminal past events," cross-examination works well. *Davis v. Washington,* 547 U.S. 813, 830 (2006).

Confrontation and cross-examination do not work well, however, with respect to the work of copyists and lab technicians, which is undertaken under circumstances not even remotely resembling *ex parte* witness interviews and affidavits. Laboratory reports are not human recollections of past criminal events; they are transcriptions of machine-produced data concerning faceless samples, making the *machine*, not the human, the declarant. Similarly, it is the document itself, not the copyist, that was considered by the Framers to be the declarant.

Melendez-Diaz, 129 S.Ct. at 2553 (Kennedy, J., dissenting).

Placing either the machine or the technician into the "crucible of cross examination," *Crawford,* 541 U.S. at 61, does not satisfy any of the Confrontation Clause's objectives. First, machines of course cannot be cross examined, and they have no "conscience" to "sift" or "demeanor upon the stand." *Mattox,* 156 U.S. at 242, *see also United States v. Washington,* 498 F.3d 225, 230 (4th Cir. 2007) (holding that "raw data generated by the machines were not hearsay statements as implicated by the Confrontation Clause").

Second, technicians who report machine test results are not adequate substitutes for the machines as witnesses. Although technicians may interpret raw test data in some fashion and draw conclusions from it, they do not act as "witnesses against" defendants in any meaningful sense. "After all, the analyst is far removed from the particular defendant and, indeed, claims no personal knowledge of the defendant's guilt." *Melendez-Diaz*, 129 S.Ct. at 2548 (Kennedy, J., dissenting). Unlike examining victims, accomplices, and other witnesses with personal knowledge of the crime and related events, cross-examining technicians about a particular defendant's case provides little, if any, insight into the composition of the drugs in question beyond what is contained in the report. "The Confrontation Clause is simply not needed for these matters. Where . . . the defendant does not even

dispute the accuracy of the analyst's work, confrontation adds nothing." *Id.* at 2549.

Melendez-Diaz is not only burdensome, but also unnecessary and misdirected at scientific procedures rather than live-witness accounts. It should therefore be overruled.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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