NO. 22-899

In the Supreme Court of the United States

JASON SMITH,

Petitioner,

v.

ARIZONA,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Arizona, Division One

BRIEF OF COLORADO, OKLAHOMA, 36 ADDITIONAL STATES, 1 TERRITORY, AND 1 FEDERAL DISTRICT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE STATES

"The States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quotation marks omitted). Tens of thousands of criminal trials are held in state courts every year. One survey, based on the caseload data of 22 states for the year 2019 (*i.e.*, pre-pandemic), reported that the median number of criminal jury trials for a given state in that year was 1,288. S. Gibson, et al., *Court Statistics Project Criminal Statistics*, available at https://tinyurl.com/w73krmrn (filter for "Jury Trials" and "2019"). In such trials, expert testimony is commonly based on hearsay, and state courts across the nation have already repeatedly addressed the intersection between this type of testimony and the Confrontation Clause. These courts have struck a balance that protects both the rights of the defendant and the interests of justice. In seeking to overturn the opinion of the lower state court here, Petitioner proposes an aggrandized interpretation of the Confrontation Clause that would undo this balance and hinder the administration of justice. Thus, Amici States have a strong interest in ensuring this Court decides this case with respect for both the well-reasoned and common wisdom of the state courts on this issue and the real-world consequences for criminal justice that could result. Furthermore, given that the power to regulate the admissibility of out-of-court statements that are not testimonial is reserved to the States, Amici States have an interest in seeing that the Confrontation Clause is interpreted "consistent[ly] with the Framers' design to afford the States flexibility in their

development of hearsay law." *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

INTRODUCTION

An Arizona jury convicted Petitioner of various drug-related offenses. Pet.App.3a-6a. At trial, Department of Public Safety ("DPS") forensic scientist Greggory Longoni testified that the substances at issue were methamphetamine, marijuana, and cannabis. Pet.App.5a. Though Longoni had not tested the substances himself, he formed and testified to an independent opinion based on his review of the testing conducted by Elizabeth Rast, a former DPS forensic scientist who did not testify. Pet.App.5a.

On appeal, the Arizona Court of Appeals rejected Petitioner's Confrontation Clause claim because Longoni offered an independent opinion, based on a review of Rast's notes and reasonable reliance on the facts and data therein, and did not merely serve as a conduit for Rast's opinions. Pet.App.11a-12a. Moreover, the State did not introduce Rast's opinions, report, or notes into evidence. Pet.App.12a. The Arizona Supreme Court denied review. Pet.App.1a.

Before this Court, Petitioner argues that Rast's opinions, report, and notes were testimonial and that Longoni effectively conveyed her testimonial hearsay to the jury because his opinion was not truly independent. Pet.Br.18-26. In fact, Petitioner suggests, a substitute expert can never truly offer an independent opinion unless she observed the original testing or

conducted retesting. Pet.Br.23-24, 42-43. Here, Petitioner asserts, "the State could easily have had Longoni retest the evidence at issue." Pet.Br.42.

But Petitioner fails to appreciate that Longoni was testifying to his review of Rast's *notes*, as opposed to her report, Pet.App.46a, and does not convincingly demonstrate that the former were testimonial, Pet.Br.18-23. Rather than requiring retesting in this case, this Court should take this opportunity to clarify what information produced by forensic scientists is testimonial and hold that no testimonial evidence was improperly admitted in this case.

This Court should further reject Petitioner's proposed rule—that an expert is not independent unless she observed the original testing or retested the evidence. Such a rule would have consequences far beyond cases involving forensic testing of controlled substances and would impact many cases where retesting is not possible. What of a medical examiner who dies before trial? The victim's body will likely have decomposed to the point that a second autopsy is not viable. Or consider a sexual assault examiner who passes away prior to the opportunity to testify. Any physical signs of sexual assault uncovered in the exam will have likely healed, precluding a reexamination. The concern is particularly acute with cold cases, which stand increasing chances of being solved in recent years due to advancements in forensic science, such as the advent of forensic genetic genealogy. While Petitioner's drug crimes are quite serious on their own—he possessed 6 pounds of marijuana with an approximate street value of $54,000, Pet.App.4a, 14a—the resolution of this case may impact the

pursuit of justice as to some of society's most heinous offenses, including murders and rapes.

SUMMARY OF ARGUMENT

"Is the Confrontation Clause effectively to function as a statute of limitations for murder?" *Williams v. Illinois*, 567 U.S. 50, 98 (2012) (Breyer, J., concurring) (quotation marks omitted). Should this Court adopt Petitioner's position, that is the likely result.

Scientific evidence is an essential component of criminal investigations and prosecutions, be it in the form of drug testing, DNA analysis, or serological examination. Such evidence is typically admitted through expert witnesses, who are, by definition, unlike other witnesses because they render their opinions by drawing on knowledge developed from other sources—including other experts in their field, most of whom never appear in the courtroom. Thus, it is common practice for experts to rely on hearsay in reaching their opinions. In addition, it is common practice for substitute experts to reach independent opinions in cases where evidence cannot be retested or reexamined.

In urging this Court to find a Confrontation Clause violation occurred at his trial, Petitioner threatens to disrupt these common practices through a rule that is overly expansive, both in its definition of "testimonial" and in its blanket prohibition against substitute experts absent retesting. As the Amici States will show, however, Petitioner's aggrandized interpretation of the Confrontation Clause should be rejected for two primary reasons.

First, because a forensic report containing a certification made by a non-testifying witness was not admitted or relied on by an expert in this case, this case presents a question that was not addressed in *Williams*: whether a lab technician's notes about the tests she has performed are testimonial. And they are not.

Before considering whether the primary purpose of such statements is testimonial, this Court should first determine whether the statements are the kind that have historically required confrontation. And because lab technician's notes like those relied upon by the substitute expert in this case do not resemble in any meaningful way the historical out-of-court statements obtained through formal interrogation that the Confrontation Clause was enacted to address, they are not testimonial. In any event, the primary purpose of such notes is not testimonial.

Second, Petitioner's position that an expert can never offer a truly independent opinion without retesting the evidence at issue is contrary to common practice for expert witnesses in state courts. Even assuming Longoni relied on testimonial hearsay in this case, experts regularly rely on hearsay—testimonial and non-testimonial—and substitute experts testify without having observed the testing at issue or conducted retesting. Numerous state courts have sanctioned such substitute expert testimony under this Court's Confrontation Clause precedents, so long as the expert offers an *independent* opinion. The well-reasoned opinions of these state courts define what makes an opinion "independent" and demonstrate that such hearsay-reliant testimony can be offered without offending a defendant's confrontation rights.

Petitioner's view of the Confrontation Clause, under which such testimony would be prohibited, gives short shrift to the wisdom of these state courts and threatens to disrupt this common practice, with harmful consequences.

Chief among these consequences, adopting Petitioner's position would impose a *de facto* statute of limitations in certain criminal cases—the life of the lab analyst, medical examiner, sexual assault examiner, or other type of expert. Such an outcome is not constitutionally preordained, as shown by the weight of state-court authority, and it is unnecessary as a practical matter. Expert testimony, and the disclosure of underlying hearsay, is already adequately regulated and cabined by state evidentiary rules, and is not the sort of testimony that our nation's founders contemplated when they provided defendants a Constitutional right to confront witnesses against them. Finally, Petitioner's assumption that states will engage in confrontation gamesmanship, strategically putting poorly prepared substitute experts on the stand, is unfounded.

ARGUMENT

I. This Court Should Hold that a Lab Technician's Notes Are Not Testimonial.

A question left open by *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and *Williams* is whether a lab technician's notes are testimonial. Because they are not, Petitioner's confrontation rights were not violated in this case.

A. This Case Presents a Question That Was Not Addressed by *Melendez-Diaz*, *Bullcoming*, or *Williams*.

Unlike in *Melendez-Diaz* and *Bullcoming*, a forensic report containing a certification made by a non-testifying witness was not admitted in this case. And unlike *Williams*, another expert's forensic report was not the basis for the testifying expert's opinions. The testifying expert, Longoni, stated under oath that he had developed independent opinions[1] that were not

1 Although the notes contained Rast's conclusions in addition to information about the tests she performed, machine-generated information produced by the testing, and the chain-of-custody report, Pet.App.85A-126A, Longoni repeatedly testified that his opinions were "independent," Pet.App.42A, 46A-47A, 49A.

based on the report[2] by the non-testifying expert,[3] and the trial court found that testimony credible.[4]

Of the data that Longoni relied on to form his opinion, Petitioner contends only that Rast's notes about the tests she performed were testimonial.[5] Pet. Br. 18-23. Thus, Petitioner's claim is ultimately premised on the previously unaddressed question of whether a lab technician's notes about the tests she performed are testimonial.

B. A Lab Technician's Notes About the Tests She Performed Are Not Testimonial.

"[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial."

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2 Rast's report contained only her testimonial certifications as to her ultimate expert opinions about the nature of the substances that were tested. Pet.App.85A-87A. It did not contain the chain-of-custody information for the items or any information about the types of tests that were used or how they were performed in this case, noting that "[a]ny notes, photographs, charts, or graphs generated during the examination are retained in the laboratory." Pet.App.86A-87A.

3 Q. Let me be clear. You're not testifying as to her report, you're testifying as to review of lab notes?

A. Correct.

Pet.App.46a.

4 "The Court finds this case is distinguished from the *Bullcoming* case in that the expert testimony from the witness in this case, Mr. Longoni, testified of his own opinion as to what the nature of the substances was that was tested." Pet.App.62a.

5 Any machine-generated information considered by Longoni was not testimonial, as there is no declarant to confront for those statements. *See, e.g.*, *United States v. Hill*, 63 F.4th 335, 358-59 (5th Cir. 2023). Petitioner does not contend otherwise.

Ohio v. Clark, 576 U.S. 237, 245 (2015). But while that primary purpose is necessary, it is not sufficient. *Id.* If a statement is not the kind that has historically required confrontation, then the purpose for which the statement was made is not determinative. *See id.*

In considering whether the statements in the lab technician's notes at issue here, or in any other data produced by forensic scientists, are the kind of statements that have historically required confrontation, a return to first principles is elucidative.

"[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. "On this view the Clause operates to bar admission of out-of-court statements obtained through formal interrogation in preparation for trial." *Bullcoming*, 564 U.S. at 680 (Kennedy, J., dissenting); *see also Clark*, 576 U.S. at 244-46 (discussing the development of the primary purpose test to address cases involving police interrogation and applying it to a case involving questioning by a mandatory reporter). Only such testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006).

And it is the testimonial character of such statements that "separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id.* The power to determine the admissibility of all other out-of-court statements in state criminal cases is reserved to the States. *See Crawford*, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is

wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law.") .

An expert's forensic report containing a certification represents a solemn, formal response to a police or prosecution request for the forensic analysis at issue. But the same cannot be said about a lab technician's notes.

A forensic report containing a testimonial certification is created solely for an evidentiary purpose and in aid of a police investigation. *Bullcoming*, 564 U.S. at 664. It is a statement of an expert witness's proposed trial testimony, certifying the opinions they have reached based on an analysis of all the observations and testing that were performed by the forensic lab. In Arizona, it must be disclosed as a matter of course to the defendant prior to trial and generally defines the scope of the testimony that will be permitted by that witness. *See* Ariz. R. Crim. P. 15.1(b)(4)(B) (requiring disclosure of expert reports); Ariz. R. Crim. P. 15.7(c)(1) (authorizing preclusion of evidence if it has not been properly disclosed); *see also, e.g.*, Fed. R. Crim. P. 16(a)(1)(F)-(G), (d)(2)(C); Colo. R. Crim. P. 16(I)(a)(1)(III), (III)(g); Okla. Stat. tit. 22, § 2002(A)(1)(d), (E)(2). If a state permitted admission of the report without confrontation, it would serve as a direct substitute for the expert's testimony, negating the need to ever call the authoring expert, or any other expert, as a witness. *See Melendez-Diaz*, 557 U.S. at 307-08 (addressing admission of forensic reports without any accompanying expert testimony).

In contrast, a lab technician's notes are not a formal response to a police or prosecution request for forensic analysis. They are not an affidavit certifying

an expert's opinion. And they are not intended to be introduced as evidence at trial or to be disclosed to the police in aid of an investigation.

Rather, they are the empirical data generated during the ordinary course of a scientific lab applying the scientific method. Like business or public records generally, they are created for the administration of the entity's affairs. *See Michigan v. Bryant*, 562 U.S. 344, 362 (2011) ("Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." (quoting *Melendez-Diaz*, 557 U.S. at 324)).

The statements generally regard proceedings before it is known whether the tests results will ultimately be exculpatory or inculpatory, and thus the lab technicians cannot yet be classified as witnesses against the defendant or in his favor when the statements were made. *See Melendez-Diaz*, 557 U.S. at 313 (noting that the Sixth Amendment "contemplates two classes of witnesses—those against the defendant and those in his favor" and that the Confrontation Clause applies only to the former). Instead, the lab technicians are simply not witnesses at all within the meaning of the Confrontation Clause. *See State v. Lui*, 315 P.3d 493, 504 (Wash. 2014) ("[M]erely laying hands on evidence, DNA or otherwise, does not a 'witness' make."). Their notes cannot alone substitute for the testimony of an expert analyzing all the observations and testing made by the forensic lab to reach an ultimate opinion admissible as evidence at

trial. And the notes permit experts supporting either party to develop independent opinions.

Because a lab technician's notes about the testing she performed do not resemble in any meaningful way the historical out-of-court statements obtained through formal interrogation that the Confrontation Clause was enacted to address, they are not testimonial.

Indeed, for similar reasons, the notes are not subject to Confrontation Clause requirements under the primary purpose test. The primary purpose of the notes is to document scientific procedures as they occur so that the steps taken by the analyst can later be assessed by experts for either party. *See State v. Stanfield*, 347 P.3d 175, 188 (Idaho 2015) (holding that lab technician's labeling of slides "was manifestly for a laboratory—rather than trial—purpose"). The statements therein are not given with the primary purpose of creating an out-of-court substitute for trial testimony. *See Clark*, 576 U.S. at 250-51 ("We have never suggested, however, that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case. Instead, we ask whether a statement was given with the 'primary purpose of creating an out-of-court substitute for trial testimony.'" (quoting *Bryant*, 562 U.S. at 358); *Bullcoming*, 564 U.S. at 669 (Sotomayor, J., concurring in part) (concluding a forensic report was testimonial because its primary purpose was "evidentiary," to create "an out-of-court substitute for trial testimony" and "to create a record for trial" (quotations omitted)).

Here, Rast's formal, testimonial opinions, which were reached based on an analysis of all the observations and testing that were performed by the forensic lab, were properly set aside when she was no longer

able to testify at trial. Another expert, Longoni, performed that analysis and developed independent, testimonial opinions based on Rast's non-testimonial notes as a lab technician documenting the tests she performed. Longoni then testified to those opinions in court, where he was available to be confronted by Petitioner. Thus, Petitioner's confrontation rights were not violated.

II. Petitioner's Proposed Prohibition on the Use of Independent, Substitute Expert Testimony Is Against the Weight of Authority and Would Have Devastating Consequences.

Even assuming this Court concludes Longoni relied on testimonial statements, this Court may still affirm the Arizona Court of Appeals on grounds that Longoni—who testified and was available for cross-examination—offered his independent, expert opinion and did not simply parrot testimonial hearsay to the jury. Resisting this conclusion, Petitioner argues, "The Sixth Amendment's text admits of no exceptions for testimonial evidence against a criminal defendant, regardless of whether that testimonial evidence is used as the basis for a testifying expert to offer a purportedly 'independent' opinion." Pet.Br.3-4. As such, Petitioner repeatedly suggests that a substitute expert cannot testify unless she supervised the original testing or retested the evidence. Pet.Br.3, 9, 15, 42-43.

However, state-court experts routinely rely on hearsay in reaching their opinions, and state courts have repeatedly held that expert testimony that conveys an *independent* opinion and provides the opportunity for cross-examination does not run afoul of the

Confrontation Clause under this Court's precedents. Moreover, substitute experts often testify to evidence that cannot be retested; to constitutionally require such retesting would have deleterious effects, such as creating a *de facto* statute of limitations for certain crimes that runs with the life of the expert.[6] Thus, Petitioner's proposed rule—that a substitute expert cannot truly offer an "independent" opinion absent retesting—is both against the weight of state-court authority interpreting this Court's precedents and would have devastating consequences.

A. Petitioner's Proposed Rule Is Contrary to the Common Wisdom of a Majority of State Courts That Have Faithfully Applied This Court's Confrontation Precedents and Sanction Independent, Substitute Expert Testimony.

"Constitutional law is not the exclusive province of the federal courts. . . . " *Caspari v. Bohlen*, 510 U.S. 383, 395 (1994); *see also Sawyer v. Smith*, 497 U.S. 227, 241 (1990) ("State courts are coequal parts of our

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6 This concern is not the same as to fact witnesses. To be sure, the unfortunate possibility always exists that a fact witness could pass away before trial, meaning his or her testimonial hearsay could not be presented absent a prior opportunity for cross-examination. *See Crawford*, 541 U.S. at 53-54. But an expert is distinguished from a fact witness both by the number of cases on which a given expert works and by her permissible reliance on hearsay. *See* Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington, 15 J.L. & POL'Y 791, 807 (2007) ("Any time a forensic scientist quit her job, moved to another state, or died, there would be a backlog of cases for which she had done the tests but that had not yet gone to trial—how would these tests now be introduced into evidence?").

national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution."). State courts across the nation have grappled with the issue of substitute experts and have, nearly universally, sanctioned the type of substitute testimony offered in this case.

To begin with, most state courts have concluded that the testimony of a substitute expert to her own independent analysis and opinion does not violate confrontation. *See Marshall v. People*, 309 P.3d 943, 947 (Colo. 2013) ("Other courts that have considered this question have found that supervisor testimony satisfies the Confrontation Clause when the supervisor prepares or signs the report." (collecting cases)); *Stanfield*, 347 P.3d at 186 ("A number of courts . . . have . . . held that the testimony of an expert witness who arrives at an independent conclusion is permissible under the Confrontation Clause even where other non-testifying analysts have provided underlying data or conducted portions of the testing." (collecting cases)); *State v. Sauerbry*, 447 S.W.3d 780, 788 (Mo. Ct. App. 2014) ("The Supreme Courts of at least three States have reached the same result: the testimony of an expert witness does not violate the Confrontation Clause where the expert testifies to his or her own *bona fide,* independently developed opinions, even though the expert's opinions are based in part on observations made by others." (collecting cases)); *State v. Michaels*, 95 A.3d 648, 676 (N.J. 2014) ("[A] number of states have held that there is no Confrontation Clause violation where a supervisor, who has conducted his or her own independent review of the data generated by other analysts, testifies to the

conclusions he or she has drawn from that independent analysis." (collecting cases)); *State v. Maxwell*, 9 N.E.3d 930, 949 (Ohio 2014) ("[T]he majority of jurisdictions that have examined this issue have concluded that a substitute examiner, on direct examination, may at least testify as to his or her own expert opinions and conclusions regarding the autopsy and the victim's death." (collecting cases)).[7]

Notably, state courts have sanctioned the use of substitute experts who rely on hearsay across jurisdictions and a variety of contexts, even where the testifying expert did not observe or recreate the work of the non-testifying expert. Courts have admitted testimony by a substitute or supervising lab analyst from the same lab as a non-testifying analyst. *See, e.g.*, *Chambers v. State*, 181 So. 3d 429, 437-38 (Ala. Crim. App. 2015); *Com. v. Greineder*, 984 N.E.2d 804, 815-18 (Mass. 2013); *Jenkins v. State*, 102 So. 3d 1063, 1069 (Miss. 2012) (*en banc*); *State v. Ortiz-Zape*, 743 S.E.2d 156, 157 (N.C. 2013); *Michaels*, 95 A.3d at 672-76; *State v. Huettl*, 305 P.3d 956, 959, 963-65 (N.M. Ct. App. 2013); *Com. v. Yohe*, 79 A.3d 520, 534-35, 540-41 (Pa. 2013); *State v. Lopez*, 45 A.3d 1, 13-16 (R.I. 2012); *Garrett v. State*, 518 S.W.3d 546, 548, 554-56 (Tex. App. 2017); *State v. Griep*, 863 N.W.2d 567, 581-82 (Wisc. 2015). Courts have also admitted testimony by a substitute forensic pathologist. *See, e.g.*, *People v.*

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7 As *Sauerbry* recognized, these state courts are in accord with "numerous federal Courts of Appeals" that follow the rule "that expert testimony does not violate the Confrontation Clause if the expert is testifying to his or her own independently developed opinions, and is not merely acting as a conduit for the admission of hearsay statements of other absent individuals." *Sauerbry*, 447 S.W.3d at 787-88 (collecting federal cases).

Edwards, 306 P.3d 1049, 1088 (Cal. 2013); *Calloway v. State*, 210 So. 3d 1160, 1194-95 (Fla. 2017); *Ackerman v. State*, 51 N.E.3d 171, 189 (Ind. 2016); *Sauerbry*, 447 S.W.3d at 784-85; *State v. Gonzales*, 274 P.3d 151, 151-52 (N.M. Ct. App. 2012); *Maxwell*, 9 N.E.3d at 945-49; *Cuesta-Rodriguez v. State*, 241 P.3d 214, 229 (Okla. Crim. App. 2010). Courts have further admitted the testimony of a substitute sexual assault examiner. *See, e.g.*, *Naquin v. State*, 156 So. 3d 984, 987-91 (Ala. Crim. App. 2012); *Vega v. State*, 236 P.3d 632, 638 (Nev. 2010). Finally, courts have also permitted testimony by other surrogate experts. *See, e.g.*, *State v. Carr*, 502 P.3d 546, 596-99 (Kan. 2022) (neuroradiologist who relied on brain scans conducted by his colleagues); *State v. McLeod*, 66 A.3d 1221, 1224, 1227-33 (N.H. 2013) (no confrontation violation where federal special agent testified as fire science expert and relied on statements of now-deceased witness in later-solved cold case).[8] Together these cases demonstrate both the prevalence of expert reliance on hearsay and reflect a collective wisdom that such testimony does not run afoul of the Confrontation Clause. *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) ("This Court would be well advised to endorse the collective wisdom of the distinguished judges of the Courts of Appeals. . . . ").

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[8] In some instances, these courts found the substitute expert's testimony partially violated the Confrontation Clause, such as where the non-testifying expert's testimonial report was actually or effectively admitted, but these courts consistently found that the *independent* opinion of the substitute expert was properly admitted. *See, e.g.*, *Vega*, 236 P.3d at 638; *Cuesta-Rodriguez*, 241 P.3d at 229.

Applying this Court's recent confrontation precedents—with a focus on *Melendez-Diaz* and *Bullcoming*—these courts have generally emphasized some combination of three factors in upholding independent, substitute expert testimony.

First, as here, Pet.App.12a, the State did not admit the report of the original, non-testifying analyst, distinguishing *Melendez-Diaz* and *Bullcoming*. *See, e.g.*, *Calloway*, 210 So. 3d at 1195 ("[U]nlike in *Bullcoming*, the autopsy reports of [the medical examiner who conducted the autopsy] were not admitted through the testimony of [the testifying examiner]."); *Ortiz-Zape*, 743 S.E.2d at 163 ("[U]nlike in *Melendez-Diaz* and *Bullcoming*, the reports produced by the non-testifying analyst were not admitted into evidence."); *Yohe*, 79 A.3d at 539 ("This is a circumstance that is factually distinct from either *Melendez-Diaz,* which involved no live testimony in support of the certificates of analysis, or *Bullcoming,* which involved the use of surrogate testimony by another analyst in the same lab with no connection to the laboratory report. . . . ").

Second, as here, Pet.App.11a, the State did not call to the stand an analyst or examiner who was unfamiliar with the underlying testing or examination, further distinguishing *Bullcoming*. *See*, *e.g.*, *Stanfield*, 347 P.3d at 185 ("The facts presented by this appeal differ from . . . *Bullcoming*, which involved a signed report that was admitted through surrogate testimony of another analyst who had no connection to the report and offered no independent expertise."); *Michaels*, 95 A.3d at 673 ("If all we had was a co-analyst reciting the findings contained in a report that he had not participated in preparing or evaluated inde-

pendently, we would be faced with a scenario indistinguishable from *Bullcoming*."); *Yohe*, 39 A.3d at 389-90 ("Dr. Blum is in a similar position as the testifying witnesses in . . . *Bullcoming* in that he did not personally handle the [testing]. However, unlike the testifying witness[] in . . . *Bullcoming,* Dr. Blum did certify the results of the testing and author the report. . . . ").

Third, as here, Pet.App.11a, and again unlike *Bullcoming*, the substitute analyst or examiner offered an *independent* expert opinion. *Compare State v. Fulton*, 353 S.W.3d 451, 456 (Mo. Ct. App. 2011) ("[I]n rejecting New Mexico's arguments, the Court noted that the State never asserted that the testifying analyst 'had any "independent opinion" concerning Bullcoming's [blood alcohol concentration].'" (quoting *Bullcoming*, 564 U.S. at 662)), *with Stanfield*, 347 P.3d at 186 ("A defendant's right to confrontation is violated when an expert acts merely as a well-credentialed conduit, and does not provide any independent expert opinion." (quotation marks omitted) (collecting cases)); *State v. Bass*, 132 A.3d 1207, 1226 (N.J. 2016) (finding confrontation error where, "[a]t defendant's trial, instead of limiting its examination of Dr. DiCarlo to his independent observations and analysis regarding Shabazz's condition and cause of death, the State prompted its expert to read the contents of various portions of Dr. Peacock's autopsy report").

Generally, in finding an opinion to be independent, courts have considered the basis for the opinion, highlighting such factors as the testifying expert's reliance on his or her own (1) personal review of any documentation generated by the non-testifying analyst

or examiner; (2) evaluation of the underlying data; (3) determination of the facial validity of the underlying testing or examination; (4) confirmation that proper protocols were followed based on review of the documentation; (5) education, experience, and judgment; (6) knowledge of and familiarity with standard procedures for his or her employer; and/or (7) knowledge of other records (such as law enforcement and medical records in the case of forensic pathology). *See, e.g.*, *Calloway*, 210 So. 3d at 1195; *Vega*, 236 P.3d at 638; *Ortiz-Zape*, 743 S.E.2d at 163; *Yohe*, 79 A.3d at 541; *Lopez*, 45 A.3d at 13-14.[9] The Supreme Court of New Jersey has specified that "[t]he independent reviewer . . . must draw conclusions based on his or her own findings, and his or her verification of the data and results must be explained on the record." *State v. Roach*, 95 A.3d 683, 696 (N.J. 2014). The Supreme Court of Mississippi has developed a two-part "intimate knowledge" test, holding that a substitute expert has not rendered an independent opinion unless she has "intimate knowledge" regarding both "the underlying

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9 The claim by Petitioner's amicus that "[m]any" states already prohibit substitute expert testimony is clearly overstated; it relies in part on the minority view and in part on cases that are actually in line with the above authority. Nat'l Assoc. of Crim. Def. Lawyers, *et al.*, Br. at 5-6 ("New York requires the prosecution [to present the testing or supervising analyst] or [an expert] who used their "independent analysis on the raw data, as opposed to a testifying analyst functioning as a conduit for the conclusions of others.'" (quoting *People v. John*, 52 N.E.3d 1114, 1128 (N.Y. 2016)). Moreover, the requirement of an *independent* analysis and opinion renders inapt Petitioner's hypothetical of "a note-taking policeman" who simply "recite[s] an unsworn out-of-court statement." Pet.Br.27 (quotation marks omitted).

analysis and the report prepared by the primary analyst." *Jenkins*, 102 So. 3d at 1069.[10]

Petitioner suggests that a substitute expert's opinion can never truly be independent because "'it would require an impossible feat of mental gymnastics to disaggregate the expert's own non-hearsay conclusions from the interwoven hearsay on which the expert relied' and related to the trier of fact." Pet.Br.34-35 (quoting *Young v. United States*, 63 A.3d 1033, 1048 (D.C. 2013) (internal quotation marks omitted, alterations adopted)). But, as the above authority demonstrates, the task is far from impossible. This is an analysis state courts engage in all the time.

Indeed, state courts have rejected exactly the argument Petitioner now advances. In *Greineder*, Massachusetts's highest court was unpersuaded by the defendant's argument that "the underlying facts that form the basis of an expert opinion and the expert opinion itself[]are inextricably linked." *Greineder*, 984 N.E.2d at 818-19. In the DNA context, the Massachusetts court readily distinguished between the two categories, reasoning that "[t]here is a clear distinction between the allelic information that establishes genetic makeup and the statistical significance of the data that establishes how frequently a genetic combination appears in the population at large." *Id.* at 819; *see also Ortiz-Zape*, 743 S.E.2d at 161 (distinguishing between "the expert opinion itself" and "its underlying factual basis").

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10 To be clear, "intimate knowledge" does not require that the testifying analyst have actually observed or participated in the underlying analysis or testing. *See Jenkins*, 102 So. 3d at 1068-69.

Finally, as the above discussion indicates, the state courts have not adopted Petitioner's suggested rule—that a substitute expert cannot testify unless she observed or reconducted the testing. Pet.Br.3, 9, 15, 42-43. As one court noted, it would require an "exten[sion]" of this Court's holdings "to toss a blanket ban on the testimony of an expert witness . . . when the expert did not perform the [testing or examination at issue] and the [non-testifying expert's] report has not been admitted into evidence." *Gonzales*, 274 P.3d at 159. Such an extension is unwarranted, as the Amici States will show next.

B. Petitioner's Proposed Rule Would Have the Disruptive and Unnecessary Consequence of Transforming the Confrontation Clause into a *De Facto* Statute of Limitations for Certain Crimes.

If Petitioner's proposed rule—that the substitute expert must have supervised or conducted retesting—is adopted, then, as Justice Breyer warned, the Confrontation Clause will "effectively . . . function as a statute of limitations for murder" in many cases. *Williams*, 567 U.S. at 97-98 (Breyer, J., concurring) (quotation marks omitted). "Autopsies are typically conducted soon after death," and "when, say, a victim's body has decomposed, repetition of the autopsy may not be possible. What is to happen if the medical examiner dies before trial?" *Id.*

This is no academic concern. "[H]omicide investigations may take years to complete, and . . . State[s] unavoidably face[] situations in which a medical examiner who conducted an autopsy dies, becomes incapacitated or relocates out of state before trial."

Bass, 132 A.3d at 1211-14, 1226-27 (medical examiner passed away during three years it took to bring the defendant to trial for fatal shooting of nineteen-year-old woman); *see also, e.g.*, *Ackerman*, 51 N.E.3d at 176 (medical examiner passed away while a cold case murder went unsolved for thirty-six years until an eyewitness came forward with new information); *Glass v. State*, 227 S.W.3d 463, 467-68, 472 (Mo. 2007) (*en banc*) (medical examiner passed away in time it took to bring the defendant to trial for capital murder); *State v. Pallipurath*, No. A-5491-11T3, 2015 WL 10438847, at *2, 5 (N.J. Super. Ct. App. Div. 2016) (unpublished) (medical examiner passed away in time it took to bring the defendant, who gunned down his estranged wife and two others in a church, to trial); *People v. Krauseneck*, 156 N.Y.S.3d 713, *1-2 (N.Y. Sup. Ct. 2021) (unreported table decision) (pathologist passed away while a cold case ax murder of a young mother went unsolved for thirty-six years until advancements in forensic testing helped solve the case); *Shepard v. State*, 2023 OK CR 15, ¶ 17 n. 2, __ P.3d __, __ (medical examiner in capital murder case "suffered a massive stroke, leaving him one hundred percent debilitated and unavailable to testify"); *State v. Hernandez*, 2019 WL 2150171, at *1-2, 4, 28, 48-49 (Tenn. Crim. App. May 15, 2019) (unpublished) (medical examiner passed away during twenty years between murder of woman, who was bound and beaten to death with a hammer, and identification of the defendant's DNA underneath her fingernails).

Nor is this situation unique to medical examiners. States also face situations where "the analyst or analysts no longer work at the lab, are unavailable, or are deceased." *Michaels*, 95 A.3d at 677; *see, e.g.*,

United States v. Davies, 291 F. Supp. 3d 1252, 1257 (D. Colo. 2017) (police department chemist, who tested "'[s]even drug exhibits,'" passed away prior to trial); *Chambers*, 181 So. 3d at 435 n. 2 (lab analyst "had been diagnosed with terminal colon cancer and was too weak to testify at trial"); *Jenkins*, 102 So. 3d at 1069 ("The primary analyst in this case was unavailable to testify because she had taken an indefinite leave of absence after being diagnosed with stage-four cancer."); *State v. Sizemore*, 692 S.E.2d 194 (N.C. App. 2010) (unpublished table decision) (chemical analyst, who "tested several items found in defendant's apartment for the presence of accelerants," passed away during the time it took to bring the defendant to trial for arson). And, unlike in this case, Pet.App.53a-54a, "it cannot be assumed that retesting a sample is invariably a possibility." *Michaels*, 95 A.3d at 677. Other examples abound. *See, e.g.*, *Naquin*, 156 So. 3d at 987 (by the time of trial, physician who conducted sexual assault exam "was 87 years old," "retired from the practice of medicine, and in poor health"); *Brown v. Com.*, No. 0178-07-1, 2008 WL 630829, at *2 (Va. Ct. App. Mar. 11, 2008) (unpublished) ("The [Sexual Assault Nurse Examiner (SANE)] who performed the examination . . . died in an automobile accident before trial. . . . [But t]he SANE nurse supervisor appeared at trial, testified based upon the photos of the victim, and subjected her *own* opinion testimony to cross-examination.").

The problem of a deceased medical examiner, analyst, or other expert is particularly prevalent in cold cases. *See Michaels*, 95 A.3d at 677; *see also generally* Dylan O. Keenan, Bullcoming *and Cold Cases: Reconciling the Confrontation Clause with*

DNA Evidence, 30 YALE L. & POL'Y REV. 13 (2012). Furthermore, in recent times, cold cases stand increased chances of being solved given constant advancements in forensic science. *See Dist. Attorney's Off. Third Jud. Dist. v. Osborne*, 557 U.S. 52, 62 (2009) ("Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology."); Hannah Parman, *The Thickness of Blood: Article 1, Section 7, Law Enforcement, and Commercial DNA Databases*, 95 WASH. L. REV. 2057, 2057-60 (2020) (describing "increasingly popular investigatory method, often called 'familial DNA searching' or 'investigative genetic genealogy,' which was credited with solving '"dozens of cold cases"' in a two-year period, including the infamous Golden State Killer serial murderer case).

Notably, the aforementioned examples are limited to those scenarios where the medical examiner, lab analyst, or other expert is quite literally unavailable due to death or dire health conditions. Thus, this collection of cases does not even begin to cover the larger class of cases in which, as commonly occurs, an expert has retired or changed jobs, sometimes out of state. *See, e.g.*, *Gonzales*, 274 P.3d at 152; *Cuesta-Rodriguez*, 241 P.3d at 226. Prohibiting the State from using a substitute expert, even one who offers an independent opinion, in these circumstances, will have no small impact on the administration of justice, as often over-burdened and under-funded state courts and state prosecutors' offices face the logistical and financial costs of securing the presence of such experts.

Petitioner's proposed rule—in addition to creating a *de facto* statute of limitations for many crimes, running with the life of the examiner or analyst—is entirely unnecessary as a practical matter. Petitioner claims that, unless his aggrandized interpretation of the Confrontation Clause is adopted, then a race to the bottom will result, with prosecutors strategically presenting unknowledgeable substitute experts. Pet. Br.36-42. For starters, however, Petitioner ignores the limitations state courts have applied in determining whether an opinion is independent. *See* II.A, *supra*; *see, e.g.*, *Jenkins*, 102 So. 3d at 1069 (requiring "intimate knowledge")[11]; *accord Sawyer*, 497 U.S. at 241 ("This argument is premised on a skepticism of state courts that we decline to endorse. State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution.").

Petitioner also ignores the role state evidentiary rules play in regulating expert testimony. As the United States demonstrates, the federal rules of evidence, as well as *Daubert v. Merrell Dow Pharms.,*

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11 Petitioner cites two cases to argue that the race-to-the-bottom "concern is not hypothetical." Pet.Br.37. In the first of those cases, *Grim v. State*, 102 So. 3d 1073, 1081 (Miss. 2012), the Mississippi Supreme Court specifically found that the substitute expert "had 'intimate knowledge' about the underlying analysis and the report prepared by the primary analyst." In the second, *State v. Joseph*, 283 P.3d 27, 29 (Ariz. 2012), a substitute medical examiner testified to his own independent opinion after reviewing the autopsy report and photographs. In neither case did the prosecution strategically choose to use a substitute expert. Given that independent substitute expert opinion testimony has been the majority rule for many years, if Petitioner's concern were founded, surely there would be some evidence by now.

Inc., 509 U.S. 579 (1993), already adequately police expert reliance on hearsay in federal courts. United States' Brief, at 17-25. The same can be said for state courts. "[A] majority of states have adopted *Daubert* or a test consistent with *Daubert* (*i.e.*, a '*Daubert*-like' test)." Robert J. Goodwin, *Fifty Years of* Frye *in Alabama: The Continuing Debate over Adopting the Test Established in* Daubert v. Merrell Dow Pharmaceuticals, Inc., 35 CUMB. L. REV. 231, 267 (2005). Moreover, more than forty states have adopted evidence rules patterned after the federal rules. Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 836 & n. 36 (2008).

The previously discussed state courts, in sanctioning the use of independent, substitute expert testimony, have recognized the role evidentiary rules play in limiting the scope of such testimony. For instance, state-court parallels to Federal Rule of Evidence 703 cabin reliance on inadmissible facts or data to that which would "reasonably [be] relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Ortiz-Zape*, 743 S.E.2d at 163 (quoting N.C. R. Evid. 703); *see also, e.g.*, *Ackerman*, 51 N.E.3d at 189 (discussing Ind. R. Evid. 703); *Michaels*, 95 A.3d at 655 (discussing N.J. R. Evid. 703); *Cuesta-Rodriguez*, 241 P.3d at 249 (discussing Okla. Stat. tit. 12, § 2703). Furthermore, state-court counterparts to Federal Rule of Evidence 702 limit who may testify as an expert and offer opinion testimony, requiring, *inter alia*, sufficient knowledge, skill, experience, training, or education and reliance on sufficient facts or data. *See, e.g.*, *Gonzales*, 274 P.3d at 153 (discussing N.M. R. Evid. 11-702). And state-

court counterparts to Federal Rule of Evidence 705 regulate when experts may disclose underlying facts or data. *See, e.g.*, *McLeod*, 66 A.3d at 1232 (discussing N.H. R. Evid. 705); *Cuesta-Rodriguez*, 241 P.3d at 249 (discussing Okla. Stat. tit. 12, § 2705). Thus, contrary to the line-drawing problems envisioned by Petitioner, Pet.Br.34-35, courts applying state versions of Rule 705 already regularly differentiate between admissible independent conclusions and inadmissible underlying hearsay. *See, e.g.*, *Greineder*, 984 N.E.2d at 813-15; *McLeod*, 66 A.3d at 1232; *Huettl*, 305 P.3d at 966-67.

Finally, Petitioner also overlooks the prosecution's incentive to present the original expert or a highly knowledgeable substitute whenever possible. In cases involving multiple lab analysts, for instance, it is well established that gaps in custody reduce the weight of evidence, *see, e.g.*, *Stouffer v. State*, 147 P.3d 245, 279 (Okla. Crim. App. 2006); *Lopez*, 45 A.3d at 16, a point the defense can argue to the jury. As Massachusetts's highest court reasoned, a defendant confronting a substitute expert has the option of waiving his confrontation right and eliciting underlying hearsay on cross, or "[i]f a defendant does not open the door on cross-examination to the hearsay basis of an expert's opinion, then the jury may properly accord less weight to the expert's opinion." *Greineder*, 984 N.E.2d at 819. Thus, "[s]hould the prosecution wish to offer weightier testimony, then it should call either the author-analyst (assuming that person is qualified to testify to the statistical significance of the underlying data), or both the author-analyst and an expert, the former to testify to the underlying factual findings and the latter to interpret them." *Id.*

CONCLUSION

For the reasons stated, this Court should affirm the decision below.

Respectfully submitted this
20th Day of December, 2023,

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