No. 22-899

IN THE

Supreme Court of the United States

JASON SMITH,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICAN CIVIL LIBERTIES UNION, AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF ARIZONA IN SUPPORT OF PETITIONER

JEFFREY L. FISHER
Co-Chair, Amicus Curiae Committee
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
559 Nathan Abbot Way
Stanford, CA 94305

[Additional Counsel Listed On Inside Cover]

TIMOTHY P. O'TOOLE
Counsel of Record
MILLER & CHEVALIER CHARTERED
900 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 626-5800
totoole@milchev.com

SARAH A. DOWD
BINDER & SCHWARTZ LLP
675 Third Avenue, 26th Fl.
New York, NY 10017

November 20, 2023

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION
915 15th Street, N.W.
Washington, D.C. 20005

CLAUDIA VAN WYK
AMERICAN CIVIL LIBERTIES UNION
201 West Main Street
Suite 402
Durham, NC 27701
(919) 433-8533
cvanwyk@aclu.org

JARED G. KEENAN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF ARIZONA
P.O. Box 17148
Phoenix, AZ 85011-0148
(602) 773-6021
jkeenan@acluaz.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Rules

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates. NACDL's mission is to serve as a leader in identifying and reforming flaws and inequities in the criminal justice system, redressing systemic racism, and ensuring that its members are equipped to serve all accused persons at the highest level. NACDL has participated as an *amicus curiae* in many of the Court's most significant criminal cases.

The issue before the Court is central to NACDL's mission because it implicates an accused's Sixth Amendment right to "be confronted with the witnesses against him." U.S. Const. amend. VI. NACDL fully supports Petitioner's position that the Sixth Amendment confrontation right can only be satisfied in cases where the prosecution seeks to introduce a forensic report by presenting the analyst who authored the critical report, rather than only

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of the brief.

through a different expert who relies on the absent analyst's report and explains the meaning of that report to jurors. That is the only way in which the accused can meaningfully "be confronted with the witnesses against him." *Id.* NACDL writes separately as an *amicus* to provide the Court, based on NACDL's experience with the criminal legal systems throughout the fifty states, with information about the administrability of such a rule. By doing so, NACDL does not agree that the Court has the authority to relax the confrontation right for the sake of convenience. But even if such concerns were validly considered, the reality is that the actual practices in many states confirm the administrability of a right that requires the accused to "be confronted with" the authoring analyst when the prosecution's expert witness seeks to rely on that analyst's report in a criminal trial.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU Foundation of Arizona is one of the ACLU's statewide affiliates, with over 20,000 members throughout Arizona. Since its founding more than 100 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*, including in cases concerning the rights of criminal defendants and the confrontation right in particular. The proper interpretation of the Confrontation Clause is thus of significant interest to the ACLU, the ACLU Foundation of Arizona, and their members.

SUMMARY OF ARGUMENT

The Court will decide in Mr. Smith's case whether the Sixth Amendment's confrontation right permits the prosecution in a criminal trial to present testimonial statements of a non-testifying laboratory analyst through an expert who relies on the non-testifying expert's statement to reach their conclusions. *Amici* support Petitioner's view on the textual and historical aspects of that question and will not repeat his arguments. However, as representatives of the Nation's criminal defense bar and others with a bird's eye view on the criminal legal system, *amici* are uniquely positioned to discuss the practical aspects of this question—that is, whether respecting the confrontation right in this context presents an unacceptable strain or burden on that system. *Cf. Peña-Rodriguez v. Colorado*, 580 U.S. 206, 226–28 (2017) (surveying practicalities of the proposed legal rule in various jurisdictions).

We answer that question with a resounding "no." The criminal legal system will not face an undue burden if Petitioner's proffered rule carries the day. First, as *amici* show, Petitioner's construction of the confrontation right is already successfully administered in a number of diverse jurisdictions around the country and has not proved unmanageable. Second, this is not surprising, as criminal trials already constitute a very small fraction of criminal prosecutions, and this fraction is no different in those states that already require the authoring analyst to testify in these circumstances. Thus, it is highly unlikely that recognizing the accused's right to be confronted with the authoring analyst would create overwhelming burdens. Third, any burdens on the prosecution can be (and in many

states already are) reduced even further through reasonable efficiency-promoting procedural mechanisms, like stipulation and waiver. Fourth and finally, even if the burdens were meaningful, or even heavy, the Court should not return to a system in which confrontation rights are "balanced away," as they often were in the *Ohio v. Roberts* era.

ARGUMENT

I. REQUIRING THE PROSECUTION TO PRESENT THE AUTHOR OF THE LABORATORY REPORT WHOSE CONTENTS AN EXPERT WITNESS TRANSMITS TO THE JURY DOES NOT IMPOSE AN UNDUE BURDEN ON OUR LEGAL SYSTEM

In *amici*'s view, the text and history of the Confrontation Clause require that a defendant be afforded the right to confront the author of any laboratory report on which the prosecution ultimately relies—no matter whether directly or indirectly through another expert's conclusions—to convict them. But to the extent there are questions about the administrability of that rule, the Court need not speculate: Many diverse jurisdictions across the country already impose that rule as a matter of both federal and state constitutional law. And the sky has not fallen. As we demonstrate below, prosecutors in those same jurisdictions routinely satisfy this requirement in meeting their burden of proof at trial. As a result, there is no credible argument for watering down the Sixth Amendment's guarantee in order to assist prosecutors in meeting a burden they have already proven they are fully capable of shouldering.

A. Many states already construe the confrontation right as requiring the accused to be confronted at trial with the authoring examiner, not a substitute expert who relies on the other's work

Many appellate decisions around the country require prosecutors to call the authoring analyst in order to satisfy a defendant's right to confrontation, rather than permitting the prosecution to evade the confrontation right by putting on a substitute expert who effectively vouches for absent analyst's testing without affording the opportunity for confrontation. For example, in *Gardner v. United States*, the District of Columbia Court of Appeals held that the prosecution's expert violated the confrontation clause when the expert testified about testing results in which they had no involvement, despite some testimony containing independent opinion. *Gardner v. United States*, 999 A.2d 55, 59 (D.C. 2010). The court explained that the expert witness's "explicit reliance on and references to the reports prepared by third parties make it impossible to disaggregate their opinion testimony from evidence admitted in violation of the Confrontation Clause." *Id.* at 62.; *see also Young v. United States*, 63 A.3d 1033, 1046 (D.C. 2013).

In Delaware, the Supreme Court held that the prosecution violated the confrontation right where the testifying expert relied on representations from an absent analyst to reach their conclusion and the prosecution did not call that absent analyst to testify. *Martin v. State*, 60 A.3d 1100, 1107 (Del. 2013). The Delaware Supreme Court explained that when the prosecution "presented critical evidence to

a jury, the defendant had a right guaranteed by the Sixth Amendment to confront the analyst who performed the test in order to determine her proficiency, care, and veracity." *Id.* at 1109. And Connecticut prohibits experts from testifying about other experts' conclusions or about evidence the experts did not have an independent recollection of reviewing. *State v. Tyus*, 272 A.3d 132, 148–49 (Conn. 2022). Maryland's Supreme Court reached a similar conclusion. *Leidig v. State*, 256 A.3d 870, 908–09 (Md. 2021). And New York requires the prosecution in these circumstances to offer testimony from the analyst who "witnessed, performed or supervised" the test or who used their "independent analysis on the raw data, as opposed to a testifying analyst functioning as a conduit for the conclusions of others." *People v. John*, 52 N.E.3d 1114, 1128 (N.Y. 2016).

California also prohibits prosecution experts from testifying about facts that it relied on, when those facts are case-specific hearsay and the expert relates to the jury that the facts it relied on are true, unless the prosecution satisfies *Crawford v. Washington*, 541 U.S. 36 (2004), as to those relied upon facts. *People v. Sanchez*, 374 P.3d 320, 324 (Cal. 2016). California's instructive experience is the subject of a separate *amicus* brief and not addressed in detail here.

B. Other states' notice-and-demand procedures require testimony from an authoring analyst

Numerous other states use notice-and-demand procedures that "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." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326 (2009); *see also Bullcoming v. New Mexico*, 564 U.S. 647, 666 (2011) (discussing notice-and-demand procedures). These procedures streamline trial issues by permitting the defendant "to assert (or forfeit by silence)" that right. *Melendez-Diaz*, 557 U.S. at 326. While these procedures do not directly address Petitioner's rule, they show that states have systems in place to ensure testimony from the person who performed the analysis.

Even before *Melendez-Diaz*, several states had notice-and-demand procedures that required testimony from the testing analyst, after demand by the defendant. Since 1982, Alaska has required, for controlled substance offenses, the testimony of "the person signing the report," and the report must be "signed by the person performing the analysis." Alaska Stat. Ann. § 12.45.084(a)&(d)–(e) (1982). Other states have similar requirements. Ark. Code Ann. § 12-12-313(d)(2) (1979) (testimony of "the analyst of the laboratory who performed the analysis"); Colo. Rev. Stat. Ann. § 16-3-309(5) (1984) (testimony of "the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification"); S.D. Codified Laws § 23-3-19.3 (1996) (testimony of "the person in the State Forensic Laboratory or the certified chemist employed by a law enforcement agency within the state, who conducted the examination"); Ohio Rev. Code Ann. § 2925.51 (2001) (testimony of "the person signing the report," and the report must be "signed by the person performing the analysis"); Ga. Code Ann. § 35–3–

154.1(b) & (e) (2004) (testimony of "the person who performed the analysis or examination"); Minn. Stat. Ann. § 634.15 (2007) (testimony of the "person who performed the laboratory analysis or examination" or the "person who prepared the blood sample").

And in the wake of *Melendez-Diaz* and *Bullcoming*, other states have adopted similar notice-and-demand procedures. Virginia adopted a procedure that requires the prosecution to present the testimony of "the person who performed the analysis or examination." Va. Code Ann. § 19.2-187.1 (2009). Michigan adopted a similar rule in 2012, Michigan Court Rule 6.202(C), that its courts have interpreted as requiring the testimony of the person who performed the analysis. *People v. Reaves*, No. 352348, 2021 WL 4239024, at *6 (Mich. Ct. App. Sept. 16, 2021) (explaining "the purpose of" Rule 6.202(C) "is to provide notice of a party's intent to offer a report in lieu of calling the report's author as a witness"). Pennsylvania also adopted a procedure requiring the testimony of "the person who performed the analysis or examination that is the subject of the forensic laboratory report." Pa. R. Crim. P. 574 (2014); *see also* Pa. R. Juv. Ct. P. 405 (adopting similar rule for juveniles).

C. States that require testimony from the authoring analyst still prosecute offenses that often rely on forensic evidence for conviction

These jurisdictions of varying geographies, population centers, and political flavors all require their prosecutors to call the analyst performing the test—and have successfully prosecuted thousands of cases that rely on laboratory evidence. For example,

Minnesota sentenced 5,670 defendants for felony drug offenses in 2017—its record high—despite the fact that it has had a notice-and-demand statute since 1980.[2] In New York in 2022, the state charged 4,513 felony drug cases, and only approximately 10% were acquitted or dismissed.[3] For driving while intoxicated felony offenses, New York charged 2,597 cases and only 3% were dismissed or acquitted.[4] And, in 2017 and 2018, South Dakota charged 10,619 DUI offenses and convicted defendants in 6,312 cases.[5] Only 61 of those cases went to trial, and the state obtained a guilty verdict in all but three of those trials.[6]

These varied states have implemented administrable rules that require the prosecution to carry its fundamental burden—introducing only admissible evidence and ensuring the accused can confront the witness who prepared that evidence.

---

[2] Minn. Sent'g Guidelines Comm., *Controlled Substance Offenses: Sentencing Practices for Offenses Sentenced in 2020 and 2021* 6 (2023), https://mn.gov/sentencing-guidelines/assets/2020_2021MSGCControlledSubstancesReport_tcm30-578679.pdf; Minn. Stat. Ann. § 634.15 (1980).

[3] Kathy Hochul & Rossana Rosado, *Criminal Justice Case Processing Arrest through Disposition, New York State, January – December 2022* 20 tbl.9 (2022), https://www.criminaljustice.ny.gov/crimnet/ojsa/dar/DAR-4Q-2022-NewYorkState.pdf.

[4] *Id.*

[5] S.D. Unified Jud. Sys., *DUI Filings and Dispositions by SDCL and Offense Code* 15 (2018), https://ujs.sd.gov/uploads/annual/fy2018/DUIFilingsAndDispositionsByCounty.pdf.

[6] *Id.*

And yet these rules have not impaired the ability of states to prosecute such cases.

II. PETITIONER'S RULE IS FEASIBLE BECAUSE FORENSIC EXPERTS TESTIFY IN FEW CASES AND FAIR PROCEDURES CAN ALLEVIATE ANY BURDENS

One reason recognizing the confrontation right does not pose a substantial burden is that so few criminal cases even go to trial. As the Court has noted, "ours 'is for the most part a system of pleas, not a system of trials.'" *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (quoting *Lafler v. Cooper*, 566 U.S. 156, 170 (2012)). This fact alone, which is equally true both in jurisdictions that follow Petitioner's proffered rule and those that do not, undermines any administrative burden argument. *See Melendez-Diaz*, 557 U.S. at 325 (noting that the confrontation right advocated for there was already the rule in many states and that "[p]erhaps the best indication that the sky will not fall after today's decision is that it has not done so already"). Moreover, the potential effect of this rule is diluted further by the fact that for the small pool of cases that do go to trial, states remain free to adopt the sorts of practical and reasonable procedural mechanisms, which we have mentioned above and elaborate on below, to ensure that the confrontation rights are afforded in the most efficient way possible.

A. Trials are rare in today's practice in all jurisdictions, including in States that already follow the rule Petitioner seeks

Jury trials are increasingly rare. Over the last fifty years, jury trials have "declined at an ever-

increasing rate to the point that" they occur "in less than 3% of state and federal criminal cases."[7] The trial rate remains the same in states that interpret the confrontation right as requiring the authoring analyst to testify at trial when a prosecution expert relies on their report. For example, in California, during fiscal year 2021–2022, 97.5% of all felony criminal cases were resolved before trial.[8] Last year in Delaware 2.3% of criminal cases went to trial.[9] In New York, 97% of felony charges were resolved without trial.[10]

In States with notice-and-demand procedures that require testimony from an authoring analyst, trials are similarly rare. In Alaska, a total of seventy-one cases in which felony criminal charges were originally filed went to trial—accounting for only 1% of all felony criminal cases.[11] In Michigan

---

[7] NACDL & Found. For Crim. Just., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 5 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf; *see also Frye*, 566 U.S. at 143 ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

[8] Jud. Council of Cal., *2023 Court Statistics Report, Statewide Caseload Trends, 2012–13 Through 2021–22* 65 fig.37 (2023), https://www.courts.ca.gov/documents/2023-Court-Statistics-Report.pdf.

[9] Del. Cts. Jud. Branch, *Superior Criminal Caseload Breakdown Fiscal Year 2022* (2022), https://courts.delaware.gov/aoc/AnnualReports/FY22/doc/Superior%20Criminal%20Caseload%20Breakdown.pdf.

[10] Kathy Hochul & Rossana Rosado, *supra* note 3, at 24 tbl.11.

[11] Alaska Ct. Sys., *Statistical Report FY 2022, July 1, 2021 – June 30, 2022* 37 tbl.4.10 (2023), https://courts.alaska.gov/admin/docs/fy22-statistics.pdf.

in 2019, only 2.9% of criminal cases were resolved with a trial.[12]

Indeed, cases that most often involve laboratory evidence—drug possession and distribution offenses and driving under the influence offenses—are overwhelmingly resolved through pleas. Across the federal system in 2022, 97.9% of drug trafficking cases and 99% of drug possession cases were resolved by plea.[13] In New York in 2022, 98% of driving while intoxicated cases and felony drug cases were resolved without trial.[14] When New York prosecutors did go to trial, they prevailed in 72% of felony drug cases (52 of 72 trials) and 76% of driving while intoxicated cases (32 of 42 trials).[15] And in South Dakota, 99.4% of all DUI cases were disposed of without a trial.[16]

Because the lion's share of criminal cases are resolved without trial, the prosecution rarely must put its forensic test results through the rigors of the evidentiary process. For the same reason, defendants' confrontation rights regarding forensic testing will remain an infrequent issue, as it

---

[12] Mich. Statewide Cir. Ct. Summary, *2019 Court Caseload Report* 1 (2019), https://www.courts.michigan.gov/49f191/siteassets/reports/statistics/caseload/2019/2019statewide.pdf (summed all criminal cases resolved through jury or bench trial divided by total disposition of all three types of criminal cases).

[13] U.S. Sent'g Comm'n, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics* 59 tbl.12 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf.

[14] Kathy Hochul & Rossana Rosado, *supra* note 3, at 24 tbl.11.

[15] *Id.* at 25 tbl.12.

[16] S.D. Unified Jud. Sys., *supra* note 5, at 15.

remains an infrequent issue in jurisdictions that already follow the rule Petitioner urges here. Thus, any rule that maintains a prosecutor's burden to comply with defendants' confrontation rights will not over-burden prosecutorial resources or the justice system.

B. Stipulation and waiver reduce the prosecution's need to call the authoring analyst at trial

In the rare occasion that cases go to trial, forensic testing is neither regularly challenged nor a frequent focal point for the defense. *Amici* can confirm that, in the jurisdictions in which they practice, defendants who exercise their right to go to trial stipulate (when asked) regularly to the admission of forensic analysis. Certainly, this is true in drug possession and distribution cases, where the defense is often that the drugs did not belong to the defendant and that the defendant was misidentified as the person who possessed or was selling the drugs. And a myriad of other scenarios exist in which the defense is "unlikely" to "insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis." *Melendez-Diaz*, 557 U.S. at 328.

Stipulations are a mechanism defendants use to avoid live testimony from a forensic expert. Through stipulations, the parties can establish facts necessary for the prosecution to meet its burden of proof but that the defense does not believe it can effectively dispute. Defendants often use stipulations to narrow the evidence at issue, including for forensic evidence.

Notice-and-demand procedures, discussed in section I.B., often result in defendants' waiving their confrontation rights if they do not demand laboratory analyst testimony, thereby reducing the number of cases in which analysts must testify to those cases where the laboratory report is actually challenged by the defense. These procedures further reduce the number of cases in which the prosecution would be burdened by the need to present testimony from the author of a laboratory report.

III. EVEN IF RECOGNIZING THE CONFRONTATION RIGHT WERE BURDENSOME, THAT WOULD NOT BE A VALID BASIS TO DENY THE RIGHT

Even if the prosecution's use of a substitute analyst who testifies as an expert might alleviate genuine burdens imposed by the judicial system, the Court should still resist weighing a "bedrock procedural guarantee" against purported efficiencies. *Crawford v. Washington*, 541 U.S. 36, 42 (2004). As the Court recently explained in another Sixth Amendment case: "When the American people chose to enshrine [the jury trial] right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 (2020); *see also Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) ("[The jury trial] right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.").

The same logic applies to this clause of the Sixth Amendment: "The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to

trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience." *Melendez-Diaz*, 557 U.S. at 325. The Court has, in other words, no ability to relax the demands of the confrontation clause based on the purported burdens that would arise from a requirement that the prosecution present for confrontation the author of the laboratory report whose contents the expert witness transmits to the jury. *Id.* At bottom, criminal defendants have "the right to put the State to its burden, in a jury trial that comports with the Sixth Amendment, before facing criminal punishment." *Ramos*, 140 S. Ct. at 1409 (Sotomayor J., concurring).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Arizona Court of Appeals.

Respectfully submitted,

TIMOTHY P. O'TOOLE
Counsel of Record
SURUR FATEMA YONCE
MILLER & CHEVALIER
CHARTERED
900 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 626-5800
totoole@milchev.com

SARAH A. DOWD
BINDER & SCHWARTZ LLP
675 Third Avenue
Twenty-Sixth Floor
New York, NY 10017
(212) 510-7274
sdowd@binderschwartz.com

JEFFREY L. FISHER
Co-Chair, Amicus Curiae Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
559 Nathan Abbot Way
Stanford, CA 94305

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION
915 15th Street, N.W.
Washington, D.C. 20005

CLAUDIA VAN WYK
AMERICAN CIVIL LIBERTIES UNION
201 West Main Street
Suite 402
Durham, NC 27701
(919) 433-8533
cvanwyk@aclu.org

JARED G. KEENAN
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF ARIZONA
P.O. Box 17148
Phoenix, AZ 85011-0148
(602) 773-6021
jkeenan@acluaz.org

November 20, 2023