

No. 14-1008

IN THE
Supreme Court of the United States

JEFFREY HARDIN,

Petitioner,

v.

OHIO,

Respondent.

**On Petition for a Writ of Certiorari
to the Supreme Court of Ohio**

**BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS AMICUS
CURIAE IN SUPPORT OF PETITIONER**

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| <i>Coroner</i> , Clinton Cnty., Ind. Gov't, http://www.clintonco.com/coroner/ (last visited Mar. 19, 2015) | 13 |

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| U.S. Dep’t of Justice, <i>Death Investigation: A Guide for the Scene Investigator</i> (1999) | 3, 5, 6 |
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INTEREST OF AMICUS CURIAE¹

Amicus Curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense practice. NACDL works tirelessly to ensure the proper administration of justice, an objective that this case directly impacts in light of its overarching importance to ensuring that criminal convictions are accurate and based upon reliable forensic evidence. NACDL has supplied this Court with briefs as amicus curiae in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and is committed to ensuring the integrity of courtroom testimony through robust protection of a defendant's right to confront witnesses. NACDL's membership has long relied upon cross-examination as one of the vital means of ensuring accuracy. As such, NACDL is uniquely qualified to offer assistance to this Court in this matter.

¹ Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), Petitioner Jeffrey Hardin and Respondent Ohio received timely notice of amicus curiae's intent to file this brief and have consented to its filing. Emails reflecting their consent were filed contemporaneously with this brief.

SUMMARY OF ARGUMENT

NACDL writes separately in this case to emphasize that the nature of autopsy reports marks them as testimonial and hence subject to the strictures of the Confrontation Clause.

Medical examiners necessarily work closely with police when investigating a suspicious death. This relationship ensures that the examiner knows the report will be introduced to prove guilt at any trial; moreover, this relationship provides opportunities for the routine and silent incorporation of police investigative judgment into the report's conclusions. No uniform standards exist for autopsies, and examiners must make a host of subjective decisions about cause of death. Such inherent ambiguity makes cross-examination of the report's author necessary to advance the truth-seeking function of trial. Autopsy is far from a rigorous, standardized science, and reports proffer conclusions that may conceal internal disputes among examiners. Yet in the absence of cross-examination, autopsy reports are presented to the factfinder as if they carry the weight of scientific reliability—weight that they do not possess. Finally, in authoring their reports, coroners and medical examiners routinely assert that they speak for the dead, that they seek justice for the victim. Such advocacy, however, allows unconscious biases and social pressures to infect a report's conclusions and thereby heightens the importance of and the need for cross-examinations to ensure the integrity of our adversarial trial system.

**I. AUTOPSY PROCEDURES ARE NOT
STANDARDIZED AND INCORPORATE
EVIDENCE BEYOND THAT OBTAINED
FROM THE BODY, INCLUDING EVIDENCE
PROVIDED BY THE POLICE.**

As yet, there are no national or even uniform professional standards of autopsy procedure. Typically without medical training, coroners still serve nearly half the U.S. population, and have counted tow-truck drivers, plumbers, and funeral directors among their ranks. Stefan Timmermans, *Postmortem: How Medical Examiners Explain Suspicious Deaths* 4–5 (2006). The U.S. Department of Justice’s leading text in the field, *Death Investigation: A Guide for the Scene Investigator*, describes the state of death investigation:

There is no “system” of death investigation that covers the more than 3,000 jurisdictions in this country. No nationally accepted guidelines or standards of practice exist for individuals responsible for performing death-scene investigations. No professional degree, license, certification, or minimum educational requirements exist, nor is there a commonly accepted training curriculum. Not even a common job title exists for the thousands of people who routinely perform death investigations in this country.

U.S. Dep’t of Justice, *Death Investigation: A Guide for the Scene Investigator* 1 (1999) (updated June 16, 2011) (internal citations omitted).

Surveying the reliability of autopsies, the Agency for Healthcare Research and Quality characterized the state of the field as poor: “The quality of the autopsy has received little systematic study except in the case of perinatal autopsies, where deficiencies in the quality of reporting appear to be common.”

K. Shojania et al., *The Autopsy as an Outcome and Performance Measure*, Agency Healthcare Res. & Quality Pub. No. 03-E002, at 23 (2002). The report further noted that “[i]n at least 1–5% of cases, diagnostic uncertainty persists despite technically adequate autopsy. Classification errors affecting autopsy diagnoses at even this relatively small rate can substantially distort estimates of the performance of clinical diagnosis.” *Id.* Indeed, in certain types of cases, autopsies have been determined to be particularly unreliable and contestable. For example, autopsies in deaths potentially resulting from “shaken baby syndrome” are plagued by “enormous gaps” in scientific and medical knowledge, which has lead to many wrongful accusations and convictions. Appellant’s Br. at 26–27, *State v. Hardin*, No. 11-0122 (Ohio Mar. 21, 2013) (citing Keith A. Findley et al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 Hous. J. Health L. & Pol’y 209, 212–14, 262 (2012)); Pet. 20.

Ideally, autopsy reports are comprised of two separate parts: a descriptive part, known as a “protocol,” and a subjective part, the assessment of the cause of death. Vernard Irvine Adams, *Guidelines for Reports by Autopsy Pathologists* 1 (2008). The first part includes an inventory of clothing and surface evidence, quantitative measurements, and observations regarding the physical state of the body, such as the presence of wounds and the condition of internal organs. See *id.* at 3; Pekka Saukko & Bernard Knight, *Knight’s Forensic Pathology* 33–35 (3d ed. 2004). In contrast, the second part presents an opinion, documenting the examiner’s assessments of the cause of

death, diagnoses of illnesses, and explanations of trauma.²

The examination of the body alone often cannot yield a conclusion as to the cause of death. In such cases, the subjective portion of a report will engage police and witness accounts, crime scene observations, and circumstantial evidence to interpret the physical evidence. Examiners engage in an “investigation” of the death that incorporates multiple sources of information. See, *e.g.*, *Death Investigation: A Guide for the Scene Investigator*, *supra*, at 1. When there are multiple plausible explanations of the cause of death, this outside information can be dispositive in selecting the cause presented in the autopsy report.

When presented with a suspicious death, medical examiners begin their examination with the scene of the death. See, *e.g.*, Saukko & Knight, *supra*, at 4; *Spitz and Fischer’s Medicolegal Investigation of*

² The descriptive portion of the report cannot be considered truly objective, however, because the choice of what to describe is informed by the examiner’s existing investigation. The Department of Justice instructs examiners to interview all witnesses at the scene before formal examination of the body, necessarily coloring the later physical autopsy. *Death Investigation: A Guide for the Scene Investigator*, *supra*, at 27–28. An examiner’s background training biases what type of trauma they find in a body. Based on the same evidence, pathologists are more likely to document internal organ injuries than radiologists, who themselves find more skeletal injuries and more injuries overall. Peter M. Leth, *Interobserver Agreement of the Injury Diagnoses Obtained by Postmortem Computed Tomography of Traffic Fatality Victims and a Comparison with Autopsy Results*, 225 *Forensic Sci. Int’l* 15, 15 (2013). Descriptive reports are subject to the examiner’s prior witness interviews and professional training, meaning that even these reports must be subject to cross-examination.

Death 71 (Werner U. Spitz ed., 4th ed. 2006); Adams, *supra*, at 59; *Death Investigation: A Guide for the Scene Investigator*, *supra*, at 15. At the scene, the examiner makes observations that inform the cause of death, considering the position of the body, the physical characteristics of the surrounding area, and the location and trajectory of any blood spatter. Saukko & Knight, *supra*, at 5–6.

Physical evidence is only the beginning of the inquiry, however. Medical examiners consider social factors to understand the circumstances surrounding a suspicious death. When investigating infant deaths, examiners are instructed to consider the socio-economic status and family arrangements of victims and their parents. Kirsten Kramar, *Coroners' Interested Advocacy: Understanding Wrongful Accusations and Convictions*, 48 Can. J. Criminology & Crim. Just. 803, 816 (2006). Autopsy reports, then, detail the results of the examiner's physical and social investigation, not just an examination of the body.

Importantly, the examiner conducts her investigation in tandem with police in homicide investigations. *Spitz and Fischer's Medicolegal Investigation of Death*, *supra*, at 20 (“[F]orensic pathology service is dependent not only on the pathologist, but also on the other agencies and personnel involved in the death investigation.”). Where homicide is suspected, police officers are customarily present during the autopsy. Saukko & Knight, *supra*, at 4. At an autopsy, the police expound their opinions regarding the nature of the death and detail the progress of any criminal investigation. Further, police provide indirect accounts of the statements of witnesses, suspects, and other interested parties, such as family members of the deceased. *Spitz and Fischer's Medicolegal Investigation of Death*, *supra*, at 361, 847. Police may bring addi-

tional physical evidence to the autopsy for consideration by the medical examiner. Of course, the police choose which evidence to present. From his ethnographic immersion in an examiner's office, Stefan Timmermans describes how, in particularly complicated cases, the medical examiner would meet with district attorneys and police to review the evidence and consult their opinions *before* making an official determination of the cause of death. *Postmortem: How Medical Examiners Explain Suspicious Deaths*, *supra*, at 105. In one recent example, an examiner waited *two months* to issue a determination on the cause of death to allow "discussions with police detectives." *People v. Crawford*, 2 N.E.3d 1143, 1180 (Ill. App. Ct. 2013), *appeal denied*, 5 N.E.3d 1125 (Ill. 2014). The court further noted that "an investigation under these circumstances cannot occur in a vacuum or within the confines of the medical examiner's office," but failed to consider how such interaction may jeopardize the integrity of a report. *Id.*

Amicus does not suggest that police and medical examiner cooperation indicates wrongdoing. To the contrary, the police offer necessary background and context essential for the medical examiner to understand the body in front of her. However, because the police choose what information to present, the objectivity of the examiner reasonably may be called into question. Moreover, and of significance in this Court's Confrontation Clause decisions, the examiner is keenly aware that her report may be used at a criminal trial to establish the guilt of the accused. In fact, states such as Ohio statutorily mandate that autopsies be performed when death occurs under potentially suspicious circumstances, and coroners are required to promptly inform the prosecuting attorney of deaths believed to be worthy of further investigation.

See Ohio Rev. Code § 313.09; see also § 313.12 and § 313.121 (requiring an autopsy be performed whenever “a child under two years of age, dies suddenly when in apparent good health” and whenever a death involves “any suspicious or unusual manner”).

This Court has recognized the pressure and influence police may exert on the outcome of an autopsy: “[a] forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009). Even assuming the good faith of medical examiners and police investigators, the fact remains that these investigations can be informed and shaped by the prosecutorial drive to establish guilt. The report made by the examiner, however, will not reflect any such motivation, and may not even describe police presence, comments, or influence.

II. AUTOPSY REPORTS CONVEY CIRCUMSTANTIAL EVIDENCE AS AUTHORITATIVE AND FAIL TO REFLECT INTERNAL DISSENT.

As the American system of death investigation continues its slow shift from medically untrained coroners to trained medical examiners, forensic pathologists have fought to give their reports the legitimacy of scientific certainty—“to transform their interpretation of the circumstantial evidence of the body and the scene of the crime [so as] to convey it with the immediacy and authority of eyewitness testimony.” Julie Johnson-McGrath, *Speaking for the Dead: Forensic Pathologists and Criminal Justice in the United States*, 20 Sci., Tech. & Human Values 438, 453 (1995). This push for legitimization reflects an effort to demonstrate that “the forensic

pathologist's testimony is unaffected by his or her own background, beliefs, and social and intellectual biases; the dead speak through them directly." *Id.*

But the subjective aspect of autopsy reports is unavoidable. Because it is inherently *post hoc*, the medical examiner's task is not and cannot be an exact science. "[U]nlike in other scientific disciplines, death investigators explicitly acknowledge that their expert work might not completely erase subjectivity." *Post-mortem: How Medical Examiners Explain Suspicious Deaths*, *supra*, at 21; see also *Spitz and Fischer's Medicolegal Investigation of Death*, *supra*, at 20 ("Forensic pathology has two components, documentation and interpretation. The interpretation of injuries relies partly on training and experience of the pathologist, but can only be accomplished accurately when evaluated in the light of the circumstances surrounding the death."). Acknowledging the subjective nature of these conclusions, the National Association of Medical Examiners ("NAME") states that "because the cause and manner of death are opinions, judgment is required to formulate both for reporting on the death certificate." NAME, *A Guide for Manner of Death Classification* 4 (1st ed. 2002); see also *Post-mortem: How Medical Examiners Explain Suspicious Deaths*, *supra*, at 21 ("The death certificate requires the pathologist to document a *medical opinion* about the cause and manner of death . . ."). Because of the inherent uncertainty in establishing a cause of death, NAME urges medical examiners to include a "degree of certainty" along with the examiner's determination; these degrees include "Undetermined," "Preponderance of medical/investigative evidence," "Clear and convincing medical/investigative evidence," and "Beyond any reasonable doubt." NAME, *supra*, at 4. Thus, in certifying an opinion about the cause and

means of death, the examiner's "responsibilities include . . . quasi-judicial elements." *Id.* at 5.

The unavoidably subjective element of death examination sometimes provokes internal dissent among investigating medical examiners. In his investigation of a medical examiner's office, Timmermans discusses how the chief medical examiner's opinion prevailed over differences among pathologists. *Suicide Determination and the Professional Authority of Medical Examiners*, 70 Am. Soc. Rev. 311, 322 (2005). Final reports, however, "presented a united front to the outside, smoothing out differences in opinion and making it difficult for relatives to contest a conclusion." *Id.*

Documenting internal dissent is a push-button issue for the profession. At a 2010 National Institute of Justice symposium on forensic death investigation, participants bluntly discussed the issue in a panel. Per the official report:

Participants discussed what is discoverable under *Brady v. Maryland*. They asked: Should conversations between medical examiners and their staff—and any disagreements over the manner of death—be documented? Some members said that this could have a chilling effect on the field. Others noted that there are no standards for what must be provided to the defense. Participants agreed that it should come down to the materiality of the evidence and relevance to the case.

Nat'l Inst. of Justice, *Forensic Death Investigation Symposium: Navigating Legal and Ethical Issues in Death Investigation* (June 15, 2011), <http://www.nij.gov/topics/forensics/investigations/death-investigation/symposium/Pages/legal-issues.aspx>.

Despite the recognized subjective nature of conclusions, and the possibility of internal dissent, the field's interest in professional legitimacy encourages suppression of internal dissent and a unified front in final autopsy reports. In turn, these reports are "cloaked in the mantle of 'objective' science," allowing medical examiners' "interpretation of physical evidence and judgments of probability—actions inherently subjective—[to] go unremarked." Johnson-McGrath, *supra*, at 454.

Because of the singular nature of an autopsy, there are few studies of how frequently medical examiners disagree on autopsy results; performing multiple autopsies of the same body is invasive and unnecessary, and study participants may perform differently knowing that they are taking part in an experiment. The available studies show that while pathologists may generally agree on background illness, they agree on the immediate cause of death only 50 to 75 percent of the time. Biborka Bereckzky-Veress et al., *The Reliability of Autopsy Diagnostics: Inter-Observer Variation Between Pathologists, a Preliminary Report*, 5 Int'l J. Quality Health Care 337, 337 (1993). More common is anecdotal evidence of disagreement among medical examiners. See, e.g., Tony Gordon, *Doctors Disagree Over Meaning of Toddler's Autopsy Results*, Daily Herald (Chicago) (Nov. 8, 2011, 5:39 PM), <http://www.dailyherald.com/article/20111108/news/711089669/> (prosecution expert witness testified that infant died of head trauma, while defense expert testified that cause of death was a pre-existing blood clot); Laura Fitzloff, *Experts Disagree on Autopsy Results*, Daily Reporter (Spencer, IA), July 18, 1997, at 1 (defense expert testified that cause of death in an alleged murder was unknown and that the victim had not been beaten to death, while the prosecution's ex-

pert testified that the victim had died from head trauma).

Autopsy reports' smoothing of internal tension demonstrates the need for the performing examiner to testify in court. When a supervisor or outside expert reviews an autopsy report to issue an opinion, they rely on a document that has been constructed to appear decisive and final. Professional and academic accounts, however, reveal that these reports are anything but. Courtroom controversy regarding the interpretation of a report may imply controversy in its authorship, necessitating the testimony of the preparing examiner.

III. *WILLIAMS* V. *ILLINOIS* WARRANTS TREATING ALL AUTOPSY REPORTS AS TESTIMONIAL EVIDENCE.

Given the lack of standardized procedures and possibility for unidentified internal dissent inherent in autopsies, autopsies should generally be considered testimonial even if not created from the outset with the intent that it would assist a criminal investigation. Even in circumstances that appear innocent at the outset, an investigation into the manner of a death necessarily entails the possibility that the findings may spur a criminal investigation.

As this Court recognized in *Williams*, statements in a forensic analysis may be subject to the Confrontation Clause regardless of whether the person performing the analysis could have known at the time that it would turn out to be incriminating or exonerating. *Williams v. Illinois*, 132 S. Ct. 2221, 2263 (2012) (Thomas, J., concurring in judgment). Nor does the text of the Sixth Amendment distinguish between statements that are “merely helpful” when viewed in the context of other evidence and those that inculcate

on their own. *Id.* Thus even if an autopsy does not, by itself, inculcate a particular suspect—or even any suspect—that fact does not insulate the report from a Confrontation Clause challenge when it is later used in a criminal prosecution.

Nor is there any justification for a requirement that the accused’s identity be known prior to the autopsy in order to sustain an objection on Confrontation grounds. *Id.* at 2262 (Thomas, J., concurring in judgment). The Confrontation Clause does not “constrain the time at which one becomes a ‘witness,’” permitting a declarant to act as a witness even before the prosecution of a particular defendant begins. *Id.* As such, the coroner preparing an autopsy report before a potential defendant has been identified or prosecution begins is still a declarant for Confrontation purposes.

Because all autopsies are subject to the inherent controversies in interpretation discussed above, and are prepared with the knowledge that their ultimate findings may lead to criminal prosecution, they require that scrutiny which can only be afforded in the “crucible of cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

IV. MEDICAL EXAMINERS VIEW THEMSELVES AS ADVOCATES FOR THE DEAD.

“We represent the living but speak for the dead.”³ The coroner’s historical motto reveals a profession

³ “Civitatem Servamus Mortes Loquimur.” The motto, thus translated, has fallen out of favor as medical examiners replace coroners, but it remains widely in use. *See, e.g., Coroner’s Office*, Allen Cnty., Ind., <http://www.allencounty.us/coroners-office> (last visited Mar. 19, 2015); *Coroner*, Clinton Cnty., Ind. Gov’t, <http://www.clintonco.com/coroner/> (last visited Mar. 19, 2015). A

steeped in advocacy for the deceased, a practice that continues today. Though coroners have largely been replaced by medical examiners, the focus on justice persists.⁴ “We provide closure for the people who have lost loved ones . . . Our role is to speak for the dead and to seek justice for the people who were killed.” Christina Villacorte, *L.A.’s First New Coroner in Decades Faces Tough Tasks*, L.A. Daily News (Sept. 4, 2013, 5:17 PM), <http://www.dailynews.com/general-news/20130904/las-first-new-coroner-in-decades-faces-tough-tasks> (quoting Dr. Mark Fajardo, Los Angeles County medical examiner-coroner). “We are the last voice of someone who is gone.” Nat’l Inst. of Justice, *Forensic Death Investigation Symposium: A Systematic Approach for Enhancing Policy and Practice* (June 15, 2011), <http://www.nij.gov/topics/forensics/investigations/death-investigation/symposium/pages/enhancing-policy-practice.aspx> (quoting Barbara Butcher, chief of staff and director of the Forensic Science Training Program in New York City’s Office of the Chief Medical Examiner).

As public officials, medical examiners face immense pressure to protect the public, victims, and their families. An inconclusive ruling on the cause of death could allow a murderer to walk free, while a determination of suicide stigmatizes the deceased and his family. Yet the observable facts from an examination

better translation may be “We serve the living by speaking for the dead.”

⁴ Coroners, typically untrained in medicine, were historically responsible for determining cause of death. Rampant abuse of these positions through municipal patronage, however, led to a movement for the replacement of coroners with medical examiners, typically forensic pathologists by training. For a detailed discussion of the history of coroners and medical examiners, see *Postmortem: How Medical Examiners Explain Suspicious Deaths*, *supra*.

of the body itself rarely provide a full explanation of the cause of death.⁵ As discussed above, *supra* 3–7, medical examiners consider information about the scene and circumstances of death, through either their own investigation or police reports. Just as physicians exhibit unconscious racial bias in diagnosing mental illness, Harold W. Neighbors et al., *Racial Differences in DSM Diagnosis Using a Semi-Structured Instrument: The Importance of Clinic Judgment in the Diagnosis of African Americans*, 43 J. Health & Soc. Behav. 237, 237 (2003), the inductive autopsy process allows an examiner’s unconscious biases to inform the conclusion.

When the deceased is vulnerable and the death shocking, medical examiners are more prone to become advocates. The national uproar against child abuse in the 1980s and 1990s fomented assertions that medical examiners were doing little to hold parents accountable for suspicious deaths. Marjie Lundstrom & Rochelle Sharpe, *Getting Away with Murder: Three Child Abuse Deaths are Believed to go Undetected Every Day—Because No One Bothers to Autopsy*, 49 Pub. Welfare 18 (Summer 1991). Teams and institutions were established to review suspicious child deaths, and the number of deaths reportedly resulting from child abuse increased. Michael Durfee et al., *Child Fatality Review: An International Movement*, 26 Child Abuse & Neglect 619 (2002). Yet background social biases still colored medical exam-

⁵ For example, in cases allegedly involving “shaken baby syndrome,” the traditional diagnosis rests entirely upon three internal findings, referred to as “the triad of symptoms”; however, there is now widespread agreement that the presence of the triad alone is not enough to diagnose a case of “shaken baby syndrome.” See Appellant’s Br. at 26–27, *State v. Hardin*, No. 11-0122.

iners' reporting, as examiners are more likely to report death by child abuse for girls and African-Americans. Tessa L. Crume et al., *Underascertainment of Child Maltreatment Fatalities by Death Certificates, 1990–1998*, 110 *Pediatrics* e18 (2002). Professional guidelines instruct medical examiners to consider a family's prior involvement with child protective services when presented with a child's death, Robert H. Kirschner, *The Pathology of Child Abuse*, in *The Battered Child* 248, 277 (Mary Edna Helfer et al. eds., 1997), even though racial disparities are rife within child protective services engagement. See Yuhwa Eva Lu et al., *Race, Ethnicity, and Case Outcomes in Child Protective Services*, 26 *Child. & Youth Services Rev.* 447 (2004).

Increased diagnosis of death by child abuse does not imply that medical examiners are making improper diagnoses. Rather, it demonstrates that medical examiners are part of a broader advocacy structure for victims. Examiners respond to outside pressure on behalf of victims, and they are more likely to find homicide when the deceased is socially favored (girls) or the accused perpetrator is socially disfavored (African Americans). Crume et al., *supra*, at e18. Medical examiners and their professional standards of inquiry are shaped by a system with preconceived notions about victims, accused perpetrators, and causes of death. Medical examiners' written conclusions, however, carry the weight of science and bear no trace of such advocacy, though it may have shaped the ultimate conclusions reached.

Suicide creates additional pressure for examiners to interpret physical evidence consistent with a socially desirable outcome. In potential suicides, medical examiners rely upon a "rule of optimism"—give the deceased the benefit of the doubt. *Suicide Determina-*

tion and the Professional Authority of Medical Examiners, supra, at 325. Families frequently lobby medical examiners to find a cause of death other than suicide, and examiners acknowledge their cognizance of a suicide determination's impact for insurance payments to the deceased's family or ongoing civil litigation. *Id.* at 324. In fact, examiners use stigma to deny a suicide. From his immersion in a medical examiner's office, Timmermans recounts how examiners would argue that the stigma associated with suicide inhibited the deceased from taking his own life. *Id.* at 325. Susceptibility to such influence, however, necessitates adversarial examination of autopsy conclusions.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully submits that the petition for a writ of certiorari to the Supreme Court of Ohio should be granted.

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March 23, 2015

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