

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

VIRGINIA HERNANDEZ LOPEZ,

Defendant and Appellant.

Case No. S177046

Fourth Appellate District, Division One, Case No. D052885
San Diego County Superior Court, Case No. SCE274145
The Honorable Lantz Lewis, Judge

**RESPONDENT'S SUPPLEMENTAL REPLY BRIEF RE
*BULLCOMING v. NEW MEXICO***

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SUPREME COURT
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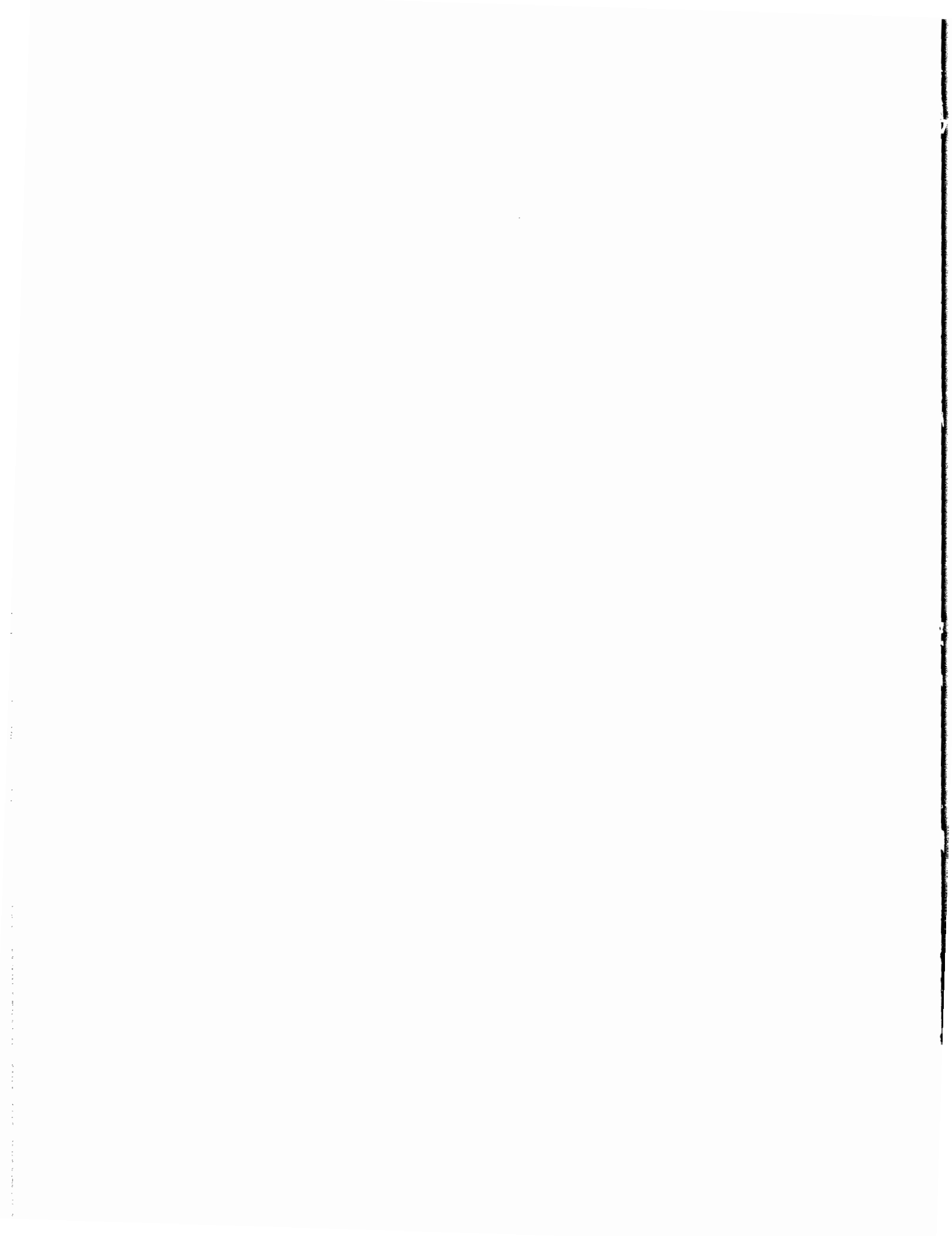


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INTRODUCTION

As set forth in Respondent's Supplemental Brief on the Merits (RSB) and as further demonstrated below, *Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705 (*Bullcoming*) has little effect on the present case. While appellant argues that *Bullcoming* is indistinguishable from her circumstances, appellant's argument is based on an inaccurate reading of the facts of the present case.

ARGUMENT

I. *BULLCOMING* HAS LITTLE EFFECT ON THIS CASE

Appellant argues that in *Bullcoming*, the Court held that testimony by a "surrogate" or "conduit" does not satisfy the Confrontation Clause. (ASB 3.) Respondent agrees. Appellant then claims, without supporting facts, that Willey acted as a surrogate witness. (ASB 4-5.) Appellant is wrong. As set forth in the respondent's supplemental brief, Willey testified that he had trained and was intimately familiar with the work of Jorge Peña, the criminalist working at the lab who performed the tests on Lopez's samples. (4 RT 461.) He was also the reviewer for Peña's results. As a supervisor and reviewer, he reviewed Peña's report recording the alcohol level in Lopez's blood sample. He also reviewed the printout of the GCMS, and the "before and after" quality control calibrations on that instrument. (4 RT 462-463.) Willey also testified about the testing process used to analyze the sample. He testified that the samples were tested using the GCMS. He explained how the instrument operates. (4 RT 459.) He testified that, after the instrument tests the samples, its computer generates a paper printout of the results. (4 RT 459-460.) A graph on the printout shows, by widths and heights, the nature of the chemical being tested. (4 RT 460.) Willey also testified, in his role as supervisor, about the safeguards the lab uses to ensure that the tests are run properly and that the GCMS is in working

order. (4 RT 460-461.) Thus, unlike the witness in *Bullcoming*, who had no connection to the test at issue (*Bullcoming, supra*, 131 S.Ct. at pp. 2712, 2715), Willey was a supervisor and reviewer. His status as such placed him outside the limited reach of the *Bullcoming* opinion.

Also incorrect is appellant's assertion that Willey offered no independent opinion concerning Lopez's blood alcohol level. (ASB 5.) As explained in detail in the respondent's supplemental brief (RSB 7-8), Willey set forth his expertise in blood-alcohol analysis, including his education and training in the field. (4 RT 456-458.) Willey also testified that based on his training and expertise, he reached an independent conclusion that Lopez's blood-alcohol level was .09 percent. (4 RT 467.) As the *Bullcoming* Court noted, the testifying witness in that case had no "independent opinion" regarding the defendant's blood alcohol content. (*Bullcoming, supra*, 131 S.Ct. at p. 2716.) The converse is true here. Accordingly, *Bullcoming* has no application to Willey's testimony.

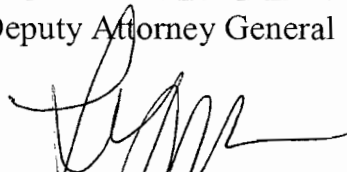
Finally, appellant asserts that the "report" in this case was testimonial. Appellant claims it was certified, accusatory, and prepared in anticipation of litigation. (ASB 6.) Appellant is once again mistaken. As stated in respondent's supplemental brief (RSB 8), there was no report of the type at issue in *Bullcoming*. Instead, the document introduced into evidence consisted of four pages of instrument-generated data and a cover page summarizing the data. There were no notes from any analyst about procedures performed, the analyst's qualifications, his experience, the laboratory's procedures, or whether the instruments were functioning properly. Instead, a live witness – Willey – provided that information from the witness stand. *Bullcoming* specifically left open the question of the admissibility of raw data (as opposed to a report). (*Bullcoming, supra*, 131 S.Ct. at p. 2722 (Sotomayor, J., concurring).) For this reason, too, *Bullcoming* does not resolve the issues before the Court in the present case.

CONCLUSION

Based on the foregoing, as well as for the reasons stated in the previous briefing, the judgment of the Court of Appeal should be reversed.

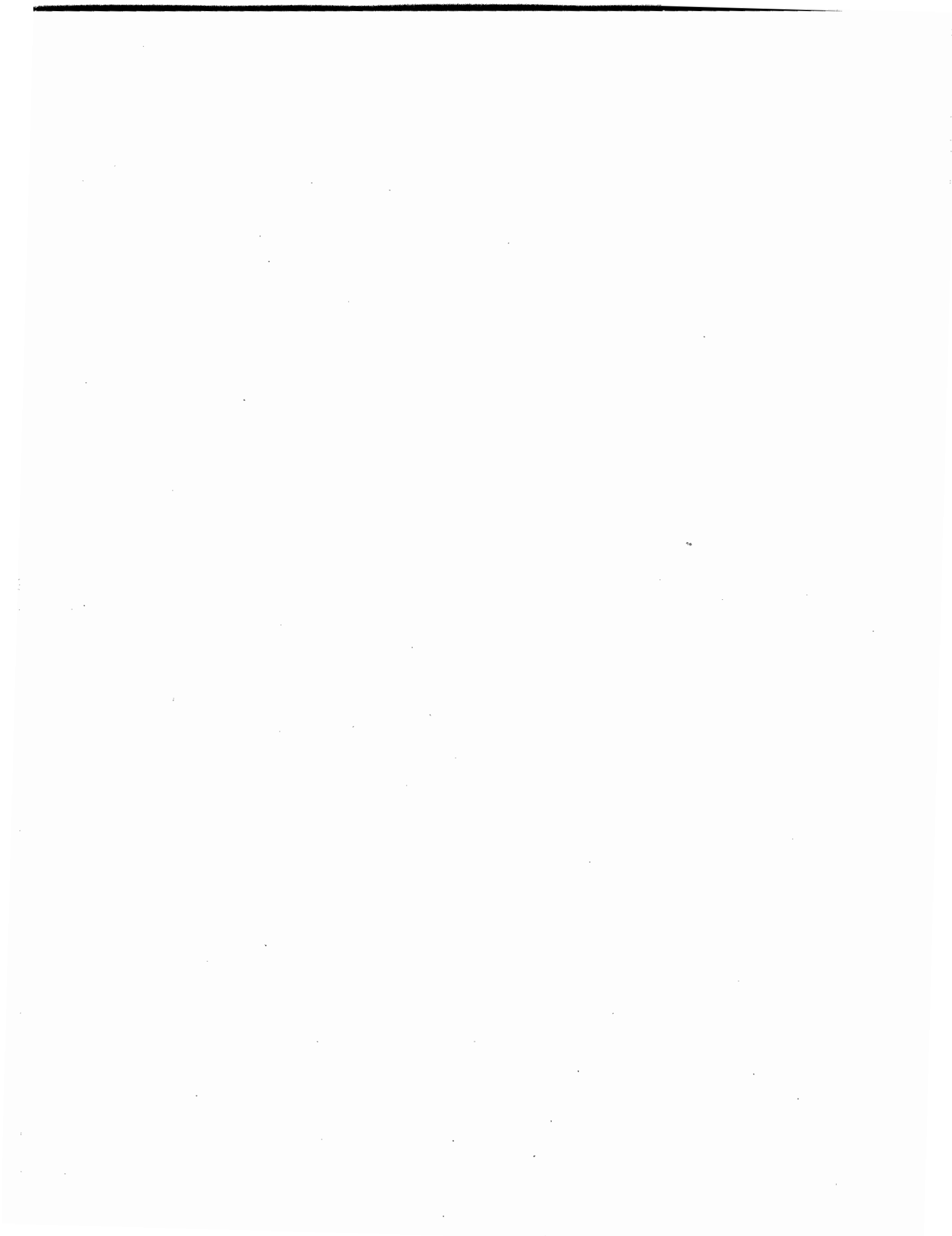
Dated: September 8, 2011 Respectfully submitted,

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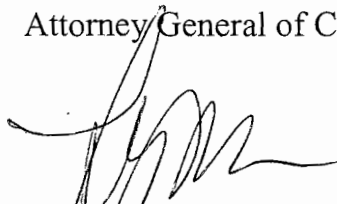


CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL
REPLY BRIEF RE BULLCOMING v. NEW MEXICO** uses a 13 point
Times New Roman font and contains 890 words.

Dated: September 8, 2011

KAMALA D. HARRIS
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A handwritten signature in black ink, appearing to read 'Lynne G. McGinnis', written over the printed name and title.

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **PEOPLE v. VIRGINIA HERNANDEZ LOPEZ**

No.: **S177046**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **September 8, 2011**, I served the attached **RESPONDENT'S SUPPLEMENTAL REPLY BRIEF RE *BULLCOMING v. NEW MEXICO*** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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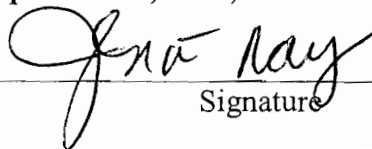
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **September 8, 2011**, at San Diego, California.

Jena Ray
Declarant


Signature

