No. 22-885

IN THE
SUPREME COURT OF THE UNITED STATES

State of South Carolina,

Petitioner,

v.

Angela D. Brewer,

Respondent.

On Petition for Writ of Certiorari
to the South Carolina Supreme Court

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent Angela D. Brewer respectfully requests that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

A. Factual Background

1. On October 17, 2014, Angela Brewer was at home with her grandchild, Minor, who was thirteen months old. Pet. App. at 2-3. She was also taking care of Minor's one-month-old sister. Pet. App. 2-3. The adults and other children living in the house left that morning, and Brewer was alone with the two children for the rest of the day. Pet. App. 2-3.

Shortly after 4:00 p.m., Brewer's husband called on his way home from work. Pet. App. 3. While the two were talking, Brewer tried to wake Minor from his nap, but Minor was not responsive. Pet. App. 3. When Brewer's husband arrived home, he began performing CPR while Brewer called 911. Pet. App. 3. Minor was then taken in an ambulance to the hospital. Pet. App. 3. Despite the efforts of medical personnel, Minor died. Pet. App. 2.

2. The sheriff's deputy who initially responded to the hospital was not a member of the county's juvenile investigative team. R. 102. He contacted another officer who was a member of the team because "there's mandates by the state for a death of a child that have to be followed." R. 102-03. Title 17 of South Carolina's Code, entitled "Criminal Procedures," regulates what happens when a child dies. S.C. Code Ann. § 17-5-520, 540. Section 540 requires the coroner or medical examiner to notify the Department of Child Fatalities when a child dies either in a suspicious manner or "when the death is unexpected and unexplained. . . ." S.C. Code Ann. § 17-5-540. When a child dies under the circumstances listed in section 540, the coroner is required to

order an autopsy that "must be performed as soon as possible by a pathologist with forensic training." S.C. Code Ann. § 17-5-520(B).

3. Two officials with the county coroner's office were already at the hospital when Minor's mother arrived. R. 143, 203. The coroners notified the county sheriff's office and South Carolina's statewide law enforcement unit, known as SLED. R. 204. SLED sent an agent to the hospital. R. 206-07. The police began asking questions about Oxycodone at the hospital. R. 110. A SLED agent observed the child for signs of abuse. R. 275. If no signs of abuse are present, a "full investigation" starts at that point. R. 276. The agent said that a deceased child with no signs of trauma "concerned [her] greatly. There was—we had some issues." R. 276. She did not think the child was malnourished or died from SIDS. R. 277. The agent said they typically ask for testing of anything associated with the child by a laboratory. R. 281. Blood was taken from both Brewer and her husband that night. R. 329. Brewer and her husband's blood samples were sent to the same laboratory that performed the toxicology report on Minor's samples. R. 329.

At the hospital, the police asked the Brewers for consent to search their home. R. 134, 217. Multiple police officers went to the house. R. 326. One of the officers who participated in the search said the purpose was to collect evidence and preserve the scene. R. 217-18. The officer noticed medication on the kitchen counter and took an inventory. R. 220. They used evidence markers and took photographs in the house. R. 223. Forensics took two sippy cups, a baby bottle, and Minor's bedding. R. 335-37. R. 361. A SLED agent asked officers to "[d]ocument any medications that were in the house." R. 293.

The coroner, a sheriff's deputy, and the SLED agent went to Brewer's home that night after leaving the hospital. R. 206-07. Law enforcement had Brewer perform "a reenactment." R. 207.

The coroner recorded the reenactment with his phone. R. 207. The deputy coroner had no medical training; his background was in law enforcement. R. 212.

A Department of Social Services employee went to Brewer's house that evening. R. 122. The social services officer's testimony that he thought Brewer was "erratic" that night and that she was "acting a little bit when it came to the child's death" was stricken by the trial judge after defense counsel objected to speculation. R. 321. The DSS officer asked Brewer about her medications. R. 327. They took the rest of the children from the home. R. 144.

The day after Minor's death, Dr. James Fulcher, a pathologist, performed Minor's autopsy. R. 389. A SLED agent attended the autopsy. R. 294. During the autopsy, the pathologist noticed "unusual specimens" in Minor—that is, certain tissues and fluids that he thought required further testing. R. 392. Accordingly, the pathologist submitted tissue and blood samples from Minor to NMS, a private laboratory in Pennsylvania. Pet. App. 3-4.

About three weeks after Minor's death, the police interviewed Brewer again. R. 226-27. They asked Brewer if Minor could have accessed her OxyContin. R. 232-33. The officer described Brewer as "argumentative" in maintaining that it was impossible, and Brewer persisted in having "an answer" for the multiple scenarios the police suggested. R. 232-33. This officer worked in a unit that specialized in crimes committed against children. R. 236.

After receiving the laboratory reports from the private laboratory, the coroner's office ruled Minor's death a homicide. R. 211. Specifically, the pathologist "concluded the cause of death was 'acute oxycodone toxicity.'" Pet. App. 4. This conclusion was based directly on the NMS reports. Those reports found that "minor had a [toxicity] level of 2,700" nanograms per millimeter. R. 392-93. And the average for fatalities in adults is 1,600." R. 395. The amount of toxicity in Minor "would have killed anybody," even an adult. *Id.*

The liquids from the sippy cups and baby bottle taken from Brewer's home on the day of Minor's death were then sent by law enforcement to SLED's in-house laboratory for testing. R. 281-82. R. 361. SLED's testing looked "for the presence or absence of drugs or poisons." R. 359. SLED found that one of the liquids contained caffeine and methamphetamine and the other contained Oxycodone. R. 361-74.

B. Procedural History

1. The State charged Brewer with homicide by child abuse. During trial, Brewer objected to any testimony regarding laboratory reports issued by NMS. R. 193-94. Brewer argued the testimony was inadmissible hearsay. R. 194. Relying upon *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), Brewer also argued that admitting the statements in the NMS reports would violate Brewer's Sixth Amendment right to confrontation. R. 194-201. In *Melendez-Diaz*, this Court held that a forensic laboratory report identifying a substance as cocaine was "testimonial" and therefore could not be introduced against the defendant without putting the report's author on the stand.

Brewer also explained that the pathologist rendered his opinion on the cause of death based upon the findings of NMS. R. 193-94. In fact, the pathologist did not conduct any testing and relied exclusively on the results from the laboratory. R. 196. Brewer admitted the doctor could testify to anything he found at the autopsy, but she objected to the statements in the autopsy report regarding blood levels because NMS, not the doctor, had conducted those tests. R. 198.

The State made no argument that the NMS laboratory reports were not testimonial. R. 198 - 201. But it argued that even if the reports "are not admissible" as a general matter, *Melendez-Diaz* was inapplicable because the State intended to offer the pathologist's testimony under Rule 703 of the South Carolina Rules of Evidence. R. 199. According to the State, this situation was

distinguished from *Melendez-Diaz* because it would present a witness the defendant could confront – the pathologist. R. 199.

The trial court held the testimony was admissible. R. 201. The court did not address whether the NMS reports were testimonial. R. 201. But the court ruled that "the confrontation clause [was] met by the cross-examination of the witnesses here." R. 201. R. 383.

Dr. Fulcher was then qualified by the court as an expert in forensic pathology and toxicology as part of that pathology. R. 384-88. He noted that he is "a member of a private group" that "charge[s] money for all these services to cover [their] costs." R. 390. He and his partner "decided as a protocol to use" whom the two believed was "the best laboratory in the country to run all [their] specimens." R. 390. According to Dr. Fulcher, that best laboratory in the entire country was "National Medical Services, … located in a suburb of Philadelphia." R. 390. He went on to explain that he used NMS instead of SLED because, although "they do a good job," SLED was "slow." R. 390. Next, Dr. Fulcher vouched for the work performed by NMS.

> I believe in them. They have been the preeminent lab in uncovering novel opiates. And one of the best things I like about them is they take specimens from the entire country. So they see the really weird stuff first, because they do more volume across the country.
>
> They've got a handful, like five or six people that have died from this really weird opiate in two rural counties in Pennsylvania. It happened in a week period and went away. The got a test for that compound. If you sent that anywhere else, they wouldn't find it.
>
> So when I get their report back - - I can never say a report is absolute, you know. Only - - only God knows what is absolute truth. And we are trying to get as best we can to that. However, as far as our ability to test, this represents the finest lab in this country that we can send specimens to.

R. 391.

Dr. Fulcher then informed the jurors about the results of the testing conducted by NMS. Specifically, he informed the jurors of the exact levels of oxycodone and oxymorphone found in Minor's blood, ocular fluid, and gastric contents. R. 392. According to the NMS laboratory report about the testing conducted on Minor's blood, "Oxycodone was present at 2,700 … nanograms per milliliter[,] Oxymorphone was present at 120 nanograms per milliliter." R. 392. Regarding the ocular fluid, "the same compounds were present at lower levels, 190 nanograms per milliliter Oxycodone, 15 nanograms per milliliter oxymorphone." R. 392. Turning to the gastric fluid, NMS reported "the concentration of Oxycodone was 360,000 nanograms per milliliter" and "[O]xymorphone was present at 920 nanograms per gram." R. 392.

When asked to explain what "those numbers" meant, Dr. Fulcher read from the NMS report. R. 393-94. The laboratory report was not admitted into evidence; Dr. Fulcher just read from the document to the jury. Dr. Fulcher told the jurors that what he was reading to them was "an interpretation of all the current literature" and "represent[ed] what the medical establishment thinks about this drug, period." R. 394. Reading from the report, he claimed that "[f]ollowing oral administration of Oxycodone, sustained release in regular formulations peak concentrations in adults at therapeutic levels are, generally, less than 100 nanograms per milliliter." R. 394. "[T]he sustained release preparation usually results in Oxycodone less than 10 … nanograms per milliliter." R. 394. Dr. Fulcher opined that the amount of drugs in Minor's system, which was "a level of 2,700" based upon the information provided by NMS, caused his death. R. 395.

Again, relying on the NMS report, Dr. Fulcher recounted that Minor did not have methamphetamine in his blood. R. 396. To explain how it was "possible" that Minor's blood did not have methamphetamine in it, Dr. Fulcher hypothesized that either the concentration was

"extremely small" or Minor "was in another room." R. 397. He claimed "[t]he half life of methamphetamine in the human body is approximately five to ten hours." R. 397.

Using the information in the NMS laboratory report, Dr. Fulcher theorized Minor ingested the drugs in liquid form due to the "impressive" amount found by NMS. R. 398. Knowing the State's theory of the case involved extended release capsules, the solicitor asked Dr. Fulcher if he were familiar with "extended release versus immediate release." R. 399. Dr. Fulcher responded, "Not on a personal level, but on a professional level, generally speaking." R. 399. When questioned about the number of pills Minor ingested, Dr. Fulcher explained:

> When you do the math on his body weight and the concentration, it ends up being slightly over one pill on average. It's a range. I won't lie to you, I can't give you an exact number. Technically, it could have been one pill. But it is more likely than not that it was maybe one and half or two, that range. It's, certainly, not five pills.
>
> Keep in mind this is a baby that weighs 20 some odd pounds. So the concentration is going to be higher with an adult dose just by the nature of the adult dose.

R. 399 - 400.

Dr. Fulcher told the jurors that the concentration of Oxycodone found by NMS in Minor's system "probably set[] a record for this county … in any person, including adults." R. 402-03. He claimed the concentration of Oxycodone in the gastric contents was the highest he had ever seen in approximately 3,000 autopsies. R. 403. The "fact that the concentration [was] so high" and no pill fragments were found in the stomach led him to "think" the drug was ingested in liquid form, which was the state's theory to overcome accidental ingestion. R. 403.

On cross-examination, Dr. Fulcher stated he sent the specimens to the Pennsylvania laboratory via FedEx. R. 408. He admitted he was not present when the package was opened. R. 409. He also admitted that he was not present when the tests were performed and could not address

any questions related to the controls or protocols that were used in this particular case. R. 409. He admitted to the ever-present possibility of contamination. R. 409. Although he did not know "what was done, how it was done, or if it was done properly" in this case, he nevertheless relied upon the NMS report. R. 409.

During re-direct examination, Dr. Fulcher's vouching for NMS continued:

> Q. Dr. Fulcher, how often do you use this lab in Pennsylvania?
>
> A. 100 percent of the time, which would approximately be 700 case - - well, 650 cases a year.
>
> Q. Okay. And on those 650 cases, do you always give a cause of death and a manner of death?
>
> A. I do, yes.
>
> Q. And do you sign that report?
>
> A. I do.
>
> Q. Would you add your signature to the report if there was any concern of you that this lab does not appropriately test substances?
>
> A. At some point, you have to trust people to do the right thing, so, yes.
>
> Q. Do you have any concern that this lab does not appropriately test substances?
>
> A. I do not. I've had conversations with their director, PhD toxicologists about more unusual substances showing up. And I feel like they're offering me the best product I can purchase.

R. 413.

2. South Carolina's intermediate appellate court issued an unpublished opinion affirming Brewer's conviction. Pet. App. 24. Unlike its argument at trial, the State argued on appeal that the NMS laboratory results were not testimonial because the laboratory did not have an objectively reasonable belief that the results would be used in a criminal case. Pet. App. 37-38. The court

applied the "primary purpose" test from *Davis v. Washington*, 547 U.S. 813 (2006) and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) and held the laboratory results were not testimonial. Pet. App. 37-40.

3. The South Carolina Supreme Court reversed, holding that Brewer's right to confrontation was violated because the NMS laboratory results were testimonial and no one from NMS testified. Pet. App. 13-22. The court traced the holdings and reasoning of this Court's Confrontation Clause cases from *Crawford v. Washington*, 541 U.S. 36 (2004), to *Melendez-Diaz* and *Bullcoming v. New Mexico,* 564 U.S. 647 (2011), to *Williams v. Illinois*, 567 U.S. 50 (2012). Pet. App. 13-22. The court found that law enforcement "zeroed in" on Brewer as a criminal suspect at the hospital on the day of Minor's death. Pet. App. 19. The court also cited sections 17-5-520 and -540 of the South Carolina Code and found that because an autopsy was required by state law, "then its primary purpose is for a criminal investigation and thus, is testimonial." Pet. App. 20. The court also noted that its decision was consistent with cases from West Virginia, Oklahoma, and North Carolina, holding that in cases in which state law had similarly required autopsies because of suspicious circumstances, the results are testimonial. *Id.* Finally, the court explained that "none of the safeguards in *Williams*" were present in Brewer's case because: (1) the NMS report was offered for the truth of the matter asserted; (2) Brewer was tried before a jury instead of the bench; and (3) Dr. Fulcher (and the State in closing argument) vouched extensively for the laboratory's integrity and quality. Pet. App. 21-22.

REASONS FOR DENYING THE WRIT

The State does not dispute that, if the NMS toxicology report here in aid of the autopsy of Minor was testimonial, then the pathologist's testimony in this case that recounted the reports violated the Confrontation Clause. The State argues, however that the state supreme court erred

in holding that the laboratory report was testimonial. This Court has recently and repeatedly denied certiorari in cases involving similar arguments.[1] And the State's claim does not warrant further review either. The state supreme court's holding correctly applies this Court's Confrontation Clause jurisprudence dealing with laboratory reports to the particular circumstances here, including South Carolina law governing autopsy procedures. The state supreme court's decision does not conflict with any decision from any other state court of last resort or federal court of appeals. Finally, this case would be a poor vehicle for expounding on how the Confrontation Clause applies to forensic laboratory reports.

I. The South Carolina Supreme Court's Holding that the Toxicology Report Was Testimonial Is Correct.

The South Carolina Supreme Court faithfully applied this Court's precedent in holding that the toxicology report here was testimonial. In particular, the state supreme court explained that this case "is more analogous to *Melendez-Diaz [v. Massachusetts, 557 U.S. 305 (2009)]* and *Bullcoming [v. New Mexico,* 564 U.S. 647 (2011)] than . . . *Williams [v. Illinois,* 567 U.S. 50 (2012)]." Pet. App. 21; *see also id.* 13-21. In *Melendez-Diaz*, this Court held that a laboratory report stating that a substance seized from the defendant was an illegal drug was testimonial because an objective creator of the report would have known it would be used for prosecutorial purposes. In *Bullcoming*, this Court similarly held that a blood-alcohol level report stating that the blood sample contained alcohol well above the legal limit was testimonial. So too here, the laboratory report stated that a deceased child had a toxicology level of oxycodone at a level that

[1] *See, e.g.*, *Taylor v. Illinois*, No. 20-5344; *Garlick v. New York*, 17-5385; *Mattox v. Wisconsin*, No. 16-9167; *Maxwell v. Ohio*, No. 14-6882; *Hardin v. Ohio*, No. 14-1008; *Medina v. Arizona*, No. 13-735; *New Mexico v. Navarette*, No. 12-1256.

"would have killed anybody." R. 395. It can be reasonably expected that a laboratory showing a toxicity level of 2700 for a baby when a level of 1600 kills adults would know that a criminal prosecution is imminent. The child could not have made his own drink in the sippy cup, so some adult must have been involved. And given that the laboratory knew it was providing its report to a pathologist and a coroner's office working in conjunction with law enforcement to investigate a suspicious death, any objectively reasonable person would have known that the report would be used for prosecutorial purposes. The same cannot be said of the DNA profile at issue in *Williams*—information that is not inherently incriminating.

The holding that the toxicology report here was testimonial is all the more correct when the particular aspects of South Carolina law that governed are taken into account. As the state supreme court stressed, "section 17-5-520 specifically requires that an autopsy be done by a 'pathologist with forensic training' whenever a child dies as a result of violence, in a suspicious manner, or in an unexplained way." Pet. App. at 19-20 (citing S.C. Code Ann. § 17-5-520, 540 (2014)). The statutes governing autopsies of children in South Carolina cited by the court are not in the part of South Carolina's code regulating local government (Title 6), public officers and employees (Title 8), law enforcement and public safety (Title 23), public records (Title 30), health (Title 44), or the children's code (Title 63). See S.C. Code Ann. Table of Contents. The statutes governing children's autopsies are contained in Title 17: "Criminal Procedures." S.C. Code Ann. Title 17. The placement of these statutes by the legislature is telling. These are criminal procedure statutes designed to guide local officials to prepare cases for criminal prosecutions.

Section 17-5-540 requires the coroner or medical examiner to notify the Department of Child Fatalities. S.C. Code Ann. § 17-5-540. The first deputy who responded to the hospital knew about these protocols and testified he had to contact another officer who was a member of the

juvenile investigative team because "there's mandates by the state for a death of a child that have to be followed." R. 102-03. When the sheriff's deputy was asked what the SLED agent's role was in these cases, she answered, "They have a child fatality unit. And we notify them of every child death . . . . If we respond to a child death, we notify them whether it's immediately or after we've processed the scene." R. 306-07. When asked what she did at SLED, the agent who went to the hospital said, "I work for the special victims unit child fatalities." R. 331. These officers were following the procedures mandated by state law in South Carolina's criminal procedures code. The forensic pathologist—and by extension, NMS, acting at his direction—were also following these same criminal procedures.

The State advances three arguments against this reasoning, but none has merit. First, the State argues that the state supreme court improperly relied on "the point of view of law enforcement and its ultimate importance at trial, instead of determining the primary purpose behind the creation of the toxicology report." Pet. 13. The State is mistaken. The state supreme court recognized that "[i]n determining whether an out-of-court statement is testimonial, *courts employ the primary purpose* test," which turns on whether the primary purpose of a laboratory report would have been "to serve as evidence at a later trial or substitute for in person testimony." Pet. App. 13. The view of law enforcement and the relevant state law were simply pertinent to applying that "primary purpose" test.

Second, the State says "[t]he investigation being conducted by the forensic pathologist was not criminal in nature but was a scientific one to explain how the infant died." Pet. 14. But those two things are not mutually exclusive. As *Melendez-Diaz* and *Bullcoming* establish, scientific analyses can be performed for law enforcement purposes and thus trigger the Confrontation Clause. Likewise here, state law and the surrounding circumstances make clear that this

investigation, which involved various law enforcement entities, was aimed at developing evidence for a criminal prosecution.

Third, the State asserts that "[l]aw enforcement played no role in obtaining the samples [that NMS tested] or requesting the report." Pet. 15. But this artful statement again ignores state law. When the coroner's office got involved and sent the samples to NMS, it did so under a state-law obligation to aid law enforcement's investigation into the suspicious death of a child. And even if the toxicologist at NMS did not know all of the particulars of the police's suspicions of Brewer, the state supreme court correctly noted that "the State cannot undermine the Confrontation Clause by utilizing a private laboratory in a criminal trial without calling the individual who performed the testing." Pet. App. at 19. As Justice Thomas has explained, the Confrontation Clause bars the introduction of forensic laboratory reports that are "offered in order to evade confrontation." *Williams*, 567 U.S. at 111 n.5 (internal quotation marks and citation omitted).

II. The South Carolina Supreme Court's Holding Does Not Implicate Any Conflict in State or Lower Federal Courts.

The State itself accepts that autopsies, as well as laboratory reports created to facilitate autopsies, can be testimonial under "special or unique circumstances." Pet. 16. And several other state courts of last resort have indeed held under certain circumstances that autopsy and related reports are testimonial. *See* Pet. App. at 20 (citing *State v. Frazier*, 735 S.E.2d 727, 731 (W.Va. 2012); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 228 (Okla. 2010); *State v. Locklear*, 681 S.E.2d 293, 305 (N.C. 2009)); *see also State v. Navarette*, 294 P.3d 435, 440-41 (N.M. 2013). According to the State, however, several courts would not have held under the circumstances here that the toxicology report in aid of Minor's autopsy was testimonial. The State is incorrect.

For example, the State cites a case from the Second Circuit that found that a toxicology report was not testimonial. Pet. at 9-10 *citing United States v. James*, 712 F.3d 79 (2d Cir. 2013). But Brewer's case would come out the same even under the Second Circuit's analysis in *James*. The pathologist suspected poisoning in the victim's death, but testified that accidental poisonings and suicides were fairly common. *Id.* at 100-01. Other natural causes, including alcoholism, were also suspected. *Id.* The Second Circuit found there was "no indication" in the pathologist's testimony "or elsewhere in the record that a criminal investigation was contemplated into the cause" of the victim's death. *Id.* at 101.

Unlike *James*, and as the South Carolina Supreme Court properly found, the police suspected Brewer from the very beginning of the case. The police asked about Oxycodone at the hospital and drew blood from Brewer and her husband. R. 110. R. 329. The victim in *James* was an adult who could have committed suicide or died from alcoholism. The decedent here was a thirteen-month-old child who could not have made himself the sippy cups the police seized from Brewer's home on the evening of his death. The pathologist here certainly knew that in the case of an infant, writing a toxicology report stating that oxycodone levels so high they would have killed anyone meant that an adult was suspected in Minor's death. The *James* court would have reached the same result under the specific facts of Brewer's case.

The state law basis here would change the result of the Illinois court's decision in the other main case cited by the State, *People v. Leach*, 980 N.E.2d 570, 591 (Ill. 2012). In *Leach*, the court looked at a general statute governing the duties of a coroner contained in the portion of the Illinois code titled "Counties." *Leach*, 980 N.E.2d at 591 *citing* 55 ILCS 5/3-3013 (West 2010). The state law at issue here is contained in South Carolina's criminal procedures code section and specifically deals with suspicious deaths of children.

Nor does the South Carolina Supreme Court's holding here conflict with *State v. Hutchison*, 482 S.W.3d 893 (Tenn. 2016). In that case, the Tennessee Supreme Court recognized that "an autopsy may be conducted and a report generated for purposes other than its use at a later criminal trial." *Id.* at 911 (citation omitted). The Court simply held that "[t]he overall circumstances do not indicate that the autopsy report in th[at] case" was testimonial. *Id.* at 914. And in that case, there is no indication that Tennessee had state law governing the autopsy procedure that rendered the autopsy part of a law enforcement investigation.

Finally, the State is wrong (at Pet. 11) that the state supreme court's holding here is "directly opposed" to *United States v. Bass*, 80 M.J. 114 (C.A.A.F. 2020). For one thing, the diagnostic test in that case was not performed in conjunction with an autopsy. That alone distinguishes it from this case and the state law that governed here. Indeed, the test there was requested by a "private physician" acting as a "medical provider," and the physician was seeking the test to help her "treat" any infection the child had. *Id.* at 121. Here, by contrast, the tests were ordered by a governmental actor (the coroner), and there was no possibility of treatment—only of a prosecution to punish a perpetrator.[4]

III. The Facts and Arguments Below Make This Case a Poor Vehicle to Address the Question Presented

Even if this Court were interested in revisiting the circumstances under which forensic laboratory reports are testimonial, this case would be a poor vehicle for doing so. First and

[4] The South Carolina Supreme Court also noted that *Ackerman v. State*, 51 N.E.3d 171 (Ind. 2016), held that "an autopsy report was not testimonial." Pet. App. 20. But that holding rested on particularities of Indiana law and "the Guidebook for Indiana coroners" providing that "[n]one of the reasons for performing an autopsy were based upon providing evidence for a criminal investigation." *Ackerman*, 51 N.E.2d at 186. The Indiana Supreme Court also acknowledged that an autopsy prepared under different circumstances could be testimonial. *Id.* at 187.

foremost, the NMS report was not admitted into evidence or even made a court's exhibit. Instead, its contents were transmitted to the jury via the testimony of the pathologist.

The reason the NMS report is not in the record is that the State failed to litigate in the trial court the issue it now brings to this Court. The State references this problem in a footnote. Pet. at 4, n.1. But the State does not face up to its consequences.

The State sought admission of the toxicology findings through Dr. Fulcher under the state evidence rule governing reliance on hearsay by experts. The State bypassed the question of whether the laboratory report was testimonial and convinced the trial judge to hold the Confrontation Clause was satisfied by examining the pathologist. As a result of the State's failure in the trial court to argue the report was not testimonial, no record was developed on what the laboratory knew or believed when it created the report. And because the State did not dispute the report was testimonial, Brewer has no incentive to introduce or elicit facts relating to that issue. Having induced Brewer to forego developing a record, the State now wants this Court to rely on speculation and inductive reasoning to overrule a state supreme court that properly analyzed the case under both state and federal law. The State's own failure to develop a record on this point and to argue the point it wants considered by this Court is an extraordinary request and is reason enough to deny certiorari.

The particulars of South Carolina law governing the death of infants also counsels against review here. Most of the cases that deal with how the Confrontation Clause applies to autopsy and related reports arise in the context of deaths of adults. This case, however, implicates particular investigatory practices and rules that are relevant only because of the special nature of the deceased here. This Court should not review such an atypical case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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15th of May, 2023

APPENDIX C

SOUTH CAROLINA STATUTES ANNOTATED
TITLE 17 – CRIMINAL PROCEDURES

§ 17-5-520. Authority to order autopsy; request in event of child's death.

(A) In addition to the powers vested in other law enforcement officials to order an autopsy, the coroner or medical examiner is authorized to determine that an autopsy be made.

(B) The coroner or medical examiner immediately shall request an autopsy if a child's death occurs as defined in Section 17-5-540. The autopsy must be performed as soon as possible by a pathologist with forensic training.

* * * *

§ 17-5-540. Coroner or medical examiner to notify Department of Child Fatalities of certain child deaths.

The coroner or medical examiner, within twenty-four hours or one working day, whichever occurs first, must notify the Department of Child Fatalities when a child dies in the county he serves:

(1) as a result of violence;

(2) in any suspicious or unusual manner; or

(3) when the death is unexpected and unexplained including, but not limited to, possible sudden infant death syndrome.