No. 23-820

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

WILLIAM JOHNSON

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals to the State of Ohio, Eighth Appellate District

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REPLY BRIEF FOR PETITIONER

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The Ohio Court of Appeal's decision below held, as a matter of federal law, that the admission of a domestic violence victim's statements to a 911 dispatcher violated the Confrontation Clause. But the reasoning is hardly a plain vanilla analysis about a recurrent fact pattern given the disparagement for evidence-based prosecution. The Petition showed that the Court should review this decision for four reasons. First, the Petition showed a need to help the lower courts reconcile the Court's Confrontation Clause jurisprudence. Second, the Petition highlighted a conflict in principle in how appellate courts are applying the Court's precedent to domestic violence offense. Third, the Petition and the amicus briefs in support of certiorari highlight compelling policy issues involved in evidence-based prosecutions such that the reasons favoring granting the Petition under Sup. Ct. R. 10(c) exist here. Finally, the Petition shows that this case is an excellent vehicle to consider these questions because the Ohio Court of Appeals decision relied extensively on the Court's understanding of the Confrontation Clause jurisprudence.

I. COURTS ARE INCONSISTENTLY APPLYING THE COURT'S PRECEDENT.

Respondent argued that there is no conflict in law, that the Court should ignore unreported cases, and that the Court can ignore cases from the state courts where a federal conflict does not exist. But the cases cited in the Petition show how courts are inconsistent.

A. Not all past statements describing domestic abuse are testimonial.

Respondent criticizes select cases cited by Petitioner by dwelling on minutiae factual differences between this case and others cited. *Davis v. Washington,* 547 U.S. 813 (2006) is often cited by defense counsel for the proposition that statements establishing or proving "past events potentially relevant to later criminal prosecutions" are testimonial ones. See Response, pgs. 3-4 citing *Davis* at 822-823; see also Pet. App. 38 (describing T.R.'s statements as an account of the assault that had recently occurred – i.e., to document past events relevant to a potential criminal proceeding – and were testimonial. And so, Petitioner cited *United States v. Lundy*, 83 F. 4th 615 (6th Cir. 2023), *United State v. Estes*, 985 F.3d 99 (1st Cir. 2021), and the unpublished decision in *United States v. Bates*, 2023 U.S. App. LEXIS 2368 (5th Cir. Jan. 30, 2023) as illustrative cases showing how not all statements about "past events potentially relevant to later criminal prosecutions" will be deemed testimonial post- *Ohio v. Clark*, 576 U.S. 237 (2015).

The myriad of other cases cited in the Petition should highlight how courts across the country decide Confrontation Clause questions by reconciling the Court's precedent to particular facts. Respondent argues these are not conflicts in principle through handpicked facts and omission. For instance, Respondent omits that in *Smith v. United States*, 947 A.2d 1131 (D.C. 2008) the court deemed defendant's view of the Confrontation Clause "unduly restrictive." *Smith* at 1134. Important was the uncertainty in the

perpetrator's location and whether he would return. *Id.* And it is claimed that the facts here are closer to *Andrade v. United States,* 106 A.3d 386 (D.C. 2015) which was decided months before *Clark*. Response at 17. Unlike *Andrade*, the context here was a 911 recording and not police questioning, and it was unknown here whether Respondent was still in the residence thus it was far from clear whether it was safe for T.R. to return home.

B. The Confrontation Clause analysis has evolved since *Crawford*.

United States v. Fryberg, 854 F.3d 1126 (9th Cir. 2017) shows how a court understands the Confrontation Clause analysis as one involving testimonial purpose not bound by a dictionary definition of emergency. While the case involved a return of service notice, it is notable in how it describes the question in *Davis* in terms of testimonial purpose. *Id. at 1134.* In the case below, the court narrowed its understanding of *Davis* as those circumstances involving "ongoing emergencies" as defined through a dictionary. See Pet. App. 20-21, 33. Thus, the conflict in principle is in the understanding of *Davis*.

What should not be lost in applying *Davis* is the evolution of Confrontation Clause since *Davis*. Post-*Clark* a better understanding of why statements made during an "ongoing emergency" (or more broadly statements made to enable police assistance) are nontestimonial is because those statements are not as likely to "bear sufficient indicia of solemnity to qualify as testimonial." *Crawford v. Washington*, 541 U.S. 36, 51 (2004); *Davis,* 547 U.S. 813-837 (Thomas, J., concurring in judgment in part and dissenting in

part); *Clark*, 576 U.S. at 254-255 (Thomas, J., concurring). And that when these statements are made they are not procured for the primary purpose of creating an out-of-court substitute for trial testimony. *Clark* at 244-245. Simply put, the Confrontation Clause analysis should not be reduced to mere silos.

C. Courts approach excited utterances differently for Confrontation Clause purposes.

The Petition at 19-20 refers to the different approaches in whether courts consider an excited utterance important for Confrontation Clause purposes. The First Circuit in *United States v. Brito,*427 F.3d 53 (1st Cir. 2005) described three approaches to excited utterances. The first approach is a categorical approach that an excited utterance is never testimonial as those statements are made in response to a startling event and there is no anticipation of bearing witness. *Brito at 60* citing *United States v. Brun,* 416 F.3d 703, 707 (8th Cir. 2005). The more recent decision in *United States v. Robertson*, 948 F.3d 912 (8th Cir. 2020) while referencing the "ongoing emergency" test seemingly found that a 911 call did not violate a defendant's Confrontation Clause rights because the statements were excited utterances. *Robertson* at 916-917. The second approach holds that an excited utterance is unrelated to whether a statement is testimonial for Confrontation Clause purposes. *Brito* at 60. See also *Lundy,* 83 F.4th at 619-620 (analyzing the excited utterance separately from constitutional claim). This was the approach taken by the Ohio Court of Appeals below. Pet. App. 31 (describing the hearsay exception

as a separate inquiry). The third approach and the one adopted by First Circuit recognizes that symbiotic nature between the excited utterance inquiry and the testimonial hearsay inquiry. *Id.* citing *State v. Wright,* 701 NW.2d 802, 811 (Minn. 2005) and *State v. Hembertt*, 696 N.W.2d 473 (Neb. 2005). To suggest there is no federal circuit split as to the relevance of excited utterances during 911 calls in the nontestimonial/testimonial analysis is not true. In this case, the Ohio Court of Appeals took a categorical approach inconsistent with the Eighth Circuit and the position adopted by the First Circuit in *Brito* as it expressly deemed the exception irrelevant to the Confrontation Clause analysis. Pet. App. 30 (stating "[t]here is, however, no 'excited utterance' exception to the Confrontation Clause."

D. A conflict is not needed to grant the petition.

Respondent's challenge to the Petitioner's assertion of a conflict is not fatal to the Petition. The Court has granted certiorari where it was argued that a petition documented no "conflict in or between the Federal court of appeals or state courts of last resort." See Response in *Michigan v. Bryant*, Docket No. 09-150, available at 2009 U.S. S. Ct. Briefs Lexis 2884. Respondent there criticized Michigan's citation two only two decisions from state intermediate appellate courts in addition to the Court's precedential cases. *Id.* at *3-4. see also Petition in *Michigan v. Bryant*, Docket No. 09-150, available at 2009 U.S. S. Ct. Briefs LEXIS 2883, *13 (citing two cases including one unreported case). Rather than focus on a conflict, Michigan plainly expressed its concern that an

"ongoing emergency" can exist even though a person describes a past event during a fluid situation. *Id.* at *9-11. Of course, certiorari was granted leading to the decision in *Michigan v. Bryant,* 562 U.S. 344 (2011).

In any event even without a conflict, given the Court's grant of certiorari in *Bryant*, the Court is not obligated to deny the Petition. If anything, Respondent's careful analysis of the cases cited in the Petition shows just how dynamic any ongoing emergency can be, particularly those involving domestic violence. And this case offers a vehicle for to consider the Confrontation Clause issue to a set of facts that do not align with any of the Court's prior cases.

II. RESPONDENT'S MERITS ARGUMENT CONFIRMS THE NEED FOR REVIEW.

Respondent argues the correctness of the Ohio Court of Appeals brushing off any policy concerns in this case and characterizing review of the decision below as one involving the review of "fact-specific error." Response at 21.

The Confrontation Clause applies "only to testimonial statements." *Crawford*, 541 U.S. at 61 (2004). But statements can be "nontestimonial" when given "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an on-going emergency." *Davis*, 547 U.S. at 822 (2006). "And the existence of an 'ongoing emergency' at the time of the encounter is among the most important circumstances informing the interrogation's primary purpose." *Id.* at 828-830. But the "ongoing emergency" analysis is under the broader umbrella of whether a statement is

nontestimonial. Implicit here is that the prospect of fabrication is significantly diminished in such circumstance making the Confrontation Clause inapplicable. *Bryant,* 562 U.S. at 361. The logic is like justifying the "excited utterance" exception because in excitement there is presumably no falsehood. *Id.* Also important is, "the informality of the situation and the interrogation." *Clark*, 576 U.S. at 245 citing *Bryant* at 377. The understanding of the Confrontation Clause in *Clark* should not be ignored merely because T.R. was not a child. And one can easily see how the analysis of the decision below mirrors the analysis in the now overruled opinions in *State v. Clark,* 999 N.E.2d 592, 597 (Ohio 2013) (overruled decision stated no "ongoing emergency" where child did not complain of physical injuries, did not need urgent medical care, and where medical care was not administered and child had been separated from other children).

Respondent argues a faithful application of the Court's primary purpose test supports the holding below that: (1) no emergency existed at the time of the 911 call; (2) T.R.'s statements identifying Respondent and his actions were testimonial; and (3) the lack of Confrontation results in a violation of his Sixth Amendment rights. Response, pg. 22. Respondent keys into the "relevant factors identified" by the Court's precedent as "overwhelmingly" supporting the decision of the court of appeals. Response, pg. 23.

Respondent essentially argues that statements that tell what happened, even in the immediate aftermath of an assault, are testimonial because they did not tell events as they were happening. Response, at pg. 23 citing *Bryant at 356*-357 (quoting *Davis*, 547 U.S. at 827). Although, Respondent argues this case

is like *Hammon* in how the statements here described past events, he selectively omits how the statements in the *Hammon* case were given to police rather than a 911 dispatcher, that the primary purpose of the question was investigatory, and that the statement included an *affidavit*. *Davis* at 820.

Next, Respondent argues that *Bryant* cannot control here because there was no record evidence that he had a firearm and highlights how the Court distinguished between unarmed assailants and assailants who use firearms. Response at 23. But unarmed assailants like those who strangle can be lethal. And in any event, there was still a gun in the apartment.

Third, Respondent, relying on *Davis*, argues there was no imminent threat to T.R. during the 911 call and that separation between assailant and victim was important. Response at 25. But *Bryant* also informs an ongoing emergency can exist where a suspect's location was unknown when the victim was located. *Bryant* at 359. Setting aside *Bryant's* description of the facts as involving a nondomestic dispute, recall here that T.R. fled her home during a global pandemic. Pet. App. 5-7. At that time, it was unclear whether Respondent was still in the home, whether Respondent would find T.R., and whether it would be safe for T.R. to return home.

Fourth, Respondent would require there be express evidence that there be some evidence to the threat to police or the public. Response at 26. But literature shows how domestic abusers pose threats

beyond the partner including to the police.[1] Thus, it appears important for police to know if they are responding to an act of domestic violence.

Finally, Respondent agrees that a victim's medical condition is important in contextualizing an ongoing emergency but would give weight to visible injuries and a victim's lay opinion. Response at 26. This ignores the invisible and potentially fatal injuries described by the victim. The often-overlooked medical concerns described in the Petition at 26-28 were confirmed in the Safe Living Space Amicus Brief at 7-8 (describing how sound practice requires transportation of anyone who has suffered strangulation to the emergency room and where there is loss of consciousness observation for 24 hours and discussion concussions and TBIs). The Court's decision in *Clark,* 573 U.S. 991 did not find the child's lack of immediate medical attention transformed the statement into a testimonial one. And while Respondent argues that T.R.'s medical condition did not prevent her from forming a testimonial purpose because she said she wanted to "report an assault" (see Response at 27) she also sounded distraught and was unsure whether she wanted to press charges.[2] Pet. App. 8, 67-68.

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[1] See Casey Gwinn, Gael Strack, & Craig Kingsbury, A Dangerous Link - From Stranglers to Cop Killers available at https://www.familyjusticecenter.org/resources/a-dangerous-link-from-stranglers-to-cop-killers.

[2] The Ohio Court of Appeals citation to Richard D. Friedman and Bridget McCoramack, Dial-In Testimony, 150 U. Pa. L. Rev. 1171 appears to adopt a position that those who call 911 do so

III. THE CASE PROVIDES AN IDEAL VEHICLE TO COHESIVELY ANSWER THE CONFRONTATION CLAUSE QUESTION.

Respondent's vehicle criticism is unpersuasive. First, there is no dispute that the Ohio Court of Appeals decision qualifies as "final" under 28 U.S.C. §1257. Second, there is no argument that a federal question was not raised and decided below. He does not argue that a federal question was not raised and decided below. And there is an adequate record because of the admission of the 911 recording as an exhibit which allowed the Ohio Court of Appeals to review it and cite to it throughout the opinion below.

If anything, Respondent's so called "vehicle" argument is an argument that the Court can wait for another case to revisit the Court's Confrontation Clause jurisprudence. Respondent suggests that the Court could consider one of the cases pending in the Supreme Court of Ohio. The Supreme Court of Ohio's pending consideration of two Confrontation Clause cases, as described in the Petition, does not mean the Court should deny the Petition. While both cases involve the Confrontation Clause and application of the Court's jurisprudence, the facts are different. Perhaps *State v. Wilcox,* 2023 Ohio App. LEXIS 2927, 2023 WL 5425510 (Ohio Ct. App. Aug 23, 2023), a case involving a witness's recorded statements on a body worn camera describing how her ex-boyfriend shot and killed her current boyfriend is merely a

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because testimonial intent because they know there will be a prosecution. See Pet. App. 53-54, fn. 26.

straightforward application of *Bryant* given that the defendant was at large. And while *State v. Smith,* 209 N.E.3d 883 (Ohio Ct. App. 2023) is like this case in that the domestic violence victim's statements were made after the assault rather than describing the assault was happening it is different in that the victim had visible injuries, expressed concern about her unborn baby, and was receiving medical treatment while speaking with police. As Petitioner explained when it filed the application to extend the time to file the Petition, this case and *Smith* involved closely related federal questions, "albeit under different factual circumstance" and there was a possibility that the two cases could be companion cases with each decided on its own merits. See Application (23A358).

IV. The Ohio Court of Appeals has decided an important question of federal law and review should be granted.

Three brief points are made here. First, the Court ought to grant the Petition because the Court has not yet decided the Confrontation Clause question under the circumstances here. It is an opportunity to clarify whether physical separation from an assailant, the failure to request an ambulance, and the lack of a firearm among other things precludes an "ongoing emergency." Second, the case is an opportunity to discuss the relevance of the excited utterance, a well-rooted hearsay exception, on Confrontation Clause analysis. Finally, the decision below and Respondent's arguments defending the merits of the decision is inconsistent with the Court's understanding of the Confrontation Clause given the analysis in *Clark* (notwithstanding the fact that the

victim in *Clark* was a child). And comprehensively understanding the "ongoing emergency" framework considering *Clark* is to understand that bearing witness and testimonial intent is true focus of the analysis.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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