No. 24-985

IN THE
SUPREME COURT OF THE UNITED STATES

State of Ohio,

Petitioner,

v.

Garry Smith,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ohio Supreme Court correctly held that an assault victim's description of past criminal conduct, made in response to structured police questioning, was "testimonial" for purposes of the Confrontation Clause.

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STATEMENT OF THE CASE

A. Legal Background

The Sixth Amendment guarantees the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. At its heart, the Confrontation Clause requires the prosecution to subject its witnesses to "testing in the crucible of cross-examination," *Crawford v. Washington*, 541 U.S. 36, 61 (2004)—a process this Court has called the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (citation omitted). The Confrontation Clause also ensures that no one will be criminally punished based on accusations procured by government officers outside of a courtroom, beyond the presence of the defendant and the jury. *See, e.g.*, *Coy v. Iowa*, 487 U.S. 1012, 1016-17 (1988); *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

Decades ago, the Court adopted an approach to the Clause that asked—notwithstanding the Clause's categorical demand—whether out-of-court accusations covered by the Clause were sufficiently "reliable" to dispense with the need for cross-examination. *See Ohio v. Roberts*, 448 U.S. 56 (1980). In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court repudiated that approach and returned to the Confrontation Clause's original meaning. Focusing on the Sixth Amendment's word "witnesses," and stressing that witnesses are individuals who provide *testimony*, the Court held: "Where *testimonial* statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69 (emphasis added). Consequently, out-of-court testimonial statements are inadmissible against criminal defendants unless the declarant actually takes the stand at trial—or the

declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Id.* at 53-54.

B. Facts and Procedural History

1. In March of 2020, Officer Brandon Soucek and his partner responded to a dispatch call "for a female assaulted." Pet. App. 5a. Officer Soucek arrived at the scene in East Cleveland, Ohio and activated his body camera. *Id.* The victim, B.B., and two EMTs were walking from the front porch of a house to an ambulance. *Id.*

Officer Soucek approached the ambulance while his partner questioned a witness outside. Pet. App. 5a-6a. The witness explained that she "called EMS because [B.B.] came on [her] doorstep." *Id.*

Officer Soucek entered the ambulance and asked B.B., who was now sitting down, "So what happened?" Pet. App. 6a. "B.B. told him that her fiancé had beaten her up because she had had an argument with his niece and that her fiancé had ripped out her hair." *Id.* 6a.

Officer Soucek then posed a series of questions. He asked whether B.B. and her fiancé lived together; where the assault happened; and for her Social Security number, name, and date of birth. Pet. App. 6a-7a. During this "calm" encounter, *id.* 19a, B.B. asserted that the altercation happened "down the street" and that her fiancé "drove away" and "left," *id.* 7a. She also noted that they had been drinking. *Id.* Officer Soucek then asked for the name of B.B.'s fiancé. *Id.* 8a. She responded by identifying respondent Garry Smith. *Id*. B.B. specified that his name was spelled with "two r's." *Id.* Officer Soucek asked for respondent's date of birth and address. *Id.*

While Officer Soucek questioned B.B., the EMTs interjected with their own questions, including about the fact she was pregnant. Pet. App. 8a. While attending to B.B., one of the

EMTs asked if, in addition to drinking, she had ingested any other substance. *Id.* 9a. B.B. shushed him twice. *Id.* She eventually responded, "I snorted a couple lines of cocaine." *Id.* When Officer Soucek completed his questioning, he exited the ambulance, and the ambulance drove away. *Id.* 10a.

Upon arrival at the hospital, B.B. was under the influence of drugs and alcohol to such an extent that she could not be properly assessed. The medical staff kept B.B. in the emergency department so that they could do a "sober re-eval" after the drugs and alcohol wore off. Tr. Ex. 10 at 7.

The next day, B.B. called respondent and asked him to drive her home from the hospital. Pet. App. 82-83a. He did so. *Id.*

2. The State indicted respondent on two counts of domestic violence under Ohio Rev. Code § 2919.25. Pet. App. 3a. He "pled not guilty to all charges" and maintained that B.B. must have sustained her injuries by getting into a fight with another woman. *Id.* 57a, 82a. He said he had been at the house only earlier in the day and that B.B. had been "fine" when he had left. *Id.* 11a.

Prior to the trial, respondent suspected the State might try to proceed without calling B.B. as a witness. Among other things, B.B. had outstanding warrants for her own arrest for domestic violence and child endangerment. *See State v. B[.]* (No. CR-21-661365). She also had a record of evading the criminal justice system.[1] Respondent accordingly filed a motion in limine to "preclude the state from introducing evidence of (among other things) [B.B.'s]

[1] B.B. had been arrested in July 2021 after she allegedly "strangled, punched and attempted to hit" her fifteen-year-old daughter with a "box fan and broom." Case Information Form, *State v. B[.]* (No. CR-21-661365). After her release on bond, she failed to appear in court two months later, and the court revoked her bond. *Id*. B.B. was taken back into custody in September 2023. *Id.*

out-of-court statements" without calling her to the stand. Pet. App. 58a. He argued that admitting those statements would violate the Sixth Amendment's Confrontation Clause and the Ohio Rules of Evidence. *Id.* The State asserted that "it had subpoenaed" B.B. and that, even if she did not appear, "her statements would nevertheless be admissible." *Id.* 59-60a. The court partially sided with the State, holding that B.B.'s statements were nontestimonial under the Confrontation Clause and deferring any ruling on their admissibility under state law. *Id.* 62a-63a.

B.B. did not appear at trial, and the State did not request a bench warrant demanding she appear. Pet. App. 63a n.4. Explaining this decision at the intermediate appellate court, the State pointed out that "it can be 'easier to go without the victim in these cases.'" *Id.* 103a (citation omitted).

Accordingly, the State sought to prove the charges against respondent by offering B.B.'s statements in the ambulance, as captured by Officer Soucek's notes and body camera footage. Pet. App. 5a. Respondent renewed his objections to the State's use of B.B.'s out-of-court statements. *Id.* 5a, 11a. However, the court overruled these objections and admitted the statements as "excited utterances" under state hearsay law. *Id.* 11a.

During the bench trial, the prosecution wove together the body camera video of B.B.'s statements and Officer Soucek's live testimony. Pet. App. 5a-7a, 64a-68a. "Rather than having Soucek testify based on his own recollection of events, the [S]tate asked Soucek to describe what he observed on the body camera footage and, at times, to repeat what [B.B.] had said as heard on the body camera footage while the trial court viewed the body camera footage." *Id.* 65a.

Beyond Officer Soucek, the only live witnesses for the prosecution were three other police officers, a 911 dispatcher, and a Cleveland police detective. Pet. App. 63a-64a. Although B.B. indicated that several witnesses had observed the altercation, there is also "no evidence" that prosecutors or police "attempted to locate or interview" any of those eyewitnesses. *Id.* 71a n.7. So the only evidence that respondent was the one who inflicted B.B.'s injuries came from B.B.'s out-of-court statements.

The judge found respondent guilty. Pet. App. 83a. After the verdict was entered, B.B. sent "a text message to be read at sentencing, requesting leniency." *Id.* The judge sentenced respondent to twelve months on each count to be served concurrently. *Id.* 84a.

3. Respondent appealed to the Court of Appeals for Ohio's Eighth District, arguing that the trial court had erred on both Confrontation Clause and state hearsay grounds when it admitted B.B.'s out-of-court statements in the ambulance. Pet. App. 55a-56a. The court of appeals agreed with respondent's Confrontation Clause claim, holding that B.B.'s statements to both Officer Soucek and the EMT were testimonial. *Id.* 105a. The court of appeals also held that admitting this evidence had not been harmless error, in part because "presenting [B.B.'s] testimony live (rather than through body camera footage) and subjecting her to cross-examination may very well have weakened the state's case." *Id.* 104a; *see also id.* 109a. Accordingly, the court of appeals vacated respondent's convictions and remanded for a new trial. *Id.* 110a. It did not reach whether B.B.'s statements were also inadmissible on hearsay grounds. *Id.*

4. The State appealed to the Ohio Supreme Court, arguing that the intermediate appellate court erred in finding B.B.'s statements in the ambulance inadmissible under the Confrontation Clause. Pet. App. 2a. To address that claim, the Ohio Supreme Court turned to

this Court's jurisprudence governing when allegations of criminal conduct to police officers or other first responders are testimonial. Such statements, the Ohio Supreme Court explained, "are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* 15a (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). On the other hand, statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* (quoting *Davis*, 547 U.S. at 822).

Applying that dichotomy, and agreeing with the intermediate appellate court, the Ohio Supreme Court held that B.B.'s statements to Officer Soucek were testimonial because they were given to further the investigation of the crime rather than to stem an ongoing emergency. Pet. App. 2a. The Court reasoned that, from Officer Soucek's standpoint, the circumstances of the encounter—including the "calm scene" and the fact that B.B. was already safely in the back of the ambulance—indicated that there was no "active threat against the victim." *Id.* 19a. Likewise, nothing gave him any reason to believe that Smith was a threat to members of the broader public. *Id.* 20a. Nor did Officer Soucek ask B.B. "whether Smith had a weapon" or any other question designed to address any ongoing threat. *Id.*

From B.B.'s standpoint, the analysis was much the same. She "knew that Smith was not a threat to her at the time of the police interrogation," as evidenced by the fact that she spoke to Soucek about the incident "without reservation." Pet. App. 22a. And to the extent that she displayed hesitancy to disclose "her own criminal activity in front of a police officer," that only further "demonstrate[d] that she had a testimonial intent." *Id.* Likewise, the Court

reasoned that the relative formality of the questioning while pinning down "what had happened" further cemented that B.B.'s statements to the police were testimonial. *Id.* 22a-23a.

At the same time, the Ohio Supreme Court held that B.B.'s statements made to the EMT were not testimonial, reasoning that the statements were made "for purposes of medical diagnosis" rather than to establish past events to aid law enforcement. Pet. App. 24a. The court then left it to the intermediate appellate court to address on remand whether the nontestimonial statements to the EMT were admissible under state hearsay law. *Id.* 25a. The Ohio Supreme Court directed the lower court, if necessary, to conduct a new harmless error analysis and address Smith's additional claims. *Id.*

Three justices concurred in part and dissented in part. Pet. App. 25a. These justices agreed that "B.B.'s statements after Officer Soucek asked for her Social Security number were testimonial and should have been excluded from evidence at Smith's trial." *Id.* 33a-34a. In addition, these justices agreed with the majority that the statements to the EMT were nontestimonial. *Id.* 34a. But these justices believed that Officer Soucek could not yet rule out the existence of an ongoing emergency during the first part of his interview of B.B. *Id.* 32a-33a. Thus, the justices would have found B.B.'s answers before she clarified that respondent had left the area to be nontestimonial. *Id.*

REASONS FOR DENYING THE WRIT

The State asks this Court to decide whether B.B.'s statement to the responding police officer that accused respondent of assaulting her was "testimonial" under the Confrontation Clause. But *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny provide a comprehensive framework governing whether out-of-court statements to responding

officers are testimonial, and the Court has already applied that framework multiple times to similar such accusations of domestic violence. The Ohio Supreme Court's factbound application of that framework does not warrant this Court's attention. The State cannot point to any jurisdiction that would have decided this case differently. Respondent's confrontation claim here raises no unanswered issue of importance that transcends this case. And the Ohio Supreme Court properly applied the governing framework to the particular facts here. Finally, this petition provides no occasion to reconsider any aspect of the *Crawford* doctrine or this Court's confrontation jurisprudence more generally. Certiorari should be denied.

I. The State seeks nothing more than factbound error-correction.

The Court has applied its modern Confrontation Clause doctrine numerous times in the context of fresh reports of criminal activity, including accusations of domestic violence. The Ohio Supreme Court did nothing more here than apply that well-established framework.

1. In this Court's seminal decision in *Crawford*, it held that the Confrontation Clause generally prohibits the admission of out-of-court "testimonial" statements unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. 541 U.S. at 59. The testimonial approach, the Court explained, does not turn on the "vagaries of the rules of evidence." *Id.* at 61. Instead, it is keyed to whether the declarant of an out-of-court statement was acting like a "witness," U.S. Const. amend. VI—that is, making statements to establish past facts for law enforcement use. *Crawford*, 541 U.S. at 51.

In the years since *Crawford*, the Court has refined the definition of "testimonial" statements. Most notably, in an opinion styled *Davis v. Washington*, 547 U.S. 813 (2006), the Court decided two cases in tandem: *Davis* itself and *Hammon v. Indiana*. Both cases involved accusations of domestic violence that were admitted under state hearsay law as excited

utterances. *Davis*, 547 U.S. at 820; *State v. Davis*, 64 P.3d 661, 664 (Wash. Ct. App. 2003). In *Hammon*, police "responded to a 'reported domestic disturbance' at the home of Hershel and Amy Hammon." *Davis*, 547 U.S. at 819. Officers kept the couple separated, interviewing Amy in the living room to establish "what had happened." *Id.* at 819-20. In *Davis*, a woman called 911 to report that she was "involved in a domestic disturbance with her former boyfriend." *Id.* at 818.

The Court set forth the following to resolve those cases: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. Applying that "primary purpose" framework, the Court then held that Amy Hammon's statements were testimonial, whereas the declarant's initial statements in *Davis* to the 911 operator were nontestimonial. *Id.* at 828-30. (The Court suggested that statements later in the 911 call might have been testimonial, but it did not resolve that question. *Id.* at 828-29.)

In *Hammon*, "[t]here was no emergency in progress" when the victim accused the defendant of assaulting her. 547 U.S. at 829. Instead, the victim's statements were given after the altercation was over, while the victim was safely in the presence of the investigating officer. *Id.* at 830. The Court explained that under those circumstances, Amy Hammon's statements were "an obvious substitute for live testimony, because they d[id] precisely *what*

a witness does on direct examination": they "deliberately recounted," in response to official questioning, "how potentially criminal past events began and progressed." *Id.* at 830.

By contrast, in *Davis*, the questions asked and answered "were necessary to be able to *resolve* [a] present emergency." 547 U.S. at 827. That was because the situation was much more fluid when the 911 call began. No officer was yet at the scene; indeed, the whole point of the call was to summon a police response because, in the victim's words, the defendant was there "jumpin[g] on [her] again." *Id.* at 817; *see also id.* at 827 (victim was describing events "*as they were actually happening*"). Accordingly, the victim's 911 "call was plainly a call for help against bona fide physical threat," not an attempt to document past events in a witness-like manner. *Id*. at 827.

The formality of the statements in the two cases differed as well. In *Hammon*, the context was "formal enough" because the victim's "interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].'" 547 U.S. at 830. In *Davis*, by contrast, the victim's "frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." *Id.* at 827. As the Court put it, "no 'witness' goes into court to proclaim an emergency and seek help." *Id.* at 828.

In *Michigan v. Bryant*, 562 U.S. 344 (2011), the Court applied *Davis*'s "primary purpose" test in yet another context. In that case, the victim of a "nondomestic" dispute was found suffering from a fatal gunshot wound. The perpetrator was at large, his identity and location unknown. *Id.* at 359. The victim identified his assailant to a responding police officer, and the trial court admitted that statement as an excited utterance. *Id.* at 351 n.1. This Court held that the statement was nontestimonial. Distinguishing both *Davis* and *Hammon*, the

Court reasoned that a gunman on the loose presents a threat to the "police and public" that a private domestic assault does not. *Id.* at 363. As such, even though the victim's statement described past events, its primary purpose was still to help resolve an ongoing "threat to first responders and the public," not to provide evidence for a later prosecution. *Id.*

The Court in *Bryant* also observed that the "logic" underlying this "ongoing emergency" analysis was "not unlike that justifying the excited utterance exception in hearsay law." 562 U.S. at 361. Excited utterances are often nontestimonial because "a startling event or condition" tends to "focus[] the mind" on an ongoing emergency, instead of on bearing witness. *Id.* The Court added that "[m]any other exceptions to the hearsay rules similarly rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution and therefore should not be barred by hearsay prohibitions." *Id.* at 362 n.9; *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009) (explaining that "[b]usiness and public records are generally admissible" because they are not typically created "for the purpose of establishing or proving some fact at trial").

At the same time, the *Bryant* Court also reaffirmed its holding in *Hammon* that a statement recounting a past domestic assault to a responding officer is testimonial. 562 U.S. at 365. Even if the perpetrator of such an incident has fled the scene, a perpetrator who is not "armed with a gun" typically poses "little prospect of [] a threat to the public." *Id.* at 364-65. Accordingly, statements the victim makes in that context—particularly in response to police questioning—remain focused on "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution" and thus are testimonial. *Id.* at 356 (quoting *Davis*, 547 U.S. at 822).

2. In holding that B.B.'s answers to the responding officer's questions here were testimonial, the Ohio Supreme Court did nothing more here than apply this well-established precedent. The officer's very first question—"what happened?"— was past tense. Pet. App. 6a. The Ohio Supreme Court thus emphasized that, just as in *Hammon*, the responding officer interviewed B.B. after the events in question had concluded. *Id.* 5a-7a.

The Ohio Supreme Court also carefully considered whether an ongoing emergency nonetheless existed. It noted that, during the interview, B.B. "knew that [respondent] was not a threat to her." Pet. App. 22a. She was safely in the presence of the police officer. *Id.* 7a. Nor, the Ohio Supreme Court explained, did Officer Soucek have any reason to perceive an ongoing threat: B.B.'s answers to his questions here were "far from the harried 911 call that was at issue in *Davis." Id*. 22a. Just as in *Hammon*, the interview took place during a "calm scene," and Officer Soucek took notes to document his interaction with B.B for evidentiary purposes. *See id.* 5a-6a.

Lastly, the Ohio Supreme Court observed that B.B.'s recorded responses were "an obvious substitute for live testimony, because they d[id] precisely *what a witness does* on direct examination." Pet. App. 22a (quoting *Davis*, 547 U.S. at 830). Just as in *Hammon*, they "deliberately recounted," in response to official questioning, "how potentially criminal past events began and progressed." *Davis*, 547 U.S. at 830.

II. There is nothing to be gained by engaging in the factbound analysis the State asks this Court to undertake.

The State advances three reasons for granting review to apply the already well-established primary-purpose framework to the specific facts here. None withstands scrutiny.

1. The State first tries to conjure up splits of authority in the lower courts—one regarding the "ongoing emergency" aspect of the "primary purpose" test and another

regarding the relationship between the confrontation right and hearsay law. But neither attempt is successful.

a. *Ongoing emergency.* The State contends that the Ohio Supreme Court's determination that no ongoing emergency existed while Officer Soucek questioned B.B. conflicts with the Maine Supreme Court's decision in *State v. Sheppard*, 327 A.3d 1144 (Me. 2024), and a handful of other cases. Pet. 16-21. The State is wrong.

In *Sheppard*, a police officer was driving "on routine patrol" when he noticed a woman on the street. 327 A.3d at 1146. She was crying and bleeding and looked "scared." *Id.*; *see also id.* at 1148. "Within ten seconds of becoming aware that [the officer] was present and before he could ask a single question," the woman made a "spontaneous" statement that "her boyfriend . . . had beat her up." *Id.* at 1146, 1151. The officer later recounted the statement from memory; he never created a written record of it. *See id.* at 1147-48. The Maine Supreme Judicial Court held that the victim's statement was nontestimonial because its primary purpose was to "resolv[e] a current and ongoing emergency," rather than "giv[e] evidence against Sheppard." *Id.* at 1157. In reaching this conclusion, the court stressed that the officer was not conducting any investigation when he happened upon the victim. Nor did he engage in any "structured police questioning." *Id.* at 1152. Instead, he simply received an "unsolicited" statement regarding a continuing physical threat. *Id.* at 1155.

The facts here are quite different. Officer Soucek was not on routine patrol and did not receive any sort of spontaneous statement. Rather, he "received a dispatch call to a home 'for a female assaulted'" and then "respond[ed]" to the scene of that suspected crime. Pet. App. 5a. Upon arrival, he "began to interview [B.B.] about the incident." *Id.* 19a. He started by inquiring, "So what happened?" *Id.* 20a. He continued by asking B.B. a series of

questions—much like would occur in a stationhouse interview or deposition—over the course of several minutes. *Id.* 5a-10a. These questions ranged from whether respondent lived with her to what the digits of her Social Security number were. *Id.* 6a-7a. Officer Soucek "actively t[ook] handwritten notes of B.B.'s answers." *Id.* 23a. The Ohio Supreme Court accordingly found that the primary purpose of the statement "was not to aid in the officer's response to an ongoing emergency but rather, to tell [B.B.'s] account of the incident" to aid a potential prosecution. *Id.* 22a.

None of the additional cases the State quickly references conflicts with the decision below either. In *United States v. Lundy*, 83 F.4th 615 (6th Cir. 2023), the Sixth Circuit held that a victim's statements to police were nontestimonial because a "convicted and armed felon" had pointed his gun at her just before the officers arrived, and the perpetrator's "location was unknown" at the time of her statement. *Id.* at 621. That reasoning is inapplicable here. "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." *Bryant*, 562 U.S. at 363. And cases in which dangerous gunmen are on the loose are different from those in which suspected victims of domestic violence tell investigating officers that their "assailants used their fists." *Id.* at 364. In the former situation, there is an ongoing threat to public safety even when the victim is safely in the presence of police officers. *Id.* at 372-74.[2]

In other cases the State cites, the statements at issue were made to private actors, not police officers. *See United States v. Johnson*, 117 F.4th 28 (2d Cir. 2024) (statement to the

[2] The Ohio Supreme Court's recent decision in *State v. Wilcox*, 2024 WL 5049115 (Ohio Dec. 10, 2024), confirms that it understands the difference between cases like *Lundy* and this one. In *Wilcox*, the court held that statements to a responding officer were nontestimonial when a shooting suspect was still at large. *Id.* at *3.

director of corporate security at Fox Corporation); *United States v. Latu*, 46 F.4th 1175 (9th Cir. 2022) (statements to a nurse and doctor responsible for treating the victim's broken jaw); *State v. Slater*, 939 A.2d 1105 (Conn. 2008) (statements to two strangers on the street and to a nurse and doctor at the hospital). Statements to such private individuals "are much less likely to be testimonial than statements to law enforcement officers" because they are much less likely to have prosecutorial purposes. *Ohio v. Clark*, 576 U.S. 237, 246 (2015).

Finally, the three decisions the State cites from intermediate state appellate courts (one of which is unpublished) do not establish any conflict either. *Contra* Pet. 19. State intermediate court decisions cannot contribute to a conflict of authority. *See* S. Ct. R. 10. In any event, the courts in *Gutierrez v. State*, 516 S.W.3d 593 (Tex. App. 2017), and *Wright v. State*, 434 S.W.3d 401 (Ark. App. 2014), concluded that the statements at issue were testimonial, the same bottom-line outcome reached by the Ohio Supreme Court here with respect to B.B.'s statements to Officer Soucek. And in *State v. Richards*, 928 N.W.2d 158 (Iowa App. 2019), the court held that the statement was nontestimonial because—as in *Bryant* and *Lundy*, but unlike here—it was taken to help find and apprehend an individual whom the police believed to be armed.

b. *Hearsay law.* The State also makes much of the fact that the Ohio Supreme Court held that B.B.'s statements to Officer Soucek were testimonial without ruling on whether they fell within the "excited utterance" exception to the rule against hearsay. Pet. 29; *see also* Pet. App. 13a n.2. The State argues that this approach implicates a conflict over how the *Crawford* framework interacts with hearsay law. Pet. 28-29. In reality, there is no conflict.

To start, nearly all of the cases the State cites were decided between 1999 and 2006—before this Court held in *Davis* that the Confrontation Clause barred the admission of Amy

Hammon's out-of-court statement even though it had been admitted as an excited utterance. 547 U.S. at 821. Those decades-old lower court decisions also predate this Court's subsequent decisions in *Bryant* and *Melendez-Diaz*, which further fleshed out the relationship between confrontation and hearsay law. *See supra* at 12. Those lower court decisions, therefore, are too old to contribute to any split under this Court's present jurisprudence.

Neither of the two more recent lower court decisions the State cites conflicts with the holding below either. The State first asserts that the Eighth Circuit has adopted a "categorical approach" under which "excited utterances are never testimonial." Pet. 28 (citing *United States v. Robertson*, 948 F.3d 912 (8th Cir. 2020)). Such a rule would run directly afoul of *Davis*—and, not surprisingly, the Eighth Circuit in *Robinson* issued no such holding. Instead, the Eighth Circuit held that the statement was nontestimonial in part because it "was intended to help police 'identify and apprehend an armed, threatening individual'"—a factor having nothing to do with an excited-utterance analysis. *Robinson*, 948 F.3d at 917 (quoting *United States v. Mitchell*, 726 Fed. Appx. 498, 502 (8th Cir. 2018)). The Ohio Supreme Court, by contrast, emphasized that B.B.'s statement was made to establish past events relevant to a potential criminal prosecution, not to enable the police to quell "any possible threat" to public safety. Pet. App. 20a.

The State also claims that the decision below conflicts with decisions from the Minnesota Supreme Court in which that court addressed whether statements at issue fell within a hearsay exception before considering Confrontation Clause arguments. Pet. 29. (citing *State v. Tapper*, 993 N.W.2d 432 (Minn. 2023), and *Bernhardt v. State*, 684 N.W.2d 465 (Minn. 2004)). But the Minnesota Supreme Court has not adopted a definitive order of

operations when evaluating Confrontation Clause and hearsay challenges. In *State v. Lopez-Ramos*, 929 N.W.2d 414 (Minn. 2019), for example, the court began by considering the Confrontation Clause. *Id.* at 417-23. Nor has the Ohio Supreme Court established any rigid order of operations. The Ohio Supreme Court began here with the Confrontation Clause because the sole question before the court was whether B.B.'s statements were testimonial. Pet. App. 14a. And that court opined merely that the intermediate appellate court's choice to analyze respondent's Confrontation Clause challenge before his hearsay challenge was "reasonable"—not that it was somehow required. *Id.* 13a n.2.

This case-by-case variance makes sense. An out-of-court statement the prosecution offers in a criminal case must satisfy both evidence law and confrontation law to be admissible. And just like this Court, state high courts may exercise discretion in determining which questions they will hear and the order in which they will address the questions before them. Indeed, it would be "heavy-handed" and "paradoxical" for this Court to dictate the "sequence" in which state courts address questions. Jeffrey Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 202 (2018).

2. The State next argues that "domestic violence is a pervasive problem" that sometimes justifies prosecutions without presenting in-court testimony from complaining witnesses. Pet. 31. No one disputes the importance of combating domestic violence. But this Court has already addressed the impact of the Confrontation Clause on such prosecutions. In *Davis*, the parties and various *amici* asked this Court to allow for "greater flexibility" in the use of testimonial evidence in domestic violence prosecutions without calling complaining witnesses to the stand. 547 U.S. at 832-33. But this Court declined that invitation, reasoning that allowing enhanced use of out-of-court accusations in that setting would inappropriately

"vitiate constitutional guarantees" in the name of law enforcement efficiency. *Id.* Two years later, the Court reiterated that while "[d]omestic violence is an intolerable offense," the judicial system may not "abridg[e] the constitutional rights of criminal defendants" to facilitate such prosecutions. *Giles v. California*, 554 U.S. 353, 376 (2008).

The State relatedly asserts that "[d]omestic violence abusers can pose dangers to the public including innocent bystanders" until they are apprehended. Pet. 33. But the Court's confrontation jurisprudence already accounts for that as well. In *Bryant*, the Court made clear that "[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue." 562 U.S. at 363. So if, under the facts of a particular domestic-violence investigation, an assailant who has fled still poses a genuine threat to others, a statement to a responding officer may well be nontestimonial. And even if it is not, other "statements to friends and neighbors about [domestic] abuse and intimidation" are likely to be nontestimonial. *Giles*, 554 U.S. at 376; *see also Clark*, 576 U.S. at 249 (statements recounting abuse to "individuals who are not law enforcement officers" are much less likely to be testimonial).

That being said, domestic violence incidents sometimes "have a narrower zone of potential victims" than other violent crimes, thereby rendering accusations to responding officers less likely to be nontestimonial. *Bryant*, 562 U.S. at 363-64. But that is simply a function of this Court's "highly context-dependent inquiry" for when an ongoing emergency exists. *Id.* at 363.

3. Finally, the State suggests that the "increased implementation of body worn cameras," as in this case, supports this Court's intervention here. Pet. 34. Yet the State does

not argue that bodycams should or could change the legal analysis under *Crawford* and its progeny in any meaningful way. Nor is there anything about bodycams that makes statements more likely to be nontestimonial. In fact, lower courts have routinely applied the *Davis* framework to bodycam footage without any difficulty. *See, e.g.*, *United States v. Tuttle*, 837 Fed. Appx. 391, 393-95 (6th Cir. 2020); *United States v. Lundy*, 83 F.4th 615, 617-21 (6th Cir. 2023); *United States v. Graham*, 47 F.4th 561, 568-70 (7th Cir. 2022); *Johnson v. Commonwealth*, 694 S.W.3d 232, 244-51 (Ky. 2023). Accordingly, the fact that video footage exists here creates no need for this Court to grant certiorari in this factbound case.

III. The Ohio Supreme Court faithfully applied *Crawford* and its progeny.

The State's attacks on the Ohio Supreme Court's application of the primary purpose framework are also unavailing.

1. The State first argues that the Ohio Supreme Court ignored a grab bag of relevant facts when conducting "its inquiry into the existence of an ongoing emergency." Pet. 21-23. But nothing the State highlights rendered B.B.'s statements to Officer Soucek nontestimonial.

To begin, the State argues that the Ohio Supreme Court's primary-purpose analysis failed to properly account for the fact that B.B.'s assailant had "left the area" when she spoke to Officer Soucek. Pet. 21. But, contrary to the State's contention, (Pet. 15) the Court in *Bryant* did not categorically distinguish the circumstances in *Hammon* from "situations involving suspects at large." The *Bryant* Court explained that the "primary purpose" test is "highly context-dependent." 562 U.S. at 363. And "the duration and scope of an emergency may depend in part on the type of weapon employed." *Id.* at 364. In *Bryant*, it was the perpetrator's use of a gun—not the mere fact that the perpetrator was on the loose when the

police responded—that "extend[ed]" the emergency "beyond an initial victim . . . to the responding police and the public." *Id.* at 359; *see also id.* at 373-74.

That reasoning does not apply here. There was no shooting, and Officer Soucek had no reason to believe the perpetrator had a weapon. *See* Pet. App. 20a.[3] Instead, the attacker here used only "fists" to harm B.B.—exactly the kind of assault that the *Bryant* Court distinguished from a shooting and explained is unlikely to give rise to an ongoing emergency even while the perpetrator is at large. 562 U.S. at 364.

In addition, the State is wrong (Pet. 22) that the fact that B.B. was receiving medical treatment while she answered Officer Soucek's questions rendered her statements to him nontestimonial. The Court in *Bryant* explained that "the medical condition of the victim" is relevant insofar as "a severely injured victim may have no purpose at all in answering questions posed; the answers [to an officer's questions] may be simply reflexive." 562 U.S. at 364-65, 368-69. Such was true in light of the victim's mortal gunshot wounds in *Bryant*. By contrast, *Davis* and *Hammon* "did not present medical emergencies, despite some injuries to the victims." *Id.* at 364.

This case falls into the latter category. There is nothing in B.B.'s interactions with Officer Soucek to suggest that she was incapable of having any purpose. To the contrary, she had sufficient wherewithal to shush the EMT (twice) when he asked about her drug use. Pet. App. 9a. As the Ohio Supreme Court recognized, this "selective disclosure of information and hesitancy to admit her own criminal activity in front of a police officer demonstrates that

[3] B.B. mentioned in passing later at the hospital that respondent had a gun. But as the State recognizes, she "made no mention of a weapon when the officers were questioning her while she was in the ambulance." Pet. App. 69a; *see* Pet. 21. And Officer Soucek never sought to ascertain whether respondent might pose a threat to public safety broadly. Pet. App. 20a.

she had testimonial intent when she made statements to the officer concerning the assault." *Id.* 22a.

Trying another tack, the State claims that B.B.'s responses were nontestimonial because Officer Soucek was asking about "where the incident occurred." Pet. 22. But the overall "context" of the questioning here, *Bryant*, 562 U.S. at 363, renders that fact immaterial. The scenario here was not like *Davis*, where the 911 operator had to discern the location of the crime to help first responders find and address an ongoing emergency. *See* 547 U.S. at 827-28. Rather, when Officer Soucek asked his questions, both he and B.B. were safely away from the location of the crime. The officer simply asked B.B. "[w]here did this happen" to establish one of the facts of the case—the "where"—for subsequent prosecutorial purposes.

The State also argues that B.B.'s statements were nontestimonial because she gave what the State calls "fragmented and conversational answers" to the officer's questions. Pet. 22-23. Even if the State is right in that characterization, it is wrong about what it means. No one would say that a witness on the stand at trial is not giving testimony simply because her speech is "conversational in tone with filler phrases ('you know')" or answers questions in "fragmented" sentences. *Id.* 22. A person's way of talking does not generally affect whether her statements are testimonial. At any rate, other evidence here makes clear that B.B.'s statements were testimonial. The officer asked B.B. a regimented set of questions—much like a mini-deposition—and the interview took place "away from any witnesses to the assault and safely away from her attacker." Pet. App. 23a; *see also id.* 6a-7a (reproducing deposition-like quotations and transcript). The officer even asked B.B. for her Social Security number—hardly an "informal" (Pet. 22) piece of information.

2. The State also argues that the Ohio Supreme Court gave short shrift to whether B.B.'s statements were excited utterances under Ohio law. Pet. 24. But as explained above, this Court has squarely held that statements much like the ones here are testimonial even if they qualify as excited utterances. *See Davis*, 547 U.S. at 821; *supra* at 17. So holding that B.B.'s statements so qualified would not have mattered here. The State responds by quoting *Bryant* and *Clark* for the proposition that "standard rules of hearsay, designed to identify some statements as reliable, will be relevant" to the testimonial inquiry. Pet. 30. But as also explained above, that passage from those opinions means merely that certain earmarks relevant to hearsay analyses will often be relevant to confrontation analyses as well. *See supra* at 12. And the Ohio Supreme Court considered the relevant earmarks here and correctly determined that B.B.'s statements to Officer Soucek were testimonial.

IV. This case provides no opportunity to revisit the *Crawford* framework more generally.

After the State filed its Petition here, two Members of this Court expressed interest in reconsidering the Court's approach to the Confrontation Clause. *See Franklin v. New York*, 145 S. Ct. 831 (2025) (statements of Alito and Gorsuch, JJ., respecting the denial of certiorari). But this case presents no occasion to revisit the primary purpose test or *Crawford*'s testimonial approach more generally. The State has not asked this Court to revisit any element of Confrontation Clause doctrine. In any event, this case would be a poor vehicle for reconsidering governing precedent.

1. Justice Alito's opinion in *Franklin* questions whether *Crawford*'s exclusionary rule comports with the "relevant common law rules at the time of the adoption of the Sixth Amendment." 145 S. Ct. at 831. But any deeper inquiry into such history in this case would not yield a different outcome.

As the State suggests, the "longstanding *res gestae* doctrine" is the most useful historical touchpoint for evaluating the sort of statements at issue in this case. Pet. 26. Under that doctrine, statements that were themselves part of the act in question were admissible at common law. In contrast, "'narrative[s] of past events, made after the events are closed' fall outside the *res gestae*." Jeffrey L. Fisher, *What Happened—and What is Happening—to the Confrontation Clause?*, 15 Brook. L. Sch. J. L. & Pol'y 587, 597 (2007) (quoting *People v. Wong Ark*, 30 P. 1115 (Cal. 1892)). For example, the statement "stop hitting me" would have been admissible under the *res gestae* doctrine, whereas the statement "he hit me," made after the fact, would not. *See id.* at 598-599 (citing examples).

The statements here fall unquestionably into the latter camp. B.B.'s answers to Officer Soucek's questions were a retrospective account of an incident that had ended. Indeed, she gave her statements in response to the initial question: "So what happened?" Pet. App. 6a. There is consequently no schism between the Ohio Supreme Court's confrontation analysis and common-law evidentiary principles. B.B.'s would not have been admissible under common law rules in effect when the Sixth Amendment was enacted.

2. Justice Alito also suggested in *Franklin* that the Court might benefit from revisiting *Crawford* entirely. 145 S. Ct. at 831-833. According to Justice Alito, the confrontation right might give defendants nothing more than a right to cross-examine witnesses who "appear in court and testify." *Id.* at 832. This Court, however, has always held to the contrary, making clear that the right sometimes excludes out-of-court statements from non-testifying witnesses. *See, e.g.*, *Motes v. United States*, 178 U.S. 458 (1900); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Lee v. Illinois*, 476 U.S. 530 (1986); *Lilly v. Virginia*, 527 U.S. 116 (1999). After canvassing the history of the confrontation right, *Crawford* simply held yet "again" that the

Clause applies beyond testifying witnesses to exclude some out-of-court statements. 541 U.S. at 50-51. The alternative approach Justice Alito has floated, in short, would require this Court to overrule not just *Crawford*, but over one hundred years of settled doctrine.

There is no good reason to do that. "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Crawford*, 541 U.S. at 51. Indeed, limiting the confrontation right to witnesses who testify in court would seemingly have condoned the introduction of Lord Cobham's out-of-court statement implicating Sir Walter Raleigh—perhaps the foundational event in the development of the common law confrontation right. *See id.* at 44-45, 51. That simply cannot be right. If the Court ever wishes to reconsider the confrontation right in general, it should wait for the development of a less radical proposal—or at least for the "insights and further experience of [the] lower court[s]." *Franklin*, 145 S. Ct. at 837 (Gorsuch, J., statement respecting the denial of certiorari).

CONCLUSION

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

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