No. 24-985

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

GARRY SMITH

Respondent.

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

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REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The petition presents two questions that have divided the lower courts and demand this Court's resolution. First, when does the immediate aftermath of a crime justify admitting victim statements made during initial police questioning at a crime scene? Second, do hearsay exceptions like excited utterances affect the testimonial analysis under *Crawford v. Washington*, 541 U.S. 36 (2004)? As the petition demonstrated (Pet. 16-21, 23-30), these questions arise in countless domestic-violence prosecutions when body-worn cameras capture victim statements that become critical when victims later refuse to testify.

Smith's brief reinforces why review is needed. This case exposes genuine doctrinal confusion that has left lower courts applying this Court's precedents in different ways—confusion that affects thousands of prosecutions nationwide (Pet. 28-30). Smith ignores this doctrinal divide.

The amicus brief from Joyful Heart Foundation and Aequitas underscore the urgency of review. Drawing on deep expertise, amici explain that domestic violence often involves persistent threats that extend beyond physical attacks. This Court should grant the petition.

ARGUMENT

I. Calls for Reexamining *Crawford*.

Two justices have recently called for reworking *Davis*'s "primary purpose" test. Justice Alito described it as producing "unpredictable and inconsistent

results" that "continues to confound courts, attorneys, and commentators" *Franklin v. New York*, 145 S. Ct. 831 (2025) (Alito, J., respecting denial of certiorari). Justice Gorsuch observed the test "came about accidentally" and "has caused considerable confusion." *Id.* at 836 (Gorsuch, J., respecting denial of certiorari).

Smith describes the current framework as well-established. But consistent terminology does not guarantee consistent outcomes. Courts applying the same test to similar facts have reached opposite conclusions—revealing a doctrinal flaw, not a factual distinction.

The doctrinal divide is stark. As shown (Pet. 16-17), Maine reached the opposite result on nearly identical facts in *State v. Sheppard*, 327 A.3d 1144 (Me. 2024). The parallels are striking: both cases involved domestic-violence victims who named their attackers to officers roughly twenty minutes post-assault in informal and conversational encounters, with assailants still at large. Yet courts reached conflicting conclusions.

Maine found the victim's statement nontestimonial while Ohio found it testimonial. The *Sheppard* court noted that the victim's statement was "spontaneous and unreflecting" and served "to enable police assistance to meet an ongoing emergency." *Id.* ¶¶ 11, 27. The *Smith* court reached the opposite conclusion using the same framework, finding that "any active threat against the victim, B.B., had been eliminated" before questioning began. (Pet. App. 19a). This exposes *Smith*'s flaw: it treats emergencies like light switches—on or off. When the switch flips off, informal statements become testimonial.

This binary approach fails to reflect the realities of volatile encounters. They're ongoing events. When nearly identical facts yield opposite constitutional outcomes, the framework invites "raw judicial choice." *Franklin*, 145 S. Ct. at 836 (Gorsuch, J., respecting denial of certiorari).

These concerns aren't new. For nearly two decades, Justice Thomas has maintained that the "primary purpose" test is "an exercise in fiction," disconnected from historical practice, and lacking predictability. *Michigan v. Bryant*, 562 U.S. 344, 379 (2011) (Thomas, J., concurring in judgment); *see also Davis v. Washington*, 547 U.S. 813, 839, 838 (2006) (Thomas, J., concurring in part and dissenting in part). He has proposed a historically grounded approach focused on formality and solemnity, limiting the Confrontation Clause to "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment); *see also Smith v. Arizona*, 602 U.S. 779, 804 (2024) (Thomas, J., concurring in part); *Ohio v. Clark*, 576 U.S. 237, 254-255 (2015) (Thomas, J., concurring in judgment). The statements here are none of these things.

Scholars have echoed these concerns. *See, e.g.*, David Crump, *Overruling* Crawford v. Washington*: Why and How*, 88 Notre Dame L. Rev. 115, 127 (2012). Professor Bernadette Meyler's archival research demonstrates that colonial practice diverged significantly from the English model *Crawford* indicated was universal. Bernadette Meyler, *Common*

Law Confrontations, 37 Law & Hist. Rev. 763, 765 (2019). Professor Meyler offers that founding-era practice was far more flexible than *Crawford* concluded. Colonial courts regularly admitted written statements when witnesses were unavailable without problem. Meyler, *supra*, at 777-85. And Professor Michael Pardo advises that confrontation doctrine be grounded in evidence theory's core principles of reliability, predictability, and fairness. Michael Prado, *Constructing Confrontation: Between Constitutional and Evidence Theory*, 57 U. Mich. J. L. Reform 813, 824-30 (2024).

As Justice Alito concluded, "the result might be a reaffirmation of *Crawford* or the adoption of an entirely different Confrontation Clause rule. But whatever the outcome might be, reconsideration is needed." *Franklin*, 145 S. Ct. at 833 (Alito, J., respecting denial of certiorari). This case presents that chance.

II. Smith's Opposition Confirms the Call to Revisit *Crawford*.

The Supreme Court of Ohio was divided (App. 1a-35a). So was the Ohio Court of Appeals (App. 55a-128a). Both courts examined the same six-minute encounter and applied *Crawford*, reaching vastly different results. Smith calls this faithful application (Opp. 19), but such divergent results from identical facts reveal deeper doctrinal problems.

The Supreme Court of Ohio majority found B.B.'s statements testimonial to police but not to EMTs. The dissent split differently: initial statements nontestimonial, later ones testimonial. Constitutional

rights now turn on parsing verb tenses. "What happened?" requires confrontation. "What is happening?" doesn't. B.B. described the same attack to both audiences in one conversation, yet *Crawford* renders her statements testimonial to one listener and nontestimonial to another. This cannot be right.

Smith's defense underscores the problem. He says that B.B.'s assailant "left the area," she was "safely in the back of the ambulance," no "active threat" remained. (Opp. 6, 19, 21). He concludes no emergency. So under Smith's application of *Crawford*, the constitutional line depends on judicial mind-reading about police motivations on a second-by-second basis. And if hearsay rules are still relevant earmarks, as Smith calls them (Opp. 22), then why does the analysis end when Smith says the emergency is over?

Smith does not address the concerns raised by Justices Alito and Gorsuch about the current framework being unworkable. Recent scholarship undermines *Crawford*'s historical foundations, which give "witnesses" a meaning "radically different" from the Compulsory Process Clause. And the primary purpose test "appears nowhere in the text of the Sixth Amendment," *Franklin*, 145 S. Ct. at 832–34 (Alito, J., respecting denial of certiorari). Rather than address these fundamental questions, Smith doubles down on a framework that produces different results depending on which judicial formulation courts choose—exactly the instability that demands review.

III. This Is Not a Factbound Case.

Smith insists this is merely a "factbound" application of settled law (Opp. 9). Not so. The Supreme Court of Ohio's decision does more than resolve a single case—it shapes Confrontation Clause doctrine through a categorical rule: once EMTs arrive and place a victim in an ambulance, any emergency ends, making all later statements to police testimonial. Period.

This contradicts *Michigan v. Bryant* at every turn. *Bryant* demands "a highly context-dependent inquiry," not mechanical rules. 562 U.S. at 363. It requires courts to assess emergencies "from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight." *Id.* at 361 n.8. Yet Ohio's new rule does what *Bryant* forbids: it uses hindsight to declare that because B.B. was "already safely in the back of the ambulance," the officer "knew that any active threat against the victim . . . had been eliminated." (App. 19a).

The consequences will be sweeping. When anyone is seriously injured, treatment comes first. Under Ohio's rule, any victim who reaches an ambulance before speaking to police is automatically "safe"—regardless of whether the assailant remains at large, whether the victim is in shock, or whether the officer has even begun to assess the threat. That's where the constitutional inquiry ends—incorrectly.

This approach has already split the courts. While Ohio categorically excludes such statements, Maine held otherwise. *State v. Sheppard*, 327 A.3d 1144 (Me. 2024).

The decision below thus does what Smith denies: it binds future courts, undermines doctrinal coherence, and threatens evidence-based prosecutions. That systemic error warrants this Court's review.

IV. Amici Underscore the Importance.

The amicus brief reinforces why this Court's should intervene. Joyful Heart Foundation and AEquitas detail the realities of domestic violence: the persistent threat that continues after physical attacks end, the pattern of coercion and control, and the danger victims face when seeking help. These organizations, with deep expertise in domestic-violence response, confirm what the petition argued—that the Supreme Court of Ohio's narrow view of "ongoing emergency" does not address the realities of domestic violence. (Pet. 31-34).

As the amici explain, domestic violence is not an isolated incident but "a persistent pattern of physical, sexual, and psychological abuse to instill fear and coerce intimate partners." (Amici Br. 3). The Supreme Court of Ohio ignored that "an emergency stemming from domestic violence does not necessarily end when one physical attack ceases." *Id*. at 4.

Declaring emergencies over when EMTs arrive is like assuming fires are extinguished when the fire truck arrives. Presence doesn't equal resolution of the emergency. Even so, the event is ongoing.

V. Res Gestae Is Relevant.

The problem is that *Davis* and *Bryant* have left courts without clear guidance on when criminal events truly end. The doctrinal gap has led, as in this case, to the mechanical application of "emergency"

determinations that ignore what courts historically understood: res gestae encompassed not just the criminal act but its immediate aftermath, when victims weren't witnessing but remained within the event's gravitational pull. This understanding points towards a more historically grounded and textually consistent approach.

Smith agrees with the premise that excited utterances were firmly rooted as res gestae. (Opp. 23). *See also State v. Branch*, 865 A.2d 673 (N.J. 2005) (describing common-law foundation). But the cases discussed here prove he is wrong to assume that because B.B.'s statements were made after the assault, they can't be res gestae (Opp. 22).

Courts take conflicting approaches to whether excited utterances affect the testimonial analysis. (Pet. 23-30). Smith's dismissiveness only highlights the problem with prematurely declaring emergencies over. Why should courts disregard the evidentiary principles underlying hearsay exceptions? They shouldn't.

Consider the landscape: the Eighth Circuit holds that excited utterances are never testimonial. *United States v. Robertson*, 947 F.3d 912, 916 (8th Cir. 2020). Ohio treated the inquiries as separate. App. 13a n.2. The First Circuit recognizes a middle ground. *United States v. Brito*, 427 F.3d 53, 60-61 (1st Cir. 2005).

This isn't fact-bound variation—it's disagreement about whether "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Ohio v. Clark*, 576 U.S. 237, 245 (2015) (citation omitted).

Why does this matter? Because history proves res gestae are inherently nontestimonial—with or without an ongoing emergency.

The historical record supports treating res gestae statements—including excited utterances—as inherently nontestimonial. In *United States v. Gooding*, 25 U.S. 460 (1827), the Court distinguished between "naked declarations" and statements that were "a part of the res gestae" because they were "coupled with proceedings." Captain Gooding hired a ship for illegal slave trading. When he did, certain communications became inevitable—the captain had to hire crew and explain payment arrangements. Captain Hill's statement that "Uncle John" (Gooding) would pay for the voyage was admitted as a declaration "coupled with proceedings for the objects of the voyage." The Court understood that res gestae statements were part of ongoing events—the event speaking through the participant, not a witness testifying about an event.

This understanding held firm. In *St. Clair v. United States*, 154 U.S. 134, 149–50 (1894), the Court explained that res gestae statements are "the undesigned incidents of a particular litigated act" that "are not produced by the calculating policy of the actors." These statements must "stand in immediate casual relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence."

The domestic-violence parallel is striking. In *Commonwealth v. M'Pike*, 57 Mass. 181, 184 (1849), a woman was stabbed by her husband. Massachusetts recognized that res gestae declarations are admitted

not as witness testimony but as "part of the ongoing event itself." The victim's immediate declaration to the witness that "John had stabbed her"—made "so recent after the receiving of the injury"—was admitted because it captured the spontaneous reaction to the stabbing, not a deliberate attempt to create evidence. An ongoing event.

This historical understanding is textually significant because under res gestae doctrine, the victim making a spontaneous statement isn't acting as a "witness against" the defendant—rather, the traumatic event itself is speaking through the victim's immediate reaction. It's an ongoing event.

B.B.'s ambulance statements prove the point. Between receiving medical care for her swollen face and other injuries and answering the officer's basic question, she said, "My fiancée beat me up 'cuz I had an argument with his niece . . . He pulled my hair up on the roots." (App. 6a, 66a). No solemnity. No deliberation. Just an immediate response from an injured woman—the essence of res gestae and the antithesis of testimonial statements.

The current doctrine has lost sight of this historical wisdom. Courts now struggle to identify when "ongoing emergencies" end because the framework focuses on physical safety rather than recognizing what courts previously knew: traumatic events extend beyond their physical violence into their immediate human consequences. When judges declare "safety" while victims still bear fresh wounds and attackers remain free, they truncate both history and human experience.

VI. The Remand Hearsay Question Doesn't Undermine Review.

Smith contends that B.B.'s statements do not qualify as firmly rooted res gestae because they occurred after the assault. But that misunderstands the doctrinal evolution. Courts have long recognized that res gestae encompasses modern hearsay exceptions—present-sense impressions, excited utterances, and statements of mental state. These categories are not confined to statements made contemporaneously with the crime.

But that's beside the point. The question here is not whether B.B.'s statements meet the excited-utterance standard but whether their classification under a firmly rooted hearsay exception supports their nontestimonial character. The Ohio Supreme Court addressed the constitutional issue first, correctly recognizing that testimonial statements are barred under the Sixth Amendment regardless of their evidentiary admissibility. (Pet. App. 13a n.2).

At most, the hearsay question may warrant remand following clarification of the "ongoing emergency" doctrine—a routine step. Indeed, the Ohio Supreme Court has already directed such a remand regarding B.B.'s statements to EMTs. (Pet. App. 24a–25a). And Smith agrees that the trial court admitted the statement as an excited utterance (Opp. 4), and he acknowledges the issue wasn't addressed on appeal, (Opp. 22). Of course, Smith claims that the Supreme Court of Ohio considered the hearsay theory. But he does so without citation. A careful reading confirms that the decision below was decided on whether there was an ongoing emergency.

The excited-utterance issue cuts to the heart of the Confrontation Clause analysis. Smith leans on *Davis v. Washington* to argue that such statements are testimonial—excited utterances or not. But that view misses the Court's *Michigan v. Bryant* clarification: the rationale behind the excited-utterance exception mirrors the logic of the ongoing-emergency doctrine. 562 U.S. at 361. These statements carry historical reliability in their DNA. Their res gestae foundations serve as historical analogues, not historical twins—offering textual and historical support for classifying them as nontestimonial. The bottom line is simple: whether we're talking about res gestae, excited utterances, or ongoing emergencies—all involve spontaneous statements made without intent to create trial testimony. Because these doctrines overlap and reinforce each other, courts should consider all relevant factors indicating non-testimonial purpose rather than mechanically focusing on ongoing emergency alone.

The Court should clarify that the analysis must account for the full scope of criminal events as historically understood—not just the moment of violence but its immediate wake, when victims remain participants in unfolding events rather than witnesses reflecting on past ones.

VIII. This Case Presents an Ideal Vehicle.

Smith claims this case is a poor vehicle because "the State has not asked the Court to revisit any element of Confrontation Clause doctrine." (Opp. 22). But parties "can make any argument in support of" a properly presented federal claim and "are not limited to the precise arguments they made below." *Yee v. City*

of Escondido, 503 U.S. 519, 534 (1992). The Court reaffirmed this in *Hemphill v. New York*, 595 U.S. 140, 148-49 (2022).

Smith also argues that the Court should wait for "the development of a less radical proposal." (Opp. 24). He repeats Justice Gorsuch's suggestion to await "the insights and further experience of [the] lower court[s]." (Opp. 24). But lower courts cannot overrule *Crawford*—only this Court can reconsider it.

Smith doesn't articulate any other vehicular objections. He doesn't dispute that the case raises a federal question. He can't argue the petition turns on factual disputes given the body-camera footage. He doesn't contest that these facts exemplify typical police encounters with injured people. He doesn't even contest finality—nor could he.

That silence confirms what the record shows: this case warrants the Court's attention. The facts aren't disputed—body-worn camera settles what was said. Petitioner argued from day one that the statements were admissible. The court below decided this federal question. And Smith defends the judgment under the Sixth Amendment.

Three Justices have already signaled that *Crawford*'s framework needs revisiting—and this case provides the perfect vehicle. The facts are undisputed, captured on body-camera footage without interlocutory complication. When identical encounters produce opposite constitutional outcomes depending on which court hears the case, the framework has failed. This case offers a clean record and compelling

stakes for this Court to historically ground Confrontation Clause jurisprudence.

CONCLUSION

Given the doctrinal confusion and the national impact, this case merits review. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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