No. 23-820

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

WILLIAM JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, on the facts of this case, an intermediate Ohio appellate court correctly held that a declarant's out-of-court statements were "testimonial" for purposes of the Confrontation Clause of the Sixth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Constitutional Provisions:

Statutes:

Rules:

Other Authorities:

INTRODUCTION

This case satisfies none of the traditional criteria for certworthiness. The decision below is simply an intermediate state appellate court's fact-specific application of well-settled law to a particular case. The court below issued no broad holding—indeed, no holding that extends beyond the unique facts of this case—and the State has not shown that the decision implicates any split of authority. The point is vividly illustrated by the State's own phrasing of the question presented, which consists of a 150-word description of this case's unique facts, followed by a simple request for this Court to assess whether on those facts the court of appeals correctly applied the testimonial/nontestimonial framework of *Crawford* v. *Washington*, 541 U.S. 36 (2004). See Pet. i. And this case would be an extraordinarily poor vehicle for revisiting this Court's Confrontation Clause jurisprudence.

The State tacitly concedes the absence of any decision from a federal appellate court or state court of last resort reaching an inconsistent outcome on materially similar facts. Presumably that is why the State carefully limits itself to the opaque suggestion that certain lower court decisions conflict "in principle" with the decision below. Pet. 11, 15, 17. Yet the State fails to show even that much. The cited cases simply illustrate that courts consistently and faithfully apply this Court's Confrontation Clause precedent to reach different results on different facts. That is unsurprising, given this Court's admonition that the relevant inquiry is "highly context-dependent." *Michigan* v. *Bryant*, 562 U.S. 344, 363 (2011). The State's bare disagreement with the court

of appeals' balancing of the unique factual considerations in this case provides no basis for this Court's review—though, in any event, the decision below was correct.

The real gravamen of the State's petition is that it thinks one of Ohio's twelve intermediate appellate courts applies the Confrontation Clause in an overly strict manner. See Pet. 22-23 (citing several Eighth District Court of Appeals opinions). But even if the State were right about that, its proper recourse is to first seek review in the Ohio Supreme Court, not ask this Court to act as a case-by-case superintendent of Ohio's lower state courts. To be sure, in *this* case the Ohio Supreme Court denied discretionary review. But as the State forthrightly concedes, briefing is underway in another case, likewise arising out of the Eighth District, in which the Ohio Supreme Court is considering the proper application of this Court's Confrontation Clause jurisprudence to statements made by an injured, alleged domestic violence victim to authorities in the aftermath of the precipitating incident. See Pet. 9-10; *State* v. *Smith*, 225 N.E.3d 1013 (Ohio 2024) (accepting appeal as case no. 2023-1289). In these circumstances, there is no reason for this Court to grant review of an intermediate state court decision that neither decided nor implicates any certworthy question of law. The petition should be denied.

STATEMENT

I. Legal Background

1. The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the ac-

cused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. amend. VI. Its purpose is to ensure that the reliability of testimony is subject to "testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Thus, "testimonial statements of a witness who d[oes] not appear at trial" cannot be admitted "unless [the witness] was unavailable to testify, and the defendant had * * * a prior opportunity for cross-examination." *Id.* at 53-54. This constitutional guarantee exists independently of state or federal evidentiary rules, such as hearsay exceptions codified in state or federal rules of evidence. *Id.* at 51.

The Confrontation Clause's guarantee applies to some, but not all, out-of-court statements. Specifically, statements that are "testimonial" fall within the Clause's ambit, whereas those that are "nontestimonial" do not. *Crawford*, 541 U.S. at 51-53; *Davis* v. *Washington*, 547 U.S. 813, 823-824 (2006). While this Court has not "produce[d] an exhaustive classification of all conceivable statements * * * as either testimonial or nontestimonial," it has provided significant guidance. *Davis*, 547 U.S. at 822. In particular, statements made "in the course of police interrogation," including statements to 911 dispatchers when acting as "agents of law enforcement," "are nontestimonial * * * under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822, 823 n.2. By contrast, such statements are "testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the in-

terrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822.

2. This Court has applied the foregoing analytic framework, which "has come to be known as the 'primary purpose' test," *Ohio* v. *Clark*, 576 U.S. 237, 244 (2015), in several cases involving interactions between law enforcement and professed witnesses to crimes. In *Davis* v. *Washington*, this Court considered statements made during a 911 call by Michelle McCottry, who was "involved in a domestic disturbance with her former boyfriend." 547 U.S. at 817. McCottry explained that "[h]e's here jumpin' on me," "usin' his fists." *Ibid.* The 911 operator informed McCottry that she had "got help started," and asked for the perpetrator's name. *Id.* at 817-818. McCottry stated that his name was Adrian Davis. *Id.* at 818. McCottry then reported that "[h]e's runnin' now" and was leaving in a car. *Ibid.*

In concluding that McCottry's statements identifying Davis were nontestimonial, this Court emphasized that McCottry was "speaking about events *as they were actually happening*, rather than describing past events." *Davis*, 547 U.S. at 827 (internal quotation marks and alterations omitted). Moreover, McCottry was plainly "facing an ongoing emergency" and phoned 911 in "a call for help against a bona fide physical threat." *Ibid.* "[T]he elicited statements were necessary to be able to *resolve* the present emergency," and "McCottry's frantic answers were provided over the phone, in an environment that was not tranquil[] or * * * safe." *Ibid.* Thus, the circumstances "objectively indicate[d]" that the primary

purpose of the conversation—at least until Davis left the premises—"was to enable police assistance to meet an ongoing emergency." *Id.* at 828. This Court cautioned, however, that "[i]t could readily be maintained that," from the point when McCottry reported that Davis had driven away, her remaining statements "were testimonial." *Id.* at 828-829.

This Court reached a different conclusion in *Hammon* v. *Indiana*, a companion case to *Davis*. In *Hammon*, officers responding to a domestic disturbance questioned the declarant, Amy Hammon, while her husband, Herschel, remained in a different room. 547 U.S. at 819. Although Herschel "became angry" and "made several attempts to participate in Amy's conversation with the police," he was "rebuffed" by officers, and the two were kept "separated." *Id.* at 819-820. Amy signed an affidavit stating that Herschel broke the furnace, shoved her into the floor, hit her and threw her down, broke other objects in the home, and attacked her daughter. *Id.* at 820.

This Court concluded that the statements in the affidavit were testimonial. It noted that "there was no immediate threat to [Amy's] person" when officers arrived, that she was "actively separated from the defendant," and that the questioning occurred "some time after the events described were over." *Davis*, 547 U.S. at 829-830. Moreover, although the interaction was relatively informal, it was "conducted in a separate room, away from [the] husband (who tried to intervene)"; ultimately, it "import[ed] sufficient formality * * * that lies to [the] officers" would be "criminal offenses." *Id.* at 830 & n.5. Thus, considered as a whole, the objective facts indicated that Amy's

statements were "neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation." *Id.* at 832. The Court contrasted these facts with *Davis*, where the declarant was "alone" and "unprotected," "apparently in immediate danger," and offered "present-tense statements" rather than a "narrative of past events * * * delivered at some remove in time from the danger she described." *Id.* at 831-832.

More recently, in *Michigan* v. *Bryant*, this Court considered statements made by a mortally wounded shooting victim found by police in a gas station parking lot. 562 U.S. at 349. In response to police inquiries about what happened, the victim provided an identification and description of the shooter and the location of the shooting. *Ibid.* Reiterating the "highly context-dependent" nature of the inquiry, this Court held that the victim's statements were nontestimonial. *Id.* at 363, 377-378. In contrast to *Davis* and *Hammon*, *Bryant* presented a situation in which "an armed shooter, whose motive for and location after the shooting were unknown," was at large, potentially presenting an ongoing risk to public safety. *Id.* at 374. Particularly because the perpetrator was armed with a firearm, "[t]he physical separation that was sufficient to end the emergency" in *Hammon* was "not necessarily sufficient to end the threat" in *Bryant*. *Id.* at 373. That was especially true given that the shooter's location was unknown, and there was "no reason to think that the shooter would not shoot again if he arrived on the scene." *Id.* at 377. In addition, the declarant was "mortally wounded," and his "answers to the police officers' questions were punc-

tuated with questions about when emergency medical services would arrive." *Id.* at 374-375. In these circumstances, the "primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency," and the victim's identification of the shooter was nontestimonial. *Id.* at 377-378 (internal quotation marks omitted).

II. Factual and Procedural Background

1. On October 26, 2020, Respondent was indicted on counts of domestic violence and child endangering, arising out of an alleged assault of his child's mother, T.R. Pet. App. 2. Respondent pleaded not guilty, and a bench trial was held. *Ibid.*

a. A critical piece of evidence at trial was an audio recording of a 911 call T.R. made on the night in question. The call began with the dispatcher, Allyson Walentik, asking, "Where is your emergency?" Pet. App. 6. T.R. responded, "in Parma." *Ibid.* T.R. stated that she had "just left" and wanted to "report an assault," providing the address of her Parma apartment. *Ibid.* T.R. stated that her child's father had started hitting her, saying that she owed him money. *Ibid.* T.R. informed Walentik that to her knowledge the alleged assailant was still at the apartment, but that T.R. had left with her son and drove to her parents' home in Maple Heights, a 10-minute drive from Parma. *Id.* at 7; see also Pet. 8 n.5.

T.R. informed Walentik that she had a gun, which was registered in her name, "put up" in a bathroom closet in the apartment. Pet. App. 7. She stated that she had not "pull[ed] it on him or anything" and "couldn't get to it," but wanted Walentik to know it

was there. *Ibid.* In response to further questioning from Walentik, T.R. provided Respondent's name and date of birth, and her own name and phone number. *Ibid.* She confirmed that she had left "like 10 minutes ago" and was calling from her mother's phone. *Ibid.* T.R. stated that Respondent had choked her and hit her with his knee, but when asked whether she needed an ambulance, she stated that she did not. *Id.* at 7-8. Walentik asked T.R. if she "wanted charges" on Respondent. *Id.* at 8. T.R. responded, "I don't know," but said her father wanted her to press charges. *Ibid.* In response to further questions, T.R. stated that she and Respondent were currently living together, and that she had the only car (which she had used to drive to her parents' house). *Ibid.* The recording introduced at trial ended abruptly with Walentik stating "Hold on for just a second." *Ibid.*

T.R. did not ask Walentik to send police to her apartment during the 911 call, see Pet. App. 47 n.23, but (for reasons unclear from the trial record) police later met T.R. at the apartment in Parma, searched the premises, and did not find Respondent. *Id.* at 10-11. A warrant was obtained for Respondent's arrest, *id.* at 13, and he was arrested some months later, after he called police and reported that T.R. "was threatening him with a knife." *Id.* at 51; see *id.* at 13.

b. Respondent moved to exclude the audio recording of the 911 call. Pet. App. 3. He argued that T.R.'s statements on the call were testimonial and that their admission would violate his right to confront the witness against him, given that T.R. was

not present at trial. *Id.* at 3-4. He also argued that T.R.'s out-of-court statements did not constitute "excited utterances" and were inadmissible hearsay under the rules of evidence. *Id.* at 4. The trial court disagreed and admitted the recording. *Id.* at 5, 14. Respondent was found guilty and sentenced, *inter alia*, to a suspended 18-month prison sentence. *Id.* at 15-17.

2. Respondent appealed to one of Ohio's intermediate appellate courts (the Eighth District Court of Appeals), arguing again that the 911 call's introduction violated his confrontation rights and that it was inadmissible hearsay. See Resp. C.A. Br. 3.

a. The appellate court agreed with Respondent that T.R.'s statements identifying him and reporting what he had done were testimonial. Pet. App. 39.[1] After summarizing in detail this Court's precedent on the testimonial/nontestimonial distinction and the primary purpose test, see *id.* at 19-28, the court of appeals set out to "appl[y] [this] established precedent" to the "unique set of facts" and evidentiary record before it. *Id.* at 39. The court explained that while "[s]tatements a caller makes during a 911 call are often * * * non-testimonial," *id.* at 25, that is not universally so. Consistent with this Court's precedent and the reality (supported by trial testimony in this case) that 911 calls are often made to report "crimes after the fact" in "nonemergenc[y]" circum-

[1] Because it was unnecessary to do so, the court of appeals did not decide whether the other statements made during the 911 call were testimonial. Pet. App. 32 n.16.

stances, the court of appeals explained that it was necessary to examine the circumstances and objectively assess whether the primary purpose of the statements was to enable police assistance to meet an ongoing emergency. *Id.* at 32.[2]

"[O]bjectively considering the totality of the circumstances," the court of appeals concluded that T.R.'s statements were testimonial. Pet. App. 33. The absence of an ongoing emergency became apparent in the first few moments of the call. *Id.* at 34. At the outset, T.R. "told Walentik that she 'wanted to report an assault,'" and "Walentik learned within the first few seconds of the 911 call" that T.R. had left the location of the alleged assault and was "not facing any immediate harm." *Id.* at 34, 37.

The court explained that T.R. and her son were safe at her parents' house, and had "no reasonable expectation that [Respondent] would follow them." Pet. App. 34. They were not just physically separated from Respondent—a fact that, the court acknowledged, would not necessarily imply, on its own, the absence of an ongoing emergency. *Id.* at 34 n.18. Rather, they were "in a safe environment and out of

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[2] The court acknowledged that "there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony," and thus nontestimonial. Pet. App. 23 n.12 (quoting *Bryant*, 562 U.S. at 358). But because the State never "claimed that any such 'other circumstance' existed in this case," the court did not "further address that issue here," instead focusing on the presence or absence of an ongoing emergency. *Ibid.*

danger" at T.R.'s parents' home "in another city." *Id.* at 36 n.18. They did not "need emergency medical services." *Id.* at 34-36. And there was "nothing in the record to suggest" that Respondent "presented any ongoing, immediate physical threat" to T.R., her son, the police, or the public at the time of the call. *Id.* at 36. To the contrary, T.R. affirmatively "told the 911 operator that she did not need any medical services," *id.* at 40, and "[d]uring the 911 call," T.R. did "not ask Walentik to send police to her apartment," *id.* at 47 n.23. Moreover, T.R.'s statements were "not simply reactive," but "demonstrate[d] a level of reflection." *Id.* at 37. For example, T.R. "had contemplated whether to press charges against Johnson (and, in fact, had discussed the issue with her father) prior to making the 911 call." *Id.* at 38.

Because the court of appeals concluded that the trial court's error was not harmless, it reversed and remanded. Pet. App. 49-57. The court did not address Respondent's alternative argument that the statements were not admissible as excited utterances under state rules of evidence, because that issue was rendered moot by the court's disposition of the Confrontation Clause question. *Id.* at 39 n.20. The court did, however, express skepticism toward the trial court's conclusion that the excited-utterances exception would apply. *Id.* at 38 n.19.

b. One judge dissented. Though he focused largely on perceived deficiencies in the appellate briefing, see Pet. App. 59-61 (Sean C. Gallagher, P.J.), he also disagreed with the majority's application of the primary purpose test. Despite agreeing that there is "no * * * presumption" that 911 calls are nontestimonial,

id. at 67, he emphasized that T.R. was "audibly upset," *id.* at 63, and placed weight on his view that Respondent "potentially" had "access" to a firearm, *id.* at 64—notwithstanding the absence of evidence indicating that Respondent knew about the gun, which was stored in a closet and registered in T.R.'s name. He also expressed doubt about whether T.R. actually said she was calling to "report" an assault, because he found that portion of the audio unclear. *Id.* at 62 n.29.

3. The State moved to certify a conflict, for reconsideration, and for en banc consideration. Those motions were denied. Pet. App. 71-73, 76-77. The State then sought discretionary review by the Ohio Supreme Court, and its request was denied. *Id.* at 89. However, the Ohio Supreme Court subsequently granted the State's requests for review in two Confrontation Clause cases involving the application of this Court's primary purpose test, both dealing with statements made to police and recorded on body cameras. See Pet. 9-10. One of those cases, *State* v. *Smith*, 209 N.E.3d 883 (Ohio Ct. App. 2023), appeal accepted, 225 N.E.3d 1013 (Ohio 2024), centers on the admissibility of statements made to police by an injured domestic violence victim and, like this case, arises out of the Eighth District Court of Appeals. As of the date of this filing, both cases remain pending in the Ohio Supreme Court.

REASONS FOR DENYING THE PETITION

I. The Petition Demonstrates No Split of Authority.

1. This case implicates no split of authority, much less one worthy of this Court's review. Indeed, even if the intermediate state appellate court's decision here *did* conflict with other courts' decisions, it still would not meet the Court's traditional certiorari criteria, which address conflicts between federal courts of appeals and "state court[s] of last resort." See Sup. Ct. R. 10.[3] Regardless, the State fails to show that the decision below conflicts with any decision from another federal or state appellate court, either as to the legal standards it applied or the outcome it reached.

2. The State asserts that the decision below conflicts "in principle" with certain federal appellate decisions, vaguely hinting that they are in tension with the decision below because they "illustrate" that "descriptions of past events can be nontestimonial." Pet. 15-17. But the court below explicitly disclaimed the notion that descriptions of past events are necessarily testimonial. Pet. App. 44-45. It simply held that the

[3] Notably, the State does not suggest that the Ohio Supreme Court has adopted a position on any of the issues presented in the petition. The Ohio Supreme Court's decision not to grant discretionary review does not change the calculus. "The refusal of the [Ohio] Supreme Court to accept any case for review shall not be considered a statement of opinion as to the merits of the law stated by the trial or appellate court from which review is sought." Ohio Sup. Ct. Rep. Op. R. 4.1; accord *State* v. *Davis*, 894 N.E.2d 1221, 1225 (Ohio 2008).

descriptions of past events at issue *here*, on the facts of *this* case, were testimonial. In any event, the State's assertion of a conflict "in principle" collapses upon examination of the cited cases, which merely applied the same context-sensitive primary purpose test on different facts.

United States v. *Lundy*, 83 F.4th 615, 616-617 (6th Cir. 2023), involved queries about the whereabouts of an armed felon who threatened the declarants just minutes prior, at the same location and who could return any moment. On those facts, the court found that the "primary purpose" of the statements was to "meet an ongoing emergency." *Id.* at 621 (citation omitted). That factual scenario is worlds away from this case, where the declarant had fled to a different town miles away and there was no reason to believe the alleged (unarmed) attacker could, would, or did follow.

So too with *United States* v. *Estes*, 985 F.3d 99 (1st Cir. 2021). The court in *Estes*, stating and applying this Court's primary purpose test, found statements nontestimonial where the victim was "speaking [to a 911 dispatcher] about current events in real time," while physically in the car with (or "otherwise in close proximity to") her boyfriend. *Id.* at 104. The boyfriend had just pointed a loaded gun at her, was "acting in an odd and unstable manner," and, in the victim's estimation, was "probably going to shoot her." *Id.* at 102-104 (alterations omitted). The court explained that although the caller waited 20-30 minutes after the defendant "pointed the gun" to call 911, she likely did so "because she was in a car with [the defendant]"—and at the time of the call, the de-

fendant "still had the gun and could have taken it from his pocket at any time." *Id.* at 104-105.

United States v. *Fryberg*, 854 F.3d 1126 (9th Cir. 2017), is even further off-point. That case rejected a Sixth Amendment challenge to admission of a return of service document used to prove the defendant received notice of a hearing. *Id.* at 1130. *Fryberg* involved and decided no question about the admissibility of 911 calls, mentioning the subject only in background reference to *Davis*' facts. *Id.* at 1134.[4]

Finally, the Fifth Circuit's unpublished disposition in *United States* v. *Bates*, No. 22-60261, 2023 WL 1099148 (5th Cir. Jan. 30, 2023) (per curiam), is not binding even within that circuit, see 5th Cir. R. 47.5.4—and, in any event, is readily distinguishable. That case involved a 911 call reporting that the defendant had brandished a firearm during an argument and left with the weapon. *Bates*, 2023 WL 1099148, at *1. The court concluded that "the emergency had not been quelled because [the defendant] either still had the firearm or disposed of it in pub-

[4] To the extent the State cites *Fryberg* to support the proposition that "there may be other circumstances, aside from ongoing emergencies," in which statements are nontestimonial (because the facts otherwise indicate their primary purpose is not to establish past events potentially relevant to prosecution), again, the court of appeals agreed. Pet. App. 23 n.12 (quoting *Bryant*, 562 U.S. at 358). However, the State failed to argue below that any such "other circumstance" existed here—forfeiting any such argument. *Ibid.*; cf. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 33-34 (2001) (declining to reach alternative argument "because it was not raised or briefed below").

lic." *Ibid.* This case, by contrast, lacks the factual predicate the Fifth Circuit relied upon to conclude that an ongoing emergency existed. See Pet. App. 36-37 (no indication Johnson used or had access to a firearm, or otherwise posed a public threat).

3. The State next turns to a broader (if vaguer) theory that courts "struggle to apply" the primary purpose test, suggesting that some courts—supposedly including the court below—"emphasize" whether the statements focused on past events, whereas others "take a broader view." Pet. 17; see generally *id.* at 17-22. But this argument simply misdescribes the decision below. To be sure, the court of appeals gave weight to the fact that the statements described past events—as *Davis* not only permits, but requires. See *Davis*, 547 U.S. at 827. That was, however, only one of many factors the court considered in its evaluation of the "totality of the circumstances." Pet. App. 33. Other courts take the same approach, and the scattered citations in Part III of the petition do not demonstrate any split of authority. At most, they show courts reaching different results in different circumstances, in faithfully applying a legal framework that this Court has described as fact- and context-specific.

The Sixth Circuit's decision in *United States* v. *Arnold*, 486 F.3d 177 (6th Cir. 2007) (en banc), is a case in point. The court acknowledged the primary purpose test articulated in *Davis*, and enumerated the same pertinent factors identified by the Ohio court in this case. *Id.* at 187-188 (quoting *Davis*, 547 U.S. at 827); accord Pet. App. 21 (identifying same factors). The Sixth Circuit concluded that the state-

ments to a 911 operator in that case were nontestimonial, where a woman called to say the defendant was "fixing to shoot" her. 486 F.3d at 189. Although the victim had "left the residence," she had merely gone "around the corner and called the police." *Id.* at 190. At the time, "she had no reason to know whether [the defendant] had stayed in the residence or was following her." *Ibid.* The Ohio court below understandably found *Arnold* distinguishable, see Pet. App. 35 n.18, given the *Arnold* declarant's expressed belief that an armed assailant intended to kill her, her physical proximity to the scene, and the absence of reason to believe the assailant would not return.

Smith v. *United States*, 947 A.2d 1131 (D.C. 2008), is to similar effect. The State cites that case for its observation that "the actual physical presence of the alleged wrongdoer" should not always be given dispositive weight. *Id.* at 1134. But the State ignores the case's key facts: a 911 caller's report that her husband assaulted her, then "either [ran] out of the house, *or was still in the basement*," followed by a plea for the dispatcher to "hurry" in sending help. *Id.* at 1133 (emphasis added). The D.C. Court of Appeals reasonably concluded there was an ongoing emergency because the complainant "did not know appellant's location, could not know if the attack had ended, and feared he might return." *Id.* at 1134. By contrast, on facts closer to those presented here, the same court concluded that statements to responding police were testimonial. *Andrade* v. *United States*, 106 A.3d 386, 389, 391 (D.C. 2015) (police's post-incident questioning of alleged domestic violence victim elicited testimonial statements, where unarmed assailant depart-

ed the residence and there was no indication he would imminently return). There is no difference in the legal standards applied in *Smith* and the decision below—only different material facts.

The State argues that *United States* v. *Brito*, 427 F.3d 53 (1st Cir. 2005), took a "different approach" from the Ohio court here, Pet. 19, because *Brito* observed that similar facts may bear on whether a statement is testimonial and whether it is an "excited utterance" under hearsay rules—rendering the two inquiries practically related, though analytically distinct. 427 F.3d at 60-61; accord *United States* v. *Ayoub*, 701 Fed. Appx. 427, 439 (6th Cir. 2017) (similar). But the Ohio court below acknowledged the same distinct-yet-overlapping relationship between the two inquiries. See Pet. App. 30-31. Indeed, it explicitly noted that some of the same facts were relevant to both the Confrontation Clause and excited-utterance inquiries here—such as the declarant's prior contemplation and discussion of whether to press charges, which cut *in favor* of concluding that the statements were testimonial and *against* treating them as excited utterances. *Id.* at 38 & n.19. There is no conflict "in principle" with *Brito*, and certainly no conflict in outcome, given its radically different facts. See *Brito*, 427 F.3d at 56, 62-63 (911 call made mere moments after nightclub shooting, reporting armed man on the loose who pointed gun at caller, was nontestimonial).[5]

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[5] The State also passingly cites *United States* v. *Robertson*, 948 F.3d 912 (8th Cir. 2020), wherein the Eighth Circuit referred to its stance, predating *Davis*, that 911 calls "are ad-

Finally, the State string-cites a handful of decisions from other state courts, mostly intermediate appellate courts but including some state courts of last resort. But none articulates any legal principle that conflicts with the framework applied by the court of appeals here, and the varying results in those cases are readily attributable to factual differences. *State* v. *Camarena*, 176 P.3d 380, 386-387 (Or. 2008), acknowledged and articulated *Davis*' primary purpose test, and found statements in a 911 call nontestimonial where they occurred within one minute of the attack, and there was a reasonable likelihood that the assailant (who had departed just seconds previously) could imminently return to the apart-

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missible as nontestimonial statements when they are 'excited utterances.'" *Id.* at 916. In practice, however, *Robertson* applied a legal standard fully aligned with that of other courts—looking to the nature of the statements, and their intended purpose to help police address an ongoing emergency—to conclude they were nontestimonial. *Id.* at 916-917. The statements at issue (a breathless identification of an armed man who had "just now shot at [someone]" and was "going to come back with a gun," *id.* at 916) would be nontestimonial under *Davis* in any jurisdiction. In any event, the State's petition never contends (and could not credibly contend) that any statement qualifying as an "excited utterance" under state hearsay rules is *ipso facto* nontestimonial. See *Davis*, 547 U.S. at 821, 829-830 (holding that statements in *Hammon* were testimonial, notwithstanding state court's determination they were excited utterances). And this case would be a uniquely poor vehicle to address that issue anyway, given that the court below did *not* hold that the statements at issue were excited utterances. (To the extent the court addressed the issue, it expressed skepticism toward that claim.) See Pet. App. 38 n.19, 39 n.20.

ment from which the 911 call was made. That is a far cry from the facts of this case, where the declarant had fled to safety with her parents in a different town. The petition's other cited cases are even less persuasive. See *State* v. *Miller*, 814 S.E.2d 93, 100 (N.C. 2018) (statements leading officer to enter apartment and check to determine whether attacker was still present were nontestimonial because of ongoing emergency); *People* v. *Chism*, 324 P.3d 183, 203 (Cal. 2014) (statements nontestimonial where suspect was "armed with a gun, remained at large and posed an immediate threat to officers responding to [a] shooting and the public").[6]

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[6] The petition also cites various decisions (many unpublished) from intermediate state appellate courts. This Court does not grant review to resolve tensions between intermediate state courts, see Sup. Ct. R. 10, but regardless, the cited cases simply applied the primary purpose test to reach different outcomes on varying facts. Compare *State* v. *Rawlins*, No. 22-1259, 2023 WL 6620129, at *5 (Iowa Ct. App. Oct. 11, 2023) (statements testimonial where attacker "fled the scene in his vehicle, a weapon was not involved, and the victim did not need medical attention"), *People* v. *Covington*, No. 4-19-0676, 2021 WL 4127073, at *9 (Ill. App. Ct. Sept. 8, 2021) (statements testimonial where "calm" caller reported her boyfriend kicked in her door, then departed), *Gutierrez* v. *State*, 516 S.W.3d 593, 598-599 (Tex. App. 2017) (statements testimonial where assailant drove away, "[n]o one expressed concern" he "would return," and declarant declined medical aid), and *Wright* v. *State*, 434 S.W.3d 401, 407-408 (Ark. Ct. App. 2014) (statements testimonial where defendant left area and posed no "ongoing threat to the public, to [the declarant], or to the police"), with *State* v. *Bassett*, No. 21-0923, 2022 WL 16630788, at *7 (Iowa Ct. App. Nov. 2, 2022) (despite no emergency, statements

II. The Decision Below Was Correct.

Although a purported fact-specific error in an intermediate state appellate court's application of well-accepted precedent is no basis for this Court's review, the court of appeals' decision was, in any event, cor-

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nontestimonial when made in police's accidental encounter with reluctant declarant), *Commonwealth* v. *Fitzgerald*, 284 A.3d 465, 471-472 (Pa. Super. Ct. 2022) (statements nontestimonial where assailant was "tearing [declarant's] house apart" and declarant "pleaded with the operator" to "come soon"), appeal denied, 297 A.3d 400 (Pa. 2023), *State* v. *Williams*, 462 P.3d 832, 837 (Utah Ct. App. 2020) (statements nontestimonial where caller "was in an unsafe environment," and assailant was "still at large and potentially carrying a weapon"), *State* v. *Sykes*, No. 18-1564, 2019 WL 5424945, at *2-3 (Iowa Ct. App. Oct. 23, 2019) (statements nontestimonial where caller "requested the assistance of medics and police," and assailant, who "probably had weapons," was "in the parking lot" of hotel where caller was located), *State* v. *Richards*, No. 18-0522, 2019 WL 1057886, at *2, *5 (Iowa Ct. App. Mar. 6, 2019) (statements nontestimonial where victim, in need of medical care, stated that if assailant found out she called police, "he's going to kill me"), *State* v. *Soliz*, 213 P.3d 520, 525-527 (N.M. Ct. App. 2009) (statements nontestimonial where declarant fled to neighbor's house, was "uncertain whether [assailant] might harm" the "two small children" she left behind, and "needed medical attention"), *Dixon* v. *State*, 244 S.W.3d 472, 484-485 (Tex. App. 2007) (statements nontestimonial where assailant was at large, and caller was still at home in trailer whose door "d[idn't] lock very good"), *People* v. *Brenn*, 60 Cal. Rptr. 3d 830, 838 (Cal. Ct. App. 2007) (statements nontestimonial where caller was "suffering from a fresh stab wound" by potentially armed attacker just "100 feet" away), and *Garcia* v. *State*, 212 S.W.3d 877, 883-884 (Tex. App. 2006) (statements nontestimonial where declarant reported in-progress kidnapping).

rect on the merits. Faithfully applying this Court's primary purpose test, the court of appeals correctly determined that (1) no emergency existed at the time of the 911 call; (2) T.R.'s statements identifying Respondent and detailing what he allegedly did were testimonial; and, (3) because Respondent had no opportunity to cross-examine T.R., the admission of those statements violated Respondent's Confrontation Clause rights.

1. "[T]he existence of an 'ongoing emergency' at the time of an encounter between an individual and the police is among the most important circumstances informing the 'primary purpose' of an interrogation." *Bryant*, 562 U.S. at 361 (citations omitted); see Pet. App. 21. Relevant considerations include whether the victim is describing present events or recounting past events, whether the assailant is known to have a deadly weapon, whether the victim faces an ongoing, imminent physical threat, whether the dispute is a private or public dispute, and the victim's medical condition. See *Bryant*, 562 U.S. at 363-365; *Davis*, 547 U.S. at 827. After "objectively considering all the relevant facts and circumstances" and applying the "[f]actors th[is] Court [has] identified as relevant to determining whether an ongoing emergency exists," Pet. App. 25 n.13, 48, the court of appeals correctly concluded that T.R.'s "statements to the 911 dispatcher * * * [fell] on the testimonial side of th[e] line." Pet. App. 48-49.[7]

[7] Although the State makes much of the court of appeals' purported reliance on a dictionary definition of "emergency," see

The relevant factors identified by this Court's precedents overwhelmingly support the court of appeals' conclusion that there was no ongoing emergency when T.R. spoke with the 911 dispatcher. First, like the declarants in *Hammon* and *Crawford*, T.R. was "describ[ing] past events," not "speaking about events *as they were actually happening*." *Bryant*, 532 U.S. at 356-357 (quoting *Davis*, 547 U.S. at 827). Indeed, the State explicitly conceded below that this case "can be distinguished from *Davis*" because T.R.'s 911 call "was made approximately 10 minutes after the incident occurred rather than as the events were occurring." Pet. App. 29 (quoting Pet. C.A. Br. 9). In *Davis*, the victim spoke to the 911 dispatcher while she was being assaulted and as the assailant fled the scene, 547 U.S. at 817-818, while here, akin to *Hammon*, T.R.'s statements were "made after the alleged assault was over," Pet. App. 34.

Second, unlike in *Bryant*, nothing in the record suggests that Respondent possessed a deadly weapon. In determining whether an ongoing emergency exists, this Court has distinguished situations involving unarmed assailants from those in which the assailant was alleged to have used a firearm. See *Bry-*

Pet. 8, 15, 22, that citation—referenced just once at the beginning of the court's legal analysis—was merely provided to orient readers. Pet. App. 33. Put differently, the Ohio court's discussion of dictionary definitions provided helpful background to the court's later doctrinal analysis, and underscored that the word "emergency" cannot credibly be broadened to cover any situation that may be frightening, or even dangerous in a more diffuse or long-term sense.

ant, 562 U.S. at 364 (emphasizing that the defendant shot the victim and noting that had the defendant in *Hammon* also been reported to have a gun, "separation by a single household wall might not have been sufficient to end the emergency").

Here, T.R. made clear that the altercation did *not* involve a gun, telling Walentik that "she 'did not pull [her gun] * * * or anything' and that [the gun] was 'put up in the house' and she 'couldn't get to it.'" Pet. App. 7. T.R. volunteered this information about the gun, which was registered in her name and put away in her upstairs bathroom closet, only to ensure Walentik was aware of it—not based on any stated concern that Respondent might access it. See *id.* at 37. Critically, the court of appeals found "nothing in the record to indicate whether [Respondent] had knowledge of the existence or location of that gun." *Ibid.*[8] That situation is worlds away from *Bryant*, where police knew the assailant was carrying—and had actually fired—a gun. 562 U.S. at 377.

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[8] Notwithstanding the absence of any record evidence contravening the majority's characterization, the dissent took a different view of the facts, repeatedly asserting that Respondent "had ready access to a firearm." Pet. App. 68. But the mere proximity of a gun, without any record basis to suggest that the assailant even knew about it, can hardly be said to transform "the type of weapon employed" in the altercation. *Bryant*, 562 U.S. at 364. And to the extent the State's arguments in this Court depend on revisiting a highly factbound dispute between the majority and dissenting judges below, that only underscores why the case is not certworthy.

Third, no imminent physical threat to T.R. existed at the time of the 911 call. This Court has repeatedly cited separation between the victim and the assailant as one important indication that an emergency situation has concluded. See *Davis*, 547 U.S. at 828 (noting emergency situation in *Davis* ended "when [the defendant] drove away from the premises"); *id.* at 830 (finding emergency ceased in *Hammon* when the victim was "actively separated from the defendant" by officers). While there was also a degree of separation between the assailant and the victim in *Bryant*, it "was not necessarily sufficient to end the threat" under those facts because the assailant was armed, had just shot the victim "within a few blocks and a few minutes of the location where the police found [the victim]," and might well "shoot again if he arrived on the scene." 562 U.S. at 373-374, 377.

Here, T.R. drove several miles from her home in Parma to her parents' house in Maple Heights before speaking with the 911 dispatcher. When T.R. did call 911, she told the dispatcher that, to her knowledge, Respondent was still at her apartment in Parma and that "she had the only car," which she used to drive to her parents' house. Pet. App. 7-8. Based on that information, Walentik testified at trial that "there was no immediate danger" at the time of the 911 call, because T.R. "was not with [Respondent]" and he "didn't have the means to get to her parents' house right away." *Id.* at 10. In short, as the court of appeals concluded, there was "no need for assistance * * * to avoid imminent danger" because T.R. and her son were safe at her parents' house in another city,

with "no reasonable expectation that [Respondent] would follow them." *Id.* at 34.

Fourth (and relatedly), there was no indication that Respondent posed a danger to "the police [or] the public." *Bryant*, 562 U.S. at 359. Whereas in *Bryant*, "[n]othing [the declarant] said to the police indicated that the cause of the shooting was a purely private dispute or that the threat from the shooter had ended," *id.* at 372, "there is nothing in the record [here] to suggest that Johnson presented any ongoing, immediate physical threat to * * * the police, the public or anyone else at the time of the 911 call," Pet. App. 36. That conclusion comports with this Court's observation that "[d]omestic violence cases * * * often have a narrower zone of potential victims than cases involving threats to public safety." *Bryant*, 562 U.S. at 363.

Finally, T.R. did not require—and, indeed, affirmatively "told the [dispatcher] that she did not need"—medical attention. Pet. App. 40. As this Court noted in *Bryant*, a victim's medical condition can shed light both on the victim's ability "to have any purpose at all in responding to police questions" and on the "likelihood" that his or her purpose was "a testimonial one." 562 U.S. at 364-365. In *Bryant* itself, the victim "was lying in a gas station parking lot bleeding from a mortal gunshot wound" and repeatedly asked police about medical services—signs that the victim's statements were not made with a testimonial purpose. *Id.* at 375. On the other hand, this case—like the domestic violence disputes in *Davis* and *Hammon*—"did not present [a] medical emergenc[y], despite some injuries" to the alleged victim. *Id.* at 364.

T.R.'s medical condition did not prevent her from forming a testimonial purpose; indeed, the record shows that she *did form that intent*, telling the dispatcher that she wanted to "report an assault" within the first few seconds of their conversation. Pet. App. 6.

2. The State's scattered arguments to the contrary lack merit. The State says "the 911 call was not a formal interrogation." Pet. 9; but see *Davis*, 547 U.S. at 826 (referring to "interrogation" over course of 911 call). But it "import[ed] sufficient formality * * * that lies" to the 911 operator would be a "criminal offense." *Davis*, 547 U.S. at 830 n.5; see *City of Centerville* v. *Knab*, 166 N.E.3d 1167, 1169 (Ohio 2020) (citing Ohio Rev. Code § 2917.32(A)(3)). Nor was the conversation "spontaneous," Pet. 9; on the contrary, T.R. called authorities specifically to "report an assault," apparently after discussing the matter with her father. Pet. App. 37.

The suggestion that the court of appeals "did not consider whether the excited utterance made the statement nontestimonial," Pet. 15, is also wrong. The court in fact *did* consider, and gave weight to, the degree of "reflection" and "contemplat[ion]" exhibited in T.R.'s statements—which it found weighed *against* the State's contention that the statements would qualify as "excited utterances" under state rules of evidence. Pet. App. 37-38 & n.19; cf. *supra* note 5.

Finally, the State's passing reliance on *Ohio* v. *Clark* is misplaced. The backward-looking statements at issue there "occurred in the context of an ongoing emergency," and were made by a small child

who would have "little understanding of prosecution." 576 U.S. at 246-248. "This case, by contrast, involves * * * statements made by an adult * * * who was in a safe place and who initiated contact with law enforcement to 'report an assault.'" Pet. App. 41-44 (distinguishing *Clark*).

III. The Factbound Question Presented Does Not Warrant Review, and This Case Is a Poor Vehicle for Revisiting This Court's Confrontation Clause Jurisprudence.

1. a. Contrary to the State's assertion that this case presents an "important and recurring" issue, Pet. 22, the petition by its express terms seeks only factbound correction of a perceived error by an intermediate state court. See Pet. i. The decision below articulated and applied a well-established legal standard, uncontested by any party below or in this Court, to specific facts and a specific evidentiary record. It is no more certworthy than any of the other innumerable intermediate state or federal appellate cases applying this Court's primary purpose test to varying fact patterns. Indeed, the State's own framing of the question presented is unabashedly factbound—providing a lengthy (albeit selective) recital of this particular case's facts, followed by a single question about the application of established law to that same set of facts. Pet. i.

This Court rarely indulges such factbound error-correction requests, see generally Sup. Ct. R. 10, and there is especially little reason to do so here. This Court has already repeatedly addressed the applicability of the Confrontation Clause in the context of

911 calls and similar situations, including multiple domestic violence cases. See *Davis*, 547 U.S. at 817-821. The Court's guidance in those cases is clear. Statements made in 911 calls *can* be nontestimonial where the purpose of the call is "to describe current circumstances requiring police assistance," *id.* at 827, but not *every* 911 call—and not every statement made on such a call—will fall on the nontestimonial side of the line, *id.* at 828-829. The relevant factors to be considered are well-established in this Court's precedents. And while the inquiry is ultimately "highly context-dependent," *Bryant*, 562 U.S. at 363—resulting in fact-specific decisions, and sometimes close cases—applying the primary purpose test in this context "presents no great problem" for lower courts. *Davis*, 547 U.S. at 829.

b. In an attempt to make this case appear more certworthy than it is, the State spends considerable time discussing the history of domestic violence laws, and urging that domestic violence is a serious social problem. See Pet. 22-28. There is no dispute about the "intolerab[ility]" of domestic violence. Pet. App. 54 (quoting *Giles* v. *California*, 554 U.S. 353, 376 (2008)). But the Confrontation Clause's protections do not differ based on the nature of the offense with which a defendant is accused. *Giles*, 554 U.S. at 376; *Davis*, 547 U.S. at 832-833. And this case does not involve any domestic-violence-specific legal questions

that would assist lower courts in applying this Court's primary purpose test.[9]

2. a. Even if the Court were inclined to revisit its Confrontation Clause jurisprudence, this case is an exceptionally poor vehicle to do so. The decision below represents the views of just one of twelve intermediate appellate districts in Ohio. Cf. *Huber* v. *N.J. Dep't of Env't Prot.*, 562 U.S. 1302, 1302 (2011) (statement of Alito, J., respecting denial of certiorari) ("[B]ecause this case comes to us on review of a decision by a state intermediate appellate court, I agree that today's denial of certiorari is appropriate."). And review of that decision is especially unwarranted given that, as the State itself concedes, the Supreme Court of Ohio is poised to decide multiple cases that are likely to provide guidance to lower Ohio courts, having already accepted review of *State* v. *Smith*, 209 N.E.3d 883, and *State* v. *Wilcox*, No. C-220472, 2023 WL 5425510 (Ohio Ct. App. Aug. 23, 2023). *Smith*, in particular, arises from the same district as this case, and involves the admissibility of statements by an alleged domestic violence victim to police while being treated by medics in the aftermath of the precipitat-

[9] The State's (and *amici*'s) overtures about medical issues are misplaced. This case does not involve any evidence of "decreased cognitive functioning, memory loss," "PTSD," Pet. 26, or "concussion[s]," Safe Living Space *Amicus* Br. 8, much less the after-the-fact suggestion that T.R. was so injured as to be incapable of forming a testimonial purpose, *id.* at 9; Pet. 25.

ing incident. 209 N.E.3d at 892-893, 906-907; cf. Pet. 23 (citing *Smith*).[10]

If the State remains dissatisfied with the state of Confrontation Clause jurisprudence in Ohio after *Wilcox* and *Smith* are decided, it can seek this Court's review in those cases—and this Court can evaluate the State's arguments with the benefit of the Ohio Supreme Court's views on the matter. See *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1931-1932 (2017) (Gorsuch, J., concurring in part and concurring in the judgment) (because lower-court percolation can "yield insights" and "reveal pitfalls," "[t]his Court often speaks most wisely when it speaks last").

b. The State's residual efforts to promote this case as an "appropriate" vehicle (Pet. 28-29) are unpersuasive. The State says "the facts are clear" because "the 911 call and its contents are undisputed." Pet. 28. In fact, the 911 call was never officially transcribed, Pet. App. 6 n.4, and there appears to have been considerable disagreement and uncertainty below about the recording's clarity in salient respects. *Id.* at 33 n.17; *id.* at 62 n.29 (Sean C. Gallagher, P.J, dissenting); cf. *id.* at 8 n.5 (trial judge's comment that portions of recording were "difficult to understand"). Moreover, even if the court of appeals did not base its decision on any "independent state ground," Pet. 28, the State's effort to characterize this

[10] Indeed, portions of the State's merits brief before the Ohio Supreme Court in *Smith* appear to be adapted from its petition in this case. See generally Appellant's Merits Br., *State* v. *Smith*, No. 2023-1289 (Ohio Apr. 9, 2024), 2024 WL 1697881.

case as free of potential state-law complications is dubious, given its own repeated—and very much disputed—contention that T.R.'s statements qualify as "excited utterances" under state rules of evidence. But see Pet. App. 39 n.20 (declining to decide issue).

Finally, although the State concedes that the decision below is binding in just one Ohio county, it nonetheless urges this Court to grant review because the decision's "publication" purportedly "provides influence beyond Ohio." Pet. 28-29. But any ongoing "influence" the court of appeals' fact-specific decision may have—in Cuyahoga County or elsewhere—will undoubtedly pale in comparison to the Ohio Supreme Court's forthcoming decisions in *Wilcox* and *Smith*, however those cases may be decided.

3. The State briefly alludes to *Smith* v. *Arizona*, this Court's case No. 22-899, stating that "a holding in that case may have impact here." Pet. 11. To begin, the Court should not construe the State's glancing reference to *Smith* as a request that its petition be actually held for that case. Nor would there be a sound basis for doing so. *Smith* v. *Arizona* was litigated below and presented to this Court as raising unrelated issues regarding the Confrontation Clause's application in a very different context, i.e., whether that Clause permits the presentation of expert testimony that in turn relies on the work product of a non-testifying forensic analyst, under a theory that the non-testifying analyst's statements are offered not for their truth but to explain the expert's opinion. Pet. i, *Smith* v. *Arizona*, No. 22-899. Disposition of *that* issue will have no effect on the question presented here.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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