

No. 23-820

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**In the Supreme Court of the United States**

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OHIO, *Petitioner,*

*v.*

WILLIAM JOHNSON.

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

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**BRIEF OF SAFE LIVING SPACE AND DR. EDIE  
ZUSMAN, MD, FAANS, AS AMICI CURIAE IN  
SUPPORT OF THE PETITIONER**

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## INTERESTS OF THE *AMICI CURIAE*<sup>1</sup>

This brief presents the perspective of a neurosurgeon and an organization dedicated to addressing neurological injuries in victims of domestic violence.

*Amicus* Safe Living Space (SLS) is a non-profit organization dedicated to education regarding unrecognized brain injury from domestic/intimate partner violence, child abuse, sexual assault and trafficking.

The founder and CEO of Safe Living Space is Dr. Edie Zusman, MD, MBA, FAANS, a trauma neurosurgeon and Emeritus Chief of Neurosurgery at the Mayo Clinic Network Affiliate in Northern California. Dr. Zusman is one of the first 100 women to become Board Certified by the American Board of Neurological Surgery and the first female neurosurgeon to serve on the Board of Directors of the American Association of Neurological Surgeons. She is a recognized leader in her field and currently serves as Adjunct Professor of Neurosurgery at Touro University School of Medicine.

Since SLS was founded in February 2021, its team has been nationally and internationally recognized as subject matter experts on abuse-induced brain injury. An estimated 60 million people in the US are currently living with the effects of unrecognized brain injury due

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<sup>1</sup> No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, its members, and counsel, made a monetary contribution to the brief's preparation or submission. See S. Ct. R. 37.6. Counsel of record for all parties received timely notice of the intent to file this brief in accord with Rule 37.2.

to abuse and strangulation. These individuals can be unaware of their injuries, the symptoms of which have often been labeled as mental health disorders including depression, anxiety, feelings of hopelessness, and post-traumatic stress disorder, and as cognitive issues including attention problems, poor memory and decreased judgment, decision-making, or executive function.

*Amici* have a strong interest in the Court's prompt resolution of the question presented because the nontestimonial statement of the victim was held inadmissible under the Confrontation Clause due to the supposed lack of an ongoing emergency, even though she had sustained traumatic brain injury with strangulation and loss of consciousness only minutes before she called 911. When she made the call, the victim was in the midst of a medical emergency requiring urgent evaluation and care.

*Amici* work with domestic violence victims and have a strong interest in their safety, including the proper recognition of their neurological status immediately after injury. Because domestic violence victims often cannot or will not testify against their abusers, they often remain exposed to repeated violence. The safety of domestic violence victims who have suffered neurological injury should not be compromised by erroneous applications of the Confrontation Clause that allow abusers to go free unnecessarily.

### **SUMMARY**

The petition squarely presents the scope of the "ongoing emergency" doctrine under the Confrontation Clause in a critically important setting: a 911 call after a domestic violence assault where the victim

suffered head injury and strangulation. The authorities cited in the Petition (at 17–22) indicate that the federal and state appellate courts conflict in their analysis of both 911 calls and statements by injured declarants. The distinctions between statements found to be testimonial and statements found to be nontestimonial appear brittle to nonexistent. This case presents the Court with an important opportunity to provide necessary guidance that will be crucial to many prosecutions of those who commit domestic violence.

The context of this case underscores the recurring importance of the question presented. Incidents of severe domestic violence remain all too frequent in the United States, and Confrontation Clause issues often arise in those prosecutions. Head injuries and non-fatal strangulation occur in a very large proportion of domestic violence assaults. The constitutional issues arising from this common setting warrant this Court's attention and guidance.

The Court has identified the physical condition of the declarant as an important factor in determining whether the primary purpose of an out-of-court statement was testimonial. This case presents an opportunity to address how the common presence of head injury and strangulation in domestic violence assaults not only affects the scope and persistence of the relevant ongoing emergency but directly affects the formation of testimonial intent.

This case is an excellent vehicle to resolve the important question presented. As in the Court's other recent Confrontation Clause decisions, the factual setting here permits the Court to resolve a division among the lower courts over the ramifications of

existing doctrine in a context that involves recurring factual elements. That will maximize the salutary, practical effect of the guidance resulting from a grant of certiorari and a decision on the merits by this Court.

### ARGUMENT

This Court has repeatedly held that out-of-court “[s]tatements are nontestimonial”—and thus their admission at trial does not violate the Sixth Amendment’s Confrontation Clause—when the statement was “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.” *Ohio v. Clark*, 576 U.S. 237, 244 (2015) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

The Court has further explained that “the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry.” *Id.* at 245 (quoting *Michigan v. Bryant*, 562 U.S. 344, 374 (2011) (cleaned up)). Rather, “the question is whether, in light of all the circumstances, viewed objectively, the ‘primary purpose’ of the conversation was to ‘create an out-of-court substitute for trial testimony.’” *Ibid.* (quoting *Bryant*, 562 U.S. at 358).

In *Bryant*, this Court noted that courts should take “into account a victim’s injuries” when assessing whether a statement was made with a primarily testimonial purpose. 562 U.S. at 369. In many cases, the Court observed, “a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive.” *Id.* at 368–69. And some victims’ “injuries could be so debilitating as to prevent [them] from thinking sufficiently clearly to

understand whether [their] statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution” (*id.* at 369)—which should preclude a conclusion that the primary purpose of the statement was testimonial.

This case raises significant issues, largely overlooked or undervalued by the court below, central to the “objective inquiry” under the Confrontation Clause into “the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim’s physical state.” *Ibid.*

The court below applied an “unduly narrow understanding of ‘ongoing emergency,’” *id.* at 362, a constricted understanding shared by too many lower courts. See Pet. 17–19. This Court should grant the petition and provide the guidance needed to ensure that nontestimonial statements to first responders are not erroneously excluded.

**A. The Volume of Domestic Violence, and the Prevalence of Head Injuries and Strangulation in Those Assaults, Underscore the Exceptional and Recurring Importance of the Question Presented.**

The Court has explicitly recognized the importance of the declarant’s medical condition in determining whether the primary purpose of a conversation is testimonial or nontestimonial. That is, the intention, if any, of the declarant counts:

The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of

the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one.

*Bryant*, 562 U.S. at 364–65.

In addition, this Court’s recent Confrontation Clause cases reflect the importance of out-of-court statements in domestic violence prosecutions. See *Davis, supra* (partner abuse); *Clark, supra* (child abuse). This is not surprising. Victims in these types of cases often are unable or unwilling to testify, leaving their safety (and the safety of the public) dependent in part upon the use of out-of-court statements in prosecutions of the abusers.

Domestic violence is all too common in the United States, where 52 million women have experienced violence at the hands of an intimate partner. See Ruth W. Leemis et al., *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Intimate Partner Violence*, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, p. 5 (2020). Nearly a third of those victims reported severe physical violence. *Ibid.* The CDC’s most recent annual figures showed that 5.6 million women experienced physical violence from an intimate partner, 3.9 million of whom reported severe violence. *Ibid.* (Table 1). Moreover, underreporting to law enforcement is rampant. An estimated 27% to 48% of incidents were never reported to the police. See Shannan Catalano, *Intimate Partner Violence: Attributes of Victimization 1993–2011*, U.S. Dep’t of Justice, Bureau of Justice Statistics, p.7 (Nov. 2013).

Important to the testimonial intent inquiry, 74% of domestic violence events involve injury to the head, neck and face. Eve M. Valera *et al.*, *Correlates of Brain Injuries in Women Subjected to Intimate Partner Violence: Identifying the Dangers and Raising Awareness*, 28 *J. Aggression, Maltreatment & Trauma* 695, 696 (2019). These incidents frequently involve strangulation, *ibid.*; Lee Wilbur *et al.*, *Survey Results of Women Who Have Been Strangled While in an Abusive Relationship*, 21 *J. Emergency Med.* 297, 299, 300 (2001), and victims of strangulation often lose consciousness. Wilbur, *supra*, 21 *J. Emergency Med.* at 301; Lisa Shields *et al.*, *Living Victims of Strangulation: A 10-Year Review of Cases in a Metropolitan Community*, 31 *Am. J. Forensic Med. & Pathology* 320, 322 (2010).

Sound practice requires transporting to an emergency department anyone who has suffered strangulation, with or without loss of consciousness. Al Lulla *et al.*, *Prehospital Guidelines for the Management of Traumatic Brain Injury*, 27 *Prehospital Emergency Care* 507, 510 (2023). When there is any loss of consciousness, practice guidelines call for a strangulation patient to admitted to the hospital for 24 hours and to be observed for 12 to 24 hours. See American College of Emergency Physicians, Forensic Medicine, *Guidelines on the Clinical Approach to Strangulation from the Evaluation and Management of the Sexually Assaulted or Sexually Abused Patient* 88 (2d ed. 2023). That is because of the many serious long-term risks of strangulation, including cervical artery dissection, stroke, swelling of and closure of the airway, and anoxic brain injury. See Helen Bichard *et al.*, *The*

*Neuropsychological Outcomes of Non-Fatal Strangulation in Domestic And Sexual Violence: A Systematic Review*, 32 *Neuropsych. Rehabilitation* 1164, 1166, 1182–84 (2022); Michelle Patch et al., *Injuries of Women Surviving Intimate Partner Strangulation and Subsequent Emergency Health Care Seeking: An Integrative Evidence Review*, 44 *J. Emergency Nurs.* 384, 384 (2018); Anousha Victoire, “*I Thought I Was About to Die*”: *Management of Non-Fatal Strangulation in General Practice*, 51 *Aus. J. Gen. Practice* 871, 872 (2022).

In addition, of course, head trauma can cause concussion, with the associated medical and mental effects of that kind of traumatic brain injury (TBI). See David F. Meaney & Douglas H. Smith, *Biomechanics of Concussion*, 30 *Clinical Sports Med.* 19, 20 (2011). Strangulation and TBI are underdiagnosed and often missed in the treatment of domestic violence victims. See Adam J. Pritchard et al., *Nonfatal Strangulation as Part of Domestic Violence: A Review of Research, Trauma, Violence, & Abuse* 407, 408, 412–13 (2015). “Battered women who present to [emergency departments] with a broad range of physical complaints but who do not have obvious serious injuries frequently receive only a cursory history and physical examination.” George E. McClane et al., *A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation of the Surviving Victim*, 21 *J. Emergency Med.* 311, 312 (2001). Indeed, the individual may not be aware of the medical significance of an acute strangulation event with loss of consciousness. *Ibid.*

As the Court has recognized, “whether an emergency exists and is ongoing is a highly context-dependent inquiry.” *Bryant*, 562 U.S. at 363. The

medical realities attending domestic violence injuries make it imperative that the Court provide additional guidance regarding the effect of the declarant's medical condition on the ongoing emergency exception in the domestic violence context.

**B. The Likely Presence of Brain Injury From Strangulation or Other Trauma in Domestic Violence Cases Should Inform the Testimonial Purpose Inquiry, Including the Scope of an Ongoing Emergency.**

As noted above, this Court made clear in *Bryant* the importance of the declarant's physical condition to the primary testimonial purpose inquiry. That factor is especially important in domestic violence cases, which make up a significant portion of cases presenting Confrontation Clause issues.

Brain injury associated with strangulation or other trauma impedes the ability to form testimonial intent as opposed to immediate intent to protect oneself. In particular, an "ongoing emergency" sufficient to show nontestimonial purpose may persist for hours after the event of trauma when the victim has sustained a head injury, even when the victim has left the scene and the abuser is not nearby. As noted above, from a medical point of view, persons with such injuries should be immediately evaluated by emergency medical personnel because of the risk for airway compromise, injury to cervical vasculature, stroke, and brain injury. They should be transferred to the emergency department so that they may be observed for up to 24 hours—certainly much longer than the delay of 10 minutes or so at issue in this case.

Like a statement from one “under the stress of excitement” resulting from “a startling event or condition,” a statement from a declarant who speaks in the early aftermath of an assault involving head injury or strangulation should be “considered reliable because the declarant \* \* \* presumably cannot form a falsehood.” *Bryant*, 562 U.S. at 361 (quoting Fed. R. Evid. 803(2)). The presumption should be that the relatively persistent “ongoing emergency” resulting from such an injury—especially in the highly charged emotional context of domestic violence assaults—“focus[es] an individual’s attention on responding to the emergency” that persists in her body and consciousness. *Id.* at 362. And consequently “the prospect of fabrication \* \* \* is presumably significantly diminished.” *Id.* at 361.

**C. This Case Is a Sound Vehicle to Resolve the Question Presented in a Critically Important Context.**

This case presents a sound vehicle to resolve the conflict among the lower appellate courts on the proper application of the “ongoing emergency” doctrine within the testimonial purpose inquiry.

The declarant here suffered unquestionable head injuries. The abuser “bash[ed]” her head into a wall. Pet. App. 8. She suffered strangulation—“choking”—and her father noticed nail marks on her neck. *Ibid.* And she “kinda blacked out.” Pet. App. 6. In addition, a police officer later responding to the scene of the abuse noticed “some sort of vomit on the ground” and that the declarant still “seemed a little flustered” and “didn’t appear to be normal.” Pet. App. 11. Although emergency medical services are appropriate in such

situations, the declarant declined an ambulance, Pet. App. 8, and apparently none was sent to her.

The injuries in evidence here provide an opportunity to explore further the relationship between a declarant’s physical condition and the presence or absence of testimonial purpose. As the Court pointed out in *Bryant*, “a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive.” 562 U.S. at 368–69. And the evidence in this case suggests just such a lack of testimonial intent: When asked whether she “wanted charges” on her abuser, the victim-declarant here stated, “I don’t know.” Pet. App. 8.

This case is a sound and appropriate vehicle for the additional reason that the setting here departs from the facts of prior cases to a similar degree as prior departures. The Court applied the principles of *Crawford v. Washington*, 541 U.S. 36 (2004), to the domestic violence context in *Davis, supra*, and applied the principles of those cases and *Clark, supra*, while addressing the medical condition of a dying declarant on *Bryant, supra*.

This setting—where the victim has attained a modicum of safety but is still immediately affected by the physical sequelae to a domestic assault—presents an appropriate new context to explore the contours of the Confrontation Clause. This case allows the Court to build on *Bryant* and *Davis* by addressing nonfatal injuries from a domestic violence assault.

In addition, if this Court considers this case on the merits, it will have the benefit of ever-increasing knowledge and understanding of abuse-induced brain injuries, including head injuries, traumatic brain

injury, and strangulation, and their immediate post-trauma effects.

In short, this case permits the Court to resolve important Confrontation Clause issues. And that opportunity comes in a recurrent set of circumstances common to domestic violence victims who have made out-of-court statements within minutes after an event, but who ultimately are unwilling or unable to testify at trial.

### CONCLUSION

The petition for a writ of certiorari should be granted and the decision of Ohio Court of Appeals reversed.

Respectfully submitted,

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