No. 2019-2020

IN THE

Supreme Court of the United States

Bobby Bronner, Petitioner

V.

The State of Olympus, Respondent

On Writ of Certiorari to the Supreme Court of the State of Olympus

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

(1) Whether Bobby Bronner's Fourth Amendment rights were violated by obtaining his cellphone records without a warrant?

(2) Whether Bobby Bronner's Sixth Amendment right to confront his accuser was violated by the introduction of Andy Sommerville's hearsay declarations?

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U.S. Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

In order to combat an expected surge in human trafficking for the 2016 Super Bowl, the FBI established a Task Force in Olympus headed by Myles Chaney ("Chaney") and Sarah Geesaman ("Geesaman"). The Task Force began investigating famed human trafficker William DeNolf ("DeNolf") and quickly found an informant within the operation by the name of Chester Comerford ("Comerford"). Based on information from Comerford, the Task Force obtained warrants to get DeNolf's phone records from local cellular provider Olympus Cellular. DeNolf's operation frequently switched "burner phones" as a way to keep police from tracking their activities.

One of the individuals suspected to be involved in DeNolf's human trafficking operation was Bobby Bronner ("Bronner"). DeNolf and Bronner had many contacts in common, and online postings for "adult entertainment" services told those interested to call and "ask for a B.B." Bronner frequented local brothels and bars, and the Task Force became more and more concerned with Bronner's potential involvement in human trafficking as the Super Bowl approached. The Task Force requested records from Olympus Cellular concerning Bronner's calls and location without a warrant three times, but all instances involved real-time data. On February 7, two days after the Super Bowl, the Task Force arrested Bronner with charges related to human trafficking.

On the day following Bronner's arrest, a School Resource Officer named Chris Rael ("Rael") asked Bronner's step-son, Andy Sommerville ("Sommerville"), if the boy was okay because the child's behavior had changed. Sommerville replied that he was fine, but the following day he appeared in Rael's office and asked to talk. Sommerville and Rael were well-acquainted, and Rael had watched Sommerville grow up since Kindergarten. Sommerville told

Rael that something was bothering him. He then told Rael about a "dirty movie" he had found on the TV belonging to Bronner. The movie contained children around Sommerville's age as well as his sister, Samantha, being sexually assaulted. Sommerville stated he did not quite understand the movie and that he could not stop thinking about it. Rael only took notes after Sommerville left the office, at which time he also placed calls to a school counselor and the school principal.

When Chaney and Geesaman showed up at the school by chance a couple hours later, Rael informed them of Sommerville's statement, at which time Bronner's charges were amended to include possession of child pornography. An Olympus law protecting children under ten from testifying in court kept Sommerville from testifying against Bronner, and Rael's testimony regarding his conversation with Sommerville was admitted instead. Bronner subsequently claimed that his Fourth Amendment rights were violated by the Task Force's warrantless searches and that his Sixth Amendment rights were violated by his inability to confront his step-son; he appealed the lower court's guilty verdict on both the charge of human trafficking and the charge of possession of child pornography.

SUMMARY OF THE ARGUMENT

When this Court examines Fourth Amendment questions, it must first determine whether a search has actually occurred. *Katz* and *Smith* make clear that what an individual knowingly exposes to the public or a third party does not receive Fourth Amendment protection because no search has occurred. *Katz v. United States*, 389 U.S. 347, 351 (1967) ; *Smith v. Maryland*, 442 U.S. 735 (1979). What Bronner exposed to Olympus Cellular does not receive protection under the Fourth Amendment because no search occurred. This holds true even if Bronner did not expect that this information would be further revealed or would only be used for a limited purpose. 442 U.S. at 744.

Bronner gave his information to Olympus Cellular. It would be ridiculous for this Court to find that Bronner's Fourth Amendment rights were violated when Olympus Cellular's property was searched and seized, not Bronner's. This court has applied the third-party doctrine to information as sensitive as bank records. *United States v. Miller*, 425 U.S. 435 (1976); as cited in *Smith v. Maryland*, 442 U.S. 735, 744 (1979). What is at issue in the case at bar is simply the numbers that Bronner communicated with and his locations, in real-time and limited in scope. The Court in *Smith* found that an individual does not have a subjective expectation of privacy in numbers dialed, which are necessary to make the calls go through; like phone numbers, real-time location information is necessary for the actual mechanics and business logistics of a phone company. *Carpenter v. United States*, 138 S.Ct. 2206, 2212 (2018). Further, real-time data tracking notably falls outside the Court's decision in *Carpenter v. United States*; thus, the third-party doctrine can still be applied without disrupting that narrow ruling. *Id*. at 2220.

Even if this Court determines a search occurred, it must look to the overall "reasonableness" of the Task Force's actions. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006);

as cited in *Kentucky v. King*, 563 U.S. 452, 459 (2011). Looking to the totality of the circumstances indicates that the Task Force recognized a threat to the health of safety of the community as well as the potential destruction of evidence. Exceptions to the warrant requirement are allowed when, "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394; as cited in *Kentucky v. King*, 563 U.S. 452, 460 (2011). Because the Task Force faced exigent circumstances with the impending Super Bowl, and deference is commonly given to police officers in determining such exigency, this Court should not find issue with the actions taken by the Task Force in order to protect the community from dangerous criminals.

The Confrontation Clause of the Sixth Amendment places an importance on protecting the accused against the use of ex parte examinations as evidence against the accused. *Crawford v. Washington*, 541 U.S. 36, 53 (2004). The Clause's primary object is testimonial hearsay. *Id.* What the Sixth Amendment has never been held to do, however, is to prohibit introduction of statements that were not primarily intended to be testimonial, especially evidence that was regularly admitted in criminal cases at the time of the founding. *Ohio v. Clark*, 135 S. Ct. 2173, 2182-83 (2015).

The present case presents an opportunity for the Supreme Court to, once again, affirm its position regarding the admission of hearsay evidence by children. *Clark*, 135 S. Ct. at 2182 (statements by very young children will rarely, if ever, implicate the Confrontation Clause); *Id.* at 2184 (SCALIA, J., concurring) ("At common law, young children were generally considered incompetent to take oaths, and were therefore unavailable as witnesses unless the court determined the individual child to be competent"). The Court should apply the *Clark* test and

find that Sommerville's statements to Rael are nontestimonial and are therefore not subject to the Confrontation Clause, precluding the necessity to examine the remaining two prongs of the *Crawford* test.

The *Clark* test considers the primary purposes of the relevant parties, the existence of an ongoing emergency, and the formality of the situation. Both Sommerville and Rael's primary purposes were to seek and provide—respectively—explanation and comfort for the trauma Sommerville incurred from viewing Super Bowl Party. R. 5-6. First, Sommerville approached Rael to seek relief and explanation about something he did not quite understand but by which he was disturbed. Sommerville was not bearing witness with testimonies against Bronner but was instead asking questions about something he saw. Second, Rael did not intend to collect evidence for future criminal investigations, but to ensure that Sommerville was not currently in danger and to provide any necessary help. In *Clark*, the Court concluded that even though the preschool teachers were mandated reporters, their primary purpose was not aimed primarily at gathering evidence for a prosecution. The Court held that the Confrontation Clause did not prohibit introduction of the statements because they were not primarily intended to be testimonial. *Clark*, 135 S. Ct. at 2183.

Third, Rael perceived an ongoing threat to Sommerville's health and safety. There is a present threat to Sommerville's mental and emotional welfare, because Sommerville has already been continuously and repeatedly exposed to videos of sexual content in his own home and he could be in danger of seeing more videos where children of his age and his own sister are sexually assaulted. R. 6. Additionally, School Resource Officers like Rael, "do not administer discipline in or outside the classroom; discipline is left to school officials." R. 5. In other words,

Rael cannot proceed or take any other measures without first attaining the permission of his superiors, the school district counselor and the principal, who did not respond or return his calls.

Fourth, the Court has noted that a, "formal station-house interrogation," is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused. *Michigan v. Bryant*, 562 U. S. at 366, 377 (2011); as cited in *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015). Because Rael and Sommerville were acquaintances and the conversation did not take place in a formal police station with active questioning, video or audio recording, or even note-taking, the circumstances on February 11 were informal. R. 5-6. After considering Sommerville's and Rael's primary purposes, the on-going emergency, and the informality, the Court should find that Sommerville's statements are not testimonial.

Even if the Court holds that Sommerville's statements are testimonial, the Olympus statute that establishes the minimum age for testifying makes Sommerville unavailable. Olympus has a compelling state interest in protecting minors from further trauma. A state's interest in safeguarding the wellbeing of a minor is compelling and evident beyond the need for elaboration. *Osborne v. Ohio*, 495 U.S. 103 (1990); as cited in *Maryland v. Craig*, 497 U.S. 836, 852-53 (1990). Olympus' statute is a means undertaken to shield the child witness from the traumatizing court experiences, and even if Sommerville's statements were testimonial, this Court must hold that the State's interest outweighs Bronner's 6th Amendment rights. Thus, when a traumatized child speaks to a trusted adult figure to seek relief and explanation in an informal setting, as did Sommerville in this case, this Court need not review the wisdom of that decision.

ARGUMENT

I. BOBBY BRONNER'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE TASK FORCE'S OBTAINMENT OF HIS CELLPHONE RECORDS WITHOUT A WARRANT

A. A search did not occur

The Fourth Amendment protects against unreasonable searches and seizures, but it does not give citizens a general constitutional right to privacy. *Katz v. United States*, 389 U.S. 347, 350 (1967). Shortly after the founding of America, Noah Webster's 1828 dictionary defined a search as, "to look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief." *Kyllo v. United States*, 533 U.S. 27, 32, 52 n.1 (2001). Over time, increasing advances in technology have changed the level of protection the Fourth Amendment affords, but the first question the Court must always examine is whether a search actually occurred.

Katz v. United States is the first instance in which the Court began "referring incessantly" to the Fourth Amendment as a law to protect privacy, which Justice Black derisively criticized in his *Katz* dissent. 389 U.S. at 373. Yet, even in *Katz* the Court made clear that what is <u>not</u> a subject of Fourth Amendment protection is anything knowingly exposed to the public. *Id.* at 351. Because the Fourth Amendment protects people not places, what someone seeks to keep private in a public space may receive Fourth Amendment protection. *Id.* at 347. Conversely, there is <u>not</u> Fourth Amendment protection for what may be seen through visual surveillance or aerial surveillance because such information has been knowingly exposed; thus, <u>no search has occurred</u>. *Kyllo*, 533 U.S. at 31-33.

Justice Harlan's concurrence in *Katz* is often cited because it lays out the fundamental 'expectation of privacy' test. Yet, Justice Harlan also wrote that "objects, activities, or statements" exposed to outsiders do not receive Fourth Amendment protection. 389 U.S. at 361.

Building off the logic of this concurrence, the Court in *Smith v. Maryland* found that the installation of a pen register to gather phone numbers did not constitute a search. *Smith v. Maryland*, 442 U.S. 735 (1979). Phone users do not have any general expectation that the numbers they dial will remain secret because they knowingly disclose the numbers they dial to a third-party phone company. *Id*. This 'third-party doctrine' applies even when someone expects that disclosed information will not be further revealed or will only be used a certain way. *Id.* at 744.

1. Bronner knowingly disclosed his information to a third party

Bronner cannot object to a "search" of his phone records because he knowingly disclosed his call and location information to Olympus Cellular, his phone company. Unlike the conversations gathered by the unconstitutional listening device in *Katz*, no content of Bronner's communication was gathered in the case at bar, which makes the case analogous to *Smith*. 442 U.S. at 741. Bronner, like other phone users, does not have any expectation that the numbers he dials will remain secret; in fact, his use of burner phones indicates he is aware that Olympus Cellular monitors his call data. Petitioner may argue that his choice of burner phones is proof that he desires privacy, but burner phones are, "disposable cellphones," and Bronner informed Comerford that such phones are being used to avoid police detection. R. 2, 4. Therefore, burner phones are not used to keep information to oneself but to frequently destroy such information.

Because Bronner knowingly disclosed his information to Olympus Cellular, there was no unreasonable search and seizure of his person, house, papers, or effects. Rather, as Justice Thomas pointed out in his dissent in *Carpenter v. United States*, if a phone user does not create records, does not maintain them, cannot control them, and cannot destroy them, the records are not his property and thus no unreasonable search of his property can occur. *Carpenter v. United*

States, 138 S.Ct. 2206, 2235 (2018). Bronner cannot reasonably object to the search of a third party's property, and this Court would set a dangerous precedent if it allowed such an objection, without, "recognizing the revolutionary nature of this change." *Id.* at 2260. The Fourth Amendment was aimed at the detested practice of breaking in and ransacking buildings to seize personal belongings without first receiving a warrant, not at the search of information voluntarily given over to a third party which the third party controls. *Katz*, 389 U.S. at 367.

2. The third-party doctrine laid out in *Smith v. Maryland* is appropriate to apply

Petitioner might claim that the third-party doctrine should be inapplicable to records that contain both call information and location information. However, the pen register in *Smith* not only revealed the numbers that Smith called, it could reveal the location that calls were made from and to, in this case revealing the relevant detail that a call was placed from petitioner's home to McDonough's phone. 442 U.S. 735. The Court did not want to make a "crazy quilt" of the Fourth Amendment, but it was not concerned that phone companies use pen registers and electronic equipment to keep track of toll calls and other calls subject to special rate structures because such records are for legitimate business purposes. *Id.* at 742-45. Thus, the case at bar is far more similar to *Smith* than petitioner would like this Court to believe. Going straight to Olympus Cellular to ask for the company's records was like using a glorified pen register. Just as the Court concluded no search occurred in Smith, no search has occurred here. *Id.* at 738.

By revealing his affairs to Olympus Cellular, Bronner took the risk that the company would convey their records of his calls and location to the Task Force. Petitioner may point to the intimacy of such information, which Justice Sotomayor worried could reflect details about, "familial, political, professional, religious, and sexual associations." *United States v. Jones*, 565 U.S. 400, 415 (2012). Yet, this Court has applied the third-party doctrine to financial information

voluntarily conveyed to banks. *United States v. Miller*, 425 U.S. 435 (1976); as cited in *Smith v. Maryland*, 442 U.S. 735, 744 (1979). Financial transactions surely reveal a wealth of information about a person's associations and can paint a detailed picture about a person's movements. However, because the depositor assumes the risk of disclosure, it would be unreasonable to expect those records to remain private. *Id.* Bronner's phone records are far less sensitive than the material in question in *Miller* and are extremely comparable to the material in *Smith*; therefore, the third-party doctrine as laid out in *Smith* is appropriate to apply.

3. *Carpenter v. United States* did not overturn the third-party doctrine

Petitioner may also point to the Court's recent decision in *Carpenter v. United States* as reason not to apply the third-party doctrine to the case at bar. However, the Court in *Carpenter* made clear that:

> …this case is not about "using a phone" or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*.

138 S.Ct. at 2220. The case at bar contains no such detailed, historical chronicle spanning multiple years. The Task Force not only tracks Bronner for eight days or less in all warrantless instances, it only tracks him in real-time. R. 4. This is notable because real-time information falls outside of the narrow ruling in Carpenter. 138 S.Ct. at 2220. Not only did the Court in *Carpenter* specifically decline to address matters not before it (including real-time data), it was careful to mention it was not disturbing the application of *Smith* or *Miller*. *Id.* Because the Court was careful to make sure it would not "embarrass the future" with its ruling, the *Smith* third-party doctrine can still be applied to real-time location data without disrupting precedent. *Id.*

This is precisely what the Court today should do. Real-time data is far less intrusive than the historical chronicle encompassing 127 days of past movements and 12,898 location points referenced in *Carpenter*. *Id.* at 2212. It is also far less intrusive than looking through the expansive amounts of digital information that police had access to incident to arrest in *Riley v. California*, 573 U.S. 373 (2014).

Though petitioner may point to the intersection of two lines of cases referenced in *Carpenter* (cases involving third party records such as *Smith* and cases involving location such as *Jones*), the location data collected in the case at bar does not pose a problem. Like phone numbers, real-time location information is necessary for the actual mechanics and business logistics of a phone company. In *Carpenter*, the Court stated that phone companies use CSLI data to find weak spots in their network and to apply roaming charges. 138 S.Ct. at 2212. In order to get the best signal, cell phones are almost continuously scanning for the closest cell site. *Id.* at 2211. The Court also called it a "business purpose" that, "wireless carriers often sell aggregated location records to data brokers." *Id.* at 2212. Bronner's location records, like his phone number records, belong to Olympus Cellular for them to maintain, control, and destroy as they see fit.

According to the Court in *United States v. Jacobsen*, a seizure of property can only occur when there is "some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); as cited in *United States v. Jones*, 565 U.S. 400, 419 (2012). Ruling for Bronner would essentially allow Bronner to object to the search and seizure of Olympus Cellular's property, something that he did not have a possessory interest in. Because no unreasonable search and seizure of Bronner's person, house, papers, or effects has occurred, his Fourth Amendment rights were not violated.

B. Even if a search occurred, exigent circumstances justify obtaining phone records from Olympus Cellular without a warrant

In *Oliver v. United States*, the Court said that it is important to provide a "workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 181 (1984); as cited in *Kyllo v. United States*, 533 U.S. 27, 38 (2001). It would be naïve to allow advancing technology to only benefit criminals and not law enforcement. In his *Jones* concurrence, Justice Alito points to the difficulty that law enforcement is often faced with when dealing with advancing technology under the Fourth Amendment:

> If the police attach a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the Fourth Amendment applies. But if the police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints.

565 U.S. at 425. Such incongruous results are particularly problematic when law enforcement is tasked with handling a dangerous, urgent situation like human trafficking and do not have time to secure a warrant. Thus, exceptions to the warrant requirement are allowed when, "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978); as cited in *Kentucky v. King*, 563 U.S. 452, 460 (2011). Because the Task Force was confronted with an urgent situation requiring swift action, there are exigent circumstances reasonably exempting the officers from obtaining a warrant.

1. "Reasonableness" should be the overall standard to apply

This Court has held that warrants, "must generally be secured" but also that there are "certain reasonable exceptions" to the warrant requirement. 563 US. At 459. What all of those

exceptions are cannot entirely be defined, since, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); as cited in *Kentucky v. King*, 563 U.S. 452, 459 (2011). Though the Court has identified 'well-recognized' exceptions, it looks to the totality of the circumstances to determine whether an exception exists. *Missouri v. McNeely*, 569 U.S. 141 (2013). Without, "more precise guidance from the founding era," this Court has previously used a balancing of interests rule which weighs an intrusion on privacy against the promotion of legitimate government interests to determine what to exempt from the warrant requirement. *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999); as cited in *Riley v. California*, 573 U.S. 373 (2014).

In the case at bar, the Task Force's need to stop a dangerous human trafficking ring far outweighed Bronner's alleged privacy concerns in records owned and maintained by Olympus Cellular. Rather than look only to the 'well-recognized' exceptions laid out in *King* of emergency aid, hot pursuit, and destruction of evidence, this Court should also look at the overall reasonableness of the Task Force's actions. 563 U.S. at 460. Not all emergencies fall neatly into one of the Court's previously denoted categories; thus, the Court has concluded that the reasonableness inquiry is fact-specific, and exigency must be examined on "on its own facts and circumstances." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931); as cited in *Missouri v. McNeely*, 569 U.S. 141 (2013). This Court must examine the unique facts and circumstances facing the Task Force in the days and weeks leading up to the Super Bowl, an event with an expected surge of human trafficking.

2. Olympus law enforcement was confronted with an urgent situation

Human trafficking is the third largest criminal enterprise in the world, trapping around 2.4 million people in human trafficking situations at any given time. R. 2. The Task Force was

understandably concerned when it uncovered that Bronner was working with William DeNolf, a human trafficker of renown in the western United States. R. 2. Bronner frequented brothels and bars and appeared to pose a threat to the community with his involvement in human trafficking. R. 3, 4. The fact-specific threats recognized by this Court that justify warrantless searches are those related to bomb threats, active shootings, and child abductions. 138 S.Ct. at 2223. The Task Force was responding to Bronner's involvement in a situation of child abduction since human trafficking is defined as, "the illegal trade of human beings, through abduction," and 98% of those trafficked for sex are women or girls (children). R. 2. Thus, the Task Force's actions fall under the "urgent situation" exception to the warrant requirement referenced in *Carpenter*, and the warrant requirement, "does not limit their ability to respond to an ongoing emergency." 138 S.Ct. at 2223.

3. Police did not create the exigency

Petitioner may argue that the Task Force created an exigency for themselves since they were not confronted with a split-second decision. However, in *King* the Court clearly stated:

> Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution.

563 U.S. at 467. The Court has also made clear that there are many different valid reasons for not immediately seeking a search warrant, as well as that police in some sense always create the exigency. *Kentucky v. King*, 563 U.S. 452 (2011). For each of the warrantless instances in question, the Task Force had a valid reason for not obtaining a warrant.

4. In each instance where there was a warrantless request, a specific event or fear prompted the Task Force's decision not to obtain a warrant

The Task Force obtained information from Olympus Cellular without a warrant three times: on January 16, February 3, and February 7. R. 4.

On January 16, members of the Task Force were concerned that time was of the essence. R. 4. They talked to Olympus Cellular, who perceived that the safety and health of the community were at risk. R. 4. The Task Force did not need to delay investigating Bronner with the health and safety of Olympus at risk since they had just found out that in December Bronner communicated with ten of the numbers previously identified as contacts of DeNolf. R. 3. See *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-299 (1967); as cited in *Riley v. California*, 573 U.S. 373 (2014) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.").

An exigency often recognized by this Court is the need to prevent destruction of evidence. *King*, 563 U.S. 452. On February 2, Comerford informed the Task Force that Bronner told him DeNolf was changing phones every week to avoid police detection. R. 4. The operation's use of burner phones was clear destruction of evidence justifying the Task Force's need to take immediate action without a warrant, particularly given that on February 1 Olympus Cellular had reported the destruction of eight other burner phones. R. 4. In addition to the destruction of burner phones, the Task Force planned to destroy evidence of their entire operation by leaving town after the Super Bowl to head to Las Vegas, justifying the Task Force's need to swiftly apprehend criminals on February 7 through warrantless real-time monitoring. R. 4.

While the Task Force may have had more time to respond to their emergency than the few minutes in *King* or the few hours in *McNeely*, fact-specific circumstances justified their

immediate, warrantless actions. As Justice Roberts stated in his *McNeely* concurrence, "Fire can spread gradually, but that does not lessen the need and right of the officers to respond immediately." 569 U.S. at 170. Deference must be given to law enforcement who are capable of making "reasonable judgements" about whether obtaining a warrant would cause an, "unacceptable delay under the circumstances." *Missouri v. McNeely*, 569 U.S. 141, 158, 183 n.7 (2013). Because obtaining a warrant would have caused an unacceptable delay, harming the ability of law enforcement to protect the community, the Task Force was justified in their actions.

II. BOBBY BRONNER'S SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER WAS NOT VIOLATED BY THE INTRODUCTION OF ANDY SOMMERVILLE'S HEARSAY DECLARATIONS

A. The *Crawford* Test and *Clark's* Totality of the Circumstances Test are the tests to be applied

After a comprehensive historical review of the right to confront one's accusers, the Court in *Crawford v. Washington* concluded that the Sixth Amendment's primary objective was to control the use of testimonial hearsay at trial. *Crawford v. Washington*, 541 U.S. 36 (2004). The Court stated that "witnesses" are those "who bear testimony," and laid out a three prong test, ruling that testimonial statements by a nontestifying witness have been admitted only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine. *Id.* at 51, 59. However, *Crawford* does not offer an exhaustive definition of "testimonial" statements. Instead, the label applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. *Id.* at 68.

Accordingly, *Davis v. Washington* later expounds on the testimonial dichotomy, ruling that statements are nontestimonial when made in the course of police interrogation under

circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. *Davis v. Washington*, 547 U.S. 813, 822 (2006). The totality of the circumstances test further expands the meaning of testimony in order to create a test for when statements are made to non-law enforcement officers, as the *Davis* test was tailored towards statements made to police officers. *Michigan v. Bryant*, 562 U. S. 344, 369 (2011); as cited in *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015); *Seely v. State*, 282 S.W.3d 778, 786 (Ark. 2008); *Davis*, 547 U.S. at 822. The test takes into account multiple factors such as the primary purposes of the relevant parties, the existence of an on-going emergency, and the formality of the situation. *Bryant*, 562 U. S. at 369; as cited in *Clark*, 135 S. Ct. at 2180.

B. Sommerville's statements to Rael are nontestimonial and therefore are not subject to the Confrontation Clause

1. Sommerville's primary purpose was not one to prove past events for later criminal proceedings

The Court notes that statements are nontestimonial when not procured with the primary purpose to create an out-of-court substitute for trial testimony. *Bryant*, 562 U. S. at 358; as cited in *Clark*, 135 S. Ct. at 2180. Sommerville did not approach Rael to offer formal statements about how criminal past events began and progressed, hoping to generate *ex parte* testimony. In fact, statements by young children will rarely, if ever, implicate the Confrontation Clause. *Clark*, 135 S. Ct. at 2182. The Court in *Clark* stressed that a young child would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all. *Id.* As such, Sommerville lacked understanding of prosecution and simply wished to confide in Rael and to seek aid for Samantha Sommerville.

An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. *Crawford*, 541 U.S. at 51. However, Rael was "well-acquainted" with Sommerville, having been in his classroom

several times since Sommerville had started kindergarten. R. 5. The present case is akin to *Seely* where the child voluntarily—not in response to police questioning—approached her mother for relief. 282 S.W. 3d 778. Sommerville was not bearing testimony against Bronner but was instead seeking relief and explanation about something he did not quite understand and was disturbed by. R. 5. On February 10, Sommerville appeared sullen with red, moist eyes and during recess he kept to himself, did not make eye contact with others, and did not eat his lunch. *Id.* No "witness" goes into court to proclaim an emergency and seek help. *Davis*, 547 U.S. at 828. Similarly, no one goes into court to seek to understand what someone did. Sommerville did not understand if the contents of Super Bowl Party were right or wrong or even what it was, which is demonstrated by his description of Super Bowl Party:

> Some naked guy was holding her. She was trying to get away. She was screaming but no one helped her. All the guys in the scene were laughing. It was awful. I turned it off, but I can't stop thinking about it.

R. 6. Sommerville does not use the terms "sexual assault," "rape," or similar words and phrases; if Sommerville cannot understand that what he viewed was illegal, he cannot be intending to create a substitute for trial testimony. Instead, Sommerville was confiding in an adult figure he trusted and saw as a shoulder to cry on.

In addition, a young victim's awareness that a statement would be used to prosecute is not dispositive of whether her statement is testimonial. *State v. Justus*, 205 S.W.3d 872 (Mo. 2006); as cited in *State v. Henderson*, 160 P. 3d 776, 785 (Kan. 2007). Even if Sommerville's primary purpose was to prove past events potentially relevant to later criminal proceedings, there are other elements within the totality of the circumstances test that must also be examined. *Bryant*, 562 U. S. at 369; as cited in *Clark*, 135 S. Ct. at 2180.

2. Rael's primary purpose was not one to prove past events for later criminal proceedings.

Rael's course of actions and statements also indicate that his primary purpose of the conversation was to protect the welfare of Sommerville to provide any necessary help. Rael had initially checked in with Sommerville to offer help after noticing that Sommerville was emotionally disturbed. R. 5. Rael did not have prior knowledge about Bronner's arrest, and Rael did not ask Sommerville any questions, further demonstrating his lack of intention for probing information out of Sommerville. R. 5-6. Moreover, following the conversation, Rael placed a call to the school district counselor and the principal, not any law enforcement officers. R. 6.

Petitioner may argue that because Rael is a government official, the statements were testimonial. *Clark* stated that the relationship between a student and his teacher is vastly different from that between a citizen and the police. 135 S. Ct. at 2182. Rael is a School Resource Officer, who, "in addition to performing law enforcement duties…serves as an educator, emergency manager, and informal counselor." R. 5 (some internal quotation marks omitted). Unlike Sylvia Crawford and Amy Hammon's relationship with law enforcement officers, Sommerville's relationship with Rael would be closer to that of a student and a counselor or a student and a teacher like the relationships in *Seely* and *Clark*. *Clark*, 135 S. Ct. 2173; *Seely*, 282 S.W.3d. 778; *Davis*, 547 U.S. 813 ; *Crawford*, 541 U.S. 36. Even when informing Chaney and Geesaman, Rael stressed that he was worried about Sommerville's welfare, showing that his primary purpose was not to create probative evidence against Bronner.

The Confrontation Clause does not prohibit introduction of the statements because they were not primarily intended to be testimonial. *Clark,* 135 S. Ct. at 2183. In *Clark*, the Court concluded that even though the preschool teachers were mandated reporters, their primary purpose was not aimed primarily at gathering evidence for a prosecution. *Id.* Similarly, the

Supreme Court of Arkansas concluded that a social worker's statements were nontestimonial even though the social worker was a mandated child-abuse reporter and had testified at more than 50 trials. *Seely*, 282 S.W.3d at 781. Instead, the court weighed her intentions to enable child assistance and to ensure the victim child's continued safety over her obligation to report. *Id.* The Court should adopt this approach to looking at statements received by government agents where the primary purpose was not to collect evidence for legal proceedings. However, even if Rael was acting as an officer, his position does not automatically render his conversation with Sommerville to be testimonial, especially due to the ongoing emergency.

3. There was a perceived on-going emergency.

Rael perceived an ongoing threat to Sommerville's health and safety. The Court has not provided an exact definition of "on-going emergency," but it has provided some guidance with examples of what constitutes an immediate threat and what does not. In *Clark*, the victim child was not currently getting assaulted when talking to the teachers, but the possibility of future attacks was an ongoing emergency. *Clark*, 135 S. Ct. at 2181.

Petitioner may argue that there is no ongoing emergency of any sort because the declarant is not a child abuse victim. Sommerville may not be a victim of physical child abuse, but he is a victim of emotional child abuse. During his conversation with Rael, Sommerville mentioned that "[Super Bowl Party] was gross, just like the other ones." R. 5-6. The fact that he was continuously and repeatedly exposed to videos of sexual content in his own home is a form of mental and emotional harm. All Sommerville had to do was turn on the television, and without his consent or knowledge one of Bronner's videos would start playing. There is a present threat to Sommerville's welfare because Sommerville could be in danger of seeing more videos that involve children of his age and his own sister getting sexually assaulted. R. 6.

Petitioner may also argue that because Rael did not take instant law enforcement actions following the conversation, he did not perceive an ongoing emergency. However, Rael only had a two-hour window between talking to Sommerville and later talking to the Task Force. R. 6. The Court has never established a clear time guideline for what constitutes an ongoing emergency, but instead courts have reviewed circumstances on a case-by-case basis. In precedents where the actions of the questioner did not occur immediately after the child's report of the abuse, courts have found that there was still an ongoing emergency. *Clark*, 135 S. Ct. at 2178 (preschool teachers do not call the child abuse hotline immediately but allow the child to return home, who is then taken to the hospital the following morning) ; *Seely*, 282 S.W.3d at 780-81 (victim child twice informs her mother of the vaginal pain and the mom simply applies Vaseline on the area, visiting the emergency room after more than an hour).

Even if the Court decides that there was no perceived emergency, it must consider all of the relevant circumstances. *Bryant*, 562 U. S. at 369; as cited in *Clark*, 135 S. Ct. at 2180. There may be other circumstances, aside from ongoing emergencies, when a statement is not procured to create an out-of-court substitute for trial testimony. *Bryant*, 562 U. S. at 369; as cited in *Clark*, 135 S. Ct. at 2180. For example, the Court has made it clear that a casual statement made to an acquaintance can be nontestimonial, despite the fact no emergency exists. *Davis*, 547 U.S. at 825 (giving examples of "clearly nontestimonial" statements made to nongovernment officials in nonemergency situations).

4. The situation in which the conversation took place was informal.

The informality of the conversation is another factor within the objective totality of the circumstances test. *Bryant*, 562 U. S. at 369; as cited in *Clark*, 135 S. Ct. at 2180. *Bryant* noted that a "formal station-house interrogation" is more likely to provoke testimonial statements,

while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused. *Bryant*, 562 U. S. at 366, 377; as cited in *Clark*, 135 S. Ct. at 2180. Rael and Sommerville were acquaintances from past interactions, R. 5, and unlike the questionings in precedents, the conversation did not take place in a formal police station with active questioning and video or audio recording. *Contreras*, 979 So. 2d at 898; *Henderson*, 160 P. 3d at 778; *Crawford*, 541 U.S. at 38. Rael was wearing his soft uniform, which is a polo shirt and khaki pants; there was nothing on the walls to indicate that he was a police officer, and Rael did not ask questions or take notes during the conversation, which would create the formal appearance of an investigation. R. 5-6. After considering Sommerville's and Rael's primary purpose, the existence of an on-going emergency, and the informality of the situation, the Court must hold that these out-of-court statements are not testimonial.

If the Court does hold that Sommerville's statements are nontestimonial, there is no need to examine the remaining two prongs of the *Crawford* test: the declarant's unavailability or to provide a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 59. The Court has emphasized that where nontestimonial hearsay is at issue, individual states' hearsay law developments are wholly consistent with the design of the Constitution, as nontestimonial hearsay is altogether exempt from scrutiny under the Confrontation Clause. *Clark*, 135 S. Ct. at 2180 ; *Davis*, 547 U.S. at 821 ; *Crawford*, 541 U.S. at 68.

C. Even if Sommerville's statements are testimonial, the Olympus statute protecting young children from suffering trauma makes Sommerville unavailable to testify.

1. States have a traditional and transcendent interest in protecting the welfare of children.

Even if the Court holds that Sommerville's statements are testimonial, the Olympus statute that establishes the minimum age for testifying makes Sommerville unavailable. Although unavailability of the witness is the second prong of its test, *Crawford* does not elaborate on what

constitutes "unavailability." *Crawford*, 541 U.S. at 59. Instead, many states have enacted legislation to provide further guidance, and the Supreme Court of the United States has given judicial deference to the individual states when discussing "unavailability." *Seely*, 282 S.W. 3d 778; *Contreras*, 979 So. 2d 896; *Henderson*, 160 P.3d 776; *People v. Sisavath*, 118 Cal. App. 4th 1396, 1400 (Cal. Ct. App. 2004); as cited in *Contreras*, 979 So.2d at 906. A significant majority of States have passed statutes that establish an age requirement to protect child witnesses from the trauma of giving testimony in court, attesting to the widespread belief in the importance of a State's interest in the physical and psychological wellbeing of child abuse victims. *Seely*, 282 S.W. 3d 778; *Contreras*, 979 So. 2d 896; *Henderson*, 160 P.3d 776; *Maryland v. Craig*, 497 U.S. 836 (1990). According to *Craig*, this interest to protect minors may sometimes outweigh a defendant's right to face his accusers in court. 497 U.S. at 852.

Olympus, like other states, has a genuine, compelling state interest in protecting minors from further trauma. *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 607 (1982); as cited in *Maryland v. Craig*, 497 U.S. 836, 852 (1990). A state's interest in safeguarding the wellbeing of a minor is compelling and evident beyond the need for elaboration. *Osborne v. Ohio*, 495 U.S. 103 (1990); as cited in *Maryland v. Craig*, 497 U.S. 836, 852-53 (1990). The trauma of being cross-examined applies to all child witnesses testifying—in court or *ex parte*—even those who may not be recounting sex crimes or child abuse cases. Buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, *Coy v. Iowa* acknowledged that face-to-face confrontation causes such significant emotional distress in a child witness that such confrontation would, in fact, disserve the Clause's truth-seeking goal because it overwhelms the

child as to prevent the possibility of effective testimony. *Coy v. Iowa*, 487 U.S. 1012, 1032 (1988) (BLACKMUN, J., dissenting); as cited in *Maryland v. Craig*, 497 U.S. 836, 857 (1990).

2. The Olympus statute is not a categorical rule, thus not violating the Confrontation Clause.

The Olympus statute establishes that children must be at least ten years old in order to testify in court in order for Olympus, "to protect the physical and psychological well-being of victims under ten years of age associated with testifying in court about painful experiences including sexual and physical assault." R. 6. The review of the Olympus statute is not whether the child is ready to testify in court and be cross-examined; the review is at the evidentiary level. The Olympus statute does not require the admission of testimonial evidence, as it is not a hearsay evidence rule. Unlike other states' statutes that determine whether the child can testify and thereafter admit hearsay evidence—regardless of whether the statements are testimonial—Olympus's law seeks to protect all children under the age of ten and would only admit nontestimonial evidence. *See Seely*, 282 S.W.3d at 783 (hearsay exceptions for children under the age of ten, allowing the admission of any statements if the reliability of statements can be demonstrated through examination) ; *Contreras*, 979 So. 2d at 783 (child victim hearsay rule admitting statements that fall within one of the statutory exceptions to the hearsay rule). The Olympus statute is the least restrictive means for its large, all-encompassing interest and faithfully follows the Sixth Amendment.

CONCLUSION

The Fourth Amendment does not give citizens a general constitutional right to privacy. It would be a disgrace to the Founder's Fourth Amendment intentions if this Court allowed Bronner to object to the search of cellphone records created, owned, and maintained by Olympus Cellular, when the Fourth Amendment was simply aimed at the detested practice of breaking in and ransacking buildings without a warrant. Technology *does* change privacy expectations, but under the third-party doctrine laid out in *Smith*, there is no protection for the phone numbers or location information that Bronner exposed to his phone company. Even assuming a search occurred, the Task Force only obtained real-time location information without a warrant and had a *reasonable* perception that it was necessary to do so based on the urgency of the human trafficking situation. Deference has long been given to police officers in determining when exigency exists, and this Court must maintain that precedent.

Further, an application of *Clark*'s totality of the circumstances test shows that Sommerville's statements are nontestimonial and accordingly not subject to confrontation; therefore, the admission of the statements does not violate Bronner's Sixth Amendment rights. Even if this Court holds that Sommerville's statements are testimonial, the Olympus statute—which faithfully adheres to the Sixth Amendment—makes Sommerville unavailable to testify. The Court in precedents such as *Craig* has acknowledged the transcendent interest of individual states to protect the welfare of children. The statements in the present case are nothing like the notorious use of ex parte examination in Sir Walter Raleigh's trial for treason, which the *Crawford* Court has identified as the principal evil at which the Confrontation Clause was directed. Taking into consideration this distinction between the unreliable accusations against Sir Walter Raleigh and Sommerville's nontestimonial statements made in an attempt to seek relief,

we respectfully ask this court to affirm the decision of the Supreme Court of the State of Olympus.

Respectfully Submitted,

Counsel for the Defendant