No. 13-1352

IN THE

Supreme Court of the United States

STATE OF OHIO

Petitioner,

v.

DARIUS CLARK

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF AMICI CURIAE NATIONAL EDUCATION ASSOCIATION, AMERICAN FEDERATION OF TEACHERS, NATIONAL SCHOOL BOARDS ASSOCIATION, AND OHIO SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

Alice O'Brien*
**Counsel of Record*
Jason Walta
Lisa Powell
Derrick Ward
National Education Association
1201 16th Street, N.W.
Washington, D.C. 20036
(202) 842-7035
AOBrien@nea.org

David J. Strom
Jeremy Garson
American Federation of Teachers, AFL-CIO
555 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 393-7472

Francisco M. Negrón, Jr.
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*

This brief is submitted with the consent of the parties on behalf of the National Education Association (NEA), American Federation of Teachers (AFT), National School Boards Association (NSBA), and Ohio School Boards Association (OSBA) as *amici curiae* in support of the Petitioner, the State of Ohio.[1]

NEA is a nationwide employee organization with nearly three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. NEA has a strong and longstanding commitment to promoting students' safety, health, and welfare. The NEA Representative Assembly, NEA's highest governing body, has adopted numerous resolutions to increase the support provided to children who are abused or subject to violence and family instability. Of particular note, NEA Resolution C-12 supports, among other measures, "[r]equir[ing] education employees to report to appropriate authorities instances of suspected child abuse, neglect, and exploitation, while providing those employees with immunity from legal action," as well as "processes, protective options, and coping provisions for the abused, neglected, and exploited child." Additionally, in 2013, the NEA Representative Assembly adopted a

[1] Letters of consent from all parties are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

New Business Item supporting Gabriel's law, model legislation named in memory of a child killed by his abusers despite a teacher's and others' repeated reports of the abuse, which would authorize school employees and other mandated reporters of child abuse to turn over a child suspected of being abused to proper authorities when the mandated reporter suspects the child is in imminent danger.

AFT, an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.6 million members in more than 3,000 local affiliates nationwide, including pre-K through 12th-grade teachers; paraprofessionals and other school-related personnel; and early childhood educators. AFT members play a natural role in guiding and protecting our nation's children and are committed to ensuring the safety and well-being of their students. Our members also play an important role in reporting suspected child abuse of the students under their care under the nation-wide system of mandatory reporting statutes.

The NSBA, founded in 1940, is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly fifty million public school students. NSBA represents the school leaders responsible for adopting policies and procedures to promote the safety and welfare of all students. Public school districts have a strong interest in advocating for the interpretation and application of federal, state, and local laws in a

manner that allows them to meet their student safety obligations with respect for the rights of students and their families but without undue legal burdens or potential liability. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as *amicus curiae* in numerous cases.

OSBA is the largest statewide organization representing the concerns of public elementary and secondary schools leaders in Ohio. OSBA is a nonprofit 501(c)(4) corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter. Nearly 100% of the 719 district boards throughout the State of Ohio are members of OSBA, whose activities include extensive informational support, advocacy, board development and training, legal information, labor relations representation, and policy service and analysis.

Amici believe that their work with teachers and other school employees give them a unique perspective on how mandatory reporting statutes operate in schools nationwide, and that their views on these issues will assist the Court in resolving this case.

INTRODUCTION AND SUMMARY

As organizations that represent millions of educators and school officials, *amici* understand the essential role of teachers and other school personnel in protecting children from abuse, neglect, and other harms, including the importance of mandatory reporting statutes that require educators in all fifty states to report suspected abuse in reinforcing those efforts. *Amici* submit this brief in support of Petitioner, the State of Ohio, to emphasize that when teachers, school administrators, and other school personnel carry out their duties as mandatory reporters of child abuse, they do not do so as agents of law enforcement or for the purpose of creating out-of-court statements for use in a prosecution. As should be obvious from both the legislative objectives of mandatory reporting laws and the in-school context in which educators work, the overwhelming purpose of an educator's inquiry about possible abuse or neglect is to protect a child, not to apprehend and prosecute the perpetrator. That being so, an educator's inquiry into possible child abuse will not normally, if ever, qualify as the kind of purposeful solicitation of out-of-court statements for use in a prosecution that triggers concerns under the Confrontation Clause.

Mandatory reporting regimes that cover educators exist in all fifty states and are supported by federal grants. Both as a matter of their histories and design, these regimes consistently reinforce the notion that reporting is required—not as means of deputizing educators, medical professionals, and others as agents of law enforcement for the

prosecution of crimes—but to ensure that those who are in the best position to identify the signs of abuse will trigger a variety of mostly *civil* investigations and interventions that help ensure the safety and well-being of children. Mandatory reporters are not charged with investigating or establishing whether, as a matter of fact, abuse has occurred; they must instead report what they reasonably suspect or believe is abuse so that other entities (such as Child Protective Services) may investigate the report. And, where suspicions of abuse are substantiated through an investigation, the official response is more likely to be the delivery of social services that prioritize family preservation, not a criminal prosecution.

Furthermore, the unique setting in which educators usually inquire about a child's injuries—which may or may not be the product of child abuse—militates against the notion that there are prosecutorial aims at work. Schools are broadly concerned with the well-being of their students, and educators will therefore inquire about a wide range of behaviors, injuries, or problems that a child presents at school. It may only become apparent after a child has responded to such an inquiry that the underlying issue is one that implicates the educator's mandatory reporting duties (as opposed to one that should be addressed through school discipline or counseling). Educators do not approach these frequent and often informal interactions with children as quasi-prosecutors eliciting out-of-court testimony, but rather as educators seeking to foster a positive school environment and to ensure the well-being of students.

The Ohio Supreme Court's decision has startlingly broad implications for the wide variety of people and professions identified as mandatory reporters, but they are particularly serious for educators and public schools. Any holding that educators are agents of law enforcement for purposes of mandatory reporting will greatly complicate efforts to train school personnel in carrying out their reporting duties, which could further weaken protection for children. Treating educators as law enforcement for purposes of the Confrontation Clause could also hamper the administration of the nation's public schools in unintended ways—for example, requiring school personnel to operate as police officers may suggest they should deliver *Miranda* warnings or procure warrants for routine school disciplinary matters.

Finally, even if statements made to teachers or school personnel might be considered "testimonial" in certain circumstances, this Court need not reach that issue because the statements at issue in this case clearly are non-testimonial under this Court's existing precedent. Given the facts presented here, the statements made to the teacher clearly indicated an emergency situation involving a child returning to a potentially dangerous environment. Furthermore, even in the absence of an emergency, both the informality of the questioning in this case and the child's intent in answering the teacher's questions confirm that the answers elicited by the teacher were not "testimony" for purposes of the Confrontation Clause.

ARGUMENT

The Ohio Supreme Court concluded that a three-year-old child's statement to his preschool teacher about how he received visible wounds was testimonial for the purposes of the Confrontation Clause. *See State v. Clark*, 999 N.E.2d 592 (Ohio 2013). Such an expansive reading of the Confrontation Clause has no basis in this Court's jurisprudence. Moreover, that holding wrongly equates the civil child protective systems adopted by all fifty states with the criminal justice system, and it misconstrues teachers' and other school employees' relationships to the children in their care. If not reversed, the Ohio Supreme Court's decision will have far-reaching effects that harm both children and educators.

A. *Clark v. Ohio* and this Court's Confrontation Clause Jurisprudence

1. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 50-54 (2004), this Court held that this provision, the Confrontation Clause, prohibits the admission of "testimony" of a witness who does not appear at trial, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. However, not all out-of-court statements that might be used in a criminal trial are subject to the Confrontation Clause. Rather, only those statements that amount to "testimony"—or a

"solemn declaration or affirmation made for the purpose of establishing or proving some fact"—implicate the right to cross-examine the declarant. *Id.*; *Davis v. Washington*, 547 U.S. 813, 824-25 (2006). As relevant here, the Court has held that "prior testimony" given during "police interrogations" may be testimonial under the Confrontation Clause. *Id.* at 68.

To date, this Court has not considered "whether and when statements made to someone *other* than law enforcement personnel are 'testimonial.'" *Davis*, 547 U.S. at 823 n.2 (emphasis added). And even with law enforcement questioning, it is clear that "not all those questioned by the police are witnesses and not all interrogations by law enforcement officers are subject to the Confrontation Clause." *Michigan v. Bryant*, 131 S. Ct. 1143, 1153 (2011) (internal citation and quotation marks omitted). When such questioning is not for the "*primary purpose* of creating an out-of-court substitute for trial testimony," it falls outside the scope of the Confrontation Clause. *Id.* at 1155 (emphasis added); *see also Davis*, 547 U.S. at 822.

2. Although purporting to apply this Court's precedents, the Ohio Supreme Court adopted an expansive reading of the Confrontation Clause that would deputize millions of school employees (including teachers, counselors, and administrators), doctors, social workers, and even ordinary citizens as agents of law enforcement, and would render the Court's "primary purpose" test largely meaningless.

The Ohio court concluded that three-year-old L.P.'s out-of-court statements to his preschool teacher, identifying Clark as the source of his visible

injuries were testimonial in nature. *Clark*, 999 N.E.2d at 594. This was so, the court reasoned, because Ohio law imposes on teachers (and various other professionals) a duty to report suspected child abuse. *Id.* at 594, 596. While acknowledging that the primary purpose of that reporting obligation is protecting children, the court reasoned that because the reporting statute contemplates the possibility of prosecution for reported abuse, those subject to the reporting requirement are "agents of law enforcement" when they are questioning children about potential abuse. *Id.* at 596-97.

Having concluded that teachers function as agents of law enforcement in that circumstance, the court held that "[w]hen teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator, any statements obtained are testimonial for purposes of the Confrontation Clause." *Id.* at 597. In reaching that result the Ohio Supreme Court did not contemplate that teachers could seek to identify the perpetrator of abuse for any reason other than a prosecutorial one, such as obtaining child protective services or remedying a bullying situation; the court deemed "*any* statements" obtained with a primary purpose of identifying the perpetrators to be testimonial. *Id.* (emphasis added).

Applying these rules to the present case, the court determined that L.P.'s teachers questioned L.P. about wounds they observed on him primarily to determine who had harmed him, and not to address an ongoing emergency. The court concluded that the efforts to identify the person responsible for L.P.'s injuries "indicate a purpose to ascertain facts of

potential criminal activity" and therefore L.P.'s statements to his teachers were testimonial. *Id.* at 600. Because the three-year-old did not testify at trial, the court concluded that these statements should have been excluded under the Confrontation Clause. *Id.* at 600-01.

B. Mandatory Reporting Statutes Do Not Deputize Teachers as Agents of Law Enforcement

The Ohio Supreme Court is not the first court to consider this issue. The argument that statements to mandatory reporters of child abuse are testimonial under the Confrontation Clause has been raised in a number of cases, and both federal and state courts have consistently rejected it.[2] There are

[2] *See United States v. Squire*, 72 M.J. 285, 289 (C.A.A.F. 2013) (a mandatory reporting "requirement, which broadly covers health care professionals, employees of public and private schools, child care providers, and providers of recreational and sports activities" is insufficient to establish that a doctor "was acting in a law enforcement capacity"); *United States v. DeLeon,* 678 F.3d 317, 325-26 (4th Cir. 2012), *rev'd on other grounds by* 133 S. Ct. 2850 (2013) (statements to social worker were non-testimonial because the social worker did not operate as an agent of law enforcement and her primary purpose was to develop a treatment plan); *United States v. Peneaux*, 432 F.3d 882, 894-96 (8th Cir. 2005) (statements to doctor were non-testimonial because the doctor's primary purpose was "ensuring [the child's] health and protection," the interview was informal, and lacked law enforcement involvement). *See also People v. Phillips*, 315 P.3d 136, 165-66 (Colo. App. 2012) (child's statements to his kindergarten teacher, teacher's aide, and acting principal about visible wounds they observed and asked him about were non-testimonial); *People v. Duhs*, 947 N.E.2d 617, 619-20 (N.Y. 2011) (reaching the same result, even

good reasons for that: a look at the reach, intent, and function of mandatory child abuse reporting laws in the broad context of child protection demonstrates that the fifty states did not intend to deputize as law enforcement all mandatory reporters of suspected abuse.

Affirming the Ohio Supreme Court's decision could have troubling and broad implications, not just for educators, but for all manner of other professionals. In all states, mandatory reporters

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though "the pediatrician may have had a secondary motive for her inquiry, namely, to fulfill her ethical and legal duty, as a mandatory reporter of child abuse"); *State v. Bella*, 220 P.3d 128, 132-33 (Or. App. 2009) (holding that the mandatory reporting "statute does not, in effect, put a police officer into the doctor's office; nor does it effectively convert the doctor into an agent or proxy of the police"); *Seely v. State*, 282 S.W.3d 778, 789 (Ark. 2008) (reaching the same result regarding statements to a social worker subject to mandatory reporting, even if she anticipated "that the information she gathered might be used in a subsequent prosecution"); *State v. Spencer*, 169 P.3d 384, 389 (Mont. 2007) ("There is no indication [] that the Legislature intended to deputize th[e] litany of professionals and individuals [who must report suspected child abuse] into law enforcement, and we refuse to attach that significance to the duty to report."); *People v. Cage*, 155 P.3d 205, 218-21 (Cal. 2007) (duty to report suspected child abuse does not transform a child's responses to a physician about his injuries into a testimonial statement); *State v. Hosty,* 944 So.2d 255, 261 (Fla. 2006) (statements a disabled adult victim made to her teacher were non-testimonial); *State v. Bobadilla*, 709 N.W.2d 243, 254-56 (Minn. 2006) (statements to child-protection worker were non-testimonial because the purpose of the child abuse investigation and reporting statute "is to protect the health and welfare of children" and the questioner's "purpose [was] assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child").

include teachers, social workers, medical professionals, and others, and in approximately eighteen states include *anyone at all* who suspects abuse.[3] Taking the Ohio reporting statute at issue in this case, under the Ohio Supreme Court's decision, all school employees; attorneys; all manner of health professionals including doctors, nurses, psychologists, marriage and family therapists, dentists, podiatrists, and massage therapists; coroners; all child care employees; all residential or child day camp employees; social workers; agents of the humane society; employees of home health agencies and entities that provide homemaker services; governmental employees associated with a wide variety of services for children and families; religious officials; and certain other professionals would be agents of law enforcement whenever they inquire into possible child abuse. *See* Ohio Rev. Code Ann. § 2151.421 (West 2014). Ohio's massage therapists, school custodians, home health employees, and others would likely be shocked to learn that they are agents of law enforcement, and that if they seek to determine who is harming a child, "any statements obtained are testimonial for purposes of the Confrontation Clause." *Clark*, 999 N.E.2d at 597.

In those eighteen states where all citizens are mandatory reporters, the Ohio Supreme Court's rationale would deem a child's own parent or

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[3] U.S. DEPT. OF HEALTH AND HUMAN SERVS., Child Welfare Information Gateway, *Mandatory Reporters of Child Abuse and Neglect: State Statutes* (2014), *available at* www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf.

guardian an agent of law enforcement. And if a mother, now an agent of law enforcement, asks questions to find out who hurt her child—if she investigates "with a primary purpose of identifying the perpetrator"—it would again be the case that "any statements obtained are testimonial for the purposes of the Confrontation Clause." *Id.* These results defy common sense. No objective evaluator would find that, solely as a result of reporting obligations, any educator, parent, or doctor who asks a child questions about injuries is serving as the functional equivalent of a law enforcement officer or is working at the behest of police investigators. Allowing the Ohio court's ruling to stand will cause such bizarre legal conclusions due to the ruling's extraordinary reach.

The ruling is also inconsistent with the purpose of mandatory reporting laws. The history of these laws makes clear they are intended to protect children from potential abuse and neglect, and generally are not intended to further criminal prosecutions. The laws are designed to handle most substantiated abuse and neglect cases civilly, with a goal of family reunification, and any criminal justice involvement is unusual. That being so, it is clear that the researchers and legislators involved in the development of the laws never sought to deputize those required to report suspected abuse and neglect as agents of law enforcement.

The ground-breaking 1962 article, *The Battered-Child Syndrome*,[4] by Dr. C. Henry Kempe and other distinguished scholars greatly increased

[4] 181 J. AM. MED. ASS'N 17 (1962).

public attention to physical child abuse and is regarded as the direct cause and catalyst for mandatory reporting laws.[5] Among other proposals, the article (whose initial audience was medical professionals) recommended that all medical professionals report suspected child maltreatment to authorities.

The next year, after seeking input from professionals in the field, including Dr. Kempe, the U.S. Children's Bureau released a model statute that, among other provisions, required doctors and hospitals to report suspected incidences of child abuse.[6] Nearly all substantive recommendations in Dr. Kempe's influential article focus on the doctor's duty to protect the child. The only mentions of law enforcement come with the direction that a doctor "should report possible willful trauma to the police department or any special children's protective service that operates in his community" and that a doctor's training "makes it quite difficult for him to assume the role of policeman or district attorney and start questioning parents as if he were investigating a crime."[7] Even these passing glances at law enforcement are accompanied by the suggestion of a

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[5] *See* Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 838 (2010); Margaret H. Meriwether, *Child Abuse Reporting Laws: Time for A Change*, 20 FAM. L.Q. 141, 142 (1986).

[6] U.S. DEP'T OF HEALTH & HUMAN SERVS., *The Child Abuse Prevention and Treatment Act: 40 Years of Safeguarding America's Children* at 3-4 (2014).

[7] Kempe et al., *supra*, note 4 at 19, 23.

possible civil remedy—a court proceeding to effectuate temporary or permanent separation from the parents—and the repeated suggestion of treatment for parents.[8] Throughout his work, Dr. Kempe's clear focus was the safety of the child, and the possible prosecution of the abuser was not discussed. Accordingly, the approach reflected in the Children's Bureau's model reporting statute was that an agency responsible for children protection, rather than the police, should be designated as the appropriate authority for reports of abuse, and that police should be designated to receive reports "only where 'communities lacked protective services and the police were the only universally available agency . . . to investigate such complaints.'"[9]

By 1967, Dr. Kempe's work and the grassroots efforts that grew from it led to the passage of mandatory reporting laws in all fifty states.[10] Nearly all of these state reporting schemes were based, at least in part, on the Children's Bureau's model statute.[11]

Later, Congress stepped in to reinforce state efforts to protect children from maltreatment with the Child Abuse Protection and Treatment Act of

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[8] *Id.*

[9] Monrad Paulson et al., *Child Abuse Reporting Laws—Some Legislative History*, 34 GEO. WASH. L. REV. 482, 485 (1966) (citation and quotation marks omitted).

[10] *See* Hafemeister, *supra* note 5 at 839-41.

[11] *See* Paulson et al., *supra*, note 9 at 486.

1974 (CAPTA).[12] Among other provisions, CAPTA encouraged state efforts to combat child maltreatment and increased uniformity of state laws by offering financial incentives in the form of conditional grants. States established eligibility for these grants by meeting requirements including: enacting laws for mandatory reporting of child abuse; offering legal immunity to good faith reporters; establishing a means for rapid investigation and service to children in need; requiring confidentiality; creating channels for cooperation between social service providers, police, and courts; requiring appointment of a guardian ad litem; educating the public on child maltreatment; and not reducing state funding for addressing child maltreatment below 1973 levels.[13] Tellingly, the grant funding requiring mandatory reporting laws is codified under the section entitled "Grants to States for child abuse or neglect prevention and treatment programs," 42 U.S.C. § 5106a, (2014), rather than under the section "Grants to States for programs relating to investigation and prosecution of child abuse and neglect cases," 42 U.S.C. § 5106c (2014). This legislative choice indicates that Congress intended such reporting requirements to be measures aimed at preventing abuse and protecting the child, not as prosecutorial efforts.

CAPTA's administration likewise demonstrates a child protective and not criminal focus. For

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[12] *See* Pub L. No. 93–247, 88 Stat. 4 (1974) (current version at 42 U.S.C. §§ 5101-5107) (2014).

[13] *Id*.

example, CAPTA is administered by the U.S. Department of Health & Human Services (HHS), the department responsible for children's health and welfare initiatives, rather than the Department of Justice, as would be the case for a criminal justice program. Under CAPTA as amended, HHS tracks rich, case-level data on all children nation-wide who received a child protective service (CPS) response as a result of alleged child abuse or neglect, but does not track any criminal statistics whatsoever.

The structure of mandatory reporting laws also reinforces the conclusion that they do not deputize those required to report suspected abuse and neglect as law enforcement agents. Mandatory reporting statutes are generally codified in sections of the code related to child welfare or the adjudication of civil child custody cases, not in sections devoted to law enforcement or criminal procedure.[14] Moreover, as a typical reporting statute like Ohio's requires, covered individuals must "immediately report" suspected abuse or neglect, and although the statute specifies that certain information "known or reasonably suspected or believed" should be reported, it makes no mention of any obligation to investigate or verify any information about the suspected abuse. Ohio Rev. Code Ann. § 2151.421(A)(1)(a), (C). In keeping with

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[14] *See e.g.*, N.Y. SOC. SERV. LAW § 413.1(a) (McKinney 2014); 325 ILL. COMP. STAT. ANN. 5/4 (2014); MICH. COMP. LAWS ANN. § 722.623 (West 2014); OHIO REV. CODE ANN. § 2151.421 (2014); TEX. FAM. CODE ANN. § 261.101 (West 2014); FLA. STAT. ANN. § 39.201 (West 2014).

these requirements, the state of Ohio instructs school personnel:

> Early reporting to the children services agency is encouraged to prevent injury or harm to a child. . . . It is not [school employees'] responsibility to determine if abuse or neglect is in fact occurring or if any of the circumstances surrounding suspected incidents of abuse or neglect actually happened. Making this determination is the legally mandated function of the public children services agency.[15]

School policies and procedures typically specifically require that once a mandatory reporter suspects abuse, a report must be made to the proper authorities and no further investigation of the abuse should be conducted by anyone in the school district.[16]

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[15] OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, OFFICE OF FAMILIES AND CHILDREN, *Child Abuse and Neglect: A Reference for Educators* at 8-9 (Oct. 2013).

[16] *See, e.g., Id.* at 30-32 (model reporting procedures); Model Policy Reporting Child Abuse and Neglect for School Officials in Dupage County (IL), *available at* http://www.dupage.k12.il.us/districts/resources/pdf/ModelPolicy.pdf; Los Angeles Unified School District Child Abuse Reporting Information Sheet, *available at* http://notebook .lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/LAUSDNET/OFFICES/SCHOOL_OPS/SCHOOL_OPERATIONS_DIVISION/SCHOOL_OPERATIONS_CHILD_ABUSE_AWARENES/BULL%201347_2_CHILD%20ABUSE_ATTACHMENT%20B.PDF.

The vast majority of reports of suspected abuse or neglect are handled civilly by CPS rather than criminally, further demonstrating that mandatory reporters do not function as agents of law enforcement. According to HHS, local CPS agencies received an estimated 3.4 million reports of potential child abuse involving approximately 6.3 million children in 2012. U.S. Dep't of Health & Human Servs., CHILD MALTREATMENT: 2012 at 5 (2012). Investigation substantiates or indicates probable abuse or neglect in approximately one-fifth of these cases. *Id.* at 18. Most often, the result in these cases is to provide much needed support and resources to children and their families. And this is appropriate because most cases of child maltreatment are due to neglect, and this neglect is often the result of poverty, not deliberate indifference to the child. *See id.* at 20 (78.3% of substantiated cases involved neglect).[17] As Douglas Besharov, the first Director of the U.S. National Center on Child Abuse and Neglect, noted, "[t]he purpose of reporting is to foster the protection of children—not to punish those who maltreat them. Hence, child protective laws have no provisions for criminal court prosecution because, in most situations, criminal intent is absent." Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 464 (1978).

This primary emphasis on identifying maltreatment and protecting children from abuse through a variety of civil interventions is also well founded, considering the significant psychosocial and

[17] *See also* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 131-32 (2001).

economic damages to both the child victim and to society, once maltreatment occurs:

> Child abuse and neglect have known detrimental effects on the physical, psychological, cognitive, and behavioral development of children. These consequences … include physical injuries, brain damage, chronic low self-esteem, problems with bonding and forming relationships, developmental delays, learning disorders, and aggressive behavior. Clinical conditions associated with abuse and neglect include depression, post-traumatic stress disorder, and conduct disorders. Beyond the trauma inflicted on individual children, child maltreatment also has been linked with long-term, negative societal consequences. For example, studies associate child maltreatment with increased risk of low academic achievement, drug use, teen pregnancy, juvenile delinquency, and adult criminality. Further, these consequences cost society by expanding the need for mental health and substance abuse treatment programs, police and court interventions, correctional facilities, and public assistance programs, and by causing losses in productivity. Calculation of the total financial cost of child maltreatment must account for both the

> direct costs as well as the indirect costs of its long-term consequences.[18]

Rather than seeking to prosecute all cases of suspected abuse, scholars and legislators concluded long ago that in many instances prosecution would be both inappropriate and detrimental to the interests of the child. Instead, most efforts are focused on providing interventions and supports in the interest of preserving the family. For example, Ohio's mandatory reporting statute states that it seeks to "preserve the family unit intact." Ohio Rev. Code Ann. § 2151.421 (West 2014). Indeed, among all fifty states and the District of Columbia, a 1996 General Accounting Office survey found that all but one jurisdiction had at least one family preservation program.[19] Likewise, Congress has repeatedly recognized the value of promoting family preservation and family reunification.[20]

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[18] NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT INFO., *Prevention Pays: The Costs of Not Preventing Child Abuse and Neglect* (2001) (internal citations omitted).

[19] Robert Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L.Q. 359, 366 (2000) (citing U.S. Gen. Accounting Office, *Child Welfare: States' Progress in Implementing Family Preservation and Support Services* 24 (GAO/HEHE-97-94) (1997)).

[20] *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96–272, 94 Stat. 500 (1980); Omnibus Budget Reconciliation Act of 1993, Pub L. No. 103–66, 107 Stat. 312 (1993) (establishing the Family Preservation and Support Services Program); Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997); Promoting Safe and

The history and structure of mandatory reporting laws, along with the actual handling of child abuse reports in practice, demonstrate that these laws are designed to protect children, and that any nexus to the criminal justice system is unusual. That being so, the Ohio Supreme Court's conclusion that a responsibility to report suspected child abuse and neglect transforms millions of teachers, school administrators, and others from all walks of life into law enforcement agents cannot be sustained.

C. The Unique Setting in Which Teachers or Other School Personnel Inquire About a Child's Injuries Strongly Militates Against Finding that Such Inquiries are Made for a Prosecutorial Purpose

Even if school personnel were treated as agents of law enforcement (or if the Court were to broaden the audience to whom testimonial statements can be made), within the unique context of school settings it is clear that in virtually all situations, their inquiries into a child's injuries are non-testimonial because those inquiries are made for the primary purpose of protecting children and not primarily to advance a future prosecution that, ultimately, is unlikely to occur.

Teachers and other education professionals pay close attention to the children entrusted into their care, always monitoring their ever changing

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Stable Families Amendments of 2001, Pub. L. No. 107–133, 115 Stat. 2413 (2002); Child and Family Services Improvement Act of 2006, Pub. L. No. 109–288, 120 Stat. 1233 (2006); 42 U.S.C. §§ 629-629b (2014).

moods, dispositions, behaviors and actions so as to tailor their instruction and guidance to their students accordingly. As this Court has recognized, school authorities have an "obvious concern" with protecting the children entrusted to their care. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986); *see also Morse v. Frederick*, 551 U.S. 393, 408 (2007). Teachers' and other school officials' frequent interactions with students lead to familiarity that allows them to detect subtle changes in a child's mood, behavior, or appearance. Such changes put educators on alert that a situation may exist that demands their attention. This is especially true where the change is dramatic or negative. Teachers' and other educators' natural reaction when these situations arise is to talk with the student about what led to the change.

In a school setting, numerous factors or causes having nothing to do with abuse might prompt these kinds of inquiries. For example, a drastic mood or behavior change from a student may indicate something as minor as a tiff between friends or as serious as suicidal depression. Similarly, a change of appearance or injury can signify a variety of problems, which demand a variety of situation- and context-dependent solutions. For instance, a teacher or education support professional may notice that a student appears to have a series of scratches on his arm. While the marks could be the result of abuse, they might also be the result of bullying, nonsuicidal self-injury, rough-housing with a sibling or friend, or simply playing in some woods near the student's home. Similarly, a student who for weeks has arrived at school looking gaunt and tired could be

suffering from severe neglect at home, but she might just as easily be suffering from drug addiction, an eating disorder, depression, or another medical condition, or from disruption in the wake of her parents' divorce or job loss.

Of particular note, a student's injury, unusual mood, or behavior may relate to an altercation between students or an incidence of bullying. In recent years, in response to the Columbine shootings and other tragic events, teachers, school officials, and policy makers have paid increasing attention to the issue of peer bullying within schools. *See, e.g.*, Susan M. Swearer et al., *Bullying Prevention and Intervention: Realistic Strategies for Schools* at 53 (2009). Virtually all school employees agree that they have a responsibility to intervene when they see bullying occur. *See, e.g.*, National Education Association, *Bully Free: It Starts with Me*, "How to Identify Bullying," *available at* http://www.nea.org/home/53359.htm. In Ohio and many other states, teachers generally are required to report bullying incidents to school officials. *See, e.g.*, Ohio Rev. Code Ann. § 3313.666(B)(4) (2014). Indeed, in this very case, the Ohio Supreme Court acknowledged that the preschool teacher's initial inquiries sought to determine whether the child was harmed by another child, asking L.P. whether the person who hurt him was "big or little?" *See Clark*, 999 N.E.2d at 602. Such situations are unlikely to represent child abuse subject to a mandatory reporting obligation and are much more likely to be handled through school discipline, counseling, or parental notification.

School officials investigate children's injuries to address myriad problems, frequently including

violence *among* students rather than child abuse, so their inquiries cannot be assumed to be related to mandatory child abuse reporting obligations. Teachers' and other school officials' ability to respond to the situation and recommend appropriate remedies or coping mechanisms hinges upon their ability to freely and informally engage the student in dialogue about the challenges that student is facing. And, particularly relevant to violence among students, this Court has "recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and [has] respected the value of preserving the informality of the student-teacher relationship." *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985). This flexibility and informality are essential to the work that educators do and would be severely undermined if teachers were presumed to be investigating for the purposes of prosecution rather than for purposes of maintaining order and ensuring the safety of students.

Finally, the training teachers receive is at odds with the notion that any statement made to a teacher is intended or solicited to serve as an out-of-court substitute for live court testimony. Teachers receive extensive training both to earn their teaching credentials, and to continue to master their subject areas and new instructional and classroom management techniques as they progress as professionals. That training covers a myriad of subjects including instructional methods, curriculum content, classroom management techniques, data and assessment, techniques for reaching struggling students or those who need special education

services, cultural competence, anti-bullying, and school safety.[21] This training is intended to assist teachers in creating an environment that is safe for students, orderly, and conducive to learning. By contrast, teachers and other school personnel receive little or no training on the penal code, the elements of crimes, how to conduct a lawful search, how to preserve evidence, what sort of evidence or testimony is admissible at trial, or the roles and responsibilities of law enforcement generally. Indeed, members of this Court have recognized that "[u]nlike police officers, school authorities have no law enforcement responsibility or indeed any obligation to be familiar with the criminal laws." *T.L.O.*, 469 U.S. at 350 n.1 (J. Powell joined by J. O'Connor, concurring). Given the focus of teachers' training, the notion that a teacher's primary purpose in inquiring about a student's injury is "creating an out-of-court substitute for trial testimony," *Bryant*, 131 S.Ct. at 1155, is implausible at best.

The special responsibility of teachers to care for their students and provide for their safety is not one that educators take lightly. Preserving the

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[21] *See e.g.*, Univ. of Va. – The Curry Sch. of Educ., *Teaching Students with Unique Needs*, http://curry.virginia.edu/teacher-education/teaching-students-with-unique-needs (offering overview of Special Education curriculum); Univ. of Tex. at Austin – The College of Educ., *Early Childhood – 6th Grade Generalist*, http://www.edb.utexas.edu/education/departments/undergrad/ald/ec6gen/ (offering four-year education curriculum for primary education teachers); Stanford Univ. – Graduate Sch. of Educ., *Curriculum Outline – Secondary*, https://gse-step.stanford.edu/academics/secondary/curriculum-outline (offering overview of curriculum for secondary education teachers).

flexible and supportive relationships teachers have with their students is essential to accomplishing those goals and ensures that teachers can continue to focus on protecting and nurturing each child. Respecting those relationships is important to continue to allow teachers to reach children where they are, even when doing so requires that teachers take on roles above and beyond their duties as instructors to serve as counselors, friends, mentors, and surrogate parents to their students.

D. Treating School Personnel as Law Enforcement for Purposes of the Confrontation Clause is Likely to Have Unintended and Adverse Consequences

To hold that teachers and other school personnel operate as law enforcement when carrying out their mandatory reporter duties could also have far-reaching consequences that would undermine the welfare of students and the educational process.

1. Most importantly, such a holding will likely make it more difficult for teachers and other school personnel to carry out their duties as mandatory reporters. This would be an especially baleful result because educators are among the most likely people to detect and report abuse: for the past five years, more than sixteen percent of reports were by education professionals.[22]

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[22] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT: 2012 at 22. *See also* Maureen C. Kenney, *Child Abuse Reporting: Teachers' Perceived Deterrents*, 25 CHILD ABUSE & NEGLECT 81, 82 (2001) ("By virtue of their work, [educators] have ongoing contact with children, thus

School personnel may be uncomfortable serving as law enforcement or justifiably concerned that their actions would compromise potential criminal investigations. This could be exacerbated by the fact that many teachers already feel that they do not receive adequate training on how to carry out their duties as mandatory reporters.[23] If this Court were to impose additional law-enforcement duties on those who serve as mandatory reporters, it would be impractical to provide teachers, other school personnel, and millions of other mandatory reporters the training they would need in order to carry out their duties responsibly. As it is, effective training for mandatory reporters must cover complex topics such as recognizing and identifying various forms of abuse (including sexual abuse, physical abuse, emotional abuse, and neglect), distinguishing abuse from other injuries, as well as the proper reporting procedures for suspected abuse.[24] Adding further layers of complexity related to a reporter's duties as a supposed agent of law enforcement would only distract school personnel—who, it must be remembered, must also focus on their key objective of educating the nation's children—from their responsibility to protect children from abuse.

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placing them in a unique position to detect signs of child abuse.").

[23] *See* Krisann M. Alvarez et al., *Why are Professionals Failing to Initiate Mandated Reports of Child Maltreatment, and Are There Any Empirically Based Training Programs to Assist Professionals in the Reporting Process?*, 9 AGGRESSION & VIOLENT BEHAVIOR 563, 564-65 (2004).

[24] *See id.* at 570-72; *Child Abuse and Neglect: A Reference for Educators*, *supra* note 15, at 17-33.

2. Treating teachers as law enforcement for purposes of the Confrontation Clause could also lead to their being treated as law enforcement in other contexts that would greatly complicate the administration of the nation's public schools in unintended ways. For example, courts have uniformly held that questioning of a student by school personnel generally does not qualify as "custodial interrogation" that calls for the prophylactic warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966), unless teachers are working in concert with law enforcement to support a prosecution.[25] Yet, if this Court were to suddenly conclude that teachers and other school personnel *are* agents of law enforcement in certain circumstances, that could easily change. *See S.E.*, 544 F.3d at 640-41 (reasoning that a school official's questioning of a student did not violate *Miranda* largely because the official was not an agent of law enforcement). And, in that event, school officials would be forced to make difficult case-by-case determinations about whether responding to routine

[25] *See S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633, 641 (6th Cir. 2008); *see also C.S. v. Couch*, 843 F. Supp. 2d 894, 918 (N.D. Ind. 2011); *People v. Pankhurst*, 848 N.E.2d 628 (Ill. App. Ct. 2006); *J.D. v. Virginia*, 591 S.E.2d 721 (Va. Ct. App. 2004); *Massachusetts v. Ira I.*, 791 N.E.2d 894 (Mass. 2003); *In re V.P.*, 55 S.W.3d 25 (Tex. Ct. App. 2001); *Louisiana v. Barrett*, 683 So. 2d 331 (La. Ct. App. 1996); *Matter of Navajo County Juvenile Action No. JV91000058*, 901 P.2d 1247 (Ariz. Ct. App. 1995); *Florida v. V.C.*, 600 So. 2d 1280 (Fla. Dist. Ct. App. 1992); *In re Corey L.*, 203 Cal. App. 3d 1020 (1988); *Jefferson v. Alabama*, 449 So. 2d 1280 (Ala. Crim. App. 1984); *Boynton v. Casey*, 543 F. Supp. 995 (D. Me. 1982); *Matter of Gage*, 624 P.2d 1076 (Or. Ct. App. 1980).

school disciplinary or behavioral issues requires the delivery of *Miranda* warnings.

The same is true of the Fourth Amendment's warrant requirement as it applies to the school setting. This Court has clearly established that educators do not act as law enforcement agents in the Fourth Amendment search and seizure context. *T.L.O.*, 469 U.S. at 334. To make them law enforcement agents for purposes of the Confrontation Clause would create confusing and inconsistent constitutional standards. In *Greene v. Camreta*, 131 S. Ct. 2020 (2011), this Court vacated the Ninth Circuit's holding that a CPS caseworker's in-school interview of a student concerning suspected abuse constituted a warrantless and unreasonable "seizure" in violation of the Fourth Amendment. But, if this Court were to determine that teachers and other school personnel operate as law enforcement whenever they inquire into possible child abuse, it would be increasingly likely that the very holding vacated in *Greene* would become the law of the land. Such a result would place teachers—who have "neither the training nor the day-to-day experience in the complexities" of the Fourth Amendment and are therefore "ill-equipped to make a quick judgment" about its application, *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring)—in the impossible position of having to choose between securing the safety of their students and complying with warrant requirements they lack the training and experience to understand.

The position advocated by the Respondent threatens to further constitutionalize many of the day-to-day functions of our nation's schools. This

Court should resist the invitation "to substitute courts for school boards, or to turn the judge's chambers into the principal's office." *Morse v. Frederick*, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part).

E. The Statements at Issue are Non-testimonial even if Statements to Teachers Could be Testimonial in Other Circumstances

As a final matter, even assuming that statements made to teachers or school personnel could be testimonial in some circumstances[26] this case can be resolved on narrow grounds because the statements at issue here were non-testimonial for at least three additional reasons.

1. First, this Court has stated that when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not

[26] Perhaps one could imagine a scenario in which a teacher or school administrator works so closely with law enforcement so as to be considered an agent of law enforcement with the primary purpose of creating an out-of-court substitute for criminal trial testimony. This might be so, for example, if a teacher questioned a student at the behest of police officers, using questions prepared in advance by officers, with responses relayed back to the officers at a later time. *Cf. T.L.O.*, 469 U.S. at 341 n.7 (noting a distinction between searches "carried out by school authorities acting alone" and those done "in conjunction with or at the behest of law enforcement" for purposes of the Fourth Amendment). But, this Court need not address that scenario—or the broader question of whether a teacher's inquiries *ever* might produce a testimonial statement—because that issue is not presented here.

to create a record for trial and thus is not within the scope of the Clause." *Bryant*, 131 S. Ct. at 1155. To determine "whether an emergency exists and is ongoing" requires "a highly context-dependent inquiry" that may depend in part on the type of crime in question. *Id.* at 1156, 1158-59. Because child maltreatment is often a crime of secrecy, *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), and can involve a pattern of abuse, the threat posed to a child by an abusive caretaker may create an ongoing emergency, until some form of intervention is taken. As the Court has recently acknowledged, children "have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (quotations and alterations omitted). This fact is especially true of young children.

Here, the statements at issue were made by a three-year-old child, L.P., whose bloodshot or bloodstained eye, red marks "like whips" and welts on his face, "redness around his neck," and red marks on his body left his preschool teachers "in shock." *Clark*, 999 N.E.2d at 602 (internal quotation marks omitted). Moreover, L.P. appeared bewildered and would not eat. *Id.* Although the social worker who responded to the school was unable to stop Clark from leaving with L.P., the social worker who located L.P. the next day called 911 after seeing his and his sister's injuries, and they were transported to the hospital. *Id.* at 602-03.

Each indicator of an ongoing emergency that this Court highlighted in *Davis* and *Bryant* was present in this case—L.P. faced an "imminent . . .

bona fide physical threat," his teacher needed to determine the source of the threat in order to resolve it, and her questions lacked formality. *Davis*, 547 U.S. at 827; *Bryant*, 131 S. Ct. at 1160. L.P.'s age, bewilderment, and medical condition further indicate a lack of testimonial purpose on his part. *See Bryant*, 131 S. Ct. at 1159. Where, as in this case, a child could be returning to a dangerous environment where he lacks meaningful control or the ability to escape, teachers' efforts to intervene to protect the child should be considered non-testimonial inquiries with the primary purpose of addressing an ongoing emergency.

2. Even if the emergency exception were not applied, the Court has noted 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." *Bryant*, 131 S. Ct. at 1155. Though not determinative by itself, the Court has repeatedly stressed "the importance of *informality* in an encounter" to the ultimate determination of primary purpose. *Id* at 1160. Furthermore, the Court has instructed that 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. Providing guidance on that point, the Court has noted that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard," because "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England."

Id. at 52. Furthermore, members of this Court have indicated that the formality needed to make a statement testimonial may derive from hallmarks of formality such as a signature or certification of veracity, *see Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2721 (2011) (J. Sotomayor, concurring in part), the use of formalized testimonial materials such as a deposition or affidavit, *see Bryant*, 131 S. Ct. at 1167 (J. Thomas, concurring), or the taking of a statement while in police custody or other formalized setting, *see Davis*, 547 U.S. at 840 (J. Thomas, concurring).

Here, L.P. was merely pulled aside, as students often are, and asked a few questions. *See Ohio v. Clark*, No. 96207, 2011 WL 6780456, at * 6 (Ohio Ct. App. 2011), *rev'd*, 999 N.E.2d 592 (Ohio 2013). A short aside with one of the most trusted and familiar figures in L.P.'s life, prior to any involvement of the police or even CPS, could hardly be said to resemble formal interrogation by a police officer. L.P.'s statement further lacked hallmarks of formal testimony such as a certification of the veracity of his statement, an affidavit, or indeed any written documentation whatsoever.

3. Finally, in considering whether statements are testimonial, one must also look to the primary purpose of the victim, and this Court has intimated that the condition or competency of the victim is relevant to that determination.[27] *Bryant*,

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[27] Notably, English common law at the time that the Confrontation Clause was drafted reflected a willingness by courts to admit child hearsay in child abuse cases by "family members, doctors, neighbors, or others." Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from King v. Brasier*, 15 J.L. & POL'Y 495, 518-20 (2007); *see also* Tom Harbinson, *Crawford v. Washington and Davis v. Washington's*

131 S. Ct. at 1159. Specifically, the "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." *Id*.

Here again, L.P.'s young age reinforces the conclusion that his statements were not testimonial. That is especially true where, as in this case, the evidence indicates that the child "'seemed kind of bewildered,'" was "'[s]taring out,'" and "'almost looked uncertain.'" *Clark*, 999 N.E.2d at 595. Additionally, L.P. received no warning about the consequences of his statements, and he only engaged in a brief dialogue with his teacher, a professional with whom he speaks on a near daily basis. An objective evaluator could not conclude that a reasonable three-year-old child in L.P.'s position would have formed a testimonial purpose, or would even understand that his statements might be used at a criminal trial.

Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians Are Nontestimonial and Admissible As an Exception to the Confrontation Clause, 58 MERCER L. REV. 569, 610 (2007).

CONCLUSION

For the foregoing reasons, the judgment of the Ohio Supreme Court should be reversed.

Respectfully submitted,

ALICE O'BRIEN
(Counsel of Record)
JASON WALTA
LISA POWELL
DERRICK WARD
National Education Association
1201 16th Street, N.W.
Washington, D.C. 20036
(202) 842-7035

DAVID J. STROM
JEREMY GARSON
American Federation of Teachers, AFL-CIO
555 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 393-7472

FRANCISCO M. NEGRÓN, JR.
General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6165

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