No. 13-1352

In the Supreme Court of the United States

OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF *AMICI CURIAE* OHIO PROSECUTING ATTORNEYS ASSOCIATION AND THE NATIONAL CHILDREN'S ALLIANCE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Ohio Prosecuting Attorneys Association ("OPAA") is a non-profit organization created to assist county prosecuting attorneys in their pursuit of truth, justice, and the promotion of public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and to serve as legal counsel to county and township authorities. In addition to its advocacy efforts, OPAA provides continuing legal education programs for prosecutors across Ohio.

The National Children's Alliance ("NCA") is a non-profit organization created to support communities in providing a coordinated investigation and comprehensive response to child victims of abuse through Children's Advocacy Centers and Multidisciplinary Teams. NCA's 776 Children's Advocacy Centers provide a multidisciplinary team response, child-friendly facilities, trained forensic interviewers, victim advocacy, and specialized medical and mental health services for children in the investigation, prosecution, and treatment of child abuse.

In this case the Ohio Supreme Court examined the Confrontation Clause in the context of statements a

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

three-year-old child made to his preschool teachers. In light of the teachers' obligation to report child abuse, the court evaluated the statements as if they had been elicited in the course of a police interrogation. Proceeding from that false premise, the court found a three-year-old child's statements to his teachers to be testimonial.

While the court's decision was unprecedented, the underlying facts are all too common. Of the more than 290,000 children who receive services through a Children's Advocacy Center each year, 39% are too young to attend kindergarten. Because such children can rarely testify, the statements they make to their daycare providers, doctors, nurses, and counselors are typically the only way their voices can be heard. It is this population, the most vulnerable in our society, whom the Ohio Supreme Court has silenced and deprived of justice.

SUMMARY OF ARGUMENT

This Court should hold that statements made between private individuals are generally nontestimonial under the Confrontation Clause. This holding is justified because out-of-court statements exchanged between private individuals do not meet this Court's threshold requirements for implicating the Confrontation Clause. Unlike statements elicited during police interrogations, statements between privates individual rarely constitute "solemn declarations" made "for the purpose of establishing or proving some fact."

The level of formality and expectation of evidential use on the part of the declarant, present in police

interrogations, is absent from most conversations between private individuals. The colloquies in this case between a three-year-old and his teachers are illustrative of this point. Neither the teachers, nor the three-year-old, could reasonably expect that the handful of questions asked about visible injuries would one day be used as substitute for in-court testimony. These informal exchanges, conducted without police involvement, bear no resemblance to the Marian examinations the Framers sought to prohibit.

Recognition by this Court that statements exchanged between private individuals are nontestimonial will have little impact on existing Confrontation Clause jurisprudence. Two categories of statements have been evaluated by this Court since Crawford: statements elicited by agents of law enforcement, and formal statements prepared for evidentiary use. The statements at issue represent a third category of statements on which this Court has repeatedly reserved judgment. The Court should now explicitly hold what it has long implied. Statements between private individuals are nontestimonial.

This holding would be consistent with the Framers' understanding of the limitations on the right of confrontation. In the decades preceding the Framing, out-of-court statements of children incompetent to testify were admitted at trial. Parents, neighbors, doctors, and midwives routinely testified to the statements. Because these children were incompetent to testify, they could hardly be thought to "bear testimony" against the accused. Moreover, Framing-era courts appreciated that if such statements were prohibited, there would be no evidence of the offense.

The Ohio Supreme Court failed to recognize the limits of the right to confrontation as it existed at the time of the Framing. In so doing, it mistakenly applied the primary purpose test this Court set forth to evaluate statements made during police interrogations. This Court has never suggested the primary purpose test should be used to evaluate statements between private individuals. Mandatory reporters of child abuse are not *de facto* police interrogators for the purpose of the Confrontation Clause. The Ohio Supreme Court erred when it concluded otherwise.

ARGUMENT

I. A child's statements to private individuals are nontestimonial under the Confrontation Clause.

The Sixth Amendment is unconcerned with a preschool child's statements to his teachers made during lunchtime and play. Such statements are not the "principal evil"[2] at which the founding fathers directed the guarantees of the Sixth Amendment. They are nontestimonial statements whose admissibility is governed not by the Confrontation Clause, but by the traditional rules regulating hearsay.

A. Out-of-court statements made to private individuals are generally nontestimonial.

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right

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[2] *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

. . . to be confronted with the witnesses against him."[3] In *Crawford v. Washington*, this Court expounded upon the right to confrontation, explaining that it only applies to "witnesses" against the accused.[4] The word "witnesses" was defined to mean those who "bear testimony"; "testimony" was defined as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."[5]

However, this Court recognized not all out-of-court statements constitute "testimony" requiring confrontation. *Crawford* distinguished between "testimonial" statements, whose admission requires witness unavailability and a prior opportunity for cross-examination,[6] and "nontestimonial" statements, which face no constitutional bar to admission if they fall within an exception to hearsay.[7] *Crawford* did not draw clear dividing lines between "testimonial" and "nontestimonial" but "testimonial" statements were said to include at a minimum "police interrogations" and "prior testimony at a preliminary hearing, before a grand jury, or at a former trial."[8] L.P.'s statements were certainly none of these.

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[3] U.S. Const. amend. VI

[4] 541 U.S. at 51.

[5] *Id*.

[6] *Id.* at 53-54.

[7] *Id*. at 68.

[8] *Id*.

In *Davis v. Washington*, this Court further clarified that not even all statements in response to police questioning are *per se* testimonial. Statements are nontestimonial when made during "police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." [9] By contrast, statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[10]

The point was not reached, however, to decide "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'"[11] Yet, stark comparisons have been drawn in *Crawford* and its progeny between statements made to friends, family, and non-law enforcement and those formal statements made to police officers investigating a crime. In explaining how statements to law enforcement *are* testimonial, this Court has contrasted how statements to non-law enforcement officers *are not* testimonial.

This Court has observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual

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[9] *Davis v. Washington*, 547 U.S. 813, 822 (2006).

[10] *Id.* at 822.

[11] *Id*. at 823 n.2.

remark to an acquaintance does not."[12] Similarly, for an out-of-court statement to be testimonial the declarant "must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark" and he "must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused. *This is what distinguishes a narrative told to a friend over dinner from a statement to the police.*"[13] Especially pertinent in the instant case, this Court has provided that "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules . . . ."[14]

Statements made to law enforcement have both the indicia of formality and likelihood of use in prosecutions that statements made to private individuals do not.[15] Referring back to the practices at which the Sixth Amendment was directed, "[i]t was this discrete category of testimonial materials ["affidavits, depositions, prior testimony, or confessions"] that was historically abused by

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[12] *Crawford*, 541 U.S. at 51.

[13] *Michigan v. Bryant*, 131 S. Ct. 1143, 1168-69 (2011) (Scalia, J. dissenting) (internal citation omitted) (emphasis added).

[14] *Giles v. California,* 554 U.S. 353, 376 (2008) (plurality opinion).

[15] Affidavits, civil depositions, and other exceptions not relevant to the case at hand may exist, even absent law enforcement involvement, as they possess the requisite "formality and solemnity" to be considered testimonial. *Bryant*, 131 S.Ct. at 1167 (Thomas, J. concurring).

prosecutors as a means of depriving criminal defendants of the benefit of the adversary process."[16] Statements to family, friends, neighbors, acquaintances, and here, preschool teachers, bear no resemblance to formal police questioning of the sort that implicates the Confrontation Clause and even less do they look like the historical abuses that the Framers sought to avoid.

1. L.P.'s statements to his teachers do not meet this Court's definition of "testimonial."

This Court has explained that testimonial statements result from "prior testimony at a preliminary hearing, before a grand jury, or at a former trial"[17] and from police interrogations that have "a primary purpose . . . to establish or prove past events potentially relevant to later criminal prosecution" and no "ongoing emergency" exists.[18] These statements require "unavailability and prior opportunity for cross-examination"[19] to pass Sixth Amendment muster. This Court has contrasted such formal statements with

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[16] *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J. concurring in part and concurring in the judgment.

[17] *Crawford*, 541 U.S. at 68.

[18] *Davis*, 547 U.S. at 822.

[19] 541 U.S. at 68.

statements made to "an acquaintance,"[20] "a friend,"[21] or a "neighbor."[22] In each of these cases, the Court has suggested such statements are nontestimonial facing only hearsay, not constitutional, obstacles to admission.

This Court may recall the image of Sylvia Crawford who had received her *Miranda* warnings and was repeatedly interrogated by police officers. This Court understandably held that, as a nontestifying witness, Crawford's "solemn" declaration to law enforcement officers for "the purpose of establishing or proving some fact"[23] required confrontation. Now contrast the image of Sylvia Crawford in the police interrogation room to that of the three-year-old L.P. answering his teachers' questions in a daycare lunchroom and classroom. These are starkly different images.

The first questioning at issue in this case occurred while L.P. was eating lunch. Ramona Whitley, one of L.P.'s teachers, observed that his left eye appeared to be bloodshot and bloodstained. As he sat at the lunch table, Whitley asked him, "*What happened?*" L.P.

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[20] *Id.* at 51.

[21] *Bryant*, 131 S. Ct. at 1168-69 (Scalia, J. dissenting).

[22] *Giles,* 554 U.S. at 376 (plurality opinion).

[23] 541 U.S. at 51.

replied "*I fell.*"[24] Whitley asked, "*How did you fall and hurt your face?*" L.P. answered "*I fell down.*"[25]

The second questioning occurred in the preschool classroom. In better lighting, Whitley saw additional red marks on L.P.'s face. As L.P. sat and played at a table, Whitley again asked him, "*Oh, what happened?*"[26] Whitley then requested Debra Jones, another teacher, to take a look at L.P. Upon seeing the marks, Jones said "*Whoa, what happened? Who did this? What happened to you?*"[27] L.P. said, "*Dee Dee.*" Jones, unaware of who L.P was talking about (whether adult or child) asked "*Is he big or little?*" to which L.P. answered "*Dee is big*." [28]

These exchanges between two preschool teachers and their three-year-old charge bear no resemblance to the *ex parte* Marian examinations the Framers sought to prohibit.[29] Rather, they fall squarely within the realm of statements made to friends, family, acquaintances, or neighbors this Court has previously suggested were nontestimonial.[30] There were no solemn declarations to police officers meant to establish facts

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[24] *State v. Clark*, 999 N.E.2d 592, 594 (2013).

[25] *Id*.

[26] *Clark*, 999 N.E.2d at 602 (O'Connor, J. dissenting).

[27] *Id*. at 595, 602.

[28] *Id*. at 602.

[29] *Crawford*, 541 U.S. at 51.

[30] *Giles,* 554 U.S. at 376 (plurality opinion).

for later prosecution. There was no oath or affirmation. In fact, no law enforcement was involved before, during, or even immediately after this exchange. It was only when Jones and Whitley took L.P. to their supervisor's office and discovered additional marks on his body that the decision to make a call to the child-abuse-reporting hotline was made.[31]

L.P.'s preschool teachers were certainly not police officers, nor were they acting at the behest of police officers, during their conversations with L.P. Their questions to him were "initial inquiries" that occurred well before any law enforcement, or even a social service worker had been made aware of the situation. As this Court has noted in both *Davis* and *Bryant*, even in cases of *police* interrogation, "initial inquiries may often . . . produce nontestimonial statements."[32] If this is true of police interrogations, it would be absurd to conclude that initial inquiries made by private citizens would, perhaps ever, produce testimonial statements.

Moreover, there was no solemnity in the statements at issue. This is a not a case that invites debate regarding whether the out-of-court statements were unsworn or "sworn before a notary public"[33] or whether they comprise a "certificate" or a "report."[34] L.P.'s

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[31] *Clark*, 999 N.E.2d at 602.

[32] *Bryant*, 131 S. Ct. at 1166 (citing *Davis*, 547 U.S. at 832) (italics omitted).

[33] *Williams v. Illinois*, 132 S. Ct. 2221, 2260 (2012) (Thomas, J. concurring in the judgment); *id*. at 2276 (Kagan. J. dissenting).

[34] *Id*. at 2260, 2276.

statements to his teacher were "off-hand"[35] and "casual."[36] They bore no "degree of solemnity"[37] and possessed no "indicia of formality."[38] They were not statements "produced at the request of law enforcement"[39] nor were they elicited as part of an ongoing criminal investigation "accusing a targeted individual."[40] Rather the statements were derived from questions by a pair of preschool teachers who noticed a three-year-old student had marks on his face.

When parents entrust their child to a teacher, the teacher assumes certain responsibilities and obligations with respect to the child. "The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education, and it is the "primary duty of school officials and teachers" to educate and train young people as well as "to protect pupils from mistreatment by other children . . . ."[41] Whitley and Jones inquired into the source of L.P.'s injury as part of their duty as his educators and

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[35] *Crawford*, 541 U.S. at 51.

[36] *Id*.

[37] *Davis*, 547 U.S. at 836 (Thomas, J. concurring in the judgment in part and dissenting in part).

[38] *Id*. at 840.

[39] *Williams*, 132 S. Ct. at 2260 (Thomas, J. concurring in the judgment).

[40] *Id.* at 2243 (plurality opinion).

[41] *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J. concurring).

caretakers. They were personally responsible for L.P.'s safety while he was in their care; they needed to determine where, where, and how the injuries occurred.

As an essential function as their roles as teachers, they needed to know if the source of L.P.'s injuries was from another child in the classroom. Did they occur at the preschool? If so, they would need to discover which child was responsible, document the injury, and form a plan to keep L.P. and other children safe. Was the source from a sibling or other child at home? If so, they would need to have a conversation with the parent or caregiver who picks the child up to ensure that the parent is aware of the situation (and knows that the injury did not occur at the center). Was the source from a negligent employee or adult caregiver of the child? If so, the teachers would need to take additional steps to secure L.P.'s safety.

L.P.'s teachers acted just as they should have: as teachers and responsible adults. Their questions and L.P.'s answers were not "accusing a targeted individual of engaging in criminal conduct."[42] On the contrary, the teachers stated that L.P. was new to their school and they were not familiar with who "Dee" might be.[43] So when L.P. told them that "Dee" had hurt him, the teachers didn't even know if L.P. was describing another child or an adult. This prompted their follow-up question of whether Dee was "big or little?" Whitley and Jones did what any teacher, what *any person*,

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[42] *Williams*, 132 S. Ct. at 2242.

[43] *Clark,* 999 N.E.2d at 595, 602 (O'Connor, J. dissenting).

would do upon seeing an injured three-year-old child before them. They asked what happened. L.P.'s statements were made to his teachers who, acting as teachers, not as agents of law enforcement, inquired about the source of his injuries. L.P.'s statements bore no indicia of formality or solemnity associated with this Court's prior example of testimonial statements.

2. Recognition that out-of-court statements between private parties are nontestimonial is consistent with *Crawford* and its progeny.

Despite the array of Sixth Amendment cases this Court has considered since *Crawford*, none has required a decision on "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'"[44] Should this Court hold that out-of-court statements between private parties are outside the province of the Confrontation Clause, little, if any, impact will be seen on the types of Confrontation Clause issues this Court has previously addressed.

In *Crawford* and *Hammon* this Court held statements made during police interrogation, regardless of whether the declarant was in formal

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[44] *Davis*, 547 U.S. at 823 n.2. *See also Bryant*, 131 S. Ct. at 1155 n.3 ("*Davis* explicitly reserved the question of "whether and when statements made to someone other than law enforcement are "testimonial." We have no need to decide that question in this case either . . .").

police custody, were testimonial.[45] Conversely, in *Davis*, statements made by a domestic violence victim to a 911 emergency operator during an "ongoing emergency" were held to be nontestimonial.[46] In *Bryant*, statements that a mortally wounded victim made to police officers during an "ongoing emergency" were also held to be nontestimonial.[47] The rule proposed here would leave the existing analytical framework governing police interrogations unaffected; by definition, only out-of-court statements between private parties would carry a presumption that the statements are nontestimonial.

Since *Crawford*, this Court has also evaluated whether certain scientific reports prepared as evidence for trial by private parties, at the request of the police, were testimonial. In *Melendez-Diaz* this Court held statements contained in a forensic laboratory's "certificates of analysis" showing a substance to be cocaine were "quite plainly affidavits" and "testimonial statements."[48] The Court reached the same conclusion in *Bullcoming* when it examined a forensic laboratory report with a "certification" as to the defendant's blood-

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[45] *Crawford*, 541 U.S. at 38; *Davis*, 547 U.S. at 830. "[T]he primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime . . ." and there was no "ongoing emergency."

[46] *Davis*, 547 U.S. at 817.

[47] *Bryant*, 131 S. Ct. at 1150.

[48] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009).

alcohol level.[49] Both reports "fell within the core class of testimonial statements."[50] They were out-of-court statements, prepared to be used as evidence in a criminal case, and at the request of the police. Moreover, they were solemn affirmations of facts that the state sought to prove at trial. The very reasons why such reports were deemed testimonial are the same as why statements between private parties are nontestimonial.[51] This is because statements between private parties, like those elicited from L.P., bear no similarity to formal reports generated for trial. A clear ruling from this Court that these statements are nontestimonial will strengthen and properly define this Court's previous decisions.

In addition to being consistent with *Crawford* and its progeny, such a ruling would be consistent with this Court's holding in *White v. Illinois*.[52] In *White*, the victim was a four-year-–old girl who disclosed sexual abuse by her father to her babysitter, her mother, a police officer, a nurse, and a doctor. The victim's statements to each of these individuals were admitted at trial. Applying the now-rejected *Roberts* analysis,

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[49] *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011).

[50] *Id*.

[51] This Court also determined statements contained in a scientific report to be nontestimonial in *Williams v. Illinois*, 132 S. Ct. at 2242 (plurality opinion) (private laboratory report showing a DNA profile "match" to the defendant's blood could have been "introduced for its truth" with "no Confrontation Clause violation").

[52] 502 U.S. at 349-350.

the *White* Court determined that the challenged testimony did not violate the Confrontation Clause.[53]

White's holding has been described as "in tension" with *Crawford* inasmuch as *White* permitted the unconfronted "statements of a child victim to an *investigating police officer* admitted as spontaneous declarations."[54] Yet the testimony from the victim's babysitter, mother, nurse, and doctor were *not* mentioned along with the investigating police officer as potentially problematic testimonial statements in *Crawford*. Not only is it fair to infer the other witness statements are nontestimonial under *Crawford*, such a conclusion is consistent with this Court's repeated observations that out-of-court statements between private parties are generally outside the purview of the Confrontation Clause.

Recognition from this Court that out-of-court statements between private parties are regulated by the rules of evidence and generally *not* the Confrontation Clause would be consistent with this Court's previous rulings. Such a ruling would allow trial courts to evaluate each statement under the rules of evidence which are better equipped, and a more appropriate vehicle, than the Confrontation Clause to address issues of reliability.[55] Moreover, such a ruling would respect the Framers' intent that testimonial

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[53] *Id*. at 350.

[54] *Crawford*, 541 U.S. at 58 n.8 (emphasis added).

[55] 541 U.S. at 68 "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ."

statements mark both the core concern and the perimeter of the Confrontation Clause.

B. Out-of-court statements by children incompetent to testify have historically been admitted at trial through third parties.

As this Court has previously observed, we must often "turn to the historical background of the Clause to understand its meaning."[56] This Court has previously recognized two historical exceptions to the Confrontation Clause,[57] and statements by children incompetent to testify should be a third.

1. Out-of-court statements by children incompetent to testify were routinely admitted in Framing-era cases.

In the decades preceding the Framing of the Constitution, hearsay statements of child victims were routinely admitted in common-law prosecutions of rape and assault. This was true even when the child did not testify.[58] These unconfronted out-of-court statements, related to the jury by whomever the victim happened to

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[56] *Id.* at 43.

[57] *Giles*, 554 U.S. at 362 (plurality opinion); *Reynolds v. United States*, 98 U.S. 145, 148 (1879).

[58] *See e.g., Trial of William Nichols*, Old Bailey Session Papers (hereinafter "OBSP"), t17240226-73, (Feb. 1724); *Trial of Thomas Padget*, OBSP, t17270222-72, (Feb. 1727); *Trial of Samuel Street*, OBSP, t17251013-66, (Oct. 1725*); Trial of Francis Moulcer*, OBSP, t17441017-25, (Oct. 1744); *Trial of William Tankling*, OBSP, t17500711-25, (July 1750).

tell, were often the only evidence of what transpired. An early example of this can be seen at the trial of William Kirk.[59]

In 1754, Kirk was indicted for raping seven-year-old Anne Brown. At the time of the trial it was noted that because of her age, and her "not understanding the nature of an oath," she could not be questioned at trial. In lieu of her testimony, her out-of-court statements describing the defendant's conduct were related through several third parties.[60]

At trial, a Mr. Stevenson was permitted to testify that the victim told him the accused "used to set her upon his knee, and used to put his finger into her." Similarly, an acquaintance of the victim was permitted to testify that her children told her the accused would "put his hand up their petticoats, and that some of them were sore." She was further permitted to testify that "they also told me that Anne Brown was one of those he served so." Finally, she testified that Anne "told me he had done to her as mentioned by the last evidence." Anne's mother was also permitted to testify that "the child told me he used to put his hands up her petticoats."

The Court took no exception to multiple witnesses testifying to the child's out-of-court statements. However, given that "there was no other evidence against the prisoner than hearsay from the child's mouth" Kirk was acquitted of the capital offense of

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[59] *Trial of William Kirk*, OBSP, t17540530-36, (May 1754).

[60] *Id*.

rape. Despite the acquittal, the court's ruling recognized that Anne's unconfronted hearsay statements were *evidence*. This inference is borne out by the court's decision to detain Kirk, based upon the hearsay evidence, for trial on the lesser offense of assault with intent to commit rape. While hearsay statements alone may have been sufficient to put Kirk to death, those same statements were evidently sufficient to deprive him of his liberty.[61]

Far from an anomaly, *Kirk* is representative of a common theme throughout Framing-era cases involving child victims. Their statements were routinely admitted at trial despite their inability to testify.[62] Looking solely at rape cases recorded in the Old Bailey Session Papers between 1684 and 1789, one can find nearly two dozen Framing-era cases in which unconfronted out-of-court statements, made by children too young to testify, were admitted as evidence at trial.[63] While this evidence alone was rarely sufficient

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[61] Rape, as defined at the time, required vaginal intercourse and emission. Anne's out-of-court statements did not mention emission. *See* Matthew Hale, *Historia Placitorum Coronae* 628 (Sollom Emlyn ed., London 1736).

[62] *Trial of Thomas Crosby*, OBSP, t17571207-14, (Dec. 1757); Trial of Aaron Davids, OBSP, t17591205-25, (Dec. 1759); *Trial of Samuel Tibbel*, OBSP, t17651016-2, (Oct. 1765); *Trial of Charles Brown*, OBSP, t17670603-52, (June 1767); *Trial of Isaac Spicer*, OBSP, t17671209-64, (Dec. 1767); *Trial of William Allam*, OBSP, t17680907-40, (Sept. 1768); *Trial of James Craige*, OBSP, t17710703-33, (July 1771); *Trial of Joseph Fyson*, OBSP, t17880625-93, (June 1788).

[63] For a summary of the statements admitted, see Thomas D. Lyon and Raymond LaMagna, *The History of Children's Hearsay: From*

to convict the accused of a capital offense, it often carried sufficient weight to support lesser charges.[64]

Admission of such statements, closer to the time of the Framing, can be seen in the trial of Charles Ketteridge. On July 24, 1779 Ketteridge was indicted for the rape of four-year-old Sarah Roultney.[65] When the trial was held, Sarah was "setup to be examined, but no answer could be got from her to any questions put to her." Upon her failure to testify, her mother was sworn and testified to a number of the statements Sarah would have presumably related to the jury. Her mother also testified that after having Sarah's injuries examined she and a Sir John Fielding went "with warrant" to confront the accused.

After describing an emotional exchange she had with the accused, Sarah's mother was permitted to testify to Sir John Fielding's questioning of her daughter. She recalled,

> Sir John: "my dear, tell me who hurt you"
>
> Sarah: "Mr. Wright's coachman."
>
> Sir John: "where was it in the garret or the kitchen"

Old Bailey to Post-Davis, 82 Ind. L.J. 1029, 1042 (2007), Table 2, "Hearsay admitted in Old Bailey child rape cases in which the victim did not testify (sworn or unsworn), 1684-1789."

[64] While admissible, a child's out-of-court statements were rarely sufficient to sustain convictions. Rather, after their acquittal, defendants were tried on lesser offenses. *Id*. at 1046.

[65] *Trial of Charles Ketteridge*, OBSP, t17790915-18, (Sept. 1779).

Sarah: "neither, it was in the stable"

Sir John: "where did he lay you?"

Sarah: "On the hay."

Sir John: "point out the man"

Sarah's mother testified that the encounter ended when Sarah "pointed out the prisoner." Once Sarah identified the accused, "Sir John committed him." After testifying to this colloquy between her daughter and the "investigating officer," she was permitted to testify to a number of other statements her daughter made about the accused.[66]

As in *Kirk*, the victim's mother in *Ketteridge* was permitted to testify in her stead as Sarah was incompetent to take the oath herself. However, it cannot be overlooked that she was also permitted to relate Sarah's statements to Sir John to the jury. The exchange between Sarah and Sir John, who confronted the accused "with warrant" and ultimately "committed him," bears a striking resemblance to a modern day police investigation. This strongly suggests that regardless of the formality in which it is made, children's statements will never be testimonial when they are incompetent to testify.

The prevalence of hearsay in child rape cases was recognized by commentators in the treatises of the era. In his 1769 *Commentaries on the Laws of England*, William Blackstone observed that "the law allows what the child told her mother, or other relations, to be given

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[66] *Id*.

in evidence, since the nature of the case admits frequently of no better proof."[67] In his *Historia Placitorum Coronae*, published in 1736, Matthew Hale wrote that "if the child complain presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken . . ." [68] This necessity of admitting hearsay testimony in cases with child victims was also recognized by Henry Bathurst in his 1761 *Theory of Evidence*.[69]

This necessity existed–and still exists–for two reasons. First, some child victims are simply unable to testify. They may not understand the nature of the oath, or they may simply sit silent when they attempt to "bear witness." Second, as Hale observed in describing child rape, "[t]he nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed . . . ."[70] Hale's remarks are as true today as they were in the eighteenth century; in most cases, the only first-hand account of what transpired is the statement of the child. While other evidence may corroborate the statement, it can seldom supplant it.

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[67] William Blackstone, *Commentaries on the Laws of England* 214 (Oxford 1769).

[68] Hale, *supra* note 61, at 634.

[69] Henry Bathurst, *The Theory of Evidence* 110 (Dublin 1761) ("In cases of foul facts done in secret, where the party is injured the repelling of their evidence is, in some measure, denying them the protection of law.")

[70] Hale, *supra* note 61, at 634.

2. Framing-era developments involving child competency and hearsay did not render statements made by children incompetent to testify testimonial.

While recognizing the difficulties involved with prosecuting sexual assaults against children, Hale and others remained concerned with *reliability* of the second-hand relation of the child's out-of-court statements.[71] Hale opined "there is much more reason for the court to hear the relation of the child herself, than to receive it at second-hand from those, that swear they heard her say so; for such a relation may be falsified, or otherwise represented at the second-hand, than when it was first delivered."[72] This concern was later echoed by Henry Bathurst.[73]

In an effort to reduce the reliance on third-party relation of children's out-of-court statements, both Hale and Bathurst suggested that children be permitted to offer unsworn testimony at trial.[74] Numerous cases can be found where courts followed Hale's suggestion and allowed a child victim to testify unsworn. In 1720, a

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[71] Despite the relative recency of the Marian abuses to defendants of this era, admission of the out-of-court statements of children was challenged, if at all, only on the grounds the statements were related second-hand. *See Trial of Joseph Pearson*, OBSP, t17321206-69, (Dec. 1732); *Trial of John Grimes*, OBSP, t17540530-1, (May 1754).

[72] Hale, *supra* note 61, at 635.

[73] Bathurst, *supra* note 69, at 110.

[74] *See* Hale, *supra* note 61, at 634-35; Bathurst, *supra* note 69, at 109-10.

ten-year-old girl was questioned regarding her understanding of the oath; when she stated she did not understand, she was permitted to testify unsworn.[75] In 1762, a five-year-old child was "examined not sworn" when she testified to the details of her rape.[76] In 1766, a ten-year-old child was also permitted to testify "not upon oath."[77]

In addition to allowing young children to testify unsworn, Hale further suggested that courts eliminate the irrebuttable presumption that children under the age of twelve were incompetent to take the oath and give sworn testimony. He wrote that if it appears to the court the victim "hath that sense and understanding that she knows and considers the obligation of an oath, tho she be under twelve years, she may be sworn."[78] Although at odds with the leading decision on child competency of the era, Hale's comments proved influential.[79]

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[75] *Trial of Thomas Beesley*, OBSP, t17200427-38, (April 1720).

[76] *Trial of Richard Smith*, OBSP, t17620421-11, (April 1776).

[77] Trial of Edward Brophy, OBSP, t17660903-38, (Sept. 1766).

[78] *See* Hale, *supra* note 61, at 634.

[79] Hale's proposed modifications to the rules governing child competency were at odds with the prevailing common-law tradition that witnesses under a certain age could never be competent to testify. Witnesses under twelve were historically incompetent to swear an oath; that age was reduced to nine at a later date. *See* Hale, *supra* note 61, at 634 and *Rex v. Travers*, 93 Eng. Rep. 793 (1726).

This inconsistency in whether children could be permitted to offer statements in court, attributable at least in part to the influence of Hale and Bathurst, was ultimately addressed in the now oft-quoted *Brasier* decision.[80] The most widely cited version of *Brasier* involved the sexual assault of seven-year-old Mary Harris and the statements she made to her mother and a woman who lodged with them. Mary's mother and the lodger were permitted to testify as to what was told to them "immediately on her coming home." Based upon this testimony, and the "hurt" she had received, Brasier was convicted.

Upon his conviction, the judgment was respited and submitted to the Twelve Judges at Serjeants'-Inn Hall in 1779 to review whether the "evidence was sufficient in point of law." Upon this review the Twelve Judges held:

> "[N]o testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence."[81]

This reporting of *Brasier* indicates Mary was neither sworn as a witness nor examined by the court and

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[80] *Davis*, 547 U.S. at 828.

[81] *Rex v. Brasier*, 168 Eng. Rep. 202 (1779).

determined to be incompetent to take the oath. In light of these facts, "the information which the infant had given to her mother and the other witness, ought not to have been received."[82]

Brasier was presumably an important case in its day as it answered several questions English courts had struggled with in the preceding century. First, it unequivocally adopted Hale's position that the irrebuttable presumption of child incompetency should be abandoned in favor of an individualized examination of each child. Second, it rejected Hale's suggestion that children too young to comprehend the oath should be allowed to testify as witnesses unsworn.[83] Finally, it suggested that the uncorroborated hearsay statements of a child were not "sufficient in point of law" to convict a defendant of misdemeanor assault charges.[84] While each of these developments in English Common Law is intriguing, none is particularly relevant to a Sixth Amendment analysis.

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[82] *Id*.

[83] *Id*. ". . . if they are found incompetent to take an oath, their testimony cannot be received."

[84] *Id*. As discussed *supra*. When the uncorroborated hearsay statements of a child were insufficient to sustain a conviction for the capital offense of rape, defendants were often held and convicted on charges such as "assault with an intent to rape." *See* e.g., *Trial of William Nichols* (Feb. 1724); *Trial of William Tankling* (July 1750); *Trial of Samuel Street*, (Oct. 1725).

By some accounts, *Brasier* also addressed issues relating to hearsay.[85] However, the published accounts of *Brasier* differed dramatically in this area. The reported versions of *Brasier* in 1789, 1792, and 1800 each reported that Mary testified unsworn; moreover, the 1789 and 1792 versions did not mention any testimony by the mother or lodger at all.[86] If the published versions of *Brasier* available before, during and after the Framing of the Sixth Amendment made no reference to hearsay, much less a common-law right to confront one's accuser, any relevance this case has to understanding the Confrontation Clause seems speculative at best.[87]

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[85] William Blackstone, *Commentaries on the Laws of England* 214 (9th ed., London 1783) ("[I]t is now settled . . . that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath. . . ." This interpretation was eventually echoed by nineteenth century legal theorists and courts. *See also* Edward Hyde East, *A Treatise of the Pleas of the Crown* 443-44 (London 1803).

[86] *King v. Brasier*, 1 Leach 182-183 (K.B. rev. ed 1792), *King v. Brasier*, 1 Leach 346 (K.B. 1789 ed.); *King v. Brasier*, 1 Leach 237 (K.B. rev. ed 1800); S.M. Phillipps, *A Treatise on the Law of Evidence* 202 (New York, Gould, Banks & Gould 1816).

[87] For a thorough discussion of *Brasier* in its historical context see Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from* King v. Brasier, 15 J.L. & Pol'y 495, 499 (2007) ("When read in context, Brasier is not about confrontation at all. Rather, the case concerns unique Framing-era law governing the competency of children to take the oath and give sworn—or sworn—testimony at trial").

A review of Framing-era case law and secondary sources supports but one conclusion: out-of-court statements made by children found incompetent to testify are *not* testimonial.[88] While this conclusion may be at odds with twentieth-century Confrontation Clause jurisprudence that focused on the reliability of such statements,[89] it follows logically from the concept of "witness" itself. As this Court has previously explained, "witnesses" are those who "bear testimony" against the accused.[90] It would be illogical to conclude that one who *cannot testify* by virtue of their age and capacity *bears testimony*. If testimony is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact,"[91] how can an out-of-court statement, made by a child who lacks the capacity to make a solemn declaration in court, constitute a solemn declaration?[92]

This conclusion is consistent with Framing-era cases in which out-of-court statements of children too young to testify were excluded, if at all, only by the

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[88] Simply because a child's statements are not testimonial *does not necessarily make them admissible*. Their admissibility will ultimately be governed by applicable hearsay rules which, in part, focus on the reliability of the statements. *Davis*, 547 U.S. at 821.

[89] *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

[90] *Crawford*, 541 U.S. at 51 (internal citation omitted).

[91] *Id*.

[92] "But a person who cannot perceive his own purposes certainly cannot perceive why a listener might be interested in what he has to say." *Bryant*, 131 S. Ct. at 1169 (Scalia, J. dissenting).

rules governing hearsay.[93] Further, it reflects the developing trend at the time of the Framing that when a child is determined competent to testify, the child should testify.[94] Once a child is of sufficient capacity to appreciate the importance of an oath and attest to a "solemn declaration or affirmation" his statements can potentially be determined to be testimonial. However, unless and until that occurs, the "levity and want of experience" Bathurst observed[95] in children dictate that statements they make lay outside the province of the Confrontation Clause.[96]

This conclusion is also consistent with this Court's initial understanding of the Confrontation Clause.[97] In *Mattox* this Court observed "the primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases . . . ."[98] Receiving the statements of a child who lacks the basic capacity to even execute a deposition or affidavit seems far amiss from the evils the Confrontation Clause was adopted to address.

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[93] *See supra* notes 58, 62.

[94] Hale, *supra* note 60, at 634-35; Bathurst, *supra* note 68, at 110; *Trial of Joseph Fyson*, OBSP, t17880625-93, (June 1788).

[95] Bathurst, *supra* note 69, at 110.

[96] *Davis*, 547 U.S. at 824 ("A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter.").

[97] *Mattox v. United States*, 156 U.S. 237 (1895).

[98] *Id*. at 242.

Moreover, the *Mattox* Court recognized "general rules of law," like the Confrontation Clause, "however beneficent in their operation and valuable to the accused" must "occasionally give way to considerations of public policy and the necessities of the case."[99] This is such an occasion.[100]

Finally, this conclusion is consistent with *Crawford* and its progeny. Can a child who lacks the competency to testify really be thought to "bear testimony" against the accused? Would a child who lacks the competency to testify reasonably expect his statements to be used prosecutorially or at a later trial?[101] Would the reasonable child who lacks the competency to testify have intended his statements for use at a future trial?[102] No matter how the question is asked, the answer is the same. Statements made by children who lack the competency to testify are nontestimonial.

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[99] *Id*. at 243.

[100] "Dying declarations" and "forfeiture by wrongdoing" are two other occasions in which this "general rule" must give way to considerations of public policy and the nature of the case. *Giles*, 554 U.S. at 358-59 (plurality opinion). All three of these exceptions are firmly rooted in the common law and existed as a matter of necessity.

[101] *Crawford*, 541 U.S. at 51-52; *Melendez-Diaz*, 557 U.S. at 310.

[102] *Bryant*, 131 S. Ct. at 1156.

II. The Ohio Supreme Court erred in applying the primary purpose test in this case.

This Court has recognized that police officers serve the public in the dual capacity of both first responder and criminal investigator.[103] When an officer responds to an incident and begins to questions those present, it is not always apparent whether the responses elicited by his questions are testimonial. To assist lower courts in determining whether or not certain statements are testimonial, this Court developed what has become known as the "primary purpose test."[104] In light of its origin, the primary purpose test is well-suited to determine whether statements gathered during an interrogation of a witness to a criminal offense are testimonial.

In *Hammon*, *Davis*, and *Bryant*, this Court applied the primary purpose test to police interrogations that occurred while the police were actively investigating a reported crime (*Hammon*[105]and *Bryant*[106]) or were simultaneously being dispatched to investigate a crime

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[103] *Id*. at 1161.

[104] *Davis*, 547 U.S. at 822.

[105] *Davis*, 547 U.S. at 819. The *Hammon* interrogation occurred after police responded to the victim's home upon a report of a "domestic disturbance", found broken glass and a "somewhat frightened" victim, and questioned the victim separately from the defendant about what had occurred. *Id*. at 819-20.

[106] *Bryant*, 131 S. Ct. at 1150. The interrogation in *Bryant* took place after police officers were dispatched to a report that a man had been shot, found the gunshot victim lying on the ground at a gas station, and questioned him.

(*Davis*[107]). These previous applications of the primary purpose test stand in stark contrast to the facts in *Clark* involving preschool teachers seeing marks on the face of their very young student and asking him what had happened.[108]

The Ohio Supreme Court erred in its application of the primary purpose test in *Clark* because this Court has never implied, much less held, that the primary purpose test applies to conversations between private parties. Moreover, this Court has never suggested a mere duty to *report* suspected child abuse instantly transmutes educators into police interrogators. In applying the primary purpose test to those facts, the Ohio Supreme Court needlessly "strain[s] the text of the Confrontation Clause"[109] and extends it far beyond any possible intent of the Framers.

A. This Court has never suggested that the primary purpose test applies to conversations between private individuals.

While this Court has explicitly reserved judgment as to when, *if ever* statements between private parties implicate the Confrontation Clause, it has never suggested the primary purpose test should, or even

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[107] *Davis*, 547 U.S. at 817. The *Davis* interrogation between a domestic violence victim and a 911 operator occurred while the 911 operator was simultaneously gaining enough information from the victim to dispatch police to her. The operator was talking to the victim while, at the same time, dispatching law enforcement to investigate the crime. *Id*. at 817-18.

[108] *Clark*, 99 N.E.2d at 602.

[109] *White*, 502 U.S. at 364.

could, be used to evaluate statements between private parties.[110] In *Davis*, this Court held,

> "[S]tatements 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. They are testimonial when the circumstances indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[111]

This holding both explicitly and implicitly recognizes that—at the very minimum—*police involvement* is a condition precedent for application of this test.

The primary purpose test was recently revisited by this Court in *Bryant*. The Court explained,

> "To determine whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties."[112]

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[110] *Davis*, 547 U.S. at 823 n.2 (internal quotation marks omitted); 131 S. Ct. at 1155 n.3.

[111] *Davis*, 547 U.S. at 822 (emphasis added).

[112] *Bryant*, 131 S. Ct. at 1150 (internal quotation marks omitted).

Once again, the Court used the primary purpose test to evaluate statements elicited during *police interrogation*.[113] However, nothing in the opinion suggested the Court intended this test to be used to evaluate out-of-court statements between private parties. Rather, "police interrogation" continues to be the *sine qua non* for the application of the primary purpose test.

This limitation on the scope of primary purpose test is necessary as the test is a poor vehicle for evaluating the out-of-court statements of private parties, like those given by L.P. in this case. The test was developed to address the unique circumstances in which police interrogators interact with declarants.[114] Police act as both first responders and criminal investigators; an interrogation, viewed from the perspective of the police, is likely both to respond to the emergency and to gather evidence.[115] Similarly, in some circumstances the formality of the encounter and the dual capacity in which police officers serve may allow a reasonable declarant to suspect his statements will be used in a future criminal case. However, these dynamics, presupposed in the primary purpose test, are simply not present in the day-to-day interactions private citizens have with one another. These informal

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[113] *Id*. at 1157. "As our recent Confrontation Clause cases have explained, the existence of an 'ongoing emergency' at the time of an encounter between an individual and the police is among the most important circumstances informing the 'primary purpose' of an interrogation."

[114] *Id*. at 1161.

[115] *Id*.

encounters bear no relation to the interactions citizens have with law enforcement during a criminal investigation.

The Ohio Supreme Court has failed to appreciate the difference between a formal police interrogation and the informal questioning of L.P. by Whitley and Jones. In doing so they have expanded the reach of the Confrontation Clause far beyond the "discrete category" of formal testimony envisioned by the Framers and beyond the guidance of all post-*Crawford* cases.

B. Ohio's mandatory reporting statute does not convert teachers into police interrogators.

The Ohio Supreme Court's misapplication of the primary purpose test was, in part, predicated upon its erroneous belief that a duty to report child abuse converts private individuals into agents of law enforcement. Ohio, like every other state, has enacted a statute which requires certain individuals to report suspected child abuse to designated government entities.[116] The *Clark* holding improperly converted teachers and over forty other enumerated non-law enforcement occupations—from attorney, doctor, teacher, and counselor to "employee of an entity that provides homemaker services"[117]—into agents of law

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[116] Ohio Revised Code § 2151.421(A)(1)(a). A comprehensive listing of the reporting requirements of all state statutes can be accessed at www.childwelfare.gove/systemwide/laws_policies/statutes/manda.cfm (last accessed Nov. 20, 2014).

[117] § 2151.421(A)(1)(a).

enforcement based solely on their mandatory reporting status under Ohio Revised Code § 2151.421(A)(1)(b).

In Ohio, the duty to report suspected child abuse is placed upon individuals whom the legislature believes are uniquely situated through their "official or professional capacity" to "encounter and identify abused and neglected children" and who have "the necessary training or skill to detect the symptoms of child abuse."[118] The statute provides that no persons listed in R.C. § 2151.421(A)(1)(b)[119] "shall fail to immediately report [] knowledge or reasonable cause to suspect" "that a child under eighteen years of age . . . has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child."[120] The mandatory reporting duty is satisfied by an individual making a report "to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred."[121]

Perhaps as important as what Ohio's mandatory reporting statute requires is what it does not require. Nothing in the statute requires any *investigation* on the part of the reporter. As preschool teachers Whitley and Jones were unquestionably mandatory reporters; they were not, however, mandatory *investigators*.

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[118] *Yates v. Mansfield Bd. of Edn.*, 808 N.E.2d 861, 867 (2004).

[119]R.C. § 2151.421(A)(1)(b).

[120] R.C. § 2151.421(A)(1)(a).

[121] *Clark*, 999 N.E.2d at 597.

Nothing in the statute required them to ask L.P. "What happened?", "Who did this?", or any other questions. They did not ask these questions out of some imagined duty to investigate crimes. They asked these questions because they were conscientious teachers who cared about the welfare of their student.

The Ohio Supreme Court erred in its Confrontation Clause analysis; it simply misread the duty of the over forty classes of mandatory reporters under the statute. It deemed statutory reporters to be law enforcement interrogators. As the *Clark* dissent aptly points out "[t]he duty is to report knowledge or suspicion of abuse or neglect that the designated persons encounter while doing their work"[122] but "[t]he reporting statute *does not* impose a duty to ask questions about suspicious injuries or conditions or to undertake any investigation."[123] "In turn, the children's services agency or the police—not the mandatory reporters—are responsible for investigating the injury or condition . . ."[124]

Where, as here, the teachers did inquire into the situation, this concern did not arise from the statutory duty to report, but rather from "a professional responsibility or concern for the child—to find out what

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[122] *Id*. at 609.

[123] *Id*.

[124] *Id*. "That any information received by one who is required to report may cause the state to initiate an investigation or may later by used by the state for another purpose—to prosecute a perpetrator—"does not change the fact that the statements were not made for the state's use" " (internal citations omitted). *Id*.

happened to the child."[125] As the *Clark* dissent states, "It would be negligent, if not reckless, for a teacher to fail to inquire about the source of newly inflicted, serious injuries on a small child in her care, irrespective of R.C. 2151.421."[126] Regardless of whether they had a statutory duty to report abuse, the questions asked by two preschool teachers of a three-year-old child bear no relation to a police interrogation.

In this case, the Ohio Supreme Court has effectively deputized doctors, attorneys, and a laundry list of other professionals, including L.P.'s preschool teachers. Having deputized them, the *Clark* court then held that the questions these teachers asked their injured student should be reviewed under the same standard as if they were elicited in a police interrogation.

Throughout the United States, there were 124,544 substantiated cases of physical abuse and 62,936 substantiated cases of sexual abuse against children in 2012.[127] Who can these children tell if not their own teachers? Due to *Clark*, doctors, coaches, counselors, and virtually every person a child might approach for help has been made the equivalent of a police interrogator in Ohio. While disastrous for the State of Ohio, the implications of the *Clark* decision cannot be overstated for the 18 states that have universal reporting requirements requiring *every citizen* to report

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[125] *Id*.

[126] *Id*.

[127] *Admin. For Children & Families, Dept of Health and Human Servs.,Child Maltreatment* 2012, Table 3-8, available at http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf.

suspected child abuse to the relevant authorities.[128] Should any of those states find *Clark* persuasive, the words of the neglected, beaten, and raped children too young to speak for themselves will simply never be heard at all. The children will be silenced, and justice will be denied. The *Clark* decision represents a grave error; an error with national ramifications and one that requires swift correction.

CONCLUSION

The *amicus curiae* respectfully requests this Court reverse the judgment of the Ohio Supreme Court and remand the case for proceedings consistent with this Court's decision.

Respectfully submitted,

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[128] *See supra* note 116.