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 FOR THE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WEST VIRGINIA, WISCONSIN, WYOMING, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

2. Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

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INTEREST OF AMICI CURIAE

Child abuse is an all-too-common occurrence in this nation. Approximately 678,810 children were victims of child abuse in 2012, and an estimated 1,640 died that year as a result of abuse and neglect. U.S. DEP'T OF HEALTH & HUMAN SERVS., *Child Maltreatment* 2012 at xii (2013).[1] Every state has laws requiring professionals who frequently come in contact with children—including teachers, care providers, dentists, firefighters, and nurses—to report suspected abuse to child protective services agencies or law enforcement. A rigid rule classifying mandatory reporters as law enforcement agents and presuming that their primary purpose in speaking to injured children is to gather evidence for criminal prosecution sweeps far too many nontestimonial statements within the purview of the Confrontation Clause. As the states' chief law enforcement officers, the undersigned Attorneys General have an abiding interest in ensuring that the lower court's erroneous interpretation of the Confrontation Clause is rejected.

ARGUMENT

A. Statements Made to Individuals Who Are Not Law Enforcement Agents Are Rarely Testimonial

In *Crawford* and subsequent cases, this Court has addressed whether statements made to law enforcement officers were testimonial. *Crawford v. Washington*, 541 U.S. 36 (2004). In that situation the Court held that the Confrontation Clause applies to

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[1] *Available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf#page=13 (last visited November 4, 2014).

statements "procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011). The Court has reserved the question "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006); *see also Bryant*, 131 S. Ct. at 1155 n.3 (internal quotation marks omitted) (also leaving open that question).

As Ohio explains, statements made to someone who is not a law enforcement agent will be testimonial only in the rarest of circumstances, such as when there is some level of police involvement in the exchange. *See, e.g.*, *State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (2007) (child's videotaped statement was testimonial, when given to a nurse and forensic interviewer, while police officer observed from another room). Outside of these rare circumstances, statements made to private persons do not implicate the "principal evil at which the Confrontation Clause was directed," namely, "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50.

Historically, pretrial examinations of suspects and witnesses were conducted before trial by "justices of the peace or other officials." *Id.* at 43-44. Justices of the peace had an "essentially investigative and prosecutorial function." *Id.* at 53. The Court has found that "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England." *Id.* at 52. Police interrogations, "testimony at a preliminary hearing, before a grand jury, or at a formal trial" are "the modern practices with

closest kinship to the abuses at which the Confrontation Clause is directed." *Crawford*, 541 U.S. at 68. But unlike a formal statement to a police officer, a statement made to another private person will only rarely be made for the "primary purpose" of "creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155.

The first step in the Confrontation Clause analysis here, therefore, is to determine whether the obligation to refer suspicions of abuse to a social services agency transforms preschool teachers into law enforcement agents. For the reasons set out below, it does not.

B. Teachers Are Not "Law Enforcement" Agents Merely Because They Are Mandatory Reporters

1. Mandatory Reporter Laws Aim Primarily to Protect Children, Not Facilitate Prosecution

The Ohio Supreme Court assumed that a mandatory reporter's referral of suspicion of neglect, physical abuse, sexual abuse, or emotional abuse is the first step in an inevitable progression to prosecution. That is simply not so. By referring suspected abuse, mandatory reporters allow state social workers to determine what type of assistance or state intervention is needed to protect the child, if any. Most states allow reporters to make an anonymous call to a toll-free hotline. U.S. DEP'T OF HEALTH & HUMAN

SERVS., *Child Welfare Info. Gateway*.[2] Although prosecution is one possible outcome, mandatory reporters play a broader role in protecting children.

Of the 6.3 million children that were referred in 2012 to social services agencies as potential victims of abuse or neglect, only 3.2 million received a response from a child protective services office. ANNIE E. CASEY FOUNDATION, *On the Frontline: Improving Child Protective Services Investigations*.[3] When a mandatory reporter's suspicions are substantiated, social services agencies respond in the manner best suited to prevent a recurrence of the abuse. These strategies include assessment of the degree of risk to the child's safety and the specific strains on the family, such as poverty, drug abuse, and lack of parenting skills. U.S. DEP'T OF HEALTH & HUMAN SERVS., *Child Welfare Info. Gateway*.[4] Depending on the nature and severity of the problem, the response may concentrate on "what might happen in the future" rather than "an investigation that concentrates on determining whether maltreatment has already occurred." *Id.* To enable assistance to families to be effective, the states have a strong incentive to provide services as early in the child's life as possible.

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[2] *Available at* https://www.childwelfare.gov/pubs/reslist/rl_dsp.cfm?rs_id=5&rate_chno=W-00082 (last visited November 12, 2014).

[3] *Available at* http://www.aecf.org/blog/on-the-frontline-improving-child-protective-services-investigations/ (last visited November 12, 2014).

[4] *Available at* https://www.childwelfare.gov/pubs/usermanuals/neglect/chaptersix.cfm (last visited November 4, 2014).

Mandatory reporters play a vital role in alerting social services to the need for family support, before the situation devolves to a point that prosecution is necessary. Child care providers and mandatory reporters who work with children on a daily basis play an important role in alerting the state to signs of abuse early in a child's life. More than 60% of American children under the age of five are in a regular child care arrangement, where they spend an average of 33 hours a week. Lynda Laughlin, *Who's Minding the Kids?*, U.S. CENSUS BUREAU, Table 1 (2013).[5] Preschool teachers and child care providers thus have a unique opportunity to observe a young child's injuries or behavioral changes that may indicate abuse or neglect. Similarly, pediatricians, clergy, firefighters, and counselors have an opportunity to see signs of possible abuse while interacting with children and families. Requiring that such signs be reported provides a critical first line of defense in the states' efforts to aid families, and prevent the need for eventual prosecution or termination of parental rights.

2. There Is No Reason to Treat Most Mandatory Reporters As "Law Enforcement"

In marked contrast to police officers, mandatory reporters of child abuse do not have an investigative or prosecutorial function. Rather, they are professionals that come into contact with children in the course of their daily job duties. A mandatory reporter may notice signs of abuse while cleaning a

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[5] *Available at* http://www.census.gov/prod/2013pubs/p70-135.pdf (last visited November 4, 2014).

child's teeth, caring for a child at daycare, or performing a regular pediatric check up. When there are signs of abuse, mandatory reporters are required only to refer the suspicion to a child services agency, so that an investigation can be carried out by the social services agency or the police. To this end, Ohio requires mandatory reporters with knowledge that a child "has suffered or faces a threat of suffering" any physical or mental injury to "immediately" inform the public children services agency or the police by telephone or in person. Ohio Rev. Code § 2151.421.

The requirement that suspicions be referred to a social services agency does not deputize mandatory reporters into law enforcement agents responsible for investigating and gathering evidence. To the contrary, that responsibility is specifically entrusted to state child protective services agencies and the police. A mandatory reporter's responsibilities stop after their suspicions are shared with child protective services. In fact, if a mandatory reporter asks probing questions, it "can harm subsequent [child protective services] or legal processes." U.S. DEP'T OF HEALTH & HUMAN SERVS., *The Role of Professional Child Care Providers in Preventing and Responding to Child Abuse and Neglect* (2008).[6]

The responsibility for investigation in Ohio lies with the public children services agency. When a teacher suspects abuse, the Ohio public children services agency is statutorily required to conduct an investigation within 24 hours. After completing its investigation, the agency makes a recommendation to

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[6] *Available at* https://www.childwelfare.gov/pubs/usermanuals/childcare/chapterthree.cfm (last visited June 4, 2014).

the prosecutor. Ohio Rev. Code § 2151.421(F). The other states' systems operate similarly. Child protective services or the police are responsible for investigating allegations of abuse or neglect. *See, e.g.*, Wash. Rev. Code § 26.44.050; Tex. Fam. Code Ann. § 261.301(a); 325 Ill. Comp. Stat. 5/7.4. Child services agencies screen the referrals and employ specially trained persons to question children after notice of possible abuse is received and determine whether the allegation is founded. The agency determines whether the family needs assistance or intervention by social services, and whether it is necessary to refer the matter to the police. Since no state deputizes mandatory reporters or requires that they conduct an investigation, characterizing them as law enforcement agents verges on the outlandish.

3. L.P.'s Caregivers Were Not Acting As Law Enforcement Agents When They Spoke to Him

This case illustrates the non-law-enforcement nature of interactions between teachers, doctors, nurses, and other mandatory reporters and injured children. The exchange took place in a preschool. In a preschool or child care setting, the teachers' primary responsibility is to protect the health and safety of the children in their care. It is common for children to receive injuries during the normal course of their play. U.S. DEP'T OF HEALTH & HUMAN SERVS., *Role of Professional Child Care Providers in Preventing & Responding to Child Abuse and Neglect* (2008).[7] Teachers must also observe children for

[7] *Available at* https://www.childwelfare.gov/pubs/usermanuals/childcare/chaptertwo.cfm (last visited June 4, 2014).

signs of illness. If members of the general public were asked what purpose the teachers had here in asking the questions, virtually all would respond that they sought to ensure the wellbeing of the child and discover whether there were classroom bullies.

This is precisely what L.P.'s teachers sought to do. The situation "must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight." *Bryant*, 131 S. Ct. at 1157 n.8. At the time the teachers saw L.P.'s blood-stained eye and the whip-like marks on his face, they did not know the extent of his injuries, whether he had been hurt at the school, who had hurt him, or whether a hazard at the preschool caused him to fall and posed an immediate threat to other children. The questions exclaimed by the teachers—"whoa, what happened?" "how did you fall and hurt your face" and "who did this?"—were objectively necessary to evaluate the situation. In contrast to the formal, deliberate interrogations at issue in *Crawford* and *Hammon,* the questions posed to L.P. were a spontaneous reaction to the sight of his injuries. The teachers' questions—which were asked in the informal setting of the school lunch room and the classroom—were those of caregivers, not enforcers of the law.

Once the teachers determined that L.P. did not need medical attention, and had not been hurt at the preschool, the questions ended. Indeed, it is difficult to imagine how Jones and Whitley could have asked any fewer questions to fulfill their need to determine whether L.P. was being harmed at the preschool or needed medical help. As soon as they realized that the harm was not caused by another child

or a hazard at the preschool, and that L.P. may have been abused, the questioning stopped and a phone call was made to the county children and family services agency. Pet. App. 4a. The teachers did not seek to obtain even the most elementary information that would be needed for trial—such as when the abuse occurred, how the abuse was inflicted, where the child was when the abuse occurred, or whether there were witnesses present. The police did not participate in the questioning, were not present during the questioning, and did not ask the preschool teachers to ask any questions. Neither the police nor the child services agency had any knowledge of the questioning at the time it was performed.

The informal questioning of L.P. bears no resemblance to the type of formal statements to law enforcement that have been found to implicate the confrontation right. *See Bryant*, 131 S. Ct. at 1155; *Davis*, 547 U.S. at 825-826, 827, 830; *Crawford*, 541 U.S. at 51-52 ("core class" of statements implicating the Confrontation Clause "is contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions"). In responding to the situation at hand, the teachers had no opportunity to plan or construct questions designed to elicit anything more than the barest information, much less to structure their questions in a manner designed to prompt L.P. to provide information for use in a criminal trial.

C. Even if Mandatory Reporters Qualify as "Law Enforcement," a Young Child's Statements to Them Will Rarely Qualify as Testimonial, and Certainly Do Not Here

Even if the duty to refer suspicions of abuse transforms mandatory reporters into law enforcement, young children's statements to mandatory reporters will rarely be testimonial. Under the "primary purpose" test applicable to statements made to law enforcement agents, a statement is testimonial if, viewed from the perspective of both the declarant and the questioner, it was planned or calculated to "'establish or prove past events potentially relevant to later criminal prosecution.'" *Bryant*, 131 S. Ct. at 1160 (quoting *Davis*, 547 U.S. at 822). That will rarely be the case as to young children's statements to mandatory reporters. As described above, mandatory reporters are not investigating or seeking to preserve testimony of past events when they spontaneously question a child about injuries. And an objective witness would not expect a young child to have any ability to comprehend that his informal answers would be used at trial.

1. Mandatory Reporters Such as Preschool Teachers Rarely Ask Questions of Injured Students for the Purpose of Obtaining Substitutes for Trial Testimony

The most fundamental flaw in the Ohio Supreme Court's decision was its creation of a strict dichotomy: questions either "deal with an existing emergency" (in which case they are not testimonial)

or they "gather evidence potentially relevant to a subsequent criminal prosecution" (in which case they are testimonial). Pet. App. 9a. In the court's view, once it found that no emergency existed (a questionable proposition in itself), it necessarily followed that the teachers' primary purpose was to "establish[ ] past events potentially relevant to a later criminal prosecution." Pet. App. 3a. But rigidly classifying all encounters as either an emergency or an interrogation to gather information for trial distorts the primary purpose test in a manner that "creates a beneficial catch-22 for pedophiles and other abusers of children." Pet. App. 46a (O'Connor, J., dissenting).

Unlike the Ohio Supreme Court, this Court has expressly chosen *not* to create two classifications for out-of-court statements, as either emergencies or testimonial statements. *Bryant*, 131 S. Ct. at 1155; *Davis*, 547 U.S. at 822. As *Bryant* explained, "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." 131 S. Ct. at 1155. The context and purpose of out-of-court statements must be examined to determine whether the statements "evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." *Id.*

When a police officer responds to an emergency, the "emergency focuses the participants on something other than 'prov[ing] past events potentially relevant to later criminal prosecution.'" *Id.* at 1157 (quoting *Davis,* 547 U.S. at 822). The same logic applies when the Confrontation Clause is applied to

mandatory reporters. A mandatory reporter may be told something that raises a suspicion of abuse while the mandatory reporter and the child are focused on the adult's professional duties—extracting a tooth, teaching Sunday school, injecting childhood vaccines, or providing child care. In such situations, the mandatory reporter's spur-of-the-moment, unstructured questions are comparable to a police officer's questions during an emergency. The focus of the adult and the child is on the immediate situation, not on an interrogation to preserve testimony for use in a criminal trial.

As discussed in section (B)(3) above, viewed objectively, the exchange between L.P. and his teachers was focused on the teachers' professional obligation to assess the risk of harm to L.P. and the other children. That is what preschool teachers do every day; their focus is not on future criminal prosecutions. The questions were "informal and spontaneous" and were asked "on the spot in the classroom" and lunchroom, rather than in a police station or on a 9-1-1 call. Pet. App. 40a. And as this Court explained in *Bryant*, the informality of the encounter, while not dispositive, "informs" the primary purpose inquiry and militates against finding that the primary purpose was to prove past events in anticipation of later prosecution. *Bryant*, 131 S. Ct. at 1160.

To be sure, L.P.'s teachers had a duty to report suspected abuse and were presumably aware of that duty when they asked L.P. what happened. As this Court has recognized, "dual responsibilities may mean that [interrogators] act with different motives simultaneously or in quick succession." *Bryant*, 131 S. Ct. at 1161. When an interrogator has dual pur-

poses, the *primary* purpose still must be objectively ascertained by focusing on the understanding, statements, and actions of all of the participants. *Id.* at 1161-1162. And that brings us back to the commonsense inquiry of why a reasonable teacher would ask a bruised child what happened: to address the child's health and safety and ensure classroom order, or to "creat[e] an out-of-court substitute for trial testimony"? Given the limited role teachers have in the law enforcement process—not to investigate, but merely to refer suspicions to others—and their continual, routine obligation to care for their students, the answer is self-evident.

2. L.P.'s Statements Were Not Made with Testimonial Intent

In addition to failing to analyze the context of the encounter, the Ohio Supreme Court failed to undertake "a combined inquiry that accounts for both the declarant and the interrogator." *Bryant*, 131 S. Ct. at 1160; *see also id.* at 1168 (Scalia, J., dissenting) ("[t]he declarant's intent is what counts"). As the Court has emphasized, "what was *asked and answered*" must be viewed objectively to determine the purpose of the questioning. *Id.* (citing *Davis*, 547 U.S. at 827). Focusing solely on the interrogators' purpose, the Ohio Supreme Court ignored the requirement that it also consider the declarant's purpose.

Viewed objectively, a young child's purpose in answering his teacher's questions lacks any intent or comprehension that the answers could be used at trial. In responding to the teachers' questions, L.P. was not "'bear[ing] testimony'" as a witness. *Bryant*,

131 S. Ct. at 1153-54 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). The three-year-old boy did not make "'a solemn declaration or affirmation . . . for the purpose of establishing or proving some fact.'" *Id.* Nor is there any indication that L.P. intended to create evidence for Clark's trial. His short answers did not volunteer anything more than the minimal amount required of him. He stated only that he fell, Dee did it, and Dee is big. Pet. App. 20a-21a. And even if L.P. had provided more information, a three-year-old child is highly unlikely to have even a rudimentary understanding of the legal system and would not understand that his answers could lead to or be used in a criminal trial. Because L.P.'s statements were not testimonial, the confrontation right was not implicated.

D. The Ohio Supreme Court's Misinterpretation of the Confrontation Clause Adds Unnecessary Barriers to State Prosecutions of Child Abuse

Construing the Confrontation Clause to bar the admission of statements children informally make to mandatory reporters of abuse will greatly impair states' ability to protect children by successfully prosecuting abusers. As the dissenting judge below cautioned, the Ohio Supreme Court's opinion prohibits "[t]he very people who have the expertise and opportunity to recognize child abuse" from testifying to out-of-court statements when the child is unable to testify. Pet. App. 46a (O'Connor, C.J., dissenting). The costs of that rule are immense.

This Court has recognized that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are not witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). A child's feelings of vulnerability and guilt make it particularly difficult to come forward when a parent is the abuser. *Id.* The absence of witnesses, and often a lack of physical or scientific evidence of the crime or identity of the perpetrator, make the child's initial statements particularly important. Robert P. Mosteller, *Confrontation in Children's Cases*: *The Dimensions of Limited Coverage,* 20 J.L. & Pol'y 393, 394 (2012).

Evidence from caregivers is often critical to the prosecution of these difficult cases. In 2012, nearly 27% of child abuse victims were younger than three-years old and 20% were in the three-to-five-year range. U.S. DEP'T OF HEALTH & HUMAN SERVS., *Child Maltreatment 2012* at 19 (2013).[8] When a young child is unable to testify regarding physical or sexual abuse, the testimony of a trusted care provider may offer the only means of allowing the child's voice to be heard at trial.

The severe limitation the Ohio Supreme Court's rule places on prosecutions would impact cases involving other mandatory reporters of suspected abuse as well. State laws mandating who must report abuse include a wide variety of professionals that come into contact with children, including nurses, doctors, dentists, firefighters, school personnel, and members of the clergy.

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[8] *Available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf#page=19 (last visited November 4, 2014).

Eighteen states require that *any* person who suspects child abuse must report it. *See* Pet. App. 38a n.4. Mandatory reporters submit more than three-fifths of the reports of suspected abuse received annually by state child protective services. U.S. DEP'T OF HEALTH & HUMAN SERVS., *Child Maltreatment 2012* at xi (2013).[9] Since every state has enacted laws requiring the mandatory reporting of child abuse, adoption of the Ohio Supreme Court's reasoning would severely impede child abuse prosecutions nationwide.[10]

CONCLUSION

The judgment of the Supreme Court of Ohio should be reversed.

RESPECTFULLY SUBMITTED.

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[9] *Available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf#page=22 (last visited November 4, 2014).

[10] *Available at* https://www.childwelfare.gov/systemwide/laws_policies/state/index.cfm?event=stateStatutes.processSearch (last visited November 4, 2014).

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