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 FOR THE INNOCENCE NETWORK AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

CHARLES C. SPETH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

FELICIA H. ELLSWORTH
Counsel of Record
DARREN T. GRIFFIS
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
felicia.ellsworth@wilmerhale.com

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INTEREST OF AMICUS CURIAE[1]

The Innocence Network is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide proof of innocence. The 66 current members of the Innocence Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Innocence Network and its members are dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Innocence Network promotes study and reform designed to enhance the truth-seeking function of the criminal justice system and to ensure that future wrongful convictions are prevented.

The Innocence Network has helped to exonerate hundreds of individuals over the past two decades. From those experiences, the Innocence Network is aware that there are often significant problems with the reliability of child-witness testimony. Numerous convictions that rested largely on the testimony of children have subsequently been overturned when that testimony later proved to be unreliable. The Innocence Network's experience with wrongful convictions has also shown that a defendant's personal examination of

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk of Court.

witnesses against the accused—as opposed to their surrogates—is a fundamental safeguard of the truth-seeking function of the criminal justice system. Given these experiences, the Innocence Network has a strong interest in protecting the rights secured by the Confrontation Clause.

SUMMARY OF ARGUMENT

Inculpatory statements by child witnesses present particular reliability risks due to children's susceptibility to particular modes of questioning, suggestion, and coaching. The unreliability of child-witness testimony is established not only by an extensive body of research but also by numerous wrongful convictions that were secured on the basis of child-witness testimony that subsequently proved untrue.

The well-established reliability concerns about children's statements make the procedural safeguards secured by the Confrontation Clause particularly important in the context of child-witness testimony. *See Crawford* v. *Washington*, 541 U.S. 36, 61 (2004) (the Confrontation Clause's "ultimate goal is to ensure reliability of evidence"); *Michigan* v. *Bryant*, 131 S. Ct. 1143, 1157 (2011) ("[B]ecause the prospect of fabrication in statements given for the primary purpose of resolving [an] emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination."). These procedural protections include not just a defendant's opportunity to cross examine—the "'greatest legal engine ever invented for the discovery of truth'"—but also, of signal importance in the case of child witnesses, the jury's direct observation of "'the demeanor of the witness in making his statement,

thus aiding the jury in assessing his credibility.'" *Maryland* v. *Craig*, 497 U.S. 836, 866 (1990).

In the context of prosecutions involving a child victim, which often—as was true in this case—depend entirely on the statements of the child, the importance of the procedures secured by the Confrontation Clause cannot be overstated. In recent decades, however, state legislatures and courts have relaxed evidentiary rules for the use of child-declarant hearsay in order to facilitate criminal prosecutions where the victim-witnesses are children. As a result, many of the out-of-court statements for which the procedural protections secured by the Confrontation Clause are most important are now least likely to be afforded those protections by state rules of evidence. This confluence of factors—the significant potential for unreliable child-witness testimony, the often dispositive impact of child-witness testimony in certain prosecutions, and the prevalence of modern evidentiary rules that facilitate the use of such testimony without the procedural protections of cross examination or jury observation—demonstrates that categorically defining statements made by young children to teachers or care providers as non-testimonial would carry a significant risk of increasing the number of wrongful convictions.

Nor could such a categorical exclusion be justified under the Confrontation Clause. The Confrontation Clause requires that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. This provision was enacted in order to check the "use of *ex parte* examinations as evidence against the accused," *Crawford*, 541 U.S. at 50, especially the sort of "abuses" exemplified at the notorious treason trials of 16th and 17th century England. *Id.* at 50-51. A child's answer to

a question posed by a questioner acting on behalf of the state for law enforcement purposes, and aimed at determining how certain criminal acts transpired, is just such an abuse, as the child's answer reflects "precisely *what a witness does* on direct examination." *Davis* v. *Washington*, 547 U.S. 813, 830 (2006).

Statements made to mandated reporters who gather information about suspected abuse of a child pursuant to their statutory duties can therefore be testimonial, and the categorical rule that Ohio and its amici propose cannot be sustained. The mandatory reporting statutes make clear that teachers and other employees who serve as reporters by virtue of their employment act, at least in part, with an investigative purpose on behalf of the state when they question children upon observation of suspected abuse. Indeed, these reporting statutes *compel*—by making failure to comply a criminal offense—teachers and other reporters to provide evidence to facilitate prosecution. The statutes require mandated reporters to collect information about the cause of a child's injuries and the person or persons responsible for the abuse, often require reporters to generate written reports when requested, and some, like the Ohio statute in this case, authorize the reporter to document any injuries with photographs and x-rays. The statutes are thus designed to facilitate the state's gathering of information for prosecution by compelling certain categories of citizens to act in conjunction with law enforcement.

Moreover, as evidenced by both the statutes and the official guidance provided by states, the investigative and prosecutorial purposes of these laws is not concealed from the mandated reporter. The guidance prepared by the states, and in many instances, the statutes themselves, inform reporters that they may be

required to testify as a witness at a criminal trial. Statements made by children to questions posed by mandated reporters that elicit, on behalf of the government, the type of information that could be used during live testimony in court are thus testimonial.

The age or abilities of the child declarant do not change that conclusion. Indeed, courts, including this Court, have repeatedly applied the Confrontation Clause to exclude statements made by children as young as two-and-a-half when they determined that the statements were gathered during the course of an official investigation and were being used as a substitute for the type of information commonly produced during direct examination at trial. Moreover, even very young children understand that their statements may have punitive consequences for the accused. Thus, any categorical rule that a young child's statements to a mandated reporter cannot be testimonial would be contrary to this Court's precedent and the well-established understanding of the confrontation requirements.

ARGUMENT

I. STATEMENTS BY CHILD WITNESSES PRESENT PARTICULAR RELIABILITY CONCERNS

A. Statements By Child Witnesses May Lead To Errors For Several Reasons—Some Of Which Are Present In This Case

This Court, relying in part on a well-developed body of scientific research, has recognized the "problem of unreliable, induced, and even imagined child testimony." *Kennedy* v. *Louisiana*, 554 U.S. 407, 443 (2008); *see also id.* at 443-444 (referencing studies concluding "that children are highly susceptible to suggestive

questioning techniques like repetition, guided imagery, and selective reinforcement"); *see Arizona* v. *Youngblood*, 488 U.S. 51, 72 n.8 (1988) (Blackmun, J., dissenting) ("Studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults."); *Idaho* v. *Wright*, 497 U.S. 805, 819 (1990) (recognizing that the avoidance of leading questions "may well enhance the reliability of out-of-court statements of children regarding sexual abuse"); *Maryland* v. *Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting) (noting "'special reasons'" to be suspicious of child testimony in light of "studies show[ing] that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality").

The "well-documented" and "serious" concerns about the reliability of child-witness testimony have also been noted by other courts. *See, e.g.*, *Fowler* v. *Sacramento County Sheriff's Dep't*, 421 F.3d 1027, 1039 n.7 (9th Cir. 2005) ("We note further that fantasy by child witnesses is well-documented."); *Danaipour* v. *McLarey*, 386 F.3d 289, 298 (1st Cir. 2004) (noting that "statements by a young child, even if accurately recounted by an adult, may not reflect the truth" for reasons including coaching, repeated inquiry, and a child's desire for attention); *Washington* v. *Schriver*, 255 F.3d 45, 57 (2d Cir. 2001) ("An emerging consensus in the case law relies upon scientific studies to conclude that suggestibility and improper interviewing techniques are serious issues with child witnesses[.]").

Indeed, within the child-development research community, "there is an overwhelming consensus that children are suggestible to a degree that … must be regarded as significant." Ceci & Friedman, *The Suggesti-*

bility of Children: Scientific Research and Legal Implications, 86 Cornell L. Rev. 33, 36 (2000); *see also* Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2146 (1996) (describing a "consensus in the social-science literature" on this point); Goodman, *Children's Eyewitness Memory: A Modern History and Contemporary Commentary*, 62 J. Soc. Issues 811, 818-819 (2006) (acknowledging that, in the 1990s, "[i]t became increasingly clear … that there were conditions under which children were susceptible to false suggestion").

There is also widespread support for the proposition that statements by child witnesses may lead to errors for the following reasons—some of which are present in this case:

- Children may make false accusations as a result of coaching or instigation by an adult, particularly by a parent. *See* Lyon, et al., *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denial*s, 79 Child Dev. 914, 915 (2008) (adults who seek to influence a child's honesty "can successfully encourage children to make false allegations," including "in situations in which children's motivation was to conceal a parent's wrongdoing"); Ceci et al., *Children's Allegations of Sexual Abuse: Forensic and Scientific Issues*, 1 Psychol., Pub. Pol'y, & L. 494, 506 (1995) ("No one familiar with the scientific research ought to doubt that some children could be brought to make false claims of sexual abuse if powerful adults pursue them repeatedly with [suggestive] enjoinders.").

- Children may make false allegations against someone whom they have heard discussed in a negative light. Ceci & Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, 130-131 (1995) (citing study finding that 11% of five- and six-year-olds, after hearing prejudicial remarks regarding a particular individual, made false allegations against that individual).

- When interviewed, children are particularly susceptible to influence from direct or leading questions. *E.g.*, Lyon, et al., 79 Child Dev. at 915 ("direct questions" can "increase the likelihood of false allegations" by children and "children coached to make false allegations are more likely to do so in response to yes–no or forced-choice questions than in free recall"); Ceci & Bruck, *Children's Suggestibility: Characteristics & Mechanisms*, 34 Advances in Child Dev. & Behav. 247, 253 (2006) (children may provide answers to yes or no questions "even though they may not know the answer or understand the question"); Peterson & Bell, *Children's Memory for Traumatic Injury*, 67 Child Dev. 3045, 3059 (1996) (finding children made roughly five times as many errors in response to directed questions as compared to open-ended ones); Saywitz, et al., *Children's Memories of a Physical Examination Involving Genital Touch: Implications for Reports of Child Sexual Abus*e, 59 J. Consulting & Clinical Psychol. 682, 687 (1991) (finding 8% of the girls falsely reported sexual touching during a medical examination when researchers used leading questions).

- Children may be "more suggestible when questioned by an authority figure." *See* 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §1.10[B] (2005); Ceci & Bruck, *Jeopardy in the Courtroom* 258-259; *see also* Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 Duke L.J. 691, 692 (1991) (noting that children "are susceptible to accommodating their reports of events to fit what they perceive the adult questioner to believe").
- Children can give incorrect answers when they are led to believe that their initial answers were wrong, *see* Garven et al., *Allegations of Wrongdoing: The Effects of Reinforcement on Children's Mundane and Fantastic Claims*, 85 J. Applied Psychol. 38, 41-43 (2000), and may make false allegations if they believe that authority figures will not accept their initial accounts, *see* Ceci et al., *Unwarranted Assumptions about Children's Testimonial Accuracy*, 3 Ann. Rev. of Clinical Psychol. 311, 319 (2007); *see also* Ceci & Bruck, *Jeopardy in the Courtroom*, 259 (noting that children "are required to continue until the adult decides to terminate" the questioning).

Many of the above characteristics are present in this case. For example, the initial questioning of L.P. was performed by his teachers, obvious authority figures. In addition, when Deborah Jones first questioned L.P., she asked several direct questions, "Who did this? What happened to you?" (JA 59), and "[D]id [you] get a spanking?" (JA 79). Although L.P. provided an initial answer that failed to identify Respondent, this initial answer was not accepted by his teachers. And

when L.P. responded to a question with "Dee," Jones parroted the response back to him, supplying additional context: "What did you say? Dee? Dee did this?" JA 60.[2]

B. Many Wrongful Convictions Have Rested On Child-Witness Testimony Later Demonstrated To Be Unreliable Or False

This extensive body of social science research is not the only manifestation of the particular unreliability of child testimony providing "'special' reasons" to be wary of child testimony. *Craig*, 497 U.S. at 868 (Scalia, J., dissenting). Rather, numerous actual convictions have rested on child-witness testimony that was subsequently determined to be unreliable or untrue.

Even in cases in which a child's statements are subjected to cross examination, there are often significant concerns about the reliability of those statements. The case of Clarence Elkins provides an example. On the night of June 6, 1998, Elkins' six-year-old niece was sleeping at her grandmother's house when she awoke to hear her grandmother screaming. She ran to the kitchen and found her grandmother fighting with a man; she ran back to her bedroom and was sexually assaulted. The next thing she remembered was waking up to find her grandmother dead. The girl went to a neighbor's house and, after the police were called but

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[2] In addition, in this case, like many abuse cases, there are multiple caregivers who could have been responsible for the abuse—and thus the risk of an adult influencing a child's narrative is particularly acute. Indeed, the central issue at trial was not whether L.P. had been abused, but rather by whom, with a substantial amount of evidence and testimony suggesting that L.P.'s mother, Taheim T., and not Respondent, was the likely perpetrator of the abuse. *See* Resp. Br. 15.

before they arrived, allegedly told the neighbor that the attacker looked like her uncle Clarence. Elkins was subsequently convicted for the rape and murder of his mother-in-law and the rape of his niece. His conviction rested almost entirely on the testimony of his six-year-old niece. Bischoff & McCarty, *Murder, Then Rush to Judgment*, Dayton Daily News, August 6, 2006, at A8. In 2002, however, Elkins' niece recanted her testimony, explaining that her initial statement identifying her uncle Clarence meant only that the perpetrator reminded her of Elkins and that she only subsequently identified Elkins in testimony because prosecutors urged her to do so. Bischoff & McCarty, *My God, This Thing is Horrifying*, Dayton Daily News, August 8, 2006, at A6; *see also* Motion for Leave to Amend, Affidavit of Brooke Sutton, *Ohio v. Clarence Elkins*, No. CR 98061415 (Ohio Ct. C.P. Aug. 12, 2002). DNA evidence eventually led to Elkins' exoneration, and in August 2008, another individual pleaded guilty to aggravated murder, attempted murder, aggravated burglary, and rape in connection with the 1998 crime. McCarty, *A Guilty Plea Closes the Final Chapter on a Book of Horrors*, Dayton Daily News, August 24, 2008, at A6; *see also Elkins* v. *Summit County, Ohio*, 615 F.3d 671 (6th Cir. 2010).

Similarly, in 1984, Frederico Macias was convicted of capital felony murder, largely on the testimony of a nine-year-old witness. *See* Ceci & Bruck, *Jeopardy in the Courtroom*, at 17-18. Testifying at a stay of execution hearing four years later, however, the witness described the process that had elicited her original accusation: "I thought I might have seen something that would be helpful to the police. … I thought they wanted me to be certain, so I said I was certain even though I wasn't. … I answered questions I wasn't certain

about because I wanted to help the adults." *Id.* at 304. After nine years on death row, Macias secured habeas relief. *See Martinez-Macias* v. *Collins*, 979 F.2d 1067 (5th Cir. 1992). When the prosecution re-presented the case, a new grand jury found insufficient evidence to indict. *See* Cohen, *The Difference A Million Makes*, Time, June 9, 1995.

Barry Byars was charged in November 2001 with sexually assaulting his eleven-year-old niece after the girl, who had been taken to the police by her father, described two incidents of abuse. Byars decided to plead guilty in 2004, fearing a jury would not believe his denials and knowing he would face a lengthy prison term because of his prior convictions. In January 2005, the girl, by then a teenager, recanted her allegations. In an affidavit in support of Byars' application for a writ of habeas corpus, she stated that, at the time of her original accusation, her parents were divorced and she was living with her mother. She said that when she was interviewed by investigators, her father was waiting outside the interview room. "I knew that he was watching me," she said. "I felt that if I didn't say these things, that he would get real mad and at that time, I wanted to live with my father and no longer live with my mother. So without really thinking, I was willing to say just about anything." *See* Application for Writ of Habeas Corpus Exhibit A, Affidavit of Tyleigh Fuselier, *Ex parte Byars*, No. AP-75293 (Tex. Crim. App. Apr. 21, 2005). Byars' conviction was subsequently vacated. *See Ex parte Byars*, 176 S.W.3d 841 (Tex. Ct. Crim. App. 2005).

John Stoll spent twenty years in a California prison following his conviction for abusing six children, including his own son. After four of the children ultimately acknowledged that their trial testimony had been

"completely false" and a fifth claimed to have no memory of molestation, Stoll was released after the habeas court found that "improper interview techniques" employed by the investigating officers "created a substantial risk that [the victims'] trial testimony was unreliable." *Stoll* v. *County of Kern*, No. 1:1:05-cv-01059, 2007 WL 2815032, at *2 (E.D. Cal. Sept. 25, 2007).

It is also well documented that during the 1980's, "a series of highly publicized 'daycare ritual abuse cases' erupted across the United States." Garven et al., 85 J. Applied Psychol. at 38. Many of these cases led to convictions, but after the scope of suggestive interviewing techniques used in the investigations was exposed, more than half of the convictions were overturned. *See* Hayward & Mashberg, *Upheaval in '80s Put the Spotlight on Child Abuse*, Boston Herald, Dec. 3, 1995, at 23; *see also Devereaux* v. *Abbey*, 263 F.3d 1070, 1083 (9th Cir. 2001) (en banc) (Kleinfeld, J., concurring in part, dissenting in part) ("Wenatchee Washington seems to have been among the many towns engulfed by sexual witchhunts in the 1980's and 1990's," and after forty-three people had been charged with 29,727 counts of abuse, "few charges stood up in court except against the government's own witness"); Rabinowitz, *No Crueler Tyrannies* 10-21 (2003) (discussing the conviction and successful appeal of daycare teacher Margaret Kelly Michael); Ceci et al., *Unwarranted Assumptions About Children's Testimonial Accuracy*, 3 Ann. Rev. of Clinical Psychol. at, 319 (2007) (describing investigations in Jordan, Minnesota, that caused an eleven-year-old boy to accuse his parents because he was "just sick of being badgered"); *Craig*, 497 U.S. at 868 (Scalia, J., dissenting) (referring to the "tragic" investigations in Jordan, Minnesota).

Moreover, it can be exceedingly difficult to unwind a wrongful conviction once it has been improperly secured. For example, in 1988, this Court upheld the defendant's rape conviction in *Arizona* v. *Youngblood* against a due process challenge. 488 U.S. 51. That conviction was primarily based on the ten-year-old victim's identification of Youngblood as the perpetrator. *Id.* at 53; *see also id.* at 72 (Blackmun, J., dissenting). Twelve years after that decision, Youngblood was exonerated by DNA evidence. *See* Whitaker, *DNA Frees Inmate Years After Justices Rejected Plea*, N.Y. Times, Aug. 11, 2000, at A12.

II. THE UNRELIABILITY OF CHILD-WITNESS TESTIMONY UNDERSCORES THE IMPORTANCE OF CONFRONTATION, PARTICULARLY AS THE STATES HAVE WEAKENED HEARSAY STANDARDS FOR CHILD WITNESSES

The documented unreliability of child-witness testimony makes it especially important to maintain the procedural protections secured by the Confrontation Clause in cases involving child witnesses, particularly in cases in which a child witness's testimony is so central to conviction. *See Crawford*, 541 U.S. at 61 (the Confrontation Clause's "ultimate goal is to ensure reliability of evidence"); *Coy* v. *Iowa*, 487 U.S. 1012, 1020 (1988) (recognizing the role of confrontation in "reveal[ing] the child coached by a malevolent adult").

Those protections include not just the right of cross examination but also the right to have the jury observe the witness, in order to "look at him, and judge by … the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242-243 (1895). Indeed, simply observing a young child, such as the three-and-a-half-year-old victim in this case, would allow jurors to assess the reliability of

his or her statement in a way they cannot when a teacher, often regarded as having unique insight into a child's perspective, testifies at trial as to the absent child's statements. *See Craig*, 497 U.S. at 846 ("physical presence" and "observation of demeanor by the trier of fact" are two "elements of confrontation" that "ensur[e] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings").

In recent decades, however, many states have revised historical rules of evidence regarding the use of child-declarant hearsay in order to facilitate criminal prosecutions where the victims or witnesses are children. Most states have enacted hearsay exceptions—like the Ohio exception in this case—that are specifically designed to facilitate admission of out-of-court statements by child witnesses. Lyon & Dente, *Child Witnesses and the Confrontation Clause*, 102 J. of Crim. L. & Criminology 1181, 1183 (2012) ("Most states have such exceptions, which were promulgated to address the difficulties of proving child abuse …." (citing National Center for Prosecution of Child Abuse, *Investigation and Prosecution of Child Abuse* (3d ed. 2004)). As a result, the Confrontation Clause's procedural protections of cross examination and juror observation are unlikely to be secured through contemporary rules of evidence.

In addition to the general reliability challenges presented by child testimony, there are unique challenges presented by the admission of out-of-court statements made to teachers or other care providers designated as mandated reporters (like the statements at issue in this case). Although "[o]fficial investigators may be trained to avoid suggestiveness; most parents

and teachers are not." Ceci & Friedman, 86 Cornell L. Rev. at 59. The heightened potential for unreliability in cases involving questioners who may not be trained to avoid suggestiveness underscores the need to subject statements elicited by them to the crucible of cross-examination.

Given the serious concerns regarding the accuracy of statements by child witnesses, the importance of confrontation to the truth-seeking process, and the existence of state evidentiary rules eroding the usual procedural protections in cases of child testimony, a categorical rule excluding statements by children to teachers or other mandated reporters from the ambit of the Confrontation Clause would pose significant risks of increasing the likelihood of wrongful convictions.

III. Statements By Children To Mandated Reporters Can Be, And Often Are, Testimonial

The history and purpose of the Confrontation Clause make clear that neither the fact that the questioner was a teacher nor the fact that the declarant was a young child renders L.P.'s statements non-testimonial. Indeed, when deciding if particular statements by a child to his or her teachers are testimonial, the Confrontation Clause allows for a court to reasonably consider the mandatory reporting obligations of the teacher.

A. Statements To Non-Law Enforcement May Still Be Testimonial

The Confrontation Clause applies to all "witnesses" against the accused or all "those who 'bear testimony.'" *Crawford*, 541 U.S. at 51. Based on this foundational principle, this Court has repeatedly reaffirmed that any "accuser who makes a formal statement to government

officers," *id.*, that could be used as a "substitute for live testimony," must be available to be cross examined "because they do precisely *what a witness does* on direct examination," *Davis*, 547 U.S. at 830. This fulfills the Confrontation Clause's ultimate goal of securing a defendant's right to test the reliability of testimony of any witness against him "in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

In determining whether an out-of-court statement made in response to a question is testimonial, the key is to determine whether the "primary purpose of the interrogation" is "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822; *see also Bryant*, 131 S. Ct. at 1165 (same). A statement made in response to a question is testimonial if the questioner is "performing investigative functions," *Crawford*, 541 U.S. at 53, that are aimed at discerning "how potentially criminal past events began and progressed" and who was responsible for the putative criminal acts. *Davis*, 547 U.S. at 830. Thus, as this Court noted in *Davis*, "[i]f 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers." 547 U.S. at 823 n.2.

Relying on these principles, federal and state courts routinely find that statements made to individuals outside of law enforcement who nevertheless are performing investigative functions for law enforcement purposes are testimonial. *E.g.*, *McCarley* v. *Kelly*, 759 F.3d 535, 546 (6th Cir. 2014) (statements to child psychologist working at direction of law enforcement); *Bobadilla* v. *Carlson*, 575 F.3d 785, 791–793 (8th Cir. 2009) (questioning of child by social worker); *T.P.* v. *State*, 911 So. 2d 1117, 1123 (Ala. Crim. App. 2004) (statements to social worker and investigator as part of

criminal investigation); *People* v. *Sharp*, 155 P.3d 577, 581 (Colo. App. 2006) (statements to forensic interviewer during visit arranged by police); *Hernandez* v. *State*, 946 So.2d 1270, 1271 (Fla. Dist. Ct. App. 2007) (statements made to "Child Protection Team" nurse); *People* v. *Stechly*, 870 N.E.2d 333, 364 (Ill. 2007) (statements to hospital's clinical specialist); *Rangel* v. *State*, 199 S.W.3d 523, 534 (Tex. App. 2006) (statements to child protective services). These cases correctly reflect that, where statements are made to questioners performing investigative functions for law enforcement purposes, they are testimonial and therefore subject to the Confrontation Clause.

B. The Questioner's Mandatory Reporting Obligations Are Relevant To Determining Whether A Statement Is Testimonial

"In determining whether a declarant's statements are testimonial, courts should look to *all* of the relevant circumstances" that bear on the interrogation in which the statements were made. *Bryant*, 131 S. Ct. at 1162 (emphasis added); *see also id.* (requiring evaluation of "the statements and actions of the parties to the encounter, *in light of the circumstances in which the interrogation occurs*" (emphasis added)).

The mandatory reporting obligations that prompted the questioning in this case provide one such "relevant circumstance[.]" Just as it was necessary in *Crawford* to understand the Marian statutes under which "[j]ustices of the peace [were] conducting examinations" in order to conclude that they were performing "an essentially investigative and prosecutorial function," *Crawford*, 541 U.S. at 53, a court should consider the reporting statutes in order to ascertain the purpose of a mandated reporter's questioning. As shown below,

these statutes are designed to enlist the reporters' assistance in securing evidence needed for criminal prosecution, and thus, the product of this questioning is subject to confrontation rights because it reflects the "[i]nvolvement of government officers in the production of testimony with an eye toward trial." *Crawford*, 541 U.S. at 56 n.7; *see also Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 557 U.S. 305, 311 (2009) ("not only were the affidavits made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, but under Massachusetts law the *sole purpose* of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance" (citations and internal quotation marks omitted)). Finally, the mandated reporter's legal obligations provide the necessary context to interpret "'the content and tenor'" of the reporter's questions, which "can illuminate the 'primary purpose of the interrogation.'" *Bryant*, 131 S. Ct. at 1162; *see also id.* at 1169 (Scalia, J., dissenting).

C. Mandatory Reporting Statutes Are Designed To Secure Evidence For Criminal Prosecution

Mandatory reporting statutes are specifically designed to enlist reporters' assistance in securing evidence for criminal prosecution. The Ohio statute at issue in this case expressly contemplates the collection of information "directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at 826. The law requires that such a report contain, in addition to information concerning the child's injuries, "[a]ny other information that might be helpful in establishing the

cause of the injury, abuse, or neglect." Ohio Rev. Code Ann. § 2151.421(C)(3). In another provision, the statute directs the Department of Children and Family Services to investigate, "in cooperation with the law enforcement agency," each report generated by a mandated reporter to determine, among other things, "the cause of the injuries, abuse, [or] neglect," and "make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention." *Id.* § 2151.421(F)(1), (2). In light of these characteristics, the Ohio Supreme Court was surely correct to find in this case that the "prosecution for criminal acts of child abuse is expressly contemplated by the reporting statute as a means of protecting children." Pet. App. 8a.

The statute also explicitly authorizes the reporter to engage in the collection of potential evidence for a criminal prosecution by specifically permitting reporters to take photographs and x-rays of the victim. Ohio Rev. Code Ann. § 2151.421(C). In addition, Ohio law requires the mandated reporter to generate a written report upon the request of the child services agency or law enforcement officer receiving the initial report. *Id.*

The design of Ohio's statute is far from unique. In general, mandatory reporting statutes facilitate the eventual criminal prosecution of those responsible for the abuse that triggers the reporters' obligations. At least some of the statutes explicitly state this purpose. *See, e.g.*, Ark. Code Ann. § 12-18-102 ("The purpose of this chapter is to: … Encourage the cooperation of state law enforcement officials, courts, and state agencies in the investigation, assessment, *prosecution*, and treatment of child maltreatment."(emphasis added)). Some of the mandatory reporting statutes are actually codi-

fied within state penal codes. *See, e.g.*, Cal. Penal Code §§ 11164 *et seq.*; Ariz. Rev. Stat. Ann. § 13-3620 *et seq.*

The mandatory reporting statutes also typically provide for the involvement of law enforcement following a report under the statute. Many jurisdictions explicitly require that the police be involved with the investigation of a report of abuse if there is any indication that a crime may have occurred. *E.g.*, D.C. Code § 4-1301.04 ("The initial phase of the investigation [of "a report of suspected child abuse or neglect"] shall … include notification and coordination with the Metropolitan Police Department when there is indication of a crime[.]"); 325 Ill. Comp. Stat. 5/7.3(b) ("[T]he Department shall adopt rules expressly allowing law enforcement personnel to investigate reports of suspected child abuse or neglect concurrently with the Department[.]"). A number of states also specifically require that child welfare agencies and police freely share information as part of their shared responsibilities for investigating alleged abuse. *See, e.g.*, Kan. Stat. Ann. § 38-2226(b) ("investigation shall be conducted as a joint effort between the secretary and the appropriate law enforcement agency or agencies, with a free exchange of information between them").

Other states have established joint task forces or multidisciplinary teams comprised of child welfare workers and law enforcement officials. *See* Conn. Gen. Stat. Ann. § 17a-105a (providing for a child abuse division within the state police that can assist "a multidisciplinary team… in the investigation of a report of child abuse"); D.C. Code § 4-1301.51(a) (requiring a "multidisciplinary investigation team" to review and investigate any instance of alleged sexual abuse, focusing on "the needs of the child, and…on the law enforcement, prosecution, and related civil proceedings."); Idaho

Code Ann. § 16-1617(1) & (2) (requiring "an interagency multidisciplinary team" that includes "law enforcement personnel" and is "responsible for developing a written protocol for investigation of child abuse cases and for interviewing alleged victims of such abuse or neglect[.]"). Even in states where a child welfare agency, rather than law enforcement, is charged with receiving or preparing the initial report regarding alleged abuse, such reports often must be forwarded to local law enforcement if they contain grounds for concluding that a child suffered criminal abuse or neglect. *See, e.g.*, Fla. Stat. Ann. § 39.301(2)(a), (b); Mich. Comp. Laws § 722.628(3). These highly structured efforts demonstrate the extent to which mandated reporters are compelled to provide information for law enforcement purposes when confronted with potential abuse.

And, as is true in Ohio, many states require the reporter to provide information that is directed to "establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at 826. For example, Georgia's reporting statute requires that all reports regarding child abuse "contain … the nature and extent of the child's injuries, including any *evidence* of previous injuries, and any other information that the reporting person believes might be *helpful in establishing* the cause of the injuries and *the identity of the perpetrator*." Ga. Code Ann. § 19-7-5(e) (emphases added); *see also* Iowa Code Ann. § 232.70(6) (a report must include information which "might be *helpful in establishing* the cause of the injury to the child, *the identity of the person or persons responsible for the injury*, or in providing assistance to the child"(emphases added)).

Many statutes, like Ohio's, also authorize mandated reporters to collect particular types of evidence of the

abuse. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3620(I) (allowing any person who takes an abuse report to take photos "of the minor and the vicinity involved"); Me. Rev. Stat. tit. 22, § 4011-A(5) ("Whenever a person is required to report as a staff member of a law enforcement agency or a hospital, that person shall make reasonable efforts to take, or cause to be taken, color photographs of any areas of trauma visible on a child.").

Nor is there any basis to assume that individuals who serve as mandated reporters by virtue of their employment are unaware of their obligations or of the potential use of the contents of their reports as evidence in a criminal prosecution. As one commentator noted about medical professionals subject to mandatory reporting laws, there "is every reason to assume that the vast majority of doctors and nurses are aware both of reporting requirements and the admissibility of many statements made to them during the examination process." Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them*," 82 Ind. L.J. 917, 952 (2007).

In addition to the expectation that professionals are familiar with the laws that regulate their conduct, states publish guides and offer training courses for mandated reporters, and these resources often specifically instruct mandated reporters to collect information relevant to criminal investigation and prosecution. *See, e.g.*, Minnesota Department of Human Services, *Reporting Child Abuse and Neglect: A Resource Guide for Mandated Reporters*, at 3 (2012), *available at* https://edocs.dhs.state.mn.us/lfserver/Public/DHS-2917-ENG (directing mandated reporters to be prepared to provide a: "description of when and where the incident occurred and what happened to the child[;] … [a] description of any injuries and the present condition

of the child; … the names and addresses of the child, parents or caregivers"); Florida Department of Children and Families, *Reporting Abuse of Children and Vulnerable Adults* (2013), *available at* http://www.dcf.state.fl.us/programs/abuse/publications/mandatedreporters.pdf (instructing mandated reporters that "specific descriptions of the incident(s) or the circumstances contributing to the risk of harm are very important. This includes **who** was involved, **what** occurred, **when** and **where** it occurred, **why** it happened, the extent of any injuries sustained, and what the victim(s) said happened, and any other pertinent information." (emphasis in original)).

Some guidance provided by state agencies expressly notes the potential reliance on mandated reports in subsequent court proceedings. For example, a training offered by the District of Columbia informs mandated reporters: "Be aware that if the case proceeds to a trial, you may be called to testify as a witness and your identity would be revealed in court." D.C. Child and Family Services Agency, *Keeping DC Children and Youth Safe: Online Mandated Reporter Training* (available at https://dc.mandatedreporter.org/public/pdf/en_US/FAQ.pdf). (last visited Jan. 13, 2015) Similarly, guidance provided to reporters in Pennsylvania instructs them, in response to the question "Will I have to testify in court?" that "Criminal charges are filed against some perpetrators. You may be subpoenaed to testify at a criminal proceeding." Pennsylvania Department of Public Welfare, *Mandated Reporters* (Sept. 2012) *available at* http://www.dpw.state.pa.us/cs/groups/webcontent/documents/communication/p_011835.pdf). Some guidance to reporters actually requests verbatim transcription of a child's statements. For example, guidance published to Kern County (California)

reporters instructs that "[i]f a child discloses circumstances that lead you to believe he or she is being abused or neglected, you will need to document these statements using quotes if possible." *See* Kern County Department of Human Resources, *A Guide to Mandated Reporting Responsibilities*, (Sept. 2009), *available at* http://kerncares.org/wp-files/kerncares-org/2011/02/Mandated-Reporter-Manual2009ReadOnly_StaffDev_.pdf.[3]

As the characteristics detailed above show, many of these mandatory reporting statutes: (1) are designed to secure evidence for subsequent prosecution; (2) inform the reporter of that potential use of reported information; and (3) attempt to provide the reporter with the tools and training needed to effectively obtain such evidence. The full force of the state's investigative authority is thus engaged when a teacher or other mandated reporter observes evidence of abuse, which is only underscored by the fact that many states, including

[3] It also bears noting that numerous mandatory reporting statutes specifically provide for the waiver of certain privileges (*e.g.*, the doctor-patient privilege) if the reporter is called to "*give evidence*" or "*testify*" regarding the report in a subsequent court proceeding. For example, the model mandatory reporting statute proposed in 1975 provided: "Such privileged communications, excluding those of attorney and client, shall not constitute grounds for failure to report as required or permitted by this Act, to cooperate with the child protective service in its activities pursuant to this Act, *or to give or accept evidence in any judicial proceeding relating to child abuse, sexual abuse or neglect*." Child Abuse & Neglect Project, Education Comm'n of the States, Report No. 71, *Child Abuse and Neglect: Model Legislation for the States* 30 (1975), (emphasis added) (cited in Mosteller, *Child Abuse Reporting Laws and Attorney Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 Duke L.J. 203, 214 & n.31 (1992)); *see also* Mass. Gen. Laws Ann. ch. 119, § 51A(j); Mich. Comp. Laws § 722.631.

Ohio, make failure to report suspected child abuse a criminal offense. *E.g.*, Ohio Rev. Code § 2151.99(C); R.I. Gen. Laws § 40-11-6.1; Texas Fam. Code § 261.109. Moreover, the additional threat of potential civil liability for a failure to report, like the one included in Ohio's statute, *see* Ohio Rev. Code § 2151.421(M), increases the likelihood that an institution, such as Head Start in this case, will feel compelled to ensure that its employees proactively gather information and contact law enforcement in order to fulfill their obligations. There can be little doubt, then, that when teachers question a child about suspected abuse based on a duty imposed by a mandatory reporting statute, they often will be performing an investigative function for law enforcement purposes.

Contrary to arguments by some of Ohio's amici, protecting children who are abused and prosecuting their abusers are complementary, not mutually exclusive, purposes. Just as police officers can have "dual responsibilities" relating to public safety and criminal investigation and may "act with different motives simultaneously or in quick succession," *Bryant*, 131 S. Ct. at 1161, mandated reporters can have multiple motives, which will be informed by their statutory reporting obligations. Whether these motives result in the reporter eliciting testimonial statements can be determined based on an objective review of the primary purpose of the questioning. Questions meant to determine "what happened" rather than "what is happening" are more likely to elicit information that more closely tracks the types of statements that might be made in court. *Davis*, 547 U.S. at 830. Because mandated reporters are charged by these statutes with performing investigative functions meant to aid in potential criminal prosecutions, teachers and others can act with the primary

purpose of eliciting testimonial statements. As this Court has instructed, the product of questioning "directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" is testimonial. *Id.* at 826.

D. If The Purpose Of The Question Is To Obtain Information For Use In The Investigation Or Prosecution Of A Crime, The Fact That The Declarant Is A Young Child Does Not Make The Response Non-Testimonial

In determining whether statements made as a result of questioning were testimonial, the focus of this Court's analysis is not the "subjective or actual purpose" of the declarant, but rather an "objective analysis" of "the statements and actions of the parties" to assess "'the primary purpose of the interrogation.'" *Bryant*, 131 S. Ct. at 1156 (emphasis added); *see also id.* at 1162.

Where, as in this case, the questions (and thus the responses) derive from mandatory reporting statutes reflecting governmental involvement "in the production of testimony with an eye toward trial," *Crawford*, 541 U.S. 36 at 56 n.7, and the purpose of the interrogation is to elicit statements that are capable of "establishing or proving some fact at trial," *Melendez-Diaz*, 557 U.S. at 324, the fact that the declarant is a young child should not alter the conclusion that the purpose of the interrogation is testimonial. Although Ohio argues (Pet. Br. 11) that an "incompetency finding shows that [a child's] out-of-court statements could not have been 'witness' testimony" for purposes of the Confrontation Clause, that argument substitutes one concept (competency)

for another (testimony).[4] The relationship between these concepts in fact compels the opposite conclusion. Where, as here, a trial court determines a child could not testify because he cannot recount facts or comprehend the nature of his testimony, there could be no meaningful right of confrontation at trial. As the Sixth Amendment animates why his testimony could not be heard in court, it also bars the prosecution from introducing his out-of-court statements when they are used as a substitute for live testimony.[5]

Consistent with these principles, this Court has often found that out-of-court statements made by very young children fall within the ambit of the Confrontation Clause. *See Crawford*, 541 U.S. at 58 n.8 (noting that the statements that a four-year-old made to "to an investigating police officer" in *White* v. *Illinois*, 502

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[4] Ohio also suggests that *competent* children who do not "'understand the legal system'" may be incapable of providing testimony (Pet. Br. 31 (quoting *State* v. *Bobadilla*, 709 N.W.2d 243, 256 (Minn. 2006))), but there is no sound basis for such a proposition. *Cf. Bobadilla* v. *Carlson*, 575 F.3d 785, 791–93 (8th Cir. 2009) (finding three-year-old's statements testimonial and affirming grant of habeas petition). Such a rule would allow the widespread introduction of statements given by competent witnesses (e.g., an 11-year-old child) to law enforcement simply because the witness does not understand the legal process.

[5] Indeed, police interrogations of children who are incompetent to testify would be akin to unsworn hearsay under the Marian statutes, which would also not have been admissible. *See generally Crawford*, 541 U.S. at 52 n.3. Ohio's position thus misunderstands the relationship of competency and testimony—it is not whether the hearsay is sworn and attested that determines whether cross-examination is required, but rather the precept that live testimony is required for reliability. Even sworn affidavits require confrontation; necessarily, hearsay that is even less reliable does too. *See id.*

U.S. 346 (1992), were "testimonial"); *Idaho* v. *Wright*, 497 U.S. 805, 826 (1990) (affirming the exclusion of statements made by a two-and-a-half-year-old child to a physician).

Similarly, lower federal and state courts routinely hold that statements made by very young children may be testimonial. *E.g.*, *McCarley* v. *Kelly*, 759 F.3d 535 (6th Cir. 2014) (three-and-a-half–year-old); *Bobadilla*, 575 F.3d at 791–793 (three-year-old); *T.P.*, 911 So. 2d at 1123 (eight-year-old); *People* v. *Sisavath* 13 Cal. Rptr. 3d 753, 758 n.3 (2004) (four-year-old); *State* v. *Henderson*, 160 P.3d 776, 792 (Kan. 2007) (three-year-old). Indeed, numerous decisions reject the argument that a child's statements are necessarily non-testimonial simply because the child would not be able to understand that the statements were likely to be used in a later criminal proceeding. *See People* v. *Vigil*, 127 P.3d 916, 926 n. 8 (Colo. 2006) ("[I]f a child makes a statement to a government agent as part of a police interrogation, his statement is testimonial irrespective of the child's expectations regarding whether the statement will be available for use at a later trial."); *State* v. *Snowden*, 867 A.2d 314, 328-329 (Md. 2005) ("[W]e are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants."); *Henderson*, 160 P.3d at 785 ("A young victim's awareness, or lack thereof, that her statement would be used to prosecute, is not dispositive of whether her statement is testimonial." (citing *State* v. *Justus*, 205 S.W.3d 872 (Mo. 2006))).[6]

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[6] In fact, up until the time that Respondent moved to exclude L.P.'s out-of-court statements under the Confrontation Clause, Ohio *also* considered L.P.'s statements to be "testimonial," insofar

Categorically excluding young children's statements from the scope of the Confrontation Clause would have a sweeping effect on criminal prosecutions. Although many of Ohio's amici focus on child abuse cases, children serve as witnesses in all manner of criminal prosecutions. If children's cognitive abilities prevent them from acting as a "witness" within the meaning of the Clause, the same would hold true for many adult witnesses who commonly provide statements in the course of criminal investigations, including those with mental disabilities or mental illnesses or those who are impaired by the use of narcotics or alcohol.

Even if the understanding of a reasonable (or average) child of the declarant's age—as opposed to the objective purpose of the questioning—was necessary to determine the "purpose of the interrogation," children possess a sufficient understanding of their accusations to satisfy this requirement, were it to exist. For example, "abuse victims often report that their decision regarding whether and when to disclose was affected by their expectations about how others would react to their disclosure *and the effects of disclosure on* themselves and *others close to them*." Lyon, et al., *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials*, 79 Child Dev. 914, 915 (2008) (emphasis added). And it has been documented in several studies that "[c]hildren are less likely to disclose abuse by parents than by strangers," and that "[a]buse by parents is less likely than abuse by

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as Ohio's actions in singling out a suspect, attributing L.P.'s injuries to that suspect, and arresting and charging Respondent demonstrate that Ohio considered L.P.'s statements to be a sufficiently "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford*, 541 U.S. at 51.

strangers to be reported to the police." Lyon, et al., *Children's Reasoning About Disclosing Adult Transgressions: Effects of Maltreatment, Child Age, and Adult Identity*, 81 Child Dev., 1714-1715 (2010); *see also Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60 (1987) (A "child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent."). In some cases, moreover, a child is aware of the consequences of disclosure precisely because an adult has warned the child not to reveal the abuse. *See* Smith & Elstein, *The Prosecution of Child Sexual and Physical Abuse Cases: Final Report 93* (1993) (threats not to reveal abuse included "pleas that the abuser would get into trouble if the child told"). Thus, there is no basis, objective or subjective, to categorically exempt statements made by young children to a mandated reporter from the protections of the Confrontation Clause.

CONCLUSION

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

Respectfully submitted.

FELICIA H. ELLSWORTH
Counsel of Record
DARREN T. GRIFFIS
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
felicia.ellsworth@wilmerhale.com

CHARLES C. SPETH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

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