No. 09-991396

IN THE

Supreme Court of the United States

RICKY LEE ALLSHOUSE, JR.,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari
to the Pennsylvania Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a child's statements in an interview with a child protection agency worker investigating suspicions of past abuse are "testimonial" evidence subject to the demands of the Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36 (2004).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ricky Lee Allshouse respectfully petitions for a writ of certiorari to the Pennsylvania Supreme Court in this case.

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court (Pet. App. 1a) is reported at 985 A.2d 847. The opinion of the Pennsylvania Superior Court (Pet. App. 53a) is reported at 924 A.2d 1215. The relevant trial court order is unpublished but is recited at Pet. App. 6a.

JURISDICTION

The Pennsylvania Supreme Court issued a final judgment affirming petitioner's conviction on December 29, 2009. On March 17, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to April 28, 2010. *See* 09A869. On April 9, 2010, Justice Alito further extended the time within which to file a petition for a writ of certiorari to and including May 13, 2010. *See id.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Although the Pennsylvania Supreme Court's decision remanded the case for adjustment of petitioner's fine, restitution, and costs, it affirmed his conviction. Pet. App. 1a, 85a-86a. The conviction that petitioner challenges therefore constitutes a "final judgment" under Section 1257(a). *See Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

42 Pa. Cons. Stat. § 5985.1, **Admissibility of certain statements**, provides:

(a) General rule. – An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:

(1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) the child either:

(i) testifies at the proceeding; or

(ii) is unavailable as a witness.

(a.1) Emotional distress. – In order to make a finding under subsection (a)(2) (ii) that the child is unavailable as a witness, the court must determine, based on evidence presented to it, that testimony by the child as a witness will result in the child suffering

serious emotional distress that would substantially impair the child's ability to reasonably communicate. In making this determination, the court may do all of the following:

(1) Observe and question the child, either inside or outside the courtroom.

(2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child in a medical or therapeutic setting.

STATEMENT OF THE CASE

This case presents a pressing constitutional issue concerning the administration of criminal justice over which courts across the country are deeply divided: whether a child's statements to a child protection worker investigating possible abuse are testimonial under the Confrontation Clause, and thus may not be introduced against the accused absent an opportunity for cross-examination. A majority of state and federal courts holds that such statements are testimonial. In this case, however, three different levels of Pennsylvania courts employed three different lines of reasoning to find such statements nontestimonial.

1. On May 20, 2004, petitioner Ricky Lee Allshouse was in his living room with his children, four-year-old A.A. and seven-month-old twins J.A. and M.A. Their mother was in the kitchen. According to the mother, she heard a chair squeak and one of the children begin to cry. She entered the living room and found A.A. sitting with J.A.'s head on her lap. Petitioner was on his way out of the room. Believing that J.A. was hurt, she took him to the hospital, where a doctor determined that he had a spiral fracture to his right arm.

Suspecting abuse, the hospital summoned John Geist, a caseworker with Jefferson County Children and Youth Services (CYS). Such caseworkers "investigate" "allegations of abuse and neglect of children," Tr. 93 (9/19/05), and state law requires such workers to "cooperate and coordinate, to the fullest extent possible" with law enforcement. 55 Pa. Code § 3490.108. To that end, Geist received extensive training before starting his job in "child intensive" investigation and "forensic interviewing" techniques, including "[c]ollecting statements from victims [and] witnesses." Tr. 12, 17 (9/16/05).

Geist first made a "safety plan" to ensure the well-being of the children "until the investigation was fully completed." Tr. 7 (9/16/05). Under the plan, he removed the children from their parents' home and arranged for them to stay with their paternal grandparents. Geist then interviewed both parents. Petitioner denied hurting A.A. and, among other things, suggested that perhaps A.A. might have twisted J.A.'s arm. The mother likewise denied hurting J.A.

Seven days into the investigation, Geist went to the grandparents' home to interview A.A. He "had concerns she may have been a witness to the assault," Tr. 96 (9/19/05), and he intended "to investigate and figure out what happened." *Id.* at 120. Upon his arrival, he "introduced himself to A.A," and he "shook her hand." Pet. App. 20a. She remembered Geist as "the one that came in and transported the children" away from the parents into protective custody. Tr. 14 (9/16/05). Geist "asked her permission to speak with her." Pet. App. 20a. After A.A. assented, he escorted

her to the front porch of the house, where they could speak privately. Pet. App. 3a.

Geist began the interview by asking A.A. whether "she could remember her brother being hurt." Pet. App. 3a n.4. She said "yes." He next asked if A.A.'s other brother, her mother, or A.A. herself had hurt J.A. A.A. answered "no" to each question. Geist then asked whether petitioner had hurt J.A. A.A. answered "yes." Geist asked A.A. "if she could remember how [J.A.] got the injury." A.A. "put her hand on [Geist's] arm and said [petitioner] grabbed her [sic] right above the elbow and pulled." *Id.*

Geist reported A.A.'s accusation to his supervisor, who reported it to the police. Geist then "typed up a bunch of notes" from his interviews and "gave them to the district attorney." Tr. 117 (9/19/05). Geist later met with a police officer and the district attorney, and participated in "[a] free-flow of information." *Id.* at 116. The district attorney also gave Geist various "instructions" for conducting future interviews. *Id.*

Geist further arranged for Dr. Allen Ryen, a child psychologist who conducts forensic interviews for CYS, to become part of the investigative team. Dr. Ryen subsequently interviewed A.A., and she repeated her allegation that "Daddy grabbed and yanked the infant." RR 219a.

Three days later, the police arrested petitioner and charged him with five different crimes arising from the incident: aggravated assault, simple assault, endangering the welfare of a child, reckless endangerment, and harassment.

2. During pretrial proceedings, the Commonwealth filed a motion in limine asking the trial court to declare that A.A.'s accusatory statements to Geist and Dr. Ryen were admissible at trial regardless of whether A.A. testified. The Commonwealth relied on a Pennsylvania statute allowing the prosecution to introduce a child's "out-of-court statement" alleging assault (or certain other crimes) in place of live testimony, provided the court finds that the statement contains "sufficient indicia of reliability" and the court declares the child "unavailable." 42 Pa. Cons. Stat. § 5985.1(a).

The trial court then held a hearing to determine the admissibility of A.A.'s accusations. Geist and Dr. Ryen testified at the hearing. Without requiring A.A. to appear, the court deemed her statements to Geist reliable "because of the content, location, and nature of that statement." Tr. 53 (9/16/05). The court also ruled that A.A. was "unavailable" to testify at trial, basing that finding on Dr. Ryen's prediction that A.A. would suffer emotional distress if she testified. *Id.*

Petitioner objected to the court's ruling, arguing that it would violate the Confrontation Clause for the prosecution to introduce A.A.'s statements without her taking the stand. Petitioner specifically relied on this Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004), that a witness's "testimonial" statements are inadmissible when the defendant lacks an opportunity for cross-examination. Petitioner contended that A.A.'s statements were testimonial because they described past criminal events in response to questions from a government agent who was gathering evidence for a potential prosecution. The trial court rejected the argument,

ruling that A.A.'s statements were nontestimonial because a child in her position would not have been able to "make the determination that [the statements] would be available for use later at trial." Pet. App. 6a.

At trial, the Commonwealth introduced A.A.'s statements through both Geist and Dr. Ryen. These statements constituted the only direct evidence that petitioner caused J.A.'s injury. Petitioner, for his part, continued to maintain that he never hurt J.A. and that someone else must have done it.

After three hours of deliberations, the foreman told the judge that he doubted the jury could reach a unanimous verdict. The judge encouraged the jury to reach a consensus on at least some charges. The jury then resumed deliberations and convicted petitioner of simple assault and endangering the welfare of a child. It acquitted him on the remaining charges. The judge sentenced petitioner to one to two years in prison, plus various fines and costs, and restitution.

3. The Pennsylvania Superior Court affirmed petitioner's conviction and prison sentence.[1] Notwithstanding Geist's trial testimony that his purpose in interviewing A.A. had been "to investigate and figure out what happened," Tr. 120 (9/19/05), the court held that A.A.'s statements during her interview with Geist were nontestimonial because Geist's "primary purpose" was "to ensure both A.A. and her siblings' welfare was secure." Pet. App. 67a.

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[1] It also vacated and remanded certain fines, costs, and the order of restitution. But those matters are irrelevant here.

Having found A.A.'s statements to Geist nontestimonial, the appellate court deemed it unnecessary to determine whether her subsequent statements in her forensic interview with Dr. Ryen were testimonial. Even if the trial court had erred in admitting the statements, the appellate court held, the error would have been harmless because the statements were "merely duplicative" of the statements she had made during her interview with Geist. Pet. App. 73a.

4. The Supreme Court of Pennsylvania affirmed. Departing from the theories advanced by the trial and appellate courts, as well as from the argument advanced in the Commonwealth's brief, a four-justice majority held that A.A.'s statements were nontestimonial because Geist was an "agent of law enforcement" who was responding to "an ongoing emergency." The majority reasoned that the possibility that "A.A. had caused J.A.'s injury" made it "incumbent upon Geist to immediately investigate" because "A.A. could do further harm to J.A." Pet. App. 22a. Like the Superior Court, the majority did not address whether A.A.'s statements to Dr. Ryen were testimonial, finding them "merely cumulative" of Geist's testimony. Pet. App. 23a.

Two of the four justices in the majority wrote separately to "highlight" what they see as "the tension between the testimonial litmus of *Crawford v. Washington* and the plain terms of the Sixth Amendment." Pet. App. 40a (Saylor, J., concurring) (citation omitted). They also pointed out that there are still "many open questions" under *Crawford*, "leav[ing] lower-tier federal courts and state courts in a difficult position in terms of predicting the

appropriate limits of this critical Sixth Amendment provision." *Id.*

Two more justices wrote separately to concur in the result only. These justices disagreed that Geist acted as an agent of law enforcement and thus concluded that the "ongoing emergency" test did not apply at all. Pet. App. 50a (Baer, J., concurring in the result). Instead, they contended that A.A.'s statements to Geist were not testimonial because "an objective person in A.A.'s position would not reasonably have anticipated that her statements might be used in a later prosecution of [petitioner]." Pet. App. 51a.

The final justice on the court did not participate in the case, Pet. App. 39a, because he had been a member of the Superior Court panel below.

REASONS FOR GRANTING THE WRIT

Two years ago, in a case on interlocutory review involving accusations that a child made during an interview with a child protection worker, twenty-six states urged this Court to address the "inconsistent results" and growing legal uncertainty over whether statements to government officers investigating possible past child abuse are testimonial under this Court's Confrontation Clause jurisprudence. Br. of Missouri et al. as Amicus Curiae Supporting Pet'r at 2, *Iowa v. Bentley*, No. 07-886 (2008). The states called the matter one "of great importance." *Id.* at 1. The National District Attorneys Association echoed this request, explaining that "prosecutors across this country are eager for a resolution" of the issue. Mot. for Leave to File Br. and Br. of National District Attorneys Ass'n as Amicus Curiae Supporting Pet'r at

2, *Iowa v. Bentley*, No. 07-886 (2008). This Court, however, declined to take up the issue at that time.

Since that denial of certiorari, several more courts have addressed whether witnesses' statements in interviews with child protection workers are testimonial, and the conflict over the issue has solidified and become deeply entrenched. These developments have erased any prospect that continued litigation will bring order to this area of law absent a direct decision from this Court. This case squarely presents the issue on a complete trial record and exemplifies why this Court should promptly clarify that such statements are testimonial.

I. Courts Are Deeply Divided Over Whether A Child's Statements In An Interview With A Child Protection Worker Investigating Allegations Of Past Abuse Are Testimonial.

A. Legal and Factual Background

1. The Confrontation Clause "[h]istorically" prohibited the defendant from being "denied the opportunity to challenge his accusers in a direct encounter before the trier of fact." *Ohio v. Roberts*, 448 U.S. 56, 78 (1980) (Brennan, J., dissenting). Yet during the generation that followed this Court's decision in *Roberts*, this Court's jurisprudence allowed the prosecution to introduce out-of-court accusations made to government officials without the declarants taking the stand, so long as a trial court deemed the accusations "reliable." *Id.* at 66; *accord Lilly v. Virginia*, 527 U.S. 116, 123-24 (1999)

(plurality opinion); *Idaho v. Wright*, 497 U.S. 805, 814-15 (1990).

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court restored the Confrontation Clause to its traditional mode of operation. It held that the prosecution may not introduce "testimonial" hearsay from an unavailable declarant unless the defendant had a prior opportunity for cross-examination. *Id.* at 54, 68. This Court "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. But it reminded courts that the "principal evil" the Confrontation Clause was designed to prevent was "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. Thus, at the very least, the "testimonial" concept must encompass accusatory statements made to "government officers perform[ing] the investigative functions primarily associated with the police." *Id.* at 53; *see also Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2548 (2009) (Kennedy, J., dissenting) (Clause is designed to "alleviate the danger of" conducting trials based on "one-sided interrogations by adversarial government officials who might distort a witness's testimony").

In *Davis v. Washington*, 547 U.S. 813 (2006), this Court elucidated the distinction between testimonial and nontestimonial statements in the context of interrogations by the police or their agents. This Court held that statements in this context are nontestimonial when they are made "to enable police assistance to meet an ongoing emergency." *Id.* at 822. But they are testimonial when "the primary purpose of the interrogation is to establish or prove

past events potentially relevant to later criminal prosecution." *Id.* Applying this dichotomy to the two cases before it, this Court held that statements at the beginning of "a [911] call for help" in which the declarant "was speaking about events *as they were actually happening*" were nontestimonial. *Id.* at 827. In contrast, a witness's statements in her home describing a just-completed domestic assault, while the suspect was in another room, were testimonial. Calling the latter scenario a "much easier" case, this Court explained that the statements were testimonial because they were "an obvious substitute for live testimony," in that they did "precisely *what a witness does* on direct examination": They recounted, in response to governmental questioning, "some time after the events described were over," how "potentially criminal past events began and progressed." *Id.* at 829-30.

2. The question now arises whether statements children make to specialized government officials (usually called "child protection workers" or something similar) who investigate suspicions of past abuse are testimonial.

The issue arises as a result of the method of investigating and prosecuting child abuse cases that states developed during the *Roberts* era. As law enforcement came to appreciate that "[t]echniques used in interviewing adult crime victims will not work with children," states and local governments assigned the task of conducting such interviews to other individuals with special training "to communicate effectively with children." Am. Prosecutors Research Inst., Investigation and Prosecution of Child Abuse 37 (3d ed. 2004).

Nowadays, some localities use child protection agency caseworkers, while other jurisdictions use trained interviewers at "child advocacy centers" to conduct such interviews. *See* Lindsey E. Cronch et al., *Forensic Interviewing in Child Sex Abuse Cases: Current Techniques and Future Directions*, 11 Aggression & Violent Behavior 195, 196, 204 (2006). But regardless of the interviewers' exact titles or where they conduct their interviews, the modern investigative model deploys specially trained individuals to conduct forensic interviews, in coordination with the police, to determine whether abuse has occurred.[2]

Pennsylvania's method is typical. The Child and Youth Services (CYS) division of its Child Protective Services agency is "the investigating arm" in charge of conducting initial inquiries into child abuse allegations. Pet. App. 22a. State law requires caseworkers at this government division to coordinate their work "to the fullest extent possible" with "law enforcement agencies." 55 Pa. Code § 3490.108; *see also* 23 Pa. Cons. Stat. §§ 6302(b), 6365(c). Moreover,

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[2] *See* Nat'l Dist. Attorneys Ass'n, Multidisciplinary/Multi-Agency Child Protection Teams Statutes (2008), http://www.ndaa.org/pdf/ncpca_statute_multidisciplinary_nov_08.pdf (compiling statutes from 49 states, District of Columbia, and three territories); Anna Richey-Allen, *Note*, *Presuming Innocence: Expanding the Confrontation Clause Analysis to Protect Children and Defendants in Child Sexual Abuse Prosecutions*, 93 Minn. L. Rev. 1090, 1092 (2009) (citing Nancy Chandler, *Children's Advocacy Centers: Making a Difference One Child at a Time*, 28 Hamline J. Pub. L. & Pol'y 315, 329-31 (2006)).

to "avoid duplication of fact-finding efforts and interviews," state law requires district attorneys and CYS to establish standards for "coordinating investigations" and "sharing the information obtained as a result of any interview." 23 Pa. Cons. Stat. § 6365(c).

At the same time that states were changing how they investigated suspicions of child abuse, they also enacted special hearsay statutes – sometimes called "tender years" laws – allowing them to use the products of their *ex parte* interviews with child witnesses in place of the witnesses' in-court testimony at trial. *See Snowden v. State*, 846 A.2d 36, 39 n.7 (Md. App. 2004) (collecting such statutes), *aff'd*, 867 A.2d 314 (Md. 2005); Br. of Missouri et al. as Amicus Curiae Supporting Pet'r at 2, *Iowa v. Bentley*, No. 07-886 (2008).

Pennsylvania's tender years law is, once again, typical. Enacted in 1989, and amended in 1996 and 2000, it deems any accusation "describing any of the offenses enumerated in 18 Pa. [Cons. Stat.] Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery)," automatically exempt from the rule against hearsay, provided the trial judge finds (1) that the accusation contains "sufficient indicia of reliability" and (2) that the child is "unavailable" to testify at trial. 42 Pa. Cons. Stat. § 5985.1(a). In order to declare a child accuser "unavailable," a court need not find that she is incompetent to testify. Instead, a court may find the child unavailable if it determines that in-court "testimony by the child as a witness will result in the

child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate." *Id.* As the Commonwealth explained in the Pennsylvania Supreme Court, children's "memories fade and their performance as witnesses is anything but stable," impeding the prosecution's "effective presentation of evidence." Br. of Appellee in Pa. S. Ct. at 2. The "tender years" system solves this problem by allowing prosecution by *ex parte*, out-of-court interviews.

The extent to which *Crawford* calls this system into question is "[o]ne big area of contention and confusion" that commentators have opined "will ultimately have to be resolved by the United States Supreme Court." Eileen A. Scallen, *Coping with* Crawford*: Confrontation of Children and Other Challenging Witnesses*, 35 Wm. Mitchell L. Rev. 1558, 1586 (2009). For six years now, "[t]he varying analyses employed by courts to determine the admissibility of out-of-court statements made by children to nonlaw enforcement personnel has led to inconsistent results." Pilar G. Kraman, *Divining the U.S. Supreme Court's Intent: Applying* Crawford *and* Davis *to Multipurpose Interrogations by Non-Law Enforcement Personnel*, 23 Crim. Just. 30, 30 (Winter 2009); *see also Flores v. State*, 120 P.3d 1170, 1177 (Nev. 2005) ("courts nationwide have encountered considerable difficulty in negotiating the fine line between" testimonial and nontestimonial statements in this realm); *State v. Hopkins*, 154 P.3d 250, 256 (Wash. App. 2007) ("This issue represents an unsettled area of law.").

B. The Conflict Among Federal And State Courts

Federal and state courts are now deeply divided over whether statements children make in interviews conducted by child protection workers investigating suspicions of past abuse are testimonial.

1. The majority of appellate courts to address the issue has held that statements to child protection workers investigating past abuse are testimonial. One federal court of appeals and eight state courts of last resort have reached this conclusion. *See Bobadilla v. Carlson*, 575 F.3d 785, 787 (8th Cir. 2009) (statements to "a social worker employed by the Kandiyohi County Family Service Department"), *cert. denied*, 130 S. Ct. 1081 (2010);[3] *State ex rel. Juvenile Dep't v. S.P.*, 215 P.3d 847, 849 (Or. 2009) (statements to "a social worker" at the regional child advocacy center);[4] *State v. Contreras*, 979 So. 2d 896, 898 (Fla. 2008) (statements to the "coordinator of a Child Protection Team"); *In re Rolandis G.*, 902 N.E.2d 600, 603 (Ill. 2008) (statements to "a child advocate at Rockford's Carrie Lynn Children's Center"), *cert. denied*, 129 S. Ct. 2747 (2009);[5] *State*

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[3] *See also United States v. Bordeaux*, 400 F.3d 548, 555 (8th Cir. 2005) (statements to an interviewer at a "center for child evaluation").

[4] *See also State v. Mack*, 101 P.3d 349, 349 (Or. 2004) (statements to "a Department of Human Services (DHS) caseworker").

[5] *See also People v. Stechly*, 870 N.E.2d 333, 339 (Ill. 2007) (statements to "a social worker at the [public] school where [the declarant] attended kindergarten"); *In re T.T.*, 892 N.E.2d 1163,

v. Bentley, 739 N.W.2d 296, 297 (Iowa 2007) (statements to "a counselor at St. Luke's Child Protection Center"), *cert. denied*, 552 U.S. 1275 (2008); *State v. Henderson*, 160 P.3d 776, 779 (Kan. 2007) (statements to a "social worker" with "the Kansas Department of Social and Rehabilitation Services"); *State v. Justus*, 205 S.W.3d 872, 876 (Mo. 2006) (statements to "a counselor and a licensed social worker for the Northwest Missouri Children's Advocacy Center in St. Joseph" and a social worker who "investigates child abuse and neglect for the division of family services"); *State v. Snowden*, 867 A.2d 314, 316 (Md. 2005) (statements to "a sexual abuse investigator for the Montgomery County Department of Health and Human Services"); *Flores*, 120 P.3d at 1172 (Nev. 2005) (statements to "Child Protective Services" investigator).

Five other states' intermediate appellate courts also have held that these kinds of statements are testimonial. *See State v. Hopkins*, 154 P.3d 250, 251 (Wash. App. 2007) (statements to "a CPS social worker"); *Rangel v. State*, 199 S.W.3d 523, 529 (Tex. App. 2006) (statements to "a CPS investigator"), *review dismissed*, 250 S.W.3d 96 (Tex. Crim. App. 2008); *Anderson v. State*, 833 N.E.2d 119, 121 (Ind. App. 2005) (statements to "the Owen County Office of Family and Children"); *T.P. v. State*, 911 So. 2d 1117, 1119 (Ala. Crim. App. 2004) (statements to a "social worker" with "the Baldwin County Department of Human Resources"); *People v. Sisavath*, 13 Cal. Rptr.

1165 (Ill. App. Ct. 2008) (statements to "a Department of Children and Family Services (DCFS) investigator").

3d 753, 756 (Cal. Ct. App. 2004) (statements to "a trained interviewer at Fresno County's Multidisciplinary Interview Center").

The courts that have deemed statements to child protection workers testimonial have reasoned that the "primary purpose" of such interviews is "to establish or prove past events potentially relevant to later criminal prosecution." *Justus*, 205 S.W.3d at 880. Emphasizing that state law requires child protection workers to coordinate their investigations with police and prosecutors, these courts treat such workers as extensions of (or specialized replacements for) law enforcement. *Henderson*, 160 P.3d at 789-90; *see also Bobadilla*, 575 F.3d at 793 (child protection worker "act[s] as a substitute for a police interrogator"); *Bentley*, 739 N.W.2d at 299 (same); *Contreras*, 979 So. 2d at 905 (child protection worker "serv[es] as a police proxy"). Even though child protection workers investigating past abuse are often also attempting to prevent further harm or to facilitate some kind of future medical treatment, these courts do not believe that any such dual purpose in the interviews changes the analysis. *See, e.g., United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005). The "ultimate question," they emphasize, is the "functional" one "whether the declarant's statements [a]re the equivalent of 'testimony.'" *S.P.*, 215 P.3d at 864. That test is met here, these courts hold, because the statements are made during examinations probing whether criminal events occurred in the past. *Id* at 865.

These courts also emphasize that the fact that the declarants in these cases are children does not deprive their otherwise testimonial statements of

that status. Some courts reason that *Crawford* and *Davis* establish "an objective test" concerning whether the setting of the interview resembles an *ex parte* examination, and that this test renders a declarant's age irrelevant. *Snowden*, 867 A.2d at 329; *accord Bentley*, 739 N.W.2d at 300. Others "treat the child's age as one of the objective circumstances to be taken into account," *People v. Stechly*, 870 N.E.2d 333, 363 (Ill. 2007), but "not dispositive of whether [the child's] statement is testimonial." *Henderson*, 160 P.3d at 785. Either way, these courts maintain that when a child describes past events to a child protection worker seeking to determine whether criminal conduct has occurred, the child's statements "lie at the very core of the definition of 'testimonial.'" *Bentley*, 739 N.W.2d at 300.

2. In direct contrast, four state supreme courts have held that child statements in interviews with child protection workers are nontestimonial. *See* Pet. App. 2a, 23a (statements to a "caseworker" with "Jefferson County Children and Youth Services"); *State v. Buda*, 949 A.2d 761 (N.J. 2008) (statements to interviewer from the Division of Youth and Family Services' "Office of Child Abuse Control"); *State v. Arroyo*, 935 A.2d 975 (Conn. 2007) (statements to "a licensed clinical social worker and forensic interviewer" at the "Yale Sexual Abuse Clinic"); *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006) (statements to "a Kandiyohi County child-protection worker from the Family Service Department"), *cert. denied*, 549 U.S. 953 (2006). These courts employ at least three distinctly different rationales for finding such statements nontestimonial.

a. Three courts have held – like Justice Baer's concurrence in the Pennsylvania Supreme Court, Pet. App. 50a – that statements to child protection workers investigating past abuse are nontestimonial because such workers are not "an extension of law enforcement." *Buda*, 949 A.2d at 779. In other words, these courts reason, the interviews are not designed to gather evidence for a potential prosecution. Instead, the Minnesota Supreme Court asserts that "the overriding purpose" of such an interview is to "assess[] whether abuse occurred, and whether steps [a]re therefore needed to protect the health and welfare of the child." *Bobadilla*, 709 N.W.2d at 255. The Connecticut Supreme Court characterizes the primary purpose of such an interview as facilitating mental health care. *Arroyo*, 935 A.2d at 997. And the New Jersey Supreme Court maintains that a child protection worker's questions are designed to "gather[] data in order to assure a child's future well-being." *Buda*, 949 A.2d at 780. Indeed, the New Jersey Supreme Court contends that when child protection workers conduct interviews directly in collaboration with prosecutorial authorities, the presence of both types of governmental employees makes "[t]he division of duties . . . clear: while the Prosecutor's Office investigator [is] charged with collecting evidence of the crimes visited on [the victim-declarant], the DYFS worker [is] responsible for ensuring [his] continued safety and well-being." *Buda*, 949 A.2d at 780.

b. Two courts have held that statements to child protection workers investigating past abuse are nontestimonial because the purpose of such

interviews is to address an "ongoing emergency." In the New Jersey Supreme Court's view, a child protection worker is not "an agent/proxy or an operative for law enforcement," nor is such a worker's purpose in conducting an interview "to collect evidence of past events to secure the prosecution of an offender." *Buda*, 949 A.2d at 779. Rather, the purpose is to protect a child from future harm. *Id.* Thus, a child's accusatory statement in such an interview is "no different than the domestic abuse victim's 911 call [in] *Davis*." *Buda,* 949 A.2d at 780.

The Pennsylvania Supreme Court's holding here starts from a premise opposite the New Jersey Supreme Court's "ongoing emergency" analysis – namely, it views a child protection worker investigating suspicions of abuse as "an agent of law enforcement for purposes of a *Davis* analysis." Pet. App. 22a. The Pennsylvania Supreme Court also leaves open the possibility, in contrast to the New Jersey Supreme Court, that the primary purpose of a child protection interview is "to establish or prove past events potentially relevant to later criminal prosecution," Pet. App. 23a; *see also* Pet. App. 20a n.12. But the Pennsylvania Supreme Court deems that possibility irrelevant, reasoning that accusations made during such an interview are nontestimonial because they are made to allow law enforcement to meet an "ongoing emergency" – specifically, the fact that a victim might suffer "further harm." Pet. App. 21a-22a. Thus, like the New Jersey Supreme Court, the Pennsylvania Supreme Court deems all statements in child protection worker interviews to be nontestimonial – insofar as further harm is always

a serious possibility until a perpetrator of past child abuse is identified and incapacitated.

c. Finally, the Minnesota Supreme Court, like the trial court here (Pet. App. 6a), maintains that a statement cannot be testimonial if the declarant cannot comprehend its evidentiary or investigatory purpose. *Bobadilla,* 709 N.W.2d at 255-56. Since very young children (there, a three-year-old) "are simply unable to understand the legal system and the consequences of statements made during the legal process," their statements to child protection workers can never be testimonial. *Id.* at 256.[6]

3. Courts are not merely divided over the question presented; they are squarely in conflict. Of course, not every fact pattern, and not every child protection system, is identical. But the basics of each system, and the pertinent facts giving rise to the interviews in each case described above, are the same.

The *Bobadilla* case provides perhaps the starkest illustration of this reality. There, the Minnesota Supreme Court held the victim's statement to a child

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[6] The question whether and how *Crawford* takes the age of a declarant into consideration arises outside of the setting of child protection interviews as well. *Compare, e.g., State v. Siler*, 876 N.E.2d 534, 541-44 (Ohio 2007) (canvassing conflicting case law and deeming three-year-old's age irrelevant in holding that his statement to a police officer was testimonial), *with Lagunas v. State*, 187 S.W.3d 503, 519-20 (Tex. App. 2005) (deeming four-year-old's age highly significant in holding that his statement to a police officer was nontestimonial). Granting review in this case would allow this Court to give guidance on that broader issue as well.

protection worker was nontestimonial because the interview was focused on "protect[ing] the health and welfare of the child." *State v. Bobadilla*, 709 N.W.2d at 255. The Eighth Circuit granted the defendant habeas relief, holding that the Minnesota Supreme Court's decision was not only wrong, but that it constituted "an unreasonable application of clearly established Federal law" under AEDPA, 28 U.S.C. § 2254(d)(1) (internal punctuation omitted). In the Eighth Circuit's view, the witness's statements were clearly testimonial because the interview was designed in part to achieve a "purpose akin to a police investigation: assisting law enforcement with the investigation of a suspected criminal violation." *Bobadilla v. Carlson*, 575 F.3d at 793.

When the very same fact pattern produces such diametrically opposite analysis and results, there can be no doubt that courts are divided over the *law*, not facts, and that this Court's guidance is necessary.

II. The Question Presented Is Very Important.

As the Commonwealth itself emphasized below, the question presented is an "enormously important issue." Br. for Appellee in Pa. S. Ct. 2. This is so for at least three reasons.

1. The right to be confronted with one's accuser is one of the fundamental rights of the accused in a criminal trial. "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution." *Maryland v. Craig*, 497 U.S. 836, 847 (1990) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (quoting in turn *Pointer v. Texas*, 380 U.S. 400, 404 (1965))). Confrontation

guarantees openness of procedure by "bringing the interrogation into the more neutral and public forum of the courtroom." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2548 (2009) (Kennedy, J., dissenting). It allows the jury to "observe the demeanor of the witness" as the witness accuses the defendant of wrongdoing. *Craig*, 497 U.S. at 846 (internal citation omitted). Finally, confrontation guarantees an opportunity for cross-examination, "the 'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367, at 29 (3d ed. 1940)).

2. This issue arises on a daily basis in courts across the country. States nationwide have adopted the child-protection-worker-as-interviewer model of investigating child abuse. *See* Am. Prosecutors Research Inst., Investigation and Prosecution of Child Abuse xxiii, xxx, 37 (3d ed. 2004). Furthermore, at least thirty-five states have special child hearsay statutes like Pennsylvania's, which render accusations made by children during such interviews admissible in lieu of live testimony so long as a court deems the statements "reliable" and deems the child "unavailable" to testify in court. *See Snowden v. State*, 846 A.2d 36, 39-40 n.7 (Md. Ct. Spec. App. 2004) (listing and categorizing forty such statutes); Br. Amicus Curiae of Missouri et al. at 2-3 n.1, *Iowa v. Bentley*, No. 07-886 (thirty-five statutes). While most states to consider the issue have determined that *Crawford* renders such accusations testimonial and therefore inadmissible absent the witnesses' taking the stand, *see supra* at 16-20, other states appear set on using such accusations as a substitute for live testimony – as they did during the

Roberts era – unless and until this Court squarely tells them that they cannot. *See supra* at 19-22.

3. Child accusations elicited during *ex parte* interviews are particularly in need of the adversarial testing that the Confrontation Clause guarantees. As this Court and others have recognized, "children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement." *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008); *see also 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, 298-99 (1st Cir. 2004) (noting that "statements by a young child, even if accurately recounted by an adult, may not reflect the truth" because of a child's desire for attention, repeated inquiry, and coaching); *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.").

As a result, out-of-court accusations by child witnesses present a "special risk" of false convictions. *Kennedy*, 128 S. Ct. at 2663 (internal citation omitted); *see also* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 539 (2005) (convictions based on children's false accusations are "one major set of false conviction cases"); Bennett L. Gershman, *Child Witnesses and Procedural Fairness*, 24 Am. J. Trial Advoc. 585, 607 (2001) (modern child hearsay statutes "raise serious questions about . . .

whether innocent persons are more likely to be convicted of extraordinarily serious crimes"). This is especially so when other evidence corroborates the fact of the abuse but not the identity of the abuser, creating "a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement." *Idaho v. Wright*, 497 U.S. 805, 824 (1990). Confrontation is necessary in such a situation to "test[]" such statements in order "to tease out the truth." *Crawford*, 541 U.S. at 67.

To be sure, this Court has held that a state may relieve a young child of the ordinary obligation to testify *face-to-face* with the defendant, if such testimony would prove too traumatic. *See Craig*, 497 U.S. at 849-50. The Confrontation Clause might also permit other accommodations to protect child witnesses from undue distress. *See, e.g.*, *Coronado v. State*, ___ S.W.3d ___, 2010 WL 1287039 (Tex. App. 2010) (holding that cross-examination of a three-year-old via written interrogatories asked during videotaped interview at a child advocacy center was "constitutionally sufficient" because the defendant was able to ask questions and the jury was able to observe the child's demeanor).

It is one thing, however, to allow a different method of confrontation when in-court testimony would cause a child witness emotional distress; it is wholly another to treat such predicted distress as a reason to dispense, as Pennsylvania and other states do, with *any* form of confrontation whatsoever – and to allow trial-by-*ex-parte*-interview instead. As this Court emphasized in *Craig*, the truth-seeking function of trial demands, at a minimum, that a

defendant have an opportunity to engage in *some* form of cross-examination, lest he lack any opportunity to "confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Craig*, 497 U.S. at 851 (internal quotation marks and citations omitted). Systems such as Pennsylvania's lack that essential safeguard.

III. This Case Is An Excellent Vehicle For Considering The Question Presented.

This case is an excellent vehicle for the Court to clarify how *Crawford* applies to children's statements to child protection workers investigating past abuse.

1. This case squarely raises the issue. In contrast to the only other petition this Court has reviewed since the conflict solidified, *Carlson v. Bobadilla*, 130 S. Ct. 1081 (2010) (denying certiorari), this case comes to the Court on direct review, and thus is free of any collateral review complications. And unlike *Iowa v. Bentley*, 552 U.S. 1275 (2008) (denying certiorari), which came to this Court on interlocutory review of a pretrial order, this case comes to this Court after a trial and conviction and, hence, with a complete record.

2. That this Court has already decided to hear another case involving *Crawford*'s testimonial concept during the October 2010 Term, *Michigan v. Bryant*, 768 N.W.2d 65 (Mich. 2009), *cert. granted*, 129 S. Ct. ____ (2010) (No. 09-150), makes this a particularly opportune time for this Court to take up this issue. This Court regularly grants certiorari during the same Term in two or more cases raising similar legal issues in different factual settings. It

did so, for example, this Term in three cases raising slightly different attacks on convictions under the "honest services" provision of the federal mail fraud statute. *See Black v. United States*, No. 08-876; *Weyhrauch v. United States*, No. 08-1196; *Skilling v. United States*, No. 08-1394. It also did so in two cases involving whether sentencing a juvenile to life in prison without the possibility of parole violates the Eighth Amendment. *See Graham v. Florida*, No. 08-7412; *Sullivan v. Florida*, No. 08-7621. And it did so four terms ago respecting *Crawford*'s testimonial concept itself. *See Davis v. Washington*, 547 U.S. 813 (2006) (consolidated opinion in *Davis* case and *Hammon v. Indiana*).[7] This practice allows this Court to engage in a more robust and nuanced

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[7] For other examples, see *Parents Involved in Seattle Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (whether race-based elements in public school assignment plans in Seattle and Louisville violate the Equal Protection Clause); *Van Orden v. Perry*, 545 U.S. 677 (2004), and *McCreary County, Ky. v. ACLU*, 545 U.S. 844 (2004) (whether Ten Commandments displays violate the Establishment Clause); *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (whether affirmative action in university admissions violates the Equal Protection Clause); *Ewing v. California*, 538 U.S. 11 (2003), and *Lockyer v. Andrade*, 538 U.S. 63 (2003) (whether applications of California's Three Strikes Law violated the Cruel and Unusual Punishment Clause); *Sutton v. United Air Lines*, 527 U.S. 471 (1999), and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (whether "correctable" disabilities are covered by Americans with Disabilities Act); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (whether employers are vicariously liable for sexual harassment under Title VII).

analysis of a legal doctrine, and thus to provide more comprehensive guidance to lower courts.

Hearing both *Bryant* and this case in the same term would allow this same kind of productive and efficient use of resources. The *Bryant* case involves whether statements a victim made to a police officer, minutes after being shot, were testimonial. The State of Michigan asserts that they were not, arguing that the declarant's need for medical treatment and the police's need to apprehend a violent perpetrator rendered the primary purpose of the statements assisting the police in meeting an ongoing emergency. In this case, the Pennsylvania Supreme Court held that the primary purpose of a calm interview with a witness to a suspected assault that occurred seven days before was to resolve an ongoing emergency. Addressing both of these arguments at the same time would enable this Court to give comprehensive guidance regarding the ongoing emergency concept.

At the same time, granting plenary review in this case would allow this Court to address the category of child protection worker interviews in a holistic manner. As the three different rationales advanced by the three Pennsylvania courts in this case illustrate, the ongoing emergency concept is just one of the three arguments courts deploy in assessing whether child protection worker interviews produce testimonial statements. State and federal courts are divided over the validity of each of the other two arguments as well. Some courts treat child protection workers' interviews as sufficiently tied to law enforcement and potential prosecutions to trigger *Crawford*, while others do not; some treat children the same as other witnesses, while others do not. *See*

supra at 16-23. This Court's ongoing emergency analysis in *Bryant* will not resolve these disagreements. Therefore, unless and until this Court squarely addresses the specific category of statements at issue here, state and federal courts will not be able to come to any agreement on this subject. Better for this Court to provide clarity on this frequently recurring and extremely important matter as soon as possible.[8]

IV. A Child's Statements During An Interview With A Child Protection Worker Investigating Past Abuse Are Testimonial.

This Court's precedent indicates that a child's statement to a child protection worker investigating allegations of abuse is testimonial.

1. In *Crawford*, this Court noted that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. 36, 50; *accord Mattox v. United States*, 156 U.S. 237, 242 (1895). And in *Davis* (and its companion case, *Hammon*), this Court explained that statements are testimonial when the "primary purpose" of a police interrogation is "to investigate a possible crime" – in other words, "to establish or prove past events potentially relevant to later criminal prosecution."

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[8] At the very least, this Court should hold this case pending the consideration of *Bryant* and dispose of it – either by granting certiorari or by granting, vacating, and remanding it – at the conclusion of those proceedings.

Davis, 547 U.S. at 822, 830. Applying that rule to the facts in *Hammon*, this Court held that a witness's statements to the police at the scene describing a just-completed domestic assault were testimonial.

A witness's statements made, as here, to a child protection worker investigating suspicions of past abuse are testimonial for the same reasons. As in *Hammon*, the interview is "an obvious substitute for live testimony." *Id.* at 830. The child witness does "precisely *what a witness does* on direct examination." *Id.* She recounts, in response to government questioning "some time after the events described [a]re over," "how potentially criminal past events began and progressed." *Id.* at 829-30. Indeed, whatever disagreements Members of this Court have had respecting the outer boundaries of the testimonial concept, it has remained common ground that statements of a "conventional witness" – that is, an eyewitness to the incident being investigated – are paradigmatically testimonial when they "respond[] to questions under interrogation" about the "events observed in the past." *Melendez-Diaz*, 129 S. Ct. at 2551-52 (Kennedy, J., dissenting); *compare id.* at 2534 (majority opinion).

2. None of the rationales that the Pennsylvania courts advanced in this case (which mirror the rationales other courts across the country have advanced) to hold that statements in child protection interviews are nontestimonial withstands scrutiny.

a. Contrary to the Pennsylvania Superior Court's holding (Pet. App. 67a) and Justice Baer's concurrence in the Pennsylvania Supreme Court (Pet. App. 51a), the fact that a government investigator is a child protection worker (or some similar kind of

social worker) instead of a police officer does not change the testimonial analysis.

An interview's investigative purpose, rather than the precise title or employing agency of the governmental questioner, is what renders a witness's statements during an interview testimonial. In *Crawford*, this Court noted that the right to confrontation developed in response to investigative interviews that magistrates conducted under the sixteenth-century Marian statutes. Magistrates "performed the investigative functions now associated primarily with the police," *Crawford*, 541 U.S. at 53, thereby raising "the danger of one-sided interrogations by adversarial government officials who might distort a witness's testimony." *Melendez-Diaz*, 129 S. Ct. at 2548 (Kennedy, J., dissenting). Child protection workers perform the same "investigative functions." As the child protection worker explained in this case: "I ha[d] allegations in front of me of serious bodily injury. I ha[d] to investigate and figure out what happened." Tr. 120 (9/19/05). Indeed, his investigation and interview was statutorily coordinated with police and prosecutors to such an extent that he acted as an "agent of law enforcement." Pet. App. 22a.

To be sure, a child protection worker also aims to ensure the safety and wellbeing of a child. But often, the role of a police officer is similarly two-fold: ensuring safety *and* investigating a past crime. Consider an officer (like the officer in *Hammon*) who is investigating a domestic assault. The officer seeks both to find out what happened and to protect the victim from future abuse. *Indeed, the chief method of ensuring the safety of a victim is often to arrest a*

suspect and to prosecute and imprison him for his criminal acts. Thus, in the context of investigating child abuse, as in the context of investigating domestic abuse and other crimes, interviews that governmental officials conduct to determine "how potentially criminal past events began and progressed" are sufficiently tied to potential prosecutions as to render their evidentiary products testimonial, even when a concurrent concern exists respecting the wellbeing of the victim. *Davis*, 547 U.S. at 830.

b. Nor is the Pennsylvania Supreme Court's majority opinion correct that the evidence-gathering function of a child protection worker's interview is irrelevant because such an interview is done to resolve an "ongoing emergency." Pet. App. 21a-23a.

In *Hammon*, a police officer interviewed a woman who seemingly had just been the victim of domestic violence. Her husband (the suspect) was in the next room. The police needed to find out what had just happened and "whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action." *Davis*, 547 U.S. at 841 (Thomas, J., concurring in the judgment and dissenting in part). But because Mrs. Hammon faced no "immediate threat to her person" during the interview, but rather gave a "narrative of past events . . . delivered at some remove in time from the danger she described," Mrs. Hammon's statements were testimonial. *Id.* at 830, 832 (majority opinion).

The same is true here. A child protection worker who interviews a potential witness to (or perpetrator of) child abuse is no doubt attempting in part to prevent "further harm" to the victim. Pet. App. 22a.

But when, at the time of the interview, no such harm is occurring, and the interviewer, as here, asks questions "to investigate and figure out what happened" in the past, Tr. 120 (9/19/05), the witness's statements are testimonial. *See Davis*, 547 U.S. at 829-32; *see also State v. Buda*, 949 A.2d 761, 785 (N.J. 2008) (Albin, J., dissenting) ("[A] narrative of a crime already committed that can be used in a future prosecution" is testimonial because it is not uttered "for the purpose of stopping a crime in progress."). Indeed, the incident under investigation here was much further removed in time and space than was true in *Hammon*. Finding an ongoing emergency in this case based upon a concern of possible future harm simply cannot be squared with *Hammon*.

c. Contrary to the trial court's assertion here (Pet. App. 6a), the fact that the declarant in a case such as this is a young child does not render her statements nontestimonial.

In light of the Confrontation Clause's rejection of using *ex parte* examinations in place of live testimony, *Crawford*, 541 U.S. at 50, a person's out-of-court statements must be testimonial when the statements "do precisely *what a witness does* on direct examination": recount, in response to questioning, "how potentially criminal past events began and progressed." *Davis*, 547 U.S. at 830. In other words, statements are testimonial when they "are an obvious substitute for live testimony." *Id.*

Nothing in this framework turns on the age of the witness. A child's statements in an interview with a child protection worker operate as a substitute for live testimony just as readily as an adult's statements in the same context would. And the risk

of governmental manipulation in the context of *ex parte* child interviews is at least as strong as with adults. Indeed, Members of this Court have emphasized "the value of the confrontation right" in the specific context of "guarding against a child's distorted or coerced recollections." *Melendez-Diaz*, 129 S. Ct. at 2548 (Kennedy, J., dissenting) (quoting *Craig*, 497 U.S. at 869 (Scalia, J., dissenting)).

Even if a witness's age were a factor that is relevant to testimonial analysis, that factor could not render a child's statements nontestimonial in the context of an interview with a child protection worker investigating past abuse. In such a setting, a child realizes that she is speaking to a person of authority who is trying to determine whether someone has done something "bad." The child also realizes "that some adverse consequences . . . w[ill] be visited on the wrongdoer," if that person is identified. Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 Brook. L. Rev. 241, 273 (2005). Here, for instance, A.A. remembered Geist as the person who had taken her away from her parents and into protective custody. She shook hands with Geist and spoke privately with him on the front porch. Pet. App. 3a, 20a. Regardless of whether a declarant in this situation understands the particularities of the American legal system, the person is knowingly performing the function of a witness. Any accusation she makes must be considered testimonial under the Confrontation Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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