No. 13-____

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In all fifty States, certain individuals—most often, teachers, social workers, and medical professionals—have a mandatory duty to report suspected child abuse that they notice in the course of their work. In this case, the Ohio Supreme Court held both that this mandatory-reporting duty turned day-care teachers into "agents of the state for law-enforcement purposes" and that a child's out-of-court statements to the teachers qualified as "testimonial" under the Confrontation Clause. It did so even though there was no police involvement in the encounter between the teachers and child. Several other state supreme courts, by contrast, have rejected arguments that these mandatory-reporting statutes turn an individual subject to them into "law enforcement," and have held instead that a child's statements to the individual were non-testimonial and thus not subject to the Confrontation Clause.

The two questions presented are:

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

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

LIST OF PARTIES

The Petitioner is the State of Ohio. The Respondent is Darius Clark.

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JURISDICTIONAL STATEMENT

The Supreme Court of Ohio entered its judgment in this case on October 30, 2013. The State filed a motion for reconsideration, which was denied on December 24, 2013. On March 13, 2014, Justice Kagan granted a 45-day extension of time to file this petition for writ of certiorari until May 8, 2014. The State of Ohio invokes the Court's jurisdiction under 28 U.S.C. § 1257. The Supreme Court of Ohio's decision qualifies as a "[f]inal judgment or decree[]" within the meaning of that statute. *Id.*; *see Michigan v. Bryant*, 131 S. Ct. 1143, 1151-52 (2011) (granting review when state supreme court found Confrontation Clause violation and remanded for new trial); *see also Kansas v. Marsh*, 548 U.S. 163, 168 (2006); *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984).

CONSTITUTIONAL PROVISIONS INVOLVED

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 . . . ."

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Darius Clark Physically Assaulted His Girlfriend's Minor Children

The defendant, Darius Clark, began living with his girlfriend, T.T., in 2008. Pet. App. 19a. T.T. had two young children, L.P., her three-year-old son, and A.T., her two-year-old daughter. Late at night on March 16, 2010, T.T. left on a trip to Washington, D.C., leaving her children in Clark's care. *Id.* Around 1:00 p.m. the next day, Clark dropped off L.P. at the William Patrick Day Head Start Center. Pet. App. 3a, 20a. Soon thereafter, in the Center's lunchroom, one of L.P.'s daycare teachers, Ramona Whitley, noticed that his left eye appeared bloodshot or bloodstained. Pet. App. 3a. She asked him, "What happened?" *Id.* L.P. eventually responded that he "fell." *Id.* Whitley then asked how he had "fall[en] and hurt [his] face." Pet. App. 4a. L.P. again simply said, "I fell down." *Id.* Whitley also noticed that L.P. was much less talkative than usual and that he refused to eat anything. Pet. App. 20a.

When Whitley saw L.P. in the brighter classroom setting, she noticed additional red marks that looked like "whips of some sort" and welts on his face. Pet. App. 4a, 20a. At this point, Whitney was "kind of like in shock" and asked L.P. again "what happened?" Pet. App. 20a. Whitley then told the class's lead teacher, Debra Jones, about L.P.'s injuries. Pet. App. 4a. When she saw L.P.'s injuries, Jones asked L.P., "Whoa, what happened?" and "Who did this?"

Pet. App. 4a, 20a. According to Jones, L.P. "seemed kind of bewildered. He said something like Dee, Dee." *Id.* At that time, the teachers did not know what L.P. meant by this statement. They wanted to know whether L.P. had been talking about another child in the class. So Jones asked L.P. if Dee was "big or little." Pet. App. 21a. L.P. responded, "Dee is big." *Id.* It is now undisputed that Clark's nickname is "Dee." Pet. App. 53a.

Jones then took L.P. to her supervisor. Pet. App. 4a, 21a. The supervisor raised L.P.'s shirt, and saw additional red marks on his body. Pet. App. 21a. She concluded that whoever saw L.P. first should "make the call" to the Cuyahoga County Department of Children and Family Services ("CCDCFS") reporting a suspicion of child abuse. Pet. App. 4a, 21a. "As a result, Whitley called 696-KIDS and made a report of suspected child abuse." Pet. App. 4a.

A CCDCFS social worker subsequently arrived at the school. *Id.* The social worker asked L.P. about his injuries, and L.P. again implicated Clark in response. Pet. App. 61a. Shortly after the social worker arrived, Clark also returned to the daycare center. Pet. App. 4a. He denied responsibility for the injuries, and left with the child. *Id.* The social worker tried to stop Clark, but could not do so and was unable to write down the license-plate number for Clark's car quickly enough. Pet. App. 21a. CCDCFS was unable to locate L.P. until the next day. *Id.* Ultimately, a different social worker found L.P. and his sister, A.T., at Clark's mother's house. Pet. App. 4a. That social worker confirmed L.P.'s injuries and "discovered very serious injuries on A.T., including two

black eyes and a large burn on her cheek." Pet. App. 21a. When speaking with this social worker, L.P. again implicated Clark in the physical abuse. Pet. App. 58a-59a. The social worker called 911, and took both children to the hospital after the police arrived at the house. Pet. App. 4a, 21a.

At the hospital, "[a] physician determined that L.P. had bruising in various stages of development and abrasions consistent with having been struck by a linear object and that A.T. had bruising, burn marks, a swollen hand, and a pattern of sores at her hairline." Pet. App. 4a-5a. "The physician suspected child abuse and estimated that the injuries occurred between February 28 and March 18, 2010." Pet. App. 5a.

B. A Jury Convicts Clark, But The Ohio Supreme Court Affirms The Reversal Of His Conviction On Confrontation Clause Grounds

1. A grand jury indicted Clark on one count of felonious assault relating to L.P., four counts of felonious assault relating to A.T., two counts of endangering children, and two counts of domestic violence. Pet. App. 5a. The jury also indicted T.T., the children's mother, on similar charges. Pet. App. 19a n.1. She pleaded guilty to charges of child endangerment, domestic violence, and permitting child abuse, and also agreed to testify against Clark at his trial. *Id.* Ultimately, she was sentenced to eight years' imprisonment for these convictions. *Id.*

At Clark's trial, the trial court declared L.P. incompetent to testify under state law because of his

young age. Pet. App. 5a. Clark had also argued that L.P.'s statements identifying Clark as the abuser were "testimonial" and thus triggered the Confrontation Clause's prohibition on admitting out-of-court statements without a prior ability to cross examine the declarant. Pet. App. 19a. Rejecting the objections to the testimony, the trial court ultimately allowed seven witnesses to testify as to what L.P. stated concerning who had injured him, including the two daycare teachers (Whitley and Jones), the two social workers who met with L.P. at his school and at the house of Clark's mother, the police officer who responded to the social worker's 911 call and spoke with L.P. at the hospital, and the child's grandmother and great aunt. Pet. App. 5a. The jury found Clark guilty of all charges but one relating to A.T., and the trial court sentenced Clark to an aggregate total sentence of 28-years' imprisonment. *Id.*

2. On appeal, the Eighth District Court of Appeals reversed Clark's conviction and remanded for a new trial. Pet. App. 52a. The appellate court initially held that the testimony by five of the seven witnesses about what L.P. had told them, including the testimony of the police officer, the social workers, and the teachers, all violated Clark's Confrontation Clause rights. Pet. App. 55a-63a.

With respect to L.P.'s out-of-court statements to *the teachers*, the court concluded that the statements were testimonial (and thus subject to the Confrontation Clause) because "the primary purpose of Jones and Whitley questioning L.P. was to report potential child abuse to law enforcement." *Id.* The court of appeals reached that conclusion because "[b]oth

teachers testified that their obligation to report [suspected child abuse] is mandatory," and because a reasonable witness could thus "expect that statements made to a teacher while she is reporting suspected child abuse may be used at a later trial." *Id.*

The court next reviewed "L.P.'s statements to [his] grandmother and great aunt" under Ohio Evid. R. 807, which permits the admission of a child's out-of-court statements concerning child abuse if certain requirements are met. Pet. App. 63a. The court held that L.P.'s statements to his grandmother and great aunt "lacked the 'particularized guarantees of trustworthiness'" necessary to permit admission under the rule. Pet. App. 68a. Because it had already concluded that L.P.'s separate statements to his teachers were testimonial, however, the court did not consider whether they also would have been inadmissible under Ohio Evid. R. 807. *See* Pet. App. 63a-69a.

3. The State filed a discretionary appeal with the Ohio Supreme Court, challenging the Eighth District's ruling that the admission of L.P.'s out-of-court statements to his two daycare teachers violated the Confrontation Clause. In a sharply divided 4-3 decision, the Ohio Supreme Court affirmed. *See* Pet. App. 17a.

The majority recognized that, as this Court held in *Davis v. Washington*, 547 U.S. 813 (2006), and again in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), the Confrontation Clause applies only to "testimonial" statements. Pet. App. 2a; *see* Pet. App. 10a-12a. And *Davis*, the majority further noted, "enunciated the primary-purpose test to determine whether a statement made to a law-enforcement officer or an

agent of law enforcement in the course of an investigation is testimonial" in nature. Pet. App. 2a; *see* Pet. App. 11a. Under this test, statements are not testimonial if their primary purpose is to enable police assistance with an ongoing emergency, but they are testimonial if their primary purpose is to establish or prove past events potentially relevant to later criminal prosecution. Pet. App. 2a-3a (citing *State v. Siler*, 876 N.E.2d 534 (Ohio 2007)).

Applying these rules to the facts presented here, the majority first held that Jones and Whitley (the two daycare teachers) qualified as law-enforcement agents because "Ohio law imposes a duty on all school officers and employees, including administrators and employees of child day-care centers, to report actual or suspected child abuse or neglect." Pet. App. 6a (citing Ohio Rev. Code § 2151.421). While "'the primary purpose of reporting is to facilitate the protection of abused and neglected children rather than to punish those who maltreat them,'" the majority reasoned, "'*it is clear that the General Assembly considered identification and/or prosecution of the perpetrator to be a necessary and appropriate adjunct in providing such protection,* especially in the institutional setting.'" Pet. App. 7a-8a (quoting *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 865 (Ohio 2004)). Accordingly, the majority held that "[w]hen teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator" under this mandatory-reporting statute, "any statements obtained are testimonial for purposes of the Confrontation Clause." Pet. App. 9a.

The majority next held that the primary purpose of L.P.'s statements to the teachers showed that the statements were testimonial in nature and thus subject to the Confrontation Clause. Pet. App. 8a-9a, 15a-16a. It concluded that "no ongoing emergency existed, nor had L.P. complained about his injuries or needed emergency medical care"; instead, the teachers merely "acted to fulfill their duties to report abuse" when they questioned him about his injuries. Pet. App. 15a. Indeed, Whitley expressly testified that she is trained to look for suspected child abuse when children visit the daycare center. *Id.* Accordingly, the majority said that, "[a]t a minimum, when questioning a child about suspected abuse in furtherance of a duty pursuant to [Ohio Rev. Code §] 2151.421, a teacher acts in a dual capacity as both an instructor and as an agent of the state for law-enforcement purposes." *Id.* The majority also suggested that the teachers questioned L.P. away from other students "in a formal question-and-answer format," seeking "facts concerning past criminal activity to identify the person responsible." Pet. App. 16a. And, according to the majority, L.P.'s statements were "'functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.'" *Id.* (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-311 (2009)).

Chief Justice O'Connor drafted a vigorous dissent. Pet. App. 18a-47a. The dissent initially criticized the majority for suggesting that its conclusion followed from this Court's binding precedent. Pet. App. 23a-25a. In both *Davis* and *Bryant*, the dissent pointed out, this Court had expressly left open whether the Confrontation Clause applies *at all* to

statements to non-law enforcement. Pet. App. 24-25a (citing *Bryant*, 131 S. Ct. 1155 n.3; *Davis*, 547 U.S. at 823 n.2). "[C]ontrary to the majority's suggestion that *Davis* compels the conclusion that L.P.'s statements to his teachers were testimonial," the dissent reasoned, "the United States Supreme Court has yet to decide under what circumstances statements are testimonial when they are made to someone other than law-enforcement personnel." Pet. App. 25a. The Ohio Supreme Court, by contrast, had considered that question. It applied an "objective-witness test" to "statements made to someone other than law-enforcement personnel," one that treats those statements as non-testimonial unless "an objective witness would reasonably believe that the questioning served primarily a prosecutorial purpose." Pet. App. 26a (citing *State v. Stahl*, 855 N.E.2d 834, 844 (Ohio 2006)).

The dissent next criticized the majority's conclusion that L.P.'s statements to his teachers should be considered statements to law enforcement because of the teachers' mandatory-reporting obligations. Pet. App. 30a-39a. To begin with, the teachers were employed by a private non-profit entity (the Council for Economic Opportunities of Greater Cleveland, which operates the Head Start program at the William Patrick Day Services Center), not by a law-enforcement agency. Pet. App. 30a. And law enforcement had no role in any of the teachers' questions to L.P. *Id.*

Thus, the majority could rely *only* on the mandatory-reporting statute to hold that these teachers acted as law enforcement. *Id.* at 31a. But that statute did not deputize them, the dissent concluded, be-

cause "'the primary purpose of reporting is to facilitate the protection of abused and neglected children,'" and any "prosecutorial purpose is secondary." *Id.* at 33a (quoting *Yates*, 808 N.E.2d at 865). And that is a duty that all school teachers already have—"'to protect those children committed to their care and control.'" Pet. App. 35a (citation omitted). In other words, the dissent noted that teachers "have a professional responsibility upon observing a student's injuries to inquire about those injuries, to protect that child and the other children in the classroom, and to maintain a safe and structured environment in which learning can take place." Pet. App. 36a. The majority's reliance on the mandatory-reporting statute was all the more troubling, the dissent concluded, because it created a conflict with several other appellate courts, which had "held that a mandatory reporter is not an agent of law enforcement when there is little or, as here, no police involvement." Pet. App. 37a-39a (citing *United States v. Squire*, 72 M.J. 285 (C.A.A.F. 2013); *Seely v. State*, 282 S.W.3d 778 (Ark. 2008); *State v. Spencer*, 169 P.3d 384 (Mont. 2007); *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007)).

Applying the objective-witness test, the dissent concluded that the teachers "questioned L.P. to protect him and to maintain a safe and structured classroom, not to create evidence for use at Clark's trial." Pet. App. 39a-40a. The questioning occurred in a classroom; it was informal and spontaneously arose from seeing L.P.'s injuries; and the teachers were concerned that another classmate might have injured L.P. Pet. App. 40a-42a. In short, "[t]he teachers' questions allowed them to determine whether

something was happening in the classroom or on the school grounds that they needed to address." Pet. App. 41a-42a.

The dissent concluded by "invit[ing] [this Court] to now address the issues that it reserved in *Davis* and to provide uniform guidance on the issue of the effect, for Confrontation Clause purposes, of a duty to report child abuse." Pet. App. 47a. The dissent emphasized its "hope that four justices vote to accept [its] invitation," because, without immediate intervention, it said that "[c]hildren in Ohio will go unprotected." *Id.* Indeed, the majority's holding was troubling because it "treat[ed] differently out-of-court statements made by those who are the most vulnerable and the most in need of protection . . . from those made by most adults." Pet. App. 45a.

REASONS FOR GRANTING THE WRIT

For several reasons, the Court should grant the petition for writ of certiorari to review the Ohio Supreme Court's decision in this case. *First*, the Court's guidance is needed because its prior cases have yet to consider whether or when statements to individuals other than law enforcement qualify as "testimonial" within the meaning of the Confrontation Clause. *Second*, in light of that lack of guidance, it should be unsurprising that the Ohio Supreme Court's decision conflicts with numerous decisions from other state supreme courts considering mandatory-reporting statutes. *Third*, the petition raises an often recurring legal issue that implicates the most compelling of concerns—child safety. *Fourth*, this case provides a good vehicle for the Court to consider this important question.

I. THE COURT HAS PROVIDED LITTLE GUIDANCE ON HOW THE CONFRONTATION CLAUSE APPLIES TO STATEMENTS TO NON-LAW ENFORCEMENT

As an initial matter, the Court's review is sorely needed because its prior cases leave lower courts with little guidance on the method to resolve the recurring and important question presented by this case—when, if ever, statements to private individuals who are not law enforcement qualify as "testimonial" and thus trigger the Confrontation Clause.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held that this provision prohibits the admission *only* of those out-of-court statements that are "testimonial" if the defendant lacked a prior opportunity to cross-examine the declarant. *Id.* at 68. As for the important definition of "testimonial," *Crawford* explained that it at least includes *both* out-of-court statements made in "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" *and* out-of-court statements made during "police interrogations." *Id.* But *Crawford* refrained from providing a "comprehensive definition" of the term, leaving its definition to be fleshed out on a case-by-case basis. *Id.* at 68 n.10. After *Crawford*, the Court has elaborated on the meaning of "testimonial" in only two contexts—neither of which directly applies to the question presented here.

Statements To Law-Enforcement Responders. The Court has twice considered when a declarant's out-of-

court statements *to law-enforcement agents* responding to requests for help qualify as "testimonial." *See Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011); *Davis v. Washington*, 547 U.S. 813, 817 (2006). In that context, the Court has held that the dividing line between testimonial and non-testimonial turns on the purpose of the statement. When "the primary purpose of [a] [law-enforcement] interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus" statements to police made during that interrogation are not testimonial. *Bryant*, 131 S. Ct. at 1155. When, by contrast, no ongoing emergency exists and the statements are made with a "primary purpose of creating an out-of-court substitute for trial testimony," the statements are "testimonial" and thus within the scope of the Confrontation Clause. *Id.*

The Court has applied this dichotomy to three discrete sets of facts. As an initial matter, the Court has found to be "testimonial" (and thus subject to the Confrontation Clause) certain statements that a wife made to a police officer about her husband's abuse after the abuse had ended and after the police had separated the couple. *Davis*, 547 U.S. at 820, 829-32. The wife made her statements during the officer's questioning about her version of events; indeed, "[a]fter hearing [the wife's] account, the officer 'had her fill out and sign a battery affidavit.'" *Id.* at 820 (citation omitted). The Court found it "clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct—as, indeed, the testifying officer expressly acknowledged"—and that "[t]here was no emergency in progress." *Id.* at 829-30.

The Court, by contrast, has found that a woman's statements to a 911 operator that her former boyfriend was physically abusing her were not "testimonial." *Id.* The Court indicated that "[a] 911 call, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Id.* at 827. The woman faced an "ongoing emergency" and her statements sought "help against bona fide physical threat." *Id.* "She simply was not acting as a witness; she was not testifying." *Id.*

Similarly, the Court has found that a shooting victim's statements to police who were called to assist him were not "testimonial" because an ongoing emergency continued at the time they encountered him at a gas station. *See Bryant*, 131 S. Ct. at 1162-67. Among other things, the Court highlighted that the police did not know the location of the shooter, that a gun was involved, that the declarant's statements were made while "lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen," that the questions asked of him were precisely the type of questions necessary to assess the emergency, and that the "situation was fluid and somewhat confused." *Id.*

Forensic Reports. Aside from considering statements to law-enforcement responders, the Court has repeatedly considered when statements made in various types of reports qualify as "testimonial." In that context, the Court has held that scientific statements included in forensic reports that were "created specifically to serve as evidence in a criminal proceeding"

qualify as "testimonial" and are thus subject to the Confrontation Clause. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709 (2011). Applying this rule, the Court has treated as testimonial a statement in a report concluding that particular white powder was cocaine, *see Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009), and a statement in a report concluding that a particular driver's blood-alcohol concentration was well above a State's legal limit, *see Bullcoming*, 131 S. Ct. at 2709.

The Court, by contrast, has noted that ordinary "business and public records" would not generally be testimonial because they "'hav[e] been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.'" *Id.* at 2714 n.6. And at least a plurality has held that a DNA report designed to help the police investigate a rape was not testimonial because its "primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against [the defendant], who was neither in custody nor under suspicion at that time." *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012) (plurality op.); *see also id.* at 2260 (Thomas, J., concurring in judgment) (finding that the report was not testimonial because it "lack[ed] the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact").

Statements to Non-Law Enforcement. As this discussion shows, the Court has not yet considered the scope of the term "testimonial" in a case, like today's case, involving out-of-court statements to individuals who are not law enforcement.

To begin with, the Court has expressly left open whether those statements can *ever* qualify as testimonial. In *Crawford*, the declarant's out-of-court statements were *to police* during a formal interrogation, so the Court did not consider the question. *See* 541 U.S. at 65-66. In *Davis*, the relevant statements were to police and to a 911 operator (whom the Court assumed, for purposes of the opinion, to qualify as a law-enforcement agent). *See* 547 U.S. at 823 n.2. Thus, the *Davis* Court expressly refrained from considering "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Id.* The relevant statements in *Bryant* were likewise to police, and so the Court again expressly noted that it had "no need to decide that question" concerning statements to non-law enforcement. 131 S. Ct. at 1155 n.3; *see also id.* at 1169 n.1 (Scalia, J., dissenting) ("I remain agnostic about whether and when statements to nonstate actors are testimonial.").

Even if some version of the "primary purpose" test should apply to statements to non-law enforcement, moreover, the Court has given seemingly conflicting instructions on the scope of that test. On the one hand, the Court has indicated that "if a statement is not made for 'the primary purpose of creating an *out-of-court substitute for trial testimony*,' its admissibility 'is the concern of state and federal rules of evidence, not the Confrontation Clause.'" *Williams*, 132 S. Ct. at 2243 (plurality op.) (quoting *Bryant*, 131 S. Ct. at 1155) (emphasis added). And when discussing this test, the Court has noted that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with

a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155. In the context of spousal abuse, for example, it has suggested that a spouse's "[s]tatements to *friends and neighbors* about abuse and intimidation and statements to *physicians* in the course of receiving treatment would be excluded, if at all, only by hearsay rules" rather than the Confrontation Clause. *Giles v. California*, 554 U.S. 353, 376 (2008) (emphases added); *cf. Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring) (noting that the State "has not claimed that the report was necessary to provide [the defendant] with medical treatment"); *Melendez-Diaz*, 557 U.S. at 312 n.2 (noting that "medical reports created for treatment purposes" "would not be testimonial under our decision").

On the other hand, some of the Court's other cases articulate a seemingly broader "primary purpose" test—suggesting that the Confrontation Clause covers not just statements made to "'creat[e] an out-of-court substitute for trial testimony,'" *Williams*, 132 S. Ct. at 2243 (plurality op.), but also statements made to "establish[] or prov[e] past events potentially relevant to later criminal prosecution,'" *Bullcoming*, 131 S. Ct. at 2714 n.6 (quoting *Davis*, 547 U.S. at 822). And the Court has also distinguished—rather than rejected—a common-law case, *King v. Brasier*, 168 Eng. Rep. 202, 202-03 (K.B. 1779), that overturned a conviction based on a child's out-of-court statements to her *mother* soon after the child had been sexually assaulted. *See Davis*, 547 U.S. at 828; *compare Bryant*, 131 S. Ct. at 1155 n.3 (criticizing dissent's reliance on *Brasier*), *with id.* at 1173 (Scalia, J., dissenting) (suggesting that, under the

majority's approach, *Brasier* likely would have come out differently because the "mother likely listened to the account to assess the threat to her own safety and to decide whether the rapist posed a threat to the community that required the immediate intervention of the local authorities").

In sum, the Court should grant the petition for writ of certiorari because its previous cases provide lower courts with little guidance over how to treat out-of-court statements to private individuals.

II. THE OHIO SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS OF MANY OTHER APPELLATE COURTS

The Court should also grant the petition for writ of certiorari because the Ohio Supreme Court's decision conflicts in two key respects with decisions from other courts. First, the Ohio Supreme Court held that L.P.'s daycare "teachers acted as agents of the state for law-enforcement purposes" because they had a mandatory duty to report suspected child abuse. Pet. App. 15a-16a. Second, the court held that the statements L.P. made to those teachers were testimonial under the Confrontation Clause. As the dissent below expressly noted, *see* Pet. App. 36a-37a, the Ohio Supreme Court's reasoning departs from other cases that reject identical arguments on similar facts. Indeed, "[c]ourts in other jurisdictions . . . have held that the mere fact of a declarant making a hearsay statement to a statutorily defined mandatory reporter does not make the statement testimonial." *People v. Phillips*, 315 P.3d 136, 165 (Colo. Ct. App. 2012). The majority did not even

cite—let alone attempt to distinguish—any of these decisions. *See* Pet. App. 6a-16a.

To begin with, the Montana Supreme Court rejected a defendant's reliance on a similar mandatory-reporting statute when holding that a child's statements to mandatory reporters were not testimonial. *See State v. Spencer*, 169 P.3d 384, 389 (Mont. 2007). There, the trial court introduced out-of-court statements about the defendant's sexual abuse that a child had previously made to a professional counselor and to her foster parent. *Id.* at 387. The defendant argued that these statements qualified as "testimonial" because Montana's mandatory-reporting statute required professional counselors and foster parents to report suspected abuse. *Id.* at 389. The Montana Supreme Court disagreed, finding "no indication . . . that the Legislature intended to deputize this litany of professionals and individuals into law enforcement, and . . . [refusing] to attach that significance to the duty to report." *Id.* Instead, the court held that "the objective circumstances indicate that when [the counselor] and [parent] heard [the child's] statements the primary purpose of their interactions with [the child] were counseling and parenting, respectively." *Id.* It thus found no Confrontation Clause violation in similar circumstances.

The California Supreme Court reached the same conclusion in *People v. Cage*, 155 P.3d 205 (Cal. 2007). In *Cage*, a 15-year-old child showed up at a hospital with a slash wound. In response to a doctor's question about "what happened," the child said that his mother had cut him. *Id.* at 207. The court found this statement non-testimonial even though

the doctor had a mandatory-reporting obligation under state law. *Id.* at 219-20. Specifically, it held that "[t]he mere fact that doctors must report abuse" neither "transform[s] them into *investigative agents* of law enforcement" nor "convert[s] their medically motivated questions during the examination of minor patients into investigatory interrogations that elicit testimonial responses." *Id.* at 220; *see also People v. Duhs*, 947 N.E.2d 617, 620 (N.Y. 2011) (noting that "it [was] of no moment that the pediatrician may have had a secondary motive for her inquiry, namely, to fulfill her ethical and legal duty, as a mandatory reporter of child abuse," because "[h]er first and paramount duty was to render medical assistance to an injured child"); *State v. Bella*, 220 P.3d 128, 132-33 (Or. Ct. App. 2009) (reaching similar result).

The Arkansas Supreme Court subsequently adopted similar reasoning in *Seely v. State*, 282 S.W.3d 778 (Ark. 2008). In that case, a child's mother, suspecting child sexual abuse by her father, took her to the hospital. *See id.* at 781. Before seeing a doctor, the child was interviewed by "a social worker whose duties included interviewing children who were brought in for physical or sexual abuse." *Id.* During the interview, the child stated that her father had abused her in response to the question whether "she knew why she was at the hospital." *Id.* The "court conclude[d] . . . that this duty to report, by itself, did not render all statements made by [the child] to [the social worker] testimonial." *Id.* at 788. And even though the social worker knew "that the information she gathered might be used in a subsequent prosecution," *id.* at 789, the court nevertheless held that the statements were non-testimonial be-

cause the primary purpose of the conversation was to define the scope of any subsequent medical treatment and to ensure the child's safety, not to gather evidence for a prosecution, *id.* at 789-90.

Likewise, a Colorado Court of Appeals adopted the same analysis in a similar teaching setting. *See Phillips*, 315 P.3d at 165-66. In that case, a child (who eventually died of starvation) made various statements to school employees, including, for example, that his "dad clobbered" him in response to a question about his bruised right ear. *Id.* at 143. The trial court allowed the school employees to testify about the child's out-of-court statements, and the appellate court affirmed. *See id.* at 161-62, 165-66. The court reasoned that the "primary purpose" of the conversations with the school employees was "to assess [the child's] injury and determine whether human services should be notified," not to make a record for a subsequent criminal prosecution. *Id.* at 162. The court rejected the defendant's reliance on the mandatory-reporting statute, holding that the employees "were not law enforcement officials; law enforcement officials had not asked them to question [the child] about his injuries; and, they did not otherwise work with law enforcement officials to obtain [his] injury-related statements for later use in prosecuting defendant." *Id.* at 165-66.

In the federal courts, both the Fourth Circuit and U.S. Court of Appeals for the Armed Forces have reached similar conclusions. *See United States v. Squire*, 72 M.J. 285, 289 (C.A.A.F. 2013); *United States v. DeLeon,* 678 F.3d 317, 324 (4th Cir. 2012), *rev'd on other grounds by* 133 S. Ct. 2850 (2013). In

Squire, a mother took her eight-year-old daughter to the hospital after suspecting that the defendant had abused her. 72 M.J. at 287. When the doctor was taking the child's medical history, the child told him that the defendant had abused her. *Id.* On appeal, the defendant argued that the doctor qualified as "law enforcement" because he "was a mandatory reporter of cases involving child sexual assault victims under Hawaii state law." *Id.* at 288. The court rejected this argument "that this general requirement, which broadly covers health care professionals, employees of public and private schools, child care providers, and providers of recreational and sports activities, . . . is alone sufficient to establish that [a doctor] was acting in a law enforcement capacity." *Id.* at 289. "Without more," the court continued, "we decline to 'deputize [the] litany of [mandatory reporters] . . . into law enforcement.'" *Id.* (citation omitted).

Finally, in *DeLeon*, the Fourth Circuit reached a similar conclusion. There, a jury convicted the defendant of murdering his eight-year-old stepson. At trial, a social worker testified about prior statements that the stepson had made to her. The stepson's teacher had referred him to a social worker after noticing a bruise on his forehead. 678 F.3d at 320. He told the social worker about his stepfather's physical abuse. *Id.* at 320-21. The Fourth Circuit rejected the defendant's arguments that the social worker's testimony violated the Confrontation Clause, holding "that the primary purpose [of the conversation] was to develop a treatment plan—not to establish facts for a future criminal prosecution." *Id.* at 325-26. In the process, it rejected the defendant's reliance on

the fact that the social worker had "reporting requirements," noting that "[c]ourts have not treated such [a] factor[] as determinative when examining whether statements were provided for the purpose of future criminal prosecution." *Id.* at 324.

In short, the Ohio Supreme Court's decision below is irreconcilable with numerous decisions from other state and federal appellate courts. Whether its analysis is right or wrong, the conflict warrants this Court's attention.

III. THE OHIO SUPREME COURT'S DECISION RAISES AN IMPORTANT AND RECURRING ISSUE

The Court should also grant the petition for writ of certiorari because this case raises a recurring issue that implicates compelling state interests.

First, mandatory-reporting statutes like the one on which the Ohio Supreme Court relied here are ubiquitous. In fact, all 50 states and the District of Columbia have statutes that impose mandatory-reporting obligations similar to those imposed by the Ohio statute. *See* Ala. Code § 26-14-3; Alaska Stat. § 47.17.020; Ariz. Rev. Stat. § 13-3620; Ark. Code. Ann. § 12-18-402; Cal. Penal Code § 11165.9; Colo. Rev. Stat. § 19-3-304; Conn. Gen. Stat. § 17a-101; Del. Code Ann. tit. 16, § 903; D.C. Code Ann. § 4-1321.02; Fla. Stat. § 39.201; Ga. Code Ann. § 19-7-5; Haw. Rev. Stat. § 350-1.1; Idaho Code § 16-1605; 325 Ill. Comp. Stat. 5/4; Ind. Code. § 1-33-5-1; Iowa Code § 232.69; Kan. Stat. Ann. § 38-2223; Ky. Rev. Stat. Ann. § 620.030; La. Child Code Ann. art. 609; Me. Rev. Stat. Ann. tit. 22, § 4011-A; Md. Code Ann.,

Fam. Law § 5-704, 5-705; Mass. Ann. Laws ch. 119, § 51A; Mich. Comp. Laws § 722.623; Minn. Stat. § 626.556; Miss. Code Ann. § 43-21-353; Mo. Rev. Stat. § 210.115; Mont. Code Ann. § 41-3-201; Neb. Rev. Stat. § 28-711; Nev. Rev. Stat. § 432B.220; N.H. Rev. Stat. Ann. § 169-C:29; N.J. Stat. Ann. § 9:6-8.10; N.M. Stat. Ann. § 32A-4-3; N.Y. Soc. Serv. Law § 413; N.C. Gen. Stat. § 7B-301; N.D. Cent. Code § 50-25.1-03; Ohio Rev. Code § 2151.421; Okla. Stat. tit. 10A, § 1-2-101; Or. Rev. Stat. § 419B.010; 23 Pa. Cons. Stat. § 6311; R.I. Gen. Laws § 40-11-3; S.C. Code Ann. § 63-7-310; S.D. Codified Laws § 26-8A-3; Tenn. Code Ann. § 37-1-403; Tex. Fam. Code Ann. § 261.101; Utah Code Ann. § 62A-4a-403; Vt. Stat. Ann. tit. 33, § 4913; Va. Code Ann. § 63.2-1509; Wash. Rev. Code § 26.44.030(1)(a); W. Va. Code § 49-6A-2; Wis. Stat. § 48.981; Wyo. Stat. Ann. § 14-3-205.

Not only that, in at least 18 of these States, the obligation to report suspicions of child abuse is more expansive than in Ohio. In those States, *anyone* who suspects child abuse (not just a designated subset of individuals) must report suspicions of abuse to the appropriate authorities. *See* Pet. App. 38a n.4; *see also* Del. Code Ann. tit. 16, § 903; Fla. Stat. § 39.201(1)(a); Idaho Code § 16-1605(1); Ind. Code § 31-33-5-1; Ky. Rev. Stat. Ann. § 620.030(1); Md. Code Ann., Fam. Law § 5-705(a)(1); Miss. Code Ann. § 43-21-353(1); Neb. Rev. Stat. § 28-711(1); N.H. Rev. Stat. Ann. § 169-C:29; N.J. Stat. Ann. § 9:6-8.10; N.M. Stat. Ann. § 32A-4-3(A); N.C. Gen. Stat. § 7B-301(a); Okla. Stat. tit. 10A, § 1-2-101(B)(1); R.I. Gen. Laws § 40-11-3(a); Tenn. Code Ann. § 37-1-403(a)(1); Tex. Fam. Code Ann. § 261.101(a); Utah Code Ann. § 62A-4a-403(1)(a); Wyo. Stat. Ann. § 14-3-205(a).

There can be no dispute, therefore, that this case raises an issue that will affect literally every State in the Nation. Either the Ohio Supreme Court's reasoning is correct, in which case the conflicting state courts are systematically violating criminal defendants' Confrontation Clause rights. Or other state courts are correct, in which case, as the dissent put it, the Ohio Supreme Court has unnecessarily left "[c]hildren in Ohio . . . unprotected." Pet. App. 47a.

Second, child abuse tragically remains all too common, and so criminal prosecutions for child abuse and neglect also remain all too common. Child abuse is a "pervasive and devastating force in our society." *Yates*, 808 N.E.2d at 864. Indeed, "'[b]y 1973 child abuse was recognized as the most common cause of death of small children in the United States.'" *Id.* (quoting 6 American Jurisprudence Proof of Facts 2d (1975), Failure to Report Suspected Case of Child Abuse, 345, 351). More recently, in 2012, an estimated 686,000 children were the victims of abuse or neglect. *See* Admin. for Children & Families, Dep't of Health & Human Servs., *Child Maltreatment 2012*, at xi (2013), *available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf; *cf. Paroline v. United States*, No. 12-8561, 2014 WL 1612426, at *4 (U.S. Apr. 23, 2014) (recognizing that "'sexual exploitation of children . . . has grown exponentially'" with the Internet (citation omitted)). Accordingly, the issues presented by this case will continue to arise frequently.

Indeed, as the previously discussed conflict cases show, courts routinely have confronted the question whether statements become "testimonial" under the

Confrontation Clause when they are made to individuals who have been designated mandatory reporters. *See* Part II; *see also, e.g.*, Pet. App. 37a (noting that "several courts" have considered the question); *Phillips*, 315 P.3d at 165 (citing several "[c]ourts in other jurisdictions" to have considered the question). Given the frequency with which courts must grapple with the issue, it is "[o]bvious[] [that] judges, prosecutors, and defense lawyers have to know, in as definitive a form as possible, what the Constitution requires so that they can try their cases accordingly." *Williams*, 132 S. Ct. at 2248 (Breyer, J., concurring).

Third, this Court's guidance is also needed because of what can only be described as the compelling state interests at stake. It should go without saying that the States have a significant interest in identifying and preventing child abuse and neglect. The prevalence of mandatory-reporting statutes reflect that significant state interest. *See Lindsay v. Dep't of Social Servs.*, 791 N.E.2d 866, 871 (Mass. 2003) ("The purpose of [the mandatory reporting statute] is to alert the department to instances where children may have been abused or neglected and, if the department's investigation confirms those reported suspicions, to take steps to protect the child and correct the underlying situation that led to the abuse or neglect."); *Jensen v. Anderson Cnty. Dep't of Social Servs.*, 403 S.E.2d 615, 619 (S.C. 1991) ("[T]he purpose of the child abuse statutes is to provide protection for children from being abused."). Such state interests are particularly significant because in many cases "children lack the ability to ameliorate their own plight." *Yates*, 808 N.E.2d at 867; *see also*

United States v. Peneaux, 432 F.3d 882, 894 (8th Cir. 2005) ("[I]dentification of the abuser is a matter of great concern because if the person who brought the child to the [health] clinic is the abuser, the child should not leave with that individual.").

In sum, the Court should grant the petition for a writ of certiorari in light of the States' compelling interest in protecting children from abuse and the recurring nature of the questions presented.

IV. THIS CASE PROVIDES A GOOD VEHICLE TO CONSIDER THE IMPORTANT QUESTIONS THAT IT PRESENTS

The Court should lastly grant the petition for writ of certiorari because this case provides a good vehicle to consider the questions presented. To begin with, the Ohio Supreme Court's decision rested *entirely* on the federal Confrontation Clause, as illustrated by its heavy reliance on this Court's cases. *See, e.g.*, Pet. App. 17a ("The passionate rant of the dissent and its parade of horribles to the contrary, today's majority decision supports a basic constitutional right guaranteed to all accused of crime by the *Sixth Amendment of the United States Constitution* (emphasis added)); *see also* Pet. App. 18a (noting that the majority was "wrong as a matter of *federal* constitutional law" (emphasis added)). As a result, the Court need not worry about its jurisdiction to consider the questions presented because the Ohio Supreme Court did not discuss or rely on any state-law issues. *See Ohio v. Robinette*, 519 U.S. 33, 36-37 (1996). That explains why the dissent expressed its "hope that four justices vote to accept [the dissent's]

invitation" to consider the issues presented by this case. Pet. App. 47a.

In addition, this is not a case in which the teachers that spoke with the child did so either at law enforcement's request or in cooperation with law enforcement. To the contrary, as the dissent noted, "there [was] no police involvement in the interview" between the teachers and L.P. Pet. App. 37a. Accordingly, the Court need not consider when private actors should be viewed as "agents of law enforcement" because of their extensive cooperation with the police when engaging in the relevant interview. *See, e.g.*, *Bobadilla v. Carlson*, 575 F.3d 785, 791-92 (8th Cir. 2009) (noting that "instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same"). The lack of any police participation presents the questions in the best procedural posture. The Court can focus solely on those questions—whether the mandatory-reporting statute made the teachers agents of law enforcement and, if not, whether statements to them should nevertheless be considered testimonial—without having to consider how police involvement might affect the analysis.

Relatedly, there is no evidence in this case that the child's statements at issue were made "in order to evade confrontation." *Davis*, 547 U.S. at 840 (Thomas, J. concurring). Like the absence of police participation, the absence of evidence suggesting an attempt to evade the requirements of the Confrontation Clause allows the Court to focus narrowly on the questions of what effect a mandatory-reporting obligation has under the Sixth Amendment and of how

statements to non-law enforcement should be treated under that amendment. The Court need not consider whether, even in the absence of law enforcement involvement, there was an attempt to evade formalized process and confrontation.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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MAY 2014