No. 13-1352

In the Supreme Court of the United States

OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

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

BRIEF OF *AMICUS CURIAE* OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

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

In *State v. Clark*, the Ohio Supreme Court examined the Confrontation Clause in the context of statements a three–and-a-half-year-old child made to his preschool teacher identifying the individual who abused him.[2] The Court held that a teacher, as mandatory reporter of child abuse, acts as an agent of law enforcement when questioning a child about suspected abuse. In addition, they found that due to the absence of an ongoing emergency, any statements elicited from the child about the abuse are testimonial and inadmissible under *Crawford*.[3]

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[1] No counsel for either party authored this brief in whole or in part. No person or entity aside from the amicus curiae and its members made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of the intent to file this brief under Sup. Ct. R. 37.2. Consent to file has been granted by both parties.

[2] *State v. Clark*, 137 Ohio St.3d 346 (2013).

[3] *Id.*, syllabus, citing *Davis v. Washington*, 547 U.S. 813 (2006).

A review of the Ohio Supreme Court's decision in this case is of substantial interest to OPAA. The organization is comprised of prosecutors from Ohio's eighty-eight counties who deal with the consequences of the *Clark* decision on a daily basis. These prosecutors are on the frontlines combating offenses of violence against children. This decision has stripped those prosecutors of the ability to seek justice for and ensure the safety of the most vulnerable children in Ohio.

Prior to the lower court's decision in this case, prosecutors throughout Ohio relied upon the fact that certain statements, made by child victims, would be admissible against a defendant, even if the child was not found competent to testify at trial.[4] Statements children made to their teachers, guidance counselors, and day care providers were routinely admitted as substantive evidence in the prosecution of physical and sexual abuse cases. Similarly, statements made by children to treating doctors and nurses were often the backbone of prosecution's case. However, with its recent ruling, the Ohio Supreme Court has effectively barred the admission of all such statements if the child does not testify.

The impact of this decision cannot be overstated. In Ohio, children under the age of ten are presumed incompetent to testify.[5] This presumption can be overcome in children near the age of ten; however, the

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[4] *State v. Arnold*, 126 Ohio St.3d 290 (2010); *State v. Muttart*, 116 Ohio St.3d 5 (2007); *State v. Stahl*, 111 Ohio St.3d 186 (2006).

[5] Ohio Evid. R. 601(A)

younger the child, the more difficult this task becomes. It is this population, the most vulnerable in our society, whom the *Clark* decision has silenced and deprived of justice. If the *Clark* decision is permitted to stand, Ohio's ability to prosecute those who prey on young children will all but be eliminated. Furthermore, if other states similarly misconstrue the Confrontation Clause, as applied to mandatory child abuse reporting statutes, Ohio's tragedy will no longer be unique. It is for these reason this *amicus* urges the Court to grant petitioners writ of certiorari.

SUMMARY OF ARGUMENT

The Ohio Prosecuting Attorneys Association respectfully urges this Honorable Court grant Ohio's petition for writ of certiorari for two reasons. First, the lower court's decision to treat mandatory reporters of child abuse as *de facto* agents of law enforcement, within the context of Confrontation Clause analyses, has effectively eliminated Ohio's ability to prosecute the majority of child abuse cases in Ohio. Second, this Court has provided little guidance in determining what statements made to individuals other than law enforcement, if any, are testimonial within the meaning of the Confrontation Clause. This case presents the Court with an important opportunity to protect Ohio's children and provide much needed guidance to courts across the country.

ARGUMENT

In *State v. Clark*, the Ohio Supreme Court examined statements L.P., a three –and-a-half-year-old child, made to his preschool teachers identifying his abuser. The Court held that because the teachers were

mandatory reporters of child abuse and questioned the child about past abuse, the statements made by the child were testimonial. When Clark successfully argued the victim was too young to testify at trial, the Court concluded admission of the victim's statements, through the teacher, ran afoul of the Confrontation Clause.[6]

The Court explained that Ohio Revised Code 2151.421 imposed a mandatory duty upon the teachers to report suspected child abuse. In light of that obligation, the Court asserted that the teachers were effectively acting as agents of law enforcement when they questioned L.P. Proceeding from this premise, a 4-3 majority of the Court misapplied the primary purpose test that this Court previously enunciated in *Davis v. Washington*.[7] Utilizing that test, they concluded that the primary purpose of their questioning was to gather evidence potentially relevant to a subsequent prosecution and, therefore, L.P.'s statements were testimonial.

I. Granting a writ of certiorari in this case is necessary as the Ohio Supreme Court's misapplication of *Davis v. Washington* jeopardizes Ohio's ability to prosecute offenses with child victims.

Does the Confrontation Clause preclude the prosecution of up to 60% of all child abuse cases? That is the practical effect of the Ohio Supreme Court's

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[6] *Clark*, 137 Ohio St.3d at 350.

[7] *Davis v. Washington* at 822.

decision in *State v. Clark*. Physical and sexual abuse are crimes of secrecy. These crimes occur behind closed doors and are seldom witnessed by anyone other than the perpetrator and the victim. In light of Fifth Amendment protections, the victim is often the only witness available to the state who can relate the details of the abuse to the jury.

In Ohio, as in many other jurisdictions, witnesses ten years of age and older are presumed competent to testify at trial.[8] In such cases, absent extenuating circumstances, those witnesses who testify at trial will be subject to the rigors of cross examination. However, in cases where the witness is under the age of ten, competency must be established prior to the witness being permitted to testify.[9] Depending upon the age and maturity of the child, this can be difficult, if not impossible to establish.

Unfortunately, children too young to testify are spared neither physical nor sexual abuse. In 2012, 33.8 percent of the children who were sexually assaulted in the United States were eight years old or younger.[10] Similarly, 58.5 percent of the children who were physically abused in the United States in 2012 were eight years old or younger.[11] In 2012, there were 12,351

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[8] Ohio Evid. R 601(A); Ohio Revised Code 2317.01.

[9] *State v. Clark*, 71 Ohio St.3d 466 (1994).

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

[11] *Id*.

substantiated cases of physical abuse and 5,490 substantiated cases of sexual abuse against children in Ohio alone.[12]

During that same year there were 124,544 substantiated cases of physical abuse and 62,936 substantiated cases of sexual abuse against children nationwide.[13] Although these statistics mask the faces of the tens of thousands of children that are victimized each year, they do convey the magnitude of this issue; tens of thousands of child victims will be incompetent to testify each year. In the vast majority of these cases, the only way to establish what occurred is to present the child's statements through other witnesses.

While the lower court's decision could effectively bar the prosecution of Mr. Clark, the broader impact of the decision can be seen by examining a scenario trial courts routinely encounter. Jane Doe, a six year old first grader, is a happy and outgoing young girl. However, her teachers begin to notice she is becoming withdrawn, moody, and inattentive in class; they no longer see her talking to her friends and she has developed serious personal hygiene issues. Because this sudden change concerns her teachers, Jane Doe is called to the office to speak with the guidance counselor. During this conversation, Jane Doe discloses sexual abuse at the hands of a family member.

Based upon her disclosure, a children services worker is contacted who refers the child for medical

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[12] *Id.* at Table 3-8.

[13] *Id*.

examination to assess the health of the child. Prior to meeting with the doctor, Jane Doe speaks with a trained social worker who questions her about her medical history and the details of the abuse; the social worker relates the child's statements to the doctor to assist him in performing his examination. Because the most recent sexual abuse occurred two weeks prior to the examination, no forensic evidence is discovered. The case is referred to law enforcement and is ultimately indicted by a grand jury.

Prior to trial, the defendant successfully argues that Jane Doe is incompetent to testify. Given that ruling, the prosecution relies upon the testimony of the teacher, the social worker, and the doctor. Each witness testifies to the statements Jane Doe made describing the details of the sexual abuse and the identity of the perpetrator. The defendant objects to this testimony as an alleged violation of his right to confront the child he successfully argued should not be permitted to testify. Over his objection, the testimony is presented to the jury.

Before the *Clark* decision, the Ohio Supreme Court routinely approved of this practice.[14] While variations of this precise scenario unfold across the United States on a daily basis, the lower court's decision in this case casts serious doubt upon this practice. The Ohio Supreme Court held that when questioning children "teachers act in at least a dual capacity, fulfilling their obligations both as instructors and also as state agents to report suspected child abuse pursuant to R.C.

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[14] *State v. Arnold*, 126 Ohio St.3d 290 (2010); *State v. Muttart*, 116 Ohio St.3d 5 (2007); *State v. Stahl*, 111 Ohio St.3d 186 (2006).

2151.421."[15] In light of this duty, in the absence of an ongoing emergency, the primary purpose of the questioning is to establish or prove past events potentially relevant to a later prosecution.[16]

The Court reached this conclusion by conflating the concepts of "mandatory reporter" and "mandatory investigator." Stated differently, the court determined that teachers were more like police officers than 9-1-1 operators.[17] Ohio Revised Code 2151.421 required the teachers in this case to report their suspicions of child abuse to the relevant authorities. But the statute placed no obligation on the teachers to question L.P. or investigate the alleged abuse. Despite this omission, the Court below suggests that the statute virtually deputizes the teachers who questioned L.P. Proceeding from this false premise, the Court applied the law as if sworn peace officers had questioned L.P. If this errant reasoning were adopted by other states, the careful distinction the Court crafted in *Davis* would be destroyed.

The decision to treat teachers as *de facto* police interrogators in this case is all the more puzzling when one examines the very authority the Court invoked to support its conclusion.[18] In *Yates*, the Ohio Supreme Court explicitly recognized that the "primary purpose

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[15] *Clark* at 347.

[16] *Id*.

[17] *Davis* at 828.

[18] *Clark* at 350 (quoting *Yates v. Mansfield Bd. Of Educ.*, 102 Ohio St.3d 205 (2004)).

of the reporting [requirement] is to facilitate the protection of abused and neglected children rather than to punish those who maltreat them." This primary purpose to protect children can be contrasted with the mandatory investigation requirements imposed upon children services agencies by R.C. 2151.421(F)(1) and (2) discussed by the Court in the very next sentence of its opinion.[19]

Here, the teacher elicited information to determine whether the child needed medical attention and whether someone at home was the abuser; it would make little sense to inform the abuser and then send the child home to be further abused. Like a 9-1-1 operator, the teacher wanted neutralize the threat the child was facing. Therefore, the primary purpose of this questioning is unlike that of an investigator. Although, it may be proper to consider the presence of the statute when evaluating the teacher's primary purpose, to treat it as dispositive compounds an interpretative error with a constitutional error.

The greater danger of the *Clark* decision arises because the mandatory reporting requirements of R.C. 2151.421 are not limited to just teachers. Ohio Revised Code 2151.421(A)(1)(a) imposes an affirmative duty upon most adults who interact with children in a professional capacity to report known or suspected child maltreatment. The reporting requirement applies to all teachers, child care providers, doctors, nurses, medical professionals, camp counselors, attorneys, therapists, counselors, and numerous other categories

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[19] *Yates* at 209.

of adults.[20] Additionally, every state in the nation has similar mandatory reporting requirements to those that exist in this case.[21] Under the Ohio Supreme Court's analysis in this case, any adult in one of these professions who questions a child about suspected abuse effectively becomes an agent of law enforcement.

If the *Clark* decision is applied to the scenario described above, the statements Jane Doe made to the guidance counselor, the social worker, and the doctor would all be testimonial and prohibited under the Ohio Supreme Court's analysis in this case. While each individual had a legitimate purpose for questioning Jane Doe, other than gathering information to be used in a future prosecution, each individual was also a mandatory reporter under R.C. 2151.421(A)(1)(b). As such, each is also an agent of law enforcement under the *Clark* decision.

Virtually every unbiased adult a child might approach is a mandatory reporter of abuse in Ohio. Once successful in arguing Jane Doe is incompetent to testify, the defendant need merely then invoke the protections of the Confrontation Clause. Shrouded in this perverse protection, the defendant could successfully preclude the state from introducing any account of the sexual abuse. Thus, under the formulation below, an abused child is more likely to get

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[20] Ohio Revised Code 2151.421(A)(1)(b).

[21] See DeFrancis & Lucht, *Child Abuse Legislation in the 1970's* (Rev.Ed.1974) 6; Annotation, Validity, Construction; *Application of State Statute Requiring Doctor or Other Person to Report Child Abuse* (1989), 73 A.L.R.4th 782, 789–790.

justice by confiding in strangers than by confiding in those people we educate children to turn to for help.

Even in light of the lower court's decision, it is conceivable that family members of a victim could potentially testify to the victim's out of court statements. However, it is an unfortunate reality that the vast majority of those abused are victimized by their own family. In 2012, 80.3 percent of the children abused in the United States were victimized by a parent; less than 4 percent of the perpetrators were unknown to the child.[22] If the victim's own parent is the abuser, who else can the child be expected to tell?

Assume now that instead of telling a teacher, Jane Doe disclosed to her mother that her father had sexually abused her. If Jane was believed, it would be reasonable to expect her mother to be hurt and angry at her husband. If, however, her mother believed her husband incapable of such a horrific act, it is equally reasonable to assume that her mother would rally to his defense. Regardless of her mother's reaction, the result is the same; the potential witness relating Jane's statement is a partisan. While long-gone are the days when reliability was the touchstone of the Confrontation Clause, it would still be ironic if the partisan mother could testify as to Jane's statements but her teacher and doctor could not.[23]

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[22] *Admin. For Children & Families, Dept of Health and Human Servs.,Child Maltreatment* 2012, Exhibit 5-D, available at http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf.

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

In cases of sexual abuse how else, other than through the victim's own words, can the offense be proven? Vaginal tearing and abrasions cannot identify the perpetrator nor establish where that rape occurred. Semen recovered from a victim's underwear may well establish the identity of a perpetrator, but it cannot tell the jury if, when, or where penetration occurred. While blood or semen on a victim's bed can demonstrate where an offense may have occurred, cannot establish sexual conduct. Absent a confession, video evidence of the offense, forensic evidence –if it exists– cannot supplant the statement of the victim.

The adverse impact of this decision on public safety cannot be overstated. L.P. stands in the shoes of the thousands of children across this country whose voices will be silenced by the *Clark* decision. Children will not be permitted to tell the jury of their abuse nor will others be permitted to speak on their behalf. Without the statements of L.P. and countless victims he represents, the vast majority of child abuse cases cannot be prosecuted. The *amicus curiae* respectfully requests this Honorable Court grant petitioner's writ of certiorari and once again let Ohio's children be heard.

II. A standard is needed by which reviewing courts can determine whether out of court statements, made to individuals other than law enforcement and not acting as agents of law enforcement, are testimonial within the meaning of the Confrontation Clause.

Since this Court's decision in *Crawford*, there has been substantial uncertainty as to what constitutes testimonial statements within the meaning of the Confrontation Clause. In *Crawford*, the Court opined

that, at minimum, testimonial statements must include prior the testimony at a preliminary hearing, before a grand jury, at a former trial, and during police interrogations.[24] However, further development of what else may constitute testimonial statements was reserved for future cases.

In 2006 this Court decided a pair of cases offering additional guidance to lower Courts in determining what constitutes testimonial statements.[25] In those cases, this Court set forth the "primary purpose test" to employ when evaluating statements made in response to interrogations by police and their agents.[26] The Court explained that statements made during a police interrogation, when the declarant was facing an "ongoing emergency," were non-testimonial, as their primary purpose to enable the police to resolve a present emergency.[27] These statements were contrasted with statement made to the police when it was clear that the interrogation was part of an investigation into a suspect's past criminal conduct.

Since *Davis,* the Court has determined that additional types of statements are not testimonial. In *Bryant* the Court found that statements made to police were not testimonial because, when viewed objectively, the primary purpose of the questioning was to end a

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[24] *Id.* at 68.

[25] *Davis*, supra.

[26] *Id*. at 828.

[27] *Id*. at 829.

threatening situation.[28] The Court has also recently opined that DNA results identifying an unknown rapist currently at large would not be testimonial even if admitted to prove his identity at trial as they did not have the primary purpose of accusing a targeted individual of engaging in criminal activity.[29]

These cases must be contrasted with those, like *Hammon*, where the Court determined the statements in question were testimonial. For example, in *Melendez-Diaz* the Court found that a certified laboratory report demonstrating the substance attributed to the defendant was cocaine to be testimonial.[30] Similarly, in *Bullcoming*, the Court found a certified laboratory report showing the defendant's blood-alcohol level exceeded the legal limit was testimonial.[31]

Virtually every post-*Crawford* statement whose admission this Court found offensive to the Confrontation Clause bore two characteristics. [32] In the context of deciding whether a DNA profile produced before any suspect was identified, the Court noted the statements it had previously found testimonial 1) were out of court statements having the primary purpose of accusing a targeted individual of engaging in criminal

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[28] *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

[29] *Williams v. Illinois*, 132 S. Ct. 2221 (2012) at 2243.

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

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

[32] *Williams* at 2717.

conduct and 2) were formalized statements such as affidavits, depositions, prior testimony, or confessions. While these factors were not referred to as a "test" for lower courts to utilize, they were relevant here but ignored by the lower court in this case.

The statements made by L.P. to his teacher in this case bear neither of these characteristics. When L.P. was questioned, no suspect had been identified much less targeted. The statements were made during an informal colloquy between a preschool student and his teacher. One additional commonality between all of the post-*Crawford* statements determined to be testimonial is that they were made to law enforcement or elicited the request of law enforcement. That factor, in addition to those listed in *Williams*, was not present in this case.

Rather than applying the factors set forth in *Williams*, the Ohio Supreme Court believed it was required to apply the primary purpose test set forth in *Davis*. The Court stated that "although a teacher's questioning of a child about suspect injury is consisted with a duty to report potential abuse and arises from a concern to protect a child, the United States Supreme Court's Confrontation Clause analysis requires that we ascertain the 'primary purpose' for the questioning." Utilizing that framework, and presuming that mandatory reporters are agents of law enforcement, the Court held that "when teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator, any statements obtained

are testimonial for the purposes of the Confrontation Clause."[33]

Given the current ambiguity in Confrontation Clause jurisprudence, it is somewhat understandable that the Court utilized the *Davis* framework. However, in doing so the lower court has expanded the definition of 'testimonial' far beyond that which this Court has previously sanctioned. This Court has previously cautioned that testimonial statements mark both the core and perimeter of the Confrontation Clause.[34] That same caution was not present in this case.

Despite this Court's cautionary words, the *Clark* decision instantly created an entirely new class of testimonial statements. Any statement made to a mandatory reporter, interacting with the child in their professional capacity, is testimonial in light of their statutory reporting duties. This Court has never held that the "primary purpose test", as formulated in *Davis*, should be utilized when private citizens make informal inquiries unprompted by law enforcement.[35] Yet, that is exactly what the lower court did in this case.

Recognizing that children are helpless to protect themselves, the legislatures in all 50 states, as well as

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[33] *Clark* at 351.

[34] *Davis* at 823.

[35] *Giles v. California*, 554 U.S. 353, 376 (2008) (explaining that statements made to friends, neighbors, and physicians about abuse and intimidation would be excluded, if at all, only by hearsay rules).

the District of Columbia and three territories, have enacted child-abuse reporting laws.[36] However, it does not follow from these reporting requirements that mandatory reporters are agents of the state when they make simple inquires of children they suspect are being abused. The California, Montana, and Arkansas Supreme Courts have previously considered and rejected that very principle.[37] Because Ohio's mandatory reporting requirement does not deputize broad swaths of the population and there is no evidence that the teachers were questioning L.P. at the behest of law enforcement, the *Davis* test is a poor fit in this case.

Examining L.P.'s statements by the criteria set forth in *Williams* compels the conclusion that they are not testimonial and do not implicate the Confrontation Clause. They were not elicited by law enforcement for the purpose of accusing a targeted individual engaging in criminal conduct and they were not formalized statements akin to affidavits, depositions, or prior testimony. In an effort to force this case squarely into the *Davis* framework, the lower court reached the opposite conclusion. The *Amicus Curiae* respectfully requests this Honorable Court grant petitioner's writ of certiorari to provide a test that reviewing courts can employ when evaluating statements elicited during non-law enforcement questioning.

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[36] *Yates* at 207-08.

[37] *People v. Cage*, 155 P.3d 205 (Cal.2007); *State v. Spencer*, 169 P.3d 384 (Mont.2007); *Seely v. State*, 282 S.W.3d 778 (Ark. 2008).

CONCLUSION

The Ohio Supreme Court's misapplication of *Davis* in this case has seriously jeopardized the safety of Ohio's children. Its ruling effectively silenced L.P. He is not permitted to testify in light of competency rules and his teachers cannot testify to his statements because they are mandatory reporters. Absent a confession or the presence of an extraordinary array of forensic evidence, the *Clark* decision bars the prosecution of nearly 60 percent of child abuse cases. This cannot be what the Confrontation Clause requires.

The test in *Davis* is aimed at determining when statements made to law enforcement are testimonial. The test is in ill fit for determining what, if any, statements made to non-law enforcement personnel with reporting duties are testimonial. The factors set forth in *Williams* provide an alternative framework for analysis, but this Court has offered limited guidance in this area. To the extent these individuals are viewed as quasi-law enforcement, the Court needs to craft a new test. Accordingly, the *amicus curiae* respectfully requests this Honorable Court grant Ohio's petition for certiorari to review this case and reverse the Ohio Supreme Court's erroneous decision.

Respectfully submitted,

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