No. 13-1352

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

REPLY BRIEF FOR THE PETITIONER

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The Ohio Supreme Court's decision below held, as a matter of *federal* law, that the admission of a child-abuse victim's statements to his teachers violated the Confrontation Clause. The Petition showed that the Court should review this decision for four reasons. *First*, this case provides an opportunity to address a question that the Court's prior cases have left open: When, if ever, do statements to individuals who are not law enforcement qualify as "testimonial"? *See Michigan v. Bryant*, 131 S. Ct. 1143, 1155 n.3 (2011); *Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006). *Second*, as the dissent below explained, the decision conflicts with many appellate cases rejecting the notion that statements qualify as testimonial when they are made to individuals who have a mandatory duty to report child abuse. *Third*, this case raises an important and recurring question, as all 50 States have mandatory-reporting statutes and child abuse remains tragically pervasive. *Fourth*, this case provides a good vehicle to consider these questions because the Ohio Supreme Court's decision rested exclusively on federal law, and the police were not involved in the teachers' conversation with the victim.

Darius Clark's Brief in Opposition fails to rebut these reasons for the Court to grant certiorari.

I. CLARK CANNOT DISPUTE THAT THE DECISION BELOW IS "FINAL" UNDER § 1257

The Supreme Court of Ohio's decision qualifies as "final" under 28 U.S.C. § 1257. *See Bryant*, 131 S. Ct. at 1150-52. Clark does not argue that this Court lacks jurisdiction, but does ambiguously hint (at 3) that the "finality" necessary for jurisdiction under § 1257 may be lacking. That is mistaken.

It is treatise law that state decisions suppressing criminal evidence are "final" under § 1257. *See* 16B Charles Alan Wright, Arthur Miller & Edward Cooper, Federal Practice & Procedure § 4010, at 241 (3d ed. 2012) ("The [*California v. Stewart*, 384 U.S. 436 (1966)] case has established the finality of state decisions suppressing evidence in criminal trials so firmly that most decisions do not even pause to remark on finality." (collecting cases)); *see also California v. Trombetta*, 467 U.S. 479, 483 n.4 (1984) (noting that "a judgment affirming a suppression order . . . is reviewable in this Court under 28 U.S.C. § 1257(3)."). This rule applies here. The Ohio Supreme Court affirmed a decision ordering that the evidence at issue be excluded on retrial. Pet. App. 17a, 63a. If Clark is acquitted, the State will be barred from appealing the judgment. *See State v. Lomax*, 774 N.E.2d 249, 254 (Ohio 2002). If Clark is convicted, the question will be mooted. *See New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984).

Despite all of this, Clark cites (at 3) Ohio Revised Code § 2945.67(A) and *State v. Bistricky*, 555 N.E.2d 644 (Ohio 1990), for the proposition that the State may be able to appeal by leave of court after a trial. But that statute and case do not detract from the finality of the decision under § 1257. Notably, in *In re M.M.*, 987 N.E.2d 652 (Ohio 2013), the court held that the State could *not* rely on the statute to appeal a trial court's exclusion of a child-abuse victim's statements after a final judgment. *Id.* at 661. This Petition thus provides the sole opportunity for the State to challenge the Confrontation Clause holding below in this Court.

In sum, this case fits squarely within the third set of cases identified in *Cox Broadcasting Corp. v Cohn*, 420 U.S. 469 (1975)—those in which "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. Accordingly, the decision below is "final" under § 1257.

II. CLARK'S RELIANCE ON *DAVIS* AND *BRYANT* CONFIRMS THE NEED FOR REVIEW

On the merits, Clark argues (at 11-16) that the decision below represents a fact-bound application of the primary-purpose test this Court announced in *Davis* and applied in *Bryant*. Clark can make this "fact-bound" argument only by assuming the answer to the legal issues that this case presents.

First, Clark's assumption that the primary-purpose test applies here is misplaced. This case asks whether statements by children to non-law enforcement *ever* qualify as testimonial. As the dissent below recounted, the Court "has yet to decide under what circumstances statements are testimonial when they are made to someone other than law-enforcement." Pet. App 25a; *see Davis*, 547 U.S. at 823 n.2 (declining to address "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'"); *see also Bryant*, 131 S. Ct. at 1155 n.3 (stating that there was "no need to decide that question" concerning statements to non-law enforcement); *id.* at 1169 n.1 (Scalia, J., dissenting) ("I remain agnostic about whether and when statements to nonstate actors are testimonial."). It is thus no answer for Clark to say that the Ohio Supreme Court merely engaged in a fact-bound

application of the primary-purpose test when the Petition asks whether that test should apply *at all*.

It is also notable that Clark's assumption that the primary-purpose test applies here overlooks strong contrary evidence. As a matter of history, "eighteenth-century treatises . . . assumed that when children were too young to testify, and thus unavailable, their hearsay was admissible in child rape and assault prosecutions." Thomas D. Lyon and Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post*-Davis, 82 Ind. L.J. 1029, 1038 (2007). As a matter of precedent, courts have cited this Court's disclaimers about statements to non-law enforcement when finding that statements to private individuals might be largely exempt. *See, e.g.*, *State v. Franklin*, 308 S.W.3d 799, 816 (Tenn. 2010) (noting that "some courts have categorically held that statements between private parties—or, at least, specific types of such statements—are not testimonial," but resolving the case on narrower grounds).

Second, even if the Court holds that the Confrontation Clause sometimes applies to statements to non-law enforcement, Clark mistakenly assumes that the Court would incorporate the primary-purpose test *wholesale*. Courts, for example, have analyzed statements to non-law enforcement under a modified test, one that treats those statements as "presumptively nontestimonial." *See, e.g.*, *Seely v. State*, 282 S.W.3d 778, 787 (Ark. 2008). Indeed, the Ohio Supreme Court itself applies a relaxed "objective-witness test" to statements made to non-law enforcement, *see* Pet. App. 30a, which is why the major-

ity and dissent vigorously disputed whether the teachers here were law enforcement.

At day's end, Clark's argument that the decision below rests on a fact-bound application of *Davis* and *Bryant* misses the point; it assumes the answer to the important legal questions that this case presents.

III. CLARK CANNOT RECONCILE THE DECISION BELOW WITH MANY SIMILAR CASES FROM OTHER JURISDICTIONS

Clark next tries to downplay (at 16-22) what the dissent below recognized to be a significant conflict with other appellate cases. *See* Pet. App. 37a-39a. His two attempts to reconcile these cases fall flat.

First, Clark claims (at 16-18) that the Ohio Supreme Court's conclusion that the statements to the teachers were testimonial did not rest *entirely* on its preliminary holding that the mandatory-reporting statute made the teachers law-enforcement agents, because the court went on to apply the primary-purpose test after reaching that conclusion. *See* Pet. App. 6a-16a. But Clark does not attempt to dispute the split over whether individuals subject to a mandatory-reporting duty should be viewed as law enforcement or non-law enforcement. And this split is important in these courts because, as noted, the distinction between law enforcement and non-law enforcement often determines the applicable test—whether *Davis*'s primary-purpose test (for statements to law enforcement) or some reduced standard (for statements to non-law enforcement). *Seely*, 282 S.W.3d at 787 (concluding "that a more appropriate test should recognize the distinction between state-

ments to government officials and statements to nonofficials"); Pet. App. 30a.

The decision below adopted the bright-line rule that a teacher subject to the mandatory-reporting statute "act[s] as an agent of the state for purposes of law enforcement." Pet. App. 3a. Other courts reject this legal rule. *See, e.g.*, *People v. Cage*, 155 P.3d 205, 220 (Cal. 2007) (holding that "[t]he mere fact that doctors must report abuse" does not "transform them into *investigative agents* of law enforcement"); *State v. Spencer*, 169 P.3d 384, 389 (Mont. 2007) (finding "no indication . . . that the Legislature intended to deputize this litany of professionals and individuals into law enforcement"); *United States v. Squire*, 72 M.J. 285, 289 (C.A.A.F. 2013) (declining to "'deputize [the] litany of [reporters] . . . into law enforcement'" (citation omitted)).

Second, Clark claims (at 19-22) that this mandatory-reporting debate is much ado about nothing because the State's cited decisions are all reconcilable on their facts. To the contrary, the conflict is made more apparent, not less so, by his factual discussion.

On the one hand, the decision below emphasized the role that the mandatory-reporting statute played in its *ultimate* conclusion that the primary purpose of the teachers' questioning was to investigate crime. It conceded that the teachers acted in a "dual capacity" when speaking with the child—both as instructors and as law-enforcement agents. Pet. App. 15a. But it was the mandatory-reporting duty that tipped the scales to the law-enforcement side: The court stressed that the teachers "acted to fulfill their duties to report abuse," Pet. App. 15a, as the *main* rea-

son for its conclusion that they spoke with the victim primarily to "establish[] past events potentially relevant to later criminal prosecution" rather than to ensure the victim's classroom safety, Pet. App. 15a-16a.

On the other hand, the majority of "[c]ases in other jurisdictions with similar facts have . . . held the child-victim's statements to be nontestimonial." *State v. Ladner*, 644 S.E.2d 684, 690 (S.C. 2007). Like the Ohio Supreme Court, many of these cases recognize the dual capacity with which mandatory reporters operate, but reach the opposite conclusion on which of the dual roles is the "primary" one.

Take the Arkansas Supreme Court's decision in *Seeley*. There, the court recognized that the social worker was a mandatory reporter and that she "would have anticipated during her interview with [the child] that the information she gathered might be used in a subsequent prosecution." 282 S.W.3d at 789. But it found the questioning non-testimonial because it concerned the treatment of the child, which "included ensuring her continued safety" by identifying "anyone who may have harmed her." *Id.* Contrary to Clark's claim (at 19-20), the same conclusion could have been reached here.

Or consider the Montana Supreme Court's *Spencer* decision. There, foster parents suspected child abuse; a physician confirmed the abuse; and a professional counselor began seeing the child. 169 P.3d at 387. The child made statements to the counselor implicating her biological father. *Id.* Clark says (at 20) this case is different because those statements "were unexpected and not the product of coaching or leading questions." *Id.* at 389. But here, too, the

teachers did not use coaching or leading questions to implicate Clark, and, unlike in *Spencer*, their conversation was *not* the result of a medical referral tied to child-abuse concerns. Nor did the teachers even know of child abuse; they asked whether "Dee" was big or little because they thought another student might have bullied the victim. Pet. App. 20a-21a.

No better is Clark's distinction of *United States v. DeLeon*, 678 F.3d 317 (4th Cir. 2012). There, a social worker testified about statements a child told her after he had been referred by a teacher who had noticed abuse. *Id.* at 320-21. The best that Clark can come up with to distinguish this case is that (at 21) the social worker made "no effort . . . to separate [the child]" from others or to "memorialize" the encounter. But that mirrors what happened here, where the victim's teachers spoke with him in the lunchroom and classroom (not in a private office), and did not transcribe everything the child said to them. Pet. App. 20a-21a, 40a.

Similarly, many of Clark's statements (at 21-22) about *People v. Phillips*, 315 P.3d 136 (Colo. Ct. App. 2012), could have just as easily been made about this case. The questions here were "informal and spontaneous," and were asked "to protect [the victim]." *Compare* Opp. at 21 *with* Pet. App. 40a. Clark's contrary claims are belied by the record. The question "Whoa, what happened?," Pet. App. 20a, is one that any adult would ask upon encountering an injured child; it is a far cry from the formalities of a police interrogation. And, as in *Phillips*, after investigation, the child received medical treatment. Pet. App. 21a. Finally, this case is nothing like the other Colo-

rado case that Clark cites. *People v. Moreno*, 160 P.3d 242, 246 (Colo. 2007) (state conceded statements to police were testimonial, but relied on forfeiture arguments).

In sum, the decision below is irreconcilable with the reasoning in, and ultimate outcomes of, many other appellate cases.

IV. CLARK'S CLAIMS OF VEHICLE FLAWS CONFLICT WITH BLACK-LETTER LAW

Clark lastly argues (at 23-27) that the Court should deny the Petition because the child's statements to his teachers would be inadmissible on alternative state-law grounds under Ohio Rule of Evidence 807. This argument fails.

Most notably, Clark cannot dispute that the decision below rested *entirely* on federal constitutional law, *not* on the state-law grounds he raises. The federal basis for the decision is perhaps the only thing on which the majority and dissent agreed. *Compare* Pet. App. 17a (noting that the "majority decision supports a basis constitutional right guaranteed to all accused of crime by the Sixth Amendment of the United States Constitution"), *with* Pet. App. 18a (stating that the majority was "wrong as a matter of federal constitutional law"). The majority cited only cases from this Court or state cases applying this Court's decisions. At no point does it discuss state law. The dissent is even clearer. It states that "the state-law evidentiary issue is not before us." Pet. App. 46a.

In addition, Clark claims (at 25) that the State has "ignored" the decision of the intermediate appel-

late court on this state-law question. To the contrary, that court considered the state-law question only with respect to *different* statements by the child that are not at issue. *See* Pet. App. 63a-64a. The child's statements to his teachers—the statements that were considered by the Ohio Supreme Court and that are at issue now—were *not* rejected on state-law grounds by the Ohio Supreme Court or by the intermediate appellate court. *See* Pet. App. 63a.

Nor is it obvious that the Ohio Supreme Court would rule, on remand, that the child's statements to his teachers should be excluded under state law. With respect to the child's other statements, Clark notes (at 24) that the intermediate appellate court had difficulty reconciling the trial court's incompetency finding with its admissibility finding. But the Ohio Supreme Court has expressly disavowed the rule that children must be found competent for their hearsay to be admissible. *See State v. Silverman*, 906 N.E.2d 427, 432 (Ohio 2009) (citing *State v. C.J.*, 63 P.3d 765, 770 (Wash. 2003)); *cf. Idaho v. Wright*, 497 U.S. 805, 825 (1990) (noting, under prior "trustworthiness" test, that "that the Confrontation Clause does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury").

Regardless, this whole state-law debate is academic. Time and again, the Court has said that the "possibility that the state court might have reached the same conclusion if it had decided [a] question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal

question." *United Air Lines v. Mahin*, 410 U.S. 623, 630-31 (1973); *see City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 242 (1983); *Orr v. Orr,* 440 U.S. 268, 276-77 (1979); *Beecher v. Alabama*, 389 U.S. 35, 37 n.3 (1967); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 197 n.1 (1944); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938). "The state court, in other words, has freedom of choice in formulating its grounds of decision, and its choice of federal grounds cannot be undone by speculation as to other choices that might have been made." E. Gressman, K. Geller, S. Shapiro, T. Bishop, E. Hartnett, Supreme Court Practice 211 (9th ed. 2007).

Another Ohio case is instructive. In *Ohio v. Robinette*, 519 U.S. 33 (1996), the Court reviewed a Fourth Amendment question even though it was unclear whether the Ohio Supreme Court's decision rested on federal law or on the State's equivalent Fourth Amendment. *Id.* at 36-37. The Court noted: "[W]hen 'a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.'" *Id.* at 37 (citation omitted). After resolving the federal issue, the Court remanded for the Ohio Supreme Court to consider the state-law one. *See State v. Robinette*, 685 N.E.2d 762, 766 (Ohio 1997).

Clark has failed to show why that same two step is improper here. *Coleman v. Thompson*, 501 U.S.

722 (1991)—the only decision on which he relies for this point (at 26)—is not to the contrary. In that case, the relevant state decision rested *entirely* on *state-law* grounds. *See id.* at 740. The opposite is true in this case—where the state courts resolved the admission issue *exclusively* under federal law. And the state courts' resolution of that federal issue has excluded the admission of what Clark now claims (at 26) to "be literally the only evidence identifying [him] as the perpetrator." His own allegations show the compelling need for review.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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