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

BRIEF FOR THE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, MICHIGAN, MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OREGON, SOUTH CAROLINA, TENNESSEE, TEXAS, VERMONT, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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?

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INTEREST OF AMICI CURIAE[1]

At issue in this case is whether and when statements a child makes to a mandatory reporter of child abuse are testimonial under the Confrontation Clause. The Ohio Supreme Court held that preschool teachers are agents of law enforcement because they are required to report abuse to law enforcement or a child services agency. The court further held that, under the test this Court has adopted for statements made to law enforcement agents, an injured child's statements to a preschool teacher were testimonial. The amici states are deeply troubled by the Ohio Supreme Court's decision and have a significant interest in this Court clarifying how the Confrontation Clause applies in this situation.

When young victims of child abuse are incompetent or too frightened to testify, admission of statements made to a trusted adult is essential to the state's ability to protect children by prosecuting the abuser. Every state has mandatory reporting laws requiring professionals that come into contact with children—including teachers, child care providers, dentists, firefighters, nurses, and pharmacists—to report suspected abuse. A rigid rule classifying mandatory reporters as law enforcement, and presuming that teachers' and other reporters' primary purpose in speaking to children is to gather evidence for criminal prosecution, sweeps far too

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[1] Counsel of record received timely notice of the states' intent to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the states to file this brief.

many statements within the purview of the Confrontation Clause.

ARGUMENT

This Court's landmark decision in *Crawford v. Washington*, 541 U.S. 36 (2004), reshaped the government's obligations under the Confrontation Clause. Under *Crawford*, the Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id.* at 53-54. Critically, however, "not all hearsay implicates the Sixth Amendment's core concerns," and therefore not all hearsay is subject to the Confrontation Clause. *Id.* at 51; *Davis v. Washington*, 547 U.S. 813, 821 (2006). The Confrontation Clause "applies to 'witnesses' against the accused"—and only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Crawford,* 541 U.S. at 51; *Davis*, 547 U.S. at 821.

Crawford declined to adopt a comprehensive definition of "testimonial statement," leaving to later cases a fuller elaboration. Ever since, this Court and lower courts have struggled to draw the line between testimonial and non-testimonial statements. Among the most important and frequently litigated statements are those made by children to teachers, doctors, and other mandatory reporters regarding physical and sexual abuse. The Ohio Supreme Court has adopted an approach, in conflict with other courts, that would treat virtually all such statements as testimonial. Under that approach, prosecutions of

abusers would often be impossible when the child, as is common, is unable to testify at trial. Certiorari is warranted to resolve the conflict and ensure that statements outside the Confrontation Clause's ambit are not improperly subjected to the *Crawford* rule, thereby stymying important prosecutions.

I. Statements to Mandatory Reporters of Abuse Are Critical to State Prosecution of Child Abuse

Construing the Confrontation Clause to bar the admission of statements children make to mandatory reporters of abuse will greatly impair states' ability to protect children by successfully prosecuting abusers. Prosecution of child abuse is a significant issue for the states. Approximately 678,810 children were victims of child abuse in 2012, and an estimated 1,640 children died that year as a result of abuse and neglect. U.S. Dep't of Health & Human Servs., *Child Maltreatment 2012* (2013).[2] The states have a vital interest in protecting young children from abuse by prosecuting those who harm these vulnerable individuals.

Child abuse cases, however, are particularly difficult to try. Robert P. Mosteller, *Confrontation in Children's Cases: The Dimensions of Limited Coverage,* 20 J.L. & Pol'y 393, 394 (2012). Abuse tends to occur in secret and the child is often the only witness. Depending on the nature of the abuse, there may be no physical evidence of the crime or the perpetrator's identity. As the Supreme Court of South Carolina has observed:

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[2] *Available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf#page=13 (last visited June 2, 2014).

> Child abuse differs from other types of crimes in several respects. Specifically, the crime of child abuse often occurs in secret, typically in the privacy of one's home. The abusive conduct is not usually confined to a single instance, but rather is a systematic pattern of violence progressively escalating and worsening over time. Child victims are often completely dependent upon the abuser, unable to defend themselves, and often too young to alert anyone to their horrendous plight or ask for help.

State v. Smith, 750 S.E.2d 612, 614 n.7 (S.C. 2013) (quoting *State v. Fletcher*, 664 S.E.2d 480, 484–85 (S.C. 2008) (Toal, C.J., dissenting)); *see also State v. Chauvin*, 846 So. 2d 697, 702 (La. 2003) ("Child sexual abuse is difficult to prove because it most often occurs in private, often the perpetrator is a member of the victim's family, and physical evidence of the abuse is rare."); *State v. Goblirsch*, 246 N.W.2d 12, 14 (Minn. 1976) ("[D]ue to the fact there are rarely eyewitnesses to child abuse, it is very difficult in these prosecutions to establish the guilt of a defendant other than by circumstantial evidence.") (internal alterations and quotation marks omitted).

Child care providers and others who work with children on a daily basis play an important role in observing and reporting signs of abuse. More than 60% of American children under the age of five are in a regular child care arrangement, where they spend an average of 33 hours a week. Laughlin, Lynda,

Who's Minding the Kids? Child Care Arrangements: Spring 2011, Current Population Reports, 70-135, U.S. Census Bureau (2013).[3] Preschool teachers and child care providers thus have a unique opportunity to observe a young child's injuries or behavioral changes that may indicate abuse. Daily contact between an abused child and a care provider nurtures the child's trust and encourages the child to feel safe in confiding in his or her caregiver. Caregivers are therefore often able to provide important evidence regarding the abuse, including by relating statements the children made to them.

Evidence from caregivers is often critical to the prosecution of these difficult cases. In 2012, nearly 27% of child abuse victims were younger than three-years old and 20% were in the three-to-five-year age group. U.S. Dep't of Health & Human Servs., *Child Maltreatment 2012* (2013).[4] When a young child is unable to testify regarding physical or sexual abuse, the testimony of a trusted care provider may offer the only means of allowing the child's voice to be heard at trial.

Yet because teachers and care providers must report suspicions of abuse, the Ohio Supreme Court ruled that they are agents of law enforcement and that, absent an "ongoing medical emergency," they elicit "testimonial" statements when they ask the child what happened. Pet. App. 6a-7a. This

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[3] *Available at* http://www.census.gov/prod/2013pubs/p70-135.pdf (last visited June 2, 2014).

[4] *Available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf#page=34 (last visited June 2, 2014).

misguided test places a potentially insurmountable burden on the states' ability to prosecute abusers.

Making matters worse, the reasoning applied by the Ohio Supreme Court would deputize not only teachers and child care providers, but also all other mandatory reporters of suspected abuse. State laws mandating who must report abuse include a wide variety of professionals that come into contact with children, including dentists, nurses and physicians, firefighters, paramedics, school personnel, and members of the clergy. *See* Br. of Pet. at 23-24. Eighteen states require that *any* person who suspects child abuse must report it. *See* Pet. App. 38a n.4. Mandatory reporters submit more than one-half of the reports of suspected abuse received annually by state child protective services. U.S. Dep't of Health & Human Servs., *Child Maltreatment 2012* (2013).[5] Since every state has enacted laws requiring the mandatory reporting of child abuse, the Ohio Supreme Court's reasoning will have repercussions nationwide. *Id.*

II. The Ohio Supreme Court Erred in Holding That Statements Made to a Preschool Teacher Are Testimonial Statements to a Law Enforcement Agent

This case involves a commonplace occurrence: a teacher asking a child with a bruise what happened. If members of the general public were asked what purpose the teacher had in asking the question, responses would probably be ensuring the

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[5] *Available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf#page=22 (last visited June 2, 2014).

wellbeing of the child, bringing order to the classroom, and dealing with potential classroom bullies. Few if any would consider the teacher a "law enforcement agent" who elicited the information with an eye toward a future criminal prosecution. Yet that is precisely what the Ohio Supreme Court held here. The law should not defy common sense. L.P.'s teachers were not acting as law enforcement agents, and L.P. did not give "testimony" when he answered his teachers' questions. The Confrontation Clause therefore does not apply to his statements.

The Ohio Supreme Court's holding is deeply flawed in at least two respects. First, requiring preschool teachers to report suspected abuse does not transform them into law enforcement agents. The Ohio Supreme Court therefore should not have applied the "primary purpose" test that governs whether statements made to law enforcement agents are testimonial.

Second, even if preschool teachers were law enforcement agents, the Ohio Supreme Court wrongly converted the "primary purpose" test into an any-purpose-other-than-dealing-with-an-ongoing-emergency test. The court found that no emergency existed, and that the teachers were instead trying to obtain information. That was enough for the court to hold that L.P.'s statements were testimonial. But the primary purpose test does not deem as testimonial any statement made in a non-emergency situation. It asks whether a "statement is . . . procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011). Even if L.P.'s teachers were not dealing with an emergency (a

questionable proposition in itself), it strains credulity to suggest that reasonable persons in the teachers' shoes would be focused on a future criminal trial, as opposed to dealing with health, safety, and classroom order. The Ohio Supreme Court's vast expansion of the universe of testimonial statements should not be permitted to stand.

A. Mandatory Reporters of Child Abuse Are Not Law Enforcement Agents

To date, the Court has addressed whether statements are testimonial only in the context of statements made to law enforcement, reserving "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Davis*, 547 U.S. at 823 n.2. *See also Bryant*, 131 S. Ct. at 1155 n.3 (internal quotation marks omitted) (also leaving open that question). That phrasing—which leaves open the possibility that statements made to non-law-enforcement agents are never testimonial—suggests at the very least that statements made to non-law-enforcement agents are unlikely to have been made with an eye toward securing information for prosecutorial purposes. *See also Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). A critical first step in this case and all cases like it, therefore, is determining whether the teachers should be deemed law enforcement agents. In holding that they should, the Ohio Supreme Court vastly—and improperly—expanded the universe of law enforcement personnel.

Mandatory reporters of child abuse are not law enforcement agents and are not charged with conducting investigations to gather evidence. Indeed, many mandatory reporters, from preschool teachers to doctors to clergy members, are not even government employees. Rather, they are simply citizens required to protect children by informing others of their suspicions so that an investigation can be carried out by the police or child protective services. To this end, Ohio requires mandatory reporters with knowledge that a child "has suffered or faces a threat of suffering" any physical or mental injury to "immediately" inform the public children services agency or the police by telephone or in person. Ohio Rev. Code § 2151.421. Some states require that the report be put in writing; others do not. *See, e.g.*, Mass. Ann. Laws Ch. 119 § 51A(a) (written report); Conn. Gen. Stat. § 17a-101b(a) (oral report); Wash. Rev. Code § 26.44.040 (initial oral report, written report may be requested).

Critically, mandatory reporters are not deputized to conduct law enforcement investigations. On the contrary, that responsibility is specifically entrusted to state child protective services agencies and the police. After it receives a telephone call regarding potential abuse, the Ohio public children services agency is statutorily required to conduct an investigation within 24 hours. When the agency completes its investigation, it makes a recommendation to the prosecutor. Ohio Rev. Code § 2151.421(F). The other states' systems operate similarly. Child protective services or the police are responsible for investigating allegations of abuse or neglect. *See, e.g.,* Wash. Rev. Code § 26.44.050;

Tex. Fam. Code Ann. § 261.301(a); 325 Ill. Comp. Stat. 5/7.4. In fact, mandatory reporters such as child care providers are sternly warned that asking probing questions "can harm subsequent [child protective services] or legal processes." U.S. Dep't of Health & Human Servs., *The Role of Professional Child Care Providers in Preventing and Responding to Child Abuse and Neglect* (2008).[6]

Rather than acting as law enforcement agents, preschool teachers have a routine professional responsibility to question children about injuries so that they can protect the health and safety of the children in their care. It is common for children to receive injuries during the normal course of their play. U.S. Dep't of Health & Human Servs., *Role of Professional Child Care Providers in Preventing & Responding to Child Abuse and Neglect* (2008).[7] When they see an injured child, care providers need to learn how the child was hurt, whether they need medical help, and whether the injury was caused by another child hitting, biting, or throwing something at the injured child. This information allows care providers to intervene and stop any threat to the children's safety.

The preschool teachers here, Jones and Whitley, needed to protect L.P.'s health and safety, as reflected in their questions. When Whitley saw that L.P.'s eye was bloodshot, she asked him, "What

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[6] *Available at* https://www.childwelfare.gov/pubs/usermanuals/childcare/chapterthree.cfm (last visited June 4, 2014).

[7] *Available at* https://www.childwelfare.gov/pubs/usermanuals/childcare/chaptertwo.cfm (last visited June 4, 2014).

happened?" Pet. App. 3a. When L.P. said he fell, Whitley asked, "How did you fall and hurt your face?" Pet. App. 3a, 4a. When Whitley later noticed additional injuries, she was "kind of like in shock" and again asked what happened. Pet. App. 20a. Jones, the lead teacher, looked at the injuries and asked, "Whoa, what happened?" and "Who did this?" Pet. App. 4a, 20a. When L.P. responded "Dee, Dee," Jones needed to determine if "Dee" was a child. *Id.* She asked whether Dee is "big or little." Pet. App. 21a. These questions allowed the teachers to learn whether another child was hurting L.P., whether there was a safety hazard at the child care center that was causing children to be hurt, and whether L.P. would shortly be leaving with a possible abuser.

The notion that preschool teachers who ask a bruised child what happened are law enforcement agents verges on the outlandish. Indeed, it is difficult to imagine how Jones and Whitley could have asked any fewer questions to fulfill their need to determine whether L.P. was being harmed at the preschool. After learning that the harm was not caused by another child, and that L.P. may have been abused, the questioning stopped and a phone call was made to the county children and family services agency. Pet. App. 4a. The police did not participate in the questioning, were not present during the questioning, and did not ask the preschool teachers to ask any questions. Neither the police nor the child services agency had any knowledge of the questioning at the time it was performed.

Not surprisingly, then, and contrary to the Ohio Supreme Court, many courts have held that the duty to report child abuse does not make mandatory

reporters law enforcement agents. *See* Pet. at 18-23. For example, the California Supreme Court held that although doctors must report suspected child abuse, an emergency room doctor did not act as a law enforcement agent when he asked a bleeding fifteen-year-old boy "what happened." *People v. Cage*, 155 P.3d 205, 218-20 (Cal. 2007). "[T]he reporting statute does not oblige a doctor to *investigate* or *ascertain*, for purposes of possible criminal prosecution, whether a patient has suffered such abuse." *Id.* at 219; *see also, e.g.*, *State v. Spencer*, 169 P.3d 384 (Mont. 2007) (mandatory reporter laws did not deputize a professional counselor or foster parent); *People v. Duhs*, 947 N.E.2d 617 (N.Y. 2011) (doctor's primary duty is medical assistance, not law enforcement); *Seeley v. State*, 282 S.W.3d 778 (Ark. 2009) (mandatory reporter law did not deputize social workers). Two federal courts of appeals have reached similar conclusions. *United States v. DeLeon*, 678 F.3d 317 (4th Cir. 2012), *rev'd on other grounds*, 133 S. Ct. 2850 (2013) (social worker's reporting requirements not determinative in evaluating whether statements were testimonial); *United States v. Squire*, 72 M.J. 285 (C.A.A.F. 2013) (pediatrician not acting as law enforcement even though he knew statements might be used in a later trial).

B. Even if They Were Law Enforcement Agents, the Teachers' Primary Purpose Was Not to Gather Testimony for Use in a Criminal Prosecution

After holding that the teachers were law enforcement agents, the Ohio Supreme Court purported to apply the primary purpose test set out in *Davis v. Washington* and applied in *Davis* and

Bryant. The court's application of the test, however, was deeply flawed and produced the startling result that virtually any statement elicited by a teacher, daycare provider, nurse, or other mandatory reporter in a non-emergency situation will be deemed testimonial. That outcome defies common sense and, more importantly, this Court's precedent.

The most fundamental flaw in the Ohio Supreme Court's reasoning was its creation of a strict dichotomy: questions either "deal with an existing emergency" (in which case they are not testimonial) or they "gather evidence potentially relevant to a subsequent criminal prosecution" (in which case they are testimonial). Pet. App. 9a. In the court's view, once it found that no emergency existed, it necessarily followed that the teachers' primary purpose was to "establish[] past events potentially relevant to a later criminal prosecution." Pet. App. 3a. As this Court explained in *Bryant*, however, "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. How could it be otherwise? People ask questions for myriad reasons, of which dealing with emergencies and "creating an out-of-court substitute for trial testimony" are only two. *Id*. at 1155.

Had the Ohio Supreme Court considered other reasons, the outcome would surely have been different. A reasonable teacher in Jones' and Whitley's shoes would have asked questions to assess the risk of harm to L.P. and to determine whether one of the other children was misbehaving. That is

what preschool teachers do every day; their focus is not on future criminal prosecutions. Moreover, the questions were "informal and spontaneous" and were asked "on the spot in the classroom," rather than in a police station or on a 9-1-1 call. Pet. App. 40a. As this Court explained in *Bryant*, the informality of the encounter, while not dispositive, "informs" the primary purpose inquiry and militates against finding that the primary purpose was to prove past events in anticipation of later prosecution. *Bryant*, 131 S. Ct. at 1160.

To be sure, L.P.'s teachers had a duty to report suspected abuse and were presumably aware of that duty when they asked L.P. what happened. As this Court has recognized, "dual responsibilities may mean that [interrogators] act with different motives simultaneously or in quick succession." *Bryant*, 131 S. Ct. at 1161. When an interrogator has dual purposes, the *primary* purpose still must be objectively ascertained by focusing on the understanding, statements, and actions of all of the participants. *Id.* at 1161-1162. And that brings us back to the common-sense inquiry of why a reasonable teacher would ask a bruised child what happened: to address the child's health and safety and ensure classroom order, or to "creat[e] an out-of-court substitute for trial testimony"? Given the limited role teachers have in the law enforcement process—not to investigate, but merely to report to others—and their continual, routine obligation to care for their students, the answer is self-evident.

By rigidly classifying all encounters as either an emergency or an interrogation to gather information for trial, the Ohio Supreme Court

distorted the primary purpose test in a manner that "creates a beneficial catch-22 for pedophiles and other abusers of children." Pet. App. 46a (O'Connor, C.J., dissenting). It prohibits "[t]he very people who have the expertise and opportunity to recognize child abuse" from testifying to out-of-court statements when the child is unable to testify. *Id.*

The other fundamental flaw of the Ohio Supreme Court's primary-purpose analysis was its failure to undertake "a combined inquiry that accounts for both the declarant and the interrogator." *Bryant*, 131 S. Ct. at 1160. As the Court has emphasized, "what was *asked and answered*" must be viewed objectively to determine the purpose of the questioning. *Id.* (citing *Davis*, 547 U.S. at 827). Focusing solely on the interrogators' purpose, the Ohio Supreme Court ignored the requirement that it also consider the declarant's purpose.

There is no indication that L.P. intended to create evidence for Clark's trial. His short answers did not volunteer anything more than the minimal amount required of him. He stated only that he fell, Dee did it, and Dee is big. Pet. App. 20a-21a. And even if L.P. had provided more information, a three-year-old child is highly unlikely to have even a rudimentary understanding of the legal system and would not understand that his answers could lead to or be used in a criminal trial. The spontaneous, informal nature of the teachers' questions, without any police present, would not lead a reasonable child to believe the answers were intended to provide information for a criminal trial.

In sum, even if mandatory reporters such as Whitley and Jones are considered law enforcement agents, the absence of an emergency does not terminate the Confrontation Clause analysis. It is still necessary to consider the totality of the circumstances to determine the primary purpose of the interrogator and the declarant. Short-circuiting the analysis ignores this Court's affirmation that there may be other circumstances in which the primary purpose is not to create a substitute for testimony during trial. *Bryant*, 131 S. Ct. at 1155.

CONCLUSION

The Court should grant the petition for writ of certiorari.

RESPECTFULLY SUBMITTED.

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