November, 2014

5. American Professional Society on the Abuse of Children in Support of Petitioner, Ohio v. Clark (merits)

Thomas D. Lyon, *University of Southern California*

No. 13-1352

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF *AMICUS CURIAE* AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Professional Society on the Abuse of Children is the leading national organization for professionals who serve children and families affected by child maltreatment, which includes both abuse and neglect. As a multidisciplinary group of professionals, APSAC achieves its mission in a number of ways—most notably through expert training and educational activities, policy leadership and collaboration, and consultation that emphasizes theoretically sound, evidence-based principles.

APSAC is a 27-year-old organization that has played a central role in developing professional guidelines that address child maltreatment and, as such, is well qualified to inform the Court about the nature of child maltreatment and the ways society acts to prevent it. APSAC is submitting this *amicus* brief to assist the Court in understanding the perspectives of children who disclose maltreatment and of mandatory reporters—such as teachers, doctors, and social workers—who have a statutory duty to report it. Both children and mandatory reporters act with the primary purpose of protecting against further harm.[2]

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation or submission of this brief. All parties have consented to this filing in letters that have been filed with the Clerk of the Court.

[2] *Amicus* acknowledges the assistance and contributions of Thomas D. Lyon, J.D., Ph.D., Judge Edward J. and Ruey L. Guiardo Chair in Law and Psychology, University of Southern California; and the assistance of Sam Brown, Barrett Hammond, and Scott Mills, members of the University of Southern California Gould School of Law, classes of 2015 and 2016.

SUMMARY OF ARGUMENT

Child maltreatment is a problem of staggering dimensions in our society. By the age of 18, one in eight children is a victim.[3] And the social consequences are huge. Aside from causing long-lasting physical and mental harm to the victims, maltreatment costs $124 billion annually in the United States alone.[4]

To protect children, all fifty states have passed mandatory-reporting statutes. These statutes require certain individuals—teachers, social workers, therapists, doctors, and, in many states, everyone—to report suspected maltreatment to government agencies, including child-protective services or the police. These statutes play a key role in protecting children.

These statutes also raise important questions under the Confrontation Clause. The clause requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *see Crawford v. Washington*, 541 U.S. 36, 53 (2004) (concluding that the Confrontation Clause bars "testimonial hearsay" absent an opportunity to cross-examine the declarant). The question in this case is whether a three-year-old's disclosure of abuse to his preschool teacher was testimonial and thus inadmissible in a criminal prosecution. More broadly, the question in cases across the country is whether young children's disclosures of maltreatment to mandatory reporters are testimonial.

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[3] Christopher Wildeman, et al., *The Prevalence of Confirmed Maltreatment Among American Children, 2004-2011*, 168 JAMA Pediatrics 706, 709 (2014).

[4] Xiangming Fang, et al., *The Economic Burden of Child Maltreatment in the United States and Implications for Prevention*, 36 Child Abuse & Neglect 156, 161 (2012).

The clear answer to these questions is no. As an initial matter, the Court has not decided whether statements to anyone other than the police can be testimonial. *Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006). But even if they can be testimonial under the primary-purpose test—a test that the Court has applied solely to police interrogations—the answer is the same. This test defines statements as testimonial only if the primary purpose of the interrogation is to "creat[e] an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011). The perspectives of both the declarant and the questioner are relevant. *Id.* at 1160.

And from both perspectives—the young child's and the mandatory reporter's—these disclosures of maltreatment are not in any sense testimonial. Neither has the primary purpose of creating a substitute for trial testimony:

Children's primary purpose in disclosing maltreatment is to protect themselves and other victims from further harm. Young children have little or no understanding of the criminal-justice process. They do not recognize that their disclosures to mandatory reporters can be used in trial or, for that matter, that their disclosures can lead to trial at all. Children are most often mistreated by their caretakers, and in this context, they are particularly unlikely to anticipate or want their disclosures to lead to trial. As the Court has recognized, "children cannot be viewed simply as miniature adults." *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2397 (2011). And this is especially so when evaluating their primary purpose in disclosing maltreatment.

Mandatory reporters, for their part, also act with the primary purpose of protecting children—not

prosecuting abusers. Most states recognize that the purpose of mandatory reporting is to protect vulnerable children. States carry out this purpose by focusing on the child's and family's welfare rather than on criminal justice. In fact, "[m]ost substantiated and founded child abuse cases do not lead to prosecution"[5] and instead are the sole province of child-protective services.

For these reasons, the Court should conclude that young children's disclosures of maltreatment to mandatory reporters are non-testimonial. This conclusion will also improve the judicial process. Prosecutors will continue to present child victims in court, recognizing that jurors want to see the victims. And when the victims are unavailable, courts will screen their disclosures—which generally are reliable—under the rules of evidence. To conclude otherwise would make it much more difficult to prosecute cases of child maltreatment. "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987); *see also* Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius*, 415–16 (Dublin, Elizabeth Watts 1768) (explaining the importance of children's hearsay "in cases of foul acts done in secret, where the child is the party injured"). The Confrontation Clause was not meant to insulate entire categories of offenses from prosecution.

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[5] Theodore P. Cross, et al., *Prosecution of Child Abuse: A Meta-Analysis of Rates of Criminal Justice Decisions*, 4 Trauma, Violence & Abuse 323, 333 (2003).

ARGUMENT

I. YOUNG CHILDREN'S DISCLOSURES OF MALTREATMENT TO MANDATORY REPORTERS ARE NON-TESTIMIONIAL UNDER THE PRIMARY-PURPOSE TEST

Under the primary-purpose test, statements are testimonial only when the primary purpose is to create an out-of-court substitute for trial testimony. *Bryant*, 131 S. Ct. at 1155; *see also Davis*, 547 U.S. at 822 (explaining that the purpose must be "to establish or prove past events potentially relevant to later criminal prosecution"). By contrast, statements are non-testimonial when the primary purpose is something else—for example, to respond to an emergency or to protect the declarant by "incapacitat[ing] temporarily or rehabilitat[ing]" the perpetrator. *Bryant*, 131 S. Ct. at 1161. Likewise, statements are non-testimonial when the declarant has "no purpose at all" and is simply speaking "reflexive[ly]." *Id.*

This test considers the perspectives of both the declarant and the questioner. *Id.* at 1160. And it requires an objective evaluation: "[t]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* at 1156.

An objective evaluation of conversations between young children and mandatory reporters reveals that from both perspectives—the young child's and the mandatory reporter's—the primary purpose is not to create a substitute for trial testimony.

A. Young Children Neither Expect Nor Want Their Disclosures To Be Used To Prosecute Abusers

Young children are different in many ways from adults. These differences matter under the primary-purpose test, which assesses "the understanding and purpose of a reasonable victim in the circumstances of the actual victim," including "the victim's physical state." *Bryant,* 131 S. Ct. at 1161–62 (indicating that a statement would be non-testimonial if the declarant were so physically incapacitated "as to prevent her from thinking sufficiently clearly to understand whether her statements are for . . .the purpose of future prosecution"). Any such objective test must "account for th[e] reality" that a reasonable child is different from a reasonable adult. *J.D.B.*, 131 S. Ct. at 2403, 2406 (rejecting the notion "that courts must blind themselves to a juvenile defendant's age" in a *Miranda* custody analysis). Indeed, "it is the odd legal rule that does not have some form of exception for children." *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012).

1. Young children do not appreciate that their disclosures may be used at trial because they do not fully understand the legal system.

The social science on this point is clear: young children understand little about the legal system. They believe that the police punish criminals but have little or no appreciation of the criminal-justice process. So they are unlikely to speak to mandatory reporters with the purpose of creating a substitute for trial testimony—much less with the *primary* purpose of doing so.

Research on children's understanding of the legal system finds that whereas children have some appreciation of the role of the police, they have little understanding of prosecution until they are ten years old.[6] For example, when asked who sends people to jail, "[t]he majority of children eight and younger mentioned police," while older children mentioned

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[6] Alexia Cooper, Allison R. Wallin, Jodi A. Quas & Thomas D. Lyon, *Maltreated and Nonmaltreated Children's Knowledge of the Juvenile Dependency Court System*, 15 Child Maltreatment 255, 258 (2010) (concluding that 65 percent of four- to seven-year-olds could provide partially correct definitions of "police" but overall "knew very little about the legal system"); *see also* Catherine Maunsell, et al., *What Happens in Court? The Development of Understanding of the Legal System in a Sample of Irish Children and Adults*, 21 Irish J. Psychol. 215, 221, 222 (2000) (surveying 4- to 18-year-olds and adults); Michelle Aldridge, et al., *Children's Understanding of Legal Terminology: Judges Get Money at Pet Shows, Don't They?*, 6 Child Abuse Rev. 141 (1997) (surveying 5- to 10-year-olds); Karen Saywitz et al., *Children's Knowledge of Legal Terminology*, 14 Law & Hum. Behav. 523, 528-30 (1990) (surveying 5- to 11-year-olds); Rhona H. Flin, et al., *Children's Knowledge of Court Proceedings,* 80 British J. Psychol. 285, 291 (1989) (surveying 6- to 10-year-old children and adults). Some of the research can be criticized for underestimating children's understanding because children were often asked to define terms and provided little context. *See* Karen J. Saywitz, *Children's Conceptions of the Legal System: "Court Is a Place to Play Basketball"* in Stephen J. Ceci, et al., eds., *Perspectives on Children's Testimony* 131, at 154 (1989) ("[C]hildren are likely to know more about a concept than they can express in verbal statements."). But even with more context—such as vignettes in which children testify in court—young children still do not understand the roles of attorneys and juries. *See* Judy Cashmore & Kay Bussey, *Children's Conception of the Witness Role*, in J.R. Spencer, et al., eds., *Children's Evidence in Legal Proceedings: An International Perspective* 177, at 179 (1989) (surveying 6- to 14-year-olds).

both the police and judges.[7] Young children who speak directly to the police might anticipate that their disclosures will lead to punishment because they associate the police with "the punitive role."[8] But they are unlikely to understand that their disclosures to mandatory reporters and others will lead to punishment because they do not associate them with this role. Indeed, one study that questioned former child sexual abuse witnesses up to 20 years old—much older than the victim in this case—found that the "vast majority" had not expected that "the police would be called when they disclosed" the abuse.[9]

Even children who have some understanding of the legal system are unlikely to be aware of the possible

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[7] Amye Warren-Leubecker, et al., *What Do Children Know About the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research*, in Stephen J. Ceci, et al., eds., *Perspectives on Children's Testimony* 158, at 170 (surveying 2- to 14-year-olds). *See also* Saywitz, *Children's Conceptions*, *supra*, at 135 (discussing a survey of 6- to 10-year-olds that found "[a]t the initial phase, children believed that an offense could go unpunished or that the accused could be arrested, condemned, and punished by the police. In a second phase, children began to understand that arrest leads to an intermediary stage where a judge, rather than the police, makes a decision about guilt and punishment").

[8] Martine B. Powell, et al., *Children's Perceptions of the Role of Police: A Qualitative Study*, 10 Int'l J. of Police Science & Mgmt. 464, 470 (2008) (surveying 5- to 8-year-olds and finding that "children predominantly identify policing with the punitive role, such as arresting criminals, shooting guns, killing and hurting people").

[9] Child Witness Project, *Three Years After the Verdict: A Longitudinal Study of the Social and Psychological Adjustment of Child Witnesses Referred to the Child Witness Project* 55 (1993) (interviewing 8- to 20-year-olds approximately three years after the criminal cases ended).

evidentiary use of their disclosures. It is one thing for children to understand that the police put criminals in jail—it is another entirely for them to expect that their disclosures to a teacher or doctor will be admitted as evidence in a criminal trial. For these reasons, unless young children are questioned by a uniformed police officer[10] or are explicitly told that their statements will be used by the police, they are unlikely to believe that the statements will lead to criminal punishment.

2. Many children do not want their disclosures to lead to criminal punishment because of their relationship with the abuser.

The sad reality is that child victims are generally abused by someone they know. Most sexual abuse is committed by someone close to the child, usually a parent or a parental figure.[11] And the same is true of physical abuse, which nearly always is committed by a caretaker.[12] Children in these difficult situations are

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[10] Young children believe that police officers who are not in uniform do not have authority to arrest—particularly when the officers fail to identify themselves. Kevin Durkin & Linda Jeffrey, *The Salience of the Uniform in Young Children's Perception of Police Status*, 5 Legal & Criminological Psychol. 47, 52 (2000) (surveying 5- to 9-year-olds and finding that "younger children were more likely to select a non-policeman in police uniform as allowed to carry out an arrest than they were to select a policeman out of his uniform").

[11] *See* Thomas D. Lyon & Julia Dente, *Child Witnesses and the Confrontation Clause,* 102 J. Crim. L. & Criminology 1181, 1203–04 (2012) ("Virtually all sexual abuse is perpetrated by someone the child knows. . . . [C]riminal samples are made up primarily of perpetrators close to the child, with the most common single type a parent or parent figure.").

[12] *See* Irit Hershkowitz, *Delayed Disclosure of Alleged Child Sexual Abuse Victims in Israel*, 76 Am. J. Orthopsychiatry 444,

particularly unlikely to disclose abuse with the purpose of creating a substitute for trial testimony.

Children are reluctant to disclose abuse in part because they fear repercussions to the abuser. Studies that assess the willingness of children to disclose transgressions have shown that children are less likely to disclose transgressions by their parents than by strangers.[13] More to the point, population surveys and clinical studies have shown that children are less likely to disclose sexual abuse—and more likely to delay disclosing—when it is committed by familiar adults.[14] Indeed, this reluctance has played an important role in the Court's case law. In *Kennedy v. Louisiana*, for example, the Court recognized that executing child rapists may deter disclosure: "one of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member." 554 U.S. 407, 445 (2008).[15] And in

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447, table 2 (2006) (reviewing Israeli data). Most child witnesses in criminal court are victims of either sexual or physical abuse. Gail S. Goodman, et al., *Innovations for Child Witnesses: A National Survey*, 5 Psychol. Pub. Pol'y & L. 255, 264–65 (1999).

[13] Thomas D. Lyon et al., *Children's Reasoning About Disclosing Adult Transgressions: Effects of Maltreatment, Child Age, and Adult Identity*, 81 Child Dev. 1714, 1720–21 (2010); Marcus Choi Tye, et al., *The Willingness of Children to Lie and the Assessment of Credibility in an Ecologically Relevant Laboratory Setting*, 3 Applied Dev. Sci. 92, 95–96 (1999).

[14] Lyon & Dente, *supra*, at 1210 ("The most common factor that predicts delay in reporting abuse is the relationship between the perpetrator and the child: the closer the relationship, the longer the delay. This is true in population surveys, clinical samples, and criminal samples").

[15] The Court cited three studies for this proposition: Tina B. Goodman-Brown, et al., *Why Children Tell: A Model of Children's*

Pennsylvania v. Ritchie, the Court recognized that a child may be especially unwilling to report abuse "when the abuser is a parent." 480 U.S. at 60.

Even when children disclose abuse by adults close to them, they are not seeking criminal punishment. After all, as noted above, most children who disclose sexual abuse do not anticipate that the police will become involved, and this is especially true in cases of abuse by a family member.[16] Rather, children disclose abuse primarily to make it stop and to protect other victims.[17] Even subsequent to disclosure and formal intervention, young children are unlikely to be motivated by prosecution. Children are more likely to recant allegations of sexual abuse if they are younger and the abuser lived in their home.[18]

Disclosure of Sexual Abuse, 27 Child Abuse & Neglect 525, 527–28 (2003); Daniel W. Smith, et al., *Delay in Disclosure of Childhood Rape: Results From A National Survey*, 24 Child Abuse & Neglect 273, 283-84 (2000); Rochelle F. Hanson, et al., *Factors Related to the Reporting of Childhood Rape*, 23 Child Abuse & Neglect 559, 565–66, table 3 (1999).

[16] Child Witness Project, *supra*, at 55 (interviewing 8- to 20-year-olds approximately three years after the criminal cases ended).

[17] *Id.* at 48–49.

[18] Lindsay C. Malloy, et al., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. Am. Acad. Child & Adolescent 162, 165 (2007).

3. The Court has recognized that children often lack the same purpose and understanding as adults.

Much of this research establishes the basic principle—well known to any parent—that young children do not fully appreciate the consequences of their actions. The Court has consistently relied on this same principle in defining other constitutional rights.

In Eighth Amendment cases, for example, the Court has relied "on science and social science" to show that teenagers have a limited ability to appreciate the consequences of their actions when compared to adults. *Miller*, 132 S. Ct. at 2464, 2468 ("Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."); *Graham v. Florida*, 560 U.S. 48, 78 (2010) (similar); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (similar); *Eddings v. Oklahoma*, 455 U.S. 104, 115–117 (1982) ("[M]inors . . . are generally less mature and responsible than adults."). Of course, these conclusions hold true for younger children as well, such as the three-year-old victim in this case.

The Court has also recognized the significance of age in Fourth and Fifth Amendment cases. The Court recently held that a suspect's age must be considered in determining whether a reasonable person in the suspect's position would believe that she was under arrest. *See J.D.B.*, 131 S. Ct. at 2402–03 ("[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any

damage to the objective nature of the custody analysis."). In so holding, the Court aptly described age as "a fact that 'generates commonsense conclusions about behavior and perception'" and noted that these conclusions are "self-evident to anyone who was once a child himself, including any police officer or judge." *Id.* at 2403 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)); *see also Gallegos v. Colorado*, 370 U.S. 49, 53 (1962) ("[The petitioner] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."); *Kaupp v. Texas*, 538 U.S. 626, 631 (2003) (considering among other factors that the defendant was a "17-year-old boy" in finding that he was arrested without probable cause).

* * *

The social science and the Court's jurisprudence support the same conclusion. In the maltreatment context, young children generally do not recognize that their statements will be used at trial and often do not want a trial at all. For these reasons, their disclosures to mandatory reporters do not have "a primary purpose of creating an out-of-court substitute for trial testimony" and therefore are not testimonial under the Confrontation Clause. *Bryant*, 131 S. Ct. at 1155.

B. Mandatory Reporters' Primary Purpose Is To Protect Children—Not To Create Evidence To Prosecute Abusers

The other participants in these conversations—mandatory reporters—also lack a primary purpose of creating a substitute for trial testimony. Instead, their primary purpose is to protect children. And this is true even absent an emergency or immediate threat to the

child, which puts mandatory reporters in the "*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." *Id.*

1. By statute, mandatory reporters' primary purpose is to protect children and rehabilitate the family.

All fifty states have adopted mandatory-reporting statutes. The statutes require certain people—particularly those who come in close contact with children—to report suspected child maltreatment to government agencies such as child-protective services and the police. These statutes emphasize the need to protect the child and rehabilitate the family.

Many states have explicitly identified the primary purpose of mandatory reporting as "protect[ing] children whose health and welfare may be adversely affected" through abuse or neglect. Ala. Code § 26-14-2; *see also* Cal. Penal Code § 11164(b) ("The intent and purpose of this article is to protect children from abuse and neglect."); Colo. Rev. Stat. Ann. § 19-3-302 ("[I]t is the intent of the general assembly to protect the best interests of children of this state and to offer protective services . . . ."); Del. Code Ann. tit. 16, § 901 ("The child welfare policy of this State shall serve to advance the best interests and secure the safety of the child . . . ."); D.C. Code § 4-1321.01 ("It is the purpose of this subchapter to . . . protect the child . . . .").[19] In other

[19] *See also* Alaska Stat. Ann. § 47.17.010; Conn. Gen. Stat. Ann. § 17a-101; R.I. Gen. Laws Ann. § 40-11-1; Vt. Stat. Ann. tit. 33, § 4911; Ga. Code Ann. § 19-7-5; Idaho Code Ann. § 16-1601; 325 Ill. Comp. Stat. 5/2; Ind. Code Ann. § 31-33-1-1; Iowa Code Ann. § 232.67; Kan. Stat. Ann. § 38-2201; Ky. Rev. Stat. Ann. § 620.010; La. Child. Code Ann. art. 601; Me. Rev. Stat. tit. 22,

states such as Ohio, courts have identified the same purpose. *See, e.g.*, *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 865 (Ohio 2004) (explaining that "the *primary purpose* of reporting is to facilitate the protection of abused and neglected children rather than to punish those who maltreat them" and that prosecution is merely an "adjunct" (emphasis added)).

Likewise, many states have identified the purpose of mandatory reporting as "preserv[ing] the family life of the parents and children, to the maximum extent possible" without endangering the child. D.C. Code § 4-1321.01.[20] To fulfill this purpose, many states emphasize rehabilitation of the child's parent, guardian, or custodian—not prosecution—as the goal. States require, when possible, child-protective services to provide rehabilitative services to a child's parent, guardian, or custodian. *See, e.g.*, Iowa Code Ann. § 232.67 (specifying that "[i]t is the purpose [of this provision]. . . to provide the greatest possible protection to victims or potential victims of abuse" through, among other things, "providing rehabilitative services, where appropriate and whenever possible to abused children and their families which will stabilize the home environment so that the family can remain intact without further danger to the child").[21]

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§ 4003; Mass. Gen. Laws Ann. ch. 119, § 1; Minn. Stat. Ann. § 626.556.

[20] *See also* Alaska Stat. Ann. § 47.17.010, Del. Code Ann. tit. 16, § 901; Ga. Code Ann. § 19-7-5; Idaho Code Ann. § 16-1601; 325 Ill. Comp. Stat. 5/2; Iowa Code Ann. § 232.67; Kan. Stat. Ann. § 38-2201; Ky. Rev. Stat. Ann. § 620.010; La. Child. Code Ann. art. 601; Mass. Gen. Laws Ann. ch. 119, § 1; Me. Rev. Stat. tit. 22, § 4003; Minn. Stat. Ann. § 626.556.

[21] *See also* Ind. Code Ann. § 31-33-1-1; Kan. Stat. Ann. § 38-2201.

By contrast, no state has identified criminal prosecution and punishment as the primary purpose of mandatory reporting. At most, a few states have acknowledged that mandatory reporting may facilitate the "prosecution . . . of child maltreatment." *E.g.*, Ark. Code Ann. § 12-18-102(6) (listing seven purposes of the statute, including to "[e]ncourage the cooperation of state law enforcement officials, courts, and state agencies in the investigation, assessment, prosecution, and treatment of child maltreatment"). But even these states recognize that the child's welfare is paramount. *Id.* § 12-18-102(2), (3), (7) (listing other purposes of the statute, including "ensuring the immediate screening, safety assessment, and prompt investigation" of reports, "[p]rotect[ing] a maltreated child," and "[s]tabilizing the home environment if a child's health and safety are not at risk").

In short, the stated legislative purpose of mandatory reporting is to protect children. And the Court has recognized that a legislative purpose plays an important role in determining whether a statement made pursuant to the legislation is testimonial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) ("[U]nder Massachusetts law the *sole purpose* of the affidavits" regarding results of forensic analysis requested by the police "was to provide 'prima facie evidence of the composition, quality, and the net weight" of the analyzed substance.'" (quoting Mass. Gen. Laws, ch. 111, § 13)). Consistent with the stated purpose of mandatory reporting, a "reasonable" mandatory reporter would act with the primary purpose of protecting children. *Bryant*, 131 S. Ct. at 1156 (explaining that under the primary-purpose test, "[t]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular

encounter, but rather the purpose that reasonable participants would have had").

2. States carry out this statutory purpose by investigating reports of maltreatment with a focus on protection and rehabilitation.

States have implemented their mandatory-reporting statutes in a way that confirms the purpose is to protect children and rehabilitate families—not prosecute abusers.

Mandatory reporting usually does not result in prosecution at all. Most allegations of sexual and physical abuse are investigated solely by child-protective services.[22] In turn, "most substantiated and founded child abuse cases do not lead to prosecution."[23] This is by design. Child maltreatment is a family problem—often occurring at the hands of family members or others close to the child—so states have generally chosen to address the problem through child-protective services investigations and civil proceedings in juvenile court.[24] These proceedings can lead to supervision of the family, removal of the child

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[22] *See* Theodore P. Cross, et al., *Police Involvement in Child Protective Services Investigations: Literature Review and Secondary Data Analysis*, 10 Child Maltreatment 224, 237, table 2 (2005) (finding that child-protective services were the sole investigators in 72 percent of physical-abuse allegations and 55 percent of sexual-abuse allegations in a large, nationally representative sample of investigations).

[23] Cross, *Prosecution of Child Abuse*, *supra*, at 333.

[24] U.S. Dep't of Health & Hum. Servs., *Working with the Courts in Child Protection* 45 (2006) ("Matters involving child maltreatment . . . typically are resolved in juvenile court."), available at https://www.childwelfare.gov/pubs/usermanuals/courts/courts.pdf.

from the parents' home, and, in extreme cases, termination of parental rights. They are not, however, criminal proceedings and are not subject to the requirements of criminal procedure. *See Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (discussing the standard of proof); *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 33 (1981) (discussing the right to counsel).

These civil proceedings do not have the same goals as criminal proceedings. "[J]uvenile and criminal courts perform distinct functions in intrafamily abuse or neglect cases. The juvenile court proceeding is designed to protect children and, when possible, rehabilitate the family. The criminal proceeding is primarily designed to determine the guilt or innocence of the alleged perpetrator and, if the perpetrator is found guilty, to impose punishment."[25] Chief Justice Warren Burger recognized this same distinction in *Lassiter*: "The purpose of [a] termination proceeding . . . is not 'punitive,'" but rather, "its purpose [is] protective of the child's best interests." 452 U.S. at 34 (Burger, C.J., concurring).

To be sure, mandatory reporting may trigger police involvement or lead to criminal charges. Indeed, some mandatory reporters go directly to the police, and a number of states require child-protective services to coordinate with the police.[26] But this possibility of

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[25] Marcia Sprague & Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings*, 35 U. Louisville J. Fam. L. 239, 242–43 (1997).

[26] Child-protective services investigate cases "with alleged perpetrators who are parents, guardians, or caretakers of the alleged victim." Cross, *Police Involvement*, *supra*, at 225. Approximately half of the states require child-protective services to cross-report to the police when the suspected abuse takes place

police involvement does not mean that the primary purpose of the reporting statutes is criminal prosecution.

When child-protective services refer a matter to the police, they continue to be involved in a non-prosecutorial role.[27] Their role prioritizes the child's welfare. The police complain that investigations by child-protective services "tip[] off" abusers before the police can interrogate and that when they remove children from the home, abusers seek legal advice and no longer cooperate with the police.[28] Prosecution is foregone entirely when it would interfere with rehabilitation of the family.[29]

And even the states that require coordination between child-protective services and the police remain focused on the child. The goal of coordination is to "minimize the number of times individual

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at the hands of certain individuals outside the child's family. The police are also more likely to be notified in cases of alleged sexual abuse and in more serious cases of physical abuse. Fourteen states require child-protective services to coordinate their investigations and share information with the police. U.S. Dep't of Health & Hum. Servs., *Cross-Reporting Among Responders to Child Abuse and Neglect: Summary of State Laws* 2 (Jan. 2010).

[27] *See e.g.*, Ohio Rev. Code Ann. § 2151.421(F)(1) (requiring child-protective services to investigate cases referred to the police); Mich. Comp. Laws Ann. § 722.628(5) ("Involvement of law enforcement officials under this section does not relieve or prevent the department from proceeding with its investigation or treatment if there is reasonable cause to suspect that the child abuse or neglect was committed by a person responsible for the child's health or welfare.").

[28] Cross, *Police Involvement*, *supra*, at 230.

[29] U.S. Dep't of Health & Hum. Servs., *Working with the Courts*, *supra*, at 41 (noting that one of the "reasons to forgo prosecution [is] that it may interfere with rehabilitating families").

children are interviewed," thus protecting the child from the trauma of repeated interviewing.[30] It also improves the quality of investigations while facilitating the removal of children when their safety demands it.[31]

Finally, police involvement itself often is aimed at protection rather than at future prosecution. The police have the power both to remove children from an environment in which they are abused and to remove the person suspected of committing the maltreatment.[32] They exercise these powers to ensure the child's well-being rather than to collect evidence.

States thus use mandatory reporting to protect children. They do so through investigations and civil proceedings that may involve the police but rarely lead to criminal prosecution.

3. The Court has recognized the distinction between a protective and punitive purpose in defining other rights.

The Court has long distinguished between laws that are protective and those that are prosecutorial or punitive. These same distinctions are relevant to mandatory reporting. Indeed, they help to establish

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[30] U.S. Dep't of Health & Hum. Servs., *Cross-Reporting Among Responders to Child Abuse and Neglect*, *supra*, at 2; *see, e.g.*, Conn. Gen. Stat. Ann. § 17a-101h (explaining that the goal is to "minimize the number of interviews of any child").

[31] Cross, *Police Involvement*, *supra*, at 229.

[32] Donna Pence & Charles Wilson., *The Role of Law Enforcement in the Response to Child Abuse and Neglect* 7 (1992), available at https://www.childwelfare.gov/pubs/usermanuals/law/law.pdf.

that the primary purpose of mandatory reporting is in fact protective and not prosecutorial.

First, the fact that an act is triggered by criminal behavior and may lead to criminal prosecution does not make the act punitive. In Fourth Amendment cases, the Court has emphasized the distinction between police checkpoints with the "primary purpose" of "detect[ing] evidence of ordinary criminal wrongdoing," and those "designed to intercept illegal aliens" or "aimed at removing drunk drivers from the road." *City of Indianapolis v. Edmond*, 531 U.S. 32, 38–39 (2000). All these checkpoints identify criminal conduct and may result in arrest. But in the case of intercepting illegal aliens or removing drunk drivers, police involvement is primarily aimed at preventing future harm and thus does not violate the Fourth Amendment. *Id*.

And in the statutory context, the test to determine whether an act is punitive is "the legislative objective." *Smith v. Doe*, 538 U.S. 84, 92 (2003). Based on this test, the Court has upheld sex-offender-registration and commitment statutes under the Ex Post Facto Clause. The Court distinguished between ordinary criminal statutes and sex-offender registration and commitment statutes that are "'designed to protect the public from harm.'" *Id.* at 93 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). In each instance, intervention is "triggered" by and dependent upon prior criminal conduct. Yet intervention is non-punitive when proof of the conduct is "not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior." *Hendricks*, 521 U.S. at 361–62 (quoting *Allen v. Illinois*, 478 U.S. 364 at 371 (1986)). Here, too, mandatory-reporting statutes are meant to protect.

The fact that the behavior they report is often criminal and may lead to prosecution does not undermine their primary purpose.

Second, states often act with the primary purpose of protecting children well beyond emergencies. In the typical emergency, separating the victim from the perpetrator adequately protects the victim because the victim is capable of self-protection (or of renewing a request for protection). But while protection of adults may require only brief intervention, protection of children requires continued monitoring and repeated inquiry. Parents have exclusive custody of a child until he reaches majority, and the child "cannot usually extricate himself" from a "brutal or dysfunctional" family or home. *Miller*, 132 S. Ct. at 2468.

In *Prince v. Massachusetts*, the Court upheld the criminal conviction of a nine-year-old's guardian for allowing the child to distribute religious materials in violation of child-labor laws. 321 U.S. 158, 170 (1944). The Court rejected the dissent's argument that the harms justifying conviction must be "immediate." *Id.* at 175 (Murphy, J., dissenting). It noted that the state has a long-term interest in children being "safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." *Id.* at 165. States have this long-term interest in the safety of children in particular given the lasting effects of adverse events on their development. Like child-labor laws, mandatory-reporting statutes operate to protect the long-term well-being of children.

Third, the Constitution goes a long way in accommodating state laws that protect children. The Court has explained, for example, that "[i]t is evident beyond the need for elaboration that a State's interest

in safeguarding the physical and psychological well-being of a minor is compelling." *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (citation and quotation marks omitted); *see also Ritchie*, 480 U.S. at 60 (noting in the due-process context Pennsylvania's "compelling interest in protecting its child-abuse information" as part of its "efforts to uncover and treat abuse"). The mandatory-reporter statutes at issue are a classic example of laws aimed at protecting children.

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Mandatory reporters, much like young children, do not have "a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155. Indeed, to find that mandatory reporters act with that purpose would ignore the explicit legislative purpose of mandatory-reporting statutes—which is to protect the child and rehabilitate the family.

II. THE CONCLUSION THAT YOUNG CHILDREN'S DISCLOSURES ARE NON-TESTIMONIAL WILL PROMOTE ACCURACY IN ADJUDICATING MAL-TREATMENT CASES

The practical implications of this case are straightforward. A holding that young children's disclosures to mandatory reporters are testimonial would mean that if a child is unwilling or unable to testify in a criminal trial, those disclosures cannot be admitted—no matter their accuracy. Meanwhile, a contrary holding does not mean that such disclosures must be admitted or that they will be the only evidence at trial. Instead, it would allow courts to assess the admissibility of those disclosures under the rules of evidence and, if they are admitted, allow juries to consider them along with other evidence.

A. It Will Encourage Accurate And Fair Maltreatment Prosecutions

This case will not lead to a flood of trials that rely solely on a child's hearsay. On the contrary, prosecutors already have an incentive to produce child victims because they know that jurors want to see them testify.[33] In fact, even prior to *Crawford*, prosecutors rarely relied on children's hearsay.[34] In practice, prosecutors are likely to rely on hearsay only when the child is unable to qualify as a witness, as happened in this case. JA12.

And the disclosures will still need to fall within an exception to the hearsay rule. Most states have special exceptions for children's disclosures of maltreatment. These exceptions require the court to assess the reliability of the disclosure and either require a showing of unavailability or corroboration of the maltreatment.[35]

Despite not fully understanding the legal system, young children can accurately recount events. They tend to be more suggestible, but when questioned properly, they are capable of providing reliable

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[33] John E.B. Myers et al., *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 Psychol. Pub. Pol'y & L. 388, 411 (1999) ("[P]rosecutors are reluctant to take child sexual abuse cases to trial unless the victim is available to testify.").

[34] Angela D. Evans & Thomas D. Lyon, *Assessing Children's Competency to Take the Oath in Court: The Influence of Question-Type on Children's Accuracy*, 36 L. & Hum. Behav. 195, 197 (2012) (finding that hearsay was admitted in lieu of children's testimony in 3 percent of child sexual abuse cases between 1997 and 2001).

[35] Nat'l Ctr. for Prosecution of Child Abuse, *Investigation and Prosecution of Child Abuse* 369–70 (3d ed. 2004).

statements.[36] Compared to older children and adults, they are less inclined to lie[37] and less capable of lying effectively.[38] They are especially unlikely to make false accusations against adults who are close to them.

Nor are children's disclosures unreliable simply because they fail to qualify as competent to testify. In the first place, young children are most likely to be unavailable because they refuse to testify or are unable to maintain their composure when testifying, not because they are declared incompetent.[39] And

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[36] Carole Peterson, *Children's Autobiographical Memory Across the Years: Forensic Implications of Childhood Amnesia and Eyewitness Memory for Stressful Events*, 32 Developmental Rev. 283, 303 (2012). Even experts who are skeptical of young children's abuse disclosures endorse the probative value of their statements. Richard D. Friedman & Stephen J. Ceci, *The Child Quasi-Witness*, U. Chi. L. Rev., manuscript at 9 (forthcoming) ("Though very young children are often more vulnerable to suggestion than adults are, their memory is reasonably good, even over an extended period. . . ." (footnotes omitted)), available at http://www-personal.umich.edu/~rdfrdman/quasi.chicago.pdf.

[37] Angela D. Evans & Kang Lee, *Emergence of Lying in Very Young Children*, 49 Developmental Psychol. 1958, 1961 (2013) (noting that children's ability to lie emerges at three years of age).

[38] Victoria Talwar et al., *Lying in the Elementary School Years: Verbal Deception and its Relation to Second-Order Belief Understanding*, 43 Developmental Psychol. 804, 809 (2007) (surveying 6- to 11-year-olds and concluding that older children are better able to maintain a lie).

[39] In this case, the child's "demeanor" and "behavior" led the trial court to find that he was not competent to testify; the court concluded, "he's gone already." JA12. Testifying in a courtroom is an inherently difficult exercise for young children. One study asked four- to eight-year-olds to testify in a mock-trial setting. Despite efforts to make the trial comfortable for the children, 25 percent "refused to testify, either by outright refusal or by appearing distressed so that the research assistant judged that the child should not continue." Gail S. Goodman et al., *Face-to-*

even when they provide inadequate responses to competency questions, the cause is typically poor questioning, compounded by the stresses of appearing in court.[40]

In this case, for example, the child—four years old at the time of trial—made several errors that are understandable given his age. He responded "no" when asked if he knew "the difference between the truth and a lie," JA7, a common response among children in court who nevertheless understand the concept of truth.[41] On the other hand, he correctly identified a false statement as a lie, stated that he would receive a "whooping" for telling lies, and affirmed that he would tell the truth. JA9. He also had trouble with questions about his birthdate, his grade in school, and his current living situation. These questions seem simple yet inquire into concepts that prove difficult for young children—in fact, nearly half of maltreated six-year-olds do not know their own birthdates.[42] Children often recall the central aspects

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Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions, 22 L. & Hum. Behav. 165, 179 (1998).

[40] Evans & Lyon, *supra*, at 201. *See also* Saywitz, *Children's Knowledge*, *supra*, at 523-24.

[41] Evans & Lyon, *supra*, at 202. The reason for this error is unclear but may have to do with children's interpretation of the question as a suggestion that the questioner will provide the information.

[42] Lindsay Wandrey, et al., *Maltreated Children's Ability to Estimate Temporal Location and Numerosity of Placement Changes and Court Visits*, 18 Psychol. Pub. Pol'y & L. 79, 90 (2012) (finding that 40 percent of maltreated 6-year-olds did not know their birthdates).

of significant events while struggling to answer temporal questions about those same events.[43]

Courts can accommodate a child's limited vocabulary by modifying their procedures and using simpler words.[44] If questioned in a child-friendly way, most children can explain the difference between truth and falsehood and know the importance of telling the truth by four years of age.[45] Even very young children who do not know the labels "truth" and "lie" reliably reject false statements.[46] Young children are unlikely to understand the word "oath," but they appreciate the significance of a "promise" at an early age.[47] They are more likely to tell the truth after promising to do so—even when they have difficulty in demonstrating their understanding of the meaning of truth and lies.[48]

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[43] *See* Peterson, *supra*, at 293.

[44] *See, e.g.*, Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. Cal. L. Rev. 1017, 1057–58 (2000) (many courts allow children to "promise to tell the truth" rather than take a formal oath).

[45] Thomas D. Lyon, et al., *Right and Righteous: Children's Incipient Understanding of True and False Statements*, 14 J. Cognition & Development 437, 451 (2013).

[46] *Id.*

[47] Saywitz, *Children's Knowledge*, *supra*, at 528 (finding that young children do not understand the word "oath"); Thomas D. Lyon & Angela D. Evans, *Young Children's Understanding That Promising Guarantees Performance: The Effects of Age and Maltreatment*, 38 L. & Hum. Behav. 162, 169 (2014) (finding that young children have some understanding of "promise" and "will," supporting asking children "do you promise that you will tell the truth?").

[48] Thomas D. Lyon, et al., *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials,* 79 Child Development 914, 925 (2008).

Defendants are not left defenseless when a child fails to qualify as competent. Those who wish to confront the child in court can waive their objections to competency and ask for accommodations to make the child more comfortable. If the child still fails to qualify, defendants can argue to the jury that the child's prior statements are thus unreliable. Defendants also can highlight the dangers of suggestibility. For their part, jurors understand that young children have weaker memories and are more suggestible.[49] They are less likely to convict if defendants focus on potential influences by parents or others.[50]

B. It Will Also Improve The Quality Of Maltreatment Investigations

This case will also affect how states investigate allegations of maltreatment. A recognition that these disclosures are non-testimonial will enable states to continue improving their process for investigating child maltreatment. This, in turn, will enhance the reliability of such disclosures.

Many states employ trained interviewers to conduct videotaped interviews with children.[51] Videotaping has a number of advantages. It enables viewers to assess the exact words and tone of the interviewer and the child. It reduces the need for multiple parties to

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[49] Jodi A. Quas, et al., *Do Jurors "Know" What Isn't So About Child Witnesses?,* 29 L. & Hum. Behav. 425, 448 (2005).

[50] Stacia N. Stolzenberg & Thomas D. Lyon, *Evidence Summarized in Attorney's Closing Arguments Predicts Acquittals in Criminal Trials of Child Sexual Abuse*, 19 Child Maltreatment 119, 127 (2014).

[51] Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don't Die and Ways to Facilitate Child Testimony*, 16 Widener L. Rev. 239, 252 (2010).

interview the same child.[52] It also reduces the likelihood that repeated interviews will distort the child's memory.

These interviewers often use protocols such as interview instructions, promises to tell the truth, productive rapport building, and open-ended questions.[53] Such protocols reduce the likelihood of suggestion and make the interviews more effective.

Because videotaping and protocols make interviews more formal, however, they have led some courts to conclude that statements in these settings are testimonial.[54] This case provides an opportunity for the Court to offer guidance on this issue—particularly regarding the balancing of factors such as the child's perspective (for example, did the child recognize that the interview might be used as evidence) and the extent of police involvement (for example, did the police initiate the interview or prescribe the questions asked). A holding that young children's disclosures in these settings are non-testimonial would encourage states to continue improving their investigations through these methods.

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[52] Frank E. Vandervort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community's Approach*, 96 J. Crim. L. & Criminology 1353, 1389–90 (2006).

[53] *See generally* Am. Prof'l Soc'y on the Abuse of Children, *Practice Guidelines: Forensic Interviewing in Cases of Suspected Child Abuse* (2012).

[54] John E.B. Myers, *Myers on Evidence of Interpersonal Violence, Child Maltreatment, Intimate Partner Violence, Rape, Stalking, And Elder Abuse* 874–76 (5th ed. 2012) (collecting cases).

CONCLUSION

For the reasons set forth above and in the brief of the Petitioner, the Court should reverse the decision of the Ohio Supreme Court.

Respectfully submitted,

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