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4. American Professional Society on the Abuse of Children in Support of Petitioner, Ohio v. Clark (petition for cert.)

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 Petition for 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 supporting professionals who serve children and families affected by child maltreatment and violence. As a multidisciplinary group of professions, 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 26-year-old organization that has played a central role in the development of professional guidelines addressing child abuse and neglect, and as such is well-qualified to help inform this Court about the current nature of child abuse and the manner in which society acts to prevent and mitigate that abuse. APSAC is submitting this amicus brief to assist the Court in understanding the child-protection role served by mandatory reporters such as teachers, social workers, doctors, and other members of society. A proper understanding of the roles and duties of these individuals reveals that child protection is their primary purpose in working with victims of child abuse.²

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 of the parties have consented to this filing in letters that have been filed with the Clerk of the Court.

² Amicus curiae acknowledges the assistance and contributions of Thomas D. Lyon, J.D., Ph.D., Judge Edward J. and Ruey L. Guirado Chair in Law and Psychology, University of Southern California; and the assistance of Jessica Culpepper, a member of the University of Southern California Law School Class of 2014;

SUMMARY OF ARGUMENT

Child abuse is an all-too-common problem in contemporary society. To protect children, states have adopted statutes requiring certain members of society—such as doctors, teachers, social workers, and in some cases even lawyers—to report suspected child abuse to appropriate local child-welfare agencies (referred to throughout this brief as CPS, or child protective services).

This case involves a conversation between two of these mandatory reporters (a pair of pre-school teachers) and a three-year old child who exhibited signs of potential child abuse, including bloodshot eyes and red marks on his face that looked “like whips of some sort . . .” Pet. App. 2a, 4a. According to the Ohio Supreme Court, the conversation between the teachers and the young child occurred for the purpose of obtaining testimony to be used to identify and prosecute the child’s abuser. *Id.* at 9a, 15a-16a. Based on this premise, the court concluded that the child’s statements to the teachers constituted testimonial hearsay. *Id.* at 15a-17a. Because the child was deemed incompetent to testify at trial, the crucial evidence linking the defendant to the crime is now missing. *Id.* at 5a.

The Ohio Supreme Court’s ruling exacerbates a pair of splits among the lower courts. *First*, the court viewed the teachers as “agents of the state for law-enforcement purposes” because they are required under Ohio law to report suspected child abuse to the local CPS agency, and effectively held that *any*

Sam Brown and Trey Chiriboga, members of the University of Southern California Law School Class of 2015; and Jodie Liu, a member of the Harvard Law School Class of 2015.

statement in response to a mandatory reporter's question is by definition testimonial hearsay. *Id.* at 6a-9a, 15a-16a. The court failed to recognize (as other courts have) that, viewed objectively, a teacher's (or other mandatory reporter's) primary purpose in questioning a child abuse victim is to *protect* the child rather than *prosecute* the perpetrator.

Second, the court entirely ignored the fact that the victim was a three-year-old child. *See* Pet. App. 1a-17a. Courts are divided over whether a child declarant's age is a relevant consideration in determining if the child's statement to a mandatory reporter is testimonial hearsay. A proper resolution of this split requires little more than the application of basic child psychology, which teaches that young children typically lack any meaningful understanding that statements to non-law enforcement personnel might be used for purposes of criminal prosecution. In light of *Michigan v. Bryant*'s admonition that courts must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties," *Michigan v. Bryant*, __ U.S. __, 131 S.Ct. 1143, 1156 (2011), courts cannot ignore a young declarant's age when deciding whether his or her statement is testimonial.

This case presents a strong vehicle for this Court to address either or both of these splits of authority, and to set out the proper framework for analyzing testimonial hearsay in the context of out-of-court statements made to non-law enforcement personnel such as teachers, social workers, and doctors. It is apparent that the Ohio Supreme Court—along with numerous other courts across the country—is in need of clearer guidance on the issue.

Until such guidance is provided, the practical implications of the Ohio Supreme Court's ruling are stark. "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). Children are often unavailable to testify at trial for a variety of reasons, including their failure to satisfy the threshold requirement of testimonial capacity (as occurred here), their psychological fragility resulting from the abuse, *e.g.*, *People v. Stechly*, 870 N.E.2d 333, 341 (Ill. 2007), or, most tragically, their death (whether at the hands of their abuser or some other cause), *e.g.*, *State v. Bentley*, 739 N.W.2d 296, 301 (Iowa 2007). In these situations, the only available evidence may be the child's out-of-court statements to his or her teachers, social workers, or medical providers. Under the Ohio Supreme Court's holding, virtually any statement by the child victim to these individuals, regardless of the circumstances, will be deemed inadmissible testimonial hearsay as a result of Ohio's mandatory reporting statute. Victims will go unprotected and wrongdoers will go unprosecuted. The Confrontation Clause was not meant to insulate entire categories of offenses from prosecution.

ARGUMENT

I. THE PRIMARY PURPOSE OF MANDATORY CHILD ABUSE REPORTING AND INVESTIGATION IS CHILD PROTECTION

A. Child protection occupies a special status in constitutional interpretation

This Court has long recognized the crucial importance of laws meant to protect children, and has taken great pains to protect such laws from attack.

The Court has also long distinguished between laws bearing a *protective* purpose and laws bearing a *prosecutorial* or *punitive* one. The mandatory reporter statute at issue in this case is a classic example of a law aimed at protecting children, who are among the most vulnerable members of society.

This Court has repeatedly recognized that when a state's purpose is to protect children, the Constitution goes far in accommodating that purpose. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (“It 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’” (citation omitted)) (freedom of speech); *Ritchie*, 480 U.S. at 60 (noting state’s “compelling interest in protecting its child-abuse information” as part of its “efforts to uncover and treat abuse”) (Due Process).

The Court has distinguished, as it must here, between laws aimed at protecting child victims and laws aimed at prosecuting or punishing those children’s abusers. For instance, the Court has held that parents are not entitled to procedural protections standard to criminal trials (such as the right to appointed counsel and the beyond-a-reasonable-doubt standard of proof) where the state seeks to terminate their right to custody of their children. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982); *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 33 (1981). That conclusion resulted in part because “[t]he purpose of [a] termination proceeding . . . was not ‘punitive[,]’” but rather, “its purpose was *protective* of the child’s best interests.” *Lassiter*, 452 U.S. at 34 (Burger, C.J., concurring).

In other contexts as well, this Court has emphasized the distinction between state action aimed at

protecting child abuse victims and action designed to further the prosecution and punishment of perpetrators. In cases interpreting the scope of the ex post facto and double jeopardy clauses, this Court has held that both a civil commitment statute and a sex offender registration statute were “designed to protect the public from harm” rather than to punish sex offenders. *Smith v. Doe*, 538 U.S. 84, 93 (2003) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

The present case involves an issue that the Court has not previously addressed: the intersection between a state’s purpose in mandating child abuse reporting to governmental authorities and the proper characterization of statements elicited by mandatory reporters under the Confrontation Clause.

In *Bryant*, the Court emphasized that the “primary purpose” of a conversation is the touchstone for determining whether or not a hearsay statement is testimonial. *Bryant*, 131 S.Ct. at 1155; *see also Davis v. Washington*, 547 U.S. 813, 822 (2006) (a statement is “testimonial when the circumstances objectively indicate that the . . . primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution”). This case provides an opportunity for the Court to address whether children’s statements to individuals who are obligated to report their suspicions to others—CPS agencies and the police—should be considered testimonial under the Confrontation Clause.

B. The stated purpose of mandatory child abuse reporting laws is child protection

All fifty states have adopted mandatory reporting statutes requiring certain individuals, particularly

those who come into close or frequent contact with children, to report suspected child abuse to government agencies such as CPS agencies. These laws emphasize the need for child protection and rehabilitation of the family, rather than the potential prosecution and punishment of the abusers. For instance, several states articulate the primary purpose of their mandatory reporting provisions as “protect[ing] children whose health and welfare may be adversely affected” through abuse or neglect. Ala. Code § 26-14-2.³ Most other states’ statutes contain similar language emphasizing the laws’ primary purpose of child protection. *See, e.g.*, Cal. Penal Code § 11164(b) (“The intent and purpose of this article is to protect children from abuse and neglect.”); N.J. Stat. Ann. § 9:6-8.8 (“The safety of the children served shall be of paramount concern.”).

Many state legislatures also intend to “preserve the family life of the parents and children, to the maximum extent possible” without endangering the child. D.C. Code § 4-1321.01.⁴ To fulfill this purpose, many states specifically emphasize *rehabilitation* rather than *prosecution* as a goal. These states require

³ *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.

⁴ *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; N.J. Stat. Ann. § 9:6-8.8; Or. Rev. Stat. Ann. § 419B.007; R.I. Gen. Laws Ann. § 40-11-1; Tenn. Code Ann. § 37-1-403; Utah Code Ann. § 62A-4a-401; Vt. Stat. Ann. tit. 33, § 4911; W. Va. Code Ann. § 49-6A-1; Wyo. Stat. Ann. § 14-3-201.

that CPS should, when possible, provide rehabilitative services to a child's parent, guardian, or custodian. *See, e.g.*, Iowa Code Ann. § 232.67 (“It 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”).⁵

No states specify criminal prosecution and punishment as the *primary* purpose animating the mandatory reporting regime. At most, a small minority of states acknowledge that mandated reporting will facilitate the “prosecution . . . of child maltreatment.” *See, e.g.*, Ark. Code Ann. § 12-18-102(6) (one of seven purposes of mandatory reporting statutes is to “[e]ncourage the cooperation of state law enforcement officials, courts, and state agencies in the investigation, assessment, prosecution, and treatment of child maltreatment”).

In short, the purpose behind mandatory reporting statutes is to protect children, not to prosecute their abusers. As this Court has previously recognized, legislative purpose can play an important role in determining whether a hearsay statement made pursuant to a legislative scheme is testimonial hearsay. *See, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (“under Massachusetts law the sole purpose of . . . affidavits” regarding a forensic analysis of drug chemistry “was to provide ‘prima facie evidence . . .’” (quoting Mass. Gen. Laws, ch. 111, §13)).

⁵ *See also* Ind. Code Ann. § 31-33-1-1; Kan. Stat. Ann. § 38-2201; N.Y. Soc. Serv. Law § 411.

C. The practical purpose of mandatory child abuse reporting laws and child abuse investigation is child protection

The fact that mandatory reporting may trigger a criminal investigation, or even lead to criminal charges, does not mean the primary purpose of reporting statutes is always criminal prosecution. The mandatory reporting laws, in fact, have been implemented in a manner that confirms that their primary function is child protection. CPS workers are not agents for the police; rather, the two systems have formed uneasy alliances born of the need to minimize trauma to the child and to maximize child protection. Such cooperation shields children from invasive investigations; it does not transform child-focused CPS agents into an arm of law enforcement.

Private citizens' mandated reports may trigger investigation by CPS and the police. At an early stage of most investigations, investigators conduct a safety assessment intended to identify higher risk situations that require additional resources.⁶ Further CPS involvement is typically limited to "dealing with alleged perpetrators who are parents, guardians, or caretakers of the alleged victim." Theodore P. Cross, et al., *Police Involvement in Child Protective Services Investigations: Literature Review and Secondary Data Analysis*, 10 *Child Maltreatment* 224, 226 (2005) (hereinafter "Cross"). This can include caretakers who have failed to protect the child from abuse by a third

⁶ U.S. Department of Health and Human Services, *National Study of Child Protective Services Systems and Reform Efforts: Review of State CPS Policy*, ch. 4 (April 2003) (surveying state policies regarding risk and safety assessment), available at <http://aspe.hhs.gov/hsp/cps-status03/state-policy03>.

party. Approximately half of the states require child protective services to cross-report to law enforcement bodies when the suspected abuse takes place at the hands of certain individuals outside the child's family. U.S. Department of Health and Human Services, *Cross-Reporting Among Responders to Child Abuse and Neglect: Summary of State Laws* 2 (Jan. 2010) (hereinafter "DHHS"). Law enforcement is also more likely to be notified in cases of alleged sexual abuse and in more serious cases of physical abuse. Nevertheless, most sexual and physical abuse allegations are investigated solely by CPS. Cross, *supra*, at 237 table 2 (CPS were the sole investigators in 72% of physical abuse allegations and 55% of sexual abuse allegations in a large, nationally representative sample of child maltreatment investigations). Even when law enforcement is involved, CPS remains involved in the investigation and response in a non-prosecutorial role. *E.g.*, Ohio Rev. Code Ann. § 2151.421(F)(1) (requiring CPS investigation of referred cases); 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.").

Fourteen states require CPS to coordinate their investigations and share information with law enforcement. DHHS, *supra*, at 2. The purpose of coordination is "to minimize the number of times individual children are interviewed" and thus reduce the potential trauma of state intervention. *Id.*; see, *e.g.*, Conn. Gen. Stat. Ann. § 17a-101h (stated goal is to "minimize the number of interviews of any child").

When both CPS and the police investigate child abuse allegations, their goals remain distinct. Indeed, CPS workers argue that the police are excessively punitive in their orientation; police worry that CPS investigation will “tip[] off” the alleged perpetrator before they have a chance to interrogate, or that removal of the children will prompt the perpetrator to obtain legal help and thereafter refuse to cooperate. Cross, *supra*, at 225. Nevertheless, coordination advances the state’s interest in child protection, because it improves the quality of CPS investigation and facilitates removal of children when their safety demands it. *Id.* at 229.

Although coordination is also likely to benefit the state’s prosecution of the abuser, that does not mean that the primary purpose of investigation (or the reporting that spurs it) is to gather evidence with an eye toward prosecution. “[M]ost substantiated and founded child abuse cases do not lead to prosecution. . . .” 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).

Hence, coordination between CPS and law enforcement assists the state’s efforts to protect children against further abuse more often than it creates evidence for prosecutors. As a practical matter, this fundamental goal of child protection would be undermined if agencies were deterred from pursuing coordination for fear that their efforts would turn evidence gathered during a CPS investigation into testimonial hearsay.

II. THERE IS A CONFLICT AMONG LOWER COURTS REGARDING WHETHER OUT-OF-COURT STATEMENTS BY CHILDREN TO MANDATORY REPORTERS ARE TESTIMONIAL

Lower courts have reached varying conclusions regarding whether children's statements elicited by mandatory reporters are testimonial hearsay. This case raises two particular issues that have divided lower courts: first, whether statements elicited by mandatory reporters are necessarily testimonial, and second, whether the declarant's age plays a meaningful role in determining whether or not an out-of-court statement is testimonial.

To date, this Court has declined to address “whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’” *Bryant*, 131 S.Ct. at 1155 n.3 (quoting *Davis*, 547 U.S. at 823 n.2); see also *id.* at 1169 n.1 (Scalia, J., dissenting) (“I remain agnostic about whether and when statements to nonstate actors are testimonial.”). In all of this Court's post-*Crawford* decisions finding a statement to be testimonial, the cases have involved statements made directly to law enforcement personnel or provided in response to a direct request from law enforcement. *Bullcoming v. New Mexico*, __ U.S. __, 131 S.Ct. 2705, 2717 (2011) (noting that in both *Bullcoming* and *Melendez-Diaz*, “a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations”); *Davis*, 547 U.S. at 829-32 (interrogation by police resulted in testimonial statements); *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (same).

This case also provides an effective vehicle for the Court to address the status of children's statements to mandatory reporters such as teachers, medical professionals, and social workers—a question that this Court has repeatedly left unanswered. *See, e.g., Bryant*, 131 S.Ct. at 1169 (Scalia, J., dissenting) (“How to assess whether a declarant with diminished capacity bore testimony is a difficult question, and one I do not need to answer today.”); *White v. Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., concurring) (noting the uncertain status under the Confrontation Clause of “the unsuspecting social-services worker who is told of possible child abuse”).

A. There is a conflict regarding the extent to which statements made to mandatory reporters are testimonial

Courts are divided regarding the extent to which statements elicited by mandatory reporters are testimonial. Some courts, such as the Ohio Supreme Court in this case, have concluded that any statement made to a mandatory reporter is testimonial. Similarly, some courts have relied on the existence of a mandatory reporting system to support a case-specific conclusion that the declarant's statements to a mandatory reporter were testimonial. Other courts, in contrast, have determined that statements to mandatory reporters are not testimonial in light of the particular circumstances of the interview or exchange at issue in the case.

The Ohio Supreme Court's decision falls into the first category of cases, which hold in effect that any statements to mandatory reporters are testimonial. The court explained that because the victim's “teachers acted to fulfill their duties to report abuse,” their questioning was intended “to ascertain facts of

potential criminal activity and identify the person or persons responsible.” Pet. App. 15a. As the court identified no other basis for its conclusion, the existence of the mandatory reporting statute was the only conceivable basis on which the court held that the victim’s statements to his teachers were testimonial.

The Illinois Supreme Court’s plurality opinion in *Stechly* falls into the same category. There, the opinion asserted that the existence of a mandatory reporting statute “substantially buttress[ed]” the conclusion that a child abuse victim’s statements to a school social worker and a hospital nurse were testimonial, because those individuals “appear[ed] to have done nothing as a result of taking those statements other than contacting the authorities.” *Stechly*, 870 N.E. 2d at 365, 367; *see also State v. Hosty*, 944 So. 2d 255, 266 (Fla. 2006) (Pariente, J., concurring in part and dissenting in part) (“In assessing whether a statement is testimonial, pertinent factors include . . . whether the witness had a duty to report the contents of the statement to a law enforcement agency (as did the teacher in this case).”).⁷

⁷ Similarly, in cases involving CPS investigations (rather than mandatory reporters), courts have placed significant emphasis on the CPS agencies’ duty to cooperate with law enforcement. *See Bobadilla v. Carlson*, 575 F.3d 785, 793 (8th Cir. 2009) (holding that statements made during a CPS investigation were testimonial despite the CPS agent’s child-protection role, because the CPS “statute requires the interview to achieve another purpose akin to a police interrogation: assisting law enforcement with the investigation of a suspected criminal violation”); *Flores v. State*, 120 P.3d 1170, 1179 (Nev. 2005) (holding that a victim’s statements to a CPS investigator were testimonial because the

In contrast to these cases, a number of courts have held that a child’s statement to a mandatory reporter is not necessarily testimonial. Many of these cases distinguish between *primary* and *secondary* purposes of the interview with the child, and reach the conclusion (consistent with the discussion above in Part I) that non-law enforcement interviews are fundamentally *protective* rather than *prosecutorial* in nature. These courts have held that children’s statements to mandatory reporters are not testimonial where the mandatory reporters are acting for a primary purpose other than gathering information to use in a prosecution. *See People v. Duhs*, 947 N.E.2d 617, 620 (N.Y. 2011) (“[I]t is of no moment that the pediatrician may have had a secondary motive for her inquiry, namely, to fulfill her ethical and legal duty, as a mandatory reporter of child abuse, to investigate whether the child was potentially a victim of abuse. Her first and paramount duty was to render medical assistance to an injured child.”); *Seely v. State*, 282 S.W.3d 778, 788 (Ark. 2008) (stating that a hospital social worker’s “duty to report, by itself, did not render all statements made by [the victim] to her testimonial”); *People v. Cage*, 155 P.3d 205, 220 (Cal. 2007) (“The mere fact that doctors must report abuse they see, suspect, or know of in the course of practice does not transform them into investigative agents of law enforcement.”); *State v. Spencer*, 169 P.3d 384, 389 (Mont. 2007) (“we refuse to attach that significance to the duty to report”).

In reaching these conclusions, courts have often categorized the purpose of an interview in one of three ways: a primary purpose of obtaining medical

investigator was “tasked with reporting instances of child abuse for prosecution”).

treatment, *e.g.*, *Duhs*, 947 N.E.2d at 620; a primary purpose of responding to an ongoing emergency, *e.g.*, *Commonwealth v. Allshouse*, 36 A.3d 163, 179 (Pa. 2012), *cert. denied*, __ U.S. __, 133 S.Ct. 2336 (2013); and a third category involving all other interactions that do not involve medical treatment or ongoing emergencies, which courts almost reflexively deem to be testimonial (as occurred in this case). A particularly telling example of this tendency can be found in *State v. Maguire*, 78 A.3d 828 (Conn. 2013). In the course of remanding for an evidentiary hearing regarding the circumstances surrounding the child victim’s statements during a forensic interview conducted at a child advocacy center, the court admonished the lower court that “a victim’s statements during a forensic interview may be deemed nontestimonial *only if* the essential purpose of the interview is to provide medical assistance to the victim.” *Id.* at 850 (emphasis added). This narrow focus on medical treatment fails to recognize that non-law enforcement personnel may have a primary purpose other than *either* medical treatment *or* obtaining evidence for use in a prosecution. As this Court emphasized in *Bryant*: “[T]here may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.” *Bryant*, 131 S.Ct. at 1155.

In contrast to the rigid quasi-categorical approach adopted by many courts, a handful of cases have adopted a nuanced approach that is more consistent with the core concerns of this Court’s Confrontation Clause precedent. For example, in *State v. Buda*, 949 A.2d 761 (N.J. 2008), a social services employee asked a child abuse victim if anyone had beaten him. *Id.* at 778. The court examined the “proper context” of the

interview and concluded that the employee's questioning was aimed at protecting the child from his suspected abuser, even though the social worker was not providing medical care. *Id.* The court rightly observed that "the primary obligation of a [social services] worker is not to collect evidence of past events to secure the prosecution of an offender, but to protect prospectively a child in need." *Id.* at 778-79. Mandatory reporting is done "*in addition* to her paramount duty to care for the safety of children." *Id.* at 779 (emphasis added).⁸

Given the variety of diverging approaches courts have adopted when addressing children's statements to mandatory reporters, the question presented in this case warrants this Court's attention. Many courts (including the Ohio Supreme Court) have overlooked the fundamentally *protective*, rather than *prosecutorial*, purpose of mandatory reporting statutes, and have accordingly failed to view statements to mandatory reporters in the proper context.

This case presents a particularly suitable vehicle for addressing this question because there is no evidence here that the teachers who elicited the victim's statements were acting at the direction of law enforcement. This case thus avoids the separate and

⁸ See also, e.g., *State v. Spencer*, 169 P.3d 384, 389 (Mont. 2007) (a social worker's interview was done for the primary purpose of "ensuring [the victim's] continued safety," and discerning "the identity of anyone who may have harmed [the victim] was relevant to ensuring her safety after she left the hospital," even though the interviewer "would have anticipated during her interview with [the victim] that the information she gathered might be used in a subsequent prosecution").

difficult question of whether private citizens have been deputized by law enforcement for purposes of the Confrontation Clause.⁹ Rather, this case presents a straightforward question: when are statements elicited by non-law enforcement personnel testimonial, and does it matter if the person eliciting the statements is obligated to report suspected child abuse to CPS agencies and/or law enforcement?

B. There is also a split of authority regarding the relevance of the child's age in determining whether his or her statements are testimonial

In addition to the split regarding the correct characterization of statements elicited by mandatory reporters, courts are divided about how to address statements made by very young children (such as the three-year-old victim in this case).

The existence of this disagreement is somewhat surprising given the reality that young children are unlikely to appreciate that their statements to non-law enforcement personnel will be used in future prosecutions of their abusers. Research examining children's developing understanding of the legal system has found that although children as young as four years of age have some familiarity with the police

⁹ Compare *State v. Bentley*, 739 N.W.2d 296, 297 (Iowa 2007) (statement was testimonial where an interview at a Child Protective Center was jointly arranged by law enforcement and CPS, and law enforcement officer observed the interview), with *State v. Krasky*, 736 N.W.2d 636, 639, 641 (Minn. 2007) (statement was non-testimonial where elicited by a nurse practitioner in the presence of law enforcement, where the referral "was a joint decision made by social services and law enforcement").

(whom they view as playing the preeminent role in punishing criminals¹⁰), they are unfamiliar with other legal professionals and the legal process.¹¹ As a result, unless children are explicitly told that what they say will be shared with the police, they are unlikely to believe that their statements will lead to criminal punishment.

The lower courts are in conflict over the relevance of a child's age in determining whether his or her statements are testimonial. Some courts have relied on the declarant's young age to support the conclusion that the statement was non-testimonial. *State v. Miller*, 264 P.3d 461, 490 (Kan. 2011); *State v. Vigil*, 127 P.3d 916, 925-26 (Colo. 2006). Other courts have taken the declarant's age into consideration but determined that the statement was nonetheless testimonial. *State v. Justus*, 205 S.W. 3d 872, 880 (Mo. 2006); *People v. Stechly*, 870 N.E.2d 333, 363 (Ill. 2007) (plurality opinion). And, in contrast, yet other courts have held that the declarant's age is entirely *irrelevant* to whether a statement is testimonial. *State v. Snowden*, 867 A.2d 314, 329 (Md. 2005); *State v.*

¹⁰ 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) (5- to 8-year-old "children predominantly identify policing with the punitive role, such as arresting criminals, shooting guns, killing and hurting people").

¹¹ Karen Saywitz et al., *Children's Knowledge of Legal Terminology*, 14 Law & Hum. Behav. 523, 528-30 (1990) (most 5-year-olds could define "police" but exhibited little understanding of other legal personnel); Alexia Cooper, Allison R. Wallin, Jodi A. Quas, and Thomas D. Lyon, *Maltreated and Nonmaltreated Children's Knowledge of the Juvenile Dependency Court System*, 15 Child Maltreatment 255, 258 (2010) (65% of 4- to 7-year-olds could give partially correct definition of the police, but overall "knew very little about the legal system").

Bentley, 739 N.W.2d 296, 300 (Iowa 2007); *State v. Siler*, 876 N.E.2d 534, 544 (Ohio 2007).

This disagreement has continued even after *Bryant*. Following a remand for reconsideration in light of *Bryant*, the Pennsylvania Supreme Court found the age of the declarant was pertinent, given *Bryant*'s "requirement that a court consider all of the relevant circumstances when determining whether a declarant's statements are testimonial." *Commonwealth v. Allshouse*, 36 A.3d 163, 181 (Pa. 2012). By contrast, the Connecticut Supreme Court has held that *Bryant* shifted the focus "away from the declarant's intent" and should "further restrict the admissibility of children's hearsay statements in sexual abuse prosecutions." *Maguire*, 78 A.3d at 849-50. And in this case the Ohio Supreme Court placed no weight on the fact that the declarant was three years old. See Pet. App. 1a-17a.

The fact that the relevant inquiry is objective, such that one examines how a reasonable declarant would perceive the purpose of the questioning, does not preclude considering the declarant's age. Indeed, this Court recently held that the "objective" question of custody for *Miranda* purposes "can account for th[e] reality" that a reasonable child can be different from a reasonable adult. *J.D.B. v. North Carolina*, __ U.S. __, 131 S.Ct. 2394, 2403 (2011). Because of the declarant's young age, this case provides the Court an excellent opportunity to clarify whether the declarant's age should play a role in determining if his or her statements are testimonial.

CONCLUSION

For the reasons set forth above and in the brief of the Petitioner, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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