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 THE FAMILY DEFENSE CENTER AND OTHER ADVOCATES FOR FAMILIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## INTEREST OF THE *AMICI CURIAE*[1]

*Amici* are a collection of non-profit advocacy organizations and law professors with a strong interest in protecting the rights of families.

The Family Defense Center is a not-for-profit legal advocacy organization whose mission is to help families involved with the child welfare system receive just outcomes. The Center defends children who can safely stay with their own families and helps families preserve the right to raise their own children. The Center also works in areas of policy advocacy, community legal education, and systemic reform litigation. The Center supports the respondent in this case based on its extensive work on behalf of children and families subjected to traumatic investigations that harm children instead of protecting them.

Established in 1990, the New York University School of Law Family Defense Clinic was the first law school clinic in the country to train students to represent parents accused of child abuse and neglect and prevent the unnecessary break-up of indigent families. A pioneer of interdisciplinary representation in the field, the Clinic teaches law and graduate-level social work students to collaborate to protect family integrity and help families access services that keep children safe and out of foster care. Under supervision, Clinic students represent parents in New York City Family Courts in child abuse and neglect and

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity has made any monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

termination of parental rights proceedings. Clinic faculty teach, research, and write in the field of child welfare, advocate for policy reform, and train and provide technical support to parent advocates across the country.

Youth, Rights and Justice, Attorneys at Law (YRJ) (formerly Juvenile Rights Project, Inc.) has been the provider of indigent juvenile defense representation in the Multnomah County (Portland) Juvenile Court since 1976. YRJ also provides statewide advocacy on issues affecting children and families, particularly in the legislative arena. YRJ is appointed to provide indigent representation in approximately 1250 cases per year. YRJ represents both children and parents in dependency and termination of parental rights cases and youth in delinquency cases. YRJ supports the respondent in this case because, in its representation of dependent children, parents and delinquent youth, it has seen the harms that occur when there is undue reliance on statements elicited from children by untrained questioners. When false allegations arise from this kind of questioning, children can be unnecessarily suspended in foster care for lengthy periods of time, families can be unnecessarily separated and older siblings can be subjected to criminal charges, including automatic waiver to adult court and mandatory minimum sentences.

The University of the District of Columbia David A. Clarke School of Law General Practice Clinic is a law school clinic in which students represent parents of children involved in the child welfare system. The clinic is directed by Matthew I. Fraidin, Professor of Law. Professor Fraidin is an expert in the area of child abuse and neglect, having written extensively on the subject and previously served as the Legal Di-

rector for the Children's Law Center in Washington, D.C.

The Family Advocacy Movement is a national collaboration of parents, grandparents, family advocates, and other professionals who are committed to reforming the child welfare system by emphasizing the value of families. The Family Advocacy Movement seeks to protect the rights and stability of families and children.

Tanya Asim Cooper, Esq., is an Assistant Professor of Clinical Legal Instruction and the Director of the Domestic Violence Law Clinic at the University of Alabama School of Law. Before joining the law school's faculty, Professor Cooper worked as a Clinical Instructor in the HIV/AIDS Legal Clinic at the University of the District of Columbia's David A. Clarke School of Law, where she worked to reunify families in civil proceedings in the District of Columbia, and as a staff attorney at the Children's Law Center in Washington, D.C.

*Amici* submit this brief to highlight the harms traceable to relying on the unreliable statements that untrained questioners elicit from young children. *Amici* urge the Court to protect the integrity of investigations of child abuse—and thus to protect the integrity of the family—by ensuring that criminal convictions are not based on statements obtained through improper suggestion. *Amici*'s experience in the civil context has shown that false statements can destroy families and harm children when those accused of abuse are not afforded sufficient procedural protections.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Ohio's mandatory reporting regime relies on teachers, physicians, and others to trigger and generate reports for criminal investigations of suspected child abuse. Mandatory reporting is a solemn business: those subject to the regime who fail to report suspected abuse face liability, as do those who knowingly file false reports. Conscientious reporters therefore seek to elicit statements from children that may confirm their suspicions when they observe a child who has been injured in any way. Those statements become an integral part of the report, which is intended for use in the subsequent criminal trial by statutory design. *See* Ohio Rev. Code § 2151.421(H)(1). When the reporting regime works as intended, teachers and other mandatory reporters gather statements confirming their suspicions *ex parte* and those statements are introduced through the reporters as surrogates at trial.

The problem, however, is that the statements that laypersons elicit from young children tend to be unreliable. Young children are highly susceptible to suggestion as a result of their developing mental and neurological capacities. Unless interviewed by a trained professional, a young child will often provide an account that reflects the questioner's perceived expectations rather than the child's memories or experience. And even with proper training, teachers in particular may be unable to avoid the problem of suggestion because of the teacher's dual role as role model and authority figure. Children are trained from a very young age to meet a teacher's expectations and provide what they perceive to be the "right" answer to a teacher's questions, even if that answer is untrue.

Unintentional suggestion can lead children to provide false accounts of abuse, sometimes with disastrous results. When false accounts lead to false convictions, an innocent man or woman may face decades in prison for a crime that he or she did not commit, or that never occurred at all. Families can be torn apart, and children who are led to provide a false account may be tormented for the rest of their lives. Some are plagued by the anxiety that they, too, may be falsely accused of abuse. Others come to create false memories of abuse and then spend a lifetime coping with anguish as a result of abuse that they never actually suffered. Some even turn to suicide.

Fortunately, the Sixth Amendment provides a procedural guarantee that guards against convictions based on such unreliable evidence: the accused's right to confront the witnesses against him. As interpreted by this Court in *Crawford v. Washington*, 541 U.S. 346 (2004), that right prohibits the civil-law mode of criminal procedure that Ohio would like to employ in the child abuse context. Ohio cannot rely on its teachers as Queen Mary relied on her justices of the peace to elicit statements and produce reports for use in criminal trials—at least not without affording the accused the opportunity to engage in in-court cross examination of his accusers or an acceptable substitute. And under the broader contextual analysis called for by *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), teacher-elicited statements from young children are simply too unreliable to be treated as categorically immune from the confrontation right.

Petitioner's preferred mode of criminal procedure, if endorsed by this Court, would have significant consequences for civil proceedings as well. If unreliable teacher-elicited statements can form the basis for a criminal conviction, there will be less incentive to

conduct thorough investigations into suspected abuse, and it will become even more difficult than it already is for parents accused of abusing their children to exclude or impugn unreliable hearsay statements in divorce, child custody, and visitation proceedings. And protective services agencies, including those already notorious for relying on scant evidence in summary adjudications, will likely separate more children from their parents based on unreliable evidence.

In short, Ohio's proposed rule would harm children and their families. As implemented here, it is also unconstitutional.

## ARGUMENT

### I. STATEMENTS TO MANDATORY REPORTERS WHO ARE INVESTIGATING ABUSE ARE TESTIMONIAL.

A. The Confrontation Clause protects a core value of American criminal procedure: to obtain a conviction, the state must present its witnesses for cross-examination. The state cannot gather witness statements *ex parte* and introduce those statements through surrogates at trial. That "civil-law mode of criminal procedure" is the "principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50.

If the police had elicited the statements on which Clark's conviction was based, there is no doubt that the evidence would be deemed "testimonial" and thus subject to confrontation. As in *Hammon v. Indiana* (consolidated with *Davis v. Washington*, 547 U.S. 813 (2006)), L.P. was questioned as "part of an investigation into possibly criminal past conduct," and there "was no immediate threat" or emergency. 547 U.S. at

829-30. Once the questioners' suspicions of abuse were confirmed, they made an official report. *See, e.g.*, JA64-66. L.P. did not testify at the ensuing trial, but his statements were introduced through those who elicited them, leading to Clark's conviction. *Crawford* and *Hammon* both held that the Sixth Amendment was violated by the introduction of similar statements to the police.

Yet the police are not the only officials who can elicit testimonial statements. Indeed, the paradigm cases leading to the adoption of the Confrontation Clause did not involve the police at all, because the professional police force did not exist. *Crawford*, 541 U.S. at 53 (noting that "England did not have a professional police force until the 19th century"). The infamous Marian bail and committal statutes directed justices of the peace—respected local officials who performed a variety of functions within the community—to "examine suspects and witnesses in felony cases," and a justice's account of an examination would often be introduced at trial. *Id.* at 44.

Police-elicited statements are deemed testimonial by analogy to these historical abuses: police perform "investigative functions" on the government's behalf and therefore present the "same risk" that the Marian justices of the peace did in the production of testimonial evidence. *Crawford*, 541 U.S. at 53; *see also id.* at 68 (holding that the term "testimonial" applies "at a minimum" to the "modern practices with closest kinship to the abuses at which the Confrontation Clause was directed"). Nothing in *Crawford* or its progeny restricts this reasoning by analogy to police alone.

B. None of this Court's post-*Crawford* cases has considered "whether and when statements made to someone other than law enforcement personnel are

'testimonial.'" *Davis*, 547 U.S. at 821 n.2. There is no need in this case to explore the outer limits of that question, however. For almost fifty years the Ohio mandatory reporter statute has channeled the investigation of criminal child abuse through teachers as a principal category of child abuse reporters and directed them to generate reports for use at trial. *See* 131 Ohio Sess. Laws 632-33 (1965) (Am. H.B. 218) (amending 2151.421 to require a "school teacher . . . acting in his official capacity" to immediately report child abuse "to a municipal or county peace officer"). Teachers, much like the Marian justices of the peace, are respected members of the community, and they are in a position to elicit information from children. The State of Ohio has therefore decided to enlist teachers' help in gathering evidence of criminal child abuse. In this respect, teacher-elicited statements present the "same risk" of the civil-law mode of criminal procedure as did statements elicited by Marian justices of the peace. *Crawford*, 541 U.S. at 53.

The current Ohio mandatory reporter statute serves a number of purposes, but several of its key features reflect the legislature's intent to rely on mandatory reporters to participate in the "identification and/or prosecution of the perpetrator." *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 865 (Ohio 2004); *see also Gersper v. Ashtabula Cnty. Children Servs. Bd.*, 570 N.E.2d 1120, 1123 (Ohio 1991) (explaining that the legislature intended "to encourage those who know or suspect that a child has fallen victim to abuse or neglect to report the incident to the proper authorities and/or *participate in the judicial proceedings* to secure the child's safety without fear of being exposed to civil or criminal liability." (emphasis added)). The key features include the following:

- The receiving agency or officer may request a written report specifying, among other things, any "information that might be helpful in establishing the cause of the injury, abuse, or neglect." Ohio Rev. Code § 2151.421(C)(3).
- A report triggers an immediate investigation into the "circumstances," "cause," and "person or persons responsible" for the abuse, conducted "in cooperation with the law enforcement agency," and culminating in a written report "to the law enforcement agency." *Id.* § 2151.421(F)(1).
- The statute requires a "memorandum of understanding" setting forth plans for coordinating the investigative efforts of law enforcement, prosecutors, and relevant public services agencies. *Id.* § 2151.421(J).
- The agency investigating abuse is directed to make "recommendations to the county prosecuting attorney." *Id.* § 2151.421(F)(2).
- The statute explicitly contemplates that criminal "charges" may "aris[e] from the report" by the mandatory reporter and that the accused might seek "suppression of any evidence obtained as a result of the report." *Id.* § 2151.421(F)(1).
- The mandatory reporter's "report is admissible in evidence" in a criminal proceeding and "is subject to discovery in accordance with the Rules of Criminal Procedure." *Id.* § 2151.421(H)(1).
- The statute includes a waiver of certain privileges, *id.* § 2151.421(A)(3), (A)(4)(c), including an express bar on using the physician-patient privilege to "exclud[e] evidence . . . in any judicial proceeding resulting from a report." *Id.* § 2151.421(G)(1)(b).

Together, these provisions reflect an intent to rely on mandatory reporters to generate evidence for use at the criminal trial of the person thought to be responsible.

The ties between the mandatory reporters and law enforcement were clear from the earliest versions of the statute, before the expansion of state agencies designed to protect children and thus before the expansion of constituencies involved in the mandatory reporting process. For example, when teachers were first added as mandatory reporters in 1965, they were required to report directly to the police, both orally and in a written report. *See* 131 Ohio Sess. Laws 632 (1965) (Am. H.B. 218). Although subsequent investigations would be made in cooperation with the applicable child welfare agency, law enforcement had "primary responsibility for such investigations," and the agency would "make such recommendations to the county prosecutor or city attorney as it deem[ed] necessary to protect such children as [were] brought to its attention." *Id.* at 632-33.

The reliance on mandatory reporters to produce evidence for use at trial is not unique to Ohio. The early mandatory reporting laws from the 1960s generally contemplated reporter participation at trial, relaxing "legal prohibitions against their testifying in court." Monrad Paulsen et al., *Child Abuse Reporting Laws—Some Legislative History*, 34 Geo. Wash. L. Rev. 482, 483 (1966). Prosecutors were deeply involved in efforts to pass mandatory reporting laws, *see id.* at 492 & n.40, and in some states reports were to be given directly to prosecutors. *See id.* at 495; Barbara Daly, *Willful Child Abuse and State Reporting Statutes*, 23 U. Miami L. Rev. 283, 322-23 (1969) (noting that five states provided for reports "*solely* to the county or district attorney," and several others

required copies to be forwarded to prosecutors and/or law enforcement). Wyoming's statute, for example, had a "purpose clause [that] include[d] the imposition of criminal responsibility upon any person who contributes to the injury of children." Alan Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 Fam. L.Q. 245, 249 (1974). And although many commentators at the time preferred non-punitive responses to mandatory reports, *see id.*, it was nonetheless apparent that cooperation with law enforcement would "result in a certain amount of prosecution no matter who receives the report." Daly, *supra*, at 325; *see also* Allan H. McCoid, *The Battered Child and Other Assaults Upon the Family: Part One*, 50 Minn. L. Rev. 1, 41 (1965) (noting the understanding that "criminal prosecution was likely to be the result of the report").

In short, mandatory reporting schemes like Ohio's rely on teachers to generate evidence for use at trial. Often, as in this case, the report is made on the basis of *ex parte* statements elicited from the child, and the child's account is introduced at trial through the reporter's testimony or written report without affording the accused any opportunity to explore the basis for the child's statements through in-court cross examination or an acceptable substitute. As implemented in this case, Ohio's mandatory reporting regime bears a "close[] kinship to the abuses at which the Confrontation Clause was directed," and L.P.'s statements should therefore be treated as testimonial under *Crawford*. 541 U.S. at 68; *see also Bryant*, 131 S. Ct. at 1155 (describing the purpose of the Confrontation Clause); *cf.* Brief for the United States at 46 n.18, *White v. Illinois*, 502 U.S. 346, 1991 U.S. S. Ct. Briefs LEXIS 397 (filed July 31, 1991) (No. 90-6113) (arguing that pediatrician's questioning of a child abuse

victim "may be regarded as functionally equivalent to other forms of official interrogation that result in statements by a 'witness'").

C. In recent cases that have tested the outer limits of "testimonial" evidence, this Court has looked to a broader range of circumstances to determine whether the right to confrontation has been triggered. *See generally Bryant*, 131 S. Ct. at 1155; *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012) (plurality opinion) (looking to "all of the surrounding circumstances"). Three relevant circumstances have carried particular force, and—although no deeper contextual analysis is required in this case—all three confirm that L.P.'s statements here are properly treated as testimonial.

*Purpose.* The Confrontation Clause requires an objective consideration of "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Bryant*, 131 S. Ct. at 1156. The circumstances here reveal that the teachers' purpose was to investigate the potentially criminal conduct that led to L.P.'s injuries—and the person responsible. Ms. Whitley's first question was "What happened?", rather than "What is happening?", thus reflecting an inquiry into past conduct rather than any immediate threat. JA27; *see Davis*, 547 U.S. at 830. Ms. Whitley promptly involved a co-teacher, Debra Jones. JA27-28, 57. Like Ms. Whitley, Ms. Jones sought information on the cause of L.P.'s injuries: "Who did this?" (thus assuming both that there was a "who" and that the "who" had inflicted an injury) and "What happened to you?", JA59. Once L.P. appeared to have implicated "Dee," Ms. Jones took him to the supervisor, Ms. Cooper, who directed Ms. Whitley to make the mandatory report, JA64-65. And from L.P.'s perspective, the

teachers asking him questions were the primary authority figures he encountered outside the home with the power to punish him and others; the questions were serious and incorporated assumptions about the likeliest cause of the injuries; the pressure to identify a person responsible for his injuries was significant; and he ultimately accused "Dee" of wrongful behavior.

*Formality*. The circumstances of the teachers' questioning of L.P. were sufficiently "formal" within the meaning of *Crawford* and *Davis*. L.P. was separated from the classroom, brought to a supervisor, and asked pointed questions aimed at eliciting statements regarding potential criminal conduct. The questioners understandably took the investigation quite seriously, since knowingly making a false report of child abuse is itself a criminal offense, *see* Ohio Rev. Code § 2151.421(H)(3), as is knowingly causing another person to do so, *see id.* *Cf. Davis*, 547 U.S. at 830 n.5 ("It imports sufficient formality, in our view, that lies to such officers are criminal offenses."). At the same time, failing to report abuse could expose the teachers to liability as well. Ohio Rev. Code § 2151.421(M).

*Reliability*. Finally, this Court has looked to whether the circumstances suggest that "the prospect of fabrication" is "significantly diminished" and thus that there is no need to subject the statements to "the crucible of cross-examination." *Bryant*, 131 S. Ct. at 1155 (citing *Davis*, 547 U.S. at 822)). In light of *Bryant*'s holding, it is now clear that "reliability is a salient characteristic of a statement that falls outside the reach of the Confrontation Clause." *Williams*, 132 S. Ct. at 2243. A statement, such as an excited utterance, that is thought to be categorically and intrinsi-

cally reliable is more likely to be non-testimonial. *Bryant*, 131 S. Ct. at 1157 n.9.

The statements elicited by L.P.'s teachers do not fall within any traditional hearsay exception. Indeed, the Court relied on an analogous historical case *excluding* a child's out-of-court account of sexual abuse (to the victim's mother) to distinguish the facts in *Davis*, which involved statements during an ongoing emergency akin to an excited utterance. 547 U.S. at 828 (citing *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779)); *see also Bryant*, 131 S. Ct. at 1157 (noting parallels between *Davis* and the excited utterance exception).

To admit the *ex parte* statements elicited by a teacher from a young child would be particularly perverse because such statements are in fact notoriously *unreliable*. Young children are susceptible to suggestion, which is enhanced when the suggestive questioning is conducted by persons in authority. Young children are also routinely misunderstood, and often unable to provide an accurate account of past events once they have been improperly interviewed by an untrained questioner. *See generally infra* Part II. Under *Bryant*, the fact that young children's statements are so likely to be unreliable militates strongly in favor of requiring confrontation, whether through in-court cross-examination or a constitutionally acceptable substitute.

## II. CHILDREN'S STATEMENTS TO TEACHERS ABOUT ABUSE ARE OFTEN HIGHLY UNRELIABLE.

Ohio channels its initial investigations of criminal child abuse through mandatory reporters, such as L.P.'s teachers, whose reports then trigger a series of responses by Ohio's child protection agencies and

services, working in cooperation with police and prosecutors. An express and laudable goal of Ohio's regime is the "elimination of all unnecessary interviews of children who are the subject of [mandatory reporters'] reports," and "when feasible, providing for only one interview of a child." Ohio Rev. Code § 2151.421(J)(2). When the system works as intended, police never interview a child victim at all—only the mandatory reporters themselves or child protection officials do so. And, on the state's view here, that would mean that statements elicited from children introduced to prove criminal child abuse would rarely (if ever) be subject to the accused's confrontation right. *See, e.g.*, Pet'r's Br. at 50-51 (arguing that statements are not testimonial when elicited by those who "have a purpose to protect the children" rather than to gather evidence "to ensure a criminal conviction"). Trial by *ex parte* testimony would be the norm.

But the concerns about the "reliability of evidence" that motivate the confrontation right are at their apex in child abuse cases. *Crawford*, 541 U.S. at 61. Children are notoriously "vulnerable to suggestion," *Maryland v. Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting), and given their unique role as caretakers and authority figures, teachers are particularly unsuited to obtain reliable statements when interviewing young children.

### A. Children Are Susceptible To Suggestion.

Children, and young children in particular, are highly susceptible to suggestion. *See* John E. B. Myers, *Children in Court, in Child Welfare Law and Practice* 641, 641-42 (Donald N. Duquette & Ann M. Haralambie eds., 2010) (noting that age is single most reliable factor in predicting a child's suggestibility). This is true in "virtually all events and eyewit-

ness contexts." *Id.* at 642; *see also Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008) ("Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement."). Whenever a young child is asked to give an account of past events, there is always a risk that the statements elicited will reflect the questioner's suggestion rather than the child's memory or experience. This problem of suggestion results from a combination of physiological and developmental factors, and it is exacerbated by common questioning techniques often employed by untrained laypersons, such as teachers, as further explained below.

*Physiology*. The problem of suggestion is so pronounced in interviews of young children in large part because their brains are not fully developed. In particular, the prefrontal cortex does not mature until young adulthood. Debra A. Poole & Michael E. Lamb, *Investigative Interviews of Children: A Guide for Helping Professionals* 36 (1998). As a result, young children are less capable of both storing memory and accurately recounting the memories they do store. *Id.* The immaturity of the prefrontal cortex also causes "source-monitoring errors"—young children have great difficulty identifying the source of knowledge, specifically whether it came from their own experience or not. *Id.* at 43-44. Thus, a young child may not be aware that "knowledge" about abuse was actually gained from an interview by an adult.

*Mental Development*. Young children also have small vocabularies, which makes it more difficult both to express themselves and to understand what is being expressed to them. This is compounded by the fact that children are less likely than adults to inform interviewers that they are confused or do not under-

stand a question. Thomas D. Lyon, *Investigative Interviewing of the Child*, *in Child Welfare Law and Practice* 87, 91 (Donald N. Duquette & Ann M. Haralambie eds., 2010). Furthermore, "very young children are not even aware of their own incomprehension." *Id.* And partly due to their limited vocabularies, children's statements are easily and often misconstrued. Stephen J. Ceci & Maggie Bruck, *Jeopardy in the Courtroom* 258 (2009). Moreover, young children can misinterpret intentions of others, so that innocent "good touches" may be readily confused by children with "bad touches." Poole & Lamb, *supra*, at 16, 19-20.

*Technique*. Children's susceptibility to suggestion makes it very difficult to obtain valuable information from them. It is possible to avoid suggestion, but doing so "requires careful investigative procedures, as well as a realistic awareness of [children's] capacities and tendencies." Michael E. Lamb et al., *A Structured Forensic Interview Protocol Improves the Quality and Informativeness of Investigative Interviews with Children*, 31 Child Abuse & Negl. 1201, 1203 (2007). The ability to elicit reliable statements takes training, and even well-trained interviewers sometimes mistakenly fall back on improper techniques. Poole & Lamb, *supra*, at 99.

Classroom teachers do not, as a general rule, receive specific training in forensic interviewing of children. Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 59 (2000) ("[T]he fact that the first contact giving rise to a suspicion of abuse is most often with parents or teachers, not with official investigators, is cause for concern rather than for comfort. Official investigators may be trained to avoid suggestiveness; most parents and

teachers are not."); Poole & Lamb, *supra*, at 106-12 (discussing the training required for forensic interviewers opposed to clinical interviewers).

Untrained interviewers (such as L.P.'s teachers) often unwittingly resort to many of the strongest forms of suggestion, which have been shown to lead children to make false statements. For example, instead of using open-ended prompts that invite a narrative response (such as "tell me the reason you came to talk to me"), Lamb et al., *supra*, at 1203, interviewers turn to closed-ended prompts that suggest a limited range of acceptable answers, *id.* at 1203-04, and interviewers engage in repetition of questions and selective reinforcement. Ceci & Friedman, *supra*, at 53-54. When children are "exposed to these forms of suggestion the error rates can be very high, sometimes exceeding 50%." *Id.*

These common but improper interview techniques can have terrible consequences. For example, in the height of the 1980s day-care hysteria, forty people in Bakersfield, California alone were convicted of ritualistic child abuse at day care centers based on the testimony of children. John Johnson, *Testimony in Child Abuse Case Recanted*, L.A. Times, Jan. 13, 2004, http://articles.latimes.com/2004/jan/13/local/mestoll13. Investigators later discovered that improper interviewing techniques were used on most of the alleged victims, and many of the alleged victims recanted their statements as adults. *See id.*; *see also Craig*, 497 U.S. at 868-69 (Scalia, J., dissenting) (describing "well-intentioned" but improper techniques that led to false convictions of child abuse of many innocent people in Jordan, Minnesota).

*The Humpty-Dumpty Effect.* The effects of improper suggestion can be irreversible. Once a child's account is tainted by improper interviewing techniques,

it is often impossible to uncover the child's original account. Poole & Lamb, *supra*, at 15. This is known as the "Humpty-Dumpty effect." *Id.* Worse, it is often difficult to discern that a child's account has been tainted by prior improper questioning. *See* Lyon, *supra*, at 87. The Humpty Dumpty effect thus puts a premium on proper questioning in the first instance. Admitting statements elicited by teachers in the lead up to a Hotline call will have the perverse effect of discouraging proper interviewing at facilities better designed to obtain accurate information from children.

### B. Teachers Face Special Challenges In Eliciting Statements About Abuse From Children.

Ohio seeks to channel investigations of criminal child abuse through teachers while simultaneously immunizing the statements teachers elicit from the Sixth Amendment confrontation right. But not only are teachers generally untrained as forensic interviewers, but their role as educators makes them especially unsuited to elicit accurate accounts of child abuse from young children. The special challenges teachers face can be traced to three primary causes.

*The Authority Figure Problem.* Even with the best of intentions, teachers sometimes struggle to avoid suggestion when questioning children about abuse. Children view teachers as authority figures. As a general rule, a child is more susceptible to improper influence when interviewed by an authority figure. *See* Myers, *supra*, at 643. Children are trained, from the first day of school, to give deference to teachers' assertions and avoid being contradictory.

Particularly troubling for the problem of suggestion, children are taught to give teachers the "right"

answer, *i.e.*, the answer a child thinks the teacher wants. Lyon, *supra*, at 94-95. When a teacher is investigating a suspicion of abuse—as Jones put it to L.P., "who did this?"—the perceived "right" answer means an accusation of abuse. The fact that L.P. later gave different answers to the same question (*i.e.*, to the question "What happened?") adds to the probability that suggestion pressured him to give an answer that would satisfy the teacher, even if untrue. Children often struggle to "stand their ground" in the face of suggestive questions. Myers, *supra*, at 643. This is especially true of young children, who are "less able than older children to withstand the social demands of the interview." *Id.*

*The Role Model Problem.* Teachers are not just authority figures; they are role models as well. Children typically have a strong desire to please the role models in their lives. Such "an important and influential person to [a] child" actually creates "more false positive statements than questioning by an investigator whom the child does not know." Ceci & Friedman, *supra*, at 59.

Relatedly, children often feel shy about expressing their incomprehension to those they look up to. Though many teachers encourage their students to speak up when confused in class, few children actually do so. Especially in the context of the teacher-student relationship, "[c]hildren do not usually volunteer that they do not understand something, and they often give an answer regardless of whether they actually know what they were asked." Ann M. Haralambie & Lauren Adams, *Interviewing and Counseling Legal Clients Who Are Children, in Child Welfare Law and Practice* 111, 116 (Donald N. Duquette & Ann M. Haralambie eds., 2010). This natural tendency is innocuous enough in many con-

texts, but not where the child's statements can lead to serious criminal charges. All the worse if the statements are categorically immune from the confrontation right, as petitioner proposes.

*The Training Problem.* Even if teachers could overcome the problems associated with their dual roles as authority figures and role models, they might still struggle to elicit reliable statements from their young students because of a lack of effective training. Most teachers simply are not "trained to avoid suggestiveness." Ceci & Friedman, *supra*, at 59. And even with training, some experts believe that certain individuals, such as teachers, who spend significant amounts of time with children, may "think 'I'm good with kids, and so I can wing this.'" Lyon, *supra*, at 95. Such thinking leads to suggestive interviews and tainted statements from children. *Id.*

### C. The Questioning Of L.P. Is A Case Study In What Not To Do.

The questioning in this case bears the hallmarks of an improper interview, conducted by teachers who were untrained in proper interviewing and poorly situated to elicit reliable statements.

*Repeated and Closed-Ended Questions.* When Ramona Whitley first saw the apparent injuries to L.P.'s face, she asked him, "What happened?" JA27. L.P. answered that he had fallen and hurt his face. Whitley ignored L.P.'s answer and again asked how he hurt his face. Again L.P. responded that he fell. Whitley and L.P. then moved from the lunchroom to the classroom. In the classroom, Whitley again asked L.P., "What happened?" Whitley's repetition of the same questions over and over would naturally signal her bias toward a particular answer (abuse) and her

dissatisfaction with the answer L.P. had first provided. *See* Ceci & Bruck, *supra*, at 78-79.

Whitley then asked Debra Jones to take a look at L.P., and she repeated the same question—"what happened?"—and added another, even more suggestive one: "Who did this?" JA59. This question assumed there was a "who" and that "this", L.P's marks, had been caused by a specific person that L.P. knew. A "bewildered" L.P. at last changed his story and gave the kind of answer his teachers seemed to expect, by giving the name of a person he knew and labeling that person as the culprit. But L.P. remained bewildered and reticent, JA64, 82, and Jones was not sure if he understood the questions he was being asked, JA81-82. As a result, Jones felt the need "to say a few things" while trying "not to put words in his mouth." JA82. *See* Lyon, *supra*, at 89 ("The more the interviewer talks, the more the interview is about the interviewers' suppositions rather than the child's memory.").

*The Problematic Setting*. The teachers' improper questioning techniques were exacerbated by the setting. The questioning was initiated by the co-teacher (Whitley) in a lunch room, but Whitley soon involved the lead teacher (Jones), who took L.P. from the classroom to the teachers' supervisor, Ms. Cooper. During the course of the questioning, therefore, L.P. was moved from an informal setting to increasingly formal settings, and he faced additional adults who had increasing degrees of authority. All of this would increase the risk of improper suggestion in an interview of a young child. *See* Sarah O'Neill & Rachel Zajac, *Preparing Children for Cross-Examination*, 19 Psych. Pub. Pol. & L. 307, 315 (2013) ("[F]actors that influence children's responding . . . include but are not limited to . . . the perceived credibility and au-

thority of the interviewer; children's desire to please adults; and the formality of the setting." (citations omitted)); Ceci & Bruck, *supra*, at 155 (explaining that additional adults tilt the odds toward false disclosures).

None of this is to suggest that teachers can never elicit the truth—or even that L.P.'s statements were necessarily false. The statements were not reliable, however.

## III. IMMUNIZING STATEMENTS TO MANDATORY REPORTERS FROM CONFRONTATION WILL DESTROY FAMILIES AND HARM CHILDREN.

If the Court were to adopt Ohio's proposed position in this case, *amici* are concerned that Ohio and other states would redouble their reliance on mandatory reporters to elicit and report on children's accounts of alleged abuse, to the potential exclusion of more reliable sources of information and sources that are better able to elicit more reliable information from children. Under such a regime, children's statements to teachers would be admissible without regard to the Confrontation Clause.

The same would not be true, however, of statements made to police personnel or consultants working with police who are fully trained in techniques designed both to elicit reliable answers from children and to avoid the "Humpty Dumpty" effect. Because statements to such trained investigators would *not* be immune from confrontation, they are less likely to be sought in the first place: relying on police or specialists working in conjunction with them to elicit statements from children would make it more difficult to secure convictions, as the Sixth Amendment confrontation right would too often get in the way.

When a Hotline call is made by any child abuse reporter, whether a mandatory reporter or a voluntary child abuse report, that should be the starting point, not the end point, of a criminal or child protection investigation. If this Court were to hold that statements of young children to mandatory reporters are not subject to the confrontation right, however, *amici* fear that the Hotline call might become the end point of the investigation in many cases, given that a child's statements may provide the strongest case for the prosecutor, and further inquiry through more accurate interviewing methods could lead the criminal case to unravel.

The predictable result of Ohio's proposed position in this case would be an increase in the number of convictions of child abuse based on faulty and unreliable statements made to teachers who do not have the benefit of training in child interview techniques. In other words, the predictable result would be the result that the Confrontation Clause is specifically designed to avoid: false convictions.

But that is not all. Because this question arises in the context of child abuse accusations, the harms from the regime advocated by the state would extend far beyond the wrongly imprisoned defendant himself, to the children at issue as well as their families. Children who provide statements in response to suggestive questioning can face life-long torment over what they have done. Moreover, immunizing statements elicited by teachers would have significant collateral effects on civil proceedings. State child protective agencies often use "summary" proceedings in which the protections afforded to children and families are already limited. Any further reduction in the reliability of such proceedings—as would accompany a push in the direction of abbreviated investigation of

abuse—will exacerbate the harms to children and families.

### A. False Convictions Cause Profound Psychological Harm To Children.

Allowing criminal conviction and imprisonment based on improperly elicited statements from a child is harmful enough. But the harms do not stop there.

Children who come to realize (or who always knew) that their statements were false may spend their lives tormented by guilt. *See, e.g.*, Maggie Jones, *Who Was Abused?,* N.Y. Times Magazine, Sept. 19, 2004, http://www.nytimes.com/2004/09/19/magazine/19KIDSL.html?pagewanted=print&position=&_r=0. For some, the guilt is too much to bear: Carla Jo Modhal, for example, attempted suicide seventeen times after falsely testifying (after being subjected to improper interviewing techniques) that her father had abused her. *See* Kimberley Sevcik, *Mean Justice's Dirty Secrets*, Rolling Stone (2005), *available at* http://truthinjustice.org/ed-jagels.htm; *see also* Mark Arax, *'After 15 Years I Finally Had Gotten Justice'*, L.A. Times, May 27, 1999, http://articles.latimes.com/1999/may/27/news/mn-41527. Rachael Clearly Patton also repeatedly attempted suicide, and was repeatedly committed to mental institutions, after having falsely claimed that her father raped her when she was six years old. David Ashenfelter, *'I'm Missing 16 Years of My Life: Prison Nightmare Ends After Daughter Recants Tale of Rape*, Detroit Free Press, Sept. 13, 2005, at A1. The details of Rachael's false account came from suggestive questions her mother had asked her. *Id.*

The psychological harms associated with having been led to falsely identify an abuser can surface in other ways as well. For example, Edward Sampley

was one of six boys who testified that they had been abused by a man named John Stoll, the father of one of Sampley's friends. *See* Jones, *supra*; Johnson, *supra*. During an investigation of Stoll, Sampley was interviewed numerous times and asked many suggestive questions, which ultimately caused him to falsely tell investigators that Stoll had abused him. Stoll was later convicted and sentenced to forty years in prison. Sampley today fears interacting with and even being in the presence of children—including his own daughter—because he "knows first hand that children do lie" and what can happen if they do. Jones, *supra.*

Other children who provide false accounts of abuse suffer a different form of enduring torment: they grow up falsely believing their own stories of abuse. *See id*. The initial false account becomes reinforced by families and therapists, and the children are thus forced to struggle with coming to terms with often heinous stories of abuse that have no basis in reality.

### B. Immunizing Unreliable Statements From Confrontation Could Have Collateral Effects In Civil Proceedings.

If this Court were to endorse the introduction of children's accounts of abuse through teachers as surrogates in a criminal trial, the troubling consequences may bleed over to civil proceedings as well.

First of all, many courts have looked to the Confrontation Clause to determine what protections to afford litigants in civil proceedings. *See, e.g.*, *In re Hunter*, 982 N.E.2d 953, 960 (Ill. App. Ct. 2013) (holding that "*Crawford* applies to proceedings under" Illinois's Sexually Dangerous Persons Act); *In re C.B.*, 574 So. 2d 1369, 1374 (Miss. 1990) ("This is not a criminal case, but we are of the opinion that the

right of confrontation should be accorded to an accused parent in such cases as this."); *Rivera v. Marcus*, 696 F.2d 1016, 1028 (2d Cir. 1982) (holding that, as a matter of due process, foster parents must be afforded the right to confront adverse witnesses in proceedings to remove children from foster care).

There is also a risk that immunizing statements to mandatory reporters from confrontation will also limit the breadth of investigations into abuse in both civil and criminal contexts. After all, if a teacher can act as an effective surrogate for the statements he or she elicits from a young child at trial, then the need to present and thus to investigate corroborating evidence is significantly diminished. The investigation can largely end where it began, with a teacher's suggestive questioning of the young child. Such a result poses a significant threat to families in civil litigation. The effects may be felt in divorce, child custody, and visitation proceedings where courts determine who will be the custodial parent and whether, when, and how often children will have contact with the non-custodial parent.

And the effects may be felt most strongly in the context of proceedings before child protective agencies. Many states have child protection agencies that can restrict parental rights in summary administrative proceedings based on an "indication" (rather than a finding based on the full weight of the evidence) of abuse. *See generally* Susan Badeau et al., *A Child's Journey Through the Child Welfare System*, *in Child Welfare Law and Practice* 341 (Donald N. Duquette & Ann M. Haralambie eds., 2010) (describing the child welfare system); *see also Dupuy v. Samuels*, 397 F.3d 493, 499, 504-06 (7th Cir. 2005) (criticizing the "credible evidence" standard) (citing *Valmonte v. Bane*, 18 F.3d 992, 1002-03 (2d Cir. 1994)). Channeling more

interviews of children to untrained interlocutors—as the vast majority of teachers are—will mean introducing less reliable statements into the mix of such summary proceedings. The proceedings will thus produce even less reliable outcomes than already results from their procedural limitations.

It is no secret that children and families already face severe harms due to the high rate of error in such summary proceedings. In Illinois, for example, those who do challenge child protection agency rulings were once shown to have been exonerated at a "staggering" rate of almost 75%. *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1136 (N.D. Ill. 2001). But all too often, initial indications are not challenged at all, because many caretakers do not know how to begin such a challenge, and lack the wherewithal to pursue it.

This Court has long recognized the importance of protecting the sanctity of the family unit. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion) (recognizing that "the Constitution protects the sanctity of the family" and family members' decisions to live with one another). Where state action may lead to the termination of parents' relationships with their children, special consideration must be given to both the parents' and children's shared interest in the maintenance of the family. *See Santosky v. Kramer*, 455 U.S. 745, 753, 760 (1982) (holding that "preventing erroneous termination of [parents' and children's] natural relationship" is a crucial consideration in parental termination matters). But endorsing official reliance on statements elicited from young children through suggestive interview techniques puts both children and their families in jeopardy.

The Confrontation Clause does not bar states from mandating that teachers report indications of child abuse to proper authorities. But neither the Confrontation Clause, nor the extensive scientific teaching on the dangers of conducting suggestive interviews of children, supports constructing a constitutional framework through which children's statements to teachers are immunized from confrontation. In the criminal context, the Constitution prescribes the required form of scrutiny: confrontation. *Crawford*, 541 U.S. at 61 (explaining that the Confrontation Clause "ensure[s] reliability of evidence" through the "procedural . . . guarantee" of confrontation). Holding states to that Sixth Amendment guarantee will lead to deeper and more careful investigations of abuse, enhance the reliability of criminal trials, and simultaneously reduce the collateral effects of false accounts of abuse in the civil context. In short, affirming the decision below will protect children and their families.

## CONCLUSION

The judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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