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 PETITIONER

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QUESTIONS PRESENTED

1. Does a daycare teacher's obligation to report suspected child abuse make that teacher an "agent of law enforcement" for purposes of the Confrontation Clause?

2. Do a child's out-of-court statements to daycare teachers in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

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JURISDICTION

The Ohio Supreme Court entered judgment on October 30, 2013. It denied Ohio's motion for reconsideration on December 24, 2013. On March 13, 2014, Justice Kagan granted a 45-day extension of time to file a petition for writ of certiorari. Ohio timely filed its petition on May 8, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Section One of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Ohio reproduces relevant portions of Ohio Rev. Code § 2151.421 (its child-abuse reporting statute) in an appendix to this brief.

STATEMENT

A. Darius Clark Assaulted His Girlfriend's Two Small Children

In early 2010, Respondent Darius Clark lived in Cleveland with his girlfriend, T.T., her three-and-a-half-year-old son, L.P., and her one-and-a-half-year-old daughter, A.T. Trial Tr. ("Tr.") 451-52; JA153, 158. Clark has gone by the nickname "Dee" since his childhood. Tr. 557, 677. He and T.T. began living together in 2008. Tr. 532-33. Clark did not hold a job then or thereafter. Tr. 534, 674. When T.T.'s employer fired her in 2009, T.T. testified, Clark acted as her pimp and persuaded her to earn money by traveling to Washington D.C. to engage in prostitution. Tr. 532-36. T.T.'s grandmother initially watched T.T.'s children during these trips, but Clark took over once T.T.'s family discovered their purpose. Tr. 537. T.T.—admittedly described as a liar even by her mother, Tr. 462—testified that Clark had not harmed her children before she began taking these trips, but had "slapped [her] a couple times, punched [her] a couple times," and "told [her] if [she] ever [left] him he'd kill [her]." Tr. 538-39.

In February 2010, T.T. and her children attended a family party. Tr. 450-51. Family members suggested that the children looked fine, but T.T.'s mother noticed bruises on A.T.'s chest. Tr. 425, 458-59. She expressed concern to T.T., who said her kids were safe with Clark. *Id.* At that time, T.T. claimed that L.P. had caused A.T.'s bruising. Tr. 541. According to T.T.'s mother, however, L.P. told her "Dee did it." Tr. 459.

On March 8, 2010, T.T. testified, she visited a Cleveland-area friend, and Clark watched her chil-

dren for a few days. Tr. 543-44. By March 12 or so, Clark left an agitated voicemail with T.T.'s grandmother saying "[i]f you want these kids, you better hurry up and get them." Tr. 403, 598-99. T.T.'s family contacted her. Tr. 403-04, 545. When T.T. picked up her children, she noticed that A.T. had burn marks on her face, arm, and chest. *Id.* Clark claimed the burns were accidental. Tr. 545-47.

In February or March 2010, L.P. began attending the William Patrick Day Head Start Center, operated by the Council for Economic Opportunities of Greater Cleveland. JA25-28. Debra Jones, the lead teacher, and Ramona Whitley, an assistant, taught the class from 1:00 p.m. to 4:30 p.m. JA25-26, 29, 39-40, 54-55. On March 16, T.T. picked up L.P. from school, and conversed with his teachers about chalk dust in his hair. JA28-29, 31, 66-67; Tr. 549. The teachers recalled that L.P. looked fine that day; he had no marks on his face. JA31, 66-67. T.T. left for Washington late that night, placing her children in Clark's care. Tr. 548-49.

The next afternoon, March 17, Clark took L.P. to school. JA34-35. While in the lunchroom, Whitley noticed, L.P. acted more reserved than usual and refused to eat. JA37, 44. On closer inspection, L.P.'s eye appeared "bloodshot" or "bloodstained." JA34. Whitley asked, "What happened?" JA27. L.P. initially said nothing, then "I fell." *Id.* Whitley did not think much of it in the lunchroom. *Id.*

In the brighter classroom setting, however, Whitley noticed that L.P.'s face had welts and red marks from "whips of some sort." JA27, 33-34. On seeing these more extensive injuries, Whitley was "kind of like in shock." JA27. She again asked L.P., "Oh, what happened?," alerting the lead teacher, Jones.

JA27, 45. On seeing L.P., Jones too asked, "Whoa, what happened?" and "Who did this?" JA27, 59. L.P. "seemed kind of bewildered" and "said something like, Dee, Dee." JA59; *see* JA46. The teachers did not know what L.P. meant. JA59. Thinking that another child might have harmed L.P., Jones asked whether Dee was "big or little." JA60-61. L.P. responded "Dee is big." JA64.

Jones took L.P. to her supervisor. *Id.* The supervisor lifted L.P.'s shirt, revealing more injuries. JA65-66. She determined that the first person to observe L.P.'s injuries should "make the call" to the Cuyahoga County Department of Children and Family Services to report child abuse. JA65. Whitley called the child-abuse hotline, 696-KIDS. JA35.

A social worker, Howard Little, arrived at the daycare. JA144. Little asked L.P. questions while playing with toys. JA145-46. L.P. initially told Little that he had fallen, but "later stated that the bruises came from Dee." JA146. When Clark arrived, he claimed that he "knew nothing about" the injuries, then that he had last spanked L.P. a week ago, and then that L.P. "had gotten [the injuries] from playing outside because he lives in the projects." JA147-48. Little asked if anyone in his house went by "Dee"; Clark said "he doesn't know Dee." JA149. Ultimately, Little told Clark "there's some real issues we need to still further discuss," and called his supervisor. JA150. While Little conversed with his supervisor, Clark said "I don't have no time for this" and started leaving with L.P. *Id.* Little and Clark had "kind of a stare-down," but Little allowed him to pass to avoid a fight. JA150-51. Clark drove off before Little could record his car's information.

Id. Little went to L.P.'s known residence, and left material for the family to contact him. JA151.

That night, another social worker, Sarah Bolog, left additional material. JA92. She spoke with T.T. over the phone the next morning, March 18. T.T., still in Washington, claimed to be at a health center with her kids because L.P. had pinkeye. JA94. Bolog knew T.T. was lying because she had alerted area health centers to contact social workers if T.T. or her children arrived. JA95-96. Bolog eventually obtained the phone numbers for T.T.'s mother and grandmother, and they suggested she look for Clark at his mother's home. JA96-98.

Accompanied by her supervisor, Bolog drove to that house and found T.T.'s children in the care of teenagers. JA99-100. When Bolog saw the kids, she knew she had a "very serious situation." JA102; *see* JA100-03. On top of L.P.'s injuries, A.T. had two black eyes and a large burn on her cheek. JA102. One hand, swollen badly, was largely unusable and "very cold." JA106, 111. Two "pigtails" in A.T.'s hair had been "ripped out at the root," JA106, which led to a staph infection, Tr. 434-35. Bolog called 911 out of concern for her safety; she also contacted a child-abuse detective. JA103. The police arrived, summoning EMS to take the children to the hospital. Tr. 193, 197. An emergency-room doctor treated the children and documented their injuries. Tr. 313-59.

The children's great aunt and grandmother met Bolog at the hospital. Tr. 423-24, 456. Their great aunt fought back tears on seeing them. Tr. 424. A.T. was bruised and burned in multiple places, including from a cigarette. Tr. 424, 436-38, 457. L.P. had a black eye, marks from a belt on his stomach and back, and bruises over his body. Tr. 424-25, 430-35.

The children were placed in their great aunt's care. Tr. 423. Sometime later while resting in her lap, L.P. told her "Dee did it." Tr. 431. He said the same to his grandmother. Tr. 460.

By trial, A.T. had scars from her burn marks, Tr. 434; L.P. continued to receive counseling and complain of headaches, Tr. 441. L.P.'s grandmother said that, "[m]entally, he's really messed up." Tr. 457.

B. A Jury Convicted Clark, But The State Appellate Courts Reversed

1. A grand jury indicted Clark on five counts of felonious assault (one count related to L.P., the others to A.T.), two counts of endangering children (one count each for L.P. and A.T.), and two counts of domestic violence (one count each for L.P. and A.T.). Tr. 6-7. T.T. was indicted on similar charges. Tr. 566. She testified against Clark after pleading guilty to child endangerment, domestic violence, and permitting child abuse. Tr. 531-91.

Before trial, the court held a competency hearing for L.P. JA5-12. The prosecution asked him questions relating to where he went to school, his birthday, who he lives with, and the like. *Id.* After this questioning, the court found L.P. "not competent to testify" based on "his demeanor," which was "perfectly understandable" given his young age. JA12.

Clark moved to preclude testimony about L.P.'s out-of-court statements identifying "Dee." JA13-19. His counsel conceded that "[i]f *Crawford* [*v. Washington*, 541 U.S. 36 (2004)] wasn't around, I'd have no argument" because Ohio R. Evid. 807 allows reliable statements from children in abuse cases. JA13. But he argued that the Confrontation Clause prohibited L.P.'s statements because they were testimonial

and he could not cross-examine L.P. JA13-14, 16-17. The prosecution responded that L.P.'s statements were non-testimonial and admissible under Ohio R. Evid. 807. JA14-16.

The court denied Clark's motion. JA20-24. It concluded that L.P.'s statements satisfied Ohio R. Evid. 807 because "the totality of circumstances surrounding the making of the statement[s] here provide . . . particular guarantees of trustworthiness." JA21-22. The court also found that L.P.'s statements implicating "Dee" were non-testimonial, and so permitted testimony about them from his teachers, JA46, 60, the social workers, JA128, 146, and his great aunt and grandmother, Tr. 431-32, 460.

Clark's main defense was that T.T. abused the children. His witness, a friend, suggested she saw T.T. hitting them back in 2009. Tr. 671.

The jury found Clark guilty on all counts but one assault count related to A.T.'s injuries. Tr. 770-73. The trial court sentenced Clark to 28 years' imprisonment. Tr. 790.

2. Ohio's Eighth District Court of Appeals reversed. Pet. App. 52a. It treated L.P.'s statements to the social workers (at the school, at Clark's mother's house, and at the hospital) as testimonial because the workers were "part of the preliminary investigation to aid law enforcement" and were not "made in the midst of a police emergency" or for "medical treatment or diagnosis." Pet. App. 60a-62a. It held that L.P.'s statements to his teachers were also testimonial because "the primary purpose of Jones and Whitley questioning L.P. was to report potential child abuse to law enforcement." Pet. App. 63a. (The court also identified a police officer as tes-

tifying that L.P. identified Clark as his abuser. Pet. App. 58a. But the officer said that L.P. did not tell her who abused him, JA160, only that L.P. identified Clark's picture as "Dee," JA162, 172-73.)

The court separately considered whether L.P.'s statements to his family were admissible under Ohio R. Evid. 807. Pet. App. 63a. It held that the trial court abused its discretion in admitting the statements because they "lacked the 'particularized guarantees of trustworthiness'" required by the rule. Pet. App. 66a-68a.

3. Ohio appealed to the Ohio Supreme Court the holding that L.P.'s statements to his teachers were testimonial. The Ohio Supreme Court affirmed by a 4-3 vote. Pet. App. 17a. The majority recognized that the Confrontation Clause applies only to "testimonial" statements. Pet. App. 2a, 10a-15a. It noted that this Court had "enunciated the primary-purpose test to determine whether a statement made to a law-enforcement officer or an agent of law enforcement in the course of an investigation is testimonial." Pet. App. 2a. Under that test, statements are testimonial if their purpose is "'to establish or prove past events potentially relevant to later criminal prosecution.'" Pet. App. 3a (citation omitted).

The majority held that this primary-purpose test applied because L.P.'s teachers were police agents. Pet. App. 6a-9a. "Ohio law imposes a duty on all school officers and employees, including administrators and employees of child day-care centers, to report actual or suspected child abuse or neglect." Pet. App. 6a (citing Ohio Rev. Code § 2151.421). The majority recognized that "'the primary purpose of reporting is to facilitate the protection of abused and neglected children rather than to punish those who

maltreat them.'" Pet. App. 7a (citation omitted). But "'the General Assembly considered identification and/or prosecution of the perpetrator to be a necessary and appropriate adjunct in providing such protection, especially in the institutional setting.'" Pet. App. 7a-8a (citation omitted). "At a minimum," then, "when questioning a child about suspected abuse in furtherance of a duty pursuant to [Ohio Rev. Code §] 2151.421, a teacher acts in a dual capacity as an instructor and as an agent of the state for law-enforcement purposes." Pet. App. 15a.

The majority next held that the primary purpose of L.P.'s statements to his teachers rendered them testimonial. Pet. App. 8a-9a. It found that no ongoing emergency existed when L.P. made the statements. Pet. App. 15a-16a. L.P. had not complained about his injuries and, the majority reasoned, did not need "emergency medical care." Pet. App. 15a. Accordingly, it concluded that the teachers acted only "to fulfill their duties to report abuse." *Id.* The majority also characterized the interaction between L.P. and his teachers as "a formal question-and-answer format," which "sought facts concerning past criminal activity to identify the person responsible." Pet. App. 16a. It described that interaction as "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* (internal quotation marks omitted).

The dissent began by criticizing the majority's reliance on this Court's cases because they left open whether the Confrontation Clause governs statements to private individuals. Pet. App. 24a-25a. (The Ohio Supreme Court, by comparison, had held that "statements made to someone other than law-enforcement personnel" should be considered non-

testimonial unless "an objective witness would reasonably believe that the questioning served primarily a prosecutorial purpose." Pet. App. 26a.)

The dissent next criticized the idea that the teachers' reporting duty made them police agents. Pet. App. 30a-39a. The teachers were employed by the Council for Economic Opportunities of Greater Cleveland, and police did not influence their questions. Pet. App. 30a-31a. There was, moreover, "no indication that the General Assembly intended to deputize mandatory reporters as agents of law enforcement." Pet. App. 35a. Instead, "the primary purpose of reporting is to facilitate the protection of abused and neglected children." Pet. App. 33a.

Under Ohio's objective-witness test, the dissent found, "[a]n objective witness would reasonably believe that the teachers' questions enabled them to adequately assess the risk of harm for both L.P. and the other children at the school." Pet. App. 42a. L.P.'s statements were made in the classroom, "the questioning was informal and spontaneous," and the teachers were unsure whether "L.P.'s injuries were a result of abuse or of an accidental injury from playing with another child." Pet. App. 40a-41a. The teachers asked L.P. what happened "to understand how he had been injured" and "maintain a secure and orderly classroom." Pet. App. 42a. Their questions were "not to create evidence" for trial. *Id.*

SUMMARY OF ARGUMENT

I.A. For three reasons, the Court should hold that the Confrontation Clause does not apply to statements meant *solely* for private parties without *any* police direction. *First*, that view comports with the Confrontation Clause's textual focus on "witness"

testimony. Unlike with prior in-court testimony or custodial police interrogation, individuals do not "bear testimony" when they speak to friends, coworkers, or teachers. The Court has recognized this point in many settings, ranging from statements to friends about abuse to prison-yard conversations.

Second, the Confrontation Clause's purpose illustrates that statements made to private parties fall outside the clause. The Confrontation Clause halted the civil-law method of criminal procedure (a method used against colonial Americans in admiralty courts) by which justices of the peace examined witnesses, recorded their answers, and used that written testimony at trial. Unlike the use of statements made during custodial police interrogation (which resembles this abuse), a witness's testimony about a private conversation is far afield of it.

Third, the judiciary's traditional method of regulating statements between private parties confirms that they do not pertain to a constitutional right. Courts long regulated those statements under evidentiary rules *equally* applicable in criminal and civil trials, not confrontation rules applicable *only* in criminal trials. The common-law evolution of private-party hearsay standards also shows that courts viewed the standards as rooted in *changeable* rules of evidence, not *rigid* rules of confrontation.

B. At the least, statements to private parties by a child found too young to testify are non-testimonial. When a State's competency rules track the Confrontation Clause's testimonial rules (asking whether an individual can make solemn statements at trial), an incompetency finding shows that the out-of-court statements could not have been "witness" testimony. That conclusion comports with history. The common

law long allowed private parties to testify about statements from young children.

C. The conclusion that a young child's statements to a private party are non-testimonial does not open the door to trial by private-party hearsay. Hearsay rules backed by a general due-process check still regulate those statements. That makes good sense. Hearsay rules, not the Confrontation Clause, police reliability. And leaving private-party statements to hearsay rules allows for democratic evolution of those rules, an important benefit in child-abuse cases that are notoriously difficult to prosecute.

II. The Ohio Supreme Court mistakenly treated L.P.'s teachers as police agents because Ohio requires teachers to report child abuse. Both history and modern analysis confirm that teachers are not police agents. Reporting duties are nothing new. The common law recognized a general duty to report crime; this duty did not turn all citizens into public officers. Nor are reporters anything like the justices of the peace whose criminal investigations led to the clause. The statute creates merely a duty to *report*, not a duty to *investigate*. And the statute does not even require mandatory reporters to call police. It permits reports to social workers because it is primarily about protecting children, not prosecuting criminals. Finally, even if the teachers acted according to this duty, it is implausible that L.P. knew anything about the duty when conversing with them.

Related constitutional provisions point the same way. Under the Fourth Amendment, reporting laws do not turn reporters into police agents. This Court, for example, distinguished reporting laws like Ohio's that merely require reports of facts uncovered in the course of medical treatment from a hospital policy

requiring a search *specifically* for a criminal purpose. Lower courts, too, have rejected the notion that reporting duties turn private searches into government searches. Under the Fifth Amendment, courts have declined to equate mandatory reporters with police for purposes of their conversations with potential child abusers; the courts have thus found that reporters need not give *Miranda* warnings. Under the Sixth Amendment's right to counsel, courts have refused to treat prison informers as government agents when they converse with fellow prisoners merely because of a general reporting duty.

III. Even under the primary-purpose test applicable to police interrogations, L.P.'s statements were non-testimonial. Under that test, the totality of the circumstances determines whether a statement qualifies as a substitute for trial testimony. Three factors guide this inquiry: the questioner's perspective, the declarant's perspective, and the environment in which they spoke.

Here, the totality of the circumstances shows that L.P. did not make his statements to create evidence. As for the teachers, they acted to protect L.P. and secure the classroom. That is made plain by their question whether Dee was big or little. As for L.P., the Court should consider his young age when analyzing the purpose of a "reasonable person" with his physical traits. Taking his youth into account, L.P. was simply answering "reflexively" (similar to what this Court said might occur for injured victims). As for the environment, the questioning occurred in a classroom full of students.

ARGUMENT

The Sixth Amendment's Confrontation Clause (incorporated against the States by the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403 (1965)) gives a defendant "the right . . . to be confronted with the witnesses against him" "[i]n all criminal prosecutions." U.S. Const. amend. VI. This right applies *only* to "'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (citation omitted). The clause thus regulates "*testimonial* statements of a witness who [does] not appear at trial." *Id.* at 53-54 (emphasis added). Conversely, it does not regulate *non-testimonial* statements made in something other than a "witness" capacity; the witness limit is "so clearly reflected in the [clause's] text" that the limit "must fairly be said to mark out not merely its 'core,' but its perimeter" as well. *Davis v. Washington*, 547 U.S. 813, 824 (2006).

L.P.'s statements to his teachers were non-testimonial. The Confrontation Clause's text, purpose, and history show that hearsay rules, not confrontation rights, govern the admissibility of a young child's statements to private parties. *See* Part I. Further, Ohio's mandatory-reporting statute does not turn teachers into police "agents." *See* Part II. Finally, even if it did, L.P.'s statements are non-testimonial under the primary-purpose test applicable to the police. *See* Part III.

I. A YOUNG CHILD'S STATEMENTS TO INDIVIDUALS WHO ARE NOT POLICE AGENTS ARE NOT TESTIMONIAL UNDER THE CONFRONTATION CLAUSE

The Court has reserved "whether and when statements made to someone other than law en-

forcement personnel are 'testimonial.'" *Davis*, 547 U.S. at 823 n.2; *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 n.3 (2011). This case squarely presents that question: L.P. identified Clark to his *teachers*. JA25-26, 59. The Court should now hold that the Confrontation Clause does not apply to statements meant for private parties without any police direction. At the least, it should reach that holding for statements from a child found too young to testify. Instead, evidence rules and due-process restraints regulate those types of statements.

A. Statements Made Solely To Private Parties Without Police Involvement Are Non-Testimonial

Setting aside potential exceptions not implicated here, *see* Part II.B, the Court should hold that statements made between private parties without police involvement are non-testimonial. That view comports with (1) the Confrontation Clause's *textual* focus on "witnesses"; (2) the clause's *purpose* to prevent distinct government abuses; and (3) this Nation's *history* of regulating private-party hearsay under evidentiary, not constitutional, rules.

1. Statements made solely to private parties are not "witness" testimony

a. To qualify as "witness" testimony, a statement must be a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford*, 541 U.S. at 51 (quoting 2 Noah Webster, *An American Dictionary of the English Language* (1828)); 1 Giles Jacob, *The Law-Dictionary: Explaining the Rise, Progress, and Present State of the English Law* (10th ed. 1797) (defining witness as "[o]ne who gives evidence in a cause"; defining "evidence"

as "[p]roof by testimony of witnesses, on oath" and other "proofs to be given and produced to a jury for the finding of any issue joined between the parties"). Under this definition, "testimonial" statements must meet two requirements.

First, testimonial statements must be solemn and formal, not casual or spontaneous. The Court has rejected a strict reading of this requirement that would "render inadmissible only sworn *ex parte* affidavits, while leaving admission of formal, but unsworn statements 'perfectly OK.'" *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011) (citation omitted). And while Justices disagree over the types of *unsworn* statements that qualify as sufficiently "formal," *compare Williams v. Illinois*, 132 S. Ct. 2221, 2260-61 (2012) (Thomas, J., concurring in the judgment), *with id.* at 2276-77 (Kagan, J., dissenting), *all* agree that statements must cross a formality threshold. As *Davis* said, "formality is indeed essential to testimonial utterance." 547 U.S. at 830 n.5.

Second, testimonial statements must be "for the purpose of establishing or proving some fact at trial," not for a social, business, or other purpose. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). Disagreement exists over this factor, too, with some requiring even a narrower purpose to accuse a specific target. *Williams*, 132 S. Ct. at 2242 (plurality op.). But all agree that statements must at least be made "for the purpose of providing evidence." *Id.* at 2273-74 (Kagan, J., dissenting). The statements must, when considered *objectively*, have "a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155; *id.* at 1156 & n.7.

b. The Court's cases applying these requirements have filled in the details about when three categories

of statements—prior testimony, statements to police, and trial records—qualify as testimonial.

Prior Testimony. All prior court testimony—whether "at a preliminary hearing, before a grand jury, or at a former trial"—satisfies both requirements. *Crawford*, 541 U.S. at 68. Indeed, most of this Court's cases consider that testimony, which sits at the clause's core. *Id.* at 57-58. That testimony is generally admissible only if the defendant had a prior opportunity to cross-examine an unavailable witness, *Mattox v. United States*, 156 U.S. 237, 240-44 (1895), or if the defendant kept the witness away, *Reynolds v. United States*, 98 U.S. 145, 158-59 (1878). The testimony is inadmissible, by contrast, if the witness was not shown to be unavailable, *Motes v. United States*, 178 U.S. 458, 470-75 (1900), or the defendant lacked an adequate cross-examination opportunity, *Pointer*, 380 U.S. at 406-08.

Statements to Police. More complex standards govern statements to police. On the one hand, a seemingly bright-line rule applies to a subset of those statements: Statements made during formal custodial interrogation at the stationhouse are testimonial. *Crawford*, 541 U.S. at 52-53, 68. Most of this Court's police cases involved interrogations of this sort, which resulted in formal confessions. *See Davis*, 547 U.S. at 837 n.2 (Thomas, J., dissenting). On the other hand, a totality-of-the-circumstances test applies to less formal statements to police in the field. *Bryant*, 131 S. Ct. at 1162. Those statements can have sufficient formality because of the "severe consequences that can attend a deliberate falsehood" to police. *Davis*, 547 U.S. at 826; *id.* at 830 n.5 ("It imports sufficient formality, in our view, that lies to such officers are criminal offenses."). The key ques-

tion boils down to the interrogation's purpose. If a declarant speaks to police for a reason other than "creating an out-of-court substitute for trial testimony" (such as seeking help), the statements are non-testimonial. *Bryant*, 131 S. Ct. at 1155.

Records for Trial. The same elements apply to an analyst's statements describing test results. *Melendez-Diaz*, 557 U.S. at 309-11. Those statements must serve an "evidentiary purpose"—such as a "certificate" created to prove that a substance found on the defendant was cocaine, *id.* at 310, or a "report" created to prove the defendant's blood-alcohol level, *Bullcoming*, 131 S. Ct. at 2711, 2716-17. And the statements must be sufficiently "formal"—such as a sworn affidavit, *Melendez-Diaz*, 557 U.S. at 310, or a report "'formalized' in a signed document," *Bullcoming*, 131 S. Ct. at 2717 (citation omitted).

c. This case calls for a bright (albeit narrow) *rule* like the one for prior testimony and custodial confessions, not a fact-specific *standard* like the one for field interrogations. The Court chose the former because prior testimony and formal interrogations are testimony "under any definition." *Crawford*, 541 U.S. at 52. It chose the latter because police questioning in the field straddles the murky border between testimonial and non-testimonial and so requires a fact-specific test. *Bryant*, 131 S. Ct. at 1162.

Statements like L.P.'s that (when objectively considered) are meant solely for a private party are the antithesis of prior testimony or custodial questioning. People do not "bear testimony" when they speak with their relatives, neighbors, coworkers, or, in this case, teachers. Thus, subject to potential exceptions this case does not implicate, *see* Part II.B, the Court should hold that statements objectively meant solely

for private parties are non-testimonial because they lack sufficient formality or an evidentiary purpose—and usually both. *Cf. Virginia v. Moore*, 553 U.S. 164, 175 (2008) (noting "'essential interest in readily administrable rules'" for Fourth Amendment (citation omitted)); *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (same for Fifth Amendment).

The Court's cases justify this rule. *Crawford* recognized that "[a]n accuser who makes a formal statement to *government officers* bears testimony in a sense that a person who makes a casual remark to an *acquaintance* does not." 541 U.S. at 51 (emphasis added). Indeed, it is the "[i]nvolvement of government officers in the production of testimony with an eye toward trial [that] presents unique potential for prosecutorial abuse." *Id.* at 56 n.7. This logic applies to many factual settings.

The Court, for example, has twice suggested that statements between acquaintances are non-testimonial. When a witness asks "what happened?" on seeing a bruised friend, the friend's response "my husband hit me" is not testimony. *See Giles v. California*, 554 U.S. 353, 376 (2008). Those statements, objectively considered, are neither formal nor for trial. Instead, statements "to friends and neighbors about abuse" are regulated "by hearsay rules." *Id.*

Prison talk falls under the same rubric. During the trial in *Dutton v. Evans*, 400 U.S. 74 (1970), a prisoner testified about his conversation with the defendant's accomplice while the two walked in the prison yard. *Id.* at 76-77 (plurality op.). On the accomplice's return from an arraignment, the testifying prisoner asked: "'How did you make out in court?'" *Id.* The accomplice's response: "'If it hadn't been for that dirty son-of-a-bitch Alex Evans [the defendant],

we wouldn't be in this now.'" *Id.* *Dutton* held that the admission of this accusation did not violate the Confrontation Clause. *Id.* at 80-90. That was because, *Davis* clarified, the prisoners' conversation was "clearly nontestimonial." 547 U.S. at 825.

The Court has made the same point for private statements falling within hearsay exceptions. Statements introduced under the co-conspiracy exception (which admits a coconspirator's statements furthering a conspiracy) do "not pertain to a constitutional right." *Giles*, 554 U.S. at 374 n.6 (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)). *Bourjaily* allowed the use of an informant's recorded conversation with the defendant's accomplice. 483 U.S. at 173-74, 182-84. This admission did not violate the Confrontation Clause because the accomplice's statement was "not (as an incriminating statement in furtherance of the conspiracy would probably never be) testimonial." *Giles*, 554 U.S. at 374 n.6; *Wiborg v. United States*, 163 U.S. 632, 657-58 (1896).

Or consider business records. They are "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Melendez-Diaz*, 557 U.S. at 324. The Court thus allowed the use of "bank deposit slips and book entries" even though recorded by individuals "not produced as witnesses." *Salinger v. United States*, 272 U.S. 542, 547 (1926).

Similarly, a patient's statements to doctors in the course of treatment are non-testimonial. *Giles*, 554 U.S. at 376. So are "medical reports created for treatment purposes." *Melendez-Diaz*, 557 U.S. at 312 n.2. In both situations, the declarant makes the statements for health reasons.

L.P.'s statements to his daycare teachers fit this mold. The statements were made in a classroom, not a courtroom, to educators, not investigators. JA26, 44. Unlike with statements to police, no formality can be premised on the notion that lies to the teachers were crimes. *Davis*, 547 U.S. at 826. And L.P.'s statements had as much of an "evidentiary" purpose as an adult's "[s]tatements to friends and neighbors about abuse." *Giles*, 554 U.S. at 376. Both may recount events, but neither is "an obvious substitute for live testimony." *Davis*, 547 U.S. at 830.

Indeed, *Crawford*'s discussion of *White v. Illinois*, 502 U.S. 346 (1992), reinforces this distinction between statements to *private actors* and statements to *police* in the most analogous setting. In *White*, a child told her babysitter that the defendant had abused her moments after the abuse. *Id.* at 349. The child's mother "question[ed] her daughter about what had happened." *Id.* The mother called the police, who again questioned the child. *Id.* Finally, a nurse and physician examined her. *Id.* at 350. The child "provided an account of events that was essentially identical." *Id.* With the child emotionally unable to testify, the trial court admitted her statements under the spontaneous-declaration and medical-examination hearsay exceptions. *Id.* at 350-51. *White* held that evidence falling within those exceptions satisfied the Confrontation Clause regardless of the child's availability. *Id.* at 356-57.

Crawford called *White* into doubt, but the way it did so is revealing. It criticized *White* regarding the statements to the "police officer." 541 U.S. at 58 n.8. *Crawford* hinted that the statements *to police* might have been testimonial there, noting that *White* did not ask "whether *certain* of the statements" that the

child made could be used even if they were testimonial. *Id.* (emphasis added). *Crawford*, by contrast, did *not* question the admission of the child's statements to her babysitter, mother, nurse, or doctor. Those statements, like L.P.'s, were non-testimonial.

2. Statements made solely to private parties do not mirror the official abuses resulting in the Confrontation Clause

a. Statements made solely to private parties fall outside the Confrontation Clause's *purpose*. In 16th-century England, justices of the peace used civil-law methods of criminal procedure. Officials questioned witnesses in preliminary hearings; the prosecution used records of the interrogations at trial. *Crawford*, 541 U.S. at 43 (citing 1 James F. Stephen, *History of the Criminal Law of England* 326 (1883)). Often "the main part of the case for the prosecution was contained in the depositions under oath of witnesses." 9 William S. Holdsworth, *A History of English Law* 218 (1926). Walter Raleigh's treason trial was the "most notorious" example. *Crawford*, 547 U.S. at 44.

To guard against trial by *state-generated* affidavit, English courts developed a common-law right prohibiting the use of written preliminary-hearing testimony unless the defendant had a cross-examination opportunity. *Id.* at 44-46 (citing *King v. Paine*, 87 Eng. Rep. 584, 585 (1696)). Thus, Blackstone "presented the confrontation right as designed to avoid the unfairness of *government-prepared* depositions." Akil R. Amar, *The Constitution & Criminal Procedure* 130 (Yale Univ. Press 1997) (emphasis added). "[O]pen examination of witnesses," he said, "is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer or his clerk." 3 William

Blackstone, *Commentaries on the Laws of England* 373 (1768). An evidence treatise made the same point: "[T]he Examiners and Commissioners in such Cases do often dress up secret Examinations, and set up a quite different Air upon them from they would seem if the same Testimony had been plainly delivered under the strict and open Examination of the Judge at the Assizes." 1 Geoffrey Gilbert, *The Law of Evidence* 60 (2d ed. 1756).

The Framers "were keenly familiar" with this practice. *Crawford*, 541 U.S. at 56 n.7. They did not just decry taxation without representation; they decried the "means of enforcing the new taxes." David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1776*, 16 W. & Mary Q. 459, 460 (1959). "Parliament directed that the new tax laws could be enforced in either the regular colony courts where common-law procedures operated or in the *courts of admiralty* which proceeded without juries *according to the civil law*." *Id.* at 461 (emphases added). "[T]estimony by depositions was commonplace" in those admiralty courts. Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 397 (1959). This led to unflagging protests against their methods. *See* 30 Charles A. Wright et al., *Federal Practice & Procedure* § 6345, at 525 (1997); 1 Journals of the Continental Congress 1774-1789, at 71 (Worthington C. Ford ed. 1904) (criticizing extension of "admiralty courts beyond their ancient limits").

The Framers remedied this evil (the government's trying the case before the trial) with the Confrontation Clause and its state analogs. Those provisions constitutionally enshrined the common-law right against the civil-law procedure. *See Salinger*, 272

U.S. at 548; 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1785, at 662 (1833). Thus, the Confrontation Clause's "primary object . . . was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness." *Mattox*, 156 U.S. at 242.

b. This purpose (to prevent the "use of *ex parte* examinations") has guided the Court's reading of the Confrontation Clause. *Crawford*, 541 U.S. at 50. The Court has applied the purpose in two factual settings—those existing when the Confrontation Clause was enacted and those arising later.

For the former, the Court has rejected efforts to "attribute[] to the right a much broader scope than it had at common law." *Salinger*, 272 U.S. at 548; *Mattox*, 156 U.S. at 243. Because, for example, the right never prohibited the use of prior testimony when the defendant had an opportunity to cross examine an unavailable witness, *Mattox*, 156 U.S. at 242, the Court incorporated this limit on the right into the Constitution, *Crawford*, 541 U.S. at 59.

For the latter, the Court has inferred how the Framers would have applied the right in the new setting. Most notably, *Crawford* and *Davis* asked how the right should apply to police questioning, a new development because "England did not have a professional police force until the 19th century." *Crawford*, 541 U.S. at 53. Those cases extended the clause to police because—while "we no longer have examining Marian magistrates"—today's "examining police officers" undertake the "investigative and testimonial functions once performed by" the earlier investigators. *Davis*, 547 U.S. at 830 n.5. Police interrogations designed to generate evidence for trial serve

the same purposes (and are subject to the same abuses) as magistrate interrogations bemoaned by the Framers. "The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace." *Crawford*, 541 U.S. at 53.

c. The Confrontation Clause's purpose confirms that L.P.'s statements (like all statements meant solely for private parties) fall outside the right. It would be a stretch to characterize the use of those statements as a "modern-day practice[] that [is] tantamount to the abuses that gave rise to the" right. *Williams*, 132 S. Ct. at 2242 (plurality op.). Those statements, by definition, are not made to *criminal investigators* like police officers or justices of the peace. They are meant *solely* for private parties. And they objectively lack a purpose to create a substitute for the criminal trial. Their use at trial is thus not analogous to "government-prepared depositions." Amar, *Criminal Procedure*, at 130. To hold that the clause regulates these statements would "attribute[] to the right a much broader scope than it had at common law." *Salinger*, 272 U.S. at 548.

Nor do private-party statements require the Court to infer how the Framers would have applied the right in a new setting. Private conversations existed just as much in the 18th century as they do today. Yet Ohio is unaware of early cases extending the clause to those statements. "Most of the American cases applying the Confrontation Clause or its state constitutional or common-law counterparts involved testimonial statements of the most formal sort—sworn testimony in prior judicial proceedings or formal depositions under oath . . . ." *Davis*, 547 U.S. at 825-26; *cf. Anthony v. State*, 19 Tenn. 265,

1838 WL 1124, at *8 (1838) (noting "after more than forty years from the adoption of our first Constitution [an] argument against the admissibility of dying declarations on the ground of the Bill of Rights is for the first time made"). Instead, as shown below, courts regulated purely private statements under *evidentiary*, not *constitutional*, standards.

3. Courts historically regulated statements made solely to private parties under evolving hearsay, not rigid confrontation, rules

The judiciary's traditional manner of regulating statements solely between private parties confirms that they do "not pertain to a constitutional right." *Giles*, 554 U.S. at 374 n.6. Courts historically analyzed the statements under *general* hearsay rules, and gradually *expanded* use of the statements under growing exceptions. Both facts conflict with any notion that the Confrontation Clause provided special rules for those statements solely in criminal cases.

a. Courts did not historically equate private-party hearsay with the "*ex parte* examinations" at the Confrontation Clause's core. *Crawford*, 541 U.S. at 51. They regulated the former under evidentiary *hearsay* rules (applicable in civil and criminal cases); they regulated the latter under constitutional *confrontation* rules (applicable in criminal cases). *Equal* treatment of private-party hearsay in civil and criminal cases conflicts with any notion that the Confrontation Clause triggered *special* criminal rules for that private-party hearsay.

In England, "[t]he common-law rule [of confrontation] had been settled since *Paine* in 1696." *Crawford*, 541 U.S. at 54 n.5. Yet "[a]n emerging consen-

sus dates the hearsay rule—as a genuine rule, honored more in the observance than in the breach—to the late eighteenth century and early nineteenth century." David A. Sklansky, *Hearsay's Last Hurrah*, 2009 Sup. Ct. Rev. 1, 26 (2009); John H. Langbein, *The Origins of Adversary Criminal Trial* 238-39 (2003). While early treatises recite the rule against hearsay, 1 Gilbert, *Evidence*, at 152, private-party hearsay remained common in 18th-century trials. Criminal cases in the Old Bailey court used hearsay "with very little restraint." Stephen Landsman, *Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 Cornell L. Rev. 497, 567 (1990). Even by 1755, "[w]itnesses continued to recite what they had learned from 'a man' or 'somebody.'" T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 Iowa L. Rev. 499, 514 (1999); *Trial of George Lord Gordon*, 21 How. St. Tr. 485, 514-15 (1781) (admitting mob's statements). If the confrontation right was understood as reaching private-party hearsay, courts would not have admitted it so cavalierly. *Cf.* 2 William Hawkins, *A Treatise of the Pleas of the Crown* 429-31 (4th ed. 1762) (identifying ban on prior depositions and ban on hearsay in *different* sections).

Crossing the Atlantic, "one important generalization can be established" from some colonial courts—"that in general a good deal of testimony which would today be excluded as hearsay was regarded as admissible in the eighteenth century." Julius Goebel Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* 642 (1944); *cf. id.* at 641 (noting that preliminary-examination testimony was "only exceptionally a part of the case"). Post-ratification courts likewise evaluated private conversations under hear-

say law *equally* applicable in civil and criminal cases. As *Crawford* noted, 541 U.S. at 59 n.9, Chief Justice Marshall prohibited a witness from recounting a private conversation during Aaron Burr's treason trial because the hearsay rule "excludes" such declarations "from trials of a criminal or civil nature." *United States v. Burr*, 25 F. Cas. 187, 193 (C.C. Va. 1807); *cf. Queen v. Hepburn*, 11 U.S. 290, 295-96 (1813). This Court later *admitted* co-conspirator statements falling under the "res gesta" or "thing done" hearsay exception. *United States v. Gooding*, 25 U.S. 460, 469-70 (1827). It refused to confine this exception to civil cases because "[i]n general the rules of evidence in criminal and civil cases are the same." *Id.* at 469.

Early state cases made the same point. *Cornwell v. State*, 8 Tenn. 147, 151 (1827) (admitting co-conspirator statement, as "it is immaterial whether they be civil or criminal cases"); *State v. Rawls*, 11 S.C.L. 331, 333 (S.C. Const. Ct. App. 1820) (applying refreshed-recollection rule, as "it is now very well settled, that the rules of evidence are the same in criminal, as in civil, cases."). By 1880, one commentator called it "late in the day" to distinguish "between civil cases and criminal cases as to the admission of declarations as a part of the *res gesta*," finding that confrontation rights did *not* affect this rule. James B. Thayer, *Bedingfield's Case: Declarations as a Part of the Res Gesta*, 14 Am. L. Rev. 817, 828-29 (1880); *see* Henry Roscoe, *Digest of the Law of Evidence in Criminal Cases* 1, 22 (2d ed. 1840).

b. Equally noteworthy, courts steadily expanded the *exceptions* to the hearsay ban for private-party hearsay, an expansion that would have sputtered at the outset if the Confrontation Clause (and its state

counterparts) rigidly constitutionalized 18th-century hearsay law for private-party statements.

The excited-utterance exception provides the best example. "[I]t is questionable whether testimonial statements would ever have been admissible on that ground in 1791." *Crawford*, 541 U.S. at 58 n.8. A declarant would have needed to make the statement near simultaneously with the event described. *Id.* And "it [was] only within later generations that [the exception was] firmly and unquestionably established." 6 John H. Wigmore, *Evidence* § 1747, at 195 (J. Chadbourn rev. 1974).

Thus, if a victim's after-the-fact *identification* of the culprit to *private actors* qualifies as testimonial, courts have been violating the confrontation right for quite some time. In *Hill v. Commonwealth*, 2 Gratt. 594 (Va. 1845), for example, the victim was stabbed, stumbled back to a tavern, and passed out. *Id.* at 600-01. Reawakening, he "'put his hand to his left breast, and said here it is, here it is'—'[the defendant] asked me to walk out, and stabbed me here.'" *Id.* The court admitted these statements without constitutional concern. *Id.* Similarly, in *Commonwealth v. M'Pike*, 57 Mass. 181 (1849), the victim asked a witness to find help and later told him that the defendant stabbed her. *Id.* at 182. The court affirmed the use of these statements, saying that, "[i]n the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding judge." *Id.* at 184. Or consider *Rex v. Foster*, 172 Eng. Rep. 1261 (1834), where the court admitted a victim's statements to a "waggoner" after a carriage ran him over. *Id.* at 1261. "It [was] the best possible testimony that, under the circumstanc-

es, can be adduced to shew what it was that had knocked the deceased down." *Id.*

Cases like these were routine by the late 19th century. *See Croomes v. State*, 51 S.W. 924, 924-25 (Tex. Crim. App. 1899); *State v. Murphy*, 17 A. 998, 999 (R.I. 1889); *People v. Vernon*, 35 Cal. 49, 50-51 (1868); *Von Pollnitz v. State*, 18 S.E. 301, 301 (Ga. 1893); *People v. Callaghan*, 6 P. 49, 54-55 (Utah 1885); *People v. Simpson*, 12 N.W. 662, 664 (Mich. 1882). By the early 20th century, a victim's identification to a private party was used "[i]n most of the states." *People v. Del Vermo*, 85 N.E. 690, 695 (N.Y. 1908). Courts could cite "cases almost without limit." *Solice v. State*, 193 P. 19, 22 (Ariz. 1920). To be sure, some States applied stricter rules than others. *See State v. Estoup*, 1 So. 448, 449 (La. 1887); *Jones v. State*, 71 Ind. 66, 81-83 (1880). But these cases, too, regulated the statements under *evidentiary* rules. *Jones*, 71 Ind. at 81-83. Most cases (early or late) did not suggest that private-party hearsay raised constitutional concerns, notwithstanding the state confrontation rights. *See* 5 Wigmore § 1397, at 155-58 n.1.

In sum, the historical treatment of statements between private parties confirms what the Confrontation Clause's text and purpose show. While those statements raise *evidentiary* concerns, they do not raise *constitutional* ones. If, as Professor Thayer said, it was too "late in the day" to constitutionally regulate them back in the 1880s, *Bedingfield's Case*, 14 Am. L. Rev. at 829, it is too late to regulate them that way some 130 years later.

B. At The Least, Statements To Private Parties By Children Found Too Young To Testify Are Non-Testimonial

Logic and history show that, at the least, statements to private parties are non-testimonial if made by a child found too young to provide "testimony."

1. Statements to private parties from a child found too young to testify fall outside the Confrontation Clause's text ("witness" testimony) when the State's competency rules mirror the constitutional divide between testimonial and non-testimonial. Ohio children under ten are too young to testify if they "appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Ohio R. Evid. 601(A). Courts must examine children to assess whether they can recount facts and comprehend the solemn nature of their testimony. *See State v. Maxwell*, 9 N.E.3d 930, 957-58 (Ohio 2014).

Out-of-court statements to private parties from young children who do not pass this test are not witness testimony. The competency finding confirms that those children are "simply unable to understand the legal system and the consequences of statements made during the legal process." *State v. Bobadilla*, 709 N.W.2d 243, 256 (Minn. 2006). In other words, "some very young children should be considered incapable of being witnesses for Confrontation Clause purposes." Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 Brook. L. Rev. 241, 272 (2005). If a child cannot be a "witness" *inside* the courtroom, it makes no sense to say the child can be a "witness" *outside* it.

2. A volume of history supports this page of logic. Incompetent children's statements to private parties were often introduced as the "best evidence" well after the confrontation right had been settled. In England, young children were incompetent. 1 Gilbert, *Evidence* at 146-47; *Rex v. Travers*, 93 Eng. Rep. 793, 794 (1726). Writing in the 17th century, Matthew Hale sought to change this rule by allowing children to be sworn if they "know[] and consider[] the obligation of an oath." 1 Matthew Hale, *The History of the Pleas of the Crown* 634 (E. Rider et al., 1800). Even if they could not be sworn, Hale asserted, the child should be heard unsworn on the ground that the child's unsworn statement was better than a relative's secondhand account. *Id.* Hale took it *as a given* that when a "child complains presently of the wrong done to her to the mother or other relations," "their evidence" (the hearsay) "shall be taken." *Id.*

Based on Hale's influence, 18th-century treatises "assumed that when children were too young to testify, and thus unavailable, their hearsay was admissible in child rape and assault prosecutions." Thomas D. Lyon and Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 Ind. L.J. 1029, 1038 (2007). In the first edition of his Commentaries, Blackstone suggested that the law "allow[ed] what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof." 4 Blackstone, *Commentaries*, at 214; Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 293 (4th ed. London 1785).

This view is evident in 18th-century practice. When judges found children incompetent, they "were disposed to compensate by allowing the mother, a

surgeon, or others to whom the child had spoken contemporaneously upon the happening of the events to give an account of what the child had then said." Langbein, *Origins*, at 239-40. Child hearsay was thus common "from 1684 to 1789." Lyon, 82 Ind. L.J. at 1039-45 (citing cases). In a stolen-handkerchief case, for example, the aggrieved owner testified that a man told him that his servant had found the stolen item "in Black-and-white-court," and that the servant could not testify because she was "a child of about 12 or 13 years of age, and not of years sufficient to give testimony." *Rex v. Reddy*, Old Bailey Session Papers No. 302-03, at 271 (Sept. 1755). In a rape case, a mother detailed her child's statements about the rape. *Trial of Charles Ketteridge*, Old Bailey Session Papers, No. 394, at 427-28 (Sept. 1779).

3. *King v. Brasier*, 168 Eng. Rep. 202 (1779)—a child-rape case cited by this Court—comports with this history when understood as a *competency*, not a *hearsay*, case. Various accounts exist of the evidence in the case. Earlier reporters from the 18th-century suggest the victim testified unsworn (consistent with Hale's idea). *See* Thomas Leach, *Cases in Crown Law* 200 (1st ed. 1789); Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from* King v. Brasier, 15 J.L. & Pol'y 495, 527-41 (2007). Later 19th-century reporters (like the 1815 reporter copied into the English Reports) state that the child's mother and another testified about her statements after the rape and on the next day when she identified Brasier. 1 Edward H. East, *A Treatise of the Pleas of the Crown* 443 (Philadelphia 1806); *Brasier*, 168 Eng. Rep. at 202. Brasier was convicted; a 12-judge panel reversed. East, *Pleas*, at 444.

As a matter of *competency*, *Brasier* unambiguously accepted one Hale idea and unambiguously rejected another. The panel "unanimously agreed" with Hale "that a child of any age if, if she were capable of distinguishing between good and evil, might be examined on oath." *Id.* But it rejected Hale's view that an incompetent child could testify *unsworn*, finding "that a child of whatever age cannot be examined unless sworn." *Id.* Thus, *Brasier* "principally was understood in England and the states as resolving child competency issues." Franze, 15 J.L. & Pol'y at 534-35; *see, e.g.*, *McGuff v. State*, 7 So. 35, 37 (Ala. 1889).

As a matter of *hearsay*, *Brasier* is an enigma. Some reporters suggest the testimony about "the information which the infant had given to her mother and the other witness, ought not to have been received." 168 Eng. Rep. at 203. But *Brasier* likely adopted a "best evidence" rule: that the child should testify and the hearsay found inadmissible when the child is *competent* (saying nothing about *unavailable* children's hearsay). *See Commonwealth v. Bardino*, 3 Berks 350, 1911 WL 3681, at *5 (Pa. O & T 1911). Indeed, the 1815 reporter elsewhere suggested that the child "was held a good witness by all the Judges." *Travers*, 93 Eng. Rep. at 794 n.1. English cases *after Brasier*, moreover, continued to admit *incompetent* children's hearsay (one by a judge who sat on *Brasier*). Lyon, 82 Ind. L.J. at 1044-45. Regardless, even assuming *Brasier* established broader *evidentiary* hearsay principles, *cf. id.* at 1053 (citing later edition of Blackstone reading *Brasier* more broadly), it does not establish broader *constitutional* confrontation principles. The judges debated whether the statements to the mother were part of the "fact or transaction" under the res gesta exception. East, *Pleas*, at

444. Our fundamental charter did not constitutionalize the fine subtleties of that hearsay exception.

C. Treating Private-Party Statements As A Hearsay Matter Promotes The Development Of Sound Evidentiary Rules

While a non-testimonial finding for an incompetent child's statement to private parties ends the matter as far as the *Confrontation Clause* is concerned, it does not end the matter as far as the *criminal trial* is concerned. "Of course the Confrontation Clause is not the only bar to admissibility of hearsay statements." *Bryant*, 131 S. Ct. at 1162 n.13. Other rules regulate the use of the child's statements. Courts may admit the statements only if they survive two "reliability" tests.

As an initial matter, the statements must satisfy an exception to the evidentiary hearsay ban. Ohio R. Evid. 802. A statement must fall within either a categorical exception for statements historically deemed reliable or a residual exception asking whether the relevant statements contain "particularized guarantees of trustworthiness." Ohio R. Evid. 807(A)(1). Ohio's reading of the Confrontation Clause thus does not open the floodgates to trial by hearsay. Hearsay still must be reliable. After all, it is "[t]he rules of evidence, not the Confrontation Clause, [that] are designed primarily to police reliability." *Bullcoming*, 131 S. Ct. at 2720 n.1 (Sotomayor, J., concurring).

Notably, moreover, leaving private-party hearsay to evidence rules has modern benefits. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Crawford*, 541 U.S. at 68. Legislatures and courts can adapt

their evidence rules to new statistics and new insights regarding the wisdom of hearsay exceptions.

That is no small benefit. "From Bentham to the authors of the Uniform Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom." Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434, 1436 (1966). The benefit is especially critical in cases like this one. "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).

Finally, state and federal hearsay rules are backed by a broad due-process check. *Bryant*, 131 S. Ct. at 1162 n.13. Gross misuse of unreliable hearsay could violate the Due Process Clause if it is "'so extremely unfair that its admission violates fundamental conceptions of justice.'" *Perry v. New Hampshire*, 132 S. Ct. 716, 724 (2012) (citation omitted).

In sum, "[t]here is no reason to strain the text of the Confrontation Clause" based on reliability concerns. *White*, 502 U.S. at 364 (Thomas, J., concurring in the judgment). Evidence and due-process rules already "provide criminal defendants with [such a reliability] protection." *Id.*

II. THE OHIO SUPREME COURT MISTAKENLY HELD THAT A MANDATORY-REPORTING DUTY TURNED DAYCARE TEACHERS INTO POLICE AGENTS

Perhaps recognizing that statements between private parties fall outside the Confrontation Clause, the Ohio Supreme Court made this case about police. Pet. App. 6a-9a. It erred in holding that Ohio's mandatory-reporting statute transformed statements to

teachers into statements to police. Further, no other facts suggest that the teachers were police "agents."

A. The Confrontation Clause Does Not Treat Mandatory Reporters As Police Agents

In Ohio, as in all States, teachers and medical professionals (among others) must "immediately report" child-abuse suspicions to a "public children services agency or a municipal or county peace officer" when they "know[], or ha[ve] reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child." Ohio Rev. Code § 2151.421(A)(1)(a); Pet. 23-24 (citing statutes). If reporters make these reports, they are immune from suit for injuries arising from the reports. Ohio Rev. Code § 2151.421(G)(1)(a). If they fail to make the reports, a child may sue for any damages suffered, *id.* § 2151.421(M), and the reporters can be criminally punished, *id.* § 2151.99(C).

Specific Confrontation Clause principles and general constitutional principles show that the clause does not require courts to treat statements to mandatory reporters like statements to police.

1. Confrontation Clause principles illustrate that mandatory reporters are not police agents

Two Confrontation Clause principles—one focused on the mandatory-reporting listener, the other on the child declarant—prove that the Court should

not treat statements to mandatory reporters as if they were statements to police.

a. *The Listener*. Mandatory reporters are a more recent phenomenon than police forces; statutes date only to the 1960s. 130 Ohio Laws 625-26, 1819 (1963) (Am. H.B. 765); Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 Columbia L. Rev. 679, 710-13 (1966). But both historical reporting duties and the nature of the present one show that reporters should not be deemed police agents.

"Historically, the common law recognized" a general "duty to raise the 'hue and cry' and report felonies to the authorities." *Branzburg v. Hayes*, 408 U.S. 665, 696 & nn.34-35 (1972). A "misprision of felony" occurred when "'anyone learn[ed] or [knew] that another ha[d] committed treason or felony, and he d[id] not choose to denounce him to the King or to his Council, or to any magistrate, but conceal[ed] his offense.'" *United States v. Caraballo-Rodriguez*, 480 F.3d 62, 71 (1st Cir. 2007) (quoting *Sykes v. Dir. Pub. Prosecutions*, [1962] A.C. 528, 555 (H.L.) (U.K.)). According to Blackstone, statutes treated this failure to report *differently* if committed by a "public officer" or a "common person," 4 Blackstone, *Commentaries*, at 121, illustrating that common people with reporting duties were not viewed as public officers. *See Caraballo-Rodriquez*, 480 F.3d at 75-76. And while "the term 'misprision of felony' now has an archaic ring, gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship." *Roberts v. United States*, 445 U.S. 552, 558 (1980). If Ohio's reporters are police agents, this traditional duty deputized the entire populace.

Turning to today's duty, *Crawford*'s method for analyzing a modern phenomenon (the police) illus-

trates that mandatory reporters are not their equivalent. 541 U.S. at 52-53. As noted, police interrogations are testimonial because of their similarity to civil-law interrogations by justices of the peace—who "performed the investigative functions now associated primarily with the police." *Id.* at 53. Mandatory reporters, by contrast, are not 21st-century justices of the peace. The statute merely requires them to *report* suspicions arising from their normal job activities. Doctors must report abuse they uncover from examining patients; teachers must report abuse they uncover from teaching students. Ohio courts have rejected "reliance on [the statute] for the creation of a duty to investigate." *Fishpaw v. Francisco*, No. 05AP-861, 2006 WL 1825976, at *6 (Ohio Ct. App. June 30, 2006). Accordingly, treating a mandatory reporter as a police agent is analogous to treating a neighbor who *calls* 911 as a police agent (rather than the operator who *answers* the call).

Yet a law-enforcement nexus is even one step removed from the neighbor's 911 call. Mandatory reporters need not (and the daycare teachers here did not) call *police*. A "reporter under the statute has the option to report suspected abuse to either the public children services agency or law enforcement." *O'Toole v. Denihan*, 889 N.E.2d 505, 513 (Ohio 2008). To be sure, social workers conduct their investigation "in cooperation with law enforcement" and issue a "report of [the] investigation, in writing, to" law enforcement. Ohio Rev. Code § 2151.421(F)(1). But social workers are not themselves law enforcement; they have neither a "duty to enforce laws" nor a power "to arrest violators." *State v. Dobies*, No. 91-L-123, 1992 WL 387356, at *3 (Ohio Ct. App. Dec. 18, 1992).

So the statute does not even require reporters to directly invoke the State's criminal apparatus.

This decision was intentional. Ohio's mandatory-reporting statute arose from a *protective*, not a *prosecutorial*, purpose. "[T]he primary purpose of reporting is to facilitate the protection of abused and neglected children." *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 871 (Ohio 2004). The statute thus directs *social workers*—not *police officers*—to investigate reports within 24 hours. Ohio Rev. Code § 2151.421(F)(1). That is true even when the reporter calls the police; the police must refer the report to a social worker. *Id.* § 2151.421(D)(1). Reliance on social workers was suggested by model-legislation drafters, Paulsen, 66 Columbia L. Rev. at 713-14, to "emphasize[] the rehabilitative and treatment aspects of the process" rather than the punitive aspects, Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 Vill. L. Rev. 458, 491 (1978).

In sum, Ohio places on mandatory reporters neither a duty to investigate crime nor a duty to cooperate with those who do. They are not police agents.

b. *The Declarant*. Ultimately, moreover, what matters is the intent of the *child declarant* who makes a statement, not the intent of the *mandatory reporter* who listens to it. *Bryant*, 131 S. Ct. at 1162. Even when a listener (such as an FBI informant) initiates a conversation for a secret police purpose, courts must ignore that purpose if the declarant does not know about it. *Bourjaily*, 483 U.S. at 181-84. In other words, "statements made unwittingly to a Government informant" do not become testimonial merely because of the listener's hidden prosecutorial motives. *Davis*, 547 U.S. at 826.

By analogy, even if mandatory reporters *subjectively* ask questions with the reporting obligation in mind, it is *objectively* unlikely (to say the least) that small children speaking to the reporters will know about this duty, let alone equate their teachers with police. That is true even if the children have some vague understanding of what police do. *Cf.* Alexia Cooper et al., *Maltreated and Nonmaltreated Children's Knowledge of the Juvenile Dependency Court System*, 15 Child Maltreatment 255, 258 (2010).

2. Other constitutional provisions confirm that mandatory reporters are not police agents

Another way to think about the problem—an analogy to sister constitutional rights—cements the conclusion that the Ohio Supreme Court erred in treating mandatory reporters as police agents.

Fourth Amendment. The Court has rejected the notion that private parties act as police agents under the Fourth Amendment when they conduct private searches. Rather, a defendant must show that the private party undertook the search with the police's endorsement. *Compare Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614-16 (1989), *with United States v. Jacobsen*, 466 U.S. 109, 113-15 (1984). Under this test, courts have rejected the argument that a statute requiring internet service providers to report child pornography turned them into police agents. The statute merely "clear[ed] the way for [providers] to *report* violations of the child pornography laws, not investigate them." *United States v. Richardson*, 607 F.3d 357, 367 (4th Cir. 2010); *United States v. Stevenson*, 727 F.3d 826, 830 (8th Cir. 2013) ("A reporting requirement, standing alone, does not transform an Internet service provider into

a government agent whenever it chooses to scan files sent on its network for child pornography."). If a statutory reporting duty does not turn a private party's *search* into a police search under the Fourth Amendment, it is hard to see why such a duty turns the private party's *questions* into police questions under the Confrontation Clause. *Cf. United States v. Miller*, 425 U.S. 435, 443 (1976) (holding that bank's duty to maintain customer records did not turn the bank into government agent).

Nor, for that matter, would reporting duties raise Fourth Amendment red flags even if imposed on a state actor. Indeed, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), expressly distinguished reporting statutes from a state hospital's policy of drug testing pregnant women "*for the specific purpose of incriminating those patients*" (rather than for any medical purpose). *Id.* at 85. Unlike that policy, reporting statutes merely require personnel to "provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment." *Id.* at 84-85. They do *not* require personnel to "set out to obtain incriminating evidence from their patients for law enforcement purposes." *Id.* at 78 n.13; *id.* at 90 (Kennedy, J., concurring in the judgment) (noting that the holding did "not call into question the validity of mandatory reporting laws such as child abuse laws which require teachers to report evidence of child abuse").

Fifth Amendment. The warnings required under *Miranda v. Arizona*, 384 U.S. 436 (1966), confirm that mandatory reporters are not police agents. Those warnings apply only to custodial interrogation due to that setting's coercive nature. *Illinois v. Perkins*, 496 U.S. 292, 296 (1990). The Court has thus

held that *Miranda* warnings are not required "whenever a suspect is in custody in a technical sense and converses with someone [such as an undercover officer] who happens to be a government agent." *Id.* at 297; 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.10(c), at 542 (3d ed.).

Under this framework, lower courts have repeatedly rejected the claim that a mandatory-reporting "statute transforms [a reporter] into a state agent so that any incriminating statements made to the [reporter] violate [a child abuser's] privilege against self-incrimination" unless the reporter provides *Miranda* warnings. *People v. Younghanz*, 202 Cal. Rptr. 907, 911 (Cal. Ct. App. 1984); *State v. Coonrod*, No. CA2009-08-013, 2010 WL 1019586, at *2-4 (Ohio Ct. App. Mar. 22, 2010); *Wilkerson v. State*, 173 S.W.3d 521, 528-29 (Tex. Crim. App. 2005); *State v. Sprouse*, 478 S.E.2d 871, 874-76 (S.C. Ct. App. 1996); *People v. Cavaiani*, 432 N.W.2d 409, 414 (Mich. Ct. App. 1988). If a conversation between a mandatory reporter and a child abuser lacks a police interrogation's inherent *coerciveness* to trigger *Miranda*, it should not be viewed as having a police interrogation's inherent *solemnity* to trigger *Crawford*.

Sixth Amendment. An analogy to the Sixth Amendment's right to counsel shows the same. The right to counsel bars the government from using a cooperating prisoner as a government agent to elicit jailhouse admissions from an indicted defendant. *United States v. Henry*, 447 U.S. 264, 270-75 (1980). Yet no Sixth Amendment problem arises if the "informant, either through prior arrangement or voluntarily," merely "report[s] [the defendant's] incriminating statements to the police." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). Under this standard,

courts have rejected the notion that an informer qualifies as a "police agent" merely by acting on the "duty that is imposed upon all citizens to report criminal activity to the appropriate authorities." *Lightbourne v. Dugger*, 829 F.2d 1012, 1020 (11th Cir. 1987); *United States v. Birbal*, 113 F.3d 342, 344-46 (2d Cir. 1997) (informer not police agent merely because he agreed "to provide 'any and all information in his possession . . . of which he has knowledge'"). Just as a statute requiring *anyone* to report crime would not turn all prisoners into police agents under the right to counsel, it also does not turn all prisoners (such as the prisoner in *Dutton*) into police agents under the right to confrontation.

Two final points remove all doubt. For one, courts have held that a duty to report child abuse does *not* transform private parties into state actors under 42 U.S.C. § 1983. While a reporting duty "goes somewhat beyond the cases dealing with the voluntary furnishing of information to the police . . . the reporting requirement . . . does not create the kind of regulatory nexus that could justify treating [a reporter] as a state actor." *Brown v. Newberger*, 291 F.3d 89, 93-94 (1st Cir. 2002); *Mueller v. Auker*, 700 F.3d 1180, 1191-92 (9th Cir. 2012). For another, the weight of authority holds "that mandatory reporters are not transformed into investigative agents of law enforcement upon hearing a declarant's hearsay statement because their reporting requirement, by itself, does not compel them to initiate the inquiry, investigate the statement, or ascertain its veracity for the purpose of possible criminal prosecution." *People v. Phillips*, 315 P.3d 136, 165 (Colo. Ct. App. 2012); *United States v. Squire*, 72 M.J. 285, 288-89 (C.A.A.F. 2013); *United States v. DeLeon,* 678 F.3d

317, 324-25 (4th Cir. 2012), *rev'd on other grounds by* 133 S. Ct. 2850 (2013); *Seely v. State*, 282 S.W.3d 778, 788-89 (Ark. 2008); *People v. Cage*, 155 P.3d 205 (Cal. 2007); *State v. Spencer*, 169 P.3d 384, 389 (Mont. 2007); *People v. Duhs*, 947 N.E.2d 617, 620 (N.Y. 2011); *State v. Bella*, 220 P.3d 128, 132-33 (Or. Ct. App. 2009).

B. No Other Basis Exists For Finding That The Teachers Were Police Agents

The Ohio Supreme Court relied solely on the mandatory-reporting duty to find that the teachers were police agents. Pet. App. 6a-9a. That was for good reason. This case offers no factual basis to consider whether *other* exceptions should exist to the rule that statements between private parties are non-testimonial.

The Court need not resolve whether statements objectively meant for the *police* should be viewed as non-testimonial because they were made to *private-party* "conduits" or "pass-throughs." *Compare State v. Jensen*, 727 N.W.2d 518, 521, 527-28 (Wis. 2007) (finding testimonial victim's letter given to neighbor for delivery to police "if anything happened to her"), *with People v. Richter*, 977 N.E.2d 1257, 1280-83 (Ill. Ct. App. 2012) (rejecting use of "conduit" theory for statements to private parties). Here, no evidence suggests that L.P. really meant for his statements to reach the police and used his teachers as conduits.

Nor need the Court consider when (if ever) police *direction* of private-party conversations can turn a private party into a police agent. Such police involvement best explains *Idaho v. Wright*, 497 U.S. 805 (1990), the only case in which this Court has used the Confrontation Clause to prohibit the admis-

sion of statements to a private party (a pediatrician examining a child). *Id.* at 818-25. The child's statements there were made after the police took her into custody, *id.* at 809; they took the child to the pediatrician "for physical examination and an interview," Br. of Respondent at 5, *Idaho v. Wright*, 497 U.S. 805 (1990) (No. 89-260), 1989 WL 1127314. It is questionable whether *Wright* remains valid after *Crawford*. If so, it should be read narrowly. Just as the constitutional ban on using a declarant's out-of-court sworn testimony cannot be evaded "by having a note-taking policeman *recite* the [declarant's] unsworn hearsay testimony," *Davis*, 547 U.S. at 826, it perhaps cannot be evaded by having the policeman pass the notebook to a private party to conduct the interrogation on the policeman's behalf. But this is *not* the case to decide when, if ever, police direction changes things. The teachers were not working with police when they spoke to L.P.

III. EVEN UNDER THE PRIMARY-PURPOSE TEST GOVERNING POLICE INTERROGATIONS, L.P.'S STATEMENTS ARE NON-TESTIMONIAL

Assuming, lastly, that the primary-purpose test for police interrogation applies to L.P.'s statements to his daycare teachers, the Ohio Supreme Court mistakenly found the statements testimonial.

A. The Primary-Purpose Test Identifies The Declarant's Main Reason For A Statement Based On All Of The Circumstances

1. The primary-purpose test applies to "statements in response to police interrogation." *Davis*, 547 U.S. at 822. That test ultimately asks whether an out-of-court declarant made a statement "with a primary purpose of creating an out-of-court substi-

tute for trial testimony." *Bryant*, 131 S. Ct. at 1155. If so, the statement is testimonial; if not, it is not. *Id.* To answer this question, the Court "objectively evaluate[s] the circumstances in which the encounter occurs and the statements and actions of the parties." *Id.* at 1156. In other words, it "look[s] to all of the relevant circumstances," a fact-specific standard ensuring that courts do not "sacrifice accuracy for simplicity." *Id.* at 1162.

Under this test, "[t]he statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." *Bryant*, 131 S. Ct. at 1160. Starting with the declarant, the Court looks to "the understanding and purpose of a reasonable [declarant] in the circumstances of the actual [declarant]—circumstances that prominently include the [declarant's] physical state." *Id.* at 1161-62. A "frantic" declarant, *Davis*, 547 U.S. at 827, and a declarant suffering from a gunshot wound, *Bryant*, 131 S. Ct. at 1165, are more likely to make non-testimonial statements than a declarant sitting in her living room under police protection, *Davis*, 547 U.S. at 830.

Turning to the questioner, "'[t]he identity of an interrogator, and the content and tenor of his questions,' can illuminate the 'primary purpose of the interrogation.'" *Bryant*, 131 S. Ct. at 1162 (citation omitted). Police officers, for example, "function as both first responders and criminal investigators"; these "dual responsibilities may mean that they act with different motives simultaneously or in quick succession." *Id.* at 1161. The type of interrogator and the nature of the interrogator's questions can help decide which of these roles was the *primary* one during a particular conversation.

Aside from the statements of the declarant and police agent, the Court looks to "the circumstances in which [the declarant] interacted with the" police agent. *Id.* at 1158. For example, "the existence of an 'ongoing emergency' at the time of an encounter between an individual and the [agent] is among the most important circumstances." *Id.* at 1157. Whether an emergency exists "is a highly context-dependent inquiry." *Id.* at 1158. It depends on the nature of the crime and the type of injury. *Id.* at 1158-59. Even if no emergency exists, moreover, statements are not thereby testimonial. *Bryant*, 131 S. Ct. at 1160. Not all statements can be pigeonholed into *either* emergency-response purposes *or* substitute-for-trial purposes. Rather, "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Id.* at 1155.

The Court also examines the *time* at which the questioning occurs. "'[I]nitial inquiries'"—such as immediate answers to questions during 911 calls—"may '*often* . . . produce nontestimonial statements.'" *Id.* at 1166 (quoting *Davis*, 547 U.S. at 832). That is true even if the statements expressly accuse a suspect, because during an emergency police agents may "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cnty.*, 542 U.S. 177, 186 (2004); *Davis*, 547 U.S. at 827. Follow-up answers to questions occurring later, by contrast, are more likely to be testimonial. *Davis*, 547 U.S. at 828-29.

Lastly, the Court has noted "the importance of *informality* in an encounter" with police agents. *Bryant*, 131 S. Ct. at 1160. Statements are more likely testimonial if they are "conducted in a separate room" from all others under a question-and-answer format. *Davis*, 547 U.S. at 830-31. Statements are more likely non-testimonial if "the questioning . . . occur[s] in an exposed, public area" or in a hurried, "disorganized fashion." *Bryant*, 131 S. Ct. at 1160.

2. The Court has applied this primary-purpose test to three sets of facts. It held that statements a wife made to police about her husband's abuse after the police had separated the couple were testimonial. *Davis*, 547 U.S. at 820, 829-32. The wife made her statements during the officer's questioning about her version of events, and "the officer 'had her fill out and sign a battery affidavit.'" *Id.* at 820 (citation omitted). The Court found it "clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct," and that "[t]here was no emergency." *Id.* at 829-30.

The Court, by contrast, has found that a woman's allegations to a 911 operator that her former boyfriend was attacking her were non-testimonial. *Id.* "A 911 call, . . . and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Id.* at 827. The woman thus faced an "ongoing emergency" and her statements sought "help against bona fide physical threat." *Id.* Similarly, a shooting victim's pained statements to police were not "testimonial" because an ongoing emergency continued when they encountered him in a gas-station parking lot. *Bryant*, 131

S. Ct. at 1162-67. Among other things, the police did not know the location of the shooter, a gun was involved, the declarant's statements were made while "lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen," the questions asked of him were the type of questions necessary to assess the emergency, and the "situation was fluid and somewhat confused." *Id.*

B. The Primary Purpose Of L.P.'s Conversation With His Teachers Was Not To Create An Out-Of-Court Substitute For Trial

All of the circumstances—the teachers' perspective, L.P.'s perspective, and the environment in which they conversed—illustrate that L.P. did not identify Dee to his daycare teachers for the "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155.

Teachers' Perspective. The facts, objectively assessed, show that the teachers questioned L.P. to protect him and to secure the classroom—purposes that have nothing to do with investigating crime.

As a general matter, even if mandatory-reporting teachers qualify as police agents and trigger the primary-purpose test, that does not mean that their *actual* occupations fall by the wayside. The test is expansive enough to consider the "'identity of [the] interrogator.'" *Bryant*, 131 S. Ct. at 1162 (citation omitted). It is obvious that teachers and police perform fundamentally different roles in our society.

Unlike police, "[t]he primary duty of school officials and teachers . . . is the education and training of young people." *New Jersey v. T.L.O.,* 469 U.S. 325, 350 (1985) (Powell, J., concurring). When teachers question students about injuries, they will generally

have a purpose to protect the children and maintain a safe and structured learning environment. *Yates*, 808 N.E.2d at 870 ("Schoolteachers . . . have a special responsibility to protect those children committed to their care and control."); Ohio Dep't of Educ., *Licensure Code of Professional Conduct for Ohio Educators*, at 2 (Mar. 22, 2008) ("An educator's responsibility includes nurturing the intellectual, physical, emotional, social, and civic potential of all students and providing a safe environment free from harassment, intimidation and criminal activity."), *available at* http://education.ohio.gov. In that regard, "[m]aintaining order in the classroom has never been easy." *T.L.O.,* 469 U.S. at 339.

A teacher's primary concern will rarely be gathering out-of-court evidence to ensure a criminal conviction. "A teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker." *Id.* at 353 (Blackmun, J., concurring). And while a "'teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute,'" *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) (citation omitted), the teacher has yet to take on the role of gumshoe. The teachers' occupation *alone* should go a long way toward finding a primary purpose other than creating an out-of-court substitute for trial testimony.

As a specific matter, the teachers' questions and actions show that their teaching-related duties drove the questioning. After noticing significant injuries to L.P., Whitley "was kind of like in shock." JA27. She immediately got the attention of the lead teacher, Jones, who asked, "Whoa, what happened." *Id.* These are not the words of police interrogators; they are

the spontaneous words of surprised adults upon seeing a bruised child. The initial questions—"Who did this? What happened to you?" JA59—are precisely the types of questions for assessing the situation that this Court has said often lead to non-testimonial answers. *See Bryant*, 131 S. Ct. at 1150 (asking "'what had happened, who had shot him, and where the shooting had occurred'" (citation omitted)); *Davis*, 547 U.S. at 818 (asking "do you know [the perpetrator's] last name?").

When, moreover, L.P. identified "Dee" in response to questions, the teachers did not know what he meant. JA59. During their conversation, it was unclear to them if L.P. had been injured by another child. And they had a duty to protect L.P. from harm at school. So Jones asked if Dee was "big or little, because [she] wanted to know was he talking about another child, because sometimes they'll say a brother or a sister hit him or somebody." JA60.

To be sure, Whitley agreed that she had a mandatory duty to report child abuse. JA37. Tellingly, however, neither of them was the *initial* individual to express that they should "make the 696 call" to report that abuse. JA32. Rather, it was the *supervisor* who did so, JA65, confirming that the teachers' reporting duty was far from their minds during the *initial* questioning of L.P.

L.P.'s Perspective. The facts, objectively considered, illustrate that L.P. was not focused on criminal proceedings when responding to his teachers' questions. Most notably, L.P. was only three-and-a-half-years old in March 2010. JA153. Just as the Court considered the victim's fatal wound in *Bryant*, 131 S. Ct. at 1161, it should consider the victim's tender age here. After all, the Court has already said that

the primary-purpose test incorporates "the circumstances of the actual" declarant, including the declarant's "physical state." *Id.* at 1161-62.

The Court, moreover, has already held that a similar objective test—the one asking whether a reasonable suspect would view himself in "custody" for *Miranda* purposes—*must* account for a suspect's youth. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402-05 (2011). *J.D.B.* was premised on the insight that a "child's age is far 'more than a chronological fact.' It is a fact that 'generates commonsense conclusions about behavior and perception.'" 131 S. Ct. at 2403 (citation omitted). The same is true here. Many lower courts have thus recognized that "a person's age is a pertinent characteristic for analysis" under the Confrontation Clause. *People v. Vigil*, 127 P.3d 916, 925-26 (Colo. 2006); *Commonwealth v. Allshouse*, 36 A.3d 163, 180-81 (Pa. 2012); *State v. Scacchetti*, 690 N.W.2d 393, 396 (Minn. Ct. App. 2005).

L.P.'s age should be all but dispositive for determining his purpose in answering his teachers. Perhaps even more so than "[a] severely injured victim," a small child "may have no purpose at all in answering questions posed; the answers may be simply reflexive." *Bryant*, 131 S. Ct. at 1161. That certainly seems the case for L.P. When responding to his teachers' questions, he reflexively said "I fell" and then implicated "Dee" while in a "bewildered" state. JA27, 32, 59-60. Nothing suggests he had any particular purpose in mind when doing so.

Circumstances of Questioning. Lastly, an evaluation of the circumstances in which L.P. conversed with his teachers confirms that his statements to them were not testimonial. The "highly context-dependent inquiry" for determining whether an

emergency exists shows that one existed here. *Bryant*, 131 S. Ct. at 1158. When confronted with an injured *child*, teachers "need to know whom they are dealing with in order to assess the . . . possible danger to [that] victim." *Hiibel*, 542 U.S. at 186. They will be concerned about sending children home with the very individual who may be abusing them. It is a tragic fact that abuse routinely occurs in the home. *See* David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 The Future of Children 46 (1994). Thus, what one court said about parents is true about teachers—to "characterize such . . . questioning as the gathering of evidence for purposes of litigation would unnecessarily and undesirably militate against a [teacher's] ability to support and nurture a child at a time when the child most needs that support." *Pantano v. State*, 138 P.3d 477, 483 (Nev. 2006).

The "*informality* in [this] encounter" also cannot go overlooked. *Bryant*, 131 S. Ct. at 1160. The open-ended questions occurred "in the classroom" "aside from the other children." JA45; *see* JA27, 58. Jones only later took L.P. to the supervisors' office for a closer examination; she downplayed the emergency in the classroom so as not to alarm other children or embarrass L.P. JA58. Jones's actions, in other words, are a prototypical example why the Court has "respected the value of preserving the informality of the student-teacher relationship." *T.L.O.*, 469 U.S. at 340 (citing *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975)). Further, the questions to L.P. were the "'initial inquiries'" by adults to L.P. about the abuse. *Bryant*, 131 S. Ct. at 1166 (citation omitted). They were not second-level interviews.

* * * *

In sum, a totality-of-the-circumstances analysis under the primary-purpose test shows that L.P. did not implicate Clark with the primary purpose of creating an out-of-court substitute for trial testimony. More than that, it shows how unnecessary that fact-specific test is here. The test, while suited for close cases involving police interrogations in the field, is ill-suited for cases like this one involving a young child's statements meant *solely* for private parties without *any* police involvement. That type of hearsay is not testimonial "under any definition." *Crawford*, 541 U.S. at 60. While "[s]impler is not always better," sometimes it is. *Bryant*, 131 S. Ct. at 1162. It is better for prior testimony; it is better for formal custodial police interrogation; and it is better for statements like those L.P. made to his teachers.

CONCLUSION

The Ohio Supreme Court's judgment should be reversed, and the case should be remanded for proceedings consistent with this Court's decision.

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NOVEMBER 17, 2014

APPENDIX

Ohio Revised Code § 2151.421. Persons required to report injury or neglect; procedures on receipt of report.

(A)

(1)

(a) No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, the person making the report shall make it to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. In the circumstances described in section 5120.173 of the Revised Code, the person making the report shall make it to the entity specified in that section.(b)Division (A)(1)(a) of this section applies to any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; li-

censed school psychologist; independent marriage and family therapist or marriage and family therapist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp or child day c administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; person engaged in social work or the practice of professional counseling; agent of a county humane society; person, other than a cleric, rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion; employee of a county department of job and family services who is a professional and who works with children and families; superintendent or regional administrator employed by the department of youth services; superintendent, board member, or employee of a county board of developmental disabilities; investigative agent contracted with by a county board of developmental disabilities; employee of the department of developmental disabilities; employee of a facility or home that provides respite care in accordance with section 5123.171 of the Revised Code; employee of a home health agency; employee of an entity that provides homemaker services; a person performing the duties of an assessor pursuant to Chapter 3107. or 5103. of the Revised Code; or third party employed by a public children services agency to assist in providing child or family related services.

(b) Division (A)(1)(a) of this section applies to any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other

health care professional; licensed psychologist; licensed school psychologist; independent marriage and family therapist or marriage and family therapist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp or child day c administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; person engaged in social work or the practice of professional counseling; agent of a county humane society; person, other than a cleric, rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion; employee of a county department of job and family services who is a professional and who works with children and families; superintendent or regional administrator employed by the department of youth services; superintendent, board member, or employee of a county board of developmental disabilities; investigative agent contracted with by a county board of developmental disabilities; employee of the department of developmental disabilities; employee of a facility or home that provides respite care in accordance with section 5123.171 of the Revised Code; employee of a home health agency; employee of an entity that provides homemaker services; a person performing the duties of an assessor pursuant to Chapter 3107. or 5103. of the Revised Code; third party employed by a public children services agency to assist in providing child or family related services; court appointed special advocate; or guardian ad litem.

(2) . . .

(3) . . .

(4) . . .

(B) Anyone who knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in similar circumstances to suspect, that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect of the child may report or cause reports to be made of that knowledge or reasonable cause to suspect to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, a person making a report or causing a report to be made under this division shall make it or cause it to be made to the public children services agency or to a municipal or county peace officer. In the circumstances described in section 5120.173 of the Revised Code, a person making a report or causing a report to be made under this division shall make it or cause it to be made to the entity specified in that section.

(C) Any report made pursuant to division (A) or (B) of this section shall be made forthwith either by telephone or in person and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

(1) The names and addresses of the child and the child's parents or the person or persons having custody of the child, if known;

(2) The child's age and the nature and extent of the child's injuries, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to have occurred or of the threat of injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to exist, including any evidence of previous injuries, abuse, or neglect;

(3) Any other information that might be helpful in establishing the cause of the injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to have occurred or of the threat of injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to exist.

Any person, who is required by division (A) of this section to report child abuse or child neglect that is known or reasonably suspected or believed to have occurred, may take or cause to be taken color photographs of areas of trauma visible on a child and, if medically indicated, cause to be performed radiological examinations of the child.

(D) As used in this division, "children's advocacy center" and "sexual abuse of a child" have the same meanings as in section 2151.425 of the Revised Code.

(1) When a municipal or county peace officer receives a report concerning the possible abuse or neglect of a child or the possible threat of abuse or neglect of a child, upon receipt of the report, the municipal or county peace officer who receives the report shall refer the report to the appropriate public children services agency.

(2) When a public children services agency receives a report pursuant to this division or division (A) or (B) of this section, upon receipt of the report, the public children services agency shall do both of the following:

(a) Comply with section 2151.422 of the Revised Code;

(b) If the county served by the agency is also served by a children's advocacy center and the report alleges sexual abuse of a child or another type of abuse of a child that is specified in the memorandum of understanding that creates the center as being within the center's jurisdiction, comply regarding the

report with the protocol and procedures for referrals and investigations, with the coordinating activities, and with the authority or responsibility for performing or providing functions, activities, and services stipulated in the interagency agreement entered into under section 2151.428 of the Revised Code relative to that center.

(E) No township, municipal, or county peace officer shall remove a child about whom a report is made pursuant to this section from the child's parents, stepparents, or guardian or any other persons having custody of the child without consultation with the public children services agency, unless, in the judgment of the officer, and, if the report was made by physician, the physician, immediate removal is considered essential to protect the child from further abuse or neglect. The agency that must be consulted shall be the agency conducting the investigation of the report as determined pursuant to section 2151.422 of the Revised Code.

(F)

(1) Except as provided in section 2151.422 of the Revised Code or in an interagency agreement entered into under section 2151.428 of the Revised Code that applies to the particular report, the public children services agency shall investigate, within twenty-four hours, each report of child abuse or child neglect that is known or reasonably suspected or believed to have occurred and of a threat of child abuse or child neglect that is known or reasonably suspected or believed to exist that is referred to it under this section to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible. The investigation shall be made in cooperation

with the law enforcement agency and in accordance with the memorandum of understanding prepared under division (J) of this section. A representative of the public children services agency shall, at the time of initial contact with the person subject to the investigation, inform the person of the specific complaints or allegations made against the person. The information shall be given in a manner that is consistent with division (H)(1) of this section and protects the rights of the person making the report under this section.

A failure to make the investigation in accordance with the memorandum is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from the report or the suppression of any evidence obtained as a result of the report and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person. The public children services agency shall report each case to the uniform statewide automated child welfare information system that the department of job and family services shall maintain in accordance with section 5101.13 of the Revised Code. The public children services agency shall submit a report of its investigation, in writing, to the law enforcement agency.

(2) The public children services agency shall make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention.

(G)

(1)

(a) Except as provided in division (H)(3) of this section, anyone or any hospital, institution, school, health department, or agency participating in the

making of reports under division (A) of this section, anyone or any hospital, institution, school, health department, or agency participating in good faith in the making of reports under division (B) of this section, and anyone participating in good faith in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of the making of the reports or the participation in the judicial proceeding.

(b) Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the cause of the injuries, abuse, or neglect in any judicial proceeding resulting from a report submitted pursuant to this section.

(2) In any civil or criminal action or proceeding in which it is alleged and proved that participation in the making of a report under this section was not in good faith or participation in a judicial proceeding resulting from a report made under this section was not in good faith, the court shall award the prevailing party reasonable attorney's fees and costs and, if a civil action or proceeding is voluntarily dismissed, may award reasonable attorney's fees and costs to the party against whom the civil action or proceeding is brought.

(H) . . .

(I) Any report that is required by this section, other than a report that is made to the state highway patrol as described in section 5120.173 of the Revised Code, shall result in protective services and emergency supportive services being made available by the public children services agency on behalf of the

children about whom the report is made, in an effort to prevent further neglect or abuse, to enhance their welfare, and, whenever possible, to preserve the family unit intact. The agency required to provide the services shall be the agency conducting the investigation of the report pursuant to section 2151.422 of the Revised Code.

(J)

(1) Each public children services agency shall prepare a memorandum of understanding that is signed by all of the following:

(a) If there is only one juvenile judge in the county, the juvenile judge of the county or the juvenile judge's representative;

(b) If there is more than one juvenile judge in the county, a juvenile judge or the juvenile judges' representative selected by the juvenile judges or, if they are unable to do so for any reason, the juvenile judge who is senior in point of service or the senior juvenile judge's representative;

(c) The county peace officer;

(d) All chief municipal peace officers within the county;

(e) Other law enforcement officers handling child abuse and neglect cases in the county;

(f) The prosecuting attorney of the county;

(g) If the public children services agency is not the county department of job and family services, the county department of job and family services;

(h) The county humane society;

(i) If the public children services agency participated in the execution of a memorandum of understanding under section 2151.426 of the Revised Code establishing a children's advocacy center, each participating member of the children's advocacy center established by the memorandum.

(2) A memorandum of understanding shall set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities under this section and division (C) of section 2919.21, division (B)(1) of section 2919.22, division (B) of section 2919.23, and section 2919.24 of the Revised Code and shall have as two of its primary goals the elimination of all unnecessary interviews of children who are the subject of reports made pursuant to division (A) or (B) of this section and, when feasible, providing for only one interview of a child who is the subject of any report made pursuant to division (A) or (B) of this section. A failure to follow the procedure set forth in the memorandum by the concerned officials is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from any reported case of abuse or neglect or the suppression of any evidence obtained as a result of any reported child abuse or child neglect and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person.

(3) A memorandum of understanding shall include all of the following:

(a) The roles and responsibilities for handling emergency and nonemergency cases of abuse and neglect;

(b) Standards and procedures to be used in handling and coordinating investigations of reported cases of child abuse and reported cases of child neglect, methods to be used in interviewing the child who is the subject of the report and who allegedly was abused or neglected, and standards and procedures addressing the categories of persons who may interview the child who is the subject of the report and who allegedly was abused or neglected.

(4) If a public children services agency participated in the execution of a memorandum of understanding under section 2151.426 of the Revised Code establishing a children's advocacy center, the agency shall incorporate the contents of that memorandum in the memorandum prepared pursuant to this section.

(5) The clerk of the court of common pleas in the county may sign the memorandum of understanding prepared under division (J)(1) of this section. If the clerk signs the memorandum of understanding, the clerk shall execute all relevant responsibilities as required of officials specified in the memorandum.

(K) . . .

(L) The director of job and family services shall adopt rules in accordance with Chapter 119. of the Revised Code to implement this section. The department of job and family services may enter into a plan of cooperation with any other governmental entity to aid in ensuring that children are protected from abuse and neglect. The department shall make recommendations to the attorney general that the department determines are necessary to protect children from child abuse and child neglect.

(M) Whoever violates division (A) of this section is liable for compensatory and exemplary damages to the child who would have been the subject of the report that was not made. A person who brings a civil action or proceeding pursuant to this division against a person who is alleged to have violated division (A)(1) of this section may use in the action or proceeding reports of other incidents of known or suspected abuse or neglect, provided that any information in a report that would identify the child who is the subject of the report or the maker of the report,

if the maker is not the defendant or an agent or employee of the defendant, has been redacted.

(N) . . .

(O) As used in this section, "investigation" means the public children services agency's response to an accepted report of child abuse or neglect through either an alternative response or a traditional response.