No. 13-1352

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

vs.

DARIUS CLARK,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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

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

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. Both parties have filed blanket consents to the filing of *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

The State of Ohio has determined, through an exception to its hearsay rule, when the statement of a child regarding violent or sexual abuse will be deemed reliable enough to be introduced in evidence. The decision of the Supreme Court of Ohio in the present case expands the meaning of the Confrontation Clause of the Sixth Amendment far beyond the original understanding of its scope to trump that decision in an important class of cases—statements made by a child to any person who is required by law to report child abuse. This result is contrary to the interests of victims that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On March 17, 2010, Cleveland Head Start teacher Ramona Whitley noticed an apparent injury to the eye of three-year-old L.P. The child had been dropped off at the school by defendant Darius Clark, his mother's boyfriend and pimp. App. to Pet. for Cert. 19a-20a. When she asked, "What happened?" L.P. said he had fallen. When Ms. Whitley noticed additional injuries, she took L.P. to lead teacher Debra Jones, who asked, "Whoa, what happened?" and "Who did this? What happened to you?" L.P. answered "Dee, Dee." To clarify whether Dee was an adult or child, Ms. Jones asked "Is he big or little?" L.P. answered, "Dee is big." *Id.*, at 20a-21a. Dee is the nickname of the defendant.

Ms. Jones took L.P. to the supervisor's office, where she observed further injuries. Ms. Whitley then reported the incident to the child-abuse-reporting hotline. The county children's services agency investigated. The next day a social worker confirmed L.P.'s injuries, found that his two-year-old sister A.T. had very serious injuries, and took them both to the hospital. *Id.*, at 5a, 21a.

"A physician determined that L.P. had bruising in various stages of development and abrasions consistent with having been struck by a linear object and that A.T. had bruising, burn marks, a swollen hand, and a pattern of sores at her hairline. The physician suspected child abuse and estimated that the injuries occurred between February 28 and March 18, 2010.

"{¶ 11} A grand jury indicted Clark on one count of felonious assault relating to L.P., four counts of felonious assault relating to A.T., two counts of endangering children, and two counts of domestic violence. The trial court declared L.P. incompetent to testify but denied Clark's motion in limine to exclude L.P.'s out-of-court identification statements. Seven witnesses testified regarding the statements made by L.P.: Jody Remington, a Cleveland police detective; Sarah Bolog, a CCDCFS social worker; Howard Little, a CCDCFS intake social worker; Whitley and Jones; the children's maternal grandmother; and the children's maternal great-aunt." *Id*., at 5a.

As in all American jurisdictions, hearsay is generally inadmissible in Ohio, see Ohio R. Evid. 802, but there are a number of exceptions. One of them is for reports of abuse by children who are unavailable to testify that the court finds have particularized guarantees of trustworthiness under all the circumstances and are supported by independent proof that a sexual or violent act has occurred. See Ohio R. Evid. 807; App. to Pet. for Cert. 64a-65a.

Defendant was convicted of multiple counts of felonious assault, child endangerment, and domestic violence and sentenced to 28 years in prison. He appealed, and the Court of Appeals reversed and remanded for a new trial. App. to Pet. for Cert. 52a.

The Court of Appeals found that the admission of the testimony of the police officer, social workers, and teachers violated the Confrontation Clause. *Id.*, at 58a-63a. That court further found that the admission of the testimony of the grandmother and great-aunt was error under the state's child abuse hearsay exception, Rule 807. See *id.*, at 63a, 68a.

The State sought review of only the holdings regarding the teachers. See *id.*, at 6a. That ruling would preclude testimony by the teachers on retrial. See Reply Brief for the Petitioner (to Brief in Opposition) 2. The Ohio Supreme Court affirmed in a narrowly divided decision. See *id.*, at 17a. Chief Justice O'Connor, dissenting, wrote, "The majority decision creates confusion in our case law, eviscerates Evid.R. 807, and threatens the safety of our children. Not surprisingly, it is also wrong as a matter of federal constitutional law." See *id.*, at 17a. This Court granted certiorari on October 2, 2014.

SUMMARY OF ARGUMENT

Crawford v. *Washington* upended this Court's jurisprudence of the Confrontation Clause, replacing the reliability-based rule of *Ohio* v. *Roberts* with a historical approach based on similarity to the practices the Clause was intended to prohibit. However, *Crawford*'s historical discussion did not pay sufficient attention to early American cases on dying declarations, the primary form of hearsay admissible in criminal cases in the founding era. The early cases uniformly indicate that dying declarations were seen as consistent with the Confrontation Clause, not an exception to it, because the person hearing the statement and not the deceased declarant was considered the "witness" for the purpose of the confrontation right. Given that original

understanding is the entire basis of the *Crawford* rule, the definitions of "witness" and "testimonial" under that rule must conform to that original understanding, notwithstanding any implications to the contrary in *Crawford* or *Davis* v. *Washington*.

For a statement to be "testimonial" for this purpose, it must resemble the forbidden practices in a way that a dying declaration does not. Solemnity alone will not make a statement testimonial, as one of the reasons dying declarations were admitted was *because* they were considered to have solemnity equivalent to an oath. Intent of a declarant to inform the authorities of the identity of the perpetrator, as distinguished from creating admissible evidence to prove guilt in court, is insufficient to make a statement testimonial, as that is the intent of most dying declarants.

A statement by a preschool child to a teacher is far less testimonial, by any definition, than a dying declaration and therefore cannot make the child a witness for the purpose of the Confrontation Clause.

The broad language of *Davis* has been significantly narrowed by *Michigan* v. *Bryant* regarding the principal purpose test. Only a purpose of "creating an out-of-court substitute for trial testimony" now makes a statement testimonial.

Williams v. *Illinois* establishes a precedent controlling in this case, despite the lack of a majority opinion. The plurality and the concurrence, taken together, establish that a statement is not testimonial if it was not taken "for the primary purpose of accusing a targeted individual" (plurality) *and* if it is not "formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized dialogue, such as custodial interrogation" (concurrence). The teachers' questions to the child in

this case and his answers meet both tests; therefore, the teachers and not the child were the "witnesses" for the purpose of the Confrontation Clause.

ARGUMENT

I. Dying declarations provide key insights into the original understanding of hearsay and the Confrontation Clause, not yet sufficiently appreciated.

Under the since-discarded rule of *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980), the Confrontation Clause of the Sixth Amendment was virtually a constitutionalization of the hearsay rule of evidence law. If a hearsay declaration came within a "firmly rooted hearsay exception" or had "particularized guarantees of trustworthiness," no confrontation of an unavailable declarant would be deemed constitutionally required. See *ibid*. Otherwise, the actual witness in court could not testify to what the declarant said, even though the defendant was fully able to confront that witness.

Roberts was overruled and Confrontation Clause jurisprudence was upended in *Crawford* v. *Washington*, 541 U. S. 36 (2004). *Crawford* instead took a historical approach and found that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused . . . . The Sixth Amendment must be interpreted with this focus in mind." *Id*., at 50.

The *Crawford* opinion noted, "This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it

bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Id.*, at 51. "Not all" is a significant understatement. *Most* hearsay bears little resemblance to the historical practices identified in the decision. These practices included pretrial examinations by justices of the peace, *id.*, at 43, the examination by the Privy Council used in the trial of Sir Walter Raleigh, *id.*, at 44, admission of a letter in the same trial, *ibid.*, use of examinations taken by governor-appointed commissioners, *id.*, at 47, and testimony by deposition or private examination in admiralty courts. *Id.*, at 47-48. For the most part, this Court since *Crawford* has applied the Confrontation Clause to statements resembling the historical practices and declined to apply it to those that do not. The exception is the oral statement of the victim in *Hammon* v. *Indiana*, decided with *Davis* v. *Washington*, 547 U. S. 813 (2006). See *id.*, at 840 (Thomas, J., dissenting in part).

Deciding what kinds of hearsay do "implicate[] the Sixth Amendment's core concerns" is not an easy task, but the logical place to start is with hearsay that was generally admissible in the founding era. The most solidly established exception to the hearsay rule in criminal cases in the late eighteenth century and into the nineteenth was the dying declaration, see *Crawford*, 541 U. S., at 56, n. 6., and it would make sense to look there first to see what information may be gleaned regarding the interrelation between the hearsay rule and the Confrontation Clause in the founding era and in the period not too far removed from that era. Oddly, though, the *Crawford* opinion treats dying declarations as a loose end, dropped into a footnote and declared to be acceptable, if at all, only on historical grounds and as *sui generis* rather than establishing principles applicable to other forms of hearsay. See *ibid*. That characterization is unsupported by authority or analysis. Fur-

ther, interpreting the Sixth Amendment in a way that requires an "exception" not contained in the text, see *ibid*., is highly problematic. If the constitutional mandate is subject to unwritten exceptions, why should the historical one be the only one in perpetuity? If we can make exceptions on the basis of history, why can we not make exceptions on the basis of new knowledge of the types of hearsay that are both reliable and necessary? That is, of course, the road back to *Roberts*. Cf. *id*., at 62.

Looking more closely at the nineteenth century dying declaration cases, we see that this category of evidence was not seen as an unstated "exception" to the Confrontation Clause at all, but rather as fully consistent with it. An understanding of the Confrontation Clause consistent with these cases is historically more honest, theoretically more sound, and practically less subject to future creation of further nontextual exceptions.

The question should not be "whether the exception for dying declarations survives [this Court's] recent Confrontation Clause decisions." *Michigan* v. *Bryant*, 562 U. S. __, 131 S. Ct. 1143, 1177, 179 L. Ed. 2d 93, 131 (2011) (Ginsburg, J., dissenting). The question should be whether expansive language in those decisions survives a proper analysis of the indisputable admissibility of dying declarations in the founding era.

Woodsides v. *State*, 3 Miss. (2 Howard) 655 (1837) appears to be the earliest reported case squarely addressing a Confrontation Clause challenge to a dying declaration. The state constitution had a provision essentially the same as the Sixth Amendment. See *id*., at 664-665. The claim was rejected and the evidence was held admissible, but not because of a historical, nontextual "exception" to the right of confrontation.

> "But it is upon the ground alone that the murdered individual is not a witness, that his declarations made *in extremis* can be offered as evidence upon the trial of the accused. If he were, or could be a witness, his declaration, upon the clearest principle, would be inadmissible. His declarations are regarded as facts or circumstances connected with the murder, which, when they are established by oral testimony, the law has declared to be evidence. *It is the individual who swears to the statements of the deceased that is the witness, not the deceased*." *Id*., at 665 (emphasis added).

If lawyers in the founding era thought there were a substantial constitutional issue with the admission of dying declarations, we would expect to see it in Virginia. That state adopted a bill of rights including confrontation 15 years before the Sixth Amendment, see *Crawford*, 541 U. S., at 48, and it was initially the largest state with the most cases. *Giles* v. *California*, 554 U. S. 353, 361-362 (2008), noted in a related context that an absence of lawyers even making a particular argument was telling, and absence is what we have in founding-era Virginia. Seven decades after the adoption of the Virginia Declaration of Rights, it was a case of first impression when a defendant claimed a conflict between the confrontation right and the admission of a dying declaration, even though such declarations had been admitted in "constant practice" during that period. See *Hill* v. *Commonwealth*, 43 Va. (2 Gratt.) 594, 607 (1845). With the issue raised, the Virginia Supreme Court specifically declined to reject the argument on historical practice alone, instead saying "this Court is bound to decide it now; not upon practice, but upon principle." *Ibid*.

Deciding the case on principle, the *Hill* court reached the same conclusion as *Woodsides*. "It is analogous

to [the rule] which authorizes the admissions of the prisoner to be given in evidence against him. In that case, he is not the witness; neither is the dead man. His declarations are facts to be proved by witnesses, who must be confronted with the accused." *Id*., at 608.

We see the same conclusion over and over in antebellum cases confronted with confrontation objections to dying declarations.

> "The accused *is confronted* by the witness on his trial. The deceased person is not the witness, but the person who can relate, on the trial, the death-bed declarations, is the witness. The objection, if there be one, is to the competency of the evidence, and not to the want of the personal presence of the witness." *Robbins* v. *State*, 8 Ohio St. 131, 163 (1857).

In other words, this is a hearsay rule question, not a constitutional confrontation question.

> "The argument for the exclusion of the testimony, proceeds upon the idea that the deceased is the witness, when in fact it is the individual who swears to the statements of the deceased, who is the witness. And it is as to *him* that the privileges of an oral and cross examination are secured." *Campbell* v. *State*, 11 Ga. 353, 374 (1852).

Summons v. *State*, 5 Ohio St. 325, 341-342 (1856) makes the same point and notes that it also applies to other hearsay exceptions recognized at that time, including co-conspirator statements, fresh reports of rape victims, and admissions of the accused.

Near the end of the nineteenth century, the highest court of New York declared, citing numerous authorities, "It is *invariably* held that the deceased is not a witness within the meaning of such a provision or of the Bill of Rights, and that it is sufficient if the defendant is confronted with the witness who testifies to the

declaration." *People* v. *Corey*, 157 N. Y. 332, 348, 51 N. E. 1024, 1029 (1898) (emphasis added).[2] Given that historical understanding is the entire foundation of the *Crawford* rule, the meaning of "witness" should certainly conform to the historical understanding of that term as applied to otherwise admissible hearsay, and dying declarations provide the primary window into that understanding.

The first insight we gain from these cases is that solemnity of the statement alone is not sufficient to change a declarant into a witness. For a dying declaration to be admissible, the declarant must know he is at death's door, and the resulting solemnity was regularly cited as a reason *for* admissibility. "[F]or this is supposed to create a solemnity equivalent to an oath." *Commonwealth* v. *Casey*, 65 Mass. (11 Cush.) 417, 421 (1853). It would create a Catch-22 (to use a decidedly twentieth-century term) if the very solemnity that warranted an exception to the hearsay bar operated to invoke the confrontation bar. That result cannot be squared with the historical understanding of dying declarations.

The second insight is that the intent of the declarant to direct the criminal justice system to the perpetrator of the offense so that he may be prosecuted and punished is not sufficient to make the declarant a witness. Of course that typically is the intent of the dying declarant.

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2. There is, to be sure, language to the contrary in *Mattox* v. *United States*, 156 U. S. 237, 243-244 (1895), but this is mere *dictum* as *Mattox* was not a dying declaration case, and it made no examination of those precedents. It is also half a century further removed from the founding than the antebellum cases discussed above.

It may well be that the question of whether the declarant is a "witness" can be equated to the question of whether his statement is "testimonial," see *Crawford*, 541 U. S., at 51, but then "testimonial" must be defined in a way consistent with the historical understanding that the admission of dying declarations is consistent with the confrontation right and not an exception to it. To the extent that understanding differs from Noah Webster's nonlegal definition of "testimony," see *ibid*., the legal understanding must prevail. The central purpose of the Confrontation Clause is preventing trial by depositions and similar methods, see *id*., at 50; *Summons* v. *State*, 5 Ohio St., at 340-341, and a hearsay statement cannot be "testimonial" for this purpose unless it resembles a deposition in some material way that a dying declaration does not.

II. A statement by a preschool child to his teacher is far less "testimonial" than a dying declaration and therefore does not make the child a "witness" for the purpose of the Confrontation Clause.

Crawford v. *Washington*, 541 U. S. 36 (2004), and *Davis* v. *Washington*, 547 U. S. 813 (2006), made no attempt to reconcile their definitions of "witness" and "testimonial" with the original understanding that dying declarations are fully compatible with the Confrontation Clause. Broad statements in those cases have already been trimmed back in *Michigan* v. *Bryant*, 562 U. S. __, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), and may require some further trimming to be consistent with the original understanding.

Davis, 547 U. S., at 822, says,

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

The implication in this statement and elsewhere in the opinion, see *id.*, at 830, that a statement becomes "testimonial" if its purpose is merely to identify the perpetrator to the authorities rather than to build a case to convict him is highly doubtful. Identification of the perpetrator with the intent that the information be conveyed to the authorities, if not made directly to them, is likely the central purpose of most dying declarants.

Bryant significantly narrowed the broad language of *Davis*.

> "But 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 . . . . Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Bryant*, 131 S. Ct., at 1155, 179 L. Ed. 2d, at 107-108.

The *Bryant* Court ultimately decided that the case fit within the primary purpose of meeting an ongoing emergency, see *id.*, 131 S. Ct., at 1166-1167, 179 L. Ed. 2d, at 119, so it was not necessary to explore

what those other circumstances might be, but "creating an out-of-court substitute for trial testimony" is certainly much narrower than "establishing or proving past events potentially relevant to later criminal prosecution," and it is more consistent with the purpose and original understanding of the confrontation right. A substitute for trial testimony would only be for the purpose of proving past events, not establishing them, to the extent that "establishing" implies something broader than or different from "proving."

The *Bryant* Court also considered the formality, or lack of it, in obtaining the statements, see *id.*, 131 S. Ct., at 1166, 179 L. Ed. 2d, at 119, and the concurrence considered this factor alone to be dispositive. See *id.*, 131 S. Ct., at 1167-1168, 179 L. Ed. 2d, at 120 (Thomas, J., concurring in the judgment).

The distinction between building a case against a targeted individual and solving an as-yet unsolved crime was presented in *Williams* v. *Illinois*, 567 U. S. __, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012). That case involved DNA testing before any suspect had been identified. The plurality noted, as one of two alternate grounds, that the testing report "plainly was not prepared for the primary purpose of accusing a targeted individual." *Id.*, 132 S. Ct., at 2243, 183 L. Ed. 2d, at 115; see also *id.*, 132 S. Ct., at 2250-2251, 183 L. Ed. 2d, at 123-124 (Breyer, J., concurring). Such a statement, the plurality held, " 'bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.' " *Id.*, 132 S. Ct., at 2244, 183 L. Ed. 2d, at 116 (quoting *Bryant*, 131 S. Ct., at 1167, 179 L. Ed. 2d, at 120 (Thomas, J., concurring in the judgment)).

Justice Thomas concurred in the judgment, providing the fifth vote for affirmance. This was based on his view that exclusion under the Confrontation Clause is

limited to "formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized dialogue, such as custodial interrogation." *Id.*, 132 S. Ct., at 2260, 183 L. Ed. 2d, at 133 (citations and internal quotation marks omitted). The rule of *Marks* v. *United States*, 430 U. S. 188, 193 (1977), that the holding of a case with no majority opinion is found in the opinion on the narrower grounds, has proven difficult to apply when neither opinion is unambiguously narrower than the other. For the reasons set forth in our brief in *Grutter* v. *Bollinger*, No. 02-241,[3] *amicus* believes that the precedent formed by such a case requires the same result in any case that shares the characteristics that both opinions concurring in the result found controlling.

With this understanding, the present case is straightforward. It shares all the essential characteristics that part IV of the *Williams* plurality opinion and Justice Thomas's concurrence found necessary to the result. A preschool teacher asking a child the cause of his injury is not accusing anyone or creating evidence for use at trial. See *Williams*, 132 S. Ct., at 2243-2244, 183 L. Ed. 2d, at 115-116. Indeed, until the question is answered, it is most likely that no crime has been committed at all, that the injury either was accidental or was inflicted by a person incapable of criminal culpability, *i.e.*, another preschooler. Even if abuse by an adult is suspected, no individual is targeted at least

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3. Available online at http://www.cjlf.org/briefs/Grutter.pdf.

until the question is answered.[4] As with catching the dangerous rapist at large in *Williams*, the primary purpose quite clearly was protection of the child from further injury. Applying Justice Thomas's test, the teachers' questions and the child's answers in this case do not amount to "formalized dialogue." They are even less so than the questions and answers that Justice Thomas found "highly informal" in *Bryant*, 131 S. Ct., at 1167, 179 L. Ed. 2d, at 120. *Williams* is therefore controlling precedent in this case.

CONCLUSION

The decision of the Ohio Supreme Court should be reversed.

November, 2014

Respectfully submitted,

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4. Even then, a teacher is not an agent of law enforcement, mandatory reporting statute or not. If mandatory reporting is enough to make a person an agent of law enforcement, then every person in the United States is an agent of law enforcement for federal felonies. See 18 U. S. C. § 4 (misprision). This issue is not further addressed in this brief because it is fully presented in the Brief for Petitioner.