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

REPLY BRIEF FOR PETITIONER

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Ohio's opening brief made three points. *First*, a child's statements that are objectively meant solely for private parties without police involvement are non-testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). *Second*, Ohio's child-abuse reporting statute does not turn reporters into police "agents" and trigger the primary-purpose test governing police interrogations in the field. *Third*, even if the primary-purpose test applies, L.P.'s statements to his teachers were non-testimonial.

Clark's response on each point lacks merit. He argues for a contrary rule with no grounding in *Crawford* or its progeny. And he justifies his rule primarily with reliability and competency concerns more appropriately directed to state legislatures when drafting evidentiary rules than federal courts when interpreting the Confrontation Clause.

I. CLARK MISTAKENLY EXPANDS THE PRIMARY-PURPOSE TEST TO COVER ALL ACCUSATIONS

A. Clark's Argument That Accusations Are Testimonial Conflicts With *Crawford* And Its Progeny

As Ohio noted, Petr. Br. 14-30, the Confrontation Clause's text, purpose, and history show that, when *objectively* assessed, statements meant *solely* for private parties without *any* police involvement are non-testimonial. This rule follows from the Confrontation Clause's "witness" *text*—which covers statements meant for a criminal trial, not a private audience. The rule follows from the clause's *purpose* to bar the use of *ex parte* examinations by government officers. And it follows from the Nation's *history* of regulating private conversations under evidentiary, not consti-

tutional, rules. Here, L.P.'s statements to his teachers fall within this narrow rule because they were meant for daycare teachers, and the government had no involvement in the conversation.

In response, Clark asserts that Ohio mistakenly relies on a statement's *private audience*, suggesting instead that the focus should be on the statement's *accusatorial content*. Specifically, Clark argues that the Confrontation Clause bars "out-of-court statements that . . . would function if introduced at trial as 'the equivalent in the jury's mind of testimony.'" Resp. Br. 25-26 (quoting *Douglas v. Alabama*, 380 U.S. 415, 419 (1965)). Under this rule, he says, "statements 'accusing a targeted individual of engaging in criminal conduct' are generally testimonial." *Id.* at 27 (quoting *Williams v. Illinois*, 132 S. Ct. 2221, 2242 (2012) (plurality op.)). But the same text, purpose, and history that prove Ohio's approach equally disprove Clark's competing view.

1. Clark's test conflicts with the Confrontation Clause's text

The clause's "witness" text shows that Clark is wrong *both* to focus on the jury's perspective *and* to place dispositive weight on the statement's content.

a. Clark's *jury*-focused test conflicts with the Court's *declarant*-focused test. Whether a declarant is a "witness" turns on the declarant's perspective because the declarant's statements must "pass the Sixth Amendment test." *Michigan v. Bryant*, 131 S. Ct. 1143, 1162 (2011). While a *questioner's* perspective helps "assess the nature of the declarant's purpose," *id.* at 1160 n.11, 1162, no post-*Crawford* case adds the *jury's* perspective to the mix. Indeed,

even under the primary-purpose test—which considers the *totality* of the circumstances—"[t]he existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight." *Id.* at 1157 n.8.

Douglas, the pre-*Crawford* case on which Clark relies, does not help him. Resp. Br. 25-26. There, the defendant and the declarant, Loyd, had been charged with assault. 380 U.S. at 416. At the defendant's trial, the prosecutor handed Loyd his confession and "read from the document, pausing after every few sentences to ask Loyd, in the presence of the jury, 'Did you make that statement?'" *Id.* Loyd invoked his right to remain silent each time. *Id.* The prosecutor did this "[u]nder the guise of cross-examination to refresh Loyd's recollection," never introducing the confession. *Id.* at 416-17. That the prosecutor's *questions* were at issue led the Court to say that his "reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement." *Id.* at 419. This language responded to the distinction between a prosecutor's questions and a witness's answers. *Lee v. Illinois*, 476 U.S. 530, 542 (1986) (noting the confession was "technically not evidence"). It did not distinguish testimonial from non-testimonial hearsay.

b. Clark incorrectly asserts that accusations "are generally testimonial." Resp. Br. 27. *First*, Clark's accusation test conflicts with the "witness" text. A witness speaks solemnly and "for the purpose of establishing or proving some fact at trial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). An accusation does not satisfy this definition simply be-

cause it inculpates the defendant. Like any statement, it must be made to "creat[e] an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155. And just as the purpose of custodial police interrogation, objectively assessed, is evidentiary, the purpose of an accusation meant solely for private parties without police direction, objectively assessed, is non-evidentiary. "An accuser who makes a formal statement to government officers" acts as a witness; an accuser "who makes a casual remark to an acquaintance" does not. *Crawford*, 541 U.S. at 51.

Clark responds with language from *Davis v. Washington*, 547 U.S. 813 (2006), that statements are testimonial if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822; Resp. Br. 26. But *Davis* was discussing statements *to police* who were "perform[ing] investigative and testimonial functions." *Id.* at 830 n.5. It disclaimed any notion that its test governed "all conceivable statements," leaving open the proper test for private conversations. *Id.* at 822-23 & n.2.

Second, Clark's accusation test conflicts with cases distinguishing between statements to government officers and statements to private actors. Take *Crawford*'s treatment of the child's statements in *White v. Illinois*, 502 U.S. 346 (1992). While *Crawford* suggested the child's statements to *police* were testimonial, Resp. Br. 32, it expressed no concern about similar statements to the *mother*. 541 U.S. at 58 n.8; *White*, 502 U.S. at 349-50. The statement's audience, not its content, made the difference.

This is confirmed by comparing cases Clark cites (*Douglas* and *Hammon v. Indiana*) with cases he ig-

nores (*Giles v. California*, 554 U.S. 353 (2008), and *Dutton v. Evans*, 400 U.S. 74 (1970)). *Douglas* and *Hammon* found statements testimonial because they were to *police*. Loyd's confession after interrogation represented "exactly the type of formalized testimonial evidence that lies at the core of the Confrontation Clause's concern." *White*, 502 U.S. at 365 (Thomas, J., concurring in the judgment). *Hammon* found statements testimonial because they were made "in response to police questioning" about past crimes. *Davis*, 547 U.S. at 830.

Giles and *Dutton*, by contrast, show that private-party accusations are non-testimonial. *Giles* rejected the dissent's view that the Confrontation Clause's forfeiture exception should be interpreted broadly to help "women in abusive relationships." 554 U.S. at 376. In the process, it noted that "[s]tatements to friends and neighbors about abuse" are non-testimonial. *Id.* The *Dutton* statement—"[i]f it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now"'—was as accusatorial as they come. 400 U.S. at 77 (plurality op.). Yet it was "clearly nontestimonial" because directed to a prisoner, not a cop. *Davis*, 547 U.S. at 825.

Third, Clark's accusation test conflicts with cases finding a statement's accusatorial nature irrelevant. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011). When rejecting the argument that "analysts are not subject to confrontation because they are not 'accusatory' witnesses," the Court found "no support in the text of the Sixth Amendment" for a distinction between accusations and other statements. *Melendez-Diaz*, 557 U.S. at 313. If the Confrontation

Clause does not exempt *non-accusatorial* testimony, it should not encompass *non-testimonial* accusations.

Fourth, Clark incorrectly claims support for his test in the *Williams* plurality and *Melendez-Diaz* dissent. Resp. Br. 26-27, 42-43. These opinions do view the Confrontation Clause as limited to statements "having the primary purpose of accusing a targeted individual of engaging in criminal conduct." *Williams*, 132 S. Ct. at 2242 (plurality op.). But Clark mistakes a *necessary* condition for a *sufficient* one. The opinions require statements to be both accusatorial *and* testimonial. *Id.*; *Melendez-Diaz*, 557 U.S. at 330 (Kennedy, J., dissenting).

2. Clark's test conflicts with the Confrontation Clause's purpose

Clark misreads the Confrontation Clause's purpose when he asserts that it was designed "to prevent trial by *ex parte* accusations," Resp. Br. 42, and that it reaches accusations made to private parties engaged in "investigations," *id.* at 29-30.

a. The Confrontation Clause was not designed to prohibit *ex parte accusations*; it was designed to prohibit *ex parte examinations*. *Crawford*, 541 U.S. at 50. Those examinations were conducted by government officials interviewing witnesses when investigating crime. This "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." *Crawford*, 541 U.S. at 56 n.7. Ordinary hearsay does not. Clark is thus wrong to accuse Ohio of seeking to "shield[]" witnesses "by procuring their out-of-court assertions." Resp. Br. 24. A rule limited to hearsay meant solely for private parties without

police direction would not shield from confrontation statements "procured" by the government. As Ohio noted, Petr. Br. 45-46, the Court can leave for another day situations where a declarant uses private parties as "conduits" for government actors or speaks with private parties at the government's behest.

No better is Clark's reliance on the *reasons* for the confrontation right—allowing the jury to assess the demeanor of witnesses and the defendant to cross-examine them. Resp. Br. 23. If these benefits triggered the right, the clause would cover *all* hearsay because confrontation is missed anytime the prosecution admits an out-of-court statement. *California v. Green*, 399 U.S. 149, 173 (1970) (Harlan, J., concurring). Tellingly, moreover, the treatises that Clark cites in support of these reasons show the confrontation right's intended scope. They contrast testimony *not* with garden-variety hearsay, but with *ex parte* examinations. 3 William Blackstone, *Commentaries on the Laws of England* 373 (1768); Matthew Hale, *The History and Analysis of the Common Law of England* 257-58 (1713). They thus confirm that the right exists to bar the use of *ex parte* examinations and their equivalents.

Clark also invokes Raleigh's trial. Resp. Br. 24, 43. "[T]he abuses there, however, went far beyond a conviction based on hearsay." *Green*, 399 U.S. at 178 n.11 (Harlan, J., concurring). They included a classic civil-law examination of Lord Cobham. *Williams*, 132 S. Ct. at 2249 (Breyer, J., concurring). Even the Cobham letter referenced by this Court was written for officials in the *midst* of trial. 9 William S. Holdsworth, A History of English Law 228 (1926). If anything, the only arguable analogy between this

case and that one appears in the history reports, not the U.S. Reports. In addition to Cobham's evidence, a man named Dyer testified that an out-of-court declarant accused Raleigh of planning to kill the king. 1 James F. Stephen, History of the Criminal Law of England 333 (1883). That the Court has never expressed any constitutional concern with this hearsay shows that it falls outside the Confrontation Clause.

b. Clark mistakenly uses the Confrontation Clause's purpose to conclude that it reaches statements to listeners engaged in "investigative functions." Resp. Br. 29-30. His proposal misreads *Crawford* and *Davis*. Those cases hold that the clause regulates statements to *police* because their "interrogations bear a striking resemblance to examinations by justices of the peace in England." *Crawford*, 541 U.S. at 52. "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." *Id.* at 53. This logic—that the government cannot evade the clause by changing its employees' job titles—does not extend to private conversations about past events.

Additionally, Clark's investigative-function proposal conflicts with the perspective that matters in the end. Whether or not a questioner has a prosecutorial motive, the declarant's purpose ultimately controls whether the declarant is a witness. *Bryant*, 131 S. Ct. at 1160 n.11, 1162. Even when a questioner cooperates with the government, a declarant's "statements made unwittingly to [that] Government informant" do not become testimonial merely because of the listener's investigative functions. *Davis*, 547 U.S. at 825 (discussing *Bourjaily v. United States*,

483 U.S. 171 (1987)). What sets yesterday's justices of the peace and today's police apart from everyone else is that declarants speaking to them objectively know their crime-fighting duties. The same cannot be said when declarants speak to secret sleuths who *objectively* have no criminal duties—whether or not they *subjectively* act to obtain criminal evidence.

Finally, Clark's proposal is unworkable. A test asking whether a questioner seeks "to aid the official search for truth" creates uncertainty in every case. Resp. Br. 30. Clark claims that "[f]amily members and friends almost never engage in conversations for this purpose," *id.*, but fails to explain why. In this case, for example, L.P.'s family might have had Clark's "investigative functions" when speaking to L.P. Tr. 431, 460. Under Clark's proposal, nobody could predict the admissibility of any declarant's answer to the question, "what happened?"

3. Clark's test conflicts with the Confrontation Clause's history

Clark's accusation test conflicts with the traditional way courts regulated accusations to private parties—through rules of evidence. One can cite "cases almost without limit" admitting a victim's after-the-fact accusation to private parties. *Solice v. State*, 193 P. 19, 22 (Ariz. 1920). Clark responds that these cases involve the *excited-utterance* exception rather than the *child-abuse* exception, a distinction that allegedly matters for historical and reliability reasons. Resp. Br. 43-46. Clark mistakenly details the history and reliability of child hearsay. *See* Part I.B. But, even assuming his account, these distinctions are without a difference.

History. While Clark claims the excited-utterance rule is old, Resp. Br. 44, "it is questionable whether testimonial statements would ever have been admissible on that ground in 1791," *Crawford*, 541 U.S. at 58 n.8. Rooted in the "res gesta" concept, the rule *expanded* to statements made after the described events. *Travellers' Ins. Co. of Chicago v. Mosley*, 75 U.S. 397, 408 (1869); 6 John H. Wigmore, *Evidence* § 1756, at 231 (J. Chadbourn rev. 1974). Clark cites no case raising the slightest constitutional concern with this expansion. That provides good evidence that private-party hearsay falls within "the Framers' design to afford the States flexibility in their development of hearsay law." *Crawford*, 541 U.S. at 68.

Clark retorts that it is the rule's *excitement element* (not its *private audience*) that removes these cases from the Confrontation Clause. Resp. Br. 44. He thus seeks to constitutionalize the excited-utterance rule. Courts would always have to ask whether a private-party accusation met *both* the evolving "excitement" element of state law *and* the rigid "excitement" element of the Confrontation Clause. *Hammon* shows what is in store for the States under his view. The state court admitted statements *to police* under Indiana's excited-utterance rule, but this Court found the statements testimonial. *Davis*, 547 U.S. at 821, 830-31. While the clause's concern with statements to *government investigators* necessitated this approach, Clark seeks to expand it to cover the usual situation where a declarant utters to neighbors, not investigators. This view that all excited-utterance rulings raise a fact-intensive constitutional question conflicts with *Crawford*'s effort to "delink the intricacies of hearsay law

from a constitutional mandate." *Bullcoming*, 131 S. Ct. at 2727 (Kennedy, J., dissenting).

Reliability. Clark argues that, unlike excited utterances, child hearsay is unreliable. Resp. Br. 43-44. This distinction "is little more than an invitation to return to [the Court's] overruled decision in" *Ohio v. Roberts*, 448 U.S. 56 (1980), which used reliability as the touchstone for admissibility. *Melendez-Diaz*, 557 U.S. at 317-18. Indeed, the report in *Melendez-Diaz* was likely *more* reliable than an excited utterance. *Cf. United States v. Boyce*, 742 F.3d 792, 799-800 (7th Cir. 2014) (Posner, J., concurring). Yet it was still excluded. If alleged reliability is not enough to *veto* the Confrontation Clause, then alleged unreliability should not be enough to *trigger* it.

Bryant, the case on which Clark relies, does not help him. When "making the primary purpose determination," the Court said, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." 131 S. Ct. at 1155. But it left open the proper test for statements to private actors. *Id.* at 1155 n.3. Those statements are nontestimonial without regard to reliability. *Bullcoming*, 131 S. Ct. at 2720 n.1 (Sotomayor, J., concurring) ("The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability.").

B. Clark's Child-Hearsay Analysis Flips History On Its Head And Advocates For A Rule This Court Has Already Rejected

As Ohio noted, Petr. Br. 31-35, at a minimum, an *incompetent child's* statements to private parties are non-testimonial. Logically, the incompetency finding suggests that the child is incapable of making "tes-

timonial" statements. Historically, courts introduced hearsay from incompetent children. In response, Clark invokes history and logic to argue for the opposite rule—that a child's incompetency means courts must exclude the child's hearsay. He is twice wrong.

History. Clark agrees that "child hearsay was commonly introduced," Resp. Br. 47, but explains this fact on the ground that children were historically allowed to testify, *id.* at 1-3, 47-49. Not so. "It was at one time considered, that an infant, under the age of nine years could not be permitted to testify." *State v. Whittier*, 21 Me. 341, 347 (1842); *Commonwealth v. Hutchinson*, 10 Mass. 225, 225 (1813); *Rex v. Travers*, 93 Eng. Rep. 793, 794 (1726). This was the "sharply criticized" rule. Resp. Br. 51. Hale, for example, advocated for a *case-by-case* approach tied to each child's understanding. 1 Matthew Hale, *The History of the Pleas of the Crown* 634 (E. Rider et al., 1800). His view prevailed in *King v. Brasier*, 168 Eng. Rep. 202 (1779). And this case-by-case rule (the one Clark says "deviated" from history, Resp. Br. 51) was the law most everywhere until recently. *Wheeler v. United States*, 159 U.S. 523, 524-25 (1895); *Van Pelt v. Van Pelt*, 1810 WL 773, at *1 (N.J. 1810).

Clark relies on Blackstone for his contrary argument. Resp. Br. 1. But Blackstone cites only Hale's "private opinion" that children should testify *unsworn*. W. Williamson, *The Trials at Large of the Felons, in the Castle of York* 19 (York 1775). That view was always disputed. Hale's treatise was first published in 1736. Thomas D. Lyon and Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 Ind. L.J. 1029, 1034 (2007). Before then, a court rejected a child's testi-

mony without suggesting the child could speak unsworn. *Travers*, 93 Eng. Rep. at 794. And Hale's opinion was expressly repudiated forty years later. *King v. Powell*, 168 Eng. Rep. 157, 157-58 (1775).

It *was* settled, however, that private parties could testify about what children told them. Indeed, Hale opined that children should testify unsworn *precisely because* courts admitted their hearsay. 1 Hale, *Pleas* at 634. The trial judge in *Powell*, for example, stated that, "[w]ith regard to the admitting the declaration of the child to the mother, lord Hale speaks of that as a clear and settled thing." Williamson, *Trials at Large*, at 19. Thus, when judges found a child incompetent, they "were disposed to compensate by allowing the mother, a surgeon, or others" to testify about the child's statements. John H. Langbein, *The Origins of Adversary Criminal Trial* 239-40 (2003); Br. of Domestic Violence Legal Empowerment & Appeals Project, at 21-30.

Clark says *Brasier* changed things. Resp. Br. 48. But *Brasier* held only "that the infant would have been competent, and therefore that the extrajudicial evidence could not be used"; it said nothing about *incompetent* children. 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 1760, at 2271 (1904); *Travers*, 93 Eng. Rep. at 794 n.1; 1 Edward H. East, *A Treatise of the Pleas of the Crown* 444 (Philadelphia 1806). Ignoring all contrary authority, Clark cites Richard Burn's 1783 edition of Blackstone articulating a broader view of *Brasier*. Resp. Br. 48. But "Burn's source of information for the case is unknown." Lyon, 82 Ind. L. J. at 1053. And Clark cites no authority suggesting that Burn tied his idiosyncratic view to the confrontation right.

Clark's more modern authorities (McCormick and Wigmore) help Ohio. Resp. Br. 2, 48-49. The very footnote of McCormick that Clark cites for a rule excluding hearsay from incompetent parties adds: "However, in the past many jurisdictions have held excited utterances admissible even when declarant was a small child who would have been in competent [sic] to testify at trial." 1 Kenneth S. Broun, *McCormick on Evidence* § 61 n.3 (6th ed. 2006). Likewise, consistent with his view of *Brasier*, Wigmore recognized that "[w]here the prosecutrix is a child *too young to be a witness*, the statements should nevertheless be receivable." John Henry Wigmore, *A Supplement to A Treatise on the System of Evidence in Trials at Common Law* § 1761, at 170 (1908).

Logic. Clark suggests that an incompetency finding means the child's hearsay must be unreliable. Resp. Br. 6-7, 43-46. Yet at the height of the *Roberts* regime—when a statement's admissibility *turned* on its reliability—the Court rebuffed this logic. In *Idaho v. Wright*, 497 U.S. 805 (1990), it "reject[ed] [the defendant's] contention that [a child's] out-of-court statements . . . [were] *per se* unreliable, or at least presumptively unreliable, on the ground that the trial court found the [child] incompetent." *Id.* at 824. *Wright* did so partially because, while the finding that a child could not communicate with the jury "might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness, a *per se* rule of exclusion would not only frustrate the truth-seeking purpose of the Confrontation Clause, but would also hinder States in their own 'enlightened development in the law of evidence.'" *Id.* at 825 (citation omitted). It would be

ironic if the Court adopted a reliability rule under *Crawford* that it rejected under *Roberts*.

Wright had good reason to reject Clark's proposal. Literature suggests that the competency inquiry at trial is a poor proxy for assessing whether the child's previous statements were reliable. *See* Victoria Talwar et al., *Children's Conceptual Knowledge of Lying and Its Relation to Their Actual Behaviors: Implications for Court Competence Examinations*, 26 Law & Hum. Behav. 395, 396, 411-12 (2002); Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children's Competence to Take the Oath*, 3 Applied Dev. Sci. 16, 16-17 (1999). Indeed, one of Clark's *amici* rejects equating the two. Br. of Richard D. Friedman & Stephen J. Ceci, at 15-19.

II. CLARK IMPROPERLY TREATS TEACHERS AS POLICE MERELY BECAUSE OF A REPORTING DUTY

As Ohio showed (at 36-46), the teachers' reporting duty did not transform them into police "agents" or trigger the primary-purpose test. The duty imposes no requirement to investigate and does not make mandatory reporters analogous to police. Further, the duty would not transform private parties into "state actors" for purposes of related constitutional provisions. Clark's contrary arguments lack merit.

First, Clark blurs the distinction between a *reporting* duty and an *investigating* duty. He compares Ohio law to the hospital's drug-testing policy for pregnant women in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). Resp. Br. 35. Yet the hospital undertook that testing "for the specific purpose of incriminating those patients," not for a medical purpose. *Ferguson*, 532 U.S. at 85. *Ferguson* itself dis-

tinguished the hospital's *investigations* from a "duty to provide the police with evidence of criminal conduct that [reporters] inadvertently acquire in the course of routine treatment." *Id.* at 84-85 & n.24.

Second, Clark notes that a reporter's allegations may be given to police. Resp. Br. 35-36. He fails to explain why that matters. If it did, *anyone* who called 911 would be considered the "police" with respect to anything said to them before the call. In addition, Clark nowhere disputes that *everyone* historically had a duty to report crimes, Petr. Br. 38, and *everyone* now has a duty to report child abuse in many States, Pet. 24. Clark would turn all of these people into state agents. This case, moreover, is even further removed from police because reporters need only call social-service agencies, *O'Toole v. Denihan*, 889 N.E.2d 505, 513 (Ohio 2008), and the statute imposes an investigating duty on those agencies, not on police, Ohio Rev. Code § 2151.421(F)(1). That social-service entities investigate rebuts Clark's claim that prosecution is the primary "'means'" of protecting children. Resp. Br. 35. Such prosecution is merely an "adjunct" to the civil scheme. *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 866 (Ohio 2004).

Third, Clark suggests that administrative guidelines tell teachers to investigate abuse. Resp. Br. 37. Yet the guidelines instruct that "[i]t is not your responsibility to determine if abuse or neglect is in fact occurring or if any of the circumstances surrounding suspected incidents of abuse or neglect actually happened." ODJFS, Child Abuse and Neglect: A Reference for Educators, at 9 (2013), available at http://www.odjfs.state.oh.us/forms/file.asp?id=398&type=application/pdf. They instruct that, "since it is

the responsibility of the [social-service agency] to investigate alleged child abuse and neglect, school personnel shall not pressure the child to divulge information regarding specific circumstances or the identity of the alleged perpetrator." *Id.* at 32. And they instruct that handbooks "should be clear that your school does not investigate abuse and neglect, but the law enforcement and [social-service agency] do these investigations and your personnel cooperate whenever necessary." *Id.* at 46. Clark cites no evidence that the teachers here reviewed the guidelines, let alone shared his misunderstanding of them.

Fourth, Clark argues that Ohio Rev. Code § 2151.421(H) "guaranteed that any accusatory statements the teachers elicited would be admissible in any [criminal] prosecution." Resp. Br. 20; *id.* at 10-11, 35. But subsection (H) is an irrelevant *confidentiality* provision (as illustrated by this brief's appendix). It says "a report made under this section is confidential." Ohio Rev. Code § 2151.421(H)(1). It then lists exceptions to this confidentiality rule, including criminal prosecutions. *Id.* Yet a report is "admissible" in those prosecutions only "in accordance with the Rules of Evidence." *Id.* Clark's reliance on § 2151.421(H) is thus analogous to arguing that all statements to private parties are really statements to police because, like child-abuse reports, *all* are also "admissible in accordance with the rules of evidence." But a business record does not become a police report simply because it is admissible in accordance with Ohio Rule Evid. 803(6). The same is true of the reports at issue here.

Fifth, Clark fails to distinguish the related constitutional provisions that Ohio cited. He says the oth-

er provisions are irrelevant because they regulate "police conduct," whereas the Confrontation Clause "'in no way governs police conduct.'" Resp. Br. 31 (quoting *Davis*, 547 U.S. at 832 n.6). Yet *Davis* made this statement not for Clark's proposition (that statements to police are the same as statements to private actors), but for a far different one (that the clause does not prohibit police from procuring testimony). *Crawford* notes the obvious difference between statements to government actors and statements to private parties, 541 U.S. at 51, and the rules for distinguishing the two elsewhere are just as informative here.

III. CLARK HAS NOT SHOWN THAT L.P.'S STATEMENTS WERE TESTIMONIAL UNDER THE PRIMARY-PURPOSE TEST

As Ohio showed (at 46-54), L.P.'s statements to his teachers were non-testimonial under the primary-purpose test. The teachers spoke with L.P. to protect him; L.P., given his young age, likely had no purpose at all when responding to his teachers; and the questioning was informal. Clark's contrary arguments are mistaken.

Teachers' Perspective. To claim that the teachers spoke with L.P. for prosecutorial purposes, Clark relies on their reporting duty. Resp. Br. 34-38. Even if the Court agrees that the primary-purpose test applies, the reasons discussed above, *see* Part II, show that this duty does not establish that the teachers spoke with L.P. for evidentiary reasons.

Clark also notes that L.P. did not "simply have a bump on his nose" and had "seemingly been struck repeatedly by 'whips of some sort.'" Resp. Br. 34

(quoting JA27). These egregious injuries, Clark says, prove the teachers' prosecutorial purpose because they "'immediately suspected child abuse.'" *Id.* at 34 (quoting Pet. App. 16a). Quite the opposite is true. For starters, when asking questions like "Whoa, what happened," the teachers were "kind of like in shock." JA27. Most human beings, on encountering a severely injured three-year-old, would *spontaneously* ask the same questions without attempting to "creat[e] an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155.

In addition, "the dramatic and serious nature of L.P.'s injuries," Resp. Br. 38, had the "effect of focusing [the teachers'] attention on responding to the emergency," *Bryant*, 131 S. Ct. at 1157. When confronted with an injured child, teachers "need to know whom they are dealing with in order to assess the . . . possible danger to" the child. *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cnty.*, 542 U.S. 177, 186 (2004); *Davis*, 547 U.S. at 827. After all, L.P. himself "was not old enough to dial 911 or to find his way to the local police station." Resp. Br. 40.

L.P.'s Perspective. Clark argues that "[w]hile young children lack a sophisticated understanding of our criminal justice system, they perceive certain authority figures much the same way adults perceive the police—as official actors who have the power to punish wrongdoers." Resp. Br. 32; *id.* at 40. But Clark cites nothing for this bald conclusion. Here, no evidence suggests L.P. viewed his daycare teachers as people who would "punish" his abuser. More generally, studies suggest that, while children may view police as those who punish wrongdoers, they do not

view others in that light. Br. of Am. Prof'l Soc'y on the Abuse of Children, at 7-9 & nn.6-10.

Clark also claims that L.P. would have recognized the gravity of the situation because the teachers questioned him like police would. Resp. Br. 39-40. But their conversation was brief, and the lead teacher did not want to embarrass L.P. or alarm the children in the classroom. JA58. Further, when L.P. implicated "Dee," she did not repeat L.P's words to reinforce "the gravity of the accusation." Resp. Br. 40. She did so because she "didn't know what that meant," JA59, and "just wanted to understand [L.P.] clearly," JA60. If anything, L.P.—given his youth and "bewildered" state, JA59—had "no purpose at all in answering questions posed; the answers [were] simply reflexive." *Bryant*, 131 S. Ct. at 1161.

Circumstances of Questioning. Clark claims that the "same earmarks of formality are present here" as were present in *Hammon*. Resp. Br. 41. That is a stretch. In *Hammon*, "[i]t import[ed] sufficient formality . . . that lies to [police] officers are criminal offenses." *Davis*, 547 U.S. at 830 n.5. Here, no criminal law punished L.P. for lying to teachers. In *Hammon*, the victim's "interrogation was conducted in a separate room." *Id.* at 830. Here, L.P. was "in the classroom," and it was only later that a teacher took him to a separate room. JA45, 58. In *Hammon*, "after [the victim] answered the officer's questions, he had her execute an affidavit." *Davis*, 547 U.S. at 832. The teachers did not later draft an affidavit for L.P. to execute.

IV. The Proper Balance In Child-Abuse Cases Should Be Struck Through Democratic Means, Not Through An Atextual, Ahistorical Reading Of The Confrontation Clause

For centuries, child-abuse cases have presented difficult dilemmas. "In Cases of foul Facts done in Secret, where the Child is the Party injured, the repelling their Evidence entirely is, in some Measure, denying them the Protection of the Law." Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 293 (4th ed. London 1785). "[B]ut it must be remembered" that child abuse "is an accusation . . . harder to be defended by the party accused, [though] never so innocent." 1 Hale, *Pleas* at 634. As the dueling *amicus* briefs show, the debate over the proper procedure for resolving these tragic cases is alive and well today.

Clark, for his part, claims to have discovered the solution to this centuries-old problem, and criticizes Ohio for not having adopted it. Resp. Br. 1-7, 49-59. Ohio (like many States) follows the case-by-case approach to determining a child's competency, *State v. Maxwell*, 9 N.E.3d 930, 957-58 (Ohio 2014), but allows courts to introduce child hearsay if it has "particularized guarantees of trustworthiness," Ohio R. Evid. 807(A)(1). Far better, Clark argues, for Ohio to eliminate competency requirements, Resp. Br. 3-5 & n.1, and protect children with techniques like examinations by therapists, *id.* at 4, 53-55. This proposal—one with little relevance to the Confrontation Clause—is ironic.

For one, it is the *defendant* who typically challenges a child's competency. *See, e.g.*, *Maxwell*, 9 N.E.3d at 957; *State v. Frazier*, 574 N.E.2d 483, 486-

87 (Ohio 1991). Statistics suggest that prosecutors rarely bring cases without the victim's testimony. Br. of Am. Prof'l Soc'y on the Abuse of Children, at 24. Here, prosecutors sought to prove L.P.'s competency. JA5-12. When they failed, Clark immediately moved to exclude L.P.'s remaining evidence. JA13.

For another, to justify his expansion of the confrontation right, Clark suggests the right could permit unique forms of child testimony. Resp. Br. 53-55. Yet, in other cases where States have opted for such approaches, defendants have been less forgiving than Clark about their validity. *Compare Maryland v. Craig*, 497 U.S. 836 (1990), *with Coy v. Iowa*, 487 U.S. 1012 (1988). Clark offers no basis to think that defendants would stop challenging these methods.

For a third, even in jurisdictions with more relaxed competency rules, Resp. Br. 3-5 & n.1, courts still exclude witnesses for lack of competency (for example, under the requirement that a witness have oath-taking capacity). *See* Fed. R. Evid. 603; Daniel J. Capra, *Case Law Divergence From the Federal Rules of Evidence*, 197 F.R.D. 531, 536 (2000); Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. Cal. L. Rev. 1017, 1021-24 (2000). The relaxed rules also provide no solution when the problem is the child's refusal to testify, *White*, 502 U.S. at 350, or the child's death, *United States v. DeLeon*, 678 F.3d 317, 327 (4th Cir. 2012), *rev'd on other grounds by* 133 S. Ct. 2850 (2013).

In short, Clark's proposal is not the panacea he claims. Worse still, by enshrining it in the Constitution, Clark "foreclose[s] [the States] from contributing to the formulation and enactment of rules that make trials fairer and more reliable." *Bullcoming*,

131 S. Ct. at 2727 (Kennedy, J., dissenting). It speaks volumes on the need for such democratic evolution that many *amicus* briefs are filled with psychological literature debating when children's statements are reliable. *Compare* Br. of Am. Prof'l Soc'y on the Abuse of Children, at 23-29, *with* Br. of Family Defense Ctr. et al., at 14-23. If ever there were an area where the Court should "afford the States flexibility in their development of hearsay law," *Crawford*, 541 U.S. at 68, this would be it.

One last word on Ohio's approach. The same brief that ridicules Ohio R. Evid. 807's reliability requirement as an "empty promise," Resp. Br. 46, criticizes Ohio for seeking an "advisory opinion" on the constitutional question because the intermediate court said that L.P.'s statements to his family should have been excluded under the rule, *id.* at 17. Clark's own brief suggests the rule is far from "empty." To be sure, Ohio believes that L.P.'s statements to his teachers fall within Ohio R. Evid. 807. Unlike the suggestive questioning in *Wright*, 497 U.S. at 826, the teachers did not know Clark or even "what [L.P.] meant" when he implicated "Dee," JA59. And Clark was the only suspect L.P. implicated to *six* different people. JA46, 59, 128, 146, Tr. 431, 460. Yet this reliability question is not for *this Court* under the Confrontation Clause. It is for the *state courts* under Ohio R. Evid. 807.

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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APPENDIX

Ohio Revised Code § 2151.421(H).

(H)

(1) Except as provided in divisions (H)(4) and (N) of this section, a report made under this section is confidential. The information provided in a report made pursuant to this section and the name of the person who made the report shall not be released for use, and shall not be used, as evidence in any civil action or proceeding brought against the person who made the report. Nothing in this division shall preclude the use of reports of other incidents of known or suspected abuse or neglect in a civil action or proceeding brought pursuant to division (M) of this section against a person who is alleged to have violated division (A)(1) of this section, 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 of the report is not the defendant or an agent or employee of the defendant, has been redacted. In a criminal proceeding, the report is admissible in evidence in accordance with the Rules of Evidence and is subject to discovery in accordance with the Rules of Criminal Procedure.

(2) No person shall permit or encourage the unauthorized dissemination of the contents of any report made under this section.

(3) A person who knowingly makes or causes another person to make a false report under division (B) of this section that alleges that any person has committed an act or omission that resulted in a child being an abused child or a neglected child is guilty of a violation of section 2921.14 of the Revised Code.

(4) If a report is made pursuant to division (A) or (B) of this section and the child who is the subject of the report dies for any reason at any time after the

report is made, but before the child attains eighteen years of age, the public children services agency or municipal or county peace officer to which the report was made or referred, on the request of the child fatality review board, shall submit a summary sheet of information providing a summary of the report to the review board of the county in which the deceased child resided at the time of death. On the request of the review board, the agency or peace officer may, at its discretion, make the report available to the review board. If the county served by the public children services agency is also served by a children's advocacy center and the report of alleged sexual abuse of a child or another type of abuse of a child is specified in the memorandum of understanding that creates the center as being within the center's jurisdiction, the agency or center shall perform the duties and functions specified in this division in accordance with the interagency agreement entered into under section 2151.428 of the Revised Code relative to that advocacy center.

(5) A public children services agency shall advise a person alleged to have inflicted abuse or neglect on a child who is the subject of a report made pursuant to this section, including a report alleging sexual abuse of a child or another type of abuse of a child referred to a children's advocacy center pursuant to an interagency agreement entered into under section 2151.428 of the Revised Code, in writing of the disposition of the investigation. The agency shall not provide to the person any information that identifies the person who made the report, statements of witnesses, or police or other investigative reports.