No. 13-1352

IN THE

Supreme Court of the United States

OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On a Writ of Certiorari
to the Supreme Court of Ohio

BRIEF FOR RESPONDENT

Erika Cunliffe
Jeffrey M. Gamso
CUYAHOGA COUNTY
PUBLIC DEFENDER'S
OFFICE
310 Lakeside Avenue
Suite 200
Cleveland, OH 44113

Donald B. Ayer
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001

Jeffrey L. Fisher
Counsel of Record
Brian Wolfman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

QUESTION PRESENTED

"When teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator," Pet. App. 9a, are answers a child gives to the teachers' questions testimonial under the Confrontation Clause?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AUTHORITIES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

BRIEF FOR RESPONDENT

Respondent Darius Clark respectfully requests that this Court affirm the judgment of the Ohio Supreme Court.

STATEMENT OF THE CASE

Shortly after this Court decided *Ohio v. Roberts*, 448 U.S. 56 (1980), states began enacting new hearsay exceptions allowing children's statements describing past abuse to be admitted in criminal trials in lieu of live testimony. This case involves whether the admission of such a statement violated the Confrontation Clause.

A. Legal Background

1. Historically, it was "settled" that when prosecuting child abuse cases, "infants of any age are to be heard," allowing the jury "to hear the narration of the child herself, [rather] than to receive it at second hand from those who swear they heard her say so." 4 William Blackstone, Commentaries on the Laws of England 214 (1769). Over time, however, many jurisdictions became skeptical of juries' ability to assess the veracity of such testimony. So the jurisdictions adopted strict competency requirements. These requirements forbade children from testifying unless they were capable of demonstrating in pretrial hearings that they could (i) receive and relay accurate impressions of perceived events and (ii) differentiate between truth and lies. *See, e.g.*, 2 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law ("Wigmore on Evidence") § 506 (3d ed. 1940).

These competency requirements came at a price. "The admission of hearsay statements" traditionally "presupposes that the assertor possessed the qualifications as a witness." 5 Wigmore on Evidence § 1424 (emphasis removed). So jurisdictions understood that if they deemed children incompetent to testify, the prosecution could not introduce any prior accusations the children made. *See, e.g.*, 4 William Blackstone, Commentaries on the Laws of England 214 (1783 ed.); Kenneth S. Broun et al., McCormick on Evidence § 61 n.3 (6th ed. 2006). But, for many years, lawmakers were content to accept that trade-off.

2. In the latter part of the twentieth century, states began to pay fresh attention to the problem of child abuse. As part of this movement, states began in the 1960's to enact "mandatory reporter" laws. Petr. Br. 38. These laws required various professionals, including teachers, to report suspected instances of child abuse, in part so that law enforcement agencies could identify and prosecute offenders. *See, e.g.*, Br. of Child Justice 2-6. Yet even when such reports were made, many jurisdictions' competency statutes continued to prevent children from testifying in court against their alleged abusers. And because "there are often no witnesses [to child abuse] except the victim," *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), prosecutions sometimes foundered.

In the early 1980's, the federal government funded two studies to address this situation. First, the federal government awarded a grant to the ABA's National Legal Resource Center for Child Advocacy and Protection. The Center, in turn, formed an

"expert review panel" of advocates for abused children: the Executive Director of the National Committee for the Prevention of Child Abuse and other child abuse specialists; a former president of the National District Attorneys Association and other prosecutors; law professors; and judges. Nat'l Legal Res. Ctr. for Child Advocacy & Prot., Am. Bar Ass'n, *Recommendations for Improving Legal Intervention in* Intrafamily Child Sexual Abuse Cases i-ii (1982) ("*Recommendations*"). Second, U.S. Attorney General William French Smith formed a Task Force, comprised of one U.S. Senator (John Ashcroft), plus various law enforcement and child advocacy officials. U.S. Dep't of Justice, *Attorney General's Task Force on Family Violence* (1984) ("*Task Force*").

The two working groups issued reports recommending that children "be considered competent witnesses," as they had been historically, and "allowed to testify without prior qualification in any judicial proceeding." *Recommendations* at 30; *see also Task Force* at 39 ("Children, regardless of their age, should be presumed to be competent to testify in court."). In making this recommendation, the ABA Expert Panel stressed that the Federal Rules of Evidence already had abolished any competency requirement for children, *see* Fed. R. Evid. 601, and that "[a] trend [was] developing in state statutes" to do the same. *Recommendations* at 30. Under these provisions, the experts explained, it is up to "[t]he trier of fact" to "determine the weight and credibility to be given to the testimony." *Recommendations* at 30; *accord Task Force* at 39. "[A]lthough very young children, usually under four years, may not have sufficient perception, memory, or narration abilities, these deficiencies [should] simply

affect the credibility of the child's testimony," not its admissibility. *Recommendations* at 31.

As a means of implementing this reform while minimizing stress and trauma to children, the Attorney General's Task Force and other child advocacy specialists also urged legislatures and judges to "adopt special rules and procedures [to enable child victims] to more comfortably and effectively communicate the harm they have suffered." *Task Force* at 38; *see also* Kee MacFarlane, *Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 Miami L. Rev. 135, 146-49 (1985-86). "For instance," the Task Force suggested, "testimony could be videotaped in a therapeutic atmosphere," with questioning "done by an objective therapist in a relaxed setting with one-way mirrors." *Task Force* at 39. And to "safeguard the rights of the accused" under the Confrontation Clause, "[t]he person questioning the child could be fitted with an earpiece to allow questions from the prosecutor and defense attorney to be presented in a nonthreatening manner." *Id.*; *see also State v. Melendez*, 661 P.2d 654, 656-67 (Ariz. Ct. App. 1982) (holding that use of this method of testifying satisfied Confrontation Clause because "[d]efendant and his counsel were present during the videotaping and the opportunity to cross-examine the victim was made available at that time").

3. Around the same time these reforms were proposed and several states had begun successfully implementing them, this Court decided *Ohio v. Roberts*, 448 U.S. 56 (1980). In that case, this Court held that the Confrontation Clause permitted the prosecution to introduce nontestifying witnesses' out-

of-court statements against the accused – even if the statements were made expressly to aid criminal prosecutions – so long as judges deemed the statements to bear "particularized guarantees of trustworthiness." *Id.* at 66. This decision signaled an alternative way of facilitating the prosecution of child abuse cases. Instead of relaxing competency requirements, states seemingly could revise their hearsay rules to enable prosecution of child abuse cases solely by out-of-court statements deemed "reliable" by trial judges – eliminating any need whatsoever for children to testify subject to cross-examination.

The reform that had been proceeding with respect to competency laws halted in its tracks. While the seventeen or so states that, starting in the 1970's, had abolished their competency requirements left those changes in place,[1] virtually no new states

---

[1] These seventeen states fall into two camps. First, thirteen states have abolished competency requirements along the lines of Federal Rule 601. *See* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806, 819 n.89 (1985). Those states are Alabama, Arizona, Arkansas, Indiana, Iowa, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Wisconsin, and Wyoming. *See* National District Attorney's Association, *Legislation and Case Law Regarding the Competency of Child Witnesses to Testify in Criminal Proceedings* (March 2011) (collecting state statutory provisions), *available at* http://www.ndaa.org/pdf/Competency%20of%20Child%20Witnesses(2011).pdf. Second, at least four other states have statutes specifically deeming children competent to testify in child abuse cases. *See* Conn. Gen. Stat. § 54-86h; Ga. Code Ann. § 24-6-603(b); Mo. Rev. Stat. § 491.060(2); Utah Code Ann. § 76-5-410.

followed their lead. Instead, several states – starting with Washington State in 1982 – enacted "special exception[s]" to their hearsay codes for out-of-court statements by children describing past child abuse. Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806, 808 (1985). Ohio's Rule of Evidence 807, enacted in 1991 (and reproduced in full in the Appendix), is typical: It provides that any "out-of-court statement made by a child who is under twelve years of age at the time of trial describing [physical or sexual abuse] is not excluded as hearsay" – even if made to police officers or other investigating authorities – provided certain criteria are met. Ohio R. Evid. 807(A).

One of Rule 807's required criteria is that "the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement [sufficiently] reliable." Ohio R. Evid. 807(A)(1). But the Ohio Supreme Court – again following Washington's lead, and again departing from traditional hearsay law – has held that even if a court deems a child at the time of trial to be incompetent to testify, the child's pretrial out-of-court accusations can be deemed sufficiently reliable to be introduced under the special child hearsay exception. Petr. Cert. Reply 10 (citing *State v. Silverman*, 906 N.E.2d 427, 432 (Ohio 2009), and *State v. C.J.*, 63 P.3d 765, 770 (Wash. 2003)). The Ohio Supreme Court has never explained how a child incapable at the time of trial of receiving and relaying accurate information or understanding the duty to tell the truth could previously have made accusatory statements having "particularized guarantees of

trustworthiness" such that cross-examination would be futile. But courts in Ohio and other states sometimes find that seemingly incongruous situation to be present. *Id.*

4. Shortly after states enacted these special hearsay exceptions – and especially as courts began to hold that these exceptions allowed prosecutors to introduce out-of-court statements from children that trial courts deemed incompetent to testify – commentators and judges began to question whether the exceptions, at least under some circumstances, violated the Confrontation Clause. *See, e.g.*, Note, 98 Harv. L. Rev., *supra*, at 808-09; *State v. Lanam*, 459 N.W.2d 656, 662-68 (Minn. 1990) (Kelley, J., dissenting). Even during the *Roberts* era, this Court expressed reservations concerning whether state law could deem a child incompetent and simultaneously admit the child's prior out-of-court accusations to authority figures investigating whether abuse occurred. *Idaho v. Wright*, 497 U.S. 805, 815-16 (1990) (reserving the issue whether incompetency could constitute "unavailability" under *Roberts* framework). But instead of directly addressing that question, this Court resolved the only such case it heard during that era on narrower grounds, holding that the admission of an incompetent child's statements to a physician who had examined her for signs of abuse violated the Confrontation Clause because the statements lacked "particularized guarantees of trustworthiness." *Id.* at 825-27.

Rather than taking *Wright* as a warning, many states pressed ahead, continuing to base prosecutions on out-of-court accusations of abuse from children

they deemed incompetent – and thus not reliable enough – to testify.

5. In 2004, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* abandoned *Roberts*' framework insofar as it "allow[ed] a jury to hear [testimonial] evidence, untested by the adversary process, based on a mere judicial determination of reliability." *Crawford*, 541 U.S. at 62. Under *Crawford*'s reinstatement of the Confrontation Clause's traditional mode of operation, the prosecution generally may not introduce out-of-court testimonial statements unless the declarant testifies at trial. *Id.* at 68. Following that decision, the potential problem this Court identified in *Wright* with respect to the interaction between state competency and hearsay laws has taken on added significance, and it is at the center of this case.

B. Factual and Procedural History

1. In the spring of 2010, L.P. was three-and-one-half years old; his sister, A.T., was eighteen months old. The children lived with their mother, Taheim T. Respondent Darius ("Dee") Clark was Taheim's boyfriend.

Taheim has five children and "an extensive history" with the Cuyahoga County Department of Children and Family Services (CFS). J.A. 96, 139. Before the events giving rise to this case, CFS had already severed Taheim's parental rights with respect to her three older children due to abuse or neglect, as well as her own substance abuse. *Id.* 139; *see also* Ohio Rev. Code § 2151.353(A). And it seems that Taheim treated the younger children no better than she had the older ones. A family friend once saw her "whip[] [L.P.] with the little strap of her

purse" over an argument concerning potato chips. Tr. 670-71. She also "spanked him" when "he wouldn't go to sleep," and she "whooped that baby [A.T.] a lot." *Id.* Furthermore, according to Taheim's mother and aunt, Taheim "is a big liar and you can't trust a word that she says." J.A. 139.

On March 16, 2010, Taheim picked up L.P. from preschool. Tr. 549. The boy had no observable injuries. *Id.*; J.A. 31, 67. Taheim was with him the rest of the afternoon and evening until she put him to sleep. Tr. 549. At around midnight, she caught a Greyhound bus to Washington, D.C. to engage in prostitution. *Id.* 548.[2] Because Taheim knew that her mother and aunt disapproved of what she was doing, *id.* 537, she left L.P. and A.T. at her house under respondent's care, *id.* 553-54. The children knew respondent well, *id.* 585, and neither Taheim nor anyone else had ever seen respondent hurt them, *see, e.g.*, 585, 670.

The next day, respondent dropped L.P. off at school. J.A. 36. While in the lunchroom, the assistant teacher, Ramona Whitley, noticed some red marks on his face. *Id.* 27. When she asked if something had happened, L.P. responded, "I don't know. I hurt myself. I fell." *Id.* 32. Whitley did not pursue the matter because L.P. had not complained of any pain and did not seem in need of medical care. *Id.* 27, 44-45; Pet. App. 9a.

---

[2] Taheim later claimed that respondent was her pimp, but neither she nor the State has ever offered anything but her word to support this claim. Tr. 532, 538, 573.

In the brighter light of the classroom, however, it was apparent that L.P.'s face had been struck with "whips of some sort." J.A. 27. As a CFS worker later explained, "[i]t was obvious when you looked at him" that he had been the victim of "child abuse." *Id.* 100. "Immediately upon seeing him, you could see there was a loop-shaped mark from about the side of his face by his [ear] and it went through the corner of his eye and back; and then there was broken blood vessels." *Id.*; *see also* Pet. App. 16a (L.P.'s teachers "immediately suspected child abuse").

Whitley, like other teachers in Ohio, is a "mandatory reporter" and had been "trained" to call a government hotline – 696-KIDS – when suspecting child abuse. J.A. 36-37; *see also* Ohio Rev. Code § 2151.421(A)(1). This hotline goes straight to CFS and triggers "investigat[ions]" for abuse and neglect that state law, as well as CFS's internal policies, require it to conduct "in cooperation with the [local] law enforcement agency." J.A. 135-36; Ohio Rev. Code § 2151.421(F)(1); *see also* Cuyahoga County Department of Children and Family Services Policy Statement, Standards for the Investigation of Intake Reports § H (effective May 24, 1996), *available at* http://cfs.cuyahogacounty.us/pdf_cfs/en-US/20300.pdf; J.A. 90, 103, 105, 126; Pet. App. 8a. Callers to the hotline are asked to report, among other information, "who did this alleged abuse or neglect." J.A. 134. And state law provides that "[i]n a criminal proceeding, the report is admissible in evidence in

accordance with the Rules of Evidence." Ohio Rev. Code § 2151.421(H)(1).[3]

Whitley summoned the head teacher, Debra Jones, and they pulled L.P. "aside from the other children" to question him. J.A. 45. Consistent with her training and local policy, Jones asked, "Who did this? What happened to you?" *Id.* 59. "[D]id [you] get a spanking?" *Id.* 79. Looking "kind of bewildered" and "uncertain," L.P. responded "something like Dee, Dee." *Id.* 59; Pet. App. 4a. Jones "repeated his words back," saying, "What did you say? Dee? Dee did this?" J.A. 60.

After L.P. responded affirmatively to this reinforcement, Jones pressed for more information "because sometimes they'll say a brother or sister hit him or somebody." J.A. 60. "[W]ho is Dee?," she asked. *Id.* "Is Dee big or little?" *Id.* 61. L.P. "kept looking kind of bewildered," *id.* 61-62, and "wouldn't answer," *id.* 79. Jones then asked the question again while gesturing with her arms. *Id.* 60, 79. L.P. "didn't say that Dee was big," but "[h]e might have shook his head a little bit," to indicate big. *Id.* 62.

After these "few minutes" of questioning, J.A. 78, Jones concluded "that's all I can get out of him right now," *id.* 62. Accordingly, she took L.P. to her supervisor's office. Jones wasn't "sure if he [had] understood the questions" she had asked him. *Id.* 80-

---

[3] Ohio's statute concerning mandatory reporting and "procedures on receipt of [such] report[s]" is reproduced in part in the appendix to the State's brief. For some reason, the appendix does not contain the subsection rendering reports admissible in evidence. App. to Petr. Br. 8a.

82. But Jones and her supervisor decided they had "enough to make the call" to 696-KIDS. *Id.* 66. And because Whitley had been the first to observe L.P.'s injuries, they had her make the report. *Id.* 65. Whitley made the call "regarding allegations of physical abuse" and named "Darius Clark . . . as an alleged perpetrator." *Id.* 91, 134; *see also* Pet. App. 52a.

CFS, in coordination with the Cleveland Police Department, sprang into action. CFS dispatched a social worker, Howard Little, to the school. Little interviewed L.P. and asked what had happened. J.A. 145-46. L.P. responded that he had fallen. *Id.* 146. But when Little "re-questioned" him later, L.P. "stated that the bruises came from Dee." J.A. 146. Respondent later arrived at school and picked up the boy. *Id.* 150-51.

The next day, CFS worker Sarah Bolog called Taheim to relay her "concerns regarding child abuse." J.A. 94. Taheim responded with "an obvious lie." *Id.* 96. She said that L.P. "didn't have any marks on him" and accused the preschool teachers of "making this up." *Id.* 94. Even though Taheim was still in Washington, D.C., Taheim further claimed that L.P. and A.T. were with her and that she was about to take L.P. for treatment for pink eye. *Id.*

Later that day, Bolog and her supervisor continued the investigation by going to respondent's mother's house. J.A. 99-107. Two Cleveland police officers would follow closely behind. *Id.* 103, 105. As soon as Bolog saw L.P.'s injuries and observed that A.T. had two black eyes and a burn on her cheek, Bolog texted Detective Remington of the Cleveland Police Department to confirm that she was "going to

need" police assistance. *Id.* 100-02, 103. The officers on the scene then decided to have the children go to the hospital for an evaluation, where Detective Remington would await their arrival.

Before leaving the home, Bolog and her supervisor re-interviewed L.P. J.A. 128. As Bolog later explained, calls to the 696-KIDS hotline "oftentimes" include "false allegations," so she wanted to explore the veracity of L.P.'s accusation that "Dee did it" for herself. J.A. 135. The supervisor accordingly asked L.P., "how did you get this mark on your face?" *Id.* 128. L.P. "said, Daddy did it. Dee did it." *Id.* At the hospital, Detective Remington also offered L.P. a pink stuffed animal, showed L.P. a picture of respondent, and asked "if he knew who this was." J.A. 128-29. L.P. "said again, Dee did it." *Id.* 129. Sometime later, L.P. repeated the accusation again, telling his maternal grandmother and great-aunt that respondent caused his and A.T.'s injuries. Pet. App. 63a-64a.

The physician who examined L.P. determined that he had "abrasions consistent with being struck by a linear object" and "bruising in several stages of development" on his torso and face. Pet. App. 5a. The physician found that A.T. had "bruising, burn marks, a swollen hand, and a pattern of sores at her hairline." *Id.* A.T. also had "some hair loss" and "skin that[had] been picked and bleeding," but the physician could not "make any determination as to either the cause or age" of that condition. Tr. 357. The physician estimated that the children's injuries had occurred sometime over the preceding three weeks. Pet. App. 5a.

When Bolog and Taheim's mother told Taheim about the physician's findings and L.P.'s allegations of abuse, Taheim decided to stay in Washington, D.C. Tr. 580-82. She did not return to Cleveland until she was extradited five months later. Tr. 566-67, 582-83.

2. The State charged respondent with one count of felonious assault relating to L.P., four counts of felonious assault related to A.T., two counts of endangering children, and two counts of domestic violence. The State also levied an eleven-count indictment against Taheim, alleging various counts of felonious assault, child endangerment, and permitting child abuse. Tr. 566-71. Facing the possibility of over fifty years in prison, *see id.*, Taheim pleaded guilty to child endangerment and permitting child abuse and agreed to testify against respondent, *id.* 562, 566-71. In exchange, the State dropped all of the remaining charges against her. Taheim's sentencing, however, was held open until respondent's trial was complete.

Ohio retains a strict competency regime, presuming that all children younger than ten are incompetent to testify unless they demonstrate the ability to perceive and narrate events and to distinguish between truth and falsehood. *See* Ohio R. Evid. 601(A). Thus, the trial judge began respondent's trial by holding a pretrial hearing to determine whether L.P. was competent to testify. J.A. 4-12. After L.P. gave varying answers concerning his birthday, his sister's age, and the adults with whom he had lived, the trial court held that "[h]e will not be able to testify as a witness." *Id.* 12. At the same time, the trial court held (over respondent's objection) that L.P.'s out-of-court

accusations to the teachers, social workers, police officer, grandmother, and great-aunt were admissible under Ohio R. Evid. 807 on the ground that they contained "particularized guarantees of trustworthiness." *Id.* 13, 15, 21-24.

Respondent moved in limine to exclude L.P.'s out-of-court accusations on Confrontation Clause grounds. He argued that the "constitutional right" enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004) – namely, the right not to be convicted based on testimonial statements from witnesses who are not subject to cross-examination – "trumps" Rule 807 here. J.A. 13. "Bottom line," respondent contended, "the State is trying to make [L.P.'s] statement competent, trustworthy, and everything by bringing it in through these other people without the jury having the ability to see the young child," and that's "violative of *Crawford*." J.A. 17.

The trial court summarily denied the motion. J.A. 20-24. The trial court also denied respondent's fall-back request to at least instruct the jury that L.P. was not testifying because he had been deemed incompetent. Tr. 657-60.

The central issue at trial was whether respondent or Taheim inflicted L.P.'s and A.T.'s injuries. The "only direct evidence" implicating respondent as the one who abused either child was L.P.'s accusatory statements. Pet. App. 68a. In closing arguments, therefore, the prosecution focused on those accusations, repeatedly telling the jury that "when this young three-year-old with numerous injuries is asked, What happened to you? Who did this to you? He said Dee." Tr. 685; *see also* Tr. 696.

The jury found respondent guilty of all of the charges except one related to A.T. The trial court sentenced him to twenty-eight years' imprisonment. It subsequently sentenced Taheim to eight years' imprisonment.

3. The Ohio Court of Appeals reversed, holding that L.P.'s statements to all seven adults that "Dee did it" should have been excluded at trial. Pet. App. 54a-55a, 69a. As the court of appeals framed its inquiry, it first considered the "threshold" question whether the statements were testimonial, such that the Confrontation Clause barred their introduction. *Id.* 55a. To the extent it found statements to be nontestimonial, the court of appeals assessed whether they satisfied Ohio R. Evid. 807. *Id.* 63a.

The court of appeals held that L.P.'s statements to the teachers were testimonial because "the primary purpose" of these statements was to establish – "in response to investigative questions" – who abused L.P. to aid law enforcement. Pet. App. 63a, 66a. It reached the same conclusion with respect to the statements made to the social workers and Detective Remington. *Id.* 58a-62a.

The court of appeals treated L.P.'s statements to his grandmother and great-aunt as nontestimonial. *Id.* 63a-64a. But the court of appeals held that these statements failed to satisfy two of the four prerequisites for admission under Rule 807: (1) the record lacked any "independent proof" to corroborate the statements' assertions that respondent committed the abuse; and (2) the statements lacked "particularized guarantees of trustworthiness." Pet. App. 65a-68a; *see also* Pet. App. 64a-65a (reciting the four prerequisites, "all" of which must be satisfied).

4. The State sought discretionary review in the Ohio Supreme Court. The State did not challenge the court of appeals' determination that L.P.'s statements to the police and social workers were testimonial. Pet. App. 6a. Neither did the State dispute the court of appeals' holding that his statements to the grandmother and great-aunt were inadmissible under Rule 807. Instead, the State sought only an advisory opinion concerning whether the court of appeals erred in holding that L.P.'s statements to the teachers were testimonial.[4]

The Ohio Supreme Court granted review and affirmed. The court began by explaining that under Ohio's mandatory reporting law, Ohio Rev. Code

---

[4] Respondent uses the term "advisory opinion" to describe what the State sought from the Ohio Supreme Court (and seeks from this Court, *see* BIO 22-27) because the State has never offered any reason why the court of appeals' Rule 807 holding does not apply with equal force to L.P.'s statements to his teachers. *See* Cert. Reply 10. Nor could the State make any such argument. The court of appeals' holding (now law of the case) that the record lacks sufficient proof beyond L.P.'s statements that respondent committed the alleged abuse applies identically to all of L.P.'s statements. And it is hard to see how L.P.'s statements to his teachers could have particularized guarantees of trustworthiness if those to his grandmother and great aunt did not. Accordingly, there can be no doubt that if the Ohio Supreme Court had held (or if this Court were to hold) that L.P.'s statements to his teachers were nontestimonial, then the Ohio Court of Appeals on remand would require them to be excluded under Rule 807. The only reason the Ohio Court of Appeals did not issue such a holding in the first place is because it elected to consider first whether L.P.'s statements were testimonial and to turn to Rule 807 only if they were not, instead of first considering state law. *See* Pet. App. 55a, 63a-64a.

§ 2151.421, "'a necessary and appropriate'" element of protecting children is the "prosecution for criminal acts of child abuse." Pet. App. 8a (quoting *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861 at ¶25 (Ohio 2004)) (emphasis removed). Thus, while teachers are usually motivated by purely private concerns when questioning students, a teacher acts "as an agent of the state for law enforcement purposes" "when questioning a child *about suspected abuse in furtherance of a duty pursuant to [the mandatory reporter statute].*" *Id.* 15a (emphasis added). The teachers here "immediately suspected child abuse," "separated L.P. from other students," and "sought facts" consistent with their training "in a formal question-and-answer format" concerning "who had perpetrated the abuse." *Id.* 16a. As a result, the Ohio Supreme Court held that "the nature and focus of the questions asked indicate a purpose to ascertain facts of potential criminal activity and identify the person or persons responsible." *Id.* 15a. The statements, therefore, were testimonial. *Id.* 16a.

Three Justices dissented. They argued that "[o]n the record before us, there is no basis from which to conclude that the injured child's teachers acted on behalf of law enforcement." Pet. App. 18a (O'Connor, C.J., dissenting). Instead, the dissent surmised that "the teachers questioned L.P. about his injuries to protect L.P. and possibly other students from additional injury, and to maintain a secure and orderly classroom in which learning could take place." *Id.*

SUMMARY OF THE ARGUMENT

The Ohio Supreme Court correctly held that the statements L.P. made to his teachers accusing respondent of abusing him were testimonial.

I. In cases dealing with police interrogations of adults, this Court has held that statements are testimonial if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). The reason for this rule is straightforward: The Confrontation Clause gives defendants a right to confront their accusers, and if the prosecution introduces an accusation made under those circumstances at trial in lieu of live testimony, juries will view the accusation as a substitute for in-court testimony.

Neither the fact that the questioners here were teachers nor that the accuser was a child renders the primary purpose test inapplicable. Teachers can undertake to elicit accusations identifying perpetrators of crime, thus generating statements that juries would perceive as substitutes for live testimony. And children, just like adults, can make such accusations – realizing that they allege wrongful behavior – that function as perfect replacements for courtroom analogues.

II. The primary purpose test is satisfied here. As soon as the teachers saw L.P.'s facial bruising in the bright light of the classroom, they "immediately suspected child abuse." Pet. App. 16a. In this situation, the teachers had been trained to question the child to identify the abuser and to make an official report of the abuser's identity, so that social

services and law enforcement personnel could further investigate and decide whether to prosecute. Furthermore, state law guaranteed that any accusatory statements the teachers elicited would be admissible in any such prosecution. Ohio Rev. Code § 2151.421(H)(1). Accordingly, the teachers pulled L.P. aside and asked L.P. – directly, repeatedly, and while seeking as much detail as they could – to identify who had abused him. L.P.'s response – "Dee did it" – was a perfect substitute for trial testimony. And that is exactly how the prosecution presented it to the jury.

III. The history and development of hearsay law confirms that introducing L.P.'s statements violated the Confrontation Clause. For centuries before and after the Founding, the general rule was that children's statements describing past abuse were inadmissible when the children did not testify. The only exception was for statements that qualified as excited utterances, thereby signaling that the participants in the exchange were "focuse[d] . . . on something other than 'prov[ing] past events potentially relevant to later criminal prosecution'" and that the statement was "reliable because the declarant, in the excitement, presumably [could]not form a falsehood." *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 (2011).

Neither of those circumstances is present here. To the contrary, Ohio's special child hearsay law – enacted in 1991 – is designed to capture accusatory statements made at some remove from the crimes they allege. Children's extrajudicial accusations of abuse also are notoriously "unreliable." *Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008). L.P.'s

statements here, in fact, are a case-in-point: They were given in response to ambiguous questions; immediately reinforced in a suggestive manner by the teachers; and never subjected to any probing as to whether it was really his mother – who, after all, already had an "extensive history" of child abuse and neglect, J.A. 96 – who had perpetrated the crimes against him and his sister. Ohio's child hearsay law, therefore, dispenses with cross-examination precisely where it is needed most.

IV. The confrontation violation here is all the more intolerable because L.P.'s unavailability for cross-examination was a problem entirely of the State's own making. The law in many jurisdictions renders young children perfectly competent to testify, provided they can communicate with some minimal level of credibility. These jurisdictions also allow age-appropriate accommodations to facilitate such testimony. Yet Ohio presumes that all children younger than ten are *incompetent* to testify in any manner.

There is no need for any such rule. Worse yet, it is blatantly unfair. If out-of-court interviews with victims such as L.P. are reliable enough to be admissible and to sustain convictions, defendants should not be simultaneously prevented from having any opportunity whatsoever to question their accusers. This dramatic imbalance harks back to the infamous trial of Sir Walter Raleigh and is antithetical to our Constitution's adversarial system of justice.

ARGUMENT

I. The Primary Purpose Test Applies Here.

"[T]he principal evil at which the Confrontation Clause was directed was the . . . use of *ex parte* examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 50 (2004). Indeed, extrajudicial accusations that a specific person committed a crime lie at the very core of the confrontation right. It thus would seem readily apparent that the Clause would presumptively apply to the out-of-court statement in this case accusing a specific individual – in response to structured questioning – of having perpetrated a crime.

The State, however, contends that the "primary purpose" test this Court has developed to implement the Confrontation Clause should not even apply here. Respondent thus begins by situating the primary purpose test within history and precedent. Respondent then explains why the "primary purpose" test must be applied to the facts of this case, just as it would to any other set of facts.

A. The Primary Purpose Test Protects The Integrity Of The Confrontation Clause's Requirement Of Live Testimony.

1. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. This provision expresses a rule of procedure. Namely, the prosecution must present its witnesses to testify in court, so that the jury can observe their demeanor and the defense can have an opportunity for cross-examination.

This procedure, of course, has a robust pedigree as a cornerstone of the adversarial process. The great expositors of the common law stressed the value of enabling the jury to "observ[e] the quality, age, education, understanding, behaviour, and inclinations of the witness." 3 William Blackstone, Commentaries on the Laws of England 373 (1768). "[T]he very Manner of a Witness's delivering his Testimony will give a probable Indication whether he speaks truly or fals[e]ly." Matthew Hale, The History and Analysis of the Common Law of England 257-58 (1713); *see also Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (the opportunity to evaluate a witness's "demeanor upon the stand and the manner in which he gives his testimony" helps to demonstrate "whether he is worthy of belief"). Cross-examination, for its part, has repeatedly been described as "the 'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1367 (3rd ed. 1940)); *accord, e.g.*, *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987).

This right of confrontation has always applied with special solicitude to witnesses who, as here, make direct accusations that a defendant engaged in criminal conduct. "The right to confront one's *accusers* is a concept that dates back to Roman times." *Crawford*, 541 U.S. at 43 (emphasis added). In the words of the Bible, the Romans believed it was unjust to condemn any man "before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Book of Acts 25:16, *quoted in Coy v. Iowa*, 487 U.S. 1012,

1015-16 (1988). In the infamous English treason trials of the sixteenth and seventeenth centuries, the Crown deviated from this principle, introducing witnesses' out-of-court interrogations and letters in place of live testimony. This occasioned the cries of Sir Walter Raleigh – unheeded then, but later vindicated – that he was unable to confront his "accuser." *Crawford*, 541 U.S. at 44 (citation omitted).

In short, under the common law that the Framers inherited and incorporated in the Bill of Rights, the "direct and open participation" of the complaining witness "was indispensible." Leonard W. Levy, Origins of the Fifth Amendment 29 (1968). "Without the accuser there could not even be a prosecution." *Id.*

2. To safeguard this procedural right to confront adverse witnesses, the Confrontation Clause must prevent the prosecution from introducing certain out-of-court statements from nontestifying witnesses. As the Raleigh trial demonstrates, if the prosecution could introduce out-of-court statements that the jury would treat as the functional equivalent of testimony without putting the declarants on the stand, then the right to confront and cross-examine witnesses who do appear in court would be of little value. The state could choose which witnesses it wanted to bring into court, while shielding others from direct adversarial testing simply by procuring their out-of-court assertions *ex parte* and introducing them in lieu of live testimony at trial.

A twentieth century case further elucidates the point. In *Douglas v. Alabama*, 380 U.S. 415 (1965), a person named Loyd asserted during police

interrogation that Douglas had committed the assault and attempted murder at issue. At Douglas' trial, Loyd invoked his privilege against self-incrimination, so the prosecution introduced his extrajudicial statements in lieu of live testimony. This Court unanimously held that introducing these statements violated the Confrontation Clause. *Id.* at 419. Although Loyd's statements "were not technically testimony," their introduction "may well have been the equivalent in the jury's mind of testimony." *Id.* Such statements, the Court explained, cannot be introduced when there is an "inability to cross-examine" the declarant. *Id.*; *see also Green*, 399 U.S. at 179 (Harlan, J., concurring) (Confrontation Clause bars "trials by anonymous accusers, and absentee witnesses"); *Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) ("[A]n out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused.").[5]

3. *Crawford*'s "testimonial" framework implements this reasoning. Under *Crawford*, the Confrontation Clause prohibits the admission of nontestifying witnesses' out-of-court statements that

---

[5] Contrary to the suggestion of amici Fern and Charles Nesson, this prohibition against submitting out-of-court accusations in lieu of live testimony applies to *all* prosecution witnesses, not just those necessary to establish a prima facie case. If the law were otherwise, the prosecution could put a single eyewitness on the stand and then present the rest of its case by affidavit. Transforming the Confrontation Clause into a mere "production requirement" would flout the Clause's text, history, and precedent.

– as this Court put it in *Douglas* – would function if introduced at trial as "the equivalent in the jury's mind of testimony," 380 U.S. at 419. In order for a pretrial statement to be subject to this risk, it need not literally be testimony. *Contra* Petr. Br. 15-16; U.S. Br. 21. People, for example, do not testify during stationhouse interrogations or when they write unsworn letters to prosecutors accusing someone of a criminal offense. But if the prosecution introduces such statements at trial, the functional kinship they share with in-court testimony will result in jurors taking the statements as a "*substitute* for live testimony" at trial, *Davis v. Washington*, 547 U.S. 813, 830 (2006) (emphasis added).

This is where the "primary purpose" test comes in. The question whether juries are likely to treat an out-of-court statement not as an ordinary piece of evidence but rather as a nontestifying witness's *testimony* turns on whether its primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. If so, then the statement has essentially the same function as in-court testimony and, therefore, is testimonial. *Id.* If not, then the object of the Confrontation Clause is not implicated and the statement's admissibility depends solely on the rules of evidence.

This Court's Justices, of course, recently have disagreed over the parameters of the "primary purpose" test. *Compare Williams v. Illinois*, 132 S. Ct. 2221, 2242-44 (2012) (plurality opinion), *with id.* at 2272-77 (Kagan, J., dissenting). But all agree that the test applies to "conventional witnesses" – that is, to those, as here, "who perceived an event that gave

rise to a personal belief in some aspect of the defendant's guilt." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330-31, 344 (2009) (Kennedy, J., dissenting).

And this Court's decision in *Davis*' companion case, *Hammon v. Indiana*, demonstrates broad core agreement over when the test is satisfied. In *Hammon*, an eight-Justice majority held that out-of-court statements a woman made describing spousal abuse to a questioning police officer had the primary purpose of establishing past events potentially relevant to a later criminal prosecution. *Davis*, 547 U.S. at 829-31. "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination." *Id.* at 830. They "deliberately recount[], in response to [official] questioning, how potentially criminal past events began and progressed" and who allegedly perpetrated the wrongful acts. *Id.* Hence, whatever else the Confrontation Clause may cover, statements "accusing a targeted individual of engaging in criminal conduct" are generally testimonial. *Williams*, 132 S. Ct. at 2242 (plurality opinion); *accord id.* at 2251 (Breyer, J., concurring).

This general rule, of course, is not absolute. In *Davis*, this Court held that a caller's "frantic answers" to a 911 operator, describing her assailant as events were unfolding, were not testimonial. 547 U.S. at 827. But that was because the primary purpose of the call was "to enable police assistance to meet an ongoing emergency." *Id.* at 827-28. "No 'witness,'" this Court explained, "goes into court to proclaim an emergency and seek help." *Id.* at 828.

So there was no danger that the jury would treat the caller's statements as her testimony. Similarly, this Court held in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), that a gunshot victim's identification of his shooter – an armed and dangerous killer who was "on the loose" and thus posed an imminent threat to public safety – was not testimonial because it was made "to enable police assistance to meet an ongoing emergency." *Id.* at 1159, 1167.

At the same time, *Davis* and *Bryant* emphasized that their holdings were exceptions to the rule. Out-of-court accusations to investigators "[a]re testimonial" so long as they "[a]re neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation." *Id.* at 1155 (quoting *Davis*, 547 U.S. at 832).

B. The Primary Purpose Test Applies To *All* Statements Designed To Aid Criminal Investigations, Not Just To Those Made By Adults To Police Officers.

The State contends that the primary purpose test "does not apply" here because the questioners were "private parties," not police officers, and the declarant was a child deemed incompetent under state law. Petr. Br. 10-11. As the United States recognizes, however, neither of these factors categorically exempts out-of-court statements from the primary purpose inquiry. U.S. Br. 12, 26-29.

1. The primary purpose test applies to statements elicited by teachers and other non-law enforcement personnel. This conclusion flows from history, precedent, and common sense.

Police involvement has never been the touchstone of the Confrontation Clause. What mattered historically when assessing whether an extrajudicial statement was testimonial was whether the questioner, if there was one, was "perform[ing] the *investigative functions* now primarily associated with the police." *Crawford*, 541 U.S. at 53 (emphasis added). In sixteenth and seventeenth century England, justices of the peace, who conducted examinations under the Marian statutes, often performed this function. *Id.* at 53. So those examinations were testimonial. In the contemporary case of *Hammon*, the declarant spoke to police officers. But what this Court emphasized was that the questioners were "perform[ing] investigative . . . functions." *Davis*, 547 U.S. at 830 n.5; *see also id.* at 829 (statements were designed to aid "an investigation into possibly criminal past conduct"); *id.* at 830 (primary purpose of the interrogation "was to investigate a possible crime").

The reasons for this "investigative function" inquiry should be apparent. If a statement elicited to aid an investigation into possibly criminal conduct is presented to the jury in lieu of putting the witness on the stand, the jury will take it as the declarant's testimony. This is especially so if the statement accuses a specific individual of having committed the crime.

It does not matter whether the participants in the conversation spoke with the specific intent to create evidence for trial. "It is doubtful that the original purpose of the [Marian] examinations was to produce evidence admissible at trial." *Crawford*, 541 U.S. at 44. Rather, the critical point is that

statements made for investigative purposes are made to aid the official search for truth concerning suspected criminal events. That is precisely the function of testimony – and why juries view such out-of-court statements at trial as testimonial.

Non-law enforcement personnel, of course, do not "ordinarily" undertake to aid "the investigation and prosecution of crime." U.S. Br. 14. Family members and friends almost never engage in conversations for this purpose. And even the teachers in this case noted that they had called 696-KIDS to report child abuse only once in nine years before this incident. J.A. 37. But in the rare instances when a non-governmental questioner undertakes an investigative function or "a declarant uses a civilian solely as a conduit to communicate with the police," the primary purpose of the statement renders it just as testimonial as a statement made directly to law enforcement investigators. U.S. Br. 13; *see also People v. Stechly*, 870 N.E.2d 333, 365 (Ill. 2007) (holding that statements alleging abuse that a school social worker elicited, in his role as a mandatory reporter, from a kindergartner "to pass on to the authorities" were testimonial).

The State, in fact, implicitly concedes as much, acknowledging that statements objectively meant to be passed on to the police to aid an investigation might be testimonial. Petr. Br. 45-46. This concession is wise: a jury certainly would not treat a statement in response to a "private party's" structured questioning designed to discover the perpetrator of a crime any differently from one elicited directly by investigating officers.

And crediting this reality would not create any schism between the Confrontation Clause and the reach of "[o]ther constitutional provisions," Petr. Br. 41. The exclusionary rules this Court has created to enforce the Fourth Amendment, the requirement to give *Miranda* warnings, and the right not to be questioned without counsel present are all designed to regulate police conduct and to deter improper tactics. "The Confrontation Clause," by contrast, "in no way governs police conduct." *Davis*, 547 U.S. at 832 n.6. "[I]t is the *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision." *Id.* Accordingly, there is no need for state action to be present in the field in order to trigger the Confrontation Clause. All that is necessary is that the prosecution seek at trial to use a declarant's out-of-court statements generated primarily for investigatory reasons in lieu of live testimony. If the prosecution does so, the Confrontation Clause's core prohibition against trial by out-of-court accusation is implicated, thus necessitating judicial intervention.

2. Nor is there any basis for rendering the primary purpose test categorically inapplicable when the declarant is a young child. To the contrary, this Court has already made clear that "[o]ut-of-court statements made by children regarding . . . abuse" fall within the ambit of the Confrontation Clause. *Idaho v. Wright*, 497 U.S. 805, 818 (1990).

It makes no difference if state law deems the child incompetent to testify. In *Wright*, the child declarant was two-and-one-half and incompetent under Idaho law. 497 U.S. at 808-09. Yet this Court held that the introduction of statements she made to

a doctor describing abuse violated the Confrontation Clause. *Id.* at 825-27. In *White v. Illinois*, 502 U.S. 346 (1992), this Court likewise applied the Confrontation Clause to a four-year-old's statements without any suggestion that the child's age categorically excluded his statements from the Clause's reach. *Id.* at 349, 355-58. *Crawford* confirmed that the Clause applies to young children, describing statements that the child in *White* made to the police as "testimonial." 541 U.S. at 58 n.8.

To be sure, a child's age is part of "all of the relevant circumstances" that courts must take into account within the primary purpose analysis. *Bryant*, 131 S. Ct. at 1162. Courts cannot "reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances." *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2405 (2011). Yet such adjustments must be made in both directions. While 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. Therefore, at least where, as here, the child demonstrated an ability before trial to understand and respond to requests to describe wrongful behavior, a child's age cannot exempt the statements from confrontation scrutiny.

No other rule would make sense. The Confrontation Clause provides that "[i]n *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI (emphasis added). There is no

exception allowing *child abuse prosecutions* to proceed by *ex parte* interview or affidavit. Nor is there any such exception for any other kind of prosecution in which a victim or critical eyewitness might be a young child. *See, e.g.*, *State v. Siler*, 876 N.E.2d 534 (Ohio 2007) (three-year-old eyewitness to murder). If anything, the potential defectiveness of children's perceptions and narratives make confrontation in this context all the more critical. *See infra* at 43-44.[6]

II. The Primary Purpose Of The Dialogue Between L.P. And His Teachers Was To Ascertain Facts For An Investigation Into Apparently Criminal Past Conduct.

The primary purpose test requires an objective evaluation of "the purpose that reasonable participants [in the dialogue at issue] would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Michigan v. Bryant*, 131 S. Ct.

---

[6] In light of Ohio's prerequisite to introducing a child's out-of-court accusation of abuse that the accusation evince "particularized guarantees of trustworthiness" such that "cross-examination would add little to the reliability of the statement," Ohio R. Evid. 807(A)(1), this Court need not consider here whether statements from children too young even to understand and answer questions may be deemed testimonial. *See* Richard D. Friedman and Stephen J. Ceci, *The Child Quasi-Witness*, http://www-personal.umich.edu/~rdfrdman/quasi.chicago.pdf (forthcoming U. Chi. L. Rev.). It is impossible to imagine a child's statement satisfying Rule 807 without the child being able to communicate sufficiently to be a "witness" under the Confrontation Clause.

1143, 1156 (2011). Applying that test here, the Ohio Supreme Court held that L.P.'s statements to his teachers were testimonial because "the nature and focus of the questions asked indicate a purpose to ascertain facts of potential criminal activity and identify the person or persons responsible." Pet. App. 15a.

The State takes issue with this fact-intensive determination. Petr. Br. 46-55. But the perspectives of the teachers and L.P., as well as the circumstances in which their dialogue occurred, demonstrate that the primary purpose of the dialogue was to ascertain facts for an investigation into apparently criminal past conduct.

A. The Teachers' Perspective

1. The Ohio Supreme Court accurately determined that the teachers' primary purpose in questioning L.P. "was not to extricate the child from an emergency situation or to obtain urgently needed medical attention, but rather [to undertake] an information seeking process to determine what had occurred in the past and who had perpetrated the abuse, establishing past events potentially relevant to later criminal prosecution." Pet. App. 16a.

This is so for several straightforward reasons. First, as soon as the teachers saw L.P. in the bright light of the classroom, they "immediately suspected child abuse." Pet. App. 16a. L.P. did not simply have a bump on his nose or a scrape on his arm; he had seemingly been struck repeatedly by "whips of some sort," J.A. 27; *see also* J.A. 43-44, 100 ("It was obvious when you looked at him" that he had been the victim of "child abuse."). Second, "[w]hen teachers suspect and investigate child abuse with a primary purpose

of identifying the perpetrator," Ohio law guarantees that any accusatory statements the teachers elicit will be passed on to law enforcement, Pet. App. 9a, and will be admissible in any prosecution, Ohio Rev. Code § 2151.421(H)(1). Third, the teachers here did, in fact, ask L.P. – directly, repeatedly, and while seeking as much detail as they could – to identify who had abused him. J.A. 59-62.

2. The State takes issue with this analysis, contending that the teachers "questioned L.P. [i] to protect him and [ii] to secure the classroom – purposes that have nothing to do with investigating crime." Petr. Br. 50. Neither contention has merit.

a. The State's protective-purpose argument ignores this Court's precedent and the Ohio Supreme Court's reasoning. When assessing whether actions served an investigative or protective purpose, one cannot simply focus on their "ultimate goal." *Ferguson v. City of Charleston*, 532 U.S. 67, 82-83 (2001). Viewed in such terms, virtually all actions designed to elicit evidence of criminal conduct have the protective aim of preventing further harm. Rather, "[w]hat matters" is "the means by which [this protective purpose] was to be met." *Id.* at 83 n.20. Where the actions are meant to elicit incriminating evidence to "turn[] over to the police," *id.* at 86, then their "immediate objective" is "to generate evidence *for law enforcement purposes,*" *id.* at 82-83.

This is what occurred here. The overall goal of Ohio's mandatory-reporter statute is "protecting children." Pet. App. 8a. But when children have been seriously injured, the "means" that Ohio law uses to accomplish that objective is the "prosecution for criminal acts of child abuse." Pet. App. 8a; *see*

also id. at 7a-8a ("[A] necessary and appropriate" means of protecting children is "identification and/or prosecution of the perpetrator . . . in cooperation with law enforcement.") (quoting *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861, 865 (Ohio 2004)) (emphasis removed); Amicus Br. of Child Justice 6 ("[P]rotecting victims and potential victims of child abuse . . . cannot be accomplished without the ability to see the process through to prosecution and conviction."). Thus, "when questioning a child about suspected abuse in furtherance of a duty pursuant to Ohio Rev. Code § 2151.421," teachers perform an investigative function tantamount to "law enforcement." Pet. App. 15a.

That is what the teachers were doing here. The teachers, like others in the state, had been "trained" to report child abuse to the Department of Child and Family Services (CFS). J.A. 37; *see also* Ohio Rev. Code § 2151.421(A)(1). They were also specifically instructed to report "who did this alleged abuse or neglect," J.A. 134, so that CFS could "notify law enforcement if the report involves a criminal offense against a child." Cuyahoga County Department of Children and Family Services Policy Statement, Standards for the Investigation of Intake Reports § H (effective May 24, 1996), *available at* http://cfs.cuyahogacounty.us/pdf_cfs/en-US/20300.pdf. The teachers' report of abuse, in fact, directly triggered an "investigat[ion]" that state law required CFS to conduct "in cooperation with the [local] law enforcement agency." Ohio Rev. Code § 2151.421(F)(1); *see also* J.A. 90, 103, 105, 126; Pet. App. 8a ("children services agencies shall investigate each report of known or suspected child abuse in cooperation with law enforcement") (quotation marks

and citation omitted). And state law explicitly provided that "[i]n a criminal proceeding, the report [was] admissible in evidence in accordance with the Rules of Evidence." Ohio Rev. Code § 2151.421(H)(1).

Lest there be any doubt concerning the teachers' primary purpose, official guidelines that Ohio disseminates to teachers underscore that L.P.'s teachers were engaged primarily in investigating an apparent crime. The guidelines instruct teachers generating reports of child abuse to procure and provide "as much information as [they] can," including "[w]hen and where the alleged abuse . . . occurred," "[t]he circumstances surrounding the alleged abuse," and "[t]he identity and current whereabouts of the alleged perpetrator." Ohio Department of Job and Family Services, Office of Families and Children, *Child Abuse and Neglect: A Reference for Educators*, at 31 (2013), *available at* http://www.odjfs.state.oh.us/forms/file.asp?id=398&type=application/pdf. Any initial oral report "shall be followed up with a written report within five working days" and is a "confidential law enforcement record[]" *Id.* at 32. Finally, the guidelines place the teachers on notice that "the county prosecutor will determine if filing charges against the alleged perpetrator is appropriate," *id.* at 37.

In light of the practices and procedures that L.P.'s teachers followed here, it matters little that "[w]hen teachers question students about injuries," they are "rarely" seeking to aid law enforcement. Petr. Br. 50-51. There is no doubt that teachers address everyday bumps, scrapes, and disciplinary issues without any thought of law enforcement. But teachers, like police and others, "act with different

motives" at different times, *Bryant*, 131 S. Ct. at 1161; *see also* Pet. App. 3a, 15a. And this case involves one of the rare and deeply serious occasions in which teachers undertook to "investigate child abuse with a primary purpose of identifying the perpetrator." Pet. App. 9a.

b. The State's attempt to shoehorn this case into the "ongoing emergency" exception fares no better. Although teachers have a generalized obligation to keep a secure classroom "to protect [children] from harm at school," Petr. Br. 52, there is not the slightest suggestion in the record that L.P.'s teachers ever thought he had been harmed at school. The dramatic and serious nature of L.P.'s injuries – bruises across his face apparently inflicted by "whips of some sort," J.A. 27 – precluded any such supposition. It is doubtful any preschool-age child could have caused such injuries, and L.P. in any event would have wailed in pain when he received them. Yet the teachers never heard or observed such suffering. *See id.* 43-44.

That leaves the State's reliance on the fact that Teacher Jones asked L.P. whether the perpetrator was "big or little." Petr. Br. 52. But Jones herself explained that she was only seeking to determine whether the abuser was "a brother or sister," as opposed to an adult. J.A. 60. This probing inquiry evinced, not erased, the teachers' investigatory purpose.

Nor is there any reason to believe the teachers' predominant goal was to "decide whether [L.P.] could be returned home at the end of the day." U.S. Br. 22-23. The teachers did not have any power to prevent Taheim or respondent from picking up L.P. after

school. The only way for them to safeguard L.P. from further abuse was to summon state authorities – which is exactly what they did.

Even when those authorities arrived, the situation bore no material difference from the one in *Hammon*, in which a police officer questioned a victim of domestic violence to determine in part whether she faced a continuing threat. *See Davis v. Washington*, 547 U.S. 813, 829-32 (2006); *id.* at 841 (Thomas, J., dissenting). This Court held in *Hammon* that notwithstanding that overall protective objective, the primary purpose of the questioning was to aid "an investigation into possibly criminal past conduct." *Id.* at 829. So too here.[7]

B. The Declarant's Perspective

L.P.'s actions within the broader context of his teachers' questioning show that a reasonable child in his situation would have grasped that the questioning was designed to elicit a consequential accusation of wrongdoing. Like the declarant in *Hammon*, L.P. was being pressed by authority figures to disclose who had perpetrated an assault that had inflicted visible physical injuries upon him. *See* J.A. 62 (Teacher Jones asked, "Who did this? Who did that to you?"). Like the declarant in *Hammon*, L.P.

---

[7] The United States also surmises that the teachers may have questioned L.P. "to determine whether L.P. had an urgent need for medical care." U.S. Br. 22. But the record belies this speculation as well. L.P. "made no complaints" about any pain, J.A. 44-45, and "he did not have any need for urgent medical care," Pet. App. 9a. Nor did the teachers ask him any questions designed to discern if he needed any kind of medical attention.

was being questioned "for the second time," 547 U.S. at 830, having initially said that nothing wrongful had happened but now facing fresh questioning that was obviously skeptical of the earlier explanation. *See* J.A. 32, 47, 50; *Davis*, 547 U.S. at 819-20. When L.P. responded with an accusation, the authority figures reinforced the gravity of the accusation – as in *Hammon*, *see* 547 U.S. at 820 – by seeking confirmation of it. In Teacher Jones' words, she "repeated his words back," saying, "What did you say? Dee? Dee did this?" J.A. 60. And like the declarant in *Hammon*, L.P. provided such confirmation.

Of course, the declarant in *Hammon* responded to questions from a police officer, while L.P. faced questioning from his teachers. But L.P.'s age must be taken into account in assessing his perception of authority. L.P.'s teachers (whom he had known only a couple of weeks, J.A. 28) were probably the most powerful authority figures he had ever encountered. After all, L.P. was not old enough to dial 911 or to find his way to the local police station. His teachers were infused with public trust and had the authority to punish him and others. And L.P. would have viewed the teachers very differently from family members – as "official" authority figures, much like the declarant in *Hammon* (like any adult) would have viewed the police. These perceptions are more than enough to indicate his statements were testimonial.

C. The Circumstances Of Questioning

The circumstances under which the teachers questioned L.P. confirm that the primary purpose of the dialogue was to investigate potentially criminal

past events to aid law enforcement. Indeed, the State itself later portrayed the dialogue in just this way.

1. The "formality" of an exchange is a "factor" in the primary purpose calculus. *Bryant*, 131 S. Ct. at 1160. "[F]ormality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to 'establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* (quoting *Davis*, 547 U.S. at 822). In *Hammon*, this Court found that the exchange between the declarant and the officer was "formal enough" to indicate "the statements' testimonial aspect" because the questioner "actively separated" the declarant from others before inquiring into what happened, and the declarant "deliberately recounted . . . how potentially criminal past events began and progressed." 547 U.S. at 830.

Those same earmarks of formality are present here. Indeed, there are few circumstances that are more formal in the world of a child than focused and deliberate questioning from teachers, particularly when the child has been singled out and pulled aside from his classmates.

This Court's formality analysis in *Hammon* also relied on the fact that "lies to [police] officers are criminal offenses." 547 U.S. at 830 n.5. Similarly, here, the dialogue between the teachers and L.P. transpired under the shadow of the state's criminal apparatus. Not only is child abuse an extremely serious crime, but "a failure to report suspected child abuse is a criminal offense pursuant to [Ohio Rev. Code §] 2151.99(C), and [Ohio Rev. Code §] 2151.421(M) makes a mandated reporter 'liable for compensatory and exemplary damages to the child

who would have been the subject of the report that was not made.'" Pet. App. 8a. These laws alone do not make L.P.'s statements testimonial, but they – along with the state-law provisions expressly providing for mandatory reports to be reduced in writing for law enforcement and making them "admissible in evidence," Ohio Rev. Code § 2151.421(C) & (H)(1) – surely render the interaction the teachers initiated more formally investigative in nature.

2. Any lingering uncertainty as to whether L.P.'s statements were testimonial should be resolved by considering them against the backdrop of the overarching purpose of the Confrontation Clause: to prevent trial by *ex parte* accusations. *See Crawford v. Washington*, 541 U.S. 36, 50 (2004); *supra* at 22-25 (collecting pre-*Crawford* sources). That is exactly what happened here. The State charged respondent with child abuse. Yet the only "direct evidence" it presented at trial to prove that he, and not Taheim, perpetrated the abuse was the extrajudicial accusation that L.P.'s teachers and others elicited from him. Pet. App. 68a.

There can be no doubt that the jury treated L.P.'s accusation as the functional equivalent of testimony. At closing, the State expressly invited the jury to do so, explaining that "when this young three-year-old child with numerous injuries is asked, What happened to you? Who did this to you? He said, Dee." Tr. 685; *see also* Tr. 696. That is not the way a prosecutor presents "a casual remark to an acquaintance," *Crawford*, 541 U.S. at 51, or any other piece of nontestimonial hearsay. It is the way the government characterizes a witness's formalized

statement made to "accus[e] a targeted individual of engaging in criminal conduct." *Williams v. Illinois*, 132 S. Ct. 2221, 2242 (2012) (plurality opinion).

Respondent's trial thus resembled Sir Walter Raleigh's in every way that matters. The Framers rejected the specter of trials by *ex parte* accusation. This Court should not countenance one here.

III. The History And Development Of Hearsay Law Confirm That L.P.'s Statements Were Testimonial.

"In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will [also] be relevant." *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011). This is because traditional exceptions to the hearsay rule generally "rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution." *Id.* at 1157 n.9; *see also Crawford v. Washington*, 541 U.S. 36, 55-56 (2004) (noting that no hearsay exceptions at the time of the Founding allowed the admission of testimonial statements).

The State argues that hearsay law's historical treatment of accusatory statements such as L.P.'s indicates that the statements were nontestimonial. Petr. Br. 26-30, 32-35. But in fact, the evolution of hearsay law demonstrates the opposite.

1. The State first contends that hearsay law has customarily allowed the admission of "a victim's after-the-fact identification of the culprit to private actors." Petr. Br. 29 (emphasis removed). But all of the cases the State cites in support of this contention involved excited utterances – that is, statements that

were made, if not during the criminal acts themselves, at least "in natural consequence of the principal transaction." *State v. Murphy*. 17 A. 998, 999 (R.I. 1889). Hearsay law since at least the turn of the century has considered such statements "reliable because the declarant, in the excitement, presumably cannot form a falsehood." *Bryant*, 131 S. Ct. at 1157. And that excitement "focuses the participants on something other than 'prov[ing] events potentially relevant to later criminal prosecution.'" *Id.*; *see also id.* at 1157 n.9.

Ohio's child hearsay exception, Ohio R. Evid. 807, has no comparable historical pedigree. Washington enacted the country's first child hearsay law in 1982 (two years after *Roberts*)[8]; Ohio enacted its exception in 1991. Furthermore, these states (and others) enacted these exceptions even though child hearsay alleging abuse is notoriously "unreliable." *Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008). Young children, for example, are "highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement." *Id.* Children, therefore, may make "induced, and even imagined" allegations of abuse, *id.*, and sometimes "modify their stories to fit what the adult questioner believes to have happened." Diana Younts, Note, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 Duke L. J. 691, 722 (1991).

---

[8] *See* Wash. R. Evid. 802 (1982). This provision has since been amended and recodified at Wash. Rev. Code § 9A.44.120.

Studies have also shown that abusive parents sometimes "program" their children to blame some other specified person if ever asked to identify the abuser. William Bernet, *Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused*, 36:10 J. Am. Acad. Child Adolesc. Psychiatry, 37S, 44S, 50S (1997); *see also Maryland v. Craig*, 497 U.S. 836, 869 (1990) (Scalia, J., dissenting) (discussing the "value of the confrontation right in guarding against a child's distorted or coerced recollections"). This reality creates "a very real danger" that a jury will rely on the undeniable presence of a child's physical injuries "to mistakenly infer the trustworthiness of the entire statement," including "the child's allegations regarding the identity of the abuser." *Idaho v. Wright*, 497 U.S. 805, 824 (1990).

Worse yet, instead of identifying statements where the participants are likely to have been "focuse[d] . . . on something other than 'prov[ing] events potentially relevant to later criminal prosecution," *Bryant*, 131 S. Ct. at 1157, Ohio's Rule 807 casts its net directly at statements "describing [physical or sexual abuse] directed against the child." Ohio R. Evid. 807(A). L.P.'s statements, therefore, do not fall within some generally applicable hearsay exception that might occasionally happen to cover accusatory statements. Rather, Rule 807 captures statements only insofar as they directly allege criminal conduct. This focus is at war with the Confrontation Clause.

To be sure, Rule 807 conditions the admissibility of allegations of abuse on trial-court findings that "the child was particularly likely to be telling the

truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement." Ohio R. Evid. 807(A)(1). Yet one need look no further than this case to see what an empty promise this is. When L.P.'s teacher first asked him "Who did this," J.A. 59, she also simultaneously asked "did he get a spanking?" *Id.* 79. L.P. "looked uncertain" and "bewildered." *Id.* 59, 62. He responded "something like Dee, Dee," *id.* 59, but the teachers were "not sure if he understood the questions," *id.* 81. Instead of asking open-ended questions seeking clarification, however, the teacher followed-up with strongly suggestive reinforcement: "What did you say? Dee? Dee did this?" J.A. 60. L.P. simply responded, "Dee." J.A. 60, 62.

The notion that cross-examination could have added little to the jury's assessment of the reliability of this exchange is hard to fathom. L.P. may not have understood the questions he was asked, and it is unclear whether he was suggesting that Dee had spanked him or abused him in some other way. Indeed, Teacher Jones acknowledged that she never specified what she was asking about. J.A. 62. And even if L.P. had plainly asserted that Dee abused him, it is unclear whether he was talking only about his face or whether his allegation included the injuries later found on his chest and torso. Surely a defense lawyer on cross-examination would have wished to explore these ambiguities – not to mention whether it was really L.P.'s mother (a woman with an "extensive history" of abusing her other children, J.A. 96; *see also id.* 139, and who had previously been seen hitting L.P. with her purse strap, Tr. 670-71) – who actually perpetrated some or all of this abuse.

2. The State argues that, at the least, history supports the admission of child hearsay statements in lieu of live testimony when the children are deemed incompetent to testify. Petr. Br. 32-35. Once again, the historical record refutes, rather than supports, the State's claim.

For most of the eighteenth century, child hearsay was commonly introduced, but that was only because the practice at that time was also for children to testify in court. "Even if they could not be sworn, Hale asserted, the child should be heard unsworn." Petr. Br. 32 (citing 1 Matthew Hale, The History of the Pleas of the Crown 634 (E. Rider et al., eds. 1800)). And "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraint at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 60 n.9.

Based on a handful of reports from the Old Bailey Sessions Papers, the State insists that child hearsay was sometimes introduced during this period without any in-court testimony. Petr. Br. 32-33. But even if this occurred once in a while, the most plausible explanation is that the defendants in those cases did not demand live testimony because – as the first edition of Blackstone's treatise explained – "infants of very tender years often give the clearest and truest testimony." 4 William Blackstone, Commentaries on the Laws of England 214 (1769); *cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328 (2009) (noting that defendants, for "strategic" reasons, sometimes allow prosecution to use out-of-court statements in lieu of live testimony). When defendants did demand live testimony, there is every indication it was required. As Blackstone put it at

the time: "[I]t is now settled, that infants of any age are to be heard" to allow "the court to hear the narration of the child herself, [rather] than to receive it at second hand from those who swear they heard her say so." 4 Blackstone, *supra*, at 214.

In *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), the King's Bench altered the rules governing child testimony. Young children, the court held, were incompetent to testify if they could not take the oath. *Id.* at 200. But this decision did not open the door to the introduction of child hearsay in lieu of in-court testimony. To the contrary, *Brasier* held that "the evidence of the information which the infant had given to her mother and the other witness, ought *not* to have been received." *Id.* (emphasis added). And Blackstone's Commentaries were promptly amended to note the "now settled" principle "that no hearsay evidence can be given of the declaration of a child who hath not capacity to be sworn." 4 William Blackstone, Commentaries on the Laws of England *214 (1783 ed.).

The prohibition against introducing prior statements by persons deemed incompetent to testify at trial predominated in America too. In *Le Baron v. Crombie*, 14 Mass. 234, 235 (1817), the court considered "whether the declarations of a witness under oath, competent at the time, but being incompetent by infamy at a subsequent trial, [were] legal and admissible." The answer was no, *id.*, for "[t]he admission of hearsay statements . . . presuppose[d] that the assertor possessed the qualifications as a witness." 5 Wigmore on Evidence, § 1424 (emphasis removed); *see also* Kenneth S. Broun et al., McCormick on Evidence § 61 n.3 (6th ed.

2009) ("As a general proposition, competency standards apply to hearsay declarants as well as in-court witnesses. If a person would be incompetent to testify . . . his hearsay statement is usually inadmissible."). This principle applied with full force to children. In *State v. Dominque*, 30 Mo. 585, 586 (1860), an eight-year-old boy found hurt in a field said "papa did it" and died two days later of his injuries. The statement was "inadmissible" against the defendant because it was neither connected to the criminal transaction nor a dying declaration. *Id.* at 586-67.

Not until the innovation of special child hearsay rules like Ohio's Rule 807 did states deviate from this time-tested rubric. *See* McCormick on Evidence § 61 n.3. The modernity and opportunism of this innovation undermine, rather than support, the State's position here.

IV. The States Have A Readily Available Solution To The Problem Of Child Testimony.

Child abuse is a terrible crime. Thus, if out-of-court accusations provided the only way to prosecute such transgressions, then the Ohio Supreme Court's holding might be cause for concern. But, in fact, law and practice in many other jurisdictions show that the historically preferred method of having children testify works in modern times too. That being so, permitting Ohio to engage in trial-by-ex-parte interview would be all the more intolerable.

A. The State's Own Law Needlessly Prevented It From Presenting Constitutionally Acceptable Testimony From L.P.

The State's amici warn that deeming children's extrajudicial accusations to investigators testimonial will "silence[]" children's voices. Br. of Ohio Pros. Att'ys Ass'n 2. But if any children are at risk of being silenced here, the culprit is not the Confrontation Clause, but rather Ohio's child competency provision, Ohio R. Evid. 601(A), which presumes that all children younger than ten are incapable of testifying. The State and its amici, in other words, are complaining here about a problem of the State's own making.

1. The law in numerous jurisdictions provides that young children can testify in child abuse cases – thereby obviating any constitutional problem with introducing their out-of-court statements. Federal Rule of Evidence 601, for instance, forbids any competency test for children, leaving instead a requirement only of "minimum credibility." Kenneth S. Broun et al., McCormick on Evidence § 62, at 310 (6th ed. 2009); *accord* 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 601.03 (2d ed. 1997). Under this rule, children may testify so long as their "powers of perception, recollection, [and] narration" are not "so deficient that it is not worth the time listening to [their] testimony." *Id.* Thirteen states follow the federal system, and many others have simply decreed children automatically competent to testify in child abuse prosecutions. *See supra* at 5 n.1.

Since the time of Hale and Blackstone, leading commentators have stressed that – no matter what a child's age – it is far better in child abuse cases to allow the jury "to hear the narration of the child herself, [rather] than to receive it at second hand from those who swear they heard her say so." 4 William Blackstone, Commentaries on the Laws of England 214 (1769). The jury can then take that testimony – along with any out-of-court statements – "for what it may seem to be worth." 2 Wigmore on Evidence § 509; *see also Hoffa v. United States*, 385 U.S. 293, 311 (1966) ("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.").

To the extent states such as Ohio have deviated from this system, they have been sharply criticized. As the McCormick treatise explains, restrictive competency rules like Ohio's are grounded in a "distrust of a jury's ability to assess the words of a small child." McCormick on Evidence § 62, at 306. Yet there is no justification for such distrust. Jurors, like nearly all other people, regularly encounter young children and are well-equipped from their daily experience to evaluate their veracity. Consequently, "the remedy of excluding such a witness, who may be the only person knowing the facts, seems primitive and Draconian." *Id.*; *see also* Wigmore on Evidence § 509 (describing such laws as "unjust").

Worse yet, using pretrial competency hearings such as the one here, *see* J.A. 4-12, to try to assess the value of child testimony is "futile and

unprofitable," Wigmore on Evidence § 509 – or, as child psychologists put it, "clearly a waste of court time [while] d[oing] nothing to promote the search for the truth." Nicholas Bala et al., *The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform*, 18 Int'l J. of Children's Rights 53, 74 (2010). Children regularly become confused during colloquies asking them to demonstrate they know the difference between truth and lies, yet are fully capable of providing useful testimony. Thomas D. Lyon, *Assessing the Competency of Child Witnesses: Best Practice Informed by Psychology and Law, in Children's Testimony: A Handbook of Psychological Research and Forensic Practice* 69, 75-77 (Michael E. Lamb, et al. eds. 2011).

Of course, some children might be so young that they are truly incapable of perceiving events or meaningfully communicating – and thus might be unqualified to testify even under a properly flexible regime. But this Court need not concern itself with this possibility here. As noted above, Ohio's Rule 807 (like other special child hearsay laws) conditions the admissibility of out-of-court accusations on a finding that the statements bear "particularized guarantees of trustworthiness." It is impossible to imagine a child whose pretrial statement satisfies that test not being able to communicate with a minimum level of credibility at the time of trial. Thus, all respondent seeks is to preclude Ohio from having it both ways: pronouncing a child's ex parte, out-of-court accusation sufficiently reliable to prove a serious crime while simultaneously deeming the child incapable of providing useful testimony. In other words, all respondent seeks is what prosecutors and

child abuse experts themselves advocated before the *Roberts* framework took hold. *See supra* at 2-4 (discussing U.S. Dep't of Justice, *Attorney General's Task Force on Family Violence* ("*Task Force*") 39 (1984); Nat'l Legal Res. Ctr. for Child Advocacy & Prot., Am. Bar Ass'n, *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases* 30 (1982)).

2. Perhaps the reason states like Ohio continue to cling to their *Roberts*-era procedures for prosecuting child abuse cases by way of "[t]estimony from mandatory reporters" is that the procedures "spare child victims from the trauma of testifying." Br. of Child Justice 33. The proper way to address this concern, however, is by adjusting the *methods* by which children testify subject to cross-examination, not preventing confrontation altogether.

This Court has already held, for example, that children, under certain circumstances, may testify from another room via live closed-circuit television. *Maryland v. Craig*, 497 U.S. 836, 857 (1990). Numerous other potential accommodations also exist to make it easier for children to testify in courtrooms. Federal law allows children to testify while supported by a nearby support person or independent counsel. 18 U.S.C. § 3509(b)(1)(D). Ohio and other states likewise permit judges to take measures, such as allowing children to hold "comfort items," "to ensure that a child testifies accurately and efficiently so as to minimize anxiety and trauma." Allie Phillips & Susanne Walters, *A Courtroom for All: Creating Child- and Adolescent-Fair Courtrooms*, National District Attorneys Association, National Child Protection Training Center, & Gundersen Health

System at 7, 16 (2013); *see also State v. Johnson*, 528 N.E.2d 567, 569 (Ohio Ct. App. 1986) (allowing child to testify while sitting on her aunt's lap).

When children would struggle even with accommodations to testify in court, courts might permit them to testify in age-appropriate settings such as child advocacy centers. The Attorney General's Task Force suggested in 1984, for instance, that "testimony could be videotaped in a therapeutic atmosphere," with questioning "done by an objective therapist in a relaxed setting with one-way mirrors." *Task Force* at 39. In order to "safeguard the rights of the accused," "[t]he person questioning the child could be fitted with an earpiece to allow questions from the prosecutor and the defense attorney to be presented in a nonthreatening manner." *Id.* Some states have implemented protocols along these lines, with the approval of appellate courts and commentators. *See, e.g.*, *State v. Melendez*, 661 P.2d 654, 656-67 (Ariz. Ct. App. 1982); Prudence Beidler Carr, *Playing by All the Rules: How to Define and Provide a "Prior Opportunity for Cross-Examination" in Child Sexual Abuse Cases After* Crawford v. Washington, 97 J. Crim. L. & Criminology 631, 654-64 (2007) (explaining why such protocols are consistent with *Crawford* and advocating them as the solution that best "balance[s] all of the competing interests at stake").[9]

---

[9] As the title of this article suggests, if a child is interviewed in this manner substantially before the trial, the argument for the interview's admissibility in the absence of live testimony might be framed as a constitutionally adequate "prior opportunity to cross-examine," *Crawford*, 541 U.S. at 59, instead

There may come a point where such alternative processes deviate so dramatically from the model of in-court testimony that the Confrontation Clause comes into play. *See, e.g.*, *Coronado v. State*, 351 S.W.3d 315 (Tex. Crim. App. 2011) (finding confrontation violation where defendant was permitted only to submit written interrogatories for child witness). But that would be a question regarding *what constitutes confrontation*, not whether confrontation is required. All respondent argues here is that defendants are entitled confrontation, whatever form it might take.

In other words, even videotaped confrontation in a child advocacy center would be immeasurably better that what occurred here. At the very least, the jury could then observe the demeanor of a child declarant, *see Craig*, 497 U.S. at 846, and evaluate the child's responses to the defendant's questions, gaining valuable insights even if the child does nothing more than profess "he cannot recall," *United States v. Owens*, 484 U.S. 554, 559 (1988); *see also California v. Green*, 399 U.S. 149, 159-60 (1970). That does not seem too much for a defendant to ask before being subjected to decades in prison.

3. The State's own actions here reinforce the reasonableness of respondent's position. After L.P.'s teachers elicited the accusations at issue, the State sent out its own experts – social workers and police officers – to conduct subsequent interviews with L.P.

---

of the declarant actually appearing at trial. Either way, the result would be the same. *See id.*

As social worker Bolog explained her reasons for re-interviewing L.P.:

> [W]e oftentimes get false allegations. . . . So for me being an investigator, what I get from the hotline on paper, I don't just take it as the god's truth. I take it at face value. And although it might be written on paper or might have somebody tell me, until I'm able to prove it in my own mind or I'm able to see a connection, I tend to try to play a devil's advocate in my head or take things at face value.

J.A. 135. One would be hard pressed to offer a more cogent explanation of why cross-examination is so important – and why it was critical to test the veracity of L.P.'s accusation in this very case. In other child abuse cases, it is similarly customary – in deciding whether to prosecute – for police or prosecutors to arrange for child interview specialists to conduct interviews in age-appropriate settings. Nancy Chandler, *Child Advocacy Centers: Making a Difference One Child at a Time*, 28 Hamline J. Pub. L. & Pol'y 315, 330-32 (2006).

If law enforcement itself has concluded that it is important and worthwhile to carefully question young children regarding allegations of abuse, it hardly seems fair to deny defendants any semblance of the same opportunity. Nor is it sensible to deny the jury the information it might glean from viewing more balanced interviews. Insofar as the goal of the Confrontation Clause is to aid the search for truth, this should be an easy case.

B. Allowing States To Prosecute Child Abuse Cases By Way Of *Ex Parte* Accusations Such As Those Here Would Fatally Undermine The Adversarial System.

Allowing states to use school interviews in lieu of live testimony would not only undermine the truth-seeking goal of trial; it would provide a roadmap for states wishing systematically to evade the adversarial process in child abuse cases.

A recent bulletin from the Office of the Texas Attorney General provides a glimpse of what would come. Texas' special child hearsay statute allows only the first person to whom a child discloses abuse to repeat that extrajudicial accusation in court. *See* Tex. Crim. Pro. Art. 38.072 § 2(a)(3). Accordingly, the bulletin advises teachers that they "may have an especially important role to play in subsequent legal proceedings." Office of the Attorney General, *What Can We Do About Child Abuse?*, at 20 (Apr. 21, 2005), https://www.texasattorneygeneral.gov/ag_publications/pdfs/child_abuse.pdf. When teachers observe signs of child abuse, the bulletin continues, they should "[a]sk about what happened" and make a "secure and confidential" record for use "in a subsequent legal proceeding." *Id.* at 19-20. "[I]f you immediately pass the child on to another person such as a counselor or clergy-man, important testimony could be lost." *Id.* at 20.

The State's litigation strategy in this case indicates that it desires a similar system. After the Ohio Court of Appeals ruled that L.P.'s statements to the teachers, social workers, and police officer were testimonial, the State appealed that decision only with respect to the statement to the teachers. Pet.

App. 6a. The appeal will have no effect on the outcome of this particular case. *See supra* at 17 n.6. But apparently, the State is confident that if it can obtain an opinion from this Court exempting accusatory statements elicited by teachers from the Confrontation Clause, it will be able to prosecute child abuse cases in the future though out-of-court statements to teachers alone, without having to subject the alleged victims to any form of adversarial testing.

Where, as here, the State's evidence against the defendant is thin, such a procedure can make all the difference. As one of the State's amici puts it, "mandatory reporters have a better understanding [than children] of the legal system, can better withstand scrutiny on the stand, and are more likely to be believed by a jury." Br. of Child Justice 31. Their testimony thus helps "to ensure convictions," *id.* at 28, without subjecting a child's memory, comprehension of the questions previously asked, or credibility to scrutiny – that is, without providing the defendant with any opportunity of confrontation.

* * *

As hard as child abuse sometimes is to prove, it has been recognized for centuries that such a criminal charge is even "harder to be defended by the party accused, though innocent." 4 Blackstone, *supra*, at 215. Indeed, due to the "heinousness of the offence," there is a special danger that the jury may be "overhastily carried to the conviction" by false or inaccurate accusations. *Id.* For hundreds of years, the Anglo-American legal system has recognized that the best antidote to this danger is cross-examination – "the greatest legal engine ever invented for the

discovery of truth." 5 Wigmore on Evidence § 1367. This Court should turn away the State's request to systematically dispense with that protection where it is most needed.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

Erika Cunliffe
Jeffrey M. Gamso
CUYAHOGA COUNTY
PUBLIC DEFENDER'S
OFFICE
310 Lakeside Avenue
Suite 200
Cleveland, OH 44113

Donald B. Ayer
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001

Jeffrey L. Fisher
Counsel of Record
Brian Wolfman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

January 7, 2015

APPENDIX A

Ohio Rule of Evidence 601

General rule of competency

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

APPENDIX B

Ohio Rule of Evidence 807

Hearsay exceptions; child statements in abuse cases

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid.R. 802 if all of the following apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

(2) The court finds all of the following:

(a) the child is absent from the trial or hearing;

(b) the proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good faith effort to do so;

(c) it is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time.

(3) The court finds both of the following:

(a) the child is unable to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity;

(b) the illness or infirmity would not improve sufficiently to permit the child to testify if the trial or hearing were delayed for a reasonable time.

The proponent of the statement has not established that the child's testimony or attendance is not reasonably obtainable if the child's refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.

(C) The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.