No. 13-1352

In The Supreme Court of the United States

OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Ohio

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with membership of more than 10,000 attorneys, in addition to more than 40,000 affiliate members in all 50 states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that both parties have consented to this filing as reflected in the blanket consent letters noted on the docket.

knowing whether surrogates may be used to introduce statements of non-testifying witnesses.

In the wake of *Crawford v. Washington*, 541 U.S. 36 (2004), courts have routinely wrestled with the question whether the Confrontation Clause permits this form of surrogate testimony. This practice poses serious problems because it fundamentally alters the structure of a criminal trial, hampers its truth-seeking function, and ultimately threatens the integrity of our criminal justice system.

SUMMARY OF ARGUMENT

The instant case must be viewed in the context of the nationwide shift away from police interviewing potential victims of child abuse. States increasingly rely on professionals other than police and prosecutors to investigate child-abuse cases. The recognized best practice in child-abuse cases is the use of teams comprised of professionals from multiple disciplines who work together to detect, prevent, and investigate child abuse. Indeed, multidisciplinary teams for child-abuse investigations are mandated by law in many states. The primary purpose of interviews conducted by members of these multidisciplinary teams – including teachers – is to establish past events potentially relevant to future criminal prosecution.

Reversing the Ohio Supreme Court in this case would give law enforcement officials a roadmap for exempting from cross-examination nearly all victim

testimony in child-abuse cases. This has it exactly backwards. The constitutionally prescribed test of reliability is especially important in child-abuse cases because, as this Court has acknowledged, children are particularly susceptible to suggestion and unreliable testimony.

ARGUMENT

I. TEACHERS PLAY A CRITICAL ROLE IN THE PROSECUTION OF CHILD-ABUSE CASES.

Teachers are in a unique position to detect child abuse. Because they have regular contact with the children under their care, these professionals can readily observe a child's change in behavior, habits, and hygiene. Such changes may point toward physical or sexual abuse that would otherwise go undetected. *See, e.g.,* U.S. Department of Health and Human Services, *What Is Child Abuse and Neglect? Recognizing the Signs and Symptoms* 5-7 (July 2013). For that reason, it is common for teachers and school administrators to receive specialized training to recognize and respond to signs of child abuse. *See, e.g.*, Va. Code § 22.1-298.1 (requiring teachers to receive training in recognizing child abuse as condition of licensure).

Recognizing this reality, states began to enact mandatory-reporting laws. These laws place a legal obligation on professionals who have regular contact

with children, like teachers, to report suspected child abuse or neglect. *See, e.g.*, Ohio Rev. Code § 2151.421. Mandatory reporting laws currently exist in all 50 states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. *See generally* U.S. Department of Health and Human Services, *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws* (2014). All of these mandatory reporting laws include teachers within their scope. *See id.*

The threshold for a mandatory reporter to report abuse or neglect under these laws is extremely low. Typically, these statutes require a mandatory reporter to notify law enforcement or social services when abuse is merely *suspected*. *See, e.g.*, Ohio Rev. Code § 2151.421 (report required when person knows or suspects that a child has suffered abuse); *see also, e.g.*, Alaska Stat. §§ 47.17.020, 47.17.023 (report required where there is "reasonable cause to suspect" that a child has suffered abuse); Colo. Rev. Stat. § 19-3-304 (report required upon "reasonable cause to know or suspect that a child has been subjected to abuse").

II. TEACHERS QUESTION ABUSED CHILDREN FOR THE PRIMARY PURPOSE OF GATHERING EVIDENCE FOR FUTURE PROSECUTION.

To determine the testimonial nature of a statement, courts must determine the primary purpose of

the interrogation. *See Michigan v. Bryant*, 562 U.S. 344, 131 S. Ct. 1143, 1154 (2011). If the primary purpose of the interrogation is to establish past events potentially relevant to future criminal prosecution, the statements are testimonial, and therefore, subject to the Confrontation Clause. *Id.* To determine the primary purpose of an interrogation, courts examine factors such as the circumstances under which an encounter occurs and the statements and actions of *both* the declarant and the interrogators. *Id.* at 1160; *see also Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009).

Under the mandatory-reporting laws in every state, teachers *must* share their findings of potential abuse – including statements by victims – with law enforcement officials or child protective services under penalty of law. Through training and the text of the applicable statutes themselves, teachers necessarily understand that, when questioning a child about suspected abuse, they will be required to report the details of the interview promptly to law enforcement or child protective services. They understand that the statements they elicit will be an important part of any subsequent criminal prosecution. And they understand that the information the child provides will be an important part of any criminal investigation. Consequently, teachers must be treated like law enforcement officers for Confrontation Clause purposes. *See, e.g., Crawford*, 541 U.S. at 53 (while discussing the historical foundations of the Sixth

Amendment, noting that "it is not surprising that other government officers performed the investigative functions [under the Marian statutes] now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.").

States depend on evidence gathered by teachers to prosecute child-abuse cases. Teachers' daily contact and rapport with children put them at the forefront of child-abuse investigations. Their specialized training allows them to recognize and develop facts regarding suspected abuse long before law enforcement takes an active role in any investigation. And their role as mandatory reporters ensures that this information will eventually make its way to law enforcement, either directly or through another state agency, where it will be available in any subsequent prosecution and investigation. Indeed, several state *amici* openly admitted to the Court in this case that their child-abuse prosecutions depend on the surrogate testimony of teachers and other caregivers. (*See* Brief for the States of Washington, Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, South Carolina, Tennessee, Texas, Vermont, West Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Petitioner, p. 5) ("Evidence from caregivers is often critical to the prosecution of these difficult cases.").

All of these circumstances combine to create a regulatory regime in which a teacher's primary purpose in questioning abused children is often to gather evidence for criminal prosecutions or investigations. *See Child Abuse & Neglect*, Office of Essex County District Attorney Jonathan W. Blodgett (Oct. 2005), *available at* http://www.mass.gov/essexda/docs/publications/child-abuse/br-51a-child-abuse-and-neglect.pdf ("Mandatory reporting is the first step to initiating the investigation of child abuse and is essential to our mission to identify and prosecute those who prey upon children in Essex County."). This primary purpose qualifies the child's responses as testimonial. Consequently, these statements cannot be used against the defendant in a subsequent criminal prosecution, absent unavailability and the opportunity to cross-examine the declarant.

III. STATES ASSIGN OTHER NON-LAW ENFORCEMENT OFFICIALS TO INVESTIGATE CHILD-ABUSE CASES.

It is critical to assess the Confrontation Clause question in this case in light of the practical realities of child-abuse investigations. In practice, most states choose to deploy mandatory reporters and child welfare officials as "first responders" in child-abuse investigations. The choice of those professionals – instead of police and prosecutors – is intentional. An effective child-abuse investigator needs particularized training and experience with the unique psychology of children. Traditional police investigators often are

not suited for this task, especially in the case of children traumatized by abuse. Subjecting abused children to repeated questioning about the abuse can inflict additional trauma on an already traumatized child. States recognize that they need to employ special investigative methods to address the unique challenges they face in child-abuse cases.

To address these challenges, most states deploy "multidisciplinary teams" to detect, prevent, and investigate child abuse. A multidisciplinary team is "a group of professionals who work together in a coordinated and collaborative manner to ensure an effective response to reports of child abuse and neglect." Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Forming a Multidisciplinary Team to Investigate Child Abuse* 2 (2000); *see also* National Children's Advocacy Center, *Multidisciplinary Team*, *available at* www.nationalcac.org/about/multiteam.html (last visited Jan. 2, 2015) (the multidisciplinary team approach is "widely adopted as a best practice in responding to child sexual abuse in the United States"); Jennifer Van Pelt, *Multidisciplinary Child Protection Teams – the Social Worker's Role*, 13 Social Work Today 2, at 26 (Mar./Apr. 2013) (noting a "growing emphasis on multidisciplinary approaches" because "[p]rofessionals have recognized that children live in the real world where they go to school, live at home or at a caregiver's home, and have behavioral health and/or medical issues, all of which reach across disciplines."). These teams typically include law enforcement, child protective services workers,

physicians, mental health professionals, victim advocates, and educators. Because of their specialized training, it is widely recognized that multidisciplinary teams are "the best response to the challenge of child abuse and neglect investigations." *Forming a Multidisciplinary Team*, at 4.

Use of multidisciplinary teams is the preferred method of investigating child-abuse cases in nearly every state. *See* National Children's Advocacy Center, *Multidisciplinary Team*, *available at* www.nationalcac.org/about/multi-team.html (last visited Jan. 2, 2015) (the multidisciplinary team approach is "widely adopted as a best practice in responding to child sexual abuse in the United States"); *see also, e.g.,* Pennsylvania Chapter of Children's Advocacy Centers & Multidisciplinary Teams, *The Multidisciplinary Team/Children's Advocacy Center Model* 2 (2012) ("Since 1985, at least 750 communities across the United States have implemented investigation and treatment programs based on the Child Advocacy Center (CAC) model, [the heart of which] is the multidisciplinary team (MDT) of professionals with expertise in medicine, mental health services, child protection, law enforcement, prosecution, and victim advocacy."); Lisa M. Jones, et al., *Criminal Investigations of Child Abuse: The Research Behind "Best Practices,"* 6 Trauma, Violence & Abuse No. 3, 254, 255 (2005) ("Given the number of professionals involved in child-abuse investigations, there have been increasing efforts to coordinate investigator activities, particularly those

of law enforcement and child protective services (CPS).").

Indeed, multidisciplinary teams are *mandated by law* in a number of states and specifically endorsed by statute, although discretionary, in many more. For example, Kentucky law mandates that "[e]ach investigation of reported or suspected sexual abuse of a child shall be conducted by a specialized multidisciplinary team composed, at a minimum, of law enforcement officers and social workers from the Cabinet for Health and Family Services." Ky. Rev. Stat. § 431.600(1). Oregon law is even broader, specifying that "[t]he district attorney in each county shall be responsible for developing county multidisciplinary child-abuse teams to consist of but not be limited to law enforcement personnel, Department of Human Services child protective service workers, school officials, county health department personnel, county mental health department personnel who have experience with children and family mental health issues, child-abuse intervention center workers, if available, and juvenile department representatives, as well as others specially trained in child abuse, child sexual abuse and rape of children investigation." Or. Rev. Stat. § 418.747.

These states do not stand alone in their use of multidisciplinary teams to investigate child abuse. New York law allows a social services district to establish multidisciplinary teams that are "primarily responsible for the investigation of child abuse reports." N.Y. Soc. Serv. Law § 423(6). These multidisciplinary

teams "shall include but not be limited to representatives from the following agencies: child protective services, law enforcement, district attorney's office, physician or medical provider trained in forensic pediatrics, mental health professionals, victim advocacy personnel and, if one exists, a child advocacy center." *Id.* Multidisciplinary team members "shall participate in joint interviews and conduct investigative functions consistent with the mission of the particular agency member involved." *Id.*

Similarly, Florida law requires the formation of "multidisciplinary child protection teams" comprised of "appropriate representatives of school districts and appropriate health, mental health, social service, legal service, and law enforcement agencies." Fla. Stat. Ann. § 39.303. Idaho law requires the formation of multidisciplinary teams "for investigation of child abuse and neglect. . . ." Idaho Code Ann. § 16-1617. These teams must consist, at a minimum, of "law enforcement personnel, department of health and welfare child protection risk assessment staff, child advocacy center staff where such staff is available in the county, a representative of the prosecuting attorney's office, and any other person deemed to be necessary due to his or her special training in child abuse investigation." *Id.* Washington law requires counties to develop protocols that address "the coordination of child sexual abuse investigations between the prosecutor's office, law enforcement, children's protective services, children's advocacy centers, where available, local advocacy groups, community sexual assault

programs . . . and any other local agency involved in the criminal investigation of child sexual abuse. . . ." Wash. Rev. Code Ann. § 26.44.180.

Even where not formally *required* by statute, almost every state legislature endorses and encourages the multidisciplinary team approach when investigating child abuse. *See, e.g.*, Cal. Welf. & Inst. Code § 18961.7(b)(1) (specifying that a "child abuse multidisciplinary personnel team" may include psychiatrists, psychologists, marriage and family therapists, or other trained counseling personnel; police officers or other law enforcement agents; medical personnel; social services workers; and public or private school teachers and administrative officers); 325 ILCS 5/7.1 ("To the fullest extent feasible, the Department [of Children and Family Services] shall cooperate with and shall seek the cooperation and involvement of all appropriate public and private agencies, including health, education, social service and law enforcement agencies, religious institutions, courts of competent jurisdiction, and agencies, organizations, or programs providing or concerned with human services related to the prevention, identification or treatment of child abuse or neglect." Va. Code § 63.2-1507 ("All law-enforcement departments and other state and local departments, agencies, authorities and institutions shall cooperate with each child-protective services coordinator of a local department and any multi-discipline teams in the detection and prevention of child abuse."); *see also, e.g.*, Ala. Code § 26-16-51; Alaska Stat. § 47.14.300; Ariz. Rev. Stat.

§ 8-828; Ark. Code Ann. § 20-82-209; Colo. Rev. Stat. § 19-3-308; Conn. Gen. Stat. § 17a-106; Del. Code Ann. tit. 16, § 906; D.C. Code Ann. § 4-1301.51; Fla. Stat. Ann. § 39.303; Ga. Code Ann. § 19-15-2; Haw. Rev. Stat. Ann. § 588-1.5; Idaho Code Ann. § 16-1617; Ind. Code Ann. § 31-33-3-1; Iowa Code § 331.909; Kan. Stat. Ann. § 38-2228; La. Child Code Ann. art. 508; Me. Rev. Stat. Ann. tit. 22, § 4093; Md. Code Ann., Fam. Law § 5-584; Mass. Ann. Laws ch. 119 § 51D; Mich. Comp. Laws Serv. § 722.628; Minn. Stat. § 626.558; Miss. Code Ann. § 43-15-51; Mo. Rev. Stat. § 210.145; Mont. Code Ann. § 41-3-107; Neb. Rev. Stat. Ann. § 28-728; Nev. Rev. Stat. Ann. § 432B.350; N.H. Rev. Stat. Ann. § 169-C:34-a; N.J. Stat. Ann. § 9:6-8.100; N.M. Stat. Ann. § 32A-4-3; N.C. Gen. Stat. § 7B-1407; N.D. Cent. Code § 50-25.1-04.1; Ohio Rev. Code Ann. § 2151.427; Okla. Stat. tit. 10, § 7110; 23 Pa. Cons. Stat. § 6365; S.C. Code Ann. § 20-7-495; S.D. Codified Laws § 26-8A-17; Tenn. Code Ann. § 37-1-607; Tex. Fam. Code § 264.406; Utah Code Ann. § 62A-4a-409; Vt. Stat. Ann. tit. 33, § 4917; Wash. Rev. Code Ann. § 74.14B.030; W. Va. Code Ann. § 49-5D-2; Wis. Stat. § 48-981; Wyo. Stat. Ann. § 14-3-212; Guam Code Ann. § 13331; P.R. Laws Ann. tit. 8, 444c; V.I. Code Ann. tit. 5, § 2536; *cf.* 42 U.S.C. § 5106a(a)(2)(A) (providing grants to states for child abuse or neglect prevention and treatment programs for the purpose of "creating and improving the use of multidisciplinary teams and interagency, intra-agency, interstate, and intrastate protocols to enhance investigations.").

It is by design – by law enforcement officials and state legislatures – that law enforcement personnel often become involved in child-abuse cases only after the alleged victim has had extensive contact with other non-law enforcement agencies and personnel. For example, of the 26,944 reports of suspected child abuse to Pennsylvania's ChildLine and Abuse Registry for 2013, only 1,650 (6.1%) came from law enforcement agencies. *See* Pennsylvania Department of Public Welfare, Annual Child Abuse Report, 11 (2014). The remaining 25,294 reports came from schools, family members, doctors, neighbors, daycare workers, babysitters, dentists, social service agencies, and the like. *Id.*; *see also id.* at 12 ("Mandated reporters continue to be the highest reporters of suspected child abuse."). The professionals with specialized training generally operate as "first responders" with the knowledge and expectation that the evidence they gather will be used later by law enforcement officials.

Under the multidisciplinary team system, law enforcement personnel delegate interviews of abused children to child protective service workers, counselors, or other non-law enforcement personnel. *See generally* National Children's Advocacy Center, *Multidisciplinary Teams and Collaboration in Child Abuse Intervention* (2011); Alaska Children's Justice Act Task Force, *Guidelines for the Multidisciplinary Response to Child Abuse in Alaska*, 11 (Oct. 2010) ("All reasonable efforts will be made by each agency to coordinate each step of the investigation/assessment process in order to minimize the number

of interviews and interviewers involved with the child, as well as the number of medical exams. All agencies participating in this process will share pertinent case information with other appropriate agencies except as prohibited by law or policy."). These individuals have the specialized training in dealing with children that law enforcement personnel typically lack. *See* Wendy Walsh, et al., *Children's Advocacy Centers: One Philosophy, Many Models*, APSAC Advisor, Vol. 15, No. 3 (2003) ("Forensic interviewers are trained to understand children's communications, talk with them clearly, and put them at ease, while still collecting sound investigative information.").

The delegation is purposeful. It is designed both to improve the quality of evidence gathered by the trained professionals and to minimize the number of interviews an abused child has to endure. Pennsylvania Chapter of Children's Advocacy Centers & Multidisciplinary Teams, *The Multidisciplinary Team/ Children's Advocacy Center Model* 4 (2012) ("Forensic interviews are child-centered and coordinated to avoid duplication. Using this approach, the CAC model reduces systemic trauma imposed on children by eliminating the multiple interviews typically conducted in non-CAC/MDT investigations."), *see also* Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Forming a Multidisciplinary Team to Investigate Child Abuse* 17 (2000). Typically, a single interview is conducted, and the contents of that interview are utilized by *all* members

of the multidisciplinary team to determine follow-up actions. T.P. Cross, et al., *Child forensic interviewing in Children's Advocacy Centers: Empirical data on a practice model*, 31 Child Abuse & Neglect 1031, 1033 (2007) ("Most [Children's Advocacy Centers] increase coordination by conducting multidisciplinary team interviews. In this method, one professional interviews the child while other professionals observe through a one-way mirror or closed-circuit television system. The team also shares information and decision-making, and coordinates communication with the family."). Social service staff and counselors may have the primary role for conducting interviews under the multidisciplinary team approach, but they are acting as "first responders" for law enforcement officials. *See id.*

Consequently, even though these interviews are intentionally delegated to non-law enforcement personnel, the interviews nonetheless have the primary purpose of establishing past events potentially relevant to future criminal prosecution. *See The APSAC Handbook on Child Maltreatment* 364 (John E. B. Myers, et al. eds., 2d ed. 2002) ("When [multidisciplinary teams] are employed, a single interviewer (e.g., a police officer) may question a child, having consulted first with officials from relevant agencies (e.g., social services) on important questions to ask."). Therefore, they are testimonial and subject to the Confrontation Clause. *See Bryant*, 131 S. Ct. at 1154; *see also, e.g., State v. Oliveira*, 961 A.2d 299, 311 (R.I. 2008) (holding that defendant had Sixth Amendment

right to assistance of counsel in interview with child services worker because child services worker intended to elicit incriminating information and knew she would have to turn interview notes over to police).

IV. REVERSING THE OHIO SUPREME COURT WOULD GIVE LAW ENFORCEMENT A ROADMAP TO EXEMPT CHILD-ABUSE TESTIMONY FROM CONFRONTATION.

Given the practical reality of *who* conducts most child-abuse investigations, a reversal of the Ohio Supreme Court's decision in this case risks prescribing a clear path to avoiding confrontation altogether in abuse prosecutions. States would accelerate their efforts to integrate teachers, child services workers, physicians, and other non-law enforcement personnel into the investigative machinery. The national trend to funnel child-abuse victims through social services agencies would only grow stronger; law enforcement agencies would know that the multidisciplinary teams of experts could gather all necessary statements from the child without any involvement from police or prosecutors. As a nation, we would formally indulge the fiction that the primary purpose of these interviews is not to collect evidence for use in future prosecution, but to assess imminent risks to the child's well-being. (*See* Brief for the United States as Amicus Curiae Supporting Petitioner, p. 22).

Indeed, law enforcement officials have already taken the first steps toward this end. For example,

just months after this Court's *Crawford* decision, the American Prosecutors Research Institute published an update carefully instructing law enforcement officials to use child services workers to conduct interviews in a way that would render the child's statements nontestimonial. Victor I. Vieth, *Keeping the Balance True: Admitting Child Hearsay in the Wake of* Crawford v. Washington, APRI Update, Vol. 16, No. 12 (2004). The Update instructed:

> Although the statement may also serve the purposes of the prosecutor at a criminal trial, the interview itself is not to focus exclusively or even primarily on the needs of investigators or prosecutors. States following the *CornerHouse/Finding Words* protocol for interviewing children can cite the "child first doctrine" upon which the interview is based. . . . Moreover, forensic interviewers are specifically taught not to focus only on the possibility a child was abused by a given person. . . . These and other safeguards distinguish forensic interviews from the "formalized testimonial materials" for criminal trials cited by the Court in *Crawford*.

Id. at 2. Five years later, another APRI Update reinforced this technique, instructing that when faced with a child's statements to sexual assault nurse examiners, social workers and forensic interviewers:

> [P]rosecutors should take the position that the non-police interviewer is not an agent of law enforcement and therefore only the reasonable expectation of the child-declarant,

> and not the primary purpose of the interrogation, is at issue. But even if the primary purpose of the interrogation is considered, it was to benefit the child, not to prejudice the defendant.

Mary E. Sawicki, *The* Crawford v. Washington *Decision – Five Years Later: Implications for Child Abuse Prosecutors*, APRI Update, Vol. 21, Nos. 9 & 10 at 7 (2009).

A reversal of the Ohio Supreme Court here would signal to law enforcement that delegation to specialized interrogators is all that is needed to subvert a core constitutional protection against wrongful convictions. *See* Rami S. Badawy, *The Supreme Court Clarifies the Primary Purpose Test*, APRI Update Express, No. 3 at 2 (March 2011) (noting that "*Bryant* provides professionals who work on cases with reluctant witnesses the framework from which they can effectively prosecute those challenging cases that revolve around the admissibility of statements from unavailable and/or reluctant witnesses."); *Leading Cases*, 120 Harv. L. Rev. 213, 217 (2006) ("Rather than resolving emergencies before conducting an investigation, police officers might be inclined to gather as much information as possible during a pending emergency in order to evade the Confrontation Clause. 911 operators, for instance, might be instructed to press callers for information about their assailants during the emergency rather than guide them to safety and then ask questions.").

Such a holding would also risk exempting a highly unreliable class of statements from the constitutionally mandated test of accuracy. This has it exactly backwards. The right to confrontation through cross-examination is *especially critical* in child-abuse cases because, as this Court has acknowledged, children are particularly susceptible to suggestion and often produce unreliable and imagined testimony. *See Kennedy v. Louisiana*, 554 U.S. 407, 444 (2008) (noting that "children are highly susceptible to suggestive questioning techniques"); *see also, e.g.,* Maggie Bruck, Stephen J. Ceci & Helene Hembrooke, *The Nature of Children's True and False Narratives*, 22 Developmental Review 520, 521 (2002) (noting that children's "reports can be greatly distorted when they are obtained under suggestive interviewing conditions."). Exposing and counteracting this effect is the very purpose of the Confrontation Clause. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 338 (2009) ("[A purpose of the Confrontation Clause] is to alleviate the danger of one-sided interrogations by adversarial government officials who might distort a witness's testimony.") (Kennedy, J., dissenting).

This Court should not sanction the erosion of constitutional rights urged by Petitioner. Reversing the decision below would dramatically and unfairly shift the balance of power in criminal trials for an entire class of cases throughout the country. Nearly *all* witnesses in abuse cases could be shielded from cross-examination at the whim of prosecutors. Child-abuse trials will soon become trials by *ex parte*

examination – precisely the evil targeted by the Confrontation Clause. *See Davis v. Washington*, 547 U.S. 813, 826 (2006) ("[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case – English or early American, state or federal – can be cited, that is it."); *see also Crawford*, 541 U.S. at 51 ("Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.").

CONCLUSION

Amicus understands the concern that child-abuse cases, like domestic violence cases, are "notoriously susceptible to intimidation or coercion of the victim" and often difficult to prosecute. *Davis*, 547 U.S. at 833. By the same token, however, convictions for child abuse carry significant punishments and social stigmas, and our criminal justice system must ensure that such convictions are correct and reliable. Cross-examination of alleged child-abuse victims is especially important to ensure the reliability of such convictions. *See Kennedy*, 554 U.S. at 444 (2008) ("Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement."). Put bluntly, this category of testimony is *more* in need

of the constitutional guarantee of reliability (confrontation), not *less*.

Accordingly, *amicus* urges this Court to affirm the decision of the Supreme Court of Ohio and to recognize the practical reality that non-law enforcement officials play a critical role in the investigation and prosecution of child-abuse cases.

Respectfully submitted,

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