
IN THE

STATE OF OHIO

Petitioner,

v.

DARIUS CLARK

Respondent.

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INTERESTS OF AMICI CURIAE

manner that allows them to meet their student safety obligations with respect for the rights of students and their families but without undue legal burdens or potential liability. NSBA regularly

UHSUHVHQWV LWV PHPEHUV· LQWHUHVWV EHIRU and federal and state courts and has participated as amicus curiae in numerous cases.

OSBA is the largest statewide organization representing the concerns of public elementary and secondary schools leaders in Ohio. OSBA is a nonprofit 501(c)(4) corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter. Nearly 100% of the 719 district boards throughout the State of Ohio are members of it.

INTRODUCTION AND SUMMARY

As organizations that represent millions of educators and school officials, amici understand the essential role of teachers and other school personnel in protecting children from abuse, neglect, and other harms, including the importance of mandatory reporting statutes that require educators in all fifty states to report suspected abuse in reinforcing those efforts. Amici submit this brief in support of Petitioner, the State of Ohio, to emphasize that when teachers, school administrators, and other school personnel carry out their duties as mandatory reporters of child abuse, they do not do so as agents of law enforcement or for the purpose of creating out-of-court statements for use in a prosecution. As should be obvious from both the legislative objectives of mandatory reporting laws and the in-school context in which educators work, the overwhelming

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abuse or neglect is to protect a child, not to
apprehend and prosecute the perpetrator. That
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prosecution of crimes³ but to ensure that those who are in the best position to identify the signs of abuse will trigger a variety of mostly civil investigations and interventions that help ensure the safety and well-being of children. Mandatory reporters are not charged with investigating or establishing whether, as a matter of fact, abuse has occurred; they must instead report what they reasonably suspect or believe is abuse so that other entities (such as Child Protective Services) may investigate the report. And, where suspicions of abuse are substantiated through an investigation, the official response is more likely to be the delivery of social services that prioritize family preservation, not a criminal prosecution.

Furthermore, the unique setting in which HGXF DWRUV XVXDOO\ LQTXLUH³ DERXW D FKLOG·V which may or may not be the product of child abuse³ militates against the notion that there are prosecutorial aims at work. Schools are broadly concerned with the well-being of their students, and educators will therefore inquire about a wide range of behaviors, injuries, or problems that a child presents at school. It may only become apparent after a child has responded to such an inquiry that the underlying issue is one that implicates the HGXF DWRU·V PDQG DWRU\ UHSRUWLQJ GXWLHV DV one that should be addressed through school discipline or counseling). Educators do not approach these frequent and often informal interactions with children as quasi-prosecutors eliciting out-of-court testimony, but rather as educators seeking to foster a positive school environment and to ensure the well-being of students.

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injuries were testimonial in nature. Clark , 999 N.E.2d at 594. This was so, the court reasoned, because Ohio law imposes on teachers (and various other professionals) a duty to report suspected child abuse. Id. at 594, 596. While acknowledging that the primary purpose of that reporting obligation is protecting children, the court reasoned that because the reporting statute contemplates the possibility of prosecution for reported abuse, those subject to the

SRWHQWLDO FULPLQDO DFWLYLW\µ DQG WKHUF
statements to his teachers were testimonial. Id. at
600. Because the three-year-old did not testify at
trial, the court concluded that these statements
should have been excluded under the Confrontation
Clause. Id. at 600-01.

B. Mandatory Reporting Statutes Do Not
Deputize Teachers as Agents of Law
Enforcement

The Ohio Supreme Court is not the first court
to consider this issue. The argument that statements
to mandatory reporters of child abuse are
testimonial under the Confrontation Clause has been
raised in a number of cases, and both federal and
state courts have consistently rejected it. ² There are

good reasons for that: a look at the reach, intent, and function of mandatory child abuse reporting laws in the broad context of child protection demonstrates that the fifty states did not intend to deputize as law enforcement all mandatory reporters of suspected abuse.

\$IILUPLQJ WKH 2KLR 6XSUHRPH &RXUW·V GHFL could have troubling and broad implications, not just for educators, but for all manner of other professionals. In all states, mandatory reporters

WKRXJK ´WKH SHGLDWULFLDQ PD\ KDYH KDG D VHFRQGDU\ her inquiry, namely, to fulfill her ethical and legal duty, as a PDQGDWRU\ UHSRUWH) State v. Belle, 220 P.3d 128, 132-33 (Or. App. 2009) (holding that the mandatory UHSRUWLQJ ´VWDWXWH GRHV QRW LQ HIIHFW SXW D SRO

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WKH SHUSHIWOODWAGU be the case that
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\$OORZLQJ WKH 2KLR FRXUW·V UXOLQJ WR VWDQG
VXFK ELJDUUH OHJDO FRQFOXVLRQV GXH WR WK
extraordinary reach .

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1974 (CAPTA).¹² Among other provisions, CAPTA encouraged state efforts to combat child maltreatment and increased uniformity of state laws by offering financial incentives in the form of conditional grants. States established eligibility for these grants by meeting requirements including: enacting laws for mandatory reporting of child abuse; offering legal immunity to good faith reporters; establishing a means for rapid investigation and service to children in need; requiring confidentiality; creating channels for cooperation between social service providers, police, and courts; requiring appointment of a guardian ad litem; educating the public on child maltreatment; and not reducing state funding for addressing child maltreatment below 1973 levels.¹³ Tellingly, the grant funding requiring mandatory reporting laws is for child abuse or neglect prevention and treatment programs, rather than for programs relating to investigation and prosecution of child abuse. This legislative choice indicates that Congress intended such reporting requirements to be measures aimed at preventing abuse and protecting the child, not as prosecutorial efforts.

Section 375(d)(1)(B) of the CAPTA states a child protective and not criminal focus. For

¹² See Pub L. No. 93-247, 88 Stat. 4 (1974) (current version at 42 U.S.C. §§ 5101-5107) (2014).

¹³ *Id.*

example, CAPTA is administered by the U.S. Department of Health & Human Services (HHS), the department responds LE OH IRU FK LOG UHQ · V KHDOWK DQ welfare initiatives, rather than the Department of Justice, as would be the case for a criminal justice program. Under CAPTA as amended, HHS tracks rich, case-level data on all children nation-wide who received a child protective service (CPS) response as a result of alleged child abuse or neglect, but does not track any criminal statistics whatsoever.

The structure of mandatory reporting laws also reinforces the conclusion that they do not deputize those required to report suspected abuse and neglect as law enforcement agents. Mandatory reporting statutes are generally codified in sections of the code related to child welfare or the adjudication of civil child custody cases, not in sections devoted to law enforcement or criminal procedure.¹⁴ Moreover, as a typical reporting statute

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 EHOLHSHUHQ reported, it makes no mention of any obligation to investigate or verify any information about the suspected abuse. Ohio Rev. Code Ann. § 2151.421(A)(1)(a), (C). In keeping with

¹⁴ See e.g., N.Y. SOC. SERV. LAW § 413.1(a) (McKinney 2014); 325 ILL. COMP. STAT. ANN. 5/4 (2014); MICH. COMP. LAWS ANN. § 722.623 (West 2014); OHIO REV. CODE ANN. § 2151.421 (2014); TEX. FAM. CODE ANN. § 261.101 (West 2014); FLA. STAT. ANN. § 39.201 (West 2014).

these requirements, the state of Ohio instructs school personnel:

Early reporting to the children services agency is encouraged to prevent injury or harm to a child. . . . It is not [school

HP SOR\HHV·@ UHVSRQVLELOLW\ WR GHWHUPL

The vast majority of reports of suspected

economic damages to both the child victim and to society, once maltreatment occurs:

Child abuse and neglect have known detrimental effects on the physical, psychological, cognitive, and behavioral development of children. These

FRQVHTXHQH V « LQFOXGH SK\VLFD O injuries, brain damage, chronic low self - esteem, problems with bonding and

The history and structure of mandatory reporting laws, along with the actual handling of child abuse reports in practice, demonstrate that these laws are designed to protect children, and that any nexus to the criminal justice system is unusual.

7 K D W E H L Q J V R W K H 2 K L R 6 X S U H P H & R X U W · V F R
that a responsibility to report suspected child abuse and neglect transforms millions of teachers, school administrators, and others from all walks of life into law enforcement agents cannot be sustained.

C. The Unique Setting in Which Teachers or Other School Personnel Inquire About a
& K L O G · V , Q M X U L H V 6 W U R Q J O \ 0 L O L W D W H
Against Finding that Such Inquiries are Made for a Prosecutorial Purpose

Even if school personnel were treated as agents of law enforcement (or if the Court were to broaden the audience to whom testimonial statements can be made), within the unique context of school settings it is clear that in virtually all V L W X D W L R Q V W K H L U L Q T X L U L H V L Q W R D F K L O G · non-testimonial because those inquiries are made for the primary purpose of protecting children and not primarily to advance a future prosecution that, ultimately, is unlikely to occur.

Teachers and other education professionals pay close attention to the children entrusted into their care, always monitoring their ever changing

Stable Families Amendments of 2001, Pub. L. No. 107 2133, 115 Stat. 2413 (2002); Child and Family Services Improvement Act of 2006, Pub. L. No. 109 288, 120 Stat. 1233 (2006); 42 U.S.C. §§ 629-629b (2014).

moods, dispositions, behaviors and actions so as to tailor their instruction and guidance to their students accordingly. As this Court has recognized,

VFKRRO DXWKRULWLHV KDYH DQ 'REYLRXV FRQF protecting the children entrusted to their care.

Bethel Sch. Dist. No. 403 v. Fraser , 478 U.S. 675, 684 (1986); see also Morse v. Frederick, 551 U.S. 393, 408

(2007). 7HDFKHUV· DQG RWKHU VFKRRO RIILFLDOV· I interactions with students lead to familiarity that allows them to detect subtle changes in a ch LOG·V mood, behavior, or appearance. Such changes put

educators on alert that a situation may exist that demands their attention. This is especially true

ZKHUH WKH FKDQJH LV GUDPDWLF RU QHJDWLYH DQG RWKHU HGXFDWRUV· QDWXUDO UHDFWLRQ

situations arise is to talk with the student about what led to the change.

In a school setting, numerous factors or causes having nothing to do with abuse might prompt these kinds of inquiries. For example, a drastic mood or behavior change from a student may indicate something as minor as a tiff between friends or as serious as suicidal depression. Similarly, a change of appearance or injury can signify a variety of problems, which demand a variety of situation - and context-dependent solutions. For instance , a teacher or education support professional may notice that a student appears to have a series of scratches on his arm. While the marks could be the result of abuse, they might also be the result of bullying, nonsuicidal self-injury, rough -housing with a sibling or friend, or

VLPSO\ SOD\LQJ LQ VRPH ZRRGV QH DU WKH VW home. Similarly, a student who for weeks has arrived at school looking gaunt and tired could be

suffering from severe neglect at home, but she might just as easily be suffering from drug addiction, an eating disorder, depression, or another medical condition, or from disruption in the wake of her

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mood, or behavior may relate to an altercation between students or an incidence of bullying. In recent years, in response to the Columbine shootings and other tragic events, teachers, school officials, and policy makers have paid increasing attention to the issue of peer bullying within schools. See, e.g.,

Susan M. Swearer et al., *Bullying Prevention and Intervention: Realistic Strategies for Schools* at 53 (2009). Virtually all school employees agree that

they have a responsibility to intervene when they

see bullying occur. See, e.g., National Education

Association, *Bully Free: It Starts with Me* + RZ WR

, G H Q W L I \ % available at <http://www.nea.org/home/53359.htm>. In Ohio and many other states,

teachers generally are required to report bullying

incidents to school officials. See, e.g., Ohio Rev. Code

Ann. § 3313.666(B)(4) (2014). Indeed, in this very

case, the Ohio Supreme Court acknowledged that

WKH SUHVFKRRO WHDFKHU · V LQLWLDO LQTXLUL

determine whether the child was harmed by another

child, asking L.P. whether the person who hurt him

ZDV 'ELJ RU OLWWOH"μ

services, cultural competence, anti-bullying, and school safety.²¹ This training is intended to assist teachers in creating an environment that is safe for students, orderly, and conducive to learning. By contrast, teachers and other school personnel receive little or no training on the penal code, the elements of crimes, how to conduct a lawful search, how to preserve evidence, what sort of evidence or testimony is admissible at trial, or the roles and responsibilities of law enforcement generally. Indeed, members of this Court have recognized that

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law enforcement responsibility or indeed any
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T.L.O., 469 U.S. at 350 n.1 (J. Powell joined by J.
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WUDLQLQJ WKH QRWLRQ WKDW D WHDFKHU·V SUL
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flexible and supportive relationships teachers have with their students is essential to accomplishing those goals and ensures that teachers can continue to focus on protecting and nurturing each child. Respecting those relationships is important to continue to allow teachers to reach children where they are, even when doing so requires that teachers take on roles above and beyond their duties as instructors to serve as counselors, friends, mentors, and surrogate parents to their students.

D. Treating School Personnel as Law Enforcement for Purposes of the Confrontation Clause is Likely to Have Unintended and Adverse Consequences

To hold that teachers and other school personnel operate as law enforcement when carrying out their mandatory reporter duties could also have far-reaching consequences that would undermine the welfare of students and the educational process.

1. Most importantly, such a holding will likely make it more difficult for teachers and other school personnel to carry out their duties as mandatory reporters. This would be an especially baleful result because educators are among the most likely people to detect and report abuse: for the past five years, more than sixteen percent of reports were by education professionals.²²

²² See U.S. DEPT OF HEALTH & HUM. SERVS., CHILD MALTREATMENT : 2012 at 22. See also Maureen C. Kenney, & KLOG \$EXVH 5HSRUWLQJ 7HDFKH, U25. 3HUFHLYHG 'HWHU CHILD ABUSE & NEGLECT ' % \ YLUWXH RI WKHLU work, [educators] have ongoing contact with children, thus

School personnel may be uncomfortable serving as law enforcement or justifiably concerned that their actions would compromise potential criminal investigations. This could be exacerbated by the fact that many teachers already feel that they do not receive adequate training on how to carry out their duties as mandatory reporters.²³ If this Court were to impose additional law enforcement duties on those who serve as mandatory reporters, it would be impractical to provide teachers, other school personnel, and millions of other mandatory reporters the training they would need in order to carry out their duties responsibly. As it is, effective training for mandatory reporters must cover complex topics such as recognizing and identifying various forms of abuse (including sexual abuse, physical abuse, emotional abuse, and neglect), distinguishing abuse from other injuries, as well as the proper reporting procedures for suspected abuse.²⁴ Adding further a supposed agent of law enforcement would only distract school personnel³ who, it must be remembered, must also focus on their key objective of educating children on their responsibility to protect children from abuse.

placing them in a unique position to detect signs of child
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²³ See Krisann M. Alvarez et al., Why are Professionals Failing to Initiate Mandated Reports of Child Maltreatment, and Are There Any Empirically Based Training Programs to Assist Professionals in the Reporting Process?, 9 AGGRESSION & VIOLENT BEHAVIOR 563, 564-65 (2004).

²⁴ See id. at 570-72; Child Abuse and Neglect: A Reference for Educators, supra note 15, at 17-33.

2. Treating teachers as law enforcement

school disciplinary or behavioral issues requires the delivery of Miranda warnings.

The same is true of the Fourth Amendment warrant requirement as it applies to the school setting. This Court has clearly established that educators do not act as law enforcement agents in the Fourth Amendment search and seizure context. *T.L.O.*, 469 U.S. at 334. To make them law enforcement agents for purposes of the Confrontation Clause would create confusing and inconsistent constitutional standards. In *Greene v. Camreta*, 131 S. Ct. 2020 (2011), this Court vacated *WKH 1 L Q W K & L U F X L W · V K R O G L Q J W K D W D & 3 6 F D V* in-school interview of a student concerning suspected abuse constituted a warrantless and *X Q U H D V R Q D E O H ´ V H L J X U H µ L Q Y L R O D W L R Q R I W* Amendment. But, if this Court were to determine that teachers and other school personnel operate as law enforcement whenever they inquire into possible child abuse, it would be increasingly likely that the very holding vacated in *Greene* would become the law of the land. Such a result would place teachers ³ *Z K R K D Y H ´ Q H L W K H U W K H W o d a y Q L Q J Q R U W K H G* *H [S H U L H Q F H L Q W K H F R o f F o u r t h L W L H V µ R I W K* *\$ P H Q G P H Q W D Q G D U H e q u i p p e d t o m a k e U H ´ L O O* *D T X L F N M X G J P H Q W µ D E R T X L V . L 4 6 9 V D S S O L F D W L R Q* U.S. at 353 (Blackmun, J., concurring) ³ in the impossible position of having to choose between securing the safety of their students and complying with warrant requirements they lack the training and experience to understand.

The position advocated by the Respondent threatens to further constitutionalize many of the day-to-

Court should resist the invitation to find that the statements at issue here were non-testimonial for at least three additional reasons. *Moore v. United States*, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part).

E. The Statements at Issue are Non-testimonial even if Statements to Teachers Could be Testimonial in Other Circumstances

As a final matter, even assuming that statements made to teachers or school personnel could be testimonial in some circumstances ²⁶ this case can be resolved on narrow grounds because the statements at issue here were non-testimonial for at least three additional reasons.

1. First, this Court has stated that when the government seeks to introduce a statement made to a teacher or school personnel as evidence of a crime, it must first establish that the statement was made for the purpose of investigating or prosecuting a crime. *Id.*

²⁶ Perhaps one could imagine a scenario in which a teacher or school administrator works so closely with law enforcement so as to be considered an agent of law enforcement with the primary purpose of creating an out-of-court substitute for criminal trial testimony. This might be so, for example, if a teacher questioned a student at the behest of police officers, using questions prepared in advance by officers, with responses relayed back to the officers at a later time. Cf. *T.L.O.*, 469 U.S. 289, 301 (1984) (finding that a school administrator who questioned a student at the behest of police officers was acting as an agent of law enforcement for purposes of the Fourth Amendment). But, this Court need not address that scenario ³ or the broader question of whether a statement made to a teacher or school personnel is testimonial for purposes of the Fourth Amendment. *Id.* (finding that a statement made to a teacher or school personnel is testimonial for purposes of the Fourth Amendment only if it is made for the purpose of investigating or prosecuting a crime). ³ because that issue is not presented here.

to create a record for trial and thus is not within the

Bryant, 131 S.Ct. at 1155. To
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LQTXLU\µ WKDW PD\ GHSHQG LQ SDUW RQ WKH
crime in question. *Id.* at 1156, 1158-59. Because
child maltreatment is often a crime of secrecy,
Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987), and
can involve a pattern of abuse, the threat posed to a
child by an abusive caretaker may create an ongoing
emergency, until some form of intervention is taken.
As the Court has recently acknowledged, children
´KDYH OLPLWHG FRQWURO RYHU WKHLU RZQ HQ
and lack the ability to extricate themselves from
horrific, crime - SURGXFLQJ VHWLQJµ
Alabama, 132 S. Ct. 2455, 2464 (2012) (quotations
and alterations omitted). This fact is especially true
of young children.

Here, the statements at issue were made by a
three-year-old child, L.P., whose bloodshot or

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on his IDFH ´UHGQHV V DURXQG KLV QHFN µ DQG
PDUNV RQ KLV ERG\ OHIW KLV SUHVFKRRO WHD
V KRFOHµ, 999 N.E.2d at 602 (internal quotation
marks omitted). Moreover, L.P. appeared bewildered
and would not eat. *Id.* Although the social worker
who responded to the school was unable to stop
Clark from leaving with L.P., the social worker who
located L.P. the next day called 911 after seeing his
DQG KLV VLVWHU·V LQMXULHV DQG WKH\ ZHUH V
to the hospital. *Id.* at 602-03.

Each indicator of an ongoing emergency that
this Court highlighted in *Davis* and *Bryant* was
present in this case ³ L.P. faced an ´LPPLQH QW

Id. at 52. Furthermore, members of this Court have indicated that the formality needed to make a statement testimonial may derive from hallmarks of formality such as a signature or certification of veracity, see *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2721 (2011) (J. Sotomayor, concurring in part), the use of formalized testimonial materials such as a deposition or affidavit, see *Bryant*, 131 S. Ct. at 1167 (J. Thomas, concurring), or the taking of a statement while in police custody or other formalized setting, see *Davis*, 547 U.S. at 840 (J. Thomas, concurring).

Here, L.P. was merely pulled aside, as students often are, and asked a few questions. See *Ohio v. Clark*, No. 96207, 2011 WL 6780456, at * 6 (Ohio Ct. App. 2011), *U H, Y 999* N.E.2d 592 (Ohio 2013). A short aside with one of the most trusted and

131 S. Ct. at 1159. 6SHFLILFDOO\ WKH 'FRQGLWLRQ RI W
 victim is important to the primary purpose inquiry
 to the extent that it sheds light on the ability of the
 victim to have an y purpose at all in responding to
 police questions and on the likelihood that any
 purpose formed would necessarily be a testimonial
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 conclusion that his statements were not testimonial.
 That is especial ly true where, as in this case, the
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