No. 13-1352

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

AMICUS CURIAE BRIEF OF CHILD JUSTICE, INC. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*.[1]

Child Justice is a national organization that advocates for the safety, dignity, and self-hood of abused, neglected, and at-risk children. The mission of Child Justice is to protect and to serve children in cases where child sexual abuse, physical abuse, or domestic violence is present. It works with local, state, and national advocates, legal and mental health professionals, and child welfare experts to defend the interests of affected children. It provides public policy recommendations, community service referrals, court watching services, research, and education. Child Justice also serves important public interests by securing pro bono representation for protective parents in financial distress and by seeking appropriate judicial solutions to the threats facing abused, neglected, and at-risk children.

Child Justice is concerned about the negative effect that the Ohio Supreme Court's ruling will have on the safety and welfare of the abused and threatened children on whose behalf Child Justice advocates every day. The Ohio Supreme Court's

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amicus curiae* represents that it authored the brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the *amicus curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice under Rule 37.2(a) of intent to file this brief was provided to the Petitioner and the Respondent. Both have provided to the Court blanket consent to the filing of *amicus curiae* briefs in this matter.

ruling compounds the practical and legal challenges of proving child abuse beyond a reasonable doubt without the admission at trial of a child's statement to a required reporter. Child Justice has a strong interest in this Court upholding the intent of the Ohio Legislature that information learned through the required reporting process be available to prosecutors at trial to further the goal of providing complete protection to children by punishing those who abuse and endanger them.

SUMMARY OF ARGUMENT

Ohio has a compelling state interest in protecting children from abuse. It is part of Ohio's fundamental responsibility to ensure the safety and welfare of children who cannot protect themselves. OHIO REV. CODE § 2151.421 ("Ohio's Required Reporter Statute") was enacted as part of Ohio's child welfare legislative scheme and is a cornerstone on which Ohio's policy of protecting children depends. There can be no doubt that criminal prosecution, while not the primary purpose of Ohio's Required Reporter Statute, is a necessary and contemplated adjunct to further Ohio's policy to protect children. The enactment and later amendments to Ohio's Required Reporter Statute reflect a consistent intent on the part of Ohio's Legislature to expand the scope of professionals qualifying as required reporters, the information that is reported, and the use of that information in both civil and criminal proceedings. Many other states with required reporter statutes similar to

Ohio have also made clear that punishing offenders is part of the legislative goal of protecting children.

If affirmed, the Ohio Supreme Court's ruling will impede that goal because of the many cases that will not be prosecuted or will not result in a conviction without the admission at trial of a child victim's statements to a required reporter. These cases are all too common, and involve the most vulnerable children with the least access to the justice system. Allowing admission at trial of a child's statement to a required reporter is consistent with the legislative intent of Ohio's Required Reporter Statute, and similar statutes in other states, and serves to ensure that no offender slips through the cracks.

ARGUMENT

I. THE LEGISLATIVE INTENT OF OHIO'S REQUIRED REPORTER STATUTE AND SIMILAR STATUTES IN OTHER STATES IS TO PROTECT CHILDREN, INCLUDING THROUGH CRIMINAL PROSECUTION OF CHILD ABUSERS.

The primary purpose of any required reporter statute is to protect victims and potential victims of child abuse who cannot protect themselves because of their age, the circumstances of the abuse, or legal obstacles that limit their access to, and participation in, the justice system. *See* Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*. 11 GEO.

J. LEGAL ETHICS 509, 525 n.82 (1999) (explaining that the purpose of required reporter statutes is "to protect a child who is unable to protect himself"). These laws, typically enacted as part of larger child welfare regimes, enable States to carry out their fundamental responsibility to protect the best interests of children by mandating that certain professionals in the best position to identify child abuse report their reasonable suspicions, and by providing those professionals with a formal reporting structure to ensure the safety and welfare of the children in their care. The mandatory reporting duty serves a vital function within the larger child welfare system because children so often are unable physically and emotionally to notify authorities on their own and to articulate affirmatively and coherently the abuse that has been inflicted upon them. As one scholar has noted:

> Oftentimes, there is no physical evidence of the abuse. Children will frequently recant their allegations, since the vast majority of these crimes are committed by a parent, other relative, or by a friend of the family. The child is often the only witness to the crime because these crimes take place in secret. Furthermore, the young child witness may be incapable of understanding the nature of the crime, the significance of his or her testimony, or be too frightened or anxious to

> testify. The problem is compounded when courts find young children incompetent to testify on the grounds that they are unable to distinguish the truth from lies or because they are unable to communicate in a traditional courtroom setting.

Deborah Paruch, *Silencing the Victims in Child Sexual Abuse Prosecutions: the Confrontation Clause and Children's Hearsay Statements Before and After Michigan v. Bryant*, 28 TOURO L. REV. 85, 85-86 (2012). Simply put, "[i]f the child easily could report the abuse, there would be no reason for the reporting statutes." Marrus, 11 GEO. J. LEGAL ETHICS at 525 n.82.

The fundamental legislative purpose behind Ohio's Required Reporter Statute, and similar statutes throughout the country, is to give children a vehicle to voice their abuse and to trigger the process by which social services and law enforcement remove the imminent threat of additional harm, and where appropriate, prosecute the alleged perpetrators of the abuse. To that end, many states have made clear that the goal of protecting children through required reporting statutes includes punishing offenders. Therefore, Ohio and other states allow for the use of statements by children made to required reporters and communicated to social services and/or law enforcement authorities in criminal prosecutions.

As the dissent below so rightly grasped, prosecution of child abusers, while not the overarching goal of the statute, is "a necessary and appropriate adjunct in providing such protection.'" *State v. Clark*, 137 Ohio St. 3d, 2013-Ohio-4731, 999 N.E.2d 592, ¶ 78 (O'Connor, C.J., dissenting) (quoting *Yates v. Mansfield Bd. of Educ.*, Ohio 102 St. 3d 205, 2004-Ohio-2491, 808 N.E.2d 861, ¶ 25). Affirming the Ohio Supreme Court's ruling would severely undermine the ability of Ohio, and many other states, to enforce the policy of protecting victims and potential victims of child abuse, which cannot be accomplished without the ability to see the process through to prosecution and conviction.

A. Ohio's Required Reporter Statute and Its Amendments Reflect a Consistent Legislative Intent to Make Information Learned by Required Reporters Available in Criminal Proceedings.

First adopted in 1963, Ohio's Required Reporter Statute is part of Ohio's Juvenile Code, which, as one of its purposes, aims "[t]o provide for the care, protection, and mental and physical development of children . . . whenever possible, in a family environment . . . ." OHIO REV. CODE ANN. § 2151.421(A). The required reporter section of the Juvenile Code was originally limited to establishing an affirmative duty by physicians, including hospital interns and resident physicians, to promptly report any evidence gathered from an examination of a child less than 18 of "injury or physical neglect not

explained by the available medical history." OHIO REV. CODE ANN. § 2151.421 (LexisNexis 1963). The statute further required the physician to submit such reports to a municipal or county police officer in both oral and written form. *Id.* The type of information to be submitted was broadly inclusive; it encompassed all "information that the physician believes might be helpful in establishing the cause of the injury or physical neglect." OHIO REV. CODE ANN. § 2151.421(C) (1963).

From the very inception of Ohio's Required Reporter Statute, the Ohio Legislature made clear that it did not want to hinder the collection or use of evidentiary support for a related prosecution of a child abuser. The first version of the statute contemplated the use of such evidence in *both* civil and criminal proceedings, and more to the point, expressly exempted any evidence obtained from a physician from the physician-patient privilege: "[T]he physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries or physical neglect, or the cause thereof in *any* judicial proceeding resulting from a report submitted to this section." *Id.* (emphasis added).

Since its adoption in 1963, and in recognition of the many avenues through which professionals interact with children on a daily basis, Ohio's Required Reporter Statute has been continuously expanded to encompass new categories of reporters. The first amendments to the statute, passed in 1965, included nurses, schoolteachers, and social workers

as required reporters, and mandated that they report to municipal or county peace officers when they had "reason to believe that a child less than eighteen years of age has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of such child." OHIO REV. CODE ANN. § 2151.421 (1965). In 1985, the statute was again broadened to include all school employees. OHIO REV. CODE ANN. § 2151.421 (1985).

The current version of the statute sets forth 35 categories of professionals and other workers who qualify as required reporters, and requires that they not only report reasonable suspicion of past abuses, but also the threat of future abuse to children under 18. *See* OHIO REV. CODE ANN. § 2151.421(A)(1)(a) (LexisNexis 2014) (describing duty to report reasonable suspicion that a child "has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child"). This expanded class of required reporters encompasses a broad range of professionals, including attorneys, physicians and medical professionals, psychologists and therapists, coroners, day care providers, camp counselors, teachers, social workers, and educational administrators. OHIO REV. CODE ANN. § 2151.421(A)(1)(b) (LexisNexis 2014).

In effect, by including within its ambit virtually every person who comes into contact with a child in a professional capacity, Ohio's Required Reporter Statute today exemplifies the Ohio

Legislature's intent to provide every opportunity for victims or potential victims of child abuse to have a voice in any situation in which they are placed outside the home. *See also Clark*, 137 Ohio St. 3d 346, 2013-Ohio-4731, 999 N.E.2d 592, at ¶ 76 (O'Connor, C.J., dissenting) ("Child abuse is not confined to the home. Tragically, children are also sometimes abused and neglected by the institutions meant to care for them."). The goal is a comprehensive detection system so that no child "falls through the cracks."

In addition to the expanded class of reporters, the statute ensures that as much information regarding the abuse is made available to the proper authorities, both civil and criminal. Under the current version of the statute, required reporters maintain a duty to report to the public children services agency or municipal or county peace officer in the county in which the child resides or in which the abuse has taken place. OHIO REV. CODE ANN. § 2151.421(A). The nature of the report and the breadth of the information it must contain, remains largely unchanged since 1963, and reflects the consistent policy throughout the history of amendments to Ohio's Required Reporter Statute that information learned by required reporters pursuant to the mandatory reporting duty be available in criminal prosecutions. The reporter must make both an oral and written report "forthwith," the latter to include (1) information identifying the child and his/her parent; (2) the

extent of the child's injuries; and (3) "[a]ny other information that might be helpful in establishing the cause of the injury, abuse or neglect that is known or reasonably suspected believed" or any threat thereof. OHIO REV. CODE ANN. § 2151.421(C)(1-3) (LexisNexis 2014). Information about the "cause of the injury" is broad and would include information necessary to identify the abuser and to distinguish between accidental and intentional injury.

In part to vindicate the statute's core purpose to protect children, the Ohio Legislature has also expanded the use of information obtained through the reporting process in criminal proceedings. As already noted, the original version of the statute codified an exemption to the physician-patient privilege for any information obtained by a required reporter. In 1987, pursuant to Substitute Senate Resolution No. 12 and recommendations from a Domestic Relations Task Force, the statute was expanded beyond this initial physician privilege exemption by explicitly permitting use of the report in all criminal proceedings. Accordingly, the statute affirms that "[i]n a criminal proceeding, the report is admissible in evidence in accordance with the Rules of Evidence and is subject to discovery in accordance with the Rules of Criminal Procedure." OHIO REV. CODE ANN. § 2151.421(H)(1) (LexisNexis 2014). Notably, unlike its broad criminal provision, the statute carves out specific exemptions for certain uses in particular civil proceedings. *See id.*

The Ohio Legislature's intention to broadly allow admission of such evidence in criminal proceedings as a means to prosecute offenders, and thus to protect children, is further confirmed by Ohio Rule of Evidence 807, which defines as non-hearsay out-of-court statements made by a child less than 12 years old describing sexual or physical abuse. In short, while not the core purpose of Ohio's legislative scheme, there can be no doubt that criminal prosecution was a necessary and contemplated "adjunct" of Ohio's goal to protect children.

To be sure, criminal prosecution is not the primary purpose of the statute; nor does the statute contemplate that required reporters are acting as prosecutorial arms in carrying out their statutorily mandated duties. *See Yates*, 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E.2d 861, at ¶ 12 ("[T]he primary purpose of reporting is to facilitate the protection of abused and neglected children rather than to punish those who maltreat them."); *Clark*, 137 Ohio St. 3d 346, 2013-Ohio-4731, 999 N.E.2d 592, at ¶ 76 (O'Connor, C.J., dissenting) (explaining that "the duty to report child abuse does not change the primary purpose of the designated professionals' interaction with children" nor does it "deputize mandatory reporters as agents of law enforcement"). Nevertheless, the importance of Ohio's Required Reporter Statute to Ohio's criminal prosecution regime cannot be denied. As the dissent in the decision below remarked, "[t]he General Assembly 'considered identification and/or prosecution of the

perpetrator to be a necessary and appropriate *adjunct* in providing such protection.'" *Clark*, 137 Ohio St. 3d 346, 2013-Ohio-4731, 999 N.E.2d 592, at ¶ 78 (O'Connor, C.J., dissenting) (emphasis added) (quoting *Yates*, 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E.2d 861, at ¶ 25).

Affirming the Ohio Supreme Court's flawed ruling would compromise the efforts of the Ohio legislature to prevent child abuse from occurring and would discourage future abuse by prosecuting offenders. As the dissent below rightly noted, such a result would impede those legislative goals and threaten the safety of children. *Clark*, 137 Ohio St. 3d 346, 2013-Ohio-4731, 999 N.E.2d 592, at ¶¶ 35-39 (O'Connor, C.J., dissenting).

B. The Required Reporter Statutes of Other States Reflect the Same Goals and Purposes as Those of the Ohio Statute.

Should this Court affirm the ruling of the Ohio Supreme Court, the decision also would have dramatic and harmful effects well beyond Ohio's borders. As Petitioner has previously noted, required reporter statutes are "ubiquitous," and all 50 states and the District of Columbia have statutes that impose mandatory reporting obligations similar to those of the Ohio statute. Pet. at 23. A comprehensive survey of every state's required reporter statute is beyond the scope of this brief. However, examination of representative examples from a diverse group of states (Arkansas, Colorado,

Montana, New York, and Maryland) demonstrates that required reporter statutes consistently contemplate child protection as their primary purpose.

As part of this objective, the admissibility in criminal proceedings of the type of testimony at issue here is often expressly included in the statutory regime. As is the case with the Ohio statute, the existence of this goal in the statutory regime does not render the "primary purpose" of such statutes prosecutorial in nature. Accordingly, courts applying those statutes have made clear that, simply because a person is required to report evidence or statements regarding potential child abuse, does not render such evidence inadmissible in a criminal proceeding. Nevertheless, based on the text of various required reporter statutes, the state's emphasis on the protection of children through prosecutions of child abuse, both civil and criminal, is undeniable.

1. Arkansas

The Arkansas required reporter statute, ARK. CODE ANN. § 12-18-402, is part of the Arkansas Child Maltreatment Act, ARK. CODE ANN. § 12-18-101, *et seq*., the purpose of which is "to help ensure the health, safety, and welfare of children by modernizing and updating the law related to child abuse and neglect." Further underscoring the Arkansas required reporter statute's overall purpose to protect children, the Act's preface emphasizes that

its goals are to "[e]nsure the immediate screening, safety assessment, and prompt investigation of reports of known or suspected child maltreatment" and "[e]nsure that immediate steps are taken to . . . [p]rotect a maltreated child and any other child under the same care who may also be in danger of maltreatment . . . ." ARK. CODE ANN. § 12-18-102(2-3) (2014).

The Child Maltreatment Act is a comprehensive scheme; the required reporter section of the statute mandates that 39 classes of reporters provide immediate notification to the state Child Abuse Hotline if they suspect that a child has been subjected to or has died as a result of maltreatment. One of the Arkansas regime's overarching purposes is to "[e]ncourage the cooperation of state law enforcement officials, courts, and state agencies in the investigation, assessment, *prosecution*, and treatment of child maltreatment." ARK. CODE ANN. § 12-18-102(6) (2014) (emphasis added). To this end, the Arkansas statute authorizes the Arkansas Department of Human Services, the Department of Arkansas State Police, and other state agencies to conduct investigations, and mandates production to the Department of Human Services of an investigatory report or "any information gathered during the course of the investigation, including statements from witnesses and transcripts of interviews." ARK. CODE ANN. § 12-18-701(c) (2014).

The statute further makes clear that "[t]he report, exclusive of information identifying the

person making the notification, shall be admissible in evidence in any proceeding related to child maltreatment." ARK. CODE ANN. § 12-18-701(f) (2014). Although no Arkansas case has directly addressed the issue of admissibility of required reporter statements in a criminal proceeding, the Supreme Court of Arkansas has held that hearsay statements of abused children, as testified to by a social worker (who qualifies as a "required reporter" under Arkansas law), may be non-testimonial in nature and admissible, so long as the primary purpose was not to aid law enforcement or gather evidence for a future prosecution. *Seely v. State*, 373 Ark. 141, 282 S.W.3d 778, 788 (2008).

2. Colorado

Colorado has similar statutory purposes, and thus similar admissibility standards for statements made to required reporters. The Colorado required reporter statute, COLO. REV. STAT. § 19-3-304, is part of the Colorado Child Protection Act of 1987, COLO. REV. STAT. § 19-3-301, *et seq*. The legislative purpose section of the broader statute notes that "the complete reporting of child abuse is a matter of public concern and that, in enacting this [law], it is the intent of the general assembly to protect the best interests of children of this state and to offer protective services in order to prevent any further harm to a child suffering from abuse," thus demonstrating the importance of child protection to the goals of the Colorado required reporter statute. Colo. Rev. Stat. § 19-3-302 (2014).

The Colorado required reporter provision mandates that any member of one of 27 defined categories of persons who (1) knows or suspects that a child has been subjected to abuse or neglect, or (2) has observed the child being subjected to circumstances or conditions that would reasonably result in abuse or neglect, shall immediately report such information. COLO. REV. STAT. § 19-3-304(1)(a) (2014). That statute reflects the legislature's clear intention that required reporter statements be admissible in legal proceedings by expressly stating that such statements will not be excluded from evidence based upon standard privileges. *See* COLO. REV. STAT. § 19-3-311 (2014) (stating that privilege between patient and physician, patient and registered professional nurse, certified or licensed school psychologist and client, and husband and wife "shall not be a ground for excluding evidence in *any* judicial proceeding resulting from a report pursuant to this part") (emphasis added).

More importantly, subject to exceptions that do not apply in the present context, Colorado law makes clear that written reports of known or suspected child abuse or neglect "shall be admissible as evidence in any proceeding relating to child abuse . . ." COLO. REV. STAT. § 19-3-307(4) (2014). Indeed, Colorado courts have upheld a broad interpretation of § 19-3-307(4) (in direct contrast to the views of the Ohio Supreme Court regarding Ohio's statute), by holding that hearsay statements made to mandatory reporters of child abuse are not necessarily

testimonial for purposes of confrontation clause analysis. *See People v. Phillips*, 315 P.3d 136, 165-66, 2012 COA 176 ¶¶ 135-44 (Colo. App. 2012) (holding that child's statements to public school employees "were not rendered testimonial merely because of their statutory duty to report" because employees were not law enforcement officials and had not been asked to question the child or obtain statements from the child), *cert denied*, *Phillips v. Colorado*, 134 S. Ct. 1325 (2014).

3. New York

The relevant required reporter statute in New York, N.Y. SOC. SERV. LAW § 413, is part of Title 6 of Article 6 of New York's Social Services Law. Title 6 states that, given the "urgent need for effective child protective service to prevent [abused and maltreated children] from suffering further injury and impairment," the purpose of the law is to "encourage more complete reporting of suspected child abuse and maltreatment." To vindicate the larger purpose of child protection, § 413 requires a broad class of professionals to make a report when they have reasonable cause to suspect that (1) a child coming before them in their professional or official capacity is an abused or maltreated child, or (2) the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity and states from personal knowledge facts, conditions or circumstances which, if correct, would render the child an abused or maltreated child. N.Y. SOC. SERV.

LAW § 413 (Consol. 2014).

The statute further provides that any report must be made immediately by telephone, with a written report to follow within 48 hours. N.Y. SOC. SERV. LAW § 415 (Consol. 2013). Section 415 further clarifies that "[w]ritten reports from persons or officials required by this title to report shall be admissible in evidence in any proceedings relating to child abuse or maltreatment." N.Y. SOC. SERV. LAW § 415 (Consol. 2013). This principle has been upheld in New York state courts and remains good law. *Cf. People v. Gwaltney*, 140 Misc. 2d 74, 76-77, 530 N.Y.S.2d 437, 439 (N.Y. Sup. Ct. 1988) (holding that caseworker's testimony was admissible under N.Y. SOC. SERV. LAW § 415, which states that written reports from officials or persons required by law to report suspected child abuse are admissible in evidence in any proceeding relating to child abuse or maltreatment). The New York required reporter statute expressly contemplates that the contents of the report may be used in criminal prosecution. *See* N.Y. SOC. SERV. LAW § 422(4)(A) (Consol. 2014) (providing that "[r]eports made pursuant to this title as well as any other information obtained, reports written or photographs taken concerning such reports" may be made available to the district attorney's office or the police "when such official requests such information stating that such information is necessary to conduct a criminal investigation or criminal prosecution of a person").

4. Montana

The Montana required reporter statute, MONT. CODE ANN. § 41-3-201, is found within Title 41, Chapter 3 of the Montana Code addressing minors. The statute specifically states the legislature's intention that "the mandatory reporting of abuse or endangerment cases by professional people and other community members to the appropriate authority will cause the protective services of the state to seek to prevent further abuses, protect and enhance the welfare of these children, and preserve family life whenever appropriate." MONT. CODE ANN. § 41-3-101(2) (2013). The text of the Montana required reporter statute requires a particular class of professionals or government employees who know or have reasonable cause to suspect that a child is abused or neglected to make a prompt report to the Montana Department of Health and Human Services. Mont. Code Ann. § 41-3-201. Such reports must include "the facts that led the person reporting to believe that the child has suffered injury or injuries or willful neglect . . . ." MONT. CODE ANN. § 41-3-201(7(d) (2013).

The Montana statute, while mainly a social services regime, specifically contemplates criminal prosecution of those who commit child abuse. *See* MONT. CODE ANN. § 41-3-106(1) (2013) ("If the evidence indicates violation of the criminal code, it is the responsibility of the county attorney to file appropriate charges against the alleged offender.").

Although there is no specific provision within the statute authorizing admission of reports in criminal proceedings, the Supreme Court of Montana has flatly rejected the argument that required reporter status automatically implicates, and thus prohibits, a required reporter from testifying as to statements made by a child regarding past or ongoing abuse. *See State v. Spencer*, 2007 MT 245, ¶ 19, 339 Mont. 227, 169 P.3d 384 (holding that "[t]here is no indication, however, that the Legislature intended to deputize this litany of professionals and individuals into law enforcement, and we refuse to attach that significance to the duty to report").

5. Maryland

The Maryland required reporter statute, MD. CODE ANN., FAM. LAW § 5-704, instructs health practitioners, police officers, educators, and human service workers who have "reason to believe that a child has been subjected to abuse or neglect" to notify either the local department or the appropriate law enforcement agency, or the head of their respective institutions. MD. CODE ANN., FAM. LAW § 5-704(a)(1-2) (LexisNexis 2014). Such notification includes the provision of both an oral and a written report; among the required contents is "any other information that would help to determine . . . the identity of any individual responsible for the abuse or neglect." MD. CODE ANN., FAM. LAW § 5-704(c)(5) (LexisNexis 2014). The statute contemplates that the contents of the report may be used in a criminal proceeding, as it requires the reporter to provide a

copy of the report to the local State's Attorney. MD. CODE ANN., FAM. LAW § 5-704b(1)(ii)(2) (LexisNexis 2014).

Furthermore, under the Maryland Rules of Criminal Procedure, out-of-court statements made by children under 13 years old are admissible to prove the truth of the matter of child abuse, rape, or sexual assault. MD. CODE ANN., CRIM. PROC. § 11-304(b) (LexisNexis 2014). Importantly, the Maryland Court of Appeals has confirmed that statements made by children to a social worker, who qualifies as a required reporter under Maryland law, are admissible against a defendant in a criminal proceeding, even in circumstances when the police first notified the social worker as to the abuse. *Lawson v. State*, 389 Md. 570, 584-85, 886 A.2d 876, 884-85 (2005).

In short, although the fundamental purpose of these statutes is to protect children, there is no question that one of the many tools made available to the appropriate authorities in each state is the ability to use evidence and testimony secured from the required reporting process in criminal proceedings. As discussed further below, eliminating this crucial tool would also severely hinder the ability of States to prosecute those who would harm our nation's children.

II. THE OHIO SUPREME COURT'S RULING UNDERMINES THE OHIO LEGISLATURE'S POLICY TO PROTECT CHILDREN AND IMPEDES CRIMINAL PROSECUTION IN CASES WHERE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT.

A. Reading Ohio's Required Reporter Statute *In Pari Materia* with the Laws Against Child Abuse Is Consistent with the Ohio Legislature's Policy to Protect Children.

Ohio's Required Reporter Statute should be read *in pari materia* with the related body of criminal laws under which perpetrators of child abuse are prosecuted.[2] When read together, these laws embody the general policy of the Ohio Legislature to protect children, who often have no voice in the criminal justice system, including

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[2] "Statues *in pari materia* are to be construed together; each legislative act is to be interpreted with reference to the other acts relating to the same matter or subject." Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* § 86 (reprint 2008) (1896). This doctrine has a long and established history in the Court's construction of statutes. *See, e.g. Kohlsaat v. Murphy*, 96 U.S. 153, 160 (1878) (holding that "[r]esort may be had to every part of a statute, or, where there is more than one *in pari materia*, to the whole system, for the purpose of collecting the legislative intention"). Even if not strictly *in pari materia*, courts may construe unrelated, but analogous statutes to "illuminate the general course of legislative policy." 2B Norman Singer & Shambie Singer, *Sutherland Statutory Construction* §53:5 (7th ed. 2007).

through prosecution. In not considering the legislative intent of the battery and child endangerment laws under which the defendant in this case was charged and convicted, the Ohio Supreme Court construed Ohio's Required Reporter Statute in a way that defeats that general policy.

The Supreme Court has recognized that statutory interpretation requires courts to consider the "total corpus of pertinent law." *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970). Consistent with that guidance, the Ohio Legislature should be presumed in its enactment of Ohio's Required Reporter Statute to have been aware of and to have considered existing legislation on the same subject in pursuit of a uniform and cohesive legislative scheme. *Erlenbaugh, et al. v. United States*, 409 U.S. 239, 244-245 (1972) ("[W]henever Congress passes a new statute, it acts aware of all previous statutes on the same subject.") (citing *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 541-552 (1954)); *In re Marriage of Sager*, 2010 OK Civ. App. 130, ¶ 18, 249 P.3d 91 ("All legislative enactments *in pari materia* are to be interpreted together as forming a single body of law that will fit into a coherent symmetry of legislation.").

As the courts of Ohio have recognized, the language and the legislative history of Ohio's Required Reporter Statute demonstrate that the Ohio Legislature contemplated the existing body of criminal laws under which child abusers are

prosecuted when it created the mandatory duty to report suspected child abuse. *Yates*, 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E.2d 861, at ¶ 24. In this regard, the purpose of Ohio's Require Reporter Statute must be understood as complementing and supplementing the Ohio's Legislature general policy of protecting children through mandatory reporting of suspected abuse to appropriate authorities in aid of prosecution of child abusers.

The Ohio Supreme Court's interpretation goes too far. In holding that a teacher, in fulfilling her statutorily required reporter duties, is an agent of law enforcement when questioning a child about suspected abuse to fulfill her mandatory reporting duty, the Ohio Supreme Court unhinged the certainty in the law that comes from construing Ohio's Required Reporter Statute to achieve the Ohio Legislature's general policy of protecting children from the criminal offenders who abuse and endanger them. If affirmed, the Ohio Supreme Court's interpretation will lead to the perverse result that, because a child victim's statements were made to a required reporter, many cases of child abuse will not be prosecuted or will not result in a conviction.

B. In Many Instances, Child Abuse Will Go Unpunished Without Direct Testimonial Evidence From Required Reporters.

Child abuse is notoriously difficult to prosecute,[3] in large part due to the difficulty in acquiring physical evidence.[4] This difficulty is particularly pronounced in sexual abuse cases where sexual acts, not involving penetration, are unlikely to leave physical marks.[5] Even in cases where physical harm resulted, evidence of this harm is difficult to attain because reporting often happens well after the abuse has occurred and because children heal more quickly.[6] Indeed, in 2006, 53% of

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[3] Jennifer E. Rutherford, *Unspeakable! Crawford v. Washington and Its Effects on Child Victims of Sexual Assault*, 35 SW. U. L. REV. 137, 138 (2005) ("Cases are regularly dismissed, or simply not prosecuted, due to 'a lack of medical or physical evidence, lack of eyewitnesses, and . . . young child witnesses whose competence or credibility were questioned or who were too traumatized to testify. . . .'" (quoting Josephine A. Bulkley, Claire Sandt & Mark Horwitz, "Key Evidentiary Issues in Child Sexual Abuse Cases," *A Judicial Primer On Child Sexual Abuse* 63, 63 (Josephine Bulkley & Claire Sandt eds., 1994)).

[4] Deborah Paruch, *Silencing the Victims in Child Sexual Abuse Prosecutions: The Confrontation Clause and Children's Hearsay Statements Before and After Michigan v. Bryant*, 28 TOURO L. REV. 85 (2012).

[5] Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, 20 Crim. Just. 24, Summer 2005, at 32.

[6] *Id.*

prosecution declinations for child sexual abuse made by U.S. attorneys resulted from weak or inadmissible evidence.[7] Given the hurdles that prosecutors regularly face in successfully prosecuting child abuse, including sexual abuse, mandatory reporter testimony can be the difference between a conviction and an acquittal of an abuser.

Without direct testimony, many criminal child abuse cases cannot be proven beyond a reasonable doubt, allowing even the most heinous abusers to escape conviction. Although the majority rule in the United States is that circumstantial evidence and direct testimonial evidence are given the same weight, there are large categories of cases, which by their very nature, are difficult to prosecute successfully without direct testimonial evidence. For example, even where child abuse has undoubtedly occurred and physical evidence exists, convictions involving two or more potential perpetrators have been overturned because of insufficient evidence to show which individual actually committed the abuse. *See State v. Miley*, 114 Ohio App. 3d 738, 744-45, 684 N.E.2d 102 (1996) (finding that although injuries inflicted upon a child were "horrific" and abuse was "apparent," there was no proof presented, beyond a reasonable doubt, to pinpoint which caretaker was the actual abuser); *State v. Celestino*, No. S-91-50,

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[7] Mark Motivans and Tracey Kyckelhahn, *Federal Prosecution of Child Sex Offenders, 2006*, NCJ 219412, December 2007, at 3.

1993 Ohio App. LEXIS 1544, at *43 (Ohio Ct. App., 6th App. Dist. Mar. 19, 1993) (finding that, although child sexual abuse occurred, "[n]o evidence exists to exclusively identify appellant as the perpetrator of abuse against the child"); *People v. Wong*, 81 N.Y.2d 600, 610, 601 N.Y.S.2d 440 (N.Y. 1993) (ruling that although abuse was "heinous" and culpability of one of the parties was "evident," both defendants' convictions "must be reversed even though that conclusion means that one clearly guilty party will go free").

Circumstantial evidence is often insufficient to convict in cases where it is difficult to distinguish beyond a reasonable doubt between an accident and an abusive act. Even where the fact of injury and the identity of the potential perpetrator is undisputed, direct testimonial evidence is necessary to establish intent or proximate cause. *See State v. Madison*, No. 92AP-1461, 1993 Ohio App. LEXIS 3216, at *13-14 (Ohio Ct. App., 10th App. Dist. June 22, 1993) (finding that a child's injury was as consistent with an accidental fall as with physical abuse and that proximate cause cannot be established); *Kreager v. State*, 252 S.E.2d 1, 1 (Ga. Ct. App. Sept. 18, 1978) (holding that because the "wholly circumstantial" evidence related to head injuries on a child could be consistent with "unexpected childhood scrapes and falls," the defendant could not be convicted for child abuse and voluntary manslaughter).

Direct testimonial evidence is also crucial in a large number of cases where the act itself is unlikely to leave physical marks, even when the defendant has confessed to the crime. *See generally Hayes v. Virginia,* No. 0330-08-1, 2009 Va. App. LEXIS 162 (Apr. 7, 2009) (finding that there was a failure to show that a "touching" occurred, since evidence was not presented to show that there was molestation); *Allen v. Com.*, 287 Va. 68, 74, 752 S.E.2d 856, 860 (2014) (applying the *corpus delicti* rule after defendant confessed to the crime and holding that even though only "slight corroboration" was necessary to convict the defendant for molesting his grandson, the lack of physical evidence and eyewitness testimony prevented the court from affirming the conviction).

The importance of testimony from mandatory reporters to ensure convictions in child abuse cases cannot be underestimated in the many instances where the court finds the child to be incompetent to testify. Although children are generally presumed to be competent,[8] research suggests that "some courts are hesitant to find children competent to testify."[9] Children can be barred from testifying for a number of reasons, including possessing insufficient intelligence or memory, lacking the capacity to

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[8]Jennifer A. Lindt, *Comment, Protecting the Most Vulnerable Victims: Prosecution of Child Sex Offenses in Illinois Post Crawford v. Washington*, 27 N. Ill. U. L. Rev. 95, 108 (2006).

[9] Paruch, *supra* note 4, at 143.

observe, the inability to communicate, and the inability to articulate an understanding of courtroom procedures or to define the difference between truth and falsehood on the stand.[10]

These limitations are more acute for younger children, who may have been traumatized by their abuse and who have not yet developed adequate cognitive skills.[11] A study of four to seven-year-old children found that they were "less than one percent accurate in understanding the terms court, jury, judge, and witness," potentially leading to a finding of incompetency.[12] Even when a child victim is being truthful in their testimony, their inability to express themselves on matters at issue can result in a ruling

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[10] John E. B. Myers, *Children in Court, in Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases* 641, 647 (Marvin Ventrell & Donald N. Duquette eds., 2010). *See also* Paruch, *supra* note 4, at 86, 108 (stating that "courts find young children incompetent to testify on the grounds that they are unable to distinguish the truth from lies or because they are unable to communicate in a traditional courtroom setting" and "[a] court, in determining the competence of a child to testify, will look at the child's ability to understand the difference between right and wrong, reality and fantasy, and truth and lie, as well as the mental abilities and intelligence pertaining to the ability to recount past events").

[11] Allie Phillips, *Child Forensic Interviews After Crawford v. Washington: Testimonial or Not?*, HALF A NATION, Fall 2005, at 7 (Am. Prosecutors Res. Inst. 2005).

[12] *Id.* at 22.

that they are incompetent.[13] Furthermore, in many child abuse cases, a number of years will elapse from the date of abuse to the date of the first proceeding and, as a result, a child's inadequate recollection could lead to an incompetency determination.[14]

Even when children overcome these obstacles and are deemed competent to testify, courts often assume that their testimony is inaccurate.[15] The Court noted this problem in *Kennedy v. Louisiana*, when describing child testimony as being potentially "unreliable, induced, and even imagined." *Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008). The Court went on to explain that child testimony has been the subject of criticism because "the central narrative and account of the crime often comes from the child herself. She and the accused are, in most instances, the only ones present when the crime was committed." *Id.* at 444.

There is also the risk that testimony from children will be unduly dismissed, since even honest children, because of the trauma inflicted on them, can exhibit behavior in court that would suggest to a jury that they are being untruthful. For example,

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[13] *See also* Paruch, *supra* note 4, at 108.

[14] *Id.* at 109.

[15] Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don't Die and Ways to Facilitate Child Testimony*, 16 WIDENER L. REV. 239, 242 (2010) (stating that "[t]he distrust of child testimony still persists today and is fueled in part by the psychological literature").

children who are the victims of molestation who tell the truth are often the most inconsistent in their testimony.[16] Children can also have their credibility impeached because of their reluctance to answer "I don't know" to a yes or no question.[17] Juries also have a tendency to disbelieve children who report multiple instances of abuse.[18] Despite evidence suggesting that these views are unfounded, it is difficult for prosecutors to dispel these misconceptions during a trial.[19] Since mandatory reporters have a better understanding of the legal system, can better withstand scrutiny on the stand, and are more likely to be believed by a jury, they can be essential witnesses for ensuring that child abusers are convicted, even when child victims are too young or afraid to advocate on their own behalf.

Even when children are deemed competent and their testimony is believed by juries, forcing child victims to testify can severely traumatize them. Studies have shown that testifying can cause "re-victimization" in an abused child,[20] forcing him or her to relive the abuse in the presence of unfamiliar

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[16] Jodi A. Quas, et al., *Repeated Questions, Deception, and Children's True and False Reports of Body Touch*, 12 Child Maltreatment 60 (2007).

[17] Raeder, *supra* note 15, at 250.

[18] *Id.*

[19] *Id.*

[20] Raeder, *supra* note 5, at 32.

strangers and the abuser.[21] Other studies have shown that even where prosecution is successful because of a child's testimony, child victims can feel increased stigma and a sense of guilt and responsibility for sending the abuser to prison.[22] Indeed, in a study that examined over 200 sexual assault victims, those who testified experienced greater "behavioral disturbance"[23] that persisted long-term.[24] Furthermore, use of closed circuit television (CCTV) for testifying is not ideal – not only because it still forces a child to relive the

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[21] *See, e.g., Maryland v. Craig*, 497 U.S. 836, 855 (1990) (discussing the state's interest in protecting the welfare of children and noting the "growing body of academic literature [that] document[s] the psychological trauma suffered by child abuse victims who must testify in court"); Dorothy F. Marsil, et al., *Children as Victims and Witnesses in the Criminal Trial Process: Child Witness Policy: Law Interfacing with Social Science*, 65 LAW & CONTEMP. PROBS. 209, 213 (2002) (noting that "the phenomenon of confrontational stress experienced by children is amply supported by social science evidence" and citing sources).

[22] Rutherford, *supra* note 3, at 146-49.

[23] *Id.*

[24] Jessica Lieboergott Hamblen, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim Witnesses*, 21 LAW & PSYCHOL. REV. 139, 168 (1997) ("testifiers continued to exhibit significantly more overall behavior problems in general, and more internalizing problems specifically, than children who had not testified") (also acknowledging that testifying may be both traumatic during the actual giving of the testimony and long-term as well).

trauma and does nothing to prevent stigma from attaching – but because studies show that juries find children who testify through CCTV to be "less believable."[25] Since prosecutors are often unwilling to indict or to prosecute abusers without testimony from the child victim,[26] the psychological and traumatic consequences of forcing children to testify places prosecutors in a difficult position. Testimony from mandatory reporters can obviate this Hobson's choice. Required reporters spare child victims from the trauma of testifying, while providing crucial direct testimonial evidence – that otherwise would be unavailable or insufficient – necessary to convict child abusers, thereby carrying out the full intent and purpose of the statutes enacted to protect children.

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[25] Bruce A. Arrigo & Stacey L. Shipley, Introduction to Forensic Psychology 66 (2d ed. 2005).

[26] John E. B. Myers, Allison D. Redlich, Gail S. Goodman & Lori P. Prizmich, *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCHOL. PUB. POL'Y & L. 388, 411 (1999) (finding that "prosecutors are reluctant to take child sexual abuse cases to trial unless the victim is available to testify").

CONCLUSION

For the foregoing reasons, the Court should reverse the Ohio Supreme Court's decision.

Respectfully submitted,

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