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IN THE SUPREME COURT OF THE UNITED STATES

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OHIO, :

Petitioner :

v. : No. 13-1352.

DARIUS CLARK. :

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Washington, D.C.

Monday, March 2, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

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ILANA EISENSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

JEFFREY L. FISHER, ESQ., Stanford, Cal.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 13-1352, Ohio v. Clark.

5 Mr. Meyer.

6 ORAL ARGUMENT OF MATTHEW E. MEYER

7 ON BEHALF OF PETITIONER

8 MR. MEYER: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 In cases of foul acts done in secret where
11 the child is the party injured, the repelling of their
12 evidence entirely is in some measure denying them the
13 protection of the law.

14 That 254-year-old passage, I think, quite
15 accurately predicts the situation we find ourselves in
16 in Ohio following the decision of the Ohio Supreme Court
17 in this case, we believe, misapplying the Sixth
18 Amendment Confrontation Clause to these facts.

19 We believe the Ohio Supreme Court erred in
20 two fundamental ways. First, when it held that private
21 parties who are acting with no police involvement by
22 virtue of their mandatory reporter's status are
23 transformed into law enforcement agents or agents of the
24 government for purposes of the Confrontation Clause
25 analysis.

1 JUSTICE SCALIA: Do you have to be an agent
2 of the government for the Confrontation Clause to kick
3 in?

4 MR. MEYER: Based on this Court's
5 post-Crawford decisions, we believe that that is the
6 primary analysis that should be conducted.

7 JUSTICE SCALIA: Not primary. I'm asking,
8 is it -- is it exclusive that no person who's not an
9 agent of the government can trigger a Confrontation
10 Clause protection? I mean, that's clearly not true. I
11 mean, you -- you can have a cross-examination in a civil
12 case, a lawyer in a civil case has somebody on the
13 stand.

14 MR. MEYER: Well, in a civil case, I would
15 agree that that is -- that is testimonial evidence, but
16 purely private --

17 JUSTICE SCALIA: It is.

18 MR. MEYER: -- people --

19 JUSTICE SCALIA: That's a private person.

20 MR. MEYER: Well, in a civil case, Your
21 Honor, I believe that -- that official solemnity that
22 attaches to the oath that a witness is taking and an
23 understanding --

24 JUSTICE SCALIA: It's a question of
25 solemnity, but solemnity -- solemnity has nothing to do

1 with whether you're a civilian or -- or a policeman.

2 MR. MEYER: Well, going -- going back to
3 Crawford itself and what this Court explained was the
4 purpose behind the Sixth Amendment, when the framers
5 adopted it, was to prevent a very specific kind of
6 abuse. And that's government agents who are
7 investigating crimes for purposes of a criminal
8 prosecution. And when you reduce it to the level of a
9 three and a half-year-old child talking to his daycare
10 teacher, I would submit that that is far --

11 JUSTICE SOTOMAYOR: Doesn't the --

12 MR. MEYER: -- removed.

13 JUSTICE SOTOMAYOR: Isn't the test whether
14 the statement is intended to be testimonial in nature?

15 MR. MEYER: Yes, Justice Sotomayor, that --

16 JUSTICE SOTOMAYOR: So whether it's given to
17 a private individual or a police officer is irrelevant.
18 The question is, was it intended to substitute for
19 testimony to be used later.

20 MR. MEYER: That is the test that this Court
21 has announced in -- in Davis certainly. But we have
22 submitted, I think, perhaps a threshold formulation
23 maybe, before you get to primary purpose, and this Court
24 has consistently applied it to law enforcement actors.
25 When you talk about private persons, I think that is an

1 easier test, coming from this as a boots-on-the-ground
2 trial prosecutor and trying to predict the way that
3 primary purpose test is going to be applied, I would
4 suggest the private party analysis as a first step would
5 lead to more predictable results. Certainly --

6 JUSTICE GINSBURG: Mr. Meyer, could you
7 explain one anomaly in this case? The child, three and
8 a half years old, is incompetent to appear in court as a
9 witness. How can the substitute be permissible? If the
10 child is incompetent to testify in court, why isn't the
11 child incompetent to testify out -- make the same
12 statement out of court?

13 MR. MEYER: Respectfully, Justice Ginsburg,
14 I think it would be a mistake to say that his
15 incapability, his incompetence for purposes of the
16 courtroom setting means that nothing he's ever said on
17 planet Earth could be taken as a reliable statement.
18 Any parent knows that talking to their three year old,
19 certain things they say can be relied upon.

20 The Ohio rule, evidence rule 807, which is
21 modeled, I think, off of this Court's opinion in Idaho
22 v. Wright somewhat applies very rigorous factors to
23 determine reliability.

24 And so I think the -- the choice for a
25 prosecutor is not between live testimony and hearsay. I

1 think when you deal with a three year old, it's a choice
2 between hearsay and nothing.

3 JUSTICE SCALIA: Well, that -- that goes to
4 the hearsay rule. I mean, you could -- you could have
5 an exception to your -- to your hearsay rules. But --
6 but how could this child ever have the intent that
7 Justice Sotomayor described? Which is the test of
8 whether particular evidence is testimonial or not. How
9 could a three and a half-year-old child have that
10 intent?

11 MR. MEYER: I don't think he can. And I
12 think, looking at this Court's emphasis in -- in both
13 Davis and Bryant on the declarant's purpose, if you view
14 it from that standpoint, and Crawford -- Crawford's
15 requirement that the person bear testimony, he's just
16 incapable of doing so.

17 JUSTICE SOTOMAYOR: Well, let's --

18 JUSTICE KENNEDY: Then they can talk about
19 testimonial and I think we should, and I don't want to
20 take argument in another -- suppose that this is not
21 testimonial. Suppose you prevail on that. Isn't there
22 still a question as to whether or not this is hearsay
23 that is so unreliable that it violates the Confrontation
24 Clause slash -- and/or the Due Process Clause and we
25 remand for that?

1 If we -- if we rule in your favor that this
2 is not testimonial, that at the end of the case their
3 statement comes in or do we remand? Or is it before us
4 to say, part two, we think this is inadmissible under
5 other hearsay principles that are so well settled that
6 it's a violation of either the Confrontation Clause or
7 the Due Process Clause?

8 MR. MEYER: I don't think the reliability
9 question is one for the Confrontation Clause. I do
10 think the reliability question is one for the -- the Due
11 Process Clause. And so if --

12 JUSTICE KENNEDY: And has that been
13 addressed here or is that still open?

14 MR. MEYER: I think that's --

15 JUSTICE KENNEDY: We -- we remand for that?

16 MR. MEYER: I -- I think that's still open.
17 And if you have a situation where the States are
18 designing their rules for the deliberate purpose of --
19 of avoiding having live witnesses come to court, a sham
20 rule, that would be a very arbitrary rule under the Due
21 Process Clause, but I don't think the Confrontation
22 Clause is what that was designed to address.
23 Certainly --

24 JUSTICE SCALIA: What about the Due Process
25 Clause? Do we -- have -- have we adopted hearsay rules

1 under the Due Process Clause?

2 MR. MEYER: Not that I'm aware of, Justice
3 Scalia. What I meant --

4 JUSTICE SCALIA: I thought it was up to the
5 States, let it in and let the jury take it for what it's
6 worth. I'm not sure we've ever --

7 MR. MEYER: What I meant to say -- and I
8 think this Court did say this in Crawford -- was that
9 the reliability question is one for the States and their
10 democratic processes. And -- and they should have some
11 leeway in formulating their hearsay rules. And so
12 unless the -- the hearsay rules themselves rise to the
13 level of a due process violation, the reliability
14 question as this Court has explained is not for the
15 Confrontation Clause. Otherwise, I think we're
16 backsliding towards the Ohio v. Roberts analysis and the
17 constitutionalization of all hearsay rules.

18 JUSTICE KAGAN: Mr. Meyer, can I go back --

19 JUSTICE KENNEDY: Or of some hearsay rules.

20 JUSTICE KAGAN: Sorry. Can I -- can I go
21 back to what you said before in answer to Justice
22 Scalia? We can all obviously agree that three year olds
23 don't form any kind of intent to make testimonial
24 statements. But -- but that would suggest that there --
25 the Confrontation Clause just doesn't come into play at

1 all with respect to any people with diminished capacity,
2 without the capacity to form that kind of legal intent.

3 And that seems -- that seems not right to
4 me. That it seems as though there ought to be some
5 other inquiry that substitutes for the intent inquiry
6 when we're talking about people with diminished capacity
7 in order to decide whether a statement that they make is
8 testimonial.

9 MR. MEYER: If you disagree with my
10 formulation that private parties is the first step, this
11 Court has consistently said that there's three key
12 inquiries. The intent of the declarant, I think, has
13 been this Court's focus, but also the intent of the
14 questioner, and the circumstances of the questioning.
15 And at the outer margins, I suppose there could be a
16 situation where the intent of the -- the questioner
17 might tip the balance. But in this case, the Ohio
18 Supreme Court seemed to put all of its emphasis on the
19 possible speculative intent of the questioner, and I
20 think that's fundamentally wrong. If the intent of the
21 declarant isn't to do anything other than respond to the
22 basic questions asked like the declarant in Bryant, like
23 the declarant in Davis, I don't think you have
24 testimonial evidence.

25 JUSTICE SOTOMAYOR: You're forgetting --

1 you're forgetting the circumstances prong of it. Were
2 the questions here by the interrogator for purposes of
3 law enforcement or were they for the purposes of the
4 ongoing emergency, the abuse of the child?

5 MR. MEYER: Here --

6 JUSTICE SOTOMAYOR: So --

7 MR. MEYER: I think the -- the intent from
8 the questioner's standpoint, the teacher was just simply
9 that. And I think a helpful way to look at this,
10 Justice Sotomayor, is to remove this reporting
11 requirement and ask if the questions would be any
12 different. And I submit they would not.

13 These are just the basic questions that a
14 teacher would ask when a three year old comes to school
15 with a bruised face. It's a concern the teacher has for
16 their student and to say that that teacher is
17 stepping into a role of a law enforcement officer, I
18 think, is --

19 JUSTICE SOTOMAYOR: Well, that goes to
20 reliability, and that goes to whatever the finder of
21 fact, whether they take that approach or they take
22 another. But the point, I think, that Justice Kagan is
23 making in deciding the intent of the declarant, you have
24 to look at what everyone else is doing and who they are.

25 MR. MEYER: Well, I think that -- it -- it

1 may go to reliability, but more fundamentally, it goes
2 to the function that these actors are -- are performing.
3 And if these aren't law enforcement people, if there's
4 no direction by the police, this is just a teacher and
5 student.

6 JUSTICE KAGAN: Suppose this, Mr. Meyer.
7 Let's take the -- the diminished capacity out of the
8 equation. Let's just presume a 13-year-old kid rather
9 than a 3-year-old. And the 13-year-old kid comes in
10 with welts or bruises or whatever it is, and the teacher
11 says to the 13-year-old, Listen, Joe, I want to know
12 what happened, but I want to tell you that I'm under a
13 statutory reporting obligation, so everything you tell
14 me, I'm going to tell the police, and I'm going to write
15 down everything you tell me just so I can get the facts
16 straight.

17 Would you think that that is testimonial
18 such that it's a violation of the Confrontation Clause
19 if that comes into a case without the opportunity for
20 cross-exam?

21 MR. MEYER: It -- it may be, and if I could
22 explain.

23 If both the intent of the questioner and the
24 intent of the declarant both acknowledge that, in some
25 way, this is going to the police and the circumstances

1 of the discussion is for the police, that's a much
2 closer question, and I would --

3 JUSTICE KAGAN: Well, that seems to me then,
4 is then -- it suggests that the way to do this is
5 actually more the way the S.G. suggests, that we should
6 just ask in every case whether there -- whether a
7 statement is testimonial rather than to draw the very
8 sharp distinctions you want us to with respect to
9 private parties.

10 MR. MEYER: Well, I think the Solicitor
11 General in Ohio's opinion are -- are harmonious in that
12 they agree in their brief that in almost every
13 circumstance, a private discussion is not going to be
14 testimonial because it's just not for law enforcement.
15 And maybe the better way, if the Court agrees, is to
16 view it as a threshold determination before you even get
17 to the question of purpose. And I would agree at the
18 outer margins of some of these hypotheticals, you have
19 to look at purpose to sort out difficult facts.

20 To say that, like the Ohio Supreme Court
21 did, we just look at the foreseeability of the statement
22 reaching law enforcement is fundamentally wrong.
23 Everything that you see in life that you might have to
24 testify about as a private person may make its way to
25 law enforcement, but that's not intent, I would submit,

1 of the framers when they adopted the Confrontation
2 Clause.

3 JUSTICE GINSBURG: Could you remind us, the
4 young people who -- who heard this child's utterances,
5 what -- did their statements come in? The
6 grandmother -- was it the grandmother, the aunt, the
7 social worker, and the police, what happened to their
8 statements?

9 MR. MEYER: Justice Ginsburg, the Eighth
10 District Court of Appeals -- those statements did come
11 in at trial. The Eighth District Court of Appeals ruled
12 that their admission violated Ohio evidence rule 807.
13 And so while they were heard by the jury, they
14 were -- they were not, according to the intermediate
15 Ohio appellate court, proper evidence.

16 JUSTICE GINSBURG: But the teachers didn't
17 violate -- the teachers -- that was an hearsay
18 exception; is that right?

19 MR. MEYER: The Eighth District analyzed the
20 teacher's statements exclusively on the Federal
21 constitutional question. There was no discussion of
22 Ohio rule 807.

23 JUSTICE GINSBURG: Well, then what -- if all
24 the others were -- were inadmissible under Ohio's own
25 hearsay rule, why wouldn't the same thing apply to the

1 teacher? What's the difference between the teacher and
2 the social worker?

3 MR. MEYER: Well, first -- first off,
4 Justice Ginsburg, I think this is a -- a purely Federal
5 constitutional question. But if you look at -- if this
6 were to be remanded to the Eighth District for
7 consideration of that issue, you -- you would have to,
8 and the Eighth District would be required to look at
9 very specific factors that I think distinguish the
10 child's statement to the teachers, to those of -- the
11 social worker and the police the next day.

12 The teachers asked the questions very close
13 in time to when the injuries occurred. It was within
14 hours. They also asked very open-ended questions.
15 There were only two real questions: Who did this? And
16 what happened? These are all factors you can look to to
17 assess the reliability of the statement under Ohio
18 evidence rule 807.

19 But more fundamentally, both the Eighth
20 District and the Supreme Court of Ohio have said as a
21 per se matter, these are testimonial statements and that
22 we disagree with.

23 I would ask to reserve the balance of my
24 time for rebuttal.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Eisenstein, welcome.

2 ORAL ARGUMENT OF ILANA EISENSTEIN

3 ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING PETITIONER

5 MS. EISENSTEIN: Mr. Chief Justice, and may
6 it please the Court:

7 The Ohio Supreme Court did err by viewing
8 the teachers here as equivalent to police. And if I
9 could turn first to Justice Sotomayor's concern there, I
10 think that it is significant that these were teachers
11 and not police officers; teachers who were not acting as
12 surrogates for police, but in their normal, ordinary
13 role as care providers for this child.

14 Teachers aren't in the business of
15 prosecution. They're not in the business of collecting
16 evidence, and as such, this Court can generally presume
17 that when they inquire of their students as to how they
18 got hurt, they are asking out of a concern for welfare,
19 safety, and out of their normal, routine role, not as a
20 means of collecting evidence.

21 It's also significant that when you take
22 away, you strip away that view of the teachers as
23 equivalent to police, the conversation viewed through
24 that lens takes on a very different character. Instead
25 of scrutinizing each question and answer to determine

1 whether this is an emergency on the one hand, or whether
2 it is a -- a need to address a criminal violation,
3 instead there is a whole range of reasons why these
4 teachers, out of care for the student, would be asking
5 what happened and how the child got hurt.

6 And fundamentally, the type of fluid,
7 informal, spontaneous conversation between the teachers
8 and the students is far from resembling the type of core
9 Confrontation Clause testimonial statements. It lacks
10 the type of formality, the solemnity, and it also
11 reflects that the teachers were addressing a present
12 purpose in trying to understand how this child was
13 injured.

14 JUSTICE KAGAN: But what happens,
15 Ms. Eisenstein, really along the lines of the
16 hypothetical that I gave to Mr. Meyer where it's pretty
17 clear to both the teacher and the student that back of
18 that conversation, is the presence of police. In other
19 words, the teacher will say, I'm under a reporting
20 obligation, or maybe the kid will bring it up. If I
21 tell you, does that mean it's going to the police? And
22 the teacher says, Yes, it does. You know, what happens
23 when -- when that arises?

24 MS. EISENSTEIN: Justice Kagan, I think that
25 is a much harder case for two reasons. One is from the

1 declarant's perspective, which is where I believe this
2 Court generally starts. The declarant is now
3 recognizing that this teacher is essentially a direct
4 conduit to police in a way that a 3-year-old child here
5 certainly did not.

6 And secondly, the teacher is expressly
7 recognizing her role as, in some respects, a surrogate
8 for police. Now, not in all respects. And that's --
9 you know, an important point as to one of the special
10 concerns with prosecution and police questioning is that
11 there is an additional concern with the police that they
12 may, for one thing, shade the nature of the
13 conversation. It's also a concern where there is a
14 level of structure and formality, that simply the
15 conversation would tend to resemble testimony or the
16 taking of evidence.

17 None of that would be present in this kind
18 of informal, spontaneous interaction between a -- a
19 civilian who frankly the -- the teachers who initially
20 questioned the student and elicited the statement that
21 Dee did it, did so -- did so prior to their supervisor
22 recognizing an obligation to call -- to call in. And
23 even then, in your hypothetical, one further distinction
24 is that the teachers here and the obligation here was to
25 call social services, not police. While it certainly

1 may have been foreseeable from an objective standpoint
2 whether there was the subjective view here --

3 JUSTICE GINSBURG: I thought it was
4 either -- that the school teacher could notify either
5 the social worker or the police.

6 MS. EISENSTEIN: Yes, Justice Ginsburg, they
7 can notify either. But when the police are notified,
8 then the next step is for the police to call in social
9 services, and the first responder at the agency charged
10 with investigating primarily child abuse especially in
11 the very immediate moments, as was the case here, is the
12 social welfare agency, the social services agency not
13 the police.

14 JUSTICE KENNEDY: Just so I have it clear.
15 Social services, if they're selected to -- to get the
16 information, I assume they have the obligation to advise
17 the police. Am I wrong about that?

18 MS. EISENSTEIN: I -- in terms of there
19 is -- there is a cooperative structure, at least under
20 the Ohio statute. And nationally, in these reporting
21 structures there's --

22 JUSTICE KENNEDY: Is it a legal requirement
23 in Ohio that social services report to the police?

24 MS. EISENSTEIN: I'm not sure the extent,
25 Justice Kennedy, of the sharing of information and the

1 degree to which social services in this particular
2 statutory scheme must report all information to police.

3 JUSTICE KAGAN: Well, would I be right to
4 think that where there is any kind of serious injury,
5 police are involved as a routine matter?

6 MS. EISENSTEIN: Well, Justice Kagan, I'm
7 not sure about that. At least one of the amici cites
8 that in a majority of cases of reported child abuse, it
9 is social services alone who investigates the case.
10 Clearly, in this case, the police got involved, but I do
11 know that the police did not get involved until two days
12 later when the second social worker came to the house
13 and discovered a much more serious circumstance than was
14 presented initially at the daycare.

15 JUSTICE ALITO: There can be a lot of --

16 CHIEF JUSTICE ROBERTS: Go ahead.

17 JUSTICE ALITO: Okay. There can be a lot of
18 circumstances where a -- a person seems to be under a
19 threat, maybe -- may have been hurt, seems to be under
20 a -- an ongoing threat. Someone questions that
21 individual and the person who makes the statement, as
22 well as the person who asks the question, may have in
23 mind immediate safety concerns and also the possibility
24 of criminal prosecution.

25 How realistic is it to try to break that

1 down and determine which of the two is the primary
2 purpose?

3 MS. EISENSTEIN: I think that is a challenge
4 and the test, but it's less challenging in the context
5 presented here where you have a -- a -- an ordinary
6 citizen questioning a small child. It may be a more
7 difficult circumstance that the cases like Bryant and
8 Davis where you have police who have a duty, one of
9 their primary duties, to collect evidence and forward to
10 prosecution to -- to try to parse that out.

11 I think this Court can comfortably believe
12 that it is the hearsay rules that should govern the
13 interactions at issue here and not be governed by the
14 Confrontation Clause.

15 CHIEF JUSTICE ROBERTS: What if you had --
16 maybe this is just a specific example of what Justice
17 Alito is talking about, but what if you have the teacher
18 who did this to you, Dee, the teacher knows there's
19 nobody in the immediate vicinity named Dee, and then she
20 asks, Well, has he done this before? I mean, is that
21 something that's not subject to the Confrontation
22 Clause? It's not related to the immediate concerns or
23 immediate safety but seems to be designed to compile a
24 case.

25 MS. EISENSTEIN: Well, Your Honor, to the

1 extent to which the teacher is asking that question, I
2 think that one of the -- the presumptions here is that
3 it's not to gather, to collect evidence for a case
4 because she's not thinking police prosecution, and
5 there's good reason why --

6 CHIEF JUSTICE ROBERTS: How do you know
7 that? Maybe she is -- you know, we've got to protect
8 the child. The way we do is to get the person who did
9 this locked up, so she wants to confirm who is it.
10 Doesn't need to know that for the immediate safety of
11 the child.

12 MS. EISENSTEIN: Well, and the immediacy --

13 CHIEF JUSTICE ROBERTS: I mean, sorry, wants
14 to know whether he has done it before.

15 MS. EISENSTEIN: The immediacy here is not
16 whether -- if I'm understanding your hypothetical, not
17 immediate in terms of at the school, but in this
18 particular case, there is the immediacy that, as was the
19 case here, the defendant was the one who picked up the
20 child and took him home at the end of the day leaving
21 him, as it turned out, in a far worse position when the
22 social worker finally tracked him down. So that is
23 often -- I think that's one of the motives, frankly, for
24 these mandatory reporting statutes is because of the
25 recognition that there is an urgency involved when

1 children -- when there is suspected abuse. And so --

2 JUSTICE KENNEDY: Well, what am I supposed
3 to -- what are we supposed to do if we think 50 percent
4 of the motivation was to comply with the statute and --
5 and -- and her duty as a teacher not to send this kid
6 home, and 50 percent was in order to fulfill the
7 reporting obligation to the police. Then -- then what
8 do we do?

9 MS. EISENSTEIN: Well, Your Honor, I think
10 you still have to look at the three parts that this
11 Court has addressed: the declarant, the questioner's
12 intent, and the circumstances. And this Court has
13 looked at those in tandem, and when you look at the
14 perspective of the declarant, which they -- Ohio Supreme
15 Court, in my view, erred in ignoring, he's not going to
16 see his daycare teacher as an evidence collector. And
17 when you look at the circumstances like the
18 circumstances here of a spontaneous and informal
19 encounter in the classroom, it has no resemblance to the
20 type of abuses the Confrontation Clause is meant to
21 address.

22 If there are no further questions, thank
23 you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Fisher?

1 ORAL ARGUMENT OF JEFFREY L. FISHER

2 ON BEHALF OF RESPONDENT

3 MR. FISHER: Mr. Chief Justice, and may it
4 please the Court:

5 We are not here today asking for any sort of
6 rule that would ban prosecutors from using statements
7 like LPs in criminal prosecutions. All we are asking
8 for is that a State not to be allowed to have it both
9 ways, introducing such evidence while at the same time
10 prohibiting the defense from any form of confrontation
11 whatsoever. And you don't have to look any further than
12 the facts of this case to see the grave dangers that
13 such a system would present to the accuracy of criminal
14 prosecutions. The only --

15 JUSTICE GINSBURG: I'm looking at the -- the
16 -- the judge said this witness is not -- this child is
17 not competent to testify as a witness, and you've read
18 the transcript. How -- how can there be a question of
19 cross-examining a 3-year-old? The -- this person is
20 incompetent as a witness because the -- the testimony is
21 unreliable?

22 MR. FISHER: Well, two things, Justice
23 Ginsburg. Remember, first of all, the State is taking
24 the position, by necessity, under its own hearsay law,
25 rule 807, that what the State said -- I'm sorry, what

1 the -- what the child said when he was, in effect,
2 interviewed by the teacher, was particularly likely to
3 be trustworthy. And so it seems to us quite impossible
4 for it to take the position that 6 months later the
5 child cannot, in the words of the Ohio evidence rule
6 601, quote, "relate events truly."

7 So we think it's utterly incompatible, but,
8 Justice Ginsburg --

9 JUSTICE GINSBURG: Well, just let me stop
10 you. Part of your answer I don't follow because one
11 thing is the child is asked immediately, on the spot,
12 close in time to when this occurred. The trial is
13 months later, and one of the problems with 3-year-olds
14 is they don't remember.

15 MR. FISHER: Well, that -- that -- that is
16 an issue. Of course, the Court's Confrontation Clause
17 jurisprudence squarely holds that even if a witness has
18 difficulty with memory, that does not impede
19 confrontation or defeat the defendant's rights to
20 confrontation.

21 But I think you're also asking, you know,
22 what good would cross-examination do in this setting,
23 and so let me answer that in two ways. First of all,
24 there are innumerable reasons -- and perhaps, Justice
25 Kennedy, when you've talked about reliability, some of

1 these were in your mind -- as to why we might doubt the
2 veracity of LP's initial statements. The teacher
3 herself said, I'm not sure he understood me, she fed him
4 a line, is it Dee? Is it Dee who did it? The child,
5 LP, knew that his three older siblings had already been
6 removed from his mother's custody because she had abused
7 them, so he would have had an incentive and knowledge of
8 how the system worked when he was answering that
9 question.

10 So there are numerous reasons we might be
11 very concerned. All we're saying --

12 JUSTICE SOTOMAYOR: I'm sorry, you start by
13 saying she fed him a line. I understood that she asked
14 him who did it and he said Dee, and she didn't know what
15 Dee meant.

16 MR. FISHER: Yeah, she said, Dee, Dee, is it
17 Dee who did it. That's what I meant, Justice Sotomayor.

18 JUSTICE SOTOMAYOR: Well, but it wasn't as
19 if she got Dee out of thin air.

20 MR. FISHER: Fair enough. Fair enough.

21 But if I could turn back to -- I think the
22 other thing you're asking, Justice Ginsburg, is how
23 would cross-examination be useful here. And let me be
24 clear, all we're asking for is something; more than
25 nothing. You know, the State itself, after getting the

1 allegations from the teacher, the social worker
2 testified, I had to go out and ask this child myself to
3 see whether this was true, to see whether it was
4 believable.

5 JUSTICE KENNEDY: May I ask this --

6 MR. FISHER: That's all we want.

7 JUSTICE KENNEDY: Suppose I'm in State X,
8 not -- not Ohio. There's a mandatory reporting duty to
9 the social services by the -- by the teacher, and the
10 same facts. And I'm the trial judge, and this statement
11 is offered, and I say, does the defense want to examine
12 the 3-year-old or the 4-year-old, and provide some means
13 2 or 3 months later -- 2 or 3 months after the Dee
14 statement, to cross-examine the child maybe in the
15 clinical setting that you suggested in your brief.

16 Any problems with that? What -- what if --
17 if we're saying what the rule should be in that kind of
18 situation, that kind of State, what -- what guidance can
19 you offer?

20 MR. FISHER: I -- I think you would start
21 with Maryland against Craig where the Court has held
22 that confrontation of children can be more flexible to
23 accommodate child's perceptions, understandings and
24 abilities.

25 JUSTICE GINSBURG: That -- that case, the

1 child was held competent as a witness.

2 MR. FISHER: That's right. Now, remember --

3 JUSTICE GINSBURG: This --

4 MR. FISHER: -- competency, though, is a
5 creature of the State's own making. It can -- many
6 other States, and we've provided an amicus briefs from
7 three illustrative States -- Arizona, Iowa, and
8 Connecticut -- like many others, deem all children
9 competent in this setting, at least competent to give
10 testimony. We think that's a much better rule and it
11 gets me back to Justice Kennedy's question, I believe,
12 which is, we think it would be perfectly acceptable to
13 have testimony, if necessary, and if proper findings
14 were made taken outside of a courtroom, perhaps even
15 through an expert, I think a very strong argument could
16 be made, if it were necessary to be made to this Court
17 or any other, that if by interviewing the child outside
18 of a courtroom in a more therapeutic setting is more
19 likely to be able to enable the child to tell his story
20 and to answer questions, then that's what confrontation
21 is all about.

22 JUSTICE KENNEDY: And if -- but if that
23 happened, would the statement to the teacher come in?

24 MR. FISHER: Yes, of course, because once
25 you have confrontation, then you can bring in any prior

1 statement, and that's the essence of our position.

2 JUSTICE GINSBURG: But by confrontation you
3 mean the -- you -- you have a therapeutic expert, but as
4 the defendant's witnesses, you're not -- I don't think
5 you suggested that the Court could appoint its own
6 expert and the defendant would be out of it. I mean,
7 this is -- the way we do things in our adversary system
8 is you're a partisan expert, you're the defense expert.

9 MR. FISHER: Well, Justice Ginsburg, I think
10 the defense would have to have some inclusion in this
11 questioning. We cite an Arizona case in our brief where
12 a child interview specialist conducts the interview, but
13 she has an earpiece with the defendant's lawyer in
14 another room that's able to direct questions for.

15 Her. So I think the defendant would have to
16 be participating, but I'm not sure it would be an
17 irreducible requirement that the defendant's lawyer be
18 asking the questions.

19 JUSTICE SOTOMAYOR: Mr. Fisher --

20 MR. FISHER: And Certainly the Court --

21 JUSTICE SOTOMAYOR: -- I want to go back to
22 your basic premise. I know that you're attacking the
23 competency question a lot. But what is it about the
24 statement that makes it testimonial? Is it the rule
25 that the State -- that she's a mandatory reporter, as

1 the Ohio court thought?

2 Tell me what you think. Is it any
3 out-of-court statement? What -- what is it that makes
4 it testimonial?

5 MR. FISHER: Well, you start with the rule
6 the Court laid down in Davis and repeated in Bryant,
7 which is: If the primary purpose of the statement is to
8 establish or prove past events potentially relevant to a
9 criminal prosecution, then you have a testimonial
10 statement.

11 And I think a helpful way to analyze this
12 particular statement is to start with Justice Kagan's
13 hypothetical. If the teacher had said to a student --
14 and, as in this case, there's nothing spontaneous about
15 what happens here -- pulls the student aside and says,
16 "You" -- says, "I need to know -- tell me what happened
17 and who did this so I can tell the police," I think the
18 other side, if -- almost conceded that that would have
19 to be testimonial.

20 But on the facts of this case, that is, in
21 fact, precisely what you have when you conduct a proper
22 objective totality of the circumstances.

23 JUSTICE ALITO: There's -- there's an
24 awful -- a -- a great distance between Justice Kagan's
25 hypothetical and what happened here.

1 First of all, there's the age of the
2 Declarant. Do you really think a three-year-old or a
3 three and a half-year-old can have any conception that
4 the thing that the -- that this child is saying is going
5 to be used in court to prosecute somebody for a crime?

6 MR. FISHER: No, Justice Alito. I don't
7 think it's --

8 JUSTICE ALITO: All right. So the Declarant
9 is out. And then you have the teacher, and the teacher
10 isn't saying anything about gathering evidence for a
11 criminal prosecution. I would think the first thing on
12 the teacher's -- I -- I don't think the teacher probably
13 broke it down that way. The teacher is concerned about
14 the safety of this child, period.

15 MR. FISHER: Can I say one more word about
16 the Declarant shortly?

17 JUSTICE ALITO: Sure.

18 MR. FISHER: And then I'll respond to you
19 about the teacher.

20 I absolutely concede that a three and a
21 half-year-old doesn't have sophisticated knowledge of
22 how the criminal justice system works, but I think a
23 three and a half-year-old does understand when he's
24 asked to -- whether somebody did something wrong to him.
25 Again, remember that LP's three older siblings had all

1 been removed from the home already for his mother's
2 abuse and neglect. I think he would have understood he
3 was being asked --

4 JUSTICE SOTOMAYOR: That's a big assumption,
5 to know that this child understood the criminal process
6 at three years old.

7 MR. FISHER: I -- Justice Sotomayor --

8 JUSTICE SOTOMAYOR: And when -- how long
9 before had the --

10 MR. FISHER: -- I didn't say "the criminal
11 process."

12 JUSTICE SOTOMAYOR: -- children been
13 removed?

14 MR. FISHER: I didn't say "criminal
15 process." And -- and all I want to make the point is,
16 is that if we're going adjust for the age of children,
17 we also need to adjust across the board. And I think it
18 would be enough, to the extent we're looking at the
19 declarant's purpose, to understand that he was being
20 asked to make an accusation of -- of wrongdoing.

21 Now, turning to the teacher's purpose, I
22 want to talk about four things that are very important:
23 First, the nature of the injuries; second, the teacher's
24 training; third, the teacher's actions; and fourth, Ohio
25 law, because when you put them all together, you end up

1 with the effect of the teacher having quite clear
2 understanding of where these statements were going to be
3 used.

4 First of all, the injuries --

5 JUSTICE GINSBURG: Mr. Fisher, I would like
6 to ask you, before we get to the four -- your four
7 points, it just seems to me that a teacher looking at a
8 child who has been abused, the first reaction of that
9 teacher is just as Justice Alito suggested: Get that
10 child out of harm's way. Don't give that child back to
11 a potential abuser.

12 So the teacher, I would think, is not
13 thinking about prosecution down the road: What can I do
14 to assure the safety of this child right now?

15 MR. FISHER: Right. So -- so I think that
16 does lead me right to what I was about to try to say.

17 First of all, the injuries were very serious
18 here, and the teacher quite well knew that they didn't
19 occur in the classroom. They had occurred outside the
20 classroom, and so the -- and one of the teachers
21 testified, only once --

22 JUSTICE SOTOMAYOR: And why --

23 MR. FISHER: -- over the past --

24 JUSTICE SOTOMAYOR: Why did the teacher
25 bother saying that she wanted to make sure that it

1 wasn't another child?

2 MR. FISHER: The teacher never testified to
3 that, Justice Sotomayor. The closest you have is the
4 quote the State pulls from J.A. 60, where the teacher
5 said, "I asked whether Dee was big or little."

6 But the teacher, in the very same paragraph
7 of testimony, says the reason why she asked that
8 question is she was wondering whether it was an older
9 brother or sister. So the teacher knew it -- it wasn't
10 something that occurred in the classroom. Of course, LP
11 had just gotten to school. And as I'm trying to say,
12 one other teacher had said, "Only once in nine years
13 have we seen something like this."

14 So, secondly, that leads me to the teacher's
15 training. We've cited to the reference for educators
16 that Ohio gives to all teachers. It's at page 37 of our
17 brief. And the teachers are told to look out for child
18 abuse, they have a special duty to look out for child
19 abuse, and when they see it, they're supposed to -- and
20 I'm going to quote page 31 -- they are supposed to
21 gather, quote, "information which might be helpful to
22 establishing the cause of the abuse."

23 They're told to gather information that
24 would be helpful to establish the cause of abuse. So
25 she is gathering evidence. That's what she's told to

1 do. And, quote, "the identity of the perpetrator."

2 Later on in that reference guide, it tells
3 the teacher that a local prosecutor will then decide
4 whether to prosecute. And then, understanding --

5 JUSTICE GINSBURG: But before we --

6 MR. FISHER: -- that training --

7 JUSTICE GINSBURG: -- get to the prosecutor,
8 is this child going to be returned to this person who
9 the child has identified as -- it seems to me that --
10 that there is a concern immediately with the child's
11 safety, and there is also, down the road, the potential
12 prosecution. But the -- if you have to divide what is
13 the prime purpose, it seems to me that the well-being of
14 the child has got to be the first thing in the mind of
15 the teacher.

16 MR. FISHER: Justice Ginsburg --

17 JUSTICE KENNEDY: And what Justice Ginsburg
18 has said is completely consistent with your No. 3. She
19 wants to find out the cause. She wants to know if
20 there's something happening at home where this kid
21 should not go back home that day.

22 MR. FISHER: That -- that's right. We don't
23 dispute that a teacher has a protective purpose, partly,
24 in mind. And I think it's absolutely natural that the
25 teacher would.

1 But the problem is, and our position is,
2 that is inextricably intertwined with criminal
3 prosecution as well. That's what the Ohio Supreme Court
4 said, construing Ohio law, is that one of the chief
5 methods of protection is prosecution. And --

6 JUSTICE GINSBURG: Much too late.

7 MR. FISHER: Well, it might be too late.
8 But, Justice Ginsburg, it doesn't make it that much
9 different than the situation you had in Hammon involving
10 domestic violence. It doesn't make it -- that much
11 difference in a situation you have with a police officer
12 or someone else trying to get a drug dealer off the
13 corner, to try to get a white-collar criminal to stop
14 embezzling money.

15 All of those things are ongoing crimes, but
16 gathering statements that help both stop the harm that's
17 occurring and are useful in the criminal justice
18 proceeding, we think, still are testimonial when that
19 criminal incentive and purpose is intertwined with the
20 protective purpose.

21 Even my adversary, I think, acknowledged
22 that even if it were nothing other than the teacher
23 trying to get information for protective purposes --
24 that is, removing LP from the custody of an abuser --
25 that's a civil case and civil process, which I

1 wholeheartedly agree would still trigger the
2 Confrontation Clause.

3 JUSTICE SOTOMAYOR: Mr. Fisher, you -- in
4 Davis, when an abused woman is separated from the
5 abuser, she can voluntarily say, "I don't want to go
6 back." She can make her own choices.

7 How does a child make those choices?

8 MR. FISHER: I think it's -- obviously, it's
9 more difficult, Justice Sotomayor. I think the true
10 dynamics of domestic violence don't make that choice
11 terribly easy.

12 JUSTICE SOTOMAYOR: I -- I know for many
13 women it's not -- they don't perceive it as a real
14 choice. I'm not naysaying that.

15 MR. FISHER: Right. But there are other --

16 JUSTICE SOTOMAYOR: But I think there is a
17 difference in terms of protecting a child and protecting
18 an adult.

19 MR. FISHER: There are differences, but
20 again, I would give you my drug-dealing-on-the-corner
21 hypothetical. There are numerous innocent victims that
22 are going to be harmed by the distribution of those
23 narcotics until the person is taken off the street, but
24 we don't therefore say that when statements are gathered
25 to do that as quickly as possible, that they're

1 non-testimonial.

2 JUSTICE ALITO: Let's suppose that everybody
3 who could have possibly done this to the child was
4 immune from criminal prosecution. They're all
5 diplomats. They all have diplomatic immunity. Would
6 the teacher have done anything different?

7 MR. FISHER: Perhaps not, Justice Alito.
8 I -- I'm just not sure what that tells us, because even
9 if the teacher was gathering evidence for a civil legal
10 process, then I think you still have a testimonial
11 statement.

12 JUSTICE ALITO: The Confrontation Clause
13 applies in civil cases?

14 MR. FISHER: Well, it applies in the same
15 way Justice Scalia was adverting to earlier. I think if
16 somebody made a civil deposition, I think that -- the
17 Confrontation Clause doesn't apply in that setting, but
18 if the statement were tried to be used later in a
19 criminal prosecution instead of testimony --

20 JUSTICE ALITO: No, but all these people,
21 they are immune from prosecution, from criminal
22 prosecution. Would the teacher have done anything
23 different?

24 MR. FISHER: I'm not sure she would --
25 they -- they would have.

1 JUSTICE ALITO: Well, that would be the end
2 of the question, isn't it?

3 MR. FISHER: I don't see why it is.

4 JUSTICE ALITO: Because then the teacher has
5 no purpose of gathering evidence for use in a criminal
6 prosecution.

7 MR. FISHER: Well, the purpose is gathering
8 evidence for use in serious legal proceedings, and I
9 think that would be enough, if I had to make that
10 argument. I don't have to make anything like that
11 argument. Let me tell you now about Ohio law that's
12 hanging over this interaction. And, Justice Kennedy,
13 you asked about the social -- the relationship between
14 social services and the police. Ohio law quite
15 explicitly and unambiguously requires the social
16 services agency to share information of any possible
17 abuse, criminal abuse with the police, and also the
18 Cuyahoga County's own guidelines which we cite in our
19 briefs. So there's no doubt those two things are
20 intertwined.

21 And secondly, the independent -- the
22 mandatory reporter statute along with Ohio Rule 807
23 expressly make these statements admissible in criminal
24 court proceedings. So you put all this together and
25 it's -- it's -- I just think it's frankly undeniable

1 that the criminal process is hanging over this. And so
2 really, the only hard problem is I think the one Justice
3 Ginsburg is asking is, how do you disentangle that or
4 how do you weigh that against the protective purpose,
5 which the teacher must have had as well.

6 JUSTICE KAGAN: Mr. -- Mr. Fisher, can I ask
7 a question that steps back a little bit? Because it
8 seems to me that the strongest part of your case goes
9 something like this. This is a statement that's going
10 to come in and is going to have great consequence in a
11 trial. It's going to function as the most relevant kind
12 of testimony imaginable, it's an accusation. In a case
13 like this, there are two potential parties that could be
14 accused. Essentially, this is fingering one of them,
15 and it's being done by a three year old.

16 And -- and the question of whether that's a
17 particularly reliable way to choose between which of
18 these two potential people did it is like a little bit
19 scary. And then you're not being able to question it,
20 you're not being able to do the things that you normally
21 do.

22 Okay. So all of that, seems to me, that's
23 your strongest case. And it seems to me that it doesn't
24 fit very well with the test we have and what the
25 questions that we're supposed to ask. In other words,

1 all of what I said seems to be -- or most of what I said
2 at least -- seems to me kind of irrelevant to the
3 question that we ask under the primary purpose test and
4 what do we do with that lack of fit?

5 MR. FISHER: I think I can answer that
6 question while also going back to the question I posed
7 before you asked the question, which is what do you do
8 when it's too difficult to pinpoint a purpose? The
9 Court has also described in its cases the very helpful
10 inquiry of whether the thing -- the statement when it's
11 introduced in court functions as an in-court substitute
12 for trial testimony. That is exactly what the
13 testimonial test is designed to answer and I think part
14 of the power of the --

15 JUSTICE KAGAN: You see, I think I don't
16 think it really does. I mean, the way I've always
17 understood the primary purpose test is that it's not
18 whether it functions at trial as testimony or how the
19 jury understands it; it really is how the declarant
20 understands it, maybe leavened by some -- you know, what
21 does the questioner think and what are the
22 circumstances. But it seems to be mostly about the
23 purpose of the person who's making the statement
24 which -- which fits, you know, not very well with these
25 kinds of concerns that you're talking about.

1 MR. FISHER: Well, I think the linkage
2 between the two is that when a statement is made outside
3 the courtroom for the primary purpose of establishing
4 facts that might be relevant to a later criminal
5 prosecution, then when it's transported into the
6 courtroom, it does perform the substitute of trial
7 testimony, which is exactly why you so accurately said,
8 there was such power in this statement. The prosecutor
9 at closing said -- just as she would have said if LP had
10 taken the stand -- she said when this child of three and
11 a half years old is asked who did it, she said Dee did
12 it, he said Dee did it. And so the way the prosecutor
13 presented it to the jury was as a precise perfect
14 substitute for in-court testimony. And it's not I think
15 dis -- disjointed from the fact that outside the
16 courtroom, the statement was made to establish a fact
17 relevant to prosecution. It's difficult.

18 JUSTICE ALITO: But all -- all admissible
19 hearsay is a substitute for in-court testimony. So the
20 test you just gave us seems to me to encompass all
21 hearsay, doesn't it?

22 MR. FISHER: No. I think a jury would view
23 a stray remark to an acquaintance, as the Court has put
24 it, as a piece of evidence, relevant evidence perhaps,
25 but not as testimony. It wouldn't make sense to

1 describe somebody's -- I think this Court has put it
2 this way -- somebody's stray remark to an acquaintance
3 or somebody's cry for help, later on as somebody's
4 testimony. But here, this is exactly LP's testimony.
5 That's what it is functioning as.

6 And if I could turn to one other piece of
7 Ohio law that I think is important to have before you.
8 We've talked about Ohio rules of evidence. They're
9 both -- both the relevant rules are in the appendix to
10 our red brief. On 2A, it is Ohio rule of evidence 807
11 that is very unusual. And Justice Kennedy, you were
12 asking earlier about this, I think.

13 First of all, this is a rule of evidence
14 that no State had any rule of evidence like this until
15 1982. This was a brand new thing that came up only
16 after Roberts. And the entire purpose of this law is to
17 gather out-of-court accusations and to use them as a
18 substitute for trial testimony. So let me point you to
19 two aspects that show that.

20 First of all, the only thing that the
21 State -- that the hearsay law gathers up are statements,
22 quote, "describing any sexual abuse or physical abuse
23 directed against the child." So the sole target of this
24 hearsay law is to get out-of-court accusations of
25 criminal conduct. And then odder yet, looking at the

1 first sentence, it says, "An out-of-court statement made
2 by a child who is under 12 years of age at the time of
3 trial, making such an accusation," ask yourself why the
4 words "at the time of trial" are in this hearsay rule?
5 If it were designed to pluck out reliable statements
6 from the world, it ought to be asking some question
7 about the world when the statement was made. But it's
8 conditioning admissibility on some fact at the time of
9 trial, which is still further evidence that what Ohio is
10 doing is gathering up these statements to use them as a
11 substitute for in-court testimony.

12 And so the pedigree of this hearsay rule in
13 contrast to innumerable other well-established rules
14 that the Court has dealt with in the -- in the past show
15 the problem here. And even Justice Thomas has talked in
16 his separate writings about evade -- you know, a State
17 system that would evade the confrontation right. If
18 there's ever a State system that would evade the
19 confrontation right, it's taking this rule and then
20 coupling it with Ohio rule 601, which automatic -- which
21 presumes that all children under 10 are incompetent to
22 testify.

23 So it's telling the State you can -- you can
24 gather up selectively these out-of-court accusations,
25 using the reporter requirement, teacher training, all

1 the rest, and then you can go into court and introduce
2 those statements and at the same time completely bar the
3 defense from any form of cross-examination whatsoever.
4 The defense has no right to compulsory process. He has
5 nothing.

6 And Justice Kagan, you asked about the facts
7 of this case, and this is where I was speaking at the
8 beginning, I don't know if you could have a more vivid
9 example of the true danger of a wrongful conviction than
10 the facts of this case, whereas the Ohio court of
11 appeals said the only direct evidence are LP's
12 statements.

13 And LP is found incapable of relating true
14 events. And the circumstances under the statement --
15 under the making of the statement that I described give
16 you great -- I hope would give the Court great pause
17 before condoning a system. And I want to emphasize that
18 word "system" that would allow convictions like this.
19 Because you don't have to look further than the back of
20 our red brief where we reference the -- the Texas
21 attorney general's own manual that it's issued to
22 teachers.

23 Under Texas, they already have the rule that
24 in effect Ohio is asking for here. Statements that are
25 made to social workers and police officers are deemed

1 inadmissible. But statements first made to teachers are
2 not. And so what does the Ohio attorney general's
3 office tell its teachers? Please gather up as much
4 accusatory evidence as you possible -- as you can -- as
5 is possible; otherwise, important testimony might be
6 lost. So you have already a system set up for
7 prosecution by out-of-court statement -- out-of-court
8 accusation.

9 And that is exactly what the Confrontation
10 Clause is designed to -- to prohibit. And I -- believe
11 me, I -- I understand the Court when it gets down into
12 the weeds of the primary purpose test and says to
13 itself, boy, it's really hard to -- sort of looking in a
14 vacuum to ask what is the primary purpose here? But if
15 you have that difficulty, draw the lens back a little
16 bit and ask yourself whether this prosecution comports
17 with anything relating to the spirit of the
18 Confrontation Clause.

19 I submit to you, I just don't see how it
20 can. Let me put the point another way. I know that,
21 obviously, in some of the more recent decisions applying
22 the Crawford case, some of the Justices on the Court
23 have developed some misgivings about the full breadth of
24 that decision. But I -- I want to really forcefully
25 tell you this is not the case to cut back on Crawford.

1 If you applied the old Roberts regime, it
2 would be an absolute lay-down for me and my client
3 because of the unreliability of the statements Justice
4 Kennedy has noted.

5 So it's not Crawford v. Roberts that's
6 driving the discomfort here. I really think that if
7 anything is driving discomfort here, it's the discomfort
8 we have with putting this young child on the stand, and
9 for --

10 JUSTICE KENNEDY: But -- but isn't -- but
11 doesn't that indicate that the testimonial inquiry is
12 somewhat -- somewhat awkward and formalistic?

13 MR. FISHER: No, Justice Kennedy --

14 JUSTICE KENNEDY: And -- there's -- just to
15 follow up, it's almost the same one, that there are
16 States in which every citizen has a -- has a duty to
17 report abuse; is that not correct?

18 MR. FISHER: That is correct. It's not
19 Ohio, but it is correct. But we don't rest our case
20 solely or even primarily on the mandatory reporting
21 requirement. There's the whole constellation of other
22 facts, involving the injuries, involving the teacher's
23 training, involving Ohio law, the way it's written and
24 the like that -- that make us far different than any
25 other ordinary mandatory reporting.

1 JUSTICE GINSBURG: Did we -- I'm going to
2 use the primary purpose test at all. Maybe it doesn't
3 fit as has been suggested, but what of the information
4 that a few of the briefs conveyed, that in most of these
5 cases, the abuser is not criminally tried. There is an
6 attempt to provide for the safety of the child and maybe
7 there is family counseling, but in most cases -- most
8 cases, a criminal prosecution is not waiting at the end
9 of the road.

10 MR. FISHER: Let me say two things, Justice
11 Ginsburg. First, that's because most cases don't
12 involve injuries as serious as this. My client got
13 30 -- almost 30 years in prison because of the
14 seriousness of the injuries here. And so, I don't think
15 there was any -- any possibility this wasn't going to be
16 a criminal prosecution. And, in fact, the Cuyahoga
17 County guidelines that we cite tell social workers to --
18 to divide up cases between the really serious ones and
19 the less serious ones, so criminal prosecution is the
20 really serious one.

21 But even if -- even if I took your premise
22 to apply even on facts like this, imagine a State that
23 said, most drug cases we're going to put into a
24 divert -- a noncriminal diversion program. I can't
25 imagine, then, that it would take the -- that that would

1 take statements alleging drug use or drug possession or
2 drug dealing out of the realm of the Confrontation
3 Clause, because everybody would know that criminal
4 prosecution was still intertwined with that system.

5 And I think that's where I would leave you,
6 is that if you struggle with the primary purpose test
7 here, look at the overall setting and look at the way
8 this is used at trial.

9 JUSTICE BREYER: To be fair to you, I don't
10 think the misgivings come so much from -- they come from
11 the fact that you don't want -- I don't want to see the
12 Confrontation Clause swallow up the 30 exceptions to the
13 hearsay rule, and therefore you have to draw lines.
14 This case is tangential. This case involves tragedy
15 either way. It's a tragedy to abuse children. It's a
16 tragedy to put the wrong person in jail on the basis of
17 unreliable testimony.

18 Now, with that kind of tragedy, it seems
19 tailor-made for the Due Process Clause, allowing States
20 to experiment, allowing the bar to work out some of the
21 things you say. What's at issue here to me, is the
22 problem of not having that Confrontation Clause swallow
23 up the 30 exceptions which are necessary in many
24 instances for the justices of a trial. That's at a
25 general level, since you asked.

1 MR. FISHER: Yeah. No, please, I'm glad.
2 Justice Breyer, that, I hope, gets me back to rule 807,
3 though, which is that that shows the extreme unusual
4 nature of the hearsay law except at issue here. So
5 we're not doing anything that would touch other hearsay
6 laws; those could be other Crawford cases down the line.

7 So you have a highly unusual hearsay law
8 designed to evade the Confrontation Clause.

9 JUSTICE SOTOMAYOR: But what you've -- but
10 you haven't raised a Due Process argument.

11 MR. FISHER: We haven't pressed that and we
12 hope --

13 JUSTICE SOTOMAYOR: This is not a
14 longstanding, traditional exception to the hearsay rule.

15 MR. FISHER: No, it's not.

16 JUSTICE SOTOMAYOR: All right. Whether this
17 would or would not be an excited utterance is another
18 issue altogether under -- depending on how strict the
19 State defines that. But that's also part of why you're
20 fighting the unreliability here, but you're not raising
21 the right challenge.

22 MR. FISHER: No --

23 JUSTICE SOTOMAYOR: Is this really
24 Confrontation Clause.

25 MR. FISHER: It's really Confrontation

1 Clause for all the reasons I've said about the objective
2 purpose of the statement made outside the courtroom to
3 partly aid the criminal process in the way it was used
4 in the court.

5 And, Justice Breyer, I agree with you these
6 are tragic cases. All I'm asking for is that before you
7 put somebody away for 30 years, give them at least what
8 the State has. The State itself is already conducting
9 interviews of these children in advocacy centers or with
10 their own personnel. Give the defense at least the same
11 opportunity. It's no additional -- it's a marginal
12 additional effort and trauma on the child. And we do a
13 long ways to protect against these kind of wrongful
14 prosecutions and convictions.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Meyer, you have five minutes remaining.

17 REBUTTAL ARGUMENT OF MATTHEW E. MEYER

18 ON BEHALF OF THE PETITIONER

19 MR. MEYER: Thank you.

20 One key point of disagreement I have with my
21 colleague is the issue of Ohio law. And specifically,
22 Ohio law does not impose upon any mandatory reporter a
23 duty to investigate. And if it did, I think that would
24 be a fundamentally different analysis. Because the
25 kinds of abuses this Court has told us the Confrontation

1 Clause was designed to address, are government abuses.
2 And where you have a situation where mandatory
3 reporters, who are simply people who interact with
4 children in their day-to-day lives, are required to
5 report to the social services agency what they learn
6 just going about their business, that is fundamentally
7 different than, let's say, the Marion magistrates who
8 are going out collecting affidavits and submitting them
9 in criminal trials as evidence.

10 JUSTICE KENNEDY: So in Ohio the teacher
11 satisfies his or her duty by just phoning social service
12 and then, "There's a kid with terrible bruises in my
13 class, good-bye." That's it?

14 MR. MEYER: That is it. Now, the issue came
15 up, and I think it was pointed out, that you can also
16 satisfy your duty by reporting the -- the abuse to the
17 police. The statute then, in turn, requires the police
18 to notify children's services. So we have a regime
19 that's set up to protect children.

20 And I'd also point out that in many of
21 Ohio's 88 counties, you don't have a children's services
22 agency set up to go out and deal with these emergencies,
23 let's say, in the middle of the night. You call the
24 person who is equipped to deal with it, and that's going
25 to be the sheriff most often.

1 In response to the indication that the
2 accusation is the most important component of this, I
3 would say certainly the -- there was an accusatorial
4 element in the declarant in Davis. Even the victim,
5 Covington, in Bryant as he lay dying, I think, could
6 understand that, when he's telling the police that
7 so-and-so shot me, there's an accusatorial element
8 there. The Dutton case, which this Court referenced in
9 Crawford, and the statement by the prisoner, "If it
10 hadn't been for that son of a bitch, Alex Evans, we
11 wouldn't be here," that is an accusatorial statement.

12 But that does not transform it magically
13 into testimonial statements for purposes of the
14 Confrontation Clause. Ohio's teachers, I think, are
15 horrified to learn that the Supreme Court of Ohio used
16 them no different than cops when they're talking to
17 their child -- the children in their classrooms. That
18 is fundamentally not the type of analysis that -- that
19 any court should be conducting when it comes to
20 testimony -- whether statements are testimonial.
21 So in closing, I would reiterate my prayer for reversal
22 and point out that this three-year-old child, when these
23 bruises were being described to his teacher, is just
24 fundamentally unlike the -- the treasonous conspiracies
25 of unknown scope aimed at killing or overthrowing the

1 king, which is the Sir Walter Raleigh case. It's just
2 not the same.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 12:05 p.m., the case in the
7 above-entitled matter was submitted.)

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