No. 11-1407

In The Supreme Court of the United States

RICKY LEE ALLSHOUSE, JR.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania, Western District

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE DEFENDER ASSOCIATION OF PHILADELPHIA AND THE PUBLIC DEFENDER ASSOCIATION OF PENNSYLVANIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici adopt and incorporate the question presented by petitioner.

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INTEREST OF *AMICI CURIAE*[1]

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all 50 states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

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

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received at least 10-days' notice of *amici curiae*'s intent to file this brief and have consented to its filing as reflected in the consent letters filed herewith.

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

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

PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania, who are actively engaged in providing criminal defense representation. As *amicus curiae*, PACDL presents the perspective of experienced criminal defense attorneys who aim to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and U.S. Constitutions, and work to achieve justice and dignity for defense lawyers, defendants, and the criminal justice system itself. PACDL includes more than 800 private criminal defense practitioners and public defenders throughout the Commonwealth.

DEFENDER ASSOCIATION OF PHILADELPHIA

The Defender Association of Philadelphia is a private, non-profit corporation that represents a substantial percentage of the criminal defendants in Philadelphia County at trial, at probation and parole revocation proceedings, and on appeal. The Association is active in all of the trial and appellate courts, as well as before the Pennsylvania Board of Probation and Parole. The Association attempts to ensure a high standard of representation and to prevent the abridgment of the constitutional and other legal rights of the citizens of Philadelphia and Pennsylvania.

PUBLIC DEFENDER ASSOCIATION OF PENNSYLVANIA

The Public Defender Association of Pennsylvania is a Pennsylvania non-profit corporation whose membership comprises of the Chief Public Defenders, or their designees, for all of the 67 counties of the Commonwealth of Pennsylvania.

The *Amicus* Committee of the Board of Directors of the Public Defenders Association of Pennsylvania has discussed this case and determined the issue presented in this matter is of such importance to the indigent criminal defense community, the clients we represent, and the public at large throughout the Commonwealth of Pennsylvania, that it should offer its views to the Court for consideration.

SUMMARY OF THE ARGUMENT

Statements to child services workers are testimonial under the standards enunciated by this Court. Across the country, child services workers are commonly integrated into teams of law enforcement officials who investigate allegations of child abuse. The mandatory reporting laws that exist in *all 50 states* reflect this integration. Child services workers are under a legal obligation to submit detailed reports to law enforcement officials when they even suspect abuse. This legal obligation, as well as their role in law enforcement investigations, undoubtedly shapes their interviews.

As a result, a primary purpose of child services workers' investigations is to gather evidence for use in future criminal prosecutions. Therefore, statements made to them are testimonial under the Confrontation Clause. Ruling otherwise would remove an entire class of cases from the protection of the Confrontation Clause. That result is especially damaging here, where children are particularly susceptible to suggestibility, and convictions for child abuse carry grave penalties and substantial social stigma. *Amici* respectfully submit that this category of testimony is *more* in need of the constitutional guarantee of reliability (confrontation), not *less*.

ARGUMENT

I. ONLY THIS COURT CAN RESOLVE THE DEEP SPLIT OF AUTHORITY ON THIS IMPORTANT QUESTION OF CONSTITUTIONAL LAW.

The Confrontation Clause of the Sixth Amendment mandates that, in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. In *Crawford* v. *Washington*, 541 U.S. 36, 62 (2004), this Court ruled that the Confrontation Clause mandates a particular procedural method, namely cross-examination, as the means of assessing a statement's reliability. Therefore, this Court ruled, that when testimonial statements are involved, the *only* indicium of reliability sufficient to satisfy constitutional demands is confrontation. *Id.* at 68 ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination").

In *Davis* v. *Washington*, 547 U.S. 813, this Court elaborated on the distinction between "testimonial" and "nontestimonial" statements. In *Davis*, this Court ruled that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the interrogation's primary purpose is to enable police to meet an ongoing emergency. By contrast, statements are testimonial when circumstances objectively indicate that no ongoing emergency exists, and that the interrogation's primary purpose is to establish past events

potentially relevant to later criminal prosecution. *Id.* at 822. To determine an interrogation's primary purpose, courts must objectively assess the circumstances under which the interrogation takes place and the statements and actions of the parties involved. *Michigan* v. *Bryant*, 131 S. Ct. 1143, 1156 (2011).

State and lower federal courts have come to different conclusions when applying this test to statements made to child services workers. As Petitioner points out, this area has proved particularly troublesome. *Compare, e.g.*, *Commonwealth* v. *Allshouse*, Pet. App. at 39a (child's statement to Children and Youth Services caseworker was nontestimonial), *and State* v. *Buda*, 949 A.2d 761, 780 (N.J. 2008) (holding that statements to interviewer from Division of Youth and Family Services were nontestimonial), *and State* v. *Bobadilla*, 709 N.W.2d 243, 256 (Minn. 2006) (holding that statements by a child to a child protection worker during a risk assessment interview were nontestimonial) *with Bobadilla* v. *Carlson*, 575 F.3d 785, 787 (8th Cir. 2009) (statements to social worker were testimonial), *cert. denied*, 130 S. Ct. 1081 (2010), *and People* v. *Rolandis G.*, 902 N.E.2d 600, 613 (Ill. 2008) (child's statements to child advocate were testimonial), *and State* v. *Justus*, 205 S.W.3d 872, 880-81 (Mo. 2006) (statements made to social worker were testimonial because interview was performed to preserve child's testimony for trial), *and State* v. *Mack*, 101 P.3d 349, 352 (Or. 2004) (child's statements to Department of

Human Services worker were testimonial because DHS worker was acting as a proxy for the police).

As a result, there are vastly different legal regimes governing child abuse prosecutions across the country. This dichotomy has serious repercussions. The scope of an individual's Sixth Amendment rights varies widely depending on the state in which the individual finds himself criminally accused. The severe punishments attendant to criminal convictions should not depend on such incidental circumstances. Only this Court can remedy this unfairness.

Amici and their members regularly encounter this disparity and strongly believe that the criminal justice system would benefit from a resolution of this question. The normal adversarial testing of evidence is not occurring in thousands of cases across the country each year. Moreover, defendants and their attorneys are regularly forced to develop a trial strategy in the face of uncertain constitutional rights. Indeed, *Amici* and its members observe that many of these defendants give up their right to a trial altogether and plead guilty because they know that they will be unable to exercise their right of confrontation and will examine only a child services worker instead of their alleged victim. Such a limitation is known to be ineffective at exposing bias, suggestion, or fabrication. The present state of confusion thus has real consequences for real people nearly every day.

As the cases surveyed by Petitioner demonstrate, the split of authorities regarding the admissibility of

child forensic interview testimony is deep and shows no signs of resolving itself. Indeed, the split is entrenched and growing with time, as noted even by the Attorneys General of numerous states in supporting a petition for *certiorari* in *Iowa* v. *Bentley*. *See* Br. of Missouri et al. as *Amicus Curiae* Supporting Pet'r at 2, *Iowa* v. *Bentley*, No. 07-886 (2008). Additional percolation will only yield additional confusion and unfair treatment.

II. STATEMENTS TO CHILD SERVICES WORKERS ARE TESTIMONIAL BECAUSE CHILD SERVICES WORKERS SERVE AS PROXIES OF LAW ENFORCEMENT OFFICIALS IN CHILD ABUSE CASES.

To determine the testimonial nature of a statement, courts must determine the primary purpose of the interrogation. *Bryant*, 131 S. Ct. at 1154 (citing *Davis*, 547 U.S. at 822). If the primary purpose of the interrogation is to establish past events potentially relevant to future criminal prosecution, the statements are testimonial, and therefore, subject to the Confrontation Clause. *Id.* To find the primary purpose of an interrogation, courts examine factors such as the circumstances under which an encounter occurs and the statements and actions of *both* the declarant and the interrogators. *Id.* at 1160.

Child services workers may have multiple purposes for conducting interviews, but one of their constant and primary duties is to gather evidence for future criminal prosecutions. *See, e.g.*, *State* v.

Arnold, 933 N.E.2d 775, 782-83 (Ohio 2010) (acknowledging the multidisciplinary role of child-advocacy centers). Indeed, law enforcement officials long ago recognized that, to be effective, child abuse investigators needed particularized training on the unique psychology of children. Law enforcement officials recognized that ordinary police investigators often are not suited for this task especially in the case of children who have suffered abuse. Instead, the law enforcement community recognized that a coordinated response from professionals from multiple disciplines and with specialized training was required to respond adequately to possible cases of child abuse. *See generally*, Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, *Forming a Multidisciplinary Team To Investigate Child Abuse* 4 (2000) ("It is now well accepted that the best response to the challenge of child abuse and neglect investigations is the formation of a [Multidisciplinary Team].").

These "multidisciplinary teams" have emerged as the preferred model of investigation in nearly every state. Multidisciplinary teams are mandated by law in a number of states and specifically provided for by statute, although discretionary, in many more. *See generally* National Center for Prosecution of Child Abuse, National District Attorneys Association, *Multidisciplinary/Multi-Agency Child Protection Teams Statutes* (2010) (listing multidisciplinary team statutes by state), *available at* http://www.ndaa.org/pdf/Multidisciplinary%20Multi%20Agency%20Child%20Protection%20Teams.pdf.

Presently, child services workers across the country are an essential partner of law enforcement agencies through these multidisciplinary teams. States routinely use Child Advocacy Centers (CACs) to integrate the social, medical, and legal response to child abuse and to avoid repeated questioning of child abuse victims. Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, 24 Crim. Just. 12 (2009). Because child services workers are trained in the specialized interview techniques appropriate for child victims, they are the government officials most likely to conduct child interviews. *Id.* In this way, their role on the "front lines" of child abuse investigations and their specialized expertise has created a regime in which their primary purpose in conducting interviews is often to gather evidence for criminal prosecutions. *See, e.g.*, *Jerry Sandusky Trial: "Victim 1" testifies that school counselor didn't believe him*, CBS News.com (June 12, 2012) *available at* http://www.cbsnews.com/2102-504083_162-57451650.html?tag=contentMain;contentBody (detailing how Children & Youth Services worker conducted initial law-enforcement interview of suspected abuse victim).

Indeed, law enforcement officials from almost every State acknowledged to this Court only last year that child services workers are a critical component of their criminal investigations. *See* Brief of the States of Arizona, Alabama, Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada,

New Hampshire, New Jersey, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming as *Amici Curiae* in Support of Petitioners at 22, *Camreta* v. *Green*, 131 S. Ct. 2020 (2011) (Nos. 09-1454 and 09-1478) ("Child-abuse investigations necessarily implicate law enforcement issues. . . . Many States therefore encourage or require cooperation between child-welfare agencies and law enforcement departments. . . .").

The mandatory reporting laws for child services workers that exist in *all 50 states* reflect their integration with law enforcement officials. *See generally* U.S. Dept. of Health and Human Services, *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws* (2012). These laws deliberately establish a very low threshold for requiring child services workers to report evidence of abuse to law enforcement officials – typically prescribing disclosure of evidence to law enforcement officials even if abuse is merely *suspected*. *See, e.g.*, 23 Pa. Cons. Stat. § 6312 (report required upon *reasonable cause to suspect* that child suffered abuse); *see also* Ala. Code § 26-14-3; Alaska Stat. §§ 47.17.020, 47.17.023; Ariz. Rev. Stat. § 13-3620; Ark. Code Ann. § 12-18-402; Cal. Penal Code §§ 11165.7, 11166; Colo. Rev. Stat. § 19-3-304; Conn. Gen. Stat. § 17a-101a; Del. Code Ann. Tit. 16 § 903; D.C. Code Ann. § 4-1321.02; Fla. Stat. Ann. § 39.201; Ga. Code Ann. §§ 16-12-100, 19-7-5; Haw. Rev. Stat. § 350-1.1; Idaho Code § 16-1605; Ill. Comp. Stat. Ch. 325 § 5/4; Ind. Code Ann. §§ 31-33-5-1,

31-33-5-2; Iowa Stat. Ann. §§ 232.69, 728.14; Kan. Stat. Ann. § 38-2223; Ky. Rev. Stat. § 620.030(3); La. Child Code Art. 609-10; Me. Rev. Stat. Tit. 22, § 4011-A; Md. Fam. Law §§ 5-704, 5-705; Mass. Gen. Law Ch. 119, § 51A; Mich. Comp. Laws § 722.623; Minn. Stat. Ann. § 626.556; Miss. Code Ann. § 43-21-353; Mo. Rev. Stat. §§ 210.115, 568.110; Mont. Code Ann. § 41-3-201; Neb. Rev. Stat. § 28-711; Nev. Rev. Stat. § 432B.220; N.H. Rev. Stat. § 169-C:29; N.J. Stat. Ann. § 9:6-8.10; N.M. Stat. Ann. § 32A-4-3; N.Y. Soc. Serv. Law § 413; N.C. Gen. Stat. § 7B-310; N.D. Cent. Code § 50-25.1-03; Ohio Rev. Code § 2151.421; Okla. Stat. Ann. Tit. 10A, § 1-2-101; Or. Rev. Stat. § 419B.010; R.I. Gen. Laws §§ 40-11-3(a), 40-11-6; S.C. Code Ann. § 63-7-310; S.D. Codified Laws § 26-8A-15; Tenn. Code Ann. §§ 37-1-403, 37-1-605; Tex. Fam. Code § 261.101; Utah Code Ann. § 62A-4a-403; Vt. Stat. Ann. Tit. 33, § 4913; Va. Code Ann. § 63.2-1509; Wash. Rev. Code § 26.44.030; W. Va. Code Ann. § 49-6A-2; Wis. Stat. Ann. § 48.981; Wyo. Ann. Stat. § 14-3-205.

In every state, therefore, child services workers *must* share their findings of potential abuse – including statements by victims – with law enforcement officials upon penalty of law. Child services workers must be aware of this legal obligation when they conduct interviews. Consequently, they must be treated like law enforcement officers for Confrontation Clause purposes. *See, e.g., Crawford*, 541 U.S. at 53 (while discussing the historical foundations of the Sixth Amendment, noting that "it is not surprising that other government officers performed the investigative functions [under the Marian statutes] now

associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.").

For this reason, it is unsurprising that several states recognize that these mandatory-reporter laws require courts to treat child services workers as law enforcement officials for constitutional purposes. *See, e.g.*, *State* v. *Oliveria*, 961 A.2d 299, 311 (R.I. 2008) (holding that defendant had Sixth Amendment right to assistance of counsel in interview with child services worker because child services worker intended to elicit incriminating information and knew she would have to turn interview notes over to police); *Commonwealth* v. *Ramos*, 532 A.2d 465, 468 (Pa. Super. Ct. 1987) (requiring child services workers to issue *Miranda* warnings because "CYS is not only a treatment agency, but is the investigating arm of the statewide system of Child Protective Services"); *Cates* v. *State*, 776 S.W.2d 170, 174 (Tex. Crim. App. 1989) (requiring child services workers to issue *Miranda* warnings because they are representing "the State of Texas, the party in interest in a criminal prosecution").

Combined, the integration of child services workers into the prosecutorial machinery, mandatory reporting laws, and the low threshold for reporting render child services workers proxies of law enforcement officers. Child services workers who are dispatched to interview children regarding abuse must realize that, unless the accusations turn out to be completely unfounded, they will be legally required to

report the details of the interview promptly to law enforcement officers. They must realize that they will be an important part of any subsequent criminal prosecution. And they must realize that the information the child provides will be an important part of any criminal investigation. These realizations inevitably shape the questions asked and qualify the child's responses as testimonial. *See Williams* v. *Illinois*, No. 10-8505, slip op. at 29 (U.S. June 18, 2012) (plurality opinion) (noting that statements are subject to the Confrontation Clause when they involve "out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct. . . ."). Consequently, these statements cannot be used against the defendant in a subsequent criminal prosecution, absent unavailability and the opportunity for cross-examination.

The right to confrontation through cross-examination is especially important in child abuse cases. Children are particularly susceptible to suggestion. *See* Maggie Bruck, Stephen J. Ceci & Helene Hembrooke, *The Nature of Children's True and False Narratives*, 22 Developmental Review 520, 521 (2002); *see also Kennedy* v. *Louisiana*, 554 U.S. 407, 444 (2008) (acknowledging that "children are highly susceptible to suggestive questioning techniques"). When interviewing a child, child services workers can inject bias into the process – often without even realizing it – that can lead to false allegations of

abuse.[2] *See Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 338 (2009) (Kennedy, J., dissenting). ("[A purpose of the Confrontation Clause] is to alleviate the danger of one-sided interrogations by adversarial government officials who might distort a witness's testimony.").

Moreover, *amici*'s experience in criminal prosecutions is that child services workers are (understandably) predisposed to believe that abuse has occurred. This is so because they are dispatched to investigate child abuse only when there has been an allegation of abuse. "[B]iased interviewers do not ask questions that might provide alternative explanations for the allegation or that elicit information inconsistent with the interviewer's hypothesis." *Id.* Exposing and counteracting this bias is the Confrontation Clause's *raison d'être*. The import of the decision below, however, is to encourage law enforcement officials to insulate those accusations from confrontation – the paradigmatic evil to which the Sixth Amendment was addressed. *See Crawford*, 541 U.S. at 51 ("Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.").[3]

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[2] While there are techniques to reduce interviewer bias and, therefore, produce fewer "false positives," use of those techniques is only a means of ensuring reliability – and not the constitutionally mandated means of ensuring reliability, cross-examination, at that.

[3] *See also, e.g.*, *Davis*, 547 U.S. at 826 (emphasis in original): "[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a

(Continued on following page)

III. RULING THAT STATEMENTS TO CHILD SERVICES WORKERS ARE NONTESTIMONIAL WOULD REMOVE AN ENTIRE CATEGORY OF CASES FROM THE PROTECTIONS OF THE CONFRONTATION CLAUSE.

Categorizing statements made to child services workers as nontestimonial will give police and prosecutors a roadmap to eliminate confrontation in a category of cases most in need of it. The vast majority of suspected child abuse cases initially are reported not to the police but to a child services organization.[4] These organizations must investigate the reports to determine if abuse occurred. Under the mandatory reporting laws, however, if the child services workers who conduct the investigation *suspect* that abuse is occurring, they *must* report it to law enforcement. *See supra* at 11-12.

The path to avoiding confrontation is a clear one. If this Court were to endorse the Pennsylvania Supreme Court's decision below, either actively or passively by declining review, law enforcement officials

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note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case – English or early American, state or federal – can be cited, that is it."

[4] For example, in 2010, only 5.6% of suspected child abuse referrals in Pennsylvania came from law enforcement agencies. Pennsylvania Department of Public Welfare, 2010 Annual Child Abuse Report 10 (2011), *available at* http://www.dpw.state.pa.us/ucmprd/groups/webcontent/documents/report/p_011342.pdf.

would know to funnel *all* child abuse investigations through child services workers to avoid subsequent confrontation. They could do this knowing that the child services worker is under a *legal obligation* to report evidence of suspected abuse to law enforcement. They could also do so by indulging the fiction adopted below that a primary purpose of this initial interview would be to assess imminent risks to the child's well-being, not to collect evidence for use in future prosecution. This theory willfully ignores the fact that child services workers are mandatory reporters and play a critical role in the law-enforcement process.

Indeed, law enforcement officials have already begun to employ such tactics. For example, an *American Prosecutors Research Institute Update*, published just months after the *Crawford* decision, carefully instructed law enforcement officials to use child services workers to conduct interviews in a way that would render the child's statements nontestimonial.[5] Victor I. Vieth, *Keeping the Balance True: Admitting*

[5] The cat-and-mouse game between law enforcement officials and this Court's decisions is nothing new. For example, years after the Court's decision in *Miranda*, law enforcement officials invented several practices to bend the decision to make criminal convictions easier. *See, e.g., Missouri* v. *Seibert*, 542 U.S. 600, 617 (2004) (rejecting a deliberate, two-step process by law enforcement agencies whereby confessions were illegally induced and then repeated after the issuance of *Miranda* warnings: "Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute.").

Child Hearsay in the Wake of Crawford v. *Washington*, APRI Update, Vol. 16, No. 12 (2004). The Update instructed:

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

Id. at 2. One of our core constitutional protections against wrongful convictions should not be so easily subverted.

This Court needs to halt the erosion of constitutional rights underway in Pennsylvania and other jurisdictions. Endorsing the decision below that statements to child services workers are non-testimonial would dramatically and unfairly shift the balance of power in criminal trials for an entire class of cases throughout the country. Without correction by this Court, nearly all witnesses in abuse cases could be shielded from cross-examination at the whim of prosecutors. Child abuse trials will soon become

trials by ex parte examination – precisely the evil targeted by the Confrontation Clause.

IV. RULING THAT STATEMENTS TO CHILD SERVICES WORKERS ARE TESTIMONIAL WILL NOT SILENCE CHILDREN'S VOICES.

It is wrong to mischaracterize this case as a choice between promoting or discouraging child abuse prosecutions. Several states, including Pennsylvania, have enacted laws that allow children to testify in a manner that greatly reduces the trauma of the experience, such as testifying outside of the defendant's presence. *See, e.g.*, 42 P.S. § 5984.1 (allowing child victims or material witnesses to testify outside of the defendant's presence if testifying in open court would result in child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate); *see also, e.g.*, Ark. Code Ann. § 16-43-1001; Cal. Penal Code § 1347l; Ga. Code Ann. § 17-8-55; 725 Ill. Comp. Stat. 106B5; Ky. Rev. Stat. Ann. §§ 26A.140, 421.350; Mo. Rev. Stat. § 491.680; N.Y. Crim. Proc. Law § 65.10; R.I. Gen. Laws § 11-37-13.2; Tex. Code Crim. Proc. Ann. Art. 38.071; Va. Code Ann. § 18.2-67.9. These statutes give child victims special accommodations to cope with the stresses of a face-to-face encounter with their alleged abuser in open court. This Court has held that such procedures are constitutionally permissible. *See Maryland* v. *Craig*, 497 U.S. 836, 857 (1990).

Importantly, however, these statutes do not exempt the child's testimony from cross-examination – the only constitutionally permissible way to test the reliability of a testimonial statement. Rather, these statutes protect children from the emotional distress that may come with testifying in the presence of their alleged abuser in open court while preserving the defendant's right to confrontation. The Constitution demands no less, yet the opinion below – when adopted by other states – will eliminate cross-examination of this critically important and emotionally charged testimony.

CONCLUSION

Amici understand the concern that child abuse cases, like domestic violence cases, are "notoriously susceptible to intimidation or coercion of the victim" and often difficult to prosecute. *Davis*, 547 U.S. at 833. By the same token, convictions for child abuse carry huge stigmas, and we must ensure that such convictions are correct and reliable. Cross-examination of alleged child abuse victims is especially important to ensure the reliability of such convictions. *See Kennedy*, 554 U.S. at 444 (2008) ("Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement."). Put simply, this category of testimony is *more* in need of the constitutional guarantee of reliability (confrontation), not *less*.

Accordingly, *amici* urge this Court to grant the petition and to recognize the practical reality that child services workers are surrogate law enforcement agents, and that statements made to them in the course of investigating child abuse are therefore testimonial.

Respectfully submitted,

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