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STATEMENT OF INTEREST OF AMICI CURIAE

The sexual abuse of a child¹ triggers a critical social and health crisis that requires two immediate actions. The first action is to immediately protect the child. In Ohio, county children services agencies and local law enforcement provide emergency protection to victims and investigate and prosecute allegations of child abuse. The second, often simultaneous action, is to provide immediate diagnosis and medical treatment for the victim, functions that have traditionally been carried out by whichever medical facility was closest. This led to inconsistent diagnoses and treatment by medical professionals who were not specially trained and thus, ill-equipped to address the magnitude of trauma suffered by these victims.

Amici Curiae The Center for Child and Family Advocacy (“CCFA”) and Nationwide Children’s Hospital (“NCH”) recognized this problem, and advocated for the establishment of one of the first children’s advocacy centers in Ohio. Children’s advocacy centers are not child protection or law enforcement agencies. Instead, they focus on treating child abuse victims through a multi-disciplinary medical model of care that focuses on treating the immediate injury and providing long term healing and support for the child abuse victim and their non-offending family members. In 2005, lawmakers approved the establishment of children’s advocacy centers at the county level in Ohio. In so doing, they created a framework in which the medical treatment model of children’s advocacy centers worked in coordination with the traditional protective service/law enforcement model in order to provide prompt and expert supports for child victims and their families.

¹ In Franklin County, Ohio alone, more than 7,000 allegations of physical, sexual, and emotional abuse and neglect of children were reported in 2007. Almost 1,400 of these reports, over eighteen percent, referred children alleged to have been sexually abused to Franklin County Children Services (“FCCS”). Over eighty percent of sexual abuse cases reported to FCCS involve a parent, a relative, or other known adult as the perpetrator.

Now a children's advocacy center established in Franklin County, CCFA is a health facility which responds to the immediate medical and emotional needs of child abuse and domestic violence victims and provides these victims and their non-offending family members long-term medical and therapeutic support. Every day, CCFA brings together an expert team, specially trained in child abuse, to work with child victims utilizing strategies and techniques based upon current trauma research. The team includes physicians, nurse practitioners, psychologists, therapists, domestic violence advocates, and social workers who coordinate with law enforcement, public children services workers, and prosecutors to quickly identify victims in order to provide comprehensive medical diagnoses, ongoing treatment, and long term support to victims and their families.

As entities that were instrumental in establishing children's advocacy centers in Ohio, NCH and CCFA are especially interested in the legal issues presented in this appeal: (1) whether CCFA functions as a law enforcement agency or a child abuse prevention center; and (2) whether child victims interviewed by an employee of CCFA understand that their statements may be used in a later legal proceeding. Accordingly, Amici Curiae respectfully submit this brief to emphasize that, rather than functioning as an arm of law enforcement, CCFA specializes in the diagnosis and comprehensive medical treatment of children who are sexually abused. The impact of child sexual victimization is far-reaching. Some victims experience physical injuries, infection, or pregnancy. All victims experience emotional injuries. Since family members and other known adults perpetrate most sexual abuse of children, families suffer as well. Children and families who receive services through children's advocacy centers are not focused on witness preparation and litigation. Instead they are focused on the treatment of the acute physical and mental injuries caused by the abuse and the long, difficult process of healing.

Research has shown that such healing begins with a comprehensive assessment of the victim's physical and emotional injuries. The assessment is completed to identify and treat physical injuries and to alleviate the impact of sexually transmitted infections or pregnancy. The assessment must be comprehensive to avoid re-traumatizing the victim through numerous physical examinations and/or interviews about the event(s). Research has also shown that child victims respond best to developmentally focused interview techniques designed to elicit the critical information necessary to reveal potential physical and emotional injuries. Identifying potential physical and emotional injuries helps in the development of a medical response and a mental health treatment intervention plan for the child and the family.

The legal process adopted in Ohio for the establishment of children's advocacy centers does not override the traditional authority vested in local law enforcement, local children services agencies, and local prosecuting attorneys to receive and investigate allegations and to prosecute criminals for committing crimes against children. As established in Ohio, children's advocacy centers work to prevent child abuse by providing research, education, intervention and treatment services to child victims and their families. A ruling that children's advocacy centers function as agents of law enforcement by collecting statements from child victims to be used in future legal proceedings would strike a blow to some of the most innovative and successful public/private collaborations in Ohio. NCH and CCFA urge this Court to affirm the ruling of the Tenth District Court of Appeals.

STATEMENT OF FACTS

Amici adopts the statement of the case and facts set forth by Appellee State of Ohio.

ARGUMENT

Proposition of Law

Employees of the Center for Child and Family Advocacy at Nationwide Children's Hospital are not law enforcement agents when providing services to alleged victims of abuse, and as a result Ohio courts must apply the objective witness test to determine whether or not the victim's out-of-court statements were testimonial so as to implicate the Confrontation Clause of the Sixth Amendment.

A. **Employees of the Center for Child and Family Advocacy at Nationwide Children's Hospital are not law enforcement agents when providing services to alleged victims of abuse.**

The only issue in this case is whether or not the Tenth District Court of Appeals correctly held that a victim's statements, recorded during an interview conducted by a licensed social worker employed by CCFA prior to the victim's medical examination, were nontestimonial. Following the U.S. Supreme Court's decision in Crawford v. Washington (2004), 541 U.S. 36, and its progeny, this Court has repeatedly wrestled with the admissibility of out-of-court statements in criminal prosecutions. The first part of the analysis generally focuses on the circumstances in which the statements were made. If the statement was made during a police interrogation, a court must then address the primary purpose of the interview. If the primary purpose was to enable police to address an ongoing emergency, the statements are nontestimonial. If the statements were made to gather information for later criminal prosecution, they are testimonial. See Davis v. Washington (2006), 547 U.S. 813; State v. Siler (2007), 116 Ohio St. 3d 39.

If the statements were not made during a police interrogation, the second part of the analysis focuses on perception of the declarant. Commonly called the objective witness test, the analysis considers whether the statement was "made under circumstances which would lead an

objective witness reasonably to believe that the statement would be available for use at a later trial.” Crawford, 541 U.S. at 52; State v. Stahl (2006), 111 Ohio St. 3d 186.

In the instant case, the Tenth District Court of Appeals determined that CCFA is not an agent of the police. Accordingly, any statements made by the witness during her CCFA interview were evaluated under the objective witness test. Evaluating all the circumstances leading to the interview, the court concluded that the statements were nontestimonial since the witness would not have understood that her statements could be used at a later trial. Amici Nationwide Children’s Hospital and the Center for Child and Family Advocacy respectfully urge this Court to affirm the Tenth District Court of Appeals decision finding these statements to be nontestimonial.

1. **Crawford does not bar out-of-court statements that are nontestimonial.**

In Crawford, 541 U.S. 36, the Supreme Court of the United States held that out-of-court statements that are **testimonial** are barred, under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether the statements are deemed reliable by the trial court. Id. at 68-69. In Crawford, the Court made a distinction between the treatment of testimonial and nontestimonial hearsay:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law . . . , and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross examination.

Id. at 68. Although the Crawford Court did not define the term “testimonial,” it concluded that “whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police investigations.” Crawford, 541 U.S. at 68. Statements made to medical personnel for purposes of diagnosis or treatment remain

properly admissible under the medical treatment exception to the hearsay rule contained in Rule 803(4) of the Ohio Rules of Evidence. Indeed, this Court has already recognized that Crawford did not render these statements inadmissible because “they are not even remotely related to the evils that the Confrontation Clause was designed to avoid.” State v. Muttart (2007), 116 Ohio St. 3d 5, 18.

Following Crawford, the United States Supreme Court in Davis, 547 U.S. 813 revisited the definition of “testimonial,” and articulated the “primary purpose test” to determine whether statements made in response to law enforcement interrogations are testimonial or nontestimonial:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

2. **The Center for Child and Family Advocacy does not function as a law enforcement agency.**

In his Memorandum in Support of Jurisdiction (filed Aug. 25, 2008) and his Brief on the Merits (filed on Mar. 30, 2009), Appellant, with little analysis or legal support (and indeed contrary to numerous Ohio decisions as set forth below), simply concludes that statements made by an alleged victim of abuse to employees of CCFA are statements made to law enforcement officials in the course of a police investigation. Appellant’s Memo in Support of Jurisdiction, at 7 and Appellant’s Merit Brief, at 10.

Appellant argues that CCFA is a law enforcement agency since it is intricately connected and involved with law enforcement and prosecution under the Ohio Revised Code. Appellant’s Merit Brief, at 13. Specifically, Appellant cites the Ohio Revised Code sections that enumerate

county law enforcement and prosecutors as parties to the Memorandum of Understanding (MOU) required to establish a children's advocacy center at the county level. Appellant's Merit Brief, at 10. Appellant fails to explain, however, that the statutory code sections cited – O.R.C. §§ 2151.425 through 2151.428 -- merely describe the steps to be taken should an Ohio county choose to establish a children's advocacy center. Specifically, local law enforcement, children services agencies, and prosecuting attorneys are identified as entities who should participate with a children's advocacy center in drafting an MOU that describes and delineates responsibility for carrying out the functions, activities and services to be provided to child victims and their families in counties served by a local children's advocacy center. This statutory framework encourages collaboration at the local level to improve the timely delivery of critical services to victims of sexual abuse and their families. It does not make CCFA a law enforcement agency.²

In his analysis of CCFA's alleged law enforcement function, Appellant fails to mention R.C. 2151.428(C) which states that nothing in the laws establishing the methodology to set up a children's advocacy center relieves any "...public official or agency from any legal obligation or responsibility." Under Ohio law, public children services agencies are the sole legal entity responsible for investigating allegations of child abuse and neglect, in cooperation with local law enforcement. O.R.C. § 5153.16 creates children services boards in Ohio and establishes their authority. The primary function of public children services agencies in Ohio is to protect children. Under Ohio law, a public children services agency must "...[m]ake an investigation concerning any child alleged to be an abused, neglected, or dependent child." R.C.

²The Tenth District Court of Appeals recently addressed this issue in State v. M.B., No. 08AP-169, 2009 WL 418768, at *1, fn. 3 (Ohio App. 10th Dist. Feb. 19, 2009) stating, "[c]hild advocacy centers, such as the Child and Family Advocacy Center at Children's Hospital, were established in 2005 by the adoption of R.C. 2151.425 through 2151.428. These statutes authorize collaboration between children services agencies, local law enforcement, prosecutors and other appropriate entities through a memorandum of understanding. Local law enforcement and prosecutors are permitted to access information at the centers when investigating alleged abuse. This collaboration does not make the centers' employees agents of the police when providing services to alleged victims of sexual abuse."

§ 5153.16(A)(1). Further, a public children services agency is prohibited from delegating this investigative responsibility to any other public or private agency. See State ex rel. Beacon Journal Publishing Co. v. City of Akron (2004), 104 Ohio St. 3d. 399; O.R.C. § 5153.16(C)(2); O.A.C. § 5101:2-33-07(A). Far from becoming a law enforcement agency, CCFA is prohibited by law from investigating allegations of child abuse.

In carrying out its legal mandate to investigate circumstances surrounding any child alleged to be abused, neglected, or dependent, a public children services agency is required to cooperate with local law enforcement agencies, which includes timely notification of an allegation of child abuse or neglect, cooperation in an investigation, and prompt submission of a written report summarizing its investigation to local law enforcement. R.C. § 2151.421(F)(1). None of these requirements was changed when Chapter 2151 was amended in 2005 to address the establishment of children's advocacy centers at the county level. CCFA was established in Franklin County to provide immediate comprehensive medical treatment and services for child victims and their families as a supplement to existing supports for abused children, not to supplant them.

3. The Davis/Siler primary purpose test is not applicable where questioner is not a law enforcement agent or officer.

In his briefing, Appellant, drawing on his conclusion that CCFA is a law enforcement agency, erroneously asserts that the victim's out-of-court statements should have been analyzed under the primary purpose test of Davis, 547 U.S. at 822 and Siler, 116 Ohio St. 3d 39 (adopting the Davis primary purpose test) to determine if they are testimonial or nontestimonial under Crawford.

Surprisingly absent from Appellant's Memorandum in Support of Jurisdiction and Appellant's Merit Brief, however, is any mention of this Court's decision in Stahl, 111 Ohio St.

3d 186. In Stahl, this Court, faced with a Confrontation Clause challenge to the admission of statements made by an adult victim to a nurse at the hospital's specialized unit for victims of sexual assault, declined to apply the Davis primary purpose test in determining whether or not the statements were testimonial. The Stahl Court distinguished the statements made in Davis, which were made in response to questioning by 911 operators assumed to be agents of law enforcement officers, from the statements made by the victim in Stahl, which were made in response to questioning by a medical professional at a medical facility to determine proper medical treatment for the victim. Because of this distinction, the Stahl Court applied the "objective witness" test articulated in Crawford. Thus, in Ohio, if the questioner eliciting out-of-court statements is a law enforcement officer or agent, courts apply the primary purpose test to determine whether the statements are testimonial. Siler, 116 Ohio St. 3d 39. If the questioner, however, is not a law enforcement officer or the agent thereof, courts apply the objective witness test. Stahl, 111 Ohio St. 3d at 186.

Appellant further ignores the Ohio decisions which, consistent with Stahl, have held that the questioning of a child by a social worker at CCFA does not constitute a police interrogation. In State v. Edinger (Ohio App. 10th Dist. Mar. 30, 2006), No. 05AP-31, 2006 WL 827412, the Tenth District Court of Appeals determined that the questioning of a child by a social worker at CCFA "did not constitute the functional equivalent of a police interrogation" where the facts show:

- (1) The social worker was not a governmental officer or employee. She was an employee of the Child Advocacy Center, which is part of Children's Hospital. The fact that the social worker was, in essence, a member of a team does not, in and of itself, make the social worker a government official absent a more direct and controlling police presence.
- (2) The social worker testified that her function in interviewing P.S. [the child] was solely for medical treatment and diagnosis and not to develop testimony for trial.

- (3) The forms used were prepared by the hospital and the social worker did not act at the direction of the police.
- (4) Although the police were permitted to watch the interview, they did not control the process.
- (5) The police were not overtly present and the child was not made aware of their presence.

Id. at *16. See also State v. Martin (Ohio App. 10th Dist. Jun. 1, 2006), No. 05AP-818, 2006 WL 1495079, at *4 (statements made to CCFA social worker were nontestimonial where social worker did not work for the state, purpose of interview was to gather information for hospital's medical staff to treat child, child was not aware of any police presence during interview, and child, at age 10, would not have realized that her statements would be available for use at a later trial.); State v. Jordan (Ohio App. 10th Dist. Nov. 28, 2006), No. 06AP-96, 2006 WL 3411420, at *5 (statements made to CCFA social worker were nontestimonial where social worker was not an employee of the state and the purpose of the interview was to gather information for treatment and not to investigate alleged sexual abuse); In re M.E.G. (Ohio App. 10th Dist. Aug. 23, 2007), No. 06AP-1256, 2007 WL 2398503, at *5-6 (Interview by CCFA social worker was not a subterfuge to gather information for law enforcement where (1) interview was done for medical diagnosis and treatment, (2) social worker communicated information she obtained to doctor who then performed a physical examination, (3) law enforcement did not initiate the interview, (4) child was unaware that law enforcement officials were watching the interview); and State v. D.H. (Ohio App. 10th Dist. Nov. 8, 2007), 07AP-73, 2007 WL 3293361, at *9-13 (Interview by social worker was not a police interrogation where victim was unaware of the presence of law enforcement and social worker shared information from the interview with a medical examiner who then performed a physical examination of victim based in part on information learned during interview).

Appellant chooses to ignore this long-standing Ohio precedent (with its thoughtful analysis of the procedures in place at CCFA, the same child advocacy center at issue in this case) and asks this Court to consider other cases from around the country which have found that other interviewers are agents of the police. See Appellant's Memo In Support of Jurisdiction, at 1, fn. 1 and 2, and Appellant's Merit Brief, at 14-19. A review of these cases reveals facts that are distinguishable from this case. Specifically, each case cited by Appellant involves an excessive amount of police activity in the interview process itself or in developing questions to prompt statements to preserve or develop testimony for trial. For cases involving excessive police involvement in the interview process, see, e.g.:

- State v. Snowden (Md. 2005), 867 A.2d 314, 325, 27 (detective initiated questioning and was present during questioning);
- State v. Mack (Or. 2004), 101 P.3d 349 (interviewer who began questioning victim when police could not do so for police to videotape statements for use at trial);
- In re: S.R. (Pa 2007), 920 A.2d 1262, 1263-64 (child's statements to a forensic interviewer were testimonial when interview was carried out under the direction of the police department and for purposes of investigation and potential prosecution);
- State v. Contreras (Fla. 2008), 979 So.2d 896 (although law enforcement officer not in room, he was connected electronically to interviewer in order to suggest questions);
- State v. Bentley (Iowa 2007), 739 N.W.2d 296, 299-300 (police arranged interview, child told of police presence, and midway through interview, interviewer discussed interview with police to see if she missed anything).

For cases involving statements gathered to preserve or develop testimony for trial, see, e.g.,

- State v. Blue (N.D. 2006), 717 N.W.2d 558, 564-65 (primary purpose of interview was to prepare for trial);
- State v. Pitt (2006), 209 Or.App. 270, 278-79 (director of child advocacy center was an agent of police where interview was conducted for the express purpose of furthering a police investigation, police officer videotaped the interview, the interviewer explicitly attempted to solicit information that would be useful for defendant's prosecution, and where "whole idea" of the operation is that parents know child is being interviewed on tape to preserve their statements for trial);

- State v. Henderson (2007), 284 Kan. 267, 283-88 (statements were testimonial when purpose of the interview was not to protect the welfare of the child but instead to establish or prove past events potentially relevant to a later criminal prosecution);
- State v. Hooper (2007), 145 Idaho 139, 145 (Statements of child to nurse were testimonial when interview was geared toward gathering evidence rather than providing medical treatment where nurse showed child video camera, reminded child of rules such as telling the truth, and asked numerous questions regarding the identity of the alleged perpetrator);
- State v. Justus (Mo. 2006), 205 S.W.3d 872, 880-81 (child's statements to social worker were testimonial where primary purpose of interview was to establish or prove past events potentially relevant to later criminal prosecution).

In direct contrast, the following factors in the present case demonstrate that the social worker at CCFA was not a law enforcement agent:

- The victim's mother brought her daughter to CCFA the morning after the alleged sexual assault³ instead of to the police station; no law enforcement agency initiated the interview.
- The CCFA social worker who interviewed the child victim was an NCH employee; she was not employed by any law enforcement agency.
- The CCFA social worker interviewed the child alone for purposes of medical diagnosis and treatment.
- Although a law enforcement officer observed the interview from another room, the officer did not enter the interview room and the child was never aware of their presence.
- Law enforcement officials were not involved in the interview.
- The CCFA social worker told the child at the beginning of the interview that a nurse would conduct a medical examination after the interview.
- Following the interview, the CCFA social worker shared the information she learned from the interview with a nurse who then performed a complete medical examination of the child guided by the details provided by the social worker's interview.

The interview at issue in this case was not conducted by any law enforcement agent. It was conducted by a social worker at CCFA for purposes of medical diagnosis and treatment of

³ Contrary to Appellant's assertion in Footnote 3 of his Merit Brief, the police did not transport the child to the Center. Appellant's Merit Brief, at 13.

the child. Thus, it is unnecessary to determine the primary purpose of the interview as set forth in the Davis/Siler analysis. Instead, it is appropriate to use the objective witness standard articulated in Stahl to determine if the victim's statements were testimonial or nontestimonial.

B. A four year old witness could not have understood that statements made during her interview at CCFA could be available for later use at trial.

Since the social worker at the CCFA was not an agent of the police, this Court should affirm the Tenth District Court of Appeals' decision applying the objective witness test to determine if the victim's statements to this social worker are testimonial under Crawford. See Stahl, 111 Ohio St. 3d at 186. Under the "objective witness" test, a testimonial statement includes one "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." In Stahl, this Court held that:

In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations.

Stahl, 111 Ohio St. 3d 186, at syllabus ¶ 2.

In the present case, there is no evidence that the victim, age 4,⁴ realized that her statements would be available for use at a later trial. The victim was brought to CCFA by her mother. The child's interview occurred at CCFA, clearly a medical facility, not at police headquarters. There were no police officers in the interview room, and the victim was not aware at any time of the presence of police officers in another room. The social worker asked open-ended questions during her interview, and also told the victim at the beginning of the interview that she would be examined by a nurse after the interview. As a result, the Tenth District Court

⁴ See State v. Martin, 2006 WL 1495079, at * 4 (finding it highly doubtful that a six year old had any idea that her statements would be preserved for use at a later trial).

of Appeals correctly concluded that an objective witness would not have reasonably believed that the statements made in the interview with the CCFA social worker would be available for use at a later trial. The victim's statements in response to questioning by the social worker were nontestimonial, and the decision of the Court of Appeals should be affirmed.

CONCLUSION

The Tenth District Court of Appeals correctly held that the CCFA social worker in this case was not acting as a law enforcement agent during her questioning of the victim, and therefore, the objective witness test applied to determine whether or not the victim's statements were testimonial under Crawford. The Court of Appeals also correctly held that, under the objective witness test, the four-year old victim's out-of-court statements were nontestimonial because there was no evidence that the child realized that her statements to the CCFA social worker would be available for use at a later trial. Amici Curiae Nationwide Children's Hospital and the Center for Child and Family Advocacy respectfully urge this Court to affirm the decision of the Tenth District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amici Curiae Nationwide Children's Hospital and The Center for Child and Family Advocacy in Support of Appellee State of Ohio was served via U.S. Mail, postage prepaid, this 19th day of May, 2009, on the following:

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