No. 13-1352

IN THE
Supreme Court of the United States

STATE OF OHIO,
Petitioner,

v.

DARIUS CLARK,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF *AMICUS CURIAE* DOMESTIC VIOLENCE LEGAL EMPOWERMENT & APPEALS PROJECT (DV LEAP) IN SUPPORT OF PETITIONER

JOAN S. MEIER
SASHA DROBNICK
DOMESTIC VIOLENCE LEGAL EMPOWERMENT & APPEALS PROJECT
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 G Street, N.W.
Washington, D.C. 20052
(202) 994-2278

JOHN S. MOOT
Counsel of Record
BORIS BERSHTEYN
ERICA PERDOMO
DANIELE SCHIFFMAN
MICAH FERGENSON
DAVID LEAPHEART
LAUREN EISENBERG
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
John.Moot@skadden.com

Attorneys for Amicus Curiae

QUESTIONS PRESENTED

Whether mandatory reporters of suspected child abuse are agents of law enforcement for purposes of the Confrontation Clause.

Whether a child's out-of-court statements to a teacher in response to questions about the cause of the child's injuries qualify as "testimonial" statements subject to the Confrontation Clause.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

American Case Law

Supreme Court Authority

State Court Authority

English Case Law

Old Bailey Case Law

(*Available at* www.oldbaileyonline.org, *see* n.5 *infra.*)

Other English Case Law

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) is an organization committed to combating domestic violence and child abuse through appellate litigation, trainings, consulting and policy initiatives. DV LEAP has extensive experience working with survivors of domestic violence and protective parents seeking to keep their children safe from abuse through the civil courts. DV LEAP has also filed eight *amicus curiae* briefs in this Court, including two on confrontation rights.

DV LEAP is concerned that an overly expansive interpretation of the Confrontation Clause, such as that adopted by the Ohio Supreme Court, would endanger the safety of victims of domestic violence and children at ongoing risk of abuse, particularly after their parents separate. Most children are required by courts to continue to see their non-residential parent after the parents separate, but family courts are inexpert at determining whether a parent is unsafe. Affirmance of the Ohio Supreme Court's decision—which effectively excludes

---

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

the testimony of mandatory reporters who witness children's reports of abuse—would deprive civil as well as criminal courts of this critical information in proceedings where children's safety and well-being should be paramount.

SUMMARY OF ARGUMENT

In *Davis v. Washington*, 547 U.S. 813 (2006), the Court articulated general criteria for determining when out-of-court statements made to law enforcement officers should be deemed "testimonial" under the Confrontation Clause. Pertinent here, the test turns on whether the statement is uttered during an "ongoing emergency" where public safety is at risk, *id.* at 822, or, as subsequently characterized in *Michigan v. Bryant,* there remains a "continuing threat" to public safety. 131 S. Ct. 1143, 1159 (2011).

Children's reports of abuse to a teacher, doctor or other civil professional fall into this category. These professionals are not police investigators and, even when subject to a mandatory reporting requirement, their primary function is to protect the child, not to investigate crime. Their role, in this context, is to protect the child from *ongoing threats to the child's safety*—including being returned to the abuser's household when the school day ends. Where an abuser is a family member or other person with continuing access to the child, the danger is, by definition, ongoing.

The Court's decision in this case will not only affect the ability of the criminal justice system to hold abusers accountable, but also the civil justice sys-

tem's ability to protect children from known risks. *Amicus* specializes in work with parents seeking to prevent ongoing abuse of their children by the other parent in the context of civil custody or child protective proceedings. Our experience—and that of most of the domestic violence field, as well as a growing body of research—is that civil courts frequently fail to protect children in such cases. The two primary and related reasons for this failure are that (i) the civil courts are wary of child abuse allegations brought by a custody litigant, and (ii) such claims evoke judicial concerns about criminal liability, triggering an emphasis on protecting the rights of "the accused," rather than the safety of an at-risk child.

This skepticism toward testimony by one custody litigant that the other is abusive makes testimony from independent third parties, when available, critical to protecting the safety of children. The Ohio Supreme Court decision, if affirmed, would thus profoundly tilt even the *civil*, *protective* playing field against children's safety and in favor of potential perpetrators of abuse.

Finally, admission of children's statements made to third parties has been permitted by courts dating back to the Founding era. The most important Anglo-American criminal court throughout the eighteenth century routinely heard, without objection, parents and doctors testify to suspect-identifying statements made by child rape victims. Those witnesses' involvement with law enforcement during the Founding era cases was very likely more significant, and certainly not less significant, than

that of the mandatory reporters in the case before the Court.

ARGUMENT

I. CHILD ABUSE TYPICALLY INVOLVES ONGOING THREATS TO SAFETY

This case does not involve accusatory statements to police investigators; it involves statements by children to professionals entrusted with their care. When these professionals ask children about bruises, cuts or other indicia of harm, they are doing so to protect the child from a potential "continuing threat" of harm. *Bryant*, 131 S. Ct. at 1159; *see also Davis*, 547 U.S. at 830 (statements providing information to "end a threatening situation" are not covered by the Confrontation Clause).

Social science research is quite clear that both domestic violence and child abuse are recurring in nature and typically committed by a person with continuing access to the victim. Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. Rev. 1, 8 (2006) ("Abuse victims are faced with a threat that is ongoing"); Jane Koziol-McLain et al., *Predictive Validity of a Screen for Partner Violence Against Women*, 21 Am. J. Prev. Med. 93, 99 (2001). Indeed, past physical abuse is probably the best predictor of re-abuse. *See* Lauren B. Cattaneo & Lisa A. Goodman, *Risk Factors for Reabuse in Intimate Partner Violence: A Cross-Disciplinary Critical Review*, 6 Trauma, Violence, & Abuse 141, 142 (2005). The likelihood of repeat-

ed abuse illustrates "the reality of domestic violence [—] that even when a single incident is 'over,' the danger is still ongoing." Joan S. Meier, Davis/Hammon*, Domestic Violence, and the Supreme Court: The Case for Cautions Optimism*, 105 Mich. L. Rev. First Impressions 22, 26 (2006).

Although adult domestic violence is generally understood to occur within the home, a common misconception is the idea that strangers are the most frequent perpetrators of *child* abuse. Mark L. Rosenberg & Mary Ann Fenley, *Violence in America: A Public Health Approach* 84 (1991). In fact, "in almost all studies, [abuse by a stranger] is substantially less common than abuse either by family members or by persons known to the child." David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 The Future of Children 46 (1994). *See* Graham Farrell et al., *Like Taking Candy: Why Does Repeat Victimization Occur?* 35 Brit. J. Criminology, 384, 389 (1995) (estimating that in 80%-86% of sexual abuse cases, the perpetrator is not a stranger); Rosenberg, *supra*, at 84 (16%-42% of child abuse cases involve abuse by other family members, and 32%-60% involve "non-relatives known to the child (including neighbors, family friends, child care workers, and other authorities)").

The potential for recurring abuse by a family member or acquaintance is in part a product of the child's reluctance to report abuse "due to a sense of allegiance to a parent or [acquaintance] whom they do not want to see punished." *See* Rosenberg, *supra*, at 84. Such a perpetrator implicitly has authority or

power over the child (as an adult, often a caregiver), making the child victim especially vulnerable to threats of what will happen if they disclose the abuse. Alternatively, adult perpetrators often calculatingly condition the child to tolerate what the perpetrator establishes as acceptable, a pattern of behavior known as "grooming" the child for victimization, thereby smoothing the path to repeated abuse of the child. *See* Farrell et al., *supra*, at 389. The perpetrator's continued access to the child victim therefore facilitates repeated instances of abuse. *See* John E.B. Myers, *Myers on Evidence of Interpersonal Violence: Child Maltreatment, Intimate Partner Violence, Rape, Stalking, and Elder Abuse* 457 (5th ed. 2011) (noting that because perpetrators of child sexual abuse "often [have] continuing access to the victim, multiple episodes of sexual abuse are common").

Reputable studies thus place the incidence of recurring child abuse at close to or above fifty percent. Suzanne R. Dakil et al., *Recidivism in the Child Protection System: Identifying Children at Greatest Risk of Reabuse Among Those Remaining in the Home*, 165 Archives Pediatric Adolescent Med. 1006, 1008 (2011) (44% of children were re-reported as victims of repeat abuse during five-year study period); Roy C. Herrenkohl et al., *The Repetition of Child Abuse: How Frequently Does It Occur?*, 3 Child Abuse & Neglect 67, 70, 72 (1979) (reporting 54.1% rate of repeated physical child abuse and rates of 66.3% and 85%, respectively, when two and three types of abuse are experienced).

Even these studies likely understate the problem because of the low rates of children's disclosure of abuse. *See, e.g.*, Herrenkohl, *supra*, at 71-72. This is particularly true for sexual abuse, which is a "hidden offense" characterized by secrecy and shame. Myers, *Evidence*, *supra*, at 467-68. Ann-Christin Cederborg et al., *Delay of Disclosure, Minimization and Denial When the Evidence Is Unambiguous: A Multivictim Case*, *in Child Sexual Abuse: Disclosure, Delay and Denial* 171 (Margaret-Ellen Pipe et al. eds., 2007) ("Children may also minimize, delay disclosure or deny abuse when they are in a secrecy pact with the perpetrator, when they feel responsible for participating, or if they fear punishment by the perpetrator if they tell about their experiences.").

Given the ongoing danger of re-victimization in abusive families, when a teacher, doctor or counselor notices signs of injury and asks a child what happened, the child's response should not be considered "testimonial" under the *Sixth Amendment*, but rather non-testimonial and necessary to protect the child from a "continuing threat" of harm. *Bryant*, 131 S. Ct. at 1157 n.9, 1159.

II. THE OHIO DECISION, IF AFFIRMED, WOULD SIGNIFICANTLY IMPAIR THE PROTECTION OF CHILDREN IN CIVIL PROCEEDINGS

Amicus regularly consults with and represents parents around the country who are, in the context of civil court custody or child welfare proceedings, seeking to prevent ongoing abuse of their children. Domestic violence is a common backdrop for custody and child protection litigation. Affirmance of the Ohio Supreme Court's ruling below would exacerbate the difficulties facing abused children in civil proceedings because the ruling would likely be adopted by many *civil* courts, which tend to discount child abuse allegations as unwelcome criminal claims in a civil context.

A. Protection of Children in Civil Proceedings Is Inconsistent at Best

Domestic violence and child abuse are often not prosecuted criminally, yet arise regularly in civil court cases, such as custody litigation. *See* Judith G. Greenburg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. Ill. U. L. Rev. 403, 411 (2004) ("[C]ases that get to litigation (or even to judicial intervention short of litigation) are exactly those most likely to involve domestic violence."); Janet R. Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families,* 43 Fam. Ct. Rev. 283, 284 (2005) (approximately 75% of contested custody claims have history of domestic violence); Peter Jaffe, Michelle Zerweer, & Samantha Poisson, *Access Denied: The*

Barriers of Violence and Poverty for Abused Women and Their Children's Search for Justice and Community Services After Separation, Center for Child. & Fam. Just. Sys. (2002) (citing multiple studies finding a comparable statistic).

This is due both to the fact that adult and child abuse are logical triggers for divorce and custody litigation,[2] and that, contrary to common belief, the risks of child abuse and domestic violence *increase after separation* of the adult parties. Because domestic violence is about dominance and control of the victim, separation tends to escalate the perpetrator's tactics as he works to regain and extend control over his family members. *See generally* Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007). Thus, scholar Martha Mahoney coined the term "separation assault" to capture the fact, among other things, that women who are separated from their abusers are twenty-five times more likely to be victimized than married women. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 24-30 (1991).

Victims' risks of being killed peak *after* the victim leaves their abuser. Peter Jaffe, Claire Crooks and

---

[2] *See, e.g.*, Kathleen Colborn Faller, *Possible Explanations for Child Sexual Abuse in Divorce*, 61 Am. J. Orthopsychiatry 86, 87 (1991) (observing, in part, that a divorce may be precipitated by discovery of sexual abuse and that long-standing sexual victimization may be revealed after a separation).

Samantha Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juv. & Fam. Ct. J., Fall 2003, at 59 ("[a]ttempts to leave a violent partner, with children, is one of the most significant factors associated with severe domestic violence and death) (citation omitted).

Children's risks of abuse post-separation, even where there was no prior child abuse, also escalate significantly. Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations,* 43 Juv. & Fam. Ct. J., no. 4, 1992, at 33-34 ("Abuse of children by batterers may be more likely when the marriage is dissolving, the couple has separated, and the husband and father is highly committed to continued dominance and control of the mother and children.") (citations omitted). "Separation of their parents seems to increase, rather than decrease, children's exposure to violence." Einat Peled, *Parenting by Men Who Abuse Women: Issues and Dilemmas*, 30 Brit. J. Soc. Work 25, 28 (2000). "Indeed, the ongoing risks to abused women and children are so high at the point of separation that supervised visitation centers have become an essential domestic violence service (Sheeran & Hampton, 1999)." Jaffe et al., *Common Misconceptions*, *supra*, at 60. "[E]ven if prior to separation the abuse was only focused on the mother, an abusive partner will ' . . . shift his focus to control of the child as a way to continue the terror and violence against the mother.'" Catriona Shalansky et al., *Abused Women and Child Custody: the Ongoing Exposure to Abusive Ex-Partners*, 29 J. Advanced Nursing 416, 424 (1999) (citation omitted).

In civil proceedings involving child abuse allegations, the purpose is not to adjudicate an accused's guilt or innocence, but rather to assure the "best interests" of the child are prioritized in decisions about the child's care and custody. Elizabeth M. Schneider et al., *Domestic Violence and the Law: Theory and Practice* 531 (2d ed. 2008). Unfortunately, many civil courts lack adequate understanding of domestic violence and child abuse, particularly the facts discussed above. *See* Daniel G. Saunders et al., *Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations* 116 (Final Report to Nat'l Inst. Just., NCJRS # 2007-WG-BX-0013) (2012), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf ("The least common [knowledge] area—especially among judges, evaluators, and private attorneys—were post-separation violence, screening, and assessing dangerousness (although the majority nevertheless had knowledge in these areas)."); Jaffe et al., *Common Misconceptions*, *supra*, at 60 (detailing seven common misconceptions about domestic violence and custody which result in harmful outcomes in custody litigation, despite changes in laws).

Like much of society, courts often mistakenly presume that once the adult parties in a battering relationship are separated, the victim and the children are safe. Family courts also understandably prioritize the rights of both litigants to parent their children and tend to see "shared parenting" as the highest value. Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for*

Custody and Visitation Decisions, 54 Juv. & Fam. Ct. J., Fall 2003, at 12.

As a result, *Amicus's* experience, and that of many other organizations and litigants across the country, has been that "[f]amily courts and child protective services often appear skeptical of domestic violence or child abuse allegations brought by women in custody and visitation litigation, believing that such reports are exaggerated for strategic purposes." Lundy Bancroft et al., *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 154 (2d ed. 2012). *See* Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solution*, 11 Am. U. J. Gender Soc. Pol'y & L. 657, 717 (2003) ("Many judges' and mental health professionals' resistance to taking seriously a battered mother's claims of risk to children is driven, at least in part, by the fact that she is a litigant with a presumed self-interested bias against the opposing party, which casts doubt on all of her claims about the children's welfare").

Even child protection agencies harbor skepticism toward claims of abuse if raised by a custody litigant. *See, e.g.*, U.S. Dep't of Health and Human Servs., *Child Protective Services: A Guide for Caseworkers* at 42 (2003), *available at* www.childwelfare.gov/pubs/usermanuals/cps/cps.pdf ("[C]aseworkers should be alert to separated or divorced parents making allegations against each other."). The practice of child welfare workers' discounting of child abuse claims raised in custody

litigation is well known. *See* Nancy Thoennes & Jessica Pearson, *Summary of Findings from the Sexual Abuse Allegations Project*, *in Sexual Abuse Allegations in Custody and Visitation Cases 4*, at 6 (E. Nicholson ed., 1988) (caseworkers are sometimes reluctant to investigate allegations of abuse in custody disputes because they assume the cases are "undoubtedly false").

The net effect is that civil proceedings frequently result not only in non-protection of children at risk from abusive parents, but in added exposure to those risks by court orders mandating children to participate in unsupervised custody and visitation time with an abusive parent. Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 Violence Against Women, no. 8, Aug. 2005, at 1076 (even in states with a presumption against custody to a batterer, 40% of *adjudicated* batterers received joint (legal or physical) custody) (emphasis added); Jay Silverman, Cynthia Mesh, Carrie Cuthberg, Kim Slote and Lundy Bancroft, *Child Custody Determinations in Cases Involving Intimate Partner Violence: a Human Rights Analysis,* 94 Amer. J. Pub. Health, no. 6, June 2004, at 951-56, 953 (18 out of 39 cases resulted in sole or joint physical custody to documented perpetrators of abuse against spouse; 7 also had documented abuse of children); Meier, *Child Custody and Protection*, *supra*, at 662 n.19, 672-73 (informal survey of appellate decisions found that trial courts awarded joint or sole custody to vast majority of parents accused of and found to have committed abuse, including some who had (i) been repeatedly convicted of domestic assault; (ii)

committed an undisputed choking of the mother resulting in her hospitalization and his arrest; (iii) had broken the mother's collarbone; (iv) had committed "occasional incidents of violence"; and (v) had committed two admitted assaults) (case citations omitted). In the pilot study for a recently awarded National Institute of Justice grant, forty percent of litigants found to have committed domestic violence still won their custody case. Joan S. Meier, *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations* (Report to Nat'l Inst. Just., NIJ-2014-3749) (on file with author). *See also* Michael S. Davis et al., *Custody Evaluations When There Are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators* 80, (Final Report to Nat'l Inst. Just., NCJRS # 2007-WG-BX-0001) (2001), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf ("Most surprising, the safety of the parenting plans did not appear to be affected by the characteristics of the case: that is, when the domestic violence had been more severe, the parenting plans were no more protective of the mother or child than if the physical and emotional abuse, threats and stalking had not been so severe.").

Thus, the Leadership Council on Child Abuse and Interpersonal Violence — a network of leading scholars and experts on abuse in the family — estimates that 58,000 children a year are placed in the care or custody of an abusive parent. *See* Joyanna Silberg, The Leadership Council on Child Abuse and Interpersonal Violence, *How Many Children Are Court-Ordered into Unsupervised Contact with an Abusive Parent After Divorce?* (Sept. 22, 2008)

("[W]hen courts get involved in determining custody, children are rarely protected from the violent parent. In at least 75% of cases the child is ordered into unsupervised contact with the alleged abuser. (Research has found results ranging from 56-90%; a conservative estimate is 75%).") (citations omitted), http://leadershipcouncil.org/1/med/PR3.html.

The severity of the problem in the nation's custody courts has reached the attention of the federal government, which has stated that "[b]attered women continue to lose custody of their children because many family courts do not take domestic violence into account in their decision-making. Children continue to be placed in unsafe environments because the system fails to adequately assess and address the impact of domestic violence on the children."[3] In recognition of the problem, the Department of Justice has been funding a growing number of research studies and programs aimed at informing and improving family court responses to custody and abuse cases.[4]

---

[3] *Violence Against Women Act Grants*, *Fiscal Year 2014 Performance Budget*, U.S. Dept. of Just., Office of Violence Against Women (Mar. 27, 2013), http://www.justice.gov/sites/default/files/jmd/legacy/2013/09/26/ovw-justification.docx.

[4] *See, e.g.*, *Projects Funded Under Fiscal Year 2014 Solicitations*, Nat'l Inst. Just., http://www.nij.gov/funding/awards/pages/award-detail.aspx?award=2014-MU-CX-0859) (last visited Nov. 20, 2014); *Solicitation: Research and Evaluation on Children Exposed to Family Violence*, U.S. Dept. of Just., Nat'l Inst. Just., OMB No. 1121-0329, https://www.ncjrs.gov/pdffiles1/nij/sl000928.pdf (last *(cont'd)*

B. Civil Courts Often Respond to Child Abuse Allegations as Though Criminal Defendants' Rights Are at Stake, Making It Harder To Protect At-Risk Children.

Although in *Crawford v. Washington,* 541 U.S. 36, 51 (2004), this Court observed that the Confrontation Clause does not control civil evidentiary rules as a matter of law, *Amicus* has found that it often does so as a matter of practice. The Court's ruling in this case will therefore have a significant effect on civil courts' protection of children from ongoing abuse.

As scholars and advocates have widely recognized, "[a]n allegation of sexual [or child] abuse in a

---

(cont'd from previous page)
visited Nov. 20, 2014); *OVW Fiscal Year 2014 Family Court Enhancement Project Application Guidelines*, U.S. Dept. of Just., Office of Violence Against Women, OMB No. 1122-0020 (July 2, 2014), http://www.justice.gov/sites/default/files/pages/attachments/2014/09/30/fy14-fcep-application-guidelines.pdf; *VAWA 2013 Summary: Changes to OVW-Administered Grant Programs*, U.S. Dept. of Just., Office of Violence Against Women (Oct. 1, 2013), http://www.justice.gov/sites/default/files/ovw/legacy/2014/06/16/VAWA-2013-grant-programs-summary.pdf (new grant program to improve civil and criminal justice system response to families with histories of domestic violence, sexual assault, dating violence, stalking, and cases involving allegations of child sexual abuse); *Professor Meier Awarded NIJ Grant to Research Domestic Violence Allegations in Custody Cases*, Geo. Wash. U. L., http://www.law.gwu.edu/News/newsstories/Pages/2014_Meier_NIJ_DV_grant.aspx (last visited Nov. 20, 2014).

divorce or custody proceeding . . . introduces a criminal allegation into a civil proceeding." Catherine Paquette, *Handling Sexual Abuse Allegations in Child Custody Cases,* 25 New Eng. L. Rev. 1415, 1437 (1991) (citation omitted); John E.B. Myers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection,* 28 J. Fam. L. 1, 25 (1989/1990) ("Skepticism regarding allegations arising in custody litigation may be reinforced through unwarranted comparisons between custody litigation and criminal litigation."). In these cases the courts often implicitly—and sometimes explicitly—require an elevated level of proof for allegations of abuse. *See, e.g.*, *In re Christine H.,* 451 N.Y.S.2d 983, 986 (Fam. Ct. 1982) (holding, in child protective action, that "the private interests affected by the proceeding are the stigma of child abuse, possible criminal prosecutions, and possible termination of parental rights," and replacing the "preponderance test" with "clear and convincing" standard of proof). "[G]iven the inflammatory character of a charge of child sexual abuse, as well as the fact that the accused parent's right to maintain a relationship with the child is at stake, the alleging parent's standard of proof [in a civil custody suit], realistically, is more akin to that of a criminal case, requiring proof beyond a reasonable doubt." Meredith Sherman Fahn, *Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter*, 14 Women's Rts. L. Rep. 123, 130-31 (1992).

Amicus has observed this phenomenon in our own practice. *See, e.g.*, *Ferguson v. Wilkins*, 928 A.2d 655, 664 (D.C. 2007) (reversing trial court hold-

ing that, despite child's repeated reports of father's abuse, the absence of coaching by mother, and multiple experts' concerned opinions, there was "insufficient evidence to conclude that Mr. Ferguson engaged in inappropriate touching or conduct with his child").

Some courts go even further, explicitly limiting the admissible evidence of child abuse they will consider by applying the Confrontation Clause to custody proceedings. For example, Mississippi courts have expressly held that the Sixth Amendment's Confrontation Clause affords *civil* litigants in child custody cases the right to confront witnesses against them. *See Bailey v. Woodcock*, 574 So.2d 1369, 1374 (Miss. 1990) ("This is not a criminal case, but we are of the opinion that the right of confrontation should be accorded to an accused parent in such cases as this. The fact that the accusation is a terrible and shameful one ought not blind us to the plight of one who may stand wrongfully accused."); *cf. In re Interest of T.S.*, 732 S.E.2d 541, 542 (Ga. Ct. App. 2012) (relying on Confrontation Clause language from a criminal case to define the right to confrontation in a civil parental termination hearing).

Other courts hold that the right to confrontation is protected under the Due Process Clause. Georgia, Kentucky, Massachusetts, and Texas courts, among others, have found such a right to confrontation in a civil litigation context, again rooted in the Due Process Clause. *See, e.g.*, *In re T.S.*, 732 S.E.2d at 542; *Cabinet for Health and Family Servs. v. A.G.G.*, 190 S.W.3d 338, 345 (Ky. 2006) ("A civil litigant's right of confrontation and cross-examination is grounded in

the Due Process Clauses of the Fifth and Fourteenth Amendments."); *In re Adoption of Mary*, 610 N.E.2d 898, 901 (Mass. 1993) ("Due process concerns and fundamental fairness require that a parent have an opportunity effectively to rebut adverse allegations concerning child-rearing capabilities."); *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987) (emphasizing that longstanding jurisprudential principles demonstrate that "[d]ue process requires an opportunity to confront and cross-examine adverse witnesses"); *In re S.P.*, 168 S.W.3d 197, 206 (Tex. App. 2005) (citing cases in which courts have held "cross-examination is normally part of the meaningful hearing requirement inherent in principles of due process.").

C. Evidence from Third Party Professionals, Including Mandated Reporters, Is Critical in Proving Child Abuse.

Given both civil courts' protectiveness of the rights of parents accused of abuse, and their skepticism of parents' accusations of each other, the Court's decision in this case on child statements to mandatory reporters will have a direct impact on civil courts' protection of children from parental abuse. Statements made by a child to a mandatory reporter are often the only *extra-parental* source of evidence of abuse. In 2005, over one-half of reports of child maltreatment (61.7%) were from professionals who are considered "mandated reporters." *See Child Abuse and Neglect Statistics*, Am. Humane Ass'n (2013), http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/child-abuse-and-neglect-statistics.html.

A recent federally-funded study highlights the importance of third-party professionals' opinions in protecting children. Joyanna Silberg et al., *Crisis in Family Court: Lessons from Turned Around Cases* (Final Report to Office of Violence Against Women, # 2011-TA-AX-K006) (2013). The authors analyzed twenty-seven custody cases involving parental allegations of child abuse initially determined by a court to be false, resulting in an order granting custody to the alleged abuser. *The abuse claims were later found by another court to have been valid*. In analyzing the factors that caused the incorrect initial determinations, the authors found that the child's disclosure at Time 1 was always to the non-offending mother; in most, the judge found the mother's reports not credible (78%) and many judges (67%) characterized the mother as pathological. In most of these cases, it was only subsequent testimony (years later) by independent experts—particularly mandatory reporters—that removed the child from ongoing abuse. "The main reason that [these] cases turned around was because protective parents were able to present evidence of the abuse and back the evidence up with reports by professionals who were able to dispel the misinformation and myths promulgated [in the first proceeding]." *Id.* at 42.

In short, reports of independent third parties, such as the teacher in this case, are often indispensable to protecting children in *non-criminal* proceedings, where children's best interests should be the priority. Since, in practice, Confrontation Clause jurisprudence can have a spillover effect on civil proceedings, the ruling below would impede child protection even in civil courts.

III. UNAVAILABLE CHILDREN'S STATEMENTS TO AUTHORITY FIGURES WERE REGULARLY ADMITTED IN THE FOUNDING ERA.

Common law from the Founding era—an established guide to the scope of the Confrontation Clause—counsels strongly in favor of admitting the testimony of an authority figure about out-of-court statements made by an unavailable child. The courts of Old Bailey routinely accepted, without objection, the testimony of parents and doctors about identifications made by young rape victims. They did so even when the parents and doctors were acting with or as an investigator or prosecutor, in a far more "state-involved" role than the mandatory reporter in the case before this Court.

A. This Court Has Relied on Founding Era Common Law to Establish the Parameters of the Sixth Amendment's Confrontation Right.

Pre-Founding common law has played a decisive role in Confrontation Clause jurisprudence. In *Crawford,* this Court emphasized the historical reading of the Sixth Amendment's right of confrontation, holding that the clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." 541 U.S. at 54; *see also Salinger v. United States*, 272 U.S. 542, 548 (1926) ("The purpose of [the Confrontation Clause], this court often has said, is to continue and preserve that [common-law] right, and not to broaden it or disturb the exceptions."); *Mattox v. United States*, 156 U.S. 237,

243 (1895) (interpreting Confrontation Clause as "securing to every individual such [rights] as he already possessed as a British subject…"). In the ensuing decade, this Court has continued to look to history as a guide. *See, e.g.*, *Giles v. California*, 554 U.S. 353, 358 (2008) ("We therefore ask whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right.").

B. Pre-Founding Criminal Cases Consistently Allowed Parents and Doctors To Testify to the Accusatory Statements of Unavailable Child-Victims.

Founding era common law routinely allowed authority figures charged with protecting the child—such as parents or doctors—to testify to unavailable child-victims' out-of-court statements. This doctrine is best reflected in the Old Bailey Sessions Papers, pamphlet publications summarizing the proceedings of the Old Bailey.[5] "As the court with jurisdiction over cases of serious crime in metropolitan London, the Old Bailey was the most important criminal court in the Anglo-American world throughout the eight-

[5] A near-complete collection of the Old Bailey Session Papers (OBSP) reports is available online in a searchable format at www.oldbaileyonline.org. Citations herein to cases reported in the OBSP will begin with the defendant's surname, followed by notation that the case is found in the OBSP, the case's date, and the online case reference number that allows retrieval of the report at www.old baileyonline.org.

eenth century." John H. Langbein, *The Origins of Adversary Criminal Trial* vii (2003). The jurists who presided over trials at the Old Bailey included the Twelve Judges, who also sat on the regional assize circuits. *See id.* at 172, 181. "Hence, while the special problems of the metropolis shaped the trial procedure that we see in the Old Bailey, there was no means of confining the developments to London. What was created was not London law but English law." *Id*. at 181.

A recent study of all child rape cases reported in the Old Bailey Session Papers from 1684 to 1789 identified twenty-two cases in which thirty witnesses repeated children's out-of-court statements with no mention of any testimony by the child, either sworn or unsworn.[6] Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 Ind. L.J. 1029, 1041 (2007). All but one of these twenty-two cases were decided well after 1696, the date this Court treats as the settled recognition of the confrontation requirement at common law. *See Crawford*, 541 U.S. at 45-46 (stating that the "widely reported" case of *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (1696), "settled the rule requiring a prior opportunity for cross-examination as a matter of common law").

---

[6] One report, *Davids*, OBSP (Dec. 5, 1759) (t17591205-25), covers three trials of the same defendant. In the second trial, for the alleged rape of Sarah Jacobs, the child testified unsworn. That trial is accordingly excluded from the study; the first and third trials in the report are included.

The typical witnesses in the twenty-two prosecutions were either family members of the victim or doctors. Family members often learned of the child's injuries and, in seventeen cases, testified to the child's defendant-identifying statements.[7]

Influential treatises from the period record and approve this practice, making specific reference to children's statements to their parents, and thus likely reflecting the frequency of this fact pattern. Sir Matthew Hale's treatise, which was written in the late 1600s but not published until 1736, noted that "if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken." 1 Matthew Hale, *The History of the Pleas of the Crown* 634 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736). Echoing Hale, Sir William Blackstone noted that "the law allows what the child told her mother, or other rela-

---

[7] *See Fyson*, OBSP (June 25, 1788) (t17880625-93); *Ketteridge*, OBSP (Sept. 15, 1779) (t17790915-18); *Allam*, OBSP (Sept. 7, 1768) (t17680907-40); *Spicer*, OBSP (Dec. 9, 1767) (t17671209-64); *Brown*, OBSP (June 3, 1767) (t17670603-52); *Tibbel*, OBSP (Oct. 16, 1765) (t17651016-2); *Davids*, OBSP (Dec. 5, 1759) (t17591205-25) (first trial); *Davids*, OBSP (Dec. 5, 1759) (t17591205-25) (third trial); *Crosby*, OBSP (Dec. 7, 1757) (t17571207-14); *Kirk*, OBSP (May 30, 1754) (t17540530-36); *Moulcer*, OBSP (Oct. 17, 1744) (t17441017-25); *Senor*, OBSP (Aug. 28, 1741) (t17410828-63); *Gray*, OBSP (Sept. 11, 1735) (t17350911-53); *Padget*, OBSP (Feb. 22, 1727) (t17270222-72); *Nichols*, OBSP (Feb. 26, 1724) (t17240226-73); *Hullock*, OBSP (Aug. 28, 1723) (t17230828-64); *Robbins*, OBSP (Jan. 13, 1721) (t17210113-28).

tions, to be given in evidence." 4 William Blackstone, *Commentaries on the Laws of England* 214 (Oxford, Clarendon Press 1769).

Medical personnel testimony was likewise a key feature of common law rape prosecutions—indeed, only three of the twenty-two cases fail to mention "surgeons." Doctors would typically opine on whether both the child and the victim had "the foul disease," gonorrhea, and whether there was evidence of penetration, a necessary element of this capital felony. Four cases feature a surgeon testifying to the child victim's accusatory statements, each without record of any complaint or qualification.[8]

In one 1754 case that received relatively lengthy treatment in the Old Bailey Session Papers, defendant William Kirk was indicted for raping a girl under the age of seven. *See Kirk*, OBSP (May 30, 1754) (t17540530-36). The reporter begins by noting "[t]he child being so young and not knowing the nature of an oath, [she] could not be examined." *Id.* The jury instead heard the testimony of five witnesses, including two surgeons. The first surgeon testified that after being summoned by the local justice of the peace, he examined the victim with the justice and another surgeon, finding the child had been forcibly entered and likely had a venereal disease. Afterwards, seem-

---

[8] *See Kirk*, OBSP (May 30, 1754) (t17540530-36); *Tankling*, OBSP (July 11, 1750) (t17500711-25); *Nichols*, OBSP (Feb. 26, 1724) (t17240226-73); *Row*, OBSP (Dec. 7, 1687) (t16871207-30).

ingly within the same house,[9] the surgeons examined the defendant's anatomy and found that his venereal disease had advanced to a point that they initially questioned whether he was capable of the crime. After the first surgeon was cross-examined, the second surgeon testified on the same points but also recounted the victim's accusatory statement: "The child told me Mr. Kirk used to set her upon his knee, and used to put his finger into her." *Id.* Nothing in the papers reflects any objection or comment from the court.[10]

---

[9] The record makes clear, however, that the defendant was not present during the child's statement. The second surgeon begins his testimony: "I was at Justice Cox's, and went up stairs with the mother and the child." After examining the child, he recounts: "Then I said it would be proper to inspect Mr. Kirk if he will give us leave."

[10] Ultimately the defendant was acquitted: "There being no other evidence against the prisoner than hearsay from the child's mouth it was not judged sufficient; he was therefore acquitted, but detained to be tried on another indictment at Hick's Hall for an assault, with an intent to commit a rape." *Kirk*, OBSP (July 11, 1750) (t17500711-25). This acquittal-but-detention pattern is seen throughout the cases. Children's hearsay testimony appears to have been admissible, yet often insufficient, evidence to support conviction for the capital felony of rape (although it could support a conviction for the misdemeanor offense, as some reports explicitly bear out). *See, e.g.*, *Tankling*, OBSP (July 11, 1750) (t17500711-25); *Nichols*, OBSP (Feb. 26, 1724) (t17240226-73).

Although their records are less comprehensive than the account in *Kirk*, other cases similarly report a surgeon testifying to the identifying statements of the child victim without any indication of a confrontation problem. *See Tankling*, OBSP (July 11, 1750) (t17500711-25) ("The child said, the prisoner hurt her very much"); *Nichols*, OBSP (Feb. 26, 1724) (t17240226-73) ("that the child did say it had been done to her by the Prisoner"); *Row*, OBSP (Dec. 7, 1687) (t16871207-30) ("that when he looked after the Child, the girl said the Prisoner did it").

It is notable that the surgeons in *Kirk* conducted their examinations at the direction of the justice of the peace. That the surgeon's role could intertwine to some extent with the investigative function performed by the justice of the peace was not unique to that type of witness. Parents and family members, too, often testified not merely as father or mother but as prosecutor and prosecutrix. *See* John H. Langbein, *The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors*, 58 Cambridge L.J. 314, 314 (1999) ("The victim of the crime [or at times his/her kin] usually served as the prosecutor."). For example, in *Brown*, a surgeon testified that "the prosecutrix" (the mother) sent for him to examine her daughter (the victim). *See Brown*, OBSP (June 3, 1767) (t17670603-52). The prosecutrix-mother in that case also served as a witness and testified to what her daughter, out of court, said: "I examined her; she told me about the prisoner, and what he had done." *Id.*; *see also Senor*, OBSP (Aug. 28, 1741) (t17410828-63) (witness referring to the mother as "the Prosecutrix"). Like doctors, the parent witnesses often played a partly prosecutorial role,

but the statements of children to these authority figures were nonetheless admitted without concern that the confrontation right was at issue.

The law in this area did evolve at the end of the eighteenth century, and even then did not upend the principles above. The major development came when the Twelve Judges, in *Brasier*, officially rejected the presumption that, based on age alone, children were incompetent to testify—a topic of legal debate at the time. *See King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (K.B. 1779).[11] The trial judge in that rape prosecution presumed the seven-year-old victim incompetent to testify, and therefore allowed the victim's mother to testify to the child's allegations of rape. The Twelve Judges reversed the conviction, holding that the court should have assessed the child's competency before allowing the mother to testify. As the child might have been competent to testify, there was no necessity shown for the mother to testify in the child's place.

Post-*Brasier* cases confirm that *Brasier*'s ruling affected the presumption of child incompetence rather than the admissibility of hearsay statements. For example, four months after *Brasier* was decided, one of the Twelve Judges, Sir Beaumont Hotham,

---

[11] Although a number of versions of *Brasier* were reported after the case was decided, the Court has consistently referred to the versions cited in the text above. *See Bryant*, 131 S. Ct. at 1155 n.3 (2011); *id.* at 1173 (Scalia, J., dissenting); *Davis*, 547 U.S. at 828; *Crawford*, 541 U.S. at 69 (Rehnquist, J., concurring); *Wheeler v. United States*, 159 U.S. 523, 525 (1895) (citing only to 1 Leach 199).

Baron of the Court of Exchequer, presided over a child rape case at Old Bailey. *See Ketteridge*, OBSP (Sept. 15, 1779) (t17790915-18). Following *Brasier*, Baron Hotham did not presume the four-year-old victim to be incompetent; rather, he attempted to qualify the child to take the oath. *See id.* When the young victim failed to qualify, Baron Hotham allowed the mother to testify to the child's reports of abuse. *Id.*; *see also Fyson*, OBSP (June 25, 1788) (t17880625-93) (allowing the victim's parent to testify to the child's reports of abuse after first attempting to qualify the child to take the oath, but finding the child incompetent); *R. v. Guttridges*, 9 Car. & P. 471, 472, 173 Eng. Rep. 916, 917 (1840) ("At the time of Brazier's case, it seems to have been considered, that, as the child was incompetent to take an oath, what she said was receivable in evidence.") (citation omitted).[12]

---

[12] Modern legal scholarship also recognizes that *Brasier* does not implicate the Confrontation Clause or the admissibility of hearsay statements. *See, e.g.*, Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from* King v. Brasier, 15 J.L. & Pol'y 495, 500 (2007) ("[*Brasier*] has no place in confrontation doctrine, under an originalist approach or otherwise."); Randolph N. Jonakait, *The (Futile) Search for A Common Law Right of Confrontation: Beyond* Brasier's *Irrelevance to (Perhaps) Relevant American Cases*, 15 J.L. & Pol'y 471, 474 (2007); Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 Ind. L.J. 1029, 1032 ("[T]reatises published after *Brasier*…show that virtually without exception, they interpreted *Brasier* as changing the rules for qualifying child witnesses but not the acceptability of hearsay when a child could not testify."). *But see* Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban*

(cont'd)

Thus, before and after *Brasier*, the Founding era common law routinely admitted the statements of unavailable victims in child abuse prosecutions through the testimony of authority figures charged with protecting them. There was no discussion of a confrontation violation when authority figures like doctors or parents testified, even when those witnesses frequently played a role in investigation and prosecution—no smaller (and likely greater[13]) role than the mandatory reporter in the case before the Court.

CONCLUSION

The Court should reverse the Ohio Supreme Court and hold that the out-of-court statements by the child are not subject to the Confrontation Clause.

(cont'd from previous page)

Against Hearsay Evidence Refutes the Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & Pol'y 349, 443 (2007); Richard D. Friedman, Crawford*,* Davis*, and Way Beyond*, 15 J.L. & Pol'y 553, 565 (2007).

[13] "Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption"—here, mandatory reporters—"involves some degree of estimation." *Crawford*, 541 U.S. at 52 n.3.

Respectfully submitted,

JOAN S. MEIER
SASHA DROBNICK
DOMESTIC VIOLENCE LEGAL EMPOWERMENT & APPEALS PROJECT
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 G Street, N.W.
Washington, D.C. 20052
(202) 994-2278

JOHN S. MOOT
Counsel of Record
BORIS BERSHTEYN
ERICA PERDOMO
DANIELE SCHIFFMAN
MICAH FERGENSON
DAVID LEAPHEART
LAUREN EISENBERG
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
John.Moot@skadden.com

Attorneys for Amicus Curiae

November 24, 2014