No. 13-1352

IN THE
Supreme Court of the United States

STATE OF OHIO,
Petitioner,

v.

DARIUS CLARK,
Respondent.

On Petition for a 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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL AND STATE RULES

OTHER AUTHORITIES

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.

INTEREST OF *AMICUS CURIAE*[1]

The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) is committed to combating domestic violence through litigation, legislation, and policy initiatives. DV LEAP has extensive experience working with survivors of domestic violence and engaging in legal and policy reform efforts on their behalf, and has filed seven *amicus curiae* briefs in this Court, including two on confrontation rights.

DV LEAP is concerned that an overly expansive interpretation of the Confrontation Clause could endanger victims of domestic violence, particularly

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[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.

children who are abused. Although the Confrontation Clause confers no rights in civil proceedings, civil courts often apply comparable principles of due process and sometimes even explicitly apply the Confrontation Clause in the context of claims of abuse. DV LEAP therefore fears that the Ohio Supreme Court's decision—which effectively excludes the testimony of mandatory reporters who witness child statements of abuse—will profoundly undermine civil courts' ability to determine whether children are at risk of future abuse.

This issue is directly relevant to many of DV LEAP's clients who have faced setbacks in custody proceedings where they allege abuse. Over the last 16 months, DV LEAP has received assistance requests from 76 mothers in 31 states who have lost custody or had their visitation terminated or significantly limited by courts that rejected their allegations of child abuse by the fathers. DV LEAP believes that these decisions raise significant concerns because they are representative of family courts' widespread wariness of mothers' claims of potential abuse. This underscores the critical role that testimony from a mandatory reporter can serve in protecting an abused child. Therefore, the decision below, if applied in the context of custody or child welfare proceedings, will further endanger the health and welfare of children across the nation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ohio Supreme Court's decision, if left undisturbed, will have significant adverse effects beyond

the criminal courts. Child abuse is frequently an issue in contested custody and child protection cases.[2] When abuse is alleged in a civil context, courts often treat the allegations as quasi-criminal, and some courts explicitly apply the Confrontation Clause in those circumstances. Many courts also apply similar principles as a matter of civil due process.

The issue is critically important—and the danger resulting from the decision below particularly pronounced—in child custody disputes that involve claims of abuse by one parent. In this context, family courts across the country have been skeptical of testimony by one parent against the other because of perceived bias or animosity. In particular, allegations by a mother against a father are frequently discounted or rejected on the assumption that they are designed to gain custody, rather than to protect the child. This troubling trend simply underscores the enormous value that testimony from an independent third party—often a mandatory reporter—can have in protecting the safety of our nation's children. Yet the decision below could, if applied in the civil context, render that testimony inadmissible.

This case therefore presents an issue of exceptional importance to DV LEAP and American families and children that warrants review by this Court.

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[2] We note that child abuse comes up in many contexts, but focus here on the impact of the Ohio Supreme Court's decision on custody and child welfare cases because these cases represent the most common civil court contexts in which the decision is likely to have an impact.

ARGUMENT

I. Criminal Confrontation Rights Doctrine Influences Family Law Cases Where the Protection of Children Is of Paramount Importance

A. Allegations of Domestic Violence and Child Abuse Commonly Arise in Civil Proceedings Designed to Protect Children

Domestic violence, including child abuse, is not just a criminal offense and not every occurrence of intrafamily violence is prosecuted. Allegations of domestic violence or child abuse frequently come up in the context of civil proceedings in family courts. The presence of domestic violence is particularly likely to be an issue in contested custody cases. *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. 284 (2005) (approximately 75% of contested custody claims have allegations of domestic violence); Peter Jaffe, Michelle Zerweer, and Samantha Poisson, Centre for Children and Families in the Justice System, *Access Denied: The Barriers of Violence and Poverty for Abused Women and their Children After Separation* at 1 (2004) (same).

The legal and functional purpose of these civil proceedings is not to adjudicate an accused's guilt or innocence. Instead, in child custody or child welfare

proceedings, the court's objective is to establish a custody and visitation order that protects the "best interests" of the minor child.

A history of domestic violence or child abuse is thus highly relevant to the outcome of these proceedings. Of course, courts must determine the veracity of alleged abuse in order to properly determine which custody and visitation arrangement might be in the child's best interests. *See* National Council of Juvenile and Family Court Judges, *Domestic Violence As A Factor To Be Considered in Custody/Visitation Determinations* (2003), *available at* http://www.ncjfcj.org/sites/default/files/chart-custody-dv-as-a-factor.pdf (listing state codes requiring the consideration of domestic violence or child abuse in custody and visitation cases).

B. Civil Courts Often Treat Allegations of Abuse as Quasi-Criminal and Are Influenced by Criminal Defendants' Procedural Protections, Including Confrontation Rights

It is well-documented that civil courts have subjected allegations of child abuse to careful scrutiny, especially in the custody or child welfare context. Frequently the net effect is to treat such allegations as requiring a higher level of proof than a normal civil matter. "[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 Cus-*

tody Disputes: Getting to the Truth of the Matter, 14 Women's Rts. L. Rep. 123, 130-31 (1992) (*Getting to the Truth*). *Amici* have observed this phenomenon in their own practice before family courts. *See, e.g.*, *Ferguson v. Wilkins*, Case Nos. DRB757-01 & CPO2261-02 (D.C. Super. Ct. Dec. 15, 2005) (finding, despite child's repeated reports of father's sexual abuse, the absence of coaching by mother, and multiple experts' cautionary opinions, that there was "insufficient evidence to conclude that Mr. Ferguson engaged in inappropriate touching or conduct with his child"), *rev'd*, 928 A.2d 655 (D.C. 2007).

In addition, courts also are surprisingly willing to apply Confrontation Clause principles in civil custody or child welfare proceedings when child abuse is alleged, even though the Confrontation Clause applies only to criminal matters. In fact, 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 In re Interest of C.B.*, 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).

While some courts acknowledge that the Confrontation Clause does not extend to civil cases, they nevertheless conclude that similar rights must be pro-

tected under the Due Process Clause. Such rights include a right to cross-examine witnesses, and are sometimes construed specifically to afford parents a comparable right to confront and cross-examine witnesses testifying against them in civil proceedings that could impact custody or parental access. Georgia, Kentucky, Massachusetts, and Texas courts, among others, have found such a civil right to confrontation rooted in the Due Process Clause. *See, e.g.*, *In re Interest of 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 Interest of 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").

This case therefore not only presents, as Petitioner explains, an issue of exceptional importance for criminal courts, but also an issue that will significantly affect the ability of civil courts to protect children from abuse. As discussed below, the issue is particularly important in custody disputes where parental reports or testimony are often rejected as

manufactured accusations stemming from hostility, making evidence from mandatory reporters potentially critical to protecting an abused child.

II. The Ohio Supreme Court's Decision Threatens to Undermine the Mission of Family Courts to Assure the Best Interests of the Child

A. Courts Routinely Discount Claims Made by One Parental Litigant that the Other Parental Litigant Has Abused the Child

Given the widely-held archetypes of a loving family, nurturing parents, and the innocence and vulnerability of children, acts of intrafamily child abuse, particularly sexual abuse, can seem beyond comprehension. Nonetheless, many children in the United States suffer abuse or neglect at the hand of a parent. *See* Children's Bureau, U.S. Dep't of Health and Human Servs., *Child Maltreatment 2012*, 21-22, *available at* http://www.acf.hhs.gov/programs/cb/resource/child-maltreatment-2012.

Accusations of maltreatment of a child also often and understandably emerge in the context of a divorce proceeding, particularly in connection with custody and visitation determinations. *See* 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); Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations,* 43 Juv. & Fam. Ct. J. 1, 33-34 (1992) ("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).

The adversarial setting of a custody dispute tends to magnify the inherent inclination to disregard, discount, or reject allegations of abhorrent acts when those allegations are made by one litigating parent against the other litigating parent. *See Getting to the Truth* at 123-24; Lundy Bancroft et al., *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 154 (2d ed. 2012) ("Family 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."). "[B]ecause the [custody] court is hearing only from two warring parents, . . . courts become deaf to mothers' claims that they are advocating for the best interest of their children." 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) (*Understanding Judicial Resistance*) ("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.").

The tendency of courts to discount abuse claims made by one parent against the other may be revealed, for example, when a judge indicates from the

bench that he intends to discredit reports of child maltreatment merely because it was reported "by *the mother*." *See id.* at 665 (describing case in which judge disparaged attorney's allegations of the child's destructive behaviors after visits with the child's father). Even in child protection agencies, this skepticism can be reflected in explicit guidelines urging child welfare personnel to be skeptical of abuse claims if the parents are involved in custody litigation. *See, e.g.*, U.S. Dep't of Health and Human Servs., *Child Protective Services: A Guide for Caseworkers* (2003) at 42, *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."). Regardless of printed guidelines, 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," *Sexual Abuse Allegations in Custody and Visitation Cases 4* (E. Nicholson ed., A.B.A. Nat'l Legal Resource Ctr. for Child Advoc. & Protection 1988) at 6 (caseworkers are sometimes reluctant to investigate allegations of abuse in custody disputes because they assume the cases are "undoubtedly false").

Even when statutory provisions explicitly take abuse into account in custody determinations, they can perversely lead to judicial skepticism about abuse claims. Virtually every state requires the family court to take into consideration whether there is a history of domestic violence in determining the best interests of the child. Ellen Pence et al., The Battered Women's Justice Project, *Mind the Gap: Accounting for Domestic Abuse in Child Custody Evalu-*

ations at 5 (June 2012). Many state laws actually go further and contain a "rebuttable presumption" that an abusive spouse may not have sole or joint custody of his or her children because of the potential harm (direct and indirect) to their children. *See Understanding Judicial Resistance* at 661-62; *see*, *e.g.*, D.C. Code sec. 16-914(a)(2) ("There shall be a rebuttable presumption that joint custody is not in the best interest of the child or children if a judicial officer finds by a preponderance of the evidence that an intrafamily offense [has occurred]."). Courts thus may often fear that claims of domestic violence or child abuse by one parent are "incentivized" by these laws—and are therefore suspect.

Skepticism toward allegations of child abuse has been fueled in particular by the controversial pseudoscientific theory of "parental alienation"—which implies that abuse claims made by a mother against a father are merely an attempt to "alienate" the child from the accused parent's affections. The use of "parental alienation" theory to refute abuse claims has been widely discredited. *See, e.g.*, Joan S. Meier, National Online Resource Center on Violence Against Women, *Parental Alienation Syndrome and Parental Alienation: A Research Review* (rev. 2013), *available at* http://www.vawnet.org/Assoc_Files_VAWnet/AR_PASUpdate.pdf; Joyanna Silberg, Ph.D. et al., *Crisis in Family Court: Lessons from Turned Around Cases, Final Report Submitted to the Office of Violence Against Women, Department of Justice* at 12-19 (Sept. 30, 2013) (*Turned Around Cases*).

A recent study considered 27 custody cases involving parental allegations of child abuse initially determined to be false, resulting in an order granting

custody to the alleged abuser. The allegations were later found to be valid and, in a subsequent proceeding, the child was protected from unsafe contact with the abusive parent. In analyzing the factors that caused the incorrect initial determinations, the authors found one significant problem to be that the "[f]amily courts were highly suspicious of mother's motives for being concerned with abuse." *See Turned Around Cases* at 37.

For all of the above reasons, without third-party testimony supporting an abuse allegation, the parental accuser is often perceived as a strategic fabricator and, in the eyes of the court, may be worse off than if she had remained silent. *See*, *e.g.*, Stephanie Dallam, The Leadership Council on Child Abuse & Interpersonal Violence, *Are "Good Enough" Parents Losing Custody to Abusive Ex-Partners?* (2006), *available at* http://www.leadershipcouncil.org/1/pas/dv.html.

Assertions of abuse also face an uphill battle because most state family courts and many statutes treat the "friendly parent" as the best parent: That is, the parent who is willing to "share" the child is the preferred parent; by contrast, a parent who resists sharing parenting and alleges that the other parent abuses the child is seen as a bad parent. *Getting to the Truth* at 125.

These troubling trends have increasingly put protective parents in a bind: if they report abuse to the court, they face potential loss of custody or disbelief in court; if they fail to report, they can be accused of failing to protect. Their fears in both directions are painfully well-founded. *See* Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children,* 19 Harv.

Women's L.J. 229 (1996) (describing child welfare agencies' and state courts' application of "failure to protect" doctrine to remove children from battered mothers); Civic Research Institute, *Sexual Assault Report*, Vol. 9, No. 3 (Jan./Feb. 2006) at 44 ("[W]omen who raise abuse allegations have been shown to receive less favorable rulings than those who do not . . . . [f]or this reason, some lawyers advise women not to tell courts or mediators about child abuse or domestic abuse because, by doing so, they risk losing custody to the alleged abuser.") (internal citations omitted). One study reports that 63% of mothers in custody/abuse litigation indicated that they eventually stopped reporting abuse of their children (which the children disclosed during visitations after being put in custody of the alleged abusers) for fear that all contact with their children would be terminated by the courts. *See* Geraldine Butts Stahly et al., *Protective Parents Survey Data* (2003), *available at* http://protectiveparents.com/research.html.

Given the family courts' skepticism of protective parents' reports that a child has been victimized by the other parent, independent evidence of child abuse is essential to protecting children in custody and child protection proceedings. The dominant source of such third-party reports is inevitably mandatory reporters—typically a teacher, a doctor, a therapist, or other provider of service to the child.

B. Mandatory Reporters' Accounts of Children's Disclosures of Abuse Are Essential to Keeping Children Safe

When a child discloses his or her own abuse to a mandatory reporter, the reporter's duty to report protects the child's safety. *See, e.g.*, Child Welfare In-

formation Gateway, Children's Bureau, U.S. Dep't of Health and Human Servs., *Mandatory Reporters of Child Abuse and Neglect* (2014), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm. The reporter's duties include disclosing the abuse to law enforcement or an appropriate child protective services agency. *Id.* Absent a child's statements to a trusted independent source, families may lack the evidence necessary to persuade a court or evaluator that the abuse occurred.

Mandatory reporters know key details and may be the only source of "direct" evidence. Children's in-court testimony regarding their own abuse can be difficult to obtain because young children are particularly vulnerable in cross-examination and risk exposure to more trauma when confronting their abuser. *See, e.g.*, David Crump, *Child Victim Testimony, Psychological Trauma, and the Confrontation Clause: What Can the Scientific Literature Tell Us?*, 8 J. C.R. & Econ. Dev. 83 (1992), *available at* http://scholarship.law.stjohns.edu/jcred/vol8/iss1/5.

Children can also be excluded from testifying in civil cases for various reasons, usually related to their age or understanding of courtroom proceedings and the requirements of testifying. But, even if unable to testify in court, young children are often able to give plausible reports of abuse outside of the courtroom. *See, e.g.*, Ind. Dep't of Child Servs., *Child Welfare Policies*, ch. 4, sec. 22, at 4-5 (2012), *available at* http://www.in.gov/dcs/files/4.22_Making_an_Assessment_(Investigation).pdf ("[Y]oung children are able to give plausible and specific descriptions of traumatic situations that would normally be beyond their experience (e.g., sexual acts) and such statements

should be taken seriously."); Iris Blandon-Gitlin and Kathy Pezdek, *Children's Memory in Forensic Contexts: Suggestibility, False Memory and Individual Differences,* CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS, PSYCHOLOGICAL SCIENCE AND THE LAW 57-80 (Bette L. Bottoms et al. eds., 2009). Because statements made to mandatory reporters are usually voluntary and made to an impartial but trusted person in the child's life, these statements have little risk of unreliability.

A statement made by a child to a mandatory reporter is often the only extra-parental source of evidence of abuse. In 2005, over one-half of reports of child maltreatment (61.7 percent) were from professionals who are considered "mandated reporters." *See* American Humane Association, *Child Abuse and Neglect Statistics* (2013), http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/child-abuse-and-neglect-statistics.html. Treating the reports from mandatory reporters as testimonial and therefore inadmissible would hamstring family courts' ability to determine accurately the risk of child abuse in custody and child protection determinations. Mistakes in these determinations are already common. The Leadership Council on Child Abuse and Interpersonal Violence estimates that 58,000 children a year are placed in the custody of an abuser. *See* The Leadership Council on Child Abuse and Interpersonal Violence, *How Many Children Are Court-Ordered into Unsupervised Contact with an Abusive Parent After Divorce?* (2008), *available at* http://leadershipcouncil.org/1/med/PR3.html ("[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 un-

supervised contact with the alleged abuser. (Research has found results ranging from 56-90%; a conservative estimate is 75%.).") (citations omitted).

Moreover, when courts mistakenly place children with abusers, third-party corroboration of subsequent abuse can also be critical in *correcting* judicial errors. In the "turned around" cases discussed above, corroborating evidence from trusted professionals was critical in the subsequent (corrective) court's decision. "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]." *Turned Around Cases* at 42.

This case therefore presents an issue with significance beyond the criminal context. Given that some family courts follow criminal evidentiary standards, the Ohio Supreme Court's decision puts children at significant risk by limiting the scope of available evidence of abuse, thereby making children's legal protection from parental abuse more difficult. This Court should grant the Petition to ensure that the nation's civil courts can still provide the legal protection that vulnerable children require and deserve.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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