

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	Case No. 2023-1289
Appellant,	:	
	:	On Appeal from the
v.	:	Cuyahoga County Court
	:	of Appeals, Eighth
Garry F. Smith,	:	Appellate District
	:	
Appellee.	:	Court of Appeals Case
	:	No. 111274
	:	

**BRIEF OF AMICI CURIAE SUPPORT AND ADVOCACY
GROUPS FOR VICTIMS OF DOMESTIC VIOLENCE
IN SUPPORT OF APPELLANT STATE OF OHIO**

Jason J. Blake (0087692)
(Counsel of Record)
Gretchen L. Whaling (0096780)
CALFEE, HALTER & GRISWOLD LLP
1200 Huntington Center
41 South High Street
Columbus, OH 43215
Tel.: (614) 621-1500
Fax: (614) 621-0010
jblake@calfee.com
gwhaling@calfee.com

COUNSEL FOR AMICI CURIAE

Emily L. Rapalino
Alexandra Lu
Molly Grammel
Sierra J. Perez-Sparks
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Tel.: (617) 570-1000
erapalino@goodwinlaw.com

Michael C. O'Malley (0059592)
Cuyahoga County Prosecutor
Kristen Hatcher (0093864)
(Counsel of Record)
Assistant Prosecuting Attorney
Daniel T. Van (0084614)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, OH 44113
Tel.: (216) 443-7800
khatcher@prosecutor.cuyahogacounty.us
dvan@prosecutor.cuyahogacounty.us

COUNSEL FOR APPELLANT

Cullen Sweeney (0077187)
Cuyahoga County Public Defender
Michael Wilhelm (0098821)
(Counsel of Record)
John T. Martin (0020606)
Assistant Public Defenders
310 Lakeside Avenue, Suite 200

alu@goodwinlaw.com
mgrammel@goodwinlaw.com
sperezsparks@goodwinlaw.com

Benjamin Hayes
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Tel.: (202) 346-4000
bhayes@goodwinlaw.com

Alexandra D. Valenti
GOODWIN PROCTER LLP
620 Eighth Avenue
New York, NY 10019
Tel.: (212) 813-8800
avalenti@goodwinlaw.com

OF COUNSEL FOR AMICI CURIAE

Cleveland, OH 44113
Tel.: (216) 443-7583
mwilhelm@cuyahogacounty.us

COUNSEL FOR APPELLEE

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STATEMENTS OF INTEREST OF THE AMICI CURIAE

Amicus AEquitas provides training and other resources to prosecutors, law enforcement, advocates, and allied professionals who respond to crimes of domestic and sexual violence, human trafficking, and related offenses. AEquitas' staff is primarily composed of former prosecutors with expertise in these areas, and its work incorporates best practices and up-to-date research in law, social science, medicine, forensic science, police science, and related fields. The Stalking Prevention, Awareness and Resource Center (SPARC) is an AEquitas Initiative.

Amicus Joyful Heart Foundation was founded by Mariska Hargitay in 2004 to help survivors of domestic and sexual violence heal and reclaim joy in their lives. Today, it is a national organization working to transform society's response to domestic violence and sexual assault and end this violence forever. Ensuring that courts can consider all relevant evidence of domestic and sexual violence—whether in the form of physical evidence like rape kits or victim statements about the crime—is a top priority of the organization's advocacy work.

Amici submit this brief to ensure that the Court's Confrontation Clause analysis is informed by well-founded research on domestic violence, the societal impact of these crimes, and the many ways abusers can coerce their victims to recant or not participate in prosecutions. Amici believe that evidence-based prosecution plays a crucial role in protecting victims from sometimes lethal risks and preventing abusers from acting with impunity.

INTRODUCTION AND SUMMARY OF ARGUMENT

Intimate partner violence is a national epidemic of astounding proportions, affecting an estimated 41% of women and 26% of men,¹ with domestic violence accounting for 21% of all

¹ Centers for Disease Control and Prevention, *Fast Facts: Preventing Intimate Partner Violence*, (Oct. 11, 2022), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html>.

violent crime.² Unlike other forms of violent crime, the hallmark of domestic violence is the ongoing cycle of physical, sexual, and psychological abuse used to coerce intimate partners to act against their will or best interests and keep them within the abuser’s control. That persistent threat of abuse is an ever-present danger to victims—a threat that does not evaporate simply because the abuser has left the house. The pattern of abusive control persists even after the abuser has been caught and charges have been filed; abusers routinely coerce their victims into abandoning efforts to seek justice.

The court of appeals did not engage with these realities when ruling that Ms. Bradley’s recorded statements to law enforcement were not made during an ongoing emergency and therefore were prohibited by the Sixth Amendment’s Confrontation Clause. Rather than acknowledge the persistent danger that overshadows victims of domestic violence, responding law enforcement, and the public, the court adopted a narrow view of what constitutes an “ongoing emergency” for purposes of the Sixth Amendment, and then compounded its error by claiming that a victim’s non-participation at trial must have been her “choice”—rather than the fruits of the perpetrator’s ongoing coercion.³ The decision is wrong on the law,⁴ and the court’s failure to account for the realities of domestic violence will undermine efforts to bring perpetrators to justice—it will deter prosecutors from pursuing domestic violence cases, compound victims’

² National Center for Injury Prevention and Control, *The Impact of Intimate Partner Violence*, 3 (Aug. 2019), <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvs-impactbrief-508.pdf>; U.S. Dep’t of Justice (“DOJ”), *Nonfatal Domestic Violence, 2003-2012*, 1 (Apr. 2014), <https://bjs.ojp.gov/content/pub/pdf/ndv0312.pdf>. “Domestic violence includes victimizations committed by intimate partners . . . , immediate family members . . . , and other relatives.” DOJ, *supra*, at 1. This memorandum primarily addresses intimate partner violence.

³ *State v. Smith* (“Op.”), 2023-Ohio-603, 209 N.E.3d 883, 909, ¶ 99 (8th Dist.).

⁴ See Appellant’s Memorandum in Support of Jurisdiction.

trauma, and ultimately undermine public safety. For these reasons, Amici respectfully ask the Court to reverse the court of appeals.

STATEMENT OF THE CASE AND FACTS

Amici adopt by reference the Statement contained in Appellant’s memorandum.

ARGUMENT

Amici Curiae Proposition of Law:

The majority opinion fundamentally misunderstands the dynamics of domestic violence and undermines the safety of victims, law enforcement, and the general public.

I. THE COURT OF APPEALS’ “ONGOING EMERGENCY” ANALYSIS IS DIVORCED FROM THE REALITIES OF DOMESTIC VIOLENCE.

Domestic violence is not an isolated incident of physical aggression; it is a persistent pattern of physical, sexual, and psychological abuse to instill fear and coerce intimate partners to act against their own will or best interests.⁵ The decision below, however, did not acknowledge these hallmarks of domestic violence when conducting its “ongoing emergency” analysis under the Sixth Amendment. Instead, the court of appeals narrowly cabined the “emergency” to the moments of physical abuse that precipitated Ms. Bradley’s contact with police and medical personnel—the so-called “original threat.”⁶ This restricted view overlooks that an emergency stemming from domestic violence does not end after one attack—and certainly extends beyond the temporary departure of the abuser and the arrival of first responders.

⁵ See Joyful Heart Foundation (“JHF”), *About Domestic Violence*, <https://www.joyfulheartfoundation.org/learn/domestic-violence/about-domestic-violence> (accessed Oct. 7, 2023).

⁶ Op. ¶¶ 89–93.

Because incidents of domestic violence are part of a pattern of recurring abuse,⁷ perpetrators pose a persistent threat to their victims, unlike, for example, those who commit single-incident assaults. Many perpetrators of domestic violence cohabit with their victims,⁸ thereby depriving many victims of refuge after an attack.⁹ Victims thus may find themselves in danger again in the immediate aftermath of an attack.¹⁰ Compounding that risk is that an attempt to find distance and safety after an attack may place victims at further risk. One study found that 12% of petitions for protective orders described incidents of retaliation against the victim for having called the police for help.¹¹ Other research shows that victims are generally in the most danger when they attempt to leave their abuser¹²—and, too often, that is when abuse turns fatal.¹³ For these reasons, a victim of domestic violence may still be “acting . . . to secure protection”¹⁴ from the abuser even if the abuser has left the scene of the attack and EMS has arrived—unlike a single incident of random assault, the risk that a domestic abuser will return is ever present.

⁷ Nat’l Inst. of Just. (“NIJ”), *Practical Implications of Current Domestic Violence Research* (“*Practical Implications*”), 18 (June 2009), <https://www.ojp.gov/pdffiles1/nij/225722.pdf>.

⁸ See NIJ, *Practical Implications*, *supra* note 7, at 56. Cohabitation occurred here. Op. ¶ 22.

⁹ One-third of victims in a study opposed the abuser’s prosecution because they relied on the abuser for housing. See NIJ, *Practical Implications*, *supra* note 7, at 39.

¹⁰ Most abusers who reoffend do so quickly. NIJ, *Practical Implications*, *supra* note 7, at 9. Over time, the violence in violent relationships tends to escalate. The Advocates for Human Rights, *Lethality Assessments and Extremely Dangerous Behavior* (2019), https://www.stopvaw.org/lethal_and_extremely_dangerous_behavior. The record supports these conclusions: The violence was becoming increasingly severe, and Officer Melbar feared the victim would be “in danger” after the December 26 incident if the abuser returned, Op. ¶¶ 26, 41, 46.

¹¹ NIJ, *Practical Implications*, *supra* note 7, at 57.

¹² Pelley, *Leaving Relationship Is ‘Most Dangerous Time’ for Domestic Violence Victims, Experts Say*, CBC (Dec. 8, 2016), <https://www.cbc.ca/news/canada/toronto/domestic-violence-victims-1.3885381>. One study found that 48% of petitions for protective orders described separation violence. NIJ, *Practical Implications*, *supra* note 7, at 57.

¹³ See NIJ, *Extent, Nature, and Consequences of Intimate Partner Violence* (“*Consequences*”), 37 (July 2000), <https://www.ojp.gov/pdffiles1/nij/181867.pdf>.

¹⁴ *State v. Beasley*, 153 Ohio St. 3d 497, 2018-Ohio-493, 108 N.E.3d 1028, 1064, ¶ 183.

The victim is not the only person threatened in the period of prolonged danger during and following a specific incident of physical violence. Police officers are at particular risk when responding to reports of domestic violence,¹⁵ as are family members, friends, and even strangers, who together make up 20% of homicide victims stemming from domestic violence incidents.¹⁶ Similarly, the connection between domestic violence and mass gun violence is well documented,¹⁷ and research suggests that domestic disputes are a contributing factor in about 20% of mass shootings.¹⁸ Thus, even after the abuser has left the scene of the attack, law enforcement may try to elicit a wide variety of statements from the victim to better understand the abuser’s risk profile while the period of emergency is still ongoing.

The court of appeals erred by failing to consider these realities when evaluating whether there was an “ongoing emergency” when the police arrived and questioned Ms. Bradley. The court made much of the abuser’s flight, but it is well established in the domestic violence context that “suspects who flee the scene before police arrive are significantly more likely . . . to reabuse than those arrested at the scene.”¹⁹ The court also suggested that the danger to Ms. Bradley was reduced because she knew her assailant’s identity;²⁰ but the intimacy between abuser and victim is precisely what makes victims *more* vulnerable to repeated abuse and what made the situation *more* of an

¹⁵ Tucker, *Domestic Incidents Are Highly Dangerous for Police Officers, Experts Say*, CNN (Jan. 22, 2022), <https://www.cnn.com/2022/01/22/us/domestic-incidents-police-officers-danger/index.html>.

¹⁶ See Smith *et al.*, *Intimate Partner Homicide and Corollary Victims in 16 States: National Violent Death Reporting System, 2003-2009*, 104 Am. J. Public Health 461, 464 (Mar. 1, 2014).

¹⁷ See, e.g., Federal Bureau of Investigation, *A Study of the Pre-Attack Behaviors of Active Shooters in the United States Between 2000 and 2013*, 12 (June 2018), <https://www.fbi.gov/file-repository/pre-attack-behaviors-of-active-shooters-in-us-2000-2013.pdf/view>.

¹⁸ Krouse *et al.*, *Mass Murder with Firearms: Incidents and Victims, 1999-2013*, CRS, 29 (July 30, 2015), <https://sgp.fas.org/crs/misc/R44126.pdf>.

¹⁹ NIJ, *Practical Implications*, *supra* note 7, at 12.

²⁰ See Op. ¶ 92.

emergency. The court thus had it backwards when weighing that factor against a finding of ongoing emergency. Moreover, the court placed undue weight on the fact that nothing in the record suggested that the abuser knew where Ms. Bradley was in the immediate aftermath of the attack, but the court did not consider the fact that the abuser lived in the same home as she, and thus was likely to return to the same location.²¹ Finally, the court characterized the attack as a “private dispute”²² and saw “nothing in the record” that would suggest the public was in danger. But as discussed above, there is a documented correlation between domestic violence and future—sometimes immediate—threats to the general public.

The court of appeals thus failed to consider the well-documented dynamics of domestic violence when analyzing whether Ms. Bradley’s statements were made during an ongoing emergency. That failure underestimates the magnitude and duration of the danger posed by abusers to their victims and, in so doing, undermines the safety of victims, police, and the public.

II. REQUIRING VICTIM TESTIMONY AT TRIAL IGNORES THE DYNAMICS OF DOMESTIC ABUSE, PERPETUATES ABUSE AND TRAUMA, AND HARMS EFFORTS TO PROTECT VICTIMS AND THE BROADER PUBLIC.

The court of appeals chastised the State for engaging in what the court called a “disturbing trend” of “‘victimless’ prosecution,” and attributed that “trend” to strategic calculus by the State.²³ While this portion of the opinion may be *dicta*, the statement sheds light on an apparent misunderstanding of domestic violence dynamics. Contrary to the court’s characterization, prosecutions in which domestic violence victims do not testify at trial are not “victimless,” and the

²¹ See Op. ¶ 22.

²² Op. ¶ 92. The majority’s phrasing here is particularly unfortunate in light of the country’s legal and social history of minimizing abuse as a personal matter within the family. See NIJ, *The Criminalization of Domestic Violence: Promises and Limits*, 3–9 (Jan. 1996), <https://www.ojp.gov/pdffiles/crimdom.pdf>.

²³ See Op. ¶¶ 95–100.

court's focus on a victim's absence overlooks both the cause of the victim's unavailability and the wealth of other reliable evidence that can support a guilty verdict.

The court also appeared to blame Ms. Bradley for not testifying, stating that “[t]rial courts need to hold the prosecution *and the ‘victims’* accountable in these matters. . . . If the state cannot proceed to trial, a case can be dismissed without prejudice and refiled at a time when the ‘victim’ sees the folly of their way.”²⁴ The court’s position that victims must be “held accountable” for the legal prosecution of crimes that they report demonstrates the court’s misunderstanding of the stakes in domestic violence cases. The opinion suggests that reporting a crime and then choosing not to testify in its prosecution is a shameful “folly,” when in fact the decision not to participate often reflects the victim’s assessment of the safest course available and the only way the victim can minimize retaliation and further trauma.

A. Abusers Often Coerce Their Victims into Not Testifying at Trial.

Victims of domestic violence are often unavailable to testify at trial for reasons integrally related to the abusive relationship—not to any “folly of their way[s].”²⁵ As the Supreme Court recognized in *Giles v. California*, “[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions.”²⁶ Perpetrators abuse their victims to maintain power and control over the relationship, and they use physical, sexual, and psychological abuse, among other tactics, to instill fear and coerce their victims to act against their self-interest.²⁷ These dynamics of control and intimidation do not end simply because police have been called or the state prosecutes; rather, abusers frequently continue to coerce and control their victims after the

²⁴ Op. ¶ 99 (emphasis added).

²⁵ *Id.*

²⁶ 554 U.S. 353, 377 (2008).

²⁷ JHF, *supra* note 5.

precipitating criminal act and even while the state is prosecuting the crime, including by coercing or influencing their victims not to testify against them.

This ongoing coercive influence of abusers is well documented. One study found that 25% of victims who opposed prosecution did so because their abusers threatened them.²⁸ Another study found that nearly half of abusers attempted to “talk” their victims out of testifying, and a third of those perpetrators stalked their victims before trial.²⁹ Other research found that almost a quarter of perpetrators re-abused their victims before trial.³⁰ And not all witness intimidation is overt: abusers often resort to “softer” manipulation tactics to procure the victim’s unavailability at trial or otherwise frustrate justice (such as by convincing the victim to recant). A 2011 analysis of jail calls between abusers and their victims found that a victim’s recantation was most often spurred by the abuser appealing for sympathy, minimizing the abuse, or blaming the prosecutor for the couple’s separation.³¹ These are just some of the many ways abusers maintain control over their victims and “dissuade . . . [them] from resorting to outside help.”³²

Although the legal issue in this case did not invite the court to engage in an unavailability analysis, its opinion assumed that Ms. Bradley was—and that victims generally are—available to testify.³³ That was error: the court overlooked a number of classic signs of the power dynamics in a domestic violence relationship and failed to consider how these dynamics may have rendered Ms. Bradley unavailable to testify. First, the court failed to appreciate that Ms. Bradley did not

²⁸ NIJ, *Practical Implications*, *supra* note 7, at 39.

²⁹ *Id.* at 40.

³⁰ *Id.* at 40.

³¹ Bonomi *et al.*, “Meet Me at the Hill Where We Used To Park”: *Interpersonal Processes Associated with Victim Recantation*, 73 *Soc. Sci. & Med.* 1054 (2011), <https://doi.org/10.1016/j.socscimed.2011.07.005>.

³² *Giles*, 554 U.S. at 377.

³³ *See Op.* ¶ 100. (“We recognize that some prosecutions can go forward without a ‘victim’ but that should be the exception and not the rule.”).

participate in the criminal investigation long before she did not appear at trial.³⁴ Victims of severe trauma “may be among the least able to cooperate with law enforcement” due to the lasting impact of their traumatic experiences.³⁵ This can include post-traumatic stress disorder (affecting roughly 65% of domestic violence victims),³⁶ traumatic brain injury (occurring among victims about 1.6 million times annually),³⁷ severe anxiety (affecting 75% of victims),³⁸ and substance abuse disorders (occurring among victims at a rate six times greater than for non-victims).³⁹ Thus, Ms. Bradley’s non-appearance at trial was far more likely the consequence of the abuse she had tried to escape rather than any “folly” of her own.

The court also failed to appreciate the subtler forms of intimidation that abusers use to prevent their victims from testifying. The court did not challenge the defendant’s claim that during a phone call while he was incarcerated the victim purportedly told him “she was not going to present herself at the court to testify as ‘I already told you. You ain’t did nothing.’”⁴⁰ Far from showing that the defendant was innocent, this self-reported conversation should have set off alarm bells that the defendant likely was continuing to procure the victim’s unavailability even while awaiting trial. As discussed *supra*, p. 8, nearly half of abusers try to convince their victims not to

³⁴ See Op. ¶ 30.

³⁵ NIJ, *Practical Implications*, *supra* note 7, at 31.

³⁶ *Id.*; Hillstrom, *The Hidden Epidemic of Brain Injuries From Domestic Violence*, N.Y. Times (Mar. 1, 2022), <https://www.nytimes.com/2022/03/01/magazine/brain-trauma-domestic-violence.html>.

³⁷ Hillstrom, *supra* note 36.

³⁸ NIJ, *Practical Implications*, *supra* note 7, at 30.

³⁹ Bonomi *et al.*, *Medical and Psychosocial Diagnoses in Women With a History of Intimate Partner Violence*, 169 *Archives of Internal Medicine* 1692 (Oct. 12, 2009). Many victims self-medicate with drugs, NIJ, *Practical Implications*, *supra* note 7, at 30, which is what Ms. Bradley said, Op. ¶¶ 23, 28. The court focused on Ms. Bradley’s drug use, Op. ¶ 96, but only to opine on her credibility and did not consider how it may be a symptom of the abuse.

⁴⁰ Op. ¶ 98.

testify, and these efforts range from overt threats to cajoling and “expressions of love and desire.”⁴¹ Regardless of the type of intimidation employed, an abuser’s attempt to preclude victim testimony is an extension of the psychological coercion inherent in a domestic violence relationship.⁴² The court should have considered how the defendant may have contributed to Ms. Bradley’s unavailability, rather than decrying so-called “victimless prosecutions.”

B. Evidence-Based Prosecutions Are Necessary To Thwart Abusers’ Efforts To Procure Their Victim’s Nonparticipation at Trial.

A victim’s nonparticipation at trial is the natural culmination of the abuser’s pattern of acts “intended to dissuade a victim from resorting to outside help.”⁴³ Evidence-based prosecutions permit cases to progress on the basis of reliable evidence other than victim testimony. Similar to strategies in domestic violence homicide prosecutions, such evidence includes law enforcement testimony, physical evidence, statements from the defendant, other witness testimony, and out-of-court victim statements under the doctrine of forfeiture by wrongdoing.⁴⁴ The use of all this relevant and reliable evidence to prosecute domestic violence crimes is not “disturbing,”⁴⁵ but rather is a necessary and effective countermeasure to abusers’ often successful efforts to coerce and intimidate victims into not testifying at trial.

⁴¹ *People v. Reneaux*, 264 Cal. Rptr. 3d 459, 471 (2020) (holding defendant forfeited his right to confrontation by telling his victim to recant, pledging his love, and asking for reassurance).

⁴² *Id.* (recognizing that an abuser may procure his victim’s nonparticipation at trial via statements to the victim that are “not explicitly threatening and directive”). See *State v. McKelton*, 2016-Ohio-5735, 70 N.E.3d 508, 546, ¶ 111 (“Evidence of domestic violence is ‘highly relevant’ to analyzing the purpose prong of the forfeiture exception.” (quoting *Giles*, 554 U.S. at 377)).

⁴³ *Giles*, 554 U.S. at 377.

⁴⁴ AEquitas, “Next-Level” *Compulsion of Victim Testimony in Crimes of Sexual and Intimate Partner Violence*, 5 (Jan. 2023), <https://aequitasresource.org/wp-content/uploads/2023/01/Next-Level-Compulsion-of-Victim-Testimony.pdf>. This equitable doctrine has been recognized by this Court and the U.S. Supreme Court and provides that a wrongdoer who has rendered a witness unavailable to testify at trial may not invoke his Sixth Amendment confrontation right. See, e.g., *McKelton*, 2016-Ohio-5735; *Giles*, 554 U.S. at 353.

⁴⁵ *Op.* ¶ 95.

The court's decision delegitimizes evidence-based prosecutions. If left undisturbed, it will push prosecutors to either (a) refuse to prosecute domestic violence cases, thus rewarding abusers, or (b) use the coercive power of the state to compel *victims* to testify, effectively treating them as offenders and causing further trauma. *See* Section III, *infra*. Instead of considering how a victim's nonparticipation at trial likely is the consequence of the defendant's actions, the court framed the issue as the victim's "choice" and the State's strategic maneuver. The court's opinion thus casts a shadow over evidence-based prosecutions per se, which are critical to combatting victim intimidation in the domestic violence context.

III. COMPELLING VICTIMS TO TESTIFY AT TRIAL WILL CAUSE IMMENSE TRAUMA AND IS COUNTERPRODUCTIVE.

The court of appeals also erred by suggesting that to resolve the perceived problem of "victimless prosecutions," prosecutors and courts should not hesitate to compel a victim's testimony at trial.⁴⁶ But using the state's coercive power to secure victim participation would be immensely harmful to victims and ultimately counterproductive. As discussed *supra*, pp. 8–9, there are many reasons why domestic violence victims may be unavailable for trial, including difficulty remembering the details of the trauma and fear of retaliation. One study found that "[a] quarter of victims opposing prosecution reported being specifically threatened by their abusers against prosecution," while "[o]thers expressed fear that their abusers would become more violent."⁴⁷ Many victims report that they are more afraid of testifying than they are of their abuser,⁴⁸ and they understandably may feel repelled by the prospect of enduring multiple court appearances and repetitive interviews during which they must continually relive their traumatic

⁴⁶ *See Op.* ¶ 99.

⁴⁷ NIJ, *Practical Implications*, *supra* note 7, at 39.

⁴⁸ "Specifically, victims expressed fear that the prosecutors would not prepare them adequately to testify." *Id.*

experience.⁴⁹ The court considered none of this when it advocated for compelling appearance and holding victims “accountable.”⁵⁰ Forcing domestic violence survivors to participate at trial not only ignores the immense trauma they have already suffered—it threatens to make it worse.

Use of compulsory measures such as material witness and bench warrants to compel victim testimony can have disastrous effects. Arresting and holding victims to testify causes humiliation and agony, making victims feel *they* are the offender.⁵¹ And no wonder: one victim arrested on a material witness warrant was jailed for five days on a \$100,000 bond where:

[Her] clothes were taken, and she was given an orange jumpsuit. When she appeared in court, she was shackled at her hands and feet. . . . The defendant . . . had paid his \$3,500 secured bond at arraignment and was released. He came to court from home in his own clothes. He pled guilty . . . and was sentenced to probation, avoiding a jail sentence altogether.⁵²

This loss of freedom not only harms the victim economically and professionally (when forced to miss work), but it compounds the deprivation of their agency already inherent in the relationship between abuser and the abused.⁵³ Coercive measures can also interfere with victims’

⁴⁹ See Simpson, *Benefits and Drawbacks of No-Drop Policies and Evidence-Based Prosecution*, 26 Rich. Pub. Int. L. Rev. 141, 148 (2023).

⁵⁰ Op. ¶ 99.

⁵¹ See Stillman, *Why Are Prosecutors Putting Innocent Witnesses in Jail?*, The New Yorker (Oct. 17, 2017), <https://www.newyorker.com/news/news-desk/why-are-prosecutors-putting-innocent-witnesses-in-jail> (victim stating, “Well, right now I don’t feel like the victim,” after being arrested pursuant to material witness warrant); see also AEquitas, *supra* note 44, at 2. One rape and assault victim had a severe breakdown on the witness stand and refused to continue testifying. The court jailed her for a month to ensure she would finish her testimony and remain available in case additional testimony was needed. While incarcerated, she was assaulted and denied medication. Jail paperwork documented her as “arrested for sexual assault,” and staff “claimed she was ‘confused’” when she insisted she was a victim. Clarke, “*Jenny’s Law*” Passed after Texas Prosecutor Jails Rape Victim; District Attorney Voted Out, Prison Legal News (Jan. 8, 2018), <https://www.prisonlegalnews.org/news/2018/jan/8/jennys-law-passed-after-texas-prosecutor-jails-rape-victim-district-attorney-voted-out/>.

⁵² Second Amended Complaint and Jury Demand at 3, *Singleton et al. v. Cannizzaro et al.*, No. 2:17-cv-10721-JTM-JVM (E.D. LA Jan. 25, 2018), Doc. No. 52.

⁵³ Simpson, *supra* note 49, at 151.

ability to care for themselves⁵⁴ and their family; victims with children may face worst-case scenarios, such as seeing their children placed in shelters or foster care—or with the abuser’s family where the victim and abuser have children together. And the consequences of forced compliance do not always end with the conclusion of the case: if adjudicated for criminal contempt, the victim may acquire a criminal record and face follow-on penalties at home (e.g., losing child custody) or work (losing a job or security clearance).⁵⁵ To the victim, it feels as though these punishments confirm what their abuser has communicated all along—they are the ones to blame.⁵⁶

Using such measures can ultimately be counterproductive to the State’s ability to secure a conviction. By the time the victim finally takes the stand, he or she may resent the prosecution, and the defense may try to exploit the victim’s reluctance to testify in order to portray the prosecution as overzealous. The victim may struggle on the stand,⁵⁷ or even recant.⁵⁸ The judge or jury may accept this new narrative, jeopardizing any prospect of conviction.⁵⁹

Beyond a particular prosecution, the routine use of compulsory measures may negatively affect the reputation of law enforcement and judicial bodies and their ability to serve justice. Using coercive measures to compel victim testimony can create the impression that the State is more interested in a win for its own sake than in the safety and wellbeing of victims.⁶⁰ This can erode trust in law enforcement and undermine efforts to encourage victims of domestic violence to come forward and report these crimes,⁶¹ which already are significantly underreported. Indeed, only one

⁵⁴ See Clarke, *supra* note 51.

⁵⁵ See *id.*

⁵⁶ See JHF, *supra* note 5.

⁵⁷ See Clarke, *supra* note 51.

⁵⁸ E.g., *State v. Olson*, No. C2-97-137, 1997 WL 457447, at *2 (Minn. Ct. App. Aug. 12, 1997).

⁵⁹ JHF, *supra* note 5.

⁶⁰ Simpson, *supra* note 49, at 151. See also Clarke, *supra* note 51.

⁶¹ *Id.*

in five physical assaults against an intimate partner is reported to police, and only one in six rapes.⁶² And approximately 25% of abuse victims who called the police following a physical or sexual assault would not call again in the future due to negative interactions with the police.⁶³ Thus, compelling victim testimony will not only further traumatize victims, but also will likely backfire and weaken the prosecution of domestic violence crimes, and the reputation and integrity of the justice system as a whole.

CONCLUSION

Amici respectfully request that the Court reverse the court of appeals and reinstate the convictions and sentences.

⁶² NIJ, *Consequences*, *supra* note 13, at 49.

⁶³ Schreyer, *Too terrified to speak up: Domestic abuse victims afraid to call police*, USA Today (Apr. 9, 2018), <https://www.usatoday.com/story/news/nation/2018/04/09/too-terrified-speak-up-domestic-abuse-victims-afraid-call-police/479855002/> (“‘Between the police and the criminal I’m dead already,’ one survey participant said.”).

Respectfully submitted,

OF COUNSEL:

Emily L. Rapalino
Alexandra Lu
Molly Grammel
Sierra J. Perez-Sparks
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000
erapalino@goodwinlaw.com
alu@goodwinlaw.com
mgrammel@goodwinlaw.com
sperezsparks@goodwinlaw.com

Benjamin Hayes
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000
bhayes@goodwinlaw.com

Alexandra D. Valenti
GOODWIN PROCTER LLP
620 Eighth Avenue
New York, NY 10019
(212) 813-8800
avalenti@goodwinlaw.com

/s Jason J. Blake

Jason J. Blake (0087692)
(Counsel of Record)
Gretchen L. Whaling (0096780)
CALFEE, HALTER & GRISWOLD LLP
1200 Huntington Center
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 621-1500
Fax: (614) 621-0010
jblake@calfee.com
gwhaling@calfee.com

COUNSEL FOR AMICI CURIAE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Brief of Amici Curiae Support and Advocacy Groups for Victims of Domestic Violence in Support of Appellant State of Ohio* was sent by e-mail and First Class United States Mail, postage prepaid, upon the following this April 9, 2024:

Michael C. O'Malley (0059592)
Cuyahoga County Prosecutor

Kristen Hatcher (0093864)
(Counsel of Record)
Assistant Prosecuting Attorney
Daniel T. Van (0084614)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, OH 44113
khatcher@prosecutor.cuyahogacounty.us
dvan@prosecutor.cuyahogacounty.us

COUNSEL FOR APPELLANT

Alexandria M. Ruden (0022246)
(Counsel of Record)
Tonya Whitsett (0062848)
The Legal Aid Society of Cleveland
1223 West Sixth Street
Cleveland, Ohio 44113
amruden@laslev.org
tonya.whitset@laslev.org

**COUNSEL FOR AMICI CURIAE
LEGAL AID SOCIETY OF
CLEVELAND**

Cullen Sweeney (0077187)
Cuyahoga County Public
Defender
Michael Wilhelm (0098821)
(Counsel of Record)
John T. Martin (0020606)
Assistant Public Defenders
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113
mwilhelm@cuyahogacounty.us

COUNSEL FOR APPELLEE

Steven L. Taylor 0043876
Legal Research and Staff Counsel
Ohio Prosecuting Attorneys
Association
196 East State Street, Ste. 200
Columbus, Ohio 43215
E-mail: taylor@ohiopa.org

**COUNSEL FOR AMICUS
CURIAE OHIO
PROSECUTING ATTORNEYS
ASSN.**

/s/ Jason J. Blake
Jason J. Blake (0087692)
COUNSEL FOR AMICI CURIAE