EIGHTH DISTRICT COURT OF APPEALS OF OHIO,
COUNTY OF CUYAHOGA
Case No. CA-12-098708

VICKI M. O'MALLEY,

PLAINTIFF-APPELLANT,

v.

PATRICK J. O'MALLEY,

DEFENDANT-APPELLEE.

ON APPEAL FROM THE COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
CUYAHOGA COUNTY, OHIO, CASE NO. DR-04-299141

BRIEF OF *AMICI CURIAE* ACTION OHIO COALITION FOR BATTERED WOMEN, OHIO NOW EDUCATION AND LEGAL FUND, PROFESSOR MIKE BRIGNER, JD, AND DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT IN SUPPORT OF PLAINTIFF-APPELLANT

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Chris Marcinko (#0077846)
430 Fremont Road
Port Clinton, OH 43452
(419) 734-0022
Counsel for Amici Curiae

Nomi Berenson (*pro hac vice pending*)
Jessica Davis (*pro hac vice pending*)
Goodwin Procter LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018
Tel.: 212.813.8800
Fax.: 212.355.3333

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INTERESTS OF *AMICI CURIAE*

1. ACTION OHIO Coalition For Battered Women is a statewide coalition of individuals and organizational members, both non-profits and government entities. It was founded in 1976 by members of the YWCA as the result of a needs assessment of women and girls in Ohio. Its initial purpose was to foster the development of battered women's shelters throughout the State. The organization also influenced the passage of legal and legislative reforms to respond to the needs of battered victims and hold abusers accountable. In addition, **ACTION OHIO** spearheaded baseline funding in the state budget for domestic violence ("DV") shelters, the creation of Ohio's DV protocol and county-wide DV task forces, and the publication of the Justice Guide for Ohio's DV Victims.

ACTION OHIO is actively involved in legal and legislative issues, frequently filing *amicus curiae* briefs in precedent setting cases and lobbying for new laws at the state and federal levels. It has also presented legal seminars in conjunction with the Ohio State Bar Association on stalking and on divorce, custody, visitation, and domestic violence, **ACTION OHIO** also conducts a variety of statewide projects, including housing advocacy for survivors and screening for DV in health care and social services settings.

ACTION OHIO has observed the courts' shift in child custody preferences from the mother, typically the DV victim, to shared parenting or joint custody with the father, typically the DV offender. In recent years, research (and real life stories from Ohio victims) indicates that the court is not adverse to allocating parental rights solely to the abuser (in a contested case), based on lack of evidence of physical harm to children, negating research substantiating the impact of witnessing violence on children as well as the common co-occurrence of child abuse and spouse abuse. Courts are favoring fathers' rights over the best interests of the children and failing to factor in the risks to the children. This punishes the DV survivor and places the child or children in both short term and long term danger.

ACTION OHIO believes the outcome of this appeal could have far-reaching impact on Ohio's families and the systems that respond to domestic violence and child abuse.

2. Ohio NOW Education and Legal Fund is a statewide nonprofit organization founded in 1981 by members of Ohio National organization for Women for the purpose of eliminating sex discrimination through research, education and legal activities. It focuses on inequities in education, employment, and family law as well as gender discrimination as evidenced by violence against women and girls, job segregation, biased media and marketing images of females of all ages, and barriers for women and their children to obtain justice in the court system.

The **Fund** has taken leadership roles in challenging discriminatory practices and policies at local and state levels. It has filed *amicus curiae* briefs since its founding challenging decisions that have failed to consider important issues that have disparate impact on women.

3. Professor Mike Brigner, JD

As a former Ohio domestic relations court judge, an Ohio attorney of thirty-five years' experience, and an educator of lawyers, judges, police, and advocates in domestic violence cases, I am interested in assuring that the justice system fulfills its duty to safeguard children and other victims of family violence, as required by a unanimous Supreme Court of Ohio: "[C]ourts have an obligation to carry out the legislative goals to protect the victims of domestic violence." *Felton v. Felton*, 79 Ohio St.3d 34, 44-45 (1997).

In my experience on the bench, custody cases involving DV issues are the most easily mishandled, and additional efforts toward educating judges increase competence in such cases. Often, I found financially-advantaged spouses, primarily fathers, driven to assert parental rights as leverage for financial concessions. No matter how scarce their history of child care, or abundant their history of violence toward the mother or children, these fathers insist that they be judged by their aspirations rather than past performance. Combined with the imbalance in legal representation that the parties can afford, judges can be misled into decisions that discount child safety.

The misapplication of legal standards is another trap set by overzealous counsel – often counsel originally hired for companion criminal charges. Best interest of children standards are sometimes disregarded where judges wrongly assume there must be extraordinary proof of abuse or neglect before it can impose limitations on custodial rights of fathers, regardless of their history of abuse or neglect.

Similarly, concepts of *res judicata* or separation of the issues are misapplied by legal counsel. The severe compartmentalization developed in the criminal justice system is inappropriate in custody and domestic violence cases. Custody disputes cannot be comprehended without considering patterns of conduct. Every incident related to custody, control, and violence among the parties and their children is relevant to the best interest of children. By persuading courts in custody cases to sever consideration of criminal convictions or other findings, abusive individuals can shield themselves from the consequences of their prior behavior.

For these reasons, and the extraordinary pressure applied by crowded dockets, it is possible for even the best-intentioned judicial officer to misapply legal and discretionary standards. That courts can inadvertently put children in danger, sometimes mortal danger, is of particular concern. This occurs when parental rights asserted by demonstrably-dangerous individuals are elevated over child safety considerations. Only vigilant appellate review of custody decisions in abuse cases will prevent abuse of judicial discretion and ensure the safety of children entangled in custody proceedings.

4. Domestic Violence Legal Empowerment and Appeals Project

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** was founded in 2003 by one of the nation's leading domestic violence lawyers and scholars. DV LEAP provides a stronger voice for justice by helping overturn unjust trial court outcomes, advancing legal protections for victims and their children through expert appellate advocacy, training lawyers, psychologists and judges on best practices, and spearheading domestic violence litigation in the Supreme Court. DV LEAP works to ensure that federal and state courts understand the realities of domestic violence and the law when deciding cases with significant implications for domestic violence litigants. DV LEAP has co-authored amicus briefs in numerous state courts and in the United States Supreme Court, on domestic violence, child custody and many related issues. DV LEAP is a partnership of the George Washington University Law School and a network of participating law firms.

DV LEAP specializes in custody and abuse litigation, and partners with the U.S. Department of Justice to provide trainings and technical assistance to judges, lawyers, advocates, and litigants, on custody and abuse to seek to reverse the growing trend toward awards of custody to abusive parents. DV LEAP is concerned about the trial court decision here, as it appears to reflect some of the problematic trends in family courts' responses to abuse allegations which the DOJ has asked us to address.

STATEMENT OF THE ISSUES

Amici adopt Appellant's Statement of the Issues.

STATEMENT OF THE CASE

Amici adopt the Appellant's Statement of the Case, highlighting the following key facts in evidence below:

First, Defendant's felony obscenity conviction is irrefutable: he pled guilty to possessing extensive obscene materials demonstrating his sexual interest in child molestation.

Second, the evidence of child abuse is not in dispute. The court below did not reject the children's various descriptions of the abuse,[1] and the children exhibited classic symptoms of abuse – fear, anxiety, anger, hair plucking, somatic pain, and more. The evidence showed:

1. In September 2008, while an on overnight visit with their father, they telephoned their mother and asked her to pick them up, saying that their father was chasing Patrick and/or Caitlin around the lawn in his car. She picked them up at approximately 2:30 a.m. that night and they all went to stay at WomenSafe. (T.D. 559, 7; Chldn. Intv. Tr. vol. II, 9:6-11:6.)

2. Patrick told his therapist at WomenSafe "that he was scared because his father had tried to run him over with the car." (T.D. 559, 33 (quoting T.D. 545, 31:7-8).)

3. Molly Edwards, Patrick's school psychologist, testified that Patrick was nervous when his father was about to be released from prison. (T.D. 477, 13, 19-20, 28.)

[1] Rather, it questioned only the *reasons* they were making such reports. (T.Tr. vol. X, 101:11-81 ("Where do memories come from? Where do memories come from when you have the policeman pick up a report from mother who's there with the children. We have the hospital saying, you have a concussion and you have a daughter going to school and saying my father injured my arm. You can't believe all the reports I've read about what these children [say].").)

4. Kelly Andreas, Patrick's third-grade teacher from 2009-2010, testified that Patrick was sad when his dad was released, and would "pull his eyelashes out in class". (T.D. 475, 7-8, 10-11, 15, 17, 20; T.D. 559, 56.)

5. "Patrick's Description of Problem: 'My dad is very mean to me he tried to run me over in his car last night and his face was very scary. He did not give us dinner last night and just put us in our rooms. I was very scared so I called my mom and asked her to come and pick us up." (T.D. 559, 36-37 (quoting Ex. 3-1 (WomenSafe intake assessment form)).)

6. "Patrick's adjustment difficulties and anxiety are strongly associated with his witnessing and experiencing domestic violence committed by his father. During sessions, Patrick specifically reported a history of domestic violence during which his father harmed his mother and hit him and his sister with various items such as spoons or broom sticks. Patrick also reported that his most recent past visits at his father's home scared him due to threats his father made to physically harm him and his sister." (T.D. 559, 38 (quoting letter from therapist submitted as evidence).)

7. Recounting Christmas day 2009, Caitlin testified: "You see my brother wanted to call my mom, but my dad said she just left and then our dad saw my, um, the phone in Patrick's hand and then lifted him up in the bathroom, carried him into the bathroom, did a headlock on him, and then put – set him down, pushed him right to the sink . . . [Patrick] was crying." (Chldn. Intv. Tr. vol. I, 7:13-8:22.)[2]

8. Patrick testified: "One time around Christmas right before he hit me in the face he pushed me into the sink in the bathroom…after he pushed me into the sink, he put me in an illegal headlock." (Chldn. Intv. Tr. vol. II, 12:5-10.)

9. The following week (January 2010), Patrick's father punched him in the face; his mother took him to the hospital and the doctor determined that Patrick had a concussion. (*See* T.D. 559, at 8, 31.) Patrick testified: "he's hurt me. He gave me a concussion on Sunday . . . he just punched me in the face." (Chldn. Intv. Tr. vol. I, 41:2-12.) Caitlin testified: "My dad stopped and punched Patrick right in the face. . . . He just got angry and punched him." (*Id.* at 26:25-27:6, 29:6.) In response to the judge's question "did he mean to push [Patrick] in the face?" Caitlin responded, "No. Punch him." (*Id.* at 29:7-8.)

[2] The Court discussed Christmas day solely based on Defendant's relatives' recounting that the children refused to eat or open presents. (T.D. 559, 63 (referring to the testimony of Renee Classen, Defendant's significant other).) It appears they did not witness this incident, which explains why the children were not enjoying themselves.

10. Patrick reported to his Cub Scout Troop leader that he was worried that his dad would "grab him, do something to him" at the 2010 St. Patrick's Day parade. (T.D. 513, 11:22-12:21.)

11. The next year (January 2011), Patrick returned from his father's home with sore ribs and Caitlin, a strained wrist. (T.D. 559, 7.) Defendant admitted that "[h]e pulled Patrick's arm away and grabbed him with a 'jujitsu' move, as Patrick was ready to attack him." (*Id.*)

SUMMARY OF ARGUMENT

The central tenet of custody adjudication is furtherance of the best interests of children. Children's best interests require safety, love, caring, and nurturance. In this case, Defendant's history – even apart from his children's complaints – is checkered with warning signs. For instance, the record includes evidence of two prior criminal convictions, each of which presents significant safety risks to children: (i) a felony obscenity conviction for possession of material depicting child molestation, bestiality, bondage and suffocation, among other things; and (ii) a prior conviction for disorderly conduct based on "a rather violent encounter with the defendant dragging a bleeding victim by his feet on the streets." The research is clear: there is a very strong correlation between possessing child pornography and committing acts of child molestation. Moreover, defendant's history of domestic violence predates the children in this case: his prior wife reported violence and rape.

Here, the children repeatedly reported – to anyone who would listen – their father's violent acts towards themselves and their mother, and their extreme fear of him. Their reports were consistent with their behaviors – all of which were incapable of being coached (*e.g.*, anxiety, hair plucking, somatic pain, difficulty sleeping, anger and hostility towards their father). Numerous professionals who worked with the family, including therapists, social workers and physicians, found their reports credible,

uncoached, spontaneous and emotional. Yet the court ignored this evidence, instead blaming the children's difficulties and disruptive behavior on their mother, even though there is no plausible method by which any mother could produce the kind of extreme acting out and emotional outbursts demonstrated by these children. Instead of trusting that the children spoke from their experiences and feelings, the court faulted their mother for not somehow forcing them to stop feeling the way they do and to accept a father who terrifies them. This conclusion was contrary not only to any reasonable interpretation of this record, but also to the opinions of the majority of psychological professionals who assessed the children outside of the litigation context.

The court below drew on a controversial theory, parental alienation, to justify ignoring the children's (and mother's) allegations of past abuse and the reasons for their fear. But parental alienation does not and cannot explain these things – as a matter of empirical fact, parental alienation is only present when *both* parents have contributed to a child's alienation, often including critical incidents of child abuse by the hated parent. And parental alienation – which merely captures a child's hostility to a parent but does not, as a label, provide the reasons – offers no explanation for how these children could be as distraught and out of control as they are, if not in reaction to their father's own out of control and terrifying behavior.

The court's Order implicitly recognized that the children might be at risk of harm in Defendant's care: it ordered Defendant to wire his home with security cameras "for the purpose of securing the safety of the children" (T.D. 559, 80) and insisted that he have a third party present with him and the children "at all times (24) hours a day," (*id*. at 81). However, with no method for monitoring these requirements, they provide no

protection (and potentially invade the children's privacy). The Order to remove the children from the one parent they trust and love subjects them to unacceptable risks of harm; actually harms them emotionally, psychologically, and physically; and, therefore, has no reasonable factual basis.

This Court should reverse the lower court's decision, not only to ensure Patrick and Caitlin O'Malley's safety, but also to send important guidance to future courts. It is critically important that serious *risks to children* are taken seriously, even absent absolute proof of past abuse. The parens patriae role of the family courts demands that when determining a child's fate, erring on the side of safety is the first priority. Without some specific, scientifically-grounded theory or explanation for how the children's numerous reports of abuse and fear could be completely fabricated, the obvious inference (*i.e.*, that the father is in fact cruel and frightening) must be taken seriously – and the children's emotional and physical wellbeing must not be experimented with.

ARGUMENT

I. THE COURT BELOW FAILED TO CONSIDER THE RISK TO THE CHILDREN'S SAFETY.

A. Under Ohio Law, The Safety Of The Child Is Paramount.

In custody proceedings, the near universal "best interest" standard concerns the best interest of the *child*, not those of the parents. *See, e.g.*, Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. Fam. Stud. 337, 338 (2008). At the heart of the "best interest" standard is ensuring the child's safety. Bowles et al., Nat'l Council of Juv. & Family Court Judges, *A Judicial Guide to Child Safety in Custody Cases* 5 (2008) ("A child's physical, emotional, and psychological safety are always in his or her best interest. . . . [S]afety of the child is the

primary factor in determining his or her best interest."). Thus, to maximize the safety of the children, a court must minimize the risks associated with causing them harm. *Id.* ("Evaluate safety risks . . . from initial filing through post-disposition.").

Risk measures the possibility of a loss or injury. It is not measured in absolutes. A judge may not dismiss a risk to a child's safety because she is uncertain that a harmful event will occur. The court must consider the future risk of harm to a child, not just those harms that have already befallen the child. Courts should also consider all evidence to assess each risk and weigh the probability of that harm arising, and must factor the chance that a parent will abuse a child. Evidentiary standards like "clear and convincing evidence" or "proof beyond a reasonable doubt" have no place in determining a child's best interest. *See In re Perales*, 52 Ohio St.2d 89, 98, 369 N.E.2d 1047 (1977) ("Parents may be denied custody only if a preponderance of the evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parent is otherwise unsuitable—that is that an award of custody would be detrimental to the child.").

Ohio law reflects these concerns and pragmatic realities. It requires courts "to consider a child's best interests" when the trial court allocates parental rights. R.C. 3109.04(B)(1). In doing so, the court must consider the non-exclusive list of factors set forth in R.C. 3109.04(F)(1)." *Beard v. Bloomfield*, 3rd Dist. No 16-11-19, 2012-Ohio-2133, 2012 WL 1664151, ¶ 26. Each of these factors in some way touches and concerns a child's physical, emotional, and psychological safety and wellbeing. *See* R.C. 3109.04(F)(1). None addresses the best interests of the parents. *Id.*

When dealing with children amidst allegations of child abuse, two statutory

factors stand. First, the court must assess the mental and physical health of all persons involved, including the children. R.C. 3109.04(F)(1)(e). Second, the court is required to consider "whether there is a reason to believe that either parent has acted in a manner resulting in a child being an abused or neglected child."[3] R.C. 3109.04(F)(1)(h). This factor is premised on the notion that the possibility of past abuse heightens the risk of future abuse. As we now show, the court below essentially ignored these factors and failed to prioritize Patrick's and Caitlin's safety.

B. The Court Erred In Downplaying Defendant's Obscenity Conviction.

In purporting to consider the best interests of the children, the lower court essentially ignored the evidence of Defendant's conviction for possessing obscene materials – including materials depicting both child rape and supposedly consensual sex with children.

Defendant pled guilty in 2008 to a federal felony charge of importation of obscene material and served a year in prison. The FBI discovered the obscene images and texts on three computers and several disks belonging to Defendant. A forensic examination determined that he had accumulated the material over the course of several years, including spanning the years his children were born.[4] The obscenity found on each disk and computer, including the computer used by the children, was "very similar in its nature and content." United States Sentencing Memorandum at 3, United States v.

[3] The court instead considered "whether there is reason to believe that either parent has acted in a manner resulting in a child." (T.D. 559, 78.) Because Patrick and Caitlin are the birth children of Mr. and Ms. O'Malley, the court seemingly found this supposed factor in equipoise.

[4] Caitlin O'Malley was born on October 3, 2002. (Chldn. Intv. Tr. vol. I, 4:8-12 (testimony of Caitlin O'Malley).) Patrick O'Malley was born on August 25, 2001. (*Id.* at 43:8-9 (testimony of Patrick O'Malley).)

O'Malley, No. 1:08 CR 23 (N.D. Ohio 2008) [hereinafter Sentencing Memorandum]; (*see also* T.Tr. vol. II, at 77:23-79:7, 80:5-16.) In addition to images of bestiality with nine different species of animals, of bondage and suffocation, and of sex with wide variety of inanimate objects, Defendant's collection contained many obscene textual stories, Sentencing Memorandum at 3-4; (T.Tr. vol. II, at 83:24-84:2) including –

1. A story of a "man forcing his eight-year-old daughter to remain in the back of a 'sex store' where she was raped repeatedly for two years by hundreds of men, including her father. The story includes graphic and vile descriptions of a variety of sex acts performed on the young girl."

2. A story that "details a man and his 27-year old girlfriend approaching two young sisters, aged seven and eight, in a park. The man and women perform oral sex on both children and have the children perform oral sex on them."

3. A story describing a man having sex with his teenage daughter. It concludes with the child having an abortion after learning that her father had impregnated her.

See Sentencing Memorandum at 4. The federal prosecutor described Defendant's acts as follows: Defendant sought and obtained "numerous stories glorifying and salaciously describing sex between adults and children, including children who would have mirrored his own children's ages . . . [and] including sex between family members, including brothers and sisters, and fathers and daughters." *See id*. at 5. "The scope and depravity of the material Defendant sought is made exceedingly more disturbing by the fact that he was the custodial parent of small children at the time." *Id*. at 6.

The custody court below summarily – and remarkably – concluded as a matter of law that Defendant's possession of obscene materials containing sexual abuse of minors "is not applicable" to its analysis of the best interest factors. (T.D. 559, 78.) In so doing the court cursorily swept aside not only common sense but also decades of research verifying

the obvious: that individuals with histories similar to Defendant's pose significant danger to children.

Careful studies have shown that individuals who possess child pornography are likely to sexually molest children. The Butner Study, published in the *Journal of Family Violence*, is the most well-known and widely-cited. *See* Bourke & Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. Fam. Violence 183 (2009) [hereinafter *The Butner Study*]. After an extensive comparison of offenders convicted of possession of child pornography with those who were known to have had sexual contact with a minor, it concluded that the *vast majority* of people who fantasize about sexually abusing a child in fact do so. More specifically, the Butner Study found that *fewer than 2 percent* of subjects who possessed child pornography were "just pictures" offenders. *Id*. at 188. As one district court put it: "most who appear to be lookers are, in fact doers." *U.S. v. Crisman*, D.N.M. No. CR 11-2281, 2011 WL 5822731, *21 (Nov. 15, 2011) (affirming detention order and denying motion for release).

The Study explains that the very act of seeking and obtaining obscene material depicting sex with children has an "insidiously deleterious effect" on the viewer because "[i]t normalizes child/adult sexuality, dehumanizes children, and desensitizes the offender to the harmful consequences of child victimization." *The Butner Study* at 188. Pornography has a generally corrosive effect. An individual becomes increasingly interested in child pornography, is attracted to images of increasing severity, and becomes desensitized to the harm victims experience. *See* Wortley & Smallbone, *Child Pornography on the Internet Guide No. 41 (2006)*,

http://www.popcenter.org/problems/child_pornography/print/ (accessed Dec. 16, 2012); *see also* Kim C., From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children, http://www.ndaa.org/pdf/Update_gr_vol1_no3.pdf (accessed Dec. 16, 2012). Moreover, "with access and opportunity," even "just pictures" offenders are at heightened risk for engaging in hands-on molestation. *See id*. This finding dovetails with evidence that child pornography offenders who reside with a child pose a greater risk to sexually molest a child, either their own or their children's friends. *See, e.g.*, Seto, *Response to Additional Commissioner Questions on Child Pornography Sentencing Guidelines*, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Responses_15_Seto.pdf (accessed Dec. 16, 2012) [hereinafter *Seto Testimony*]; *see also The Butner Study* at 185 (finding that all but a very small minority are "motivated by pre-existing sexual interest in minors").

The risk is even greater where the offending individual is socially engaged, as compared with antisocial offenders who spend disproportionate amounts of time involved with online pornography. *See Seto Testimony*. That makes sense: socially-engaged offenders increase their opportunity for child molestation by engaging with children.

The court's refusal to even consider the evidence of Defendant's child pornography possession, and its dismissive attitude toward the Sentencing Memorandum is difficult to comprehend. (T.D. 559, 78.) The only other consideration the court gave to the statutory requirement that abuse or neglect be considered, *see* R.C. 3109.04(F)(1)(h), was its observation that there were no allegations that the children had already been sexually abused. (T.D. 559, 78.) This demonstrates that the court profoundly misunderstood its

obligation to protect the children's best interests. Proof that sexual abuse has already occurred is not required – yet that seems to be the standard the court applied. Instead, the court failed to bring a modicum of common sense to its view of Defendant's collection of obscene materials involving child rape and incest, and recognize that it indicated a significant risk of future sexual abuse.

Notably, the court only went out of its way to rule that there has never been past child *sexual* abuse. It made no such ruling regarding past physical abuse. But factor (h) speaks of "abuse or neglect" generally and is not limited to sexual abuse. The children's evidence of nonsexual abuse was extensive and powerful (*see* Section I.C., below) and without a finding that it did not occur it should not be ignored in the custody determination.

C. The Court Erred In Downplaying Defendant's History of Violence.

Defendant is no stranger to allegations of domestic violence. In addition to the allegations of his children, set out above, his first wife alleged domestic abuse and rape.[5] Like many battered women, she never filed a criminal complaint. *E.g.*, Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 Am. U. J. Gender Soc. Pol'y & L.163, 183-84 (2009) ("Victims are reluctant to contact law enforcement, seek medical treatment or inform others of the physical or emotional injuries they suffer at the hands of their batterers."). When questions about his former wife's allegations, Defendant admitted that she had alleged

[5] The first Mrs. O'Malley submitted testimony that: "My husband has choked me so hard that at one time, I thought I was going to die. . . . Pat ran after me down the steps and started beating me with a belt. . . . He pinned me in a wrestling hold, took off my clothes and raped me on the basement floor." Trickey, *Porn, Fisticuffs and the Fall of Pat O'Malley*, ClevelandMagazine.com (October 2008), www.clevelandmagazine.com (accessed Dec. 16, 2012).

physical abuse and that "she might have" alleged that he raped her. (T.Tr. vol. IV, 22:16-20.) The court immediately cut off the line of questioning. (*Id*. at 23:7 ("I don't know how this is relevant.").) Despite its assertion of irrelevance, the court repeatedly referred to Defendant's first marriage, to echo the assertion that he shared custody amicably with his prior wife. (T.D. 559, 14; T.D. 555, 4.) Given the prior abuse allegations, the court's assertion that he had "cordial" relations with his first wife is patently unsupportable. (T.D. 559, 14.)

Moreover, the former wife's alleged physical and sexual abuse was unquestionably relevant to his children's safety with him, particularly given their and their mother's own allegations of domestic violence.[6] *See* Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, Juv. & Fam. Ct. J., Sept. 2003, at 57.

The Guardian ad Litem herself acknowledged Defendant's impulsive rage and inability to think before he acts. (*See* T.D. 559, 22 ("[Defendant's] impulsivity and

[6] The court did not credit Vicki O'Malley's allegations of domestic abuse despite corroboration by her psychologist and the domestic violence specialists at WomenSafe. (T.D. 559, 10, 12.) Dr. Silberg testified, "[Ms. O'Malley] was extremely humiliated, ashamed, cried, was extremely distraught by having experiences and very embarrassed and humiliated by what she had been through and having flashbacks and kind of a variety of traumatic symptoms, which is what one would expect given what she described." (T.Tr. vol. X, 124:16-125:8.) Dr. Silberg testified that Ms. O'Malley consistently described the typical pattern of how domestic violence develops. (*Id.* at 125:9-24.) The court found Ms. O'Malley's allegations not credible for a lack of objective evidence. (T.D. 559, 44.) But domestic violence almost always occurs in private, resulting in minimal verifiable evidence; battered women must often rely heavily on their own testimony to prove allegations of abuse. *See, e.g.*, Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 Am. U. J. Gender Soc. Pol'y & L.163, 183-84 (2009). Moreover, abuse survivors often appear angry, distrustful, and suspicious of all professionals related to the court proceedings, which sometimes makes courts distrust their testimony. *See* Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, Juv. & Fam. Ct. J., Sept. 2003, at 57, 62.

reactivity has contributed to the problems.").) Defendant was previously convicted of disorderly conduct based on "a rather violent encounter with the defendant dragging a bleeding victim by his feet on the streets." (Sentencing Memorandum at 6.) And Defendant himself acknowledged his reputation as a "hot head" (but claimed that he was reformed). (T.D. 559, 14; T.Tr. vol. IV, 16:18–17:22.) *See* Trickey, *Porn, Fisticuffs and the Fall of Pat O'Malley,* ClevelandMagazine.com (October 2008), www.clevelandmagazine.com (accessed Dec. 16, 2012).

The court's disregard for the evidence of Defendant's penchant for violence, and prior conviction for violent behavior, was dangerous and improper. The court below relied on Defendant's "cordial relationship" with his prior wife as indicative of his ability to share custody of Patrick and Caitlin, and yet prevented testimony concerning that woman's alleged rape by Defendant because she deemed it irrelevant. (T.Tr. vol. IV, 21:24-23:7; T.D. 559, 14.) Additionally, the court placed no weight on Defendant's prior conviction for disorderly conduct, and concluded that his obscenity conviction was "not applicable" even though Defendant's pornography collection contained numerous depictions of child molestation. (T.D. 559, 78.) There can be no doubt that past behavior is a strong predictor of future behavior. The court's role is to scrutinize potential risk of harm to the children who appear before it, not to downplay the risks they face, as was done here.

D. The Court Failed to Consider the Children's Corroborated Reports of Violence and Fear

The court wrote only two brief paragraphs to evaluate the statute's subparagraph (e) – the mental health of all the parties – and gave almost no attention to assessing Patrick's and Caitlin's health and safety. (T.D. 559, 76.) In fact, it entirely failed to

address either their current mental or physical health. Yet uncontroverted evidence showed that the children suffered physical and mental anguish from just anticipating spending time with their father. The court ignored these serious mental health issues.

Patrick and Caitlin O'Malley have repeatedly and consistently accused their father of threatening and violent behavior towards them. Their allegations, which the court did not explicitly reject, have not waivered over time. Additionally, five therapists and/or physicians expressly credited their reports of fear and abuse, and both a boy scout troop leader and school personnel further testified to the children's spontaneous expressions of fear of their father in these settings entirely unrelated to the litigation. Thus, each of the children's therapists at WomenSafe testified that they did not believe the children were coached by their mother and found the children "to be spontaneous and expressive." (T.D. 559, 35 (citing therapists' depositions).) Similarly, an expert in childhood trauma testified that she believed the children's expressions of hurt and anxiety to be valid. (*See, e.g.*, T.Tr. vol. X, 103:1-15.) She noted that "[Patrick] described very specifically how his father reached in and punched him in the face while he was trying to secure a seatbelt in the backseat. He described specific holds that his father had put him in." (*Id.* at 73:17-20.) The children's pediatrician also testified that "he did not think the children exaggerated their problems. He had concerns about the children's interaction with Father." (T.D. 559, 32 (discussing pediatrician's testimony).) Another therapist who worked with Patrick determined that, consistent with his allegations, Patrick's –

> adjustment difficulties and anxiety are strongly associated with his witnessing and experiencing domestic violence committed by his father. During sessions, Patrick specifically reported a history of domestic violence during which his father harmed his mother and hit him and his sister with various items such as spoons or broom sticks. Patrick also reported that his most recent past visits at his father's home scared him

due to threats his father made to physically harm him and his sister.

Order at 38 (quoting letter from therapist submitted as evidence).

Patrick's diagnoses of posttraumatic stress disorder ("PTSD") and somatoform disorder (*i.e.*, mental disorder characterized by physical symptoms that suggest physical illness or injury – symptoms that cannot otherwise be fully explained) were also well-supported, though the court found his diagnoses inconclusive. (T.D. 544, 44 (noting that the court did not "know whether or not these children have PTSD.").) The court admitted expert testimony that Patrick's score for PTSD symptoms measured in the very elevated range, specifying that Patrick is a "highly symptomatic child primarily plagued by PTSD symptoms. (T.Tr. vol. X, 69:15-20, 70:10-17.) On par with his pediatrician's findings, Dr. Silberg also observed that Patrick's somatic symptoms subsided when there was little perception of threat from his father. (*Id.* at 137:22-138:3.) Children exposed to a violent parent are likely to experience short-term negative consequences such as fear, depression, anxiety, sleep disturbance, eating disorders, physical illness, educational difficulties, and behavior problems. *See* Conner, 17 Am. U. J. Gender Soc. Pol'y & L. at 185-86. Moreover, several studies show an association between PTSD and child abuse. *See, e.g.*, Runyon et al., *An Overview of Child Physical Abuse*, 5 Trauma, Violence & Abuse 65 (2004). Specifically, abused children experiencing trauma may experience nightmares, intrusive thoughts, recurrent memories, hypersensitivity, anxiety, angry out-bursts, and other post-trauma symptoms. *Id.* at 66. Patrick suffered from many of these symptoms. *See, e.g.*, (Tr. Vol. X, 66:10-13, 78:1-4, 82:19-25 (reported anxiety); *id.* at 67:1-5 (flashbacks), *id.* at 134:23-35:8 (night terrors); T.D. 559, 16 (outburst at the O'Malley's Christmas celebration).)

The court erred in disregarding the evidence of Patrick's PTSD and other mental

diagnoses. (T.D. 559, 44 ("The Court does not have sufficient objective information to know whether or not these children have PTSD.").) As noted above, under R.C. 3109.04(F)(1)(h), the court must determine "whether there is a reason to believe that either parent has acted in a manner resulting in a child being an abused or neglected child." One factor expressly asks the court to consider if there is "reason to believe" either parent has caused abuse or neglect. *Id.* "Reason to believe" is a fairly low standard that should be applied unstintingly if children's safety and best interests are to be prioritized, and all of Patrick's undisputed symptoms are clear indications that he has been traumatized, *i.e.*, abused.

Nevertheless, even though the court acknowledged that it does not know for sure whether any of the children's abuse claims are accurate, it appears to have concluded that, as in a criminal proceeding, if it does not know for sure, it must ignore such claims and their implications for future risk. It found that tests for PTSD were inconclusive and it did not "know whether or not these children have PTSD." (*Id.* at 44.) The court did not find that Patrick did *not* suffer from PTSD but instead found it irrelevant in assessing his mental health, erroneously disregardiing the testimony cited above and the diagnoses of Patrick's adjustment disorder and anxiety closely associated with his father's aggression (including somatic complaints and hair plucking). (*Id.* at 27, 38 (citing Patrick's medical records).)

In short, the court minimized and ignored the children's allegations. Far from being their protector, the court here was outright dismissive of Patrick's and Caitlin's reports of child abuse. For example, during Patrick's testimony, the court asked:

COURT: You just don't want a relationship with [your Father]?

PATRICK: Because he hurts me and I do not want to be with anybody that hurts me. Would you like to be with anybody that hurts you?

COURT: Well, I have grown up being hurt a lot. And I don't find that would be the way I would look at my parents as to somebody hurt me or not because there are times that they've hurt my feelings and what have you and I kind of worked through that.

(Chldn. Intv. Tr. vol. II, 40:4-12.) The court's response is, to say the least, troubling, not least because Patrick had also testified earlier that his father had "hit [him] in the face." (*Id*. at 5:17.)

That same day, the court had the following colloquy with Caitlin and again sought to minimize her report of her father's violence and her fear:

CAITLIN: [My father is] a bad person. He's done bad things. And do you honestly think I'm going to forgive him for punching my brother in the face?

COURT: But that was one incident that everybody knows is most unfortunate and one can't sanction that being a good thing.

CAITLIN: He punched him on the face on purpose.

COURT: But there are other times that you have been with your dad, right, and he didn't punch Patrick or he didn't hurt you at all?

(*Id*. at 67:16-24.)

Courts, whose task is to protect children's best interests, should not discount a child's fear and perception of danger. Indeed, the evidence shows that a child's fear of harm is nearly as damaging as actual exposure to violence. Am. Psychol. Ass'n, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 103 (1996). There can be no doubt that the O'Malley children are utterly terrified of their father. (*See e.g.*, T.D. 513, 12:20-21 (reporting that Patrick was afraid that Defendant would grab him and do something to him at the St.

Patrick's Day parade) (deposition of Paul Campbell).) Patrick's therapist for most of 2010 found that "[Patrick] was able to verbalize that he does not like being with his father because he hurt him. He reports that his father will hit him when he is with him." (T.D. 559, 40.) One of the therapist's at WomenSafe testified:

> "Children's overall response about visitation with their Father was that they did not want to see him, they were scared of him . . . they would report that they were just – basically when they would go over to his house, that they were put in the bedroom, and sometimes they didn't get to eat, things like that.

(*Id.* at 34 (quoting deposition).) During Patrick's testimony, the judge interjected: "I've never had someone come in and tell me before they never want to see somebody again." In response, Patrick reiterated: "I never want to see him again." (Chldn. Intv. Tr. vol. I, 39:23-25.) Caitlin also testified that her father scares her and physically hurts her brother. (*Id.* at 9:22, 13:12-13, 14:1-7, 33:13-14, 33:18-2.) Consequently, she explained, "I actually don't want to be with my dad anymore because he scares me." (*Id*.at 33:13-14.)

To the extent the court relied on the GAL's recommendation to turn the children over to their father and forbid them contact with their mother, it is all the more concerning. Asked about the children's safety, the GAL acknowledged that Defendant has "aggression issues, and he may have moved too fast to an aggressive stance." She testified that "she had concerns about putting power in Father's hands and she did not discount that Father may have emotionally or physically abused the children." (T.D. 559, 28 (discussing GAL's testimony).) However, the GAL went on to state that "she works with the premise that domestic violence by Father against the children did not happen." (*Id*.) Given that the GAL – the purported advocate for the children's best interests – entirely neglected to assess or seek an actual finding of whether the children had been

abused, her report and recommendation cannot provide an adequate basis for the court's decision.

E. The Court's Order Increases the Risks To The Children's Wellbeing

The court below acknowledged that "the children have a very strong bond with Mother." (T.D. 559, 2.)[7] It is not disputed that they are terrified of their father. In ordering them into the full custody of their father, the court put these children at great psychological and physical risk, as subsequent events demonstrated.[8]

After the order came down, both children were taken to a local hospital after threatening suicide on a 9-1-1 call. Patrick stated to the 9-1-1 dispatcher, "My name is (bleep) O'Malley. And if you make me go with my dad I'm going to kill myself." Upon arriving at the house, the police learned that the children had locked themselves in a room upstairs and were holding knives to their throats. The children were removed unharmed, and taken to Rainbow Babies & Children's Hospital where they were admitted for the next ten days. These are desperate acts done by desperately fearful children.

This type of severe stress and chronic childhood trauma, also called "Adverse Childhood Experiences" ("ACEs"), releases hormones that can physically damage a child's developing brain. *See* Stevens, *The Adverse Childhood Experiences Study – the*

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[7] A common element of inappropriately-labeled "alienation" cases is criticism of the favored parent's closeness with the children. (T.D. 559, 75 (noting that the children are "more closely bonded with Mother than is usual").) In fact, where one parent is competent and safe, and the other is perceived as frightening, it is to be expected that children will be deeply bonded with her. A closer, deeper bond is a natural response to the dynamic of fear and intimidation in the home. Bancroft & Silverman, *The Batterer as Parent* 127 (1st ed. 2002).

[8] *Amici* ask the court to take judicial notice of these facts. The facts were reported by the news media and based on 9-1-1 transcripts and police and hospital reports, and are not subject to reasonable dispute. *See Big-name Cleveland family embroiled in custody battle*, http://www.19actionnews.com/story/19665358/tonight-at-11-big-name-cleveland-family-embroiled-in-custody-battle (Accessed Dec. 16, 2012).

Largest Public Health Study You Never Heard Of, Part Three, The Huffington Post (Oct. 8, 2012, 9:33 AM), http://www.huffingtonpost.com/jane-ellen-stevens/the-adverse-childhood-exp_7_b_1944199.html (accessed Dec. 16, 2012) [hereinafter *The ACEs Study*]. Researchers have demonstrated a powerful relationship between ACEs – including sexual and physical abuse, witnessing domestic violence and other forms of household dysfunction – and the risk of attempted suicide throughout life. *See* Dube et al., *Childhood Abuse, Household Dysfunction, and the Risk of Attempted Suicide Throughout the Life Span*, 286 J. Am. Med. Ass'n 3089 (2001). The risk of attempting suicide increased from between 200% and 500% if a child was exposed to emotional abuse, physical abuse, sexual abuse, or a battered mother. *See id*. The same studies demonstrate that ACEs trigger "flight, fright or freeze" hormones that become toxic when "turned on" for too long. *The ACEs Study*. This is precisely what happens when children are exposed to regular fear of physical and emotional abuse at home. *See id*.

This research strongly suggests that Patrick and Caitlin are awash with stress hormones that will inhibit their ability to function appropriately in their father's custody because they are in a world that they experience as a place of constant danger. This is consistent with the pattern that was observed by several of their therapists, who found that the children's contact with their father "significantly exacerbated PTSD symptoms . . . [and] are interfering more with [Patrick's] ability to perform everyday activities (e.g., sleep difficulties, daytime fatigue, academic performance) and his overall function." (T.D. 559, 42 (quoting psychologist's report recommending that "it is in Patrick's best interest that visitation with Dad be decreased or eliminated").)

In addition to placing the children with their father full-time, the court forbade the

children *even from communicating* with their mother for an unspecified length of time. Taking a parent away from a child as a form of punishment is cruel and never in the best interests of the children. The harm to children when they are ripped away from a parent they love, and forced into the custody of a parent they fear or hate, has been recognized by leading alienation expert Johnston *et al*. to be a cure worse than the disease. Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 Fam. L. Q. 757 (2005).[9] Taking children away from a safe parent to whom they are securely attached has been widely recognized as a significant form of trauma that may lead to long lasting harm. McLaughlin et al., *Childhood Adversities and First Onset of Psychiatric Disorders in a National Sample of US Adolescents*, 69 Archives Gen. Psychiatry 1151 (2012) (finding that separation from a parent during childhood is linked to increases in behavioral and psychiatric disorders). Moreover, placing children with a parent they fear can lead to significant depression and has even led children to kill themselves. *See,* Carpenter & Kopas, *Casualties of a Custody War: What's Best for the Child?* Pittsburgh Post-Gazette (May 31, 1998); Farragher & Rodebaugh, *Hanged Boy Caught in Custody Case*, San Jose Mercury News (February 2, 1989) D. 100-15. Thus, even regardless of the truth of the abuse claims, this draconian order threatens the children's mental health, as their conduct after learning of the order demonstrated. Their suicidality and extreme acts, including

[9] A common element of inappropriately labeled 'alienation" cases is criticism of the favored parent's closeness with the children. (T.D. 559 (noting that the children are "more closely bonded with Mother than is usual").) In fact, where one parent is competent and safe, and the other is perceived as frightening, it is to be expected that children will be deeply bonded with her. A closer, deeper bond is a natural response to the dynamic of fear and intimidation in the home. Bancroft & Silverman, *The Batterer as Parent* 127 (1st ed. 2002).

holding knives to their throats, indicate substantial harm already done by the order. The cases cited above provide chilling reminders that children have been known to act irrevocably on such feelings.

II. PARENTAL ALIENATION CANNOT EXPLAIN THE ALLEGATIONS AND EVIDENCE OF ABUSE HERE

Despite the undisputed fact that these children are terrified of and enraged with their father, and the multiple indications of his dangerousness, including his conviction for possession of grotesque child pornography and the additional concerns detailed above, the court below did not draw the presumably logical conclusion that the children's feelings and reports might be based in real experiences with their father. Instead, the court concluded that the children's reports of terrifying events, extreme fear, hostility, and obstreperous behaviors bespeak only their *mother's* hostility and "terror" toward her ex-husband, and that their feelings and behaviors were presumably created through some kind of deliberate pattern of "alienation" by Ms. O'Malley, the specifics of which the court does not describe. (T.D. 559, 74.)

The court explicitly stated that the two most important factors that it took into consideration were: (1) which parent is more likely to honor and facilitate court-approved parenting time, and (2) whether the residential parent has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court. (*Id.* at 76.) The court then faulted the mother for failing "to implement Father's parenting time" (*id.* at 77) and for failing to ensure that each parent "have full involvement in [the children's lives], where possible and desired by the parent (*id.* (quoting *Davis v. Flickenger*, 77 Ohio St.3d 415,419, 694 N.E.2d 151 (1997)) (analogizing the present case to one where the child was well cared for by each parent and where each parent provided

a loving, nurturing environment).)

But this is not a case in which both parents are providing good care and loving, nurturing environments, as was true in *Flickenger, above.* Section I above has already detailed the substantial evidence that Defendant may well be a frightening, aggressive, and violent father. To dismiss all of this evidence the GAL, evaluators, and court relied on the concept of parental alienation, attributing the children's spontaneous expressions of fear, the therapists' corroborations, etc, entirely to Mrs. O'Malley's supposed malevolent campaign. (*See, e.g.,* T.D. 559, 2 ("Mother does not see that *bending the children's will to conform to her own attitudes, feelings and beliefs and agenda is causing* [harm]") (emphasis added); *id*. at 74 ("Mother started a deceptive campaign to recast Father in the eyes of his children from a parent deserving of their love to an object of their hatred. Her campaign worked so well, eight-year-old Caitlin, related to one of her mental health assessors (Dr. Henschel) that she 'needs a plan to kill her father'. . . Mother's campaign of deception and distortion [has created a change of circumstances].").) What follows explains how alienation simply cannot carry the water it was made to carry here: the empirical evidence shows that alienation is far less impactful and prevalent than is typically assumed, that it has no little to do with false abuse allegations, and, most importantly, that children's alienation from a parent is inevitably driven in large part by that parent's own conduct. Rather, this misuse of the alienation label enacted precisely the error which has been warned against by leading expert bodies – the masking of the abusive parent's impact on the children and their protective parent with an unscientific glossing over by a theory that does not bear the weight put on it.

A. The Decision and Evaluations Never Actually Ruled out Abuse but Leaped Instead to the View that Mrs. O'Toole was the Source of the Children's Problems

The decision below – and the GAL's recommendations and evaluations on which it is based – reflect the assumption that the children's sometimes bad behavior and hostility and fear of their father are not a reaction to an abusive father, but instead, a result of malevolent, pathological, or otherwise illegitimate brainwashing or coaching by their mother.[10] Yet none of the evaluators in this case was able to – or did – *rule out* the possibility that the children accurately reported their father's treatment. Rather, those who assumed that the problem stemmed from Mrs. O'Malley simply sidestepped the possibility that the abuse allegations might be true or the children's fears valid, even as they acknowledged that it was not inconceivable.

Thus, the opinion fails to make any explicit findings about whether any of the alleged abuse is true, instead simply assuming that the abuse claims are not "supported by the facts". (*See, e.g.*, T.D. 559, 44 ("The facts as submitted in this case do not support Dr. Silberg's conclusion that Mother is a victim of domestic violence . . . The court does not have sufficient objective information to know whether or not these children have PTSD. . . . There are no facts in this case that Caitlin suffered any physical abuse. And there [sic] no facts by any of the experts to note any sexual concerns about the parties or their children"); T.D. 555, 4 ("[T]he children's unreasonable negative feelings and beliefs such as anger, hatred, rejection, disrespect, avoidance, and fear toward Father are significantly disproportionate to the children's actual past experiences with Father.");

[10] The children may to have behaved poorly toward their father and other relatives, and to various professionals involved with the case, but all of those people *were working to reunify the children and not taking their fears and feelings seriously.*

T.D. 559, 22 (quoting GAL as stating "[t]he reality base for the statements which have been made, starting with assertions that go back to the times when the mother picked up the children in the middle of the night . . . all suggest an ongoing program of disinformation . . . .").) In sidestepping a genuine investigation and assessment of the abuse claims, the court was supported by the similarly unexplored assumptions of the GAL and evaluators that alienation is the problem. For instance, the GAL appears to have taken for granted that the allegations of past abuse were false, but does not appear to have objectively assessed the possibility that they were true. (T.D. 559, 27 (testifying that she told one doctor there "had been *no confirmation* of Mother's alleged [abuse claims]" (emphasis added).) Remarkably the GAL also testified that "*she did not discount that Father may have emotionally or physically abused the children*" and that he "has some aggression issues," yet she "works with the premise that domestic violence by Father against the children did not happen" (*id.* at 28) while also stating that domestic violence "and other allegations . . . *may* not have happened." (*Id.* at 29 (emphasis added).) Both the GAL and the judge simply dismissed Dr. Silberg's report and findings validating the abuse concerns as "not helpful." (*Id.* at 26 (summarizing GAL's testimony).)[11]

[11] Dr. Levine opined that "neither" parent was likely "to sexually abuse children in the future," despite the fact that Defendant had pled guilty to possession of extremely grotesque child pornography, including involving children of his children's ages. (T.D. 559, 41.) He further mischaracterized his role as seeking to determine whether "there is sufficient evidence to strip [Defendant] of his parental rights" (*Id.* at 44). This mischaracterization of an assessment of dangerousness for purposes of custody suggests a strong and pre-existing bias against validating any potential risk. Moreover, Dr. Levine was asked only to opine on the "likelihood" that Mr. O'Malley might sexually abuse a child, and not to make findings regarding allegations of past physical abuse. (*Id.*) While stating that he had no training in domestic violence he characterized Mrs. O'Malley's claims as "demonization." (*Id.*) Ultimately, Dr. Levine concluded that "the harm to the

In fact, the assumption that all of the children's reports of paternal abuse are fabricated is almost indefensible. For instance, rejection of the sincerity of the children's reports requires the implausible idea that the children and mother concocted a story in the middle of the night that Defendant tried to run Patrick over with his car, and then tried to make it credible by leaving his house and going to a domestic violence shelter at 2:30 a.m., where the child asked the counselor whether she believed him that "he tried to kill me last night" and where Mrs. O'Malley was visibly "upset, shaky, crying." (T.D. 559, 33, 37.) Similarly, the alienation theory does not explain how it is that Patrick acquired a concussion after the incident in the car which was not witnessed by the supervisor. (*Id.* at 8, 31 (Dr. Weinberger (pediatrician)'s notes indicate concussion).) Notably the court, in summarizing this incident, makes no mention of the concussion. (*Id.* at 65.) Finally, the alienation theory requires the belief that Patrick's repeated reports of his own fear of his father, his father's threats to hurt him and his sister, and his sleep problems and anxiety symptoms related to his father, were all the product of *no actual experiences with his father.*

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children is *more likely* to come from the demonization of Patrick O'Malley, Sr., than from Patrick O'Malley, Sr.'s risk to sexually abuse his children." (*Id*. at 46) (emphasis added). However, as noted by the court, there were no allegations of past sexual abuse – only of physical abuse of Patrick. (*Id.* at 78.) In short, Dr. Levine did not rule out any risk of any kind of abuse, nor did he address the alleged past physical abuse.

Dr. Kohl was a "semi-retired" forensic evaluator who provided a custody evaluation. (*Id.* at 46.) He apparently assumed that the children must have a relationship with their father and did not seriously consider that he might be dangerous to them. (*Id.* at 50.) He then stated that "mother was found to have demonstrated a pattern of efforts to alienate the children from their father . . ." It is clear from the court's summary of his report that Dr. Kohl never actually entertained the possibility that the abuse reports might be true. Rather, he started from the *assumption* that they were false, or somehow irrelevant. While stating that Mrs. O'Malley is "frightened to death" and "terrified" of Mr. O'Malley (*id.* at 51) he never offered any explanation for *why* she might feel this way if in fact Defendant had done nothing to terrify her.

B. Treating Undetermined Abuse Allegations as Alienation, as was Done Here, is a Dangerous Error.

It is a cardinal rule of alienation evaluators that if abuse allegations are true then alienation is not an appropriate label for the children's hostility to the abusive parent. Drozd & Olesen, *Is it Abuse Alienation, and/or Estrangement? A Decision Tree*, 1 J. Child Custody 65 (2010); Gardner, *Conducting Scientifically Crafted Child Custody Evaluations* (2nd ed. 2006). Nonetheless, alienation is far too often misused to deny, minimize or ignore abuse claims.

The phenomenon of courts treating abuse claims that have never been seriously weighed - as a deliberate campaign of alienation - has been repeatedly identified as a major error in family court adjudications of custody and abuse claims. As early as 1996, the American Psychological Association's Presidential Task Force on Violence and the Family stated:

> When children reject their abusive fathers, it is common for the batterer and others to blame mother for alienating the children. They often do not understand the legitimate fears of the child.

Am. Psychol. Ass'n, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 40 (1996). The same Report states that "[t]erms such as 'parental alienation' may be used to blame the women for the children's reasonable fear of or anger towards their violent father." *Id*. at 100.

Similarly, the National Council of Juvenile & Family Court Judges has issued several reports for judges, warning them that alienation is often misused to mask abuse issues:

> In contested custody cases, children may indeed express fear of, be concerned about, have distaste for, or be angry at one of their parents. Unfortunately, an all too common practice in such cases is for evaluators to diagnose children who exhibit a very strong bond and alignment with one parent and, simultaneously, a

> strong rejection of the other parent, as suffering from "parental alienation syndrome. . . ." The discredited "diagnosis" of "PAS" *(or allegation of "parental alienation")*, quite apart from its scientific invalidity…diverts attention away from the behaviors of the abusive parent, who may have directly influenced the children's responses by acting in violent, disrespectful, intimidating, humiliating and/or discrediting ways towards the children themselves, or the children's other parent.

Dalton et al., Nat'l Council of Juv. & Family Court Judges & State Justice Inst., *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide* 24 (rev. 2006) (emphasis added). *Amici* fear that this passage may describe exactly what happened in this case.

These warnings have recently been validated by new research which demonstrates, chillingly, that the parental alienation label is frequently the cause of courts' erroneous rejections of claims of parental abuse and dangerousness in custody litigation. The Leadership Council on Child Abuse and Interpersonal Violence has collected a database of cases which were "turned around," i.e., cases in which abuse was first rejected and then subsequently validated, leading to reversal of the initial custody arrangement. This research has found that the most frequent reason judges failed to recognize real cases of child abuse in the first determination was their misinterpretation of mother's attempts to protect their children as a form of parental alienation. Presentation at Institute on Violence, Abuse and Trauma, San Diego, September 2012.

C. Regardless of the Accuracy of the Abuse Claims, Alienation Cannot Itself Explain These Children's Feelings and Behaviors.

The concept of parental alienation is an adaptation of "parental alienation syndrome ("PAS")," a theory invented by Richard Gardner, MD to crystallize his conviction that many allegations of child sexual abuse in custody litigation were made by mothers who sought to "alienate" the father from the children. Gardner, *Parental*

Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Abuse (1987). As PAS has become increasingly scientifically discredited, *see* Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. Child Custody 232, 235-36 (2009) (citing multiple authorities rejecting scientific validity of PAS), the field has reframed the issue as parental or child "alienation," to capture the behavioral and factual situation when a child is extremely hostile to one parent for reasons other than a natural response to that parent's own behavior. *See* Kathleen C. Faller, *Maltreatment in Early Childhood: Tools for Research-Based Intervention* (NY 1999); Righthand et al., *Child Maltreatment Risk Assessments: An Evaluation Guide* (NY 2003); *see, also, e.g., Matter of Bunting*, 1988 WL 10999 (Ohio Ct. App. Feb. 5, 1988) (where parents had abused and neglected the children the children had a great dislike and fear toward both parents). Parental or child alienation is understood to be more multi-faceted than the original somewhat simplistic understanding of a "syndrome" which, in Gardner's view, was fueled entirely by a malevolent or pathological mother. Rather, actual child alienation is known to be caused by myriad different factors, always including negative behaviors of the disliked parent. *Id.* Because of PAS' lack of scientific acceptance, it has been deemed invalid and inadmissible by numerous authorities. Meier, 38 Fam. L. Q. at 239-40. Hence, suspicions of parental interference with a child's relationship with the other parent are now commonly discussed under the rubric of "alienation."

Unlike PAS, alienation has been subject to some degree of empirical research and some grounded knowledge about alienation dynamics actually can be stated. The leading expert, Janet Johnston, Ph.D., has explored parental alienation's effects on children, as

well as its relationship to abuse and abuse claims. While she is regularly touted as the leading authority on parental alienation (the court below cited her (T.D. 559, 53)) some of her key findings are often ignored in the forensic context, perhaps because they cast doubt on the way alienation is sometimes misapplied in court. In particular, the empirical evidence shows that children's alienation from a parent is hard to intentionally achieve, is typically transient, and is caused by multiple factors, always including that parent's own destructive behavior. *See e.g.*, Johnston, et al., *Is it Alienating Parenting, Role Reversal, or Child Abuse? A Study of Children's Rejection of a Parent in Child Custody Disputes*, 5 J. Emotional Abuse 191, 206 (2005).

D. Parental Hostility Rarely Suffices to Create Child Alienation

First, the research shows that alienation is both far less common and likely less harmful for children than is typically assumed. Johnston has consistently found that, while many divorcing parents do seek to ally the children with their hostility to the other spouse to some degree, such behavior rarely has a significant effect on the children's feelings toward the other parent. *See* Johnston & Kelly, *Commentary on Walker, Brantley, and Rigsbee's (2004) 'A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in Family Court,'* 1 J. Child Custody, no. 4, 2004, at 77, 81 (reporting study reflecting "alienating" behavior by both parents, "only about one fifth of the children [studied] had rejected a parent"). In Johnston's studies, while most parents made derogatory remarks about each other to the children, only 6% of the children demonstrated "extremely rejecting" behavior toward the parent who was the subject of derogatory statements. Johnston, 5 J. Emotional Abuse at 206. The authors concluded that

> [i]t is remarkable that so few children were rejecting of a parent, especially in

> the face of the parents' negative attitudes and behaviors toward one another. These findings support commonly held views that pre-adolescent childrens' ties to both their parents are remarkably resilient in the context of family conflict and divorce."

Id.

Given the ineffectiveness of "alienating" conduct some courts' extreme reactions to such behavior appear to be overblown. This is especially true where a child's "alienation" is treated as though it is as bad or worse for a child than being abused. A robust literature dating back at least forty years documents the long term significant harm of physical and sexual abuse. *See* Kaufman et al., *Effects of Early Adverse Experiences on Brain Structure and Function: Clinical Implications*, 48 Biological Psychiatry 778 (2000); McCloskey et al., *The Effects of Systemic Family Violence on Children's Mental Health*, 66 Child Dev. 1239, 1258 (1995). On the other hand, as Johnston reports, there is no empirical research showing long term harm from a child's alienation from a parent when a child. Johnston & Kelly, 1 J. Child Custody at 84. In fact, Johnston has found that alienated children find ways on their own to reconcile with a parent over time. In a study of children who rejected a parent after divorce, nearly all initiated contact with their rejected parents after turning 18. Johnston & Goldman, *Outcomes of Family Counseling Interventions with Children Who Resist Visitation: An Addendum to Friedlander and Walters*, 48 Fam. Ct. Rev. 112 (2010). *See also* Wallerstein et al., *The Unexpected Legacy of Divorce* (2000) (leading divorce researcher and originator of the notion of child alienation Judith Wallerstein finds after longitudinal study that children with a pathological hostility toward a noncustodial parent after divorce typically evolved, of their own accord, to a more balanced view over 1-2 years).

Second, to *Amici's* knowledge, no scientific or empirical evidence supports the

assumption that appears to have fueled the decision and some of the evaluations below, *i.e.*, the idea that a hostile and alienating parent may create in her children the kind of extreme hostility, fear, and acting out toward another parent that has been seen in the children in this case. Rather, empirical research has found that children may be persuaded to deny abuse when it has really happened, but that false allegations of abuse are difficult to produce and rare. Everson & Faller, *Base Rates, Multiple Indicators, and Comprehensive Forensic Evaluations: Why Sexualized Behavior Still Counts in Assessments of Child Sexual Abuse Allegations*, 21 J. Child Sex Abuse 45 (2012).

Furthermore we are aware of no research evidence to suggest that parents can create rage, hatred, terror, and symptoms of trauma in children purely by coaching a child. On the contrary, children's fear, hostility, traumatic stress symptoms, and social or academic regression are usually seen by child abuse experts as indicative of true abuse. *See* Righthand et al., *Child Maltreatment Risk Assessments: An Evaluation Guide* (2003); Faller, *Maltreatment in Early Childhood: Tools for Research-Based Intervention* (1999); *see, e.g., Matter of Bunting*, 1988 WL 10999 (Ohio Ct. App. Feb. 5, 1988) (finding that when parents had abused and neglected their children, the children had a great dislike and fear toward both parents).[12]

[12] A recent major study into beliefs and knowledge about domestic violence and child abuse among custody evaluators found distinct differences between those who had specialized training or background in domestic violence and those who did not. Those without tended to have less knowledge of domestic violence and child abuse than the other professionals involved with a case, and the lack of this knowledge was correlated to beliefs that mothers falsely allege domestic violence, and that victims falsely allege child abuse and alienate their children from their father. Saunders et al., *Child Custody Evaluators' Beliefs about Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations, Final Technical Report Submitted to the National Institutes of Justice, U.S. Dep't of Justice, October 2011*,

Third, and of particular significance here, of the small number of children who became severely alienated in the Johnston and other studies, *every one of these children* had reasons for their hostility based on the disfavored parent's *own* behavior. Johnston et al., *Is it Alienating Parenting, Role Reversal, or Child Abuse? A Study of Children's Rejection of a Parent in Child Custody Disputes*, 5 J. Emotional Abuse 191, 206 (2005). These behaviors included child abuse or neglect, lack of warm, involved parenting, and other behaviors which caused the children to feel poorly treated or disconnected.[13] Johnston *et al* state that "[r]ejected parents, whether father or mother, appear to be the more influential architect of their own alienation, in that deficits in their parenting capacity are more consistently and most strongly linked to their rejection by the child." Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce*, 31 J. Am. Academy Psychiatry & L. 158, 169 (2003). Furthermore, research by Johnston and Campbell found that children who were aligned with one parent chose the one who provided more empathy and understood the child's age-specific concerns. Johnston & Campbell, *Impasses of Divorce: The Dynamics and Resolution of Family Conflict* (1988). Similarly, in examining specifically whether children's alignment with one parent over the other during divorce was due to manipulation by the

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http://ssw.umich.edu/about/profiles/saunddan/Custody-Evaluators-Beliefs-About-Domestic-Abuse-Allegations-Final-Tech-Report-to-NIJ-10-31-11.pdf (accessed December 16, 2012).

[13] According to the research, alienation resulted when there was a confluence of factors including "critical incidents of child abuse and/or lack of warm, involved parenting" in conjunction with the favored parent's warm parenting and alienating behaviors. Johnston & Kelly, 1 J. Child Custody at 80-81. In a custody decision, while any alienating behaviors may be legitimately of concern, "critical incidents of child abuse" must take precedence – both because such acts are the primary cause of the alienation and because they signal future risk to the child. Indeed, a protective parent who is committing alienating conduct may be able to cease once the other parent's abuse of the child is recognized and stopped.

preferred parent, Lampel found that children naturally aligned with the parent who the child found to be more "self-confident, problem solving, enthusiastic, and outgoing." Lampel, *Children's Alignments with Parents in Highly Conflicted Custody Cases*, 34 Fam. & Conciliation Cts. Rev. 229 (1996). She concluded:

> The complex family dynamics suggested by these studies are that a closed parent system, in which both parents are defensive and remain in conflict, led the child to align with the more problem solving, capable, and outgoing of the two parents. The empathy-driven model was more supported by the present studies than was the manipulation-driven model.

Surely if a child is "alienated" from and hostile to a parent who has committed child abuse (or neglect), and/or is aligned with a parent who is responsive to the child's age-appropriate needs, as Mrs. O'Malley was found to be here prior to the final decision (T.D. 555, 5), it cannot be in the child's best interests to blame solely the favored parent for the child's alienation and to reward the disfavored (and harmful) parent with custody.

E. Potentially False Abuse Allegations Have Not Been Identified in Cases of True Alienation.

Even if the court had actually found as a fact that both Mrs. O'Malley and the children were lying about abuse, that would not justify the conclusion that the children's situation is due merely to a "campaign of alienation." On the contrary, the empirical research demonstrates that false abuse allegations have essentially *no role* in true alienation. Johnston & Kelly, 1 J. Child Custody at 81-82; Janet R. Johnson, 38 Fam. L.Q. at 764-66. Johnston *et al.* list many factors contributing to alienation, including anger and hurt toward the parent who left, moral indignation toward the parent for some behavior, worry and sympathy for the "left-behind" parent, resentment of new partners, and resentment of the disruption to their lives from the separation, as well as neglect, abuse, and other directly destructive behavior. *Id.* at 763. Nowhere in this litany of

factors that can lead to child alienation (a litany repeated in many publications) are false allegations of abuse even mentioned.

The National Council of Juvenile & Family Court Judges' discussion of alienation and abuse statement also crystalizes another important point: children may become afraid of or hostile to a parent in response to that parent's "disrespectful, intimidating, humiliating, and/or discrediting behaviors – including behaviors that *are not criminal or harmful*.

> The discredited "diagnosis" of "PAS" *(or allegation of "parental alienation"*), quite apart from its scientific invalidity . . . diverts attention away from the behaviors of the abusive parent, who may have directly influenced the children's responses by acting in violent, disrespectful, intimidating, humiliating and/or discrediting ways towards the children themselves, or the children's other parent.

Dalton et al., Nat'l Council of Juv. & Family Court Judges & State Justice Inst., *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide* 24 (rev. 2006) (emphasis added).

In this case the evaluators and court refused to believe that Defendant committed criminal or unlawful behavior (apart from the child pornography, which was deemed irrelevant to the children's safety), and then assumed that the children's attitudes were unjustified. Yet Defendant's "controlled aggression" (T.D. 559, 46 (quoting Dr. Levine)) "dominance" (*id.* at 48 (quoting Dr. Kohl)) lack of sensitivity or understanding of his children (*id.* at 51 (quoting Dr. Kohl)) is acknowledged. And Defendant's criminal possession of the kind of child pornography, described in Section I above, not only reflects on his adult responsibility and psychic health but also suggests a willingness to

objectify children as sexual objects, lack of empathy for children,[14] and presumably finding pleasure from viewing sexual abuse.

In short, even the undisputed evidence makes clear that Mr. O'Malley is disconnected from his children's emotional wellbeing, lacks the capacity to help them cope with their feelings, and profoundly lacks respect or caring for children in at least the sexual context. (*See id.* ("[Defendant's] personal need for love and reassurance from the children prevented him tolerating their fear and anger . . . and from understanding their confusion and frustration .").) As the National Council warns, children may become hostile and afraid in response to myriad behaviors or experiences with parents, not only unlawful or criminal behavior. *See Bodine v. Bodine*, 38 Ohio App.3d 173, 528 N.E.2d 973 (10th Dist.1988) (reversing unsupervised visitation to father where children were "uncomfortable" around him due to his violence toward their mother during the marriage); *Johntonny v. Malliski*, 67 Ohio App.3d 709, 588 N.E.2d 200 (11th Dist.1990) (affirming suspension of visitation where sexual abuse allegations against the father had been unfounded but child was nonetheless suffering from father's constant criticisms and lack of empathy); *Smith v. Smith*, 1993 WL 439925 (Ohio Ct. App. Oct. 29, 1993) (affirming order suspending visitation based solely on child's fear of the father, without finding any basis for it). These children's hostility toward their father cannot be dismissed as entirely fueled by their mother, merely because the court is unpersuaded of particular abuse allegations. Certainly, alienation theory does not support such dismissal, and neither the court nor any evaluator proffered a different explanation.

Amici wish to emphasize the dangerousness to children of the court's reasoning:

[14] As noted in Section I above, possession of child pornography is also highly correlated with actual sexual acts on children.

As long as abuse has not been ruled out, and children's feelings *could* be explained by actual experiences with the disliked parent (whether or not they rise to the level of a crime), courts which leap to the alienation conclusion may put children at significant risk. What may be perceived as alienation may in fact reflect only a protective parent's efforts to provide emotional support for distressed children reporting distressing things, and to keep her children physically and emotionally safe. *See Hanke v. Hanke*, 94 Md.App. 65, 72, 615 A.2d, 1205 (1992) (holding that a court's primary responsibility is to protect the minor child, and not to punish [the mother] by removing the child from her custody to punish her non-cooperation with visitation). If children's extreme hostilities and acting out against a parent become grounds for an alienation finding and custody reversal, then that the more abusive a *parent* behaves, resulting in children's increased hatred and fear, the *more likely the justifiably hated parent will win custody*. Indeed, the Leadership Council's research into turn-around cases provides disturbing evidence that this kind of circular misuse of alienation is resulting in the award of custody or unsafe visitation to harmful parents.

Accordingly, unless abuse is ruled out after an appropriate investigation into the alleged conduct, it cannot be in the children's "best interests" to be subjected to the parent they fear and who *may* in fact be emotionally or physically harmful or abusive.

CONCLUSION

In this case, the court's order has driven the children to desperation. It cannot possibly be in their best interests and this Court should set it aside. The judgment below should be reversed.

Respectfully submitted,

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Christopher Marcinko (#0077846)
430 Fremont Road
Port Clinton, OH 43452
Phone (419) 734-0022
Fax (419) 732-6507
Attorney for Amici Curiae

Nomi Berenson (*pro hac vice pending*)
Jessica Davis (*pro hac vice pending*)
Goodwin Procter LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018
Tel.: 212.813.8800
Fax.: 212.355.3333
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief of Amici Curiae was served by U.S. Mail on this 17th day of December 2012 to the following:

Colleen O'Toole
Attorney for the Appellant
6185 Grandridge Pointe
Concord, Ohio 44077
Attorney for Appellant

Margaret Metzinger
55 Public Square, Suite 1950
Cleveland, OH 44113
Attorney for Appellee

Adam Thurman
1001 Lakeside Avenue, Suite 1720
Cleveland, OH 44114
Attorney for Guardian ad Litem Sandra Mc Pherson

_____

Nomi Berenson
Goodwin Procter LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018
Tel.: 212.813.8800
Fax.: 212.355.3333