

DOCKET NO. XXXXXXXX

**IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX**

Ms. H,
Appellant,

vs.

Mr. H,
Respondent.

*V. County Super. Ct., Civil No. XX-XXXX-XXXXXXXXXX-XX-XX-XXX
The Honorable Mark Borrell, Judge Presiding, Department 41*

**COMBINED APPLICATION FOR PERMISSION TO FILE
AMICUS BRIEF AND SUPPORTING APPENDIX OF NON-
CALIFORNIA AUTHORITIES IN EXCESS OF TEN PAGES AND
PROPOSED AMICUS BRIEF OF DOMESTIC VIOLENCE LEGAL
EMPOWERMENT AND APPEALS PROJECT ET AL IN SUPPORT
OF DEFENDANT-APPELLANT MS. H**

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**APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND
APPENDIX OF NON-CALIFORNIA AUTHORITIES IN EXCESS
OF TEN PAGES**

Pursuant to Rule 8.200 of the California Rules of Court, the DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT (“DV LEAP”), LEGAL VOICE, BATTERED WOMEN’S JUSTICE PROJECT (“BWJP”), BAY AREA LEGAL AID (“BALA”), and CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE (“CPEDV”) (collectively, “*Amici*”) apply for permission to file the accompanying brief in support of Appellant Ms. H.

Additionally, pursuant to Rule 8.204 of the California Rules of Court, *Amici* also apply for permission to file their supporting Appendix of Non-California Authorities, which exceeds the 10-page limit (not including case opinions required to be attached pursuant to Rule 8.1115(c)) by pages.

Interest Of *Amici*

DV LEAP. DV LEAP was founded in 2003 by one of the nation’s leading domestic violence lawyers and law professors to advance safety and justice for abused women and children through appellate litigation. Despite numerous legislative and policy reforms designed to protect victims of domestic violence, DV LEAP has found that many abused women and children are deprived of legal protections and rights in court. Appellate review has frequently proven successful in correcting trial court errors, but

appeals are rare due to both their expense and the need for scarce appellate and domestic violence expertise. DV LEAP fills this vacuum for victims of abuse by providing *pro bono* appeals and *amicus* briefs, as well as training and strategic assistance to lawyers and courts. While DV LEAP prioritizes cases from the District of Columbia, it also accepts cases of substantial importance from other states such as California. DV LEAP also organizes and spearheads the domestic violence community's advocacy in U.S. Supreme Court domestic violence litigation. DV LEAP is a partnership of the George Washington University Law School and a network of participating law firms.

LEGAL VOICE. Legal Voice (formerly known as the Northwest Women's Law Center) is a regional nonprofit public interest organization based in Seattle that works to advance the legal rights of all women through litigation, legislation, education, and the provision of legal information and referral services. Since its founding in 1978, Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country and is currently involved in numerous legislative and litigation efforts. Legal Voice has been a regional leader in combating all forms of violence against women, with an emphasis on domestic violence. Legal Voice has a strong interest in this case because it raises important questions regarding "litigation abuse" against victims of domestic violence. Legal Voice has long recognized that abusers often misuse litigation to control,

harass, punish, and impoverish victims of domestic violence, and advocates for stronger efforts to curb this form of abuse.

BWJP. BWJP is a national technical assistance center that provides training and resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to domestic violence. The BWJP promotes systemic change within community organizations and governmental agencies engaged in the civil and criminal legal response to domestic violence, in order to hold these institutions accountable for the safety and security of battered women and their children. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice. In an effort to promote more safe and just results for women and their children, the BWJP works at state, national and international levels to engage court systems in methods of accurately assessing the effects of intimate partner violence on women and children and to fashion safe outcomes that hold batterers accountable.

BALA. BALA is the largest provider of free legal services to low income residents of the San Francisco Bay Area. Domestic Violence is one of our priority areas. Over the past forty years, BALA and its predecessor

organizations have represented thousands of domestic violence survivors in cases involving restraining orders, divorces, child custody, immigration, and other matters. BALA has participated in task forces and trainings to improve the response of law enforcement to domestic violence. It has represented clients who have been sued for calling the police about their domestic violence. BALA's clients would be put at risk of litigation abuse if persons are permitted to bring suits for malicious prosecution against intimate partners who report domestic violence to the police.

CPEDV. The CPEDV is the federally recognized State Domestic Violence Coalition for California. Like other Domestic Violence Coalitions throughout the U.S. States and territories, the CPEDV is rooted in the battered women's movement and the values that define this movement, including social justice, self-determination, and ending the oppression of all persons. The CPEDV has a 30-year history of providing statewide leadership, and has successfully passed over 100 pieces of legislation to ensure safety and justice for domestic violence survivors and their children. CPEDV believes that by sharing expertise, advocates, legislators, and allies can end domestic violence. Every day CPEDV inspires, informs and connects all those concerned with this issue, because together we are stronger.

The CPEDV's mission and work are focused on protecting the safety of domestic violence victims, which includes ensuring their safe access to

police protection and the criminal justice system. Victims already face formidable barriers to reporting abuse to law enforcement, such as lack of sufficient police protection and serious personal security issues. The CPEDV is therefore deeply concerned that if we allow these crime victims to be subject to litigation from their perpetrators, victims of intimate partner abuse will be further dissuaded from making potentially life-saving calls for help. When they take the important step of contacting law enforcement to report a violent incident, victims must feel confident that they will not trigger litigation from their abusers, as yet another form of coercion and intimidation.

Accordingly, the CPEDV has a compelling interest in this case, and joins the amicus curiae brief filed by DV LEAP.

Benefit To The Court

As evident from *Amici*'s statements of interest, they individually and collectively have a significant interest in ensuring that the Court's decision in the instant appeal will not adversely impact the rights of domestic violence victims throughout California (nor other states), inadvertently erect any additional barriers to victims' access to justice, or chill victims' willingness to seek aid from law enforcement when they are in danger from their abusers.

The *H* case is critically important to the abuse survivors because their right to call police when frightened by threatening behaviors of

intimate family members is jeopardized if they can be civilly sued for seeking protection. Malicious prosecution tort suits are infamous for being used against victims by their abusers after a criminal prosecution fails or is dismissed. A decision by this Court allowing Mr. H to proceed with his malicious prosecution action would have a damaging ripple effect both in California and around the country.

Amici submit that the accompanying brief will be helpful to the Court in deciding the appeal in that it will present the perspective of multiple third-party, non-profit organizations which advocate on behalf of domestic violence victims, all of whom will be affected by the Court's decision in this matter as to whether domestic violence 911 calls may give rise to malicious prosecution claims against the caller. The accompanying brief does not seek to simply repeat the Appellant's arguments. Rather, *Amici* will demonstrate how the trial court's decision, if not reversed, could have substantial deleterious consequences for domestic violence victims throughout California, not just Appellant.

PREPARATION OF BRIEF

No party or any counsel for a party in the pending appeal authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than *Amici* made a monetary contribution intended to fund the preparation or submission of the application and brief.

For all of these reasons, *Amici* respectfully request that this Court grant them leave to file the accompanying brief and the supporting appendix of authorities.

Respectfully submitted,

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AMICUS BRIEF IN SUPPORT OF APPELLANT Ms. H

INTRODUCTION

Permitting malicious prosecution litigation against an alleged victim of abuse is an open invitation to abusers to sue their victims whenever they call for help. Victims of abuse are already hobbled by numerous obstacles, including their intimate vulnerability to their abuser, and the inadequate protection and under-enforcement of the law. Subjecting a person who seeks police protection from abuse to tort litigation by the accused will only strengthen abusers' ability to continue their abuse through vengeful litigation. This State has already recognized that allowing malicious prosecution tort suits between divorce litigants would be disastrous. *See Bidna v. Rosen*, 19 Cal. App. 4th 27, 36 (1993), and *Begier v. Strom*, 46 Cal. App. 4th 877, 887-88 (1996). Allowing tort litigation in response to 911 calls for help would be far worse than allowing it in the context of divorce litigation because it would subject crime victims to legal attacks by the perpetrators of their crimes and it would exacerbate the myriad hurdles which already impede domestic violence victims' reporting of the crimes against them. Allowing malicious prosecution litigation will only encourage abusers' continued abuse of their victims—this time in a court of law.

Amici urge this Court to explicitly extend the ban on malicious prosecution claims already announced with respect to family proceedings in

Bidna to domestic violence 911 calls and reports to the police. Such an extension is critically important to domestic violence victims across California because it will ensure that they need not fear that reporting abuse will subject them to being financially ruined and emotionally tormented by frivolous legal proceedings brought on by their simple need to protect themselves against violence.

ARGUMENT

Allowing malicious prosecution suits in response to domestic violence 911 calls and reports to the police where there has been no finding of factual innocence on the part of the arrestee would be disastrous public policy. Domestic violence is a widespread social evil which is not easily amenable to legal prevention or response. Allowing malicious prosecution suits for reports to police would profoundly burden victims' calls for help and would unduly empower abusive individuals to re-victimize their victims through ongoing tort litigation. Since false reports of abuse are rare, and courts cannot predict *ex ante* whether a report was knowingly false, the widespread harm done to genuine victims of abuse who are targeted by unjustified malicious prosecution suits will vastly outweigh any legitimate benefit to a falsely accused individual, particularly where the

abuser is wealthy and he can use his wealth to litigate his victim into submission.¹

I. DOMESTIC VIOLENCE IS A SERIOUS PROBLEM AND IS NOTORIOUSLY UNDER-PROSECUTED

A. Domestic Violence Is Widespread, And Especially In Upscale Marriages, Is Often Characterized By Low Violence And Frightening Coercive Control

Contrary to widespread assumptions, domestic violence affects a significant portion of the United States population. According to the Centers for Disease Control and Prevention (CDC), “[m]ore than one-third of women in the United States (35.6% or approximately 42.4 million) have experienced rape, physical violence, and/or stalking by an intimate partner at some point in their lifetime.” Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R., National Center for Injury Prevention and Control, Centers for Disease Control and Prevention (Atlanta, GA), The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report (“NISVS Report”) 39 (2011), *available at*

¹ Eliminating civil malicious prosecution claims in the context of domestic violence 911 calls or reports to police does not leave a truly falsely accused individual with no recourse: He may file a petition for factual innocence under California Penal Code section 851.8 or, if no charges are filed, the charges are dismissed or he is acquitted, he may ask the prosecutor to charge the accuser with filing a false police report under California Penal Code section 148.5. Indeed, the threat of criminal prosecution for making false police reports is a powerful general deterrent to making false police reports.

http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf

(last visited 5/7/2012). The same report also found that “[n]early 1 in 3 women (30.3%) in the United States has been slapped, pushed or shoved by an intimate partner at some point in her lifetime.” *Id.* at 43.²

“[A]pproximately 40% of California women experience physical intimate partner violence during their lifetime. . . .” *California Partnership To End Domestic Violence, Statistics & Facts, Abuse in California, Rates of Domestic Violence* (2012), available at <http://www.cpedv.org/Statistics> (last visited 5/7/2012). “Approximately 1.5 million women . . . are raped and/or physically assaulted by an intimate partner each year [].” *Id., Statistics, Abuse in California, Domestic Violence Facts*. “[T]here were 113 domestic violence fatalities [in California] in 2008.” *Id., Statistics & Facts, Abuse in California, Domestic Violence Homicides*. “These accounted for 5% of all homicides in the State. Of the 113 domestic violence homicides in 2008, 99 of the victims were females (88%) and 14

² Violence between intimate partners (spouses and boyfriends and girlfriends) accounted for 34% of all violent crimes recorded by police in eighteen states and the District of Columbia. Durose, M.R., Harlow, C.W., Langan, P.A., Motivans, M., Rantala, R.R. & Schmitt, E.L., Bureau of Justice Stats., Office of Justice Programs, U.S. Dep’t of Justice, *Family Violence Statistics* 29 (NCJ 207846, June 12, 2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs.pdf> (last visited 5/7/2012). In a study of eleven large counties during May 2000, approximately one third of felony assault charges involved family violence (broadly defined). *Id.* at 45.

were males (12%).” *Id.* Finally, “there were 174,649 domestic violence-related calls for assistance in 2007. . . .” *Id.*, *Statistics & Facts, Abuse in California, Domestic Violence-Related Calls To Law Enforcement Agencies.*

These statistics are not limited to particular races or income levels; on the contrary, professional and upper class women are equally at risk of domestic abuse, although much of that abuse may take the form of intimidation and coercive control rather than extreme or overt violence. *See* Weitzman, Susan, *Not To People Like Us: Hidden Abuse In Upscale Marriages* 45-46, 59-60 & 156-157 (Basic Books: 2000); Mahoney, Martha R., *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 93 (1991) (available on Westlaw at citation 90 MILR 1) (“battering is power and control marked by violence and coercion”). Most abused women are subjected to “an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman’s life, including sexuality; material necessities; relations with family, children, and friends; and work.” Stark, Evan, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 986 (1995) (available on Westlaw at citation 58 ALBLR 973).

Coercive control, while not always itself illegal, is commonly considered to be intrinsic to the most damaging and terrifying dimensions of domestic violence and abuse. *See* Stark, Evan, *Coercive Control: The*

Entrapment of Women In Personal Life 276 (Oxford U. Press: 2007). One significant study found that women subjected to coercive control were three times more likely to report fear than those who had only been assaulted by their partners. *Id.* at 278 (citation omitted). A majority of abused women reported that the psychological abuse they suffered had a more severe impact on them than the physical attacks. Jaffe, Peter G., Zerwer, Michele & Poisson, Samantha, *Access Denied: The Barriers of Violence & Poverty for Abused Women and their Children After Separation* 1, 15 (The Center for Children & Families in the Justice System of the London Family Court Clinic: 2002), available at http://www.lfcc.on.ca/access_denied_full.pdf (last visited 5/7/2012). The history of this case, involving two calls to police over two years for minor violence or frightening conduct, in the context of a highly contested divorce, where the parties remain in the same home, is consistent with what we know about upscale abuse. See Weitzman, *supra*, at 180 (“physical violence was the least of Rhonda’s troubles. Andrew had gradually created such an aura of fear in her that she anticipated his response to her every action and word. This otherwise powerful woman had been reduced to catering to her husband’s vacillating moods and bullying behaviors”).

B. Victims Are Reluctant To Report Intimate Abuse

One profound impact of the psychological aspect of an abusive relationship is its undermining of a victim’s ability to obtain legal

protection. Because battering and coercive control is often traumatizing, and because it takes place in an intimate relationship—often one in which the victim shares children with the perpetrator—it is especially difficult for victims to take their private suffering public, by seeking help from police or other parts of the legal system.³ Indeed, many victims are explicitly warned by their abusers *not* to call the police. *See, e.g.*, Davis Amicus Brief, *supra*, at *1AA (Letter from Paul Dedinsky, Assistant District Attorney and DV Unit Director, Milwaukee County District Attorney’s Office, Wisconsin, describing how one victim “was afraid for her safety

³ Testifying in court forces a victim to face her terrorizer, retell the trauma to his face, and endure potentially aggressive cross-examination. Brief of Amici Curiae the National Network to End Domestic Violence, Indiana, and Washington Coalitions Against Domestic Violence, Legal Momentum, *et al.*, In Support of Respondents, *Davis v. Washington*, 547 U.S. 813 (2006), Nos. 05-5224 and 05-5705, 2006 WL 284229 (hereinafter “Davis Amicus Brief”) at *15aa (every time victim sees her boyfriend or even a photograph, she re-lives both the rape and the battering). As one survivor put it: “Today, even ten years later, after years of counseling to become whole again—I still have a hard time facing him in court in matters involving the children. Over ten years after my last beating it still makes me throw-up when I have to face him. I break out in a horrible, drenching cold sweat. I shake from the tips of my fingers to toes, [which] I usually have to consciously place on the ground with force to stop my heels from clacking in the courtroom. . . . I often have to seek medical attention afterwards for migraines.” Davis Amicus Brief, *supra*, at *27aa. In short, “if one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law.” Herman, Judith, *Trauma And Recovery* 72 (Basic Books: 1992), available at http://books.google.com/books?id=3cn2R0KenN0C&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (last visited 5/7/2012).

because the defendant had warned her in the past that ‘if she ever called 911 on him, he would come back and kill her’”).

The trauma and fear associated with abuse is only one of many factors contributing to victims’ under-reporting of domestic violence. Victims are also discouraged from reporting due to inadequate responses from police, prosecutors, and courts, inadequate sentences, the risk of retaliatory violence, and some degree of dependency on their abuser. *See* Bailey, Kimberly D., *The Aftermath Of Crawford And Davis: Deconstructing The Sound Of Silence*, 2009 B.Y.U. L. Rev. 1, 32, 47 (2009) (available on Westlaw at citation 2009 BYULR 1) (“In addition to a lack of material resources and physical safety, the quality of victims’ interactions with actors in the criminal justice system affects their willingness to participate in the prosecution of their batterers. [Footnote omitted.] One survey found that women ‘were more afraid of the courts and the law than they were of harming their relationship with’ their partner or retaliation from their partner.”). In short, under-reporting of domestic abuse is driven, not just by fear of the batterer himself, but by the failings of and obstacles to usage of the law enforcement and judicial systems. Thus, it is well established that many victims simply do not report the domestic violence crimes committed against them. Holt, Victoria L., Kernic, Mary A., Lumley, Thomas, Wolf, Marsha E., and Rivara, Frederick P., *Civil Protection Orders and Risk of Subsequent Police-Reported*

Violence, 5 JAMA 592 (Aug. 7, 2002), available at www.jama.ama-assn.org/cgi/content/full/288/5/589 (last visited 5/7/2012) (crime victim surveys have indicated that only about half of all domestic violence incidences are reported).

II. PERMITTING MALICIOUS PROSECUTION SUITS AGAINST DOMESTIC VIOLENCE VICTIMS WHO CALL THE POLICE WILL INCREASE THE BARRIERS TO OBTAINING LEGAL PROTECTION

A. Victims Already Face Daunting Hurdles To Obtaining Justice And Protection

If domestic violence were adequately addressed by the criminal justice system, the burden on victims that the prospect of malicious prosecution suits might place on their efforts to obtain legal protection and perpetrator accountability might be more tolerable. However, in fact, while legal reforms during the past 30 years have improved states' criminal laws and practices, in *Amici's* experience and as evidenced in the literature, the criminal justice system continues to fail victims of abuse to a disturbing degree. Thus rather than erecting any additional hurdles, the legal system needs to be made more – not less – accessible to victims of abuse.⁴

Not only do surveys consistently characterize the failure of police response as a “significant or very serious problem,” Kinports, Kit & Fischer, Karla, *Orders of Protection in Domestic Violence Cases: An*

⁴ For purposes of this brief we limit our discussion to police - and below, prosecutorial - responses.

Empirical Assessment of the Impact of the Reform Statutes, 2 Tex. J. Women & L. 163, 223-224 (1993) (available on Westlaw at citation 2 TXJWL 163), when police do respond, they often refuse to make an arrest. *Id.* at 224. See also Ptacek, James, *Battered Women In The Courtroom: The Power of Judicial Responses* 162 (Northwestern Univ. Press: 1999), available at http://books.google.com/books?id=gBcIKm7OZPsC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false) (last visited 5/7/2012) (detailing anecdotes of police failures to respond to protection order violations); Logan, T.K., Walker, Robert, Horty, and Faragher, Teri, *The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, and Costs* 97-98 (September 2009) (hereinafter “The Kentucky Civil Protection Order Violation Study”), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228350.pdf> (last visited 5/7/2012) (federally funded study finding that only 27.9% of reported civil protective order violations resulted in arrests). See also Lenahan, Jessica (Gonzales) et al., Case 12.626, Inter-Am. Comm’n H.R. Report No. 80/11, (July 21, 2011), available at http://www.oas.org/en/iachr/media_center/PReleases/2011/092.asp (last visited 5/7/2012) (finding that the United States has violated human rights

by police failure to respond to victim's pleas, resulting in murder of three young children, and that major reforms are necessary on a national scale).

In San Francisco, recent data indicate that only 28% of all domestic violence calls (2014 out of 7311) are followed by even an investigation. City and County of San Francisco Department on the Status of Women, Family Violence Council, *Comprehensive Report on Family Violence in San Francisco* (2010) at 9, 12 (hereinafter "Family Violence Council, *Comprehensive Report*"), available at <http://www.sfgov3.org/Modules/ShowDocument.aspx?documentid=458> (last visited 5/7/2012). The report does not state the percentage of investigations that result in arrest, but it can be assumed to be far smaller. Moreover, only 26% of the cases *referred* to the District Attorney's Office actually resulted in the filing of criminal charges. *Id.* at 15.

Given the difficulty of prosecuting domestic violence even now, it would be contrary to California's stated public policy in favor of deterring and punishing domestic violence, *see, e.g.*, California Penal Code sections 13700, *et seq.* (law enforcement response to domestic violence), and California Penal Code section 273.81 (spousal abuser prosecution program), for this Court to erect yet another obstacle to the reporting and prosecution of domestic abuse. The very real possibility that calling the police—if no charges are filed, the case is dismissed before trial, or if there is an acquittal—can trigger a malicious prosecution suit by the person from

whom the caller sought protection in the first place, would establish an even greater hurdle to the reporting and prosecution of domestic violence.

B. Allowing Malicious Prosecution Suits For 911 Calls Will Increase Abuse Through Litigation

“Litigation abuse” has recently been recognized to be one significant form of domination and control by abusers, particularly those with significant resources at their command. Malicious prosecution tort litigation is a paradigmatic example.

Litigation abuse occurs when abusers harass their victims through litigation aimed at draining them emotionally and financially. *See, e.g.,* Jaffe, Peter G., Lemon, Nancy K. D. and Poisson, Samantha E., *Child Custody & Domestic Violence*, 32 (Sage Publications, Inc. 2003) (hereinafter “Jaffe, et al., *Child Custody & Domestic Violence*”), available at http://books.google.com/books?id=bbZmp7ALQ4C&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (last visited 5/7/2012). Litigation abuse is increasingly recognized to be as harmful as other forms of abuse. *See, e.g.,* Bellew, Kara, *Silent Suffering: Uncovering and Understanding Domestic Violence in Affluent Communities*, 26 Women’s Rights L. Rep. 39, 42-45 (2005) (listing the primary forms of abuse as financial abuse, psychological abuse, physical abuse and litigation abuse) (available on Westlaw at citation 26 WRLR 39); Pollema, Leah J., *Note: Beyond the Bounds of Zealous Advocacy: The Prevalence of Abusive*

Litigation in Family Law and The Need for Tort Remedies, 75 UMKC L. Rev. 1101, 1110 (2007) (hereinafter “Pollema, *Note: Beyond the Bounds*”) (available on Westlaw at citation 75 UMKCLR 1107); Vollans, Andrea, *Court-Related Abuse and Harassment* (YWCA Vancouver 2010), available at <http://www.ywcavan.org/sandbox/UserFiles/files/Women%20and%20Their%20Families/Legal%20Educator/Litigation%20Abuse%20web.pdf> (last visited 5/7/2012) (detailing the many ways abusers use the courts to extend their abuse and undermine the victim). Litigation abuse is particularly insidious because it occurs under the auspices of the very legal system meant to protect battered victims. Pollema, *Note: Beyond the Bounds*, *supra*, at 1110 (“[T]he legal system actually becomes the instrument in which an individual is able to continue the abuse despite the presence of a restraining order. . . .”) And it is a particular problem among upscale families, because only pecunious individuals can launch repeated litigation attacks:

An upscale abusive man can use the courts to continue tormenting his wife, even after she has separated from him. . . . ‘a well-to do abuser can sometimes use the litigation process for meritless, baseless, frivolous litigation as a means for further abuse. All too frequently the courts, in an effort to accord the accused batterer all his rights, permit this excessive protraction in the process. They permit the petitioner to be pounded with legal fees—thereby allowing the judicial system to become a vehicle for further harassment.’

Weitzman, *supra* at 209 (citation omitted). Scholars and legal authorities have therefore recognized the prevalence of and danger posed by litigation abuse. *Id.*; *see also* National Council of Juvenile and Family Court Judges, *Batterer Manipulation of the Courts to Further Their Abuse, and Remedies for Judges*, 12 Synergy No. 1 at 12 (2008), available at <http://www.ncjfcj.org/sites/default/files/synergy-12-1.pdf> (last visited 5/7/2012). As one court has observed, extended litigation abuse can trap a victim in what amounts to modern-day slavery, because an aggressive and well-funded perpetrator can maintain regular and almost unending contact with his victim by continually hauling her into court. *See, e.g., Schuyler v. Ashcraft*, 680 A.2d 765, 774 (N.J. Super. Ct. App. Div. 1996). *See also* Pollema, *Note: Beyond the Bounds, supra*, at 1110 (“[A]busers may use the legal system to maintain and even prolong . . . contact.”). *See* Jaffe, Peter G., *et al., Parenting Arrangements After Domestic Violence*, J. of the Center for Families, Children & The Courts 95, 99 (2005), available at <http://www.crvawc.ca/documents/Parenting%20arrangements%20after%20DV%20Jaffe,Crooks,Wong.pdf> (last visited 5/7/2012) (“In some cases of domestic violence, perpetrators actively employ the legal system as a means of maintaining ongoing control of their victims”). And where the parties are not actually separated, as here, litigation abuse can be used to bankrupt, to exhaust, and to try to defeat the victim.

Abusive litigation is also often initiated in retaliation for the victim's efforts to separate and/or challenge the abuser's control, *e.g.*, by filing for divorce, or a protective order, by calling 911 for help (as here), reporting abuse to law enforcement, or asking that criminal charges be filed against the abuser. *See, e.g.*, Office for Victims of Crime, *National Victim Assistance Academy Textbook* Chapter 5.1 (Anne Seymour, *et al.*, eds., 2002), *available* *at* https://www.ncjrs.gov/ovc_archives/nvaa2002/chapter5_1.html#1 (last visited 5/7/2012) ("A disturbing trend in victim's civil litigation cases involves legal retributions against the victim by the perpetrator"); Vollans, *Court-Related Abuse, supra*, at 16-17 (Section titled "Using the courts as a way to enact revenge").

C. Malicious Prosecution Claims Like The One Filed Here Are A Classic Form Of Litigation Abuse

Malicious prosecution claims brought against alleged victims of domestic violence are a prime example of abusive litigation. By challenging the truth of a report of abuse in the civil setting, the abuser is able to effectively punish his victim for having asked that criminal charges be filed against the abuser or, as here, for calling the police to seek assistance, *regardless of whether the allegations of violence were true*. Without ever resolving the actual truth or falsity, perpetrators can cause significant financial and emotional injury to victims by forcing them to hire

lawyers to defend against the malicious prosecution suit. When plaintiffs prevail in such a suit, they can sometimes exact astronomical damage awards. *See, e.g., Bhatia v. Debek*, 948 A.2d 1009 (Conn. 2008) (upholding \$3.5 million damage award against single mother earning under \$30,000 annually, despite trial court's acknowledgment that mother sincerely believed child was molested, and independent experts as well as police and prosecutors had validated the abuse, which court ultimately rejected). But even in cases where the defendant prevails, the cost of defense and the emotional damage of defending litigation can cause substantial harm to a victim.

For instance, in *Davey v. Dolan*, 453 F. Supp. 2d 749 (S.D.N.Y. 2006), Mary Davey obtained a temporary order of protection following an assault by her husband Peter, and filed for divorce a week later. In the years that followed, Peter Davey filed countless complaints against his ex-wife, her brother, her sister, her attorneys, their law firms, the judges who presided over their divorce proceedings, the State of New York and his own son. These claims included allegations of malicious prosecution and conspiracy, among many others. Eventually, Peter Davey was judicially barred from filing any further complaints without permission from the court, due to his pattern of meritless, vexatious litigation, which it found to be designed primarily to continue the harassment of Mary Davey. *Id.* at 756. *See also Moldowan v. City of Warren*, 578 F.3d 351, 363 (6th Cir.

2009) (affirming in part and denying in part summary judgment motion in civil rights and conspiracy action filed by alleged kidnapper and sexual assaulter against police officers, his alleged victim and others); *Ledvina v. Cerasani*, 146 P.3d 70 (Ariz. Ct. App. 2006) (in defamation action filed by one neighbor against another based on allegation that defendant had falsely claimed that plaintiff slashed defendant's tire, appellate court affirmed trial court's order granting summary judgment to defendants on ground that reports to police are absolutely privileged); *McLarnon v. Jokisch*, 727 N.E.2d 813, 815-16 (Mass. 2000) (Anti-SLAPP statute found applicable to a civil action alleging a violation of malicious prosecution and other torts arising out of protective orders against the plaintiff); *Fabre v. Walton*, 781 N.E.2d 780 (Mass. 2002) (Supreme Judicial Court grants Anti-SLAPP motion on grounds that the tort case must be dismissed unless it provides a "substantial basis" that the domestic violence claim was "devoid of any reasonable factual support," noting that since the order had been extended, the claim must have had some factual support).

Amici collectively are aware of a number of false malicious prosecution suits brought by abusers against victims, some of whom have been our clients. Given the denial that is the hallmark of battering, malicious prosecution litigation is tailor-made for an abuser to further his denial while re-victimizing the victim by subjecting her to ongoing dealings with him through stressful, burdensome, and financially crippling litigation.

We urge this Court to refuse this invitation to empower abusers and re-victimize victims through the courts.

III. JUDICIAL POLICY ON MALICIOUS PROSECUTION FOR DOMESTIC VIOLENCE CALLS TO POLICE CANNOT BE BASED ON ASSUMPTIONS ABOUT THE PROBABLE TRUTH OR FALSITY OF DOMESTIC VIOLENCE REPORTS IN CASES WHERE CHARGES ARE DISMISSED OR NOT FILED

Respondent asserts that Ms. H's report to police that she was subject to a frightening physical altercation was simply fabricated and false. Respondent's Brief, *passim*. Respondent thereby implies that permitting a malicious prosecution suit here would have no impact on valid domestic violence complaints. However, it is impossible to discern, especially where a prosecution has been dismissed without explanation, whether such allegations are true or false, *before allowing the tort suit to proceed* with all of its attendant harms. Indeed, the elements of a malicious prosecution *do not include proof of the falsity* of the allegations. *See, e.g., Begier v. Strom*, 46 Cal. App. 4th 877, 886 (1996) (citation omitted) (elements of malicious prosecution are (1) the prior action was commenced by or at the direction of the defendant and was pursued to a legal termination in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice"). Thus, depending on how "malice" is construed, *cf.* Respondent's Brief at 45 (arguing that malice may be inferred solely from a lack of probable cause), it is possible for a malicious prosecution tort suit to succeed even where the

underlying allegations triggering the criminal prosecution were true or in good faith, or where, as here, the sued party did not even seek or intend a criminal prosecution. *See Bhatia v. Debek, supra* (upholding massive damages award for malicious prosecution where courts acknowledged that defendant sincerely believed her daughter had been molested by father, and daughter’s report had been validated by experts in child sexual abuse). Given that the malicious prosecution tort is aimed at remedying the misuse of the criminal justice system by fabricators of false allegations, the following Section addresses some of the basic realities that bear on the veracity of abuse complaints and domestic violence reports and prosecutions.

A. Abuse Victims Generally Do Not Seek Criminal Prosecution—Victims’ Calls To Police Are Almost Always Made Seeking Protection, Not Prosecution

Police officers have long been understood to serve not just a law enforcement function, but a “community caretaking function” as well. *See People v. Ray*, 21 Cal. 4th 464, 472 (1999). The California Supreme Court has recognized that:

The police have ‘complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses’; by design or default, the police are also expected to ‘*reduce the opportunities for the commission of some crimes through preventive patrol and other measures,*’ ‘*aid individuals who are in danger of physical harm,*’ ‘assist those who cannot care

for themselves,’ ‘*resolve conflict,*’ ‘*create and maintain a feeling of security in the community,*’ and ‘provide other services on an emergency basis.’

Id. at 471 (emphasis added) (citation omitted). Given these varied duties (which are in addition to officers’ law enforcement responsibilities), it is reasonable for any person to believe that a call to 911 will result in the assistance of a peace officer with the peacekeeping function, and not necessarily an arrest.

The Supreme Court has, in fact, explicitly recognized that calls to the police are often made for protection in an emergency, and not for purposes of launching a prosecution. Thus, in *Davis v. Washington*, 547 U.S. 813, 822 (2006), the Court held that the contours of the Sixth Amendment’s right to confrontation depends on whether a 911 call or police report is “testimonial” or not – holding that if the report is made “under circumstances objectively indicating that the primary purpose of [police] interrogation is to enable police assistance to meet an ongoing emergency,” it is *not* “testimonial.” *Davis v. Washington, supra*, 547 U.S. at 822; *see also People v. Cage*, 40 Cal. 4th 965, 970-71 (2007) (statement by child abuse victim to attending physician not testimonial because primary purpose of the physician's general question was to deal with a contemporaneous medical situation that required immediate information about what had caused the victim's wound); *People v. Morris*, 166 Cal.

App. 4th 363 (2008) (rap sheets not testimonial as they are not analogs for testimony at trial—statements made with the solemnity associated with testimony at trial, but are mere compilations of statistical data.)⁵

The fact that most women call the police for protection, and not for prosecution, is even more clear when one looks at prosecutorial statistics. Empirical research makes clear that abused women are far more likely than any other crime victim to avoid participation in criminal trials or to recant their accusations in an effort to escape it. Lininger, Tom, *Prosecuting Batterers After Crawford*, 91 Va. L. R. 747, 768 (2005) (available on Westlaw at citation 91 VALR 747).⁶ Repeated studies in different jurisdictions have found that battered women recant or refuse to cooperate with the prosecution approximately 80-90% of the time. *Id.*; see also Beloof, Douglas E. & Shapiro, Joel, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3-4 (2002) (available on Westlaw at citation 11 CLMJGL 1); Peterson, Richard R.,

⁵ The Supreme Court has also suggested that subsequent reports to police “where there is no such ongoing emergency” may be treated as “testimonial” and thereby potentially excluded pursuant to the Confrontation Clause. *Davis v. Washington, supra*, 547 U.S. at 822. Whether or not a statement is “testimonial” pursuant to the 6th Amendment doctrine has no bearing on whether such reports are protected activity, which the court below found these reports were.

⁶ Thus, the trial court’s statement below that “[a] person reporting a crime to law enforcement may fairly expect a criminal prosecution may follow” [CT II, 285] does not accurately reflect the reasons women call the police in the heat of an altercation.

Combating Domestic Violence in New York City: A Study of DV Cases in the Criminal Courts 9-10 (New York City Criminal Justice Agency Apr. 2003), available at <http://www.nycja.org/research/reports/ressum43.pdf> (last visited 5/7/2012). The same is apparently currently true in at least one California jurisdiction. Family Violence Council, *Comprehensive Report*, *supra*, at 15-16 (describing how difficult it now is to prosecute domestic violence due to both federal and state legal changes requiring the voluntary participation of the victim in the case) (citing *Crawford v. Washington*, 541 U.S. 36 (2004), and Code of Civil Procedure Section 1219 (forbidding compulsion of victim-witness's testimony)).

In short, the reality is that 911 calls to police are typically made in *extremis*, when people are frightened and need protection. Far from calling 911 for the purpose of launching a prosecution, most abused women, as here, want anything but that.⁷ Thus, there should be no suggestion that women often call the police to fabricate abuse that did not happen – while such behavior is certainly conceivable, it is the opposite of the norm. Malicious prosecution litigation for such calls, then, is, at best, a solution in search of a problem. At worst, it is simply a new and lawful tool for abusers.

B. The Majority Of Criminal Domestic Violence Charges Are Dismissed For Reasons Having Nothing To Do With The Truth Of The Allegations

⁷ While *Amici* urge this Court to prohibit malicious prosecution suits for any calls or reports to police by persons alleging domestic violence, it is particularly incomprehensible for such a suit to be allowed when, as here, it is uncontested that the caller urged the police *not* to arrest and the prosecutors *not* to prosecute.

As noted in Section III.A above, the vast majority of domestic violence complainants resist criminal prosecution of their abusers, for many reasons unrelated to the validity of the complaint. Prior to 2004, the proactive prosecutorial strategy was therefore to build a case that did not depend on the victim's cooperation, a practice dubbed "victimless" or "evidence-based" prosecution. Gwinn, Casey G. & Sgt. O'Dell, Anne, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. St. U. L. Rev. 297, 313 (1993), *available* at http://heinonline.org/HOL/Page?public=false&handle=hein.journals/wsulr20&men_hide=false&men_tab=citnav&collection=journals&page=297 (last visited 5/7/2012); Epstein, Deborah, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1858 (2002) (available on Westlaw at 43 WMMLR 1843). Evidence-based prosecution focuses on the gathering of corroborating evidence including admissible hearsay by the victim, in order to make a case that does not depend on victim cooperation. Even with such strategies domestic violence prosecution was always challenging. *See* Karan, Hon. Amy and Gersten, David, *Domestic Violence Hearsay Exceptions in the Wake of Crawford v. Washington: A View From The Bench*, Synergy (Newsletter of the Resource Center on Domestic Violence: Child Protection and Custody), 8 Nat'l Council of Juvenile & Fam. Ct. Judges, no. 2 (Summer 2004) at 2, *available* at <http://www.ncdsv.org/images/DVHearsayExceptionsWakeCrawford.pdf> (last visited 5/7/2012) (evidence-based prosecutions have been historically difficult

because of the absence of a complaining witness and the need to rely on hearsay statements). However, the road became far more uphill after the Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004) and its sequelae, holding that even admissible hearsay must be excluded under the Confrontation Clause, unless it was "non-testimonial," as in the case of a 911 call made seeking emergency help during an assault. *Davis v. Washington*, *supra*, 547 U.S. at 822. An extensive survey of more than 60 prosecutors' offices in California, Oregon and Washington, demonstrated the immediate, devastating impact of *Crawford*. Lininger, Tom, *Prosecuting Batterers After Crawford*, 91 Va. L. R. 747, 750 (2005) (available on Westlaw at citation 91 VALR 747). Among the results: 63 percent of respondents reported that the *Crawford* decision significantly impeded prosecutions of domestic violence; 76% indicated that after *Crawford*, their offices were more likely to dismiss domestic violence charges when victims recant or refuse to cooperate; and 65% reported that victims of domestic violence are now less safe in their jurisdictions than during the era preceding the *Crawford* decision. *Id.*; see also Mosteller, Robert P., *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 608 (2004-2005) (available on Westlaw at citation 39 URMDLR 511) ("*Crawford* has disrupted domestic violence prosecutions to a degree not seen in any other area. It erected a 'stop sign' in front of most of this evidence").

Precisely this problem has been identified by the San Francisco District Attorney's Office as the core reason for its quite low (26%) prosecution rate in domestic violence cases. Family Violence Council, *Comprehensive Report*,

supra, at 16 (“The DA’s Office faces challenges to prosecuting domestic violence cases that have led to a reduction in the number of cases filed . . . Now [after *Crawford*], victims must testify and be cross-examined . . . something many victims are reluctant to face, as the courtroom experience can be re-traumatizing”).

In short, while domestic violence prosecution has always suffered from a lack of sufficient prosecutorial resources, difficulty of proof, and sometimes a lack of commitment, the *Crawford* line of cases necessitates that even more cases be dismissed, some early on, and others as time passes as it becomes apparent that the complaining witness cannot or will not participate. Contrary to Respondent’s implication that the prosecutors here dismissed the charges because they were false, Respondent’s Brief at 50-51 (suggesting the dismissal of charges reflects his innocence), it is impossible to surmise that a dismissed prosecution of domestic violence indicates anything whatsoever about the actual truth of the allegations. This is true not only in this case, but in most future cases that a ruling in this case could impact.

C. Empirical Research Indicates That False Reports Of Adult Or Child Abuse To The Legal System Are Rare, While False Denials By The Accused Are Concededly The Norm

Credibility judgments in litigation inevitably depend, not solely on “the evidence,” but upon the factfinder’s beliefs and views of men and women. Within our society, it is common for women alleging abuse to be perceived as lacking credibility—in part on the theory that many women claim abuse out of vengeance toward their ex-husbands. Czapanskiy, Karen, *Domestic Violence, the*

Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts, 27 Fam. L.Q. 247, 253 & n.18 (1993) (available on Westlaw at citation 27 FAMLQ 247) (describing the bias against women's credibility in domestic violence cases); Meier, Joan, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. Child Custody, Nos. 3-4, 232-257 (2009) (hereinafter "Meier, A Historical Perspective"), available at <http://www.dvleap.org/LinkClick.aspx?fileticket=dUauj0V-0Fs%3D&tabid=181> (last visited 5/7/2012). Interestingly, the contrary image, of the abuser who falsely denies abuse allegations, does not seem as prevalent or as widely accepted. Yet empirically, the first image has been demonstrated to be largely false; the second, largely true.

Regarding the veracity of reports of abuse, while there is very little statistical research into the prevalence of false domestic violence allegations, there is substantial research into adult claims of sexual assault, and parents' allegations of child abuse by the other parent. All of this research consistently indicates extremely low rates of false allegations.

First, false claims of sexual assault of an adult victim have been studied by a number of researchers. The most recent thorough and credible study of this sort found that only 5.9% of the reports of sexual assault to the police department of a major northeast university were likely to be false. Lisak, David, Gardinier, Lori, Nicksa, Sarah C. and Cote, Ashley M., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 Violence Against Women 1318 (2012) available at <http://vaw.sagepub.com/content/16/12/1318.full.pdf+html>

(last visited 5/7/2012). The study's authors also summarized a handful of other credible studies, which resulted in findings of false reports ranging from 2% to 11%, with an average of 5.65%. *Id.* at 1324-1327. Notably, all of these assessments were based to some degree on police assessments of the evidence, not a particularly gullible or anti-male population. *Id.*

Second, several substantial studies of false allegations of child abuse have consistently found that rates of child abuse reports in the custody litigation context were validated half the time or more often, that the majority of the non-validated allegations were indeterminate, and that intentionally false reports were quite few. Trocme, Nico & Bala, Nicholas, *False Allegations of Abuse and Neglect When Parents Separate*, 29 *Child Abuse & Neglect* 1333-1345 (Elsevier Ltd. 2005) (available on Westlaw at citation (2005) 29 ESCABN 12 1333-1345) (only 12% of allegations found to be intentionally fabricated, the vast majority of those fabricated concerned neglect not abuse claims, and were made by non-custodial fathers, not custodial mothers). *See also* Faller, Kathleen Coulborn, *The Parental Alienation Syndrome: What Is It and What Data Support It?* 3 *Child Maltreatment* 100, 108 (Sage Publications, Inc.: 1998) (finding approximately 70% of child sexual abuse allegations were valid; only 10 out of 215 appeared to be intentionally false, of these, 6 were made by men; also stating that Thoennes study found only 13 to be apparently malicious or pathological). The first two of these studies relied on child welfare workers and custody evaluators, populations known for conservatism in assessing the validity of such allegations. Faller, *supra*, at 107. The Trocme & Bala study also contradicts the conventional

wisdom in another respect: Most of the false allegations were made – *not by custodial mothers or the children* – but by noncustodial *fathers*. Trocme & Bala, *supra*, at 1341.

In short, credible and substantial empirical research powerfully contradicts the stereotype of the vengeful female who levels false claims of abuse against her ex-husband or partner. Rather, it suggests that a markedly low rate of intentionally false allegations of child and adult abuse is lodged by mothers against fathers.

That the rate of false domestic violence calls to the police is likely low is indirectly supported by some of the data contained in the San Francisco Family Violence Council Report: In 2009-2010 the number of calls to anonymous domestic violence hotlines (26,340) was more than three times as high than the number of domestic violence calls made to the police (7311). Family Violence Council, *Comprehensive Report, supra*, at 35, 39. While obviously not definitive, the fact that so many fewer calls were made to the police than to crisis hotlines is consistent with *Amici*'s experience with survivors of domestic violence, for whom calling the police is an act of desperation not taken lightly.

On the other hand, the well-established understanding among domestic violence experts regarding the veracity of *the accused* is that abusers ordinarily deny, either the entire allegation, or the acts of primary concern. Thus, experts in batterers' counseling and custody evaluation have commented that their "clients" are "good liars," and describe the skill with which many accused batterers will skillfully admit to something innocuous while turning the accusations and focus

onto the victim. Bancroft, Lundy & Silverman, Jay, *The Batterer As Parent* 124 (Sage Publications, Inc.: 2002) available at http://books.google.com/books?id=Uix-ezdPq_UC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (last visited 5/7/2012) (“it is common for our clients [batterers] to be skillfully dishonest”). In short, opening the door to malicious prosecution suits by accused batterers creates a whole new playing field for the kind of “skillful dissembling” that is the abuser’s hallmark.

D. Forensic Evidence Of The Sort Proffered By Respondent Here Is Notoriously Unreliable

Respondent argues that the combined effect of his children’s failure to witness what went on between himself and the Appellant, with his own polygraph and a forensic expert’s assessment of the marks on Ms. H, necessitate the conclusion that her allegations of assault were false. Respondent’s Brief at 6-9, 43. *Amici*, who are unfamiliar with the parties in this case, wish only to point out the fallibility of this sort of evidence.

First, the fact that the children heard something but did not witness it, actually provides *corroboration*, rather than contradiction of Ms. H’s allegations. By corroborating that a loud altercation in fact occurred, their statements actually increase the likelihood that the frightening acts Ms. H has alleged may have also occurred. Second, polygraph data is widely known to be unreliable and inadmissible in criminal trials. *See* Cal. Evid. Code § 351.1 (excluding results of polygraph test, polygraph examiner’s opinion, or even the offer to take a polygraph test unless both parties stipulate to the admission of that evidence).

Indeed, abusive men's reputation for being superb dissemblers and powerful self-rationalizers suggests that such individuals can be expected to perform well on a polygraph. Bancroft, *et al.*, *The Batterer As Parent*, *supra*, 124.

Finally, the forensic scientific opinion proffered here cannot bear the weight Respondent seeks to place upon it. Respondent's Brief at 8-9 (describing opinion of Dr. Harry J. Bonnell). The notion that an outside expert can look at scratches [marks] and determine by observation that they were "not committed by fingernails," that they lacked "lateral movement," and that they were therefore self-inflicted, *Amici* submit, is scarcely credible. Forensic expert evidence of many kinds is notoriously unreliable and over-relied upon. *See, e.g.*, Public Broadcasting System, "*The Real CSI*" (April 27, 2012) available at <http://www.pbs.org/wgbh/pages/frontline/real-csi/?elq=cf48dfac841e46f4a2f58c03d7b3193a&elqCampaignId=170> (last visited 5/7/2012) ("some of the best-known tools of forensic science have serious flaws. . . . Our investigation, done jointly with ProPublica and the Investigative Reporting Program at UC Berkeley, shows that fingerprints, bite-mark identification and other forensic evidence used in courtrooms may not be as scientifically precise as we once believed. And the credentials some forensic examiners offer to prove their expertise may not mean what we think they do."). This is especially so in contested custody litigation, where inadmissible psychological theories with little scientific validity are widely allowed and relied upon by courts. Bruch, Carol, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 *Fam. L.Q.* 527 (2001) (available on Westlaw at citation 35

FAMLQ 572); Meier, *A Historical Perspective*, *supra*, at 232-57. Whether or not a full trial would vindicate Dr. Bonnell’s opinion, at this stage, it, like the other evidence Respondent proffers, can only be seen, at best, as inconclusive.

CONCLUSION

For all the foregoing reasons, *Amici Curiae* DV LEAP and those organizations submitting statements of interest herewith submit that this issue—whether 911 domestic violence calls may give rise to malicious prosecution claims in the State of California—is crucial for adults and children who are at risk of domestic violence. The odds are already heavily weighted against domestic violence victims who seek safety and legal protection. Allowing domestic violence 911 calls and statements to police to trigger malicious prosecution litigation would, in essence, remove the safety net of the 911 call, and replace it with a danger sign: “*Call at your own risk.*” *Amici* urge the Court to protect domestic violence victims’ access to the protection and aid that 911 was meant to offer, and to reverse the decision below.

DATED: May 7, 2012

Respectfully submitted,

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CALIFORNIA PARTNERSHIP TO END
DOMESTIC VIOLENCE

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 14(c)(1) of the California Rules of Court, the undersigned hereby certifies that the enclosed Brief produced using 13-point type, including footnotes, but excluding the Tables of Contents and Authorities, the Application for Leave to File this Brief, this Certification and the Certificate of Service, contains 7,343 words. Counsel relies on the word count of the computer program used to prepare this Brief.

Dated: May 7, 2012

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 515 South Flower Street, 40th Floor, Los Angeles, CA 90071.

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AUTHORITIES IN EXCESS OF TEN PAGES AND PROPOSED AMICUS
BRIEF OF DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND
APPEALS PROJECT IN SUPPORT OF DEFENDANT-APPELLANT MS.
H**

on the interested parties in this action as follows:

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Executed on May 7, 2012, at Los Angeles, California.

JENNIFER TAI

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