

IN THE SUPREME COURT OF IOWA

No. 02-1191

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PLANNED PARENTHOOD  
OF GREATER IOWA, INC.,

Plaintiff

vs.

THE IOWA DISTRICT COURT  
in and for BUENA VISTA COUNTY,

Defendant

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APPEAL FROM THE DISTRICT COURT  
OF BUENA VISTA, IOWA

THE HONORABLE FRANK B. NELSON, DISTRICT COURT JUDGE

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**BRIEF OF AMICI CURIAE:**

**Janice Roe,**

**the Iowa Civil Liberties Union, Inc.,**

**and**

**the American Civil Liberties Union**

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**PROOF OF SERVICE**

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## INTERESTS OF AMICI

JANICE ROE suspected she was pregnant in early September 2001, and sought confirmation of that fact from a private medical clinic in the Storm Lake area. Ms. Roe and her husband were thrilled when the test results revealed that she was pregnant. Ms. Roe shared this exciting news with close family members and began receiving prenatal care. Tragically, approximately six weeks later, during a routine ultrasound, Ms. Roe discovered that her fetus had no heartbeat. The next day, she underwent a surgical procedure to remove the remains of the fetus. Ms. Roe and her husband were devastated by the loss of the pregnancy. She felt empty and found it extremely difficult to discuss her grief even with those close family members who knew of her pregnancy.

In July 2002, Ms. Roe learned that the medical facility revealed her name, telephone number, work address and the fact of her pregnancy to law enforcement in response to a subpoena similar to the one at issue in this case. Ms. Roe was extremely upset by the prospect of receiving a telephone call from law enforcement concerning their investigation, and felt betrayed by her private medical clinic, an organization into which she had placed her trust. Ms. Roe had no notice of the subpoena and no opportunity to object to her name and private information being disclosed to law enforcement; indeed, her doctor was not even consulted before her personal records were divulged.

Officials have never acknowledged to Ms. Roe that they invaded her records, nor did they offer to expunge and return the information they seized. She lives in dread of the questions about her pregnancy that may be posed to herself and others in the small community where she lives.

As an adult woman in continuing need of confidential, reliable reproductive health care, Ms. Roe fears that information she provides to clinics could be shared with government officials in the future without any oversight or need for justification. For the first time, she has begun to wonder if she should respond candidly to sensitive health questions and whether it is really necessary to visit medical providers.

Because she and her husband are desperate to avoid the pain and intrusion into their private lives that will result if they, or other couples like them, are subjected to government investigations of their reproductive history, she submits this brief.

The IOWA CIVIL LIBERTIES UNION, INC. [*ICLU*] is a private, non-profit membership organization devoted to the protection of fundamental liberties and constitutional rights including the rights of constitutional privacy and freedom from unreasonable search and seizure. Approximately half of its membership are women. As an organization the ICLU and its members believe fervently in the right of all persons to receive private reproductive health care on a confidential basis. The ICLU believes that access to confidential health care is essential to the free exercise of the constitutional right of reproductive privacy and autonomy. The ICLU has periodically engaged in litigation to protect those rights within the State of Iowa.

The AMERICAN CIVIL LIBERTIES UNION [ACLU] is a non profit, nonpartisan public interest organization with over 300,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the United States Constitution. The ACLU has long been committed to protecting the constitutional right to reproductive choice, and has defended that right in courts throughout the country, including the United States Supreme Court, for thirty years. It joins this case as amicus in recognition of the sweeping implication that any adverse decision from this Court would have on the right of persons to secure confidential, trustworthy reproductive health care and counseling across the nation.

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## STATEMENT OF THE CASE

On June 17, 2002, the Buena Vista County Attorney filed a request for a sweeping series of overly broad subpoenas duces tecum. The subpoenas sought all medical records and other documents held by Storm Lake's reproductive health clinics, including Planned Parenthood, regarding women who had requested pregnancy tests over a nine and one-half month period. See e.g., Application for Approval to Issue Prosecuting Attorney's Subpoena Duces Tecum, approved June 17, 2002, at ¶ 2 [App. Tab 1]. The County Attorney presented no facts establishing the relevance of the private medical records to the investigation, merely alleging that the medical records requested were "desirable and necessary" "[i]n connection with" "a criminal investigation of an indictable nature." See id. at ¶¶ 1-2. The Defendant Court approved this insufficient application in an *ex parte* proceeding. The District Court made no findings of fact or of law in support of its decision. There is no indication from the record that the Defendant Court examined the scope and relevance of the subpoena, or indeed, that it ever exercised independent judgment over the validity of the subpoena.

The following day, Planned Parenthood moved to quash the subpoena. See Motion to Quash Subpoena Duces Tecum, June 18, 2002 [App. Tab 3]. The District Court denied the Motion to Quash in a two-paragraph ruling. In this

opinion, the District Court did not evidence any attempt to protect the constitutional privacy interests at stake, or even to balance these interests with the investigatory interests asserted. See Ruling on Motion to Quash, June 24, 2002. The Court's half-hearted attempt to limit the subpoena, to the name, address and birth date of women who had positive pregnancy tests, only served to ensure that investigators will show up at each woman's home or office, thus further disclosing this private information to friends, family and co-workers. The District Court neglected to take even the most minimal steps to discourage further privacy violations, failing to enter a protective order or indeed, any restrictions on the investigators' use, abuse or dissemination of the private information obtained.

Planned Parenthood moved for reconsideration of this ruling. See Motion to Reconsider, Amend and Enlarge the Ruling of June 24, 2002, July 3, 2002 [App. Tab 13]. The Defendant Court denied the motion in a two-page decision that again reflects no analysis of the constitutional rights of women whose private information was requested in the subpoena. See Ruling on Pending Motions, July 15, 2002 [App. Tab 19 (?)].

## SUMMARY OF ARGUMENT

This case began with the tragic discovery of a dead newborn. No one disputes that the State has not only a right, but also a responsibility, to investigate the circumstances surrounding the infant's death. But the need to investigate does not entitle the State to unfettered access to the constitutionally protected intimate details of hundreds of innocent women's lives.

Yet that is precisely what the District Court permitted here: Without any consideration of the women's intense privacy interests in the information and without having been presented with any reason to believe that the mother of the newborn sought a pregnancy test at Planned Parenthood, the District Court ordered Planned Parenthood to disclose the names and addresses of all women who obtained a positive pregnancy test during the nine and a half month period from August 15, 2001 to May 30, 2002. And by ordering this disclosure the District Court in effect also ordered disclosure of each woman's private decisions regarding her pregnancy: Did she continue the pregnancy and bear a child? Did she place the child for adoption? Did she have an abortion? Or did she, as approximately sixteen percent of women who become pregnant do, suffer a miscarriage? Moreover, the District Court ordered this disclosure though the County Attorney has no intention of keeping this highly private information confidential: The sole purpose of seeking the information is to enable the state to

investigate the outcome of each pregnancy by questioning the woman at her home or office, thereby alerting family members, neighbors, and co-workers, to this pregnancy.

In ordering Planned Parenthood to reveal its patients' confidences, the District Court wholly failed to follow the test set forth by this Court in McMaster v. Iowa Bd. of Psychology Exam'rs, 509 N.W.2d 754, 759 (Iowa 1993), for use in evaluating the competing interests at stake here. In particular, the District Court failed even to consider (1) the constitutionally protected interest Planned Parenthood's patients have in preventing disclosure of their pregnancies to law enforcement and their communities; (2) the lack of any showing that this information is necessary, or even relevant to, the investigation; and (3) the absence of any safeguards to protect the confidentiality of the information once it is disclosed to the County Attorney. Because the District Court ignored the women's constitutional rights to privacy and failed to perform the required balancing, its Order, dated July 15, 2002 (hereinafter "Order"), to produce these records must be overturned.

## ARGUMENT

### **I. The District Court's Order Must be Overturned Because the Court Failed To Weigh the State's Asserted Need for the Information Against Planned Parenthood's Patients' Constitutionally Protected Interest in Keeping the Information Private.**

The District Court's Order requiring the disclosures of the names of hundreds of pregnant women to investigators significantly intrudes on women's constitutionally protected privacy rights. This Court has held that where, as here, a party has a constitutionally protected interest in preventing the disclosure of private information, a court may order compliance with a subpoena only after the party seeking the information demonstrates that the need for the information outweighs the individual's privacy interests and that there are adequate safeguards to ensure the confidentiality of the information. See McMaster, 509 N.W.2d at 759-60. Far from holding the County Attorney to his burden, the District Court failed even to consider the relevant factors. Had the court done so, it would have become apparent that the County Attorney could not meet his burden. For both of these reasons, the Order must be overturned.

**A. The information sought – the names and addresses of all women who obtained positive pregnancy tests at Planned Parenthood during a nine-and-one-half-month period – is protected from disclosure by the constitutional right to privacy.**

The information sought here – the names and addresses of women who are or were pregnant and by implication their decisions concerning their pregnancies – reveals some of the most intimate and personal details of a woman’s life. As cases from this Court and the United States Supreme Court demonstrate, the constitutional right to privacy protects this information against state-ordered disclosure.

This Court has recognized that individuals have a constitutionally protected privacy right “in avoiding disclosure of personal matters.” McMaster, 509 N.W.2d at 758; see also Head v. Colloton, 331 N.W.2d 870, 876 (Iowa 1983) (holding that potential bone marrow donor has constitutionally protected privacy interest in avoiding revelation of her identity). In McMaster, this Court held that this right protected mental health records against disclosure to a medical board investigating misconduct by a psychologist. 509 N.W.2d at 761. This Court recognized that the privacy right protects at least two different interests. “One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.” Id. at 758 (quoting Whalen v. Roe, 429 U.S. 589, 599-600, 97 S. Ct. 869, 876, 51 L. Ed.2d

64 (1977)). And this Court held that both prongs of this right were implicated in the disclosure of mental health records. See id. at 758-59. (“A patient has an interest in avoiding disclosure of these records because of the obvious personal and intimate information contained in them. The patient also has an interest in keeping independent the patient’s choice to seek the help of mental health professionals.”)

Disclosure of the pregnancies and the decisions made about them likewise implicate both of these interests. First, the same interest in avoiding disclosure of personal matters that protected the records of the psychologist’s patient in McMaster also applies to the information relating to the women’s pregnancies. The United States Supreme Court has repeatedly recognized that few facts about a woman’s life are as personal as the fact of her pregnancy and the decisions she makes concerning it. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 851, 112 S. Ct. 2791, 2807, 120 L. Ed. 2d 674 (1992) (describing decisions about whether or not to bear a child as matters “involving the most intimate and personal choices a person may make in a lifetime” and “central to the liberty protected by the Fourteenth Amendment”); Carey v. Population Serv. Int’l, 431 U.S. 678, 685, 97 S. Ct. 2010, 2016, 52 L. Ed. 2d 675 (1977) (“The decision whether or not to beget or bear a child is at the very heart . . . of the right of privacy”); Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S. Ct. 1029, 1038, 31 L. Ed. 2d 349 (1972) (“If the right of

privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion” into matters concerning whether or not to have a child) (citations omitted)).

Second, like the disclosure sought in McMaster, the possibility that a positive pregnancy test will be revealed threatens a woman’s independence in making a number of important decisions. See McMaster, 509 N.W.2d at 758-59. A woman who obtains a positive pregnancy test has a decision to make: Will she continue the pregnancy and parent the child, will she continue the pregnancy and place the child for adoption, or will she have an abortion. If she is confident that her privacy will be respected, she is able to make that decision on her own, consulting only those she trusts for their input and guidance. If, however, she believes that her pregnancy may be revealed to and her decision scrutinized by others, her ability to make this constitutionally protected private choice will be sharply circumscribed. For example, the Supreme Court has recognized that “[a] woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known.” Thornburgh v. Am. College of Obstetricians & Gynecologists, 476 U.S. 747, 766, 106 S. Ct. 2169, 2182, 90 L. Ed. 2d 779 (1986), overruled in part on other grounds, Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

Even the decision to seek a pregnancy test from a health care provider will be affected if the information is disclosed. Critical to a woman's decision to seek health care of all kinds, and reproductive health care in particular, is the belief that the information related to the care will be kept confidential. See Ferguson v. City of Charleston, 532 U.S. 67, 78, 121 S. Ct. 1281, 1288, 149 L. Ed. 2d 205 (2001) (holding, in the context of striking down a hospital policy that provided results of drugs tests on maternity patients to law enforcement, that "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests . . . is that the results of those tests will not be shared with nonmedical personnel without her consent."); McMaster, 509 N.W.2d at 759 (noting that the possibility that a psychologist's records will be revealed will have a chilling effect on an individual's decision to seek treatment); Colloton, 331 N.W.2d at 876 (noting chilling effect on medical research if bone marrow donor's name is made public). In fact, the United States Department of Health and Human Services has noted that an alarming number of Americans – 1 in 6 – have taken evasive action, including providing inaccurate information to a medical provider or avoiding health care altogether, because they fear their confidential health information will be disclosed to others. 65 Fed. Reg. 82461 (2000), Office of the Secretary, U.S. Dep't of Health & Human Servs. Supplemental Information for 45 CFR Parts 160-164, Standards for Privacy of Individually Identifiable Information (2000).

Indeed, the County Attorney's subpoena has already deterred Iowa women from seeking medical care. The number of patients seeking pregnancy tests at the Storm Lake Planned Parenthood Clinic dropped by seventy to eighty percent in July 2002. See Affidavit of Jill June, ¶ 16. After learning about the disclosure of her own medical records to investigators, Janice Roe has become hesitant to share private information with her doctor because she fears that information might also be disclosed to others. This realistic fear, shared both by women whose records were revealed and others who have learned that their private records may not be secure, will seriously deter women from providing vital information to health care providers and discourage them from seeking care.

This issue is magnified for teens. The research demonstrates that a significant percentage of teens forego necessary reproductive health care because of confidentiality concerns. See, e.g., Diane M. Reddy, PhD, et al., Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services, 288 J. Am. Med. Ass'n 710, 713-14 (2002) (finding that fifty-nine percent of sexually active adolescent girls surveyed would stop using some reproductive health care services but remain sexually active if confidentiality was at risk); Carol A. Ford, MD et al., Influence of Physician Confidentiality Assurances on Adolescents' Willingness to Disclose Information and Seek Health Care, 278 J. Am. Med. Ass'n 1029, 1032 (1997) (finding seventeen percent

of adolescents surveyed had foregone health care due to confidentiality concerns); Cathy Schoen et al., *The Commonwealth Fund Survey of the Health of Adolescent Girls 5* (Nov. 1997) (finding that thirty-six percent of all girls surveyed cited confidentiality concerns as reason for failure to seek health care).

Government activities that foster this fear do a tremendous disservice to the public health generally, and are particularly troubling where, as here, the actions threaten to deter pregnant women from seeking health care. Regardless of the option they choose – carrying to term or having an abortion – early care is critical. Proper prenatal care protects the health of both the pregnant woman and the developing fetus. See Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, From Data to Action: CDC's Public Health Surveillance for Women, Infants, and Children 105 (1994); Office of Technology Assessment, U.S. Congress, Healthy Children: investing in the future 80 (1988). Prompt medical care is also important for women who choose abortion. Although abortion is a safe procedure and remains so throughout pregnancy, the risks of abortion increase substantially as pregnancy progresses. See Herschel W. Lawson et al., Abortion Mortality, United States, 1972 through 1987, 171 *Am. J. Obstetrics & Gynecologists* 1365, 1367 (Table II) (1994); Christopher Tietze & Stanley K. Henshaw, Induced Abortion: A World Review 1986 103 (The Alan Guttmacher Institute, 6th ed. 1986).

In addition to threatening women’s right to avoid disclosure of private information and to independent reproductive choice, the revelation of these confidential facts will have dangerous and devastating consequences for certain women. This is particularly true for women who are the victims of domestic violence and whose partners will learn of their pregnancies (either current early pregnancies or past pregnancies that were terminated) as a result of the County Attorney’s investigation. The Supreme Court has noted that “[m]ere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during pregnancy and often the worst abuse can be associated with pregnancy.” Casey, 505 U.S. at 889; see also Council on Ethical and Judicial Aff., Am. Med. Ass’n, Mandatory Parental Consent to Abortion, 269 J. Am. Med. Ass’n 82, 83 (1993) (family violence in abusive families reaches its worst levels during a family member’s pregnancy). In addition to the physical violence, disclosure of an early pregnancy to an abusive partner may prevent a woman who chooses to do so from exercising her constitutional right to terminate her pregnancy. Indeed, it is for this very reason that the Supreme Court has held that it is unconstitutional to require women to notify their spouses before having an abortion. See Casey, 505 U.S. at 897 (holding spousal notification requirement unconstitutional because it enables an abusive husband to “wield an effective veto over his wife’s decision”).

For teens from abusive or severely dysfunctional families, the disclosure of their pregnancies will have equally dire results. Although the vast majority of teens who become pregnant involve their parents, some do not because they fear physical abuse or forcible expulsion from home. See Stanley K. Henshaw & Kathryn Kost, Parental Involvement in Minors' Abortion Decisions, 24 Fam. Plan. Persp. 196, 207 (1992). For these teens, investigation of their pregnancies will cause serious harm. As the American Academy of Pediatrics has found, “[t]he risks of violence, abuse, coercion, unresolved conflict, and rejection are significant in nonsupportive or dysfunctional families when parents are informed of a pregnancy against the adolescent’s considered judgment.” Committee on Adolescence, Am. Acad. of Pediatrics, The Adolescent’s Right to Confidential Care When Considering Abortion, 97 Pediatrics 746, 749 (1996). Even non-abusive family relationships can become abusive or neglectful when a parent learns that the daughter is pregnant or wishes to have an abortion. See, e.g., Council on Ethical and Judicial Aff., Am. Med. Ass’n, Mandatory Parental Consent to Abortion, 269 J. Am. Med. Ass’n 82, 84 (1993) (“the minor’s pregnancy may precipitate the first episode of physical abuse that she suffers”); Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1462 (8th Cir. 1995). Notification of a minor’s parents of her pregnancy also raises serious constitutional concerns. See Bellotti v. Baird, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed.

2d 797 (1979) (holding that the Constitution mandates that laws requiring parental consent before minors obtain an abortion enable minors to obtain a confidential waiver of the requirement without first notifying a parent); Miller, 63 F.3d at 1459 (holding unconstitutional a law that mandated notice to a parent of a minor's abortion decision that lacked a confidential waiver alternative).

Moreover, enforcement of the subpoena is likely to cause severe emotional harm to some women. For example, for the sixteen percent of women whose pregnancies, like Janice Roe's, end in miscarriage,<sup>1</sup> the disclosure of the pregnancy to investigators can have devastating effects. For such a woman, the prospect of a police officer arriving on her doorstep or at her office demanding to know what became of her pregnancy can be debilitating. Janice Roe, for example, was extremely upset when she discovered that her private medical clinic had disclosed not only her identity and confidential medical records, but also her telephone number and place of employment to law enforcement. The prospect of receiving a telephone call from law enforcement to investigate the pregnancy that she had lost made Ms. Roe feel betrayed and angry, and forced her to re-live her grief over a miscarriage that she had suffered almost a year earlier. The idea that

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<sup>1</sup> National Center for Health Statistics, U.S. Dep't of Health and Human Services, Highlights of Trends in Pregnancies and Pregnancy Rates by Outcome: Estimates for the United States, 1976-96 1 (47 Nat'l Vital Statistics Reports No. 29, 1999).

law enforcement could arrive at her office to investigate a pregnancy that her co-workers knew nothing about was even more upsetting.

Because the District Court failed even to consider the privacy interests of Planned Parenthood's patients, the Order must be overturned.

**B. The District Court failed to find that the County Attorney's need for the information outweighed the patients' privacy interests.**

In its Order, the District Court also failed to make any findings that the identities of the hundreds of women who obtained positive pregnancy tests at Planned Parenthood over the nine month period are sufficiently related to the investigation to outweigh these women's constitutional right to privacy. Because the information sought is constitutionally protected, before ordering disclosure the District Court is required to find that the County Attorney established a compelling need for the information. See McMaster, 509 N.W.2d at 759 (holding that "a compelling need for the information may override the privacy interest" and that "the burden [is on the entity seeking disclosure] to establish the need for intrusion on a person's right of privacy") (internal citation omitted). The right to

privacy must prevail where, as here, the information sought has “only a remote and tenuous connection to the subject of the investigation.” Branzburg v. Hayes, 408 U.S. 665, 710, 92 S. Ct 2646, 2671, 33 L. Ed. 2d 626 (1972) (Powell, J., concurring).

The District Court utterly failed to hold the County Attorney to his burden.<sup>2</sup> The initial application merely stated that the information was “desirable and necessary” “in connection with” “a criminal investigation of an indictable nature.” See Application for Approval to Issue Prosecuting Attorney’s Subpoena Duces Tecum, approved June 17, 2002, at ¶¶ 1, 2.[App. Tab 1] This Court has recognized that this type of conclusory statement, lacking any explanation as to *why* the information is “necessary,” falls far short of the required showing. See McMaster, 509 N.W.2d at 760-61 (the lack of a “showing beyond conclusory statements that the records are necessary” was a factor in holding “the record [to be] wholly inadequate to justify an intrusion into [the patient’s] right of privacy”).

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<sup>2</sup> Surely the Iowa procedural requirement that the County Attorney’s subpoenas be issued with “approval of the court” envisioned that the District Court would engage in meaningful judicial review of subpoena applications. Iowa Rule of Criminal Procedure 2.5(6). Where, as here, the court has done little more than act as a “rubber stamp” by approving the subpoena without determining the relevance, materiality or necessity of the information sought, the Order enforcing such a subpoena must be overturned.

Furthermore, had the District Court considered this factor, it would have become apparent that the County Attorney could not meet his burden as the subpoena is at once both vastly overly broad and tragically under inclusive. As an initial matter, not all pregnancies are carried to term. Indeed, studies show that roughly sixteen percent of pregnant women have miscarriages and another twenty-two percent have abortions. See National Center for Health Statistics, U.S. Dep't of Health and Human Services, [Highlights of Trends in Pregnancies and Pregnancy Rates by Outcome: Estimates for the United States, 1976-96](#) 1 (47 Nat'l Vital Statistics Reports No. 29, 1999) (reporting that only sixty-two percent of pregnancies ended in live birth). Thus, the information sought includes private information about many women who gave birth to no child during the relevant time period, let alone the child in question.

Moreover, although enforcement of the subpoena will reveal the private information of hundreds of innocent women, it is unlikely to yield any information at all about the woman sought by the County Attorney. If, as the County Attorney appears to assume, the mother of the infant is responsible for this tragic act, all of the available research suggests that she was highly unlikely to have sought a pregnancy test at a health clinic. Rather, research reveals that such a woman is much more likely to deny her pregnancy, seek no care for it, and make no preparations for the birth.

Indeed, studies show that in such cases, “medical confirmation of pregnancy is routinely absent.” Steven E. Pitt and Erin M. Bale, Neonaticide, Infanticide, and Filicide: A Review of the Literature, 23 Bulletin Am. Acad. of Psychiatry L. 375, 384 (1995). A study conducted **in Iowa** confirms that such women “often deny that they are pregnant” and make no preparation for the birth of the child. Edward Saunders, Neonaticides Following ‘Secret’ Pregnancies: Seven Case Reports, 104 Pub. Health Rep. 368, 369 (1989); see also Margaret G. Spinelli, A Systematic Investigation of 16 Cases of Neonaticide, 158 Am. J. Psychiatry 811, 811 (2001) (denial of pregnancy is common among such women); Los Angeles County Department of Health Services, Report to the Safe Haven for Abandoned Babies Task Force, Attachment C: Data on Abandoned Newborns, Los Angeles County, 1999-2001, 7 (2002) (most of these women are in denial about their pregnancies and therefore do not seek prenatal care) (citing Catherine Bonnet, Adoption at Birth: Prevention Against Abandonment or Neonaticide, 17 Child Abuse & Neglect, 501-13 (1993)).

Because there is no evidence that the information sought is relevant to the investigation, and indeed every reason to believe that it is not, the subpoena is nothing more than a license to engage in a fishing expedition, and one that exacts significant costs for the hundreds of innocent women who will be irreparably harmed by a serious breach of their privacy rights.

**C. The District Court failed to require that the information be safeguarded against unauthorized disclosure.**

The absence of any safeguards to prevent unauthorized disclosure of the protected information also weighs heavily in favor of reversing the Order. See McMaster, 509 N.W.2d at 760 (holding that, before ordering compliance with subpoena, party seeking information “should establish that there are adequate safeguards to prevent unauthorized disclosure”). In cases approving the disclosure of private information, the state has consistently provided evidence of extensive security protections preventing the further revelation of such information. See United States v. Westinghouse Electric Corp., 638 F.2d 570, 580 (3rd Cir. 1980) (data held in locked cabinets; disclosure of personal information prohibited by regulation; statute required contractual non-disclosure agreement with outside contractors); Whalen, 429 U.S. at 594-95, 97 S. Ct. at 873 (records locked in cabinet in room with locked wire fence and alarm system; disclosure of identities criminalized by statute).

In dramatic contrast, the District Court failed to require that the County Attorney provide any guarantee that the women’s private information will be kept confidential. Indeed, the sole impetus for obtaining this information is to go out into the community and attempt to determine what happened to each woman’s pregnancy. Investigators have already shown up at the homes of some women

demanding to know whether they are still pregnant and, if not, what happened to the pregnancy. See, e.g., In Iowa: Privacy Debate Divides Community, Associated Press Newswires, Aug. 11, 2002 (reporting that police have knocked on the doors of women who had positive pregnancy tests but no birth record). This investigation will alert family members, roommates, neighbors, and co-workers, who may not have known, that the woman is or was pregnant. Janice Roe continues to be extremely upset by the prospect of such an investigation, which will reveal the private and personal fact of her pregnancy and miscarriage. The total absence of safeguards against disclosure – and indeed the high likelihood that this information will be widely disclosed – is a crucial factor in favor of reversing the Order.

Moreover, even safeguards against disclosure by the investigators may be inadequate to protect the confidential medical records at stake here. Where records of a “unique personal nature” are at issue, “[t]he possibility that those records could be disclosed to anyone, whether it be state officials or the public, is sufficient to constitute an intrusion into the right of privacy.” McMaster, 509 N.W.2d at 760-61 (quoting Hawaii Psychiatric Soc’y v. Ariyoshi, 481 F. Supp. 1028, 1041 (D. Haw. 1979) (emphasis added in McMaster)). Like the mental health records protected in McMaster, reproductive health records contain information about the most intimate and personal aspects of women’s lives. In a small

community like Storm Lake, where women are likely to know the investigators personally, the disclosure of their private medical information to these state officials would be an extreme invasion of privacy. Thus the revelation of women's reproductive health information to investigators may constitute a violation of their constitutional right to privacy regardless of any safeguards against disclosure. The extremely personal nature of this information, such that any disclosure would be a serious intrusion on privacy, is yet another factor favoring reversal of the Order.

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Because the District Court did not consider Planned Parenthood's patients' constitutionally protected privacy interests and failed to hold the County Attorney to his burden of showing that there was a compelling need for the information and that it would be protected against unauthorized disclosure, the decision and order of the District Court must be reversed, and the subpoena previously approved herein should be quashed.

Respectfully Submitted:

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