IN THE SUPREME COURT OF OHIO

JOHN AND JUNE ROE, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF JANE ROE, A MINOR,	:	**Case No. 2007-1832**
Appellants,	:	**On Appeal from Hamilton County Court of Appeals, First Appellate**
v.	:	**District**
PLANNED PARENTHOOD SOUTHWEST OHIO REGION, et al.,	:	**Appeals Case No. C060557**
Appellees.	:	

BRIEF OF AMICI CURIAE OHIO CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS; OHIO ACADEMY OF FAMILY PHYSICIANS; SOCIETY FOR ADOLESCENT MEDICINE; NATIONAL ASSOCIATION OF SOCIAL WORKERS; NATIONAL CENTER FOR YOUTH LAW; CENTER FOR ADOLESCENT HEALTH & THE LAW; OHIO NOW EDUCATION AND LEGAL FUND; OHIO DOMESTIC VIOLENCE NETWORK; ACTION OHIO DOMESTIC VIOLENCE; BREAK THE CYCLE; AND WEAVE, INC. IN SUPPORT OF APPELLEES

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Ohio Chapter of the American Academy of Pediatrics

The Ohio Chapter of the American Academy of Pediatrics (AAP) promotes the health, safety and well being of children and adolescents so they may reach their full potential. The Ohio AAP accomplishes this by addressing the needs of children, their families, and their communities, and by supporting Chapter members through advocacy, education, research, service, and improving the systems through which they deliver pediatric care. The Ohio AAP represents approximately 2,700 pediatricians, pediatric medical specialists, pediatric surgical specialists and physicians in training in Ohio.

Ohio Academy of Family Physicians

The Ohio Academy of Family Physicians (OAFP) is a statewide professional association of approximately 4,400 members, including practicing physicians, residents and medical students. The mission of OAFP is to shape healthcare in Ohio through advocacy, empower the specialty of family medicine through leadership, and facilitate achievement of professional

excellence and satisfaction. Since 1948, OAFP has represented the professional interests of Ohio family physicians, provided postgraduate medical education, and encouraged medical students to enter this field and to advance the patient-physician relationship.

Society for Adolescent Medicine

The Society for Adolescent Medicine (SAM) is a national multidisciplinary organization composed of health care professionals devoted to the care of adolescents. SAM works to promote public and professional awareness of the health-related needs of adolescents and supports confidential access to quality health care, including reproductive health services, for all adolescents. The Ohio Valley Regional Chapter of SAM helps professionals in the region deliver the highest quality care by providing a local forum for communication and continuing education; offering a network for health care referrals for adolescents; advocating for adolescent health care needs; and collaborating with other regional professional organizations and national SAM.

National Association of Social Workers

Established in 1955, the National Association of Social Workers (NASW) is the largest association of professional social workers in the world with 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. The Ohio Chapter of NASW has 3,858 members. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. Among these is a statement, *Adolescent Pregnancy and Parenting*, which supports access by

adolescents to "safe, legal, affordable, and confidential health and reproductive health services, including sex education, contraception, pregnancy testing, abortion, prenatal care, birthing services, postnatal care, and pediatric care, especially well baby services . . . ." NASW, Social Work Speaks Series, NASW Policy Statements 9, 13 (7th Ed., 2006-2009).

National Center for Youth Law

The National Center for Youth Law (NCYL) is a non-profit organization located in Oakland, California. Since 1970, NCYL has worked to improve the lives of poor children nationwide. NCYL provides representation to children and adolescents in class action litigation and other cases which have broad impact. The Center also engages in legislative and administrative advocacy at the national and state levels. NCYL provides support for the advocacy efforts of others through its legal journal and training programs, and by providing technical assistance to other advocates for youth nationwide. One of NCYL's particular concerns is access to critical health care for adolescents. Beginning in 1987 and continuing for ten years, NCYL was counsel in *American Academy of Pediatrics v. Lungren*, 66 Cal. Rptr. 2d 210 (1997). In that landmark case, the California Supreme Court determined that a legislatively-enacted requirement that minors get the permission of a parent or a judge before exercising their right to an abortion violated the California State Constitution.

Center for Adolescent Health & the Law

The Center for Adolescent Health & the Law was established in 1999 to respond to the pressing needs of adolescents' for comprehensive health care. The Center is a national nonprofit organization that conducts research, analyzes laws and policies, develops and disseminates publications, provides training and technical assistance, and engages in advocacy. The Center's work addresses a broad range of issues influencing the financing, delivery, and utilization of

comprehensive health services for adolescents and its expertise is routinely sought by health care professionals, policy makers, researchers, and advocates. The Center works to overcome financial barriers that limit access to comprehensive health care for adolescents and to ensure that the confidentiality of adolescents' health care information is protected.

Ohio NOW Education and Legal Fund

Ohio NOW Education and Legal Fund is a nonprofit, tax-exempt organization, incorporated in the State of Ohio in 1981 for the purpose of eliminating sex discrimination through research, education, and legal activities. The Fund provides resources, referral, and support services to victims of discrimination, sponsors research internships and educational activities aimed at documenting and eliminating gender discrimination, participates as *amicus curiae* in precedent-setting discrimination cases, and monitors state and federal legislation for its particular impact on the lives of women and girls. The Fund reviews all major issues affecting women's lives, especially in the areas of violence, safety, and criminal justice.

Ohio Domestic Violence Network

The Ohio Domestic Violence Network (ODVN) is a statewide coalition of domestic violence programs, supportive agencies, and concerned individuals organizing to ensure the elimination of all forms of intimate partner violence, including teen dating violence and child sexual abuse. As the state's largest and most comprehensive resource on domestic violence, ODVN provides technical assistance, resources, information, and training to all who address or are affected by domestic violence. Among other programs, ODVN trains healthcare providers on the dynamics of domestic violence, effective screening and assessment of patients, documentation of disclosed violence, safety planning, and referral of patients to local resources. In partnership with physicians, nurses, social workers, and domestic violence and public health

advocates, ODVN has developed *The Ohio Domestic Violence Health Care Protocol: Standards of Care*, a comprehensive resource for healthcare providers to address the needs of patients experiencing domestic violence. A lack of confidentiality of medical records may result in teens who are involved in abusive dating relationships failing to seek medical attention.

ACTION OHIO Coalition For Battered Women

Founded in 1976, ACTION OHIO Coalition For Battered Women (ACTION OHIO) is a statewide domestic violence coalition whose members include individuals, organizations, nonprofit agencies, and governmental entities. ACTION OHIO has been a leader in the enactment of domestic violence and stalking laws, development of county domestic violence task forces and protocols, professional education for service providers, and quality shelter and program services for domestic violence victims and their children. ACTION OHIO strives to help create a society where: (1) Family violence is no longer acceptable and (2) All persons have equal access to power and resources. ACTION OHIO is greatly concerned about the possible impact of this case, especially upon teenagers seeking reproductive health care, because pregnant teens may be victims of family violence or intimate partner violence, and assurance of confidentiality when seeking health care services enables them to have access to needed services without threat of retaliation from those who may have abused them.

Break the Cycle

The mission of Break the Cycle is to engage, educate, and empower youth to build lives and communities free from domestic and dating violence. Founded in 1996, Break the Cycle is the nation's first organization to provide law-based domestic violence services exclusively to young people, ages twelve to twenty-four. Break the Cycle's domestic violence prevention and early intervention services include prevention education, outreach, peer leadership opportunities,

and comprehensive, free legal services for young victims of abuse. Break the Cycle is a leader in the field of youth dating violence and serves as a model for communities nationwide looking to implement pro-active and effective programs to respond to the issues of dating violence. Break the Cycle is a trusted resource for domestic violence information and referrals nationwide and staff members regularly provide trainings for other social service agencies. Since its founding, Break the Cycle has directly served more than 103,000 youth across the nation.

Women Empowered Against Violence, Inc.

Women Empowered Against Violence, Inc., (WEAVE), a nonprofit organization founded in 1997 and incorporated in the District of Columbia, provides holistic services to adult and teen survivors of domestic and dating violence. WEAVE's Teen Dating Violence Program provides legal, counseling, economic, and educational services to help enable teen survivors to free themselves safely from the cycle of abuse, attain independence and self-sufficiency, and live empowered lives. WEAVE has learned through this work that adolescents involved in abusive relationships face many barriers to accessing reproductive health care, including fear that their abusers will learn that they have sought services such as testing and treatment for sexually transmitted infection, contraceptives, or abortion care. WEAVE believes that maintaining the privacy of medical records is critical to ensuring that abused adolescents will obtain safe and timely health care.

Statement of Facts

Amici curiae adopt Appellee Planned Parenthood of Southwest Ohio's Statement of Facts.

Argument

This Court should reject Plaintiffs' request to review the medical records of non-party minor patients. First, the disclosures Plaintiffs seek would violate the confidentiality of physician-patient communications, undermining the provision of medical care to all Ohio residents and chilling minors from accessing critical medical treatment. Second, the patients whose medical records Plaintiffs seek have a federal constitutional right to privacy in those records. Plaintiffs fail to demonstrate any actual need for the records, much less a need that can overcome the significant threat to public health and the invasion of privacy inherent in the disclosure.

Thus, this Court should affirm, first, because absent the assurance of confidentiality, patients avoid or delay treatment or fail to disclose pertinent medical information, disabling physicians from providing the proper treatment. The need for confidentiality is heightened when minors, in particular, seek reproductive health care, which requires divulging the most intimate of details. Allowing Plaintiffs access to the records they seek would show minors that their health care information will not remain confidential, leading them to avoid critical care. Minors in need of diagnosis and treatment for sexually transmitted infection, contraceptive services, safe abortion care, and early and adequate prenatal care would all suffer for lack of these services. And the redaction Plaintiffs tout is no answer: given the wealth of detail a medical record contains, redaction cannot reliably conceal patient identity; the process of redaction itself entails disclosure at least to lawyers and their assistants; and minors – who are, in any event, unlikely to understand what "redaction" means – will be deterred from seeking essential medical care out of fear of disclosure.

This Court should affirm, second, because, reflecting the importance of confidentiality in health care, the United States Constitution prohibits disclosure of the medical records Plaintiffs seek. Both of the privacy interests identified by the United States Supreme Court are at stake here: the interest in avoiding disclosure of personal matters and the interest in making certain decisions independently. Based on that constitutional right, numerous courts have prohibited disclosure of non-party medical records, including records of abortion care. This Court should do the same.

I. Proposition of Law No. I: Disclosure of Non-Party Medical Records Damages the Physician-Patient Relationship and Deters Minors From Seeking Timely and Safe Medical Care.

Plaintiffs' request to read ten years of medical records from defendants' non-party patients should be rejected. To permit this broad discovery, even with redaction, would violate the privacy of communications inherent in the physician-patient relationship and chill minors from accessing essential reproductive health care.

A. Privacy is at the Heart of the Physician-Patient Relationship and Critical to the Provision of Reproductive Health Care.

The privacy of communication between patients and their physicians is at the heart of the physician-patient relationship and at the core of the medical profession. Without a guarantee of confidentiality, those in need of health care delay treatment or avoid it all together, and those who do seek care withhold information about their symptoms and medical history that may be critical to diagnosis and treatment. As one scholar explained, absent the assurance of confidentiality, "patients will be reluctant to accurately and honestly disclose personal information, or they may avoid seeking care altogether for fear of suffering negative consequences, such as embarrassment, stigma, and discrimination." Janlori Goldman, *Protecting Privacy To Improve Health Care*, Health Affairs, Nov./Dec. 1998 at 47, 48; *see also United*

States v. Chase (C.A. 9, 2003), 340 F.3d 978, 990 (en banc) (explaining that candor is essential to the psychotherapist-patient relationship "because patients will be more reluctant to divulge" relevant information if they know that it may be disclosed without their consent). The promise that one's health care provider will not betray confidentiality is so fundamental that patients have come to take it for granted, and can hardly imagine seeking medical care without it. *See* Robert M. Veatch, Medical Ethics (1997), 89.

This need for privacy is particularly acute when a patient seeks reproductive health care. Here the patient is especially vulnerable as she reveals some of the most intimate details of her life. And when a woman seeks abortion care, the stakes are even higher, given the intense politicization of abortion and the public scrutiny of women who decide to end their pregnancies. As the District Court for the Northern District of Illinois explained when rejecting a request for the medical records of non-party abortion patients,

> American history discloses that the abortion decision is one of the most controversial decisions in modern life, with opprobrium ready to be visited by many upon the woman who so decides and the doctor who engages in the medical procedure. An emotionally charged decision will be rendered more so if the confidential medical records are released to the public, however redacted, for use in public litigation in which the patient is not even a party. Patients would rightly view such disclosure as a significant intrusion on their privacy.

Nat'l Abortion Fed'n v. Ashcroft (N.D. Ill. Feb. 6, 2004), Slip Op. No. 04 C 55, 2004 WL 292079 at *6, aff'd sub nom. *Nw. Mem'l Hosp. v. Ashcroft* (C.A.7, 2004), 362 F.3d 923. Given that abortion is "indisputably of the most sensitive stripe" of medical care, "the ability to communicate freely without fear of public disclosure is the key to successful treatment." *Id.*

Disclosing the health care records of patients seeking any reproductive health care undermines patients' trust in their doctors, disrupts the physician-patient relationship, and thereby undermines patients' medical care.

B. Minors Will Not Seek Safe and Timely Medical Care When Their Confidentiality is Not Protected.

The need for privacy in the physician-patient relationship is all the more important to adolescents, particularly when they seek reproductive health care. It is therefore all the more urgent to protect the records sought here, which are the records of adolescents' abortion care.

It is well established that many adolescents forgo necessary health care when they fear their privacy will not be protected. In one national study of middle and high school students, for example, concern about confidentiality was the leading reason among adolescents for not seeking necessary medical care. Jocelyn A. Lehrer et al., *Forgone Health Care Among U.S. Adolescents: Associations between Risk Characteristics and Confidentiality Concern*, 40 J. of Adolescent Health (2007), 218. These findings echo other studies, which have concluded that the most common reason adolescents give for failing to obtain needed medical treatment is that they do not want a parent to learn of the care. *See* Jonathan D. Klein et al., *Access to Medical Care for Adolescents: Results from the 1997 Commonwealth Fund Survey of the Health of Adolescent Girls*, 25 J. Adolescent Health (1999), 120, 125; see also Tina L. Cheng et al., *Confidentiality in Health Care: A Survey of Knowledge, Perceptions, and Attitudes Among High School Students*, 269 JAMA (1993)1404.

When minors seek reproductive health care their need for confidentiality is all the more crucial. A study published in the Journal of the American Medical Association, for example, reported that nearly half of the sexually active teenage girls surveyed would stop using *all* sexual health care services at a facility if it required parental notification for minors seeking prescription contraceptives. Diane M. Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288 JAMA (2002) 710, 712-13.. Ninety-nine percent

of those adolescents who would stop using sexual health care services indicated that they would continue having sexual intercourse. *Id.* at 713.

And while the majority of minors who have abortions do so with at least one parent's knowledge, Stanley K. Henshaw and Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 Fam. Plan. Persp. (1992), 196, 200, many minors who seek to conceal their pregnancy or abortion from their parents have good reason for doing so, including the well-founded fear that their parents will force them to carry to term, force them to abort, throw them out of the house, or beat them. *Id.* at 202-03 & tbl. 5. In one nationwide study of adolescents whose parents learned of their pregnancy other than by their daughters freely informing them of it, many reported harmful consequences ranging from physical abuse to being forced to leave home. *Id.* at 204 & tbl. 7. Indeed, the case law is filled with tragic examples of minors who were harmed, or worse, at the hands of abusive and neglectful parents who learned about their daughters' abortions. See, e.g., *Planned Parenthood v. Camblos* (C.A.4, 1998), 155 F.3d 352, 390 n.3 (en banc) (Michael, J., concurring) (describing case of father who had impregnated his daughter, and then killed her upon learning of her intended abortion); *Planned Parenthood v. Miller* (C.A.8, 1995), 63 F.3d 1452, 1462 (recounting evidence of a father opposed to abortion who, upon learning his daughter was at clinic, assaulted clinic staff and forced the minor to leave, and noting that "a stressful, but non-abusive, parent-child relationship can become abusive or neglectful after the parent learns of the daughter's pregnancy or desire to have an abortion"); *see also Ayotte v. Planned Parenthood of N. New Eng.* (2006), 546 U.S. 320, 327 n.2 ("It is the sad reality . . . that young women sometimes lack a loving and supportive parent capable of aiding them to exercise their rights wisely") (internal quotation marks omitted).

Driving minors away from the health care system by failing to protect their confidentiality has serious repercussions. As the Centers for Disease Control and Prevention recently reported, one in four young women ages fourteen to nineteen has at least one sexually transmitted infection (STI). Sara E. Forhan et al., *Prevalence of Sexually Transmitted Infections and Bacterial Vaginosis among Female Adolescents in the United States: Data from the National Health and Nutritional Examination Survey (NHANES) 2003-2004*, *in* 2008 National STD Prevention Conference, Chicago, Ill. (Mar. 10-13, 2008). Sexually transmitted infections can have long-term, devastating consequences, including cervical cancer and infertility, which can often be avoided or mitigated through timely treatment. *See, e.g.*, Kimberly A. Workowski, et al., *U.S. Centers for Disease Control and Prevention Guidelines for the Treatment of Sexually Transmitted Diseases: An Opportunity to Unify Clinical and Public Health Practice*, 137 Ann. Intern. Med. (2002), 255; *see also Aid for Women v. Foulston* (D. Kansas, 2006), 427 F. Supp. 2d 1093, 1108 (finding that mandatory reporting of voluntary sexual activity between minors would result in a "significant decrease in minors seeking care and treatment related to sexual activity" and that "in the long term, forgoing or delaying medical care leads to risks to minors including the worsening of existing medical conditions and the spreading of undiagnosed diseases"), *vacated as moot following amendment of relevant statute* (C.A. 10, Sept. 18, 2007), Order at 3-4; *Protecting Adolescents: Ensuring Access to Care and Reporting Sexual Activity and Abuse*, 35 J. of Adolescent Health (2004), 420, 422 ("The long-term consequences of limiting access to health care for sexually active adolescents may include an increase in the prevalence of STIs, a rise in unintended teen pregnancy, and escalation in the number of mental and behavioral health issues, including the potential of partner violence"). Thus, connecting

minors to early screening, diagnosis and treatment is crucial, which necessarily means assuring these minors that their health care records will remain confidential.

Like minors seeking contraceptive service or diagnosis and treatment for an STI, minors seeking abortion care also need timely and safe medical attention. While abortion is an extremely safe medical procedure, its risks increase as pregnancy advances. Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstetrics & Gynecology (2004), 729, 735. A minor who wants to end a pregnancy, but who fears that her privacy will not be protected, will delay seeking abortion care. That delay, in turn, increases the risks associated with the procedure, if she does eventually obtain one; increases the risk that she will resort to clandestine abortion, because she may be unable to locate a provider who performs procedures later in pregnancy, or be unable to pay for a later, more expensive procedure; and increases the risk that she will carry to term, and become a teenage mother, against her will.

But there is yet another category of minors who would be harmed by the disclosure of the records sought here: those seeking to carry to term. Minors continuing their pregnancies without yet having informed their parents that they are pregnant, as well as minors continuing their pregnancies against their parents' wishes, need early and adequate prenatal care in order to ensure both their own health and the birth of a healthy baby. *See* Alison M. Fraser et al., *Association of Young Maternal Age with Adverse Reproductive Outcomes*, 332 New Eng. J. Med. (1995), 1113 (discussing importance to pregnant adolescents of prenatal care, and explaining that "teenage mothers have an increased risk of having low-birth-weight babies, premature babies, and babies who die during the first year of life"). These minors, too, would be

deterred from seeking prenatal care – and, critically, seeking it early – by the knowledge that their medical care may not be kept confidential.

For reasons such as these, major medical organizations have adopted policies recognizing that confidentiality in the care of adolescents is essential. For instance, in 2004, the American College of Obstetricians and Gynecologists, and *Amici* American Academy of Pediatrics, American Academy of Family Physicians, and the Society for Adolescent Medicine issued a joint position paper concluding that "[t]he issue of confidentiality of care is a significant access barrier to health care" and that "[i]t is critical that adolescents who are sexually active receive appropriate confidential health care and counseling." *Protecting Adolescents: Ensuring Access to Care and Reporting Sexual Activity and Abuse*, 35 J. of Adolescent Health (2004), 420, 422 (Joint Position Paper). The medical groups therefore recommend that "[f]ederal and state laws should support physicians and other health care professionals and their role in providing confidential health care to their adolescent patients." *Id.* at 420. The American Medical Association has similarly adopted a policy statement that "confidential care for adolescents is critical to improving their health." American Medical Association, *Confidential Health Services for Adolescents*, Policy No. H-60.965 (1998), at 1; *see also* Council on Ethical and Judicial Affairs, American Medical Association, *Mandatory Parental Consent to Abortion*, 269 JAMA (1993), 82, 86 (codified in AMA Policy No. E-2.015) (stating that "minors should ultimately be allowed to decide whether parental involvement [in their pregnancy decision] is appropriate.").

The Ohio General Assembly has likewise recognized the need to ensure minors' privacy in order to promote their access to critical reproductive health care. Ohio permits teens to consent on their own to testing and treatment for STIs, R.C. 3709.241, testing for HIV, R.C. 3701.242(B), and provides a process for minors to bypass the requirement of parental consent for

abortion, R.C. 2919.121(C). Federal law similarly requires confidentiality when providing contraceptive services to minors under Title X of the Family Planning Program, Section 300(a), Title 42 U.S.Code; Sections 59.5(a)(4) and 59.11 Title 42, C.F.R., or the Medicaid program, Section 1396d(a)(4)(C), Title 42, U.S.Code; Sections 431.301, 431.305(b), 440.240(b), 440.250(c), Title 42, C.F.R..

Privacy concerns are especially important for minors who may be victims of sexual abuse or involved in abusive dating relationships. Abused and neglected teens are more likely than other teens to avoid or delay seeking needed medical care, at least in part because they are concerned about confidentiality. Cathy Schoen et al., *The Commonwealth Fund Survey of the Health of Adolescent Girls* (1997), 1. According to one study, teens who were exposed to violence were less likely to have access to healthcare, with nearly half of the victims reporting that they had gone without needed medical care at some point in their lives. *Id.* Absent assurances of confidentiality, victims of abuse are unlikely to access medical, legal, and other needed services due to a justified fear of retaliation from the abuser. *Id.*; see also, e.g., Joan Zorza, ABA Comm'n on Domestic Violence, *Confidentiality, in The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook* (Margaret B. Drew et al. eds., 2nd ed. 2004) 64, 64; Michael B. Bressman & Fernando R. Laguarda, *Jaffee v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege*, 30 Creighton L. Rev. (1997), 319, 343-345; Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 Fam. L.Q. (1995) 273, 299-302.

As the aforementioned medical associations' Joint Position Paper explained, "[o]pen and confidential communication between the health professional and the adolescent patient, together with careful clinical assessment, can identify the majority of sexual abuse cases." Joint Position

Paper at 420. For this reason Plaintiffs' *Amici* are simply wrong when they suggest that disclosing medical records in this case will help protect minors who are victims of abuse. See Br. of *Amicus Curiae* Members of the U.S. Congress for the State of Ohio at 10. To the contrary, releasing non-party medical records would show minors who may be victims of abuse or dating violence only that their health care privacy cannot be guaranteed. Rather than seeking timely and safe health and mental health care from professionals who can identify sexual abuse, these minors will forgo care altogether or delay seeking professional attention, thereby placing themselves at greater risk.

This is not to say that confidentiality is absolute. In certain cases, limited disclosure to the *government* is appropriate and required by statute. See R.C. 2151.421. The broad and indiscriminate disclosure to *private litigants* such as Plaintiffs seek here, however, would only discourage minors from accessing health and mental health care. Consequently, fewer cases of abuse will become known to care providers and reported to the state.

While Plaintiffs seek medical records from an abortion provider, the implications of their discovery demand are much broader. Those who provide testing and treatment for STIs, contraceptive services, and prenatal care to minors – indeed all health and mental health care professionals who care for young people – are subject to the sexual abuse reporting law Plaintiffs rely on here. Thus a ruling in this case permitting discovery of minors' medical records would be applicable in a private civil suit against any health care practitioner who provides minors with any sexual health or pregnancy-related care. This Court should not permit Plaintiffs to undermine so drastically the provision of all reproductive health services to minors.

C. Redaction of the Records Will Not Protect Minors' Privacy.

Redaction of the medical records cannot – contrary to Plaintiffs' assertions – protect non-party minors from an invasion of their privacy. "[H]owever redacted" the records of their abortion care might be, "[p]atients would rightly view such disclosure as a significant intrusion on their privacy." *Nat'l Abortion Fed'n*, 2004 WL 292079 at *6.

First, redaction cannot hide patients' "identities." *See* Br. of Pls.-Appellants at 7. Medical records contain a wealth of highly detailed and patient-specific information. Revealing that an abortion patient has, for example, colitis and a history of depression, or Lupus and early onset of menses can reveal her identity to certain parties, even when other information that would obviously identify the patient is redacted. See *Planned Parenthood Fed'n of Am., Inc. v. Ashcroft* (N.D. Cal, Mar. 5, 2004), Slip Op. No. C03-4872 PJH, 2004 WL 432222, at *2 (rejecting argument that "the redaction of names, addresses, birthdates, and other objectively identifying information," from abortion patients' medical records would adequately protect their privacy because "the records nevertheless contain other potentially identifying information of an extremely personal and intimate nature"); *Parkson v. Central DuPage Hosp.* (Ill.App. 1982), 435 N.E.2d 140, 144 (finding it "questionable at best" whether the redaction of patients' names and identifying numbers from hospital records would protect non-party patients' identities where the records "arguably contain[ed] histories of the patients' prior and present medical conditions, information that in the cumulative can make the possibility of recognition very high").

As Judge Posner explained when quashing a subpoena for medical records of non-party abortion patients:

> Even if all the women whose records the government seeks know what "redacted" means, they are bound to be skeptical that redaction will conceal their identity from the world. . . . Some of these women will be afraid that when their redacted records are made a part of the trial record . . . persons of their acquaintance, or skillful "Googlers," sifting the information contained in the medical records concerning each patient's medical and sex

> history, will put two and two together, "out" the . . . women, and thereby expose them to threats, humiliation, and obloquy.

Nw. Mem'l Hosp. v. Ashcroft (C.A. 7, 2004), 362 F.3d 923, 929.

Second, as a practical matter, the process of deciding what material might be "identifying" and should be redacted is subjective. Information that the redactor believes would not permit identification may in fact be identifying to another reader of the same document. Moreover, the very process of redaction, which will require lawyers and their assistants to review entire medical records to determine what information is properly protected, itself results in an invasion of privacy.

Third, courts have recognized that privacy is invaded even if information is revealed that does not cause discovery of a person's identity. Some information is so private that to disclose it is invasive:

> Even if there were no possibility that a patient's identity might be learned from a redacted medical record, there would be an invasion of privacy. Imagine if nude pictures of a woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her privacy had been invaded.

Id. at 929.

Finally, even if redaction could protect the non-party patients from invasion of privacy, disclosing medical records will nonetheless chill minors from seeking reproductive health care. It is safe to assume that if the records are discovered, many minors will understand that medical records from Planned Parenthood were given to parents of a minor who obtained an abortion; they will not understand what it means that those records were "redacted" or will fear (justifiably) that the redacting process itself compromised their privacy, and was insufficient. As the American Academy of Pediatrics explained when adopting a policy recommending that an adolescent's pregnancy diagnosis not be shared with others, including parents, without her

consent: Minors are deterred from seeking health care services upon "even a perceived lack of confidentiality in health care regarding sexual issues." American Academy of Pediatrics, *The Adolescent Right to Confidential Care When Considering Abortion*, 97 Pediatrics (1996), 746, 749.

Permitting civil discovery of the medical records here would teach young people in Ohio and throughout the country that the confidentiality of their doctor-patient communications – even in areas in which society encourages them to trust in that confidentiality – cannot be guaranteed. Adolescents would be put on notice that if they obtain reproductive health care, their health care records may be sought at some future time in civil lawsuits to which they are not even parties. *See Planned Parenthood Fed'n of Am.*, 2004 WL 432222, at *2 (denying motion to compel discovery of medical records of non-party abortion patients because, among other reasons, "allowing disclosure of records will have a chilling effect on communications between patients and providers" and "the potential for injury to the relationship between patient and provider is significant given the providers' pledge of confidentiality").

Because minors value the privacy of their health care so highly, if records were disclosed here, at least some adolescents would refrain entirely from seeking critical reproductive health care, while others would fail to disclose to their health care practitioners full information and details about their medical histories, conditions, and concerns – information without which these practitioners cannot provide care to protect minors, as well as the public health.

II. Proposition of Law No. II: Minors Have a Constitutional Right to Privacy in Their Medical Records that Is Not Overcome By the Plaintiffs' Interest in Those Records.

Because of the fundamental nature of privacy of communications between health care provider and patient, the United States Constitution protects the medical records from discovery in this case.

A. The Constitution Protects Minors' Privacy Rights Implicated in Medical Records.

The United States Supreme Court long ago recognized two types of privacy interests protected by the Constitution, "the individual interest in avoiding disclosure of personal matters . . . and . . . the interest in independence in making certain kinds of important decisions." *Whalen v. Roe* (1977), 429 U.S. 589, 599-600; accord *Nixon v. Adm'r of Gen. Servs.* (1977), 433 U.S. 425, 457 (recognizing that public officials have "constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity"); see also *State ex rel. Fisher v. Cleveland*, 109 Ohio St.3d 33, 2006-Ohio-1827, ¶ 24 (applying *Whalen*); *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994), 70 Ohio St.3d 605, 607 (applying *Nixon* and citing *Whalen*); *Lambert v. Hartman* (C.A. 6, 2008) 517 F.3d 433, 440-41 (recognizing a privacy interest under *Whalen* in information regarding sexual matters). Of course, decisions about pregnancy enjoy protection under both the informational and decisional strands of the right.

This right extends to minors. In *Carey v. Population Servs. Int'l*, the United States Supreme Court recognized that "the right to privacy in connection with decisions affecting procreation extends to minors as well as adults." (1977), 431 U.S. 678, 693 (plurality opinion); *see also Bellotti v. Baird* (1979) 443 U.S. 622, 633 n.12 (*Bellotti II*) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. 'Minors, as well as adults, are protected by the Constitution and possess constitutional rights.'") (quoting *Planned Parenthood of Cent. Missouri v. Danforth* (1976), 428 U.S. 52, 74); *Doe v. Irwin* (C.A.6, 1980) 615 F.2d 1162, 1166 ("Though the state has somewhat broader authority to regulate the conduct of children than that of adults, minors do possess a constitutionally protected right of privacy").

These protections extend to minors because "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." *Bellotti II*, 443 U.S. at 642. Decisions relating to sexuality and pregnancy are primary among those an individual may make without unjustified governmental interference. *See, e.g.*, *Carey*, 431 U.S. at 685. Indeed, "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices." *Id.*

Given the importance of decisions about pregnancy, the Constitution requires that minors be assured confidentiality when seeking abortion care. In *Bellotti II*, for example, the Supreme Court ruled that a requirement of parental involvement in a minor's abortion decision is unconstitutional unless it includes a *confidential* bypass process, in order "to provide an effective opportunity for an abortion to be obtained." 443 U.S. at 644. *See also Thornburgh v. Am. Coll. Obstetricians & Gynecologists* (1986),476 U.S. 747, 766 (1986) ("The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity."), *overruled on other grounds by Planned Parenthood v. Casey* (1992), 505 U.S. 833; *Planned Parenthood of Idaho v. Wasden* (D. Idaho, 2005), 376 F. Supp. 2d 1012, 1016-18 (striking down parental consent requirement because under judicial bypass procedure, the court was to report minor for having sex, and explaining that this loss of confidentiality would lead some minors to "drop out of the legal abortion process altogether and . . . either look for a back-room alternative or proceed with a potentially dangerous pregnancy").

Where minors are victims of sexual abuse, courts recognize that their privacy rights are heightened. *See Michigan v. Lucas* (1991), 500 U.S. 145 (noting that a victim's right to privacy in information regarding her sexual assault may outweigh even a defendant's constitutional right

to confrontation); *Planned Parenthood of Indiana v. Carter* (Ind.App. 2006), 854 N.E.2d 853, 876 ("'victims of sexual crimes have a heightened, not diminished, right of privacy'") quoting *Aid for Women v. Foulston* (C.A. 10, 2006), 441 F.3d 1101, 1125 (Herrera, J., dissenting).

B. The Disclosure Plaintiffs Seek in Discovery Would Violate Minors' Constitutional Rights.

The discovery of the non-party medical records Plaintiffs seek here would undermine both the informational and decisional privacy interests identified by *Whalen*. As discussed above, disclosing the records would deter minors from seeking timely and safe reproductive health care, interfering with their ability to make decisions regarding pregnancy. See discussion supra Part I. Permitting discovery of non-party medical records would also reveal highly "personal matters," and would thus invade the right to informational privacy.

When considering disclosure of private matters, the right to privacy is balanced against the need for the information. *Whalen*, 429 U.S. at 600, 602. This entails a two-step process: "First must be determined whether a legitimate expectation of privacy exists in the information sought to be disclosed. Second, if the expectation of privacy exists, the benefits to the individual of withholding the information must be weighed against the benefits . . . of disclosure." *State ex rel. Fisher*, 2006-Ohio-1827 at ¶ 25.[1]

As to step one of the test set out in *Fisher*, there can be no doubt that the non-party patients have a legitimate (and significant) expectation in the privacy of their medical records. Such privacy is at the core of the physician-patient relationship. See supra Part I. This

[1] The scope of discovery permitted by Civ. R. 26(B)(1) instructs that "[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action." (Emphasis added.) Medical records are admittedly privileged. Disclosure of privileged records is proper only when the information contained therein is necessary to further or protect a countervailing interest that outweighs the privilege. *Richards v. Kerlakian*, 162 Ohio App.3d 823, 2005-Ohio-4414, citing *Biddle v. Warren Gen. Hosp.*(1999), 86 Ohio St.3d 395.

expectation of privacy is heightened when minors seek reproductive health care, because of their statutory rights to consent on their own for these services, or, in the case of abortion, their right to petition a court to waive the parental consent requirement. See *Planned Parenthood of Indiana*, 854 N.E.2d at 878 (observing that minors have a "particularly compelling" expectation of privacy in their relationships with their healthcare providers "given the multiple state and federal protections for the confidentiality of the relationship") (internal quotation marks omitted).[2]

Similarly, the United States Court of Appeals for the Sixth Circuit has found a right to privacy in personal information where the individual privacy interest is of a "constitutional dimension," *Kallstrom v. City of Columbus* (C.A.6, 1998), 136 F.3d 1055, 1061, including where the information is about "sexuality and choices about sex," because these "are interests of an intimate nature which define significant portions of our personhood." *Bloch v. Ribar* (C.A. 6, 1998), 156 F.3d 673, 685. "The disclosure of private sexual information implicate[s] a 'fundamental right or one implicit in the concept of ordered liberty' – namely the fundamental right of privacy in one's sexual life.'" *Lambert*, 517 F.3d at 441, quoting *Bloch*, 156 F.3d at 684, 686. As the Sixth Circuit explained earlier this year, there is a "right to be free from governmental intrusion into matters touching on sexuality and family life," and to permit

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[2] Indeed, this Court has recognized a privacy interest in personal information in contexts far less invasive than the disclosure of intimate sexual health information at issue here. See, e.g., *State ex rel. Fisher*, 2006-Ohio-1827 at ¶¶ 26-28 (ruling there is a legitimate expectation of privacy in information contained in income tax returns); *Beacon Journal Publishing Co.*, 70 Ohio St.3d at 607 (describing the "right to avoid disclosure of personal matters" as "broad in scope," and concluding that disclosure of social security numbers would violate right to privacy); *see also Doe v. Univ. of Cincinnati* (1989), 42 Ohio App.3d 227, 233 (deciding that non-party blood donor who was HIV positive had expectation of privacy that, along with the public interest in encouraging blood donation, outweighed plaintiffs' interest in learning donor's identity).

disclosure of such personal information "would be to strip away the very essence of . . . personhood." *Id.* at 441, citing *Bloch*, 156 F.3d at 685.

As to step two of the test set out in *State ex rel. Fisher*, Plaintiffs fail to demonstrate any need for the disclosure, much less need that outweighs the non-party patients' substantial privacy interest in the medical records. As the First District Court of Appeals correctly held, Plaintiffs do not need the medical records of non-party patients to establish liability or to obtain punitive damages if liability is found. *Roe v. Planned Parenthood Sw. Ohio Region*, 173 Ohio App.3d 414, 2007-Ohio-4318, ¶¶ 34-46. As discussed above, redaction does not protect the minors' identity or privacy interests, see discussion supra Part IC; it therefore does not tilt the balance in Plaintiffs' favor.

For these reasons, other courts have rejected efforts to obtain non-party medical records of abortion patients, and this Court should do the same. *See, e.g.*, *Nat'l Abortion Fed'n*, 2004 WL 292079 at *7 (quashing subpoena seeking medical records of non-party abortion patients), aff'd sub nom. *Northwest Memorial Hosp.*, 362 F.3d at 928; *Planned Parenthood Fed'n of Am.*, 2004 WL 432222, at *2 (denying motion to compel discovery of medical records of non-party abortion patients); *Planned Parenthood of Indiana*, 854 N.E.2d at 879-80 (granting preliminary injunction prohibiting state from accessing medical records of Planned Parenthood's minor patients, holding that minors possess a right of privacy in their medical information, and noting "the chilling effect that disclosure of the records would have upon [the] patients, who might be reluctant to continue their relationship with [Planned Parenthood] if they believed that their unredacted medical records were subject to disclosure"); *see also King v. State* (Ga., 2000), 535 S.E.2d 492 (holding that patient had right to privacy in her own medical record under the Georgia Constitution and quashing ex parte subpoena seeking medical record for criminal

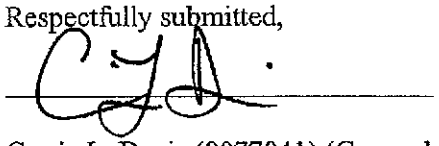
prosecution); *In re Xeller* (Tex. App., 1999), 6 S.W.3d 618 (prohibiting discovery of non-party medical records, among other reasons, on ground that disclosure would violate constitutional privacy right).

Given the non-party patients' profound privacy interest in their medical records and the limited value, at best, of the records to Plaintiffs, the balance tips strongly against disclosure of the records. This Court should not permit discovery that will result in an invasion of privacy and chill minors from seeking timely, high quality health care.

Conclusion

For the reasons set forth above, *Amici* respectfully request that this Court deny Plaintiffs' request for discovery of medical records.

Respectfully submitted,



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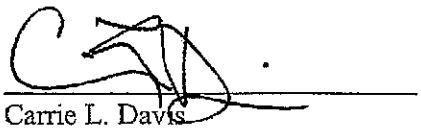

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