

In the
Supreme Court of Ohio

MARK ALBRECHT, et al., : Case No. 2007-0507
: :
Plaintiffs-Respondents, : On Review of Certified Question from
: the United States District Court,
v. : Southern District of Ohio, Western
: Division
BRIAN TREON, M.D., et al., :
: District Court Case No. 1:06-CV-00274
Defendants-Petitioners. :
:
:

MERIT BRIEF OF *AMICUS CURIAE*
STATE OF OHIO IN SUPPORT OF DEFENDANTS-PETITIONERS

DONALD W. WHITE
Clermont County Prosecuting Attorney
H. ELIZABETH MASON* (0051967)
**Counsel of Record*
THOMAS BLUST (0022166)
GEORGE JONSON (0027124)
Assistant Prosecuting Attorneys
101 E. Main Street
Batavia, Ohio 45103
513-732-7585

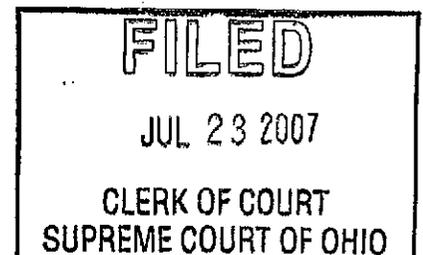
Counsel for Defendants-Petitioners

PATRICK J. PEROTTI* (0005481)
**Counsel of Record*
Dworken & Bernstein Co., LPA
60 South Park Place
Painesville, Ohio 44077
440-352-3391
440-352-3469 fax

JOHN METZ (0019039)
Carew Tower, 44th Floor
441 Vine Street
Cincinnati, Ohio 45202
513-241-8844

Counsel for Plaintiffs-Respondents

MARC DANN (0039425)
Attorney General of Ohio
WILLIAM P. MARSHALL* (0038077)
Solicitor General
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
wmarshall@ag.state.oh.us
Counsel for Amicus Curiae
State of Ohio



JOHN R. CLIMACO* (0011456)
**Counsel of Record*
DAVID M. CUPPAGE (0047104)
SCOTT D. SIMPKINS (0066775)
JENNIFER L. GARDNER (0080817)
Climaco, Lefkowitz, Peca, Wilcox & Garofoli
Co., LPA
55 Public Square, Suite 1950
Cleveland, Ohio 44113
216-621-8484
216-771-1632 fax

WILLIAM D. MASON

Cuyahoga County Prosecuting Attorney
DAVID G. LAMBERT (0030273)
FREDERICK W. WHATLEY (0010988)
RENEE A. BACCHUS (0063676)
Courts Tower – Justice Center
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
216-443-5869
216-443-7602 fax

Counsel for Amici Curiae
Board of Commissioners of Cuyahoga
County, and Cuyahoga County Coroner

MARK D. TUCKER (0036855)
Benesch, Friedlander, Coplan & Aronoff LLP
41 S. High St., 26th Floor
Columbus, Ohio 43215
614-223-9358
614-223-9330 fax

Counsel for Amici Curiae
Ohio State Medical Association, and
Ohio State Coroners Association

MARK LANDES* (0027227)
**Counsel of Record*
JENNIFER GEORGE (0080808)
DAVID G. JENNINGS (0040487)
Isaac, Brant, Ledman & Teetor LLP
240 East Broad Street, Suite 900
Columbus, Ohio 43215-3742
614-221-2121
614-365-9516 fax

Counsel for Amici Curiae
Sixty-five Interested Ohio Counties

RON O'BRIEN (0017245)
Franklin County Prosecuting Attorney
NICK A. SOULAS, JR.* (0062166)
**Counsel of Record*
A. PAUL THIES (0074641)
PATRICK J. PICCININNI (0055324)
Assistant Prosecuting Attorneys
373 South High Street, 13th Floor
Columbus, Ohio 43215
614-462-3520
614-462-6012 fax

Counsel for Amici Curiae
Franklin County Board of Commissioners,
and Franklin County Coroner

PATRICK FARDAL (0058600)
365 Stonewall Court
Dublin, Ohio 43017
614-889-0333

Counsel for Amicus Curiae
National Association of Medical Examiners

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INTRODUCTION

County coroners serve an important function in preserving the health and safety of Ohio residents. Their autopsies provide critical information for both prosecuting crimes and identifying the spread of infectious disease. Accordingly, Ohio law grants county coroners wide latitude to exercise professional judgment in conducting autopsies.

The present lawsuit threatens to disrupt the county coroners' authority to perform their functions properly. Plaintiffs-Respondents Mark and Diane Albrecht seek recognition of a next-of-kin's property rights in a decedent's autopsied organs. The Albrechts insist, in their preliminary memorandum to this Court, that they do not challenge the coroner's ability to perform autopsies. They claim that they seek only recognition of a right to be informed before a decedent's organs are retained. But the right to notice before deprivation depends on an underlying property right in the material being taken. Ohio law has created no such property right, and changing the law to recognize an enforceable property interest in a decedent's organs could have consequences far beyond the parameters of this lawsuit.

Simply put, the Albrecht' property deprivation lawsuit is not the appropriate vehicle for changing the standard coroner practices that the Albrechts find troublesome. While their concerns are sympathetic, their claim is both legally unsound and disproportionate to the relief they seek. Whatever concerns may exist regarding communicating sensitively with decedents' families, these concerns should be addressed by establishing appropriate coroner's office protocol, and if necessary by legislative amendment, and not by the Court creating a full-fledged property interest that has never existed under Ohio law.

The answer to the certified question is straightforward: Ohio law does not give a decedent's next-of-kin a property right in a decedent's organs removed during an autopsy. The Court should faithfully interpret Ohio's statutes as written and decline to recognize a new property interest that

would interfere with a coroner's public duties and enable individuals to derail criminal investigations, as well as expose Ohio counties to millions of dollars in liability for years of properly-conducted autopsies.

STATEMENT OF AMICUS INTEREST

The State of Ohio has a strong interest in ensuring rigorous and consistent enforcement of Ohio's criminal laws. The State of Ohio relies heavily on autopsies performed by county coroners to pursue its law enforcement goals. The State of Ohio also has a strong interest in protecting the health and safety of Ohio's citizens, and recognizes the role that county coroners can play in identifying and preventing the spread of contagious disease within Ohio. The State of Ohio accordingly has a strong interest in ensuring that county coroners are free to perform their statutory and regulatory duties without improper interference. The Albrechts' alleged property right, if recognized, could severely hamper county coroners' abilities to execute their public duties effectively.

STATEMENT OF THE CASE AND FACTS

Plaintiffs-Respondents Mark and Diane Albrecht allege that upon the death of their adult son, Christopher, the Clermont County Coroner's Office took possession of Christopher's body to perform an autopsy, and, without notifying Mark or Diane, removed and retained the brain. Compl. ¶¶ 35-39. As explained in detail in the Preliminary Memoranda of fellow *Amici*, it is common practice for county coroner's offices, both in Ohio and across the country, to return a decedent's body to the next-of-kin before testing of the decedent's brain has been completed, because of the amount of time required to "fix" the organ to prepare it properly for forensic analysis and because of the implicit understanding that the decedent's family would rather not postpone the funeral until such analysis is complete. See Preliminary Memorandum of *Amici Curiae* Ohio State Coroners Association and Ohio State Medical Association, at 2; Preliminary

Memorandum of Amicus Curiae National Association of Medical Examiners, at 3-6; see also *Foley v. St. Thomas Hospital* (Tenn. Ct. App. 1995), 906 S.W.2d 448 (noting that coroner's cremation of organs after autopsy is standard accepted medical practice).

The Albrechts apparently learned of the coroner's retention of Christopher's brain at some point after his burial. Compl. ¶ 40. In May 2006, the Albrechts sued in federal district court pursuant to 42 U.S.C. § 1983, seeking damages and injunctive relief for alleged violations of due process and other constitutional claims; they also asserted pendent state tort claims. Compl. ¶ 1. They named as defendants the Coroner of Clermont County, Brian Treon, M.D., as well as several members of the Board of County Commissioners of Clermont County in their official capacities, and the Board itself.

The Albrechts have sought to certify a class of plaintiffs that includes "all beneficiaries and next-of-kin of decedents who have had their decedent's body parts and/or organs removed and retained by defendants without notice and/or in reckless disregard of whether there was any objection or refusal by said next-of-kin to allow such procedure and taking to occur." Compl. ¶ 11. They have also sought to certify a class of defendants that includes the Commissioners, County Commissions, and Coroners of every county in Ohio except Hamilton County (which has separately reached a settlement, pending court approval, in another suit involving the same issue). Compl. ¶ 19.

Recognizing that the Albrechts were not entitled to any due process unless "Ohio law affords them a protected right to their son's body parts that were removed and retained by the coroner," the federal district court certified the question of proper interpretation of Ohio law to this Court. See Dist. Ct. Order, Mar. 21, 2007, at 2-3. This Court granted review of the following question:

Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a protected right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

The State of Ohio files this amicus curiae brief in support of the Defendants-Petitioners, urging the Court to answer the question in the negative.

ARGUMENT

Amicus Curiae Attorney General's Proposition of Law:

Under Ohio law, a decedent's next-of-kin do not have a property interest in the decedent's tissues, organs, blood, or other body parts removed and retained by a coroner during an autopsy.

A property interest is constitutionally protected under the federal Due Process Clause only where the claimant possesses "a legitimate claim of entitlement to" the benefit at issue. *Bd. of Regents v. Roth* (1972), 408 U.S. 564, 577. Such entitlements are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.*; accord *Town of Castle Rock v. Gonzales* (2005), 545 U.S. 748, 756. Therefore, the federal trial court has asked this Court—and this Court has agreed to answer—whether Ohio has created an enforceable interest for a decedent's next-of-kin in the decedent's body parts that have been removed and retained during a coroner's forensic examination. For the reasons below, the Court should answer the certified question in the negative.

The state law question in this action is what substantive right the State has created; the question of whether that substantive right constitutes "property" protected by the federal due process clause is a matter of federal law, and thus whatever label the state attaches to the substantive right is irrelevant. *Memphis Light, Gas & Water Div. v. Craft* (1978), 436 U.S. 1, 9. Likewise, the question of what process is due to a person before the State may take the property is determined by federal law. *Cleveland Bd. of Educ. v. Loudermill* (1985), 470 U.S. 532, 540-

41. The question before this Court, therefore, is what enforceable rights, if any, Ohio grants to a decedent's next-of-kin in a decedent's organs removed during an autopsy.

Ohio law has never recognized any legal right regarding a dead body that would entitle the Albrechts to their desired control over autopsy protocol. Regarding human remains, Ohio courts have historically refused to recognize such traditional property interests as the right to bequeath and inherit. See *Hayhurst v. Hayhurst* (Hamilton Co. Common Pleas 1926), 1926 Ohio Misc. Lexis 970, 4 Ohio L. Abs. 375; *Hadsell v. Hadsell* (Ohio 3d Cir. Ct. 1893), 1893 Ohio Misc. Lexis 96, 3 Ohio Cir. Dec. 725. The enforceable interests that Ohio courts have recognized in relation to a dead body are quite limited, such as the right of a decedent's survivor to sue a private funeral home or cemetery association in tort for mishandling of a corpse. See *Carney v. Knollwood Cemetery Ass'n* (8th Dist. 1986), 33 Ohio App. 3d 31, 37; *Biro v. Hartman Funeral Home* (8th Dist. 1995), 107 Ohio App. 3d 508, 512-513. And no Ohio case or statute gives next-of-kin a right to object to a coroner removing organs for autopsy testing, or a right to take possession of the organs removed. Finally, the Albrechts' alleged right to advance notice of the coroner's procedures is an argument as to what process is due to them, which presupposes a property interest in the decedent's organs that has never existed under Ohio law.

A. Ohio law does not grant a decedent's next-of-kin a right to object to the removal of a decedent's organs for forensic testing.

As an initial matter, Ohio law plainly does not create a right for next-of-kin to object to an organ's removal for testing. The Albrechts now appear to concede this point, stating they "do not contest the coroners' right to conduct forensic examinations," see Preliminary Memorandum of Plaintiffs-Respondents at 1, 4, although their complaint originally objected to the county coroners removing organs without regard for the next-of-kin's "refusal" to "allow such procedure," see Compl. ¶ 11. For the sake of thoroughness, the State discusses below the law

establishing a coroner's authority to remove organs during an autopsy without the next-of-kin's consent.

Ohio statutory law requires that the county coroner be contacted in the case of a violent, suspicious, unusual, or sudden death. R.C. § 313.12. In such cases, the coroner has absolute authority to perform an autopsy whenever, in the coroner's opinion, an autopsy is necessary, unless the coroner has reason to believe that an autopsy is contrary to the deceased person's own religious beliefs. (This is not at issue here.) R.C. § 313.131. In cases involving suspected murder or manslaughter, the coroner's authority to perform an autopsy overrides even the decedent's religious objection. R.C. § 313.131(F). The coroner has the authority to hold any dead body in her or his custody "until such time as the coroner, after consultation with the prosecuting attorney, or with the police department . . . or with the sheriff, has decided that it is no longer necessary to hold such body" R.C. § 313.15. A coroner may even disinter a body already buried in order to examine it or to perform an autopsy. R.C. § 313.18.

The coroner's broad discretion to perform an autopsy when necessary, and to retain the body for as long as necessary in order to do so, encompasses the authority to remove and test individual organs within the body. Indeed, the protocol for an autopsy of a child under two years (also not at issue here) *requires* the coroner in certain circumstances to take tissue samples from certain organs in order to perform particular tests. See O.A.C. § 3701-5-14. The county coroner's authority to retain and examine organs is also reflected in certain provisions of Ohio's Anatomical Gift Law. Under this law, the rights of a donee to an organ are paramount to all others, with one express exception: The coroner's right to the dead body, and any part of that body, is "paramount to the rights of the donee." R.C. § 2108.02(E). Given that a coroner's right to remove and examine an organ trumps even a donee's rights to an organ transplant, the law

cannot be read to support any assertion that the Albrechts have a right to contest organ removal for autopsy purposes.

B. Ohio law does not grant a decedent's next-of-kin a right to possession of removed organs after the coroner's forensic testing is completed.

The Albrechts argue that, regardless of the coroner's ability to remove organs for further autopsy, the coroner does not have the authority to dispose of organs removed during the autopsy. They claim that "[t]he practice to which Plaintiffs object is the retention and eventual disposal of entire organs, such as brains, hearts, livers, etc." See Preliminary Memorandum of Plaintiffs-Respondents at 1. They insist they have an interest in the "ultimate disposition" of these organs, and that this right forms the basis of their current property deprivation claim. They are wrong, as no such right exists.

Ohio law has never bestowed any right upon next-of-kin to possession or control of disposition of organs removed during an autopsy. Under R.C. § 313.14, "the coroner shall notify any known relatives" of the deceased person, and the "next of kin, other relatives, or friends of the deceased person, in the order named, shall have prior right as to disposition of the body of such deceased person." But § 313.14 speaks only of disposition *of the body*, as a single entity. The statute does not contemplate a situation in which organs are retained for further study, and no other provision of Ohio law specifically provides for such organs' return.

Furthermore, § 313.14 operates to resolve confusion over whom the coroner should contact to make funeral arrangements, not to create a right enforceable against the coroner. It sets forth a hierarchy of priority for determining which of several relatives has custodial authority to prepare the body for funeral: "next of kin, other relatives, or friends of the deceased person, in the order named." It thus serves the practical purpose of defining family members' rights vis-à-vis each

other, not vis-à-vis the coroner, who has absolute authority to retain the body for as long as necessary, and even to disinter the body after it has been buried. See R.C. §§ 313.15, 313.18.

In fact, no Ohio court has held a county coroner liable to a decedent's next-of-kin for failure to deliver, in whole or in part, a body for burial. In *Everman v. Davis* (8th Dist. 1989), 54 Ohio App. 3d 199, 121, the Eighth District assumed without deciding that under § 313.14 a family member has a "possessory" right to a dead body for burial, stating there was "no issue in th[e] case" as to that question, and dismissed the plaintiff's constitutional claim of unreasonable search and seizure on the ground that a body was not an "effect" of the survivor within the meaning of the Fourth Amendment. But the reading assumed by the Eighth District has never been applied to hold a coroner liable, and such a holding would be unsupported by the statutory scheme, which bestows upon the coroner extremely broad discretion. And in any event, no Ohio court has ever even suggested that next-of-kin have a possessory or custodial interest in the burial of a decedent's autopsied *organs*.

Recent federal precedent interpreting R.C. § 313.14 as conferring a property right in a decedent's organs is not persuasive. In *Hainey v. Parrott* (S.D. Ohio 2005), No. 1:02-CV-733, 2005 U.S. Dist. Lexis 44837, at *17-*19, the federal district court cited *Everman* and § 313.14 for the proposition that Ohio recognizes a next-of-kin's enforceable interest against a coroner in disposition of a decedent's body. The court then inferred, without explanation, that a right to disposition of a body must encompass the right to take possession of organs such as the brain that have been removed from the body during the autopsy. *Id.* In reaching its conclusion, the federal court stressed that it saw nothing incompatible in both recognizing a county coroner's authority to conduct an autopsy and also recognizing a family member's right to retrieve any removed organs after the coroner has determined they are no longer needed. *Id.* But even

assuming such a right to organ retrieval would not be in *conflict* with the coroner's powers, this does not mean that such a right *exists*. And under Ohio law, it does not.

Brotherton v. Cleveland (6th Cir. 1991), 923 F.2d 477, relied on by the Albrechts, is inapposite. In *Brotherton*, the Sixth Circuit identified a right created under Ohio's Anatomical Gift Act for a next-of-kin to enforce a decedent's objection to cornea donation, because the coroner's discretion to donate the corneas was limited by Ohio law to cases in which the coroner had no knowledge of an objection. *Id.* at 482. This determination has no bearing on whether Ohio law creates a right for a next-of-kin to control disposal of organs removed by the coroner for forensic testing, as it is an entirely separate question of Ohio law. And, as noted above, a coroner's right to perform an autopsy trumps organ donation. See R.C. § 2108.02(E); see also *Montgomery v. County of Clinton* (6th Cir. 1991), No. 90-1940, 1991 U.S. App. Lexis 19070 (unpublished) (distinguishing *Brotherton* on ground that different statute, with different degree of coroner discretion, was at issue).

Recent additions to the Ohio Revised Code clarify that the decedent's next-of-kin never had any rights of disposition in organs removed during autopsy. While *Hainey* was pending in federal court in 2005, House Bill 235 of the 126th General Assembly was introduced. A portion of this bill, codified at R.C. § 313.123 and effective August 17, 2006, clarifies that "retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste and shall be disposed of in accordance with applicable federal and state laws." The section provides a sole exception, parallel to that found in R.C. § 313.131, for cases where the coroner has reason to believe the autopsy is contrary to the decedent's religious beliefs. This designation of removed organs as "medical waste" cannot be squared with the Albrechts' assertion that they have a property right in the retrieval of a decedent's organs upon completion

of an autopsy. And the subsection providing that a “cause of action shall not lie against any employee of a coroner’s office for requesting, ordering, or performing an autopsy in good faith under the authority of this chapter,” see R.C. § 313.123(C), leaves no doubt that Ohio law does not provide a cause of action for decedents’ next-of-kin against a county coroner for the disposal of organs.

C. The Plaintiffs’ desire for candid and timely communication is not a property interest, and such a concern should be addressed in another forum.

In reality, the Albrechts appear to seek something *more* than the right to possess and dispose of the organ itself. If this were the property right in question, then the alleged “deprivation” would occur not when their son’s body was returned without the brain, but only after the brain was disposed. This is so because any right under Ohio law to organ disposition by next-of-kin, even if such a right existed, would not accrue until after the coroner had completed his or her tests—which could be weeks or months after the decedent’s burial. But if the coroner had simply delivered the decedent’s brain for disposition after testing was complete and after the Albrechts’ son had been buried, it does not appear that this would have resolved the Albrechts’ distress; indeed, it may have compounded it.

Based on the emphasis of the Albrechts’ arguments in their Preliminary Memorandum and district court filings, it appears the Albrechts desired not the alleged property itself, but rather information on its location provided in such a time frame so as to make a choice regarding whether to proceed with their son’s burial. They argue that they “were entitled to notice that [their son’s brain was] retained,” because “[s]uch notice would have enabled the Plaintiffs to make an informed decision with regard to whether they wished to have the retained organ released to them . . . so that they might have buried it with their son.” Preliminary Memorandum

of Plaintiffs-Respondents, at 2. It seems the basis of the Albrechts' claim is, foremost, a purported right to communication.

This fact underscores the disconnect between the lawsuit plaintiffs have brought and the reform that they seek. The right to notice itself is not a free-standing property right:

The categories of substance and procedure are distinct. Were the rule otherwise, the [Due Process] Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty.

Loudermill, 470 U.S. at 541. Before the Albrechts can demonstrate a federal due process right to notice, they must demonstrate a state-created right to the property. The Albrechts' arguments about a right to information assume a property interest that does not exist under Ohio law.

Obviously, the Albrechts raise sympathetic concerns about proper communication and sensitivity to grieving families. But recognizing these concerns does not support judicial creation of a new-found property right enforceable by federal lawsuits under 42 U.S.C. § 1983. Perceived problems in coroner office protocol could be handled in a variety of other ways, including legislative reform, although, to be sure, as *Amicus Curiae* National Association of Medical Examiners notes, the current protocol has the advantage of minimal disruption to the family during the grieving process. The family may in fact be offended by discussions of the procedures and time frame involved in testing the decedent's organs. See Preliminary Memorandum of *Amicus Curiae* National Association of Medical Examiners, at 12. And many families, moreover, may prefer to never know the details of their loved one's autopsy, and may be content to lay to rest the decedent's body without information on its internal state. The Court, however, need not enter the policy debate. Its inquiry ends simply with the interpretation of existing law: Ohio recognizes no property interest of a next-of-kin in a decedent's organs removed during autopsy.

D. Ohio's existing law advances important public policy objectives, and these objectives would be hindered if the Court changed the law to recognize Plaintiffs' asserted property interests.

The discretion afforded Ohio county coroners promotes important goals in law enforcement and public health. Most obviously, autopsies provide critical evidence in criminal investigations. The coroner's verdict is the legally accepted cause of death, R.C. § 313.19, creating a rebuttable presumption in the absence of competent, credible evidence to the contrary. *Vargo v. Travelers Ins. Co.* (1987), 34 Ohio St. 3d 27. The coroner has the power to subpoena witnesses, to compel their appearance, and to administer to them the standard testimonial oath in order to assist in ascertaining the cause of death. R.C. § 313.17. The coroner also plays an important role in preventing the spread of infectious disease, as coroner reports can offer early warnings of an outbreak. Not all diseases are readily apparent upon initial autopsy. Therefore the retention of organs to check against other decedents later may help confirm the presence of a disease as well as the manner in which it has been spread.

If Ohio gave decedents' next-of-kin the authority to contest organ autopsies, these important law enforcement and public health goals would be seriously frustrated. Some family members, for example, will themselves be persons of interest in ongoing homicide investigations, and notification from the coroner's office may compromise the investigation. Even when a family has no suspect motives for an abbreviated autopsy, interference is foreseeable: the desire simply to bury the decedent's body as quickly and as intact as possible may lead to debates with coroners offices about the need for additional testing.

Changing Ohio law to recognize a next-of-kin's right to dispose of organ and tissue remains would also be problematic. One could imagine a system by which the coroner would hold the entire body until all organ tests had been completed; or, alternatively, a system by which the coroner would return the body without the organs and then return the remaining organs

separately after testing was completed. It is questionable whether either system would be preferable to the present practice, wherein the coroner respectfully disposes of organ remains rather than delaying a funeral or further disturbing the family during their grieving.

Under either alternative system, recognizing the Albrechts' asserted right to retrieve a decedent's organ and tissue samples would also interfere with the efficient operation of the coroner's office, and with the public interests advanced by the coroner's professional execution of her duties. Although the Southern District of Ohio has opined that a coroner's autopsy authority and a family member's right to retrieve remains are not mutually exclusive, this conclusion ignores the tensions that may arise between the two parties' interests. A family member will still, understandably, desire to bury the decedent as quickly as possible, and as intact as possible, and accordingly may pressure the coroner to take smaller samples of tissue for a certain test, or to forgo certain tests entirely.

Further, questions would arise regarding precisely which remains must be retained for family retrieval and which remains may simply be discarded. Forensic examination will nearly always involve dissection and thus leave small samples of remains that no family would realistically wish to recover. Although the Albrechts now insist that they are only interested in retrieval of entire organs, and not tissue samples or fluids, see Preliminary Memorandum of Plaintiffs-Respondents at 1, they advance no legal theory for this distinction, in which some body parts would carry with them a property interest whereas others would not. And when an organ has been retained and tested during an autopsy, a bright line may not exist for when it loses its character as an organ and becomes a tissue sample. Assuming property rights would attach only to fully intact organs, the Albrechts can offer no theory for why a coroner's dissection of a once-intact organ would not itself give rise to a property deprivation claim. And if a coroner's

allegedly unnecessary dissection of an organ could give rise to a due process claim, then next-of-kin would be empowered to interfere directly with a coroner's judgment.

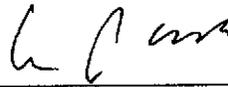
In any event, rewriting Ohio law is not the Court's role. The clear resolution of the legal question in this case—namely, that Ohio law does not create a property interest in organs removed during autopsy—is merely further supported by the negative policy consequences that would flow from a contrary conclusion.

CONCLUSION

For the reasons above, *Amicus Curiae* State of Ohio urges the Court to answer the certified question in the negative.

Respectfully submitted,

MARC DANN (0039425)
Attorney General of Ohio



WILLIAM P. MARSHALL* (0038077)
Solicitor General
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
wmarshall@ag.state.oh.us

Counsel for *Amicus Curiae*
Ohio Attorney General Marc Dann

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of the Defendants-Petitioners was served by U.S. mail this ____ day of July 2007, on the following counsel:

DONALD W. WHITE
H. ELIZABETH MASON
THOMAS BLUST
GEORGE JONSON
101 E. Main Street
Batavia, Ohio 45103

PATRICK J. PEROTTI
Dworken & Bernstein Co., LPA
60 South Park Place
Painesville, Ohio 44077

JOHN METZ (0019039)
Carew Tower, 44th Floor
441 Vine Street
Cincinnati, Ohio 45202

JOHN R. CLIMACO
DAVID M. CUPPAGE
SCOTT D. SIMPKINS
JENNIFER L. GARDNER
Climaco, Lefkowitz, Peca, Wilcox & Garofoli
Co., LPA
55 Public Square, Suite 1950
Cleveland, Ohio 44113

WILLIAM D. MASON
DAVID G. LAMBERT
FREDERICK W. WHATLEY
RENEE A. BACCHUS
Courts Tower – Justice Center
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

MARK D. TUCKER
Benesch, Friedlander, Coplan & Aronoff LLP
41 S. High St., 26th Floor
Columbus, Ohio 45103

MARK LANDES
JENNIFER GEORGE
DAVID G. JENNINGS
Isaac, Brant, Ledman & Teetor LLP
240 East Broad Street, Suite 900
Columbus, Ohio 43215-3742

RON O'BRIEN
NICK A. SOULAS, JR.
A. PAUL THIES
PATRICK J. PICCININNI
373 South High Street, 13th Floor
Columbus, Ohio 43215

PATRICK FARDAL
365 Stonewall Court
Dublin, Ohio 43017



WILLIAM P. MARSHALL
Solicitor General