

IN THE SUPREME COURT OF OHIO

JOHN AND JUNE ROE, individually	:	Case No. 2007-1832
and as parents and next friend of JANE	:	
ROE, a minor,	:	On appeal from the Hamilton County
	:	Court of Appeals, First Appellate
Appellants,	:	District
	:	
v.	:	APPEAL NO. C060557
	:	TRIAL NO. A0502691
	:	
PLANNED PARENTHOOD	:	
SOUTHWEST OHIO REGION, <i>et al.</i>	:	
	:	
Appellees.	:	

BRIEF OF *AMICUS CURIAE* WOMEN INFLUENCING THE NATION, CITIZENS FOR COMMUNITY VALUES, OHIO RIGHT TO LIFE, CLEVELAND LAWYERS FOR LIFE, LIFEWORKS OHIO, RIGHT TO LIFE OF GREATER CINCINNATI, LIFE ISSUES INSTITUTE, *et al.* IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION FOR RECONSIDERATION

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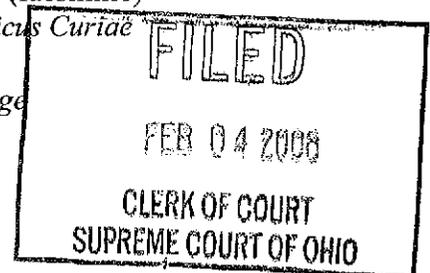
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Other Sources

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Planned Parenthood Southwest Ohio Region,
Planned Parenthood – Who We Are, Video on website,
<http://www.plannedparenthood.org/swoh/Who-We-Are.htm>, 2008.....15, 21

Ruggiero, K.J., & Kilpatrick, D.G. (2003).
Rape in Ohio: A Report to the State
Charleston, SC: National Violence Against Women Prevention Research Center,
Medical University of South Carolina.
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SUMMARY OF THE MISSIONS OF AMICUS CURIAE INTEREST GROUPS

Women Influencing the Nation is an organization that believes in the right to life from natural conception to natural death, and that God has supreme rights over everyone. Its challenge is to uncover the lies, reverse the damage, and reclaim the respect for women that has been lost in America today.

Citizens for Community Values is a grassroots organization of citizens who are concerned for the well-being of the community, the strength of its families, and the future of its children. It strives to be a leader in the restoration of those Judeo-Christian moral values upon which this country was founded in hopes of leaving a lasting legacy of citizens endeavoring to foster and maintain healthy, wholesome, safe, and happy communities.

Ohio Right to Life is a group that exists to promote and defend the right to life of all innocent human beings from the time of fertilization until natural death by eliminating practices such as abortion, infanticide, and euthanasia. Ohio Right to Life's directive is to serve those whose right to life is vulnerable and to work with those who share a common desire to preserve the sanctity of life.

Cleveland Lawyers for Life is a group of people who believe in the sanctity and dignity of human life from conception until natural death. Its mission is to educate the public about the dignity of human life, support right-to-life organizations and advocate for life in four areas of law: Abortion, Adoption, Embryonic Stem Cell research and Advance Directives.

Lifeworks Ohio is an organization that exists to promote and defend the rights of all innocent human beings from the time of fertilization until natural death by eliminating

practices such as abortion, infanticide and euthanasia. Its programs for elementary through college age students provide factually based information on how to respect the dignity and rights of all human life with compassion. Lifeworks Ohio has reached over 35,000 students with its message of hope over the past 8 years.

Right to Life of Greater Cincinnati is a grassroots organization which exists to ensure that pro-life principles of protection and dignity for all innocent human life are upheld and kept before the public. It educates society on the malice and extent of attacks on innocent human life that may occur through such actions as abortion, infanticide, embryonic manipulation, and euthanasia. Right to Life of Greater Cincinnati also promotes effective legislation to achieve these ends and secures enforcement of relevant statutes.

Life Issues Institute, Inc is an Ohio organization whose mission is to assure, through education, equal protection under the law for all living humans from the beginning of their biological life at fertilization until natural death. Life Issues Institute dedicates itself to promoting and providing effective educational tools for the pro-life movement.

Columbus Right to Life is made up of two parts: The Columbus Right to Life Society and The Columbus Right to Life Educational Foundation. The Columbus Right to Life Society, Inc. is a nonprofit corporation organized in 1975 to promote a deeper understanding and respect for human life and encourage its protection in an increasingly violent world. The main objective of the Society is to present detailed and factual information about fetal development, abortion, infanticide, and euthanasia. The Columbus Right to Life Education Foundation is a nonprofit corporation founded in

1976. The Foundation was established with the purpose of fostering respect for human life from conception to natural death.

The Center for Bioethical Reform (CBR) was founded in July of 1990 as a privately-funded, nonprofit educational corporation. CBR works to establish prenatal justice and the right to life for the unborn, the disabled, the infirm, the aged and all vulnerable people through education and the development of cutting-edge educational resources. CBR also publishes educational resources and conducts seminars to establish the humanity of the unborn and the inhumanity of abortion.

Pregnancy Center West is located in Cincinnati, Ohio and is a Christian pro-life ministry. It provides education regarding positive alternatives to abortion and offers assistance with pregnancy-related services. Chaste lifestyles are encouraged. Spiritual and emotional healing is fostered in those experiencing crisis or suffering from Post-Abortion Syndrome. Pregnancy Center West seeks to affirm and maintain dignity of all human life as created by God.

Mission: America began in 1995 as a publication and website. It covers the latest cultural and social trends in the United States and what they might mean for Christians. Mission: America researches social trends inside and outside Christianity, and publishes articles and newsletters on its website.

Touch the World Ministries, Inc's mission is to facilitate and coordinate existing ministries so that the community may look upward toward God and outward toward His people to solve spiritual and social problems.

The Institute for Principled Policy is a body of like-minded individuals committed to a foundation of Biblical truths. Its goal is to influence the creation and

implementation of social, moral and political public policy from the vantage point of a Biblical world-view. The Institute for Principled Policy publishes a semi-annual journal, *In the Gates*, with articles addressing the topics and debates of our day from a number of distinguished writers and thinkers. Articles are chosen for publication based on the author's approach to the topic from a Biblical perspective. The Institutes primary interest is on policies for the state of Ohio.

Family First is a conservative political action committee serving Ohio and Northern Kentucky. It operates with donations and the volunteer help of citizens who are concerned about our country. Family First is especially concerned with pro-life, pro-marriage, school choice, and fiscal responsibility issues.

Elizabeth's New Life Center is a leader in the Miami Valley, promoting responsible sexual values and alternatives to abortion. It seeks to provide complete and caring services (without prejudice to religion, age, race, gender, marital status or income level) to as many individuals as possible at its centers located in Dayton, Fairborn, Kettering, Lebanon and Sidney. The abstinence education and marriage education programs provide services to seven counties in Southwestern Ohio.

Old St. Mary's Pregnancy Center is a Catholic, pro-life ministry providing education regarding positive alternatives to abortion and offering assistance with pregnancy-related services. Chaste lifestyles are encouraged for married and singles. Spiritual and emotional healing is fostered for those experiencing crises or suffering from Post-abortion Syndrome. Old St. Mary's Pregnancy Center seeks to affirm and maintain the dignity of all human life as created by God.

A Caring Place Pregnancy Help Center is a Cincinnati organized and funded outreach organization. It provides a variety of free services and programs to meet the needs of clients and of the community. Its services include free pregnancy tests, medical referrals, education on all pregnancy options, confidential education on sexually transmitted diseases, STD testing and referral, medical and social services referrals, parenting classes, baby and maternity supplies, adoption information, sexual integrity education, and post-abortion recovery program.

Pregnancy Center East is pro-life, pro family pregnancy help center. It offers free and confidential services including crisis counseling, free pregnancy tests, abortion consultations, ultrasounds, consultations concerning pregnancy, parenting education, adoption education and referrals, post-abortion counseling, medical referrals, and referrals for Legal Aid and other social services.

Right to Life of Butler County is a subsidiary group of Right to Life of Cincinnati. Volunteers meet with the purpose of reaching out to the Butler County area. They support local pregnancy care centers and distribute pro life materials to the community; mainly through churches and schools. The group meets monthly to discuss current issues and plan large community gatherings.

Right to Life Summit County is a group of individuals concerned with protecting innocent human life from conception to natural death with a focus on core issues of abortion alternatives, stem cell research and cloning, and euthanasia/end-of-life decisions

INTEREST OF *AMICI CURIAE*

Amici are a broad-based coalition of pro-woman, pro-family, and pro-life groups who love children. Our missions are described in the previous pages. Amici believe it is crucial that this Court hear this case to further the important public interest of our childrens' safety. Specifically, Amici and the State of Ohio have a compelling interest in ensuring that entities are following the child abuse reporting statute. Amici seek to preserve the integrity and the force of the statute because it protects minors from abuse generally and teenage victims of statutory rape specifically. For that reason, Amici urge the Court to reconsider its denial of certiorari.

STATEMENT OF CASE

Plaintiffs-Appellants are fourteen year old "Jane Roe" and her parents. Jane Roe was a victim of statutory rape and a former patient of Defendants-Appellees Planned Parenthood Southwest Ohio and Dr. Roslyn Kade. Defendants-Appellees are corporate medical providers in Ohio who routinely treat thousands of teenage girls like Jane Roe statewide. The Roes seek documents (medical records of minors with all identifying information redacted) relevant to their claims regarding the corporate policy, pattern and practices of Planned Parenthood. Specifically, they seek Planned Parenthood's documentation of its treatment of teenage girls when it suspected the girls were sexually abused. Recognizing the important public interest in protecting our children from sexual abuse, the trial court granted the Roes motion to compel Planned Parenthood to produce the redacted records. The trial court found this need to be "Tremendous."

The Court of Appeals reversed this decision. It did not use an *abuse of discretion* standard, as is customary in discovery disputes. Despite precedent, the Court of Appeals

used a *de novo* standard of review. It found *no* compelling reason to protect our children from suspected failed reporting, even if it occurred one thousand times. With this reversal, the Court of Appeals eliminated any avenue for the Roes to pursue common law and/or statutory punitive damages against Planned Parenthood. They cannot do so without documentary evidence to establish malice.

The Court of Appeals has sent a message to childhood sexual predators; if they bring pregnant victims to Planned Parenthood, their confidentiality will be protected with the utmost care. With this, and the emotional health of our children, in mind, Amici respectfully request this Court to reconsider its denial of certiorari.

ARGUMENT

THERE IS GRAVE PUBLIC INTEREST IN PRODUCING THE REDACTED MEDICAL RECORDS OF NON-PARTY MINOR PATIENTS

I. Disclosure of Redacted Medical Records of Non-Party Minor Patients of These Corporate Defendants-Appellees Serves an Important Public Interest in Ohio.

Long ago, the Ohio legislature enacted mandatory reporting statutes to protect children from abuse. Recognizing that physicians are in a uniquely intimate relationship with patients, the legislature named them specifically among those required to report signs of physical and sexual abuse noted during examinations and medical procedures. Often these medical providers are the only safeguards between the child-victim and the perpetrator's ongoing abuse. It is critical they follow the statute and report suspected abuse.

One out of seven adult women in Ohio have been forcibly raped.¹ Many of these rapes occurred when the women were under eighteen.² These estimates are conservative because they do not include statutory rapes, or rapes experienced by victims currently under the age of eighteen.³ Like Jane Roe, many of Southwest Ohio's sexually abused girls have access to Planned Parenthood. Planned Parenthood's outreach is notable. In 2006, Planned Parenthood Southwest Ohio Region served fifty thousand, six hundred twenty nine patients.⁴ Sixty-seven thousand, two hundred sixteen people visited Planned Parenthood's health centers in Ohio in 2006.⁵ Planned Parenthood's website states "we are a dynamic organization whose vision and values reflect mainstream America."⁶ Planned Parenthood promotes itself to viewers of the video on its site that it is an "advocacy group" that provides "compassionate care" by "staff who give accurate medical information, with all options."⁷ Planned Parenthood reached almost ten thousand community members

¹ Ruggiero, K.J., & Kilpatrick, D.G. (2003). *Rape in Ohio: A Report to the State 2* Charleston, SC: National Violence Against Women Prevention Research Center, Medical University of South Carolina.

<http://www.odh.ohio.gov/ASSETS/6514ECC75BB14C7691CF849D29675C86/cdcoh.pdf>

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² *Id.*

³ *Id.*

⁴ Planned Parenthood Southwest Ohio Region, *Planned Parenthood – About Planned Parenthood*, <http://www.plannedparenthood.org/swoh/about-planned-parenthood.htm>, 2008.

⁵ *Id.*

⁶ Planned Parenthood Southwest Ohio Region, *Planned Parenthood – Who We Are*, <http://www.plannedparenthood.org/swoh/Who-We-Are.htm>, 2008.

⁷ Planned Parenthood Southwest Ohio Region, *Planned Parenthood – Who We Are*, Video on website, <http://www.plannedparenthood.org/swoh/Who-We-Are.htm>, 2008.

with sexuality education and training programs in 2006.⁸ Every year, thousands of people, including children, trust that Planned Parenthood will give them accurate information about their God-given gift to form human life and how to best respect and care for themselves as tomorrow's mothers, fathers and leaders.

Defendants-Appellees Planned Parenthood and Dr. Kade are the very medical providers the statute contemplates and identifies by name. If the statistics listed on their website are true, they are in a peak, optimal position to detect situations where adults abuse our children because of the sheer numbers of girls they see.

Sadly, discovery in Jane Roe's case has revealed that Planned Parenthood has a "don't ask don't tell" method of counseling young, frightened statutory rape victims seeking abortion services. Such a policy is not in the best interest of our children. It certainly does not comply with the reporting statute.

In light of this information and the grave public interest of protecting our teenage girls from statutory rape and sexual abuse, Amici plead with this Court to hear this case and reinstate the order of the Trial Court. Justice demands that Planned Parenthood produce the redacted records of non-party minors and be held accountable for the existence of any policy which contravenes (facially or de facto) Ohio law mandating they report sexual abuse. Our children deserve as much.

II. Ohio Law Permits the Disclosure of the Requested Discovery.

Any threat to a child's wellbeing is certainly of interest to the public. The *Biddle* case allows disclosure of privileged physician-patient communications "where

⁸ Planned Parenthood Southwest Ohio Region, *Planned Parenthood – About Planned Parenthood*, <http://www.plannedparenthood.org/swoh/about-planned-parenthood.htm>, 2008.

disclosure is necessary to further a countervailing interest which outweighs the patient's interest in confidentiality."⁹ The Supreme Court stated that "medical conditions indicative of child abuse or neglect"¹⁰ are privileged disclosures which outweigh patient confidentiality.¹¹ The Court also allowed disclosure "for the safety of individuals, or [when] important to the public in matters of public interest."¹²

Privileged medical documents can be disclosed when the patients' identities are protected.¹³ In *Richards v Kerlakian*, the First Appellate District held that redacted reports of a defendant doctor's past surgeries were discoverable.¹⁴ The plaintiffs sought records to support their primary claim and to impeach the defendant.¹⁵

The First Appellate District has also allowed the disclosure of medical records without redacting identifying patient information.¹⁶ In *Alcorn v. Franciscan Hospital Mt. Airy Campus*, the plaintiff was sexually assaulted by a patient at the defendant's hospital.¹⁷ The plaintiff knew her attacker's name, and was granted discovery of the attacker's medical records.¹⁸

⁹ *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 402, 1999-Ohio-115, 715 N.E.2d 518.

¹⁰ *Id.* at 401.

¹¹ *Id.* at 401, 402.

¹² *Id.* at 402 (citing *Humphers v. First Interstate Bank of Oregon* (1985) 298 Ore. 706, 720, 696 P.2d 527).

¹³ *Richards v. Kerlakian*, 162 Ohio App.3d 823, 2005-Ohio-4414, N.E.2d 678.

¹⁴ *Id.* at ¶8.

¹⁵ *Id.* at ¶8.

¹⁶ *Alcorn v. Franciscan Hosp. Mt. Airy Campus*, 1st Dist. No. C-060061, 2006-Ohio-5896.

¹⁷ *Id.* at ¶3.

¹⁸ *Id.* at ¶12, 13.

There is evidence that Defendants-Appellants' disclosure of redacted medical records will show that they ignored "medical conditions indicative of child abuse"¹⁹ in violation of Ohio law. The Trial Court, recognizing that the safety of young girls must surpass the interests of the physician-patient privilege, allowed disclosure like the court in the *Richards* case (with names redacted.) Also like the *Richards*' plaintiffs, the Roes seek the medical records from Defendants to develop their claim.

The Roes do not seek names, addresses, phone numbers or any other identifying information of Planned Parenthood's past patients. They do not seek identifying information like the plaintiffs in *Alcorn*. They have no interest in compromising any patients' privacy rights. Instead, the Roes seek (and the trial court granted) redacted records to help establish their claims. Redacted records will not disclose identities. The Roes seek limited information to determine if Planned Parenthood has systematically violated Ohio law in the past. The grave public interest in protecting child abuse victims outweighs the confidentiality interest of anonymous past patients.

III. Common Law Punitive Damages Are Available Against Corporate Defendants-Appellees For Violating R.C. 2151.421 Because That Industry's Failure To Report Suspected Child Sexual Abuse Is A Matter of Grave Public Interest And The Statute Requires Liberal Construction To Protect Children.

Jane Roe and her parents seek punitive damages to punish Planned Parenthood for willful, malicious conduct in failing to report sexual abuse under R.C.

¹⁹ *Biddle*, 86 Ohio St.3d at 401.

2151.421. This statute requires professionals to report even suspected abuse and provides, in part:

No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age...has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of a child **shall fail to immediately report** that knowledge or reasonable cause to suspect...
R.C. 2151.421(A)(1)(a) (emphasis added.)

No one disputes that failing to report an adult male having sex with a minor girl is the type of abuse this statute contemplates.

The legislature intended broad interpretation of the statute to protect children. This is set forth in R.C. 2151.01 which states, “The sections in Chapter 2151 of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, **shall be liberally interpreted** and construed so as to effectuate the following purposes: (A) To provide for the **care, protection, and mental and physical development of children...**” (emphasis added).

To establish punitive damages for breaching this statute, the Roes must look to common law principles of actual malice. The statute does not provide specifically for punitive damages, but the statute must be construed liberally to protect children.²⁰ There is a strong argument that establishing punitive damages in this case **will protect children as it may prevent further sexual abuse to girls.**²¹

²⁰ R.C.2151.01.

²¹ Planned Parenthood tries to dispose of the Roes’ argument for punitive damages citing statutory preclusion in a securities fraud case, *Byrley v. Nationwide Life Ins. Co.* (1994), 94 Ohio App.3d 1,

A plaintiff can prove actual malice by showing her willful and malicious injury is another in a long pattern of similar injuries at the hands of defendants. A plaintiff is usually only able to show the defendants' pattern of wrongdoing by obtaining *discovery*. To demonstrate actual malice, the Roes must show that Planned Parenthood engaged in "extremely reckless behavior revealing a conscious disregard for a great and obvious harm."²² The Court can infer malice from PP's conduct.²³ The Roes seek evidence that, not once, but again and again, Planned Parenthood acted maliciously. The Roes seek evidence of actual malice in Planned Parenthood's repeated failures, under R.C. 2151.421, to report adult males sexually abusing minor girls. The Roes seek Planned Parenthood's medical records (without names) of other young girls which they believe will demonstrate this pattern. They believe that Planned Parenthood knew some of its patients were minor girls who had conceived because adult males had sex with them. They believe that, again and again, Planned Parenthood reported this abuse to no one. And the abuse continued.

640 N.E.2d 187. In that case, an investor sued her financial advisors for alleged fraudulent advice, including violation of R.C.1707.41 (Control bids made pursuant to tender offer or request or invitation for tenders). The court found the investor could not claim punitive damages because the statute (dealing with financial transactions) did not provide for them. Section 1707.01 of the Revised Code, Securities Definitions, has no provision stating its sections shall be liberally construed. Section 1707 of the Revised Code addresses corporations, money and securities. Conversely, R.C. 2151.01 instructs that its sections shall be liberally constructed to protect children. Chapter 2151 addresses not money but, far more precious, our small human beings; children. Planned Parenthood's application of a securities fraud case in a situation involving a statute designed to protect our children is misplaced.

²² *Schellhouse v. Norfolk & W. R. Co.* (1991), 61 Ohio St. 3d 520, 525 n 2 (citing *Preston v. Murty* (1987), 32 Ohio St.3d 334, 335, 512 N.E.2d 1174, 1175).

²³ *Id.*

Planned Parenthood touts itself as “educators who promote personal responsibility.”²⁴ Planned Parenthood claims that it provides educational programs “for schools, universities, correctional facilities, community groups, churches and parents.”²⁵ It promotes itself as “an organization whose vision and values reflect mainstream America.”²⁶ Planned Parenthood’s pattern of failure to report suspicions of sexual abuse, especially considering its programs on date-rape prevention,²⁷ is reprehensible behavior. It is the type of behavior that punitive damages are designed to stop and punish. Without access to this information, the Roes are helpless to support their claim. More than an attempt “to bolster a speculative punitive damages award,”²⁸ the Roes suspected Planned Parenthood’s egregious pattern based on reports in other jurisdictions.²⁹ The Roes must be allowed to discover Planned Parenthood’s records, names redacted, if they are to establish the pattern of abuse and Planned Parenthood’s pattern of failing to protect children in the Southwest Ohio and Northern Kentucky region.

24 Planned Parenthood Southwest Ohio Region, Planned Parenthood – Who We Are, Video on website, <http://www.plannedparenthood.org/swoh/Who-We-Are.htm>, 2008.

25 Planned Parenthood Southwest Ohio Region, Planned Parenthood – Education Programs, <http://www.plannedparenthood.org/swoh/education-programs.htm>, 2008.

26 Planned Parenthood Southwest Ohio Region, Planned Parenthood – Who We Are, <http://www.plannedparenthood.org/swoh/Who-We-Are.htm>, 2008.

27 Planned Parenthood Southwest Ohio Region, Planned Parenthood – Education Programs, <http://www.plannedparenthood.org/swoh/education-programs.htm>, 2008.

28 *Roe v. Planned Parenthood Southwest Ohio Region*, 173 Ohio App.3d 414, 2007-Ohio-4318, at ¶ 38.

29 *Roe’s Memorandum in Support of Motion to Compel*, citing information learned from the Hamilton County’s Prosecutor’s office and investigations of Planned Parenthood conducted by the Attorneys General of the states of Nebraska and Indiana.

The Appellate Court has stated that it is not concerned whether Planned Parenthood violated Ohio law once or 1,000 times in the past 10 years.³⁰ Those who are concerned with protecting children are very concerned. They do not see Planned Parenthood's conduct as mere violations of Ohio law. Rather, each time Planned Parenthood failed to report suspected abuse, another Jane Roe left Planned Parenthood's office, and continued to be victimized. Not only for the sake of Jane Roe, but for countless other young girls, this Court should accept jurisdiction.

IV. Plaintiff-Appellants' Proposition of Law No. 2 and Discovery Orders Involving Privilege

By accepting for review the Roes' Proposition of Law No. 2, this Court will resolve not only issues it has previously found to be matters of public and great general interest, but it will also resolve two important conflicts among the Appellate Districts.

1. The Two Conflicts Between The Districts

a) Conflict No. One: The Standard Of Review To Be Applied By Appellate Courts In Discovery Disputes Involving Privilege Issues

In Ohio, absent an abuse of discretion, an appellate court must affirm a trial court's disposition of discovery issues.³¹ However, in recent years, the "standard for review applied in discovery disputes involving privilege [has] varied among courts."³² Some use the *de novo* standard and others use the abuse of discretion standard.³³ Indeed,

³⁰ *Roe* at ¶40.

³¹ See e.g., *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 1998-Ohio-329, 692 N.E.2d 198.

³² *National Union Fire Ins. Company of Pittsburg, PA v. Ohio State University Board of Trustees*, 10th Dist. No. 04AP-1340, 2005-Ohio-3992.

³³ See e.g. *State of Ohio v. Moore*, Nos.1-06-89 and 1-06-96, 2007-Ohio-3600; *Ingram v. Adena Health System*, 149 Ohio App.3d 447, 2002-Ohio-4878, 777 N.E.2d 901; *Riggs v.*

at least one, the First Appellate District, has used both standards of review.³⁴ Further, one appellate court – the Eighth Appellate District – recently ignored its own precedent, and, relying on the Decision of the First Appellate District in this action – applied the *de novo* standard.³⁵ Specifically, in 2005 and 2006 that Court stated the following about the review of trial courts’ discovery orders involving privilege issues:

The standard of review of a trial court’s decision in a discovery matter is whether the court abused its discretion.³⁶

It is well-settled law that a trial court has broad discretion in controlling the discovery process . . . It is also important to note that the regulation of pretrial discovery matters concerning privilege are governed by an abuse of discretion standard.³⁷

Yet, without even mentioning its decisions in *Muehrcke* and *O’Donnell Const. Co.*, the Eighth Appellate District recently stated that a “trial court’s decisions on the management of discovery are reviewed under an abuse of discretion standard, . . . [but] [q]uestions of privilege . . . ‘including the propriety of disclosure are questions of law and

Richard, 5th Dist. No. 2006CA00234, 2007-Ohio-490; *Cook v. Toledo Hosp.*, 159 Ohio App.3d 180, 2006-Ohio-5278; *DePaul v. St. Elizabeth Health Center*, 7th Dist. No. 03 MA 137, 2004-Ohio-4992; *Abbuhl v. Orange Village*, 8th Dist. No. 82203, 2003-Ohio-4662; *McPherson v. Goodyear Tire & Rubber Co.*, 146 Ohio App.3d 441, 2001-Ohio-1517; *Myers v. Bosobas* (1998), 129 Ohio App.3d 692, 718 N.E.2d 1001; *Covington v. Saffold*, 150 Ohio App.3d 126, 2002-Ohio-6280; *Manley v. Heather Hill*, 11th Dist. No. 2007-G-2765, 2007-Ohio-6944; *Grantz v. Discovery For Youth*, 12th Dist. Nos. CA2004-09-216 & CA2004-09-217, 2005-Ohio-680.

34 See e.g. *Roe v. Planned Parenthood Southwest Ohio Region*, 173 Ohio App.3d 414, 2007-Ohio-4318; *Richards v. Kerlakian*, 162 Ohio App.3d 823, 2005-Ohio-4414, N.E.2d 678; *Alcorn v. Franciscan Hospital*, 1st Dist. No. C-060061, 2006-Ohio-5896; *Flynn v. University Hospital, Inc.*, 172 Ohio App.3d 775, 2007-Ohio-4468, 876 N.E.2d 1300.

35 See e.g. *Muehrcke v. Housel*, 8th Dist. Nos. 85643, 85644, 2005-Ohio-5440; *O’Donnell Const. Co. v. Stewart*, 8th Dist. No. 86576, 2006-Ohio-1838; *Med. Mut. of Ohio v. Schlotterer*, 8th Dist. No. 89388, 2008-Ohio-49.

36 *Muehrcke* at ¶’s 12 and 13.

37 *O’Donnell Const. Co.* at ¶ 10.

are reviewed *de novo*.³⁸ If this Court decides to exercise jurisdiction over Proposition of Law No. 2, it will also be able to address and resolve this conflict among the districts.

b) Conflict Number Two: Whether A Discovery Order Involving Privileged Matters Which The Trial Court Has Safeguarded Is A Final, Appealable Order

Ohio courts have long recognized that discovery orders are interlocutory in nature, and, with few and clearly defined exceptions, they are not subject to immediate appellate review.³⁹ Among the exceptions are discovery orders involving privileged information where the trial court has not provided safeguards to that information. However, where, as here, the trial court has provided those safeguards, at least two districts are in conflict about whether such discovery orders are final and appealable.

Ohio appellate courts have consistently refused to exercise jurisdiction over discovery orders that do not meet all three requirements of R.C. 2505.02(B)(4) because they are not final, appealable orders.⁴⁰ When faced with this issue, the first question that must be answered is whether the trial court ordered the disclosure of privileged

³⁸ *Med. Mut. of Ohio* at ¶ 21.

³⁹ *Walters v. The Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 120-121, 1997-Ohio- 232, 676 N.E.2d 890; *State ex. rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 438, 639 N.E.2d 83; *Dispatch Printing Co. v. Recovery Ltd.*, 166 Ohio App.3d 118, 121, 2006-Ohio-1347; *See Dispatch Printing Co. v. Recovery Ltd.* 166 Ohio App.3d 118, 123, 2006-Ohio-1347; *Tessler v. Ackman* (Oct 25, 1995), 1st Dist. Nos. C-940574, C-940632, C-940780, C-940849, 1995 Ohio App. LEXIS 4686 at *17, n.5 (Ohio App. 1st Dist. Oct. 25, 1995).

⁴⁰ *Dispatch*, 166 Ohio App.3d at 123; *Othman v. Heritage Mutual Insur. Co.*, 158 Ohio App.3d 283, 2004-Ohio-4361; *Covington v. MetroHealth System*, 150 Ohio App.3d 558, 563, 2002-Ohio-6629; *Holliday v. Gerth*, 8th Dist. No. 86570, 2006-Ohio-934, 2006 Ohio App. LEXIS 839 (Ohio App.8th Dist. March 2, 2006) at *3; *State v. South*, 5th Dist. No. 04-CA-38, 2004-Ohio-5073, 2004 Ohio App. LEXIS 4590 (Ohio App. 5th Dist. Sept. 20, 2004) at **13-16; *Adams v. Community Support Services, Inc.*, 9th Dist. No. C-21419, 2003-Ohio-3926, 2003 Ohio App. LEXIS 3503 (Ohio App.9th Dist July 23, 2003) at *8.

information. If the trial court order did *not* order such a disclosure, the order does not constitute a ‘provisional remedy’ as the term is statutorily defined (i.e. there is not “discovery of privileged matter”).⁴¹ No further analysis under R.C. 2505.02(B)(4) is then required. In answering this question, appellate courts have distinguished blanket orders compelling disclosure of privileged materials from orders where, as here, the trial courts have instituted safeguards or procedures to ensure that privileged materials are not disclosed in discovery. Such safeguards include redaction, *in camera* inspection and protective orders.⁴²

In *Dispatch*, the Eighth Appellate District addressed whether a trial court’s order compelling discovery of confidential/privileged information is a final, appealable order when the trial court protected that information with sufficient safeguards. That court held that it was not, specifically distinguishing that case with cases where trial courts had ordered the production of privileged or protected materials with no safeguards, from cases such as this case involving discovery orders with protective measures that shield or safeguard privileged or protected materials from disclosure. In the latter instance, there is no appealable issue under R.C. 2505.02 precisely “because [the other] does not provide for unfettered discovery coupled with the danger of being unable to unring the proverbial bell.”⁴³

In effect, the trial court did not simply order the production of [privileged] information, but, rather, it ordered that discovery should continue with safeguards in place in order

41 R.C. 2505.02(A)(3).

42 See *Dispatch*, 166 Ohio App.3d at 123; *Othman*, 158 Ohio App.3d at 285; *Covington*, 150 Ohio App.3d at 563; *Holliday*, 2006 Ohio App. LEXIS 839 at *3; *South*, 2004 Ohio App. LEXIS 4590 at **13-16; *Adams*, 2003 Ohio App. LEXIS 3503 at *8.

43 *Dispatch*, 166 Ohio App.3d at 123.

to address the concerns regarding proprietary information or trade secrets.⁴⁴

Other appellate courts have dismissed appeals on related grounds.⁴⁵

The Trial Court in this action issued a discovery order that provided *complete* protection of the privileged and confidential information that Planned Parenthood and Dr. Kade were ordered to produce. In addition to ordering that all privileged information be redacted, the Trial Court stated that it intended “to protect the privacy of all patients who are or may be subject to appropriate discovery measures . . . [by] enforc[ing] complete protection of any and all patient’s identity regarding discovery.”⁴⁶ In sum, the Trial Court issued a discovery order that five appellate courts would hold was *not* a final, appealable order. However, in conflict with those appellate districts, the First Appellate District found that the Trial Court’s Decision in this case was a final, appealable order.⁴⁷ If this Court decides to exercise jurisdiction over Proposition of Law No. 2, it will be able to address and resolve this conflict between at least two districts.

CONCLUSION

For these reasons, and those set forth in Plaintiffs-Appellants’ Memorandum in Support of Jurisdiction, Amici respectfully request that this Court accept jurisdiction in this case.

⁴⁴ *Id.*

⁴⁵ *Othman*, 158 Ohio App.3d at 285; *Holliday*, 2006 Ohio App. LEXIS 839 at **3-4; *South*, 2004 Ohio App. LEXIS 4590 at **15-16; *Adams*, 2003 Ohio App. LEXIS 3503 at **8.

⁴⁶ Decision at 6-7.

⁴⁷ *Roe v. Planned Parenthood Southwest Ohio Region*, 173 Ohio App.3d 414.

Respectfully submitted,

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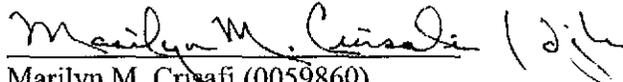
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