IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO	*	Supreme Court Case No. 2018-1705
Plaintiff-Appellee,	*	
v.	*	On appeal from the Warren County Court of Appeals, Twelfth Appellate District
BROOKE SKYLAR RICHARDSON	*	
Defendant-Appellant.	*	
	*	App. Case Nos. CA2018-04-043, CA2018-04-044

MEMORANDUM OF AMICI CURIAE NATIONAL ADVOCATES FOR PREGNANT WOMEN, SIA LEGAL TEAM, NATIONAL PERINATAL ASSOCIATION, CENTER FOR REPRODUCTIVE RIGHTS, NATIONAL ASSOCIATION OF PERINATAL SOCIAL WORKERS, AND JONATHAN SCHAFFIR, MD, IN SUPPORT OF JURISDICTION FOR APPELLANT BROOKE SKYLAR RICHARDSON'S SECOND PROPOSITION OF LAW

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are experts in the fields of public and reproductive health and law, and are committed to the health and rights of pregnant women (collectively "*amici*"). *Amici* fully incorporate the legal and constitutional arguments made by the Appellant in this case, and write separately to bring attention to significant harms to public health that will result from the Twelfth District Court of Appeals' ("Twelfth District") judicial expansion of Ohio's laws to effectively create an exception for pregnant women from the protections of the physician-patient privilege. The Twelfth District has created a non-statutory exception, essentially eliminating physician-patient privilege for women who are or might become pregnant. *Amici* are gravely concerned that allowing the Twelfth District's ruling to stand would undermine public health and the constitutional rights of women in Ohio. *Amici curiae* are as follows:

National Advocates for Pregnant Women is a non-profit legal organization that works to secure the human and civil rights, health and welfare of all people, focusing particularly on pregnant and parenting women.

The SIA Legal Team works through litigation, public policy advocacy, and organizing to ensure that everyone may self-determine their reproductive lives and access care in ways that best meets their needs and upholds their dignity.

National Perinatal Association is a multi-disciplinary organization comprised of doctors, nurses, midwives, social workers, administrators, parents, and those interested in collaborating to improve perinatal health.

The Center for Reproductive Rights is a nonprofit that works to advance reproductive rights as fundamental human rights around the world and works to ensure that women do not lose their core rights because of pregnancy, including their right to medical privacy.

The National Association of Perinatal Social Workers was incorporated in 1980 for the purpose of promoting, expanding, and enhancing the role of social work in perinatal health care.

Jonathan Schaffir, MD[1], is an Associate Professor in the Department of Obstetrics and Gynecology at The Ohio State University College of Medicine.

EXPLANATION OF WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Amici urge the Court to accept jurisdiction because the appeal raises issues of great general interest, as well as implicating substantial constitutional questions. First, the Twelfth District's decision to create a new exception to Ohio's physician-patient privilege creates significant risks to public health, which is an issue of great general interest. S.Ct.Prac.R. 5.02 (3); *see e.g., Danis Carkco Landfill Co., v. Clark County Solid Waste Management District,* 73 Ohio St.3d 590, 653 N.E.2d 646 (1995); Ohio Constitution, Article IV, Section 2. In its decision, the Twelfth District invents an exception to state law protecting physician-patient confidentiality for pregnant women and states that it does so for the purpose of "detecting crimes in order to protect society." *State of Ohio v. Richardson*, 12th App. Dist. Warren Nos. CA2018-04-043, CA2018-04-044, 2018-Ohio-4254. As every leading medical and public health group to address issues of pregnancy and the criminal law recognizes, government action that discourages open communications between pregnant patients and their physicians undermines society's interest in maternal, fetal, and child health.[2] Moreover, because women do not necessarily know if and when they have become pregnant, a pregnancy exception to the physician-patient privilege threatens to undermine health care for all women of childbearing age. Second, this Court should accept jurisdiction because the

[1] Institutional affiliations are provided for identification purposes only.
[2] Explained *infra*, p.4.

decision below raises the significant question of whether it is constitutional to create a gender specific exception to the physician-patient privilege. S.Ct.Prac.R. 5.02(A)(1); Ohio Constitution, Article IV, Section 2(b)(2)(a)(ii).

The ruling below effectively creates a new duty for health care providers to report pregnant patients who make decisions believed to create a possible threat to the pregnancy – potentially violating physicians' medical ethics. RC. 2151.421. *See* American Medical Association, *Code of Medical Ethics Opinion 3.2.1: Confidentiality*, https://www.ama-assn.org/delivering-care/ethics/confidentiality, (accessed Dec. 2, 2018) ("physicians. . . have an ethical obligation to preserve the confidentiality of information gathered in association with the care of the patient.") American Academy of Family Physicians, *Policies: Confidentiality, Patient/Physician* (1979) (2018), available at https://www.aafp.org/about/policies/all/patient-confidentiality.html ("[o]nly in a setting of trust can a patient share the private feelings and personal history that enable the physician to comprehend fully, to diagnose logically, and to treat properly.")[3]

Amici support the arguments put forth in Appellant's Memorandum and ask this Court to accept jurisdiction and correct the erroneous ruling of the Twelfth District, which also runs afoul of additional Constitutional guarantees and harms the health of women, children and families.

A. Allowing a judicially created exception to the legislated physician-patient privilege under Ohio R.C. 2317.02(B) for pregnant women undermines public health by discouraging women from being candid with their physicians and from seeking health care when they are or might be pregnant.

Ohio law has no precedent for judicially created restrictions of the physician-patient privilege for a select group of people. Creating a new women-only exception to Ohio's well

[3] Medical ethics principles also forbid threatening patients with court action. *See, e.g.*, Am. Coll. Obstetricians & Gynecologists, Comm. on Ethics, *Committee Opinion 664: Refusal of Medically Recommended Treatment During Pregnancy* (June 2016) ("threats to involve courts or child protective services" are never acceptable).

defined physician-patient privilege harms women and their families and will have serious consequences to public health and welfare. In the context of this case, the Twelfth District concluded that respecting the confidentiality of a pregnant woman's communications with her physicians would "not further the purposes of the physician-patient privilege." *Richardson* at ¶ 35. There is overwhelming consensus among medical and public health professional bodies, recognized by the Supreme Court, that state action that undermines confidentiality and trust between pregnant patients and their physicians will deter pregnant women from speaking openly with health care providers and deter many from seeking health care altogether.

The American College of Obstetricians and Gynecologists ("ACOG") Committee on Ethics, says that "[s]eeking obstetric-gynecologic care should not expose a woman to criminal or civil penalties, such as incarceration, involuntary commitment, loss of custody of her children, or loss of housing." ACOG, Comm. on Ethics, Comm. Op. No. 473, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* 117 Obstet. Gynec. 200 (2011, *reaffirmed* 2014), *available at* https://bit.ly/2rclLk2 (accessed Nov 30, 2018). *See also, Ferguson v. City of Charleston*, 532 U.S. 67, 84, 121 S.Ct. 1281, at 1292, n 23 (2001) (noting that *Amici* reported "a near consensus in the medical community" that government programs to identify crimes by pregnant patients "harm, rather than advance, the cause of prenatal health" "by discouraging women who use drugs from seeking prenatal care.") Health professionals and courts have long recognized that confidentiality is a necessary precondition of every relationship between a patient and a health practitioner. *See Jaffee v. Redmond*, 518 U.S. 1, 10 (1996); *see also* Robert A. Wade, *Note: The Ohio Physician-Patient Privilege: Modified, Revised, and Defined*, 49 Ohio St. L.J. 1147, 1148 (1989).

Here, the State demonstrates a serious misunderstanding of the consequences of creating a

new gender-specific exception to privilege for women. Such prosecutions undermine the public health and unnecessarily compound the grief of women who have experienced a loss. If pregnant women fear that sharing important information with medical professionals, such as taking medication or other drugs, or even falling down the stairs is not confidential and could lead to prosecution, they do not share the information and are deterred from seeking all health care.

Medical privacy is the cornerstone of the physician-patient privilege and for good reason. The general interest is in all people, including pregnant women, receiving optimal health care based on a trusting relationship that encourages patients to seek help and share sensitive, sometimes embarrassing information, with providers. *See State Med. Bd of Ohio v. Miller*, 44 Ohio St.3d 136, 139-140, 541 N.E.2d 602 (1989) (purpose of the privilege is to "encourage the patient to be completely candid with her physician, thus enabling more complete treatment.") Health care relating to pregnancy is especially sensitive since it involves issues subject to strong public opinion and often harsh judgment about sex, contraception and the like, and because prenatal care requires women to allow repeated examination of the most intimate parts of their bodies. Judicially expanding the exceptions to physician-patient privilege for pregnant women undermines this vital trust, and there is no countervailing public interest to support it.

Pregnancy occurs inside a woman's body and it is believed everything a pregnant woman does or does not do might have an impact on pregnancy outcome. As a result, this ruling would leave every pregnant and potentially pregnant woman to worry that everything she says to her physician could be used against her in a court of law. It is also true that regardless of what women do, they cannot ultimately control pregnancy outcomes. Many pregnancies result in miscarriage or stillbirth, and the cause of most are unknown. *See,* Ruth C. Fretts, *Etiology and Prevention of Stillbirth*, 193 Am. J. of Obstet. and Gynec. 1923, 1925 (2005). For this reason, it is incorrect to

state there is a societal interest in investigating a stillbirth as a potential crime, as the court below asserted. While it is true that law enforcement efforts would undoubtedly catch more criminals without physician-patient privilege, Ohio's Legislature has weighed the public interests and has a strong privilege statute because medical confidentiality promotes the public health and welfare. R.C. § 2317.02.

B. Creating an exception to physician-patient privilege for the communications of pregnant women raises substantial questions regarding well-established principles of Constitutional law.

In addition to the public health implications of the Twelfth District's ruling, Constitutional rights are also implicated. S.Ct.Prac.R. 5.02(1). *Amici* urge the Court to accept jurisdiction for the reasons set forth in Appellant's brief, and because this ruling also undermines women's Constitutional rights to medical decision-making, privacy, and due process.

The ruling below interferes with pregnant patients' Constitutional rights to medical privacy and bodily integrity. The Supreme Court has long held that people have a right to bodily integrity. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 110 S.Ct. 2841 (1990).[4] Interpreting Ohio's reporting statutes to require physicians to report pregnant women's statements or behaviors to state authorities gives health care providers coercive power over their patients who may fear that their informed decisions their physician may disagree with will result in a report.

Further, the Twelfth District ruling implicates women's right to medical privacy by opening their private communications with trusted medical providers to government intervention. The Twelfth District panel held that reactions a woman has toward a pregnancy may be

[4] *See also, Union Pac. Ry v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000 (1891) ("[N]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of [their] own person, free from all restraint or interference of others.")

"reconsidered . . . in light of reporting requirements under R.C. 2151.421" and may be retroactively treated as suspicious if a stillbirth occurs. *Richardson* at ¶ 35. Under such a rule, any woman who expresses ambivalence about a pregnancy[5] might find herself stripped of confidentiality if her physician deems her reaction inappropriate. Or a physician whose patient experiences a stillbirth may be compelled to testify as to her emotional state and whether it might suggest some culpability in the stillbirth.

STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the Case and Facts in Appellant Richardson's Memorandum in Support of Jurisdiction.

ARGUMENT IN SUPPORT OF SECOND PROPOSITION OF LAW

Second Proposition of Law: R.C. 2151.421 and R.C. 2317.02(B) are not subject to judicially crafted revisions.

Ohio Revised Code Section 2317.02 codifies the physician-patient privilege, and states: "The following persons shall not testify in certain respects . . . (B)(1) A physician, advanced practice registered nurse, or dentist concerning a communication made to the physician, advanced practice registered nurse, or dentist by a patient in that relation." There are exceptions to the privilege, including a duty imposed on health care professionals to report suspected child abuse. R.C. § 2151.421. The Twelfth District judicially expanded and interpreted these two statutes in a manner that denies Ms. Richardson the protections of the privilege, allowing disclosure of

[5] Ambivalence about pregnancy is a fairly common phenomenon, particularly where the pregnancy is unplanned, and does not necessarily mean that the woman does not want to or will not continue the pregnancy to term. K. Holmgren & N. Uddenberg, *Ambivalence During Early Pregnancy Among Expectant Mothers*, 36 *Gynecologic & Obstetric Investigation* 15 (1993) (recommending that "all pregnant women should be offered the opportunity to talk about their situation, their thoughts and feelings to a neutral listener" in order to make "a well-considered decision about the future of her pregnancy").

statements made while Ms. Richardson was pregnant and after no child was born, reasoning that sustaining the privilege would serve no purpose. *Richardson* at ¶ 35. As this Court has explained:

> A review of the physician-patient privilege . . . indicates that the statute has a specific purpose. It is designed to create an atmosphere of confidentiality, which theoretically will encourage the patient to be completely candid with his or her physician, thus enabling more complete treatment. . . [t]he purpose of this privilege is to encourage patients to make a full disclosure of their symptoms and conditions to their physicians without fear that such matters will later become public . . . Under the physician/patient privilege, a treating physician is prohibited from disclosing matters disclosed by the patient to the physician during consultations regarding treatment or diagnosis of the patient. The rationale of this privilege is to promote health by encouraging a patient to fully and freely disclose all relevant information which may assist the physician in treating the patient. If the patient feared that such information could be revealed by the treating doctor, the patient might refrain from, or be inhibited from, disclosing relevant information. The privilege is designed to provide an assurance of confidentiality.

Ward v. Summa Health System, 128 Ohio St.3d 212, 217, 2010-Ohio-6275, 943 N.E.2d 514 at ¶¶ 24–25 (internal citations and quotations omitted). Contrary to the Twelfth District's opinion, sustaining Ms. Richardson's privilege and barring the doctors' testimony furthers the purposes described in *Ward*. The ruling has significant implications for pregnant women's Constitutional rights, and necessitates this Court's review.

Dispensing with legal precedent and judicially expanding the privilege exceptions will harm the health and welfare of pregnant women, mothers, and children in Ohio.

Amici agree with Appellant that the question of whether women should be criminally liable for a stillbirth has already been answered in the negative by the legislature and Ohio courts. It is well recognized that the criminal statutes of the Revised Code are to be "strictly construed against the state and liberally construed in favor of the accused." R.C. § 2901.04.

Every leading medical organization, governmental body, and nearly every court to consider the question has concluded that responding to issues of pregnancy and pregnancy loss through the criminal legal system is likely to harm rather than help women and children. Promoting honest communications between a patient and a physician is the primary purpose of the privilege. *Ward*

at ¶ 24–25. Creating an exception to privilege for pregnant women will only deter them from receiving health care.

When medical settings become the setting for criminal investigation and health care providers become informants for law enforcement, individuals may decide that avoiding a criminal investigation takes precedence over health care. As the Law and Policy Committee of the Association of Maternal and Child Health Programs wrote:

> The threat of criminal prosecution prevents many women from seeking prenatal care and early intervention for their alcohol or drug dependence, undermines the relationship between health and social service workers and their clients, and dissuades women from providing accurate and essential information to health care providers. The consequence is increased risk to the health and development of their children and themselves.

Ass'n of Maternal & Child Health Programs, Law & Pol'y Comm., *Statement Submitted to the Senate Finance Committee Concerning Victims of Drug Abuse: Resolution on Prosecution* (1990).

Creating an exception to physician patient confidentiality for pregnant women to further law enforcement purposes sends a message to the greater community that health facilities are not a place for confidential care. Rather, the message is that anything you say or do can and will be used against you in a court of law. This is a dangerous message, especially in a state that is working to reduce its maternal and infant mortality rate. *See,* Ohio Collaborative to Prevent Infant Mortality, Ohio Infant Mortality Reduction Plan 2015–2020 (Aug. 28, 2018), *available at* https://bit.ly/2Pdj0su (accessed Nov. 28, 2018).

Rulings that strip away individuals' medical privacy rights instill fear in the community of being arrested because of statements made while seeking health care. Women who are prosecuted will not return to physicians for a future pregnancy. Everyone in these communities is likely to remain outside of a system viewed as untrustworthy. Requiring health care providers

to act as law enforcement compels them to collect evidence from, report, and testify against their own patients. Thus, deterrence – a core precept of the criminal justice system – is turned on its head: the behavior that is deterred is not the alleged crime, but rather, the act of seeking medical care during or after pregnancy. By creating an exception to the physician-patient privilege and admitting the statements made between a pregnant patient and physician, the Court's ruling sets a precedent that will have implications for all women of childbearing age who seek health care, corroding the formation of trust fundamental to any physician-patient relationship.

Health care for women of childbearing age is vital to maternal and child health.

Prenatal care is an important factor in preventing neonatal death. Lack of prenatal care is associated with a 1.4–1.5-fold increase in risk of neonatal death. Anthony M. Vintzileos et al., *The Impact of Prenatal Care on Neonatal Deaths in the Presence and Absence of Antenatal High-Risk Conditions*, 186 Am. J. Obstet. & Gynec. 1011, 1013–14 (2002). Ohio has placed a high priority on addressing maternal and infant health outcomes. *See* Ohio Infant Mortality Reduction Plan 2015–2020, *supra*.

Deterring women from seeking prenatal care by breaching the patient-physician relationship is especially troubling because all health care before and during pregnancy has been associated with improved maternal and fetal health outcomes. Pregnant women who are deterred from receiving health care will lose the opportunity for medical interventions needed to address significant risk factors, such as obesity, nutrition, tobacco and alcohol use, that are associated with fetal development. *See, e.g.*, Tronick & Beeghly, *Prenatal Cocaine Exposure, Child-Development, and the Compromising Effects of Cumulative Risk*, 26 Clin. Perinatology 151 (1999).

Applying the physician-patient privilege to Ms. Richardson's statements does not undermine the interest of the general public in detecting crimes and protecting society.

The Twelfth District concluded that disclosure of Ms. Richardson's confidential statements

to her physicians was required in order to protect the interest of the public in detecting crimes. *Richardson, supra,* at ¶ 41. The statements and disclosures at issue, however, are not germane to any crime. The Twelfth District's finding that disclosure was necessary to investigate Ms. Richardson's reported stillbirth as a potential crime is unsupported, and warrants this Court's further review. There was no "countervailing public interest" that requires Ms. Richardson's physician-patient privilege to be breached. *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 402, 715 N.E.2d 518; *see also Hageman v. Sw. Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343, 893 N.E.2d 153.

According to the Ohio Department of Health's Stillbirth Fact Sheet, "Stillbirth is one of the most common adverse pregnancy outcomes, complicating 1 in 160 deliveries in the United States." Ohio Dep't of Health, Stillbirth Fact Sheet (Aug. 29, 2018), *available at* https://bit.ly/2BIsubN (accessed Nov. 30, 2018). Between 2011 and 2013, there were 1,833 fetal deaths in Ohio, and the fetal mortality rate was higher than the national average. *Id.* at 1. These statistics belie the notion that the birth of a living child is a guaranteed outcome of a pregnancy, or that the cause of a stillbirth can always be determined, so as to necessitate such an intrusion into pregnant women's medical privacy.

This ruling fosters the dangerous myth that child health is solely or primarily the result of what any individual pregnant woman does. The American Public Health Association has found that "social characteristics of a community also hold important implications for pregnancy outcomes . . . the physical and social environments within which individuals function need to be safe, clean, affordable, socially supportive and adequately resourced in order to maximize every woman's potential to deliver a full-term and healthy infant." Am. Pub. Health Ass'n, *Reducing Racial/Ethnic and Socioeconomic Disparities in Preterm and Low Birthweight Births* (Nov. 8,

2006) available at https://bit.ly/2FS8GH7 (accessed Nov. 28, 2018); *see also* Simone C. Gray, et al., *Assessing the Impact of Race, Social Factors and Air Pollution on Birth Outcomes: A Population-Based Study*, 13 Envtl. Health (2014).

Adding potential criminal liability to a stillbirth unnecessarily compounds the grief that women already experience.

The justification for the Twelfth District's ruling will apply to all Ohio women. Whatever the cause of a pregnancy loss, many women grieve the loss and may even blame themselves for it. Adding the threat of disclosure of confidences for the purpose of invasive criminal investigations and arrest to pregnancy losses will compound that suffering. The emotional experience is unique to the individual, but research shows that women may suffer psychological harm, extreme feelings of grief, loss, and trauma. *See,* Joanne Cacciatore & Suzanne Bushfield, *Stillbirth: A Sociopolitical Issue,* 23 J. Women & Soc. Work 378, 378 (2008). The use of privileged communications for the purposes of ascribing criminal liability in cases where women have experienced pregnancy loss is cruel, and necessitates this Court's review.

Judicially creating a special exception to the privilege only for pregnant patients deprives women of their right to make medical decisions.

Every individual has a right, under the common law and the Constitution, to decide what will happen with his or her own body. *See Cruzan, supra*. The Twelfth District's ruling, however, improperly creates an exception to this fundamental right by permitting pregnant women's health care providers to report to authorities anything the providers believe places a fetus at risk of harm, thus giving providers coercive power over their pregnant patients. Permitting physicians to report such risks to child protective authorities or law enforcement denies pregnant women the right to weigh risks and benefits of treatment for themselves, depriving them of their Constitutional right to medical decision-making.

As the Supreme Court has recognized, the Fourteenth Amendment forbids the government from interfering with an individual's control over their own person except in a limited set of compelling justifications. *See, e.g., Cruzan,* 497 U.S. at 289. This Court has recognized the right to be free from unwanted medical invasion is rooted in the "cherished liberties" of personal security, bodily integrity, and autonomy, which "were not created by statute or case law," but rather "are rights inherent in every individual. *Steele v. Hamilton Cty. Cmty. Mental Health Bd.*, 90 Ohio St.3d 176, 180-81, 736 N.E.2d 10 (2000).

There is no pregnancy exception to the right to make decisions about medical care. This right is possessed equally by women throughout pregnancy even when the decision may cause the death of the fetus. Other courts have acknowledged that even though it may consider an individual's health care decisions "unwise, foolish, or ridiculous," it may not permit interference with those decisions in the absence of an "overriding danger to society." *In re Baby Boy Doe*, 632 N.E.2d 326, 333 (Ill. App. 1994). *See also In re A.C.*, 573 A.2d 1235, 1237 (D.C. 1990) (overturning court order requiring cesarean surgery, holding women retain medical decision making rights throughout pregnancy).

The ruling at issue here however, opens the door to physicians' coercion in the form of telling pregnant patients that if they do not heed medical advice they will be reported as posing risks to their pregnancies. The Twelfth District's creation of a pregnancy exception to medical confidentiality logically opens the door to reporting any number of circumstances or decisions that health care providers suspect could lead to a "threat of suffering any physical or mental wound, injury, [or] disability." RC. 2151.421.[6]

[6] For example: having gestational diabetes, continuing medications for conditions such as seizure disorders despite risks posed to a fetus, etc.

Creating a pregnancy exception to the physician-patient privilege singles pregnant women out for improper surveillance of their statements to health care providers regarding pregnancy, improperly discriminating on the basis of gender.

Among the communications at issue in this case are Ms. Richardson's oral statements during her April 26, 2017 medical appointment with Dr. William Andrew. Requiring reporting to government authorities based on the appropriateness of a woman's response to discovering that she is pregnant invites arbitrary judgments based on how women are supposed to feel about pregnancy. But the U.S. Supreme Court has long held that women's rights may not be burdened based on stereotypes about their proper role as "mothers or mothers-to-be," *see, e.g.*, *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 729 (2003), and the state must provide an "exceedingly persuasive justification" for an interpretation of the law that would discriminate on the basis of gender. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996). The appeals panel here identified an interest in "detecting crimes in order to protect society" as justification for revoking Appellant's right to keep her communications privileged, but the Supreme Court has held that a "general interest in crime control" is insufficient to strip pregnant women of fundamental privacy rights. *See Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001) ("The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.")

The judicial creation of a pregnancy exception to privilege, requiring doctors to report pregnant patients, violates due process by creating an unanticipated and novel result.

The Fifth and Fourteenth Amendments of the Constitution afford criminal defendants a right to due process including "core due process concepts" such as "notice, foreseeability, and, in particular, the right to fair warning." *See, e.g.*, *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001). This includes a right to be free from novel and unexpected interpretations of law. *See Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964).

The Ohio Legislature properly deferred to these concerns in the statute regarding the interpretation of laws governing the Juvenile Courts, which are to be liberally interpreted to effectuate the purposes of child protection, *except* where the criminal prosecution of adults is involved. R.C. 2151.01. The Twelfth District's reinterpretation of the definitions of "child" and "person" in R.C. 2151.421 and R.C. 2901.01 (B)(2), for the purpose of revoking a statutory privilege to facilitate criminal prosecutions, is constitutionally impermissible and would lead to a novel and unanticipated use of the law. This is apparent because Ohio law forbids charging women with crimes in relation to their own pregnancies. R.C. 2901.01 (B)(2) provides that "in no case" should the law be construed to punish a woman for acts or omissions that might have an effect on a fetus they are carrying. *State v. Clemons*, 996 N.E.2d 507, 2013-Ohio-3415 (4th Dist.) ("Specifically, R.C. 2901.01 (B)(2)(b)(i)-(v) essentially protects conduct by a woman during her pregnancy that might or does result in the injury, illness, impairment or death of her child, either before or after its birth. Thus, . . . a woman cannot be criminally prosecuted for her conduct during pregnancy that results in harm to her child.") *See also State v. Gray*, 62 Ohio St.3d 514, 584 N.E.2d 710 (1992).

CONCLUSION

For the aforementioned reasons, *Amici* respectfully request this Court accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail and electronic mail to counsel for Appellant Neal D. Schuett, Charles H. Rittgers, and Charles M. Rittgers, Rittgers & Rittgers, 12 East Warren Street, Lebanon, Ohio 45036, neal@rittgers.com, and counsel for Appellee David P. Fornshell and Kirsten A. Brandt, Warren County Prosecutor's Office, 520 Justice Drive, Lebanon, Ohio 45036, david.fornshell@co.warren.oh.us, on December 6, 2018.

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