

IN THE SUPREME COURT OF IOWA

**Supreme Court No. 02-1191
Buena Vista County No. – None Assigned**

**PLANNED PARENTHOOD OF
GREATER IOWA, INC.,**

Plaintiff-Appellant

vs.

**THE IOWA DISTRICT COURT in and
for BUENA VISTA COUNTY,**

Defendant-Appellee

**CERTIORARI TO THE DISTRICT COURT
FOR BUENA VISTA COUNTY
THE HONORABLE FRANK B. NELSON**

**BRIEF OF AMICI AMERICAN COLLEGE OF OBSTETRICIANS AND
GYNECOLOGISTS, AMERICAN NURSES ASSOCIATION, FAMILY
PLANNING COUNCIL OF IOWA, IOWA COALITION AGAINST SEXUAL
ASSAULT, IOWA NURSES' ASSOCIATION, IOWA PSYCHOLOGICAL
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September 30, 2002

CERTIFICATE OF FILING

The undersigned certifies that on the 30th day of September, 2002, I will file the following Brief of Amici American College of Obstetricians and Gynecologists, American Nurses Association, Family Planning Council of Iowa, Iowa Coalition Against Sexual Assault, Iowa Nurses Association, Iowa Psychological Association, National Family Planning and Reproductive Health Association, and Physicians for Reproductive Choice and Health in support of Plaintiff-Appellant, Planned Parenthood of Greater Iowa, Inc. with the Iowa Supreme Court by hand-delivering eighteen (18) copies to the Clerk of the Iowa Supreme Court, Capitol Building, Des Moines, Iowa 50319, in accordance with the Iowa Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 30, 2002, the following Brief of Amici American College of Obstetricians and Gynecologists, American Nurses Association, Family Planning Council of Iowa, Iowa Coalition Against Sexual Assault, Iowa Nurses Association, Iowa Psychological Association, National Family Planning and Reproductive Health Association, and Physicians for Reproductive Choice and Health in support of Plaintiff-Appellant, Planned Parenthood of Greater Iowa, Inc., was served by mailing one copy by United States mail to all parties at their respective addresses as shown below, in accordance with the Iowa Rules of Appellate Procedure:

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT'S DECISION TO APPROVE THE COUNTY ATTORNEY'S SUBPOENA VIOLATES PPGI'S PATIENTS' CONSTITUTIONAL RIGHT TO PRIVACY.

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II. WHETHER SECTION 622.10 OF THE IOWA CODE PROHIBITS DISCLOSURE OF PPGI'S PATIENTS' MEDICAL RECORDS WITHOUT THE PATIENTS' CONSENT.

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INTEREST OF AMICI

Amici represent a broad range of health care providers and organizations. They file this brief because they have a strong interest in seeing that all Iowans have access to safe and effective health care and believe that protecting the confidentiality of medical records is vital to achieving that goal.

Amicus AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (“ACOG”), a nonprofit educational and professional organization founded in 1951, is the leading professional association of physicians who specialize in the health care of women. Its more than 44,000 members, including 277 in Iowa, represent approximately 94% of all board-certified obstetricians and gynecologists practicing in the United States. ACOG supports women’s confidential access to reproductive health services, including pregnancy testing, and supports strong legal protection for records that contain private medical information. ACOG is concerned that this subpoena will jeopardize the health of Iowa women by compromising their right to confidential care.

Amicus AMERICAN NURSES ASSOCIATION (“ANA”) has represented the interests of America’s registered nurses for over a century. The ANA is comprised of 54 constituent member associations, including one from every state of the United States, the District of Columbia, Guam, Virgin Islands and federal military nurses. The ANA also works closely with 13 specialty nursing organizations that have organizational affiliate status with the ANA and whose membership represents several hundreds of thousands of registered nurses. The ANA represents the interests of all 2.7 million nurses in the United States. In the course of its representation of registered nurses, the ANA establishes professional standards of practice and promulgates the *Code of Ethics for*

Nurses, which guides the work of registered nurses throughout the profession. The ANA joins this case because one of its primary goals is promoting the improvement of health standards and the availability of health care services for all people. Protecting the confidentiality of medical records is a key part of encouraging people to seek medical assistance.

Amicus FAMILY PLANNING COUNCIL OF IOWA (“FPCI”) is a Des Moines-based nonprofit organization focusing on the reproductive health care field. FPCI works with a variety of organizations and individuals to ensure access to reproductive health care in Iowa. FPCI’s mission is to provide quality reproductive health care and family planning services to all people in Iowa who desire such services. FPCI’s programs include providing family planning services, educational programs, and health care provider training. FPCI is concerned that the District Court’s decision will discourage families in Iowa from seeking out prenatal advice and care and would inhibit Iowans from seeking screening and treatment for sexually transmitted disease and other medical conditions out of fear that their records may be disclosed.

Amicus IOWA COALITION AGAINST SEXUAL ASSAULT (“IowaCASA”) is a Des Moines-based nonprofit membership organization serving thirty-two rape crisis centers throughout the State of Iowa. IowaCASA’s member centers provide confidential crisis counseling to victims of sexual assault. IowaCASA victim counselors also assist and advocate on behalf of victims as they navigate the medical, investigative, and legal systems in the aftermath of an assault. IowaCASA member centers serve many women who also require reproductive health services. IowaCASA joins in this brief out of a strong belief that such services must remain confidential both to its own clients and to all citizens of Iowa.

Amicus IOWA NURSES' ASSOCIATION ("INA") was established in 1904 and is a constituent member of the ANA. The INA represents the interests of the more than 38,000 registered nurses in the State of Iowa. Its members include registered nurses who have worked at Planned Parenthood in Iowa as women's health nurse practitioners. All of the registered nurses in Iowa are potentially affected by the decision of this Court, since all of them handle confidential medical records.

Amicus IOWA PSYCHOLOGICAL ASSOCIATION ("IPA") is a nonprofit membership organization made up of Iowa psychologists. The purpose of the IPA is to advance the science and practice of psychology and promote human welfare. IPA joins this case because it is concerned that the County Attorney's subpoena threatens the confidentiality of its members' interactions with their patients — a cornerstone of the psychology profession.

Amicus NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION ("NFPRHA") is a Washington, D.C.-based nonprofit membership organization committed to assuring access to voluntary and comprehensive family planning and reproductive health care services. NFPRHA represents a substantial number of individuals and organizations involved in the field of domestic family planning, including private nonprofit clinics; state, county and local health departments; family planning councils and hospital-based clinics; and Planned Parenthood Federation of America Affiliates. NFPRHA joins this brief because it is concerned that the District Court's decision will harm patients served by NFPRHA's members in Iowa.

Amicus PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH® ("PRCH") is a national nonprofit organization with more than 5,000 members, more than 2,800 of whom are physicians, is committed to ensuring that all people have the

knowledge, access to quality services, and freedom of choice to make their own reproductive health decisions. The mission of PRCH is to enable concerned physicians to take a more active and visible role in support of universal reproductive health. PRCH is concerned that the District Court's decision will seriously undermine the delivery of health care. People who expect privacy to surround their most intimate decisions will be less likely to seek out necessary medical services and treatment if they believe their confidential personal information will be compromised by those outside the doctor-patient relationship. As a physician-led organization, PRCH knows that the confidentiality of this critical relationship encourages patients to provide much-needed information on sensitive subjects effecting their health and well being. PRCH is deeply concerned that this breach of confidence could irrevocably damage the sacrosanct doctor-patient relationship.

STATEMENT OF THE CASE

Amici agree with the Statement of the Case statement set forth in the Plaintiff-Appellant's Brief.

STATEMENT OF FACTS

On May 30, 2002, the remains of an infant were found at the Harold Rowley Recycling Center in Storm Lake, Iowa. The State Medical Examiner determined that the baby was male and had been born 24 to 48 hours before the body was found. The police began an immediate investigation into the baby's death, and on May 31, 2002 the County Attorney for Buena Vista County ("County Attorney") filed broad applications with the District Court of Buena Vista County ("District Court") seeking information from four health care providers in the Storm Lake area, including the Plaintiff-Appellant, Planned

Parenthood of Greater Iowa, Inc. (“PPGI”). The County Attorney’s application to PPGI sought information on “any and all records of prenatal patients or clients, expectant mothers, or mothers having given birth” covering the period February 1 to May 31 of this year.¹

In response, PPGI stated in a letter to the County Attorney that it could not comply with the subpoena because the request violated Iowa Code § 622.10 (2002), which prohibits medical professionals from releasing any confidential information without the patient’s consent. Approximately two weeks later, the County Attorney filed another application with the Defendant Court. Compared with his earlier request, the County Attorney’s new subpoena was narrower in the scope of material sought but covered a larger time period; the application demanded that PPGI turn over “[r]ecords, documents, or files relating to or otherwise containing information regarding persons who requested pregnancy tests through [PPGI] on or between the dates of August 15, 2001, and May 30, 2002”² PPGI moved to quash the new subpoena in the Defendant Court on June 18, 2002. The Defendant Court rejected PPGI’s motion,³ but made little effort to explain its reason for doing so other than to cite this Court’s decision in Chidester v. Needles.⁴

¹ See Application for Approval to Issue Prosecuting Attorney’s Subpoena Duces Tecum — No Action Filed, In the Matter of the Issuance of a Prosecuting Attorney’s Subpoena, Iowa District Court for Buena Vista County (May 31, 2002).

² See Application for Approval to Issue Prosecuting Attorney’s Subpoena Duces Tecum — No Action Filed, In the Matter of the Issuance of a Prosecuting Attorney’s Subpoena, Iowa District Court for Buena Vista County (June 17, 2002).

³ See Ruling on Motion to Quash, In the Matter of the Issuance of a Prosecuting Attorney’s Subpoena, Iowa District Court for Buena Vista County (June 24, 2002).

⁴ 353 N.W.2d 849 (Iowa 1984).

PPGI then asked the Defendant Court to reconsider its ruling, arguing that the Defendant Court's reliance on Chidester was misplaced and that the subpoena violated PPGI's patients' constitutionally protected right to confidentiality.⁵ In support of its motion for reconsideration, PPGI presented additional evidence to the Defendant Court, including an affidavit by Penelope A. Dickey, PPGI's Vice President of Health Services; the confidentiality agreement all PPGI employees must sign; and information concerning the pregnancy test used by PPGI.⁶ This evidence demonstrates that PPGI is a health care provider and that the pregnancy tests at issue are medical records. Nonetheless, the Defendant Court denied PPGI's request and ordered PPGI to comply with the subpoena by August 17, 2002.⁷ The Defendant Court also limited the scope of the subpoena to the names and addresses of the women who received positive pregnancy test results at the Plaintiff's clinic.⁸ Faced with the possibility of having to reveal the confidential medical records of numerous women, and with no other legal recourse, PPGI filed its Petition for Certiorari and Motion to Stay with this Court on August 2, 2002.⁹

⁵ See Motion to Reconsider, Amend and Enlarge the Ruling of June 24, 2002, In the Matter of the Issuance of a Prosecuting Attorney's Subpoena, Iowa District Court for Buena Vista County (July 3, 2002) ("Motion to Reconsider").

⁶ See Affidavit of Penelope A. Dickey (July 3, 2002) ("Dickey Aff."), attached as Exh. A to Motion to Reconsider.

⁷ See Ruling on Pending Motions, In the Matter of the Issuance of a Prosecuting Attorney's Subpoena, Iowa District Court for Buena Vista County (July 15, 2002) at 2 ("Ruling on Pending Motions").

⁸ Id.

⁹ See Petition For Writ of Certiorari, Application for Discretionary Review and Application for Interlocutory Appeal, Planned Parenthood of Greater Iowa, Inc. v. The Iowa District Court for Buena Vista County (Aug. 2, 2002).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici join this case because they have a strong interest in seeing that all Iowans have access to safe and effective health care, and the Defendant Court's decision to enforce the County Attorney's subpoena could frustrate *amici*'s efforts to achieve that goal. Confidentiality is a cornerstone of delivering effective health care services, especially in the context of reproductive care, and forcing PPGI to disclose its patients' confidential medical information would violate both Iowa law and the patients' constitutionally protected right to privacy. Upholding the Defendant Court's decision could also cause long-term harm to the health care system in Iowa by setting a dangerous precedent on the ease with which the government may overcome that privacy right in the pursuit of overbroad investigatory objectives.

The United States Constitution prohibits government investigators from obtaining confidential medical records without first demonstrating either that the patients have given permission or that the state's need for the information is "compelling" and clearly outweighs the patients' right to confidentiality. In other words, if the patient does not consent to the release of her personal information, the government must show that the information is absolutely critical to its investigation.

The County Attorney, however, has failed to make that showing here. In brief, the release of the information sought would violate the confidentiality interest of numerous innocent women without materially advancing the investigation at issue. There is no evidence that the mother sought care at PPGI's clinic or from any other health care provider. Among other considerations, women who abandon or kill their infants are unlikely to have sought out prenatal care from institutional health care providers. Equally important, the County Attorney has not adequately explained how the police could use

the information they seek. Even in the unlikely event that the mother did have a pregnancy test at PPGI's clinic and that her name is on the list sought by the County Attorney, the police have no way of then identifying a suspect without demanding that each woman on the list show that she (a) is still pregnant, (b) has the child, (c) had an abortion, (d) had a miscarriage, or (e) gave the child up for adoption. The specter of the police demanding such information from numerous women — and forcing them to disclose (for example) that they had a miscarriage as their “alibi” in this open-ended investigation — is deeply disturbing.

The District Court's failure to give adequate weight to the privacy issues in this matter is contrary not only to law, but also to sound public policy. Undermining privacy in the delivery of health care ultimately threatens our public health care system. Americans want and expect privacy in their medical care, and they are less likely to seek out diagnostic services, counseling, and treatment if they believe that their medical history will be shared with outsiders. The need for confidentiality is especially acute in the context of reproductive health care. It is in everyone's interest to encourage expectant mothers to receive prenatal health care, and the law thus requires particularly searching scrutiny of any government action that compromises their incentives to seek it out.

Finally, as we argue in Section II, below, the County Attorney's subpoena is contrary to Iowa law governing the physician-patient privilege. Section 622.10 of the Iowa Code prohibits medical professionals from disclosing their patients' confidential medical information without their consent. This Court should reconsider its decision, in Chidester v. Needles, 353 N.W.2d 849 (Iowa 1984), to exclude documentary evidence from the scope of that privilege. As Justice Carter has explained, the Court's distinction

between testimonial and documentary evidence makes no policy sense and defeats the very purposes of the statute. State v. Sanders, 623 N.W.2d 858, 862 (Iowa 2001) (Carter, J., concurring). Justice Carter argued that Chidester was “wrongly decided” because “[t]he privilege is designed to protect confidential communications from disclosure, and that purpose is frustrated nearly as much by compelled disclosure for investigatory purposes as by compelled disclosure for use as trial evidence.” Id. Moreover, on its face, the language of section 622.10 makes clear that confidential physician-patient materials are protected to the same extent as confidential attorney-client materials, and there is no doubt that the latter materials would be subject to protection in analogous circumstances.

There is no question that the death of the infant found in Storm Lake was tragic and that the police need to find the child’s mother. But there is also no reason to believe that the subpoena at issue in this case would help in any meaningful way to discover the identity of the mother. Instead, the subpoena threatens the privacy of a number of innocent individuals who have sought the most personal of medical services in the expectation that they would be rendered in confidence. The use of state power to coerce the betrayal of this confidence is an abuse of the subpoena power, is contrary to law and public policy, and is not reasonably calculated to bring a resolution to the criminal investigation. For all of these reasons, *amici* strongly oppose the Defendant Court’s decision and respectfully request that this Court quash the County Attorney’s subpoena.¹⁰

¹⁰ Newspapers throughout the United States have also expressed their concern with the Defendant Court’s decision. See Editorial, Medical Privacy in Jeopardy, Des Moines Register, July 20, 2002 (“Iowa law must be clear that the individual’s right to privacy cannot be sacrificed to the state’s interest in solving a crime when its search for clues amounts to looking under every bed.”); Editorial, Guard Privacy of Clinic Clients, Telegraph Herald (Dubuque), July 10, 2002 (“Regardless of one’s opinion on abortion, this fishing expedition by investigators is an outrageous breach of clinic-patient confidentiality. This effort should send a chill through everyone who visits a family physician, seeks counseling or medical attention.”); Editorial, Investigative Excesses in Iowa, The N.Y. Times, Aug. 29, 2002 (“[O]n balance the clinic is right to oppose such overly broad and intrusive efforts by investigators. . . . Prosecutors have an obligation to develop a

ARGUMENT

I. THE DISTRICT COURT'S DECISION TO APPROVE THE COUNTY ATTORNEY'S SUBPOENA VIOLATES PPGI'S PATIENTS' CONSTITUTIONAL RIGHT TO PRIVACY.

Standard of Review. *Amici* agree with the Appellant's statement of the standard of review in this case.

Preservation. *Amici* agree that Appellant has preserved error.

Both this Court and the United States Supreme Court have recognized that the Constitution protects the right of patients to confidentiality of their sensitive medical records. While this right is not absolute, the state must demonstrate that its interest in obtaining such records clearly outweighs a patient's need to maintain his or her confidentiality. In other words, the state must show that the benefits it receives from breaching the patient's privacy outweigh the harm that the breach will cause the patient.

The County Attorney did not make such a showing here, and the Defendant Court made little effort to balance the interests involved. *Amici* demonstrate below that patients' interests in this case clearly outweigh the state's, and so the Defendant Court's decision to compel PPGI to turn over the names of all of the women who received positive pregnancy tests from its clinic from August 2001 to May of 2002 violates PPGI's patients' constitutionally protected right to privacy.

more specific set of targets rather than casting such a wide net."); Editorial, A Question of Medical Privacy, The Washington Post, Aug. 11, 2002 ("It is certainly wrong to permit sweeping law enforcement access to this sort of sensitive information without a reasonable balancing of important privacy interests and an insistence that any request be as narrow as possible. That has not happened here.").

A. This Court Has Recognized That the Constitution Protects Patients' Right to Privacy in Their Medical Records.

It is well established under both Iowa law and federal law that the 14th Amendment protects an individual's right to confidentiality with respect to highly personal information. In Whalen v. Roe, 429 U.S. 589, 599-600 (1977), the Supreme Court identified two types of constitutionally protected privacy interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Id. This Court has also explicitly recognized an individual's constitutional right to privacy. See McMaster v. Iowa Bd. of Psychology Exam'rs, 509 N.W.2d 754, 758 (Iowa 1993); Chidester, 353 N.W.2d at 853-54; Head v. Colloton, 331 N.W.2d 870, 876 (Iowa 1983).¹¹ In McMaster, this Court followed Whalen in ruling that "an individual has an interest in avoiding disclosure of personal matters," and that this constitutionally protected interest extends to patient records of mental health professionals. McMaster, 509 N.W.2d at 758.

The Court went on to hold that, "[i]n determining whether the privilege attaches, we apply a balancing test: 'The privacy interest must always be weighed against such public interests as the societal need for information, and a *compelling need* for information may override the privacy interest.'"¹² Thus, if the government wishes to intrude "on a person's right of privacy" by demanding confidential medical records, it must establish that it has a "compelling need" for the information, that there is a

¹¹ See also Office of the Attorney General, State of Iowa, Opinion No. 82-3-25(L), 1982 WL 524886, (Iowa A.G.) at *16 (Iowa A.G. Mar. 31, 1982) ("[T]he constitutional right to privacy precludes the non-consensual disclosure of confidential medical information, unless such disclosure is justified by compelling state interests.").

¹² Id. at 759 (quoting Chidester, 353 N.W.2d at 853) (emphasis added). See also State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976) ("Before the state can encroach into . . . the personal right of privacy,

substantial connection between the government interest and the invasive action that is sought, that the government has attempted to obtain consent from the patients before issuing the subpoena, and that “adequate safeguards to prevent unauthorized disclosure” are in place.¹³ The court reviewing the government’s subpoena must then apply these elements to balance the needs of the government against the rights of the patient.¹⁴

Although “courts have traditionally been reluctant to expand this branch of privacy beyond those categories of data which, by any estimation, must be considered extremely personal,” Eagle, 88 F.3d at 625, it is beyond serious dispute that all forms of medical information are protected, particularly those dealings with sensitive personal issues. See McMaster, 509 N.W.2d at 759; see also Westinghouse, 638 F.2d at 577 (“There can be no question that . . . medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.”); St. Luke’s Reg’l Med. Center, Inc. v. United States, 717 F.Supp. 665, 666 (N.D. Iowa 1989) (applying Westinghouse balancing test); Doe, 15 F.3d at 267 (“Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one’s health, and few matters the dissemination of which one would prefer to maintain greater control over.”).

Even within the category of constitutionally protected medical information, information concerning sex and reproduction, such as the information at issue in this

there must exist a subordinating interest which is compelling and necessary, not merely related, to the accomplishment of a permissible state policy.”).

¹³ Id. at 759-60.

¹⁴ A number of other courts also have explicitly recognized this right. See, e.g., Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir. 1996) (acknowledging right to privacy); Alexander v. Peffer, 993 F.2d 1348, 1349 (8th Cir. 1993) (same); Doe v. City of New York, 15 F.3d 264, 267 (2nd Cir. 1994) (same); United States v. Westinghouse Electric Corp., 638 F.2d 570, 577 (3d Cir. 1980) (same).

case, is particularly sensitive and should be vigilantly protected from unjustified government intrusion. See Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). Indeed, a number of courts have applied the Whalen confidentiality right to non-medical information concerning an individual's decisions on sexual matters. See Bloch v. Ribar, 156 F.3d 673, 686 (6th Cir. 1998) (applying right to "crimes of sexual violence"); Eastwood v. Dep't of Corrections, 846 F.2d 627, 631 (10th Cir. 1988) (holding that plaintiff's "sexual history" was protected by right to confidentiality); Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983) (holding that plaintiff's prior sexual relationship and miscarriage were protected by right to confidentiality).

B. PPGI's Patients' Right to Confidentiality Easily Outweighs the County Attorney's Need for the Records Sought.

In a case that this Court has previously followed in analogous circumstances, the Third Circuit described its test for assessing proposed intrusions into the constitutional right to privacy:

The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access.

Westinghouse, 638 F.2d at 578. In McMaster, this Court applied many of the Westinghouse factors in its analysis of the State's interests in obtaining patients' mental health records. McMaster, 509 N.W.2d at 759-60 (citing Westinghouse, 638 F.2d at 578).

The Westinghouse factors strongly militate against disclosure of the information at issue here. As discussed, that information — PPGI’s patients’ pregnancy tests — is medical information that PPGI obtained as part of its treatment of the women at issue. This information thus is no different from the psychological records at issue in McMaster or the medical records at issue in Westinghouse. Moreover, both of the Whalen interests described above — “the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions,” Whalen, 429 U.S. at 599-600 — are implicated here. The women potentially affected by the subpoena have an interest in “avoiding disclosure of personal matters” — *i.e.*, the results of their pregnancy tests. In addition, as described in more detail below, forcing PPGI to comply with the County Attorney’s subpoena would threaten the second privacy interest by discouraging Iowans from seeking medical care if they fear that the confidentiality of their medical records will be compromised.

Because PPGI’s patients have a protected right to maintain the confidentiality of their pregnancy tests, the County Attorney is required either to obtain each patient’s consent to the release of her confidential records or to demonstrate that his need for the information outweighs the patient’s right to confidentiality. Obviously, the County Attorney could not do the former without actually having the information at issue, so he is therefore required to demonstrate a truly compelling need for the information. The Defendant Court was thus required to, but did not, apply the rest of the Westinghouse factors, balancing the interests of the patients against the State’s need for the information before enforcing the subpoena. As demonstrated below, forcing PPGI to comply with the subpoena would cause significant harm both to PPGI’s patients and the public at large,

and that harm could not possibly be outweighed by the minimal benefits the State would receive from the information at issue.

1. Releasing the Names of the Women Who Took Pregnancy Tests to the County Attorney Would Violate Core Privacy Interests.

The first interest that must be addressed in applying the constitutionally mandated balancing test is the potential harm to the individuals whose confidential information would actually be disclosed — in this case, the numerous women who received positive pregnancy test results at PPGI’s Storm Lake Clinic during the past year. Many of those women could be seriously harmed if PPGI were forced to reveal their names and addresses. Indeed, as other courts have recognized, disclosure of an individual’s confidential medical records could cause a variety of harms:

First, the breach may produce direct negative consequences for the patient. . . . Second, the patient may suffer harm simply from knowing that elements of the intimate details of his life have been laid bare for the uninvited viewer. Third, the patient may suffer harm to his public image that, if the public disclosures are true, cannot be rehabilitated through legal action. . . . Finally, the patient-doctor relationship, founded as it is on trust, may be irredeemably shattered.

Ms. B. v. Montgomery County Emergency Serv., 799 F.Supp. 534, 538 (E.D. Pa. 1992) aff’d sub nom. Ms. B. v. United States Postal Service, 989 F.2d 488 (3d Cir. 1993) (cite omitted); accord Howard v. Des Moines Register and Tribune Co., 283 N.W.2d 289, 301 (Iowa 1979).

Here, once the police obtained the information sought, they would receive little information of value *unless* they then pursued a highly intrusive field investigation on each name they receive. No matter how discreet the investigation might be, it would almost certainly result in the disclosure of highly personal information to some patients’ family members, friends, and acquaintances. In addition, the investigations themselves

would almost certainly traumatize many women who might have information that they do not wish to reveal to anyone, and are guilty of nothing more than seeking medical treatment at PPGI's clinic.¹⁵

The likelihood that many of the women affected by the subpoena would have to disclose to the police and County Attorney that they had a miscarriage or abortion is particularly troubling. For example, one in five pregnancies ends in miscarriage,¹⁶ and it is a virtual certainty that many of the women potentially affected by the subpoena could "clear their names" only by recounting that their pregnancies ended in this upsetting manner. The prospect of these women having to cite the trauma of miscarriage as their "alibi" for child murder is disturbing, to say the least.

2. The Public Interest Strongly Favors Protecting PPGI's Patients' Confidentiality.

Upholding the Defendant Court's decision not only would harm the women personally affected by the subpoena, but could also have devastating long-term consequences for the health care of all Iowans. Ensuring that Iowans have unimpeded access to safe and effective health care is, without question, sound public policy. However, if patients fear that their personal medical information will be exposed to others, they are less likely to seek out diagnostic services, counseling, and treatment. As the Supreme Court has recognized, "individuals' concern for their own privacy may lead

¹⁵ See also Medical Privacy in Jeopardy, Des Moines Register, July 20, 2002 ("[i]f authorities get the list, they will presumably go door-to-door demanding proof of the outcome of each pregnancy. Women will be forced to produce a live child, or explain a miscarriage or an abortion, or that the baby was stillborn or placed for adoption."); Guard Privacy of Clinic Clients, Telegraph Herald, July 10, 2002 ("How often would such an encounter needlessly and callously expose an extremely personal secret?").

¹⁶ See "Miscarriage," March of Dimes (Sept. 24, 2002), available at http://www.modimes.org/HealthLibrary/334_592.htm.

them to avoid or to postpone needed medical attention,” Whalen, 429 U.S. at 602, to the obvious detriment of the public interest.

Empirical research confirms this concern. Americans greatly value the confidentiality of their medical information and thus expect such information to be kept private.¹⁷ A CNN/Time poll conducted in 1996 revealed that 87% of Americans wish their approval to be sought every time their medical records are accessed for any reason.¹⁸ “[T]he promise of confidentiality encourages patients to disclose sensitive subjects to a physician without fear that an embarrassing condition will be revealed to unauthorized people[.]”¹⁹ This Court came to the same conclusion in the context of mental health care, noting that “in some circles a social stigma still attaches to anyone who merely seeks the help of such professionals. If the patient cannot be assured that the choice to seek help will be kept confidential, that choice is severely limited.” McMaster at 759.

By the same token, research studies indicate that, without assurances of confidentiality, Americans are less likely to seek out needed health care. A 1992 poll found that 7% of those questioned chose not to seek health care for fear that their medical information might be revealed.²⁰ In another study, more than 25% of teenagers stated that they would forgo treatment for private health issues if they thought that their parents

¹⁷ Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427, 475 (1991) (“Privacy [is] . . . among the most fundamental rights that we have as citizens of this country.”).

¹⁸ Alissa J. Rubin, Gore to Propose More Privacy Safeguards for Public Legislation, L.A. Times, July 31, 1998, at A26 (citing the results of the CNN/Time poll).

¹⁹ Robert Arnold et al, Medical Ethics and Doctor/Patient Communication in the Medical Interview: Clinical Care, Education and Research 345, 365 (Mack Lipkin Jr. et al. eds., 1995); see also Eileen Meier, Medical Privacy and Its Value for Patients, 18 Seminars in Oncology Nursing 105, 108 (2002) (“Patients must have trust and confidence that the health care system will safeguard their health information . . .”).

²⁰ Louis Harris & Associates, survey conducted for Equifax (1992), available at http://www.healthprivacy.org/usr_doc/PollingData9012.pdf.

might find out about the treatment.²¹ And just last month, a study in the Journal of the American Medical Association (“JAMA”) found “that 47% of girls surveyed in Wisconsin would stop using sexual health services” — including pregnancy testing and counseling, health exams, and testing for sexually transmitted diseases — if the clinic were required by law to notify the girls’ parents.²² At the same time, 99% of the girls “who would stop using sexual health care services with parental notification indicated that they would continue having sexual intercourse.”²³ The same privacy concerns also apply to other types of health care issues.²⁴

Such failures to seek medical treatment present a considerable threat to the public health. According to JAMA, many adolescents use clinics like those run by PPGI precisely because they have privacy concerns.²⁵ “If adolescents’ access to confidential care for sensitive health issues were significantly limited or eliminated, privacy concerns would likely have an even greater impact on adolescents’ use of health care.” *Id.* In

²¹ See Tina L. Cheng, et al., Confidentiality in Health Care: A Survey of Knowledge, Perceptions, and Attitudes Among High School Students, 269 JAMA 1404 (1993). See also Heather Boonstra & Elizabeth Nash, Minors and the Right to Consent in Health Care, The Guttmacher Report on Public Policy, Vol. 3, No. 4, 4, 6-7 (Aug. 2000), available at <http://www.guttmacher.org/pubs/journals/gr030404.html>.

²² Diane M. Reddy, et al., Effect of Mandatory Parental Notification on Adolescent Girls’ Use of Sexual Health Care Services, 288 JAMA 710, 713 (2002).

²³ *Id.*

²⁴ See Lynn Paringer, et al., Who Seeks HIV Testing? The Impact of Risk, Knowledge, and State Regulatory Policy on the Testing Decision, 28 Inquiry 226, 233 (1991) (“[S]tate policies that protect individual privacy encourage individuals to seek [HIV] testing.”); Andrew B. Bindman, et al., Multistate Evaluation of Anonymous HIV Testing and Access to Medical Care, 280 JAMA 1416, 1419 (1998) (“Anonymous testing for HIV infection was associated with earlier testing and medical care.”); Howard B. Roback, PhD. & Mary Shelton, M.S., Effects of Confidentiality Limitations on the Psychotherapeutic Process, 4 Journal of Psychotherapy Practice and Research 185, 190-91 (1995) (“[K]nowledge of the limitations of confidentiality may delay entry into [psychotherapy] treatment.”); Emily A. Peterson, et al., Health Insurance and Discrimination Concerns and BRCA1/2 Testing in a Clinic Population, 11 Cancer Epidemiology, Biomarkers & Prevention 79, 86 (2002) (finding that concerns about confidentiality are one of the primary reasons patients decline testing for breast cancer genes).

²⁵ See Carol A. Ford & Abigail English, Limiting Confidentiality of Adolescent Health Services: What Are the Risks?, 288 JAMA 752 (2002).

particular, “[i]f the majority of adolescents receiving confidential health services in family planning clinics were to modify their use of or stop seeking services, the impact on rates of teen pregnancy and [sexually transmitted infections] would undoubtedly be substantial.” Id. at 753.

Just as significant are the substantial risks involved when pregnant women do not receive prenatal health care. Women who receive early and regular prenatal care are more likely to have healthy babies.²⁶ As discussed above, there is good reason to expect that many women will forgo such care if they believe that their pregnancy, or even a mere suspicion of pregnancy, will be disclosed without their consent. Indeed, for a variety of reasons, many women do not or cannot consult with family or partners when they suspect they may be pregnant. One of the most alarming is the fear of physical abuse. Long-term studies of abusive and dysfunctional families reveal that the incidence of violence escalates when a wife or teenage daughter becomes pregnant.²⁷

The facts of this case bear out these concerns: Since the County Attorney served his subpoena, the number of patients who have sought pregnancy tests at PPGI’s Storm Lake clinic is down 70% to 80%. See Affidavit of Jill June (July 3, 2002) ¶ 16. If the Court were to uphold the District Court’s decision, this trend might well spread to other health care providers in the State, with adverse consequences for anyone in Iowa who needs medical assistance.

²⁶ See Center for Chronic Disease Prevention and Health Promotion, From Data to Action: CDC’s Public Health Surveillance for Women, Infants, and Children, 105 (1994); Office of Technology Assessment, U.S. Congress, Healthy Children: Investing in the Future 80 (1988).

²⁷ See American Medical Association, Council on Ethical and Judicial Affairs, Mandatory Parental Consent to Abortion, 269 JAMA 82, 83 (1993).

3. The County Attorney's Subpoena Is a Fishing Expedition That Has Virtually No Hope of Finding the Perpetrator.

The final element of the balancing test requires the Court to assess the state's need for access to the information whose confidentiality is at issue. *Amici* agree that the state's need for confidential medical information can, at times, overcome a patient's constitutional right to confidentiality. Indeed, had the subpoena sought the records of a specific suspect, it is very likely that PPGI would have complied.²⁸ There is also no question that the investigation at issue here is a serious one that needs to be resolved. But to tip the balance in favor of breaching PPGI's patients' confidentiality, the County Attorney must demonstrate, at a minimum, that the information he seeks will actually help the State solve the crime.

In this case, compliance with the subpoena would produce no investigatory benefits that could begin to justify the scope of this fishing expedition. Put simply, there is no reason to believe that the woman responsible for this act ever sought out prenatal advice or care or ever went to PPGI's clinic; indeed, there is every reason to believe that she probably did not. Women who commit neonaticide rarely discuss their pregnancy with those closest to them, let alone reveal the pregnancy to health care professionals.²⁹ Indeed, many women who commit this crime are in denial about their pregnancies; one recent survey of neonaticide cases found that 19 out of the 47 women studied had denied the existence of the pregnancy until they went into labor. See Schwartz & Isser at 47-

²⁸ See Investigative Excesses in Iowa, The NY Times, Aug. 29, 2002 ("Officials at Planned Parenthood say that if the prosecutors had come to them with a specific suspect, the clinic would readily have cooperated by sharing information.").

²⁹ See Michelle Oberman, Mothers Who Kill: Coming to Terms With Modern American Infanticide, 34 Am. Crim. L. Rev. 1, WL 34 AMCLRLR, at *23-*24 (Fall 1996); Cheryl L. Meyer & Michelle Oberman, Mothers Who Kill Their Children: Understanding the Acts of Moms from Susan Smith to the "Prom

48.³⁰ Most significantly, these women almost never sought any type of prenatal testing or advice: One recent study of neonaticide cases from 1990 to 1999 found that only one woman out of the 37 surveyed had received any medical care before giving birth. Meyer & Oberman at 48.³¹

These studies simply confirm what common sense suggests: When women who carry their pregnancies to term (as this one did) go to a clinic or hospital, it is almost always for the purpose of ensuring the safety of the fetus during pregnancy. This purpose is not consistent with carrying the pregnancy to term and then killing the infant after birth. Moreover, if the woman did wish to take a pregnancy test, it is entirely possible that she simply purchased an over-the-counter pregnancy test — such tests can be purchased at almost every drug store in the State — and took the test at home.³² Accordingly, there is good reason to believe that the mother who committed this crime did not seek care from any health care provider in the area, including PPGI.

Mom,” 41-46 (New York Univ. Press 2001); Lisa Linzer Schwartz & Natalie K. Isser, Endangered Children: Neonaticide, Infanticide and Filicide, 47-50 (CRC Press 2000).

³⁰ See also Margaret G. Spinelli, M.D., A Systematic Investigation of 16 Cases of Neonaticide, 158 Am. J. Psychiatry 811 (2001) (finding that five out of sixteen women studied denied existence of pregnancy until delivery).

³¹ See also Mary D. Overpeck, Dr.PH, et al., Risk Factors For Infant Homicide in the United States, 339 New Eng. J. Med. 1211, 1214 (1998) (“95 percent of infants killed during the first day of life were not born in a hospital.”); Sara J. Emerick, M.D., et al., Risk Factors for Traumatic Infant Death in Oregon, 1973 to 1982, 77 Pediatrics 518, 521 (1986) (finding “late or no prenatal care” and “nonhospital births” to be significant risk factors for neonaticide).

³² See also Guard Privacy of Clinic Clients, Telegraph Herald, July 10, 2002 (“[T]he information sought [by the County Attorney] likely will shed no light on the crime. There is nothing but supposition that the mother even visited a Planned Parenthood clinic. She could have undergone a pregnancy test out of town, taken a home pregnancy test or not taken one at all.”).

II. SECTION 622.10 OF THE IOWA CODE PROHIBITS DISCLOSURE OF PPGI'S PATIENTS' MEDICAL RECORDS WITHOUT THE PATIENTS' CONSENT.

Standard of Review. *Amici* agree with the Appellant's statement of the standard of review in this case.

Preservation. *Amici* agree that Appellant has preserved error.

Even apart from the constitutional concerns discussed above, section 622.10 of the Iowa Code prohibits the County Attorney from demanding that PPGI release its patients' confidential medical information without the patients' consent. While this Court held in Chidester v. Needles that section 622.10 does not apply in the context of investigatory subpoenas, 353 N.W.2d at 853-54, *amici* believe that Chidester was incorrectly decided on this point and should be overturned.

Section 622.10 prohibits the disclosure of information obtained by a health-care professional in connection with his or her treatment of a patient.³³ This Court has held that "[t]hree elements must be established in order for the privilege to be applicable:

(1) the relationship of doctor-patient; (2) the acquisition of the information or knowledge during this relationship; and (3) the necessity of the information to enable the physician to treat the patient skillfully.

State v. Henneberry, 558 N.W.2d 708, 709 (Iowa 1997) (citing State v. Deases, 518 N.W.2d 784, 787 (Iowa 1994)).

All three of these elements are satisfied in the case at hand. First, the evidence in the record plainly demonstrates that a doctor-patient relationship has been established between PPGI and all of the women potentially affected by the subpoena. As Ms. Dickey

³³ The statute provides that "A practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional . . . or confidential clerk of any such person, who obtains information by reason of the person's employment . . . shall not be allowed, in

pointed out in her affidavit, every woman seeking a pregnancy test at one of PPGI's clinics must sign a "Request For The Provision Of Medical Services." See Dickey Aff. ¶ 12 & Exh. 7. By signing that document, the patient is "request[ing] that a person authorized by Planned Parenthood of Greater Iowa provide *appropriate evaluation, testing and treatment*[".]” Id., Exh. 7 (emphasis added). In any event, such evidence is unnecessary to establish the applicability of the privilege. Because no one disputes that PPGI is providing pregnancy tests and advice regarding reproductive health care to its patients, this Court can take judicial notice of the fact that PPGI is a health care provider. See Iowa R. Evid. 5.201.

The County Attorney's concern that the "record lacks any information that a physician has even seen the results of the pregnancy tests at issue"³⁴ is simply irrelevant under section 622.10. The plain language of that provision states that the privilege applies to almost all employees who might have knowledge of a patient's medical records, including a "physician assistant, advanced registered nurse practitioner, . . . or the stenographer or confidential clerk of any such person." I.C.A. § 622.10. Thus, even if the patients at issue never met with a doctor or nurse at PPGI's clinic, PPGI has demonstrated that *all* of its employees must sign a confidentiality statement, see Dickey Aff. ¶ 4, and that is sufficient to classify those employees at the very least as "confidential clerks." Unless the County Attorney is claiming that the patients at issue were not seen by any PPGI employee at all during their visit, a position that is on its face

giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity[".]” I.C.A. § 622.10(1).

³⁴ Resistance to Petition for Writ of Certiorari, Application for Discretionary Review, and/or Interlocutory Appeal, Planned Parenthood of Greater Iowa, Inc. v. Iowa Dist. Ct. for Buena Vista County, Sup. Ct. No. 02-1191, Aug. 16, 2002 ("County Attorney's Resistance").

untenable, the doctor-patient relationship described by section 622.10 was established with respect to each of the patients potentially affected by the subpoena. Moreover, PPGI's Storm Lake clinic operates under the Clinical Laboratory Improvement Amendment ("CLIA") of 1988, which requires all *medical* facilities to obtain a CLIA certificate in order to operate a laboratory. Id. ¶ 5.³⁵ Finally, the laboratory director for the Storm Lake clinic is a physician licensed in this State. Id. ¶ 7.

The second and third elements are also satisfied. Because the women potentially affected by the subpoena went to PPGI's clinic in order to take the pregnancy tests at issue, it is beyond debate that PPGI received the results of the tests during its relationship with each of the women and that the tests were also necessary to treat the women. It is well established in this state that blood tests are covered by the doctor-patient privilege of section 622.10. See Henneberry, 558 N.W.2d at 710. While the pregnancy tests used by PPGI generally use a patient's urine, see Dickey Aff., Ex. 3, Iowa law generally does not draw a distinction among bodily fluids for testing purposes, nor would any such distinction make sense. See, e.g., I.C.A. § 123.46 ("'Chemical test' means a test of a person's *blood*, *breath*, or *urine* to determine the percentage of alcohol present by a qualified person using devices and methods approved by the commissioner of public safety.") (emphases added). Moreover, in the context of the Iowa statute addressing public records, I.C.A. § 22.7(2), this Court has stated that "'treatment' is broad enough to embrace *all steps* in applying medical arts to a person." Head v. Colloton, 331 N.W.2d at 875 (emphasis added) (citing Webster's Third International Dictionary 2435 (1976)). In sum, because the three elements of the Court's 622.10 test can be deemed satisfied even

³⁵ PPGI's Storm Lake clinic operates under CLIA ID #16DO384533. See Dickey Aff. ¶ 6 & Exh. 2.

without the evidence currently in the record, the Defendant Court was incorrect in holding that PPGI failed to develop a sufficient evidentiary record with respect to a section 622.10 privilege claim.³⁶

The Defendant Court and the County Attorney have cited Chidester to support their claim that the protection against disclosure applies only to oral testimony and not to the provision of medical records in documentary form in response to a subpoena. The Chidester decision has recently been called into question by a member of this Court. In State v. Sanders, 623 N.W.2d 858 (Iowa 2001), Justice Carter argued that Chidester was “wrongly decided” because “[t]he privilege is designed to protect confidential communications from disclosure, and that purpose is frustrated nearly as much by compelled disclosure for investigatory purposes as by compelled disclosure for use as trial evidence.” Id. at 862 (Carter, J., concurring).

Justice Carter’s view is correct; indeed, it is the only interpretation of this statute that makes sense. On its face, section 622.10 plainly protects the confidentiality of attorney-client materials to exactly the same extent that it protects the confidentiality of doctor-patient materials; the provision’s syntax does not permit extending such protection to the former materials in circumstances where it would not extend to the latter.³⁷ As Judge Carter noted, “[i]t would be abhorrent for this court, as the constitutionally established tribunal of the organized bar, to approve prosecutorial invasion of lawyer’s files in an attempt to obtain information to be used against the lawyer’s client. It is no

³⁶ See Ruling on Pending Motions at 2.

³⁷ See I.C.A. § 622.10(1) (“A *practicing attorney* [or] *physician* . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person’s professional capacity[.]”) (emphases added).

less abhorrent to grant such approval to raids by prosecutors on medical files.” Sanders, 623 N.W.2d at 863.

Justice Carter’s position is also consistent with the great care this Court has generally has taken great care to protect confidential communications between a physician and patient. “Section 622.10 is intended to promote uninhibited and full communication between a patient and his doctor so the doctor will obtain the information necessary to competently diagnose and treat the patient.” Chung v. Legacy Corp., 548 N.W.2d 147, 149 (Iowa 1996), citing Deases, 518 N.W.2d at 787. The Court has thus recognized that the “legislature made the policy judgment that complete and honest communications between a physician and patient would be enhanced by making these communications confidential.” Chung, 548 N.W.2d at 150-51. The Chidester decision thwarts that recognized policy judgment and should be overruled.

CONCLUSION

For all of the reasons discussed above, *amici* respectfully request that the Court quash the County Attorney's subpoena.

Respectfully submitted,

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