IN THE COURT OF APPEALS OF OHIO
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO

STATE OF OHIO,	)	
	)	CASE NOS. 13CA010366, 13CA010367
Plaintiff,	)	13CA010368 and 13CA010369
	)	
	)	TRIAL CASE NOS. 11 CR 0833227, 11CR08328
-vs-	)	11 CR 083329 and 11CR083330
	)	
ASIM TAYLOR,	)	**APPEAL FROM A JUDGMENT OF THE**
	)	**LORAIN COUNTY COURT OF COMMON PLEAS**
Defendant	)	

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF OHIO URGING REVERSAL ON BEHALF OF DEFENDANT-APPELLANT, ASIM J. TAYLOR

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae the American Civil Liberties Union of Ohio is the Ohio affiliate of the national American Civil Liberties Union, one of the oldest and largest groups in the Nation dedicated to the preservation and defense of the Bill of Rights. With some five hundred thousand members in all fifty states and with almost thirty thousand members and supporters in Ohio, this Amicus appears routinely in state and federal courts to defend the right of reproductive freedom under the Fourteenth Amendment. Issues relating to reproductive freedom are among the core issues on which Amicus represents its members and constituencies.

Amicus Curiae has repeatedly litigated both as amicus and direct counsel on issues dealing with the reproductive freedom of Ohioans, and includes such issues within its mandate and mission, which is to advance, preserve, and defend the Bill of Rights, and the freedoms set forth therein, without bias or political partisanship. The Fourteenth Amendment rights to privacy and personal autonomy which are directly implicated by the instant case touches directly upon this mission.

STATEMENT OF ASSIGNMENT OF ERROR

Amicus adopts by reference herein the Assignment of Error set forth in the Merit Brief of the Defendant-Appellant Asim J. Taylor.

STATEMENT OF THE ISSUE PRESENTED ON APPEAL

Whether a trial court judge may, consistent with the Fourteenth Amendment to the United States Constitution and analogous provisions of the Ohio Constitution, impose as a condition of probation the requirement that the probationer make all reasonable efforts to avoid impregnating a woman during probation or until such time that Mr. Taylor can prove to the court

that he is able to provide support for the children he already has, and is in fact supporting the children, or until a change in conditions warrants the lifting of this requirement.

STATEMENT OF THE CASE

The facts of the case are not contested. On August 10, 2011, Appellant Asim Taylor was indicted for nonsupport of his dependent children in violation of R.C. §2919.21(B). The indictments involved four separate cases and non-support for four separate children. R.C. §2919.21(B) provides that "No person shall abandon, or fail to provide support as established by a court order to another person who, by court order or decree, the person is legally obligated to support." As indicted, the cases were all felonies of the Fifth Degree.

On September 27, 2012, Appellant entered pleas of "Guilty" to the four separate indictments which were accepted by the Court. Sentencing was held on January 23, 2013 at which time Appellant was sentenced to serve a suspended sentence of twelve months at the Lorain Correctional Institution. Appellant was then sentenced to serve a five year community control sanction, ending on January 23, 2018. (Sentencing Hr'g Tr. 5:4-6). Standard conditions of community control were imposed, including requirements that the Appellant abide by all laws, submit to drug and alcohol abuse evaluation, participate in counseling, treatment and/or random drug screens, maintain full-time, verifiable employment, pay restitution of child support arrearages totaling $78,922.19 in monthly installments, pay court and prosecution costs and obey all orders and directions of the Lorain Probation Department. (Sentencing Hr'g Tr. 5:7-6:10).

As an additional community control sanction, Appellant was ordered to, "[m]ake all reasonable efforts to avoid impregnating a woman during the community control period or until such time that defendant can prove to this Court that he's able to provide support for children that he already has and is, in fact, supporting the children or until a change in conditions warrant

the lifting of this condition." (Sentencing Hr'g Tr. 6:12-19). This condition of community control, according to the trial Court was, "[r]elated to the interests of justice, *** was reasonably related to rehabilitating the offender [and] has some relationship to the crimes of which the offender was convicted....", i.e. non-support. (Sentencing Hr'g Tr. 6:20-7:4).

Trial counsel strenuously objected to the anti-procreation provision contending that such a provision was in violation of Appellant's federal equal protection and due process rights because the order infringed on the Appellant's fundamental right to engage in sexual relations. (Sentencing Hr'g Tr. 10:13-11:4). Trial counsel also objected to the anti-procreation provision on state grounds, contending that the order was over-broad in that it did not specify exactly what he could or could not do. (Sentencing Hr'g Tr. 12:10-19). In response to a query as to whether the anti-procreation provision included "abstinence" the trial Court affirmatively acknowledged: "That is one of the things." (Sentencing Hr'g Tr. 13:7-8). In reinforcing the trial Court's position that "abstinence" was the only guarantee of full compliance with the trial Court's order to "make reasonable efforts to avoid impregnating a woman" the Court recognized that male birth control has a failure rate of up to 18 percent (Sentencing Hr'g Tr. 13:18-20) and suggested that he, "[j]ust take personal responsibility for his children." (Sentencing Hr'g Tr. 14:15-17)

On February 22, 2013 Appellant timely filed his Notice of Appeal of the trial Court's January 23, 2013 community control anti-procreation provision.

LAW AND ARGUMENT

In 2004, the Supreme Court of Ohio overturned a portion of the conditions of community control[1] imposed on a defendant, Sean Talty, following his conviction for non-support. *State v. Talty*, 103 Ohio St.3d 177, (2004). The condition at issue in that case, which was similar, but not identical, to the condition of community control at issue in the case at bar, required the defendant to "make all reasonable efforts to avoid conceiving another child" during his five year probationary period. *Id.* at 178, ¶ 4. Talty argued that the language in question violated his fundamental right to procreate under the Ohio and United States Constitutions.

The *Talty* court, in overturning the anti-procreation condition, reasoned that it was overbroad because it did not "provide a mechanism by which the prohibition can be lifted if the relevant conduct should change." Id at 182, ¶ 20. Avoiding a "strict scrutiny" test, the Ohio Supreme Court pointed out that it was not considering whether the condition of probation would withstand a constitutional challenge, because it was able to decide the case on abuse-of-discretion grounds. Moreover – and of significance to the case at bar - the *Talty* court pointed out that it was also *not* deciding "whether a mechanism that allowed the anti-procreation condition to be lifted would have rendered the condition valid..." Id. at 182, ¶ 21.

Unlike *Talty*, in the instant case, there is a "purging" mechanism provided in the order to lift the anti-procreation condition:

> "Deft is ordered to make all reasonable efforts to avoid impregnating a woman during community control **or until such time that Deft can prove to the court that he is able to provide support for his children he already has and is in fact supporting the children** or until a change in conditions warrant the lifting of this condition." (Emphasis added.)

[1] The term "community control" has replaced "probation," but they are essentially the same. R.C. §2929.15. See discussion, *State v. Talty*, 103 Ohio St.3d at 5-6.

Ct. Order, Jan. 23, 2013.

Amicus submits that the question which was not resolved by the *Talty* court, i.e., whether the aforesaid purging mechanism is sufficient to make an anti-procreation condition constitutional, must be answered in the negative. First, this brief will review the body of law under which the right of procreation has been established as a fundamental right under the United States Constitution. Next, this brief will argue that the Trial Court's anti-procreation condition of community control violates this fundamental right because it is not narrowly tailored to further a compelling state interest. Finally, Amicus will argue that the so-called purging mechanism in the order does not save the order from fatal constitutional infirmities because it deprives persons of their fundamental right to procreate, based on financial ability, in contravention of the Equal Protection Clause.

A. THE RIGHT TO PROCREATE IS A FUNDAMENTAL RIGHT PROTECTED BY THE FOURTEENTH AMENDMENT

The Court's order infringes upon one of the most fundamental rights protected by the United States Constitution and, therefore, must be subjected to the strictest scrutiny. The United States Supreme Court, for more than six decades has consistently recognized the basic human right to make decisions regarding procreation as a fundamental right of privacy cloaked with the protection of the Constitution against unreasonable state action. Commencing with *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and continuing through *Troxell v. Granville;* 530 U.S. 57 (2000), the Supreme Court has held that decisions regarding procreation, family planning, and child rearing are beyond the purview of state officials (including judges) in all but the most limited of circumstances, and then only for the most compelling of reasons.

While accorded particular deference within the context of the marital relationship, *Griswold v. Connecticut,* 381 U.S. 479 (1965) (invalidating a Connecticut law prohibiting physicians from dispensing contraceptive advice to patients, as offensive, inter alia, to the right of marital privacy), the right to reproductive autonomy extends far beyond the marital bedroom.

"If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget children." *Eisenstadt v. Baird,* 405 U.S.438, 453 (1972) (invalidating on Equal Protection grounds Massachusetts law forbidding the dispensation of contraceptives to unmarried persons). While not every regulation on the use or sale of contraceptives has been held invalid "where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing burdens on [such decisions] may be justified only by compelling state interests and must be drawn to express only those interests." *Carey v. Population Services International,* 431 U.S. 678, 685-86 (1977) (invalidating a Pennsylvania law forbidding the sale or distribution of contraceptives to minors). Similar to the right to marry itself, choices regarding procreation and childbirth are "personal decisions protected by the right of privacy." *Zablocki v. Redhail,* 434 U.S. 374,384 (1978) (citing *Whalen v. Roe,* 429 U.S. 589, 598-600 (1977); *Carey,* 431 U.S. 678).

These cases make clear that the fundamental nature of reproductive autonomy is not linked to, nor is not dependant upon, a particular status such as marriage. Likewise, a socially disfavored status, based on past misconduct, does not automatically wrest these basic freedoms - including marriage and procreation- from the sphere of individual privacy and put them in the hands of the state.

In *Zablocki,* for example, the Supreme Court invalidated a Wisconsin statute that required those failing to meet child support obligations to children of whom they did not have custody to seek judicial permission before marrying. Equating marriage with reproduction in terms of the privacy and autonomy interests implicated, the court found the legislative scheme offensive to the Due Process Clause of the Fourteenth Amendment. *Id* at 386.

Although the Supreme Court in *Talty* refrained from considering the constitutionality of an anti-procreation provision, the Court did, nevertheless, observe that "the right to procreate is considered fundamental under the United States Constitution..." *Talty*, 103 Ohio St.3d at 186, 2004 Ohio- 4888 ¶ 35, citing to *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942). The *Talty* court then went on to determine that the condition of no procreation is unreasonable under state standards. Similarly, the condition imposed upon Mr. Taylor is one that interferes with his fundamental right to procreate, and requires strict scrutiny.

Some thirty years earlier, in *Skinner v. Oklahoma*, the Court held that even habitual criminality will not serve to take intimate decisions regarding reproductive freedom away from the individual and place them in the hands of the state. At issue in *Skinner* was Oklahoma's Habitual Criminal Sterilization Act, which provided a judicial mechanism by which the state attorney general could seek to have repeat felony offenders rendered sexually sterile. Skinner, convicted of two separate felony offenses (one involving the theft of chickens) was ordered to undergo a vasectomy. *Id.* at 537. The Court invalidated the statute on equal protection grounds and, in so doing, noted that the rights at issue were fundamental, even for repeat felons:

> "We are dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise

> invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."

Id. at 541.

While the effect of the judicial prohibition against procreation at bar is not as permanent as the sterilization at issue in *Skinner*, the fundamental right is the same, and the constitutional prohibition against the state action is identical.

In 2003, the United States Supreme Court once again affirmed the fundamental right to privacy involving intimate sexual conduct. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down a Texas statute prohibiting sodomy, and suggested that the law violated the Fourteenth Amendment because it implicated the most fundamental of rights. In discussing matters "that our laws and tradition afford constitutional protection to [including] personal decisions relating to marriage, procreation, contraception, [and] child rearing" the Court noted that:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

Id. at 574 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

Just as in *Lawrence* and *Casey*, here, the state is interfering with intimate, personal and fundamental rights.

B. THE PROHIBITION OF PROCREATION AS A CONDITION OF A COMMUNITY CONTROL SANCTION IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST.

Once a fundamental right is implicated, the burden of proving that the statute is narrowly tailored to meet a compelling state interest falls to the state. *Eisenstadt*, 405 U.S. at 447; *Sorrell*

v. Thevenir, 69 Ohio St.3d 415, 423 (1994). In this case, the decision as to whether or not to have a child, is a decision "at the very heart" of the right to privacy. *Carey*, 431 U.S. at 685, In the present situation,that burden has not, and indeed, cannot be met.

The State cannot establish that a compelling state interest is advanced by prohibiting Mr. Taylor from procreating during his five years of community control. Although there is a purging provision in the order by which Mr. Taylor could come back to court and demonstrate he has met certain conditions, the conditions are vague and overbroad, and significantly, the provision does not cure the fundamental constitutional flaw with the Court's anti-procreation prohibition.

Prohibiting Mr. Taylor from having more children is not related to a compelling state interest. A prohibition against procreation clearly has no rehabilitative purpose and, although the imposition of community control sanctions can serve as a deterrent for future misconduct, in this case it does not. In fact, the violation of the condition could result in imprisonment which would actually hinder, rather than enhance, Mr. Taylor's ability to work and earn the money he needs to support his children. (Sentencing Hr'g Tr., 6:10-19, 7:5-7).

The State might also argue that having more children could affect Mr. Taylor's ability to cover child support for his older children and that the prohibition thus relates to a state interest in reducing public expenditures which might be required on the care of those older children. However, this prohibition is not narrowly tailored to advance such an interest. Moreover, such a use of a community control sanction as a condition to further such state concern is inappropriate. As one court aptly noted:

> The burden on the taxpayer to maintain...children at the public expense is a grave problem, but a court cannot use its awesome power in imposing conditions of probation to vindicate the public interest in reducing the welfare rolls by applying unreasonable conditions of probation. The interest of the public in saving money for the taxpayers is by no means the same thing as the public interest in the

> reformation and rehabilitation of offenders. Probation orders are not merely bookkeeping arrangements.

People v. Dominguez, 256 Cal. App.2d 623, 628 (1967).

In *Dominguez,* the California court applied a three-part "reasonableness" test to conclude that a ban on procreation outside marriage exceeded the power of the court. *Id.* at 627.

> "A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid."

Dominguez, 256 Cal. App.2d at 627.

At least one Ohio court has directly relied upon the reasoning of the *Dominguez* court to invalidate a probation term similar to the one at bar. In *State v. Livingstone,* 53 Ohio App.2d 195 (6th Dist. 1976), the Court of Appeals invalidated a term of probation which forbade the probationer from having children during her five year probation. The court held that **"[i]n addition to being unconstitutional,** such [a] restriction...is an unreasonable burden to place on an already pregnant woman." (Emphasis added.) *Id.* at 197

This court has subsequently and expressly endorsed a standard of review at least as strict as the *Dominguez-Livingston* analysis. *State v. Brillhart,* 129 Ohio App.3d 180, (9th Dist. 1998). In *Brillhart*, the defendant was convicted of domestic violence. As a condition of probation, the trial court forbade the defendant from having contact with his wife or her family, including his children, for a period of five years. Defendant appealed this condition of probation, claiming that the trial court abused its discretion and violated his right of privacy, as guaranteed under the United States and Ohio Constitutions. This court, relying on language in *State v. Jones*, 49 Ohio St.3d 51 (1990), held that a convicted felon has "a reduced expectation of privacy." However, the Court struck down the condition as to the children for being unrelated to the crime for which

the defendant was convicted, and, therefore, invalid. As to the limits of the court's authority to impose conditions of probation, the *Brillhart* court observed:

> "The trial court has broad, but not unlimited, discretion in fashioning the conditions of probation.... A valid condition of probation must (1) be reasonably related to rehabilitating the offender, (2) have some relationship to the crime for which the offender was convicted, and (3) relate to conduct that is criminal or reasonably related to future criminality and serves the statutory ends of probation.... A court may nullify a condition of probation as failing to satisfy the three-part test when it involves a "flagrant violation of a probationer's privacy rights.""

Brillhart, 129 Ohio App.3d at 183, quoting *State v. McLean,* 87 Ohio App.3d 392, 396 (1st Dist. 1993).

Applying the *Brillhart* test to the case at bar, an anti-procreation condition has no rehabilitative purpose. Failure to meet the condition could result in Mr. Taylor being incarcerated, and therefore, he will have less opportunity to earn money to support his children. The right to procreate with a consenting adult is not only legal, but a fundament right. *Skinner v. Oklahoma,* 316 U.S. 535 (1942). Unlike less intrusive options, such as wage garnishment, this anti-procreation provision is unreasonable and will actually obviate the goal of supporting the children. Further, it directly infringes on Appellant's procreative privacy rights. This level of intrusion is something the court simply cannot use to achieve its goal. *See, Griswold v. Connecticut,* 381 U.S. 479 (1965) and *Lawrence v. Texas,* 539 U.S. 558 (2003).

Therefore, the condition of community control at issue cannot survive the three-part reasonableness test traceable to *Dominguez,* nor a strict scrutiny standard of review.

The anti-procreation condition is also essentially unworkable. As the United States Court of Appeals for the Eighth Circuit explained when faced with a similar prohibition:

> [T]he condition is unworkable. Short of having a probation officer follow [defendant] twenty-four hours a day, there is no way to prevent [him] from fathering more children. If [defendant] were to violate this condition of his

> probation, he may well be returned to prison, leaving no way to provide for his dependants. This certainly would not serve...the goal of 'adequately support[ing] and sustain[ing]' [defendant's] children.

United States v. Smith, 972 F.2d 960, 962 (8th Cir. 1992). The unfeasibility of the term makes its reasonableness suspect, suggests that it is little more than a hollow gesture, and is far from narrowly tailored to promote whatever interest it purports to advance. In summary, the anti-procreation provision is fatally flawed and cannot survive the reasonableness test articulated in *Dominguez* or strict scrutiny.

C. THE EXISTENCE OF A "PURGING CLAUSE" IN THE TRIAL COURT'S ORDER IN EFFECT DEPRIVES APPELLANT OF HIS FUNDAMENTAL RIGHT TO PROCREATE, BASED ON FINANCIAL STATUS, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The trial court in the instant case seems to have fashioned the anti-procreation condition in the order *sub judice* with the *Talty* decision in mind. The *Talty* court refused to consider whether an antiprocreation condition – with or without a mechanism for purging -- would pass constitutional muster. *Talty*, 103 Ohio St.3d at 183, 2004 Ohio- 4888 ¶ 25. Instead of applying a strict scrutiny standard of review, the *Talty* court applied an abuse of discretion test and concluded that without a purging mechanism in the order, the anti-procreation condition necessarily failed. *Id.* at 179, 182 ¶ 9, 20. However, even with a purging mechanism, as is the case here, the anti-procreation provision is nevertheless vague and overly-broad. *Id.* at 182, ¶ 20. *See, State v. Talty*, 103 Ohio St.3d 177, (2004) and *State v. Jones*, 48 Ohio St.3d 52 (1990).

Most importantly, a "purging mechanism" does nothing to satisfy the unconstitutional restrictions of the anti-procreation condition. The Supreme Court holding in *Zablocki v. Redhail*, 434 U.S. 374 (1978) emphasized this point. In *Zablocki,* the court was faced with a constitutional challenge to a Wisconsin statute. The statute required that any resident "having minor issue not in his custody and which he is under obligation to support by any court order or judgment" may not marry without a court approval order, which cannot be granted absent a showing that the support obligation has been met and that children covered by the support order "are not likely thereafter to become public charges." *Zablocki,* 434 U.S. at 374. The Court held the statute was unconstitutional. Equating marriage with reproduction in terms of the privacy and autonomy interests implicated, the *Zablocki* Court found the legislative scheme did not "stop short of

telling people that they may not marry **because they are too poor or because they might persist in their financial irresponsibility**...[a concept] so alien to our traditions and so offensive to our shared notions of fairness [as to] offend the Due Process Clause of the Fourteenth Amendment." (Emphasis added.) *Id.* at 395.

The legislation in *Zablocki* is remarkably similar to the antiprocreation and purging conditions in the case at bar. The fundamental right to marry, found in *Zablocki*, is analogous to the fundamental right of procreation in the present case. The invasive obligation to prove that the marriage candidate was current in his child support payments and financially able to continue with such payments in *Zablocki* is no different from the obligation in the case at bar requiring the Appellant to demonstrate to the court that he "is able to provide support for his children... [and] is in fact supporting the children." This purging provision denies Mr. Taylor equal protection under the law based on his financial status.

In summary, the anti-procreation provision implicates a fundamental right of privacy. Therefore, this condition should be reviewed under a "strict scrutiny" analysis that it cannot survive. Strict scrutiny is fatal to the community control condition imposed in the case at bar because the condition is unreasonable and not narrowly tailored to advance a compelling state interest.

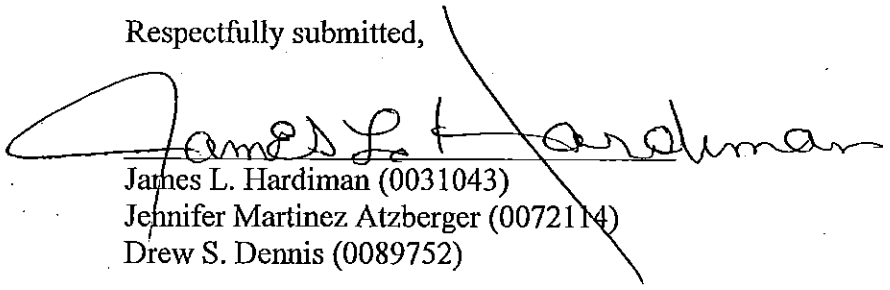
CONCLUSION

The right of procreation is a fundamental privacy right that requires strict scrutiny. Applying a strict scrutiny standard of review to the trial court's anti-procreation provision of the Appellant's community control sanction it is clear that the provision is unconstitutional. The provision is not necessary to achieve a compelling state interest and, in any event, mandating that

the Appellant remain celibate for the next five years is not a provision narrowly tailored to achieve the state's interest in ensuring that he supports his children financially.

WHEREFORE, for the foregoing reasons, the American Civil Liberties Union Foundation of Ohio urges this Court to reverse the conditions of probation in favor of Defendant Asim J. Taylor, and to remand the case to the trial court to modify such conditions consistent with the Ohio and United States Constitutions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The foregoing *Amicus* Brief was sent by means of United States Mail with sufficient postage affixed thereto and/or personally delivered on the 30th day of April, 2013 to each of the following.

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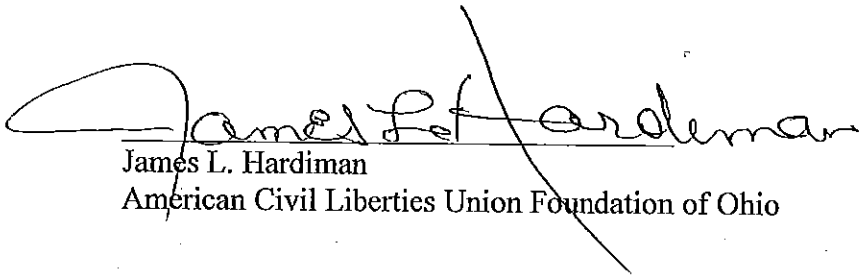

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