

NO. _____

IN THE SUPREME COURT OF ALABAMA

EX PARTE AMANDA HELAINE KIMBROUGH, *PETITIONER*

IN RE

STATE OF ALABAMA

VS.

AMANDA HELAINE KIMBROUGH,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, FOLLOWING
APPEAL FROM THE CIRCUIT COURT OF COLBERT COUNTY

***MOTION FOR LEAVE AND BRIEF OF AMICI CURIAE IN SUPPORT OF
CERTIORARI***

ORAL ARGUMENT NOT REQUESTED

Mary Bauer
Alabama Bar No. 1181R76B
Southern Poverty Law Center
400 Washington Ave
Montgomery, AL 36104
(334) 956-8333

Tamar Todd
Alabama Bar No. T0D005
Drug Policy Alliance
Office of Legal Affairs
918 Parker St Bldg A21
Berkeley, CA 94710
(510) 229-5211

Emma S. Ketteringham*
Lynn M. Paltrow**
National Advocates for Pregnant Women
15 West 36th Street, Suite 901
New York, NY 10018
(212) 255-9252

* Application to appear *pro hac vice* to be submitted

** Leave to appear *pro hac vice* was granted by the Court of
Criminal Appeals on July 12, 2010

Attorneys for *Amici Curiae*

Pursuant to Alabama Rule of Appellate Procedure 29, the Southern Poverty Law Center, Drug Policy Alliance, and National Advocates for Pregnant Women respectfully move for leave to file a brief of *amici curiae* herein proffered, in support of Amanda Kimbrough's petition for certiorari review.

1. Proposed *Amici* are national and Alabama healthcare providers, drug policy organizations, human rights organizations, experts in addiction and their associations, and advocates for pregnant women. Namely, the American Academy of Addiction Psychiatry, American Medical Women's Association, American Nurses Association, The Alabama Women's Resource Network, American Society of Addiction Medicine, Global Lawyers and Physicians, Institute for Health and Recovery, International Center for Advancement of Addiction Treatment of the Beth Israel Medical Center Baron Edmond de Rothschild Chemical Dependency Institute, National Asian Pacific American Women's Forum, National Association of Nurse Practitioners in Women's Health, National Association of Social Workers and National Association of Social Workers, Alabama Chapter, National Council on Alcoholism and Drug Dependence, Inc., National

Latina Institute for Reproductive Health, National Organization for Women - Alabama, National Perinatal Association, National Women's Health Network, National Women's Law Center, Our Bodies Ourselves, Southern Center for Human Rights, Sheila Blume, MD, Wendy Chavkin, MPH, MD, Nancy Day, MPH, PHD, Deborah A. Frank, MD, Leslie Hartley Gise, MD, Stephen R. Kandall, MD, Linda Worley, MD.

2. We recognize that *amicus* briefs in support of petitions for certiorari are rarely filed. We have also filed a brief in support of the petition for certiorari filed in *Ex Parte Elisabeth Ankrom, In re: Hope Elisabeth Ankrom v. State of Alabama*, No. 11-10176, and respectfully request that the Court accept this brief in support of review in this case as well so that all of the implications of the Court of Criminal Appeals' decision may be reviewed and considered by this Court. The legal questions presented in this petition involve complex scientific, medical, and public health issues in which the *amici* have longstanding interest. *Amici* are recognized experts in fetal, neonatal, and maternal health, and in the effects of drugs and other substances on public health and families. *Amici* believe they have both a public and an ethical duty

By Attorneys for Amici Curiae

Mary Bauer
Alabama Bar No. 1181R76B
Southern Poverty Law Center
400 Washington Ave
Montgomery, AL 36104
(334) 956-8333

Tamar Todd
Alabama Bar No. TOD005
Drug Policy Alliance
Office of Legal Affairs
918 Parker Street
Building A21
Berkeley, CA 94710
(510) 229-5211

Emma S. Ketteringham*
Lynn M. Paltrow**
National Advocates for Pregnant Women
15 West 36th Street, Suite 901
New York, NY 10018
(212) 255-9252

ESK@ADVOCATESFORPREGNANTWOMEN.ORG

* Application to appear *pro hac vice* to be submitted

** Leave to appear *pro hac vice* was granted by the Court of
Criminal Appeals on July 12, 2010

NO. _____

IN THE SUPREME COURT OF ALABAMA

EX PARTE AMANDA HELAINE KIMBROUGH, *PETITIONER*

IN RE

STATE OF ALABAMA

VS.

AMANDA HELAINE KIMBROUGH,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, FOLLOWING
APPEAL FROM THE CIRCUIT COURT OF COLBERT COUNTY

BRIEF OF AMICI CURIAE
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Mary Bauer
Alabama Bar No. 1181R76B
Southern Poverty Law Center
400 Washington Ave
Montgomery, AL 36104
(334) 956-8200
Fax: (334) 956-8481
Mary.Bauer@splcenter.org

Tamar Todd
Alabama Bar NO. TOD005
Drug Policy Alliance
Office of Legal Affairs
918 Parker St. Bldg A21
Berkeley, CA 94710
(510) 229-5211
Fax: (510) 295-2810
TTODD@DRUGPOLICY.ORG

Emma S. Ketteringham*
Lynn M. Paltrow**
National Advocates for Pregnant Women
15 West 36th Street, Ste 901
New York, NY 10018-7126
ESK@ADVOCATESFORPREGNANTWOMEN.ORG

* Application to appear *pro hac vice* to be submitted
** Leave to appear *pro hac vice* was granted in Court of
Criminal Appeals on July 12, 2010

Attorneys for Amici Curiae

Table of Contents

Table of Authorities **iii**

Interests of Amici **1**

Summary of the Argument **2**

Argument **6**

 I. The Court of Criminal Appeals’ Decision Should Be Reversed Because the Expansion of the Chemical Endangerment Law To Punish Pregnant Women Who Continue To Term Despite Having Used A Controlled Substance Endangers Maternal, Fetal, and Child Health. 6

 A. The Plain Language of the Chemical Endangerment Law Reflects the Concerns of Medical and Public Health Specialists and Organizations. 6

 B. The Legislative History of the Chemical Endangerment Law Demonstrates that Alabama’s Legislature Did Not Intend the Law to Apply to Pregnant Women Who Continue to Term Despite Having Used A Controlled Substance. 8

 C. The Judicial Expansion of the Chemical Endangerment Law to Pregnancy Undermines Maternal, Fetal, and Child Health. 15

 1. *Allowing the Court of Criminal Appeals Decision to Stand Will Deter Drug-Dependent Pregnant Women from Seeking Health Care.* 15

 2. *The Expansion of the Chemical Endangerment Law Discourages Pregnant Women With Drug Problems from Carrying Pregnancies to Term.* 19

 3. *Allowing the Court of Criminal Appeals Decision to Stand Will Deter Pregnant Women from Sharing Vital Information with Health Care Professionals.* 21

 4. *Allowing the Court of Criminal Appeals Decision to Stand Will Endanger Maternal and Fetal Health by Incarcerating Pregnant Women.* 22

 5. *Allowing the Court of Criminal Appeals Decision to Stand Will Make Pregnant Women Who Lawfully Take Prescribed Controlled Substances Subject to Criminal Investigation and Arrest.* 24

 D. The Court of Criminal Appeals Decision Makes Alabama an Outlier Because the Majority of Sister States Have Refused to Expand the Criminal Law to Reach Women in Relation to the Fetuses They Carry and Sustain. 31

II. The Court of Criminal Appeals Decision Is Not Supported or Justified by Scientific Research.	34
A. There is No Conclusive Evidence that Exposure to Illegal Drugs Causes Harms the are Greater Than or Different From Harms Resulting From Legal Drugs and Innumerable Actions, Conditions, and Circumstances Common to Pregnant Women.....	36
III. The Court of Criminal Appeals' Decision Reflects a Misunderstanding of the Nature of Addiction.	40
A. Addiction is Not Simply a Voluntary Act That is Cured by Threats.	42
B. Addiction is a Medical Condition that is Difficult to Overcome.....	43
IV. Allowing the Court of Criminal Appeals Decision to Stand Implicates both Constitutional Rights and International Laws and Norms.	44
Conclusion	47
Certificate of Service	48

TABLE OF AUTHORITIES

Cases

Cochran v. Commonwealth, 315 S.W.3d 325 (Ky. 2010) 32

Collins v. State, 890 S.W. 2d 893 (Tex. App. 1994) 32

Commonwealth v. Welch, 864 S.W. 2d 280 (Ky. 1993) 32

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 33

Herron v. State, 729 N.E.2d 1008 (Ind. Ct. App. 2000) 46

Jaffee v. Redmond, 518 U.S. 1 (1996) 22

Johnson v. State, 602 So. 2d 1288 (Fla. 1992) 20, 32, 45

Kilmon v. State, 905 A.2d 306 (Md. 2005) 31

Linder v. United States, 268 U.S. 5 (1925) 42

McKnight v. State, 661 S.E.2d 354 (S.C. 2008). 36

People v. Hardy, 469 N.W. 2d 50 (Mich. Ct. App. 1991) 32

Reinesto v. Superior Court, 894 P.2d 733 (Ariz. Ct. App. 1995) 31

Robinson v. California, 370 U.S. 660, 667 (1962) 42

Sheriff v. Encoe, 885 P.2d 596 (Nev. 1994) 32

Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1998) 13

State v. Aiwohi, 123 P.3d 1210 (Haw. 2005) 31

State v. Armstard, 991 So. 2d 116 (La. App. 2 Cir. 2008) . 32

State v. Dunn, 916 P.2d 952 (Wash. Ct. App. 1996) 32

State v. Geiser, 763 N.W.2d 469 (N.D. 2009) 31

State v. Gethers, 585 So. 2d 1140 (Fla. App. 4th Dist. 1991) 32

State v. Greywind, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992) 20

State v. Horne, 319 S.E.2d 703 (S.C. 1984) 33

State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992) 32

State v. Wade, 232 S.W.3d 663 (Mo. Ct. App. 2007) 31

Ward v. State, 188 S.W. 3d 874 (Tex. App. Amarillo 2006) . 32

Whitner v. State, 492 S.E.2d 777 (S.C. 1997) 32, 33

Statutes

§ 13A-1-4, Ala. Code 1975 34

§ 13A-16-1, Ala Code 1975 8, 10

§ 13A-2-23(2), Ala. Code 1975 29

§ 13A-6-1(c), Ala. Code 1975 12

§ 13A-6-1(d), Ala. Code 1975 7, 11, 14

§ 16-28-40(a)(5), Ala. Code 1975 7

§ 19-3-170, Ala. Code 1975 7

§ 20-2-20 to 32 Ala. Code 1975 25, 37

§ 22-10A-2(d), Ala. Code 1975 7

§ 22-19-41(2), Ala. Code 1975 7

§ 22-6-8(c), Ala. Code 1975	7
§ 22-9A-1(2), Ala. Code 1975	7
§ 22-9A-13, Ala. Code 1975	7
§ 22-9A-13(a)(4) Ala. Code 1975	7
§ 22-9A-13(b), Ala. Code 1975	7
§ 22-9A-24(a)(2), Ala. Code 1975	7
§ 26-15-3.2 Ala. Code 1975	1, 2, 5, 17
§ 26-15-3.2(a)(3), Ala. Code 1975	14
§ 26-15-3.2(c), Ala. Code 1975	25
§ 26-22-1(a), Ala. Code 1975	8
§ 26-22-2(8) Ala. Code 1975	7
§ 26-23A-3(8), Ala. Code 1975	7
§ 26-23A-5, Ala. Code 1975	7
§ 26-23B-3 Ala. Code 1975	7
21 U.S.C. § 812	37
42 U.S.C. § 201(q)	42
U.S. Const. amend. IV, V, VI, VIII, XIV	46

Other Authorities

A. Addis et al., <i>Fetal Effects of Cocaine: an Updated Meta Analysis</i> , 15 <i>Reproductive Toxicology</i> 341-369 (2001)	37
A. Racine et al., <i>The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City</i> , 270 <i>JAMA</i> 1581 (1993)	15, 18
A.H. Schempf & D.M Strobino, <i>Illicit Drug Use and Adverse Birth Outcomes: Is It Drugs or Context?</i> , 85 <i>J. Urban Health</i> 858 (2008)	35
<i>Alabama Prison Conditions</i> , Equal Justice Initiative Report of Alabama Prison Conditions	24
Am. Coll. of Obstetricians & Gynecologists, <i>Comm. On Health Care for Underserved Women, Committee Opinion 473 Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist</i> , 117 <i>Obstetrics & Gynecology</i> 200 (2011)	16, 17
Am. College of Obstetricians & Gynecologists, <i>Information about Methamphetamine Use in Pregnancy</i> , Mar. 3, 2006	39
Am. Med. Ass'n Bd. of Trustees, <i>Legal Interventions During Pregnancy</i> , 264 <i>JAMA</i> 2663 (1990)	17, 23, 41
Am. Psychiatric Ass'n., <i>The Diagnostic and Statistical Manual of Mental Disorders</i> (4th ed. 1994)	42
American Medical Association, <i>Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy</i> , Resolution 131 (1990)	17

Anja Huizink & Eduard Mulder, *Maternal smoking, drinking or cannabis use during pregnancy and neurobehavioral and cognitive functioning in human offspring*, 30 *NEUROSCIENCE AND BIOBEHAVIORAL REVIEWS* 1(2005) 40

Anthony M. Vintzileos et al., *The Impact of Prenatal Care on Neonatal Deaths in the Presence and Absence of Antenatal High-Risk Conditions*, 186(5) *Am. J. of Obstetrics and Gynecology* 1011 (2002)..... 18

Barbara L. Thompson et al., *Prenatal exposure to drugs: effects on brain development and implications for policy and education*, 10 *NATURE REVIEWS NEUROSCIENCE* 303 (2009) 35

Brian J. Cleary et al., *Medication Use in Early Pregnancy: Prevalence and Determinants of Use in a Prospective Cohort of Women*, 19 *PHARMACOEPIDEMIOLOGY & DRUG SAFETY* 410 (2010) ... 27

Chaya G. Bhuvaneshwar, MD, et al., *Cocaine and Opioid Use During Pregnancy: Prevalence and Management*, 10(1) *Primary Care Companion Journal of Clinical Psychiatry* 59 (2008). 42

Chemical Endangerment Debate (audio), May 2008 9, 10, 20

Clara Crowder, *Settlement Filed in Tutwiler Prison Suit*, *Birmingham News*, June 29, 2004..... 23, 24

Ctr. For The Evaluation Of Risks To Human Reproduction, *Report of the NTP-CERHR Expert Panel on the Reproductive & Developmental Toxicity of Amphetamine and Methamphetamine II-189* (July 2005) 38

Cynthia Chazotte et al., *Cocaine Use During Pregnancy and Low Birth Weight: The Impact of Prenatal Care and Drug Treatment*, 19(4) *SEMINARS IN PERINATOLOGY* 293 (1995) 18

Cynthia Dailard & Elizabeth Nash, *State Responses to Substance Abuse Among Pregnant Women*, *The Guttmacher Report on Public Policy*, Dec. 2000..... 31

D. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 *JAMA* 1613 (2001)..... 37

D. M. Fergusson et al., *Maternal use of Cannabis and Pregnancy Outcome*, 109 *BJOG: Int'l J. Obstetrics & Gynecology* 21 (2002) 39

David C. Lewis et al., *Meth Science Not Stigma: Open Letter To The Media*, (July 25, 2005)..... 39

Drugs Inside Prison Walls, *Wash. Times*, Jan. 27, 2010 23

Edward F. Funai et al., *Compliance with Prenatal Care in Substance Abusers*, 14(5) *J. MATERNAL FETAL NEONATAL MED.* 329 (2003) 18

Emmalee S. Bandstra et al., <i>Prenatal Drug Exposure: Infant and Toddler Outcomes</i> , 29 JOURNAL OF ADDICTIVE DISEASES 245 (2010)	35
Erika Hyde Riley, et al. <i>Correlates of Prescription Drug Use during Pregnancy</i> , 14 J. WOMEN'S HEALTH, 401-409 (2005)	26
Euni Lee et al., <i>National Patterns of Medication Use during Pregnancy</i> , 15 PHARMACOEPIDEMOLOGY & DRUG SAFETY 537 (2006) ..	26
Guttmacher Inst., <i>State Policies in Brief: Substance Abuse During Pregnancy</i> , July 1, 2010	31
H.B. 601, 2010 Leg., Reg. Sess. (Ala. 2010)	9
H.B. 723, 2008 Leg., Reg. Sess. (Ala. 2008)	9
Int'l Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 10(2), U.N. Doc. A/6316 (Dec. 16, 1966)	45
Jeanne Flavin, <i>OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA</i> 112 (NYU Press 2008)	20
Kelly et al., <i>The Detection & Treatment of Psychiatric Disorders and Substance Use Among Pregnant Women Cared for in Obstetrics</i> , 158 Am. J. Psych. 213 (2001)	22
Maria A. Morgan et al., <i>Management of Prescription and Nonprescription Drug Use During Pregnancy</i> , 23 J. MATERNAL-FETAL & NEONATAL MED, 813 (2010),	25, 26
Marilyn L. Poland et al., <i>Punishing Pregnant Drug Users: Enhancing the Flight from Care</i> , 31 Drug Alcohol Dependence 199 (1993)	17
Martha A. Jessup, <i>Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women</i> , 33 J. Drug Issues 285 (2003)	17, 44
Matt Elofson, <i>Some County Jails face Overcrowding</i> , DOTHAN EAGLE, May 17, 2009	24
Megan Bastick & Laurel Townhead, <i>Women in Prison: A Commentary on the UN Standard Minimum Rules for the Treatment of Prisoners</i> at 42 (June 2008)	23
Michael J. Rivkin et al., <i>\Volumetric MRI Study of Brain in Children With Intrauterine Exposure to Cocaine, Alcohol, Tobacco, and Marijuana,\</i> 121 PEDIATRICS 741 (2008)	38
Mishka Terplan et al., <i>Methamphetamine Use Among Pregnant Women</i> , 113 Obstetrics & Gynecology 1290(2009)	17
N.C. Goler et al., <i>Substance Abuse Treatment Linked with Prenatal Visits Improves Perinatal Outcomes: A New Standard</i> , 28 Journal of Perinatology 597 (2008)	19
Nat'l Council on Crimes and Delinquency, <i>The Spiral Risk: Health Care Provision To Incarcerated Women</i> 12 (2006) ...	23

Off. Inspector General, U.S. Dept. of Justice, <i>Deterring Staff Sexual Abuse of Federal Inmates</i> , Apr. 2005.....	23
P. Moran et al., <i>Substance Misuse During Pregnancy: Its Effects and Treatment</i> , 20 <i>Fetal & Maternal Med. Rev.</i> 1 (2009)	15
Patrick J. Sweeney et al., <i>The Effect of Integrating Substance Abuse Treatment with Prenatal Care on Birth Outcomes</i> , 20(4) <i>J. Perinatology</i> 219 (2000)	19
Peter Fried & A.M. Smith, <i>A Literature Review of the Consequences of Prenatal Marijuana Exposure: An Emerging Theme of a Deficiency in Aspects of Executive Function</i> , 23 <i>Neurotoxicology & Teratology</i> 1 (2001)	39
<i>Physicians, Scientists to Media: Stop Using the Term "Crack Baby,"</i> February 27, 2004.....	38
Rukmini Menon & Cheryl D. Bushnell, <i>Headache and Pregnancy</i> 14 <i>THE NEUROLOGIST</i> 113 (2008)	27
SAMHSA, U.S. Dep't Health & Human Servs., <i>2007 State Estimates of Substance Use & Mental Health—Alabama</i> (2009)	43
SB 133 (Ala. 2006)	6, 8, 41
Sheri Della Grotto et al. <i>Patterns of Methamphetamine Use During Pregnancy: Results from the Infant Development, Environment, and Lifestyle (IDEAL) Study</i> , <i>Maternal Child Health J.</i> (2009)	18
Stephen A. Contag et al., <i>Migraine during pregnancy: is it more than a headache?</i> , 5 <i>Nature Reviews: Neurology</i> 449 (2009)	27
Steven Ertelt, <i>Alabama Killer Won't Be Charged for Killing Pregnant Woman's Baby</i> , <i>LifeNews</i> (August 2, 2005).....	11
Susan Hatters Friedman, Amy Heneghan, & Miriam Rosenthal, <i>Disposition and health outcomes among infants born to mothers with no prenatal care</i> , 33 <i>CHILD ABUSE & NEGLECT</i> 116 (2009)	18
T.A. Campbell & K.A. Collins, <i>Pediatric Toxicologic Deaths: A 10 Year Retrospective Study</i> , 22 <i>Am. J. Forensic Med. & Pathology</i> 184 (2001)	38
Thomas M. Brady & Olivia S. Ashley, <i>Women in Substance Abuse Treatment: Results from the Alcohol and Drug Services Study (ADSS)</i> , Sept. 2005.....	44
Tiffany Von Wald & Anne D. Walling, <i>Headache During Pregnancy: CME Review Article</i> , 57 <i>OBSTETRICAL & GYNECOLOGICAL SURVEY</i> 181 (2002)	27

U.N. Office on Drugs and Crime, *Custodial and Non-Custodial Measures: The Prison in The Criminal Justice Assessment Toolkit 27* (2006) 45

United Nations Office on Drugs and Crime & World Health Organization Reg'l Office for Europe, *Women's Health in Prison: Correcting Gender Inequity in Prison Health 32* (2009) 45

United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), *Substance Abuse Treatment Facility Locator*.... 43

Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25(2), U.N. Doc. A/810 (Dec. 10, 1948) 45

INTERESTS OF AMICI

Amici curiae include 26 Alabama and national organizations and individuals¹ with recognized expertise in the areas of maternal, fetal and neonatal health and in understanding the effects of improper drug use on users, their families, and society. Amici respectfully request that this Court accept certiorari in order to address a question of first impression raised by the criminal conviction in this case; a conviction that unjustifiably expands the scope of the crime of Chemical Endangerment of a Child, § 26-15-3.2 Ala. Code 1975, to include women in

¹ Statements of interest for each are included as an appendix. Amici include: American Academy of Addiction Psychiatry, American Medical Women's Association, American Nurses Association, The Alabama Women's Resource Network, American Society of Addiction Medicine, Global Lawyers and Physicians, Institute for Health and Recovery, International Center for Advancement of Addiction Treatment of the Beth Israel Medical Center Baron Edmond de Rothschild Chemical Dependency Institute, National Asian Pacific American Women's Forum, National Association of Nurse Practitioners in Women's Health, National Association of Social Workers and National Association of Social Workers, Alabama Chapter, National Council on Alcoholism and Drug Dependence, Inc., National Latina Institute for Reproductive Health, National Organization for Women - Alabama, National Perinatal Association, National Women's Health Network, National Women's Law Center, Our Bodies Ourselves, Southern Center for Human Rights, Sheila Blume, MD, Wendy Chavkin, MPH, MD, Nancy Day, MPH, PHD, Deborah A. Frank, MD, Leslie Hartley Gise, MD, Stephen R. Kandall, MD, Linda Worley, MD.

relation to their own pregnancies, that endangers, rather than protects, pregnant women, fetuses, and children, and that creates potential criminal liability for health care providers.

SUMMARY OF THE ARGUMENT

This case presents a question of first impression and of monumental importance to the health and well-being of Alabama women and their families and the lives of health care providers. In essence, the Court of Criminal Appeals redefined the word "child" to include a "viable fetus," thus making § 26-15-3.2 Ala. Code 1975, enacted to address the issue of children endangered by exposure to hazardous chemical byproducts in methamphetamine laboratories, applicable to a pregnant woman who used any amount of a controlled substance and seeks to continue a pregnancy to term. In so doing, the Court of Criminal Appeals has created new law that reaches well beyond the Legislature's clear intent and even beyond women who use illegal drugs. Without even considering the implications, it has made the law applicable to pregnant women who, under the care of a medical provider, are lawfully taking certain prescription medications. Furthermore, the Court of Criminal Appeals,

apparently failing to realize the legal reach of its decision and purporting to be interpreting one word in one statute, has created constitutional vagueness problems with every Alabama criminal statute that uses the term "child." The Court's decision extends the criminal law, for the first time in Alabama, to permit the prosecution and punishment of both a pregnant woman in relation to her pregnancy and her health care providers who treat her. This has profound and detrimental implications for the health and welfare of women and their babies.

Amici seek to assist this Court by bringing to bear the medical and scientific research on the decision to accept certiorari review. Amici urge this Court to accept certiorari review because the decision below is not supported by the plain language and intent of the chemical endangerment statute, is contradicted by scientific research that makes clear that illegal drugs cannot be singled out from innumerable other actions, inactions, and exposures that pose potential risks to a fetus or to a child once born, is contrary to the consensus judgment of medical practitioners and their professional organizations, and undermines individual and public health.

Amici are committed to reducing potential drug-related harms at every opportunity. Amici do not endorse the non-medicinal use of drugs--including alcohol or tobacco--during pregnancy. Nor do amici assert that there are no health risks associated with the use of cocaine or other controlled substances during pregnancy. Rather, amici contend that the relevant medical and scientific research does not support the prosecution of women who use a controlled substance and continue to term for the crime of "chemical endangerment" and that such prosecutions undermine maternal and fetal health.

Amici recognize a strong societal interest in protecting the health of women, children, and families. In the view of amici, however, such interests are undermined, not advanced, by the judicial expansion of the chemical endangerment law to apply to pregnant women who seek to continue their pregnancies to term despite a drug problem.

The consequences of the Court of Criminal Appeals' decision for pregnant women and their families are significant and far-reaching. The Alabama State Legislature did not intend the chemical endangerment statute to encompass drug use during pregnancy and has refused to

amend it to do so. The Legislature recognizes that applying the chemical endangerment statute to pregnant women who use drugs leads to harmful and dangerous public health consequences. Public health research establishes that pregnant women are often deterred from pursuing drug treatment and prenatal care in circumstances where they fear arrest, prosecution, and possible imprisonment. The threat of criminal sanctions also creates a disincentive for pregnant women to disclose information about drug use to health care providers. Furthermore, prosecuting women for continuing their pregnancies to term despite a drug problem encourages them to terminate pregnancies to avoid criminal penalties.

Because this case presents issues critical to all pregnant women in Alabama and has broad implications for maternal, fetal, and child health, and for the development of the law, this Court should grant certiorari to clarify: (1) that § 26-15-3.2 Ala. Code 1975 was not intended to apply to pregnant women in relation to the viable fetuses they carry; and (2) that claims concerning medicine and public health must be supported by evidence-based research rooted in current science.

ARGUMENT

I. The Court of Criminal Appeals' Decision Should Be Reversed Because the Expansion of the Chemical Endangerment Law To Punish Pregnant Women Who Continue To Term Despite Having Used A Controlled Substance Endangers Maternal, Fetal, and Child Health.

A. The Plain Language of the Chemical Endangerment Law Reflects the Concerns of Medical and Public Health Specialists and Organizations.

The Alabama Legislature enacted the chemical endangerment of a child statute in 2006 based on a bill that was titled "Chemical Endangerment of Exposing a Child to a Methamphetamine Laboratory, Crime of Established Penalties."² The statute does not mention pregnancy, womb, umbilical cord, uterus, or drug use by a pregnant woman, nor does it mention fetuses or unborn children. There is no hint in the terms of this statute as they are commonly understood that the statute has any application to a pregnant woman's relationship to a fetus she carries inside her body. Taking the words in the statute at their ordinary meaning, the section is limited to children who have been born and therefore might come into contact with hazardous chemicals or drug paraphernalia.

² 2006 Ala. Acts 204; SB 133 (Ala. 2006).

The Alabama legislature has been careful to explicitly use the terms "fetus," "unborn,"³ and "pregnant" or "pregnancy"⁴ when a law is meant to apply to fetuses, the unborn, or pregnancy. Even when the State of Alabama professed to value fetal life, a statement upon which the Court of Criminal Appeals relies, it did not use the term

³ *E.g.*, § 26-22-2(8) Ala. Code 1975 ("Unborn child or fetus. An individual organism of the species homo sapiens from fertilization until live birth"); § 26-23B-3 Ala. Code 1975, Effective Jan. 1, 2012 ("Unborn child or fetus. An individual organism of the species homo sapiens from fertilization until live birth"); § 22-9A-13(a)(4), Ala. Code 1975, effective Jan. 1, 2012 (defining "fetal death"). See *e.g.*, § 22-9A-1(2), Ala. Code 1975 (defining "fetal" death); § 22-9A-13, Ala. Code 1975 (reports of fetal death); § 22-9A-24(a)(2), Ala. Code 1975 ("dead body or dead fetus"); § 22-19-41(2), Ala. Code 1975 (defining a decedent as a deceased individual and includes a still-born infant or fetus"); § 16-28-40(a)(5), Ala. Code 1975 (is a parent with the care and custody of minor or unborn child"); § 19-3-170, Ala. Code 1975 (substitution or executory devise to any other person, born or unborn"); § 22-6-8(c), Ala. Code 1975 ("where it has been determined that it would be in the best interest of the unborn child for the mother to receive coverage during pregnancy").

⁴ See *e.g.*, § 26-23A-3(8), Ala. Code 1975 ("Pregnant or Pregnancy. The female reproductive condition of having an unborn child in the mother's (woman's) body"); § 13A-6-1(d), Ala. Code 1975 (Outlining an exception to homicide and manslaughter for consent given by a pregnant woman for an abortion); § 22-9A-13(b), Ala. Code 1975 (Outlining the reporting requirements for induced pregnancy terminations); § 22-10A-2(d), Ala. Code 1975 (The criteria for eligibility for prenatal genetic testing); § 26-23A-5, Ala. Code 1975 (Mandating a printed index of services available to pregnant women).

"child" but used unequivocal language stating it values "unborn life that is capable of living outside the womb." § 26-22-1(a), Ala. Code 1975. When the Alabama legislature made a criminal law applicable to an "unborn child," it did not use the term "child," but used unambiguous, specific and plain language, "unborn child in utero." § 13A-16-1, Ala. Code 1975. The Legislature's choice not to use those terms in this statute further clarifies that the lower court usurped the legislative function, rewriting rather than interpreting the law.

B. The Legislative History of the Chemical Endangerment Law Demonstrates that Alabama's Legislature Did Not Intend the Law to Apply to Pregnant Women Who Continue to Term Despite Having Used A Controlled Substance.

The chemical endangerment law was intended to "provide for the crime of chemical endangerment of exposing a child to an environment in which controlled substances are produced or distributed,"⁵ such as methamphetamine labs. On its face, the statute does not apply to pregnant women or to controlled substance use by any person, including a pregnant woman.

⁵ 2006 Ala. Acts 204; S.B. 133, 2006 Leg., Reg. Sess. (Ala. 2006).

Moreover, since enacting the chemical endangerment law in 2006, the Alabama Legislature has on three occasions, including as recently as the 2011 session, refused to amend the law to apply to pregnant women who use controlled substances or to include a "fetus" in the statute's definition of "child."⁶ During the 2008 debate on whether to amend the statute to apply to pregnant women who use controlled substances, legislators specifically expressed concern that, if amended, women with a history of drug problems would avoid prenatal care and seek abortions out of fear of prosecution, causing preventable harms to the mother and fetus.⁷ Although it is often hard to infer why a legislature has rejected a particular amendment, this is a case of multiple rejected attempts, with legislators explicitly recognizing that women receive limited to no substance abuse treatment through the criminal justice

⁶ H.B. 723, 2008 Leg., Reg. Sess. (Ala. 2008); H.B. 601, 2010 Leg., Reg. Sess. (Ala. 2010); H.B. 8, 2011 Leg., Reg. Sess. (Ala. 2011); S.B. 34, 2011 Leg., Reg. Sess. (Ala. 2011)

⁷ *Id.* See also, *Chemical Endangerment Debate (audio)*, May 2008, available at <http://altaxdollarsatwork.blogspot.com/2008/05/chemical-child-endangerment-debate.html> (Alabama House Debate on 4/17/08 about HB723).

system and that incarcerating pregnant women would harm maternal, fetal, and child health.⁸

Also telling is that even when the legislature has made the criminal law applicable to an "unborn child" it has considered the public health consequences and made sure to explicitly exempt the pregnant woman herself from prosecution in relation to her own pregnancy. Articles 1 and 2 of Title 13A were amended in 2007, just a year after the chemical endangerment law was enacted, to redefine the term "person" in those articles to include "unborn child in utero, at any stage of development, regardless of viability." § 13A-16-1, Ala. Code 1975. Until that law was amended, District Attorneys had publicly claimed there was no law allowing a criminal charge relating to the death of an unborn child. See Steven Ertelt, *Alabama Killer Won't Be Charged for Killing Pregnant Woman's Baby*, LifeNews

⁸ *Id.* (Representative Todd expressed concern that such amendments would criminalize drug addiction rather than treat it as a public health problem, have not worked in other states, encourage abortions and the avoidance of prenatal care, and result in the incarceration of hundreds of women. Representative Warren expressed the need for drug treatment rather than incarceration. Representative Salaam expressed his concern that pregnant drug users in rural communities would be unable to access drug treatment through the court system and instead would be incarcerated without receiving help).

(August 2, 2005). If the term child were plainly understood to include viable fetuses, as the Court of Criminal Appeals suggests, prosecutors would have had the power to arrest people believed to have caused a fetal loss pursuant to any statute prohibiting conduct injurious to a "child." Instead, prosecutors publically stated that they did not have that power, indicating that they understood the plain meaning of the word "child" to exclude fetuses.

Understanding the significant ramifications of legislation addressing unborn life, the Alabama Legislature has taken extraordinary precautions to limit the law and avoid the public health consequences amici seek to avert. In each instance, the Legislature uses specific and unequivocal plain language, and ensures that the law will not be applied to the pregnant woman herself. For example, while making the criminal law applicable to crimes involving an unborn child for the first time, the legislature specifically provided that those laws could not be used against the pregnant woman herself. See § 13A-6-1(d), Ala. Code 1975 ("Nothing in Article 1 or Article 2 shall permit the prosecution of . . . any woman with respect to her unborn child."); § 13A-6-1(c), Ala. Code

1975 ("A victim of domestic violence or sexual assault may not be charged under Article 1 or Article 2 for the injury or death of an unborn child caused by a crime of domestic violence or rape perpetrated against her."). By contrast, the Court of Criminal Appeals' decision tramples these carefully-erected safeguards.

Because the Court's reinterpretation of the word "child" is based primarily on dictionary definitions and a general statement of legislative intent in the section of Title 26 regulating abortion, it cannot, as a matter of law or logic, be restricted to the chemical endangerment law. If, as the Court's ruling suggests, the word "child" plainly includes a viable fetus, that definition must control in every other instance in which that word is used in the Alabama Code unless the Legislature specifically excludes fetuses. Such laws as the generally-worded child endangerment statute would necessarily become applicable to pregnant women, subjecting to criminal investigations every pregnant woman who "engag[es] in virtually any injury-prone activity" such as:

Continued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to

avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little.

Kilmon v. State, 905 A.2d 306, 311-12 (Md. Ct. App. 2006).

"Any woman who suffers a post-viability miscarriage could be subject to scrutiny regarding whether or not she intentionally acted to cause the miscarriage." Hillman v. State, 503 S.E.2d 610, 613 (Ga. Ct. App. 1998).⁹

Until the Appeals Court's decision, only third parties

⁹ The Supreme Court of Illinois has also recognized that imposing legal liability on pregnant women themselves is very different from imposing it on third parties. *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1998). As the court explained:

The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant. No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type possible at the risk of her own life, in order to bring forth an adversary into the world. It is after all, the whole life of the pregnant woman which impacts on the development of the fetus. As opposed to the third-party defendant, it is the mother's every waking and sleeping moment which for better or worse shapes the prenatal environment which forms the world for the developing fetus. That this is so is not a pregnant woman's fault: it is a fact of life. *Stallman v. Youngquist*, 531 N.E.2d at 360

who harmed a pregnant woman, killing or harming her unborn child, could be held criminally responsible in Alabama for the death or harm to an unborn child. See § 13A-6-1(d), Ala. Code 1975. The criminal law was used to value and protect pregnant women, not punish them. Now, despite the Legislature's clear intent, women may be held criminally liable for their own pregnancy loss under § 26-15-3.2(a)(3), Ala. Code 1975.

In this case of first impression, without careful and serious consideration of legislative intent, purpose and history, the principle of lenity in criminal law, and all of the legal, practical, and public health ramifications of its decision, the Court of Appeals has rewritten the law so that the chemical endangerment law and other generally worded criminal laws will apply to a pregnant woman in relation to the viable fetus she carries, sustains, and often at risk to her own life, gives life. In so doing, the Court of Appeals has ruled in a manner that is opposed by nationally renowned health, medical, and other scientific and professional organizations and leading experts including amici. The decision below creates uncertainty for pregnant women and their doctors and

invites decades of legal battles regarding which of the endless number of actions, inactions, and circumstances, and will subject women to prosecution.

C. The Judicial Expansion of the Chemical Endangerment Law to Pregnancy Undermines Maternal, Fetal, and Child Health.

The Alabama Legislature is well aware of the negative public health consequences of applying a criminal law approach to the issue of drug use and pregnancy. Because the Court of Criminal Appeals' decision contravenes legislative intent and rewrites state law in a way that is unlawful and detrimental to fetal and maternal health, this Court should grant certiorari.

1. Allowing the Court of Criminal Appeals Decision to Stand Will Deter Drug-Dependent Pregnant Women from Seeking Health Care.

Comprehensive, early, and high-quality prenatal care is one of the most effective weapons against pregnancy complications and infant mortality, especially for women experiencing a drug dependency problem.¹⁰ Pregnant women who

¹⁰ P. Moran et al., *Substance Misuse During Pregnancy: Its Effects and Treatment*, 20 *Fetal & Maternal Med. Rev.* 1, 16 (2009); A. Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 *JAMA* 1581, 1585-86 (1993) (finding that pregnant women who use cocaine but who have at least four prenatal visits significantly reduce their chances of

fear arrest will be deterred from seeking prenatal care.¹¹ Indeed, the harm resulting from a mother's fear of being prosecuted is so apparent that the American College of Obstetricians and Gynecologists ("the College") Committee on Health Care for Underserved Women has called upon doctors to change policies that lead to punitive interventions.¹² As the College committee explains, "[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."¹³ Furthermore, the committee notes that, "use of the legal system to address perinatal alcohol and substance abuse is inappropriate."¹⁴

The College committee makes clear that punitive approaches wrongly treat addiction as a failure of will. Instead, "[a]ddiction is a chronic, relapsing biological

delivering low birth weight babies).

¹¹ See e.g., Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 *Drug Alcohol Dependence* 199 (1993).

¹² Am. Coll. of Obstetricians & Gynecologists, Comm. On Health Care for Underserved Women, *Committee Opinion 473 Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 *Obstetrics & Gynecology* 200 (2011).

¹³ *Id.* at 200.

¹⁴ *Id.* at 201.

and behavioral disorder with genetic components [. . .] subject to medical and behavioral management in the same fashion as hypertension and diabetes.”¹⁵ The interpretation of § 26-15-3.2 Ala. Code 1975 adopted by the Court of Criminal Appeals creates an atmosphere of fear and uncertainty among women who have used a controlled substance. This uncertainty is likely to drive women from needed drug treatment.¹⁶

The American Medical Association agrees that fear of prosecution is a deterrent to pursuing drug treatment and prenatal care.¹⁷ It has stated:

¹⁵ *Id.* at 200.

¹⁶ See e.g., Martha A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. Drug Issues 285 (2003); Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 Drug Alcohol Dependence 199 (1993); Mishka Terplan et al., *Methamphetamine Use Among Pregnant Women*, 113 Obstetrics & Gynecology 1290 (2009) (“Although the desire for behavioral change may be strong in pregnancy, substance-using women may be afraid to seek prenatal care out of fear of prosecution or child protection intervention. This is unfortunate, because prenatal care has shown improvement in birth outcomes, even given continued substance use.”).

¹⁷ Am. Med. Ass’n Bd. of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2669 (1990); See also Am. Med. Ass’n, *Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy*, Resolution 131 (1990) (resolving “that the AMA oppose[s] legislation which criminalizes maternal drug addiction”).

Pregnant women will be likely to avoid seeking prenatal or open medical care for fear that their physician's knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.¹⁸

In rejecting amendments to the chemical endangerment law, the Alabama Legislature was rightly concerned with the disincentives that applying the statute to pregnancy would create, as prenatal care,¹⁹ drug treatment,²⁰ and other

¹⁸ *Id.* at 2667.

¹⁹ Prenatal care is strongly associated with improved outcomes for children exposed to drugs in utero. A. Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 JAMA 1581, 1585-86 (1993) (finding that pregnant women who use cocaine but who have at least four prenatal care visits significantly reduce their chances of delivering low birth weight babies); Edward F. Funai et al., *Compliance with Prenatal Care in Substance Abusers*, 14(5) J. Maternal Fetal Neonatal Med. 329, 329 (2003); Cynthia Chazotte et al., *Cocaine Use During Pregnancy and Low Birth Weight: The Impact of Prenatal Care and Drug Treatment*, 19(4) Seminars in Perinatology 293, 293 (1995); Sheri Della Grotto et al., *Patterns of Methamphetamine Use During Pregnancy: Results from the Infant Development, Environment, and Lifestyle (IDEAL) Study*, Maternal Child Health J. (2009). Conversely, lack of prenatal care is associated with poor health outcomes for mothers and newborns. See, Anthony M. Vintzileos et al., *The Impact of Prenatal Care on Neonatal Deaths in the Presence and Absence of Antenatal High-Risk Conditions*, 186(5) Am. J. Obstetrics & Gynecology 1011, 1013-14 (2002); Susan Hatters Friedman, Amy Heneghan, & Miriam Rosentha, *Disposition and Health Outcomes Among Infants Born to Mothers with no Prenatal Care*, 33 Child Abuse & Neglect 116 (2009).

²⁰ The research also shows that drug treatment can be effective for pregnant women and can produce beneficial

general health care have all been demonstrated to improve pregnancy outcomes whether or not a woman is able to overcome her drug addiction during the short length of pregnancy.²¹ The flight from care that would result from the ruling below expanding Alabama's chemical endangerment law would endanger maternal, fetal, and child health.

2. The Expansion of the Chemical Endangerment Law Discourages Pregnant Women With Drug Problems from Carrying Pregnancies to Term.

Prosecuting pregnant women who have used a drug or who are drug dependent will pressure women to terminate wanted pregnancies. In hearings to amend the chemical endangerment law, legislators expressed concern that

pregnancy outcomes. See e.g., Patrick J. Sweeney et al., *The Effect of Integrating Substance Abuse Treatment with Prenatal Care on Birth Outcomes*, 20(4) *J. Perinatology* 219, 223 (2000) (finding that neonatal outcome "is significantly improved for infants born to substance abusers who receive[d] drug treatment concurrent with prenatal care.")

²¹ See SAMSHA, U.S. Dep't Health Human Servs., *Curriculum for Addiction Professionals (CAP): Level 1* ("Prenatal care is necessary for healthy pregnancies, particularly for women with alcohol or drug issues"); see also, N.C. Goler et al., *Substance Abuse Treatment Linked with Prenatal Visits Improves Perinatal Outcomes: A New Standard*, 28 *Journal of Perinatology* 597, 602 (2008) ("Women who admit to use might be more motivated to stay clean in pregnancy. However, they will only get better if they receive appropriate support that they can access without . . . stigmatization or fears of criminal investigation.").

extending the chemical endangerment law to pregnant women may encourage women to seek abortions.²² Courts have also recognized that this type of prosecution may “unwittingly increase the incidence of abortion.”²³ Although it is difficult to know how frequently abortions result from fear of prosecution, one study reported that “two-thirds of the women [surveyed] who reported using [c]ocaine during their pregnancies . . . considered having an abortion.”²⁴ In at least one well-documented case, a woman did obtain an abortion to win her release from jail and prevent prosecution. In *State v. Greywind*, a pregnant woman accused of child endangerment, based on alleged harm to her fetus from drugs she had taken, obtained an abortion. The prosecutor then dropped the charge.²⁵ By encouraging such a

²² See *Chemical Endangerment Debate (audio)*, May 2008, available at <http://altaxdollarsatwork.blogspot.com/2008/05/chemical-child-endangerment-debate.html> (Alabama House Debate on 4/17/08 about HB723).

²³ See e.g., *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992) (“Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion”).

²⁴ See Jeanne Flavin, *Our Bodies, Our Crimes: The Policing of Women's Reproduction in America*, 112 (NYU Press 2008).

²⁵ See Motion to Dismiss With Prejudice, *State v. Greywind*, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992) (prosecutor sought and obtained dismissal of the endangerment charge because “[d]efendant has made it known

result, the expansion of the chemical endangerment law would clearly be at odds with the asserted state interest in fetal life.

3. Allowing the Court of Criminal Appeals Decision to Stand Will Deter Pregnant Women from Sharing Vital Information with Health Care Professionals.

In addition to deterring some women from seeking care altogether or coercing them into ending their pregnancies, the ruling below is also likely to undermine the provider/patient relationship for those women who do seek care. A relationship of trust is critical for effective medical care because the promise of confidentiality encourages patients to disclose sensitive subjects to a physician.²⁶ Open communication between drug-dependent pregnant women and their health care providers is critical,²⁷ and courts have long viewed confidentiality as fundamental to this relationship.²⁸

to the State that she has terminated her pregnancy. Consequently, the controversial legal issues presented are no longer ripe for litigation.”)

²⁶ Physician Resources, *Patient Confidentiality*, Am.Med. Ass’n, <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/patient-confidentiality.page#>

²⁷ See Kelly et al., *The Detection & Treatment of Psychiatric Disorders and Substance Use Among Pregnant Women Cared for in Obstetrics*, 158 Am. J. Psych. 213

Allowing the Court of Criminal Appeals' decision to stand would therefore place Alabama policy directly at odds with the prevailing medical and public health recommendations regarding the treatment of pregnant women with drug addictions, with potentially serious health consequences. For this reason, this matter warrants review by this Court.

4. Allowing the Court of Criminal Appeals Decision to Stand Will Endanger Maternal and Fetal Health by Incarcerating Pregnant Women.

Application of the chemical endangerment law to the pregnancy context will result in the incarceration of pregnant women.²⁹ Incarcerating pregnant women creates additional health risks for their fetuses and is counterproductive to the goals of promoting maternal and

(2001).

²⁸ As the United States Supreme Court recognized, a "confidential relationship" is necessary for "successful [professional] treatment," and "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Jaffee v. Redmond*, 518 U.S. 1,10 (1996) (upholding confidentiality of mental health records).

²⁹ According to a news report, Alabama women have been incarcerated while still pregnant under the district attorney's interpretation of the chemical endangerment law. *In Alabama, a Crackdown on Pregnant Drug Users*, N.Y. Times, Mar. 15, 2008 ("Rachel Barfoot . . . told her probation officer that she was pregnant. When she tested positive for cocaine, she was arrested").

fetal health. Incarcerated pregnant women generally receive inadequate prenatal care³⁰ and are exposed to other health risks such as infectious disease,³¹ poor sanitary conditions, poor nutrition,³² sexual abuse,³³ high stress levels³⁴ and poor mental health care.³⁵ Furthermore, incarceration cannot guarantee that pregnant women abstain from the use of controlled substances since illegal drugs are available in jails and prisons.³⁶

In Alabama, medical care in prison is appalling. Alabama received an "F" rating for the delivery of prenatal

³⁰ Nat'l Council on Crimes and Delinquency, *The Spiral Risk: Health Care Provision To Incarcerated Women* 14 (2006).

³¹ Am. Med. Ass'n Bd. of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990).

³² Nat'l Council on Crimes and Delinquency, *The Spiral Risk: Health Care Provision To Incarcerated Women* 16 (2006).

³³ Off. Inspector General, U.S. Dept. of Justice, *Deterring Staff Sexual Abuse of Federal Inmates*, Apr. 2005 (Kathleen Sawyer, a former Bureau of Prisons Director, stated that inmate sexual abuse was the "biggest problem" she faced as Director.)

³⁴ Megan Bastick & Laurel Townhead, *Women in Prison: A Commentary on the UN Standard Minimum Rules for the Treatment of Prisoners* 57 (June 2008) ("The high level of stress that accompanies incarceration itself has the potential to adversely affect pregnancy.").

³⁵ See e.g., Clara Crowder, *Settlement Filed in Tutwiler Prison Suit*, Birmingham News, June 29, 2004.

³⁶ See *Drugs Inside Prison Walls*, Wash. Times, Jan. 27, 2010 ("In many large state prison systems, a mix of inmate ingenuity, complicit visitors and corrupt staff has kept the level of inmate drug abuse constant over the past decade despite concerted efforts to reduce it.").

care to pregnant inmates.³⁷ Alabama is last in the nation in terms of per inmate medical spending.³⁸ The Julia Tutwiler Prison for Women is overcrowded³⁹ and has a history of failing to provide basic medical care, adequate hygiene, beds, ventilation, and nutrition.⁴⁰ County jails in Alabama are similarly ill equipped to provide healthy environments to pregnant women.⁴¹ Such conditions are antithetical to the health and well-being of pregnant women and their fetuses.

5. Allowing the Court of Criminal Appeals Decision to Stand Will Make Pregnant Women Who Lawfully Take Prescribed Controlled Substances Subject to Criminal Investigation and Arrest.

Judicial expansion of the chemical endangerment law to apply to pregnant women would make women who fill certain lawful prescriptions subject to arrest. The chemical

³⁷ The Rebecca Project for Human Rights and National Women's Law Center, *Mothers Behind Bars: A state-by-state report card and analysis of federal policies on conditions of confinement for pregnant and parenting women and the effect on their children* (Oct. 2010).

³⁸ Equal Justice Initiative Report of Alabama Prison Conditions, *Alabama Prison Conditions*.

³⁹ *Id.* (In the Julia Tutwiler facility the inmate population remains at 200 percent of capacity, even after approximately 31 percent of the prison population was transferred to a private prison in Louisiana.)

⁴⁰ Clara Crowder, *Settlement Filed in Tutwiler Prison Suit*, Birmingham News, June 29, 2004.

⁴¹ Matt Elofson, *Some County Jails face Overcrowding*, Dothan Eagle, May 17, 2009.

endangerment statute criminalizes "exposing" a "child" to any "controlled substance" or "chemical substance." Many prescription medications are "controlled substances" under the law. By its terms, the chemical endangerment law does not apply when a medical care provider has prescribed a controlled substance a child. See § 26-15-3.2(c), Ala. Code 1975 ("It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was administered to the child in accordance with the prescription instructions provided with the controlled substance.") There is, however, no affirmative defense if the controlled substance was prescribed to the woman who is pregnant with the child. Many types of schedule II, III, IV, and V controlled substances⁴² are medications, including painkillers, anti-seizure drugs, and stimulants that are routinely, appropriately prescribed for patients--including pregnant women.⁴³ A recent survey of obstetricians and

⁴² See § 20-2-20 to 32 Ala. Code 1975, (listing controlled substances).

⁴³ See Maria A. Morgan et al., *Management of Prescription and Nonprescription Drug Use During Pregnancy*, 23 J. Maternal-Fetal & Neonatal Med, 813 (2010) (noting, "Many preexisting chronic conditions require continued drug management during pregnancy, and pregnant women may develop

gynecologists found "that approximately a third of their pregnant patients took at least one prescription medication other than prenatal vitamins during pregnancy prior to labor."⁴⁴ The survey found that overall, "OB-Gyns were more likely to recommend prescription medications for a greater number of conditions in pregnant than nonpregnant patients."⁴⁵ A survey of pregnant women showed that over half (56%) were prescribed at least one drug during pregnancy, many of which were controlled substances under both federal and state laws.⁴⁶ A study analyzing data from

diseases or pregnancy-related disorders that require treatment during pregnancy. Further, given that about half of pregnancies in the United States are unplanned, women may inadvertently be exposed to medications during pregnancy.").

⁴⁴ *Id.* at 815-817 (OB-Gyns reported prescribing medications to both pregnant and non-pregnant patients for the following conditions: Chlamydia, urinary tract infection, depressed mood, generalized anxiety disorder, chronic insomnia, asthma, major depressive disorder, hypertension, frequent/severe headaches, flu, and diabetes.).

⁴⁵ *Id.* 817.

⁴⁶ Erika Hyde Riley, et al. *Correlates of Prescription Drug Use during Pregnancy*, 14 *J. Women's Health*, 401, 401 (2005) (finding that 18% of pregnant women surveyed were prescribed analgesic medications, many of which are listed in schedules II-V); See also, Euni Lee et al., *National Patterns of Medication Use During Pregnancy*, 15 *Pharmacoepidemiology & Drug Safety* 537 (2006) (finding that among the medications most commonly prescribed to pregnant women were analgesic drugs); Brian J. Cleary et al., *Medication Use in Early Pregnancy: Prevalence and Determinants of Use in a Prospective Cohort of Women*, 19

two national surveys that tracked all doctor visits made by pregnant women in 1999 and 2000 found that about half of all pregnant women visiting had one or more medications, including several controlled substances such as: the benzodiazepines alprazolam, triazolam, midazolam, lorazepam to treat anxiety; anti-epileptic drugs like pentobarbital and Phenobarbital; and codeine and other analgesics to treat pain.⁴⁷ Narcotic analgesics are also standard second-line treatments for pregnant women suffering severe migraine and tension headaches,⁴⁸ conditions that affect up to 18% of pregnant women.⁴⁹ In fact, hydromorphone, an opioid analgesic classified under Alabama and federal law

Pharmacoepidemiology & Drug Safety 408, 410-411 (2010) (finding that analgesics were among the most commonly reported medications in a sample of 23,989 pregnant women, each of whom reported taking at least one medicine during their pregnancy, including other controlled substances like benzodiazepines).

⁴⁷ Euni Lee et al., *National Patterns of Medication Use during Pregnancy*, 15 *Pharmacoepidemiology & Drug Safety* 537, 541 (2006).

⁴⁸ See e.g., Tiffany Von Wald & Anne D. Walling, *Headache During Pregnancy: CME Review Article*, 57 *Obstetrical & Gynecological Survey* 179, 181 (2002); Rukmini Menon & Cheryl D. Bushnell, *Headache and Pregnancy*, 14 *The Neurologist* 113, 115 (2008); Stephen A. Contag et al., *Migraine during pregnancy: is it more than a headache?*, 5 *Nature Reviews: Neurology* 449 (2009).

⁴⁹ Stephen A. Contag et al., *Migraine during pregnancy: is it more than a headache?*, 5 *Nature Reviews: Neurology* 449, 454 (2009).

as a schedule II substance, is "considered relatively safe in pregnancy" by neurologists to treat migraine symptoms.⁵⁰ Central nervous system depressants, such as alprazolam (Xanax©), diazepam (Valium©) and lorazepam (Ativan©), are schedule IV substances sometimes prescribed to women suffering from anxiety or depression during pregnancy.⁵¹

Among the drugs covered by the chemical endangerment statute as rewritten by the Court of Appeals is methadone. Methadone is the treatment recommended by the U.S. government for pregnant women with opioid addictions,⁵² and is a schedule II controlled substance under Alabama law. Section 20-2-25, Ala. Code 1975.

⁵⁰ Rukmini Menon & Cheryl D. Bushnell, *Headache and Pregnancy*, 14 *The Neurologist* 109, 113 (2008) (stating that the federal Food and Drug Administration gives hydromorphone a "B" rating, indicating its relative safety in pregnancy for acute migraine treatment).

⁵¹ Erika Hyde Riley, et al. *Correlates of Prescription Drug Use during Pregnancy*, 14 *J. Women's Health*, 401, 404, 407 (2005).

⁵² Substance Abuse & Mental Health Servs. Admin., U.S. Dep't Health & Human Servs., *Methadone Treatment for Pregnant Women*, Pub. No. SMA 06-4124 (2006) ("If you're pregnant and using drugs such as heroin or abusing opioid prescription pain killers, it's important that you get help for yourself and your unborn baby. Methadone maintenance treatment can help you stop using those drugs. It is safe for the baby, keeps you free of withdrawal, and gives you a chance to take care of yourself.").

In addition to potentially criminalizing the receipt of prescribed medications, the Court of Criminal Appeals' reinterpretation of the statute to include pregnant women in relation to their pregnancies raises the question of criminal liability for medical care providers who prescribe controlled substances to pregnant women. Under § 13A-2-23(2), Ala. Code 1975, a person may be held liable for the criminal conduct of others if "he aids or abets such other person in committing the offense." If ingestion of a controlled substance now constitutes chemical endangerment, it stands to reason that provision of that controlled substance would be aiding and abetting chemical endangerment. Indeed, the Alabama Legislature recognized the potential for practitioner liability in each of the rejected proposals to expand the law, and included language safeguarding receipt of prescribed medication and exempting health care providers from criminal liability.⁵³ The Court

⁵³ *E.g.*, H.B. 8, 2011 Leg., Reg. Sess. (Ala. 2011) ("(f) A rebuttable presumption of exposure in utero in violation of this section exists if both the mother and the child test positive for the same controlled substance at the time of birth **and the controlled substance was not prescribed by a licensed physician.**"

(g) **Any licensed physician providing medical care and treatment to a mother or child shall not be subject to any criminal liability under this section.** Medical care and treatment

of Criminal Appeals' sweeping expansion of the chemical endangerment law failed to take these issues into consideration, creating great uncertainty among health care providers and potentially chilling their ability to practice according to their medical judgment and the standard of care.

The adverse consequences of applying the statute to the context of pregnancy and to women who experience pregnancy losses as Ms. Kimbrough did are severe: the Court of Criminal Appeals' decision sends a perilous message to pregnant women who have used controlled substances: not to seek prenatal care or drug treatment, not to confide their addiction to health care professionals, not to continue vital medical treatments, or not continue their pregnancies and bring forth life. The decision therefore warrants review by this Court, as such prosecutions fail to serve any recognized state interests and are an affront to the intent of the Alabama Legislature.

includes, but is not limited to, prescribing, ordering, or administering medications or medical procedures.") (emphasis added)

- D. The Court of Criminal Appeals Decision Makes Alabama an Outlier Because the Majority of Sister States Have Refused to Expand the Criminal Law to Reach Women in Relation to the Fetuses They Carry and Sustain.

The Alabama Legislature's decision not to expand the chemical endangerment statute to the context of pregnancy is consistent with sister state legislatures and state appellate courts across the country. No state legislature has adopted a law creating special criminal penalties for pregnant drug-using women who seek to continue their pregnancies to term.⁵⁴ Additionally, with the exception of one, every state appellate court to address the issue has rejected efforts to judicially expand existing criminal laws to reach women who carry their pregnancies to term in spite of a drug problem.⁵⁵ Most recently in June 2010, the

⁵⁴ Guttmacher Inst., *State Policies in Brief: Substance Abuse During Pregnancy*, November 1, 2011; Cynthia Dailard & Elizabeth Nash, *State Responses to Substance Abuse Among Pregnant Women*, The Guttmacher Report on Public Policy, Dec. 2000.

⁵⁵ See e.g., *State v. Geiser*, 763 N.W.2d 469 (N.D. 2009); *State v. Wade*, 232 S.W.3d 663 (Mo. Ct. App. 2007); *Kilmon v. State*, 905 A.2d 306 (Md. 2005) (holding that the Maryland legislature did not intend child abuse and neglect law to be applied to the context of pregnant women); *State v. Aiwohi*, 123 P.3d 1210 (Haw. 2005) (holding that according to the plain language of the law, the definition of person did not include fetus); *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. Ct. App. 1995) (dismissing child

Supreme Court of Kentucky reversed a mid-level appellate court ruling that judicially expanded Kentucky's child endangerment law to reach a woman who tested positive for cocaine during pregnancy.⁵⁶ These decisions decline to judicially expand criminal laws to reach the alleged transfer of an illegal drug through the umbilical cord after birth.⁵⁷ Even the United States Supreme Court has

abuse charges filed against a woman for heroin use during pregnancy; court held that the ordinary meaning of "child" excludes fetuses); *Collins v. State*, 890 S.W. 2d 893 (Tex. App. 1994) (dismissing substance abuse charges because application of the statute to a pregnant woman violates federal due process guarantees); *State v. Dunn*, 916 P.2d 952 (Wash. Ct. App. 1996) (holding that the legislature did not intend to include fetuses within the scope of the term "child"); *State v. Gethers*, 585 So. 2d 1140 (Fla. App. 4th Dist. 1991) (dismissing child abuse charges brought for prenatal drug exposure on ground that such application misconstrues the purpose of the law); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992) (finding that drug distribution statute did not apply to pregnant women in relation to their fetuses); *Sheriff v. Encoe*, 885 P.2d 596 (Nev. 1994); *Commonwealth v. Welch*, 864 S.W. 2d 280 (Ky. 1993).

⁵⁶ *Cochran v. Commonwealth*, 315 S.W.3d 325 (Ky. 2010). *But cf.*, *Whitner v. State*, 492 S.E.2d 777 (1997).

⁵⁷ *State v. Armstard*, 991 So. 2d 116 (La. App. 2 Cir. 2008) (holding that transmission of drugs and alcohol via umbilical cord after child was born could not constitute offense of cruelty to juveniles because of the lack of "child" status at the time of ingestion and as a result of the involuntariness of delivery); *Ward v. State*, 188 S.W. 3d 874 (Tex. App. Amarillo 2006) (holding that chemical transfer via umbilical cord did not constitute delivery of drugs); *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *People v. Hardy*, 469 N.W. 2d 50, 52 (Mich. Ct. App. 1991)

questioned the underlying policy rationale of addressing the issue of drug use and pregnancy through the criminal justice system.⁵⁸

The Court of Criminal Appeals ignored this overwhelming jurisprudence and chose to rely heavily on a decision from South Carolina in *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997). *Whitner*, however, is based on unique South Carolina law that does not exist in Alabama. The South Carolina court in *Whitner* relied on its earlier decision in *State v. Horne*, 319 S.E.2d 703, where it had determined that South Carolina courts had a "right and duty to develop the common law of South Carolina" and concluded that "an action for murder may be maintained in the future when the state can prove beyond a reasonable doubt that the fetus . . . was viable" *State v. Horne*, 319 S.E.2d at 704. In South Carolina, unlike in Alabama, "[t]here is no distinction

(dismissing drug delivery charges against a pregnant women who used cocaine, noting that "there was insufficient evidence that defendant's ingestion of cocaine, while pregnant, caused serious physical harm to her child.").

⁵⁸ *Ferguson v. City of Charleston*, 532 U.S. 67, 84 n.23 (2001) (The Court's analysis casts doubt on the assumption that the prosecution of pregnant women is a valid way to protect fetuses: "[a]mici claim a near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health").

between statutory and common-law murder: the statute is merely declaratory of the common law" and the Court in *Whitner* was exercising its unique judicial power to clarify the common law.

The Alabama legislature, in direct contrast to South Carolina, has declared that Alabama does not have common law crimes that can be developed by the courts. See § 13A-1-4, Ala. Code 1975 ("[n]o act or omission is a crime unless made so by this title or by other applicable statute or lawful ordinance.") The Alabama Court of Criminal Appeals erred in following South Carolina because it does not have the same power to expand the definition of "child" to include a "viable fetus" as a way to clarify the common law.

II. The Court of Criminal Appeals Decision Is Not Supported or Justified by Scientific Research.

Implicit in Court of Criminal Appeals decision is the assumption that harm from prenatal exposure to controlled substances--including illegal drugs--is so great that district attorneys and courts should create new criminal penalties where the Legislature has not. Evidence-based research, however, does not support the popular, but medically unsubstantiated, assumption that any amount of

prenatal exposure to an illegal drug causes unique, severe, or even inevitable harm.⁵⁹

The assumption that exposure to illegal drugs is necessarily harmful has been rejected by courts that have evaluated the scientific research. For example, the Supreme Court of South Carolina, placing the continuing vitality of the *Whitner* decision in doubt, recently and unanimously overturned the conviction of a woman who suffered a stillbirth and allegedly tested positive for an illegal drug, noting specifically that the research the prosecutor relied on was "outdated" and that trial counsel failed to call experts who would have testified about "recent studies

⁵⁹ A.H. Schempf & D.M. Strobino, *Illicit Drug Use and Adverse Birth Outcomes: Is It Drugs or Context?*, 85 J. Urban Health 858 (2008); Emmalee S. Bandstra et al., *Prenatal Drug Exposure: Infant and Toddler Outcomes*, 29 J. Addictive Diseases 245 (2010); A.H. Schempf, *Illicit Drug Use and Neonatal Outcomes: A Critical Review*, 62 Obstetric and Gynecological Survey 749 (2007) ("Although the neonatal consequences of tobacco and alcohol exposure are well established, the evidence related to prenatal illicit drug use is less consistent despite prevalent views to the contrary."); Barbara L. Thompson et al., *Prenatal exposure to drugs: effects on brain development and implications for policy and education*, 10 Nature Reviews Neuroscience 303, 303 (2009) ("Many legal drugs, such as nicotine and alcohol, can produce more severe deficiencies in brain development than some illicit drugs, such as cocaine. However, erroneous and biased interpretations of the scientific literature often affect educational programmes and even legal proceedings.").

showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor.”⁶⁰

A. There is No Conclusive Evidence that Exposure to Illegal Drugs Causes Harms the are Greater Than or Different From Harms Resulting From Legal Drugs and Innumerable Actions, Conditions, and Circumstances Common to Pregnant Women.

The judicial expansion of the chemical endangerment law is based on the scientifically and medically unsupported assumption that a pregnant woman’s use of an illegal drug causes unique and certain harm her fetus. Numerous prosecutions will be brought under the Appeals Court’s expansion of the law based on evidence of previous use of an illegal drug and on tests at birth that reveal exposure. Drug tests, however, can only confirm that someone took the drug or was exposed to it. Drug tests do not establish that a particular drug caused particular harms. Nor does the fact that a drug is an illegal controlled substance establish such a causal connection.

Criminal proscription of cocaine, for example, relates to its potential for abuse and its potential to induce dependence, not to any proven unique risk to pregnant

⁶⁰ *McKnight v. State*, 661 S.E.2d 354, 358 n.2 (S.C. 2008).

women, fetuses, or children.⁶¹ In 2001, The Journal of the American Medical Association ("JAMA") published a comprehensive analysis of developmental consequences for the fetus or child based on maternal cocaine use during pregnancy.⁶² The report exposes as erroneous the belief that prenatal cocaine exposure is conclusively associated with developmental toxicity and condemns as "irrational[]" policies that selectively "demonize" *in utero* cocaine exposure and that target pregnant cocaine users for special criminal sanction.⁶³

There are many widely held, deeply rooted misconceptions about cocaine. For over two decades, the popular press was suffused with highly prejudicial and inaccurate and exaggerated information about the effects of *in utero* cocaine exposure. Contemporary research, however, on the developmental impact of cocaine use during pregnancy

⁶¹ See 21 U.S.C. § 812 (1970); § 20-2-20 to 32 Ala. Code 1975(listing controlled substances).

⁶² D. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001).

⁶³ *Id.* at 1613("[T]here is no convincing evidence that prenatal cocaine exposure is associated with any developmental toxicity difference in severity, scope, or kind from the sequelae of many other risk factors."); see also, A. Addis et al., *Fetal Effects of Cocaine: an Updated Meta Analysis*, 15 Reproductive Toxicology 341 (2001).

has debunked the myth that mere exposure to cocaine is causally linked to identifiable fetal harms.⁶⁴ In 2004, doctors and researchers signed an open letter denouncing the "crack baby" myth and called on the press to refrain from using the medically misleading and erroneous term.⁶⁵

Similarly, in spite of myths and misconceptions, science has failed to prove that in utero exposure to other illegal drugs, including methamphetamine, causes certain, unique harms distinguishable from those caused by other uncontrollable factors. In 2005, a national expert panel reviewed published studies about the developmental effects of prenatal exposure to methamphetamine and related drugs and concluded that, "the data regarding illicit methamphetamine are insufficient to draw conclusions concerning developmental toxicity in humans."⁶⁶ In that same

⁶⁴ T.A. Campbell & K.A. Collins, *Pediatric Toxicologic Deaths: A 10 Year Retrospective Study*, 22 *Am. J. Forensic Med. & Pathology* 184 (2001); Michael J. Rivkin et al., *Volumetric MRI Study of Brain in Children With Intrauterine Exposure to Cocaine, Alcohol, Tobacco, and Marijuana*, 121 *Pediatrics* 741 (2008).

⁶⁵ *Physicians, Scientists to Media: Stop Using the Term "Crack Baby"*, February 27, 2004.

⁶⁶ *Ctr. For The Evaluation Of Risks To Human Reproduction, Report of the NTP-CERHR Expert Panel on the Reproductive & Developmental Toxicity of Amphetamine and Methamphetamine II-189* (July 2005).

year more than 90 leading medical doctors, scientists, psychological researchers, and treatment specialists released an open letter warning that terms such as "meth babies" lack medical and scientific validity and should not be used.⁶⁷ The American College of Obstetricians and Gynecology's special information sheet about methamphetamine use in pregnancy notes that "the effects of maternal methamphetamine use cannot be separated from other factors" and that there "is no syndrome or disorder that can specifically be identified for babies who were exposed in utero to methamphetamine."⁶⁸ Similar findings have been made with respect to illegal drug most commonly used during pregnancy: marijuana.⁶⁹

⁶⁷ See David C. Lewis et al., *Meth Science Not Stigma: Open Letter To The Media*, (July 25, 2005).

⁶⁸ Am. College of Obstetricians & Gynecologists, *Information about Methamphetamine Use in Pregnancy*, Mar. 3, 2006.

⁶⁹ For evidence-based information about the effects of prenatal exposure to marijuana, see e.g., Peter Fried & A.M. Smith, *A Literature Review of the Consequences of Prenatal Marijuana Exposure: An Emerging Theme of a Deficiency in Aspects of Executive Function*, 23 *Neurotoxicology & Teratology* 1, 8 (2001) (In a 2001 review of the scientific literature about the effect of prenatal exposure to marijuana, the authors concluded: "The consequences of prenatal exposure to marijuana are subtle."); D. M. Fergusson et al., *Maternal use of Cannabis and Pregnancy Outcome*, 109 *BJOG: Int'l J. Obstetrics & Gynecology* 21, 21-22 (2002); Anja Huizink & Eduard Mulder, *Maternal Smoking, Drinking or Cannabis Use During Pregnancy*

This is not to say that prenatal exposure to illegal drugs is benign or that ongoing research may not reveal something as yet undiscovered. Amici recognize the State of Alabama's interest in reducing drug-related harm. It is irrational, however, to rewrite the law to address the issue when science has yet to support the need for such a law and the harms to maternal and fetal health that result from such prosecutions are clear.

Amici bring the existing scientific research to the Court's attention because this research contradicts many popular myths about the use of illegal drugs during pregnancy and does not support the Court of Criminal Appeals' decision that now permits the prosecution of women who continue their pregnancies and use a controlled substance.

III. The Court of Criminal Appeals' Decision Reflects a Misunderstanding of the Nature of Addiction.

and Neurobehavioral and Cognitive Functioning in Human Offspring, 30 *Neuroscience and Biobehavioral Reviews* 1, 35-36 (2005); A.H. Schempf, *Illicit Drug Use and Neonatal Outcomes: A Critical Review*, 62 *Obstetrical and Gynecological Survey* 749, 750 (2007) (finding "Studies that have examined the impact of prenatal marijuana use on birth outcomes have generally reported small and inconsistent effects... In addition to null or negative effects, several studies have reported unexpected, positive effects of marijuana on gestational age-adjusted birth weight.").

The assertion that pregnant women who use a controlled substance are creating a harm akin to parents who allow their child in "an environment in which controlled substances are produced or distributed,"⁷⁰ is dangerously misinformed. Medical groups have long recognized that addiction is not simply the product of a failure of individual willpower. In August 2011, the American Society of Addiction Medicine announced a definition of addiction based on a four year process with more than 80 experts actively working on it, including top addiction authorities, addiction medicine clinicians and leading neuroscience researchers from around the country. This new definition is that addiction is a primary, chronic disease of brain reward, motivation, memory and related circuitry.⁷¹ It must be treated like diabetes or cardiovascular disease and is not the manifestation of an individual's poor choices.⁷² Dependency has been described as the product of complex hereditary and environmental factors.⁷³ Addiction

⁷⁰ 2006 Ala. Acts 204; S.B. 133, 2006 Leg., Reg. Sess. (Ala. 2006).

⁷¹ Press Release, American Society of Addiction Medicine, *New Definition of Addiction* (August 15, 2011).

⁷² *Id.*

⁷³ Am. Med. Ass'n Bd. of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2669 (1990).

has pronounced physiological factors that heavily influence the user's behavior and affect his or her ability to cease use and seek treatment.⁷⁴

A. Addiction is Not Simply a Voluntary Act That is Cured by Threats.

The medical profession has long acknowledged that drug dependence has biological and genetic dimensions and cannot often be overcome without treatment.⁷⁵ Addiction is marked by "compulsions not capable of management without outside help."⁷⁶ This is why the vast majority of drug-dependent people cannot simply "decide" to refrain from drug use or achieve long-term abstinence without appropriate treatment and support. Because of the compulsive nature of drug dependency, warnings or threats are unlikely to deter drug use among pregnant women.

⁷⁴ Chaya G. Bhuvaneshwar et al., *Cocaine and Opioid Use During Pregnancy: Prevalence and Management*, 10(1) Primary Care Companion J. of Clinical Psychiatry 59, 61 (2008).

⁷⁵ See e.g., "Psychoactive Substance Dependence" is listed as a mental illness with specific diagnostic criteria in the Am. Psychiatric Ass'n., *The Diagnostic and Statistical Manual of Mental Disorders*, 176 (4th ed. 1994). See *Linder v. United States*, 268 U.S. 5, 18 (1925); *Robinson v. California*, 370 U.S. 660 (1962).

⁷⁶ *Robinson v. California*, 370 U.S. at 671 (Douglas, J., concurring); see also 42 U.S.C. § 201(q) (1970) ("'drug dependent person' means a person who is using a controlled substance . . . and who is in a state of psychic or physical dependence, or both").

B. Addiction is a Medical Condition that is Difficult to Overcome.

In Alabama, tens of thousands of substance-abusing adults do not receive the treatment they need. An estimated 79,000 adults need, but have not received, treatment for a drug abuse problem.⁷⁷ Another 210,000 adults need, but have not received, treatment for alcohol problems.⁷⁸

The Substance Abuse Mental Health Services Administration (SAMHSA) identifies only 16 treatment facilities in the entire state that list themselves as serving pregnant women.⁷⁹ Such programs, however, are often not actually accessible because of transportation barriers, cost, waiting-lists, and lack of childcare and mental health service, which impede access to successful

⁷⁷ SAMHSA, U.S. Dep't Health & Human Servs., *2007 State Estimates of Substance Use & Mental Health—Alabama* (2009), available at <http://oas.samhsa.gov/2k7State/Alabama.htm> (Table 1. Selected Drug Use, Perceptions of Great Risk, Average Annual Marijuana Initiates, Past Year Substance Dependence or Abuse, Needing But Not Receiving Treatment, Serious Psychological Distress, and Having at Least One Major Depressive Episode in Alabama, by Age Group: Estimated Numbers (in Thousands), Annual Averages Based on 2006–2007 NSDUHs.).

⁷⁸ *Id.*

⁷⁹ SAMHSA, U.S. Dep't Health & Human Servs, *Substance Abuse Treatment Facility Locator*, available at <http://findtreatment.samhsa.gov/facilitylocator/doc.htm>.

treatment, particularly in the short time frame of pregnancy.⁸⁰

Many pregnant women do not have access to health care, quality housing, safe environments, or an enhanced capacity to overcome behavioral health problems such as addiction.⁸¹ Extending the chemical endangerment statute to women who are unable to overcome their drug problem in the short term of pregnancy misunderstands addiction and the nature of effective treatment.

IV. Allowing the Court of Criminal Appeals Decision to Stand Implicates both Constitutional Rights and International Laws and Norms.

Allowing the Court of Criminal Appeals' decision to stand would not only make Alabama an outlier among sister states by permitting the prosecution of pregnant women and new mothers, it would also make it an outlier in the world. Amici are not aware of any country in the world that uses

⁸⁰ See Thomas M. Brady & Olivia S. Ashley, *Women in Substance Abuse Treatment: Results from the Alcohol and Drug Services Study (ADSS)*, Sept. 2005; see also Martha A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. Drug Issues 285 (2003).

⁸¹ Chaya G. Bhuvaneshwar et al., *Cocaine and Opioid Use During Pregnancy: Prevalence and Management*, 10(1) Primary Care Companion J. Clinical Psychiatry 59, 64 (2008) ("Even for motivated women, obtaining treatment is not always straightforward. The scarcity of specialized treatment centers has already been noted.").

its criminal justice system to punish women who cannot ensure a healthy birth outcome or who allegedly create some risk of an adverse birth outcome. Indeed, international law and principles of human rights overwhelmingly call upon governments to provide services to pregnant and parenting women and discourage the imprisonment of pregnant women for any reason.⁸²

Additionally, courts have recognized that applying the criminal law to reach pregnant women in relation to their fetuses would be unconstitutional.⁸³ While this Court need

⁸² See Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25(2), U.N. Doc. A/810 (Dec. 10, 1948) (“Motherhood and childhood are entitled to special care and assistance.”); Int’l Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 10(2), U.N. Doc. A/6316 (Dec. 16, 1966) (“Special protection should be accorded to mothers during a reasonable period before and after childbirth”); U.N. Off. Drugs & Crime & World Health Org. Reg’l Office for Europe, *Women’s Health in Prison: Correcting Gender Inequity in Prison Health* 32 (2009), available at www.unodc.org/documents/commissions/CND-Session51/Declaration_Kyiv_Women_60s_health_in_Prison.pdf (“pregnant women should not be imprisoned except for absolutely compelling reasons”); U.N. Off. Drugs & Crime, *Custodial and Non-Custodial Measures: The Prison in The Criminal Justice Assessment Toolkit* 27 (2006), available at www.unodc.org/pdf/criminal_justice/prison_system.pdf (“Pregnant women and nursing mothers have particular problems relating to their condition and should not be imprisoned unless exceptional circumstances exist.”).

⁸³ See e.g., *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991); *Herron v. State*, 729 N.E.2d 1008, 1010-11 (Ind. Ct.

not reach the Constitutional issues, the Court of Criminal Appeals' decision permitting the expansion of the chemical endangerment law to apply in the context of pregnancy violates Constitutional guarantees of liberty, privacy, equality, due process, and freedom from cruel and unusual punishment.⁸⁴ While Constitutional rights are not absolute, the state may only infringe upon them if acting to *further* a compelling, or at minimum rational, state interest. Applying the chemical endangerment law to pregnant women fails to serve a compelling or rational state interest because, as discussed *supra*, it will undermine maternal, fetal and child health rather than advance these interests.

App. 2000).

⁸⁴ U.S. Const. amend. IV, V, VI, VIII, XIV.

CONCLUSION

Because the Court of Criminal Appeals' decision is unsupported as a matter of science, is misguided as a matter of public health, and is without authority under the law, amici curiae respectfully request this Honorable Court grant Ms. Kimbrough's petition for certiorari.

/s/Mary Bauer

Mary Bauer
Alabama Bar No. 1181R76B
Southern Poverty Law Center
400 Washington Ave
Montgomery, AL 36104
(334) 956-8200
Fax: (334) 956-8481
Mary.Bauer@splcenter.org

Tamar Todd
Alabama Bar NO. TOD005
Drug Policy Alliance
Office of Legal Affairs
918 Parker St. Bldg A21
Berkeley, CA 94710
(510) 229-5211
Fax: (510) 295-2810
TTODD@DRUGPOLICY.ORG

Emma S. Ketteringham*
Lynn M. Paltrow**
National Advocates for Pregnant Women
15 West 36th Street, Ste 901
New York, NY 10018-7126
ESK@ADVOCATESFORPREGNANTWOMEN.ORG

* Application to appear *pro hac vice* to be submitted
** Leave to appear *pro hac vice* was granted in Court of Criminal Appeals on July 12, 2010

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Brief of Amicus Curiae on the Honorable Luther Strange, Attorney General of the State of Alabama, **310 State House, 11 S. Union St., Montgomery, Alabama 36130** by placing a copy of same in U. S. Mail, postage prepaid and properly addressed on this, the 18th day of November, 2011.

/s/ Mary Bauer

NO. _____

EX PARTE AMANDA HELAINE KIMBROUGH, *PETITIONER*

IN RE

STATE OF ALABAMA

vs.

AMANDA HELAINE KIMBROUGH

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, FOLLOWING
APPEAL FROM THE CIRCUIT COURT OF COLBERT COUNTY

AMICI CURIAE STATEMENTS OF INTEREST

Amicus Curiae **American Academy of Addiction Psychiatry ("AAAP")** is an international professional membership organization made up of practicing psychiatrists, university faculty, medical students and other related professionals. Founded in 1985, it currently represents approximately 1,000 members in the United States and around the world. AAAP is devoted to promoting access to continuing education for addiction professionals, disseminating new information in the field of addiction psychiatry, and encouraging research on the etiology, prevention, identification, and treatment of addictions. AAAP opposes the prosecution of pregnant women based on the belief that the disclosure of personal drug use to law enforcement for use in criminal prosecutions will undermine prenatal care, discourage many women from seeking substance abuse treatment, and damage the medical provider-patient relationship that is founded on principles of confidentiality.

Amicus Curiae **American Medical Women's Association (AMWA)** is an organization of women physicians, medical students and other persons dedicated to serving as the unique voice for the improvement of women's health and the advancement of women in medicine.

Amicus Curiae **American Nurses Association (ANA)** is the largest nursing organization in the United States. Through its Code of Ethics for Nurses, standards for nursing practice, and public advocacy, the ANA actively promotes patient safety and the public health.

Amicus Curiae **The Alabama Women's Resource Network (AWRN)**'s mission is to significantly reduce the number of women in prison by promoting investment in a statewide network of community programs that responsibly and effectively treat drug addiction, provide pathways out of domestic violence, develop jobs skills, and improve the physical and mental health of women. AWRN's long-term vision is to change the way Alabama's criminal justice system responds to women trapped in the multiple jeopardizes of poverty, addiction, racism, and gender-based violence. Through outreach, legislative action, and grassroots organizing, we seek to change the way society envisions incarcerated women- and therefore shift the way the state responds to them- from a punitive response to a community-based one. Our current members include: Alabama Coalition Against Domestic Violence, ACLU of Alabama, Aletheia House, Eve's Circle, Friends of Recovery Morgan, Madison, Lawrence, Limestone, and Cullman & Randolph Counties, Longtimers/ Insiders, Longtimer Lifeline, Path to Success, Southern Center for Human Rights, The Ordinary People's Society, The Lovelady Center, UAB Treatment Alternatives to Street Crime and W.I.N.N.E.R.S.

Amicus Curiae **American Society of Addiction Medicine ("ASAM")** The American Society of Addiction Medicine is a nationwide organization of more than 3600 of the nation's foremost physicians specializing in addiction medicine. We believe that the proper, most effective solution to the problem of substance abuse during pregnancy lies in medical prevention, i.e. education, early intervention, treatment and research on chemically dependent pregnant women, We further believe that state and local governments should avoid any measures defining alcohol or other drug use during pregnancy as "child abuse," and should avoid prosecution, jail, or other punitive measures as a substitute for providing effective health services.

Amicus Curiae **Global Lawyers and Physicians ("GLP")** is a non-profit non-governmental organization that focuses on health issues and human rights. Founded in 1996, GLP was formed to reinvigorate the collaboration of the legal, medical and public health professions in protecting the human rights and dignity of all persons. GLP's mission is to implement the health-related provisions of the Universal Declaration of Human Rights and the Covenants on Civil and Political Rights and Economic, Social, and Cultural rights, and human experimentation.

Amicus Curiae **Institute For Health and Recovery ("IHR")** The Institute for Health and Recovery is a statewide service, research, policy, and program development agency. IHR's mission is to develop a comprehensive continuum of care for individuals, youth, and families affected by alcohol, tobacco, and other drug use, mental health problems, and violence/trauma. IHR's work is based on principles of establishing collaborative models of service delivery, integrating gender-specific, trauma-informed and relational/cultural models of prevention, intervention, and treatment; fostering family-centered, strength-based approaches, and advancing multicultural competency within the service delivery system.

Amicus Curiae **International Center for Advancement of Addiction Treatment of the Beth Israel Medical Center Baron Edmond de Rothschild Chemical Dependency Institute** seeks to promote, among medical professionals and the general community, the humane treatment of people who are living with opiate addiction. It utilizes dissemination of relevant medical, legal and policy information in its effort to advocate for change in attitudes that constrain optimal addiction treatment delivery.

Amicus Curiae **National Asian Pacific American Women's Forum's** mission includes strengthening communities to reflect the social, political, health, and economic perspectives of Asian Pacific American women and girls on matter of reproductive justice, access to quality health care, immigrant and refugee rights, civil rights, violence against women, and economic empowerment.

Amicus Curiae **National Association of Nurse Practitioners in Women's Health (NPWH)** works to assure the provision of quality health care to women of all ages by nurse practitioners. NPWH's mission includes protecting and promoting a woman's right to make her own choices regarding her health within the context of her personal, religious, cultural, and family beliefs.

Amicus Curiae **National Association of Social Workers ("NASW") and National Association of Social Workers, Alabama Chapter** is the world's largest association of professional social workers with 150,000 members in fifty-six chapters throughout the United States and abroad. The NASW, Alabama Chapter has 1,044 members. Founded in 1955 from a merger of seven predecessor social work organizations, NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. NASW believes that criminal prosecution of women who use drugs during their pregnancy is inimical to family stability and counter to the best interests of the child. The needs of society are better served by treatment of addiction, not punishment of the addict. NASW's policy statement, Alcohol, Tobacco, and other drugs, supports "an approach to ATOD [alcohol, tobacco, and other drug] problems that emphasize prevention and treatment" and efforts to "eliminate health disparities that accrue from ATOD problems and discriminatory practices from the criminal justice system" (NASW, Social Work Speaks, 8th ed., 2009).

Amicus Curiae **National Council on Alcoholism and Drug Dependence, Inc. ("NCADD")**, with its nationwide Network of Affiliates, provides prevention, education, information, referral, advocacy, and hope in the fight against the chronic diseases of alcoholism and other drug addictions. Founded in 1944 and based in New York, NCADD historically has provided confidential assessment and referral services for persons addicted to alcohol and other drugs and their families. In 1990, the NCADD Board of Directors adopted a policy statement on "Women, Alcohol, Other Drugs, and Pregnancy" recommending that "[s]tates should avoid measures which would define alcohol and other drug use

during pregnancy as prenatal child abuse and should avoid prosecutions, jailing, or other punitive measures which would serve to discourage women from seeking health care services."

Amicus Curiae **National Institute for Reproductive Health** works to ensure the fundamental human right to reproductive health and justice for Latinas, their families and their communities through public education, community mobilization and policy advocacy. Latinas face a unique and complex array of reproductive health and rights issues that are exacerbated by poverty, gender, racial and ethnic discrimination and xenophobia. These circumstances make it especially difficult for Latinas to access reproductive health care services.

Amicus Curiae **National Organization for Women - Alabama** The National Organization for Women (NOW) is the largest organization of feminist activists in the United States. Now has 500,000 contributing members and 550 chapters in all 50 states and the District of Columbia. Since its founding in 1966, NOW's goal has been to take action to bring about equality for all women. NOW works to eliminate discrimination and harassment in the workplace, schools, the justice system, and all other aspects of society; secure reproductive rights for all women; end all forms of violence against women; eradicate racism, sexism and homophobia; and promote equality and justice in our society.

Amicus Curiae **National Perinatal Association (NPA)** promotes the health and well being of mothers and infants enriching families, communities and our world. NPA is a multidisciplinary organization comprised of doctors, nurses, midwives, social workers, administrators, parents, and those interested in collaborating to improve perinatal health.

Amicus Curiae **National Women's Health Network (NWHN)** improves the health of women by influencing public policy and providing health information to support decision-making by individual consumers. Founded in 1975 to give women a greater voice within the health care system, the NWHN

aspires to a health care system that is guided by social justice and reflects the needs of diverse women. We are committed to advancing women's health by ensuring that women have self-determination in all aspects of their reproductive and sexual health; challenging the inappropriate medicalization of women's lives; and establishing universal access to health care that meets the needs of diverse women. The core values that guide the NWHN's work include our belief that the government has an obligation to safeguard the health of all people; that we value women's descriptions of their own experiences and believe health policy should reflect the diversity of those experiences; and that we believe evidence rather than profit should determine what services and information are available to inform women's health decision-making and practices. The NWHN is a membership-based organization supported by 8,000 individuals and organizations nationwide.

Amicus Curiae **National Women's Law Center** is a Washington DC based nonprofit organization with a longstanding commitment to equality on the basis of sex, and the constitutionally protected freedoms of liberty, privacy and bodily integrity. The Center advances and supports both state and federal policies that promote public health, and opposes policies that hinder access to health care, including prenatal care and mental health care.

Amicus Curiae **Our Bodies Ourselves ("OBOS")** provides clear, truthful information about health, sexuality and reproduction from a feminist and consumer perspective. OBOS vigorously advocates for women's health by challenging the institutions and systems that block women from full control over our bodies and devalue our lives. OBOS is noted for its long-standing commitment to serve only in the public interest and its bridge-building capacity. OBOS is dedicated to the autonomy and well being of all women.

Amicus Curiae **Southern Center for Human Rights** provides legal representation to people facing the death penalty, challenges human rights violations in prisons and jails, seeks through litigation and advocacy to improve legal representation for poor people accused of crimes, and

advocates for criminal justice system reforms on behalf of those affected by the system in the Southern United States. From 2002 through 2009, SCHR represented all Alabama women in prison in *Laube v. Allen*, a class action lawsuit against the Alabama Department of Corrections that challenged severe overcrowding, horrendous conditions, and unconstitutional medical care.

Amicus Curiae **Sheila Blume, MD**, is retired Medical director of Addiction Services at South Oaks Hospital and Clinical Professor of Psychiatry at the State University of New York at Stony Brook. Dr. Blume is a Fellow and former President of the American Society of Addiction Medicine and a Distinguished Life Fellow of the American Psychiatric Association, where she chaired the Committee on Treatment Services for Addicted Patients for several years.

Amicus Curiae **Wendy Chavkin, MPH, MD**, is a Professor of Clinical Public Health and Obstetrics and Gynecology at the Mailman School of Public Health and the College of Physicians and Surgeons at Columbia University. She has written extensively about women's reproductive health issues and done extensive research related to pregnant women, punishment and barriers to care for over two decades.

Amicus Curiae **Nancy Day MPH, PhD.**, is Professor of Psychiatry and Epidemiology. She has studied the effects of prenatal exposures to alcohol, marijuana, cocaine, and tobacco for over 20 years. She has multiple publications and has received grants from NIH in support of this work. She is currently the Director of the Maternal Health Practices and Child Development Project, a consortium of projects centered on the identification of the long-term effects of prenatal substance abuse.

Amicus Curiae **Deborah A. Frank, MD**, is a Professor of Pediatrics at Boston University School of Medicine. Dr. Frank is also an Assistant Professor of Social and Behavioral Sciences at the Boston University School of Public Health. Since 1981 she has been the Director of the Failure to Thrive Program at the Boston Medical Center where she is also a staff physician in the Child Development Unit. In 1993, she was named a Fellow of the

Society for Pediatric Research. Dr. Frank is a recognized expert on the effect of maternal substance abuse on fetal development and newborn behavior. She has published widely on these topics, including numerous articles concerning prenatal cocaine and methamphetamine exposure. In 2002, Dr. Frank testified before the United States Sentencing Commission concerning the effects of prenatal cocaine exposure. Dr. Frank comes to this Court in her capacity as amicus curiae in order to ensure that prevalent stigma and stereotypes about the nature of women who use drugs during pregnancy do not prevent the Court from understanding the medical issues in this case.

Amicus Curiae **Leslie Hartley Gise, M.D.**, Amicus Curiae Leslie Hartley Gise, M.D., is a Clinical Professor at the John A. Burns School of Medicine at the University of Hawaii in Honolulu. She is also staff psychiatrist at the Maui Memorial Medical Center in Wailuku. She has pioneered protocols and teaching curricula for screening of medical patients for psychological dysfunction. Dr. Gise has devoted particular attention to cognitive screening of elderly patients and screening for depression in women. She was an investigator on three National Institute of Mental Health contracts on mental health in primary care. Dr. Gise is on the editorial board of five journals, taught in board review courses and examined for the American Board of Psychiatry and Neurology. She has consulted at Malama Family Recovery Center treating substance abuse disorders in pregnant and parenting women. Dr. Gise belongs to many professional organizations, and has assumed active committee and leadership roles, including presidency of the North American Society for Psychosocial Obstetrics and Gynecology and the Society for Liaison Psychiatry. Dr. Gise was appointed by the Academic Council to be Women's Liaison Officer to the American Association of Medical Colleges. Dr. Gise has been active in the American Psychiatric Association where she is the state representative to the assembly, past President of the Hawaii State Psychiatric Society, the Area 7 Council, and the Committee on Public Affairs, the Committee on Public and Community Psychiatry. She is the Chair of the Disaster Preparedness Committee of the Hawaii Psychiatric Medical Society, an American Red Cross mental health volunteer, a member of the federal Disaster Medical Assistance Team (DMAT) under NDMS, FEMA

and Homeland Security, a member of Disaster Psychiatry Outreach (DPO), Maui Memorial Medical Center Disaster Committee and Maui Voluntary Organizations Active in Disaster (VOAD). Finally, Dr. Gise has published voluminously and lectured around the world on addiction in women, post partum depression, outpatient commitment and other topics.

Amicus Curiae **Stephen R. Kandall, MD** is a pediatrician who has cared for over a thousand babies exposed to drugs. He is also chief of neonatology at Beth Israel Medical Center in New York and has written a book (Substance and Shadow: Women and Addiction in the United States Cambridge: Harvard University Press, 1996) outlining the horrors of prosecuting women who need drug treatment.

Amicus Curiae **Linda Worley, M.D.** is a Professor of Psychiatry with a secondary appointment in Obstetrics and Gynecology in the College of Medicine at the University of Arkansas for Medical Sciences (UAMS). She directs the campus side Student Mental Health Program, the College of Medicine Faculty Wellness Program and is the consulting psychiatrist to the ANGELS program in the department of Obstetrics and Gynecology. Dr. Worley is a board certified Psychiatrist with sub-specialization in Psychosomatic Medicine. Dr. Worley was recruited to join the UAMS, Department of Psychiatry Faculty in 1992. She received the American Psychiatric Association Gold Award for directing a model program for the nation for addiction treatment for women with their children.