

COPY

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

No. 29,775

CYNTHIA MARTINEZ, a/k/a
CYNTHIA NAVARETTE,

Defendant-Respondent.

On Writ of Certiorari to the New Mexico Court of Appeals
In an Appeal from the Fifth Judicial District Court
Lea County, New Mexico
The Honorable William A. McBee, District Judge

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TABLE OF CONTENTS

INTRODUCTION	1
INTEREST OF AMICI.....	1
STATEMENT OF FACTS AND PROCEDURAL HISTORY.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	5
I. The Prosecution of Ms. Martinez Violates Legislative Intent and New Mexico Policy to Promote Public Health and the Importance of Family.....	5
II. The Prosecution of Ms. Martinez Endangers Public Health By Jeopardizing the Therapeutic Relationships Between Women and Their Health Care Providers and Deterring Access to Important Services	7
A. The Prosecution of Ms. Martinez will Erode the Fundamental Trust Between Patients and their Health Care Providers That is Critical to Quality Health Care	8
B. Prosecuting Women for Continuing to Term In Spite of a Drug Problem is an Ineffective Means of Protecting Fetal Health.....	12
III. Criminal Prosecutions of Pregnant Women are Counterproductive and Detrimental to Children and Families.....	15
A. Separating Children from their Mothers By Incarcerating Mothers Poses Substantial Risk of Harm	15
B. Treatment and Responses Outside of the Criminal Justice Context Better Protects and Promotes Children and Families.....	17
IV. Imposing Criminal Sanctions on Women who Continue Pregnancies in Spite of Drug Dependency Problems Contradicts Broadly Accepted Principles of Law and is Ineffective in Halting Drug Abuse.....	18
V. The Prosecution of Ms. Martinez is Belied by Peer-Reviewed Medical Evidence	21
A. Medical Science Has Failed to Substantiate the Alleged Harms that Prompted the Prosecution of Ms. Martinez	21
B. Upholding This Prosecution Would Throw Open the Door to Criminally Charging Pregnant Women for Myriad Actions and Behaviors	23

VI. An Overwhelming Majority Of State Courts Have Concluded that Application Of Child Endangering Laws to Pregnant Women Violates Legislative Intent, Undermines Public Health And Implicates Constitutional Principles of Due Process And Privacy27

CONCLUSION..... 30

TABLE OF AUTHORITIES

New Mexico Cases

State v. Martinez,
2006-NMCA-068, 137 P.3d 1195..... 3, 28

Other Jurisdiction Cases

Ferguson v. City of Charleston, South Carolina,
121 S.Ct. 1281 (2001)..... 27

Jaffee v. Redmond,
518 U.S. 1 (1997)..... 9

Linder v. U.S.,
268 U.S. 5 (1925)..... 18

National Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989)..... 20

Robinson v. California,
370 U.S. 660 (1962)..... 19

Collins v. State,
890 S.W.2d 893 (Tex. App. 1994)..... 29

Commonwealth v. Welch,
864 S.W.2d 280 (Ky. 1993)..... 27, 28

Johnson v. Florida,
602 So.2d 1288 (Fla. 1992)..... 21

Kilmon v. State of Maryland,
905 A.2d 306 (Md. App. 2006)..... 27, 28, 29

People v. Hardy,
469 N.W.2d 50 (Mich. App. 1991)..... 27

Reinesto v. Superior Court,
894 P.2d 733 (Ariz. App. 1995)..... 27, 29

Sheriff v. Encoe,
885 P.2d 596 (Nev. 1994)..... 27, 28

<i>South Carolina v. McKnight</i> , 576 S.E.2d 168 (S.C. 2003)	28
<i>State v. Aiwohi</i> , 123 P.3d 1210 (Haw. 2005)	27, 28
<i>State v. Dunn</i> , 916 P.2d 952 (Wash App. 1996).....	29
<i>State v. Gethers</i> , 585 So.2d 1140 (Fla. App. 1991).....	29
<i>State v. Gray</i> , 584 N.E.2d 710 (Ohio 1992).....	28
<i>State v. Luster</i> , 419 S.E.2d 32 (Ga. 1992).....	14
<i>Ward v. State</i> , 188 S.W.3d 874 (Tex. App. 2006).....	28
<i>Whitner v. South Carolina</i> , 492 S.E.2d 777 (S.C. 1997)	28
 <u>New Mexico Statutes</u>	
NMSA 1978, § 24-9A-1 (1985).....	6
NMSA 1978, § 24-9A-3 (1979).....	6
NMSA 1978, § 24-9A-5 (1979).....	6
NMSA 1978, § 30-3-7 (1985).....	6
NMSA 1978, § 30-6-1 (2005).....	2, 3, 6, 7
NMSA 1978, §§ 66-8-101.1 (1985).....	6
 <u>New Mexico Legislation</u>	
NM Leg. H.B 97, § 2 (Purpose) (2005).....	6
NM Leg., S.B. 102 (2005); Fiscal Impact Report “Drug Addiction as Child Abuse” (2005).....	6

Federal Authorities

42 U.S.C. § 280(f)..... 24

42 U.S.C. § 671(a)(15)(B) 18

45 C.F.R. § 1355.25(f)..... 18

Secondary Sources

American Academy of Pediatrics, Comm. on Substance Abuse, *Drug-Exposed Infants*, 86 Pediatrics 639 (1990)..... 13

American College of Obstetricians and Gynecologists Committee Opinion 321 (Nov. 2005).... 13

American Medical Ass'n, *Legal Intervention During Pregnancy. Court-ordered medical treatments and legal penalties for potentially harmful behavior by pregnant women*, 264 JAMA 2663 (1990)..... 8, 12

American Medical Association, *Proceedings of the House of Delegates: 137th Annual Meeting*, Board of Trustees Report NNN 267 (June 26-30, 1988)..... 20

American Nurses Ass'n, Position Statement (Apr. 5, 1992) 13

American Soc'y of Addiction Med., Bd. of Directors, *Public Policy Statement on Chemically Dependent Women and Pregnancy* (Sept. 25, 1989)..... 9, 13

G. Annas, *Protecting the Liberty of Pregnant Patients*, 316 New Eng. J. Med. 1213 (1987) 14

R. Arnold et al., *Medical Ethics and Doctor/Patient Communication, In The Medical Interview: Clinical Care, Education and Research* 345 (M. Lipkin, Jr. et al. ed., 1995)..... 9, 10

Phyllis Baunach, *Mothers in Prison* (1995) New Brunswick, NJ: Transaction Books 15

BBC News, *Stress 'Harms Brain in the Womb,'* (26 January 2007) available at <http://news.bbc.co.uk/1/hi/health/6298909.stm> 25

Richard L. Berkowitz, *Should Refusal to Undergo a Cesarean Delivery Be a Criminal Offense?* Obstet Gynecol Vol. 104, No. 6: 1220-1221, December 2004..... 26

Barbara Bloom & David Steinhart, *Why Punish the Children? A Reappraisal of the Children of Incarcerated Mothers in America* (1993) San Francisco: National Council on Crime and Delinquency 15

Bove, Frank, Shim Youn, Zeitz, Perri, <i>Drinking Water Contaminants and Adverse Pregnancy Outcomes: A Review</i> , available at http://ehp.niehs.nih.gov/members/2002/suppl-1/61-74bove/bove-full.html	25
Center for the Future of Children, <i>Recommendations, 1 The Future of Children</i> 8 (1991).....	14
Center on Addiction and Substance Abuse, <i>Substance Abuse and the American Woman</i> , 64 (1996).....	24
Ira Chasnoff, <i>Drug Use in Pregnancy: Parameters of Risk</i> , 35 <i>Pediatric Clinics N. Am.</i> 1403 (1988).....	10
A. Eisenberg et al., <i>What To Expect When You're Expecting</i> (2d ed. 1996).....	26
D. Frank et al., <i>Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review</i> , 285 <i>JAMA</i> 1613 (2001).....	21, 22
D.A. Frank et al., <i>Maternal Cocaine Use: Impact on Child Health and Development</i> , 40 <i>Advances in Pediatrics</i> 65 (1993).....	23
R. Fretts et al., <i>Increased Maternal Age and the Risk of Fetal Death</i> , 333(15) <i>New Eng. J. Med.</i> 953, 956 (1995).....	25
M.E. Goldberg, <i>Substance-abusing Women: False Stereotypes and Real Needs</i> , 40 <i>Social Work</i> 789 (1995).....	11
J. Held et al., <i>The Effect of Prenatal Cocaine Exposure on Neurobehavioral Outcomes: a Meta-Analysis</i> , 21 <i>Neurotoxicology & Teratology</i> 619 (1999).....	23
Helfer, <i>The Perinatal Period, a Window of Opportunity for Enhancing Parent-Infant Communication: An Approach to Prevention</i> , 11 <i>Child Abuse and Neglect: The International Journal</i> 566 (1987).....	16
Dorothy Henderson, <i>Drug Abuse and Incarcerated Women</i> , <i>Journal of Substance Abuse Treatment</i> Vol. 15, No 6 at 583 (1998).....	17
H. Hurt et al., <i>Children with In Utero Cocaine Exposure Do Not Differ from Control Subjects On Intelligence Testing</i> , 151 <i>Archives Pediatric & Adolescent Med.</i> 1237 (1997).....	22
E. Hutchins, <i>Drug Use During Pregnancy</i> , 27 <i>J. Drug Issues</i> 463 (1997).....	23
Elizabeth Inez Johnson, et al., <i>Children of Incarcerated Parents: Cumulative Risk and Children's Living Arrangements</i> , 1 (17 July 2002) at http://www.jcpr.org/wpfiles/johnson_waldfogel.pdf	15, 16
S.R. Kandall, <i>Substance and Shadow: Women and Addiction in the United States</i> 278 (1996) ..	14

Klaus and Kennell, <i>Mothers Separated from their Newborn Infants</i> , 17 <i>Pediatric Clinics of North America</i> 1015 (1970)	16
A. Lazare, <i>Shame, Humiliation, and Stigma in the Medical Interview</i> , In <i>The Medical Interview: Clinical Care, Education and Research</i> 333 (M. Lipkin, Jr. et al. ed., 1995)....	9, 10
March of Dimes, <i>Statement on Maternal Drug Abuse</i> 1 (Dec. 1990)	13
Katherine McCaa, <i>Health Issues Specific to Incarcerated Women: Information for State Maternal and Child Health Programs</i> , at 2, U.S. Department of Health and Human Services, Health Services and Resources Administration, Maternal and Child Health Bureau (May 2000)	17
D. Miller & M. Thelen, <i>Knowledge & Belief About Confidentiality in Psychotherapy</i> , 17 <i>Prof. Psychol. Res. & Prac.</i> 15 (1986)	10
Mone, Suzanne, MD, Gillman, Matthew, MD, SM, Miller, Tracie, MD, Herman, Eugene, PhD, Lipshultz, Steven E., MD, <i>Effects of Environmental Exposures on the Cardiovascular System: Prenatal Period Through Adolescence</i> , <i>PEDIATRICS</i> Vol. 113 No. 4, April 2004	25
National Association of Public Child Welfare Administrators, <i>Guiding Principles for Working with Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response</i> (Jan. 1991).....	13
National Council on Alcoholism and Drug Dependence, <i>Women, Alcohol, Other Drugs and Pregnancy</i> (1990).....	13
R. Neugebauer et al., <i>Association of Stressful Life Events With Chromosomally Normal Spontaneous Abortion</i> , 143 <i>Am. J. Epidemiology</i> 588 (1996)	25
The Osborne Association, <i>How Can I Help? Working with Children of Incarcerated Parents</i> 3 (1998).....	16
R. K. Portenoy & R. Payne, <i>Acute and Chronic Pain, in Substance Abuse, A Comprehensive Textbook</i> 563 (J.H. Lowinson et al. eds., 1997).....	20
G. Richardson et al., <i>Prenatal cocaine exposure: effects on the development of school-age children</i> 18 <i>Neurotoxicol & Teratology</i> 627 (1996).....	22
Southern Regional Project on Infant Mortality, <i>A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women</i> 21 (1993).....	12, 14
Ann Stanton, <i>When Mothers go to Jail</i> (1980) Lexington, MA: Lexington Books.....	15

Substance Abuse and Mental Health Services Administration, <i>Improving Treatment for Drug-Exposed Infants</i> 21 (1993)	17
United States Department of Health and Human Services, <i>Improving Treatment for Drug Exposed Infants</i> 31 (1993)	18
United States General Accounting Office, <i>ADMS Block Grant: Women's Set Aside Does Not Assure Drug Treatment for Pregnant Women</i> 5 (1991).....	13
Van Marter et al., <i>Persistent Pulmonary Hypertension of the Newborn and Smoking and Aspirin and Nonsteroidal Antiinflammatory Drug Consumption During Pregnancy</i> , 97 <i>Pediatrics</i> 658 (1996).....	24
J. Wallen, <i>A Comparison of Male and Female Clients in Substance Abuse Treatment</i> , 9 <i>J. Substance Abuse Treatment</i> 243 (1992).....	11
G.A. Wasserman et al., <i>Prenatal Cocaine Exposure and School Age Intelligence</i> , 50 <i>Drug & Alcohol Dependence</i> 203 (1998).....	22
Wisborg, et al., <i>Exposure to Tobacco Smoke in Utero and the Risk of Stillbirth and Death in the First Year of Life</i> , 154 <i>Am. J. Epidemiology</i> 322 (2001).....	24

INTRODUCTION

The state's prosecution in *New Mexico v. Martinez* lacks foundation in law and medical science. This Court should uphold the appellate court's decision in this case because, as that court correctly decided, the plain language of New Mexico's child abuse statutes do not permit application to the context of a woman and her pregnancy. Moreover, as *Amici* will explain, accepting the State's radical new interpretation of New Mexico's child abuse statute will undermine both maternal and fetal health, interfere with the provider-patient relationship and set a new legal standard that, if judicially imposed, would leave every pregnant New Mexico woman subject to potential criminal sanctions for a vast range of conditions, circumstances, and actions that could arguably pose some risk – even an ill-defined risk – to fetal health.

The legal issues presented by Ms. Martinez's prosecution cannot properly be decided in isolation from the scientific, medical, and public health contexts in which they are rooted. *Amici* hope to provide this context so that this case may be resolved based on an accurate understanding of medical science. For the reasons explained herein, *Amici* urge the Court to affirm the ruling of the New Mexico Court of Appeals.

INTEREST OF AMICI

At the outset it must be noted that each and every *Amicus Curiae* is committed to reducing potential drug-related harms at every reasonable opportunity, particularly with respect to children. Thus, *Amici* do not endorse the non-medical use of drugs – including alcohol or tobacco – during pregnancy by either parent. *Amici* include health care providers, counselors, psychiatrists, child welfare advocates, social welfare advocates, public health practitioners, and

their professional associations.¹ These individuals and organizations have recognized expertise in maternal and neonatal health, the effects of prenatal exposure to drugs, the impact of drug use on families and society, and the efficacy of treatment and other interventions that further the health of individuals, families and communities.

While there is great variety among *Amici* as to experience, expertise, and perspective on medical, scientific, and public health issues, *Amici* are united in their condemnation of the State of New Mexico's prosecution of Ms. Martinez. *Amici* join together in this brief to explain why the prosecution under NMSA 1978, § 30-6-1 (2005) of women who continue their pregnancies to term and give birth in spite of a health problem such as drug addiction, flies in the face of good medicine, is unsupported by law, and contradicts the New Mexico state legislature's considered decisions to address issues relating to pregnancy, drug use, and related matters through the civil child welfare and public health systems.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The facts in this case are not in dispute. Cynthia Martinez sought and received prenatal care at the New Mexico Health Department. (R.P. 45). On December 9, 2002, Ms. Martinez confided in the Health Department staff that she used cocaine and alcohol. The record indicates that she was warned that use of drugs and alcohol would harm her "unborn baby." She was not referred to any substance abuse treatment or provided with any resources to access such treatment. (R.P. 45-46).

On January 12, 2003, when Ms. Martinez was at 36 weeks gestation, she gave birth to her daughter by caesarian section. Forty-eight hours later the baby's urine was tested. The test was positive for cocaine.² Detective Michael Weiss of the Hobbs Police Department then

¹ Descriptions of the *Amici* are set forth in Appendix A of this brief.

² The record is silent regarding whether Ms. Martinez consented to have her child tested or what protocol was

interrogated Ms. Martinez on March 10, 2003. Under questioning, Ms. Martinez acknowledged that she was unable to overcome her addiction to cocaine. (R.P. 45).

The State of New Mexico charged Ms. Martinez with felony child abuse for permitting “a child under 18 years of age, to be placed in a situation that may endanger the child’s life or health, contrary to 30-6-1 (D), N.M. STAT. ANN. § 1978.” (R.P. 1). Defense counsel moved to dismiss the action on the grounds that the child abuse statute does not apply to pregnant women in relationship to the fetuses they are carrying. The trial court denied this motion. Ms. Martinez then entered a plea of guilty to child abuse, specifically reserving the right to appeal. Ms. Martinez appealed and the Court of Appeals reversed the trial court’s ruling.

The Court of Appeals concluded that a fetus is not a “child” and therefore the State’s child abuse statute proscribing certain conduct relating to children was not applicable. *See State v. Martinez*, 2006-NMCA-068, ¶13, 137 P.3d 1195, cert. granted. The Court of Appeals additionally held that Ms. Martinez’s right to due process was violated because she “could not have reasonably known that her conduct was criminal” under the child abuse statute. *Id.* The State now appeals the lower court’s decision.

SUMMARY OF ARGUMENT

The decision to *criminally* charge Ms. Cynthia Martinez because she continued her pregnancy to term while experiencing drug dependency violates state law and policy, and threatens significant harm to the public health. This Court should uphold the lower court’s decision because to do otherwise would usurp the legislative function, require the court to radically rewrite and expand the State’s child abuse and neglect laws, and cause considerable fear and confusion among health professionals and their pregnant patients all of which would

followed that led her newborn daughter to be tested for drugs. The record is also silent as to whether this single drug screen was confirmed by a follow up test.

jeopardize the well-being of women and their children.

Amici are well aware of the strong societal interest in protecting the health and rights of children. In the view of *Amici*, however, such protective instincts are *undermined*, not advanced, by holding women criminally liable based on conditions, actions, or inactions that they experience during pregnancy. Indeed, the policy of seeking criminal arrests and prosecutions of pregnant women with drug dependency or other health problems is contrary to law, scientific research, and the consensus judgment of medical practitioners and their professional organizations. Furthermore given the paucity of treatment available in New Mexico, low income women, like Ms. Martinez, would be particularly vulnerable to punishment for failing to access drug treatment, prenatal care and other critical social services due barriers of poverty and social stigma.

Amici believe that the prosecution of Ms. Martinez is misguided on several grounds. First, the New Mexico Legislature, in alliance with the public health community, has repeatedly and unambiguously recognized that prosecuting new mothers under circumstances like these does not further the important state interests of maternal and fetal health. To this end, the state legislature has purposefully excluded viable fetus from the definition of an infant/child and instead, has consistently differentiated between an infant/child and a fetus.

Second, threats of arrest and prosecution will deter many pregnant women from seeking prenatal care and drug and alcohol treatment altogether. Moreover, these threats create a disincentive for pregnant women who do seek medical attention from disclosing information about drug use to health care providers – information essential to the delivery of appropriate prenatal care – out of fear that the disclosure will lead to possible criminal sanctions.

Third, criminal prosecutions of drug dependent pregnant women and new mothers expose

these women to serious stressors and inadequate medical and mental health services that unfortunately characterize the vast majority of jails and prisons in New Mexico and elsewhere. When an incarcerated mother gives birth, she is often immediately separated from her newborn. Contrary to promoting the child's best interest, children separated from their mothers at birth are at heightened risk for suffering psychological harm from the abrupt deprivation of the parental bond at this critical juncture.

Fourth, the prosecution reflects a basic misunderstanding of the nature of drug use and dependency. The prosecution vitiates the longstanding recognition by the courts and the medical community that addiction is not a crime but rather a medical condition that successfully responds to treatment.

Fifth, scientific and medical evidence fails to support any claim that the risks from cocaine exposure are so uniquely harmful – or even imminent – as to justify judicially re-writing the law in New Mexico.

Finally, the vast majority of state courts that have dealt with the issue presented here have concluded that extending child endangerment laws or similar laws to reach women in relationship to their pregnancies violates legislative intent and undermines public health concerns.

ARGUMENT

I. The Prosecution of Ms. Martinez Violates Legislative Intent and New Mexico Policy to Promote Public Health and the Importance of Family

The New Mexico legislature has recognized that prosecuting women for the combined status of pregnancy and addiction is counterproductive to public health and will work to harm the woman, child and family. The legislature has repeatedly addressed the issue of drug use and pregnancy through the public health system rather than through the criminal justice complex.

Through its actions, the New Mexico legislature has supported pre-natal care and protected the confidentiality of the practitioner-patient relationship.

The Attorney General's office aside, New Mexico is a leader among states in supporting non-punitive responses to vulnerable families. The New Mexico legislature in 2005 enacted the Family Support Act to demonstrate the "state's policy of support for the family and to emphasize the responsibilities of parents and the state in the healthy development of children and the family as an institution." NM Leg. H.B 97, § 2 (Purpose) (2005).

The legislature reiterated its public health approach by rejecting criminal sanctions in a bill that would have established drug addiction as child abuse. **In refusing to enact such a law, the legislature stated that the bill "may have unintended consequences of discouraging pre-natal care. New Mexico's mandatory child abuse reporting laws applies to physicians. A drug addicted or alcoholic mother may forego medical care during her pregnancy for fear of criminal charges."** NM Leg., S.B. 102 (2005); Fiscal Impact Report "Drug Addiction as Child Abuse" (2005) (emphasis added.) In short, the legislature expressly repudiated the measures that the Attorney General is advancing here in its prosecution of Ms. Martinez.

The New Mexico child abuse statute defines child as "a person who is less than 18 years of age." Section 30-6-1. Where the legislature has sought to include the fetus, it has done so expressly.³ Policing a pregnant woman's behavior violates her due process by rendering the

³ See NMSA 1978, § 30-3-7 (1985) ("death is manifested by the fact that after the expulsion or extraction the fetus does not breathe spontaneously ..."); NMSA 1978, § 24-9A-1 (1985), Maternal, Fetal, and Infant Experimentation, Definitions, where the legislature provided separate definitions for fetus and for infant; NMSA 1978, § 24-9A-5 (1979) Research Activity ("No clinical research activity involving fetuses, live-born infants or pregnant women shall be conducted unless ... (B) No inducements, monetary or otherwise, shall be offered to any woman to terminate her pregnancy for the purpose of subjecting her fetus or live-born infant to clinical research activity. (C) No consent to involve a pregnant woman, fetus or infant as a subject in clinical research activity shall be valid unless the pregnant woman or the parent or guardian of the infant has been fully informed ..."); NMSA 1978, §§ 66-8-101.1 (1985) Injury to Pregnant woman; "miscarriage" or "stillbirth" defined. ("A 'miscarriage' means the interruption of the normal development of the fetus ... resulting in the complete expulsion or extraction from a pregnant woman of a product of human conception....."); NMSA 1978, § 24-9A-3 (1979) Fetus ("No fetus shall be involved as a subject

child abuse statute impermissibly vague; a woman could not know what behavior would fall within its scope. Penalizing women for continuing their pregnancy to term in spite of a drug problem will result in potentially limitless criminal liability. Everything from skiing, not wearing a seatbelt, carrying a child with a genetic abnormality to term, refusing a recommended c-section, using legal drugs that are contraindicated for pregnancy, to even leaving the house on a particularly hot day, would potentially “endanger the child’s life or health” and make the pregnant woman subject to prosecution under Section 30-6-1.

The New Mexico legislature has refused to extend the State’s child abuse statute to encompass women who use illicit drugs while pregnant or to include fetus in the definition of child. This wise and considered policy should be honored, by upholding the decision of the appellate court below.

II. The Prosecution of Ms. Martinez Endangers Public Health By Jeopardizing the Therapeutic Relationships Between Women and Their Health Care Providers and Deterring Access to Important Services.

Medical and public health professionals uniformly object to the prosecution of women for conditions, circumstances and actions that may affect pregnancy outcomes because such prosecutions have been shown to erode women’s willingness to seek health care or to confide in their health care providers if they do seek such care. As a result, the health and well-being of both pregnant women and their fetuses is jeopardized. For these reasons, *Amici* urge the Court to decline to dramatically expand the child abuse statute to cover the facts of this case.

Amici firmly believe that the choice to prosecute Ms. Martinez for endangering her child’s life or health will undermine the quality and accessibility of health care for pregnant

in any clinical research activity unless the purpose of the activity is to meet the health needs of the particular fetus and the fetus will be placed at risk only to the minimum extent necessary to meet such needs or no significant risk to the fetus is imposed by the research activity.”).

women and women recovering from delivery who may in fact have drug use and dependency problems. Trust and confidence in health care providers lie at the core of every doctor-, nurse-, or counselor-patient relationship. The prosecution, like that being brought against Ms. Martinez, however, erodes such trust. Pregnant patients will be discouraged from divulging sensitive health issues to their care providers for fear that such disclosures will be divulged to law enforcement and become the basis for criminal prosecution and conviction rather than form the building blocks of a medically appropriate treatment plan.

Additionally, as *Amici* can attest and clinical experience confirms, the prosecution of pregnant illicit drug users deters them from seeking or obtaining important obstetrical care. See American Medical Ass'n, *Legal Intervention During Pregnancy. Court-ordered medical treatments and legal penalties for potentially harmful behavior by pregnant women*, 264 JAMA 2663, 2667 (1990). If disclosure by medical facilities extends to those individuals who may have ingested cocaine or other drugs, thousands of women could be affected. Accordingly, the State's claim that this prosecution will promote the health and well-being of pregnant women and their future children is dangerous and unfounded. The prosecution will almost certainly have the opposite effect. It will drive women away from prenatal care and substance abuse services, and force them into further marginalized statuses, to the detriment of everyone. If the State wishes to promote maternal and fetal health, then it should do so through the public health system, not with the aid of prosecutors and jailors, but with the involvement of medical and clinicians versed in drug use and pregnancy.

A. Prosecution of Ms. Martinez will Erode the Fundamental Trust Between Patients and their Health Care Providers That is Critical to Quality Health Care.

Patients like Ms. Martinez consent to the administration of intrusive, sometimes painful medical tests because they believe that the information obtained will be handled with the strictest

confidence by care providers and will be used for their treatment, not punishment. Because complete and accurate patient information is essential for the delivery of proper medical care, health care professionals across all disciplines are taught to uphold the duty of medical confidentiality. *See Jaffee v. Redmond*, 518 U.S. 1, 12 (1997). Law enforcement's intrusion on the delivery of prenatal care, however, is counterproductive to the health and well-being of both the woman and fetus, particularly when the mother suffers from a substance abuse problem. *See American Soc'y of Addiction Med., Bd. of Directors, Public Policy Statement on Chemically Dependent Women and Pregnancy* (Sept. 25, 1989). Even the *suggestion* that seeking health care could lead to criminal sanctions deters pregnant women from getting the prenatal care critical to the health of both mother and child.

Medical and public health professionals and the courts have long recognized that the obligation of confidentiality is not solely a matter of principle: it is a necessary precondition of every relationship between a patient and a physician, nurse or substance abuse counselor. *See Jaffee*, 518 U.S. at 10 ("the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment"). Thus, not only does "[v]iolation of confidentiality . . . show[] disrespect to the patient as a human being," it substantially impairs the ability of medical providers to do their jobs.

To make diagnoses and treat patients effectively, the physician must obtain sensitive information about a patient. A patient must be willing to tell a physician, who is often a total stranger, about such matters as drug usage . . . and to allow the physician to examine intimate parts of his or her anatomy. The promise of confidentiality encourages patients to disclose sensitive subjects to a physician without fear that an embarrassing condition will be revealed to unauthorized people.

R. Arnold et al., *Medical Ethics and Doctor/Patient Communication*, *In The Medical Interview: Clinical Care, Education and Research* 345, 365 (M. Lipkin, Jr. et al. ed., 1995). *See also* A. Lazare, *Shame, Humiliation, and Stigma in the Medical Interview*, *in The Medical Interview:*

Clinical Care, Education and Research 333 (M. Lipkin, Jr. et al. ed., 1995) (hereinafter "The Medical Interview"); D. Miller & M. Thelen, *Knowledge & Belief About Confidentiality in Psychotherapy*, 17 *Prof. Psychol. Res. & Prac.* 15, 18 (1986) ("[P]atients view confidentiality as an all-encompassing, superordinate mandate for the profession of psychology."). When the substance dependent patient is pregnant, an environment of communication and trust is paramount if potential harm to the fetus is to be reduced or prevented and optimum safety for the pregnant woman and child are to be ensured before, during and after delivery. Fear of criminal prosecution and conviction for child abuse is almost certain to chill the willingness of many pregnant patients to speak openly with their care providers during prenatal care visits or hospitalization.

For several reasons, a pregnant, recently delivered or miscarried patient's reluctance to confide fully in care providers can endanger her health. First, drug use is one of the most commonly missed diagnoses in obstetric and pediatric medicine; in most cases, a patient's drug use is not readily apparent if the patient does not disclose it. See Ira Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 *Pediatric Clinics N. Am.* 1403, 1410 (1988).

Additionally, health care workers must be able to discuss fully with pregnant women many sensitive matters to protect both maternal and fetal health. Among these are whether she and the fetus are at risk of HIV, Hepatitis C, or herpes infection due to unprotected sex or intravenous drug use. Important medical benefits accrue when treatment providers encourage patients to feel sufficiently comfortable to divulge highly personal, often stigmatizing, and sometimes incriminating information. See *Medical Ethics and Doctor/Patient Communication*, *supra.*, at 345. See also, *Shame, Humiliation, and Stigma in the Medical Interview*, *supra.*, at 333.

For nearly three decades researchers have tracked the special treatment needs of pregnant, drug-dependent and parenting women. Pregnant drug-dependent women often suffer from depression at high rates and from low self-esteem. In all cases, their decision to seek medical care is considered a highly positive step. And because such patients often lack the self-esteem that is important for completing treatment, it is especially important that care providers form a strong “therapeutic alliance” with them. In addition, women with substance abuse problems often require distinct gender appropriate treatment. For example, large numbers of drug-dependent women have been victims of sexual or other physical abuse, and women with substance abuse problems are far more likely than their male counterparts to have child care responsibilities. See, J. Wallen, *A Comparison of Male and Female Clients in Substance Abuse Treatment*, 9 J. Substance Abuse Treatment 243 (1992). For women with children, studies have shown that treatment outcomes improve substantially when treatment programs take into account patients’ needs for transportation to appointments, job training, primary medical care, education, child care, and medical care for infants and children. See M.E. Goldberg, *Substance-abusing Women: False Stereotypes and Real Needs*, 40 Social Work 789 (1995).

In sum, there are many reasons to take steps to enhance (not endanger) the confidentiality of the health care provider-patient dialogue concerning all health risks, including drug use – licit and illicit. The ability to adequately respond to the special treatment needs of drug dependent women, however, is jeopardized, if not altogether thwarted, by the sledgehammer of criminal prosecution. Health care providers cannot form the necessary relationships with their clients, or assist with appropriate treatment placements, if the avenues of open and honest communication are blocked by the well-grounded fear of criminal sanctions. The prosecution of Ms. Martinez, in short, places in grave jeopardy the ability of health care practitioners to safeguard patient

confidences, foster patient trust, obtain medically pertinent patient information, and motivate pregnant and parenting patients to pursue an agreed-upon course of care and treatment designed to protect and maximize maternal, fetal and child health.

B. Prosecuting Women for Continuing to Term In Spite of a Drug Problem is an Ineffective Means of Protecting Fetal Health.

Numerous expert bodies and authoritative commissions have found that the intrusion of the criminal justice system on health care practices exacerbates the already strong reluctance of pregnant substance abusers to seek medical attention and treatment. After a comprehensive three-year study of perinatal substance abuse in southern states, the Southern Regional Project on Infant Mortality, an initiative of the Southern Governors' Association and the Southern Legislative Conference, concluded: "If pregnant women . . . feel that they will be 'turned in' by health care providers or substance abuse treatment centers, they will avoid getting care. If women are able to discuss their addiction with providers without fear of retribution . . . they are more likely to enter treatment." Southern Regional Project on Infant Mortality, *A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women* 21 (1993).

Similarly, the Board of Trustees of the American Medical Association determined that where the criminal justice systems are used to deal with drug-abusing mothers, "[p]regnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment." American Medical Ass'n, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2667 (1990) (reporting AMA resolution that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate"). The American Society of Addiction Medicine, comprised of the leading

specialists in the field of substance abuse treatment and prevention, declared “criminal prosecution of chemically dependent women will have the overall result . . . of increasing, rather than preventing, harm to children and to society as a whole.” See American Soc’y of Addiction Med., Bd. of Directors, *Public Policy Statement on Chemically Dependent Women and Pregnancy* (Sept. 25, 1989). Even a study by the United States General Accounting Office concluded that “the threat of prosecution poses . . . [a] barrier to treatment for pregnant women.” See United States General Accounting Office, *ADMS Block Grant: Women’s Set Aside Does Not Assure Drug Treatment for Pregnant Women* 5, 20 (1991).

Amici -- and every other prominent public health and medical organization to have given the subject serious consideration -- agree that a punitive approach to drug use during pregnancy will worsen rather than resolve the situation. These organizations include the American College of Obstetricians and Gynecologists,⁴ the American Academy of Pediatrics,⁵ the March of Dimes,⁶ the National Association of Public Child Welfare Administrators,⁷ the National Council on Alcoholism and Drug Dependence,⁸ the American Nurses Association⁹ and the Center for the

⁴ American College of Obstetricians and Gynecologists Committee Opinion 321 (Nov. 2005) (“Pregnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.”)

⁵ American Academy of Pediatrics, Comm. on Substance Abuse, *Drug-Exposed Infants*, 86 *Pediatrics* 639, 642 (1990) (“The public must be assured of nonpunitive access to comprehensive care which will meet the needs of the substance-abusing pregnant woman and her infant.”).

⁶ March of Dimes, *Statement on Maternal Drug Abuse* 1 (Dec. 1990).

⁷ National Association of Public Child Welfare Administrators, *Guiding Principles for Working with Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response* (Jan. 1991) (“Laws, regulations, or policies that respond to addiction in a primarily punitive nature, requiring human service workers and physicians to function as law enforcement agents, are inappropriate.”).

⁸ National Council on Alcoholism and Drug Dependence, *Women, Alcohol, Other Drugs and Pregnancy* (1990) (A “punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drug addictions. It thus works against the interest of infants and children . . .”).

⁹ American Nurses Ass’n, *Position Statement* (Apr. 5, 1992) (“ANA . . . opposes any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants . . . The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems.”).

Future of Children.¹⁰

By contrast, and as discussed above, when treatment providers can establish a trusting relationship with pregnant substance abusers, they can offer ongoing support and interventions that substantially improve health outcomes for their patients, so that ultimately there is both a healthy mother and child. When a pregnant patient is persuaded of the undivided loyalty of her health care provider she will be far more likely to seek out and complete drug treatment and avail herself of early, comprehensive prenatal care. See S.R. Kandall, *Substance and Shadow: Women and Addiction in the United States* 278-79 (1996). In addition, negative health effects associated with prenatal drug exposure can be mitigated through intensive counseling and training in parenting skills. Early, high-quality, comprehensive prenatal care is one of the most effective weapons against infant mortality, including for women suffering from drug dependency. Southern Regional Project on Infant Mortality, *A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women* 6 (1993).

As one public health expert observed more than a decade ago in the *New England Journal of Medicine*:

[M]arriage of the state and medicine is likely to harm more fetuses than it helps, since many women will quite reasonably avoid physicians altogether during pregnancy if failure to follow medical advice can result in . . . involuntary confinement, or criminal charges. By protecting . . . the integrity of a voluntary doctor-patient relationship, we not only promote autonomy; we also promote the well-being of the vast majority of fetuses.

G. Annas, *Protecting the Liberty of Pregnant Patients*, 316 *New Eng. J. Med.* 1213, 1214 (1987).

¹⁰ Center for the Future of Children, *Recommendations*, 1 *The Future of Children* 8 (1991) ("A woman who uses illegal drugs during pregnancy should not be subject to special criminal prosecutions on the basis of allegations that her illegal drug use harms the fetus. Nor should states adopt special civil commitment provisions for pregnant women who use drugs"). See also *State v. Luster*, 419 S.E.2d 32, 35 n.2 (Ga. 1992) (listing medical and public health organizations opposing the prosecution of women for cocaine use during pregnancy).

Because the prosecution of women like Ms. Martinez creates a perilous and powerful disincentive to pregnant addicts *not* to seek prenatal care or drug treatment, *not* to confide their addiction to health care professionals, and *not* to give birth in hospitals – or *not* to carry the fetus to term – such prosecutions fail to serve any legitimate purpose, and in fact undermine the State’s purported objectives of promoting maternal and fetal health.

III. Criminal Prosecutions of Pregnant Women are Counterproductive and Detrimental to Children and Families.

A. Separating Children from their Mothers By Incarcerating Mothers Poses Substantial Risk of Harm.

The State asks this Court to expand the scope of the criminal law, by creating new reasons for incarcerating women and separating them from their infant children. The separation of mother from child carries with it profound and well-documented dangers that merit discussion.

The research “on children of incarcerated parents suggests that parental incarceration can negatively affect the emotional, behavioral, and psychological development of children.” Elizabeth Inez Johnson, et al., *Children of Incarcerated Parents: Cumulative Risk and Children’s Living Arrangements*, 1 (17 July 2002) at http://www.jcpr.org/wpfiles/johnson_waldfogel.pdf. See also, Ann Stanton, *When Mothers go to Jail* (1980) Lexington, MA: Lexington Books; Phyllis Baunach, *Mothers in Prison* (1995) New Brunswick, NJ: Transaction Books; Barbara Bloom & David Steinhart, *Why Punish the Children? A Reappraisal of the Children of Incarcerated Mothers in America* (1993) San Francisco: National Council on Crime and Delinquency. The research further indicates that children of incarcerated parents may also have problems with aggression and withdrawal, criminal involvement, depression, and

concentration.¹¹

The imposition of jail sanctions on women such as Ms. Martinez will deprive children of the chance to bond with their parents at the most critical time in their lives – the immediate moments after birth. As a result, the “arrest and incarceration of a parent can have a profound effect on a child. It can cause financial dislocation to the family, family dismemberment or dysfunction, and great social and emotional pain.” The Osborne Association, *How Can I Help? Working with Children of Incarcerated Parents* 3 (1998). Ray Helfer, a pioneer in the prevention of child abuse, notes that the neo-natal period is a particularly important period for child development.

When this sensitive period goes well, the relationship between new parents and their newly-born infants has the potential of progressing far beyond . . . expectations . . . [W]hen this interaction goes poorly, a vicious cycle can develop when the infant and the new parent[s] do not engage, resulting in a degree of discontent and frustration which can lead to a breakdown in the interactions between [parent and newborn.]

Helfer, *The Perinatal Period, a Window of Opportunity for Enhancing Parent-Infant Communication: An Approach to Prevention*, 11 *Child Abuse and Neglect: The International Journal* 566 (1987). Researchers consider “the strength of these attachment ties” as critical determinants as to whether the child “will survive and develop optimally.” Klaus and Kennell, *Mothers Separated from their Newborn Infants*, 17 *Pediatric Clinics of North America* 1015 (1970).

Jails and prisons, moreover, are notoriously ill-suited to respond adequately to the health needs of pregnant women and addicted persons. Despite the dramatic increase in the number of women currently incarcerated in state, federal, and local prisons, little attention – and even less money – has been devoted to developing programs based on the unique needs of incarcerated

¹¹ Elizabeth Inez Johnson, et al., *Children of Incarcerated Parents: Cumulative Risk and Children's Living Arrangements*, 1 (17 July 2002) at http://www.icpr.org/wpfiles/johnson_waldfogel.pdf.

women. See Katherine McCaa Baldwin and Jacquelyn Jones, *Health Issues Specific to Incarcerated Women: Information for State Maternal and Child Health Programs*, at 2, U.S. Department of Health and Human Services, Health Services and Resources Administration, Maternal and Child Health Bureau (May 2000) (also available at <http://www.med.jhu.edu/wchpc>). Thus, jails and prisons are ill-equipped to provide health care services tailored to women, particularly in providing prenatal care. The United States Department of Health and Human Services stated that “in order to assure that the unique health needs of incarcerated women are met, it is important that correctional facilities are equipped with appropriate information, staff and resources.” *Id.* However, state prison systems fall woefully short when it comes to providing “enough treatment slots for women, particularly women who are pregnant, have children, are mentally ill, or have committed a violent offense.” Dorothy Henderson, *Drug Abuse and Incarcerated Women*, *Journal of Substance Abuse Treatment*, Vol. 15, No 6 at 583 (1998).

B. Treatment and Responses Outside of the Criminal Justice Context Better Protects and Promotes Children and Families

A panel of experts convened by the United States Department of Health and Human Services concluded that when it appears that treatment is warranted for children exposed to drugs in utero, the most effective treatment, in the vast majority of cases, should take place within the relationship of the mother-child dyad, because that relationship defines the child’s existence early in life. Substance Abuse and Mental Health Services Administration, *Improving Treatment for Drug-Exposed Infants* 21 (1993). The expert panel further urged that community-based outreach programs work with mothers and children in tandem, to provide the full range of social services for the family unit. *Id.* at 27. Of particular note, and contradictory to the State’s prosecution of Ms. Martinez, the panel concluded that the best way to promote the health and

well-being of drug-exposed children is to help their mothers recover from addiction in community-based settings, *not* to criminally prosecute or incarcerate them. *Id.* at 28.

Accordingly, the arrest and prosecution of Ms. Martinez not only will deter women from seeking care, but it also will rupture familial bonds shown to have therapeutic significance. Prosecuting pregnant drug-dependent women also contradicts Congressional mandates and federal law. Congress has mandated that all states make reasonable efforts to keep families together, even where the children in those families may suffer from abuse or neglect. *See* 42 U.S.C. § 671(a)(15)(B). Federal regulations further explain that preventive services, such as substance abuse treatment, housing, mental health, health, education, childcare, and informal support networks be provided to strengthen and empower families who are at risk of child abuse and neglect. *See* 45 C.F.R. § 1355.25(f).

When a pregnant woman uses drugs it is counterproductive to rely upon the heavy-handed and punitive tools of involuntary civil commitment and criminal prosecution out of concern for fetal health. United States Department of Health and Human Services, *Improving Treatment for Drug Exposed Infants* 31 (1993). Rather, such cases are best handled by front-line social services professionals who are knowledgeable about the benefits of preventive services programs and who have access and referrals to the tools and resources needed to preserve family unity while protecting children from abuse and neglect. Arresting and incarcerating pregnant women and new mothers, by contrast, is not only futile but also detrimental.

IV. Imposing Criminal Sanctions on Women who Continue Pregnancies in Spite of Drug Dependency Problems Contradicts Broadly Accepted Principles of Law and is Ineffective in Halting Drug Abuse.

As early as 1925, the United States Supreme Court observed that drug dependent persons “are diseased and proper subjects for [medical] treatment.” *Linder v. U.S.*, 268 U.S. 5, 18

(1925). The Supreme Court reaffirmed this principle nearly four decades later when it found unconstitutional a law making the status of narcotic addiction a criminal offense. *Robinson v. California*, 370 U.S. 660, 667 (1962). The Court stated that “narcotic addiction is an illness ... which may be contracted innocently or involuntarily.” *Id.*

The decision to prosecute Ms. Martinez assumes in part, that the threat of criminal prosecution would be sufficient to stop a pregnant woman from continuing her drug use. This assumption is flawed, particularly in the context of using threats of prosecution for women who are drug dependent. See Shelley Gehshan, MPP, *Missed Opportunities for Intervening in the Lives of Pregnant Women Addicted to Alcohol or Other Drugs*, 50 J. Am. Med. Women’s Ass’n 160 (Sept/Oct 1995) (noting that using drugs near delivery is an indicator of drug dependency or addiction).

The medical profession has long recognized that drug dependence is an illness that cannot generally be overcome without treatment. “Psychoactive Substance Dependence” is listed as a mental illness with specific diagnostic criteria in the American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders – 4th Edition- TR* (2000) (hereinafter “DSM-IV-TR-TR”), used by psychiatrists, psychologists and clinical social workers to diagnose mental illness. Indeed, the DSM-IV-TR-TR assigns separate categories for cocaine-dependence (304.20), cocaine-abuse (305.60), amphetamine dependence (304.40), and amphetamine abuse (305.70). In the words of the American Medical Association:

Treatment – in the form of medical, psychological and psychiatric care – is a necessary and appropriate response to drug abuse ...while there is much to be learned about drug dependency, it is clear that addiction is not simply the product of a failure of individual willpower. Instead, dependency is the product of complex hereditary and environmental factors. It is properly viewed as a disease, and one that physicians can help many individuals control and overcome.

American Medical Association, *Proceedings of the House of Delegates: 137th Annual Meeting*,

Board of Trustees Report NNN 236, 241, 247 (June 26-30, 1988). *See also* R. K. Portenoy & R. Payne, *Acute and Chronic Pain, in Substance Abuse, A Comprehensive Textbook* 563, 582-84 (J.H. Lowinson et al. eds., 1997) (*citing* AMA task force). *See also National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 676 (1989) (“[A]ddicts may be unable to abstain even for a limited period of time.”); 21 U.S.C. § 802(1) (“The term ‘addict’ means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic as to have lost the power of self-control with reference to his addiction.”).

The medical condition of drug dependency is often further exacerbated among poor, pregnant women, many of whom suffer from depression and low self-esteem, and/or disorders associated with sexual or other physical abuse. As described in the DSM-IV-TR, one of the hallmarks of dependency is the inability to reduce or control substance abuse *despite adverse consequences*. *See* DSM-IV-TR at 179. Thus the Board of Trustees of the American Medical Association, addressing the very situation presented here, noted that punishing people for substance abuse “[i]gnores the impaired capacity of substance-abusing individuals to make decisions for themselves. In all but a few cases, taking a harmful substance such as cocaine is not meant to harm the fetus but to satisfy an acute psychological and physical need for that particular substance.” American Medical Association, *Proceedings of the House of Delegates: 137th Annual Meeting*, Board of Trustees Report NNN 267 (June 26-30, 1988).

Because of the compulsive nature of drug dependency, criminal sanctions will not deter drug use among pregnant women. Furthermore, punishing women for the dual status of being an addict and pregnant, does not advance the State’s dual interests in protecting and promoting maternal and fetal health. It actually creates a perverse incentive for women to end their

pregnancies in order to avoid criminal charges. See *Johnson v. Florida*, 602 So.2d 1288, 1294 (Fla. 1992) (“prosecution of these women would likely have the opposite effect. A woman may abort her child or avoid prenatal care or treatment out of fear of prosecution.”).

V. The Prosecution of Ms. Martinez is Belied by Peer-Reviewed Medical Evidence

A. Medical Science Has Failed to Substantiate the Alleged Harms that Prompted the Prosecution of Ms. Martinez

The factual record and current state of medical science fail to support the State’s assertion that prenatal exposure to cocaine is so uniquely harmful that it justifies re-writing the law.

The Journal of the American Medical Association (“JAMA”), one of the most distinguished peer-reviewed medical journals in the United States, published a comprehensive, systematic, and authoritative analysis of the medical research assessing the relationship between maternal cocaine use during pregnancy and adverse developmental consequences for the fetus and child. See D. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001) [hereafter “*A Systematic Review*”]. This report exposes as erroneous and unfounded the assumptions that underlie the prosecution and conviction of Ms. Martinez.

Using carefully developed selection criteria, the JAMA researchers identified seventy-five English-language studies regarding the effects of in utero cocaine exposure. See Frank, *A Systematic Review*, at 1614. The researchers then undertook a detailed review of all the studies that complied with accepted scientific practices. *Id.*¹² The researchers concluded that:

[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. Many findings once thought to be specific findings of in

¹² “Detailed review was ... restricted to studies that ... met 3 criteria: (1) samples were prospectively recruited; (2) examiners of the children were masked to their cocaine exposure status; and (3) the cocaine-exposed cohort did not include a substantial proportion of children also exposed in utero to opiates, amphetamines, or phencyclidine, or whose mothers were known to be infected with the human immunodeficiency virus (HIV).”

utero cocaine exposure can be explained in whole or in part by other factors, including prenatal exposure to tobacco, marijuana, or alcohol and the quality of the child's environment.

Id. at 1621.

Specifically, the JAMA researchers found that when studies are controlled for prenatal exposure to tobacco and alcohol, prenatal cocaine exposure is not associated with physical growth retardation; there is little or no impact of prenatal cocaine exposure on children's scores on assessments of cognitive development; "[p]roblem-solving abilities [do] not differ between cocaine-exposed and unexposed preschoolers"; nor does cocaine exposure impact standardized language measures. *Id.* at 1617, 1620. In fact, the oldest group of children studied to date registered *no* effect from in utero cocaine exposure on any IQ scales or on academic achievement. *Id.* at 1616 (citing G. Richardson et al., *Prenatal cocaine exposure: effects on the development of school-age children* 18 *Neurotoxicol & Teratology* 627 (1996)). Accord, G.A. Wasserman et al., *Prenatal Cocaine Exposure and School Age Intelligence*, 50 *Drug & Alcohol Dependence* 203, 209 (1998) ("prenatal cocaine exposure does not seem to confer an additional risk for adverse developmental outcome"); H. Hurt et al., *Children with In Utero Cocaine Exposure Do Not Differ from Control Subjects On Intelligence Testing*, 151 *Archives Pediatric & Adolescent Med.* 1237 (1997).

The *only* unique effect of prenatal cocaine exposure that the JAMA researchers uncovered is the potential for decreased emotional expressiveness. See D. Frank et al., *supra*, at 1620. And even this finding is tempered by the observation that "[f]ull-term cocaine-exposed infants show[] better arousal modulation than their unexposed counterparts." *Id.* at 1617.

In light of these scientific findings, the JAMA researchers condemn as "irrational[]" policies that selectively "demonize" in utero cocaine exposure and that target pregnant cocaine

users for special criminal sanction. *Id.* at 1621.

This scientific thinking has been echoed in a standard pediatrics textbook, which observes that “[t]o date no hypothesized or demonstrated effect of in utero cocaine exposure has been found to be specific to that drug. No studies have shown that prenatal cocaine exposure causes unique developmental dysfunction.” D.A. Frank et al., *Maternal Cocaine Use: Impact on Child Health and Development*, 40 *Advances in Pediatrics* 65, 92 (1993).

In 1997, scientists continued to urge a suspension of judgment, stating “[k]nowledge concerning the biological effects of cocaine exposure on the newborn is inconclusive at present.” E. Hutchins, *Drug Use During Pregnancy*, 27 *J. Drug Issues* 463, 465 (1997). By 1999, the general consensus among scientists was that there was not enough evidence to conclude definitively that prenatal cocaine exposure was linked to developmental delays or abnormalities. See J. Held et al., *The Effect of Prenatal Cocaine Exposure on Neurobehavioral Outcomes: a Meta-Analysis*, 21 *Neurotoxicology & Teratology* 619, 624 (1999) (noting “general consensus among researchers that the reproductive effects of cocaine appear to be minimal” and finding that “the effect of prenatal exposure to cocaine on neurobehavior appears to be only marginal and transitory”).

The prosecution of Ms. Martinez flouts the existing scientific research and medical consensus concerning the issue of cocaine-specific harms on pregnancy and fetal development.

B. Upholding This Prosecution Would Throw Open the Door to Criminally Charging Pregnant Women for Myriad Actions and Behaviors.

If this Court expands the child abuse statute to include a pregnant woman and her fetus, then an untold number of other women risk prosecution for exposing their fetuses to known teratogens or situations proven to elevate the risk of fetal harm. Indeed, as discussed below, if prosecution of Ms. Martinez for cocaine use during pregnancy is permitted to proceed, then state

prosecutors would be afforded discretion of unknowable dimensions and sweeping breadth to criminally charge women who, during the course of their pregnancies, expose themselves to one or more of a vast array of lawful substances, or engage in any number of lawful activities that are equally or more likely to result in negative outcomes to fetal health.

Aspirin, for example, if taken in large doses “may result in delayed onset of labor, premature closure of the fetal ductus arteriosus . . . or neonatal bleeding.” Van Marter et al., *Persistent Pulmonary Hypertension of the Newborn and Smoking and Aspirin and Nonsteroidal Antiinflammatory Drug Consumption During Pregnancy*, 97 *Pediatrics* 658 (1996) (maternal consumption of aspirin during pregnancy found to be consistently associated with pulmonary hypertension of the newborn, an important cause of respiratory failure in neonates).

Prenatal exposure to alcohol and nicotine pose an undeniable risk to the health and well-being of the fetus. Indeed, tobacco is the “single most powerful determinant of poor fetal growth in the developed world.” *Center on Addiction and Substance Abuse, Substance Abuse and the American Woman*, 64 (1996). See also Wisborg, et al., *Exposure to Tobacco Smoke in Utero and the Risk of Stillbirth and Death in the First Year of Life*, 154 *Am. J. Epidemiology* 322 (2001). The dangers of alcohol on fetal development are equally well-established. “[C]hildren of women who use alcohol while pregnant have a significantly higher infant mortality rate (13.3 per 1,000) than children of those women who do not use alcohol 8.6 per 1,000” and “up to 12,000 infants are born in the United States with Fetal Alcohol Syndrome, suffering irreversible physical and mental damage.” 42 U.S.C. § 280(f).

Significantly, many factors unrelated to the ingestion of drugs - licit or illicit - also increase the risk of poor pregnancy outcomes. For example, becoming pregnant after the age of 35, even when controlling for diabetes, hypertension, and other complications associated with

increased maternal age, increase the risk of fetal health problems. See R. Fretts et al., *Increased Maternal Age and the Risk of Fetal Death*, 333(15) *New Eng. J. Med.* 953, 956 (1995). Women who experience even a single stressful event during pregnancy are more than twice as likely to experience reproductive loss. See R. Neugebauer et al., *Association of Stressful Life Events With Chromosomally Normal Spontaneous Abortion*, 143 *Am. J. Epidemiology* 588 (1996). According to some sources, if a woman has an emotionally abusive partner during pregnancy or high maternal stress, the risk of problems to the child is dramatically increased, including “doubl[ing] the risk of attention deficit hyperactivity disorder.” BBC News, *Stress ‘Harms Brain in the Womb,’* (26 January 2007) available at <http://news.bbc.co.uk/1/hi/health/6298909.stm>. (quoting UK study conducted by Professor Vivette Glover of Imperial College London, of the Fetal and Neonatal Stress Research Group).

Moreover, there is a long-standing scientific consensus that prenatal exposure to adverse environmental factors such as poor nutrition, substandard housing, and a lack of social supports – all of which are associated with poverty – can also profoundly affect maternal and fetal health. See Mone, Suzanne, MD, Gillman, Matthew, MD, SM, Miller, Tracie, MD, Herman, Eugene, PhD, Lipshultz, Steven E., MD, *Effects of Environmental Exposures on the Cardiovascular System: Prenatal Period Through Adolescence*, *PEDIATRICS* Vol. 113 No. 4, April 2004, pp. 1058-1069. See also Bove, Frank, Shim Youn, Zeitz, Perri, *Drinking Water Contaminants and Adverse Pregnancy Outcomes: A Review*, available at <http://ehp.niehs.nih.gov/members/2002/suppl-1/61-74bove/bove-full.html>.

If Ms. Martinez’s prosecution and conviction for continuing her pregnancy to term in spite of a drug problem is permitted to go forward, then it stands to reason - as a matter of logic and science - that pregnant women who engage in one or more of a wide range of behaviors that

are known to pose a risk to fetal health face the possibility of criminal prosecution and jail sanctions. Having a glass of wine with dinner, taking aspirin to control pain, living at high altitude, living on the wrong side of the tracks near a coal burning or methane emitting plant, or failing to take the proper or full complement of vitamins are all examples of actions or omissions that “may endanger the child’s life or health” under Section 30-6-1. *See, e.g., A. Eisenberg et al., What To Expect When You’re Expecting* 54-57 (2d ed. 1996) (popular pregnancy advice book warning women to avoid, *inter alia*, changing a cat litter box, consuming unpasteurized cheese or undercooked meat, gardening without gloves, inhaling when handling household cleaning products, and ingesting caffeine).

The rationale underlying the state’s prosecution here – namely, punishing anything that “may endanger the child’s life or health” – also could be extended to justify the prosecution of women for not behaving in the manner that their care providers consider appropriate. For example, in Utah, a mother was prosecuted for failing to immediately acquiesce to her obstetrician’s recommendation that she undergo a caesarean delivery. The mother was pregnant with twins, and when she later agreed to the c-section, one of her twins was stillborn. She was charged with murder. The prosecution’s theory behind the mother’s charge was that her delay in choosing to undergo surgery risked harm to her fetus and ultimately caused its demise. *See Richard L. Berkowitz, Should Refusal to Undergo a Cesarean Delivery Be a Criminal Offense?* *Obstet Gynecol* Vol. 104, No. 6: 1220-1221, December 2004 (the murder charge was subsequently dropped). As this Utah case demonstrates, the prosecution of Ms. Martinez necessarily carries with it the specter of unwarranted, future targeting of pregnant women by law enforcement authorities for engaging in all manner of conduct that could conceivably cause harm to a developing fetus.

VI. An Overwhelming Majority Of State Courts Have Concluded that Application Of Child Endangering Laws to Pregnant Women Violates Legislative Intent, Undermines Public Health And Implicates Constitutional Principles of Due Process And Privacy.

The vast majority of courts to address the criminalization of substance dependence during pregnancy have struck down attempted prosecutions. *See, e.g., Sheriff v. Encoe*, 885 P.2d 596, 599 (Nev. 1994); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1995); *Reinesto v. Superior Court*, 894 P.2d 733, 736-37 (Ariz. App. 1995). The United States Supreme Court questioned the underlying policy rationale of extending criminal statutes to include prenatal conduct similar to that of Ms. Martinez. In *Ferguson v. City of Charleston, South Carolina*, the Court concluded that South Carolina's interest in conducting nonconsensual, suspicionless drug testing of pregnant women to gather evidence for possible criminal charges as part of a government effort to deter pregnant women from ingesting cocaine and other drugs cannot justify circumventing the warrant requirement of the Fourth Amendment. 121 S.Ct. 1281 (2001). The Court's analysis casts doubt on the assumption that the prosecution of pregnant women is a valid way to protect fetuses. As the Court observed, "[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." *Id.*

The overwhelming majority of state courts to have addressed this issue – with the single exception of South Carolina – have observed that the extension of child abuse statutes to include maternal conduct that may endanger a fetus leads to absurd, unintended, and dangerous results. *See e.g. Kilmon v. State of Maryland*, 905 A.2d 306, 313-14 (Md. App. 2006); *State v. Aiwohi*, 123 P.3d 1210, 1214 (Haw. 2005); *Sheriff*, 885 P.2d at 598; *Welch*, 864 S.W.2d at 283; *Reinesto*, 894 P.2d at 736-37; *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. App. 1991).

The high courts of Kentucky, Nevada, and Ohio have declined to extend the use of child

neglect statutes to punish women for their conduct during pregnancy, recognizing that the due process guarantee of notice and its prohibition against vague criminal statutes precludes such prosecution. See *Sheriff*, 885 P.2d at 598; *Welch*, 864 S.W.2d at 283; *State v. Gray*, 584 N.E.2d 710, 710 (Ohio 1992). Additionally, the high court of Maryland declined to extend the use of the child abuse statute for a woman's ingestion of cocaine while pregnant, recognizing that such convictions would violate legislative intent. *Kilmon*, 905 A.2d at 313-14. From 1977 to the present, prosecutors in more than thirty states have attempted to use existing criminal laws to punish women for pregnancy-related behavior that posed potential harm to fetuses. With the sole exception of the South Carolina in *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997) and *South Carolina v. McKnight*, 576 S.E.2d 168 (S.C. 2003), every state court of last resort, as well as all intermediate appellate courts, including the New Mexico Court of Appeals, and numerous trial courts that have addressed this issue have rejected the use of child endangerment and similar criminal statutes to punish women for their conduct during pregnancy. See, e.g., *Martinez*, 2006-NMCA-068, ¶13 (holding that under New Mexico law, a fetus is not a child for the purposes of the child abuse statute, and to prosecute a woman for child abuse because of her drug use while pregnant would violate her due process rights); *Kilmon*, 905 A.2d at 313-14 (holding that the Maryland legislature did not intend its child abuse and neglect law to be applied to the context of pregnant women, and to do so would render the statute impermissibly broad and vague, limited only by the prosecutor's discretion); *Ward v. State*, 188 S.W.3d 874, 876 (Tex. App. 2006) (holding that chemical transfer in question did not constitute a delivery, noting that it was impossible for a fetus to "possess" the drugs since a fetus would not be capable of handling, manipulating or using drugs.); *Aiwohi*, 123 P.2d at 1214 (holding that according to the plain language of the Hawaii manslaughter statute, the definition of person did not include fetus);

Reinesto, 894 P.2d at 736-37 (dismissing child abuse charges filed against a woman for heroin use during pregnancy; court held that the ordinary meaning of "child" excludes fetuses, and to conclude otherwise, would offend due process notions of fairness and render statute impermissibly vague); *Collins v. State*, 890 S.W.2d 893, 898 (Tex. App. El Paso 1994) (charges brought for substance abuse during pregnancy dismissed because application of the statute to prenatal conduct violates federal due process guarantees); *State v. Dunn*, 916 P.2d 952, 955-56 (Wash App. 1996) (holding that the legislature did not intend to include fetuses within the scope of the term "child" which was defined "as a person under eighteen years of age"); *State v. Gethers*, 585 So.2d 1140, 1141 (Fla. App. 1991) (dismissing child abuse charges brought for prenatal drug use on ground that such application misconstrues the purpose of the law).

The *Kilmon* case provides a most poignant example. In *Kilmon*, Maryland's highest court, the Court of Appeals, answered the question of "whether the intentional ingestion of cocaine by a pregnant woman can form the basis for a conviction under that statute of the reckless endangerment of the later-born child." *Kilmon*, 905 A.2d at 313-14. The Court held that its reckless endangerment statute, Md. Criminal Law Code Ann. §3-204, did not "apply to prenatal drug ingestion by a pregnant woman." *Id.* at 313-14. The *Kilmon* court recognized that:

[T]he Legislature obviously gave credence to the evidence presented to it that criminalizing the ingestion of controlled substances -- in effect criminalizing drug addiction for this one segment of the population, pregnant women -- was not the proper approach to the problem and had, in fact, proved **ineffective** in other States in deterring either that conduct or addiction generally on the part of pregnant women.

Id. at 313 (emphasis added.) The same reasoning applies here.

Given the wide range of conduct by pregnant women commonly believed to cause significant harm to a fetus, the prosecution's theory of the case makes pregnancy in New Mexico

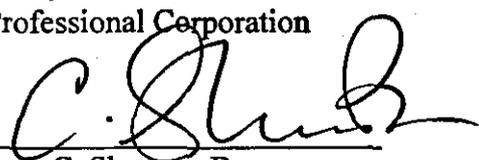
a precarious exercise in potential criminal liability.

CONCLUSION

To permit the prosecution of Cynthia Martinez is unfounded for the reasons set forth above, and *amici curiae* respectfully request that the charges against her be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing pleading was served upon:

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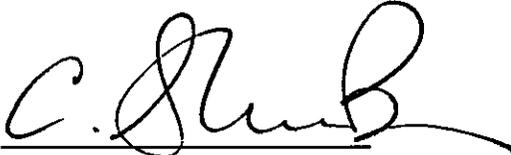
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C. Shannon Bacon

APPENDIX A

Amicus Curiae Pegasus Legal Services for Children (“PLSC”), a nonprofit organization founded in 2002 and incorporated in the state of New Mexico, is dedicated to improving the well-being of children and provides legal services to children and their caregivers. Pegasus Legal Services for Children is extremely concerned about rewriting the criminal child abuse statutes to reach the conduct of women while pregnant when the clear consensus among medical and public health professional organizations is that criminal prosecution of pregnant women jeopardizes the well-being of children.

Amicus Curiae New Mexico Section of the American College of Obstetricians and Gynecologists (“NMACOG”) is an organization dedicated to enhancing the health of women and children through education, advocacy, practice and research. In pursuing its goal of protecting and improving the health and welfare of women and children in New Mexico, NMACOG focuses not only on the scientific and social aspect of patient care, but also advocates for patient care from the economic, educational and political perspectives. In 2005, the American College of Obstetricians and Gynecologists adopted a national position that the criminalization of drug and alcohol abuse by pregnant women and subsequent prosecution of pregnant women does not advance the goal of improving the health of women and children. In fact, the prosecution of women for addiction, rather than providing treatment alternatives, does not further the best interests of women and their children.

Amicus Curiae New Mexico Public Health Association (“NMPHA”) is a New Mexico organization whose mission is to promote the physical, social, emotional well-being of individuals and populations in New Mexico by serving as a forum for health professionals and workers to share approaches, research, and applications that promote health, and advocate for policies that support and advance NMPHA’s mission.

Amicus Curiae New Mexico Nurses Association (“NMNA”) believes all people are entitled to quality health care. The association is responsible to the recipients and providers of health care to foster high standards of nursing, to stimulate and promote the professional development of nurses, and to advance their educational, economic and general welfare. The NMNA represents New Mexico nurses and the nursing profession at the state and local levels.

Amicus Curiae American College of Physicians (“ACP”), New Mexico Chapter, is the nation's largest medical specialty society. Members are physicians in general internal medicine and related subspecialties, including cardiology, gastroenterology, nephrology, endocrinology, hematology, rheumatology, neurology, pulmonary disease, oncology, infectious diseases, allergy and immunology and geriatrics. Its mission is to enhance the quality and effectiveness of health care by fostering excellence and professionalism in the practice of medicine. One of the main goals of the ACP is to advocate responsible positions on individual health and on public policy relating to health care for the benefit of the public, our patients, the medical profession, and our members. The New Mexico chapter of the ACP agrees that providing confidential and supportive treatment is a much more effective and responsible approach to decreasing drug use during pregnancy than

the threat or actuality of prosecution and punishment. Charging women with felony child abuse for using illicit drugs while they are/ were pregnant may well do more harm than good, by discouraging women from seeking prenatal care, and from being open and honest with their doctors and other clinicians.

Amicus Curiae National Association of Social Workers ("NASW") is the world's largest association of professional social workers with nearly 150,000 members in fifty-six chapters throughout the United States and abroad. 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 emphasizes 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, 7th ed., 2006).

Amicus Curiae National Association of Social Workers – New Mexico ("NASW-NM") has 1,013 members and is particularly interested in this case due to its significant local impact.

Amicus Curiae Yolanda Briscoe, MD. Dr. Briscoe is a licensed psychologist with 10 years of educational and professional experience in providing substance abuse treatment. She currently serves as the Executive Director and Clinical Psychologist at the Santa Fe Recovery Center. Dr. Briscoe received a Doctorate in Psychology from the University of San Francisco and a Masters Degree in Counseling from the University of El Paso at Texas.

Amicus Curiae Bette Fleishman. Ms. Fleishman is the Executive Director of the Rape Crisis Center of Central New Mexico. She has worked in the field of substance abuse for over 25 years, and has overseen nonprofit organizations that work directly with men and women both in community-based as well as incarcerated settings. She is a licensed substance abuse counselor, and served on the Licensing Board for all behavioral health professionals in Arizona for nine years and was the Chairperson of the Board for two of those years. Ms. Fleishman has published several articles regarding jail-based treatment programs for men and women with substance abuse problems. She has also worked with the nonprofit organization, Amity Foundation ("Amity"), a tri-state organization based in Arizona, New Mexico and California, for 23 years.

Amicus Curiae Norton Kalishman, MD. Dr. Kalishman is a Pediatrician and Program Director of the McCune Charitable Foundation. Dr. Kalishman is the former Chief Medical Officer for the New Mexico Department of Health.

Amicus Curiae Eve Espey, M.D. Dr. Eve Espey is an Obstetrician-Gynecologist and Associate Professor in the Department of Obstetrics and Gynecology, University of New Mexico, Albuquerque. She serves as the medical student clerkship director. Dr. Espey earned her M.D. from the University of California, Irvine, College of Medicine and has been in the profession for 20 years

Amicus Curiae Gabriela DeBoer. Ms. DeBoer is the President of the New Mexico Hepatitis C Alliance.

Amicus Curiae Dona Upson, MD, MA is a Pulmonary and Critical Care physician in Albuquerque, NM, with expertise in health policy, tobacco control and nicotine dependence. For identification purposes only, she is an Associate Professor of Medicine at the University of New Mexico and on staff at the New Mexico Veterans Affairs Health Care Services hospital. She is on the Health Policy Committee for the American Thoracic Society, the Board of Directors for the American Lung Association of the Southwest, the Advisory Council for New Mexicans Concerned about Tobacco and the Advisory Council for Stop Tobacco on My People (working to decrease tobacco-related health disparities in NM). She is a former member of CDC's Tobacco Control Network. Dr Upson has given numerous peer-reviewed presentations at scientific meetings, authored several publications and received awards for work related to tobacco control and dependence. The reasons underlying drug use are complex and not yet fully elucidated. We know that treatment can work, and should be easily accessible. New Mexico's decision to mandate insurance coverage of smoking cessation programs has helped make our state a leader in the treatment of tobacco dependence, and has made a difference in the lives of many people addicted to nicotine. We know that addiction is a disease that is not overcome as a result of threats or punishment, even for highly motivated people, including pregnant women. In fact, the threat of punishment may make it less likely that pregnant women would seek the treatment they need.

Amicus Curiae National Coalition for Child Protection Reform ("NCCPR") is an organization of professionals drawn from the fields of law, academia, psychology, social work and journalism, who are dedicated to improving child welfare systems through public education and advocacy. NCCPR, a tax-exempt non-profit organization founded at a 1991 meeting at Harvard Law School, is incorporated in Massachusetts and headquartered in Alexandria, Virginia.

Amicus Curiae Child Welfare Organizing Project ("CWOP") is a 10-year-old organization of New York City parents and professionals who seek reform of New York City child welfare practices through increased, meaningful parent / client involvement in child welfare decision-making at all levels, from case-planning to policy, budgets and legislation. CWOP has approximately 1,500 parent members. Most of CWOP's staff, and about half of CWOP's Board of Directors, are parents who have had direct, personal involvement with the Administration for Children's Services ("ACS"). A significant percentage of CWOP members are mothers in recovery. A large part of CWOP's work involves debunking prevailing stereotypes about ACS-involved parents and families, putting a human face on parents who are often unfairly and inaccurately demonized, and

bringing CWOP's unique insights into policy discussions. CWOP hopes this will result in more enlightened public policy that effectively identifies and addresses real problems and challenges to successful family life in New York City, ultimately protecting children by helping and strengthening their families and communities.

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, dissemination 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 **The Association for Medical Education and Research in Substance Abuse ("AMERSA")** was founded in 1976 by members of the Career Teachers Program, a multidisciplinary health professional faculty development program supported by the National Institute on Alcohol Abuse and Alcoholism and the National Institute on Drug Abuse. AMERSA has since grown to over 300 members representing physicians of several specialties (MD and DO), nurses, social workers, psychologists, pharmacologists, dentists, and other professionals. AMERSA prides itself on its multidisciplinary and multispecialty membership, and its members benefit from the diversity of perspectives. AMERSA members have been responsible for many important advances in substance abuse education and research. AMERSA members have developed, implemented, and evaluated state-of-the-art curricula, educational programs, and faculty development programs. Our members have developed clinical and research measures for substance abuse services and professional education. They are actively engaged in research related to substance abuse education, clinical service, and prevention.

Amicus Curiae **American Public Health Association ("APHA")** is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It represents all disciplines and specialties in public health, including maternal and child health and substance abuse. APHA strives to improve public health for everyone by proposing solutions based on research, helping to set public health practice standards, and working closely with national and international health agencies.

Amicus Curiae **Citizens for Midwifery ("CfM")** is a national, non-profit, and consumer-based group that promotes maternal and child health through advocating the Midwives Model of Care and seeks to have these practices recognized as an accepted standard of care for childbearing mothers. In focusing on the normalcy of childbirth and

the uniqueness of each childbearing woman and family, this model includes monitoring the physical, psychological, and social well-being of childbearing mothers, providing pregnant women with individualized prenatal care and hands-on assistance during interventions, and identifying women who require obstetrical attention. As an organization, CfM also provides information on midwifery and childbirth issues, encourages and provides guidance for midwifery and childbirth issues, and represents consumer interests regarding midwifery and maternity care.

Amicus Curiae Doctors of the World-USA was founded in 1990 by a group of volunteer physicians and is an international health and human rights organization working where health is diminished or endangered by violations of human rights and civil liberties. Reaching out to the most vulnerable and marginalized populations, in concert with local partners around the globe, Doctors of the World-USA's projects build long-term solutions addressing urgent health issues, with particular focus on women's health and vulnerable children.

Amicus Curiae Family Justice is an organization that draws on the unique strengths of families and neighborhoods to break cycles of involvement with the criminal justice system. It works on engaging families in support of those released under community supervision and demonstrates the positive effect that families have on the reentry and rehabilitation process. In pursuing its mission, Family Justice assists government and communities by providing direct services, testing methodologies that promote change, delivering training and consulting to encourage use of its methods, and serving as a resource for both the criminal justice field and the general public.

Amicus Curiae The Hygeia Foundation, Inc. is concerned with Pregnancy Loss (miscarriage, stillbirth, neonatal death), Maternal and Child Health and narrowing disparities in access to Information Technologies and Women's Health Services. The Hygeia Foundation, Inc. is committed to improving universal access to healthcare services and healthcare information with respect, dignity and advocacy. The foundation also provides solace and bereavement for parents whose children have died before and after birth. The Hygeia Foundation commits its resources and mission to underserved, vulnerable and disadvantaged women, children and families and seeks philanthropic donations to: develop and implement its unique programs, fund in-kind programs in patient care and basic science research related to Perinatal Health and Loss, and support public health initiatives to reduce perinatal and neonatal morbidity and mortality so as to improve the health of medically and economically disadvantaged families.

Amicus Curiae National Perinatal Association ("NPA") is a multidisciplinary group concerned with perinatal health issues from preconception through infancy. The membership fosters optimal perinatal health and quality health care by promoting education, supporting research, and influencing national priorities. NPA sponsors clinical informational sessions, serves as an education and legislative resource center, and facilitates the education of health care professionals. NPA encourages the development of perinatal organizations and promotes communication among existing groups. The NPA is dedicated to promoting the health and well-being of mothers and babies,

enriching families, communities and our world. NPA engages a broad coalition to improve social, cultural, and economic environments.

Amicus Curiae National Asian Pacific American Women's Forum ("NAPAWF") is dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of Asian Pacific American (APA) women and girls. Founded in 1996, NAPAWF's vision includes strengthening communities to reflect the social, political, and economic concerns and perspectives of APA women and girls; inspiring leadership and promoting the visibility and participation of APA women and girls in the political process and within the broader national and international women's movement; and creating a vehicle for progressive APA women to connect with others across the country to share strategies and form lasting coalitions around policy initiatives and grassroots organizing campaigns. Issues related to domestic violence, reproductive justice, education, civil rights, immigrant and refugee rights, and economic empowerment form the basis of NAPAWF's work.

Amicus Curiae National Council on Alcoholism and Drug Dependence ("NCADD"), with its nationwide network of affiliates, provides education, information, 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 alcoholics and other drug addicts seeking treatment. 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 Latina Institute for Reproductive Health ("NLIRH") wants to ensure the fundamental human right to reproductive health care for Latinas, their families and their communities through education, policy advocacy, and community mobilization. Through advocacy, community mobilization, and public education, NLIRH is shaping public policy, cultivating new Latina leadership, and broadening the reproductive health and rights movement to reflect the unique needs of Latinas. NLIRH believes that coercive, discriminatory and/or punitive policies and practices (such as the criminalization of pregnant substance users) are differentially impacting Latinas and other women of color.

Amicus Curiae National Women's Health Network improves the health of all women by developing and promoting a critical analysis of health issues in order to affect policy and support consumer decision-making. The Network aspires to a health care system that is guided by social justice and reflects the needs of diverse women. The National Women's Health Network was founded in 1975 to give women a greater voice within the healthcare system. NWHN is a membership-based organization supported by 8,000 individuals and organizations nationwide. NWHN has established core values to guide us in our work as advocates for women's health: (1) We value women's descriptions of their own experiences and believe that health policy should reflect the diversity of

women's experiences, (2) we believe that evidence rather than profit should drive the services offered and information that is made available to women to inform their health decision making and practices, (3) we value analysis of science that takes into consideration systems of power and oppression, (4) we believe that the government has an obligation to safeguard the health of all people, (5) all women should have access to excellent health care and (6) women's normal physiological changes over the lifespan should not be unduly medicalized.

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 Physicians and Lawyers for National Drug Policy ("PLNDP") is a non-partisan group of the nation's leading physicians and attorneys, whose goal is to promote and support public policy and treatment options that are scientifically-based, evidence-driven, and cost-effective. The initiative, funded by the JEHT and Robert Wood Johnson, and building on the earlier work of Physician Leadership on National Drug Policy, is organized around the belief that effective policies for alcohol and other drugs must be grounded in data, not politics. PLNDP will advocate for evidence-based policy decisions and will encourage local innovation by establishing stable professional partnerships in every state and by supporting community coalitions. For the first time, physicians and lawyers, often viewed as squaring off in policy debates, have joined forces to make a concerted effort to move the national conversation beyond the often misleading and polarizing policy debates of the past.

Amicus Curiae Center for Gender and Justice ("CGJ") seeks to develop gender-responsive policies and practices for women and girls who are under criminal justice supervision. The Center is committed to research and to the implementation of policies and programs that will encourage positive outcomes for this underserved population.

Amicus Curiae Elizabeth M. Armstrong, Ph.D. holds a joint appointment in the Department of Sociology and the Woodrow Wilson School at Princeton University and is a faculty associate at both the Office of Population Research and the Center for Health and Wellbeing. She has published articles in the scholarly literature on substance use during pregnancy, family planning, adolescent motherhood, and the sociology of pregnancy and birth. She is the author of *Conceiving Risk, Bearing Responsibility: Fetal Alcohol Syndrome and the Diagnosis of Mortal Disorder* (Johns Hopkins University Press, 2003), the first book to challenge conventional wisdom about drinking during pregnancy. Her current research includes a longitudinal study of agenda setting around disease in the U.S. and a study of fetal personhood and obstetrical ethics. She has an M.P.A. from Princeton University and a Ph.D. from the University of Pennsylvania.

Amicus Curiae **Wendy Chavkin, M.D., M.P.H.**, is a Professor of Clinical Public Health and Obstetrics/Gynecology at Columbia University, Mailman School of Public Health and College of Physicians and Surgeons in New York City. She is a 2004-2005 Fulbright New Century Scholar conducting research on policies relating to fertility decline. Dr. Chavkin currently serves as the director of the Soros Reproductive Health and Rights Fellowship. She has written extensively about women's reproductive health issues for over two decades. She has done extensive programmatic and policy research related to illegal drug use by pregnant women, punishment and lack of care.

Amicus Curiae **Ellen Wright Clayton, MD, JD**, has a longstanding interest in women's and children's health and was a participant in the American Academy of Pediatrics working group that concluded that prosecution of women for their actions during pregnancy was bad policy. She received a bachelor's degree from Duke, a master's degree from Stanford, her law degree from Yale, and her medical degree from Harvard. A member of the Vanderbilt faculty since 1988, she is currently the Rosalind E. Franklin Professor of Genetics and Health Policy and Co-Director of the Center for Biomedical Ethics and Society at the Vanderbilt University Medical Center. She is also Professor of Pediatrics (and a practicing general pediatrician) and Professor of Law. At Vanderbilt, she directs the Law Emphasis program and teaches in the Patient, Profession, and Society in the medical school and teaches the interdisciplinary course in Bioethics and Law in four schools of the University. She has been interested in issues surrounding the ethical, legal, and social implications of advances in genetics and genomics for many years as both a scholar and a policy maker. She has been very involved with the human genome project in the United States, most recently serving as Co-Chair of the Ethical, Legal, and Social Implications Working Group of the International Haplotype Mapping Project. Recently elected to membership in the Institute of Medicine, she has served on several IOM Committees, including those on Genomics and the Public's Health in the 21st Century and on Assessing Interactions Among, Social, Behavioral, and Genetic Factors of Health. She is currently directing three empirical research projects investigating the impact of advances of genetic knowledge on patients. Her scholarly interests also include research ethics, ranging from the use of stored tissue samples generally to international issues, as well as ethical issues in women's and children's health. Author of two books and more than 75 articles and book chapters, she is an internationally sought after speaker, consultant, and collaborator.

Amicus Curiae **Nancy Day, M.P.H.** 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 published prolifically and has received grants from the NIH in support of her work. She is currently the Director of the Maternal Health Practices and Child Development Project centered on identifying long-term effects of prenatal substance abuse.

Amicus Curiae **Leslie Hartley Gise, M.D.**, is a Clinical Professor at the John A. Burns School of Medicine at the University of Hawai'i in Honolulu. She is also the Chief of the Department of Psychiatry of 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 the Malama Family Recovery Center treating substance use 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, President-Elect of the Hawai'i State Psychiatric Society, on the Council on Minority and Under-Represented Groups, the Committee on Women, the Area 7 Council, the Committee on Public Affairs, the Committee on Public and Community Psychiatry and the Assembly. She is the Chair of the Disaster Preparedness Committee of the Hawai'i Psychiatric Medical Society, an American Red Cross mental health volunteer, a member of the federal Disaster Medical Assistance Team (DMAT) under FEMA and Homeland Security where she is the Public Information Officer, 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 **Stephanie S. Covington, Ph.D., L.C.S.W.**, has more than twenty-five years of experience in the design, development, and implementation of treatment services for women. She is recognized for her work on gender-responsive services in both the public and private sectors. Her fifteen years of experience in the criminal justice system include training, speaking, and writing, as well as consulting with varied national, state, and local corrections agencies in the United States and Canada. Dr. Covington has published extensively. She co-authored the multi-year National Institute of Corrections project report "Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders."