

NO. 11-10219

IN THE SUPREME COURT OF ALABAMA

EX PARTE AMANDA HELAINE KIMBROUGH, *PETITIONER*

IN RE

STATE OF ALABAMA

VS.

AMANDA HELAINE KIMBROUGH,

MOTION FOR LEAVE AND BRIEF OF AMICI CURIAE
IN SUPPORT OF PETITION OF AMANDA HELAINE KIMBROUGH

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* Leave to appear *pro hac vice* was granted in the Supreme Court of Alabama on January 24, 2012

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

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

1. Proposed *Amici* are national and Alabama healthcare providers, drug policy organizations, human rights organizations, experts in addiction and their associations, and advocates for pregnant women. Namely, the American Academy of Addiction Psychiatry, American College of Obstetricians and Gynecologists, American Psychiatric Association, American Medical Women's Association, American Nurses Association, The Alabama Women's Resource Network, American Society of Addiction Medicine, Black Women's Health Imperative, Child Welfare Organizing Project, Global Lawyers and Physicians, Harm Reduction Coalition, Institute for Health and Recovery, International Center for Advancement of Addiction Treatment of the Beth Israel Medical Center Baron Edmond de Rothschild Chemical Dependency Institute, International Centre for Science in Drug Policy, International Doctors for Healthy Drug Policies, International Mental Disability Law Reform

Project, Legal Action Center, National Asian Pacific American Women's Forum, National Association of Nurse Practitioners in Women's Health, National Association of Social Workers and National Association of Social Workers, Alabama Chapter, National Council on Alcoholism and Drug Dependence, Inc., National Institute for Reproductive Health, National Latina Institute for Reproductive Health, National Organization for Women - Alabama, National Perinatal Association, National Women's Health Network, National Women's Law Center, Our Bodies Ourselves, Southern Center for Human Rights, Pippa Abston, MD, PhD, FAAP, Sheila Blume, MD, Susan C. Boyd, PhD, Wendy Chavkin, MPH, MD, Nancy Day, MPH, PHD, Gabriele Fischer, MD, Deborah A. Frank, MD, Leslie Hartley Gise, MD, Stephen R. Kandall, MD, Howard Minkoff, MD, Daniel R. Neuspiel, MD, MPH, Robert G. Newman, MD, MPH, Linda Worley, MD, Trecia Wouldes, PhD, Tricia E. Wright, MD, MS.

2. The legal questions presented in this petition, involve complex scientific, medical, and public health issues in which the *amici* have longstanding interest. *Amici* are recognized experts in fetal, neonatal, and maternal health, and in the effects of drugs and other

substances on public health and families. *Amici* have both a public and an ethical duty to bring an evidence-based perspective and on the ground experience to a prosecution *amici* believe is informed by neither and cannot be reconciled with the well-being of mothers and children, scientific evidence, or Alabama law.

3. The brief proffered provides a scientific and public health background to the lower court's decision to extend the chemical endangerment law to pregnant women, including evidence-based, peer-reviewed research that weighs overwhelmingly against it.

4. Because of the important issues raised in this case and the *amici's* substantial expertise and interest in its outcome, *amici* respectfully proffer this brief and respectfully request leave to file the same for the Court's consideration.

Respectfully submitted,

 /s/ Mary Bauer

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* Leave to appear *pro hac vice* was granted by the Court of
Criminal Appeals on September 29, 2010

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INTERESTS OF AMICI

Amici curiae include 44 Alabama and national organizations and individuals¹ with recognized expertise in the areas of maternal, fetal and neonatal health and in understanding the effects of improper drug use on users, their families, and society. Amici respectfully request that this Court reverse the decision below and address a question of first impression raised by the criminal conviction in this case; a conviction that unjustifiably expands the scope of the crime of Chemical Endangerment of a Child, § 26-15-3.2 Ala. Code 1975, to include women in relation to their own pregnancies, that endangers, rather than protects, pregnant women, fetuses, and children, and that creates potential criminal liability for health care providers.

SUMMARY OF THE ARGUMENT

This case presents a question of first impression and of monumental importance to the health and well-being of Alabama women and their families and the lives of health care providers. In essence, the Court of Criminal Appeals

¹ Statements of interest for each are included as an appendix. Amici will provide the Court with sources relied on in this brief upon the Court's request.

redefined the word "child" to include a "viable fetus," thus making § 26-15-3.2, Ala. Code 1975, enacted to address the issue of children endangered by exposure to hazardous chemical byproducts in methamphetamine laboratories, applicable to a pregnant woman who used any amount of a controlled substance and seeks to continue a pregnancy to term. In so doing, the Court of Criminal Appeals has created new law that reaches well beyond the Legislature's clear intent and even beyond women who use illegal drugs. Without even considering the implications, it has made the law applicable to pregnant women who, under the care of a medical provider, are lawfully taking certain prescription medications. Furthermore, the Court of Criminal Appeals, apparently failing to realize the legal reach of its decision and purporting to be interpreting one word in one statute, has created constitutional vagueness problems with every Alabama criminal statute that uses the term "child." The Court's decision extends the criminal law, for the first time in Alabama, to permit the prosecution and punishment of both a pregnant woman in relation to her pregnancy and her health care providers who treat her. This

has profound and detrimental implications for the health and welfare of women and their babies.

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

Amici are committed to reducing potential drug-related harms at every opportunity. Amici do not endorse the non-medicinal use of drugs--including alcohol or tobacco--during pregnancy. Nor do amici assert that there are no health risks associated with the use of methamphetamine or other controlled substances during pregnancy. Rather, amici contend that the relevant medical and scientific research does not support the prosecution of women who use a

controlled substance and continue to term for the crime of "chemical endangerment" and that such prosecutions undermine maternal and fetal health.

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

The consequences of the Court of Criminal Appeals' decision for pregnant women and their families are significant and far-reaching. The Alabama State Legislature did not intend the chemical endangerment statute to encompass drug use during pregnancy and has refused to amend it to do so. The Legislature recognizes that applying the chemical endangerment statute to pregnant women who use drugs leads to harmful and dangerous public health consequences. Public health research establishes that pregnant women are often deterred from pursuing drug treatment and prenatal care in circumstances where they fear arrest, prosecution, and possible imprisonment. The threat of criminal sanctions also creates a disincentive

for pregnant women to disclose information about drug use to health care providers. Furthermore, prosecuting women for continuing their pregnancies to term despite a drug problem encourages them to terminate pregnancies to avoid criminal penalties.

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

ARGUMENT

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

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

The Alabama Legislature is well aware of the negative public health consequences of applying a criminal law

approach to the issue of drug use and pregnancy.² The Court of Criminal Appeals' decision contravenes legislative intent and rewrites state law in a way that is unlawful and detrimental to fetal and maternal health.

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

Comprehensive, early, and high-quality prenatal care is one of the most effective weapons against pregnancy complications and infant mortality, especially for women experiencing a drug dependency problem.³ Pregnant women who fear arrest will be deterred from seeking prenatal care.⁴ Indeed, the harm resulting from a mother's fear of being

² See § 13A-6-1, Ala. Code 1975 (demonstrating that when the Alabama Legislature amended the Homicide and Assault law to include the unborn it explicitly provided that the laws could not be used against a pregnant woman in relation to her unborn child).

³ Paul Moran et al., *Substance Misuse During Pregnancy: Its Effects and Treatment*, 20 *Fetal & Maternal Med. Rev.* 1, 16 (2009); Andrew Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 *JAMA* 1581, 1585-86 (1993) (finding that pregnant women who use cocaine but who have at least four prenatal visits significantly reduce their chances of delivering low birth weight babies).

⁴ See e.g., Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 *Drug Alcohol Dependence* 199 (1993), available at <ftp://senfiles.healthystartfv.org/Sort%20Literature%20Review%201990%20-%201999.Data/Poland-1993-Punishing%20pregnant%20d-2670163712/Poland-1993-Punishing%20pregnant%20d.pdf>.

prosecuted is so apparent that the American College of Obstetricians and Gynecologists ("the College") Committee on Health Care for Underserved Women has called upon doctors to change policies that lead to punitive interventions.⁵ As the College committee explains, "[s]eeking obstetric-gynecologic care should not expose a woman to criminal or civil penalties, such as incarceration, involuntary commitment, loss of custody of her children, or loss of housing."⁶ Furthermore, the committee notes that, "use of the legal system to address perinatal alcohol and substance abuse is inappropriate."⁷

The College committee makes clear that punitive approaches wrongly treat addiction as a failure of will. Instead, "[a]ddiction is a chronic, relapsing biological and behavioral disorder with genetic components [. . .] subject to medical and behavioral management in the same

⁵ Am. Coll. of Obstetricians & Gynecologists, Comm. On Health Care for Underserved Women, *Committee Opinion 473 Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 *Obstetrics & Gynecology* 200 (2011), available at http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Substance_Abuse_Reporting_and_Pregnancy_The_Role_of_the_Obstetrician_Gynecologist.

⁶ *Id.* at 200.

⁷ *Id.* at 201.

fashion as hypertension and diabetes.”⁸ The interpretation of § 26-15-3.2 Ala. Code 1975 adopted by the Court of Criminal Appeals creates an atmosphere of fear and uncertainty among women who have used a controlled substance. This uncertainty is likely to drive women from needed drug treatment.⁹

The American Medical Association agrees that fear of prosecution is a deterrent to pursuing drug treatment and prenatal care.¹⁰ It has stated:

Pregnant women will be likely to avoid seeking prenatal or open medical care for fear that their physician’s knowledge of substance abuse or other

⁸ *Id.* at 200.

⁹ See e.g., Martha A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. Drug Issues 285 (2003), available at http://www.nnvawi.org/pdfs/alo/Humphreys_barriers_substance_treatment.pdf; Poland et al., *supra* note 4; Mishka Terplan et al., *Methamphetamine Use Among Pregnant Women*, 113 *Obstetrics & Gynecology* 1290 (2009) (“Although the desire for behavioral change may be strong in pregnancy, substance-using women may be afraid to seek prenatal care out of fear of prosecution or child protection intervention. This is unfortunate, because prenatal care has shown improvement in birth outcomes, even given continued substance use.”), available at http://journals.lww.com/greenjournal/Fulltext/2009/06000/Who_Will_be_There_When_Women_Deliver___Assuring.14.aspx.

¹⁰ Am. Med. Ass’n Bd. of Trustees, *Legal Interventions During Pregnancy*, 264 *JAMA* 2663, 2669 (1990); See also Am. Med. Ass’n, *Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy*, Resolution 131 (1990) (resolving “that the AMA oppose[s] legislation which criminalizes maternal drug addiction”).

potentially harmful behavior could result in a jail sentence rather than proper medical treatment.¹¹

In rejecting amendments to the chemical endangerment law so that it applied to pregnant women in relation to their own pregnancies, the Alabama Legislature was rightly concerned with the disincentives that applying the statute to pregnancy would create, as prenatal care,¹² drug

¹¹ Am. Med. Ass'n Bd. of Trustees, *supra* note 10, at 2667.

¹² Prenatal care is strongly associated with improved outcomes for children exposed to drugs in utero. Andrew Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 JAMA 1581, 1585-86 (1993) (finding that pregnant women who use cocaine but who have at least four prenatal care visits significantly reduce their chances of delivering low birth weight babies); Edward F. Funai et al., *Compliance with Prenatal Care in Substance Abusers*, 14(5) J. Maternal Fetal Neonatal Med. 329, 329 (2003); Cynthia Chazotte et al., *Cocaine Use During Pregnancy and Low Birth Weight: The Impact of Prenatal Care and Drug Treatment*, 19(4) Seminars in Perinatology 293, 293 (1995); Sheri Della Grotto et al. *Patterns of Methamphetamine Use During Pregnancy: Results from the Infant Development, Environment, and Lifestyle (IDEAL) Study*, 14 Maternal Child Health J. 519 (2010), available at <http://www.escholarship.org/uc/item/84j88256.pdf>. Conversely, lack of prenatal care is associated with poor health outcomes for mothers and newborns. See, Anthony M. Vintzileos et al., *The Impact of Prenatal Care on Neonatal Deaths in the Presence and Absence of Antenatal High-Risk Conditions*, 186(5) Am. J. Obstetrics & Gynecology 1011, 1013-14 (2002); Susan Hatters Friedman, Amy Heneghan & Miriam Rosenthal, *Disposition and Health Outcomes Among Infants Born to Mothers with No Prenatal Care*, 33 Child Abuse & Neglect 116 (2009).

treatment,¹³ and other general health care have all been demonstrated to improve pregnancy outcomes whether or not a woman is able to overcome her drug addiction during the short length of pregnancy.¹⁴ The flight from care that would result from the ruling below expanding Alabama's chemical endangerment law would endanger maternal, fetal, and child health.

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

Prosecuting pregnant women who have used a drug or who are drug dependent will pressure women to terminate wanted

¹³ The research also shows that drug treatment can be effective for pregnant women and can produce beneficial pregnancy outcomes. See e.g., Patrick J. Sweeney et al., *The Effect of Integrating Substance Abuse Treatment with Prenatal Care on Birth Outcomes*, 20(4) J. Perinatology 219, 223 (2000) (finding that neonatal outcome "is significantly improved for infants born to substance abusers who receive[d] drug treatment concurrent with prenatal care.")

¹⁴ See Substance Abuse & Mental Health Servs. Admin., U.S. Dep't Health & Human Servs., *Curriculum for Addiction Professionals (CAP): Level 1* ("Prenatal care is necessary for healthy pregnancies, particularly for women with alcohol or drug issues"); see also, Nancy C. Goler et al., *Substance Abuse Treatment Linked with Prenatal Visits Improves Perinatal Outcomes: A New Standard*, 28 J. Perinatology 597, 602 (2008) ("Women who admit to use might be more motivated to stay clean in pregnancy. However, they will only get better if they receive appropriate support that they can access without . . . stigmatization or fears of criminal investigation."), available at <http://www.nature.com/jp/journal/v28/n9/pdf/jp200870a.pdf>.

pregnancies. In hearings to amend the chemical endangerment law, legislators expressed concern that extending the chemical endangerment law to pregnant women may encourage women to seek abortions.¹⁵ Courts have also recognized that this type of prosecution may "unwittingly increase the incidence of abortion."¹⁶ Although it is difficult to know how frequently abortions result from fear of prosecution, one study reported that "two-thirds of the women [surveyed] who reported using [c]ocaine during their pregnancies . . . considered having an abortion."¹⁷ In at least one well-documented case, a woman did obtain an abortion to win her release from jail and prevent prosecution. In *State v. Greywind*, a pregnant woman accused of child endangerment, based on alleged harm to her fetus from drugs she had taken, obtained an abortion. The

¹⁵ See *Chemical Endangerment Debate (audio)*, May 2008, available at <http://altaxdollarsatwork.blogspot.com/2008/05/chemical-child-endangerment-debate.html> (Alabama House Debate on 4/17/08 about HB723).

¹⁶ See e.g., *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992) ("Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion").

¹⁷ See Jeanne Flavin, *Our Bodies, Our Crimes: The Policing of Women's Reproduction in America*, 112 (NYU Press 2008).

prosecutor then dropped the charge.¹⁸ By encouraging such a result, the expansion of the chemical endangerment law would clearly be at odds with the asserted state interest in fetal life.

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

In addition to deterring some women from seeking care altogether or coercing them into ending their pregnancies, the ruling below is also likely to undermine the provider/patient relationship for those women who do seek care. A relationship of trust is critical for effective medical care because the promise of confidentiality encourages patients to disclose sensitive subjects to a physician.¹⁹ Open communication between drug-dependent pregnant women and their health care providers is

¹⁸ See Motion to Dismiss With Prejudice, *State v. Greywind*, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992) (prosecutor sought and obtained dismissal of the endangerment charge because “[d]efendant has made it known to the State that she has terminated her pregnancy. Consequently, the controversial legal issues presented are no longer ripe for litigation.”)

¹⁹ Am. Med. Ass’n, Patient Physician Relationship Topics: *Patient Confidentiality*, <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/patient-confidentiality.page#> (last visited Mar. 12, 2012).

critical,²⁰ and courts have long viewed confidentiality as fundamental to this relationship.²¹

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

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

Application of the chemical endangerment law to the pregnancy context will result in the incarceration of pregnant women.²² Incarcerating pregnant women creates

²⁰ See Rosemary H. Kelly et al., *The Detection & Treatment of Psychiatric Disorders and Substance Use Among Pregnant Women Cared for in Obstetrics*, 158 Am. J. Psych. 213 (2001), available at <http://ajp.psychiatryonline.org/article.aspx?articleID=174591>.

²¹ As the United States Supreme Court recognized, a "confidential relationship" is necessary for "successful [professional] treatment," and "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Jaffee v. Redmond*, 518 U.S. 1,10 (1996) (upholding confidentiality of mental health records).

²² According to a news report, Alabama women have been incarcerated while still pregnant under the district

additional health risks for their fetuses and is counterproductive to the goals of promoting maternal and fetal health. Incarcerated pregnant women generally receive inadequate prenatal care²³ and are exposed to other health risks such as infectious disease,²⁴ poor sanitary conditions, poor nutrition,²⁵ sexual abuse,²⁶ high stress levels²⁷ and poor mental health care.²⁸ Furthermore,

attorney's interpretation of the chemical endangerment law. Adam Nossiter, *In Alabama, a Crackdown on Pregnant Drug Users*, N.Y. Times, Mar. 15, 2008 ("Rachel Barfoot . . . told her probation officer that she was pregnant. When she tested positive for cocaine, she was arrested"), available at www.nytimes.com/2008/03/15/us/15mothers.html.

²³ Nat'l Council on Crimes and Delinquency, *The Spiral of Risk: Health Care Provision To Incarcerated Women* 14 (2006), available at http://www.nccd-crc.org/nccd/pubs/2006_spiral_of_risk.pdf.

²⁴ Am. Med. Ass'n Bd. of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990).

²⁵ Nat'l Council on Crimes and Delinquency, *supra* note 23 *The Spiral Risk: Health Care Provision To Incarcerated Women* at 16.

²⁶ Off. Inspector Gen., U.S. Dept. of Justice, *Deterring Staff Sexual Abuse of Federal Inmates*, Apr. 2005 (Kathleen Sawyer, a former Bureau of Prisons Director, stated that inmate sexual abuse was the "biggest problem" she faced as Director.), available at <http://www.justice.gov/oig/special/0504/final.pdf>.

²⁷ Megan Bastick & Laurel Townhead, Quaker United Nations Office, *Women in Prison: A Commentary on the U.N. Standard Minimum Rules for the Treatment of Prisoners* 57 (June 2008) ("The high level of stress that accompanies incarceration itself has the potential to adversely affect pregnancy."), available at <http://www.quno.org/geneva/pdf/humanrights/women-in-prison/WiP-CommentarySMRs200806-English.pdf>.

incarceration cannot guarantee that pregnant women abstain from the use of controlled substances since illegal drugs are available in jails and prisons.²⁹

In Alabama, medical care in prison is appalling. Alabama received an "F" rating for the delivery of prenatal care to pregnant inmates.³⁰ Alabama is last in the nation in terms of per inmate medical spending.³¹ The Julia Tutwiler Prison for Women is overcrowded³² and has a history of failing to provide basic medical care, adequate hygiene, beds, ventilation, and nutrition.³³ County jails in Alabama

²⁸ See e.g., Clara Crowder, *Settlement Filed in Tutwiler Prison Suit*, Birmingham News, June 29, 2004.

²⁹ See *Drugs Inside Prison Walls*, Wash. Times, Jan. 27, 2010 ("In many large state prison systems, a mix of inmate ingenuity, complicit visitors and corrupt staff has kept the level of inmate drug abuse constant over the past decade despite concerted efforts to reduce it."), available at <http://www.washingtontimes.com/news/2010/jan/27/drugs-inside-prison-walls/>.

³⁰ Rebecca Project for Human Rights & Nat'l Women's Law Ctr., *Mothers Behind Bars: A State-by-State Report Card and Analysis of Federal Policies on Conditions of Confinement for Pregnant and Parenting Women and the Effect on Their Children 15*(2010), available at <http://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf>.

³¹ Equal Justice Initiative, *Alabama Prison Conditions* (2005), <http://eji.org/eji/files/Prison%20Conditions.pdf>.

³² *Id.* at 1 (In the Julia Tutwiler facility the inmate population remains at 200 percent of capacity, even after approximately 31 percent of the prison population was transferred to a private prison in Louisiana.).

³³ Clara Crowder, *Settlement Filed in Tutwiler Prison Suit*,

are similarly ill equipped to provide healthy environments to pregnant women.³⁴ Such conditions are antithetical to the health and well-being of pregnant women and their fetuses.

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

Judicial expansion of the chemical endangerment law to apply to pregnant women would make women who fill certain lawful prescriptions subject to arrest. The chemical endangerment statute criminalizes "exposing" a "child" to any "controlled substance" or "chemical substance." Many prescription medications are "controlled substances" under the law. By its terms, the chemical endangerment law does not apply when a medical care provider has prescribed a controlled substance a child. See § 26-15-3.2(c), Ala. Code 1975 ("It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was

Birmingham News, June 29, 2004, available at <http://www.schr.org/node/99>.

³⁴ Matt Elofson, *Some County Jails face Overcrowding*, Dothan Eagle, May 17, 2009, available at http://www2.dothaneagle.com/news/2009/may/17/some_county_jails_face_overcrowding-ar-193981/.

administered to the child in accordance with the prescription instructions provided with the controlled substance.”) There is, however, no affirmative defense if the controlled substance was prescribed to the woman who is pregnant with the child. Many types of schedule II, III, IV, and V controlled substances³⁵ are medications, including painkillers, anti-seizure drugs, and stimulants that are routinely, appropriately prescribed for patients--including pregnant women.³⁶ A recent survey of obstetricians and gynecologists found “that approximately a third of their pregnant patients took at least one prescription medication other than prenatal vitamins during pregnancy prior to labor.”³⁷ The survey found that overall, “OB-Gyns were more

³⁵ See § 20-2-20 to 32 Ala. Code 1975, (listing controlled substances).

³⁶ See Maria A. Morgan et al., *Management of Prescription and Nonprescription Drug Use During Pregnancy*, 23 J. Maternal-Fetal & Neonatal Med, 813 (2010) (noting, “Many preexisting chronic conditions require continued drug management during pregnancy, and pregnant women may develop diseases or pregnancy-related disorders that require treatment during pregnancy. Further, given that about half of pregnancies in the United States are unplanned, women may inadvertently be exposed to medications during pregnancy.”).

³⁷ *Id.* at 815-817 (OB-Gyns reported prescribing medications to both pregnant and non-pregnant patients for the following conditions: Chlamydia, urinary tract infection, depressed mood, generalized anxiety disorder, chronic insomnia, asthma, major depressive disorder, hypertension,

likely to recommend prescription medications for a greater number of conditions in pregnant than nonpregnant patients.”³⁸ A survey of pregnant women showed that over half (56%) were prescribed at least one drug during pregnancy, many of which were controlled substances under both federal and state laws.³⁹ A study analyzing data from two national surveys that tracked all doctor visits made by pregnant women in 1999 and 2000 found that about half of all pregnant women visiting had one or more medications, including several controlled substances such as: the benzodiazepines alprazolam, triazolam, midazolam, lorazepam to treat anxiety; anti-epileptic drugs like pentobarbital

frequent/severe headaches, flu, and diabetes.).

³⁸ *Id.* at 817.

³⁹ Erika Hyde Riley, et al. *Correlates of Prescription Drug Use During Pregnancy*, 14 *J. Women's Health* 401, 401 (2005) (finding that 18% of pregnant women surveyed were prescribed analgesic medications, many of which are listed in schedules II-V); See also, Euni Lee et al., *National Patterns of Medication Use During Pregnancy*, 15 *Pharmacoepidemiology & Drug Safety* 537 (2006) (finding that among the medications most commonly prescribed to pregnant women were analgesic drugs); Brian J. Cleary et al., *Medication Use in Early Pregnancy: Prevalence and Determinants of Use in a Prospective Cohort of Women*, 19 *Pharmacoepidemiology & Drug Safety* 408, 410-411 (2010) (finding that analgesics were among the most commonly reported medications in a sample of 23,989 pregnant women, each of whom reported taking at least one medicine during their pregnancy, including other controlled substances like benzodiazepines).

and Phenobarbital; and codeine and other analgesics to treat pain.⁴⁰ Narcotic analgesics are also standard second-line treatments for pregnant women suffering severe migraine and tension headaches,⁴¹ conditions that affect up to 18% of pregnant women.⁴² In fact, hydromorphone, an opioid analgesic classified under Alabama and federal law as a schedule II substance, is "considered relatively safe in pregnancy" by neurologists to treat migraine symptoms.⁴³ Central nervous system depressants, such as alprazolam (Xanax®), diazepam (Valium®) and lorazepam (Ativan®), are schedule IV substances sometimes prescribed to women suffering from anxiety or depression during pregnancy.⁴⁴

⁴⁰ Euni Lee et al., *supra* note 39, at 541.

⁴¹ See e.g., Tiffany Von Wald & Anne D. Walling, *Headache During Pregnancy: CME Review Article*, 57 *Obstetrical & Gynecological Survey* 179, 181 (2002); Rukmini Menon & Cheryl D. Bushnell, *Headache and Pregnancy*, 14 *The Neurologist* 108, 115 (2008), available at http://www.neurologia.org.mx/portalweb/documentos/reunion_anual/2.pdf; Stephen A. Contag et al., *Migraine During Pregnancy: Is it More Than a Headache?*, 5 *Nature Revs.: Neurology* 449 (2009), available at <http://www.nature.com/nrneurol/journal/v5/n8/pdf/nrneurol.2009.100.pdf>.

⁴² Contag et al., *supra* note 41, at 454.

⁴³ Menon & Bushnell, *supra* note 41 at 113 (stating that the federal Food and Drug Administration gives hydromorphone a "B" rating, indicating its relative safety in pregnancy for acute migraine treatment).

⁴⁴ Riley, *supra* note 39, at 404, 407.

Among the drugs covered by the chemical endangerment statute as rewritten by the Court of Appeals is methadone. Methadone is the treatment recommended by the U.S. government for pregnant women with opioid addictions,⁴⁵ and is a schedule II controlled substance under Alabama law. § 20-2-25, Ala. Code 1975.

In addition to potentially criminalizing the receipt of prescribed medications, the Court of Criminal Appeals' reinterpretation of the statute to include pregnant women in relation to their pregnancies raises the question of criminal liability for medical care providers who prescribe controlled substances to pregnant women. Under § 13A-2-23(2), Ala. Code 1975, a person may be held liable for the criminal conduct of others if "he aids or abets such other person in committing the offense." If ingestion of a controlled substance now constitutes chemical endangerment, it stands to reason that provision of that controlled

⁴⁵ Substance Abuse & Mental Health Servs. Admin., U.S. Dep't Health & Human Servs., *Methadone Treatment for Pregnant Women*, Pub. No. SMA 06-4124 (2006) ("If you're pregnant and using drugs such as heroin or abusing opioid prescription pain killers, it's important that you get help for yourself and your unborn baby. Methadone maintenance treatment can help you stop using those drugs. It is safe for the baby, keeps you free of withdrawal, and gives you a chance to take care of yourself.").

substance would be aiding and abetting chemical endangerment. Indeed, the Alabama Legislature recognized the potential for practitioner liability in each of the rejected proposals to expand the law, and included language safeguarding receipt of prescribed medication and exempting health care providers from criminal liability.⁴⁶ The Court of Criminal Appeals' sweeping expansion of the chemical endangerment law failed to take these issues into consideration, creating great uncertainty among health care providers and potentially chilling their ability to practice according to their medical judgment and the standard of care.

The adverse consequences of applying the statute to the context of pregnancy and to women who experience pregnancy losses as Ms. Kimbrough did are severe: the Court of Criminal Appeals' decision sends a perilous message to

⁴⁶ *E.g.*, H.B. 8, 2011 Leg., Reg. Sess. (Ala. 2011) ("(f) A rebuttable presumption of exposure in utero in violation of this section exists if both the mother and the child test positive for the same controlled substance at the time of birth **and the controlled substance was not prescribed by a licensed physician.**"

(g) **Any licensed physician providing medical care and treatment to a mother or child shall not be subject to any criminal liability under this section.** Medical care and treatment includes, but is not limited to, prescribing, ordering, or administering medications or medical procedures.") (emphasis added)

pregnant women who have used controlled substances: not to seek prenatal care or drug treatment, not to confide their addiction to health care professionals, not to continue vital medical treatments, or not continue their pregnancies and bring forth life. The decision therefore should be reversal by this Court, as such prosecutions fail to serve any recognized state interests and are an affront to the intent of the Alabama Legislature.

B. The Court of Criminal Appeals' Decision Makes Alabama an Outlier Because the Majority of Sister States Have Refused to Expand the Criminal Law to Reach Women in Relation to the Fetuses they Carry.

Every state appellate court to address this issue, but one, has refused to expand existing state laws including drug delivery, child abuse, and homicide laws to punish women who become pregnant and continue or attempt to continue to term despite a drug problem.

The Court of Criminal Appeals evades this overwhelming jurisprudence asserting that these decisions are either unpersuasive or involve statutes fundamentally different from the chemical endangering law. *Ankrom v. State*, No. CR-09-1148, 2011 Ala. Crim. App. LEXIS 67 (Ala. Crim. App. Aug. 26, 2011). While it is not surprising that courts in

other states were considering statutes that are not identical, word for word, with the chemical endangering law, the Appeals Court fails to acknowledge that many of the cases involved statutes no less general than Alabama's chemical endangering law. See *Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007) (decision of Texas's highest court refusing to imply a broad interpretation of a drug delivery statute); *Johnson v. State*, 602 S.2d 1288, 1296-97 (Fla. 1992) (reversing the conviction of a woman who used cocaine during pregnancy for 'delivering drugs to a minor'); *State v. Luster*, 419 S.E.2d 32, 35 (Ga. Ct. App. 1992) (holding that a statute proscribing distribution of cocaine from one person to another did not apply to a pregnant woman in relation to her fetus, that to interpret the law otherwise would deprive pregnant women of fair notice, and noting that viewing addiction during pregnancy as a disease and addressing the problem through treatment rather than prosecution was the approach "overwhelmingly in accord with the opinions of local and national medical experts"); *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. App. 1991) (dismissing drug delivery charges against a pregnant woman who used cocaine, finding that "to prosecute

defendant for delivery of cocaine is so tenuous that we cannot reasonably infer that the Legislature intended this application, absent unmistakable legislative intent").

Furthermore, this Court should consider those cases that involved more general statutes because, as explained *supra*, the lower court, by virtue of its plain language interpretation, makes generally worded Alabama criminal laws that contain the word "child" applicable to a pregnant woman. Moreover, these cases were decided upon principles of statutory interpretation that apply in Alabama.

Most recently in 2010, the Supreme Court of Kentucky reversed the opinion of an appellate court and dismissed an indictment charging Ina Cochran for first-degree wanton child endangerment when she gave birth to an infant who tested positive for cocaine. *Cochran v. Commonwealth*, 315 S.W.3d 325 (Ky. 2010). The lower court had judicially expanded the law because it believed the state's feticide law and *Commonwealth v. Morris*, 142 SW3d 654 (Ky. 2004) (holding that the feticide law supported a homicide charge where a man killed a pregnant woman and her fetus) provided the basis for judicial expansion of the child endangerment law. The Kentucky Supreme Court refused to use these laws,

all intended to reach third parties not a pregnant woman in relation to the fetus she carries, as a basis for rewriting its child endangerment law.

The Kentucky Supreme Court concluded, as this Court should, that “[i]t is the legislature, not the judiciary, that has the power to designate what a crime is.” *Cochran*, 315 S.W.3d at 330; see also *State v. Geiser*, 763 N.W.2d 469, 471-74 (N.D. 2009) (holding that the child endangerment law could not be expanded to punish a pregnant woman who experienced a stillbirth); *State v. Wade*, 232 S.W. 3d 663, 666 (Mo. 2007) (despite Missouri’s legal authority for protecting the unborn against third parties, legislature did not create penalties for women who experienced poor pregnancy outcomes); *Kilmon v. State*, 905 A.2d 306, 313-14 (Md. 2006) (child abuse and neglect laws not applicable to pregnant drug using women who went to term); *State v. Aiwohi*, 123 P.3d 1210, 1214 (Haw. 2005) (holding that the use of the term “person” in the manslaughter statute does not include unborn children); *State v. Gray*, 584 N.E.2d 710, 710 (Ohio 1992) (holding that the criminal child endangerment statutes did not encompass a pregnant woman who used cocaine).

State intermediary courts have also rejected attempts by prosecutors to apply penal statutes to the context of pregnancy. See *State v. Martinez*, 137 P.3d 1195, 1197 (N.M. Ct. App. 2006) ("this court may not expand the meaning of 'human being' to include an unborn viable fetus because the power to define crimes and to establish criminal penalties is exclusively a legislative function"); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 4th Dist. 1991); *Reinesto v. Superior Court*, 894 P.2d 733, 736-37 (Ariz. Ct. App. 1995); *State v. Dunn*, 916 P.2d 952, 955-56 (Wash. Appl. 1996); *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Cal. Ct. App. 1997) (all following rules of statutory construction and lenity and refusing to rewrite state child abuse laws to permit punishment of pregnant drug using women who went to term); *State v. Deborah J.Z.*, 596 N.W. 2d 490 (Wis. Ct. App. 1999) (granting motion to dismiss first degree homicide and reckless conduct charges brought against a woman who used alcohol during pregnancy). Despite the state's effort to distinguish sister state cases, the core holding in all is the same: plain meaning and clear legislative intent of the states' laws, like Alabama's, did not support the interpretation urged by prosecutors. See,

e.g., Herron v. State, 729 N.E.2d 1008, 1011 (Ind. App. 2000) (“We cannot expand the General Assembly’s definition of a dependent and, consequently, the intended application of the neglect of a dependent statute, beyond the fair meaning of the words used. [The statutes] do not criminalize conduct that occurs prior to a child’s birth.”).

This Court should consider the decisions of other state courts refusing to judicially expand the scope of existing criminal statutes to reach the context of pregnancy and birth as they are highly relevant and persuasive authority.⁴⁷

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

Implicit in Court of Criminal Appeals decision is the assumption that harm from prenatal exposure to controlled substances--including illegal drugs--is so great that district attorneys and courts should create new criminal penalties where the Legislature has not. Evidence-based

⁴⁷ It is important to note that in virtually all of these states, as in Alabama, civil wrongful death laws have been expanded to permit recovery for viable fetuses and, in some states, non-viable fetuses, but these courts have not found those laws controlling when interpreting criminal statutes.

research, however, does not support the popular, but medically unsubstantiated, assumption that any amount of prenatal exposure to an illegal drug causes unique, severe, or even inevitable harm.⁴⁸

The assumption that exposure to illegal drugs is necessarily harmful has been rejected by courts that have evaluated the scientific research. For example, the Supreme Court of South Carolina, placing the continuing vitality of the *Whitner* decision in doubt, recently and unanimously overturned the conviction of a woman who suffered a stillbirth and allegedly tested positive for an illegal

⁴⁸ Ashley H. Schempf & Donna M. Strobino, *Illicit Drug Use and Adverse Birth Outcomes: Is It Drugs or Context?*, 85 J. Urban Health 858 (2008), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2587644/pdf/11524_2008_Article_9315.pdf; Emmalee S. Bandstra et al., *Prenatal Drug Exposure: Infant and Toddler Outcomes*, 29 J. Addictive Diseases 245 (2010); Ashley H. Schempf, *Illicit Drug Use and Neonatal Outcomes: A Critical Review*, 62 Obstetric and Gynecological Survey 749, 750 (2007) ("Although the neonatal consequences of tobacco and alcohol exposure are well established, the evidence related to prenatal illicit drug use is less consistent despite prevalent views to the contrary."); Barbara L. Thompson et al., *Prenatal Exposure to Drugs: Effects on Brain Development and Implications for Policy and Education*, 10 Nature Revs. Neuroscience 303, 303 (2009) ("Many legal drugs, such as nicotine and alcohol, can produce more severe deficiencies in brain development than some illicit drugs, such as cocaine. However, erroneous and biased interpretations of the scientific literature often affect educational programs and even legal proceedings.").

drug, noting specifically that the research the prosecutor relied on was "outdated" and that trial counsel failed to call experts who would have testified about "recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor."⁴⁹

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

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

⁴⁹ *McKnight v. State*, 661 S.E.2d 354, 358 n.2 (S.C. 2008).

Criminal proscription of cocaine, for example, relates to its potential for abuse and its potential to induce dependence, not to any proven unique risk to pregnant women, fetuses, or children.⁵⁰ In 2001, The Journal of the American Medical Association ("JAMA") published a comprehensive analysis of developmental consequences for the fetus or child based on maternal cocaine use during pregnancy.⁵¹ The report exposes as erroneous the belief that prenatal cocaine exposure is conclusively associated with developmental toxicity and condemns as "irrational[]" policies that selectively "demonize" *in utero* cocaine exposure and that target pregnant cocaine users for special criminal sanction.⁵²

There are many widely held, deeply rooted misconceptions about cocaine. For over two decades, the

⁵⁰ See 21 U.S.C. § 812 (1970); § 20-2-20 to 32 Ala. Code 1975 (listing controlled substances).

⁵¹ Deborah Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2504866/pdf/nihms-49270.pdf>.

⁵² *Id.* at 1613 ("[T]here is no convincing evidence that prenatal cocaine exposure is associated with any developmental toxicity difference in severity, scope, or kind from the sequelae of many other risk factors."); see also, Antonio Addis et al., *Fetal Effects of Cocaine: an Updated Meta Analysis*, 15 Reproductive Toxicology 341 (2001).

popular press was suffused with highly prejudicial and inaccurate and exaggerated information about the effects of *in utero* cocaine exposure. Contemporary research, however, on the developmental impact of cocaine use during pregnancy has debunked the myth that mere exposure to cocaine is causally linked to identifiable fetal harms.⁵³ In 2004, doctors and researchers signed an open letter denouncing the "crack baby" myth and called on the press to refrain from using the medically misleading and erroneous term.⁵⁴

Similarly, in spite of myths and misconceptions, science has failed to prove that *in utero* exposure to other illegal drugs, including methamphetamine, causes certain, unique harms distinguishable from those caused by other uncontrollable factors. In 2005, a national expert panel reviewed published studies about the developmental effects

⁵³ Teresa A. Campbell & Kim A. Collins, *Pediatric Toxicologic Deaths: A 10 Year Retrospective Study*, 22 *Am. J. Forensic Med. & Pathology* 184 (2001), available at http://journals.lww.com/amjforensicmedicine/fulltext/2001/06000/pediatric_toxicologic_deaths__a_10_year.15.aspx; Michael J. Rivkin et al., *Volumetric MRI Study of Brain in Children With Intrauterine Exposure to Cocaine, Alcohol, Tobacco, and Marijuana*, 121 *Pediatrics* 741 (2008), available at <http://pediatrics.aappublications.org/content/121/4/741.full.pdf>.

⁵⁴ *Physicians, Scientists to Media: Stop Using the Term "Crack Baby,"* February 27, 2004.

of prenatal exposure to methamphetamine and related drugs and concluded that, "the data regarding illicit methamphetamine are insufficient to draw conclusions concerning developmental toxicity in humans."⁵⁵ In that same year more than 90 leading medical doctors, scientists, psychological researchers, and treatment specialists released an open letter warning that terms such as "meth babies" lack medical and scientific validity and should not be used.⁵⁶ The American College of Obstetricians and Gynecology's special information sheet about methamphetamine use in pregnancy notes that "the effects of maternal methamphetamine use cannot be separated from other factors" and that there "is no syndrome or disorder that can specifically be identified for babies who were exposed in utero to methamphetamine."⁵⁷ Similar findings have been

⁵⁵ Ctr. For The Evaluation Of Risks To Human Reproduction, *Report of the NTP-CERHR Expert Panel on the Reproductive & Developmental Toxicity of Amphetamine and Methamphetamine* II-189 (July 2005), available at http://ntp.niehs.nih.gov/ntp/ohat/stimulants/amphetamines/Amphetamine_final.pdf

⁵⁶ See David C. Lewis et al., *Meth Science Not Stigma: Open Letter To The Media*, (July 25, 2005).

⁵⁷ Am. Coll. of Obstetricians & Gynecologists, *Information about Methamphetamine Use in Pregnancy*, Mar. 3, 2006, available at <http://www.rhrealitycheck.org/emailphotos/ACOGmethalkingpo>

made with respect to illegal drug most commonly used during pregnancy: marijuana.⁵⁸

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

ints.pdf.

⁵⁸ For evidence-based information about the effects of prenatal exposure to marijuana, see e.g., Peter Fried & Andra M. Smith, *A Literature Review of the Consequences of Prenatal Marijuana Exposure: An Emerging Theme of a Deficiency in Aspects of Executive Function*, 23 *Neurotoxicology & Teratology* 1, 8 (2001) (In a 2001 review of the scientific literature about the effect of prenatal exposure to marijuana, the authors concluded: "The consequences of prenatal exposure to marijuana are subtle."); David M. Fergusson et al., *Maternal Use of Cannabis and Pregnancy Outcome*, 109 *BJOG: Int'l J. Obstetrics & Gynecology* 21, 21-22 (2002) available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1471-0528.2002.01020.x/pdf>; Anja Huizink & Eduard Mulder, *Maternal Smoking, Drinking or Cannabis Use During Pregnancy and Neurobehavioral and Cognitive Functioning in Human Offspring*, 30 *Neuroscience & Biobehavioral Revs.* 1, 35-36 (2005); Ashley H. Schempf, *Illicit Drug Use and Neonatal Outcomes: A Critical Review*, 62 *Obstetrical and Gynecological Survey* 749, 750 (2007) (finding "Studies that have examined the impact of prenatal marijuana use on birth outcomes have generally reported small and inconsistent effects... In addition to null or negative effects, several studies have reported unexpected, positive effects of marijuana on gestational age-adjusted birth weight.").

law and the harms to maternal and fetal health that result from such prosecutions are clear.

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

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

The assertion that pregnant women who use a controlled substance are creating harm akin to parents who allow their child in "an environment in which controlled substances are produced or distributed,"⁵⁹ is dangerously misinformed. Medical groups have long recognized that addiction is not simply the product of a failure of individual willpower. In August 2011, the American Society of Addiction Medicine announced a definition of addiction based on a four year process with more than 80 experts actively working on it, including top addiction authorities, addiction medicine clinicians and leading neuroscience researchers from around

⁵⁹ S.B. 133, 2006 Leg., Reg. Sess. (Ala. 2006).

the country. This new definition is that addiction is a primary, chronic disease of brain reward, motivation, memory and related circuitry.⁶⁰ It must be treated like diabetes or cardiovascular disease and is not the manifestation of an individual's poor choices.⁶¹ Dependency has been described as the product of complex hereditary and environmental factors.⁶² Addiction has pronounced physiological factors that heavily influence the user's behavior and affect his or her ability to cease use and seek treatment.⁶³

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

The medical profession has long acknowledged that drug dependence has biological and genetic dimensions and cannot often be overcome without treatment.⁶⁴ Addiction is marked

⁶⁰ Press Release, American Society of Addiction Medicine, *New Definition of Addiction* (August 15, 2011).

⁶¹ *Id.*

⁶² Am. Med. Ass'n Bd. of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2669 (1990).

⁶³ Chaya G. Bhuvaneshwar et al., *Cocaine and Opioid Use During Pregnancy: Prevalence and Management*, 10(1) Primary Care Companion J. Clinical Psychiatry 59, 61 (2008), available at www.psychiatrist.com/pcc/pccpdf/v10n01/v10n0110.pdf.

⁶⁴ See e.g., "Psychoactive Substance Dependence" is listed as a mental illness with specific diagnostic criteria in the Am. Psychiatric Ass'n., *The Diagnostic and Statistical Manual of Mental Disorders*, 176 (4th ed. 1994). See Linder

by "compulsions not capable of management without outside help."⁶⁵ This is why the vast majority of drug-dependent people cannot simply "decide" to refrain from drug use or achieve long-term abstinence without appropriate treatment and support. Because of the compulsive nature of drug dependency, warnings or threats are unlikely to deter drug use among pregnant women.

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

In Alabama, tens of thousands of substance-abusing adults do not receive the treatment they need. An estimated 79,000 adults need, but have not received, treatment for a drug abuse problem.⁶⁶ Another 210,000 adults need, but have not received, treatment for alcohol problems.⁶⁷

v. United States, 268 U.S. 5, 18 (1925); *Robinson v. California*, 370 U.S. 660 (1962).

⁶⁵ *Robinson v. California*, 370 U.S. at 671 (*Douglas, J., concurring*); see also 42 U.S.C. § 201(q) (1970) ("'drug dependent person' means a person who is using a controlled substance . . . and who is in a state of psychic or physical dependence, or both.").

⁶⁶ Substance Abuse & Mental Health Servs. Admin., U.S. Dep't Health & Human Servs., *2007 State Estimates of Substance Use & Mental Health—Alabama* (2009), available at <http://oas.samhsa.gov/2k7State/Alabama.htm> (Table 1. Selected Drug Use, Perceptions of Great Risk, Average Annual Marijuana Initiates, Past Year Substance Dependence or Abuse, Needing But Not Receiving Treatment, Serious Psychological Distress, and Having at Least One Major Depressive Episode in Alabama, by Age Group: Estimated

The Substance Abuse Mental Health Services Administration (SAMHSA) identifies only 16 treatment facilities in the entire state that list themselves as serving pregnant women.⁶⁸ Such programs, however, are often not actually accessible because of transportation barriers, cost, waiting-lists, and lack of childcare and mental health service, which impede access to successful treatment, particularly in the short time frame of pregnancy.⁶⁹

Many pregnant women do not have access to health care, quality housing, safe environments, or an enhanced capacity to overcome behavioral health problems such as addiction.⁷⁰

Numbers (in Thousands), Annual Averages Based on 2006-2007 NSDUHs.).

⁶⁷ *Id.*

⁶⁸ Substance Abuse & Mental Health Servs. Admin., U.S. Dep't Health & Human Servs., *Substance Abuse Treatment Facility Locator*, available at <http://findtreatment.samhsa.gov/facilitylocator/doc.htm>.

⁶⁹ See Thomas M. Brady & Olivia S. Ashley, *Women in Substance Abuse Treatment: Results from the Alcohol and Drug Services Study (ADSS)*, Sept. 2005, available at <http://oas.samhsa.gov/WomenTX/WomenTX.htm>; see also Martha A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. Drug Issues 285 (2003), available at http://www.nnvawi.org/pdfs/alo/Humphreys_barriers_substance_treatment.pdf.

⁷⁰ Chaya G. Bhuvaneshwar et al., *Cocaine and Opioid Use During Pregnancy: Prevalence and Management*, 10(1) Primary Care Companion J. Clinical Psychiatry 59, 64 (2008) ("Even

Extending the chemical endangerment statute to women who are unable to overcome their drug problem in the short term of pregnancy misunderstands addiction and the nature of effective treatment.

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

Allowing the Court of Criminal Appeals' decision to stand would not only make Alabama an outlier among sister states by permitting the prosecution of pregnant women and new mothers, it would also make it an outlier in the world. Amici are not aware of any country in the world that uses its criminal justice system to punish women who cannot ensure a healthy birth outcome or who allegedly create some risk of an adverse birth outcome. Indeed, international law and principles of human rights overwhelmingly call upon governments to provide services to pregnant and parenting women and discourage the imprisonment of pregnant women for any reason.⁷¹

for motivated women, obtaining treatment is not always straightforward. The scarcity of specialized treatment centers has already been noted."), available at www.psychiatrist.com/pcc/pccpdf/v10n01/v10n0110.pdf.

⁷¹ See Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25(2), U.N. Doc. A/810 (Dec. 10, 1948) ("Motherhood and childhood are entitled to special care and

Additionally, courts have recognized that applying the criminal law to reach pregnant women in relation to their fetuses would be unconstitutional.⁷² While this Court need not reach the Constitutional issues, the Court of Criminal Appeals' decision permitting the expansion of the chemical endangerment law to apply in the context of pregnancy violates Constitutional guarantees of liberty, privacy, equality, due process, and freedom from cruel and unusual punishment.⁷³ While Constitutional rights are not absolute, the state may only infringe upon them if acting to *further* a compelling, or at minimum rational, state interest.

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

⁷² See e.g., *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 4th Dist. 1991); *Herron v. State*, 729 N.E.2d 1008, 1010-11 (Ind. Ct. App. 2000).

⁷³ U.S. Const. amend. IV, V, VI, VIII, XIV.

Applying the chemical endangerment law to pregnant women fails to serve a compelling or rational state interest because, as discussed *supra*, it will undermine maternal, fetal and child health rather than advance these interests.

CONCLUSION

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

/s/Mary Bauer

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* Application to appear *pro hac vice* was granted in the Supreme Court on January 24, 2012.

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

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NO. 11-10219

EX PARTE AMANDA HELAINE KIMBROUGH, *PETITIONER*

IN RE

STATE OF ALABAMA

vs.

AMANDA HELAINE KIMBROUGH

AMICI CURIAE STATEMENTS OF INTEREST

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

Amicus Curiae **American College of Obstetricians and Gynecologists** is a non-profit educational and professional organization founded in 1951. The College's objectives are to foster improvements in all aspects of health care of women; to establish and maintain the highest possible standards for education; to publish evidence-based practice guidelines; to promote high ethical standards; and to encourage contributions to medical and scientific literature. The College has more than 54,000 members, including 631 in Alabama.

Amicus Curiae **American Psychiatric Association ("APA")**, with roughly 40,000 members, is the nation's leading organization of physicians specializing in psychiatry, a field regularly concerned with substance abuse and dependence. The APA opposes criminal prosecutions based on use of substances during pregnancy. By deterring prenatal care and addiction treatment, such prosecutions impair the health and safety interests that are the central concern of the APA's members.

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

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

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

Center, UAB Treatment Alternatives to Street Crime and W.I.N.N.E.R.S.

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

Amicus Curiae **Black Women's Health Imperative** is dedicated to promoting optimum health and wellness for Black women.

Amicus Curiae **Child Welfare Organizing Project ("CWOP")** was established in 1994 as an organization of parents and professionals seeking reform of 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 child welfare systems. A significant percentage of CWOP members are mothers in recovery. A large part of CWOP's work involves debunking prevailing stereotypes about child welfare-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, ultimately protecting children by helping and strengthening their families and communities.

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

Amicus Curiae **Harm Reduction Coalition** is a national advocacy and capacity-building organization that promotes the health and dignity of individuals and communities impacted by drug use. HRC was founded in 1993 and incorporated in 1994 by a working group consisting of syringe exchange providers, advocates and drug users. Today, HRC is a diverse network of community based organizations, service providers, researchers, policy-makers, academics, and activists challenging the persistent stigma placed on people who use drugs and advocating for sensible policy reform. HRC advances policies and programs that help people address the adverse effects of the 'war on drugs' and drug use including overdose, HIV hepatitis C, addiction, and incarceration. We recognize that the structures of social inequality impact the lives and options of affected communities. Since its inception in 1994, HRC advances harm reduction philosophy, practice and public policy by prioritizing areas where structural inequalities and social injustice magnify areas where structural inequalities and social injustice magnify drug related harm.

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

multicultural competency within the service delivery system.

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

Amicus Curiae International Centre for Science in Drug Policy is an organization dedicated to improving community health and safety by conducting research and public education on best practices in drug policy while working collaboratively with communities, policy makers, law enforcement and other stakeholders to help guide effective and evidence-based policy responses to the many problems posted by illicit drugs.

Amicus Curiae International Doctors for Healthy Drug Policies (IDHP) is an organization of medical doctors from 49 countries devoted to increasing the participation of medical doctors in drug policy reform. Drug policies effect the health of us all, but especially people who use drugs and those who are living with HIV and chronic pain. There is a gap between evidence based practice and drug policy in many countries and IDHP aims to influence changes in drug policies and practices to promote harm reduction and create healthy drug policies internationally.

Amicus Curiae International Mental Disability Law Reform Project is a human rights advocacy organization that is housed within the Justice Action Center at New York Law School. It is involved in legislative reform, lawyer and law student training, pro bono legal assistance, and the full range of law reform projects that relate to the practice of mental disability law. This project is closely related to the online, distance learning Mental Disability Law program that now offers thirteen separate courses in all aspects of mental disability law.

Amicus Curiae **Legal Action Center (LAC)** is a national public interest law firm, with offices in New York and Washington, D.C., that performs legal and policy work to fight discrimination against and promote the privacy rights of individuals with criminal records, alcohol/drug histories, and/or HIV/AIDS. LAC has done a tremendous amount of policy advocacy work to expand treatment opportunities for people with alcohol and drug problems and to oppose legislation and other measures that employ a punitive approach, rather than a public health approach, to addiction. It has also represented individuals and alcohol/drug treatment programs that face discrimination based on inaccurate and outmoded stereotypes about the disease of addiction. The question posed in this case is of vital concern to LAC's constituency across the country.

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

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

Amicus Curiae **National Association of Social Workers ("NASW") and National Association of Social Workers, Alabama Chapter** is the world's largest association of professional social with 150,000 members in fifty-six chapters throughout the United States and abroad. The NASW, Alabama Chapter has 1,044 members. Founded in 1955 from a merger of seven predecessor social work organizations, NASW is devoted is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. NASW believes that criminal

prosecution of women who use drugs during their pregnancy is inimical to family stability and counter to the best interests of the child. The needs of society are better served by treatment of addiction, not punishment of the addict. NASW's policy statement, Alcohol, Tobacco, and other drugs, supports "an approach to ATOD [alcohol, tobacco, and other drug] problems that emphasize prevention and treatment" and efforts to "eliminate health disparities that accrue from ATOD problems and discriminatory practices from the criminal justice system" (NASW, Social Work Speaks, 8th ed., 2009).

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

Amicus Curiae **National Institute for Reproductive Health (Institute)** is a non-profit organization that was established to examine access to reproductive health and services and develop innovative, proactive approaches to expand the available family planning services in states all across the nation. The Institute's mission is to work with local organizations to confront issues that are national in significance, yet are best addressed through locally managed initiatives.

Amicus Curiae **National Latina Institute for Reproductive Health** works to ensure the fundamental human right to reproductive health and justice for Latinas, their families and their communities through public education, community mobilization and policy advocacy. Latinas face a unique

and complex array of reproductive health and rights issues that are exacerbated by poverty, gender, racial and ethnic discrimination and xenophobia. These circumstances make it especially difficult for Latinas to access reproductive health care services.

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

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

Amicus Curiae **National Women's Health Network (NWHN)** improves the health of women by influencing public policy and providing health information to support decision-making by individual consumers. Founded in 1975 to give women a greater voice within the health care system, the NWHN aspires to a health care system that is guided by social justice and reflects the needs of diverse women. We are committed to advancing women's health by ensuring that women have self-determination in all aspects of their reproductive and sexual health; challenging the inappropriate medicalization of women's lives; and establishing universal access to health care that meets the needs of diverse women. The core values that guide the NWHN's work include our belief that the government has an obligation to safeguard the health of all people; that we

value women's descriptions of their own experiences and believe health policy should reflect the diversity of those experiences; and that we believe evidence rather than profit should determine what services and information are available to inform women's health decision-making and practices. The NWHN is a membership-based organization supported by 8,000 individuals and organizations nationwide.

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

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

Amicus Curiae **Southern Center for Human Rights** provides legal representation to people facing the death penalty, challenges human rights violations in prisons and jails, seeks through litigation and advocacy to improve legal representation for poor people accused of crimes, and advocates for criminal justice system reforms on behalf of those affected by the system in the Southern United States. From 2002 through 2009, SCHR represented all Alabama women in prison in *Laube v. Allen*, a class action lawsuit against the Alabama Department of Corrections that challenged severe overcrowding, horrendous conditions, and unconstitutional medical care.

Amicus Curiae **Pippa Abston, MD, PhD, FAAP** is a pediatrician and Assistant Professor of Pediatrics practicing in

Alabama. She is on the board of Physicians for a National Health Program and is Physician Coordinator for North Alabama Healthcare for All. In her book *Who is My Neighbor: A Christian Response to Healthcare Reform*, she explains why providing good healthcare to everyone in our country would improve not only the quality of our medical system but our economic health. She is also on the board of the Huntsville Chapter of NAMI, The National Alliance on Mental Illness. In her family, practice and community work, she has witnessed first-hand the effects of addiction as a medical illness and has advocated for better access to effective treatment instead of criminalization of the sick.

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

Amicus Curiae **Susan C. Boyd, PhD**, is Professor in Studies in Policy, University of Victoria. She is a drug policy researcher and author of numerous journal articles and books, including: *Hooked: Drug War Films from Britain, Canada, and the U.S.*; *From Witches to Crack Moms: Women, Drug Law, and Policy*; *Mothers and Illicit Drugs*; and co-editor of *With Child: Substance Abuse During Pregnancy: A Woman-Centered Approach*.

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

Amicus Curiae **Nancy Day MPH, PhD.**, is Professor of Psychiatry and Epidemiology. She has studied the effects of prenatal exposures to alcohol, marijuana, cocaine, and tobacco for over 20 years. She has multiple publications

and has received grants from NIH in support of this work. She is currently the Director of the Maternal Health Practices and Child Development Project, a consortium of projects centered on the identification of the long-term effects of prenatal substance abuse.

Amicus Curiae **Gabriele Fischer MD**, is a Professor of Psychiatry and the Medical Director of the Addiction Clinic at the Medical University of Vienna. She is also a Member of the Scientific Board for Quality Control & Quality Management in Medicine- Austria, a Board Member of Trustees for the Medical University of Innsbruck, and a Founding Board Member of *Women for Women: Health Policy in Focus*. Dr. Fischer's work on maintenance therapy in opioid dependence for pregnant women has been recognized internationally.

Amicus Curiae **Deborah A. Frank, MD**, is a Professor of Pediatrics at Boston University School of Medicine. Dr. Frank is also an Assistant Professor of Social and Behavioral Sciences at the Boston University School of Public Health. Since 1981 she has been the Director of the Failure to Thrive Program at the Boston Medical Center where she is also a staff physician in the Child Development Unit. In 1993, she was named a Fellow of the Society for Pediatric Research. Dr. Frank is a recognized expert on the effect of maternal substance abuse on fetal development and newborn behavior. She has published widely on these topics, including numerous articles concerning prenatal cocaine and methamphetamine exposure. In 2002, Dr. Frank testified before the United States Sentencing Commission concerning the effects of prenatal cocaine exposure. Dr. Frank comes to this Court in her capacity as amicus curiae in order to ensure that prevalent stigma and stereotypes about the nature of women who use drugs during pregnancy do not prevent the Court from understanding the medical issues in this case.

Amicus Curiae **Leslie Hartley Gise, M.D.**, *Amicus Curiae* Leslie Hartley Gise, M.D., is a Clinical Professor at the John A. Burns School of Medicine at the University of Hawaii in Honolulu. She is also staff psychiatrist at the Maui Memorial Medical Center in Wailuku. She has pioneered protocols and teaching curricula for screening of medical

patients for psychological dysfunction. Dr. Gise has devoted particular attention to cognitive screening of elderly patients and screening for depression in women. She was an investigator on three National Institute of Mental Health contracts on mental health in primary care. Dr. Gise is on the editorial board of five journals, taught in board review courses and examined for the American Board of Psychiatry and Neurology. She has consulted at Malama Family Recovery Center treating substance abuse disorders in pregnant and parenting women. Dr. Gise belongs to many professional organizations, and has assumed active committee and leadership roles, including presidency of the North American Society for Psychosocial Obstetrics and Gynecology and the Society for Liaison Psychiatry. Dr. Gise was appointed by the Academic Council to be Women's Liaison Officer to the American Association of Medical Colleges. Dr. Gise has been active in the American Psychiatric Association where she is the state representative to the assembly, past President of the Hawaii State Psychiatric Society, the Area 7 Council, and the Committee on Public Affairs, the Committee on Public and Community Psychiatry. She is the Chair of the Disaster Preparedness Committee of the Hawaii Psychiatric Medical Society, an American Red Cross mental health volunteer, a member of the federal Disaster Medical Assistance Team (DMAT) under NDMS, FEMA and Homeland Security, a member of Disaster Psychiatry Outreach (DPO), Maui Memorial Medical Center Disaster Committee and Maui Voluntary Organizations Active in Disaster (VOAD). Finally, Dr. Gise has published voluminously and lectured around the world on addiction in women, post partum depression, outpatient commitment and other topics.

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

Amicus Curiae **Howard Minkoff, MD**, is the Chair of the Department of Obstetrics and Gynecology at Maimonides Medical Center, and a distinguished Professor of Obstetrics

and Gynecology at the State University of New York Health Science Center at Brooklyn. He is a member of the Ethics Committee of the American College of Obstetricians and Gynecologists and he sits on the editorial board or is an editorial consultant to almost all of the most prominent medical journal, including JAMA, New England Journal of Medicine, Lancet, and has authored hundreds of articles, and is an internationally recognized expert on HIV disease and high risk pregnancy. Professor Minkoff has conducted years of grand scale research, supported by millions of dollars of grants, concerning the reproductive behaviors of low-income women, many with drug abuse problems. Through his work with these women, he has developed widely adopted treatment protocols and ethical guidelines. Professor Minkoff brings his wealth of knowledge to this Court to ensure that it understands that punitive measures, including criminal prosecutions, of pregnant women with drug abuse problems will harm both maternal and child health.

Amicus Curiae **Daniel R. Neuspiel, M.D., M.P.H.**, is Director of Ambulatory Pediatrics at Levine Children's Hospital and Adjunct Clinical Professor of Pediatrics at University of North Carolina School of Medicine in Charlotte, NC. As a pediatrician, he has cared for hundreds of drug-affected infants and children, has published research on the impact of maternal substance use and abuse on infants, and has lectured widely as an expert on this topic.

Amicus Curiae **Robert G. Newman, MD, MPH**, was until January, 2001, President and CEO of Continuum Health Partners, Inc., a \$2.2 billion hospital network in New York City. Prior to the creation of Continuum in 1997 he was CEO of the Beth Israel Health Care System for 20 years. He is now President Emeritus of Continuum and Director of The Baron Edmond de Rothschild Chemical Dependency Institute of Beth Israel Medical Center. For over 40 years Dr. Newman has played a major role in planning and directing some of the largest addiction treatment programs in the world - including the New York City Methadone Maintenance and Ambulatory Detoxification Programs, which in the mid-'70s treated over 33,000 patients annually. He has also been a strong addiction treatment advocate in Europe, Australia and Asia. Throughout his career he has championed the right

of drug-dependent persons to treatment access and choice of provider, and the right to be cared for under the same conditions as apply to the management of all other chronic medical conditions.

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

Amicus Curiae **Trecia Wouldes, PhD,** is a developmental psychologist and Senior Lecturer in the Department of Psychological Medicine in the Faculty of Medical and Health Sciences at the University of Auckland. She is also a member of the Executive Board of the Werry Centre for Child and Adolescent Mental Health. The focus of her teaching and research is the health, mental health and development of children exposed to biological and/or psychological insults that occur prenatally or during early childhood. She is currently the Director of the Auckland, New Zealand site of the 5-site Infant Development Environment And Lifestyle (IDEAL) study investigating the developmental outcomes of children born to mothers who use methamphetamine during their pregnancy. Through her research, Dr. Wouldes has developed a special interest in the provision of early, evidence-based interventions for infants, toddlers and pre-school children.

Amicus Curiae **Tricia E. Wright, MD, MS,** is an assistant professor of Obstetrics, Gynecology and Women's Health at the University of Hawaii John A. Burns School of Medicine and founder, former medical director, and now Women's Health Liaison of the PATH Clinic, an outreach clinic of Waikiki Health Center, which provides prenatal, postpartum

and family planning to women with a history of substance use disorders. She is board certified in both OB/Gyn and Addiction Medicine and a Fellow of the American College of Obstetricians and Gynecology. She specializes in taking care of pregnant women with substance use disorders and psychiatric illness. She won funding approval in 2006 from the Hawaii legislature to start the first perinatal clinic for women with substance use issues in the state. Her research interests include substance use disorders among pregnant women, including barriers to family planning, best practices for treatment, and the effects of methamphetamine and tobacco on the placenta.