

STATE OF WISCONSIN  
SUPREME COURT

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STATE OF WISCONSIN, ex rel.

Angela M.W.

Petitioner-Petitioner,

Case No. 95-280-W

vs.

William Kruzicki, Sheriff of Waukesha County,  
Rexford W. Titus III, President, Waukesha Memorial Hospital  
Fred Syrjanen, Director, Lawrence Center, and Director of Chemical  
Dependency at Waukesha Memorial Hospital  
Circuit Court for Waukesha County,  
The Honorable Kathryn W. Foster,  
Waukesha County Corporation Counsel, Thomas Farley and  
Assistant Corporation Counsel William Domina

Respondents-Respondents.

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**BRIEF OF AMICI CURIAE, THE AMERICAN PUBLIC HEALTH  
ASSOCIATION, THE DRUG POLICY FOUNDATION, THE NATIONAL BLACK  
WOMEN'S HEALTH PROJECT, THE NATIONAL CENTER FOR YOUTH LAW,  
THE NATIONAL LATINA HEALTH PROJECT, THE NATIONAL WOMEN'S  
HEALTH NETWORK, THE NORTHWEST WOMEN'S LAW CENTER, THE NOW  
LEGAL DEFENSE AND EDUCATION FUND, PLANNED PARENTHOOD OF  
WISCONSIN, INC., THE WISCONSIN COUNCIL ON CHILDREN AND FAMILIES,  
AND THE WISCONSIN WOMEN'S NETWORK**

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## INTRODUCTION

This is a case regarding preventive detention. In holding that a viable fetus is a child for the purposes of Wisconsin's "children in need of protection or services" (CHIPS) statute<sup>1</sup> and applying the "protective custody" provisions<sup>2</sup>, not to a child, but to a pregnant woman, the court improperly deprived Angela M.W. of one of our most fundamental rights, liberty. In adopting this interpretation, the Court relied on the legal fiction that it was not detaining Angela M.W., but rather that it was merely approving the "protective custody" of her fetus, (App. 142),<sup>3</sup> to ensure that it would have "a safe environment in the womb of its mother." (App. 129). But, since "Angela and her viable

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<sup>1</sup> §§48.02(2); 48.13 Stats.

<sup>2</sup> §48.19(1)(c) Stats.

<sup>3</sup> Citations to the opinion of the court below are to the Appendix to the Brief of the Petitioner-Petitioner and appear as "App. \_\_\_\_".

fetus are physically and biologically one", (App. 142),  
"protective custody" of the fetus, constituted involuntary  
detention of Angela M.W..

The lower court's interpretation of the CHIPS statute  
to allow the state to police a woman's pregnancy not only  
violates the plain meaning of the statute, it is also at odds  
with national health policy and is ultimately likely to harm,  
rather than protect, the health of children.

**I. THE COURT BELOW ERRED IN RULING  
THAT A FETUS MAY BE TREATED AS A  
CHILD IN NEED OF PROTECTION UNDER  
THE STATE'S CHIPS STATUTE.**

Upholding the involuntary detention of petitioner, the  
court below ruled that §48.19 Stats., which permits the  
county to take a child into custody, applied to a fetus. As  
counsel for Petitioner have demonstrated, the plain meaning  
of the word child in the CHIPS statute and the Wisconsin

statutory scheme that it is a part of, make clear that the legislature did not intend the CHIPS statute to apply to fetuses. When the Wisconsin legislature intends a statute to apply to fetuses or to address pregnant women or pregnancy, it says so explicitly. In addition to those statutes discussed by the Petitioner, Brief of Petitioner-Petitioner [hereinafter "Petitioner's Brief"] at 7-9, 12-14, many Wisconsin statutes refer explicitly to pregnant women or pregnancy and that a dozen statutes refer specifically to fetuses.<sup>4</sup>

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<sup>4</sup> See, e.g. §767.45 Stats. (determination of paternity) (distinguishing between a female who is pregnant and her future child) and §301.049 Stats. (mother - young child care program) (distinguishing between a mother who is pregnant, a child if born, and a child if unborn). Section 46.03 (34), which specifically mentions a fetus, is part of the Wisconsin legislature's efforts to address the problem of substance abuse and pregnancy through the provision of non-punitive services and education. See Petitioner's Brief at 12 n.5. This statute provides that:

[t]he department shall acquire . . . pamphlets that describe the causes and effects of fetal alcohol

The court's decision below departs not only from the statute's plain language and the legislature's obvious intent, but also from the clear national trend to give the word child its ordinary meaning.

In Burns v. Alcala, 420 U.S. 529 (1975), the Supreme Court refused to construe the word child to include a fetus. In that case, the Court rejected the argument that the term dependent child, as used in the Aid to Families with Dependent Children statute, included unborn children.

Following the axiom that words used in a statute are to be

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syndrome and the dangers to a fetus of the mother's use of cocaine or other drugs during pregnancy and shall distribute the pamphlets free of charge to each county clerk in sufficient quantities so that each clerk may provide pamphlets to marriage license applicants under s. 765.12 (1).

Thus, even in the specific context of substance abuse, the legislature knows how to distinguish a child from a fetus and clearly articulate the distinction.

given their ordinary meaning in the absence of persuasive reasons to the contrary, and reading the definition of 'dependent child' in its statutory context, we conclude that Congress used the word 'child' to refer to an individual already born, with an existence separate from its mother.

Id., at 581.

Similarly, courts across the country have found that there is no "persuasive reason", id., to interpret existing statutes designed to protect children, to reach fetuses or pregnant women. In state after state, courts have given the word "child" its plain meaning and rejected attempts to broadly interpret the word "child" to include a fetus when the word appears in statutes that are criminal or punitive in application.

Every appellate court and numerous trial courts to rule on the question of whether a state's criminal child abuse or similar statute may be used to punish pregnant

women who use drugs has held that such statutes may not.<sup>5</sup>

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<sup>5</sup> See Alabama: State v. Padgett, CC-94-2650, 2651 (Ala. Cir. Ct. Montgomery Cty., Aug. 14, 1955) (dismissing charges of child abuse and delivery of controlled substances against woman in connection with ingestion of cocaine during pregnancy and holding that a fetus does not constitute a child or a person under either statute);

Arizona: State v. Reinesto, No. 1 CA-Sa 94-0348, Order, at 4 (Ariz. Ct. App. March 14, 1995) (dismissing on special appeal, child abuse charges against woman based on her alleged use of heroin during pregnancy, finding that a child defined as "an individual who is under eighteen years of age" does not include an unborn fetus.);

California: Reyes v. Superior Court, 75 Cal. App. 3d 214, 219 (1977) (child endangering statute does not refer to an unborn child or include a woman's alleged drug use during pregnancy); see also People v. Stewart, No. M508197, slip op. (Cal. Mun. Ct. Feb. 26, 1987) (holding criminal child support statute that explicitly covered "a child conceived but not yet born" was not intended to impose additional legal duties on pregnant women and could not be used to punish a pregnant woman for failing to follow her doctor's advice);

Georgia: State v. Luster, 419 S.E.2d 32, 35 (Ga. App. 1992), cert. denied, S92C1020 (June 4, 1992) (statute proscribing delivery and distribution of cocaine did not encompass prenatal transmission since the defendant's child was not a person under Georgia law until she was born);

Massachusetts: Commonwealth v. Pellegrini, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990), no appeal filed (dismissing charges of distributing or dispensing cocaine against a woman who ingested cocaine while pregnant because a fetus is not a "person under the age of thirteen");

Michigan: People v. Bremer, No. 90-32227-FH, slip op. (Mich. Cir. Ct. Jan. 31, 1991), appeal dismissed, No. 137619 (Mich. App. July 14, 1992) (dismissing drug delivery charges against a woman who ingested cocaine during pregnancy on principles of

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statutory construction, due process, and privacy, holding that a fetus is not another person for the purposes of the delivery statute); People v. Cox, No. 90-53454 FH, slip op. (Mich. Cir. Ct. July 9, 1990), aff'd, No. 131999 (Mich. App. Feb. 28, 1992) (granting motion to dismiss, finding that a unborn fetus, even when viable, is not a person, that the drug delivery statute is not intended to regulate prenatal conduct);

Nebraska: State v. Arandus, No. 93072, slip op. (Neb. Dist. Ct. June 17, 1993) (quashing indictment on child abuse because application of the term minor child to an unborn child or viable fetus is not supported by legislative intent);

New York: People v. Morabito, 580 N.Y.S.2d 843, 845-46 (Geneva City Ct. 1992) aff'd slip op. (Ontario County Ct. 1992) (dismissing child endangerment charges against woman who allegedly smoked cocaine during her pregnancy, because the court may not extend the reach of the statute to allow a fetus to be included within the definition of child,);

Ohio: State v. Gray, 584 N.E.2d 710, 713 (Ohio 1992) (mother cannot be convicted of child endangerment based solely on prenatal substance abuse, finding that a child does not become a child until it is born alive, and the plain meaning of statute does not extend to fetuses or prenatal conduct); State v. Andrews, No. JU 68459, slip op. (Ohio C.P. June 19, 1989) (child endangerment statute is not intended to apply to a fetus, but rather to a living child placed at risk by actions that occurred after its birth)

Pennsylvania: Commonwealth v. Kemp, 75 Westmoreland L.J. 5 (Pa. Ct. C.P. 1992), aff'd 643 A.2d 705 (Pa. Super. Ct. 1994) (affirming dismissal of charges of recklessly endangering another person or endangering the welfare of a child against a pregnant woman who allegedly ingested cocaine while pregnant; finding that neither child nor person include an unborn fetus);

South Carolina: Sullivan v. State, No. 93-CP-23-3223, Slip op., (S.C. Ct. C.P., Dec. 19, 1994) (holding that where the legislature "chose to use the word child the court "must interpret the statute to exclude its application to a fetus, granting post-conviction

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relief to a woman who plead guilty to child abuse for her use of cocaine during pregnancy); Rickman v. Evatt, 94-CP-04-138, slip op. (S.C. Anderson, Sept. 9, 1994) (strictly construing the word child and granting habeas corpus relief to reverse conviction under the state's child neglect law of woman who used drugs while pregnant); State v. Crawley, 93-GS-04-756, slip op. (S.C., Anderson Nov. 29, 1993) (quashing indictment under state child neglect statute of woman who allegedly used drugs while pregnant, finding that the plain and ordinary meaning generally given to the word child does not include fetus); Lester v. State, 93-CP-23-2984 (S.C. Greenville, Nov. 22, 1993) (granting post-conviction relief of woman who pled guilty to child abuse charges based on her use of drugs while pregnant); Whitner v. State, 93-CP-39-347, slip op. (S.C. Ct. C.P. Nov. 22, 1993) cert. granted, (June 30, 1994) (granting post-conviction relief to woman who plead guilty to child neglect based on her use of cocaine during pregnancy); Tolliver v. State, No. 90-CP-23-5178, slip op (S.C. Greenville Aug. 10, 1992) cert. denied (S.C. Mar. 10, 1993) (granting post-conviction relief for a woman who pled guilty to child neglect under finding that application of statute to a woman who used drugs while pregnant violated statute's plain meaning and legislative intent);

Texas: Collins v. State, No. 08-93-00404, slip op. (Tex. Ct. App., Dec. 22, 1994) (dismissing injury to a child charges against a woman who allegedly used drugs during pregnancy, where Legislature by its definitions of child had limited the application of the penal laws to conduct committed against a person who has been born);

Virginia: Commonwealth v. Wilcox, No. A-44116-01, slip op. (Va. Dist. Ct. Oct. 9, 1991) (dismissing child abuse charges against a woman who allegedly used cocaine during pregnancy, since when defendant's liberty is at risk a statute concerned with acts or omissions concerning a child must be strictly construed and a fetus is not a child); Commonwealth v. Smith, No. CR-91-05-4381, slip op. (Va. Cir. Ct. Sept. 16, 1991) (dismissing child abuse charges against a

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woman who allegedly used drugs during pregnancy, finding that child abuse statute is not intended to apply to fetuses or to prenatal conduct);

Washington: State v. Dunn, 93-1-00043-2, Transcript of Record (Wash. Super. Ct. April 1, 1994), appeal pending, (holding that the word child could not be interpreted to include a fetus and dismissing child mistreatment charges against a woman who took cocaine during pregnancy).

See also, North Carolina: State v. Inzar, Nos. 90CRS6960, 90CRS6961, slip op. (N.C. Super. Ct. Apr. 9, 1991), appeal dismissed, No. 9116SC778 (N.C. App. Aug. 30, 1991) (dismissing charges against a woman who allegedly used crack during her pregnancy under statute prohibiting assault with a deadly weapon and delivery of a controlled substance, finding that a fetus is not a person within the meaning of the statutes).

The following states have dismissed or reversed prosecutions brought against women for ingesting drugs or alcohol during their pregnancy based on other grounds:

Florida: Johnson v. State, 602 So. 2d 1288, 1297 (Fla. 1992) (reversing a woman's convictions for "delivering drugs to a minor" via the umbilical cord); State v. Carter, 602 So. 2d 995, 996 (Fla. App. 1992) (affirming the trial court's decision to dismiss charges of child abuse against woman who allegedly used illegal drugs while pregnant); State v. Gethers, 585 So. 2d 1140, 1143 (Fla. App. 1991) (dismissing child abuse charges on ground that such application misconstrues the effect of the law and violates public policy of preserving family life);

Kentucky: Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993) (affirming reversal of child abuse conviction, finding that to construe the child abuse statute to apply to a woman's prenatal conduct would make the statute impermissibly vague and violate legislative intent);

Michigan: People v. Hardy, 469 N.W.2d 50, 52-53 (Mich. App. 1991), appeal denied, 471 N.W.2d 619 (Mich. 1991) (statute

Sister state courts have also refused to expand the meaning of the word "child" in civil statutes when they could be used to punish or deprive women of their liberty.

Rejecting the use of a civil statute like Wisconsin's to detain a pregnant woman for the benefit of her fetus, a California appellate court held that a fetus is not a

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prohibiting delivery of cocaine to children was not intended to apply to pregnant drug users);

Nevada: Sherriff v. Encoe, 885 P.2d 596, 598 (Nev. 1994) (holding that to interpret statute criminalizing child endangerment to apply to a woman who used methamphetamines while pregnant "would be a radical incursion upon existing law");

Oklahoma: State v. Alexander, No. CF-92-2047, slip op. (Okla. Dist. Ct. Aug. 31, 1992) (dismissing charges of unlawful possession of a controlled substance and unlawful delivery of a controlled substance to a minor brought against a woman who ingested illegal drugs while pregnant, finding that the presence of drug in defendant's system does not constitute possession and transfer of the drug through the umbilical cord is not volitional);

Wyoming: State v. Osmus, 276 P.2d 469 (Wyo. 1954) (criminal neglect statute cannot be applied to the woman's prenatal conduct).

The opinions cited above and additional opinions of out of state courts are reprinted in an appendix to Brief of Amici Curiae for the convenience of this Court.

dependent child within the meaning of the Welfare and Institutions Code. In re Steven S., 126 Cal. App.3d 23; 178 Cal.Reptr. 525 (1981). Similarly, a New York trial court held that involuntary commitment of a pregnant substance abusing pregnant woman to protect her fetus "runs afoul both of the Liberty and the Equal Protection Clauses of the Federal and State Constitutions." In the Matter of the Retention of Tanya P., Index No. 530069/93 slip op. at 24 (Sup. Ct. N.Y.Cty. 1995). The Court explained that for the purposes of the Mental Health Law the word "person" should be strictly construed so as not to include a fetus "[b]ecause MHL 9.13 involves a loss of liberty, like criminal statutes. . ." Id., at 21.

The court below justified its judicial expansion of the word "child" in part on the basis that it had been interpreted to include a fetus in the context of tort cases

brought by the parents of fetuses injured in utero by third parties. (App. 131-137) citing Puhl v. Milwaukee Auto. Ins. Co., 8 Wis.2d 343, 99 N.W. 2d 163 (1959) and Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis.2d 14, 148 N.W.2d 107 (1967). But the appellate courts of sister states correctly have rejected the applicability of such tort rulings because they are compensatory and allow only money damages, not a deprivation of liberty or other constitutionally protected right. For example, in the case of In re Valerie D., 223 Conn. 492 (1992) the Connecticut Supreme Court refused to terminate a mother's parental rights based upon evidence that she had injected herself with cocaine during her pregnancy. Specifically holding that the word child did not include a fetus and rejecting many of the same cases relied upon by the Respondents-

Respondents,<sup>6</sup> the court concluded that parental rights could not be terminated based on a woman's conduct during pregnancy. Id. at 514-15. Moreover, that court specifically distinguished Connecticut tort law, which like Wisconsin's, permits subsequently born children to maintain a cause of

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<sup>6</sup> Indeed, the Connecticut Supreme Court specifically found that many of the cases cited in the Respondents-Respondents Brief at 13-17 were unpersuasive:

We recognize, as the [respondent-respondents] points out, that the intermediate appellate courts of some other jurisdictions have approved of custodial commitment petitions, and in at least one case a termination petition, based upon prenatal drug use by the mother. See e.g., In re Troy D., 215 Cal. App. 3d 889, 263 Cal. Rptr. 869 (1989) (commitment petition); In re Solomon L., 190 Cal App. 3d 1106, 236 Cal. Rptr. 2 (1987) (both commitment and termination petitions); In re Nash, 165 Mich. App. 450, 419 N. W.2d 1 (1987) (commitment petition); In the Matter of Baby X, 97 Mich. App. 111, 293 N.W. 2d 736 (1980) (commitment petition); Matter of Stefanel Tyasha C., 157 App. Div. 2d 322, 556 N.Y.S. 2d 280 (1990) (commitment petition). We are unpersuaded by the reasoning of these decisions because they do not rely, as do we, on a close examination of the language, constitutional background and available legislative history of the statutory framework purporting to support a petition for termination of parental rights.

Id., at 526.

action against a third party for injuries inflicted while the child was in utero. Id. at 526. The court explained:

the compensatory purposes of those tort principles are inapposite to the delicate and sensitive policy choices that inform our search for the legislative intent underlying §45a-717(f)(2).

Id.<sup>7</sup>

The Arizona Court of Appeals also refused to expand the meaning of the word child to include a fetus, even though such an interpretation had been made for the word child as used in the state's compensatory wrongful death

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<sup>7</sup> The fact that Connecticut Workers' Compensation law applied the word child to a fetus was also considered by the court to be inadequate justification to apply the parental termination statute based on the mother's conduct during pregnancy. The court concluded that the difference in interpretation of the word child was justified on the ground that the Workers' Compensation Act was a remedial statute, which by its nature should be broadly construed. In contrast, the court found that the "constitutional backdrop" of the parental termination statute compelled it "to choose the narrow construction and limit the reach of the language accordingly." Id., at 516.

statute.<sup>8</sup> In the Matter of the Appeal in Pima County

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<sup>8</sup> Similarly, many state courts which, by judicial decision, have expanded their wrongful death statutes to permit recovery for the death of a fetus or newborn that was caused by a third-party while the fetus was in utero, have nonetheless refused to hold women criminally liable for their drug use during pregnancy. For example, State v. Barnett, No. 02D04-9308-CF-611, Notice of Ruling (Ind. Super. Ct. Feb. 11, 1994) dismissed homicide charges against pregnant woman who used cocaine, despite Britt v. Sears, 277 N.E. 2d 20 (Ind. App. 1971) which permitted a father to maintain an action for wrongful death of a stillborn fetus where existing statutes recognized certain interests of the unborn child); State v. Reinesto, *supra*, dismissed child abuse charges against a woman who used heroine while pregnant, despite Summerfield v. Superior Court, 698 P. 2d 712 (Ariz. 1985) permitting parents of viable but stillborn fetus to for wrongful death relying on common law tort cases recognizing a viable fetus as a person; State v. Alexander, *supra*, dismissed charges of delivery of drugs to a minor and possession of cocaine brought against a pregnant woman who allegedly used cocaine, despite Hughes v. State, 868 P.2d 730 (Okla. Ct. Crim. App.1 994) which upheld a manslaughter conviction for a drunk driver who hit a pregnant woman and caused her viable fetus to die and Evans v. Olson, 550 P.2d 924 (Okla. 1970) recognized a cause of action for wrongful death of viable unborn child.).

Similarly, courts have specifically rejected attempts to extend cases holding third parties criminally liable for prenatal injuries to the fetus or child subsequently born, to cases where the pregnant woman herself is charged with injuring her fetus. Compare Commonwealth v. Welch, *supra*, at 282-83 (Ky. 1993) (dismissing charges against woman for use of illegal drugs during pregnancy) with Jones v. Commonwealth, 830 S.W.2d 877 (Ky. 1992) (drunk driver could be convicted of second-degree manslaughter for causing an injury to a fetus which died after being born alive); compare also State v. Gray, *supra*, at 712 (Ohio 1992) (dismissing charges against pregnant woman

Juvenile Severance Action No. S-120171, 905 P.2d 555; 1995 Ariz. App. Lexis 143; 194 Ariz. Adv. Rep. 28 (Ct. App. 1995). As a result, the court would not permit termination of parental rights of a woman who ingested alcohol during pregnancy, even though it caused fetal alcohol syndrome in her child.

By concluding that a fetus is a child for purposes of the CHIPS statute and pretending that the juvenile court ordered only the fetus and not Angela M. W. into

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because of, inter alia, "the unique relationship between the pregnant woman and the developing fetus") with State v. Dickinson, 275 N.E.2d 599 (Ohio 1971) (case suggesting that vehicular homicide statute could be applied to prenatal injuries caused by a third party, if the child had been born alive). See also People v. Hardy, *supra*, at 54 n. 3 (Mich. Ct. App. 1991) (Reilly, J. concurring) (distinguishing State v. Cornelius, 448 N.W.2d 434 (Wis. 1989), (which applied homicide statute to drunk driver who caused the death of the child within hours of its premature delivery.)

See also, Commonwealth v. Kemp, *supra* at 5 (Pa. Super. Ct., Feb. 22 1994) (dismissing charges against a woman who used cocaine during pregnancy despite abortion law's definition of "unborn child" as a human being from fertilization until birth.

involuntary inpatient treatment, see (App. 142), the lower court permitted an egregious infringement on Angela M.W.'s constitutionally protected rights to liberty and privacy. See Petitioner's Brief at 15-40. The CHIPS statute as interpreted by the lower court is thus punitive rather than compensatory in nature, and provides no basis for judicial expansion. This Court should follow the decisions of the United States Supreme Court and numerous sister state courts and reject the lower court's tortured interpretation of the word child to include fetus.

**II. INVOLUNTARY DETENTION OF A PREGNANT WOMAN WITH AN ADDICTION PROBLEM IS AT ODDS WITH STATE AND NATIONAL HEALTH POLICY AND VIOLATES FUNDAMENTAL NOTIONS OF PRIVACY AND DUE PROCESS.**

**A. Addiction During Pregnancy Is A Health Problem Appropriately Addressed By The Availability Of Voluntary Services And Education And Not By Punitive Action**

### **Against The Pregnant Woman.**

As long ago as 1925, the United States Supreme Court observed that addicts "are diseased and proper subjects for [medical] treatment." Linder v. United States, 268 U.S. 5,18 (1925). Thirty-seven years later, the Supreme Court reaffirmed that addiction to drugs is a disease, and not a crime. Robinson v. California, 370 U.S. 660, 667 n.8 (1962); see also United States v. Southern Management Corp., 955 F.2d 914, 920 (4th Cir. 1992) ("addiction is a chronic illness that is never cured but from which one may nonetheless recover") (quoting H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2183). The World Health Organization and the American Psychiatric Association both classify substance abuse as a disease. See Southern Management Corp., 955 F.2d at 921. This disease is best

addressed through treatment rather than the threat of punishment. See Wendy Chavkin, Drug Addiction and Pregnancy: Policy Crossroads, 80 Am. J. Pub. Health 483, 484-85 (1990).

Experts have identified several factors that affect a pregnant woman's drug use. As the American Medical Association explains, "addiction is not simply the product of a failure of individual willpower. [It] is caused by complex hereditary, environmental, and social factors. . . ." American Medical Association Board of Trustees Report, Legal Interventions During Pregnancy, 264 JAMA 2663, 2667 (1990).<sup>9</sup> A history of victimization is a key

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<sup>9</sup> As a medical matter, "addiction is the result of a biogenic predisposition in vulnerable individuals combined with stressors on their environment." Martha Jessup, Drug Dependency in Pregnancy: Managing Withdrawal (1992).

predictor for a woman's substance abuse.<sup>10</sup> Incest, sexual abuse, rape, and battering are disproportionately present in the lives of women who are drug-dependent. In one study, up to seventy-four percent of alcohol and drug-dependent women reported that they had experienced sexual abuse.<sup>11</sup> In another survey of drug-dependent pregnant women, seventy percent reported that they had been beaten as adults.<sup>12</sup>

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<sup>10</sup> See Dean G. Kilpatrick, Violence as a Precursor to Women's Substance Abuse: The Rest of the Drug-Violence Story 7 Paper Presented Before the American Psychological Association, 98th Annual Convention (Aug. 1990).

<sup>11</sup> Norma Finkelstein et al., Getting Sober, Getting Well: A Treatment Guide for Caregivers Who Work With Women 244 (1990) (citing Sharon Wilsnack, Drinking, Sexuality, and Sexual Dysfunctions, in Alcohol Problems in Women (Sharon Wilsnack & Linda Beckman eds., 1984)).

<sup>12</sup> Dianne O. Regan et al., Infants of Drug Addicts: At Risk for Child Abuse, Neglect and Placement in Foster Care, 9 Neurotoxicology & Teratology 315 (1987). See also Shelly Gehshan, Southern Regional Project on Infant Mortality, A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant Women, (hereinafter "A Step Toward Recovery") at 5

Many specialists in the field of substance abuse believe that women who are abused self-medicate with alcohol, illicit drugs, and prescription medication to alleviate the pain and anxiety of living under the constant threat of violence. See Hortensia Amaro et al., Violence During Pregnancy and Substance Abuse, 80 Am. J. Pub. Health 575, 578 (1990).<sup>13</sup>

As the National Association for Perinatal Addiction Research and Education points out: “These women are addicts who become pregnant, not pregnant women who

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(1993) ( about one-third of women interviewed cited abusive or violent relationships which prevented them from entering treatment sooner).

<sup>13</sup> See also Teri Randall, Domestic Violence Begets Other Problems of Which Physicians Must Be Aware To Be Effective, 264 JAMA 940, 943 (1990); Denise Paone & Wendy Chavkin, From the Private Family Domain to the Public Health Forum: Sexual Abuse, Women and Risk for HIV Infection, Siecus Report 13 (April/May 1993); Lenore E. Walker, Abused Mothers, Infants and Substance Abuse: Psychological Consequences of Failure to Protect, in Mothers, Infants and Substance Abuse 106 (Phyllis R. Magrab & Diane M. Doherty, eds. 1991); Finkelstein, supra note 9, at 243-255.

decide to use drugs . . . .”<sup>14</sup> They are in need of appropriate voluntary services; not coerced or mandatory treatment. A review of the literature on mandatory treatment for substance abusing pregnant women concludes:

There is a lack of rigorous data to substantiate the effectiveness of compulsory treatment in general . . . . The general failure to define outcome parameters by which to assess mandatory treatment is even more obvious in the case of pregnancy because of the conceptual fuzziness characterizing the whole venture. . . . Indeed, in the current context of the scarcity and poor quality of drug treatment programs for women/mothers, a debate over mandatory treatment is symbolic at best and is meaningless in practical terms.

Wendy Chavkin, Mandatory Treatment for Drug Use During Pregnancy, 266 JAMA 1556, 1560 (1991).

As a United States Department of Health and Human Services publication recently concluded: "there is no evidence that punitive approaches work." Center for

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<sup>14</sup> National Association for Perinatal Addiction Research and Education, NAPARE Policy Statement No. 1, Criminalization of Prenatal Drug Use: Punitive Measures Will Be Counter-Productive (1990).

Substance Abuse Treatment, U.S. Department of Health and Human Services, DHHS Pub. No. (SMA) 93-1998, Pregnant Substance-Using Women at 2 (1993).

**B. Empowering The Juvenile Courts To Detain Pregnant Women And Force Them To Get Drug Treatment Is Unjustified When Appropriate Drug Treatment Is Largely Unavailable.**

Just as the Petitioner, in this case, voluntarily sought treatment for her addiction, (App. 118), pregnant women, motivated by their desire to be good mothers, often seek drug and alcohol treatment. See A Step Toward Recovery, supra at 7. Unfortunately, despite the fact that drug treatment programs tailored for pregnant and parenting women help them overcome their addiction problems, greatly improve birth outcomes, and are cost-effective, such programs are extremely rare and overburdened. See Center for Substance Abuse Treatment, U.S. Department of Health

and Human Services, Producing Results: A Report to the Nation 5-15 (1995). The 1991 Federal General Accounting Office (GAO) Report found that the most critical barrier to women's treatment "is the lack of adequate treatment capacity and appropriate services among programs that will treat pregnant women and mothers with young children. The demand for drug treatment uniquely designed for pregnant women exceeds supply."<sup>15</sup>

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<sup>15</sup> U.S. General Accounting Office, GAO/HRD-90-80, ADMS Block Grant, Women's Set-Aside Does Not Assure Drug Treatment for Pregnant Women, 4 (1991). "One 1990 survey estimates that less than 14 percent of the 4 million women needing drug treatment received such treatment." *Id.* at 1. Even when programs do accept women, there are numerous barriers to successful treatment. For example, if a program does not provide child care services, that fact effectively precludes the participation of women in drug treatment. Wendy Chavkin, Help, Don't Jail, Addicted Mothers, N.Y. Times, July 18, 1989, at A21.

Similarly, despite significant evidence that long-term (twelve to eighteen months) residential care may be the most effective for chronic alcohol or drug dependent pregnant and parenting women, such services are virtually nonexistent. U.S. General Accounting Office, GAO/HRD-90-138, Drug-Exposed Infants, A Generation at Risk, 37 (1990).

As is true nationwide, services are also inadequate in Wisconsin. In 1990, the State of Wisconsin established a task force charged with making recommendations for addressing the problem of addiction to controlled substances by pregnant women and mothers of young children. Task Force To Combat Alcohol And Other Drug Use By Pregnant Women & Mothers Of Young Children, (hereinafter, Task Force), Final Report, Wisconsin Department of Health and Social Services, at 1 (June 1991) (hereinafter, Final Report). This Task Force concluded that services for pregnant women are "fragmented and inadequate," finding that:

Although Wisconsin has begun some excellent pilot projects that intensively and comprehensively address the needs of addicted women and their families, they are only able to serve very limited numbers of families.

Traditional services are unable to meet the

comprehensive and complex needs of addicted women.

Many service providers are not trained either to recognize substance abuse or understand the need for coordination with other services such as prenatal care, mental health, social services, and drug treatment.

Id. at 7.

Significantly, although this Task Force made nine recommendations for addressing the problem of substance abuse in pregnancy, it specifically rejected punitive approaches, id. at 1; and never suggested that the CHIPS or any other statute be used to detain women or coerce treatment. Id. at 9-15. Because the Task Force felt that provision of services was the most effective way to combat the problem, it urged legislators, policy makers and program managers to "review statutes, programs and proposed legislation to ensure positive approaches" including the funding of comprehensive services for women. Id. at 1, 2 (emphasis supplied). As discussed

below infra part II.C, affording juvenile courts the power to detain pregnant women they believe to be endangering fetal health, will undermine these efforts.

**C. Detaining A Pregnant Woman To Protect The Fetus Threatens to Drive Women Out Of The Health Care System And Will Ultimately Harm Children.**

The court below upheld the involuntary detention of Angela M.W. on the basis of the "state's recognized interest in promoting and protecting the safety and well-being of children."<sup>16</sup> (App. 150). Interpreting the CHIPS

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<sup>16</sup> The court below interpreted Roe v. Wade, 410 U.S. 113 (1973), which provided that during the third trimester of pregnancy, a state's interest in fetal life could override a woman's right to abortion, as permitting a state's interest in fetal health to override a woman's right to physical liberty. The lower court completely ignore the fact, however, that under Roe even in the third trimester a woman's life and health take precedence over the state's interest in the fetus. Moreover, the court's interpretation went far beyond the rulings of Roe and its progeny, such as Planned Parenthood v. Casey, 505 U.S. , 112 S.Ct. 2791 (1992). As Judge Anderson noted in his dissent, quoting Lawrence J. Nelson & Nancy Milliken, Compelled Medical Treatment of Pregnant Women: Life, Liberty and Law in Conflict, 259 JAMA 1060, 1062 (Feb. 19, 1988) ". . . Roe says nothing about whether the state may force treatment on a woman to promote fetal

statute to involuntarily detain pregnant women, however, threatens to drive pregnant, drug-addicted women out of the health care system entirely, thereby endangering the health of both women and their future children.

To a pregnant woman, involuntary detention to prevent her from taking drugs during her pregnancy is punishment, much the same as the criminal sanction of incarceration. Thus, whether involuntary detention results

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health." Judge Anderson concluded further:

Because these cases focus on attempts of the state to restrict a woman's right to an abortion - in violation of her privacy rights, Roe, or in violation of her liberty interest, Casey - the impact of the County's arguments premised on the State's profound interest in the potential life justifying intervention into a woman's pregnancy is substantially lessened. These cases establish that the state's profound interest in the potential of life is not absolute and the rights of the mother must be carefully considered and jealously guarded.

(App. 161).

from a civil or criminal proceeding, the threat of detention is likely to discourage women at risk from seeking care.

As the Institute of Medicine recognized:

Pregnant women who are aware that their life-styles place their health and that of their babies at risk may also fear seeking care because they anticipate sanctions or pressure to change such habits as drug and alcohol abuse, heavy smoking, and eating disorders. Substance abusers in particular may delay care because of the stress and disorganization that often surround their lives, and because they fear that if their use of drugs is uncovered, they will be arrested and their other children taken into custody.

Institute of Medicine, Prenatal Care 79 (1988). See also, Marilyn L. Poland et al., Punishing Pregnant Drug Users: Enhancing the Flight from Care, 31 Drug and Alcohol Dependence 199-203 (1993) (study finding that substance-abusing pregnant women would go underground and avoid treatment for fear of incarceration and loss of their

children.)<sup>17</sup>

Finally, studies have shown that even if women continue to use drugs during pregnancy, prenatal care can improve the health of their infants at birth.<sup>18</sup> Since fear of punishment is likely to discourage pregnant women from seeking drug treatment as well as prenatal care, the practical effect of any punitive approach, including the application of Wisconsin's CHIPS statute to prenatal conduct, is likely to adversely effect the health of the very children the state was seeking to protect.

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<sup>17</sup> This research team attempted to conduct an identical study in a state where prosecutors are threatening incarceration, but all post-partum women who were known to use drugs refused to participate in that survey for fear of self-incrimination. *Id.*, at 202.

<sup>18</sup> See, e.g., S. N. MacGregor et al., Cocaine Abuse During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome, 74 *Obstetrics and Gynecology* 882 (1989); Andrew Racine, et al., The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City, 270 *JAMA* 1581 (1993).

That is why every leading public health and medical organization that has addressed this issue has opposed punitive approaches to this problem. In addition to Amici and those organizations cited in the Petitioner's Brief, at 27-28, such groups as the March of Dimes,<sup>19</sup> American College of Obstetricians and Gynecologists,<sup>20</sup> the National Council on Alcoholism and Drug Dependence,<sup>21</sup> the

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<sup>19</sup> "Punitive approaches to drug addiction may be harmful to pregnant women because they interfere with access to appropriate health care. Fear of punishment may cause women most in need of prenatal services to avoid health care professionals." March of Dimes, Statement on Maternal Drug Abuse (1990).

<sup>20</sup> "Actions of coercion to obtain consent or force a course of action limit maternal freedom of choice, threaten the doctor/patient relationships, and violate the principles underlying the informed consent process." American College of Obstetricians and Gynecologists Committee Opinion No. 55, Patient Choice: Maternal-Fetal Conflict (1987).

<sup>21</sup> "[A] punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drug addictions." National Council on Alcoholism and Drug Dependence Policy Statement, Women, Alcohol, Other Drugs and Pregnancy (1990).

Southern Regional Project on Infant Mortality (an initiative of the Southern Governors' Association and the Southern Legislative Conference),<sup>22</sup> Center for the Future of Children,<sup>23</sup> the American Society of Addiction Medicine,<sup>24</sup> the National Association for Perinatal

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<sup>22</sup> "[S]tates should adopt, as preferred methods, prevention, intervention, and treatment alternatives rather than punitive actions to ameliorate the problems related to perinatal exposure to drugs and alcohol." Southern Regional Project on Infant Mortality, Southern Legislative Summit on Healthy Infants and Families, Policy Statement 8 (Oct. 1990)

<sup>23</sup> "A woman who uses illegal drugs during pregnancy should not be subject to special criminal prosecution on the basis of allegations that her illegal drug use harms the fetus. Nor should states adopt special civil commitment provisions for pregnant women who use drugs." Center for the Future of Children, Recommendations in 1 The Future of Children 8, 9 (1991).

<sup>24</sup> "Criminal prosecution of chemically dependent women would have the overall result of deterring such women from seeking both prenatal care and chemical dependency treatment, thereby increasing, rather than preventing harm to children and to society as a whole." American Society of Addiction Medicine, Policy Statement on Chemically Dependent Women and Pregnancy, (Sept. 1989), at 49.

Addiction Research and Education,<sup>25</sup> the Association of Maternal and Child Health Programs,<sup>26</sup> and the Coalition on Alcohol and Drug Dependent Women and Their Children,<sup>27</sup> oppose punitive measures because they are

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<sup>25</sup> “From a health-care perspective, it appears likely that criminalization of prenatal drug use will be counterproductive. It will deter women who use drugs during pregnancy from seeking the prenatal care which is important for the delivery of a healthy baby. . . . The threat of criminal prosecution alone will not deter women in most instances from using drugs during pregnancy.” National Association for Perinatal Addiction Research and Education, Policy Statement No. 1, Criminalization of Prenatal Drug Use: Punitive Measures Will be Counterproductive (1990).

<sup>26</sup> “The threat of criminal prosecution prevents many women from seeking prenatal care and early intervention for their alcohol or drug dependence, undermines the relationship between health and social service workers and their clients, and dissuades women from providing accurate and essential information to health care providers. The consequence is increased risk to the health and development of their children and themselves.” Association of Maternal and Child Health Programs Law and Policy Committee, Statement Submitted to the Senate Finance Committee Concerning Victims of Drug Abuse: Resolution on Prosecution (1990).

<sup>27</sup> “[T]he interests of women and their children are best served through the health care and social service systems. Women should not be singled out for punitive measures based solely on their use of alcohol and other drugs during pregnancy.” Coalition on Alcohol and Drug Dependent Women and Their Children, Coalition Statement of Purpose (passed by Coalition Jan. 23, 1990).

likely to deter women from seeking drug treatment, as well as prenatal and other important health care.

**D. The Lower Court's Interpretation Of Wisconsin's CHIPS Statute Would Permit Unlimited and Intrusive Policing Of Pregnant Women's Conduct.**

Apparently on the basis of a single affidavit of Petitioner's obstetrician, the court below assumed that continued use of cocaine during the final months of petitioner's pregnancy, she would "seriously endanger the physical health of [her] child." (App. 147).

The current research simply does not support this. As a review of the research in the Journal of the American Medical Association concluded:

Predictions of an adverse developmental outcome for these children are being made despite a lack of supportive scientific evidence . . . [A]vailable evidence from the newborn period is far too slim and fragmented to allow any clear predictions about the effects of intrauterine exposure to cocaine on the

course and outcome of child growth and development.<sup>28</sup>

That is why the court in Tanya P. concluded that the effect of cocaine constituted an insufficient basis to justify involuntary commitment and found that:

[r]eview of all these materials compels the conclusion that, at least at this time, there is insufficient evidence relating crack or cocaine use to fetal endangerment or perinatal death to justify involuntary retention, even in the absence of the legal rights based arguments. . . .

Tanya P., *supra*, at 34.

Indeed, many of the potential harms identified by the obstetrician in his affidavit in this case, [App. at 147],

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<sup>28</sup> Linda C. Mayes et al., The Problem of Prenatal Cocaine Exposure: A Rush to Judgment, 267 JAMA 406 (1992) See also Diana Kronstadt, Complex Developmental Issues of Prenatal Drug Exposure, 1 The Center for the Future of Children 36, 46 (1991)(Current research "does not shed much light on the subject of which particular substances contribute to later disability. Polydrug exposure, impoverished home life, and chaotic communities make it impossible to attribute developmental effects to one particular drug. The research has not controlled for other important variables, such as the role of the father, the mother's personality, her health, and her access to social supports.").

including an increased risk of SIDS, have simply not been  
born out by the research:

expectations of universal and permanent damage to children prenatally exposed to cocaine rest not on scientific findings but on media "hype" fueled by selective anecdotes. For example, the early reports of adverse effects of prenatal exposure to cocaine, including neurobehavioral dysfunction, a remarkably high rate of SIDS [Sudden Infant Death Syndrome], and birth defects, were initial observations that constitute the legitimate first step in the scientific process. However, these unreplicated findings were uncritically accepted by scientists and lay media alike, not as preliminary and possibly unrepresentative case reports, but as "proven" facts . . . . For example the initial report of a high rate of SIDS was never peer reviewed. The "fact" that prenatal cocaine exposure greatly increases the risk of SIDS continues to be disseminated in the lay and medical media in spite of subsequent peer-reviewed studies that did not confirm this finding. Even scholarly reviews and the introductions to scientific papers present a litany of adverse effects without any methodologic critique or qualifications.<sup>29</sup>

While the scientific literature provides ample ground for  
concern about potential health effects, and form an

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<sup>29</sup> Deborah A. Frank, et. al., Children Exposed to Cocaine Prenatally: Pieces of the Puzzle, 15 *Neurotoxicology and Teratology* 298, 299 (1993) (citations omitted).

appropriate basis for additional research, it does not provide even a rational basis for detaining a pregnant woman.

Moreover, cocaine use is only one factor that can adversely affect birth outcomes. See Marilee C. Allen et al., The Limit of Viability: Neonatal Outcome of Infants Born at 22 to 25 Weeks' Gestation, 329 New Eng. J. Med. 1597, 1599 (1993). From the evidence available at this time, it appears that the effects of maternal cocaine use upon the fetus are similar to the effects of paternal and maternal cigarette smoking. See George Washington Univ. Ctr. for Health Policy Research, An Analysis of Resources to Aid Drug-Exposed Infants and Their Families at 3 (1993) (citing J.J. Volpe, Mechanisms of Disease: Effect of Cocaine Use on the Fetus, 327 New Eng. J. Med. 399

(1992)).<sup>30</sup> In fact, Wisconsin's Task Force concluded that one in four pregnant women in Wisconsin put their babies at risk from consumption of alcohol and one in four put their babies at risk from the use of tobacco as compared with one in ten who put their babies at risk from the use of cocaine or other illegal drug. Final Report, at 8.

An array of physiological, environmental and behavioral factors lead to prematurity and low birthweights, including pre-eclampsia, diabetes, hypertension, lead exposure, cigarette smoking, poor nutrition, alcohol consumption, and lack of prenatal care. Committee to

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<sup>30</sup> See also K.C. Schoendorf & J.L. Kiely, Relationship of Sudden Infant Death Syndrome to Maternal Smoking During and After Pregnancy, 90 Pediatrics 905 (1992); D.L. Davis, Parental Smoking and Fetal Health, 337 The Lancet 123 (1991); Office for Substance Abuse Prevention, Alcohol, Tobacco and Other Drugs May Harm the Unborn, U.S. Dept. of Human Services Publication (ADM) 90-1711 (1970); U.S. General Accounting Office, Drug-Exposed Infants: A Generation at Risk, Government Printing Office 1990 Publication GAO/HRD 90138.

Study the Prevention of Low Birthweight, Institute of Medicine, Preventing Low Birthweight 1, 1-7 (1986).

If the lower court's interpretation of CHIPS and its misinterpretation of Roe v. Wade, 410 U.S. 113 (1973), see supra n. 16 is upheld, pregnant women who smoke, or live with a smoker, or maintain a poor diet, or fail to take medications could be subjected to an order of protective custody to ensure that they change their behavior and provide "a safe environment in the womb" for their fetus. (App. at 129). The danger and legislatively unintended ramifications of such an interpretation of Wisconsin's CHIPS statute was recognized by Judge Anderson in his dissent below when he spoke of the many "unknown consequences" presented by the case. (App. 161).

The court below, however, assumed that dangers from substances other than cocaine, such as nicotine and

alcohol, were minimal, (App. 145), and suggested that the argument that the statute might be applied to pregnant women who smoke or drink alcoholic beverages, "border[ed] on the hyperbolic". (App. 145). Courts of other states have not, however, considered such fears to be exaggerated. Far from it. Many have expressed strong concern that if a pregnant woman could be punished (or here, involuntarily detained) because of her drug use, she could be similarly punished for a wide array of behaviors that could possibly harm a fetus. For example, in Reinesto v. Arizona, supra, the Court of Appeals considered many types of conduct during pregnancy that can cause physical or mental abnormalities in a newborn and therefore could form the basis for punitive action against a pregnant woman:

. . . smoking during pregnancy may cause, among

other problems, low birth weight, which is a major factor in infant mortality. F. Gary Cunningham, M.D. et al., *Williams Obstetrics* 974 (19th ed. 1993); Steven G. Gabbe, M.D. et al., *Obstetrics Normal and Problem Pregnancies* 314-15, 923-24 (2d ed. 1991); Gerrard N. Burrow, M.D. and Thomas F. Ferris, M.D., *Medical Complications During Pregnancy* 476-78 (3d ed. 1988). Drinking alcoholic beverages during pregnancy can lead to fetal alcohol syndrome, a condition characterized by mental retardation, prenatal and postnatal growth deficiencies, and facial anomalies. Cunningham et al., *supra* at 973; Gabbe et al., *supra*, at 315-16; Burrow, *supra*, at 574-77.

A pregnant woman's failure to obtain prenatal care or proper nutrition also can affect the status of the newborn child. Poor nutrition can cause a variety of birth defects: insufficient prenatal intake of vitamin A can cause eye abnormalities and impaired vision; insufficient doses of vitamin C or riboflavin can cause premature births; deficiencies in iron are associated with low birth weight. Burrow, *supra*, at 122-23. Poor prenatal care can lead to insufficient or excessive weight gain, which also effects the fetus. *Id.* at 124-25. Some researchers have suggested that consuming caffeine during pregnancy also contributes to low birth weight. See Gabbe et al., *supra*, at 317; Burrow, *supra*, at 572-73.

Reinesto v. Arizona, at 8. The court also noted that occupational and environmental exposure to toxic chemicals and certain treatments for diseases such as cancer can harm

a fetus as well, and concluded that

[a]llowing the state to define the crime of child abuse according to the health or condition of the newborn child would subject many mothers to criminal liability for engaging in all sorts of legal or illegal activities during pregnancy [was not] consistent with the dictates of due process.

Reinesto, at 9.<sup>31</sup> As a South Carolina Court found:

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<sup>31</sup> The Supreme Court of Kentucky, citing the Pennsylvania case, Commonwealth v. Kemp, *supra*, expressed a similar concern in Commonwealth v. Welch, *supra* at 283, stating: "if the statutes at issue are applied to women's conduct during pregnancy, they could have an unlimited scope and create an indefinite number of new 'crimes'.... lead[ing] to a 'slippery slope' whereby the law could be construed as covering the full range of a pregnant woman's behavior - a plainly unconstitutional result that would, among other things, render the statutes void for vagueness." Similarly, the supreme court of Nevada concluded that to make its child endangering statute applicable to a pregnant woman's drug use would "open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a range of miscellaneous, otherwise legal toxins." Serriff v. Encoe, *supra* at 598. See also, Commonwealth v. Pellegrini, *supra* n. 3 slip op at 9, ("The state's sanctioning of a woman's behavior during pregnancy under the circumstances of this case could lead to prosecution for drinking and smoking by pregnant women, or for other activities perceived as harmful to the fetus."); State v. Andrews, *supra* at 8 (noting that applying statute to cases in which pregnant woman with viable fetus does some act resulting in harm to fetus or later-born child "could include prosecution for failure to get prenatal care and excessive ingestion of alcohol, as well as illegal drug use."); Johnson v. State, *supra* at 1294-95 ("To construe the statute in this

If the position of the State were to be sustained, then any pregnant woman who drinks alcohol could be charged for harming the fetus she is carrying due to fetal alcohol syndrome. A pregnant woman could be arrested for smoking cigarettes and harming the fetus she is carrying. In fact, warnings on cigarette packages warn of this specific danger. A pregnant woman could be arrested for failing to take proper medication or follow her doctor's instructions and thus harm the fetus she is carrying. This court cannot conclude that the legislature intended such consequences.

Tolliver v. South Carolina, *supra* at 6.

Permitting juvenile courts to involuntarily detain women to ensure a "safe environment in the womb" (App. at 129), is both inconsistent with the dictates of due process and the constitutional right to privacy. See Petitioner's Brief at 15-23. This Court should reject an application of Wisconsin's CHIPS statute which permits courts to

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manner would mean that every expectant woman who ingested a substance with the potential of harm to her child, e.g., alcohol or nicotine, would be criminally liable under [the child endangering statute.]. We do not believe such result was intended by the General Assembly." (quoting State v. Gray, No. L-89-239, slip op. at 3 (Lucas Cty., Ct. App. Aug. 31, 1990)).

supervise, judge and or detain a woman based on her behavior during pregnancy.

### CONCLUSION

For all of the foregoing reasons, amici respectfully urge this Court to reverse the ruling of the court below.

Respectfully submitted,

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