

ALABAMA CRIMINAL DEFENSE TRAINING



Defending Chemical Endangerment of A Child Cases

Greater Birmingham Criminal Defense Lawyer's Association

October 2019

National Advocates
for Pregnant Women

N A P W





October 2019

AL Criminal Defense Training: “Defending Chemical Endangerment of a Child Cases”

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Training with National Advocates for Pregnant Women (NAPW): “Defending Chemical Endangerment of a Child Cases”

October 24, 2019 | Greater Birmingham Criminal Defense Lawyer’s Association | 11:30 am-1:00 pm
950 22nd Street N, Suite 1000, Birmingham, AL 35203

1 hour CLE | \$10 for GBCDLA Members | \$15 for Public

Alabama’s chemical endangerment of a child law was passed in 2006 to deter people from bringing children to places where controlled substances are produced or distributed, such as methamphetamine laboratories. Since 2006, however, more than 700 pregnant women and new mothers around the state of Alabama have been arrested under this law in relationship to pregnancy and alleged substance use, on the theory that a fetus is a “child” and the woman’s body is a “dangerous environment”. These prosecutions are unconstitutional violations of their rights.

This training from National Advocates for Pregnant Women (NAPW), a non-profit legal advocacy organization that works to secure the human and civil rights of pregnant women, will offer guidance and resources to defense attorneys for litigating and defending such cases. NAPW attorney Aarin Williams will use model motions, case examples and more to equip defense attorneys with tools and strategies to defend pregnant women and mothers in Alabama charged with chemical endangerment of a child.

Speaker:



Aarin Michele Williams, JD
Senior Staff Attorney, National Advocates for Pregnant Women

Aarin Michele Williams, JD is an experienced criminal defense and civil rights attorney. Currently Aarin’s state-based projects include Alabama, Georgia, Mississippi, Oklahoma and Tennessee. Her subject-matter specialties include criminal law and policy, as well as maternal health disparities. Aarin earned her J.D. from Rutgers School of Law-Newark where she was a member of the Rutgers Law Review and her B.A. in English from Howard University. She is also a graduate of the National Criminal Defense College Trial Practice Institute in Macon, Georgia. She clerked in the New Jersey Superior Court, Family Division and is admitted to practice in NY & NJ. Prior to NAPW she was a senior trial attorney with the New Jersey Office of the Public Defender. Aarin passionately advocates for disempowered people and believes that her community is owed and deserving of the benefits and fruits of her education.

Contact Aarin Williams and National Advocates for Pregnant Women (NAPW) at:
amw@advocatesforpregnantwomen.org | info@advocatesforpregnantwomen.org | (212) 255-9252

National Advocates for Pregnant Women Alabama Defense Counsel Trainings 2019

Introduction

Since its founding, National Advocates for Pregnant Women (“NAPW”) has developed expertise in advocating for women targeted by laws and law-enforcement strategies that harm women who are or might become pregnant, whether they experience a pregnancy loss, terminate a pregnancy, or go to term and give birth. Since *Roe v. Wade* was decided in 1973, NAPW has documented more than 1200 pregnant women or women who have recently given birth in the U.S. who have been arrested or civilly detained on charges that would not be prosecuted except for the fact of pregnancy. Many of these charges, in addition to civil child abuse or neglect cases, are the result of targeting by authorities because of alleged drug use or other alleged actions or omissions during pregnancy. NAPW, as the only organization that consistently partners with both women's rights and drug policy advocates, organizers and criminal defense attorneys, has been instrumental in bringing justice to the women caught between the “war on drugs” and criminalization of pregnant women around the nation.

This devaluing of pregnant women around Alabama is particularly important to NAPW. We have documented more than 800 women in Alabama who have been arrested and detained under an Alabama criminal law that has been judicially expanded and misused to single out and target pregnant women. In 2006, Alabama legislators passed the “Chemical Endangerment of Exposing a Child to an Environment in which Controlled Substances are Produced or Distributed” law (Alabama Code Section 26-15-3.2). The stated legislative purpose of this criminal law was to deter people from bringing children to dangerous places, such as methamphetamine labs, where drugs were produced. The statute does not mention pregnant women or fetuses. It was not meant to be employed to address the issue of drug use and pregnant women—in fact, the legislature refused four times to amend the law to include women who are pregnant.

In spite of the legislative intent, overzealous Alabama prosecutors began using the law to charge pregnant women under a theory that a fetus is a child and that a uterus could be a dangerous environment. With the aid of state trial court judges, these targeted and unconstitutional prosecutions spread throughout the state. In 2013 and 2014, NAPW played a key role by obtaining appellate counsel for Hope Ankrom and Amanda Kimbrough, and organized amicus efforts at all levels of their criminal appeals, filing a State Supreme Court amicus brief along with the Drug Policy Alliance and Southern Poverty Law Center, on behalf of more than 50 medical and health advocacy groups and experts.

Yet the Alabama Supreme Court – with an explicit focus by one judge on creating personhood rights for fertilized eggs, embryos and fetuses and thus overturning *Roe v. Wade*– upheld the convictions of women charged with violating the law by being pregnant, using drugs, and continuing pregnancies to term. Cumulatively, the State Supreme Court in the *Ankrom*, *Kimbrough* and *Hicks* decisions ruled that the word “child” in the statute includes “unborn children” from the moment of fertilization, and that the uterus is an “environment” in which children may be exposed to dangerous drugs. These decisions made it a crime for a woman to be pregnant and use any controlled substance – even one prescribed by a physician.

In addition to increasing the unjust incarceration of women, Alabama's judicially expanded chemical endangerment of a child law drives pregnant women who use controlled substances away from prenatal and other essential health care. Every major medical and public health organization – including the American College of Obstetricians and Gynecologists, the American Medical Association, and the American Academy of Pediatrics – opposes using criminal law and other punitive measures as a means of coercing pregnant women to behave in particular ways, including women who use certain drugs. Encouraging trust between women and healthcare providers and increasing access to effective and affordable treatment, not jail, is the best way to advance the health of women, children, and their families.

In response to the obvious misuse of this law, NAPW has been documenting the hundreds of arrests in Alabama and assisting defense attorneys challenging the subsequent charges. NAPW has worked with several local counsel to challenge the arrests, helping write motions to dismiss and organizing a public health amicus brief, while realizing the composition of Alabama's Supreme Court made success on those efforts unlikely. After the 2013 and 2014 court decisions, NAPW launched various advocacy strategies to challenge the judicially expanded law. One result of NAPW's efforts to bring public attention to this clearly unconstitutional law was a major investigative report by Pro Publica, *Take a Valium, Lose your Kid, Go to Jail*. Relying heavily on NAPW research, the report documents arrests including some of women who used controlled substances legally prescribed to them by their doctors. As a result of this and other reporting, the legislature amended the law to exclude prescribed medications. Despite these changes, pregnant women in Alabama continue to be charged and found guilty under this law.

NAPW and our allies continue to fight this outrageous application of the law. Through legal trainings for the defense bar, public education presentations on the myths around drug use and pregnancy, collaborations with local organizers, and building relationships with medical and public health experts, we hope to challenge the law successfully and remove the threat of prosecution for pregnant and parenting women around Alabama.

NAPW Qualtrics Survey

National Advocates for Pregnant Women (NAPW) developed a survey to gather information related to cases in which the "chemical endangerment of exposing a child to an environment in which controlled substances are produced or distributed" law (Ala. Code § 26-15-3.2.) is used to prosecute people based on allegations of substance use during pregnancy.

The survey was developed and intended for attorneys and legal support to share information with us, to assist us in a more accurate count and understanding of what is occurring in Alabama related to prosecutions under the chemical endangerment of a child law. It is safe, secure, and confidential, and the results will only be viewed by legal team members of NAPW. Aggregated, de-identified data may be shared with advocates to highlight the prevalence of how this law is being applied and develop action plans, legal strategies, and resources for how to handle these cases. The survey allows for participants to provide case information for one defendant at a time, and will take 5-10 minutes to complete.

To access the survey, visit: https://surveys.iad1.qualtrics.com/jfe/form/SV_7a3LLSOWaIFSOWx

Code of Alabama

Title 26. Infants and Incompetents. (Refs & Annos)

Chapter 15. Child Abuse Generally. (Refs & Annos)

Ala.Code 1975 § 26-15-3.2

§ 26-15-3.2. Chemical endangerment of exposing a child to an environment in which controlled substances are produced or distributed.

Currentness

(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:

(1) Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in [Section 13A-12-260](#). A violation under this subdivision is a Class C felony.

(2) Violates subdivision (1) and a child suffers serious physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia. A violation under this subdivision is a Class B felony.

(3) Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the child. A violation under this subdivision is a Class A felony.

(b) The court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.

(c) It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was administered to the child in accordance with the prescription instructions provided with the controlled substance.

Credits

([Act 2006-204](#), p. 302, § 2.)

Ala. Code 1975 § 26-15-3.2, AL ST § 26-15-3.2

Current through Act 2019-540.

Code of Alabama

Title 26. Infants and Incompetents. (Refs & Annos)

Chapter 14. Reporting of Child Abuse or Neglect. (Refs & Annos)

Ala.Code 1975 § 26-14-3

§ 26-14-3. Mandatory reporting.

Currentness

(a) All hospitals, clinics, sanitariums, doctors, physicians, surgeons, medical examiners, coroners, dentists, osteopaths, optometrists, chiropractors, podiatrists, physical therapists, nurses, public and private K-12 employees, school teachers and officials, peace officers, law enforcement officials, pharmacists, social workers, day care workers or employees, mental health professionals, employees of public and private institutions of postsecondary and higher education, members of the clergy as defined in [Rule 505 of the Alabama Rules of Evidence](#), or any other person called upon to render aid or medical assistance to any child, when the child is known or suspected to be a victim of child abuse or neglect, shall be required to report orally, either by telephone or direct communication immediately, and shall be followed by a written report, to a duly constituted authority.

(b)(1) When an initial report is made to a law enforcement official, the official subsequently shall inform the Department of Human Resources of the report so that the department can carry out its responsibility to provide protective services when deemed appropriate to the respective child or children.

(2) As soon as is practicable after a report of known or suspected child abuse or neglect is made, the Department of Human Resources shall make efforts to determine the military status of the parent or guardian of the child who is the subject of the child abuse or neglect allegation.

(3) If the Department of Human Resources determines that a parent or guardian under subdivision (2) is in the military, the department shall notify a United States Department of Defense family advocacy program at the military installation of the parent or guardian that there is an allegation of child abuse or neglect that is being investigated that involves a child of the military parent or guardian.

(c) When the Department of Human Resources receives initial reports of suspected abuse or neglect, as defined in [Section 26-14-1](#), including suspected abuse or neglect involving discipline or corporal punishment committed in a public or private school or suspected abuse or neglect in a state-operated child residential facility, the Department of Human Resources shall transmit a copy of school reports to the law enforcement agency and residential facility reports to the law enforcement agency and the operating state agency which shall conduct the investigation. When the investigation is completed, a written report of the completed investigation shall contain the information required by the state Department of Human Resources which shall be submitted by the law enforcement agency or the state agency to the county department of human resources for entry into the state's central registry.

(d) Nothing in this chapter shall preclude interagency agreements between departments of human resources, law enforcement, and any other state agencies on procedures for investigating reports of suspected child abuse and neglect to provide for departments of human resources to assist law enforcement and other state agencies in these investigations.

(e) Any provision of this section to the contrary notwithstanding, if any agency or authority investigates any report pursuant to this section and the report does not result in a conviction, the agency or authority shall expunge any record of the information or report and any data developed from the record.

(f) Subsection (a) to the contrary notwithstanding, a member of the clergy shall not be required to report information gained solely in a confidential communication privileged pursuant to [Rule 505 of the Alabama Rules of Evidence](#) which communication shall continue to be privileged as provided by law.

(g) Commencing on August 1, 2013, a public or private employer who discharges, suspends, disciplines, or penalizes an employee solely for reporting suspected child abuse or neglect pursuant to this section shall be guilty of a Class C misdemeanor.

Credits

(Acts 1965, No. 563, p. 1049, § 1; Acts 1967, No. 725, p. 1560; Acts 1975, No. 1124, p. 2213, § 1; [Acts 1993, 1st Ex. Sess., No. 93-890, p. 162, § 3](#); [Act 2003-272, p. 645, § 1](#); [Act 2013-201, p. 416, § 1](#); [Act 2016-354, p. 867, § 2](#); [Act 2017-257, § 1.](#))

Ala. Code 1975 § 26-14-3, AL ST § 26-14-3
Current through Act 2018-579.

Pertinent Case Summaries

***Ex parte Ankrom*, 152 So.3d 397 (Ala. 2013)**

The issue in this case was whether the term “child” as used in Alabama Code § 26-15-3.2, the Chemical Endangerment Statute, includes an unborn child. In addressing this question, the Alabama Supreme Court consolidated *Ankrom v. State*, 152 So.3d 373 (Ala. Crim. App. 2011) and *Kimbrough v. State*, 114 So. 3d 163 (Ala. Crim. App. 2011) on appeal.

Ankrom: Facts & Procedural History

In 2009, defendant Hope Ankrom and her newborn son tested positive for cocaine. After obtaining medical records revealing that Ankrom had tested positive for cocaine and marijuana on more than one occasion during her pregnancy, the state created a plan of care for Ankrom’s son and brought charges against her for chemical endangerment of a child. The grand jury indicted. Ankrom filed a motion to dismiss her indictment on the grounds that the code’s plain language did not include an unborn child or a fetus and that other states with the same or similar chemical endangerment statutes have held that such statutes do not apply to prenatal conduct harming or allegedly harming a fetus. The trial court denied the motion to dismiss, and in 2010, Ankrom pleaded guilty and was sentenced to three years, which was suspended and replaced with one year of probation.

Kimbrough: Facts & Procedural History

This case involves the same facts as Ankrom except that Amanda Kimbrough and her newborn son tested positive for methamphetamine, and Kimbrough’s son died minutes after birth. The cause of his death was disputed. Kimbrough filed pretrial motions to dismiss her indictment, alleging that the term “child” in § 26-15-3.2 did not include a fetus; that her prosecution violated the separation of powers doctrine; that the statute was void for vagueness and violated her due process right to notice that her conduct was proscribed; and that the interpretation of “child” to include an unborn child violated her equal protection rights. The trial court denied all of the motions to dismiss and Kimbrough reached a plea agreement with the state in which she was sentenced to ten years imprisonment while reserving her right to appeal.

Outcome

In both cases, the Court of Criminal Appeals, using the plain language of the statute and principles of textual interpretation, held that the word “child” did include an unborn child. The Supreme Court of Alabama affirmed the decision, agreeing with the Court of Criminal Appeals that the word “child” includes unborn children and also rejecting the suggestion that the statute should be restricted to “viable” unborn children only.

***Hicks v. State*, 153 So. 3d 53 (Ala. 2014)**

After delivering her son, who tested positive for cocaine at birth, Sarah Janie Hicks was indicted on a charge for chemical endangerment of a child. *See* Ala. Code 26-15-3.2. Her son had no reported health problems at the time the case went before the Alabama Supreme Court. Before the court, Hicks asserted that the plain language of the statute reflects legislative intent to apply only to live-born children; challenged the statute's application to her as unconstitutionally vague, violating her due process rights; contended that the State violated separation of powers by allowing the district attorney, not the legislature, to criminalize particular conduct; and claimed an equal protection violation based on the punishment, as a class, of women who use substances while pregnant. Leaning heavily on its reasoning in *Ankrom*, the Supreme Court determined that the plain meaning of the word "child" as used in the statute at issue unambiguously included unborn children. The court declined to consider Hicks's public policy arguments, dismissing those as legislative in nature, and ruled that her constitutional arguments failed based on the reasoning in *Ankrom*.

152 So.3d 397
Supreme Court of Alabama.

Ex Parte Hope Elisabeth ANKROM.

(In re Hope Elisabeth Ankrom

v.

State of Alabama).

Ex parte Amanda Helaine Borden Kimbrough.

(In re Amanda Helaine Borden Kimbrough

v.

State of Alabama).

1110176 and 1110219.

|

Jan. 11, 2013.

|

Rehearing Denied in no. 1110176 Dec. 13, 2013.

Synopsis

Background: Defendants were convicted, on pleas of guilty in separate cases before the Circuit Court, Coffee County, No. CC-09-395, [Thomas E. Head, J.](#), and the Circuit Court, Colbert County, No. CC-08-381, [Jacqueline M. Hatcher, J.](#), of chemical endangerment of a child, based upon their use of controlled substances while pregnant. [Defendants appealed. The Court of Criminal Appeals, 152 So.3d 373](#), affirmed one defendant's conviction; the other defendant's conviction was affirmed by unpublished memorandum, [114 So.3d 163 \(table\)](#). Defendants petitioned for certiorari review. Review was granted, and cases were consolidated.

Holdings: The Supreme Court, [Parker, J.](#), held that:

[1] as matter of first impression, plain meaning of the word “child,” as used in the statute defining the offense of chemical endangerment of a child, includes unborn children, and

[2] restriction of statute's applicability to viable unborn children is inconsistent with plain meaning of word “child” and with state law.

1110176—Affirmed.

1110219—Affirmed.

[Parker, J.](#), concurred specially, with opinion.

[Shaw, J.](#), concurred in part and concurred in the result, with opinion.

[Malone, C.J.](#), dissented, with opinion.

[Murdock, J.](#), dissented, with opinion.

[Wise, J.](#), recused herself.

West Headnotes (23)

[1] Criminal Law

🔑 Liberal or strict construction; rule of lenity

One who commits an act which does not come within the words of a criminal statute, according to the general and popular understanding of those words, when they are not used technically, is not to be punished thereunder, merely because the act may contravene the policy of the statute.

[2] Statutes

🔑 Penal Statutes

Penal statutes are to reach no further in meaning than their words.

[3] Criminal Law

🔑 Creation and Definition of Offenses

Criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, that is, defendants.

[4] Criminal Law

🔑 Liberal or strict construction; rule of lenity

No person is to be made subject to penal statutes by implication and all doubts concerning their interpretation are to predominate in favor of the accused.

[5] Statutes

🔑 Plain Language; Plain, Ordinary, or Common Meaning

In ascertaining the legislature's intent in enacting a statute, the supreme court will first attempt to assign plain meaning to the language used by the legislature.

[1 Cases that cite this headnote](#)

[6] **Statutes**

🔑 Liberal or strict construction; rule of lenity

Although penal statutes are to be strictly construed, courts are not required to abandon common sense; absent any indication to the contrary, the words of a statute must be given their ordinary and normal meaning.

[1 Cases that cite this headnote](#)

[7] **Statutes**

🔑 Intent

Statutes

🔑 Language and intent, will, purpose, or policy

Fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute; if possible, the intent of the legislature should be gathered from the language of the statute itself.

[3 Cases that cite this headnote](#)

[8] **Statutes**

🔑 Plain language; plain, ordinary, common, or literal meaning

When the language of a statute is plain and unambiguous, courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning, interpreting that language to mean exactly what it says and thus giving effect to the apparent intent of the legislature.

[8 Cases that cite this headnote](#)

[9] **Statutes**

🔑 Plain Language; Plain, Ordinary, or Common Meaning

In determining the meaning of a statute, the supreme court looks to the plain meaning of the words as written by the legislature.

[1 Cases that cite this headnote](#)

[10] **Statutes**

🔑 Natural, obvious, or accepted meaning

Statutes

🔑 Purpose and intent; unambiguously expressed intent

Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says; if the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.

[8 Cases that cite this headnote](#)

[11] **Statutes**

🔑 Language and intent, will, purpose, or policy

Only if there is no rational way to interpret the words of a statute as stated will the supreme court look beyond those words to determine legislative intent.

[12] **Statutes**

🔑 In general; factors considered

Only when language in a statute is ambiguous will the supreme court engage in statutory construction.

[3 Cases that cite this headnote](#)

[13] **Infants**

🔑 Child abuse, neglect, or endangerment

Plain meaning of the word "child," as used in the statute defining the offense of chemical endangerment of a child, includes unborn children. [Code 1975, § 26-15-3.2.](#)

4 Cases that cite this headnote

[14] Statutes

🔑 Motives, Opinions, and Statements of Legislators

Statutes

🔑 Sponsors or authors

Court interpreting a statute does not rely solely on the views of a single legislator in ascertaining the intent of the bill by which it was enacted, even when that legislator was a sponsor of the bill.

1 Cases that cite this headnote

[15] Statutes

🔑 Post-enactment legislative history

Interpreting a statute based on later attempts to amend that statute is problematic.

[16] Infants

🔑 Child abuse, neglect, or endangerment

Statutes

🔑 Post-enactment legislative history

Subsequent legislative history of statute defining offense of chemical endangerment of a child, including legislative inaction on several attempted amendments thereof, was not helpful in ascertaining legislative intent with respect to whether statutory term “child” was intended to include unborn children, as legislative inaction supported several equally tenable inferences.

[17] Infants

🔑 Child abuse, neglect, or endangerment

Statutory term “environment,” as utilized in statute defining offense of chemical endangerment of a child, encompassed a person's physical surroundings and circumstances, and thus included the womb of a pregnant woman. Code 1975, § 26–15–3.2.

[18] Statutes

🔑 Titles, headings, and captions

Title of a statute does not override the plain meaning of the words contained in that statute.

[19] Statutes

🔑 Introductory statements; preambles and prologues

Statutes

🔑 Titles, headings, and captions

Title or preamble may be used to remove ambiguity or uncertainty in a statute; it cannot, however, be used to contradict the plain, unambiguous terms of the statute itself.

[20] Infants

🔑 Child abuse, neglect, or endangerment

Use of the word “distribute” in title of statute criminalizing the chemical endangerment of a child could not be read to contradict plain meaning of statutory term “child” to include unborn children. Code 1975, § 26–15–3.2.

3 Cases that cite this headnote

[21] Infants

🔑 Child abuse, neglect, or endangerment

Restriction of the applicability of the chemical-endangerment statute to viable unborn children is inconsistent with the plain meaning of the word “child” and with state law. Code 1975, § 26–15–3.2.

3 Cases that cite this headnote

[22] Constitutional Law

🔑 Policy

Public-policy arguments should be directed to the legislature, not to the supreme court, as the legislature, and not the supreme court, has the exclusive domain to formulate public policy in Alabama.

[23] Criminal Law

🔑 Certiorari

Supreme Court would decline to consider constitutional challenges to statute defining criminal offense of chemical endangerment of a child, where such challenges were outside scope of grounds on which certiorari review was granted. [Code 1975, § 26–15–3.2](#).

Attorneys and Law Firms

***400** [Paul Young](#), Enterprise; and [Carmen F. Howell](#), Enterprise, for petitioner Hope Elisabeth Ankrom.

[Jake Watson](#) of Watson Graffeo PC, Huntsville; and [Brian White](#) of White & Oakes, LLC, Decatur, for petitioner Amanda Helaine Borden Kimbrough.

[Luther Strange](#), atty. gen., and [John C. Neiman, Jr.](#), deputy atty. gen., and [Cecil G. Brendle, Jr.](#) (1110176), and [Michael G. Dean](#) (1110219), asst. attys. gen., for respondent.

[Allison Neal](#), Montgomery, for American Civil Liberties Union of Alabama Foundation; and [Alexa Kolbi–Molinas](#), New York, New York, for ACLU Reproductive Freedom Project, for amici curiae American Civil Liberties Union of Alabama Foundation and the American Civil Liberties Union, in support of the petitioners.

[Kathryn A. King](#), Cullman, for amicus curiae Alabama Criminal Defense Lawyers Association, in support of the petitioners.

[Lisa W. Borden](#) of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Birmingham, for amicus curiae State Representative [Patricia Todd](#), in support of the petitioners.

Mary Bauer, Southern Poverty Law Center, Montgomery; Tamar Todd, Drug Policy Alliance, Berkeley, California; and Emma S. Ketteringham and Lynn M. Paltrow, National Advocates for Pregnant Women, New York, New York, for amici curiae Southern Poverty Law Center, Drug Policy Alliance, and the National Advocates for Pregnant Woman, in support of the petitioners.

[A. Eric Johnston](#), Birmingham; and [Mathew D. Staver](#), Liberty Counsel, Maitland, Florida, for amicus curiae Liberty Counsel, in support of the respondent.

Mary Bauer, Southern Poverty Law Center, Montgomery; Tamar Todd, Drug Policy Alliance, Berkeley, California;

and Emma S. Ketteringham and Lynn M. Paltrow, National Advocates for Pregnant Women, New York, New York, for amici curiae American Academy of Addiction Psychiatry, American Medical Women's Association, American Nurses Association, The Alabama Women's Resource Network, American Society of Addiction Medicine, Global Lawyers and Physicians, Institute for Health and Recovery, International Center for Advancement of Addiction Treatment of the Beth Israel Medical Center Baron Edmond de Rothschild Chemical Dependency Institute, National Asian Pacific American Women's Forum, National Association of Nurse Practitioners in Women's Health, National Association of Social Workers, National Association of Social Workers–Alabama Chapter, National Council on Alcoholism and Drug Dependence, Inc., National Latina Institute for Reproductive Health, National Organization for Women–Alabama, National Perinatal Association, National Women's Health Network, National Women's Law Center, Our Bodies Ourselves, Southern Center for Human Rights, Sheila Blume, MD, Wendy Chavkin, MPH, MD, Nancy Day, MPH, PhD, Deborah A. Frank, MD, Leslie Hartley Gise, MD, Stephen R. Kandall, MD, and Linda Worley, MD, in support of the petitioners.

Mary Bauer, Montgomery; Tamar Todd, Drug Policy Alliance, Berkeley, California; and Emma S. Ketteringham and Lynn M. Paltrow, National Advocates for Pregnant Women, New York, New York, for amici curiae All Our Lives and Experts in Treatment of Addiction in Women, in support of the petitioners (and also joining in the brief filed on behalf of The American Academy of Addiction Psychiatry et al.).

Opinion

PARKER, Justice.

Hope Elisabeth Ankrom and Amanda Helaine Borden Kimbrough (“the petitioners”) ***401** each petitioned this Court for a writ of certiorari to review the Court of Criminal Appeals' decisions in their cases. We granted the petitions and consolidated these cases, each of which presents the same issue of first impression for this Court's consideration: Whether the term “child” as used in [§ 26–15–3.2, Ala.Code 1975](#) (“the chemical-endangerment statute”), includes an unborn child. Concluding that it does and that the Court of Criminal Appeals reached the correct decision in both cases, we affirm the judgments of the Court of Criminal Appeals.

I. Facts and Procedural History

The Court of Criminal Appeals recounted the facts of Ankrom's case as follows in its opinion:

“At the guilty-plea hearing, the parties stipulated to the following facts:

“ ‘On January 31, 2009, the defendant, Hope Ankrom, gave birth to a son, [B.W.], at Medical Center Enterprise. Medical records showed that [Ankrom] tested positive for cocaine prior to giving birth and that the child tested positive for cocaine after birth.

“ ‘Department of Human Resources worker Ashley Arnold became involved and developed a plan for the care of the child. During the investigation [Ankrom] admitted to Ashley that she had used marijuana while she was pregnant but denied using cocaine.

“ ‘Medical records from her doctor show that he documented a substance abuse problem several times during her pregnancy and she had tested positive for cocaine and marijuana on more than one occasion during her pregnancy.’

“On February 18, 2009, Ankrom was arrested and charged with chemical endangerment of a child. On August 25, 2009, the grand jury indicted Ankrom. The indictment stated that Ankrom ‘did knowingly, recklessly, or intentionally cause or permit a child, to-wit: [B.W.], a better description of which is to the Grand Jury otherwise unknown, to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in [Section 13A-12-260 of the Code of Alabama, 1975](#), to-wit: Cocaine, in violation of Section [26-15-3.2(a)(1)].’

“On September 25, 2009, Ankrom filed a motion styled as a ‘Motion to Dismiss Indictment.’ In that motion, after setting forth the facts, Ankrom argued that ‘[t]he plain language of [[§ 26-15-3.2, Ala.Code 1975](#),] shows that the legislature intended for the statute to apply only to a child, not a fetus’; that ‘courts in other states which have enacted the same or similar chemical endangerment statutes have determined that such statutes do not apply to prenatal conduct that allegedly harms a fetus’; that ‘[t]he state's contention that the defendant violated this statute renders the law impermissibly vague, and therefore the rule of lenity applies’; that ‘[t]he legislature has

previously considered amending the statute to include prenatal conduct that harms a fetus, and declined to do so’; that ‘the defendant has not been accorded due process because there was no notice that her conduct was illegal under this statute’; that ‘[t]he prosecution of pregnant women is a violation of the constitutional guarantee of Equal Protection’; and that ‘[p]rosecution of pregnant, allegedly drug-addicted women is against public policy for numerous moral and ethical reasons.’ The State responded to that motion on October 13, 2009. In the State's response, it agreed that on January 31, 2009, Ankrom gave birth to a son and that medical records *402 showed that Ankrom tested positive for cocaine immediately prior to giving birth and that the child tested positive for cocaine after birth. Based on that conduct, the State argued that prosecution of Ankrom was proper under [§ 26-15-3.2, Ala.Code 1975](#). On October 15, 2009, the trial court denied Ankrom's motion.

“On April 1, 2010, Ankrom pleaded guilty to a violation of [§ 26-15-3.2\(a\)\(1\), Ala.Code 1975](#).”

Ankrom v. State, 152 So.3d 373, 375-76 (*Ala.Crim.App.*2011). Ankrom was sentenced to three years in prison, but her sentence was suspended and she was placed on probation for one year. *Ankrom*, 152 So.3d at 375.

In its unpublished memorandum in *Kimbrough v. State*, 114 So.3d 163 (*Ala.Crim.App.*2011) (table), the Court of Criminal Appeals recounted the facts of Kimbrough's case as follows:

“In September 2008, Amanda Helaine Borden Kimbrough was indicted for the chemical endangerment of a child that resulted in death, a violation of [§ 26-15-3.2\(a\)\(3\), Ala.Code 1975](#). The indictment stated:

“ ‘The grand jury of said county charge that, before the finding of the indictment, Amanda Helaine Borden Kimbrough, whose name is otherwise unknown to the Grand Jury than as stated, ... did knowingly, recklessly, or intentionally cause or permit a child, Timmy Wayne Kimbrough, to be exposed to, to ingest or inhale, or to have contact with a controlled substance, to wit: methamphetamine, and the exposure, ingestion, inhalation, or contact resulted in the death of Timmy Wayne Kimbrough, in violation of [[§ 26-15-3.2 of the Code of Alabama \[1975\]](#)], against the peace and dignity of the State of Alabama.’

“Kimbrough, through retained counsel, filed several pretrial motions, including four motions to dismiss the indictment. In her motions to dismiss, Kimbrough alleged: (1) that the term ‘child’ in § 26–15–3.2 did not include an unborn child, and therefore, her conduct in smoking methamphetamine while pregnant did not constitute the offense of the chemical endangerment of a child; (2) that prosecuting her for violating § 26–15–3.2 for conduct that occurred during her pregnancy when, she says, that conduct did not constitute the offense of chemical endangerment of a child, violated the doctrine of separation of powers; (3) that interpreting the term ‘child’ in § 26–15–3.2 to include an unborn child rendered the statute void for vagueness and violated her due-process right to notice that her conduct was proscribed; and (4) that interpreting the term ‘child’ in § 26–15–3.2 to include an unborn child violated her right to equal protection under the law. The trial court denied the motions without comment.

“Kimbrough initially proceeded to trial; however, after the trial court denied her motion for a judgment of acquittal at the close of the State's case, Kimbrough reached a plea agreement with the State, and the jury was dismissed. Pursuant to the plea agreement, Kimbrough pleaded guilty to the chemical endangerment of a child as charged in the indictment, and the trial court sentenced her to 10 years' imprisonment.

“Before entering her guilty plea, Kimbrough's counsel expressly reserved Kimbrough's right to appeal several issues, namely:

“ ‘Colbert County being improper venue and improper jurisdiction.

*403 “ ‘The constitutional issue with an unborn child is not covered by [§ 26–15–3.2, Ala.Code 1975].

“ ‘The denial of indigency status on her behalf for the purposes of expert witnesses. The plain language of this statute shows that the legislature intended the statute to apply only to a child and not an unborn child. This statute is vague and impermissibly vague. And the legislature has declined to pass a statute that would include an unborn child in this type of situation. And that [Kimbrough] has not been afforded due process because there was no notice to her that the conduct was illegal under the statute.

“ ‘The prosecution of pregnant women is a violation of the constitution [sic] of the guaranty of equal protection. And the prosecution of a pregnant addicted woman is against public policy for ethical and morale [sic] reasons. And [Kimbrough] is not a re[sponsible] person as defined under the statute.

“ ‘And anything else I objected to.’

“The record reflects the following facts. Shortly before 10 a.m. on April 29, 2008, Kimbrough was admitted to the Helen Keller Hospital in Colbert County experiencing labor pains. She was 25 weeks and 5 days pregnant at the time. Her obstetrician, Dr. F.C. Gapultos, Jr., diagnosed her with [preterm labor](#) and ‘occult cord prolapse,’ a condition in which the umbilical cord descends through the birth canal before the fetus, resulting in the blood flow through the umbilical cord being cut off. Dr. Gapultos also ordered a urine drug screen on Kimbrough, which came back positive for methamphetamine. Both Dr. Gapultos and the biological father of Kimbrough's unborn child confronted her about using methamphetamine while pregnant, but Kimbrough denied using methamphetamine while she was pregnant.

“A [Caesarian section](#) was performed on Kimbrough and, at approximately 1:21 p.m., she delivered a baby boy she named Timmy Wayne Kimbrough (‘Timmy’). Timmy was not breathing when he was born; he was blue; and his heart rate was low for a newborn infant, approximately 80 beats per minute. Pediatric staff who were present during the [Caesarian section](#) immediately began [manual resuscitation](#) efforts on Timmy. Initially, Timmy improved, with his heart rate rising above 100 beats per minute and his color becoming more pinkish. Timmy was intubated and placed on a ventilator. However, after the intubation, Timmy's condition declined rapidly and he died at 1:40 p.m., 19 minutes after he was born.

“The pediatrician who treated Timmy opined that he had died from ‘respiratory arrest secondary to prematurity.’ However, Dr. Emily Ward, a medical examiner with the Alabama Department of Forensic Sciences who performed an autopsy on Timmy, determined that Timmy had died from ‘acute methamphetamine intoxication.’ A [toxicology screen](#) conducted on Timmy's blood and a sample of his liver tissue showed that he had both methamphetamine and [amphetamine](#), a ‘metabolite of methamphetamine’ produced when the body ‘converts’ the methamphetamine into [amphetamine](#), in his system.

“The Colbert County Department of Human Resources (‘DHR’) was notified regarding Kimbrough's testing positive for methamphetamine and Timmy's death, and Kimbrough's other two children were temporarily removed from her home and placed with Kimbrough's mother. A DHR social worker spoke *404 with Kimbrough regarding a safety plan for her children on two occasions. During one of those conversations, Kimbrough admitted that she had smoked methamphetamine with a friend three days before she had experienced labor pains. In July 2008, after having determined that the children would be safe in Kimbrough's home, DHR returned Kimbrough's children to her custody.”

Kimbrough was sentenced to 10 years in prison and appealed her conviction and sentence before her scheduled probation hearing could be held; however the record indicates that she has remained free on bond during her appeal.

Ankrom and Kimbrough appealed their convictions to the Court of Criminal Appeals. In its opinion in *Ankrom*, that court held that the word “child” in the chemical-endangerment statute included an unborn child:

“Ankrom alleges that the term ‘child’ in § 26–15–3.2, Ala.Code 1975, does not include a viable fetus. The State responds that the plain meaning of the term ‘child,’ as used in the statute, includes an unborn child.

“ ‘Principles of statutory construction instruct this Court to interpret the plain language of a statute to mean exactly what it says and to engage in judicial construction only if the language in the statute is ambiguous.’ *Ex parte Pratt*, 815 So.2d 532, 535 (Ala.2001). ‘[T]he fundamental rule [is] that criminal statutes are construed strictly against the State.’ *Ex parte Hyde*, 778 So.2d 237, 239 n. 2 (Ala.2000). ‘The “rule of lenity requires that ‘ambiguous criminal statute[s] ... be construed in favor of the accused.’ ” ’ *Ex parte Bertram*, 884 So.2d 889, 892 (Ala.2003) (quoting *Castillo v. United States*, 530 U.S. 120, 131, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000)).

“ ‘Although penal statutes are to be strictly construed, courts are not required to abandon common sense. *United States v. Green*, 446 F.2d 1169, 1173 (5th Cir.1971). Absent any indication to the contrary, the words must be given their ordinary and normal meaning. *Day v. State*, 378 So.2d 1156, 1158 (Ala.Cr.App.), reversed on other grounds, 378 So.2d 1159 (Ala.1979).’

“*Walker v. State*, 428 So.2d 139, 141 (Ala.Crim.App.1982).

“The legislature has stated that ‘[t]he public policy of the State of Alabama is to protect life, born, and unborn. This is particularly true concerning unborn life that is capable of living outside the womb.’ § 26–22–1(a), Ala.Code 1975. Chapter 15 of Title 26, Ala.Code 1975, does not define the term ‘child.’ However, Chapters 14 and 16 of Title 26, Ala.Code 1975, define a ‘child’ as a ‘person’ under the age of 18 years. § 26–14–1(3), Ala.Code 1975; § 26–16–2(1), Ala.Code 1975.

“Also, the Alabama Supreme Court has interpreted the term ‘minor child’ in Alabama's wrongful-death-of-minor statute to include a viable fetus that received prenatal injuries causing death before a live birth. *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So.2d 354 (1974). Specifically, the Court held that ‘the parents of an eight and one-half month old stillborn fetus [are] entitled to maintain an action for the wrongful death of the child’; thus, the Court explicitly recognized the viable fetus as a ‘child.’ *Eich*, 293 Ala. at 100, 300 So.2d at 358.

“Furthermore, the dictionary definition of a word provides the meaning ordinary people would give the word. *405 *Carpet Installation & Supplies of Glenco v. Alfa Mut. Ins. Co.*, 628 So.2d 560, 562 (Ala.1993). According to *Merriam–Webster's Collegiate Dictionary* 214 (11th ed. 2003), the word ‘child’ is defined as ‘an unborn or recently born person.’ The word ‘child’ is defined in *Black's Law Dictionary* 254 (8th ed. 2004), as ‘[a] baby or fetus.’

“The present case is similar to the situation in *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). We find the reasoning of the South Carolina Supreme Court in that case to be persuasive.

“In *Whitner*, a mother pleaded guilty to criminal child neglect, a violation of S.C.Code Ann. § 20–7–50 (1985), for causing her baby to be born with cocaine metabolites in its system by reason of the mother's ingestion of crack cocaine during the third trimester of her pregnancy. On appeal, the South Carolina Supreme Court held that the mother had been properly convicted of the charge. S.C.Code Ann. § 20–7–50 (1985), provided in relevant part: ‘Any person having the legal custody of any child ..., who shall, without lawful excuse, refuse or neglect to provide ... the proper care and attention for such child ..., so that the life, health or comfort of such child ... is endangered or is likely to be endangered, shall be guilty of a

misdeemeanor and shall be punished within the discretion of the circuit court.’ *Whitner*, 328 S.C. at 5, 492 S.E.2d at 779. The issue on appeal was whether that statute encompassed maternal acts that endanger or were likely to endanger the life, health, or comfort of a viable fetus. *Id.* The Court stated that

“ ‘[u]nder [South Carolina’s] Children’s Code, “child” means a “person under the age of eighteen.” S.C.Code Ann. § 20–7–30(1) (1985). The question for this Court, therefore, is whether a viable fetus is a “person” for purposes of the Children’s Code.’

“328 S.C. at 6, 492 S.E.2d at 779.

“The South Carolina Supreme Court held that a viable fetus is a child under S.C.Code Ann. § 20–7–50 (1985), reasoning:

“ ‘South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges. In 1960, this Court decided *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960). That case concerned the application of South Carolina’s wrongful death statute to an infant who died four hours after her birth as a result of injuries sustained prenatally during viability. The Appellants argued that a viable fetus was not a person within the purview of the wrongful death statute, because, inter alia, a fetus is thought to have no separate being apart from the mother.

“ ‘We found such a reason for exclusion from recovery “unsound, illogical and unjust,” and concluded there was “no medical or other basis” for the “assumed identity” of mother and viable unborn child. *Id.* at 262, 113 S.E.2d at 793. In light of that conclusion, this Court unanimously held: “We have no difficulty in concluding that a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother *is a person.*” *Id.* at 263, 113 S.E.2d at 793 (emphasis added).

“ ‘Four years later, in *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964), we interpreted *Hall* as supporting a finding that a viable fetus injured while still in the womb need not be born alive for another to maintain an action for the wrongful death of the fetus.

“ ‘ “Since a viable child is a *person before separation from the body* *406 of its mother and since prenatal injuries tortiously inflicted on such a child are actionable, it is apparent that the complaint alleges

such an ‘act, neglect or default’ by the defendant, to the injury of the child....

“ ‘ “....

“ ‘ “Once the concept of the unborn, viable child as a person is accepted, we have no difficulty in holding that a cause of action for tortious injury to such a child arises immediately upon the infliction of the injury.”

“ ‘ *Id.* at 613, 138 S.E.2d at 44 (emphasis added). *Fowler* makes particularly clear that *Hall* rested on the concept of the viable fetus as a person vested with legal rights.

“ ‘More recently, we held the word “person” as used in a criminal statute includes viable fetuses. *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984), concerned South Carolina’s murder statute, S.C.Code Ann. § 16–3–10 (1976). The defendant in that case stabbed his wife, who was nine months’ pregnant, in the neck, arms, and abdomen. Although doctors performed an emergency caesarean section to deliver the child, the child died while still in the womb. The defendant was convicted of voluntary manslaughter and appealed his conviction on the ground South Carolina did not recognize the crime of feticide.

“ ‘This Court disagreed. In a unanimous decision, we held it would be “grossly inconsistent ... to construe a viable fetus as a ‘person’ for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context.” *Id.* at 447, 319 S.E.2d at 704 (citing *Fowler v. Woodward*, supra). Accordingly, the Court recognized the crime of feticide with respect to viable fetuses.

“ ‘Similarly, we do not see any rational basis for finding a viable fetus is not a “person” in the present context. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse. Our holding in *Hall* that a viable fetus is a person rested primarily on the plain meaning of the word “person” in light of existing medical knowledge concerning fetal development. We do not believe that the plain and ordinary meaning of the word “person” has changed in any way that would now deny viable fetuses status as persons.

“ ‘The policies enunciated in the Children’s Code also support our plain meaning reading of “person.”

S.C.Code Ann. § 20–7–20(C) (1985), which describes South Carolina's policy concerning children, expressly states: “It shall be the policy of this State to concentrate on the *prevention of children's problems* as the most important strategy which can be planned and implemented on behalf of children and their families.” (emphasis added). The abuse or neglect of a child at *any* time during childhood can exact a profound toll on the child herself as well as on society as a whole. However, the consequences of abuse or neglect which takes place after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth. This policy of prevention supports a reading of the word “person” to include viable fetuses. Furthermore, the scope of the Children's Code is quite broad. It applies “to *all* children who have need of services.” S.C.Code Ann. § 20–7–20(B) (1985) (emphasis added). When *407 coupled with the comprehensive remedial purposes of the Code, this language supports the inference that the legislature intended to include viable fetuses within the scope of the Code's protection.’

“*Whitner*, 328 S.C. at 6–8, 492 S.E.2d at 779–81.

“Likewise, in the present case, we do not see any reason to hold that a viable fetus is not included in the term ‘child,’ as that term is used in § 26–15–3.2, Ala.Code 1975. Not only have the courts of this State interpreted the term ‘child’ to include a viable fetus in other contexts, the dictionary definition of the term ‘child’ explicitly includes an unborn person or a fetus. In everyday usage, there is nothing extraordinary about using the term ‘child’ to include a viable fetus. For example, it is not uncommon for someone to state that a mother is pregnant with her first ‘child.’ Unless the legislature specifically states otherwise, the term ‘child’ is simply a more general term that encompasses the more specific term ‘viable fetus.’ If the legislature desires to proscribe conduct against only a ‘viable fetus,’ it is necessary to use that specific term. However, if the legislature desires to proscribe conduct against a viable fetus and all other persons under a certain age, the term ‘child’ is sufficient to convey that meaning. In fact, proscribing conduct against a ‘child’ and a ‘viable fetus’ would be redundant.

“The term ‘child’ in § 26–15–3.2, Ala.Code 1975, is unambiguous; thus, this Court must interpret the plain language of the statute to mean exactly what it says and not engage in judicial construction of the language in the

statute. Also, because the statute is unambiguous, the rule of lenity does not apply. We do not see any rational basis for concluding that the plain and ordinary meaning of the term ‘child’ does not include a viable fetus.”

Ankrom, 152 So.3d at 379–82. Citing *Ankrom*, the Court of Criminal Appeals affirmed Kimbrough's conviction in an unpublished memorandum.

As noted, both Ankrom and Kimbrough separately petitioned this Court for a writ of certiorari, alleging that the issue decided by the Court of Criminal Appeals in their respective cases presented a material question of first impression for this Court.

II. Standard of Review

“We review questions of statutory construction and interpretation de novo, giving no deference to the trial court's conclusions. *Greene v. Thompson*, 554 So.2d 376 (Ala.1989).” *Pitts v. Gangi*, 896 So.2d 433, 434 (Ala.2004).

III. Discussion

Ankrom and Kimbrough were convicted of violating the chemical-endangerment statute by causing their unborn children to ingest a controlled substance. The facts of the petitioners' cases are not disputed; thus, the only issue before this Court is whether the chemical-endangerment statute governs the petitioners' conduct. We conclude that it does.

The chemical-endangerment statute, § 26–15–3.2, Ala.Code 1975, provides:

“(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:

“(1) Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, ^[1] to ingest or inhale, *408 or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A–12–260. A violation under this subdivision is a Class C felony.

“(2) Violates subdivision (1) and a child suffers serious physical injury by exposure to, ingestion of, inhalation

of, or contact with a controlled substance, chemical substance, or drug paraphernalia. A violation under this subdivision is a Class B felony.

“(3) Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the child. A violation under this subdivision is a Class A felony.

“(b) The court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.

“(c) It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was administered to the child in accordance with the prescription instructions provided with the controlled substance.”

The petitioners raise three main arguments on appeal. First, the petitioners argue that the Court of Criminal Appeals misapplied the chemical-endangerment statute in *Ankrom* when it applied that statute to the use of a controlled substance by a pregnant woman that resulted in the ingestion of that controlled substance by her unborn child. Next, the petitioners argue that the Court of Criminal Appeals' decision in *Ankrom* is bad public policy. Finally, the petitioners argue that the Court of Criminal Appeals' decision in *Ankrom* violates both the United States Constitution and the Alabama Constitution.

A.

THE COURT OF CRIMINAL APPEALS ERRED IN ANKROM WHEN IT APPLIED THE CHEMICAL-ENDANGERMENT STATUTE TO THE USE OF A CONTROLLED SUBSTANCE BY A PREGNANT WOMAN THAT RESULTED IN THE INGESTION OF THAT CONTROLLED SUBSTANCE BY HER UNBORN CHILD.

The petitioners present seven arguments in support of their position that the chemical-endangerment statute does not protect unborn children.

1. The word “child,” as used in the chemical-endangerment statute, does not include an unborn child.

Ankrom argues that “[t]he legislature did not intend for the term ‘child’ as used in [the chemical-endangerment statute]

to impliedly include an unborn child,” Ankrom's brief, at 6, and states that this “Court must determine the intent of the legislature and ascribe meaning to the word ‘child’ that comports with the legislature's intent.” Ankrom's brief, at 8–9. *409 She argues that “[c]riminal statutes are to be *strictly construed in favor of those persons sought to be subjected to their operation*” and that “all doubts concerning statutory interpretation are to *predominate in favor of the accused*.” Ankrom's brief, at 7. Similarly, Kimbrough argues that “[b]ecause this is a criminal case, any perceived ambiguity in the chemical endangerment statute must be resolved in favor of reversing the conviction.” In support of her argument, Kimbrough cites *Ex parte Bertram*, 884 So.2d 889 (Ala.2003), and argues that the Court of Criminal Appeals “incorrectly determined that it need not observe the rule of lenity because the word ‘child’ plainly applied to a ‘viable fetus.’ ... [H]owever, its analysis demonstrates that the term ‘child’ is, at best, ambiguous.” Kimbrough's brief, at 24. Thus, Kimbrough argues, “it is clear that this Court must reject the [Court of Criminal Appeals'] decision usurping the legislative function and rewriting Alabama law.” Kimbrough's brief, at 25.

[1] [2] [3] [4] In *Bertram*, this Court stated:

“ ‘A basic rule of review in criminal cases is that *criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e., defendants*.

“ ‘Penal statutes are to reach no further in meaning than their words.

“ ‘One who commits an act which does not come within the words of a criminal statute, according to the general and popular understanding of those words, when they are not used technically, *is not to be punished thereunder; merely because the act may contravene the policy of the statute*.

“ ‘No person is to be made subject to penal statutes by implication and *all doubts concerning their interpretation are to predominate in favor of the accused*.’ ”

884 So.2d at 891 (quoting *Clements v. State*, 370 So.2d 723, 725 (Ala.1979) (citations omitted; emphasis added in *Bertram*)).

[5] [6] [7] In ascertaining the legislature's intent in enacting a statute, this Court will first attempt to assign plain meaning to the language used by the legislature. As the Court of Criminal Appeals explained in *Walker v. State*, 428 So.2d 139, 141 (Ala.Crim.App.1982), “[a]lthough penal

statutes are to be strictly construed, courts are not required to abandon common sense. Absent any indication to the contrary, the words must be given their ordinary and normal meaning.” (Citations omitted.) Similarly, this Court has held that “[t]he fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. If possible, the intent of the legislature should be gathered from the language of the statute itself.” *Volkswagen of America, Inc. v. Dillard*, 579 So.2d 1301, 1305 (Ala.1991).

[8] [9] [10] [11] [12] We look first for that intent in the words of the statute. As this Court stated in *Ex parte Pfizer, Inc.*, 746 So.2d 960, 964 (Ala.1999):

“ ‘When the language of a statute is plain and unambiguous, as in this case, courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning—they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature.’ *Ex parte T.B.*, 698 So.2d 127, 130 (Ala.1997). Justice Houston wrote the following for this Court in *DeKalb County LP Gas Co. v. Suburban Gas, Inc.*, 729 So.2d 270 (Ala.1998):

“ ‘In determining the meaning of a statute, this Court looks to the plain *410 meaning of the words as written by the legislature. As we have said:

“ ‘ ‘Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.’ ”

“ ‘*Blue Cross & Blue Shield v. Nielsen*, 714 So.2d 293, 296 (Ala.1998) (quoting *IMED Corp. v. Systems Eng'g Assocs. Corp.*, 602 So.2d 344, 346 (Ala.1992)); see also *Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n*, 589 So.2d 687, 689 (Ala.1991); *Coastal States Gas Transmission Co. v. Alabama Pub. Serv. Comm'n*, 524 So.2d 357, 360 (Ala.1988); *Alabama Farm Bureau Mut. Cas. Ins. Co. v. City of Hartselle*, 460 So.2d 1219, 1223 (Ala.1984); *Dumas Brothers Mfg. Co. v. Southern Guar. Ins. Co.*, 431 So.2d 534, 536 (Ala.1983); *Town of Loxley v. Rosinton Water, Sewer & Fire Protection Auth., Inc.*, 376 So.2d 705, 708 (Ala.1979). It is true

that when looking at a statute we might sometimes think that the ramifications of the words are inefficient or unusual. However, it is our job to say what the law is, not to say what it should be. Therefore, only if there is no rational way to interpret the words as stated will we look beyond those words to determine legislative intent. To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers. See *Ex parte T.B.*, 698 So.2d 127, 130 (Ala.1997).’ ”

Thus, only when language in a statute is ambiguous will this Court engage in statutory construction. As we stated in *Ex parte Pratt*, 815 So.2d 532, 535 (Ala.2001), “[p]rinciples of statutory construction instruct this Court to interpret the plain language of a statute to mean exactly what it says and to engage in judicial construction only if the language in the statute is ambiguous.”

As the Court of Criminal Appeals explained in *Ankrom*, the rule of construction referenced in *Bertram* applies only where the language of the statute in question is ambiguous; the issue in these cases is whether the plain, ordinary, and normal meaning of the word “child” includes an unborn child. Concluding that the word “child” in the chemical-endangerment statute plainly and unambiguously includes unborn children, the Court of Criminal Appeals stated in *Ankrom* that it was declining to “engage in judicial construction.” 152 So.3d at 379.

Kimbrough argues that “the chemical endangerment statute, by its plain language, does not apply to unborn children, pregnant women, or the biological processes that occur during pregnancy, labor, or delivery.” Kimbrough's brief, at 10. Kimbrough argues that “[t]here is no hint in the terms of this statute as they are ‘commonly understood’ that it has any application to a pregnant woman's relationship to her fetus.” Kimbrough's brief, at 12. Instead, Kimbrough argues, “[t]he ordinary meaning of [the word ‘child’ in the chemical-endangerment statute] is limited to children who have been born and therefore exist in a world where they might come in contact with drug paraphernalia or places where drugs are made or sold.” Kimbrough's brief, at 12.

Kimbrough also argues that “[t]he extrinsic materials relied upon by the Court of Criminal Appeals do not support expanding *411 the law to hold pregnant women criminally liable in relation to the viable fetus they carry.” Kimbrough's brief, at 19. She argues that the chemical-endangerment

statute is ambiguous because, she says, the Court of Criminal Appeals “had to resort to extrinsic material to support its purported plain language interpretation.” Kimbrough’s brief, at 19. That “reliance” on that extrinsic material, Kimbrough argues, “clearly acknowledges that the term ‘child’ in [the chemical-endangerment statute] is, at best, ambiguous.” Kimbrough’s brief, at 19. Additionally, Kimbrough argues that, even if the Court of Criminal Appeals correctly applied the definitions it cited, those definitions were selected in an “arbitrary” manner, and their selection demonstrates the “selection of a favorite definition” rather than a plain reading of the statute. Kimbrough’s brief, at 15–16.

Conversely, the State argues that “[t]he plain meaning of the word ‘child,’ as used in the [chemical-endangerment] statute, includes an unborn child.” The State admits that the chemical-endangerment statute does not define the word “child,” but it argues that “an unborn child is a person.” Citing this Court’s decision in *Carpet Installation & Supplies of Glencoe v. Alfa Mutual Insurance Co.*, 628 So.2d 560, 562 (Ala.1993), the State argues that “[t]his Court has stated that the dictionary definition of a word provides the meaning ordinary people give the word.” The State then cites definitions of the word “child” from *Black’s Law Dictionary* 271 (9th ed. 2009) (“[a] baby or fetus”), and *Merriam–Webster’s Collegiate Dictionary* 214 (11th ed. 2008) (“an unborn or recently born person”). State’s brief in *Ankrom*, at 8.

[13] As the definitions cited by the State indicate, the plain meaning of the word “child” is broad enough to encompass all children—born and unborn—including Ankrom’s and Kimbrough’s unborn children in the cases before us. As the Court of Criminal Appeals said in *Ankrom*:

“Likewise, in the present case, we do not see any reason to hold that a viable fetus is not included in the term ‘child,’ as that term is used in § 26–15–3.2, Ala.Code 1975. Not only have the courts of this State interpreted the term ‘child’ to include a viable fetus in other contexts, the dictionary definition of the term ‘child’ explicitly includes an unborn person or a fetus. In everyday usage, there is nothing extraordinary about using the term ‘child’ to include a viable fetus. For example, it is not uncommon for someone to state that a mother is pregnant with her first ‘child.’ Unless the legislature specifically states otherwise, the term ‘child’ is simply a more general term that encompasses the more specific term ‘viable fetus.’ If the legislature desires to proscribe conduct against only a ‘viable fetus,’ it is necessary to use that specific term. However, if the legislature desires to proscribe conduct

against a viable fetus and all other persons under a certain age, the term ‘child’ is sufficient to convey that meaning. In fact, proscribing conduct against a ‘child’ and a ‘viable fetus’ would be redundant.

“The term ‘child’ in § 26–15–3.2, Ala.Code 1975, is unambiguous; thus, this Court must interpret the plain language of the statute to mean exactly what it says and not engage in judicial construction of the language in the statute. Also, because the statute is unambiguous, the rule of lenity does not apply. We do not see any rational basis for concluding that the plain and ordinary meaning of the term ‘child’ does not include a viable fetus.”

152 So.3d at 382. We find this reasoning persuasive and agree with the Court of *412 Criminal Appeals that the plain meaning of the word “child” in the chemical-endangerment statute includes unborn children.

In her reply brief, Ankrom argues that the use of the word “or” in both definitions cited by the State is disjunctive, meaning that only one of the possible definitions could be applicable: i.e., if the word “child” can mean “recently born person” then it cannot also mean “unborn person”; if “child” can mean “unborn person” then it cannot also mean “recently born person.” Ankrom argues that “it is clear that the Alabama legislature’s intent coincides with the portion of *Black’s* and *Merriam–Webster’s* dictionaries that says ‘baby’ ‘or recently born person.’ ” Ankrom’s reply brief, at 6.

The use of the word “or,” however, does not always indicate that only one of the joined words is applicable in a particular situation. This Court has repeatedly recognized that the word “or” is not always intended to express strict disjunction. As this Court stated in *Rutland v. Emanuel*, 202 Ala. 269, 272, 80 So. 107, 110 (1918), “[i]t is hardly necessary to add that, notwithstanding the words ‘and’ and ‘or’ are, when abstractly considered, unambiguous in their respective meanings, the judicial function of reading one of them as if the other had been used is not thereby restricted.” See also *Hilliard v. Binford’s Heirs*, 10 Ala. 977, 996 (1847); *In re Opinion of the Justices*, 252 Ala. 194, 198, 41 So.2d 559, 563 (1949).²

2. Other statutes in the Alabama Code require this Court to interpret the word “child” as excluding unborn children. Ankrom argues that “[t]here are many clues throughout Title 26 and other Alabama Code Sections which show that the legislature *did not* intend for [the chemical-endangerment statute] to apply to an unborn child or fetus.” Ankrom’s

brief, at 9. She cites [§ 26-14-1\(2\), Ala.Code 1975](#), which defines “child” as “[a] person under the age of 18 years,” and [§ 26-16-91\(2\), Ala.Code 1975](#), which defines “child” as “[a] person who has not yet reached his or her eighteenth birthday.” Ankrom argues that these definitions, appearing in the chapters immediately preceding and following the chapter containing the chemical-endangerment statute, reflect the legislature's intent in the chemical-endangerment statute, as well. Ankrom cites [Draper v. State ex rel. Patillo, 175 Ala. 547, 557, 57 So. 772, 775 \(1911\)](#), in which this Court stated that “[w]hen words which have a known meaning and significance are used in a statute, it must be presumed that the Legislature used or adopted them in their well-known meaning and sense; the contrary not appearing.”

Ankrom also notes that, in other statutes, the Alabama Legislature has chosen [*413](#) to clarify its intent to include an unborn child within the statute by using the words “fetus,” *see, e.g.*, [§ 26-23-1 et seq., Ala.Code 1975](#),³ or “unborn child,” *see, e.g.*, [§ 26-23A-1 et seq., Ala.Code 1975](#).⁴ Ankrom argues that, if the legislature had intended to include unborn children in the class of persons protected by the chemical-endangerment statute, it would have used either of those more specific terms to clarify the scope of the statute. Ankrom's brief, at 10. Additionally, in her reply brief, Ankrom notes that the chemical-endangerment statute was enacted in 2006, the same year the legislature amended the homicide statute to specifically define “person” to include an unborn child. Ankrom's reply brief, at 3.

Kimbrough, like Ankrom, points to specific instances where the Alabama Code specifically refers to unborn children and argues that “when the Alabama legislature legislates regarding the unborn it uses clear and unequivocal language, rather than the now ambiguous term ‘child.’ ” Kimbrough's brief, at 27. Kimbrough also claims that the legislative intent to limit the meaning of the word “child” to children who have already been born is demonstrated by the exception in [§ 26-15-3.2\(c\), Ala.Code 1975](#), for medications prescribed to the child, because, she says, “[p]rescriptions are not written for” unborn children.⁵ Kimbrough's brief, at 12–13. Kimbrough also alleges that, if the definition of the word “child” includes unborn children, then many forms used by State agencies, which distinguish between children already born and children yet to be born, must be revised. Kimbrough's brief, at 17–18.

Similarly, in her reply brief, Kimbrough argues that “[t]he meaning of the [chemical-endangerment] statute does not turn on the meaning of ‘child.’ ” Kimbrough's reply brief,

at 6. Kimbrough argues that “[t]he [chemical-endangerment] statute contains more than 50 words, none of which mention a pregnant woman's drug use” and that “the rules of statutory interpretation require a court to examine the statutory language as a whole.” Kimbrough's reply brief, at 6. In support of this argument, Kimbrough cites [Boutwell v. State, 988 So.2d 1015, 1020 \(Ala.2007\)](#), in which this Court stated that, “[i]n interpreting a statute, a court does not construe provisions in isolation, but considers them in the context of the entire statutory scheme; moreover, to ascertain legislative intent, a court should look to the entire act instead of isolated phrases and clauses.”

In response, the State argues that the legislature's general intent to protect unborn life is evident from a variety of other statutory provisions. For example, the legislature has stated that “[t]he public policy of the State of Alabama is to protect life, born, and unborn.” [§ 26-22-1\(a\), Ala.Code 1975](#). Similarly, the legislature has declared that “[e]very child is entitled to live in safety and in health and to survive into adulthood.” [§ 26-16-90, Ala.Code 1975](#). The legislature has created an exception to the education requirements for a driver's license when the person “is a parent with the care and custody of a [*414](#) minor or *unborn child*.” [§ 16-28-40, Ala.Code 1975](#) (emphasis added). Unborn children are recognized as persons with regard to real property, *see, e.g.*, [§ 19-3-170, Ala.Code 1975](#) (referring to “any other person, born or unborn”), and are specifically included within the definition of “person” in the homicide statute, *see* [§ 13A-6-1\(a\)\(3\), Ala.Code 1975](#) (defining “person” as “a human being, including an unborn child in utero at any stage of development, regardless of viability”). The State notes that, informed by these statutes, this Court has applied Alabama's wrongful-death statute to protect unborn children at all stages of gestation. *See* [Mack v. Carmack, 79 So.3d 597 \(Ala.2011\)](#); [Hamilton v. Scott, 97 So.3d 728 \(Ala.2012\)](#). Ultimately, the State argues, “it would be inconsistent to treat an unborn child as a person for purposes of assigning civil and criminal liability, but not do so under [the chemical-endangerment statute].” State's brief in *Ankrom*, at 16.

A review of the statutes cited by the petitioners and of the context of the chemical-endangerment statute provides no conclusive evidence as to how this Court should interpret the word “child” as that term is used in the chemical-endangerment statute. The statutory definitions of the word “child” cited by the petitioners are not conclusive because both set a maximum age for childhood without setting a minimum age. Similarly, when Kimbrough argues in her

reply brief that “the examples put forth by the State show that the legislature uses the explicit term ‘unborn child’ to refer to the unborn, rather than rely on the now ambiguous term ‘child,’ ” Kimbrough's reply brief, at 10, she fails to note that the legislature's decision to use the more restrictive words “fetus” and “unborn child” was appropriate in those other statutes because those statutes applied only to protect unborn children.⁶ In sum, nothing in the statutes cited by the petitioners contradicts the plain meaning of the word “child” in the chemical-endangerment statute to include an unborn child or requires this Court to interpret the word “child” as excluding unborn children.

3. *The legislative history of attempts to amend the chemical-endangerment statute demonstrates that the word “child” as used in that statute does not include unborn children.*

[14] Kimbrough argues that “[t]he Legislative history of [the chemical-endangerment statute] and subsequent legislative inaction clarify that the Legislature never intended this law to apply to a [sic] pregnant women who continue to term and used a controlled substance.” Kimbrough's brief, at 28. She claims that “[t]he sponsor” of the chemical-endangerment statute⁷ “is on record saying he did not intend the law to be used against new mothers,”⁸ Kimbrough's brief, at 28–29, *415 and that “there have been several legislative attempts to amend the chemical endangerment statute to include fetuses exposed prenatally to controlled substances.” Kimbrough's brief, at 29. She cites House Bill 723 (2008 Regular Session of the Alabama Legislature), which, she claims, would have amended the chemical-endangerment statute to apply specifically to unborn children, while adding an exception for medication prescribed for the treatment of the pregnant mother or the unborn child. Kimbrough's brief, at 30. Kimbrough argues that “[t]he debate about the bill makes clear that its death was deliberate, not the result of an understanding that the existing law already reached pregnant women who used an illegal drug and continued to term.” Kimbrough's brief, at 30. She alleges that similar bills were introduced in 2010 (House Bill 601 (2010 Regular Session)) and in 2011 (House Bill 8 and Senate Bill 34 (2011 Regular Session)) and that none of those bills became law.⁹ Thus, Kimbrough concludes, this history “leaves no doubt that these efforts have failed because of public health and public policy concerns relating to us[ing] the criminal law to address what the legislature itself recognizes to be health problems relating to pregnancy and drug use.” Kimbrough's brief, at 34.

The State argues in response that the language of the chemical-endangerment statute “is clear: an unborn child is a ‘child’ as that word is used in the [chemical-endangerment statute].” State's brief in *Kimbrough*, at 52–53. The State argues that, because the chemical-endangerment statute is unambiguous, “it would be inappropriate for this Court to examine extrinsic materials such as the Legislature's failure to amend the statute.” State's brief in *Kimbrough*, at 52–53. The State also argues that, “contrary to Kimbrough's assumptions,” the amendments Kimbrough refers to “were originally intended to make it explicit that an unborn child is—and always has been—included within the [chemical-endangerment] statute's protections.” State's brief in *Kimbrough*, at 54. Thus, the State argues, “[t]he fact that the Legislature ultimately failed to take any *416 action on these proposed amendments may easily be read as proof that it believed the statute clearly included an unborn child within its protection and that it did not need clarification.” State's brief in *Kimbrough*, at 54–55.

[15] Interpreting a statute based on later attempts to amend that statute is problematic. As the United States Supreme Court stated in *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990):

“[S]ubsequent legislative history is a ‘hazardous basis for inferring the intent of an earlier’ Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction, ‘including the inference that the existing legislation already incorporated the offered change.’ ”

(Citations omitted.)

[16] In this case, it is possible to conclude, as Kimbrough argues, that the legislature understood the original chemical-endangerment statute to protect only children who were already born. It is also possible to conclude, as the State argues, that the legislature understood the original chemical-endangerment statute to protect all children—born and unborn—and that proposals to amend the statute were unnecessary attempts to clarify the legislature's original intent. This Court cannot determine the intentions of the legislature apart from the language in the chemical-endangerment statute that is now before us; as discussed *supra*, the plain meaning of that statutory language is to

include within its protection unborn children. *See LTV Corp., supra; Becton v. Rhone-Poulenc, Inc.*, 706 So.2d 1134, 1139 (Ala.1997) (“‘[S]ubsequent legislative history’ is not helpful as a guide to understanding a law.”) (quoting *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1438 (7th Cir.1988), citing in turn *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988))).

4. *The language in the child-endangerment statute makes that statute inapplicable to unborn children.*

[17] Kimbrough argues that the chemical-endangerment statute cannot plainly be read to protect unborn children because, she says, the word “environment” in the chemical-endangerment statute cannot refer to an unborn child’s existence within its mother’s womb. She states that “[n]o dictionary defines ‘environment’ to be synonymous with ‘pregnant woman,’ ‘uterus,’ or ‘womb.’” However, it is not necessary to find the words “uterus” or “womb” in the definition of the word “environment”; the word “environment” refers simply to a person’s surroundings, to the situation in which a person lives his or her life. *Black’s Law Dictionary* 479 (5th ed. 1979) defines “environment” as “[t]he totality of physical, economic, cultural, aesthetic, and social circumstances and factors which surround and affect ... the quality of peoples’ lives.” Clearly, for an unborn child, the mother’s womb is an essential part of its physical circumstances; in the cases before us, it was while Ankrom’s and Kimbrough’s unborn children were within their mothers’ wombs that they ingested controlled substances.

[18] [19] [20] Kimbrough also argues that “[t]he very title of the statute describes the criminalized action as exposing a child to an environment where controlled substances are ‘produced’ or ‘distributed’—neither of which would be within a reasonably *417 intelligent woman’s understanding of her bodily functions.” Kimbrough’s brief, at 18. These words appear solely in the title of the statute, not in the text of the statute, and, as this Court has previously held, the title of a statute does not override the plain meaning of the words contained in that statute:

“ ‘The title or preamble may be used to remove ambiguity or uncertainty in a statute; *it cannot, however, be used to contradict the plain, unambiguous terms of the statute itself.* *See Newton v. City of Tuscaloosa*, 251 Ala. 209, 218, 36 So.2d 487, 494 (1948) (“both the preamble and the title of an act may be looked to in order to remove ambiguities and uncertainty in the enacting clause”); *United States v. McCrory*, 119 F. 861 (5th Cir.1903) (if the act is free from

doubt or ambiguity, the title of an act may not be resorted to in construing the act); and *Bartlett v. Morris*, 9 Port. 266 (Ala.1839) (the title of an act may explain what is doubtful, but it cannot control what is contained in the body of the act).’ ”

City of Bessemer v. McClain, 957 So.2d 1061, 1084 (Ala.2006) (Harwood, J., concurring in part and dissenting in part and quoting from main opinion on original deliverance (withdrawn on rehearing)) (emphasis added). In this case, because, given a plain-meaning reading, the word “child” in the chemical-endangerment statute includes unborn children, the use of the word “distribute” in the title of that statute cannot be interpreted to contradict the plain meaning of the text of the statute.

5. *This Court should follow the majority of states in refusing to apply the chemical-endangerment statute to protect unborn children.*

Kimbrough argues that, “[d]espite the overwhelming jurisprudence from other states refusing to extend criminal laws to pregnant women in relation to the unborn children they carry, ... [t]he [Court of Criminal Appeals] chose to follow one outlier state, South Carolina,” whose “unique law is inapplicable in Alabama.” Kimbrough’s brief, at 53. *Whitner v. State* 328 S.C. 1, 492 S.E.2d 777 (1997), is not persuasive, Kimbrough argues, because “South Carolina courts, ... unlike Alabama’s courts, have the authority to create new common law crime[s].” Kimbrough’s brief, at 54.

The State argues that, like the Court of Criminal Appeals, this Court “should rely on the persuasive reasoning of *Whitner* and find that [Ankrom’s and] Kimbrough’s prenatal drug use violated [the chemical-endangerment statute].” State’s brief in *Kimbrough*, at 30. *Whitner*, the State argues, is persuasive because South Carolina law, like Alabama law, permits a wrongful-death action for the death of an unborn child, and because, in both states, the word “person” is defined, at least for some criminal offenses, to include unborn children.

Additionally, the State argues that the cases relied on by the petitioners in advancing this argument are not persuasive because, the State says, “[m]any of the states that have disallowed the prosecution of pregnant women for conduct committed during their pregnancies have done so on grounds of statutory construction based on their own state law.” State’s brief in *Kimbrough*, at 39. For example, at least one state has separate statutory provisions covering cases of chemical endangerment involving unborn children. *See Kilmon v.*

State, 394 Md. 168, 905 A.2d 306 (2006). Courts in other states, whose corresponding statutes prohibit “delivery” of the controlled substance to a child, have held that those statutes do not protect unborn children because use of the controlled substance by the mother and the transfer of *418 that substance to her child through her body is not “delivery.” See *Johnson v. State*, 602 So.2d 1288 (Fla.1992); *State v. Luster*, 204 Ga.App. 156, 419 S.E.2d 32 (1992); and *People v. Hardy*, 188 Mich.App. 305, 469 N.W.2d 50 (1991). Several courts have cited the fact that their state’s homicide statute did not apply to the killing of an unborn child as relevant to holding that the chemical-endangerment statutes in those states did not protect unborn children. See *Reinesto v. Superior Court*, 182 Ariz. 190, 894 P.2d 733 (1995); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky.1993). And, the California Supreme Court held that, according to California’s murder statute, a fetus was distinct from a human being; consequently, an unborn child was not a child for purposes of California’s chemical-endangerment statute. See *Reyes v. Superior Court*, 75 Cal.App.3d 214, 141 Cal.Rptr. 912 (1977).

Furthermore, the State argues:

“Alabama law, unlike the statutory schemes in some of these states, does not provide for separate treatment for crimes committed against unborn children. Instead, it expressly includes an unborn child within the definition of ‘person’ in its criminal homicide and assault statutes. Thus, in Alabama, violent crimes committed against unborn children are prosecuted under the same provisions as violent crimes committed against adults and children who have been born.”

State’s brief in *Kimbrough*, at 42 (citations omitted). The State notes that, unlike some other states that have addressed this issue, Alabama’s child-abuse statutes define a “child” as a person *under* the age of 18 years rather than a person *between* birth and 18 years. See Ala.Code 1975, §§ 26–14–1(3); 26–16–2(1); and 26–16–91(2). Compare *State v. Geiser*, 763 N.W.2d 469 (N.D.2009) (reversing the conviction of a pregnant mother under a statute similar to the chemical-endangerment statute, relying in part on a North Dakota

statute expressly providing that age is to be calculated from birth).

In sum, although, as the petitioners correctly state, a majority of jurisdictions have held that unborn children are not afforded protection from the use of a controlled substance by their mothers, they nonetheless fail to convince this Court that the decisions of those courts are persuasive and should be followed by this Court. See *Planned Parenthood v. Casey*, 505 U.S. 833, 846, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (“[T]he State has legitimate interests from the outset of the pregnancy in protecting ... the life of the fetus that may become a child.” (quoted with approval in *Hamilton v. Scott*, 97 So.3d 728, 740 (Ala.2012) (Parker, J., concurring specially, joined by Stuart, Bolin, and Wise, JJ.))).

6. *The Court of Criminal Appeals erred in holding that the plain meaning of the word “child” included viable unborn children when the definitions cited by that court did not mention viability.*

Kimbrough notes that neither of the dictionary definitions of the word “child” cited by the Court of Criminal Appeals in *Ankrom* mention “viability,” and she argues that those definitions are at odds with the Court of Criminal Appeals’ holding in *Ankrom*, i.e., that the word “child” in the chemical-endangerment statute includes a “viable fetus.” Similarly, Ankrom argues in her reply brief that the holding of the Court of Criminal Appeals—that the word “child” includes a “viable fetus” even though the chemical-endangerment statute does not mention viability—demonstrates the ambiguity of the word “child” in the statute and requires this Court to look beyond the “plain meaning” of that word. Ankrom’s reply brief, at 7.

*419 The definitions of the word “child” cited by the Court of Criminal Appeals in *Ankrom* do not distinguish between previable and viable unborn children because the viability distinction is not found in the plain meaning and ordinary usage of the word “child,” nor is it found in the plain meaning of the word “child” as that word is used in the chemical-endangerment statute. Instead, the Court of Criminal Appeals’ insertion of the viability standard into the definition of the word “child” was based on this Court’s previous decisions holding that parents could not bring a wrongful-death action for the death of an unborn child before viability. Those cases, particularly *Gentry v. Gilmore*, 613 So.2d 1241 (Ala.1993), adopted the viability distinction, at least in part, because of a misplaced deference to *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). After *Ankrom* was decided,

however, this Court overruled *Gentry* in *Mack v. Carmack*, 79 So.3d 597 (Ala.2011), specifically permitting recovery of damages for the wrongful death of any unborn child, regardless of viability.

The Court of Criminal Appeals also looked to the South Carolina Supreme Court's decision in *Whitner*. *Whitner*, like *Gentry*, relied on *Roe* and on *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), for its description of the State's interest in the life of an unborn child before and after viability. However, outside the right to abortion created in *Roe* and upheld in *Planned Parenthood*, the viability distinction has no place in the laws of this State. See *Hamilton v. Scott*, 97 So.3d 728, 737 (Ala.2012) (Parker, J., concurring specially, with Stuart, Bolin, and Wise, JJ., joining).

[21] Thus, although *Whitner* is persuasive on the issue whether an unborn child is a person and thus a “child,” we find *Whitner*'s adoption of the viability distinction to be inconsistent with the plain meaning of the word “child” and with the laws of this State. Furthermore, to the extent that the Court of Criminal Appeals limited the applicability of the chemical-endangerment statute to *viable* unborn children in *Ankrom*, this Court expressly rejects that distinction as inconsistent with the plain meaning of the word “child” and with the laws of this State. Because we reject the Court of Criminal Appeals' application of a viability distinction, the petitioners' arguments on the issue are moot.

7. The Court of Criminal Appeals' decision in *Ankrom* is “absurd.”

Kimbrough argues that “[a]pplying [the chemical-endangerment statute] to pregnant women who continue to term despite having used a controlled substance would produce absurd and illogical results harmful to justice and public health unintended by the Alabama Legislature” and that “[s]tatutes should be construed to avoid absurd and irrational results.” Kimbrough's brief, at 35. In support of this argument, Kimbrough quotes *Lane v. State*, 66 So.3d 824, 828 (Ala.2010) (quoting *City of Bessemer v. McClain*, 957 So.2d at 1075 (citations omitted)), in which we stated:

“ ‘To discern the legislative intent, the Court must first look to the language of the statute. If, giving the statutory language its plain and ordinary meaning, we conclude that the language is unambiguous, there is no room for judicial construction. If a literal construction would produce an absurd and unjust result that is clearly inconsistent with the

purpose and policy of the statute, such a construction is to be avoided.’ ”

However, as discussed *supra*, this Court has determined that the “plain and ordinary meaning” of the word “child” in the chemical-endangerment statute is unambiguous; that, given its plain meaning, the word “child” includes unborn children; and that, consequently, the chemical-endangerment *420 statute is applicable to Ankrom and Kimbrough. As we stated in *Ex parte Pratt*, 815 So.2d at 535, “[p]rinciples of statutory construction instruct this Court to interpret the plain language of a statute to mean exactly what it says and to engage in judicial construction only if the language in the statute is ambiguous.” Thus, there is “no room for judicial construction” of the chemical-endangerment statute in this case, and we need not address the merits of Kimbrough's reasons she believes that applying the chemical-endangerment statute to protect unborn children is absurd.

B.

THE COURT OF CRIMINALS APPEALS' DECISION IN ANKROM IS BAD PUBLIC POLICY.

[22] Although the briefs of the petitioners and of several amici curiae recite numerous potential public-policy implications of this Court's decision in these cases, policy cannot be the determining factor in our decision; public-policy arguments should be directed to the legislature, not to this Court. As we stated in *Boles v. Parris*, 952 So.2d 364, 367 (Ala.2006): “[I]t is well established that the legislature, and not this Court, has the exclusive domain to formulate public policy in Alabama.”

This is not because policy is unimportant but because policy arguments are ill-suited to judicial resolution. See *M & Assocs., Inc. v. City of Irondale*, 723 So.2d 592, 599 (Ala.1998) (“ ‘There are reasonable policy arguments on both sides of this issue; however, the Legislature is the body that must choose between such conflicting policy considerations.’ ” (quoting *City of Tuscaloosa v. Tuscaloosa Vending Co.*, 545 So.2d 13, 14 (Ala.1989))). For this reason, although we recognize that the public policy of this State is relevant to the application of this statute, we decline to address the petitioners' public-policy arguments; we leave those matters for resolution by the legislature. As we stated in *Marsh v. Green*, 782 So.2d 223, 231 (Ala.2000), “[t]hese concerns deal with the wisdom of legislative policy rather than constitutional issues. Matters of public policy are for the

Legislature and, whether wise or unwise, legislative policies are of no concern to the courts.” See also *Cavalier Mfg., Inc. v. Jackson*, 823 So.2d 1237, 1248 (Ala. 2001), overruled on other grounds, *Ex parte Thicklin*, 824 So.2d 723 (Ala.2002) (“The Legislature is endowed with the exclusive domain to formulate public policy in Alabama, a domain upon which the judiciary shall not tread.”). We therefore refrain from considering the policy issues raised by the petitioners or amici curiae, limiting ourselves to interpreting the text of the chemical-endangerment statute.

We would be remiss if we failed to recognize that the legislature may disagree with the result of this Court’s interpretation and application of the chemical-endangerment statute and is free to amend the statute to effect a different scope for the application of the statute. As this Court said in *Ex parte Jackson*, 614 So.2d 405, 408 (Ala.1993):

“If the Legislature disagrees with our interpretation of [the statute], then it will enact appropriate legislation to modify the statute and yield a different result in subsequent cases. With that action, this Court would not be asked to do so. This Court will not make such a modification for it.”

C.

THE DECISION OF THE COURT OF CRIMINAL APPEALS IN ANKROM VIOLATES BOTH THE UNITED STATES CONSTITUTION AND THE ALABAMA CONSTITUTION.

[23] Ankrom and Kimbrough present four arguments pertaining to the constitutionality *421 of the chemical-endangerment statute. The State contends that this Court should not address those constitutional arguments because, it says, “they are outside the scope of the writ granted by this Court.” The State’s brief, at 10. We agree. Neither Ankrom nor Kimbrough raised any constitutional arguments in their respective grounds of first impression, which were the only grounds on which we granted certiorari review; as noted above, we granted certiorari review to consider only the issue whether the word “child” in the chemical-endangerment statute includes an unborn child; we denied

certiorari review as to all other grounds, including those grounds advancing constitutional arguments. Because these constitutional arguments are not properly before us, we will not address them.

IV. Conclusion

We conclude that Court of Criminal Appeals correctly held that the plain meaning of the word “child” in the chemical-endangerment statute includes an unborn child or fetus. However, we expressly reject the Court of Criminal Appeals’ reasoning insofar as it limits the application of the chemical-endangerment statute to a *viable* unborn child. With that exception, we agree with the decisions of the Court of Criminal Appeals in both *Ankrom* and *Kimbrough*, and we therefore affirm those decisions.

1110176 —AFFIRMED.

1110219 —AFFIRMED.

WOODALL, [STUART](#), [BOLIN](#), and [MAIN](#), JJ., concur.

[PARKER](#), J., concurs specially.

[SHAW](#), J., concurs in part and concurs in the result.

[MALONE](#), C.J., and [MURDOCK](#), J., dissent.

[WISE](#), J., recuses herself. *

[PARKER](#), Justice (concurring specially).

In *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the United States Supreme Court created a fundamental right for pregnant women, allowing them to terminate their pregnancies through medical abortions under certain circumstances, in spite of the fact that those abortions resulted in the death of their unborn children. Subsequently, *Roe* has sometimes been misread as holding that those unborn children are not persons and do not have the same fundamental rights as does every other person, which rights must be protected by the law. As I explained in *Hamilton v. Scott*, 97 So.3d 728, 737 (Ala.2012) (Parker, J., concurring specially, joined by Stuart, Bolin, and Wise, JJ.), nothing could be further from the truth.

I concur in the decision of the Court today, which I authored. I write specially to emphasize that this decision, holding

that the plain language of the chemical-endangerment statute requires the application of that statute to protect unborn children, is consistent with many statutes and decisions throughout our nation that recognize unborn children as persons with legally enforceable rights in many areas of the law. This special concurrence briefly summarizes some of the protections and rights of unborn children in five areas of the law—property law, criminal law, tort law, guardianship law, and health-care ^{*422} law—demonstrating the breadth of legal protection afforded the rights of unborn children.¹⁰

I. Property Law

For centuries, the law of property has recognized that unborn children are persons with rights. For example, if a father (or, in some states, a close relative) died before his child was born, that child would inherit from the father as if he or she had already been born at the time the father died.¹¹ Similarly, if a will failed to provide for the possibility of a child born after the execution of the will and a child was born, the omitted child could, in many cases, receive a share in the estate equal in value to what he or she would have received if the testator had died intestate or a share equal in value to that provided to children named in the will.¹² Some states apply a ^{*423} similar rule to ownership of future interests in land, as well.¹³

II. Criminal Law

There are at least three aspects of criminal law where the states have increasingly protected fetal life: first, criminalizing fetal homicide; second, making the pregnancy of a homicide victim an aggravating factor that can lead to the imposition of the death penalty; and, third, prohibiting the execution of pregnant criminals.

A. Fetal–Homicide Statutes

In a strong majority of states, killing an unborn child is criminal homicide unless it occurs as the result of a medical abortion. The majority of states prohibit any killing of an unborn child, other than a medical abortion at the mother's request, regardless of gestational age.¹⁴ However, some ^{*424} states limit the applicability of homicide statutes based on the gestational age of the fetus. The most common

age requirements are viability, which is that portion of the pregnancy where the unborn child is capable of surviving birth and living outside the womb,¹⁵ and quickening, which is the point during the pregnancy when the pregnant woman first notices the movements of her unborn child.¹⁶ A few states have created other age requirements.¹⁷

B. Penalty–Enhancement Statutes

Seven states specifically provide that the murder of a pregnant woman is an aggravating factor that may justify the imposition of the death penalty.¹⁸ In nine other ^{*425} states, the murder of a pregnant woman and her unborn child can lead to the application of the death penalty under statutes that allow for imposing the death penalty where a defendant murders more than one person in a single incident.¹⁹ And in Florida, a killing that would be capital murder if the pregnant woman died is capital murder if the mother survives but her unborn child dies.²⁰

C. Restrictions on Imposition of the Death Penalty

Of the 33 states in which the death penalty is authorized by law, at least 23 states have statutes prohibiting the execution of a pregnant woman.²¹ If a pregnant woman is sentenced to death, the woman's sentence is suspended, permitting the unborn child to develop and be born, thus protecting that unborn child's life.

III. Tort Law

Tort law recognizes the humanity of unborn children by permitting actions to recover damages for prenatal injury and for prenatal wrongful death.

A. Prenatal Injuries

Thirty states permit recovery of damages for *nonfatal prenatal injuries*, regardless of the gestational age of the unborn child at the time the child suffered those injuries.²² Seventeen other states and the ^{*426} District of Columbia permit an action to recover damages for *prenatal injuries* when those injuries occur after viability, but have not determined whether

an action may be brought for injuries occurring before viability.²³

*427 B. Wrongful Death

Forty states and the District of Columbia permit recovery of damages for the wrongful death of an unborn child when post-viability injuries to that child cause its death before birth. See *Hamilton v. Scott*, 97 So.3d at 737 (Parker, J., concurring specially, joined by Stuart, Bolin, and Wise, JJ.).²⁴ Of these states, 2 also allow recovery in any case where the child dies *428 after quickening even if it is not yet viable,²⁵ and 11 states allow recovery regardless of the stage of pregnancy when the injury and death occur.²⁶

IV. Guardianship Law

All states—by statute, rule, or precedent—permit a court to appoint a guardian ad litem to represent the interests of an unborn child in various matters including estates and trusts.²⁷

*429 V. Health–Care Law

Every state permits competent adults to execute advance directives, including living wills and durable powers of attorney for health care. These documents describe the types of health care the author wishes to receive or not receive if he or she is unable to make decisions concerning his or her health care. With a few limited exceptions, however, most states prohibit the withdrawal or withholding of life-sustaining treatment from a pregnant woman, regardless of her advance directive.²⁸ Similarly, those states generally prohibit an agent acting under a health-care power of attorney from authorizing an abortion.²⁹

Conclusion

The decision of this Court today is in keeping with the widespread legal recognition that unborn children are persons with rights that should be protected by law. Today, the only major area in which unborn children are denied legal protection is abortion, and that denial is only because of the dictates of *Roe*. Furthermore, the decision in the present cases

is consistent with the Declaration of Rights in the Alabama Constitution, which states that “all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; *that among these are life*, liberty and the pursuit of happiness.” Ala. Const.1901, § 1 (emphasis added).³⁰

*430 SHAW, Justice (concurring in part and concurring in the result).

These cases present the very narrow issue whether the word “child” in Ala.Code 1975, § 26–15–3.2, the “chemical-endangerment statute,” includes an unborn child or fetus. Section 26–15–3.2(a) provides:

“(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:

“(1) Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A–12–260....

“(2) Violates subdivision (1) and a child suffers serious physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia....

“(3) Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the child....”

On January 31, 2009, Hope Elisabeth Ankrom gave birth to a son, B.W. The evidence at trial indicated that Ankrom tested positive for cocaine prior to giving birth and that the child tested positive for cocaine after his birth. Medical records showed that Ankrom had tested positive for cocaine and marijuana on more than one occasion during her pregnancy. Ankrom was charged with and pleaded guilty to violating § 26–15–3.2(a)(1) in that she knowingly, recklessly, or intentionally caused or permitted B.W. to be exposed to, to ingest or inhale, or to have contact with a controlled substance, namely, cocaine.³¹

The evidence at the trial of Amanda Helaine Borden Kimbrough indicated that she ingested methamphetamine while pregnant with her son, Timmy. He was born prematurely during the 25th week of the pregnancy and died 19 minutes after birth from acute methamphetamine intoxication. Kimbrough was charged with, and pleaded

guilty to, violating § 26–15–3.2(a)(3) in that she knowingly, recklessly, or intentionally caused or permitted Timmy to be exposed to, to ingest or inhale, or to have contact with a controlled substance, namely, methamphetamine,³² which resulted in his death.

The only issue involved in these two appeals is whether B.W. and Timmy were each a “child” within the meaning of § 26–15–3.2(a).

“In determining the meaning of a statute, this Court looks to the plain meaning of the words as written by the legislature. As we have said:

“ ‘ ‘Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, *431 then there is no room for judicial construction....’ ” ’ ”

DeKalb County LP Gas Co. v. Suburban Gas, Inc., 729 So.2d 270, 275 (Ala.1998) (quoting *Blue Cross & Blue Shield v. Nielsen*, 714 So.2d 293, 296 (Ala.1998), quoting in turn *IMED Corp. v. Systems Eng’g Assocs. Corp.*, 602 So.2d 344, 346 (Ala.1992)).

I see no patent or latent ambiguity in the word “child”; it is not a term of art and contains no inherent uncertainty. This Court’s most cited dictionary defines “child” as “an unborn or recently born person.” *Merriam–Webster’s Collegiate Dictionary* 214 (11th ed. 2003). The venerable Oxford English Dictionary defines “child” as an “unborn or newly born human being; foetus, infant.” III *The Oxford English Dictionary* 113 (2d ed. 1989). See also *Webster’s Third New International Dictionary* 388 (2002) (defining “child” as “an unborn or recently born human being”). The language of the Code section is clear; there is nothing to construe, no need to attempt to divine the “intent” of the legislature, and no need to search the Code for examples of its usage. Clearly, B.W. and Timmy were each a “child” under § 26–15–3.2 when they were exposed to, ingested, inhaled, or had contact with a controlled substance.

Some of the arguments made in these cases or concerns expressed by the Justices are premised on hypothetical situations,³³ different from the facts before us, in which the Code section might be either unconstitutional as applied or seemingly unwise in its application. It goes without saying that we cannot strike down the application of the Code section

in Ankrom’s and Kimbrough’s cases merely because the Code section might be unconstitutionally applied in some other context.³⁴ It is not the role of this Court to sit in judgment of the wisdom of the enactments of the Alabama Legislature, and “ ‘[i]t is well established that the legislature, and not this Court, has the exclusive domain to formulate public policy in Alabama.’ ” *Suttles v. Roy*, 75 So.3d 90, 104 (Ala.2010) (Shaw, J., concurring specially and quoting *Boles v. Parris*, 952 So.2d 364, 367 (Ala.2006)). See also Ala. Const.1901, Art. III, § 43.

I concur with the main opinion’s holding that the word “child” as used in § 26–15–3.2 includes an unborn child. As to the remainder of the opinion, I concur in the result.

MALONE, Chief Justice (dissenting).

I respectfully dissent. This case turns on the construction of Ala.Code 1975, § 26–15–3.2, the “chemical-endangerment” statute. This Court is therefore governed by the fundamental rule of statutory construction regarding criminal statutes, i.e., that such statutes are to be construed narrowly to avoid criminalizing actions the legislature did not specifically intend to *432 criminalize. A few of the many cases espousing this principle are *Ex parte Theodorou*, 53 So.3d 151 (Ala.2010); and *Billingsley v. State*, 115 So.3d 192 (Ala.Crim.App.2012). That this rule is fundamental is exemplified by the words of Chief Justice John Marshall in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820): “The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.” Although the majority acknowledges this settled rule, it refuses to apply it, instead favoring a “common-sense” reading of the chemical-endangerment statute that construes the term “child” as used in the statute as broadly as possible, to include unborn children back to the instant of conception.

I have great difficulty accepting this construction in light of the legislature’s action in 2006 to amend Ala.Code 1975, § 13A–6–1(a)(3), a part of Alabama’s homicide statutes, Ala.Code 1975, § 13A–6–1 et seq., to include in the definition of “person” an “unborn child.” The chemical-endangerment statute was enacted that same year, but that statute specifically uses the term “child,” as distinct from the language in the homicide statute. The majority’s rationale for its expansive interpretation of the chemical-endangerment statute in spite

of the plain language of that statute is that the legislature's use of the term "unborn child" in other statutes such as the homicide statute shows a concern for the protection of unborn children in all instances, even when the legislature specifically used the word "child," and not "unborn child," in the chemical-endangerment statute. Although I do not doubt the legislature's concern for the protection of unborn children, I have concerns in questioning the collective wisdom of the legislature as it relates to this specific statute. Secondly, I must question whether this Court is acting within correct conservative judicial principles by implying an intent to supplant the actual language used by the legislature. I believe that the legislature's use of the term "child" in the chemical-endangerment statute when it was contemporaneously using the term "unborn child" in other criminal statutes was purposed and requires this Court to distinguish between those two terms in the context of the chemical-endangerment statute. That is, the Court must give effect to the legislative intent and wisdom as expressed in the plain language of the statute. *Jefferson Cnty. Comm'n v. Edwards*, 32 So.3d 572, 586 (Ala.2009).

My disagreement with the majority's "common-sense" expansion of the chemical-endangerment statute is that that expansion potentially leads to other, more practical, problems. First, a simple application of the present state of the law set out by the majority to a woman who has conceived, but who is without knowledge that she is pregnant, and who thereafter has a glass of wine, makes her subject to a felony prosecution at the "discretion" of the State. Whether the chemicals that are harmful to the unborn child are legal or illegal, their ingestion or use by a woman who has conceived has become a felony even though the act that is criminalized is committed without knowledge or intent. I believe that the chemical-endangerment statute as construed by the majority therefore raises profound concerns for challenges to its constitutionality under the provisions of the Alabama and the United States Constitutions that require due process of and equal protection under the laws. Furthermore, the majority's opinion raises these concerns with *every expectant mother*; in a number of complex ⁴³³ situations that are significantly impacted by religious faith, racial background, economic status, and the nature of the conception, among many things; those things "all do not matter" based on the majority's opinion. Finally, and sadly for the majority's "common-sense" construction, the chemical-endangerment statute will now supply women who have, either intentionally or not, run afoul of the proscriptions of the statute a strong incentive to terminate their pregnancy. I do not believe that the majority's

construction reflects the intent and wisdom of the legislature or the long settled law governing this Court's construction of criminal statutes; I must therefore respectfully dissent.

MURDOCK, Justice (dissenting).

I agree with much of what is said by Chief Justice Malone in his dissenting opinion and with many of the arguments made by Hope Elisabeth Ankrom in her "Motion to Dismiss Indictment." In her motion, Ankrom argued

" 'that "courts in other states which have enacted the same or similar chemical endangerment statutes have determined that such statutes do not apply to prenatal conduct that allegedly harms a fetus"; that "[t]he state's contention that the defendant violated this statute renders the law impermissibly vague, and therefore the rule of lenity applies"; that "[t]he legislature has previously considered amending the statute to include prenatal conduct that harms a fetus, and declined to do so"; that "the defendant has not been accorded due process because there was no notice that her conduct was illegal under this statute"; that "[t]he prosecution of pregnant women is a violation of the constitutional guarantee of Equal Protection"; and that "[p]rosecution of pregnant, allegedly drug-addicted women is against public policy for numerous moral and ethical reasons." ' "

152 So.3d at 401 (quoting *Ankrom v. State*, 152 So.3d 373, 376 (Ala.Crim.App.2011), quoting in turn Ankrom's motion to dismiss her indictment).

In particular, I would reiterate that criminal statutes must provide ordinary persons with clear notice of what is prohibited. *United States v. Sepulveda*, 115 F.3d 882, 887 n. 12 (11th Cir.1997). See also *Ex parte Mutrie*, 658 So.2d 347, 349 (Ala.1993); *Fuller v. State*, 257 Ala. 502, 60 So.2d 202 (1952). This due-process requirement is the foundation for the rules of strict construction and lenity applicable to criminal statutes. See generally *Castillo v. United States*, 530 U.S. 120, 131, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000) (explaining that the "rule of lenity requires that 'ambiguous criminal statute[s] ... be construed in favor of the accused' "). In this regard, I note the statement in the main opinion that "it is possible to conclude, as Kimbrough argues, that the legislature understood the original chemical-endangerment statute to protect only children who were already born." 152 So.3d at 416. Nothing in the statute as now written changes that possibility.³⁵

I respectfully dissent.

All Citations

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Footnotes

- 1 We note that, although the word “expose” is not defined in the chemical-endangerment statute and none of the parties have raised the meaning of that word as an issue in this case, that word in a similar statute in another state has been interpreted to mean placing a child in a situation that involves a risk of physical harm. See [State v. Gallegos](#), 171 P.3d 426, 430 (Utah 2007):

“We agree with defendants’ argument that there must be an actual risk of harm to a child in order for conduct to constitute ‘exposure’ under the statute....

“... If the mere presence, for example, of a controlled substance in the same room or house with children constitutes endangerment, many innocent possessors of legal prescription drugs in secure places in their homes would be committing felonies under the statute. Children are not ‘exposed to’ substances they cannot acquire or be harmed by even though they may be under the same roof with them.”

- 2 The multiple possibilities for the use and meaning of the word “or” are nothing new; as this Court explained in [Harris v. Parker](#), 41 Ala. 604, 605 (1868):

“This construction of the language might be adopted, if we were bound to construe the word in the sense in which it is used by the best writers of the English language, and thus sacrifice the obvious meaning.... ‘Or’ is defined to be a ‘connective, that marks an alternative;’ ‘one of two; either; other.’ In strict accuracy, such is its signification.... But it is not always used in that sense. It is often, in common parlance, and even in written instruments, used in the sense of ‘both.’ ... Our Savior says: ‘For when two or three are gathered together in my name, there am I in the midst of them;’ yet the Christian world does not understand that text to imply an assurance of his presence when one or the other of the specified numbers are gathered together, leaving it undetermined which. On the contrary, it is understood to convey a promise of presence both in a gathering of two, and in a gathering of three—as well in the one as in the other.”

- 3 Chapter 23 of Title 26 of the Alabama Code is entitled the “Alabama Partial–Birth Abortion Ban Act of 1997.”

- 4 Chapter 23A of Title 26 of the Alabama Code is entitled “The Woman’s Right To Know Act.”

- 5 [Section 26–15–3.2\(c\), Ala.Code 1975](#), states:

“It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was administered to the child in accordance with the prescription instructions provided with the controlled substance.”

- 6 Using the word “fetus” or “unborn child” in place of the word “child” would not have been appropriate in the chemical-endangerment statute because that statute also protects children after they have been born.

- 7 Kimbrough’s assertion suggests that there was only 1 sponsor of the chemical-endangerment statute; however, there were actually 21 sponsors of Senate Bill 133, which was eventually enacted as Act No. 2006–204, Ala. Acts 2006. Act No. 2006–204 added [§ 26–15–3.2 to the Alabama Code](#).

- 8 To support her assertion that the sponsor of the chemical-endangerment statute “is on record saying he did not intend the law to be used against new mothers,” Kimbrough cites Phillip Rawls, *National Ire Over Ala. Prosecuting Pregnant Moms*, USA TODAY (August 1, 2008), which on the day this opinion was released could be found at http://www.usatoday.com/news/nation/2008–08–01–4274196709_x.htm. In that article, former Alabama State Senator Lowell Barron, who was one of the 21 sponsors of the chemical-endangerment statute, stated: “I hate to see a young mother put in prison away from her child. But if she could be put in a treatment program with her children, that would be the best course. Maybe we need to revisit the legislation.” Former Senator Barron’s views are irrelevant; this Court will not rely solely on the views of a single legislator in ascertaining the intent of a bill, even when that legislator was a sponsor of the bill. See, e.g., [Utility Ctr., Inc. v. City of Ft. Wayne](#), 868 N.E.2d 453, 459 (Ind.2007) (“ ‘In interpreting statutes, we do not impute the opinions of one legislator, even a bill’s sponsor, to the entire legislature unless those views find statutory expression.’ ” (quoting [A Woman’s Choice–East Side Women’s Clinic v. Newman](#), 671 N.E.2d 104, 110 (Ind.1996), citing in turn [O’Laughlin](#)

v. Barton, 582 N.E.2d 817, 821 (Ind.1991)); *Doe v. Bridgeport Police Dep't*, 198 F.R.D. 325, 348 n. 16 (D.Conn.2001) (" 'Post-enactment views of those involved with the legislation should not be considered when interpreting the statute.' " (quoting 2A Singer, *Sutherland Statutory Construction* § 48:20, at 184 (5th ed. 1999 Supp.)); *Davis v. City of Leawood*, 257 Kan. 512, 528, 893 P.2d 233, 244 (1995) (concluding that "post-enactment statements of individual legislators" are not "reliable indicators of the legislative intent"); *In re F.D. Processing, Inc.*, 119 Wash.2d 452, 461, 832 P.2d 1303, 1308 (1992) ("[T]he comments of a single legislator are generally considered inadequate to establish legislative intent." (citing *Yakima v. International Ass'n of Fire Fighters, Local 469*, 117 Wash.2d 655, 818 P.2d 1076 (1991), and *Convention Ctr. Coalition v. Seattle*, 107 Wash.2d 370, 730 P.2d 636 (1986))).

9 Additionally, we take judicial notice of the fact that again during the 2012 Regular Session of the Alabama Legislature another bill amending the chemical-endangerment statute (Senate Bill 31) was introduced. That bill likewise did not pass.
 * Justice Wise was presiding judge of the Court of Criminal Appeals when that court initially considered these cases.

10 The citations to state codes and cases in the footnotes in this special writing are drawn largely from the following article: Paul Benjamin Linton, *The Legal Status of the Unborn Child under State Law*, 6 U. St. Thomas J.L. & Pub. Pol'y 141 (Fall 2011). I have not independently checked or verified these sources.

11 See § 43–8–47, Ala.Code 1975; see also Alaska Stat. § 13.12.108 (2008); Ariz.Rev.Stat. Ann. § 14–2108 (2005); Ark.Code Ann. § 28–9–210 (2004); Cal. Prob.Code § 6407 (2009); Colo.Rev.Stat. Ann. § 15–11–104(1)(b) (2011); Del.Code Ann. tit. 12, § 505 (2007); Fla. Stat. Ann. § 732.106 (2010); Ga.Code Ann. § 53–2–1(b)(1) (2010); Haw.Rev.Stat. Ann. 560:2–108 (2010); Idaho Code Ann. § 15–2–108 (2009); 755 Ill. Comp. Stat. Ann. § 5/2–3 (2007); Ind.Code Ann. § 29–1–2–6 (2010); Iowa Code Ann. § 633.220 (1992); Kan. Stat. Ann. § 59–501(a) (2008); Ky.Rev.Stat. Ann. §§ 391.070, 394.460 (2010); La. Civ.Code Ann. art. 940 (2000); Me.Rev.Stat. Ann. tit. 18, § 2–108 (1998); Md.Code Ann., Est. & Trusts, § 3–107 (2001); Mass. Gen. Laws Ann. 190B § 2–302 (2012); Mich. Comp. Laws Ann. § 700.2108 (2002); Minn.Stat. Ann. § 524.2–108 (2002); *Harper v. Archer*, 4 Smedes & M. 99, 12 Miss. 99 (1845) (noting that "from the time of conception the infant is in esse, for the purpose of taking any estate which is for his benefit, ... provided ... that the infant be born alive, and after such a period of foetal existence that its continuation in life might be reasonably expected"); Mo. Ann. Stat. § 474.050 (2000); Mont.Code Ann. § 72–2–118 (2011); Neb.Rev.Stat. Ann. § 30–2308 (2010); Nev.Rev.Stat. Ann. § 111.085 (2010); N.H.Rev.Stat. Ann. § 21.20 (2008) (defining "issue"), 561:1 (2006); N.J. Stat. Ann. § 3B:5–8 (2007); N.M. Stat. Ann. § 45–2–104(A)(2) (2011); N.Y. Est. Powers & Trusts Law § 4–1.1(c) (McKinney 1998); N.C. Gen.Stat. § 29–9 (2009); N.D. Cent.Code § 30.1–04–04 (2010); Ohio Rev.Code Ann. § 2105.14 (2007); Okla.Rev.Stat. Ann. tit. 84, § 228 (1990); Or.Rev.Stat. § 112.075 (2007); 20 Pa. Cons.Stat. Ann. § 2104(4) (2005); S.C.Code Ann. § 62–2–108 (2009); S.D. Codified Laws § 29A–2–108 (2004); Tenn.Code Ann. § 31–2–108 (2007); Utah Code Ann. § 75–2–104(1) (b) (2010); Vt. Stat. Ann. tit. 14, § 303 (2010); Va.Code Ann. § 64.1–8.1 (2007); Wash. Rev.Code Ann. § 11.02.005(8) (2012); W. Va.Code Ann. § 42–1–8 (2004); Wis. Stat. Ann. § 854.21(5) (2011); Wyo. Stat. Ann. § 2–4–103 (2009).

12 See § 43–8–91, Ala.Code 1975; see also Alaska Stat. § 13.12.302 (2008); Ariz.Rev.Stat. Ann. § 14–2302 (2005); Ark.Code Ann. § 28–39–407 (2004); Cal. Prob.Code § 21620 (2011); Colo.Rev.Stat. Ann. § 15–11–302 (2011); Conn. Gen.Stat. Ann. § 45a–256b (2010); Del.Code Ann. tit. 12, §§ 301, 310 (2007); Fla. Stat. Ann. § 732.302 (2010); Ga.Code Ann. § 53–4–48 (Supp.2010); Haw.Rev.Stat. Ann. § 560:2–302 (2010); Idaho Code Ann. § 15–2–302 (2009); 755 Ill. Comp. Stat. Ann. § 5/4–10 (2007); Ind.Code Ann. § 29–1–3–8 (2010); Iowa Code Ann. § 633.267 (1992); Ky.Rev.Stat. Ann. § 394.382 (2010); La. Civ.Code Ann. art. 1474 (2000); Me.Rev.Stat. Ann. tit. 18, § 2–302 (1998); Md.Code Ann., Est. & Trusts, § 3–301 et seq. (2001); Mass. Gen. Laws Ann. ch. 191, § 20 (2011); Mich. Comp. Laws Ann. § 700.2302 (2002); Minn.Stat. Ann. § 524.2–302 (2012); Miss.Code Ann. §§ 91–5–3, 91–5–5 (1999); Mo. Ann. Stat. § 474.240 (2009); Mont.Code Ann. § 72–2–332 (2011); Neb.Rev.Stat. Ann. § 30–2321 (2010); Nev.Rev.Stat. Ann. §§ 133.160, 133.180 (2009); N.H.Rev.Stat. Ann. § 551:10 (2006); N.J. Stat. Ann. § 3B:5–16 (2007); N.M. Stat. § 45–2–302 (2008); N.Y. Est. Powers & Trusts Law § 5–32 (McKinney Supp.2012); N.C. Gen.Stat. § 31–5.5 (2009) (see also § 41–5 (providing that an unborn child "shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born")); N.D. Cent.Code § 30.1–06–02 (2010); Ohio Rev.Code Ann. § 2107.34 (2007); Okla. Stat. Ann. tit. 84, § 131 (1990); Or.Rev.Stat. § 112.405 (2007); 20 Pa. Cons.Stat. Ann. § 2514(4) (2005); R.I. Gen. Laws § 33–6–23 et seq. (2011); S.C.Code Ann. § 62–2–302 (2009); S.D. Codified Laws § 29A–2–302 (2004); Tenn.Code Ann. § 32–3–103 (2007); Tex. Prob.Code Ann. § 67 (Vernon Supp.2011); Utah Code Ann. § 75–2–302 (Supp.2010); Vt. Stat. Ann. tit. 14, §§ 303, 332 et seq. (2010); Va.Code Ann. §§ 64.1–70, 64.1–71 (2007); Wash. Rev.Code Ann. § 11.12.091 (1998); W. Va.Code Ann. §§ 41–4–1, 41–4–2 (2004); Wis. Stat. Ann. § 854.21(5) (2011).

13 See § 35–4–8, Ala.Code 1975; see also Cal. Civ.Code §§ 698, 739 (2007); Colo.Rev.Stat. Ann. § 38–30–119 (2007); Ky.Rev.Stat. Ann. § 381.140 (1999); Minn.Stat. Ann. § 500.14 (2012); Nev.Rev.Stat. Ann. § 111.080 (2010); N.M. Stat. Ann. § 47–1–21 (1995); N.D. Cent.Code § 47–02–19 (1999) (see also § 47–02–29); Ohio Rev.Code Ann. § 2307.14

- (2010) (providing that court may appoint a trustee to represent the future interests of an unborn child); [Okla. Stat. Ann. tit. 12, § 1147.1 \(2000\)](#) (providing that court may appoint a trustee to represent the future interests of an unborn child); [S.D. Codified Laws § 43-3-14 \(2004\)](#) (see also § 43-3-16); [Tex. Prop.Code Ann. § 112.036 \(Vernon 2007\)](#).
- 14 See [Ala.Code 1975, § 13A-6-1\(a\)\(3\)](#); [Alaska Stat. § 11.81.900\(b\)\(62\)](#) (defining “unborn child”); § 11.41.150 et seq. (2008); [Ariz.Rev.Stat. Ann. §§ 13-1102\(A\), \(B\)](#) (negligent homicide), 13-1103(A)(5), (B) (manslaughter), 13-1104(A), (B) (second-degree murder), 13-1105(A)(1), (C) (first-degree murder) (2010); [Ga.Code Ann. §§ 16-5-80](#) (feticide), 40-6-393.1 (feticide by vehicle), 52-7-12.3 (feticide by vessel) (2007 & Supp.2010); [Idaho Code Ann. §§ 18-4016](#) (defining “human embryo” and “fetus”), 18-4001 (defining “murder”), 18-4006 (defining “manslaughter”) (2004); [720 Ill. Comp. Stat. Ann. §§ 5/9-1.2](#) (intentional homicide of an unborn child), 5/9-2.1 (voluntary manslaughter of an unborn child), 5/9-3.2 (involuntary manslaughter or reckless homicide of an unborn child) (2011); [Ind.Code Ann. § 35-42-1-6](#) (feticide) (2011) (see also [Ind.Code Ann. §§ 35-42-1-1\(4\)](#) (murder), 35-42-1-3(a)(2) (voluntary manslaughter), 35-42-1-4(b), (d) (involuntary manslaughter) (2011)); [Kan. Stat. Ann. § 21-5419](#) (Supp.2011); [Ky.Rev.Stat. § 507A.010 et seq.](#) (fetal homicide) (2008); [La.Rev.Stat. Ann. §§ 14:2\(A\)\(11\)](#) (defining “unborn child”), 14:32.5 (defining “feticide”), 14:32.6 et seq. (substantive offenses) (2012); [Mich. Comp. Laws Ann. § 750.90a et seq. \(2004\)](#); [Minn.Stat. Ann. § 609.266 et seq. \(2009\)](#); [Miss.Code Ann. § 97-3-37 \(2011\)](#); [Neb.Rev.Stat. Ann. § 28-388 et seq. \(2009\)](#); [N.D. Cent.Code § 12.1-17.1-01 et seq. \(1997\)](#); [Ohio Rev.Code Ann. §§ 2903.01\(A\), \(B\)](#) (aggravated murder), 2903.02(A) (murder), 2903.03(A) (voluntary manslaughter), 2903.04(A), (B) (involuntary manslaughter); 2903.041(A) (reckless homicide), 2903.05(A) (negligent homicide), 2903.06(A) (aggravated vehicular homicide, vehicular homicide, and vehicular manslaughter), 2903.09(A), (B) (definitions) (2010); [Okla. Stat. Ann. tit. 21, § 691](#) (defining “homicide”), tit. 63, § 1-730(4) (defining “unborn child”) (2012); [18 Pa. Cons.Stat. Ann. § 2601 et seq. \(1998\)](#); [S.C.Code Ann. § 16-3-1083 \(Supp.2011\)](#); [S.D. Codified Laws §§ 22-1-2\(31\)](#) (defining “person”), 22-1-2(50A) (defining “unborn child”); 22-16-1 (defining “homicide”), 22-16-1.1 (fetal homicide), 22-17-6 (intentional killing of a human fetus) (Supp.2011); [Tenn.Code Ann. § 39-13-214](#) (Supp.2012); [Tex. Penal Code §§ 1.07\(a\)\(26\)](#) (defining “individual”), 1.07(a)(38) (defining “person”) (Vernon 2011); [Utah Code Ann. § 76-5-201\(1\)\(a\)](#) (Supp.2010); [W. Va.Code Ann. § 61-2-30](#) (2010); [Wis. Stat. Ann. §§ 939.75\(1\)](#) (defining “unborn child”), 940.01(1)(b) (first-degree intentional homicide), 940.02(1m) (first-degree reckless homicide), 940.05(2g) (second-degree intentional homicide), 940.06(2) (second-degree reckless homicide), 940.08(2) (homicide by negligent handling of a dangerous weapon, explosive, or fire), 940.09(1)(c), (1)(cm), (1)(d), (1)(e) (homicide by intoxicated use of a vehicle), 940.09(1g)(c), (1g)(cm), (1g)(d) (homicide by intoxicated use of a firearm), 940.10(2) (homicide by negligent operation of a vehicle), 940.04(1) (intentional destruction of the life of an unborn child) (2011) (see also [Wis. Stat. Ann. § 940.04\(2\)\(a\)](#) (2005) (intentional destruction of the life of an “unborn quick child”)). In addition to the foregoing statutes, Missouri has enacted a statute providing a rule of construction, see [Mo. Ann. Stat. § 1.205](#) (2000), which has been applied to the state’s homicide statutes, making them applicable to any killing of an unborn child at any stage of gestation that is not the result of an abortion. See [State v. Knapp](#), 843 S.W.2d 345 (Mo.1992), [State v. Holcomb](#), 956 S.W.2d 286 (Mo.Ct.App.1997), [State v. Rollen](#), 133 S.W.3d 57 (Mo.Ct.App.2003).
- 15 [Fla. Stat. Ann. §§ 782.09\(5\)](#) (homicide) (defining “unborn quick child” in terms of viability), 782.071 (vehicular homicide) (2007); [Ind.Code Ann. §§ 35-42-1-1\(4\)](#) (murder), 35-42-1-3(a)(2) (voluntary manslaughter), 35-42-1-4(b), (d) (involuntary manslaughter) (2011) (see also [Ind.Code Ann. § 35-42-1-6](#) (feticide) (2011)); [Md.Code Ann., Crim. Law § 2-103](#) (Supp.2011); [Mich. Comp. Laws Ann. § 750.322](#) (2004) (a “quickening” manslaughter statute that, subsequent to *Roe v. Wade*, the Michigan Supreme Court limited to post-viability criminal acts, [Larkin v. Cahalan](#), 389 Mich. 533, 208 N.W.2d 176 (1973)) (see also [Mich. Comp. Laws Ann. § 750.90a et seq. \(2004\)](#)); [R.I. Gen. Laws § 11-23-5](#) (2002) (defining “quickening” in terms of viability).
- 16 [Nev.Rev.Stat. Ann. § 200.210](#) (2006) (manslaughter); [Wash. Rev.Code Ann. § 9A.32.060\(1\)\(b\)](#) (2012) (manslaughter); [Wis. Stat. Ann. § 940.04\(2\)\(a\)](#) (2005) (intentional destruction of the life of an “unborn quick child”) (see also [Wis. Stat. Ann. §§ 939.75\(1\)](#) (defining “unborn child”), 940.01(1)(b) (first-degree intentional homicide), 940.02(1m) (first-degree reckless homicide), 940.05(2g) (second-degree intentional homicide), 940.06(2) (second-degree reckless homicide), 940.08(2) (homicide by negligent handling of a dangerous weapon, explosives, or fire), 940.09(1)(c), (cm), (d), and (e) (homicide by intoxicated use of a vehicle), 940.09(1g)(c), (1g)(cm), (1g)(d) (homicide by intoxicated use of a firearm), 940.10(2) (homicide by negligent operation of a vehicle), 940.04(1) (intentional destruction of the life of an unborn child) (2011)).
- 17 Arkansas draws the line at 12 weeks’ gestation; see [Ark.Code Ann. §§ 5-1-102\(13\)\(B\)\(i\)\(a\), \(b\)](#) (2009) (cross-referencing homicide offenses), § 5-10-101 et seq. (2006); under California law, the offense of murder has been defined to include the unlawful killing of a “fetus,” see [Cal.Penal Code § 187\(a\)](#) (2008) (interpreted by the California Supreme Court to mean “post-embryonic”—i.e., 7 to 8 weeks’ gestation), [People v. Davis](#), 7 Cal.4th 797, 872 P.2d 591, 599, 30 Cal.Rptr.2d 50

- (1994); Virginia also has enacted a statute prohibiting the “[k]illing [of] a fetus,” *Va.Code Ann. § 18.2–32.2* (2009), but the term “fetus” is not defined in the criminal code and has not yet been interpreted by the Supreme Court of Virginia.
- 18 *Ariz.Rev.Stat. § 13–751(F)(9)* (specifically listing the killing of an unborn child as an aggravating factor); *Colo.Rev.Stat. Ann. § 18–1.3–1201(5)(q)* (2012); *Del.Code Ann. tit. 11, § 4209(e)(1)(p)* (2012); *Ind.Code Ann. § 35–50–2–9(b)(16)* (limited to cases where the unborn child had reached viability); *42 Pa. Cons.Stat. Ann. § 9711(d)(17)* (limited to cases where the pregnancy is in its third trimester); *Tenn.Code Ann. § 39–13–204(i)(16)* (Supp.2012); *Va.Code Ann. § 18.2–31(11)* (Supp.2012).
- 19 See *§ 13A–5–40(a)(10)*, *Ala.Code* 1975; *Ark.Code Ann. § 5–10–101(a)(4), (9A)*; *Idaho Code Ann. § 19–2515(9)(b)*; *Mo.Rev.Stat. § 565.032 2(2)* (2012); *Ohio Rev.Code. Ann. § 2929.04(A)(9)*; *Okla. Stat. tit. 21, § 701.12* (2012); *S.C.Code Ann. § 16–3–20(C)(a)(9)*; *Vernon's Tex. Penal Code Ann. § 19.03(a)(7)*; *Utah Code Ann. § 76–5–202(1)(b)*.
- 20 *Fla. Stat. Ann. § 782.09(1)(a)* (2012).
- 21 *Ala.Code* 1975, *§ 15–18–86*; *Ariz.Rev.Stat. Ann. §§ 13–4025, 4026* (2010); *Ark.Code Ann. § 16–90–506(d)(2)* (2005); *Cal.Penal Code §§ 3705, 3706* (2011); *Fla. Stat. Ann. § 922.08* (2001); *Ga.Code Ann. §§ 17–10–34, 17–10–39* (2004); *Idaho Code Ann. §§ 19–2713, 19–2714, 19–2719a* (2004); *Ind.Code Ann. § 35–38–6–10* (2010); *Kan. Stat. Ann. § 22–4009* (2008); *Ky.Rev.Stat. Ann. § 431.240(2)* (1999); *La.Rev.Stat. Ann. § 15:567(D)* (2005); *Md.Code Ann., Corr. Servs. § 3–902(e)* (2008); *Miss.Code Ann. § 99–19–57* (2006); *Mo. Ann. Stat. § 546.800 et seq.* (2002); *Mont.Code Ann. §§ 46–19–203, 46–19–204* (2011); *Neb.Rev.Stat. Ann. §§ 29–2540, 29–2541* (2009); *Nev.Rev.Stat. Ann. § 176.465 et seq.* (2009); *Ohio Rev.Code Ann. § 2949.31* (2010); *Okla.Rev.Stat. Ann. tit. 22, §§ 1010, 1011* (2003); *S.C.Code Ann. § 16–3–20(A)* (2003); *S.D. Codified Laws § 23A–27A–27 et seq.* (2004); *Utah Code Ann. § 77–19–202* (Supp.2010); *Wyo. Stat. §§ 7–13–912, 7–13–913* (2007).
- 22 *Wolfe v. Isbell*, 291 Ala. 327, 280 So.2d 758, 761 (1973) (express statement in context of wrongful-death action); *Walker by Pizano v. Mart*, 164 Ariz. 37, 790 P.2d 735, 739 (1990) (dictum in wrongful-life action); *Cal. Civ.Code § 43.1* (2007) (“A child conceived, but not yet born, is deemed an existing person, so far as necessary for the child's interests in the event of the child's subsequent birth.”); *Kelemen v. Superior Court*, 136 Cal.App.3d 861, 186 Cal.Rptr. 566, 568 (1982) (prenatal injury); *Empire Cas. Co. v. St. Paul Fire & Marine Ins. Co.*, 764 P.2d 1191, 1195–97 (Colo.1988) (by implication in decision recognizing cause of action for pre-conception tort); *Simon v. Mullin*, 34 Conn.Supp. 139, 380 A.2d 1353, 1357 (1977) (prenatal injury); *Day v. Nationwide Mut. Ins. Co.*, 328 So.2d 560, 562 (Fla.Dist.Ct.App.1976) (prenatal injury); *Larusso v. Garner*, 888 So.2d 712, 719 (Fla.Dist.Ct.App.2004) (prenatal injury); *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956) (prenatal injury); *McAuley v. Wills*, 251 Ga. 3, 303 S.E.2d 258, 259–60 (1983) (dictum in wrongful-death action); *Renslow v. Mennonite Hosp.*, 67 Ill.2d 348, 352–53, 367 N.E.2d 1250, 1252–53, 10 Ill.Dec. 484, 486–87 (1977) (express statement in decision recognizing cause of action for preconception tort); *Stallman v. Youngquist*, 125 Ill.2d 267, 272–73, 531 N.E.2d 355, 357–58, 126 Ill.Dec. 60, 62–63 (1988) (following *Renslow*); *Cowe by Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 967–68 (Ind.Ct.App.1989), *aff'd in part, rev'd in part, and remanded*, 575 N.E.2d 630, 636–37 (Ind.1991) (adopting *Restatement (Second) of Torts § 869(1)*) (prenatal injury); *Humes v. Clinton*, 246 Kan. 590, 596, 792 P.2d 1032, 1037 (1990) (dictum in wrongful-death action); *Danos v. St. Pierre*, 402 So.2d 633 (La.1981) (by implication in wrongful-death action); *Group Health Ass'n, Inc. v. Blumenthal*, 295 Md. 104, 117–18, 453 A.2d 1198, 1206–07 (1983) (express statement in context of wrongful-death action); *Payton v. Abbott Labs.*, 386 Mass. 540, 559–64, 437 N.E.2d 171, 182–85 (1982) (prenatal injury); *Torigian v. Watertown News Co.*, 352 Mass. 446, 225 N.E.2d 926 (1967) (by implication in wrongful-death action); *Womack v. Buchhorn*, 384 Mich. 718, 187 N.W.2d 218 (1971) (prenatal injury); *Connor v. Monkem Co.*, 898 S.W.2d 89 (Mo.1995) (by implication in wrongful-death action); *Bergstreser v. Mitchell*, 448 F.Supp. 10, 14–15 (E.D.Mo.1977), *aff'd*, 577 F.2d 22, 25–26 (8th Cir.1978) (by implication in decision recognizing cause of action for preconception tort); *Miller v. Duhart*, 637 S.W.2d 183, 185 (Mo.Ct.App.1982) (dictum in “wrongful-life” case); *Weeks v. Mounter*, 88 Nev. 118, 121–22, 493 P.2d 1307, 1309 (1972) (prenatal injury); *White v. Yup*, 85 Nev. 527, 532–33, 458 P.2d 617, 620–21 (1969) (express statement in context of wrongful-death action); *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958) (prenatal injury); *Smith v. Brennan*, 31 N.J. 353, 362–63, 157 A.2d 497, 502 (1960) (prenatal injury); *Hughson v. St. Francis Hosp. of Port Jervis*, 92 A.D.2d 131, 459 N.Y.S.2d 814, 815 (1983) (prenatal injury); *Kelly v. Gregory*, 282 A.D. 542, 125 N.Y.S.2d 696, 697 (1953) (prenatal injury); *Stetson v. Easterling*, 274 N.C. 152, 155–56, 161 S.E.2d 531, 533–34 (1968) (express statement in context of wrongful-death action); *Gay v. Thompson*, 266 N.C. 394, 399, 146 S.E.2d 425, 429 (1966) (by implication in wrongful-death action); *Hopkins v. McBane*, 359 N.W.2d 862, 864 (N.D.1984) (adopting *Restatement (Second) of the Law of Torts § 869(1)* in context of wrongful-death action); *Evans v. Olson*, 550 P.2d 924, 927 (Okla.1976) (express statement in context of wrongful-death action); *Sinkler v. Kneale*, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (prenatal injury); *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222 (1966) (prenatal injury); *Re Certification of a Question of Law from the United States District Court*, 543 N.W.2d 787 (S.D.1996) (by implication in

wrongful-death action); *Delgado v. Yandell*, 468 S.W.2d 475 (Tex.App.1971), writ ref'd n.r.e. per curiam, 471 S.W.2d 569 (Tex.1971) (prenatal injury); *Kalafut v. Gruver*, 239 Va. 278, 283, 389 S.E.2d 681, 683–84 (1990) (adopting *Restatement (Second) of Torts* § 869(1) in context of wrongful-death action); *Harbeson v. Parke–Davis, Inc.*, 98 Wash.2d 460, 479, 656 P.2d 483, 495 (1983) (dictum in “wrongful-life” case); *Seattle–First National Bank v. Rankin*, 59 Wash.2d 288, 290–91, 367 P.2d 835, 837–38 (1962) (prenatal injury); *Farley v. Sartin*, 195 W.Va. 671, 681, 466 S.E.2d 522, 532 (1995) (express statement in context of wrongful-death action); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis.2d 14, 148 N.W.2d 107, 109 (1967) (express statement in context of wrongful-death action); *Puhl v. Milwaukee Auto. Ins. Co.*, 8 Wis.2d 343, 99 N.W.2d 163, 169–71 (1959) (dictum in prenatal-injury case), overruled on other grounds, *In re Estate of Stromsted*, 99 Wis.2d 136, 299 N.W.2d 226, 229–30 (1980). See generally Roland F. Chase, Annot., *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971 & Supp. May 2011) (collecting cases).

- 23 *Crussell v. Electrolux Home Prods., Inc.*, 499 F.Supp.2d 1137, 1138–41 (W.D.Ark.2007) (applying Arkansas law); *Luff v. Hawkins*, 551 A.2d 437, 438 n. 1 (Del.Super.Ct.1988) (by implication in wrongful-death action); *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557 (Del.Super.Ct.1956) (express statement in context of wrongful-death action); *Wade v. United States*, 745 F.Supp. 1573, 1579 (D.Haw.1990) (express statement in context of wrongful-death action); *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11, 13 (1982) (express statement in context of wrongful-death action); *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417 (Iowa 1985) (recognizing action for medical malpractice in attending pregnant woman); *Kilker v. Mulry*, 437 N.W.2d 1 (Iowa Ct.App.1988) (prenatal injury); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky.1955) (by implication in wrongful-death action); *City of Louisville v. Stuckenberg*, 438 S.W.2d 94, 95 (Ky.1968) (same); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949) (same); *Pehrson v. Kistner*, 301 Minn. 299, 222 N.W.2d 334 (1974) (following *Verkennes*); *Rainey v. Horn*, 221 Miss. 269, 281–82, 72 So.2d 434, 439–40 (1954) (express statement in context of wrongful-death action); *Strzelczyk v. Jett*, 264 Mont. 153, 870 P.2d 730 (1994) (by implication in wrongful-death action); *Hartley v. Guthmann*, 248 Neb. 131, 532 N.W.2d 331 (1995) (prenatal injury); *Miles v. Box Butte Cnty.*, 241 Neb. 588, 489 N.W.2d 829 (1992) (prenatal injury); *Davila v. Bodelson*, 103 N.M. 243, 704 P.2d 1119 (N.M.Ct.App.1985) (prenatal injury); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949) (prenatal injury); *Griffiths v. Doctors Hosp.*, 150 Ohio App.3d 234, 238, 780 N.E.2d 603, 606 (2002) (dictum in wrongful-death case); *Mallison v. Pomeroy*, 205 Or. 690, 291 P.2d 225 (1955) (by implication in wrongful-death case); *Hall v. Murphy*, 236 S.C. 257, 262, 113 S.E.2d 790, 793 (1960) (express statement in context of wrongful-death action); *Shousha v. Matthews Drivurself Serv., Inc.*, 210 Tenn. 384, 395–96, 358 S.W.2d 471, 476 (1962) (express statement in context of wrongful-death action); *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982) (apparently recognizing that a cause of action for prenatal injuries exists in Utah); *Vaillancourt v. Medical Ctr. Hosp. of Vermont, Inc.*, 139 Vt. 138, 141–42, 425 A.2d 92, 94–95 (1980) (by implication in wrongful-death action); *Greater Southeast Cmty. Hosp. v. Williams*, 482 A.2d 394, 396 & n. 2 (D.C.Ct.App.1984) (express statement in context of wrongful-death action).

- 24 In addition to the cases cited *supra* nn. 22–23, see: *Eich v. Gulf Shores*, 293 Ala. 95, 300 So.2d 354 (1974); *Summerfield v. Superior Court*, 144 Ariz. 467, 474–79, 698 P.2d 712, 719–24 (1985); *Aka v. Jefferson Hosp. Ass'n, Inc.*, 344 Ark. 627, 637–43, 42 S.W.3d 508, 515–19 (2001) (see also Ark.Code Ann. § 16–62–102(a)(1) (Michie 2005) (recognizing cause of action for the wrongful-death of a viable unborn child)); *Espadero v. Feld*, 649 F.Supp. 1480, 1483–85 (D.Colo.1986), cited with approval in *Keefe v. Pizza Hut of America, Inc.*, 868 P.2d 1092, 1094 (Colo.Ct.App.1994); *Gorke v. Le Clerc*, 23 Conn.Supp. 256, 181 A.2d 448 (1962); *Florence v. Town of Plainfield*, 48 Conn.Supp. 440, 452–60, 849 A.2d 7, 15–19 (2004); *Porter v. Lassiter*, 91 Ga.App. 712, 87 S.E.2d 100 (1955); *Shirley v. Bacon*, 154 Ga.App. 203, 267 S.E.2d 809 (1980); *Wade v. United States*, 745 F.Supp. 1573 (D.Haw.1990); *Chrisafogeorgis v. Brandenburg*, 55 Ill.2d 368, 304 N.E.2d 88 (1973); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *State ex rel. Odham v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964); *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Jarvis v. Providence Hosp.*, 178 Mich.App. 586, 444 N.W.2d 236, 238 (1989); *O'Grady v. Brown*, 654 S.W.2d 904 (Mo.1983); *Strzelczyk v. Jett*, 264 Mont. 153, 870 P.2d 730 (1994); Neb.Rev.Stat. § 30–809(1) (2010); *Poliquin v. Macdonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Salazar v. St. Vincent Hosp.*, 95 N.M. 150, 619 P.2d 826 (N.M.Ct.App.1980); *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987); *Werling v. Sandy*, 17 Ohio St.3d 45, 476 N.E.2d 1053 (1985); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636 (1974); *Amadio v. Levin*, 509 Pa. 199, 501 A.2d 1085 (1985); *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Re Certification of a Question of Law from United States District Court*, 387 N.W.2d 42 (S.D.1986); Tenn.Code Ann. § 20–5–106(c) (1994); Tex. Civ. Prac. & Rem.Code Ann. § 71.001(4) (Vernon 2006); *Carranza v. United States*, 267 P.3d 912 (Utah 2011) (interpreting former Utah Code Ann. § 78–11–6 (Supp.2006)); *Moen v. Hanson*, 85 Wash.2d 597, 537 P.2d 266 (1975). See generally Sheldon R. Shapiro, Annot., *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978 & Supp. May 2011) (collecting cases).

- 25 *Porter v. Lassiter*, 91 Ga.App. 712, 87 S.E.2d 100 (1955); *Rainey v. Horn*, 221 Miss. 269, 72 So.2d 434 (1954); Miss.Code Ann. § 11–7–13 (2004) (amending wrongful-death statute to include an “unborn quick child”).
- 26 *Mack v. Carmack*, 79 So.3d 597 (Ala.2011); 740 Ill. Comp. Stat. Ann. § 180/2.2 (2010) (amending wrongful-death statute to apply to an unborn child regardless of the stage of gestation or development) (*but see Miller v. American Infertility Group of Illinois, S.C.*, 386 Ill.App.3d 141, 897 N.E.2d 837, 325 Ill.Dec. 298 (2008) (statute does not apply to pre-implanted fertilized ova)); *Johnson v. Southern New Orleans Light & Traction Co.*, Docket 9048 (La.Ct.App. Dec. 10, 1923) (rejecting viability standard for wrongful death of unborn child); *Danos v. St. Pierre*, 402 So.2d 633, 638–39 (La.1981) (approving *Johnson*’s rejection of viability); *Danos v. St. Pierre*, 383 So.2d 1019, 1027 (La.Ct.App.1980) (Lottinger, J., concurring), aff’d, 402 So.2d 633 (La.1981); La. Civ.Code Ann. art. 26 (1999) (“An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception; If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death.”); Mich. Comp. Laws Ann. § 600.2922a (2010); *Connor v. Monkem*, 898 S.W.2d 89 (Mo.1995) (interpreting statute setting forth rule of construction); Neb.Rev.Stat. § 30–809(1) (2010) (amending wrongful-death statute to include “an unborn child in utero at any stage of gestation”); Okla. Stat. Ann. tit. 12, § 1053(F) (2011), tit. 63, § 1–730 (2012); S.D.Code Ann. § 21–5–1 (1987) (amending wrongful-death statute to include “an unborn child”); *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D.1996) (interpreting wrongful-death statute); Tex. Civ. Prac. & Rem.Code Ann. § 71.001(4) (Vernon 2008) (defining “individual” in wrongful-death statute to include “an unborn child at every stage of gestation from fertilization until birth”); *Carranza v. United States*, 267 P.3d 912 (Utah 2011); *Farley v. Sartin*, 195 W.Va. 671, 466 S.E.2d 522 (1995) (interpreting wrongful-death statute).
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- 28 See § 22–8A–4(h), Ala.Code 1975 (“Advance Directive for Health Care,” § 3); see also Alaska Stat. § 13.52.055 (2008); Ark.Code Ann. § 20–17–206(c) (2005); Conn. Gen.Stat. Ann. § 19a–574 (2011); Del.Code Ann. tit. 16, § 2503(j) (2003); Fla. Stat. Ann. § 765.113(2) (2010); Ga.Code Ann. §§ 31–32–4 (2009) (Form, Part Two, ¶ (9)), 31–32–9(a)(1); Idaho Code Ann. §§ 39–4504 (2002) (A Living Will, ¶ 4), 39–4505 (2002) (A Durable Power of Attorney for Health Care, ¶ 4); 755 Ill. Comp. Stat. Ann. 35/3(c) (2011); Ind.Code Ann. § 16–36–4–8(d) (2007); Iowa Code Ann. § 144A.6(2) (2005); Kan. Stat. Ann. § 65–28,103(a) (2008) (last sentence); Ky.Rev.Stat. Ann. §§ 311.625(1) (form), 311.629(4) (2010); Mich. Comp. Laws Ann. §§ 700.5509(1)(d), 700.5512(1) (2011); Mo. Ann. Stat. § 459.025 (2007); Mont.Code Ann. §§ 50–9–106(7), 50–9–202(3) (2011); Neb.Rev.Stat. Ann. §§ 20–408(3) (2008), 30–3417(1)(b) (2010); Nev.Rev.Stat. Ann. § 449.624(4) (2009); N.H.Rev.Stat. Ann. § 137–J:5(V)(c) (2011); N.D. Cent.Code § 23–06.5–09(5) (2009); Ohio Rev.Code Ann. § 1337.13(D) (2006), § 2133.06(B) (2007); Okla.Rev.Stat. Ann. tit. 63, §§ 3101.4(C) (Advance Directive for Health Care Form, ¶ IV(c)), 3101.8(C) (2012); 20 Pa. Cons.Stat. Ann. §§ 5429(a), (b) (2008) (see also tit. 20, § 5429(b) (do-not-resuscitate orders)); R.I. Gen. Laws §§ 23–4.10–5(c), 23–4.11–6(c) (2008); S.C.Code Ann. §§ 44–77–70 (2002), 62–5–504(G) (2009); S.D. Codified Laws §§ 34–12D–10 (2004), 59–7–2.8 (2009); Tex. Health & Safety Code Ann. § 166.049

(Vernon 2010) (see also § 166.098 (do-not-resuscitate orders)); Utah Code Ann. § 75–2a–123(1) (Supp.2010); Wash. Rev.Code Ann. § 70.122.030(1)(d) (2011); Wis. Stat. Ann. § 154.03 (Directive to Attending Physician, para. 4) (2006) (see also § 154.19(1)(e) (do-not-resuscitate orders)).

29 See § 26–1–2(g)(1), Ala.Code 1975; see also Alaska Stat. § 13.26.150(e)(2) (2008) (restriction on guardian authorizing an abortion); Cal. Prob.Code § 4652(e) (2009); Fla. Stat. Ann. § 765.113(1) (2010); Ga.Code Ann. § 31–32–14(b) (2009); Nev.Rev.Stat. Ann. § 162A.850(1)(e) (2009); N.D. Cent.Code § 23–06–5.03(6) (Supp.2009); Okla.Rev.Stat. Ann. tit. 30, § 3–119(3) (2009) (restriction on guardian authorizing an abortion); Or.Rev.Stat. § 127.540(5) (2009); Tex. Health & Safety Code § 166.152(f)(4) (Vernon 2010) (see also § 166.163 (form of disclosure statement)); Va.Code Ann. § 54.1–2983.3(B) (Supp.2010).

30 These words, borrowed from the first guarantee of the Declaration of Independence, which states that “[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,” affirm that each person has a God-given right to life.

31 “Controlled substance” for purposes of § 26–15–3.2 is defined by Ala.Code 1975, § 26–15–2(2), which refers to Ala.Code 1975, § 20–2–2(4), which in turn refers to, among other Code sections, Ala.Code 1975, § 20–2–25, which defines cocaine as a Schedule II controlled substance.

32 Methamphetamine is a Schedule III controlled substance. See Ala.Code 1975, § 20–2–27.

33 The Chief Justice's example in his dissent of a woman, not knowing she was pregnant, being prosecuted for drinking wine is inapposite. Wine is not a controlled substance, chemical substance, or drug paraphernalia as those terms are defined in the Code, and the mens rea provisions of § 26–15–3.2 would arguably require that a defendant know that a child is present. Such mens rea requirement would also arguably not be satisfied in the situation where an expectant mother is administered a prescription drug under the direction of a physician; it is difficult to conclude that the requisite criminal intent exists where a woman—in good faith—acts in accord with the superior medical knowledge of her treating physician. Thus, no exception for physician-prescribed controlled substances would appear to be necessary.

34 This Court did not grant the petition for a writ of certiorari to review the constitutionality of § 26–15–3.2.

35 Indeed, if it is not possible that the legislature understood the chemical-endangerment statute as protecting only children who are already born, has it not made into a felony the act of a pregnant mother in ingesting drugs prescribed to her by a physician? The statute contains an exception for drugs prescribed to a child, see Ala.Code 1975, § 26–15–3.2(c), but noticeably lacks any exception for controlled substances prescribed to the mother by a physician. (The comment in note 33 of Justice Shaw's special writing regarding criminal intent and physician-prescribed substances presumes that one cannot be guilty of violating the chemical-endangerment statute without having an intent to harm the child or at least knowledge that the exposure contemplated is likely to do so. The legislature did not include such a requirement in the statute. The only criminal intent prescribed by the legislature relates to the exposure element itself (i.e., the requirement that the defendant “[k]nowingly, recklessly, or intentionally causes or permits a child to be exposed to” the substance or paraphernalia at issue (emphasis added)).)

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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

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

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

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

* 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

Attorneys for Amici Curiae

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

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

By Attorneys for Amici Curiae

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

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

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

esk@advocatesforpregnantwomen.org

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

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

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

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Attorneys for Amici Curiae

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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, *Detering 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/ACOGmethhtalkingpo>

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 Marihuana 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 marihuana 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

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

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

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

* Application to appear *pro hac vice* 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

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Brief of Amicus Curiae on the Honorable Luther Strange, Attorney General of the State of Alabama, **310 State House, 11 S. Union St., Montgomery, Alabama 36130** by placing a copy of same in U. S. Mail, postage prepaid and properly addressed on this, the ___ day of March, 2012.

_____/s/ Mary Bauer_____

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 multidisciplinary organization comprised of doctors, nurses, midwives, social workers, administrators, parents, and those interested in collaborating to improve perinatal health.

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

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

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

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

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

Amicus Curiae **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.

153 So.3d 53
Supreme Court of Alabama.

Ex parte Sarah Janie Hicks.
(In re Sarah Janie HICKS

v.
STATE of Alabama).

1110620.
|
April 18, 2014.

Synopsis

Background: Defendant pleaded guilty and was convicted in the Circuit Court, Coffee County, No. CC-09-268, [Jeffery W. Kelley](#), J., of chemical endangerment of a child. Defendant appealed. The Court of Criminal Appeals, 153 So.3d 52, affirmed. Defendant filed petition for writ of certiorari.

Holdings: The Supreme Court, [Parker](#), J., held that:

[1] “child,” as used in chemical-endangerment statute, includes an unborn child, and

[2] statute was not unconstitutionally vague as applied to defendant who exposed her unborn child to a controlled substance.

Affirmed.

[Moore](#), C.J., concurred specially and filed opinion.

[Parker](#), J., concurred specially and filed opinion, in which [Moore](#), C.J., concurred.

[Shaw](#), J., concurred in the result and filed opinion.

[Murdock](#), J., filed dissenting opinion.

West Headnotes (7)

[1] **Criminal Law**
🔑 Review De Novo

The Supreme Court reviews questions of statutory construction and interpretation de novo, giving no deference to the trial court's conclusions.

[2 Cases that cite this headnote](#)

[2] **Infants**
🔑 Child abuse, neglect, or endangerment

The word “child,” as used in statute governing offense of chemical endangerment of a child, includes an unborn child. [Code 1975, § 26-15-3.2\(a\)\(1\)](#).

[2 Cases that cite this headnote](#)

[3] **Infants**
🔑 Welfare and best interest of child in general

The State has a legitimate interest in protecting the life of children from the earliest stages of their development.

[2 Cases that cite this headnote](#)

[4] **Constitutional Law**
🔑 Policy

Public-policy arguments should not play a role in the Supreme Court's interpretation of a statute.

[5] **Constitutional Law**
🔑 Drugs; controlled substances

Controlled Substances

🔑 Validity

Infants

🔑 Crimes against children

Infants

🔑 Child abuse, neglect, or endangerment

Chemical-endangerment statute, unambiguously protecting all children, born and unborn, from exposure to controlled substances, provided fair notice to the public of what conduct was prohibited, and thus was not unconstitutionally vague in violation of due process as applied to defendant who exposed her unborn child to a controlled substance. [U.S.C.A. Const.Amend. 14; Code 1975, § 26-15-3.2\(a\)\(1\)](#).

3 Cases that cite this headnote

[6] **Infants** Child abuse, neglect, or endangerment

The chemical-endangerment statute unambiguously protects all children, born and unborn, from exposure to controlled substances. Code 1975, § 26–15–3.2(a)(1).

2 Cases that cite this headnote

[7] **Criminal Law** Knowledge of law

A person is presumed to know the law and is expected to conform his conduct to it. Code 1975, § 13A–2–6(b).

Attorneys and Law Firms

*54 [Carmen F. Howell](#), Enterprise, for petitioner.

[Luther Strange](#), atty. gen., [John C. Neiman, Jr.](#), deputy atty. gen., and [Michael G. Dean](#), asst. atty. gen., for respondent.

Opinion

[PARKER](#), Justice.

Sarah Janie Hicks petitioned this Court for a writ of certiorari to review the Court of Criminal Appeals' judgment affirming her conviction, following a guilty plea, for chemical endangerment of a child for exposing her unborn child to a controlled substance, in violation of Alabama's chemical-endangerment statute, § 26–15–3.2(a)(1), Ala.Code 1975. We granted her petition, and we now affirm the judgment of the Court of Criminal Appeals and hold that the use of the word “child” in the chemical-endangerment statute includes all children, born and unborn, and furthers Alabama's policy of protecting life from the earliest stages of development.

I. Facts and Procedural History

The Court of Criminal Appeals set forth the relevant facts and procedural history in its unpublished memorandum in [Hicks v. State](#), 153 So.3d 52 (Ala.Crim.App.2011), as follows:

“Hicks appeals from her conviction, following a guilty plea, for chemical endangerment of a child, a violation of § 26–15–3.2(a)(1), Ala.Code 1975. Hicks was sentenced to three years' imprisonment; the sentence was suspended and Hicks was placed on supervised probation for one year. Court costs and fees were assessed.

“Section 26–15–3.2, Ala.Code 1975, provides:

“ ‘(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment *55 in which he or she does any of the following:

“ ‘(1) Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A–12–260.’

“The indictment charged:

“ ‘The Grand Jury of said County charges that before the finding of this indictment that, Sarah Janie Hicks; whose name is to the Grand Jury otherwise unknown, did knowingly, recklessly, or intentionally cause or permit a child, to-wit: [J.D.], a better description of which is to the Grand Jury otherwise unknown, to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A–12–260 of the Code of Alabama, 1975, to-wit: Cocaine, in violation of Section 26–[15–3.2](a)(1), Against the Peace and Dignity of the State of Alabama.’

“Concisely, the State charged that Hicks ingested cocaine while pregnant with J.D. and that that resulted in J.D. testing positive for the presence of cocaine in his body at the time of his birth. Documents in the record suggest that, since his birth, J.D. is ‘doing fine.’ Hicks filed a pretrial motion to dismiss the indictment in which she asserted: 1) that the plain language of § 26–15–3.2(a)(1) reflects that the legislature intended for the statute to apply to a child and not to a fetus, i.e., an unborn child and that, therefore, her conduct in ingesting cocaine while pregnant did not constitute the offense of the chemical endangerment of a child; 2) that Hicks was denied due process because, although the statute as written is not vague, the statute, as applied to Hicks's conduct, is impermissibly vague because the statute provides no notice that it encompasses exposing

a fetus, i.e., an unborn child, to a controlled substance; 3) that the State has violated the doctrine of separation of powers because it is the duty of the legislature and not a district attorney to proscribe criminal offenses, and the legislature recently declined to criminalize prenatal conduct that harms a fetus, i.e., an unborn child; and 4) that Hicks is being denied equal protection because the State is seeking to punish, as a class, women who abuse drugs while pregnant, whereas, a man may father a child while abusing drugs and not be prosecuted under the statute.

“On November 19, 2009, a hearing was conducted at which Hicks and the State presented arguments addressing the assertions in Hicks's motion to dismiss. At the conclusion of arguments, the trial court asserted that the motion to dismiss seemed ‘based on factual arguments’ and questioned whether the assertions in the motion would ‘be more applicable for a motion for a judgment of acquittal at the end of the State's case.’ The trial court asked the parties to explain ‘[h]ow does this Court reach out and dismiss an indictment that is a valid indictment?’ Hicks argued that ‘it's a question of law, not a question of fact whether a child includes the term “fetus” ’ and ‘there's no crime that's been committed based on the set of circumstances alleged in that indictment.’ The State responded that, as the trial court stated, ‘if the indictment is valid, it then becomes ... a question of fact; and, therefore, it cannot be dismissed on a motion to dismiss the indictment when the indictment is correct on its face and is a valid indictment.’ After the hearing, on November 30, 2009, the trial *56 court entered a written order denying the motion to dismiss stating: ‘Upon consideration of the pleadings and arguments presented at hearing, it is ordered that the Motion to Dismiss the Indictment filed by [Hicks] is denied.’

“On December 7, 2009, Hicks filed a Motion to Declare the Statute Unconstitutional that presented arguments similar to those in her motion to dismiss. It does not appear that the trial court ruled on this motion.

“On January 11, 2010, before entering a guilty plea, Hicks expressly reserved the right to appeal the issues presented in her motion to dismiss. Then, pursuant to a plea agreement, Hicks pleaded guilty to the chemical endangerment of a child as charged in the indictment. She was sentenced to three years' imprisonment; the sentence was suspended, and Hicks was placed on supervised probation for one year.”

(References to the record omitted.)

The Court of Criminal Appeals, relying on its opinion in *Ankrom v. State*, 152 So.3d 373 (Ala.Crim.App.2011), affirmed the trial court's judgment, stating:

“Hicks contends on appeal, as she did in the trial court, that the plain language of the statute is clear and unambiguous, and ‘the statute [(§ 26–15–3.2(a)(1))] does not mention unborn children or fetuses.’ (Hicks's brief, at p. 11.) Thus, Hicks argues, the term ‘child’ in § 26–15–3.2 should not be construed to include an unborn child or fetus. Hicks argues that the settled rules of statutory construction require this Court to construe the term ‘child’ as not including an unborn child or fetus. Specifically, she argues: (1) that the rule of lenity requires criminal statutes to be strictly construed in favor of the accused; (2) that the legislative history of the statute and the Alabama Legislature's failure to amend § 26–15–3.2 to specifically state that the statute applies to a fetus shows that the legislature did not intend for the statute to apply to the prenatal exposure of unborn children to controlled substances; and (3) that the majority of our sister states have refused to allow women to be prosecuted criminally for conduct occurring during pregnancy. Hicks also presented constitutional challenges to § 26–15–3.2: (1) the State's application of the statute is violative of the separation-of-powers doctrine; and (2) as applied to her, the statute is void for vagueness and violative of due process.

“Recently, in *Ankrom v. State*, 152 So.3d 373 (Ala.Crim.App.2011), a case involving virtually identical facts as the facts in this case, this Court held that the plain language of § 26–15–3.2 was clear and unambiguous and that the plain meaning of the term ‘child’ in § 26–15–3.2 included an unborn child or viable fetus. *Ankrom v. State*, 152 So.3d at 385 (‘[T]he plain meaning of the term “child,” as found in § 26–15–3.2, Ala.Code 1975, includes a viable fetus.’). This Court also noted that because the plain language of the statute was clear and no statutory construction was necessary, the rule of lenity was inapplicable, the fact that subsequent attempts to amend § 26–15–3.2 to include an unborn child within the definition of ‘child’ did not pass the legislature was irrelevant, and holdings from courts in other jurisdictions were either distinguishable from the facts in *Ankrom* or unpersuasive.

“Applying the holding in *Ankrom* to this case, Hicks's argument that the plain meaning of the term ‘child’ in §

26–15–3.2 does not include an unborn child or fetus must fail, given that it has already been rejected by this Court.

*57 Moreover, because this Court found no ambiguity in the statute, Hicks's constitutional challenges fail.

“Based on the foregoing, the judgment of the trial court is affirmed.”

On February 24, 2012, Hicks petitioned this Court for a writ of certiorari. On April 6, 2012, we granted her petition; we now affirm the judgment of the Court of Criminal Appeals.

II. Standard of Review

[1] “We review questions of statutory construction and interpretation de novo, giving no deference to the trial court's conclusions.” *Pitts v. Gangi*, 896 So.2d 433, 434 (Ala.2004) (citing *Greene v. Thompson*, 554 So.2d 376 (Ala.1989)).

III. Discussion

Hicks was convicted of violating § 26–15–3.2, Ala.Code 1975 (“the chemical-endangerment statute”), by causing her unborn child to be exposed to, to ingest or inhale, or to have contact with a controlled substance. The chemical-endangerment statute provides:

“(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:

“(1) Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A–12–260. A violation under this subdivision is a Class C felony.

“(2) Violates subdivision (1) and a child suffers serious physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia. A violation under this subdivision is a Class B felony.

“(3) Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the child. A violation under this subdivision is a Class A felony.

“(b) The court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.

“(c) It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was administered to the child in accordance with the prescription instructions provided with the controlled substance.”

[2] The facts of Hicks's case are undisputed; the only issue before this Court is whether the chemical-endangerment statute applies to Hicks's conduct. After the parties submitted their briefs in this case, this Court released its opinion in *Ex parte Ankrom*, 152 So.3d 397 (Ala.2013), a case involving facts virtually identical to the facts in this case, in which it addressed the same issue. In *Ankrom*, as will be discussed in greater detail below, this Court held that the plain meaning of the word “child,” as that word is used in the chemical-endangerment statute, includes an unborn child. Accordingly, for the reasons given below, we hold that chemical-endangerment statute also applies to Hicks's conduct.

Hicks raises three main arguments on appeal. First, Hicks argues that the legislature did not intend for the word “child” in the chemical-endangerment statute to apply to an unborn child. Next, Hicks argues that applying the chemical-endangerment statute to protect unborn children *58 is bad public policy. Finally, Hicks argues that she was denied due process of law. Each of Hicks's arguments is addressed below.

A. Legislative Intent

Hicks argues that the legislature did not intend for the word “child” in the chemical-endangerment statute to include an unborn child. First, Hicks argues that, under the rules of statutory interpretation, the word “child” in the chemical-endangerment statute cannot include an unborn child because the word “child” is not defined in the statute. Hicks argues that the statute is, therefore, unconstitutionally ambiguous and should be declared void for vagueness.¹ Hicks's brief, at pp. 6–7. In the alternative, Hicks argues that, if this Court does not find that the chemical-endangerment statute is impermissibly and unconstitutionally vague, then the Court must follow the rule of lenity and construe the statute in her favor.

In *Ankrom*, this Court applied the rules of statutory construction to interpret the chemical-endangerment statute:

“In [*Ex parte*] *Bertram*, [884 So.2d 889 (Ala.2003),] this Court stated:

“ ‘ “A basic rule of review in criminal cases is that *criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e., defendants.*

“ ‘ “Penal statutes are to reach no further in meaning than their words.

“ ‘ “One who commits an act which does not come within the words of a criminal statute, according to the general and popular understanding of those words, when they are not used technically, *is not to be punished thereunder; merely because the act may contravene the policy of the statute.*

“ ‘ “No person is to be made subject to penal statutes by implication and *all doubts concerning their interpretation are to predominate in favor of the accused.*” ’

“884 So.2d at 891 (quoting *Clements v. State*, 370 So.2d 723, 725 (Ala.1979) (citations omitted; emphasis added in *Bertram*)).

“In ascertaining the legislature's intent in enacting a statute, this Court will first attempt to assign plain meaning to the language used by the legislature. As the Court of Criminal Appeals explained in *Walker v. State*, 428 So.2d 139, 141 (Ala.Crim.App.1982), ‘[a]lthough penal statutes are to be strictly construed, courts are not required to abandon common sense. Absent any indication to the contrary, the words must be given their ordinary and normal meaning.’ (Citations omitted.) Similarly, this Court has held that ‘[t]he fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. If possible, the intent of the legislature should be gathered from the language of the statute itself.’ *Volkswagen of America, Inc. v. Dillard*, 579 So.2d 1301, 1305 (Ala.1991).

“We look first for that intent in the words of the statute. As this Court stated in *Ex parte Pfizer, Inc.*, 746 So.2d 960, 964 (Ala.1999):

“ ‘ “When the language of a statute is plain and unambiguous, as in this case, courts must enforce the

statute as written by giving the words of the statute their ordinary plain meaning—they must interpret that language to mean exactly what it says and thus *59 give effect to the apparent intent of the Legislature.” *Ex parte T.B.*, 698 So.2d 127, 130 (Ala.1997). Justice Houston wrote the following for this Court in *DeKalb County LP Gas Co. v. Suburban Gas, Inc.*, 729 So.2d 270 (Ala.1998):

“ ‘ “In determining the meaning of a statute, this Court looks to the plain meaning of the words as written by the legislature. As we have said:

“ ‘ “ “Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.” ’

“ ‘ “*Blue Cross & Blue Shield v. Nielsen*, 714 So.2d 293, 296 (Ala.1998) (quoting *IMED Corp. v. Systems Eng'g Assocs. Corp.*, 602 So.2d 344, 346 (Ala.1992)); see also *Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n*, 589 So.2d 687, 689 (Ala.1991); *Coastal States Gas Transmission Co. v. Alabama Pub. Serv. Comm'n*, 524 So.2d 357, 360 (Ala.1988); *Alabama Farm Bureau Mut. Cas. Ins. Co. v. City of Hartselle*, 460 So.2d 1219, 1223 (Ala.1984); *Dumas Brothers Mfg. Co. v. Southern Guar. Ins. Co.*, 431 So.2d 534, 536 (Ala.1983); *Town of Loxley v. Rosinton Water, Sewer & Fire Protection Auth., Inc.*, 376 So.2d 705, 708 (Ala.1979). It is true that when looking at a statute we might sometimes think that the ramifications of the words are inefficient or unusual. However, it is our job to say what the law is, not to say what it should be. Therefore, only if there is no rational way to interpret the words as stated will we look beyond those words to determine legislative intent. To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers. See *Ex parte T.B.*, 698 So.2d 127, 130 (Ala.1997).” ’

“Thus, only when language in a statute is ambiguous will this Court engage in statutory construction. As we stated in *Ex parte Pratt*, 815 So.2d 532, 535 (Ala.2001),

‘[p]rinciples of statutory construction instruct this Court to interpret the plain language of a statute to mean exactly what it says and to engage in judicial construction only if the language in the statute is ambiguous.’

“As the Court of Criminal Appeals explained in *Ankrom* [v. *State*, 152 So.3d 373 (Ala.Crim.App.2011)], the rule of construction referenced in *Bertram* applies only where the language of the statute in question is ambiguous; the issue in these cases is whether the plain, ordinary, and normal meaning of the word ‘child’ includes an unborn child.”

Ankrom, 152 So.3d at 409–10.

This Court concluded in *Ankrom* that

“the plain meaning of the word ‘child’ is broad enough to encompass all children—born and unborn—including [the] unborn children in the cases before us. As the Court of Criminal Appeals said in *Ankrom*:

“Likewise, in the present case, we do not see any reason to hold that a *60 viable [2] fetus is not included in the term “child,” as that term is used in § 26–15–3.2, Ala.Code 1975. Not only have the courts of this State interpreted the term “child” to include a viable fetus in other contexts, the dictionary definition of the term “child” explicitly includes an unborn person or a fetus. In everyday usage, there is nothing extraordinary about using the term “child” to include a viable fetus. For example, it is not uncommon for someone to state that a mother is pregnant with her first “child.” Unless the legislature specifically states otherwise, the term “child” is simply a more general term that encompasses the more specific term “viable fetus.” If the legislature desires to proscribe conduct against only a “viable fetus,” it is necessary to use that specific term. However, if the legislature desires to proscribe conduct against a viable fetus and all other persons under a certain age, the term “child” is sufficient to convey that meaning. In fact, proscribing conduct against a “child” and a “viable fetus” would be redundant.

“The term “child” in § 26–15–3.2, Ala.Code 1975, is unambiguous; thus, this Court must interpret the plain language of the statute to mean exactly what it says and not engage in judicial construction of the language in the statute. Also, because the statute is unambiguous, the rule of lenity does not apply. We do not see any rational

basis for concluding that the plain and ordinary meaning of the term “child” does not include a viable fetus.’

“We find this reasoning persuasive and agree with the Court of Criminal Appeals that the plain meaning of the word ‘child’ in the chemical-endangerment statute includes unborn children.”

Ankrom, 152 So.3d at 411–12. As thoroughly explained in *Ankrom*, the use of the word “child” in the chemical-endangerment statute is clear and unambiguous; thus, we reject Hicks’s argument that the rule of lenity should apply to our interpretation of the statute.

Next, Hicks argues that the legislature’s intended definition of the word “child” as that term is used in the chemical-endangerment statute can be discerned from the legislature’s use of the word in the surrounding chapters of the Alabama Code, which define the word “child” as “[a] person under the age of 18 years,” § 26–14–1(3), Ala.Code 1975,³ and as “[a] person who has not yet reached his or her eighteenth birthday,” § 26–16–91(2), Ala.Code 1975.⁴ Hicks argues that the placement of the chemical-endangerment statute in the title and chapter of the Alabama Code in which it was placed is meaningful and that “the legislature is presumed to know the definition of child in the preceding and subsequent chapters.” Hicks’s brief, at p. 8. Hicks also argues that the legislature’s intended definition of the word “child” in the chemical-endangerment statute is evidenced by Alabama’s partial-birth-abortion statute, § 26–23–3, Ala.Code 1975, which refers to an unborn child as “a human fetus” as opposed to “a child.” Hicks also argues that the legislature’s intent is further demonstrated in the definition section *61 of the “Woman’s Right to Know Act,” § 26–23A–1 et seq., Ala.Code 1975, which defines “unborn child” as “the offspring of any human person from conception until birth.” § 26–23A–3(10), Ala.Code 1975. Additionally, Hicks argues that the legislature’s intent to exclude unborn children from the definition of the word “child” in the chemical-endangerment statute is evidenced by the fact that § 13A–6–1(d), Ala.Code 1975, forbids the prosecution under “Article 1 or Article 2 ... of ... any woman with respect to her unborn child,” while at the same time defining “person” as “including an unborn child in utero at any stage of development, regardless of viability.” § 13A–6–1(a)(3), Ala.Code 1975.

This Court addressed arguments similar to those raised by Hicks in *Ankrom*, as follows:

“A review of the statutes cited by the petitioners and of the context of the chemical-endangerment statute provides no

conclusive evidence as to how this Court should interpret the word ‘child’ as that term is used in the chemical-endangerment statute. The statutory definitions of the word ‘child’ cited ... are not conclusive because both set a maximum age for childhood without setting a minimum age. Similarly, [the argument] that ‘the examples put forth ... show that the legislature uses the explicit term “unborn child” to refer to the unborn, rather than rely on the ... ambiguous term “child,” ’ ... fails to note that the legislature’s decision to use the more restrictive words ‘fetus’ and ‘unborn child’ was appropriate in those other statutes because those statutes applied only to protect unborn children.⁶ In sum, nothing in the statutes cited ... contradicts the plain meaning of the word ‘child’ in the chemical-endangerment statute to include an unborn child or requires this Court to interpret the word ‘child’ as excluding unborn children.

“

“⁶ Using the word ‘fetus’ or ‘unborn child’ in place of the word ‘child’ would not have been appropriate in the chemical-endangerment statute because that statute also protects children after they have been born.”

Ankrom, 152 So.3d at 414. As this Court held in *Ankrom*, the statutory definitions of the word “child” in other chapters of the Code do not limit “child” to only a child who has been born but simply set a maximum age at which the person is no longer regarded as a “child” under a particular statutory scheme. Also, the references to a “human fetus” or “unborn child” in the partial-birth-abortion statute and the Woman’s Right to Know Act both deal exclusively with unborn children. Thus, it would be inappropriate to use the word “child” because that would, nonsensically in that context, include children who have already been born. Because both born and unborn children can be exposed to controlled substances, we have no reason to doubt that the legislature intended for the chemical-endangerment statute to be using the plain meaning of the word “child” and thereby protecting all children.

[3] Hicks also argues that a majority of other jurisdictions have refused to define the word “child” as including an unborn child and that the Court of Criminal Appeals erred by following the minority view espoused by the South Carolina Supreme Court in *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). This Court addressed this argument in *Ankrom*, as follows:

“[A]lthough, as the petitioners correctly state, a majority of jurisdictions have held that unborn children are not afforded *62 protection from the use of a controlled substance by their mothers, they nonetheless fail to convince this Court that the decisions of those courts are persuasive and should be followed by this Court. See *Planned Parenthood v. Casey*, 505 U.S. 833, 846, 112 S.Ct. 2791, 120 L.Ed.2d 624 (1992) (‘[T]he State has legitimate interests from the outset of the pregnancy in protecting ... the life of the fetus that may become a child.’ (quoted with approval in *Hamilton v. Scott*, 97 So.3d 728, 740 (Ala.2012) (Parker, J., concurring specially, joined by Stuart, Bolin, and Wise, JJ.))).”

152 So.3d at 418. As set forth in *Ankrom*, the State has a legitimate interest in protecting the life of children from the earliest stages of their development and has done so by enacting the chemical-endangerment statute. The fact that other states have failed to do so does not persuade us to look beyond the plain meaning of the word “child” as that word is used in the chemical-endangerment statute.

Hicks also argues that legislative intent can be discerned by the failure of several proposed amendments to the chemical-endangerment statute that would have specifically defined the word “child” to include unborn children. This Court addressed this argument in *Ankrom*, as follows:

“Interpreting a statute based on later attempts to amend that statute is problematic. As the United States Supreme Court stated in *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990):

“ ‘[S]ubsequent legislative history is a “hazardous basis for inferring the intent of an earlier” Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks “persuasive significance” because “several equally tenable inferences” may be drawn from such inaction, “including the inference that the existing legislation already incorporated the offered change.” ’ ”

“(Citations omitted.)

“In this case, it is possible to conclude ... that the legislature understood the original chemical-endangerment statute to protect only children who were already born. It is also possible to conclude ... that the legislature understood

the original chemical-endangerment statute to protect all children—born and unborn—and that proposals to amend the statute were unnecessary attempts to clarify the legislature's original intent. This Court cannot determine the intentions of the legislature apart from the language in the chemical-endangerment statute that is now before us; ... the plain meaning of that statutory language is to include within its protection unborn children. See *LTV Corp.*, supra; *Becton v. Rhone-Poulenc, Inc.*, 706 So.2d 1134, 1139 (Ala.1997) (‘ “[S]ubsequent legislative history” is not helpful as a guide to understanding a law.’ (quoting *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1438 (7th Cir.1988), citing in turn *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988))).”

Ankrom, 152 So.3d at 416. Because the legislature could have failed to pass the proposed amendments for a plethora of reasons, Hicks's argument that the legislature's inaction in that regard should influence our interpretation of the chemical-endangerment statute is unpersuasive.

B. Public Policy

Hicks argues that the overwhelming majority of medical and public-health organizations agree that, as a matter of public *63 policy, prosecuting women for drug use during pregnancy does not protect human life. Hicks's brief, at p. 17.

[4] In *Ankrom*, this Court rejected the notion that public-policy arguments should play a role in this Court's interpretation of a statute:

“Although the briefs of the petitioners and of several amici curiae recite numerous potential public-policy implications of this Court's decision in these cases, policy cannot be the determining factor in our decision; public-policy arguments should be directed to the legislature, not to this Court. As we stated in *Boles v. Parris*, 952 So.2d 364, 367 (Ala.2006): ‘[I]t is well established that the legislature, and not this Court, has the exclusive domain to formulate public policy in Alabama.’

“This is not because policy is unimportant but because policy arguments are ill-suited to judicial resolution. See *M & Assocs., Inc. v. City of Irondale*, 723 So.2d 592, 599 (Ala.1998) (‘ “There are reasonable policy arguments on both sides of this issue; however, the Legislature is the body that must choose between such conflicting policy considerations.” ’ (quoting *City of Tuscaloosa v. Tuscaloosa Vending Co.*, 545 So.2d 13, 14 (Ala.1989))).

For this reason, although we recognize that the public policy of this State is relevant to the application of this statute, we decline to address the petitioners' public-policy arguments; we leave those matters for resolution by the legislature. As we stated in *Marsh v. Green*, 782 So.2d 223, 231 (Ala.2000), ‘[t]hese concerns deal with the wisdom of legislative policy rather than constitutional issues. Matters of public policy are for the Legislature and, whether wise or unwise, legislative policies are of no concern to the courts.’ See also *Cavalier Mfg., Inc. v. Jackson*, 823 So.2d 1237, 1248 (Ala.2001), overruled on other grounds, *Ex parte Thicklin*, 824 So.2d 723 (Ala.2002) (‘The Legislature is endowed with the exclusive domain to formulate public policy in Alabama, a domain upon which the judiciary shall not tread.’). We therefore refrain from considering the policy issues raised by the petitioners or amici curiae, limiting ourselves to interpreting the text of the chemical-endangerment statute.”

Ankrom, 152 So.3d at 420. For the reasons set forth in *Ankrom*, we refrain from considering Hick's public-policy arguments.

C. Constitutional Arguments

[5] Hicks argues that the application of the chemical-endangerment statute is unconstitutional as applied to her because, she says, the statute is vague and, therefore, did not provide her with adequate notice of what conduct was prohibited, in violation of her due-process rights. Hicks's brief, at p. 24. Hicks argues that a vague statute is one that fails to give adequate “ ‘notice of the required conduct to one who would avoid its penalties.’ ” *Vaughn v. State*, 880 So.2d 1178, 1194 (Ala.Crim.App.2003) (quoting *McCall v. State*, 565 So.2d 1163, 1165 (Ala.Crim.App.1990), quoting in turn *Boyce Motor Lines v. United States*, 342 U.S. 337, 340, 72 S.Ct. 329, 96 L.Ed. 367 (1952)). Hicks also argues that “[m]en of common intelligence cannot be required to guess at the meaning of [an] enactment.” *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 92 L.Ed. 840 (1948). To support her arguments, Hicks cites *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), in which the United States Supreme Court stated that “the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary *64 people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” Hicks argues that the chemical-endangerment statute is facially vague because it does not define the word “child,” leaving her unaware that it includes unborn children. Hicks also argues that the prosecution of women

under similar circumstances, as well as news reports of such prosecutions, did not provide her with adequate notice that her conduct was criminal. Hicks, therefore, argues that she was not afforded constitutionally adequate notice that her conduct would violate the chemical-endangerment statute. Hicks's brief, at pp. 24–25.

In *Vaughn v. State*, supra, the Court of Criminal Appeals explained the doctrine of vagueness:

“ ‘ “The doctrine of vagueness ... originates in the due process clause of the Fourteenth Amendment, see *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), and is the basis for striking down legislation which contains insufficient warning of what conduct is unlawful, see *United States v. National Dairy Products Corporation*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963).

“ ‘ “Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989, 996 (1954). A vague statute does not give adequate ‘notice of the required conduct to one who would avoid its penalties,’ *Boyce Motor Lines v. United States*, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367, 371 (1952)), is not ‘sufficiently focused to forewarn of both its reach and coverage,’ *United States v. National Dairy Products Corporation*, 372 U.S. at 33, 83 S.Ct. at 598, 9 L.Ed.2d at 566, and ‘may trap the innocent by not providing fair warning,’ *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222, 227–28 (1972).

“ ‘ “As the United States Supreme Court observed in *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948):

“ ‘ “There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests to ascertain guilt.’ ”

“ ‘ “333 U.S. at 515–16, 68 S.Ct. at 670, 92 [L.Ed. at] 849–50 [citations omitted].”

“ ‘ *McCrary v. State*, 429 So.2d 1121, 1123–24 (Ala.Crim.App.1982), cert. denied, 464 U.S. 913, 104 S.Ct. 273, 78 L.Ed.2d 254 (1983).’

“*McCall v. State*, 565 So.2d 1163, 1165 (Ala.Crim.App.1990).

“ ‘ “ ‘As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’ *Kolender v. Lawson*, 461 U.S. 352 [357], 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) (citations omitted). A statute challenged for vagueness must therefore be scrutinized to determine whether it provides both fair notice to the public that certain conduct is proscribed and minimal guidelines to aid *65 officials in the enforcement of that proscription. See *Kolender*, supra; *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).” ’

“*Timmons v. City of Montgomery*, 641 So.2d 1263, 1264 (Ala.Crim.App.1993), quoting *McCorkle v. State*, 446 So.2d 684, 685 (Ala.Crim.App.1983). However,

“ ‘ “ ‘[t]his prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for “[i]n most English words and phrases there lurk uncertainties.” *Robinson v. United States*, 324 U.S. 282, 286, 65 S.Ct. 666, 668, 89 L.Ed. 944 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.’ ” ’

“*Sterling v. State*, 701 So.2d 71, 73 (Ala.Crim.App.1997), quoting *Culbreath v. State*, 667 So.2d 156, 158 (Ala.Crim.App.1995), abrogated on other grounds by *Hayes v. State*, 717 So.2d 30 (Ala.Crim.App.1997), quoting in turn, *Rose v. Locke*, 423 U.S. 48, 49–50, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975).

“ ‘ “ ‘Mere difficulty of ascertaining its meaning or the fact that it is susceptible of different interpretations will not render a statute or ordinance too vague or uncertain to be enforced.’ ” ’ *Scott & Scott, Inc. v. City of Mountain*

Brook, 844 So.2d 577, 589 (Ala.2002), quoting *City of Birmingham v. Samford*, 274 Ala. 367, 372, 149 So.2d 271, 275 (1963). The judicial power to declare a statute void for vagueness ‘should be exercised only when a statute is so incomplete, so irreconcilably conflicting, or so vague or indefinite, that it cannot be executed, and the court is unable, by the application of known and accepted rules of construction, to determine, with any reasonable degree of certainty, what the legislature intended.’ *Jansen v. State ex rel. Downing*, 273 Ala. 166, 170, 137 So.2d 47, 50 (1962).”

Vaughn v. State, 880 So.2d at 1194–96. Therefore, to survive scrutiny under the void-for-vagueness doctrine, the chemical-endangerment statute must provide fair notice to the public of what conduct is prohibited in a manner that does not encourage arbitrary and discriminatory enforcement.

[6] [7] As discussed above, by its plain meaning, the chemical-endangerment statute unambiguously protects all children, born and unborn, from exposure to controlled substances. A person is presumed to know the law and is expected to conform his conduct to it. See § 13A–2–6(b), Ala.Code 1975 (“A person is not relieved of criminal liability for conduct because he engages in that conduct under a mistaken belief that it does not, as a matter of law, constitute an offense....”); *Ex parte Tuscaloosa Cnty.*, 770 So.2d 602, 605 (Ala.2000) (“Mistake of law, however, is not a defense to a crime.”); *White v. Birmingham Post Co.*, 235 Ala. 278, 279, 178 So. 449, 450 (1938) (“All persons are presumed to know the law.”); *Gordon v. State*, 52 Ala. 308, 310 (1875) (“Ignorance of the law is never an excuse, whether a party is charged civilly or criminally.”). Accordingly, because the chemical-endangerment statute is unambiguous, it provides “fair notice to the public that certain conduct is proscribed.” *Timmons v. City of Montgomery*, 641 So.2d 1263, 1264 (Ala.Crim.App.1993) (quoting *McCorkle v. State*, 446 So.2d 684, 685 (Ala.Crim.App.1983)).

Hicks has presented no evidence indicating that the chemical-endangerment statute *66 “encourage[s] arbitrary and discriminatory enforcement.” *Kolender*, 461 U.S. at 361. Therefore, Hicks has not demonstrated that the chemical-endangerment statute is unconstitutionally vague.

IV. Conclusion

Consistent with this Court's opinion in *Ankrom*, by its plain meaning, the word “child” in the chemical-endangerment

statute includes an unborn child, and, therefore, the statute furthers the State's interest in protecting the life of children from the earliest stages of their development. See § 26–22–1(a), Ala.Code 1975 (“The public policy of the State of Alabama is to protect life, born, and unborn.”); see also *Ankrom*, 152 So.3d at 420 (Parker, J., concurring specially) (explaining that the application of the chemical-endangerment statute to protect the life of unborn children “is consistent with many statutes and decisions throughout our nation that recognize unborn children as persons with legally enforceable rights in many areas of the law”). Accordingly, we affirm the judgment of the Court of Criminal Appeals.

AFFIRMED.

STUART, BOLIN, MAIN, WISE, and BRYAN, JJ., concur.

MOORE, C.J., and PARKER, J., concur specially.

SHAW, J., concurs in the result.

MURDOCK, J., dissents.

MOORE, Chief Justice (concurring specially).

I concur with the main opinion and with Justice Parker's specially concurring opinion, which rightly notes that “[b]ecause an unborn child has an inalienable right to life from its earliest stages of development, it is entitled ... to a life free from the harmful effects of chemicals at all stages of development.” 153 So.3d at 83–84. I write separately to emphasize that the inalienable right to life is a gift of God that civil government must secure for all persons—born and unborn.

I. Our Creator, Not Government, Gives to All People “Unalienable” Natural Rights.

According to our Nation's charter, the Declaration of Independence, the United States was founded upon the “self-evident” truth that “all Men are created equal, [and] that they are endowed by their Creator with certain unalienable Rights.” *Declaration of Independence*, ¶ 2 (1776). Denominated in the United States Code Annotated as one of the “Organic Laws of the United States of America,” the Declaration acknowledges as “self-evident” the truth that all human beings are endowed with inherent dignity and the right to life as a direct result of having been created by God. When it was signed by our Founding Fathers in 1776, the

Declaration returned to first principles of God, His law, and human rights and government.

As Thomas Jefferson explained, “[t]he object of the Declaration of Independence” was “[n]ot to find out new principles, or new arguments, never before thought of ... but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent [I]t was intended to be an expression of the American mind.”⁵ Thomas Jefferson, *67 Letter to Henry Lee, May 8, 1825, in VIII *The Writings of Thomas Jefferson* 407 (H.A. Washington ed., 1854). The American mind of the founding era had been nurtured in its views of law and life by the most influential legal treatise of the time, Sir William Blackstone's *Commentaries on the Laws of England* (1765). See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 593–94, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (recognizing Blackstone's work as “ ‘the preeminent authority on English law for the founding generation’ ” (quoting *Alden v. Maine*, 527 U.S. 706, 715, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999))). Blackstone recognized that God's law was superior to all other laws:

“This law of nature, being co-eval [beginning at the same time] with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: *no human laws are of any validity, if contrary to this....*”

1 William Blackstone, *Commentaries* at *41 (emphasis added). See also *id.* at *42 (“Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.”).

Like Jefferson, Alexander Hamilton defended American independence based on the “law of nature” and emphasized that divine law was the source of our human rights:

“[T]he Deity, from the relations we stand in to Himself and to each other, has constituted an eternal and immutable law, which is indispensably obligatory upon all mankind, prior to any human institution whatever.

“This is what is called the law of nature....

“Upon this law depend the natural rights of mankind”

Alexander Hamilton, “The Farmer Refuted,” in 2 *The Works of Alexander Hamilton* 43 (John C. Hamilton ed., 1850) (emphasis added). According to Blackstone, God, not

governments and legislatures, gives persons these inherent natural rights:

“Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable.”

1 *Commentaries* at *54 (emphasis added). Government, in fact, has no “power to abridge or destroy” natural rights God directly bestows to mankind, *id.*, and, indeed, no power to contravene what God declares right or wrong:

“The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore st[y]led *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only ... in subordination to the great lawgiver, transcribing and publishing his precepts.”

Id. Therefore, as stated by James Wilson, one of the first Justices on the United *68 States Supreme Court: “Human law must rest its authority ultimately upon the authority of that law which is divine.” James Wilson, “Of the General Principles of Law and Obligation,” in 1 *The Works of the Honourable James Wilson, L.L.D.*, 104–05 (Bird Wilson ed., 1804) (hereinafter “*Works of James Wilson*”).

II. The Right to Life is an “Unalienable” Gift of God.

The first right listed in the Declaration as among our unalienable rights is the right to “Life.” Blackstone wrote that “[I]f life is the immediate gift of God, a right inherent by nature

in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb.”⁶ 1 *Commentaries* at *125. See also *id.* at *126 (stating that an infant “in the mother's womb, [was] supposed in law to be born” for various legal purposes and rights, e.g., legacy and guardianship). As the gift of God, this right to life⁷ is not subject to violation by another's unilateral choice: “This natural life being, as was before observed, the immediate donation of the great creator, *cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.*” *Id.* at *129 (emphasis added). Even the United States Supreme Court has recognized that “[t]he right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable.” *Washington v. Glucksberg*, 521 U.S. 702, 715, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (quoting *Martin v. Commonwealth*, 184 Va. 1009, 1018–19, 37 S.E.2d 43, 47 (1946)).

III. All Governments Must Secure God–Given Rights.

Although not the source of our rights, governments are instituted in order to “secure *69 these rights” given by God, the Declaration continues, and are fashioned by the people “in such form, as to them shall seem most likely to effect their Safety and Happiness.” Thomas Jefferson identified “the first and only legitimate object of good government” to be “[t]he care of human life and happiness, and not their destruction.” Thomas Jefferson, Letter to the Republican Citizens of Washington County, Maryland, Assembled at Hagerstown on the 6th Instant, March 31, 1809, in VIII *Writings* at 165. But what if a government, its positive laws, and “settled” judicial opinions become destructive of these ends, violating the people's preexistent rights to life, liberty, and the pursuit of happiness? We have an illustrative example in the preceding century: the trials at Nuremberg, Germany.

IV. Nuremberg: The Law of Nature Applied Internationally.

When Germany was defeated in World War II, German officers were tried for “war crimes” and “crimes against humanity” in Nuremberg from 1945–46 before an International Military Tribunal formed by France, Great Britain, the United States, and the Soviet Union.⁸ See Indictments, *Nurnberg Military Tribunals* 3 (Office of Military Gov't for Germany (US), Nuremberg 1946). The German defendants contended that they were only following orders and the laws of their country and that prosecuting them

for crimes not previously specified as crimes in their own country constituted an improper *ex post facto* application. “Motion Adopted By All Defense Counsel,” Nov. 19, 1945, 1 *Trial of the Major War Criminals before the International Military Tribunal* 169 (International Military Tribunal, Nuremberg 1947). In his opening statement, however, lead prosecutor Robert Jackson (then an Associate Justice on the United States Supreme Court) argued that “even rulers are, as Lord Chief Justice Coke said to King James, ‘under God and the law.’ ” Robert Jackson, “Opening Statement,” Nov. 21, 1945, in 2 *Trial*, *supra*, at 143. Likewise, British prosecutor Sir Hartley Shawcross declared no immunity “for those who obey orders which—whether legal or not in the country where they are issued—are manifestly contrary to the very law of nature from which international law has grown.” Hartley Shawcross, “Closing Arguments,” July 26, 1946, in 19 *Trial*, *supra*, at 466. The Nuremberg Court rejected the arguments of the German defendants, noting that “so far from it being unjust to punish [them], it would be unjust if [their] wrong[s] were allowed to go unpunished.” Judgment, “The Law of the Charter,” in 1 *Trial*, *supra*, at 219.

Although the Nuremberg defendants were following orders and the laws of their own officials and country, they were guilty of violating a higher law to which all nations are equally subject: the laws of nature and of nature's God. As Justice James Wilson explained:

“The law of nature, when applied to states or political societies, receives a new name, that of the law of nations....

“....

“... Though the law ... receives a new appellation; it retains, unimpaired, its qualities and its power. The law of nations as well as the law of nature is of *70 obligation indispensable: the law of nations, as well as the law of nature, is of origin divine.”

Works of James Wilson at 145–47. The law of nations “depends entirely upon the rules of natural law” such that, even in the construction of compacts and treaties between nations, “we have no other rule to resort to, but the law of nature[,] being the only one to which both communities are equally subject.” 1 *Commentaries* at *43. See also 2 Samuel Pufendorf, *Of the Law of Nature and Nations* 150 (1729) (agreeing with Thomas Hobbes that “what ... we call the Law of nature, the same we term the Law of Nations, when we apply it to whole States, Nations, or People”). From local to international, all law “flows from the same divine source:

it is the law of God.” *Works of James Wilson* at 104. The law of nature and of nature's God therefore binds all nations, states, and all government officials—from Great Britain to Germany to Alabama—regardless of positive laws or orders to the contrary.

V. Alabama Recognizes the Right to Life is “Inalienable.”

As this Court has recognized, the unalienable right to life is duly secured under Alabama law:

“[T]he Declaration of Rights in the Alabama Constitution ... states that ‘all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; *that among these are life, liberty and the pursuit of happiness.*’ Ala. Const. 1901, § 1 (emphasis added). These words, borrowed from the Declaration of Independence ..., affirm that *each person has a God-given right to life.*”

Hamilton v. Scott, 97 So.3d 728, 734 n. 4 (Ala.2012). Alabama statutory law provides that “[t]he public policy of the State of Alabama is to protect life, born, and unborn.” § 26–22–1(a), Ala.Code 1975. In 2006, the Alabama Legislature amended the homicide statute to define “person” to include “an unborn child in utero at any stage of development, regardless of viability,” § 13A–6–1(a)(3), Ala.Code 1975, “ ‘thus recogniz[ing] under that statute that, when an “unborn child” is killed, a “person” is killed.’ ” *Hamilton*, 97 So.3d at 739 (Parker, J., concurring specially) (quoting *Ziade v. Koch*, 952 So.2d 1072, 1082 (Ala.2006) (See, J., concurring specially)).⁹ This Court in *Ex parte Ankrom*, 152 So.3d 397 (Ala.2013), and again today, merely applies equally to born and unborn children the statute prohibiting the chemical endangerment of any child in Alabama, a protection commensurate with the constitutional and statutory protections Alabama gives to all unborn life.

***71 VI. States Have an Affirmative Duty to Protect Unborn Human Life Under the Equal Protection Clause of the Fourteenth Amendment.**

The Equal Protection Clause of the Fourteenth Amendment provides that a state may not “deny to any *person* within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV (emphasis added). “[T]he framers [of the Fourteenth Amendment] attempted to create a legal bridge between their understanding of the Declaration of Independence, with its grand declarations of equality

and rights endowed by a Creator God, and constitutional jurisprudence.” *The Heritage Guide to the Constitution* 400 (Edwin Meese III et al. eds., 2005). The Equal Protection Clause expressly applies to “any *person* ” within a state's jurisdiction. By contrast, the Privileges and Immunities Clause applies to “citizens,” namely, “[a]ll persons born or naturalized in the United States....” U.S. Const. amend XIV, § 1 (emphasis added). This definitional distinction necessarily implies that personhood—and therefore the protection of the Equal Protection Clause—is not dependent, as is citizenship, upon being born or naturalized. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (“The fourteenth amendment to the constitution is not confined to the protection of citizens.”). “The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or *class, or to any individual*, the equal protection of the laws.” *Civil Rights Cases*, 109 U.S. 3, 31, 3 S.Ct. 18, 27 L.Ed. 835 (1883) (emphasis added). Unborn children are a class of persons entitled to equal protection of the laws.

A plain reading of the Equal Protection Clause, therefore, indicates that states have an affirmative constitutional duty to protect unborn persons within their jurisdiction to the same degree as born persons.¹⁰ “The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352, 38 S.Ct. 495, 62 L.Ed. 1154 (1918) (quoted in *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000)). Any state's discriminatory failure to provide legal protection equally to born and unborn persons under, for instance, its ***72** statutes prohibiting homicide, assault, or chemical endangerment violates, therefore, the Equal Protection Clause of the United States Constitution. See *Dobbins v. City of Los Angeles*, 195 U.S. 223, 237, 25 S.Ct. 18, 49 L.Ed. 169 (1904) (stating that where a state's police powers “amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void”). Therefore, the State of Alabama's application of its chemical-endangerment statute, § 26–15–3.2(a)(1), Ala.Code 1975, equally to protect born and unborn children is entirely consistent with its constitutional duty under the Equal Protection Clause.

VII. Conclusion.

Under the Equal Protection Clause of the Fourteenth Amendment, states have an obligation to provide to unborn children at any stage of their development the same legal protection from injury and death they provide to persons already born. Because a human life with a full genetic endowment comes into existence at the moment of conception, the self-evident truth that “all men are created equal and are endowed by their Creator with certain unalienable rights” encompasses the moment of conception. Legal recognition of the unborn as members of the human family derives ultimately from the laws of nature and of nature's God, Who created human life in His image and protected it with the commandment: “Thou shalt not kill.” Therefore, the interpretation of the word “child” in Alabama's chemical-endangerment statute, § 26–15–3.2, Ala.Code 1975, to include all human beings from the moment of conception is fully consistent with these first principles regarding life and law.

PARKER, Justice (concurring specially).

This case presents an opportunity for this Court to continue a line of decisions affirming Alabama's recognition of the sanctity of life from the earliest stages of development. We have done so in three recent cases;¹¹ we do so again today by holding that the word “child” as used in Alabama's chemical-endangerment statute, § 26–15–3.2(a)(1), Ala.Code 1975, unambiguously includes an unborn child.

“Liberty finds no refuge in a jurisprudence of doubt.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion). A plurality of United States Supreme Court Justices stated this truism in their misguided effort to stabilize our nation's abortion jurisprudence by reaffirming “the essential holding of *Roe v. Wade* [, 410 U.S. 113 (1973)].”¹² *Casey*, 505 U.S. at 846. However, as discussed below, by affirming the rejection in *73 *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), of an unborn child's inalienable right to life, *Casey* did anything but dispel the shroud of doubt hovering over our nation's abortion jurisprudence. Rather, *Casey* has resulted in a jurisprudential quagmire of arbitrary and inconsistent decisions addressing the recognition of an unborn child's right to life. This legal conundrum has been described as follows:

“While logic may not be the life of the law in all circumstances, should logic and law be at swords' point? One does not have to be an Aristotelian to recognize the

law of non-contradiction. This principle states that it is impossible for a thing to be and not to be at the same time and in the same respect. When it comes to the personhood of the unborn, the law of logic is today sorely challenged by the collision course of fetal rights laws and abortion laws.”

Roger J. Magnuson & Joshua M. Lederman, *Aristotle, Abortion, and Fetal Rights*, 33 Wm. Mitchell L.Rev. 767, 769 (2007) (footnotes omitted).

In contrast to the reasoning of *Roe* and *Casey*, Alabama's reliance upon objective principles has led this Court to consistently recognize the inalienable right to life inherently possessed by every human being and to dispel the shroud of doubt cast by the United States Supreme Court's violation of the law of noncontradiction. This sound foundation allows Alabama to provide refuge to liberty—the purported objective of the plurality opinion in *Casey*. Liberty will continue to find no refuge in abortion jurisprudence until courts refuse to violate the law of noncontradiction and, like Alabama, recognize an unborn child's inalienable right to life at every point in time and in every respect.

I. Alabama recognizes an unborn child's inalienable right to life

“The public policy of the State of Alabama is to protect life, born, and unborn.” § 26–22–1(a), Ala.Code 1975. This inalienable right is a proper subject of protection by our laws at all times and in every respect. The Declaration of Independence, one of our nation's organic laws, recognized that governments are “instituted among men” to protect this sacred right.¹³ Accordingly, protecting the inalienable right to life is a proper subject of state action.¹⁴ We have affirmed Alabama's policy of protecting life at every stage of development in our recent decisions in *Mack v. Carmack*, 79 So.3d 597 (Ala.2011), *Hamilton v. Scott*, 97 So.3d 728 (Ala.2012), *Ex parte Ankrom*, 152 So.3d 397 (Ala.2013), and in our decision today, by consistently recognizing that an unborn child is a human being from the earliest *74 stage of development and thus possesses the same right to life as a born person.

In *Mack*,¹⁵ a wrongful-death case, this Court held that § 6–5–391(a), Ala.Code 1975,¹⁶ and § 6–5–410(a), Ala.Code 1975,¹⁷ “permit[] an action for the death of a previable fetus.” *Mack*, 79 So.3d at 611. Our decision in *Hamilton* affirmed this holding. In *Ankrom*, this Court held that the chemical-endangerment statute at issue in the present case, § 26–15–3.2, Ala.Code 1975, protects unborn children from

exposure to controlled substances. Today, this Court reaffirms *Ankrom*. This Court's decisions consistently recognize that an unborn child's right to life vests at the earliest stage of development. Although Alabama's ban on postviability abortions, § 26-22-3(a), Ala.Code 1975,¹⁸ is constrained by the United States Supreme Court's viability limitation for abortion set forth in *Roe* and its progeny, this Court has consistently affirmed Alabama's recognition of the right to life of all unborn children. In my special concurrence in *Hamilton*, 97 So.3d at 737-47 (Parker, J., concurring specially, joined by Stuart, Bolin, and Wise, JJ.), I explained why the viability standard is arbitrary¹⁹ and should *75 be abandoned altogether. As I noted in *Hamilton*, I am not alone.²⁰

My special concurrence in *Hamilton* was not the first time members of this Court have criticized the viability standard. In *Mack*, this Court expressed its recognition of the separate and distinct existence of unborn children by quoting *Wolfe v. Isbell*, 291 Ala. 327, 280 So.2d 758 (1973): “ ‘ “[M]edical authority has recognized ... that the child is in existence from the moment of conception....” ’ ” *Mack*, 79 So.3d at 602 (quoting *Wolfe*, 291 Ala. at 330, 280 So.2d at 760, quoting in turn Prosser, *Law of Torts*, p. 336 (4th ed.1971)). In *Wolfe*, this Court criticized the viability distinction, as follows:

“[T]he more recent authorities emphasize that there is no valid medical basis for a distinction based on viability These proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother.”

Wolfe, 291 Ala. at 330-31, 280 So.2d at 761. Forty years later, this Court again held that there is no valid basis for the viability standard by expressly rejecting the Court of Criminal Appeals' application of the chemical-endangerment statute solely to a viable unborn child. See *Ankrom*, 152 So.3d at 405. Today, we affirm this Court's holding in *Ankrom*.

Alabama's recognition of an unborn child's right to life at all stages of development is distinct from the vague standard delineated in *Casey* of “the State's ‘important and legitimate interest in protecting *76 the potentiality of human life.’ ” *Casey*, 505 U.S. at 871 (quoting *Roe*, 410 U.S. at 162).²¹ Although subtle, the distinction is nonetheless profound. As explained above, Alabama recognizes that, from the child's earliest stage of development, the existence of an unborn child is separate from that of its mother's. Accordingly, Alabama has an interest not only in promoting a sustainable society and a culture that appreciates life, but also in “secur[ing] the blessings of liberty” by protecting the right to life inherent in the new life itself. Ala. Const. 1901 pmbl.

Consistent protection of an unborn child's right to life at every point in time and in every respect is essential to the duty of the judiciary because, as stated above, “[l]iberty finds no refuge in a jurisprudence of doubt.” *Casey*, 505 U.S. at 844. Ironically, by affirming “the essential holding of *Roe v. Wade*,” the plurality in *Casey* cast a shroud of doubt over our nation's jurisprudence by suppressing an unborn child's inalienable right to life.

II. Examples of a jurisprudence of doubt

Despite *Casey*'s reaffirmation of the unsupported “essential holding of *Roe v. Wade*,”²² asserted in the vain hope of stabilizing abortion jurisprudence, we have seen just the opposite since *Casey* was decided.²³ In court opinions subsequent to *Casey*, unborn children are contradictorily treated as human beings at one particular point in time and in one particular respect while at the same point in time, but in another respect, are discarded as mere tissue or “products of conception.” See, e.g., *Carhart v. Stenberg*, 192 F.3d 1142, 1146 (8th Cir.1999), aff'd, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (describing one method of *second-trimester abortion* as “remov[ing] the fetus and other products of conception”). The particular status afforded unborn children often depends entirely upon a subjective perception of them in a particular context or from a particular vantage point, rather than upon objective factors that would dispel the shroud of doubt that *Casey*'s affirmation of *Roe* cast over our nation's abortion jurisprudence. Two examples demonstrating the violation of the law of noncontradiction in our nation's abortion jurisprudence follow.²⁴

**77 A. Partial-birth-abortion cases*

One of the most puzzling instances of the doubtful jurisprudence resulting from *Casey*'s affirmation of *Roe* is the violation of the law of noncontradiction that is exposed by a comparison of the United States Supreme Court's "partial-birth-abortion" cases of *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), and *Gonzales v. Carhart*, 550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007). In *Stenberg*, the Court struck down a Nebraska statute because it interpreted the statute to ban the two most common late-term abortion procedures. In *Gonzales*, the Court upheld a federal statute that banned only one of the two "equally gruesome" procedures. *Stenberg*, 530 U.S. at 946 (Stevens, J., concurring). As discussed below, an unborn child at a particular stage of gestation is treated as a child in *Gonzales* while referred to merely as "potential life" in *Stenberg*. This clearly violates the law of noncontradiction.

In *Stenberg*, an abortion provider challenged the constitutionality of a Nebraska statute providing as follows:

" 'No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.' Neb.Rev.Stat. Ann. § 28–328(1) (Supp.1999).

"The statute defines 'partial birth abortion' as:

" 'an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.' § 28–326(9).

"It further defines 'partially delivers vaginally a living unborn child before killing the unborn child' to mean

" 'deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.' *Ibid.*"

Stenberg, 530 U.S. at 921–22.

Justice Kennedy described the two abortion procedures prohibited by the statute and explained the legal challenge to the statute in his dissent:

"The person challenging Nebraska's law is Dr. Leroy Carhart, a physician who received his medical degree from Hahnemann Hospital and University in 1973. Dr. Carhart performs the procedures in a clinic in Nebraska and will also travel to Ohio to perform abortions there. Dr. Carhart has no specialty certifications in a field related to childbirth or abortion and lacks admitting privileges at any hospital. He performs *78 abortions throughout pregnancy, including when he is unsure whether the fetus is viable. In contrast to the physicians who provided expert testimony in this case (who are board certified instructors at leading medical education institutions and members of the American Board of Obstetricians and Gynecologists), Dr. Carhart performs the partial birth abortion procedure (D & X [25]) that Nebraska seeks to ban. He also performs the other method of abortion at issue in the case, the D & E. [26]

"As described by Dr. Carhart, the D & E procedure requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina. Dr. Carhart uses the traction created by the opening between the uterus and vagina to dismember the fetus, *tearing* the grasped portion away from the remainder of the body. The traction between the uterus and vagina is essential to the procedure because attempting to abort a fetus without using that traction is described by Dr. Carhart as 'pulling the cat's tail' or 'drag [ging] a string across the floor, you'll just keep dragging it. It's not until something grabs the other end that you are going to develop traction.' The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. Dr. Carhart agreed that '[w]hen you pull out a piece of the fetus, let's say, an arm or a leg and remove that, at the time just prior to removal of the portion of the fetus, ... the fetus [is] alive.' Dr. Carhart has observed fetal heartbeat via ultrasound with 'extensive parts of the fetus removed,' and testified that mere dismemberment of a limb does not always cause death because he knows of a physician who removed the arm of a fetus only to have the fetus go on to be born 'as a living child with one arm.' At the conclusion

of a D & E abortion no intact fetus remains. In Dr. Carhart's words, the abortionist is left with 'a tray full of pieces.'

"The other procedure implicated today is called 'partial birth abortion' or the D & X. The D & X can be used, as a general matter, after 19 weeks' gestation because the fetus has become so developed that it may survive intact partial delivery from the uterus into the vagina. In the D & X, the abortionist initiates the woman's natural delivery process by causing the cervix of the woman to be dilated, sometimes over a sequence of days. The fetus' arms and legs are delivered outside the uterus while the fetus is alive; witnesses to the procedure report seeing the body of the fetus moving outside the woman's body. At this point, the abortion procedure has the appearance of a live birth. As stated by one group of physicians, '[a]s the physician manually performs breech extraction of the body of a live fetus, excepting the head, she continues in the apparent role of an obstetrician delivering a child.' With only the head of the fetus remaining in utero, the abortionist tears open the skull. According to Dr. Martin Haskell, a leading proponent of the procedure, the appropriate instrument to be used at this stage of the *79 abortion is a pair of scissors. Witnesses report observing the portion of the fetus outside the woman react to the skull penetration. The abortionist then inserts a suction tube and vacuums out the developing brain and other matter found within the skull. The process of making the size of the fetus' head smaller is given the clinically neutral term 'reduction procedure.' Brain death does not occur until after the skull invasion, and, according to Dr. Carhart, the heart of the fetus may continue to beat for minutes after the contents of the skull are vacuumed out. The abortionist next completes the delivery of a dead fetus, intact except for the damage to the head and the missing contents of the skull."

Stenberg, 530 U.S. at 958–60 (Kennedy, J., dissenting, joined by Rehnquist, C.J.(citations omitted)).²⁷

Although Nebraska argued that it intended to ban only the dilation and extraction ("D & X") procedure, the United States Supreme Court held that the wording of the statute could be interpreted to encompass the dilation and evacuation ("D & E") procedure as well. Therefore, the Court concluded that the Nebraska statute violated the United States Constitution:

"In sum, using this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D & E procedures, the most commonly used method for performing previability [second trimester abortions](#). All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional."

Stenberg, 530 U.S. at 945–46. Thus, the Nebraska statute that was enacted to "prohibit a method of abortion that millions find hard to distinguish from infanticide and that the Court hesitates even to describe" was held to be an undue burden and prohibited by *Casey* because the description in the statute of this horrendous procedure could be read to also apply to D & E procedures. *Stenberg*, 530 U.S. at 983 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.). Two of the Justices who formed the majority in *Stenberg* recognized in a special concurrence that abortions using the D & E procedure are as "equally gruesome" as those using the D & X procedure, yet they argued that the state has no legitimate interest in prohibiting only abortions performed *80 by D & X in its attempt to establish an ethical line between abortion and infanticide.²⁸

The irony of the idea that a state has no legitimate interest in banning one, but not all, "brutal" or "gruesome" methods of killing unborn children²⁹ was made evident seven years later when the United States Supreme Court issued its opinion in *Gonzales*. The question presented to the Court in *Gonzales* was whether the federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 ("the Act"), was constitutional.³⁰ Armed with the Court's dissection of the Nebraska statute in *Stenberg*, Congress recognized that it must clearly articulate that the Act banned only abortions performed by D & X, as opposed to the piece-by-piece dismemberment of an unborn child during an abortion by D & E, to avoid having the Act overturned by the United States Supreme Court. Thus, the

Act artfully defined “partial-birth abortion” as an abortion in which the person performing the abortion

“ ‘deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of [breech presentation](#), any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.’ ”

[Gonzales, 550 U.S. at 142](#) (quoting [18 U.S.C. § 1531\(b\)\(1\)\(A\)](#)).

The Court's majority opinion in *Gonzales* had a completely different tone than [*81](#) the majority opinion in *Stenberg*.³¹ *Gonzales* contained the following description of the type of procedure the Act intended to ban:

“Here is ... [a] description from a nurse who witnessed the [prohibited] method performed on a 26 1/2-week fetus and who testified before the Senate Judiciary Committee:

“ ‘ “Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the head right inside the uterus....

“ ‘ “The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

“ ‘ “The doctor opened up the scissors, stuck a high-powered [suction tube](#) into the opening, and sucked the baby's brains out. Now the baby went completely limp....

“ ‘ “He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.” ’ ”

[Gonzales, 550 U.S. at 138–39](#) (quoting [H.R.Rep. No. 108–58, p. 3](#) (2003)). Such a description is difficult to read; it shocks even the most callous conscience. Yet, this is the procedure several of the Justices who formed the majority in *Stenberg* found to be no more gruesome than the

procedure they approved in *Stenberg*—D [*82](#) & E. See [Gonzales, 550 U.S. at 181–82](#) (Ginsburg, J., dissenting).

In *Gonzales*, the Court held that the Act did not ban abortions by D & E or several other rarely used procedures. Therefore, the Court concluded that the Act was consistent with the guidelines of *Casey* because it did not unduly burden the ability to have an abortion.³²

The United States Supreme Court's opinions in *Stenberg* and *Gonzales* cast a thick shroud of doubt over abortion jurisprudence. A reconciliation of the two opinions leads to a conclusion that a state is free “to draw a bright line that clearly distinguishes abortion and infanticide” by banning the killing of a completely intact infant mere seconds from being fully delivered so long as another, and perhaps equally gruesome, method of killing the child is permitted. [Gonzales, 550 U.S. at 158](#). Justice Ginsburg's dissent in *Gonzales* notes the illogicality of banning only one method of abortion:

“Today's ruling, the Court declares, advances ‘a premise central to [*Casey* 's] conclusion’—i.e., the Government's ‘legitimate and substantial interest in preserving and promoting fetal life.’ (‘[W]e must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.’). But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion. See [Stenberg, 530 U.S., at 930](#).... In short, the Court upholds a law that, while doing nothing to ‘preserv[e] ... fetal life,’ bars a woman from choosing intact D & E [i.e., D & X,] although her doctor ‘reasonably believes [that procedure] will best protect [her],’ [Stenberg, 530 U.S., at 946](#) (Stevens J., concurring).

“As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the nonintact D & E procedure. But why not, one might ask. Nonintact D & E could equally be characterized as ‘brutal,’ involving as it does ‘tear[ing] [a fetus] apart’ and ‘ripp[ing] off’ its limbs. ‘[T]he notion that either of these two equally gruesome procedures ... is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational.’ [Stenberg, 530 U.S., at 946–947](#) (Stevens, J., concurring).

“Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, or a

fetus delivered through medical induction or cesarean. Yet, the availability of those procedures—along with D & E by dismemberment—the Court says, saves the ban on intact D & E from a declaration of unconstitutionality.”

Gonzales, 550 U.S. at 181–82 (Ginsburg, J., dissenting).

Although Justice Ginsburg was not arguing for a ban of all abortions, her analysis exposes a violation of the law of noncontradiction resulting from a joint reading of *Stenberg* and *Gonzales*. If an unborn child is nothing more than a *83 piece of tissue, why should it be afforded any protection at all? On the other hand, if it does have an existence distinct from its mother's, why is it protected from having its life annihilated by one method but not all methods? The unborn child cannot logically be a separate and distinct human for the purpose of one abortion procedure but not another. Protecting the unborn child's right to life at all stages of development would eliminate the contradictory reasoning of the Court's abortion decisions and dispel the shroud of doubt obscuring the unborn child's right to life.

B. Botched abortions

A second example of our abortion jurisprudence's violation of the law of noncontradiction is the effect that the current jurisprudence has on the prosecution of abortionists who either intentionally or negligently kill a born child after failing to kill it in the womb. This issue was thrust to the forefront of the abortion debate by the recent trial of Kermit Gosnell, a Philadelphia abortionist who was recently convicted of murdering three unwanted babies by snipping their spinal cords with scissors after they were born alive.³³ Gosnell argued that the babies were killed in the womb by an injection of the drug *Digoxin* and that they then had their spinal cords snipped for some other reason after they were stillborn. The prosecution contended that the babies were not killed in the womb but were born alive and were then murdered by cutting their spinal cords. Witnesses testified that some of the babies whined, moved their limbs, and shrugged their shoulders before being killed. That the location or method of killing was the decisive factor is an affront to logic.

Consider a tragic hypothetical situation of two lifeless corpses lying side-by-side. One of the corpses belongs to a baby who was born alive and then killed by having its spinal cord snipped while the other baby was killed while in the womb by an injection of *Digoxin*. The fact that the two corpses may be virtually indistinguishable demonstrates the

doubtfulness of our nation's abortion jurisprudence. Did one of the innocent babies have a right to life, while the other did not? If so, why? Both babies were distinct human beings with a genetic makeup completely separate from their mothers; both were completely dependent upon others for nourishment and care; both were intentionally killed. The only distinction between the two lifeless bodies is the subjective value, simply based upon the location and method of their demise, that our jurisprudence of doubt affords them. It is morally indefensible to suggest that the actions taken against one child violates an inalienable right to life, while those against the other do not. Why should legal protection of an individual at a particular point in time depend entirely upon his or her subjective relationship to the killer? Such irrational protection defies logic. Recognition of a child's right to life from the earliest stages of its development would dispel the shroud of doubt from this area of jurisprudence and avoid unequal protection of the two children.

Conclusion

It is impossible for an unborn child to be a separate and distinct person at a particular point in time in one respect and not to be a separate and distinct person at the same point in time but in another respect. Because an unborn child has an inalienable right to life from its earliest stages of development, it is entitled not only to a life *84 free from the harmful effects of chemicals at all stages of development but also to life itself at all stages of development. Treating an unborn child as a separate and distinct person in only select respects defies logic and our deepest sense of morality.

Courts do not have the luxury of hiding behind *ipse dixit*³⁴ assertions. The United States Supreme Court has attempted to do so by setting the line for state protection of unborn children at viability in the area of abortion. “It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*. But one must grieve for the Constitution.” *Morrison v. Olson*, 487 U.S. 654, 726, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (Scalia, J., dissenting). To dispel the shroud of doubt shadowing our nation's abortion jurisprudence, courts must have the courage to allow the law of noncontradiction to dismantle the *ipse dixit* reasoning of *Roe*, *Casey*, and *Stenberg* and recognize a child's inalienable right to life at all stages of development. Until then, our grief is not for the Constitution alone; we also grieve for the millions of children who have not been afforded equal value, love, and protection since *Roe*.³⁵

SHAW, Justice (concurring in the result).

I concur in the result. I adhere to my writing in *Ex parte Ankrom*, 152 So.3d 397, 430 (Ala.2013) (Shaw, J., concurring in part and concurring in the result), in which I explain that the word “child” in Ala.Code 1975, § 26–15–3.2, plainly and unambiguously refers to both born and unborn persons.

(Ala.2012). The proper outcome in the present case, however, is impacted by constitutional requirements of due process and related concerns regarding the construction and application of a criminal statute (e.g., a criminal statute must give clear notice of what is and is not illegal conduct). For the reasons stated in my dissenting opinion in *Ex parte Ankrom*, 152 So.3d 397, 433 (Ala.2013), I respectfully dissent in this case as well.

All Citations

MURDOCK, Justice (dissenting).

I concurred in this Court's decisions in *Mack v. Carmack*, 79 So.3d 597 (Ala.2011), and *Hamilton v. Scott*, 97 So.3d 728

153 So.3d 53

Footnotes

- 1 We discuss Hicks's constitutional arguments in Part III.C of this opinion.
- 2 This Court expressly rejected the Court of Criminal Appeals' limitation of the statute to only unborn children who are viable at the time of their exposure to a controlled substance. See *Ankrom*, 152 So.3d at 382.
- 3 Chapter 14 is titled “Reporting of Child Abuse or Neglect.”
- 4 Chapter 16 is titled “Child Abuse and Neglect.”
- 5 Jefferson further explained:

“Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, [the Declaration] was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, [etc.]. The historical documents which you mention as in your possession, ought all to be found, and I am persuaded you will find, to be corroborative of the facts and principles advanced in that Declaration.”

Letter to Henry Lee, May 8, 1825, VIII *Writings* at 407.

- 6 Blackstone's reference to the point in time when the unborn child “is able to stir” or when “a woman is quick with child,” 1 *Commentaries* at *125, acknowledges the notice sufficient for criminal intent to form under the common law, but should not be read as a definitive statement about when life begins in fact. Indeed, Blackstone (in footnote “o,” *id.*) quoted a relevant passage from Henry de Bracton's classic work, *On the Laws and Customs of England*, namely, “If one strikes a pregnant woman or gives her poison in order to procure an abortion, *if the foetus is already formed* or quickened, especially if it is quickened, he commits homicide.” II Bracton, *On the Laws and Customs of England* 341 (S.E. Thorne trans., 1968) (emphasis added), cited in Charles I. Lugini, *When Abortion Was A Crime: A Historical Perspective*, 83 U. Det. Mercy L.Rev. 51, 53 (2006). Modern medicine and prenatal technology, of course, have given us a clearer and much earlier view into when a “foetus is already formed” or when a woman is pregnant and has notice thereof. As this Court first noted in 1973: “ ‘ ‘Medical authority has recognized long since that the child is in existence from the moment of conception....’ ” *Mack v. Carmack*, 79 So.3d 597, 602 (Ala.2011) (quoting *Wolfe v. Isbell*, 291 Ala. 327, 330, 280 So.2d 758, 760 (1973), quoting, in turn, Prosser, *Law of Torts* 336 (4th ed.1971)).
- 7 God's creation of man and woman “in His own image,” *Genesis* 1:27 (King James), together with the divine command, “Thou shalt not kill,” provides the baseline for the right to life. See *Exodus* 20:13 (King James). *Exodus* 21 provides express protection for the unborn: where fighting men “hurt a woman with child, so that her fruit depart from her ... [a]nd if any mischief follow, then thou shalt give life for life.” *Exodus* 21:22–23; see *id.* (requiring that if “no mischief follow” then the offender must pay a fine). Both testaments attest to the sanctity and personhood of unborn life. See, e.g., *Psalms* 139:13–15 (“For you formed my inward parts; you knitted me together in my mother's womb. I praise you, for I am fearfully

and wonderfully made. Wonderful are your works; my soul knows it very well. My frame was not hidden from you, when I was being made in secret, intricately woven in the depths of the earth.”); *Luke* 1:44 (Elizabeth declaring that “the babe leaped in my womb for joy”).

8 The crimes against humanity prosecuted at Nuremberg included promoting abortion and even compelling abortion in an attempt to exterminate Poles, Slavs, and others the Nazis considered racially inferior. See Jeffrey C. Tuomala, *Nuremberg and the Crime of Abortion*, 42 U. Tol. L.Rev. 283 (2011). For example, the Germans were prosecuted at Nuremberg for preventing Poland’s courts from enforcing its statute criminalizing abortion. *Id.* at 376–77.

9 Although I was not on the Court when *Hamilton* was decided, I fully agree with the decision in that case and with Justice Parker’s special concurrence describing the invalidity of *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), at its inception (or rather, judicial creation) and its complete irrelevance outside the abortion context. I would go further and state that the judicially created “right” to abortion identified in *Roe* has no basis in the text or even the spirit of the Constitution and is therefore an illegitimate opinion of mere men and not law. See *id.*, 410 U.S. at 174 (Rehnquist, J., dissenting) (describing *Roe* as finding “within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment”); *Doe v. Bolton*, 410 U.S. 179, 221, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) (White, J., dissenting) (finding “nothing in the language or history of the Constitution to support the Court’s judgments.... fashion [ing] and announc[ing] a new constitutional right”). *Roe* and its progeny therefore have no applicability in any case, in any context, and, like the German laws nullified at Nuremberg, should be jettisoned from federal and state jurisprudence.

10 This principle was violated by the United States Supreme Court in 1973 in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The Court in *Roe*, ignoring the broad sense of “person” in the Fourteenth Amendment, cited other “postnatal” uses of “person” in other corners of the Constitution, and then referred to its own historical review of 19th Century abortion laws—all of which “persuade[d]” the Court to believe “that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” 410 U.S. at 158. Yet even in the midst of this constitutional misdirection, the *Roe* Court conceded that if the unborn child’s “personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.” *Id.* at 156–57. Thus, the very opinion in which the “right” to abortion was judicially created also left open the possibility that if an unborn child’s personhood is established, he or she must be equally protected under law. See *id.* at 157 n. 54 (noting Texas’s dilemma in arguing for fetal personhood because the state did not equally protect born and unborn life: “Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists.”). Although personhood amendments and statutes have been proposed in many states (including Alabama), and voted on in a few, none have become law.

11 *Ex parte Ankrom*, 152 So.3d 397 (Ala.2013); *Hamilton v. Scott*, 97 So.3d 728 (Ala.2012); and *Mack v. Carmack*, 79 So.3d 597 (Ala.2011).

12 In *Casey*, the Court held that the “essential holding of *Roe v. Wade*” included the following three parts:

“First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.”

Casey, 505 U.S. at 846.

13 The Declaration of Independence set forth this basic function of government, as follows:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit

of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed....”

Declaration of Independence ¶ 2 (U.S.1776).

- 14 The preamble to the United States Constitution recognized that the new constitution did not create inalienable rights but rather was “ordain[ed] and establish[ed]” to “secure the Blessings of Liberty” to every person. U.S. Const. pmb. Likewise, the preamble to the Alabama Constitution states: “We, the people of the State of Alabama, in order to ... secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama.” Ala. Const. 1901 pmb.
- 15 *Mack* contains an exhaustive history of wrongful-death actions brought on behalf of unborn children in Alabama.
- 16 Section 6–5–391(a) provides:

“When the death of a minor child is caused by the wrongful act, omission, or negligence of any person, persons, or corporation, or the servants or agents of either, the father, or the mother as specified in Section 6–5–390, or, if the father and mother are both dead or if they decline to commence the action, or fail to do so, within six months from the death of the minor, the personal representative of the minor may commence an action.”

- 17 Section 6–5–410(a) provides, in relevant part, as follows:

“A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama where provided for in subsection (e), and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or her or their servants or agents, whereby the death of the testator or intestate was caused, provided the testator or intestate could have commenced an action for the wrongful act, omission, or negligence if it had not caused death.”

- 18 Section 26–22–3 provides, in relevant part:

“(a) *Prohibition*. Except as provided in subsection (b), no person shall intentionally, knowingly, or recklessly perform or induce an abortion when the unborn child is viable.

“(b) *Exceptions*.

“(1) It shall not be a violation of subsection (a) if an abortion is performed by a physician and that physician reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman. No abortion shall be deemed authorized under this paragraph if performed on the basis of a claim or a diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible impairment of a major bodily function.

“(2) It shall not be a violation of subsection (a) if the abortion is performed by a physician and that physician reasonably believes ... that the unborn child is not viable.”

- 19 The arbitrary nature of the viability standard was explained by United States Supreme Court Justice Scalia, as follows: “The arbitrariness of the viability line is confirmed by the Court’s inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child’s life ‘can in reason and all fairness’ be thought to override the interests of the mother. *Ante*, at 870. Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves.”

Casey, 505 U.S. at 990 n. 5 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J., and White and Thomas, JJ.).

- 20 In *Hamilton*, I noted:

"Numerous scholars have criticized the viability rule of *Roe*.¹⁶ Today, 'there is broad academic agreement that *Roe* failed to provide an adequate explanation for the viability rule.' Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 Nw. U.L.Rev. 249, 268–69 (2009).

"

"¹⁶ Randy Beck, *Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework*, 51 Am. J. Legal Hist. 505, 516–26 (2011); Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 Nw. U.L.Rev. 249, 268–70 (2009); Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 St. Louis U. Pub.L.Rev. 15, 38–40 (1993); Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 Const. Com. 75, 83 (1991) ('[U]sing the line of viability to distinguish the time when abortion is permitted from the time after viability when it is prohibited (as *Roe v. Wade* does), is entirely perverse.');

John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 924–25 (1973); and Mark J. Beutler, *Abortion and the Viability Standard—Toward a More Reasoned Determination of the State's Countervailing Interest in Protecting Prenatal Life*, 21 Seton Hall L.Rev. 347, 359 (1991) ('It is difficult to understand why viability should be relevant to, much less control, the measure of a state's interest in protecting prenatal life.'). See generally Douglas E. Ruston, *The Tortious Loss of a Nonviable Fetus: A Miscarriage Leads to a Miscarriage of Justice*, 61 S.C. L.Rev. 915 (2010); Justin Curtis, *Including Victims Without a Voice: Amending Indiana's Child Wrongful Death Statute*, 43 Val. U.L.Rev. 1211 (2009); and Sarah J. Loquist, *The Wrongful Death of a Fetus: Erasing the Barrier Between Viability and Nonviability*, 36 Washburn L.J. 259 (1997); see also the sources cited by Justice Maddox in his dissent in *Gentry v. Gilmore*, 613 So.2d [1241] at 1248–49 [(Ala.1993)]."

Hamilton, 97 So.3d at 742.

- 21 See Martin Wishnatsky, *The Supreme Court's Use of the Term "Potential Life": Verbal Engineering and the Abortion Holocaust*, 6 Liberty U.L.Rev. 327 (2012) (analyzing the United States Supreme Court's use of the term "potential life").
- 22 See *Hamilton*, 97 So.3d at 742–47 (Parker, J., concurring specially), for a discussion of why the viability standard delineated in *Roe* was, and remains, unsupportable.
- 23 Chief Justice Rehnquist criticized the authors of the plurality and concurring opinions in *Casey* for their blind application of *stare decisis*:

"Of course, what might be called the basic facts which gave rise to *Roe* have remained the same—women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children. But this is only to say that the same facts which gave rise to *Roe* will continue to give rise to similar cases. It is not a reason, in and of itself, why those cases must be decided in the same incorrect manner as was the first case to deal with the question. And surely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive forever, based simply on the fact that it was no more outlandish later than it was when originally rendered."

Casey, 505 U.S. at 955–56 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part, joined by White, Scalia, and Thomas, JJ.).

- 24 In addition to the examples demonstrating the violation of the law of noncontradiction that are discussed in this writing, which is limited to the context of abortion, my special concurrence in *Ankrom*, 152 So.3d at 421 (Parker, J., concurring specially), illustrates how unborn children are recognized as persons in five additional areas of law—property law, criminal law, tort law, guardianship law, and health-care law—despite *Roe*'s rejection of the unborn child's right to life. These provide additional examples of our abortion jurisprudence's violation of the law of noncontradiction. See also Roger J. Magnuson & Joshua M. Lederman, *Aristotle, Abortion, and Fetal Rights*, *supra*.
- 25 "D & X" is a common abbreviation for a procedure known as "dilation and extraction."
- 26 "D & E" is a common abbreviation for a procedure known as "dilation and evacuation."
- 27 Justice Kennedy found the need to supplement the majority's description of the procedures at issue in the case for the following reasons:

"The Court's failure to accord any weight to Nebraska's interest in prohibiting partial-birth abortion is erroneous and undermines its discussion and holding. The Court's approach in this regard is revealed by its description of the abortion methods at issue, which the Court is correct to describe as 'clinically cold or callous.' The majority views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life. Words invoked by the majority, such as 'transcervical procedures,' '[o]smotic dilators,' 'instrumental disarticulation,' and 'paracervical block,' may be accurate and are to some extent necessary; but for citizens who seek to know why laws on this subject have been enacted across the Nation, the words are insufficient. Repeated references to sources understandable only to a trained physician may obscure matters for persons not trained in medical terminology. Thus it seems necessary at the outset to set forth what may happen during an abortion."

[Stenberg, 530 U.S. at 957–58](#) (Kennedy, J., dissenting, joined by Rehnquist, C.J. (citations omitted)).

28 Justice Stevens noted that the statute would be irrational for banning one method of abortion, but not the other:

"Although much ink is spilled today describing the gruesome nature of late-term abortion procedures, that rhetoric does not provide me a *reason* to believe that the procedure Nebraska here claims it seeks to ban is more brutal, more gruesome, or less respectful of 'potential life' than the equally gruesome procedure Nebraska claims it still allows.... For the notion that either of these two equally gruesome procedures performed at this late stage of gestation is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational."

[Stenberg, 530 U.S. at 946–47](#) (Stevens, J., concurring, joined by Ginsburg, J.).

29 Justice Scalia articulated the irony of *Stenberg* 's creation of a Constitutional right to a brutal abortion in his dissent:

"I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* [*v. United States*, 323 U.S. 214 (1944),] and *Dred Scott* [*v. Sandford*, 60 U.S. 393 (1856)]. The method of killing a human child—one cannot even accurately say an entirely unborn human child—proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion.... The notion that the Constitution of the United States, designed, among other things, 'to establish Justice, insure domestic Tranquility, ... and secure the Blessings of Liberty to ourselves and our Posterity,' prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd."

[Stenberg, 530 U.S. at 953](#) (Scalia, J., dissenting).

30 *Gonzales* recites the history of the passage of the Act:

"In 1996, Congress ... acted to ban partial-birth abortion. President Clinton vetoed the congressional legislation, and the Senate failed to override the veto. Congress approved another bill banning the procedure in 1997, but President Clinton again vetoed it. In 2003, after this Court's decision in *Stenberg*, Congress passed the Act at issue here. H.R.Rep. No. 108–58, at 12–14. On November 5, 2003, President Bush signed the Act into law. It was to take effect the following day. 18 U.S.C. § 1531(a)."

[Gonzales, 550 U.S. at 140–41](#) (some citations omitted).

31 Writing for the majority, Justice Kennedy refrained from using the term "potential life," except when quoting *Casey*, in reference to the unborn children who would be protected by the Act. Martin Wishnatsky notes the significance of the Court's change in tone:

"[*Gonzales*], the Court's most recent major abortion case, addressed partial-birth abortion, this time upholding a state ban. Justice Kennedy's majority opinion, quoting *Casey*, twice mentioned 'the State's interest in potential life.'"

Justice Ginsburg, in dissent, mentioned it once. But more significant than fewer mentions of 'potential life' was Justice Kennedy's adoption of new terminology to describe life in the womb. Instead of 'potential life,' he used the phrase 'the life of the fetus that may become a child.' Is this an improvement? The infant in the womb is still subject to a dehumanizing medical term—considered less than a child. Yet somehow the departure from 'potential life' with its heavy freight of association with abortion-on-demand seems a step in the right direction. But Justice Kennedy went further, noting that the State has a legitimate purpose 'to promote respect for life, including life of the unborn.' He spoke of the 'stage of the unborn child's development,' and, quoting *Casey*, 'profound respect for the life of the unborn.' He twice referred to 'fetal life' and also quoted a nurse's description of the puncturing of a child's skull that used the term 'baby' eight times.

"From 'potential life,' the Court has progressed to 'unborn life,' which is a significant step. Later, Justice Kennedy referred to 'the fast-developing brain of [an] unborn child, a child assuming the human form.' A child halfway out of the womb has certainly long since assumed 'the human form.' The Court's acknowledgment of the humanity of the unborn child is a labored form of intellectual birth, a 'rough beast' slouching towards Bethlehem to be born. Justice Ginsburg, in dissent, complained about the majority's new nomenclature. 'A fetus is described as an "unborn child,"' she objected, 'and as a "baby." ' She has reason for concern. Once the 'potential life' misnomer is discarded, the Court's abortion jurisprudence may go with it."

Martin Wishnatsky, *The Supreme Court's Use of the Term "Potential Life": Verbal Engineering and the Abortion Holocaust*, 6 *Liberty U.L.Rev.* 327, 342–43 (2012) (footnotes omitted).

32 Justice Thomas wrote a short concurring opinion to "reiterate [his] view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution" but that he joined the Court's opinion because it "accurately applies current jurisprudence." *Gonzales*, 550 U.S. at 169 (Thomas, J., concurring, joined by Scalia, J.).

33 *Commonwealth of Pennsylvania v. Gosnell*, (CP–51–CR–0001667–2011) (Pa. Ct. of Common Pleas of Philadelphia Cnty.2013).

34 "[H]e himself said it." *Black's Law Dictionary* 743 (5th ed.1979).

35 It is estimated that as of January 2014 over 56 million children have been killed before birth. See *The State of Abortion In the United States* 27 (National Right to Life Committee, Inc., January 2014) ("On the basis of the most recent reports from the U.S. Centers for Disease Control (CDC) and the private research Guttmacher Institute, National Right to Life estimates that there have been more than 56 million abortions in America since 1973....").

IN THE DISTRICT COURT OF [] COUNTY, ALABAMA

STATE OF ALABAMA

) Criminal

) Case No. DC-_____

v.

)

)

[],

Defendant.

)

MOTION TO DISMISS THE INDICTMENT

Defendant hereby moves this Honorable Court to dismiss the indictment against her on the following grounds: First, the indictment does not state facts sufficient to constitute an offense. Second, the indictment is insufficient in that the application of the criminal law under which Defendant is charged is unconstitutional under the United States and Alabama constitutions.

Defendant has been indicted under Ala. Code 1975 § 26–15–3.2, titled “Chemical Endangerment of Exposing a Child to an Environment in which Controlled Substances are Produced or Distributed” (“the Chemical Endangerment Statute” or “the Statute”). The stated legislative purpose of this law enacted in 2006 was to deter people from bringing children to dangerous places where drugs were being manufactured, such as methamphetamine labs. The Statute, however, has been improperly stretched and expanded to target for criminal prosecution

pregnant women, such as Defendant, who are alleged to have used controlled substances. Despite the Alabama Supreme Court's rulings in *Ex Parte Ankrom*, 152 So.3d 397 (Ala. 2013) and *State v. Hicks*, 153 So.3d 53 (Ala. 2014), Defendant may challenge this prosecution based on the individual circumstances of Defendant's case and on constitutional grounds that the court did not reach in the limited *Ankrom* and *Hicks* decisions.

[Insert basic facts of case and charges]

Because the indictment does not state facts sufficient to constitute an offense, and the indictment is insufficient in that the application of the Statute is unconstitutional under the United States and Alabama constitutions, the indictment must be dismissed.

ARGUMENT

The Alabama legislature enacted the Statute, entitled "Chemical Endangerment of Exposing a Child to an Environment in Which Controlled Substances Are Produced or Distributed," in 2006, with the purpose of addressing the danger posed to children exposed to the hazardous chemical byproducts in buildings where methamphetamine is manufactured (popularly known as "meth labs"). The Statute provides in relevant part that

(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:

(1) Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia ...

Ala. Code 1975 § 26-15-3.2(a)(1). The term "child" is used throughout the Statute to refer to the individual who is allegedly exposed to the "controlled substance, chemical substance, or drug paraphernalia." The Statute provides further that if the "child suffers serious physical injury"

from the exposure, the “responsible person” can be charged with a Class B felony, and if the “exposure, ingestion, inhalation, of contact results in the death of the child,” the person can be charged with a Class A felony.

The law does not mention pregnant women and was not meant to be employed to address the issue of drug use and pregnant women – in fact, the Alabama legislature refused four times to amend the law to include pregnant women explicitly¹. Despite the intent of the Statute to address the issue of children exposed to meth labs, in a limited ruling, the Alabama Supreme Court held that the word “child” as used in the Statute included fertilized eggs, embryos and fetuses, and that a woman’s uterus could be deemed a dangerous “environment.” *Ex Parte Ankrom*, 152 So.3d 397 (Ala. 2013)². This ruling and the ruling in *State v. Hicks*, 153 So.3d 53 (Ala. 2014), following *Ankrom*, then led to more prosecutions applying the Statute to the facts and circumstances alleged against this Defendant and other women who became pregnant and used any controlled substance, even one prescribed to them by a physician³. Defendant asks this Court to reexamine the ruling in *Hicks* and find that the Statute’s own terms do not support such a judicial expansion of the Statute. Defendant also asks this Court to examine constitutional questions unaddressed by the state Supreme Court and find that this use of the Statute is unconstitutional in violation of Defendant’s rights to privacy, procreative autonomy, freedom from unreasonable search and seizure, and equal protection of the law.

I. The Indictment Must Be Dismissed Because It Does Not State Facts Sufficient to Charge an Offense

¹ The four attempts to amend the chemical endangerment statute to include explicitly “an unborn child in utero” failed without reaching the floor of the legislature. *See*, Alabama Legislative Information System Online, at <http://www.legislature.state.al.us/acas/alisonstart.html>. (2008 H.B. 723, S.B. 545, 2009 H.B. 841, 2010 H.B. 601).

² The rulings in *Ankrom* and *Hicks*, *supra*, do not foreclose any of challenges in this motion to dismiss.

³ In 2016 the Legislature amended the Statute to exclude prescribed substances.

[Insert summary paragraph depending on the charge in the indictment. The indictment alleges _____. It is facially insufficient.]

A. Defendant lacked the necessary *mens rea*

The indictment alleges that defendant “knowingly, recklessly, or intentionally” caused a “child” (meaning her fertilized egg, embryo or developing fetus) to be exposed to a controlled substance, and that allegation is based solely on the results of an unconfirmed drug toxicology screen. The indictment rests on the alleged presence of a controlled substance in Defendant’s [or the baby’s] [blood/urine: describe type of test and, if so, that the test is unconfirmed] and its concurrence with Defendant’s pregnancy. These factual allegations say nothing about Defendant’s mental state when she used the substance and whether she had any knowledge that she was or could have been pregnant. Thus, the indictment cannot support even the minimal *mens rea* requirement of recklessness under the Statute and must be dismissed.

There is good reason to reexamine the *Ankrom* and *Hicks* decisions. Nothing in the Statute, or the Alabama Supreme Court’s expansion of the definition of the word “child,” specifies whether knowledge of pregnancy is a prerequisite to prosecution. Further, the *Ankrom* decision was explicit that its alleged protection of fertilized eggs, embryos, and fetuses did not begin at any particular stage of pregnancy, and that the Statute applies from the moment of conception. *Ankrom*, 152 So.3d at 418-19. Not only is it medically a fact that the moment of conception is before pregnancy even occurs (pregnancy does not occur until a fertilized egg is implanted in the uterus), but it is also true that women often do not know they are pregnant until weeks or months into a pregnancy⁴.

⁴ Jenkins, A., Millar, S., & Robins, J. (2011). Denial of pregnancy: a literature review and discussion of ethical and legal issues. *Journal of the Royal Society of Medicine*, 104(7), 286-91. Retrieved from: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3128877/>

The *mens rea* here for knowingly, recklessly or intentionally causing “exposure” necessarily attaches to Defendant’s knowledge of her pregnancy at the time of her use of a controlled substance. Otherwise, there is no “reckless” exposure, much less a “knowing” or “intentional” one. How can a woman who does not know yet that she is pregnant knowingly, intentionally or recklessly “expose” the fertilized egg, embryo or fetus to a substance? In Alabama, as in many states, drug use itself is not a crime. *See, e.g.*, § 13A-12-212 (criminalizing possession, class D felony). Under the State’s reasoning, all women with the capacity for pregnancy would have to abstain from controlled substance use entirely – including prescribed medication for anxiety, epilepsy, or ADHD -- for decades of their lives, or else be at risk of criminal prosecution.

B. The Indictment Fails to Allege Facts Sufficient to Support the Allegation that Defendant Caused a “Child [to] Suffer[] Serious Physical Injury”.

[Applies if Defendant is charged under sub a(2)]

The charge under subsection (a)(2) of the Statute requires an allegation that a “child suffer[] serious injury.” The indictment fails to allege facts sufficient to support this allegation. The only fact alleged is a positive and unconfirmed toxicology result based on a blood/urine test of a pregnant woman’s bodily fluids [or baby’s once born]. The mere presence of a drug in a woman’s body is neither an allegation that a child has in fact been exposed nor an allegation that a child has been injured, let alone seriously.

The statutory language requires an allegation of causation – that serious physical injury is caused “by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia” (emphasis added). The State, however, has not pled causation, nor even that the fetus suffered “serious physical injury” as defined in the Alabama Code as “physical injury which creates a substantial risk of death, or which causes serious and

protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ.” §13A-1-2(14).

Even if the Court were to presume that the presence of a controlled substance in a woman’s or baby’s urine or blood is the same as “exposure,” the presence of a substance is far from prima facie or any other kind of evidence of injury to the developing baby. *See, e.g., N.J. Dep’t of Children & Families v. A.L., 213 N.J. 1, 23 (2013)* (In the civil child welfare context, “not every instance of drug use by a parent during pregnancy, standing alone, will substantiate a finding of abuse and neglect in light of the specific language of the statute;” “The proper focus is on the risk of substantial, imminent harm to the child, not on the past use of drugs alone.”)

Alabama’s rule for the sufficiency of indictments is that if the indictment substantially follows the language of the statute violated, the indictment is sufficient. *Ex Parte Allred*, 393 So.2d 1030, 1032 (Ala. 1981). At minimum, however, the indictment must “apprise the accused not only of the nature of the offense but also of the particular act or means by which it was committed,” *Harrison v. State*, 384 So.2d 641, 643 (Ala. Cr. App. 1980), and this indictment does not do so. It presumes harm to a fetus or baby from the mere presence of a controlled substance (or even a metabolite of a controlled substance) in the body of the mother, rather than specifying what that harm is alleged to be and by what means the harm was caused. A key element of the indictment for this crime is “serious physical injury” as defined in the Alabama code, and it is clear that the allegations in this indictment are not sufficient to charge “serious physical injury” as defined in §13A-1-2(14). Compounding the impropriety of this indictment, even if a baby is born with a medical problem of some kind, the indictment fails to allege that the medical problem is the result of an “injury” or that evidence of the presence of a controlled substance has caused the medical problem. A mere allegation of exposure is insufficient.

II. The Indictment Must be Dismissed Because Using the Chemical Endangerment Statute to Address Pregnancy and Drug Use Violates Defendant's Constitutional Rights.

The holdings in *Ankrom* and *Hicks* are limited and do not foreclose the Constitutional arguments raised in this motion based on privacy, the Fourth Amendment, and equal protection. U.S. Const. Amdts. IV, XIV; Ala. Const. Sections 1, 5, 6. In upholding the convictions of three women charged with violating the Chemical Endangerment Statute by being pregnant, using drugs, and continuing their pregnancies to term, the Alabama Supreme Court in these cases addressed only the Constitutional challenge based on due process void-for-vagueness. The Court in *Ankrom* and *Hicks* did not address Constitutional challenges other than vagueness, which remain undecided. The earlier rulings (in cases in which women *were* continuing their pregnancies) did, however, include lengthy discourses on abortion. Then-Justice Moore and Justice Parker wrote concurring opinions citing the Bible and calling for the “dismantling” of women’s right to terminate pregnancy affirmed by *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)⁵. The Court did not reach or rule on the privacy, procreative autonomy or unreasonable search and seizure arguments, which are as yet undecided.

A. The Use of the Chemical Endangerment Statute to Punish Women Who Become Pregnant and Have Used Drugs Violates their Fundamental Fourteenth Amendment Right of Privacy and Procreative Autonomy.

⁵ Then-Justice Moore wrote, for example, “Government, in fact, has no power to abridge or destroy natural rights God directly besets to mankind and indeed no power to contravene what God declares right or wrong,” *Hicks*, supra, 153 So. 3d, and Justice Parker wrote, “Until [Roe and Casey are reversed], our grief is not for the Constitution alone, we also grieve for the millions of children who have not been afforded equal value, love, and protection since *Roe*,” *Id.*

Prosecuting and punishing a woman who becomes pregnant and has allegedly used a controlled substance deprives her of fundamental constitutional rights. The State of Alabama has indicted Defendant solely because she was pregnant and used a controlled substance. The State does not charge Defendant with possession of a controlled substance or distribution of a controlled substance, both of which are crimes in Alabama. Instead it penalizes Defendant because she has continued her pregnancy after allegedly using a controlled substance. This prosecution is an unjustified state intrusion into Defendant's constitutional rights of privacy, liberty, autonomy, and bodily integrity.

The fundamental right to procreate has long been protected by the Fourteenth Amendment to the United States Constitution. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *see also Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977). The decision whether or not to beget or bear a child is at the very heart” of the right to privacy.” *Id.*; *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“the right be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”).

This constitutional guarantee of procreative privacy *specifically* protects women from measures that penalize them for carrying pregnancies to term. *Planned Parenthood of E. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (explaining that the decision in *Roe v. Wade* “had been sensibly relied upon to counter” attempts to interfere with a woman’s decision to become pregnant or carry the pregnancy to term). The Court’s decision in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) stakes out this position clearly. There, the Court struck down a rule that required school teachers to take unpaid maternity leave beginning in their fifth month of pregnancy. “By acting to penalize the pregnant teacher for deciding to bear a child, overly

restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms” *id.* at 640, particularly the “freedom of personal choice in matters of marriage and family life.”

It is unquestionable that the application of this statute to Defendant imposes a heavy burden on her decision to sustain her pregnancy. Prosecuting women who have a drug problem or who are drug dependent or have even once used a controlled substance during pregnancy will actually pressure women to terminate pregnancies. Indeed, courts have recognized that this type of statute may “unwittingly increase the incidence of abortion.” *See e.g., Johnson v. State*, 602 So.2d 1288 (Fla. 1992) (“Prosecution of pregnant women for engaging activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion”). One study reported that “two-thirds of the women surveyed who reported using [c]ocaine during their pregnancies . . . considered having an abortion.” Jeanne Flavin, *Our Bodies, Our Crimes: The Policing of Women’s Reproduction in America*, 112 (NYU Press 2008). In a North Dakota case, a pregnant woman accused of child endangerment based on the alleged harm to her fetus from drugs she had taken, obtained an abortion – and the prosecutor dropped the charge. *See Motion to Dismiss with Prejudice, Sate v. Greywind*, No. CR-92-447 (N.D. Cass County Ct. April 10, 1992) (seeking dismissal because the issue was “no longer ripe for litigation”).

The State is not permitted to coerce a woman to terminate her pregnancy. *See Casey*, 505 U.S. at 859 (citing with approval circuit court decisions finding state-compelled abortion unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973)). *See also Arnold v. Bd. Of Educ. of Escambia County, Ala.*, 880 F.3d 305, 311 (11th Cir. 1989) (permitting a lawsuit against public school officials accused of coercing a young woman into having an abortion and holding that “[t]here simply can be no question that the individual must be free to decide to carry a child to

term.”). Even when the State asserts that it is acting to protect the fetus from harm allegedly caused by exposure to an illegal drug, pregnant women retain their right to the full protection of the Constitution. *See Ferguson v. City of Charleston*, 532 U.S. 67, 81-86 (2001) (hospital’s policy of turning over prenatal drug-test results to law enforcement for use in criminal prosecution violated the Fourth Amendment; no exception to Fourth Amendment protection where State asserted interest in protecting the fetus).

Thus, “where a decision as fundamental as whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by *compelling* state interests, and must be *narrowly drawn* to express *only* those interests.” *Carey*, 431 U.S. at 686. This strict scrutiny remains the standard of review for state burdens on the right to procreate and bear a child. *See Casey*, 505 U.S. at 858-59.

Because these fundamental rights are implicated, the burden shifts to the State of Alabama to prove that *criminally prosecuting and incarcerating* Defendant because she may have used drugs after she became pregnant and chose to remain pregnant furthers a compelling government interest. *Carey*, 431 U.S. at 685-86. The State here is at a loss to establish that this prosecution furthers any legitimate state interest, much less a *compelling* one. These prosecutions are not simply ineffective (and cruel), they are counterproductive – they undermine the State’s asserted goal of protecting the health of children once born.

Early and high-quality prenatal and other health care is one of the most effective weapons against pregnancy complications and infant mortality, especially if a woman is struggling with drug dependency. 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). The American Academy of Pediatrics (and the AAP's Alabama chapter in a separate policy statement) has concluded that "[p]unitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health" American Academy of Pediatrics, Committee on Substance Abuse, 1994 1995, *Drug-Exposed Infants* 96 Pediatrics 365-66 (1995).

In fact, these punitive approaches may put the health of a pregnancy at risk because they effectively drive women who are drug-dependent or even drug-using away from seeking prenatal and other care as well as substance abuse treatment if needed.⁶ See, e.g., Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 Drug & Alcohol Dependence 199 (1993).

Every major professional medical and public health association has warned against punitive measures aimed at pregnancy. The American Medical Association has warned that fear of prosecution is a deterrent for pursuing drug treatment and prenatal care: "Pregnant women will be likely to avoid seeking prenatal or open medical care for fear that their physician's knowledge of substance abuse . . . could result in a jail sentence rather than proper medical treatment." Am. Med. Ass'n Bd. Of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2267-9 (1990). See also Am Medical Ass'n, *Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy*, Resolution 131 (1990) (resolving "that the AMA

⁶ Based on 20 years of experience, the Southern Regional Project on Infant Mortality (a joint project of the Southern Legislative Conference and the Southern Governor's Association) warned in a report that "If pregnant women . . . feel that they will be 'turned in' by health care providers or substance abuse treatment centers, they will avoid getting care." Shelly Gehsham, *A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and parenting Omen: Results from a Regional Study* 21 (1993); Nai Hallman, *The Southern Regional Project on Infant Mortality: A 20-Year Retrospective* (2005).

oppose[s] legislation which criminalizes maternal drug addiction”).⁷ The American Public Health Association states that “women who might want medical care for themselves and their babies may not feel free to seek treatment because of fear of criminal prosecution related to illicit drug use.” See Am. Pub. Health Ass’n, *Illicit Drug Use by Pregnant Women*, Policy Statement No. 9020, 8 Am. J. Pub. Health 240 (1990); the American College of Obstetricians and Gynecologists (ACOG) states, “Drug enforcement policies that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus. Incarceration and the threat of incarceration have proven to be ineffective in reducing the incidence of alcohol or drug abuse ... The use of the legal system to address perinatal alcohol and substance abuse is inappropriate.” ACOG Committee on Health Care for Underserved Women, Committee Opinion 473, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (2011, reaffirmed 2014). It has been reported that when South Carolina began aggressively prosecuting women who used drugs during pregnancy, there was an 80 percent reduction in admissions of pregnant women into drug treatment programs. See Cynthia Dailard & Elizabeth Nash, *State Responses to Substance Abuse among Pregnant Women*, Guttmacher Report on Pub Pol’y, Dec. 2000 at 6 (available at <http://guttmacher.org/pubs/tgr/03/6/gr030603.pdf>).

Application of this law to Defendant [has already resulted in her incarceration and] risks incarcerating her further – a status that poses significant additional health risks for the fetus and is counterproductive to the goals of maternal and fetal health. Incarcerated pregnant women generally receive inadequate prenatal care. National Council of Crimes and Delinquency, *The*

⁷ The medical and scientific evidence showing that threats of prosecution and other punitive sanctions deter women from seeking prenatal care is extensive. See, e.g., Marth A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. Drug Issues 285 (2003); 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.”).

Spiral of Risk: Health Care Provision to Incarcerated Women 14 (2006) (avail. at http://www/nccd_crc.org/nccd/pubs/2006_spiral_of_risk.pdf). Pregnant women in jails and prisons are also exposed to numerous other health risks: infectious disease, poor sanitary conditions, poor nutrition, sexual abuse, high stress levels, and poor mental health care.⁸

Furthermore, all evidence suggests that in Alabama’s prisons and jails, medical care is woefully inadequate. The state has received an “F” rating for the delivery of prenatal care to pregnant inmates. *See* Rebecca Project for Human Rights & Nat’l Women’s Law Ctr., *Mother’s Behind Bars: A State-b-State Report Card and Analysis of Federal Politics on Conditions of Confinement for Pregnant and Parenting Women and the Effect on their Children* 12 (2010). The Julia Tutwiler Prison for Women has a history of failing to provide basic medical care, adequate hygiene, beds, ventilation, and nutrition. Clara Crowder, *Settlement Filed in Tutwiler Prison Suit*, Birmingham News, June 29, 2004, available at <http://schr.org/node/99>. The state’s county jails are no better – and may be worse. Matt Elofson, *Some County Jails Face Overcrowding*, Dothan Eagle, May 17, 2009, available at http://dothaneagle.com/news/2009/may/17/some_county_jails_face_overcrowding-ar-193981/.

Surely, a law that discourages pregnant women from seeking prenatal and other health care and may even encourage abortion does *nothing* to further the prosecution’s stated interest in protecting fetal health – and, at the very least, is not narrowly drawn or even related to furthering that interest. Misuse of a statute resulting in incarceration instead of medical care does the opposite of furthering fetal health. This statute as applied to Defendant undeniably burdens her

⁸ *See generally*, Am. Med. Ass’n Bd. Of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990); Nat’l Council of Crimes and Delinquency *supra*, *The Spiral of Risk*; Megan Bastick & Laurel Townhead, Quaker United Nations Office, *Women in Prison: A Commentary on the UN Standard Minimum Rules for the Treatment of Prisoners* 57 (June 2008).

privacy and liberty interests and fails to further a compelling state interest. It is unconstitutional and the indictment must be dismissed.

B. The Indictment Must be Dismissed Because It Rests on a Violation of Defendant's Fourth Amendment Right to Be Free From Unreasonable Search and Seizure.

The application of the Statute to Defendant also violates the Fourth Amendment's prohibition on unreasonable searches and seizures. The U.S. Supreme Court has held that government officials (here, the police, the prosecution) violate the Fourth Amendment when they obtain a pregnant woman's medical test results without a warrant or without her consent and in order to arrest her, prosecute her, or jail her. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). Even when a woman has consented to testing for medical purposes, the use of those test results for law enforcement purposes is unconstitutional. *Id.* In *Ferguson*, the U.S. Supreme Court held that a collaborative hospital-city policy of secretly searching pregnant patients for evidence of drug use (and reporting women with positive test results to police and coordinating their arrests) violated their guarantee of freedom from unreasonable search and seizure. Hospitals in Alabama, like the South Carolina hospital in the *Ferguson* case, also gather evidence of women's pregnancies and drug use and turn it over to law enforcement officials without consent or court authorized search warrants. Martin, N. *How Some Alabama Hospitals Quietly Drug Test New Mothers — Without Their Consent*, Pro Publica, Sept. 30, 2015, available at <https://www.propublica.org/article/how-some-alabama-hospitals-drug-test-new-mothers-without-their-consent>.

[Insert facts here about the Defendant's medical test results turned over to law enforcement] [if private hospital, add argument re delegation and/or collaboration between hospital and law enforcement making the hospital a state actor.]

The Fourth Amendment, incorporated to the states by the Fourteenth Amendment, provides that the “the right of people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures shall not be violated.” U.S. Const. amend. IV. The Amendment assures the “privacy, dignity, and security” of individuals against arbitrary and invasive acts by Government officers or those acting on the government’s behalf. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528 (1967). The Fourth Amendment protects against warrantless intrusions in both civil and criminal contexts. *New Jersey v. T.L.O.* 469 U.S. 325, 335 (1985). Thus, the Fourth Amendment applies to child welfare workers and, in aspects, to medical personnel. It is well established that “searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions,” *Katz v. United States*, 389 U.S. 347, 357 (1967) (internal citations omitted), none of which apply here.

A state’s interest in the health of fetuses does not justify a departure from the ordinary rule that a nonconsensual search is unconstitutional if not authorized by a valid warrant. *Ferguson*, 532 U.S. at 70. All patients, including pregnant women, enjoy a reasonable expectation of privacy when seeking medical advice and undergoing medical tests at a hospital or the office of a health care provider. *Id.* at 78. When patients consent to testing for medical purposes, they reasonably expect that the results of their medical tests will not be shared with law enforcement without their consent. *Id.* When state actors obtain a patient’s test results without her consent in order to criminally prosecute her, those actors violate the Fourth Amendment. *See Ferguson*, 532 U.S. at 78.

Across the state, application of this Chemical Endangerment Statute to pregnant women has consistently rested on the use of confidential medical information collected without the patient's consent. The Statute, as it is applied to Defendant (and other Alabama women), rests on and results in the destruction of doctor-patient confidentiality, which is necessary for maternal and fetal health. Patients in the United States expect – and have a constitutional right to expect – that the information they provide and the records about their health are used only for the purpose of health care treatment and are kept confidential. As the U.S. Supreme Court put it in *Ferguson*, “[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests is that the results of those tests will not be shared with nonmedical personnel without her consent.” *Ferguson*, 532 U.S. at 78. Because use of the Statute to prosecute pregnant women effectively brings police into the medical process for pregnant women, it violates not only the patient's trust but also her constitutional guarantee against unreasonable search and seizure.

C. Judicial Expansion of the Chemical Endangerment of a Child Law to Cover Pregnant Women Violates Women's Right to Equal Protection Under the Law.

Judicially expanding the Chemical Endangerment of a Child law to apply to pregnancy effectively creates a law that unconstitutionally discriminates on the basis of sex in violation of the right to equal protection of the laws guaranteed by both the United States and Alabama Constitutions. U.S. CONST. amend. XIV, § 1, ALA. CONST. § __. Application of this statute to pregnant women alleged to use drugs applies only to acts or omissions by women and not by men. A law violates the equal protection principle when, in reliance on invidious stereotypes about women's roles as “mothers” and “mothers-to-be,” it places additional restrictions on women to which men are not subject. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003). Although men can take actions that might harm a fetus in utero, men are exempt from

prosecution for assault under the State’s expansive view of this statute because they are not women carrying the fetus.

1. Heightened Scrutiny Requires an Important Governmental Objective and Must be Substantially Related to that Objective

The Fourteenth Amendment of the U.S. Constitution and § __ of the Alabama Constitution “guarantee equal privileges and immunities for all those similarly situated.” (The Alabama constitutional provision confers “essentially the same protection” as the federal Equal Protection Clause.) Statutory classifications that distinguish between men and women are subject to heightened scrutiny, meaning that the classification must serve important governmental objectives and must be substantially related to achievement of those objectives. *Hibbs*, 538 U.S. at 722. The burden rests entirely on the State to establish an “exceedingly persuasive” justification for the differential treatment of men and women that is “genuine, not hypothesized or invented” and that does “not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *United States v. Virginia*, 518 U.S. 515, 532-33 (1996). Justifications that rest on the “pervasive presumption that women are mothers first,” *id.* at 533, do not satisfy the State’s burden. *Hibbs*, 538 U.S. at 722.

2. Making Women Criminally Accountable for Pregnancy Outcomes is Sex Discrimination With No Important Governmental Objective.

Here, Alabama has no justification for applying this expanded reading of the Chemical Endangerment Law only to women, although one can presume the State would cite its interest in protecting the health of fetuses. The proposed expansion classifies on the basis of sex by creating a separate and unequal criminal penalty for women. Only women face criminal charges for a wide range of actions that may affect future children. While men and women could both be prosecuted for injuring a third party pregnant woman under the Alabama assault law, only

women can be prosecuted under the State’s chemical endangerment theory for their own alleged drug use that occurred prior to the birth of a child, specifically a child’s prenatal exposure to drugs.

Further, Alabama law does not criminalize the private use of controlled substances (in comparison to manufacture, sale or possession), with the exception of this creative prosecution of pregnant women under the Chemical Endangerment law. The State’s interpretation relies on precisely the type of stereotypes prohibited by the United States and Alabama Constitutions, reviving and reinforcing the notion that “[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother,” *Bradwell v. Illinois*, 83 U.S. 130, 142 (1873). Importantly, no recognized governmental objective is served through such a law. In fact, medical organizations conclude that such laws are bad for babies. CITE, Policy H-420.970: Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy; CITE FORM A.C.O. G., Committee Opinion 473 at 200. Neither maternal health nor children’s health are served by such punitive actions. As discussed above, authorities on health oppose the imposition of criminal penalties on women who become pregnant and use controlled substances. There is no evidence-based research to support the assumption that harm from prenatal exposure to controlled substances—including certain controlled substances—is so great that pregnant women should be singled out for criminal charges carrying time behind bars. Therefore, the State’s gender-based classification is not substantially related to achieving an important governmental interest, and cannot constitutionally be used to prosecute the defendant.

The State’s proposed interpretation of the Chemical Endangerment of a Child law places unique burdens on women throughout their reproductive lives, burdens that men will never face – the potential for criminal conviction, prosecution, and all the consequences that flow from

being labeled a felon if a woman uses any amount of any controlled substance while pregnant. These burdens put pregnant women in Alabama in a separate class of citizens. Police may scrutinize their medical records and prosecutors, judges, and juries can second-guess their behavior and health care decisions. This gender-based discrimination cannot withstand any level of constitutional scrutiny.

The State's proposed expansion of this law fails even the lowest level of equal protection scrutiny - rational basis - and cannot survive heightened scrutiny. As described above, criminalizing pregnancy does not discourage pregnant women from drug use, whether it poses risk to the pregnancy or not. Rather, punitive policies like this one discourage women from obtaining appropriate medical care including prenatal care and treatment for substance use disorders. This is detrimental to both the health of a woman and her pregnancy. Such outcomes are neither substantially nor rationally related to the State's interest in protecting fetal health/potential life.

[conclusion and signature block]

NAPW Motion Template

SUPERIOR COURT OF ALABAMA

STATE OF ALABAMA,

:

Plaintiff-Respondent,

:

Criminal Action

v.

:

**On Motion to Suppress
Evidence of Warrantless Search**

MS. X

Defendant-Movant.

:

.....

BRIEF ON BEHALF OF DEFENDANT-MOVANT

Deputy Public Defender

Assistant Deputy Public Defender

I. Introduction

Ms. X is charged with violating Ala. Code § 26-15-3.2 (“the Statute”) based on the results of an illegally obtained **[blood/urine sample]** (“the Sample”). **Ms. X** moves to suppress the Sample on Fourth Amendment grounds because it resulted from an unconstitutional search. U.S. CONST. amend. IV; ALA. CONST., Art. I, § 5; Alabama R. Crim. P. 15.6(a); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Loyd v. State*, 186 So.2d 731, 736 (Ala. 1966).

When **Ms. X** went to **[hospital name]**, to receive pregnancy care, she reasonably expected: (1) to receive only healthcare,¹ and (2) that her bodily fluids were private from law enforcement. *See Schmerber v. California*, 384 U.S. 757, 767-768 (1966) (recognizing reasonable expectation of privacy in bodily fluids).² **Ms. X** never consented to a toxicology test that served law enforcement purposes, and the hospital lacked probable cause and a warrant for the test. The violation of **Ms. X**’s reasonable expectation of privacy in her body and bodily fluids was an unconstitutional Fourth Amendment search. *See* U.S. CONST. amend. IV; ALA. CONST., Art. I, § 5; *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (where the Court found that warrantless, nonconsensual urine tests of patients are unreasonable and unconstitutional searches requiring protection when positive test results are reported to law enforcement and a purported concern for women and children is not a “special need”); *Lebron v. Secretary of Florida Dept. of Children and Families*, 772 F.3d 1352 (11th Cir. 2014); *Ex parte Hilley*, 484 So.2d 485, 489 (Ala. 1985). Here, **Ms. X** did not consent to the search, and the hospital did not have a warrant based on probable cause. *Katz v. United States*, 389 U.S. 347, 357 (1967) (noting that warrantless searches are unlawful and that searches “conducted outside the judicial process” are “per se unreasonable”). For these reasons, the Sample must be suppressed. *Ex parte Kelley*, 870 So.2d 711, 718 (Ala. 2003).

II. Statement of Facts

A. The Search

[Counsel should insert all relevant facts, to include known details regarding the following:]

- Whether the hospital is public/private
- Whether Defendant did/not consent to a drug test
- Whether Defendant was not informed or did not consent to disclosure of drug test to law enforcement

¹ Even where strong state interests are implicated, a pregnant woman’s health and relationship of trust with her healthcare provider are of paramount importance. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 898 (2002) (“The U.S. Constitution protects all individuals, male or female ... from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual’s family.”); *cf. Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (recognizing a right of privacy protecting decisions about pregnancy).

² Decisions of the United States Supreme Court are binding on state courts. *Singleton v. State*, 40 Ala. App. 157 (1971); *see also Sawyer v. City of Marion*, 666 So.2d 113 (Ala. Crim. App. 1995) (citing *Seely v. State*, 669 So.2d 209 (Ala. Crim. App. 1995)); *Seely v. State*, 669 So.2d 209, 213 (Ala. Crim. App. 1995) (“State courts are bound by the interpretations given to the Fourth Amendment by the United States Supreme Court ... If we ignore [the United States Supreme Court] we would be ignoring our duty to uphold the Constitution and would be setting the stage for almost certain reversal by a higher court.” (citing *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949))).

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- Details re: the consent provided to testing for purposes of medical treatment:
 - How consent was obtained (orally or by signing a form, etc.)
 - What the consent form said about medical testing and the use of test results
 - State of Defendant when she signed consent; pay attention to what drugs she was receiving, and their impact upon her ability to comprehend
 - When consent was obtained, particularly if close to the time to labor
 - What Defendant was told about the purpose of the tests
 - What Defendant was told about how test results would affect her treatment
- Changes, if any, to Defendant's medical care following the positive toxicology results:
 - Whether any treatment plan was implemented or recommended
 - Whether any treatment plan was implemented for her newborn
- Details re: hospital's policy and pattern of practice for drug testing pregnant women or their newborns
- Details re: reporting to law enforcement and/or child protective services (how long after testing, the order and time in which the agency arrived, etc.)

B. Relevant Statutes

Section 26-15-3.2, codified in the Child Abuse Chapter of the Alabama Code, provides that:

(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:

(1) Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in [Section 13A-12-260](#). A violation under this subdivision is a Class C felony.

(2) Violates subdivision (1) and a child suffers serious physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia. A violation under this subdivision is a Class B felony.

(3) Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the child. A violation under this subdivision is a Class A felony.

(b) The court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.

(c) It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was administered to the child in accordance with the prescription instructions provided with the controlled substance.

C. The Statutory Scheme

[The idea and goal of this section is to describe, as a matter of fact, the statutory scheme to establish that the Chemical Child Endangerment law, together with mandatory reporting requirements and the *Ankrom* decision, creates an “entangled” statutory scheme such that a “law enforcement purpose” is effectively built into the drug tests.]

Section 26-15-3.2(a)(1) is codified in the Child Abuse Chapter of the Alabama Code and makes it a Class C felony to expose a child to a controlled substance. The Statute does not require a showing of harm. Ala. Code § 26-15-3.2(a)(1) (2018). Exposure alone – which can be evidenced by a blood or urine sample – triggers criminal punishment for child endangerment. *See* Ala. Code § 26-15-3.2(a)(1) (2018).³ While Chapter 15 of Title 26 does not define the term “child,” both Chapters 14 and 16 of Title 26 define a “child” as “[a] person under the age of 18 years.” Ala. Code § 26-14-1(3) (2018); § 26-16-2(1) (2018). The Alabama Supreme Court has held that as used in the Statute, the term “child” includes both born children and fertilized eggs, embryos and fetuses, and that a woman’s uterus may be considered an “environment” under the Statute. *See Hicks v. State*, 153 So.3d 53 (2014); *Ex parte Ankrom*, 152 So.3d 397, 411 (Ala. 2013).

With this judicial definition of a “child,” the Statute makes prenatal exposure to controlled substances criminal child endangerment. *Id.*; Ala. Code § 26-15-3.2 (2018). Alabama hospital employees are deemed mandatory reporters and thus required to report suspected child abuse or neglect to a “duly constituted authority.” Ala. Code § 26-14-3(a) (2018). Under this section, it is clear that the Department of Human Resources and law enforcement bodies are the preferred authorities to which one should report abuse or neglect. *See id.* As a result, a pregnant or postpartum woman who tests positive for controlled substances automatically faces a law enforcement investigation. This is true even if an initial report is made to the Department of Human Resources. *See Ex parte Ankrom*, 152 So.3d 397, 401-05 (Ala. 2013); *see also* Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, ProPublica, Sept. 23, 2015, <https://www.propublica.org/article/when-the-womb-is-a-crime-scene> (describing a patient’s experience in Etowah County who took one Valium pill during her pregnancy and received a positive drug screen for benzodiazepines was contacted and cleared by the Department of Human Resources after she gave birth, but then was charged under the Statute several weeks later by local law enforcement). Because of the judicial interpretation of the Statute and the mandated reporter requirements, a “law enforcement purpose” is effectively built into any drug toxicology tests performed by health care providers on pregnant or postpartum patients.

III. Legal Argument

A. Summary of the Legal Argument

³ Subsection (b) of the Statute is a supremacy clause of sorts, requiring that courts punish women “pursuant to [the Statute] rather than imposing punishment authorized under *any other provision of law*, unless another provision of law provides for a greater penalty or a longer term of imprisonment.” Ala. Code § 26-14-3(b) (2018) (emphasis added). This means that when a pregnant or postpartum woman tests positive for a controlled substance, she will face law enforcement and punishment under the Statute, unless some other law is even more punitive.

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Ms. X's motion to suppress should be granted, disallowing the State to use the Sample and all fruits resulting from the illegal and improper search. There are **two** issues the court should consider. First, **Ms. X** has a Fourth Amendment right to freedom from unreasonable searches of her bodily fluids. U.S. CONST. amend. IV; ALA. CONST., Art. I, § 5; *Schmerber v. California*, 384 U.S. at 772; *Ex parte Hilley*, 484 So.2d 485, 489 (Ala. 1985). Government searches are constitutional only when supported by a warrant, or probable cause was established, *Ex parte Kelley*, 870 So.2d 711, 718 (Ala. 2003); neither of which existed here. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Lloyd v. State*, 186 So.2d 731, 736 (Ala. 1966) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)). This concept applies to one's person to include their bodily fluids, no matter their medical status. A warrantless search is only legitimate if the State proves that it falls within one of the narrowly circumscribed exceptions to the warrant requirement.

Second, the Sample must be suppressed even where it may have served a medical purpose because it was conducted by a State agent for law enforcement purposes. In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the United States Supreme Court established that warrantless nonconsensual drug tests of pregnant patients that serve criminal investigatory purposes are subject to rigorous Fourth Amendment review even if the tests also further a health or policy purpose. *Id.* at 76-77, 79-84. The Statute at issue here, Ala. Code § 26-15-3.2, operates together with the mandatory reporting duties of hospital employees, Ala. Code § 26-14-3, to make drug testing a pregnant woman a law enforcement search. The Fourth Amendment has been held to apply to a similarly entwined statutory scheme. *See Greene v. Camreta*, 588 F.3d 1011, 1029 (9th Cir. 2008) (holding Fourth Amendment applicable because "Oregon's statutory scheme convinces us that the involvement of law enforcement in this case is symptomatic of the broader entanglement of law enforcement and social services officials in the state's investigation of child abuse"), *cert. granted*, *Camreta v. Greene*, 562 U.S. 960 (2010), *vacated in part on other grounds*, *Greene v. Camreta*, 661 F.3d 1201 (9th Cir. 2011).

- a. **Collection and use of **Ms. X**'s bodily fluids for law enforcement purposes was a Fourth Amendment search because it violated her reasonable expectation of privacy in her bodily fluids.**

The Sample must be suppressed because the drug test was an illegal Fourth Amendment search. The Fourth Amendment protects people from unreasonable government searches. *Ex parte Hilley*, 484 So.2d 485, 489 (Ala. 1985) (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). Bodily fluids undoubtedly receive Fourth Amendment protection, *Schmerber v. California*, 384 U.S. at 772, and government intrusions on bodily fluids and privacy are a Fourth Amendment search. *See Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (concluding that a blood test is a Fourth Amendment search) ("[T]he type of search at issue in this case ... involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)); *American Federation of State, County, and Mun. Employees Council 79 v. Scott*, 717 F.3d 851, 866 (11th Cir. 2013) ("Testing a urine sample, which 'can reveal a host of private medical facts about an employee,' and which entails a process that 'itself implicates privacy interests,' is a search.") (quoting *Skinner*, 489 U.S. at 617 (1989) (citing *Chandler v. Miller*, 520 U.S. 305, 313 (1997))); *see also Anonymous v. Anonymous*, 617

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So.2d 694, 698 (Ala. Civ. App. 1993) (“An involuntary blood test constitutes a search and seizure within the scope of the Fourth Amendment”) (citing *Skinner*, 489 U.S. 602 (1989)).

Pregnancy is not an exception to the reasonable expectation of privacy in bodily fluids. See *Ferguson*, *supra*. The *Ferguson* Court emphasized that the reporting of positive toxicology results on pregnant women’s bodily fluids in that South Carolina case resulted from a collaboration between the hospital and law enforcement, *id.* at 78-84; this fact suggested that a law enforcement purpose was effectively built into every drug test.

The same rationale applies here. Like the pregnant women in *Ferguson*, Ms. X sought healthcare but was charged with a crime because the results of her warrantless nonconsensual drug test were turned over to law enforcement. She did not consent to have her medical test results used for law enforcement purposes. In Alabama, as in *Ferguson*, a law enforcement purpose is embedded in drug tests of pregnant women. See *Section II.C. above*. The Statute makes a child’s or fetus’s exposure alone a felony, and the evidence of alleged exposure by Ms. X exists only because of this medical test.

Ms. X sought healthcare at [insert hospital name]. She had an objectively reasonable understanding of herself as a patient and not a suspect. See *Ex parte Mack*, 461 So.2d 799, 800 (Ala. 1984) (“[P]atients enjoy a right to privacy and confidentiality with regard to disclosures made within the doctor-patient relationship”); *cf. Horne v. Patton*, 287 So.2d 824, 829-30 (Ala. 1973) (noting a doctor’s duty to not disclose information acquired as part of the doctor-patient relationship). Ms. X never consented to the Fourth Amendment search. It is no defense that a medical or administrative purpose also may have existed; a medical purpose does not negate a law enforcement purpose. See *Greene v. Camreta*, 588 F.3d 1011, 1029 (9th Cir. 2008) (citing *Roe v. Texas Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 406-07 (5th Cir. 2002)), *cert. granted*, *Camreta v. Greene*, 562 U.S. 960 (2010), *vacated in part on other grounds*, *Greene v. Camreta*, 661 F.3d 1201 (9th Cir. 2011).

The Sample must be suppressed because the search violated the Fourth Amendment and Ms. X’s constitutional protections. *Ex parte Hilley*, 484 So.2d 485, 489 (Ala. 1985).

B. The Search was Conducted by a State Agent

If public hospital, use this text:

The [insert name of hospital] is a state/county/city hospital subject to the Fourth Amendment. *Ferguson v. City of Charleston*, 532 U.S. 67, 76-77 (2001) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 335-337 (1985)). Because [insert name of hospital] is a state hospital its employees are government actors subject to the restraints of the Fourth Amendment. *Id.* at 77. Like the drug tests in *Ferguson*, the nonconsensual drug test of Ms. X was a Fourth Amendment search that served a programmatic law enforcement purpose: punishing pregnant women for controlled substance use. 532 U.S. 67, 81-84.

Ms. X’s nonconsensual drug test served a law enforcement purpose and Fourth Amendment protections were applicable, but were not observed. In *Ferguson*, the U.S. Supreme Court looked to “all available evidence” to decide that the testing at a public hospital in South

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Carolina served a law enforcement purpose. 532 U.S. 67, 81-84. The evidence in Alabama leads to the same conclusion regarding Ms. X's drug test. The Alabama statutory scheme governing substance use during pregnancy and mandatory reporting, together with [insert any other relevant facts],⁴ embeds a law enforcement purpose in Ms. X's drug test. *See United States v. Hardin*, 539 F.3d 404, 419-20 (6th Cir. 2008) (finding that mixed-motive private searches that include a motive of assisting law enforcement may be subject to Fourth Amendment scrutiny); *United States v. Davis*, 482 F.3d 893, 904 (9th Cir. 1973) (noting that a broad law enforcement scheme that encourages and requires private actors to conduct searches may subject those searches to Fourth Amendment requirements); *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2012) (noting that even when a search is carried out by a private party, the Fourth Amendment is implicated when the party conducting the search "acts as an instrument or agent of the government"). The hospital was required to observe Fourth Amendment protections, but failed to do so, and the Sample must be suppressed.

If private hospital, use text below but consider the following:

- [If the hospital is private, it is not automatically a state actor for Fourth Amendment purposes. Defense counsel should include any information that supports a finding that the private hospital knew of or acquiesced in the testing, and that the purpose of the test was to further a government purpose. Supporting information could include, but is not limited to]:
 - Public statements by law enforcement, hospital employees, government actors re: prenatal or postnatal exposure to substances, the so-called "opioid crisis", the reporting duties of hospital employees and/or medical professionals, and/or fetal rights
 - Any documents, including news articles, supporting the conclusion that the hospital regularly, or historically has, turned over test results to law enforcement, either directly or by sharing results with a state or local agency that then reports to law enforcement
 - Prior cases/reports of cases in which a woman who sought medical treatment at that hospital was arrested
 - Your client's own narrative of events, questioning by staff, calls made to law enforcement by medical staff or threats of same, arrival of law enforcement and civil child welfare agents together, and more that suggests collusion
 - **BOTTOM LINE:** Ideal facts help support that conclusion, or even the inference or suspicion, that the drug test results are not inadvertently or unexpectedly ending up in the hands of law enforcement. Instead, they support the conclusion that even if the test does serve a medical purpose, the test is foreseeably in furtherance of the government purpose of punishing substance users under the Chemical Child Endangerment Act as interpreted by the Alabama Supreme Court in *Ankrom*.

⁴ [Defense counsel should include any facts available about a written policy codifying partnership between hospital and law enforcement or established practices that strongly suggest such a partnership, as this proves that local enforcement "knew of and acquiesced in the intrusive conduct" and that the hospital's "purpose was to assist law enforcement rather than to further [its] own ends," per *Steiger*.]

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- [Insert name of hospital], a private hospital, was a governmental actor for Fourth Amendment purposes when it drug tested Ms. X knowing the results would be used for law enforcement purposes. Private institutions can be state actors for Fourth Amendment purposes. *See Walter v. United States*, 477 U.S. 649, 662 (1980); *United States v. Emile*, 618 Fed. Appx. 953, 955 (11th Cir. 2015) (per curiam) (citing *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003), see *Ex parte Hilley*, 484 So.2d 485, 490 (Ala. 1985) Fourth Amendment protections extend to any “governmental action,” including by civil and criminal authorities. *New Jersey v. T.L.O.*, 469 U.S. at 335.

The drug test in this case was governmental action triggering Fourth Amendment protections. A private institution is a governmental actor under the Fourth Amendment when: the government is aware of and acquiesces in the action, and the purpose of the action is to further a government purpose. *See United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003); *United States v. Emile*, 618 Fed. Appx. 953, 955 (11th Cir. 2015) (per curiam) (reiterating the two-prong test established in *Steiger* and adding the question of government encouragement to the inquiry). The Alabama statutory scheme satisfies each of these prongs.

First, the Statute itself, as judicially interpreted to cover drug use and pregnancy, is evidence that Alabama is aware of, encourages, and acquiesces in the drug testing of pregnant women for law enforcement purposes. *See Ferguson* 532 U.S. 67 (2001) (holding urine tests of pregnant women with results transmitted to law enforcement unreasonable Fourth Amendment searches); *Skinner*, 489 U.S. at 615-16 (concluding that the government’s endorsement of a specific mandatory drug testing regime and desire to “share the fruits of such intrusions” were “clear indices of the Government’s encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment”). The Statute criminalizes *exposure* to controlled substances. Ala. Code § 26-15-3.2(a)(1) (2018). Drug tests can be essential to finding exposure, and without drug tests, the Statute might be satisfied only in very limited circumstances such as third-party allegations of use [Note: defense counsel should insert any known facts supporting a claim that law enforcement/government facilitated testing by training or partnering with the hospital in any way; in the Eleventh Circuit this determination is very-fact based and rigorous].

Second, the drug tests further the law enforcement purpose of the Statute, and in this respect their purpose is to further the government purpose of criminalizing prenatal exposure to controlled substances. The hospital employees who perform the drug tests are state instruments and agents. Specifically, the hospital employees who perform the drug tests also are mandatory reporters of suspected child abuse or neglect. Ala. Code § 26-14-3 (2018). In Alabama, prenatal exposure to controlled substances is itself criminal child endangerment. Hospital employees are trained and instructed to adhere to specific policies and state law especially when it comes to allegations of child abuse or neglect. As such, they are aware that through their disclosure of a patient’s nonconsensual, positive toxicology result to child welfare agencies, they are an important and necessary step in the law enforcement action. The result is that hospital employees who drug test pregnant women are “instrument[s] or agent[s]” of the Alabama state government and of Alabama law enforcement. *See United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2012) (noting that a search by a private party implicates the Fourth Amendment if “he acts as an instrument or agent of the government”).

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The Statute, as interpreted by the Alabama Supreme Court, *requires* that pregnant or postpartum women who test positive for controlled substances be charged under the Statute unless a more punitive option exists. Ala. Code § 26-15-3.2(b) (2018).⁵ Hospital employees enact this purpose by performing the tests, without consent, and in so doing “assist law enforcement efforts” by conducting an illegal search and seizure of the woman and her bodily fluids ultimately used to arrest and charge her thereafter. *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003); *see also United States v. Hardin*, 539 F.3d 404, 419-20 (6th Cir. 2008) (finding that mixed-motive private searches that include a motive of assisting law enforcement may be subject to Fourth Amendment scrutiny). This constitutes exactly the kind of cooperation and open encouragement by the state and by law enforcement sufficient to trigger Fourth Amendment protections. *See United States v. Emile*, 618 Fed. Appx. 953, 955 (11th Cir. 2015) (per curiam).

a. The search was unconstitutional because the hospital lacked a warrant based on probable cause.

The Sample must be suppressed because the law enforcement search of **Ms. X**’s bodily fluids was conducted without a warrant based on probable cause. *See Ex parte Kelley*, 870 So.2d 711, 718 (Ala. 2003); *Katz*, 389 U.S. at 357.

1. The hospital failed to obtain a search warrant or **Ms. X’s consent prior to testing, making the testing an unconstitutional search.**

Warrantless searches are “per se unreasonable.” *Ex parte Kelley*, 870 So.2d 711, 718 (Ala. 2003) (“A warrantless search...is per se unreasonable under the Fourth Amendment ...”); *Katz*, 389 U.S. at 357 (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.”). The state must prove that an exception to the warrant requirement existed; in this case, no exception exists. *Ex parte Kelley*, 870 So.2d at 718 (noting exceptions to the warrant requirement and that State bears the burden to identify and justify an exception’s applicability to a given case). The hospital did not have a warrant to search **Ms. X**, rendering the collection, testing, and turning over of her bodily fluids unconstitutional.

2. The hospital lacked probable cause that **Ms. X was engaged in criminal activity.**

There is no evidence that the search was performed because the hospital suspected **Ms. X** of criminal activity. General suspicion of substance use is insufficient to justify a search. *Nicaud*

⁵ [Defense counsel should include any facts available about a written policy codifying partnership between hospital and law enforcement or established practices that strongly suggest such a partnership, as this proves that local enforcement “knew of and acquiesced in the intrusive conduct” and that the hospital’s “purpose was to assist law enforcement rather than to further [its] own ends,” per *Steiger*.]

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v. State ex rel. Hendrix, 401 So.2d 43, 46 (Ala. 1981) (citing *Brinegar v. United States*, 338 U.S. 160 (1949) (probable cause for a search “cannot be founded on mere suspicion”)). The hospital must have had a “reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant” a belief that **Ms. X** violated the Statute. *Lunsford v. Dietrich*, 9 So. 38, 310 (Ala. 1891) (internal quotations omitted). No such circumstances existed here; to the extent that suspicion existed, the hospital should have obtained a warrant prior to drug testing that could or would lead to criminal charges.

b. **Ms. X never consented to the search of her body or bodily fluids.**

Ms. X never consented to the search. Any consent that she gave was for medical testing and treatment, not testing for law enforcement purposes.

The scope of a search is limited by the terms of a woman’s consent. See *Walter v. United States*, 447 U.S. 649, 656 (1980). Consent must be: (1) unequivocal; (2) specific; and (3) “knowingly, intelligently, and freely given.” *Ex parte Bridgett*, 1 So. 3d 1057, 1062 (Ala. 2008) (citing *Kennedy v. State*, 640 So. 2d 22, 24 (Ala. Crim. App. 1993)); *Ex parte Wilson*, 571 So. 2d 1251, 1255 (Ala. 1990); *Duncan v. State*, 176 So. 2d 840, 852-853 (Ala. 1965) (citing *United States v. Page*, 302 F.2d 81, 83-84 (9th Cir. 1962)). To be knowingly and intelligently given, consent must be “based on knowledge or means of knowledge of *all material facts incident thereto*.” *Bull v. Armstrong*, 48 So. 2d 467, 470 (Ala. 1950) (internal citations omitted) (emphasis added). A material fact certainly includes potential for detention, arrest, or either civil child welfare as well as law enforcement involvement.

Ms. X gave the Sample in the course of [prenatal and/or postpartum] healthcare. She did not consent to a law enforcement search. The scope of consent is limited to what a “typical reasonable person” would have thought under the circumstances. *Ex parte Bridgett*, 1 So.3d 1057, 1062 (Ala. 2008) (citing *Florida v. Jimeno*, 500 U.S. 248, 251 (2001); see also *King v. State*, 6 So. 3d 30 (Ala. Cr. App. 2008); and *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)). Faced with similar facts, the Third Circuit applied the “objectively reasonable person” standard to hold that drug testing for law enforcement purposes fell outside the scope of a woman’s consent to a hospital rape-kit examination. *Reedy v. Evanson* 615 F.3d 197, 230 (3d Cir. 2010), *cert. denied*, 562 U.S. 1256 (2011). As *Ferguson* makes clear, even a general consent to testing of bodily fluids for medical care purposes is not consent to use of those test results for law enforcement purposes. In *Ferguson*, the United States Supreme Court concluded that a patient undergoing diagnostic testing in a hospital has a reasonable expectation of privacy that her test results will not be shared with nonmedical personnel without her consent. 532 U.S. at 78. This court should reach the same conclusion and suppress the evidence. To the extent that **Ms. X**’s healthcare was conditioned on her consent to a drug test for law enforcement purposes, her consent was defective and did not waive the warrant requirement. See *Lebron v. Sec’y of the Fla. Dep’t of Children & Families*, 710 F.3d 1202, 1214 (11th Cir. 2013); *Lebron v. Sec’y of the Fla. Dep’t of Children & Families*, 772 F.3d 1352, 1374 (11th Cir. 2014), *reh’g en banc denied*.

Any consent **Ms. X** gave was limited to the medical treatment she sought at the hospital. Her consent did not include a law enforcement search, and thus the warrant requirement is not waived. The evidence must be suppressed.

IV. Conclusion

Ms. X's pregnancy did not diminish her Fourth Amendment rights. The search of Ms. X was unconstitutional. When evidence is seized without a warrant, the burden of proof is upon the State to prove that there was no Fourth Amendment violation. *Ex parte Tucker*, 667 So. 2d 1339, 1343 (Ala. 1995) (citing *Kinard v. State*, 335 So.2d 924 (Ala. 1976)). The State must prove that there was no Fourth Amendment violation by a preponderance of the evidence. Here it is clear that the State has not met its burden and Ms. X requests that all evidence seized as a result of the unlawful search is fully and properly suppressed.

Respectfully submitted,

IN THE DISTRICT COURT OF THE JUDICIAL
DISTRICT OF THE STATE OF MISSISSIPPI, IN
AND FOR THE COUNTY OF

STATE OF MISSISSIPPI,)
) CASE NO.
Plaintiff,)
) AFFIDAVIT OF DR. MISHKA TERPLAN
vs.)
)
MOTHER ,)
)
Defendant.)
_____)

AFFIDAVIT OF MISHKA TERPLAN, MD, MPH

I, Dr. Mishka Terplan, do hereby swear and affirm that I make the following declaration, under penalty of perjury, from my expertise and personal knowledge.

1. I am a physician licensed to practice medicine in the Commonwealth of Virginia with board certifications in both obstetrics and gynecology, and addiction medicine. I currently serve as Professor of Obstetrics and Gynecology and Psychiatry at the Virginia Commonwealth University (VCU) School of Medicine in Richmond, Virginia. Additionally, I am the Associate Director of Addiction Medicine and oversee the outpatient addiction medicine clinics at VCU including MOTIVATE and Starting Anew, a clinic for pregnant women with substance use disorders. I also provide expert consultative services for the National Center on

Substance Abuse and Child Welfare. A complete copy of my current curriculum vitae is attached.

2. I received my M.D. from the University of California, San Francisco; completed my residency in obstetrics and gynecology at the University of Southern California; and received my master's in public health from the University of North Carolina, School of Public Health, with a concentration in Epidemiology. I am certified as a Fellow of the American Congress of Obstetricians and Gynecologists and as a Distinguished Fellow of the American Society of Addiction Medicine. My clinical and research work focuses on the intersection of reproductive health and substance use disorders.
3. I have written more than 80 published, peer-reviewed, journal articles. I am the lead author on the most comprehensive systematic review/meta-analysis regarding behavioral interventions for substance use disorder treatment in pregnancy: "Psychosocial interventions for pregnant women in outpatient illicit drug treatment programs compared to other interventions" (*Cochrane Database of Systematic Reviews*, 2015, Issue 4). Other pertinent publications include: "Clinical care for opioid-using pregnant and postpartum women: The role of obstetric providers" (*American Journal of Obstetrics and Gynecology*) and "The role of screening, brief intervention, and referral to treatment (SBIRT) in the perinatal period" (*American Journal of Obstetrics and Gynecology*).
4. Since 2010, I have served on the "Women and Substance Use Disorders Action Group" for the American Society of Addiction Medicine (ASAM) which in collaboration with the American Congress of Obstetricians & Gynecologists (ACOG), co-authored several ACOG and ASAM Committee Opinions including: "Public Policy Statement on Women, Alcohol

and Other Drugs, and Pregnancy,” published July 2011, and “Opioid Abuse, Dependence, and Addiction in Pregnancy,” published May 2012.

5. Since 2014 I have been a member of the American Medical Association (AMA) Federation Task Force to Reduce Opioid Abuse¹, serving as a representative for ACOG. I have participated in federal task forces and workgroups related to women and addiction, including with the Substance Abuse and Mental Health Services Administration (SAMHSA) on the development of a guide to the management of opioid-dependent pregnant and parenting women and their children), and with the Centers for Disease Control and Prevention (CDC) (Expert Meeting on Perinatal Illicit Drug Abuse). I was an invited participant (representing ACOG) at the “Opioid Use in Pregnancy, Neonatal Abstinence Syndrome, and Childhood Outcomes Workshop”, co-sponsored by National Institute of Child Health and Human Development, ACOG, American Academy of Pediatrics, The Society for Maternal-Fetal Medicine, and Center for Disease Control.
6. I was Co-Chair of a work group with the Alliance for Innovation on Maternal Health (AIM) Program which produced the patient safety bundle “Obstetric Care for Women with Opioid Dependence.” I am one of the authors of the ACOG Committee Opinion “Summary: Opioid Use and Opioid Use Disorder in Pregnancy” (August 2017), and was head of the writing committee that developed the ASAM "Public Policy Statement on Substance Use, Misuse, and Use Disorders During and Following Pregnancy, with an Emphasis on Opioids," January 2017.
7. In Virginia, I am currently on the executive leadership team of the Virginia Neonatal Perinatal Collaborative and served on the Substance Exposed Infant (SEI) Barriers to Treatment Work

¹ In 2016 this group was renamed the AMA Opioid Task Force.

Group, organized under the Department of Social Services (DSS) and Virginia Department of Behavioral Health & Developmental Services and was a member of the Opioid Curricula Workgroup Steering Committee, with the Virginia Department of Health and Human Resources and Virginia Department of Health Professionals.

8. In this case, I was retained as a *pro bono* medical and public health expert to provide my opinion on whether Mother 's alleged use of marijuana, hydrocodone, and methamphetamine while pregnant amounts to "poisoning" of her then-fetus.
9. As a physician, it is considered a professional obligation to keep current on medical research; review medical journals; and be up to date on policies of professional medical associations. I have done that, and I base my opinions below on my qualifications; extensive experience; review of the records listed below; and familiarity with those sources.
10. It is my expert opinion that there is no evidence that prenatal substance use caused or contributed to "poisoning" of Mother 's then-fetus (now her child). It is also my expert opinion that the alleged substance use could not have poisoned any fetus in similar circumstances.

Sources Reviewed

11. In developing my opinions, I reviewed: (1) County Indictment filed , charging Mother with "possession of hydrocodone and acetaminophen with intent", and "felonious child abuse/battery"; (2) affidavit in support of the indictment; (3) offense report to the District Attorney by Investigator ; (4) State's witness list; (5) State's Evidence List; (6) two affidavits by Investigator supporting the charges of felonious child abuse and possession of a controlled substance with intent to deliver; (7) Mother Driver's License Printout; (8) NCIC Interstate Identification Index; (9) Mississippi

Criminal Case History; (10) Mississippi State Crime Lab Results/ Toxicology Reports; (11) Mississippi State Forensic Laboratory Drug Analysis Report; (12) Mother 's Rights Statement; (13) Mother 's Consent to Search Form; (14) Mississippi State Forensic Laboratory Evidence Submission forms; (15) Mother 's signed statement of Miranda Rights; (16) Mother 's Certificate of Initial Appearance; (17) Mother 's Affidavit of Indigency; (18) County Evidence of Chain of Custody report; (19) Consent to obtain bodily fluids form; (20) Mother 's consent to draw blood form.

12. Notably, none of the records I reviewed are medical reports of either Mother or her now born child. It is my understanding that defense counsel has not been provided with any medical reports. Regardless of any additional information provided I am still able to come to a reliable opinion within a reasonable degree of medical certainty based upon what I have reviewed and extensive knowledge in this specific subject matter.

Invalidity of Prenatal Poisoning Due to Substance Use

13. It is my understanding that one of the criminal charges levied against Mother is Mississippi Code Ann. §97-5-39, felony child abuse/battery, which is defined as follows:

“Any person shall be guilty of felonious child abuse in the following circumstances:

(a) Whether bodily harm results or not, if the person shall intentionally,
knowingly or recklessly:

(iv) Poison a child;”

14. It is important to note that a developing fetus is not a “child.” Biologically we consider a child to be a person between birth and puberty. During early gestation we refer to the pregnancy as an embryo and, from the second trimester on, as a fetus.

15. I am not aware of any legal definition of “poisoning”. Generally speaking, in medicine poisoning refers to an adverse clinical effect due to exposure to an exogenous substance. Exposure is primarily by ingestion, inhalation, injection, or absorption through the skin or mucous membranes and the clinical effect of poisoning is often due to a dose of a substance exceeding the individual’s biologic or metabolic response. Poisoning can be either accidental or intentional.
16. It is my understanding, in Mississippi, a legal definition of “poisoning” has not been clearly defined. When it has been applied, it included an intent to kill or harm the recipient of the substance or by administration of a substance. For the purpose of this affidavit, I use the common language and understanding of the term found in the Merriam Webster Dictionary.
17. Merriam-Webster Dictionary defines poison as a noun and verb. As a noun: “a substance that through its chemical action usually kills, injures, or impairs an organism (1): something destructive or harmful (2): an object of aversion or abhorrence 2: a substance that inhibits the activity of another substance or the course of a reaction or process.” As a verb it is defined as follows: “to injure or kill with poison: to treat, taint, or impregnate with or as if with poison 2: to exert a baneful influence on; CORRUPT: to inhibit the activity, course, or occurrence of.” There is no separate definition of “poisoning,” as it is incorporated into the definition of “poison.”
18. The state has provided no medical reports or allegations that Mother ’s fetus, while in utero, was injured or impaired, corrupted, inhibited the activity of the fetyus or there was a baneful influence. Since her child was born alive, Mother ’s fetus was certainly not “killed.” The state also makes no allegations concerning amounts of drug use. The state appears to have filed this charge based purely on an assumption that a woman’s use of any (especially illicit) substances

during pregnancy in any amount must necessarily cause injury or harm. Such an assumption is false.

Substance Use and Pregnancy

19. Substance use is common in American society. Most Americans have used a substance that is associated with addiction (nicotine, alcohol, cannabis, etc.), however only a minority of individuals who have used a substance develop an addiction to it. Men use more substances than women and non-pregnant women use more substances than pregnant women. This is because most women quit or cut back substance use during pregnancy.
20. Pregnancy is a unique time, especially for behavior change. In all my years of providing prenatal care, I never encountered anyone who thought that smoking cigarettes, drinking alcohol or using drugs while pregnant was healthy. Each one of them was motivated to quit, and, although many did, some could not, because they had a substance use disorder.
21. Continued substance use in pregnancy is pathognomonic for addiction. Addiction is brain centered condition whose symptoms are behaviors: cravings, compulsive use, inability to quit, and continued use despite adverse consequences. Therefore, pregnant women who continue to use substances are not doing so because they are careless or devoid of concern for their baby-to-be. Rather they have the condition of addiction and need treatment and support.
22. There is an unusually large consensus among professional medical associations – including ACOG, ASAM, the American Medical Association and the American Academy of Pediatrics - that punishment of pregnant women for having the condition of addiction is a harmful health policy.²

²See e.g., American Medical Association, Policy Statement -H-420.962, *Perinatal Addiction -Issues in Care and Prevention* (2009); American Academy of Family Physicians, Position Statement, *Substance Abuse and Addiction: Pregnant Women, Substance Use and Abuse by* (2014); American Academy of Pediatrics, Committee on Substance Use and Prevention, Policy Statement, *A Public Health Response to Opioid use in Pregnancy* (2017); American College of Obstetricians and

23. There are many factors that can affect the development of a fetus and the outcome of a pregnancy including social determinants of health and individual factors such as obesity, poor nutrition, cigarette smoking, exposure to environmental toxins, and stress. Developing scientific research suggests that stress and maternal anxiety elevate cortisol (“stress response”) in both the mother and the pregnancy and is associated with preterm delivery, low birth weight and possibly the development of chronic illness later in life for the fetus.. The broader environment in which women are pregnant and in which children develop plays a significant role in children's health.³ It is my opinion that the additional stress placed on pregnant women and mothers when they fear criminal prosecution or charges of child neglect or abuse in relation to drug use and pregnancy is in itself harmful to both the woman and the child.

24. There is a great deal of popular mythology concerning substance use and pregnancy.

Fortunately, medical science does not support the popular beliefs about harm to babies attached to substance use and pregnancy. The fetal, newborn and developmental risks due to methamphetamine, hydrocodone (opioids) and/or cannabis exposure are far less extreme than has been portrayed in the media, are no different than many other factors affecting pregnant women, and in fact are less than the risks posed by use of tobacco or alcohol while pregnant. Unlike the Zika virus, for example, that is known to cause significant harm to developing fetuses, the substances alleged to be present in this case pose far less risk. The risks certainly do not justify a judicial expansion of this criminal law concerning “poison[ing] a child” to reach back into pregnancy.

Gynecologists Committee on Ethics, Committee Opinion 664, Refusal of Medically Recommended Treatment During Pregnancy (2016); American Society of Addiction Medicine, Public Policy Statement on Substance Use, Misuse, and Use Disorders During and Following Pregnancy, with an Emphasis on Opioids (2017).

³ Liana B. Winett, Alyssa B. Wulf, Lawrence Wallack, *Framing Strategies to Avoid Mother-Blame in Communicating the Origins of Chronic Disease*, American Journal of Public Health, Vol. 106, No. 8 (August 2016); Winett, Wallack, Dawn Richardson, Janne Boone-Heinonen, Lynne Messer, *A Framework to Address Challenges in Communicating the Developmental Origins of Health and Disease*, Environmental Epigenetics, Curr. Envir. Health Rpt. 3: 169-77 (2016).

25. A common misconception about people with substance use disorder is that their behaviors are intentional and could be controlled if they weren't so selfish. Nothing could be farther from truth. The salient feature of addiction is the continued use of a substance despite adverse consequence, knowing what you are doing is harming yourself and others and being unable to stop doing so. This misunderstanding underlies the stigma and discrimination that people with addiction face, a stigma that is more pronounced during pregnancy, as pregnant women are often perceived as *choosing* their illness over their fetus. This is simply untrue. Women who cannot stop using drugs during pregnancy have a substance use disorder. Although vulnerabilities for addiction vary between individuals and populations, no one chooses to have a substance use disorder. Furthermore, the substance use disorder does not develop *de novo* during pregnancy. I have provided care hundreds of pregnant women with substance use disorder in my career, and I have never seen someone develop the disease during the gestational period. I have certainly diagnosed individuals for the first time with an addiction and seen individuals relapse. Often pregnancy is the first-time women get access to addiction treatment. One of the largest barriers to care, however, is stigma and discrimination, which are based on a misunderstanding of the condition of addiction.

Methamphetamine

26. There is less medical literature on the effects of prenatal methamphetamine exposure on child developmental outcomes than there is on other substances such as alcohol. The one consistent finding is that infants exposed to methamphetamine may be small for their gestational age,⁴ but being small for gestational age does not necessarily mean the infant is harmed.

⁴ Tricia Wright, MD, et al., *Methamphetamines and Pregnancy Outcomes*, 9 J. Addict. Med. 111 (2015).

27. Research shows that when pregnant women who stopped using methamphetamine in their first or second trimester were compared to non-users, the birth outcomes were similar.⁵

Hydrocodone

28. Hydrocodone is an opioid analgesic sold under the brand name Vicodin (among others). Like many opioid analgesics, it is an opioid agonist – meaning that it binds to the opioid receptor and activates the opioid system. It is commonly prescribed for both acute and chronic pain. We have almost 50 years of research on opioid exposure during pregnancy – most of which focuses on medications to treat opioid use disorder (methadone or buprenorphine) or untreated (primarily heroin) opioid addiction. The main risk of opioid exposure is the possibility that the newborn will develop withdrawal after birth, called neonatal abstinence syndrome (NAS). NAS is treatable and without long-term consequences.

Cannabis

29. The scientific literature on cannabis use and its health effects during pregnancy is extensive and includes four prospective cohorts (that have followed children exposed to cannabis prenatally into young adulthood) as well as four systematic reviews/meta-analyses. As a co-author and I summarized recently, “[t]aken together, the literature supports at best subtle and likely confounded effects.”⁶
30. Some researchers have found no correlation between maternal cannabis use during pregnancy and pregnancy outcomes. While other researchers studying the effects of maternal cannabis use during pregnancy have found a correlation between maternal cannabis use and subtle negative

⁵ Id.

⁶ Katrina Mark & Mishka Terplan, *Cannabis and Pregnancy: Maternal Child Health Implications During a Period of Drug Policy Liberalization*, 104 Preventive Med. 46 (Nov. 2017).

effects on the birth weight or birth length of newborns, in those studies the negative effects dissipated after a few months. Conclusions are further confounded due to poly-substance use, specifically tobacco smoking. As one study noted: "As many cannabis users are often tobacco or alcohol users, determining a cannabis-only effect (excluding the presence of tobacco and alcohol) was currently not possible in this systematic review and meta-analysis with the available literature. . . by conclusion, the effects of cannabis on maternal and fetal outcomes remain generally unknown."⁷ Therefore, there is no conclusive medical science to establish that cannabis use alone during pregnancy can cause any level of harm to a developing fetus.

31. The scientific literature regarding prenatal exposure to cannabis does not support a presumption of harm. In my work, I have found no evidence of harm to children associated with cannabis use during pregnancy.

Mother 's Alleged Substance Use

32. Based upon my review of the materials listed above, it is my opinion that the prosecutor's Complaint, Indictment and the Probable Cause Affidavit contain significant medical misinformation in that they assert that Mother committed "child abuse/battery" of her fetus through allegedly using certain substances during pregnancy, based upon both confirmed (methamphetamine and benzodiazepine) and unconfirmed (for cannabis) positive toxicology tests of Mother - not her fetus - when she was arrested while still pregnant.
33. The indictment alleges that use of cannabis, hydrocodone and methamphetamine "caused harm to her unborn child." Toxicology results of a pregnant woman simply cannot be the

⁷ JK Gunn, et al., *Prenatal Exposure to Cannabis and Maternal and Child Health Outcomes: A Systematic Review and Meta Analysis*, BMJ Open (2016).

basis for a medical diagnosis of “poisoning” to a fetus. Such test results, at best, merely demonstrate that a pregnant woman used some amount of those substances.

34. Medically it does not make sense to apply a law that covers harm to children, to women during pregnancy. For example, providing methamphetamine, cannabis or hydrocodone to a one-year-old child is medically very different than the possible effect on a fetus *in utero*. A physician can assess the effects of the substance on a child separate and apart from its mother or any other person who provided it to the child. In a child, a doctor can test for blood levels, toxicity and assess the effects or harm of the substance on the child independent from the person who provided it. Contrarily, the effect on a pregnant woman of her use of methamphetamine, cannabis, hydrocodone or any other substance cannot be measured against any effect on her fetus, and thus they alleged harm is undeterminable.⁸
35. Scientific research does not support the allegation/presumption of harm connected with the substances alleged to have been present in this woman’s body. Importantly, the pregnant woman’s use of substances does not equate to exposure of the fetus to such substances nor does exposure to substances mean the fetus is addicted or harmed.

Public Health Concerns

36. Prosecuting pregnant women by theorizing that every action or inaction during pregnancy could endanger a child not yet born would essentially make pregnancy itself equivalent to “harm to a child”. For example, stillbirths affect tens of thousands of women in the United States each year.⁹ Depending on how you define pregnancy, roughly 20-50% of pregnancies will end in a loss, either in miscarriage or stillbirth. Miscarriage and stillbirth are among the

⁸ It is worth reiterating that it is not my opinion that drug use while pregnant harms/injures/neglects/batters a fetus.

⁹ See R.L. Goldenberg et al., *Stillbirth: A Review*, 16 Journal of Maternal-Fetal & Neonatal Medicine 79, 79 (2004) (“in the year 2000, there were nearly 27,000 of these events.”).

most common adverse outcomes of pregnancy¹⁰ and they occur despite the best intentions and numerous precautions taken by health care professionals and individual women. The prosecution's apparent request to make this law reach back into pregnancy would logically make the statute cover miscarriage and stillbirth as well. It does not make sense to extend a law that covers injury to children to birth outcomes, much less into the gestational period.

37. The prosecution's theory is also illogical. Permitting prosecution under a theory of poisoning a fetus based upon what a pregnant woman ingests or digests could allow the State to prosecute based on what a woman eats, even when her treating physician does not advise against it. For example, if one believes it potentially harmful for pregnant women to consume sushi, under the State's proposed application of the law here, a pregnant woman could be prosecuted for consuming a controversial food without any showing of harm to the fetus, under a premise of poisoning. No credible physician would support such a claim.
38. As a premier expert in the field of public health, obstetrics and gynecology, and substance use disorders, it is my opinion that assumptions like this are not supported by medical science and have the undesired public health effect of pregnant women avoiding prenatal and other health care. Such avoidance *is* actually harmful for both woman and fetus.
39. As a physician, I agree with every major medical and public health association, including the American Medical Association and the National Perinatal Association, that substance use is a health issue best addressed through health care, and that a criminal justice approach has negative consequences.¹¹ The results of criminalization and punishment of women related to

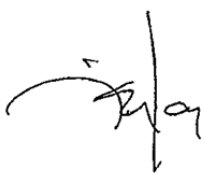
¹⁰ Id.

¹¹ See e.g., American Medical Association, Policy Statement -H-420.962, *Perinatal Addiction-Issues in Care and Prevention* (2009) ("Transplacental drug transfer should not be subject to criminal sanctions or civil liability"); National Perinatal Association, Position Statement, *Substance Abuse Among Pregnant Women* (2012).

pregnancy and drug use can be dire to maternal and fetal health, as they serve as deterrents to pregnant women from receiving prenatal and other health care based upon a fear of prosecution.¹²

40. In this case, it is my opinion to a reasonable degree of medical certainty, that there is no evidence that prenatal substance use caused poisoning of Mother's fetus during pregnancy or thereafter. There is also no scientific evidence to conclusively determine that the medications individually or in combination with each other could have caused or contributed to any level of fetal poisoning.

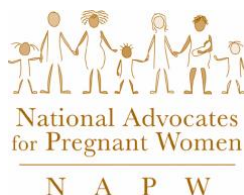
I declare under penalty of perjury that the foregoing is true and correct and reflects my best medical judgment.



July 16, 2018

Dr. Mishka Terplan, M.D., M.P.H.

¹² See e.g. American Academy of Pediatrics, Committee on Substance Use and Prevention, Policy Statement, *A Public Health Response to Opioid Use in Pregnancy* (2017); American Public Health Association, Policy Statement No. 9020, *Illicit Drug Use by Pregnant Women*, 8 Am. J. Pub. Health 240 (1990); American Nurses Association, Position Statement, *Non-Punitive Alcohol and Drug Treatment of Pregnant and Breast-feeding Women and their Exposed Children* (2011).



UNDERSTANDING CAPTA AND STATE OBLIGATIONS

September 2018

This fact sheet addresses common misconceptions about what states are required to do to comply with the federal Child Abuse Prevention and Treatment Act (CAPTA), with regard to newborn infants' prenatal drug exposure. Many states and local child welfare agencies have assumed that CAPTA – a federal funding provision – requires them to report all substance-exposed newborns to child welfare agencies as being abused or neglected. This assumption is incorrect; CAPTA does not require this.

When addressing the topic of child protection, it is particularly important to note that drug use is not the same as a substance use disorder (SUD) and that SUD is a medical condition – not a form of child neglect or abuse. Pregnant women do not experience drug dependencies because they don't care about their children. Like other medical and behavioral health conditions, substance use disorder is best addressed through treatment. Medical knowledge about dependency and treatment demonstrates that patients do not, and cannot, simply stop their drug use as a result of threats of legal charges or other negative consequences. In fact, threat-based approaches do not protect children. They do, however, frighten pregnant and parenting women away from seeking healthcare.ⁱ

What is CAPTA?

CAPTA is the key federal legislation addressing child abuse and neglect. Originally enacted in 1974, the law provides federal funding to states to support the “prevention, assessment, investigation, prosecution, and treatment” of child abuse, in exchange for states’ fulfillment of certain requirements.ⁱⁱ One such requirement is that states enact laws mandating that certain professionals report known or suspected child abuse to a child protective services agency.ⁱⁱⁱ In 2003, in response to alarmist and scientifically inaccurate information about pregnancy and cocaine use, Congress required that states arrange for “plans of safe care” for infants affected by “illegal” substance use, and in 2016, Congress enacted the Comprehensive Addiction and Recovery Act, including amendments to CAPTA requiring those “plans of safe care” be for infants affected by use of any substances, as well as for their parents. No funding was allocated for the added care presumed to be needed.

Does CAPTA Require States to Characterize Substance Use in Pregnancy as Child Abuse?

No. CAPTA specifically does not “establish a definition under Federal law of what constitutes child abuse or neglect; or (II) require prosecution for any . . . action.”^{iv}

What Does CAPTA Require?

Under CAPTA, states must have: "policies and procedures (including appropriate referrals to child protection service systems and for other appropriate services) to address the needs of infants born with and identified as being *affected by substance abuse or withdrawal symptoms resulting from prenatal drug exposure, or a Fetal Alcohol Spectrum Disorder*, including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition in such infants."

Does CAPTA Require Testing All Newborns for Drug Exposure?

No. CAPTA does not require testing of all newborn babies.

Does CAPTA Require Reporting All Substance-Exposed Newborns to Child Protective Services?

No. CAPTA only requires states to have policies in place to "notify" child welfare agencies of babies who fall into one of the three enumerated categories: being "affected by substance abuse"^{vii} affected by "withdrawal symptoms resulting from prenatal drug exposure" or having Fetal Alcohol Spectrum Disorder" (FASD).^{vi} Such notifications or reports are *for the purpose of identifying whether the family is in need of care or services* ("to address the needs of infants").

Does CAPTA Require Mandated Reports to Take the Form of an Allegation of Child Abuse or Neglect?

No. The law specifically states that these reports are *not* for the purpose of redefining child neglect or abuse, nor for the purpose of accusing the mother of abuse or neglect, even when newborns receive a diagnosis of neonatal abstinence syndrome or FASD. In fact, it should be noted the purpose of the federal funds is to assist states in creating programs and services designed to help newborns and their families. CAPTA-based reports are not required to be, and should not be, treated in the same manner as a report of suspected neglect or abuse against a parent. CAPTA does not say that a baby's positive toxicology result is *per se* evidence of civil child neglect or abuse.^{vii}

Does CAPTA Require States to Mandate CPS Involvement with All Babies After a Report?

No. CAPTA's grant eligibility criteria require state programs to include "the development of a plan of safe care" for infants identified as affected by substance abuse, withdrawal symptoms, or Fetal Alcohol Spectrum Disorder.^{viii} It is up to individual states to determine when and if a plan is needed^{ix} and which agency or entity (such as hospitals, community organizations, or a child protective services department that is established to receive CAPTA reports separate from reports of child neglect/abuse) is responsible for developing the plan of care.^x It does not have to be and should not be the existing child welfare agency.

Ideally, states should create a separate reporting and data collection process outside the child welfare system to receive CAPTA reports. The federal funds can be used by states to develop a myriad of ways to offer confidential services and support to families after a baby has been identified in a report, outside of the context of a punitive child neglect investigation and proceeding. At a minimum, separate reporting and data collection processes should include a separate database, separate staff, and separate contact person/office. They could also include collaborating with another agency to collect the information and “notify” the child welfare agency. For example, the state’s de-identified Pregnancy Risk Assessment Monitoring system could be used to collect data in the three enumerated categories.

ⁱ Poland, et al., *Punishing Pregnant Drug Users: Enhancing the Flight From Care*, 31 Drug and Alcohol Dependence 199 (1993). See also Rosa Goldensohn & Rachel Levy, The State Where Giving Birth Can be Criminal, The Nation, Dec. 10, 2014, available at <https://www.thenation.com/article/state-where-giving-birth-can-be-criminal/>, (investigative report documenting that Tennessee’s “fetal assault” law in effect from 2014-2016 caused pregnant women to avoid healthcare and flee the state to give birth).

ⁱⁱ U.S. Dep’t of Health and Human Services, Admin. For Children and Families, *About CAPTA: Legislative History* (July 2011), available at <https://www.childwelfare.gov/pubPDFs/about.pdf>.

ⁱⁱⁱ 42 U.S.C. § 5106a (2017).

^{iv} *Id.* Guidance issued by the Administration for Children and Families reiterates this and notes that, “It is ultimately the responsibility of CPS staff to assess the level of risk to the child and other children in the family and determine whether the circumstance constitutes child abuse or neglect under State law.” U.S. Dep’t of Health and Human Services, Admin. For Children and Families, *Mandatory Reporters of Child Abuse and Neglect*, (2015), available at <https://www.childwelfare.gov/pubPDFs/manda.pdf#page=5&view=Summaries%20of%20State%20laws>.

^v It should be noted that CAPTA itself does not provide a definition of “affected by substance abuse.” In guidance to CPS workers, the Office on Child Abuse and Neglect, which is responsible for administering programs under CAPTA, distinguishes between substance use and “substance use disorders,” the term now used by most medical experts instead of “substance abuse.” Substance use disorder is defined as: *A pattern of substance use that leads to significant impairment or distress, reflected by one or more of the following: Failure to fulfill major role obligations at work, school, or home (e.g. substance-related absences from work, suspension from school, neglect of a child’s need for regular meals); Continued use in spite of physical hazards (e.g., driving under the influence); Trouble with the law (e.g. arrests for substance-related disorderly conduct); Interpersonal or social problems.* U.S. DEP’T OF HEALTH AND HUMAN SVCS. ADMINISTRATION FOR CHILDREN AND FAMILIES, PROTECTING CHILDREN IN FAMILIES AFFECTED BY SUBSTANCE USE DISORDERS (2009), available at <https://www.childwelfare.gov/pubPDFs/substanceuse.pdf>.

^{vi} 42 U.S.C. § 5106a (2017).

^{vii} While workplace drug testing is typically done in accordance with federal regulation and consistent standards, toxicology tests on pregnant women and newborns are not. The tests are often unconfirmed and not preserved for re-testing, so they are not reliable, nor do they provide information about drug dependency or parenting ability.

^{viii} 42 U.S.C. § 5106a (2017).

^{ix} Not every infant identified will need a plan of safe care following discharge from the hospital, as affects and withdrawal symptoms are often temporary and best treated with constant parent contact and breastfeeding. MacMillan, et al., *Association of Rooming-in With Outcomes for Neonatal Abstinence Syndrome, A Systematic Review and Meta-analysis*, JAMA Pediatr. 2018, available at <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2672042>; Saiki, et al., *Neonatal Abstinence Syndrome-Postnatal Ward Versus Neonatal Unit Management*, 169 EUR. J. PEDS. 95 (2010); Welle-Strand, et al., *Breastfeeding Reduces the Need for Withdrawal Treatment in Opioid-Exposed Infants*, 102 FOUNDATION ACTA PAEDIATRICA 1060 (2013).

^x U.S. Dep’t of Health and Human Services, Admin. For Children and Families, *Mandatory Reporters of Child Abuse and Neglect*, (2015), available at <https://www.childwelfare.gov/pubPDFs/manda.pdf#page=5&view=Summaries%20of%20State%20laws>.



National Advocates
for Pregnant Women

N A P W

July 31, 2019

District Attorney Neal Pinkston
Hamilton County District Attorney's Office
600 Market Street, Suite 310
Chattanooga, TN 37402

District Attorney Pinkston:

As 168 signatories to this letter, including physicians, health care professionals, public health advocates, legal advocates, faith leaders, experts in reproductive health and gender equality, and many others from Tennessee and around the country, we call on your office to dismiss the charges against Tiffany Roberts, a Chattanooga woman who remains in jail for experiencing a pregnancy loss. While we believe pregnancy, pregnancy outcomes, and attempts to receive medical care should never be the basis for a criminal prosecution or incarceration, it is particularly troubling that this arrest has occurred despite the fact that Tennessee's legislature has clarified that these laws may not be used to prosecute pregnant women.¹

Our commitment to the constitutional and human rights as well as the health and welfare of pregnant people requires us to speak out against this callous, dangerous and counterproductive prosecution of Ms. Roberts related to her pregnancy loss.

The arrest in this case assumes the impossible -- that pregnant women can guarantee healthy birth outcomes and they should be held criminally liable if they do not. Increasingly, research shows that pregnancy outcomes have far more to do with the economic and social conditions a woman has experienced in the course of her life, rather than with anything she does or does not do while pregnant.² We also know that 15 to 20 percent of all pregnancies end in miscarriages

¹ Pursuant to § 39-13-214(c), pregnant women specifically may not be prosecuted for homicide regarding their own embryo or fetus. Pursuant to § 39-13-107(c) "Viable Fetus as a Victim," pregnant women specifically may not be prosecuted under the assault section regarding their own embryo or fetus. Pursuant to § 39-15-402, "Aggravated Child Abuse or Neglect," caselaw is clear that fetuses are not within the definition of "child." Finally, under § 39-13-102 the "First-Degree Murder" statute, application of the law is only appropriate when there is an act resulting in death during "aggravated child abuse/neglect" for which there is none in Ms. Roberts case.

² See World Health Organization, *Social Determinants of Health*, 2017, http://www.who.int/social_determinants/sdh_definition/en/ ("social determinants of health are the conditions in which people are born, grow, live, work and age."); Kim Krisberg, American Public Health Association,

and stillbirths, whether or not a pregnant woman smokes cigarettes, drinks alcohol, uses controlled or prescription substances or engages in many of the life activities popularly thought to impact pregnancy outcomes.³ These economic and social conditions can also be heavily influenced by the criminal system. Women who find themselves subject to punitive treatment are disproportionately women of color and poor white women. Prosecutions of health-related matters like pregnancy, will only increase the number of women who find themselves part of a carceral system instead of a supportive and rehabilitative one.

Every leading medical organization that has addressed the issue of drug use and pregnancy, including the American Medical Association, the American College of Obstetricians and Gynecologists, The American College of Nurse-Midwives, the American Academy of Pediatrics, and the March of Dimes, has concluded that this issue is best addressed through education and evidence-based treatment when necessary for substance use disorder, not through the criminal legal system.⁴

More specifically with regard to drug use, evidence-based research does not support the contention that any of the drugs Ms. Roberts is alleged to have used causes a miscarriage or stillbirth.⁵ Like other medical and behavioral health conditions, when someone does have a substance use disorder it is best addressed through treatment. Medical knowledge about dependency and treatment demonstrates that patients do not and cannot simply stop their drug use as a result of threats of arrest or other negative consequences. In fact, threat-based approaches and criminal charges do not protect fetuses, embryos, fertilized eggs or children. Instead, these practices and policies have been shown to deter pregnant and parenting people from seeking health care rather than from using drugs.⁶ This is especially counterproductive since studies overwhelmingly demonstrate that pregnancy is a time when women are most motivated to seek treatment because of their concern about the effect of substance use on their pregnancies.⁷

Transforming Public Health Works: Targeting Causes of Health Disparities, 46 *The Nation's Health*, July 2016 (“at least 50% of health outcomes are due to the social determinants . . .”).

³ *Id.*

⁴ See Medical and Public Health Statements, attached.

⁵ See Mishka Terplan et al., *The Effect of Cocaine and Amphetamine Use During Pregnancy on the Newborn: Myth versus Reality*, 30 *Journal of Addictive Diseases* 1, 3 (2011); see also American College of Obstetricians and Gynecologists, *Information About Methamphetamine Use In Pregnancy* (March 2006); Claudia Malacrida, *Complicating Mourning: The Social Economy of Perinatal Death*, 9 *Qualitative Health Res.* 504, 505 (July 1999).

⁶ See Poland, et al., *Punishing Pregnant Drug Users: Enhancing the Flight From Care*, 31 *Drug and Alcohol Dependence* 199 (1993). See also Rosa Goldensohn & Rachel Levy, *The State Where Giving Birth Can be Criminal*, *The Nation*, Dec. 10, 2014, available at <https://www.thenation.com/article/state-where-giving-birth-can-be-criminal>, (investigative report documenting that Tennessee’s “fetal assault” law in effect from 2014-2016 caused pregnant women to avoid health care and flee the state to give birth).

⁷ See e.g., Mishka Terplan et al., *Pregnant and Non-Pregnant Women with Substance Use Disorders: The Gap Between Treatment Need and Receipt* 31 *J. Addictive Diseases* 342-409 (2013); Polly Taylor et al., *Prenatal*

Unfortunately, many people with alcohol or drug use disorders find it difficult to obtain the help they need and want. There are significant structural and social barriers to obtaining care including stigma and fear of prosecution, forcible detention, and removal of their children.⁸ Concern about such consequences discourages women from seeking prenatal and other health care, including treatment for drug dependency.⁹ In addition, those women who do seek treatment often have difficulty accessing it: many treatment providers do not serve pregnant women, and Tennessee, unlike many other states, has not created or funded drug treatment programs that address the specialized needs of pregnant women who use drugs.¹⁰

The prosecution of Ms. Roberts follows in the footsteps of Tennessee's embarrassing enactment of the fetal assault law, which made the state the first to openly criminalize pregnancy. Two years after its enactment and enforcement, it became clear that the law did not deter drug use nor did it reduce rates of opioid withdrawal symptoms in newborns – the law's stated purpose.¹¹ As a result of the law, in fact, women avoided prenatal care and drug treatment and avoided delivering their babies in hospital settings.¹² Based on clear evidence that the law permitting the arrest of pregnant women for drug use had failed to achieve any of the law's stated goals, the legislature allowed it to sunset.

Screening for Substance Use and Violence: Findings from Physician Focus Groups 11 Maternal and Child Health Journal 241-47 (2007).

⁸ See Rebecca Stone, *Pregnant women and substance use: fear, stigma, and barriers to care*, 3 Health & Justice 1-15 (2015); Sarah C. M. Roberts & Amani Nuru-Jeter, *Universal screening for alcohol and drug use and racial disparities in Child Protective Services reporting*, 39 J. Behavioral Health Services Research 1199-1216 (2012); Sarah C. M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 Maternal & Child Health J. 333-41 (2011); Ashley H. Schempf & Donna M. Strobino, *Drug use and limited prenatal care: an examination of responsible barriers*, 200 Am. J. Obstetrics & Gynecology 412.e1-412.e10 (2009); Embry M. Howell & Nancy Heiser, *A Review of Recent Findings on Substance Abuse Treatment for Pregnant Women*, 16 J. Substance Abuse Treatment 195-219 (1999); Norma Finkelstein, *Treatment Issues for Alcohol- and Drug-Dependent Pregnant and Parenting Women*, 19 Health & Social Work 7-15 (1994).

⁹ *Id.*

¹⁰ Sister Reach, Ibis Reproductive Health & National Advocates for Pregnant Women, *Tennessee's Fetal Assault Law: Understanding its impact on marginalized women*, available at <https://bit.ly/2J31JB6>. See also, *Substance Use During Pregnancy*, Guttmacher Institute, <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy> (last visited July 31, 2019) (establishing that health care providers have certain requirements to encourage and facilitate pregnant women to receive counseling only, and are pregnant women are given priority in general treatment centers, none that are specifically focused on pregnancy).

¹¹ Tony Gonzalez, *Tennessee Fetal Assault Bill Fails, Allowing It To Be Struck From State Law*, NASHVILLE PUB. RADIO (Mar. 22, 2016), <http://nashvillepublicradio.org/post/tennessee-fetal-assault-bill-fails-allowing-it-be-struck-state-law#stream/0>.

¹² Rosa Goldensohn & Rachel Levy, *The State Where Giving Birth Can Be Criminal*, THE NATION (Dec. 10, 2014), <https://www.thenation.com/article/state-where-giving-birth-can-be-criminal/>.

We ask you not to repeat the same shameful history of prosecuting women related to pregnancy and its outcomes. We call on you, in the interests of maternal, fetal, and child health, to drop the charges against Ms. Roberts and the dangerous and counterproductive prosecution of pregnant women that the laws of Tennessee clearly do not allow.

Signed,



Aarin Michele Williams, Esq.
National Advocates for Pregnant Women, and

CHOICES. Memphis Center for Reproductive Health
Healthy and Free Tennessee
March of Dimes, Tennessee
Just City - Memphis
Knoxville Center for Reproductive Health
Tennessee Advocates for Planned Parenthood
New Voices for Reproductive Justice
Music City Doulas
Sister Reach
Reproductive Rights Coalition
ReVIDA Recovery
All Families Healthcare
Feminist Women's Health Center
Interfaith Voices for Reproductive Justice
PorchSwing Ministries, Inc.
Abortion Care Network
Maine Family Planning
National Alliance for Medication Assisted Recovery
Oasis Lily Ministries International
The Love and Justice Project
Tranquil Therapy
Young Women United

Abigail Leavitt LaBella Ph.D., Postdoctoral Scholar, Vanderbilt University, Nashville TN
Aftyn Behn, LMSW
Aimee Lewis, VP of External Affairs, Planned Parenthood of Tennessee and North Mississippi
Alexandra Chambers, M.Div.
Alexis B. Paulson, MSN, APRN, WHNP-BC
Alys Moore, CNM, Baby+Co birth center and Vanderbilt University Medical Center, Nashville, TN*

Amy Mulroy, JD., Memphis, TN
 Anjelica Ash, Memphis, TN (BLM Memphis)*
 Anna Stanley, LPC, LCAS, CCS
 April Mallory, LCSW Mt. Juliet, TN
 April Pepper PharmD
 Arielle Fears, Doula and Student Midwife, Nashville TN
 Ashley Myrick BSSW Knoxville, TN
 Ashley Stafford LMT
 Briana Perry, Co-Executive Director, Healthy and Free Tennessee, Nashville, TN
 Brittney Jackson Brown, MTS, MED, Memphis, TN
 Brooke Adams, President, Reproductive Rights Coalition, Charlotte, NC
 Caira Moody, LPC-MHSP in training, graduate student, East Tennessee State University, Johnson City TN*
 Cait Vaughan, Community Organizer, Maine Family Planning, Maine
 Cassie Speck, WHNP
 Cathie Bird, MA, PsyP, Pioneer, TN
 Charity Woods, Managing Director, Interfaith Voices for Reproductive Justice
 Charity Woods, Managing Director, Interfaith Voices for Reproductive Justice*
 Cherisse A Scott, CEO & Founder, SisterReach
 Christine Fox Parker, MA, President PorchSwing Ministries, Inc
 Corinne Rovetti APRN-BC
 Dr. Bayla Ostrach, MA, PhD, Research Scientist, UNC Health Sciences at MAHEC; Assistant Professor of Family Medicine and Affiliated Faculty of Medical Anthropology, Boston University School of Medicine*
 Ellen Wright Clayton, MD, JD, Professor of Pediatrics, Professor of Law, Vanderbilt University Medical Center and Vanderbilt University*
 Graci D'Amore, Administrative Assistant, Jane's Due Process, Austin, TX
 Gregory Stafford, RN, BSN, Harm Reduction Coordinator, Critical Care OB Nurse Certified, Knoxville TN*
 Jane Marcellus, Ph.D. Murfreesboro, TN
 Jeralyn B. Major, D. Min.
 Jill Alliman, DNP, CNM, APRN
 Josh Spickler, Executive Director, Just City, Memphis, TN
 Kaitlin Shetler, MSW, Nashville, TN
 Kearney Coghlan, JD candidate, Harvard Law School, Cambridge, MA*
 Kim S. Lovell, MPH, MBA, Nashville, TN
 Lauren Buford, MPH
 Lesly-Marie Buer, PhD, MPH; Research Director; Knoxville, TN*
 Lindsey Baksh, DNP, WHNP-BC Nashville, TN
 Lindsey Seldin, PhD
 Louise Vincent MPH, Urban Survivors Union and NC Survivors Union
 Paige Rappleye, Office Manager, All Families Healthcare
 Pamela Graham of SisterReach*

Pamela Merritt, Reproaction Co-Director
Racquel B. Martin, Esq., Attorney, Nashville, TN
Renee Schwartz, RN, BSN McDonald, TN
Rev. Vincent J. Lachina, American Baptist Church*
Sahba Mahmoodi Meymand Murfreesboro Tennessee
Sarah Smith, BSN, RN Knoxville, TN
Shannon Hardaway, LPC-MHSP
Shawn Fischer, MPA
Shelby Scott BSW
Sherry Shurden Brewer, J.D., M.Div.
Simone Godwin, MS, MPH, First Aid Collective Knoxville, Science for the People East TN, Knoxville, TN
Tory Mills, Director of Community Engagement, Planned Parenthood of Tennessee & North Mississippi - Knoxville, TN
Victoria Stinson, Special Program Coordinator, Maryland Family Planning Program, Baltimore, MD*
Wendy A. Bach, Professor of Law, University of Tennessee College of Law*
Zachary C Talbott, CADCI, CCS

Alexandria Campbell
Allison Wolf
Amanda Bureau, Memphis, TN
Amanda T., Boston, MA
Amy Morris
Angel Anderson, Memphis TN
Ann Strange, Knoxville, TN
Anna Carella, Nashville, TN
Anna Morris
Ash Baker
Ashlyn Smith, CNA, Eagleville, TN
Barbara Snell
Brittany Miles
Cal Lane
Carol A. Lévy
Carol D Elkins
Carolina Rocha (Nashville, TN)
Caroline Cain, RN
Caroline Rowcliffe, Knoxville, TN
Cassandra Mihalko Murfreesboro, TN
Cassie Speck, WHNP
Chuck Savoy
Damona Balkin
Diana Page, Nashville

Donna (PhD) and Vance (PhD) Sherwood
Doug Ketchum, Cordova
Eli Stanfield, Knoxville, TN
Elizabeth, EM
Felicia Brown-Williams
Francie Hunt
Gala Gonsalves, Nashville, TN
Galloway Allbright
Genoa Clark, Knoxville, TN
Halden Ingwersen, Knoxville, TN
Heather Ault, Heather Ault Design, Buffalo
Heather Lindsay, Martin, TN
J Caine
Jacob Hogan, Lenoir City, TN
James W. Betbeze, Jr.
Jane e Morris, Gatlinburg, TN
Jane Meyers
Jennifer Kobran
Jenny Cate
Jess Tilley
Judith Clerjeune , Nashville TN
Julie Edwards
Julie Schwam Harris
K. Swindall, Johnson City, TN
Katha Pollitt, New York
Kimberly Bradshaw, Memphis, TN
Leslie Jacobs, Memphis, TN
Lisa Smith, Indianapolis, IN
Maci Makayla
Mackenzie del Carmen
Maria Hassol
Mark Walleman, Pulaski
Max Carwile, Knoxville, TN
Melanie Bresnan, Nashville, TN
Melenka Reed
Meredith Robinson, Nashville, TN
Michelle Colón
Michelle Monroe, Collierville, TN
Mindy Arnett
Molly Rochelson
Mrs. Laura Dunn
Ms. Skiela Johns, Philadelphia, TN
Pamela DeMatteo-Linn, Nashville

Pat Christopher MS, Germantown TN
Patricia Dishman
Rachel A. Rogers
Rachel Jones, New York
Rachel Moss
Rebecca Terrell, Memphis, TN
Rev. Dr. David W. Butler, retired, Hermitage, TN
Sara Treece, Knoxville, TN
Shannon MB Dixon
Shawnee Crumley, Chattanooga, TN
Sierra Norman, Nashville TN
SPC Cooper, Soriya LPN, ACLS
Susan Moskop
Tereva Parham
Tian Anderson Crossville, TN
Tonya Williams-Love, Cordova
Vernita Gutierrez, San Diego, CA
Victoria Turner Chattanooga, TN
Yomayra Coria

**Institution listed for identification purposes only.*



September 14, 2018

Craig Ladd, Carter County District Attorney
Carter County Courthouse
20 B Street S.W.
Room 201
Ardmore, OK 73401

District Attorney Ladd:

As signatories to this letter, including Oklahoma and national physicians, health care professionals, public health advocates, legal advocates, and experts in reproductive health and gender equality, we are writing to ask you to stop the counterproductive and unauthorized arrests of pregnant women in your district – Carter, Marshall, Love, Murray and Johnston Counties.

In December 2017, your office announced a policy of prosecuting women who are pregnant and alleged to have used controlled substances.¹ At that time you had already prosecuted approximately 10 women. Based upon your senseless targeting we are confident there are more to come. Most disturbing, your policy and all of these arrests are *unauthorized under Oklahoma law*² as conceded in your statement.³ This is clear prosecutorial activism and is unwarranted and prohibited by law. If, as your statement suggests, your goal is to protect children, other approaches have been shown to be far more effective than arrests, prosecutions, and incarceration, all of which deter women from seeking health care of any kind. This policy contradicts the recommendations of every leading medical group, is based on medically inaccurate and unsupported assumptions, and will not accomplish any of the stated goals. Instead, the policy harms babies and mothers.

Our commitment to the rights and health of pregnant women requires us to speak out against this dangerous and counterproductive prosecution.

Every leading medical organization that has addressed the issue of drug use and pregnancy, including the American Medical Association, the American College of Obstetricians and

¹ Matt Payne, *District Attorney, county entities target pregnant drug-abusers*, The Daily Ardmoreite, (Dec. 4 2017) <http://www.ardmoreite.com/news/20171204/district-attorney-county-entities-actively-target-pregnant-drug-abusers>

² See 21 O.S. § 843.5.

³ See note 1. District Attorney Ladd stated: “Even though the law, as it pertains to ‘child neglect,’ does not recognize a fetus as a child, we have taken the position that when newborn babies test positive for drugs, then proof of those positive tests establishes that the mother essentially neglected her newborn by her prior use of drugs while the baby was in utero.”

Gynecologists, The American College of Nurse-Midwives, the American Academy of Pediatrics, and the March of Dimes, has concluded that this issue is best addressed through education and evidence-based treatment when necessary for substance use disorder, not through the criminal legal system.⁴ Drug dependency is a medical condition, not a crime. Pregnant women do not experience drug dependencies because they want to harm their fetuses or because they do not care about their children; drug dependency is a medical condition that deserves treatment alone.

The arrests in your county assume that pregnant women can set aside their medical conditions at will, and that they should be held criminally liable if they “fail to properly accommodate the children they carry.” Medical knowledge about dependency and treatment demonstrates that patients do not and cannot simply stop drug use as a result of threats of arrest or other negative consequences. Far from safeguarding the health and well-being of women and their children, coercive and punitive policies are more likely to discourage pregnant women from seeking health care and successful drug treatment (when needed), adversely affect maternal and infant mortality rates, and undermine the trust that is essential for the physician-patient relationship.⁵

Research has shown that pregnancy outcomes have far more to do with the economic and social conditions a woman has experienced in the course of her life, rather than with anything she does or does not do while pregnant.⁶ These economic and social conditions can also be heavily influenced by the criminal system. Women who find themselves subject to punitive treatment are disproportionately women of color and poor white women. Moreover, the vast majority are mothers.⁷ Thus, because you have a targeted approach of prosecuting pregnant women *you are separating families*. This is especially damaging in a state that notoriously incarcerates more women per capita than any other state in the United States⁸, and has held this shameful position for twenty-five years. Your efforts focused on prosecuting pregnant women will only increase

⁴ See Medical and Public Health Statements, attached.

⁵ See *The AMA Code of Medical Ethics' Opinions on Confidentiality of Patient Information*, 14 American Medical Association Journal of Ethics 715 (2012) (“The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services.”)

⁶ See World Health Organization, *Social Determinants of Health*, 2017, http://www.who.int/social_determinants/sdh_definition/en/ (“social determinants of health are the conditions in which people are born, grow, live, work and age.”); Kim Krisberg, American Public Health Association, *Transforming Public Health Works: Targeting Causes of Health Disparities*, 46 The Nation’s Health, July 2016 (“at least 50% of health outcomes are due to the social determinants . . .”).

⁷ Elizabeth Swavola, Kristeine Riley and Ram Subramanian, *Overlooked: Women and Jails in the Era of Reform* Vera Institute of Justice, 12, (2016) available at: https://storage.googleapis.com/vera-web-assets/downloads/Publications/overlooked-women-and-jails-report/legacy_downloads/overlooked-women-and-jails-report-updated.pdf. Finding: “79 percent [of women in jail] have young children and approximately five percent are pregnant when they are incarcerated. Most often, they are single mothers. Given that many come from communities blighted by high rates of poverty, crime, and low educational attainment, even a short stay in jail may do more than temporarily break up their families. Without the financial means to support their families for the length of their detention and upon their release, these women are very likely to be separated from their children, especially those who are in foster care, for longer than necessary.”

⁸ See E. Ann Carson, PhD, *Prisoners in 2016*, U.S. Dep’t of Justice Bureau of Justice Statistics, p. 9 available at: <https://www.bjs.gov/content/pub/pdf/p16.pdf> (published January 2018; revised August 7, 2018). The national average of female inmates is 64 per 1,000 women, while Oklahoma’s rate is 159 women per 1,000 women, amounting to more than twice the national average.

the number of Oklahoma women who find themselves as part of a carceral system instead of a supportive and rehabilitative one.

For many pregnant women, there are significant structural and social barriers to obtaining health care, including stigma and fear of prosecution, forcible detention, and removal of their children.⁹ Concern about such consequences discourages women from seeking prenatal and other health care, including treatment for drug dependency.¹⁰ In addition, many drug treatment providers do not serve pregnant women, and Oklahoma has not created or funded drug treatment programs that address the specialized needs of pregnant women who use drugs.¹¹

Stigma and fear dissuaded women from obtaining treatment in Tennessee as a result of a 2014 fetal assault law that authorized the arrest of pregnant women who used narcotic drugs. After two years of enforcement, it became clear that the law did not deter drug use or make babies healthier.¹² As a result of the law, women avoided prenatal care and drug treatment and avoided delivering their babies in hospital settings.¹³ Based on this evidence, the legislature allowed the law to sunset just two years after its enactment. Your policy of prosecuting pregnant women mirrors that of Tennessee and will likewise discourage women from seeking drug treatment (when needed) and other health care, jeopardizing maternal and infant health while violating women's constitutional rights.

We therefore call on you, in the interests of maternal, fetal, and child health, to drop the dangerous and counter-productive prosecution of pregnant women that the laws of Oklahoma clearly do not support.

⁹ See Rebecca Stone, *Pregnant women and substance use: fear, stigma, and barriers to care*, 3 Health & Justice 1-15 (2015); Sarah C. M. Roberts & Amani Nuru-Jeter, *Universal screening for alcohol and drug use and racial disparities in Child Protective Services reporting*, 39 J. Behavioral Health Services Research 1199-1216 (2012); Sarah C. M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 Maternal & Child Health J. 333-41 (2011); Ashley H. Schempf & Donna M. Strobino, *Drug use and limited prenatal care: an examination of responsible barriers*, 200 Am. J. Obstetrics & Gynecology 412.e1-412.e10 (2009); Embry M. Howell & Nancy Heiser, *A Review of Recent Findings on Substance Abuse Treatment for Pregnant Women*, 16 J. Substance Abuse Treatment 195-219 (1999); Norma Finkelstein, *Treatment Issues for Alcohol- and Drug-Dependent Pregnant and Parenting Women*, 19 Health & Social Work 7-15 (1994).

¹⁰ *Id.*

¹¹ *Substance Use During Pregnancy*, Guttmacher Institute, <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy> (last visited June 1, 2018).

¹² Tony Gonzalez, *Tennessee Fetal Assault Bill Fails, Allowing It To Be Struck From State Law*, NASHVILLE PUB. RADIO (Mar. 22, 2016), <http://nashvillepublicradio.org/post/tennessee-fetal-assault-bill-fails-allowing-it-be-struck-state-law#stream/0>.

¹³ Rosa Goldensohn & Rachel Levy, *The State Where Giving Birth Can Be Criminal*, THE NATION (Dec. 10, 2014), <https://www.thenation.com/article/state-where-giving-birth-can-be-criminal/>.

Signed,



National Advocates for Pregnant Women, and:

ACLU of Oklahoma
Oklahoma Call for Reproductive Justice
Oklahoma Nurses Association
Oklahoma Society of Addiction Medicine
Oklahoma Women's Coalition
Oklahoma NORML
Oklahoma Mothers' Milk Bank
Still She Rises - Tulsa, LLC
American Medical Women's Association (AMWA)
American Medical Women's Association, Opioid Addiction in Women Task Force
American Medical Women's Association
Facing Addiction with NCADD
Legal Action Center
Harm Reduction International
National Association of Nurse Practitioners in Women's Health (NPWH)
National Institute for Reproductive Health (NIRH)
National Alliance for Medication Assisted Recovery (NAMA Recovery)
Center for Reproductive Rights
National Association of Perinatal Social Workers
American Society of Addiction Medicine
Our Bodies Ourselves
Project RESPECT, Substance Use Disorder in Pregnancy Treatment Clinic at Boston
Medical Center
SisterReach



Liz Waggoner, Executive Director
Oklahoma Women's Coalition

Norma Sapp, State Director
Oklahoma NORML

Rebecca Mannel, MPH, IBCLC, Executive Director
Oklahoma Mothers' Milk Bank, Oklahoma City

Theresa Rohr-Kirchgraber, MD, FACP

875 6th Avenue, Suite 1807, New York, New York 10001
phone: 212-255-9252 | fax 212-255-9253

 NationalAdvocatesforPregnantWomen |  @NAPW
www.advocatesforpregnantwomen.org

FAMWA President AMWA 2015-2016

Connie B. Newman, MD, FACP, President
American Medical Women's Association

Eliza Chin, MD, MPH

Kelley Saia, MD, DABAM, Director
Project RESPECT at Boston Medical Center

Cherisse Scott, CEO & Founder
SisterReach

Kathleen W. Wallace, JD

Sandy Ingraham, JD, MSW
McLoud OK

Stephen R. Kandall, MD
Raleigh, NC

C. N. Johnson

Cheryl Cheah, Medical Student

Neeraja Chandrasekaran, MD MPH

Bruce G Trigg, MD
Public Health and Addiction Medicine Consultant, New York, NY

Katherine Fleming*, Undergraduate at Princeton University
Princeton, NJ



Norma Jo Waxman, M.D.*, Associate Professor
University of California San Francisco

Omega Silva*
George Washington University, Washington, DC

**Individuals listed above have signed this letter in their personal capacities, institutional affiliations are noted for identification purposes only*

Cc: Attorney General Mike Hunter

875 6th Avenue, Suite 1807, New York, New York 10001
phone: 212-255-9252 | fax 212-255-9253

 NationalAdvocatesforPregnantWomen |  @NAPW
www.advocatesforpregnantwomen.org

PREGNANT AND....USED DRUGS, HAD AN ABORTION,
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BEI BEI SHUAI



KENLISSIA JONES

STOP PROSECUTORS FROM CRIMINALIZING PREGNANT PEOPLE

We're holding prosecutors accountable to never prosecute childbearers for **pregnancy loss, miscarriage, abortion, drug use, or any other part of pregnancy.**

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National Advocates
for Pregnant Women

N A P W



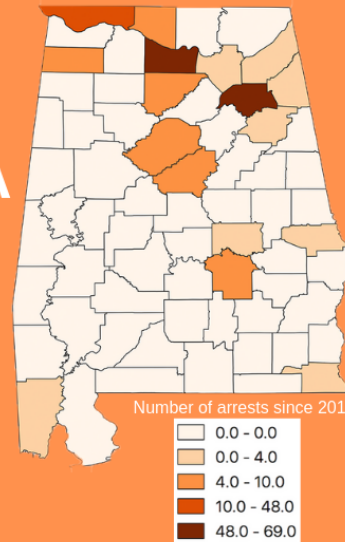
Chemical Endangerment Arrests in Alabama

Created by
National Advocates for Pregnant Women

THERE HAVE BEEN MORE THAN 800 ARRESTS SINCE NAPW BEGAN TRACKING DATA IN 2006

This is likely a gross underestimation of the number of arrests due to limitations in data collection

Number of Chemical Endangerment Arrests by County

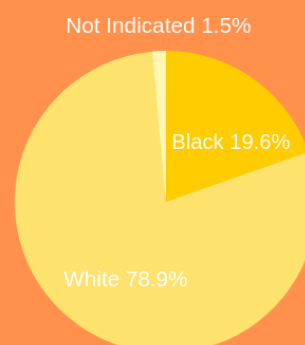


Access to Substance Use Treatment in Alabama is Limited for Pregnant Women



In Etowah County, **69 pregnant women** have been arrested, but there is **only 1 substance use treatment facility** that accepts pregnant and postpartum women

Racial Breakdown of Arrests



Maternal Mortality & Prosecutions Under the Chemical Endangerment of a Child Law

The U.S. Maternal Mortality Crisis:

- “The United States has the highest maternal mortality rate of any high resource country—and it is the only country outside of Afghanistan and Sudan where the rate is rising.”ⁱ
- Dr. Sara Mazzoni, an Associate Professor of obstetrics and gynecology at the University of Alabama Birmingham says that “Maternal and child health is one of the best indicators of the health of a society. It should be the utmost priority.”ⁱⁱ
- According to the CDC, causes of pregnancy related deaths in the United States from 2011-2016 were shown as having the following percentages: Other cardiovascular conditions, 15.7%, Other non-cardiovascular medical conditions, 13.9%, Infection or sepsis, 12.5%, Cardiomyopathy, 11.0%, Hemorrhage, 11.0%, Thrombotic pulmonary or other embolism, 9.0%, Cerebrovascular accidents, 7.7%, Hypertensive disorders of pregnancy, 6.9%, Amniotic fluid embolism, 5.6%, and Anesthesia complications, 0.3%. Additionally, 6.4% of all 2011–2016 pregnancy-related deaths do not have a known cause.ⁱⁱⁱ

Alabama Maternal Mortality Statistics:

- In 2006, the Chemical Endangerment of a Child Law (the Law) went into effect in Alabama. Over the years, local prosecutors began to use the law to prosecute pregnant and drug using women in spite of contrary Legislative intent. When comparing the number of maternal deaths from 2006, the year the law was enacted, to the most recent year data available, it is notable that there were 31 more reported deaths in 2017.^{iv}
- Alabama is home to women who belong to groups that experience high rates of maternal mortality and should invest resources in protecting these residents. According to 2018 population estimates from the Alabama Department of Public Health there are about 390,306 women in Alabama ages 10-44 who identify as people of color; approximately 8% of Alabama’s total population.^v In 2017, there were 20,208 live births among women who identified as people of color^{vi}, about 34% of live births in the state that year.
- Like the rest of the country, the incarceration rate of women in Alabama has skyrocketed.^{vii} Like the rest of the country, the war on drugs has fueled this increase.
- Specifically, in 2006 it increased to a rate of about 80 per 100,000 and in 2015 was at 97.^{viii} This suggests that the state of Alabama has progressively focused on prosecuting pregnant women, while ignoring threats to their overall health and safety, which would serve maternal and fetal health.
- According to the Center for Disease Control data, there are significant racial/ethnic disparities in maternal mortality. From 2011-2016, among Black non-Hispanic women there were 42.4 deaths per 100,000 live births and among American Indian/Alaskan Native

non-Hispanic women there were 30.4 deaths per 100,000 live births. For comparison Asian/Pacific Islander non-Hispanic women experienced 14.1 deaths per 100,000 live births, white non-Hispanic women experienced 13.0 deaths per 100,000 live births and Hispanic women experienced 11.3 deaths per 100,000 live births.

- The CDC has observed that the number of pregnant women in the United States with chronic health conditions is rising. These contribute to women's increased risk of prenatal and postpartum pregnancy complications.^{ix} Pregnant women in Alabama who have chronic conditions may avoid seeking treatment for their conditions for fear of being prosecuted under the Law or other punitive measures, which puts them at greater risk for pregnancy complications that could result in maternal and fetal mortality and morbidity.
- According to data gathered from a September 2018 USA Today investigation using death rates from 2012-2016 for 46 states with available data, Alabama ranks in the middle at #29.^x It is neither the best nor the worst state when it comes to maternal mortality demonstrating that there is still work to be done in terms of lowering maternal mortality rates.
- The amount of maternal mortality deaths reflects the cause of death that is listed on mothers' death certificate which has been shown to cause under and overreporting of deaths related to pregnancy and childbirth.^{xi} A woman's death may not be viewed as being caused by pregnancy and childbirth complications because of the official cause that was *chosen* for their death certificate. Often, a listed cause of death is limited and does not capture the full combination of factors that contributed to a specific death.

Recommendations for Addressing Maternal Mortality in Alabama:

- Since the Law was passed in 2006, Alabama's maternal mortality rate has risen. Alabama's state government must make maternal mortality a priority or it risks letting people with the capacity for pregnancy die while it focuses on prosecuting them instead of addressing a public health concern. Prosecuting people in relationship to their pregnancy or health outcomes is counterproductive and harmful.
- The Alabama Department of Public Health reports that 15.8% of the state's population is uninsured.^{xii} Working towards insuring the whole population of Alabama will help make sure that all pregnant women with chronic conditions receive the care and treatment they need helping lower their risks of complications during pregnancy. It is more worthwhile for the state of Alabama to focus on this work rather than prosecuting pregnant people.
- The State of Alabama does not know exactly how many maternal deaths occur in the state each year as a result of pregnancy and childbirth.^{xiii} This crisis merits further research to give Alabama an accurate understanding of how many women die from pregnancy and child birth complications and what specific factors are contributing to these deaths. An improved understanding will allow the state to identify which women are most at-risk and design better interventions to protect them.

ⁱ “Alliance for Innovation on Maternal Health AIM” *Council on Patient Safety in Women’s Health Care*, 2019, <https://safehealthcareforeverywoman.org/aim-states-systems-2/>. Accessed 16 October 2019.

ⁱⁱ Vollers, Anna Claire. “These volunteers teamed up to investigate deaths of moms in Alabama.” *AL.com*, 11 Jun. 2019, <https://www.al.com/news/2019/06/these-volunteers-teamed-up-to-investigate-deaths-of-moms-in-alabama.html>.

ⁱⁱⁱ Center for Disease Control, *Pregnancy Mortality Surveillance System*, <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm>. last visited October 22, 2019,

^{iv} “Underlying Cause of Death 1999-2017 on CDC WONDER Online Database.” *Centers for Disease Control and Prevention, National Center for Health Statistics*, Dec. 2018. In 2006, 10 women in Alabama died from complications of pregnancy and childbirth. In 2017, eleven years later, 41 women died.^{iv}

^v “Table 83: Estimated Population By Age Group, Race and Sex Alabama 2018.” *Alabama Department of Public Health*, 2018. <http://www.alabamapublichealth.gov/healthstats/assets/83t2018.pdf>. Accessed 21 October 2019.

^{vi} “2017 Alabama Estimated Population by Age, Race & Sex.” *Alabama Department of Public Health Center for Health Statistics, Statistical Analysis Division*, 2017. <http://www.alabamapublichealth.gov/healthstats/assets/ata glance2017.pdf>. Accessed 21 October 2019.

^{vii} Wendy Sawyer, Prison Policy Initiative, *The Gender Divide: Tracking Women's State Prison Growth*, https://www.prisonpolicy.org/reports/women_overtime.html. 9 Jan. 2018.

^{viii} Wendy Sawyer, Prison Policy Initiative, *Alabama prison incarceration rates: Women*. https://www.prisonpolicy.org/graphs/AL_Women_Rates_1978_2015.html. Jan. 2018.

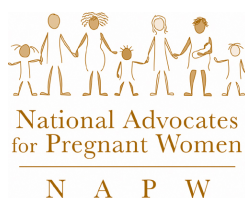
^{ix} Center for Disease Control, *Pregnancy Mortality Surveillance System*, *supra*.

^x Laura Unger and Caroline Simons, USA Today, “Which states have the worst mortality rates”, Accessed at <https://www.usatoday.com/list/news/investigations/maternal-mortality-by-state/7b6a2a48-0b79-40c2-a44d-8111879a8336/?block=alabama>. 1 Nov. 2018.

^{xi} Vollers. “These volunteers teamed up to investigate deaths of moms in Alabama.” 11 Jun. 2019.

^{xii} Alabama Public Health, Access To Care, Accessed at <https://www.alabamapublichealth.gov/healthrankings/access-to-care.html>. 23 Aug. 2018.

^{xiii} Vollers. “These volunteers teamed up to investigate deaths of moms in Alabama.” 11 Jun. 2019. One of the best ways to study maternal mortality in a specific state is for that state’s legislature to establish a comprehensive and inclusive Maternal Mortality Review Committee (MMRC). In Alabama no state legislator has ever introduced such a bill. In December 2018, the Alabama Department of Public Health established an MMRC made up of volunteers. The committee has begun reviewing medical records and other information pertaining to maternal deaths with complications of pregnancy or childbirth listed as a contributing cause of death. This review will lead to a better understanding of the exact factors that lead to maternal death in Alabama.



Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women

Revised June 2018

American Medical Association

“Transplacental drug transfer should not be subject to criminal sanctions or civil liability . . . In particular, support is crucial for establishing and making broadly available specialized treatment programs for drug-addicted pregnant and breastfeeding women wherever possible. . .” American Medical Association, Policy Statement - H-420.962, *Perinatal Addiction - Issues in Care and Prevention* (last modified 2017).

“Pregnant women will be likely to avoid seeking prenatal or open medical care for fear that their physician's knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.” Report of American Medical Association Board of Trustees, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, JAMA Vol. 264, No. 20 p.2667 (1990).

“Judicial intervention is inappropriate when a woman has made an informed refusal of a medical treatment designed to benefit her fetus. If an exceptional circumstance could be found in which a medical treatment poses an insignificant or no health risk to the woman, entails a minimal invasion of her bodily integrity, and would clearly prevent substantial and irreversible harm to her fetus, it might be appropriate for a physician to seek judicial intervention. However, the fundamental principle against compelled medical procedures should control in all cases which do not present such exceptional circumstances. The physician's duty is to provide appropriate information, such that the pregnant woman may make an informed and thoughtful decision, not to dictate the woman's decision.” American Medical Association, Policy Statement - H-420.969, *Legal Interventions During Pregnancy* (2016).

“Our AMA supports language recently adopted by the New Mexico legislature that ‘an adult or juvenile correctional facility, detention center or local jail shall use the least restrictive restraints necessary when the facility has actual or constructive knowledge that an inmate is in the 2nd or 3rd trimester of pregnancy. No restraints of any kind shall be used on an inmate who is in labor, delivering her baby or recuperating from the delivery unless there are compelling grounds to believe that the inmate presents: an immediate and serious threat of harm to herself, staff or others; or a substantial flight risk and cannot be reasonably contained by other means.’” American Medical Association, Policy Statement - H-420.957, *Shackling of Pregnant Women In Labor* (2010).



American College of Obstetricians and Gynecologists

“Pregnancy is not an exception to the principle that a decisionally capable patient has the right to refuse treatment, even treatment needed to maintain life. Therefore, a decisionally capable pregnant woman’s decision to refuse recommended medical or surgical intervention should be respected... The College opposes the use of coerced medical interventions for pregnant women, including the use of the courts to mandate medical intervention for unwilling patients.” American College of Obstetricians and Gynecologists Committee on Ethics, Committee Opinion 664, *Refusal of Medically Recommended Treatment During Pregnancy* (2016).



“Drug enforcement policies that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus. Incarceration and the threat of incarceration have proven to be ineffective in reducing the incidence of alcohol or drug abuse ... The use of the legal system to address perinatal alcohol and substance abuse is inappropriate.” American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women, Committee Opinion 473, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (2011, reaffirmed 2014).

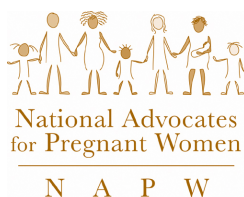
“The American College of Obstetricians and Gynecologists (ACOG) opposes the prosecution of a pregnant woman for conduct alleged to have harmed her fetus, including the criminalization of self-induced abortion... Obstetrician-gynecologists should protect patient autonomy, confidentiality, and the integrity of the parent-physician relationship with regard to self-induced abortion attempts and should advocate against mandated reporting.” American College of Obstetricians and Gynecologists, Position Statement: “Decriminalization of Self-Induced Abortion” (2017).

“Seeking 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. These approaches treat addiction as a moral failing. Addiction is a chronic, relapsing biological and behavioral disorder with genetic components. The disease of substance addiction is subject to medical and behavioral management in the same fashion as hypertension and diabetes.” American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women, Committee Opinion 473, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (2011, reaffirmed 2014).

“...[I]t is important to advocate for this often-marginalized group of patients (patients with substance use disorders) particularly in terms of working to improve availability of treatment and to ensure that pregnant women with opioid use disorder who seek prenatal care are not criminalized. Finally, obstetric care providers have an ethical responsibility to their pregnant and parenting patients with substance use disorder to discourage the separation of parents from their children solely based on substance use disorder, either suspected or confirmed. In states that mandate reporting, policy makers, legislators, and physicians should work together to retract punitive legislation and identify and implement evidence-based strategies outside the legal system to address the needs of women with addictions.” American College of Obstetricians and Gynecologists Committee on Obstetric Practice, Committee Opinion 524, *Opioid Use and Opioid Use Disorder in Pregnancy* (2017).

875 6th Avenue, Suite 1807, New York, New York 10001
phone: 212-255-9252 | fax 212-255-9253

 NationalAdvocatesforPregnantWomen |  @NAPW
www.advocatesforpregnantwomen.org



National Perinatal Association

“Treating this personal and public health issue (perinatal substance use) as a criminal issue-or a deficiency in parenting that warrants child welfare intervention-results in pregnant and parenting people avoiding prenatal and obstetric care and putting the health of themselves and their infants at increased risk...The threats of discrimination, incarceration, loss of parental rights, and loss of personal autonomy are powerful deterrents to seeking appropriate prenatal care. Perinatal providers promote better practices when they adopt language, attitudes, and behaviors that reduce stigma and promote honest and open communication about perinatal substance use.” National Perinatal Association, Position Statement, *Perinatal Substance Use* (2017).

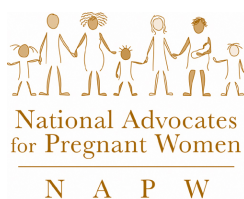
“The National Perinatal Association opposes any legal measures that involve the criminal justice system for drug use during pregnancy. Any statute which criminalizes substance use during pregnancy is inherently discriminatory in addition to being counterproductive to the goal of improving maternal and neonatal outcomes. Criminalization and incarceration are ineffective and harmful to the health of the pregnant person and their infant.” National Perinatal Association, Position Statement, *Perinatal Substance Use* (2017).

“As clinicians, mental health, and community care providers, it is imperative that we understand the nature of perinatal substance use disorders and provide interventions and care that preserve the parent-infant dyad, promote parenting potential, and support the baby’s health and development.” National Perinatal Association, Position Statement, *Perinatal Substance Use* (2017).

“The National Perinatal Association opposes legislation that defines personhood as beginning at or after viability...The NPA encourages its members to oppose any legislation defining fetal personhood at conception and encourages its members to support legislators in favor of leaving this discussion to the medical sphere.” National Perinatal Association, Position Statement, *Supporting The Legal Autonomy of Pregnant Women* (2013).

American Academy of Family Physicians

“[T]he AAFP supports public and individual education about the risks of any substance use and abuse during pregnancy. The AAFP opposes imprisonment or other criminal sanctions of pregnant woman solely for substance abuse during pregnancy, but encourages facilitated access to an established drug and alcohol rehabilitation program for such women.” American Academy of Family Physicians, Policy, *Substance Abuse and Addiction*, section entitled “Pregnant Women, Substance Use and Abuse by” (2003, 2016 COD).



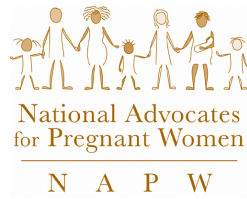
American Society of Addiction Medicine

“Criminal prosecution of chemically dependent women will 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, *Public Policy Statement on Chemically Dependent Women and Pregnancy* (1989).

“In order to prevent harm to mothers and infants, ASAM recommends the following: ...Substance use disorder treatment services able to meet the specific needs of women, including pregnant and parenting women, and their families: Preservation of the physician-patient relationship, so that laws or regulations should not require physicians to violate confidentiality by reporting their pregnant patients with current or past history of substance use to legal authorities and/or child welfare services in the absence of evidence of child abuse or neglect.” American Society of Addiction Medicine, *Public Policy Statement on Women, Alcohol and Other Drugs, and Pregnancy* (2011).

“It is inappropriate to reflexively move from the possibility to an alleged certainty of defective parenting or danger to the child simply because of evidence of substance use . . . Sanctions against parents under child protective services interventions should be made only when there is objective evidence of danger, not simply evidence of substance use.” American Society of Addiction Medicine, *Public Policy Statement on Substance Use, Misuse, and Use Disorders During and Following Pregnancy, with an Emphasis on Opioids* (2017).

“State and local governments should avoid any measures defining alcohol or other drug use during pregnancy as ‘child abuse or maltreatment,’ and should avoid prosecution, jail, or other punitive measures as a substitute for providing effective health care services for these women.” American Society of Addiction Medicine, *Public Policy Statement on Substance Use, Misuse, and Use Disorders During and Following Pregnancy, with an Emphasis on Opioids* (2017).



American Public Health Association

"Recognizing that pregnant drug-dependent women have been the object of criminal prosecution in several states, and that women who might want medical care for themselves and their babies may not feel free to seek treatment because of fear of criminal prosecution related to illicit drug use . . . [the Association] recommends that no punitive measures be taken against pregnant women who are users of illicit drugs when no other illegal acts, including drug-related offenses, have been committed..." American Public Health Association, Policy Statement No. 9020, *Illicit Drug Use by Pregnant Women* (1990).

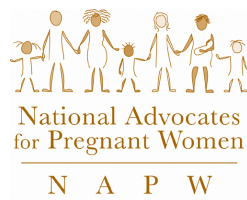
American Nurses Association

"ANA opposes laws that may result in punitive legal actions and result in incarceration of pregnant women because of substance use disorder." American Nurses Association, Position Statement, *Non-punitive Treatment for Pregnant and Breast-feeding Women with Substance Use Disorders* (2017).

"ANA supports the fact that substance use disorders are diseases that require treatment, not incarceration." American Nurses Association, Position Statement, *Non-punitive Treatment for Pregnant and Breast-feeding Women with Substance Use Disorders* (2017).

"Criminalization of pregnant women with substance use disorder often results in more harm than good. The threat of criminal prosecution prevents many pregnant women from seeking prenatal care and treatment for their substance problems (Schempf & Strobino, 2009). Prisons are not prepared to provide for the specialized needs of pregnant women (Cardaci, 2013; Skerker, Dickey, Schonberg, Macdonald, & Venters, 2015)." American Nurses Association, Position Statement, *Non-punitive Treatment for Pregnant and Breast-feeding Women with Substance Use Disorders* (2017).

"Contrary to claims that prosecution and incarceration will deter pregnant women from substance use, the greater result is that fear of detection and punishment poses a significant barrier to treatment (Stone, 2015)." American Nurses Association, Position Statement, *Non-punitive Treatment for Pregnant and Breast-feeding Women with Substance Use Disorders* (2017).



Association of Women's Health, Obstetric and Neonatal Nurses

“The Association of Women's Health, Obstetric and Neonatal Nurses (AWHONN) opposes laws and other reporting requirements that result in incarceration or other punitive legal actions against women because of a substance abuse disorder in pregnancy. . . [t]he threat of incarceration has been shown to be an ineffective strategy for reducing the incidence of substance abuse, while medication and behavioral therapies serve as important elements of an over-all therapeutic process.” Association of Women's Health, Obstetric and Neonatal Nurses, *Criminalization of Pregnant Women with Substance Use Disorders* (2015).

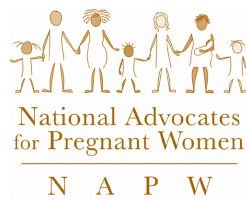
“The Association of Women's Health, Obstetric and Neonatal Nurses (AWHONN) believes that any woman's reproductive health care decisions are best made by the informed woman in consultation with her health care provider. AWHONN believes these personal and private decisions are best made within a health care system whose providers respect the woman's right to make her own decisions according to her personal values and preferences and to do so confidentially.” Association of Women's Health, Obstetric and Neonatal Nurses, *Health Care Decision Making for Reproductive Care* (revised 2016).

American College of Nurse Midwives

“ACNM supports a health care system in which women with substance addictions in pregnancy are treated with compassion, not punishment. Women should not be deterred from seeking care during pregnancy due to fear of prosecution. Optimal care for women with addiction occurs within a multidisciplinary environment in which holistic care is provided that considers the context of her social environment and her unique health risks. In the health policy and legislative arena, efforts should be directed towards comprehensive approaches to promoting addiction recovery.” American College of Nurse Midwives, Position Statement, *Addiction in Pregnancy* (updated 2013).

“It is the position of the American College of Nurse Midwives (ACNM) that: Physiologic vaginal birth is the optimal mode of birth for most women and babies. Cesarean birth is valued as a surgical procedure when there are maternal, fetal, or obstetric indications . . . Women have the right to accurate, balanced and complete information regarding the risks, benefits and potential harms of both vaginal and cesarean birth.” American College of Nurse Midwives, Position Statement, *Elective Primary Cesarean Birth* (updated 2016).

“It is the position of the American College of Nurse-Midwives (ACNM) that: Women who have experienced cesarean births have the right to safe and accessible options for subsequent births. Women should receive evidence-based information to guide their decision making when they consider labor after cesarean versus elective repeat cesarean.” American College of Nurse Midwives, Position Statement, *Vaginal Birth After Cesarean Delivery* (Revised and reapproved 2017).



American Academy of Pediatrics

“The American Academy of Pediatrics (AAP) first published recommendations on substance-exposed infants in 1990 and reaffirmed its position in 1995 that ‘punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health’ and argued that ‘the public must be assured of nonpunitive access to comprehensive care that meets the needs of the substance-abusing pregnant woman and her infant.’ . . . The AAP reaffirms its position that punitive measures taken toward pregnant women are not in the best interest of the health of the mother-infant dyad.” American Academy of Pediatrics, Committee on Substance Use and Prevention, Policy Statement, *A Public Health Response to Opioid Use in Pregnancy* (2017).

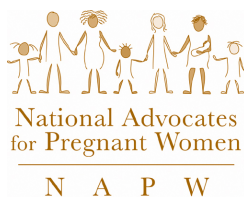
“The existing literature supports the position that punitive approaches to substance use in pregnancy are ineffective and may have detrimental effects on both maternal and child health . . . [T]he AAP supports an approach toward substance use in pregnancy that focuses on a public health approach of primary prevention, improving access to treatment, and promoting the provider-patient relationship rather than punitive measures through the criminal justice system.” American Academy of Pediatrics, Committee on Substance Use and Prevention, Policy Statement, *A Public Health Response to Opioid Use in Pregnancy* (2017).

March of Dimes

“The March of Dimes opposes policies and programs that impose punitive measures on pregnant women who use or abuse drugs. . . The March of Dimes believes that targeting women who used or abused drugs during pregnancy for criminal prosecution or forced treatment is inappropriate and will drive women away from treatment vital both for them and the child.” March of Dimes, Fact Sheet, *Policies and Programs to Address Drug-Exposed Newborns* (2014).

American Psychological Association

“...[T]he American Psychological Association [a]ffirms its view that alcohol and drug abuse by pregnant women is a public health problem and that laws, regulations and policies that treat chemical dependency primarily as a criminal justice matter requiring punitive sanctions are inappropriate...[T]he APA a]ffirms the use of health care strategies to foster the welfare of chemically dependent women and their children by expanding access to prenatal care and to reproductive health care generally. . .” American Psychological Association, Policy, *Resolution on Substance Abuse by Pregnant Women* (1991).



National Organization on Fetal Alcohol Syndrome

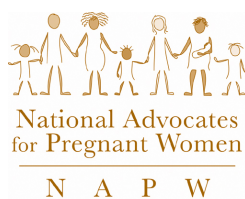
“NOFAS opposes any law or policy that would impose a criminal penalty on pregnant women for drinking alcohol. Alcohol use during pregnancy is a serious problem, yet criminalization is not a solution. Criminalizing alcohol use during pregnancy interferes with the private patient/doctor relationship and intrudes on the rights of women. Such laws could result in pregnant women choosing not to disclose their alcohol use to medical and allied health providers out of fear of criminal sanction. As a result, women with alcohol dependence or an alcohol use disorder could go unidentified and untreated. Alcoholism is a primary, chronic disease with genetic, psychosocial, and environmental factors and should be treated accordingly.” National Organization on Fetal Alcohol Syndrome, Position Statement, *NOFAS Opposes Criminalizing Alcohol Use by Pregnant Women* (2014).

American Psychiatric Association

“The use of the legal system to address perinatal alcohol, tobacco, and other substance use disorders is inappropriate. APA opposes the criminal prosecution and incarceration of pregnant and/or newly delivered women on child abuse charges based on the use of substances during pregnancy. (Social services and legal actions may be appropriate if positive evidence of substance use or neglect is found following the birth of a child).” American Psychiatric Association, Position Statement, *Assuring the Appropriate Care of Pregnant and Newly-Delivered Women with Substance Use Disorders* (2016).

“Subsequent incarceration in jails or prisons or in locked psychiatric units deprives the mother of her liberty and disrupts the incipient or nascent maternal-infant bond. This vulnerable patient population needs comprehensive care for both immediate and long-term symptoms in order to restore a healthy maternal-infant relationship and improved functioning in the mother.” American Psychiatric Association, Position Statement, *Assuring the Appropriate Care of Pregnant and Newly-Delivered Women with Substance Use Disorders* (2016).

“The American Psychiatric Association opposes all constitutional amendments, legislation, and regulations curtailing family planning and abortion services to any segment of the population; The American Psychiatric Association reaffirms its position that abortion is a medical procedure for which physicians should respect the patient’s right to freedom of choice. . . The American Psychiatric Association affirms that the freedom to act to interrupt pregnancy must be considered a mental health imperative with major social and mental health implications.” American Psychiatric Association, Position Statement, *Abortion and Women’s Reproductive Health Care Rights* (reaffirmed 2014).



National Association of Public Child Welfare Administrators

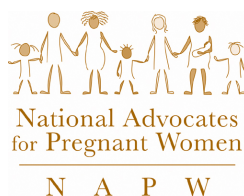
The National Association of Public Child Welfare Administrators has stated that “laws, regulations, or policies that respond to addiction in a primarily punitive nature, requiring human service workers and physicians to function as law enforcement agents are inappropriate.” National Association of Public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

National Council on Alcoholism and Drug Dependence

“[A] punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drug addictions. It thus works against the best interests of infants and children by involving the sanctions of the criminal law in the case of a health and medical problem.” National Council on Alcoholism and Drug Dependence, Policy Statement, *Women, Alcohol, Other Drugs and Pregnancy* (1990).

Association of Maternal and Child Health Programs

“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).



Understanding Opioid Use During Pregnancy

Opioid use and dependency among pregnant women in the United States has increasingly been the subject of new state laws and policies. Unfortunately, this has not led to increased funding for treatment and misinformation has resulted in harmful policy decisions. This fact sheet provides information about opioid use during pregnancy, neonatal abstinence syndrome, and best practices for improving maternal and fetal health.

Best Medical Practices for Treating Opioid-Dependent Pregnant Women

- **Opioid-assisted therapy.** The current standard of care for treating pregnant women with opioid dependence is opioid-assisted therapy with methadone or buprenorphine. Taken in constant daily doses, methadone and buprenorphine work by blocking the euphoric and sedating effects of opioids, preventing withdrawal symptoms, and reducing the craving for opioids. Medication-assisted treatment results in better pregnancy outcomes and shorter hospital stays for newborns. A pregnant woman who is in medication-assisted treatment may still give birth to a baby with symptoms of opiate withdrawal.¹ Health care providers and pregnant woman can prepare for this together and can anticipate and use best practices to help newborns as their symptoms subside.

Understanding Neonatal Abstinence Syndrome (NAS)

- **What is NAS?** Some newborns who are prenatally exposed to opioids, such as heroin, morphine, oxycodone, and medically-recommended medication treatments for opioid dependency (methadone and suboxone), may experience temporary and treatable withdrawal symptoms at birth. These symptoms, which may include trembling, fever, loose stools, and difficulty sleeping, are collectively referred to as neonatal abstinence syndrome (NAS).² NAS is a treatable and temporary condition. It is not life threatening or permanent, and studies show that newborns with NAS do not develop any differently than other children.³
- **What causes NAS?** Newborns whose mothers took opioids during pregnancy — including prescribed painkillers, addiction treatment medications, and illicit opiates — may experience NAS. But prenatal exposure to opioids does not always result in NAS.⁴ Medical science has not yet determined why some babies develop NAS and others do not.
- **How is NAS treated?** Research shows that skin-to-skin contact, breastfeeding, and caring for mother/baby in the same room (“rooming in”) can significantly reduce a newborn’s hospital stay and need for medication.⁵ Some NAS-diagnosed newborns may need medication.

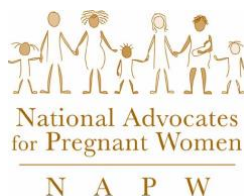
¹ American College of Obstetricians & Gynecologists, Committee on Health Care for Underserved Women, *Opioid Abuse, Dependence, and Addiction in Pregnancy*, Committee Opinion No. 524 (May 2012).

² Substance Abuse & Mental Health Services Administration (SAMHSA), U.S. Department of Health & Human Services, Pub. No. [SMA] 06-4124, *Methadone Treatment for Pregnant Women* (2006).

³ Walter K. Kraft & John N. van den Anker, *Pharmacologic Management of the Opioid Neonatal Abstinence Syndrome*, 59 *Ped. Clinics of N. Am.* 1147 (2012).

⁴ Lauren M. Jansson, et al., *The Opioid Exposed Newborn: Assessment and Pharmacologic Management*, 5 *J. Opioid Manag.* 47 (2009).

⁵ Ronald R. Abrahams et al., *An Evaluation of Rooming-In Among Substance-exposed Newborns in British Columbia*, 32 *J. Obstet. Gynaecol. Can.* 866 (2010); Tolulope Saiki et al., *Neonatal Abstinence Syndrome - Postnatal Ward Versus Neonatal Unit Management*, 169 *Eur. J. Peds.* 95 (2010); Gabrielle K. Welle-Strand et al., *Breastfeeding Reduces the Need for Withdrawal Treatment in Opioid-Exposed Infants*, 102 *Foundation Acta Paediatrica* 1060 (2013).



CLINICAL DRUG TESTING OF PREGNANT WOMEN AND NEWBORNS

March 2019

Pregnant and postpartum women and their newborn babies are typically drug tested in medical settings without their knowledge or explicit, informed consent. Positive toxicology results are too often reported to government officials and used to support criminal and civil child abuse or neglect prosecutions. As the U.S. Department of Justice has explained, “A positive test result, even when confirmed, only indicates that a particular substance is present in the test subject’s tissue. It does not indicate abuse or addiction, recency, frequency, or amount of use; or impairment.”¹

Thus, while such medical test results should never be used to prosecute women or accuse them of bad parenting, it is particularly concerning that the test results may not even be accurate or reliable. Yet clinical drug testing, without specific informed consent, is used as an excuse to intrude into people’s lives with grave consequences, including criminal proceedings and family separation.² It is important to know the facts about clinical drug testing.

Clinical Drug Test Results Are Not Reliable & Are Not Forensic Evidence.

- ❖ A clinical drug test is an initial screening test done in a healthcare setting, and is meant to evaluate a patient’s health and to design an appropriate treatment plan.³
- ❖ The most common clinical test is a urine test.⁴ A clinical drug test is qualitative, meaning it establishes that a chemical compound is present in the bodily fluid.⁵ If a clinical drug test is positive, it creates a *presumption* that a drug is present.⁶ It does not *prove* that the drug is present.
- ❖ To determine whether the positive clinical result is accurate, a forensic test *must* be done to confirm the result.⁷
- ❖ A forensic drug test is a more rigorous drug test, which is why it meets evidentiary and testing requirements and protocols.⁸ It is a quantitative test, meaning it indicates how much of the chemical compound is present.⁹ Such tests, however, are also more expensive which is why healthcare providers often start with a clinical drug test.

Clinical Drug Test Results Often Show False Positives.

- ❖ A positive clinical test does not prove the patient was using a particular substance because many clinical test results are wrong and imprecise.¹⁰ A false positive may occur in two situations: when the chemical compound is not present at all (in other words the result is just wrong),¹¹ or when the chemical compound is present but comes from a lawful source, like medication,^{12, 13} but in any event the test result does not distinguish

between a positive for criminalized opioids, such as heroin, and non-criminalized opioids such as prescribed pain killers and the treatment medications methadone and buprenorphine. The test results are therefore not reliable and should not be treated as concrete proof that one used a particular substance, without at least confirmatory testing.

Drug Tests May Be Conducted Improperly or Produce Inaccurate Results.¹⁴

- ❖ Examples from across the U.S. and abroad demonstrate the risks of contamination in laboratories and the resulting errors in test results and reporting.^{15,16} For example, between 2005 and 2015, the Motherisk Laboratory at the Hospital for Sick Children in Toronto tested more than 24,000 hair samples for drugs and alcohol, from over 16,000 different individuals, for child protection purposes. The results were introduced as evidence in court and resulted in both temporary and permanent loss of custody of children. An independent review in 2015 found this testing was “inadequate and unreliable” for use in child protection and criminal proceedings.”¹⁷ In Houston, Texas, a leaky roof damaged specimens held in a police lab, and a state audit revealed serious contamination and employees lacking key qualifications and training required to conduct and interpret drug and DNA test results. The lab was shut down and several people convicted of crimes were exonerated.¹⁸

“Secret” Drug Testing Undermines the Doctor-Patient Relationship.

- ❖ The use of drug testing without informed consent (especially without the patient’s knowledge), and the practice of reporting the results to government officials, violates physicians’ ethical responsibility¹⁹ and can deter women from obtaining prenatal and other healthcare during pregnancy. For women who are pregnant and actually have a substance use disorder, it can deter them from seeking treatment.
- ❖ That’s why major medical and public health associations, including the American Medical Association, the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, and the American Society of Addiction Medicine oppose prosecution of pregnant women based on drug use.²⁰
- ❖ The U.S. Supreme Court has ruled that it is unconstitutional to use the results of drug testing obtained in the guise of medical care for law enforcement purposes without informed specific consent to a search for evidence of a crime.²¹

Drug Testing Practices Further Discrimination and Racial Profiling.

- ❖ Current drug testing policies and practices disproportionately burden women of color. Despite the fact that drug use by Black and white women occurs at approximately the same rate in the U.S.²², numerous studies and investigative news reports find that Black mothers and infants born to Black mothers are more likely than those born to white mothers to have been screened or tested for criminalized drugs.²³ As leading researchers in one study concluded, “providers seemed to have used race as a factor in deciding whether to screen an infant for maternal illicit drug use.”²⁴

NOTES

¹ U.S. Department of Justice, A National Report from the Bureau of Justice Statistics (Dec. 1992), NCJ-133652 at 119.

² Moeller et al., *Urine Drug Screening: Practical Guide for Clinicians*, 45 Mayo Clinic Proceedings 66, 66 (2008) (“misinterpretation of drug tests can have serious consequences, such as unjust termination from a job, risk of prison sentence, . . . and possibly inappropriate medical treatment in emergencies.”); Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, <https://www.propublica.org/article/when-the-womb-is-a-crime-scene>; Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. Rev. (2016), available at: <https://academicworks.cuny.edu/clr/vol20/iss1/14>.

³ U.S. Dept. of Health and Human Services, *Clinical Drug Testing in Primary Care*, Substance Abuse and Mental Health Services Administration 2012. HHS Publication (SMA) 12-4668 at 5, available at <https://store.samhsa.gov/system/files/sma12-4668.pdf>.

⁴ Moeller et al., note 2 above at 66 (“Immunoassays, which use antibodies to detect the presence of specific drugs or metabolites, are the most common method for the initial screening process.”).

⁵ *Clinical Drug Testing in Primary Care* (note 3 above) at 9.

⁶ *Clinical Drug Testing in Primary Care* (note 3 above) at 9, 29.

⁷ Moeller et al., *Urine Drug Screening: Practical Guide for Clinicians*, note 2 above (“A confirmatory test (e.g. GC-MS) is required before decisions can be made on the basis of UDSs” and “[t]he main disadvantage of immunoassays is obtaining false-positive results when detection of a drug in the same class requires a second test for confirmation.”). Even in the 1970’s, the National Bureau of Standards said clinical drug tests “should not be used as the sole evidence for the identification of a narcotic or drug of abuse.” Ryan Gabrielson & Topher Sanders, *Busted*, PROPUBLICA (July 7, 2016) <https://www.propublica.org/article/common-roadside-drug-test-routinely-produces-false-positives>).

⁸ Susan E. Lang, *Report of the Motherisk Hair Analysis Independent Review* (Dec. 15, 2015) <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lang/>.

⁹ O’Donnell, J. T., & O’Donnell, J. J., III. (2016). *O’Donnell’s Drug Injury* (4th ed.). Retrieved from <https://www.lawyersandjudges.com/>.

¹⁰ Arthur L. Kellermann et al., *Utilization and Yield of Drug Screening in the Emergency Department*, 6 Am. J. of Emergency Med. 14, 19 (1987) (“these investigators have reported false-negative rates for urine screening of 30% and higher.”). See also Hugh J. Hansen et al., *Crisis in Drug Testing: Results of CDC Blind Study*, 253 J. OF THE AM. MED. ASS’N. 2382 (1985).

¹¹ Ryan Gabrielson & Topher Sanders, *Busted*, note 7 above (“Data from the Florida Department of Law Enforcement lab system show that 21 percent of evidence that the police listed as methamphetamine after identifying it was not methamphetamine, and half of those false positives were not any kind of illegal drug at all.”). Even a seemingly small false positive rate can affect many people. “By our estimate...every year at least 100,000 people nationwide [in Canada] plead guilty to drug-possession charges that rely on field-test results as evidence.” *Id.* Even if the false or innocent positive rate is one percent, that is still 1000 people who are affected.

¹² Robert L. DuPont et al., *Drug Testing: A White Paper of the American Society of Addiction Medicine*, 1, 6 (Oct. 26, 2013).

¹³ Brahm, et al., *Commonly Prescribed Medications and Potential False-Positive Urine Drug Screens*, 67 Am. J. Health-Sys Pharm 1344, 1349 (Aug. 15, 2010) (“A number of routinely prescribed medications have been associated with triggering false-positive UDS results.”). Another example is Venlafaxine, an anti-depressant, which can lead to a positive result for PCP. Moeller et al., *Urine Drug Screening: Practical Guide for Clinicians*, note 2 above at 72-73.

¹⁴ For example, “[n]o central agency regulates the manufacture or sale of” the roadside tests that police use to make drug arrests. Roadside tests are designed to be easy to use and will change color to indicate the presence of a chemical compound, but it is hard to determine a color late at night with police lights flashing. Ryan Gabrielson & Topher Sanders, *Busted*, note 7 above.

¹⁵ *Mass. Lab Mishandling May Mean 1,140 Inmates Convicted Using Tainted Evidence, Report Says*, CBS Boston, (Sept. 25, 2012) <https://www.cbsnews.com/news/mass-lab-mishandling-may-mean-1140-inmates-convicted-using-tainted-evidence-report-says/>.

¹⁶ Justin Zaremba, *Lab Tech Allegedly Faked Result in Drug Case; 7,827 Criminal Cases Now in Question*, NewJersey.com (Mar. 2, 2016) http://www.nj.com/passaic-county/index.ssf/2016/03/state_police_lab_tech_allegedly_faked_results_in_p.html.

¹⁷ Susan E. Lang, *Report of the Motherisk Hair Analysis Independent Review* (Dec. 15, 2015), available at <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lang/>; The Honourable Judith C. Beaman, Commissioner, *Harmful Impacts: The Reliance on Hair Testing in Child Protection Report of the Motherisk Commission* (Feb 2018).

¹⁸ Paul C. Giannelli, *Houston! We Have a Problem!*, 21 Crim. J., 40 (2006) (on file with NAPW).

¹⁹ American College of Obstetricians and Gynecologists, Committee Opinion 633, *Alcohol Abuse and Other Substance Use Disorders: Ethical Issues in Obstetric and Gynecologic Practice* (June 2015).

²⁰ *Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women*, National Advocates for Pregnant Women (June 2018), available at <http://advocatesforpregnantwomen.org/Medical%20and%20Public%20Health%20Group%20Statements%20revised%20June%202018.pdf>.

²¹ *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Id. on remand*, 308 F.3d 380 (4th Cir. 2002)

²² U.S. Dept. of Health & Human Services, Results from the 2013 National Survey on Drug Use and Health Summary of National Findings (2014), <https://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>.

²³ Chasnoff, Ira J., Harvey J. Landress, and Mark E. Barrett. 1990. "The Prevalence of Illicit-Drug Or Alcohol use during Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida." *New England Journal of Medicine* 322 (17): 1202-1206. doi:10.1056/NEJM199004263221706; Ellsworth, Marc A., Timothy P. Stevens, and Carl T. D'Angio. 2010. "Infant Race Affects Application of Clinical Guidelines when Screening for Drugs of Abuse in Newborns." *Pediatrics* 125 (6): e1379-85. doi:10.1542/peds.2008-3525; Race Tilt in Foster Care Hit; Hospital Staff More Likely to Screen Minority Mothers, *Daily News of Los Angeles* (June 29, 2008), available at <http://advocatesforpregnantwomen.org/LA%20daily%20news%20series.pdf>; Roberts, Sarah C., and Amani Nuru-Jeter. 2010. "Women's Perspectives on Screening for Alcohol and Drug use in Prenatal Care." *Women's Health Issues* 20 (3): 193-200. doi:10.1016/j.whi.2010.02.003; Rotzoll, Brenda W. "Black Newborns Likelier to be Drug-Tested: Study." *Chicago Sun-Times*, March 16, 2001; Anderson, Troy. "Race Tilt in Foster Care Hit; Hospital Staff More Likely to Screen Minority Mothers." *L.A. Daily News*, June 30, 2008.

²⁴ Emma Ketteringham et al., *Healthy Mothers, Healthy Babies*, 20 CUNY L. Rev. 77, fn. 53 (2016), referencing Marc A. Ellsworth et al., *Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns*, 125 *Pediatrics* 1379 (2010). See also Sarah CM Roberts, E Zahnd, C Sufrin, and MA Armstrong, *Does adopting a prenatal substance use protocol reduce racial disparities in CPS reporting related to maternal drug use?* 35 *Journal of Perinatology* 146 (2015).

Public Health & Human Rights Concerns of Prosecuting Pregnant Women for Chemical Endangerment of a Child in Alabama

National Advocates for Pregnant Women (2019)

Alabama's Chemical Endangerment of a Child Law was enacted in 2006 to punish individuals who exposed children to dangerous environments such as methamphetamine laboratories.¹ The legislature explicitly stated that the law was not meant to prosecute pregnant women. Very quickly, however, prosecutors began using the law to criminally charge women who were pregnant and used substances (drugs or alcohol) at some point in the duration of their pregnancy. Alabama's Supreme Court then interpreted the law to allow these prosecutions. Every major public health and medical group in the U.S. opposes laws that prosecute women in relationship to pregnancy.² This use of Alabama's criminal law has affected hundreds of women; it harms the public's health and violates international human rights standards.

Public Health Implications of Using the Chemical Endangerment of A Child Law Against Pregnant Women:

Justification for prosecuting pregnant women under the chemical endangerment of a child law often rests on the false assumption that punitive policies deter pregnant people from using substances and therefore would protect the health of both mothers and their future children. But these laws are truly counterproductive to advancing health and have been shown to cause harm to mothers and children in a number of ways.

I. Diminished Access to Healthcare and Treatment

Studies, along with medical and public health association policy statements, show that laws that criminalize substance use during pregnancy result in pregnant people avoiding medical and treatment care.³ Individuals who use substances during pregnancy often report that to avoid detection, they either do not tell their healthcare provider about their substance use or do not see a healthcare provider because of a fear of being reported to law enforcement.⁴ This has potentially dire health consequences for the pregnancy and for the pregnant person's health. Comprehensive prenatal and other health care during pregnancy is consistently associated with

¹ Amnesty International. *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA*, 2017. Retrieved from: <https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf>

² National Advocates for Pregnant Women (NAPW) (2018). Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women. Retrieved from: http://advocatesforpregnantwomen.org/main/publications/fact_sheets/medical_and_public_health_group_statements_opposing_prosecution_and_punishment_of_pregnant_women_revised_june_2018.php

³ Stone R. (2015). Pregnant women and substance use: fear, stigma, and barriers to care. *Health & Justice*, 3, 2. doi:10.1186/s40352-015-0015-5; National Advocates for Pregnant Women (NAPW) (2018). Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women. Retrieved from: http://advocatesforpregnantwomen.org/main/publications/fact_sheets/medical_and_public_health_group_statements_opposing_prosecution_and_punishment_of_pregnant_women_revised_june_2018.php

⁴ Stone R (2015).

fewer preterm births and high-risk conditions.⁵

Alabama ranks next to worst in the nation in terms of infant mortality, and the state has substantial disparities between African American and white infants—African American infants are 80 percent more likely to be born at low birth weight and twice as likely to die compared to white infants.⁶ Alabama has identified that prenatal care is a major public health goal for the state and for advancing maternal health, yet State trends demonstrate that fewer, not more, pregnant people are receiving adequate prenatal care.⁷

Furthermore, states that punish pregnant people for substance use during pregnancy have fewer individuals enrolled in evidence-based substance use disorder treatment programs than states who do not criminalize substance use during pregnancy.⁸

The consequences of prosecuting pregnant women for child endangerment related to substance use—disparate racial impact, avoidance of prenatal care, not sharing important information with healthcare providers, and decreased utilization of treatment programs—undermine the State’s goal of advancing maternal and child health. Immediate action is needed to protect pregnant people in the State by expanding access to healthcare services that are confidential and will not lead to punitive consequences for the pregnant woman.

II. Scientific Evidence Does Not Support These Prosecutions

Scientific studies do not support the widespread public belief that use of any amount of any controlled substance or alcohol during pregnancy poses substantial risk to the developing fetus. A recent review of 200 studies, for example, found that there were no significant harms associated with prenatal exposure to opioids when measuring for cognitive, behavioral, and psychomotor development.⁹ A person who is pregnant can be prosecuted under Alabama’s Chemical Endangerment of a Child Law due to a single, positive and unconfirmed toxicology test, and until the law was amended after public outcry, for the use of prescription medication as prescribed by a physician. A single, positive toxicology tells nothing about harm or risk of harm, or the amount or duration of a person’s substance use, and is not supported by medical evidence to demonstrate harm to the fetus. It is this adoption and reliance upon mythology about drug use and pregnancy that many who support charging pregnant women with chemical endangerment of a child use to bolster their agenda. It is important to combat these inaccuracies with reliable, peer-reviewed science and facts.

⁵ Vintzileos AM1, Ananth CV, Smulian JC, Scorza WE, Knuppel RA. (2002). The impact of prenatal care in the United States on preterm births in the presence and absence of antenatal high-risk conditions. *American Journal of Obstetrics and Gynecology*, 187, 5. Retrieved from: [https://www.ajog.org/article/S0002-9378\(02\)00404-0/fulltext](https://www.ajog.org/article/S0002-9378(02)00404-0/fulltext)

⁶ Alabama Public Health. (2018). Poor Pregnancy Outcomes. Retrieved from: <https://www.alabamapublichealth.gov/healthrankings/pregnancy.html>

⁷ Alabama Public Health. (2018).

⁸ Angelotta C, Weiss, C, Friedman, J. (2016). A Moral or Medical Problem? The Relationship between Legal Penalties and Treatment Practices for Opioid Use Disorders in Pregnant Women. *Women’s Health Issues* 26, no. 6: 595-601. doi:10.1016/j.whi.2016.09.002.

⁹ Baldacchino, A., Arbuckle, K., Petrie, D. J., & McCowan, C. (2014). Neurobehavioral consequences of chronic intrauterine opioid exposure in infants and preschool children: a systematic review and meta-analysis. *BMC psychiatry*, 14, 104. doi:10.1186/1471-244X-14-104

III. Pregnancy & Substance Use Disorder Treatment

Many people who use alcohol and other substances do so without having a use disorder. People who are pregnant in Alabama and do have substance use disorders, however, do not have adequate access to substance use treatment programs. In Etowah County, for example, where NAPW has documented more than 69 chemical endangerment of a child charges involving pregnancy since 2016 alone,¹⁰ there is only one substance use treatment provider that accepts pregnant and postpartum women. The standard of care for substance use disorder during pregnancy is to receive or continue in treatment. Pregnant people are advised against stopping the use of substances abruptly because of the risk of pregnancy loss.¹¹

Individuals who are unable to access treatment programs and fear criminal prosecution and child abuse or neglect charges are left with few options for their pregnancy, including abortion. Even those who wish to pursue this option have limited access. There are only three abortion care facilities in the state.¹² New research additionally suggests that coerced (ordered by a court or threatened by a prosecutor) substance use disorder treatment is ineffective.¹³ Public health and medical experts recommend voluntary, substance use treatment integration into prenatal care for individuals who are pregnant and who need it.¹⁴

Human Rights Implications:

International and national human rights advocates have raised concerns over the use of Alabama's Chemical Endangerment of a Child Law against pregnant women, especially regarding key human rights principles concerning the right to the highest attainable standard of healthcare, freedom from discrimination, and the right to privacy.

I. The Right to the Highest Attainable Standard of Healthcare.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) and The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) both assert and protect women's right to health. As the U.S has signed both these treaties, the U.S. is obligated to abstain from undermining the terms of these treaties.¹⁵ The ICCPR affirms that States must take "measures to improve child and maternal health, sexual and reproductive health services, pre- and postnatal care, access to information, as well as resources necessary to act on that information."¹⁶ The CEDAW further promotes that States must take action to end the

¹⁰ NAPW documents cases through on-line media alerts and follow-up court records and related research. This significantly limits our overall count of prosecutions as well as the jurisdictions that are most involved in these prosecutions. Our numbers are thus an undercount of the amount and places these prosecutions are occurring.

¹¹ World Health Organization (WHO). (2014). Guidelines for the identification and management of substance use and substance use disorders in pregnancy. Retrieved from: https://www.afro.who.int/sites/default/files/2017-06/9789241548731_eng.pdf

¹² Crain, A (2019). Alabama only has three abortion clinics. Here's one woman's story. Retrieved from: <https://www.al.com/news/2019/01/alabama-only-has-three-abortion-clinics-heres-one-womans-story.html>

¹³ Werb, D., Kamarulzaman, A., Meacham, M. C., Rafful, C., Fischer, B., Strathdee, S. A., & Wood, E. (2015). The effectiveness of compulsory drug treatment: A systematic review. *The International journal on drug policy*, 28, 1-9.

¹⁴ NAPW. (2018).

¹⁵ Csete, J. Key resources for health-related human rights advocacy, lecture, 22 January, 2019.

¹⁶ Committee on Economic, Social and Cultural Rights, General Comment 14, UN Doc. E/C.12/2000/4 Retrieved from [https://www.nesri.org/sites/default/files/Right to health Comment 14.pdf](https://www.nesri.org/sites/default/files/Right%20to%20Health%20Comment%2014.pdf)

discrimination of women in healthcare.¹⁷ The Universal Declaration of Human Rights (UDHR) and the American Convention on Human Rights (American Convention) both highlight the need for special attention for people who are pregnant and individuals in the postpartum period.¹⁸

Criminalizing pregnancy undermines the right to the highest attainable standard of healthcare as it decreases access and utilization of healthcare.¹⁹ The U.N. Special Rapporteur on the Right to Health has further confirmed that when a criminal law results in a barrier to healthcare decision making, the state is obligated to remove that law.²⁰

II. The Right to Freedom from Discrimination

Almost all human rights treaties recognize the sanctity of nondiscrimination and gender equity as essential to the realization of human rights.²¹ Both the International Covenant on Civil and Political Rights (ICCPR), which is legally binding upon the U.S., and the ICESCR rely on the definition of discrimination against women put forth by the CEDAW which declares that states “take all appropriate measures to eliminate the discrimination against women in the field of healthcare.”²² The CEDAW committee further states that “criminalizing behaviors that can only be performed by women” discriminates against women.²³ While Alabama’s Chemical Endangerment of a Child law appears to be gender neutral, meaning that both men and women can be charged for exposing a child to illicit substances after the child is born, adding pregnancy as an element of the crime solely and disproportionately impacts women as only women can be charged from the moment of conception.

Laws that criminalize pregnancy also tend to be differentially enforced against communities of color and low-income individuals who are already being surveilled by other avenues for state control including the child welfare system.²⁴ The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) has been signed and ratified by the U.S. and therefore the U.S. has a legal obligation to uphold the conditions of this treaty.²⁵ The ICERD asserts that states must end racial discrimination especially in terms of access to medical and public health services.²⁶ Because these laws are applied mostly to low income and minority women, marginalized groups face greater challenges in accessing and utilizing medical services—directly violating ICERD.

¹⁷ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 12, 18 December 1979, United Nations. From <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article1>

¹⁸ Amnesty International (2017)

¹⁹ Ibid

²⁰ Report of the Special Rapporteur on the Right to the Highest Attainable Standard of Health, U.N. General Assembly, 66th Sess., 3 August 2011, UN Doc. A/66/254 From <https://undocs.org/A/66/254>

²¹ Soderberg, V. More an Receptacles: An International Human Rights Analysis of Criminalizing Pregnancy in the United States, 2016, 31(2):299-351.

²² UN General Assembly, CEDAW. See footnote 7.

²³ Committee on the Elimination of Discrimination against Women. General recommendation on women’s access to justice, 23, July, 2015. Retrieved from: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf

²⁴ Amnesty International (2017)

²⁵ Csete J. (2019)

²⁶ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 4 December 1969, United Nations. Retrieved from: <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>

III. The Right to Privacy and Family Life

The ICCPR and the American Convention provide protection for everyone from “arbitrary or unlawful interference in family life and private matters.”²⁷ The condition of arbitrariness has been interpreted to “include elements of inappropriateness, injustice, lack of predictability and due process of the law,” and reasonableness, necessity, and proportionality.²⁸ This is closely related to the right to liberty as many of these laws are considered to be abhorrently vague and contain terms that are neither reasonable nor proportional.²⁹

These rights are further implicated by hospital policies that often obscure informed consent for drug testing on women and their newborns by burying consent into long and complicated documents that many do not read nor understand.³⁰ Moreover, tests of bodily fluids that are procured without explicit, clear informed consent that the results can potentially lead to arrest, incarceration or compulsory treatment violate the right to privacy.³¹

Because women may feel compelled to seek out an abortion if they cannot access treatment services and are subject to criminal prosecution as a result of substance use,³² women are robbed of the right to reproductive decision making which is part of the right to privacy and family life.

IV. A Rights-Based Solution

Alabama has a valid interest in protecting and promoting maternal and child health, but criminalizing substance use and pregnancy to advance this objective is counterproductive. Countries are directed to take immediate action to remove legal barriers that prevent those with the capacity for pregnancy from accessing healthcare.³³ Government should offer substance use disorder treatment as an integral part of providing prenatal and other health care. Treatment options should be voluntary and accessible to all people, with a special emphasis on individuals who are further marginalized by social factors including race and socioeconomic status.

²⁷ Soderberg, V. (2016)

²⁸ Ibid.

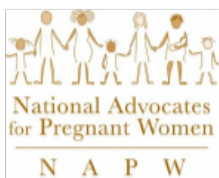
²⁹ Seung-Bickley R, Marshall, R. New Report Shows Alabama’s Pregnancy Law Hurts, Not Helps, 25 May, 2017, Retrieved from: <https://www.aclualabama.org/en/news/new-report-shows-alabamas-pregnancy-laws-hurts-not-helps>

³⁰ Ibid.

³¹ Ibid.

³² Seung-Bickley R, Marshall, R (2017).

³³ UN Human Rights Office of the High Commissioner. Frequently Asked Questions on Economic, Social and Cultural Rights. Fact Sheet No. 33. Retrieved from: <https://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf>



THE SIA LEGAL TEAM

Movement Lawyers • RJ Values • Bold Vision

POVERTY & HUMAN RIGHTS IN ALABAMA

Reproductive justice is defined as the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities.¹

Every person has the non-negotiable human right to determine whether, when, and how to create a family.² People deserve unrestricted access to the information and resources necessary to care for themselves and their families. In Alabama, pregnant people face barriers impeding their right to access healthcare and other necessary services. There are only 3 abortion clinics in Alabama, and impoverished and rural pregnant people seeking abortion care face great barriers (lack of money to pay for the procedure, travel costs, child care, and lost wages) to access them. The state of Alabama's refusal to expand Medicaid access³ and a dearth of local hospitals and clinics means that a large number of pregnant people are going without the prenatal, birth, and postnatal care needed to ensure healthy pregnancies and birth outcomes.⁴ As a result, the state of Alabama reported a maternal mortality rate of 12 per 1,000 births (Black women were 3 times as likely to die as a result of pregnancy than white women) in 2015⁵ and infant mortality rates from 2016 show that Alabama's infant mortality rate is 9.1 per 1,000 births (Black infants were more than 2 times more likely to die than white infants).⁶ There is also a lack of substance use disorder treatment programs available to rural pregnant people in the state. As of 2016, only 24.3% of substance use treatment programs in Alabama provided specially tailored services for pregnant

¹ SisterSong, *What is Reproductive Justice*, available at <http://sistersong.net/reproductive-justice/>.

² National Network of Abortion Funds, "Values" (2017), available at: <https://abortionfunds.org/about/>; National Network of Abortion Funds, "Yellowhammer Fund" (2017), available at: <https://abortionfunds.org/welcome-yellowhammer/>.

³ Lyman, Brian "Bentley takes tougher tone on Medicaid expansion under Obamacare" *Montgomery Advertiser* (15 Dec 2013), available at <http://www.montgomeryadvertiser.com/story/news/2013/12/15/-bentley-takes-tougher-tone-on-medicare-expansion-under-obamacare/1578890/>.

⁴ Maron, Dina F. "Maternal Health Care Is Disappearing in Rural America" *Scientific American* (15 Feb 2017), available at <https://www.scientificamerican.com/article/maternal-health-care-is-disappearing-in-rural-america/>.

⁵ Alabama Center for Health Statistics "Alabama Vital Statistics 2015" Table 36 at page 44, available at <http://www.alabamapublichealth.gov/healthstats/assets/AVS2015.pdf>. More information regarding the much greater rate of maternal mortality among Black women compared to white women in the United States is discussed in this publication by the Center for Reproductive Rights: https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/USPA_MH_TO_ResearchBrief_Final_5.16.pdf.

⁶ Alabama Center for Health Statistics "Infant Mortality: Alabama 2016," available at http://www.alabamapublichealth.gov/healthstats/assets/IM_16.pdf.

or postpartum people and an almost negligible number offered child care or residential services for children.⁷

Criminalization of Pregnancy:

Alabama enacted the “chemical endangerment of a child” law in 2006, with the goal of making it a crime to take a child to places where illegal drugs were manufactured (such as methamphetamine laboratories).⁸ However, since 2006, more than 500 people in Alabama have been arrested under this act for alleged actions while pregnant, including drug use.⁹ Alabama’s law has created an environment where medical professionals are placed in the position of reporting pregnant patients to the criminal justice and child welfare system if they learn of or suspect any type of drug use.

Criminalization harms poor families. Mothers in Alabama face criminal prosecutions which can result in years of incarceration, as well as civil child welfare proceedings that have the power to separate families and sever a person’s parental rights. Families living in poverty are already disproportionately the subject of child welfare investigations in the United States.¹⁰ Experts have found that poor children disproportionately suffer impositions of the child welfare system, and families who receive public assistance are four times more likely than others to be investigated and have their children removed from the family home on the basis of alleged child maltreatment.¹¹ A national study showed “Two thirds of all cases of maltreatment identified by the study involved families with income below \$15,000.”¹²

Criminalization puts infant and maternal health at risk. This law primarily affects poor, rural pregnant people throughout the state of Alabama and drives those who use controlled substances away from vital and necessary prenatal care.¹³ Pregnant people are deterred from accessing necessary healthcare services out of fear of prosecution, punishment, and loss of child custody. Every major medical organization opposes creating special crimes to punish pregnant people.

⁷ HHS SAMHSA National Survey of Substance Abuse Treatment Services (N-SSATS): 2016 Data on Substance Abuse Treatment Facilities, available at https://www.samhsa.gov/data/sites/default/files/2016_NSSATS.pdf.

⁸ Alabama Code of Laws 26-15-3.2

⁹ Martin, Nina “Take a Valium, Lose Your Kid, Go to Jail” ProPublica (2015), available at <https://www.propublica.org/article/when-the-womb-is-a-crime-scene>.

¹⁰ National Coalition for Child Protection Reform, Child Abuse and Poverty, available at https://drive.google.com/file/d/0B291mw_hLAJsMW80MnhkbnB5bnM/view (Provides examples of state laws with case examples and citations).

¹¹ See generally Douglas J. Besharov, *Child Abuse Realities: Over-reporting and Poverty*, 8 VA. J. SOC. POLICY & L. 165, 183-84 (2000); see also Dana Mack, *The Assault On Parenthood: How Our Culture Undermines The Family* 67 (1997); Children’s Defense Fund, *State of America’s Children: Child Welfare* (2005); see also Candra Bullock, *Low-Income Parents Victimized by Child Protective Services*, 11 Am. UJ Gender Soc. Pol’y & L. 2 (2003) (“Children who live in families with annual incomes of less than \$15,000 are 22 times more likely to be [the subject of a child neglect/abuse proceeding] . . . than those with annual incomes of \$30,000 or more.”)

¹² Khiara Bridges, *The Poverty of Privacy Rights* 114 (2017) citing Besharov 183 (2000)

¹³ See: American College of Obstetricians and Gynecologists Committee on Ethics, Committee Opinion No. 321, *Maternal Decision Making, Ethics, and the Law* (Nov. 2005); Association of Women’s Health, Obstetric and Neonatal Nurses, *Criminalization of Pregnant Women with Substance Use Disorders* (2015); see also Martin, Nina “Take a Valium, Lose Your Kid, Go to Jail” ProPublica (2015), available at <https://www.propublica.org/article/when-the-womb-is-a-crime-scene> (only 11% of women arrested for a chemical endangerment charge in Alabama could afford their own lawyer).

These organizations recognize that encouraging trust between patients and health care providers and increasing access to effective services, not punishment, is the best way to advance health and reproductive freedom, especially in impoverished communities.¹⁴

Recommendations:

- Adopt policies that provide accessible, confidential, and comprehensive healthcare for all people in Alabama, including abortion care.
- Repeal all laws that criminalize pregnancy and any alleged actions while pregnant.
- Reform the child welfare system to provide non-punitive, voluntary assistance to families in need, with a focus on preserving the family unit.

Criminalization of People for Self-Inducing Abortions

Access to abortion in the US is more limited now than at any time since the Supreme Court recognized protections for reproductive decision-making in *Roe v. Wade* in 1973.¹⁵ Barriers to care such as cost, over-regulation of abortions that have forced clinic closures, and pervasive abortion stigma lead many people in poverty to seek ways to end their pregnancies on their own. Fortunately, the advent of safe and effective abortion medications (e.g. Mifepristone/RU 486) has given people with limited access to abortion services a safe and effective method of ending a pregnancy.

But even with new medical technologies and long-standing constitutional jurisprudence protecting abortion, people face the threat of criminal prosecution. Seven states retain and enforce statutes that explicitly criminalize self-managed abortion, and more than a dozen others have laws susceptible to distortion by politically-motivated prosecutors.¹⁶ People in poverty are disproportionately affected because they are subject to greater public surveillance (e.g. social workers, welfare offices, and public health officials) and prosecution.¹⁷ This criminalization violates both the U.S. Constitution and international human rights law and discriminates against those seeking reproductive medical care.¹⁸

Criminalization endangers personal health. People in poverty are driven away from assistance in the event of a complication or spontaneous miscarriage for fear of arrest and prosecution. Many of the people who have been arrested in recent years came to the attention of law enforcement when they sought emergency medical care.¹⁹

¹⁴ See NAPW medical/public health group statements fact sheet; see also American Academy of Pediatrics, Alabama Chapter, *Position on Alabama's Chemical Endangerment Statute* (2016).

¹⁵ Andrea Rowan, *Guttmacher Policy Review*, Summer 2015, Vol. 18 No. 3 at 70.

¹⁶ SIA Legal Team, *Roe's Unfinished Promise: Decriminalizing Abortion Once and For All*, November 2017, at 9, available at www.sialegalteam.org/roes-unfinished-promise.

¹⁷ Jill E. Adams & Melissa Mikesell, *And Damned if They Don't: Prototype Theories to End Punitive Policies Against Pregnant People Living in Poverty*, 18 Geo. J. Gender & L. 283, 306 (2017), citing 123 Cong. Rec. 19, 700 (1977) at 323.

¹⁸ Farah Diaz-Tello, Cynthia Soohoo, *Criminalization of Women Who Self-Induce Abortions in the United States*, submitted to UN Working Group on Discrimination Against Women in Law and Practice, June 2017 at 21.

¹⁹ *Id.* at 7.

Criminal investigations and convictions exacerbate poverty. Criminal convictions have collateral consequences impacting housing, education, and employment opportunities, and publicity around arrests can result in loss of employment even if a person is not convicted.

Criminalization has a racially disproportionate effect. Between 1973 and 2005 approximately 15% of Florida's population was African American, but 75% of its pregnancy-related criminal cases were brought against African Americans. By contrast, only 22% of cases were brought against whites, who represented 60% of the overall population.²⁰

Criminalization of self-induced abortion violates human rights. In June of 2017, the Working Group on Discrimination Against Women, the Special Rapporteur on Violence Against Women, and the Special Rapporteur on the Right to Health wrote to the United States urging the repeal of New York's criminal self-abortion statutes, arguing that the current law violates women's human rights and "instrumentalizes women's bodies, undercuts women's autonomy and puts their lives and health at risk."²¹ They further noted that criminalization of abortion constitutes discrimination on the basis of sex and called upon states to repeal such laws.

Recommendations

- Protect women's health by halting criminalization of self-induced abortion. States should ensure that people are able to seek health care without fear by ensuring that self-induced abortion is not criminalized, in law or in practice, and private health information has robust protections under the law.
- Support progressive legislative change that decriminalizes self-induced abortion. States should repeal laws that explicitly criminalize self-induced abortion. For instance, the New York Reproductive Health Act (Senate Bill 2796) would repeal the criminal "self-abortion" statutes²² and bring New York law in line with *Roe v. Wade*.
- Forbid the use of feticide laws against people who end their pregnancies. State should clarify (through amendment or authoritative interpretation) that feticide laws are not intended to punish people who self-induce abortions or are unable to guarantee a healthy birth outcome. For example, the Indiana Court of Appeals recently overturned a conviction and 20-year sentence of a woman accused of self-inducing an abortion based on the fact that feticide laws are intended to protect, not punish, pregnant women.²³

²⁰ Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. Health Pol. Pol'y & L. 299, 311 (2013)

²¹ Communication from the Special Rapporteur on the Right to Health, the Special Rapporteur on Violence Against Women, and the Working Group on Discrimination against women to the U.S. State Department regarding the New York Reproductive Health Act, June 20, 2017, available at http://www.ohchr.org/Documents/Issues/Women/WG/Communications/OL_USA_8_2017.pdf.

²² NY Penal Law § 125.50; § 125.05

²³ *Patel v. State*, 60 NE3d 1041 (Ind Ct App 2016).

- Ensure meaningful access to facility-based abortion care. Everyone should have access to abortion in a setting that provides for their health, safety, and dignity, whether that is in a clinic, hospital, or their own home. Ensuring access to abortion in a healthcare setting for those who want it can help guarantee that people who decide to end their own pregnancy do so as a matter of empowerment rather than desperation.

Bans on Abortion Funding for Low-Income People

I would certainly like to prevent, if I could legally, anybody having an abortion: a rich woman, a middle-class woman, or a poor woman.

Unfortunately, the only vehicle available is the Medicaid bill.”²⁴

- Rep. Henry Hyde (R-IL), 1976

The Hyde Amendment, passed in 1976 and renewed annually thereafter, prohibits the use of federal funds for abortion coverage through Medicaid except in cases of rape, incest and endangerment of the life of the pregnant person.²⁵ This policy creates a significant barrier to abortion care for people living in poverty, forcing those who can least afford to do so to pay for their care out-of-pocket. The Hyde Amendment undermines the purpose of public health insurance by denying coverage for a needed medical procedure and endangering the wellbeing of pregnant people.²⁶

Bans on Medicaid funding make people’s access to abortion contingent on where they live.

States are able to use their own Medicaid funds to cover abortion care. Currently only 17 states have a policy or case law requiring coverage,²⁷ but only 15 appear to actually be doing so.²⁸ Medicaid funding in Alabama does not cover abortion care.

The Hyde Amendment disproportionately affects non-white people. Non-white people are more likely to be living in poverty due to a history of marginalization. In 2014, 30% of Black and 24% of Latina women of reproductive age were enrolled in Medicaid, compared to 14% of white women.²⁹ This marginalization also makes them more likely to experience unintended pregnancy. In 2011, Black and Latina women had an unintended pregnancy rate of 79 and 58 per 1,000 women, respectively, compared with 33 per 1,000 white women.³⁰

²⁴ Statement from a floor debate. 123 CONG. REC. 19, 700 (1977).

²⁵ Available at <https://www.congress.gov/bill/113th-congress/senate-bill/142/text>.

²⁶ The Hyde Amendment prohibits coverage of abortions necessary to preserve a woman’s health. Medicaid was created with the express purpose of providing healthcare to those too poor to afford it and is the largest source of insurance funding for medical and health-related services for low-income and indigent individuals in the United States. Center for Reproductive Rights, *Whose Choice: How the Hyde Amendment Harms Poor Women*, 18, Sept. 13, 2010. <http://bit.ly/2yia3u6>.

²⁷ Guttmacher Institute, *Evidence You Can Use: Medicaid Funding of Abortion*, Dec. 21, 2016, at 1 (Dec. 2016) <http://bit.ly/2xJPMwB>.

²⁸ John O’Connor and Sophia Tareen, *Illinois Governor Agrees to Allow Medicaid Coverage for Abortions*, Time Standard (Sept. 28, 2017). <http://www.times-standard.com/article/zz/20170928/NEWS/170929049>.

²⁹ Guttmacher Institute, *supra*, note 4 at 1.

³⁰ *Id.*

Bans on Medicaid funding for abortion serve as an outright ban on abortion for many. The out-of-pocket cost for obtaining an abortion can be substantial. The median cost of a clinic-based abortion at 10 weeks is \$500 and increases with each passing week. Securing necessary funds, while also making arrangements for time off from work and travel, may be difficult and cause one to delay the procedure. Such delays increase both the cost and risk to the pregnant person's health.³¹

Recommendations

- *Ensure federal Medicaid coverage for all abortions.* Congress should let the Hyde Amendment lapse or enact other measures to guarantee affordable access to abortion services for people enrolled in Medicaid.
- *Remove barriers to funding for abortion at the state level.* Access to healthcare should not depend on where a person lives. Alabama should follow the lead of California and Illinois and allocate state Medicaid funds to cover abortions.

³¹ *Id.*

American Academy of Pediatrics

DEDICATED TO THE HEALTH OF ALL CHILDREN™



Alabama Chapter

19 S. Jackson Street
Montgomery, AL 36104
Phone: 334/954-2543
Toll-Free: 866/293-4783
Fax: 334/269-5200
E-mail: lee@aap.net
<http://www.alaap.org>

January 18, 2016

Alabama Chapter-American Academy of Pediatrics Position on Alabama's Chemical Endangerment Statute

Comprised of more than 750 pediatricians from across the state, the Alabama Chapter-American Academy of Pediatrics is a 501 (c) 3 organization that serves to protect the health and well-being of all of Alabama's children. As you are aware, there is an epidemic of infants born in our state addicted to legal and illegal substances due to maternal use or abuse during pregnancy. There is nothing more devastating than watching a newborn struggle helplessly with the effects of withdrawal. However, our organization (along with many other medical organizations in our state) recommends that the state enact a moratorium that will halt chemical endangerment arrests of pregnant women until the state can research the consequences of this law. There is a critical need to understand and address the unintended consequences of interpreting a law aimed at drug manufacturing to include pregnant women, even if the intent is to protect infants. We also strongly support the increased provision of voluntary, easily accessible and affordable treatment for addiction during pregnancy.

Here are some of the consequences that have been observed by pediatricians and others in Alabama, since this particular application of the statute has begun:

1. Currently, many hospitals obtain a urine drug screen when a pregnant woman presents for delivery. These urine drug screens have an unusually high rate of false positives due to cross-reaction with over-the-counter and prescription medications and foods (attachment 1). We are aware of women who have had their newborns taken from them due to false positive tests, which affects early attachment and interrupts breastfeeding.
2. Although the American College of Obstetricians and Gynecologists (ACOG) recommends screening pregnant women for drug and alcohol use, it specifically does not intend for this to be conducted by mandatory laboratory testing but by clinical interview (attachment 2). It explicitly advises against the practice of providing screening results to law enforcement. ACOG also advises against the criminal prosecution of women in cases of drug and alcohol use during pregnancy. The American Academy of Pediatrics has similarly advised against prosecution and in favor of offering treatment (attachment 3). This advisement is due to the potential for causing women to delay seeking medical care during pregnancy out of fear of arrest, which endangers the health of both the women and infants. We are aware of Alabama women who have delayed pregnancy care because of this fear, and also women who have had abortions, when they otherwise would not have planned to abort, in order to avoid arrest.

Officers

President

Catherine L. Wood, MD, FAAP
8160 Seaton Place
Montgomery, AL 36116
334/272-1799
Fax: 334/272-4876
cdocwood@aol.com

Vice President

Andrew W. Stubblefield, MD, FAAP
421 W College Street
Florence, AL 35630
256/764-9522
Fax: 256/764-1139
stubblefield.wes@gmail.com

Secretary-Treasurer

L. Katrina Skinner, MD, FAAP
19087-B Greeno Road
Fairhope, AL 36532
251/928-5568
Fax: 251/928-2605
katski@bellsouth.net

Immediate Past President

Michael J. Ramsey, MD, FAAP
126 Clinic Drive
Dothan, AL 36303
334/793-1881
Fax: 334/712-1815
mj_ramsey@msn.com

Executive Director

Linda P. Lee, APR

Continued

Alabama Chapter-American Academy of Pediatrics

Position on Alabama's Chemical Endangerment Statute

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3. Some women have been arrested and/or had their children removed from them for minor, non-habitual drug use before they were aware of pregnancy. Others have lost custody or been arrested after they ingested a drug without their knowledge or consent because of the actions of others, and in at least one case, when the woman was not even pregnant. These removals for minimal exposures, even when later reversed, have disrupted breastfeeding and the parent-child bonding process, both of which can have long-term health consequences.
4. Pregnant women have been prosecuted and/or had children removed from their care for the use of prescribed medications, such as methadone. Treating women with opiate addiction with methadone and other prescribed medication is the standard of care. This law, as currently interpreted, is creating a situation where physicians, in order not to commit malpractice, are prescribing treatment that puts their patients at risk of arrest and where women are afraid to seek appropriate treatment.
5. Alabama lacks sufficient resources to offer affordable medical treatment for addiction in many counties. We are aware of women who have attempted to self-treat their addictions during pregnancy and who have meanwhile delayed medical care, in order to avoid arrest, even when such treatment is available and even when it is offered as an alternative to jail. These women wanted treatment. If treatment were made more easily available and offered without the threat of arrest, they would be able to seek care voluntarily.

Thank you to the Governor's Healthcare Improvement Task Force for considering this and other issues to help improve the health and safety of children in Alabama.

Facility Name	Address
Lighthouse Counseling Center Inc Intensive Outpatient Unit	111 Coliseum Boulevard Montgomery, AL 36109 334-286-5980
Chilton County Treatment Center	2100 Holiday Inn Drive Clanton, AL 35046 205-755-4300
Montgomery Metro Treatment Center	6001 East Shirley Lane Montgomery, AL 36117 334-244-1618
Shelby County Treatment Center	750 Highway 31 South Alabaster, AL 35007 205-216-0200
Northwest Alabama Treatment Center	4204 Edmonton Drive Bessemer, AL 35022 205-425-1200
Phoenix House Inc	700 35th Avenue Tuscaloosa, AL 35401 205-758-3867
University of Alabama at Birmingham Beacon Addiction Treatment Center	401 Beacon Parkway West Suite 150 Birmingham, AL 35209 205-917-3733 x205
Zukoski Outpatient	601 Princeton Avenue SW Birmingham, AL 35211 205-785-5787
University of Alabama at Birmingham Addiction Recovery Program	1713 6th Avenue South Birmingham, AL 35294 205-975-8494
Aletheia House	201 Finley Avenue West Birmingham, AL 35204 205-324-6502
Olivias House	8017 2nd Avenue South Birmingham, AL 35206 205-833-5708 x21
SpectraCare Geneva County/Outpatient	1203 West Maple Street Geneva, AL 36340 800-951-4357
SpectraCare Outpatient	133 North Orange Avenue Eufaula, AL 36027 800-951-4357
MedMark Treatment Centers Oxford	118 East Choccolocco Street Oxford, AL 36203 256-831-4601
Walker Recovery Center Inc	2195 North Airport Road Jasper, AL 35504 205-221-1799
MedMark Treatment Centers Dothan	9283 U.S. Highway 84 West Newton, AL 36352 334-692-4455

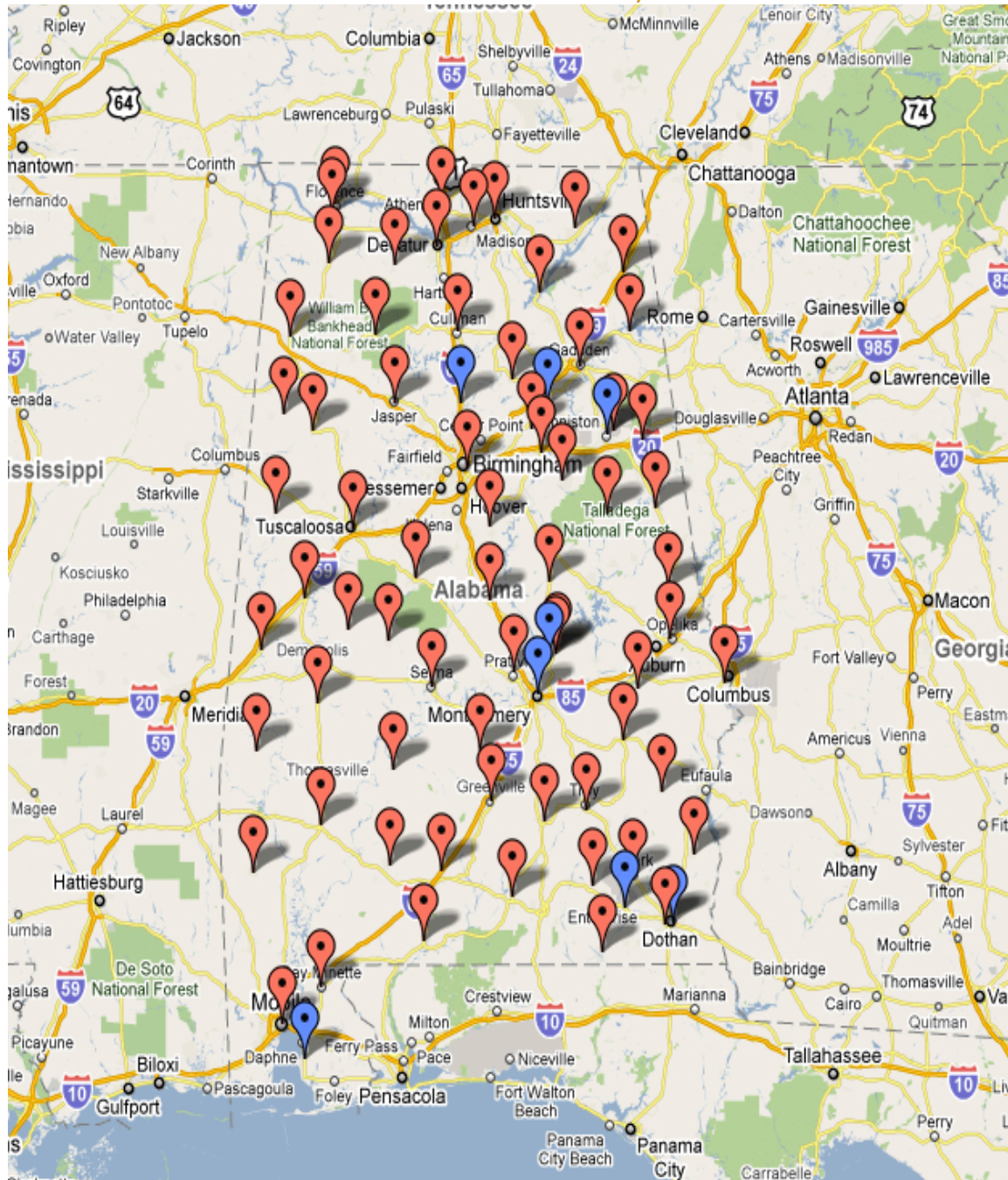
SpectraCare Henry County/OP	219 Dothan Road Abbeville, AL 36310 800-951-4357
SpectraCare The Haven	831 John D Odom Road Dothan, AL 36303 800-951-4357
SpectraCare Adult Outpatient Services	1672 Columbia Highway Dothan, AL 36303 800-951-4357
Gadsden Treatment Center	1121 Gardner Street Gadsden, AL 35901 256-549-0807
Cullman County Treatment Center	1912 Commerce Avenue NW Cullman, AL 35056 256-739-5595
ECD Program Inc	808 Downtowner Loop West Mobile, AL 36609 251-341-9504
Mobile Metro Treatment Center New Season	1924 Dauphin Island Parkway Suite C Mobile, AL 36605 251-476-5733
AltaPointe Health Systems Inc AltaPointe Medication Assisted Trt	4211 Government Boulevard Mobile, AL 36693 251-666-2569
Marion County Treatment Center	1879 Military Street South Hamilton, AL 35570 205-921-3799
Gulf Coast Treatment Center	12271 Interchange Road Grand Bay, AL 36541 251-865-0123
Huntsville Metro Treatment Center	2227 Drake Avenue Suite 19 Huntsville, AL 35805 256-881-1311
Freedom House	54 Wheeler Hills Road Rogersville, AL 35652 256-247-1222
BHG Shoals Treatment Center Inc	3430 North Jackson Highway Sheffield, AL 35660 256-383-6646
Health Connect America	614 South Court Street Florence, AL 35630 256-712-2822
Stevenson Recovery Center	196 County Road 85 Stevenson, AL 35772 256-437-2728



National Advocates
for Pregnant Women

N A P W

Treatment Centers versus County Jails in Alabama



Legend

Red: County Jail

Blue: Treatment Center

Recommended Additional Sources

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