To be argued by Farah Diaz-Tello
(Time Requested: 5 minutes)

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Suffolk County Clerk's Indictment Nos. 1425/09 and 1099/10
Appellate Division, Second Department Docket No. 2012-05826

Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff-Respondent

-against-

JENNIFER JORGENSEN

Defendant-Appellant.

BRIEF OF AMICI CURIAE NATIONAL ADVOCATES FOR PREGNANT WOMEN ET AL., IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Amicus National Advocates for Pregnant Women is a nonprofit organization under Title 26, Section 501(c)(3) of the United States Code, and has neither parent nor subsidiary entities.

INTEREST OF AMICI CURIAE

Amici are organizations and individuals with expertise in law, policy, medicine, and ethics with respect to reproductive health and gender equality.[1] Amici submit this brief in support of Defendant-Appellant Jennifer Jorgensen's position that prosecuting women who suffer neonatal losses is impermissible under New York law and a violation of constitutional rights. In addition to the grave consequences for women's status as equal persons, amici are concerned that allowing this impermissible expansion of the criminal code will undermine public health. Punitive responses to actions, decisions, and health conditions of pregnant women not only compound the grief of pregnancy loss; they threaten maternal and fetal health by deterring pregnant women from seeking medical care.

PRELIMINARY STATEMENT

The prosecution of Jennifer Jorgensen is predicated on the fundamentally flawed notion that women who experience neonatal losses should be treated no differently under the law than people who assault pregnant women and cause them to miscarry. The key question before this Court is whether New York's manslaughter statute may be used to punish women who give birth to babies who survive only a short while, and thus to create a legal obligation for pregnant women to refrain from

[1] Statements of interest for each amicus curiae are included with this brief as Appendix A.

any activity that might cause the loss of a pregnancy. But this is not the law in New York. Nor can it be, if women are to retain their status as equal persons under the law.

It is not a crime for a woman to lose a pregnancy—even if the baby lives briefly outside the womb, and even if the loss may have been related to something the woman did or failed to do. Ms. Jorgensen's conviction is thus an outcome neither envisioned nor sanctioned by the Legislature, but rather represents prosecutorial overreach and an unconstitutional judicial expansion of the penal code. Because a pregnant woman's every act or omission may influence the outcome of her pregnancy, the specter of prosecution for "reckless" acts leading to pregnancy loss threatens to create a society in which women of reproductive age are relegated to surveillance, restriction, and punishment far beyond what is permissible for any other class of persons.

STATEMENT OF FACTS

Amici adopt the statements of facts set forth in Ms. Jorgenson's briefs. (Defendant-Appellant's Brief at 2-68).

SUMMARY OF ARGUMENT

In U.S. jurisprudence, the "born alive" rule in the context of criminal prosecutions means this and only this: a person (other than the pregnant woman herself) who harms the pregnant woman, leading to the birth of a baby who later dies from the injuries sustained in utero, may be charged with a crime for the baby's

subsequent death. But the State claims that, in the interest of potential life, it may turn laws and legal doctrines intended to protect pregnant women's lives and health against them. This claim fails on three fronts.

First, it asks this Court to disregard New York law and legal precedent and radically expand the manslaughter law to create a rule that is plainly not permitted by the text of the law, would creates absurd consequences, and would make New York an extreme outlier among states. Second, to impose a new legal duty for women to avoid risks in order to try to ensure a healthy pregnancy (something no woman can ensure) violates women's state and federal constitutional rights to due process and equal protection. Finally, the position urged by the State is cruel, unjust, serves no state interest and instead threatens women's health, and unnecessarily compounds the grief that accompanies the death of a baby with criminal investigations, arrest, and prosecution with no benefit to society or justice.

Amici's arguments are not hypotheticals drawn from an imagined slippery slope. This case represents what happens at the bottom of that slope: a woman is found innocent of all the crimes that she could legitimately be charged with under New York law, and is nevertheless convicted of a new, special crime for pregnant women only, that creates gender specific legal obligations, that substitutes innuendo and gender stereotypes for proof beyond a reasonable doubt, and that is punishable by up to nine years in prison. Because women would be reduced to second-class

status if the state of New York were allowed to police and prosecute them for every decision they make that could possibly affect a pregnancy outcome, amici urge this Court to reverse the Appellate Division's ruling affirming Ms. Jorgenson's conviction, and dismiss this Count of the Indictment.

ARGUMENT

At the heart of this case are two extraordinary claims: first, that women who suffer neonatal losses should be subject to criminal investigation and prosecution as though they had committed a homicide, and second, that this is an outcome intended — though curiously never articulated — by the Legislature. Both claims are baseless, and unprecedented in the history of New York law.

I. New York law does not permit prosecution of women in relation to their pregnancy outcomes.

At no time has it been any kind of crime in the state of New York, much less a felony carrying a penalty of multiple years in prison, for a woman to experience a non-intentional pregnancy loss. The fact that a baby may have survived for some short period of time cannot, in the absence of direction from the Legislature, transform a woman's pregnancy loss into a homicide.

A. The State's interpretation of the manslaughter statute violates well-established rules of statutory construction.

Under the New York Constitution, the legislative power is "vested in the senate and assembly." NY CLS Const, Art III, § 1. In interpreting the laws, this Court

determines the intent of the Legislature. *See People v Allen*, 92 NY2d 378, 383 (1998) ("In matters of statutory construction, legislative intent is the great and controlling principle[.]") (citations omitted); *Matter of Scotto v Dinkins*, 85 NY2d 209, 214 (1995) (The "proper judicial function is to discern and apply the will of the Legislature.") (citations omitted). Where the language of the statute is clear, courts need look no further and may not expand or limit the reach of the law in contravention of legislative intent. *People v Quinto*, 77 AD3d 76, 82 (2d Dept 2010).

1. *The plain meaning of the manslaughter statute does not permit prosecution of pregnant women who suffer neonatal losses.*

The first step in discerning the Legislature's intent is to look to the plain meaning of the words chosen by the Legislature. *Brown v Wing*, 93 NY2d 517, 522 (1999). Although the common law requirement that penal laws be strictly construed has been superseded by statute, courts must construe penal law provisions "according to the fair import of their terms." (Penal Law § 5.00). Only conduct that "falls within the plain, natural meaning of the language of a Penal Law provision may be punished as criminal." *See People v Ditta*, 52 NY2d 657, 660 (1981). Courts must take care to adhere to the intent of terms used by the Legislature because "[p]enal responsibility, unlike moral responsibility, cannot be extended beyond the fair scope of the statutory mandate." *People v Wood*, 8 NY2d 48, 51 (1960).

The statute at issue in this case states that a person commits manslaughter in the second degree if they "recklessly cause the death of another person." Penal Law § 125.15. Unlike other states that have adopted feticide and "unborn victims of violence" laws that create a class of assault and homicide crimes against fetuses, only "a human being who has been born and is alive" can be a victim of a homicide in New York. Penal Law § 125.05 (1). While homicide is defined as conduct which "causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks," Penal Law § 125.00, the provision of the law referencing fetuses does not apply to generally to homicide offenses. Rather, this portion of the definition applies only to sections that make certain abortions criminal. *See People v Joseph*, 130 Misc2d 377, 380 (NY County Ct 1985) (reviewing the legislative history of Penal Law § 125.00 and finding that "the Legislature did not intend to make the nonabortional killing of an unborn child a homicide.") Thus, criminal liability for prenatal harm lies only after the live birth and death of an infant proven to be due to some third party assault on the pregnant woman. *See e.g. People v Hall*, 158 AD2d 69 (1st Dept 1990) (affirming conviction of assailant who shot a pregnant woman who then prematurely delivered a medically fragile baby who died hours after birth).

On its face, the statute makes no reference to pregnant women, much less the notion that underlies the prosecution and conviction in this case: that manslaughter includes reckless self-induced harm by a pregnant woman, nor to the idea that an

individual may come under it through self-injury. Of the many thousands of neonatal deaths that have occurred since the Penal Law took effect in 1967 (and that are not classified as abortions), no New York court has ever applied a homicide statute to a woman in relation to her pregnancy. Nor has any court signaled that the homicide statutes may be so interpreted. To the contrary, as this Court has recognized, even in the limited circumstance where a third party may have a legally cognizable duty to the fetus (as in the doctor-patient relationship), New York law assigns liability only for "injuries sustained *through the host mother*." *See Byrn v New York City Health & Hosps. Corp.*, 31 NY2d 194, 200 (1972) (emphasis added).

In an attempt to justify the charges against Ms. Jorgensen, the State cites *Hall,* 158 AD2d 69, and *People v Hardy,* 30 Misc3d 967 (Sup Ct, Monroe County 2011), two cases in which third party assailants were found criminally liable for injuring pregnant women so severely that they gave birth to extremely premature babies who survived only for a short time. (Respondent's Brief at 23-24). Recognizing that neither case justifies the charge here, the State argues that if the Legislature had intended to prevent the absurd result visited upon Ms. Jorgensen, it should have done so by explicitly stating that infant loss is not a crime. (Respondent's Brief at 24). This is directly contrary to the principle of *nullum crimen sine legae* — only acts prohibited by law are crimes. *See e.g. People v Eisen*, 77 Misc2d 1044, 1047 (1974). It is also contrary to the Legislature's intent, evinced by Article 125 as a whole.

2. *Prosecuting women for neonatal losses conflicts with New York's homicide laws, flouting legislative intent.*

Even if this Court were to find that the plain meaning of Penal Law § 125.15 is ambiguous, the next task is to discern the intent of the Legislature from the whole of the statutory scheme in which it appears. *See e.g. People v Mobile Oil Corp.*, 48 NY2d 192, 199 (1979) ("It is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole[.]").

New York retains just one criminal statute – retained from the decades prior to *Roe v Wade* – that criminalizes women in relation to their own pregnancies: Self-Abortion in the First Degree. Penal Law § 125.55. Amici note that the constitutionality of this statute is called into question by recent case law addressing abortion. *See McCormack v Hiedeman*, 694 F3d 1004, 1014-15 (9th Cir 2012) (finding that imposing criminal penalties on pregnant women themselves for having an unlawful abortion creates an unconstitutional undue burden upon the right to abortion); *McCormack v Hiedeman*, 900 F Supp 2d 1128, 1145 (D Idaho 2013). Regardless, § 125.55 explicitly specifies the intended subjects of that law (pregnant women), the intent required to commit the offense, and the prohibited outcome. *See People v Hall*, 158 AD2d at 77 ("an essential element … is that the one carrying out the act must possess the intent to cause a miscarriage.").

By contrast, Penal Law § 125.15 makes no reference to pregnant women other than as possible victims in the case of death due to an unlawful abortional act. It cannot be assumed that the Legislature would remain silent on this issue where it has otherwise been so explicit in distinguishing harm to fetuses caused by pregnant women and harm to fetuses caused by assailants. *See e.g. Matter of Town of Eastchester v New York State Bd. of Real Prop. Servs.*, 23 AD3d 484, 485 (2d Dept 2005) ("Pursuant to the maxim *expressio unius est exclusion alterius*, 'where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded." (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240)). This is especially so when to conflate the two would make pregnant women a special class of perpetrators who can commit the crime of manslaughter by recklessly harming themselves. But the Legislature did no such thing, and thus the manslaughter statute may not be judicially expanded in defiance of clear statutory intent.

3. *To interpret the manslaughter law to criminalize neonatal losses would create absurd results.*

As the State concedes, this Court must interpret the plain and unambiguous meaning of a statutory text so as to avoid "absurdity and contradiction." *People v Quinto*, 77 AD3d at 82, citing *Tompkins v Hunter*, 149 NY 117, 123 (1896). A literal interpretation of the law that produces "inequality, injustice, or absurdity" should be

discarded. *See Matter of Hogan v Culkin*, 18 NY2d 330, 335 (1966). Courts must presume that the Legislature did not intend unjust or unreasonable results and must likewise construe the laws consistent with that presumption. *Zappone v Home Ins. Co.,* 55 NY2d 131, 137 (1982).

It would be patently absurd and contradictory for intentional terminations of pregnancy to be treated as a Class A misdemeanor (the constitutional issues raised by such prosecutions notwithstanding, *see McCormack v Hiedeman*, 694 F3d at 1014-15), and unintentional neonatal losses to be a class C Felony.[2] In fact, under the State's proposed interpretation, a woman would potentially be criminally liable for a felony if she undertook a risk at *any* point in her pregnancy that later led to a premature delivery and infant loss: courts have found liability in third parties for injuries to later born-alive infants occurring significantly prior to viability. *See e.g. Leighton v City of New York*, 39 AD3d 84 (2d Dept 2007) (holding that a deceased plaintiff stated a cause of action for negligence where the plaintiff was a pre-viable 14 week fetus at the time of injury and died after a premature live birth). To extend the homicide statute to a

[2] An analogous "absurd result" of "criminalizing a nonfatal [prenatal] injury while not criminalizing conduct resulting in a fatal injury" was recently addressed by the Supreme Court of North Dakota in deciding whether to judicially expand a child endangerment statute to a child born alive after exposure to controlled substances in utero. *State v Stegall*, 828 NW2d 526, 533 (ND 2013). That court resolved the inconsistency by reaffirming its refusal to extend jurisdiction into the womb, holding that there is "no distinction between a factual scenario in which the pregnant woman prenatally ingests a controlled substance and the child subsequently dies *in utero* and the factual scenario in which the child is born alive for purposes of criminal prosecution of the mother." *Id.* (citing *State v Geiser*, 763 NW2d 469 (ND 2009) (reversing the child endangerment conviction of a woman who suffered a drug overdose and pregnancy loss)).

pregnant woman in this manner would create a legal duty to prioritize the safety of her fetus over all else for the entirety of her pregnancy, and to know at all times whether she was pregnant in order to assess the risk that any particular act or decision would have on a pregnancy.

4. *The language of an un-enacted bill that proposes to protect pregnant women from unconstitutional and ill-advised prosecution in the future does not provide authority for such prosecutions now.*

Finally, the State has offered, as proof that New York law currently permits the criminalization of pregnancy losses, an "unborn victims of violence" bill introduced in the 2015 legislative session. The bill, 2015 NY Senate Bill 2532 – which did not pass and thus cannot serve as any kind of evidence of legislative intent – proposes to add fertilized eggs, embryos, and fetuses to the category of "persons" who may be victims of an assault or homicide, and states that it may *not* be construed to permit criminal prosecution of pregnant women for anything other than intentional and legally unjustifiable self-induced abortion. 2015 NY Senate Bill 2532 § 3 (3); § 4 (2)(C).

The bill does not, as the State claims, suggest that the current law *may* be construed to permit prosecution for anything other than what is explicitly permitted by the Self-Abortion statute. If it shows anything at all, it demonstrates a concern that the feticide laws that have proliferated across the nation since the 1970s have been used against pregnant women in almost every jurisdiction, almost invariably without

statutory authority.[3] These wrongful prosecutions often occur even in defiance of explicit statutory protections for women in relation to their own pregnancies.[4] So, once a state creates non-abortional crimes against the unborn, a provision like the one in this bill is the only bulwark against criminal investigations, arrests, and charges against women for their own pregnancy or infant losses. New York, having no such crimes, has never needed such a protection.

Contrary to the State's claims of implicit culpability for infant loss, pregnant women are so differently situated to third parties who attack them and cause them to miscarry that they must be explicitly *included* in statutes by legislatures rather than left to judicial interpretation. As explained below, even if pregnant women were specifically included as the subjects of murder laws in relation to their own pregnancies, their inclusion would violate the Constitution. In fact, protecting, not punishing, pregnant women is a fundamental facet of the law inherited from the common law and embraced by virtually every sister jurisdiction to consider the issue.

B. To permit prosecutions for neonatal losses would reject New York's legal traditions and the weight of American case law, making New York an extreme outlier.

New York and the majority of sister states recognizes the difference between suffering a neonatal loss and causing a woman to suffer one. An "overwhelming

[3] 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, 317 (2013).
[4] *Id.*

majority" of U.S. jurisdictions do not permit the prosecution of women in relation to their own pregnancies. *See, e.g., State v Aiwohi*, 123 P3d 1210, 1214 (Haw 2005). To permit such prosecutions here would be a marked departure from New York jurisprudence - a departure with no foundation in law but with grievous consequences for both public health and women's legal status.

1. *The "born-alive" rule does not permit prosecutions of women in relation to their pregnancies.*

New York's homicide laws were codified to adopt the common law "born alive" rule. *People v Vercelletto*, 135 Misc2d 40, 43 (Ulster County Ct 1987); *People v Hayner,* 300 NY 171 (1949). The Penal Code's definition of victims of homicide as only including persons born alive is an inheritance from that tradition. *People v Hall*, 134 Misc2d 515, 516 (Sup Ct, NY County 1987), affd *People v Hall,* 158 AD2d 69 (1st Dept 1990); *see also* Amended Decision and Order, *People v Gilligan*, No. 5456 (Sup Ct, Warren County Apr 19, 2004) (dismissing child endangerment charges against woman who used alcohol while pregnant and stating that "[t]he commonly accepted notion of a 'child' is a person who has been born," not a fetus).

No court to examine the issue of whether the "born alive" rule creates criminal culpability for women who experience neonatal losses has affirmed such a prosecution. *See State v Ashley*, 701 So2d 338 (Fla 1997)*; State v Aiwohi*, 123 P3d at 1212; *State v. Deborah J.Z.*, 596 NW2d 490 (Wis Ct App 1999) (granting motion to

dismiss attempted homicide charges brought against a woman who used alcohol just before delivering).[5] As the Supreme Court of Florida explained when deciding whether a young woman could be charged with manslaughter for the death of her baby born alive but premature due to a self-inflicted gunshot wound to the abdomen, "[a]t common law, while a third party could be held criminally liable for causing injury or death to a fetus, the pregnant woman could not be." *State v Ashley,* 701 So2d at 340. That court declined to create a new form of criminal liability without legislative directive, declaring that it could not "abrogate willy-nilly a centuries-old principle of the common law —which is grounded in the wisdom of experience and has been adopted by the legislature— and install in its place a contrary rule bristling with red flags and followed by no other court in the nation." *Id.* at 342-43.

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[5] However, one commonly quoted version of the born alive rule states:

> If a woman be quick with childe and by potion or otherwise killeth it in her wombe, or if a man beat her whereby the childe dyeth in her body and is delivered of a dead childe this is a great misprision (misdemeanor) and no murder, but, if the childe be born alive and dyeth of the potion or battery or other cause this is murder. (73 Coke, Institutes, at 58 [1648].)

This has been a source of some confusion, which was clarified by Professor Cyril Means, Jr. Professor Means reviewed early statements of common law and concluded that women had a liberty of abortion at any stage in pregnancy and that Coke's suggestion that self-induced pregnancy loss was murder was "an outrageous attempt to create a new common-law misprision" to fulfill Coke's "politico-religious motives." *See* Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty,* 17 N.Y. L. Forum 335, 345-54 (1971). Moreover, a Florida appeals court relied on this passage in affirming the denial of a motion to dismiss a manslaughter charge against a pregnant woman, *see State v Ashley,* 670 So2d 1087, 1089 (Fla Dist Ct App 2d Dist 1996), and was overturned upon appeal by the Florida Supreme Court. *State v Ashley*, 701 So2d 338.

Connecticut's high court provided an account of the common law doctrine that explained why women were not held criminally liable for acts affecting fetuses they carry:

> At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another [. . .] It was in truth a crime which, in the nature of things, she could not commit.

State v Carey, 56 A 632 (Conn 1904). To the extent that New York has abrogated this doctrine, it has done so only explicitly and only for the Self-Abortion crimes, which, unlike manslaughter, are misdemeanors requiring an intentional act.

In *State v Aiwohi,* the Supreme Court of Hawaii reversed the manslaughter conviction of a woman who had smoked methamphetamine during her pregnancy and whose baby died several days after birth, noting that "an overwhelming majority of the jurisdictions confronted with the prosecution of a mother for her own prenatal conduct, causing harm to the subsequently born child, refuse to permit such prosecutions." 123 P3d at 1214.

In fact, only two states' high courts have rewritten state law to permit charging pregnant women with a crime in relation to their own pregnancies. *See Ex Parte Ankrom & Kimbrough,* 152 So3d 397 (Ala 2013), *Whitner v State,* 492 SE2d 777, 786 (SC 1997), and their reasoning is inapplicable in New York. In distinguishing South Carolina from all of its sister states, that Whitner court noted that all of the other

states that had unanimously rejected judicial expansion of existing child abuse or related laws had done so based on "entirely different bodies of case law from South Carolina." *Whitner*, 492 S.E.2d at 782. Moreover, the South Carolina Supreme Court, unlike New York and most other states, retains the power to create common law crimes. This power, explicitly exercised in *State v. Horne*, 319 S.E.2d 703, 704 (1984), provides the unique basis for South Carolina's aberrant decision. In Alabama, the Supreme court reached the extraordinary conclusion that in Alabama the plain meaning of the word "child" includes the unborn from the moment a pregnancy begins. *Ex Parte Ankrom & Kimbrough,* 152 So3d at 421. These states' interpretations are foreclosed in New York because a fetus is not a child, *see* Amended Order, *People v. Gilligan*; by the plain language of Penal Law § 125.00;[6] and because legal liability attaches only if a child is born alive. In short, these outlier states operate in different common law and statutory schemes – and, as will be discussed below, imperil women's constitutional rights.

2. *New York courts have declined to expand existing laws to punish women for pregnancy outcomes.*

[6] Furthermore, fundamental rules of due process notice would prohibit the application of a wholly unprecedented interpretation of the law to Ms. Jorgensen in particular. *See e.g. State v Horne*, 319 SE2d 703, 704 (SC 1984) (declaring a new crime of feticide under South Carolina courts' unique "right and the duty to develop the common law," but reversing the defendant's conviction because "[t]he criminal law whether declared by the courts or enacted by the legislature cannot be applied retroactively.")

That Penal Law § 125.15 is not applicable as against a pregnant woman is also evident from the fact that New York courts have rejected parallel prosecutions for child endangerment when the alleged act was committed by a pregnant woman in relation to her own pregnancy. *See People v Morabito*, 151 Misc2d 259 (Geneva City Ct, Ontario County 1992) (dismissing child endangerment charges against woman who gave birth and allegedly used cocaine while pregnant). Indeed, the trial court relied on *Morabito* in dismissing the count of child endangerment against Ms. Jorgensen. *People v Jorgensen*, 26 Misc3d 1232(A), 907 NYS2d 439 (Sup Ct, Suffolk County 2010). That court rightly concluded that the term "child" under Penal Law § 260.10 (1) does not include fetuses, and that there was therefore no child to be endangered at the time of the accident. A later live delivery did not change that.

Finding no support in criminal cases, the State points to cases where New York family law courts have extended limited protection to fetuses. Those decisions are not only entirely inapplicable to interpreting the criminal code, but they are markedly split, with at least one court declining to find abuse and neglect based on prenatal harms because it could discern "no evidence in either the Family Court Act or its legislative history that New York State has seen fit to regulate a pregnant woman's body or to control her diet, medication, exercise or smoking habits on behalf of a fetus." *In re Fletcher*, 141 Misc2d 333, 336 (Fam Ct, Bronx County 1988). That court noted that "[a]n expectant mother, just like any other person, is protected by a constitutional

right to privacy and bodily integrity which the State may not violate without showing a compelling State interest. *Id.* (citing *Roe v Wade*, 410 US 113, 155 [1973]; *Thornburgh v Am. Coll. of Obstetricians & Gynecologists*, 476 US 747 [1986]; *Schloendorff v Socy. of N.Y. Hosp.,* 211 NY 125 [1914].) Even the court in *Gloria C. v William C.*, cited by the State to justify punishment of pregnant women, acknowledged that protecting a fetus *by granting an order of protection to a pregnant woman* is only permissible when "the mother's constitutional privacy right is not involved." *In re Gloria C. v William C.,* 124 Misc2d 313, 323 (Fam Ct, Richmond County 1984).

One case relied upon by the State in particular, *In re Unborn Child*, 179 Misc2d 1 (Fam Ct, Suffolk County 1998), is plainly wrong. In that case, the Suffolk County Family Court conjured a legal personality for fetuses to find a substance-addicted woman liable for derivative neglect of her unborn child. In so doing, it grossly misconstrued the homicide law, stating that the reference to fetuses past 24 weeks means that these fetuses can be victims of homicide, notwithstanding case law to the contrary. *Id.* at 7-8. Notably, that court also claimed that "the District of Columbia Court of Appeals held that a mother's penumbral privacy right against bodily intrusion was properly subordinated to the interests of the unborn child and State" when she was forced to a undergo a court ordered cesarean surgery that killed her and her extremely premature baby. *Id.* at 16, citing *In re A.C.*, 533 A2d 611 (DC 1987). But that decision was vacated: the rule actually enunciated in *In re A.C.* is precisely

opposite. *See In re A.C.,* 573 A2d 1235, 1252 (DC 1990) (A pregnant patient's wishes control "in virtually all cases unless there are truly extraordinary or compelling reasons to override them. Indeed, some may doubt that there could ever be a situation extraordinary or compelling enough to justify a massive intrusion into a person's body, such as a caesarean section, against that person's will.") Thus *Unborn Child* cannot provide any persuasive authority and should be discounted.

This Court set out the correct rule in *Nassau County Dept. of Social Servs. ex rel. Dante M. v. Denise J.,* 87 NY2d 73 (1995), holding that evidence of prenatal substance exposure alone is insufficient to prove child neglect under the Family Court Act, *id.* at 79. In any event, Family Court Act child abuse proceedings and the prosecution for child endangerment under the Penal Code have different purposes, *see People v Roselle*, 84 NY2d 350, 358 (1994) (A child protective proceeding "seeks to safeguard the child," whereas child endangerment prosecutions "yields a final determination conclusive of defendant's penal responsibility."), and New York courts, including the first trial court in this case, have rejected child endangerment charges for prenatal injuries. *See People v Jorgensen*, 26 Misc3d 1232(A), 2010 NY Slip Op 50348(U) (Sup Ct, Suffolk County 2010)*; People v Morabito*, 151 Misc2d 259. It is nonsensical to suggest that Family Court cases authorize homicide prosecutions when they do not even authorize prosecutions under the analogous provisions of the Penal Code.

C. Permitting criminal charges for pregnancy and infant losses would disregard the unique relationship between the pregnant woman and the fetus she carries.

As the U.S. Supreme Court has acknowledged, the biological realities of pregnancy warrant consideration by law because "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Planned Parenthood v Casey*, 505 US 833, 852 (1992). For the law to impose a duty upon a woman to remain safe and healthy in the name of her fetus defies common sense, would have devastating consequences, and is unconstitutional.

This principle was articulated by the Supreme Court of Illinois when it refused to create liability, even in tort, for a woman to her child for harms from an injury that occurred prenatally: "It would be a legal fiction to treat the fetus as a separate legal person with rights hostile to and assertable against its mother. The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant." *Stallman v Youngquist*, 531 NE2d 355, 360 (Ill 1988).

Similarly to the rule enunciated by this Court in *Endresz v. Friedberg*, 24 NY2d 478 (1969), Illinois recognizes "a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother." *Stallman,* 531 NE2d at 359, citing *Renslow v Mennonite Hosp.*, 367 NE2d 1250, 1255 (Ill 1977). However, the Illinois court – like this Court in *Woods v. Lancet*, 303 NY 349 (1951), which accepts

that "such a child, still in the womb, is, in one sense, part of its mother" – recognized that to make such a right assertable against the pregnant woman herself "would have serious ramifications for all women and their families, and for the way in which society views women and women's reproductive abilities." *Id.* Creating liability in third parties for harm to a fetus later born alive corrected "[t]he error that a fetus cannot be harmed in a legally cognizable way when the woman who is its mother is injured," but to create a duty in pregnant women to be guarantors of fetal wellbeing would "make an error of a different sort, one with enormous implications for all women who have been, are, may be, or might become pregnant." *Id.* The court rejected the view that a pregnant woman owes legal duties to the fetus she carries, explaining that this would not only make mother and child "legal adversaries from the moment of conception until birth," it would legally enshrine the belief that "a woman should subordinate her right to control her life when she decides to become pregnant or does become pregnant." *Id.*

Following these principles, a Texas appellate court recognized the reality that while "a fetus is more than merely a part of its mother[,] . . . the unique symbiotic relationship between a mother and her unborn child . . . cannot be ignored." *Chenault v Huie*, 989 SW2d 474, 475 (Tex App 1999). In that case, the court refused to recognize a cause of action in tort on behalf of a minor born with cerebral palsy against her mother, who had used illegal drugs during her pregnancy. The court

emphasized the far-reaching consequences of treating the mother no differently than a third party in terms of legal liability:

> [Such an obligation would affect every aspect of a woman's life for many years, including her diet, her physical and sexual activity, and even her choice of work. No duty currently imposed under Texas law has such far-reaching ramifications on matters involving day-to-day personal decisions.

Id. at 477.

New York's Penal Code dictates that a person "acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when [she] is aware of and consciously disregards a substantial and unjustifiable risk." Penal Law § 15.05 (3). Every pregnant woman who walks to work on an icy sidewalk, strains to lift a child or elderly relative, or climbs a ladder to reach an item on a high shelf is aware of and consciously disregards a substantial risk. The potential for a tragic outcome for each situation is the same; whether that risk is unjustifiable can only be determined by the pregnant woman herself in the context of her life and family. The State offers no limiting principle other than that the survival of a newborn for any amount of time transforms an accident into a crime.

Further support for the distinction between harm to pregnant women and acts by pregnant women comes from courts analyzing challenges to feticide laws raised by men claiming that it is gender discrimination to permit abortion but prosecute feticide. *See e.g. Commonwealth v Bullock*, 913 A2d 207, 216 (Penn 2006) ("[T]he General

Assembly had a legitimate basis for distinguishing between the mother and everyone else. Simply put, the mother is not similarly situated to everyone else, as she alone is carrying the unborn child."); *Minnesota v Merrill,* 450 NW2d 318, 321 (Minn 1990) (dismissing Equal Protection claim of a man who shot and killed a woman carrying a 28-day embryo and argued that he was similarly situated to a pregnant woman terminating a pregnancy, noting that "the situations are not similar"). Importantly, these cases recognize that the pregnant woman has constitutional rights, including but not limited to the right to terminate the pregnancy, which are not implicated in prosecuting a third-party assault against a pregnant woman. *E.g. People v Ford*, 581 NE2d 1189, 1199 (Ill App Ct 1991) ("A woman has a privacy interest in terminating her pregnancy; however, defendant has no such interest.").

In New York and elsewhere, the difference between criminal and noncriminal conduct toward a fetus is not simply whether or not the fetus survives to birth, but the consent and autonomy of the woman without whom the fetus would not exist. Thus, legal abortional acts are not automatically transmuted into homicides if a fetus is unintentionally born alive. Nor should a pregnant woman's actions – even those characterized or perceived as reckless with respect to her own body – be transformed into a homicide if she experiences a premature birth. The factor that escalates the act of a third party that causes the death of a born-alive child to a homicide is that the act

was always a criminal offense toward the pregnant woman.[7] *Cf. Gloria C. v William C.,* 124 Misc2d at 315 ("Concededly, almost every act injurious or potentially injurious to the unborn child would, at the same time, be similarly offensive to the [woman seeking an order of protection for her fetus after experiencing intimate partner violence directed at the fetus]"). The distinction between acts committed *against* pregnant women and those undertaken *by* pregnant women is not trivial. The intent of legal doctrines punishing harms to fetuses is to protect, not punish, pregnant women.

II. Rewriting the manslaughter law to punish neonatal losses renders it unconstitutional.

Even had the Legislature intended to use the manslaughter law to hold women criminally liable for their pregnancies losses, to permit such a construction would violate women's constitutional rights to due process, equality, and liberty. Statutes must be interpreted, where possible, to avoid such clashes with constitutional liberties. *See People v Dietze*, 75 NY2d 47, 54 (1989)("It is an elementary maxim of constitutional decision making that '[n]o statute should be declared unconstitutional if by any reasonable construction it can be given a meaning in harmony with the fundamental

[7] The Family Court notes that "this is not always the case. For example, ingestion of certain drugs may be entirely harmless to the mother while causing damage or even death to the fetus." *Gloria C. v William C.,* 124 Misc2d at 315, citing *Hughson v St. Francis Hosp.,* 92 AD2d 131, 137 (2d Dept 1983). While this may be the case in medical malpractice, this reasoning is not applicable to the context of a crime, which requires criminal intent in the administration of the drug and, as recognized by the Ulster County Court, "it cannot be said that the loss of an unborn child through criminal negligence is not a serious physical injury as a matter of law." *People v Vercelletto*, 135 Misc2d 40, 47 (NY County Ct 1987) (permitting charges for vehicular assault, but not vehicular manslaughter, against a defendant who caused a pregnant woman to miscarry at seven months gestation.)

law.'") quoting *People ex el rel v Simpson*, 181 NY 252, 257 (1905). Women do not automatically yield their fundamental rights during pregnancy. *See e.g. Ferguson v City of Charleston*, 532 US 67 (2001) (upholding, at all stages of pregnancy, a woman's Fourth Amendment protection against illegal searches and seizures, rejecting claims of fetal protection as a "special needs" exception); *In re A.C.*, 573 A2d at 1248 (upholding the right of all people to due process, privacy, and bodily integrity in vacating court-ordered cesarean surgery on a terminally ill woman); *Matter of Sara Ashton McK. v Samuel Bode M.*, 111 AD3d 474, 475 (1st Dept 2013) (holding that pregnant women have a constitutionally protected liberty to relocate that "putative fathers have neither the right nor the ability to restrict" by asserting home state jurisdiction over a fetus under the UCCJEA).

A. Prosecuting women who have pregnancy losses for manslaughter violates constitutional due process requirements.

One of the central purposes of the Penal Law is "[t]o give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction." Penal Law § 1.05 (2). This is consistent with the State and Federal constitutional due process guarantee that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Cramp v Bd. of Pub. Instruction*, 368 US 278, 287

(1961); *People v Bright*, 71 NY2d 376, 382 (1988) ("no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.")

A statute that fails to give adequate notice of proscribed conduct is void for vagueness. *Grayned v City of Rockford*, 408 US 104, 108 (1972). A statute is unconstitutionally vague if 1) as judicially construed, it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or 2) it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *City of Chicago v Morales*, 527 US 41, 56 (1999); *Kolender v Lawson*, 461 US 352 (1983), *Bright*, 71 NY2d at 382. Clear direction to law enforcement is recognized as "perhaps the more important aspect of vagueness doctrine," because "[t]he absence of objective standards to guide those enforcing the laws permits the police to make arrests based upon their own personal, subjective idea of right and wrong." *Id.* at 383. The State's application of the manslaughter statute to Ms. Jorgenson fails on both counts.

The legal principle that would follow from permitting women to be charged with manslaughter if they give birth to babies who do not survive would fail to give constitutionally adequate notice of what conduct is proscribed. It could apply to any number of acts or omissions believed by law enforcement to have led to the infant loss. Of every thousand women who give birth in New York, approximately four will

give birth to a baby who will not survive the first month of life.[8] Most of these deaths are explicable -- related to prematurity, congenital abnormalities, or cardiovascular issues stemming from delivery or shortly after. Others have no clear explanation. Further, all pregnant women are warned of a vast and often confusing list of activities and exposures to avoid, many of which are linked to premature delivery or other adverse infant outcomes.[9] Under the State's interpretation of § 125.15, any neonatal death may give rise to a criminal investigation to rule out criminal culpability.

If a premature birth caused by placental abruption due to a car accident can sustain a manslaughter charge, it stands to reason that eating deli meat and contracting a listeria infection that leads to a placental infection and premature delivery would as well.[10] In fact, while the State has made much of the possibility that Ms. Jorgensen was not wearing a seatbelt, wearing a seatbelt improperly (or, even wearing it properly) can cause a placental abruption in the event of a crash.[11] Working long hours in an

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[8] NY Dept. of Health, Vital Statistics of New York State 2013 (Feb. 2015) (Table 45: Infant Deaths, Neonatal Deaths, Post Neonatal Deaths and Perinatal Mortality By Resident County New York State – 2013) available at https://www.health.ny.gov/statistics/vital_statistics/2013/table45.htm (accessed Jul. 22, 2015).

[9] *See* H. Murkoff & S. Mazel, *What to Expect When You're Expecting* 68-84 (4th ed. 2008) (warning women to avoid, among other things, changing a cat litter box, consuming unpasteurized cheese, sushi or deli meats, gardening without gloves, inhaling when handling household cleaning products, and ingesting excessive caffeine).

[10] *Id.* at 502.

[11] Placental abruption "is the most common case of fetal loss" in car accidents. Kathleen Klinish et al,. *Injuries to Pregnant Occupants in Automotive Crashes*, Association for the Advancement of Automotive Medicine 2046, 2051 (1998), available at http://www-nrd.nhtsa.dot.gov/pdf/ESV/esv16/98S9P17.PDF. Because pregnant women are more likely to be injured without a car seat, fetal injuries are reduced when pregnant women wear seatbelts. *Id.* at

environment with exposure to chemicals, such as a nail salon,[12] having anxiety,[13] and being exposed to racism[14] have been linked to poor birth outcomes. ACOG's Committee on Ethics adds to the list poorly controlled diabetes, folic acid deficiency, obesity, and exposure to certain medications, asking, "If states were to consistently adopt policies of punishing women whose behavior (ranging from substance abuse to poor nutrition to informed decisions about prescription drugs) has the potential to lead to adverse perinatal outcomes, at which point would they draw the line?"[15]

The potential for unlimited power to second-guess every action or inaction of a pregnant woman, and the arbitrary enforcement it invites, has been considered by courts across the country deciding cases similar to this one. In *Cochran v Commonwealth*,

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2046. As the Centers for Disease Control and amicus American College of Obstetricians & Gynecologists ("ACOG") explain, proper placement of the seatbelt above and below a pregnant woman's belly helps ensure safer outcomes in the event of the crash; for this reason, both organizations encourage prenatal counseling on safe seatbelt wearing for pregnant women. ACOG, *FAQ 018, Car Safety for You and Your Baby* (2014); Centers for Disease Control & Prevention, Pregnancy Risk Assessment Monitoring System, Motor Vehicle Injuries, available at http://www.cdc.gov/prams/pdf/snapshot-report/motorvehicleinjuries.pdf. However, even pregnant women who are properly seatbelted still suffer placental abruption and attendant fetal harms in automobile accidents. In a study published in 1998, the majority of placental abruptions occurred when pregnant women did not wear seatbelts; but at least 9 of the 69 women were documented to have been "properly" wearing their seatbelts during the accident, and nonetheless, they suffered placental abruption in the crash. Klinish, et al., at 2052.

[12] Sarah Maslin Nir, *Behind Perfect Nails, Ailing Workers,* N.Y. Times, May 8, 2015, at A1, available at http://www.nytimes.com/2015/05/11/nyregion/nail-salon-workers-in-nyc-face-hazardous-chemicals.html (detailing harm, including miscarriage, caused by chemicals in nail polishes and solvents to women workers).

[13] N. Dole et al., *Maternal Stress and Preterm Birth*, 157 Am. J. Epidemiology 14 (2003).

[14] M.C. Lu et al., *Closing the Black-White Gap in Birth Outcomes: A Life-Course Approach,* 20 Ethnicity & Disease S2-62 (Winter 2010).

[15] Am. Coll. Obstetricians & Gynecologists, Comm. on Ethics, *Committee Opinion 321: Maternal Decision Making, Ethics, and the Law* 5 (Nov. 2005)(hereinafter ACOG Ethics Committee Op. 321)

the Kentucky Supreme Court recognized that prosecuting new mothers for the health status of their newborns would have an unlimited scope and create an indefinite number of new crimes based on habits, conditions, actions, and inactions that have been shown to – or are simply believed to – risk harm to the developing child, calling this "a plainly unconstitutional result that would, among other things, render the statutes void for vagueness." *Cochran v. Commonwealth*, 315 SW3d 325, 328 (Ky 2010). *See also State v Wade*, 232 S.W.3d 663, 666 (Mo 2007) ("the logic of allowing such prosecutions would be extended to cases involving smoking, alcohol ingestion, the failure to wear seatbelts, and any other conduct that might cause harm to a mother's unborn child."); *Reinesto v SuperCt*, 894 P2d 733, 736-37 (Ariz App 1995) (citing factors that may impact health at birth, including poor nutrition, vitamin and iron deficiencies, poor prenatal care, insufficient or excessive weight gain, and ingesting caffeine).

A woman would have no way of knowing which actions or inactions might lead to criminal prosecution, because advice to women about what they should do during pregnancy to promote a healthy infant is ever-evolving. The lack of warning is further exacerbated by the fact that in all of New York legal history, there has not been a single reported appellate review of such a prosecution.

The potential consequences of law enforcement overreach were considered by Maryland's high court, which rejected criminalization of pregnancy outcomes because

such would potentially penalize "engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child." *Kilmon v State*, 905 A2d 306, 311-12 (Md 2006). Moreover, "criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be." *Id.* Societal judgment and scrutiny of pregnant women and mothers might spur prosecutions for conduct that is questionable but not criminal. *Cf.* Chris Gottlieb, *Reflections on Judging Mothering*, 39 U. Balt. L Rev 371, 371 (Spring 2010) (describing the harsh public criticism of parents, especially low-income parents and parents of color in the child welfare system, "[T]he discretion of strangers disappears as soon as you have a child - in fact, it disappears as soon as you are visibly pregnant.")

At summation, the State invoked societal judgment of parents who fail to protect their children to escalate a minor offense – failure wear a seatbelt – into manslaughter. In precisely the type of argument warned against by sister states, the State claimed that Ms. Jorgensen was "responsible not only for herself, but for the protection of her [fetus]" (Tr. 2093), and that a fetus in utero and an unrestrained infant in the back seat are "the same thing" (Tr. 2094). Without a seatbelt on Ms. Jorgensen, the State argued, "there is no protection [for the fetus]. Nothing to stop her from going right into the steering wheel." (Tr. 2093-94). Rather than recognize that Ms. Jorgensen was shielding her fetus with her body at all times, and that any

injury to the fetus would only occur through severe injury to her, the State claimed that Ms. Jorgensen "did nothing to protect [her fetus] that day and did everything to harm her." (Tr. 2094-95). This overreach, a natural consequence of permitting women's pregnancy outcomes to be put on trial, is not only improper as a matter of due process, it employs gender stereotypes that offend constitutional guarantees.

B. Subjecting women to state control, surveillance, and punishment on the basis of pregnancy violates the Equal Protection Clause.

The State defends the idea that New York may punish women for neonatal losses by invoking an interest in the protection of potential human life, citing *Roe v Wade,* 410 US 113 (1973). Even if the State understood *Roe* correctly, the existence of a compelling state interest is the beginning of the analysis, not the end. But the State mistakes *Roe's* meaning. What the Supreme Court actually held in *Roe*, and reiterated in *Planned Parenthood v Casey*, 505 US 833, is that "[i]f the State is interested in protecting fetal life after viability, *it may go so far as to proscribe abortion during that period*, except when it is necessary to preserve the life or health of the mother." *Roe*, 410 US at 163-64 (emphasis added). The recognition of such an interest was in no way an invitation to the states to monitor, control, and potentially criminalize people who are or have the capacity to become pregnant, or who become pregnant and seek to carry those pregnancies to term. This aspect of *Roe* is limited to the context of abortion, and is circumscribed by the paramount interest of the woman, and the State, in her own life

and health. *Id.* The overarching principle established in *Roe* and *Casey* is that women's fundamental constitutional rights are retained throughout pregnancy, and pregnancy at any stage does not obviate the protections afforded to them.

What the State is really suggesting by asserting an interest in potential life in this context is the profoundly wrong and long rejected idea that women's lives and rights can be subordinated to a state interest in women's roles as mothers. Throughout history, the capacity for pregnancy has been offered as a justification for women's subordinate legal status. *See e.g. Int'l Union v Johnson Controls*, 499 US 187 (1991) (corporate policy barred women capable of becoming pregnant from certain positions); *Muller v Oregon*, 208 US 412, 421 (1908) (law limited work hours for women because "the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race"); *Bradwell v State*, 83 US 130, 141 (1873) (Bradley, J., concurring) (law denied access to the bar based on "duties, complications, and incapacities arising out of the married state"); *Hoyt v Florida*, 368 US 57 (1961) (upholding law limiting jury duty to men). Fortunately, our society has progressed beyond systematic discrimination against women under the law. Gender stereotypes, generalizations regarding women's abilities or characteristics, and entrenched perceptions of gender roles cannot justify discriminatory laws. *See United States v Virginia*, 518 US 515 (1996); *Frontiero v Richardson*, 411 US 677 (1973); *Reed v Reed*, 404 US 71 (1971). The law may not place additional restrictions on

women based on "ideology about women's roles . . . when they are mothers or mothers-to-be." *See Nevada Dep't of Human Res. v Hibbs*, 538 US 721, 736 (2003).

The State must offer an "exceedingly persuasive justification" for interpreting the manslaughter law in such a way that women are the only ones who can violate it by failing to wear a seatbelt or some other potentially self-injurious conduct. *See United States v Virginia,* 518 US at 532-33. Such an application of the manslaughter law is only justified if it serves "important government objectives," and that prosecution is substantially related to actually achieving those objectives. *Id.* at 524. Likewise, the New York constitution requires the government to show "both the existence of an important objective and the substantial relationship between the discrimination in the statute and that objective." *People v Liberta*, 64 NY2d 152, 168 (1984).

The gender-specific impact of prosecuting pregnancy outcomes is profound. As ACOG's Committee on Ethics warns, "these policies could result in a society in which simply being a woman of reproductive potential could put an individual at risk for criminal prosecution."[16] Critically, this prosecution is rife with gender-based stereotypes of precisely the type rejected by the Supreme Court as violating the Fourteenth Amendment. The State's summation repeatedly and explicitly compared Ms. Jorgensen's concern about her baby to the passenger of the other vehicle's concern about her husband, implying that Ms. Jorgenson did not show the requisite

[16] *See* ACOG Ethics Committee Op. 321, *supra* note 15, at 9.

concern about her baby. (Tr. 2090). This, despite the fact that one of the first people to arrive on the scene testified that when Ms. Jorgensen was trapped in her car with "her bone sticking out of her arm," one of the first things she said was that she was pregnant. (Tr. 214-15.)

Ms. Jorgensen's trial counsel objected to the comparisons, which the court dismissed by telling the jury that the attorneys would each "give [the jury] their versions of how they feel the evidence should be perceived and considered." (Tr. 2090-91). This prompted the State to redouble its insistence that Ms. Jorgensen's demeanor was not appropriately selfless for a severely injured pregnant woman:

> What sober pregnant woman doesn't ask about her baby? What sober pregnant woman doesn't -- everybody she meets, is my baby okay? Her arm could be falling off, take my baby, save my baby, don't worry about me. Not the defendant. Is my face okay? Are my teeth okay? It's disturbing.

(Tr. 2091).

The State also introduced in summation an entirely fabricated scenario that Ms. Jorgensen went home and "ha[d] a few drinks" after shopping at Michael's craft store, apparently basing these speculations on the fact that Ms. Jorgensen had filled a prescription for the anti-anxiety medications alprazolam and clonazepam while she knew she was pregnant. (Tr. 2102-23). The suggestion here is plain: a good mother who cared about her baby would stop taking any medication that could have an impact on her pregnancy; because Ms. Jorgensen did not, she loses the presumption

in her favor and a jury may assume facts not in evidence about her behavior and her intent toward her baby. The constitutional guarantee of equality under the law cannot countenance prosecutions premised on such blatant gender-based stereotypes; the State's theory of liability openly invites them. The Stallman court in Illinois highlighted this precise concern, noting:

> If a legally cognizable duty on the part of mothers were recognized, then a judicially defined standard of conduct would have to be met. It must be asked, By what judicially defined standard would a mother have her every act or omission while pregnant subjected to State scrutiny? By what objective standard could a jury be guided in determining whether a pregnant woman did all that was necessary in order not to breach a legal duty to not interfere with her fetus' separate and independent right to be born whole? In what way would prejudicial and stereotypical beliefs about the reproductive abilities of women be kept from interfering with a jury's determination of whether a particular woman was negligent at any point during her pregnancy?"

Stallman, 531 NE2nd at 277-78.

The undisguised gender stereotyping at work here cannot be justified by any asserted state interest. Assuming for the sake of argument that a state interest in protecting potential life could ever justify prosecuting women for unintentional pregnancy outcomes, arresting women for the outcome of their pregnancies is not a reasonable means of achieving this interest. In fact, rather than help promote healthy birth outcomes, states thwart maternal and child health when they threaten pregnant women with criminal or civil penalties, as amici will discuss below. Thus, the State

could not meet even a rational basis test in justification of this discrimination, as the only possible interest the State could claim is undermined by this prosecution.

C. Prosecuting women for neonatal losses violates reproductive privacy.

In addition to the right to be treated with equality under the law, the Fourteenth Amendment protects a person's right to become pregnant, seek to carry a pregnancy to term without penalty, or terminate a pregnancy without undue burden. *See Carey v Population Servs. Int'l*, 431 US 678 (1977); *Eisenstadt v Baird*, 405 US 438, 453 (1972)(the Fourteenth Amendment ensures the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") State actions that impose such burdens on a fundamental right cannot be justified absent a compelling state interest. *Skinner v Oklahoma*, 316 US 535 (1952).

In *Cleveland Bd. of Educ. v LaFleur*, 414 US 632 (1974), and *Turner v Dep't of Emp't Sec.*, 423 US 44 (1975), the Supreme Court rejected policies that penalized workers who decided to bear a child. The Court recognized that restrictive maternity leave regulations can "constitute a heavy burden on the exercise of . . . freedom of personal choice in matters of marriage and family life. *LaFleur*, 414 US at 639-40. The Court looked not at whether the policy's "goals [were] legitimate, but rather whether the particular means to achieve those objective unduly infringe upon the [pregnant woman's] constitutional liberty." *Id.* at 648. Several federal appellate courts followed

suit. *See e.g. Intl. Union v Ind. Empl. Sec.*, 600 F2d 118 (7th Cir 1979) (statutes denying unemployment compensation to women willing and able to work, but denied the opportunity to do so because of pregnancy, violated the Due Process Clause); *Crawford v Cushman*, 531 F2d 1114 (2d Cir 1976) (Marine Corps regulation mandating discharge for pregnancy unconstitutionally restricted the exercise of personal freedoms protected by the Fourteenth Amendment).

Whether what was at stake was a restrictive regulation, denied work opportunity, or heightened penalty, the women in these cases were subjected to separate and unequal laws solely because they were pregnant, implicating the same constitutional concerns that are at the very foundation of substantive due process jurisprudence. Here, prosecution for second-degree manslaughter law followed from Ms. Jorgensen's attempt to save her baby's life by consenting to emergency cesarean surgery. Indeed, Ms. Jorgensen could have avoided criminal charges only by giving up her fundamental right to bear her child; had her baby died in the womb, no charges would lie. Thus, the manslaughter prosecution heavily burdens fundamental rights, in furtherance of no compelling (or even rational) purpose.

D. The threat of prosecution for a neonatal loss strips women of their right to medical decision-making during pregnancy and childbirth.

Criminalizing neonatal losses also directly offends the constitutional and common law right to medical decision-making. Pregnant women, no less than other

persons under the Constitution, have a right to refuse any proposed course of medical treatment. *See e.g. Cruzan v Dir., Mo. Dep't of Health*, 497 US 261, 289 (1990) (O'Connor, J., concurring) ("[T]he liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment. . . ."). *See also Carey*, 431 US at 684-85. A New York case articulates the most frequently cited legal tenet regarding the common law right to bodily integrity: "Every human being of adult years and sound mind has a right to determine what shall be done with [her] own body." *Schloendorff v Socy. of N.Y. Hosp.*, 211 NY 125, 129-30 (1914). *See also Union Pac. Ry. Co. v Botsford*, 141 US 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."). New York courts have noted "[a] woman's established right to exercise virtually exclusive control over her own body" during pregnancy. *Kass v Kass*, 663 NYS2d 581, 585-86 (1997) *affd* 91 NY2d 554 (1998).

As advocates for women's health, including medical experts and organizations who advise pregnant patients, amici hope that pregnant women will follow the recommendations of their health care providers (as they most often do). Amici nevertheless recognize and respect the importance of the right to decline medical

recommendations, even at the peril of one's own health or that of their fetus.[17] The creation of new legal duties to ensure that a fetus is delivered and will survive after birth infringes upon this important right. *See Stallman*, 531 NE2d at 278 (noting that maternal-fetal liability would "infringe[] on her right to privacy and bodily autonomy"). According to ACOG's Committee on Ethics, respect for the pregnant patient's autonomy and "limitations in the ability to concretely describe the relationship of maternal behavior to perinatal outcome" militate against even trying to use the power of the state to guarantee birth outcomes.[18] However, if this novel interpretation of the law is upheld, any pregnant woman who disagrees with her healthcare provider about any intervention during childbirth may be criminally charged in the event of an adverse outcome.

Such a fate might have come to a pregnant Illinois woman threatened with a court-ordered cesarean surgery by physicians who believed that her baby's chance of survival was "close to zero" without immediate intervention. *In re Baby Boy Doe*, 632 NE2d 326, 328 (Ill App Ct 1994). Rather than issuing the court order for surgery, the Illinois appellate court recognized the fundamental importance of the right to medical decision-making. *Doe,* 632 NE2d at 331. Here, instead, the State proposes that the

[17] *See* ACOG Ethics Committee Op. 321, *supra* note 15, at 6 ("Justice requires that a pregnant woman, like any other individual, retain the basic right to refuse medical intervention, even if the intervention is in the best interest of her fetus.").
[18] *Id.* at 7.

constitutionally-protected medical decisions of pregnant women may give rise to arrest, trial, and even imprisonment if something should go awry.

The State improperly used Ms. Jorgensen's decisions about medical treatment not only to imply that she was impaired during the accident, but that she was immoral and dishonest for not considering the impact of medications she was taking on her developing fetus. In summation, utterly unfounded theories about Ms. Jorgensen drinking alcohol were supported by the accusation that Ms. Jorgensen was taking prescribed medications "you are not supposed to take while you are pregnant."(Tr. 2102). The state also suggested that the medications may have been the true cause of Ms. Jorgensen's perinatal loss: "Was [the baby's difficulty breathing] due to premature lungs or the drugs the defendant was taking that's known to affect a fetus's breathing? We'll never know. But [the baby] did not deserve that. She deserved a chance at life." (Tr. 2116). Inherent in this suggestion is the idea that Ms. Jorgensen should have ensured that her body was free from any medications that could compound issues related to premature delivery, and that she should be seen as culpable for using psychiatric medications that might have side effects.

The prosecution's behavior here demonstrates precisely why the criminal legal system should have no role in reproductive health. More than half a million pregnancies each year involve women with mental illnesses with an onset prior to or

during pregnancy.[19] As many as one-third of pregnant women have taken a psychotropic medication during their pregnancy.[20] Anxiety disorders, for which the drugs alprazolam and clonazepam are prescribed, are the most common psychiatric disorders among adults.[21] While the drugs carry a risk of side effects, anxiety and stress during pregnancy "are documented factors associated with poor obstetric outcomes" including stillbirth, preterm labor, and complications of delivery. [22]

Indeed, many commonly prescribed medications have side effects that may affect fetal development; whether to use them is a decision that each woman must make based on the potential risks and benefits to her and to her developing fetus. This is optimally a decision made in consultation with a team of experts, including an obstetrician, a psychiatrist, a primary care provider, and a pediatrician.[23] But women who cannot or do not make their medical decisions based on the advice of a coordinated team of specialists should not be punished by the law.

The possibility that a neonatal loss could open the door for law enforcement to pry into all of these private medical decisions and that they might become subject to scrutiny or have to be defended in court is precisely the end that medical experts, including amici, seek to avoid. It not only offends women's right to make medical

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[19] Am. Coll. Obstetrics & Gynecology, *Practice Bulletin 92: Use of Psychiatric Medications During Pregnancy and Lactation 1* (2008).
[20] *Id.*
[21] *Id.* at 6.
[22] *Id.*
[23] *Id.* at 4.

decisions, it hampers the ability of medical experts to advise their patients and help them find the best course of treatment.

Ironically, Ms. Jorgensen would not have been charged with a crime with respect to her baby had she exercised her constitutionally-protected right to refuse medical treatment upon admission to the hospital. Had she not sought to save her baby's life by having emergency cesarean surgery, her baby would not have been born alive, but would have been stillborn. Without a born-alive child, there is no other crime Ms. Jorgensen could have been charged with for harming her own body. The rule of law sought by the State would send a perverse message to women: wait to seek help until after they are certain they have had a miscarriage or stillbirth, because the survival of the child places them at risk of incarceration.

III. Prosecuting women for neonatal losses is cruel, unjust, and serves no state interest.

Amici contend that the question of whether women should be criminally liable for a failure to produce a baby who survives has already been answered by the Legislature, and is further resolved by the constitutional issues it raises. Even if this Court found that the question remains unanswered by the Legislature, the purposes of the Penal Law provisions "must be construed according to the fair import of their terms to promote justice and effect the objects of the law." (Penal Law § 5.00 [5]). The Penal Law was intended, in part, "to provide for an appropriate public response

to particular offenses, including consideration of the consequences of the offense for the victim, including the victim's family, and the community." (Penal Law § 1.05 [5]).

Here, the State demonstrates a serious misunderstanding of the consequences of creating new, gender-specific offenses to women, their infants, and families. Such prosecutions do not promote justice, but rather undermine the public health and unnecessarily compound the grief of women who have lost an infant.

1. *Creating new crimes for pregnant women harms maternal and infant health.*

Prenatal care is an important factor in preventing neonatal death. Lack of prenatal care is associated with a 1.4-fold increase in risk of neonatal death of Black infants, and a 1.5-fold increase for white infants.[24] New York has placed a high priority on addressing racial disparities in infant health outcomes.[25] Prenatal care can narrow the gap by 57%.[26] The State threatens to undermine these positive effects by changing the nature of prenatal care.

The appropriate role for a physician is as "counselor and medical advisor."[27] A relationship of trust is critical for effective medical care because the promise of

[24] *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).
[25] *See* N.Y. Dept of Health, New York State Prevention Agenda 2013-2017: Promoting Healthy Women, Infants and Children Action Plan (2012).
[26] *See* Vintzileos et al., *supra* note 24, at 1014.
[27] Am. Med. Ass'n, Board of Trustees, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2666 (1990) (hereinafter Legal Interventions During Pregnancy).

confidentiality encourages patients to disclose sensitive subjects to a physician.[28]Making pregnancy outcomes into crimes conscripts health care providers into a law enforcement role, compelling them to collect evidence from, report, and testify against their own patients. This is counterproductive: experts recognize "[e]ncouraging prenatal care and treatment in a supportive environment" is most likely to advance maternal and child health.[29] The American Medical Association has warned against the deterrent effect of threats of punishment:

> 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.[30]

This approach also violates healthcare providers' ethical obligation to protect patient confidentiality.[31] ACOG's Committee on Ethics calls the use of legal sanctions to attempt to guarantee healthy outcomes not only unjust, but "morally dubious."[32]

B. Adding potential criminal liability to an infant loss unnecessarily compounds the grief that women already experience.

Whatever the cause of a perinatal loss, two things are almost certainly true of the woman who experienced it: she grieves the loss, and she blames herself for it.

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[28] Am. Med. Ass'n, Code of Medical Ethics, *Opinion 5.05 – Confidentiality* (June 2007)("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.")(last updated June 2007).
[29] *See* ACOG Ethics Committee Op. 321, *supra* note 15, at 8.
[30] *See* Legal Interventions During Pregnancy, *supra* note 27, at 2667.
[31] *See* Am. Med. Ass'n, Code of Medical Ethics, *supra* note 28; *see also* Am. Nurses Ass'n, *Code of Ethics for Nurses with Interpretive Statements* (January 2015).
[32] *See* ACOG Ethics Committee Op. 321, *supra* note 15, at 7.

Adding the threat of invasive criminal investigations and arrest to perinatal losses will compound that suffering. The emotional experience due to perinatal loss is unique to the individual, but research shows that women may suffer psychological harm, extreme feelings of grief and loss, and even trauma.[33] Women who experience perinatal losses may also feel anxiety, shame, and self-blame.[34] Even when evidence points to a clear cause that women could not have prevented, such as extreme exposure to environmental toxins, women blame themselves for their loss.[35]

To ascribe criminal liability in this case, where Ms. Jorgensen is the one who has suffered the most direct loss, is cruel and inhumane. This is particularly so given the uncertainty of pregnancy. Indeed, Ms. Jorgensen's physician testified that there was "no way for [him] to know" whether the placental abruption had been caused by the accident, or whether it had occurred spontaneously and caused the accident. (Tr. 579). The causes of pregnancy complications are seldom as obvious as the criminal law requires to assign liability: scientific advancements continually provide new insights into fetal development, yet there is still much that remains unknown. More importantly, any new insights science may glean do not change the fact that women are entitled to fundamental rights that are not abridged by pregnancy at any stage.

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[33]Irving G. Leon, *Perinatal Loss*, in Psychological Aspects of Women's Health Care 141, 148-50 (2d ed., Nada L. Stodtland & Donna E. Edwards eds., 2001); Joanne Cacciatore & Suzanne Bushfield, *Stillbirth: A Sociopolitical Issue,* 23 Affilia: J. Women & Soc. Work 378, 378 (2008).
[34] Leon, *supra* note 33, at 148-50.
[35] Linda L. Layne, *In Search of Community: Tales of Pregnancy Loss in Three Toxically-Assaulted Communities in the U.S.*, 29 Women's Studies Quarterly 25 (2001).

Pregnant women bear unique risks to their lives and health by carrying to term.[36] These risks have been, and should continue to be, recognized at law.

CONCLUSION

Prosecuting women for manslaughter in cases of neonatal death is contrary to New York law and flies in the face of legal principles that seek to protect women from violence during pregnancy. It violates numerous constitutional guarantees with no benefit to any important – or for that matter, rational – state interest. Amici curiae therefore respectfully ask that this Court overturn the ruling of the court below and dismiss the count of second-degree manslaughter.

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July 23, 2015

Respectfully submitted,

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[36] Amnesty International, *Deadly Delivery: The Maternal Health Care Crisis in the USA* (2009).

STATEMENTS OF INTEREST FOR EACH AMICUS CURIAE

ACCESS Women's Health Justice removes barriers to sexual and reproductive health care and builds the power of Californian's to demand health, justice and dignity. It's programs include: a bilingual Healthline that connects women and girls throughout California to information, referrals and advocacy on sexual and reproductive health issues, upstream and downstream policy advocacy within the reproductive justice movement and policy debates, and engaging with communities to build support for women seeking reproductive health care, including abortion.

American College of Nurse-Midwives ("ACNM") with roots dating back to 1929, is the oldest women's health care organization in the United States. ACNM sets standards for the education, certification, and practice of certified nurse-midwives and certified midwives; supports research; administers and promotes continuing education programs; creates liaisons with state and federal agencies and members of Congress; and advocates for programs and policies that improve the health status of women and their families. The mission of ACNM is to promote the health and well-being of women and newborns within their families and communities through the development and support of the profession of midwifery, practiced by certified nurse-midwives and certified midwives. The philosophy inherent in the profession states that the midwives believe every individual has the right to safe, satisfying health care with respect for human dignity and cultural variations.

The 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 healthcare 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's companion organization, the American Congress of Obstetricians and Gynecologists (the "Congress"), is a professional organization dedicated to the advancement of women's health and the professional interests of its members. Sharing more than 56,000 members, including 4,252 in New York, the College and the Congress are the leading professional associations of physicians who specialize in the healthcare of women.

Backline promotes unconditional and judgment-free support for the full spectrum of decisions, feelings, and experiences with pregnancy, parenting, abortion, and adoption. Through direct service and social change strategies, Backline is building a world where all people can make the reproductive decisions that are best for their

lives, without coercion or limitation, and where the dignity of lived experiences is affirmed and honored.

C.A.R.E. Alliance NW, Inc. ("C.A.R.E Alliance") provides professional advocacy, education and addition counseling services, with a special emphasis on maternal addiction. Specifically, this program offers a unique and fully integrated program for pregnant, postpartum and parenting women with substance use disorders which offers specialized treatment and recovery counseling services paired with pregnancy, birthing, and postpartum support through a doula with advanced clinical training. Patient advocacy and education includes basic childbirth education, pain management in recovery, clinical guidance understanding and responding to Neonatal Abstinence Syndrome, support breastfeeding, advocacy interacting with health care providers and neonatal intensive care staff, and understanding patient rights in medical settings as well as child welfare systems. By providing this unique integrated model of care, C.A.R.E. Alliance seeks to reduce barriers to prenatal care for women with substance use disorders, increase access to compassionate care within existing systems of care, and provide comprehensive advocacy in setting which pregnant women with substance use disorders have often been poorly served.

The Center on Reproductive Rights and Justice at UC Berkeley School of Law ("CRRJ") seeks to realize reproductive rights and advance reproductive justice by furthering scholarship, bolstering law and policy advocacy efforts, and influencing legal and social science discourse through innovative research, teaching, and convenings. In essence, CRRJ propels policy solutions by connecting people and ideas across the academic-advocate divide. We believe all people deserve the social, economic, political, and legal conditions, capital, and control necessary to make genuine choices about reproduction – decisions that must be respected, supported, and treated with dignity.

Choices in Childbirth ("CiC") is a non-profit organization that is a national leader in consumer advocacy and outreach for women and their families. At CiC we believe that every woman deserves a safe, respectful and deeply fulfilling birth experience. We help women make informed decisions about where, how and with whom to birth. CiC opposes unauthorized state action that undermines women's ability to make these decisions.

Civil Liberties and Public Policy ("CLPP") is a national program that was founded in 1981 at Hampshire College to provide education and training on reproductive and sexual health, rights and justice issues.

Colorado Organization for Latina Opportunity and Reproductive Rights ("COLOR") serves as a sisterhood of Latinas dedicated to building a movement of Latinas, their families and allies through leadership development, organizing, and advocacy to create opportunity and achieve reproductive justice. Our goals are to work expansively and intersectionally to advance the Latino community by empowering young Latinas and their families to create policy and system change that allows us to lead healthy, successful lives. We achieve this by developing a growing number of youth-to-elder continuum of Latina leaders; by having an organized, vibrant, and sustained grassroots base; and by leveraging power and allyship with elected officials and stakeholders.

The **Desiree Alliance** is a social justice organization that is led by current and former sex workers in coalition with health professionals, harm reductionists, social scientists, educators, and their supporting networks focused on building leadership, capacity-building, political advocacy, policy-making, organizing and constructive activism amongst sex workers so that they can work for sex workers' human, labor and civil rights. Ultimately, we work to eradicate barriers that prevent best practices for those impacted by criminalization.

Harm Reduction Coalition ("HRC") 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. HRC recognizes that the structures of social inequality impact the lives and options of affected communities. Since its inception in 1994, HRC has advanced harm reduction philosophy, practice, and public policy by prioritizing areas where structural inequalities and social injustice magnify drug related harm.

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, with a focus on health and human rights, patient rights, and human experimentation.

MotherWoman, Inc. is a non-profit organization committed to supporting and empowering mothers to create positive personal and social change by building community safety nets, impacting family policy and promoting the leadership and resilience of mothers. MotherWoman advocates for family-friendly social policies that support mothers and their families as well as develops community networks, coalitions and taskforces to address perinatal mental health as a public health and social justice issue.

The National Latina Institute for Reproductive Health ("NLIRH") is the only national reproductive justice organization dedicated to building Latina power to advance health, dignity, and justice for 26 million Latinas, their families, and communities in the United States through leadership development, community mobilization, policy advocacy, and strategic communications. Latinas face a unique and complex array of barriers to accessing reproductive health and rights, including economic inequality, xenophobia, and racial and ethnic discrimination. These circumstances make it especially difficult for Latinas to access basic health care, including reproductive health care.

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

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, NWHN aspires to a health care system that is guided by social justice and reflects the needs of diverse women. NWHN is 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 healthcare that meets the needs of diverse women. The core values that guide NWHN's work include its belief that the government has an obligation to safeguard the health of all people; that it values women's descriptions of their own experiences and believes health policy should reflect the diversity of those experiences; and that it believes evidence rather than profit should determine what services and information are available to inform women's health decision-making and practices. NWHN is a membership-based organization supported by 8,000 individuals and organizations nationwide.

The Native Youth Sexual Health Network ("NYSHN") is an organization by and for Indigenous youth that works across issues of sexual and reproductive health, rights and justice throughout the United States and Canada. NYSHN works with Indigenous peoples across the United States and Canada to advocate for and build strong, comprehensive, and culturally safe sexuality and reproductive health, rights, and justice initiatives in their own communities. Our key areas of work include: Culturally safe sex education; Reclaiming rites of passage, coming of age ceremonies and traditional knowledge; Healthy relationships and violence prevention; Pregnancy options, youth parenting and families; Environmental justice and environmental violence; Harm reduction; Two-Spirited and LGBTTIQQA advocacy and awareness; Sexually Transmitted and Blood Borne Infections (STBBIs) and HIV/AIDS awareness and prevention; Youth in custody, jail, prison and the child welfare system; Sex trade, sex industries and street economies; Indigenous feminisms and masculinities; Sexual self-esteem and empowerment; Media literacy; Youth activism and human rights.

National Advocates for Pregnant Women ("NAPW") is a non-profit organization that advocates for the rights, health, and dignity of all women, focusing particularly on pregnant and parenting women, and those who are most vulnerable to state control and punishment. Through litigation, representation of leading medical and public health organizations and experts as amicus, and through organizing and public education, NAPW works to ensure that women do not lose their constitutional, civil, and human rights as a result of pregnancy. The organization also conducts research, and has published a peer-reviewed study on prosecutions of and forced medical interventions on pregnant women. NAPW believes that health and welfare problems experienced by women during pregnancy should be addressed as health issues, not as crime, and promotes policies that actually protect maternal, fetal, and child health.

The National Organization for Women in NYC ("NOW-NYC") works to promote reproductive rights, secure women's economic empowerment, and end discrimination and violence against women. NOW-NYC gives women a powerful voice. As the largest NOW chapter in the country, we play a key role in shaping both the local and national debate on the issues that impact women. NOW-NYC advocates for reproductive justice, including the rights of pregnant women.

Nursing Students for Choice ("NSFC") is a national grassroots organization dedicated to advancing and securing reproductive health and justice for all by advocating for reproductive health and abortion training, organizing nursing student activists, and supporting nursing leadership in reproductive rights and social justice. They seek to participate in this brief because NSFC opposes any policy that threatens women's health and that undermines the patient-provider relationship by forcing nurses to act in service of prosecuting pregnancy losses, which is in direct violation of reproductive justice.

Positive Women's Network USA ("PWN-USA") envisions a world where women living with HIV can live long, healthy, dignified, and productive lives, free from stigma and discrimination. Our mission is to prepare and involve all women living with HIV, in all our diversity, including gender identity and sexual expression, in all levels of policy and decision-making. In working to ensure the rights and dignity of women with HIV, PWN-USA promotes the realization of reproductive justice, including our right to choose when and how to be sexual and when or whether to have children and the information to make an informed decision.

The Religious Coalition for Reproductive Choice ("RCRC") is the leading national multi-faith organization whose supporters are called by our faiths to build a just and righteous society by advancing reproductive health, rights and justice for all. We mobilize faith leaders in support of sexual and reproductive health and justice, focusing on contraception, abortion, and sexuality education.

The Reproductive Justice Clinic at NYU School of Law is dedicated to protecting the civil and constitutional rights relating to reproduction, especially the rights of the most vulnerable -- those of child-bearing capacity. The Clinic is also dedicated to promoting the learning, research and policy advocacy needed to establish sound, sensible and fair policies to ensure good reproductive health care is in reality available to all. The Clinic trains law students and attorneys in constitutional and procedural law and policy and provides pro bono legal services to those who most need it to

obtain reproductive justice. The Clinic operates under the direction of Professor Sarah E. Burns.

SURGE Northwest is a nonprofit organization based in Seattle, Washington, that works to advance racial and reproductive justice through community mobilization, education, and policy advocacy. The organization's priorities include working to ensure reproductive health and justice for imprisoned people, as well as ensuring that all people have access to health care. Surge Northwest is particularly concerned that criminalization and incarceration are far too often used to respond to what are, in fact, public health concerns, to the detriment of communities of color and poor people. Surge Northwest supports sound, evidence-based public policies that promote health and reproductive justice.

* For individual experts, institutional affiliation is noted for identification purposes only.

R. Alta Charo, JD,* is a professor of law and bioethics. An elected member of the National Academies' Institute of Medicine, and formerly a member of President Clinton's National Bioethics Advisory Commission, she has written over 100 articles and reports on ethics and policy relating to human reproduction, genetic health, and medical research.

Wendy Chavkin, MD, MPH,* is a Professor of Population and Family Health and Obstetrics-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 for over two decades and done extensive research related to pregnant women, punishment and barriers to care.

Debra DeBruin, PhD,* is Director of the Center for Bioethics at the University of Minnesota. Previously, she served as a Health Policy Fellow for the United States Senate; she also worked as a consultant to the Institute of Medicine, the National Bioethics Advisory Commission, and the American College of Obstetricians and Gynecologists. She has been a member of a number of working groups relevant to public health in Minnesota. She teaches and conducts research on the ethics of research and public health policy.

Linda C. Fentiman, J.D., LL.M., is a Professor of Law at Pace University Law School. Professor Fentiman has taught and written extensively in the areas of criminal

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Deseriee A Kennedy, JD, is a Professor of Law at Touro Law Center, Central Islip, New York. She researches in the area of gender, race, mothering and domestic violence and is the author of numerous journal articles including, "The Good Mother," Mothering, Feminism, & Incarceration and Children, Parents, & the State: The Construction of a New Family Ideology, she is also a co-author of the third edition of the treatise, New York Law of Domestic Violence published by Thomson-Reuters.

Mary Faith Marshall, PhD, FCCM, is the Emily Davie and Joseph S. Kornfeld Professor and Director of the Program in Biomedical Ethics, and Professor of Public Health Sciences at the University of Virginia School of Medicine. Dr. Marshall is an elected fellow in the American College of Critical Care Medicine and is a former Fellow of the Kennedy Institute of Ethics at Georgetown University. She is past-president of the American Association of Bioethics and Humanities and past-president of the American Association for Bioethics. Dr. Marshall was the chairperson of the National Human Research Protections Advisory Committee, DHHS, has been an on-site reviewer for the Office for Human Research Protections, and has served on several special emphasis panels regarding clinical trials and research ethics at the National Institutes of Health. She has testified before Congress on the subject of perinatal substance abuse. She sits on the Ethics Committees of the American College of Obstetricians and Gynecologists and the American College of Critical Care Medicine.

Barbara Katz Rothman, PhD* is a Professor of Sociology and Public Health at the City University of New York, and author of many books and articles on issues related to motherhood, including "A Bun in the Oven: How the Food and Birth Movements Resist Industrialization: (forthcoming 2016); "Weaving a Family: Untangling Race and Adoption" (2006); "Recreating Motherhood" (2000); "The Tentative Pregnancy:How Ameniocentesis Changes the Experience of Motherhood" (1993); "Laboring On: Birth in Transition in the United States (Perspectives on Gender)" (2006) (with Wendy Simonds and Bari Meltzer Norman), and a work on the human genome project, "The Book of Life: A Personal and Ethical Guide to Race, Normality and the Human Genome" (2001). She is a feminist sociologist, past president of Sociologists for Women in Society, and The Society for the Study of Social Problems, and current president of the Eastern Sociological Society.

Sharon Stancliff, MD, FAAFP, is the Medical Director of the Harm Reduction Coalition. She oversees SKOOP, which provides overdose prevention services both directly in New York City and through education and capacity building nationally and internationally. She has been the Medical Director of a large methadone program and, as a Family Practitioner, she has provided prenatal care for many women including those in drug treatment. Dr. Stancliff also consults on drug related problems for the AIDS Institute, New York State Department of Health and for several international organizations.

Carolyn Sufrin, MD, PhD, FACOG* is an Ob/Gyn and a medical anthropologist who has worked extensively on reproductive health issues affecting incarcerated women. She has provided clinical care to women in jail, conducted clinical and ethnographic research, established a rotation for Ob/Gyn residents in jail, and done policy work. Dr. Sufrin completed medical school at Johns Hopkins University, did her residency training at Magee Women's Hospital, and then did a family planning fellowship at UCSF, where she also obtained a PhD in medical anthropology. She is now assistant professor at Johns Hopkins School of Medicine in the Department of Gynecology and Obstetrics.