

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

| | | |
|---------------------------|---|------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Appellee, |) | |
| |) | USCA NO. 17-3727 |
| vs. |) | |
| |) | |
| SAMANTHA FLUTE, |) | |
| |) | |
| Appellant. |) | |

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, National Advocates for Pregnant Women, National Perinatal Association, Native American Community Board, Native Youth Sexual Health Network, Sovereign Bodies Institute, American Academy of Addiction Psychiatry, National Alliance for Medication Assisted Recovery, Harm Reduction Coalition, Academy of Perinatal Harm Reduction, Women and Harm Reduction International Network, Birth Rights Bar Association, Medical Students for Choice, National Crittenton, Young Women United and individual experts: Dr. Elizabeth Armstrong; Dr. Arnold Cohen; Ms. Charon Asetoyer, M.A.; Louis Backus, M.P.H.; Dr. Jerry Ballas; Ruth Birgin; Jessica Danforth; Sarah Deer, J.D.; Dr. Alesha Elizabeth Doan; Dr. Stephen Kendall; Mark Kinzy; Gary Langis; Kandace Littlefoot; Annita Lucchesi; Dr. Ruth Rose-Jacobs, Sc.D.; Dr. Andrea Smith; Dr. Kimberly Sue; Lauren van Schilfgaarde J.D.; Jocelyn Woods, MA. CARC, CMA; and

Dr. Zeal (collectively, “*Amici*”)¹ submit this motion for leave to file the *amicus curiae* brief attached hereto in support of the Petition for Rehearing *En Banc* of the panel’s ruling in *United States v. Flute*, 929 F.3d 584 (8th Cir. 2019), filed on August 9, 2019, by Defendant-Appellee Samantha Flute. Defendant-Appellee has provided consent to this filing.

This case is appropriate for *en banc* review because the panel’s decision is an error involving a question of exceptional importance: whether the federal manslaughter statute can be used to criminalize the conduct of pregnant people. As Judge Colloton noted in his dissenting opinion: “This case raises profound moral and policy questions.” *Flute*, 929 F.3d at 594.

Pursuant to FED. R. APP. P. 29(a)(3)(A), proposed amicus National Advocates for Pregnant Women (“NAPW”), a non-profit legal organization, states that their interest in the above-captioned matter is: their commitment to advance the health and welfare of all people, focusing particularly on pregnant and parenting people and those most likely to be targeted for state control and punishment, low income people and people of color. NAPW has through litigation, representation of leading medical and public health organizations and experts as amicus, and through organizing and public education, worked

¹ Each Amici’s additional detailed statement of interest is included in Appendix A to the attached proposed brief.

nationally to ensure that people do not lose their 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 people. NAPW believes that health and welfare problems experienced by pregnant people should be addressed as health issues, not as crimes, and promotes policies that protect maternal, fetal, and child health.

1. As set forth in their statements of interest, all proposed *amici curiae* listed above are experts in medicine, public health, policy and/or the health and culture of American-Indian (hereinafter referred to as “Native”) communities. Their interest in this matter is: their commitment to the optimal health and birth outcomes for all women, including those in Native communities, and their commitment to reducing potential drug-related harms and advancing the public health. The precedent setting decision at issue in this matter can have a far-reaching impact on the health of pregnant people living within the Court’s jurisdiction.

2. All proposed *amici curiae* have an interest in ensuring that this Court grants *en banc* review and interprets the federal manslaughter statute in a manner that does not harm pregnant people or the public health.

3. Pursuant to FED. R. APP. P. 29(a)(3)(B), proposed *amici curiae* state that an amicus curiae brief is desirable and the matters raised therein are

relevant to the disposition of the matter for the following reasons: it will provide relevant information and a unique perspective analyzing the need for *en banc* review of a decision regarding a question of exceptional importance. *See* Petition for Rehearing En Banc, *United States v. Flute*, 929 F.3d 584 (8th Cir. 2019). The proposed brief will aid the Court by analyzing the impact of the panel's judicial expansion of the federal manslaughter statute and its creation of new and gender- specific criminal offenses for pregnant people. It will also aid the Court by identifying the manner in which such prosecutions will undermine the public health and unnecessarily compound the grief of those who have lost a pregnancy.

4. Pursuant to FED. R. APP. P. 29(a)(3), the proposed Brief of Amicus Curiae is attached hereto as Exhibit A.

CONCLUSION

For the foregoing reasons, *amici* respectfully request the Court grant the motion for leave to file the attached proposed Brief of Amicus Curiae in the above- captioned matter.

Respectfully submitted this 16th day of August, 2019.

/s/ Nichole A. Carper

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CERTIFICATE OF COMPLIANCE

Comes now the undersigned counsel for Amici Curiae and, with regard to the foregoing document, certifies as follows:

1. That the aforementioned document, was, before submission, scanned by the undersigned for viruses on August 16, 2019, utilizing the website <http://www.virustotal.com> and was found to be virus free.
2. That the aforementioned document also complies with Fed. R. App. P. 32 in that it was prepared in a proportionally spaced typeface using Microsoft Word 2016, Times New Roman Font Face in font size 14.
3. That the aforementioned documents comply with Fed. R. App. P. 35(b)(2)(A) in that contains 777 words.

Dated this 16th day of August, 2019.

/s/ Nichole A. Carper /s
Nichole A. Carper
Burd and Carper Law Office

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of August, 2019, a true and correct copy of the foregoing document was served upon counsel of record for all parties via the Court's EC/CMF filing system.

/s/ Nichole A. Carper /s
Nichole A. Carper
Burd and Carper Law Office

APPENDIX A

APPENDIX A: Descriptions of Individual Amici

Amicus curiae **National Advocates for Pregnant Women** (NAPW) is a nonprofit legal organization committed to advancing the human rights, health and welfare of all people, focusing particularly on pregnant and parenting people and those most likely to be targeted for state control and punishment – low income people and people of color. Through litigation, representation of leading medical and public health organizations and experts as amici, and research, organizing and public education, NAPW works to ensure that women do not lose their constitutional, civil, and human rights as a result of pregnancy. NAPW believes that health and welfare problems experienced by women during pregnancy should be addressed as health issues, not as crimes, and promotes policies that protect maternal, fetal, and child health.

Amicus curiae the **National Perinatal Association** (NPA) believes in preserving the autonomy and dignity of pregnant people and opposes the criminalization of perinatal substance use. Not only does NPA oppose the use of prosecutorial discretion to try pregnant people for the outcomes of their pregnancies, it resists the application of law that separates the fetus's interests from the pregnant person's. In this specific case, we know that substance use and pregnancy do not

prevent each other. So criminalizing their concomitance is in NPA's view illogical and a violation of Constitutional laws prohibiting gender/sex discrimination.

Amicus curiae the **Native American Community Board** (NACB) serves Native Americans in its home community of the Yankton Sioux Reservation in eastern South Dakota and nationally. The NACB's principles of equity, justice and fairness are the platform from which it strives to: empower the Yankton Sioux community (and Native Americans nationally); engage the community in identifying problems and solutions; and creatively implement solutions in ways that develop community leadership. The NACB prioritizes a women's right to access services for chemical & substance dependence and is aware that access to those services are often impacted by racial, economic and social disparities. Because of those disparities that exist within Native American communities Native women should not be prosecuted for not having access to service that others have access to assist with chemical dependency.

Amicus curiae **Native Youth Sexual Health Network** (NYSHN) works across issues of sexual and reproductive health, rights, and justice with an intergenerational network of relatives across the United States and Canada. As a grassroots community-based organization that centers culturally safe approaches to

harm reduction and meeting people where they are at, NYSHN knows from first-hand experience that further criminalization of Native peoples actually causes harm particularly when they are living the effects of colonially-oppressive policies that systemically marginalize them away from receiving adequate healthcare.

Amicus curiae **Sovereign Bodies Institute** is a non-profit Indigenous research institute dedicated to research that works to end gender and sexual violence against Indigenous peoples. We understand harm reduction, adequate access to healthcare, and trauma support as integral to the protection of Indigenous women and girls, and do not support incarceration of an Indigenous woman who lost her child due to a health issue for which there is a substantive lack of accessible supports and care in Indigenous communities.

Amicus curiae the **American Academy of Addiction Psychiatry** (AAAP) is the organization for learning and sharing the art and science of Addiction Psychiatry research and treatment.

Amicus curiae **National Alliance for Medication Assisted Recovery** (NAMA Recovery) is an organization composed of medication assisted treatment patients and health care professionals that are supporters of quality opiate agonist

treatment. The primary objective of NAMA Recovery is to advocate for the patient in treatment by destigmatizing and empowering medication assisted treatment patients. First and foremost, NAMA Recovery confronts the negative stereotypes that impact on the self-esteem and worth of many medication assisted treatment patients with a powerful affirmation of pride and unity.

Amicus curiae the **Harm Reduction Coalition** is dedicated to the importance of substance use, the role of harm reduction, the health, dignity and respect of people who use drugs, public health, medicine not criminalization, racial and social justice, gender, and attacks on bodily autonomy.

Amicus curiae the **Academy of Perinatal Harm Reduction** opposes the criminalization of perinatal substance use, the use of prosecutorial discretion to apply laws to pregnant people that are discriminatory, and separation of the interest of the fetus from the pregnant person.

Amicus curiae **Women and Harm Reduction International Network (WHRIN)** is a global platform working to accelerate the implementation and expansion of gender responsive harm reduction for women. The vision of WHRIN is that all self-identified women who use drugs have unfettered access to available, quality,

relevant health, social and legal services in a context of upholding human rights without stigma, discrimination or criminalization. The notion of prosecuting drug use in pregnancy is based on moral judgement, is not scientific and compromises sexual and reproductive health and gender equality goals.

Amicus curiae the **Birth Rights Bar Association** (BRBA) is dedicated to promoting rights associated with childbirth, including physical liberty, bodily integrity, due process, equal protection, religious liberty and informed consent. This case aligns with BRBA's interest in ensuring that the physiologic process of pregnancy, labor and birth are respected and that no pregnant person be criminalized for experiencing that physiologic process.

Amicus curiae **Medical Students for Choice** supports medical students advocating for comprehensive healthcare for pregnant persons nationwide and in 24 other countries. Poor access to healthcare for pregnant persons is common in this country, particularly for the economically disadvantaged and those, like Ms. Flute, who live in areas with comparatively few healthcare options.

Amicus curiae **National Crittenton** is a nonprofit national advocacy organization whose mission is to catalyze social and systems change for girls and young people

across the gender spectrum impacted by chronic adversity, violence, and injustice. Since our founding in 1883, it has advanced the rights, needs and potential of all girls across systems and fields including educational institutions. National Crittenton and the Crittenton family of 26 direct service providers have more than a century of experience supporting the needs, rights and potential of young mothers and their children through the provision of direct services and national policy advocacy. National Crittenton wholeheartedly shares concern for the public health and policy consequences of criminalizing pregnant people and substance use disorder, in particular in Native communities. Girls, young women and women in the United States all too often find themselves criminalized for behavior that results from years of victimization and marginalization and the complicated context of their lives. It is time to break this cycle of re-victimization.

Amicus curiae **Young Women United** (YWU) leads policy change, research, place-based community organizing, and culture shift by and for women and people of color in New Mexico. YWU works to build communities where all people have access to the information, education, and resources needed to make real decisions about our own bodies and lives. YWU works to expand and improve access to reproductive health and pregnancy related care for women and people may need over their lives. Young Women United is committed to improving and ensuring

reproductive decisions, access to health care and resources for women and people of color.

Individual Experts

*Institutional affiliations designated with * are provided for identification purposes only.*

Amicus curiae **Elizabeth Mitchell Armstrong, Ph.D., M.P.A.**, is an Associate Professor of Sociology and Public Affairs at Princeton University. She has research interests in public health, the history and sociology of medicine, reproductive and maternal health policy, social determinants of health, and medical ethics. Her forthcoming book investigates how the fetus came to be viewed as a person, in law, medicine, politics and culture. In addition to this new work, Armstrong has also written: *Conceiving Risk, Bearing Responsibility: Fetal Alcohol Syndrome and the Diagnosis of Moral Disorder* (Johns Hopkins University Press, 2003) as well as many articles on family planning, medical mistakes, adolescent motherhood, obstetrical views of risk and risk management, and the sociology of pregnancy and birth. She holds a joint appointment in the Princeton Department of Sociology and the Woodrow Wilson School of Public and

International Affairs, and is a faculty associate at the Office of Population Research. She is faculty director of the Health and Health Policy Certificate.*

Amicus curiae **Dr. Arnold W Cohen, M.D., OB/GYN** is a High-risk Pregnancy Specialist in the Department of Obstetrics and Gynecology at the Albert Einstein Medical Center.* Dr. Cohen served as Chairman, Division of Maternal-Fetal Medicine at Einstein Medical Center; Director, Obstetrics and Maternal-Fetal Medicine at the Hospital of the University of Pennsylvania; and Corporate Medical Director of Women's Health at U.S. Healthcare. In 2002, Dr. Cohen returned to Einstein Medical Center as Chairman and Residency Program Director. He also serves on the Board of Overseers of the Einstein Healthcare Network. Dr. Cohen has authored more than 100 articles and abstracts and is a reviewer for many journals.

Amicus curiae **Ms. Charon Asetoyer (Comanche), M.A.**, is a Native American women's health activist, holds a Masters of International Administration and Management. She is the CEO and Founder of the Native American Community Board (1985) and the Native American Women's Health Education Resource Center (1988) on the Yankton Sioux Reservation in South Dakota. The Resource Center addresses issues of reproductive justice, violence against women, and

environmental justice. In addition to the Resource Center the organization has a shelter for women fleeing from sexual assault and domestic violence. Ms. Asetoyer has written extensively on women's health and reproductive justice issues. Under her direction her organization released *The Indigenous Women's Health Book - Within the Sacred Circle*, the first Indigenous women's reproductive health book. She organized the first Indigenous women's reproductive rights coalition and continues to organize Indigenous women to protect our health and reproductive rights at the national and international levels.

Amicus curiae **Lois V. Backus, M.P.H.** has been an Executive Director in the field of reproductive health since 1989, 12 years as the ED of two Planned Parenthood affiliates and 18 years at Medical Students for Choice.* During her time with Planned Parenthood, she added abortion services to the medical services provided at her affiliates' clinics. She moved to Medical Students for Choice in order to have a positive impact on physicians trained and willing to provide this service for those who need it. Backus also served as a Peace Corps Volunteer in Afghanistan and has a Masters in Public Health from Yale University.

Amicus curiae **Jerry Ballas, M.D., M.P.H.**, is a board-certified primatologist who cares for women with high-risk pregnancies. Dr. Ballas's expertise is in managing maternal chronic illnesses such as diabetes and hypertension, diagnosing fetal

abnormalities by ultrasound, and treating placental disorders. He also handles complications that may happen during labor and delivery. As an associate professor in the Department of Obstetrics, Gynecology, and Reproductive Sciences at UC San Diego School of Medicine, Dr. Ballas is active in educating medical students, residents and fellows.* His research interests include environmental and socioeconomic factors — such as food availability and hazardous pollutants — that have health effects on pregnancy and childbirth. He is the President of the National Perinatal Association and a member of Society for Maternal-Fetal Medicine.

Amicus curiae **Ruth Birgin** is the Founder and Coordinator, Women and Harm Reduction International Network (WHRIN). She has worked as a harm reduction specialist for over twenty years throughout Australia, Asia and, more recently, Eastern Africa. She has a working knowledge of the relevant UN organisations and INGOs involved in HIV/AIDS and harm reduction activity, as well as the issues faced by injecting drug users at community level in different parts of Asia and Eastern Africa.

Amicus curiae **Jessica Danforth** is the founder and Executive Director of the Native Youth Sexual Health Network, the first and only organization of its kind by and for Indigenous youth working across issues of sexual and reproductive health,

rights, and justice throughout the United States and Canada. She has spent more than half her life mobilizing individuals, families, and communities alike to reclaim their ancestral rights to self-determine decisions over their own bodies and spaces. Ms. Danforth is currently serving as the Youth Coordinator for the National Indigenous Youth Council on HIV/AIDS, and she is the North American co-chair for the Global Indigenous Youth Caucus at the United Nations Permanent Forum on Indigenous Issues. In addition, she is a member of a number of national and international boards and collectives including SisterSong Women of Color for Reproductive Justice Collective and Women on Web/Women on Waves.

Amicus curiae **Sarah Deer, J.D.** is a Professor of Women, Gender & Sexuality Studies at the School of Public Affairs & Administration at the University of Kansas* Professor Deer (Muscogee (Creek) Nation) has worked to end violence against women for over 25 years and was named a MacArthur Fellow in 2014. Her scholarship focuses on the intersection of federal Indian law and victims' rights. Professor Deer is a co-author of four textbooks on tribal law. Her latest book is *The Beginning and End of Rape: Confronting Sexual Violence in Native America*, which has received several awards. Her work on violence against Native women has received national recognition from the American Bar Association and the

Department of Justice. Professor Deer is also the Chief Justice for the Prairie Island Indian Community Court of Appeals.*

Amicus curiae **Alesha Elizabeth Doan, Ph.D.** is an Associate Professor at the University of Kansas and holds a joint appointment in the School of Public Affairs & Administration and the Women, Gender & Sexuality Studies Department.*

Professor Doan's interdisciplinary research is guided by her broader interests in public policy, organizations and gender/social equity, with a more specialized focus on the development, adoption and implementation of reproductive policies.

Her publications include articles in a variety of journals as well as two books:

Opposition and Intimidation: The Abortion Wars and Strategies of Political Harassment (University of Michigan Press 2007), and *The Politics of Virginity: Abstinence in Sex Education*, (co-authored, Praeger 2008). Professor Doan also

continues to work with a collaborative research team investigating gender

integration and equity in the military; and she is the lead researcher on a three-year grant from the Department of Health and Human Services, Office on Women's

Health to develop and implement policies and prevention programs addressing the issue of sexual assault on college campuses.*

Amicus curiae **Dr. Stephen Kandall M.D., FAAP** is a medical doctor board-certified in Pediatrics and Neonatal-Perinatal Medicine and ended his academic

career as Chief of Neonatology at Beth Israel Medical Center in New York and Professor of Pediatrics at the Albert Einstein College of Medicine.* He served as President of the New York Pediatric Society, the New York Perinatal Society and his 2100-pediatrician chapter of the American Academy of Pediatrics. Dr. Kandall also chaired the federal panel on “Improving Treatment for Drug-Exposed Infants.” Most of Dr. Kandall’s 90 articles and textbook chapters deal with perinatal drug issues, and his own history text, “Substance and Shadow: Women and Addiction in the United States,” was published by Harvard University Press. Dr. Kandall has lectured throughout the United States, Europe and Australia. He remains extremely active in advocacy, and continues to serve on local, statewide and national advisory groups on perinatal drug issues.

Amicus curiae **Mark Kinzly** has worked in the field of harm reduction and public health for the past 27 years. He is currently a national trainer and consultant on issues related to substance use – ranging from HIV/AIDS and Hepatitis C interventions, to the development of appropriate responses to the complexities of addiction, including housing, syringe exchange and overdose prevention. He is a peer recovery coach and a patient navigator for individuals in the medical care system. He is currently on the Board of Directors for the National Harm Reduction Coalition, while also serving as trainer and expert on the advisory boards for the

North American Syringe Exchange Network. Mr. Kinzly is co-founder of the Texas Overdose Naloxone Initiative (TONI), bringing overdose awareness and trainings to the state of Texas. He has trained people in all areas of overdose prevention and education, including law enforcement, active drug users, family/friends of people who use opioids, medication-assisted recovery clinics, and educational institutions.

Amicus curiae **Gary Langis** is a Technical Assistance Specialist at the Massachusetts Technical Assistance Partnership for Prevention.* His work began in the late 1980s volunteering as part of an independent group providing underground needle exchange on the North Shore. He has worked as an outreach educator for the Healthy Streets Outreach Program in Lynn, Massachusetts, Program Manager at Noddles Island Multi Service Agency HIV Benefits Advocacy Program, HIV Program Manager for CAB Health and Recovery Services HIV program, and as an independent consultant. Mr. Langis helped to develop cutting-edge HIV prevention programs that encompassed principles of harm reduction and served as a model for other programs. As a founding member and Board President of the New England Prevention Alliance (NEPA), Langis collaborated with the State, sharing data, forms, training methods and tools that

were created and developed by NEPA that contributed to the foundation of the Opioid Overdose Education and Naloxone Distribution program.

Amicus curiae **Kandace Littlefoot** is a policy associate at Young Women United focusing on criminal justice reform, civil rights, social justice and social change, for women and people of color in New Mexico. Kandace Littlefoot is a former tribal prosecutor with criminal prosecutorial experience and experience with children's cases with a history of working within the municipal and tribal government.

Amicus curiae **Annita Lucchesi** is Executive Director of Sovereign Bodies Institute, a research institute dedicated to community-engaged research on gender and sexual violence against Indigenous people. She is also a doctoral student at the University of Lethbridge, in the Cultural, Social, & Political Thought program. Her research interests include indigenous and critical cartography, indigenous feminisms, postcolonial geographies, and indigenous research methodologies. As part of her dissertation work, Ms. Lucchesi maintains one of the largest databases of cases of missing and murdered indigenous women and girls in Canada and the United States. This data is used not only in her own work, but is also made available to tribal advocates, activists, policy makers, service providers, and

community leaders. Ms. Lucchesi is a Southern Cheyenne descendant, and her ancestors traditionally made their home in northeastern Colorado and southern Wyoming. Her Indian name is Hetoevêhotohke'e, which translates to Evening Star Woman.

Amicus curiae **Dr. Ruth Rose-Jacobs, Sc.D.** is Associate Professor of Pediatrics at Boston University School of Medicine, Research Scientist at Boston Medical Center, Principal Investigator and Director of Evaluation of Project RESPECT-Plus (Recovery, Empowerment, Social Services, Prenatal care, Education and Community Treatment- Plus).^{*} In addition to being the principal investigator on multiple previous and current federal and foundation grants, she has extensive clinical experience with children who are at developmental risk due to biological and complex environmental factors. Dr. Rose-Jacobs has authored numerous journal articles and presented at national conferences. She serves on the State Mental Health Planning Council of the Massachusetts Department of Mental Health. Among other awards she was recognized by the Casey Family Programs and Center for Substance Abuse Prevention (CSAP), in Recognition of Outstanding Work with Children and Families. Prior to joining Boston University, she was faculty at Northeastern University and director of a clinical training program at the Eunice Shriver Center, University Affiliated Program.

Amicus curiae **Andrea Smith, J.D. Ph.D.** is a professor of Native American Studies at the University of California Riverside.* Her publications include: *Native Americans and the Christian Right: The Gendered Politics of Unlikely Alliances and Conquest: Sexual Violence and American Indian Genocide*. She is also the editor of *The Revolution Will Not Be Funded: Beyond the Nonprofit Industrial Complex*, and co-editor of *The Color of Violence, The Incite! Anthology; Theorizing Native Studies*, and *Native Studies Keywords*.

Amicus curiae **Dr. Kimberly Sue M.D., Ph.D.** is the Medical Director of Harm Reduction Coalition based in New York, New York. She completed her medical training at Massachusetts General Hospital in Boston in Internal Medicine-Primary Care in June 2018 with a particular focus on inpatient and outpatient substance use disorders within general medicine. She is a graduate of the Harvard Medical School Social Science MD-PhD Program (PhD, 2014, MD 2015). Her PhD work in sociocultural (medical) anthropology examines the intersection of U.S. prison systems, addiction policy, mental health and drug treatment. Dr. Sue's ethnographic research is based in Massachusetts at the state women's prison, a Boston jail, and a community-based buprenorphine treatment program, where she followed the experiences and treatment of women addicted to heroin through the prison and jail systems and back in their home communities.

Amicus curiae **Lauren van Schilfgaarde, J.D.** is the San Manuel Band of Mission Indians Tribal Legal Development Clinic Director at UCLA School of Law.* She was previously the Tribal Law Specialist at the Tribal Law and Policy Institute (TLPI) in West Hollywood, CA. At TLPI, van Schilfgaarde coordinated training and technical assistance to tribal courts, focusing on Tribal Healing to Wellness Courts, tribal court infrastructure, and federal Indian law. Previously, van Schilfgaarde was a law clerk at Native American Rights Fund and Legal Aid Foundation of Los Angeles and a Public Interest Fellow at American Civil Liberties Union of Colorado.

Amicus curiae **Joycelyn Woods, MA, CARC, CMA**, was Acting President & Executive Director of the National Alliance for Medication Assisted Recovery.* She was a founding member and the President of the National Alliance of Methadone Advocates. She has conducted scientific research and worked for Narcotic and Drug Research, Inc., as a Project Director of the International Working Group on AIDS and IV Drug Use. Jocelyn Woods became addicted at the age of 20 and has embraced her recovery for almost 50 years. With her father also suffering from opioid addiction, she recognized the genetic link at a young age in her career. She earned a graduate degree in biological psychology and aimed her

focus specifically at the neuroscience of endorphin systems—the brain’s pleasure and reward system activated by opioid receptors.

Amicus curiae **Carley J. Zeal, M.D.** is a fellow in the Department of Obstetrics and Gynecology, Washington University School of Medicine’s Division of Family Planning.* Her educational objectives are to develop an understanding of the history of the Reproductive Justice (RJ) Movement; learn how the RJ framework applies to current issues and research in OB/GYN; and apply the RJ framework to patient cases in her own practice.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
USCA No. 17-3727

UNITED STATES OF AMERICA,
Plaintiff - Appellant,
v.
SAMANTHA FLUTE,
Defendant - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION
HONORABLE CHARLES B. KORNMANN
UNITED STATES DISTRICT COURT JUDGE

BRIEF OF AMICI CURIAE NATIONAL ADVOCATES FOR PREGNANT
WOMEN AND OTHER EXPERTS IN MEDICINE, PUBLIC HEALTH AND
POLICY IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR
REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29 and Circuit Rule 26.1A, the undersigned counsel certifies that none of the amici curiae: National Advocates for Pregnant Women, National Perinatal Association, Native American Community Board, Native Youth Sexual Health Network, Sovereign Bodies Institute, American Academy of Addiction Psychiatry, National Alliance for Medication Assisted Recovery, Harm Reduction Coalition, Academy of Perinatal Harm Reduction, Women and Harm Reduction International Network, Birth Rights Bar Association, Medical Students for Choice, National Crittenton, Young Women United and individual experts: Dr. Elizabeth Armstrong; Dr. Arnold Cohen; Ms. Charon Asetoyer, M.A.; Louis Backus, M.P.H.; Dr. Jerry Ballas; Ruth Birgin; Jessica Danforth; Sarah Deer, J.D.; Dr. Alesha Elizabeth Doan; Dr. Stephen Kendall; Mark Kinzy; Gary Langis; Kandace Littlefoot; Annita Lucchesi; Dr. Ruth Rose-Jacobs, Sc.D.; Dr. Andrea Smith; Dr. Kimberly Sue; Lauren van Schilfgaarde J.D.; Jocelyn Woods, MA. CARC, CMA; and Dr. Zeal are an entity with a parent corporation or a publicly held corporation that owns 10 percent or more of their stock.

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INTEREST OF AMICI CURIAE

Amici Curiae, National Advocates for Pregnant Women and other experts listed in attached motion and Appendix A, are organizations and individual experts in medicine, public health, policy and American Indian women's health and culture. *Amici* are committed to ensuring optimal health and birth outcomes, to reducing potential drug-related harms and advancing the public health.

Amici certify that no party or party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Court should grant Ms. Flute's petition for rehearing *en banc* because the panel's majority decision, *United States v. Flute*, 929 F.3d 584 (8th Cir. 2019), is a precedent-setting error on a question of exceptional importance. Whether the federal manslaughter statute criminalizes the conduct of pregnant people, is a question of exceptional importance because it "raises profound . . . policy questions" impacting the health of pregnant people and their children, and would have a particularly devastating impact on American Indian (hereinafter referred to

as “Native”) people and communities living in Indian Country.¹ Fed. R. App. P. 35(b)(1)(B); *Flute*, 929 F.3d at 594.

Amici agree with the defendant-appellee that the federal manslaughter statute does not proscribe the conduct of pregnant people, and as Judge Colloton’s dissent opines, the panel decision will have “broad ramifications for the criminal liability of mothers based on their conduct while pregnant.” *Flute*, 929 F.3d at 591. Further, the panel’s decision necessitates *en banc* review because it demonstrates a serious misunderstanding of the consequences of creating new and gender-specific criminal offenses for pregnant people, their infants and families. Such prosecutions will undermine the public health and unnecessarily compound the grief of those who have lost a pregnancy.

As every leading medical organization to address this issue has concluded,² issues related to substance use and pregnancy are best addressed through healthcare, not through arrest, prosecution and incarceration.

ARGUMENT

I. **En Banc Review Should be Granted Because Whether to Expand the Manslaughter Statute to Prosecute Pregnant People for Neonatal**

¹ *Amici* note that many Native traditions believe life begins at birth, as that is when the spirit leaves the creator and enters a baby’s body – without which a person cannot exist. Ian Anderson Continuing Education Program, *Indigenous Perspectives on Death and Dying*, <https://www.cpd.utoronto.ca/endoflife/Slides/PPT%20Indigenous%20Perspectives.pdf>

² See *infra* I.A.

Losses is a Question of Exceptional Importance and Such an Expansion is Unsound Policy and Harmful to the Public Health.

The federal government and state of South Dakota recognize that substance use during pregnancy should be treated as a matter of public health – not as a matter for criminal justice intervention. *See e.g.*, Substance Abuse and Mental Health Services Administration, *Clinical Guidance for Treating Pregnant and Parenting Women with Opioid Use Disorder and Their Infants*, U.S. Health & Human Services Publication No. 18-5054 (2018), <https://store.samhsa.gov/system/files/sma18-5054.pdf>; *Substance Use Disorder Services*, South Dakota Department of Social Services (2015), available at <https://dss.sd.gov/behavioralhealth/community/treatmentservices.aspx>. Using the penal laws to prosecute Ms. Flute and other women will not protect maternal or child health, or deter substance abuse. There is no empirical evidence that criminal prosecution has significantly reduced the rate of substance use or misuse in the United States. Jeffrey A. Miron, *The Economics of Drug Prohibition and Drug Legalization*, 68 *Social Research* 835 (2001). Nor does the risk of prosecution dissuade pregnant people from using drugs. Association of Women’s Health Obstetrics and Neonatal Nurses, *Criminalization of Pregnant Women with Substance Use Disorders*, 19 *JOGNN* 93, 93 (2015) (“the threat of incarceration has been shown to be an ineffective strategy for reducing the incidence of substance abuse”), available at [3](https://nwhjournal.org/article/S1751-</p></div><div data-bbox=)

[4851\(15\)30046-5/pdf](#). Medical experts have long recognized that “addiction is a chronic illness” not a “moral weakness” and is best addressed through healthcare. Jillian Hardee, *Science Says: Addiction is a Chronic Disease, Not a Moral Failing*, University of Michigan Health News (May, 2017), <https://healthblog.uofmhealth.org/brain-health/science-says-addiction-a-chronic-disease-not-a-moral-failing>.

Marginalized populations, including low-income women of color, already have difficulty obtaining substance use disorder treatment. Barriers to treatment include cost, lack of health insurance, and the limited amount of residential treatment facilities allowing children to reside with their mothers. Erin Kampschmidt, *Prosecuting Women for Drug Use During Pregnancy: The Criminal Justice System Should Step Out and The Affordable Care Act Should Step Up*, 25 *Health Matrix: Journal of Law-Medicine* 487, 504 (2015). According to a report by the University of South Dakota, the state’s health department and others, there are only three treatment programs in the state designed specifically for pregnant women. South Dakota Department of Health et al., *Resource Guide: Alcohol and Drug Use During Pregnancy* 7, available at <https://www.usd.edu/-/media/files/medicine/center-for-disabilities/resource-guides/resource-guide-alcohol-and-drug-use-during-pregnancy.ashx?la=en> (last visited August 12, 2019). Prosecutions, along with the shortage of appropriate treatment for pregnant people

will only compound the difficulties associated with addiction and will likely have a devastating impact on already marginalized communities.³ The government’s obligations to the health and welfare of pregnant people in South Dakota would be better served through increased access to care and treatment, than through punishment.

A. The panel’s expansion of the federal manslaughter statute to include pregnancy will deter people from seeking healthcare.

Researchers and courts have determined that punitive actions for being pregnant and using substances severely threatens the health of pregnant people and their fetuses because fear of prosecution can deter them from accessing the healthcare they need. American College of Obstetricians and Gynecologists Committee on Ethics, Committee Opinion 473, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (2011, reaffirmed 2019) (“Drug enforcement policies that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus.”) *See also Women’s Set Aside Does Not Assure Drug Treatment for Pregnant Women: Hearing Before the Health & Environment Committee*, 102nd Cong. at 20 (1991) (Statement of Mark Nadel, Associate Director for National and Public Health Issues) (identifying “the threat of prosecution” as a “barrier to treatment for pregnant women . . .”); Sarah Roberts

³ *See infra* III.

et al., *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 *Maternal and Child Health Journal* 333 (2011) (study showed “most women feared that attending prenatal care while using drugs would lead to CPS reports and losing their children”). As the U.S. Supreme Court has observed, there is “near consensus in the medical community” that addressing problems of drug use and pregnancy through the criminal justice system will “harm, rather than advance the cause of prenatal health.” *Ferguson v. City of Charleston*, 532 U.S. 67, 84 n.23 (2001) (noting the *amicus* submissions of numerous leading medical and public health organizations concluding that searching pregnant women for evidence of drug use and facilitating their arrest will harm prenatal health by discouraging women from seeking prenatal care).

That is why medical organizations, including the American Medical Association, have uniformly condemned punitive approaches to substance use during pregnancy. American Medical Association, Policy Statement-H420.962, *Perinatal Addiction-issues in Care and Prevention* (last modified 2019) (“Transplacental drug transfer should not be subject to criminal sanctions or civil liability . . . In particular, support is crucial for establishing and making broadly available specialized treatment programs for drug-addicted pregnant women wherever possible. . .”). The American Academy of Pediatrics, American College of Obstetricians and Gynecologists and March of Dimes also condemn this

approach as dangerous to both women and children. American Academy of Pediatrics, Committee on Substance Use and Prevention, *A Public Health Response to Opioid Use in Pregnancy*, 139 Pediatrics at 3 (2017) (“The existing literature supports the position that punitive approaches to substance use in pregnancy are ineffective and may have detrimental effects on both maternal and child health.”); American College of Obstetricians and Gynecologists Committee on Ethics, Committee Opinion 473, *supra*; March of Dimes, Fact Sheet, *Policies and Program to Address Drug-Exposed Newborns* (2014) (“The March of Dimes opposes policies and programs that impose punitive measures on pregnant women who use or abuse drugs. . . [T]argeting women who used or abused drugs during pregnancy for criminal prosecution or forced treatment is inappropriate and will drive women away from treatment vital both for them and the child.”) *See also* American Academy of Family Physicians, *Substance Use Disorders*, (2003) (“The AAFP opposes imprisonment or other criminal sanctions of pregnant women solely for substance abuse during pregnancy”); National Perinatal Association, Position Statement, *Perinatal Substance Use* (2017) (NPA “opposes any legal measures that involve the criminal justice system for drug use during pregnancy.”)

A legal system that threatens prosecution and incarceration in the event of a neonatal⁴ loss and alleged substance use creates extraordinary risks to people who

⁴ Defined as the first 27 days of a child’s life.

become pregnant and discourages the pregnant patients who do receive care from being completely honest with their providers. Some who fear prosecution may even eliminate the risk by terminating their pregnancies. Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 Wis. J.L. Gender & Soc'y 24, 245 (2011) (concluding that “criminal law and punitive focus may adversely affect the health of pregnant women by discouraging women using drugs from seeking prenatal care and even encouraging them to terminate their pregnancies for fear of criminal sanctions. Also, such an approach appears to do nothing to curb drug addiction or drug use during or after pregnancy.”) See also Wendy Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 Yale J.L. & Feminism 317 (2014).

B. Access to healthcare is vital to maternal and fetal health.

Prenatal care and other healthcare during pregnancy including substance use disorder treatment, if needed, are associated with improved maternal and fetal health outcomes. Lack of prenatal care is associated with a 1.4 - 1.5 fold increase in risk of neonatal death. 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). Access to healthcare can also improve birth outcomes for those who continue to use controlled substances during pregnancy. A. El-Mohandes, et al., *Prenatal Care*

Reduces the Impact of Illicit Drug use on Perinatal Outcomes, 12 J. Perinatology 354 (2003) (study showed pregnant women who used controlled substances and received prenatal care reduced the risks of delivering low-birth or premature babies), available at <https://www.nature.com/jp/journal/v23/pdf/7210933a.pdf>.

The availability of substance use disorder treatment can also contribute to healthier pregnancies and pregnancy outcomes. Karen Milligan et al., *Birth Outcomes for Infants Born to Women Participating in Integrated Substance Abuse Treatment Programs: A Meta-Analytic Review*, 29 *Addiction Research and Theory* 542 (2011) (Participation in integrated programs, combining substance use disorder treatment with on-site pregnancy, parenting, and child-rearing services, are associated with greater prenatal care participation and improved birth outcomes).

II. En Banc Review Should be Granted Because Medical Science Does Not Support the Panel’s Expansion of the Manslaughter Statute to Prosecute Pregnant People.

Thousands of people in the United States experience neonatal losses each year, yet the causes are not well understood. There are approximately 15,000 neonatal deaths per year nationally. Marian MacDorman et al., *Fetal and Perinatal Mortality: United States, 2013*, 64 *National Vital Statistics Report 1* (July 2015), available at https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_08.pdf. Neonatal death is most commonly caused by preterm birth and low birth weight, but even when those factors are identified their root causes may still not be known. Robert

Anderson & Betty Smith, *Deaths: leading causes for 2002*, 53 National Vital Statistics Reports 1 (2005). South Dakota reported 97 infant deaths between 2013 and 2015 with an unknown cause listed for 26% of them. South Dakota Department of Health, *Infant Death Review* (Sept. 2017), https://doh.sd.gov/documents/statistics/SD_InfantDeathReview2013-15_Report.pdf. Sixty-two percent of infant deaths in South Dakota occur during the neonatal period. *Id.* at 3. Further, one pregnant patient may present with multiple risk factors, increasing the difficulty in later identifying any one cause of death. Anderson & Smith, *Deaths: leading causes for 2002*, 53 National Vital Statistics Reports at 10.

Significantly, research does not support the popularly held assumption that controlled substances, including cocaine – a substance at issue in this matter – pose uniquely high or well-established risks of serious harm to fetal and child health. *See e.g.*, Mishka Terplan, *The Effects of Cocaine and Amphetamine Use during Pregnancy on the Newborn: Myth versus Reality*, 30 *Journal of Addictive Diseases* 1, (2011); *see also McKnight v. State of South Carolina*, 378 S.C. 33, fn 2 (S.C. 2008) (summarizing expert testimony emphasizing “doctors' recognition of recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor.”) National Institute on Drug Abuse, *What are the effects of maternal*

cocaine use (updated May 2016) (“Dire predictions of reduced intelligence and social skills in babies born to mothers who used crack cocaine while pregnant during the 1980s—so-called “crack babies”—were grossly exaggerated.”)

III. The Panel’s Expansion of the Federal Manslaughter Statute Would Disparately Harm Native Communities.

The panel’s erroneous expansion of the statute is especially troubling as it increases the potential for discrimination against Native people. Research reveals a disturbing prevalence of race and class disproportionality with respect to drug testing of pregnant people and newborns during hospital-based childbirth as well as the reporting of alleged substance use to government authorities. M.A. Armstrong et al., *Does adopting a prenatal substance use protocol reduce racial disparities in CPS reporting related to maternal drug use? A California Case Study*, 35 *Journal of Perinatology* 146 (2015); Khiara Bridges, *The Poverty of Privacy Rights* Introduction & 110-122 (Stanford University Press 2017); Marc A. Ellsworth et al., *Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns*, 125 *Pediatrics* 1379 (2010) (finding that providers seemed to have used race, in addition to recognized risk criteria, as a factor in deciding whether to screen an infant for maternal illicit drug use). Further, for

myriad reasons including historic⁵ and systemic oppression, Native people are disproportionately impacted by poverty, lack access to adequate healthcare and have much higher rates of infant mortality, 9.4 per 1,000 live births in comparison to the overall national rate of 5.8. Centers for Disease Control & Prevention, *Infant Mortality* (2019),

<https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm>;

National Public Radio, the Robert Wood Johnson Foundation & Harvard T.H. Chan School of Public Health, *Discrimination in America: Experiences and Views of Native Americans* (Nov. 2017). Thus, the judicial expansion of the manslaughter statute is overwhelmingly likely to disproportionately burden Native and low-income pregnant people who are already more vulnerable to government interventions and more likely to experience a neonatal loss.

The Court should be vigilant in guarding against legal pronouncements that further racism and classism in the law. The expansion here burdens vulnerable communities, and is likely to exacerbate existing disparities in the criminal justice system. Sara Albertson, Dr. Jennifer Giroux, *Criminalizing Pregnancy in South Dakota, Tribal Epidemiology Center News* (July 31, 2018), available at

⁵ “[h]istorical trauma — the cumulative effects of the injustices of colonialism — are important variables in the high rates of substance abuse . . . among Natives.” Luana Ross, *Native Women, Mean-Spirited Drugs, and Punishing Policies*, 32 Soc. Just. 54, 56 (2005).

<https://tribalepicenters.org/blog/category/tec-news/page/4/> (“Evidence from the South Dakota Women’s Prison (SDWP) from July 2018, demonstrates that out of the 564 women in custody, 52% (295) of them were American Indian. Nearly 64% (361) of the women were incarcerated due to drug related offenses.”)

CONCLUSION

Whether the federal manslaughter statute criminalizes the conduct of people during pregnancy is a question of exceptional importance. This Court should grant *en banc* review.

Dated: August 16, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Comes now the undersigned counsel for Amici Curiae and, with regard to the foregoing document, certifies as follows:

1. That the aforementioned document, was, before submission, scanned by the undersigned for viruses on August 16, 2019, utilizing the website <http://www.virustotal.com> and was found to be virus free.
2. That the aforementioned document also complies with Fed. R. App. P. 32 in that it was prepared in a proportionally spaced typeface using Microsoft Word 2016, Times New Roman Font Face in font size 14.
3. That the aforementioned documents comply with Fed. R. App. P. 35 (b)(2)(A) in that it contains 2593 words.

Dated this 16th day of August, 2019.

/s/ Nichole A. Carper
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of August, 2019, a true and correct copy of the foregoing document was served upon counsel of record for all parties via the Court's EC/CMF filing system.

/s/ Nichole A. Carper
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Burd and Carper Law Office