No. PD-0401-09

IN THE TEXAS COURT OF CRIMINAL APPEALS

Ex Parte AMBER LOVILL

***AMICUS CURIAE* BRIEF OF MEDICAL, PUBLIC HEALTH, AND CHILD WELFARE EXPERTS AND ADVOCATES IN SUPPORT OF RESPONDENT AMBER LOVILL**

SUBMITTED BY:

Texas Association of Obstetricians and Gynecologists; American Society of Addiction Medicine; National Council on Alcoholism and Drug Dependence; Central Texas Council on Alcoholism and Drug Abuse; National Association of Alcohol and Drug Abuse Counselors (NAADAC); The International Center for Advancement of Addiction Treatment; American Nurses Association; Association of Reproductive Health Professionals; Center for Children of Incarcerated Parents; Center for Gender and Justice; Chicago Legal Advocacy for Incarcerated Mothers; Child Welfare Organizing Project; Connecticut Women's Consortium; Drug Policy Alliance; Family Justice; Global Lawyers & Physicians; Institute for Health & Recovery; Harm Reduction Coalition; Interfaith Drug Policy Initiative; Law Enforcement Against Prohibition; Law Students for Reproductive Justice; Legal Services for Prisoners with Children; Mills County, Iowa MOMs Off Meth; National Asian Pacific American Women's Forum; National Association of Nurse Practitioners in Women's Health (NPWH); National Association of Social Workers; National Association of Social Workers, Oklahoma Chapter; National Association of Social Workers, Texas Chapter; National Coalition for Child Protection Reform; National Latina Institute for Reproductive Health; National Network for Women in Prison; National Women's Health Network; National Women's Prison Project, Inc.; The Osborne Association; Physicians for Reproductive Choice and Health; SisterSong Women of Color Reproductive Health Collective; Texas Jail Project; Women's Prison Association; Whole Woman's Health; Howard Brody, MD, PhD, Dir. of Institute for the Medical Humanities, Univ Of TX Medical Branch; Fonda Davis Eyler, PhD; Deborah A. Frank, MD; Leslie Hartley Gise, MD; Randy Glassman, MD; C. Ronald Koons, MD, FACP; Anna C. Mastroianni, JD, MPH; Howard Minkoff, MD; Lawrence J. Nelson, PhD, JD; Eli Reshef, MD; Lois Shepherd , JD; Timothy Thorstenson, Ethicist; Elisa Triffleman, MD.

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STATEMENT OF THE CASE

Amici adopt the Statement of the Case enunciated in the Respondent's Brief and American Civil Liberty Union ("ACLU")'s *Amicus Curiae* Brief on behalf of Respondent, Amber Lovill.

ISSUES PRESENTED FOR REVIEW

Amici submit this brief in support of Respondent on all seven questions presented for discretionary review. (*See* Resp't's Br.) However, *Amici* address only the issues raised by Questions Five through Seven.

Question Five: Whether interpreting State law to permit the incarceration of Ms. Lovill based on stereotypes about the mental and physical capacities of a pregnant woman renders the law unconstitutional in violation of the Texas ERA and the 14th Amendment's prohibition against sex-based discrimination?

Question Six: Whether the State has carried its burden of establishing, under any constitutional standard, that revoking Ms. Lovill's probation and imprisoning her would further "an important and even compelling state interest" in "the health of an unborn child"? (Pet'r's Br. at 31-34.)

Question Seven: Whether depriving Ms. Lovill of her liberty by imprisonment and separating her from her newborn infant can be understood as anything other than actual harm resulting from the discriminatory prosecution?

STATEMENT OF INTEREST

The legal issues presented by this appeal cannot properly be decided in isolation from the scientific, medical, public health, and social contexts in which they are rooted. *Amici* include 52 Texas and national physicians, nurses, counselors, social workers, drug

treatment specialists, child welfare experts, and their professional associations as well as health advocates and advocates for incarcerated women.[1] These *amici* have well-established expertise and longstanding concern in the areas of maternal, fetal, and neonatal health and in understanding the effects of drugs and other substances on families and society, particularly with regard to effects of incarceration on women, children, and families.

Each and every *amicus curiae* is committed to reducing potential drug-related harms at every reasonable opportunity and share concern for the health and welfare of pregnant women and children. Thus, *amici* do not endorse the non-medical use of drugs – including alcohol or tobacco – during pregnancy. Nonetheless, it is entirely consistent with *amici*'s public health and ethical mandates to bring to this Court's attention the fact that Ms. Lovill's incarceration and selective prosecution due to her pregnancy cannot be justified by any legitimate state interest. The policy advocated by the State in this case cannot be reconciled with Texas's demonstrated disapproval of the criminal punishment of women who continue pregnancies to term in spite of a drug problem, nor can it be reconciled with evidence-based, peer-reviewed medical and scientific research. Moreover, there are narrowly tailored public health approaches that in fact promote the well-being of both pregnant women and their children and provide an effective alternative to discriminatory incarceration.

No fee has been paid, or is to be paid, for the preparation and submission of this brief.

[1] A statement of interest on behalf of each *amicus curiae* is included in Appendix A.

STATEMENT OF FACTS

Amici adopt the Statement of Facts in the Respondent's Brief and the ACLU's *Amicus Curiae* Brief on behalf of Respondent, Amber Lovill.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly held that Ms. Lovill raised a valid claim of pregnancy discrimination based on the State's decision to revoke Ms. Lovill's probation and imprison her because she was pregnant. (CCA Opinion at 23.) As fully addressed in Respondent's and the ACLU's amicus brief, treating women under community supervision more harshly because of pregnancy constitutes sex-based discrimination. Moreover, neither the Texas community supervision laws nor the Texas Criminal Justice Department Standards authorize disparately punitive treatment of pregnant women. Indeed, pursuing probation revocation because a probationer is pregnant and experiences a single drug relapse directly contravenes the Texas Department of Criminal Justice guidelines and expressed state policy with regard to pregnant women and potential life.

A punitive approach to pregnancy and drug dependence reflects a course that the medical community, international human rights community, and state policy makers have rejected. They have rejected this course because they recognize that drug dependence is a health problem and not a crime and that the threat or imposition of heightened criminal punishment deters pregnant women from seeking prenatal care and treatment for substance addiction that can improve "the health of an unborn child."

Thus, far from furthering any state interest, incarcerating pregnant women actually increases health risks, not only to the unborn, but also pregnant women and the children they give birth to. Moreover, while *amici* do not suggest that methamphetamine

use during pregnancy is benign, the existing medical research simply does not provide a rational basis for singling out pregnant women who use this drug – as opposed to a wide range of other legal and illegal substances – for harsher treatment. Similarly, evidence based research does not support the assumption that a pregnant woman's drug relapse on the road to recovery should be viewed differently from any other person's experience of a relapse.

Moreover, imposing or threatening increased punishment of women who become pregnant creates pressure for pregnant women, especially those struggling to overcome an addition in the short duration of pregnancy, to have abortions, an outcome clearly not rationally related to any asserted state interest. International human rights standards similarly note that maternal and child health are not improved by incarcerating pregnant women. Finally, separating women from their newborns also presents grave risks to the wellbeing of children, their parents, and the family unit.

Because the State cannot establish that its harsh and discriminatory treatment of Ms. Lovill furthers any legitimate state interest, its actions cannot withstand judicial scrutiny under any constitutional standard. The arguments below also make clear that the State's actions in this case cannot be considered anything other than harmful to Ms. Lovill and her unborn child. For these reasons and those stated in the Respondent's brief and ACLU's *Amicus* brief, *amici* urge this Court to affirm the decision of the Thirteenth Court of Appeals and to conclude that the discriminatory treatment of Ms. Lovill does not withstand constitutional scrutiny.

ARGUMENT

I. Selective Incarceration of Pregnant Women Does Not Serve Any State Interest Because It Undermines Maternal and Fetal Health.

As more fully addressed in the Respondent's brief and the ACLU *amicus* brief, the State unlawfully discriminated when it incarcerated Ms. Lovill because of her pregnancy and an asserted concern for the health of her fetus. Under the Texas ERA, sex is a "suspect classification" which is "afforded maximum constitutional protection" subject to "strict judicial scrutiny." *In re McLean*, 725 S.W.2d 696, 698 (Tex. 1987). This review is exacting: "Even the loftiest goal does not justify sex-based discrimination in light of the clear constitutional prohibition . . . . *[S]uch discrimination is allowed only when the proponent of the discrimination can prove that there is no other manner to protect the state's compelling interest*." *Id.* (emphasis added). Furthermore, it is well established that under the federal Equal Protection Clause, sex-based discrimination is subject to "heightened scrutiny" meaning that a state must proffer an "exceedingly persuasive justification" for its unequal treatment of women. *E.g.*, *United States v. Virginia,* 518 U.S. 515, 555-56 (1996). A state may only meet this burden by showing that its discriminatory actions are substantially related to an important governmental interest. *Id.* at 533. Even if there were no gender discrimination in this case, all classifications are subject to rational basis review and are unconstitutional if "the action is not rationally related to a legitimate governmental purpose." *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 264 (Tex. 2002). Ms. Lovill was treated differently because of her pregnancy, and this classification is, at minimum, subject to rational basis review. (CCA Opinion at 23-24.)

Regardless of the standard the Court adopts to review the discriminatory

treatment of Ms. Lovill because of her pregnancy, incarcerating a pregnant woman does not serve any state interest. Here, the State has asserted the discrimination can be justified by a "substantial and even compelling state interest" (Pet'r's Br. at 31) in "protect[ing] the health of both Lovill and her unborn child[.]" (Pet'r's Br. at 31-32); s*ee also* CCA Opinion at 6, 9.) Given the extent to which incarceration of pregnant women undermines maternal, fetal, and child health, as explained below, the policy advanced by the State in this case is actually counterproductive to the asserted interest of protecting the health of Ms. Lovill's unborn child and therefore would not further a legitimate state interest.

A. <u>The State of Texas has repeatedly rejected the idea that an interest in protecting the health of pregnant women or "the health of an unborn child" is served by punishing pregnant women.</u>

In its appeal, the State argues that it may use the State's community supervision laws to advance state interests in the health of pregnant women and "the unborn" by depriving a woman of her liberty. (Pet'r's Brief at 34.) Nothing in the Texas Code of Criminal Procedure, however, asserts or even suggests that community supervision proceedings may be used, or are intended to be used, to further a state interest in protecting the health of pregnant women or "the unborn." Indeed, the Texas Standards for Community Supervisions and Corrections Departments do not mention fetuses or "the unborn" even once, and only mention pregnancy twice in the seventy-two-page document. Tex. Dep't of Criminal Justice, Cmty. Justice Assistance Div., Standards for CSCDs, Apr. 2008, at 44, 55, *available at* http://www.tdcj.state.tx.us/publications/cjad/Standards-CSCDs%204-18-2008.pdf. Both references clarify that a pregnant woman who is already incarcerated should be given

appropriate health care. *Id.*

Moreover, the community supervision officers' Code of Ethics forbids officers from discriminating against any person on the basis of sex, *id.* at 4, thus prohibiting exactly the sex discrimination that would be necessary to further the alleged state interests. *See id.* at 5 ("The officer shall neither treat some individuals more favorably than others; nor shall the officer treat some individuals more adversely than others.").

In fact, the Texas Attorney General and Texas appellate courts have repeatedly rejected the argument that state interests in fetal health justify new interpretations of existing state law to permit punishment of pregnant women and new mothers. *See* Op. Att'y Gen. No. GA-0291 (Tex. 2005) ("[T]he Penal Code's definition of 'individual' does not apply to offenses under [the disputed law, and furthermore] a physician is not obligated to report a pregnant patient's use of a controlled substance as child abuse under [the] Family Code."); *see also Collins v. State*, 890 S.W.2d 893 (Tex. App. 1994) (dismissing injury to a child charges against a woman who allegedly used drugs during pregnancy, refusing the state's request to interpret the statute to apply to pregnant drug using women, and recognizing that to do so would violate legislative intent and due process principles).

In fact, an effort, much like the one in this case, to get courts to reinterpret the state's Prenatal Protection Act as a means for punishing pregnant women who could not overcome an addiction in the short length of a pregnancy was resoundingly rejected. *See Ward v. State*, 188 S.W.3d 874 (Tex. App. 2006) (rejecting arguments that compelling interests in fetal health justified an interpretation of the state's drug delivery law to punish pregnant women who continued to term in spite of a drug problem); Mary Alice

Robbins, *Woman to Go on Trial for Delivering Cocaine to Unborn Child: Defense Lawyer Claims Prosecutor Applying New Law Incorrectly*, Tex. Law., July 24, 2004, at 1, *available at* http://www.law.com/jsp/article.jsp?id=1090180206979 (noting that Ms. Ward was prosecuted under Potter County District Attorney's interpretation of 2003 laws passed to amend Penal Code to include "unborn child[,]" also known as the Prenatal Protection Act). *See also Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007) (relying on *Ward* when granting post-conviction relief and concluding that the delivery of controlled substance law did not apply to the context of a pregnant woman and her fetus); *Youngblood v. State*, No. 2-06-329-CR, 2007 WL 2460225 (Tex. App. Aug. 31, 2007) (per curiam) (relying on *Perales* in reversing conviction for delivery of controlled substance).

Where Texas has expressed an interest in protecting "unborn" life, it has done so in a way that makes clear that the State itself did not believe that any interest would be furthered by punishing pregnant women and new mothers. For example, when the Legislature passed the Prenatal Protection Act in 2003, amending the Penal Code to criminalize acts that harm a fetus, it focused exclusively on third parties who cause harm to pregnant women and rejected the notion that a state interest in unborn life would be furthered by punishing pregnant women and new mothers. *See* Tex. Penal Code Ann. §§ 19.06, 22.12 & 49.12 (excluding pregnant woman from prosecution for harm to the fetus under sections relating to homicide, assault, intoxicated assault, and intoxicated manslaughter); s*ee also Senate Comm. on State Affairs, Bill Analysis, S.B. 319*, 78th Leg., R.S. (Tex. 2003) ("S.B. 319 amends the Penal Code to allow the prosecution of a person who harms or kills an unborn child, *unless the death is . . . the result of an action by the*

mother.") (emphasis added).

Texas has chosen to address issues of drug use, pregnancy, and parenting through its civil child welfare code. *See* Tex. Fam. Code Ann. § 161.001(1)(R) (Vernon 2007). Indeed, a recent effort to create a criminal penalty for pregnant women who were continuing to term in spite of a drug problem never even made it out of committee. Susan Peterson, *Senate Bill 342: Busting Mommy*, Tex. Observer, Mar. 30, 2009, *available at* http://www.texasobserver.org/floorpass/senate_bill_342_busting_mommy (discussing 2009 Senate Bill 342, which would have created a legal presumption that a new mother had committed the crime of drug possession if certain drugs, including methamphetamine or cocaine, were detected in a newborn within 72 hours of its birth).

Thus, except for the State's arguments in this case, there is no indication in Texas law or policy that the State itself believes *any* state interest is served by incarcerating or threatening to incarcerate a woman because she is pregnant.

B. Medical and public health groups condemn punitive responses to the issue of pregnancy and drug use as detrimental to women and children's health.

Early, high-quality, and comprehensive prenatal care improves pregnancy outcome for all women including those who are unable to overcome their addictions during the short term of their pregnancy. *See, e.g.*, Southern Reg'l Project on Infant Mortality, *A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women* 6 (1993); March of Dimes, *Prenatal Care: What You Need to Know*, May 2008, http://www.marchofdimes.com/pnhec/159_513.asp ("All mothers-to-be benefit from prenatal care. Women who see a health care provider regularly during pregnancy have healthier babies, are less likely to deliver prematurely,

and are less likely to have other serious problems related to pregnancy.").[2] In 1990, the Texas Commission on Alcohol and Drug Abuse concluded that "infants born to women obtaining adequate prenatal care were healthier, even among substance-using mothers[,]"[3] a finding that was confirmed in subsequent research.[4]

Yet, health professionals who provide care for pregnant women, research regarding prenatal care and drug treatment, and leading medical and public health organizations all agree that threatening women with punishment because they are pregnant and unable to overcome a drug or other health problem will deter pregnant women from obtaining health care that is beneficial to them and their future children. As Dr. John Jennings, President of the Texas Association of Obstetricians and Gynecologists stated, interpreting the criminal law to punish pregnant women who continued their pregnancies in spite of a drug problem would "be a major disincentive for pregnant women to seek appropriate prenatal care." Ken Ortolon, *Doctor Cops: New Law Could Force Physicians to Report Pregnant Drug Abusers*, Tex. Med., Jan. 2004.

Fear of punishment is also a disincentive for pregnant women to disclose problems with drug use and to seek drug treatment. In 1990, the Texas Commission on Alcohol and Drug Abuse found that 20% of the women surveyed responded that fear of

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[2] *See also* Andrew Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 JAMA 1581, 1585-86 (1993); Edmund Fuani et al., *Compliance with Prenatal Care Visits in Substance Abusers*, 14 Maternal-Fetal Neonatal Med. 329 (2003) (concluding that multidisciplinary care and enabling services help improve birth outcomes in drug using pregnant women).

[3] Texas Commission on Alcohol and Drug Abuse, *1990 Texas Survey of Post-Partum Women and Drug-Exposed Infants* 39 (1991).

[4] *See* Cynthia Chazotte et al., *Cocaine Use During Pregnancy and Low Birth Weight: The Impact of Prenatal Care and Drug Treatment*, 19 Seminars Perinatology 293 (1995); Ayman El-Mohandes et al., *Prenatal Care Reduces the Impact of Illicit Drug Use on Perinatal Outcomes*, 23 J. Perinatology 354 (2003).

"getting into trouble or being jailed" would keep a pregnant woman from disclosing drug use to her doctor while she was pregnant. Texas Commission on Alcohol and Drug Abuse, *1990 Texas Survey of Postpartum Women and Drug-Exposed Infants* 42 (1991), *available at* www.dshs.state.tx.us/sa/research/populations/postpartum90.pdf [hereinafter Texas Commission]. The Texas Commission's survey is consistent with national findings.[5] As reported by the Center for Substance Abuse Treatment, "women in the criminal justice system generally fear that disclosing their need for substance abuse treatment will result in additional sanctions, *including increased time on probation or parole*, incarceration, a transfer to higher security or longer term facilities, or severance of their parental rights." U.S. Dep't of Health & Human Servs., Practical Approaches in the Treatment of Women Who Abuse Alcohol and Other Drugs (1994) (emphasis added). Similarly, a report published by the U.S. Department of Health and Human Services and the National Center on Substance Abuse and Child Welfare notes that "[o]ne key reason for th[e] lack of prenatal care is fear on the part of the pregnant woman of punitive action and/or the possible loss of custody of the child as a result of her drug use." Nancy K. Young et al., Nat'l Ctr. on Substance Abuse & Child Welfare, U.S. Dep't of Health & Human Servs., *Screening & Assessment for Family Engagement, Retention, and Recovery (SAFERR)* C-7 to 8 (2007), *available at* http://www.ncsacw.samhsa.gov/files/SAFERR.pdf (citing Barry M. Lester et al.,

[5] *See* U.S. Gen. Accounting Office, GAO/HRD-90-138, *Drug-Exposed Infants, A Generation At Risk* 9, 37 (1990) (finding that "women are reluctant to seek treatment if there is a possibility of punishment"). *See also* U.S. Gen. Accounting Office, GAO/HRO-91-80, *ADMS Block Grant, Women's Set-Aside Does Not Assure Drug Treatment for Pregnant Women* 20 (1991) ("The threat of prosecution poses yet another barrier to treatment for pregnant women and mothers with young children. These women are reluctant to seek treatment if there is the possibility of punishment, which may include incarceration.").

Substance Use During Pregnancy: Time for Policy to Catch up With Research, 1 Harm Reduction J. 1477 (2004)).

A range of public health and social science researchers confirm that threats of punishment, including probation revocation, deter women from disclosing health problems and from obtaining care. *See* Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 Drug & Alcohol Dependence 199 (1993) (survey finding that "drug using pregnant women felt strongly that criminal sanctions by doctors or other healthcare providers would absolutely encourage such women to "go underground" to avoid detection and treatment, for fear of losing their children); *see also* Martha A. Jessup et al., *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. Drug Issues 285 (2003) (concluding that barriers to care include fear and stigma as well as disclosure to law enforcement or child welfare officials); Thomas M. Brady et al., *Maternal Drug Use and the Timing of Prenatal Care*, 14 J. Health Care Poor & Underserved 588 (2003) (concluding that fear is a critical factor in deterring women from prenatal care).

Based on these widely recognized public health concerns, *amici* and other prominent public health and medical organizations agree that a punitive approach to pregnant women, and particularly those who use drugs, will undermine both maternal and fetal health. For example, the Board of Trustees of the American Medical Association determined that "[p]regnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical

treatment."[6] The American Society of Addiction Medicine, composed of the leading specialists in the field of drug dependency treatment and prevention, declared that "[c]riminal prosecution of chemically dependent pregnant or postpartum women will have the overall result . . . of increasing, rather than preventing, harm to children and to society as a whole." Am. Soc'y of Addiction Med., *Public Policy Statement on Chemically Dependent Women and Pregnancy* 1 (1989). Whether the State prosecutes under an existing criminal law to punish a pregnant drug-using woman, or threatens a probation revocation, the harm is the same – it is likely to deter women from seeking care that can help ensure healthy birth outcomes for mother and child.

The American College of Obstetricians and Gynecologists ("ACOG"),[7] the American Academy of Pediatrics,[8] the March of Dimes,[9] the National Association of Public Child Welfare Administrators,[10] the National Council on Alcoholism and Drug

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[6] Am. Med. Ass'n, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2667 (1990). *See also id*. at 2670 (reporting AMA resolution that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate").

[7] Am. Coll. Obstetricians & Gynecologists, *Maternal Decision Making, Ethics, and the Law*, ACOG Committee Opinion, No. 321, Nov. 2005, at 9 ("Pregnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.").

[8] Comm. on Substance Abuse, Am. Acad. of Pediatrics, *Drug-Exposed Infants*, 86 Pediatrics 639, 642 (1990) ("The public must be assured of nonpunitive access to comprehensive care which will meet the needs of the substance-abusing pregnant woman and her infant.").

[9] March of Dimes, *Statement on Maternal Substance Abuse* 1 (1990).

[10] Nat'l Ass'n of Pub. Child Welfare Adm'rs, *Guiding Principles for Working with Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response* (1991) ("Laws, regulations, or policies that respond to addiction in a primarily punitive nature, requiring human service workers and physicians to function as law enforcement agents, are inappropriate.").

Dependence,[11] the American Nurses Association,[12] the Center for the Future of Children,[13] the National Perinatal Association,[14] and the American Psychiatric Association[15] all reached similar conclusions. *See also State v. Luster*, 419 S.E.2d 32, 35 n.2 (Ga. 1992) (listing medical and public health organizations opposing the prosecution of women for cocaine use during pregnancy).

While punishment deters care, women are far more likely to obtain drug treatment and prenatal care if they feel their confidences will be protected and they do not have to fear punishment. *See* Stephen R. Kandall, *Substance and Shadow: Women and Addiction*

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[11] Nat'l Council on Alcoholism & Drug Dependence, *Women, Alcohol, Other Drugs and Pregnancy* (1990) ("A punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drug addictions. It thus works against the interest of infants and children . . . .").

[12] Am. Nurses Ass'n, *Position Statement* (1991) ("ANA . . . opposes any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants. . . . The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems.").

[13] Ctr. for the Future of Children, *Drug-Exposed Infants: Recommendations,* 1 The Future of Children 8 (1991) ("A woman who uses illegal drugs during pregnancy should not be subject to special criminal prosecutions of the basis of allegations that her illegal drug use harms the fetus. Nor should states adopt special civil commitment provisions for pregnant women who use drugs.").

[14] Nat'l Perinatal Ass'n, *Position Paper: Substance Abuse Among Women*, *available at* http://www.nationalperinatal.org/advocacy.php#statements (last visited July 31, 2009) ("Such a threat prevents many women from seeking prenatal care and early intervention for their alcohol or drug dependence. It undermines the relationship between the healthcare providers and their patients and may keep women from giving accurate and essential information vital to their care.").

[15] Am. Psychiatric Ass'n, APA Document Reference No. 200101, *Position Statement: Care of Pregnant and Newly Delivered Women Addicts* (2001) ("Policies of prosecuting pregnant . . . women who have used either alcohol or illegal substances during pregnancy, on grounds of 'prenatal child abuse' [and their] subsequent incarceration, either in jails, prisons or in locked psychiatric units both deprives the mother of her liberty and seriously disrupts the incipient or nascent maternal-infant bond. . . . Such policies are likely to deter pregnant addicts from seeking either prenatal care or addiction treatment, because of fear of prosecution and/or civil commitment.").

in the United States 278-79 (1996).[16] Thus, far from being "a means to help the mother better control her drug problem," (Pet'r's Br. at 34), or to "protect fetal life," (Pet'r's Br. at 33) (citation omitted), selectively enforcing probation penalties against pregnant women will actually undermine, rather than further these asserted state interests.

C. Threatening probationers with incarceration because they become pregnant while working to address drug problems creates incentive for women to have abortions, a result clearly at odds with asserted state interests in "unborn health."

Interpreting the community supervision law to permit the incarceration of women who become pregnant gives them a stark choice: become subject to incarceration for the alleged benefit of the fetus or obtain an abortion and avoid imprisonment. Creating an incentive to terminate an otherwise wanted pregnancy not only fails to serve the asserted state interest in the "unborn," it is in itself a violation of the right to procreate. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 859 (1992) (noting that *Roe v. Wade*, 410 U.S. 113 (1973), "has been sensibly relied upon to counter"attempts to interfere with "a woman's right to choose to carry a pregnancy to term" as well as "population control or eugenics"); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart" of the right to privacy.).[17]

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[16] *See also* Young, *supra*, at C- 8 (2007) ("Because quality prenatal care is such a critical factor in increasing the likelihood of good birth outcomes, everything possible should be done to ensure that the physician's office is seen as a safe and supportive resource to all pregnant women.").

[17] *See also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (finding unconstitutional a rule that required pregnant school teachers to take unpaid maternity leave at an arbitrary time prior to an expected childbirth explaining that "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms[,]"particularly the "freedom of personal choice in matters of marriage and family life"); *Walker v. State*, 454 N.E.2d 425, 429 (Ind. App. 1983) ("It is well settled that to punish a person for exercising a constitutional right is 'a due process violation of

Courts dismissing prosecutions against women for allegedly endangering fetal health have recognized the possibility of coerced abortions. *See e.g.*, *Johnson v. State*, 602 So. 2d 1288, 1296 (Fla. 1992) ("Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion."). In *State v. Greywind*, it is clear that just such a threat led Martina Greywind to have an abortion. Ms. Greywind was charged with reckless endangerment based on the claim that by inhaling the vapors of paint fumes, she was creating a substantial risk of serious bodily injury or death to her fetus. After she obtained an abortion, the prosecutor dropped the case, stating "[d]efendant has made it known to the State that she has terminated her pregnancy. Consequently, the controversial legal issues presented are no longer ripe for litigation." Motion to Dismiss With Prejudice, *State v. Greywind*, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992). *See also* Gail Stewart Hand, *Women or Children First?*, Grand Forks Herald, July 12, 1992, at 1.

Dr. John Jennings, President of the Texas Association of Obstetricians and Gynecologists, has raised this concern as well, noting that requiring doctors to report pregnant drug using women to district attorneys might prompt women to get abortions rather than continue their pregnancies to term. Ken Ortolon, *Doctor Cops: New Law Could Force Physicians to Report Pregnant Drug Abusers*, Tex. Med., Jan. 2004. Clearly, no legitimate state interest is advanced by a discriminatory application of the state's sentencing laws that places pressure on pregnant women to terminate wanted pregnancies.

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the most basic sort.'") (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

D. Incarceration itself poses risks to maternal, fetal, and newborn health that public health experts condemn.

The State argues that incarceration advances state interests in the health of the unborn child (RR 15:8-13, Aug. 6-7, stating that Ms. Lovill's incarceration would "reduce danger to unborn child") and enhances a woman's efforts to overcome a drug problem. Indeed, the probation officers and court believed that *only* the Substance Abuse Felony ***Punishment*** Facilities ("SAFPF") special needs program could provide "the treatment she needs[,]" and an environment where "her child, unborn child, can be cared for in an environment where we can have some assurance that it is safe." (RR 9, 14, Aug. 6-7) Yet probation officers and the trial court were aware that Ms. Lovill was seven months pregnant and could not be sent to SAFPF until a bed became available, which was not expected for at least three and half months, well past Ms. Lovill's estimated due date. (RR 17, Aug. 6-7, 2007.) Therefore, the court ordered Ms. Lovill held in Nueces County Jail until an SAFPF bed opened, effectively the remainder of her pregnancy. (RR 23, Aug. 6-7.)

Events in Texas specifically, and in jails and prisons generally, demonstrate the well-recognized risks to maternal, fetal, and child health created by ordering pregnant women to jail and prison.

> Judges who incarcerate pregnant, addicted defendants in order to protect fetal health are understandably concerned about unhealthy pregnancies. . . . [But a] judge who believes incarceration benefits the fetus does not understand that, in some cases, "cold turkey" withdrawal is bad for fetuses. Moreover, many jails and prisons provide unhealthy living arrangements where drugs and violence are common environmental hazards.

Barrie Becker & Hon. Peggy Hora, *The Legal Community's Response to Drug Use During Pregnancy in the Criminal Sentencing and Dependency Contexts: A Survey of*

Judges, Prosecuting Attorneys, and Defense Attorneys in Ten California Counties, 2 S. Cal. Rev. L. & Women's Stud. 527, 535 (1993). Exposure to infectious disease,[18] poor sanitary conditions, poor nutrition,[19] sexual abuse,[20] high stress levels[21] and poor mental health care,[22] are also risks pregnant women face during incarceration. As the Board of Trustees of the American Medical Association explains:

> [W]hile the incarceration of pregnant women would be intended to benefit the fetus, the reality of the environment in which pregnant women would be placed would do little to ensure fetal health. Prisons in general have inadequate health care resources. Moreover, prison health experts warn that prisons are "shockingly deficient" in attending to the health care needs of pregnant women. Most prisons have inadequate protocol, staff, or training to properly attend to the special needs of pregnant prisoners. The result has been widespread deficiencies in prenatal diet, nutrition, and exercise and seriously inadequate, if any, prenatal care. Pregnant women in jail are routinely subject to conditions that are hazardous to fetal health, such as gross overcrowding, 24-hour lock-up with no access to exercise or fresh air, exposure to tuberculosis, measles, and hepatitis, and a generally filthy and unsanitary environment. Additionally it is unclear that

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[18] Am. Med. Ass'n, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2667 (1990).

[19] Nat'l Council on Crimes & Delinquency, The Spiral of Risk: Health Care Provision To Incarcerated Women 16 (2006), *available at* https://www.policyarchive.org/handle/10207/5874.

[20] Office of the Inspector Gen., U.S. Dep't of Justice, *Deterring Staff Sexual Abuse of Federal Inmates*, Apr. 2005, *available at* http://www.usdog.gov/oig/special/0504/final.pdf (Kathleen Sawyer, a former Bureau of Prisons Director, stated that inmate sexual abuse was the "biggest problem" she faced as Director.). *See also Campos v. Nueces County*, 162 S.W.3d 778 (Tex. App.-13th 2005) (documenting sexual abuse in Nueces County Substance Abuse Treatment Facility).

[21] Megan Bastick & Laurel Townhead, *Women in Prison: A Commentary on the UN Standard Minimum Rules for the Treatment of Prisoners* 42 (June 2008) ("The high level of stress that accompanies incarceration itself has the potential to adversely affect pregnancy.").

[22] *See, e.g.*, *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 914 (S.D. Texas 1999), *rev'd and remanded for additional findings*, 178 F.3d 385 (5th Cir. 1999), *adhered to on remand*, 154 F. Supp. 2d (S.D. Tex. 2001) (referring to mental health care in a Texas prison, the court stated "Whether because of a lack of resources, a misconception of the reality of psychological pain, the inherent callousness of the bureaucracy, or officials' blind faith in their own policies, the [corrections department] has knowingly turned its back on this most needy segment of its population.").

> incarceration would prevent drug use by pregnant women because drugs are readily available in prison.

Am. Med. Ass'n, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990). The State should have known that jails do not necessarily provide a woman "with a 'drug free' environment." *See, e.g.*, *17 Charged in Drug, Sex Probe at Texas Jail*, MSNBC.com, Feb. 28, 2009, http://www.msnbc.msn.com/id/29439918/; Becker & Hora, *supra*, at 569; *see also* Matthew Purdy*, Warehouse of Addiction; Bars Don't Stop Flow of Drugs into the Prisons*, N.Y. Times, July 2, 1995, at 1 (reporting "[d]rugs are seeping, and in some cases flowing, into the nation's prisons" and "[d]rug use in prison has become an open secret among many in the corrections industry.").

Information widely available to the public at the time of Ms. Lovill's incarceration made clear that she was being sent to a particularly dangerous jail, one especially unlikely to provide a safe or healthy environment for a pregnant woman. Local press coverage reveals that Nueces County Jail has come under both federal and state scrutiny for inhumane conditions, including the discovery of "pregnant women lying on the floor with neither a bed nor a pad." Editorial, *County Officials Need to Address Jail Squalor,* Corpus Christi Caller-Times, June 23, 2006, *available at* http://caller.com/news/2006/jun/23/county-officials-need-to-address-jail-squalor; *see also* Jaime Powell & Denise Malan, *Jail's Failed '02 Inspection Surfaces*, Corpus Christi Caller-Times, July 14, 2006, *available at* http://caller.com/news/2006/jul/14/jails-failed-02-inspection-surfaces (describing unsanitary and unsafe conditions leading to three years of failed inspections at Nueces County Jail). After conducting two inspections of Nueces County Jail living conditions, both of which the facility failed, U.S. Marshals considered the jail's health and safety issues so problematic that they transferred fifty

federal prisoners out of the jail. Editorial, *Transfer of Federal Prisoners from Jail Raises Questions*, Corpus Christi Caller-Times, June 20, 2006, *available at* http://caller.com/news/2006/jun/20/transfer-of-federal-prisoners-from-jail-raises.

Furthermore, in 2005, Texas's Thirteenth Court of Appeals addressed a claim that physical defects in the Nueces County Substance Abuse Treatment Facility ("SATF") "permitted guards to have unlimited, unmonitored access to inmates, provided the seclusion necessary for the harassment and assaults [including rape] to occur, and prevented any reasonable opportunity for [victims] to escape." *Campos v. Nueces County*, 162 S.W.3d 778, 784, 787 (Tex. App.-13th 2005). The Nueces County SATF was one of the drug treatment programs that Ms. Lovill was previously required to complete as a condition of her probation. (RR 21: 20-25, Aug. 6-7.)

The well-documented evidence of inhumane conditions at Nueces County Jail facilities indicates that far from advancing any state interests in health, incarceration there would put the lives and health of pregnant women and their future children at significantly more risk. In light of this information, Ms. Lovill's probation officer testified that after having her arrested, he placed a follow up call to the arresting officer because he knew of the problematic conditions in Nueces County Jail. (*See* RR 38:15-21, Oct. 4.)

Investigations have revealed equally intolerable conditions at other Texas detention facilities. A 2006 federal investigation of the Dallas County Jail documented similar lack of care and facilities. Specific examples of dangerous maltreatment included an instance in which a pregnant woman who complained of continual bleeding could not get help for two months despite her repeated requests. Letter from Wan J. Kim, Ass't

Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to the Honorable Margaret Keliher, Presiding Officer, Dallas County Comm'r Ct. 16 (Dec. 8, 2006), *available at* http://www.texasjailproject.org/articles/must_read_feds_report_on_dallas_county_jail (concluding certain conditions violated the constitutional rights of inmates to adequate medical and mental health care and safe and sanitary environmental conditions). The investigation also found that prenatal care at Dallas County Jail was inadequate. For example, Dallas County Jail did not regularly screen and vaccinate pregnant women for illnesses such as hepatitis B, care that could prevent maternal-fetal transmission. *Id.* at 24.

Other individual reported cases of the treatment of pregnant women in jails and prisons across Texas further undermine the State's claim that imprisoning pregnant women safeguards the health of women, their fetuses, and their newborns. For example, there are documented instances of women giving birth alone in jail cells. In several cases, the baby died. *See* Diane Wilson, *Why Being Pregnant in a Texas Lock-Up Is a Living Hell*, AlterNet.Org, June 7, 2009, http://www.alternet.org/reproductivejustice/140451/why_being_pregnant_in_a_texas_lock-up_is_a_living_hell (describing horrendous experiences of pregnant women in Texas jails); Texas Jail Project, *Diane Wilson's Letter*, Jan. 20, 2006, *available at* http://www.texasjailproject.org/stories/diane_wilsons_letter (describing tragic experience of woman who suffered stillbirth breach delivery over a toilet, by herself, after staff failed to respond to repeated pleas for help); *see also Inmate Gives Birth to Baby in Jail Toilet*, Houston Chron., July 25, 2003, at A28 (describing another case in which prison medical staff ignored calls of pregnant woman experiencing severe contractions, pain, and

bleeding and left her to deliver in the cell toilet).[23]

The State's claim that incarceration was an appropriate response to Ms. Lovill's pregnancy is further challenged by the fact that until September 1, 2009, Texas permitted the shackling of women during pregnancy and even labor, a practice widely recognized by both medical and human rights groups as unnecessary, cruel, inhumane, and medically dangerous. *See* Nicole Porter, *Reproductive Health of Texas Female Prisoners*, Nov. 28, 2006, http://www.aclutx.org/article.php?aid=386 ("Currently Texas does not have legislation limiting use of shackling on pregnant inmates. Consequently, female prisoners are shackled during labor."). Shackling pregnant women poses serious health risks, as described by Dr. Patricia Garcia in Amnesty International's report on shackling: "Women in labor need to be mobile. . . . Having the woman in shackles compromises the ability to manipulate her legs into the proper position for treatment [and] mother's and baby's health could be compromised if there were complications during delivery such as hemorrhage or decrease in fetal heart beat." Amnesty Int'l, *Excessive Use of Restraints on Women in U.S. Prisons: Shackling of Pregnant Prisoners,*

[23] These experiences of pregnant women in Texas reflect the well-documented failings of prisons and jails throughout the country to meet the medical needs of incarcerated pregnant women. *See, e.g.*, *Pool v. Sebastian County*, 418 F.3d 934 (8th Cir. 2005) (denying defendants qualified immunity because jail personnel acted with deliberate indifference to pregnant woman who suffered painful bleeding while incarcerated and eventually miscarried over jail toilet); *Coleman v. Rahija*, 114 F.3d 778 (8th Cir. 1997) (upholding compensatory damages for violation of pregnant inmate's Eighth Amendment right where prison nurse anticipated premature birth yet acted with deliberate indifference once inmate began complaining that she was in labor); Elizabeth E. Coleman & Monica K. Miller, *Assessing Legal Responses to Prenatal Drug Use: Can Therapeutic Responses Produce More Positive Outcomes Than Punitive Responses?*, 20 J.L. & Health 35, 57-58 (2007) ("[P]rison policies, programs, and procedures often neglect the health needs of female inmates. This oversight can be especially harmful to the health of pregnant inmates [who] do not receive regular pelvic exams or sonograms . . . [or] education about prenatal care and nutrition.") (internal citations omitted).

http://www.amnestyusa.org/Abuse_of_Women_in_Custody/Fact_Sheet_Shackling_of_Pregnant_Prisoners/page.do?id=1108308&n1=3&n2=39&n3=720 (last visited July 31, 2009).

This year, Texas adopted a law prohibiting the shackling of pregnant women during labor and recovery unless restraints are necessary to prevent harm to the woman, her infant, or others, or to prevent a substantial risk of the woman attempting to escape. H.B. 3653 (Tex. 2009) (signed by governor June 19, 2009). The law takes effect on September 1, 2009, twenty-six months after Ms. Lovill's incarceration during her pregnancy. *Id.* In analyzing this law, the Texas House Corrections Committee recognized "[s]hackling during labor and delivery can be detrimental to the health of both the infant and the mother." Tex. H. Corrections Committee, Bill Analysis for C.S.H.B. 3653, 81R29025 (2009). Another law, effective September 1, 2009, also more than two years after Ms. Lovill's incarceration, compels the Commission on Jail Standards to establish *minimum* requirements for pregnant women in county jails. 2009 Tex. Sess. Law Serv. Ch. 977 (H.B. 3654, S.B. 1009). These modest efforts are important steps to reducing the risks of harm to pregnant women who are incarcerated in the future. They did not, however, exist at the time of Ms. Lovill's incarceration nor would they have addressed many of the other problems that known to exist when Ms. Lovill's probation was discriminatorily revoked. Thus, the State's assertion that incarceration was "merely an administrative decision" that was "at most, merely an inconvenience, and, at best, a means to help" Ms. Lovill "control her drug problem[,]" (Pet'r's Br. at 34), is contradicted by these well known conditions in jails and prisons.

Moreover, the drug treatment program recommended for Ms. Lovill during her

pregnancy and approved by the trial court, the Substance Abuse Felony ***Punishment*** Facilities ("SAFPF"), is not designed to meet the needs of pregnant women, and less than 1% of women who enter are pregnant.[24] In fact, Officer Garza acknowledged that SAFPF is "similar to a prison setting" and, except for the special needs section, does not admit pregnant women. (RR 26:10-21, 27:23, Oct. 4.) Treatment experts recognize that drug treatment programs specifically designed to meet the needs of pregnant women and parenting women, including allowing women to keep their children with them while in treatment, have better outcomes than treatment programs not so designed.[25] The probation officers further recommended that Ms. Lovill go to the "special needs" section of SAFPF where "she could receive proper care" and "would get the treatment she needs[,]" which was granted by the trial court. (Pet'r's Br. at 5.) However, the special needs section, although it appears to accept pregnant women, is primarily geared towards

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[24] Lisa Kerber, Jane Carlisle Maxwell & Lynn S. Wallisch, Tex. Commission on Alcohol and Drug Abuse, *Substance Use Among Offenders Entering the Texas Department of Criminal Justice—Substance Abuse Felony Punishment Facilities, 1998-2000* 5 (2001), *available at* http://www.dshs.state.tx.us/sa/Research/criminaljustice/SAFP_Study.pdf.

[25] Ctr. for Substance Abuse Treatment, Substance Abuse & Mental Health Serv. Admin., *Pregnant, Substance-Using Women*, *Treatment Improvement Protocol (TIP)* 6-7 (1993), *available at* http://ncadi.samhsa.gov/govpubs/bkd107 (discussing the services needed to address successfully the treatment of drug using women, noting that it "is imperative that programs include services designed specifically for women, particularly pregnant women"); Ctr. for Substance Abuse Treatment, Substance Abuse & Mental Health Serv. Admin., *Practical Approaches in the Treatment of Women Who Abuse Alcohol and Other Drugs* 124-26 (1994) (providing guidance to treatment providers to meet the specific needs of women with substance abuse problems). *See also* Patrick H. Hughes et al., *Retaining Cocaine-Abusing Women in a Therapeutic Community: The Effect of a Child Live-in Program*, 85 Am. J. Pub. Health 1149 (1995) (randomized trial showed that women who kept their children remained in residential treatment longer then women whose children were placed outside of the treatment program); Richard R. Szuster et al., *Treatment Retention in Women's Residential Chemical Dependency Treatment: The Effect of Admission with Children*, 31 Substance Use & Misuse 1001 (1996) (women who participated in residential treatment with their children had higher retention rates then women without children in treatment.).

offenders with serious mental health issues.[26] As a recent report found, almost all offenders currently in the special needs program at SAFPF suffer from a mental illness, with about 88% of women entering SAFPF having a history of seeking mental health treatment.[27] In 2008 more than a dozen narratives written by female SAFPF inmates were sent to a Texas attorney recounting routine deprivation, humiliation, and degradation in addition to arbitrary, harsh punishment in the form of both psychological and physical abuse. Patricia J. Ruland, *Rehabilitation or Torture? Inmates Charge Privatized State 'Rehab' Program Subjects Women to Prolonged Physical Stress and Degradation*, Austin Chron., May 23, 2008, *available at* http://www.austinchronicle.com/gyrobase/Issue/story?oid=oid%3A627435. The women frequently detailed an individual and collective form of punishment called the "tighthouse" in which they were forced to sit "silently, rigidly, face forward, in plastic chairs for long hours or days," while being verbally abused, a claim later confirmed by a former counselor. *Id.*; Patricia J. Ruland, *Whitmire: Substance Abuse Program is Doing Fine*, Austin Chron., Dec. 12, 2008, *available at* http://www.austinchronicle.com/gyrobase/Issue/story?oid=oid%3A714278 (noting many claims were verified, although an official investigation did not find enough evidence for legal action). No state interest in maternal, fetal, or newborn health can be advanced by incarcerating pregnant women in jails or prisons, such as Nueces County Jail or the SAFPF, that lack adequate facilities and health services for pregnant women with substance abuse problems and where dangerous and inhumane conditions exist.

Finally, it is clear that Ms. Lovill's incarceration was not narrowly tailored to

[26] Kerber et al., *supra,* at 67.
[27] *Id.* at 79.

serve a compelling interest, as required by Constitution and Texas's ERA standards. (*See* Resp't's Br. at 49; ACLU *Amicus* Br. at Section II.C.) In this case, the State was well aware that appropriate placement was available for Ms. Lovill. (*See* RR 42-49, Oct. 4 (testimony of Lee Motes, Progam Manager of Casa de Familias). The Casa de Familias program, proposed by Ms. Lovill at her revocation hearing and rejected by the trial court, (Pet'r's Br. at 5-6), is specifically designed for pregnant women and allows children to stay with their mothers at the treatment facility. Charlie's Place Casa de Familias, http://www.charliesplaceonline.com/house/casa.html (last visited July 28, 2009) (noting "Casa de Familias . . . is one of only eight facilities in the State of Texas that serves women and their dependent children."). Clearly, Casa de Familias was a more narrowly tailored alternative than incarceration in either Nueces County Jail or SAFPF, and one which would have enhanced the asserted state interests in maternal and fetal health, but trial court chose not to utilize it.

E. The State's views regarding pregnancy and the relative risks of methamphetamine reflect dangerous stereotypes and medical misinformation.

The State argues that failing to deprive Ms. Lovill of her liberty would have forced the State to "disregard the biological and psychological symptoms of pregnancy, no matter how significantly those symptoms may effect [sic] her course of treatment and rehabilitation." (Pet'r's Br. at 31.)[28] Notably, the State fails to cite a single source, other than "common knowledge[,]" to support the notion that pregnancy somehow interferes with recovery from drug problems. (Pet'r's Br. at 30-31.) In fact, evidence-based

[28] The probation officers and the State associate her pregnancy with "symptoms of stress and emotional instability." (Pet'r's Br. at 5, 8, 9, 27, 28, 30; RR 1-19, 29, 30, 36, 38, Oct. 4.)

research indicates the opposite: that pregnancy typically creates enhanced incentive for recovery and that stereotypes, such as those advanced by the State, have historically undermined women's ability to access appropriate drug treatment in the first place.

Until quite recently, the drug treatment literature repeated the unscientific assumption that drug and alcohol using women are "sicker or harder to treat" than their male counterparts. Jahn L. Forth-Finegan, *Sugar and Spice and Everything Nice: Gender Socialization and Women's Addiction – A Literature Review*, *in* Claudia Bepko, Feminism and Addiction 19, 20-22 (1992) (discussing the history of stereotypes and gender roles in understanding women with addiction). As a result of such stereotypes and stigmatizing assumptions women were marginalized from and restricted in their access to treatment programs and other types of assistance. *See* Stephen R. Kandall, *Substance and Shadow: Women and Addiction in the United States* 285 (1996). "When women admitted that they used drugs and sought help, they were subjected to blame and societal rage[.]" *Id.* Social stigma and judgment create barriers to achieving health. "[T]he fear of being labelled with the disease may cause individuals to delay or avoid seeking treatment altogether, while those already labelled may decide to distance themselves from the label, forgoing treatment or becoming noncompliant." Bruce G. Link & Jo C. Phelan, *Stigma and Its Public Health Implications*, 367 Lancet 528, 529 (2006).

Indeed, treatment programs until very recently used such excuses to bar pregnant women from treatment entirely. *See, e.g.*, *Elaine W. v. Joint Diseases N. Gen. Hosp.*, 613 N.E.2d 523 (N.Y. 1993) (invalidating, as sex discrimination under New York Human Rights Law, a hospital policy barring pregnant women from drug detoxification services

in absence of showing of medical necessity); Cynthia Dailard & Elizabeth Nash, *State Responses to Substance Abuse Among Pregnant Women*, The Guttmacher Rep. on Public Policy, Dec. 2000, at 6, *available at* http://www.guttmacher.org/pubs/tgr/03/6/gr030603.pdf ("[A]t least historically, pregnant substance abusers have faced tremendous difficulty obtaining treatment. Many programs have refused to accept pregnant women or have been unable to provide important services they need, such as prenatal care, parenting skills instruction, childcare and transportation."); Wendy Chavkin, *Cocaine and Pregnancy – Time to Look at the Evidence*, 285 JAMA 1626, (1991) ("treatment is difficult to access generally, and often specifically unavailable for pregnant women and for the incarcerated.").

To this day, old stereotypes and discrimination against women are carried forward and reflected in continuing limited access to care. A 2006 U.S. Department of Health and Human Services report showed that 13% of public and private drug treatment facilities nationwide *do not* accept any women into their programs, and, among the facilities accepting women, only 41% offered programs or groups designed to meet the needs of women and only 17% offered services for pregnant or postpartum women.[29] The 2006 National Survey on Drug Use and Health showed that in 2006, 7.4 million women aged 18 and over needed treatment for a substance use problem, but only 822,000 (11.2%) received treatment.[30]

Historically, pervasive stereotypes such as those described above justified turning

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[29] *See* Office of Applied Studies, Substance Abuse & Mental Health Serv. Admin., *Facilities Offering Special Programs or Groups for Women: 2005*, DASIS Rep., May 15, 2008 , *available at* http://www.oas.samhsa.gov/2k6/womenTx/womenTX.htm.

[30] Office of Applied Studies, Substance Abuse & Mental Health Serv. Admin., *Substance Use Treatment Among Women of Childrearing Age*, NSDUH Rep., Oct. 4, 2007, *available at* http://oas.samhsa.gov/2k7/womenTX/womenTX.htm.

women away from treatment, and in this case the probation officers relied on the same invalid presumptions to seek Ms. Lovill's incarceration.

1. *Nothing about pregnancy provides a valid basis for viewing a relapse on a woman's road to recovery any differently than a relapse experienced by a man.*

"Relapse is a pervasive phenomenon in recovery from drug and alcohol addictions, as well as other chronic diseases." Caron Treatment Ctr., *Relapse & Recovery; Behavioral Strategies for Change* 22 (2003) [hereinafter "Relapse and Recovery"]. This fact explains why probation officers generally do not automatically seek probation revocation in response to a drug test or other symptoms of relapse. Even after relapse, there is still the potential for recovery: "[I]n fact, relapse may be part of a learning process that may lead ultimately to recovery." Frank M. Tims et al*., Relapse and Recovery in Addictions* 5 (2001). Only 20% of addicts recover the first time they are treated. *See* Harvard Med. Sch., *Addiction & the Problem of Relapse*, *in* Harvard Mental Health Letter (Jan. 2007). Most people experience a period of abstinence, then a relapse, and then again abstinence before achieving sobriety. *See Relapse and Recovery* at 7. With respect to certain addictions, such as addiction to nicotine, relapse is accepted as routine, and is not stigmatized.[31] The literature indicates that "one-third to one-half of relapse prone persons eventually find permanent abstinence." Terence T. Gorski, *Relapse – Issues and Answers*, Alcoholism & Addiction, Nov. 1989, at 9 n.5.

Recognizing these principles of recovery, the Texas Department of Criminal Justice guidelines for drug treatment programs advise that *continued* relapse, rather a

[31] As Mark Twain said, "Quitting smoking is easy. I've done it a thousand times." University of Pennsylvania Medical School, *Quitting Smoking Information*, http://www.med.upenn.edu/tturc/pdf/Quit_Smoking_informationl.pdf (last visited July 31, 2009) (quoting Mark Twain).

single positive drug test, is grounds for termination from a drug treatment program and participation in the SAFPF program. [32] Texas drug court guidelines consistently express recognition that relapse is an integral part of recovery and that relapse must be addressed in a therapeutic manner, distinguishing relapse from *continued* use that should result in increasing sanctions from the court.[33]

These Texas laws, policies, and guidelines are consistent Supreme Court precedent and expert medical opinion. Medical experts have long recognized "that addiction is not simply the product of a failure of individual willpower. Instead, dependency is the product of complex hereditary and environmental factors." Am. Med. Ass'n, *Proceedings of the House of Delegates: 137th Annual Meeting*, Board of Trustees Report NNN 236, 241, 247 (June 26-30, 1988). *See also* R. K. Portenoy & R. Payne, *Acute and Chronic Pain, in Substance Abuse: A Comprehensive Textbook* 563, 582-84 (J.H. Lowinson et al. eds., 1997) (citing AMA task force); Nat'l Acad. of Scis., Inst. of Med., *Public Perceptions, Public Policies, in Dispelling The Myths About Addiction: Strategies to Increase Understanding and Strengthen Research* (1997).

Accordingly, courts and lawmakers have acknowledged that addiction is a disease marked by "compulsions not capable of management without outside help." *Robinson v. California*, 370 U.S. 660, 671 (1962) (Douglas, J., concurring); *see also* 42 U.S.C. § 201(q) ("The term 'drug dependent person' means a person who is using a controlled

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[32] Texas Dep't of Criminal Justice Rehabilitation & Reentry Programs Div., *Substance Abuse Treatment Program*, Mar. 18, 2009, http://www.tdcj.state.tx.us/pgm&svcs/pgms&svcs-subabus.htm.

[33] Tex. Ass'n of Drug Court Prof'ls, *Planning and Implementing Drug Courts in Texas: A Resource Guide* 18 (2005), *available at* http://www.american.edu/spa//justice/publications/TADCP_Planning%26ImplementingDCinTX_Jan05.pdf.

substance . . . and who is in a state of psychic or physical dependence, or both[.]"). Indeed, Texas's First Court of Appeals has held that a drug-dependent person has a disease and "should be treated as a sick person. Cruel and unusual punishment results not solely from confinement, but also from branding the addict as a criminal." *Simpson v. State*, 668 S.W.2d 915, 922 (Tex. App. 1984); *see also Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 386 (Tex. 1991) (defining alcoholism as a disease). One of the established hallmarks of the disease of drug dependence is the inability to reduce or control drug use despite adverse consequences. *See* Am. Psychiatric Ass'n, The Diagnostic and Statistical Manual of Mental Disorders 179 (4th ed. 2000) ("DSM-IV-TR"); *see also Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 676 (1989) ("[A]ddicts may be unable to abstain even for a limited period of time."). Thus, the vast majority of drug-dependent people, including pregnant women, cannot simply "decide" to refrain from drug use or achieve long-term abstinence without appropriate treatment and without periodic relapses on the road to recovery.

This course of recovery and relapse applies equally to pregnant women, making clear that there is no medical justification for penalizing them for becoming pregnant and continuing to term while experiencing this process. Indeed, numerous studies indicate that pregnant women are especially motivated to address addiction and change their behavior for the sake of their future child. (*See, e.g.*, ACLU Br. at 24); Mary M. Mitchell et al., *Pregnancy and Race/Ethnicity as Predictors of Motivation for Drug Treatment*, 34 Am. J. Drug & Alcohol Abuse 397 (2008) (pregnant women are four times as likely to "express motivation for treatment"); Einat Peles & Miriam Adelson, *Gender Differences and Pregnant Women in a Methadone Maintenance Treatment (MMT) Clinic*, J.

Addictive Diseases, Aug. 2006, at 39, 43 (finding that pregnant women had similar retention rate in the program, but had less illegal drug use after one year of treatment when compared to men and non-pregnant women). Nonetheless, pregnancy does not create a unique capacity to obtain and maintain recovery over nine months.

2. *Risks associated with methamphetamine use are not different in kind or magnitude from other pregnancy risks.*

According to the State, "high level of drugs in Lovill's positive urinalysis caused concern for both the baby and that Lovill would continue to use drugs." (Pet'r's Br. at 7.) However, medical evidence demonstrates that the risks associated with Ms. Lovill's methamphetamine use are not unique or greater than a wide variety of other pregnancy risks.

In 2006, the American College of Obstetricians & Gynecologists created a special information sheet about methamphetamine use in pregnancy, noting that "the effects of maternal methamphetamine use cannot be separated from other factors," and that there "is no syndrome or disorder that can specifically be identified for babies who were exposed *in utero* to methamphetamine." Am. Coll. Obstetricians & Gynecologists, *Information about Methamphetamine Use in Pregnancy* (Mar. 3, 2006). In 2005, a national expert panel review of published studies concerning the developmental effects of methamphetamine and related drugs concluded that: "[T]he data regarding illicit methamphetamine are insufficient to draw conclusions concerning developmental toxicity in humans." Ctr. for the Evaluation of Risks to Human Reproduction, *Report of the NTP-CERHR Expert Panel on the Reproductive & Developmental Toxicity of Amphetamine & Methamphetamine* 163, 174 (2005). That same year, more than 90 leading medical doctors, scientists, psychological researchers, and treatment specialists

released an open letter requesting that "policies addressing prenatal exposure to methamphetamines and media coverage of this issue be based on science, not presumption or prejudice" and warning that terms such as "meth babies" lack medical and scientific validity and should not be used. *See* CESAR Weekly Fax from the Center for Substance Abuse Treatment, Vol. 14 Issue 33 (Aug. 2005).

Indeed, nearly two decades of misinformation about the effects of *in utero* cocaine exposure counsels that assumptions about illegal drug use during pregnancy must be carefully scrutinized. In the face of criminal sanctions based on public fears that are fueled largely by media accounts and a handful of methodologically flawed research studies on cocaine, courts properly refused to expand the reach of criminal laws to the context of pregnancy. *See* Laura E.L. Gomez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* 14 (1997). These judicial decisions were well-founded. *See, e.g., Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007); *Kilmon v. State*, 905 A.2d 306 (Md. 2006) (noting the near universal view of other state courts ruling against prosecution of women who choose to carry a pregnancy to term in spite of a drug problem and holding " that it was not the legislature's intent that the [child abuse statute] apply to prenatal drug ingestion by a pregnant women."); *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992) (reversing the conviction of a woman who used cocaine during pregnancy for "delivering drugs to a minor"); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992) (finding that a statute proscribing distribution of cocaine from one person to another did not apply to pregnant women in relation to their fetuses and to interpret the law otherwise would deprive pregnant women of fair notice); *Herron v. State*, 729 N.E.2d 1008 (Ind. Ct. App. 2000) (dismissing, as a matter of statutory

interpretation and due process, the criminal charge of neglect of a dependent based on claim that a pregnant woman used cocaine while pregnant); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991) (holding that application of the state's drug delivery statute to a pregnant woman who allegedly "delivered" cocaine to her child through the umbilical cord violates legislative intent and due process).

Although responsible voices had cautioned that findings concerning biological effects were "contradictory" and that evidence of harm remained "slim" and "inconclusive," *see*, *e.g.*, Linda C. Mayes et al., *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 JAMA 406 (1992), a comprehensive analysis of the developmental effects of cocaine exposure did not appear until 2001 and concluded that the claimed link between prenatal exposure to cocaine and harm to children was largely unfounded. *See* Deborah Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001). Today, courts recognize "the phenomena of 'crack babies' . . . is essentially a 'myth.'" *United States v. Smith*, 359 F. Supp. 2d 771, 780 n.6 (E.D. Wis. 2005). *See also McKnight v. State*, 661 S.E.2d 354 (S.C. 2008) (granting post-conviction relief for a conviction of homicide by child abuse, the court concluded that Ms. McKnight did not have effective counsel, noting that counsel failed to call appropriate expert witnesses, creating a "reasonable probability that the jury used the adverse and *apparently outdated scientific studies* propounded by the State's witnesses" to find support for the claim that cocaine caused the death of the fetus) (emphasis added).

Likewise, existing research on the long term effects of methamphetamine ingestion during pregnancy is inclusive. *See* Lynn M. Smith et al., *The Infant*

Development, Environment, and Lifestyle Study: Effects of Prenatal Methamphetamine Exposure, Polydrug Exposure, and Poverty on Intrauterine Growth, 118 Pediatrics 1149, 1155 (2006) ("Long-term follow-up is needed to determine if [newborns exposed to methamphetamine *in utero*] are at increased risk for future growth and/or neurodevelopmental deficits.") Yet, there is at least a comparable basis for concern about the potential for serious adverse effects of numerous prescription drugs, including anticonvulsants, mood-stabilizers, benzodiazepines (a class which includes Valium, Librium and Xanax), as well as some antibacterial, anticoagulant, and antihypertensive drugs. *See* Kenneth Lyons Jones, *Smith's Recognizable Patterns of Human Malformation* 495 (5th ed. 1997); Jerrold G. Berstein, *Handbook of Drug Therapy In Psychiatry* 407-25 (2d ed. 1988); *The Merck Manual of Diagnosis and Therapy* 1859 (R. Berkow ed., 16th ed. 1992.)

In light of the medical evidence that numerous factors and substances may affect a woman's pregnancy – from a pregnant woman's age to having a partner who smokes[34]

[34] For example, there are a range of identified risk factors for low birth weight and stillbirth, including giving birth at age 35 or older, *see* Suzanne C. Tough et al., *Delayed Childbearing and Its Impact on Population Rate Changes in Lower Birthweight, Multiple Birth and Preterm Delivery*, 109 Pediatrics 399 (2002); pregnancies for women with hyperthyroidism and other diseases, *see* Paul Atkins et al., *Drug Therapy for Hyperthyroidism in Pregnancy: Safety Issues for Mother and Fetus*, 23 Drug Safety 229 (2000); and toxic exposure in the workplace, *see Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 205 (1991); *see also Int'l Union v. Johnson Controls Inc.,* 886 F.2d 871, 914-15 n.7 (7th Cir. 1989) (Easterbrook, J., dissenting) (noting that an estimated 15 to 20 million jobs entail exposure to chemicals that pose fetal risk); Sohail Khattak et al., *Pregnancy Outcome Following Gestational Exposure to Organic Solvent: A Prospective Controlled Study*, 281 JAMA 1106 (1999) (finding that pregnant women exposed to organic solvents on the job have a 13-times greater risk of giving birth to babies with major malformations than those not exposed). Studies demonstrate that pregnancy outcomes can also be influenced by male contribution. *See* Cynthia R. Daniels, *Exposing Men, the Science and Politics of Male Reproduction* 124 (2006) (linking pregnancy loss to paternal workplace exposure to ionizing radiation and paternal smoking).

-- courts in Texas and other states acknowledge the due process concerns with punishing a woman for continuing pregnancy to term in spite of a drug problem. In 1994, a Texas Appellate court recognized that applying the injury to a child statute to a woman who used cocaine while pregnant would render the statute impermissibly vague as applied to the context of pregnancy. E.g. *Collins v. State*, 890 S.W.2d 893 (Tex. App. 1994). As the Maryland Court of Appeals recently noted in refusing to interpret Maryland's criminal child endangerment statute to apply to the context of pregnancy, pregnant women could otherwise be subjected to liability for "engaging in virtually any injury-prone activity" such as:

> [C]ontinued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little[.]

Kilmon v. State, 905 A.2d 306, 311-12 (Md. 2006). *E.g., People v. Stewart,* No. M5008197 (Cal. Mun. Ct. Feb. 26, 1987) (describing prosecution of defendant for criminal neglect in part because she failed to follow her doctor's orders to stay off her feet and refrain from sexual intercourse while she was pregnant). *See also Reinesto v. Superior Court*, 894 P.2d 733, 736-38 (Ariz. Ct. App. 1995) (dismissing child abuse charges against a pregnant woman who allegedly used heroin and finding that expansion of the statute to include fetuses would offend due process notions of notice because it would make everything a pregnant woman did subject to state scrutiny); *Stallman v. Youngquist*, 531 N.E.2d 355, 360 (Ill. 1988) (refusing to recognize the tort of maternal prenatal negligence, noting that holding the mother liable for this would "infringe[] on

her right to privacy and bodily autonomy"); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993) (affirming the reversal of a child abuse conviction of a pregnant woman who used illegal drugs and concluding that applying the statute would deprive the woman of constitutionally-mandated notice).

Furthermore, efforts to suggest that the revocation decision had to do with her "high" level of drug use rather than her pregnancy are contradicted by testimony making clear that her pregnancy was the critical factor. Nevertheless the state seeks to justify Ms. Lovill's incarceration by pointing to "high" level in Ms. Lovill's a single positive urinalysis. (RR 13, 25, 29 (Oct. 4) (Officer Garza stating "three times over—it was close to three times over the cutoff limit[;]" "she is positive almost three times – the cutoff is a thousand and she scored at 3695 for amphetamines") (RR 25: 13-15 (Oct. 4).)

These references to a high level of use, however in no way support a conclusion that Ms. Lovill's relapse was in any way unique, involved usually high amount used, or established any particular high frequency of use. *See generally* Marilyn A. Huestis & Edward J. Cone, *Methamphetamine Disposition in Oral, Fluid, Plasma, and Urine*, 1098 Ann. N.Y. Acad. Science 104 (2007) (discussing various methods for testing for evidence of methamphetamine and demonstrating that test result levels will vary significantly after a single dose among individuals given identical doses and that factors such as a dehydration can also make one individuals' test results higher than another's.). This is because the test results reflect recency of use, not the amount of the drug used or frequency of its use. *Id.* Further, the fact that the result relied upon was for "amphetamine" and not methamphetamines (despite the State conflating or interchanging these terms) suggests that the State did not subject the sample to confirmatory testing,

like the type mandated for federal workplaces. *See* Mandatory Guidelines for Federal Workplace Drug Testing Programs, 69 Fed. Reg. 19,659 (April 13, 2004).

Because relapse is a normal part of the recovery process, including for pregnant women, and because the risks associated with methamphetamine dependence are not fundamentally different from other pregnancy risks, the assumptions that underlie the State's response to evidence of Ms. Lovill's drug use during pregnancy lacks scientific basis.

F. International human rights laws and principles recognize that maternal and fetal health are not advanced by incarcerating pregnant women.

International law and principles recognize that incarcerating pregnant women is counterproductive to the goals of promoting maternal and fetal health. For half a century, the international community has recognized the critical importance of protecting, rather than punishing, women throughout pregnancy and childbirth. The Universal Declaration of Human Rights declares that motherhood is "entitled to special care and assistance." G.A. Res. 217A (III), art. 25(2). The International Covenant on Economic, Social and Cultural Rights requires that mothers be given special protection before and after childbirth. ICESCR art. 12(1). In addition, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") requires that states "ensure women appropriate services in connection with pregnancy, confinement and the post-natal period." CEDAW art 12(2). As the U.S. Supreme Court acknowledged in 2005, "the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Roper v. Simmons*, *543* U.S. 551, 578 (2005).

Applying these principles in the criminal justice system, the United Nations Office of Drugs and Crime recognizes, "[t]o protect the health of the mother and of the newborn child, pregnancy should in principle be an obstacle to incarceration, both pre-trial and post-conviction, and pregnant women should not be imprisoned except for absolutely compelling reasons." United Nations Office on Drugs and Crime & World Health Organization Reg'l Office for Europe, *Women's Health in Prison: Correcting Gender Inequity in Prison Health* 32 (2009), *available at* www.unodc.org/documents/commissions/CND-Session51/Declaration_Kyiv_Women_60s_health_in_Prison.pdf. *See also* United Nations Office on Drugs and Crime, *Criminal Justice Assessment Toolkit: Custodial and Non-Custodial Measures, The Prison System* 27 (2006), *available at* http://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html ("Pregnant women and nursing mothers have particular problems relating to their condition and should not be imprisoned unless exceptional circumstances exist.").

Incarcerated pregnant, laboring, and post-partum women, like all incarcerated people, are afforded broad guarantees of health, safety and freedom from cruel, inhuman and degrading treatment by international human rights legal standards. United Nations Standard Minimum Rules for the Treatment of Prisoners § 23(1) ("there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever possible for children to be born in a hospital outside the institution."). *See also Roper*, 543 U.S. at 554; *Estelle v. Gamble*, 429 U.S. 97, 103-10 (1976) (citing Minimum Standards as evidence of "contemporary standards of decency" for purposes of Eight Amendment and holding denial of medical services to

inmates inconsistent with those standards). Medical care for incarcerated pregnant women is specifically addressed by the CEDAW, stating that signatory states "shall ensure to women appropriate services in connection to pregnancy, confinement and the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation." CEDAW art 12(2). Further, the U.N. Human Rights Committee has stated, "[p]regnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times surrounding the birth and while caring for their newly-born children." These principles require that when pregnant women are incarcerated, "the State takes on the responsibility to provide adequate care for the women and their babies. . . . The pre- and post-natal care provided should be equivalent to that available outside of prison." United Nations Office on Drugs and Crime, *Handbook for Prison Managers and Policymakers on Women and Imprisonment* 68 (2008), *available at* www.unodc.org/pdf/india/publications/HandbookForPrisonManagersAndPolicyMakers.pdf. Appropriate care that is equivalent to care in the community must include a wide array of special services not typically provided in jails and prisons such as access to a variety of providers including doctors, midwives, and doulas; flexible and nutritious diets; vitamin and mineral supplements; regular exercise; a healthy environment; pregnancy, childbirth, and breastfeeding education; miscarriage, stillbirth, and other appropriate counseling and support; and monitoring for postpartum depression, among other things. *See id*. at 68-69; United Nations Office on Drugs and Crime & World Health Organization Reg'l Office for Europe, *Women's Health in Prison: Correcting Gender Inequity in Prison Health* 32-33 (2009), *available at*

www.unodc.org/documents/commissions/CNDSession51/Declaration_Kyiv_Women_60s_health_in_Prison.pdf. International bodies recognize "[p]regnant women rarely receive adequate ante- and post-natal care in prison." United Nations Office on Drugs and Crime, *Handbook for Prison Managers and Policymakers on Women and Imprisonment* 19 (2008), *available at* www.unodc.org/pdf/india/publications/HandbookForPrisonManagersAndPolicyMakers.pdf. The fact that the appropriate level of care is rarely provided to incarcerated pregnant women reinforces the notion that the incarceration of pregnant women should avoided. In sum, the consensus in the international community is that the health of pregnant women and children is not advanced by incarceration.

G. The practice of separating newborns from incarcerated mothers poses substantial risk of harm.

As a result of the State's selective probation revocation, Ms. Lovill was sanctioned to the SAFPF program, with the provision that she would remain in Nueces County Jail until there was a place for her in the program. (RR 23:19-22, Aug. 6-7.) Probation Officer Garza acknowledged that babies born to women incarcerated at SAFPF are separated from their mothers after birth. (RR 28:8-15, Oct. 4.) Further, there is nothing in the record to suggest that Nueces County Jail, where Ms. Lovill was actually incarcerated when she gave birth, has any program allowing newborns to stay with their mothers. Such forced separation amounts to an additional penalty both on the mother and child, and poses additional risks of harm to newborn health and development, further undermining the State's claimed interests.

"Research indicates that children of incarcerated mothers, in particular, suffer

immediate and enduring adverse effects on their relationship with their peers, irreparable harm to their relationship with their mother, and may be at greater risk of future incarceration themselves." Megan Bastick & Laurel Townhead, *Women in Prison: A Commentary on the UN Standard Minimum Rules for the Treatment of Prisoners* 42 (June 2008) (citation omitted), *available at* http://www.quno.org/humanrights/women-in-prison/womenPrisonLinks.htm. Research also indicates that women who are allowed to keep their children with them during drug treatment have greater success in recovering from their addictions.[35]

Forced separation at birth breaks up families and prevents the beneficial effects of breast-feeding and maternal-infant bonding. Texas, as a matter of public policy, encourages breastfeeding in "the interests of maternal and child health and family values" and "recognizes breast-feeding as the best method of infant nutrition." Tex. Health & Safety Code § 165.001. When a mother is separated from her newborn because of incarceration, breastfeeding is not possible.

Courts have recognized that the State's interest in protecting the wellbeing of children is not fully served unless it does so in a manner that also protects the benefits of maintaining family relationships. As expressed by one court, "society's interest in the protection of children is, indeed, multifaceted, composed not only with concerns about the safety and welfare of children from the community's point of view, but also with the

[35] *See, e.g.*, Patrick H. Hughes et al., *Retaining Cocaine-Abusing Women in a Therapeutic Community: The Effect of a Child Live-In Program*, 85 Am. J. Pub. Health 1149 (1995) (randomized trial showed that women who kept their children remained in residential treatment longer then women whose children were placed outside of the treatment program); Richard R. Szuster et al., 31 Substance Use & Misuse 1001 (1996) (Women who participated in residential treatment with their children had higher retention rates then women without children in treatment.).

child's psychological well-being, autonomy, and relationship to family." *Tenenbaum v. Williams*, 193 F.3d 581, 595 (2d Cir. 1999) (quoting *Franz v. Lytle*, 997 F.2d 784, 792-93 (10th Cir. 1993)). Accordingly, courts have recognized that "governmental failure to abide by constitutional constraints may have deleterious long-term consequences for the child." *Wallis v. Spencer*, 202 F.3d 1126, 1130 (9th Cir. 1999); *see also State v. Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991) ("Criminal prosecution would needlessly destroy the family by incarcerating the child's mother when alternative measures could both protect the child and stabilize the family.") (quoting Brian C. Spitzer, Comment, *A Response to "Cocaine Babies" -- Amendment of Florida's Child Abuse and Neglect Laws to Encompass Infants Born Drug Dependent*, 15 Fla. St. U. L. Rev. 865, 881 (1987)).

The separation of new mothers from their newborns is thus recognized to harm mothers, children, and the family unit, and has been recognized by international bodies as a violation of international human rights standards. *See, e.g.*, Amnesty Int'l, *"Not Part of My Sentence" Violations of the Human Rights of Women in Custody* (1999), http://www.amnesty.org/en/library/info/AMR51/001/1999 (highlighting the negative repercussions to families and children of incarcerating mothers). Accordingly, by unnecessarily forcing the separation of Ms. Lovill and her newborn, the State created circumstances that health experts, courts, and human rights bodies oppose as detrimental to the health and welfare of children.

PRAYER FOR RELIEF

For the foregoing reasons, *amici* respectfully request that this Court affirm the Court of Appeals' December 22, 2008 judgment. Further, *amici* respectfully request that,

if this Court reaches the merits on the existing record, the Court find for the Respondent because under any standard of review, the discriminatory treatment of Ms. Lovill does not withstand constitutional scrutiny.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of the foregoing *Amicus Curiae* Brief was served on the following persons via first-class U.S. Mail on this the _____ day of August, 2009:

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No. PD-0401-09

IN THE TEXAS COURT OF CRIMINAL APPEALS

Ex Parte AMBER LOVILL

***AMICUS CURIAE* APPENDIX**

Appendix A

Amicus Curiae **Texas Association of Obstetricians and Gynecologists (TAOG)** aims to promote the art and science of medicine, specifically Obstetrics and Gynecology, for the betterment of women's health care in Texas. The Texas Association of Obstetricians and Gynecologists' core values are leadership in the promotion of the doctor-patient role and in the advocacy of patients' health, excellency in the quality of services and information provided to patients, and integrity and ethical behavior. TAOG's advocacy work includes building the Texas Coalition for Woman's Health. working closely with the American College of Obstetricians and Gynecologists, and working with the Texas Legislature, other governmental agencies, the courts, employers, health care systems, and insurers to keep the focus on women's health.

Amicus Curiae **American Society of Addiction Medicine (ASAM)** is devoted to increasing access to and improving the quality of addiction treatment. ASAM is an association of physicians dedicated to improving the treatment of alcoholism and other addictions, educating physicians and medical students, promoting research and prevention, and enlightening and informing the medical community and the public about these issues. ASAM physicians are multidisciplinary and can be found working in any number of primary care settings from hospitals to private practices to public health clinics. ASAM staunchly opposes policies that create obstacles to or deter personal from receiving substance use treatment or counseling.

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

Amicus Curiae **Central Texas Council on Alcoholism and Drug Abuse (CTCADA)** believes that alcohol, tobacco and other drug use are serious problems in communities, and, through the collaborative efforts of concerned citizens and professional, we can positively impact the problem of substance abuse in our communities. CTCADA's mission is to reduce the harm caused by substance abuse to individuals, families and communities, through prevention, intervention and treatment. The council works with many agencies in the community: probation, parole, Child Protective Services, Scott & White Hospital, and Schools in seven counties to provide prevention, intervention and substance abuse/mental health treatment. One very important program is a pregnancy and post partum intervention program that works to assist pregnant and post partum women to become and stay drug, alcohol and tobacco free. The purpose of the program is to improve the health of both mother and baby, both before and after birth, among

women at risk for abusing substances. It is CTCADA's goal to seek treatment that allows the mother and child to remain together, as keeping the child with the mother during treatment allows the mother to continue the bonding process with nurturing staff to facilitate. Incarceration does not protect the unborn child, and the stress and sanitary conditions in most jails can put the unborn child at greater risk. Alienation of a mother from her child can create future problems and can often perpetuate the cycle of addiction. Without treatment addicts will continue to return to jails and prisons, and understanding the role that a relapse plays in treatment is key for individuals to understand how an addict gets well.

Amicus Curiae **National Association of Alcohol and Drug Abuse Counselors (NAADAC), The Association for Addiction Professionals** is the largest membership organization serving addiction counselors, educators and other addiction-focused health care professionals, who specialize in addiction prevention, treatment, recovery support and education. With 10,000 members and forty-six state affiliates, NAADAC's network of addiction services professionals spans the United States and the world. NAADAC's members work to create healthier individuals, families and communities through prevention, intervention, quality treatment and recovery support. NAADAC promotes excellence in care by advocating for the highest quality and most up-to-date, science-based services for clients, families and communities. NAADAC's mission is to lead, unify, and empower addiction focused professionals to achieve excellence through education, advocacy, knowledge, standards of practice, ethics, professional development and research.

Amicus Curiae **American Nurses Association (ANA)** is the only full-service professional organization representing the interests of the nation's 2.9 million registered nurses (RNs) through its 51 constituent member nurses associations, its 24 specialty nursing and workforce advocacy affiliate organizations that currently connect to ANA as affiliates. The ANA advances the nursing profession by fostering high standards of nursing practice, promoting the rights of nurses in the workplace, projecting a positive and realistic view of nursing, and by lobbying the Congress and regulatory agencies on healthcare issues affecting nurses and the public.

Amicus Curiae **Association of Reproductive Health Professionals (ARHP)** is a national non-profit, interdisciplinary medical association for leaders in the field of reproductive health. Founded in 1963 and comprised of physicians, nurse practitioners, physician assistants, pharmacists, researchers, and educators, ARHP serves as an important source of reproductive health education and information for health care professionals, patients, legislators, other professionals, and the public at large. ARHP is concerned that the threat of prosecution, conviction, and incarceration will undermine accepted health care standards and will interfere with the ability of physicians, nurse practitioners, and other clinicians who treat pregnant and parenting women to provide appropriate, quality health care.

Amicus Curiae **The Center for Children of Incarcerated Parents (CCIP)** is an organization that works towards the prevention of intergenerational crime and

incarceration. CCIP's goals are the development of, and production of high quality documentation on, model services for children of criminal offenders and their families. CCIP has served more than 25,000 families since 1989, including over 2,500 pregnant prisoners and their families.

Amicus Curiae **Center for Gender and Justice** seeks to develop gender-responsive policies and practices for women and girls who are under criminal justice supervision. The Center is committed to research and to the implementation of policies and programs that will encourage positive outcomes for this underserved population.

Amicus Curiae **Chicago Legal Advocacy for Incarcerated Mothers (CLAIM)** is a not-for-profit agency founded in 1985 to help women prisoners and their children maintain contact. CLAIM provides free legal aid on family law matters to mothers and to children's guardians. CLAIM strives to promote community-based sentencing instead of prison for non-violent offenses and particularly for primary-caregiver parents, to promote family preservation, and to empower women former prisoners to work toward policy change.

Amicus Curiae **Child Welfare Organizing Project (CWOP)** is a 14-year-old organization of New York City parents and professionals who seek reform of New York City child welfare practices through increased, meaningful parent-client involvement in child welfare decision-making at all levels, from case-planning to policy, budgets and legislation. CWOP has approximately 1,500 parent members. Most of CWOP's staff and about half of CWOP's Board of Directors are parents who have had direct, personal involvement with child welfare services. A significant percentage of CWOP members are mothers in recovery. A large part of CWOP's work involves debunking prevailing stereotypes about parents and families involved with child welfare services, putting a human face on parents who are often unfairly and inaccurately demonized, and bringing CWOP's unique insights into policy decisions. CWOP hopes this will result in more enlightened public policy that effectively identifies and addresses real problems and challenges to successful family life, ultimately protecting children by helping and strengthening their families and communities.

Amicus Curiae **Connecticut Women's Consortium (CWC)** provides training, policy and advocacy activities related to women's unique behavioral health needs. Since 2006, CWC has delivered training to approximately 3,000 providers of behavioral health treatment services throughout Connecticut through a variety of venues that include conferences, workshops and behavioral health agency consultation. In addition, CWC has developed policy briefing papers for legislators regarding women's behavioral health and promoted legislation to identify the unique behavioral health needs across Connecticut's system of care for women and women with children.

Amicus Curiae **Drug Policy Alliance (The Alliance)** is the nation's leading advocacy organization dedicated to broadening the public debate over drug use and regulation and to advancing pragmatic drug laws and policies, grounded in science, compassion, public health and respect for human rights. The Alliance is a non-profit, non-partisan

organization with more than 25,000 members and active supporters nationwide. The Alliance has actively taken part in cases in state and federal courts around the country in an effort to being current scientific and public health data to bear on drug-related issues, and to combat irrational fears, prejudices and misconceptions about various drug-related matters that have, with regrettable frequency, distorted sound public policies regarding drug users and their families.

Amicus Curiae **Family Justice** is an organization that draws on the unique strengths of families and neighborhoods to break cycles of involvement with the criminal justice system. It works on engaging families in support of those released under community supervision and demonstrates the positive impact that families have on the reentry and rehabilitation process. In pursuing its mission, Family Justice assists government and communities by providing direct services, testing new methodology that promotes change, delivering training and consulting to encourage use of its methods, and se rving as a resource for both the criminal justice field and the general public.

Amicus Curiae **Global Lawyers & Physicians (GLP)** is a non-profit non-governmental organization that focuses on health and human rights issues. 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 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.

Amicus Curiae **Harm Reduction Coalition (HRC)** is committed to reducing drug-related harm among individuals and communities by initiating and promoting local, regional, and national harm reduction education, interventions, and community organizing. HRC fosters alternative models to conventional health and human services and drug treatment; challenges traditional client/provider relationships; and provides resources and educational materials. HRC also supports health professionals and drug users in their communities to address drug-related harm. HRC believes in every individual's right to health and well-being as well as in their competency to protect and help themselves, their loved ones, and their communities.

Amicus Curiae **Institute for Health & Recovery (IHR)** is a non-profit organization dedicated to developing and comprehensive continuum and care for families affected by substance abuse, especially women and their children. IHR focuses on the development of prevention, intervention, treatment services and the integration of gender-specific services within substance abuse prevention and treatment. IHR serves individual women and men, and families, with a continuing emphasis on pregnant and parenting women and their children. IHR members know firsthand the fears pregnant substance-abusing women have regarding prosecution, causing them to be reluctant to seek prenatal care and substance abuse treatment. With over 10 years of experience in working with pregnant women who use drugs, IHR rejects practices such as those used to punish Amber Lovill.

Amicus Curiae **Interfaith Drug Policy Initiative** is a non-profit corporation formed to organize people of faith to promote drug policy reform; i.e., moving from prohibition laws toward reasonable and compassionate drug regulation, education and treatment.

Amicus Curiae **Law Enforcement Against Prohibition (LEAP)** is a 10,000-member international non-profit educational organization, founded and run by police, judges, and prosecutors. LEAP was created to give voice to law-enforcers who believe the US war on drug has failed and who wish to support alternative policies that will lower the incidence of death, disease, crime, and addiction, without destroying generations of our young by arrest and imprisonment. LEAP does not condone drug abuse but we know "Legalized Regulation of Drugs" will end the violent and property crime that are a result of prohibition of those drugs. We can then treat drug abuse and a health problem instead of a crime problem and save the lives of our children, which we are now sacrificing at the altar of this terrible war.

Amicus Curiae **Law Students for Reproductive Justice (LSRJ)** is a nonprofit network of law students, professors, and lawyers dedicated to ensuring the future of reproductive justice by educating, organizing, and supporting law students on over 80 campuses throughout the United States and Canada. LSRJ is filling in the gaps left by formal legal education – providing educational materials and in-person learning experiences to ensure that budding legal experts have the information and skills they need to pursue reproductive justice in any realm – from the bar to the bench, school board meetings to congressional hearings, and beyond.

Amicus Curiae **Legal Services for Prisoners with Children (LSPC)** began in 1978 as one of the first legal organizations in the country to focus on the legal needs of prisoners and their children. Today, LSPC provides training, technical assistance, advocacy and litigation support to legal services offices, pro bono counsel, prisoners and their families, and advocates throughout California. LSPC has a national reputation for expertise on legal issues affecting incarcerated parents and their children. LSPC shares its expertise by writing articles, making presentations, teaching classes, and leading workshops for lawyers, social workers, child welfare workers, judges, prisoners and law students.

Amicus Curiae **Mills County, Iowa MOMs OFF METH Support Group** provides a safe place for women who have either lost their children or are in danger of losing them due to problems with drugs or alcohol. This is a group where members can share their fears, feelings of shame and guilt, past/present domestic violence and sexual assault, get referrals to other helping agencies, and have open discussions with other women who are experiencing the same problem now or who have in the past.

Amicus Curiae **National Asian Pacific American Women's Forum (NAPAWF)** is the only national, multi-issue Asian Pacific American (APA) women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for APA women and girls.

Amicus Curiae **National Association of Nurse Practitioners in Women's Health (NPWH)** is a professional organization founded in 1980 that represents nurse practitioners who provide care to women both in the primary care setting and in women's health specialty practices. NPWH is committed to assuring access of quality health care to all women of all ages by nurse practitioners, and to protecting a woman's right to determine the course of her own health care. NPWH works with other professional organization and policy makers to accomplish its goals. Its educational programs and publications offer special expertise in woman's health care across the lifespan and nurse practitioner professional issues.

Amicus Curiae **National Association of Social Workers (NASW)** is the world's largest association of professional social workers with 145,000 members in fifty-six chapters throughout the United States and abroad. Founded in 1955 from a merger of seven predecessor social work organization, NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. NASW believes that criminal prosecution of women who use drugs during their pregnancy is inimical to family stability and counter to the best interests of the child. The needs of society are better served by treatment of addiction, not punishment of the addict. NASW's policy statement, Alcohol, Tobacco, and Other Drugs, supports "an approach to ATOD [alcohol, tobacco and other drugs] that emphasizes prevention and treatment" and efforts to "eliminate health disparities that accrue from ATOD problems and discriminatory practices from the criminal justice system." (NASW, SOCIAL WORK SPEAKS, 8th ed., 2009).

Amicus Curiae **National Association of Social Workers — Oklahoma (NASW-OK)** has 1,079 members.

Amicus Curiae **National Association of Social Workers — Texas (NASW-TX)** has 5,400 members and is particularly interested in this case due to its significant local impact.

Amicus Curiae **National Coalition for Child Protection Reform** is an interdisciplinary coalition of professionals and academics who work to make the child welfare system better serve America's most vulnerable children through public education and reform of policies concerning child abuse, foster care and family preservation. NCCPR is a tax-exempt non-profit organization of which New York University Law Professor Martin Guggenheim serves as president and Richard Wexler as Executive Director.

Amicus Curiae **National Latina Institute for Reproductive Health (NLIRH)** wants to ensure the fundamental human right to reproductive health care for Latinas, their families, and their communities through education, policy advocacy, and community mobilization. Through advocacy, community mobilization, and public education, NLIRH is shaping public policy, cultivating new Latina leadership, and broadening the reproductive health and rights movement to reflect the unique needs of Latinas. NLIRH believes that coercive, discriminatory and/or punitive policies and practices (such as the

criminalization of pregnant substance users) are differentially impacting Latinas and other women of color.

Amicus Curiae **National Network for Women in Prison** was formed in 1985; its mission is to promote equity and justice for women and their families whose lives are impacted by the criminal justice system. The Network undertakes advocacy (1) to reduce the incarceration of women and girls through effective alternatives to imprisonment, (2) to end the violation of human rights of women and girls in correctional facilities, and (3) to promote quality services including health care, mental health care, perinatal care and substance abuse treatment, as well as education and vocational training. Its programs include leadership training for formerly incarcerated women and a national conference.

Amicus Curiae **National Women's Health Network (NWHN)** improves the health of all women by developing and promoting a critical analysis of health issues in order to affect policy and support consumer decision-making. The NWHN aspires to a health care system that is guided by social justice and reflects the needs of diverse women. NWHN was founded in 1975 to give women a greater voice within the healthcare system. NWHN is a membership-based organization supported by 8,000 individuals and organizations nationwide. NWHN has established core values to guide us in our work as advocates for women's health: (1) We value women's descriptions of their own experiences and believe that health policy should reflect the diversity of women's experiences, (2) we believe that evidence rather than profit should drive the services offered and information that is made available to women to inform their health decision-making and practices, (3) we value analysis of science that takes into consideration systems of power and oppression, (4) we believe that the government has an obligation to safeguard the health of all people, (5) all women should have access to excellent health care and (6) women's normal physiological changes over a lifespan should not be unduly medicalized.

Amicus Curiae **National Women's Prison Project (NWPP)** provides comprehensive, holistic reentry / survival skills and services to women both inside or released from correctional facilities while embracing them with a high level of dignity and respect to fully and successfully engage in life. NWPP's goal is to provide women with assistance and supportive networking resources for a smooth transition and successful reintegration back into their families and the community.

Amicus Curiae **The Osborne Association**, a nonprofit organization founded in 1931 to serve people involved in the criminal justice system and their children and families, offers innovative, effective, and replicable programs that serve the community by reducing crime and its human and economic costs. The Osborne Association offers educational, vocational, family and treatment services, and provides opportunities for reform and rehabilitation through public education, advocacy, and alternatives to incarceration that respect the dignity of people and honor their capacity to change as they achieve self-sufficiency, adopt healthy lifestyles, enter the workforce, form and rebuild families, and rejoin their communities.

Amicus Curiae **Physicians for Reproductive Choice and Health (PRCH)** is a national network of pro-choice physicians who are committed to providing and advocating for the best possible care for patients. PRCH exists to ensure that all people have the knowledge, access to quality services, and to make their own reproductive health decisions.

Amicus Curiae **SisterSong Women of Color Reproductive Health Collective** is the only national coalition in the United States of women of color organizations working to ensure reproductive justice for communities of color. SisterSong's mission is to strengthen and amplify the collective voices of Indigenous women and women of color in order to secure women' human rights, and thus achieve reproductive justice. SisterSong fights equally for the right to bear – or not to bear – a child, along with the subsequent and necessary enabling conditions to realize these rights. SisterSong strengthens the reproductive justice movement for low-income women and girls of color by (1) building social, political, economic and cultural power in communities, (2) winning real policy, institutional, and cultural changes in women's reproductive lives, (3) developing leadership among those who are most excluded from political power, (4) broadening the reproductive rights movement to include women of color's voices and concerns, and (5) working on individual, community, and institutional levels.

Amicus Curiae **Texas Jail Project** is dedicated to improving the conditions for the thousands of people—mothers, fathers, brothers, sons, sisters and daughters—incarcerated in Texas county jails.

Amicus Curiae **Whole Woman's Health, LLC** is a patient-centered national women's healthcare practice, where the focus is on the whole woman -- her head, her heart, and her body. Whole Woman's Health specializes in abortion care and offers a full range of reproductive healthcare. Whole Woman's Health recognizes that for most women between 14 and 60, reproductive healthcare and concern about pregnancy - being pregnant, getting pregnant, staying pregnant, not staying pregnant – are daily concerns. Their holistic approach acknowledges that pregnancy decisions are complex and we support women in their individual choice without judgment, and with support. This includes, naturally, the support of women who choose to continue a pregnancy even when that choice may reveal the need for specialized resources and care. Reducing the stigma surrounding abortion will not be aided by using abortion as a tool for change or as punishment. Whole Woman's Health knows that confidentiality between and woman and her physician is fundamental to sound medical care. They agree with the research that shows substance abuse recovery is more likely with treatment and rehabilitation, not jail-time. Healthy women are the heart of healthy families. Working holistically, we can support the empowerment of women to value themselves and their health.

Amicus Curiae **Women's Prison Association (WPA)** is a service and advocacy organization committed to helping women with criminal justice histories realize new possibilities for themselves and their families. WPA's program services make it possible for women to obtain work, housing, and health care; to rebuild their families; and to participate fully in civic life. Through the Institute on Women & Criminal Justice, WPA pursues a rigorous policy, advocacy, and research agenda to bring new perspectives to

public debates on women and criminal justice. WPA programs address each client's individual needs and strengths, dealing with the client as a whole person. WPA stresses self-reliance through the development of independent living skills; self-empowerment and peer support; and client involvement in the community. All of WPA's programs are designed to reduce the use of incarceration and to help criminal justice-involved women make decisions that support, strengthen and enrich their own lives, and those of their family members.

Amicus Curiae **Howard Brody, M.D., Ph.D**. is the Director of the Institute for the Medical Humanities and John P. McGovern Centennial Chair in Family Medicine at the University of Texas Medical Branch at Galveston. Previously, he served as University Distinguished Professor of Family Practice, Philosophy, and the Center for Ethics and Humanities in the Life Sciences at Michigan State University. He also served as Director of the Center for Ethics and Humanities from 1985 to 2000. Dr. Brody's most recent book is Hooked: Ethics, the Medical Profession, and the Pharmaceutical Industry (Rowman and Littlefield, 2007). He is also author of The Healer's Power (Yale University Press, 1992), Stories of Sickness (Yale University Press, 1987; second edition, Oxford University Press, 2003), Ethical Decisions in Medicine (Little Brown, second edition 1981), Placebos and the Philosophy of Medicine (University of Chicago Press, 1980), and The Future of Bioethics (Oxford University Press, 2009). Dr. Brody has also written more than 100 articles on medical ethics, family medicine, and philosophy of medicine. His work has been translated into six languages. Dr. Brody was elected President of the Society for Health and Human Values in 1988-89. In 1993-94, Dr. Brody served as Senior Scholar in Residency for the American Academy of Family Physicians at the Agency for Health Care Policy and Research in Rockville, MD; he also chaired the Michigan Commission on Death and Dying. In 1995, he was elected to the Institute of Medicine of the National Academy of Sciences.

Amicus Curiae **Fonda Davis Eyler, Ph.D.** is a Developmental Psychologist and Professor of Pediatrics at the University of Florida, where she has been a faculty member for 30 years. She co-directs the North-Central Florida Early Steps, a federally funded program that provides early intervention for children birth to three years who have developmental delay and disabilities. Dr. Eyler has been a consultant to numerous programs and state agencies providing services for pregnant women with addiction problems and their children, including serving on the Governor of Florida's Drug Policy Task Force: Drug Exposed Infants/Families Committee in 1990. Dr. Eyler has been conducting research on the effects of prenatal exposure to drugs on child development for nearly three decades, and her work been published in numerous widely-respected scientific journals and books.

Amicus Curiae **Deborah A. Frank, M.D.**, has been a Professor of Pediatrics at Boston University School of Medicine since 1981. She is also the Founder and Director of the Grow Clinic at Boston Medical Center, and Principal Investigator of the Children's Health Watch, which monitors the impact of policy changes on nutrition, growth and development of low-income children, ages 0-3 years. Since 1990, Dr. Frank has conducted research funded by the National Institute on Drug Abuse grant DA06532 on

the impact of prenatal exposure to cocaine and other substances on children's well being. At the request of U.S. Senators and Congressmembers, she has given testimony to the United States House and Senate. She has also testified before the United States Sentencing Commission Regarding Drug Penalties regarding the impact of prenatal cocaine exposure. Dr. Frank is the author of numerous peer-reviewed and published scientific articles and papers including, Deborah A. Frank et al., Maternal Cocaine Use: Impact on Child Health and Development, 40 Advances in Pediatrics 65 (1993) and the seminal systematic review published by the Journal of the American Medical Association ("JAMA"), Deborah A. Frank et al., Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review, 285 JAMA 1613 (2001). Dr. Frank has served on numerous committees and advisory boards and received awards recognizing her dedication to and advocacy on behalf of children in need.

Amicus Curiae **Leslie Gise, M.D**. is a Clinical Professor in the Department of Psychiatry, John A. Burns School of Medicine, University of Hawaii, medical staff at Maui Memorial Medical Center, Hawai'i Representative to the American Psychiatric Association, and Past President of the Hawai'i Psychiatric Medical Association. She continues to serve as a Staff Psychiatrist at the Maui Community Mental Health Center after twelve years. For eight years she was a Consulting Psychiatrist to the Malama Family Recovery Center on Maui, treating drug and alcohol addicted pregnant and parenting women—one of the few gender-specific addiction treatment centers in the state. Dr. Gise was in private practice for thirty years and taught at the Mount Sinai School of Medicine New York City in the Department of Obstetrics, Gynecology and Reproductive Science and Psychiatry. She specialized in the psychology of medical illness and women's mental health. She also worked in the obstetrical outpatient department, ran a screening program for postpartum depression and worked with HIV-infected pregnant women. She is a Past-President of two national professional organizations, a reviewer for many journals, a member of several professional organizations and has many publications. She has made presentations all over the world and has been quoted extensively in the media.

Amicus Curiae **Randy Glassman, M.D.,** graduated from Barnard College in 1972 and the University of California San Francisco School of Medicine in 1977. She trained in Internal Medicine and Psychiatry at Cambridge Hospital. She completed a fellowship in Consultation-Liaison Psychiatry at Brigham and Women's Hospital where she has been since 1983. Dr. Glassman is currently an Attending Psychiatrist at Brigham and Women's where, since 1993, she has also been Director of Women's Psychiatric Services. She also holds the appointment of Assistant Professor of Psychiatry at Harvard Medical School. Dr. Glassman is a women's health expert, and her work has been published in several books and numerous widely-respected scientific journals.

Amicus Curiae **C. Ronald Koons, M.D., FACP** is a retired oncologist who has volunteered at a University Medical Center for the last 14 years. Because of his experiences of listening and helping his cancer patients face the end-of-life issues, Dr. Koons has been on the Ethics Committee and regularly makes rounds in ICU's where

end-of-life issues abound. Dr. Koons's exposure to the Medical Ethics world has been a great help in seeing people as human beings, and not just as a disease or illness that needs our care. He helps patients with their problems based on their need and desire, and the capability of medicine to be a patient's partner. The responsibility of society to be the patient's partner is often lacking or misused, and he would like to help society take better responsibility for its role.

Amicus Curiae **Anna C. Mastroianni**, **JD, MPH** is an Associate Professor at the University of Washington (UW) School of Law (since 1998). She is also an Adjunct Associate Professor in the UW Department of Health Services, School of Public Health and in the Department of Bioethics & Humanities, School of Medicine, and an Affiliate Scholar at the Treuman Katz Center for Pediatric Bioethics in Seattle. She teaches health law and bioethics, including issues of reproduction, in the School of Law, the UW Institute for Public Health Genetics, and other units throughout the university. She has worked in a number of legal and governmental policy positions in Washington DC, including Associate Director of the White House Advisory Committee on Human Radiation Experiments and Study Director of the Institute of Medicine. She also practiced health law with Epstein Becker and Green, P.C., and Green, Stewart & Farber, P.C. in Washington, DC. She has served on the National Research Council's Committee on Institutional Review Boards, Social Science and Surveys and the Institute of Medicine's Committee on the Review of the National Immunization Program's Research Procedures and Data Sharing Program. Professor Mastroianni has also participated in the review of legal and ethical issues on National Institutes of Health study sections, and served on other government and non-government advisory bodies. In addition, she has been nationally recognized for her contributions to health policy, law and bioethics by the American Association for the Advancement of Science. Her publications include six books and numerous peer-reviewed articles on law, medicine and bioethics. Professor Mastroianni is admitted to the Pennsylvania and the District of Columbia bars.

Amicus Curiae **Howard Minkoff, M.D., FACOG,** is a Distinguished Professor of Obstetrics and Gynecology, SUNY-Brooklyn, and a nationally recognized leader in the field of Maternal and Fetal Medicine, specializing in the field of high-risk pregnancies. His work and research in HIV and sexually transmitted diseases is known both nationally and internationally. He has authored more than 300 scientific articles, book chapters, research abstracts, clinical presentations, and multimedia educational tool. He is currently a distinguished professor at SUNY Downstate and chairman of the department of obstetrics and gynecology at Maimonides Medical Center in Brooklyn, NY, since 1997. He also serves on the PHS panel that establishes guidelines for HIV care of pregnant women and has received the Assistant Secretary of Health Award for Service, related to his work for women with HIV.

Amicus Curiae **Lawrence J. Nelson, J.D., Ph.D.**, is a Senior Lecturer in Philosophy at Santa Clara University. During the 1978-79 academic year, he held a postdoctoral fellowship in bioethics at the University of California, San Francisco, School of Medicine. He practiced law from 1981 to 1986 with a firm in San Francisco and provided bioethics consultation and education as an independent practitioner from 1986 to 1996. He is currently a Faculty Scholar in the Markkula Center for Applied Ethics and has so far taught: Ethics in Society, Ethics in Business, Ethics in Medicine, Feminism and Bioethics, Feminism, Bioethics and the Law, and Phenomenology. Nelson has published articles on ethics, law, and health care in journals such as Journal of the American Medical Association, Hastings Center Report, Critical Care Medicine, Clinical Obstetrics and Gynecology, The Journal of Law, Medicine & Ethics, and Hastings Law Journal. He has served as a bioethics consultant to projects of the National Institutes of Health, the Hastings Center, and the American Thoracic Society. In October of 1996 he was awarded a $100,000 grant from the Robert Wood Johnson Foundation to study the legal and ethical aspects of prenatal substance abuse.

Amicus Curiae **Robert G. Newman, MD, MPH** is Director of The Edmond de Rothschild Chemical Dependency Institute of Beth Israel Medical Center and an internationally renowned expert on methadone treatment. For almost 40 years Dr. Newman has played a major role in planning and directing some of the largest addiction treatment programs in the world - including the New York City Methadone Maintenance and Ambulatory Detoxification Programs, which in the mid-‘70s treated over 33,000 patients annually. He has also been a strong addiction treatment advocate in Europe, Australia and Asia. Dr. Newman is also President Emeritus of Continuum Health Partners, a major non-profit hospital corporation, and a professor in the Albert Einstein College of Medicine's departments of Psychiatry and Behavioral Studies and Epidemiology and Population Health.

Amicus Curiae **Eli Reshef, M.D.** is a Reproductive Endocrinology and Infertility Specialist and the Medical Director of the Bennett Fertility Institute in Oklahoma City, Oklahoma. Mr. Reshef is also a Clinical Associate Professor at the University of Oklahoma Health Sciences Center. He has authored 12 book chapters, published numerous articles in major scientific journals, and given over 300 lectures.

Amicus Curiae **Lois Shepherd, J.D.**, is an expert in the fields of health law and bioethics. Her primary appointment is in the medical school's Center for Biomedical Ethics and Humanities at the University of Virginia, where she is a Professor of Law and Associate Professor of Biomedical Ethics and also directs the Center's programs in medicine and law. Professor Shepherd teaches courses in health care law and ethics at both the law school and the medical school.

Amicus Curiae **Rev. Timothy A. Thorstenson** is the primary ethics consultant for Park Nicollet Health Services and Methodist Hospital in St. Louis Park, MN. He also served as the lead bioethicist for Allina Health System from 2002 - 2005. Rev. Thorstenson has a doctorate in ministry and worked in critical medicine as spiritual care provider, including on the NICU, for 24 years. He is on the national Board of Directors for the Association

of Clinical Pastoral Education and was an adjunct Professor of Healthcare Ethics at Wm Mitchell College of Law, 2000 - 2003. He has longed championed women's rights and been active in Planned Parenthood.

Amicus Curiae **Elisa Triffleman, M.D.** is a psychiatrist specializing in post-traumatic stress disorder (PTSD) and addictions. She received her Medical Degree from Albert Einstein College of Medicine in 1987, completed residency in general psychiatry at the University of Wisconsin Hospital and Clinics in 1991, and completed a post-doctoral fellowship in addictions psychiatry at the San Francisco Veterans Administration Medical Center and the University of California, San Francisco (UCSF), CA in 1993. Thereafter, she was a faculty member in the Yale University School of Medicine Dept. of Psychiatry for many years. After returning to California, she continued to conduct research on the co-occurence of PTSD in substance abusers as begun at UCSF. She has also held other positions in numerous sectors, including in the managed healthcare industry and in evaluating individuals involved in contested legal cases concerning workers' compensation. Over the course of her career, Dr. Triffleman has evaluated and/or treated well over 150 patients with a wide array of substance use disorders, mental health disorders and/or HIV/AIDS. Dr. Triffleman has authored or co-authored 30 publications for the scientific literature, peer-reviews for over 10 scientific journals, and has recently been a guest editor for two scientific journals in the area of the overlap of diversity (ethnic and sexual orientation) and psychological trauma.