IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

CASE NO: 2008-0102

MICHELLE GEISER BEHLES,
APPELLANT,

VS.

STATE OF NORTH DAKOTA,
APPELLEE.

APPEAL OF THE DISTRICT COURT OF THE SOUTH CENTRAL JUDICIAL DISTRICT'S ORDER DENYING DEFENDANT'S MOTION TO DISMISS, CASE NO. 06-K-760

BRIEF OF AMICI *CURIAE* NORTH DAKOTA WOMEN'S NETWORK, AMERICAN ACADEMY OF ADDICTION PSYCHIATRY, AMERICAN MEDICAL WOMEN'S ASSOCIATION, NATIONAL WOMEN'S HEALTH NETWORK, NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH INTERNATIONAL CENTER FOR THE ADVANCEMENT OF ADDICTION TREATMENT'S ET. AL, IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST

Amici include physicians, nurses, public health advocates, and their professional associations.[1] These individuals and organizations have recognized expertise and longstanding concern in the areas of maternal and neonatal health, in understanding the effects of drugs and other substances on users, their families and society, and the ways those effects can best be minimized. *Amici* join this brief because the prosecution of Appellant is not authorized by North Dakota law and cannot be reconciled with evidence-based, peer-reviewed, medical and scientific research.

INTRODUCTION AND SUMMARY OF ARGUMENT

On September 27, 2007, Appellant's 29 weeks of pregnancy ended in a stillbirth. Shortly thereafter, Appellant was charged with, among other things, child endangerment, under N.D. Stat. § 19-03.1-22.2, based on the claim that her alleged use or overdose of certain prescription drugs during her pregnancy caused the pregnancy loss. This prosecution seeks to make the state's child endangerment laws applicable to the context of pregnancy, pregnancy loss and a pregnant woman's relationship with the fetus that she carries. As *amici* will explain, such a reinterpretation of the statute is dangerous to both maternal and fetal health.

This Court should reverse the trial court's denial of Appellant's motion to dismiss because to do otherwise would usurp the legislative function, require the Court to radically rewrite and expand the State's child endangerment law, and cause considerable fear and confusion among health professionals and their pregnant patients, all of which jeopardizes the well-being of women and their children.

Amici are well aware of the strong societal interest in protecting the health and rights of children. Such protective instincts, however, are *undermined*, not advanced, by holding pregnant

[1] Description of the *amici* are set forth in Appendices A and B of this brief.

women criminally liable based on the conditions, circumstances and actions they may experience during pregnancy.

Amici believe that the prosecution of Appellant lacks legal basis and furthers no legitimate state interest. Interpreting the law to apply to the context of pregnancy will instead lead to absurd and dangerous public health consequences.

Amici are all committed to reducing potential drug-related harms at every reasonable opportunity. They do not endorse the non-medical use of drugs – including alcohol or tobacco – during pregnancy, by either parent. Nor do they contend that there are no health risks associated with the use of drugs – both licit and illicit -- during pregnancy. Nonetheless, their commitment to the public health and adherence to ethical mandates compel them to challenge medical myths and the public policies that are based on these myths. In the case at bar, the State's case rests on the assumption that the pregnancy loss occurred as a result of an overdose of certain prescription drugs. While *amici* argue that the charges should be dismissed as a matter of law, they nonetheless note that establishing a causal connection between drug use and pregnancy loss is extremely difficult to ascertain as a matter of science.

Amici also note that medical, scientific and social science research fails to support the numerous assumptions that apparently underlie the State's efforts to rewrite the law, namely that addiction is simply a matter of willpower, that pregnant women can guarantee the outcome of their pregnancies, and that the insertion of the criminal justice system into the delivery room will protect children. Accordingly, *amici curiae* respectfully urge this Court to reverse the trial court's denial of Appellant's motion to dismiss.

I. THIS CASE REPRESENTS AN UNPRECEDENTED EXPANSION OF STATE LAW.

This is an issue of first impression before this Court, as no court in North Dakota has addressed the expansion of the child endangerment statute to the context of pregnancy. The North Dakota child endangerment statute, Section 19.03.1-22.2 does not mention pregnancy, pregnant women, or fetuses. Its plain language restricts it to the criminal endangerment of a child, which is defined as "an individual who is under the age of eighteen years." § 19-03.1-22.2. By contrast, when the Legislature has sought to apply statutes to fetuses, it has done so explicitly. For instance, when the Legislature adopted the N.D.Cent.Code § 12.1-17.1, "Offenses Against Unborn Children" to criminalize acts that harm a fetus, it targeted the third party conduct perpetuated against a pregnant woman. Recognizing that a fetus is physically part of a woman's own body, the law explicitly ensured that pregnant women would not be treated as third party entities. *See* N.D.Cent. Code § 12.1-17.1-01 (" 'Person' does not include the pregnant woman.")

To the extent that the North Dakota Legislature has addressed related issues, specifically fetal alcohol syndrome, it has responded, consistent with the unanimous recommendations of leading medical and public health groups, through the public health and education systems. *See* N.D. Cent. Code § 15-11-35 (establishing a fetal alcohol syndrome center as part of the department of neuroscience at the University of North Dakota School of Medicine), *see also* N.D. Cent. Code § 15-11-36 (establishing "a clinic to provide both initial diagnostic assessment and reevaluation of children with fetal alcohol syndrome" within the University of North Dakota Medical Rehabilitation Hospital's Child Evaluation and Treatment Program which also "provide[s] consultative services to schools, community agencies, and parents to assist in serving children diagnosed with fetal alcohol syndrome.") Thus, the decision below, applying the child endangerment statute to Appellant because she sought to continue her pregnancy to term but

suffered a stillbirth, is an unauthorized expansion of the child endangerment law that lacks foundation in the statute's plain language and legislative intent.

A. The Aberrational Opinion in *Whitner v. South Carolina* Does Not Provide Valid Precedent in North Dakota.

The trial court improperly relied on a South Carolina case, *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 118 S. Ct. 1857 (1998) to render its decision. *Whitner* stands out as a gross deviation from this state's and nation's laws. Moreover, the closely divided majority opinion in *Whitner* clearly recognizes that the decision is based on unique state law. The South Carolina Supreme Court noted that all of the other states that had unanimously rejected judicial expansion of existing child abuse or related laws had done so based on "entirely different bodies of case law from South Carolina." *Whitner* at 492 S.E.2d at 782.

Indeed, all appellate courts before and after *Whitner* addressing the issue of pregnancy and drug use have refused to re-write and judicially expand their state laws. *State v. Martinez*, 137 P.3d 1195 (N.M. Ct. App. 2006), *cert. quashed by* 141 N.M. 763, 161 P.3d 260 (2007) (refusing to apply child abuse statutes to punish a woman for continuing her pregnancy to term in spite of a cocaine addiction); *Kilmon v. Maryland*, 394 Md. 168, 905 A.2d 306 (2006) (holding that the reckless endangerment statute does not apply to the context of pregnancy); *Ward v. State*, 188 S.W.3d 874 (Tex. App. 2006) (reversing the convictions of Tracy Ward and Rhonda Smith, who had both been convicted of delivery of a controlled substance to a "child" for their alleged *in utero* transfer of drug metabolites to their fetuses, holding that the plain language of the statute made clear that the state legislature did not intend the drug delivery statute to apply to the context of pregnancy); *State v. Aiwohi*, 109 Haw. 115, 123 P.2d 1210 (2005) (holding that according to the plain language of the Hawai`i manslaughter statute, the definition of person did not include fetus); *Reyes v. Superior Court*, 75 Cal. App. 3d

214 (1997) (dismissing child abuse charges filed against woman who was pregnant and addicted to heroin, finding that statute was not intended to include a woman's alleged drug use during pregnancy and to conclude otherwise would offend due process notions of fairness and render statute impermissibly vague); *State v. Dunn*, 82 Wash. Ct. App. 122, 916 P.2d 952 (1996) (holding that the legislature did not intend to include fetuses within the scope of the term "child" which was defined "as a person under eighteen years of age"), *rev. denied*, 130 Wash.2d 1018, 928 P.2d 413 (1996); *Reinesto v. Superior Court*, 182 Ariz. 190, 894 P.2d 733 (Ct. App. 1995) (dismissing child abuse charges filed against a woman for heroin use during pregnancy; court held that the ordinary meaning of "child" excludes fetuses, and to conclude otherwise, would offend due process notions of fairness and render statute impermissibly vague); *Collins v. State*, 890 S.W.2d 893 (Tex. App. 1994) (charges brought for substance abuse during pregnancy dismissed because application of the statute to prenatal conduct violates federal due process guarantees); *Sheriff, Washoe County, Nevada v. Encoe*, 110 Nev. 1317, 885 P.2d 596 (Nev. 1994) (holding that application of child endangerment statute to a pregnant woman who uses illegal substances would violate plain meaning of statute, deprive woman of constitutionally mandated due process notice and render statute unconstitutionally vague); *Commonwealth v. Welch*, 964 S.W.2d 280 (Ky. 1993) (affirming reversal of child abuse conviction of pregnant woman who used illegal drugs, concluding that conviction would violate plain meaning of statute, deprive woman of constitutionally mandated due process notice and render statute unconstitutionally vague); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991) (dismissing child abuse charges brought for continuing to term in spite of a drug problem on ground that such application misconstrues the purpose of the law).

Many courts also noted that these prosecutions raise significant issues of due process

notice and vagueness issues. Since virtually everything a pregnant woman experiences can affect her pregnancy and pregnancy outcome, expanding state criminal laws to apply to the context of pregnancy would open the door to virtually limitless prosecution. Given the weight of authority from sister courts throughout the United States, this Court should reject the trial court's inexplicable and improper reliance on *Whitner*.

II. JUDICIALLY EXPANDING THE CHILD ENDANGERMENT LAW TO APPLY TO PREGNANT WOMEN UNDERMINES BOTH MATERNAL AND FETAL HEALTH.

Over the course of nearly two decades, every leading medical organization and governmental body to consider the question has concluded that responding to issues of drug use and pregnancy through the criminal justice system is likely to result in even worse outcomes for children. Fear of prosecution deters pregnant women from pursuing drug treatment, prenatal care, and labor and delivery care, and it discourages disclosure of critical medical information to health professionals – all with potentially devastating results. Moreover, given the realities of drug addiction, the difficulty of obtaining appropriate treatment, and the nature of recovery, laws that threaten women who seek to carry their pregnancies to term in spite of a drug problem place substantial pressure on women to terminate wanted pregnancies.

This possibility, recognized by several courts[2] in fact has happened in North Dakota. *See State v. Greywind*, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992). On February 7, 1992, Martina Greywind, who was approximately twelve weeks pregnant, was arrested. She 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

[2] 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."); *State v. Gethers*, 585 So.2d 1140, 1143 (Fla. Dist. Ct. App. 1991) ("[p]otential criminal liability would also encourage addicted women to terminate or conceal their pregnancies").

obtained an abortion, the prosecutor dropped the case, filing a motion to dismiss which stated that "[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).

Creating an incentive for women to terminate otherwise wanted, healthy pregnancies is manifestly inimical to the purposes this prosecution is intended to serve. This prospect is so dreadful that groups as diverse as NARAL: Pro-Choice America and the National Right to Life Committee, which rarely agree on any issue, have united in opposition to policies that are far less punitive to drug using women than North Dakota's. *See To Stop Abortion by Addict, Her Brother Steps In*, N.Y. TIMES, Feb. 23, 1992, at A16.

A. Expansion of the Child Endangerment Law to Women Suffering Pregnancy Losses Will Deter Drug-Dependent Women from Seeking Health Care.

Researchers and courts long ago determined that punishing drug-dependent pregnant women severely threatens the health of their fetuses because fear of criminal prosecution can trigger a "flight from care." Poland, et al., *Barriers to Receiving Adequate Prenatal Care*, AM. J. OB. & GYN., 297-303 (1987). As the U.S. Supreme Court observed, there is "near consensus in the medical community" that addressing problems of drug use and pregnancy through the criminal justice system will "harm, rather than advance the cause of prenatal health." *Ferguson v. City of Charleston*, 532 U.S. 67, 84 n.23 (2001) (noting the *amicus* submissions of numerous public health organizations concluding that searching pregnant women for evidence of drug use and facilitating their arrest will harm prenatal health by discouraging women from seeking prenatal care.) State courts have similarly adopted the medical professionals' conclusion that criminal penalties for drug use during pregnancy are ineffective public policy and endanger

fetal health by discouraging care. *See State v. Luster*, 419 S.E.2d 32, 35 (Ga. App. 1992); *State v. Deborah J.Z.*, 596 N.W. 2d, 490, 495 (Wis. App. 1999).

Eminent medical organizations, including the American Medical Association, have uniformly condemned punitive approaches to the problem of drug use during pregnancy. *Legal Intervention During Pregnancy*, 264 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION ("JAMA") 2663, 2670 (1990) ("[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate.") The March of Dimes, the American College of Obstetricians and Gynecologists, and the American Academy of Pediatrics also condemn this approach as dangerous to both women and children. *See e.g*. March of Dimes, *Statement on Maternal Drug Abuse 1* (1990) ("[making a] pregnant woman criminally liable solely based on the use of drugs during pregnancy, is potentially harmful to the mother and to her unborn child. Fear of punishment may cause women most in need of prenatal services to avoid health care professionals"); *see also* Appendix C (providing citations and the position statements of medical, scientific and public health organizations condemning punitive responses to the issue of drug use during pregnancy).

Research confirms that threats of punishment undermine rather than advance state interests in encouraging healthy pregnancies and improved birth outcomes. Studies of drug-dependent pregnant women have found that "fear and worry about loss of infant custody, arrest, prosecution, and incarceration for use of drugs during pregnancy" is "the[ir] primary emotional state." *See* Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, J. DRUG ISSUES (2003); U.S. General Accounting Office, *ADMS Block Grant: Women's Set Aside Does Not Assure Drug Treatment for Pregnant Women* 5, 20 (1991) (identifying "the threat of prosecution" as a "barrier to treatment for pregnant women.") In fact,

the consensus of both criminal justice and medical professionals is that the lack of prenatal care associated with criminal prosecution creates a much graver risk to fetal health than drug use during pregnancy. *See* C.J. Sovinski, *The Criminalization of Maternal Substance Abuse: A Quick Fix to a Complex Problem*, 25 PEPP. L. REV. 107-139 (1997) (concluding that "[p]unitive approaches to the problem of substance abuse during pregnancy threaten the health of women and children and seriously erode women's rights to privacy.")

B. Prenatal Care and Drug Treatment are Vital to Maternal and Fetal Health.

Deterring drug-dependent women from seeking prenatal care and drug treatment is especially troubling because both have been associated with improved maternal and fetal health outcomes. Prenatal care is strongly associated with improved outcomes for fetal development even for women who are not able to overcome their addiction problem before their due dates. For example, pregnant women who use cocaine but who had at least four prenatal care visits significantly reduced their chances of delivering low birth weight babies. 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); *see also*, Funai, et al., *Compliance with Prenatal Care in Substance Abusers*, 14 J. MATERNAL FETAL NEONATAL MED. 329-332 (2003). North Dakota has recognized the importance of prenatal care in ensuring healthy pregnancy outcomes and has instituted a program – the Optimum Pregnancy Outcome Program, which is sponsored by its Department of Health, Division of Family Health. *See* http://www.ndhealth.gov/opop/.

Drug-dependent pregnant women who are deterred from receiving prenatal care will lose the opportunity for medical interventions needed to address the many co-occurring risk factors such as poor nutrition, tobacco and alcohol use that are associated with drug use and are associated with poor fetal development. *See* Tronick & Beeghly, *Prenatal Cocaine Exposure,*

Child-Development, and the Compromising Effects of Cumulative Risk, 26 CLIN. PERINATOL. 151-71 (1999) (noting that "[i]nterventions are more likely to succeed if they attempt to reduce the overall burden of risk rather than targeting risks.")

Research also proves that drug treatment, when available and appropriate, can contribute to healthier pregnancies and pregnancy outcomes. *See* Sweeney, et al., *The Effect of Integrating Substance Abuse Treatment With Prenatal Care on Birth Outcomes*, 20 J. PERINATOL. 219-24 (2000) (finding that outcomes are "significantly improved for infants born to substance abusers who receive[d] [drug] treatment concurrent with prenatal care.") Any asserted state interest in promoting healthy pregnancy outcomes and in improving the health and welfare of mothers and babies is better served through the provision of appropriate drug treatment, prenatal care and counseling, rather than the criminal prosecution and incarceration of drug dependent pregnant women and new mothers.

C. Those Drug-Dependent Women Who Do Seek Treatment Will Be Deterred from Sharing Critical Medical Information with Their Physicians.

The threat of criminal prosecution if a woman cannot overcome her drug problem on pregnancy's timetable, or if she cannot guarantee a healthy birth outcome, will discourage pregnant women from being truthful about drug use, corroding the formation of trust that is fundamental to any doctor-patient relationship. As the U.S. Supreme Court has recognized, a "confidential relationship" is a necessary precondition for "successful [professional] treatment." *Jaffee v. Redmond*, 518 U.S. 1, 12; 116 S.Ct. 1923, 1929; 135 L.Ed. 2d 337 (1997). Medical treatment is greatly enhanced when patients feel comfortable divulging highly personal, stigmatizing, and potentially incriminating information. *Id.* (observing that a "patient must be willing to tell a physician, who is often a total stranger, about such matters as drug usage"); *see also* American College Obstetrics and Gynecology (ACOG) Committee on Ethics, *At-Risk*

Drinking and Illicit Drug Use: Ethical Issues in Obstetric and Gynecologic Practice (Opinion No. 294, 2004) (punitive measures "endanger the relationship of trust between physician and patient . . . [and can] actually increase the risks to the woman and the fetus.")

Open communication between drug-dependent pregnant women and their doctors is especially critical. Drug use is rarely obvious and typically remains undiagnosed unless disclosed by the patient. *See* Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 PEDIATRIC CLINICS N. AM. 1403, 1410 (1988); Kelly, et al., *The Detection & Treatment of Psychiatric Disorders and Substance Use Among Pregnant Women Cared For in Obstetrics*, 158 AM J. PSYCH. 213-19 (2001). Even absent the threat of criminal prosecution, drug-dependent pregnant women infrequently report drug use to their doctors. Feelings of shame, fear, and low self-esteem are significant barriers to establishing the trust prerequisite to patients' full disclosure of this medically vital information. *See* S. Kandall, SUBSTANCE & SHADOW: WOMEN & ADDICTION IN THE UNITED STATES, 278-79 (1996). Additionally, the exceptionally high rates of depression among drug-dependent women mean that their prospects of successfully completing treatment depend on their forming a strong "therapeutic alliance" with care providers. *See* Center on Addiction and Substance Abuse (CASA), SUBSTANCE ABUSE & THE AMERICAN WOMAN 64 (1996); *Social Consequences of Substance Abuse Among Pregnant and Parenting Women*, 20 PEDIATRIC ANNALS, 548-552 (1991).

The record indicates that the Appellant may have been depressed, and experiencing other psychological issues. *See* Transcript at pp. 8-9 State v. Behles, No. 07-K-357 (S.D. Dist. Ct. April 28, 2008). It is critically important then, that such women be able to convey that information to her care provider without fear of criminal prosecution, information and treatment.

Because the threat of criminal prosecution discourages drug-dependent pregnant women

from open, honest communication with their doctors or from treatment altogether, reinterpreting criminal laws to apply to the context of pregnancy will ironically and tragically contribute to adverse pregnancy outcomes.

D. Expansion of the State's Endangerment Laws will Undermine Accepted Standards of Care for Treating Women Who Suffer Pregnancy Losses.

Following stillbirth or miscarriage, parents, and particularly mothers, usually experience intense bereavement and grief. *See e.g*., L. Hammersley & C. Drinkwater, *The Prevention of Psychological Morbidity Following Perinatal Death*, 47 BRIT. J. OF GENERAL PRACTICE 583 (1997). Feelings of depression, guilt, anxiety, isolation, and bitterness are often heightened when fetal loss occurs late in pregnancy. H. Janssen et al., *Controlled Prospective Study on the Mental Health of Women Following Pregnancy Loss*, 153 AM. J. PSYCHIATRY 226 (1996). Consequently, parents who suffer fetal loss often grieve with the same intensity as those who lose a close relative, and need to engage in certain rites and rituals. K. Kobler et al, "*Meaningful Moments: the Use of Ritual in Perinatal and Pediatric Death*," 32 AMER. J. MATERNAL/CHILD NURSING 288, 290-293 (2007).

As with other momentous medical events, physicians and psychologists have developed treatment protocols to address the psychosocial difficulties that accompany pregnancy loss. Interpreting the child endangerment laws to apply to pregnancy loss and allowing this prosecution to go forward will upend all accepted medical standards for the care of women who suffer stillbirths and miscarriages. *See* K. Gold, *Navigating Care After a Baby Dies: a Systematic Review of Parent Experiences with Health Providers*, 27 J. PERINATOL. 234 (2007) ("Any hospital which provides obstetrical or pediatric care should establish training and protocol for fetal and infant death.") As a likely consequence, therapy and support for many women who suffer stillbirths or miscarriages will be compromised if not curtailed altogether, in the wake of

law enforcement needs.

III. ESTABLISHING A CAUSAL CONNECTION BETWEEN DRUG USE AND PREGNANCY LOSS IS EXTREMELY DIFFICULT TO PROVE AS A MATTER OF SCIENCE.

This case rests on the assumption that the cause of the pregnancy loss was the Appellant's drug use, which lacks any foundation in science. The landmark case of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), reminds us that even when a pregnant woman takes a drug, and her child is born with severe limb deformities, it does not necessarily mean that there is, in fact, a causal connection between the drug and the harm the child suffered. *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 43 F.3d 1311, 1313 (9th Cir. 1995).

Daubert established the federal standard for admission of scientific expert testimony and the important role that courts play as gatekeepers in the admission of such evidence. In *Daubert*, two minors brought suit against Merrell Dow Pharmaceuticals, claiming that they suffered limb reduction birth defects "because their mothers had taken Bendectin, a drug prescribed for morning sickness to about 17.5 million pregnant women in the United States between 1957 and 1982." *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 43 F.3d 1311, 1313 (9th Cir. 1995).

The 9th Circuit, which had originally kept out the evidence under the *Frye* standard, revisited the issue on remand. *Frye v. United States*, 293 F. 1013, 1014 (1923) (holding that expert opinion based on a scientific technique "is admissible if it is generally accepted as a reliable technique among the scientific community.") It explored in-depth the limits of scientific evidence concerning the causes of birth defects in general, and the specific evidence that the plaintiffs offered that their birth defects were caused by the drug Bendectin. The court noted on the issue of birth defects in general, that:

> For the most part, we don't know how birth defects come about. We do know they occur in 2-3% of births, whether or not the expectant mother has taken Bendectin. Limb defects are even rarer, occurring in fewer than one birth out of every 1000. But scientists simply do not know how teratogens (chemicals known to cause limb reduction defects) do their damage.

43 F.3d at 1313-14 (internal citations omitted). In terms of causation, or the "biological chain of events that leads from an expectant mother's ingestion of a teratogenic substance to the stunted development of a baby's limbs," the court cautions that "[n]o doubt, someday we will have this knowledge . . . in the current state of scientific knowledge, however, we are ignorant." *Id.*, *see also McKnight v. South Carolina* 2008 WL 2019141 at *5 (May 12, 2008) (unanimous decision overturning conviction of McKnight, finding that trial counsel was ineffective in her preparation of McKnight's defense because she failed to challenge "outdated research" and failed to call experts who would have testified about "recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor.")

Given these considerations, the medical examiner's conclusion regarding causation – one that has not been subject to critical scientific examination –should not provide the basis for radically reinterpreting the state child endangerment laws.

IV. REINTERPRETING THE STATE'S CHILD ENDANGERMENT LAW TO APPLY TO THIS CASE FAILS TO RECOGNIZE THE NATURE OF ADDICTION.

There is no empirical evidence that criminal prosecution has significantly reduced the rate of drug use in the United States. *See* Jeffrey A. Miron, *The Economics of Drug Prohibition and Drug Legalization*, SOCIAL RESEARCH (2001). For addicts, criminal prosecution has virtually no impact on use. Similarly, risk of prosecution does not dissuade pregnant women from using drugs. *See* Antoinette Clarke, *Fins, Pins, Chips & Chins: A Reasoned Approach to the Problem of Drug Use During Pregnancy*, 29 SETON HALL L. REV. 634, 659 (1994).

Applying North Dakota's child endangerment statute to women like the Appellant simply will not work to protect fetal health or deter prenatal drug use. "Enforcement of these laws does not deter addicts from using drugs during pregnancy; it is unrealistic to believe that heavier penalties will make a difference." *Id*.

Criminal punishment is especially inappropriate for drug-dependent women because in many cases women turn to drug use to self-medicate the trauma of prior sexual abuse. A startling series of research findings link a high proportion of substance-abusing women to early sexual abuse. *See* CASA REPORT, *supra*, at 8; *see also* Hans, *Demographic and Psychosocial Characteristics of Substance-Abusing Pregnant Women*, 26 CLIN. PERINATOL., 55-74 (1999); Martin, *Women in a Prenatal Care/Substance Abuse Treatment Program: Links Between Domestic Violence & Mental Health*, 2 MATERNAL CHILD HEALTH J. 85-94 (1998) (reporting that 42% of substance abusing women had experienced both sexual violence and other forms of physical violence.).

Comprehensive treatment is a better method for addressing drug dependence than incarceration. Congress has recognized the important benefits of "encouraging all women to abstain from alcohol consumption during pregnancy," but has identified "educational and vocational training, appropriate therapies, counseling, medical and mental health, and other supportive services," as the proper means of pursuing that objective. (42 U.S.C. § 280f.)

A. Addiction Presents Complex Health and Welfare Issues, Not Properly Addressed Through the Expansion of the Criminal Law.

Women, upon becoming pregnant, do not suddenly have greater access to the right kinds of health care, better housing, safer environments, or enhanced capacity to overcome behavioral health problems such as diabetes, obesity, and addiction. While numerous studies indicate that pregnant women are especially motivated to address addiction and change behavior for "the sake

of the child," *See e.g.*, Sheigla Murphy and Marsha Rosenbaum, PREGNANT WOMEN ON DRUGS 83, 99 (1999); Susan C. Boyd, MOTHERS AND ILLICIT DRUGS: TRANSCENDING THE MYTHS (1999), pregnancy does not create unique capacity to obtain and maintain recovery on pregnancy's timetable.

Courts and medical groups 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." American Medical Association, *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); National Academy of Sciences, Institute of Medicine, DISPELLING THE MYTHS ABOUT ADDICTION, Ch. 8.

Although there has been extensive debate within the treatment community regarding whether addiction is a "disease," there is no dispute that addiction has biological and genetic dimensions. *See Linder v. United States*, 268 U.S. 5, 18; 45 S.Ct. 446, 449; 69 L.Ed. 2d 819 (1925); *Robinson v. California*, 370 U.S. 660, 667; 82 S.Ct. 1417, 1420; 8 L.Ed. 2d 758 (1962); American Psychiatric Ass'n, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS - 4TH EDITION (2000) ("DSM-IV-TR"), 176-181 (specifying diagnostic criteria for "Substance Dependence");

As a matter of law and medical science, addiction is marked by "compulsions not capable of management without outside help." *Robinson*, 370 U.S. at 671; 82 S.Ct. at 1422; 8 L.Ed. 2d 758 (Douglas, J., concurring); *see also* 42 U.S.C. § 201(q) ("'drug dependent person' means a person who is using a controlled substance . . . and who is in a state of psychic or physical

dependence, or both.") As described in the DSM-IV-TR, one of the hallmarks of drug dependency is the inability to reduce or control substance abuse despite adverse consequences. DSM-IV-TR, at 179. *See also National 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.") This is why the vast majority of drug-dependent people -- whether they are prominent radio talk show hosts, respected physicians in the community, or women using prescription drugs to self-medicate -- cannot simply "decide" to refrain from drug use or achieve long-term abstinence without appropriate treatment.

CONCLUSION

The trial court's decision radically reinterpreting state child endangerment laws to apply to the context of pregnancy should be reversed because it lacks foundation in law and threatens substantial harm to maternal and fetal health throughout the State of North Dakota.

Respectfully submitted,

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