IN THE COURT OF CRIMINAL APPEALS OF ALABAMA
CRIMINAL APPEALS NUMBER CR-09-0395

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| Hope Elisabeth Ankrom,<br>Appellant | * |
| vs. | * On Appeal from the<br>* Circuit Court of Coffee |
| State of Alabama,<br>Appellee | * County, Alabama |

# BRIEF OF AMICI CURIAE
OF

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ORAL ARGUMENT IS REQUESTED

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## Interests of Amici

*Amici curiae* include twenty-four Alabama and national organizations and individuals[1] with recognized expertise in the areas of maternal, fetal and neonatal health and in understanding the effects of improper drug use on users, their families, and society.

Each *amicus curiae* is committed to reducing potential drug-related harms at every opportunity. *Amici* do not endorse the non-medicinal use of drugs—including alcohol or tobacco—during pregnancy. Nor do *amici* assert that there are no health risks associated with the use of cocaine or other controlled substances during pregnancy. Nonetheless, *amici* contend that the relevant medical and scientific research does not support the prosecution of Ms. Ankrom for the crime of "chemical endangerment" and that such prosecutions undermine maternal and fetal health.

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[1] Statements of interest for each are included as an appendix. Amici include: The Alabama Women's Resource Network, American Academy of Addiction Psychiatry, American Society of Addiction Medicine, Center for Gender and Justice, Child Welfare Organizing Project, Citizens for Midwifery, The Institute for Health and Recovery, International Center for Advancement of Addiction Treatment of the Beth Israel Medical Center Baron Edmond de Rothschild Chemical Dependency Institute, National Association of Nurse Practitioners in Women's Health, National Association of Social Workers, National Association of Social Workers Alabama Chapter, National Council on Alcoholism and Drug Dependence, Inc., National Organization for Women - Alabama, National Women's Health Network, Our Bodies Ourselves, The Southern Center for Human Rights, Nancy Day MPH, PhD., Leslie Hartley Gise, M.D., Stephen R. Kandall, M.D., Linda Worley, M.D.

## STATEMENT OF THE CASE

This case involves a district attorney's use of Alabama's 2006 chemical endangerment statute, Ala. Code § 26-15-3.2(a)(3) (2010), in a manner unintended by the state legislature and unprecedented by Alabama law. The chemical endangerment law was created to protect children from exposure to "an environment in which controlled substances are produced or distributed,"[2] such as methamphetamine labs.[3] In this case, the district attorney used the statute to prosecute Hope Ankrom because, allegedly, Ms. Ankrom and her newborn both tested positive for cocaine at the time of the child's birth.

Ms. Ankrom entered a plea agreement and the trial court sentenced her to three years of incarceration, but suspended the sentence with one year of supervised probation. As part of her plea, Ms. Ankrom preserved certain issues for appeal. This case is now one of four appeals currently pending before this Court where the chemical endangerment statute was improperly used to

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[2] 2006 Ala. Acts 204; SB 133 (Ala. 2006).

[3] Kenny Smith, *Addicted Mothers Target of State Law*, AL.COM, Aug. 17, 2008, *available at* http://blog.al.com/live/2008/08/addicted_mothers_target_of_sta.html ("The chemical endangerment law - written amid rising concern about clandestine methamphetamine labs - makes it a crime to expose a child to illegal drugs or paraphernalia").

prosecute drug-addicted women who sought to carry their pregnancies to term.[4]

## SUMMARY OF THE ARGUMENT

The prosecution and conviction of Hope Ankrom violates the plain language and intent of Alabama's chemical endangerment statute, is unsupported by scientific research, is contrary to the consensus judgment of medical practitioners and their professional organizations, and undermines individual and public health. This Court should refuse prosecutorial invitation to judicially expand the chemical endangerment law and should instead overturn Ms. Ankrom's conviction.

*Amici* recognize a strong societal interest in protecting the health of women, children and families. In the view of *amici*, however, such interests are undermined, not advanced, by the judicial expansion of the chemical endangerment law to apply to pregnant women who seek to continue their pregnancies to term despite a drug problem.

This *amicus* brief addresses the fact that the conviction of Ms. Ankrom lacks any legal, medical or scientific foundation. The Alabama Legislature did not

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[4] The cases names and docket numbers are: *Kimbrough v. Alabama*, CR-09-0485; *State v. C.T.*, No. CR-09-0792; and *State v. S.J.H.*, CR-09-0642.

intend for the chemical endangerment statute to encompass drug use during pregnancy and has refused to amend it to do so. The legislature recognizes that applying the chemical endangerment statute to pregnant women who use drugs leads to harmful and dangerous public health consequences. Such prosecutions deter pregnant women from seeking prenatal care and drug and alcohol treatment and create a disincentive to disclose information about drug use to health care providers out of fear of criminal sanctions. In addition, prosecuting women for continuing their pregnancies to term despite a drug problem encourages them to terminate pregnancies to avoid criminal penalties.

The prosecution and conviction of Ms. Ankrom is based on assumptions about the effects of prenatal exposure to controlled substances that are not supported by evidence-based research and reflect a basic misunderstanding of the nature of drug dependency and the possible deterrent effect of prosecution. The medical community has long recognized that addiction is a medical condition that can respond successfully to treatment and is best addressed as a matter of public health, not criminal justice.

## ARGUMENT

I. The Legislature Did Not Intend the Chemical Endangerment Law to Reach Pregnant Drug-Using Women Who Seek To Go To Term Because Such a Law Would Endanger Maternal, Fetal and Child Health.

A. The Plain Language and Legislative History of the Chemical Endangerment Law Demonstrate that Alabama's Legislature Did Not Intend the Chemical Endangerment Law to Apply to Women Who Use Controlled Substances While Pregnant.

The Alabama Legislature enacted the chemical endangerment of a child statute in 2006.[5] The statute does not mention pregnancy or drug use by pregnant women, nor does it mention fetuses or unborn children. The chemical endangerment law was intended to apply to children exposed to "an environment in which controlled substances are produced or distributed,"[6] such as methamphetamine labs. On its face, the statute does not apply to pregnant women or to controlled substance use by any person, including a pregnant woman.

Moreover, since enacting the chemical endangerment law in 2006, the Alabama Legislature has twice refused to amend the law to apply to pregnant women who use controlled substances or to include a fetus in the statute's

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[5] Ala. Code § 26-15-3.2(a)(3) (2010).
[6] 2006 Ala. Acts 204; SB 133 (Ala. 2006).

definition of "child."[7] During the 2008 debate on whether to amend the statute to apply to pregnant women who use controlled substances, legislators specifically expressed concern that, if amended, women with a history of drug problems would avoid prenatal care and seek abortions out of fear of prosecution, causing preventable harms to the mother and fetus.[8] In rejecting the amendments, the legislators recognized that women receive limited to no substance abuse treatment through the criminal justice system and that incarcerating pregnant women would harm maternal, fetal and child health.[9]

### B. The Judicial Expansion of the Chemical Endangerment Law to Pregnancy Would Undermine Maternal, Fetal and Child Health.

The Alabama Legislature is well aware of the negative public health consequences of taking a criminal justice approach to the issue of drug use and pregnancy. This Court

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[7] H.B. 601, 2010 Leg., Reg. Sess. (Ala. 2010); H.B. 723, 2008 Leg., Reg. Sess. (Ala. 2008).

[8] *Id.; see also Chemical Endangerment Debate (audio)*, May 2008, *available at* http://altaxdollarsatwork.blogspot.com/2008/05/chemical-child-endangerment-debate.html (Alabama House Debate on 4/17/08 about HB723).

[9] *Chemical Endangerment Debate (audio)*, (Representative Todd expressed concern that such amendments would criminalize drug addiction rather than treat it as a public health problem, have not worked in other states, encourage abortions and the avoidance of prenatal care, and result in the incarceration of hundreds of women. Representative Warren expressed the need for drug treatment rather than incarceration. Representative Salaam expressed his concern that pregnant drug users in rural communities would be unable to access drug treatment through the court system and instead would be incarcerated without receiving help).

should reject the district attorney's effort to contravene legislative intent and rewrite state law in a way that is unlawful and detrimental to fetal and maternal health.

1. The Proposed Expansion of the Chemical Endangerment Law Discourages Pregnant Women With Drug Problems from Carrying Pregnancies to Term.

Prosecuting drug-dependant pregnant women will pressure women to terminate wanted pregnancies. In hearings to amend the chemical endangerment law, legislators expressed concern that extending the chemical endangerment law to pregnant woman may encourage women to seek abortions.[10] Courts have also recognized that this type of prosecution may "unwittingly increase the incidence of abortion."[11] Although it is difficult to know how frequently abortions result from fear of prosecution, one study reported that "two-thirds of the women [surveyed] who reported using [c]ocaine during their pregnancies . . . considered having an abortion."[12] In at least one well-documented case, a woman did obtain an abortion to win her release from jail and prevent prosecution. In *State v. Greywind*, a pregnant

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[10] *Id.*

[11] *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").

[12] *See* Jeanne Flavin, OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA 112 (NYU Press 2008).

woman accused of child endangerment based on alleged harm to her fetus obtained an abortion. The prosecutor then dropped the charge.[13] By encouraging such a result, the expansion of the chemical endangerment law would clearly be at odds with the goals of fetal and child health.

2. Judicially Re-writing the Law Will Deter Drug-Dependent Pregnant Women from Seeking Health Care.

Pregnant women who fear arrest will be deterred from seeking prenatal care.[14] Medical and public health organizations and experts condemn criminal sanctions against pregnant women and new mothers for this reason. As one public health expert observed two decades ago:

> [M]arriage of the state and medicine is likely to harm more fetuses than it helps, since many women will quite reasonably avoid physicians altogether during pregnancy if failure to follow medical advice can result in . . . involuntary confinement, or criminal charges. By protecting … the integrity of a voluntary doctor-patient relationship, we not only promote autonomy; we also promote the well-being of the vast majority of fetuses.[15]

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[13] *See* Motion to Dismiss With Prejudice, *State v. Greywind*, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992) (prosecutor sought and obtained dismissal of the endangerment charge because "[d]efendant has made it known to the State that she has terminated her pregnancy. Consequently, the controversial legal issues presented are no longer ripe for litigation.")

[14] *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).

[15] George Annas, *Protecting the Liberty of Pregnant Patients*, 316 New Eng. J. Med. 1213, 1214 (1987).

Fear of prosecution is a deterrent to pursuing drug treatment, prenatal care, and labor and delivery care.[16] As the American Medical Association has stated:

> Pregnant women will be likely to avoid seeking prenatal or open medical care for fear that their physician's knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.[17]

In rejecting amendments to the chemical endangerment law, the Alabama Legislature was concerned that applying the statute to pregnancy would discourage women from seeking prenatal care,[18] drug treatment,[19] or other general

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[16] Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 Drug Alcohol Dependence 199 (1993); Mishka Terplan et al., *Methamphetamine Use Among Pregnant Women*, 113 Obstetrics & Gynecology 1290(2009)("Although the desire for behavioral change may be strong in pregnancy, substance-using women may be afraid to seek prenatal care out of fear of prosecution or child protection intervention. This is unfortunate, because prenatal care has shown improvement in birth outcomes, even given continued substance use.").

[17] Am. Med. Ass'n Bd. of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990). *See also* Am. Med. Ass'n, *Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy*, Resolution 131 (1990) (resolving "that the AMA oppose[s] legislation which criminalizes maternal drug addiction").

[18] Prenatal care is strongly associated with improved outcomes for children exposed to drugs in utero. A. Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 JAMA 1581, 1585-86 (1993) (finding that pregnant women who use cocaine but who have at least four prenatal care visits significantly reduce their chances of delivering low birth weight babies); Edward F. Funai et al., *Compliance with Prenatal Care in Substance Abusers*, 14(5) J. Maternal Fetal Neonatal Med. 329, 329 (2003); Cynthia Chazotte et al., *Cocaine Use During Pregnancy and Low Birth Weight: The Impact of Prenatal Care and Drug Treatment*, 19(4) Seminars in Perinatology 293, 293 (1995); Sheri Della Grotto et al. *Patterns of Methamphetamine Use During Pregnancy: Results from the Infant Development, Environment, and Lifestyle (IDEAL) Study*, Maternal Child Health J. (2009). Conversely, lack of prenatal care is associated with poor health outcomes for mothers and newborns. *See* Anthony M. Vintzileos et al., *The Impact of Prenatal Care on Neonatal Deaths in the Presence and Absence of*

health care, all of which are demonstrated to improve pregnancy outcomes whether or not a woman is able to overcome her drug addiction during the short length of pregnancy.[20]

Comprehensive, early, and high-quality prenatal care is one of the most effective weapons against pregnancy complications and infant mortality, even for women experiencing a drug dependency problem.[21] The mortality rate for infants with mothers who begin prenatal care after the first trimester, or not at all, is forty-five percent higher than the rate for infants with mothers who begin

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*Antenatal High-Risk Conditions,* 186(5) AM. J. OBSTETRICS & GYNECOLOGY 1011, 1013 (2002); Susan Hatters Friedman, Amy Heneghan, & Miriam Rosentha, *Disposition and health outcomes among infants born to mothers with no prenatal care,* 33 CHILD ABUSE & NEGLECT 116–122 (2009).

[19] The research also shows that drug treatment can be effective for pregnant women and can produce beneficial pregnancy outcomes. *See, e.g,* Patrick J. Sweeney et al., *The Effect of Integrating Substance Abuse Treatment with Prenatal Care on Birth Outcomes,* 20(4) J. PERINATOLOGY 219, 219 (2000) (finding that neonatal outcome "is significantly improved for infants born to substance abusers who receive[d] drug treatment concurrent with prenatal care.")

[20] *See* SAMHSA, U.S. Dep't Health Human Servs., *Curriculum for Addiction Professionals (CAP): Level 1, available at* http://www.fasdcenter.samhsa.gov/educationTraining/courses/CapCurriculum/glossary.cfm ("Prenatal care is necessary for healthy pregnancies, particularly for women with alcohol or drug issues"). *See also* N.C. Goler et al., *Substance Abuse Treatment Linked with Prenatal Visits Improves Perinatal Outcomes: A New Standard,* 28 Journal of Perinatology 597 (2008) ("Women who admit to use might be more motivated to stay clean in pregnancy. However, they will only get better if they receive appropriate support that they can access without . . . stigmatization or fears of criminal investigation.").

[21] SOUTHERN REGIONAL PROJECT ON INFANT MORTALITY, A STEP TOWARD RECOVERY: IMPROVING ACCESS TO SUBSTANCE ABUSE TREATMENT FOR PREGNANT AND PARENTING WOMEN 6 (1993); P. Moran et al. "Substance Misuse During Pregnancy: Its Effects and Treatment." 20 FETAL AND MATERNAL MEDICINE REVIEW 1–16 (2009); Racine et al., *supra* note 19.

receiving care during the first trimester.[22] In addition, recent research suggests that women who obtain prenatal care, whether or not they have also obtained drug treatment services, reduce their use of controlled substances.[23] Thus, the flight from care that would result from the judicial expansion of the chemical endangerment law would endanger maternal, fetal and child health.

3. Judicially Re-Writing the Law Will Deter Pregnant Women from Sharing Vital Information with Health Care Professionals.

Application of the chemical endangerment law to the context of pregnancy subjects any pregnant Alabamian who confides to her health care provider that she has used any controlled substance for any reason to risk of arrest and prosecution. For women who are not deterred from seeking care altogether, fear of prosecution will likely discourage them from being truthful, thus corroding the formation of trust that is fundamental to any health care provider-patient relationship.

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[22] *See* T.J. Matthews, et. al., Nat'l Ctr. Health Statistics, *Infant Mortality Statistics from the 2003 Period Linked Birth/Infant Death Data Set,* VITALSTATS Vol. 54 No. 16, May 3, 2006, *available at* www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_16.pdf.

[23] Della Grotto et al. (longitudinal study of methamphetamine using women from time of delivery found that "women who decreased their use of MA [methamphetamine] over the course of pregnancy had a greater number of prenatal care visits, suggesting that prenatal care might have an impact on reducing MA [methamphetamine] use.").

A relationship of trust is critical for effective medical care because "[t]he promise of confidentiality encourages patients to disclose sensitive subjects to a physician."[24] Open communication between drug-dependent pregnant women and their doctors is especially critical.[25] The prospects of drug-dependant women successfully engaging in treatment depend on forming a strong "therapeutic alliance" with care providers.[26]

Courts have long viewed confidentiality as fundamental to the patient-care provider relationship. As the United States Supreme Court recognized in *Jaffee v. Redmond*, a case upholding the confidentiality of mental health records, a "confidential relationship" is a necessary precondition for "successful [professional] treatment," and "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful

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[24] R. Arnold et al., *Medical Ethics and Doctor/Patient Communication, in* The Medical Interview: Clinical Care, Education and Research 365 (M. Lipkin, Jr. et al. eds., 1995) (citing W. Winslade, *Confidentiality, in Encyclopedia of Bioethics* (W. T. Reich ed.)).

[25] *See* 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).

[26] *See* Ctr. on Addiction and Substance Abuse (CASA), SUBSTANCE ABUSE AND THE AMERICAN WOMAN 64 (1996); *Social Consequences of Substance Abuse Among Pregnant and Parenting Women*, 20 PEDIATRIC ANNALS 548 (1991) (There are exceptionally high rates of depression among drug-dependent women, which increases the need for a strong "therapeutic alliance" with care providers.).

treatment."[27] Mental health issues are often closely related to drug use. Drug-using pregnant women need honest and confidential relationships with all their health care providers in order to achieve successful treatment outcomes. Allowing the conviction of Ms. Ankrom to stand will erode this type of practitioner-patient relationship and undermine maternal, fetal, and child health as a result.

4. Judicially Rewriting the Law Will Endanger Maternal and Fetal Health by Incarcerating Pregnant Women.

Application of the chemical endangerment law to the pregnancy context will result in the incarceration of pregnant women.[28] Incarcerating pregnant women creates additional health risks for their fetuses and is counterproductive to the goals of promoting maternal and fetal health. Incarcerated pregnant women generally receive inadequate prenatal care[29] and are exposed to other health

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[27] *Jaffee v. Redmond*, 518 U.S. 1, 10, 12 (1997).

[28] According to a news report, Alabama women have been incarcerated while still pregnant under the district attorney's interpretation of the chemical endangerment law. *In Alabama, a Crackdown on Pregnant Drug Users*, N.Y. TIMES, Mar. 15, 2008, *available at* http://www.nytimes.com/2008/03/15/us/15mothers.html ("Rachel Barfoot . . . told her probation officer that she was pregnant. When she tested positive for cocaine, she was arrested").

[29] Nat'l Council on Crimes and Delinquency, The Spiral Risk: Health Care Provision To Incarcerated Women 12 (2006), *available at* http://www.nccd-crc.org/nccd/pubs/2006_spiral_of_risk.pdf.

risks such as infectious disease,[30] poor sanitary conditions, poor nutrition,[31] sexual abuse,[32] high stress levels[33] and poor mental health care.[34] Furthermore, incarceration could not guarantee that pregnant women abstain from the use of controlled substances since illegal drugs are available in jails and prisons.[35]

In Alabama, medical care in prison is dire. Alabama is last in the nation in terms of per inmate medical spending.[36] The Julia Tutwiler Prison for women is overcrowded[37] and has a history of failing to provide basic medical care, adequate hygiene, beds, ventilation, and

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[30] Am. Med. Ass'n Bd. of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 267 (1990).

[31] Nat'l Council on Crimes and Delinquency, The Spiral Risk: Health Care Provision To Incarcerated Women 16 (2006), *available at* http://www.nccd-crc.org/nccd/pubs/2006_spiral_of_risk.pdf.

[32] Off. Inspector General, U.S. Dept. of Justice, Deterring Staff Sexual Abuse of Federal Inmates, Apr. 2005, http://www.usdoj.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.)

[33] 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.").

[34] *See, e.g.*, Clara Crowder, *Settlement Filed in Tutwiler Prison Suit*, Birmingham News, June 29, 2004, *available at* http://www.schr.org/node/99.

[35] *See Drugs Inside Prison Walls*, Wash. Times, Jan. 27, 2010, available at http://www.washingtontimes.com/news/2010/jan/27/drugs-inside-prison-walls/ ("In many large state prison systems, a mix of inmate ingenuity, complicit visitors and corrupt staff has kept the level of inmate drug abuse constant over the past decade despite concerted efforts to reduce it.").

[36] *Alabama Prison Conditions*, Equal Justice Initiative Report of Alabama Prison Conditions, *available at* http://www.eji.org/eji/files/Prison%20Conditions.pdf.

[37] *Id.* (In the Julia Tutwiler facility the inmate population remains at 200 percent of capacity, even after approximately 31 percent of the prison population was transferred to a private prison in Louisiana.)

nutrition.[38] County jails are similarly ill equipped to provide healthy environments to pregnant women.[39] In Coffee County, where Ms. Ankrom was arrested, the jail regularly operates over 100% capacity, often forcing alternate beds, such as cots, into already cramped spaces to accommodate the extra inmates.[40] Such conditions are antithetical to the health and well-being of pregnant women and their fetuses.

5. Judicial Expansion of the Chemical Endangerment Law Will Make Pregnant Women Who Lawfully Take Prescribed Controlled Substances Under the Direction of Doctors Subject to Criminal Investigation and Arrest.

Judicial expansion of the chemical endangerment law to apply to pregnant women would make women who fill certain lawful prescriptions by doctors subject to arrest. The chemical endangerment statute criminalizes "exposing" a "child" to *any* "controlled substance" or "chemical substance." Under the District Attorney's broad interpretation of the statute, there is no exception for a pregnant woman's use of a controlled substance under a

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[38] Clara Crowder, *Settlement Filed in Tutwiler Prison Suit*, BIRMINGHAM NEWS, June 29, 2004.
[39] Russ Corey, *Colbert County Jail in Need of Replacing*, TIMES DAILY (Florence, Ala.), May 12, 2009, *available at* http://www.timesdaily.com/article/20090512/ARTICLES/905125031?Title=Colbert-County-Jail-in-need-of-replacing
[40] Matt Elofson, *Some County Jails face Overcrowding*, DOTHAN EAGLE, May 17, 2009, *available at* http://www2.dothaneagle.com/dea/news/crime_courts/article/some_county_jails_face_overcrowding/72953/.

doctor's direction and pursuant to a lawful prescription. Many types of painkillers, anti-seizure drugs and stimulants are schedule II, III, IV and V controlled substances[41] that are also routinely prescribed medications by doctors to their patients, including pregnant women.[42] A recent survey of obstetricians and gynecologists found "that approximately a third of their pregnant patients took at least one prescription medication other than prenatal vitamins during pregnancy prior to labor."[43] The survey found that overall, "OB-Gyns were more likely to recommend prescription medications for a greater number of conditions in pregnant than nonpregnant patients."[44] A survey of pregnant women showed that over half (56%) were prescribed at least one drug during pregnancy, many of which were controlled substances under both federal and state laws.[45]

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[41] *See* Ala. Code § 20-2-20 to 32 (listing controlled substances).

[42] *See* Maria A. Morgan et al., *Management of Prescription and Nonprescription Drug Use During Pregnancy*, 23 J. MATERNAL-FETAL & NEONATAL MED, 813 (2010), (noting, "Many preexisting chronic conditions require continued drug management during pregnancy, and pregnant women may develop diseases or pregnancy-related disorders that require treatment during pregnancy. Further, given that about half of pregnancies in the United States are unplanned, women may inadvertently be exposed to medications during pregnancy.").

[43] Morgan et al., 815-816. OB-Gyns reported prescribing medications to both pregnant and non-pregnant patients for the following conditions: Chlamydia, urinary tract infection, depressed mood, generalized anxiety disorder, chronic insomnia, asthma, major depressive disorder, hypertension, frequent/severe headaches, flu, and diabetes.

[44] Ibid. 817.

[45] Erika Hyde Riley, et al. *Correlates of Prescription Drug Use during Pregnancy*, 14 J. WOMEN'S HEALTH, 401-409 (2005) (finding that 18% of pregnant

For example, methadone is a schedule II controlled substance under Alabama law, yet it is the treatment recommended by the U.S. government for pregnant women with opioid addictions.[46] Benzodiazepine sedatives, such as alprazolam (Xanax©), diazepam (Valium©) and lorazepam (Ativan©), are schedule IV substances sometimes prescribed to women suffering from anxiety during pregnancy.[47] A study analyzing data from two national surveys that tracked all doctor visits made by pregnant women in 1999 and 2000 found that "about half of all pregnant visits had one or more medications", including several controlled substances such as: the benzodiazepines alprazolam, triazolam, midazolam, lorazepam to treat anxiety; anti-epileptic drugs like pentobarbital and Phenobarbital; and codeine and other

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women surveyed were prescribed analgesic medications, many of which are listed in schedules II-V); *See also* Euni Lee et al., *National Patterns of Medication Use during Pregnancy*, 15 PHARMACOEPIDEMIOLOGY & DRUG SAFETY 537-545 (2006) (finding that among the medications most commonly prescribed to pregnant women were analgesic drugs); and Brian J. Cleary et al., *Medication Use in Early Pregnancy: Prevalence and Determinants of Use in a Prospective Cohort of Women*, 19 PHARMACOEPIDEMIOLOGY & DRUG SAFETY 410-411 (2010) (finding that analgesics were among the most commonly reported medications in a sample of 23,989 pregnant women, each of whom reported taking at least one medicine during their pregnancy, including other controlled substances like benzodiazepines).

[46] Substance Abuse & Mental Health Servs. Admin., U.S. Dep't Health & Human Servs., Methadone Treatment for Pregnant Women, Pub. No. SMA 06-4124 (2006), *available at* http://csat.samhsa.gov/publications/PDFs/PregnantWomen.pdf ("If you're pregnant and using drugs such as heroin or abusing opioid prescription pain killers, it's important that you get help for yourself and your unborn baby. Methadone maintenance treatment can help you stop using those drugs. It is safe for the baby, keeps you free of withdrawal, and gives you a chance to take care of yourself.").

[47] *See* Riley et al. 404.

analgesics to treat pain.[48] Narcotic analgesics are also standard second-line treatments for pregnant women suffering severe migraine and tension headaches,[49] conditions which affect "up to 18% of pregnant women."[50] In fact, hydromorphone, an opioid analgesic classified under Alabama and federal law as a schedule II substance, is "considered relatively safe in pregnancy" by neurologists to treat migraine symptoms.[51]

The adverse consequences of applying the statute to pregnancy are severe; the conviction of women like Ms. Ankrom sends a perilous message to pregnant substance abusers not to seek prenatal care or drug treatment, not to confide their addiction to health care professionals, not to continue vital medical treatments, not to give birth with medical care, or not to carry the fetus to term. Such prosecutions fail to serve any recognized state interests and are an affront to the intent of the Alabama legislature.

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[48] Lee et al., 537, 541.
[49] *See, for example,* Tiffany Von Wald & Anne D. Walling, *Headache During Pregnancy: CME Review Article*, 57 OBSTETRICAL & GYNECOLOGICAL SURVEY 181 (2002); Rukmini Menon & Cheryl D. Bushnell, Headache and Pregnancy 14 THE NEUROLOGIST 113, 115 (2008); and Stephen A. Contag et al., Migraine during pregnancy: is it more than a headache? 5 NATURE REVIEWS: NEUROLOGY 449-456 (2009).
[50] Contag et al. 454.
[51] Menon & Bushnell 115 (stating that the federal Food and Drug Administration gives hydromorphone a "B" rating, indicating its relative safety in pregnancy for acute migraine treatment).

C. The Alabama Legislature's Decision Not to Expand the Criminal Law to Reach Women in Relation to the Fetuses They Carry Is Consistent With Sister States.

The Alabama legislature's decision not to expand the chemical endangerment statute to the context of pregnancy is consistent with sister state legislatures and state appellate courts across the country. No state legislature has adopted a law creating special criminal penalties for pregnant drug-using women who seek to continue their pregnancies to term.[52] Additionally, with the exception of South Carolina,[53] every state appellate court to address the issue has rejected efforts to judicially expand existing criminal laws to reach women who carry their pregnancies to term in spite of a drug problem.[54] Most recently in June

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[52] Guttmacher Inst., State Policies in Brief: Substance Abuse During Pregnancy, July 1, 2010, *available at* www.guttmacher.org/pubs/spib_SADP.pdf; Cynthia Dailard & Elizabeth Nash, State Responses to Substance Abuse Among Pregnant Women, THE GUTTMACHER REPORT ON PUBLIC POLICY, Dec. 2000, available at www.guttmacher.org/pubs/tgr/03/6/gr030603.pdf.

[53] *See McKnight v. State*, 661 S.E.2d 354 (S.C. 2008) (granting post-conviction relief and noting that counsel failed to call appropriate experts, 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.). However, this holding is now in doubt.

[54] *See, e.g., State v. Geiser*, 763 N.W.2d 469 (N.D. 2009); *State v. Wade*, 232 S.W.3d 663 (Mo. 2007); *Kilmon v. State*, 905 A.2d 306 (Md. 2006) (holding that the Maryland legislature did not intend child abuse and neglect law to be applied to the context of pregnant women); *State v. Aiwohi*, 123 P.3d 1210, 1214 (Haw. 2005)(holding that according to the plain language of the law, the definition of person did not include fetus); *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. 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); *Collins v. State*, 890 S.W. 2d 893 (Tex. App. 1994) (dismissing substance abuse charges because application of the statute

2010, the Supreme Court of Kentucky reversed a mid-level appellate court ruling that judicially expanded Kentucky's child endangerment law to reach a woman who tested positive for cocaine during pregnancy.[55] These decisions reject attempts to judicially expand criminal laws to reach the alleged transfer of an illegal drug through the umbilical cord after birth.[56] Even the United States Supreme Court has questioned the underlying policy rationale of addressing the issue of drug use and pregnancy through the criminal justice system.[57]

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to a pregnant woman violates federal due process guarantees); *State v. Dunn*, 916 P.2d 952 (Wash. App. 1996) (holding that the legislature did not intend to include fetuses within the scope of the term "child"); *State v. Gethers*, 585 So. 2d 1140 (Fla. App. 1991) (dismissing child abuse charges brought for prenatal drug exposure on ground that such application misconstrues the purpose of the law); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992) (finding that drug distribution statute did not apply to pregnant women in relation to their fetuses); *Sheriff v. Encoe*, 885 P.2d 596 (Nev. 1994); *Commonwealth v. Welch*, 864 S.W. 2d 280 (Ky. 1995).

[55] *Cochran v. Commonwealth*, No. 2008-SC-000095-DG (Ky. June 17, 2010).

[56] *State v. Armstard*, 991 So. 2d 116 (La. App. 2008) (holding that transmission of drugs and alcohol via umbilical cord after child was born could not constitute offense of cruelty to juveniles because of the lack of "child" status at the time of ingestion and as a result of the involuntariness of delivery.); *Ward v. State*, 188 S.W. 3d 874 (Tex. App. 2006) (holding that chemical transfer via umbilical cord did not constitute delivery of drugs); *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *People v. Hardy*, 469 N.W. 2d 50, 53 (Mich. App. 1991) (dismissing drug delivery charges against a pregnant women who used cocaine, noting that "there was insufficient evidence that defendant's ingestion of cocaine, while pregnant, caused serious physical harm to her child.").

[57] *Ferguson v. City of Charleston*, 532 U.S. 67, 84 n.23 (2001) (The Court's analysis casts doubt on the assumption that the prosecution of pregnant women is a valid way to protect fetuses: "[a]mici claim a near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health").

## II. This Prosecution Is Not Supported or Justified by Scientific Research.

Implicit in this case is the assumption that harm from prenatal exposure to controlled substances—including methamphetamine,[58] cocaine,[59] and marijuana[60]—is so great that district attorneys and courts should create new criminal penalties where legislatures have not. Evidence-based research, however, does not support this popular, but

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[58] For evidence-based information about the effects of prenatal exposure to methamphetamine, see Ctr. For The Evaluation Of Risks To Human Reproduction, REPORT OF THE NTP-DERHR EXPERT PANEL ON THE REPRODUCTIVE & DEVELOPMENTAL TOXICITY OF AMPHETAMINE AND METHAMPHETAMINE 163, 174 (2005) (A national expert panel that reviewed published studies concerning the developmental effects of methamphetamine and related drugs concluded that "the data regarding illicit methamphetamine are insufficient to draw conclusions concerning developmental toxicity in humans.").

[59] For evidence-based information about the effects of prenatal exposure to cocaine, see, *e.g.*, Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613, 1621 (2001) ("[T]here is no convincing evidence that prenatal cocaine exposure is associated with any developmental toxicity difference in severity, scope, or kind from the sequelae of many other risk factors.").

[60] For evidence-based information about the effects of prenatal exposure to marijuana, see, *e.g.*, Peter Fried & A.M. Smith, *A Literature Review of the Consequences of Prenatal Marihuana Exposure: An Emerging Theme of a Deficiency in Aspects of Executive Function*, 23 NEUROTOXICOLOGY & TERATOLOGY 1, 8 (2001) (In a 2001 review of the scientific literature about the effect of prenatal exposure to marijuana, the authors concluded: "The consequences of prenatal exposure to marihuana are subtle."); D. M. Fergusson et al., *Maternal use of Cannabis and Pregnancy Outcome*, 109 BJOG: Int'l J. Obstetrics & Gynecology 21, 21-22 (2002); Anja Huizink & Eduard Mulder, *Maternal Smoking, Drinking or Cannabis Use During Pregnancy and Neurobehavioral and Cognitive Functioning in Human Offspring*, 30 Neuroscience and Biobehavioral Reviews 1 (2005); A. H. Schempf, *Illicit Drug Use and Neonatal Outcomes: A Critical Review*, 62 Obstetrical and Gynecological Survey 749 (2007)(finding "Studies that have examined the impact of prenatal marijuana use on birth outcomes have generally reported small and inconsistent effects… In addition to null or negative effects, several studies have reported unexpected, positive effects of marijuana on gestational age-adjusted birth weight.").

medically unsubstantiated, assumption that any amount of prenatal exposure to an illegal drug causes inevitable and severe harm.[61]

This assumption has been rejected by courts that have evaluated the scientific research. For example, the Supreme Court of South Carolina recently and unanimously overturned the conviction of a woman who allegedly caused a stillbirth as a result of her drug use, noting specifically that the research the prosecutor relied on was "outdated" and that trial counsel failed to call experts who would have testified about "recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor."[62]

The assumption behind the district attorney's efforts to judicially expand the statute - that the potential harm

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[61] A.H Schempf & D.M Strobino, *Illicit Drug Use and Adverse Birth Outcomes: Is It Drugs or Context?* 85 J. Urban Health 858 (2008); Emmalee S. Bandstra et al., *Prenatal Drug Exposure: Infant and Toddler Outcomes*, 29 J. Addictive Diseases 245 (2010); Schempf, *supra* note 52 at 749 ("Although the neonatal consequences of tobacco and alcohol exposure are well established, the evidence related to prenatal illicit drug use is less consistent despite prevalent views to the contrary."); Barbara L. Thompson et al., *Prenatal exposure to drugs: effects on brain development and implications for policy and education*, 10 Nature Reviews Neuroscience 303 (2009) ("Many legal drugs, such as nicotine and alcohol, can produce more severe deficiencies in brain development than some illicit drugs, such as cocaine. However, erroneous and biased interpretations of the scientific literature often affect educational programmes and even legal proceedings.").

[62] *McKnight v. State*, 661 S.E.2d 354, 358 n.2 (S.C. 2008).

of any amount of cocaine exposure to fetal health is so great as to outweigh all the disastrous public health consequences of prosecuting drug using pregnant women outlined above - is simply not supported by medical or scientific research.

### A. There is No Conclusive Evidence that Cocaine Causes Identifiable Fetal or Infant Harm.

The prosecution and conviction in this case is based on the scientifically and medically unsupported assumption that Ms. Ankroms's use of cocaine harmed her fetus. Ms. Ankrom's prosecution was based on drug tests showing that Ms. Ankrom tested positive for cocaine during prenatal appointments and after delivery, and that her daughter tested positive for cocaine at birth. Drug tests however, can only confirm that someone took the drug or was exposed to it. Drug tests do not establish that a particular drug caused particular harms. Nor does the fact that a drug is an illegal controlled substance establish such a causal connection.

Criminal proscription of cocaine relates to its potential for abuse and its potential to induce dependence, not to any proven unique risk to pregnant women, fetuses,

or children.[63] In 2001, The Journal of the American Medical Association ("JAMA") published a comprehensive analysis of developmental consequences for the fetus or child based on maternal cocaine use during pregnancy.[64] The report exposes as erroneous the belief that prenatal cocaine exposure is conclusively associated with developmental toxicity and condemns as "irrational" policies that selectively "demonize" *in utero* cocaine exposure and that target pregnant cocaine users for special criminal sanction.[65]

There are many widely held, deeply rooted misconceptions about cocaine. For over two decades, the popular press has been suffused with highly prejudicial, inaccurate and exaggerated information about the effects of *in utero* cocaine exposure. However, contemporary research on the developmental impact of cocaine use during pregnancy has debunked the myth that mere exposure to cocaine is causally linked to identifiable fetal harms.[66] In 2004,

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[63] *See* 21 U.S.C. § 812 (1970); Ala. Code § 20-2-20 to 32 (listing controlled substances).

[64] D. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001).

[65] *Id.* at 1621. *See also* A. Addis et al., *Fetal Effects of Cocaine: an Updated Meta Analysis*, 15 Reproductive Toxicology 341-369 (2001).

[66] T.A. Campbell & K.A. Collins, *Pediatric Toxicologic Deaths: A 10 Year Retrospective Study*, 22 Am. J. Forensic Med. & Pathology 184 (2001); Michael J. Rivkin et al., *Volumetric MRI Study of Brain in Children With Intrauterine Exposure to Cocaine, Alcohol, Tobacco, and Marijuana*, 121 Pediatrics 741

doctors and researchers signed an open letter denouncing the "crack baby" myth and called on the press to refrain from using the medically misleading and erroneous terms "crack baby."[67]

This is not to say that prenatal cocaine exposure is benign. While current studies are unable to causally link cocaine use to adverse fetal developmental outcomes, neither do they exclude cocaine as a potential fetotoxin.[68] More research is needed. However, it is irrational to charge Ms. Ankrom with chemical endangerment when science has yet to show that such exposure is harmful, yet the harms to maternal and fetal health that result from such prosecutions are clear.

*Amici* bring the existing scientific research to the Court's attention because this research contradicts many

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(2008).

[67] Open Letter from thirty American and Canadian researchers and scientists explaining that such terms as "crack baby" and "crack addicted baby" lack any basis in science, *Physicians, Scientists to Media: Stop Using the Term "Crack Baby,"* February 27, 2004, *available at* http://www.jointogether.org/news/yourturn/announcements/2004/physicians-scientists-to-stop.html. *See also Meth Science Not Stigma: Open Letter to the Media*, July 25, 2005, *available at* http://www.jointogether.org/news/yourturn/commentary/2005/meth-science-not-stigma-open.html.

[68] John P. Ackerman et al, *A Review of the Effects of Prenatal Cocaine Exposure Among School-Aged Children*, 125 Pediatrics 554 (2010); Gale A. Richardson et al., *Prenatal cocaine exposure: Effects on mother- and teacher-rated behavior problems and growth in school-age children*, Neurotoxicology and Teratology (forthcoming 2010), *available at* PubMed, File No. doi.10.1016/j.ntt.2010.06.003.

popular myths about the use of cocaine during pregnancy and does not support a policy of re-writing state law to allow for the prosecution of women for use of controlled substances during pregnancy under the chemical endangerment law.

## III. This Prosecution Reflects a Misunderstanding of the Nature of Addiction.

The assertion that pregnant women who use a controlled substance are creating a harm akin to parents who allow their child in "an environment in which controlled substances are produced or distributed,"[69] is dangerously misinformed. 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."[70] Addiction has pronounced physiological factors that heavily influence the user's behavior and affect his or her ability to cease use and seek treatment.[71]

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[69] 2006 Ala. Acts 204; 2006 Al. SB 133.

[70] 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. Sciences, Inst. of Med., *Dispelling The Myths About Addiction*, Ch. 8 (1997).

[71] Chaya G. Bhuvaneswar et al., *Cocaine and Opioid Use During Pregnancy: Prevalence and Management*, 10(1) Primary Care Companion J. of Clinical Psychiatry 59 (2008).

A. Addiction is Not Simply a Voluntary Act that is Cured by Threats.

The medical profession has long acknowledged that drug dependence has biological and genetic dimensions and cannot often be overcome without treatment.[72] Addiction is marked by "compulsions not capable of management without outside help."[73] This is why the vast majority of drug-dependent people cannot simply "decide" to refrain from drug use or achieve long-term abstinence without appropriate treatment and support. Because of the compulsive nature of drug dependency, warnings or threats are unlikely to deter drug use among pregnant women.

B. Addiction is a Medical Condition that is Difficult to Overcome.

Given the paucity of treatment options available to Ms. Ankrom, it is not surprising that she continued her pregnancy without obtaining drug treatment. In Alabama, tens of thousands of substance-abusing adults do not

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[72] *See, e.g.*, "Psychoactive Substance Dependence" is listed as a mental illness with specific diagnostic criteria in the Am. Psychiatric Ass'n., The Diagnostic and Statistical Manual of Mental Disorders 176 (4th ed. 1994). *See Linder v. United States*, 268 U.S. 5, 18 (1925); *Robinson v. California*, 370 U.S. 660, 667 (1962).

[73] *Robinson*, 370 U.S. at 671; (*Douglas, J., concurring*); *see also* 42 U.S.C. § 201(q) (1070) ("'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.").

receive the treatment they need. An estimated 79,000 adults need, but have not received, treatment for an illicit drug abuse problem.[74] Another 209,000 adults need, but have not received, treatment for alcohol problems.[75] Indeed, the Alabama Department of Mental Health's Substance Abuse Provider Directory lists only two substance abuse treatment facilities that provide substance abuse treatment in Coffee County, where Ms. Ankrom was arrested.[76] These facilities offer only out-patient treatment, do not have payment assistance and do not offer childcare.[77]

The Substance Abuse Mental Health Services Administration (SAMHSA) provides a more comprehensive list of treatment facilities for Alabama. According to SAMHSA, there are only 16 treatment facilities that identify themselves as serving pregnant women in the entire state.[78]

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[74] SAMHSA, U.S. Dep't Health & Human Servs., *2007 State Estimates of Substance Use & Mental Health--Alabama*(2009), *available at* http://oas.samhsa.gov/2k7State/Alabama.htm (Table 1. Selected Drug Use, Perceptions of Great Risk, Average Annual Marijuana Initiates, Past Year Substance Dependence or Abuse, Needing But Not Receiving Treatment, Serious Psychological Distress, and Having at Least One Major Depressive Episode in Alabama, by Age Group: Estimated Numbers (in Thousands), Annual Averages Based on 2006-2007 NSDUHs.).

[75] *Id.*

[76] Ala. Dep't Mental Health, *Substance Abuse Services Division Provider Directory*, May 2010, *available at* http://www.mh.alabama.gov/downloads/SA/SASDProgramDirectory.pdf.

[77] *Id.* ; Memorandum of Jolene Forman, Legal Intern, Drug Pol'y Alliance (July 15, 2010) (on file with Drug Policy Alliance).

[78] SAMHSA, U.S. Dep't Health & Human Servs, Substance Abuse Treatment Facility Locator, *available at* http://findtreatment.samhsa.gov/facilitylocatordoc.htm.

Such programs, however, are often not actually accessible because of transportation barriers, cost, waiting-lists, and lack of child care and mental health service, which impede access to successful treatment, particularly in the short time frame of pregnancy.[79]

There are no listed in-patient substance-abuse treatment facilities in Coffee County, where Ms. Ankrom was arrested.[80] Only one facility within 80 miles of central Coffee County provides 28-day short-term in-patient substance-abuse treatment for pregnant women.[81] Participants must go through their county assessment process, be referred to this out-of-county program, and wait for an available bed.[82] However, this facility has limited availability and does not provide payment assistance for women who cannot afford treatment and does not allow women

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[79] *See* Thomas M. Brady & Ashley, Olivia S., *Women in Substance Abuse Treatment: Results from the Alcohol and Drug Services Study (ADSS)*, Sept. 2005, *available at* http://www.oas.samhsa.gov/WomenTX/WomenTX.htm; *see also* Martha A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. DRUG ISSUES 285 (2003).

[80] Ala. Dep't Mental Health, *Substance Abuse Services Division Provider Directory*, May 2010, *available at* http://www.mh.alabama.gov/downloads/SA/SASDProgramDirectory.pdf; SAMHSA, U.S. Dep't Health & Human Servs, Substance Abuse Treatment Facility Locator, *available at* http://findtreatment.samhsa.gov/facilitylocatordoc.htm; Memorandum of Jolene Forman, Legal Intern, Drug Pol'y Alliance (July 15, 2010) (on file with Drug Policy Alliance).

[81] SAMHSA, U.S. Dep't Health & Human Servs, Substance Abuse Treatment Facility Locator, *available at* http://findtreatment.samhsa.gov/facilitylocatordoc.htm.

[82] *Id.* ; Memorandum of Jolene Forman, Legal Intern, Drug Pol'y Alliance (July 15, 2010) (on file with Drug Policy Alliance).

to bring their children.[83]

Many pregnant women do not have access to health care, quality housing, safe environments, or an enhanced capacity to overcome behavioral health problems such as addiction.[84] Extending the chemical endangerment statute to women who are unable to overcome their drug problem in the short term of pregnancy misunderstands addiction and the nature of effective treatment.

## IV. Interpreting the Chemical Endangerment Law to Apply to Drug-dependant Pregnant Women Implicates both Constitutional Rights and International Laws and Norms.

Judicially rewriting this statute to permit the prosecution of pregnant women and new mothers would make Alabama an outlier among sister states—who have almost unanimously rejected attempts to re-write criminal laws to reach pregnancy—and in the world. *Amici* are not aware of any country in the world that uses its criminal justice system to punish women who cannot ensure a healthy birth outcome or who allegedly create some risk of an adverse birth outcome. Indeed, international law and principles of

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[83] *Id.*

[84] Chaya G. Bhuvaneswar et al., *Cocaine and Opioid Use During Pregnancy: Prevalence and Management*, 10(1) Primary Care Companion J. Clinical Psychiatry 59, 65 (2008) ("Even for motivated women, obtaining treatment is not always straightforward. The scarcity of specialized treatment centers has already been noted.").

human rights overwhelmingly call upon governments to provide services to pregnant and parenting women and discourage the imprisonment of pregnant women for any reason.[85]

Additionally, courts have recognized that applying the criminal law to reach pregnant women in relationship to their fetuses would be unconstitutional.[86] While this Court need not reach the constitutional issues, the district attorney's expansion of the chemical endangerment law to apply in the context of pregnancy violates Constitutional guarantees of liberty, privacy, equality, due process and freedom from cruel and unusual punishment.[87] While constitutional rights are not absolute, the state may only

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[85] *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25(2), U.N. Doc. A/810 (Dec. 10, 1948) ("Motherhood and childhood are entitled to special care and assistance."); Int'l Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 10(2), U.N. Doc. A/6316 (Dec. 16, 1966) ("Special protection should be accorded to mothers during a reasonable period before and after childbirth"); .N. Off. Drugs & Crime & World Health Org. Reg'l Office for Europe, Women's Health in Prison: Correcting Gender Inequity in Prison Health 32 (2009), available at www.unodc.org/documents/commissions/CND-Session51/Declaration Kyiv Women 60s health in Prison.pdf ("pregnant women should not be imprisoned except for absolutely compelling reasons)"; U.N. Off. Drugs & Crime, *Custodial and Non-Custodial Measures: The Prison* in *The Criminal Justice Assessment Toolkit* 27 (2006), available at www.unodc.org/pdf/criminal justice/prison system.pdf ("Pregnant women and nursing mothers have particular problems relating to their condition and should not be imprisoned unless exceptional circumstances exist.").

[86] *See, e.g., Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991); *Herron v. State*, 729 N.E.2d 1008, 1010-11 (Ind. Ct. App. 2000).

[87] U.S. Const. amend. IV, V, VI, VIII, XIV. *See* Appellant's brief at 38-46, 54-62; Brief of Amicus Curiae ACLU.

infringe upon them if acting to further a compelling, or at minimum rational, state interest. Applying the chemical endangerment law to pregnant women fails to serve a compelling or rational state interest because, as discussed *supra*, it will undermine maternal, fetal and child health rather than advance these interests.

## CONCLUSION

Because the conviction of Hope Ankrom for chemical endangerment of a child is unsupported as a matter of science, is misguided as a matter of public health, and is without authority under the law, *amici curiae* respectfully request this Honorable Court to reverse Ms. Ankrom's conviction.

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## Certificate of Service

I hereby certify that I have served a copy of the Brief of Amicus Curiae on the Honorable Troy King, Attorney General of the State of Alabama, 500 Dexter Avenue, Montgomery, Alabama 36130 by placing a copy of same in U. S. Mail, postage prepaid and properly addressed on this the 23rd day of September, 2010.