

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA
CRIMINAL APPEALS NUMBER CR-09-0485

AMANDA HELAINE BORDEN KIMBROUGH
APPELLANT

VS.

THE STATE OF ALABAMA,
APPELLEE

*
*
*
* ON APPEAL FROM THE
* CIRCUIT COURT OF FRANKLIN
* COUNTY, ALABAMA

**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT
OF APPELLANT**

Mary Bauer
Southern Poverty Law Center
400 Washington Ave
Montgomery, AL 36104
(334) 956-8333

Tamar Todd
Drug Policy Alliance
Office of Legal Affairs
918 Parker Street
Building A21
Berkeley, CA 94710
(510) 229-5211

Lynn M. Paltrow*
Kathrine Jack*
National Advocates for Pregnant Women
15 West 36th Street, Suite 901
New York, NY 10018
(212) 255-9252

*Applications for admission pro hac vice to be
submitted

Attorneys for Amici Curiae

Pursuant to Alabama Rule of Appellate Procedure 29, the American Public Health Association, National Association of Social Workers, Alabama Women's Resource Center and others respectfully move for leave to file the accompanying brief of *amici curiae* in support of appellant.

1. *Amici* are include twenty-three Alabama and national organizations and individuals 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.

Namely, *amici* are the American Public Health Association; National Association of Social Workers; 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; Global Lawyers and Physicians; The Institute for Health and Recovery; International Center for Advancement of Addiction Treatment; National Association of Nurse Practitioners in Women's Health; National Council on Alcoholism and Drug Dependence; National Latina

Institute for Reproductive Health; National Organization for Women (NOW)- Alabama ; National Women's Health Network; Our Bodies Ourselves; The Southern Center for Human Rights; Nancy Day MPH., PhD.; Deborah A. Frank, M.D.; Leslie Hartley Gise, M.D.; Stephen R. Kandall, M.D.; James Nocon, M.D.; Linda L.M. Worley, MD.

2. The legal issues presented by this appeal cannot properly be decided in isolation from the scientific, medical and public health contexts in which they are rooted. The legal questions presented in this appeal involve complex scientific, medical, and public health issues in which the *amici* have longstanding expertise. *Amici* are recognized experts in fetal, neonatal, and maternal health, and in the effects of drugs and other substances on public health and families. *Amici* have both a public health and an ethical duty to bring evidence-based scientific, medical and public health information to the Court in its consideration of this case. *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 to term despite a drug problem.

3. The brief proffered will assist the Court in its disposition of this case by providing a scientific and public health background to the State's effort to extend the chemical endangerment law to pregnant women, including evidence-based, peer-reviewed research, that weighs overwhelmingly against Ms. Kimbrough's conviction. The brief further argues that Alabama law does not permit, and the Alabama legislature manifestly did not intend, such an extension of the chemical endangerment law to reach pregnancy.

4. *Amici* only recently learned of this appeal and were unable to offer this brief at an earlier date. Because of the importance of issues raised in this case, the *amici's* substantial expertise, and the pendency of several related cases, *amici* respectfully proffer this *amicus curiae* brief and request leave to file the same for the Court's consideration.

Respectfully submitted,

/s/ Mary Bauer /s/

By Attorneys for Amici Curiae

Mary Bauer
Southern Poverty Law Center
Alliance
400 Washington Ave
Affairs
Montgomery, AL 36104
(334) 956-8333

Tamar Todd
Drug Policy

Office of Legal

918 Parker Street
Building A21
Berkeley, CA 94710
(510) 229-5211

Lynn M. Paltrow*
Kathrine Jack*
National Advocates for Pregnant Women
15 West 36th Street, Suite 901
New York, NY 10018
(212) 255-9252
*Applications for admission pro hac vice to be
submitted

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Motion to File Brief of Amicus Curiae on the Honorable Troy King, Attorney General of the State of Alabama, 310 State House, 11 S. Union St., Montgomery, Alabama 36130 by placing a copy of same in U. S. Mail, postage prepaid and properly addressed on this the 9th day

of July, 2010.

/s/ Mary Bauer /s/

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA
CRIMINAL APPEALS NUMBER CR-09-0485

AMANDA HELAINE BORDEN KIMBROUGH
APPELLANT

*
*
*

VS.

* ON APPEAL FROM THE
* CIRCUIT COURT OF FRANKLIN
* COUNTY, ALABAMA

THE STATE OF ALABAMA,
APPELLEE

BRIEF OF AMICI CURIAE

OF THE AMERICAN PUBLIC HEALTH ASSOCIATION; NATIONAL ASSOCIATION OF SOCIAL WORKERS; 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; GLOBAL LAWYERS AND PHYSICIANS; THE INSTITUTE FOR HEALTH AND RECOVERY; INTERNATIONAL CENTER FOR ADVANCEMENT OF ADDICTION TREATMENT; NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH; NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; NATIONAL ORGANIZATION FOR WOMEN (NOW)- ALABAMA ; NATIONAL WOMEN'S HEALTH NETWORK; OUR BODIES OURSELVES; THE SOUTHERN CENTER FOR HUMAN RIGHTS; NANCY DAY MPH, PHD.; DEBORAH A. FRANK, M.D.; LESLIE HARTLEY GISE, M.D.; STEPHEN R. KANDALL, M.D.; JAMES NOCON, M.D., J.D.; LINDA L.M. WORLEY, MD.

Mary Bauer
Southern Poverty Law Center
400 Washington Ave
Montgomery, AL 36104
(334) 956-8333

Tamar Todd
Drug Policy Alliance
Office of Legal Affairs
918 Parker Street
Building A21
Berkeley, CA 94710
(510) 229-5211

Lynn M. Paltrow*
Kathrine Jack*
National Advocates for Pregnant Women
15 West 36th Street, Suite 901
New York, NY 10018
(212) 255-9252

*Applications for admission pro hac vice to be submitted

Attorneys for Amici Curiae

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iv

Interests of Amici 1

Statement of the Case 2

Summary of the Argument 3

Argument 5

 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. 5

 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.
 5

 B. The Judicial Expansion of the Chemical
 Endangerment Law to Pregnancy Would Undermine
 Maternal, Fetal and Child Health. 7

 1. The Proposed Expansion of the Chemical
 Endangerment Law Discourages Pregnant Women
 With Drug Problems from Carrying Pregnancies
 to Term. 7

 2. Judicially Rewriting the Law Will Deter Drug-
 Dependent Pregnant Women from Seeking Health
 Care. 9

 3. Judicially Re-Writing the Law Will Deter
 Pregnant Women from Sharing Vital Information
 with Health Care Professionals. 11

| | | |
|------|---|----|
| 4. | Judicially Rewriting the Law Will Endanger Maternal and Fetal Health by Incarcerating Pregnant Women. | 13 |
| 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. | 15 |
| 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. | 17 |
| II. | This Prosecution Is Not Supported or Justified by Scientific Research. | 19 |
| A. | Methamphetamine Has Not Been Found to Cause Stillbirths or Premature Births and Subsequent Infant Deaths. | 22 |
| B. | Numerous Health, Environmental, and Economic Circumstances Are Associated With Preterm Birth and Reproductive Loss. | 25 |
| III. | This Prosecution Reflects a Misunderstanding of the Nature of Addiction. | 29 |
| A. | Addiction is Not Simply a Voluntary Act that is Cured by Threats. | 29 |
| B. | Addiction is a Medical Condition that is Difficult to Overcome. | 30 |
| IV. | Interpreting the Chemical Endangerment Law to Apply Implicates both Constitutional Rights and International Laws and Norms. | 33 |
| | Conclusion | 34 |
| | Certificate of Service | 36 |

TABLE OF AUTHORITIES

Cases

Collins v. State, 890 S.W. 2d 893 (Tex. App. 1994) 18

Commonwealth v. Welch, 864 S.W. 2d 280 (Ky. 1995) 18

Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311 (9th Cir. 1995) 21

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) 21

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 19

Herron v. State, 729 N.E.2d 1008 (Ind. Ct. App. 2000) 34

Jaffee v. Redmond, 518 U.S. 1 (1997) 13

Johnson v. State, 602 So. 2d 1288 (Fla. 1992).....8,18,34

Kilmon v. State, 905 A.2d 306 (Md. 2006) 18

Linder v. United States, 268 U.S. 5 (1925) 30

McKnight v. State, 661 S.E.2d 354 (S.C. 2008) 17, 20

People v. Hardy, 469 N.W. 2d 50 (Mich. App. 1991) 18

Reinesto v. Superior Court, 894 P.2d 733 (Ariz. App. 1995) 18

Robinson v. California, 370 U.S. 660 (1962) 30

Sheriff v. Encoe, 885 P.2d 596 (Nev. 1994) 18

State v. Aiwohi, 123 P.3d 1210 (Haw. 2005) 18

State v. Armstard, 991 So. 2d 116 (La. App. 2008) 18

State v. C.T., No. CR-09-0792..... 3

State v. Dunn, 916 P.2d 952 (Wash. App. 1996) 18

State v. Geiser, 763 N.W.2d 469 (N.D. 2009) 18

State v. Gethers, 585 So. 2d 1140 (Fla. App. 1991) ... 18, 34

State v. Greywind, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992) 8

State v. H.A. 3

State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992) 18

State v. S.J.H., No. CR-09-0642..... 3

State v. Wade, 232 S.W.3d 663 (2007) 18

Ward v. State, 188 S.W. 3d 874 (Tex. App. 2006) 18

Statutes

21 U.S.C. § 812 23

42 U.S.C. § 201(q) 30

Ala. Code § 20-2-20 to 32..... 16

Ala. Code § 26-15-3.2(a)(3)..... 2, 6

Other Authorities

| | |
|---|--------|
| Ala. Dep't Mental Health, <i>Substance Abuse Services Division Provider Directory</i> , May 2010 | 31 |
| Ala. Dep't Public Health, <i>Annual Report 2009</i> (2009)..... | 28 |
| <i>Alabama Prison Conditions, Equal Justice Initiative Report of Alabama Prison Conditions</i> | 15 |
| Am. Coll. Obstetrics & Gynecology, <i>Information about Methamphetamine Use in Pregnancy</i> , Mar. 3, 2006..... | 15 |
| Am. Med. Ass'n Bd. of Trustees, <i>Legal Interventions During Pregnancy</i> , 264 JAMA 2663, 267 (1990)..... | 10, 14 |
| Am. Med. Ass'n, <i>Proceedings of the House of Delegates: 137th Annual Meeting, Board of Trustees Report NNN 236, 241, 247</i> (June 26-30, 1988) | 29 |
| Am. Med. Ass'n, <i>Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy</i> , Resolution 131 (1990) | 10 |
| Am. Psychiatric Ass'n, <i>The Diagnostic and Statistical Manual of Mental Disorders - 4th Edition</i> 176-181 ("DSM-IV-TR") (2000) | 30 |
| Anthony M. Vintzileos et al., <i>The Impact of Prenatal Care on Neonatal Deaths in the Presence and Absence of Antenatal High-Risk Conditions</i> , 186(5) Am. J. Obstetrics & Gynecology 1011 (2002) | 10 |
| Brief of Amicus Curiae ACLU..... | 34 |
| C. Malacrida, <i>Complicating Mourning: The Social Economy of Perinatal Death</i> , 9 Qualitative Health Research 504 (1999) | 26 |
| CESAR Weekly Fax from the Center for Substance Abuse Treatment, Vol. 14 Issue 33 (Aug 2005) | 26 |
| Chaya G. Bhuvaneshwar et al., <i>Cocaine and Opioid Use During Pregnancy: Prevalence and Management</i> , 10(1) Primary Care Companion Journal of Clinical Psychiatry 59 (2008) .. | 29, 32 |
| <i>Chemical Endangerment Debate (audio)</i> , May 2008. | 7 |
| Chris Derauf et al., <i>Neuroimaging of Children Following Prenatal Drug Exposure</i> , 20 Semin. Cell Dev. Biol. 441 (2009) | 25 |
| Clara Crowder, <i>Settlement Filed in Tutwiler Prison Suit</i> , Birmingham News, June 29, 2004 | 14, 15 |
| Ctr. For The Evaluation Of Risks To Human Reproduction, <i>Report of the NTP-DEHR Expert Panel on the Reproductive & Developmental Toxicity of Amphetamine and Methamphetamine</i> 163 (2005). | 21, 23 |

Cynthia Dailard & Elizabeth Nash, *State Responses to Substance Abuse Among Pregnant Women, The Guttmacher Report on Public Policy*, Dec. 2000 17

D. M. Fergusson et al., *Maternal use of Cannabis and Pregnancy Outcome*, 109 *BJOG: Int'l J. Obstetrics & Gynecology* 21 (2002) 19

Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 *JAMA* 1613 (2001) 19

Drugs Inside Prison Walls, *Wash. Times*, Jan. 27, 2010 14

George Annas, *Protecting the Liberty of Pregnant Patients*, 316 *New Eng. J. Med.* 1213, 1214 (1987) 9

Greg R. Alexander, Martha Wingate et al., *The Increasing Racial Disparity in Infant Mortality Rates: Composition and Contributors to Recent US Trends*, 198.1 *Am. J. of Obstetrics and Gynecology* 51e1 (2008) 28

Guttmacher Inst., *State Policies in Brief: Substance Abuse During Pregnancy*, July 1, 2010 17

H.B. 601, 2010 Leg., Reg. Sess. (Ala. 2010) 6

H.B. 723, 2008 Leg., Reg. Sess. (Ala. 2008). 6

In Alabama, a Crackdown on Pregnant Drug Users, *N.Y. Times*, Mar. 15, 2008 14

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) 33

Jeanne Flavin, *Our Bodies, Our Crimes: The Policing of Women's Reproduction in America* 112 (2009) 8

Jennifer L. Howse, *Infant Mortality: Don't Blame Parents*, *Wall Street J.*, Feb. 27, 1992 25

Joan Keegan et al., *Addiction in Pregnancy*, 29 *J. Addictive Diseases* 175 (2010) 24

Joe G. Hollingswork & Eric G. Lasker, *Testing Claims of Adverse Drug Effects in the Courtroom*, in *Drug Abuse Handbook* 1156 (Stephen Karch ed., 1997) 21

Katy Harper, *Infant Mortality in Alabama*, Univ. Alabama at Birmingham Medical School, Mar. 16, 2009, <http://www.uabmedicine.org/60548>. 21, 27

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) 12

Kenny Smith, *Addicted Mothers Target of State Law*, *al.com*, Aug. 17, 2008 2

Laurie Barclay, *ACOG Issues Guidelines for Stillbirth Management*, 113 *Obstetrics & Gynecology* 748 (2009) 26

Lisa H. Lu et al., *Effects of Prenatal Methamphetamine Exposure on Verbal Memory Revealed with fMRI*, 30 *J. Dev. Behav. Pediatr.* 185 (2009) 25

Lynne M. Smith et al., *Prenatal Methamphetamine Use and Neonatal Neurobehavioral Outcome*, 30 *Neurotoxicology and Teratology* 20 (2008) 25

Marian F. MacDorman & Sharon Kirmeyer, *The Challenge of Fetal Mortality*, 16 *NCHS Data Brief*, Apr. 2009, available at <http://www.cdc.gov/nchs/data/databriefs/db16.htm>..... 5

Marian F. MacDorman & T.J. Mathews, *Nat'l Ctr. Health Statistics, Recent Trends in Infant Mortality in the United States*, *NCHS Data Brief*, Oct. 2008, available at <http://www.cdc.gov/nchs/data/databriefs/db09.htm>..... 27

Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 *Drug Alcohol Dependence* 199 (1993) 9

Martha A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 *J. Drug Issues* 285 (2003)..... 32

Megan Bastick & Laurel Townhead, *Women in Prison: A Commentary on the UN Standard Minimum Rules for the Treatment of Prisoners* 42 (June 2008) 14

Memorandum of Amanda Melnick, *Legal Intern, Nat'l Advocates for Pregnant Women* (June 11, 2010) (on file with Nat'l Advocates for Pregnant Women) 31, 32

Mishka Terplan et al., *Methamphetamine Use Among Pregnant Women*, 113 *Obstetrics & Gynecology* 1290 (2009) 9

N.C. Goler et al., *Substance Abuse Treatment Linked with Prenatal Visits Improves Perinatal Outcomes: A New Standard*, 28 *Journal of Perinatology* 597 (2008) 10

Nat'l Acad. Sciences, *Inst. of Med., Dispelling The Myths About Addiction*, Ch. 8 (1997) 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..... 14

Nat'l Ctr. Health Statistics, *U.S. Dep't Health & Human Servs., Fetal and Perinatal Deaths and Mortality Rates: US and Each State* (2005) 26

Nat'l Ctr. Health Statistics, *U.S. Dep't Health & Human Servs., Number of Infant, Neonatal and Postneonatal Deaths by Race and Sex: United States and each State* (2005) 26

| | |
|--|------------|
| Off. Inspector General, U.S. Dept. of Justice, Detering Staff Sexual Abuse of Federal Inmates, Apr. 2005, http://www.usdog.gov/oig/special/0504/final.pdf | 14 |
| P. Moran et al. "Substance Misuse During Pregnancy: Its Effects and Treatment." 20 Fetal and Maternal Medicine Review 1-16 (2009) | 11 |
| Patrick J. Sweeney et al., <i>The Effect of Integrating Substance Abuse Treatment with Prenatal Care on Birth Outcomes</i> , 20(4) J. Perinatology 219 (2000) | 10 |
| Peter Fried & A.M. Smith, <i>A Literature Review of the Consequences of Prenatal Marijuana Exposure: An Emerging Theme of a Deficiency in Aspects of Executive Function</i> , 23 Neurotoxicology & Teratology 1 (2001) | 19 |
| Quick Reference Sheet: Fact Sheets, Neonatal Death, March of Dimes, Jan. 2010, http://www.marchofdimes.com/professionals/14332_1196.asp#head1 | 21, 25, 26 |
| R. Arnold et al., <i>Medical Ethics and Doctor/Patient Communication</i> , in <i>The Medical Interview: Clinical Care, Education and Research</i> 365 (M. Lipkin, Jr. et al. eds., 1995) | 12 |
| R. K. Portenoy & R. Payne, <i>Acute and Chronic Pain</i> , in <i>Substance Abuse, A Comprehensive Textbook</i> 563, 582-84 (J.H. Lowinson et al. eds., 1997) | 29 |
| Russ Corey, <i>Colbert County Jail in Need of Replacing</i> , Times Daily (Florence, Ala.), May 12, 2009 | 15 |
| SAMHSA, U.S. Dep't Health & Human Servs., <i>2007 State Estimates of Substance Use & Mental Health--Alabama</i> (2009) | 31 |
| SAMSHA, U.S. Dep't Health Human Servs., <i>Curriculum for Addiction Professionals (CAP): Level 1</i> ,11SB 133 (Ala. 2006) | 10, 35 |
| SAMHSA., U.S. Dep't Health & Human Servs., <i>Methadone Treatment for Pregnant Women</i> , Pub. No. SMA 06-4124 (2006) | 16 |
| SAMSHA, U.S. Dep't Health Human Servs., <i>Substance Abuse Treatment Facility Locator</i> | 31,32 |
| Seetha Shankaran et al., <i>Risk Factor for Early Deaths Among Extremely Low-Birth Weight Infants</i> , 186 Am J. Obstet Gynceology 796 (2002) | 28 |
| Sheri Della Grotto et al. <i>Patterns of Methamphetamine Use During Pregnancy: Results from the Infant Development, Environment, and Lifestyle (IDEAL) Study</i> , Maternal Child Health J. (2009) | 10 |

| | |
|---|-------|
| Silver et al., <i>Workup of Stillbirth: A Review of the Evidence</i> , 196 <i>Am. J. Obstetrics & Gynecology</i> 433 (2007) . | 24 |
| <i>Social Consequences of Substance Abuse Among Pregnant and Parenting Women</i> , 20 <i>Pediatric Annals</i> 548 (1991) . | 12 |
| Southern Reg'l Project on Infant Mortality, <i>A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women</i> 6 (1993) . | 9, 11 |
| T.J. Matthews, et. al., Nat'l Ctr. Health Statistics, <i>Infant Mortality Statistics from the 2003 Period Linked Birth/Infant Death Data Set</i> , VitalStats Vol. 54 No. 16, May 3, 2006 . | 11 |
| The Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) . | 30 |
| Thomas M. Brady & Ashley, Olivia S., <i>Women in Substance Abuse Treatment: Results from the Alcohol and Drug Services Study (ADSS)</i> , Sept. 2005 . | 32 |
| U.N. Off. Drugs & Crime, <i>Custodial and Non-Custodial Measures: The Prison in The Criminal Justice Assessment Toolkit</i> 27 (2006) . | 33 |
| U.N. Off. Drugs & Crime & World Health Org. Reg'l Office for Europe, <i>Women's Health in Prison: Correcting Gender Inequity in Prison Health</i> 32 (2009) . | 33 |
| <i>U.S. Infant Deaths on the Decline But the U.S. Still Fares Worse Than Many Other Countries</i> , CDC experts say, HealthDay, Apr. 30, 2010 . | 28 |
| Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25(2), U.N. Doc. A/810 (Dec. 10, 1948) . | 33 |
| World Health Org., <i>Neonatal and Perinatal Mortality: Country, Regional and Global Estimates</i> 34 (2006) . | 26 |

INTERESTS OF AMICI

Amici curiae include twenty-three Alabama and national organizations and individuals¹ 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 methamphetamine or other controlled substances during pregnancy. Nonetheless, *amici* contend that the relevant medical and scientific research does not support the prosecution of Ms. Kimbrough for the crime of “chemical endangerment” and that such prosecutions undermine maternal and fetal health.

¹ Statements of interest for each are included as an appendix. Amici include: American Public Health Association; National Association of Social Workers; 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; Global Lawyers and Physicians; The Institute for Health and Recovery; International Center for Advancement of Addiction Treatment; National Association of Nurse Practitioners in Women’s Health; National Council on Alcoholism and Drug Dependence; National Latina Institute for Reproductive Health; National Organization for Women (NOW)– Alabama ; National Women’s Health Network; Our Bodies Ourselves; The Southern Center for Human Rights; Nancy Day MPH., PhD.; Deborah A. Frank, M.D.; Leslie Hartley Gise, M.D.; Stephen R. Kandall, M.D.; James Nocon, M.D., J.D.; Linda L.M. Worley, MD.

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 Amanda Kimbrough on the scientifically unsupported claim that her infant died as a result of her drug use during pregnancy. Ms. Kimbrough experienced preterm labor during her twenty-fifth week of pregnancy and underwent emergency cesarean surgery to give birth to a child. The premature infant died nineteen minutes after birth.

At trial, Ms. Kimbrough was denied funding for experts necessary to challenge the claim that her drug use caused the infant death. Unable to present an effective defense

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").

without experts, she entered a conditional plea of guilty and was sentenced to ten years in prison, preserving her right to appeal a number of issues, including the expansion of the chemical endangerment statute to apply to the context of pregnancy, the denial of funding for experts, and numerous constitutional questions.⁴ Ms. Kimbrough's case is one of four appeals currently pending before this Court where district attorneys have misconstrued the chemical endangerment statute to prosecute women who sought to go to term in spite of a drug problem.⁵

SUMMARY OF THE ARGUMENT

The prosecution and conviction of Amanda Kimbrough 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. Kimbrough's conviction.

⁴ R333-34.

⁵ The cases names and docket numbers of these cases are: *State v. S.J.H.*, No. CR-09-0642; *State v. C.T.*, No. CR-09-0792; and *State v. H.A.*

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 to term despite a drug problem.

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

No law in Alabama authorizes the prosecution of

pregnant women and new mothers who experience reproductive loss,⁶ not even those who are unable to overcome a drug dependency or other health problem during the short length of pregnancy. Finally, the prosecution and conviction of Ms. Kimbrough 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

⁶ Reproductive loss encompasses both neonatal death and fetal death. Marian F. MacDorman & Sharon Kirmeyer, *The Challenge of Fetal Mortality*, 16 NCHS Data Brief, Apr. 2009, available at <http://www.cdc.gov/nchs/data/databriefs/db16.htm>.

endangerment of a child statute in 2006.⁷ A violation of this law is a class A felony if the exposure results in the death of a child.⁸ 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 children exposed to "an environment in which controlled substances are produced or distributed,"⁹ 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 definition of "child."¹⁰ During the 2008 debate on whether to amend the statute to apply to pregnant women who use controlled substances, the 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

⁷ Ala. Code § 26-15-3.2(a)(3) (2010).

⁸ *Id.*

⁹ 2006 Ala. Acts 204; SB 133 (Ala. 2006).

¹⁰ H.B. 601, 2010 Leg., Reg. Sess. (Ala. 2010); H.B. 723, 2008 Leg., Reg. Sess. (Ala. 2008).

the mother and fetus.¹¹ 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.¹²

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 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

¹¹ *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).

¹² *Chemical Endangerment Debate (audio)*, (Representative Todd expressed concern that such amendments would criminalize drug addiction rather than treating 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).

the chemical endangerment law, legislators expressed concern that application of the chemical endangerment law to pregnant woman may encourage women to seek abortions.¹³ Courts have also recognized that this type of prosecution may "unwittingly increase the incidence of abortion."¹⁴ 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."¹⁵ 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 woman accused of child endangerment based on alleged harm to her fetus obtained an abortion. The prosecutor then dropped the charge.¹⁶ By encouraging such as result, the expansion of the chemical endangerment law would clearly be at odds with the goals of fetal and child health.

¹³ *Id.*

¹⁴ 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").

¹⁵ See Jeanne Flavin, *Our Bodies, Our Crimes: The Policing of Women's Reproduction in America* 112 (2009).

¹⁶ 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.")

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

Pregnant women who fear arrest will be deterred from seeking prenatal care.¹⁷ Medical and public health organizations and experts condemn criminal sanctions against pregnant women and new mothers. 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.¹⁸

Fear of prosecution is a deterrent to pursuing drug treatment, prenatal care, and labor and delivery care.¹⁹ As the American Medical Association has stated:

Pregnant women will be likely to avoid seeking prenatal or open medical care for fear that their

¹⁷ 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).

¹⁸ George Annas, *Protecting the Liberty of Pregnant Patients*, 316 *New Eng. J. Med.* 1213, 1214 (1987).

¹⁹ 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.").

physician's knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.²⁰

In rejecting amendments to the chemical endangerment law, the Alabama Legislature was concerned that applying the statute to pregnancy would discourage women seeking prenatal care,²¹ drug treatment,²² or other general health care, all of which are demonstrated to improve pregnancy outcomes whether or not a woman is able to overcome her drug addiction or dependency problem during the short length of pregnancy.²³

²⁰ 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").

²¹ Prenatal care is strongly associated with improved outcomes for children exposed to drugs in utero. 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 Antenatal High-Risk Conditions*, 186(5) *Am. J. Obstetrics & Gynecology* 1011, 1013 (2002).

²² 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.")

²³ See SAMSHA, 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

Comprehensive, early, and high-quality prenatal care is one of the most effective weapons against infant mortality, even for women experiencing a drug dependency problem.²⁴ 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 receiving care during the first trimester.²⁵ 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.²⁶ 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.

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.”).

²⁴ 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).

²⁵ 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.

²⁶ 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.”).

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.

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."²⁷ Open communication between drug-dependent pregnant women and their doctors is especially critical.²⁸ The prospects of drug dependant women successfully engaging in treatment depend on forming a strong "therapeutic alliance" with care providers.²⁹

²⁷ 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.)).

²⁸ 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).

²⁹ 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

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 treatment."³⁰ 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. Kimbrough 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

exceptionally high rates of depression among drug-dependent women, which increases the need for a strong "therapeutic alliance" with care providers.).

³⁰ *Jaffee v. Redmond*, 518 U.S. 1, 10, 12 (1997).

pregnant women.³¹ 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 care³² and are exposed other health risks such as infectious disease,³³ poor sanitary conditions, poor nutrition,³⁴ sexual abuse,³⁵ high stress levels³⁶ and poor mental health care.³⁷ Furthermore, incarceration could not guarantee that pregnant women abstain from the use of controlled substances since illegal drugs are available in jails and prisons.³⁸

³¹ 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").

³² 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.

³³ Am. Med. Ass'n Bd. of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 267 (1990).

³⁴ 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.

³⁵ Off. Inspector General, U.S. Dept. of Justice, *Deterring Staff Sexual Abuse of Federal Inmates*, Apr. 2005, <http://www.usdog.gov/oig/special/0504/final.pdf> (Kathleen Sawyer, a former Bureau of Prisons Director, stated that inmate sexual abuse was the "biggest problem" she faced as Director.)

³⁶ 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.").

³⁷ See, e.g., Clara Crowder, *Settlement Filed in Tutwiler Prison Suit*, Birmingham News, June 29, 2004, available at <http://www.schr.org/node/99>.

³⁸ See *Drugs Inside Prison Walls*, Wash. Times, Jan. 27, 2010, available at

In Alabama, medical care in prison is dire. Alabama is last in the nation in terms of per inmate medical spending.³⁹ The Julia Tutwiler Prison for women is overcrowded⁴⁰ and has a history of failing to provide basic medical care, adequate hygiene, beds, ventilation, and nutrition.⁴¹ County jails are similarly ill equipped to provide healthy environments to pregnant women. For example, the jail in Colbert County, where Ms. Kimbrough was arrested, is overcrowded, has consistent plumbing problems, and is regularly cited by inspectors.⁴² 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.

<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.").

³⁹ *Alabama Prison Conditions*, Equal Justice Initiative Report of Alabama Prison Conditions, available at

<http://www.eji.org/eji/files/Prison%20Conditions.pdf>.

⁴⁰ *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.)

⁴¹ Clara Crowder, *Settlement Filed in Tutwiler Prison Suit*, Birmingham News, June 29, 2004.

⁴² 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>.

Judicial expansion of the chemical endangerment law to apply to pregnant women who seek to go to term 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." There is no exception in the statute for a pregnant woman's use of a controlled substance under a 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 substances⁴³ that are also routinely prescribed medications by doctors to their patients, including pregnant women. 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.⁴⁴

The adverse consequences of applying the statute to pregnancy are severe; the conviction of women like Ms.

⁴³ See Ala. Code § 20-2-20 to 32 (listing controlled substances).

⁴⁴ 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.").

Kimbrough 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 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.

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 apply 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.⁴⁵ Additionally, with the exception of South Carolina,⁴⁶ every state appellate court to address the

⁴⁵ 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.

⁴⁶ However, this holding is now in doubt. 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

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.⁴⁷ Most recently in June 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. *Cochran v. Commonwealth*, No. 2008-SC-000095-DG (Ky. June 17, 2010). These decisions include rejecting attempts to judicially expand criminal laws to reach the alleged transfer of an illegal drug through the umbilical cord after birth.⁴⁸ Even the United

cocaine caused the death of the fetus.).

⁴⁷ See, e.g., *State v. Geiser*, 763 N.W.2d 469 (N.D. 2009); *State v. Wade*, 232 S.W.3d 663 (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. Aiwahi*, 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 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).

⁴⁸*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

States Supreme Court has questioned the underlying policy rationale of addressing the issue of drug use and pregnancy through the criminal justice system.⁴⁹

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

Implicit in this case is the suggestion that harm from prenatal exposure to controlled substances—including methamphetamine, cocaine,⁵⁰ and marijuana⁵¹ —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 medically unsubstantiated assumption that any amount of prenatal exposure to an illegal drug causes inevitable and

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.").

⁴⁹ *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").

⁵⁰ 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.").

⁵¹ 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)

severe harm.

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."⁵²

Simply knowing that a pregnant woman took some amount of a controlled substance is not enough, as a matter of science or law, to establish that the drug caused a negative outcome, in this case pre-term labor and reproductive loss. In order to do this, qualified experts would not only have to 1) demonstrate scientific research finding a causal link between a particular drug and preterm labor leading to infant death and 2) explain the biological mechanism by which it caused that death in the particular

⁵² *McKnight v. State*, 661 S.E.2d 354, 358 n.2 (S.C. 2008).

case, but they would also have to 3) rule out all of the many alternative explanations for preterm birth,⁵³ such as previous premature births; genital tract inflammation; certain uterine or cervical problems; health problems (including high blood pressure); placental problems; and a history of smoking cigarettes—all of which have been associated with an increased risk of premature delivery.⁵⁴ In addition, experts could have addressed or ruled out other causes of death including genetic diseases, chromosomal abnormalities, and structural birth defects.⁵⁵

Had Ms. Kimbrough been able to obtain experts, they would have testified about the lack of evidence linking methamphetamine to pre-term labor and reproductive loss.⁵⁶ Experts would also have testified about the rigorous testing and analysis that would be needed to rule out a host of more likely causes for the pre-term labor and loss, and what would be needed to rule *in* methamphetamine as the

⁵³ See, e.g., *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311 (9th Cir. 1995). See also Joe G. Hollingsworth & Eric G. Lasker, *Testing Claims of Adverse Drug Effects in the Courtroom*, in *Drug Abuse Handbook* 1156 (Stephen Karch ed., 1997).

⁵⁴ See *Quick Reference Sheet: Fact Sheets, Neonatal Death*, March of Dimes, Jan. 2010, http://www.marchofdimes.com/professionals/14332_1196.asp#head1.

⁵⁵ Katy Harper, *Infant Mortality in Alabama*, Univ. Alabama at Birmingham Medical School, Mar. 16, 2009, <http://www.uabmedicine.org/60548>.

⁵⁶ 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).

cause in this instance, including the need to explain by what biological mechanism methamphetamine use caused the pre-term labor and loss.

A. Methamphetamine Has Not Been Found to Cause Stillbirths or Premature Births and Subsequent Infant Deaths.

The prosecution and conviction in this case is based on the scientifically and medically unsupported claim that Ms. Kimbrough's use of methamphetamine caused her to experience pre-term birth, which allegedly caused the subsequent neonatal death. To support this prosecution, the district attorney relied on the medical examiner's problematic cause of death determination that was based on nothing more than Ms. Kimbrough's in-hospital drug test.⁵⁷ 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 causes particular harms. Nor does the fact that a drug is a controlled substance establish this causal connection, either as a matter of law or science.

Criminal proscription of methamphetamine relates to its potential for abuse and its potential to induce dependence,

⁵⁷ R320-321 (Dr. Ward, the medical examiner, stated "I made up mind" that the cause of death for Ms. Kimbrough's neonatal baby was "meth poisoning" after "reading the medical records [including Ms. Kimbrough's positive methamphetamine test results] from Helen Keller Hospital." She made this determination almost two months before she received the autopsy results.).

not to any proven unique risk to pregnant women, fetuses, or children.⁵⁸ In fact, current research fails to support the conviction in this case. 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

In 2006, the American College of Obstetrics and Gynecology ("ACOG") noted that "the effects of maternal methamphetamine use cannot be separated from other factors" and that there "is no syndrome or disorder that can specifically be identified for babies who were exposed in utero to methamphetamine."⁶⁰

Most recently, a peer-reviewed research article concerning stillbirths concluded that "despite widespread

⁵⁸ See 21 U.S.C. § 812 (1970).

⁵⁹ Ctr. For The Evaluation Of Risks To Human Reproduction, Report of the NTP-DEHR Expert Panel on the Reproductive & Developmental Toxicity of Amphetamine and Methamphetamine 163, 174 (2005).

⁶⁰ Am. Coll. Obstetrics & Gynecology, Information about Methamphetamine Use in Pregnancy, Mar. 3, 2006. See also CESAR Weekly Fax from the Center for Substance Abuse Treatment, Vol. 14 Issue 33 (Aug 2005), citing David C. Lewis et al., Meth Science Not Stigma: Open Letter to the Media, July 25, 2005, available at http://www.jointogether.org/resources/pdf/Meth_Letter.pdf. (More than 90 leading medical doctors, scientists, psychological researchers, and treatment specialists requesting that "policies addressing prenatal exposure to methamphetamines and media coverage of this issue be based on science, not presumption or prejudice" and warning that terms such as "meth babies" lack medical and scientific validity and should not be used.)

reports linking methamphetamine use during pregnancy with preterm birth and growth restriction, evidence confirming its association with an increased risk of stillbirth remains lacking."⁶¹

Responsible voices have struck a cautionary note by emphasizing that findings concerning biological effects of methamphetamine exposure were "less than reliable" and that evidence of harm remained "difficult to establish."⁶² A comprehensive review of the research literature published this year, 2010, confirmed these equivocal findings:

Overall, amphetamine abuse does not seem to be associated with any consistent increase in congenital abnormalities above the background 3% population risk.

Moreover, the review concluded that "current thought is that amphetamines are not human teratogens."⁶³

This is not to say that prenatal methamphetamine exposure is benign. While current studies are unable to causally link methamphetamine use to stillbirth, neonatal death or a specific "methamphetamine-exposure syndrome," neither do they exclude methamphetamine as a potential

⁶¹ Silver et al., *Workup of Stillbirth: A Review of the Evidence*, 196 Am. J. Obstetrics & Gynecology 433, 438 (2007).

⁶² See, e.g., Joan Keegan et al., *Addiction in Pregnancy*, 29 J. Addictive Diseases 175 (2010).

⁶³ *Id.*

fetotoxin.⁶⁴ *Amici* agree that more research is warranted.

Amici, however, bring the current state of research to this Court's attention because what is clear is that existing research, both as a matter of science and law, does not support the conviction in this case nor the district attorney's request to have this Court rewrite state law.

B. Numerous Health, Environmental, and Economic Circumstances Are Associated With Preterm Birth and Reproductive Loss

Pre-term birth and reproductive loss are major health issues in the United States and in Alabama. These events often occur despite the best intentions and precautions taken by women and their doctors.⁶⁵ Moreover, the medical community agrees that the causes of stillbirth in general and preterm birth⁶⁶ in particular are not fully understood.⁶⁷

⁶⁴ The largest (and only longitudinal) research study of women who used methamphetamine while pregnant and their infants - the Infant Development, Environment and Lifestyle (IDEAL)- reported "only subtle neurobehavioral findings in exposed newborns." Lynne M. Smith et al., *Prenatal Methamphetamine Use and Neonatal Neurobehavioral Outcome*, 30 *Neurotoxicology and Teratology* 20 (2008). See also Lisa H. Lu et al., *Effects of Prenatal Methamphetamine Exposure on Verbal Memory Revealed with fMRI*, 30 *J. Dev. Behav. Pediatr.* 185 (2009); Chris Derauf et al., *Neuroimaging of Children Following Prenatal Drug Exposure*, 20 *Semin. Cell Dev. Biol.* 441 (2009).

⁶⁵ See e.g., Jennifer L. Howse, *Infant Mortality: Don't Blame Parents*, *Wall Street J.*, Feb. 27, 1992, at 13 (No one would deny parents play a significant role in the health and well-being of their child, both before and after birth. But . . . every day in America women who did everything "right" during pregnancy - that is, they got good prenatal care, they were married to the father of the child, their neither smoked nor drank nor abused drugs - nevertheless give birth to babies with birth defects or low birth weight[.]")

⁶⁶ See *Quick Reference Sheet: Fact Sheets, Neonatal Death*, March of Dimes,

Tens of thousands of perinatal deaths occur each year in the United States.⁶⁸ In 2009, the Alabama Department of Public health reported that the infant mortality rate of 9.5 out of 1,000 and declared that this rate was "of enormous concern."⁶⁹ Indeed, the medical reality is that as many as 20-30 percent of all pregnancies will end in miscarriage or stillbirth⁷⁰ and 12 percent will result in premature birth.⁷¹ In addition, each year, there are approximately 28,000 infant deaths in the United States, 19,000 of which were neonatal deaths.⁷²

Multiple factors may affect poor pregnancy outcomes.

Jan. 2010, http://www.marchofdimes.com/professionals/14332_1196.asp#head1 ("[C]auses of premature birth are not thoroughly understood.").

⁶⁷ Laurie Barclay, *ACOG Issues Guidelines for Stillbirth Management*, 113 *Obstetrics & Gynecology* 748 (2009) (quoting Ruth C. Fretts, MD, from Harvard Vanguard Medical Associates and Harvard Medical School, "we have a long way to go before we have a clearer understanding of the causes of stillbirth"); *Quick Reference Sheet: Fact Sheets, Neonatal Death*, March of Dimes, Jan. 2010, http://www.marchofdimes.com/professionals/14332_1196.asp#head1.

⁶⁸ See Nat'l Ctr. Health Statistics, U.S. Dep't Health & Human Servs., *Fetal and Perinatal Deaths and Mortality Rates: US and Each State* (2005), available at <http://205.207.175.93/VitalStats/TableViewer/tableView.aspx>; World Health Org., *Neonatal and Perinatal Mortality: Country, Regional and Global Estimates* 34 (2006), available at

http://www.who.int/entity/making_pregnancy_safer/publications/neonatal.pdf.

⁶⁹ *Id.*

⁷⁰ C. Malacrida, *Complicating Mourning: The Social Economy of Perinatal Death*, 9 *Qualitative Health Research* 504, 505 (1999).

⁷¹ See Nat'l Ctr. Health Statistics, U.S. Dep't Health & Human Servs., *Number of Infant, Neonatal and Postneonatal Deaths by Race and Sex: United States and each State* (2005), available at

<http://205.207.175.93/VitalStats/TableViewer/tableView.aspx>; World Health

Org., *Neonatal and Perinatal Mortality: Country, Regional and Global Estimates* 34 (2006) available at

http://www.who.int/entity/making_pregnancy_safer/publications/neonatal.pdf.

⁷² See Nat'l Ctr. Health Statistics, U.S. Dep't Health & Human Servs., *Fetal and Perinatal Deaths and Mortality Rates: US and Each State* (2005), available at <http://205.207.175.93/VitalStats/TableViewer/tableView.aspx>;

For example, Dr. Waldemar Carlo from the University of Alabama School of Medicine identified “[m]ultiple elements” that contribute to infant mortality: “Prematurity and low birth weight, limited access to neonatal intensive care, inadequate or no prenatal care, maternal obesity, low maternal weight gain, multiple births, and maternal smoking” were mentioned as “among the commonest” factors.⁷³

According to the National Center for Health Statistics, “In 2005, 36.5% of infant deaths in the United States were due to preterm-related causes of death.”⁷⁴ And, “Alabama has one of the highest prematurity rates in the nation. About 16% of deliveries are premature.”⁷⁵ This all too common phenomenon in pregnancy is the subject of ongoing research at the University of Alabama. As Dr. Carlo explained “The causes and prevention of preterm birth, a major contributor to infant mortality, have been a research focus at UAB for many years.”⁷⁶

⁷³ Katy Harper, *Infant Mortality in Alabama*, University of Alabama at Birmingham Medical School, Mar. 16, 2009, <http://www.uabmedicine.org/60548>.

⁷⁴ Marian F. MacDorman & T.J. Mathews, Nat’l Ctr. Health Statistics, *Recent Trends in Infant Mortality in the United States*, NCHS Data Brief, Oct. 2008, available at <http://www.cdc.gov/nchs/data/databriefs/db09.htm>.

⁷⁵ Katy Harper, *Infant Mortality in Alabama*, University of Alabama at Birmingham Medical School, Mar. 16, 2009, <http://www.uabmedicine.org/60548>.

⁷⁶ *Id.* (Among the findings, Dr. Carol reports that research at “UAB has linked genital tract inflammation to preterm birth” and “has determined that elective repeat, cesarean deliveries before 39 weeks gestation are two to four times more likely to cause adverse neonatal outcomes.”).

Lack of health insurance⁷⁷ and lack of adequate prenatal care have also been strongly associated with infant deaths and prematurity.⁷⁸ In 2008 "adequacy of prenatal care in Alabama fell to its lowest level in more than a decade."⁷⁹ The same year only 74.2 percent of live births in Alabama were to women who received adequate prenatal care.⁸⁰ University of Alabama public health researcher Martha Wingate and colleagues concluded:

Although standard prenatal care alone is no longer widely advocated as an effective means to reduce very preterm birth, it may play a very important role in assuring access to a risk-appropriate level of medical care, thereby helping to improve infant survival for all racial groups.⁸¹

Research even suggests that how infants are treated by staff in their first 12 hours after birth, and staff attitudes about infants can affect their likelihood of survival.⁸²

In sum, because multiple factors may affect pre-term births and infant deaths, none of which were ruled out in

⁷⁷ *Id.*

⁷⁸ See *U.S. Infant Deaths on the Decline But the U.S. Still Fares Worse Than Many Other Countries*, CDC experts say, HealthDay, Apr. 30, 2010, available at http://www.nlm.nih.gov/medlineplus/news/fullstory_98248.html.

⁷⁹ Ala. Dep't Public Health, *Annual Report 2009 2* (2009), available at <http://www.adph.org/publications/assets/2009annrpt.pdf>.

⁸⁰ *Id.*

⁸¹ Greg R. Alexander, Martha Wingate et al., *The Increasing Racial Disparity in Infant Mortality Rates: Composition and Contributors to Recent US Trends*, 198.1 Am. J. of Obstetrics and Gynecology 51e1, 51e8 (2008).

⁸² See Seetha Shankaran et al., *Risk Factor for Early Deaths Among Extremely Low-Birth Weight Infants*, 186 Am J. Obstet Gynceology 796 (2002).

this case, and because research is still ongoing concerning the causes of both pre-term labor and infant deaths, this conviction must be overturned.

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

The assertion that pregnant women with drug problems are exposing their fetuses to harm akin to a parent who allows his or her child in "an environment in which controlled substances are produced or distributed,"⁸³ 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."⁸⁴ Addiction has pronounced physiological factors that heavily influence the user's behavior and affect his or her ability to cease use and seek treatment.⁸⁵

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

⁸³ 2006 Ala. Acts 204; 2006 Al. SB 133.

⁸⁴ 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).

⁸⁵ Chaya G. Bhuvaneshwar et al., *Cocaine and Opioid Use During Pregnancy: Prevalence and Management*, 10(1) *Primary Care Companion J. of Clinical Psychiatry* 59 (2008).

The medical profession has long acknowledged that drug dependence has biological and genetic dimensions and cannot often be overcome without treatment.⁸⁶ Addiction is marked by "compulsions not capable of management without outside help."⁸⁷ 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. Kimbrough, it is not surprising that she continued her pregnancy without obtaining drug treatment. In Alabama, tens of thousands of substance-abusing adults do not receive the treatment they need. An estimated 79,000 adults need, but have not received, treatment for an illicit drug

⁸⁶ 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* (4th ed. 1994). See *Linder v. United States*, 268 U.S. 5, 18 (1925); *Robinson v. California*, 370 U.S. 660, 667 (1962); Am. Psychiatric Ass'n., *The Diagnostic and Statistical Manual of Mental Disorders - 4th Edition* 176-181 ("DSM-IV-TR") (2000) (specifying diagnostic criteria for "Substance Dependence").

⁸⁷ *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.").

abuse problem.⁸⁸ Another 209,000 adults need, but have not received, treatment for alcohol problems.⁸⁹ Indeed, the Alabama Department of Mental Health's Substance Abuse Provider Directory lists only one substance abuse treatment facility that provides treatment for pregnant women in Colbert County, where Ms. Kimbrough was arrested.⁹⁰ This facility offers only out-patient treatment, does not have payment assistance and does not offer childcare.⁹¹

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.⁹² Such programs however are often not actually accessible because of transportation barriers, cost, waiting-lists,

⁸⁸ SAMHSA, U.S. Dep't Health & Human Servs., *2007 State Estimates of Substance Use & Mental Health--Alabama*(2009), available at <http://oas.samhsa.gov/2k7/State/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.).

⁸⁹ *Id.*

⁹⁰ Ala. Dep't Mental Health, *Substance Abuse Services Division Provider Directory*, May 2010, available at <http://www.mh.alabama.gov/downloads/SA/SASDProgramDirectory.pdf>.

⁹¹ *Id.* ; Memorandum of Amanda Melnick, Legal Intern, Nat'l Advocates for Pregnant Women (June 11, 2010) (on file with Nat'l Advocates for Pregnant Women).

⁹² SAMHSA, U.S. Dep't Health & Human Servs, *Substance Abuse Treatment Facility Locator*, available at <http://findtreatment.samhsa.gov/facilitylocator/doc.htm>.

lack of child care and mental health service which impede access to successful treatment, particularly in the short time frame of pregnancy.⁹³

Only one facility within 100 miles of Ms. Kimbrough's residence provides in-patient substance-abuse treatment for pregnant women.⁹⁴ However, this facility has limited availability and does not provide payment assistance for women who cannot afford treatment, such as Ms. Kimbrough, and does not allow women to bring their children.⁹⁵

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.⁹⁶ Applying the chemical endangerment law to women who are unable to overcome their drug problem in the short term of pregnancy misunderstands addiction and nature of effective treatment.

⁹³ 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).

⁹⁴ SAMHSA, U.S. Dep't Health & Human Servs, *Substance Abuse Treatment Facility Locator*, available at <http://findtreatment.samhsa.gov/facilitylocator/doc.htm>.

⁹⁵ *Id.*; Memorandum of Amanda Melnick Legal Intern, National Advocates for Pregnant Women (June 11, 2010) (on file with National Advocates for Pregnant Women).

⁹⁶ Chaya G. Bhuvanewar et al., *Cocaine and Opioid Use During Pregnancy: Prevalence and Management*, 10(1) *Primary Care Companion Journal of 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.").

IV. Interpreting the Chemical Endangerment Law to Apply 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 human rights overwhelmingly call upon governments to provide services to pregnant and parenting women and discourage the imprisonment of pregnant women for any reason.⁹⁷

⁹⁷ 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”); U.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.”).

Additionally, many courts have recognized that applying the criminal law to reach pregnant women in relationship to their fetuses would be unconstitutional.⁹⁸ While this Court need not reach the constitutional issues, the district attorney's interpretation of the chemical endangerment law as applied to the context of pregnancy violates Constitutional guarantees of liberty, privacy, equality, due process and freedom from cruel and unusual punishment.⁹⁹ While constitutional rights are not absolute, the state may only 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 state interest because, as discussed *supra*, it will undermine maternal, fetal and child health rather than advance these interests.

CONCLUSION

Because the conviction of Amanda Kimbrough 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

⁹⁸ 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).

⁹⁹ U.S. Const. amend. IV, V, VI, VIII, XIV. See Appellant's brief at 38-46, 54-62; Brief of Amicus Curiae ACLU.

request this Honorable Court to reverse Ms. Kimbrough's conviction.

/s/ MARY BAUER /s/

Mary Bauer
Southern Poverty Law Center
400 Washington Ave
Montgomery, AL 36104
(334) 956-8333

Tamar Todd
Drug Policy Alliance
Office of Legal Affairs
918 Parker Street
Building A21
Berkeley, CA 94710
(510) 229-5211

Lynn M. Paltrow*
Kathrine Jack*
National Advocates for Pregnant Women
15 West 36th Street, Suite 901
New York, NY 10018
(212) 255-9252

*Applications for admission pro hac vice to be submitted

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, 310 State House, 11 S. Union St., Montgomery, Alabama 36130 by placing a copy of same in U. S. Mail, postage prepaid and properly addressed on this the 9th day of July, 2010.

/s/ Mary Bauer /s/

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA
CRIMINAL APPEALS NUMBER CR-09-0485

AMANDA HELAINE BORDEN KIMBROUGH
APPELLANT

VS.

THE STATE OF ALABAMA,
APPELLEE

*
*
*
* ON APPEAL FROM THE
* CIRCUIT COURT OF FRANKLIN
* COUNTY, ALABAMA

AMICI CURIAE STATEMENTS OF INTEREST

Amicus Curiae **American Public Health Association ("APHA")** is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It represents all disciplines and specialties in public health, including maternal and child health and substance abuse. APHA strives to improve public health for everyone by proposing solutions based on research, helping to set public health practice standards, and working closely with national and international health agencies.

Amicus Curiae **National Association of Social Workers ("NASW")** is the world's largest association of professional social workers with 150,000 members in fifty-six chapters throughout the United States and abroad. Founded in 1955 from a merger of seven predecessor social work organizations, NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. NASW believes that criminal prosecution of women who use drugs during their pregnancy is inimical to family stability and counter to the best interests of the child. The needs of society are better served by treatment of addiction, not punishment of the addict. NASW's policy statement, Alcohol, Tobacco, and other drugs, supports "an approach to ATOD [alcohol, tobacco, and other drug] problems that emphasize prevention and treatment" and efforts to "eliminate health disparities that accrue from ATOD problems and discriminatory practices from the criminal justice system" (NASW, Social

Work Speaks, 8th ed., 2009).

Amicus Curiae **The Alabama Women's Resource Network (AWRN)**'s mission is to significantly reduce the number of women in prison by promoting investment in a statewide network of community programs that responsibly and effectively treat drug addiction, provide pathways out of domestic violence, develop jobs skills, and improve the physical and mental health of women. AWRN's long-term vision is to change the way Alabama's criminal justice system responds to women trapped in the multiple jeopardizes of poverty, addiction, racism, and gender-based violence. Through outreach, legislative action, and grassroots organizing, we seek to change the way society envisions incarcerated women- and therefore shift the way the state responds to them- from a punitive response to a community-based one. Our current members include: Alabama Coalition Against Domestic Violence, ACLU of Alabama, Aletheia House, Eve's Circle, Friends of Recovery Morgan, Madison, Lawrence, Limestone, and Cullman & Randolph Counties, Longtimers/ Insiders, Longtimer Lifeline, Path to Success, Southern Center for Human Rights, The Ordinary People's Society, The Lovelady Center, UAB Treatment Alternatives to Street Crime and W.I.N.N.E.R.S.

Amicus Curiae **American Academy of Addiction Psychiatry ("AAAP")** is an international professional membership organization made up of practicing psychiatrists, university faculty, medical students and other related professionals. Founded in 1985, it currently represents approximately 1,000 members in the United States and around the world. AAAP is devoted to promoting access to continuing education for addiction professionals, disseminating new information in the field of addiction psychiatry, and encouraging research on the etiology, prevention, identification, and treatment of addictions. AAAP opposes the prosecution of pregnant women based on the belief that the disclosure of personal drug use to law enforcement for use in criminal prosecutions will undermine prenatal care, discourage many women from seeking substance abuse treatment, and damage the medical provider-patient relationship that is founded on principles of confidentiality

Amicus Curiae **American Society of Addiction Medicine ("ASAM")**
The American Society of Addiction Medicine is a nationwide organization of more than 3600 of the nation's foremost physicians specializing in addiction medicine. We believe

that the proper, most effective solution to the problem of substance abuse during pregnancy lies in medical prevention, i.e. education, early intervention, treatment and research on chemically dependent pregnant women, We further believe that state and local governments should avoid any measures defining alcohol or other drug use during pregnancy as "child abuse," and should avoid prosecution, jail, or other punitive measures as a substitute for providing effective health services.

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

Amicus Curiae **Child Welfare Organizing Project ("CWOP")** is a 16-year-old organization of New York City parents and professionals who seek reform of New York City child welfare practices through increased, meaningful, parent/ client involvement in child welfare decision making at all levels, from case planning to policy, budgets and legislation. CWOP has approximately 1,500 parent members. Most of CWOP's staff, and about half of CWOP's Board of Directors, are parents who have had direct, personal involvement with the Administration of Children's Services ("ACS"). A significant percentage of CWOP members are mothers in recovery. A large part of CWOP's work involved debunking prevailing stereotypes about ACS-involved parents and families, putting a human face on parents who are often unfairly and inaccurately demonized and bringing CWOP's unique insights into policy discussions. CWOP hopes this will result in more enlightened public policy that effectively identifies and addresses real problems and challenges to successful family life in New York City, ultimately protecting children by helping and strengthening their families and communities.

Amicus Curiae **Citizens for Midwifery ("CFM")** is a national, non-profit, and consumer-based group that promotes maternal and child health through advocating the Midwives Model of Care and seeks to have these practices recognized as an accepted standard of care for childbearing mothers. In focusing on the normalcy of childbirth and the uniqueness of each childbearing woman and family, this model includes monitoring the physical, psychological, and social well being

of childbearing mothers, providing pregnant women with individualized prenatal care and hands-on assistance during labor and delivery, minimizing technological interventions, and identifying women who require obstetrical attention. As an organization, CFM also provides information on midwifery and childbirth issues, encourages and provides guidance for midwifery advocacy, and represents consumer interests regarding midwifery and maternity care.

Amicus Curiae **Global Lawyers and Physicians ("GLP")** is a non-profit non-governmental organization that focuses on health issues and human rights. Founded in 1996, GLP was formed to reinvigorate the collaboration of the legal, medical and public health professions in protecting the human rights and dignity of all persons. GLP's mission is to implement the health-related provisions of the Universal Declaration of Human Rights and the Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights, with a focus on health and human rights, patient rights, and human experimentation.

Amicus Curiae **The Institute For Health and Recovery ("IHR")** The Institute for Health and Recovery is a statewide service, research, policy, and program development agency. IHR's mission is to develop a comprehensive continuum of care for individuals, youth, and families affected by alcohol, tobacco, and other drug use, mental health problems, and violence/trauma. IHR's work is based on principles of establishing collaborative models of service delivery, integrating gender-specific, trauma-informed and relational/cultural models of prevention, intervention, and treatment; fostering family-centered, strength-based approaches, and advancing multicultural competency within the service delivery system.

Amicus Curiae **International Center for Advancement of Addiction Treatment of the Beth Israel Medical Center Baron Edmond de Rothschild Chemical Dependency Institute** seeks to promote, among medical professionals and the general community, the humane treatment of people who are living with opiate addiction. It utilizes dissemination of relevant medical, legal and policy information in its effort to advocate for change in attitudes that constrain optimal addiction treatment delivery.

Amicus Curiae **National Association of Nurse Practitioners in Women's Health ("NPWH")** is a professional organization founded in 1980. NPWH focuses on a broad range of women's health issues, including reproductive care, pregnancy, as well as those issues that affect women only or disproportionately. The mission of the National Association of Nurse Practitioners in Women's Health (NPWH) is to assure the provision of quality health care to women of all ages by nurse practitioners. NPWH defines quality health care to be inclusive of an individual's physical, emotional, and spiritual needs. NPWH recognizes and respects women as decision-makers for their health care. NPWH's mission includes protecting and promoting a woman's right to make her own choices regarding her health within the context of her personal, religious, cultural, and family beliefs.

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

Amicus Curiae **National Latina Institute for Reproductive Health** works to ensure the fundamental human right to reproductive health and justice for Latinas, their families and their communities through public education, community mobilization and policy advocacy. Latinas face a unique and complex array of reproductive health and rights issues that are exacerbated by poverty, gender, racial and ethnic discrimination and xenophobia. These circumstances make it especially difficult for Latinas to access reproductive health care services, including the full range of available reproductive health technologies and abortion services. We believe that in order to substantially improve the reproductive health of Latinas and protect their rights to exercise reproductive freedom, NLIRH must locate reproductive

health and rights issues within a broader social justice framework that seeks to bring an end to poverty and discrimination and affirms human dignity and the right to self-determination.

Amicus Curiae **National Organization for Women (NOW)- Alabama**

The National Organization for Women (NOW) is the largest organization of feminist activists in the United States. NOW has 500,000 contributing members and 550 chapters in all 50 states and the District of Columbia. Since its founding in 1966, NOW's goal has been to take action to bring about equality for all women. NOW works to eliminate discrimination and harassment in the workplace, schools, the justice system, and all other sectors of society; secure abortion, birth control and reproductive rights for all women; end all forms of violence against women; eradicate racism, sexism and homophobia; and promote equality and justice in our society.

Amicus Curiae **National Women's Health Network ("NWHN")**

improves the health of women by influencing public policy and providing health information to support decision-making by individual consumers. Founded in 1975 to give women a greater voice within the health care system, the NWHN aspires to a health care system that is guided by social justice and reflects the needs of diverse women. We are committed to advancing women's health by ensuring that women have self-determination in all aspects of their reproductive and sexual health; challenging the inappropriate medicalization of women's lives; and establishing universal access to health care that meets the needs of diverse women. The core values that guide the NWHN's work include our belief that the government has an obligation to safeguard the health of all people; that we value women's descriptions of their own experiences and believe health policy should reflect the diversity of those experiences; and that we believe evidence rather than profit should determine what services and information are available to inform women's health decision-making and practices. The NWHN is a membership-based organization supported by 8,000 individuals and organizations nationwide.

Amicus Curiae **Our Bodies Ourselves ("OBOS")** provides clear, truthful information about health, sexuality and reproduction from a feminist and consumer perspective. OBOS vigorously

advocates for women's health by challenging the institutions and systems that block women from full control over our bodies and devalue our lives. OBOS is noted for its long-standing commitment to serve only in the public interest and its bridge-building capacity. OBOS is dedicated to the autonomy and well being of all women.

Amicus Curiae **The Southern Center for Human Rights** provides legal representation to people facing the death penalty, challenges human rights violations in prisons and jails, seeks through litigation and advocacy to improve legal representation for poor people accused of crimes, and advocates for criminal justice system reforms on behalf of those affected by the system in the Southern United States. From 2002 through 2009, SCHR represented all Alabama women in prison in *Laube v. Allen*, a class action lawsuit against the Alabama Department of Corrections that challenged severe overcrowding, horrendous conditions, and unconstitutional medical care.

Amicus Curiae **Nancy Day MPH, PhD.**, is Professor of Psychiatry and Epidemiology. She has studied the effects of prenatal exposures to alcohol, marijuana, cocaine, and tobacco for over 20 years. She has multiple publications and has received grants from NIH in support of this work. She is currently the Director of the Maternal Health Practices and Child Development Project, a consortium of projects centered on the identification of the long-term effects of prenatal substance abuse.

Amicus Curiae **Deborah A. Frank, M.D.**, is a Professor of Pediatrics at Boston University School of Medicine. Dr. Frank is also an Assistant Professor of Social and Behavioral Sciences at the Boston University School of Public Health. Since 1981 she has been the Director of the Failure to Thrive Program at the Boston Medical Center where she is also a staff physician in the Child Development Unit. In 1993 she was named a Fellow of the Society for Pediatric Research. Dr. Frank is a recognized expert on the effect of maternal substance abuse on fetal development and newborn behavior. She has published widely on these topics, including numerous articles concerning prenatal cocaine and methamphetamine exposure. In 2002, Dr. Frank testified before the United States Sentencing Commission concerning the effects of prenatal cocaine exposure. Dr. Frank comes to this Court in

her capacity as amicus curiae in order to ensure that prevalent stigma and stereotypes about the nature of women who use drugs during pregnancy do not prevent the Court from understanding the medical issues in the case.

Amicus Curiae **Leslie Hartley Gise, M.D.**, *Amicus Curiae* Leslie Hartley Gise, M.D., is a Clinical Professor at the John A. Burns School of Medicine at the University of Hawaii in Honolulu. She is also staff psychiatrist at the Maui Memorial Medical Center in Wailuku. She has pioneered protocols and teaching curricula for screening of medical patients for psychological dysfunction. Dr. Gise has devoted particular attention to cognitive screening of elderly patients and screening for depression in women. She was an investigator on three National Institute of Mental Health contracts on mental health in primary care. Dr. Gise is on the editorial board of five journals, taught in board review courses and examined for the American Board of Psychiatry and Neurology. She has consulted at Malama Family Recovery Center treating substance abuse disorders in pregnant and parenting women. Dr. Gise belongs to many professional organizations, and has assumed active committee and leadership roles, including presidency of the North American Society for Psychosocial Obstetrics and Gynecology and the Society for Liaison Psychiatry. Dr. Gise was appointed by the Academic Council to be Women's Liaison Officer to the American Association of Medical Colleges. Dr. Gise has been active in the American Psychiatric Association where she is the state representative to the assembly, past President of the Hawaii State Psychiatric Society, the Area 7 Council, and the Committee on Public Affairs, the Committee on Public and Community Psychiatry. She is the Chair of the Disaster Preparedness Committee of the Hawaii Psychiatric Medical Society, an American Red Cross mental health volunteer, a member of the federal Disaster Medical Assistance Team (DMAT) under NDMS, FEMA and Homeland Security, a member of Disaster Psychiatry Outreach (DPO), Maui Memorial Medical Center Disaster Committee and Maui Voluntary Organizations Active in Disaster (VOAD). Finally, Dr. Gise has published voluminously and lectured around the world on addiction in women, post partum depression, outpatient commitment and other topics.

Amicus Curiae **Stephen R. Kandall, MD** is a pediatrician who has cared for over a thousand babies exposed to drugs. He is also chief of neonatology at Beth Israel Medical Center in New York and has written a book (Substance and Shadow: Women

and Addiction in the United States Cambridge: Harvard University Press, 1996) outlining the horrors of prosecuting women who need drug treatment.

Amicus Curiae **James J. Nocon, M.D., J.D.** is the Director of the Substance Use Treatment Program for pregnant women and the Prenatal Recovery Clinic at Wishard Memorial Hospital in Indianapolis, IN. He is also Chair of the Indiana Prenatal Substance Abuse Commission and Clinical Associate Professor at the Indiana University School of Medicine. After a career researching and publishing, he became certified to treat opiate addiction and developed a method of treating alcoholism and drug addiction.

Amicus Curiae **Linda Worley, M.D.** is a Professor of Psychiatry with a secondary appointment in Obstetrics and Gynecology in the College of Medicine at the University of Arkansas for Medical Sciences (UAMS). She directs the campus side Student Mental Health Program, the College of Medicine Faculty Wellness Program and is the consulting psychiatrist to the ANGELS program in the department of Obstetrics and Gynecology. Dr. Worley is a board certified Psychiatrist with sub-specialization in Psychosomatic Medicine. Dr. Worley was recruited to join the UAMS, Department of Psychiatry Faculty in 1992. She received the American Psychiatric Association Gold Award for directing a model program for the nation for addiction treatment for women with their children.

