THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

STATE OF SOUTH CAROLINA,
Appellant,

v.

REGINA D. MCKNIGHT,
Respondent.

Case No. 00-GS-26-3330

Appeal from Horry County

Court of General Sessions

Honorable James E. Brogdon, Jr., Circuit Court Judge

BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLANT, REGINA D. MCKNIGHT SUBMITTED BY

SOUTH CAROLINA STATE NOW (NATIONAL ORGANIZATION FOR WOMEN), CHARLESTON NOW, SOUTH CAROLINA ADVOCATES FOR PREGNANT WOMEN, AND CHARLESTON CHAPTER OF THE PROGRESSIVE NETWORK

---

*SUZANNE E. GROFF (# 8890)
171 Church Street, Suite 160
Charleston, SC 29401
(843) 720-3735

JILL C. MORRISON
MARCIA D. GREENBERGER
National Women's Law Center
11 Dupont Circle, Suite 800
Washington, DC 20036
(202) 588-5180

Attorneys for Amici Curiae
*(Counsel of Record)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Laws/Statutes

Other Materials

INTRODUCTION

Amici Curiae file this brief to demonstrate why the State's prosecution of Ms. Regina D. McKnight is based on unjustified stereotypes about women and pregnancy, and in addition to violating clear legislative intent, its application to a pregnant woman with a drug problem constitutes illegal discrimination on the basis of sex. For the reasons set forth below and those set forth in the Respondent's brief, Amici Curiae urge the Court to affirm the trial court's directed verdict on the drug distribution charge.

INTEREST OF AMICI CURIAE

Amicus Curiae South Carolina State NOW is the governing body of all NOW (National Organization for Women) chapters in South Carolina. SC State NOW is a grassroots organization that works toward ending sexual discrimination by raising awareness around issues affecting women in South Carolina. The members of our organization care deeply about this issue and believe that incarcerating pregnant women accused of using drugs has a negative impact not only the families involved, but on the entire social and economic infrastructure of our state.

South Carolina NOW is joined by three other organizations that share a longstanding commitment to equality on the basis of sex, and constitutionally protected freedoms of liberty, privacy and bodily integrity, as well as the advancement of policies that promote public health in South Carolina. The individual organizations are described in the attached Appendix.

STATEMENT OF THE ISSUES ON APPEAL

Amici Curiae adopt the Statement of the Issues on Appeal set forth by Respondent McKnight.

STATEMENT OF THE FACTS

Amici Curiae adopt the Statement of the Facts on Appeal set forth by Respondent McKnight.

SUMMARY OF ARGUMENT

This brief is filed in support of the Respondent Regina D. McKnight and opposes the State's appeal of the trial court's directed verdict regarding the drug distribution charge. Application of the drug distribution charge to Ms. McKnight based solely on the fact that she took cocaine while pregnant reflects unfounded, counterproductive and constitutionally impermissible discrimination based on stereotypical attitudes about pregnant women.[1] The prosecutions for "distribution" or "delivery" brought under similar circumstances have been soundly rejected by courts around the nation, each finding that prosecution of pregnant women was not what such laws were meant to cover. See, e.g., Johnson v. Florida, 602 So.2d 1288 (Fla. 1992); Georgia v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992); Michigan v. Hardy, 469 N.W.2d 50 (Mich. St. App. 1991).

In bringing this prosecution, the State assumes that any pregnant woman who ingests cocaine, including Ms. McKnight, does so for the purpose of delivering it to her fetus. As conceded by the State, South Carolina Code § 44-53-375 requires that the defendant knowingly commit the offense, thus requiring proof of Ms. McKnight's actual mental state in carrying out the alleged act of distribution. State Reply Br. at 12. There is no evidence whatever in the record to indicate that distribution to her fetus was Ms. McKnight's intent, or that her drug use was motivated by anything other than the

[1] Beyond its explicit sex-based disparate impact, the effect of testing policies and criminal prosecutions on low-income African-American women in particular has been well-established. See Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419 (May 1991).

physiological and biological consequences of her addiction. Amici urge this Court to follow the approach taken by sister states that have refused to allow such prosecutions, and "decline[] the State's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread." Johnson v. Florida, supra, at 1297.

Underlying this prosecution is the assumption that while pregnant, a woman's every act is motivated by its effect on her fetus. While it is recognized that any man who consumes drugs may do so for a variety of reasons, including his need to stave off painful withdrawal symptoms, the prosecution urged by the State here requires the assumption that once a woman becomes pregnant, her use of drugs must be motivated by an intent to distribute the drug to her fetus. This unfounded and stereotyped presumption of motivation amounts to unlawful sex discrimination.[2] Moreover, the statute's plain language and the legislature's obvious intent to reach dealers who sell drugs, not addicts who ingest drugs, make clear that the statute may not be applied to the facts of this case.

Amici urge the Court to consider the longstanding history of discrimination against women generally and pregnant women in particular, as well as the broad implications of such prosecutions, in evaluating and sustaining the trial court's entry of a directed verdict in the drug distribution charge. The Constitution requires that women be judged by their "individual talents and capacities," and not by stereotypes. U.S. v. Virginia, 518 U.S. 515, 532 (1996). It is impermissible for a state to act based on stereotypical assumptions about men's and women's abilities or characteristics. Id. at 541-42. The State's prosecution here is based on such stereotyping and discrimination, which violates the Due Process and Equal Protection guarantees under the Constitution.

[2] See State v. McKnight, Case No. 00-GS-26-432, Tr. 114:25- 116:16.

The State's refusal to look at the individual motivation and characteristics of Ms. McKnight, or any other pregnant woman who uses drugs, is directly contrary to the constitutional mandate as described in these cases.

Furthermore, laws and policies in other contexts reflect the national consensus that every act by a pregnant women that may happen to affect the fetus should not be presumed to be taken by the woman because she has a specific intent to cause that effect, as the State's prosecution here attempts to do. Numerous examples of law and policy reject this notion, instead recognizing that pregnant women make decisions and engage in behaviors that reflect a complex set of motivating factors, with their pregnancies as only one, and not necessarily either the dominant or the relevant factor in any specific instance.

While this, and similar prosecutions have the alleged goals of deterring drug use among pregnant women and improving fetal and child health outcomes, such considerations were never put before the South Carolina legislature.[3] Indeed, the State has provided no medical or other evidence in this or related cases that the prosecution of pregnant woman in fact leads to improved maternal or fetal health. In fact the contrary is true: these prosecutions neither advance fetal health by preventing women's initial drug use, nor do they encourage cessation once drug use has begun.[4] Pregnant women's participation in drug treatment in this State appears to have declined following this Court's decision in Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (S.C. 1997) (allowing

[3] The highest court to consider the rationale behind such prosecutions has soundly rejected as unsupported the claim that fetal and maternal health are furthered by this unintended application of drug distribution laws. Johnson v. Florida, supra, at 1296.

[4] See, e.g., Ferguson v. City of Charleston, 532 U.S. 67, 84 n.23 (2001) (Noting the consensus among Amici medical groups "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.")

prosecution under child abuse statute for cocaine ingestion during third trimester of pregnancy), while infant mortality increased following a decade of steady decline. See South Carolina Medical Association et al. Amicus Br. at 35 (internal citations omitted). And to the extent such prosecutions coerce some women into terminating their pregnancies, these prosecutions obviously do not serve the asserted interests of the State.[5]

The State's decision to prosecute Ms. McKnight for drug delivery is not based on any relevant, permissible or legitimate physical difference based on pregnancy. The fact of pregnancy alone, and any physical differences that result, cannot provide a legitimate rationale for effectively re-writing the State's drug distribution law. Moreover, even when actual physiological differences based on pregnancy are at issue, it is unconstitutional to place burdens on pregnancy not placed on analogous conditions.

In the face of this discriminatory prosecution, there is no legitimate justification proffered by the State. The State's claims that these prosecutions are in furtherance of public health are undermined by studies that have shown such prosecutions have the opposite effect. The former Attorney General at the helm of this and many other of these cases has articulated a more likely rationale—that such prosecutions are a supposed solution to what he views as a lack of morals among low-income women and their failure to live up to his expectations regarding motherhood. Given the patently unacceptable

---

[5] Numerous courts dismissing prosecutions against women who gave birth despite an addiction problem have recognized the possibility of coerced abortions. See e.g., Johnson v. State, supra, at 1296 ("Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion."); State v. Gethers, 585 So.2d 1140, 1143 (Fla. Dist. Ct. App. 1991) ("[p]otential criminal liability would also encourage addicted women to terminate or conceal their pregnancies"); People v. Morabito, [no case number], slip op. at 4 (N.Y. Ontario County Ct. Sept. 24, 1992); People v. Bremer, No. 90-32227-FH, slip op. at 9, 14 (Mich. Cir. Ct., Jan. 31 1991); Commonwealth v. Pellegrini, No. 87970, slip op. at 9 (Mass. Super. Ct. Oct. 15, 1990). Indeed, a policy of prosecution may have resulted in at least one coerced abortion. In February of 1992, Martina Greywind was charged with reckless endangerment because she was allegedly sniffing paint fumes while she was pregnant. Gail

nature of this rationale, it is hardly surprising that the State would not highlight or rely upon it now. Given the clear lack of any adequate justification, this is an inappropriate, discriminatory, and unconstitutional prosecution.

Stewart Hand, Women or Children First?, Grand Forks Herald (N.D.), July 12, 1992, at 1. Twelve days after her arrest she obtained an abortion. Id. Shortly after the abortion, the charges were dropped. Id.

ARGUMENT

I. THE STATE'S PRESUMPTION OF MS. MCKNIGHT'S INTENT TO DISTRIBUTE DRUGS TO HER FETUS EVIDENCES A FUNDAMENTAL MISUNDERSTANDING OF ADDICTION AND PREGNANCY AND IS WHOLLY UNSUPPORTED BY THE FACTS OF THIS CASE

This prosecution is based on the presumption that all pregnant women who use drugs, including Ms. McKnight, do so with the intent of distributing these drugs to their developing fetuses. In fact, however, the AMA and other medical groups recognize that drug addiction is "caused by complex hereditary, environmental, and social factors" which diminish decisionmaking. Legal Interventions During Pregnancy, 264 JAMA 2663 (Nov. 28, 1990). Most pregnant drug users, including Ms. McKnight, face significant obstacles to overcoming addiction, including the inability to secure access to health services and drug treatment. These women take drugs not because their pregnancies provide an opportunity to distribute drugs to their fetuses, but because they are not able to stop given their addiction, in spite of the pregnancy and a well-demonstrated motivation for most to do all they can to protect the health of their future children.

A. Pregnant Women's Addiction Often Emerges From a History Of Trauma, Abuse and Poverty and Is Often Established Prior To Pregnancy

The State presumes that a pregnant woman who ingests a drug intends for that drug to reach her fetus. Such a presumption is at odds with a large body of research regarding pregnant addicts. It is well-documented that the majority of pregnant women who use drugs had traumatic childhoods, often characterized by persistent poverty, fractured families, inadequate education and health care, and physical and sexual abuse, usually inflicted by male family members or friends. See, e.g., Susan C. Boyd, Mothers and Illicit Drugs: Transcending the Myths (1999); Sheigla Murphy and Marsha Rosenbaum, Pregnant

Women on Drugs 17-48 (1999). Most also witnessed drug use at an early age among family members, friends and neighbors. Studies indicate that drugs are integral to physical and sexual abuse, with drug use often forced on women and girls. These experiences led many women to begin seeking out drugs themselves, often to escape the terror and abuse they suffered, and most describe having their first experience with drugs by age 17 and developing an addiction soon after. Murphy and Rosenbaum, supra , at 41.

Many women with addiction problems do not have access to regular birth control. Murphy and Rosenbaum, supra, at 49. Also, most addicted women do not believe they are physically capable of becoming pregnant, as drug use often interrupts their menstrual cycles. Id. Because many women do not expect that they can conceive, they often do not realize that they are pregnant until they are in their second or third trimesters. Drew Humphries, Crack Mothers: Pregnancy, Drugs and the Media 106 (1999) (internal citations omitted); Murphy and Rosenbaum, supra, at 53-56. Early symptoms such as missed menstrual periods or nausea are usually attributed to the effect of the drugs they are taking or to withdrawal from those drugs, and they do not identify their pregnancy until much later. Murphy and Rosenbaum, supra, at 53. Therefore, drug use during pregnancy is caused by factors wholly unrelated to the pregnancy, and many women continue drug use into the pregnancy without even realizing they are pregnant, making it impossible to assert as the State does that their drug use is motivated by their intent to deliver drugs to the fetus.

B. Contrary To the Presumption That Women Intend To Deliver Drugs To Their Fetuses, Addicted Women Who Become Pregnant Typically Seek To Minimize Harm To Their Fetuses

Even though addicted women are usually not planning to have a child, one study found that most who decided to carry to term saw their pregnancies as an opportunity to start a new life and find redemption for what they perceive as past failures. Murphy and Rosenbaum, supra, at 3, 8-9. Women reported that they wanted to try to change their behavior to better ensure a healthy pregnancy, and the vast majority engaged in harm reduction efforts in order to counteract any effects of drug use—usually without any institutional support or intervention. Id. at 83-101.

Studies found that many women attempt to decrease the amount of drugs they consume, or take actions to ameliorate any harm caused by their drug use, such as taking prenatal vitamins, improving their eating habits and getting more sleep. Murphy and Rosenbaum, supra, at 83-87. Laura Gomez, Misconceiving Mothers 17 (1997) (internal citations omitted). Many women also attempt to secure access to prenatal care, but the barriers of cost, transportation, lack of child care, and fears of negative reactions of health care providers to their drug use can be insurmountable. Murphy and Rosenbaum, supra, at 88. Therefore, even with continued drug use, pregnant women are trying to protect rather than harm their fetuses.

C. Access To Treatment For Pregnant Addicts Is Limited, and Ceasing Drug Use On Their Own Is Not Only Extremely Difficult Without Help But Also Dangerous Due To the Physical Nature Of Addiction

In most communities throughout the country, access to treatment programs is very limited. Many programs refuse to take pregnant women at all.[6] Research has made clear

[6] A 1990 survey revealed that although 675,000 pregnant women were in need of drug treatment nationwide, fewer than 11 percent received it. Murphy and Rosenbaum, supra, at 150-53 (internal citations

that overcoming drug addiction requires more than a person's desire to stop using drugs, and it is extremely difficult and even dangerous for pregnant addicts to cease drug use entirely. In addition to psychological and social factors that diminish a person's ability to control drug use, studies have shown that ongoing drug use can alter the functioning of the brain. Brain cells adapt and adjust to the presence of drugs, and this adaptation can contribute to the sense of craving felt by addicts when they cease drug use entirely. Amanda J. Roberts and George F. Koob, The Neurobiology of Addiction, 21 Alcohol Health & Research World 101 (1997). Therefore, the desire to quit is insufficient for many addicts, including pregnant women, to end their drug use. Rather, comprehensive and effective treatment programs are necessary for most drug users to overcome addiction. Recovery is a complex process for women addicted to cocaine, because treatment often involves medications to ease detoxification such as antidepressants and antipsychotic drugs, and these medications may also be contraindicated for pregnancy. Humphries, supra, at 122.

In statements regarding Ms. McKnight's case, the State has repeatedly claimed that it operates an "amnesty program" for women who use drugs during their pregnancies, prosecuting them only after they have refused to participate in drug treatment programs.[7] In fact, nothing on the record in this case shows that such a

---

omitted). In New York City, a survey of 78 drug treatment programs revealed that 54 percent refused services to pregnant women, while 67 percent refused to pregnant women on Medicaid and 87 percent denied treatment to pregnant women on Medicaid who were seeking treatment for crack cocaine. LaShanda D. Taylor, Creating a Causal Connection: From Prenatal Drug Use to Imminent Harm, 25 N.Y.U. Rev. L. & Soc. Change 383, 393 (1999).

[7] See, e.g., Rick Brundrett, Fetus Abuse Law Could Get Second Look, The State, Nov. 5, 2002 at A3 (reporting South Carolina Attorney General Charlie Condon's reference to an "amnesty program" under which the state does not process pregnant women addicted to drugs unless they refuse treatment); Jeffrey Collins, South Carolina to Revisit Charging Pregnant Women Who Use Cocaine, AP Newswires, Nov. 4, 2002 (quoting South Carolina prosecutor Greg Hembree as stating that Ms. McKnight was prosecuted

treatment policy exists or that Ms. McKnight was ever offered drug treatment by the State before she was arrested and prosecuted.[8] Based on the availability of treatment and nature of addiction, it is hardly surprising that Ms. McKnight, like many other women in South Carolina, was not able to overcome her addiction problems.

D. The Prosecution Presented No Evidence That Ms. McKnight Intended To Distribute Drugs To Her Fetus

There is simply no indication in the record that Ms. McKnight ingested cocaine with the intent of "delivering" it to her fetus as required by the statute. The evidence shows that her drug use was an effort to numb her own pain in response to her mother's death. Like many women, Ms. McKnight used drugs for the first time in response to trauma. Because Ms. McKnight appears to have an IQ of 72 and was unable to obtain appropriate employment, she relied on her mother for emotional and financial support. R. p. 388, lines 1-2; p. 408 (Case No. 00-GS-26-0432). When her mother was killed by a hit and run driver, Ms. McKnight suffered from depression and turned to drugs. R. p. 388, lines 3-6; p. 408 (Case No. 00-GS-26-0432). As a consequence of her depression and drug use, she soon became homeless. R. p. 388, lines 8-9 (Case No. 00-GS-26-0432).

Her drug use thus reflected these complex psychological and socioeconomic issues, and not a desire to transform her body into a drug delivery mechanism. The only thing that is undisputed is that she intended to delivery a healthy, living baby. As the State conceded in McKnight I "[t]here was no evidence that [Ms. McKnight's] intentions

---

because she did not seek treatment: "There was a path for her out of this problem. We have an amnesty program…. We don't want to prosecute anybody."

[8] The Conway Hospital Protocol on record in this case, entitled "Protocol for the Management of Drug Abuse During Pregnancy," does not include any discussion of treatment program options for pregnant or recently delivered patients who have been properly tested and found positive for drugs. See R. p. 450-54 (00-GS-26-0432).

here were other than a normal delivery of a live child." McKnight I, Case No. 00-GS-26-432, State Br. at 41 (emphasis added).

II. THE STATE'S ATTEMPT TO PROSECUTE MS. MCKNIGHT FOR DRUG DISTRIBUTION IS BASED ON DISCRIMINATORY, PREJUDICIAL AND STEREOTYPICAL VIEWS OF PREGNANCY AND WOMEN

State action that "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women" violates the Equal Protection Clause of the Fourteenth Amendment. J.E.B. v. Alabama, 511 U.S. 127, 131 (1994). Policies and laws based on stereotypes, presumptions and discriminatory beliefs regarding women's singular role in society as mothers deny women their right to privacy, bodily integrity, liberty and autonomy:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.

Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992). Pregnant women are subject to a "highly demanding set of expectations," regarding the perceived belief that their every action impacts the fetus. Rachel Roth, Making Women Pay: The Hidden Cost of Fetal Rights 17 (2000). The expectation that they be "altruistic and self-sacrificing" places an untenable burden on pregnant women and subjects them to constant scrutiny. April Cherry, Maternal-Fetal Conflicts, The Social Construction of Maternal Deviance, and Some Thoughts About Love and Justice, 8 Tex. J. of Women and the L. 245, 256 (Spring

1999). One court noted that imposing liability on pregnant women for their inability to provide "the best prenatal environment possible . . . would have serious ramifications for all women and their families, and for the way in which society views women and women's reproductive abilities." Stallman v. Youngquist, 531 N.E.2d 355, 359 (Ill. 1988) (refusing to recognize a cause of action for unintentional prenatal infliction of injuries). The court concluded that attempting to guarantee good outcomes by punishing a mother for her prenatal conduct was to ignore the biological and practical complexities of life and severely restrain her privacy and bodily autonomy.

A. The Prosecution In This Case Reflects the Unrealistic and Discriminatory Belief That Women Are Able To Transcend Any Circumstance Once Pregnant, and That Doing So Ensures a Healthy Pregnancy

There is a persistent stereotype that once a woman becomes pregnant she is capable of instantly changing every element of her life that could possibly have a negative impact on her fetus. Punishing pregnant addicts for their inability to stop drug use treats pregnancy as though it is a "transcendent moment" that enables addicted women do to that which is scientifically known to be virtually impossible: cease drug use without intense support, medical supervision and resources. Dorothy E. Roberts, Motherhood and Crime, 79 Iowa L. Rev. 95, 113-14 (Oct. 1993)(citation omitted). While many women are highly motivated to improve their lives once pregnant,[9] there is nothing inherent about pregnancy that makes any of these changes more possible, regardless of a

[9] See infra, Section I.B. See also Agency for Healthcare Research and Quality, Guide to Clinical Preventive Services, Second Ed., Section 2. 56, Counseling to Promote a Healthy Diet 632 (1995) (identifying pregnancy as effective opportunity for nutrition counseling); Women and Smoking: A Report of the Surgeon General (U.S. Centers for Disease Control and Prevention, Office on Smoking and Health, 2001) 562 (citing pregnancy as time for both self-motivated smoking cessation and programmatic interventions); Centers for Disease Control and Prevention and American College of Obstetricians and Gynecologists, Intimate Partner Violence During Pregnancy: A Guide for Clinicians (noting strong motivation of women at onset of pregnancy to seek help regarding partner violence)(2002).

woman's newfound motivation. As previously described, pregnancy actually reduces women's access to drug rehabilitation. A pregnant addict's ability to cease drug use is, at best, identical to that of her male counterpart, yet the State's prosecution of pregnant women treats them as though their physical and mental inability to stop their addiction is motivated by an intent to deliver drugs to their fetuses, and thus requires punishment by the State. This prosecution deprives women of their most basic liberty based on unfounded and improper stereotypes of women and pregnancy.

B. This Prosecution Is Rooted In the Discriminatory Misperception That Women Are Solely Responsible For Fetal Health Outcomes and Ignores Other Determinants Of Fetal Health

In International Union v. Johnson Controls, 499 U.S. 187 (1991), the Supreme Court rejected a fetal health justification in treating women differently than men when there was evidence that men's activities and behaviors also affect fetal outcomes. In that case, the employer barred women (except those who could prove infertility) from holding certain jobs based on the potentially harmful effects of lead exposure on fetuses. The Court found that this policy was discrimination on its face under the Pregnancy Discrimination Act, since fertile men were not barred from employment despite the proven harm of lead exposure on men's reproductive functioning. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) (Pub. L. 88-352), as amended, signed October 31, 1978. "Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees." Johnson Controls, supra, at 198. The Court finds explicit sex discrimination because the employer "has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination

on the basis of sex." Id. Moreover, the Court concludes that women must be free, as are men, to make decisions about their livelihood and reproductive health after being informed of the risks. Id. at 211. In finding that this policy perpetuated blatant discrimination, the Court highlighted the inevitable result of disassociating men from fetal health outcomes and forcing women to bear sole responsibility. One byproduct of advances in maternal and fetal health is the misperception that a healthy child is the guaranteed outcome of perfect maternal behavior.[10] This misperception ignores other factors in fetal health, and focuses interventions solely on women's behavior. Katha Pollit, "Fetal Rights": A New Assault on Feminism, in "Bad" Mothers: The Politics of Blame in Twentieth-Century America 285-89 (Molly Ladd-Taylor and Lauri Umansky eds., 1998).

As established in Johnson Controls, there are some areas, including drug use, where men's contributions to pregnancy outcomes may be just as important as those of women.[11] A singular emphasis on maternal behavior was expressly rejected in Johnson Controls. Furthermore, while women carry a limited number of children at a time, and within a lifetime, men may reproduce many more times, potentially replicating the harm far more than women. Institute of Medicine, Women and Health Research: Ethical and Legal Issues of Including Women in Clinical Studies 182 (Anna C. Mastroianni, Ruth Faden, and Daniel Federman eds., 1994). Men's physical distance from pregnancy perpetuates the myth that women are solely responsible for fetal health, and has further

[10] Yet even controlling for access to prenatal care, education and income, disparities in infant mortality between whites and blacks remain. Infant Mortality and Low Birth Weight Among Black and White Infants - United States, 1980-2000, 51 Morbidity and Mortality Weekly Report 589 (July 12, 2002).

[11] Deborah A. Frank et al., Forgotten Fathers: An Exploratory Study of Mothers' Report of Drug and Alcohol Problems Among Fathers of Urban Newborns, 24 Neurotoxicology and Teratology 339 (2002) (Noting that punitive measures directed solely at mothers reflects irrational social, racial and gender bias).

made women the target of discrimination based on pregnancy and the potential to become pregnant. Cynthia Daniels, Fathers, Mothers, and Fetal Harm: Rethinking Gender Difference and Reproductive Responsibility, in Fetal Subjects, Feminist Positions 83 (Lynn M. Morgan and Meredith W. Michaels eds., 1999) (collecting studies on male exposure to occupational, behavioral and environmental factors).

C. Differential Treatment Of Women On the Basis Of Pregnancy or the Capacity To Become Pregnant Has Little Basis In Research or Science, and Has In Many Instances Eventually Been Deemed Unsupportable

Society has historically treated women differently based on both their capacity to become pregnant and their actual pregnancies. Common practices, policies and laws were based on stereotypes of women's proper and primary role as mothers. Both law and custom dictated that a woman do everything in her ability to preserve her fertility, and advance her pregnancy according to the standards of the times. These clearly archaic practices were based on presumptions about women's abilities, and denied them the right to prioritize any activity over childbearing and rearing.

The military once discharged women for becoming pregnant or otherwise taking on the responsibility of parenting, presuming that women would prioritize their "maternal duties" over military service. Lucille M. Ponte, United States v. Virginia: Reinforcing Archaic Stereotypes About Women in the Military Under the Flawed Guise of Educational Diversity, 7 Hastings Women's L.J. 1, 15 n.68 (Winter, 1996). Lawsuits and the need for more talented, able-bodied citizens willing to serve their country eventually resulted in a change in policy. Id. 18 n.90.

As the Supreme Court noted in striking down a ban on female cadets at the Virginia Military Institute, women were once denied higher education because of the

common belief that rigorous study would interfere with their "reproductive organs," and interfere with "the adequate performance of the natural functions of their sex." U.S. v. Virginia, supra, at 537 n.9 (citing C. Meigs, Females and Their Diseases 350 (1848)).

Women were once forbidden participation in athletic activity because rigorous competition was thought to cause physical and psychological harm–especially to their reproductive capabilities. Nancy Struna, Women's Pre-Title IX Sports History in the United States (Women's Sports Found., Apr. 26, 2001). Laws requiring equal participation in federally funded education programs, as well as major shifts in social trends have led to the acceptance and promotion of women in sports.

The United States Supreme Court once upheld a statute limiting women, but not men, to ten hours of work a day, finding that it did not violate any Fourteenth Amendment rights. According to the Court, the state presented adequate justification for this infringement on women's liberty: working long hours would cause physical harm to the potential mother, and therefore required governmental regulation since, "healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." Muller v. Oregon, 208 U.S. 412, 421 (1908). Such a limitation would now be unthinkable in female dominated professions such as nursing, where four-day-a-week, twelve-hour shifts are common. Eventually these types of sex-based distinctions were forbidden by law as impermissible sex discrimination under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e et seq. (Pub. L. 88-352).[12] In addition, the Supreme

[12] Even after employment discrimination on the basis of sex was made illegal, persistent stereotypes regarding the potential impact of certain types of work on the fetus, as well as the stereotype that women would abandon their jobs to bear and raise children necessitated the passage of the Pregnancy

Court has fundamentally altered its analysis of Constitutional protections against sex discrimination. See U.S. v. Virginia, supra; Kirchberg v. Feenstra, 450 U.S. 455 (1981).

This prosecution reflects the same stereotypical views advanced by these long-rejected examples: that a woman's acts can and should only be motivated by the anticipated effect on her reproductive capacity or pregnancy. The current view on each of the laws and policies below acknowledges that women have other life circumstances, concerns and priorities that may make it impossible or inadvisable to do what is thought "best" for her reproductive health or pregnancy.

III. THE STATE'S APPLICATION OF THE DISTRIBUTION STATUTE TO THE FACTS OF THIS CASE VIOLATES THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

A. The Due Process and Equal Protection Clauses Of the Fourteenth Amendment Are Violated By the State's Interpretation Of the Delivery Statute

The State may not create a burden on women based on pregnancy or the ability to become pregnant under the Due Process or Equal Protection Clauses of the Fourteenth Amendment. The decision to bear a child is a fundamental liberty interest protected by the Fourteenth Amendment that may not be burdened by the state. The Supreme Court stated in Cleveland Board of Ed. v. LaFleur, 414 U.S. 632 (1974), that because mandatory maternity leave policies "directly affect 'one of the basic civil rights of man,' the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty." Id. at 640 quoting Skinner v. Oklahoma, 316 U.S. 535, 541

Discrimination Act (PDA). Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) (Pub. L. 88-352), as amended, signed October 31, 1978.

(1942). The Court construed LaFleur in Turner v. Department of Employment Security, 423 U.S. 44 (1975), and held that a policy presuming a pregnant woman was unable to work for an 18 week period, and was therefore ineligible for unemployment compensation, infringed upon "freedom of personal choice in matters of marriage and family life" as protected by the Due Process Clause. 423 U.S. at 46, citing 414 U.S. at 639.

The Supreme Court also made clear that pregnancy discrimination can constitute sex discrimination under the Equal Protection Clause of the Fourteenth Amendment. In Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), an employer was held to violate Title VII's prohibition against sex discrimination (before the Pregnancy Discrimination Act was passed) by denying accumulated seniority to female employees returning from pregnancy leave, and thereby imposing a burden (the loss of seniority) that men do not suffer. 434 U.S. at 141-42. As General Electric Co. v. Gilbert, 429 U.S. 125 (1976) held, the analysis as to whether sex discrimination is at issue for purposes of the Fourteenth Amendment and Title VII are the same.[13]

The State's decision to prosecute Ms. McKnight based on her pregnancy constitutes a far graver imposition of a burden that men do not suffer than was at issue in Satty, Turner or LaFleur. Here, no men who simply took drugs could be prosecuted—but all pregnant women could. Ms. McKnight could have avoided the distribution charge only by choosing to terminate her pregnancy. The State's charge creates an untenable

[13] Therefore, while under Geduldig v. Aiello, 417 U.S. 484 (1974) and Gilbert, supra, the withholding of a benefit to pregnant women did not constitute sex discrimination for purposes of Title VII or the Equal Protection Clause, the imposing of a burden does constitute such discrimination. See also Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976) (mandatory discharge of pregnant women from Marines presented unconstitutionally burdensome presumption about pregnancy and women under Equal Protection clause and LaFleur Due Process analysis).

burden on her decision to bear a child, or suffer the drastic consequences of being prosecuted for a criminal offense. Unlike the women in Satty, Turner and LaFleur, Ms. McKnight is not merely disadvantaged economically from her decision—she is subject to imprisonment. Amici make no claim that Ms. McKnight has the "right" to take drugs while pregnant, or at any other time for that matter. Rather, because only the fact of her pregnancy gives rise to this prosecution, the State is imposing upon her an unconstitutional burden.

Given the sex-discriminatory nature of this prosecution, the State must show an "exceedingly persuasive justification" for the prosecution, and that such prosecutions are narrowly tailored means to further the state's interest. United States v. Virginia, supra. The State must meet its "demanding" burden of justifying differential treatment. Id. at 532-33. "This justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." Id. at 533.

While fetal and maternal health are certainly legitimate state interests, the punitive treatment of pregnant women has not been shown to further that interest, let alone with the kind of close nexus required under the Fourteenth Amendment. In fact, the South Carolina legislature never considered whether the application of this statute to circumstances such as these furthered the state's interest in any way, let alone whether it would advance the cause of fetal and maternal health. Furthermore, as described in Section II.B., men's drug use has been shown to have an impact on fetal outcomes, thereby making the State's action underinclusive of meeting its interest as well. To the extent the State has provided any justification for this prosecution, see Section I.V., this

justification is rooted in the precise types of stereotypes and presumptions about women's roles and capabilities cautioned against in U.S. v. Virginia, supra.

B. Conviction Under the Distribution Charge Would Amount To Cruel and Unusual Punishment Under the Eighth Amendment Based On the Status Of Being Pregnant and Addicted

The Supreme Court has held that criminalizing the status of addiction and allowing the prosecution of an addicted person at any period before his or her rehabilitation is cruel and unusual punishment in violation of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962) (declaring statute unconstitutional). While the state is free to impose criminal sanctions on the distribution, sale, manufacture and possession of drugs, it cannot make the defendant's status a crime. Id. at 664. The Court found that the very nature of addiction usually rendered the addict unable to alter his or her status, id. at 671 (Douglas, concurring), and recognized addiction as an illness. Id. at 667.

The effect of this prosecution is identical to the criminalization of the status of addiction prohibited in Robinson. Ms. McKnight's addiction gave rise to her continued drug use during her pregnancy, and subjected her—based on her addicted status—to prosecution from the time she became pregnant. Only the biological fact of pregnancy gives rise to the charge of drug distribution. The State alleges that cocaine was "delivered" through the umbilical cord to the fetus, yet this transfer was not intended or carried out through Ms. McKnight's own volition; it is a result of her status. The State presented no individualized analysis or evidence of Ms. McKnight's intent to distribute drugs to her fetus, and therefore subjected her to prosecution simply for her status as a pregnant addict. Being addicted in and of itself cannot be a crime. Therefore, if being

addicted while pregnant is a crime, the ultimate effect of the statute is to criminalize the status of addiction for all pregnant women. But for Ms. McKnight's pregnancy, she could not have been charged with any crime based on her own positive drug test—not even drug possession.[14]

C. The Application Of the Distribution Statute In This Case Violates the Due Process Requirements Of Definiteness and Fair Notice

A statute violates the Due Process Clause of the Fifth Amendment when it fails to clearly inform those subject to it that their actions constitute a crime. The principle of definiteness states that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." U.S. v. Harriss, 347 U.S. 612, 617 (1954). While an individual may know that her drug use is illegal, Due Process requires that she could reasonably infer what law or laws she violated. See Michigan v. Hardy, 469 N.W.2d 50, 52 (Mich. St. App. 1991) (finding application of the distribution statute in facts similar to the case at bar unconstitutionally required individuals to "speculate" about distribution statute's meaning). Similarly, statutory interpretations that are clearly outside of the scope of the statute violate the Due Process requirement of fair notice. Bouie v. Columbia, 378 U.S. 347, 352 (1964) (violation of fair notice can result from "unforeseeable and retroactive judicial expansion of narrow and precise statutory language"). South Carolina's drug distribution statute was clearly intended to punish drug dealers from seeking out children to get them addicted to drugs. Because of the plain meaning of the statute and its contrary novel construction by the State, women are

[14]See also Ferguson v. City of Charleston, 532 U.S. 67 (2001) (finding South Carolina's testing program in violation of the Fourth Amendment right to be free from unwanted searches). While the State may claim that the test of the fetus for the presence of drugs was done for diagnostic purposes, the record shows no evidence that routine tests were performed to establish the cause of the stillbirth. Nonetheless, a patient has a reasonable expectation that diagnostic tests will not be shared with others for non-medical purposes without her consent. Id. at 78.

also deprived of fair notice that their own drug use may be prosecutable as "delivery" to their fetuses.

As stated in Respondent's brief, prosecution under the drug distribution statute also leaves open the possibility that a pregnant woman could be prosecuted for taking legal prescription drugs (also "controlled substances" under the statute). Final Br. of Respondent, p. 11. The legal or illegal nature of the substance at issue is not relevant to the State's interpretation of the statute. This reading could apply to all controlled substances under South Carolina Code § 44-53-370, which includes drugs used in medical treatments. See Section IV.C. Similarly, a pregnant woman taking prescription medications could be convicted of dispensing those medications to her fetus without a prescription.

Only women are subject to these uncertainties of prosecution. These uncertainties are based solely on women's pregnancy or potential to become pregnant, and present a violation of the Fourteenth Amendment's guarantee of Due Process and of Equal Protection.

IV. PUBLIC POLICY AND LAW AFFIRM THAT THE STATE MAY NOT SUBSTITUE ITS JUDGMENTS ABOUT FETAL WELL-BEING FOR THE WOMAN'S JUDGMENTS CONSIDERING THE TOTALITY OF HER LIFE CIRCUMSTANCES

The State's prosecution in this case stems from its stereotypes about pregnancy and its attendant obligations, prejudice against pregnant addicts and the perception that they are irresponsible, morally deficient or callous.[15] Courts and policymakers have

[15] The former State Attorney General who created the testing "program" deemed unconstitutional in Ferguson v. City of Charleston, supra, has stated that testing and prosecution helped resolve the "strain" on the "moral sensibilities of hospital personnel." Charles Molony Condon, Clinton's Cocaine Babies: Why

consistently acknowledged the complexity of women's motivations and actions, and rejected the presumption that women's actions must be solely motivated by fetal impact. Furthermore, pregnant women's actions that have a potential or actual negative impact on the fetus are not treated as evidence of an intent to harm the fetus requiring criminal culpability. Pregnant women are protected by constitutional principles valuing individual autonomy and privacy. These principles forbid criminalizing women's failure to conform to the stereotype that a pregnant woman must prioritize her fetus over every other consideration.

Women maintain motivations that are independent of their pregnancies, and complex factors drive their behavior. The motivations for the personal decisions of pregnant women may range from religious belief to placing an emphasis on health and current obligations to family rather than fetal health. The right of autonomy encompasses the right of the individual to take actions deemed "unreasonable or irrational" by others, such as refusing medical care or taking a job that risks life or limb. Charity Scott, Resisting the Temptation to Turn Medical Recommendations Into Judicial Orders: A Reconsideration of Court-Ordered Surgery for Pregnant Women, 10 Ga. St. U. L. Rev. 615, 642 (May 1994). Our nation's laws and policies have evolved to support women's right to autonomous decisionmaking in multiple contexts, including medical treatment and employment. Law and policy refute the presumption that women who make difficult decisions that may appear to negatively affect their fetuses are doing so callously or maliciously, let alone criminally. In fact, the medical profession, policymakers, and

---

Won't the Administration Let Us Save our Children?, Policy Review, Mar. 22, 1995, at 12. He has also questioned women's ability to comport with his standard of motherhood in their use of social services, stating "These women want day care and free transportation, but who's taking care of their kids when they're on coke? Who's providing transportation to go get the drugs? Suddenly they're supermoms who

courts recognize that women's decisions regarding their pregnancies are some of the most difficult anyone can be faced with, encompassing complex factors that may not be apparent to others, and deserving of protection from state interference.

A woman who does work that may impair her ability to bear healthy children in the future does not appear to some to be making the proper decision. Yet that woman may chose to keep the well paying job that affords the children she does have health insurance and safe housing. See, e.g., International Union v. Johnson Controls, 499 U.S. 187 (1991). Many other decisions women are protected in making may result in fetal harm, such as the decision to refuse medical care for the benefit of the fetus; the decision to participate in health care clinical trials and research; and the decision to forego prenatal HIV testing. Yet, law and policy support a woman's right to make such decisions despite their potential impact on a fetus, and do not presume that these decisions are made with any malicious intent on the part of the woman, let alone should give rise to her criminal culpability.

A. Pregnant Women Retain the Right to Refuse Medical Treatment, Even When It Is Believed That Such Treatment Poses a Minimal Invasion To Them and a Great Benefit To the Fetus; Such Refusal Is Not Treated As a Criminal Act, But Rather an Expression Of Individual Liberties Embodied In the Constitution

The Supreme Court has reaffirmed the right to refuse medical treatment as grounded in liberty interest under the Constitution. Cruzan v. Missouri Dept. of Health, 497 U.S. 261, 278 (1990). The nation's leading physician's organizations support women's right to determine their own medical care and disfavor legal intervention in

---

won't abandon their kids." Barry Siegel, In the Name of the Children: Get Treatment of Go to Jail, L.A. Times Mag., Aug. 7, 1994, at 14 (quoting Attorney General Condon).

such cases, even when women's decisions are to the detriment of the fetus.[16] In addition, despite the potential consequences of refusing treatment, courts do not consider such actions as proof of any intent to cause harm to the fetus. Rather, courts recognize that there may be many other personal factors that motivate women's decisions to refuse treatment.

The leading case on pregnant women's right to refuse medical treatment for the benefit of her fetus is In re A.C., 573 A.2d 1235 (D.C. 1990), rev'g en banc, In re A.C., 533 A.2d 611 (D.C. 1987). The full court found that the panel had erred in permitting a cesarean to be performed on a pregnant women without her consent for the benefit of her 26½ week fetus. "[C]ourts do not compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person's health." 573 A.2d at 1243-44. After analyzing holdings that have refused to require organ donations between relatives, the court concluded, "[A] fetus cannot have rights in this respect superior to those of a person who has already been born." 573 A.2d at 1244. Every case to consider similar issues after A.C. has supported a pregnant woman's right to make medical decisions that may endanger the fetus, or refuse treatment for the fetus's benefit, even when the procedure in question is minimally invasive to the woman. See, e.g., In re Fetus Brown, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997) (citing Planned Parenthood v. Casey, 505 U.S. at 852); In re Baby Boy Doe, 632 N.E.2d 326, 333-34 (Ill. App. Ct. 1994). Each of these courts acknowledged the serious infringement of liberty interests of ruling otherwise.

[16] American Medical Association, H-420.969, Legal Interventions During Pregnancy (passed, 1990, reaffirmed 2000); The American College of Obstetricians and Gynecologists, Ethics in Obstetrics and Gynecology, Committee Op. 214, Apr. 1999).

Such expectations and intrusions to one's person are virtually unthinkable for any other class of individuals, and have been rejected as violating the basic constitutional principles of bodily integrity, autonomy and privacy, even when life is at stake. Cynthia R. Daniels, At Women's Expense 33 (1993). Courts have therefore acknowledged that women have a constitutionally protected right to act based on concerns other than fetal health, and that the state must exercise restraint in forcing women to act with the sole motivation of fetal health. Criminal prosecutions such as the one at issue in this case, which treat pregnant women as if their only motivating factor is fetal harm, infringe upon this constitutionally protected right. This prosecution presents an extreme departure from commonly accepted protections afforded by the Constitution.

B. The Federal Government Recognizes That Pregnant Women May Be Motivated By Their Own Health Concerns or Desire To Advance Medical Knowledge and Allows Participation In Clinical Trials and Medical Research Despite Potential Fetal or Reproductive Harm

Current federal guidelines regarding participation in research and clinical trials allow women the same decisionmaking power and potential benefits of participation as men.[17] Despite the potential impact on women's reproductive capacities or pregnancies, current guidelines removed past restrictions in order to reflect "a greater acknowledgment of individual values and a respect for individual autonomy."[18]

By allowing women to participate in clinical trials and medical research, the government has affirmed that women, including pregnant women, may be motivated by life concerns other than their pregnancies or reproductive capacity. Furthermore, the

[17] For a comprehensive overview of the federal government's treatment of this issue and development of the current guidelines, see Institute of Medicine, Women and Health Research: Ethical and Legal Issues of Including Women in Clinical Studies (Anna C. Mastroianni, Ruth Faden, and Daniel Federman eds., 1994).

government's interest in protecting fetuses, women's reproductive capacity, or potential future pregnancies cannot outweigh the woman's own interest in furthering other motivations by participating in trials or research, despite the potential harm. A woman may determine, for example, that her participation may help to cure or prevent certain genetic diseases found among her relatives, and that such a contribution is more important than the risk of harm to her fetus or childbearing ability.

A pregnant woman's participation in research or clinical trials is not treated as evidencing any criminal intent to cause fetal harm or expose their fetus to potentially dangerous substances. Unlike the presumption made in this case regarding intent, the federally commissioned panel of experts on medicine, ethics and law charged with sorting out the complex issues surrounding women's decisions on matters relevant to their pregnancies recognized that women have multiple, and often competing concerns driving their decisionmaking. Nowhere in the lengthy analysis of this issue is there any question that a woman's decision to prioritize her participation in research and clinic trials over the potentially harmful impact on the fetus is criminal or malicious in any way.

The punitive response of the State against pregnant women, also faced with competing motivations, is at odds with the strong trend towards acknowledging that difficult circumstances often lead to difficult personal decisions. Ms. McKnight was caught in a cycle of addiction, and unable to cease her use of a harmful drug. Her only motive in taking drugs was to address her addiction. Presuming that her act amounted to intent to do harm to her fetus defies law, policy and common sense.

---

[18] Id. at 191-92. Because the Constitution secures a right to privacy in medical decisionmaking, and equal protection forbids discriminatory distinctions based on sex, such exclusions were arguably unconstitutional. Id. at 143-46.

C. While Mandatory HIV Testing Of Pregnant Women and Newborns Could Potentially Improve Maternal, Fetal and Child Health and Prolong Life, the Federal Government Recognizes That Individual Women Have an Interest In Refusing HIV Testing

In 1994, researchers discovered means to reduce the chance of transmission of HIV from a pregnant woman to her fetus. Centers for Disease Control and Prevention, Revised Recommendations for HIV Screening of Pregnant Women, 50 Morbidity and Mortality Weekly Report 1, 64 (Nov. 9, 2001) [hereinafter "CDC Recommendations for HIV Screening"]. Despite medically accepted methods to reduce the chances of children being born with HIV, no state forces pregnant women to submit to HIV tests.[19] Id. at 71-72. The medical profession and the one court to consider the issue explicitly reject a requirement to force testing of women because mandatory testing is ineffective as a matter of public health policy and compromises the privacy rights of the individual.[20] Nowhere does our government's policy question or presume the intent of a woman refusing testing or treatment, or attempt to criminalize her behavior, despite its potential negative impact on the fetus.

The nation's Centers for Disease Control and Prevention HIV testing policy acknowledges that women are not driven exclusively by considerations of the fetus, and that respect for individual motivation is necessary to preserve fundamental rights. This policy also recognizes that pregnant women are motivated in their actions by deeply held beliefs and life concerns that cannot be subjugated to the government's interest in

---

[19] In New York, state law requires hospitals to test newborns for HIV. N.Y. Pub. Health Law § 2500-f. Connecticut requires a pregnant woman to receive HIV testing unless she expressly objects, and in cases where the mother's HIV status is unknown, the hospital must test the newborn. Conn. Gen. Stat. § 19a-593.

[20] New York State Society of Surgeons v. Axelrod, 572 N.E.2d 605, 609 (N.Y. App. Div. 1991) (designating HIV as a communicable and sexually transmissible disease would effectively remove important privacy and confidentiality requirements needed to build trust between patients and providers in order to reduce the spread of HIV).

maternal or fetal health. While it may seen wrong to some, pregnant women have multiple reasons to not want to know their HIV status, including fear of discrimination, isolation or abuse, or a sense that there is no point in knowing if they have no access to care. CDC Recommendations for HIV Screening, supra, 72. Regardless of the accuracy of these individual beliefs, and the potentially lifesaving impact of knowing one's HIV status, autonomy, privacy and bodily integrity dictate that individuals retain the right to not know information that may fundamentally alter their lives.

Women's beliefs regarding HIV testing and treatment, like addiction, may prevent women from taking actions that others believe are for the betterment of their fetuses. Nonetheless, these decisions regarding HIV testing and treatment are not treated as evidencing malicious or criminal intent to do harm to the fetus, but rather a reflection of the complexity of women's lives that may lead to the decision for many other reasons. A similar perspective should be used here in acknowledging that pregnant addicted women often act with competing concerns, but that the act of taking drugs does not amount to criminal intent to deliver the drug to their fetuses. Just as in the case of a pregnant woman's decision to not be tested for HIV, a byproduct of an addict's circumstances is that her fetus may be harmed. Yet it defies logic to view pregnancy and addiction as intentional acts of drug delivery.

CONCLUSION

For the forgoing reasons, Amici urge the court to uphold the dismissal of the charge of distribution.

Respectfully Submitted,

SUZANNE E. GROFF #8890
171 Church Street, Suite 160
Charleston, SC 29401
(843) 720-3735

JILL C. MORRISON
MARCIA D. GREENBERGER
National Women's Law Center
11 Dupont Circle, Suite 800
Washington, DC 20036
(202) 588-5180

APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

Amicus Curiae South Carolina Advocates for Pregnant Women is a nonprofit advocacy organization devoted to decriminalizing pregnancy and ensuring that substance abuse and other health problems that women face during pregnancy are treated through the health care system, and not the criminal justice system.

Amicus Curiae Charleston Chapter of the Progressive Network is a grassroots organization working toward the health, and social economy and equal rights of all in South Carolina. Our members believe that incarcerating pregnant women accused of using drugs is a violation of civil rights and thereby believe the practice should be abolished.

Amicus Curiae Charleston NOW is a grassroots organization that works toward ending sexual discrimination by raising awareness around issues affecting women in South Carolina. Charleston NOW adopts the statement of interest of South Carolina State NOW.