
INGRAHAM & ASSOCIATES, P.L.L.C.

September 25, 2007

Virgil C. Black
District Judge
Room#322 Courthouse
321 Park Avenue
Oklahoma City, OK 73102-3604

RE: *State of Oklahoma v. Theresa Lee Hernandez*, CF-2004-4801,
District Court of Oklahoma County, State of Oklahoma

Dear Judge Black:

We represent a group of organizations that had planned to submit an *Amicus* brief in support of the Defendant's Motion to Dismiss in *Oklahoma v. Hernandez*. It has come to our attention that the Defendant pled guilty on September 21, 2007. We are therefore submitting this brief not in support of the Motion to Dismiss, but in hope that you will consider the many important legal, constitutional and policy implications of this prosecution when you sentence Ms. Hernandez. We are gravely concerned that this prosecution is discriminatory and in violation of women's rights to equal protection and due process of law.

While this Brief addresses the charges of first degree murder and criminal child neglect, the same arguments apply with equal force to the Defendant's plea of second degree murder. We ask the Court's mercy in mitigating the prison term of Ms. Hernandez, in light of the numerous constitutional violations upon which this prosecution is based. We thank you for your consideration.

Sincerely,



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FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY

SEP 25 2007

STATE OF OKLAHOMA

PATRICIA PRESLEY, COURT CLERK
By _____
Deputy

STATE OF OKLAHOMA,)
)
Plaintiff,)
)
and)
)
THERESA LEE HERNANDEZ,)
)
Defendant.)
)

Case No. CF-2004-4801

AMICI CURIAE BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION, LEGAL MOMENTUM, NATIONAL
WOMEN'S LAW CENTER, NORTHWEST WOMEN'S LAW CENTER, AND
SOUTHWEST WOMEN'S LAW CENTER
IN SUPPORT OF DEFENDANT THERESA HERNANDEZ

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INTEREST OF *AMICI CURIAE*

Statements of interest of *Amici Curiae*, the American Civil Liberties Union, Legal Momentum, National Women's Law Center, Northwest Women's Law Center and Southwest Women's Law Center are appended.

BACKGROUND AND INTRODUCTION

Amici Curiae file this brief in support of Defendant Theresa Hernandez's Motion to Dismiss the Information. On September 8, 2004, Theresa Hernandez was charged with first degree murder under 21 Okl.St. Ann. § 701.1 and criminal child neglect under 10 Okl.St. Ann. § 7115.¹ The basis of this prosecution is that she suffered a stillbirth on April 17, 2004 at 32 weeks of pregnancy due to drug use during her pregnancy. Ms. Hernandez is being held in jail awaiting disposition of her case.

Amici submit this Brief to set forth the longstanding history of discrimination against women, particularly pregnant women, that impermissibly has fueled constitutional violations such as the prosecution of Ms. Hernandez. The State's prosecution of Theresa Hernandez for first degree murder and criminal child neglect is based on impermissible and discriminatory stereotypes about women and pregnancy. Furthermore, the prosecution presents numerous threats to the rights of due process and equal protection of all pregnant women.

The State cannot claim an "exceedingly persuasive justification" for this prosecution as is required when a state's policy or practice discriminates on the basis of sex. While this and similar prosecutions have the alleged goals of protecting children, deterring drug use among pregnant women and improving fetal and child health outcomes, as discussed in another amicus brief submitted in support of Ms. Hernandez, the results are often quite the contrary.

¹ Under § 7102(B)(3) neglect is defined as "failure or omission to provide . . . adequate food, clothing, shelter, medical care, and supervision."

Prosecutions of women for a variety of crimes based on their alleged drug use during pregnancy have been soundly rejected by the vast majority of courts around the nation, each finding that such acts were not in the purview of the criminal law.² *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, 602 So.2d 1288, 1297 (Fla. 1992).

SUMMARY OF ARGUMENT

A prosecution for child abuse or murder based on a woman’s conduct during her pregnancy raises serious constitutional issues. First, such prosecutions have no limits and subject women to severe restrictions on their liberty and autonomy. Moreover, they reflect longstanding stereotypes about women, as needing to be regulated and restricted in the interest of pregnancy and motherhood. Indeed, we have a longstanding history – no longer tolerated – of “protecting” women’s role as mothers: prohibiting women from being lawyers, working long hours, and continuing to teach once pregnant. This prosecution is also based in the discriminatory and mistaken belief that only women are responsible for fetal health outcomes. Because the State cannot justify this discriminatory treatment, the prosecution of Ms. Hernandez, like those other restrictions, cannot stand.

² See, e.g., New Mexico v. Martinez, No. 29, 775 (N.M. May 11, 2007) (quashing writ of certiorari; letting holding stand in favor of defendant); Kilmon v. Maryland, 905 A.2d 306 (Md. 2006) (rejecting application of common law “born alive” rule in prosecution for reckless endangerment); Hawaii v. Aiwohi, 123 P.3d 1210 (Haw. 2005) (rejecting application of common law “born alive” rule in prosecution for recklessly causing death by methamphetamine use); Oregon v. Cervantes, Case No.05FE0735ST (Cir. Ct. Deschutes County, Sept. 1, 2005) (legislature did not intend to include acts of pregnant women in statute prohibiting reckless endangerment); Johnson v. Florida, 602 So.2d 1288, 1297 (Fla. 1992) (legislature did not intend to include acts of pregnant women in statute prohibiting the delivery of a controlled substance to a minor); Georgia v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992) (legislature did not intend to include acts of pregnant women in delivery and distribution statute); Michigan v. Hardy, 469 N.W.2d 50 (Mich. St. App. 1991) (legislature did not intend to include acts of pregnant women in drug delivery statute). *But cf.*, South Carolina v. McKnight, 576 S.E.2d 168 (S.C. 2003) (affirming conviction because state’s statutory definition of “child” included a viable fetus).

Second, this prosecution presents an untenable infringement on women's right to make decisions regarding reproduction. Because the state action impinges on a fundamental right, the state is required to show that its actions are narrowly tailored to meet a compelling state interest. Because the state is unable to present any justification for its draconian actions, this Court must dismiss the information against Ms. Hernandez.

Finally, prosecuting a woman based on her pregnancy outcome undermines the constitutionally protected liberties that allow a pregnant woman the right to make decisions, even harmful decisions, which may impact her pregnancy. Given the clear lack of any adequate justification, this is an inappropriate, discriminatory, and unconstitutional effort to apply criminal statutes beyond their proper and intended scope, with far-reaching consequences for the liberty of pregnant women.

ARGUMENT

I. PERMITTING THIS PROSECUTION WOULD IMPERMISSIBLY DENY WOMEN LIBERTY AND PERPETUATE SEX DISCRIMINATION

Pregnant women are sometimes subject to a unique form of sex discrimination: they are charged with the duty of ensuring a perfect pregnancy and a healthy baby, despite the existence of factors that may be well beyond their control. Pregnant women are expected to subsume all other interests to meeting this goal, in part because motherhood has been long presumed to be a woman's singular and best contribution to society.

Because of pervasive stereotypes, only women are subject to this scrutiny, and even threatened with prosecution based on fetal health outcomes, despite men's proven contributions to these outcomes. This prosecution is rooted in these discriminatory stereotypes, violates women's right to equal protection, and should be rejected by this court.

A. This Prosecution is Based on the Discriminatory Belief that Once Pregnant, Women Relinquish Their Right to Bodily Autonomy and that Doing so Guarantees a Good Pregnancy Outcome

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 equality, 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 of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 852 (1992).

More recently, the Supreme Court has explicitly rejected state action that serves to perpetuate stereotypical and gendered roles regarding family life. Nevada Dep’t of Human Res. v. Hibbs, 538 U.S. 721 (2003).

Pregnant women are subject to a “highly demanding set of expectations,” due to the widespread perception that their every action impacts the fetus. Renee I. Solomon, Future Fear: Prenatal Duties Imposed By Private Parties, 17 Am. J. L. & Med. 411, 420-21 (health club owner canceled membership of woman upon finding out she was 10 weeks pregnant, enforcing “unwritten rule” and expressing concern for the fetus); Julie Moskin, The Weighty Responsibility of Drinking for Two, N.Y. Times, Nov. 29, 2006, at F1 (describing public

reactions to pregnant women engaging in acts presumed to be harmful in pregnancy, including eating cheese or salad, or drinking coffee).

From using hair dye to drinking alcohol, to ingesting caffeine, to consuming seafood, to having sexual intercourse to engaging in strenuous exercise: at different points in time, each of these legal activities has been declared by the popular press, medical organizations or the government to be beneficial, harmless and harmful to pregnancy outcomes. Alcohol was “prescribed” in the 18th and 19th centuries to cure morning sickness. Sara Dickerman, Food Fright, Slate, Sept. 15, 2004 (citing historian Janet Golden), available at <http://www.slate.com/id/2106463/>. The British equivalent of the American College of Obstetricians and Gynecologists states that there is a “safe amount” of alcohol that can be consumed during pregnancy. Royal College of Obstetricians and Gynaecologists, Alcohol and Pregnancy: Information for You (Nov. 2006), available at http://www.rcog.org.uk/resources/public/pdf/alcohol_pregnancy_1206.pdf.

Most recently, eating fish, which had been discouraged during pregnancy because of its mercury content, is now recommended for fetal brain development. Sally Squires, Pregnant? Say Yes to Seafood, Wash. Post, Feb. 20, 2007, at HE1.

Other factors, such as nationality, also play an important part in what is acceptable or taboo during pregnancy. Barbara Wall, Giving Birth, Far From Home: Countries Differ in Baby Care, Int’l Herald Trib., Mar. 16, 2002, [page unavailable] (noting that France did not have the pregnancy prohibition on eating cheese and pate found the U.S. and Britain). State prosecutions of pregnant women for their prenatal conduct could subject women to the threat of criminal prosecution for failure to heed these constantly shifting and sometimes contradictory commands and restrictions on behavior believed to affect the health of a fetus.

The Supreme Court of Illinois 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. Id.

It is by no means theoretical to assume that the state could attempt such prosecutions to control women’s prenatal behavior. Wyoming officials arrested a pregnant woman on charges of felony child abuse because of her alcohol use, and jailed her until the charge was dismissed. Charles Levendosky, Turning Women into Two-Legged Petri Dishes, Star Tribune (Minn.), Jan. 21, 1990, at A8. In Wisconsin, a pregnant sixteen-year-old was held in detention throughout her pregnancy based on her tendency “to be on the run” and “lack of motivation or ability to seek medical care.” Veronika E.G. Kolder, et al., Court-Ordered Obstetrical Interventions, 316 New Eng. J. Med. 1192, 1195 (1987).

As the United States Supreme Court said when striking a requirement that a woman notify her husband before an abortion, “[p]erhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus.” Casey, supra at 898. Surely, if the state cannot give a husband this power, then it cannot assert this dominion itself.

B. This Prosecution is Based On Long-Standing Stereotypes Regarding Women’s Capabilities and Role in Society

This prosecution is consistent with the long-standing regulation of women's conduct in the name of their offspring. The impulse to define women's legal rights and obligations primarily by reference to her reproductive capacity has a long and sorry history. Women's liberty and ability to participate in society have often been restricted in the name of furthering their pregnancies and role as mothers. These practices were based on presumptions about women's primary role within the family, and often came at the costs of other opportunities. Hibbs, at 729-31. As one court astutely noted, "[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them." Doe v. Maher, 515 A.2d 134, 159 (Conn. Super. Ct. 1986).

The United States Supreme Court once upheld a statute limiting women, but not men, to ten hour work days, 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 because, "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).

The military once discharged women who became pregnant or otherwise took on the responsibility of parenting, presuming that women would prioritize their "maternal duties" over military service. Lawsuits and the need for more talented, able-bodied citizens willing to serve their country eventually resulted in a change in policy. See Cook v. Arentzen, 582 F.2d 870 (4th Cir. 1977) (no rational basis for automatically discharging pregnant women from Navy); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976) (Marines; same).

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.” The Constitution’s guarantees of Due Process and Equal Protection make clear that the treatment of women under the law cannot be based on stereotypes, entrenched perceptions of proper gender roles, or sweeping generalizations regarding women’s abilities or characteristics. U.S. v. Virginia, 518 U.S. 515, 537 n.9 (1996) (citing C. Meigs, Females and Their Diseases 350 (1848)).

Women also 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. 198 F.3d 763, 773 (9th Cir. 1999) (describing sea change in attitudes over the 27 years of since the implementation of Title IX); Cohen v. Brown University, 101 F.3d 155, 179 (1st Cir. 1996) (women’s and men’s relative interest in athletics participation reflects historical exclusion and stereotypes about women’s abilities).

The prosecution of Ms. Hernandez is, in fact, a charge for failing to ensure a perfect pregnancy. The potential for prosecutorial abuse when a woman fails to have a perfect pregnancy outcome is clear. This prosecution reflects the same stereotypical views advanced by these long-rejected examples: that a woman who does not ensure a perfect pregnancy should be punished or otherwise have her legal rights limited by the state.

C. This Prosecution Is Rooted In the Discriminatory Misperception That Women Are Solely Responsible For Fetal Health Outcomes

This prosecution perpetuates gender stereotypes, and holds only women responsible for pregnancy outcomes. Despite the fact that paternal behaviors can also impact pregnancy outcomes, fathers are exempt from not only prosecution, but even the most cursory public scrutiny based on their behavior. Cynthia R. Daniels, Exposing Men 141-44 (2006).

Because women are told by their doctors to avoid certain behaviors while pregnant and to engage in others, there is now a popular misconception that only a pregnant woman's acts or omissions can guarantee a healthy baby. 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).

In International Union v. Johnson Controls, 499 U.S. 187 (1991), the Supreme Court rejected a fetal health justification for 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 discriminatory under the Pregnancy Discrimination Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k), because fertile men were not barred from employment despite the proven harm of lead exposure on men's reproductive functioning. "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 found 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. 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. Likewise, Hibbs notes that stereotypes about women’s responsibilities are reinforced by “parallel” stereotypes that release men from any similar culpability. Hibbs, supra, at 736.

As noted in Johnson Controls, there are some areas, including drug use, where men’s actions may contribute to pregnancy outcomes. In fact, drug use can cause structural defects in sperm. Zenad El-Gothamy and May El-Samahy, Ultrastructure Sperm Defects in Addicts, 57 Fertility and Sterility 699 (1992); 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). Just as with women, the range of behaviors and conditions and their impact on fetal outcomes is ever-shifting, and includes everything from smoking to relatively harmless acts and omissions, such as not getting enough Vitamin C. Daniels, Exposing Men, supra, at n. 166.

Men’s physical distance from pregnancy perpetuates the myth that women are solely responsible for fetal health, and has further made women the target of discrimination based on pregnancy and the potential to become pregnant. This bias has resulted in reluctance on the part of research institutions even to investigate men’s contributions to fetal health outcomes, despite ample evidence that men’s exposure to various substances results may impact the health of their offspring. Exposing Men, supra, at 111.

D. The State Cannot Establish an Exceedingly Persuasive Justification for this Discriminatory Prosecution

Given the discriminatory nature of this prosecution, it is the state’s heavy burden to demonstrate an “exceedingly persuasive justification” for the prosecution, and that such

prosecutions are narrowly tailored means to further the state's interest. Virginia, supra, at 533. The State must meet its "demanding" burden of justifying differential treatment by showing that the classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." Id. (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)). The state's reason for treating one sex differently "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 state cannot show that its discriminatory means is substantially related to the achievement of those objectives. As set forth in the Amicus Brief submitted by the National Advocates for Pregnant Women, the punitive treatment of pregnant women has not been shown to protect the health of a fetus or the pregnant woman, let alone with the kind of close nexus required under the Fourteenth Amendment.

Moreover, even if such prosecutions *did* cause pregnant women who use drugs to cease drug use, and again the evidence is to the contrary, the state could actually be contributing to fetal harm. It is important for the health of both a pregnant woman and her fetus to be under close medical supervision when she is withdrawing from substance use. Women Under the Influence, supra, at 160.

To the extent that prosecutions based on drug use during pregnancy coerce some women into terminating their pregnancies, these prosecutions obviously do not serve any asserted interests of the State.³

³ Numerous courts dismissing prosecutions against women who gave birth despite an addiction problem have recognized the possibility of coerced abortions. See, e.g., Johnson, supra ("Prosecution of pregnant women for

II. THE PROSECUTION OF PREGNANT WOMEN BASED ON THEIR PREGNANCY OUTCOMES PRESENTS AN UNCONSTITUTIONAL INTERFERENCE WITH THEIR REPRODUCTIVE DECISIONS

The decision to bear a child is a fundamental liberty interest protected by the Fourteenth Amendment. “Liberty presumes an autonomy of self that includes ... certain intimate conduct.” Lawrence v. Texas, 539 U.S. 558, 562 (2003). The Fourteenth Amendment’s guarantee of liberty protects a person’s right to make the most fundamental decisions free of undue governmental intrusion, including the right to “bear or beget a child.” Id. at 565 citing Griswold v. Connecticut, 381 U.S. 479 (1965). This prosecution impacts pregnant women’s decisions because once addicted, a woman would avoid prosecution only by terminating her pregnancy. She might attempt to reduce the odds of prosecution by avoiding contact with the medical system altogether, placing both her reproductive health and her pregnancy at risk

The Supreme Court has made clear that the liberty interests enshrined in the Fourteenth Amendment’s Due Process Clause prohibit government interference in personal family matters such as the decision to bear a child. Coercive policies that interfere with a woman’s decisions about her pregnancy violate these constitutional principles by impairing her autonomy and ability to make her own health choices. The Court rejected, in Cleveland Board of Ed. v. LaFleur, 414 U.S. 632 (1974), a mandatory maternity leave policy that would have forced women to lose income if they became pregnant, explaining that because such policies “directly affect ‘one of the basic civil rights of man,’ the Due Process Clause of the Fourteenth Amendment requires that

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) (“Potential criminal liability would also encourage addicted women to terminate or conceal their pregnancies.”); People v. Morabito, 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 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; shortly thereafter the charges were dropped. Id.

such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a [woman's] constitutional liberty." Id. at 640 quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (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 LaFleur, 414 U.S. at 639. Permitting women struggling with addiction to be prosecuted for homicide or child neglect based on their pregnancy outcomes raises the same constitutional concerns, by injecting the State into a woman's decision about her pregnancy.

The Oklahoma Supreme Court has also acknowledged that the state's Constitution forbids "the deprivation of life, liberty or property" and, like the federal constitution, guarantees the right of due process "with respect to certain basic matters of procreation, marriage and family life." Wood v. Independent School District of Pottawatomie County, 661 P.2d 892, 894 (Okla. 1983).

The misapplication of the homicide and child neglect statutes in this case violates both the liberty and bodily integrity of pregnant women. This prosecution impermissibly interferes with the decision to bear and carry a child without furthering the state's interest in protecting fetuses. A more effective, narrowly tailored means of protecting fetuses and investing in the lives of children would be to offer treatment, counseling and medical care to women with drug addictions, rather than threatening them with criminal prosecution and creating a greater danger to fetal well-being.

III. THIS PROSECUTION WOULD RESULT IN A WEAKENING OF PREGNANT WOMEN'S RIGHT TO EQUAL PROTECTION UNDER THE LAW

Allowing Ms. Hernandez to be prosecuted based on her acts or omissions during pregnancy would undermine pregnant women's liberty interest in making decisions regarding their medical care. The Supreme Court has reaffirmed the right to make decisions regarding one's person as a liberty interest grounded in the Constitution. Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 278 (1990). Likewise, the Oklahoma Supreme court has held, "a patient has an absolute right to meaningful treatment and a contrary right to refuse treatment." In re K.K.B., 609 P.2d 747, 749 (Okl. 1980). More recently, the Oklahoma Attorney General affirmed this right, even if the result is the death of the individual refusing care. Okl.A.G. Opin. No. 06-7 (Apr. 6, 2006).

Pregnant women also have the same right to make decisions regarding their medical care, even when such decisions may have a harmful impact on their fetuses. This prosecution calls into question whether these medical decisions could likewise subject pregnant women to criminal culpability, thus denying them liberties enjoyed by non-pregnant women or men.

A. Pregnant women have the right to make medical decisions, including those that may cause fetal harm

In the leading case on a pregnant woman's right to refuse care, 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 D.C. Court of Appeals found that the panel previously hearing the case had erred in permitting a cesarean to be performed on a pregnant woman without her consent for the benefit of her twenty-six-and-one-half-week-old 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. Virtually 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 of Southeastern Pennsylvania 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 on a pregnant woman’s liberty interests in ruling otherwise.⁴

Under both the United States and Oklahoma constitutions, a pregnant woman has the right to make decisions about her own health and medical treatment. Current federal guidelines regarding participation in research and clinical trials further reinforce this point, as the guidelines allow pregnant women the same decision-making power and potential benefits of participation as men.⁵ Furthermore, guidelines recognize that the government’s interest in protecting fetuses, women’s reproductive capacity, or potential future pregnancies cannot outweigh the woman’s own interest in or motivations for participating in trials or research.⁶ Likewise, Oklahoma State

⁴ Indeed, the one reported case to the contrary, Pemberton v. Tallahassee Memorial Regional Medical Center, 66 F. Supp.2d 1247 (N.D. Fla. 1999), graphically illustrates the incredible violation of liberty that occurs when states act overzealously. The case describes an almost unbelievable scene: a woman in labor is, under court order, taken to the hospital by the state’s attorney and a law enforcement officer to submit to a cesarean section against her will. Id. at 1250-51. While the opinion relied on the testimony of doctors who stated that a vaginal delivery was potentially deadly, Ms. Pemberton went on to deliver four children vaginally, including a set of twins. Laura Pemberton, Remarks, National Advocates for Pregnant Women, Summit (Atlanta, Jan. 20, 2007).

⁵ 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).

⁶ A woman may determine, for example, that her participation may help to cure or prevent certain genetic diseases found among her relatives. See Protection of Human Subjects, 45 C.F.R. § 46.204, Research Involving Pregnant Women or Fetuses; see also, Office for Human Research Protections, IRB Guidebook (U.S. Dept. of Health and Human Services, 1993), Chapter VI.B (“In research undertaken to meet the health problems of a pregnant woman, her needs generally take precedence over those of the fetus, except, perhaps where the health benefit to the woman is minimal and risk to the fetus is high.”).

Department of Health Institutional Review Board Policies and Procedures clearly forbid excluding women from research based on their capacity to become pregnant (Section III.C) and explicitly contemplate the participation of pregnant women as research subjects, as long as they are informed of foreseeable risks to the embryo or fetus (Section VIII.C.1).⁷

B. By Imposing Criminal Liability for Fetal harm, This Prosecution Weakens Pregnant Women’s Right to Make Medical Decisions, Undermining Their Right to Equal Protection of the Law

This prosecution imposes on pregnant women an unconstitutional duty to do everything in their power to minimize fetal harm and ensure the best possible outcome. Allowing this prosecution to move forward would seriously undermine pregnant women’s recognized right to refuse or receive medical treatment that may have a detrimental effect on the fetus.

Everything a woman experiences in her pregnancy and every decision she makes may impact the fetus. Attempting to impose criminal sanctions on pregnant women’s acts would result in unacceptable and unrelenting limits on their liberty. The nation’s leading physicians’ organizations support women’s right to determine their own medical care and disfavor legal intervention in such cases, even when women’s decisions may be to the detriment of the fetus. American Medical Association, H-420.969, Legal Interventions During Pregnancy (passed 1990, reaffirmed 2000); American College of Obstetricians and Gynecologists, Ethics in Obstetrics and Gynecology, Committee Op. 214 (Apr. 1999).

Courts have consistently acknowledged that women have a constitutionally protected right to act for reasons other than the advancement or protection of fetal health, and that the state must exercise restraint with regard to actions that may violate pregnant women’s constitutionally protected liberties. See, e.g., Taft v. Taft, 446 N.E.2d 395, 396 (Mass. 1983) (state supreme

⁷ Oklahoma State Department of Health, Institutional Review Board Policies and Procedures, Section, available at <http://www.health.state.ok.us/irb/policy.html>.

court vacated lower court decision ordering a pregnant woman to have her cervix sewn to prevent a possible miscarriage; court did not adequately consider her right of privacy).

As previously stated in Section I.D., the state is unable to offer any exceedingly persuasive justification for this infringement on women's right to equal protection, nor are the state's actions narrowly tailored to serve the purported interest of protecting maternal or fetal health because women will have an incentive to avoid prenatal care or seek an abortion.

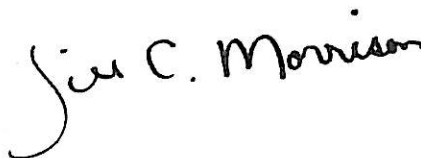
CONCLUSION

For the forgoing reasons, *Amici* urge the court to dismiss the information filed against Ms. Theresa Hernandez on September 8, 2004.

Respectfully Submitted,



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STATEMENTS OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to the constitutional principles of liberty and equality. The ACLU of Oklahoma is its state affiliate. This case raises important questions about a pregnant woman's liberty and rights to equality. The ACLU of Oklahoma and the ACLU Women's Rights and Reproductive Freedom Projects appear as amici curiae because the ACLU has fought for these rights in numerous contexts over the years and the proper resolution of this case is therefore a matter of substantial concern to the ACLU and its members.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum views reproductive rights as central to women's equality. To this end, Legal Momentum has litigated numerous cases involving reproductive health services, including Schenck v. Pro-Choice Network, 519 U.S. 357 (1997), and Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263 (1993).

The National Women’s Law Center is a Washington D.C. based nonprofit organization with a longstanding commitment to equality on the basis of sex, and the constitutionally protected freedoms of liberty, privacy and bodily integrity. The Center advances and supports both state and federal policies that promote public health, and opposes policies that hinder access to health care, including prenatal care. The Center has previously submitted *amicus* briefs opposing the criminalization of pregnancy in cases in South Carolina, New Mexico and Maryland.

The Northwest Women’s Law Center (NWLC) is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, the NWLC has been dedicated to protecting and expanding women’s reproductive rights and has long focused on the threats to women’s access to reproductive health care. Toward that end, the NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest, and the country, to ensure that women have the ability to make their own reproductive choices. For example, the Law Center obtained the first state-wide injunction in the country that effectively stopped Operation Rescue blockades by bringing contempt actions against blockaders who refused to obey the court's injunction. The NWLC has also, *inter alia*, challenged efforts by prosecutors to bring criminal charges of child abuse against women who use controlled substances while pregnant; successfully

fought anti-choice initiatives, and challenged efforts to force sterilizations on developmentally disabled women. The NWLC continues to serve as a regional expert and leading advocate on reproductive freedom.

The Southwest Women's Law Center is a nonprofit public interest organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center seeks to promote access to comprehensive reproductive health care information and services and to eliminate discrimination and disparities in access to such services and information based on gender. The Southwest Women's Law Center successfully represented Cynthia Martinez in the Supreme Court of New Mexico in 2007, in a case involving Ms. Martinez' prosecution for child abuse because she ingested drugs while pregnant.

Certificate of Delivery

On September 25, 2007, I delivered and/or mailed, postage prepaid, by First Class U.S. Mail, and/or faxed a true copy of the foregoing instrument to the individuals listed below.

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