Supreme Court of Kentucky

CASE NO. 2008-SC-000095

INA COCHRAN **APPELLANT**

v.

COMMONWEALTH OF KENTUCKY **APPELLEE**

On discretionary review from
Court of Appeals of Kentucky
Case No. 2006-CA-001561-MR

BRIEF FOR LAW STUDENTS FOR REPRODUCTIVE JUSTICE, LEGAL MOMENTUM, NATIONAL WOMEN'S LAW CENTER AND NORTHWEST WOMEN'S LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, INA COCHRAN

Sheryl G. Snyder
Amy D. Cubbage
Frost Brown Todd LLC
400 W. Market St., 32nd Floor
Louisville, KY 40202
Phone: 502-589-5400
Facsimile: 502-581-1087

Jill C. Morrison
National Women's Law Center
11 Dupont Circle, NW Suite 800
Washington, DC 20036
Phone: 202-588-5180
Facsimile: 202-588-5185

Attorneys for *Amici Curiae*

CERTIFICATE OF SERVICE

It is hereby certified that a copy of this Amici Curiae Brief was served via U.S. Mail this 24th day of February, 2009, to the following: Hon. James G. Weddell, Judge, Casey County Judicial Center, 231 Courthouse Square, Liberty, KY 42539; Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601; Kathleen K. Schmidt and Damon Preston, Dept. of Public Advocacy, 100 Fair Oaks Lane, Frankfort, KY 40601, counsel for Appellant; Jack Conway and James Shackelford, Office of the Attorney General, 1024 Capitol Center Dr., Frankfort, KY 40601, counsel for Appellee.

An attorney for *Amici Curiae*

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STATEMENT OF THE CASE

On January 9, 2006, Appellant Ina Cochran was indicted by a Casey County Grand Jury for wanton endangerment under KRS 508.060.[1] The basis of this indictment is a positive toxicology test of Ms. Cochran's newborn shortly after birth. *Amici Curiae* file this brief in support of the Appellant, urging this court to hold that the Court of Appeals erred in reversing the Circuit Court's dismissal of the Indictment against Ms. Cochran. *Amici* submit this Brief to set forth the longstanding history of discrimination against women, particularly pregnant women, that has fueled constitutional violations such as the indictment of Ms. Cochran.

This indictment is based on stereotypes about women and pregnancy, and 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 indictment, as is required when a state's policy or practice discriminates on the basis of sex. While prosecutions such as this one have the alleged goal of protecting children, deterring drug use among pregnant women and improving fetal and child health outcomes, as discussed in another amici brief submitted in support of Ms. Cochran, the results are often quite the contrary.

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, and in this Supreme Court,[2] each finding that such acts were not in the purview of

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[1] KRS § 508.060(1) states:

> A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.

[2] *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993).

the criminal law.[3] *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." [4]

SUMMARY OF ARGUMENT

An indictment for wanton endangerment 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. 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 indictment of Ms. Cochran, like those other discriminatory restrictions, cannot stand.

Second, this prosecution presents an untenable infringement on women's right to make decisions regarding reproduction. Because the state is unable to show that its actions are narrowly tailored to meet a compelling state interest, this Court must dismiss the indictment against Ms. Cochran.

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[3] *See, e.g., New Mexico v. Martinez*, No. 29,775 (N.M. May 10, 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 (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. Ct. 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 homicide conviction because state's statutory definition of "child" included a viable fetus); *reversed and remanded by McKnight v. South Carolina*, 661 S.E. 2d 354 (S.C. 2008) (finding ineffective assistance of counsel based on failure to present readily available evidence that cocaine use was not the cause of fetal death and failure to challenge jury instructions regarding criminal intent).

[4] *Johnson v. Florida*, 602 So. 2d 1288, 1297 (Fla. 1992).

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.

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 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.[5] Policies and laws based on stereotypes, presumptions and discriminatory beliefs regarding women's singular role in society as

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[5] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994).

mothers deny women their right to equality, privacy, bodily integrity, liberty and autonomy. The Supreme Court has recognized the harm that results when the State compels women to fulfill "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). More recently, the Supreme Court has explicitly rejected state action that serves to perpetuate stereotypical and gendered roles regarding family life.[6]

Pregnant women are subject to a "highly demanding set of expectations," due to the widespread perception that their every action impacts the fetus. At different points in time, various legal activities have been declared by the popular press, medical organizations or the government to be beneficial, harmless and harmful to pregnancy outcomes and, most recently, eating fish, which had been discouraged during pregnancy because of its mercury content, is now recommended for fetal brain development.[7]

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. As noted by the Supreme Court of Illinois, 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

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[6] *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), *aff'd, Hibbs v. Dep't of Human Res.*, 152 Fed. Appx. 648, 2005 U.S. App. LEXIS 23851 (9th Cir. 2005).

[7] Renee I. Solomon, *Future Fear: Prenatal Duties Imposed By Private Parties*, 17 AM. J.L. & MED. 411, 420-21, (1991) (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); Sally Squires, *Pregnant? Say Yes to Seafood*, Wash. Post, Feb. 20, 2007, at HE1. .

society views women and women's reproductive abilities."[8] 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. For example, 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, and 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."[9] As the United States Supreme Court said when striking down 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,* 505 U.S. 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 an effort to protect 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. "Since time immemorial,

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[8] *Stallman v. Youngquist*, 531 N.E.2d 355, 359 (Ill. 1988) (refusing to recognize a cause of action for unintentional prenatal infliction of injuries).

[9] Charles Levendosky, *Turning Women into Two-Legged Petri Dishes*, Star Tribune (Minn.), Jan. 21, 1990, at A8 (Wyoming); Veronika E.G. Kolder, et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1195 (1987) (Wisconsin).

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). These practices were based on presumptions about women's primary role within the family, and often came at the costs of other opportunities. *Hibbs*, 538 U.S. at 729-31.

The United States Supreme Court once upheld a statute limiting women, but not men, to ten hour work days, finding that the state presented adequate justification for this infringement on women's liberty 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). Likewise, 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.[10]

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.[11]

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[10] *See Cook v. Arentzen*, 582 F.2d 870 (4th Cir. 1978) (no rational basis for automatically discharging pregnant women from Navy); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) (Marines; same).

[11] *United States 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.[12] 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.[13]

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. The potential for prosecutorial abuse when a woman fails to have a perfect pregnancy outcome is clear.

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 also impact pregnancy outcomes, fathers are exempt from not only prosecution, but even the most cursory public scrutiny based on their behavior. 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.[14]

In *International Union v. Johnson Controls*, 499 U.S. 187 (1991), the Supreme

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[12] Women's Sports Foundation, *Women's Pre-Title IX Sports History in the United States* (Apr. 26, 2001), http://www.womenssportsfoundation.org/Content/Articles/Issues/History/W/Womens%20PreTitle%20IX%20Sports%20History%20in%20the%20United%20States.aspx.

[13] *Neal v. Bd. of Trs.*, 198 F.3d 763, 773 (9th Cir. 1999) (describing sea change in attitudes over the 27 years since the implementation of Title IX); *Cohen v. Brown Univ.*, 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).

[14] CYNTHIA R. DANIELS, EXPOSING MEN: THE SCIENCE AND POLITICS OF MALE REPRODUCTION, 141-44 (Oxford Univ. Press 2006); Katha Pollitt, *"Fetal Rights": A New Assault on Feminism, in* "BAD" MOTHERS:

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 this policy discriminatory under the Pregnancy Discrimination Act, 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,* 499 U.S. 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.* at 199. 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,* 538 U.S. at 736.

As noted in *Johnson Controls*, there are some areas, including drug use, where men's actions may contribute to pregnancy outcomes.[15] Yet 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

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THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA 285-89 (Molly Ladd-Taylor & Lauri Umansky eds., NYU Press 1997).

[15] *See, e.g.*, 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).

become pregnant.

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,* 518 U.S. at 533. The State must show 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 Amici 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. It is also important to note that 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.[16] To use such medical treatment

[16] THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, WOMEN UNDER THE INFLUENCE 160 (The John Hopkins University Press 2006).

as evidence supporting a criminal indictment deters, rather than promotes, the ostensible objective. Furthermore, 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.[17]

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). Likewise, this Court has recognized that the Constitution of Kentucky provides "a legally protected right of privacy" that extends beyond the protection provided by the U.S. Constitution. *Commonwealth v. Wasson*, 842 S.W.2d 487, 493 (Ky. 1992). The Fourteenth Amendment 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." *Lawrence*, 539 U.S. at 565 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). This prosecution impacts pregnant women's decisions because once addicted, a woman could avoid prosecution only by terminating her pregnancy.

Coercive policies that interfere with a woman's decisions about her pregnancy unconstitutionally impair her autonomy and ability to make her own health choices. The Court rejected, in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), a

[17] 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. Florida*, 602 So. 2d 1288, 1296 (Fla. 1992). ("Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion."); *State v. Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991) ("Potential criminal liability would also encourage addicted women to terminate or conceal their pregnancies."). 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?*,

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 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 18 weeks, 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 (quoting *LaFleur*, 414 U.S. at 639). Permitting women struggling with addiction to be prosecuted based on their pregnancy outcomes raises the same constitutional concerns, by injecting the State into a woman's decision about her pregnancy. As held in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the analysis as to whether sex discrimination is at issue for purposes of the Fourteenth Amendment and Title VII are the same.[18]

Charging women based solely on their actions while pregnant violates their rights to liberty and bodily integrity without furthering the state's legitimate 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

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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.*

[18] Therefore, while under *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Gilbert*, 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) (holding that mandatory discharge of pregnant women from Marines presented unconstitutionally burdensome presumption about pregnancy and women under Equal Protection clause and *LaFleur* Due Process analysis).

with drug addictions, rather than threatening them with criminal prosecution and creating a greater danger to fetal well-being. The intent of the Commonwealth to handle the problem of substance abuse during pregnancy is directly set forth in Preamble of the Maternal Health Act of 1992, 1992 Ky. Acts Ch. 442, which states:

> Punitive actions taken against pregnant alcohol or substance abusers would create additional problems, including discouraging these individuals from seeking the essential prenatal care and substance abuse treatment necessary to deliver a healthy newborn.

The Commonwealth clearly views this issue as a medical, and not a criminal matter.

III. This prosecution would result in a weakening of pregnant women's right to equal protection.

Allowing Ms. Cochran to be prosecuted based on her acts 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. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). Likewise, this Court has concluded that the Constitution of Kentucky protects individuals' liberty interest in refusing medical care, including care needed to sustain life. *Woods v. Commonwealth*, 142 S.W.3d 24, 31-32 (Ky. 2004), citing *Cruzan*. 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 Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997) (citing *Planned Parenthood v. Casey*, 505 U.S. at 852); *In re 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.[19]

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.[20] 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

[19] 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).

[20] 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

motivations for participating in trials or research.[21] The Kentucky Cabinet for Health and Family Services Institutional Review Board explicitly endorses the federal regulations, which do not foreclose pregnant women's participation in research.[22]

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 pregnancy 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.[23]

Courts have consistently acknowledged that women have a constitutionally protected right to act for reasons other than the advancement or protection of fetal health,

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ISSUES OF INCLUDING WOMEN IN CLINICAL STUDIES (Anna C. Mastroianni, Ruth Faden, and Daniel Federman eds., National Academy Press 1994).

[21] 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, [45 C.F.R. 46.207] except, perhaps where the benefit to the woman is minimal and risk to the fetus is high.").

[22] Protection of Human Subjects, 920 KAR 1:060, Section 8.

[23] American Medical Association, Board of Trustees Report, *Legal Interventions During Pregnancy: Court Ordered Medical Treatment and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663 (1990); American College of Obstetricians and Gynecologists, ETHICS IN OBSTETRICS AND GYNECOLOGY, Committee Op. 214 (Apr. 1999).

and that the state must exercise restraint with regard to actions that may violate pregnant women's constitutionally protected liberties.[24] 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, this Court should reverse the Court of Appeals and affirm the judgment of the Casey Circuit Court dismissing the indictment against Ms. Ina Cochran.

Respectfully Submitted,

Sheryl G. Snyder
Amy D. Cubbage
Frost Brown Todd LLC
400 W. Market St., 32nd Floor
Louisville, KY 40202
Phone: 502-589-5400
Facsimile: 502-581-1087

and

Jill C. Morrison
National Women's Law Center
11 Dupont Circle, NW Suite 800
Washington, DC 20036
Phone: 202-588-5180
Facsimile: 202-588-5185

Attorneys for *Amici Curiae*

[24] *See, e.g., Taft v. Taft*, 446 N.E.2d 395, 396 (Mass. 1983) (state supreme 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).