

**IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

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| STATE OF OKLAHOMA, |) | Appeal Case No. S-2019-308 |
| |) | |
| Appellant, |) | District Ct. Case No. CF-17-274 |
| |) | (Garfield County) |
| vs. |) | |
| |) | |
| KATHRYN JUANITA GREEN, |) | Type of Appeal: |
| |) | State Appeal-1053 |
| Appellee. |) | |

BRIEF FOR *AMICI CURIAE*

**AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS;
ASSOCIATION OF WOMEN'S HEALTH, OBSTETRICS AND NEONATAL NURSES;
AMERICAN MEDICAL WOMEN'S ASSOCIATION; AMERICAN ACADEMY OF
ADDICTION PSYCHIATRY; ASSOCIATION OF WOMEN'S HEALTH,
OBSTETRICAL & NEONATAL NURSES - OKLAHOMA SECTION; NATIONAL
ALLIANCE OF MEDICATION ASSISTED RECOVERY; THE OKLAHOMA SOCIETY
OF ADDICTION MEDICINE AND AMERICAN SOCIETY OF ADDICTION
MEDICINE; OKLAHOMA NURSES ASSOCIATION; DRUG POLICY ALLIANCE;
STILL SHE RISES; NATIONAL COALITION FOR CHILD PROTECTION REFORM;
INSTITUTE FOR HEALTH AND RECOVERY; HARM REDUCTION
INTERNATIONAL; LEGAL ACTION CENTER; ACLU OF OKLAHOMA;
OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE; OUR BODIES
OURSELVES; OKLAHOMA WOMEN'S COALITION; OKLAHOMA CRIMINAL
DEFENSE LAWYERS ASSOCIATION; CENTER FOR REPRODUCTIVE RIGHTS;
THE NATIONAL COUNCIL FOR INCARCERATED & FORMERLY
INCARCERATED WOMEN AND GIRLS; THE HON. NANCY GERTNER; DR. SUSAN
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ARGUMENT

The Garfield County District Court correctly held that the plain language of Oklahoma’s child neglect statute does not permit prosecution of pregnant persons for their actions during their pregnancies, because the Legislature did not include language in the statute that could sustain such a prosecution. Broadly accepted medical, public health, and scientific evidence supports the Legislature’s drafting of the neglect statute to avoid criminalizing pregnant women’s conduct with respect to their pregnancies. The unequivocal consensus among *amici* is that use of controlled substances by a woman during the course of her pregnancy is a medical and public health issue, not an issue that should be subject to state intervention and control.

These *amici* are predominantly national and state medical and public health organizations with recognized expertise and longstanding concern in the areas of maternal, fetal, and neonatal health, and in the effects of alcohol and controlled substances on families and society, as well as organizations committed to supporting the rights and protection of mothers, women generally, and families. Together, *amici* represent thousands of healthcare providers in Oklahoma and tens of thousands across the country. *Amici* recognize a strong societal interest in protecting the health of women, children, and families. Those interests are undermined, not advanced, by laws that permit the detention and arrest of pregnant women and state control over their private medical decisions during the course of their pregnancies

Amici agree with Appellee that the plain language of the Oklahoma child neglect statute does not permit prosecution of a pregnant person for the alleged use of criminalized drug(s) during pregnancy. As stated in Appellee’s brief, Oklahoma’s Abuse, Neglect, and Exploitation statute, Okla. Stat. tit. 21, § 843.5(C), which incorporates the definition of “neglect” articulated

in the Child and Juvenile Code, Title 10A § 1-1-105, is clear and unambiguous in describing only acts that would affect a born child. Appellee Brief at 11.

Appellant now asks this Court, for the first time, to nevertheless extend the criminal neglect statute to allow for prosecution of anyone who ingests a criminalized drug while pregnant on the theory that she has “failed to protect” her embryo or fetus “from exposure to the use and/or possession of illegal drugs.” Appellants’ Br. at 4. Appellant argues that the reach of the neglect statute should be extended here because this Court previously found the legislature to have intentionally criminalized other conduct against pregnant women that caused harm to fetuses. *See Hughes v. State*, 1994 CR 3 ¶ 4, 868 P.2d 730. However, the medical and scientific research communities have identified specific concerns regarding the prosecution of pregnant women for ingesting a criminalized drug, finding that even the threat of prosecution raises significant mental and physical health risks and can endanger both the pregnant woman and the fetus.

Appellant’s erroneous interpretation of existing law would have this Court vastly expand the criminal child neglect statute in a manner that would expose a wide range of pregnant individuals to criminal prosecution, including women who allegedly use prescription opioid treatment medications without a valid prescription, women under 21 or 18 years of age who consume any amount of alcohol or tobacco, respectively, during pregnancy, and arguably even women who allegedly fail to obtain for themselves “adequate” food, shelter, or medical care, including, for example, women experiencing homelessness or eating disorders. Title 10A § 1-1-105(48). Based on their professional expertise and knowledge of relevant medical and scientific research and practices, *amici curiae* write to correct several false assumptions underlying

Appellant's argument and to elucidate the expected medical and public health ramifications of criminally prosecuting women who are pregnant and have used drugs.

First, as discussed in Part I below, research demonstrates that such prosecutions serve to endanger, rather than protect, pregnancies. Coercive responses to a woman's conduct during pregnancy, including drug use, can place not only the pregnant woman but also her pregnancy, her future children, and her family at greater risk of harm. Prosecution and the threat of prosecution pose direct and indirect health risks. The direct risks arise from the profound stresses and conditions of arrest, incarceration, and family separation suffered by the pregnant woman, which can translate into adverse maternal and fetal health outcomes. The indirect risks arise when people who are pregnant, have used drugs, and wish to carry their pregnancies to term anticipate prosecution and, fearing harm to themselves, their pregnancies, and their children, avoid accessing prenatal and other medical care, or in some cases terminate their desired or intended pregnancies. These risks present serious obstacles to the provision of the best medical and ethical care for both pregnant people and their pregnancies.

Second, as discussed in Part II below, the medical and scientific communities recognize that the drug use this Court is asked to criminalize is not accurately or helpfully viewed as a matter of individual misconduct, but as a complex medical concern with highly variable significance and prognoses depending on the nature of, and reasons for, the drug use. Pregnancy is complex, and medical science has great difficulty discerning any one single factor responsible for a pregnancy outcome. Evidence of a single instance of drug use, which would sustain a conviction under Appellant's reading of the neglect statute, cannot be used independently to meaningfully assess either the overall risk to an embryo or fetus's development or the degree of a pregnant person's concern for her fetus's wellbeing. Given the nature of drug addiction, women

suffering from addiction when they become pregnant are likely to have high rates of substance use during pregnancy even if they make every effort to abstain. Addiction or substance use disorder is a chronic condition with biological and psychological components that is best addressed through the non-punitive, non-coercive medical and public health approaches used to address all chronic medical conditions, which protect and respect patient decision making. Research shows that the wellbeing of pregnant women, their pregnancies, and their children are most successfully promoted when women who have used or use drugs during pregnancy and wish to carry their pregnancies to term are treated like any other person experiencing any one of a wide variety of pregnancy risks. As with other pregnancy risk factors—including health, environmental, personal and professional factors that range from maternal age, body weight, income, and exercise habits to carrying twins or living in a home contaminated with lead—a medical and public health approach to addressing the risk of drug use, unlike criminalization, allows for differentiated responses based on the nature of and reasons for drug use.

Amici therefore ask the Court not to authorize prosecutions against pregnant people for being pregnant and using drugs. Highest courts across the country have already reached the same conclusion *amici* ask the Court to reach here. Courts have overwhelmingly held that actions taken and health conditions experienced by a pregnant person that may affect the health of an embryo or fetus do not constitute abuse or neglect.¹ The Oklahoma legislature has acted in

¹ See *Kilmon v. State*, 394 Md. 168, 182 (Md. 2006) (“These kinds of cases—prosecutions for reckless endangerment, child abuse, or distribution of controlled substances based on a pregnant woman’s ingestion of a controlled dangerous substance, or, in some cases, excessive amounts of alcohol—have arisen in other States, and the overwhelming majority of courts that have considered the issue have concluded that those crimes do not encompass that kind of activity.”); *Arms v. State*, 2015 Ark. 364 (Ark. 2015) (overturning a conviction for “introduction of a controlled substance into the body of another person” for codeine and methamphetamine use

during pregnancy); *State v. Stegall*, 828 N.W.2d 526 (N.D. 2013) (dismissing charges of child endangerment for methamphetamine use during pregnancy); *Cochran v. Com.*, 315 S.W.3d 325 (Ky. 2010) (dismissing charges of child endangerment for cocaine use during pregnancy); *State v. Aiwohi*, 109 Haw. 115 (Haw. 2005), as corrected (Dec. 12, 2005) (holding that a woman cannot be convicted of manslaughter for actions she took while pregnant); *Sheriff, Washoe Cty., Nev. v. Encoe*, 110 Nev. 1317 (Nev. 1994) (dismissing child endangerment charges for methamphetamine use during pregnancy); *State v. Gray*, 62 Ohio St. 3d 514 (Ohio 1992) (dismissing child endangerment charges for cocaine use during pregnancy); *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992) (overturning a conviction for delivery of a controlled substance to a minor for cocaine use during pregnancy). *See also State v. Hudson*, 2007 WL 1836840, No. M2006-01051-CCA-R9-CO (Tenn. Crim. App. June 27, 2007) (dismissing aggravated child abuse and neglect charges for cocaine use during pregnancy); *State v. Wade*, 232 S.W.3d 663 (Mo. Ct. App. 2007) (holding that child endangerment statute does not apply to a woman's marijuana and methamphetamine use during pregnancy); *State v. Martinez*, 139 N.M. 741 (N.M. Ct. App. 2006) (holding that the State could not prosecute a mother for child abuse for using cocaine during her pregnancy); *State v. Dunn*, 82 Wash. App. 122 (Wash. Ct.App. 1996) (holding that the fetus was not "child" within criminal mistreatment statute); *Reinesto v. Superior Court of State In & For Cty. of Navajo*, 182 Ariz. 190 (Ariz. Ct. App. 1995)(holding that a woman could not be prosecuted under child abuse statute for prenatal heroin use that opioid withdrawal symptoms in her child after birth); *Reyes v. Superior Court*, 75 Cal. App. 3d 214 (Cal. Ct. App. 1977) (holding that the mother's use of heroin during pregnancy that resulted in her twin children experiencing withdrawal symptoms did not constitute felony-child endangerment). *But see Ex parte Ankrom*, 152 So.3d 397 (Ala. 2013) (affirming chemical endangerment of a child conviction based on a woman's of controlled substances while pregnant); *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997) (holding a woman may be prosecuted for child neglect and endangering a child for prenatal substance abuse.)

Contrary to Appellant's view that it would be "absurd" to simultaneously allow for criminal prosecution of third parties whose acts against pregnant women threaten the wellbeing of their fetuses and prohibit prosecution of pregnant women for acts concerning their fetuses, a recent survey of state statutes designating embryos or fetuses as potential crime victims found that two-thirds of state legislatures had *explicitly* exempted pregnant women from prosecution. *See* Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 HEALTH AND JUSTICE 1, 2 (2015) (citing Andrew S. Murphy, *A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 INDIANA L. J. 847 (2014)). More specifically, despite the number of states that criminalize conduct that threatens harm to embryos and fetuses, one recent report found that just one state's law is interpreted to make prenatal substance use a crime.

accordance with this legal, scientific, and medical consensus and avoided measures that would criminalize pregnant women’s conduct with respect to their pregnancies. Specifically, given that the neglect statute does not on its face apply to actions by the pregnant individual that may impact a developing embryo or fetus, the Oklahoma legislature recently debated and ultimately did *not* enact amendments to the criminal code that would have established criminal penalties for substance use during pregnancy. In 2015, S.B. 559 as introduced would have expanded the assault statute to permit prosecution for the “illegal use” of a narcotic drug during pregnancy. That legislation was never enacted. The failure of the legislature to reach resolution on S.B. 559 followed the long-standing, public, and unequivocal opposition by many of the *amici* to the passage of any laws that would criminalize women’s use of drugs while pregnant.

The legal issues presented by this appeal cannot properly be decided in isolation from the scientific, medical, and public health contexts in which the relevant legislative decisions have been made. *Amici* seek to assist this Court by making known the explicit and historical opposition to legislation and statutory interpretations such as the one put forward by Appellant in the instant case by scientific, medical, and public health experts. Each *amicus* has condemned the approach considered and rejected by the legislature in SB 559. All of the *amici*, along with other leading medical and public health organization concerned with the treatment of pregnant women or substance use disorder, has strongly repudiated such application of criminal codes because punitive approaches—including labeling prospective mothers “neglectful”—fundamentally misunderstand the clinical nature of pregnancy and of substance use. A criminal legal response to substance use, addiction, and substance use disorder in pregnancy would *increase* the physical and mental health risks for pregnant women and the children they give birth to, and would undermine public health in Oklahoma. It would reinforce a scientifically unfounded stigma

against people who use substances and are pregnant, and expose them to unnecessary and serious hazards, leaving them to choose among potentially dangerous and frightening options to the detriment of their own health and the health of their future children.

I. MEDICAL AND PUBLIC HEALTH EXPERTS UNEQUIVOCALLY OPPOSE PUNITIVE RESPONSES TO SUBSTANCE USE DURING PREGNANCY BECAUSE THEY THREATEN WOMEN’S AND CHILDREN’S HEALTH

Major medical and public health organizations in Oklahoma and throughout the country oppose criminally prosecuting pregnant women who use controlled substances. Among them are *amici* American College of Obstetricians and Gynecologists (ACOG);² Association of Women’s Health, Obstetrics and Neonatal Nurses (AWHONN) and AWHONN Oklahoma Section;³ American Academy of Addiction Psychiatry (AAAP);⁴ Oklahoma Society of Addiction

² Am. Coll. Obstetricians & Gynecologists (“ACOG”), Comm. on Health Care for Underserved Women, *Comm. Opinion 473: Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 *OBSTET. GYNECOL.* 200, 2 (2011) (reaffirmed 2019) (“The use of the legal system to address perinatal alcohol and substance abuse is inappropriate. . . . In states that mandate reporting, policy makers, legislators, and physicians should work together to retract punitive legislation and identify and implement evidence-based strategies outside the legal system to address the needs of women with addictions.”).

³ Ass’n of Women’s Health, Obstetric & Neonatal Nurses (AWHONN), *Optimizing Outcomes for Women with Substance Use Disorders in Pregnancy and the Postpartum Period*, 48 *J. OF OBSTETRIC, GYNECOLOGIC, & NEONATAL NURSING* 583 (2019) (“ . . .AWHONN recommends treatment versus incarceration and that local and state policies reflect commitment to diverting pregnant women away from the criminal justice system.”).

⁴ Am. Academy of Addiction Psychiatry, *Use of Illegal and Harmful Substances by Pregnant Women* (2018), available at <https://www.aaap.org/wp-content/uploads/2018/07/AAAP-FINAL-Policy-Statement-Edits-Use-of-Illegal-Substances-by-Pregnant-Women-for-merge2.pdf> (last visited Nov. 21, 2019) (“AAAP is opposed to punitive actions against pregnant women who use substances solely based on child abuse laws. Pregnant women identified by law enforcement as using illicit substances should not receive incarceration or other punitive measures as a substitute for providing effective health services.”).

Medicine (OKSAM); American Society of Addiction Medicine (ASAM);⁵ American Medical Women’s Association (AMWA); Oklahoma Nurses’ Association (ONA), and other major organizations such as the American Psychiatric Association (APA);⁶ American Medical Association (AMA);⁷ American Academy of Pediatrics;⁸ American Nurses Association (ANA);⁹

⁵ Am. Soc’y of Addiction Medicine (“ASAM”), *Substance Use, Misuse, and Use Disorders During and Following Pregnancy, with an Emphasis on Opioids* (2017), <https://www.asam.org/advocacy/find-a-policy-statement/view-policy-statement/public-policy-statements/2017/01/19/substance-use-misuse-and-use-disorders-during-and-following-pregnancy-with-an-emphasis-on-opioids> (last visited November 18, 2019) (“It is inappropriate to reflexively move from the possibility to an alleged certainty of defective parenting or danger to the child simply based on evidence of substance use. . . [I]t is unfortunate that in some states, . . . reporting requirements have led to punitive consequences . . . State and local governments should avoid any measures defining alcohol or other drug use during pregnancy as ‘child abuse or maltreatment,’ and should avoid prosecution, jail, or other punitive measures as a substitute for providing effective health care services for these women.”).

⁶ Am. Psychiatric Ass’n, *Position Statement: Assuring the Appropriate Care of Pregnant and Newly-Delivered Women with Substance Use Disorders* (Dec. 2016) (“The use of the legal system to address perinatal alcohol, tobacco, and other substance use disorders is inappropriate.”).

⁷ Am. Med. Ass’n, Policy, *H-420.969: Legal Interventions During Pregnancy* (1990) (reaffirmed 2016) (“Criminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate.”).

⁸ Am. Acad. of Pediatrics (“AAP”), Comm. on Substance Abuse, *A Public Health Response to Opioid Use in Pregnancy*, 139 PEDIATRICS (2017) (“A public health response, rather than a punitive approach to the opioid epidemic and substance use during pregnancy, is critical . . .”).

⁹ Am. Nurses Ass’n (“ANA”), *Position Statement: Non-Punitive Treatment for Pregnant and Breast-Feeding Women with Substance Use Disorders* (Mar. 15, 2017) (“ANA opposes laws that may result in punitive legal actions and result in incarceration of pregnant women because of substance use disorder.”).

American Public Health Association (APHA);¹⁰ March of Dimes;¹¹ and the National Perinatal Association (NPA).¹²

Based on the relevant scientific and medical research discussed below, authorities agree that criminal law approaches are inappropriate and can harm the health of women, fetuses, and newborns by detaining pregnant women, separating them from their homes and families, subjecting them to stress, incarcerating them, denying them prenatal and medical care and access to appropriate treatment, and eroding the doctor-patient relationship. Accordingly, ACOG calls for doctors to work with policy makers and legislators to retract state laws and policies that criminalize being pregnant and using controlled substances because “use of the legal system to address perinatal alcohol and substance abuse is inappropriate.”¹³ The ANA has also called upon registered nurses who work with pregnant women who use controlled substances to seek out providers that offer clinically “appropriate rehabilitative therapy, rather than law enforcement or the judicial system.”¹⁴

1. Punitive Criminal Justice Responses to Pregnant Women’s Activities Directly Inflict Substantial Harm on Women and their Children

¹⁰ Am. Pub. Health Ass'n (“APHA”), *Policy No. 9020: Illicit Drug Use by Pregnant Women* (Jan. 1, 1990) (“Reaffirms the Association's view of use of illicit drugs by pregnant women as a public health problem, and recommends that no punitive measures be taken against pregnant women who are users of illicit drugs . . .”).

¹¹ March of Dimes, *Policies and Programs to Address Drug-Exposed Newborns* (Dec. 2014) (“The March of Dimes opposes policies and programs that impose punitive measures on pregnant women who use or abuse drugs.”).

¹² Nat’l Perinatal Ass’n, *Position Paper, Substance Abuse among Pregnant Women* (Jun. 2012) (“NPA oppose punitive measures that deter women from seeking appropriate care during the course of their pregnancies.”).

¹³ ACOG, *Opinion 473*, *supra* n 2.

¹⁴ ANA, *Position Statement*, *supra* n.9.

Physical and mental health professionals’ widespread opposition to coercive responses to drug use during pregnancy stems from the scientific and medical research confirming the risks that the criminal justice system poses to pregnant people’s health and that of their pregnancies and their future children.¹⁵ Appellant’s perception that prosecuting pregnant women will benefit fetuses perceives the interests of pregnant woman and her fetus to be at odds. That perception is medically unsupported. Maternal and fetal interests are uniquely intertwined.¹⁶

Attempts to promote fetal wellbeing through laws and policies that treat pregnant women harshly misunderstand this unique connection between fetal and maternal health and ignore the close relationship of maternal and fetal health interests. A fertilized egg, embryo or fetus is physiologically dependent on the pregnant woman, and any intervention by Appellant ostensibly on behalf of a fertilized egg, embryo or fetus “must be undertaken through the pregnant woman’s body.”¹⁷ Anything that affects the pregnant woman’s health, autonomy, and privacy in turn, affects the fetus, and so “questions of how to care for the fetus cannot be viewed as a simple ratio of maternal and fetal risks but should account for the need to respect fundamental values, such as the pregnant woman’s autonomy and control over her body.”¹⁸

Being subject to—or facing threat of—arrest, prosecution, incarceration, and loss of parental rights is stressful and associated with negative health outcomes, both physical and

¹⁵ See, e.g., *supra* nn.2-12.

¹⁶ See, e.g., Am. Coll. Obstetricians & Gynecologists (“ACOG”), *Comm. Opinion 664: Refusal of Medically Recommended Treatment During Pregnancy*, 127 OBSTET. GYNECOL. e175 (2016); APHA, *Policy No. 9020*, *supra* n.10..

¹⁷ ACOG, *Opinion 664*, *supra* n.16 (citing H. Minkoff & M.F. Marshal, *Fetal Risks, Relative Risks, and Relatives’ Risks*, 16 AM. J. BIOETH. 3 (2016));

¹⁸ *Id.*

psychological.¹⁹ For a pregnant woman, who must contend with the physical aspects of pregnancy as well as added concerns for the health of her fetus, her autonomy to make medical decisions for herself and her fetus, and her prospects of retaining parental authority, the psychological strains of state control and coercion are exacerbated.²⁰ Stress, both chronic and acute, cause physical and chemical changes in a pregnant woman's body, which have implications for both maternal and fetal health and are associated with increased rates of infant mortality, low birthweight, preterm birth, hypertension, developmental delays, and congenital heart defects.²¹

The adverse effects of criminally prosecuting women for their actions while pregnant continue to affect mothers, their newborns, and their other children long after the pregnancy ends, especially where mothers remain incarcerated or lose temporary or permanent custody of

¹⁹ Barbara A. Hotelling, *Perinatal Needs of Pregnant, Incarcerated Women*, 17 J. OF PERINATAL EDUC. 37 (2008) (showing negative mental and physical impacts of jail and prison conditions on women, and especially pregnant women) ; April D. Fernandes, *How Far Up the River? Criminal Justice Contact and Health Outcomes*, SOCIAL CURRENTS (2019) (showing negative physical and mental health outcomes from not only imprisonment but less severe forms of contact, including arrest and prosecution); Robert R. Weidner & Jennifer Schultz, *Examining the relationship between U.S. incarceration rates and population health at the county level*, 9 SSM POPULATION HEALTH (2019) (incarceration of any length associated with increased morbidity and mortality)

²⁰ Hotelling, *supra* n.19; (threat of incarceration to mother's authority as parent causes stress); Elena Hontoria Tuerk & Ann Booker Loper, *Contact between incarcerated mothers and their children*, JOURNAL OF OFFENDER REHABILITATION, 43, 23-43 (2006).

²¹ See March of Dimes, Issue Brief, *Stress and Pregnancy* (2015), available at <https://www.marchofdimes.org/materials/Maternal-Stress-Issue-Brief-January2015.pdf> (last visited Nov. 21, 2019); Michael T. Kinsella & Catherine Monk, *Impact of Maternal Stress, Depression & Anxiety on Fetal Neurobehavioral Development*, 53 CLIN OBSTAT GYNECOL 425-440 (2009); Lydia M. Sagrestano, Ruthbeth Finerman, *Pregnancy and Prenatal Care: A Reproductive Justice Perspective*, REPRODUCTIVE JUSTICE: A GLOBAL CONCERN. Joan C. Chrisler, ed. (2012) at 211.

their children.²² Young children separated from their mothers experience traumatic stress with lifelong consequences, even if they are eventually reunified.²³ Throughout the United States, and in Oklahoma in particular, children of incarcerated parents have increased risk of mental-health conditions, higher rates of chronic disease, decreased success in school, and increased likelihood of drug use, criminal justice involvement, homelessness, and poverty.²⁴ Appellant relies on the supposed “absurdity” of failing to prosecute pregnant women for ingesting drugs during pregnancy, Appellant’s Br. at 17, but attempting to promote fetal health by prosecuting pregnant women threatens severe harms to everyone involved.

²² Human Rights Watch, Am. Civ. Liberties Union, *You Miss So Much When You’re Gone: The Lasting Harm of Jailing Mothers Before Trial in Oklahoma* (2018), available at https://www.aclu.org/sites/default/files/field_document/jailing_mothers_before_trial_in_ok_final_report.pdf (last visited Nov. 18, 2019); Michigan Family Impact Seminars Briefing Report No. 2002-1, *What About Me? Children with Incarcerated Parents*, Eileen Trzcinski et al., eds. (2002)

²³ Women in Prison Project, Correctional Ass’n of New York, *When “Free” Means Losing Your Mother: The Collision of Child Welfare and the Incarceration of Women in New York State* (2006), available at https://repositories.lib.utexas.edu/bitstream/handle/2152/15159/When_Free_Rpt_Feb_2006.pdf?sequence=2 (last visited Nov. 18, 2019); Michael Massoglia & Jason Schnittker, *No Real Release* 41 (2009), available at <https://journals.sagepub.com/doi/pdf/10.1525/ctx.2009.8.1.38> (last accessed Nov. 26, 2019).

²⁴ Susan Sharp et al., *Oklahoma Study of Incarcerated Mothers and their Children* (2014), available at <https://www.ok.gov/occy/documents/CIP%20incarcerated%20women%20study%20report%20014.pdf> (last visited Nov. 21, 2019); U.S. Department of Health and Human Services, Office of Disease Prevention and Health Promotion, *Healthy People 2020: Incarceration*, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/incarceration> (last visited Nov. 17, 2019); Annie Gjelsvik et al., *Adverse Childhood Events: Incarceration of Household Members and Health-Related Quality of Life in Adulthood*, 25 J. HEALTH CARE FOR THE POOR & UNDERSERVED 1169 (2014); Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1481-82 (2012); Kristin Turney, *Stress Proliferation across Generations? Examining the Relationship between Parental Incarceration and Childhood Health*, 55 J. OF HEALTH AND SOCIAL BEHAVIOR 302 (2014).

2. The Threat and Prospect of Prosecution Deters Women from Securing Treatment and Prenatal Care and Undermines Maternal and Fetal Health

Women and mothers who use drugs, women and mothers in Oklahoma's jails and prisons, and women and mothers facing criminal prosecution and incarceration are, like other women and mothers, concerned about their own, their fetuses', and their children's mutual wellbeing.²⁵ Thus, clear evidence establishes that women who desire drug treatment and prenatal care are dissuaded from seeking it when faced with the threat of prosecution and its attendant harms for themselves, their pregnancies, their future children, and their families.²⁶ Studies consistently show that "fear of being reported to the police or child welfare authorities [is] related strongly to a lack of prenatal care."²⁷ Even a small number of stories of women losing custody of their children or being subjected to state coercion may have a chilling effect on

²⁵ Sharp et al., *supra* n.24; M.A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Permanent Drug Dependent Women*, 33 J. DRUG ISSUES 285 (2003) (Pregnant women who use controlled substances "fear and worry about loss of infant custody, arrest . . . , and incarceration for use of drugs."). See also A.H. Schempf & D.M. Strobino, *Drug Use and Limited Prenatal Care: An Examination of Responsible Barriers*, 200 AM. J. OBSTET. GYNECOL. 412.e1 (2009); M.L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 DRUG ALCOHOL DEPEND. 199 (1993); W. Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM. J. PUBLIC HEALTH 483 (1990).

²⁶ See Southern Reg'l Project on Infant Mortality, *A STEP TOWARD RECOVERY: IMPROVING ACCESS TO SUBSTANCE ABUSE TREATMENT FOR PREGNANT AND PARENTING WOMEN* 6 (1993); S.C. Roberts & A. Nuru-Jester, *Women's Perspectives on Screening for Alcohol and Drug Use in Prenatal Care*, 20 WOMEN'S HEALTH ISSUES 193 (2010); AWHONN, *Optimizing Outcomes*, *supra* n. 3.

²⁷ Schempf & Strobino, *supra*, n.25. See also Stone, *supra* n.1 ("[F]ear of detention and punishment presents a significant barrier to care for mothers and pregnant women."); Mishka Terplan et al., *Methamphetamine Use Among Pregnant Women*, 113 OBSTETRICS & GYNECOLOGY 1290 (2009) ("Although the desire for behavioral change may be strong in pregnancy, substance-using women may be afraid to seek prenatal care out of fear of prosecution or child protection intervention."); ACOG, *Opinion 473*, *supra* n 2 (citing study showing that women who used drugs during pregnancy did not trust health care providers to protect them from criminal justice system and avoided or disengaged from prenatal care)

a woman's likelihood of accessing medical care while pregnant if she has used or is using criminalized substances.²⁸ One study, for example, found that women who used controlled substances during pregnancy avoided or delayed care because they did not trust their health care providers to protect them from the negative consequences of identification as pregnant drug users.²⁹

Women who do seek prenatal care are likely to be discouraged from truthfully discussing their drug use by fear that they will be prosecuted or shamed, labeled "neglectful," or branded as harmful to their own children.³⁰ These barriers to trust and communication are particularly damaging because access to early and comprehensive prenatal care is one of the most effective tools for reducing infant mortality, whether or not the pregnant woman is experiencing drug dependency.³¹ Studies also show that prenatal care substantially reduces risks of low birthweight and prematurity among infants born to women experiencing drug dependency.³² Open communication is also especially critical for women who do seek, or who would otherwise seek,

²⁸ See Kristin Burgess, *Comment: Protective Custody: Will It Eradicate Fetal Abuse and Lead to the Perfect Womb?*, 35 HOUS. L. REV. 227, 265-66 (1998).

²⁹ Roberts & Nuru-Jester, *supra* n.26; A. El-Mohandes et al., *Prenatal Care Reduces the Impact of Illicit Drug Use on Perinatal Outcomes*, 23 J. PERINATOL., 354 (2003).

³⁰ See S. Kandall, *SUBSTANCE & SHADOW: WOMEN & ADDICTION IN THE UNITED STATES* 278-79 (1996); ACOG, *Opinion 473*, *supra* n 2.

³¹ See, e.g., Southern Reg'l Project on Infant Mortality, *supra* n.27, at 6; Paul Moran et al., *Substance Misuse During Pregnancy: Its Effects and Treatment*, 20 FETAL MATERN. MED. REV. 1 (2009); A. Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 J. AM. MED. ASS'N 1581, 1585-86 (1993) (at least four prenatal care visits significantly reduces likelihood of low birth weight babies among women who use cocaine).

³² A. El-Mohandes et al., *supra*, n.29; see also Terplan et al., *Methamphetamine Use Among Pregnant Women*, *supra* n.27 ("prenatal care has shown improvement in birth outcomes, even given continued substance abuse").

treatment for drug dependency.³³ Women who have a drug dependency also face higher rates of depression, increasing the importance of a strong “therapeutic alliance” between patient and health care provider for ensuring successful completion of treatment.³⁴ By contrast, threats of criminal sanctions have been shown to increase women’s stress and thereby increase their risk of relapse.³⁵

Appellant’s pursuit of criminal legal sanctions for pregnant women in the name of protecting embryos and fetuses disregards the medical evidence and scientific research on this issue. Evidence confirms the negative health impacts of subjecting pregnant women to prosecution and incarceration, and even the fear of such treatment; prosecuting women for their substance use while pregnant undermines Appellant’s objectives.³⁶ Where Appellant purports to prioritize fetal health, Appellant directly threatens pregnant women’s physical and psychological

³³ See R.H. Kelly et al., *The Detection & Treatment of Psychiatric Disorders and Substance Use Among Pregnant Women Cared for in Obstetrics*, 158 AM. J. PSYCH. 213 (2001).

³⁴ See Ctr. on Addiction & Substance Abuse, *Substance Abuse & The American Woman* 64 (1996); C.E. Tracy, *Social Consequences of Substance Abuse Among Pregnant and Parenting Women*, 20 PEDIATR. ANN. 548 (1991).

³⁵ See Danielle E. Ramo & Sandra A. Brown, *Class of Substance Abuse Relapse Situations: A Comparison of Adolescents and Adults*, 22 Psych. Addictive Behavior 372, 377 (2008) (adults are more likely to relapse while in a negative emotional state); see also M.S. Gordon et al., *A Randomized Clinical Trial of Methadone Maintenance for Prisoners: Findings at 6 Months Post-Release*, 103 Addiction 1333 (2008).

³⁶ Laura J. Faherty et al., *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy with Rates of Neonatal Abstinence Syndrome*, 2 JAMA NETW. OPEN, e 1914078 (2019); Daisy Goodman & Bonny Whalen, *It’s Time to Support, rather than Punish, Pregnant Women with Substance Use Disorder*, 2 JAMA Netw. Open e1914135 (2019)

wellbeing, and indirectly discourages women from obtaining vital prenatal care, thereby inflicting direct and profound damage on fetal and child health.³⁷

II. NO MEDICAL OR SCIENTIFIC EVIDENCE JUSTIFIES A PUNITIVE, NON-THERAPEUTIC APPROACH TO PREGNANT WOMEN WHO USE DRUGS

Preeminent health care organizations agree that drug use during pregnancy is a medical and public health issue that calls for non-punitive and family-centered responses and, if

³⁷ Extending the reach of criminal justice into matters of maternal, fetal, and newborn health care would risk exacerbating the economic and racial disparities that are already pervasive in the health care, criminal justice, and child welfare systems. For example, obstetric and gynecologic outcomes and care are marked by racial and ethnic disparities, with people of color, and especially black women, experiencing higher rates of adverse maternal, fetal and newborn health outcomes, and less access to health care services. See Am. College of Obstetricians & Gynecologists, Comm. on Health Care for Underserved Women, *Comm. Opinion No. 649, Racial and Ethnic Disparities in Obstetrics and Gynecology* (Dec. 2015) (reaffirmed 2018), available at <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Racial-and-Ethnic-Disparities-in-Obstetrics-and-Gynecology?IsMobileSet=false> (last visited Nov. 26, 2019); Elizabeth Howell & Jennifer Zetlin, *Quality of Care and Disparities in Obstetrics*, 44 *Obstetrics & Gynecology Clinics of N. Am.* 13-25 (2017). Women of color and especially black women are also overrepresented in Oklahoma's criminal justice system compared to their representation in the population, and, nationwide, they are more likely to suffer harsher outcomes at each stage of the criminal justice process, including higher conviction rates and longer sentences. See Ryan Genzler, *Lawmakers must confront racial disparities head-on as they reform the justice system*, OKPOLICY.ORG (Feb. 15, 2017) (updated May 2, 2019), last visited Nov. 26, 2019; Nazgol Chandnoos, *Eliminating the Racial Disparity in the Criminal Justice System* (2015), available at <https://www.sentencngproject.org/publications> (last visited Nov. 26, 2019). And black and Native American children are disproportionately separated from their families; they make up 33 percent of children in foster care in the United States, even though they are only 15 percent of the child population, and federal studies show that rates of child abuse and neglect are lower for black families than for white families. See Nat'l Conference of State Legislatures, *Disproportionality and Disparity in Child Welfare* (Aug. 1, 2017), <http://www.ncsl.org/research/human-services/disproportionality-and-disparity-in-child-welfare.aspx> (last visited Nov. 26, 2019). Criminalizing pregnant women's conduct with respect to their pregnancies lies at the intersection of the unequal health care, criminal justice, and welfare systems and threatens to make unequal outcomes in each even more so.

necessary, treatment.³⁸ The consensus is that an appropriate response should ensure access to quality prenatal and primary medical care, evidence-based education on drug use during pregnancy, comprehensive drug treatment programs that keep mothers and children together, and social service programs such as life skills training, mental health services, relapse strategies, and stress management.³⁹

The Court should understand the fundamental misconception of the nature of drug use, drug addiction, and drug use disorders in Appellant’s description of its targets as women who “blatantly neglect” their children, as well as the lack of scientific support for the notion that women who use drugs while pregnant willfully inflict extensive harm on their future children. *See* Appellant’s Br. at 13, 16; *see also id.* (arguing that it would be “absurd” to treat women who ingest drugs while pregnant differently from “murderers.”). Evidence of drug use is not a proxy for unique and certain harm to fetal development; and does not confirm a woman’s disregard for the health of her pregnancy or future child. Appellant’s broad characterization of drug use during pregnancy as a universally criminal act misunderstands the nature of the risk it poses, ignores the wide variety of conduct that would be criminalized by regulating pregnant women’s drug use under the neglect statute, and pursues an approach that would inhibit doctors from determining and providing the most effective and appropriate care from a range of medical and public health options.⁴⁰

Appellant would have this Court read the neglect statute to allow for the prosecution of any woman who is shown to have consumed any amount of a criminalized substance at any time

³⁸ *See, e.g., supra* nn.2-12.

³⁹ *See, e.g., ASAM, Substance Use, Misuse, and Use Disorders, supra* n. 5, at 3-6.

⁴⁰ *See id.*

during the course of her pregnancy. But proof that a person has ingested a drug cannot determine the extent of drug use, indicate whether a particular drug caused a particular harm or any harm, identify a drug dependency or substance use disorder, or establish a woman’s motive or intent for using the substance.⁴¹ Evidence that a drug was consumed at some point provides no information about the circumstances, frequency, or degree of use.⁴² The neglect statute, applied to pregnant women, would allow for prosecuting a woman—with all the attendant risks and injuries to her, her fetus, and her children—no matter the type of drug used, the number of times it was used, or the reasons for its use.

This sledgehammer response is not supported by evidence. *Amici* do not dispute that drug use during pregnancy may present risks for a developing fetus, particularly if unsupervised or not appropriately medically indicated. But standing alone, evidence of a single instance of drug use provides no meaningful information about the nature or degree of risk, and does not indicate certain or even likely harm of any kind. Evidence of drug use constitutes just one element within the incredibly complex set of factors that may influence the overall outcome of a pregnancy. Even with a detailed understanding of a patient’s circumstances, it would be challenging or often

⁴¹ See *id.*; see also *infra*. Parts II(1) & (2).

⁴² AAP, *A Public Health Response to Opioid Use in Pregnancy*, *supra*, n.8; Am. Med. Ass’n, Policy, *H-95.985: Drug Testing* (2016) (“Drug testing does not provide any information about pattern of use of drugs, dose of drugs taken, physical dependence on drugs, the presence or absence of a substance use disorder, or about mental or physical impairments that may result from drug use, nor does it provide valid or reliable information about harm or potential risk of harm to children . . .”); Am. Coll. Obstetricians & Gynecologists (“ACOG”), *Comm. Opinion 711: Opioid Use and Opioid Use Disorder in Pregnancy* (2017) (reaffirmed 2019), available at <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Obstetric-Practice/co711.pdf?dmc=1&ts=20191122T1650335154> (last visited Nov. 22, 2019) (establishing criteria for opioid use disorder diagnosis)

impossible to identify or distinguish the specific ways in which drug use, standing alone, might be the cause of a specific pregnancy outcome.⁴³

Moreover, given the complex nature of substance addiction and substance use disorder, it does not make sense from a scientific or clinical perspective to attempt to improve health outcomes by treating evidence of a pregnant woman’s use of a controlled substance as a condemnable neglect of her pregnancy. Like many other conditions of pregnancy such as diabetes, obesity, or a high-risk occupation, the significance of the risk cannot be properly understood or effectively addressed unless the pregnant person is treated as a patient, rather than a defendant; “incarceration is no more of a treatment for addiction than it is for diabetes or mental illness.”⁴⁴

1. Substance Use Disorders Are Medical Conditions

Substance use is a medically complex matter with a wide variety of causes, risk factors, and prognoses.⁴⁵ The once-popular misconception of substance use as a failure of moral grit or determination has long been abandoned by medical professionals, social scientists and most

⁴³ See, e.g., ACOG, *Comm. Opinion No. 711*, *supra* n.42, at 4 (noting that likelihood and nature of harm depends on presence of co-existing environmental, medical, and personal circumstances, and that some conditions exist in which “observed birth defects remain rare and represent a minute increase in absolute risk,” and “incidence of anomalies reported [are] similar to what would be expected in the general population”); see also *infra* Part II(2).

⁴⁴ Paul Early & Yngvild Olsen, *Redefining Addiction. Reimagining Solutions*, MEDIUM (Oct. 21, 2019), <https://medium.com/@ASAM.org/redefining-addiction-reimagining-solutions-84e0ffbb872f> (last visited Nov. 26, 2019); see also *id.* (due to the “compulsive behaviors associated with addiction . . . [b]lanket punitive policies . . . ignore science”);

⁴⁵ See *infra* nn. 46-51 & accompanying text.

courts. It is medically unrealistic to assume that all women who use substances can or even should simply choose to immediately abstain the moment they become pregnant.⁴⁶

Due to the nature of addiction, even women who seek out treatment for drug dependency during pregnancy, and who achieve abstinence, cannot do so totally and immediately. In one study of women receiving treatment for substance use during pregnancy, the average amount of time needed to achieve abstinence from cocaine and marijuana was approximately five months.⁴⁷ Substance addiction is a chronic medical condition influenced by sociocultural, economic, biological, and psychological factors.⁴⁸ The American Society of Addiction Medicine, the nation's largest organization representing medical professionals who specialize in addiction prevention and treatment, defines addiction as "a treatable, chronic disease involving complex interactions among brain circuits, genetics, the environment, and an individual's life experiences."⁴⁹ The most recent Diagnostic and Statistical Manual of Mental Disorders (DSM-5) defines a substance disorder as 'a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related

⁴⁶ See *infra* nn. 54-56; see also Center for Disease Control, "Basics About Opioid Use During Pregnancy," <https://www.cdc.gov/pregnancy/opioids/basics.html> (last visited Nov. 26, 2019) ("Quickly stopping opioids during pregnancy is not recommended, as it can have serious consequences, including preterm labor, fetal distress, or miscarriage.").

⁴⁷ Ariadna Forray, *Perinatal Substance Use: A Prospective Evaluation of Abstinence and Relapse*, 150 DRUG & ALCOHOL DEPENDENCE 147 (2015).

⁴⁸ AWHONN, *Optimizing Outcomes*, *supra* n. 3.

⁴⁹ Am. Soc'y of Addiction Med. ("ASAM"), *Definition of Addiction* (Sep. 15, 2019), available at <https://www.asam.org/resources/definition-of-addiction> (last visited Nov. 21, 2019); Office of the Surgeon General, *Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health* (2016).

problems.⁵⁰ A person addicted to certain drugs may experience a physical need for the controlled substance, which results in cravings and withdrawal symptoms.⁵¹ “People with addiction use substances or engage in behaviors that become compulsive and often continue despite harmful consequences.”⁵² Studies have increasingly found that, even when a person experiencing disordered use or addiction pursues treatment, relapses are a normal part of recovery.⁵³

Under the criminal justice theory of deterrence, punitive sanctions are used to lessen the likelihood of similar crimes in future. But as a matter of both law and medicine, people suffering from addiction “may be unable to abstain even for a limited period.” *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 676 (1989). “[T]he inability to control drug use regardless of consequences is a key feature of substance and alcohol use disorders.”⁵⁴ People grappling with addiction may “compulsively have urges to abuse and they are remarkably unencumbered by the memory of negative consequences of drug taking.”⁵⁵ An instance of drug use by a pregnant woman therefore does not necessarily reflect a decision about how to treat her

⁵⁰ Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 481, 483 (5th ed. 2013) (hereinafter DSM-5). The DSM-5 separates substance abuse disorders by type of drug, such as opioid use disorder, cocaine use disorder, and alcohol use disorder.

⁵¹ H.W. Murtaugh, *Neurologic Aspects Of Drug Abuse*, 28 NEUROL. CLIN. 199 (2010).

⁵² ASAM, *Definition of Addiction*, *supra* n.49.

⁵³ C. Hendershot et al., *Relapse Prevention for Addictive Behaviors*, 6 SUBST. ABUSE TREAT. PREV. POLICY 2 (2011).

⁵⁴ AWHONN, *Optimizing Outcomes*, *supra*, n.3.

⁵⁵ G.F. Koob & M. Le Moal, *Drug Addiction, Dysregulation of Reward, and Allostasis*, 24 NEUROPSYCHOPHARMACOLOGY 97, 98 (2001).

own body or that of her developing fetus but should instead be understood to reflect a symptom of a chronic disease that can and should be managed as a medical condition.⁵⁶

The physiological and psychological characteristics of a drug addiction and drug use disorders do not cease to apply and transform into a matter of willpower just because a user becomes pregnant. For pregnant women who experience addiction and substance use disorders, as for all other pregnant women experiencing chronic disorders, negative outcomes for both mothers and children are most effectively avoided or diminished with medical and public health strategies.⁵⁷

2. Substance Use During Pregnancy Cannot Be Isolated as a Cause of Uniquely Certain or Severe Harms

A common perception, reflected for example in the myth of the “crack baby,” is that prenatal exposure to any amount of a controlled substance necessarily causes negative health impacts in newborns, and that these health impacts are unusually certain, unusually severe, and distinct from harms associated with social and environmental factors or other actions taken by pregnant women. This perception is false. Medical consensus does not identify a safe level of use of illegal substances during pregnancy, but studies have failed to isolate the harms caused by prenatal drug exposure from the effects of exposure to other pregnancy risk factors, such as tobacco use, poverty, and lack of access to prenatal care.⁵⁸ Scientific studies have failed to prove

⁵⁶ ASAM., *Definition of Addiction*, *supra* n.49; U.S. Dep’t of Health & Human Servs., Office of the Surgeon General, *Facing Addiction in America*, *supra* n.49; World Health Org. & U.N. Office on Drugs & Crime et al., *Substitution Maintenance Therapy in the Management of Opioid Dependence and HIV/AIDS Prevention* 7 (2004).

⁵⁷ *See supra* nn.2-12.

⁵⁸ *See, e.g.*, D.A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure*, 285 J. AM. MED. ASS’N 1613 (2001) (finding “no convincing evidence” among children 6 and under “that prenatal cocaine exposure is associated

that in utero exposure to controlled substances—including not only cocaine,⁵⁹ but methamphetamine,⁶⁰ heroin and other opioids,⁶¹ and marijuana⁶²—is the clear cause of any severe or certain harms. Many pregnancy complications and adverse outcomes experienced by

with any developmental toxicity different in severity, scope, or kind from the sequelae of many other risk factors”); G.D. Helmbrecht & S. Thiagarajah, *Management of Addiction Disorders in Pregnancy*, 2 J. ADDICTION MED. 1 (2008); A.H. Schempf, *Illicit Drug Use and Neonatal Outcomes: A Critical Review*, 62 OBSTET. GYNECOL. SURV. 749 (2007).

⁵⁹ *Id.* Subsequent studies confirm these findings. See, e.g., H.S. Bada et al., *Impact of Prenatal Cocaine Exposure on Child Behavior Problems Through School Age*, 119 PEDIATRICS e328 (2007); D.S. Messinger et al., *The Maternal Lifestyle Study: Cognitive, Motor, and Behavioral Outcomes of Cocaine-Exposed Infants Through Three Years of Age*, 113 PEDIATRICS 1677 (2004) (“infant prenatal exposure to cocaine and to opiates was not associated with mental, motor, or behavioral deficits”); Mishka Terplan & Tricia Wright, *The Effects of Cocaine & Amphetamine Use During Pregnancy on the Newborn: Myth versus Reality*, 30 JOURNAL OF ADDICTIVE DISEASES, 1, 1-5 (2010); Editorial Bord, *Slandering the Unborn*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html> (last visited Nov. 21, 2019).

⁶⁰ A national expert panel concluded that “the data regarding illicit methamphetamine are insufficient to draw conclusions concerning developmental toxicity in humans.” Ctr. for the Evaluation of Risks to Human Reproduction, *Report of the NTP-DEHR Expert Panel on the Reproductive & Developmental Toxicity of Amphetamine and Methamphetamine*, 74 BIRTH DEFECTS RES. B. DEV. REPROD. TOXICOL. 471 (2005); see also Am. Coll. Obstetricians & Gynecologists, *Committee Opinion 479: Methamphetamine Abuse in Women of Reproductive Age*, 117 OBSTET. GYNECOL. 751 (2011); Terplan & Wright, *The Effects of Cocaine & Amphetamine Use During Pregnancy on the Newborn*, *supra* n.59.

⁶¹ Decades of research makes clear that exposure to opioids is not associated with birth defects. Helmbrecht & Thiagarajah, *supra*, n. 58. Some newborns who are exposed opioids in utero experience a transitory and treatable set of symptoms at birth known as neonatal abstinence syndrome (NAS) that can be safely and effectively treated in the nursery setting. Substance Abuse & Mental Health Servs. Admin., *Methadone Treatment for Pregnant Woman*, Pub. No. SMA 06-4124 (2006); ACOG, *Opinion 711*, *supra* n.42 (finding that opioid use during pregnancy is mitigated by opioid-assisted therapy offered in collaboration with pediatric care).

⁶² Marijuana use by pregnant women has not been shown to cause specific harm to the fetus or child. Science has failed to establish that in utero exposure to marijuana causes unique harms distinguishable from those caused by other uncontrollable factors. See, e.g., Schempf, *supra* n.58; see also Am. Coll. Obstetricians & Gynecologists, *Committee Opinion 637: Marijuana Use During Pregnancy and Lactation*, 126 OBSTET. GYNECOL. 234 (2015).

women who have used substances during pregnancy may be attributable to risk factors other than the substance use, including social determinants and environmental factors such as poverty, lack of access to medical care, malnutrition, or chronic stress, each of which may cause fetal and maternal harm.⁶³ Drug use during pregnancy is a medical and public health concern requiring the attention of medical providers. Extraordinary law enforcement measures—which are supposed to “protect” an embryo or fetus at the pregnant woman’s expense, but that risk harm to her pregnancy, future children, and family—cannot be justified on the basis that drug use causes universal and uniquely devastating harms to fetal development.

In a large majority of cases in which women have been prosecuted for their conduct while pregnant, no adverse pregnancy outcome as a result of that conduct was reported, and convictions were secured without any evidence of harm.⁶⁴ Among many of the remaining cases, including those involving stillbirths or other adverse outcomes, prosecutions have proceeded without any causal evidence that the woman’s drug use or other criminalized conduct caused the harm.⁶⁵ But higher courts have now recognized, after reviewing the relevant scientific research, that such prosecutions should not be sustained based on untested, and now disproven, assumptions about the harms of drug use during pregnancy.

⁶³ See e.g., Am. Pub. Health Ass'n, *Transforming Public Health Works: Targeting Causes of Health Disparities*, 46 THE NATION’S HEALTH 1 (2016) (“at least 50% of health outcomes are due to the social determinants . . .”); van Gelder, M.M., et al., *Characteristics of Pregnant Illicit Drug Users And Associations Between Cannabis Use and Perinatal Outcome in A Population-Based Study, National Birth Defects Prevention Study*, 109 DRUG ALCOHOL DEPEND. 243 (2010)

⁶⁴ Lynn M. Paltrow, Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health*, 38 J. OF HEALTH POLITICS, POLICY & LAW 299, 318 (2013)

⁶⁵ *Id.*

For example, the Supreme Court of South Carolina unanimously overturned the conviction of a woman charged with causing a stillbirth based on evidence of cocaine use. *McKnight v. State*, 661 S.E.2d 354 (S.C. 2008). The court held that the woman’s counsel provided ineffective assistance of counsel when she failed to educate the jury about “recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor.” *Id.* at 358 n.2; the conviction could not stand given the “reasonable probability” that the jury relied on “apparently outdated scientific studies” suggesting that cocaine use caused the death of her fetus, which the defendant’s counsel had failed to rebut, *id.* at 360-61. In Oklahoma, as in *McKnight*, where “current medical science cannot tell us what level of drug . . . use will pose a substantial risk of serious damage to an unborn child,” *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 920 (W.D. Wisc. 2017), *vacated on other grounds*, 893 F.3d 386 (7th Cir. 2018), there is no justification for imposing criminal measures so destructive that they harm not only the women they target but the fetuses they purport to protect.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court to deny the appeal, affirm the district court’s ruling that Oklahoma’s child neglect statute, 21 O.S. § 843.5(c), does not criminalize the conduct of pregnant women with respect to their fetuses, and affirm the district court’s ruling quashing Count One of the indictment.

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APPENDIX
INTERESTS OF AMICI CURIAE

Amicus Curiae **American College of Obstetricians and Gynecologists** (ACOG) is a non-profit educational and professional membership organization dedicated to the improvement of women's health. Founded in 1951, ACOG represents more than 90% of board certified ob-gyns in the United States, with more than 58,000 members, including 461 members in Oklahoma. ACOG's objectives are to foster improvements in all aspects of women's health care, to establish and maintain the highest possible standards for education, to publish evidence-based practice guidelines, to promote high ethical standards, and to encourage contributions to medical and scientific literature.

Amicus Curiae **Oklahoma Society of Addiction Medicine** (OKSAM) and the **American Society of Addiction Medicine** (ASAM) represent, respectively, more than 70 and 6,800 physicians, clinicians, and associated professionals who prevent, treat, and promote remission and recovery from the disease of addiction. OKSAM and ASAM members are dedicated to increasing access and improving the quality of addiction treatment, educating physicians and the public, and supporting research and prevention of addiction. OKSAM and ASAM are committed to reducing potential drug-related harms at every reasonable opportunity and share concern for the health and welfare of children and pregnant women.

Amicus Curiae **American Civil Liberties Union of Oklahoma** (ACLU-OK) is a non-profit, non-partisan membership organization devoted to protecting civil rights and civil liberties. For nearly fifty years, ACLU-OK, and its national affiliate, the American Civil Liberties Union, have litigated questions involving civil liberties in the state and federal courts, helping to establish literally dozens of precedents which today form part of the basic framework of our constitutional jurisprudence. With some 5,000 members in Oklahoma, and nearly 1.6 million members across the nation, the ACLU is among the oldest, largest and most active civil rights organizations in America. The ACLU-OK and its members have core, abiding commitments to protecting the relationship between a pregnant person and their fetus; limiting the state's attempts to control or limit that relationship; and fighting endeavors to criminalize a pregnant person in an attempt to advance an agenda that limits bodily autonomy in favor of bestowing rights to a fetus.

Amicus Curiae **American Academy of Addiction Psychiatry** (AAAP) is an international professional membership organization made up of practicing psychiatrists, university faculty, medical students and other related professionals founded in 1985 with approximately 1,000 members in the United States and around the world. AAAP is devoted to promoting accessibility to the highest quality treatment for all who need it by providing continuing education for addiction professionals, disseminating new information in the field of addiction psychiatry, and encouraging research on the etiology, prevention, identification, and treatment of the addictions. AAAP opposes prosecutions of women for use of criminalized substances during pregnancy

based on the belief that instead of promoting prenatal care and treatment, the threat that women's use of illegal substances can be disclosed to law enforcement for use in criminal prosecutions will likely discourage some pregnant women from seeking prenatal care and treatment of their substance use disorder and negatively impact the confidential psychiatrist-patient relationship.

Amicus Curiae **American Medical Women's Association (AMWA)**: It is critical AMWA be included in this Amicus Brief. AMWA has supported rights that protect women and their health. If Oklahoma expands its definition to include charging women with neglect (or worse) for things that happen during their pregnancies, that legal definition opens the window for fetal personhood (as equal to the rights of the woman). This is much more than a case about an individual because of the State's argument about fetal personhood.

Amicus Curiae the **American Medical Women's Association (AMWA)** is an organization of women physicians, medical students and other persons dedicated to serving as the unique voice for women's health and the advancement of women in medicine. AMWA is committed to supporting rights that protect women and their health, and ensuring that women physicians achieve equity in the medical profession and realize their full potential. It is the position of AMWA that that health care professionals must be able to talk to their patients about alcohol and drug use in order to make the most informed health decisions. Laws such as the proposed interpretation of Oklahoma's neglect statute interfere with the relationship between health care professionals and their patients who are pregnant, and lead to unhealthy outcomes.

Amicus Curiae **American Medical Women's Association (AMWA)** is a national, non-profit organization of over 10,000 women physicians and physicians-in-training representing every medical specialty. Founded in 1915, AMWA is dedicated to promoting women in medicine and advocating for improved women's health policy. AMWA strongly supports treatment and rehabilitation of women who use alcohol or drugs during pregnancy, and opposes the arrest, jailing and/or prosecution of pregnant women as a method of preventing or punishing chemical dependency during pregnancy. AMWA encourages all pregnant women to seek prenatal care and believes that breaching the medical confidentiality of these women or otherwise hindering their ability to establish a relationship of trust with their treatment providers will deter women, especially those that may be at high risk for adverse pregnancy outcomes, from receiving prenatal care.

Amicus Curiae the **Association of Women's Health, Obstetric and Neonatal Nurses (AWHONN)** represents 350,000 nurses Nationwide and 400 nurses in Oklahoma who are clinically active in hospitals, perinatal facilities, and health centers. AWHONN is a 501(c)3 nonprofit membership organization whose mission is to empower and support nurses caring for women, newborns, and their families through research, education, and advocacy. AWHONN members are committed to the health of women and newborns. Our Vision is to make a difference in the lives of women and newborns. The Association of Women's Health, Obstetric and Neonatal Nurses (AWHONN) opposes laws and other reporting requirements that result in incarceration or other punitive legal actions against women because of a substance use disorder

in pregnancy and the postpartum period. In AWHONN's 2019 Position Statement, "Optimizing Outcomes for Women With Substance Use Disorders in Pregnancy and the Postpartum Period," treatment is recommended in lieu of incarceration for pregnant women and mothers with substance abuse disorder.

Amicus Curiae **The Center for Reproductive Rights** (the "Center") is a global nonprofit organization incorporated and headquartered in New York that uses the power of law to advance reproductive rights as fundamental human rights around the world. The Center has undertaken a variety of initiatives, both in the U.S. and around the globe, to ensure that women do not lose their core rights to autonomy, dignity, or equality when they become pregnant. Since its founding in 1992, the Center has been involved in nearly all major litigation in the U.S. concerning reproductive rights, including as lead counsel for the plaintiffs in *Whole Woman's Health v. Hellerstedt*. As part of its work to ensure legal guarantees to the full range of reproductive rights, the Center works to promote and ensure non-discriminatory access to safe and respectful maternal health care. The Center has advocated against the shackling of women in prison during childbirth in the U.S. and challenged the detention of postpartum women for failure to pay medical bills in Kenya.

Amicus Curiae the **Drug Policy Alliance** (DPA) is a 501(c)(3) nonprofit organization that leads the nation in promoting drug policies that are grounded in science, compassion, health, and human rights. Established in 1994, DPA is a nonprofit, non-partisan organization with more than 20,000 members nationwide. DPA is dedicated to advancing policies that reduce the harms of drug use and drug prohibition, and seeking solutions that promote public health and public safety. DPA is actively involved in the legislative process across the country and strives to roll back the excesses of the drug war, block new, harmful initiatives, and promote sensible drug policy reforms. The organization also regularly files legal briefs as *amicus curiae*, including in other cases pertaining to pregnant women who use drugs. *See, e.g., Loertscher v. Anderson*, 259 F.Supp.3d 902 (2017).

Amicus Curiae **Harm Reduction International** is an international NGO in Special Consultative Status with the Economic and Social Council of the United Nations, dedicated to reducing the negative health, social and legal impacts of drug use and drug policy. It promotes the rights of people who use drugs and their communities through research and advocacy to help achieve a world where drug policies and laws contribute to healthier, safer societies.

Amicus Curiae the **Institute for Health and Recovery, Inc.** (IHR) is a statewide service, research, policy, program development and capacity building agency. IHR designs its services based on an understanding of the impact of trauma. IHR's mission is to develop a comprehensive continuum of care for families, individuals, youth and pregnant and parenting women affected by alcohol, tobacco and other drug use, violence/trauma, mental health challenges and other health issues.

Amicus Curiae **Legal Action Center** (LAC) is a national public interest law firm, with offices in New York and Washington, D.C., that performs legal and policy work to fight discrimination against and promote the privacy rights of individuals with criminal records, substance use disorders, and/or HIV/AIDS. LAC has done a tremendous amount of policy advocacy work to expand treatment opportunities for people with substance use disorders and to oppose legislation and other measures that employ a punitive approach, rather than a public health approach, to addiction. LAC has also represented individuals and substance use disorder treatment programs who face discrimination based on inaccurate and outmoded stereotypes about the disease of addiction. The question posed in this case is of vital concern to LAC's constituency across the country.

Amicus Curiae **Hon. Nancy Gertner** (retired, US District Court). Judge Gertner has taught women and the law at Yale Law School, and lectured on that subject in China and Vietnam. She presently teaches at Harvard Law School (criminal law and sentencing). Prior to becoming a judge, she represented pregnant women prosecuted for manslaughter for taking illegal drugs or driving while under the influence of alcohol. She has written and spoken on the issue.

Amicus Curiae the **National Alliance for Medication Assisted Recovery** (NAMA Recovery) is an organization of Medication Assisted Treatment (MAT) patients and healthcare professionals supporting quality MAT. Medications to treat opioid use Disorder are often viewed as just a "substitute" drug by child welfare, criminal justice, healthcare professionals and the public. Fifty years of science contradicts that perception and supports MAT as the "Gold Standard" for substance use Disorder treatment. The misperception, however, impacts MAT patients in a variety of ways; they are often seen as drug users that will not accept abstinence. Even more damaging criminal justice responses interfere with patients' comprehensive treatment by nonmedical professionals whose belief that they know what is best is based on incorrect information and assumptions. In jurisdictions where substance abuse by pregnant women is treated as a criminal justice matter, it is therefore typical for MAT patients to find themselves caught in inappropriate care because professionals working in child welfare and criminal justice agencies are ignorant about the science and medicine governing substance use treatment disorder and MAT.

Amicus Curiae **National Coalition for Child Protection Reform** (NCCPR) *Amicus Curiae* National Coalition for Child Protection Reform ("NCCPR") is an organization of professionals, drawn from the fields of law, academia, psychology and journalism, who are dedicated to improving child welfare systems through public education and advocacy. NCCPR, a tax-exempt non-profit organization founded at a 1991 meeting at Harvard Law School, is incorporated in Massachusetts and headquartered in Alexandria, Virginia. NCCPR devotes much of its attention to public education concerning widespread public misconceptions about the child protective system and its impact on the children it is intended to serve. Lawyer members of NCCPR also individually have litigated numerous precedential cases involving child protection policies and proceedings. NCCPR is concerned that, contrary to promoting the interests of vulnerable

newborn children, a policy which calls for the arrest of those children's mothers based upon urine or blood toxicology screens, or methadone treatment causes children to suffer unnecessary psychological harm and trauma from being separated from their mothers. NCCPR is also concerned that such a separation interferes with the children's constitutionally protected liberty interest in their relationship with their mothers.

Amicus Curiae the **Oklahoma Coalition for Reproductive Justice (OCRJ)**, founded as a 501(c)(4) in 2010, is a statewide grassroots coalition of organizations and individuals focusing on the advancement of reproductive health, rights and justice in Oklahoma. OCRJ peruses its mission through legislative advocacy, community outreach and education, and litigation. We believe that reproductive justice includes the right to have or not to have a child and respect for families in all their forms. It supports access to sexual education, contraception, abortion care and pregnancy care as well as to the resources needed to raise children in safe and healthy circumstances, with good schools and healthcare and other elements necessary for bright futures regardless of immigration status. It also supports all pregnancy outcomes. It encompasses respect for all individuals, their partners and families, and for sexuality and for gender differences.

Amicus Curiae the **Oklahoma Nurses Association (ONA)** is the professional association for registered nurses in Oklahoma working to empower nurses to improve health care in all specialties and practice settings by working as a community of professional nurses. ONA was founded in 1908 to foster high standards of nursing practice, promote educational development, and support better health care for Oklahomans. Nurses are the largest group of healthcare providers and ONA serves as the voice for the almost 50,000 registered nurses in Oklahoma. We support providing greater access to healthcare for all family members. ONA opposes efforts to subject women to criminal consequences for substance use disorder especially during pregnancy or postpartum.

Amicus Curiae the **Oklahoma Criminal Defense Lawyers Association (OCDLA)** works to protect and insure by rule of law those individual rights guaranteed by the Oklahoma and Federal Constitutions in criminal cases. OCDLA has a history of serving as a resource for the Oklahoma Courts providing *Amicus Curiae* opinions on legal questions having broad applicability. This case has statewide implications in that it will affect the constitutional rights of pregnant women in the State of Oklahoma. Therefore, the OCDLA joins as *amicus* to support the district court's holding that the child neglect statutes do not regulate the conduct of pregnant women regarding their pregnancies.

Amicus Curiae **Our Bodies Ourselves (OBOS)** provides clear, truthful information about health, sexuality and reproduction from a feminist and consumer perspective. OBOS vigorously advocates for women's health by challenging the institutions and systems that block women from full control over our bodies and devalue our lives. OBOS is noted for its long-standing commitment to serve only in the public interest and its bridge-building capacity. OBOS is dedicated to the autonomy and well being of all women.

Amicus Curiae the **Oklahoma Women's Coalition** (OWA) is a nonpartisan organization working to champion the collective power of Oklahomans to advance gender equity and justice. OWA achieves this mission by dismantling systemic injustice through policy change, advocacy and education. OWA honors and amplifies the voices most affected by, and often excluded from, decision and policy-making conversations, envisioning a socially just and equitable world where everyone has equal opportunity to flourish and to achieve the full potential for individuals and community. OWC is committed to policies that keep families together in Oklahoma and help women obtain treatment for substance use, addiction, and post-traumatic stress disorder, rather than approaches that seek to punish such women through the criminal-justice system. OWC has helped lead coalition efforts since 2007 to inform the Oklahoma Legislature of the dangers of criminalizing pregnant women and prevent the adoption of laws that would expose pregnant women dealing with addiction to incarceration.

Amicus Curiae **Still She Rises** (SSR) is a non-profit organization in Tulsa that offers legal representation to indigent mothers. SSR defends mothers against their criminal charges as well as the painful and unnecessary removal of their children and the potential dissolution of their families. In addition to providing traditional courtroom advocacy, SSR works with an interdisciplinary group of specialists to advocate in key areas that affect a woman's success, including mental and physical health services, and targets systemic issues impacting our clients' communities. Many of SSR's clients' involvement in the criminal justice and juvenile systems relates to their concurrent mothering and drug use. In our work defending these clients, SSR regularly encounters the assumption that evidence of a mother's drug use establishes her unfitness to parent or her disregard for her children's well-being. From our clients' experiences and relevant research, SSR knows this assumption to be false. SSR is also familiar with the harms that are inflicted on women, their families and their communities when public health conditions are met with criminal justice responses. SSR is committed to pursuing policies that break the cycle of poverty and instability that so often correlates with the incarceration of a mother. SSR opposes the criminalization of drug use by pregnant and mothering women because that action promotes and reinforces this cycle.

Amicus Curiae the **National Council for Incarcerated & Formerly Incarcerated Women and Girls** (National Council) is the only national advocacy organization founded and led by incarcerated and formerly incarcerated women and girls. The experience of National Council members gives them a unique perspective on the issue in the instant case. Based on the experience and observations of its members, the National Council knows that the prison experience increases trauma in women and, if they are mothers, to the children they are separated from. The National Council knows that prosecuting and imprisoning pregnant women causes sociological and individual harms, and is ineffective as a means of deterring and rehabilitating substance users and those with addiction.

Amicus Curiae **Dr. Susan F Sharp, Ph. D.*** is the Emerita David Ross Boyd Professor of Sociology at the University of Oklahoma. She has served on the executive board of the American

Society of Criminology and was the founding editor of *Feminist Criminology*, the official journal of the Division on Women and Crime of the American Society of Criminology. Dr. Sharp's research focuses include the incarceration of women and the impact of corrections policies on them and their families. Dr. Sharp is a long time researcher on women and crime and the criminalization of women in Oklahoma in particular. In 2014, she conducted a study and co-authored a report on incarcerated mothers and their children in Oklahoma prisons, one of five such studies over a ten-year period.

Amicus Curiae **Dr. Leslie Hartley Gise, M.D.***, is Clinical Professor of Psychiatry at the John A. Burns School of Medicine, University of Hawai'i. She has extensive experience teaching at the professional level regarding substance use disorders in women, and she worked at a facility treating drug and alcohol addicted pregnant and parenting women for eight years. She is past President of the North American Society for Psychosocial Obstetrics and Gynecology under ACOG

*institutional affiliation for identification purposes only

CERTIFICATE OF SERVICE

This is to certify that on November 27, 2019, a true and correct copy of the foregoing Motion for Leave to File *Amicus Curiae* Brief was served, by First Class Mail, upon the following:

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