IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

CRIMINAL APPEALS NUMBER CR-09-0485

AMANDA HELANIE BORDER KIMBROUGH
APPELLANT

v.

ON APPEAL FROM THE
CIRCUIT COURT OF
FRANKLIN COUNTY,
ALABAMA

THE STATE OF ALABAMA
APPELLEE

***AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT**

Oral Argument Not Requested

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INTERESTS OF *AMICI*

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, non-partisan organization of more than 500,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Through its Reproductive Freedom Project, the ACLU has long fought to ensure that women, including pregnant women, are accorded equal treatment under the law. The ACLU of Alabama is the ACLU's Alabama affiliate. With approximately 1500 members, the ACLU of Alabama has worked consistently to protect the civil liberties guaranteed Alabamians under state and federal law, including women's rights to equality and reproductive freedom.

STATEMENT OF THE CASE

This case concerns the Franklin County District Attorney's attempt to use the chemical endangerment statute - a law that criminalizes the exposure of a "child" to an "environment in which controlled substances are produced or distributed," Ala. Code §

26-15-3.2, and was enacted to address the serious risks posed by methamphetamine manufacturing to minors - not to prosecute and punish Ms. Kimbrough for the death of her extremely premature son. Ms. Kimbrough, who was not charged with any other drug-related crime (or any other crime at all), went into pre-term labor at twenty-five weeks of pregnancy and underwent emergency cesarean surgery; her son was born and died in the hospital, nineteen minutes after birth. The District Attorney's attempt to re-write a criminal law that was designed to enhance the penalties of those caught manufacturing drugs into a law addressing drug dependency and pregnancy and the relationship of a pregnant woman to her embryo or fetus is entirely unsupported by the statute and is unconstitutional. This Court should reject the District Attorney's attempt to radically expand a statute addressing the considerable dangers posed by methamphetamine labs into an unconstitutional law that turns women into criminals for no reason other than they tried to carry their pregnancies to term while struggling with addiction.

SUMMARY OF THE ARGUMENT

To construe the statute at issue to permit Ms. Kimbrough's prosecution is to render it unconstitutional in numerous respects. First, permitting the State to impose penalties on Ms. Kimbrough for trying to carry her pregnancy to term would impermissibly infringe on the fundamental constitutional rights of privacy and autonomy. Second, such misuse of the chemical endangerment statute violates due process because it fails to provide women with notice that becoming and remaining pregnant could result in criminal penalties. Moreover, such an unfettered delegation of authority to police and prosecutors to expand the child abuse statutes would undoubtedly result (as it has here) in inconsistent, ad hoc and subjective enforcement of the criminal laws in violation of the Due Process Clause. Third, permitting the prosecution of Ms. Kimbrough on the basis of her status as a pregnant woman suffering from addiction violates the Eighth Amendment's prohibition on status crimes and the criminalization of illness. Finally, allowing the State to criminalize women, but not men, for no other reason than that they allegedly used drugs

constitutes sex discrimination in violation of the Equal Protection Clause.

ARGUMENT

I. APPLICATION OF THE CHEMICAL ENDANGERMENT OF A CHILD STATUTE TO MS. KIMBROUGH WOULD VIOLATE HER CONSTITUTIONAL RIGHTS.

As ably set forth in Appellant's Brief, Ms. Kimbrough's conviction should be reversed as a matter of statutory interpretation alone. *See* Appellant's Br. 18-33. However, even if the chemical endangerment statute permitted the prosecution of Ms. Kimbrough in this instance (which it clearly does not), well established principles of constitutional law and statutory construction nonetheless compel the reversal of Ms. Kimbrough's conviction.

If a statute is reasonably susceptible to two constructions, one of which renders it unconstitutional, the Court must adopt the construction which sustains the constitutionality of the statute. *Surtees v. VFJ Ventures, Inc.*, 8 So. 3d 950, 976-77 (Ala. Civ. App. 2008), *aff'd*, 8 So. 3d 983 (Ala. 2008), *cert. denied*, 129 S. Ct. 2051 (2009). Because the application of the chemical endangerment statute to Ms.

Kimbrough in this instance would violate her constitutional rights, this Court should reject any such construction of the statute.[1]

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[1] Other courts have consistently rejected similar prosecutions under criminal child abuse, reckless or wanton endangerment, drug delivery, homicide, or related statutes. These courts have held that prosecutions of pregnant women who continue their pregnancies despite a substance abuse problem are without legal basis, unconstitutional, or both. *See, e.g., Reinesto v. Superior Court*, 894 P.2d 733, 735-36 (Ariz. Ct. App. 1995) (dismissing child abuse charges filed against woman for heroin use during pregnancy because the ordinary meaning of "child" excludes fetuses, and because concluding otherwise would offend due process notions of fairness and render statute impermissibly vague); *State v. Gethers*, 585 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1991) (dismissing child abuse charges brought for continuing to term in spite of a drug problem on ground that such application misconstrues the purpose of the law); *Kilmon v. State*, 905 A.2d 306, 314 & n.3 (Md. 2006) (collecting cases) (reasoning "courts must attempt to construe statutes in a common sense manner," *id.* at 311, and reversing conviction for reckless endangerment based on ingestion of drugs during pregnancy); *Sheriff v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (holding that application of child endangerment statute to a pregnant woman dependant on illegal substances would violate plain meaning of statute, deprive woman of constitutionally mandated due process notice, and render statute unconstitutionally vague); *State v. Martinez*, 137 P.3d 1195, 1197-98 (N.M. Ct. App. 2006), *cert. quashed by* 161 P.3d 260 (2007) (refusing to apply child abuse statutes to punish woman dependant on cocaine for continuing pregnancy to term). *But see Whitner v. State*, 492 S.E.2d 777, 782 (S.C. 1997) (permitting application of child neglect statute to viable fetus despite contrary decisions in other states, which were based on "entirely different bodies

A. The Use of Criminal Laws to Penalize Women Struggling With Drug Dependence Because They Become or Remain Pregnant Violates Their Rights of Privacy and Procreative Autonomy.

The State seeks to re-write existing criminal law in order to inflict extraordinary penalties on Ms. Kimbrough solely because she continued her pregnancy despite an underlying health problem: drug dependency. Had Ms. Kimbrough not been pregnant, or had she ended her pregnancy, she would not have been charged under the chemical endangerment statute; indeed, no man or non-pregnant woman struggling with a drug dependency *could have been* charged under the chemical endangerment statute under similar circumstances. Although Ms. Kimbrough does not contest that she is subject to prosecution under Alabama's existing drug or child abuse laws on the same basis as any other individual, prosecuting her solely on the basis of the alleged harm to her fetus constitutes an unjustified state intrusion into her constitutional rights to privacy, liberty, autonomy and bodily integrity.

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of case law from South Carolina").

The fundamental right to procreate is protected by the Fourteenth Amendment to the United States Constitution. *Skinner v. Oklahoma* ex rel. *Williamson*, 316 U.S. 535, 541 (1942); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart" of the right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"). Accordingly, the constitutional guarantee of procreative privacy specifically protects women from measures that burden or penalize the decision to carry a pregnancy to term. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (noting that the decision in *Roe v. Wade* "has been sensibly relied upon to counter" attempts to interfere with a woman's decision to become pregnant or to carry her pregnancy to term).

For example, in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the United States Supreme

Court found unconstitutional a rule that required pregnant schoolteachers to take unpaid maternity leave. The Court held that by "penaliz[ing] the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms," particularly the "freedom of personal choice in matters of marriage and family life." *Id.* at 639-40. Even when the State acts expressly in the name of protecting the embryo or fetus and the child that may subsequently be born - and even when the State's asserted concern is prenatal exposure to illegal drugs - the Supreme Court has clearly recognized that pregnant women are entitled to the full protections of the Constitution. *See Ferguson v. City of Charleston*, 532 U.S. 67, 81-86 (2001) (considering the constitutionality of a joint public hospital/law enforcement policy to drug test pregnant women and holding that, notwithstanding the State's asserted interest in protecting the embryo or fetus, the full protections of the Fourth Amendment applied). Thus, "where a decision as fundamental as that whether to

bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Carey*, 431 U.S. at 686.[3]

Because this prosecution implicates fundamental privacy rights, the burden shifts to the State to prove that using the chemical endangerment statute in this manner – to prosecute women struggling with drug dependency because they become and remain pregnant – furthers a compelling interest. *See Carey*, 431 U.S. at 685-86. The State, however, cannot establish that such prosecutions serve any legitimate, much less compelling, state interest. That is because such prosecutions are both ineffective and counterproductive. As the American Academy of Pediatrics has concluded: "Punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, *have no proven benefits for infant*

[3] The United States Supreme Court has departed from the strict scrutiny standard with respect to the right to choose to have an abortion, which is now protected under an "undue burden" standard. *See Casey*, 505 U.S. at 852, 876-79. However, strict scrutiny remains the standard for evaluating the right to procreate and bear a child. *See id.* at 858-59.

health." American Academy of Pediatrics, Committee on Substance Abuse, 1994 to 1995, *Drug-Exposed Infants*, 96 Pediatrics 365-66 (1995) (emphasis added). For this very reason, public health groups are nearly unanimous in opposing such prosecutions.[3] *See also* Brief *Amici Curiae* In Support of Appellant, submitted by the Drug Policy Alliance et al., at 11-17. The State's attempted application of the chemical endangerment statute to

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[3] *See, e.g.*, Am. Coll. Obstetricians & Gynecologists, *At-Risk Drinking and Illicit Drug Use: Ethical Issues in Obstetric and Gynecologic Practice*, ACOG COMMITTEE OPINION, No. 422, Dec. 2008, at 6("Putting women in jail, where drugs may be available but treatment is not, jeopardizes the health of pregnant women and that of their existing and future children."); Am. Coll. Obstetricians & Gynecologists, *Maternal Decision Making, Ethics, and the Law*, ACOG COMMITTEE OPINION, No. 321, Nov. 2005, at 9 ("Pregnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses."); *see also* Am. Med. Ass'n, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2670 (1990) (reporting AMA resolution that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate."); Am. Psychiatric Ass'n, *Care of Pregnant and Newly Delivered Women Addicts: Position Statement*, APA Document Reference No. 200101 (2001) (policies of prosecuting pregnant women "are likely to deter pregnant addicts from seeking either prenatal care or addiction treatment, because of fear of prosecution and/or civil commitment.").

drug-dependant pregnant women, therefore, does not further any state interest. Because these prosecutions also unmistakably burden the privacy and liberty interests of drug-dependent pregnant women, they are unconstitutional and must be rejected by this Court.

B. Application of the Chemical Endangerment Statute to Women Struggling With Drug Dependence Because They Become and Remain Pregnant is Impermissibly Vague and Fails to Give Fair Notice of Prohibited Conduct.

Applying the chemical endangerment statute to Ms. Kimbrough violates her constitutional right to due process of law because the statute provides no notice that continuing one's pregnancy and giving birth to a child while struggling with addiction could ever be penalized under that law. Moreover, if the State were permitted to so radically expand the chemical endangerment statute to reach the relationship between a pregnant woman and her embryo or fetus, despite the statute's plain language and the absence of any legislative history to that effect, then any child abuse law could be interpreted in this way. As a result, women would not only lack any notice of whether and when pregnancy could lead to criminal penalty, but the absence of standards guiding such a broad

application of the criminal laws would also invite arbitrary and discriminatory enforcement in violation of the Due Process Clause.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A statute will be void for vagueness (1) if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," *id.*, or (2) if it encourages arbitrary and discriminatory enforcement by failing to provide explicit standards for those who apply them. *See, e.g., id.; Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Colautti v. Franklin*, 439 U.S. 379, 390 (1979); *A.L.L. v. State*, No. 1080395, 2009 WL 2573907, *5 (Ala. 2009); *Lansdell v. State*, 25 So. 3d 1169, 1175-76 (Ala. Crim. App. 2007). As applied to Ms. Kimbrough, prosecution under the chemical endangerment statute fails to satisfy either constitutional requirement.[4]

[4] Indeed, courts in other states have repeatedly held that application of similarly worded statutes to a pregnant woman struggling with a substance abuse

Based on the plain language of the chemical endangerment statute, which does not mention either pregnant women or their embryos or fetuses, a woman of common intelligence could not know that she could be penalized under this law solely for being a drug-dependent woman who becomes pregnant, remains pregnant, or goes into labor. *Compare* Ala. Code § 13a-6-1(a)(3) ("[W]hen referring to the victim of a criminal homicide or assault, [person] means a human being, including an unborn child in utero at any stage of development, regardless of viability."). *Indeed, the use or ingestion of drugs in and of itself - by any adult - is not a crime in the state of Alabama.* *See* Ala. Code § 13A-12-201 et seq.; Ala. Code § 26-15-1 et seq.; *see also infra* Section C. Thus, to suggest that the chemical endangerment statute so fundamentally changes

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problem violates due process requirements. *See, e.g., Reinesto*, 894 P.2d at 736 (because criminal child abuse statute referred to "child" rather than "fetus," application to pregnant woman's conduct would offend due process); *Cochran v. Commonwealth*, No. 2008-SC-000095-DG, 2010 WL 2470870 at *2 (Ky. June 17, 2010); *Encoe*, 885 P.2d at 598 (principles of due process prevented court from interpreting child endangerment statute to reach transfer of drugs from mother to newborn thrcugh umbilical cord in moments immediately after birth).

Alabama law *sub silentio* and provides sufficient notice and warning that the use or ingestion of drugs by pregnant women has been singled out and made criminal is simply absurd.

Moreover, were the State's interpretation to stand - despite the plain language of the law and the absence of any legislative history supporting the State's construction of the statute - then there would be no discernible limit to what could constitute the willful abuse or mistreatment of a child under any of Alabama's child abuse laws. Nor would there be any standards or guidelines to prevent the arbitrary and discriminatory enforcement of these laws. For generations, numerous common conditions of and activities by pregnant women have been identified, rightly or wrongly, as posing some threat to embryonic or fetal wellbeing. For instance, to ensure optimal pre-natal development, pregnant women are urged to stop smoking entirely and immediately, *see* Heidi Eisenberg Murkoff & Sharon Mazel, *What To Expect When You're Expecting* 72-76 (4th ed. 2009); U.S. Department of Health and Human Services, *The Health Consequences of Involuntary*

Exposure To Tobacco Smoke: A Report of the Surgeon General, 167-244 (2006); American College of Obstetricians and Gynecologists, *Your Pregnancy & Birth*, 54-55 (4th ed. 2005) [hereinafter ACOG], and to avoid contact with anyone who is smoking and who could thereby subject the fetus to contamination from second-hand smoke, Murkoff & Mazel, *supra*, at 76; U.S. Department of Health and Human Services, *supra* at 170, 244. Pregnant women should also abstain from alcohol consumption, as "the Surgeon General, ACOG and the American Academy of Pediatrics (AAP) advise that no amount of alcohol is safe for pregnant women." Murkoff & Mazell, *supra*, at 71; *see also* ACOG, *supra*, at 55-57. In the name of fetal safety, pregnant women are further urged to refrain from changing a cat litter box, consuming unpasteurized cheese or undercooked meat, and gardening without gloves in order to avoid contracting toxoplasmosis, Murkoff & Mazel, *supra*, at 80, and to wear rubber gloves and avoid inhaling when using household cleaning products in order to limit exposure to potentially harmful chemicals, *id.* at 80-81. Women are urged to take folic acid before and during

pregnancy to protect the embryo from neural tube defects. *Id.* at 127. Pregnant women are also advised to ensure that their drinking water is free of lead, *id.* at 81-82, and to cut back on or give up caffeine, *id.* at 69-70; ACOG, *supra*, at 53. Gaining no less than 25, and no more than 35 pounds, is now encouraged, ACOG, *supra*, at 77-78; Murkoff & Mazel, *supra*, at 166, as is regular but not too strenuous exercise, Murkoff & Mazel, *supra*, at 68-69; ACOG, *supra*, at 37-41. *See also*, Stothard et al., *Maternal overweight and obesity and the risk of congenital anomalies: a systematic review and meta-analysis,* 301 JAMA 636 (2009) (meta-analysis concluding that maternal obesity is associated with a heightened risk of spina bifida and an increased risk of structural anomalies). These guidelines only begin to illustrate the tremendous scope of the ruling that the State urges upon this Court.

The Kentucky Supreme Court reached precisely this result in its recent ruling in *Cochran v. Commonwealth*, No. 2008-SC-000095-DG, 2010 WL 2470870 (Ky. June 17, 2010). That court dismissed the indictment of a pregnant woman who allegedly used cocaine during her

pregnancy under Kentucky's wanton endangerment of a child statute. *Id.* at *1. In so doing, the court recognized that such an application of the criminal laws "could have an unlimited scope and create an indefinite number of new crimes . . . a slippery slope whereby the law could be construed as covering the full range of a pregnant woman's behavior - a plainly unconstitutional result that would, among other things, render the statutes void for vagueness." *Id.* at *1. (citing *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993)) (internal quotations omitted). The court further explained:

> The mother was a drug addict. But, for that matter, she could have been a pregnant alcoholic, causing fetal alcohol syndrome; or she could have been addicted to self abuse by smoking . . . .
>
> *. . . The "case-by-case" approach suggested by the Commonwealth is so arbitrary that, if the criminal child abuse statutes are construed to support it, the statutes transgress reasonably identifiable limits; they lack fair notice and violate constitutional vagueness.*

Id. at *2 (quoting *Welch*, 864 S.W.2d at 283) (emphasis added).[3]

The State's virtually limitless construction of the chemical endangerment statute here would necessarily result in the same lack of fair notice and would similarly encourage discriminatory and arbitrary enforcement of the child abuse laws in violation of the constitutional due process guarantee against statutory vagueness. For this reason, this Court must reverse Ms. Kimbrough's conviction.

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[3] *See also Kilmon*, 905 A.2d at 311-12 ("[I]f, as the State urges, the statute is read to apply to the effect of a pregnant woman's conduct on the child she is carrying, it could well be construed to include . . . a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature-everything from becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, to the continued use of legal drugs that are contraindicated during pregnancy . . . to exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child. Such ordinary things as skiing or horseback riding could produce criminal liability. If the State's position were to prevail, there would seem to be no clear basis for categorically excluding any of those activities from the ambit of the statute; criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be").

C. Application of the Chemical Endangerment Statute to Women Struggling With Drug Dependence Because They Become and Remain Pregnant Violates the Eighth Amendment's Prohibition Against Status Crimes.

Given that the State unequivocally relies on Ms. Kimbrough's medical conditions at the time the alleged abuse occurred—pregnancy and drug dependency—as the justification for the prosecution, this prosecution plainly runs afoul of the Eighth Amendment's prohibition against status crimes. *See Robinson v. California*, 370 U.S. 660 (1962).

In *Robinson*, the Supreme Court struck down a state statute that made it a crime simply to suffer from the disease of drug addiction. 370 U.S. at 666 ("[W]e deal with a statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms'" and can be found "continuously guilty"). As the Court explained:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease . . . . But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an

> infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. . . .
>
> . . . To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.

Id. at 666-67. Accordingly, the Court held that a law "which imprisons a person thus afflicted [with drug addiction] as a criminal" contravened the fundamental principles of the Eighth Amendment and was therefore unconstitutional. *Id.* at 667.

The State can cite no statute (because there is none) that criminalizes the use or ingestion of drugs alone, nor any evidence that would support charging Ms. Kimbrough with a recognized drug crime in this State. As in virtually every other state, drug use alone does not constitute a crime in Alabama. *See* Ala. Code § 13A-12-201 et seq.; Ala. Code § 26-15-1 et seq. Indeed, that is unsurprising as the medical profession has long recognized that "addiction is not simply the product of a failure of individual willpower," AMERICAN MEDICAL ASS'N BOARD OF TRUSTEES, DRUG ABUSE IN THE

UNITED STATES: A POLICY REPORT 236, 241 (1988), and has both biological and genetic dimensions.[5] (It should go without saying that pregnancy too is a medical condition and not a crime). Thus, by prosecuting Ms. Kimbrough for trying to continue her pregnancy to term even though she suffered from addiction, the State – in direct contravention of the Constitution, *see Robinson*, 370 U.S. at 666 - has essentially created and charged Ms. Kimbrough with the crime of the co-existence of these two medical conditions.

As *Robinson* so clearly demonstrates, "[t]o inflict punishment for having a disease is to treat the individual as a diseased thing rather than as a sick human being." *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (discussing *Robinson*). At its core the Eighth Amendment requires that "a punishment must not be so severe as to be degrading to the dignity of human beings." *Furman*, 408 U.S. at 271. Because, under *Robinson*, this prosecution was in violation of the

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[6] *See Linder v. United States*, 268 U.S. 5, 18 (1925); *Robinson*, 370 U.S. at 667; American Psychiatric Ass'n, The Diagnostic and Statistical Manual of Mental Disorders - 4th Edition (2000), p. 176-181 (specifying diagnostic criteria for "Substance Dependence").

Eighth Amendment, this Court should reverse Ms. Kimbrough's conviction.

D. Application of the Chemical Endangerment statute to Women Struggling With Drug Dependence Because They Become and Remain Pregnant Violates the Equal Protection Clause of the Fourteenth Amendment.

Allowing the prosecution of Ms. Kimbrough because she chose to continue her pregnancy even though she was suffering from a drug dependency constitutes sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.

State action that subjects pregnant women to increased criminalization and control "in order to preserve the strength and vigor of the race," *Muller v. Oregon*, 208 U.S. 412, 421 (1908), is no longer permissible under the Constitution. In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 729 (2003), the United States Supreme Court recounted with disapproval the long and damaging history of state actors treating women more restrictively based on the view that the "'proper discharge of [a woman's] maternal functions – having in view not merely her own health, but the well-being of the race – justif[ies]'"

government intervention. *Id.* (quoting *Muller*, 208 U.S. at 422). However, it is now well settled that when states place additional restrictions on women to which men are not subject in "rel[iance] on invalid gender stereotypes," this constitutes potentially unconstitutional "gender discrimination" and "warrant[s] heightened scrutiny." *Id.* at 730. Such suspect restrictions include those based on stereotypes about "women's roles . . . when they are mothers *or mothers-to-be*." *Id.* at 736 (internal citations omitted) (emphasis added); *see also Casey*, 505 U.S. at 896 (that women's reproductive capacities preclude "full and independent legal status under the Constitution . . . [is] no longer consistent with our understanding of the family, the individual, or the Constitution" (citation omitted)).[7]

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[7] Given the discriminatory nature of the prosecution, it cannot be upheld unless this Court finds an "exceedingly persuasive justification" for the State's decision to prosecute drug-dependant women. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Under this heightened review standard, this Court must find that the discriminatory means employed, prosecution, "serves important governmental objectives and . . . [is] substantially related to the achievement of those objectives." *Id.* (quoting *Miss. Univ. for*

As the record in this case makes incontrovertibly clear, Ms. Kimbrough's pregnancy was a *but for* cause of this prosecution – as noted above, drug use is not a crime in Alabama. However, because nearly every act, omission or medical condition experienced by the pregnant woman affects embryonic or fetal health, *see supra* Section II, to allow Ms. Kimbrough's conviction to stand would subject women's liberty to unprecedented and potentially limitless control by the government. This sort of discriminatory approach to the criminal laws can no longer withstand constitutional scrutiny under the Equal Protection Clause. Accordingly, Ms. Kimbrough's conviction should be reversed.

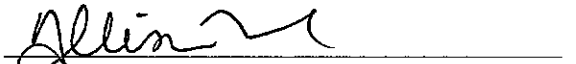
CONCLUSION

For the reasons set out above, as well as those fully briefed by Appellant and addressed by other *amici* in support of Appellant, *amici curiae* ACLU respectfully request that Honorable Court reverse Ms. Kimbrough's conviction.

Women, 458 U.S. at 724). For all the reasons set forth in Section I, *supra*, demonstrating that these prosecutions only serve to *undermine* maternal and fetal health, the State has plainly failed to carry its burden here.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Brief of Amicus Curiae on the Honorable Troy King, Attorney General of the State of Alabama, 310 State House, 11 S. Union St., Montgomery, Alabama 36130 by placing a copy of same in U.S. mail, postage prepaid and properly addressed on this 6th day of July, 2010.



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