CR-16-879

IN THE ARKANSAS COURT OF APPEALS

ANNE O'HARA BYNUM — APPELLANT

v.

STATE OF ARKANSAS — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF DREW COUNTY,
ARKANSAS, FIRST DIVISION
CASE NO. 22CR-15-508
THE HONORABLE SAMUEL B. POPE, CIRCUIT JUDGE

BRIEF OF *AMICI CURIAE*
NATIONAL PERINATAL ASSOCIATION
& NATIONAL PERINATAL SOCIAL WORKERS ASSOCIATION
IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST

The National Perinatal Association ("NPA") is an interdisciplinary 501(c)(3) organization that strives to be the leading voice for perinatal care in the United States. Its diverse membership is comprised of healthcare providers, parents and caregivers, educators, and service providers united in their desire to give voice to and support babies and families across the country. The NPA aims to promote best practices, improve perinatal outcomes, and ensure justice for pregnant women, infants, and families. Since 1977, it has published position papers that reflect its views on topics of national importance, including *Interdisciplinary Guidelines for Care of Women Presenting to the Emergency Department with Pregnancy Loss*.

The National Association of Perinatal Social Workers ("NAPSW") helps individuals, families, and communities respond to psychosocial issues that emerge during the period from pre-pregnancy through the first year of child's life. The NAPSW believes that every baby and every family should be supported with competent and compassionate care, and its community of perinatal social workers strive for excellence in practice to benefit families around the time of birth, including those that experience perinatal loss. As the NAPSW explains on its website, "When a perinatal loss occurs (infertility, miscarriage, fetal diagnosis, still birth or neonatal death), the perinatal social worker helps families to understand, express, and cope with feelings of grief and assists as they learn to live with their 'new normal.'" *What*

is a Perinatal Social Worker, THE NATIONAL ASSOCIATION OF PERINATAL SOCIAL WORKERS, http://www.napsw.org/what-is-a-perinatal-social-worker (last visited Aug. 14, 2017).

Both the NPA and the NAPSW believe that women who deliver a demised fetus should be treated with compassionate care, not criminal prosecution, and both organizations are deeply concerned about the legal, ethical, social, political, and personal ramifications of allowing Ms. Bynum's conviction to stand. These concerns affect not only Ms. Bynum and her immediate family, but they also reverberate across her community, the State of Arkansas, and the nation.

SUMMARY OF THE ARGUMENT

In this *amicus* brief, the NPA and NAPSW ("*Amici*") offer a number of medical, social, and legal arguments for the Court to consider. First, the brief explains why Ms. Bynum's decision to rest after the birth was understandable, given the sheer exhaustion that typically accompanies labor and delivery. Second, it discusses why Ms. Bynum's understanding of fetal development was reasonable. Third, it details why prosecutions such as these harm women, children, and the greater community. Finally, it analyzes the First Amendment issues that lurk in the shadows of this prosecution. Overall, *Amici* urge this Court to consider the varied issues and arguments that affect Ms. Bynum, the greater Arkansas community, and citizens across this nation—and overturn the conviction.

ARGUMENT

I. Ms. Bynum's Post-Delivery Behavior Was Not Unusual

Because most people have little experience with attending or giving birth, the public, including jurors and prosecutors, is primed to associate birth with what the media portray. However, movies, television, and other touchstones of popular culture alternatively dramatize and idealize childbirth, making what most of the public knows about the process somewhat divorced from reality. Sitcoms make birth funny. Movies shorten labor's extended timeline to fit its three-act format. No one seems to include the third stage of labor (delivery of the placenta). As one

physician/writer opined, "Of all the medical myths perpetrated by TV and film, giving birth ranks near the top." Rahul K. Parikh, *What Movies Get Wrong About Childbirth*, SALON (Apr. 11, 2011), http://www.salon.com/2011/04/11/pregnancy_screaming_poprx; *see also* Lynsey Eidell, *11 Movie and TV Scenes that Get Labor Unbelievably Wrong*, GLAMOUR (May 5, 2017, 5:11 PM), https://www.glamour.com/story/movie-and-tv-scenes-that-get-labor-give-birth-wrong-video. For television and other media to strive for accuracy, they would need to portray birth as plainly exhausting.

Leading obstetrics textbooks make this reality clear. As one classic obstetrics tome notes, one of the two most common indications for employing forceps or other tools during a vaginal delivery is maternal exhaustion. F. GARY CUNNINGHAM, ET AL., WILLIAMS OBSTETRICS 574 (24th ed. 2014). Another leading obstetrics textbook concurs that, in the second stage of labor, which is the time "from full cervical dilation until delivery of the baby[,]" women "are generally experiencing pain and exhaustion[.]" Sarah Kilpatrick & Etoi Garrison, *Normal Labor and Delivery*, in OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES 266 (Steven G. Gabbe ed., 7th ed. 2017) *and* Peter E. Nielsen, Shad H. Deering, and Henry L. Galan, *Operative Vaginal Delivery*, *in ibid* at 304. Maternal exhaustion, when it complicates labor and delivery, even has its own billing code in the International Classification of Diseases system. *See* ICD List, *ICD-10 Diagnosis Code O75.81:*

Maternal Exhaustion Complicating Labor and Delivery, http://icdlist.com/icd-10/O75.81 (last visited Aug. 14, 2017). As obstetrics teaches, childbirth and exhaustion are tightly coupled.

First-person accounts of birth echo physicians' observations. One mother of five characterized birth as "beautiful, primal, horrible, wonderful, exhilarating, **exhausting**, **painful**, shining." Kristi Hayes-Devlin, *13 Labor Tips from 2 Five-Time Moms*, WRAPSODY (May 14, 2014), https://wrapsodybaby.com/13-things-to-know-about-labor-from-2-five-time-moms (reply to 11th comment, January 31, 2015 at 7:31 pm; emphasis added). A blogger writing under the byline Meganlsmith3 remarked, "Giving birth is an extremely traumatic experience for a woman's body. Labor, alone, is equivalent to running a marathon. Then add in the stretching, and tearing, along with the amount of blood lost. **Any person experiencing this type of trauma would normally be expected to stay in bed resting for days**." Meganlsmith3, *What Recovering from Giving Birth is REALLY* Like, WE HAVE KIDS (Nov. 19, 2011), https://wehavekids.com/having-baby/What-recovering-from-Giving-Birth-is-REALLY-like (emphasis added). The bottom line for birthing women is this: "You're going to be tired from labor and delivery[.]" DAWN MEEHAN, YOU'LL LOSE THE BABY WEIGHT (AND OTHER LIES ABOUT PREGNANCY AND CHILDBIRTH) 239 (2010).

Against that backdrop, Ms. Bynum's decision to wait a few hours, spending part of it sleeping, after a stillbirth before transporting the fetal remains to a hospital is not alarming. Birth is exhausting. But the prosecution's decision to use a period of rest as evidence of criminality is not remotely attuned to the medical and physiological realities of giving birth. Ask any obstetrician, midwife, nurse, social worker, or other support personnel who attend birth. Or ask any woman who has given birth. Rushing to a hospital for assistance with a demised fetus seems more unusual, given its inherent futility and the physiologic reality of the immediate postpartum period, than simply resting. In short, Ms. Bynum's post-birthing behavior does not raise alarms and should not have been offered as support for a criminal act. The State should have been required to present evidence based on science and reality, not Hollywood fantasy. Resting is simply what women do after they give birth.

II. Ms. Bynum's Beliefs About Fetal Development Reflect Public Information On The Subject

Ms. Bynum believed that she could induce an early birth without posing risks or harms to the child, and, after the birth, she planned to bring the newborn to the hospital for care and subsequent adoption.[1] Those beliefs may be inconsistent with

[1] In this case, the stage of fetal development is not at issue because fetal demise occurred *in utero*. However, the prosecution's almost exclusive focus at trial on its

what the medical community, with its specialized access to journals, textbooks, mentors, and patients, understands about pre-term birth, but they are not inconsistent with information available to the public.

Media coverage of premature birth suggests to the public that hospitals routinely guarantee the health of even the tiniest babies. Baby Mason, born at 24 weeks and 1 day gestation, is "thriving at home" and "is now a 7-month-old smiling and giggling boy." *Micro Preemie Born at 24 Weeks, Flourishes*, UC DAVIS | HEALTH, http://www.ucdmc.ucdavis.edu/welcome/features/2015-2016/12/20151202_micro-preemie.html (Dec. 2, 2015). Baby Eirianna, born at 23 weeks gestation weighing only 13 ounces—"the smallest baby I ever took care of here," said one NICU nurse—is going home. Leah Hope, *After 140 days, Premature Baby to Leave Mount Sinai NICU*, ABC 7 EYEWITNESS NEWS (Feb. 21, 2017), http://abc7chicago.com/family/after-140-days-premature-baby-to-leave-mount-sinai-nicu/1766137. Baby Juniper, born at 23 weeks, grew up to be what her mom calls "perfect." NPR Staff, *"Juniper": The Story Of A Premature Baby Girl Who Grew To Be "Perfect"*, NPR | ALL THINGS CONSIDERED (Sept. 17, 2016, 5:12 PM), http://www.npr.org/2016/09/17/494394905/the-story-of-a-premature-birth-in-juniper.

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unsupported theory that Appellant was attempting an abortion makes the context for her beliefs about induced birth important for *Amici* to provide.

For people who hear or read these and similar stories, it would not be unreasonable to think that doctors can ensure healthy babies when a birth occurs at or after 23 and 24 weeks gestation.

In addition, the gap between knowledge and ignorance may be especially wide in rural towns. "Compared to students in urban or suburban schools," says Rachel Martin in an article for *The Atlantic*, "students in rural areas and small towns are less likely to attend college." Rachel Martin, *Salvaging Education in Rural America*, THE ATLANTIC (Jan. 5, 2016), https://www.theatlantic.com/education/archive/2016/01/americas-rural-schools/422586/. She observes that young people with bright futures resettle elsewhere. Rural areas, Martin says, are "the sort of place talented, educated young people flee as soon as they can." *Id.*

Ms. Bynum reflects her world—its positive attributes as well as its negative ones. She may not have understood the nuances of a birth at 33 weeks, but a lack of understanding about potential medical issues associated with pre-term babies does not reflect criminality. Rather, it is indicative of the public's (especially the rural public's) level of knowledge about gestation. A lack of accurate knowledge about fetal development and the needs of a baby born at 33 weeks may represent a failure of public health education, but it should not be evidence of a crime.

III. Prosecutions of Women for Decisions Surrounding Birth Deters Women and Their Families From Seeking Necessary Medical Care

A classic precept of the criminal justice system is deterrence: to deter the individual from repeating the behavior and to deter others from engaging in it. As the Supreme Court of the United States has noted, "A [criminal] sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation." *Ewing v. California*, 538 U.S. 11, 25 (2003) (*citing* 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.5, pp. 30-36 (1986) (explaining theories of punishment)). Prosecutions of women for behaviors that occurred during their pregnancy or delivery—here, for "concealing a birth" from Ms. Bynum's mother yet presenting fetal remains to hospital personnel[2]—may have a deterrent effect, but not one related to the behavior at issue. Rather, these prosecutions may deter *other* pregnant women from seeking necessary medical care. When a hospital becomes the setting for a criminal investigation and healthcare providers forsake their role as keepers of secrets to sharers of those secrets (with the police), individuals may

[2] Notably, by bringing the fetal remains to the hospital, Ms. Bynum achieved the precise goal of the statute under which she was prosecuted and convicted of violating: to allow forensic professionals to determine that a fetus is, in fact, demised prior to birth. Further, she complied with Arkansas law governing notification of stillbirths. ARK. CODE. ANN. § 20-18-603 ("A fetal death . . . shall be reported within five (5) days after delivery to the Division of Vital Records or as otherwise directed by the State Registrar of Vital Records.").

decide that avoiding a criminal investigation and jail takes precedence over optimal personal and fetal health.

Numerous advocacy groups agree. In a statement submitted to the Senate Finance Committee concerning victims of drug abuse, the Law and Policy Committee of the Association of Maternal and Child Health Programs wrote,

> The threat of criminal prosecution prevents many women from seeking prenatal care and early intervention for their alcohol or drug dependence, undermines the relationship between health and social service workers and their clients, and dissuades women from providing accurate and essential information to health care providers. The consequence is increased risk to the health and development of their children and themselves.

Association of Maternal and Child Health Programs, *Law and Policy Committee, Statement Submitted to the Senate Finance Committee Concerning Victims of Drug Abuse: Resolution on Prosecution* (1990). The March of Dimes concurs. In the context of pregnant women who use or abuse drugs, it "opposes policies and programs that impose punitive measures" because those measures "will drive women away from treatment vital both for them and the child." March of Dimes, *Fact Sheet, Policies and Programs to Address Drug-Exposed Newborns*, http://www.marchofdimes.org/materials/NAS-Policy-Fact-Sheet-December-2014.pdf (last visited Aug. 14, 2017).

The same reasoning applies here. Prosecutions of women who present to hospitals for help send a message to the greater community that a hospital is not the

place to go for confidential care. Rather, the message is that anything you say or do can and will be used against you in a court of law. Reasonable women will not present for care. Because of that reality, the American College of Obstetricians and Gynecologists Committee on Ethics says that "[s]eeking obstetric–gynecologic care should not expose a woman to criminal or civil penalties, such as incarceration, involuntary commitment, loss of custody of her children, or loss of housing." American College of Obstetricians and Gynecologists Committee on Ethics, Committee Opinion 473, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (Reaffirmed 2014) 117 OBSTET. GYNECOL. 200 (2011), available at https://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Substance-Abuse-Reporting-and-Pregnancy-The-Role-of-the-Obstetrician-Gynecologist.

Overall, prosecutions like that of Ms. Bynum instill a general fear in the community of being arrested for seeking health care at a hospital. Women who have been prosecuted will not return to physicians and hospitals for a future pregnancy. Their children, and others in their communities, are also likely to remain outside of a system viewed as suspicious, untrustworthy, and conspiratorial. To avoid entanglement with the criminal justice system, other women will avoid the medical community for both their own care and that of their families. Thus, a core precept of the criminal justice system is turned on its head: the behavior that is deterred is

not the alleged crime, but, rather, the act of seeking necessary and proper medical care. Because the prosecution of Ms. Bynum fails to follow the principles of criminal justice (and thwarts an important public health goal), it should not have occurred at all.

IV. The Prosecution's Argument, That Concealing A Birth Is Equivalent To Concealing A Pregnancy, Raises Significant First Amendment Concerns

Throughout Ms. Bynum's trial, the prosecution argued that concealing a birth is the same as concealing a pregnancy. *See Record on Appeal at* 104-05, 108, 117, 210-11; *Ab.* 7-8, 10, 18, 23-24. Regardless of *why* the prosecution advanced that equivalency, the fact that it did raises serious constitutional issues. Indeed, the prosecution's logic impacts Ms. Bynum's First Amendment rights.

First Amendment protections are robust. Not only does that amendment protect pure speech—the written and spoken word—but it also protects certain nonverbal expressive conduct. As the Supreme Court of the United States has explained, "The First Amendment generally prevents government from proscribing speech, . . . or even expressive conduct, . . . because of disapproval of the ideas expressed." *See, e.g.*, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (internal citations omitted). The Court has defined expressive conduct as "a message" "delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative."

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) (citing *Spence v. Washington*, 418 U.S. 405 (1974) *and Tinker v. Des Moines School District*, 393 U.S. 503 (1969)).

Under that two-part test, concealment of a pregnancy is expressive conduct that merits First Amendment protection. First, the behavior is intended to communicate the message of being *not pregnant*. Second, that message is reasonably understood by and communicated to a viewer. People generally assume that women who are not visibly pregnant are not pregnant, and they can discern that women who are visibly pregnant are pregnant. But that begs the question: why would a woman want to conceal a pregnancy and communicate that she is not pregnant? Any number of reasons apply, and these reasons establish that the conduct of hiding a pregnancy is worthy of protection in the marketplace of ideas.

Like so many personal issues, pregnancy can be political. Employers, superiors, and others in the workplace discriminate against pregnant women. Were that not the case, laws that exist to curb such discrimination and offer remedies to those who experience it would be unnecessary. On the federal level, pregnancy discrimination is prohibited by Title VII of the Civil Rights Act of 1964 as modified by the Pregnancy Discrimination Act. *See* 42 U.S.C. § 2000e–2(a) & (k). Arkansas also bans workplace discrimination due to pregnancy. *See* ARK. CODE ANN. § 16-123-102(1). Indeed, the Arkansas Supreme Court has noted that termination of

employment because of pregnancy would, if proven, "constitute gender discrimination expressly prohibited under Ark. Code Ann. § 16–123–107(a)(1)." *Flentje v. First Nat. Bank of Wynne*, 340 Ark. 563, 566, 11 S.W.3d 531, 534 (2000).

Such laws are not simply normative statements against discrimination; their enforcement shows that Arkansas women, as elsewhere, have first-hand experience with losing a job—or not getting one in the first place—because of a pregnancy. In 2014, for example, Arkansas pet food processor Triple T Foods was ordered to pay $30,000 and offer other relief to a former lab technician who was terminated on the same day that she shared news of her pregnancy with the company. EEOC Press Release, *Triple T Foods to Pay $30,000 to Settle EEOC Pregnancy Lawsuit* (July 28, 2014), https://www.eeoc.gov/eeoc/newsroom/release/7-28-14.cfm. In 2002, Arkansas-based Wal-Mart Stores, Inc. settled a pregnancy discrimination lawsuit for $220,000 in damages and other relief for its failure to hire a female applicant because she was pregnant. (The Assistant Manager told the applicant to "come back after she had the baby[.]") EEOC Press Release, *Wal-Mart to Pay $220,000 for Rejecting Pregnancy Applicant, in EEOC Settlement* (Dec. 23, 2002), https://www.eeoc.gov/eeoc/newsroom/release/12-23-02.cfm. And in *In re McElhanon*, an employee's supervisor at Arkansas's North Hills Country Club unequivocally stated that he was directed to "get rid of her" because she was pregnant and that he did, in fact, terminate her employment because of her

pregnancy. 207 B.R. 188 (Bankr. E.D. Ark. 1997). Thus, a reasonable woman may wish to limit public knowledge of her pregnancy as part of a personal effort to avoid workplace discrimination and make a public statement about keeping a pregnancy private. By appearing "not pregnant," she sends a message to others in the workplace that she should not be subject to harassment and discrimination.

Similarly, and relating to the issue of personal privacy, reasonable pregnant woman may want to mind her business—and encourage others to mind theirs. In the words of Justice Louis D. Brandeis, she may simply want to be "let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (arguing that the Fourth Amendment "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men"). Notably, pregnancy represents "an identity shift"—one that, in a recent article for *The New York Times*, psychiatrist and writer Dr. Alexandra Sacks called "one of the most significant physical and psychological changes a woman will ever experience." Alexandra Sacks, *The Birth of a Mother*, N.Y. TIMES (May 8, 2017), https://nyti.ms/2pW71qj. As Dr. Sacks noted, "[G]iving birth to a new identity can be as demanding as giving birth to a baby." *Id.* That identity shift—whether it is the identity of being a mother or being a mother of two children, three children, or more—may be a process that a woman wants to address on her own time. Public knowledge of a woman's pregnancy speeds up that shift.

Perhaps a pregnant woman does not want to reveal a pregnancy because miscarriages and stillbirths are not rare. In fact, 20-30% of all pregnancies will end in one of those outcomes. Claudia Malacrida, *Complicating Mourning: The Social Economy of Perinatal Death*, 9 QUALITATIVE HEALTH RES. 504, 505 (July 1999). Women who experience miscarriage or stillbirth and who have revealed the pregnancy then need to share the news to a bevy of relatives, colleagues, and strangers. When there is no happy ending with an album full of baby pictures to share, people wonder what happened. As one writer who experienced a miscarriage explained,

> Whether or not your pregnancy was planned, miscarriage can be more painful than you ever imagined. You may be stunned, thinking, 'Can I please wake up from this bad dream?' You may wish everyone would just go away and leave you alone. If you shared the news about your pregnancy with others—or even if you didn't—you may wonder how you will ever be able to tell them about your loss. Sharing news like this is not easy.

Annie Stuart, *Telling Others About Your Miscarriage*, WEBMD, http://www.webmd.com/baby/telling-others-about-your-miscarriage#1 (last visited Aug. 14, 2017). In short, the need to explain a very private situation to others creates an additional layer of discomfort that can be avoided easily by concealing the pregnancy.

Additional reasons to keep a pregnancy secret exist. Perhaps she does not want the judgment of strangers foisted upon her in the form of comments about the

food she eats. *See, e.g.*, Judith Burns, *Modern Mothers 'Watched and Judged', Say Researchers*, BBC NEWS (Mar. 20 2017), http://www.bbc.com/news/education-39309424 (discussing unwanted comments from waiters and others about pregnant women's food choices). Or the comments of the internet throngs about the exercise she may or may not do. *See, e.g.*, Anahad O'Connor, *Pregnant Weight Lifter Stirs Debate*, N.Y. TIMES (Sept. 24, 2013), https://nyti.ms/2mQYEqX (reporting on a woman who endured a "firestorm of criticism" after posting photos of her lifting heavy weights while 38 weeks pregnant). Or the inevitable sets of hands that find themselves on a pregnant belly, as if it was a beacon, an orb, inviting unwanted touch. *See, e.g.*, Elizabeth Yuko, *When You Look Pregnant, But You're Not*, N.Y. TIMES (Sept. 16, 2016), https://nyti.ms/2jAKGLV.

Bioethicist Elizabeth Yuko's experiences of *not* being pregnant but wearing clothes—an empire-waist dress—that suggested pregnancy to others is telling. On an evening bus ride in New York City, a male stranger insisted that she take his seat. She wrote, "[E]ven the appearance of pregnancy is enough for many people to think that a woman's tummy is (literally) up for grabs. When I finally acquiesced and took that man's seat on the bus that day, he put both hands on my belly and rubbed it as we switched places. By the time I processed what had happened, he got off the bus." *Id.* Yuko also remarked, "This stranger felt as if he were responsible for the

well-being of my nonexistent fetus and took it upon himself to scold me in front of the rest of the bus, providing unsolicited and inaccurate advice." *Id.*

Perhaps because of experiences like that, when celebrated Nigerian novelist Chimamanda Ngozi Adichie was pregnant, and even after she birthed her baby, she kept things quiet. As she explained, "I just feel like we live in an age when women are supposed to perform pregnancy. We don't expect fathers to perform fatherhood. I went into hiding. I wanted it to be as personal as possible." Lynsey Chutel, *Award-Winning Author Chimamanda Ngozi Adichie has had a Baby, not that it's Anyone's Business*, QUARTZ AFRICA (July 3, 2016), https://qz.com/722822 /award-winning-author-chimamanda-ngozi-adichie-has-had-a-baby-not-that-its-anyones-business. In so many ways, a public pregnancy speaks volumes and, whether invited or not, merits a range of reactions from bosses, relatives, friends, strangers, and even the government. Clearly, there are many reasons why women would not want to communicate their pregnancies.

But even if few reasons to hide a pregnancy existed, the choice of dress, alone, could merit constitutional protection. In *Canady v. Bossier Parish School Board*, a case involving students' clothing choices, the U.S. Court of Appeals for the Fifth Circuit assumed without deciding that "an individual's choice of attire . . . may be endowed with sufficient levels of intentional expression to elicit First Amendment

shelter." 240 F.3d 437, 440 (5th Cir. 2001). More specifically, the *Canady* court wrote,

> A person's choice of clothing is infused with intentional expression on many levels. . . . Clothing may also symbolize ethnic heritage, religious beliefs, and political and social views. Individuals regularly use their clothing to express ideas and opinions. . . . [S]tudents in particular often choose their attire with the intent to signify the social group to which they belong, their participation in different activities, and their general attitudes toward society and the school environment. While the message students intend to communicate about their identity and interests may be of little value to some adults, it has a considerable affect, whether positive or negative, on a young person's social development. Although this sort of expression may not convey a particularized message to warrant First Amendment protection in every instance, we cannot declare that expression of one's identity and affiliation to unique social groups through choice of clothing will never amount to protected speech.

Canady v. Bossier Parish School Bd., 240 F.3d 437, 440–41 (5th Cir. 2001). Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit echoed that sentiment when he wrote, "Merely wearing clothes inappropriate to a particular occasion could be a political statement. For that matter, parading in public wearing no clothing at all can, depending on the circumstances, convey a political message." *Brandt v. Board of Educ. of City of Chicago* (7th Cir. 2007) 480 F.3d 460, 465 (*citing White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460–61 (4th Cir. 2005); *United States v. Various Articles of Merchandise*, 230 F.3d 649, 658–59 (3d Cir. 2000); *Huffman v. United States*, 470 F.2d 386, 399 (D.C. Cir. 1971)).

Academics have explored the contours of dress and the First Amendment as well. In an article about workplace dress codes, Professor Janet Ainsworth explained, "Dress is never neutral and meaningless but is inextricably culturally coded. When a coded signal of identity is displayed through dress and appearance, observers react based on what they infer about that person on the basis of their appearance." Janet Ainsworth, *What's Wrong with Pink Pearls and Cornrow Braids?: Employee Dress Codes and the Semiotic Performance of Race and Gender in the Workplace*, LAW, CULTURE, AND VISUAL STUDIES 5 (Anne Wagner, Sophie Cacciaguidi & Richard K. Sherwin, eds. 2014).

In the case at bar, Ms. Bynum did not want to communicate her pregnancy to some people—including her mother. She did not want to change her identity from not pregnant to pregnant, and that decision and that message should not be squelched or punished by the government. To be sure, a citizen's right to expressive conduct is not unlimited. As the U.S. Supreme Court explained in *Clark v. Community for Creative Non-Violence*,

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

468 U.S. 288, 293 (1984). But the prosecution fails that test. Basically, the prosecutor argued that Ms. Bynum has no right to conceal a pregnancy. At all. From anyone. Ever. Such a restriction is not bound by time, place, or manner. And whatever government interest exists in regulating statements about avoiding discrimination, moving into the identity of motherhood on one's own timeline, simply being "let alone" vis-à-vis the government as well as strangers, choosing clothing to express identity—and no legitimate government interest may actually exist—here, it is certainly not substantial, not narrowly drawn, and not unrelated to the suppression of expression. *See Clark*, 468 U.S. at 294 (symbolic expression "may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech").

Overall, prosecuting a woman for concealing a birth, which is, according to the state, identical to concealing a pregnancy, sets a dangerous precedent as a violation of the First Amendment rights of Ms. Bynum and, indeed, of all women, pregnant or not, because all women lose the right to express themselves or hide themselves as they see fit.

CONCLUSION

Based on the aforementioned points, NPA and NAPSW respectfully request that this Court overturn Ms. Bynum's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2017, I electronically filed the foregoing with the Clerk of Court using the AOC eFlex electronic filing system, which shall provide electronic notification to all counsel of record.

/s/ Sarah E. DeLoach
Sarah E. DeLoach