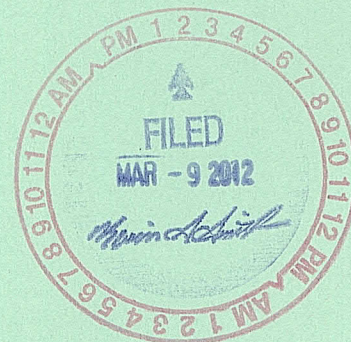


IN THE
SUPREME COURT OF INDIANA



Cause No. _____

BEI BEI SHUAI,
Appellant,

v.

STATE OF INDIANA,
Appellee.

) Appeal from the
) Marion Superior Court
)
) Court of Appeals Cause No.:
) 49A02-1106-CR-00486
) Trial Court Cause No.:
) 49G03-1103-MR-014478
)
) Hon. Sheila Carlisle, Judge

Brief of *Amici* in Support of Petition to Transfer

Sandra L. Blevins, Atty No.: 19646-49
BETZ + BLEVINS
One Indiana Square, Suite 1660
Indianapolis, IN 46204
Phone: 317-687-2222 ext. 110
Fax: 317-687-2221
Email: sblevins@betzadvocates.com

Jill Morrison, Atty No.: 3133 95 TA
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle NW, Suite 800
Washington, DC 20036
Phone: 202-588-7616
Fax: 202-588-5185
Email: jmorrison@nwlc.org

Attorneys for Amici:
Indiana National Organization for Women,
Law Students for Reproductive Justice,
National Women's Law Center and
Sistersong Women of Color
Reproductive Justice Collective

**IN THE
SUPREME COURT OF INDIANA**

Cause No. _____

BEI BEI SHUAL,)	Appeal from the
)	Marion Superior Court
Appellant,)	
)	Court of Appeals Cause No.:
v.)	49A02-1106-CR-00486
)	Trial Court Cause No.:
STATE OF INDIANA,)	49G03-1103-MR-014478
)	
Appellee.)	Hon. Sheila Carlisle, Judge

Brief of *Amici* in Support of Petition to Transfer

Sandra L. Blevins, Atty No.: 19646-49
BETZ + BLEVINS
One Indiana Square, Suite 1660
Indianapolis, IN 46204
Phone: 317-687-2222 ext. 110
Fax: 317-687-2221
Email: sblevins@betzadvocates.com

Jill Morrison, Atty No.: 3133 95 TA
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle NW, Suite 800
Washington, DC 20036
Phone: 202-588-7616
Fax: 202-588-5185
Email: jmorrison@nwlc.org

Attorneys for Amici:
Indiana National Organization for Women,
Law Students for Reproductive Justice,
National Women's Law Center and
Sistersong Women of Color
Reproductive Justice Collective

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT.....	2
I. Permitting this prosecution impermissibly perpetuates sex discrimination in violation of pregnant women’s right to equal protection.....	2
A. This prosecution is based on the discriminatory belief that once pregnant, women can be denied all their constitutional rights and liberties.	2
B. This prosecution is based on long-standing stereotypes regarding women’s capabilities and role in society.	4
II. By imposing criminal liability for fetal harm, this prosecution weakens pregnant women’s right to make medical decisions	6
A. This prosecution interferes with pregnant women’s ability to treat their depression, or even seek medical assistance.	6
B. This prosecution weakens the constitutionally protected right to refuse or receive medical care that may have an effect on pregnancy outcomes.....	6
III. This prosecution compels women who suffer from depression to terminate their pregnancies	8
IV. The State cannot establish an exceedingly persuasive justification for this discriminatory prosecution.....	10
CONCLUSION	11

TABLE OF AUTHORITIES

Federal Laws and Regulations

Office for Human Research Protections, IRB Guidebook (U.S. Dept. of Health and Human Services, 1993).....8

U.S. Constitution.....*passim*

Supreme Court Cases

AT&T Corp. v. Hulteen, 129 S. Ct. 1662 (2009).....9

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).....9

Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990).....7

Eisenstadt v. Baird, 405 U.S. 438 (1972).....8

Geduldig v. Aiello, 417 U.S. 484 (1974).....9

General Electric Co. v. Gilbert, 429 U.S. 125 (1976).....9

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).....3

Lawrence v. Texas, 539 U.S. 558, 562 (2003).....8

Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).....4

Planned Parenthood v. Casey, 505 U.S. 833 (1992).....3, 8

Turner v. Department of Employment Security, 423 U.S. 44 (1975).....9

United States v. Virginia, 518 U.S. 515 (1996).....5, 10

Other Cases

Cochran v. Commonwealth of Kentucky, 315 S.W.3d 325 (Ky. 2010).....2

Cook v. Arentzen, 582 F.2d 870 (4th Cir. 1978).....5

Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976).....9

Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986).....5

In re A.C., 573 A.2d 1235 (D.C. 1990).....7

<i>In re A.C.</i> , 533 A.2d 611 (D.C. 1987).....	7
<i>In re Brown</i> , 689 N.E.2d 397 (Ill. App. Ct. 1997).....	8
<i>In re Doe</i> , 632 N.E.2d 326 (Ill. App. Ct. 1994).....	8
<i>Johnson v. Florida</i> , 602 So. 2d 1288 (Fla. 1992).....	2
<i>Kilmon v. Maryland</i> , 905 A.2d 306 (Md. 2006).....	2
<i>Stallman v. Youngquist</i> , 531 N.E.2d 355 (Ill. 1988).....	4
<i>State v. Gethers</i> , 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991).....	9
<i>McKnight v. South Carolina</i> , 661 S.E. 2d 354 (S.C. 2008).....	2
<i>Neal v. Bd. of Trs.</i> , 198 F.3d 763 (9 th Cir. 1999).....	5
<i>New Mexico v. Martinez</i> , 141 N.M. 763, 161 P.3d 260 (N.M. 2007).....	2
<i>South Carolina v. McKnight</i> , 576 S.E.2d 168 (S.C. 2003).....	2
<i>Taft v. Taft</i> , 446 N.E.2d 395 (Mass. 1983).....	7

Indiana State Authorities

Cases

<i>Clinic for Women, Inc. v. Brizzi</i> , 837 N.E.2d 973 (Ind. 2005).....	8
<i>Herron v. Indiana</i> , 729 N.E.2d 1008 (Ind. 2000).....	2
<i>Matter of Lawrance</i> , 579 N.E.2d 32 (Ind. 1991).....	7
<i>State v. Criminal Court of Marion County</i> , 263 Ind. 236, 329 N.E.2d 573 (1975).....	8

State Statutes

Indiana Code § 35-41-5-1.....	1
Indiana Code § 35-42-1-1.....	1
Indiana Code § 35-42-1-6.....	1

State Policies

Indiana University, “Vulnerable Populations,” *Standard Operating Procedures for Research Involving Human Subjects* (approved October 2010).....8

Suicide in Indiana, 2001-2005: A Report on Suicide Completions and Attempts, Injury Prevention Program (Sept. 2007).....2

Other Authorities

American College of Obstetricians and Gynecologists, *Ethics in Obstetrics and Gynecology*, Committee Op. 214 (Apr. 1999).....7

American Medical Association, *Legal Interventions During Pregnancy: Court Ordered Medical Treatment and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663 (1990).....7

April Cherry, *Maternal-Fetal Conflicts, The Social Construction of Maternal Deviance, and Some Thoughts About Love and Justice*, 8 Tex. J. of Women and the L. 245, 256 (Spring 1999).....3

Food and Drug Administration, *Public Health Advisory: Treatment Challenges of Depression in Pregnancy and the Possibility of Persistent Pulmonary Hypertension in Newborns* (July 19, 2006).....6

Veronika E.G. Kolder, et al., *Court-Ordered Obstetrical Interventions*, 316 New Eng. J. Med. 1192 (1987).....4

Charles Levendosky, *Turning Women into Two-Legged Petri Dishes*, Star Tribune (Minn.), Jan. 21, 1990.....4

Jennifer L. Melville et al., *Depressive Disorders During Pregnancy: Prevalence and Risk Factors in a Large Urban Sample*, 116 *Obstetrics & Gynecology* 1064 (Nov. 2010).....6

National Institute of Mental Health, *Mental Health Medications*, 15 (U.S. Dept. of Health and Human Services, 2008).....6

Dorothy E. Roberts, *Motherhood and Crime*, 79 Iowa L. Rev. 95 (Oct. 1993).....5

Renee I. Solomon, *Future Fear: Prenatal Duties Imposed By Private Parties*, 17 Am. J.L. & Med. 411 (1991).....3

INTEREST OF AMICI CURIAE

Amici, Indiana National Organization for Women, Law Students for Reproductive Justice, National Women's Law Center and Sistersong Women of Color Reproductive Justice Collective are national and state nonprofit organizations committed to the elimination of discrimination against women and the promotion of women's health and reproductive rights. We submit this brief to address the issues of pregnancy rights and pregnancy discrimination presented in this case.

SUMMARY OF ARGUMENT

Amici Curiae file this brief in support of the Petition to Transfer the matter of Bei Bei Shuai to this Honorable Court. The Court of Appeals improperly denied the Motion to Dismiss the Information filed by the Marion County Prosecutor pursuant to Indiana Code §§ 35-42-1-1, 35-42-1-6 and 35-41-5-1, and failed to address the serious constitutional violations raised by this prosecution.

This Court should accept this case because the Court of Appeals' refusal to dismiss the Information threatens pregnant women's rights to equal protection, due process, bodily autonomy and bodily integrity. First, this prosecution reflects longstanding stereotypes about women as requiring regulation and restriction in furtherance of the state's interest in pregnancy and women's presumptive role as mothers. Second, this prosecution has the perhaps unforeseen consequence of drastically limiting the ability of pregnant women to make medical decisions for themselves—a right which is firmly protected by the United States Constitution. Third, this prosecution has the effect of unconstitutionally compelling women to terminate their pregnancies in order to avoid criminal liability for poor pregnancy outcomes. And finally, the State cannot

claim an “exceedingly persuasive justification” for this prosecution, as is required when a state’s policy or practice perpetuates sex discrimination or infringes upon a protected liberty interest.

Courts across the nation, including Indiana courts, have refused to uphold criminal charges against pregnant women for their own allegedly harmful actions during pregnancy, finding that such acts were not in the purview of the criminal law.¹ *Amici* urge this Court to follow the approach taken by sister states that have refused to rewrite their state laws to allow such prosecutions, and in the words of the court in *Johnson v. Florida*, “decline[] the State’s invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread.”

ARGUMENT

I. Permitting this prosecution impermissibly perpetuates sex discrimination in violation of pregnant women’s right to equal protection.

A. This prosecution is based on the discriminatory belief that once pregnant, women can be denied all their constitutional rights and liberties.

It is only by virtue of her pregnant status that Ms. Shuai is being charged with a crime. It is the express public policy of this State to treat suicide as a public health matter, and not as a crime.² This differential treatment is in direct conflict with public policy and constitutes impermissible sex discrimination.

¹*See, Herron v. Indiana*, 729 N.E.2d 1008 (Ind. 2000) (granting motion to dismiss an indictment against a woman for child neglect based on her ingestion of cocaine during pregnancy). *See also, Cochran v. Commonwealth of Kentucky*, 315 S.W.3d 325 (Ky. 2010); *New Mexico v. Martinez*, 141 N.M. 763, 161 P.3d 260 (N.M. 2007); *Kilmon v. Maryland*, 905 A.2d 306 (Md. 2006); *Johnson v. Florida*, 602 So. 2d 1288 (Fla. 1992); *But cf., South Carolina v. McKnight*, 576 S.E.2d 168 (S.C. 2003) (affirming conviction because state’s statutory definition of “child” included a viable fetus); *reversed and remanded by McKnight v. South Carolina*, 661 S.E.2d 354 (S.C. 2008) (finding ineffective assistance of counsel based on failure to present evidence that cocaine use was not the cause of fetal death).

²*Suicide in Indiana, 2001-2005: A Report on Suicide Completions and Attempts, Injury Prevention Program* 3 (Sept. 2007). Criminal prosecution of individuals who attempt suicide is not cited as a prevention strategy.

Pregnant women are subject to a “highly demanding set of expectations,” due to the widespread perception that their every action impacts the fetus.³ Pregnant women are sometimes subject to a unique form of sex discrimination: they are charged with the duty of ensuring a perfect pregnancy and a healthy baby, despite the existence of factors, such as depression and other underlying health issues that may be well beyond their control.⁴ While the relevant agency charged with protecting the health of Indiana citizens recognizes that the mental health issues that precede suicide are extremely difficult to resolve, the presumption of the prosecutor in this case appears to be that Ms. Shuai should have been able to overcome her depression merely by virtue of being pregnant. For these reasons, this prosecution is rooted in discriminatory stereotypes, violates women’s right to equal protection, and must be reviewed by this Court.

State action that “serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women” violates the Equal Protection Clause. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994). Policies and laws based on stereotypes, presumptions and discriminatory beliefs regarding women’s singular role in society as mothers deny women their right to equality, privacy, bodily integrity, liberty and autonomy. Similarly, the Supreme Court has recognized the discriminatory origins of state action that compels women to fulfill “its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture.” *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992). More recently, the Supreme Court has rejected state action that serves to perpetuate stereotypical

³Renee I. Solomon, *Future Fear: Prenatal Duties Imposed By Private Parties*, 17 Am. J. L. & Med. 411, 420-21, (1991) (health club owner canceled membership of woman upon finding out she was 10 weeks pregnant, enforcing “unwritten rule” and expressing concern for the fetus).

⁴April Cherry, *Maternal-Fetal Conflicts, The Social Construction of Maternal Deviance, and Some Thoughts About Love and Justice*, 8 Tex. J. of Women and the L. 245, 256 (Spr. 1999).

and gendered roles regarding family life. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

In short, the State is attempting to make Ms. Shuai criminally liable for her inability to overcome her depression. As noted by the court in *Stallman v. Youngquist*, attempting to guarantee good outcomes by punishing a mother is to ignore the biological and practical complexities of life and severely restrain her privacy and bodily autonomy.⁵

By not dismissing this case, the Court of Appeals has left pregnant women suffering from major depression with two choices, both of which could be illegal by virtue of their decision: either continue to take medication that could possibly cause harm to the pregnancy or stop taking such medication and risk a relapse that could lead to suicide ideation. It is by no means theoretical to assume that the state could attempt to punish pregnant women for a whole host of legal behaviors.⁶

B. This prosecution is based on long-standing stereotypes regarding women's capabilities and role in society.

The discriminatory impulse to define women's legal rights and obligations primarily by reference to her reproductive capacity has a long and unhappy history. Women's ability to participate in society has often been restricted in the name of furthering their pregnancies and role as mothers. "Since time immemorial, women's biology and ability to bear children have

⁵*Stallman v. Youngquist*, 531 N.E.2d 355, 359 (Ill. 1988) (refusing to recognize a cause of action for unintentional prenatal infliction of injuries).

⁶Charles Levendosky, *Turning Women into Two-Legged Petri Dishes*, Star Tribune (Minn.), Jan. 21, 1990, at A8 (pregnant woman charged with felony child abuse for drinking alcohol). Veronika E.G. Kolder, et al., *Court-Ordered Obstetrical Interventions*, 316 New Eng. J. Med. 1192, 1195 (1987) (sixteen-year-old held in detention throughout her pregnancy based on her tendency "to be on the run" and "lack of motivation or ability to seek medical care.").

been used as a basis for discrimination against them.” *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986).

From employment, to education, to military service to athletics, policies have sought to protect women’s “proper” role as child bearers.⁷ The Supreme Court has held that the disparate treatment of women based on stereotypes, entrenched perceptions of proper gender roles, or sweeping generalizations regarding women’s abilities or characteristics offends the guarantees of Due Process and Equal Protection. *United States v. Virginia*, 518 U.S. 515, 537 (1996).

This prosecution reflects the antiquated belief that women must be treated differently by the state in order to protect their reproductive capacities. Ms. Shuai is being prosecuted for her failure to overcome depression for the sake of her unborn child. When women are punished for being unable to transcend anything that interferes with their ability to have a perfect pregnancy - be it drug addiction, intimate partner abuse or mental illness - the law discriminates against them based on their pregnant status.⁸ The potential for prosecutorial abuse when a woman fails to have a perfect pregnancy outcome is clear.

II. By imposing criminal liability for fetal harm, this prosecution weakens pregnant women’s right to make medical decisions.

A. This prosecution interferes with pregnant women’s ability to treat their depression, or even seek medical assistance.

Pregnancy and depression are closely linked, in part because depression most frequently has its onset during women’s childbearing years.⁹ If women know that they could be prosecuted

⁷ See *Cook v. Arentzen*, 582 F.2d 870 (4th Cir. 1978) (no rational basis for automatically discharging pregnant women from Navy); *Neal v. Bd. of Trs.*, 198 F.3d 763, 773 (9th Cir. 1999) (describing sea change in attitudes over the 27 years since the implementation of Title IX).

⁸ Dorothy E. Roberts, *Motherhood and Crime*, 79 Iowa L. Rev. 95, 113 (Oct. 1993).

⁹ Jennifer L. Melville et al., *Depressive Disorders During Pregnancy: Prevalence and Risk Factors in a Large Urban Sample*, 116 Obstetrics & Gynecology 1064 (Nov. 2010).

for homicide if they experience any pregnancy complications, they may be unwilling to seek assistance for depression, or disclose suicidal thoughts to their obstetricians, depriving doctors of a crucial opportunity to intervene.

This prosecution also raises the very real concern that pregnant women may refuse, contrary to their doctors' advice, to discontinue or switch medications intended to treat depression for fear that they could relapse and attempt suicide.¹⁰ Ironically, should those legally prescribed medications be found to have any harmful fetal effects, this prosecution could also subject these women to criminal charges for refusing to follow their doctors' orders.¹¹

B. This prosecution weakens the constitutionally protected right to refuse or receive medical care that may have an effect on pregnancy outcomes.

This court should accept the Petition to Transfer and review this case because the Court of Appeals' refusal to dismiss the Information seriously undermines pregnant women's recognized right to refuse medical treatment for the benefit of the fetus, or to receive medical treatment that may have a detrimental effect on the fetus. Allowing Ms. Shuai to be prosecuted because her attempt on her own life allegedly resulted in the death of her newborn would undermine pregnant women's liberty interest in making medical decisions. Both the Supreme Court and this Court have affirmed the right to make decisions regarding one's person, including the right to refuse life-sustaining treatment, as a liberty interest grounded in the Constitution.¹²

¹⁰*Id.* (finding that "women who stopped their medicine were five times more likely to have a relapse of depression.").

¹¹Prescription drugs are approved without being tested on pregnant women, so the data on fetal effects is sparse. National Institute of Mental Health, *Mental Health Medications* 15 (HHS, 2008). Furthermore, drugs that were once thought to be safe based on observations of pregnant women have later been found to cause serious problems. *See, e.g.,* FDA, *Public Health Advisory: Treatment Challenges of Depression in Pregnancy and the Possibility of Persistent Pulmonary Hypertension in Newborns* (July 19, 2006).

¹²*Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990); *Matter of Lawrance*, 579 N.E.2d 32 (Ind. 1991).

Leading physicians' organizations support women's right to determine their own medical care and disfavor legal intervention, even when women's decisions may result in fetal harm.¹³ Moreover, courts have consistently held that the state cannot deprive a pregnant woman of her right to medical decision-making and have demanded that the state exercise restraint with regard to actions that may violate pregnant women's constitutionally protected liberties.¹⁴

Even if a medical decision has the potential to effect the outcome of a pregnancy, the constitutionally protected right to bodily autonomy prohibits state interference.¹⁵ Courts have consistently supported a pregnant woman's right to make medical decisions that may endanger the fetus, or refuse treatment for the fetus's benefit, acknowledging the serious infringement on a pregnant woman's liberty interests in ruling otherwise.¹⁶ Current federal and state regulations reinforce this point, allowing pregnant women the same decision-making power and potential benefits of participation in clinical trials as others.¹⁷ This prosecution calls into question pregnant

¹³American Medical Association, *Legal Interventions During Pregnancy: Court Ordered Medical Treatment and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663 (1990); American College of Obstetricians and Gynecologists, Ethics in Obstetrics and Gynecology, Committee Op. 214 (Apr. 1999).

¹⁴See, e.g., *Taft v. Taft*, 446 N.E.2d 395, 396 (Mass. 1983) (vacating lower court decision ordering a pregnant woman to have her cervix sewn to prevent a possible miscarriage).

¹⁵*In re A.C.*, 573 A.2d 1235, 1243-44 (D.C. 1990), *rev'g en banc*, *In re A.C.*, 533 A.2d 611 (D.C. 1987). Analyzing holdings that have refused to require organ donations between relatives, the court concluded, "[A] fetus cannot have rights in this respect superior to those of a person who has already been born."

¹⁶See, e.g., *In re Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997) (citing *Planned Parenthood v. Casey*, 505 U.S. at 852); *In re Doe*, 632 N.E.2d 326, 333-34 (Ill. App. Ct. 1994).

¹⁷See Office for Human Research Protections, IRB Guidebook (HHS, 1993), Chapter VI.B ("In research undertaken to meet the health problems of a pregnant woman, her needs generally take precedence over those of the fetus, [45 C.F.R. 46.207] except, perhaps where the benefit to the woman is minimal and risk to the fetus is high."); Indiana University, "Vulnerable Populations," *Standard Operating Procedures for Research Involving Human Subjects* (approved Oct. 2010).

women's ability to make medical decisions that non-pregnant women and men may make without fear of criminal charges and imprisonment.

III. This prosecution compels women who suffer from depression to terminate their pregnancies.

The Fourteenth Amendment protects a person's right to make the most fundamental decisions free of undue governmental intrusion, including the right to "bear or beget a child."¹⁸ The Indiana Supreme Court has recognized that the constitutional right to privacy extends to "decisions relating to marriage, procreation [and] motherhood," and the Indiana Constitution also "contains a fundamental right of privacy, rising to the level of a 'core constitutional value,' that includes 'protection of the right to make ...the decision to terminate pregnancy.'"¹⁹ This prosecution impacts a woman's fundamental right to carry her pregnancy to term because a woman who finds herself depressed and pregnant could be held criminally liable should anything go wrong with her pregnancy, or if her newborn dies shortly after birth, and could avoid the looming risk of prosecution only by terminating her pregnancy.²⁰

Coercive policies that interfere with a woman's decisions about her pregnancy unconstitutionally impair her autonomy and ability to make her own health choices.²¹ For example, the Supreme Court has held that a policy presuming a pregnant woman was unable to work for eighteen weeks, and was therefore ineligible for unemployment compensation,

¹⁸*Lawrence v. Texas*, 539 U.S. 558, 565 (2003), citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

¹⁹See *State v. Criminal Court of Marion County*, 263 Ind. 236, 253, 329 N.E.2d 573, 585 (1975); and *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 983 (Ind. 2005) (quotation omitted).

²⁰See, e.g., *Johnson*, 602 So. 2d at 1296 ("Prosecution of pregnant women ... may also unwittingly increase the incidence of abortion."); *State v. Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991) ("Potential criminal liability would also encourage addicted women to terminate or conceal their pregnancies.").

²¹*Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (rejecting a mandatory maternity leave policy that would have forced women to lose income if they became pregnant).

infringed upon “freedom of personal choice in matters of marriage and family life” as protected by the Due Process Clause.²² Permitting women struggling with depression or other mental health disorders to be prosecuted based on their pregnancy outcomes raises the same constitutional concerns by injecting the state into a woman’s decision about her pregnancy.²³

IV. The State cannot establish an exceedingly persuasive justification for this discriminatory prosecution.

Given the discriminatory nature of this prosecution, it is the State’s heavy burden to demonstrate an “exceedingly persuasive justification” for the prosecution, and that such prosecutions are a narrowly tailored means to further the state’s interest. *Virginia*, 518 U.S. at 533. The classification must serve “important governmental objectives” and be “substantially related to the achievement of those objectives.” *Id.* (citation omitted). The state must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Id.* at 533.

Charging a woman with a crime because she became pregnant, suffered the onset of a major depressive episode and attempted to kill herself violates her rights to liberty and bodily integrity without furthering any legitimate interest in fetal health. This prosecution only increases

²² *Turner v. Department of Employment Security*, 423 U.S. 44, 46 (1975), quoting *LaFleur*, 414 U.S. at 639.

²³ The analysis as to whether sex discrimination is at issue for purposes of the Fourteenth Amendment and Title VII are the same. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). Therefore, while under *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Gilbert*, the withholding of a benefit to pregnant women did not constitute sex discrimination for purposes of Title VII or the Equal Protection Clause, the imposing of a burden does constitute such discrimination. This distinction was recently reaffirmed by the Supreme Court in *AT&T Corp. v. Hulteen*, 129 S. Ct. 1662, 1670 (2009). See also *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) (holding that mandatory discharge of pregnant women from Marines presented unconstitutionally burdensome presumption about pregnancy and women under Equal Protection clause and *LaFleur* Due Process analysis).

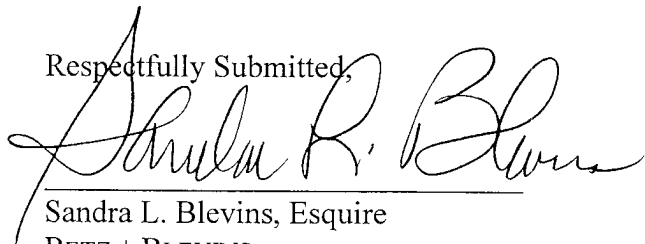
the stigma of mental health disorders and drives those who are contemplating suicide into further secrecy.

The State cannot show that its discriminatory means is substantially related to any legitimate state interest such as preventing suicide attempts among pregnant women. As set forth in the Amici Brief from public health advocates and experts, the punitive treatment of pregnant women for their actions during pregnancy has not been shown to protect the health of a fetus or the pregnant woman, let alone the kind of close nexus required under the Fourteenth Amendment.

There is no evidence that this prosecution will encourage pregnant women who are suffering with major depression to seek help. To the extent that holding Ms. Shuai criminally culpable for her unsuccessful suicide attempt leads other depressed pregnant women to terminate their pregnancies, these prosecutions obviously do not serve any asserted interests of the State. Furthermore, the State does not have any interest in encouraging pregnant women to use the deadliest and most immediate method of suicide possible in order to avoid criminal prosecution for an unsuccessful suicide attempt.

CONCLUSION

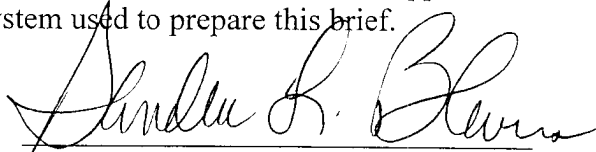
Because this case raises issues of constitutional importance and Ms. Shuai's Motion to Dismiss was improperly rejected by the Court of Appeals, we ask that this Court accept the Petition to Transfer the case.

Respectfully Submitted,

Sandra L. Blevins, Esquire
BETZ + BLEVINS

Attorneys for *Amici Curiae*

WORD COUNT CERTIFICATE

I verify that this brief contains no more than 4200 words, including footnotes and excluding the parts of the brief exempted by Rule 44 (C) of the Indiana Rules of Appellate Procedure, as calculated by the word processing system used to prepare this brief.

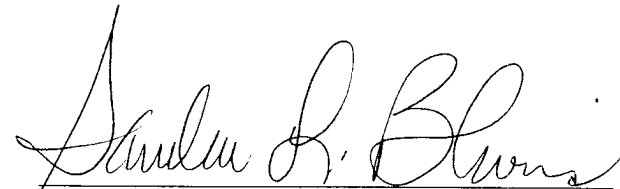

Sandra L. Blevins

BETZ + BLEVINS
One Indiana Square, Suite 1660
Indianapolis, IN 46204
Phone: 317-687-2222 ext. 110
Fax: 317-687-2221
Email: sblevins@betzadvocates.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been deposited in the U.S. Mail, first class postage prepaid, this 9th day of March, 2012, addressed to the following:

Gregory F. Zoeller
Andrew Kobe
Attorney General of Indiana
Indiana Government Center South
302 W. Washington St., 5th Floor
Indianapolis, IN 46204


Sandra L. Blevins

BETZ + BLEVINS
One Indiana Square, Suite 1660
Indianapolis, IN 46204
Phone: 317-687-2222 ext. 110
Fax: 317-687-2221
Email: sblevins@betzadvocates.com