CASE NO. 20012-CA-00725

In The Supreme Court of Mississippi

STATE OF MISSISSIPPI,

Appellant,

vs.

NINA BUCKHALTER,

Appellee.

On Grant of Interlocutory Appeal from the Circuit Court of Lamar County

BRIEF SUBMITTED ON BEHALF OF JACKSON AREA NATIONAL ORGANIZATION FOR WOMEN, LAW STUDENTS FOR REPRODUCTIVE JUSTICE, NATIONAL ASSOCIATION OF WOMEN LAWYERS AND THE NATIONAL WOMEN'S LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF APPELLEE, NINA BUCKHALTER

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STATEMENT OF THE ISSUES

This Court is asked to consider the constitutionality of applying § 97-3-47 to pregnant women who experience stillbirths.

STATEMENT OF THE CASE

On March 14, 2009, Ms. Nina Buckhalter suffered a stillbirth. On May 28, 2009, Ms. Buckhalter was indicted for manslaughter pursuant to Miss. Code Ann. § 97-3-47.[1] Through her counsel, Ms. Buckhalter filed a motion to dismiss the indictment in the Circuit Court of Lamar County. (Record Excerpts Document 71-78). The District Attorney filed a response in opposition. (Record Excerpts Document 79-81). The District Attorney's opposition states that the prosecution alleges that the stillbirth was caused by the "Defendant's action of taking illegal drugs." (State's Answer to Mot. To Dismiss, Record Excerpts 80).

After a hearing, the Circuit Court of Lamar County granted Ms. Buckhalter's motion to dismiss on April 18, 2012. (Record Excerpts Document 87-88). The trial court found the theory "under which the State seeks to criminally prosecute the defendant in this instance for the crime of manslaughter against her own unborn child to be unsupported by the plain meaning of § 97-3-47 in light of the rules of construction that criminal laws are to be strictly construed and, when vague or ambiguous, to be strictly construed against the State." (Record Excerpts 87).

Amici Curiae file this brief in support of Ms. Buckhalter urging this Court to hold that the doctrine of constitutional avoidance also supports the district court's statutory interpretation. Applying § 97-3-47 in this or similar cases would violate the constitutional rights of both Ms.

[1] Miss. Code Ann. § 97-3-47 states: Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title, shall be manslaughter.

Buckhalter and others who experience stillbirths. The interests of the *Amici* are set forth in the accompanying Memorandum for Leave to File Amicus Brief.

This Brief sets forth the longstanding history of discrimination against women, particularly pregnant women, that has fueled similar attempts to misinterpret and misuse criminal statutes in a manner that violates the Constitution. The prosecution in this case is asking this court to judicially rewrite the law to create unique and devastating penalties against women who seek to continue their pregnancies to term in spite of an addiction or other health problem. Ms. Buckhalter is being prosecuted for having experienced a stillbirth. This prosecution (a) is based on stereotypes about women and pregnancy, (b) burdens Ms. Buckhalter's exercise of her fundamental right to continue her pregnancy to term, and (c) presents numerous threats to the rights of due process, bodily autonomy and integrity, and equal protection of all pregnant women. This prosecution is not narrowly tailored to a compelling state interest, as is required when state action directly burdens the exercise of a fundamental right. Nor can the State claim an "exceedingly persuasive justification" for this indictment, as is required when a state's policy or practice discriminates on the basis of sex. While prosecutions such as this one have the alleged goal of protecting children, deterring drug use among pregnant women and improving fetal and child health outcomes, as discussed in another amicus brief in support of Ms. Buckhalter,[2] research indicates that such prosecutions actually cause women to avoid prenatal care, resulting in worse maternal and newborn health outcomes. Prosecutions of women who have continued their pregnancies in spite of alleged drug or alcohol problems have been soundly rejected by the vast majority of courts around the nation—each finding that such acts were not in the purview of the criminal law. *See, e.g., 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) (quashing writ of certiorari

[2] See Amicus Brief submitted on behalf of public health experts and advocates.

and letting stand lower court decision in favor of defendant); *Kilmon v. Maryland*, 905 A.2d 306 (Md. 2006) (rejecting application of common law "born alive" rule in prosecution for reckless endangerment); *Johnson v. Florida*, 602 So. 2d 1288 (Fla. 1992) (legislature did not intend to include acts of pregnant women in statute prohibiting the delivery of a controlled substance to a minor); *But cf., South Carolina v. McKnight*, 576 S.E.2d 168 (S.C. 2003) (affirming homicide conviction because state's statutory definition of "child" included a viable fetus); *reversed and remanded by McKnight v. South Carolina*, 661 S.E. 2d 354 (S.C. 2008) (finding ineffective assistance of counsel based on failure to present readily available evidence that cocaine use was not the cause of fetal death and failure to challenge jury instructions regarding criminal intent).

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 "decline[ ] the State's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread." *Johnson,* 602 So.2d at 1297.

SUMMARY OF ARGUMENT

Indicting a woman under Miss. Code Ann. § 97-3-47 because she has experienced a stillbirth raises serious constitutional issues. First, this prosecution impermissibly infringes on the fundamental right to bear children protected by the Fourteenth Amendment. It places addicted women in the untenable position of having to choose between ending their wanted pregnancies or carrying them to term and risking criminal prosecution. Such coercive policies also unconstitutionally interfere with a woman's ability to make her own health decisions.

Second, judicially rewriting the law to make it applicable to women who experience stillbirths would open the door to potentially limitless regulation of women for the duration of their pregnancies, further unconstitutionally burdening their fundamental rights to become

pregnant and continue their pregnancies to term, as well as their right to make critical decisions regarding their own body and health. Given the lack of any adequate justification, this is an inappropriate, discriminatory, and unconstitutional effort to apply a criminal statute beyond its proper and intended scope.

Third, this prosecution discriminates on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment and reflects longstanding stereotypes about women as needing to be regulated and restricted in the interest of pregnancy and motherhood. Because the State cannot justify this discriminatory treatment, the indictment of Ms. Buckhalter, like other state-sponsored discrimination, cannot stand.

For these reasons, this Court must dismiss the indictment against Ms. Buckhalter.

ARGUMENT

I. PROSECUTING A WOMAN BASED ON HER PREGNANCY OUTCOME PENALIZES HER FOR CARRYING HER PREGNANCY TO TERM.

Ms. Buckhalter is not being charged with using drugs or with any drug-related crime. Instead, she is facing criminal prosecution because she chose to carry her pregnancy to term. The decision to bear a child is a fundamental liberty interest protected by the Fourteenth Amendment. "Liberty presumes an autonomy of self that includes ... certain intimate conduct." *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). The Fourteenth Amendment protects a person's right to make the most fundamental decisions free of undue governmental intrusion, including the right to "bear or beget a child." *Lawrence*, 539 U.S. at 565 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). Likewise, this Court has recognized that Article 3, Section 32 of the Mississippi Constitution, protects the right to privacy, including "the right to one's choices concerning one's body," independent of the U.S. Constitution. *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 652 (Miss. 1998). This prosecution affects reproductive decisions

because once pregnant, an addicted woman could avoid the risk of prosecution only by terminating her pregnancy. Indeed, courts have recognized that prosecuting pregnant women for "engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion." *Johnson*, 602 So.2d at 1296.

Coercive policies that interfere with a woman's decisions about her pregnancy unconstitutionally impair her autonomy and ability to make her own health choices when they are not narrowly tailored to a compelling interest. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (noting that *Roe v. Wade* "has been sensibly relied on to counter" state interference with a woman's decision to become pregnant or carry to term). For this reason, in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Supreme Court rejected a mandatory maternity leave policy that forced women to lose income when they became pregnant, explaining that "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of . . . protected freedoms"—namely, the "freedom of personal choice in matters of marriage and family life." *Id.* at 640, 639. Similarly, in *Turner v. Department of Employment Security*, 423 U.S. 44 (1975), the Court held that a policy presuming a pregnant woman was unable to work for 18 weeks, and was therefore ineligible for unemployment compensation, infringed upon "freedom of personal choice in matters of marriage and family life" as protected by the Due Process Clause. 423 U.S. at 46 (quoting *LaFleur*, 414 U.S. at 639). Prosecuting women struggling with addiction based on their pregnancy outcomes raises the same constitutional concerns, by injecting the State into a woman's decision about her pregnancy.

"[W]here a decision as fundamental as whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling states interests, and

must be narrowly drawn to express only those interests." *Carey v. Population Services International*, 431 U.S. 678, 686 (1977). Charging a woman with a crime because she has become pregnant and has chosen to continue that pregnancy is not narrowly drawn to further any interest a state may have in infant and maternal health. As set forth in the Amici Brief from public health advocates and experts, the criminal prosecution of women based on behavior during pregnancy alleged to pose a risk to the fetus has not been shown to protect the health of infants or pregnant women, let alone to have the kind of close nexus to protecting health required under the Fourteenth Amendment. Furthermore, to the extent that prosecutions based on alleged drug use during pregnancy coerce some women into terminating their pregnancies, these prosecutions do not serve the asserted interests of the State.[3]

A more effective, narrowly tailored means of promoting maternal and infant health would be to offer confidential treatment, counseling and medical care to women with drug addictions, rather than threatening them with criminal prosecution and creating a greater danger to fetal well-being.[4] No doubt for this reason, as indicated by the legislative history set forth in the Appellant's main brief, the legislature chose not to penalize women who continue pregnancies and use drugs or experience addictions, despite numerous opportunities to do so.

II. THIS PROSECUTION THREATENS WOMEN'S RIGHT TO BODILY AUTONOMY BY OPENING THE DOOR TO THE CRIMINALIZATION OF ANY BEHAVIOR THAT IS BELIEVED TO THREATEN PREGNANCY OUTCOMES.

[3] Numerous courts dismissing prosecutions against women who gave birth despite an addiction problem have recognized the possibility of coerced abortions. *See, e.g., Johnson*, 602 So. 2d at 1296. ("Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion."); *State v. Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991) ("Potential criminal liability would also encourage addicted women to terminate or conceal their pregnancies."). Indeed, a policy of prosecution may have resulted in at least one coerced abortion. Gail Stewart Hand, *Women or Children First?*, GRAND FORKS HERALD (N.D.), July 12, 1992, at 1 (a woman obtained an abortion twelve days after being arrested for sniffing paint fumes while pregnant).

[4] Mississippi recognizes that addiction is an illness. Mississippi Department of Mental Health, Bureau of Alcohol and Drug Abuse, *FY 2010 State Plan* 20 ("Alcoholism and drug addiction are illnesses which are treatable and preventable."), available at http://www.dmh.state.ms.us/pdf/2010ADStatePlan-FinalVersion.pdf.

Allowing Ms. Buckhalter to be prosecuted based on the outcome of her pregnancy and alleged actions or inactions that may have contributed to that outcome would undermine all pregnant women's right to bodily autonomy. The Supreme Court has reaffirmed the right to make decisions regarding one's person as a liberty interest grounded in the Constitution. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). While the prosecution in this case focuses on the alleged use of illegal drugs, nothing in the statute applied would so limit such prosecutions. Under the State's theory of the case, the State could prosecute women who experience a stillbirth after engaging in wholly lawful, "risky" activities during pregnancy. This is by no means a theoretical threat. A pregnant woman in Wyoming was charged with felony child abuse for drinking alcohol, for example, and in Wisconsin, a sixteen-year-old was held in detention throughout her pregnancy based on her tendency "to be on the run" and "lack of motivation or ability to seek medical care."[5] Melissa Ann Rowland was charged with murder for refusing to submit to a cesarean section.[6] As the Supreme Court has observed, in striking down a spousal notification law as an unconstitutional burden on a woman's right to obtain an abortion, "[p]erhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus." *Casey,* 505 U.S. at 898. Surely, if the state cannot give a husband this power, then it cannot undertake to police this behavior itself.

Pregnant women are often subjected to a "highly demanding set of expectations," due to the widespread perception that their every action affects the fetus and that these actions (or

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

[6] Richard L. Berkowitz, *Should Refusal to Undergo A Cesarean Section Be A Criminal Offense?*, 104 OBSTETRICS & GYNECOLOGY 1220 (2004).

inactions) alone determine the fetus's health and development.[7] At different points in time, various legal activities have been declared by the popular press, medical organizations or the government to be beneficial, harmless and harmful to pregnancy outcomes.[8] Conversely, some illegal substances widely believed to be uniquely harmful have later turned out to be far less harmful than believed, and certainly no more harmful than a range of legal behaviors, such as smoking, in which far more women engage.[9]

Prosecuting women for stillbirths could subject women to the threat of criminal prosecution for failure to heed constantly shifting and sometimes contradictory commands and restrictions. Imposing liability on pregnant women for their inability to provide "the best prenatal environment possible . . . would have serious ramifications for all women and their families, and for the way in which society views women and women's reproductive abilities." *Stallman v. Youngquist*, 531 N.E.2d 355, 359 (Ill. 1988) (refusing to recognize a cause of action for unintentional prenatal infliction of injuries). For this reason, the Illinois Supreme Court concluded that attempting to guarantee good outcomes by punishing a mother was to ignore the biological and practical complexities of life and severely restrain her privacy and bodily autonomy. *Id.*

III. THIS PROSECUTION CONSTITUTES DISCRIMINATION ON THE BASIS OF SEX IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

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

[8] Julie Moskin, *The Weighty Responsibility of Drinking for Two*, N.Y. Times, Nov. 29, 2006, at F1 (describing public reactions to pregnant women engaging in acts presumed to be harmful in pregnancy, including eating cheese or salad, or drinking coffee). Most recently, eating fish, which had been strongly discouraged during pregnancy because of its mercury content, is now urged to enhance fetal brain development. Sally Squires, *Pregnant? Say Yes to Seafood*, Wash. Post, Feb. 20, 2007, at HE1 (examining the benefits of fish to fetal development).

[9] See e.g. Susan Oakie, *The Epidemic That Wasn't,* N. Y. TIMES, Jan. 27, 2009, at D1.

This prosecution is consistent with the long-standing regulation of women on the basis of their ability to become pregnant. Although the impulse to define women's legal rights and obligations primarily in reference to her reproductive capacity has a long and sorry history, it is now understood that such regulation violates the Constitution. *Nevada Department of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003). Women's ability to participate in society has often been restricted under the guise of supporting their pregnancies and role as mothers and protecting their children. "Since time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them." *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986).

For example, the United States Supreme Court once upheld a statute limiting women (but not men) to ten hour work days, finding that because "healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Muller v. Oregon*, 208 U.S. 412, 421 (1908). Women were once denied higher education because of the common belief that rigorous study would interfere with their "reproductive organs," and compromise "the adequate performance of the natural functions of their sex." *United States v. Virginia*, 518 U.S. 515, 537 n.9 (1996) (citation omitted). Today, however, the Due Process Clause and the Equal Protection Clause guarantee that the treatment of women under the law cannot be based on gender stereotypes, entrenched perceptions of proper gender roles, or sweeping generalizations regarding women's abilities or characteristics. *Id.* The Fifth Circuit Court of Appeals has also rejected state action based on "archaic assumptions" regarding women's abilities or characteristics. *Pederson v. Louisiana State University*, 213 F.3d 858, 881 (5th Cir. 2000).

State action that "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women" violates the Equal Protection Clause of the Fourteenth Amendment. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994). The Supreme Court has recognized the harm that results when the State compels women to fulfill "its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." *Casey*, 505 U.S. at 852. More recently, the Supreme Court has rejected state action that serves to perpetuate stereotypical and gendered roles regarding family life, including stereotypes about "mothers and mothers-to-be."*Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003). Such classifications are "no longer consistent with our understanding of the family, the individual, or the Constitution." *Planned Parenthood v. Casey*, 505 U.S. at 896; *Nev. Dep't of Human Res.*, 538 U.S. at 730, 736. This prosecution would impermissibly discriminate against women based on stereotypes, presumptions, and discriminatory beliefs regarding women's singular role in society as mothers.

Given the discriminatory nature of this prosecution, it is the state's heavy burden to demonstrate an "exceedingly persuasive justification" for the prosecution. *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. While infant and maternal health are certainly important state interests, the state cannot show that its discriminatory means is substantially related to the achievement of those objectives, given that such prosecutions lead pregnant women with drug addictions to avoid prenatal care, as described above and set forth in the Amici Brief from public health advocates and experts.

CONCLUSION

For the forgoing reasons, this Court should dismiss the indictment against the Appellant Ms. Nina Buckhalter.

Respectfully Submitted,

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CERTIFICATE OF SERVICE TO PARTIES IN THE CASE

I, Cliff Johnson, do hereby certify that on this 21st day of December 2012, I have mailed, postage prepaid, a true and correct copy of the above and foregoing BRIEF FOR THE APPELLEE to the following:

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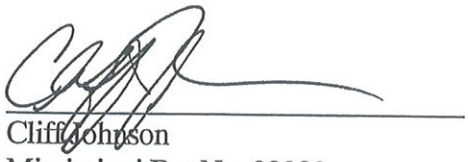

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