

NO. 07-2481

IN THE
IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Larry Norris and Patricia Turensky

Appellants

v.

Shawanna Nelson

Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
THE HONORABLE JAMES M. MOODY
UNITED STATES DISTRICT JUDGE

BRIEF OF *AMICI CURIAE* NATIONAL PERINATAL ASSOCIATION,
AMERICAN COLLEGE OF NURSE MIDWIVES, AMERICAN MEDICAL
WOMEN'S ASSOCIATION, REBECCA PROJECT FOR HUMAN
RIGHTS, ET AL, IN SUPPORT OF APPELLEE'S PETITION FOR
REHEARING

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CORPORATE DISCLOSURE STATEMENT

Each of the *amici curiae* herein is a not-for-profit organization. None has any parent corporation. None has any capital stock held by a publicly traded corporation.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES.....	ii
DESCRIPTION OF <i>AMICI CURIAE</i>	iv
INTERESTS OF <i>AMICI CURIAE</i>	xviii
ARGUMENT.....	1
I. SHACKLING PREGNANT INCARCERATED WOMEN DURING LABOR AND CHILDBIRTH IS AN OBVIOUS DANGER TO MATERNAL AND FETAL HEALTH.....	1
II. THE ROUTINE USE OF SHACKLES IS NOT JUSTIFIED BECAUSE INCARCERATED WOMEN REPRESENT A LOW SECURITY RISK GENERALLY AND PARTICULARLY DURING CHILDBIRTH.....	7
III. THE USE OF SHACKLES ON WOMEN IN LABOR VIOLATES THE UNITED STATES CONSTITUTION AND ESTABLISHED INTERNATIONAL HUMAN RIGHTS LAW.....	8
CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE.....	15
CERTIFICATE OF SERVICE.....	16

TABLE OF AUTHORITIES

CASES

<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	9
<i>Austin v. Hopper</i> , 15 F. Supp. 2d 1210 (M.D. Ala., 1998).....	9
<i>Crain v. Bordenkircher</i> , 342 S.E. 2d 422 (W.Va. 1986).....	9
<i>Detainees of Brooklyn House of Detention for Men v. Malcolm</i> , 520 F.2d 392 (2d Cir. 1975).....	9
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976).....	9, 10
<i>Everson v. Mich. Dep't of Corr.</i> , 222 F. Supp. 2d 864 (E.D. Mich. 2002).....	9
<i>Jones v. Wittenberg</i> , 440 F. Supp. 60 (N.D. Ohio 1977).....	9
<i>Jordan v. Arnold</i> , 408 F. Supp. 869 (M.D. Pa. 1976).....	9
<i>Kane v. Winn</i> , 319 F. Supp. 2d 162 (D. Mass. 2004).....	9
<i>Lareau v. Manson</i> , 507 F. Supp. 1177 (D. Conn. 1980).....	9
<i>Morgan v. LaVallee</i> , 526 F.2d 221 (2d Cir. 1975).....	9
<i>Reynolds v. Horn</i> , 81 Civ. 107 (S.D.N.Y. 1990).....	3
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	8, 9, 10-11
<i>Thomas v. Baca</i> , 514 F. Supp. 2d 1201 (C.D. Cal., 2007).....	9
<i>Williams v. Coughlin</i> , 875 F. Supp. 1004 (W.D.N.Y., 1995).....	9
<i>Women Prisoners of the District of Columbia v. District of Columbia</i> , 93 F.3d 910 (D.C. Cir. 1996).....	2

<i>Women Prisoners of District of Columbia Dep't of Corrections v. District of Columbia</i> , 877 F.Supp. 634 (D.D.C. 1994).....	3
--	---

STATUTES

CAL. PENAL CODE § 3423 (West 2006)	3, 4
55 ILL. COMP. STAT. 52-15003.6 (2000).....	3, 4
VT. STAT. ANN. tit. 28, § 801a (2005).....	3, 4

OTHER AUTHORITIES

American College of Obstetricians and Gynecologists, <i>Letter in Opposition to Shackling</i> , June 12, 2007.....	5, 6, 8
American Public Health Association, <i>Standards for Health Services in Correctional Institutions</i> 108 (2003).....	1
Amnesty Int'l Rights for All Updated Report, " <i>Not a Part of My Sentence</i> ": <i>Violations of the Human Rights of Women in Custody</i> , AMNESTY INT'L RIGHTS FOR ALL REP., 2001.....	2
Convention on the Elimination of All Forms of Discrimination Against Women art. 12(2), Mar. 1, 1980, 1249 U.N.T.S. 13.....	12, 13
F. Gary Cunningham et al., WILLIAMS OBSTETRICS (22d ed. 2005).....	7
Lawrence A. Greenfield and Tracey L. Snell, US Department of Justice, <i>Women Offenders</i> (2000).....	7
International Covenant on Economic, Social and Cultural Rights, art. 12(1), Dec. 16, 1966, 993 U.N.T.S. 3.....	13
Dana Sichel, <i>Giving Birth in Shackles: A Constitutional and Human Rights Violation</i> , 16 Am. U.J. Gender Soc. Pol'y & L. 223 (2007).....	6, 10
United Nations Office of the High Commissioner for Human Rights, Reply by the Government of Norway (March 8, 2006).....	10

United Nations Human Rights Committee Concluding Observations: United States of America, 87th Sess., ¶ 33, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (2006).....	11
United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51 (1984).....	11
United Nations Committee Against Torture, <i>Conclusions and Recommendations: United States of America</i> , 87th Sess., UN Doc. CAT/C/USA/CO/2 (July 25, 2006).....	12
United Nations Covenant on Civil and Political Rights, art 7, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966).....	12
United Nations Human Rights Committee Concluding Observations: United States of America, 87th Sess., ¶ 33, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (2006).....	12
United Nations Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611, annex 1 (Aug. 30, 1955).....	8, 9, 10
United Nations Universal Declaration of Human Rights G.A. Res. 217A (III), art. 25(2), U.N. Doc. A/810 (Dec. 10, 1948).....	12
U.S. CONST. amend. XIII.....	8

DESCRIPTION OF *AMICI CURIAE*

Amici curiae are organizations that are dedicated to protecting the health and rights of women and their children. *Amici curiae* present this brief out of their profound concern that the shackling of pregnant women during labor endangers the health and safety of mothers and their children. Specifically, the following organizations join this brief as *amici curiae*:

Amicus Curiae **National Perinatal Association** (“NPA”) promotes the health and well-being of mothers and infants, enriching families, communities and our world. NPA seeks to increase access to comprehensive health care, as this has an immeasurable impact on birth outcomes. NPA opposes all policies which endanger the well-being of infants or their mothers.

Amicus Curiae **American College of Nurse Midwives** (“ACNM”), with roots dating back to 1929, is the oldest women’s health care organization in the United States. ACNM sets standards for the education, certification and practice of certified nurse-midwives and certified midwives; supports research, administers and promotes continuing education programs; creates liaisons with state and federal agencies and members of Congress; and advocates for programs and policies that improve the health status of women and their families. The mission of ACNM is to promote the health and well-being of women and newborns within their families and communities through the development and support of the profession of midwifery, practiced by certified nurse-midwives and certified midwives. The philosophy inherent in the profession states that the midwives believe every individual has the right to safe, satisfying health care with respect for human dignity and cultural variations.

Amicus Curiae **American Medical Women’s Association** (“AMWA”) is a national non-profit organization of over 10,000 women physicians and physicians-

in-training representing every medical specialty. Founded in 1915, AMWA is dedicated to promoting women in medicine and advocating for improved women's health policy. AMWA encourages all pregnant women to seek prenatal care and believes that breaching the medical confidentiality of these women or otherwise hindering their ability to establish a relationship of trust with their treatment providers will deter women, especially those that may be at high risk for adverse pregnancy outcomes, from receiving prenatal care.

Amicus Curiae **Citizens for Midwifery** ("CfM") is a national, non-profit, and consumer-based group that promotes maternal and child health through advocating the Midwives Model of Care and seeks to have these practices recognized as an accepted standard of care for childbearing mothers. In focusing on the normalcy of childbirth and the uniqueness of each childbearing woman and family, this model includes monitoring the physical, psychological, and social well-being of childbearing mothers, providing pregnant women with individualized prenatal care and hands-on assistance during labor and delivery, minimizing technological interventions, and identifying women who require obstetrical attention. As an organization, CfM also provides information on midwifery and childbirth issues, encourages and provides guidance for midwifery advocacy, and represents consumer interests regarding midwifery and maternity care.

Amicus Curiae **BirthNet, Inc.** is a non-profit grassroots organization that seeks to educate the public about evidence-based, mother-friendly maternity care in order to improve such care for all women.

Amicus Curiae **The Bronx Health Link, Inc.** (“TBHL”) is a clearinghouse of information for members of the health and human service delivery system of the Bronx. TBHL works extensively with the community and health care providers to identify gaps in perinatal health care and improve both women’s early entry into prenatal care and the reproductive health of Bronx women. In particular, TBHL seeks to reach mothers and babies at greatest risk. TBHL seeks to empower women to make informed choices by educating them about the importance of prenatal and postpartum medical screening and care, as well as self-care and care of their infants. TBHL is concerned about any policies which undermine the health and well-being of pregnant and delivering women.

Amicus Curiae **California National Organization for Women** (“California NOW”) supports reproductive freedom for all women including funding full prenatal health care. California NOW supports full reproductive health education and advocates removal of all barriers to prenatal health care.

Amicus Curiae **Center for Reproductive Rights** (the “Center”) is a national public interest law firm dedicated to preserving and expanding reproductive rights in the United States and throughout the world. The Center's domestic and

international programs engage in litigation, policy analysis, legal research, and public education seeking to achieve women's equality in society and ensure that all women have access to appropriate and freely chosen reproductive health services.

Amicus Curiae **Chicago Legal Advocacy for Incarcerated Mothers**

("CLAIM") is a not-for-profit agency founded in 1985 to help women prisoners and their children maintain contact. CLAIM strives: 1) to promote community-based sentencing instead of prison for non-violent offenses, particularly for primary-caregiver parents; 2) to promote family preservation; and 3) to empower women former prisoners to work toward policy change.

Amicus Curiae **The D.C. Prisoners' Project of the Washington Lawyers'**

Committee for Civil Rights and Urban Affairs, a non-profit public interest organization, has sought to eradicate discrimination and fully enforce the nation's civil rights laws for over 40 years. Since The Prisoners' Project was founded in 1989, it has engaged in broad-based class action litigation, improving medical and mental health services, reducing overcrowding, and seeking to improve overall conditions at correctional facilities wherever D.C. inmates are held.

Amicus Curiae **Florida Institutional Legal Services, Inc.** ("FILS") is a non-profit legal services office representing indigent institutionalized people in Florida. Its primary focus over its 30-year history has been a mix of individual and

class action litigation in federal and state courts on behalf of people in Florida state prisons.

Amicus Curiae **Justice Now** works to promote alternatives to policing and prisons. It fulfills its mission by providing legal services and supporting prisoner organizing efforts that promote health and justice; working with prisoners, their families, and community members on political education and mobilization campaigns; building coalitions to create safety for women and individual accountability without relying on the punishment system; and training the next generation of activists and lawyers.

Amicus Curiae **Law Students for Reproductive Justice** (“LSRJ”) is a non-profit network of law students, professors, and lawyers dedicated to ensuring the future of reproductive justice by educating, organizing, and supporting law students on 75 campuses throughout the United States and Canada. LSRJ is filling in the gaps left by formal legal education—providing educational materials and in-person learning experiences to ensure that budding legal experts have the information and skills they need to pursue reproductive justice in any realm—from the bar to the bench, school board meetings to congressional hearings, and beyond.

Amicus Curiae **Legal Momentum** is the oldest legal advocacy organization in the United States dedicated to advancing the rights of women and girls. Legal

Momentum is committed to enforcing the right to be free from cruel and unusual punishment, and to women's reproductive rights and access to health care.

Amicus Curiae **Legal Services for Prisoners with Children** ("LSPC") is a non-profit California-based legal services support center, which advocates on behalf of prisoners, their children and family members. For the past fourteen years, LSPC has represented prisoners and their families through impact litigation, legislative advocacy, administrative reform efforts and direct legal assistance, raising issues of concern to incarcerated parents and their children. In this capacity, LSPC has been involved in the effort to promote humane and effective treatment of pregnant women, infants, and extended family members caring for these infants and children.

Amicus Curiae **Lutheran Social Services of Illinois, Connections Program** is a non-profit social services agency of the Evangelical Lutheran Church in America, serving people of all faiths and all walks of life, including children, families, and adults of all ages. The Connections Program provides services and programs to incarcerated parents and their families. Available services include free transportation for children to visit their mothers during incarceration, a support group for caregivers, re-entry services for women who have left prison and are returning to the Chicago area, and organized field trips for children whose mothers are incarcerated.

Amicus Curiae **Maternal and Child Health Access** is dedicated to ensuring meaningful access to health and social services for low-income women and their families and to helping them improve the quality of their lives. MCHA provides information, support, and technical assistance to health and social service organizations, assists individual women to achieve healthy pregnancies and obtain quality health care for themselves and their children, and educates policymakers and the general public to improve the health and social services systems for all low income women and families and to benefit the entire community.

Amicus Curiae **The Ms. Foundation for Women**, the first and leading national women's fund, is engaged across the United States to build women's collective power to ignite social change. The Ms. Foundation delivers strategic grants, capacity building and leadership development to organizations at local, state, Tribal and national levels working for policy change and culture change across the broad areas of women's health, economic justice, ending violence and building democracy.

Amicus Curiae **National Juvenile Justice Network** ("NJJN") is a membership organization of state-based advocacy organizations each of which seeks to ensure that youth who come into conflict with the law are treated fairly, equitably and in a developmentally appropriate manner. Over the past 10 years the number of girls who have been detained and incarcerated in both the juvenile and

adult systems has consistently risen. This increase in numbers has not been met with a concomitant increase in appropriate care. Girls' needs, many of which are distinct from those of boys, remain largely ignored. For instance, girls who are pregnant may find themselves in either the juvenile or adult system, but in neither will they be likely to receive appropriate prenatal and obstetrical care.

Amicus Curiae **National Women's Health Network** ("NWHN") seeks to improve the health of all women by developing and promoting a critical analysis of health issues in order to affect policy and support consumer decision-making. NWHN was founded in 1975 to give women a greater voice within the healthcare system. NWHN is a membership-based organization supported by 8,000 individuals and organizations nationwide. NWHN has established core values to guide its work as advocates for women's health: 1) valuing women's descriptions of their own experiences and belief that health policy should reflect the diversity of women's experiences; 2) belief that evidence rather than profit should drive the services offered and information that is made available to women to inform their health decision making and practices; 3) valuing analysis of science that takes into consideration systems of power; 4) belief that the government has an obligation to safeguard the health of all people; 5) belief that all women should have access to excellent health care; and 6) belief that women's normal physiological changes over the lifespan should not be unduly medicalized.

Amicus Curiae **National Women's Law Center** is a Washington D.C.-based non-profit organization with a longstanding commitment to advancing maternal and child health. The Center's health and reproductive rights work includes advocacy on behalf of women subjected to prosecution and imprisonment. The Center supports both state and federal policies that promote public health, and opposes policies that hinder access to health care, especially for the most vulnerable populations.

Amicus Curiae **National Women's Prison Project** embraces women returning from the criminal justice system with holistic services—conducting intake, case management, life-skills classes and job training—to become successful and decrease chances of returning to jail. This agency has partnered with the Department of Corrections, Probation and Parole and Re-entry services to provide a wide array of services, yet will develop individualistic services to meet the needs of any woman who has ever encountered the criminal justice system who is still confronting barriers in society that will not allow her the full freedom to become empowered and self-sufficient.

Amicus Curiae **The New Mexico Women's Justice Project** aims to achieve justice and fairness for New Mexico women, children, and their families impacted by the criminal justice, delinquency, and abuse/neglect systems. In New Mexico, the incarceration rate for women climbed 81% between 1999 and 2004, the 9th

fastest rate in the nation, according to the Institute on Women and Criminal Justice. The Women's Justice Project advocates that the New Mexico correctional system ensures access to women's health care; monitors compliance with the federal Prison Rape Elimination Act of 2003; and encourages community collaborations and partnerships to create innovative and unique solutions for the female inmate population to improve the readiness of women to reintegrate into their communities.

Amicus Curiae **The Northwest Women's Law Center** is a non-profit public interest organization dedicated to advancing the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, the Law Center has served as a regional expert and leading advocate on reproductive freedom and the right to healthcare. Toward that end, the Law Center works to protect and ensure access to safe and humane medical care for incarcerated women, and to advance the legal rights of all pregnant and birthing women. Part of this work includes monitoring the practices and policies of women's corrections facilities in the Northwest states to ensure that no facility in the Northwest engages in shackling of laboring women, a practice that is inhumane, abhorrent, and dangerous to the health of both mother and child.

Amicus Curiae **The National Organization for Women Foundation**

("NOW Foundation") is devoted to furthering women's rights through education and litigation. The NOW Foundation is affiliated with the National Organization for Women, the largest women's rights organization in the United States, with a membership of over 500,000 contributing women and men in more than 550 chapters in all 50 states and the District of Columbia.

Amicus Curiae **Penal Reform International** ("PRI") is an international non-governmental organization working on penal and criminal justice reform worldwide. PRI seeks to achieve penal reform by promoting the development and implementation of international human rights instruments in relation to law enforcement and prison conditions; the elimination of unfair and unethical discrimination in all penal measures; and a reduction in the use of imprisonment throughout the world.

Amicus Curiae **Prison Legal News** ("PLN") is a non-profit, charitable corporation that publishes a nationally distributed monthly journal of the same name. Since 1990, PLN has reported on news, recent court decisions, and other developments relating to the civil and human rights of prisoners. Approximately sixty-five percent of PLN subscribers are state and federal prisoners.

Amicus Curiae **Prisoners' Legal Services of New York** ("PLS") is a non-profit organization that has been providing civil legal services to indigent inmates

in New York State prisons for over thirty-two years. PLS receives over 10,000 requests for assistance annually. There are over 2,500 females currently in the custody of the New York State Department of Correctional Services. PLS' mission is to insure that New York State inmates receive fair, just, lawful and humane treatment while incarcerated. PLS seeks, wherever possible, to resolve complaints administratively and in meritorious cases that cannot be resolved administratively, PLS serves as legal counsel in both state and federal courts. PLS has a significant interest in ensuring the protection of the constitutional rights of all prisoners.

Amicus Curiae **Rebecca Project for Human Rights** ("RPHR") is a national legal and policy organization that advocates for public policy reform, justice and dignity for vulnerable families. RPHR strives to reform child welfare, criminal justice, and other policies that impact the lives of vulnerable families. RPHR addresses the pervasiveness of violence against women and girls, the draconian conditions that too often characterize maternal incarceration, and the dearth of access to health and healing for mothers and their children, as fundamental human rights violations. RPHR seeks to stop the shattering cycle of violence, trauma and addiction and seeks to urge for policies and practices that honor, strengthen, and render whole the sacred ties between parents and children. RPHR affirms the worth and dignity of every child and every family.

Amicus Curiae **SisterSong Women of Color Reproductive Health**

Collective is an organization dedicated to amplifying and strengthening the collective voices of Indigenous women and women of color to ensure reproductive justice through securing human rights. SisterSong educates women of color on reproductive and sexual health and rights, and works to improve access to health services, information and resources that are culturally and linguistically appropriate through the integration of the disciplines of community organizing, self-help and human rights education.

Amicus Curiae **Southwest Women's Law Center** ("SWLC") is a non-profit legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. SWLC seeks to promote access to comprehensive reproductive health care information and services and to eliminate discrimination and disparities in access to necessary and appropriate health care services based on gender.

Amicus Curiae **Texas Jail Project** ("TJP") is dedicated to improving the conditions for the thousands of people—mothers, fathers, brothers, sons, sisters and daughters—incarcerated in Texas jails. TJP was originally formed to improve

conditions for incarcerated women by publicizing the widespread abuse and neglect in the 258 county facilities in Texas.

Amicus Curiae **The Uptown People's Law Center** ("the Law Center") is a non-profit legal clinic founded in 1975. In addition to providing legal representation, advocacy and education for poor and working people in the Uptown neighborhood of Chicago and surrounding communities, the Law Center also provides legal assistance to people housed in Illinois' prisons in cases related to their confinement. The Law Center has provided direct representation to over 100 prisoners, including several cases before this Court. Many of these cases have included either a legal or a factual dispute over exhaustion.

Amicus Curiae **WORTH (Women on the Rise Telling Her Story)** is an association of empowered women who work to improve the lives and health of women who are affected by the criminal justice system.

INTERESTS OF *AMICI CURIAE*

Shawanna Nelson has consented to the filing of this brief in support of Appellee's Petition for Rehearing. *Amici curiae* are organizations concerned about the prison practice of shackling women during childbirth. *Amici* are deeply concerned with the issues and the outcome of this case because the experiences of Shawanna Nelson, who was shackled during her labor and the delivery of her newborn son, are shared by numerous other imprisoned mothers and newborns in

the United States each year. As advocates for the health, safety and rights of incarcerated women and their children, *amici* regard shackling as beneath any standard of decency in the care and treatment of women during childbirth. *Amici* condemn this cruel and inhumane practice that is in violation of both the United States Constitution and international human rights standards. For the reasons explained below, the health and safety of mothers and children requires rehearing of this case.

ARGUMENT

I. SHACKLING PREGNANT INCARCERATED WOMEN DURING CHILDBIRTH IS AN OBVIOUS DANGER TO MATERNAL AND FETAL HEALTH.

The shackling of pregnant women who are incarcerated is an inhumane, unnecessary and dangerous practice that should be abolished as a matter of law and policy. Shackling creates major risks to the health and safety of mothers throughout their pregnancies and postpartum, as well as during the process of childbirth. This brief, however, focuses on the risks of harm posed by shackling during childbirth. Shackling a woman in labor makes the entire birthing process more difficult and painful and places a barrier between the woman and her health care provider, creating significant and unnecessary risks of injury and even death to both mother and fetus.

The American Public Health Association explicitly states: “Women must never be shackled during labor and delivery.” APHA, *Standards for Health Services in Correctional Institutions* 108 (2003). Women who are in the process of giving birth should be mobile in order to assume various positions as needed, and shackles greatly limit, if not completely prevent, such mobility. “*Not a Part of My Sentence*”: *Violations of the Human Rights of Women in Custody, Updated Report*, AMNESTY INT’L RIGHTS FOR ALL REP., 2001, at 23, http://www.amnestyusa.org/women/custody/custody_all.pdf. The use of shackles also creates a hazardous situation for the mother and fetus

throughout the birthing process (a process that may take hours or days) and compromises the mother's ability to provide post-partum care for her newborn. *Id.*

The need for a mother in labor to remain mobile was recognized by the physician contracted to deliver babies for the Arkansas Department of Correction, as well as by Dr. Cynthia Frazier, an ACOG fellow, who gave expert testimony about the risk in this case. SA 121, 169-173. Dr. Frazier testified that it was her, "opinion to a reasonable degree of medical certainty, that it is inherently dangerous to both the mother and the unborn fetus to have a woman shackled during the final stages of labor. During the final stages of labor, it is important to the delivering physician to be able to move quickly and to act quickly, in order to avoid the potentially life-threatening emergencies for both the mother and the unborn fetus." SA 169-170.

The unjust and excessively punitive practice of shackling pregnant women during labor was once a matter of routine policy in nearly all American prisons and jails, but today, this is no longer the case. This immoral practice has been reconsidered, and in many cases, prohibited in recognition of the significant risk of harm it poses to mother and fetus.

Federal courts have recognized that correctional authorities cannot use, "restraints on any woman in labor, during delivery, or in recovery immediately after delivery." *See Women Prisoners of the District of Columbia v. District of Columbia*, 93 F.3d 910, 918, 936 (D.C. Cir. 1996). The D.C. District Court found that prison officials

acted with deliberate indifference in shackling pregnant women because the risk of injury to women prisoners is obvious, and any shackling while a woman is in labor is inhumane. *Women Prisoners of District of Columbia Dep't of Corrections v. District of Columbia*, 877 F.Supp. 634, 668 (D.D.C. 1994).

In 1990, pursuant to a consent decree entered in *Reynolds v. Horn*, 81 Civ. 107, ¶ 85 (PNL) (S.D.N.Y. 1990)(stipulation and order of settlement entered Oct. 1, 1990)(unpublished), the New York City Department of Corrections barred the use of mechanical restraints on women admitted to municipal hospitals for delivery. In New York City, after pre-trial detainees who were or would be held in medical and psychiatric wards of certain municipal hospitals brought a class action alleging constitutional violations, including Eighth Amendment violations, a consent decree was entered which established basic standards of treatment and care. These standards included that the "[Department of Corrections] will not place mechanical restraints on an outposted inmate where a doctor determines that the inmate . . . is pregnant and is admitted for delivery of the baby." *Reynolds v. Horn*, 81 Civ. 107 (S.D.N.Y. 1990). Use of mechanical restraints in general was to be determined on a case-by-case basis. *Id.* To date, there have been no escapes or security breaches as a result of these policies.

The states of California, Illinois and Vermont have enacted strict laws that prohibit the shackling of pregnant women in nearly all circumstances. CAL. PENAL

CODE § 3423 (West 2006); 55 ILL. COMP. STAT. 52-15003.6 (2000); VT. STAT. ANN. tit. 28, § 801a (2005). In the years since these states enacted their anti-shackling prohibitions, there have been no reported incidents of escape or other security problems. Illinois legislation, which went into effect in 2000, states that:

[N]o handcuffs, shackles, or restraints of any kind may be used during her transport to a medical facility for the purpose of delivering her baby. Under no circumstances may leg irons or shackles or waist shackles be used on any pregnant female prisoner who is in labor.

55 ILL. COMP. STAT. 52-15003.6 (2000).

The Vermont law, passed in 2005, has the explicit goal of "respect[ing] the unique health issues associated with a pregnant inmate " and with the "recogni[tion] that to do so might pose undue health risks for the mother and unborn child." VT. STAT. ANN. tit. 28, § 801a (2005). Vermont's ban on shackling applies to all incarcerated pregnant women who are beyond their first trimester. *Id.*

California's law barring shackling went into effect in 2006 and states that a pregnant "inmate shall not be shackled by the wrists, ankles, or both during labor, including during transport to a hospital, during delivery, and while in recovery after giving birth." CAL. PENAL CODE § 3423 (West 2006).

These state laws and policies recognize that shackling is unnecessary, given that incarcerated women, particularly those who are pregnant or in labor, represent an extremely low security or flight risk. These laws were passed to ensure that pregnant women are afforded a minimum level of dignity and a safe and healthy

pregnancy and childbirth, and that the unnecessary and wanton infliction of pain caused by shackling does not, in effect, become part of her sentence.

The nation's leading experts in maternal, fetal and child health care have clearly stated their opposition to the practice of shackling. See American College of Obstetricians and Gynecologists, *Letter in Opposition to Shackling*, June 12, 2007, *available at*:

<http://www.acog.org/departments/underserved/20070612SaarLTR.pdf>. Last year, the American College of Obstetricians and Gynecologists ("ACOG") released a statement that calls for an end to the shackling of pregnant women during labor and delivery. *Id.* In opposing the practice, ACOG stated:

Physical restraints have interfered with the ability of physicians to safely practice medicine by reducing their ability to assess and evaluate the physical condition of the mother and the fetus, and have similarly made the labor and delivery process more difficult than it needs to be; thus, overall putting the health and lives of the women and unborn children at risk. Typically, these inmates have armed guards on-site, which should be more than adequate to protect personnel helping a pregnant, laboring woman, or to prevent her from fleeing.

Id. ACOG has further stated that shackling is "demeaning and unnecessary." *Id.*

Testimonial statements from women who have been shackled describe their inability to move to reduce the pain of labor, the bruises caused by the use of metal shackles across the stomach, and the feeling that they have lost all dignity. *Id.* As one woman who was subjected to shackling during childbirth stated:

[G]iving birth while incarcerated was one of the most horrifying experiences of my life. At the hospital I was shackled to a metal bed post by my right ankle throughout seven hours of labor, although a correctional officer was in the room with me at all times... Imagine being shackled to a metal bedpost, excruciating pains going through my body, and not being able to adjust myself to even try to feel any type of comfort, trying to move and with each turn having hard, cold metal restraining my movements.

Dana Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights*

Violation, 16 AM. U.J. GENDER SOC. POL'Y & L. 223, 224-25 (2007). Statements

like this, from women who have experienced shackling, confirm concerns raised by obstetric experts. ACOG recognizes that incarcerated pregnant women, particularly those who are in labor, represent a "particularly vulnerable population" that deserves "dignity" and "compassionate care." ACOG, *Letter in Opposition to Shackling*, June 12, 2007.

The risk to women and children's health caused by shackling pregnant women during labor is obvious, as shown by the American Public Health Association Standards for Health Services in Correctional Institutions, prior law, expert medical opinion, and the record in this case. To ensure the health and safety of mothers and children as recommended by the nation's leading experts in maternal and child health, including the experts in this case, prisons should be prohibited from shackling pregnant women during childbirth.

II. ROUTINE USE OF SHACKLES IS NOT JUSTIFIED BECAUSE INCARCERATED WOMEN POSE A LOW SECURITY RISK GENERALLY & PARTICULARLY DURING CHILDBIRTH.

Prisons that shackle pregnant women in labor engage in this practice ostensibly to prevent escape or ensure the safety of prison and medical staff. This rationale ignores the realities of childbirth. Labor includes dilation of the cervix and onset of contractions which progress in intensity and duration to the point where women begin to bear down, as the fetus descends down the vagina, and deliver a newborn. *See* F. Gary Cunningham et al., WILLIAMS OBSTETRICS (22d ed. 2005). The need for support mechanisms for women in labor, such as family, friends, doulas, midwives, or nurses, recognizes that a woman going through childbirth is likely to experience excruciating pain, is largely physically incapacitated and vulnerable, and in need of care and support through this life-changing experience. Being shackled during labor, and during delivery, at this life transformative moment, amounts to a punishment totally out of proportion to any crime she may have committed. Furthermore, like the Appellee in the instant case, the vast majority of women who are incarcerated in the United State have been charged with non-violent offenses. Lawrence A. Greenfield and Tracey L. Snell, US Department of Justice, *Women Offenders* (2000).

Amici recognize that the safety of hospital and correctional personnel is a critical and legitimate concern. This concern, however, is addressed by the

presence of armed correctional staff, who are normally present in or around the delivery room to monitor the woman giving birth, both during her transportation to the hospital and during her time in the hospital. ACOG, *Letter in Opposition to Shackling*, June 12, 2007. This is a case in point - an armed guard was present during Ms. Nelson's labor and delivery. SA 70, 197. The presence of the armed guard is a sufficient safeguard which permits quality medical care to pregnant women, to ensure the safety and well being of mothers and their newborn children, while also protecting the safety of medical staff and the state's interest in maintaining custody of the prisoner. The inhumane practice of shackling is not necessary to achieve these goals, and is in fact counterproductive because it interferes with quality medical care to pregnant women, and threatens the safety and well being of mothers and their newborn children.

III. THE USE OF SHACKLES ON WOMEN IN LABOR VIOLATES THE UNITED STATES CONSTITUTION AND ESTABLISHED INTERNATIONAL HUMAN RIGHTS LAW.

The Eighth Amendment's prohibition of cruel and unusual punishment must be interpreted in light of evolving standards of decency. *See* U.S. CONST. amend. XIII; *Roper v. Simmons*, 543 U.S. 551, 561 (2005). Such standards are reflected in a range of sources. One source commonly cited by United States courts is the U.N. Standards Rules for the Treatment of Prisoners. E.S.C. Res. 663C, ¶ 33, Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611, annex 1

(Aug. 30, 1955). Indeed, the United States Supreme Court, the Second Circuit Court of Appeals and many federal district courts have invoked the Standard Minimum Rules for the Treatment of Prisoners (hereinafter “Minimum Standards”) as guidance in Eighth Amendment cases and in other cases involving prison conditions and the treatment of prisoners. *See, e.g., Roper*, 543 U.S. at 554; *Estelle v. Gamble*, 429 U.S. 97, 103-10 (1976) (citing Minimum Standards as evidence of “contemporary standards of decency” for purposes of Eighth Amendment and holding denial of medical services to inmates inconsistent with those standards); *Atkins v. Virginia*, 536 U.S. 304, 335 (2002) (considering “international opinion” in Eighth Amendment analysis).¹

¹ *See also, Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 396 (2nd Cir. 1975) (invoking single cell provision of Minimum Standards in due process challenge to conditions of confinement); *Morgan v. LaVallee*, 526 F.2d 221, 226 (2nd Cir. 1975) (citing Minimum Standards in analyzing prison health conditions); *Lareau v. Manson*, 507 F. Supp. 1177, 1187-89 (D. Conn. 1980) (relying on Minimum Standards to define meaning of “adequate shelter” and holding floor-sleeping unconstitutional); *Thomas v. Baca*, 514 F. Supp. 2d 1201, 1217 (C.D. Cal. 2007) (citing Minimum Standards as guidelines and holding floor-sleeping a violation of Eighth Amendment); *Kane v. Winn*, 319 F. Supp. 2d 162, 198-99 (D. Mass. 2004) (discussing incorporation of Standard Minimum Rules in 1962 Model Penal Code and influence on other penal laws); *Everson v. Mich. Dep't of Corr.*, 222 F. Supp. 2d 864, 885 (E.D. Mich. 2002) (citing Standard Minimum Rules as source setting forth rights for female inmates); *Crain v. Bordenkircher*, 342 S.E.2d 422, 446 (W.Va. 1986) (noting one person per cell policy under Standard Minimum Rules); *Jones v. Wittenberg*, 440 F. Supp. 60, 149 (N.D. Ohio 1977) (using Standard Minimum Rules as guidance in evaluating prison conditions); *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1260 (M.D. Ala. 1998) (using Standard Minimum Rules as guidance and holding use of hitching post unconstitutional); *Jordan v. Arnold*, 408 F. Supp. 869, (M.D. Pa.

The Minimum Standards indicate that instruments of restraint are to be used only in very narrow circumstances where the need is clear. E.S.C. Res. 663C, *supra* ¶ 33. For example, while restraints maybe used “during a transfer” or to “prevent a prisoner from injuring himself (or herself) or others...” they can only be used to prevent injury by order of the director on a case-by-case basis, and not as a blanket policy. *Id.* The Minimum Standards clearly did not contemplate any blanket use of restraints during labor and childbirth, and in fact, they state that there shall be “special accommodations” for pregnant women and “[a]rrangements shall be made wherever practicable for children to be born in a hospital outside the institution.” E.S.C. Res. 663C, *supra* ¶ 23. This is consistent with U.S. Supreme Court precedent that holds deliberate indifference to the serious medical needs of prisoners constitutes the type of “unnecessary and wanton infliction of pain” that is proscribed by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976). *See also* Sichel, *supra*, at 232.

Other countries not only follow international opinion, but they go even further. For example, Norway allows a pregnant prisoner leave to breastfeed her child. United Nations Office of the High Commissioner for Human Rights, Reply by the Government of Norway at 25, UNCCPR/C/NOR/Q/5.Add.1 (March 8,

1976) (in Eighth Amendment analysis, citing Standard Minimum Rules provision that prisoners should have at least one hour of exercise per day); *Williams v. Coughlin*, 875 F. Supp. 1004, 1013 (W.D.N.Y. 1995)(citing Standard Minimum Rules in Eighth Amendment analysis).

2006). As the U.S. Supreme Court stated in *Roper v. Simmons*, the 2005 case striking down the juvenile death penalty, it “does not lessen fidelity to the Constitution...to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom.” 543 U.S. 551, 554 (2005) (holding execution of individual under 18 at time of crime prohibited by Eighth and Fourteenth Amendments and stating “international opinion provides respected and significant confirmation” of Court’s decision).

It is equally appropriate to look at other sources of international law to determine whether a practice is “cruel and unusual punishment.” In *Roper*, the Supreme Court specifically looked to a wide range of international opinion. While the weight of international opinion against the juvenile death penalty was not binding in that case, the Court’s use of international law as persuasive authority significantly contributed to its determination that the death penalty is a disproportionate punishment for young offenders. *Id.*

Other sources of international law confirm that shackling women during childbirth seriously diverges from common standards of decency. The U.S. has ratified the Convention Against Torture, (“CAT”). Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, G.A. Res. 46, 39 U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/39/51

(1984). In 2006, the Committee Against Torture, the body that monitors State compliance with CAT, issued formal comments to the United States, stating that its prisons are in violation of international human rights laws due to the practice of shackling women during childbirth. U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, ¶ 33, UN Doc. CAT/C/USA/CO/2 (July 25, 2006).

Furthermore, the International Covenant On Civil and Political Rights, ratified by the United States in 1992, states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Covenant on Civil and Political Rights, art. 7, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966). The Human Rights Committee, which monitors State compliance with the International Covenant on Civil and Political Rights, has also criticized the United States’ practice of shackling in its 2006 review of the United States’ compliance with that treaty. *See Concluding Observations of the Human Rights Committee: United States of America*, 87th Sess., ¶ 33, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (2006).

The international community has also recognized the obligation of protecting women throughout pregnancy and childbirth. The Universal Declaration of Human Rights, which was approved by the United Nations in 1948, declares that motherhood is “entitled to special care and assistance.” G.A. Res.

217A (III), art. 25(2), U.N. Doc. A/810 (Dec. 10, 1948). The International Covenant on Economic, Social and Cultural Rights, which the United States signed in 1977, requires that mothers be given protection before and after childbirth. . International Covenant on Economic, Social and Cultural Rights, art. 12(1), Dec. 16, 1966, 993 U.N.T.S. 3. In addition, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which the United States signed in 1980, requires that states “ensure women appropriate services in connection with pregnancy, confinement and the post-natal period.” Convention on the Elimination of All Forms of Discrimination Against Women, art. 12(2), Mar. 1, 1980, 1249 U.N.T.S. 13.

International legal standards repeatedly and strongly emphasize the importance of protecting the health and well-being of mothers, especially during childbirth. These protections apply to incarcerated women. The practice of shackling contravenes these international human rights standards by directly threatening the safety of both the pregnant woman and her child, by unnecessarily making the birthing process more difficult and painful, and by placing a needless barrier between a woman and her health care provider that may result in sub-standard medical care. In addition, shackling during pregnancy and childbirth violates the basic rights to health, safety and freedom from cruel and degrading treatment that are guaranteed to all prisoners under international law. Thus, under

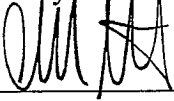
both United States Constitutional principles, and in the interest of ensuring that the United States more fully meets its international treaty obligations, the practice of shackling pregnant and laboring women should be found unconstitutional and abolished.

CONCLUSION

The nation's leading experts in maternal and fetal health have criticized the practice of shackling pregnant women during labor and delivery because of its obvious risk to the health of mother and child. The record in this case includes medical and other evidence of the obvious nature of the risk of shackling pregnant women during labor. Corrections officials, medical professionals, other states, and courts have recognized the obvious risks of shackling pregnant women. Despite the obvious nature of the risk, Appellants were deliberately indifferent to those risks when they shackled Appellee Nelson's legs and wrist to her hospital bed during labor and recovery.

The practice of shackling violates the United States Constitution and international human rights laws. Every woman who is forced to endure shackling during pregnancy and childbirth faces a loss of basic human dignity that all women deserve to retain. The health, safety and rights of pregnant women, mothers and children require a rehearing of this case, and allowing Ms. Nelson an opportunity to prove her case in court.

Respectfully submitted,



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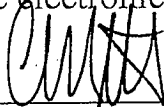
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), the attached Amicus Brief is proportionately spaced, has a typeface of 14 point, and contains 14 pages consisting of 3182 words according to the legal word count function of Microsoft Word 2003. Counsel further certifies that the disk used for the electronic version of the brief has been scanned and is virus-free.



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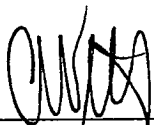
CERTIFICATE OF SERVICE

Counsel hereby certifies that on July 31, 2008, two copies of the attached Amicus Brief, as well as a digital version of the brief, were delivered by U.S. Mail to:

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