Nos. 21-16645, 21-16711

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A ISAACSON, ET AL.,

Plaintiffs-Appellees,

v.

MARK BRNOVICH, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Arizona
No. CV-21-01417-PHX-DLR
Hon. Douglas L. Rayes

BRIEF OF NATIONAL ADVOCATES FOR PREGNANT WOMEN ET AL. AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES SEEKING AFFIRMANCE IN PART AND REVERSAL IN PART

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTERESTS OF AMICI

Amici National Advocates for Pregnant Women; Arizona Attorneys for Criminal Justice; Arizona Center for Women's Advancement; Arizona Justice Alliance; Central Phoenix Inez Casiano National Organization for Women; Central Arizona National Lawyers Guild; Color of Change; Fair and Just Prosecution; If/When/How: Lawyering for Reproductive Justice; NARAL Pro-Choice Arizona; Secular Arizona; and Women's March Women2Women Mobilizing Circle in Phoenix, AZ are organizations committed to the rights, dignity, and autonomy of all persons, including those who are pregnant and postpartum. *Amici* include national and Arizona-based organizations working to ensure that women have access to medical care without fear of arrest, prosecution, forced medical interventions, and other unconstitutional deprivations of their rights. In light of grave concerns about Arizona's "Personhood Provision," *amici* wish to bring to this Court's attention the actual impact laws recognizing rights for the "unborn" have had on women's right to life and liberty, as well as the counterproductive impact such laws have had on maternal, fetal, and child health.

No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties consented to the filing of this brief.

Statements of interest of *amici* are set out in Appendix A.

SUMMARY OF ARGUMENT[1]

The Personhood Provision instructs that the laws of Arizona "be interpreted and construed to acknowledge on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons." Ariz. Rev. Stat. § 1-219. While it is clear that this provision is intended to apply to the entire Arizona legal code, it is extremely vague as to how its command should be carried out.[2] Well-documented experience over the last forty-plus years, however, demonstrates beyond doubt that laws asserting rights for the unborn have provided the basis for prosecutors, child welfare authorities, and

[1] While this brief focuses on the Personhood Provision, *amici* also urge this Court to affirm the injunction against the Reason Scheme for the reasons articulated by Plaintiffs-Appellees. *See* Pls.-Appellees Br. at 24-57.

[2] *See id*. at 57-68.

courts to reinterpret statutes that use the words "person" or "child" to include fertilized eggs, embryos, and fetuses—and therefore the pregnant woman herself. Through the reinterpretation of every manner of law, state actors have subjected pregnant and postpartum women to arbitrary and discriminatory criminal prosecutions, detentions, and forced medical interventions.[3]

Of particular note are the dozens of prosecutions in Missouri following the Court's refusal to enjoin that state's personhood provision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and the more than 1,600 deprivations of pregnant women's liberties across the country, including in Arizona.[4] While the Personhood Provision purports to expand the personhood of the unborn, its primary impact will be to delegate to law enforcement and other state actors the authority to interpret and apply the provision to diminish the

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[3] *See* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L. 299 (2013).

[4] *Id.*; *see also* Khaleda Rahman, *Overturning Roe v Wade Could Lead to More Women Being Jailed for Miscarriages*, NEWSWEEK (Nov. 30, 2021), https://www.newsweek.com/overturning-roe-v-wade-could-lead-more-women-being-jailed-miscarriages-1653772.

constitutional personhood of pregnant women, at great risk to maternal and neonatal health. For these reasons—and those in Plaintiffs-Appellees' Brief—*amici* urge the Court to recognize that the Personhood Provision is ripe for review and must be enjoined.

ARGUMENT

I. Missouri Prosecutions Following *Webster* Demonstrate the Necessity of an Injunction of the Personhood Provision

In denying an injunction of the Personhood Provision, the district court overlooked crucial distinctions between this case and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). As Plaintiffs-Appellees explain, unlike in *Webster*, Defendants-Appellants *themselves* concede that the Personhood Provision "may be used in interpreting other statutes and other provisions of the Arizona Revised Statutes, including civil provisions, probate provisions, criminal provisions, or in any other place in the law where the. . . statute is triggered." Pls.-Appellees' Br. at 59-62 (quoting 2-ER-117). In *Webster*, by contrast, Missouri made no such representation, and the Court thus held that it was merely an "abstract proposition[]" that Missouri's personhood provision would be "used to interpret other state statutes" or "applied to restrict the activities" of the plaintiff reproductive health providers or

their patients. 492 U.S. at 506-07. Given the possibility that the personhood provision was merely "precatory" and intended to "express [a] value judgment," the Court declined to issue an injunction. Yet here, Defendants-Appellants' admission makes clear that the Personhood Provision is plainly not "precatory," but rather a self-executing provision that authorizes prosecutors and other state actors to reinterpret the entire Arizona code.

Moreover, at the time *Webster* was decided, there was not a body of evidence—from Missouri or elsewhere—documenting how state actors have used legislation asserting separate rights for the unborn to deny the rights of pregnant women. In fact, there was not a single arrest of a woman in Missouri in relation to her pregnancy until after *Webster*. Yet in the intervening decades, *amici* have documented more than a thousand such cases, dozens of them involving deprivations of the rights and liberty of pregnant women in Missouri.[5] Where the legal basis for

[5] *See* Paltrow & Flavin, *supra* note 3, at 309; NAPW, Arrests of and Forced Interventions on Pregnant Women in Missouri (1991-2005), https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2021/12/Missouri-Narratives.pdf (providing case names and descriptions for the 29 arrests from 1991-2005 documented in Paltrow & Flavin article). From 2006-2020, *amici* have documented ten additional arrests based on pregnancy and perceived risks to the fetus.

such prosecutions could be discerned, they all relied on the claim that statutes using words such as "child" or "person" could include the unborn.[6] In Missouri, prosecutors specifically relied on the personhood provision allowed to go into effect in *Webster*. All of these cases demonstrate the danger of *Webster*'s "wait and see" approach.

Since *Webster*, Missouri prosecutors have prosecuted scores of women for being pregnant and subjecting "unborn children" to perceived risks of harm including drinking alcohol,[7] smoking marijuana,[8] or drinking tea made with mint and marijuana leaves to treat morning sickness.[9]

See State v. Baker, 618 S.W.3d 551 (Mo. Ct. App. 2020); *State v. Usnick*, 585 S.W.3d 298 (Mo. Ct. App. 2019); *State v. Hays*, No. 18LW-CR00898-02 (Mo. Cir. Ct. Stone Cnty. 2018); *State v. Head*, No. 18AM-CR00236 (Mo. Cir. Ct. Howell Ctny. 2018); *State v. Scroggs*, 521 S.W.3d 649 (Mo. Ct. App. 2017); *State v. Vaughn*, No. 12SN-CR01189 (Cir. Ct. Stone Cnty. 2012); State *v. Gruenewald*, No. 08SL-CR0087 (Mo. Cir. Ct. St. Louis Cnty. 2008); *State v. Decker*, No. 07BR-CR00030-01 (Cir. Ct. Barry Cnty. 2007); *State v. Lohnstein*, No. 0611-CR08757 (Mo. Cir. Ct. St. Charles Cnty. 2007); Mike Cullinan, *Mother Sentenced to Five Years for Endangering Newborn*, BOLIVAR HERALD-FREE PRESS (Oct. 13, 2006) (describing prosecution of Stacey Sturdevant for pregnancy and drug dependency).

[6] *See* Paltrow & Flavin, *supra* note 3, at 322-24.

[7] *State v. Lohnstein*, No. 0611-CR08757 (Mo. Cir. Ct. St. Charles Cnty. 2007).

[8] *State v. Lewis*, No. 03CR113048 (Mo. Cir. Ct. Chariton Cnty. Dec. 13, 2004).

[9] *State v. Kloeva-Cook*, No. 05J5-CR00219 (Mo. Cir. Ct. Saline Cnty. Apr. 10, 2006).

The first such case occurred in 1991—two years after *Webster*—when a mother was charged with second-degree assault and child endangerment based on the allegation that she drank alcohol during her pregnancy. *See State v. Pinder*, (Mo. Cir Ct. Pulaski Cnty. 1991).

Similarly, in 2006, Sherri Lohnstein was arrested on involuntary manslaughter charges based on the claim that she drank alcohol during her pregnancy. *Lohnstein*, No. 0611-CR08757 (Mo. Cir. Ct. St. Charles Cnty. 2007). She pled guilty, received a seven-year suspended sentence, was placed on probation, and was later incarcerated after her probation was revoked.[10] Ms. Lohnstein's prosecution for drinking alcohol, a legal activity, reveals the extent to which reliance on laws asserting separate rights for the unborn have provided the basis for treating pregnant women as a second class of persons who may be convicted for otherwise legal acts.[11]

Even when Missouri courts have rejected attempts to use Missouri's personhood provision as justification for criminalizing perceived risks

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[10] UPI, *Mother Jailed for Child's Alcohol Death* (Sept. 3, 2009), https://www.upi.com/Top_News/US/2009/11/03/Mother-jailed-for-childs-alcohol-death/65221257270118/.

[11] *See* Paltrow & Flavin, *supra* note 3, at 322-36.

during pregnancy, such decisions did not undo the deprivations that pregnant women faced during pre-trial incarceration, including family separation, or the damaging collateral consequences of an arrest. *See* Section VI, *infra*. For example, the Missouri Court of Appeals affirmed the dismissal of felony child endangerment charges against Janet Wade based on the claim that she was pregnant and used drugs, recognizing that "the logic of allowing such prosecutions would be extended to cases involving smoking, alcohol ingestion, the failure to wear seatbelts, and any other conduct that might cause harm to a mother's unborn child."

State v. Wade, 232 S.W.3d 663, 665 (Mo. Ct. App. 2007). Yet the dismissal of the charges against Ms. Wade failed to restore the stigmatic and material harms she faced due to an unconstitutional prosecution.

Even decisions like *Wade* have proved insufficient to dissuade Missouri prosecutors from continuing to try to criminalize pregnant and postpartum women for perceived risks during pregnancy.[12] Moreover, the vast majority of women—disproportionately women of color and

[12] *See* post-2007 cases listed in note 5, *supra*.

those who are low-income—are compelled to accept plea deals rather than put the prosecution to its proof. *See* Section VI, *infra*.

Missouri prosecutors have also been undeterred by the so-called "exception" to the personhood provision that specifies that the law does not create a cause of action against a woman "for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care," Mo. Rev. Stat. § 1.205.4—a provision that is nearly identical to Section (B)(2) of Arizona's Personhood Provision. For instance, one prosecutor who brought charges against twenty-two pregnant or postpartum women in Jackson County argued that a mother "'directly' endangered the unborn child by ingesting an already illegal drug" and that Missouri's personhood provision put her "on notice . . . that she could be prosecuted for child endangerment of her unborn child." State's Response to Motion to Dismiss, *State v. Smith*, No. 16CR2000-00964 (Mo. Cir. Ct. Jackson County Feb. 8, 2008).

These Missouri prosecutions—coupled with the hundreds of similar cases across the country, *see* Sections II-V, *infra*—demonstrate the dangerous fallacy of the *Webster* Court's assertion that a personhood

provision may be allowed to go into effect because it is only intended to "express [a] value judgment" rather than "applied to restrict the activities" of pregnant women or their medical providers. 492 U.S. at 506-07. Decades of experience and hundreds of prosecutions justify—and require—a departure from *Webster*, given the intolerably-high risk that Arizona's Personhood Provision will similarly be weaponized to police pregnant women.

II. Across the Country, State Actors Asserting an Interest in the "Unborn Child" Have Subjected Over 1,600 Women to Arrests, Detention, and Prosecution Based on Pregnancy

Over 1,600 cases from across the country likewise show that the principles animating the Personhood Provision have been used to subject pregnant and postpartum women to criminal prosecution, surveillance, and control.[13] In each of these cases, women were prosecuted, detained, or subjected to forced medical interventions due to their status as pregnant persons whose rights state actors determined could be subordinated in the interest of the "unborn child." At the heart

[13] NAPW, Arrests and Deprivations of Liberty of Pregnant Women, 1973-2020 (Sept. 2021), bit.ly/arrests1973to2020.

of these cases is the theory that once a woman becomes pregnant, her otherwise legal acts or omissions may be viewed as crimes.[14] This Section will discuss illustrative criminal cases, while Sections III and IV, *infra*, will describe forced medical interventions and civil cases.

Prosecutors and judges across the country have sought to misuse existing state criminal laws to penalize pregnant women for being HIV positive[15]; drinking alcohol[16]; and not arriving to the hospital quickly enough on the day of delivery.[17] Many of these cases involve

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[14] *See* Paltrow & Flavin, *supra* note 3 at 322-24.

[15] *See, e.g.*, Judy Harrison, *Judge jails woman until baby is born*, BANGOR DAILY NEWS (June 2, 2009), https://bangordailynews.com/2009/06/02/news/bangor/judge-jails-woman-until-baby-is-born/ (describing judge's decision to extend an HIV positive pregnant woman's incarceration to ensure she would be imprisoned when she gave birth out of stated concern for protecting the "unborn child").

[16] *See, e.g.*, Ellen Goodman, *She's Pregnant and Arrested: The Bizarre Story of Diane Pfannenstiel*, BUFFALO NEWS (Feb. 10, 1990), https://buffalonews.com/news/shes-pregnant-and-arrested-the-bizarre-story-of-diane-pfannenstiel/article_1e91c003-d3d4-531c-9584-83f2951febe4.html (describing how after Wyoming pregnant woman called battered women's hotline because her husband beat her and she was brought to police station for photographs of her bruises, she was tested for alcohol and then incarcerated and prosecuted for felony child abuse because of her alleged drinking while pregnant); *People v. Gilligan*, No. 5456 (N.Y. Sup. Ct. Warren Cnty. 2004) (dismissing child endangerment charge based on claim that pregnant woman endangered her unborn child by drinking alcohol).

[17] Marcia Chambers, *Charges Against Mother in Death of Baby are Thrown Out*, N.Y. TIMES (Feb. 7, 1987), https://www.nytimes.com/1987/

misapplications of criminal statutes that make no mention of pregnancy, while others involve the misapplication of feticide statutes that were intended to protect pregnant women from the violent acts of third parties. These cases illustrate the ways in which the Personhood Provision may be wielded by prosecutors to invent new charges in the context of pregnancy based on a reinterpretation of the criminal code to "acknowledge" the rights of the "unborn child."

For instance, in New York, Jennifer Jorgensen was convicted of manslaughter when she got into a car accident while pregnant and her newborn died after emergency cesarean surgery. Prosecutors had argued that this result occurred, in part, because she had not been wearing a seatbelt. *People v. Jorgensen*, 41 N.E.3d 778, 779-80 (N.Y. 2015). New York's highest court overturned the conviction, reasoning, "one could find it 'reckless' for a pregnant woman to disregard her obstetrician's specific orders concerning bed rest; take prescription and/or illicit drugs; shovel a walkway; engage in a contact sport; carry groceries; or disregard dietary restrictions." *Id.* at 781.

02/27/us/charges-against-mother-in-death-of-baby-are-thrown-out.html (describing prosecution of woman for alleged failure to seek medical help quickly enough on the day her infant was born).

Judges across the country have similarly observed that the criminalization of perceived risks taken during pregnancy could have the outrageous effect of subjecting women to criminal sanctions for skiing, horseback riding, failing to maintain a proper diet, or exercising too much or too little during pregnancy.[18] As the Maryland Court of Appeals noted in reversing reckless endangerment convictions based on the alleged ingestion of drugs during pregnancy, "If the State's position were to prevail, there would seem to be no clear basis for categorically excluding any [allegedly risky] activities from the ambit of the statute; criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be." *Kilmon*, 905 A.2d at 311-12.

Across the country, legislatures have passed feticide laws that treat the unborn as separate crime victims with the intent of creating an additional charge against third parties who commit violence against pregnant women, not the pregnant woman herself. Yet prosecutors have often used these laws as the basis for prosecuting women *themselves* for

[18] *See, e.g.*, *Kilmon v. State*, 905 A.2d 306, 311 (Md. 2006); *Com. v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993).

experiencing pregnancy losses—or as a basis for interpreting other criminal laws such as child neglect to prosecute pregnant women. For instance, in Indiana, after Bei Bei Shuai attempted suicide while pregnant, she was discovered in time and, very much wanting her baby to live, she underwent cesarean surgery. The baby was born alive but did not survive.[19] Although suicide is not a crime in Indiana, Ms. Shuai was charged with first-degree murder and feticide and incarcerated without bail for fourteen months. After the denial of her interlocutory appeal, *Shuai v. State*, 966 N.E.2d 619 (Ind. Ct. App. 2012), Ms. Shuai pled guilty to "criminal recklessness" to avoid a murder trial.

Much like Ms. Shuai, Jessica Clyburn of South Carolina was held without bail and prosecuted for homicide by child abuse after she attempted suicide and lost her pregnancy.[20] Rather than face years of litigation and a possible life sentence, she pled guilty to involuntary manslaughter and was sentenced to eighteen months. *State v. Clyburn*, 2009GS4603622 (S.C. Com. Pl. Gen. Sess. 2009).

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[19] MICHELLE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 32-34 (2020).

[20] Jason Foster, *Woman faces charge of killing unborn child during August suicide attempt*, THE HERALD (Feb. 21, 2009), https://www.heraldonline.com/news/local/article12250463.html.

Purvi Patel of Indiana was convicted of feticide and sentenced to twenty years in prison based in large part on evidence that she had texted a friend about ordering pills to induce an abortion.[21] After she had been incarcerated for over a year, the Court of Appeals vacated her conviction because the state's feticide statute had previously been applied only to "third parties who knowingly terminate pregnancies by using violence against the expectant mother without her consent," not to pregnant or postpartum women themselves. *Patel v. State*, 60 N.E.3d 1041, 1058 (Ind. Ct. App. 2016). The Court noted that the "State's about-face" in seeking to prosecute a pregnant woman as the perpetrator, rather than the victim, of feticide, was "unsettling" and "untenable." *Id.*

In Iowa, Christine Taylor sought medical treatment after she fell down a flight of stairs during her second trimester.[22] At the hospital, she confided in medical staff that she had contemplated abortion or adoption earlier in pregnancy. The medical staff alerted the police who arrested

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[21] Emily Bazelon, *Purvi Patel Could Be Just the Beginning*, NEW YORK TIMES MAGAZINE (Apr. 1, 2015), https://www.nytimes.com/2015/04/01/magazine/purvi-patel-could-be-just-the-beginning.html.
[22] GOODWIN, *supra* note 19, at 85-87.

and detained her. Prosecutors dropped the case in response to public outrage, yet stated that if Ms. Taylor had been in her third trimester, the prosecution would have proceeded.[23]

Melissa Rowland in Utah was charged with homicide after she delivered twins, one of whom was stillborn, based on healthcare providers' belief that the stillbirth might have been prevented had she undergone recommended cesarean surgery earlier. *State v. Rowland*, No. 041901649 (Utah Dist. Ct. 3d 2004). Prosecutors argued that Ms. Rowland's delay in undergoing cesarean surgery constituted "depraved indifference to human life." Indictment, *State v. Rowland*, No. 041901649 (Utah Dist. Ct. 3d March 11, 2004). After spending 105 days in jail, Ms. Rowland pled guilty to third-degree felony child endangerment as a condition of her release.

In Mississippi, the State's homicide laws, which had been amended to include the unborn with the intent of responding to third-party attacks on pregnant women, were used to prosecute women who experienced pregnancy losses. *See* Miss. Code Ann. § 97-3-37(1). Latice Fisher was

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[23] Bryan Nichols, *Burlington Woman Will Not Be Charged With Feticide*, RADIO IOWA, http://www.radioiowa.com/2010/02/10/burlington-woman-will-not-be-charged-with-feticide/.

charged with second-degree murder for experiencing a stillbirth in 2019; Nina Buckhalter was charged with culpable-negligence manslaughter for experiencing a stillbirth in 2013; and Rennie Gibbs was charged with depraved-heart homicide for experiencing a stillbirth in 2006.[24] Each of these prosecutions caused real and lasting harms to the women involved. For instance, prosecutors charged Ms. Gibbs with a crime that carried an automatic life sentence and ignored the fact that her pregnancy resulted from statutory rape, as she was only fifteen at the time. The charges were not dismissed until 2014—eight years after the stillbirth.[25]

Specifically relying on Alabama's feticide law and other laws the Alabama Supreme Court described as recognizing "that unborn children are persons with rights," the Court held that the state's chemical

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[24] *See* Ryan Philips, *Infant Death Case Heading Back to Grand Jury*, STARKVILLE DAILY NEWS (May 8, 2019), https://www.starkvilledailynews.com/infant-death-case-heading-back-to-grand-jury/article_cf99bcb0-71cc-11e9-963a-eb5dc5052c92.html; GOODWIN, *supra* note 19, at 34-45; *State v. Buckhalter*, 119 So. 3d 1015 (Miss. 2013).

[25] Jessica Mason Pieklo, *Murder Charges Dismissed in Mississippi Stillbirth Case*, REWIRE NEWS GROUP (Apr. 4, 2014), https://rewirenewsgroup.com/article/2014/04/04/murder-charges-dismissed-mississippi-stillbirth-case/; Nina Martin, *A Stillborn Child, A Charge of Murder and the Disputed Case Law on 'Fetal Harm,'* PROPUBLICA (March 18, 2014), https://www.propublica.org/article/stillborn-child-charge-of-murder-and-disputed-case-law-on-fetal-harm.

endangerment law, enacted to penalize taking children to methamphetamine labs, could be used to prosecute pregnant women who used controlled substances during pregnancy. *See Ex Parte Ankrom*, 152 So. 3d 397, 411-12, 422 (Ala. 2013). This included even controlled substances that were prescribed to pregnant women.[26] Since 2006, Alabama prosecutors have charged over 500 pregnant women, including a woman who used marijuana to treat epilepsy instead of a prescribed medication that was known to cause fetal harm, and another woman who took a small amount of valium when panicked after receiving threats from an ex-partner.[27]

Also in Alabama, police arrested Marshae Jones for manslaughter in 2019 after she was shot in the abdomen and experienced a pregnancy loss.[28] While the person who shot her was not charged, prosecutors

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[26] Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), https://www.propublica.org/article/when-the-womb-is-a-crime-scene.

[27] Nina Martin, *Alabama Mom's Charges are Dropped, But Only After an Arduous Battle*, PROPUBLICA (June 2, 2016), https://www.propublica.org/article/alabama-moms-charges-are-dropped-but-only-after-an-arduous-battle.

[28] Mary Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 U.C. DAVIS L. REV. 195, 198-99 (2020); Vanessa Romo, *Woman Indicted For Manslaughter After Death Of Her Fetus, May Avoid Prosecution*, NPR (June 28, 2019), https://www.npr.org/

alleged Ms. Jones "intentionally cause[d] the death of unborn Baby Jones by initiating a fight knowing she was five months pregnant."[29] The chief prosecutor only dropped the charge after local and national outrage.

These examples demonstrate the ways in which prosecutors asserting an interest in protecting "unborn children" will recast criminal statutes to charge pregnant women for posing *any* perceived risk of harm to the fertilized eggs, embryos, or fetuses inside them.

III. Fetal Personhood Arguments Have Also Provided the Basis for Subjecting Pregnant Women to Forced Medical Interventions, Leading to Loss of Life and Liberty

In addition to jeopardizing pregnant women's physical liberty and freedom from unlawful prosecution, the principles animating the Personhood Provision have led state actors across the country to subject pregnant women to forced medical procedures. State officials have forced pregnant women to undergo medical procedures that put them at grave risk of harm—or even death—by arguing that such procedures were necessary to protect fetal life. Equivalent medical procedures could not be imposed on parents or siblings to save a relative's life, as principles of

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2019/06/28/737005113/woman-indicted-for-manslaughter-after-death-of-her-fetus-may-avoid-prosecution.

[29] Crossley, *supra* note 28, at 198-203.

informed consent and bodily autonomy would guard against nonconsensual procedures in those contexts.[30] In other words, the same arguments for fetal personhood underlying the Personhood Provision have provided the grounds for treating pregnant women as a unique class of persons whose rights, health, and lives can be disregarded. The Personhood Provision and its exceedingly vague terms invite both state and civil actors to argue these force procedures are justified according to the law's edict to "acknowledge" fetal rights.

For instance, Angela Carder died following forced cesarean surgery that a hospital and District of Columbia judges justified according to a claimed interest in fetal life.[31] Ms. Carder, who was critically ill and twenty-five weeks pregnant, had agreed along with her family and physicians on treatment designed to keep her alive for as long as possible. Despite knowing that cesarean surgery could kill Ms. Carder, the trial court ordered it following an emergency hearing upheld by the Court of Appeals, reasoning that "the mother's interest in her bodily integrity"

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[30] *See Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (confirming competent person's Fourteenth Amendment liberty interest in refusing unwanted medical treatment).

[31] *See* GOODWIN, *supra* note 19, at 92-93.

and the risks of the surgery—including "postoperative embolism" and "[i]n some cases . . . death"—were not "dispositive" in light of the fetus's "chance of surviving delivery." *In re A.C.*, 533 A.2d 611, 617 (D.C. 1987). The baby died two hours after the surgery and Ms. Carder died soon thereafter, with the surgery listed as a contributing factor. *Id.* at 612.

When the court reheard the case *en banc*, it held that its earlier order violated Ms. Carder's right to "accept or refuse medical treatment or other bodily invasion." *In re A.C.*, 573 A.2d 1235, 1245 (D.C. 1990). It noted that the government does not have the power to compel "one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person's health," including where a skin graft or bone marrow transplant was necessary to protect a relative. *Id.* at 1243-44. If forced medical procedures were rejected in those contexts, the court reasoned, then Ms. Carder's forced cesarean surgery was likewise impermissible, for "[s]urely . . . a fetus cannot have rights in this respect superior to those of a person who has already been born." *Id.* at 1244.

Ms. Carder's experience of a forced medical intervention was not an isolated incident. When Samantha Burton of Florida was twenty-five weeks pregnant and thought to be at risk for a miscarriage, she was held

captive at a hospital despite the fact that she had two young children at home.[32] When hospital officials sought a civil commitment order at a hearing at which Ms. Burton was not provided legal representation, the court ordered her indefinite involuntary confinement, finding that the state's interests in the potential life of the fetus "override Ms. Burton's privacy interests." *In re Unborn Child of Samantha Burton*, No. 2009 CA 1167, 2009 WL 8628562 (Fla. Cir. Ct. 2009). The court authorized the hospital to take any action "necessary to preserve the life and health of Samantha Burton's fetus," including "restricting Samantha Burton to bed rest, administering appropriate medication, postponing labor, taking appropriate steps to prevent and/or treat infection, and/or eventually performing a cesarean section delivery." *Id*.

After three days of state-compelled confinement, physicians performed emergency cesarean surgery and discovered Ms. Burton had already lost her pregnancy. Although neither the detention nor the surgery prevented the pregnancy loss, it prevented her from caring for her young children. An appellate court later found that the lower court had failed to consider whether the state's interest was "sufficient to

[32] *See* GOODWIN, *supra* note 19, at 82-85.

override the pregnant woman's constitutional right to the control of her person, including her right to refuse medical treatment." *Burton v. State*, 49 So. 3d 263, 266 (Fl. Ct. App. 1st Dist. 2010). The appellate court's reversal was symbolic yet wholly inadequate, as Ms. Burton had already suffered the severe trauma of forced detention and surgery.

As these cases demonstrate, absent an injunction, the Personhood Provision and its vague terms will provide medical professionals and state actors with a basis for claiming they have legislative authority, if not a mandate, for overriding the constitutional rights of pregnant women in Arizona.

IV. State Actors Have Also Used Fetal Personhood Arguments to Deprive Pregnant Women of Rights and Liberty Through Civil Actions

The Personhood Provision and its vague terms likewise invite state authorities to reinterpret the Arizona civil code to further curtail pregnant and postpartum women's rights, liberty, and privacy. Like in Samantha Burton's case, *supra*, it could provide the basis for courts to order the civil commitment of pregnant women.[33] It could also

[33] *See* Ariz. Rev. Stat. § 36-540 (providing for civil commitment when a proposed patient "is a danger to others").

jeopardize the confidentiality of pregnant women's medical records by providing grounds for police, child welfare authorities, or expectant fathers to assert an interest in those records on behalf of the unborn.[34] Expectant fathers could also assert wrongful death actions against women who experienced miscarriages or stillbirths, subjecting them to intrusive discovery and thousands of dollars in monetary damages.[35] And like in the examples described below, it could also recast family law to become a tool of surveillance and control by constraining pregnant women's ability to parent and right to travel.

Examples across the country illustrate deprivations of rights and liberty that pregnant women could face pursuant to civil statutes if the Personhood Provision is upheld. For instance, in 1997, Wisconsin amended its civil child protection code to include "unborn children" from the moment of fertilization. Unborn Child Protection Act, 1997 Wisconsin Act 292, *codified at* Wis. Stat. § 48.193. The law authorized state actors to conduct confidential court proceedings at which the

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[34] *See* Ariz. Rev. Stat. § 12-2292 (providing for the confidentiality of medical records).

[35] Ariz. Rev. Stat. § 12-612 (providing for wrongful death actions to be brought by and in the name of the "surviving husband or wife, child, parent or guardian, or personal representative of the deceased person).

embryo or fetus has a right to counsel but the pregnant woman does not, and issue orders to detain pregnant women in jails, mental hospitals, or forced treatment programs.

Tamara Loertscher challenged the law after she was detained in jail for eighteen days following a hearing at which counsel was provided for her fetus, but not Loertscher. *Loertscher v. Anderson*, 259 F. Supp. 3d 902 (W.D. Wis. 2017). The district court struck down the law on vagueness grounds, reasoning that it violated constitutional guarantees of due process and that "[e]rratic enforcement, driven by the stigma attached to drug and alcohol use by expectant mothers, is all but ensured." *Id.* at 922. After Loertscher moved out of state, the Seventh Circuit vacated the decision on mootness grounds. *Loertscher v. Anderson*, 893 F.3d 386 (7th Cir. 2018). Wisconsin officials thus continue to enforce the law, and pregnant women in the state continue to live in fear that they will be locked up or subjected to forced treatment.

The implications for Arizona's family law are also exemplified by *McKenna v. Miller*, V-09682/13 (N.Y. Fam Ct. 2013). In that case, a New York family court referee declined jurisdiction over Ms. McKenna's

child custody petition despite the fact that she resided in and had given birth in New York. According to the referee, her decision to move from California to New York to attend Columbia University while pregnant was tantamount to kidnapping. The referee determined that by exercising her right to travel while pregnant, Ms. McKenna had committed an "appropriation of the child while in utero [that] was irresponsible, reprehensible." *Id*.

On appeal, the court stated, "[W]e reject the Referee's apparent suggestion that, prior to her relocation, the mother needed to somehow arrange her relocation with the father with whom she had only a brief romantic relationship. Putative fathers have neither the right nor the ability to restrict a pregnant woman from her constitutionally-protected liberty." *Sara Ashton McK. v. Samuel Bode M.*, 974 N.Y.S.2d 434, 436 (N.Y. App. Div. 2013). Despite the victory on appeal, Ms. McKenna's case demonstrates the very real possibility that family court judges could use the Personhood Provision and its ambiguous terms to reinterpret the family law and deny pregnant women's fundamental rights.

V. Past Arizona Cases Demonstrate That the Personhood Provision Will Provide Grounds for State Actors to Reinterpret the Arizona Code to Prosecute and Penalize Pregnant Women for Perceived Risks to the Unborn

By delegating authority to Arizona state actors to reinterpret the entire criminal and civil code to "acknowledge" the rights of the "unborn child," the Personhood Provision creates an impermissible risk of discriminatory enforcement and deprivations of pregnant women's rights. The subordination of pregnant women's rights to a claimed interest in unborn life is not a mere hypothetical scenario. Indeed, state actors in Arizona have *already* attempted to subject pregnant women to both criminal prosecution and civil penalties for posing some perceived risk of harm to the fetus. While these cases demonstrate that some Arizona state actors are already inclined to target pregnant women for surveillance and control, the Personhood Provision opens the door to dramatic increase in punitive state actions across a wider range of contexts.

In *Reinesto v. Superior Ct. of State In & For Cty. of Navajo*, 894 P.2d 733 (Ariz. Ct. App. 1995), prosecutors charged a mother with child abuse based on the allegation that she used heroin during her pregnancy. The Arizona Court of Appeals dismissed the charge, finding

that the plain language of the statute "refers to conduct that directly endangers a child, not to activity that affects a fetus and thereby ultimately harms the resulting child." *Id.* at 735. The court explained that the prosecution's theory would "subject many mothers to criminal liability for engaging in all sorts of legal or illegal activities during pregnancy." *Id.* at 737. As the court recognized, "the boundaries of proscribed conduct would become impermissibly broad and ill-defined" and could include smoking, drinking alcohol, failure to obtain prenatal care, consuming caffeine, facing exposure to occupational or environmental hazards, contracting certain diseases, or having a baby over the age of thirty-five. *Id.* at 736.

The *Reinesto* court's dismissal rested in large part on limitations of the judicial role and deference to the legislature. The court noted that "the legislature is in a better position than this court to determine whether a woman's prenatal conduct is more appropriately addressed through education, medical and rehabilitative treatment, social welfare, criminal statutes, or some combination of these approaches." *Id.* at 737. Subsequent prosecutions of women for perceived risks of harm to the fetus demonstrate that some prosecutors are already inclined to ignore

Reinesto's limits, even in the absence of further legislative action. *See State v. Tamara Lynn Austin*, No. CR20100722 (Ariz. Sup. Ct. Cochise Cnty. 2011) (prosecution of mother for child abuse based on claim that she was pregnant and used drug).

The Personhood Provision risks further emboldening prosecutors to re-test the limits of *Reinesto* and creates significant uncertainty for pregnant women about which acts or omissions could subject them to criminal charges. For instance, the Personhood Provision provides no clear standards regarding how the child abuse law at issue in *Reinesto* would be reinterpreted to "acknowledge" the unborn child. Nor does it clarify whether the alleged drug use at issue would be considered an illicit form of "direct" harm or a form of "indirect" harm that falls within Section B(2). These questions are not limited to the context of drug use and pregnancy, for as the *Reinesto* court noted, prosecutors could allege a risk of harm in a wide range of contexts involving pregnancy and otherwise legal acts such as smoking, drinking alcohol, or consuming caffeine.

State actors and courts in Arizona have likewise already demonstrated an inclination to reinterpret the civil code to subject

pregnant and postpartum women to penalties in the name of protecting fetal interests. Arizona's Medical Marijuana Act allows all adults, including pregnant women, to use medical marijuana. Ariz. Rev. Stat. § 36-2811. Nevertheless, a court found Lindsay Ridgell committed civil child neglect when she used medical marijuana to treat her acute hyperemesis gravidarum, a pregnancy-related condition that causes nausea, vomiting, and severe dehydration. *Ridgell v. Ariz. Dep't of Child Safety*, LC2020-000113-001 DT (Ariz. Sup. Ct. 2020). The State offered no evidence that Ms. Ridgell's child suffered any adverse health consequences following his discharge from the hospital. Yet due to the court's child neglect finding, Ms. Ridgell was placed on Arizona's Central Registry for twenty-five years.

While Ms. Ridgell's case demonstrates the extent to which Arizona state actors are already willing to single out pregnant women under the civil family code for undertaking otherwise legal acts, the Personhood Provision will provide yet another tool for controlling and penalizing pregnant women through a reinterpretation of the civil law.

VI. Injunctive Relief is Necessary to Protect the Constitutional Rights of Pregnant Women in Arizona as Well as Maternal, Fetal, and Child Health.

When challenged, courts nationwide have often recognized the unlawfulness of the state actions described in Sections II-V, *supra*—but not before extraordinary and irreparable harms are inflicted.[36] These decisions cannot restore the life of a person taken by court-ordered surgery or time spent incarcerated. Moreover, many of the women subjected to prosecutions, forced medical interventions, or civil actions—overwhelmingly low income, and disproportionately Black and Brown—lack means to contest them.[37]

For example, the post-mortem holding in *A.C., see supra*, provided no relief to Ms. Carder, whose death was attributed to the impermissible lower court-order. *In re A.C.*, 573 A.2d 1235, 1245 (D.C. 1990). Or when Regina McKnight was granted habeas relief based on her attorney's failure to proffer evidence that a stillbirth prosecuted as

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[36] *See, e.g.*, *Michelson v. United States*, 335 U.S 469, 482 (1948) ("Arrest without more may nevertheless impair or cloud one's reputation."); *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (even the innocent "experience the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check") (Sotomayor, J., dissenting).

[37] *See* Paltrow & Flavin, *supra* note 3 at 311-13 (finding women of color are disproportionately subject to pregnancy-based prosecutions).

homicide had in fact been caused by an infection, she had already served eight years in prison. *McKnight v. State*, 661 S.E.2d 354 (S.C. 2008). Even when charges are dismissed at earlier stages, the harms inflicted by arrests and detention, including family separation, are irreparable.

When cases do proceed, the risks of unreliable and unfair outcomes are intolerably high. Defendants in these cases are seldom positioned to litigate federal constitutional defenses or "put the prosecution to its proof" when offered the chance to avoid draconian punishment by pleading guilty to a minor charge. For instance, although Ms. McKnight consistently maintained that a stillbirth could not constitutionally be prosecuted as homicide, she pled guilty in exchange for a promise not to re-try her or seek further incarceration.[38]

Moreover, the ever-present threats of prosecution themselves inflict harms, as women are deterred from accessing care that would improve pregnancy outcomes. When candid communication with healthcare providers is treated as inculpatory evidence, pregnant women are less

[38] *See* Lester and Veer, Editorial, A Measure of Justice for Regina McKnight, STATE (Columbia, S.C.) (July 1, 2008), bit.ly/Regina McKnight.

likely to seek the care most likely to mitigate risks.[39] Indeed, punitive laws that drive a wedge between patients and doctors have demonstrable negative impacts on fetal and infant health. For example, empirical research found that Tennessee's fetal assault law "resulted in twenty fetal deaths and sixty infant deaths" in 2015 alone.[40] Another empirical study found a higher prevalence of neonatal abstinence syndrome (NAS) in states with punitive policies.[41]

As the American College of Obstetricians and Gynecologists recognized, "Criminalization of pregnant people for actions allegedly

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[39] Laura J. Faherty et. al., *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy With Rates of Neonatal Abstinence Syndrome*, JAMA OPEN NETWORK (2019), https://jama network.com/journals/jamanetworkopen/fullarticle/2755304; Rebecca L. Haffajee et al., *Pregnant Women with Substance Use Disorders—The Harm Associated with Punitive Approaches*, 384 N. ENGL. J. MED. 2364 (2021); Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 GEORGETOWN L. J. 475 (2021).

[40] Boone & McMichael, *supra* note 39, at 501, 514; *see also* Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WILLIAM & MARY L. REV. 3 (2019); SisterReach et. al., *Tennessee's Fetal Assault Law: Understanding its impact on marginalized women* (Dec. 14, 2020), https://www.nationaladvocatesforpregnantwomen.org/tennessees-fetal-assault-law- understanding-its-impact-on-marginalized-women/.

[41] Faherty et al., *supra* note 39; *see also* Haffajee et al., *supra* note 39; Sarah C.M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 MATERNAL FETAL HEALTH J. 33 (2011).

aimed at harming their fetus poses serious threats to people's health and the health system itself. Threatening patients with criminal punishment erodes trust in the medical system, making people less likely to seek help when they need it."[42] The American Medical Association has similarly stated, "Pregnant women will be likely to avoid seeking prenatal or open medical care for fear that their physician's knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment."[43] Pregnant women of color experience these deterrent effects at disproportionate rates, as their healthcare providers are more likely to report them for perceived risks taken during pregnancy.[44]

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[42] ACOG, *Opposition to Criminalization of Individuals During Pregnancy and Postpartum Period* (2020), https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period.

[43] American Medical Association Board of Trustees, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women* 264(2) JAMA 2667 (1990); *see also* NAPW, *Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women* (June 1, 2021), bit.ly/medicalgroupsstatements (collecting medical and public health organizations' statements of opposition to punitive responses to pregnancy).

[44] *See* Paltrow & Flavin, *supra* note 3 at 326-27 (finding that nearly half of African American women were reported to the police by health care providers, compared to less than one-third of white women); Sarah

Only an injunction of the Personhood Provision will prevent these real and lasting harms from befalling pregnant and postpartum women in Arizona. If the district court order remains in effect, the risk of prosecutions and other punitive state actions will lead pregnant women to avoid prenatal care, which in turn will harm neonatal health.

CONCLUSION

Absent an injunction of the Personhood Provision, pregnant and postpartum women across Arizona will live in fear of arbitrary and discriminatory prosecutions and other deprivations of their constitutional rights and liberty. As the hundreds of prosecutions, forced medical interventions, and civil cases targeting pregnant and postpartum women across the country make clear, the risk of punitive state action based on measures like those at issue in this case is intolerably high and leads to irreparable harms.

Roberts et al., *Does Adopting a Prenatal Substance Use Protocol Reduce Racial Disparities in CPS Reporting Related to Maternal Drug Use? A California Case Study*, 35(2) JOURNAL OF PERINATOLOGY 146–50 (2015); Marc A. Ellsworth et al., *Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns*, 125(6) PEDIATRICS 1379–85 (2010); Hillary Veda Kunins et al., *The Effect of Race on Provider Decisions to Test for Illicit Drug Use in the Peripartum Setting*, 16(2) JOURNAL OF WOMEN'S HEALTH 245–55 (2007).

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