IN THE SUPERIOR COURT OF PENNSYLVANIA

1615 WDA 2017

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

KASEY ROSE DISCHMAN,

Appellee.

On appeal from the Order dated October 19, 2017, of the Court of Common Pleas of Butler County, Pennsylvania, CP-10-CR-1495-2017

BRIEF OF *AMICI CURIAE* WOMEN'S LAW PROJECT, ET AL., IN SUPPORT OF APPELLEE AND FOR AFFIRMANCE

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** Motion for admission pro hac vice pending.*

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Amici curiae are non-profit organizations and individuals[1] concerned about the public health implications of applying punitive sanctions against pregnant women who use drugs while pregnant. *Amici* include women's health advocates and organizations that have participated as counsel or *amici curiae* in cases challenging illegal discrimination in the provision of substance use disorder treatment for pregnant women and in cases involving the criminal prosecution of pregnant women for behavior alleged to be harmful to their fetuses. *Amici* also include health care professionals and providers who treat patients who use drugs while pregnant, including pregnant women battling substance use disorders.

Amici share a common interest in improving maternal and fetal health. They seek to supplement the parties' briefs by providing this Court with information relating to drug use during pregnancy and the importance of making appropriate and accessible prenatal care and substance use disorder treatment more widely available to pregnant and parenting women.

[1] Statements of interest for each *amicus* are included as an appendix to this brief.

Amici submit this brief in support of Appellee Dischman because they believe that interpreting Pennsylvania law to allow for the prosecution of pregnant women for alleged drug use will adversely affect the health and well-being of women and their families, and would be contrary to legislative intent. Accordingly, *amici* respectfully urge this Court to affirm the order of the Court of Common Pleas dismissing the aggravated assault charge against Dischman.

SUMMARY OF ARGUMENT

The prosecution of Dischman for alleged conduct affecting her pregnancy is without any basis in law. The Pennsylvania legislature has explicitly limited a pregnant woman's liability for offenses against her so that she cannot be prosecuted for allegedly unhealthy conduct. 18 Pa. C.S. § 2608(a)(3). The plain language of the nonliability provision compels this result and confirms that the lower court's ruling should be affirmed.

Even if the statutory language were ambiguous, which it is not, tenets of statutory construction strongly support affirming the ruling below. The legislative history of the statute, the presumption that statutes should not be interpreted to advance an absurd or unreasonable result, and the rule of lenity in criminal statutes all indicate that the nonliability provision means precisely what it says.

Prosecuting pregnant women for conduct alleged to harm their fetus undermines public health, maternal and fetal well-being, and women's equality and autonomy. The practical effect of the Commonwealth's novel reading of 18 Pa. C.S. § 2606 would be to drive pregnant women who use drugs out of the health care system and away from treatment and prenatal care, and punish them for communicating openly with their health care providers. Some women may even end wanted pregnancies in order to avoid punishment.

In addition to having a harmful public health impact, applying criminal fetal assault laws to pregnant women's conduct is profoundly unjust. It punishes pregnant women for failing to undergo or successfully complete treatment that is largely unavailable or inaccessible to them. It also infringes upon pregnant women's privacy and autonomy, and could have far-reaching consequences outside the context of drug use. In light of the host of factors that can adversely affect maternal and fetal health, the sweeping expansion of the criminal laws urged by the Commonwealth opens the door to highly intrusive and coercive policing of pregnant women's behavior. The brunt of this policy would fall most heavily on poor women and women of color, who are already at higher risk of experiencing pregnancy complications and adverse outcomes, compared to the general population.

For these reasons, as well as those set forth in the Brief for Appellee, the order of the Court of Common Pleas should be affirmed.

ARGUMENT

I. THE LOWER COURT CORRECTLY APPLIED THE UNAMBIGUOUS LANGUAGE OF 18 PA. C.S. § 2608(a)(3) IN RULING THAT DISCHMAN COULD NOT BE HELD LIABLE FOR ALLEGED CONDUCT AFFECTING HER FETUS.

The Butler County Court of Common Pleas correctly held that the nonliability provision at 18 Pa. C.S. § 2608(a)(3) applies where, as here, a pregnant woman engages in conduct alleged to harm her own pregnancy. The court dismissed the charge of aggravated assault of a fetus under 18 Pa. C.S. § 2606 against Dischman, because the plain language of Section 2608 precludes prosecution under these circumstances. *See* R.R. 2-3. The nonliability provision states that criminal liability for aggravated assault under Section 2606 cannot attach "[u]pon the pregnant woman in regard to crimes against" the fetus. 18 Pa. C.S. § 2608(a)(3). This provision is plain and clear: in all circumstances, a pregnant woman cannot be liable for aggravated assault against her fetus.

It is hornbook law that "[w]hen the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Davis v. Sulcowe*, 205 A.2d 89, 92 (Pa. 1964) (quoting *Commonwealth ex rel. Cartwright v. Cartwright*, 40 A.2d 30, 33 (Pa. 1944)); *accord Commonwealth v. Empfield*, 585 A.2d 442, 444 (Pa. 1991). Here, because Dischman was charged with aggravated assault against her fetus

under Section 2606, and because the nonliability provision plainly precludes her criminal liability, the charge was correctly dismissed. The Statutory Construction Act requires that the analysis end there, *see* 1 Pa. C.S. § 1921(b) ("When the words of a statute are clear from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."), and the order of the Court of Common Pleas should be affirmed.

II. EVEN IF 18 PA. C.S. § 2608(a)(3) IS AMBIGUOUS, WHICH IT IS NOT, THE LOWER COURT RULING THAT DISCHMAN COULD NOT BE HELD LIABLE FOR CONDUCT AFFECTING HER FETUS IS SUPPORTED BY CANONS OF STATUTORY INTERPRETATION.

The Commonwealth seeks to avoid the plain reading of the statute by insisting that the nonliability provision is ambiguous. *See* Appellant's Br. 7-9. The Commonwealth would restrict the exemption to situations involving "otherwise legal activities such as abortion and medical procedures," but to do so requires rewriting the statute. Appellant's Br. 9. No words in the nonliability provision or in the statute it circumscribes indicate that the nonliability provision is limited to "otherwise legal activities." *Id*. Indeed, the subsection providing that abortion does not constitute aggravated assault of a fetus specifies that there is no liability regardless of whether an abortion or attempted abortion is otherwise "lawful or unlawful." 18 Pa. C.S. § 2608(a)(1).

Even if the nonliability provision were ambiguous, which it is not, binding principles of statutory interpretation would preclude this prosecution. First, penal provisions such as Sections 2606 and 2608 must be strictly construed, 1 Pa. C.S. § 1928(b)(1); *accord Commonwealth v. Hall*, 80 A.3d 1204, 1212 (Pa. 2013), and must be "interpreted in the light most favorable to the accused," *Hall*, 80 A.3d at 1212. Moreover, as discussed below, courts must interpret a statute so that "the entire statute" is "effective" and no parts are superfluous, the result is not "absurd, impossible . . . or unreasonable," the interpretation accords with legislative intent, and where possible, the statute does not "violate the Constitution of the United States or of this Commonwealth." 1 Pa. C.S. §§ 1921, 1922(1)–(3).

To give effect to "every word, sentence, and provision of [the nonliability] statute" and to avoid rendering portions of it "mere surplusage," *Allegheny Cty. Sportsmen's League v. Rendell*, 860 A.2d 10, 19 (Pa. 2004), the nonliability provision for pregnant women must apply to any "pregnant woman in regard to crimes against" the fetus, 18 Pa. C.S. § 2608(a)(3), not only to pregnant women "engaging in otherwise legal activities." Appellant's Br. 9. This provision speaks of nonliability for "crimes" against the fetus: for the Commonwealth to suggest that the word "crimes" really means "otherwise legal activities" is nonsense. And to the extent that the Commonwealth suggests that the nonliability provision applies only to "abortion and medical procedures," Appellant's Br. 9, that reading

"would result in duplicate [provisions] which would render [the nonliability provision for pregnant women] meaningless, and not give full effect to the plain language of [all] Sections." *Rendell*, 860 A.2d at 19. For "the entire statute . . . to be certain and effective, not superfluous and without import," the nonliability provision must apply to pregnant women in all circumstances. *Rossi v. Commonwealth*, 860 A.2d 64, 66 (Pa. 2004).

The Commonwealth's reading of this provision is also absurd and unreasonable, and hence insupportable. 1 Pa. C.S. § 1922(1); *see Zimmerman v. O'Bannon*, 442 A.2d 674, 676-77 (Pa. 1982) ("[T]he General Assembly does not intend a result that is absurd or unreasonable."). Indeed, an attempted prosecution of a pregnant woman under Pennsylvania's criminal child endangerment statute for her conduct while pregnant failed for just this reason. *Commonwealth v. Kemp*, 18 Pa. D. & C. 4th 53, 63 (C.P. 1992). In the words of the trial court, "the dangerous policy of criminally prosecuting pregnant women for their alleged drug use threatens such serious health consequences for pregnant addicts and their fetuses that the Legislature could not possibly have intended such an unreasonable application of this penal law." *Id.* As discussed in more detail below, *see infra* Part III, "[c]riminal prosecution cruelly severs women from the health care system, thereby increasing the potential for harm to both mother and fetus" and "endanger[ing] both [of them]." *Id.* at 63-64. The statute "should not be

interpreted to create more harm than it seeks to prevent." *Id.* at 64. As in *Kemp,* charging Dischman with aggravated assault of her fetus threatens far more harm than it seeks to prevent; by refusing to eviscerate the nonliability statute, the court below correctly avoided this unreasonable and absurd result.

The legislative history of the relevant statute likewise confirms that the nonliability provision was intended to apply without limitation to pregnant women's prenatal conduct. The aggravated assault of a fetus statute, 18 Pa. C.S. § 2606, and its related nonliability provision, 18 Pa. C.S. § 2608(a)(3), were sponsored by Representative Dennis O'Brien, who authored the statute as an amendment to a separate bill pending in the Pennsylvania House of Representatives.[2] Senator Melissa Hart later crafted subsequent amendments passed in the Pennsylvania Senate.[3] Throughout the legislative process, both Representative O'Brien and Senator Hart repeatedly emphasized that the bill was

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[2] The third printing of the relevant bill, SB 45, reflects Representative O'Brien's amendment. *See* SB 45, 181st Gen. Assemb., Reg. Sess. 1997-1998 (Apr. 29, 1997), http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=1997&sessInd=0&billBody=S&billTyp=B&billNbr=0045&pn=1029. The legislative debate on that day provides Representative O'Brien's explanation and defense of his amendment. *See* Pa. Legis. J., 181st Gen. Assemb., 1997 Sess., No. 28 (Apr. 29, 1997), at 870-82, http://www.legis.state.pa.us/WU01/LI/HJ/1997/0/19970429.pdf#page=8.

[3] *See* Pa. Legis. J., 181st Gen. Assemb., 1997 Sess., No. 37 (June 10, 1997), at 729, 732, http://www.legis.state.pa.us/WU01/LI/SJ/1997/0/Sj19970610.pdf#page=17. For the text of the Senate's amendments, *see* SB 45, 181st Gen. Assemb., Reg. Sess. 1997-1998 (June 10, 1997), http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=1997&sessInd=0&billBody=S&billTyp=B&billNbr=0045&pn=1167.

not focused on abortion.[4] Furthermore, immediately before final passage, Representative O'Brien made clear that the nonliability provision applied broadly and was plainly intended to preclude prosecutions such as Dischman's.

Just prior to final passage, Representative Babette Josephs pointedly asked Representative O'Brien how the law would apply to pregnant women:

> Pregnant women all over the country are being inappropriately prosecuted for behavior that somebody considers unhealthy for their fetuses . . . For instance, a woman named Pamela Rae Stewart was prosecuted in California for not getting to her doctor fast enough when she went into labor and for having intercourse too late in her pregnancy. A woman in Wisconsin named Deborah Zimmerman was prosecuted for attempted homicide because she drank alcohol shortly before giving birth. In Florida, a woman named Kawana Ashley was prosecuted for manslaughter felony murder because she shot herself in the stomach when she was 25 to 26 weeks pregnant. In almost every case of this nature, the courts have thrown out the prosecutions[,] [s]ometimes after the woman has already spent time in prison[.] [T]he courts usually base their conclusion on an interpretation that the State legislature could not possibly have meant to criminalize pregnant women's prenatal conduct.
>
> I am worried [that], in passing SB 45, Pennsylvania will be encouraging the prosecution of pregnant women who engage in arguably unhealthy behavior during their pregnancies. Is it the intention of . . . the bill that it should be used against pregnant women in any way? That is my question.[5]

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[4] *See* Pa. Legis. J., 1997 Sess., No. 28 (Apr. 29, 1997), at 871, 874-75; *see also id.* at 878 (discussing a non-abortion hypothetical situation involving a bartender serving a woman a drink); Pa. Legis. J., 1997 Sess., No. 37 (June 10, 1997), at 732-33 (same, involving an intentional physical assault on a pregnant woman).

[5] Pa. Legis. J., 181st Gen. Assemb., 1997 Sess., No. 46 (Sept. 22, 1997), at 1539, 1540-41, http://www.legis.state.pa.us/WU01/LI/HJ/1997/0/19970922.pdf#page=23.

Representative O'Brien swiftly referred to the nonliability provision for pregnant women and emphasized that no criminal liability under the bill would be possible in these circumstances:

> The answer to that question is, nothing in this chapter shall impose criminal liability upon the pregnant woman in regard to crimes against her unborn child.[6]

In quoting verbatim from the nonliability provision, Representative O'Brien confirmed the plain meaning of the statutory text. Simply put, it "does not impose any criminal penalty for the mother,"[7] regardless of whether her actions were abortion-related, not abortion-related, lawful or unlawful. 18 Pa. C.S. § 2608.

Finally, this Court should be wary of adopting the Commonwealth's interpretation of the statute because doing so would raise grave questions of constitutional magnitude. One of the basic principles of statutory interpretation is the "canon of constitutional avoidance." Under this canon, "when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *MCI WorldCom, Inc. v. Pa. Pub. Util. Comm'n*, 844 A.2d 1239, 1249-50 (Pa. 2004).

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[6] *Id.* at 1541.

[7] Pa. Legis. J., 1997 Sess., No. 28 (Apr. 29, 1997), at 871.

As stated above, *amici* do not believe this statute is "susceptible of two constructions." *Id.* However, if this Court believes otherwise, adopting the Commonwealth's position here would raise serious issues of due process notice, reproductive privacy, and equal protection.

Because the nonliability provision plainly exempts any pregnant woman from being prosecuted for aggravated assault of her fetus, interpreting it nonetheless to allow prosecution for substance use would not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and thus would raise serious questions about whether it is void for vagueness under the due process clause of the federal Constitution. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see* U.S. Const. amend. XIV, § 1.

It would also penalize a pregnant woman using drugs for carrying a pregnancy to term, thereby raising the issue of whether the statute violates her due process liberty interest in procreation under the federal and state constitutions. *See, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535 (1942)*; Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Roe v. Wade* 410 U.S. 113 (1973); *see In re "B,"* 394 A.2d 419, 425 (Pa. 1978) (explaining that Pennsylvania constitution "parallel[s]" U.S. Constitution, or "provides more rigorous and explicit protection for a person's right to privacy").

Furthermore, because the statute would criminalize only pregnant women's substance use, without criminalizing paternal substance use despite evidence that either can affect fetal health,[8] it would raise equal protection concerns under the federal and state constitutions. *See* U.S. Const. amend. XIV, § 1; Pa. Const. art. I, § 28.

As recognized by the Pennsylvania Supreme Court, in exempting pregnant women from liability under Section 2608(a)(3), the legislature reasonably sought to avoid the constitutional implications of allowing prosecution of Dischman for crimes against her fetus. *See Commonwealth v. Bullock*, 913 A.2d 207, 216 (Pa. 2006) (noting that "there are various situations," including drug use, for which "[pregnant women] alone . . . bear an increased risk of criminal prosecution were it not for the (a)(3) exception"). Rather than confront these grave constitutional issues, this Court should apply the canon of constitutional avoidance and rule in Dischman's favor.

[8] Exposure to secondhand smoke during pregnancy significantly increases the risk of low birth weight. Ctrs. for Disease Control & Prevention, *Smoking During Pregnancy* (updated Feb. 2018), https://www.cdc.gov/tobacco/basic_information/health_effects/pregnancy/index.htm. A 2014 study suggests that pregnant, non-smoking women exposed to secondhand smoke have a higher rate of miscarriage, stillbirth, and tubal ectopic pregnancy. Hyland et al., *Associations of Lifetime Active and Passive Smoking with Spontaneous Abortion, Stillbirth and Tubal Ectopic Pregnancy: A Cross-Sectional Analysis of Historical Data from the Women's Health Initiative*, 24 TOBACCO CONTROL 328 (2014).

III. SUBSTANCE USE DURING PREGNANCY IS A HEALTH CONDITION APPROPRIATELY ADDRESSED BY TREATMENT AND PRENATAL CARE, NOT PUNISHMENT.

a. Threats of state intervention and control lead women to forego treatment and prenatal care and undermine maternal and fetal health.

Virtually all major medical and public health organizations have recognized that punishing women for substance use during pregnancy is counterproductive to public and private health. This is because women with a substance use disorder during pregnancy need prenatal care[9] and treatment.[10] The threat of serious negative consequences for coming forward for treatment drives women away from medical care, thus risking their own and their child's health.[11]

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[9] Prenatal care is necessary to prevent negative birth outcomes: regular OB/GYN visits during pregnancy allow for screening and detection of numerous adverse health conditions, and they can lower incidences of stillbirth, newborn death, and maternal mortality. *See* Nagahawatte, & Goldenberg, *Poverty, Maternal Health, and Adverse Pregnancy Outcomes*, 1136 ANNALS N.Y. ACADEMY SCIENCES 80 (June 17, 2008), https://nyaspubs.onlinelibrary.wiley.com/doi/epdf.

[10] *Amici* note that not all drug use during pregnancy rises to the level of substance use disorder. Some women use drugs while pregnant and do not have substance use disorders. Nonetheless, punishing pregnant women who use drugs deters them from getting treatment they may need. Substance use disorder treatment can markedly reduce adverse birth outcomes even when the pregnant woman does not entirely abstain from substance use during her pregnancy. *See* Center on Addiction, *Punishments Don't Help Pregnant Women and New Mothers with Addiction* (Feb. 22, 2017), https://www.centeronaddiction.org/the-buzz-blog/punishments-don%E2%80%99t-help-pregnant-women-and-new-mothers-addiction.

[11] See Subbaraman et al., *Associations Between State-Level Policies Regarding Alcohol Use Among Pregnant Women, Adverse Birth Outcomes, and Prenatal Care Utilization: Results from 1972-2013 Vital Statistics*, 42 ALCOHOLISM: CLINICAL & EXPERIMENTAL RESEARCH (forthcoming June 2018) (concluding that states with policies that consider prenatal alcohol use a form of child abuse have worse outcomes than states that do not, that newborns in those states are at greater risk of low birth weight and prematurity, and that pregnant women in those states

For example, the Pennsylvania Department of Health, the state agency charged with overseeing programs combatting the opioid crisis in Pennsylvania, issued guidance on suggested approaches to opioid use during pregnancy: "Attempts to criminalize [opioid use disorder] in pregnancy should be avoided, as this may deter that patient from obtaining adequate prenatal care for herself and the fetus."[12]

Other public health authorities agree that the threat of punitive sanctions places pregnant women in an impossible situation, forcing them to choose between risking punishment for seeking health care and managing pregnancy on their own. For instance, the March of Dimes, one of the leading non-profit organizations committed to the health of mothers and babies, has stated unequivocally: "The March of Dimes opposes policies and programs that impose punitive measures on pregnant women who use or abuse drugs."[13] The statement explains further:

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are less likely to utilize prenatal care). The article is not yet available publicly, but a presentation about the findings from the authors is available at http://files.www.alcoholpolicyconference.org/presentations/C-9_AP18_-_ROBERTS._SUBBARAMAN.pdf.

[12] Commonwealth of Pa., *Prescribing Guidelines for Pennsylvania: Use of Addiction Treatment Medications in the Treatment of Pregnant Patients with Opioid Use Disorder* 7 (2016), http://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Documents/Prescribing%20Guidelines%20Pregnant%20Patients.pdf.

[13] March of Dimes, *Fact Sheet: Policies and Programs to Address Drug-Exposed Newborns* (2014), https://www.marchofdimes.org/materials/NAS-Policy-Fact-Sheet-December-2014.pdf.

> Pregnant women who are addicted to opioids often do not seek prenatal care until late in pregnancy because they are worried that they will be stigmatized or that their newborn will be taken away. The March of Dimes supports policy interventions that enable women to access services in order to promote a healthy pregnancy and build a healthy family.[14]

The American Academy of Pediatrics (AAP) also made a clear statement about this issue in response to the recent increase in opioid use: "The AAP reaffirms its position that punitive measures taken toward pregnant women are not in the best interest of the health of the mother-infant dyad."[15] The AAP opposes punitive responses because they "are ineffective and may have detrimental effects on both maternal and child health."[16]

The National Perinatal Association is the leading voice of professionals who care for newborns immediately after birth. This organization has also cautioned against a punitive approach through either the criminal or child welfare system because of its adverse effect on maternal and child health:

> Treating this personal and public health issue [perinatal substance use] as a criminal issue—or a deficiency in parenting that warrants child welfare intervention—results in pregnant and parenting people avoiding prenatal and obstetric care and putting the health of

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[14] *Id.*

[15] Am. Academy of Pediatrics, *A Public Health Response to Opioid Use in Pregnancy*, PEDIATRICS, vol. 139, no. 3, at 4 (2017), http://pediatrics.aappublications.org/content/pediatrics/early/2017/02/16/peds.2016-4070.full.pdf.

[16] *Id.* at 3.

> themselves and their infants at increased risk. Parents are rightly and understandably fearful that seeking prenatal care, disclosing substance use, and initiating treatment for a Substance Use Disorder may result in harmful and punitive child welfare involvement. This, unfortunately, increases the risk of obstetrical complications, preterm birth, and delivery of low birth weight infants.[17]

The American College of Obstetricians and Gynecologists, the leading organization of women's health care physicians, has taken a position that explicitly denounces both criminal and civil sanctions for pregnant women:

> Seeking obstetric–gynecologic care should not expose a woman to criminal or civil penalties, such as incarceration, involuntary commitment, loss of custody of her children, or loss of housing. These approaches treat addiction as a moral failing. Addiction is a chronic, relapsing biological and behavioral disorder with genetic components. The disease of substance addiction is subject to medical and behavioral management in the same fashion as hypertension and diabetes.[18]

The American Medical Association, perhaps the leading generalist medical organization in the country, agrees. In a revised 2017 policy statement, the organization wrote that "[t]ransplacental drug transfer should not be subject to

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[17] National Perinatal Association, *Position Statement 2017: Perinatal Substance Use* 2, http://www.nationalperinatal.org/resources/Documents/Position%20Papers/2017_Perinatal%20Substance%20Use_NPA%20Position%20Statement.pdf.

[18] Committee on Health Care for Underserved Women, Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion 473: Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician–Gynecologist* (2011, reaffirmed 2014), https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co473.pdf?dmc=1&ts=20151215T1226107964.

criminal sanctions or civil liability."[19] Instead, the organization recommends that "[p]regnant and breastfeeding patients with substance use disorders should be provided with physician-led, team-based care that is evidence-based and offers the ancillary and supportive services that are necessary to support rehabilitation."[20]

The American Society of Addiction Medicine, a professional medical society representing health care professionals in the field of addiction medicine, opposes state punitive measures against women for taking drugs while pregnant. In a statement that focuses on opioid use, the organization concludes: "State and local governments should avoid any measures defining alcohol or other drug use during pregnancy as 'child abuse or maltreatment,' and should avoid prosecution, jail, or other punitive measures as a substitute for providing effective health care services for these women."[21]

Indeed, there is virtual unanimity among national public health authorities that the criminalization of drug use during pregnancy is counterproductive. The

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[19] Am. Med. Ass'n, *Perinatal Addiction—Issues in Care and Prevention H-420.962* (2017), https://policysearch.ama-assn.org/policyfinder/detail/alcohol%20treatment?uri=%2FAMADoc%2FHOD.xml-0-3705.xml.

[20] *Id.*

[21] Am. Soc'y Addiction Med., *Public Policy Statement on Substance Use, Misuse, and Use Disorders During and Following Pregnancy, with an Emphasis on Opioids* 5 (2017), https://www.asam.org/docs/default-source/public-policy-statements/substance-use-misuse-and-use-disorders-during-and-following-pregnancy.pdf?sfvrsn=644978c2_4.

American Academy of Family Physicians, the American Public Health Association, the American Nurses Association, the American Psychiatric Association, and the American Psychological Association are among these organizations.[22]

The criminalization of pregnancy would worsen an already dire state of maternal and fetal health by driving more women away from health care, and it would discourage them from communicating honestly with their health care providers. It is increasingly dangerous to be pregnant and give birth in the United States. In fact, women in the United States are less likely to survive pregnancy than women in other developed countries.[23] Alarmingly, the number of women dying due to complications from pregnancy and childbirth is rising in the United States, whereas maternal mortality rates are decreasing elsewhere.[24] In the United States, maternal mortality more than doubled between 2000 and 2014, increasing

[22] *See* Nat'l Advocates for Pregnant Women, *Medical and Public Health Group Statements Addressing Prosecution and Punishment of Pregnant Women* (revised Apr. 2018), http://advocatesforpregnantwomen.org/Medical%20and%20Public%20Health%20Group%20Statements%20revised%20April%202018.pdf.

[23] *See* MacDorman et al., *Recent Increases in the U.S. Maternal Mortality Rate*, 128 OBSTETRICS & GYNECOLOGY 447 (2016).

[24] *Id*. (finding that 157 of 183 countries studied had decreases in maternal mortality rates from 2000 to 2013).

from 9.8 maternal deaths per 100,000 live births to 21.5 maternal deaths.[25] By 2016, this rate has risen to 28 maternal deaths.[26] In fact, the Centers for Disease Control and Prevention reports approximately 700 women are dying of pregnancy complications each year.[27] Driving pregnant and parenting people away from prenatal and obstetric care will worsen this public health crisis.

The implications of criminalizing drug use during pregnancy extend beyond immediate health concerns, including devastating effects on a woman and her family's safety and financial security. For example, prior criminal history may result in restrictions on child custody or ability to adopt[28] or in the inability to find employment, housing, and receive student financial aid.[29]

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[25] *Id.*

[26] *See* Sabrina Tavernise, *Maternal Mortality Rate in U.S. Rises, Defying Trend, Study Finds*, N.Y. TIMES (Sept. 21, 2016), https://www.nytimes.com/2016/09/22/health/maternal-mortality.html.

[27] Ctrs. for Disease Control & Prevention, *Pregnancy-Related Deaths* (updated May 2018), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-relatedmortality.htm.

Moreover, the risk of dying from pregnancy or childbirth does not fall equally on all women. Women of color are more likely to die from pregnancy-related causes than their white counterparts. *See infra* Part III.b.

[28] Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences*, NIJ J., No. 272, at 26 (Sept. 2013), https://www.ncjrs.gov/pdffiles1/nij/241927.pdf.

[29] *See generally* Council of State Gov'ts, *National Inventory of Collateral Consequences of Conviction*, https://niccc.csgjusticecenter.org/map_text; Amnesty Int'l, *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA* (2017), https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf.

Criminalizing pregnancy is not only counterproductive public health policy; it also serves no criminal justice purpose. *See Commonwealth v. Heck*, 491 A.2d 212, 224 (Pa. Super. Ct. 1985) (noting that "principal preferred purposes" of criminal justice are deterrence, rehabilitation, and incapacitation). Punitive measures typically do not cure individuals with substance use disorders or deter them from using drugs.[30] Moreover, punitive measures fail to prevent further harm to the fetus, because measures that hurt the woman also hurt the fetus she is carrying.[31]

Because prosecuting women for their conduct during pregnancy fulfills neither a public health nor a criminal justice purpose, this Court should affirm the ruling below.

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[30] *See* Letter from Pew Charitable Trusts to Chris Christie, Chair, President's Commission on Combating Drug Addiction and the Opioid Crisis 1 (June 19, 2017), http://www.pewtrusts.org/-/media/assets/2017/06/the-lack-of-a-relationship-between-drug-imprisonment-and-drug-problems.pdf?la=en&hash=B777C3BA24156F7C7431BD2E780FCC2A5A14BB1B ("These findings reinforce a large body of prior research that casts doubt on the theory that stiffer prison terms effectively deter drug use, distribution, and other drug-law violations.").

[31] *See* Committee on Obstetric Practice, Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion 711: Opioid Use and Opioid Use Disorder in Pregnancy* 7 (August 2017), https://www.acog.org/-/media/Committee-Opinions/Committee-on-Obstetric-Practice/co711.pdf?dmc=1&ts=20180604T1536477818 (explaining the risks of withdrawal, which "associated with high relapse rates" and "grave risks, including communicable disease transmission . . . [and] obstetric complications").

b. Punishing women for their conduct during pregnancy will disproportionately harm poor women and women of color.

It is no coincidence that the criminalization of pregnant women's conduct would have its harshest impact on poor women and women of color. The intersection of gender, race, and poverty creates conditions that exacerbate risk factors for pregnant women.[32] Black women are three times as likely as white women to die during pregnancy.[33] They are twice as likely to experience stillbirth, nearly twice as likely to deliver preterm (*i.e.*, before 37 weeks).[34]

Infant mortality in America for Black infants is now more than double that of white infants.[35] In Pennsylvania, compared to white infants, Black infants are

[32] *See generally* El-Sayed et al., *Social Environments, Genetics, and Black–White Disparities in Infant Mortality*, 19 PAEDIATRIC & PERINATAL EPIDEMIOLOGY 546 (2015).

[33] Ctrs. for Disease Control & Prevention, *Pregnancy Mortality Surveillance System*, (updated Nov. 2017), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html (reporting the Black maternal mortality rate at 43.5 deaths per 100,000 live births compared to 12.7 for white women and 14.4 for other races).

[34] Ctrs. for Disease Control & Prevention, *Preterm Birth* (updated Apr. 24, 2018), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pretermbirth.htm (showing that, in 2016, the rate of preterm birth among Black women (14%) was approximately 50 percent higher than the rate of preterm birth among white women (9%)).

[35] Ctrs. for Disease Control & Prevention, *Infant Mortality* (updated Jan. 2018), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm (reporting the Black infant mortality rate at 11.3% per 1,000 live births compared to 4.9% among white infants).

2.4 times as likely to die before their first birthday.[36] These findings hold across socioeconomic strata, even comparing births among low-income white parents without a high school education to births among educated middle-class Black parents.[37] Moreover, racial disparities in infant mortality rates also persist for Latino babies: in Pennsylvania, compared to a rate of 5.21 in 1,000 live births for white infants, the Latino infant mortality rate is nearly 7 in 1,000 live births.[38]

Tragically, the very populations that suffer the greatest risk of maternal and infant mortality also experience the worst barriers to prenatal care and substance use disorder treatment. Poor women and women of color are more likely to encounter multiple barriers to prenatal care, including lack of insurance or transportation, depression, fear of reprisal, social stigma, and other poverty-related barriers.[39] Women in these populations may underutilize substance use disorder treatment for a number of reasons, such as lack of available treatment programs[40]

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[36] Mathews et al., *Infant Mortality Statistics from 2013 Period Linked Birth/Infant Death Data Set*, 64 NAT'L VITAL STATISTICS REPORTS No. 9, at 17, tbl.2 (2015), https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_09.pdf.

[37] *See* Reeves & Matthew, *6 Charts Showing Race Gaps Within the American Middle Class* (Oct. 21, 2016), https://www.brookings.edu/blog/social-mobility-memos/2016/10/21/6-charts-showing-race-gaps-within-the-american-middle-class.

[38] Mathews et al., *supra* note 36, at 17, tbl.2.

[39] Nagahawatte & Goldenberg, *supra* note 9.

[40] Data from the 2012 National Survey of Substance Abuse Treatment Services indicate that only 13% of outpatient substance-use treatment facilities and 13% of residential treatment

or treatment facilities' refusal to allow children to remain at the treatment facility with their mother, which forces women to choose between inpatient treatment and custody of their children.[41]

The stigma that already functions as a barrier to prenatal care and substance use disorder treatment would be enormously compounded if pregnant women's conduct is criminalized.[42] The very women at highest risk of pregnancy-related morbidity and mortality would be driven away from care. The honest and open flow of information between patient and clinician would be shut down. Furthermore, poor, Black, and Latina women, disproportionately suffering the worst pregnancy outcomes, would also be disproportionately subject to investigation and prosecution for fetal abuse.

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facilities offered programs designed for pregnant or postpartum women; only 7% of hospital inpatient treatment facilities offered special programs for pregnant or postpartum women. Smith & Lipari, *Women of Childbearing Age and Opioids*, THE CBHSQ REPORT (Jan. 17, 2017), https://www.samhsa.gov/data/sites/default/files/report_2724/ShortReport-2724.html.

[41] Based on 2012 data, only about 1 in 5 (18%) outpatient treatment facilities with specialized programs for pregnant or postpartum women offered child care services. Smith & Lipari, *supra* note 40. The numbers were lower for inpatient programs, with 15% offering child care services and 12% reporting residential beds for children. *Id.*

[42] *See* Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 HEALTH & JUSTICE No. 2, at 7 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5151516/pdf/40352_2015_Article_15.pdf ("The most common strategy employed by women afraid of detection was avoidance of medical care . . . .").

Indeed, where such prosecutions have been attempted, it is striking how frequently the defendants are poor women and women of color. To date, pregnancy criminalization laws have been disproportionately enforced against poor women, Black women, and other women of color.[43] The largest systematic study of these cases, analyzing 413 arrests and forced interventions over 30 years, found that 71% of cases were brought against low-income women who qualified for indigent defense.[44] Of the 368 cases where race information was available, 59% involved women of color, most of which were Black women (52% of the 368 cases).[45]

There is ample evidence that racial bias has played a significant role in whether pregnant patients are reported by medical providers to authorities for perceived substance use violations. One study found that during a six-month period, despite Black women having the same incidence of substance use during

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[43] Amnesty Int'l, *supra* note 29, at 10. For example, after Tennessee in 2014 became the first state to criminalize giving birth to a baby showing signs of narcotic exposure, most convictions under that law occurred in rural eastern Tennessee—an area with high poverty and lacking drug treatment facilities—and in Memphis, which has a high Black population. *Id*. at 7. Along similar lines, since the enactment of a similar law in Alabama in 2006, 89% of the 479 women prosecuted under that law were unable to afford legal representation. *Id*. at 8.

[44] *See* Paltrow & 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 POLITICS, POLICY & L. 299, 310 tbl.1 (2013), https://read.dukeupress.edu/jhppl/article-pdf/38/2/299/360112/JHPPL382_09Paltrow_Fpp.pdf.

[45] *Id* at 311.

pregnancy as white women, Black women were reported to health authorities ten times more often than white women.[46] Similar racial bias in reporting occurred in *Ferguson v. City of Charleston*, where Medical University of South Carolina hospital patients sued the hospital for colluding with police and prosecutors to conduct warrantless drug searches on pregnant women's body fluids, the results of which the hospital then disclosed to law enforcement authorities. 532 U.S. 67, 22 (2001). Black women comprised of all but one of the women prosecuted under this unconstitutional policy. *Id.* at 23.[47] Should the Court adopt the Commonwealth's interpretation of Section 2606, there is every reason to expect that poor women, Black women, and Latinas—the very people most at risk for catastrophic pregnancy outcomes—will be deterred from seeking life-saving medical care.

[46] Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENGLAND J. MED. 1202, 1202 (1990), https://www.nejm.org/doi/pdf/10.1056/NEJM199004263221706.

[47] The one white patient resided with her Black boyfriend—a fact noted in her medical records. Goodwin, *How the Criminalization of Pregnancy Robs Women of Reproductive Autonomy*, 47 HASTINGS CTR. REPORT, No. 6, at 19, 23 https://onlinelibrary.wiley.com/doi/epdf/10.1002/hast.791.

IV. APPLYING SECTION 2606(a) TO PREGNANT WOMEN'S CONDUCT WILL IMPROPERLY INVOLVE THE STATE IN INTRUSIVE POLICING OF PREGNANT WOMEN.

In Pennsylvania between 2014 and 2016, 8.2% of all infants were born with low birth weight and 9.4% of all infants were born preterm.[48] Birth defects—structural changes present at birth, ranging from mild to severe—are common in the United States.[49] If Section 2606(a) is construed to impose criminal liability on a pregnant woman for conduct alleged to have harmed her fetus, any woman with a negative birth outcome could be subject to criminal investigation.

An array of factors beyond the pregnant woman's control may contribute to adverse birth outcomes: certain health conditions, social and economic circumstances, and environmental factors. Several studies show that pregnant women who are exposed to tobacco smoke or lead are at risk for preterm birth, low birth weight, and possibly fetal death or miscarriage.[50]

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[48] *See* Pa. Dep't of Health, *Maternal and Child Health Status Indicators: Pennsylvania* (2016), http://www.statistics.health.pa.gov/HealthStatistics/VitalStatistics/MaternalChildHealth/Documents/Maternal_and_Child_Health_Pennsylvania_2016.pdf. The preterm birth rates were even higher among Black and Latina women, among whom rates were 13.0% and 9.8%, respectively. *Id.*

[49] *See* Ctrs. for Disease Control & Prevention, *Facts About Birth Defects* (updated Dec. 2017), https://www.cdc.gov/ncbddd/birthdefects/facts.html (reporting that approximately 120,000 babies are born with a birth defect each year).

[50] *See* U.S. Dep't of Health & Human Servs., *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006), https://www.surgeongeneral.gov/library/reports/secondhandsmoke/fullreport.pdf (reporting that exposure to secondhand smoke during pregnancy may cause low birth weight); National Toxicology

The Commonwealth's reassurance that pregnant women would not be prosecuted for otherwise legal but unhealthy conduct is misguided. There is no reason to doubt that the Commonwealth's interpretation of 18 Pa. C.S. § 2606(a) could lead to prosecuting pregnant women for engaging in legal activity if it caused, or was perceived to have caused, harm to the fetus. In fact, pregnant women across the country have faced criminal charges for engaging in non-criminal activity alleged to have harmed the fetus.[51]

Adopting the Commonwealth's expansive reading of the statute would infringe the fundamental constitutional right of reproductive autonomy. The U.S. Supreme Court has long recognized that the Due Process Clause protects the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). When a woman battling substance use disorder

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Program, U.S. Dep't of Health & Human Servs., *NTP Monograph: Health Effects of Low-Level Lead* (2012), https://ntp.niehs.nih.gov/ntp/ohat/lead/final/monographhealtheffectslowlevellead_newissn_508.pdf (reporting that lead exposure during pregnancy may increase risk of preterm birth and fetal death or miscarriage); Maisonet et al., *Relation Between Ambient Air Pollution and Low Birth Weight in the Northeastern United States*, 109 ENVIRONMENTAL HEALTH PERSPECTIVES 351 (2001) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1240552/pdf/ehp109s-000351.pdf (reporting a link between exposure to common air pollutants and decreased fetal growth, low birth weight, and preterm birth).

[51] *See* Amnesty International, *supra* note 29, at 18 (reporting that pregnant women have been charged under fetal assault and fetal endangerment laws for driving without a seatbelt, falling down stairs, attempting suicide, and refusing medical interventions).

chooses to avoid prosecution by terminating her pregnancy, because continuing her pregnancy would be a criminal act, her reproductive choice is no choice at all. Ironically, the very statutes created to protect fetuses could, if turned against pregnant women, create a powerful incentive for termination of wanted pregnancies.

This unintended consequence is a real concern. In North Dakota, a woman obtained an abortion in order to moot a criminal prosecution for her substance use during pregnancy. *State v. Greywind*, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992). After Tennessee passed a "fetal assault" law, which criminalized giving birth to a child with symptoms of prenatal exposure to narcotics, Tenn. Code Ann. § 39-13-107 (2015), Amnesty International reported that a Tennessee woman battling substance use disorder had an abortion, partly motivated by her "[f]ear that a rogue prosecutor could prosecute her."[52] Concern that "[p]rosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion" led the Florida Supreme Court to reject an effort to criminalize pregnancy in that state. *Johnson v. State*, 602 So. 2d 1288, 1296 (Fla. 1992).

[52] Amnesty International, *supra* note 29, at 34.

The choice between, on the one hand, giving birth and being criminally charged, or, on the other, terminating a pregnancy, is no choice at all. Criminal prosecution in this case would serve as a powerful deterrent to carrying a wanted pregnancy to term. For that reason, the Commonwealth's interpretation of Section 2606(a) would violate a pregnant woman's fundamental right to decide if, when, and how to form a family. Because both legal and illegal behavior that could adversely affect a fetus would be subject to state scrutiny and regulation, the Commonwealth's interpretation would open the door to a nightmarish loss of autonomy for pregnant people.

CONCLUSION

For these reasons, as well as those set forth in the Brief for Appellee, *amici* respectfully urge the Court to affirm the ruling below.

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CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to Pa. R. App. P. 2135, the text of this *amicus curiae* brief consists of 6,658 words as determined by the Microsoft Word word-processing program used to generate this document.

Dated: June 4, 2018

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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APPENDIX OF INDIVIDUAL STATEMENTS OF *AMICI CURIAE*

ORGANIZATIONS

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN—PENNSYLVANIA

In 1881, the American Association of University Women (AAUW) was founded by like-minded women who defied society's conventions by earning twenty-seven college degrees. Since then it has worked to increase women's access to higher education through research, advocacy, and philanthropy. Today, AAUW-Pennsylvania has more than 5,000 members and supporters, 36 branches, and 50 college and university partners statewide. AAUW-Pennsylvania plays a major role in mobilizing advocates statewide on AAUW's public policy goals to educate citizens about the impact of public policies on women and girls and to advocate for policies that will advance equity for women and girls. In adherence with its member-adopted Public Policy Priorities, AAUW Pennsylvania is a staunch advocate for measures that guarantee equality, individual rights and social justice including self-determination of one's reproductive health decisions.

CALIFORNIA WOMEN'S LAW CENTER

The California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, policy advocacy and education. CWLC's issue priorities include gender discrimination, reproductive justice, violence against women, and women's health. Since its inception in 1989, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination against pregnant women. CWLC is committed to addressing the disparities facing incarcerated women, with an emphasis on the inequities facing pregnant women in incarceration.

COMMUNITY LEGAL SERVICES, INC.

Community Legal Services, Inc. (CLS) has served the legal needs of low-income Philadelphia residents by providing them with advice and representation in civil matters, advocating for their legal rights, and conducting community education about legal issues for over 50 years. The Family Advocacy Unit (FAU) is a unit within CLS which provides high quality representation to hundreds of parents each year in Philadelphia dependency and termination of

parental rights proceedings. As part of its mission, the FAU works to ensure that low-income vulnerable families involved with the child welfare system receive the due process to which they are entitled and have meaningful access to justice in these extremely important proceedings. In addition to individual client representation, the FAU engages in policy advocacy and continuing legal education at both a statewide and local level to improve outcomes for children and families.

DELAWARE COUNTY WOMEN'S CENTER

Delaware County Women's Center (DCWC) is a state licensed private doctor's office that has a professional medical team specializing in medication abortion services up to ten weeks of pregnancy. We provide compassionate abortion care and reproductive health services, inspired by our belief in the autonomy of the individual, and our commitment to strengthening communities and building a better future. We believe that threatening policies against substance-using women will discourage them from seeking medical care or treatment during their pregnancy for fear of facing legal penalization. No one should have to sacrifice their health in order to avoid punitive action.

DRUG POLICY ALLIANCE

The Drug Policy Alliance (DPA) is a 501(c)(3) nonprofit organization that leads the nation in promoting drug policies that are grounded in science, compassion, health, and human rights. Established in 1994, DPA is a nonprofit, non-partisan organization with more than 20,000 members nationwide. DPA is dedicated to advancing policies that reduce the harms of drug use and drug prohibition, and seeking solutions that promote public health and public safety. DPA is actively involved in the legislative process across the country and strives to roll back the excesses of the drug war, block new, harmful initiatives, and promote sensible drug policy reforms. The organization also regularly files legal briefs as amicus curiae, including in other cases pertaining to pregnant women who use drugs. *See, e.g.*, *In the Interest of: L.J.B., a Minor*, No. 10 MAP 2018 (Pa. 2018).

FAMILIES FOR SENSIBLE DRUG POLICY

Families for Sensible Drug Policy (FSDP), a 501(c)(3) nonprofit organization cofounded by Barry Lessin and Carol Katz Beyer, is a global coalition of families, professionals, and organizations representing the voice of the family impacted by substance use and the harms of existing drug policies. We empower families by advancing and implementing a new paradigm of comprehensive care

and progressive solutions for family support based on science, compassion, public health and human rights.

We support existing criminal statutes that provide immunity protecting pregnant women from prosecution for conduct during their pregnancy, as well as existing public health policies designed to protect pregnant women based on evidence that punishing them can prevent them from getting the care they need. We also know that punitive measures disproportionately harm poor women and women of color.

GENDER JUSTICE

Gender Justice is a nonprofit legal advocacy organization based in the Midwest that eliminates gender barriers through impact litigation, policy advocacy, and education. As part of its impact litigation program, Gender Justice acts as counsel in cases involving gender equality in the Midwest region, including advocating for abortion rights and reproductive justice for all. Gender Justice also participates as amicus curiae in cases that have an impact in the region. The organization has an interest in protecting the legal rights of pregnant persons.

LEGAL VOICE

Legal Voice is a non-profit public interest organization that works in the Pacific Northwest to advance the legal rights of women through public impact litigation, legislation, and legal rights education. Since its founding in 1978 (as the Northwest Women's Law Center), Legal Voice has been dedicated to protecting and expanding women's legal rights. Toward that end, Legal Voice has advocated for legislation protecting pregnant persons' rights, including their rights to be free from shackling if they are incarcerated and pregnant or in labor. In addition, Legal Voice has participated as counsel and as amicus curiae in the Pacific Northwest and across the country in numerous cases involving the rights of pregnant and birthing women. Legal Voice opposes, and has successfully challenged, prosecutions of women for their pregnancy outcomes and works to end punitive measure that undermine the humanity and legal rights of all pregnant people.

MATERNITY CARE COALITION

Since 1980, Maternity Care Coalition (MCC) has assisted more than 100,000 families throughout Southeastern Pennsylvania, focusing particularly on neighborhoods with high rates of poverty, infant mortality, health disparities, and changing immigration patterns. We know a family's needs change as they go

through the pregnancy and their child's first years and we offer a range of services and programs for every step along the way including helping families dealing with substance use disorder and child abuse. MCC works with families on the frontline starting with our home visiting programs that help parents with programs which strengthens families, promotes positive parenting practices and encourages early learning. Evidence-based parenting skills are taught that help reduce child abuse and neglect. In addition MCC has programs working with high risk women suffering from behavioral health issues including substance use disorder. MCC works with babies diagnosed with neonatal abstinence syndrome providing home visiting support, which is part of the plan of safe care for the baby. MCC engages in advocacy supporting regional and state efforts addressing the opioid epidemic.

MEDIA MOBILIZING PROJECT

The Media Mobilizing Project helps to support and organize with myriad low income community members and organizations in our home city of Philadelphia. We also organize directly with groups who try to reduce harm in neighborhoods struggling with live drug addiction. Women struggling with drug addiction need support to preserve their health and that of their families. Prosecuting women in the throes of addiction and poverty hurts them, their families, and our entire community.

NATIONAL ADVOCATES FOR PREGNANT WOMEN

National Advocates for Pregnant Women (NAPW) is a non-profit organization that advocates for the rights, health, and dignity of all women, focusing particularly on pregnant and parenting women, and those who are most likely to be targeted for state control and punishment. Through litigation, representation of medical and public health organizations and experts as amicus, and through public education, NAPW works to ensure that women do not lose their constitutional, civil, and human rights as a result of pregnancy. The organization also conducts research, and has published a peer-reviewed study on prosecutions of and forced medical interventions on pregnant women. NAPW believes that health and welfare should be addressed as health issues, not as crimes, and promotes policies that actually protect maternal, fetal, and child health.

NEW VOICES FOR REPRODUCTIVE JUSTICE

New Voices for Reproductive Justice is a Human Rights and Reproductive Justice advocacy organization with a mission to build a social change movement dedicated to the full health and well-being of Black women, femmes, and girls in

Pennsylvania and Ohio. Since 2004, the organization has served over 75,000 women of color and LGBTQIA+ people of color, through community organizing, grassroots activism, civic engagement, youth mentorship, leadership development, culture change, public policy advocacy and political education. New Voices defines Reproductive Justice as the human right of all people to have full agency over their bodies, gender identity and expression, sexuality, work, reproduction and the ability to form and raise families. New Voices stands in staunch opposition to laws, policies, decisions, and actions that criminalize birth outcomes and pregnant women who have used substances during pregnancy. Such criminalization deters mothers who may be struggling with addiction from seeking care and unequally harms women of color and poor women who are disproportionately punished by the criminal justice system and who are uniquely affected by roadblocks to treatment and care. Women of color, furthermore, experience higher rates of pregnancy-related maternal deaths and infant mortality for a number of reasons, including the pervasive effects of institutional racism, stress, and barriers to comprehensive reproductive healthcare. For example, in Pennsylvania, Black women comprise 11% of the population and yet account for 31% of all pregnancy-related maternal deaths. Additionally, Black infants in Pennsylvania are 2.4 times as likely to die before their first birthday than white children. For Black women, these adverse outcomes exist across income brackets and regardless of education level. New Voices firmly believes that rather than criminalizing mothers, lawmakers should work to increase access to a full range of pregnancy-related and maternal care, including substance treatment care.

PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE

The Pennsylvania Coalition Against Domestic Violence (PCADV) is a private nonprofit organization working at the state and national levels to eliminate domestic violence, secure justice for victims, enhance safety for families and communities, and create lasting systems and social change. PCADV was established in 1976 as the nation's first domestic violence coalition, and is now comprised of 60 funded community-based domestic violence programs across Pennsylvania, providing a range of life-saving services, including shelters, hotlines, counseling programs, safe home networks, medical advocacy projects, transitional housing and civil legal services for victims of abuse and their children. Current PCADV initiatives provide training and support to further advocacy on behalf of victims of domestic violence and their children.

PENNSYLVANIA RELIGIOUS COALITION FOR REPRODUCTIVE JUSTICE

The mission of the Pennsylvania Religious Coalition for Reproductive Justice is to educate, serve, witness and advocate for reproductive justice as a spiritual and moral issue of our day. We support reproductive justice because of our faith. Accordingly, we are called to support this amicus brief in *Commonwealth v. Dischman* because Dischman deserves our support as a child of God, created in the likeness and image of God.

PENNSYLVANIA STATE NURSES ASSOCIATION

The Pennsylvania State Nurses Association (PSNA) is a nursing professional organization that advocates on behalf of over 212,000 registered nurses in Pennsylvania. PSNA believes that jeopardizing policies against substance-using women will discourage them from seeking medical care or treatment during their pregnancy for fear of facing legal penalization. Penalizing women would increase the risk of poor health outcomes for themselves and their children. No one should have to sacrifice their health in order to avoid punitive action.

PHILADELPHIA WOMEN'S CENTER

Philadelphia Women's Center (PWC) has been continually meeting the needs of women and families by providing professional, confidential and compassionate abortion care since 1972. PWC provides compassionate abortion care and reproductive health services, inspired by our belief in the autonomy of the individual, and our commitment to strengthening communities and building a better future. We believe that threatening policies against substance-using women will discourage them from seeking medical care or treatment during their pregnancy for fear of facing legal penalization. No one should have to sacrifice their health in order to avoid punitive action.

PLANNED PARENTHOOD PENNSYLVANIA ADVOCATES

In partnership with the three Planned Parenthood affiliates in Pennsylvania, Planned Parenthood Pennsylvania Advocates, the state public affairs office in Harrisburg, works to achieve maximum public, governmental and media support for reproductive health care by developing, implementing and facilitating a statewide strategy. Planned Parenthood Pennsylvania Advocates supports the Women's Law Project's amicus brief in *Commonwealth v. Dischman*. We believe that pregnant people should always be encouraged to seek treatment throughout

their pregnancies. Punishing pregnant people for certain conduct during a pregnancy only deters them from seeking medical care for themselves and increases the risk of poor health outcomes for themselves and their children. We also know that punitive measures disproportionately harm poor women and women of color, groups that already face higher barriers to accessing healthcare.

SUPPORT CENTER FOR CHILD ADVOCATES

Support Center for Child Advocates ("Child Advocates") provides legal assistance and social service advocacy for abused and neglected children in Philadelphia, Pennsylvania. Representing more than 1,000 children each year, Child Advocates protects children by securing social services, finding alternative homes, and helping children testify in court. Respected for diligent and effective advocacy throughout more than 40 years, Child Advocates works to ensure safety, health, education, family permanency and access to justice for all children committed to their care. Systemically, Child Advocates promotes collaborative, multi-disciplinary casework, and solutions to recurrent problems.

WOMEN AND GIRLS FOUNDATION

The Women and Girls Foundation (WGF) is a non-profit organization with expertise in the economic security of women and vulnerable families. For over a dozen years, WGF has been involved in publishing research on the status of women in Pennsylvania. WGF is especially focused on working with community leaders to create informed policies which can help strengthen the health and economic security of vulnerable families, such as those struggling with substance use disorders.

WOMEN'S LAW CENTER OF MARYLAND, INC.

The Women's Law Center of Maryland, Inc. is a nonprofit, public interest, membership organization of attorneys and community members with a mission of improving and protecting the legal rights of women. Established in 1971, the Women's Law Center achieves its mission through direct legal representation, research, policy analysis, legislative initiatives, education and implementation of innovative legal-services programs to pave the way for systematic change. The Women's Law Center is participating as an amicus in *Commonwealth v. Dischman* because, in particular, the Women's Law Center seeks to ensure the physical safety, economic security, and autonomy of women, and that goal cannot be achieved unless all women have full sovereignty related to their reproductive choices.

WOMEN'S LAW PROJECT

The Women's Law Project (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP is dedicated to creating a more just and equitable society by advancing the rights and status of women through high-impact litigation, advocacy, and education. Throughout its history, the WLP has played a leading role in the struggle to eliminate discrimination against women based on pregnancy and reproductive capacity, representing women and *amici curiae* in a number of cases involving the improper application of state criminal, child abuse, and drug delivery statutes to pregnant women and to new mothers who have given birth while suffering from a substance use disorder. The WLP believes that it is both unjust and counterproductive to impose criminal sanctions on pregnant women with untreated substance use issues. Instead of prosecuting and incarcerating these women, the WLP believes that it is fairer and more effective to make appropriate treatment, including prenatal care and supportive services, available to women throughout their pregnancies.

WOMEN'S MEDICAL FUND

Women's Medical Fund ensures and expands abortion access for low-income women and teens through direct service and community mobilization. Attempts to criminalize drug use during pregnancy under the guise of promoting maternal and child health are violent. When we threaten to punish people for drug use during pregnancy, we jeopardize their health by deterring them from accessing care—including prenatal care and drug treatment. From other similar attempts to police pregnancy, we know that enforcement of such laws falls disproportionately on low-income women and women of color. Rather than attempting to punish and control drug use during pregnancy, Women's Medical Fund calls on Pennsylvania officials to work harder to ensure access to all reproductive health care services—including prenatal healthcare and drug treatment programs.

INDIVIDUAL AMICI[53]

AVIK CHATTERJEE, MD, MPH

Avik Chatterjee, MD, MPH, is a physician at Boston Health Care for the Homeless Program and Instructor at Harvard Medical School. He is board-certified in pediatrics, internal medicine, and addiction medicine. He works with men and women, including mothers and pregnant women, with opioid use disorder. He has published papers about opioid use disorder in top-tier journals, and he has presented at regional and national conferences on this topic as well. Engaging pregnant women in treatment for substance use disorders is incredibly important, because treatment of substance use disorders during pregnancy can help both the mother and the future child. But stigma is a major barrier for individuals who use substances seeking treatment. Dr. Chatterjee believes that allowing prosecution of women for overdosing during pregnancy as a criminal act against their fetus would drive many vulnerable women away from lifesaving prenatal and addiction care—and this sort of penalty would result in untold harm to mothers (and their future babies) by driving them away from seeking help when they most need it.

HENDRÉE JONES, PhD

Hendrée Jones, PhD, is a Professor in the Department of Obstetrics and Gynecology, School of Medicine, University of North Carolina, Chapel Hill and Executive Director of Horizons, a comprehensive drug treatment program for pregnant and parenting women and their drug-exposed children. She is also an Adjunct Professor in the Department of Psychiatry and Behavioral Sciences and in the Department of Obstetrics and Gynecology, School of Medicine, Johns Hopkins University. Dr. Jones is an internationally recognized expert in the development and examination of both behavioral and pharmacologic treatments of pregnant women and their children in risky life situations. Dr. Jones has received continuous funding from the United States National Institutes of Health since 1994 and has published over 190 peer-reviewed publications, two books on treating substance use disorders (one for pregnant and parenting women and the other for a more general population of patients), several book and textbook chapters, and multiple editorial letters and non-peer reviewed articles for clinicians. She is a consultant for The Substance Abuse and Mental Health Services Administration,

[53] The individual *amici's* views do not represent those of their respective institutions. Institutional affiliations are included for identification purposes only.

the United Nations, and the World Health Organization. Dr. Jones leads or is involved in projects in Afghanistan, India, the Southern Cone, the Republic of Georgia, South Africa, and the United States that are focused on improving the lives of children, women, and families.

STEPHEN R. KANDALL, MD, FAAP

Stephen Kandall, MD, FAAP, graduated from Harvard College *magna cum laude* and from New York University School of Medicine. He is board-certified in Pediatrics and Neonatal-Perinatal Medicine and ended his academic career as Chief of Neonatology at Beth Israel Medical Center in New York and Professor of Pediatrics at the Albert Einstein College of Medicine. He served as President of the New York Pediatric Society, the New York Perinatal Society, and his 2100 pediatrician chapter of the American Academy of Pediatrics. Dr. Kandall also chaired the Federal panel on "Improving Treatment for Drug-Exposed Infants." Most of Dr. Kandall's 90 articles and textbook chapters deal with perinatal drug issues, and his own history text, "Substance and Shadow: Women and Addiction in the United States," was published by Harvard University Press. Dr. Kandall has lectured throughout the United States, Europe and Australia. His many radio and television appearances include the Oprah Winfrey Show and the Joan Lunden Show. He remains extremely active in advocacy, and continues to serve on local, statewide and national advisory groups on perinatal drug issues.

MISHKA TERPLAN, MD, MPH, FACOG, DFASAM

Mishka Terplan, MD, MPH, FACOG, DFASAM, is a Professor of Obstetrics & Gynecology and Psychiatry, Associate Director of Addiction Medicine, and Medical Director of MOTIVATE (an outpatient office-based opioid-treatment clinic) at Virginia Commonwealth University. He is board-certified in both OB/GYN and Addiction Medicine, the Addiction Medicine Consultant for Virginia Medicaid and a consultant for the National Center on Substance Abuse and Child Welfare. He has published over 70 peer-review articles and several book chapters and has active grant funding most focused along the intersections of reproductive and behavioral health. For almost two decades, he has worked with pregnant women with addiction, and he has never met a pregnant woman who displayed no concern for the health of her baby-to-be. Addiction is a brain-centered condition for which evidence-based treatment exists and works. Relapse rates for addiction treatment are similar to other chronic conditions including hypertension, diabetes, asthma and depression. Treatment success is arguably the greatest during pregnancy due both to increased health

insurance coverage and maternal motivation for change. Hence the salient public health and clinical distinction is between treated and untreated addiction. It appears that Ms. Dischman had untreated (or undertreated) addiction. People who use heroin have no control over the quality of the product which they use. Almost all overdoses are unintentional and result from heroin that has been contaminated with fentanyl and other potent synthetic opioids. Prosecuting Ms. Dischman for the disease of addiction is discriminatory, immoral and ineffective.

BRUCE TRIGG, MD

Bruce Trigg, MD, is a pediatrician and public health physician who has worked in the field of addiction medicine for the past decade. He is currently a consultant on the treatment of opioid use disorder with medications for addiction treatment for the New York State Department of Health; the AIDS Institute; and Office of Drug User Health in the Montana Department of Health and Human Services. Dr. Trigg is also the Interim Medical Director for the Harm Reduction Coalition, a national advocacy and training organization.

TRICIA D. WRIGHT, MD, MS

Tricia D. Wright, MD, MS, is a specialist in treating pregnant women with substance use disorders. Over forty years of research shows that punitive measures—such as those used in this case—serve to worsen prenatal outcomes for women and children, by preventing women from obtaining prenatal care and addiction treatment. The best outcomes for women and children are when women are treated in a comprehensive care environment without judgment and allowed to parent their children. Women who use substances during pregnancy are much more likely to be victims themselves of childhood sexual assault and interpersonal violence, and they do not deserve to be further victimized by our court system.