

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2008-SC-95-DG

INA COCHRAN

APPELLANT

V.

COMMONWEALTH OF KENTUCKY

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BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

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PRELIMINARY STATEMENT

The Court of Appeals decision in *Commonwealth v. Cochran* establishes a worrisome and unnecessary precedent that permits the criminal punishment of a pregnant woman who chooses to carry her pregnancy to term in spite of having what is usually a pre-existing drug problem. Neither the health nor welfare of substance abusing pregnant women nor that of their children will be advanced by the application of the blunt instrument of the criminal law in a case such as this. The overwhelming majority of courts and the professional medical/public health/child welfare communities acknowledge that drug addiction and use during pregnancy is a condition needing medical and social service intervention and not criminal sanction.

INTEREST OF AMICI CURIAE

*Amici curiae*¹ are a group of professional organizations and twenty-seven individual bioethicists from a variety of professional backgrounds who are concerned about the health and welfare of pregnant women and their children-to-be, the ethical integrity of the clinician-patient relationship, and the consequences of laws and public policy relating to substance abuse by pregnant women. Each of us endorses the moral value of reducing possible drug-related harms associated with pregnancy in all reasonable and just ways. We do not approve of the non-medical use of illegal drugs by pregnant women, but, for the identical reason, we also do not approve of their use of legal substances such as tobacco and alcohol and deplore the bad effects of poverty and lack of prenatal care on pregnant women and their prenatal humans. We join in

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this brief to acquaint the Court with a few ideas and arguments that we believe are relevant to the legally and morally proper resolution on this appeal.

STATEMENT OF THE FACTS

Amici adopt the statement of the appellant.

SUMMARY OF ARGUMENT

Prenatal humans¹ are not constitutional persons and therefore lack the basic rights of persons that pregnant women, like all other persons, have. States have a legitimate interest in protecting the unborn, but this interest should be enforced only by legislation that explicitly encompasses prenatal humans. Pregnant women who behave in ways dangerous or harmful to their children-to-be are not like third party strangers who engage in violent or abusive behavior toward pregnant women. Fetal homicide laws should not be applied to pregnant women for constitutional and prudential reasons. Both empirical evidence and informed professional opinion opposes criminalizing prenatal substance use as clearly contrary to the health interests of mother, children, and the general public.

ARGUMENT

I. This Court Should Reverse the Decision Below Because Prenatal Humans Are Not Constitutional Persons, and the Wanton Endangerment Statute Applies Only to Persons.

The U.S. Supreme Court in *Roe v. Wade* 410 U.S. 113 (1973) was squarely presented with the question of whether prenatal humans are constitutional persons and specifically held that prenatal humans are not constitutional persons: “[we are persuaded] that the word ‘person,’ as used in the Fourteenth Amendment, does *not* include the unborn.” *Id.* at 158 (1973)

¹ We use the term “prenatal humans” to include all unborn human entities (zygote, pre-embryo, embryo, and fetus) from the time of uterine implantation to birth rather than the term “fetuses” which is often used to identify all unborn humans.

(emphasis added). The logically necessary implication of this is that the constitutional category "person" includes all human beings who are live-born. Therefore, a prenatal human becomes a constitutional person and a child at the time of live birth. Subsequent cases have followed *Roe* in this regard and held that constitutional persons come into existence at birth.² *Crumpton v. Gates*, 947 F.2d 1418, 1422 (9th Cir. 1991); *Hope Clinic v. Ryan*, 195 F.3d 857, 882 (7th Cir. 1999) (Posner, C.J., dissenting).

The U.S. Constitution recognizes only persons as having constitutional status and rights. Under the Fourteenth Amendment, the life, liberty, and property of persons only are protected from State interference by the Constitution; only persons must receive the equal protection of the laws. The Constitution does *not* grant these basic and vital rights to the unborn or any other non-persons. If it did, then the State would be constitutionally required to prohibit all abortion. "If [Texas' claim] of personhood is established, the appellant's case [challenging the anti-abortion statute], of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." *Roe*, 410 U.S. at 156-157. Because the unborn are not persons and lack any constitutional status, they must be sharply distinguished from persons and considered to have legal status only if the legislature expressly confers it upon them.

This is *not* to say that prenatal humans lack value or that the State has no interest in protecting them. The U.S. Supreme Court has repeatedly held that the State does have a legitimate interest in unborn human beings even though they are not constitutional persons. *Roe* held that prenatal humans are not constitutional persons but also acknowledged that the State has an "important and legitimate interest in protecting the potentiality of human life," an interest

² Courts prior to *Roe* had come to the same conclusion as well. See, e.g., *Keeler v. Superior Court*, 2 Cal.3d 619, 625-628, 87 Cal. Rptr. 481 (1970); *Abrams v. Foshee*, 3 Iowa 274, 278 (Cole ed. 1856).

“separate and distinct” from its concern with the woman’s health. 410 U.S. at 162. *Casey v. Planned Parenthood*, 505 U.S. 833 (1992) “reaffirmed” the holding of *Roe* “that the State has legitimate interests from the outset of the pregnancy in protecting the ... life of the fetus that may become a child.” *Casey v. Planned Parenthood, Id.* at 846 (1992).³

However, their lack of any constitutional status means that statutes and other forms of law referring to “persons,” “human being,” “citizens,” or “child” should be understood and interpreted to refer only to live born human beings, unless specific and express indication of legislative intent exists to include them within the ambit of a particular law. This is the proper conclusion to draw not only because the unborn are not constitutional persons and a legislature is not constitutionally required to afford them any rights, including due process and equal protection rights, but also because a legislature is free to decide at what point in gestation (if at all) it will grant legal status and protection to prenatal humans.

The variability among the states in their treatment of prenatal humans can best be seen in criminal statutes protecting the unborn from the violence of third parties. Kentucky’s fetal homicide statutes (KRS 507A.010 et seq.) protect the unborn from conception until birth as do the comparable laws of 24 other states. National Right to Life, *State Homicide Laws That Recognize Unborn Victims*, http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html (listing statutes). However, one state extends the protection of only its first degree murder statute to the unborn who have reached 8 weeks of gestation, one state brings fetuses of 12 weeks

³ *Hollis v. Commonwealth*, 653 S.W.2d 61, 62 (Ky. 1983) was correct to conclude that *Roe* “is not authority for the proposition that a viable fetus should be considered a ‘person’ whose life is entitled to constitutional protection,” but was wrong to assert that *Roe*, as reaffirmed by *Casey*, held that “no state can prohibit terminating the life of a fetus...until the final trimester of pregnancy[.]” The State cannot prohibit a *pregnant woman* from terminating her pregnancy at any point in gestation if her life or health is at stake, but at least one court has upheld the constitutionality of a statute prohibiting third party strangers from wrongfully terminating the life of the unborn at any stage of development. *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990). This court found that pregnant women and third parties are not similarly situated. *Id.* at 323

or greater gestation under the protection of its criminal homicide laws, while three protect the unborn only at quickening and five only at viability. *Id.* Fifteen states then do not expressly protect prenatal humans from criminal homicide at all, and no judicial decision exists calling this failure into constitutional question. This strikingly wide variability would not be constitutionally permissible if prenatal humans were constitutional persons entitled to the equal protection of the laws.

Appellant was indicted for a violation of KRS 508.060 which prohibits a “person...under circumstances manifesting extreme indifference to the value of human life, ...wantonly engag[ing] in conduct which creates a substantial danger of death or physical injury to another person.” KRS 500.080(12) provides that “[a]s used in the Kentucky Penal Code..., ‘person’ means a human being....” Given that prenatal humans are not persons with constitutional and other legal rights and that in this definition the legislature has not expressly included the unborn,⁴ the wanton endangerment statute cannot properly be applied to Appellant’s conduct in this case.⁵

It is, of course, true that in *Commonwealth v. Morris*, 142 S.W.2d 654, 660, this Court stated that “a viable unborn child is an entity within the meaning of the general word ‘person’...” as it appears in KRS 500.080(12). We note that the *Morris* Court did not cite *Roe* as having held that the unborn are not constitutional persons or consider the implications of this important holding. We also note that *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. App. 1955), which first held that viable unborn humans were “persons” for purposes of the wrongful death statute, was

⁴ The definition of “human being” in KRS 311.720(6) which does include the unborn “cannot constitutionally be applied to the homicide provisions of the penal code.” *Commonwealth v. Morris*, 142 S.W.2d 654, 661 (Ky. 2004).

⁵ This conclusion is buttressed by the fact that Kentucky statutory law often uses “human being” as interchangeable with “person” and in a way not applicable to the unborn. E.g., KRS 72.025(5) (“When the death of a human being occurs while the person is in a state mental institution or mental hospital...); KRS 241.010(17) (““Distilled spirits” or “spirits” means any product capable of being consumed by a human being....”); KRS 258.085 et seq. (referring to animals biting a human being); OAG 82-255 (the term “person” refers to a “human being” in KRS 121.150).

decided well before *Roe*. Significantly, *Morris* reached its conclusion about the meaning of “person” in the Kentucky criminal code not on the basis of constitutional analysis of what “person” should presumptively signify, but because it thought that biologically or medically a viable unborn child was “a presently existing person.” 142 S.W.2d at 660.

However, constitutional and legal personhood “is for the law, including, of course, the Constitution, to say”; this is “not a question of biological or ‘natural’ correspondence.” *Byrn v. New York City Health and Hospitals Corp.*, 31 N.Y.2d 194, 335 N.Y.S.2d 390, 393 (1972). Because legal personhood is not determined by science, *Bryn* correctly argued that the truth of factual descriptions of a prenatal human as having “an independent genetic ‘package’ with potential to become a full-fledged human being,” as having “autonomy of development and character although it is for the period of gestation dependent upon the mother,” as being human, or as being alive does not compel the conclusion unborn humans are constitutional persons. *Id.* at 391. *Amici* suggest that this Court not consider itself bound by *Morris* on this important point of law and policy.

This Court, like all others, should leave the inclusion of prenatal humans in existing criminal endangerment or homicide statutes (or any other laws) strictly to the legislature. Many courts have interpreted endangerment or other criminal statutes as not ... applying to the behavior of pregnant women who use drugs during pregnancy.⁶ Only the badly flawed opinion in *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), is to the contrary. The South Carolina Supreme Court ignored *Roe*’s holding on the lack of constitutional personhood for the unborn and relied

⁶ See, e.g., *State v. Aiwohi*, 123 P.3d 1210, 1214-1218 (Haw. 2005) (listing and analyzing cases); *Prosecution of Mother for Prenatal Substance Abuse Based on Endangerment of or Delivery of Controlled Substance to Child*, 70 A.L.R. 5th 461 (1999). No legislature has expressly authorized criminal punishment of women for causing pregnancy-related harm or posing a risk of harm to the unborn or children.

on its own decisions (two of which were decided in the 1960's well before *Roe* while later decisions did not even acknowledge *Roe*'s holding on constitutional personhood) that chose to include only viable fetuses within the protection of its criminal law. *Id.* at 779-780.

The South Carolina legislature never made the explicit decision to include the unborn at all in that state's criminal law, as many legislatures have done with fetal homicide statutes. If the South Carolina legislature had so chosen, it might have made a different choice of which prenatal humans to include than those made by those particular judges... In fact, when the South Carolina legislature passed its unborn victims of violence act, it included all prenatal humans within the scope of the act, not just those viable, and excluded prosecution of women for causing the death or injury to her own unborn. S.C. Code Ann. § 16-3-1083. In short, the South Carolina Supreme Court made public policy choices about the legal status of the unborn when it should have deferred to the legislature on a matter over which reasonable people surely can—and do—disagree.

In *Commonwealth v. Welch*,⁷ 854 S.W. 2d 280 (Ky. 1993), this Court recognized that courts in many other states had concluded that the statutes used to prosecute women who use drugs while pregnant were not intended “to punish as criminal conduct self-abuse by an expectant mother potentially injurious to the baby she carries” and rightly understood that “if their state legislatures intended to include a pregnant woman’s self-abuse which also abuses her unborn child within the conduct criminally prohibited, it would have done so expressly.” *Id.* at

⁷ *Welch* was decided correctly on the fundamental issue raised by that case. The common law “born alive” rule should not be the focus of decision in this case or any other case pertaining to the constitutional and legal status of prenatal humans. Under *Roe*, live born children are persons who have all fundamental constitutional rights, but prior to birth they are not, although the State has legitimate interests in protecting them (as seen in the Kentucky fetal homicide statutes). But these interests should be vindicated only by express legislation and not by judicial decision.

283. The Kentucky legislature has *not* expressly included the unborn at any gestational stage within the scope of KRS 508.060. “This Court cannot presume that the legislature intended to license us to expand the class of persons who could be treated as victims of criminal homicide as we should deem appropriate in our own discretion.” *Hollis v. Commonwealth*, 652 S.W.2d 61, 63 (Ky. 1983). We urge that the Court leave the inclusion of the unborn in the Commonwealth’s generally worded, traditional criminal laws to the legislature, subject to constitutional restraints on the Commonwealth’s authority to enforce its legitimate interests in the unborn.

II. Pregnant Women Are Not Similarly Situated to Strangers with Respect to Criminal Laws that Protect the Unborn from Injury. Treating Them the Same Raises Profound Constitutional and Ethical Problems.

The Appellant argued below that an important distinction ought to be made between danger posed to prenatal humans by the behavior of the pregnant women who gestate them and by that of third party strangers, but the Court of Appeals was not persuaded. Slip opinion at 11. The Commonwealth argued to the court below that any such distinction had to be incorrect (“[O]nce the term *person* is defined to include a viable fetus, [then the] application [of the criminal law] to pregnant women follows *ipso facto*.”) and claimed that “*any* distinction made between the expectant mother and a third-party who endangers the life of a child during viability would raise Equal Protection concerns.”⁸ Brief for Appellant Commonwealth of Kentucky at 8-9 (emphasis added).

⁸ When the term “person” is understood to mean “constitutional person,” *Morris* correctly concluded that “‘person’ cannot logically be construed one way under the statute proscribing murder and another way under the statute proscribing manslaughter in the second degree.” 142 S.W.2d at 658. However, this same reasoning does *not* apply to the unborn precisely because they are not constitutional persons and entitled to the equal protection of the laws. Consequently, a state is entitled to protect only some prenatal humans by application of only some of its criminal laws. For example, California extends only its first degree murder statute to directly protect the subgroup of prenatal humans called “fetuses.” See *People v. Davis*, 872 P.2d 591 (Cal. 1994).

Both the court below and the Commonwealth are wrong on these points. First, as set forth above, *Roe* has squarely held that the unborn are not constitutional persons and therefore do not have the right to equal protection. Kentucky and all other states may treat nonpersons differently than persons. Indeed in some circumstances, the Constitution requires the state to treat nonpersons differently. *See generally* L. Nelson, *Of Persons and Prenatal Humans: Why the Constitution Is Not Silent on Abortion*, 13 LEWIS & CLARK L. REV. ____ (2009) (forthcoming). The Kentucky legislature has expressly decided that “Nothing in [the Commonwealth’s fetal homicide laws] shall apply to any acts of a pregnant woman that caused the death of her unborn child.” KRS 507A.010(3).⁹ If unborn children were constitutional persons entitled to equal protection, such a provision would be plainly unconstitutional as no class of persons may be exempted from its duty not to wrongfully cause the death of another person. These statutes show that the Kentucky legislature recognizes the crucial distinction between pregnant women and third party strangers who harm or pose a risk of harm to the unborn and that the legislature is aware of how to include the unborn in the laws it creates when it wishes to do so.¹⁰

The Court of Appeals’ failure to recognize the difference between danger posed to a prenatal human by the pregnant woman and a third party stranger is unacceptable and lacks justification in constitutional law. Women’s constitutionally protected right to liberty would be seriously threatened if their behavior is subjected to criminal endangerment law. “Without doubt, [constitutional liberty] denotes not merely freedom from bodily restraint but also the right of the

⁹ The federal Unborn Victims of Violence Act also exempts pregnant women. 18 U.S.C. § 1841(a), (c)(3).

¹⁰ A pregnant woman cannot be prosecuted for causing the death of a viable unborn child under KRS Chapter 507A. It would be illogical for a pregnant woman to be prosecuted for wanton endangerment of her prenatal human when the endangerment statute does not explicitly include the unborn within its scope and especially when, as in this case, her unborn child was not harmed and was born alive.

individual . . . generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”¹¹ Having the autonomy to make basic decisions about how to conduct one’s daily life, choosing one’s job, food, mode of exercise, place of residence, and balancing competing values without interference by the State is surely protected by the Constitution as “an interest traditionally protected by our society,” a result that upholds “the basic values that underlie our society.”¹²

Because a prenatal human is physically attached to and literally encased within the body of a pregnant woman, the unborn can be affected by nearly anything she does or fails to do as well as by whatever happens to her body.

[V]irtually anything the pregnant woman does potentially has some effect on the fetus. A wide variety of acts or conditions on the part of the pregnant woman arguably could pose some threat to her fetus. . . . [W]ide ranging, everyday types of behavior inevitably would become suspect under laws aimed at protecting fetuses from pregnant women.¹³

Common activities like eating, drinking, working, engaging in sexual relations, playing sports, smoking, living in unhealthful surroundings, and driving could pose a risk of harm to the unborn person.¹⁴ “Since anything which a pregnant woman does or does not do may have an impact, either positive or negative, on her developing fetus, any act or omission on her part could render her liable to her subsequently born child...”*Stallman v. Youngquist*, 531 N.E.2d 355, 359 (Ill. 1988).

This Court in *Commonwealth v. Welch supra*, clearly saw how many different activities of pregnant woman could pose a risk of harm to the prenatal human she carries: drinking alcohol,

¹¹ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (citations omitted).

¹² *Michael H. v. Gerald D.*, 491 U.S. 110, 122–23 (1984).

¹³ Dawn Johnsen, *A New Threat to Pregnant Women’s Autonomy*, HASTINGS CTR. REP., Aug./Sept. 1987, 33, 35 (1987).

¹⁴ See Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women’s Liberty*, 43 HASTINGS L.J. 569 (1992).

smoking, abusing prescription painkillers or over-the-counter medicine, downhill skiing, playing sports, driving over the speed limit, failing to wear prescription lenses while driving.¹⁵ 864 S.W.2d at 283. The Court also identified the serious constitutional problem associated with subjecting women to criminal prosecution for simply living their lives.

The “case-by-case” approach suggested by the Commonwealth [to distinguish criminal from non-criminal maternal behavior] is so arbitrary that, if the criminal child abuse statutes are construed to support it, the statutes transgress reasonably identifiable limits; they lack fair notice and violate constitutional due process limits against statutory vagueness. *Id.*

In short, “If the statutes at issue are applied to women’s conduct during pregnancy, they could have an unlimited scope and create an indefinite number of ‘new’ crimes’....” *Id.* (citation omitted). The Court of Appeals’ utter failure to appreciate the fair notice constitutional problem here requires its decision to be reversed. *See* Slip opinion at 13.

Third party strangers have no constitutionally protected rights at stake when they criminally harm or endanger pregnant women and their unborn. Those who engage in behavior that would be a crime against the person of the woman (whether or not she was pregnant) or any other person are in the wrong and ought to be punished. When third party strangers commit violence against a pregnant woman, they harm not only her but the unborn child she carries. Everyone, including the State, ought to assume that the pregnancy is wanted by her and to avoid ending that pregnancy against her will. Clearly, the State is justified in prohibiting the violent behavior of third party strangers directed at a pregnant woman as two crimes, one against the woman and the other against her child-to-be. When the State criminalizes violent stranger

¹⁵ No convincing evidence exists that prenatal cocaine exposure is associated with any developmental toxicity difference in severity, scope, or kind from other risk factors such as exposure to tobacco, marijuana, alcohol, or the quality of the environment. *E.g.*, Deborah Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001).

conduct, it also rightly vindicates its “interest in punishing violent conduct that deprives a pregnant woman of her procreative choice.” *People v. Davis*, 872 P.2d at 604 (Kennard, J., concurring).

III. Prosecuting Pregnant Women for Criminal Endangerment Does Not Advance the Goal of Improving Fetal and Infant Health.

The ethically most important goal of all criminal endangerment laws is to prevent harm to the persons who are put at risk by the behavior of others. The ethical application of such laws to pregnant women, such as those who use drugs, must be to prevent harm that could occur to their unborn and that could affect the lives of the children (and persons) they become after birth as well. But the available empirical evidence clearly demonstrates that this is *not* the result of prosecuting women for drug use during pregnancy. In fact, the threat of prosecution deters pregnant women from getting prenatal care, telling their health care providers about their substance use, and seeking medical treatment (and other services to improve their health) for their substance abuse problem—all of which are detrimental to the health of their children-to-be.¹⁶ The prospect of prosecution also gives drug-dependent women a very practical incentive to consider terminating wanted pregnancies.

A host of medical, public health, and child welfare organizations oppose the criminalization of prenatal substance abuse precisely because it harms the unborn, the children

¹⁶ Am. Med. Ass’n Bd. Trustees, *Legal Interventions during Pregnancy*, 264 JAMA 2663-2670 (1990); Comm. on Substance Abuse, Am. Acad. Pediatrics, *Drug-Exposed Newborns*, 86 PEDIATRICS 639-642 (1990); M. Oberman, *Sex, Drugs, and Pregnant Addicts: An Ethical and Legal Critique of Societal Responses to Pregnant Addicts*, 1 J. CLINICAL ETHICS 145-152 (1990); D. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419 (1991). Women are particularly reluctant when they fear their children will be taken away by the State after they give birth. SOUTHERN REG’L PROJECT ON INFANT MORTALITY, A STEP TOWARD RECOVERY: IMPROVING ACCESS TO SUBSTANCE ABUSE TREATMENT FOR PREGNANT AND PARENTING WOMEN (1993); accord SOUTHERN LEGIS. SUMMIT ON HEALTHY INFANTS AND FAMILIES, HIGH RISK PREGNANCIES/SUBSTANCE ABUSE (Oct. 4-7, 1990).

they become, and their families.¹⁷ *Ferguson v. City of Charleston*, 532 U.S. 67, 84 n.23 (2001) (describing *amicus* submissions as “claiming a near consensus in the medical community that [punitive] programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health”); *Wisconsin v. Deborah J.Z.*, 596 N.W.2d 490, 495 (Wisc. Ct. App. 1999) (noting “concern that imposition of criminal sanctions on pregnant women for prenatal conduct may hinder many women from seeking prenatal care and needed medical treatment because any act or omission on their part may render them criminally liable to the subsequently born child”). These organizations urge that women with substance abuse problems receive medical treatment, education, and social services—not be put in jail. This clear consensus among the clinical, public health, and child welfare communities represents a set of empirically derived standards of care to which professional practitioners are held accountable by their own ethical norms and by the State in the form of licensure and malpractice standards. These same empirically derived standards should inform judicial and legislative action with respect to the treatment of pregnant and newly delivered substance abusers.

The Kentucky legislature has already embraced these standards in the Maternal Health Act of 1992, H.B. 192, Ch. 442: “punitive actions taken against pregnant alcohol or substance abusers would create additional problems, including discouraging these individuals from seeking the essential prenatal care and substance abuse treatment necessary to deliver a healthy newborn.” 1992 Ky. Acts 442, Preamble. The Assembly determined that it is crucial “to treat

¹⁷ See, e.g., ACOG Committee on Ethics, *Maternal Decision Making, Ethics, and the Law* (Opinion No. 321, November 2005); March of Dimes, *Statement on Maternal Drug Abuse 1* (Dec. 1990); ACOG Committee on Ethics, *At-Risk Drinking and Illicit Drug Use: Ethical Issues in Obstetric and Gynecologic Practice* (Opinion No. 422, December 2008); Am. Psychiatric Ass’n, *Care of Pregnant and Newly Delivered Women Addicts, Position Statement*, (Doc. No. 200101 March 2001).

the problem of alcohol and drug use during pregnancy solely as a public health problem.” *Id.* In light of this empirical evidence, the considered positions of professional organizations dedicated to improving individual, familial and public health, and the policy decision already made by the Kentucky legislature (and many other legislatures as well), this Court would be ill advised to apply a criminal endangerment statute to pregnant substance abusers.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the Court of Appeals decision below and dismiss the indictment against Ms. Cochran.

Respectfully submitted,

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