COMMONWEALTH OF KENTUCKY
SUPREME COURT
Case No. 2008-SC-000095

INA COCHRAN APPELLANT

V. Appeal from Kentucky Court of Appeals
No. 2006-CA-1360

COMMONWEALTH OF KENTUCKY APPELLEE

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

SUBMITTED BY THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN PSYCHIATRIC ASSOCIATION, NATIONAL PERINATAL ASSOCIATION, KENTUCKY COALITION FOR WOMEN'S SUBSTANCE ABUSE SERVICES, KENTUCKY PSYCHIATRIC MEDICAL ASSOCIATION, AMERICAN SOCIETY OF ADDICTION MEDICINE, CHILD WELFARE ORGANIZING PROJECT, , NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL COALITION FOR CHILD PROTECTION REFORM, NORTHWEST WOMEN'S LAW CENTER, NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM, PATHWAYS, INC., BARON EDMOND DE ROTHSCHILD CHEMICAL DEPENDENCY INSTITUTE OF BETH ISRAEL MEDICAL CENTER, THE DRUG POLICY ALLIANCE, PEOPLE ADVOCATING RECOVERY, SISTERSONG WOMEN OF COLOR REPRODUCTIVE HEALTH COLLECTIVE, OUR BODIES OURSELVES, THE HEALING PLACE WOMEN'S AND CHILDREN'S COMMUNITY, LAW STUDENTS FOR REPRODUCTIVE JUSTICE SUSAN BARRON, PHD, FRAN BELVIN, CPAT, SUSAN BOYD, PHD, STEPHANIE S. COVINGTON, PHD, LCSW, NANCY DAY, PHD, LYNN POSZE, MA, LPCC, AND CAROL STANGE, MSSW.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was forwarded via regular U.S. Mail postage pre-paid on this 23rd day of February 2009 to Hon. Jack Conway and Hon. James C. Shackelford, Office of the Attorney General, Capitol Bldg, Rm 116, Frankfort, KY 40601 and Kathleen Kallaher Schmidt and Jamesa J. Drake, Department of Public Advocacy, 100 Fair Oaks Lane, Ste 302, Frankfort, KY 40601.

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PRELIMINARY STATEMENT

Amici curiae[1] wish to bring to the Court's attention the troubling and unwarranted departure from established medical practice and state law occasioned by the appellate court opinion in *Commonwealth v. Cochran*. In that decision, the court ignored established precedent and effectively rewrote state law to permit the punishment of a woman who carries her pregnancy to term in spite of a drug problem. This decision not only fails to follow state precedent, it also contradicts the plain language of the statute, clear legislative intent and the fundamental precepts of public health embodied in Kentucky law. Moreover, it threatens to undermine the significant health improvements Kentucky has achieved and ignores the longstanding recognition of courts and the medical community that issues concerning pregnancy and addiction are best addressed as health issues rather than as criminal justice matters. For the reasons explained below, the health and well-being of both Kentucky children and their mothers require that the lower court decision be reversed.

INTEREST OF AMICI

The legal issues presented by this appeal cannot properly be decided in isolation from the scientific, medical and public health contexts in which they are rooted. *Amici* include Kentucky and national physicians, nurses, counselors, social workers, drug

[1] American College of Obstetricians and Gynecologists ("ACOG"), American Psychiatric Association, National Perinatal Association, Kentucky Coalition for Women's Substance Abuse Services, Kentucky Psychiatric Medical Association, American Society of Addiction Medicine, Child Welfare Organizing Project, National Association of Social Workers, National Coalition for Child Protection Reform, Northwest Women's Law Center, National Asian Pacific American Women's Forum, Pathways, Inc., Baron Edmond de Rothschild Chemical Dependency Institute of Beth Israel Medical Center,, The Drug Policy Alliance, People Advocating Recovery, Sistersong Women of Color Reproductive Health Collective, Our Bodies Ourselves, The Healing Place Women's and Children's Community, Law Students for Reproductive Justice, Fran Belvin, CPAT, Susan Barron, PhD, Susan Boyd, PhD, Stephanie S. Covington, PhD, LCSW, Nancy Day, PhD, Lynn Posze, MA, LPCC, and Carol Stange, MSSW.

treatment specialists, health advocates and their professional associations. These *amici* have recognized expertise and longstanding concern in the areas of maternal, fetal and neonatal health and in understanding the effects of drugs and other substances on families and society.

Each and every *amicus curiae* is committed to reducing potential drug-related harms at every reasonable opportunity. Thus, *amici* do not endorse the non-medical use of drugs – including alcohol or tobacco – during pregnancy. Nonetheless, it is entirely consistent with *amici*'s public health and ethical mandates to bring to this Court's attention the fact that Ms. Cochran's prosecution cannot be reconciled with evidence-based, peer-reviewed, medical and scientific research, with this Court's own precedents nor with the Kentucky Legislature's express intent to address the issue of drug use and pregnancy solely through public health approaches that in fact promote the well-being of pregnant women and their children.

BACKGROUND

On December 29, 2005, Ina Cochran gave birth to a daughter, Cheyenne. A few hours later, Ms. Cochran and her daughter were drug-tested. The unconfirmed test results were allegedly positive for cocaine. Referring only to the test results, the Commonwealth indicted Ms. Cochran for Wanton Endangerment in the First Degree, in violation of K.R.S. § 508.060(1). *See* Indictment, *Commonwealth v. Cochran*, No. 06-CR-0003 (Casey Cir. Ct. Jan. 09, 2006). The trial court properly determined that it was bound by this Court's decision in *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993) and dismissed the indictment. On appeal, the Court of Appeals usurped this Court's role, holding that *Welch* is no longer "binding precedent" and judicially expanding the

Commonwealth's wanton endangerment statute to reach and punish women who become pregnant and give birth in spite of a drug problem.

SUMMARY OF ARGUMENT

When faced with almost identical facts fifteen years ago, this Court concluded that the rules of statutory interpretation, as well as considerations of constitutional law and public health principles, required it to dismiss a criminal abuse charge. *Welch* at 285. The appellate court, however, held that this Court's decision in *Commonwealth v. Morris*, 142 S.W.3d 654 (Ky. 2004) provides a basis for ignoring the clear and continuing legislative, constitutional, and public health basis for the *Welch* decision. As fully addressed in the Appellant's brief, *Morris* only addresses the issue of third-party harm to pregnant women. It did not purport to address the issue of drug use and pregnancy, nor did it contradict express legislative intent with regard to that issue. Moreover, federal and sister state court decisions, medical and social science research, as well as the opinions of leading federal agencies and public health organizations since 1993, affirm the wisdom of *Welch*.

Overturning *Welch* will cause real and devastating health consequences by deterring some women from seeking prenatal care and drug and alcohol treatment altogether, by discouraging pregnant women who do seek medical treatment from disclosing critical information about their drug use to their health care providers, and by creating an incentive for women who cannot overcome their addictions in the short term of pregnancy to have abortions rather than face criminal charges upon the birth of a child.

Accordingly, *amici curiae* respectfully urge this Court to overturn the Court of Appeals' decision and uphold the trial court's decision dismissing the indictment.

ARGUMENT

I. This Court Should Reaffirm the Decision in *Welch* as Mandated by State Law, Constitutional Principles, and the Public Health Interests of Pregnant Women, Children, and Families.

Every legislature in the nation (including Kentucky's) to have considered the issue of drug use and pregnancy has rejected a criminal law approach. Moreover, this Court's decision in *Welch* has been validated numerous times, with courts across the country reaching the same conclusion and often citing *Welch* with approval.[2] In addition, every leading medical and public health organization to address this issue has unequivocally condemned a punitive, criminal law approach as dangerous to both maternal and fetal health.[3] This Court's decision in *Welch* continues to be consistent with clear legislative intent, and has in fact advanced the Commonwealth's interests in improving maternal and child health.

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[2] *See e.g. State v. Martinez*, 137 P.3d 1195 (N.M. Ct. App. 2006) (refusing to expand child abuse statute to reach women who continue pregnancy to term in spite of a cocaine addiction and observing that to do so would offend due process); *Kilmon v. State*, 905 A.2d 306, 314 n.3 (Md. 2006) (reckless endangerment statute does not apply to the context of pregnancy, citing *Welch)*; *Ward v. State*, 188 S.W.3d 874, 876 (Tex. App. 2006) (state legislature did not intend the drug delivery statute to apply to the context of pregnancy and recognizing that the court was "not to write where [the legislature] has not."); *State v. Aiwohi*, 123 P.2d 1210, 1214 (Haw. 2005) (reversing manslaughter conviction based on use of methamphetamine during pregnancy and noting "[a]n overwhelming majority of the jurisdictions confronted with the prosecution of a mother for her own prenatal conduct, causing harm to a subsequently born child, refuse to permit such prosecutions."); *Reinesto v. Superior Court*, 894 P.2d 733, 736, 737 (Ariz. Ct. App. 1995) (dismissing charges against pregnant heroin using woman, citing *Welch*); *Collins v. State*, 890 S.W.2d 893, 898 (Tex. App. 1994) (application of injury to a child charge to use of cocaine during pregnancy was "impermissibly vague" violating both U.S. and Texas constitutional due process guarantees); *State v. Dunn*, 916 P.2d 952 (Wash. Ct. App. 1996) (holding that the legislature did not intend to include fetuses within the term "child" in the criminal mistreatment of a child statute); *State v. Wade*, 232 S.W.3d 663 (Mo. Ct. App. 2007) (dismissal of child endangerment charge based on allegation that child tested positive for methamphetamine and marijuana at birth.).

[3] *See e.g.* Am. Med. Ass'n, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2670 (1990) (reporting AMA resolution that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate."); Am. Psychiatric Ass'n, *Care of Pregnant and Newly Delivered Women Addicts: Position Statement*, APA Document Reference No. 200101 (2001) (policies of prosecuting pregnant "are likely to deter pregnant addicts from seeking either prenatal car or addiction treatment, because of fear of prosecution and/or civil commitment.").

A. *Welch* Continues to Accurately Reflect the Legislature's Intent to Address Issues of Drug Use and Pregnancy Through Public Health Approaches.

The Court below suggests that the decision in *Welch* rested on a single provision of the Maternal Health Act of 1992 ("MHA"). In fact, far from relying on a single provision of the MHA, this Court considered the overall purpose of the Act. Quoting at length from the statute's Preamble, this Court highlighted the legislature's conclusion that "*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,*" and the Commonwealth's intent "to treat the problem of alcohol and drug use during pregnancy *solely* as a public health problem." *Welch* at 284, *citing* 1992 Ky. Acts 442, Preamble (emphasis added by this Court).

This Court further noted that the "General Assembly already absorbed the [medical and social science] literature and made its decision to take the maternal health approach." 864 S.W.2d at 285. Since the *Welch* decision, the medical community continues to endorse this approach as the only one that advances state interests in maternal and fetal health.[4]

Moreover, since the *Welch* decision, the Kentucky legislature has in numerous ways demonstrated its commitment to a public health, non-punitive approach. For

[4] Am. Coll. Obstetricians & Gynecologists, *At-Risk Drinking and Illicit Drug Use: Ethical Issues in Obstetric and Gynecologic Practice*, ACOG COMMITTEE OPINION, No. 422, Dec. 2008, at 6 ("Putting women in jail, where drugs may be available but treatment is not, jeopardizes the health of pregnant women and that of their existing and future children."); Am. Coll. Obstetricians & Gynecologists, *Maternal Decision Making, Ethics, and the Law*, ACOG COMMITTEE OPINION, No. 321, Nov. 2005, at 9 ("Pregnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.").

example in 2006, the Kentucky Senate rejected a bill that would have permitted the termination of parental rights for women who sought to continue their pregnancies to term in spite of a drug problem. *See* S.B. 21, 2006 Senate, Reg. Sess. (Ky. 2006). Likewise, in 2004, the Legislature enacted Kentucky's Fetal Homicide Act which clearly exempted a pregnant woman in relationship to the fetus she carries. *See* K.R.S. § 532. The General Assembly also funded two substance abuse treatment programs designed to address the health needs of pregnant women and permitting pregnant drug users to remain eligible for state Medicaid, *See* Office of Women's Physical and Mental Health, *Kentucky Women's Health 2002: Data, Developments and Decisions* 27 (2002) (hereinafter "KWH Report"), and in 1998, reauthorized the Substance Abuse and Pregnancy Work Group for an additional four years (renamed the Substance Abuse, Pregnancy and Women of Childbearing Age Work Group, hereinafter "KWP").

Furthermore, in 2000, Kentucky launched the KIDS NOW Substance Abuse and Pregnancy Initiative, designed to increase the number of women receiving substance abuse services through better identification and referral processes. The program includes coverage by Medicaid to pay for substance abuse prevention and treatment services for pregnant women and women who are up to 60 days post partum, coverage *no other state has opted to provide*.[5] Finally, the University of Kentucky's Institute on Women and Substance Abuse, funded by the Commonwealth's Division of Substance Abuse, works to increase the number of women served in publicly-funded drug and alcohol treatment programs in Kentucky.

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[5] Office of Women's Physical & Mental Health, Ky. Cabinet for Health Serv., *Women and Substance Abuse* (Feb. 2002).

In 2007, the Kentucky Cabinet for Health and Family Services announced major funding programs in counties across the Commonwealth to overcome addiction and strengthen families: for example, in Martin and Barren Counties, funds will support the Sobriety Treatment and Recovery Team (START) initiative, focusing on early intervention in families who are at a high risk of child abuse or neglect due to a parent's drug addiction.[6]

These efforts demonstrate the Commonwealth's understanding that addiction is a medical condition and more specifically, its steadfast commitment to the treatment, not the prosecution, of women who continue to term despite a drug addiction.

B. Dramatic Improvements in Kentucky Health Care Indicators Followed the Public Health Approach Adopted by the Legislature

In passing the MHA, the Kentucky Legislature sought to improve maternal and fetal health by making sure pregnant women who seek prenatal care could do so without fear of prosecution. Since the passage of the MHA, the Commonwealth has seen a steady and dramatic increase in the number of women receiving prenatal care. In 1990, Kentucky was ranked 26th out of 50 states for prenatal care, with 69.7 percent of women receiving prenatal care. In 2000, Kentucky improved its rank to 11th, with 80.2 percent of women receiving prenatal care.[7] In addition, infant mortality rates fell 25 percent during that decade.[8] In 2001, Kentucky reported the lowest infant mortality rate since statistics were first recorded.[9] In contrast to this, South Carolina, the only state that has

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[6] Ky. Cabinet for Health and Family Servs., News Releases dated October 16, October 18, and October 25, 2007, available at http://chfs.ky.gov/news/ (last visited Mar. 13, 2008).
[7] UNITED HEALTH FOUND., STATE HEALTH RANKING (2002 ed.).
[8] KWH Report, at 28.
[9] *Id.*, at 11.

upheld the prosecution of women who go to term in spite of a drug problem,[10] remains near the bottom of the list on infant mortality and other health indicators.[11] Accordingly, the decision of the Court of Appeals threatens to undermine the achievements of more than a decade of health-centered policies that have benefited thousands of women and children in Kentucky.

II. Overturning Welch, and Judicially Expanding the Endangerment Statute Will Result in Harm to the Health and Welfare of Pregnant Women and Children

A. Prosecuting Pregnant Women for Continuing to Term While Experiencing a Drug Dependency Will Undermine Maternal, Fetal and Child Health.

The medical profession has long recognized that drug dependence is an illness[12] that cannot often be overcome without treatment. As described in the DSM-IV, one of the hallmarks of drug dependency is the inability to reduce or control substance abuse *despite* adverse consequences.[13] Because of the compulsive nature of drug dependency, criminal sanctions are unlikely to achieve the goal of deterring drug use among pregnant

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[10] *See Whitner v. State*, 492 S.E.2d 777 (S.C. 1997). *But see also McKnight v. South Carolina*, 661 S.E.2d 354 (S.C. 2008) (overturning a homicide by child abuse conviction because of ineffective assistance of counsel who failed to call experts to testify about "recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor.").

[11] South Carolina continues to have one of the highest infant mortality rates in the nation. *See* U.S. Census Bureau, *State Rankings Infant Mortality 2005*, STATISTICAL ABSTRACT OF THE UNITED STATES (2008), *available at* http://www.census.gov/compendia/statab/ranks/rank17.html (showing South Carolina had third highest infant mortality rate in the U.S., while Kentucky ranked 27th). South Carolina recorded its most significant increase in infant mortality in a decade in 1997. ANNIE E. CASEY FOUNDATION, 2001 KIDS COUNT DATA BOOK 112 –113 (2001). This increase coincided with the *Whitner* decision and the publicity surrounding it. During roughly the same period of time, the number of abandoned babies in South Carolina increased twenty percent. *See Discarded Children Increasing; Abandoned Children: More Children Were Abandoned in South Carolina Last Year Than in the Previous Year*, POST & COURIER (Charleston, S.C.), Apr. 19, 1999, at B1.

[12] *See, e.g.,* "Psychoactive Substance Dependence" is listed as a mental illness with specific diagnostic criteria in the AM. PSYCHIATRIC ASS'N., THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994), used by mental health professionals to diagnose mental illness.

[13] Am. Med. Ass'n, *Legal Intervention During Pregnancy*, 264 JAMA 2667 (1990).

women; rather, such sanctions are likely to drive addicted women further into the shadows and away from critical health care opportunities.

Indeed, it has specifically been recognized that pregnant women who are threatened with criminal sanctions are likely to be deterred from seeking care that is critical to the health of both pregnant woman and fetus.[14] Studies of drug-dependent pregnant women have found that "fear and worry about loss of infant custody, arrest, prosecution, and incarceration for use of drugs during pregnancy" is "the[ir] primary emotional state." *See* Martha A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. DRUG ISSUES 285 (2003); M.L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 DRUG ALCOHOL DEPENDENCE 199 (1993).

Even for those women who are not completely deterred from seeking care, fear of prosecution is likely to discourage them from being truthful about drug use, corroding the formation of trust that is fundamental to any health care provider-patient relationship. As the U.S. Supreme Court recognized, a "confidential relationship" is a necessary precondition for "successful [professional] treatment." *Jaffee v. Redmond*, 518 U.S. 1, 12 (1997).

Open communication between drug-dependent pregnant women and their doctors is especially critical. *See* Kelly et al., *The Detection & Treatment of Psychiatric*

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[14] *See, e.g.*, SOUTHERN REG'L PROJECT ON INFANT MORTALITY, A STEP TOWARD RECOVERY: IMPROVING ACCESS TO SUBSTANCE ABUSE TREATMENT FOR PREGNANT AND PARENTING WOMEN 6 (1993). *See also* A. Srinivasan & G. Blomquist, *Infant Mortality and Neonatal rates: The Importance of Demographic Factors in Economic Analysis*, *available at,* http://gatton.uky.edu/GradStudents/srinivasan/InfantHealth.pdf (2002) (examining infant mortality in Kentucky); A. Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 JAMA 1581, 1585-86 (1993) (finding that pregnant women who use cocaine but who have at least four prenatal care visits significantly reduce their chances of delivering low birth weight babies).

Disorders and Substance Use Among Pregnant Women Cared For in Obstetrics, 158 AM. J. PSYCH. 213-19 (2001). Even absent the threat of criminal prosecution, drug-dependent pregnant women infrequently report drug use to their doctors. Feelings of shame, fear and low self-esteem are significant barriers to establishing the trust prerequisite to patients' full disclosure of this medically-vital information. *See* S. KANDALL, SUBSTANCE & SHADOW: WOMEN & ADDICTION IN THE UNITED STATES 278-79 (1996). Additionally, the exceptionally high rates of depression among drug-dependent women mean that their prospects of successfully completing treatment depend on their forming a strong "therapeutic alliance" with care providers. *See* Center on Addiction and Substance Abuse (CASA), SUBSTANCE ABUSE & THE AMERICAN WOMAN 64 (1996); *Social Consequences of Substance Abuse Among Pregnant and Parenting Women*, 20 PEDIATRIC ANNALS 548 (1991).

In sum, overturning *Welch* also threatens to encourage women who cannot overcome a drug problem in the short term of pregnancy to have abortions in order to avoid arrest for giving birth. *See e.g., Johnson v. State*, 602 So. 2d 1288, 1296 (Fla. 1992) ("Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion."). In at least one documented case, this scenario has, in fact, occurred. *See* Motion to Dismiss With Prejudice, *State v. Greywind*, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992) (in seeking dismissal of reckless endangerment charge based upon inhaling paint fumes during pregnancy, the prosecutor stated that "[d]efendant has made it known to the State that she has terminated her pregnancy. Consequently, the controversial legal issues presented are no longer ripe for litigation.").

Thus, reversing *Welch* and upholding the prosecution of Ms. Cochran would send a perilous message to pregnant women with substance abuse problems, *not* to seek prenatal care or drug treatment, *not* to confide their addiction to health care professionals, *not* to give birth in hospitals, or *not* to carry the fetus to term – all in order to avoid criminal punishment. This result would be to undermine, not advance, the Commonwealth's objective of promoting maternal and fetal well-being.

B. Judicially Expanding the Endangerment Law to Punish Pregnant Women Who Cannot Overcome an Addiction in the Short Term of Pregnancy is Irrational in Light of the Many Barriers to Health Care and Drug Treatment that Continue to Exist in Kentucky.

Despite Kentucky's progress and national leadership in efforts to increase access to prenatal care and drug treatment, both remain in short supply, especially in rural Kentucky. As Kentucky's Office of Women's Physical & Mental Health observed, "[o]nce women decide to seek treatment for substance abuse they find that in Kentucky, there is a large gap between the need for treatment and the availability of services, particularly gender-specific and sensitive treatment services." KWH Report, at 88.

The issues women bring to substance abuse treatment are more numerous and complex than men's issues. Compared to the general population, women in treatment show significantly higher rates of: childhood sexual abuse, domestic violence, medical problems and mental health problems. *Id.* In addition, women often have "[p]rimary caretaking responsibilities for children and other family members" and have high levels of "shame and guilt related to their substance abuse." *Id.* "Successful treatment for women substance abusers must address these sensitive issues with an emotionally and physically safe context." *Id.*

According to the University of Kentucky Institute on Women and Substance Abuse, Kentucky has approximately 72,000 women in need of treatment for drug misuse.[15] Kentucky has roughly 270 residential beds that women can access for treatment, satisfying only about four percent of the treatment needs. Residential programs typically have waiting lists, often two months long or longer, particularly programs exclusively serving women.[16] The barriers to substance abuse treatment are much greater in rural Kentucky. *See* KWH Report at 87, Fig. 2 (identifying barriers to treatment).

The prosecution of Ms. Cochran for failing to overcome her drug dependency while pregnant disregards the fact that many low income, rural women like Ms. Cochran simply cannot access appropriate treatment through no fault of their own.

III. Science Does Not Support the Assumption that Illicit Drugs Such as Cocaine Pose Unique Risks of Harm that Would Justify Judicial Expansion of State Law.

Evidence-based research does not support the Commonwealth or lower court's assumption that prenatal exposure to cocaine is so uniquely harmful that it justifies re-writing state law and overturning this Court's own precedent. Although the principal import of existing research is not that drug use during pregnancy is safe, there is no scientific or legal basis for concluding that exposure to cocaine and other illegal substances will inevitably cause harm, or that the risks presented by use of these substances are any greater than those associated with many other conditions and activities common in pregnancy. Indeed, the most careful and comprehensive study to consider the

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[15] Div. Substance Abuse, Ky. Dept. Mental Health & Mental Retardation, *Women and Substance Abuse Fact Sheet*, June 2003, *available at* http://chfs.ky.gov/NR/rdonlyres/86D46357-3288-4F92-8BF1-EE055286B402/0/WomenandSubstanceAbuse.doc (last visited Mar. 13, 2008).

[16] Interview with Carol Stange, retired Women's Program Administrator, Div. Substance Abuse, Ky. Dept. Mental Health & Mental Retardation (2002).

medical evidence concluded: "[T]here is no convincing evidence that prenatal cocaine exposure is associated with any developmental toxicity difference in severity, scope, or kind from the sequelae of many other risk factors." Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613, 1621 (2001). Subsequent longitudinal and prospective studies confirm the JAMA researchers.[17] For example, one study in 2004 confirmed that "infant prenatal exposure to cocaine and to opiates was not associated with mental, motor, or behavioral deficits after controlling for birth weight and environmental risks."[18] Another study, where researchers prospectively studied from birth inner-city children who had been exposed to cocaine during gestation, and compared them with a control group of children who had not been exposed to cocaine found that cocaine-exposed children's school performance through the fourth grade did not differ from the unexposed control group.[19]

There is now a consensus that the widespread belief that babies exposed prenatally to cocaine faced unique and certain peril constituted an unjustified and "gross exaggeration." NIDA Research Report, Cocaine: Abuse and Addiction, Nov. 2004, at 6, http://www.drugabuse.gov/ResearchReports/Cocaine/cocaine4.html; *see also* U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 21-22 (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002 crackrpt.pdf (concluding that "[t]he

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[17] S. Henrietta et al., *Impact of Prenatal Cocaine Exposure on Child Behavior Problems Through School Age*, 119 PEDIATRICS e348 (2007).
[18] D.S. Messinger et al., *The Maternal Lifestyle Study: Cognitive, Motor, and Behavioral Outcomes of Cocaine-Exposed and Opiate-Exposed Infants Through Three Years of Age*, 113 PEDIATRICS 1677 (2004).
[19] H. Hurt et al., *School Performance of Children with Gestational Cocaine Exposure*, 27 NEUROTOXICOLOGY & TERATOLOGY 203 (2005).

negative effects of prenatal cocaine exposure are significantly less severe than previously believed" and those effects "do not differ from the effects of prenatal exposure to other drugs, both legal and illegal").[20]

Indeed, there is a long-standing scientific consensus that prenatal exposure to adverse environmental factors such as poor nutrition, substandard housing, and a lack of social supports – all of which are associated with poverty –profoundly affect maternal and fetal health. *See, e.g.*, Suzanne Mone et al., *Effects of Environmental Exposures on the Cardiovascular System: Prenatal Period Through Adolescence*, 113 PEDIATRICS 1058 (2004). In the realm of substance abuse, tobacco is the "single most powerful determinant of poor fetal growth in the developed world." Center on Addiction and Substance Abuse (CASA), SUBSTANCE ABUSE AND THE AMERICAN WOMAN 64 (1996); Wisborg, et al., *Exposure to Tobacco Smoke in Utero and the Risk of Stillbirth and Death in the First Year of Life*, 154 AM. J. EPIDEMIOLOGY 322 (2001). The dangers of alcohol on fetal development are equally well-established. "[C]hildren of women who use alcohol while pregnant have a significantly higher infant mortality rate (13.3 per 1,000) than children of those women who do not use alcohol 8.6 per 1,000." 42 U.S.C. § 280(f).

Thus, the prosecution of Ms. Cochran lacks justification in claims about unique harms from illegal drugs, lacks legal and medical support, and is at odds with the understanding of addiction espoused by the medical community, endorsed by the U.S.

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[20] Courts have recognized that "the phenomena of 'crack babies' . . . is essentially a myth." *United States v. Smith*, 359 F. Supp. 2d 771, 780 n.6 (E.D. Wis. 2005). *See also McKnight v. South Carolina*, 661 S.E.2d 354 (S.C. 2008) (overturning a conviction because of ineffective assistance of counsel who failed to call experts to testify about "recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor."). *See also* Susan Okie, *The Epidemic That Wasn't*, N.Y. TIMES, Jan. 26, 2009 (reporting on long-term studies confirming these conclusions).

Supreme Court, and recognized by the Commonwealth of Kentucky. Accordingly, this Court should reverse the Court of Appeals' decision and uphold the trial court's dismissal of this case on the basis of *Welch*.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court to reaffirm Welch and overturn the decision by the Court of Appeals.

Respectfully submitted,

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