
In The Supreme Court of Mississippi

RENNIE T. GIBBS,

Appellant,

vs.

STATE OF MISSISSIPPI,

Appellee.

On Grant of Interlocutory Appeal from the Circuit Court of Lowndes County

**BRIEF SUBMITTED ON BEHALF OF
JACKSON AREA NATIONAL ORGANIZATION FOR WOMEN, LAW
STUDENTS FOR REPRODUCTIVE JUSTICE, LEGAL MOMENTUM,
THE NATIONAL WOMEN'S LAW CENTER, AND
SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE
COLLECTIVE
AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, RENNIE T. GIBBS**

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STATEMENT OF THE ISSUE

This Court is asked to consider the constitutionality of applying § 97-3-19 to pregnant women who experience stillbirths.

STATEMENT OF THE CASE

On November 12th 2006, Ms. Rennie Gibbs, then sixteen, suffered a stillbirth. On February 4, 2007, Ms. Gibbs was indicted pursuant to Miss. Code Ann. § 97-3-19.¹ The sole basis of this indictment was a conclusion by medical examiner Steven Haynes that Ms. Gibbs' stillbirth was the result of "cocaine toxicity." *Amici Curiae* file this brief in support of Ms. Gibbs urging this Court to hold that applying § 97-3-19 in this or similar cases would violate the constitutional rights of both Ms. Gibbs and others who experience stillbirths. The interests of the *Amici* are set forth in the accompanying Memorandum for Leave to File Amicus Brief.

This Brief sets forth the longstanding history of discrimination against women, particularly pregnant women, that has fueled similar attempts to misinterpret and misuse criminal statutes in a manner that violates the constitution on the basis of sex. The prosecution in this case is asking this court to judicially rewrite the law to create unique and devastating penalties against women who seek to continue their pregnancies to term in spite of a drug or other health problem. Ms. Gibbs is being prosecuted for having experienced a stillbirth. This prosecution is based on stereotypes about women and pregnancy, and presents numerous threats to the rights of due process, bodily autonomy and integrity, and equal protection of all pregnant women. The State cannot claim an "exceedingly persuasive justification" for this indictment, as is required when a

¹ Miss. Code Ann. § 97-3-19 states: (1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases: (b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;...

state's policy or practice discriminates on the basis of sex. While prosecutions such as this one have the alleged goal of protecting children, deterring drug use among pregnant women and improving fetal and child health outcomes, as discussed in another amicus brief in support of Ms. Gibbs,² research indicates that such prosecutions actually cause women to avoid prenatal care, resulting in worse maternal and newborn health outcomes.

Prosecutions of women who have continued their pregnancies in spite of drug or alcohol problems have been soundly rejected by the vast majority of courts around the nation, each finding that such acts were not in the purview of the criminal law.³ *Amici* urge this Court to follow the approach taken by sister states that have refused to rewrite their state laws to allow such prosecutions, and “decline[] the State’s invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread.”⁴

SUMMARY OF ARGUMENT

An indictment under Miss. Code Ann. § 97-3-19 of a pregnant woman who experienced a stillbirth raises serious constitutional issues. First, this prosecution presents an untenable infringement on a woman’s right to become pregnant and continue that pregnancy without fear of punishment if she cannot guarantee a healthy birth. Because the state is unable to show that its actions are narrowly tailored to meet a compelling state interest, this Court must dismiss the indictment against Ms. Gibbs.

² See Amicus Brief submitted on behalf of public health experts and advocates.

³ See, e.g., *Cochran v. Commonwealth of Kentucky*, 315 S.W.3d 325 (Ky. 2010); *New Mexico v. Martinez*, 141 N.M. 763, 161 P.3d 260 (N.M. 2007) (quashing writ of certiorari and letting stand lower court decision in favor of defendant); *Kilmon v. Maryland*, 905 A.2d 306 (Md. 2006) (rejecting application of common law “born alive” rule in prosecution for reckless endangerment); *Johnson v. Florida*, 602 So. 2d 1288 (Fla. 1992) (legislature did not intend to include acts of pregnant women in statute prohibiting the delivery of a controlled substance to a minor); *But cf.*, *South Carolina v. McKnight*, 576 S.E.2d 168 (S.C. 2003) (affirming homicide conviction because state’s statutory definition of “child” included a viable fetus); *reversed and remanded by McKnight v. South Carolina*, 661 S.E. 2d 354 (S.C. 2008) (finding ineffective assistance of counsel based on failure to present readily available evidence that cocaine use was not the cause of fetal death and failure to challenge jury instructions regarding criminal intent).

⁴ *Johnson v. Florida*, 602 So. 2d 1288, 1297 (Fla. 1992).

Second, judicially rewriting the law to make it applicable to women who experience stillbirths opens the door to potentially limitless regulation of women for the duration of their pregnancies, depriving them of their rights to become pregnant and continue their pregnancies to term. Moreover, this indictment reflects longstanding stereotypes about women as needing to be regulated and restricted in the interest of pregnancy and motherhood. Because the State cannot justify this discriminatory treatment, the indictment of Ms. Gibbs, like other state-sponsored discrimination, cannot stand.

And finally, prosecuting a woman based on her continued pregnancy and its outcome undermines the constitutionally protected liberties that allow a pregnant woman the right to make critical decisions regarding her own body and health, even decisions which may impact her pregnancy. Given the lack of any adequate justification, this is an inappropriate, discriminatory, and unconstitutional effort to apply a criminal statute beyond its proper and intended scope.

ARGUMENT

I. Permitting this prosecution would impermissibly deny women liberty and perpetuate sex discrimination.

Pregnant women are sometimes subject to a unique form of sex discrimination: they are charged with the duty of ensuring a perfect pregnancy and a healthy baby, despite the existence of factors that may be well beyond their control. Pregnant women are expected to subsume all other interests in order to meet this goal, in part because motherhood has been long presumed to be a woman's singular contribution to society. Because of pervasive stereotypes, only women are subject to this scrutiny, and even threatened with prosecution based on fetal health outcomes, despite men's proven contributions to these outcomes. This prosecution is rooted in these discriminatory stereotypes, violates women's right to equal protection, and should be rejected by this Court.

A. This prosecution is based on the discriminatory belief that once pregnant, women can be denied all their constitutional rights and liberties, with the presumption that such deprivations guarantee a good pregnancy outcome.

State action that “serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women” violates the Equal Protection Clause of the Fourteenth Amendment. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994). Policies and laws based on stereotypes, presumptions and discriminatory beliefs regarding women’s singular role in society as mothers deny women their right to equality, privacy, bodily integrity, liberty and autonomy. This court has recognized that minors, such as Ms. Gibbs, are equally entitled to these constitutional protections. *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 658 (Miss. 1998).

The Supreme Court has recognized the harm that results when the State compels women to fulfill “its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture.” *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992). More recently, the Supreme Court has rejected state action that serves to perpetuate stereotypical and gendered roles regarding family life. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

Pregnant women are subject to a “highly demanding set of expectations,” due to the widespread perception that their every action impacts the fetus.⁵ At different points in time, various legal activities have been declared by the popular press, medical organizations or the government to be beneficial, harmless and harmful to pregnancy outcomes.⁶ Even things widely

⁵ Renee I. Solomon, *Future Fear: Prenatal Duties Imposed By Private Parties*, 17 AM. J.L. & MED. 411, 420-21, (1991) (health club owner canceled membership of woman upon finding out she was 10 weeks pregnant, enforcing “unwritten rule” and expressing concern for the fetus).

⁶ Julie Moskin, *The Weighty Responsibility of Drinking for Two*, N.Y. Times, Nov. 29, 2006, at F1 (describing public reactions to pregnant women engaging in acts presumed to be harmful in pregnancy, including eating cheese or salad, or drinking coffee). Most recently, eating fish, which had been strongly discouraged during pregnancy

believed to be uniquely harmful such as cocaine have later turned out to be far less harmful than believed, and certainly no more harmful than a range of health conditions and behaviors such as smoking that far more women engage in.⁷

Prosecuting women for having stillbirths could subject women to the threat of criminal prosecution for failure to heed constantly shifting and sometimes contradictory commands and restrictions. Imposing liability on pregnant women for their inability to provide “the best prenatal environment possible . . . would have serious ramifications for all women and their families, and for the way in which society views women and women’s reproductive abilities.”⁸ The *Stallman* court concluded that attempting to guarantee good outcomes by punishing a mother was to ignore the biological and practical complexities of life and severely restrain her privacy and bodily autonomy. *Id.*

It is by no means theoretical to assume that the state could attempt such prosecutions to punish women who have experienced stillbirths unrelated to illegal drug use. A pregnant woman in Wyoming was charged with felony child abuse for drinking alcohol, and in Wisconsin, a sixteen-year-old was held in detention throughout her pregnancy based on her tendency “to be on the run” and “lack of motivation or ability to seek medical care.”⁹ Melissa Ann Rowland was charged with murder for refusing to submit to a cesarean section.¹⁰ As the Supreme Court observed, “[p]erhaps next in line would be a statute requiring pregnant married women to notify

because of its mercury content, is now urged to enhance fetal brain development. Sally Squires, *Pregnant? Say Yes to Seafood*, Wash. Post, Feb. 20, 2007, at HE1 (examining the benefits of fish to fetal development).

⁷ See e.g. Susan Oakie, *The Epidemic That Wasn’t*, N. Y. TIMES, Jan. 27, 2009, at D1.

⁸ *Stallman v. Youngquist*, 531 N.E.2d 355, 359 (Ill. 1988) (refusing to recognize a cause of action for unintentional prenatal infliction of injuries).

⁹ Charles Levendosky, *Turning Women into Two-Legged Petri Dishes*, Star Tribune (Minn.), Jan. 21, 1990, at A8 (Wyoming); Veronika E.G. Kolder, et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1195 (1987) (Wisconsin).

¹⁰ Richard L. Berkowitz, *Should Refusal to Undergo A Cesarean Section Be A Criminal Offense?*, 104 OBSTETRICS & GYNECOLOGY 1220 (2004).

their husbands before engaging in conduct causing risks to the fetus.” *Casey*, 505 U.S. at 898. Surely, if the state cannot give a husband this power, then it cannot assert this dominion itself.

B. This prosecution is based on long-standing stereotypes regarding women’s capabilities and role in society.

This prosecution is consistent with the long-standing regulation of women in an effort to protect their offspring. The impulse to define women’s legal rights and obligations primarily by reference to her reproductive capacity has a long and sorry history. Women’s ability to participate in society has often been restricted in the name of furthering their pregnancies and role as mothers. “Since time immemorial, women’s biology and ability to bear children have been used as a basis for discrimination against them.” *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986).

The United States Supreme Court once upheld a statute limiting only women to ten hour work days, finding that because, “healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.” *Muller v. Oregon*, 208 U.S. 412, 421 (1908). Women were once denied higher education because of the common belief that rigorous study would interfere with their “reproductive organs,” and interfere with “the adequate performance of the natural functions of their sex.”¹¹ The guarantees of Due Process and Equal Protection make clear that the treatment of women under the law cannot be based on stereotypes, entrenched perceptions of proper gender roles, or sweeping generalizations regarding women’s abilities or characteristics.¹² The Fifth Circuit Court of Appeals has also rejected state action based on “archaic assumptions” regarding women’s abilities or characteristics. *Pederson v. Louisiana State University*, 213 F.3d 858, 881 (5th Cir. 2000).

¹¹ *United States v. Virginia*, 518 U.S. 515, 537 n.9 (1996) (citation omitted).

The military once discharged women who became pregnant or otherwise took on the responsibility of parenting, presuming that women would prioritize their “maternal duties” over military service.¹³ And just recently, the Navy overturned its ban on women’s service on submarines.¹⁴ A 1995 Navy report concluded that the capacity to become pregnant is “incompatible with submarine deployments because [pregnancies] pose significant risks to the morbidity and mortality of the mother, and thus to the operational readiness of the unit.”¹⁵ In overturning the ban, the Navy recognized that restricting women due to their ability to become pregnant prevented the Navy from utilizing the full talents of the women who serve.¹⁶

Women also were once forbidden participation in athletic activity because rigorous competition was thought to cause physical and psychological harm—especially to their reproductive capabilities.¹⁷ Laws requiring equal participation in federally funded education programs, as well as major shifts in social trends, have led to the acceptance and promotion of women in sports.¹⁸

This prosecution reflects the same stereotypical views advanced by these examples: that women have inherently different capabilities and responsibilities, and must be treated differently by the state in order to protect their reproductive capacities. Prosecutions of women who are

¹² *Id.*

¹³ See *Cook v. Arentzen*, 582 F.2d 870 (4th Cir. 1978) (no rational basis for automatically discharging pregnant women from Navy); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) (Marines; same).

¹⁴ *Navy Names Four Subs to Carry First Women*, Associated Press, Oct. 22, 2010.

¹⁵ Department of the Navy, Submarine Assignment Policy Assessment (Science Applications International Corp. Feb. 1995) at 33, available at <http://cmrlink.org/CMRNotes/SAPA%20020195.pdf>.

¹⁶ The Chief of Naval Operations, in response to the policy change said, “Knowing the great young women we have serving in the Navy, as a former commanding officer of a ship that had a mixed gender crew, to me it would be foolish to not take the great talent, the great confidence and intellect of the young women who serve in our Navy today and bring that into our submarine force.” Commander, Submarine Forces Public Affairs, *Navy Policy Will Allow Women To Serve Aboard Submarines*, Apr. 28, 2010, available at http://www.navy.mil/Search/print.asp?story_id=52954&VIRIN=78366&imagetype=1&page=1

¹⁷ Women’s Sports Foundation, *Women’s Pre-Title IX Sports History in the United States* (Apr. 26, 2001), <http://www.womenssportsfoundation.org/Content/Articles/Issues/History/W/Womens%20PreTitle%20IX%20Sports%20History%20in%20the%20United%20States.aspx>.

unable to produce a live birth have the effect of punishing women for not conforming to sex-based stereotypes regarding their “natural” role in society. The potential for prosecutorial abuse when a woman fails to have a perfect pregnancy outcome is clear.

C. This prosecution is rooted in the discriminatory misperception that women are solely responsible for fetal health outcomes.

This prosecution rewrites the law in a manner that perpetuates gender stereotypes, and holds only women responsible for pregnancy outcomes. While paternal behaviors also impact pregnancy outcomes, fathers are exempt from not only prosecution, but even the most cursory public scrutiny based on their behavior. There is now a popular misconception that only a pregnant woman’s acts or omissions can guarantee a healthy baby. This misperception ignores other factors in fetal health, and focuses interventions solely on women’s behavior.¹⁹

In *International Union v. Johnson Controls*, 499 U.S. 187 (1991), the Supreme Court rejected a fetal health justification for treating women differently than men when there was evidence that men’s activities and behaviors also affect fetal outcomes. In that case, the employer barred women (except those who could prove infertility) from holding certain jobs based on the potentially harmful effects of lead exposure on fetuses. The Court found this policy discriminatory under the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), because fertile men were not barred from employment despite the proven harm of lead exposure on men’s reproductive functioning. “Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees.” *Id.* at 198.

¹⁸ *Neal v. Bd. of Trs.*, 198 F.3d 763, 773 (9th Cir. 1999) (describing sea change in attitudes over the 27 years since the implementation of Title IX); *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996) (women’s and men’s relative interest in athletics participation reflects historical exclusion and stereotypes about women’s abilities).

¹⁹ CYNTHIA R. DANIELS, EXPOSING MEN: THE SCIENCE AND POLITICS OF MALE REPRODUCTION, 141-44 (Oxford Univ. Press 2006); Katha Pollitt, “Fetal Rights”: A New Assault on Feminism, in “BAD” MOTHERS: THE POLITICS

The Court found explicit sex discrimination because the employer “has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex.” *Id.* at 199. In finding that this policy perpetuated blatant discrimination, the Court noted the inevitable result of disassociating men from fetal health outcomes and forcing women to bear sole responsibility. Likewise, *Hibbs* notes that stereotypes about women’s responsibilities are reinforced by “parallel” stereotypes that release men from any similar culpability. *Hibbs*, 538 U.S. at 736. As noted in *Johnson Controls*, there are some areas, including drug use, where men’s actions may contribute to pregnancy outcomes.²⁰ Yet men’s physical distance from pregnancy perpetuates the myth that women are solely responsible for fetal health, and has further made women the target of discrimination based on pregnancy and the potential to become pregnant. Ms. Gibbs’ drug use subjects her to criminal liability, where a man’s drug use would not be punishable at all.²¹

D. The prosecutor cannot establish an exceedingly persuasive justification for this discriminatory prosecution.

Given the discriminatory nature of this prosecution, it is the state’s heavy burden to demonstrate an “exceedingly persuasive justification” for the prosecution, and that such prosecutions are narrowly tailored means to further the state’s interest. *Virginia*, 518 U.S. at 533. The classification must serve “important governmental objectives” and be “substantially related to the achievement of those objectives.” *Id.* (citation omitted). The state must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Id.* at 533.

OF BLAME IN TWENTIETH-CENTURY AMERICA 285-89 (Molly Ladd-Taylor & Lauri Umansky eds., NYU Press 1997).

²⁰ See, e.g., Deborah A. Frank et al., *Forgotten Fathers: An Exploratory Study of Mothers’ Report of Drug and Alcohol Problems Among Fathers of Urban Newborns*, 24 NEUROTOXICOLOGY AND TERATOLOGY 339 (2002).

²¹ Possession of a controlled substance is a criminal offense. Nothing in the law allows a person to be prosecuted based only on evidence that they have ingested a controlled substance drugs. See Miss. Code Ann. § 41-29-139.

While fetal and maternal health are certainly legitimate state interests, the state cannot show that its discriminatory means is substantially related to the achievement of those objectives. As set forth in the Amici Brief from public health advocates and experts, the punitive treatment of pregnant women has not been shown to protect the health of a fetus or the pregnant woman, let alone with the kind of close nexus required under the Fourteenth Amendment. Even if such prosecutions *did* cause pregnant women who use drugs to cease drug use, and again the evidence is to the contrary, the state could actually be *contributing* to fetal harm. It is important for a pregnant woman to be under close medical supervision when she is withdrawing from substance use.²² Furthermore, as described below, to the extent that prosecutions based on drug use during pregnancy coerces some women into terminating their pregnancies, these prosecutions obviously do not serve any asserted interests of the State.²³

II. The prosecution of pregnant women based on their pregnancy outcomes leaves women with the unconstitutional choice of either having an abortion or facing prosecution.

The decision to bear a child is a fundamental liberty interest protected by the Fourteenth Amendment. “Liberty presumes an autonomy of self that includes ... certain intimate conduct.” *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). Likewise, this Court has recognized that Article 3, Section 32 of the Mississippi Constitution, protects the right to privacy, including “the right to one’s choices concerning one’s body,” independent of the U.S. Constitution. *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 652 (Miss. 1998). The Fourteenth Amendment protects a

²² THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, WOMEN UNDER THE INFLUENCE 160 (The Johns Hopkins University Press 2006).

²³ Numerous courts dismissing prosecutions against women who gave birth despite an addiction problem have recognized the possibility of coerced abortions. See, e.g., *Johnson*, 602 So. 2d at 1296 (“Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion.”); *State v. Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991) (“Potential criminal liability would also encourage addicted women to terminate or conceal their pregnancies.”). Indeed, a policy of prosecution may have resulted in at least one coerced abortion. Gail Stewart Hand, *Women or Children First?*, GRAND FORKS

person's right to make the most fundamental decisions free of undue governmental intrusion, including the right to "bear or beget a child." *Lawrence*, 539 U.S. at 565 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). This prosecution impacts reproductive decisions because once addicted, a pregnant woman could avoid the risk of prosecution if she suffers a coincidental stillbirth only by terminating her pregnancy.

Coercive policies that interfere with a woman's decisions about her pregnancy unconstitutionally impair her autonomy and ability to make her own health choices. The Court rejected, in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), a mandatory maternity leave policy that would have forced women to lose income if they became pregnant, explaining that because such policies "directly affect 'one of the basic civil rights of man,' the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a [woman's] constitutional liberty." *Id.* at 640 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

The Court construed *LaFleur* in *Turner v. Department of Employment Security*, 423 U.S. 44 (1975), and held that a policy presuming a pregnant woman was unable to work for 18 weeks, and was therefore ineligible for unemployment compensation, infringed upon "freedom of personal choice in matters of marriage and family life" as protected by the Due Process Clause. 423 U.S. at 46 (quoting *LaFleur*, 414 U.S. at 639). Permitting women struggling with addiction to be prosecuted based on their pregnancy outcomes raises the same constitutional concerns, by injecting the State into a woman's decision about her pregnancy. The analysis as to whether sex

HERALD (N.D.), July 12, 1992, at 1 (a woman obtained an abortion twelve days after being arrested for sniffing paint fumes while pregnant).

discrimination is at issue for purposes of the Fourteenth Amendment and Title VII are the same.²⁴ *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

Charging a woman with a crime because she has become pregnant and sought to both bear and beget a child violates her rights to liberty and bodily integrity without furthering whatever legitimate interest a state may have in infant and maternal health. A more effective, narrowly tailored means would be to offer confidential treatment, counseling and medical care to women with drug addictions, rather than threatening them with criminal prosecution and creating a greater danger to fetal well-being.²⁵ Furthermore, as indicated by the legislative history set forth in the Appellant's main brief, the legislature chose not to penalize women who continue pregnancies and use drugs or experience addictions, despite numerous opportunities to do so.

III. This prosecution would result in a weakening of pregnant women's right to equal protection.

Allowing Ms. Gibbs to be prosecuted based on the outcome of her pregnancy and alleged actions or inactions that may have contributed to that outcome would undermine pregnant women's liberty interest in making decisions regarding their medical care. The Supreme Court has reaffirmed the right to make decisions regarding one's person as a liberty interest grounded in the Constitution. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). Likewise, this Court found even before *Cruzan* that the right to privacy grounded in Mississippi's Constitution includes the right to refuse life sustaining treatment. *In re Brown*, 478 So.2d 1033, 1040, n.7 (Miss. 1985). Pregnant women also have the same right to make decisions

²⁴ Therefore, while under *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Gilbert*, *supra*, the withholding of a benefit to pregnant women did not constitute sex discrimination for purposes of Title VII or the Equal Protection Clause, the imposing of a burden does constitute such discrimination. See also *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) (holding that mandatory discharge of pregnant women from Marines presented unconstitutionally burdensome presumption about pregnancy and women under Equal Protection clause and *LaFleur* Due Process analysis).

²⁵ Mississippi recognizes that addiction is an illness. Mississippi Department of Mental Health, Bureau of Alcohol and Drug Abuse, *FY 2010 State Plan 20* ("Alcoholism and drug addiction are illnesses which are treatable and preventable."), available at <http://www.dmh.state.ms.us/pdf/2010ADStatePlan-FinalVersion.pdf>.

regarding their medical care taking numerous factors into consideration, including their ability to care for family members, or to continue employment or schooling. Even if a medical decision has the potential to effect the outcome of a pregnancy, the constitutionally protected right to bodily autonomy prohibits state interference. This prosecution calls into question whether these medical decisions could likewise subject pregnant women to criminal culpability, thus denying them the ability to make medical decision that non-pregnant women and men may make without fear of imprisonment.

A. By imposing criminal liability for fetal harm, this prosecution weakens pregnant women's right to make medical decisions, undermining their right to equal protection of the law.

This prosecution imposes on pregnant women an unconstitutional duty to do everything in their power to minimize fetal harm and ensure the best possible pregnancy outcome. Allowing this prosecution to move forward would seriously undermine pregnant women's recognized right to refuse or receive medical treatment that may have a detrimental effect on the fetus. Everything a woman experiences in her pregnancy and every decision she makes may impact the fetus. Attempting to impose criminal sanctions on pregnant women's acts would result in unacceptable and unrelenting limits on their liberty. The nation's leading physicians' organizations support women's right to determine their own medical care and disfavor legal intervention in such cases, even when women's decisions may be to the detriment of the fetus.²⁶

Courts have consistently held that the state cannot deprive a pregnant woman the right to receive or refuse medical care and have demanded that the state exercise restraint with regard to

²⁶ American Medical Association, Board of Trustees Report, *Legal Interventions During Pregnancy: Court Ordered Medical Treatment and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663 (1990); American College of Obstetricians and Gynecologists, *ETHICS IN OBSTETRICS AND GYNECOLOGY*, Committee Op. 214 (Apr. 1999).

actions that may violate pregnant women's constitutionally protected liberties.²⁷ As previously stated in Section I.D., the state is unable to offer any exceedingly persuasive justification for this infringement on women's right to equal protection, nor are the state's actions narrowly tailored to serve the purported interest of protecting maternal or fetal health because women will have an incentive to avoid prenatal care or seek an abortion.

B. Pregnant women have the right to make medical decisions, including those that may cause fetal harm.

In the leading case on a pregnant woman's right to refuse medical interventions, *In re A.C.*, 573 A.2d 1235 (D.C. 1990), *rev'g en banc*, *In re A.C.*, 533 A.2d 611 (D.C. 1987), the D.C. Court of Appeals found that the panel previously hearing the case had erred in permitting a cesarean to be performed on a pregnant woman without her consent for the benefit of her twenty-six-and-one-half-week-old fetus. "[C]ourts do not compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person's health." 573 A.2d at 1243-44. After analyzing holdings that have refused to require organ donations between relatives, the court concluded, "[A] fetus cannot have rights in this respect superior to those of a person who has already been born." 573 A.2d at 1244. Every appellate court to consider similar issues after *A.C.* has supported a pregnant woman's right to make medical decisions that may endanger the fetus, or refuse treatment for the fetus's benefit, even when the procedure in question is minimally invasive to the woman. *See, e.g., In re Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997) (citing *Planned Parenthood v. Casey*, 505 U.S. at 852); *In re Doe*, 632 N.E.2d 326, 333-34

²⁷ *See, e.g., Taft v. Taft*, 446 N.E.2d 395, 396 (Mass. 1983) (state supreme court vacated lower court decision ordering a pregnant woman to have her cervix sewn to prevent a possible miscarriage; court did not adequately consider her right of privacy).

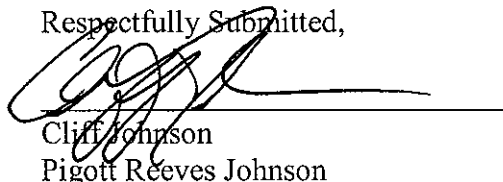
(Ill. App. Ct. 1994). Each of these courts acknowledged the serious infringement on a pregnant woman's liberty interests in ruling otherwise.²⁸

Current federal regulations regarding participation in research and clinical trials further reinforce this point, as the regulations allow pregnant women the same decision-making power and potential benefits of participation as others. Furthermore, the government's interest in protecting fetuses, women's reproductive capacity, or potential future pregnancies cannot outweigh the woman's own interest in or motivations for participating in trials or research.²⁹ Mississippi explicitly endorses these federal regulations in all research activities, whether or not such activities are federally-funded.³⁰

CONCLUSION

For the forgoing reasons, this Court should dismiss the indictment against the Appellant Ms. Rennie T. Gibbs.

Respectfully Submitted,



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and

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²⁸ Indeed, the one reported case to the contrary, *Pemberton v. Tallahassee Memorial Regional Medical Center*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999), illustrates the incredible violation of liberty that occurs when states act overzealously. Ms. Pemberton was forced to submit to a cesarean section against her will. *Id.* at 1250-51.

²⁹ See Protection of Human Subjects, 45 C.F.R. § 46.204, Research Involving Pregnant Women or Fetuses; see also, Office for Human Research Protections, IRB Guidebook (U.S. Dept. of Health and Human Services, 1993), Chapter VI.B ("In research undertaken to meet the health problems of a pregnant woman, her needs generally take precedence over those of the fetus, [45 C.F.R. 46.207] except, perhaps where the benefit to the woman is minimal and risk to the fetus is high.").

³⁰ See, e.g. Mississippi State University, *Human Research Protection Program, Vulnerable Participants—Pregnant Women, Human Fetuses, and Neonates (01-32) Approved 08-12-2009*, available at <http://www.orc.msstate.edu/irb/documents/Vulnerable%20Participants%20-%20Pregnant%20Women.pdf>, and *Policy and Procedure Statement on Human Subjects at Mississippi State University*, available at <http://www.msstate.edu/dept/audit/7903.html>.

CERTIFICATE OF SERVICE TO PARTIES IN THE CASE

It is hereby certified that a copy of this Amici Curiae Brief was served via U.S. Mail this 19th day of November, to the following interested persons:

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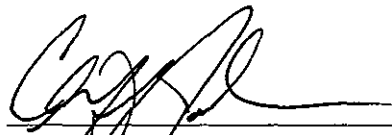
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