NO. 26838

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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<tr><td>STATE OF HAWAI`I,

Plaintiff-Appellee,

vs.

TAYSHEA AIWOHI,

Defendant-Appellant.</td><td>)
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APPEAL FROM THE AMENDED JUDGMENT/ GUILTY CONVICTION AND PROBATION SENTENCE/NOTICE OF ENTRY, FILED ON OCTOBER 4, 2004

FIRST CIRCUIT COURT

HONORABLE DAN KOCHI
HONORABLE MICHAEL TOWN
Judges</td></tr>
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BRIEF *AMICI CURIAE* OF AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN SOCIETY OF ADDICTION MEDICINE, NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS – HAWAI`I CHAPTER, and OTHER CONCERNED ORGANIZATIONS AND INDIVIDUALS IN SUPPORT OF APPELLANT

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ISSUES PRESENTED

Whether the manslaughter statute was legislatively intended to authorize punishment of women based on the results of their pregnancy?

STATEMENT OF INTEREST

As more fully described in the Appendix, *Amici* are individuals and organizations who have longstanding interest in and experience with the complex medical, ethical, scientific, and public policy issues that arise from the co-occurrence of pregnancy and drug dependency. They include drug treatment professionals; physicians and nurses who care for pregnant women and their children; medical researchers who study the effects of drug use during pregnancy; and professionals who counsel women and families who have experienced the tragedy of perinatal loss.

We submit this brief out of conviction that the legal issues presented cannot and should not be resolved in isolation from the public health context in which the case arises: were the Court to sustain the decision below, it would set a precedent that would seriously hamper the very measures – drug treatment and prenatal care – that promote healthy pregnancies and birth outcomes.

Amici are also concerned that the case be resolved based on accurate understanding of the medical evidence concerning the effects of *in utero* exposure to methamphetamine and of the nature of drug addiction. In the 1990s, state appellate courts served as a bulwark against prosecutions fueled by widely-held, now largely discredited, assumptions that the adverse effects of cocaine ingestion during pregnancy were different in kind from those associated with other activities and conditions which raise pregnancy risks – and by equally serious misunderstandings about women with drug dependencies. As public anxiety is stirred by new, alarmist claims about so-called "meth babies," this Court and others must independently assure that individuals in Ms. Aiwohi's position are treated fairly, rationally, and in accord with current medical and scientific knowledge.

BACKGROUND AND ARGUMENT SUMMARY

This appeal arises from the homicide conviction, after a conditional "no contest" plea, of Tayshea Aiwohi, a 31-year-old mother of four, on the theory that her ingestion of methamphetamine during pregnancy contributed to the death of her 2-day-old son, Treyson. (Treyson, who was born

approximately four weeks premature, died at home, hours after being released from the hospital).[1]

In denying Ms. Aiwohi's motions to dismiss, the trial judge acknowledged that the manslaughter statute could not have applied if Treyson had not been born alive, RA: 159, and further recognized that courts in other States have rejected prosecutions based on "a mother's actions allegedly harming her fetus which is later born alive and dies," RA: 159. The court reasoned, however, that no "immunity" was available here – because Hawai`i's manslaughter crime is a statutory, not a common-law matter, *id.* – and, after expressing agreement with decisions from other jurisdictions in which convictions of <u>third parties</u> for infant deaths resulting from injuries inflicted on pregnant women were upheld, it concluded that the "law should treat a mother's acts the same as a third party." RA: 160.[2]

That decision must be reversed. Although the opinion below treated the case as hinging on the availability of a common law "immunity," the primary question presented is whether the homicide statute may and should be construed as authorizing prosecution of a new mother, on the theory that her condition, activity, or inaction while pregnant resulted in a newborn infant's death. As the Appellant's Brief explains, nearly every court in the Nation to confront the question has held that provisions, like § 707-702(1)(a), which embody traditional criminal law proscriptions of "harm to others," <u>may not</u> be construed to authorize prosecution of women based on activity (or inaction) during pregnancy, in the absence of some specific indication of legislative intent to do so. Those courts have recognized what the decision below refused to: that, as a matter of constitutional and moral principle, public policy, and medical science, there are fundamental differences between

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[1]Because the case was resolved on a (conditional) no-contest plea, Ms. Aiwohi has forfeited the legal right to contest causation, but it bears emphasis that she has not <u>conceded</u> that methamphetamine <u>in fact</u> caused Treyson's death, and the Court should be aware of the substantial uncertainty that surrounds claims about the causal relationship between methamphetamine ingestion and adverse pregnancy outcomes.

[2]The court apparently viewed this proposition as disposing of Ms. Aiwohi's constitutional claims, as well as her contention, that, as a matter of legislative intent, the prosecution was unauthorized. At sentencing, the judge indicated that he – and "most people," – found it "baffling," "[w]hy anyone would use the drug knowing they are carrying a child." Kobayashi, *Mother Gets Probation in Ice Death*, Honolulu Advertiser, Aug. 26, 2004, at B1.

punishing third parties for fetal injuries caused by attacking pregnant women and using the criminal law to punish women for adverse pregnancy outcomes. Likewise, when legislatures have taken up the question, they have uniformly rejected proposals that women be punished criminally for failing to have healthy pregnancies. Indeed, the distinction between third parties and pregnant women is a central one in laws, in Hawai`i and elsewhere, specifically concerned with *in utero* exposure to harmful substances.

There is every reason to conclude that the Hawai`i Legislature did not intend for the manslaughter provision of the Penal Code to be extended to circumstances like those alleged here. Not only is the construction adopted below at odds with the text of the statute (and rife with constitutional difficulty), but the social and public health problems presented by drug addiction and pregnancy are fundamentally different – in myriad legally relevant ways – from the sort of third-party conduct with which § 707-702(1) and other Penal Code provisions addressing "harm to others" were intended to deal.

First, the "basic social interests which the [Penal] Code seeks to protect," HRS § 701-103, are undermined, rather than advanced, by holding women criminally liable based on pregnancy outcomes. Over the course of nearly two decades, every leading medical organization, governmental body, and nearly every court to consider the question has concluded that inserting the criminal law into these situations is likely to produce worse outcomes for children carried by drug-dependent women. Fear of prosecution operates as a barrier to pursuing drug treatment, prenatal care, and labor and delivery care; and it discourages disclosure of critical medical information to health professionals – all with potentially devastating results. Moreover, given the realities of drug addiction and the difficulty of obtaining appropriate treatment, a regime that threatens women who carry their pregnancies to term with homicide prosecution, in the event a baby dies shortly after birth, places substantial pressure on drug-dependent women to terminate wanted pregnancies.

The state of affairs that a punitive regime threatens is especially tragic and intolerable, because the evidence also establishes that appropriate medical interventions in these situations can dramatically improve outcomes. Drug treatment can be effective for pregnant women, and the

adverse effects associated with drug, alcohol, tobacco use and other conditions that raise pregnancy risks are substantially mitigated when women receive treatment and regular prenatal care.

Second, assertions that drug use during pregnancy is "the same" as third-party violence – and that drug-dependent women are fundamentally different from other mothers who suffer perinatal loss – should not rest on unexamined, inaccurate assumptions. A defining characteristic of drug dependency is the extent to which ingestion is not the result of "voluntary choice,"and research establishes that, contrary to media portrayals and ubiquitous stereotypes, pregnant, drug-dependent women care about their future children.

Nor does the existing scientific record bear out the intuitively appealing assumption that "illegal" drugs, such as methamphetamine, pose uniquely high or well-established risks of fetal or infant harm. While *Amici* would never suggest that ingestion of methamphetamine during pregnancy is in any way benign, that drug and other controlled substances do not owe their legal status to any determination of unique danger to fetuses. As a matter of medical science, the adverse effects of *in utero* exposure to methamphetamine are less well-established – and likely no more grave – than those of any number of "legal," *i.e.*, prescription, drugs; they are far less widespread than those resulting from ingestion of two common, "legal" substances, tobacco and alcohol, whose pregnancy risks have been widely known and extensively documented for many years.

Indeed, it bears emphasis that the tragic "result" at issue here – death soon after live birth – is associated with a vast array of conditions, activities, and inactions during pregnancy, ranging from working in a dangerous environment, to carrying a multifetal pregnancy to term, to declining a rubella screening. If, as has been maintained here, prosecution and punishment are to be meted out based on "result," there is no basis in the law (or the relevant medical science) for distinguishing between harm attributed to ingestion of illicit drugs during pregnancy and that which results from these other activities and conditions – which, while not independently unlawful, pose substantial, well-known risks.

Two conclusions follow. First, because it cannot sensibly be concluded that the manslaughter statute was intended to cover the latter situations, it cannot sensibly be read to cover

this case: <u>the statute must not reach pregnant women's conduct affecting fetuses</u>. Second, if the statute <u>were</u> read to cross the line and reach harm to action or inaction during pregnancy, it would raise manifold constitutional difficulties: (1) it would leave pregnant women – and those, including *Amici*, who care for them – guessing as to which activities will be criminally prosecuted as "homicides," in the (exceedingly rare and fundamentally unpredictable) event of neonatal death, and which infant deaths will continue to be treated as personal tragedies; and (2) it would not merely leave open the <u>possibility</u> of selective enforcement – *i.e.*, that women who engage in intrinsically similar activity will be treated very differently – but would appear to affirmatively <u>contemplate</u> disparate treatment (because, as a practical matter, there will be few, if any, prosecutions of women who lose children after incurring comparable or greater pregnancy risks).

ARGUMENT

PENAL CODE PROVISIONS ADDRESSING MANSLAUGHTER AND OTHER CRIMES AGAINST THE PERSON" SHOULD NOT BE CONSTRUED TO APPLY TO MOTHERS, BASED ON ADVERSE PREGNANCY OUTCOMES

This is not a case about "immunity." Hawai`i's laws punishing illicit drug possession, see HRS § 712-1243, contain no special exemption for pregnant women. The principal question presented is whether the State Legislature intended generally-worded, traditional criminal provisions to authorize punishment of women based on their pregnancy outcomes – and specifically, whether it intended to regulate maternal drug dependency (and other conditions or activities that raise risk of fetal harm, *infra*) through the <u>manslaughter</u> law, imposing punishment when (but only when) a woman loses her child soon after a live birth. Every relevant indication establishes that the statute was not intended, and should not be read, to address these circumstances.

I. The Trial Court's Equation of Adverse Pregnancy Outcomes With Third-Party Harm Is At Odds With Fundamental, Broadly Accepted Principles of Law and Public Health

A. With One Exception, Courts Have Uniformly Recognized The Distinction Between Third-Party Violence And Women's Conditions And Activities During Pregnancy

Affirming the decision below would effectively place Hawai`i courts in disagreement "with the rest of the Anglo-American jurisprudential world," *State v. Holbron*, 80 Hawai`i 27, 45, 904 P.2d

912, 930 (1995). Decisions from 23 States have refused to construe generally-worded criminal statutes like § 707-702, as authorizing punishment of women for pregnancy-related harms, in the absence of express, specific legislative direction to do so, with the courts of South Carolina supplying the lone exception. See *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); but see *South Carolina v. Whitner*, 492 S.E.2d 777 (1997); *cf. State v. Jones,* 96 Hawai`i 161, 175-176, 29 P.3d 351, 365 (2001) (citing "history and practice in other jurisdictions").

In dismissing such prosecutions, these courts have firmly and consistently rejected the premise that animated the decision below, *i.e.*, that the law "should treat" pregnant women "the same" as third parties who, through violence or assault, cause women to lose their children. Courts so concluding include those in "code states," see, *e.g.*, *New York v. Morabito*, 151 Misc.2d 259, 580 N.Y.S.2d 843 (1992); N.Y. Pen. Code § 5.05(1), and in jurisdictions that, like Hawai`i, adhere to the "born alive" rule, *e.g., Washington v. Dunn*, 82 Wash. App. 122, 916 P.2d 952 (1996); *Florida v. Ashley*, 701 So.2d 338 (1997) – including in the very jurisdictions cited in the trial court's decision as having permitted prosecutions (of third parties) for death following *in utero* harm. See *Collins v. Texas*, 890 S.W.2d 893 (Tex. 1994); *Reinesto v. Superior Court*, 182 Ariz. 190, 894 P.2d 733, 738 (App. 1995); see also *Kentucky v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (treating as "dispositive" that "neonatal injury in [prior case] was caused by a blow administered by an outsider"); *Ohio v. Gray*, 584 N.E.2d 710, 712 (1992) (rejecting claim that precedent sustaining conviction of third party was controlling); *Ashley*, 701 So.2d at 42 n.12 (same).[3]

Indeed, the distinction has been reaffirmed in jurisdictions where legal "personhood," has been held to begin before birth, see, *e.g.*, *In re Starks*, 18 P.3d 342, 345 (Ok. 2001) (rejecting civil child protection proceeding based on pregnant woman's involvement with methamphetamine and

[3]Even if the question were one of "common law immunity," rather than legislative intent, a key concern underlying the prohibition of judicially created offenses – defendants' right to fair notice – does not apply to defenses. Federal law illustrates the asymmetry: federal common law crimes have long been forbidden, see *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812), but defenses are "routinely allowed against federal criminal prosecutions without explicit statutory basis." G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 287 n.33 (1982).

distinguishing *Hughes v. Oklahoma,* 868 P.2d 730, 736 (Ok. Crim. 1994)), and even in those which have taken a still more expansive view, *Starks*, 18 P.3d at 346 (noting that *Nealis v. Baird,* 996 P.2d 438 (Ok. 1999) had allowed parents to sue third-party tortfeasor for injuring a nonviable fetus); *Webster v. Reproductive Health Servs., Inc.*, 492 U.S. 490, 504 n.4 (1989) (quoting provision to the effect that "'[n]othing in * * * [legislative declaration that "life" starts at conception] shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care"). See also *Stallman v. Youngquist,* 531 N.E.2d 355, 359 (Ill. 1988) (refusing to recognize a tort of maternal prenatal negligence, notwithstanding case law allowing recovery against third parties based on fetal harm); *Hillman v. Georgia*, 503 S.E.2d 610 (Ct. App. 1998) (refusing to apply criminal abortion statute to woman whose drug use was alleged to have terminated her pregnancy); *Wyoming v. Osmus*, 276 P.2d 469,475 (1954) (mother's failure to take proper preparations before birth could not be basis for homicide conviction).[4]

As these decisions have explained, the moral, constitutional, and public policy questions implicated by prosecuting women based on pregnancy outcomes are so different from those involved when legislators enact general provisions addressing "offenses against the person," HRS ch. 707, that such laws should not be construed as extending to women's activity during pregnancy, absent a clear and specific expression of legislative intent. *See, e.g.*, *Morabito*, 580 N.Y.S.2d at 845 (1992) ("'the question of whether or not the State should intervene on the activities of a pregnant woman, when it should intervene (under what circumstances and what point in the pregnancy), how it should intervene, what penalty should apply, what defenses should be available to a pregnant woman (*i.e.*, seeking treatment) and who should be responsible for reporting such activity and when, are complex legal and social questions that can only be debated and fully considered by the

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[4]Cf. *Minnesota v. Merrill*, 450 N.W.2d 318, 323 (1990) (rejecting third-party assailant's Equal Protection challenge to feticide prosecution, on ground the pregnant women and third parties are not "similarly situated"); *New York v. Hall*, 158 A.D.2d 69, 76 (App. Div. 1990) ("any attempt to equate defendant's situation with that of an individual performing or being the recipient of an abortion is unavailing").

legislature'") (quoting *Ohio v. Andrews* (Fam. Ct. June 19, 1989)); *Wisconsin v. Deborah J.Z.* 596 N.W.2d 490, 495 (1999) (given the "complex and controversial public policy considerations * * * the legislature is in a better position than the courts to gather, weigh, and reconcile the competing policy proposals addressed to this sensitive area of the law"); *Stallman,* 531 N.E.2d at 361("[I]f a legally cognizable duty on the part of pregnant women to their developing fetuses is to be recognized, the decision must come from the legislature only after thorough investigation, study and debate"); accord *Gray*, 584 N.E.2d at 712; *Michigan v. Hardy*, 469 N.W.2d 50, 53 (1991); *Reinesto*, 894 P.2d at 738; see generally *Johnson v. Florida*, 602 So.2d 1288, 1297 (1992) (authorizing prosecution would take courts down a road that "the law, public policy, reason, and common sense forbid [them] to tread").

As these decisions recognize, the biological realities of pregnancy have constitutional significance – third-party assailants are not "subject to anxieties, to physical constraints, [and] pain that [pregnant women alone] must bear," *Planned Parenthood, S.E. Pa. v. Casey*, 505 U.S. 833, 852 (1992); Haw. Op. Att'y Gen. No. 94-01 (1994) (regulation of pregnancy involves "highly personal and intimate matters") – and mean that public policies developed to regulate third-party conduct operate very differently where pregnancy is concerned. As the Illinois Supreme Court explained (in rejecting a claim that civil remedies should be extended against mothers):

> 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 * * * * Mother and child would be legal adversaries from the moment of conception until birth * * * * Holding a third person liable for prenatal injuries furthers the interests of both the mother and the subsequently born child and does not interfere with the defendant's right to control his or her own life. Holding a mother liable for the unintentional infliction of prenatal injuries subjects to State scrutiny all the decisions a woman must make in attempting to carry a pregnancy to term, and infringes on her right to privacy and bodily autonomy * * * * Logic does not demand that a pregnant woman be treated in a court of law as a stranger to her developing fetus * * * *As opposed to the third-party defendant, it is the mother's every waking and sleeping moment which, for better or worse, shapes the prenatal environment which forms the world for the developing fetus.

Stallman, 531 N.E.2d at 359-60; see also *Nealis*, 996 P.2d at 455 (noting that no constitutional question was presented in civil case against third party of mother's "interests in preserving the

child's life and in vindicating harm resulting in its death"). Other decisions catalogue the distinct public health implications of using the criminal law to regulate pregnancy, see *infra*, and the extent to which these differences have a constitutional dimension, *e.g.*, *Sheriff, Wahoe County, Nevada v. Encoe*, 885 P.2d 596, 598 (1994); cf. *Automobile Workers v. Johnson Controls*, 499 U.S. 187, 206 (1991) (rejecting lead manufacturer's "fetal protection" defense to claim of sex-based employment discrimination, because "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them").[5]

B. Legislatures Continue To Resist Punishing Women for Pregnancy Outcomes, Even Where Third-Parties Are Regulated

These fundamental distinctions – and dangers – have persuaded legislatures, as well. Notably, in the wake of the many judicial decisions addressing the subject, no legislature has authorized the criminal punishment of women for pregnancy-related harm, see Steinberg &. Geshan, *State Responses to Maternal Drug and Alcohol Use: An Update* (Nat'l Conf. of State Legislatures 2000) at 15-21. It has seldom even been proposed that harms attributable to maternal activity during pregnancy be treated "the same as" those resulting from a stranger's attack on a pregnant woman.[6]

In fact, when legislatures enact laws whose aim is to promote healthier pregnancy outcomes or, specifically, to reduce risks attributable to exposure to harmful substances *in utero*, they consistently uphold the distinction between pregnant woman and third parties. Thus, Congress has

[5]As these decisions emphasize, the constitutional problem does not derive from any supposed "fundamental right" to ingest illegal drugs. Rather, using criminal laws proscribing "harm to others" to punish pregnancy outcomes represents a grave affront to the "liberty" to which women are entitled (including, but not limited to, their constitutionally-protected interest in carrying a pregnancy to term, see *infra*), and often, as here, raise intolerable "fair notice" problems, see *infra*.

[6]The nature of the opposition to such proposals is itself indicative of how different the issues are. When Congress considered a proposal, S. 1444, 101th Cong., 1st Sess. (1989), to encourage states to penalize women for giving birth to children who test positive for illegal drugs, opposition came not only from the medical and public health communities, but also from a coalition that included the National Abortion Rights Action League, the National Right to Life League, and U.S. Catholic Conference. See Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After* Webster, 138 U. PA. L. REV. 179, 215 (1989). In contrast, traditional criminal law provisions such as §707 rarely encounter even token opposition.

expressly prohibited unauthorized distribution of controlled substances to a "pregnant individual," 21 U.S.C. § 861(f), but enacted no enhanced penalty for ingestion of drugs by such an individual. Likewise, Congress has outlawed the sale of cigarettes that do not bear a label indicating the "SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight," 15 U.S.C. § 1333, without providing for punishment of pregnant women who smoke, see *infra*. See also 18 U.S.C. § 1841(a), (c)(3) (directing that language in "Unborn Victims of Violence Act," authorizing punishment of "[w]hoever engages in conduct that * * * causes the death of, or bodily injury * * * to, a child, who is in utero at the time the conduct takes place" shall "not be construed to permit the prosecution * * * of any woman with respect to her unborn child") (emphasis added).[7]

II. There Is No Basis For Concluding That The Hawai`i Legislature Intended The Manslaughter Statute To Authorize Prosecution or Punishment for Pregnancy Outcomes

A. There Is Every Indication That The Legislature Intended To Uphold, Not Abrogate, The Distinction Between Pregnant Women and Third Parties

There is no basis for concluding that, in enacting the homicide law, the Hawai`i Legislature intended a sharp break with this deeply-rooted and pervasively-recognized distinction. There is no suggestion that in enacting § 707-702(1)(a), the Legislature ""gathered, weigh[ed], or reconcile[d] the competing polic[ies] implicated by pregnancy," *Deborah J.Z.*, 596 N.W.2d at 495, or that it ever considered, let alone ""thorough[ly] investigat[ed], stud[ied], and debate[d]," *Stallman,* 531 N.E.2d at 36, the complex questions that arise "in this sensitive area of the law,"*id*.[8]

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[7]Similarly, Congress has recognized the important benefits of "encouraging all women to abstain from alcohol consumption during pregnancy," 42 U.S.C. § 280f, but has identified "educational and vocational training, appropriate therapies, counseling, medical and mental health, and other supportive services," as the proper means of pursuing that objective, *id.*

[8]Indeed, far greater debate could be expected under these circumstances than in cases where prosecution under a drug distribution statute is at issue, see, *e.g.*, *Hardy*, 469 N.W.2d 50; *Georgia v. Luster*, 419 S.E.2d 32 (1992). Not only are the penalties under the homicide statute far more onerous, but, as explained *infra*, the provision's vaunted focus on the "result" of neonatal death – rather than drug-related "conduct" – places a far larger group of women in jeopardy of prosecution (*i.e.*, all who might lose a neonate as a "result" of their condition, activity, or omission during pregnancy) than could an expansive reading of a drug distribution statute.

The words of the Hawai`i manslaughter statute hardly compel the position adopted by the trial court: the language used by the Legislature, punishing recklessness that results in the death of "another person," is naturally read to require that the harm-inflicting action (and culpable state of mind) be directed at a live, born person. See Br. of Appellant 10-16. Indeed, that reading follows naturally from the conceded inapplicability of the statute if there is no live birth at all. When a third party attacks a pregnant woman, those elements may be satisfied by the harm to the woman herself, but in the case of a pregnant woman there is no "other person" to whom the action (and alleged recklessness) are directed. Cf. *Osmus*, 276 P.2d at 475 (rejecting prosecution of mother of neonate without proof of "'negligence towards the child after it was completely born'") (quoting *Rex v. Izod*, 20 Cox's Criminal Law Cases 690 (1904) (emphasis added)); *Hillman*, 503 S.E.2d at 612 (noting that statute "[wa]s written in the third person, clearly indicating that at least two actors must be involved").[9]

Moreover, the Legislature has not shared the trial court's view that the law "should" treat pregnancy outcomes and third party harm "the same," generally, or with respect to a pregnant woman's drug use, in particular. For example, Hawai`i requires health professionals to seek "a blood specimen from [pregnant] wom[e]n to be tested for immunity to rubella," HRS § 325-19, but acknowledges women's right to withhold consent to such a test, *id.*, notwithstanding the serious risks that *in utero* exposure is known to carry, see, *e.g.*, Cooper, *Fetal Rubella Syndrome*, in BIRTH DEFECTS ENCYCLOPEDIA 723-725 (M. Buyse, ed. 1990) (noting risks of miscarriage, stillbirth, and congenital rubella syndrome, in cases of perinatal infection); see also HRS § 321-331 ("Nothing in this section shall be construed to mean that prenatal screening and testing are mandatory").[10] And

[9]In the cases cited by the decision below, any required culpable intent toward "another person" presumably could have been established by defendants' acts against the pregnant women. See *Williams v. Maryland*, 561 A.2d 216 (1989) (defendant shot pregnant woman with bow and arrow); *Arizona v. Cotton*, 5 P.3d 918 (2000) (defendant shot pregnant girlfriend in the back of the head); cf. *State v. Kane,* 3 Haw. App. 450, 458, 652 P.2d 642, 648 (App.1982) (defendant may be guilty of general intent crime if "intending to strike B[, he] instead strik[es] C").

[10]See also *id.* § 325-16(a) (permitting HIV screening only with pregnant woman's informed consent); Mofenson, *Perinatal Exposure to Zidovudine B--Benefits and Risks*, 343 NEW ENG. J. MED. 803 (2000) (benefits of anti-retroviral therapy in preventing perinatal transmission). Although

when the Legislature enacted a law (which has since expired) conferring a civil remedy on "infants injured as a result of exposure to drugs in utero," 1995 Hawaii Laws, Act 203 § 3(a)(2), it precluded suits against parents for ingesting the drugs.[11]

It would be essentially inexplicable for a Legislature that intended that women be prosecuted for homicide in the event of neonatal death would take pains to affirm pregnant women's right to opt out of rubella testing, HIV screening, and other measures known to substantially reduce the risk of adverse outcomes. It is even harder to fathom that it would carefully and explicitly exempt mothers from civil liability for injuries ostensibly resulting from the very sort of activity that supplies the basis for this criminal prosecution. *See* HRS § 1-16 (recognizing that "[l]aws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another"); cf. *Welch*, 864 S.W.2d at 284 ("the fact [that a statute] was amended to provide special punishment for the dealer who supplies drugs to a pregnant person, but not to punish the woman on the basis that she takes drugs while pregnant" established that legislature "intend[ed] no additional criminal punishment for the pregnant woman's abuse of alcohol and drugs apart from the punishment imposed upon everyone caught committing a crime involving those substances"). Nor is it easily understood why the Legislature would intend for drug ingestion during pregnancy to give rise to conviction in one (but only one) circumstance – when a woman subsequently gives birth and her infant dies – while providing no punishment when the same activity results in demise *in utero*. *State v. Arceo*, 84 Hawai`I 1, 19, 928 P.2d 843, 861 (1996) ("legislation will be construed to avoid, if possible,

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HRS §325-51, which provides that "[e]very pregnant woman shall permit the sample of the woman's blood to be taken [to test for syphillis]," constitutes a partial exception, even in that case, criminal punishment is imposed on the health professionals, *id.* § 325-53. See also *id.* § 327E-13 (noting Legislature's deletion of subsection which had held health advance directives ineffective in cases of "a patient diagnosed as pregnant by the attending physician").

[11]The law exempted those who "purchase[d] * * * an illegal drug for personal use only," *id.* §2, and it expressly disclaimed any intent "to alter the law regarding intra-family tort immunity," *id.* § 14. The apparent purpose of the legislation was to expand liability beyond traditional common law principles, under which a drug dealer might have asserted that maternal ingestion was a superceding, intervening cause.

inconsistency, contradiction[,] and illogicality'") (quoting *State v. Malufau*, 80 Hawai`i 126, 137, 906 P.2d 612, 623 (1995) (other internal quotation marks omitted).[12]

B. The Reasons That Courts and Legislatures Have Treated Third Party Conduct Differently Are Legally Relevant – And Dispositive – Here

Although the court below believed itself bound to disregard matters of "social policy," RA: 161, the Legislature has in fact directed that the provisions of the Penal Code be construed "with reference to the[ir] purpose," HRS § 701-104, and in view of the "[b]asic social interests which the Code seeks to protect." *Id.* Applying those directives makes it even clearer that the construction imposed on the statute by the court below may not stand.

1. The Overriding Societal Interest In Promoting Health and Welfare Of Pregnant Women and Children Is Disserved By Extending the Homicide Law In The Manner Sought By the Prosecution

a. Drug-Dependent Women Would be Deterred and Care, Compromised

For nearly two decades, courts and researchers have described the central danger inherent in the punitive approach: that fear of criminal prosecution will trigger a "flight from care," among drug-dependent women. *See* Poland, et al., *Barriers to Receiving Adequate Prenatal Care,* AM. J. OB. & GYN., 157(2): 297-303 (1987). Thus, in a 1990 policy statement, the American Medical Association highlighted the danger that criminal penalties would "exacerbate the harm done to fetal health by deterring pregnant substance abusers from obtaining help or care from * * * the very people who are best able to prevent future abuse." American Med. Ass'n Bd. Of Trustees, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2667 (1990); see also *id.* at 2670 (reporting AMA resolution that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate"). Among the many other organizations to have considered the issue – and officially condemned punitive approaches – are the March of Dimes, the American

[12] Although this anomaly is partly a consequence of the "born alive" rule – a third party who causes *in utero* demise would also not be subjected to homicide prosecution on the State's theory – such cases typically involve serious, violent conduct directed against the pregnant woman, see n.9, *supra*; and pregnant women, unlike third parties, would retain the ability to avoid being prosecuted, by exercising their right to terminate the pregnancy.

College of Obstetricians and Gynecologists, the American Academy of Pediatrics, the National Association of Public Child Welfare Administrators, the National Council on Alcoholism and Drug Dependence, the American Nurses Association, the Center for the Future of Children, the American Psychiatric Association, and the American Society for Addiction Medicine. See generally *Ferguson v. City of Charleston*, 532 U.S. 67, 84 n.23 (2001) (noting, in the course of rejecting Fourth Amendment exception for prosecutorial drug-testing of pregnant women, *amicus* submissions "claiming a near consensus in the medical community that 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"); *Luster*, 419 S.E.2d at 35 n.2 (Ga. 1992); *Deborah J. Z.*, 496 N.W. at 495 (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"); U.S. G.A.O., ADMS BLOCK GRANT: WOMEN'S SET ASIDE DOES NOT ASSURE DRUG TREATMENT FOR PREGNANT WOMEN 20 (1991) (identifying "the threat of prosecution" as a "barrier to treatment for pregnant women").[13]

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[13]See American Society of Addiction Med., Bd. of Directors, *Public Policy Statement on Chemically Dependent Women and Pregnancy* (Sept. 25, 1989); March of Dimes, *Statement on Maternal Drug Abuse* 1 (Dec. 1990) ("The March of Dimes is concerned that legal action, which makes a pregnant woman criminally liable solely based on the use of drugs during pregnancy, is potentially harmful to the mother and to her unborn child * * * Fear of punishment may cause women most in need of prenatal services to avoid health care professionals"); ACOG Committee on Ethics, *At-Risk Drinking and Illicit Drug Use: Ethical Issues in Obstetric and Gynecologic Practice* (Opinion No. 294, May 2004) (punitive measures "endanger the relationship of trust between physician and patient * * * [and can] actually increase the risks to the woman and the fetus"); National Council on Alcoholism and Drug Dependence, *Women, Alcohol, Other Drugs and Pregnancy* (1990) (A "punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drug addictions. It thus works against the interest of infants and children* * * *"); 11 American Psychiatric Ass'n, *Care of Pregnant and Newly Delivered Women Addicts, Position Statement*, (Doc. No. 200101 March 2001) ("policies of prosecuting pregnant and/or postpartum women who have used either alcohol or illegal substances during pregnancy, on grounds of 'prenatal child abuse'* * * are likely to deter pregnant addicts from seeking prenatal care or addiction treatment"); American Nurses Ass'n, *Position Statement* (Apr. 5, 1992) (ANA "opposes any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants * * * The threat of

Recent research reinforces these expert judgments. Those who work closely with and study drug-dependent pregnant women have reported 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," Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, J. DRUG ISSUES (Spring 2003); see also S. MURPHY & M. ROSENBAUM, PREGNANT WOMEN ON DRUGS: COMBATTING STEREOTYPES AND STIGMA (1999); accord Whiteford & Vitucci, *Pregnancy and Addiction: Translating Research and Practice*, SOCIAL SCIENCE & MED., 44(9):1371-1380 (1997); Gazmarian, et al., *Barriers to Prenatal Care Among Medicaid Managed Care Enrollees: Patient and Provider Perceptions*, HMO PRACTITIONER 11(1) (1997).

The threat of criminal punishment also corrodes the formation of trust that is fundamental to any caregiver-patient relationship. As the Supreme Court has recognized, a "confidential relationship" is typically a necessary precondition for "successful [professional] treatment," *Jaffee v. Redmond*, 518 U.S. 1, 12 (1997): important benefits accrue when patients feel sufficiently comfortable to divulge to those who treat them highly personal, often stigmatizing, and sometimes incriminating information. See *Id.* (observing that "[t]o make diagnoses and treat patients effectively, the physician must obtain sensitive information about a patient," ands specifically noting that the "patient must be willing to tell a physician, who is often a total stranger, about such matters as drug usage * * * "); ACOG Opinion No. 294 (noting danger to "relationship of trust between physician and patient").[14]

Where patients are women who are drug-dependent and pregnant, open communication is especially critical. First, drug use is one of the most commonly missed diagnoses in obstetric and pediatric medicine; in most cases, a patient's drug use is not readily apparent if the patient does not

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criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems").

[14]See also Lazare, *Shame, Humiliation, and Stigma*, in THE MEDICAL INTERVIEW: CLINICAL CARE, EDUCATION AND RESEARCH 333 (M. Lipkin, et al., eds., 1995); Miller & Thalen, *Knowledge & Belief About Confidentiality in Psychotherapy*, 17 PROF. PSYCHOL. RES. & PRAC. 15, 18 (1986) ("[P]atients view confidentiality as an all-encompassing, super ordinate mandate for the profession of psychology").

disclose it. See Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 PEDIATRIC CLINICS N. AM. 1403, 1410 (1988); Kelly, et al., *The Detection & Treatment of Psychiatric Disorders and Substance Use Among Pregnant Women Cared For in Obstetrics*, AM J. PSYCH 158(2): 213-19 (Feb. 2001). Moreover, both maternal and fetal well-being require that health care providers be able to discuss important matters – such as HIV, Hepatitis C, and herpes infection – which are associated with drug use, and failure to disclose maternal drug use to labor and delivery personnel poses special dangers. See, *e.g.*, Campbell, et al., *Unrecognized "Crack" Cocaine Abuse in Pregnancy*, 77 BRIT. J. ANAESTHESIOLOGY 553, 555 (1996).

Similar considerations figure significantly in the provision of drug treatment. As researchers have emphasized, the very high rates of depression and poor self-esteem 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 , SUBSTANCE ABUSE AND THE AMERICAN WOMAN 64 (1996) (hereafter "CASA REPORT") (noting that "[c]onfrontational therapy programs, which aim to push addicts to shed their denial and assume responsibility for their behavior, may backfire on women by reinforcing feelings of shame, low self-esteem and depression"); O'Connor, et al., *Shame, Guilt, and Depression in Men and Women in Recovery from Addiction*, J. SUBSTANCE ABUSE TREATMENT 11(6): 03-510 (1994).[15]

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[15]See also Burman, *The Disease Concept of Alcoholism: its Impact on Women's Treatment,* J. SUBSTANCE ABUSE TREATMENT, 11(2): 121-126 (1994); Quinby & Graham, *Substance Abuse Among Women*, PRIMARY CARE, 20(1): 131-140 (1993); Tracy & Williams, *Social Consequences of Substance Abuse Among Pregnant and Parenting Women*, PEDIATRIC ANNALS, 20(10): 548-552 (1991); ADDICTIVE BEHAVIORS IN WOMEN (R. Watson, ed. 1994); S. KANDALL, SUBSTANCE & SHADOW: WOMEN & ADDICTION IN THE UNITED STATES 278 (1996).

An especially startling series of research findings relate to the high proportion of substance-abusing women who have experienced early sexual abuse. See CASA REPORT at 8; see also Hans, *Demographic and Psychosocial Characteristics of Substance-Abusing Pregnant Women*, CLIN. PERINATOL., 26: 55-74 (March 1999); Martin, *Women in a Prenatal Care/Substance Abuse Treatment Program: Links Between Domestic Violence & Mental Health*, MATERNAL CHILD HEALTH J. 2(2): 85-94 (1998) (reporting that 42% had experienced both sexual violence and other forms of physical violence); Grella, *Services for Perinatal Women With Substance Abuse and Mental Health Disorders: The Unmet Need*, J. PSYCHOAC. DRUGS, 29(1): 67-78 (1997).

b. Interventions Are Effective and Especially Important

The danger of deterrence is important, because the evidence also shows that there are large potential benefits to the medical interventions that pregnant, drug-dependent pregnant women would avoid. First, researchers have determined that prenatal care is itself strongly associated with improved outcomes for children exposed to drugs *in utero*. For example, pregnant women who use cocaine but who had at least four prenatal care visits were found to reduce significantly their chances of delivering low birthweight babies. 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); Chazotte, et al., *Cocaine Use During Pregnancy and Low Birth Weight: the Impact of Prenatal Care and Drug Treatment*, SEMINARS IN PERINATOL. 19: 293-300 (1995); Funai, et al., *Compliance with Prenatal Care in Substance Abusers*, J. MATERNAL FETAL NEONATAL MED. 14(5): 329-332 (2003).

These findings reflect two sides of a reality which recent research has brought into increasingly sharp focus: on one hand, *in utero* exposure to illegal drugs does not itself pose a uniquely severe or insurmountable danger of fetal or developmental harm; but at the same time, many children of drug-dependent women are subject to other risk factors, including poverty, poor nutrition, domestic violence, higher incidences of medical conditions such as maternal high blood pressure and thyroid disease, and tobacco and alcohol use, the effects of which could also be addressed through prenatal care. Accordingly, while the definitive analysis of the developmental effects of prenatal cocaine use found "no convincing evidence" that intrauterine exposure "is associated with any developmental toxicity different in severity, scope, or kind from the sequelae of many other risk factors," Frank, et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613, 1622 (2001), see *infra*, it explained that adverse outcomes "once thought to be [the] specific [result] of in utero cocaine exposure" were, in fact, driven by "other factors, including prenatal exposure to tobacco, marijuana, or alcohol and the quality of the child's environment," for which earlier researchers had failed to account, *id.*; see also Tronick & Beeghly, *Prenatal Cocaine Exposure, Child-Development,*

and the Compromising Effects of Cumulative Risk, CLIN. PERINATOL. 26(1): 151-71 (1999) (noting that "[i]nterventions are more likely to succeed if they attempt to reduce the overall burden of risk rather than targeting risks").

Research also shows that drug treatment can be effective for pregnant women and can itself beneficially affect pregnancy outcomes. See Sweeney, et al., *The Effect of Integrating Substance Abuse Treatment With Prenatal Care on Birth Outcomes*, J. PERINATOL., 20(4): 219-24 (June 2000) (finding that neonatal outcome "is significantly improved for infants born to substance abusers who receive[d] [drug] treatment concurrent with prenatal care compared with those who received [prenatal care during pregnancy but] * * * treatment postpartum"); Kaltenbach & Finnegan, *Prevention & Treatment Issues for Pregnant Drug-Abusing Women and Their Children*, ANN. N.Y. ACAD. SCI. 329-334 (June 21, 1998); CASA REPORT at 82 (1996) (citing studies finding "that pregnant women in treatment give birth to larger, higher birth weight infants than women who are not in treatment"); see also Egelko, et al.,, *Treatment of Perinatal Cocaine Addiction: Use of a Modified Therapeutic Community,* AM. J. DRUG & ALCOHOL ABUSE, 22(2): 185-202 (1996) (describing effects of one drug treatment program).[16]

Findings reported by the Hawai`i Department of Health from a one-year CSAT-funded treatment program confirm these results. See http://www.hawaii.gov/health/substance-abuse/prevention-treatment/treatment/adtrtwo.htm#anchor490819 (citing CENTER FOR SUBSTANCE ABUSE TREATMENT, QUARTERLY REPORT DATA FROM SAMPLING OF GRANT PROGRAMS, WOMEN AND CHILDREN'S BRANCH (1995)). Among pregnant women in the treatment program, 95% experienced uncomplicated, drug-free births. 81% successfully completed treatment and had no new criminal charges following treatment, and 75% remained drug-free, in the study period. *Id.* The rate

[16]Accord Armstrong, et al., *Early Start: Obstetric Clinic-based Perinatal Substance Abuse Intervention Program,* J. PERINATOL. 23(1): 3-9 (2003); Jones, et al., *Patient Compliance and Maternal/Infant Outcomes in Pregnant, Drug-Using Women*, SUBSTANCE USE & MISUSE 37(11): 1411-1422 (2002); Jansson, et al., *Pregnancy & Addiction: A Comprehensive Care Model*, J. SUBST. ABUSE TREATMENT 13(4): 321-29 (July 1996).

of new HIV-positives was 75% lower for the treatment population than a control group. *Id.*[17]

2. Prosecuting Women Based On The "Results" of Their Pregnancies Makes it Perilous For Women To Carry Wanted Pregnancies To Term

A regime that threatens prosecution and punishment – for homicide – in the event of an adverse pregnancy "result" places an extraordinary burden on women who carry their pregnancies to term, one that can be lifted by terminating their pregnancies through abortion. The prospect that women will be induced to terminate wanted, healthy pregnancies is obviously inimical to the purposes that Chapter 707 is intended to serve; it raises obvious and grave constitutional difficulties, see *Casey*, 505 U.S. at 859 (making clear that constitutional "Liberty" recognized in *Roe v. Wade* includes a fundamental right to carry pregnancy to term); see also *Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632 (1974); *In re Smith*, 295 A.2d 238 (Md. 1972) (refusing to compel minor to undergo abortion); and its prospect is sufficiently real that groups as diverse as NARAL and the NRLC, which rarely find common cause on pregnancy-related issues, have united in opposition to proposals for far lesser criminal punishments than those Hawai`i imposes for homicide. See n.6, *supra*; cf. *To Stop Abortion by Addict, Her Brother Steps In*, N.Y. Times, Feb. 23, 1992, at 16 (reporting case of North Dakota woman who had an abortion after being charged with endangering a fetus).[18]

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[17]This evidence is part of a larger body of outcome-focused research establishing the broad effectiveness of treatment. *See, e.g.*, U.S. SUBSTANCE ABUSE & MENTAL HEALTH ADMIN., THE NATIONAL TREATMENT IMPROVEMENT EVALUATION STUDY (1997); NATIONAL ASS'N OF STATE ALCOHOL & DRUG ABUSE DIRECTORS, TREATMENT WORKS: A REVIEW OF 15 YEARS OF RESEARCH FINDINGS ON ALCOHOL AND OTHER DRUG ABUSE TREATMENT OUTCOMES (1990); Marwick, *Physician Leadership On National Drug Policy Finds Addiction Treatment Works*, 279 JAMA 1149 (1998) (reporting analysis of more than 600 peer-reviewed research articles). This evidence notwithstanding, "[o]ne of the most enduring myths about addiction is that treatment for these disorders is ineffective." NAT'L ACADEMY OF SCIENCES, INST. OF MEDICINE, DISPELLING THE MYTHS ABOUT ADDICTION (1997) 73.

[18]These dangers are magnified by the documented tendency to credit and act upon inaccurate, beliefs about the likelihood of adverse pregnancy outcomes. See Liesenfeld, et al., *Confirmatory Serologic Testing for Acute Toxoplasmosis and Rate of Induced Abortions Among Women Reported to Have Positive Toxoplasma Immunoglobulin M Antibody Titers*, AM. J. OB. & GYN. 184 (2): 140-145 (Jan. 2001) (women who misinterpret tests concerning toxoplasma undergo abortions at very high rates); Koren & Pastuszak, *Prevention of Unnecessary Pregnancy Terminations by Counseling Women on Drug, Chemical, and Radiation Exposure During the First Trimester,* TERATOLOGY 41(6):657-660

C. Expansive Interpretations of "Result" Offenses Heighten These Concerns

Although Appellee has emphasized that many of the judicial decisions rejecting prosecutions of mothers involved "conduct" offenses (*e.g.*, statutes outlawing drug distribution), while § 707-702 imposes punishment for a <u>result</u>, that distinction in fact <u>aggravates</u> these demonstrated public health dangers and makes the inference of legislative intent even more implausible (and constitutionally doubtful).

First, because the "result" at issue – neonatal death after live birth – can result from a limitless variety of pregnancy circumstances, conditions, and activities, virtually <u>every</u> pregnant woman in Hawai`i could be prosecuted under the trial court's interpretation of the manslaughter statute. See *Reinesto*, 894 P.2d at 736-37 (noting that, given the array of pregnancy activity and conditions that "can harm a fetus," if statute were extended "to prenatal conduct that affects a fetus in a manner apparent after birth – conduct that would be defined solely in terms of its impact on the victim – the boundaries of proscribed conduct would become impermissibly broad and ill-defined"); *Morabito,* 580 N.Y.S.2d at 845 ("'if the statute, in its present form, were to be applied to cases in which a pregnant woman carrying a viable fetus does some act that results in harm to that fetus or to a child born alive, it could include prosecution for failure to get prenatal care and excessive ingestion of alcohol as well as illegal drug use'") (quoting *Ohio v. Andrews*).[19] The regime would

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(1990); Koren, et al., *The Perception of Teratogenic Risk of Cocaine*, TERATOLOGY 46(6):567-71 (1992). The researchers noted that although "conclusive evidence for cocaine teratogenicity [propensity to harm fetuses] in humans is lacking, and even those believing the drug is teratogenic agree that the rates are quite small," respondents believed that "cocaine to be as hazardous as thalidomide," and reported that when asked "whether they would wish to terminate such pregnancy in their family, most physicians (56%) and the controls (70%) had a greater than 50% tendency to terminate," *id.*

[19]Accord *Hillman*, 503 S.E.2d at 613 (construction would have put women "at risk of a criminal indictment for virtually any perceived self-destructive behavior during her pregnancy, to wit: smoking or drinking heavily, using illegal drugs or abusing legal medications, driving while under the influence of drugs or alcohol, or any other dangerous or reckless conduct * * * Taken to its extreme, prohibitions during pregnancy could also include the failure to act, such as the failure secure adequate prenatal medical care, and overzealous behavior, such as excessive exercising or dieting").

necessarily place the State government in the business of regulating women, through the instrument of homicide law, for the entire duration of pregnancy.[20]

Moreover, the lone "result" for which Appellee even claims power to punish mothers – death immediately after live birth – is both exceptionally uncommon and fundamentally unpredictable. Thus, even with respect to activity widely recognized to seriously raise risks, adverse outcomes remain rare in absolute terms, CASA REPORT at 39 (citing estimates that smoking during pregnancy increases infant mortality rate from 8.0 per 1,000 to 12.2 per 1,000), and even in cases where pregnancy loss does in fact occur, medical experts find it exceedingly hard to identify which of multiple risk factors typically present contributed to the perinatal demise. WILLIAMS OBSTETRICS (G. Cunningham, et al., eds., 21st ed. 2001) 1073-75 (noting substantial percentage of perinatal deaths that are unexplained); see also n. *supra* (summarizing research findings of tendency of pregnant women and doctors to exaggerate probability of adverse outcomes).

Finally, a regime that treats women who lose babies immediately after live birth as potentially guilty of homicide, but imposes no punishment when a pregnancy is lost, for the same complex of reasons at the same developmental stage is at the least arbitrary. The same umbrella term, "perinatal loss," is often used to describe fetal demise at the late stages of pregnancy (stillbirth) and that which occurs soon after delivery – a recognition that many of the newborns who do not survive are born preterm and succumb to the same conditions that account for stillbirths. Indeed, for this reason, Hawai`i's public health officials have explained, the fact that a high proportion of the State's infant deaths occur soon after birth is regarded as a positive public health indicator. STATE HEALTH PLANNING & DEV. AG'Y, HAWAI`I HEALTH PERFORMANCE PLAN (2001) at X-8 ("in a health system which is providing excellent care for newborns with a low absolute infant mortality rate, a majority of the deaths which do occur should be in the first month of life").

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[20]Although this prosecution here emphasized allegations of drug use late in pregnancy, many of the gravest documented dangers involve conditions and activity in the early stages of pregnancy, when major organ formation occurs. In view of Appellee's position that live birth is the only relevant event for "personhood," nothing would prevent prosecution of a woman for a neonatal death attributed to "recklessness" months earlier, in her first weeks of pregnancy.

III. Neither Law Nor Medical Science Supports Singling Out Neonatal Deaths Attributed To Methamphetamine (Or Other Illicit Drugs) As "Homicides"

A. Risks Associated With Drug-Dependency Are Not Different In Kind or Magnitude From Other Pregnancy Risks

Although concerns about prosecution of women for incurring pregnancy risks <u>other</u> than those associated with ingesting illegal drugs are sometimes brushed aside as "slippery slope" arguments – or met with assertions that prosecutors can be "trusted" to limit themselves to "already unlawful" conduct such as drug use, these defenses miss the point. First, nothing in the text of the Hawai`i manslaughter provision permits a distinction between otherwise-unlawful and otherwise-lawful activity: the statute does not impose an enhanced penalty for drug use during pregnancy – or for drug use that contributes to fetal demise, it imposes a punishment for a "result" attributed to "reckless[ness]." See *Welch*, 864 S.W.2d at 283 ("it is inflicting * * * injury upon the child that makes the conduct criminal * * * not the criminality of the conduct *per se*"). Indeed, just as a twenty-year-old pregnant woman's ingestion of alcohol poses no greater <u>fetal</u> danger (and presumably is no more "reckless" in any statutorily relevant sense) than "legal" consumption by a pregnant twenty-one-year-old, statutory determination as to which drugs are "illegal" do not reflect any finding of particular danger to <u>fetuses</u> (indeed, the principal determinants of a substance's status under federal controlled substances law, see 21 U.S.C. § 812, relate to its potential for abuse and its potential to induce dependence).[21]

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[21] As the *Welch* court observed:

> The mother was a drug addict. But, for that matter, she could have been a pregnant alcoholic, causing fetal alcohol syndrome; or she could have been addicted to self abuse by smoking, or by abusing prescription painkillers, or over-the-counter medicine; or for that matter she could have been addicted to downhill skiing or some other sport creating serious risk of prenatal injury, which the mother wantonly disregarded as a matter of self-indulgence. What if a pregnant woman drives over the speed limit, or as a matter of vanity doesn't wear the prescription lenses she knows she needs to see the dangers of the road? * * * Where do we draw the line on self-abuse by a pregnant woman that wantonly exposes to risk her unborn baby?

864 S.W.2d at 283. Although there are strong reasons to expect prosecutions based on activity not independently unlawful to be rare, attempts are not unheard-of. Utah prosecutors, for example, charged a woman with homicide on the theory that her rejection of a doctor's recommendation that

With respect to methamphetamine particularly, criminal proscription (of un-prescribed use) is not based on any proven unique risk to fetuses. In fact, in March 2005, a United States Government-sponsored expert panel charged with providing "timely, unbiased, scientifically sound evaluation of human and experimental evidence of adverse effects on reproduction and development caused by agents to which humans may be exposed," CENTER FOR THE EVALUATION OF RISKS TO HUMAN REPRODUCTION, REPORT OF THE NTP-CERHR EXPERT PANEL ON THE REPRODUCTIVE & DEVELOPMENTAL TOXICITY OF AMPHETAMINE & METHAMPHETAMINE ii (Mar. 2005), completed a review of published studies concerning the developmental effects of methamphetamine and related drugs, see *id.*, concluding that, at present, "the data regarding illicit methamphetamine are insufficient to draw conclusions concerning developmental toxicity in humans," *id.* at 174; see *id.* at 163 ("There are no interpretable human data on methamphetamine developmental toxicity"); Accord Wouldes, et al., *Maternal Methamphetamine Use During Pregnancy and Child Outcome: What Do We Know?*, N.Z. MED. J. 117: 1206 (2004) (noting that "[w]hat little we know about the effects of 'methamphetamine-use during pregnancy on the developing child' comes from animal studies, a few human studies that have a number of methodological problems, and the recent cocaine literature" and concluding that "to avoid making unfounded judgements about the development of

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she undergo a caesarean section had caused the demise of the child she was carrying. See E. Goodman, *Doctors Orders, Court Orders,* Wash. Post, Mar. 24, 2004; see also Schacher, *Of Drugs and Death: Prosecutors Raise the Ante- Woman Accused of Contributing to Baby's Demise During Pregnancy,* L.A. Times, Oct. 1, 1986, at 1 (describing prosecution of woman for "failing to follow her doctor's advice to stay off her feet, to refrain from sexual intercourse, refrain from taking street drugs, and seek immediate medical attention, if she experienced difficulties with the pregnancy").

It has sometimes been asserted that a drug-dependent woman (unlike other pregnant women) has "notice" that drug possession be punished criminally, but that suggested grounds for distinction does not withstand scrutiny. First, the constitutional requirement of "fair warning" includes a right to advance notice "not only of the conduct that will subject him to punishment but also of the severity of the penalty that State may impose," *BMW of N. Am., Inc. v. Gor*e, 517 U.S. 559, 574 (1996) – an especially salient point when, as here, activity that ordinarily would give rise to a misdemeanor or minor felony charge becomes the basis for a homicide charge. Moreover, once the statute has been judicially construed to reach "recklessness" during pregnancy that contributes in a neonatal death, a future defendant could no longer protest that the risk-increasing condition or activity (or inaction) at issue was "lawful."

infants born to mothers using these drugs during their pregnancy, further research * * * is needed").[22]

There is at least a comparable basis for concern about the potential for serious adverse effects of numerous prescription drugs, including anticonvulsants, mood-stabilizers, benzodiazepines (a class which includes Valium, Librium and Xanax), as well as some antibacterial, anticoagulant, and antihypertensive drugs. See K. JONES, SMITH'S RECOGNIZABLE PATTERNS OF HUMAN MALFORMATION 495 (5th ed. 1997); J. BERSTEIN, HANDBOOK OF DRUG THERAPY IN PSYCHIATRY 407-25 (2d ed.1988); Whittle & Hanretty, *Prescribing in Pregnancy: Identifying Abnormalities*, 293 BR. MED. J. 1485 (1986); THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1859 (R. Berkow ed., 16th ed. 1992). Accutane, a popular anti-acne medication, has been called "the most widely prescribed birth-defect causing medicine in the United States."[23] Women who take fertility drugs and choose to carry three or more embryos to term often experience pregnancy loss and risk severe, lifelong harm to the children who survive.[24] "Women ages 35 and older who bear children are at

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[22]The federal panel explained that "the studies focused upon humans were uninterpretable due to such factors as a lack of control potential confounding factors and the issue of the purity and contaminants of the methamphetamine used by drug abusers." *Id.* at 177. It did note that data from rat studies raised "concern," *id.*, about "potential adverse perinatal outcomes * * * due to prenatal methamphetamine exposure in humans." *id.*

Although questions of causation are not squarely presented in this appeal – and efforts responsive to these calls for more rigorous research are now under way, see Masuoka, *UH-Manoa Gets Share of Meth Study Grant*, Honolulu Advertiser (Nov. 8. 2001) (reporting federally-funded five-year, six-site study of the effects of prenatal methamphetamine exposure), general legal rules governing scientific evidence would raise serious questions about whether current knowledge could support liability in a <u>civil</u> case, based on a claimed link between methamphetamine and a sudden death, one day after the hospital's discharge of mother and child, apparently without any noticeable symptoms of concern, let alone under the higher standard of proof applicable to criminal cases.

[23]E. Rafshoon, *What Price Beauty?, Boston Globe Magazine* (April 27, 2003), p. 15. Describing confirmed reports of 160 drug-affected births, the article explains that "[s]ome of these children died before they reached their first birthdays because of major organ system failures. The most seriously affected babies have been institutionalized. The rest live with a variety of severe defects, ranging from heart and central nervous system abnormalities to missing or malformed ears, asymmetrical facial features, and mental retardation." *Id.*

[24]Steinbock, *The McCaughey Septuplets: Medical Miracle or Gambling with Fertility Drugs?*, ETHICAL ISSUES IN MODERN MEDICINE 375, 376 (5th ed., J. Arras & B. Steinbock, eds. 1999)

a significantly increased risk of giving birth to low birthweight babies * * * and may have increased risk of stillbirth," even when controlling for diabetes, hypertension, and other complications associated with increased maternal age. See Tough, et al., *Delayed Childbearing and Its Impact on Population Rate Changes in Lower Birthweight, Multiple Birth, and Preterm Delivery*, 109 PEDIATRICS 399-403 (March 2002). So do those who suffer from hyperthyroidism and other diseases, see, *e.g.*, Atkins, et al., *Drug Therapy for Hyperthyroidism in Pregnancy: Safety Issues for Mother and Fetus*, 23 DRUG SAFETY 229 (2000), and women who work with chemicals or solvents, see *Johnson Controls*, 497 U.S. at 205 (noting that "[e]mployment late in pregnancy often imposes risks on the unborn child"); see also *Johnson Controls,* 886 F.2d 871, 914 & n.7 (7th Cir. 1989) (Easterbrook, J., dissenting) (noting that an estimated 15 to 20 million jobs entail exposure to chemicals that pose fetal risk); *CERHR – The First Five Years,* BIRTH DEFECTS RES. B, 74: 1,4 (2005) (summarizing research establishing adverse effects from exposure to 1-bromopropane, methanol, diethylhelxphthalate and other widely-used industrial chemicals); Khattak, et al., *Pregnancy Outcome Following Gestational Exposure to Organic Solvents: a Prospective Controlled Study*, 281 JAMA 1106-9 (1999) (finding that pregnant women exposed to organic solvents on the job have a 13-times greater risk of giving birth to babies with major malformations than those not exposed).

To take an especially important example, it is doubtful that there is any medical basis on which the homicide law, if it covered this case, could exclude infant deaths "resulting" from cigarette smoking – whose prenatal dangers are serious, unusually well-established, and widely known, see 15 U.S.C. § 1333(a)(1); 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). Experts regularly recognize tobacco as "the single most powerful determinant of poor fetal growth in the developed world":

("Even if they are born alive, 'super-twins' (triplets, quadruplets and quintuplets) are 12 times more likely than other babies to die within a year * * * * Many will suffer from respiratory and digestive problems. They are also prone to a range of neurological disorders, including blindness, cerebral palsy and mental retardation").

> Each year, smoking during pregnancy causes up to 141,000 miscarriages, 61,000 low birth weight babies, 4,800 perinatal deaths (including stillborn infants and infants who die shortly after birth) and 2,200 infant deaths from Sudden Infant Death Syndrome (SIDS), and may cause respiratory illness and delay a child's cognitive development. * * * * While the infant mortality rate among women who do not smoke during pregnancy is 8.0 per 1,000, it jumps to 12.2 per 1,000 among those who smoke. The risk of infant death is almost as high among lighter smokers (less than a pack a day) as among heavier smokers * * * * Smoking during pregnancy doubles the likelihood that a baby will be born underweight, after controlling for maternal alcohol and drug use, education and employment, and prenatal care. Even passive exposure of pregnant women to cigarette smoke can double the risk.* * * *The risk of SIDS is up to five times greater for infants born to women who smoke during the second trimester of pregnancy compared to those who don't smoke at all * * * * Children prenatally exposed to half a pack or more of cigarettes per day have been found to have intelligence scores significantly lower at ages three and four than those with nonsmoking mothers, even after adjusting for the mothers' education level.

CASA REPORT at 39 (footnotes and citations omitted)

Equally serious – and apparently far more prevalent in Hawai`I than methamphetamine exposure – are dangers from alcohol. See Chiriboga, *Fetal Alcohol and Drug Effects*, NEUROLOGIST 9(6): 267-279 (2003) ("Most adverse effects of prenatal drug exposure are self-limited, with catch-up growth and resolution of withdrawal and of prior neurobehavioral abnormalities noted over time. The exception is alcohol, which is linked to life-long impairments (i.e., mental retardation and microcephaly) and possibly cigarette-related behavioral effects"). Congress has expressly found that "children 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)"; that "up to 12,000 infants are born in the United States with Fetal Alcohol Syndrome, suffering irreversible physical and mental damage * * * and thousands more infants are born each year with * * * Alcohol Related Neurobehavioral Disorder (ARND), a related and equally tragic syndrome," 42 U.S.C. § 280f; and "though approximately 1 out of every 5 pregnant women drink alcohol during their pregnancy, we know of no safe dose of alcohol during pregnancy, or of any safe time to drink during pregnancy," *id.*; see also CASA REPORT at 40 ("While the infant mortality rate among women who don't drink during pregnancy is 8.6 per 1,000, [it] * * * * is much higher – 23.5 per 1,000 – among pregnant women who drink an average of 2 or more per day"). In a recent official report to the

Legislature, the Hawai`i Department of Health noted that:

> A 2003 study examining crystal methamphetamine use during pregnancy * * * found an unexpectedly low number (0.7%) of [newborn meconium] specimens [tested] positive for crystal methamphetamine, but that * * * * when meconium was tested for the * * * * metabolite * * * indicative of alcohol use, an alarming 17.1% of the mothers tested positive.

REPORT PURSUANT TO HOUSE CONCURRENT RESOLUTION NO. 141 (2004) at 3 (quoting Derauf, et al., *Agreement between Maternal Self-reported Ethanol Intake and Tobacco Use During Pregnancy and Meconium Assays for Fatty Acid Ethyl Esters and Cotinine*. AM. J. OF EPIDEMIOLOGY, 158:705-709 (2003)) (emphasis added).

Finally, nearly two decades' experience with claims about the effects of *in utero* cocaine exposure counsels that assumptions about the consequences of illegal drug use must be subject to staunchly skeptical scrutiny. As this Court is doubtless aware, many of the judicial decisions discussed above were rendered at a time of intense public agitation and concern, fueled by media accounts (and by a handful of studies that had appeared in the medical literature), suggesting that cocaine use during pregnancy had yielded a "lost generation" of severely, irretrievably damaged "crack babies."[25]

Although, responsible voices sought to strike the appropriately cautionary note, emphasizing that findings concerning biological effects were "contradictory," and that evidence of harm remained "slim," and "inconclusive," see, *e.g.*, Mayes, et al., *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 JAMA 406 (1992), it was not until 2001 that a comprehensive and systematic analysis, peer-reviewed and published in the JAMA, established the full extent to which claims and

[25] A review of reporting in 1986, when crack cocaine began to attract substantial media attention, revealed that "six of the nation's largest and most prestigious news magazines and newspapers had run more than one thousand stories about crack cocaine. *Time* and *Newsweek* each ran five 'crack crisis' cover stories.* * * [T]hree major network television stations ran 74 stories about crack cocaine in six months * * * * Fifteen million Americans watched CBS' prime-time documentary '48 Hours on Crack Street.'" L. GÓMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 14 (1997); Reinarman & Levine, *The Crack Attack: Politics and Media in America's Latest Drug Scare*, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 18, 20-24 (C. Reinarman & H. Levine, eds. 1997); see also D. HUMPHRIES, CRACK MOTHERS: PREGNANCY, DRUGS AND THE MEDIA 19-36 (1999).

"findings" about adverse developmental effects of cocaine exposure were untenable. See Frank, et al., supra, 285 JAMA 1613 (2001).

After performing a rigorous review of 75 different English-language studies addressing the effects of *in utero* cocaine exposure, Dr. Frank and colleagues determined that there 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."[26] Indeed, children born to women with drug problems face a different threat of harm: stigma based on myths perpetuated by media coverage. *Id.* at 1621 (condemning policies that "demonize" pregnant cocaine users). See Arendt, et al., "Open Letter to the Media," Feb. 25, 2004 (letter signed by leading experts, explaining that term "crack baby" – and "similarly stigmatizing terms, such as 'meth babies' and 'ice babies'" – are "scientifically inaccurate" and "dangerous") (http://www.jointogether.org/sa/files/pdf/sciencenotstigma.pdf).

The principal import of this research is not that methamphetamine ingestion during pregnancy is "safe," but rather that the risks presented by illegal drugs should not be assumed to be – and likely are not – different in kind or gravity from those associated with many other conditions and activities common in pregnancy. Yet the Court can safely assume that losses resulting from activity <u>more</u> strongly associated with pregnancy loss than methamphetamine ingestion will <u>not</u> be prosecuted as homicides. On that assumption, the trial court's construction of the statute must not stand. Such a regime is an affront to core constitutional principle: "the law [not] lay[] an unequal

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[26]Once other factors omitted from earlier research studies were taken into consideration, they found, cocaine exposure is <u>not</u> associated with physical growth retardation, *id.* at 1613; it has little or no impact on children's scores on assessments of cognitive development – in fact, the oldest group of children studied to date registered <u>no</u> effect from *in utero* cocaine exposure on any IQ scales or on academic achievement, *id.* at 1616. Upon their exhaustive review of the research, the only adverse effect found attributable to prenatal cocaine exposure was the potential for decreased emotional expressiveness, *id.* at 1620, and even that finding was offset by findings that "[f]ull-term cocaine-exposed infants show[] <u>better</u> arousal modulation than their unexposed counterparts." *Id.* at 1617 (emphasis added). See also Behnke, et al., *The Search for Congenital Malformations in Newborns With Fetal Cocaine Exposure*, PEDIATRICS, 107(5): E74 (2001) ("large-scale, blinded, systematic evaluation for congenital anomalies in prenatally cocaine-exposed children did not identify an increased number or consistent pattern of abnormalities").

hand on those who have committed intrinsically the same quality of offense," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and statutes must not permit "policemen, prosecutors, and juries to pursue their personal predilections," *Smith v. Goguen*, 415 U.S. 566, 575 (1974)

B. The Analogy Between Drug-Dependent Women and Those Intended to Be Prosecuted Under The Manslaughter Statute Misunderstands The Nature of Addiction

Not only is it unreasonable to single out ingestion of otherwise-unlawful drugs like methamphetamine for adverse treatment under the Hawai`i manslaughter statute – because it is no more an act of imperiling of a fetus than many other acts that almost certainly will not be prosecuted. In fact, drug-dependency presents, if anything, an especially weak case for criminal prosecution.

Whether or not, as the trial judge asserted,"most people" would find it "baffling" "[w]hy anyone would use [illicit drugs] knowing they are carrying a child," both law and medical science have long recognized that "addiction is not simply the product of a failure of individual willpower," AMERICAN MEDICAL ASS'N BOARD OF TRUSTEES, DRUG ABUSE IN THE UNITED STATES: A POLICY REPORT 236, 241 (1988), or a "character defect." INSTITUTE OF MEDICINE, DISPELLING THE MYTHS ABOUT ADDICTION Ch. 8. The vast majority of drug-dependent pregnant women – and drug-dependent men – cannot simply "decide" to refrain from drug use, and in most cases, their dependence cannot be overcome without professional treatment. See *Linder v. United States*, 268 U.S. 5, 18 (1925); *Robinson v. California*, 370 U.S. 660, 667 n.8 (1962); AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS - 4TH EDITION (1994) (specifying diagnostic criteria for "Psychoactive Substance Dependence"); DISPELLING THE MYTHS at 37 (summarizing evidence that addiction "causes long-lived alterations in the biochemical and functional properties of selected groups of neurons in the brain").[27]

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[27] Although there has been long-running debate within the treatment community as to the utility of describing addiction as "a disease," there is no dispute that there are biological and genetic dimensions, and many of the intuitive bases for distinguishing drug dependency from other medical conditions do not withstand scrutiny. For example, the etiology of many health problems – including hypertension, heart disease, and diabetes – also have important behavioral dimensions. See PHYSICIAN LEADERSHIP ON NATIONAL DRUG POLICY, POSITION STATEMENT (1997) 10-11

As a matter of law and medical science, a defining feature of the condition is that "the addict is under compulsions not capable of management without outside help." *Robinson*, 370 U.S. at 671 (Douglas, J., concurring); 42 U.S.C. § 201(q) ("'drug dependent person' means a person who is using a controlled substance * * * and who is in a state of psychic or physical dependence, or both"). Moreover, although Hawai`i is better than most, appropriate treatment is by no means universally available to pregnant women. And a climate of fear engendered by prosecutions like this one operates as a barrier to seeking help and compromises treatment professionals' ability to provide it.

Finally, contrary to pervasive stereotypes, which portray women in the grips of addiction as indifferent to the well-being of their children or their fetuses, the evidence clearly establishes that pregnant drug-dependent women do try to take responsibility for their life circumstances, making sometimes heroic efforts to stop or reduce their drug use and improve pregnancy outcomes. See S. MURPHY & M. ROSENBAUM 83-99 (describing women's efforts to improve nutrition, take prenatal vitamins, and avoid unhealthy environments and behaviors); see also S. BOYD, MOTHERS AND ILLICIT DRUGS: TRANSCENDING THE MYTHS (1999).

CONCLUSION

The judgment below should be reversed, and Ms. Aiwohi's motion to dismiss, granted.

Respectfully submitted,

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(noting that "no person eats fatty foods with the purpose of developing heart disease, * * * just as no drug user begins * * * with the hope of becoming addicted").