STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS	CRIMINAL DIVISION - ROOM 3
COUNTY OF MARION	)	CAUSE NO.: 49G03-1103-MR-014478

THE STATE OF INDIANA,)
)
Plaintiff,)
)
v.)
)
BEI BEI SHUAI,)
)
Defendant.)

(183) FILED
MAR 30 2011
Elizabeth A. White
CLERK OF THE MARION CIRCUIT COURT

BRIEF *AMICI CURIAE* OF AMERICAN MEDICAL WOMEN'S ASSOCIATION, NATIONAL WOMEN'S HEALTH NETWORK, NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM, WENDY CHAVKIN, MD, MPH, LESLIE HARTLEY GISE, MD, ANNE DRAPKIN LYERLY, MD, MARY FAITH MARSHALL, PhD, JEFFREY M. ROTHENBERG, MD, DOUGLAS DAVID SCUDAMORE, MD, NADA L. STOTLAND, MD, MPH, and LINDA L.M. WORLEY, MD IN SUPPORT OF DEFENDANT

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INTEREST OF *AMICI*

The AMERICAN MEDICAL WOMEN'S ASSOCIATION (AMWA) is an organization of women physicians, medical students and other persons dedicated to serving as the unique voice for the improvement of women's health and the advancement of women in medicine. The organization was founded in 1915, at a time when women physicians were an under-represented minority. As women in medicine increase in numbers, new problems and issues arise that were not anticipated. AMWA has been addressing these issues for 96 years.

The NATIONAL WOMEN'S HEALTH NETWORK (NWHN) was founded in 1975 to give women a greater voice within the healthcare system. NWHN is a membership-based organization supported by 8,000 individuals and organizations nationwide. NWHN seeks to improve the health of all women by influencing policy and supporting informed consumer decision-making. The NWHN aspires to a health care system that is guided by social justice and reflects the needs of diverse women.

The NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM (NAPAWF) was founded in 1996 and is dedicated to forging a movement for social and economic justice and the political empowerment of Asian Pacific American (APA) women and girls. NAPAWF's founding vision includes strengthening communities to reflect the social, political, health, and economic perspectives of APA women and girls including concerns related to reproductive justice, access to quality health care, immigrant and refugee rights, civil rights, violence against women, and economic empowerment.

WENDY CHAVKIN, MD, MPH, is a Professor of Clinical Public Health and Obstetrics and Gynecology at Columbia University, in the Heilbrunn Department of Population and Family Health and Department of Obstetrics-Gynecology at Mailman School of Public Health and College of Physicians and Surgeons at Columbia University. She has written extensively about women's reproductive health issues and done extensive programmatic and policy research related to pregnant women, punishment and barriers to care for over two decades. From 1994 to 2002, Dr. Chavkin was Editor-in-Chief of The Journal of the American Medical Women's Association.

LESLIE HARTLEY GISE, MD, is Clinical Professor of Psychiatry at the John A. Burns School of Medicine, University of Hawai`i. She has extensive experience teaching at the professional level regarding reproductive depression. She also reviews various medical publications and served on and chaired the American Psychiatric Association's Committee on Women Members from 1999-2002. She worked at a facility treating drug and alcohol addicted pregnant and parenting women for 8 years. She is past President of the North American Society for Psychosocial Obstetrics and Gynecology under ACOG.

ANNE DRAPKIN LYERLY, MD, MA, an obstetrician and bioethicist, is Associate Director of the Center for Bioethics and Associate Professor of Social Medicine at the University of North Carolina at Chapel Hill. She is nationally recognized for her research on ethical issues in reproductive health, which has been supported by the National Institutes of Health and the prestigious Greenwall Foundation Faculty Scholars Program. She served

on several national committees, including the Ethics Committee of the American College of Obstetricians and Gynecologists for seven years, which she chaired from 2007-2009.

MARY FAITH MARSHALL, PhD, FCCM, is Professor of Bioethics and Professor of Family Medicine and Community Health at the University of Minnesota where she was formerly Associate Dean for Social Medicine and Medical Humanities in the Medical School. She has extensive research and publications in the areas of reproductive ethics, coercive interventions in pregnancy, and policy approaches to perinatal substance abuse — a subject on which she has testified before Congress and in US District Court. She sits on the ethics committee of the American College of Obstetricians and Gynecologists. She is co-author of the Robert Wood Johnson Foundation Substance Abuse Policy Report, *An Ethical and Legal Policy Analysis of State Compelled Loss of Liberty as an Intervention to Manage the Harm of Prenatal Substance Abuse and Drug Addiction*. This national analysis finds treatment, not criminalization or other coercive interventions, to be the most effective approach to maternal and child health in perinatal substance abuse.

JEFFREY M. ROTHENBERG, MD, MS, is Vice Chair, in the Department of Obstetrics and Gynecology at the Indiana University School of Medicine, Vice President of the Indiana University Health Medical Staff, and Chair of the Indiana Section of the American College of Obstetricians and Gynecologists. He practices obstetrics and gynecology full time out of University Hospital at the Indiana University School of Medicine.

DOUGLAS DAVID SCUDAMORE, MD is Senior Instructor of Medicine at the University of Colorado School of Medicine and Medical Director of Hospitalist Services for the Network of Care at The Children's Hospital, Colorado. He is a hospital-based pediatrician and has extensive experience caring for hundreds of newborns each year, including many who are born to clinically depressed and drug-addicted mothers.

NADA L. STOTLAND, MD, MPH, is a psychiatrist and Professor of Psychiatry at Rush Medical College in Chicago. She is the author or editor of 5 books on the psychiatric aspects of women's reproductive health and health care. She served for 7 years as the Chair of the American Psychiatric Association (APA) Committee on Women. With her encouragement, the APA adopted a policy of non-punitive treatment for pregnant women with psychiatric problems. She is also a clinician expert in the care of women with pregnancy-related issues.

LINDA L.M. WORLEY, MD, is a Professor of Psychiatry with a secondary appointment in Obstetrics and Gynecology in the College of Medicine at the University of Arkansas for Medical Sciences (UAMS). She serves as a clinician in the Women's Primary Care Clinic in the Veteran's Hospital and teaches for the Department of Obstetrics and Gynecology at UAMS. She also is an adjunct Clinical Professor of Medicine at Vanderbilt University and a professional speaker teaching physicians how to better care for patients and themselves. She is involved nationally as the Secretary of the Academy of Psychosomatic Medicine, as a member of the Adult Council in the American Psychiatric Association, and as a past President of the Association for Academic Psychiatry. She received the American Psychiatric Association Gold Award for directing a model program for the nation for addiction treatment for women with their children.

SUMMARY OF ARGUMENT

Punishing pregnant women because of fetal injury is counterproductive to the important goal of protecting fetal well-being. Accordingly, under long-standing policies, the American Academy of Pediatrics (AAP), the American College of Obstetricians and Gynecologists (ACOG), the American Medical Association (AMA), the American Psychiatric Association and the American Psychological Association have opposed criminal prosecutions of pregnant women whose actions are believed to have harmed their fetuses.

In this case, a criminal prosecution is especially inappropriate. The harm to Ms. Shuai's fetus was by all accounts the unfortunate consequence of an attempt by Ms. Shuai to commit suicide. Like other states, Indiana recognized long ago that suicide is not a matter for punishment by law enforcement officials but a matter for treatment by psychiatric professionals. The prosecution should not be allowed to criminalize conduct that the General Assembly has expressly chosen not to criminalize.

Amici, who are experts in matters of maternal, fetal, children's and mental health, therefore urge the court to dismiss the charges against Ms. Shuai.

ARGUMENT

I. PREGNANT WOMEN SHOULD NOT BE PROSECUTED BECAUSE OF FETAL INJURY

More than twenty years ago, when concerns arose about the risks to fetal welfare from drug use by pregnant women, major medical associations considered how public policy should address the problem. Prosecutors in a number of states had leveled criminal charges against pregnant women for using cocaine or other illicit drugs, but many health professionals questioned whether a punitive approach made sense. The women were not acting out of a desire or intention to harm their fetuses. Instead, they were responding to the physiological drives of their drug addiction.

In June 1990, the American Medical Association (AMA) issued a report, "Legal Interventions During Pregnancy,"[1] in which it assessed the considerations involved in prosecutions of pregnant women. For a number of reasons, the AMA rejected any role for criminal sanctions (or civil liability) because of actions by pregnant women that might result in fetal injury.[2] Similarly, in a series of statements, the American College of Obstetricians and Gynecologists (ACOG) rejected criminal prosecutions of pregnant women because of fetal harm. In its most recent statement, "Maternal Decision Making, Ethics, and the

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[1] American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663 (1990) (hereinafter "AMA").
[2] Id. at 2670.

Law,"[3] the ACOG Committee on Ethics concluded in 2005 that "pregnant women should not be punished for adverse perinatal outcomes."[4] Other medical associations share the views of ACOG and the AMA. In its policy statement, the American Academy of Pediatrics (AAP) observed that "punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health."[5] And according to the American Psychological Association, "no punitive action should be taken against women on the basis of behaviors that may harm a developing fetus. [6]

The medical organizations cited several reasons for their positions:

A. *Punitive policies wrongly treat medical problems as criminal behavior.*[7]

When pregnant women put their fetuses at risk by using illicit substances or attempting suicide, the women do so because they have a medical problem.[8] If prosecutors respond by bringing criminal charges, they are in effect punishing the women for their medical conditions. Prosecution for drug abuse represents punishment for the disease of addiction;[9] prosecution in this case represents punishment for the illness of depression.

The proper response when pregnant women appear to threaten the welfare of their fetuses is to make available the psychological and other medical treatment that can address the women's condition. Indeed, these women overwhelmingly wish to be as healthy as possible for their fetuses, but often are frustrated by their inability to access appropriate medical services.[10]

In its analysis, the AMA specifically considered whether an absolute rejection of punitive sanctions against pregnant women for fetal harm might be too extreme a position to take.[11] In concluding that an absolute prohibition against prosecution is the correct policy, the AMA observed that when women engage in conduct that could harm their fetuses, they generally also are engaging in conduct harmful to themselves. Accordingly, as in this case, psychiatric treatment is the appropriate response.

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[3] American College of Obstetricians and Gynecologists Committee on Ethics, *Maternal Decision Making, Ethics, and the Law*, 106 Obstetrics & Gynecology 1127 (2005) (hereinafter "ACOG").
[4] Id. at 1135.
[5] American Academy of Pediatrics, Committee on Substance Abuse, *Drug Exposed Infants*, 86 Pediatrics 639, 641 (1990) (hereinafter "AAP").
[6] American Psychological Association, *Resolution on Substance Abuse by Pregnant Women*, (Aug. 1991). See also American Psychiatric Association, *Care of Pregnant and Newly Delivered Women Addicts*, Position Statement, APA Document Reference No. 200101 (Mar. 2001) (also opposing criminal prosecution of pregnant women for the use of substances that risk harm to fetuses, urging treatment as the appropriate response).
[7] ACOG, *supra* note 3, at 1133-34; AMA, *supra* note 1, at 2667-2668.
[8] American Psychiatric Association, *supra* note 6.
[9] ACOG, *supra* note 3, at 1133-34.
[10] Id. at 1134.
[11] AMA, *supra* note 1, at 2669.

B. *Punitive policies are counterproductive to the important goal of promoting fetal welfare because they will discourage many women from seeking medical care.*

When prosecutors adopt a policy of criminal punishment for pregnant women whose actions are believed to threaten fetal welfare, the prosecutors actually make it less likely that fetal welfare will be promoted.[12] Studies suggest that the potential for criminal liability discourages pregnant women from seeking prenatal medical care when they are at risk for prosecution.[13] As a result, physicians are less able to provide the kinds of treatment that could address the woman's medical condition and help avert fetal harm. Indeed, after South Carolina became the only state to permit prosecution of pregnant women for risking harm to their fetuses, the infant mortality in the state rose.[14] If this prosecution proceeds, other pregnant women who have engaged in conduct that might harm their fetuses will be reluctant to go to the hospital or a physician's office for fear that they will be reported to law enforcement officials. As a result, measures that could counteract the effects of the conduct will not be implemented, and the opportunity to prevent harm will have been lost.

Punitive policies can compromise fetal welfare in another way. Such policies may lead pregnant women to have unwanted abortions.[15] In the future, there may be other women who engage in conduct that could later be seen as harmful to their fetuses and lead to fetal death. Even if their fetuses are not yet viable, these women would be at risk for prosecution under Indiana's feticide statute for feticide or attempted feticide. Accordingly, they will recognize that the only way to avoid violation of the statute would be to have an abortion. The law should not force women to choose between having an abortion and risking felony feticide charges under Ind. Code § 35-42-1-6.

Prosecutions of pregnant women are problematic for a third reason. They not only are flawed in theory, they also are flawed in practice. Coercive or punitive measures have consistently been implemented in a discriminatory fashion. Studies have found that while harm to fetuses can occur from the action—or inaction—of pregnant women from all socioeconomic groups, legal proceedings typically are brought only against some women.[16] Whether in the context of a court order to require a cesarean section or a felony conviction for the use of illicit drugs, the law extends its reach overwhelmingly to poor or minority women. Marion County courts should not permit a policy that likely will single out for punishment only some classes in society.

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[12] Id. at 2667.

[13] AAP, *supra* note 5, at 641; ACOG, *supra* note 3, at 1134; American Psychological Association, *supra note* *. See also American College of Obstetricians and Gynecologists, Committee on Health Care for Underserved Women, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 Obstetrics & Gynecology 200 (2011) ("Seeking obstetric–gynecologic care should not expose a woman to criminal or civil penalties.").

[14] ACOG, *supra* note 3, at 1134.

[15] AMA, *supra* note 1, at 2667.

[16] Id. at 2668; ACOG, *supra* note 3, at 1134-1135. Ira J. Chasnoff, et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 New Eng. J. Med. 1202 (1990); Dwight L. Greene, *Abusive Prosecutors: Gender, Race and Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 Buffalo L. Rev. 737 (1991); Veronika E.B. Kolder, et al., *Court-ordered Obstetrical Interventions*, 316 New Eng. J. Med. 1192 (1987).

II. INDIVIDUALS SHOULD NOT BE SUBJECT TO PROSECUTION FOR SUICIDAL BEHAVIOR

At one time in this country, suicide and attempted suicide often were treated as crimes. Like other states, Indiana realized many years ago that suicidal behavior reflects the presence of psychiatric dysfunction rather than criminal intent. As the drafters of the Model Penal Code observed, people attempting suicide are more properly the subject of psychiatric care than law enforcement.[17] Accordingly, Indiana law does not penalize suicide or attempted suicide. Indiana law rightly recognizes that the person who attempts suicide needs psychiatric treatment, not criminal prosecution.

The prosecution of Ms. Shuai effectively represents an effort by the prosecution to ignore the clear intent of the Indiana General Assembly. The prosecutor's office is trying to criminalize the conduct of attempted suicide by pregnant women even though the legislature chose not to include the crime of attempted suicide in the Indiana Code. The prosecution may not substitute its view of what behavior the law should make criminal in place of the judgment of the legislature. If the Marion County Prosecutor believes that pregnant women should be incarcerated after a failed suicide attempt, then the proper forum for making its case is at the Statehouse, not in a courthouse.

CONCLUSION

Accordingly, *amici* respectfully request that this court dismiss the charges against Ms. Shuai.

Respectfully submitted,

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[17] Model Penal Code and Commentaries (Official Draft and Revised Comments) § 210.5, Comment 2 at 94 (American Law Institute 1980).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by United States first class mail, postage prepaid, upon the following counsel of record this 30th day of March, 2011.

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