STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	) SS	CRIMINAL DIVISION – ROOM 3
COUNTY OF MARION	)	CAUSE NO.: 49G03-1103-MR-01447

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

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF INDIANA IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INFORMATION

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INTERESTS OF *AMICI*

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, non-partisan organization of more than 500,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Through its Reproductive Freedom Project, the ACLU has long fought to ensure that women, including pregnant women, are accorded equal treatment under the law. The ACLU of Indiana is the ACLU's Indiana affiliate. With more than 4,000 members, the ACLU of Indiana has worked consistently to protect the civil liberties guaranteed Hoosiers under state and federal law, including women's rights to equality and reproductive freedom.

STATEMENT OF THE CASE

This case concerns the State's attempt to unconstitutionally expand the homicide statutes to permit the prosecution and punishment of *any* woman for *any* act or omission that jeopardized her health while pregnant, regardless of its effect on her embryo or fetus. On December 23, 2010, Ms. Shuai, a 34 year old pregnant woman who was suffering from a major depressive disorder, attempted to take her own life. Friends found her in time and persuaded her to get help. At the hospital, her doctors decided to monitor her health and wait before delivering her baby by cesarean section. Six days later, Ms. Shuai underwent cesarean surgery and delivered a premature newborn girl who, unfortunately, died four days later.

When Ms. Shuai, in a moment of sheer desperation, attempted suicide, she committed no crime. When she later, with the support of her friends, sought medical treatment to save both her life and her pregnancy, she committed no crime. If any man in

Ms. Shuai's position in Indiana had gone to the hospital that day seeking to save his life, the State would not consider him a criminal. Yet, in the face of this terrible tragedy, Ms. Shuai has been charged with both murder, *see* Ind. Code. Ann. § 35-42-1-1, for the death of her child, and with attempted feticide, *see* Ind. Code. Ann. 35-42-1-6, because she could have miscarried, even though she did not. The State thus seeks to hold Ms. Shuai criminally responsible for jeopardizing her own life and health, through the commission of desperate, but non-criminal acts of self-harm, and potentially send her to prison for the rest of her life, solely because she was pregnant when she attempted suicide. For the reasons set forth below, this Court should reject the District Attorney's attempt to radically expand and transform the homicide statutes into unconstitutional laws that turn desperate women into criminals for no reason other than that they intentionally put their health at risk while pregnant.

SUMMARY OF THE ARGUMENT

To construe the statutes at issue to permit Ms. Shuai's prosecution is to render them unconstitutional in numerous respects. First, permitting the State to prosecute and punish Ms. Shuai solely because of conduct that jeopardized her health while pregnant would impermissibly infringe on the fundamental constitutional rights of privacy, autonomy, and bodily integrity guaranteed by the Due Process Clause of the Fourteenth Amendment. Second, allowing the State to criminalize women for any act or omission that jeopardizes their health while pregnant constitutes sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Finally, such misuse of the criminal statutes violates due process because it fails to provide pregnant women with notice that virtually any act or omission (or medical condition) that could cause harm to

their health could result in criminal penalties, even if there is no adverse effect on their pregnancy. Such an unfettered delegation of authority to police and prosecutors to expand the homicide statutes would also undoubtedly result (as it has here) in inconsistent, ad hoc, and subjective enforcement of the criminal laws in violation of the Due Process Clause.[1]

I. The Use of Criminal Laws to Penalize Women Who Jeopardize Their Health While Pregnant Violates Their Constitutional Rights.

When Ms. Shuai attempted to kill herself she knowingly, albeit in a moment of sheer desperation and psychological distress, performed a lawful act that put her health and life in jeopardy.[2] The State seeks to re-write existing criminal law in order to inflict

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[1] Other courts have consistently rejected similar prosecutions, holding that prosecuting a pregnant woman for alleged or actual harm to her fetus is without legal basis, unconstitutional, or both. *See, e.g.*, *State v. Gethers*, 585 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1991) (dismissing child abuse charges brought for continuing a pregnancy to term despite a substance abuse problem on ground that such application misconstrues the purpose of the law); *Kilmon v. State*, 905 A.2d 306, 314 & n.3 (Md. 2006) (collecting cases) (reasoning "courts must attempt to construe statutes in a common sense manner," *id.* at 311, and reversing conviction for reckless endangerment based on ingestion of drugs during pregnancy); *Sheriff v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (holding that application of child endangerment statute to a pregnant woman dependant on illegal substances would violate plain meaning of statute, deprive woman of fair notice in violation of due process, and render statute unconstitutionally vague); *State v. Martinez*, 137 P.3d 1195, 1197-98 (N.M. Ct. App. 2006), *cert. quashed by* 161 P.3d 260 (2007) (refusing to apply child abuse statutes to punish cocaine-dependant woman for continuing pregnancy to term). *But see Whitner v. State*, 492 S.E.2d 777, 782 (S.C. 1997) (permitting application of child neglect statute to viable fetus despite contrary decisions in other states, which were based on "entirely different bodies of case law from South Carolina").

[2] Recognizing that suicide is at its core a public health issue, and one that cannot be solved through the use of the criminal laws, the Indiana legislature has not made it a crime for an individual to attempt suicide. Instead, Indiana has opted to make it a crime to intentionally cause another human being, by force, duress, or deception, to commit suicide, Ind. Code Ann § 35-42-1-2, or to knowingly assist another in committing suicide, *id.* § 35-42-1-2.5.

extraordinary penalties on Ms. Shuai *solely because she was pregnant when she put her health and life at risk*.[3] Had Ms. Shuai not been pregnant when, in a moment of desperation, she attempted suicide, she would not have been charged with any crime, let alone murder and attempted feticide; indeed, no man or non-pregnant woman *could have been* charged under *any* criminal law for precisely the same acts. Thus, to prosecute Ms. Shuai because of her pregnancy constitutes an unprecedented and unjustified state intrusion into her constitutional rights to privacy, liberty, autonomy, and equality.

A. The Prosecution of Ms. Shuai Deprives Her of Her Fundamental Constitutional Rights to Privacy, Autonomy, and Bodily Integrity Guaranteed by the Due Process Clause of the Fourteenth Amendment.

Perhaps the most fundamental of all the liberties guaranteed by the United States Constitution is the freedom from government intrusion, surveillance, and control over our bodies and the most intimate aspects of our lives. *See Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct"); *Thornburgh v. ACOG*, 476 U.S. 747, 772 (1986) ("Our cases long have recognized that the Constitution embodies a promise that a certain private

[3] This prosecution does not turn solely on the death of Ms. Shuai's daughter. Indeed, the State has charged Ms. Shuai with *attempted* feticide, as well as murder. *See* Ind. Code. Ann. 35-42-1-6. By definition, this means the State is charging Ms. Shuai with knowingly and intentionally committing any act that *could have* (but did not) result in the loss of her pregnancy. Thus, this prosecution demonstrates that the State believes it can use the criminal laws to punish a woman for any acts or omissions that may jeopardize her health while pregnant, *regardless of the outcome of her pregnancy*.

sphere of individual liberty will be kept largely beyond the reach of government."), overturned in part on other grounds by *Planned Parenthood v. Casey*, 505 U.S. 833, 882-84 (1992); *Olmstead v. United States,* 277 U.S. 438, 478 (1928) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . [t]hey conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men.") (Brandeis, J. dissenting). A woman does not surrender this most fundamental of liberties when she becomes pregnant.

Indeed, it has long been recognized that decisions about family, childbearing, and intimate relationships lie at the heart of the privacy right guaranteed by the Fourteenth Amendment. *See, e.g.*, *Lawrence*, 539 U.S. at 574 ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education") (citing *Casey*, 505 U.S. at 851) (O'Connor, J. concurring); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart" of the right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

Moreover, this fundamental right is not limited to intimate conduct and personal relationships. The Fourteenth Amendment also guarantees the right to be free from bodily restraint and physical confinement, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause"), even for the purpose of providing necessary medical care,

Parham v. J. R., 442 U.S. 584, 600 (1979) (holding all individuals possess "a substantial liberty interest in not being confined unnecessarily for medical treatment"); the right to make decisions about medical care, including to refuse life-saving care, *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278 (1990) ("The Fourteenth Amendment provides . . . that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment"); the right to work, *Truax v. Raich*, 239 U.S. 33, 41 (1915) ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."); and the basic right to travel and freedom of movement, *Williams v. Fears*, 179 U.S. 270, 274 (1900) ("Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the 14th Amendment"), among others.

However, if the prosecution of Ms. Shuai is allowed to stand, it would turn this entire body of case law on its head. If a woman can be criminally prosecuted for those acts or omissions (or medical conditions) that pose a threat to her health while pregnant, then the state's control over her life would be limitless: Virtually everything a pregnant woman does and does not do has an impact on the embryo or fetus growing inside her. The facts of this particular case—indeed, of any attempted suicide—are exceptional and undeniably tragic. But this is not just a case about suicide. By knowingly committing a lawful act that, first and foremost, put her health and her life at risk, Ms. Shuai did nothing different *under the law* than, for example, what millions of pregnant women do

who smoke throughout their pregnancy, or live with a smoker. Nor is Ms. Shuai any different than those millions of pregnant women who struggle with alcoholism or a drug dependency; who cannot afford regular or even infrequent pre-natal care; who exercise too much or too little or fail to maintain a healthy diet; or who, whether inside or outside the home, continue to work long hours, and to work at physically demanding and even dangerous jobs.[4] If this prosecution is allowed to proceed, then any one of these acts or omissions, which could be detrimental to a woman's health and therefore affect her pregnancy and the health of her child after birth, would be grounds for criminal prosecution. This means the woman who smokes throughout her pregnancy and suffers a

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[4] For example, to ensure optimal pre-natal development, pregnant women are urged to stop smoking entirely and immediately, *see* Heidi Eisenberg Murkoff & Sharon Mazel, *What To Expect When You're Expecting* 72-76 (4th ed. 2009); U.S. Department of Health and Human Services, *The Health Consequences of Involuntary Exposure To Tobacco Smoke: A Report of the Surgeon General*, 167-244 (2006); American College of Obstetricians and Gynecologists, *Your Pregnancy & Birth,* 54-55 (4th ed. 2005) [hereinafter ACOG], and to avoid contact with anyone who is smoking and who could thereby subject the embryo or fetus to contamination from second-hand smoke, Murkoff & Mazel, *supra*, at 76; U.S. Department of Health and Human Services, *supra* at 170, 244. Pregnant women are also urged to abstain from any alcohol consumption, as "the Surgeon General, ACOG and the American Academy of Pediatrics (AAP) advise that no amount of alcohol is safe for pregnant women." Murkoff & Mazell, *supra,* at 71; *see also* ACOG, *supra*, at 55-57. In the name of fetal safety, pregnant women are further urged to refrain from changing a cat litter box, consuming unpasteurized cheese or undercooked meat, and gardening without gloves in order to avoid contracting toxoplasmosis, Murkoff & Mazel, *supra*, at 80, and to wear rubber gloves and avoid inhaling when using household cleaning products in order to limit exposure to potentially harmful chemicals, *id.* at 80-81. Women are urged to take folic acid before and during pregnancy to protect the embryo from neural tube defects. *Id.* at 127. Pregnant women are also advised to ensure that their drinking water is free of lead, *id.* at 81-82, and to cut back on or give up caffeine, *id.* at 69-70; ACOG, *supra*, at 53. Gaining no less than 25, and no more than 35, pounds is now encouraged, ACOG, *supra*, at 77-78; Murkoff & Mazel, *supra*, at 166, as is regular but not too strenuous exercise, Murkoff & Mazel, *supra*, at 68-69; ACOG, *supra*, at 37-41. *See also*, Stothard et al., *Maternal overweight and obesity and the risk of congenital anomalies: a systematic review and meta-analysis,* 301 JAMA 636 (2009) (meta-analysis concluding that maternal obesity is associated with a heightened risk of spina bifida and an increased risk of structural anomalies).

miscarriage or gives birth to an infant that does not survive could be charged with murder; and even if she continues her pregnancy to term and gives birth to a healthy baby, she could be charged, as Ms. Shuai was here, with *attempted* feticide, simply because she knowingly engaged in conduct that *could* have caused a miscarriage.

The constitutional implications of this prosecution are thus enormous. By forcing women to surrender their most basic privacy rights simply by virtue of becoming pregnant, this prosecution places an immense and unconstitutional burden on a woman's right to be pregnant. What is more, it would subject pregnant women to an unprecedented level of government control over every facet of their lives—over where and with whom they live, where they work, what they eat, how often they go to the doctor, whether they always follow their doctor's advice, and more. For this reason, the prosecution of Ms. Shuai – and the extreme penalty and burden it imposes on any woman who becomes and chooses to remain pregnant – can only be upheld if it meets strict scrutiny, which it does not. *See, e.g.*, *Carey*, 431 U.S. at 686; *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *see* Section I.C., *infra*.

B. The Prosecution of Ms. Shuai Constitutes Discrimination on the Basis of Sex in Violation of the Equal Protection Clause of the Fourteenth Amendment.

To allow the prosecution of Ms. Shuai for knowingly putting her health at risk while pregnant would also have devastating effects on women's equality under the law.

The Constitution no longer permits the state to subject pregnant women to increased criminalization and control "in order to preserve the strength and vigor of the race." *Muller v. Oregon*, 208 U.S. 412, 421 (1908). This was not always the case. As the Supreme Court has recounted with disapproval, our country has a long and unfortunate

history of sex discrimination, which was—until fairly recently—sanctioned by our courts. *See, e.g.*, *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 729 (2003); *U.S. v. Virginia*, 518 U.S. 515, 531-33 (1996). In particular, courts routinely upheld state action that treated women more restrictively based on the view that the "proper discharge" of a woman's "maternal functions[,] having in view not merely her own health, but the well-being of the race," justified government intervention in her life. *Nev. Dep't of Human Res.*, 538 U.S. at 729 (internal quotations and citations omitted); *see also Muller*, 208 U.S. at 421-22 (upholding maximum hours laws intended to protect a woman's "proper discharge of her maternal functions," and emphasizing that "healthy mothers are essential to vigorous offspring"); *Breedlove v. Suttles*, 302 U.S. 277, 282 (1937) (preservation of race cited as a basis for exempting women from poll taxes, on assumption that "burdens necessarily borne by them" as mothers prevented them from earning a living); *and Virginia*, 518 U.S. at 536 n.9 (explaining that in the late 19th century women were excluded from higher education out of concern that "the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs").

However, such classifications may no longer be used to perpetuate the legal and societal inferiority of women. *Virginia*, 518 U.S. at 534; *see also Casey*, 505 U.S. at 896 (that women's reproductive capacities preclude "full and independent legal status under the Constitution . . . [is] no longer consistent with our understanding of the family, the individual, or the Constitution"); *Nev. Dep't of Human Res.*, 538 U.S. at 730, 736. It is now well settled that it constitutes purposeful gender discrimination for the state to place additional restrictions on women to which men are not subject in reliance on invalid

gender stereotypes, including stereotypes about women's roles as "mothers or mothers-to-be." *Nev. Dep't of Human Res.,* 538 U.S. at 736.

It is incontrovertible that Ms. Shuai's pregnancy was the *but for* cause of this prosecution.[5] However, because nearly every act, omission, or medical condition experienced by the pregnant woman affects embryonic or fetal health, *see* Section I.A., *supra*, to allow the prosecution of Ms. Shuai to move forward would subject women's liberty to limitless control by the government and reduce pregnant women to second-class citizens. This sort of paternalistic and discriminatory approach to the criminal laws, particularly where it results in such an extreme deprivation of liberty, is necessarily subject to heightened review under the Equal Protection Clause. *Virginia*, 518 U.S. at 533-34.[6] The prosecution of Ms. Shuai fails that heightened review. *See* Section I.C., *infra*.

C. The Prosecution of Ms. Shuai Is Neither Narrowly Tailored Nor Substantially Related to Advancing Any Legitimate Governmental Interest.

[5] As noted in n.2, *supra*, attempted suicide is not a crime in Indiana.

[6] Under the Supreme Court's decision in *Geduldig v. Aiello*, "it does not follow that *every* legislative classification concerning pregnancy is a sex-based classification." 417 U.S. 484, 496 n.20 (1974) (emphasis added). However, that decision, which found no constitutional violation where the State of California demonstrated "an objective and wholly noninvidious basis," *Geduldig*, 417 U.S. at 496, for its decision to exclude pregnancy coverage from its disability insurance program, does not preclude this Court from finding that singling out and criminalizing pregnant women, because of their pregnancy, constitutes sex discrimination. In *Geduldig*, the Court had reasoned that the exclusion was not "discrimination based upon gender as such," but that California had "merely remove[d] one physical condition-pregnancy-from the list of compensable disabilities." *Id.* at 496 n.20. To extend that reasoning here—and hold that, under *Geduldig*, pregnancy is an objective and wholly noninvidious "physical condition" that justifies disproportionate criminalization and punishment of women—simply stretches that decision too far.

This prosecution would, by permitting unfettered state control over pregnant women's lives, burden at a minimum the constitutionally protected decision to become and remain pregnant. Therefore, "it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Carey*, 431 U.S. at 686. This prosecution does not meet strict scrutiny. Nor does it meet the slightly less stringent heightened scrutiny standard that applies to sex discrimination. Given the discriminatory nature of this prosecution, it cannot be upheld unless this Court finds an "exceedingly persuasive justification" for the use of the criminal laws to control pregnant women's conduct and behavior. *Virginia*, 518 U.S. at 533. Under this heightened review standard, this Court must find that the discriminatory means employed (criminal prosecution under the homicide statutes) "serves important governmental objectives and . . . [is] substantially related to the achievement of those objectives." *Id.* (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)). Moreover, "discrimination on the basis of sex because of safety concerns is allowed only in narrow circumstances," and this Court must scrutinize any attempt to invoke maternal or fetal health to justify state-imposed restrictions on women, particularly such an extreme deprivation of liberty as is at issue here. *International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 202, 211 (1991) (noting that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal . . . opportunities"). As demonstrated below, to prosecute Ms. Shuai under these circumstances plainly fails constitutional scrutiny under the heightened standard applied to sex discrimination and thus *ipso facto* fails strict scrutiny, as well.

While maternal and fetal health are important, even compelling, state interests, they do not justify the prosecution here. The prosecution of Ms. Shuai for jeopardizing her health while pregnant, regardless of the outcome of her pregnancy, cannot be said to be substantially related, let alone narrowly tailored, to the achievement of those interests. Indeed, far from advancing fetal or maternal health, this prosecution undermines both.

Leading medical and public health organizations have long opposed the use of the criminal laws to punish a woman for allegedly harming their embryo or fetus and for allegedly causing an adverse pregnancy outcome because to do so is both ineffective and counterproductive, if the ultimate goal is maternal and fetal health. *See, e.g.*, Am. Coll. Obstetricians & Gynecologists, *Maternal Decision Making, Ethics, and the Law*, ACOG COMMITTEE OPINION, No. 321, Nov. 2005, at 9 ("Pregnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses."); Am. Med. Ass'n, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2670 (1990) (reporting AMA resolution that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate."); *see also* Am. Coll. Obstetricians & Gynecologists, *At-Risk Drinking and Illicit Drug Use: Ethical Issues in Obstetric and Gynecologic Practice*, ACOG COMMITTEE OPINION, No. 422, Dec. 2008, at 6 ("Putting women in jail, where drugs may be available but treatment is not, jeopardizes the health of pregnant women and that of their existing and future children."); Am. Psychiatric Ass'n, *Care of Pregnant and Newly Delivered Women Addicts: Position Statement*, APA Document Reference No.

200101 (2001) (policies of prosecuting pregnant women "are likely to deter pregnant addicts from seeking either prenatal care or addiction treatment, because of fear of prosecution and/or civil commitment"). As such, the State cannot establish, against the weight of medical evidence to the contrary, that the use of the criminal laws to punish Ms. Shuai for jeopardizing her health, thus violating her constitutional rights to privacy and to be free from discrimination, is *substantially related to advancing* any legitimate, much less compelling, state interest in fetal or maternal health. For this reason, this Court must dismiss the information.

II. Application of the Homicide Statutes to Women Who Jeopardize Their Health While Pregnant is Impermissibly Vague and Fails to Give Fair Notice of Prohibited Conduct.

Applying the homicide statutes to Ms. Shuai violates her constitutional right to due process of law because those statutes provide no notice to a pregnant woman that any act or omission that could harm her health, regardless of the outcome of her pregnancy, could ever be penalized under its provisions. Moreover, if the State were permitted to so radically expand the homicide statutes, the absence of any standards guiding such a broad application of the criminal laws would also invite arbitrary and discriminatory enforcement in violation of the Due Process Clause.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Klein v. State,* 698 N.E.2d 296, 299 (Ind.1998) (citing *Grayned v. City of Rockford,* 408 U.S. 104 (1972)). A criminal statute may be invalidated for vagueness for either of two independent reasons: (1) for failing to provide notice enabling ordinary people to understand the conduct that it prohibits, and (2) for the possibility that it

authorizes or encourages arbitrary or discriminatory enforcement. *See, e.g.*, *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999); *Healthscript, Inc. v. State,* 770 N.E.2d 810, 815-16 (Ind.2002). As applied to Ms. Shuai, prosecution under the chemical endangerment statute fails to satisfy either constitutional requirement.

Ms. Shuai is being prosecuted for committing a solitary act: Attempting suicide and thereby endangering her health and life. This is not a crime in the state of Indiana. Indeed, the provisions of the homicide statutes under which Ms. Shuai is charged—Ind. Code. Ann. §§ 35-42-1-1; 35-42-1-6—make no mention of attempted suicide, whether by a man or by a woman. Thus, for the prosecution to suggest here that the homicide statutes in fact amended Indiana law *sub silentio* to create the crime of "attempted suicide while pregnant" and thereby provide sufficient notice and warning to a pregnant woman of common intelligence that it is a crime *for her* to attempt suicide (even though it is perfectly lawful for everyone else) is simply absurd. *See Miller v. State*, 449 N.E.2d 1119, 1121 (Ind. App. 1983) (holding "a statute which is plain and unambiguous on its face may still violate due process when applied to a specific situation").

Moreover, were the State's interpretation to stand – despite the plain language of the law – there would be no discernible limit to what could constitute homicide or attempted feticide under the Indiana code. Nor would there be any standards or guidelines to prevent the arbitrary and discriminatory enforcement of these laws. For generations, numerous common conditions of and activities by pregnant women have been identified, rightly or wrongly, as posing some threat to embryonic or fetal wellbeing. *See* n.4, *supra*. As demonstrated in Section I, these guidelines only begin to illustrate the vast implications of allowing this prosecution to stand. For this reason,

multiple courts in other states have found unconstitutional the use of criminal laws to prosecute for alleged harm to their embryo or fetus.

For example, the Kentucky Supreme Court reached precisely this result in its recent ruling in *Cochran v. Commonwealth*, No. 2008-SC-000095-DG, 2010 WL 2470870 (Ky. June 17, 2010). That court dismissed the indictment of a pregnant woman who continued her pregnancy even though she struggled with a drug dependency under Kentucky's wanton endangerment of a child statute. *Id.* at *1. In so doing, the court recognized that such an application of the criminal laws "could have an unlimited scope and create an indefinite number of new crimes . . . a slippery slope whereby the law could be construed as covering the full range of a pregnant woman's behavior – a plainly unconstitutional result that would, among other things, render the statutes void for vagueness." *Id.* at *1. (citing *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993)) (internal quotations omitted). The court further explained:

> 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 . . . .
>
> *. . . The "case-by-case" approach suggested by the Commonwealth is so arbitrary that, if the criminal child abuse statutes are construed to support it, the statutes transgress reasonably identifiable limits; they lack fair notice and violate constitutional due process limits against statutory vagueness.*

Id. at *2 (quoting *Welch*, 864 S.W.2d at 283) (emphasis added).

Similarly, in overturning the convictions of two women convicted of reckless endangerment because they continued their pregnancies while struggling with drug addiction, the Maryland Court of Appeals, held:

> [I]f, as the State urges, the statute is read to apply to the effect of a pregnant woman's conduct on the child she is carrying, it could

> well be construed to include . . . a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature-everything from becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, to the continued use of legal drugs that are contraindicated during pregnancy . . . to exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child. Such ordinary things as skiing or horseback riding could produce criminal liability. If the State's position were to prevail, there would seem to be no clear basis for categorically excluding any of those activities from the ambit of the statute; criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be.

Kilmon, 905 A.2d at 311-12.

Because the State's virtually limitless construction of the homicide statutes here would necessarily result in the same lack of fair notice and would similarly encourage discriminatory and arbitrary enforcement of the criminal laws in violation of the constitutional due process guarantee against statutory vagueness, this Court must dismiss the information.

CONCLUSION

For the reasons set forth above, the prosecution of Ms. Shuai is unconstitutional and the information should be dismissed by this Court.

Dated: _____

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the below persons on this ___ day of March 2011, by first class U.S. postage, pre-paid:

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