

IN THE SUPREME COURT, STATE OF WYOMING

THE STATE OF WYOMING,)
Plaintiff, Respondent,)
)
vs.) Case No. S-20-0230
)
LEIGHA STEWART,)
Defendant, Petitioner.)

**[PROPOSED] BRIEF OF AMICI CURIAE DR. SHELLEY SPRINGER,
NATIONAL PERINATAL ASSOCIATION, ACADEMY OF PERINATAL HARM
REDUCTION, COLORADO COALITION TO PROTECT CHILDREN AND
FAMILY RIGHTS, DR. COURTNEY L. EVERSON, EXPECTING CHANCES,
HARM REDUCTION ACTION CENTER, MEGAN HILTNER, NATIONAL
ADVOCATES FOR PREGNANT WOMEN, NATIONAL WOMEN’S HEALTH
NETWORK, NATIVE AMERICAN COMMUNITY BOARD, DR. JENNIFER
REICH, AND DR. MARILYNN TEEL IN SUPPORT OF LEIGHA STEWART’S
PETITION FOR WRIT OF REVIEW**

Megan Hayes, WY Bar #6-2891
Attorney at Law
910 Kearney Street
Laramie, WY 82070
(307) 760-6258

Emma Roth*
National Advocates for Pregnant Women
575 8th Avenue, 7th Floor
New York, NY 10018
(347) 502-6785

* Ms. Roth has obtained a Rule 8 certificate from the Wyoming State Bar. A motion for her to appear *pro hac vice* in this matter is pending.

INTRODUCTION

Amici curiae are experts in and advocates for maternal, infant, and child health.¹ Amici are deeply concerned that permitting the prosecution of Petitioner Leigha Stewart to proceed will have profound, far reaching, and adverse effects. Though Ms. Stewart's prosecution entails the judicial expansion of W.S. § 6-4-403(b)(iv) in a manner rejected by the Wyoming Legislature and never before permitted by Wyoming courts, Amici wish to focus this Court's attention on the authoritative body of medical and public health evidence that the Legislature was aware of and sharply warns against such prosecutions as counterproductive and dangerous. While Ms. Stewart's Writ Petition sets forth the legal reasons why this Court should grant the Writ of Review or issue a Writ of Certiorari, Amici here give voice to the nation's leading maternal and child health professionals as to why the lower courts' unprecedented expansion of Wyoming criminal law jeopardizes the health and safety of women, infants, and children, and so requires correction.

ARGUMENT

The extension of criminal child endangerment statutes to prosecute pregnancy and drug use is uniformly and adamantly opposed by health professionals and their professional organizations. Such criminalization harms maternal, infant and child health by deterring women from accessing prenatal care, hospital delivery services, and drug treatment.

¹ Statements of interest for each amicus are included as an appendix.

I. Health Authorities Are Unanimous and Unequivocal in Their Opposition to the Extension of Child Endangerment Statutes to Address the Issue of Pregnancy and Drug Use.

The criminal prosecution of women for the circumstances or outcomes of their pregnancies poses grave risks to public health. Every major health authority recognizes that addressing pregnancy and drug use through the criminal law deters women from seeking prenatal, labor and delivery care and drug treatment, and thus endangers maternal, infant, and child health. Among these health authorities are the American Academy of Pediatrics²; American College of Obstetricians and Gynecologists (ACOG)³; American Medical Association (AMA)⁴; American Public Health Association (APHA)⁵;

² Am. Acad. of Pediatrics (“AAP”), Comm. on Substance Abuse, A Public Health Response to Opioid Use in Pregnancy, 139 PEDIATRICS (2017) available at <https://pediatrics.aappublications.org/content/139/3/e20164070> (last visited Nov. 2, 2020) (“A public health response, rather than a punitive approach to the opioid epidemic and substance use during pregnancy, is critical . . . The AAP reaffirms its position that punitive measures taken toward pregnant women are not in the best interest of the health of the mother-infant dyad.”).

³ Am. Coll. Obstetricians & Gynecologists (“ACOG”), Comm. on Health Care for Underserved Women, Comm. Opinion 473: Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist, 117 OBSTET. GYNECOL. 200, 2 (2011) (reaffirmed 2014) (“The use of the legal system to address perinatal alcohol and substance abuse is inappropriate. In states that mandate reporting, policy makers, legislators, and physicians should work together to retract punitive legislation and identify and implement evidence-based strategies outside the legal system to address the needs of women with addictions.”).

⁴ Am. Med. Ass’n, Policy, H-420.969: Legal Interventions During Pregnancy (1990) (reaffirmed 2016) (“Criminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate.”).

⁵ Am. Pub. Health Ass’n (“APHA”), Policy, No. 9020: Illicit Drug Use by Pregnant Women (Jan. 1, 1990) (“Reaffirms the Association’s view of use of illicit drugs by pregnant women as a public health problem, and recommends that no punitive measures be taken against pregnant women who are users of illicit drugs . . .”).

March of Dimes⁶; National Perinatal Association (NPA)⁷; American Psychiatric Association (APA)⁸; and American Nurses Association (ANA)⁹.

In recognition of these known dangers and the unequivocal position of the nation’s leading health professionals, the Wyoming legislature—like legislatures all across the country—has repeatedly refused to adopt proposed legislation that would expand criminal statutes to reach women who become pregnant and use drugs. Indeed, Tennessee is the only state that has enacted legislation authorizing the prosecution of pregnant women in response to pregnancy and alleged drug use, and then, only briefly. *See* Tenn. Code § 39-13-107 (amended by 2014 Tenn. Pub. Acts, ch. 820 §§ 1, 2, eff. Apr. 29, 2014). Tennessee’s experiment was short-lived because the demonstrated impact of the law on maternal, fetal, and child health was disastrous. Fearing arrest, Tennessee women avoided prenatal care and drug treatment and gave birth in unsafe

⁶ March of Dimes, Policies and Programs to Address Drug Exposed Newborns (Dec. 2014), <https://www.marchofdimes.org/materials/NAS-Policy-Fact-Sheet-December-2014.pdf> (last visited Nov. 2, 2020) (“The March of Dimes opposes policies and programs that impose punitive measures on pregnant women who use or abuse drugs. . .targeting women who used or abused drugs during pregnancy for criminal prosecution or forced treatment is inappropriate and will drive women away from treatment vital both for them and the child.”)

⁷ Nat’l Perinatal Ass’n, Position Paper, Substance Abuse among Pregnant Women (Jun. 2012) (“NPA oppose punitive measures that deter women from seeking appropriate care during the course of their pregnancies.”).

⁸ Am. Psychiatric Ass’n, Position Statement, Assuring the Appropriate Care of Pregnant and Newly-Delivered Women with Substance Use Disorders (Dec. 2016) (“The use of the legal system to address perinatal alcohol, tobacco, and other substance use disorders is inappropriate.”).

⁹ Am. Nurses Ass’n (“ANA”), Position Statement: Non-Punitive Treatment for Pregnant and Breast-Feeding Women with Substance Use Disorders (Mar. 15, 2017) (“ANA opposes laws that may result in punitive legal actions and result in incarceration of pregnant women because of substance use disorder.”)

conditions without medical assistance.¹⁰ Following an outpouring of opposition by the medical community, the Tennessee legislature allowed the law to sunset only two years after it took effect.¹¹

A proper understanding of why neither the Wyoming legislature, nor any of its courts have never before countenanced—and should not now—a prosecution for child endangerment predicated on pregnancy and drug use is rooted in this medical reality. The reasons why such prosecutions are so dangerous to maternal, infant, and child health are set forth below.

II. Prosecutions Like that of Ms. Stewart Thwart Rather than Promote Wyoming’s Interest in Promoting Maternal, Infant, and Child Health.

The State of Wyoming has a strong interest in protecting public health. The staggering negative consequences of criminalization of pregnancy and drug use, however, frustrate, rather than advance, this important state interest, a fact reflected in legislative action rejecting such an approach. The evidence is indisputable: pregnant women who desire drug treatment and prenatal care are dissuaded from seeking it when faced with the threat of prosecution and its attendant harms for themselves, their pregnancies, their future children, and their families.¹²

¹⁰ See Sheila Burke, *Doctors Applaud End of Tennessee’s Fetal Assault Law*, Associated Press (Apr. 1, 2016), <https://apnews.com/article/08ce8448799148bf852babadc33d1aef>.

¹¹ *Id.* (“[D]octors who treat addicts say Tennessee’s experiment backfired, encouraging women to avoid prenatal care and exposing their babies to more risks while failing to reduce the astronomical costs of treating newborns who suffer from drug withdrawal.”).

¹² See M.A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Permanent Drug Dependent Women*, 33 J. DRUG ISSUES 285 (2003) (Pregnant women who use controlled substances “fear and worry about loss of infant custody, arrest . . . , and incarceration for use of drugs.”); A.H. Schempf & D.M. Strobino, *Drug Use and Limited*

Prenatal care is one of the most effective tools for reducing low birthweight, prematurity, and infant mortality, including for infants born to women experiencing a drug dependency.¹³ Yet studies consistently establish that “fear of being reported to the police or child welfare authorities [is] related strongly to a lack of prenatal care” as pregnant women who fear criminal prosecution for their drug use are powerfully deterred from seeking prenatal care that might trigger non-medical interventions.¹⁴ This reluctance to engage with health professionals in turn leads to damaging health outcomes for these women and their infants. Accordingly, while prosecutors seek to protect maternal and child health by prosecuting pregnancy and drug use, such prosecutions

Prenatal Care: An Examination of Responsible Barriers, 200 AM. J. OBSTET. GYNECOL. 412.e1 (2009); M.L. Poland et al., Punishing Pregnant Drug Users: Enhancing the Flight from Care, 31 DRUG ALCOHOL DEPEND. 199 (1993); Southern Reg’l Project on Infant Mortality, A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and parenting Women 6 (1993); W. Chavkin, Drug Addiction and Pregnancy: Policy Crossroads, 80 AM. J. PUBLIC HEALTH 483 (1990).

¹³ See P. Moran et al., Substance Misuse During Pregnancy: Its Effects and Treatment, 20 FETAL MATERN. MED. REV. 1 (2009); A. El-Mohandes et al., Prenatal Care Reduces the Impact of Illicit Drug Use on Perinatal Outcomes, 23 J. PERINATOL., 354 (2003); Mishka Terplan et al., Methamphetamine Use Among Pregnant Women, 113 OBSTETRICS & GYNECOLOGY 1290 (2009) prenatal care has shown improvement in birth outcomes, even given continued substance abuse”); Southern Reg’l Project on Infant Mortality, A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women 6 (1993).

¹⁴ A H. Schempf & D.M. Strobino, Drug Use and Limited Prenatal Care, *supra*, n.12; *see also* R. Stone, Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care, 3 HEALTH & JUSTICE 1, 3 (2015) (“[F]ear of detention and punishment presents a significant barrier to care for mothers and pregnant women.”); Terplan et al., Methamphetamine Use Among Pregnant Women, *supra* n.13 (“Although the desire for behavioral change may be strong in pregnancy, substance-using women may be afraid to seek prenatal care out of fear of prosecution or child protection intervention.”); ACOG, Committee Opinion 473, *supra* n.3 (citing study showing that women who used drugs during pregnancy did not trust health care providers to protect them from criminal justice system and avoided or disengaged from prenatal care).

instead pose immense risks to the health and safety of both mothers and their infants. The threat of such prosecutions has even been recognized as likely to result in coerced and unwanted abortions.¹⁵ *See e.g., State v. Greywind*, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992) (dismissing child endangerment charges after pregnant woman obtained an abortion to avoid prosecution based on the claim that she inhaled vapors of paint fumes); *Johnson v. State*, 602 So. 2d 1288, 1296 (Fla. 1992) (“Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion.”).

The adverse health effects that flow from lack of adequate prenatal care are compounded by the acute and measurable stress pregnant women face when they fear prosecution, incarceration, and loss of parental rights.¹⁶ This stress can cause physical and chemical changes to a pregnant woman’s body that are associated with increased rates of infant mortality, low birthweight, preterm birth, hypertension, developmental delays, and congenital heart defects.¹⁷ These negative effects continue long after the

¹⁵ Although it is difficult to know how frequently abortions result from fear of prosecution, one study reported that two-thirds of the women surveyed who reported using cocaine during their pregnancies considered having an abortion. *See* Jeanne Flavin, A Glass Half Full? Harm Reduction Among Pregnant Women Who Use Cocaine, 32 J. Drug Issues 973, 985 tbl.2 (2002).

¹⁶ *See* Barbara A. Hotelling, Perinatal Needs of Pregnant, Incarcerated Women, **17 J. OF PERINATAL EDUC. 37 (2008) (showing negative mental and physical impacts of jail and prison conditions on women, and especially pregnant women).

¹⁷ *See* March of Dimes, Issue Brief, Stress and Pregnancy (2015), *available at* <https://www.marchofdimes.org/materials/Maternal-Stress-Issue-Brief-January2015.pdf>.

pregnancy ends, especially where mothers remain in jeopardy of prosecution, incarceration, or loss of custody of their children.¹⁸

Finally, the wrongful judicial expansion of Wyoming's child endangerment law to situations such as Ms. Stewart's threatens to inject uncertainty into accepted methods for medically treating pregnant women with substance use disorders. Such prosecutions are premised on the alleged harms drugs ingested during pregnancy pose to children when passed through the umbilical cord. But health providers, adhering to medical best practices, routinely prescribe and administer drugs to pregnant women to safely manage the effects of drug dependence and other medical conditions. Indeed, epidurals routinely given during labor typically contain opioids, as well as for pain relief from cesarean surgery—yet because the judicial expansion of the state's child endangerment statute fails to distinguish between the source and purpose of drugs ingested during pregnancy, health care providers must now concern themselves with the real possibility that their recommended treatment protocols could subject their patients to future criminal liability (and perhaps themselves to aider and abettor liability). This threatens to chill health care providers' ability to practice medicine in accordance with accepted standards of care, to the detriment of their patients' health and pregnancies.

In sum, the criminal prosecution of pregnancy and drug use undermines the very interests that the State here seeks to advance—the protection of maternal, infant, and child health. Not only is such prosecution contrary to legislative intent and all Wyoming

¹⁸ See Human Rights Watch, Am. Civ. Liberties Union, *You Miss So Much When You're Gone: The Lasting Harm of Jailing Mothers Before Trial in Oklahoma* (2018), *available at* <https://www.aclu.org/report/you-miss-so-much-when-youre-gone>.

judicial precedent, it lacks any justification from the perspective of public health and safety.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court grant Ms. Stewart's petition for a writ of review or issue a writ of certiorari.

RESPECTFULLY SUBMITTED this 9th day of November, 2020.

/s/ Megan Hayes
Megan Hayes, WY Bar #6-2891
Attorney at Law
910 Kearney Street
Laramie, WY 82070
(307) 760-6258

/s/ Emma Roth
Emma Roth*
National Advocates for Pregnant Women
575 8th Avenue, 7th Floor
New York, NY 10018
(347) 502-6785

* *Pro hac vice* application pending.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 9th day of November, 2020, the foregoing **BRIEF OF AMICI CURIAE** was served on all counsel of record via email delivery through this Court's electronic service system and US mail delivery addressed as follows:

Baend Buus
District Attorney's Office
310 W. 19th St., Ste. 200
Cheyenne, WY 82001

Jenny Lynn Craig
State of Wyoming
2320 Capitol Avenue
Cheyenne WY 82002

Marci Linde, 6-2837
Assistant Public Defender
309 West 20th St., Ste 2100
Cheyenne, WY 82002

 /s/ Megan Hayes _____
Megan Hayes

APPENDIX: STATEMENT OF INTEREST OF *AMICI CURIAE*

Shelley Springer, MD, F.A.A.P., J.D., MSc, Wyoming's first ever neonatologist, is the pediatrician at Casper Children's Center where she specializes in the care of premature babies, sick and well infants and children. Fully board certified and maintained by the American Board of Pediatrics in both General Pediatrics and Neonatal-Perinatal Medicine, Dr. Springer practiced as a neonatologist around the country until forming Casper Children's Center in 2014. Dr. Springer is a Fellow of the American Academy of Pediatrics (AAP), worked with the AAP as a consulting Epidemiologist in development of Clinical Practice Guidelines, and promotes evidence-based medicine in pediatrics through her NCQA federally recognized Patient Centered Medical Home. Dr. Springer is a graduate of the Medical College of Ohio, and completed a Pediatrics residency and a Neonatal-Perinatal Medicine fellowship at the Medical University of South Carolina from where she also holds a master's degree in Biometry and Epidemiology.

The **National Perinatal Association (NPA)** is comprised of healthcare providers, parents, caregivers, educators, and service providers—all driven by their desire to support and advocate for babies and families at risk across the country. NPA promotes evidence-based practices in perinatal care by following the latest research and collaborating on interdisciplinary position statements, guidelines, and journal articles. NPA gives voice to the needs of pregnant people, infants, their families, and their healthcare providers to have the greatest positive impact on perinatal care in the United States.

The **Academy of Perinatal Harm Reduction** is an interdisciplinary group of providers, parents, and public health advocates committed to stigma-free, evidence-based care for pregnant and parenting people who use substances. It works to improve the lives of pregnant and parenting people who use substances and celebrate their expertise, courage, and voices.

The **Colorado Coalition to Protect Children and Family Rights** advocates for humane policies for families affected by substance use. The coalition is comprised of a dozen Colorado organizations that work with families and on public health and drug policy. The coalition helped improve the Colorado child abuse and neglect law to make it less punitive and more responsive to family needs.

Courtney L. Everson, PhD, is the Associate Director of the Social Work Research Center at Colorado State University. Dr. Everson's research uses biosocial health frameworks, cross-systems evaluation, and community-based approaches to study and uplift maternal-infant health, child well-being, child maltreatment prevention, positive youth development, and family strengthening. Dr. Everson also serves on the Substance Exposed Newborn (SEN) Steering Committee, a subcommittee of the Colorado Attorney General's Substance Abuse Trend and Response Task Force, convened by Illuminate Colorado, and is the Co-Chair of the SEN Data & Research Work Group.

Expecting Chances provides unconditional birth and postpartum doula support to families in Denver, Colorado who are dealing with a substance abuse disorder during

pregnancy and two years postpartum. Expecting Changes supports families in their recovery goals through nonjudgmental collaboration during the perinatal period.

The **Harm Reduction Action Center (“HRAC”)** has served Colorado’s public health by working to reduce the harms associated with drug use since 2002. HRAC is concerned about the negative public health consequences of these prosecutions in Wyoming which could have regional impact, and joins this amicus brief to educate the court about the issues.

Megan Hiltner, MPH, CLC, is a Senior Consultant with John Snow, Inc. a leading global public health consulting organization. She has dedicated her career to improving the health and well-being of women, children, and families for over 18 years. She supports safety net providers to identify challenges to providing the best possible care for their clients, and recommends proven solutions that will help their programs succeed.

The **National Advocates for Pregnant Women (“NAPW”)** is a non-profit organization dedicated to securing the human and civil rights, health and welfare of pregnant and parenting women, and furthering the interests of their families. NAPW seeks to ensure that women do not lose their constitutional and human rights as a result of pregnancy, that addiction and other health and welfare problems they face during pregnancy are addressed as health issues, not as crimes; that families are not needlessly separated, based on medical misinformation; and that pregnant and parenting women have access to a full range of reproductive health services, as well as non-punitive drug treatment services.

The **National Women’s Health Network (“NWHN”)** was founded in Washington, DC, in 1975 to improve the health of all women by developing and promoting a critical analysis of women’s health issues. NWHN works to defend women’s sexual and reproductive health and autonomy against threats that seek to undermine women's ability to make the best decisions regarding their own health.

The **Native American Community Board (“NACB”)** serves Native Americans in its home community of the Yankton Sioux Reservation in eastern South Dakota and nationally. The NACB’s principles of equity, justice and fairness are the platform from which it strives to: empower the Yankton Sioux community (and Native Americans nationally); engage the community in identifying problems and solutions; and creatively implement solutions in ways that develop community leadership. The NACB prioritizes a women’s right to access services for chemical & substance dependence and is aware that access to those services are often impacted by racial, economic and social disparities. Because of those disparities that exist within Native American communities, Native women should not be prosecuted for not having access to services that others have access to assist with chemical dependency.

Jennifer Reich, PhD, is Professor of Sociology at the University of Colorado Denver. Her research examines substance use during pregnancy in the context of child protective services policies and underscores the importance of trust in public health initiatives, and she has spent decades teaching and writing on family, law, policy, healthcare, welfare, and public health. She joins this brief because these Wyoming prosecutions undermine trust in health care providers among pregnant women, which

further undermines efforts to provide much-needed prenatal care; legal actions like this do nothing to support the immediate or long-term health and welfare of women and children; and these prosecutions risk creating a chilling effect on women's relationships to healthcare and social service providers long after pregnancy, which will further undermine public health and impact children as they grow.

Marilynn Teel, PhD, has many years of experience in clinical social work and has provided mental health treatment to women recovering from substance use disorders. Dr. Teel's previous work focused on maternal child health and early intervention for young children with developmental challenges. Dr. Teel has expertise in families involved with Child Welfare and developed the Strong Start Wraparound model in Denver for mothers and their infants. Dr. Teel formerly served on the faculties of JFK Partners at the University of Colorado School of Medicine, and at the University of Denver Graduate School of Social Work. Currently, Dr. Teel advocates for public policies that keep mothers and their infants safely together in specialized treatment programs that address their complex needs.