



AlaFile E-Notice

41-CC-2021-000134.00

Judge: GILBERT P SELF

To: BRIAN MITCHELL WHITE
bamalawyer@gmail.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF LAUDERDALE COUNTY,
ALABAMA

STATE OF ALABAMA V. BLALOCK KIMBERLY RENAE
41-CC-2021-000134.00

The following matter was FILED on 3/22/2021 4:31:55 PM

D001 BLALOCK KIMBERLY RENAE
MOTION TO DISMISS
[Filer: WHITE BRIAN MITCHELL]

Notice Date: 3/22/2021 4:31:55 PM

MISSY HOMAN
CIRCUIT COURT CLERK
LAUDERDALE COUNTY, ALABAMA
200 SOUTH COURT STREET
FLORENCE, AL, 35630

256-760-5728



IN THE CIRCUIT COURT OF LAUDERDALE COUNTY, ALABAMA

STATE OF ALABAMA,

vs.

KIMBERLY RENAE BLALOCK,

DEFENDANT.

**CASE NO.
41-CC-2021-0134**

MOTION TO DISMISS THE INDICTMENT

Comes Now the defendant Kimberly Renae Blalock and moves this Honorable Court to dismiss the indictment against her on the following grounds. First, the indictment is insufficient in that it runs counter to the plain text and legislative history of Ala. Code § 13A-212-212(a)(2), as well as every prior interpretation thereof by the Alabama courts. Second, the indictment is insufficient in that the State advances an interpretation of Ala. Code § 13A-212-212(a)(2) that is unconstitutional under the United States and Alabama Constitutions.

Ms. Blalock was indicted under Ala. Code § 13A-212-212(a)(2), titled “Unlawful Possession or Receipt of Controlled Substances” (“the Unlawful Possession Statute” or “the Statute”). Section (a)(2) of the Statute provides:

A person commits the crime of unlawful possession of controlled substance if . . . [h]e or she obtains by fraud, deceit, misrepresentation, or subterfuge or by the alteration of a prescription or written order or by the concealment of a material fact or by the use of a false name or

giving a false address, a controlled substance enumerated in Schedules I through V or a precursor chemical enumerated in Section 20-2-181.

The statute further provides that violation thereof is a Class D felony. *Id.* § 13A-212-212(b).

First, as it appears this prosecution is designed to create a mechanism for addressing pregnancy and prescription pain medication, the Legislature never intended—and this Court must not now countenance—the use of the Unlawful Possession statute to criminally prosecute pregnant women, such as Ms. Blalock, who sought to renew longstanding, medically-necessary prescriptions to manage their chronic pain. In both enacting and amending the statute, the Legislature was solely focused on criminalizing prescription fraud through such means as providing a false identity or materially altering a written prescription. The Alabama Legislature has chosen not to address pregnancy and prescription drug use through this criminal law.¹ Moreover, no Alabama court has ever interpreted the Unlawful Possession Statute to authorize the criminal prosecution of a patient with an undisputed medical need for pain medication for seeking a prescription without affirmatively disclosing her pregnancy. In pursuing this prosecution, the State is thus advocating for an unlawful judicial expansion of Ala. Code § 13A-212-

¹ Indeed, as explained further in Section I(A), *infra*, the Alabama Legislature has soundly rejected the application of the criminal law to prescription drug use by pregnant women. In 2016, the Legislature amended the Chemical Endangerment of a Child Statute, Ala. Code § 26-15-3, to provide that pregnant women must *not* face criminal prosecution for prescription drug use during pregnancy.

212(a)(2) that runs counter to the plain text and legislative history of the Statute as well as every application thereof by the Alabama courts. Such an expansion requires this Court to usurp the legislative function in violation of the separation of powers in the Alabama Constitution.

Second, because the State seeks an expansion of Ala. Code § 13A-212-212(a)(2) that conflicts with the legislative text and history as well as all prior judicial decisions, Ms. Blalock had no notice of potential prosecution on this basis in violation of her due process rights. Further, a judicially-sanctioned prosecutorial expansion of the Unlawful Possession Statute to authorize prosecution of pregnant women would render the law unconstitutional in violation of the rights to due process, privacy, and equal protection under the Fourteenth Amendment to the U.S. Constitution and the parallel provisions of the Alabama Constitution, as well as the First Amendment right to be free from compelled speech.

The State's attempted judicial expansion of the Unlawful Possession Statute—in contravention of prior precedent and legislative history, and in violation of Ms. Blalock's rights to due process, privacy, equal protection, and freedom from compelled speech—cannot be allowed. Ms. Blalock cannot be prosecuted for a crime that falls outside the clear scope of the statute, and the indictment must be dismissed.

BACKGROUND

Ms. Blalock gave birth to a baby boy on September 29, 2020 at North Alabama Medical Center. She has taken hydrocodone for approximately four years to manage chronic back pain due to the degeneration of discs in her back. She received the hydrocodone pursuant to a lawful prescription by a licensed orthopedic surgery specialist, Dr. Dyas, of Russellville Orthopedics in Russellville, AL. Ms. Blalock experienced surgery complications approximately a year prior to her pregnancy and was then in a car crash approximately two months prior to her pregnancy—both of which worsened her existing and extreme back pain. Ms. Blalock did not take her hydrocodone prescription for the majority of her pregnancy, but resumed taking it when her pain became unbearable at around 34 weeks.

On February 23, 2021, Ms. Blalock was indicted under Ala. Code § 13A-212-212(a)(2). The indictment provides that she “did unlawfully obtain a controlled substance, to wit: Opiates, by fraud, deceit, misrepresentation or subterfuge or by alteration of a prescription or written order or by concealment of a material fact or by the use of a false name, in Lauderdale County, Alabama, in violation of Section 13A-12-212(a)(2) of the Code of Alabama, against the peace and dignity of the State of Alabama.” Indictment, CC-21-134 (Feb. 23, 2020).

ARGUMENT

The indictment must be dismissed for two reasons. First, the laws of Alabama do not allow prosecution of a pregnant women for seeking renewal of a longstanding, legal pain prescription to address a legitimate medical condition—chronic back pain—without affirmatively disclosing her pregnancy. Second, Ms. Blalock was without notice that continuing her pain prescription during her pregnancy violated the Unlawful Possession Statute or any other Alabama law, and the State's interpretation of the Statute is constitutionally infirm. If this prosecution were to proceed, Ms. Blalock would face violations of her rights to due process, privacy, and equal protection under the Fourteenth Amendment to the U.S. Constitution and the parallel provisions of the Alabama Constitution, as well as her First Amendment right to be free from compelled speech.

I. The Indictment Must be Dismissed Because it Runs Counter to the Plain Text and Legislative History of the Statute, as Well as Every Prior Interpretation Thereof by the Alabama Courts

A. The Prosecution Runs Counter to the Plain Text and Legislative History of the Unlawful Possession Statute

The plain text of the Unlawful Possession Statute makes no mention of the disclosure of pregnancy, and nothing in the legislative history of the Statute indicates that the Legislature ever intended for the statute to criminalize women, such as Ms. Blalock, who became pregnant and sought to renew their medically-necessary

prescriptions to manage their chronic pain. As the Alabama Supreme Court has recognized:

A basic rule of review in criminal cases is that *criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e., defendants.*

Penal statutes are to reach no further in meaning than their words.

One who commits an act which does not come within the words of a criminal statute, according to the general and popular understanding of those words, when they are not used technically, *is not to be punished thereunder, merely because the act may contravene the policy of the statute.*

No person is to be made subject to penal statutes by implication and *all doubts concerning their interpretation are to predominate in favor of the accused.*

Ex parte Ankrom, 152 So. 3d 397, 409 (Ala. 2013) (quoting *Ex parte Bertram*, 884 So.2d 889 (Ala. 2003)) (emphasis in original). Accordingly, Ms. Blalock may not be made subject to the Unlawful Possession Statute “by implication,” and any doubt concerning the interpretation thereof must be resolved in her favor. *Id.*

Further, it is the function of Alabama courts to “say what the law is, not to say what it should be . . . To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers.” *Id.* at 410 (quoting *Ex parte Pfizer, Inc.*, 746 So.2d 960, 964 (Ala. 1999)); *see also* Ala. Const. Ar. III, § 42(c) (“the judicial branch may not exercise the legislative or executive power”); *Ex parte T.B.*, 698 So.2d 127, 130 (Ala. 1997) (“It is well settled that, although there are occasions

when a court must correct or ignore obvious inadvertences in order to give a law the effect which was plainly intended by the legislature, the judiciary cannot and should not, in a republican form of government, usurp the legislative function.”) (quoting *Hamilton v. Smith*, 264 Ala. 199, 86 So.2d 283 (Ala. 1956)).

In first enacting the Unlawful Possession Statute as part of the Drug Crimes Amendments Act of 1987, the Legislature stated that the enacted text “specif[ied] the conduct to which this act applies.” *See* Ala. Act 1987-603, 1987 Ala. Laws 1047.² Importantly, the text did not “specify” that it applied to a patient’s failure to affirmatively disclose pregnancy when seeking or renewing a prescription. Instead, the plain text of the statute criminalizes obtaining a controlled substance through “fraud, deceit, misrepresentation, or subterfuge or by the alteration of a prescription or written order or by the concealment of a material fact or by the use of a false name or giving a false address.” Ala. Code § 13A-212-212(a)(2). Ms. Blalock’s act of seeking to renew a longstanding prescription for which she had an undisputed medical need plainly does not fall within the scope of the statute. The fact that Ms. Blalock was pregnant when seeking to renew her prescription does not convert her otherwise lawful behavior into a criminal act.

² Prior to 1987, Ala. Code 1975 § 20-2-70(a) provided that “any person who possesses, sells, furnishes, gives away, obtains or attempts to obtain by fraud, deceit, misrepresentation or subterfuge or by the forgery or alteration of a prescription or written order or by the concealment of material fact or by use of false name or giving a false address controlled substances . . . is guilty of a felony.” The Drug Crimes Amendments Act of 1987, codified at Ala. Code § 13A-12-212, repealed and replaced Ala. Code 1975 § 20-2-70. *See Wells v. State*, 93 So. 3d 155, 161 (Ala. Crim. App. 2011) (describing legislative history).

Although the Legislature amended the Unlawful Possession Statute in both 2012 and 2015, it never chose to address pregnancy and prescription drug use in the amendments. In 2012, the Legislature’s stated intent in amending the Statute was to “prevent and criminally sanction the practice of ‘smurfing.’” Ala. Act 2012-237, 2012 Ala. Laws 445 § 2(b), 2012 H.B. 363 § 2(b). “Smurfing” refers to the practice of “purchasing multiple quantities of pseudoephedrine and ephedrine compounds for the intent of combining or using such quantities for the purpose of manufacture or attempting to manufacture methamphetamine.” *Id.* The Legislature thus amended the statute to provide that a person commits the crime of unlawful possession of a controlled substance if, under the enumerated circumstances, he or she obtains a “precursor chemical[s] enumerated in Section 20-2-181.” Ala. Code § 13A-212-212(a)(2). The State has not alleged—nor could it—that Ms. Blalock committed any offense related to “smurfing,” as she has neither sought nor obtained precursor chemicals for manufacturing methamphetamine.

The Legislature amended the Unlawful Possession Statute for a second time in 2015 in order to demote unlawful possession from a Class C to a Class D felony. Ala. Act 2015-185, 2015 Ala. Laws 476 § 2, 2015 S.B. 67. Once again, the Legislature did not use its amendment as an opportunity to address pregnancy and prescription drug use. The State nonetheless advances a tortured interpretation of the Unlawful Possession Statute that departs from both the plain text and the

legislative history of the Statute. This Court must reject the State's attempt to create a judicial expansion of the Statute that would require it to usurp the legislative function in violation of Alabama's separation of powers. *See Ala. Const. Ar. III, § 42(c); Ex parte Ankrom*, 152 So. 3d at 410; *Ex parte T.B.*, 698 So.2d at 130.

Indeed, the Alabama Legislature has considered—and soundly rejected—the application of the criminal law to prescription drug use by pregnant women. In 2016, the Legislature amended the Chemical Endangerment of a Child Statute, Ala. Code § 26-15-3, to provide that pregnant women must *not* face criminal prosecution for prescription drug use during pregnancy. The amended statute provides, in relevant part:

No one shall violate Section 26-15-3.2, and no one shall be required to report under Chapter 14 of this title, the exposing of an unborn child to any of the following:

- (1) A prescription medication if the responsible person was the mother of the unborn child, and she was, or there is a good faith belief that she was, taking that medication pursuant to a lawful prescription.

Id. § 26-15-3.3. In passing this amendment to the Chemical Endangerment of a Child Statute, the Alabama Legislature provided explicit recognition that pregnant women can—and must—continue to seek prescription medications during their pregnancies, and must not face criminal penalties for doing so. This notion rests on the obvious medical reality that pregnant women do not stop experiencing pain or other medical symptoms the moment they become pregnant, and that failure to

obtain relief for such pain can in fact be more detrimental to the health of the woman and her neonate than any potential harm stemming from prescription drug use. Moreover, in enacting the amendment, the Legislature never provided that pregnant women must *affirmatively* disclose the fact of their pregnancies to the doctor from whom they are seeking a prescription or face prosecution. Yet here, the State attempts to impose precisely such criminal liability despite the complete lack of statutory authority.

Permitting this prosecution to move forward thus run counter to the plain text and legislative history of the Unlawful Possession Statute. It would have dangerous consequences for the health and safety of women, fetuses, and infants in Alabama. *See infra* Section II(B).

B. The State Advances an Interpretation of the Unlawful Possession Statute Never Before Recognized by Alabama Courts

The State here seeks to advance an interpretation of the Unlawful Possession Statute that has never been countenanced by Alabama courts. Specifically, no Alabama court has ever interpreted the Unlawful Possession Statute to authorize the criminal prosecution of a patient with an undisputed medical need for pain medication for seeking a prescription without affirmatively disclosing her pregnancy or any other known or unknown pre-existing health condition. Therefore, in pursuing this prosecution, the State is advocating for an unlawful judicial expansion of Ala. Code § 13A-212-212(a)(2) that runs contrary not only to the plain text and

legislative history of the statute, but also to every application thereof by the Alabama courts.

In all of the Unlawful Possession cases related to prescription fraud, defendants charged with violating the Statute had engaged in *affirmative fraudulent acts* that led them to receive a prescription to which they were not otherwise medically entitled. Here, by contrast, the State seeks to prosecute Ms. Blalock for a perceived omission—the failure to proactively disclose her pregnancy—when seeking to renew a prescription for which she had an undisputed medical need. Importantly, the State does not allege that Ms. Blalock did not, in fact, have a medical need—experiencing chronic pain that severely impaired her day-to-day functioning—nor does it dispute that a hydrocodone prescription would help to alleviate that pain. Moreover, the State does not contend that Ms. Blalock ever lied to her medical provider about her pregnancy or that she ever answered a question about her pregnancy in a dishonest fashion.

The indictment must be dismissed because the State does not allege that Ms. Blalock ever engaged in any affirmative fraudulent act, and accordingly the State cannot possibly establish that she acted with the requisite *mens rea* to carry out a crime.

The facts surrounding Unlawful Possession charges and convictions in prior Alabama cases stand in sharp contrast to those now before this Court. For example,

Cindy and Scott Karrick were charged with violating the Unlawful Possession Statute when they presented a pharmacist with a prescription for Vicodin that appeared to be altered because it authorized refills. *Karrick v. Johnson*, 659 So. 2d 77 (Ala. 1995). The pharmacist telephoned Ms. Karrick's doctor and confirmed that the prescription the doctor wrote did not authorize any refills. *Id.* at 78. After the Karricks attempted to refill the prescription at a second pharmacy, they were arrested. *Id.* Similarly, Paul Gossett was convicted under the precursor statute to the Unlawful Possession Statute after a pharmacist noticed that beneath a prescription for phenopen II was a prescription for preludin, a narcotic, written across a slash mark in a different color ink and in different handwriting. *Gossett v. State*, 451 So. 2d 437 (Ala. Crim. App. 1984). The pharmacist called the prescribing physician and verified that he had not written the prescription for preludin. *Id.* Therefore, unlike Ms. Blalock, both the Karricks and Mr. Gossett were charged and/or convicted for engaging in *affirmative* fraudulent acts—altering their doctors' written prescriptions. Numerous other Unlawful Possession cases involve defendants who were prosecuted for forging prescriptions or calling in false prescriptions. See, e.g., *State v. Patterson*, 552 So. 2d 181 (Ala. Crim. App. 1989) (defendant indicted for Unlawful Possession after he picked up a valium prescription from a pharmacy that had been called in by someone purporting to be a physician, and the pharmacist could not verify the prescription); *Alford v. State*, 381 So. 2d 203

(Ala. Crim. App. 1979) (defendant convicted under precursor to Unlawful Possession statute after defendant and his wife attempted to fill a forged prescription made out to a fictitious person and bearing the name of a physician who denied ever writing the prescription).

Unlawful Possession cases have also involved defendants who lied in explicit, affirmative terms to their physicians. For example, Gregg Norris was convicted of attempted possession of a controlled substance when he presented a doctor with what appeared to be a false address and failed to provide any form of identification when seeking a prescription. *Norris v. State*, 601 So. 2d 1105 (Ala. Crim. App. 1991). The doctor called several individuals to seek corroboration of Mr. Norris's story, but ultimately could not verify various aspects. *Id.* The doctor also noticed that the cough for which Mr. Norris was seeking a prescription appeared to disappear in the course of their conversation. *Id.* Mr. Norris, unlike Ms. Blalock, was thus charged with engaging in affirmative fraudulent acts—including presenting a false address and other false information to his physician—in order to seek a prescription for which he apparently lacked a legitimate medical need. The indictment here alleges no act of fraud or misrepresentation on the part of Ms. Blalock to her medical providers.

In sharp contrast to the defendants in the aforementioned cases, Ms. Blalock had an undisputed medical need for her hydrocodone prescription and lacked any

notice that continuing to seek treatment for her chronic pain could be a crime because she was pregnant or because of information she allegedly did not provide to her prescribing doctor. Moreover, unlike the defendants described above, Ms. Blalock did not engage in any type of fraudulent act in order to obtain her prescription, nor did she alter the legitimate prescription that she received. Instead, she accurately conveyed to her medical providers that she was experiencing severe pain and filled the valid prescription that she was given to help alleviate that pain. The State thus seeks to advance an interpretation of the Unlawful Possession Statute for which Ms. Blalock had no notice, that diverges from all prior Alabama court decisions, and that would constitute a legislatively-unauthorized expansion of the Statute.

II. The Indictment Must be Dismissed Because the Use of the Unlawful Possession Statute to Penalize Women Who Become Pregnant and Use Prescription Drugs Violates Well-Established Constitutional Rights

Permitting this prosecution to move forward would violate Ms. Blalock's right to due process of law under the Fourteenth Amendment to the United States Constitution as her actions are not criminalized under Alabama law, and she therefore lacked notice that becoming and remaining pregnant could result in criminal penalties. If this prosecution moves forward, she will also face the denial of her rights to privacy and equal protection under the Fourteenth Amendment and the parallel provisions of the Alabama Constitution, as well as her right to be free from compelled speech under the First Amendment.

A. The Use of the Unlawful Possession Statute to Penalize Women Who Become Pregnant and Use Prescription Drugs Violates the Constitutional Right to Due Process

As described above, the State advances a judicial expansion of the Unlawful Possession Statute that flies in the face of the plain text and legislative history of the Statute and that has never before been recognized by Alabama courts. The State's proposed interpretation of the Statute and its use in this case against Ms. Blalock violates the Due Process Clause of the Fourteenth Amendment in multiple ways.

First, judicially expanding this law would transform it from one that is constitutional on its face to one that is unconstitutionally vague because it fails to provide notice of what health conditions, employment, environmental factors or other circumstances must be affirmatively disclosed by patients before they can legally obtain medically-necessary and lawfully-prescribed medication. “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). A statute will be void for vagueness if it fails to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly” or if it encourages arbitrary and discriminatory enforcement by failing to provide explicit standards for those who apply them. *Id.*; see also *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Colautti v. Franklin*, 439 U.S. 379, 390 (1979); *United States v. Harriss*, 347 U.S. 612, 617 (1954) (“Void for vagueness

simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.”). “A statute challenged for vagueness must therefore be scrutinized to determine whether it provides both fair notice to the public that certain conduct is proscribed and minimal guidelines to aid officials in the enforcement of that proscription.” *Contreras v. State*, No. CR-19-0298, 2020 WL 3888332, at *3 (Ala. Crim. App. July 10, 2020) (citations omitted).

The unprecedented and expansive interpretation of the Unlawful Possession Statute that the State advances here fails to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned*, 408 U.S. at 108. As set forth in Section I(A), *supra*, the plain language and legislative history of the Unlawful Possession Statute give no indication that it criminalizes women, like Ms. Blalock, who become pregnant, choose to continue their pregnancies to term, and seek renewal of their medically-necessary and lawfully-prescribed medications to manage their chronic pain. The statute criminalizes obtaining a controlled substance through “fraud, deceit, misrepresentation, or subterfuge or by the alteration of a prescription or written order or by the concealment of a material fact or by the use of a false name or giving a false address.” Ala. Code § 13A-212-212(a)(2). Ms. Blalock’s act of seeking the

renewal of a longstanding prescription for which she had an undisputed medical need plainly does not fall within the scope of the statute.

Under the State's tortured reading of the Statute, no individual seeking or renewing a prescription to manage their chronic pain would know what actions or inactions could convert their otherwise lawful behavior into a criminal act. If the failure to affirmatively disclose pregnancy constitutes a violation of the Statute, so too could the failure to disclose other medical conditions or other circumstances that may increase certain actual or perceived risks of harm. For instance, a patient could face criminal prosecution for seeking a prescription to manage chronic pain without affirmatively disclosing that he or she has a history of seizure disorder or Long QT syndrome, both of which are contraindications to opioids. A patient could likewise face prosecution for failing to disclose a change in employment, such as becoming a long-distance truck driver, that a prescribing physician may view as relevant to the decision about whether to prescribe certain pain medications. The State's theory thus requires patients like Ms. Blalock to effectively read their physician's mind or to independently understand all of the varied and nuanced factors that a prescribing physician may consider relevant to a decision about which medications to prescribe. Under the State's expansive interpretation, the Unlawful Possession Statute is unconstitutional because individuals like Ms. Blalock "could not

reasonably understand that [their] contemplated conduct is proscribed.” *Harriss*, 347 U.S. at 617.

Second, even if this Court concludes for the first time that the Unlawful Possession Statute may reach the omission of information such as the lack of disclosure of pregnancy, Ms. Blalock lacked notice of this novel interpretation and thus cannot be prosecuted thereunder. *See Bouie v. Columbia* 378 U.S. 347, 353 (1964) (“an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law” that is forbidden by the Constitution); *see also Williams v. State*, 184 So. 3d 1064, 1072 (Ala. Crim. App. 2015) (“While such a [novel] construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal.”) (citation omitted). “[I]n the case of judicial interpretation of statutes, due process of law prevents the retroactive application of a changed construction of a statute, just as legislative enactments cannot be retroactively applied.” *Williams*, 184 So. 3d at 1072 (citation omitted); *see also Bouie*, 378 U.S. at 354 (“The fundamental principle that the required criminal law must have existed when the conduct in issue occurred . . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures.”). Therefore, “[i]f a judicial construction of a criminal statute is unexpected and indefensible by reference to the

law which had been expressed prior to the conduct in issue, it must not be given retroactive effect.” *Id.* Allowing the prosecution to proceed would be to punish Ms. Blalock for alleged conduct that was not criminal at the time it was committed, in violation of due process. Accordingly, the indictment must be dismissed.

B. The Use of the Unlawful Possession Statute to Penalize Women Who Become Pregnant and Use Prescription Drugs Violates the Constitutional Rights to Privacy, Liberty, Autonomy, and Bodily Integrity

Permitting the State to impose penalties on women because they choose to carry their pregnancies to term (when they would be guilty of no crime if they chose to have an abortion) impermissibly infringes on the fundamental constitutional right to procreative privacy. The State has indicted Ms. Blalock because she became pregnant and continued her pregnancy to term while taking a lawfully-prescribed medication to manage her chronic back pain. Had Ms. Blalock chosen to terminate her pregnancy, she would be immune from any prosecution. This prosecution thus constitutes an unjustified state intrusion into Ms. Blalock’s constitutional rights of privacy, liberty, autonomy, and bodily integrity.³

The fundamental right to procreate has long been protected by the Fourteenth Amendment to the United States Constitution. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Carey v. Population Services 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

³ Moreover, a state-imposed restriction on pain relief for certain classes of persons, such as pregnant women, would itself raise serious constitutional concerns.

privacy. *Carey*, 431 U.S. at 685; *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

Importantly, this constitutional guarantee of procreative privacy *specifically* protects women from measures that penalize them for carrying pregnancies to term. *See Planned Parenthood of E. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (explaining that the decision in *Roe v. Wade* “has been sensibly relied upon to counter” attempts to interfere with a woman’s decision to become pregnant or carry the pregnancy to term). The Court’s decision in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) stakes out this position clearly. There, the Court found unconstitutional a rule that required school teachers to take unpaid maternity leave beginning in their fifth month of pregnancy. The Court held that “[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of . . . protected freedoms,” particularly the “freedom of personal choice in matters of marriage and family life” protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 639-40. The question was not whether the policy’s “goals [were] legitimate, but rather, whether the

particular means to achieve those objectives unduly infringe upon the [woman's] constitutional liberty." *Id.* at 648.

It is unquestionable that the application of the Unlawful Possession Statute to Ms. Blalock imposes a heavy burden on her constitutionally-protected right to carry her pregnancy to term. Prosecuting women who renew prescriptions for medically-necessary drugs to manage chronic pain during pregnancy will actually pressure women to terminate those pregnancies. Indeed, courts have recognized that the application of penal statutes to pregnancy and drug use may "unwittingly increase the incidence of abortion." *Johnson v. State*, 602 So.2d 1288, 1296 (Fla. 1992).

The State is not permitted to coerce a woman to terminate her pregnancy. *See Casey*, 505 U.S. at 859 (citing with approval circuit court decisions finding state-compelled abortion unconstitutional under *Roe v. Wade*); *see also Arnold v. Bd. Of Educ. of Escambia County, Ala.*, 880 F.3d 305, 311 (11th Cir. 1989) (permitting a lawsuit against public school officials accused of coercing a young woman into having an abortion and holding that "[t]here simply can be no question that the individual must be free to decide to carry a child to term."). Even when the State asserts that it is acting to protect the fetus from harm allegedly caused by prenatal exposure to a controlled substance, pregnant women retain their right to the full protection of the Constitution. *See Ferguson v. City of Charleston*, 532 U.S. 67, 81-86 (2001) (holding that a hospital's policy of turning over prenatal drug-test results

to law enforcement for use in criminal prosecution violated the Fourth Amendment, notwithstanding the State’s asserted interest in protecting the fetus).

Thus, “where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on 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. Because these fundamental rights are implicated, the burden rests on the State to prove that criminally prosecuting and incarcerating Ms. Blalock because she continued her lawful prescription after she became pregnant and chose to remain pregnant furthers a compelling government interest. *Id.* at 685-86. The State here cannot establish that this prosecution furthers any legitimate state interest, much less a compelling one. These prosecutions are not simply ineffective (and cruel); they are counterproductive—they undermine any rational goal the State might have. 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, with concomitant negative health impacts for both women and their neonates.⁴ Surely, a law that

⁴ See, e.g., Am. Acad. of Pediatrics, Comm. on Substance Abuse, A Public Health Response to Opioid Use in Pregnancy, 139 PEDIATRICS (2017), <https://pediatrics.aappublications.org/content/139/3/e20164070> (“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.”); Am. Coll. Obstetricians & Gynecologists (“ACOG”), Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period (2020), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period> (“Confidentiality and trust are at the core of the patient-practitioner relationship. Policies and practices that criminalize individuals during pregnancy and the postpartum period create fear of punishment that compromises this relationship and prevents many pregnant people from seeking vital health services . . . [ACOG]

discourages pregnant women from seeking health care by making them vulnerable to arrest if they do and even encouraging them to have abortions does *nothing* to further any state interest.

Moreover, application of the Unlawful Possession Statute to Ms. Blalock could subject her to incarceration and separation from her infant and her other children—a status that undermines the goals of maternal and infant health and would jeopardize the health and wellbeing of her entire family.⁵ Misuse of a statute resulting in incarceration instead of medical care does the opposite of furthering any recognizable state interests in health, family life, and community. The State’s interpretation of the Statute, as applied to Ms. Blalock, undeniably burdens her privacy and liberty interests and fails to further any interest compelling state interest. It is unconstitutional and the indictment must be dismissed.

C. The Use of the Unlawful Possession Statute to Penalize Women Who Become Pregnant and Use Prescription Drugs Violates the Constitutional Right to Equal Protection

Judicially expanding the Unlawful Possession Statute to apply to pregnancy and the continued use of prescription drugs to manage chronic pain creates a law that unconstitutionally discriminates on the basis of sex in violation of the right to

opposes any policies or practices that seek to criminalize individuals for conduct alleged to be harmful to their pregnancy.”).

⁵ See Human Rights Watch & ACLU, “*You Miss So Much When You’re Gone: The Lasting Harm of Jailing Mothers Before Trial in Oklahoma* (Sept. 26, 2018), <https://www.hrw.org/report/2018/09/26/you-miss-so-much-when-youre-gone/lasting-harm-jailing-mothers-trial-oklahoma> (documenting the harms experienced by mothers and their minor children when mothers are incarcerated, even for brief periods).

equal protection of the laws guaranteed by both the United States and Alabama Constitutions. U.S. Const. amend. XIV, § 1; Ala. Const. Art. I §§ 1, 6, 13, 22. Application of this statute to patients who continue to use prescription drugs to treat chronic pain during pregnancy applies only to acts or omissions by women and not by men. In other words, the State’s proposed expansion of the Statute classifies on the basis of sex by creating a separate and unequal criminal penalty only for women who seek or renew a lawful prescription to treat their chronic pain. The State advances an interpretation of the Statute that will never be applied against a man.

The Fourteenth Amendment of the U.S. Constitution provides that no state may “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1; *see also* Ala. Const. Art. I §§ 1, 6, 13, 22. Statutory classifications that distinguish between men and women are subject to heightened scrutiny, meaning that the classification “must serve important governmental objectives and be substantially related to achievement of those objectives.” *Hibbs*, 538 U.S. at 722 (internal quotation marks and citations omitted). The burden rests entirely on the State to establish an “exceedingly persuasive” justification for the differential treatment of men and women that is “genuine, not hypothesized or invented” and that does “not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *United States v. Virginia*, 518 U.S. 515, 532-33 (1996). Justifications that rest on the “pervasive presumption

that women are mothers first” do not satisfy the State’s burden. *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003). Rather, a law violates the equal protection principle when, in reliance on stereotypes about women’s roles as “mothers” and “mothers-to-be,” it places additional restrictions on women to which men are not subject. *Id.* The State’s interpretation relies on precisely the type of stereotypes prohibited by the United States and Alabama Constitutions, reviving and reinforcing the notion that “[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother.” *Bradwell v. Illinois*, 83 U.S. 130, 142 (1873).

Here, Alabama has no justification for applying its expansive reading of the Unlawful Possession Statute only to women. Importantly, no recognized governmental objective is served through the State’s interpretation of the Statute. As described above, medical and public health authorities are unanimous that the imposition of criminal penalties on women who become pregnant and use controlled substances serves neither maternal nor children’s health. *See supra* Section II(B). Punitive policies like this one discourage women from obtaining appropriate medical care. This is detrimental both to the health of a woman and her pregnancy. Such outcomes are neither substantially nor rationally related to the State’s putative interest in protecting fetal health or potential life. Therefore, the State’s gender-

based classification is not substantially related to achieving an important governmental interest, and cannot constitutionally be used to prosecute Ms. Blalock.

Moreover, the State's proposed interpretation of the Unlawful Possession Statute places unique burdens on women throughout their reproductive lives, burdens that men will never face—the potential for criminal prosecution, conviction, and all the consequences that flow from being labeled a felon if a woman uses any amount of a prescription for which she has a valid medical need during pregnancy. These burdens put pregnant women in Alabama in a separate class of citizens. Police may scrutinize their medical records and prosecutors, judges, and juries can second-guess their behavior and health care decisions. This gender-based discrimination cannot withstand even the lowest level of equal protection scrutiny—rational basis—and cannot survive heightened scrutiny.

D. The Use of the Unlawful Possession Statute to Penalize Women Who Become Pregnant and Use Prescription Drugs Violates Their Constitutional Right to be Free from Compelled Speech

Finally, the State's interpretation of the Unlawful Possession Statute violates pregnant patients' First Amendment right to be free from compelled speech. “[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The compelled speech doctrine applies even when the speech in question is purely factual with no ideological

implications. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797-98 (1988) (holding that “cases cannot be distinguished simply because they involve[] compelled statements of opinion while here we deal with compelled statements of ‘fact’: either form of compulsion burdens protected speech”). The State’s expansive interpretation of the Unlawful Possession Statute constitutes a content-based regulation of speech because it “compel[s] individuals to speak a particular message”—namely, to disclose their pregnancy when seeking or renewing a prescription for pain medication, irrespective of whether their physician inquires as to their pregnancy status. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (“[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.”). “As a general matter, such laws ‘are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.’” *Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2371 (quoting *Reed*, 135 S. Ct. at 2226).

As described above, the State cannot establish that the criminal prosecution of women who carry their pregnancies to term and seek to renew their preexisting, medically-indicated pain prescriptions furthers any legitimate state interest, much less a compelling one. *See supra* Section II(B). Such prosecutions undermine rather

than advance the State's presumed goal of protecting the health of fetuses and children. *See id.* Nor can the State establish that imposing criminal penalties is a narrowly-tailored means of serving its putative interests. To truly advance the health and safety of pregnant women and their neonates, the State must enforce measures that further patient-physician confidentiality and trust, not those that create fear of arrest, prosecution, and incarceration, and thus deter pregnant women from seeking vital health services.

CONCLUSION

For the reasons set forth above, the indictment against Ms. Blalock must be dismissed.

Respectfully Submitted this 22nd day of March, 2021.

s/ Brian M. White
Brian M. White
White, Oakes, Griffith, & Iverson
P.O. Box 2538
801 Church St. NE, #9
Decatur, Alabama 35601

Emma Roth*
Dana Sussman*
National Advocates for Pregnant
Women
575 Eighth Avenue, FL. 7N
New York, New York 10018

* Ms. Roth's motion to appear *pro hac vice* in this matter is pending.

* Ms. Sussman's motion to appear *pro hac vice* in this matter is pending.

CERTIFICATE OF SERVICE

This document has been filed electronically and served on opposing counsel pursuant to the Administrative Procedure for Filing Signing and Verifying Documents by Electronic Means in the Alabama Judicial System. Any opposing counsel or pro se parties not registered to file electronically were served with this pleading via the U.S. mail, postage pre-paid, to the litigant's address of record in the Circuit Clerk's office.

Dated this the 22nd day of March, 2021.

/s/ Brian M. White
Brian M. White WHI082