No. PD-0401-09

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

THE STATE OF TEXAS, PETITIONER,
v.
AMBER LOVILL, RESPONDENT.

PETITION IN CAUSE NO. 09-CR-5690-A FROM THE 28TH DISTRICT COURT OF NUECES COUNTY, TEXAS, AND CAUSE NO. 13-07-668-CR, IN THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS.

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE AMERICAN CIVIL LIBERTIES UNION OF TEXAS, LEGAL MOMENTUM, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NATIONAL WOMEN'S LAW CENTER, AND THE SOUTHWEST WOMEN'S LAW CENTER IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTERESTS OF *AMICI CURIAE* [1]

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 Women's Rights Project and 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 Texas is the ACLU's Texas affiliate. With more than 13,000 members, the ACLU of Texas has worked consistently to protect the civil liberties guaranteed Texans under state and federal law, including women's rights to equality and reproductive freedom.

Legal Momentum (formerly NOW Legal Defense and Education Fund) is the nation's oldest legal defense and education fund dedicated to advancing women's rights and to ensuring economic and personal security for all women and girls. Throughout its nearly forty-year history, as lead counsel and as *amicus curiae*, Legal Momentum has worked to enforce laws to eliminate gender discrimination, including pregnancy discrimination, so as to assure women's equality.

The National Partnership for Women & Families is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for

[1] No fee has been paid, or is to be paid, for the preparation and submission of this brief.

women, broad access to quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership firmly believes that a woman's reproductive capacity should never be used to limit her liberty or autonomy, or to curtail her right to equal treatment under the law. As a result, the National Partnership has a long history of promoting and defending women's right to non-discrimination on the basis of pregnancy by filing *amicus curiae* briefs in major cases at the federal and state levels.

The National Women's Law Center is a Washington D.C.-based nonprofit organization with a longstanding commitment to equality on the basis of sex, and the constitutionally protected freedoms of liberty, privacy and bodily integrity. The Center advances and supports both state and federal policies that promote access to health care, including drug treatment. The Center has previously submitted *amicus* briefs in South Carolina, Kentucky, New Mexico and Maryland opposing discrimination against pregnant women and the criminalization of substance use during pregnancy.

The Southwest Women's Law Center is a nonprofit public interest organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center seeks to promote access to comprehensive reproductive health care information and services and to eliminate discrimination

and disparities in access to such services and information based on gender. The Southwest Women's Law Center successfully represented Cynthia Martinez in the Supreme Court of New Mexico in 2007, in a case involving Ms. Martinez' prosecution for child abuse because she ingested drugs while pregnant.

This case raises important questions about a woman's constitutional right to equality, and freedom from punishment on the basis of pregnancy. The proper resolution of this case is, therefore, a matter of substantial interest to the *amici* and their members.

STATEMENT OF THE CASE

This appeal raises the narrow question whether the State should be required to respond to Ms. Lovill's claim that it selectively prosecuted her because of her pregnancy. Specifically, Ms. Lovill argues that the State punished her more harshly than other probationers when it sought to incarcerate her because she was pregnant and that this constitutes sex discrimination. The Court of Appeals correctly held that Ms. Lovill raised a valid claim of pregnancy discrimination and, without reaching a final judgment on her claim, remanded for full consideration by the trial court. Specifically, the Court of Appeals found:

> Although a trial court has discretion to disregard uncontradicted testimony that it finds incredible and unworthy of belief, *see Ex parte Peterson*, 117 S.W.3d at 819 n. 68, we believe that to reach the finding it did, the trial court must have disregarded all of the evidence presented. In this case, the trial court was not free to disregard the overwhelming evidence presented at the hearing showing a discriminatory effect and purpose, which allowed only a single conclusion. We hold that the fact finding is not supported by the record. *See id.*; *Ex parte Adams*, 768 S.W.2d at 288. The evidence shows (1) that Lovill was treated differently than others who violated the terms of their probation but were not pregnant, and (2) that her pregnancy was a motivating factor in the decision to prosecute.

Lovill v. State, No. 13-07-0068-CR, slip op. at 23 (Tex. App. – Corpus Christi – Edinburg, Dec. 22, 2008). Based on the "overwhelming evidence," the Court of Appeals held that the trial court erred in deciding that Ms. Lovill "did not meet her burden" of establishing that she suffered unequal treatment on the basis of gender. *Id.* It remanded so that, in the first instance, the trial court could "require the State to respond" to Lovill's claim; "determine the appropriate level of scrutiny that

applies[;] . . .take evidence on the application of that level of scrutiny in this case"; and rule on "whether the State meets its burden of proof to justify its discriminatory treatment of Lovill." *Id.* at 25-26.

Amici urge this Court to affirm that decision for all the reasons fully addressed in Respondent's Brief. Moreover, while affirmance does not require this Court to reach the merits of the sex discrimination claim, because this Court has not previously addressed a sex discrimination claim in this context, *Amici* submit this brief to clarify the correct analysis and application of the Texas Equal Rights Amendment in this case.

ISSUES PRESENTED

Amici submit this brief in support of Respondent on all seven questions presented for discretionary review. *See* Respondent's Brief. However, *Amici* address only the constitutional issues raised by Questions Five and Six. With respect to these questions, *Amici* bring extensive expertise in the relevant law, and have an interest in ensuring the correct analysis and resolution of questions directly implicating the constitutional rights of pregnant women.

Question Five: Whether adverse State action against Ms. Lovill, based on stereotypes about the mental and physical capacities of a pregnant woman, constitutes gender-based discrimination.

Question Six: Whether the State has carried its burden of establishing that a genuine concern for maternal or fetal health was the compelling interest motivating its decision to selectively sanction and imprison Ms. Lovill, and whether such punitive treatment was the only way to achieve those governmental interests.

STATEMENT OF FACTS

In 2005, Amber Lovill pled guilty to the crime of felony forgery and received a sentence of two years in a state jail, suspended pending completion of three years in community supervision.[2] Slip op. at 2. In July 2007, during a routine report to her community supervision officer, Mr. Vargas, Ms. Lovill submitted to a drug test (a condition of her probation) and also informed him that she was pregnant. Mr. Vargas received the positive results of the drug test later that day, but he did not call Ms. Lovill back to discuss the matter then, or at any time before filing a violation report. (Rep.'s R. 32:9-33:1, 35:7-13, Oct. 4, 2007).[3] Instead, he discussed her pregnancy and positive drug test with his supervisor and, with his supervisor's approval, filed a violation report on July 16th, which was swiftly processed as a motion to revoke her probation. (Rep.'s R. 11:2-7, Oct. 4, 2007 (explaining that a violation report is filed with the understanding that once it "is processed, it turns into a motion to revoke")). Within two days, Mr. Vargas phoned the warrant officer to expedite having Ms. Lovill "arrested since she is consuming methamphetamines and is five months pregnant." (Rep.'s R. 29:19-31:5; 37:16-38:5, Oct. 4, 2007).

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2 "Community supervision," an alternative to incarceration under the Texas Code of Criminal Procedure, is also commonly referred to as probation. *Amici* use the terms interchangeably.

3 Cites to "Rep.'s R." refer to the specific page and line numbers in one of the two Reporter's Records in this case. The two Reporter's Records referenced, the August 6-7, 2007, hearing on a Motion to Revoke, and the October 4, 2007, hearing on the Motion for New Trial, are distinguished by inclusion of the hearing month and day in the parenthetical citation.

During the motion to revoke hearings before the trial court, both probation officers who worked on Ms. Lovill's case testified that this was not the standard course of action in response to a positive drug screen. Rather, as both Officers Vargas and Garza readily admitted, because of Ms. Lovill's pregnancy, they were not willing to "work with" her and felt there were no "other options." (Rep.'s R. 18:3-19:16, 33:11-24, Oct. 4, 2007; *see also* Rep.'s R. 9:20-10:8, 11:20-12:9, Aug. 6-7, 2007). Indeed, Officer Vargas admitted that if Ms. Lovill "was not pregnant," less restrictive alternatives within their discretion — such as increasing the frequency of drug tests and visits to the probation department to see if a probationer can get back on track — would have been among the typical responses to a positive drug screen. (Rep.'s R. 33:2-34:16, Oct. 4, 2007). The record is replete with such admissions by both of the State's witnesses.[3]

While the officers' testimony repeatedly refers to their concern for the health of Ms. Lovill and the health of her future child, the State offered no evidence to show that revoking probation and incarcerating Ms. Lovill was intended to, or in fact would, further either of those interests. (*See, e.g.,* Rep.'s R. 30:19-31:2, 33:11-17, 33:21-24, 35:17-22, Oct. 4, 2007). Rather, the State offered

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[3] (*See* Rep.'s R. 21:24-22:16, Oct. 4, 2007 (Off. Garza stating "in all likelihood maybe we would have proceeded with a review" instead of reporting a violation if she had not been pregnant); 33:25-34:6 (Off. Vargas stating "If she was not pregnant, there is the possibility that we would have allowed the warrant to either go through the normal channels. There is a possibility that we may have conducted a review before the Court to discuss where to go from there."); 37:24-38:5 (Off. Vargas admitting "in all likel[ihood]" he would not have placed call to expedite warrant for her arrest if she were not pregnant); 39:13-41:9 (Off. Vargas stating if she had not been pregnant "in all likelihood" he would have first pursued other options "to see if she can do it on her own")).

the bare assertion that Ms. Lovill was "unwilling, or at least unable," to address her drug use while on probation and pregnant and, therefore, she should be committed to a "secure environment" for the "term of her pregnancy." (Rep.'s R. 14:18-15:21, Aug. 6-7, 2007). To ensure such an outcome, the State requested that Ms. Lovill be sanctioned and sent to the special needs unit of the Substance Abuse Felony Punishment Facility (SAFPF) for the remainder of her pregnancy and up to twelve months, or, alternatively, have her probation revoked and be sentenced to 18 months of imprisonment. (Rep.'s R. 15:8-21, 22:6-17, Aug. 6-7, 2007). The State was aware, as evidenced by the testimony of Officer Garza, that placement at SAFPF was not possible for the remainder of Ms. Lovill's pregnancy, because it would be more than three months before SAFPF would have an opening to admit Ms. Lovill, who was by then already seven months pregnant. (Rep.'s R. 17:7-12, Aug. 6-7, 2007).[4]

Moreover, the record is devoid of any evidence or testimony suggesting that Nueces County Jail, where the State knew Ms. Lovill would necessarily be incarcerated for the duration of her pregnancy, could provide access to any drug treatment or adequate prenatal care. To the contrary, testimony demonstrated the State's awareness that Nueces County Jail was not a safe environment for Ms. Lovill during her pregnancy. Officer Vargas testified that after he had Ms. Lovill

[4] In any event, even if the SAFPF had been able to accept Ms. Lovill while she was pregnant, Officer Garza described that facility itself as a lockdown facility, "similar to a prison setting," that would require the immediate separation of a mother from her newborn. (Rep.'s R. 27:23, 28:8-15, Aug. 6-7, 2007). Further, Officer Garza could not provide any description of what types of programs and medical services SAFPF is able to provide to pregnant women. (Rep.'s R. 10:12-19, Aug. 6-7, 2007).

arrested, he called Nueces County Jail to check on her because "there has been a lot of issue[s] that have happened over here at the Nueces County Jail. And I just wanted to do my part to make sure that she was going to be okay." (Rep.'s R. 38:6-21, Oct. 4, 2007). The "issues" referenced by Officer Vargas were widely known from public reports of government investigations finding unsanitary and unsafe conditions within the jail, including a pregnant inmate forced to sleep on the floor. *See infra* at 25-26. Thus, the record establishes that the State sought to incarcerate Ms. Lovill for the remainder of her pregnancy, regardless of whether the facility was safe and could meet her medical needs for both pre-natal care and substance abuse treatment.

Finally, the record evidence shows that the State rejected less punitive, and more effective, alternatives to incarceration. Officer Garza acknowledged that Ms. Lovill could be placed immediately in a community-based residential drug treatment program, (Rep.'s R. 19:20-25, Aug. 6-7, 2007), rather than at Nueces County Jail. Testimony further established that this particular residential program specializes in providing individualized treatment for women who are pregnant and have children; allows mothers to live with their newborns and children at the treatment facility; and had success working collaboratively with the Community Supervision and Probation Department. (Rep's. R. 42:23-46:15, Oct. 4, 2007). Ms. Lovill expressed her strong motivation to work within such a program: "I was clean for 21 months and I had one relapse. And I know I can stay clean again. I'd just like the chance because I want to keep my baby with me." (Rep.'s R. 16:14-

17, Aug. 6-7, 2007). Instead, the State sought and obtained Ms. Lovill's detention at Nueces County Jail until a bed became available at the SAFPF program (at least a month after the anticipated birth of her child), and a one-year increase in the length of Ms. Lovill's probation. (*See* Rep.'s R. 23:16-22, Aug 6-7, 2007; C.R. at 87-90 (Order Imposing Sanctions on Defendant and Continuing or Modifying Probation, No. 01-CR-3725-A, Aug. 13, 2007)).[5]

Ms. Lovill sought relief by filing a petition for writ of habeas corpus with the trial court, arguing that she was selectively prosecuted.[6] The trial court, in a two-page order issued on October 18, 2007, denied the petition based on a single finding of fact and a single conclusion of law: "The prosecution of the motion to revoke probation that was filed on or about July 17, 2007, in Cause No. 01-CR-3725-A did not occur because of Amber Lovill's pregnancy. . . . Amber Lovill's selective prosecution defense required proof that the prosecution of the motion to revoke probation occurred because of her pregnancy." (C.R. at 37-38 (*Lovill v. State*, No. 07-5690-A (Trial Ct. Op.), Oct. 18, 2007)).

After an exhaustive review of the trial record, slip. op.at 2-6, the Court of Appeals, Thirteenth District, Corpus Christi - Edinburg, in a 26-page opinion issued on December 22, 2008, concluded that there was no support for the trial court's finding that the motion to revoke was not based on Ms. Lovill's pregnancy.

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5 Cites to "C.R." refer to the Clerk's Record in Appeal No. 13-07-529-CR below.

6 Ms. Lovill also filed a motion to amend the conditions of probation, which was denied by the trial court and dismissed by the Court of Appeals for lack of jurisdiction. Slip. op. at 11. The Petition before this Court does not raise questions related to that motion or its dismissal.

The court found that "[t]he only evidence came from the State's witnesses, who admitted that they were not 'willing to work with' Lovill to try alternative measures because of her pregnancy," and "[c]ontrary to the State's arguments, there is nothing speculative about any of this testimony." *Id.* at 21-23.

The Court of Appeals further rejected the State's arguments that prosecuting Ms. Lovill based on her pregnancy was not a form of gender discrimination. The State had argued that "pregnancy causes added stress, anxiety, and physical sickness to the expectant mother, which makes it difficult to comply with the conditions of probation and to maintain the willpower necessary to overcome a drug addiction." *Id.* at 24. The court rejected this argument as based on "archaic" and impermissible stereotypes about pregnancy and women. *Id.* Accordingly, the Court of Appeals held that Ms. Lovill had met her burden to show that the State selectively enforced the revocation sanction against her because of her pregnancy; that such punishment based on pregnancy constitutes sex discrimination; and, therefore, on remand, the trial court must give full consideration to her claim.

SUMMARY OF THE ARGUMENT

The State of Texas prosecuted a motion to revoke Ms. Lovill's probation, with the purpose and effect of returning her to prison for the duration of her pregnancy. The record below establishes that the State imposed this sanction, one far harsher than typical alternatives, because of Ms. Lovill's pregnancy. Further, as the Court of Appeals correctly held, the State's justifications — that Ms. Lovill

suffered "emotional instability," "so intertwined with her pregnancy" that it was too "difficult" to "work with her" on probation, (Pet'r's Br. 27-28) — demonstrate the State's reliance on "archaic and outdated views of pregnancy and of women" that cannot form a lawful basis for differential treatment of a pregnant woman. Slip op. at 24. For these reasons, the court below was correct in holding that the State's treatment of Ms. Lovill amounted to disparate treatment based on her sex. Because, however, the State never came forward with evidence to justify this adverse, differential treatment, the Court of Appeals neither decided which level of constitutional scrutiny applied, nor analyzed whether the State had satisfied that standard. *Id.* at 25. Rather, the Court of Appeals remanded to the trial court for full development of the record and full consideration of the sex discrimination claim.

The State now asks this Court, on discretionary review, to reverse, and essentially reach a final decision on the merits — even though the intermediate court declined to do so. Specifically, in Question Five, the State asks this Court to reverse the Court of Appeals' determination that its treatment of Ms. Lovill was a sex-based classification subject to heightened constitutional scrutiny. And, in Question Six, the State asks this Court to hold, based on the existing record, that its differential treatment of Ms. Lovill because of her pregnancy survives constitutional scrutiny. For the reasons outlined below and discussed in Parts I through III, the Texas Equal Rights Amendment (Texas ERA or ERA) does not

permit either result in this case; the decision of the Court of Appeals should be affirmed.

In Part I, *Amici* outline the proper framework for reviewing sex discrimination claims under the Texas ERA. Parts II.A and II.B explain that a court, when applying the ERA framework to a claim of gender discrimination, must first determine whether a particular state action amounts to suspect gender-based differential treatment. In interpreting the ERA, the Supreme Court of Texas, consistent with decisions of the United States Supreme Court, has recognized that differential treatment on the basis of pregnancy can constitute gender discrimination. State action that burdens pregnant women, as well as state action premised on unlawful stereotypes about pregnant women, amounts to gender-based differential treatment that is subject to heightened constitutional scrutiny. Yet the State in this case harshly sanctioned Ms. Lovill based on her pregnancy, and attempted to justify this disparate treatment by reference to stereotypes about pregnant women's capacity to complete a probation program. Consistent with case law, and based on the record, the Court of Appeals correctly concluded that the State's adverse treatment of Ms. Lovill because of her pregnancy constituted gender-based discrimination and required the State, on remand, to justify this discrimination. Moreover, as addressed in Part II.C, it is well settled that the Texas ERA is more protective than the federal Constitution with respect to gender discrimination. The Supreme Court of Texas has held that the ERA's more protective standard requires the State to carry the burden of

demonstrating that its actions were narrowly tailored to achieve a compelling governmental interest.

Finally, in finding that Ms. Lovill made a showing of gender-discrimination and remanding for full consideration of that claim, the decision below does not, as the State suggests, prevent it from ever advancing compelling interests in maternal or fetal health — where those interests genuinely exist. Likewise, it does not absolutely prohibit the State from taking pregnancy into account with respect to conditions of probation that might pose risks to maternal or fetal health. Rather, it recognizes that, once a showing of gender discrimination is established, the State bears the burden of demonstrating that those compelling interests indeed motivated the discriminatory treatment *and* that the discriminatory treatment advances those compelling interests in a constitutionally permissible manner. As shown in Part III, on the record available in this case, it is clear the State has failed to carry that burden. Therefore, the decision of the court below narrowly, and correctly, allows conclusions of law and findings of fact on this question to benefit from the development of a fuller record in the trial court. If, however, as the State requests, this Court instead decides the merits on the existing record, for the reasons fully explored below, the discriminatory treatment of Ms. Lovill does not withstand constitutional scrutiny.

ARGUMENT

I. The Rigorous Standard of Review for Sex Discrimination Claims Brought Under the Texas Equal Rights Amendment.

The Texas ERA, passed by a margin of four-to-one by the citizens of Texas in 1972, provides that "[e]quality under the law shall not be denied or abridged because of sex . . . ." Tex. Const. art. I, § 3a; *see Ex rel. McLean*, 725 S.W.2d 696, 697 (citing Rodric B. Schoen, *The Texas Equal Rights Amendment in the Courts — 1972-1977: A Review and Proposed Principles of Interpretation*, 15 Hous. L. Rev. 537 (1978)). The Texas Supreme Court has recognized that this provision was "'designed expressly to provide protection which supplements the federal guarantees of equal protection.'" *Bell v. Low-Income Women of Texas*, 95 S.W.3d 253, 257 (Tex. 2002) (quoting Tex. Legislative Council, 14 Proposed Constitutional Amendments Analyzed for Election – Nov. 7, 1972, at 24 (1972)). The ERA accomplishes this aim by "afford[ing] greater protection through strict-scrutiny review" for "gender-based discrimination" than either the federal or state Equal Protection Clauses. *Id.* at 263. Accordingly, the Texas ERA "is more extensive and provides more specific protection than both the United States and Texas due process and equal protection guarantees." *McLean*, 725 S.W.2d at 698.

Under the ERA, a court must first decide "whether equality under the law has been denied," and, if so, "'whether equality was denied because of a person's membership in a protected class of sex." *Bell*, 95 S.W.3d at 257 (quoting *McLean*, 725 S.W.2d at 697). As discussed below, decisions of both the Texas Supreme

Court and the United States Supreme Court recognize that discrimination on the basis of pregnancy can constitute sex discrimination, particularly where the government relies on stereotypes about the capacities of pregnant women or burdens women because of their pregnancy. Once there is a finding of such discrimination, under the Texas ERA, the State must show that its differential treatment was "narrowly tailored to serve a compelling governmental interest." *Bell*, 95 S.W.3d at 257.

II. Sanctioning Ms. Lovill With Imprisonment Because of Her Pregnancy Constituted Suspect, Gender-Based Discrimination Under the ERA.

A. The State's Treatment of Ms. Lovill Stems From Archaic and Stereotypical Views About Women and Pregnancy.

The Texas Supreme Court, consistent with the U.S. Supreme Court, has recognized that deliberate discrimination motivated by pregnancy can constitute gender discrimination. In *Bell*, while holding that a ban on state funding for abortions was not "discriminat[ion] on the basis of pregnancy, which in turn is gender based," the Court expressly recognized that purposeful discrimination against, "or paternalism towards" women based on their ability to become pregnant would be prohibited by the ERA. *Id.* at 258, 263. In this respect, the *Bell* Court let stand the lower court's decision that "the ERA's proclamation that 'equality under the law shall not be denied or abridged because of sex' proscribes discrimination on the basis of pregnancy." *Low-Income Women of Texas v. Bost*,

38 S.W.3d 689, 698 (Tex. App. - Austin 2000).[7] The *Bell* Court's understanding of sex discrimination is consistent with established United States Supreme Court precedent recognizing that treating women adversely based on unfounded stereotypes about pregnancy constitutes a suspect, sex-based distinction.[8]

Even under the federal heightened scrutiny standard for sex discrimination claims, one more lenient than that required by the ERA, there is no question that a state's justification for any classification related to gender may not "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The United States Supreme Court has repeatedly made clear that stereotypes about the proper role and capacity of pregnant women are among those overbroad generalizations that may not lawfully form the basis for government action. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) (holding that it is impermissible for the State to "insist, without more, upon its own vision of the [pregnant] woman's role"). In *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S.

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[7] This analysis is further supported by an earlier decision of the Texas Supreme Court interpreting the scope of anti-discrimination statutes prohibiting sex discrimination. In *Bd. of Trs. of Bastrop Indep. Sch. Dist. v. Toungate*, 958 S.W.2d 365, 369 (Tex. 1997), the Texas Supreme Court explained that the term "because of . . . sex" in a civil anti-discrimination statute was incorporated into the Human Rights Act, which provides that sex discrimination includes discrimination based on "pregnancy, childbirth, or a related medical condition." Tex. Lab. Code Ann. § 21.106(a) (Vernon 2006). Further, the Texas Supreme Court "tied the statutory definition of 'because of sex' to the legislature's drafting of the ERA, which contains analogous language." *Bost*, 38 S.W.3d at 698 (discussing *Toungate*).

[8] As the Texas Supreme Court has recognized, while the ERA does not have "'an interpretation identical to that given . . . federal . . . equal protection guarantees,'" federal authorities provide "helpful guidance" on the question of when a classification is "because of sex." *Bell*, 95 S.W.3d at 259 (quoting *McLean*, 725 S.W.2d at 697).

721, 729 (2003), the United States Supreme Court recounted with disapproval the long and damaging history of state actors treating 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 — justif[ies]'" government intervention. *Id.* (quoting *Muller v. Oregon*, 208 U.S. 412, 422 (1908)). When states place additional restrictions on women to which men are not subject in "rel[iance] on invalid gender stereotypes," including stereotypes about "women's roles . . . when they are mothers *or mothers-to-be*," this constitutes "gender discrimination" that can be unconstitutional and that "warrant[s] heightened scrutiny." *Id.* at 730, 736 (internal citations omitted) (emphasis added).

In this case, the State acted to revoke Ms. Lovill's probation, with the goal of returning her to jail for the duration of her pregnancy. *Supra* at 3. It did so because of its view that her pregnancy rendered her "emotionally distraught," and that her "emotional concerns," which were "clearly tied to the pregnancy," would make it impossible for her to complete probation successfully. (Pet'r's Br. 8, 28). These unfounded assumptions about the diminished capabilities and emotional instability of pregnant women involve the very kinds of "invidious, archaic, and overbroad stereotypes about the relative abilities of men and women," prohibited by both the federal Equal Protection Clause, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994), and Texas's more protective ERA, *Bell*, 95 S.W.3d at 258, 263.

The State nonetheless insists that to have acted otherwise would have been to turn "a blind eye to the fact of pregnancy" and "disregard the biological and psychological symptoms of her pregnancy, no matter how significantly those symptoms may effect [sic] her course of treatment and rehabilitation." (Pet'r's Br. 30-31). But acting upon unsupported assumptions that Ms. Lovill suffered diminished capacities and "psychological symptoms of pregnancy," (Pet'r's Br. 31), does not constitute responding to legitimately "different physical needs of men and women," *Hibbs*, 538 U.S. at 733 n.6. Rather, it perpetuates some of the most pervasive and invidious stereotypes, including the idea that women are hysterical, distraught, and cannot be reasoned with.

This myth is frequently leveled against pregnant women in particular. It is well documented that "a common stereotyped image of pregnant women" is that, "because of their condition [they are] too tired, too large, or too emotional to carry on their normal activities," not to mention "hysterical." Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimating Discrimination Against Pregnant Women in the Workforce*, 50 Me. L. Rev. 225, 226, 245 (1998). In the specific context of medical treatment and the law, scholars have documented that decisionmakers hold "hidden assumptions" and "stereotypes about pregnant women's irrational[ity]," including the notion that pregnant women are "irrational, immature, emotional, incompetent," and unable to "make difficult decisions." Tracey E. Spruce, *The Sound of Silence: Women's Voices in Medicine and Law*, 7 Colum. J. Gender & L. 239, 263 (1997-98). Moreover, scholars have

demonstrated that myths depicting pregnant women as "overly emotional [and] irrational," far from being gender-neutral, are rooted in pervasive stereotypes about women as a class. *E.g.*, Joan C. Williams & Nancy Segel, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 Harv. Women's L.J. 77, 90-97 (2003). The State perpetuated precisely these gender-based stereotypes by acting to revoke Ms. Lovill's probation based on the notion that, as a pregnant woman, she was too distraught and incapacitated — both physically and mentally — to complete a community-based drug treatment program.

B. The State Engaged in Gender-Based Discrimination by Punishing Ms. Lovill More Severely Because She Was Pregnant.

Even in the absence of overt stereotyping on the basis of gender or pregnancy, differential treatment based upon pregnancy constitutes suspect gender-based discrimination where it expressly penalizes pregnant women. In *Bell*, the Texas Supreme Court recognized that "women's ability to become pregnant has historically been at the root of . . . discriminatory practices" and held that the ERA "is directed at just such purposeful gender-based discrimination." 95 S.W.3d at 263 (internal citation omitted). The U.S. Supreme Court has recognized the same. In *United States v. Virginia*, the United States Supreme Court explained that classifications — even those based on "inherent differences" between men and women — "may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women." 518 U.S. at 533-34. With

respect to pregnant women in particular, the Supreme Court has found that policies that do not "merely refuse[] to extend to women a benefit that men cannot and do not receive, but . . . impose[] on women a substantial burden that men need not suffer," are unlawful in that they impermissibly "burden" women "because of their different role . . . in 'the scheme of human existence.'" *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977) (quoting G*eneral Elec. Co. v. Gilbert*, 429 U.S. 125, 139 n.17 (1976)).[9]

Where, as here, the State claims to have discriminated in the name of a pregnant woman's health or fetal health, courts must still scrutinize such action to ensure it does not create constitutionally impermissible burdens. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640-41 (1974) (explaining that even if intended to "protect the health of the [pregnant woman] and her unborn child," "acting to penalize the pregnant" woman can "constitute a heavy burden" that is constitutionally suspect); *Int'l Union, United Auto., Aerospace, & Agric. 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

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[9] *Gilbert* interpreted Title VII's prohibition against discrimination in employment "because of sex" not to prohibit a company from excluding pregnancy-related disability from its disability *benefits* plan. 429 U.S. at 133-37 (discussing and relying on the court's Equal Protection jurisprudence). In *Satty*, the Court refined this understanding to explain that policies *burdening* pregnant women run afoul of the prohibition against discrimination. Subsequently, Congress amended Title VII, abrogating *Gilbert*, by passing the Pregnancy Discrimination Act, which defines "because of sex" in the statute to include *all* pregnancy-based distinctions, whether or not they "burden" or benefit pregnant women. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 stat. 2076 (1978). This year in *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962 (2009), the Supreme Court reaffirmed *Satty*'s holding forbidding policies that "burden" pregnant women "in such a way as to deprive them of . . . opportunities because of their different role." *Id.* at 1970 n.4 (discussing *Gilbert* and *Satty*).

offspring historically has been the excuse for denying women equal . . . opportunities").

The State attempts to evade this searching constitutional scrutiny by asserting that "not every classification concerning pregnancy" is a constitutionally suspect sex-based classification and arguing that Ms. Lovill was required to show that the State treated her differently because of animus toward women as a class. (Pet'r's Br. 28-30). This argument misses the mark.

The State is, of course, correct that "taking pregnancy into account" in a way that "does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant" women does not always amount to unlawful discrimination. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987). But here, the State revoked probation based on just such "stereotypical notions." And, even independent of stereotypes, the State treated Ms. Lovill more punitively based on her pregnancy. Indeed, all sanctions recommended by the State reflected extremely harsh punishments — either detention in Nueces County Jail until a bed became available at SAFPF, a substance abuse "punishment" facility, or serving 18 months in prison. *Supra* at 3. In this context, the State unquestionably bears the burden of demonstrating that its actions withstand heightened constitutional scrutiny.[10]

[10] The State distorts Texas Supreme Court case law by arguing that, because it asserts an interest in protecting fetal life as in *Bell*, this Court should read *Bell* to support the State's argument that pregnancy discrimination is not sex discrimination, and therefore is subject only to the more lenient "rational basis" review. Petitioner mischaracterizes *Bell*, which confirmed that pregnancy discrimination can constitute sex discrimination, while holding that carving out a funding

Moreover, contrary to the State's argument, there is no requirement that a woman demonstrate animus where the government has deliberately burdened a woman by treating her more harshly on account of her pregnancy, or where the government relies on archaic stereotypes about pregnant women. *See, e.g., Hibbs*, 538 U.S. at 736 (upholding congressional action to remedy the constitutional violations that occur when women's opportunities are curtailed because of "pervasive presumption[s]" and "prevailing ideology about women's roles . . . when they are . . . mothers-to-be."); *cf. Johnson Controls*, 499 U.S. at 199 (explaining that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect").[11]

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restriction for abortion did not "discriminate[] on the basis of pregnancy," and therefore was not "gender based." 95 S.W.3d at 258.

11 The State's reliance on *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) and *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979), in support of its animus theory is unavailing. *Bray* involved a statutory requirement of animus where a plaintiff wishes to establish a private conspiracy in violation of 42 U.S.C. § 1985(3), and is inapposite for that reason alone. *See* 506 U.S. at 267-68. Beyond that, the Court in *Bray* merely rejected the sweeping argument – not advanced here – that *every* classification that affects pregnant women is sex-based. 506 U.S. at 271. Similarly, in *Feeney*, discussed in *Bray*, the Court found that a plaintiff must show discriminatory purpose when challenging a *facially neutral* law that gave employment preference to military veterans and had a disparate adverse effect on women. 442 U.S. at 272 But Ms. Lovill does not challenge a gender-neutral distinction with a disparate effect on women; rather, she challenges the State's punitive actions towards her taken expressly because she was pregnant and justified by resort to impermissible, deeply-rooted stereotypes about pregnancy. The State's treatment of Ms. Lovill is, therefore, not "'an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate,'" *Bell*, 95 S.W.3d at 264 (quoting *Feeney*, 442 U.S. at 279 n.25), and Ms. Lovill need not show animus on the part of the State in order to shift the burden to the State to justify its actions.

Even if the State were correct that it is necessary for Ms. Lovill to show the State acted with the "purpose" of treating her differently because it wanted her to suffer "adverse effects," this assessment must be, at least in part, an objective assessment. As discussed *infra* at 19, 27, being confined in jail, particularly one without adequate medical care and safe physical facilities for Ms. Lovill during her pregnancy, is an objectively "adverse" outcome.

The record in this case leaves no doubt that the State has deliberately treated Ms. Lovill in a more punitive manner than other probationers, and it has conceded throughout that it did so because of her pregnancy, *see supra* at 2, and its conceptions about the capacity of a pregnant woman to complete probation successfully, *supra* at 3. Both Officers Garza and Vargas testified that they pursued a more restrictive approach — namely, incarcerating Ms. Lovill — because she was pregnant. *Supra* at 2. While the State now attempts to characterize its decision as a mere "administrative decision to modify the terms of probation" in order to protect maternal and fetal health, (Pet'r's Br. at 34), the record is clear that the State was acting to punish Ms. Lovill by ending her community supervision and incarcerating her in Nueces County Jail — which lacked drug treatment and prenatal care — for the duration of her pregnancy, and even beyond that at a "Punishment Facility." It is beyond dispute that incarcerating an individual constitutes a constitutionally significant burden. *See Lewis v. United States*, 518 U.S. 322, 326 (1996) (highlighting that imprisonment imposes a "deprivation of liberty" upon an individual, in contrast to the lesser infringements on freedom, such as probation or fines); *In re Johnson*, 150 S.W.3d 267, 272 (Tex. App. - Beaumont 2004) (emphasizing that "jail is a deprivation of liberty"). Therefore, the State's treatment of Ms. Lovill is among those classifications concerning pregnancy that are constitutionally suspect.

C. Because Sanctioning and Imprisoning Ms. Lovill Due to Her Pregnancy Amounted to Gender-Based Discrimination, the State Carries the Burden of Showing That Doing So Was Narrowly Tailored to Achieve Compelling Interests.

The Court of Appeals appropriately remanded for the trial court to determine, in the first instance, the correct standard of scrutiny to be applied in evaluating whether the State has met its burden of justifying its adverse, gender-based treatment of Ms. Lovill under the Texas ERA. This Court should affirm that decision. However, if this Court decides to address the appropriate standard of review, it should follow well-settled precedent to hold that under the ERA, the State can justify its punitive actions against Ms. Lovill only by demonstrating that they were narrowly tailored to achieve a compelling governmental interest.[12]

The Texas Supreme Court has held that the Texas ERA "was intended to enlarge upon federal equal protection guarantees," and that "[i]t does so by . . . subjecting sex-based classifications to heightened strict-scrutiny review." *Bell*, 95 S.W.3d at 262; *McLean*, 725 S.W.2d at 698. This standard is exacting:

> [I]t is not enough to say that the state has an important interest furthered by the discriminatory law. Even the loftiest goal does not justify sex-based

12 Because the Texas ERA provides more expansive protection than the federal Constitution, the Court need not evaluate Ms. Lovill's sex discrimination claim under the less demanding federal standard. *See McLean*, 725 S.W.2d at 697-98 (deciding case that raised claims under both federal Constitution and Texas ERA only on "independent state constitutional grounds" and "not reach[ing] federal law issues in this case"); *see LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986) (explaining that state constitutions build upon floor for individual rights set by federal Constitution). But, even under the less demanding federal standard, for reasons discussed *infra* Part III, the State has not, as it must, demonstrated that the discriminatory means employed are substantially related to achieving an exceedingly persuasive justification. *See Virginia*, 518 U.S. at 531, 533 (explaining also that this "burden of justification is demanding and it rests entirely on the State," and the "justification must be genuine, not hypothesized or invented post hoc in response to litigation").

> discrimination in light of the clear constitutional prohibition. Under our model of strict judicial scrutiny, such discrimination is allowed only when the proponent of the discrimination can prove that there is no other manner to protect the state's compelling interest.

McLean, 725 S.W.2d at 698. That is, the Texas Supreme Court has defined "narrowly tailored" under the ERA to mean that the State must show that its discriminatory action was the only way of serving its compelling interest. If there is a non-discriminatory way to protect the asserted interest, then the discrimination is unlawful. *Id.*[13]

The Court of Appeals in this case did not decide the standard of review for the trial court to apply on remand. While that was an appropriate approach, for all the reasons discussed above, it is beyond question that nothing less than strict scrutiny applies to Ms. Lovill's ERA claim. Accordingly, whether decided on remand or by this Court, the treatment of Ms. Lovill cannot be upheld as constitutional unless the State has satisfied its burden of proving that "there [was] no other manner to protect the state's compelling interest." *McLean*, 725 S.W.2d

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13 Wholly ignoring this clear precedent, the State erroneously argues that the standard for evaluating gender classifications is "intermediate scrutiny, under which the government must demonstrate the discriminatory classification is substantially related to an important governmental interest." (Pet'r's Br. at 32). In support, the State misleadingly suggests that *Casarez v. State*, 913 S.W.2d 468 (Tex. Crim. App. 1994), addresses and applies the Texas ERA. *Casarez* applies the federal Equal Protection Clause to peremptory jury challenges based on religion. It is not relevant, much less controlling, as to the standard of scrutiny for sex discrimination claims under the Texas ERA. As discussed above and *supra* Part I, *Bell*, which is the controlling precedent, incorporates the analysis of *McLean* and makes clear that the Texas ERA holds the State to a more exacting standard than either the state or federal Equal Protection clauses. 95 S.W.3d at 257.

Moreover, as discussed *supra* note 12, even as to the federal Equal Protection standard, the United States Supreme Court has made clear that "[p]arties who seek to defend gender-based government action must demonstrate an *exceedingly persuasive justification* for that action," and the justification "must not rely on overbroad generalizations about the different" capacities of men and women. *Virginia*, 518 U.S. at 531, 533 (emphasis added).

at 698. For reasons discussed *infra* Part III, the State cannot establish that imprisoning Ms. Lovill even reasonably advanced its asserted interests, let alone that it was the only way to do so.

III. The State Has Not Demonstrated That Sanctioning and Incarcerating Ms. Lovill Because of Her Pregnancy Furthered Its Compelling Interests.

Because the State's selective enforcement of probation sanctions against Ms. Lovill subjected her to unequal treatment based on sex, *supra* Part II, the critical remaining inquiry is whether the State has shown that compelling interests required that unequal treatment. The State has not come anywhere near making such a showing on the existing record. And, as discussed below, it cannot make such a showing.

As an initial matter, this inquiry does not, as the State seems to suggest, begin and end with determining the correct standard of review, or even with establishing the legitimacy of the asserted State interests. (*See* Pet'r's Br. 31-32). The necessary balancing of interests can only be done if the State sets forth record evidence demonstrating how the adverse actions against Ms. Lovill were narrowly tailored to advance those interests. The State, however, failed to bring forth any such evidence. Thus, the Court of Appeals exercised considerable judicial restraint in concluding:

> We are not in the position to decide these issues in the first instance. . . . On remand, the trial court should require the State to respond . . .[and] the trial court is instructed to make specific findings of fact and conclusions of law setting out its rulings on whether the State meets its burden of proof to

justify its discriminatory treatment of Lovill.

Slip. op. at 25-26.

Indeed, by remanding the entire inquiry, including both questions of law and fact, the Court of Appeals permitted the State a renewed opportunity to justify its discriminatory treatment of Ms. Lovill. If the Court of Appeals had reached the merits on the existing record — as the State insists it should have — the State's actions could not survive any level of constitutional scrutiny. The State put forth no evidence to demonstrate that imprisoning Ms. Lovill for the duration of her pregnancy was even rationally related, much less narrowly tailored, to achieve compelling interests in protecting maternal and fetal health.

As discussed *supra* at 13-15, the State's view that Ms. Lovill's "emotional state which was clearly tied to the pregnancy" made her impossible to work with and presumptively lacking adequate "willpower necessary to overcome a drug addiction," (Pet'r's Br. 27-28, 30), is nothing more than a discriminatory and impermissible gender stereotype. Thus, not surprisingly, the State offers no record support whatsoever for its theory that Ms. Lovill, by virtue of her pregnancy, lacked the fortitude to address a drug addiction. Moreover, the only record evidence on the issue demonstrates the opposite. When cross-examined by the State as to her "concern" about using drugs while pregnant, Ms. Lovill repeatedly and consistently explained that she was more "concerned about her baby's health" than anything else; that she wanted the help of a "prevention" program; that as soon as she discovered the pregnancy she arranged appointments with her drug

treatment sponsor and the doctor; and that despite a prior relapse, she was determined not to relapse while pregnant. (Rep.'s R. 51:9-53:6, Oct. 4, 2007). Ms. Lovill's expressed motivation is consistent with studies indicating that pregnant women are often motivated to address their addiction for the sake of their future children. *See, e.g.*, Sheila Murphy & Marsha Rosenbaum, *Pregnant Women on Drugs: Combating Stereotypes and Stigmas*, 83-99 (1998); Susan C. Boyd, *Mothers and Illicit Drugs: Transcending the Myths* (1999). Therefore, to the extent the State suggests that it should be allowed to rely on baseless and discredited stereotypes as a legitimate reason for subjecting Ms. Lovill to harsher penalties, the Court should reject this argument.

Even if these archaic stereotypes about pregnancy had not infected the State's justifications, the State cannot satisfy strict scrutiny review simply by offering, without more, hollow assertions that the discriminatory treatment of Ms. Lovill – the decision to incarcerate her because of her pregnancy—was narrowly tailored to "achieve the State's interests in Lovill's health and in the health of her unborn child." (Pet'r's Br. 34). Assuming *arguendo* that compelling state interests, such as maternal, fetal, and newborn health, were the genuine government motivations here, the State must still carry its burden of demonstrating that incarcerating Ms. Lovill was the only way to advance those interests.[14] But,

[14] For this reason, nearly all of the State's argument in support of its sixth question for review is beside the point. The only support the State provides in defense of its decision to incarcerate Ms. Lovill because of her pregnancy are cases establishing when a State's interest in protecting fetal health is "compelling." (*See* Pet'r's Br. 32-33). But that is not the end of the analysis. As explained *infra* at 25-29, the State offers absolutely no support—either in law or fact—to carry its

as is clear from the record in this case, and confirmed by expert opinions from leading health professionals, the State only undermined those goals by subjecting Ms. Lovill to unsafe conditions for the remainder of her pregnancy; obstructing her access to effective drug treatment and quality pregnancy care; and necessitating the immediate separation of Ms. Lovill and her baby after birth.

First, the State's claim that it sought to provide Ms. Lovill with appropriate substance abuse treatment by virtue of incarceration is belied by the record. Upon learning of Ms. Lovill's pregnancy, Probation Officer Vargas did not even contact her or facilitate her access to an appropriate substance abuse treatment facility — instead he had her arrested and held in the deservedly notorious Nueces County Jail. *Supra* at 1-4. In addition to the fact that Nueces County Jail could not provide Ms. Lovill with substance abuse treatment, Officer Vargas testified that he had concerns about her safety while in that facility because of problems at the jail. *Supra* at 4. Those concerns were more than justified. Previously publicized reports of government investigations revealed completely unsanitary and unsafe conditions within the jail, particularly for a pregnant woman, including "overflowing toilets, gnats swarming around drains, and even a pregnant woman lying on the floor with neither a bed nor a pad." Editorial, *County Officials Need to Address Jail Squalor*, Caller-Times, June 23, 2006, *available at* http://caller.com/news/2006/jun/23/county-officials-need-to-address-jail-squalor/.

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burden of demonstrating it furthered those interests within constitutional bounds, *i.e.*, in a way narrowly tailored to meet that compelling interest.

Indeed, as detailed in the *Amicus Curiae Brief of Medical, Public Health, and Child Welfare Experts and Advocates in Support of Respondent*, inhumane treatment of pregnant women in Texas jails, including instances of unattended births and stillbirths, has been widely reported.

Despite the extremely serious health and safety problems at Nueces County Jail, the State pursued a course that required Ms. Lovill's incarceration there for the remainder of her pregnancy. It did not consider any alternative forms of sanction that would actually advance its asserted interests in maternal, fetal, and newborn health by providing Ms. Lovill with drug treatment and pregnancy care.[15] Indeed, not only did the State pursue a course that necessarily deprived Ms. Lovill of access to substance abuse treatment and pregnancy care, it rejected alternatives to revocation that would have enabled her to receive such critical services. For example, a residential program specializing in the treatment of pregnant and parenting women, which had past experience working with probationers, was able to accept Ms. Lovill immediately. *Supra* at 4-5. In addition, the State's witnesses testified that, when a probationer tests positive for drugs, the State has the discretion to purse options besides revocation and incarceration, including increased supervision or a probation review. *Supra* at 4. Thus, allowing Ms.

[15] The State sought 18 months of incarceration in state prison or, in the alternative, detention at the special needs unit of the Substance Abuse Felony Punishment Facility – even though the State knew full well that, as Officer Garza testified, there would be no beds available at the SAFPF for three months, well after Ms. Lovill's due date. *Supra* at 3. Moreover, even if the SAFPF could have accepted Ms. Lovill before she gave birth, the State offered no testimony or evidence that the special needs unit offered specialized treatment for pregnant substance abusers. When asked "And exactly how do they [SAFPF] treat pregnant women?" Ms. Garza could provide no information beyond, "I have not been at the special needs unit." (Rep.'s R. 10:16-19, Aug. 6-7, 2007).

Lovill to remain under community supervision and seek community-based treatment was not only an option, but one that would have served the State's and Ms. Lovill's interests far better than incarceration. Instead, the State punished Ms. Lovill in a manner that only served to undermine both maternal and fetal health.

Finally, the State fares no better with its last-ditch effort to characterize its harsh and punitive treatment of Ms. Lovill as narrowly tailored by callously asserting that incarceration was "merely an administrative decision" that was "at most, merely an inconvenience, and, at best, a means to help" Ms. Lovill "control her drug problem." (Pet'r's Br. 34). This attempt to minimize the extreme nature of the sanction is insupportable on its face. Whether incarceration results from a conviction, or a probation sanction or revocation, it is among the most extreme deprivations of liberty. *See supra* at 19 (citing cases). The State itself admitted this when it argued to the trial court that Ms. Lovill needed to be committed to a "secure" environment to "punish her sufficiently and properly for the underlying offense," even if it was one lacking in appropriate services. (Rep.'s R. 15:8-21, Aug. 6-7, 2007); *supra* at 3-4. Moreover, as discussed above, the record overwhelmingly establishes that incarcerating Ms. Lovill subjected her to conditions that risked the safety of her pregnancy and left her with no "help" for her drug dependency.

Beyond the record in this case, as addressed fully by the *Amicus Curiae Brief of Medical, Public, and Child Welfare Experts*, leading experts in the fields of maternal health, fetal health, child welfare, and drug treatment, unanimously

agree that punitive measures, such as those taken against Ms. Lovill, have no proven benefits and pose numerous harms. Every leading medical, public health, and research group to address the issue of drug use and pregnancy has concluded that punitive approaches such as prosecution, probation sanctions, and imprisonment are among the least effective methods for advancing maternal, fetal, and newborn health.[16] Thus, the State's use of incarceration to allegedly advance maternal, fetal, and newborn health finds absolutely no support among relevant medical and health experts.

For all these reasons, imprisoning Ms. Lovill because of her pregnancy subjected her to unsafe conditions; denied her appropriate medical care and meaningful treatment for her dependency and pregnancy; separated her from her baby; and imposed precisely the type of punitive conditions that medical and public health experts uniformly advise against. In short, the State's discriminatory treatment of Ms. Lovill subjected her to harsher treatment because of her pregnancy, while undermining its asserted concerns for maternal, fetal, and newborn health. Accordingly, on this record, the State has not established that the

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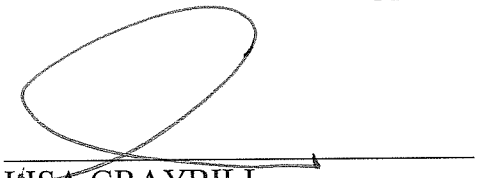
16 For example, as the American Academy of Pediatrics has concluded, "effective drug treatment programs should be made available... [but] punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health. . . ." Am. Acad. of Pediatrics, Comm. on Substance Abuse, 1994 to 1995, *Drug-Exposed Infants*, 96 Pediatrics 365-66 (1995). Likewise, the American Society of Addiction Medicine, composed of the leading specialists in the field of substance abuse treatment and prevention, declared that "criminal prosecution of chemically dependent pregnant or postpartum women will have the overall result . . . of increasing, rather than preventing, harm to children and to society as a whole." Am. Soc'y of Addiction Med., *Public Policy Statement on Chemically Dependent Women and Pregnancy* (Sept. 1989), *available at* http://www.asam.org/ChemicallyDependentWomenandPregnancy.html; *see also Amicus Curiae Brief of Medical, Public Health, and Child Welfare Experts* (providing additional examples).

motion to revoke was a reasonable, let alone narrowly tailored, way to advance any compelling interests. For these reasons, the decision to remand for the development of a complete record was not in error and should be affirmed. However, should this Court reach the merits of the State's fifth and sixth questions for review, established precedent and the record below require a finding that the discriminatory treatment of Ms. Lovill does not survive constitutional scrutiny.

PRAYER FOR RELIEF

Amici urge this Court to affirm the decision of the Court of Appeals.



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