SUPREME COURT OF THE
STATE OF WASHINGTON
Case No. 94151-3

Court of Appeals No. 45586-2-II

STATE OF WASHINGTON,

Respondent,

v.

MELISSA MCMILLEN,

Petitioner.

CONSOLIDATED WITH:

IN RE THE PERSONAL RESTRAINT
OF MELISSA MCMILLEN,
Petitioner.

AMICUS BRIEF OF LEGAL VOICE, ACLU OF WASHINGTON, BIRTH RIGHTS BAR ASSOCIATION, NATIONAL ADVOCATES FOR PREGNANT WOMEN, THE CENTER ON REPRODUCTIVE RIGHTS & JUSTICE, OPEN ARMS PERINATAL SERVICES, AND THE MIDWIVES ASSOCIATION OF WASHINGTON STATE IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION AND INTEREST OF AMICI

This case dangerously extends Washington's criminal code to condemn a woman to over a decade in prison for felony murder based on criminal abandonment, under a set of facts that could befall any number of pregnant women. Division II upheld Melissa McMillen's conviction for felony murder when she gave birth alone and unexpectedly on a toilet, left the baby there based on her belief that the baby was stillborn, and, because of that belief, did not seek emergency medical assistance. In so doing, Division II has implied a new legal duty: that Washington women must give birth in a medicalized setting or face investigation and prosecution if the child dies during or shortly after birth.

As set forth in individual statements of interest in the accompanying Motion for Leave to File Amicus Brief, Amici are nonprofit organizations with longstanding commitments to protecting a woman's right to control her own medical decisions, and to ensuring that harmful gender stereotypes do not influence the judicial system. Amici urge this Court to grant Ms. McMillen's request for review because of the substantial public interest at stake in the legal reasoning applied here, which threatens the constitutional rights of all pregnant women to make medical decisions during childbirth.[1]

[1] Although the Court of Appeals' decision is unpublished, the recent rule change allowing citation to unpublished decisions will ensure that this opinion has enduring legal consequences. *See* WA GR 14.1(a).

See RAP 13.4(B)(3) and (4). Review is further warranted because of the substantial public policy repercussions of prosecuting women who experience pregnancy losses. Such losses are sadly common; in the majority of cases, science is unable to pinpoint a cause. Seizing upon this ambiguity, this prosecution criminalizes pregnancy loss, creating a real danger of arbitrary or discriminatory enforcement, and invokes stereotypes about how pregnant women "should" act as justification. Because this opinion is likely to have a detrimental impact on the rights of all pregnant women in Washington State, this Court should grant review.

II. STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case.

III. ARGUMENT

A. The Court of Appeals' opinion implicates a substantial public interest because it severely burdens pregnant women's rights to privacy and to make medical decisions.

The impact of Division II's opinion cannot be overstated, given the message it sends about the ability of the criminal justice system to invade a woman's deeply private decisions regarding whether to seek medical intervention during or immediately after childbirth. A significant number of women make the constitutionally-protected decision to give birth at home or outside a medical setting; others may give birth unattended

unexpectedly.[2] Carried to its logical conclusion, Division II's analysis would put every pregnant person who foregoes medical treatment during childbirth, whether by choice or by virtue of unforeseen circumstances, at risk of criminal investigation and prosecution if something goes wrong.

In rejecting Ms. McMillen's argument that a criminal abandonment prosecution for felony murder in these circumstances violates her rights to privacy and equal protection, Division II rationalized that "Washington holds parents criminally liable for not giving their children necessary medical assistance." *State v. McMillen*, No. 45586-2-II, slip op. at 25-26 (Wash. Ct. App. Jan. 18, 2017) ("Opinion") (citing *State v. Williams*, 4 Wn. App. 908, 912, 484 P.2d 1167 (1971)). Notably, the *Williams* decision involved manslaughter—not felony murder—charges against parents who failed to seek medical attention for a 17-month old child who had weeks of obvious symptoms indicating the child had a severely infected tooth.[3] Yet

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[2] *See, e.g.,* Marian F. McDorman et al., *Trends in Out-of-Hospital Births in the United States, 1990-2012*, Nat'l Center for Health Statistics, Centers for Disease Control & Prevention (2014) (Three percent of Washington State births are out-of-hospital, compared to the national average of 1.36 percent); *see also* Bonnie Rochman, *A Baby Is Born on Train to NYC: Why Labor Is So Unpredictable*, Time Mag., Jan. 18, 2012, http://healthland.time.com/2012/01/18/a-baby-is-born-ontrain-to-nyc-why-labor-is-so-unpredictable/ ("In a recent study of deliveries in 19 states,17% of non-hospital births in 2006 were unplanned births — the kind that take a woman by surprise in a train car or an elevator.").

[3] *Williams*, 4 Wn. App. at 917-18. The Court's citation of this case also ironically highlights the chief failure of the prosecution here in meeting its burden at trial to prove proximate cause. *See* Petitioner's Consolidated Request for Review ("Pet. Br.") at. 19-20. (discussing lack of evidence showing Ms. McMillen's alleged "abandonment" was proximate cause of

Division II equated that case to this one, concluding that because the trial court found Ms. McMillen gave birth to a live baby, " she had a duty to seek medical treatment for that baby[;] the choice for medical treatment was not about her own treatment, it was for her dependent baby." Opinion at 25-26.

This aspect of the opinion appears rooted in the State's suggestion at trial that Ms. McMillen's decision-making about her birth setting should be a factor in her criminal conviction. *See, e.g.*, TR 820:23-821:2 ("Not in a hospital or with the assistance of a doctor, and no preparations for a home birth either. No mid-wife [sic] present, no sterile environment, no help."). But a woman has no legal duty to accept medical treatment during childbirth. Indeed, it is her constitutional right to decline to do so. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278-279, 110 S. Ct. 2841 (1990); *see also In re A.C.*, 573 A.2d 1235, 1247 (D.C. App.1990) (reversing court-ordered cesarean sections imposed on terminally ill pregnant women, and holding that "[e]very person has the right, under the constitution and common law, to accept or reject medical treatment"); *see also State v. Koome*, 84 Wn.2d 901, 530 P.2d 260 (1975); *In re Welfare of Colyer*, 99 Wn.2d 114, 660 P.2d 738 (1983).

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baby's death). The *Williams* court clarified that conviction for manslaughter requires "consideration of the question of when the duty to furnish medical care became activated. If the duty to furnish such care was not activated until after it was too late to save the life of the child, failure to furnish medical care could not be said to have proximately caused the child's death." *Williams*, 4 Wn. App. at 916.

Review is necessary to clarify that the instant case is plainly distinguishable from *Williams*, which did not involve the childbirth process that necessarily affects the pregnant woman's constitutionally-protected right to make decisions about her own medical care. *Amici* urge this Court to refute the new criminal law duty Division II has implied: that Washington women must give birth in a medicalized setting or face investigation and prosecution if the child dies during or shortly after birth.[4] This Court should accept review to clarify that no such burden exists on women's constitutional right to privacy. *See* RAP 13.4(B)(3) and (4).

B. There is a substantial public interest at stake when an adverse pregnancy outcome gives rise to a felony murder prosecution.

Because this prosecution creates new public policy that potentially criminalizes pregnancy outcomes – policy never considered or sanctioned by the Legislature – this Court should accept review to advise Washington prosecutors and trial courts that the state and federal constitutions will not support criminal liability theories that are based on pregnancy outcomes.

1. Division II's decision puts pregnant women at risk of being accused of any number of crimes if they

[4] This prosecution likewise threatens women's constitutional due process right to notice of prohibited behavior before being subject to criminal conviction and punishment, as nothing in Washington's second-degree felony murder statute or the second degree felony abandonment statute suggest that a woman can be convicted of murder for failing to summon medical assistance following a home birth. *See* RCW 9A.32.050(1)(b), RCW 9A.42.070; U.S. Const. Amend. XIV, Wash. Const. art. I, § 3.

experience a pregnancy loss – an all too common, and often inexplicable, event.

Prosecuting women for pregnancy outcomes would create an infinite number of new crimes, "a plainly unconstitutional result that would, among other things, render the statutes void for vagueness." *Cochran v. Commonwealth*, 315 S.W.3d 325, 328 (Ky. 2010). *See also State v. Wade*, 232 S.W.3d 663, 666 (Mo. App. 2007) (noting that such prosecutions could extend to legal but risky conduct, like smoking during pregnancy); *Reinesto v. Super. Ct*, 182 Ariz. 190, 894 P.2d 733, 736-37 (Ariz. App. 1995); *Kilmon v. State*, 394 Md. 168, 905 A.2d 306, 311-12 (Md. App. 2006) (such prosecutions potentially penalize women "engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child.").

This prosecution is particularly disturbing given the fact that science is unable to pinpoint a cause for the majority of stillbirths that occur after 28 weeks of gestation.[5] *See* 9RP 496, 97, 532-38 (physical evidence here did not indicate clear cause of death); Opinion at 10 (noting "the cause of death was not clear"). Stillbirth is one of the most common adverse pregnancy outcomes, but its causes are not well understood, as it can result

[5] Ruth C. Fretts, *Etiology and Prevention of Stillbirth*, 193 Am. J. Obstetrics & Gynecology 1923, 1924 (March 2005).

from the cumulative effect of several risk factors.[6] This lack of understanding applies to all perinatal loss – defined as stillbirth after 20 weeks gestational age up to infant death during or shortly after birth.[7] And if perinatal losses can give rise to criminal charges, women of color will face additional unconstitutional burdens because they are significantly more likely than white women to experience adverse perinatal outcomes.[8] Moreover, race, class, and youth can factor into a woman's ability to obtain medical treatment that could help reduce the risk of pregnancy loss.[9]

Scientific research thus indicates that it is misguided to seek criminal penalties based solely on the fact that an infant died during or shortly after childbirth in the absence of medical assistance. As this Court has discussed, courts must recognize the value of scientific research in informing criminal

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[6] R.L. Goldenberg et al., *Stillbirth: A Review*, 16 J. Maternal-Fetal & Neonatal Medicine 79, 80-88 (2004); Donald J. Dudley et al., *A New System for Determining the Causes of Stillbirth*, 116 Obstetrics & Gynecology 254, 258 (Aug. 2010) (recognizing difficulty of determining cause of fetal death with significant degree of certainty).

[7] Martin MacDorman & Elizabeth Gregory, *Fetal and Perinatal Mortality: United States, 2013*, Nat'l Vital Statistics Reports, U.S. Dep't of Health and Human Services (July 2015).

[8] *Id.* at 10; *see also* Washington State Dep't of Health, *Maternal Child Health Report, Infant Mortality*, No. 160-015, 3 (2014)(from 2009 to 2011, annual number of infant deaths per 1000 births in Washington State was 10.3 for Native American women and 6.9 for Black women, compared to 4.3 for white women), *available at* http://www.doh.wa.gov/Portals/1/Documents/Pubs/160-015MCHDataRptInfantMort.pdf.

[9] *See, e.g.,* Assoc. of State and Territorial Health Officials, *Issue Brief: Disparities and Inequities in Maternal and Fetal Health Outcomes* 7 (2012), *available at* http://www.astho.org/Programs/Health-Equity/Maternal-and-Infant-Disparities-Issue-Brief/.

law jurisprudence. *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015) (ruling recognized that the Court previously "did not have the benefit of the studies. . . that establish a clear connection between youth and decreased moral culpability for criminal conduct."). This Court should accept review to clarify that Washington law does not support a felony murder conviction for an adverse pregnancy outcome where the cause of death was uncertain.

2. There is a strong public interest in clarifying the law to prevent overcriminalization.

Even if science could effectively pin the blame on the birthing woman, characterizing this tragic situation as murder reflects the troubling trend of overcriminalization, which has ratcheted up punishments, spurred the creation of new crimes that were traditionally civil or regulatory matters, perpetuated unfair race and class disparities, and expanded criminal statutes far beyond legislative intent.[10]

This Court has previously rejected attempts to prosecute parents for second-degree murder based on a failure to act. *State v. Jackson*, 137 Wn.2d 712, 724-25, 976 P.2d 1229 (1999) (affirming reversal of a second-degree murder conviction against a foster mother on an accomplice liability theory for failure to prevent abusive husband from killing child). When a homicide

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[10] *See generally* Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* 3 (2007); Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 712-13 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001).

is charged based on the theory that a mother failed to take action after childbirth, those cases are typically prosecuted as manslaughter. Even then many courts have found such convictions unsustainable. *See, e.g.*, *Commonwealth v. Pugh*, 462 Mass. 482, 510, 969 N.E.2d 672 (Mass. 2012); *State v. Osmus*, 73 Wyo. 183, 201, 220, 276 P.2d 469 (Wyo. 1954) ("Children are born of unattended mothers on trains, in taxis, and in other out of the way places, and we fear to open up a field for unjust prosecutions of actually innocent women.").

According to Division II, "[t]his case was about [McMillen] abandoning her baby who was born alive." Opinion at 24. But to read the facts here to support a felony abandonment conviction is overcriminalization at its cruelest. All the evidence showed that Ms. McMillen had a subjective belief that the baby had been stillborn; she said it did not move or make noise, and it was purple. 9RP 371, 145-7. Given her stated belief that the baby was stillborn, and the dearth of conclusive medical evidence at trial to contradict those statements, Ms. McMillen lacked the requisite intent to abandon a baby that she did not believe was alive. She would not have known she had a duty to move the baby or seek help. Moreover, it is unclear from the evidence whether she would have even been physically able to do so, as she told an officer that after the baby was born she "went back down" on the floor for some time. 9RP 417.

This Court should take review to address whether this conduct—essentially the failure of a woman who had just given birth unexpectedly and unattended to call for aid—should result in a felony murder conviction and over ten years in prison. Opinion at 8. *See* RAP 13.4(B)(3) and (4).

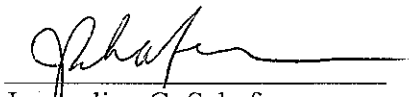
C. Public policy supports this Court reviewing how reliance on gender stereotypes unfairly influenced this conviction.

The proceedings below were rife with gender stereotypes about the way pregnant women are expected to behave, from discussions on the record about Ms. McMillen's flat affect, to the trial court's holding that it was relevant to her "credibility" that she did not obtain prenatal care and that she contacted Planned Parenthood for abortion information during her pregnancy. (9RP at 56-58). As other courts have held, such highly prejudicial, yet immaterial, facts must not be allowed to stand in for actual evidence of criminal malfeasance. *See, e.g. Stephenson v. State*, 31 So. 3d 847, 851 (Fla. 2010) (reversing a mother's conviction of aggravated manslaughter for the death of her 13-month old child, because the prosecutor introduced evidence that she had previously considered an abortion, and discussing similar rulings from other states).

IV. CONCLUSION

In short, this Court should grant review to correct a gross injustice that threatens the rights of all pregnant women in Washington State.

Respectfully submitted on April 18, 2017.



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