

No. \_\_\_\_\_

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**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1997**

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CORNELIA WHITNER,  
Petitioner,

-- v.--

STATE OF SOUTH CAROLINA,  
Respondent.

-----  
MALISSA ANN CRAWLEY,  
Petitioner,

-- v.--

MICHAEL MOORE, AS DIRECTOR OF THE SOUTH  
CAROLINA DEPARTMENT OF CORRECTIONS,  
Respondent.

-----  
ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SOUTH CAROLINA SUPREME COURT  
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PETITION FOR A WRIT OF CERTIORARI  
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**QUESTION PRESENTED**

Whether the South Carolina Supreme Court's unprecedented and unforeseeable decision reinterpreting the state's criminal child endangerment statute to expand the definition of "child" in "legal custody" to include a viable fetus violates the Fourteenth Amendment's requirement of due process notice and its prohibition against vague criminal statutes?

**PARTIES BELOW**

The parties before this Court are petitioners Cornelia Whitner and Malissa Ann Crawley, and respondents State of South Carolina and Michael Moore, as Director of the South Carolina Department of Corrections.

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## PETITION FOR WRIT OF CERTIORARI

Cornelia Whitner and Malissa Ann Crawley respectfully submit this petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of South Carolina in *Whitner v. State*, filed on October 27, 1997, and the subsequent decision in *Crawley v. Evatt*, relying on the *Whitner* opinion.<sup>1</sup>

### OPINION BELOW

The Supreme Court of South Carolina, on writ of certiorari, reversed the order of the Court of Common Pleas granting Ms. Whitner's Application for Post Conviction Relief. The *Whitner* decision is reported at 328 S.C. 1, 492 S.E.2d 777, and is reprinted in the Appendix hereto at 3a-27a.<sup>2</sup> The South Carolina Supreme Court's denial of Ms. Whitner's Petition for Rehearing (70a), and her Application to Remain on Bond are unreported (93a-95a), as is the order of the Court of Common Pleas. (64a-69a) In the wake of the *Whitner* decision, on December 1, 1997, the South Carolina Supreme Court granted the state's petition for a writ of certiorari in Ms. Crawley's case, reversed the grant of state habeas relief, denied her Petition for Rehearing, and denied her subsequent Application to Remain on Bond. (96a-97a)

### STATEMENT OF JURISDICTION

The opinion of the South Carolina Supreme Court from which petitioner Whitner seeks review was issued on October 27, 1997, and became final on November 19, 1997. The opinion from which petitioner Crawley seeks review was issued on December 1, 1997, and became final on January 8, 1998. This Court granted a thirty-

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<sup>1</sup> Pursuant to Rule 12.2 of the Rules of the Supreme Court of the United States, petitioners file a single petition for a writ of certiorari because the two judgments raise identical questions.

<sup>2</sup> For the convenience of the Court, all unpublished material is included in petitioners' Lodging and cited herein as ("L. \_\_\_")

day extension enlarging the time in which to file the petition to March 19, 1998. This petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The text of the Fourteenth Amendment, Section 1 to the United States Constitution, and South Carolina Code Ann. § 20-7-50 ("§ 20-7-50") is set forth in the Appendix at 98a-99a. Section 20-7-50 provides:

Any person having legal custody of a child or helpless person, who shall, without lawful excuse, refuse or neglect to provide the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.<sup>3</sup>

### **STATEMENT OF THE CASE**

In 1989, two South Carolina solicitors began applying the state's child endangerment law, § 20-7-50 (98a), to pregnant women whose conduct was presumed to pose a risk to fetal health. Since that time, the overwhelming majority of women arrested pursuant to this new interpretation, including petitioners Cornelia Whitner and

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<sup>3</sup> Section 20-7-50 was amended in 1993 to make a violation of the statute a felony, and to increase the maximum term of imprisonment to conform to the new classification. *See* S.C. Code Ann. § 20-7-50 (Supp. 1994). The Supreme Court of South Carolina cited the earlier version of the statute in *Whitner v. State* because Ms. Whitner was prosecuted under that version. *See Whitner v. State*, 492 S.E.2d at 778 n.1. (5a) Section 20-7-50 was amended again in 1996. S.C. Code Ann. § 20-7-50 (1997). (99a)

Malissa Crawley, have been low-income, African-American women who sought health care, and who, instead of being offered treatment for their substance dependency during pregnancy, were arrested after the hospital reported their condition to the local police department.<sup>4</sup>

#### A. Cornelia Whitner

On April 7, 1992, Cornelia Whitner, a 28 year old, African-American woman, was indicted for violating § 20-7-50 by allegedly failing "to provide proper medical care for her unborn child by using crack cocaine while pregnant." Affidavit in Support of the Arrest Warrant D-038088 (Feb. 5, 1992).

At her plea hearing on April 20, 1992, Ms. Whitner's attorney stated that Ms. Whitner's son, Tevin, born February 2, 1992, enjoyed good health, and that Ms. Whitner had received substance abuse counseling. Ms. Whitner, requesting assistance from the court, said: "I need some help, your honor." *State v. Whitner*, 92-

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<sup>4</sup> In Charleston, for example, only pregnant women who sought treatment at the Medical University of South Carolina ("MUSC"), and were determined to have a history of cocaine use were arrested pursuant to the new interpretation of the statute. Of the women arrested under this policy, 96% are African-American. See *Ferguson, et al. v. Charleston, et al.*, CA#:93-2624-12, Judgment (D.S.C. 1997) (L. 207-18), *appeal filed*, No. 97-2512 (4th Cir.); see also Philip H. Jos, *et al.*, *The Charleston Policy on Cocaine Use During Pregnancy: A Cautionary Tale*, 23 J. Law, Med. Ethics, 120, 124 (1995); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Rights of Privacy*, 104 Harv. L. Rev. 1419, 1421 n.6 (1991); *Settlement Agreement Between Medical Center of the Medical University of South Carolina and Office for Civil Rights*, U.S. Department of Health and Human Services (Aug. 8, 1994). (L. 219-24)

GS-39-670, Transcript of Record at 2 (S.C. Ct. Gen. Sess. Pickens Cty Apr. 20, 1992). (51a)

Although Ms. Whitner and her attorney emphasized both the need and Ms. Whitner's desire for in-patient treatment, *id.* (55a), the court responded, "I think I'll just let her go to jail." *Id.* Ms. Whitner was then sentenced to eight years in prison. *Id.*

On May 13, 1993, after serving more than a year of her eight year sentence, Ms. Whitner filed an Application for Post-Conviction Relief ("PCR") in the Court of Common Pleas ("PCR Court"), raising both state and federal constitutional grounds for seeking relief. (57a-63a) On November 22, 1993, the PCR Court issued an order granting Ms. Whitner's application, and vacating her sentence. *Whitner v. State*, 93, CP-39-347, slip op. (S.C. Ct. C.P. Nov. 22, 1993). (64a-69a) In doing so, the PCR Court concluded that the lower court lacked subject matter jurisdiction to accept a guilty plea based on a non-existent offense. Specifically, the PCR Court found that the "plain, ordinary, and popular meaning of 'a person under the age of eighteen' does not include a fetus." PCR Court Order at 3. (66a)

On July 15, 1996, the South Carolina Supreme Court, on writ of certiorari, and addressing only the state law issues, reversed the PCR Court's decision. *See* slip op. No. 24468 (S.C. Sup. Ct. July 15, 1996). (28a-49a) Thereafter, on October 27, 1997, the state high court granted Ms. Whitner's Petition for Rehearing, issued a refiled opinion addressing both state and federal claims, and reversed the PCR Court's order. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). (3a-27a) Ms. Whitner, who reported to the Leath Correctional Facility in December 1997, has now served almost two years of her eight year sentence.

## **B. Malissa Ann Crawley**

On January 6, 1992, petitioner Malissa Ann Crawley, a 31 year old African-American woman, was indicted on a charge of child neglect based on her pregnancy and substance dependency. On the advice of her court-appointed attorney, Ms. Crawley pled guilty before the Court of General Sessions. *State v. Crawley*, 92-GS-04-01 slip op. (S.C. Ct. Gen. Sess. Jan 6, 1992). (74a-83a) The court sentenced Ms. Crawley to five years in prison, which was suspended to five years probation.

On July 15, 1994, Ms. Crawley was assaulted by her boyfriend. Although she was the victim of abuse, she was charged with Criminal Domestic Violence. Ms. Crawley, not advised of any defenses, including that of self-defense, and not understanding the ramifications of a guilty plea, pled guilty to the charge, which carried a maximum punishment of 30 days or a fine of \$500. As a result, on August 5, 1994, she was found to have violated her probation, and was ordered to begin serving her previously suspended five year sentence.

A petition for a writ of habeas corpus was filed on September 25, 1994, alleging that the act to which Ms. Crawley pled guilty under § 20-7-50 is not a crime in South Carolina. (84a-85a) The court granted the requested relief, holding that "all other circuit court[s] that have addressed the issue have resolved the issue in favor of the petitioner." *Crawley v. Evatt*, 94-CP-04-1280, slip op. at 2 (Ct. C. P., Anderson Cty, S.C. Oct. 17, 1994) (87a)

Soon after her release, Ms. Crawley successfully completed a substance addiction treatment program. Since that time, Ms. Crawley has cared for her children, all of whom are healthy, has received health care training, and been employed as a home health care assistant. See Ms. Crawley's Application to Remain on Bond to the Supreme Court of South Carolina. (93a) However, on December 1, 1997, the South Carolina Supreme Court, ruling on the State's appeal, reversed the grant of habeas relief, and reinstated Ms. Crawley's conviction. *Crawley v. Evatt*, Mem. Op. No. 97-MO-117 (S.C. Dec. 1, 1997). (89a-90a) The court denied her

petition for rehearing on January 8, 1998. (91a-92a) Despite the positive changes in Ms. Crawley's life, the court also denied her petition to remain on bond.

On February 25, 1998, Ms. Crawley filed an application to stay the mandate of the South Carolina Supreme Court pending this Court's consideration of the petition for certiorari. The application was denied on February 27, 1998. Ms. Crawley returned to prison on March 2, 1998, compelling her to leave her young children, ages 6, 4, and 2.

### **C. Opinion Below**

In *Whitner*, the South Carolina Supreme Court examined the scope of the state's child neglect statute, § 20-7-50, and noted that: Under the Children's Code, "child" means a "person under the age of eighteen." S.C. Code Ann. Sec. 20-7-30(1) (1985). The question for this Court, therefore, is whether a viable fetus is a "person" for purposes of the Children's Code.

*Whitner*, 492 S.E.2d at 779. (7a) A three member majority of the court, in concluding that "the word `child'... includes viable fetuses," *id.* at 778 (5a), accepted the State's argument that §20-7-50 "encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a viable fetus." *Id.* at 779. (7a)

In reaching this conclusion, the court relied on two prior rulings in civil wrongful death cases, *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960), and *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964), as well as a decision in one criminal case, *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984), in which the court created, and applied prospectively, a new common law crime of "feticide." The *Whitner* court reasoned: "[I]t would be absurd to recognize the viable fetus as a person for purpose of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse." *Id.* at 780. (9a)

The court below explicitly rejected petitioner Whitner's argument that the South Carolina Legislature could not have intended such an interpretation, because it would lead to the "absurd" result of making all activities by pregnant women potentially harmful to a fetus, unlawful neglect. The majority in *Whitner* held that it "need not address this potential parade of horrors." *Id.* (12a) Nevertheless, it specifically found that applying § 20-7-50 to other conduct by pregnant women, such as smoking cigarettes and drinking alcohol, would also be consistent with the legislative intent. *Id.* at 782. (12a)

On rehearing, the majority also rejected Ms. Whitner's federal constitutional due process notice and vagueness claims, concluding that she had adequate notice because (i) of the plain meaning of the word "child," and (ii) "it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child." *Id.* at 785. (19a)

In his dissent, Chief Justice Finney concluded that "[a] plain reading of the entire child neglect statute demonstrates the intent to criminalize only acts directed at children and not those which may harm fetuses." *Id.* at 787. (Finney, C.J. dissenting). (23a-24a) He noted further that a prior South Carolina decision, *Doe v. Clark*, 318 S.C. 274, 457 S.E.2d 336 (1995), interpreting a civil section of the Children's Code, established that the term "child" means "a child in being and not a fetus." *Id.* at 786. (23a) According to Chief Justice Finney, "[i]t would be incongruous at best to hold that the definition of 'child' in the civil context of *Doe* is more restrictive than it is in the criminal context..." *Id.* Chief Justice Finney concluded his analysis by noting that "[t]he statutory requirement of legal custody is evidence of intent to extend the statute's reach only to children, because the concept of legal custody is simply inapplicable to a fetus." *Id.* (24a)

Likewise, Justice Moore, concurring in the dissent, concluded that the majority had "invade[d] what is clearly the sole province of

the legislative branch," and "embark[ed] on a course of judicial activism rejected by every other court to address the issue." *Id.* at 787. (25a) He concluded further that the majority opinion rendered the statute unconstitutionally vague because "a pregnant woman potentially [will now be] criminally liable for myriad acts which the legislature has not seen fit to criminalize." *Id.* at 788. (26a)

## REASONS FOR GRANTING THE WRIT

The *Whitner* court has created an intolerable conflict among the nation's state high courts regarding the scope of the federal constitutional guarantees embodied in the Fourteenth Amendment. The high courts of Kentucky and Nevada have squarely held that the due process guarantee of notice and its prohibition against vague criminal statutes preclude the use of child neglect statutes to punish women for their conduct during pregnancy. See *Sheriff v. Encoe*, 110 Nev. 1317, 1319, 885 P.2d 596, 598 (1994); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993). These courts, as well as all other state courts, have construed these federal constitutional protections in a manner that now directly conflicts with the *Whitner* court's constitutional analysis. This Court must issue accept the petition in order to resolve this conflict, and thereby ensure a consistent, nation-wide interpretation of federal due process guarantees.

Moreover, beyond the conflict among state courts, the *Whitner* decision demonstrates that the court below has fundamentally misconstrued the constitutional principles of due process, and in so doing, has advanced an analysis that completely confounds this Court's Fourteenth Amendment jurisprudence.

Petitioners did not have notice that South Carolina's child endangerment statute would be reinterpreted to apply to their conduct during pregnancy, and neither the statutory language, its prior interpretation, nor the legislative history would have so informed them. In fact, the South Carolina Legislature (the "Legislature"), like every other state legislature that has considered expanding its child neglect statute to reach pregnant women or creating special penalties for women who become pregnant while substance addicted, deliberately chose not to do so.<sup>5</sup> See *Whitner*,

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<sup>5</sup> See, e.g., Allison Marshall, 1994 Legislative Update, in *National Association for Families and Addiction Research and*

492 S.E.2d at 787 (Moore, A.J. dissenting). (25a) Instead, the Legislature rejected these proposals, and in so doing, acknowledged the conclusion of every leading medical group, that threatening women with arrest for conduct engaged in during pregnancy will endanger both fetal and maternal health by frightening women away from prenatal and other needed care.<sup>6</sup>

Furthermore, § 20-7-50, as reinterpreted, is so vague that it fails to provide pregnant women and their physicians with notice as to which of the infinite number of actions taken by pregnant women will be deemed criminal and/or must be reported. In addition, because pregnant women cannot know when viability will be deemed to have occurred, they are uncertain not only as to which actions are proscribed, but also when those actions will subject them to punishment. Given the arbitrary and discriminatory enforcement extant prior to the *Whitner* decision, the decision now, by virtue of its expansion of the activities that may render one subject to prosecution, will only serve to exacerbate an intolerable situation.

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*Education Update* (Spring 1995).

<sup>6</sup> See *Johnson v. State*, 602 So. 2d 1288, 1295-96 (Fla. 1992) (holding that a state statute prohibiting the delivery of any controlled substance to a "person under the age of 18 years" did not apply to a pregnant woman who was charged with "delivering" cocaine through the umbilical cord, and finding that "[r]ather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected"); *State v. Luster*, 204 Ga. App. 156, 419 S.E.2d 32, 35 (1992), (viewing addiction during pregnancy as a disease and noting that treatment rather than prosecution is the approach "overwhelmingly in accord with the opinions of local and national medical experts"), *cert. denied*, (1992 Ga. LEXIS 467 (June 4, 1992)).

Finally, the *Whitner* decision has implications far beyond the fate of the two petitioners in this case.<sup>7</sup> It will hurt those women who, because of fear of arrest, may not seek the prenatal care that could significantly improve maternal and fetal health, women whose medical decisions may now be construed as endangering fetal health, and physicians and other health care professionals who are now at risk of arrest for failure to report child neglect.<sup>8</sup> See S.C. Code Ann. § 20-7-510(A).

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<sup>7</sup> It will affect women whose convictions either have been or are likely to be upheld based on the *Whitner* decision as well as those who are now subject to its vague proscriptions. See, e.g., *Collins v. State*, Mem. Op. No. 97-MO-115 (S.C. Dec. 1, 1997) (granting state's petition for writ of certiorari, reversing the grant of post-conviction relief, and reinstating the conviction for unlawful child neglect based on Ms. Collins' substance dependency during pregnancy), *reh'g denied*, (Jan. 8, 1998) (L. 150-52); *Rickman v. Evatt*, Mem. Op. No. 97-MO-116 (Dec. 1, 1998), *reh'g denied*, (Jan. 8, 1998) (L. 163-66); *Sullivan v. State*, No. 93-CP-23-3223, Order (Ct. C. P. Greenville Cty, S.C. Dec. 19, 1994), *petiton for cert. filed*, Dec. 23, 1997. (L. 153-57); *State v. Garrick*, Case No. 95-GS-40-08467 (Ct. Gen. Sess. Richland Cty, S.C. Dec. 2, 1997). (L. 206)

<sup>8</sup> Pursuant to § 20-7-560, "[a] person required to report a case of child abuse or neglect [and] who knowingly fails to do so ... is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned not more than six months, or both."

**ARGUMENT****I. BY REINTERPRETING THE WORD "CHILD," THE WHITNER COURT HAS ENGENDERED A CONFLICT AMONG THE NATION'S STATE HIGH COURTS REGARDING THE SCOPE OF FEDERAL DUE PROCESS GUARANTEES**

From 1977 to the present, *see Reyes v. Superior Court of San Bernadino Cty*, 75 Cal. App.3d 214, 141 Cal. Rptr. 912 (4th Dist. 1977), prosecutors in more than thirty states have attempted to use existing criminal laws to punish women for their behavior during pregnancy that could be harmful to fetuses,<sup>9</sup> and, with the sole exception of the South Carolina Supreme Court, every state court of last resort, as well as all intermediate appellate courts<sup>10</sup> and

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<sup>9</sup> While many of those charged under such laws were addicted to illegal substances during pregnancy, others were charged for engaging in other conduct, such as drinking alcohol. *See, e.g., State v. Zimmerman*, No. 96-CF-525, slip op. (Cir. Ct. Racine Cty, Wis. Sept. 18, 1996), *appeal filed*, No. 96-2797-C.R. (Wis. Ct. App. Dist. II). (L. 188-205)

<sup>10</sup> *See, e.g., Reinesto v. Superior Court*, 182 Ariz. 190, 894 P.2d 733 (Ct. App. 1995) (in dismissing child abuse charges filed against a woman for heroin use during pregnancy, court held that the ordinary meaning of "child" excludes fetuses, and to conclude otherwise, would offend due process notions of fairness and render statute impermissibly vague); *Collins v. State*, 890 S.W.2d 893 (Tex. App. El Paso 1994) (charges brought for substance abuse during pregnancy dismissed because application of the statute to prenatal conduct violates federal due process guarantees); *State v. Dunn*, 82 Wash. App. 122, 916 P.2d 952 (1996) (holding that the legislature did not intend to include fetuses within the scope of the term "child" which was defined "as a person under eighteen years of age"), *review denied*, 130 Wash. 2d 1018, 928 P.2d 413 (1996);

numerous trial courts<sup>11</sup> reaching this issue, has rejected the use of child endangerment and other criminal statutes to punish women for their conduct during pregnancy.

The South Carolina Supreme Court's decision to expand the scope of § 20-7-50 directly conflicts with the decisions of its sister state courts. The high courts of Nevada and Kentucky expressly ruled that the use of child endangerment statutes to prosecute women for prenatal conduct violates the federal constitutional guarantee of due process. Specifically, in *Encoe*, 885 P.2d 596, and *Welch*, 864 S.W.2d 280, the supreme courts of Nevada and Kentucky each determined that their criminal child neglect statutes could not be applied to a pregnant woman's conduct because to do so would: (1) violate the plain meaning of their respective statutes; (2) deprive a woman of constitutionally mandated due process notice; and (3) render the statutes unconstitutionally vague.

As the Kentucky Supreme Court in *Welch* explained with regard to KRS §§ 508.100, 508.110, and 508.120:

The mother was a drug addict. But, for that matter, she could have been a pregnant alcoholic, causing fetal alcohol syndrome; or she could have been addicted to self abuse by smoking, or by abusing prescription painkillers, or over-the-counter medicine; or for that matter she could have been addicted to downhill skiing or some other sport creating serious risk of prenatal injury, risk which the mother wantonly disregarded as a matter of self-indulgence. What if a pregnant woman drives over the speed limit, or as a matter of vanity doesn't wear the prescription lenses she knows she needs to see the danger of the road? The defense asks where do we draw the line on self-abuse by a pregnant woman that

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*State v. Gethers*, 585 So. 2d 1140 (Fla. App. 1991) (dismissing child abuse charges brought for prenatal drug use on ground that such application misconstrues the purpose of the law).

<sup>11</sup> See unpublished trial court decisions (L. 1-187).

wantonly exposes to risk her unborn baby? The Commonwealth replies that the General Assembly probably intended to draw the line at conduct that qualifies as criminal, and then leave it to the prosecutor to decide when such conduct should be prosecuted as child abuse in addition to the crime actually committed.

However, it is inflicting intentional or wanton injury upon the child that makes the conduct criminal under the child abuse statutes, not the criminality of the conduct *per se*. The Commonwealth's approach would exclude alcohol abuse, however devastating to the baby in the womb, unless the Commonwealth could prove an act of drunk driving; but it is the mother's alcoholism, not the act of driving that causes the fetal alcohol syndrome. The "case-by-case" approach suggested by the Commonwealth is so arbitrary that, if the criminal child abuse statutes are construed to support it, the statutes transgress reasonably identifiable limits; *they lack fair notice and violate constitutional due process limits against statutory vagueness*.

864 S.W.2d at 283 (emphasis added).

Similarly, in *Encoe*, the Nevada supreme court held that its child neglect statute, NRS § 200.508, did not apply to a mother's prenatal substance dependency. The *Encoe* court "recognized that due process prohibits courts from interpreting existing laws in an unforeseeable or unintended manner," and stated that such an interpretation would render the statute unconstitutionally vague. 885 P.2d at 596 ("To hold otherwise would ... open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a range of miscellaneous, otherwise legal, toxins.").

A controlling opinion from the Michigan Court of Appeals,<sup>12</sup> *People v. Hardy*, 188 Mich. App. 305, 469 N.W.2d 50 (1991), *leave to appeal denied*, 437 Mich. 1046 (1991), *amended*, 471 N.W.2d 619 (Mich. 1991), held that the application of the state's drug delivery statute to a pregnant woman who "delivered" cocaine to her child through the umbilical cord violated the constitutional proscription that "a penal statute must be sufficiently definite and explicit to inform those who are subject to it what conduct will render them liable to its penalties." 188 Mich. App. at 309, 469 N.W.2d at 52. Likewise, a controlling Georgia Court of Appeals decision,<sup>13</sup> *State v. Luster*, 419 S.E.2d at 33, strictly construed a state statute proscribing drug delivery "from one person to another" because to do otherwise would deprive pregnant women of fair notice.

In addition, the supreme courts of Ohio and Florida construed their respective statutes in conformity with the federal due process requirement that penal statutes provide fair notice of the conduct prohibited so that citizens may conform their behavior to the dictates of the law. *See State v. Gray*, 62 Ohio St. 3d 514, 584 N.E.2d 710, 711 (1992) (child neglect statute could not be used to prosecute pregnant women for substance addiction because neither the statutory language nor the legislative history indicated its applicability to such conduct); *Johnson*, 602 So. 2d at 1290. Both the Nevada and Kentucky supreme courts noted that the *Johnson*, *Gray*, and *Hardy* rulings were mandated by federal due process principles. In this regard, the Nevada high court noted:

Courts in other jurisdictions have also held that the respective criminal statutes did not apply to the passage of harmful substances from a mother to her child through the umbilical cord. *See, e.g., Commonwealth v. Welch*, 864 S.W.2d 280

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<sup>12</sup> *See Wieczorek v. Volkswagenwerk*, 731 F.2d 309, 310 (6th Cir. 1984).

<sup>13</sup> *See Georgia Const. Art. VI, c V, Para. III* (1997).

(Ky. 1993); *Johnson v. State*, 602 So. 2d 1266 (Fla. 1992); *State v. Gray*, 62 Ohio St. 3d 514, 584 N.E.2d 710 (Ohio 1992); *People v. Hardy*, 188 Mich. App. 305, 469 N.W.2d 50 (Mich. Ct. App. 1991). These cases address statutes similar in effect to the one at issue here in Nevada. All of these courts concluded that, properly construed, the statutes involved do not intend to punish an expectant mother's drug use which is potentially injurious to her child. *Each court reasoned that such a construction renders the statute impermissibly vague.*

*Encoe*, 885 P.2d at 598 (emphasis added). The Kentucky supreme court used similar language. *See Welch*, 864 S.E.2d at 283 ("[A]ll of these cases point out in one way or another that to construe the statute involved otherwise makes it impermissibly vague....").

South Carolina has separated itself from all other states, not by virtue of any unique state laws, but rather by virtue of its aberrant interpretation of federal due process principles. South Carolina's protection of fetuses through tort and feticide laws addressing the conduct of third parties does not distinguish its approach from that of other states.<sup>14</sup> Nor does South Carolina's child neglect statute differ from that of most other states, which also employ the term "child," and were similarly guided by federal legislation intended to protect children, not fetuses.<sup>15</sup>

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<sup>14</sup> *See, e.g.,* Michael P. Penick, *Wrongful Death of a Fetus*, 19 Am. Jur. Proof of Facts 3d 107 (1993); *Jones v. Commonwealth*, 830 S.W.2d 877 (Ky. 1992) (drunk driver could be convicted of second degree manslaughter for causing injury to fetus which died after being born alive).

<sup>15</sup> Section 20-7-50, enacted as part of South Carolina's Child Protection Act of 1977, was intended to bring the state into compliance with the Federal Child Abuse Prevention and Treatment Act of 1974, Pub. L. 93-247, § 3, Jan. 31, 1974, 88 Stat. 5. *See* John D. Elliott, *Child Protection Act of 1977 with*

## II. THE SOUTH CAROLINA SUPREME COURT MISCONSTRUED THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS NOTICE AND THUS UNFORESEEABLY EXPANDED THE STATE'S CHILD NEGLECT STATUTE

This Court has long and diligently safeguarded the basic due process principle that all criminal statutes must provide fair warning of the prohibited conduct so that no person is held criminally responsible for conduct that he or she could not reasonably understand to be proscribed. *See, e.g., United States v. Lanier*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 1219, 1225 (1997); *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812 (1954)). As plainly stated in *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619 (1939): "[A]ll [persons] are entitled to be informed as to what the State commands or forbids."

In this case, petitioners were "given not only no 'fair warning,' but *no warning whatever*," *Bouie v. Columbia*, 378 U.S. 347, 355, 84 S.Ct. 1697, 1703 (1964) (emphasis added), that, when they became pregnant while substance addicted, their circumstances would be deemed "child neglect" under § 20-7-50. Neither the plain language of the statute, prior judicial interpretation, nor the decisions from *any* court in the country could have indicated to petitioners that this statute might apply to their situation. *See id.* at 356, 84 S.Ct. at 1704. As a result, the *Whitner* decision represents a particularly deplorable violation of the well-established principles of constitutional law:

When a[n] ... unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive

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*Commentary* (March 1980); *see also* Douglas Besharov, *The Legal Aspect of Reporting Known and Suspected Child Abuse and Neglect*, 23 Vill. L. Rev. 458, 459-61 (1977-78).

him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.

*Bouie*, 378 U.S. at 354-552, 84 S.Ct. at 1703; *see also Lanier*, 117 S.Ct. at 1225; *Marks v. United States*, 430 U.S. 188, 191-92, 97 S.Ct. 990, 992-93 (1977); *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199 (1973); *Rabe v. Washington*, 405 U.S. 313, 316, 92 S.Ct. 993, 995 (1972); *Palmer v. Euclid*, 402 U.S. 544, 91 S.Ct. 1563 (1971).

In *Bouie*, the Court made clear that the South Carolina Supreme Court could not re-write its criminal trespass law to punish two African-American protesters who refused to leave a segregated restaurant when asked to do so. 378 U.S. 347, 84 S.Ct. 1697 (1964). In reversing the convictions of the two student protesters, the Court stated:

The crime for which these petitioners stand convicted was "not enumerated in the statute" at the time of their conduct. It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment.

*Id.* at 363, 84 S.Ct. at 1707.

Here, as in *Bouie*, the crime for which petitioners were convicted was "not enumerated in the statute." 378 U.S. at 363, 84 S.Ct. at 1707. Like the trespass statute which, "[b]y its terms," did not prohibit the act of "remaining on premises after being asked to leave," *id.* at 355, 84 S.Ct. at 1703, South Carolina's child neglect statute does not, by its terms, apply to viable fetuses. *See Whitner*, 492 S.E.2d at 787 (Finney, C.J. dissenting). (23a-25a) In fact, consistent with the plain and ordinary meaning of the statutory language, the South Carolina Supreme Court, prior to its decision in *Whitner*, as well as all lower courts in the state, had interpreted this specific statute as applying only to cases involving the physical or emotional abuse of a child.

As in *Bouie*, where the state court's interpretation was "inconsistent" with the law of other states, 378 U.S. at 361, 84 S.Ct. at 1706, the *Whitner* court's interpretation of § 20-7-50 is inconsistent with its sister state courts' interpretations of similar statutes.<sup>16</sup> See pp. 13 to 16, *supra*. In fact, petitioners, based on other state decisions that found federal constitutional violations, *see id.*, could only believe that the constitution barred the application of South Carolina's child endangerment law to their conduct during pregnancy.

Moreover, most courts, including this one, have concluded that the plain and ordinary meaning of the words "child" and "person" do not include the unborn. See *Burns v. Alcala*, 420 U.S. 575, 580, 95 S.Ct. 1180, 1184 (1975) ("[f]ollowing the axiom that words used in a statute are to be given their ordinary meaning," the term "dependent child," as used in the provisions of Title IV of the Social Security Act of 1935 as amended, did not include the unborn);<sup>17</sup> *but see Whitner*, 492 S.E.2d at 778. (5a) Indeed, lower courts in

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<sup>16</sup> See, e.g., *In re Valerie D.*, 223 Conn. 492, 515, 613 A.2d 748, 760 (1992) (rejecting application of parental termination statute to a woman who used cocaine while pregnant, concluding that "the definition of 'child' as a 'person under sixteen years of age' suggests a limitation of that definition to a person who has been born, since that is the ordinary beginning point of one's 'age'"); *State ex rel. Angela M.W. v. Kruzicki*, 209 Wis.2d 112, 561 N.W.2d 729 (1997) (prohibiting detention of a pregnant woman under statute authorizing protective custody of a "child," as the legislature did not intend to include "fetus" within the definition of "child").

<sup>17</sup> See also *In re Adoption of Nelson*, 202 Kan. 663, 666, 451 P.2d 173, 176 (1969) (noting that "[we] do not ordinarily use the term child to mean an unborn child," the nine month gestation period cannot be included in computation period of a father's failure to assume parental duties).

South Carolina also rejected the interpretation recently propounded by the South Carolina Supreme Court, holding that such an interpretation is not consonant with the ordinary understanding of the term "child."<sup>18</sup>

Like *Bouie*, in which the Court considered the fact that the state's own legislature believed that its trespass statute did not cover notice after entry as evidenced by specific legislative activity on the subject, 378 U.S. at 361-62, 84 S.Ct. at 1707, the Legislature's extensive activity on the subject of substance addicted, pregnant women indicates that it also did not consider that existing laws addressed this issue. See 492 S.E.2d at 787 (Moore, A.J. dissenting). (25a-26a)

In support of its holding that petitioners had fair notice that their behavior constituted child endangerment pursuant to state law, the *Whitner* court relied on petitioners' presumptive knowledge of the "well documented" fact that cocaine use during pregnancy "can cause serious harm to the viable unborn child." *Whitner*, 492 S.E.2d at 782. (13a) However, absent a consensus within the medical community regarding the possible teratogenic risks of cocaine (especially as compared to the consensus on the dangers

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<sup>18</sup> For example, in *Tolliver v. State*, No. 90-CP-23-5178, Order at 5 (Ct. C. P. Greenville Cty, S.C. Aug. 10, 1992), *cert. denied*, (Mar. 10, 1993) (L. 171-77), the court granted post-conviction relief to a woman who pled guilty to child neglect. In doing so, the *Tolliver* court concluded that "[t]o sustain the position of the State, the word 'child' used in the statute must be interpreted to include 'fetus.' Such is not the plain and ordinary meaning generally given the word 'child'". See also *Sullivan v. State*, No. 93-CP-23-3223, Order at 3 (Ct. C. P. Greenville Cty, S.C. Dec. 19, 1994) ("When the South Carolina legislature has meant fetus, they have used the word 'fetus.' See S.C. Code of Laws Section 44-41-10(a), (f) and (1)"). (L. 153-57)

of tobacco and alcohol),<sup>19</sup> petitioners cannot be deemed to have received constitutionally sufficient notice that their conduct would be punishable under § 20-7-50.

Furthermore, petitioners cannot be charged with notice given the principle that the imposition of criminal penalties for one's status violates the Eighth Amendment to the Constitution. *See Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417 (1962) (addiction cannot be the basis for criminal prosecution under the Eighth Amendment's prohibition against cruel and unusual punishment). Similarly, petitioners could not have anticipated that they would be punished for becoming pregnant and carrying those pregnancies to term despite their addiction problems. *See Planned Parenthood v. Casey*, 505 U.S. 833, 859, 112 S.Ct. 2791, 2811 (1992) (right to privacy in reproductive decisionmaking includes a woman's decision to become pregnant and carry to term). Nor could they have known that their actions with regard to their own bodies would be treated the same as those of the strangers in *Hall*, 236 S.C. 257, 113 S.E.2d 790, *Fowler*, 244 S.C. 608, 138 S.E.2d 142, and *Horne*, 282 S.C. 444, 319 S.E.2d 703.<sup>20</sup> *Cf. State v. Ashley*, 701 So. 2d 338 (Fla. 1997) (expectant mother may not be criminally charged with the death of her child resulting from self-inflicted injuries during the third trimester of pregnancy); *Stallman v. Youngquist*, 125 Ill. 2d 267, 531 N.E.2d 355, 359 (1988) (refusing to recognize tort of maternal prenatal negligence).

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<sup>19</sup> *See Amicus Curiae* Brief of the National Association of Alcoholism and Drug Abuse Counselors, *et. al.* to be filed.

<sup>20</sup> Nor could petitioners have known from these decisions, that South Carolina would conclude that a viable fetus is a person when this Court has rejected such broad declarations. *See, e.g., Roe v. Wade*, 410 U.S. 113, 158-162, 93 S.Ct. 705, 729-31 (1973) (finding that state wrongful death actions based on prenatal injuries are designed to vindicate parents' interests, and that fetuses are not persons).

Given this decisional authority, petitioners could not have anticipated that they would not only be punished, but, in fact, punished *more* harshly for child neglect than for other offenses such as drug possession, merely because they were pregnant and substance dependent. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 1598 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that State may impose.").

### **III. THE SOUTH CAROLINA SUPREME COURT HAS MISCONSTRUED THE CONSTITUTIONAL PROHIBITION AGAINST VAGUE CRIMINAL STATUTES**

As the courts of numerous sister states have unequivocally recognized, efforts to expand the reach of pre-existing child endangerment statutes to cover a woman's conduct during pregnancy necessarily renders these laws unconstitutionally vague. *See* pp. 13 to 16, *supra*.

This Court has long adhered to the principle that laws which are so ambiguous that a person of common understanding cannot know what conduct is forbidden are unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment. *See, e.g., Lanzetta*, 306 U.S. at 453, 59 S.Ct. at 619.

The Court recently reaffirmed the vitality of this principle in the criminal context in *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 524, 114 S.Ct. 1747, 1754 (1994). In that case, the Court specifically noted that the due process concerns embodied in the vagueness test are twofold; the doctrine is intended to ensure that (1) citizens are given fair notice of what is prohibited so that they may conform their behavior to the dictates of the law,

*Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843 (1972) and (2) the discretion of law enforcement officials is limited by explicit legislative standards so as to preclude arbitrary, capricious, and discriminatory enforcement. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2299 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1689 (1971); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91, 86 S.Ct. 211, 213-14 (1965). As demonstrated below, § 20-7-50, construed to apply to a woman's conduct during pregnancy, is impermissibly vague because it fails both prongs of the constitutional test. See *Harriss*, 347 U.S. at 617, 74 S.Ct. at 812; see *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-42 (1940).

The *Whitner* court's new interpretation, coupled with the plain language of the statute, promotes a construction of the statute that is so broad that a woman of ordinary intelligence must presume that her every action might fall within its proscriptions.<sup>21</sup> Indeed, the absence of specific parameters *alone* renders the statute constitutionally infirm, because individuals arguably covered "must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926).

Where, as here, the actual activities proscribed are so uncertainly defined, this Court has struck the offending ordinance for vagueness.<sup>22</sup> See, e.g., *Palmer*, 402 U.S. at 545, 91 S.Ct. at

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<sup>21</sup> Because § 20-7-50, as construed by the *Whitner* court, proscribes "no comprehensible course of conduct at all," it "may not constitutionally be applied to any set of facts." *United States v. Powell*, 423 U.S. 87, 92, 96 S.Ct. 316, 319 (1975); see *Lanzetta*, 306 U.S. at 453, 59 S.Ct. at 619.

<sup>22</sup> The court below seeks to avoid the difficulties engendered by the vague language of the statute merely by announcing that the alleged

1564 ("suspicious person ordinance" making it unlawful to wander about the streets or be out at late or unusual hours held vague); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, (1921). In this regard, the construction of § 20-7-50 suffers from the same flaw deemed fatal by the Court in *L. Cohen Grocery*. *Id.* at 86, 41 S.Ct. at 299. In striking the statute in that case, the Court noted that the law, as worded, "forbids no specific or definite act" and "leaves open ... the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id.* at 89, 41 S.Ct. at 300.

Neither the statute itself nor the recent judicial interpretation provides a road map indicating which paths are now closed to pregnant women. A woman's conduct with respect to her own body -- conduct, such as smoking, drinking or taking prescription medications, not previously subject to punishment -- may now be determined to fall within the broad and undefined prohibitions of the statute. *See, e.g., Stallman*, 12 Ill. 2d at 276-80, 331 N.E.2d at 359-61. Thus, under the new interpretation, women, for example, undergoing chemotherapy that may endanger a fetus risk arrest and prosecution for child endangerment, as do women whose jobs may pose health risks to a developing fetus, *cf. U.A.W. v. Johnson Controls*, 499 U.S. 187, 111 S.Ct. 1196 (1991), as well as women who refuse caesarean sections believed necessary to protect the fetus. *Cf. In re A.C.*, 573 A.2d 1235 (D.C. 1990) (*en banc*) (reversing decision ordering caesarean section performed in the

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acts committed by petitioner clearly fall within the statute's proscriptions as newly interpreted. *See Whitner*, 492 S.E.2d at 785. (19a) However, as this Court has long stressed, "[i]t is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta*, 306 U.S. at 453, 59 S.Ct. at 619.

name of fetal rights over the objections of woman and physician).<sup>23</sup> However, common experience has not created a general understanding of the criminality of such actions. See *L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298.

Beyond the ambiguity regarding which activities will render one subject to prosecution, § 20-7-50 is unconstitutionally vague because a pregnant woman cannot ascertain at what moment the fetus becomes viable and her actions become punishable as felony child neglect. As this Court unequivocally stated in *Colautti v. Franklin*, 439 U.S. 379, 388, 99 S.Ct. 675, 682 (1979), the determination of viability is necessarily "a matter for medical judgment." *Id.* at 395-96, 99 S.Ct. at 686.

These constitutional infirmities are further exacerbated by the fact that the new construction of the statute: 1) encompasses a woman's negligent omissions, as well as her affirmative acts; 2) fails to incorporate any intent requirement; and 3) arbitrarily burdens a substantial amount of constitutionally protected conduct.

By reaching a woman's omissions as well as her commissions, the new construction of § 20-7-50 expands the scope of potential liability to the entire universe of a pregnant woman's behavior. As Justice Moore observed:

In construing this statute to include conduct not contemplated by the legislature, the majority has rendered the statute vague and set for itself the task of determining what conduct is unlawful. Is a pregnant woman's failure to obtain prenatal care unlawful? Failure to quit smoking or drinking?

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<sup>23</sup> See also *People v. Doe*, 260 Ill. App. 3d 392, 632 N.E.2d 326 (1st Dist. 1994); *In re Brown*, 228 Ill. 525, 689 N.E.2d 397 (App. Ct. 1st Dist. Dec. 1997) (overturning decision to restrain forcibly and sedate pregnant woman who refused a blood transfusion ordered to protect the fetus she carried).

492 S.E.2d at 788 (Moore, A. J. dissenting). (26a)

Under circumstances such as these, where one may be condemned in a criminal case for the mere failure to act, the need for adequate notice is even greater than when the prohibited conduct is specifically delineated. For this reason, the Court has traditionally scrutinized laws which criminalize omissions more closely than those which penalize solely affirmative acts.<sup>24</sup> See, e.g., *Kolender v. Lawson*, 461 U.S. at 358-59, 103 S.Ct. at 1858-59 (invalidating on vagueness grounds a law which required persons to produce on demand "credible and reliable" identification); *Lambert v. California*, 355 U.S. 225, 229, 78 S.Ct. 240, 243 (1957). Because § 20-7-50 has been interpreted in a manner which creates the possibility of prosecution of pregnant women for their failure to act, while it concomitantly fails to delineate any parameters for liability due to non-feasance, it cannot survive scrutiny. The Court should grant the petition to remedy this constitutional error.

The uncertainty as to § 20-7-50's proscriptions is compounded by the lack of any requirement of proof of intent. In this case, no effort was made to determine if petitioners, who requested treatment for their substance addiction, took drugs with the intention of hurting their children.<sup>25</sup> Moreover, because the statute had been

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<sup>24</sup> "[W]here a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1859 (1983) (citation omitted). Moreover, this concern has led to the invalidation of criminal statutes on their face, "even when they could conceivably have some valid application." *Kolender*, 461 U.S. at 358, 103 S.Ct. at 1859.

<sup>25</sup> As the National Association on Perinatal Addiction Research and Education ("NAPARE") has stated: "These women are addicts. They do not want or intend to harm their unborn children by using drugs." NAPARE Policy Statement No. 1, *Criminalization of*

previously interpreted as providing for strict criminal liability, it seems likely that there will be no such investigation in the future. *See State v. Jenkins*, 278 S.C. 219, 294 S.E.2d 44 (1982) (holding that the Legislature intended that a violation be found regardless of whether the actor violated the statute with knowledge or intent). Thus, in the absence of any intent requirement, the statute, as newly interpreted, now imposes excessive criminal penalties<sup>26</sup> on individuals who unwittingly engage in one of an infinite number of unspecified, albeit proscribed, behaviors.

The Court's reasoning in *Colautti*, 439 U.S. at 390, 99 S.Ct. at 683, that an unclear criminal law is void for vagueness when the statute also lacks a meaningful intent requirement, clearly applies here. In invalidating the statute in *Colautti*, the Court stated:

This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of mens rea. (Citations omitted).

*Id.* at 395 n.12, 99 S.Ct. at 685 n.12. (Citation omitted).<sup>27</sup>

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*Prenatal Drug Use; Punitive Measures Will Be Counter-Productive*, 2 (1990) (L. 225-26); *see also Johnson*, 602 So. 2d at 1295 n.5.

<sup>26</sup> *See* § 20-7-50 (providing for maximum penalty of 10 years in prison). Such a lengthy sentence underscores the inappropriateness of the new interpretation. As this Court recently noted in *Staples v. United States*, 511 U.S. 600, 615, 114 S.Ct. 1793, 1802 (1994): "the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea." *See also United States v. United States Gypsum Co.*, 438 U.S. 422, 442, n.18, 98 S.Ct. 2864, 2876 n.18 (1978).

<sup>27</sup> The Court has recently emphasized that strict criminal liability offenses outside the reproductive rights context are disfavored.

In addition to the above, this Court has long emphasized that the potential for "arbitrary and discriminatory enforcement" is a particular evil that vagueness review is designed to combat. *See, e.g., Papachristou*, 405 U.S. at 170, 92 S.Ct. at 847 (standardless vagrancy law "permits and encourages an arbitrary and discriminatory enforcement of the law").<sup>28</sup> If a statute designed to regulate conduct does not enumerate specific rules and guidelines to govern its enforcement, neither police officers nor citizens can hope to conduct themselves in a lawful manner. *See Coates v. Cincinnati*, 402 U.S. 611, 614 n.4, 91 S.Ct. 1686, 1688 n.4 (1971). Indeed, this is precisely the problem engendered by the new interpretation of § 20-7-50. When left *entirely* to the discretion of law enforcement officials, the selection of which specific prenatal actions or omissions are to be prosecuted, *see Papachristou*, 405 U.S. at 165-70, 92 S.Ct. at 845-47, invites subjective and discriminatory enforcement. *Id.* at 170, 92 S.Ct. at 847.

As the Court further elucidated in *Kolender*, the absence of legislatively determined boundaries for law enforcement creates the "potential for arbitrarily suppressing" constitutionally protected liberties. 461 U.S. at 359, 103 S.Ct. at 1859; *see also Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191 (1982). In this case, there can be no doubt that

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*See, e.g., Staples*, 511 U.S. at 605, 114 S.Ct. at 1796 (penal statutes must be construed "in light of the background rules of the common law" under which "the requirement of some mens rea for a crime is firmly embedded"); *United States Gypsum Co.*, 438 U.S. at 437-38, 98 S.Ct. at 2873-74 (holding that intent is an element of a criminal antitrust offense).

<sup>28</sup> In discussing the historical treatment of this prong of the analysis, the Court stressed in *Kolender*, 461 U.S. at 357-58 n.7, 103 S.Ct. at 1858 n.7, that "concern for minimal guidelines finds its roots as far back as [this Court's] decision in *United States v. Reese*, 92 U.S. 214, 221 (1876)...."

the *Whitner* decision impinges upon a constellation of fundamental rights, including the right to privacy in reproductive decisionmaking, *see, e.g., Casey*, 505 U.S. at 895-98, 112 S.Ct. 2830-31, the right to privacy of medical information, *see, e.g., Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869 (1977), the right to be free from cruel and unusual punishment, *Robinson*, 370 U.S. at 660, 82 S.Ct. at 1417, and the right to be free from laws that discriminate on the basis of gender by targeting pregnant women and new mothers for special criminal penalties. *See, e.g., United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264 (1996) (establishing the standard of review for claims of gender discrimination). While these rights are clearly implicated by the *Whitner* decision, this Court need not reach these issues in this case. *See Kolender*, 461 U.S. at 3362, 103 S.Ct. at 1860 (stating that the Court "find[s] it unnecessary to decide other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so").

The South Carolina Supreme Court, by reinterpreting the statute, has now improperly affirmed the state's unconstitutional construction of § 20-7-50, as well as sanctioned enforcement of a discriminatory policy. If left unaddressed, this new interpretation, far from resolving ambiguities, will, instead, invite similar unconstitutional applications in the future.

### CONCLUSION

As evidenced by the *Whitner* decision, when intense political controversy and judicial overreaching compromise logic and undermine fundamental constitutional guarantees, the resulting legal approach is necessarily flawed. By retroactively applying a new, judicially created crime of fetal abuse, the court below "walk[ed] down a path that the law, public policy, reason and common sense forbid it to tread." *Johnson*, 602 So. 2d at 1297. In so doing, the *Whitner* court created an intolerable conflict among the nation's state high courts, and articulated a construction of the scope of the

constitutional protections embodied in the Fourteenth Amendment that is directly at odds with the decisions of this Court, as well as that of South Carolina's sister state courts. This Court must grant the petition to redress this error.

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