National Advocates for Pregnant Women

N A P W

NAPW Final Report for McDowell Foundation Litigation Grant
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With funding support last year, NAPW has made significant advances in our efforts to file an affirmative civil rights suit against the State of Alabama challenging the constitutionality of Alabama's Chemical Endangerment of a Child statute, as reinterpreted by the Alabama Supreme Court in *Ex Parte Hope Elisabeth Ankrom*, No. 1110176, 2013 WL 135748 (Ala. Jan. 11, 2013) and yet another, more recent decision on the same issue in *Ex parte Hicks,* 2014 Ala. LEXIS 60 (Ala. Apr. 18, 2014). Working with the pro-bono assistance of law firm O'Melveny & Meyers, LLP (OMM) and the New York University School of Law Carr Center for Reproductive Justice (CCRJ), NAPW identified what kind of plaintiff would have standing to bring such a suit, and prepared numerous legal and constitutional arguments to raise on such a plaintiff's behalf. A key challenge has been identifying plaintiffs who would have standing and not, as a result of challenging the law, become more vulnerable to being prosecuted under it. We twice thought we had identified plaintiffs. (See details of one such attempt in our 2014 interim report). We have, however, expended significant funds, time, and energy to establish relationships with Alabama organizations and attorneys who may help us identify potential plaintiffs and mobilize opposition. We have prepared a written plaintiff solicitation and worked with local Alabama attorneys with expertise in class action plaintiff recruitment to lay the groundwork for more public plaintiff recruiting in Alabama in September of 2014.

As we prepare for affirmative litigation, we have documented every arrest and prosecution of pregnant women and new mothers pursuant to the Alabama child endangerment law. Using increased media tracking methods and communication with attorneys in Alabama, we identify each new arrest of a pregnant woman or new mother in the state who is charged with chemical endangerment of a child. Using our access to Alabama's online court records, we obtain the full court records for the woman's case as it proceeds, identify the attorney appointed or retained, attempt to reach out to counsel to assist in filing motions to dismiss and building a network of attorneys who are willing to support efforts against the current application of the law, and complete a data collection process of the case for our tracking and research purposes. This information and documented data will be useful in future research about these arrests, in identifying those people who may be helpful in the case moving forward, and in understanding the circumstances under which these arrests are proceeding.

Background: In 2013, Alabama Supreme Court issued a ruling concluding that the word "child" in the 2006 Chemical Endangerment of a Child statute (and Alabama law generally) includes fertilized eggs, embryos, and fetuses, effectively judicially rewriting and making it a crime for a woman to become pregnant and use any controlled substance (prescribed or unprescribed). Furthermore, the penalties for women charged

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under this law are enhanced depending on the outcome of the pregnancy. The statute was originally passed to criminalize exposing children to dangerous environments where drugs are manufactured or distributed. As written, the statute does not address pregnant women or pregnancy; the legislature refused to amend the law to include pregnant women on four separate occasions. Nevertheless, since 2006, prosecutors have used the law to arrest and jail women who gave birth to babies who test positive for a controlled substance. The *Ankrom* ruling radically reinterpreted Alabama state law to permit the prosecution of pregnant women for ingesting a controlled substance, regardless of whether it is prescribed, or even alleged to have caused harm to the fetus. The Alabama Supreme Court reiterated and reinforced this ruling in *Ex parte Hicks,* 2014 Ala. LEXIS 60 (Ala. Apr. 18, 2014). They also used the opinion to issue two concurring opinions (one of which relies on Biblical law) to explain why *Roe v. Wade* should be overturned and why women should be subject to criminal prosecution in relationship to their own pregnancies.

Unless these holdings are successfully challenged, any woman who ingests a controlled substance in Alabama can be arrested and subjected to prosecution and conviction with the possibility of a lengthy prison time. At present, we have documented more than 125 Alabama women who have been arrested. NAPW has, from the beginning, fought the use of Alabama's chemical endangerment law to police and punish pregnant women. NAPW reached out to defense counsel, urged them to file motions to dismiss the charges, provided model motions and assistance with their briefing, and did such things as obtain appellate counsel for Hope Ankrom and Amanda Kimbrough. NAPW also organized amicus efforts at all levels. With the Drug Policy Alliance and the Southern Poverty Law Center, NAPW filed an amicus brief in the Alabama Supreme Court on behalf of more than 50 medical and health advocacy groups and experts.

In *Ankrom* and *Hicks*, the Alabama Supreme Court saw fit to uphold the unconstitutional prosecution mill; NAPW recognized the need to expand its efforts to include researching and developing an affirmative litigation strategy in the federal court system. To that end NAPW has reached out to an even broader group of lawyers, activists, actively searched for potential plaintiffs in Alabama, documented each new arrest, and worked with selected investigative journalists as part of a long term strategy to expose these arrests as horrifying violations of both civil and human rights.

NAPW is grateful for the McDowell Foundation's support for our work to continue these vital efforts and to ensure that we can build on our work foundation for a lawsuit that we have created. Our overarching aim is to ensure that the 6 million women who become pregnant every year in the U.S. do not become fodder for the prison industrial complex. This affirmative litigation will provide a key opportunity to challenge the increasingly accepted idea that pregnant women (whether seeking to end a pregnancy, experience a pregnancy loss, or go to term and give birth) may be subject to state control and punishment. This challenge is particularly important to discourage prosecutions in other states (since the *Ankrom* decision, we have documented new arrests in UT, OH, WV, AR, OK, TN, & WI).