



NAPW Interim Report for McDowell Foundation Litigation Grant

March 21, 2014

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National Advocates for Pregnant Women (“NAPW”) very much appreciates the McDowell Foundation grant to assist NAPW in its 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. This law was judicially rewritten and made applicable to any pregnant woman who uses any amount of any controlled substance. In *Ex Parte Hope Elisabeth Ankrom*, No. 1110176, 2013 WL 135748 (Ala. Jan. 11, 2013). (See [“Your Epidural is Against the Law: What Alabama Women and Doctors Need to Know”](#).)

During the first six months NAPW, with pro-bono co-counsel at O’Melveny & Myers, LLP (“OMM”) and the NYU School of Law Reproductive Justice Clinic (“NYURJC”), has been researching and building the legal framework and arguments that will be used in this challenge. Our work on the case of *Beltran v. Loenish*, an affirmative federal challenge to Wisconsin’s “cocaine mom” law, has given us an opportunity to develop the kinds of constitutional arguments that will also be used in the Alabama challenge.

Because our case seeks to enjoin a state criminal law in federal court there are limits on who has standing to bring such a challenge. Although there is no shortage of women who have been and continue to be arrested in Alabama, (114 to date) none of them can be effective plaintiffs in this action. Federal courts will abstain from reviewing such cases until they have worked their way through the state court system and until all possible state remedies have been explored and exhausted. Research during these first six months have identified possible plaintiffs who would have standing and the commitment such individuals would have to make as plaintiffs in the case. Such people could include pregnant women who have had drug problems in the past and fear they might relapse, those who might need methadone treatment (a controlled substance), and those who anticipate obtaining an epidural (which uses controlled substances) could all be plaintiffs. It is possible that doctors who provide care to pregnant women could also be plaintiffs. We also believe heterosexually active women who are not yet pregnant could be plaintiffs because they now need to know every minute of everyday whether or not they are pregnant (carrying a fertilized egg) and their use of a controlled substance (legal or illegal) now constitutes the crime of chemical endangerment of a “child.”

Unfortunately, being a plaintiff in a case like this takes not only time, but also enormous courage. Some of the people who might be the likeliest plaintiffs –are already under siege.

Recognizing these significant challenges to finding plaintiffs and activists to support the lawsuit, NAPW used these last six months to begin building a network of support online and on the ground in Alabama that could help us find at risk of future prosecution and in need of representation. NAPW has obtained permission and joined two Alabama controlled Facebook pages for progressive women and activists, and through telephone, online, and in person outreach has been building the relationships and networks that will lead to the activists this lawsuit needs.

To that end, Ms. Paltrow went to Alabama to meet directly with people who could help with this effort. For example she met with Professors and graduates students at the University of Alabama in Birmingham, including grassroots activists from Women with A Vision, met with students and academics at the University of Alabama in Tuscaloosa including student activists who are part of the Alabama

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Alliance for Sexual and Reproductive Justice and did a presentation for this organization. Ms. Paltrow also did a presentation to faculty at the UAT School of Social Work, and met with University of Alabama law professor Bryan Fair. She also met the dean of Samford University's Cumberland School of Law and former Alabama magistrate Judge John Carroll, as well as a number of Alabama attorneys.

One activist associated with the Alabama Alliance for Sexual and Reproductive Justice agreed to act as a plaintiff, but she is currently finishing a PhD program out of state so is without standing until she returns to the state after completing her program. Following Ms. Paltrow's in-person trip to Alabama and some of the news coverage described below, NAPW received the following email:

If there is anyone that I can speak to that is familiar with and well informed about Alabama's Child Chemical Endangerment Law, especially regarding how some women are being prosecuted for drug use and addiction during pregnancy, PLEASE respond back. I need help getting information on this bogus law because it is so hard to find answers to specific questions on the internet. -- CT

The next morning, NAPW reached out to Ms. T. She explained that she was eight months pregnant and living in Montgomery, AL (to the best of NAPW's knowledge, one of the counties that has not been arresting pregnant women under the chemical endangerment statute). She was also receiving prescribed Suboxone as treatment for her opioid dependence, and was terrified of being arrested during her pregnancy for using a controlled substance or after if her newborn tested positive. Because we knew that there were many federal civil reproductive rights actions in which women directly affected were allowed to proceed pseudonymously, we thought we had finally found the perfect plaintiff.

NAPW consulted with counsel at OMM and NYURJC. Efforts were immediately made to see if a complaint and TRO could be filed while Ms. T was still pregnant. It was at that point that we learned the limits of proceeding anonymously where the statute at question is a criminal one. Based on the tests that federal and state courts have developed for determining the propriety of pseudonymous plaintiffs, there was a high likelihood that Ms. T's identity would eventually be revealed to state representatives. (In the reproductive rights cases the women did not risk arrest if their identities were revealed, but rather such things as public humiliation and stigma.) Realizing that there was no way we could protect Ms. T. from possible prosecution once her name was revealed, and the possibility that filing the lawsuit might make it more likely that she would be arrested, we realized that proceeding this way was not likely in her best interest. (Fortunately Ms. T was not arrested, but like many women she was subject to civil child welfare interventions that raise a whole other set of legal issues that should also be challenged).

During this funding period NAPW has also worked to bring attention to the Alabama law as part of our effort to build opposition to it and to find potential plaintiffs. NAPW has been able to bring attention to the Alabama law on [NPR's Fresh Air](#), in the Beltran [New York Times](#) story, used it to inform journalists writing about "personhood" measures for [The Boston Globe](#), and inspired Alabama activists who have [written op-eds](#) about the law's injustice. NAPW is also working with national and international journalists and writers to expose the unconstitutional and medically counterproductive nature of this law.

During the second half of the funding period, NAPW will continue to work to find appropriate plaintiffs for this case. We are confident that with the groundwork that has been laid and the relationships built that this will happen and the case will be filed.