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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

USCA No. 17-3727

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

SAMANTHA FLUTE,

Defendant - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION
HONORABLE CHARLES B. KORNMANN
UNITED STATES DISTRICT COURT JUDGE

APPELLEE'S BRIEF

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SUMMARY OF THE CASE

Samantha Flute was charged with involuntary manslaughter in violation of 18 U.S.C. § 1112 based on alleged prenatal misuse of prescription and over-the-counter medications. Her son died several hours after his birth. She is not alleged to have committed any criminal conduct after he was born.

Flute moved to dismiss the indictment on statutory and constitutional grounds. She argued that the involuntary manslaughter statute does not reach a woman's purely prenatal conduct because her unborn child did not fit the statutory definition of "human being" at the time of her conduct, even if it caused the death of her later-born child; federal law expressly prohibits the prosecution of a woman for her prenatal conduct with respect to her unborn child; and applying the involuntary manslaughter statute to Flute's prenatal conduct would render the statute impermissibly vague in violation of the Due Process Clause. The district court granted Flute's motion to dismiss on statutory grounds, finding that a woman cannot be prosecuted for the death of her child based on injury that occurred in utero. The United States appeals from the order dismissing the indictment.

REQUEST FOR ORAL ARGUMENT

Flute requests 20 minutes of oral argument to discuss the important statutory and constitutional issues in this case.

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JURISDICTIONAL STATEMENT

The United States appeals from the district court's order granting Flute's motion to dismiss the indictment for failure to state an offense. DCD 37. The district court's order was filed on 14 November 2017. DCD 37. The United States timely filed its notice of appeal on 12 December 2017. DCD 38. The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The involuntary manslaughter statute does not apply to a mother's prenatal conduct towards her unborn child even if the child is born alive and dies after birth.

United States v. Lanier, 520 U.S. 259 (1997)
State v. Louk, 786 S.E.2d 219 (W. Va. 2016)
18 U.S.C. § 1112
1 U.S.C. § 8

II. The Unborn Victims of Violence Act of 2004 governs prenatal conduct that causes death or injury to a child who was in utero at the time the conduct occured. It expressly prohibits the prosecution of a woman with respect to her unborn child.

18 U.S.C. § 1841

III. Interpreting the involuntary manslaughter statute to reach Flute's prenatal medication use would render the statute void for vagueness as applied to her.

United States v. Frison, 825 F.3d 437 (8th Cir. 2016)
State v. Louk, 786 S.E.2d 219 (W. Va. 2016)
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U.S. Const. amend. V

STATEMENT OF THE CASE

Samantha Flute was charged with involuntary manslaughter based on her alleged prenatal use of prescription and over-the-counter medications. All of her alleged conduct took place before her son was born.

Although the facts were not developed below, the United States alleges the following. Flute gave birth to a baby boy at the Coteau des Prairies Hospital in Sisseton, South Dakota at about 38 weeks gestation. DCD 26, p. 2. The baby died about 4 hours after birth. DCD 26, p. 2. A forensic pathologist examined the baby, found no anatomic cause of death, but concluded that the cause of death was a combined drug toxicity of several substances. DCD 26, pp. 2.

The United States claimed that Flute had her first prenatal appointment about one week before giving birth. DCD 26, p. 3. Her physician prescribed Lorazepam. DCD 26, p. 3. Flute later acknowledged that she took too much of this medication, used a substance she thought was hydrocodone, and ingested

cough medicine shortly before her son was born. DCD 26, pp. 2-3. She is not alleged to have committed any criminal acts against the baby after his birth.

The United States charged Flute with involuntary manslaughter based on her alleged use of these medications in the days leading up to the birth of her baby:

> Between on or about August 19, 2016, and August 20, 2016, in Agency Village, in Indian country, in the District of South Dakota, Samantha Flute, an Indian, unlawfully killed a human being, Baby Boy Flute, without malice, in the commission of a lawful act in an unlawful manner which might produce death. Such act was committed in a grossly negligent manner, with actual knowledge that her conduct was a threat to the life of another and with actual knowledge that would reasonably enable her to foresee the peril to which her act subjected another, to wit: Samantha Flute did unlawfully kill Baby Boy Flute by ingesting prescribed and over-the-counter medicines in a grossly negligent manner, and did thereby commit the crime of involuntary manslaughter, in violation of 18 U.S.C. §§ 1153 and 1112.

DCD 2. Flute moved to dismiss the indictment for failure to state an offense under Federal Rule of Criminal Procedure 12(b)(3)(B)(v) and as void for vagueness in violation of the Due Process Clause. DCD 24. The district court granted Flute's motion to dismiss, finding that federal criminal law does not permit the prosecution of Flute for the death of her child based on injury that occurred in utero. DCD 37. The district court did not address Flute's void-for-vagueness challenge. DCD 37. The United States timely filed this appeal. DCD 38.

SUMMARY OF THE ARGUMENT

Flute is charged with involuntary manslaughter under 18 U.S.C. § 1112. This indictment should be dismissed for failure to state an offense and because the statute is void for vagueness as applied to Flute's prenatal conduct.

The involuntary manslaughter statute does not apply to a woman's prenatal conduct towards her unborn child. It prohibits the unlawful killing of a "human being," which Congress has defined as any person born alive at any stage of development. Flute's unborn child was not a "human being" at the time of her allegedly criminal conduct. The text of the involuntary manslaughter statute and definition of "human being," rules of statutory construction, and the expressed intent of Congress to protect against postnatal, not prenatal, conduct make clear that when it comes to the prosecution of a mother for the death of her newborn child, the child must have been a "human being" at the time of the criminal conduct, not just at the time of his death.

Additionally, a separate statute bars the prosecution of a woman based on the effect of her prenatal conduct on her then-unborn child. *See* 18 U.S.C. § 1841(c). This statute covers third party prenatal conduct that causes the death of a child who is in utero at the time, but specifically precludes prosecution of "any woman with respect to her unborn child."

Finally, application of the involuntary manslaughter statute to Flute's prenatal conduct would render it impermissibly vague in violation of the Due Process Clause. No woman could reasonably know at the time of her prenatal conduct that she could be charged with involuntary manslaughter of her then-unborn child. Moreover, applying the statute to Flute's alleged misuse of prescription and over-the-counter medications would open the door to prosecution for a range of common prenatal acts. The statute is void for vagueness as applied to Flute.

ARGUMENT

I. The involuntary manslaughter statute does not apply to a mother's prenatal conduct towards her unborn child even if the child is born alive and dies after birth.

The involuntary manslaughter statute and the definition of "human being" do not cover a mother's prenatal conduct with respect to her unborn child even if the child was born alive before dying.[1] This is because the child did not meet the

[1] At the outset, it is important to distinguish this case from the prosecution of a third party who inflicts injury (via an attack against the pregnant mother) on an unborn child who later dies after being born alive. A third-party defendant's conduct was a crime against the mother at the time, even if it was not a crime against the unborn child. The Court need not address whether 18 U.S.C. § 1112 applies to a third-party's conduct against a pregnant woman that causes the death of a child who is born alive.

statutory definition of "human being" at the time of the alleged criminal conduct. This is clear from the text of the statute, the definition of "human being," the rules of statutory construction, and clear Congressional intent in defining "human being" to protect against postnatal, not prenatal, conduct. The district court properly dismissed the indictment for failure to state an offense. This Court reviews that order *de novo*. *United States v. Ferro*, 252 F.3d 964, 965-66 (8th Cir. 2001). It may be affirmed on any basis supported by the record. *Wages v. Stuart Mgmt. Corp.*, 798 F.3d 675, 679 (8th Cir. 2015).

Interpretation of a statute begins with the text. *United States v. Jungers*, 702 F.3d 1066, 1069 (8th Cir. 2013). Critical words or phrases must be considered in light of their placement and purpose in the statutory scheme. *Id.* The Court can look beyond the text when it is ambiguous or would lead to an absurd result if interpreted literally. *Id.* Under this framework, the involuntary manslaughter statute does not cover the alleged offense in Flute's case.

A. Under 18 U.S.C. § 1112 and 1 U.S.C. § 8, the victim of involuntary manslaughter must have been a "human being" at the time of the mother's alleged prenatal conduct.

Involuntary manslaughter is "the unlawful killing of a human being without malice . . . [i]n the commission of an unlawful act not amounting to a felony, or in

the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. § 1112(a). "Human being," is defined in turn as a person born alive:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person," "human being," "child," and "individual," shall include every infant member of the species homo sapiens who is born alive at any stage of development.

1 U.S.C. § 8(a). These statutes have never been applied to a woman's prenatal conduct based on its effect on her later-born child. They should not be here. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) (noting due process concerns with a novel construction of a criminal statute to cover conduct that neither the text nor a prior judicial decision suggest to be within its scope).

The definition of "human being" does not cover an unborn child before live birth. *See* 1 U.S.C. § 8(c) ("Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens *at any point prior to being "born alive"* as defined in this section.") (emphasis added). With this definition of "human being," the involuntary manslaughter statute does not reach a woman's prenatal conduct.

Determining status as a "human being" at time of the alleged criminal conduct is consistent with the general approach of the federal homicide statutes.

Murder or manslaughter is deemed to have been committed at the place where the injury was inflicted, not where the death occurred. 18 U.S.C. § 3236; *United States v. Eder*, 836 F.2d 1145, 1147 (8th Cir. 1988). The involuntary manslaughter statute should be similarly read to require conduct against a "human being" at the time of the act, not just that the victim became a "human being" at some point before death.[2]

Further, when Congress intends to include an unborn child in a statute or to criminalize conduct that takes place while a child is still in utero, it does so explicitly. *See* 18 U.S.C. § 1841(a)(1) (establishing a separate offense for causing the death of or bodily injury to "a child, who is in utero at the time the conduct takes place."). Failure to include conduct against unborn children in the involuntary manslaughter statute itself or in the definition of "human being" indicates that Congress did not intend to criminalize a mother's prenatal conduct

[2] The United States argues that manslaughter is committed at the time of death, citing the "crime of consequence" doctrine. Appellant's Brief, pp. 18-19. Under this doctrine, manslaughter is a composite crime. Neither the conduct nor the death make the crime, it is a combination of the two. *People v. Rehman*, 396 P.2d 913 (Cal. 1964); *see also Brockway v. State*, 138 N.E. 88, 88-89 (Ind. 1923), *overruled on other grounds by State v. Carrier*, 134 N.E.2d 456 (Ind. 1956). State cases determining when the statute of limitations begins to run and where the crime is deemed to have occurred are inapposite to interpretation of a federal statute defining who is a "human being" and when they obtain that status.

toward her own unborn child. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (when Congress includes language in one statute but omits it in another, it is presumed to be intentional).

Applying the involuntary manslaughter statute to Flute's alleged prenatal medication use would lead to an anomalous result. She could not have been charged with a crime against another at the time of her conduct. Nor could she have been prosecuted if her baby died before birth or even if she intentionally terminated her pregnancy through an illegal partial-birth abortion (there is no indication that she did so). *See* 18 U.S.C. § 1841(c); 18 U.S.C. § 1531(e). The United States nonetheless contends that she can be prosecuted for her conduct because her child died after birth. Statutes should be interpreted to avoid such anomalous, unusual, or absurd results. *United States v. E.T.H.*, 833 F.3d 931, 938 (8th Cir. 2016). Other courts have declined to interpret homicide statutes in a way that would lead to this result. *See, e.g.*, *State v. Louk*, 786 S.E.2d 219, 226 (W. Va. 2016). *Louk* refused to apply a child neglect resulting in death statute to prenatal drug use because it would "criminalize conduct that is not a crime at the time the conduct occurs, is not a crime if the unborn child dies in utero, but is a crime only by virtue of its effect on the child born alive . . . ." *Id.*

Applying the involuntary manslaughter statute in these circumstances would open the door to other unintended prosecutions. Several subsections of the federal assault statute explicitly apply to assault on an "individual," which includes any infant who is born alive at any stage of development. *See, e.g.*, 18 U.S.C. § 113(a)(7) (assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years); 1 U.S.C. § 8(a) (defining "individual" as any human born alive at any stage of development). If a woman can be charged with involuntary manslaughter based on prenatal conduct towards a later-born child, nothing logically precludes a woman from being charged with assault under § 113 for similar circumstances not resulting in death. The United States concedes that the latter is not permitted under federal law and offers no tenable rationale for those disparate conclusions. *See* Appellant's Brief, p. 16 n.4. The text of the relevant statutes simply does not support such a distinction.

B. In the definition of "human being," Congress intended to draw a bright line between actions taken while an unborn child was in utero and actions committed after birth.

To the extent the text is ambiguous, the legislative history clearly indicates that the statutory definition of "human being" was adopted to protect children from the moment of birth and not before. According to the committee report, the

purpose of the Born-Alive Infants Protection Act of 2002, codified at 1 U.S.C. § 8, was to distinguish between actions taken while an unborn child was still in utero (e.g., abortion) and actions taken after the child was born: "H.R. 2175 draws a bright line between the right to abortion—which the Supreme Court has now said includes the right to kill partially-born children—and infanticide, or the killing or criminal neglect of completely born children." H.R. Rep. No. 107-186, at 13 (2001); *see also id.* at 33 (the legislation applies "solely to the status of an infant following birth"). Although Flute's alleged prenatal conduct was not an abortion, the committee's statement shows that it is also not the type of conduct the statute was intended to cover.

Proponents of the bill reiterated that it was intended to define the legal rights and status of an infant after birth:

> [T]he purpose of this bill . . . is to protect all infants who are born alive by recognizing them as a person, human being, child or individual for purposes of Federal law. *This recognition would take effect upon the live birth of an infant* . . . .

148 Cong. Rec. H792 (daily ed. March 12, 2002) (statement of Rep. Sensenbrenner) (emphasis added). *See also id.* at H793 (the bill draws a bright line between the right to abortion and infanticide); 148 Cong. Rec. H787 (daily ed. March 12, 2002) (statement of Rep. Stearns) ("[T]he Born-Alive Infant Protect

Act, firmly establishes that an infant who is completely expelled or extracted from his or her mother and who is alive is considered a person for purposes of Federal law. . . . [T]his bill does not touch *Roe v. Wade*, which clearly pertains to a fetus in the uterus, not a baby already expelled outside his or her mother."). The definition of "human being" was intended to protect children against postnatal conduct, not to confer legal status or protections against a mother's prenatal conduct.

C. The rule of lenity requires that any dispute of interpretation be resolved in favor of Flute.

The text and legislative history make clear that the involuntary manslaughter statute does not reach a woman's prenatal conduct with respect to her unborn child who dies after being born alive. If there is ambiguity as to whether the child must have been a "human being" at the time of the alleged criminal conduct or merely the time of death, the rule of lenity requires interpreting the statute in favor of Flute. The rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Lanier*, 520 U.S. at 266; *see also United States v. Santos*, 553 U.S. 507, 513 (2008) (plurality opinion). Under this standard, the rule of lenity is appropriate and necessary in this case.

D. The common law born-alive rule and cases applying it to third parties do not bring Flute's conduct within the reach of the involuntary manslaughter statute.

The entire argument of the United States is premised on its assertion that before the enactment of 1 U.S.C. § 8, which defined "human being," and 18 U.S.C. § 1841, which criminalized certain conduct against unborn children, a woman could have been prosecuted for involuntary manslaughter based on prenatal conduct that resulted in the death of her child as long as the child was first born alive.[3] The common law born-alive rule allowed a third party who committed an offense against a pregnant woman and thereby caused the death of a later-born child to be prosecuted for homicide. The same is not true for a pregnant woman's conduct in relation to her unborn child.

First, and fundamentally, it must be noted that there is no place for common law rules in the current case. Congress adopted the statutory definition of "human being" in 2002. *See* 1 U.S.C. § 8. It later enacted the Unborn Victims of Violence Act of 2004 which was designed to "eliminate" the born-alive rule. *See* H.R. Rep.

[3] The United States argues that the district court concluded that Flute could have been prosecuted for involuntary manslaughter under 18 U.S.C. § 1112 before the enactment of these statutes. *See* Appellant's Brief, pp. 8, 11. The statute did not reach her conduct even before the enactment of 18 U.S.C. § 1841, however. In any event, this Court reviews the dismissal of the indictment *de novo*; it is not bound by any legal conclusions of the district court.

No. 108-420 (Part I), at 25 (2004). This statute, discussed at length below, allows prosecution of third parties who cause death or bodily injury to children who are in utero at the time of the conduct regardless of whether the affected child is born alive. *See* 18 U.S.C. § 1841(a)(1). In the face of these statutory enactments, the common law is irrelevant.

Second, the Eighth Circuit has never applied the born-alive rule. The Ninth Circuit has applied the rule to uphold the murder conviction of a third party who assaulted a pregnant woman and inflicted injuries on her unborn child. *United States v. Spencer*, 839 F.2d 1341, 1343 (9th Cir. 1988).

Spencer's recognition of the born-alive rule does not authorize the prosecution of Flute. First, Flute has found no federal court cases applying the born-alive rule to a mother's prenatal conduct with respect to her own unborn child. The United States does not argue otherwise. Indeed, it is unclear whether such a prosecution would have been allowed under the common law. *See, e.g.*, *State v. Ashley*, 701 So. 2d 338, 340-41 (Fla. 1997) (finding that born-alive doctrine did not apply because pregnant women were immune from prosecution under the common law).[4] The Court cannot construe the present day involuntary

[4] One formulation of the born-alive rule suggests that a woman could be charged with murder for an attempted self-abortion that caused the death of her child after

manslaughter statute and definition of "human being" in a way that is premised on the common law born-alive rule applying in a situation it has never been applied. *Cf. Lanier*, 520 U.S. at 266 (courts cannot apply a novel construction of a criminal statute to conduct that no prior judicial decision has fairly disclosed to be within its scope). Second, to the degree that the born alive rule ever applied, it has been abrogated by statutes defining "human being" to include only those born alive at the time, 1 U.S.C. § 8, and that set the scope of criminal liability for conduct while a child is in utero. 18 U.S.C. § 1841(a)(1). *Spencer* was decided before either statute was passed, making it completely inapplicable at this point.

II. The Unborn Victims of Violence Act of 2004 governs prenatal conduct that causes death or injury to a child who was in utero at the time the conduct occurred. It expressly prohibits the prosecution of a woman with respect to her unborn child.

The Unborn Victims of Violence Act of 2004, codified at 18 U.S.C. § 1841, provides an independent basis to dismiss the indictment against Flute. It covers several enumerated federal offenses that cause death or bodily injury "to a child, who is in utero at the time the conduct takes place," including manslaughter. 18

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he was born alive. *See Williams v. State*, 561 A.2d 216, 218 (Md. 1989) (quoting 3 Coke, Institutes 50 (1648)). It is unclear if this formulation has ever been applied in the United States. It certainly has never been applied under the federal manslaughter statute.

U.S.C. § 1841(a)(1). It specifically precludes prosecution "of any woman with respect to her unborn child." 18 U.S.C. § 1841(c)(3).

Section 1841 provides in relevant part:

> (a)(1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.
>
> . . .
>
> (C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being.
>
> . . .
>
> (c) Nothing in this section shall be construed to permit the prosecution—
>
> > (1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;
> >
> > (2) of any person for any medical treatment of the pregnant woman or her unborn child; or
> >
> > (3) of any woman with respect to her unborn child.
>
> (d) As used in this section, the term "unborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a

> member of the species homo sapiens, at any stage of development, who is carried in the womb.

18 U.S.C. § 1841.

By its terms, § 1841 precludes the prosecution of a woman with respect to her unborn child if the child "is in utero at the time the conduct takes place." The statute's coverage does not depend on whether the child died in utero or was born alive before dying.

It is clear from its text that § 1841 is now the sole statutory basis for prosecuting conduct that took place while the victim was in utero. The rule of statutory construction that "the specific governs the general" is "a warning against applying a general provision when doing so would undermine limitations created by a more specific provision." *Vanity Corp. v. Howe*, 516 U.S. 489, 511 (1996); *Custis v. United States*, 511 U.S. 485, 491-92 (1994). In other words, the more specific provisions of § 1841, which explicitly cover actions causing the death of a child "who is in utero at the time the conduct takes place," govern over the more general provisions of the involuntary manslaughter statute, which prohibits the unlawful killing of a "human being."

To interpret § 1841 as continuing to allow the prosecution of a woman for prenatal conduct that results in the death of a later-born child under a generally

applicable law like § 1112 would read the specific limitation in § 1841(c) out of the statute. Section 1841(c) provides that a woman cannot be subject to prosecution for manslaughter based on her prenatal conduct. 18 U.S.C. § 1841(a)(1), (b), (c). If she somehow could still face prosecution under § 1112 itself for the same prenatal conduct, § 1841(c) would be a meaningless limitation. The statute should be interpreted to avoid that result. A statute should be construed to give effect to all of its provisions, "so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quotation omitted).

The United States attempts to salvage its interpretation of § 1841 by arguing that the statute only applies if the unborn child died while still in utero. This is totally unsupported by the text. The text only refers to the timing of the criminal conduct. *See* 18 U.S.C. § 1841(a)(1). In other words, the statute defines its scope as covering harm to children who are "in utero at the time the conduct takes place." It says nothing about the time of death.

Further, that suggested reading fails to account for the statute's inclusion of bodily injury. *See* 18 U.S.C. § 1841(a)(1). A child who sustained an injury short of death in utero was, by definition, still living after birth (barring unusual

intervening circumstances). For the statue to apply to these victims, it cannot be limited to situations where an unborn child dies in utero.

Finally, the United States' reading of § 1841 is inconsistent with the explicit intent of Congress to eliminate the born-alive rule, not to enact a statute that works in concert with it:

> Federal law does not currently permit prosecution of violent criminals for killing or injuring unborn children. Instead, Federal criminal statutes incorporate the common law "born alive" rule, which provides that a criminal may be prosecuted for killing an unborn child only if the child was born alive after the assault and later died as a result of the fetal injuries.
>
> The born alive rule, however, has been rendered obsolete by progress in science and medicine. As one commentator explains, "the historical basis of the born alive rule was developed out of a lack of sophisticated medical knowledge." Because pregnancy was difficult to determine, the common law recognized that live birth was the most reliable means of ensuring that a woman was with child and that the child was in fact a living being.
>
> The use of ultrasound, fetal heart monitoring, in vitro fertilization, and fetoscopy has greatly enhanced our understanding of the development of unborn children. Pursuant to this enhanced knowledge, most jurisdictions today recognize third party tort actions for injury or death of an unborn child. Even the United States Supreme Court in *Roe v. Wade* acknowledged the inheritance and other property rights that unborn children enjoy in modern law.
>
> Because of these developments, the current trend in American law is to abolish the born alive rule. In many States, this abolition is manifest in the enactment of legislation making it a crime to kill an unborn child. Such legislation further reflects the growing trend in

> American jurisdictions of recognizing greater legal protections for unborn children, a trend consistent with the advancements in medical knowledge and technology.
>
> H.R. 1997 thus follows the current trend of modern legal theory and practice by dismantling the common law born alive rule at the Federal level. The legislation ensures that Federal prosecutors are able to punish those who injure or kill unborn children during the commission of violent Federal crimes, whether or not the child is fortunate enough to survive the attack and be born alive.

H.R. Rep. No. 108-420 (Part I), at 5-6 (2004). *See also id.* at 20 (The Act "reject[s] the antiquated and obsolete common law 'born alive' rule . . . ."); *id*. at 25 (The Act "further eliminates the obsolete common law born-alive rule"). Nothing in the text of § 1841 or its legislative history suggests that Congress intended to maintain prosecutions for harm caused to a subsequently born child under the born-alive rule.

Finally, the United States argues that § 1841 cannot be interpreted to limit a prosecution under the general involuntary manslaughter statute, citing *United States v. Montgomery*, 635 F.3d 1074 (8th Cir. 2011). *Montgomery* is inapposite. The *Montgomery* court rejected the argument that § 1841 expanded the definition of "person" in 1 U.S.C. § 8(a) to include unborn children. *Id.* at 1086. *Montgomery* does not say that § 1841 cannot be read to eliminate the common law born-alive doctrine, which is exactly what Congress wrote it to do.

In enacting 18 U.S.C. § 1841, Congress eliminated the anomaly that a third-party's criminal conduct was murder if the unborn child lived outside the womb for brief time but was not a crime at all if the child died before birth. It did not intend to create the same result for a pregnant woman's prenatal conduct with respect to her own unborn child.

III. Interpreting the involuntary manslaughter statute to reach Flute's prenatal medication use would render the statute void for vagueness as applied to her.

The involuntary manslaughter statute is unconstitutionally vague as applied to Flute's alleged prenatal misuse of prescription and over-the-counter medications. "A statute is void for vagueness if it: (1) fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Frison*, 825 F.3d 437, 442 (8th Cir. 2016) (internal quotation omitted). This court reviews *de novo* whether a statute is void for vagueness. *United States v. Cook*, 782 F.3d 983, 987 (8th Cir. 2015).[5]

[5] The district court did not address Flute's vagueness argument, but the judgment may be affirmed on any ground supported by the record. *Wages*, 798 F.3d at 679. Because Flute merely seeks affirmance of the order dismissing the indictment, she was not required to file a cross-appeal to preserve this issue for review. *See Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015).

Interpreting the involuntary manslaughter statute to reach Flute's alleged misuse of prescription and over-the-counter medications while pregnant would render the statute impermissibly vague. Flute would not have reasonably known at the time of her conduct that it could open her to prosecution for involuntary manslaughter. Section 1112 refers to "human beings," a term that is defined to exclude unborn children. Further, federal courts have never applied the common law born-alive rule or the statutory definition of "human being" to uphold the prosecution of a woman based on her prenatal conduct. Finally, 18 U.S.C. § 1841, which explicitly covers conduct committed while a child is in utero, expressly prohibits the prosecution of a woman based on conduct with respect to her unborn child. Regardless of whether this Court finds that § 1841 bars the prosecution of Flute as a matter of law, as long as this statute is on the books, pregnant women cannot reasonably be expected to know that they can be prosecuted for manslaughter based on prenatal conduct. The involuntary manslaughter statute fails to provide fair notice of what conduct is prohibited, rendering the statute void for vagueness. *See Louk*, 786 S.E.2d at 225 (finding interpreting the child neglect resulting in death statute as applying to prenatal drug use would violate due process).

The vagueness problem is heightened because involuntary manslaughter covers the commission of an otherwise lawful act in an unlawful manner or without due caution and circumspection. If this language is construed to reach Flute's alleged misuse of prescription and over-the-counter medications, it could just as easily be construed to reach host of other lawful, but potentially reckless or negligent, conduct while pregnant:

> everything from becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, to the continued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little, indeed to 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.

Kilmon v. State, 905 A.2d 306, 311 (Md. 2006). Failure to take the right vitamins, gaining too much or too little weight, consuming caffeine, being over the age of 35, or working in a place with exposure to occupational or environmental hazards could also trigger the liability. *Reinesto v. Superior Ct. of Ariz.*, 894 P.2d 733, 736-37 (Ariz. Ct. App. 1995). If the prosecution of Flute is allowed to proceed, "there would seem to be no clear basis for categorically excluding any of those activities from the ambit of the statute." *Kilmon*, 905 A.2d at 311. Moreover,

"criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be." *Id.* at 311-12. This is exactly what the due process clause is designed to prevent. The indictment must be dismissed.

CONCLUSION

Flute's alleged prenatal medication use falls outside the scope of 18 U.S.C. § 1112 because her unborn child was not a "human being" at the time of the alleged criminal conduct. Further, applying the involuntary manslaughter statute to Flute's prenatal conduct renders the statute impermissibly void for vagueness. Flute requests that the Court affirm the district court's order dismissing the indictment.

Dated this 23rd day of May, 2018.

Respectfully submitted,

/s/ Neil Fulton

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

In addition, I certify the electronic version of the foregoing has been scanned for viruses using Symantec Anti Virus Corporate Edition, and that the scan showed the electronic version of the foregoing is virus-free.

By: */s/ Neil Fulton*
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Microsoft Word 2013 was used in the preparation of Appellee's Brief and that the word count done pursuant to that word processing system shows that there are 5,971 words in Appellee's Brief.

Dated this 23rd day of May, 2018.

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