No. 09-1235

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LORRAINE HAVARD, as Guardian of CHELSIE BARKER, a minor,
Plaintiff-Appellee,

v.

DEPUTY PUNTUER, DEPUTY GRIFFIN, C. FRAZIER, R.N.,
jointly and severally, Defendants-Appellants

And

COUNTY OF WAYNE, WAYNE COUNTY JAIL, and JANE/JOHN DOES,
unknown defendants, jointly and severally, Defendants.

On Appeal from the United States District Court
for the Eastern District of Michigan, Southern Division
Case No. 2:06-cv-10449
The Honorable Stephen J. Murphy, III

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Plaintiff–Appellee
Urging Affirmance

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AND FINANCIAL INTEREST

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1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO**.

2. Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome? **NO**.

/s/ Steven W. Fitschen, November 18, 2009
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INTEREST OF THE *AMICUS CURIAE*

The National Legal Foundation (NLF) is a 501(c) (3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. The NLF and its constituents believe that the deliberate failure to treat a pregnant inmate is a serious moral issue that demonstrates a deep disrespect for the life of the mother and child. Since its founding in 1985, the NLF has litigated important Constitutional cases in both the federal and state courts. Thus, the NLF is well-equipped to bring to this Court's attention legal arguments that intersect with the moral issues before this Court. Therefore, the instant case is of great interest to our constituents and supporters, including those in Michigan.

This Brief is filed pursuant to the accompanying Motion.

SUMMARY OF THE ARGUMENT

This Brief makes one argument not made by the party it supports, Ms. Havard. The judgment of the district court sound be affirmed, but on different grounds than those relied upon by the district court. Those grounds are (1) that this case can be decided without reaching the question of fetal personhood, (2) that 42 U.S.C. § 1983 (2006) is silent concerning when the right of action arises with respect to the injuries of a fetus that is ultimately born, and (3) that under Michigan law the, right of action for an injury sustained *in utero* arises at birth.

ARGUMENT

Your *Amicus* writes to urge affirmance of the district court's judgment. However, this Brief presents alternate grounds on which the judgment should be affirmed. *See Pitt County v. Hotels.com, LP*, 553 F.3d 308, 311 (noting this Court's ability to affirm on "any grounds apparent from the record"). In reaching its decision, the district court relied upon the reasoning in *Crumpton v. Gates*, 947 F.2d 1418 (9th Cir. 1991), a case involving a claim that the killing of the father of a child *in utero* violated the child's own constitutional rights. There, the Ninth Circuit reasoned that "although the wrongful act occurred while Crumpton was *in utero*, the injury or suffering which flowed from that wrongful act occurred postnatally" because the injury—state-caused loss of "familial companionship and society"—was suffered by the born child. *Id.* at 1422. In the instant case, the district court applied *Crumpton*'s reasoning to the facts before it and concluded that "the complaint states a claim that Barker's injuries were sustained during the time period following her birth, while she was transported to the hospital, and that the cause of her injuries was the lack of adequate medical care during and immediately after birth" and that "plaintiff has also stated a claim for those injuries which Chelsie Barker may have received during the delivery process prior to birth[ ] [b]ecause the injury was a continuous one . . . ." *Havard v. Puntuer*, 600 F. Supp. 2d 845, 855 (E.D. Mich. 2009). With regard to the latter point, the district court

opined that "there is no principled reason to distinguish those injuries sustained before the birth from those sustained after birth." *Id*. However, the district court offered no support for that assertion.

As noted above, this Brief suggests alternate grounds for affirming the district court's opinion. Those grounds are (1) that this case can be decided without reaching the question of fetal personhood, (2) that 42 U.S.C. § 1983 (2006) is silent concerning when the right of action arises with respect to the injuries of a fetus that is ultimately born, and (3) that under Michigan law, the right of action for an injury sustained *in utero* arises at birth. The benefit of grounding this decision on the timing of the accrual of the right of action, rather than following *Crumpton* is that the concept of the right of action explains *why* "there is no principled reason to distinguish those injuries sustained before the birth from those sustained after birth." *Havard*, 600 F. Supp. 2d at 855. Children should not have to bear federally cognizable afflictions without recourse simply because the wrongful act was done by a state actor while the child was *in utero*.

I. *ROE V. WADE'S* HOLDING THAT A FETUS IS NOT A PERSON FOR FOURTEENTH AMENDMENT PURPOSES DOES NOT PRECLUDE A CHILD INJURED *IN UTERO* FROM ASSERTING HER RIGHTS UPON BIRTH.

A. There is no Compelling Reason in *Harman v. Daniels* why a Right of Action Must Arise at the Moment of the Wrongful Act.

Under § 1983, a right of action exists against any person acting under color of state law who subjects "any citizen of the United States or person" to the depravation of the rights secured by the Constitution or federal laws.

In *Roe v. Wade*, 410 U.S. 113 (1972), the Supreme Court held that a fetus is not a "person" under the Fourteenth Amendment. *Id.* at 158. Other courts have held that if a fetus is not a person under the Fourteenth Amendment, they are also non-persons for purposes of § 1983. *Guyton v. Phillips*, 606 F.2d 248, 250 (9th Cir. 1979); *McGarvey v. Magee-Women's Hosp.*, 340 F. Supp. 751, 752-54 (W.D. Pa. 1972).

From this premise, the court in *Harman v. Daniels*, 525 F. Supp. 798, 800 (W.D. Va. 1981), asserted that "the right of action comes into being at the moment a person 'subjects' a plaintiff to an action which deprives the 'person' or 'citizen' of rights," and then leapt to the conclusion that the germane inquiry is "whether the infant plaintiff had Fourteenth Amendment rights while *in utero*." *Id.*

The Defendants in the instant case have relied heavily upon *Harman*. *Havard*, 600 F. Supp. at 852 ("*Harman v. Daniels*, the main case relied upon by

the defendants"); (Appellant's Br. 22-25.) However, the *ipse dixit* that the right of action must arise at the "moment" of the wrongful act is a fatal weakness in *Harman's* reasoning that injuries sustained by a fetus that is ultimately born are unactionable under federal law. Neither *Harman* nor the courts that follow it, *see, e.g.*, *Ruiz Romero v. Gonzalez Caraballo*, 681 F. Supp. 123 (D.P.R. 1988), offer any substantiation for this claim, and it is not supported by the text of § 1983.

Harman correctly noted a distinction between the creation of a right of action and the accrual of a cause of action. 525 F. Supp. at 800. "The form or right of action should not be confused with cause of action. They are not interchangeable." *Swankowski v. Diethelm*, 129 N.E.2d 182, 184 (Ohio Ct. App. 1953); *see also Landry v. Acme Flour Mills Co.*, 211 P.2d 512, 515-16 (Okla. 1949) (providing a detailed discussion of the difference). A cause of action is "a legal wrong, the thing which becomes a ground for suit." *McMahon v. United States*, 186 F.2d 227, 230 (3d Cir. 1950). By contrast, a right of action is "a right presently to enforce a cause of action by suit." *Id.*

With this distinction in mind, *Harman* curiously states that it is "improper to assert that the right of action . . . arises whenever the cause of action accrues." 525 F. Supp at 800. Quite to the contrary, under federal law, a cause of action does not accrue until the plaintiff knows or has reason to know of the injury which is the basis of the action. *Perreault v. Hostetler*, 884 F.2d 267, 270 (6th Cir. 1989).

Thus, in the instant case, the cause of action accrued no sooner than birth. Furthermore, because "[a] right of action cannot accrue[1] until there is a cause of action," *First Virginia Bank-Colonial v. Baker*, 301 S.E.2d 8, 14 (Va. 1983) (citations and internal quotation marks omitted), the birth of the injured child would be the earliest time for both the cause of action and the right of action to accrue. The *First Virginia Bank* court, explicitly stated that the "right of action accrues when damage occurs" which may be *after* the time of the wrongful act. *Id.*

In the instant case, the damage to Chelsie of which this Court can take cognizance occurred at birth. Whether the *wrongful act(s)* took place before, during, or at the moment of birth is of no import. Indeed, this Court has already acknowledged the same principle in another context. In addressing a conflicts of law question, this Court reasoned by analogy. It opined that it should decide *where* an injury occurs in a manner similar to that in which it decides *when* an injury occurs. In that context this Court opined "when an injury does not result immediately, the cause of action does not accrue until actual injury or damage ensues." *Vaughn v. J.C. Penney Co.*, 822 F.2d 605, 610 (6th Cir. 1987).

Thus, this case can be resolved without implicating the personhood question and will signal to jails and prisons that they cannot decline to provide pre-natal

[1] While courts generally write of a cause of action "accruing," they are not so uniform in their usage concerning a right of action. Some courts write of the right of action "accruing"; others write of the right of action "arising."

care to *any* of their inmates, no matter what their stage of pregnancy. Under the district court's rationale, jails and prisons can fail to provide pre-natal care to all prisoners except those in the process of delivery and avoid legal consequences.

B. There is an Equitable Reason why a Right of Action Should Arise When the Depravation of Rights is Experienced.

It is readily apparent in cases of fetal injury and subsequent birth why equity requires that the right of action arises when the depravation of rights is experienced by the child. As noted at the end of Section I. A., an earlier accrual of the right of action (at the time of the wrongful act) would allow state actors to refuse medical treatment (or act or fail to act in other ways) with complete impunity, knowing that the fetus will not be considered a person. And, under this scenario, the infant injured *in utero* and later born alive must bear their federally cognizable afflictions without hope of federal remedy. Unfortunately, in several cases where the right of action arose at the moment of the misconduct, this patent injustice occurred.

For example, in *Harman*, the infant plaintiff, Sarah Beth Harman, was *in utero* when the defendant officer allegedly struck her mother in the stomach. The defendant allegedly knew that Ms. Harman was pregnant at the time of the incident and he failed to seek immediate medical assistance for her severe stomach pains. Sarah Beth Harman allegedly "received major injuries as a result of the attack and suffered severe complications at birth which required substantial medical treatment and which will require continued medical care." 525 F. Supp at 799. Because that

court decided that the right of action arose when the infant plaintiff was still *in utero*, the court concluded that the injured child had no cause of action against the defendant under the Civil Rights Act or the Constitution. *Id.* at 802.

Likewise in *Ruiz Romero v. Gonzalez Caraballo*, 681 F. Supp. 123, 124 (D.P.R. 1988), the infant plaintiff was *in utero* when his mother, who was nine-months pregnant, was allegedly beaten by officers of the police of Puerto Rico. Although he was subsequently born alive, he could not claim deprivation of his federally protected rights under §1983 because the court held that his potential right of action arose at the moment of the alleged beating when he was not a person for purposes of the Fourteenth Amendment or § 1983. *Id.* at 125.

In the instant case, the district court held that "[b]ecause the injury was a continuous one . . . there is no principled reason to distinguish those injuries sustained before the birth from those sustained after birth." *Havard*, 600 F. Supp. 2d at 855. This holding is understandable especially in light of the egregious nature of the alleged misconduct and the nature and extent of the harm to the child. However, other pregnant prisoners would not fare as well under a strict reading of the district court's approach. As noted previously, the district court concluded that "the complaint states a claim that Barker's injuries were sustained during the time period following her birth, while she was transported to the hospital, and that the cause of her injuries was the lack of adequate medical care during and immediately

after birth" and that "plaintiff has also stated a claim for those injuries which Chelsie Barker may have received during the delivery process prior to birth[ ] [b]ecause the injury was a continuous one . . . ." *Havard*, 600 F. Supp. 2d at 855. It is true that the district court noted that it found "the reasoning of the *Harman* court to be inapposite," *id*. at 854, to the current case. However, this Court should make it clear that it rejects *Harman* completely. After all, the *Harman* court unequivocally stated that under its approach such infants, after birth, have "no cause of action." 525 F. Supp. at 802.

II. 42 U.S.C. § 1983 IS DEFICIENT IN ITS FAILURE TO DISTINGUISH WHEN A RIGHT OF ACTION ARISES WITH RESPECT TO THE INJURIES OF A FETUS THAT IS ULTIMATELY BORN.

42 U.S.C. § 1988 (2006) provides that, where federal law is "deficient" with respect to accomplishment of the goals of the federal civil rights laws, a federal court should apply the law of the state where the court is located so long as it is "not inconsistent with the Constitution and laws of the United States.[2] *See also*

[2] The pertinent part of § 1988 reads: "The jurisdiction in civil . . . matters conferred on the district courts . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause."

Chardon v. Fumero Soto, 462 U.S. 650, 657 (1983) (noting that Congress "plainly instructed the federal courts to refer to state law when federal law provides no rule of decision").

The Supreme Court has held that § 1983 is "deficient" in several specific ways. For example, in *Robertson v. Wegmann*, 436 U.S. 584 (1978), the Court held that § 1983 is "deficient" as it relates to the survival of civil rights actions upon the death of either party. *Id.* at 589. It is "deficient" because it is silent. *Id*. The same is true for statute of limitations in actions under § 1983. Because §1983 does not address the issue, it is "deficient" and thus state law controls. *Chardon*, 462 U.S. at 655.

Furthermore, where silent, § 1983 is to be interpreted broadly to provide the protection against violations of federal constitutional and statutory rights. *Golden State Transit v. City of Los Angeles*, 493 U.S. 103, 113 (1989) (referring to the "broad remedial scope").

Speaking of the purpose of § 1983 Representative Shellaberger stated:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. . . . As has been decided . . . where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Cong. Globe, 42d Cong., 1st Sess. app. 68 (1871).

Thus, the broad remedial purpose of § 1983 and the fact that § 1983 does not address when a right of action arises in situations where a fetus is injured *in utero* and subsequently born alive provides sufficient evidence to conclude that §1983 is deficient and the law of Michigan must be used to answer the question of the timing of the accrual of the right of action.

III. UNDER MICHIGAN LAW, THE RIGHT OF ACTION FOR AN INJURY SUSTAINED *IN UTERO* ARISES AT BIRTH.

Under Michigan law, a right of action arises "the moment an action may be maintained to enforce it." *Finkelstein v. Dep't of Revenue*, 20 N.W. 2d 154, 155 (1945) (citation and internal quotation marks omitted). Thus, although Michigan case law is silent, because a non-person cannot possibly maintain an action to enforce their rights, under Michigan law, the right of action arises at birth.[3]

This same principle of the accrual of a right of action arising at some point after the wrongful act is seen in other areas of Michigan law. For example, in a suit to "establish or enforce a trust,"

> [o]rdinarily, no mere lapse of time will bar the *cestui que* trust of his or her rights in the subject of the trust as against the trustee, and the lapse of time which will render a claim stale cannot begin until after a breach of the trust occurs, and after complainant has notice or knowledge of the breach. A suit is not barred by laches where it is brought within a

[3] This timing of the right of action is not "inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988. This is clearly seen in that the Unborn Victims of Violence Act, 18 U.S.C. § 1841 (2006), recognizes a child *in utero* as a legal victim if the child is injured or killed during the commission of over sixty federal crimes of violence.

> reasonable time after the cause of action accrued, or where, under the circumstances, the delay is not unreasonable.

33 *Mich. L. & Prac. 2d, Trusts* § 164 (2000) (footnotes omitted).

While not directly answering the question of when a right of action arises, *Womack v. Buchhorn*, 187 N.W. 2d 218, 223 (Mich. 1971), clearly holds that the common law allows an injured fetus to recover upon birth under a negligence action. The court reasoned:

> [J]ustice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child.

Id. at 222 (citation and internal quotation marks omitted).[4]

This appeal to justice is further evidence that the right of action is tied to the time of birth in Michigan.

[4]In addition to allowing civil actions, Michigan law criminalizes harm to a mother that results in physical injury to the fetus. Mich. Comp. Laws § 750.90b(d) (1979, LEXIS through P.A. 139).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed on the grounds suggested throughout this Brief.

Respectfully submitted
this 19th day of November, 2009

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 3,276 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November, 18, 2009, I electronically filed the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Havard v. Puntuer, et al.*, No. 09-1235, with the clerk of the court by using the CM/ECF system. I further certify that all Counsel of Record were registered for service by electronic CM/ECF notification and were served in that manner.

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