

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

TAMARA M. LOERTSCHER

Plaintiff,

CIVIL ACTION

v.

Case No. 14-cv-870

J.B. VAN HOLLEN, in his official capacity as
ATTORNEY GENERAL OF THE
STATE OF WISCONSIN, and

ELOISE ANDERSON, in her official capacity as
SECRETARY OF THE DEPARTMENT OF
CHILDREN AND FAMILIES

Defendants.

**PROPOSED FINDINGS OF FACT IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff Tamara Loertscher proposes the following findings of fact in support of Plaintiff's Motion for Preliminary Injunction:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Tamara Loertscher is a 30 year-old pregnant resident of Taylor County, Wisconsin. Compl., Case No. 14-cv-870, filed December 15, 2014, ECF No. 1 ("Compl.") ¶ 2, 77; Declaration of Tamara M. Loertscher ("Loertscher Decl.") ¶¶ 1 & 2 (filed herewith).

2. At the time this action was filed, Defendant J.B. Van Hollen was the Attorney General of the State of Wisconsin, and was responsible for execution and enforcement of the laws of this State. Compl., ECF No. 1 ¶ 78. Brad D. Schimel took office as Attorney General of the State of Wisconsin on January 5, 2015. Accordingly, Plaintiff has filed a motion herewith to

substitute Brad D. Schimel in place of J.B. Van Hollen in this action.

3. Defendant Eloise Anderson is the Secretary of the Department of Children and Families for the State of Wisconsin, and is responsible for administration and enforcement of Chapter 48 of the Wisconsin Children's Code, as well as the management and direction of county departments of human services, including Taylor County Department of Human Service ("TCDHS"). Compl., ECF No. 1 ¶ 79.

4. This Court has subject matter jurisdiction over Plaintiff's causes of action arising under the Constitution of the United States pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4). Compl., ECF No. 1 ¶ 80.

5. Plaintiff's action for declaratory and injunctive relief is authorized by 28 U.S.C. § 2201 and § 2202 and by Rules 57 and 65 of the Federal Rules of Civil Procedure. Compl., ECF No. 1 ¶ 80.

6. Venue is proper in the Western District of Wisconsin pursuant to 28 U.S.C. § 1331(b) because all events giving rise to this action occurred in this judicial district, and the Defendants, who are sued in their official capacities, carry out their official duties at offices located within this District. Compl., ECF No. 1 ¶ 81.

BACKGROUND

7. Ms. Loertscher is currently pregnant with her first child, due January 29, 2015. Loertscher Decl. ¶ 2.

8. During her teens, Ms. Loertscher had radiation treatment that left her without a functioning thyroid. Loertscher Decl. ¶ 3.

9. Ms. Loertscher suffers from severe hypothyroidism, and cannot produce thyroid hormones without medication. Loertscher Decl. ¶ 3; Declaration of Mishka Terplan, M.D.,

MPH. (“Terplan Decl.”) ¶¶ 21, 24, 26 & 27 (filed herewith)

10. Ms. Loertscher understood that hypothyroidism would make it difficult or impossible for her to become pregnant. Loertscher Decl. ¶ 13.

11. Hypothyroidism and disrupt ovulation and is associated with irregular menstrual periods, miscarriage, and infertility. Terplan Decl. ¶ 23 & 25; Compl. Ex. A., ECF No. 1-2 at 21:15-20.

12. Ms. Loertscher also has a history of depression. Loertscher Decl. ¶ 4; Compl. Ex. A, ECF No. 1-2 at 14:3-6.

13. Depression is also a symptom of hypothyroidism. Terplan Decl. ¶ 24; Loertscher Decl. ¶ 4.

14. Without her thyroid medication, Ms. Loertscher experiences severe symptoms of depression and fatigue. Loertscher Decl. ¶ 8, 17; Terplan Decl. ¶ 24.

15. Ms. Loertscher has been unemployed since February 2014. Loertscher Decl. ¶ 5.

16. Previously, she worked as a certified nurse’s aide. Loertscher Decl. ¶ 5.

17. When Ms. Loertscher became unemployed, she was no longer able to pay for her thyroid medication and related blood testing. Loertscher Decl. ¶ 6.

18. Ms. Loertscher attempted to apply for BadgerCare, but was told by officials that there was a waiting list of more than a year to process any new applications. Loertscher Decl. ¶ 7.

19. Ms. Loertscher was without any medical treatment for her hypothyroidism beginning in February 2014, and sank into a deep depression. Loertscher Decl. ¶¶ 5, 6 & 8.

20. She also suffered additional symptoms of severe fatigue, head and neck pain. Loertscher Decl. ¶ 8, 17, 18.

21. In late February or early March of 2014, Ms. Loertscher began to use methamphetamine about two or three times per week to help her get out of bed in the morning. Loertscher Decl. ¶ 9.

22. Ms. Loertscher had no history of drug dependency or addiction, and had never used methamphetamine or any other illegal drug —except marijuana very occasionally—in her life before February 2014. Loertscher Decl. ¶ 22.

23. Ms. Loertscher used marijuana as well during the time period after she became unemployed. Loertscher Decl. ¶ 10

24. Ms. Loertscher used marijuana fewer than 10 times in the year preceding the end of July 2014. Loertscher Decl. ¶ 10.

25. Ms. Loertscher did not feel much like drinking alcohol during the time period after she became unemployed. Loertscher Decl. ¶ 11.

26. Ms. Loertscher drank alcohol occasionally in early 2014, then stopped drinking alcohol at all, except for one half of one glass of wine she had at a birthday celebration at the end of July 2014. Loertscher Decl. ¶ 11.

27. In the beginning of July 2014, Ms. Loertscher began to wonder if she might be pregnant, and took a home pregnancy test, which appeared to return a positive result. Loertscher Decl. ¶ 12.

28. At that time, Ms. Loertscher assumed she was not actually pregnant because of her understanding of the effect of hypothyroidism on fertility, as well as the fact that the absence of thyroid medication affects her menstrual cycle, and she was experiencing what appeared to be a spotty, light period. Loertscher Decl. ¶¶ 12 & 13.

29. Ms. Loertscher used methamphetamine again approximately two or three times

after taking the pregnancy test in early July. Loertscher Decl. ¶ 14.

30. On approximately July 30, 2014 Ms. Loertscher took another pregnancy test, just in case she might be pregnant. Loertscher Decl. ¶ 15.

31. When that test returned a positive result, Ms. Loertscher believed for the first time that she might actually be pregnant. Loertscher Decl. ¶ 15.

32. Ms. Loertscher has not used any methamphetamine, marijuana, or any other illegal drug, nor had any alcohol to drink, since the day she took the second pregnancy test on approximately July 30, 2014. Loertscher Decl. ¶ 16.

MS. LOERTSCHER SEEKS MEDICAL AND PRENATAL CARE

33. Two days later, on August 1, 2014, Ms. Loertscher went to the Taylor County Department of Human Services (“TCDHS”) for help. Loertscher Decl. ¶ 17.

34. Ms. Loertscher was concerned that she might actually be pregnant, wanted confirmation of that pregnancy, and wanted appropriate treatment for her depression, as well as fatigue and other serious symptoms of her untreated thyroid condition. Loertscher Decl. ¶ 17.

35. TCDHS personnel advised Ms. Loertscher to present herself to the Eau Claire Mayo Clinic Hospital (“Mayo Clinic”) emergency room that day, and she did so. Loertscher Decl. ¶ 18, 19.

36. Upon arrival at the Mayo Clinic emergency room, Ms. Loertscher explained to medical personnel that she needed medical and psychiatric care, and that she believed she was pregnant but wanted confirmation; she also wanted to make sure, if she was in fact pregnant, that the pregnancy was healthy. Loertscher Decl. ¶ 20.

37. At the request of Mayo Clinic personnel, Ms. Loertscher provided a urine sample that day. Loertscher Decl. ¶ 21.

38. No one at the hospital informed Ms. Loertscher that her urine would be tested for drugs. Loertscher Decl. ¶ 21.

39. Because Ms. Loertscher had stopped using drugs and had no intention of using them any longer, she was not seeking addiction treatment when she presented at Mayo Clinic for care. Loertscher Decl. ¶ 22.

40. Ms. Loertscher has never struggled with drug addiction. Loertscher Decl. ¶¶ 22-24; Terplan Decl. ¶¶ 16, 19 & 20.

41. Mayo Clinic personnel performed a drug screen on Ms. Loertscher's urine sample. The results returned "unconfirmed positive" for methamphetamine, amphetamine, and tetrahydrocannabinol (THC), the active ingredient in marijuana. The test results did not quantify concentrations, and the results were labeled, "FOR MEDICAL USE ONLY, ALL RESULTS UNCONFIRMED." The results further stated "NOTIFY LAB IF FURTHER CONFIRMATION IS NECESSARY." Exhibit C (attached hereto) at 3. (hereafter "PFOF, Ex. C") (Exhibit C is comprised of the exhibits from the September 4, 2014, plea hearing. *See Compl., Ex. G. ECF No. 1-8 at 2:6-12.* The internal pages within Exhibit C are not in numerical order).

42. A Mayo Clinic emergency room doctor informed Ms. Loertscher that the pregnancy test was positive, and that "trace amounts" of methamphetamine and marijuana had been found in her urine. Loertscher Decl. ¶¶ 25 & 26.

43. The emergency room doctor advised Ms. Loertscher that drug use is very bad for a baby, but that if she stopped now everything should be okay. Loertscher Decl. ¶ 27.

44. Ms. Loertscher told the doctor that she wanted more than anything for her baby to be okay. Loertscher Decl. ¶ 27.

45. Although Ms. Loertscher had not intended to become pregnant, and didn't believe

that it was possible, once she learned she was pregnant she wanted to have the baby, and wanted to take care of herself and her pregnancy as best as she could. Loertscher Decl. ¶ 29.

46. On the evening of August 1st, 2014, Ms. Loertscher was voluntarily admitted to the Mayo Clinic Behavioral Health Unit. Loertscher Decl. ¶ 31; PFOF, Ex. C at 1.

47. On the morning of August 2nd, 2014, Mayo Clinic personnel gave Ms. Loertscher levothyroxine, the thyroid medication she needed. Loertscher Decl. ¶ 32; Exhibit B (attached hereto) at 3. (hereafter “PFOF, Ex. B”) (Exhibit B is comprised of the exhibits from the August 5, 2014, hearing on the motion for temporary physical custody. *See Compl., Ex. A. ECF No. 1-2 at 2:17-19.* The internal pages within Exhibit B are not in numerical order).

48. A psychiatrist then visited her, and informed her that her TSH (thyroid stimulating hormone) levels were very high and that healthy thyroid functioning is very important to a healthy pregnancy. Loertscher Decl. ¶ 32.

49. Ms. Loertscher’s hypothyroidism when she was admitted to the Mayo Clinic was exceptionally severe. Terplan Decl. ¶ 21 & 24; Compl., Ex. A. ECF No. 1-2 at 21:15-20.

50. Ms. Loertscher’s TSH levels were so high – over 100 – that they were out of range of the assay. Terplan Decl. ¶ 24; PFOF Ex. B at 1; Compl., Ex. A. ECF No. 1-2 at 21:15-20.

51. Maternal hypothyroidism has been associated with a wide range of adverse outcomes including miscarriage, preterm birth, stillbirth, and impaired cognitive function in newborns. Terplan Decl. ¶ 23.

52. The Mayo Clinic psychiatrist who visited Ms. Loertscher on August 2, 2014, also asked her about her past drug use. Loertscher Decl. ¶ 33.

53. Ms. Loertscher told the psychiatrist that she had been self-medicating her

depression and extreme lethargy with occasional marijuana but mainly with methamphetamine, before she became convinced she might actually be pregnant. Loertscher Decl. ¶ 33.

54. Ms. Loertscher emphasized that she had used these drugs before she knew she was pregnant. Loertscher Decl. ¶ 33.

55. Ms. Loertscher told the psychiatrist who visited her in the Behavioral Health Unit on August 2, 2014, about her past drug use because she believed that if she was truthful and told the doctor everything, then the doctors could help her ensure a healthy pregnancy. Loertscher Decl. ¶ 33.

56. On that day, Ms. Loertscher was worried about her pregnancy because she did not know what affect her hypothyroidism and depression might have on her pregnancy. Loertscher Decl. ¶ 28.

57. She was also worried about her past drug use and its impact on the baby. Loertscher Decl. ¶ 28.

58. Later that evening, Ms. Loertscher met with an obstetrician at the Mayo Clinic, who showed Ms. Loertscher “reassuring” ultrasound images of her fetus and told her the baby looked fine. Loertscher Decl. ¶ 34; Compl., Ex. A ECF No. 1-2 at 13:25-14:2.

59. Ms. Loertscher was so relieved that the ultrasound suggested the baby was fine that she started to cry. Loertscher Decl. ¶ 34.

60. The obstetrician asked Ms. Loertscher about her alcohol use, and Ms. Loertscher explained that during the time she was pregnant, but did not know it yet, she drank a half a glass of wine. Loertscher Decl. ¶ 36.

LEGAL PROCEEDINGS AGAINST MS. LOERTSCHER

61. While Ms. Loertscher was in the hospital, personnel from the Mayo Clinic,

without Ms. Loertscher's knowledge or consent, shared Ms. Loertscher's confidential medical information with agents of TCDHS, which operates in conjunction with law enforcement under the direction and oversight of the Wisconsin Department of Children and Families. Compl. ECF No. 1 ¶ 25; PFOF Ex. B.

62. Sometime on or before August 5, 2014, a Taylor County judicial officer appointed a guardian ad litem (GAL) on behalf of Ms. Loertscher's fetus. Compl., Ex A, ECF No. 1-2 at 1:20-22 & 4:1-2.

63. On approximately the third or fourth day of Ms. Loertscher's stay at the Mayo Clinic, she met with a hospital social worker. Loertscher Decl. ¶ 38.

64. Ms. Loertscher felt the social worker asked her questions inappropriately focused on her past drug use, rather than her health. Loertscher Decl. ¶ 38.

65. Ms. Loertscher advised the hospital staff that she did not wish to speak to the social worker again because the social worker had been judgmental and unhelpful. Loertscher Decl. ¶ 38.

66. Around the third or fourth day of Ms. Loertscher's stay in the hospital, she began to feel that she was not receiving the care she needed for her health concerns because the staff were focused on her past drug use, and that the hospital staff did not really care about her baby's health at all. Loertscher Decl. ¶ 39.

67. On approximately the fourth day of her hospital stay Ms. Loertscher informed hospital staff that she wished to leave. Loertscher Decl. ¶ 38-40 .

68. In response to her request to leave, a Mayo Clinic nursing manager informed Ms. Loertscher that there was a "hold" on her, and threatened to call security if she did not get away from the door to the Behavioral Health Unit. Loertscher Decl. ¶ 41.

69. On August 4, 2014, at 3:58 p.m., an unknown person completed a “temporary physical custody request” directed at Tamara Loertscher, stating she was “taken into custody by SYNOL #873” on August 4, and 3:55 p.m., because of “serious risk to unborn child.” Exhibit A (attached hereto) at 1 (hereafter “PFOF Ex. A”).

70. On August 5, 2014, a Mayo Clinic social worker led Ms. Loertscher into a conference room within the Mayo Clinic, and told Ms. Loertscher that there was a judge on the phone for her. Loertscher Decl. ¶ 43.

71. On August 5, 2014, in the Mayo Clinic conference room, Ms. Loertscher realized from what she heard over the telephone that some kind of formal proceeding was taking place, but she had no idea what was actually going on. Loertscher Decl. ¶ 43.

72. While in the Mayo Clinic conference room on August 5, 2014, the Mayo Clinic social worker placed some kind of legal papers on the table in front of Ms. Loertscher, but Ms. Loertscher did not understand what they were. Loertscher Decl. ¶ 44.

73. While in the Mayo Clinic conference room, Ms. Loertscher stated into the telephone that she did not wish to speak without legal representation, and did not want to take part in any proceeding until she had a lawyer. Loertscher Decl. ¶¶ 43 & 45; Compl. Ex A, ECF No. 1-2 at 6:6-8 & 6:19-20.

74. After this conversation, Ms. Loertscher left the Mayo Clinic conference room and returned to her hospital room. Loertscher Decl. ¶ 45 & 46; Compl., Ex A ECF No. 1-2 at 8:14-18.

75. After she left the conference room on August 5, 2014, the Mayo Clinic social worker followed Ms. Loertscher to her hospital room, and tried to continue the telephone call with the judge from there. Loertscher Decl. ¶ 46; Compl. , Ex A ECF No. 1-2 at 8:14-18 &

10:17-20.

76. In response to the social worker coming into her hospital room, Ms. Loertscher laid down on the bed facing away from the social worker and pleaded “just please leave, just leave me alone.” Loertscher Decl. ¶ 47; Compl., Ex. A ECF No. 1-2 at 10:18-20.

77. Among the legal documents placed in front of Ms. Loertscher in the conference room of the Mayo Clinic Behavioral Health Unit was an as-yet-unfiled “Petition for Protection or Care of an Unborn Child” (“the Petition”) against Ms. Loertscher. Compl., Ex. A., ECF No. 1-2 at 4:9-23; PFOF Ex. A at 2-3.

78. The Temporary Physical Custody Request accompanying the Petition alleged that Ms. Loertscher had been taken into custody at the hospital on the basis of a “serious health risk to [an] unborn child.” PFOF Ex. A at 1.

79. The Petition alleged that if Ms. Loertscher were not ordered held in custody by the juvenile court, “there is a substantial risk that the physical health of the unborn child, and the child when born, will be seriously affected or endangered by Tamara M. Loertscher’s habitual lack of self-control in the use of alcohol beverages, controlled substances, or controlled substance analogs.” PFOF Ex. A at 3.

80. The telephone call on August 5, 2014, was deemed by the juvenile court to be a hearing on the as-yet-unfiled Petition against Ms. Loertscher. Compl., Ex. A. ECF No. 1-2 at 3:18-25.

81. On the other end of the phone on the August 5, 2014, call were the Taylor County Court Commissioner, TCDHS Corporation Counsel, the court-appointed GAL on behalf of Ms. Loertscher’s fetus, and three TCDHS personnel. Compl., Ex. A. ECF No. 1-2 at 3:18-4:3.

82. On August 5, 2014, after Ms. Loertscher announced into the phone that she would

not participate without counsel and returned to her hospital room, the juvenile court found that Ms. Loertscher had waived her appearance at the hearing and that the hearing would continue in her absence. Compl., Ex. A., ECF No. 1-2 at 9:10-10:9.

83. At the August 5, 2014, hearing, the court heard testimony from a Mayo Clinic obstetrician, responding to questions from counsel for TCDHS concerning Ms. Loertscher's personal medical information and health history. Compl., Ex. A. ECF No. 1-2 at 11:17-21:24.

84. In her testimony on August 5, 2014, the Mayo Clinic obstetrician stated that she did not have Ms. Loertscher's authorization to discuss her personal medical information. Counsel for Taylor county advised the doctor that "[t]hat is not an issue in this type of proceeding." Compl., Ex. A. ECF No. 1-2 at 13:7-13.

85. At the hearing on August 5, 2014, the doctor responded to questions concerning drug use and pregnancy. Compl., Ex. A. ECF No. 1-2 at 15:24-17:23.

86. The doctor further testified at the August 5, 2014, hearing that her greatest concern for Ms. Loertscher's pregnancy related to Ms. Loertscher's ability to get appropriate prenatal care and to her severe hypothyroidism. Compl., Ex. A. ECF No. 1-2 at 17:24-18:3 & 21:15-23.

87. At the August 5, 2014, hearing, the Mayo Clinic obstetrician testified that she recommended inpatient drug treatment for Ms. Loertscher. Compl., Ex. A., ECF No. 1-2 at 19:25-20:6.

88. No one at the Mayo Clinic evaluated or treated Ms. Loertscher for a substance use disorder. Terplan Decl. ¶¶ 17-18.

89. Ms. Loertscher's medical records from her stay at the Mayo Clinic indicate that she did not have a substance use disorder. Terplan Decl. ¶¶ 16, 19, & 20.

90. At the close of the August 5, 2014, hearing, the juvenile court entered an order of “Temporary Physical Custody” against Ms. Loertscher. Compl., Ex. B. ECF No. 1-3.

91. The Order required Ms. Loertscher to remain at the Mayo Clinic until she was “cleared,” at which time the court ordered that she be transferred to an inpatient drug treatment facility during the remaining term of her pregnancy. Compl., Ex. B. ECF No. 1-3 at 4-5.

92. On August 6, 2014, a Mayo Clinic social worker told Ms. Loertscher that a judge had ordered her to stay in the hospital, and then to go directly to the Fahrman Center, a residential addiction treatment facility in Eau Claire, Wisconsin. Loertscher Decl. ¶ 51.

93. On the morning of August 7, 2014, Mayo Clinic personnel informed Ms. Loertscher that she would need to submit to a blood test for tuberculosis before she could be admitted to the Fahrman Center. Loertscher Decl. ¶ 54.

94. Ms. Loertscher offered to take a skin test for tuberculosis, but refused to consent to a blood draw because she no longer trusted these health care workers. Loertscher Decl. ¶ 54.

95. On August 7, 2014, Ms. Loertscher informed Mayo Clinic personnel that she wanted to stay on her thyroid medication, get a prescription for prenatal vitamins, choose her own health care providers, and leave the hospital immediately. Loertscher Decl. ¶ 57; PFOF Ex. C at 11.

96. Ms. Loertscher was given a prescription for levothyroxine and iron, and was released from the Mayo Clinic on August 7, 2014. Loertscher Decl. ¶¶ 57 & 58; PFOF Ex. C at 9.

97. No one advised Ms. Loertscher that by leaving the Mayo Clinic on August 7, 2014, she would be doing anything wrong, or that she could be subjected to arrest for doing so. At the time, she believed the whole episode was over. Loertscher Decl. ¶ 58.

FURTHER LEGAL PROCEEDINGS AGAINST MS. LOERTSCHER

98. On August 11, 2014, the GAL appointed on behalf of Ms. Loertscher's fetus filed a Notice of Motion and Motion for Remedial Contempt against Ms. Loertscher in Taylor County Circuit Court. Compl., Ex C ECF No. 1-4.

99. The GAL's August 11, 2014, motion requested that if Ms. Loertscher did not comply with the terms of the Temporary Physical Custody Order she should be subject to remedial sanctions under Wisconsin Statute Section 785.04. Compl., Ex. C ECF No. 1-4 at 2.

100. Attached to the Notice of Motion was an affidavit from a TCDHS social worker alleging that Ms. Loertscher was in contempt of the juvenile court's August 5, 2014, Temporary Physical Custody Order because she had refused a TB test and otherwise failed to comply with TCDHS directives. Compl., Ex. C ECF No. 1-4 at 3-4.

101. The Notice set a hearing date on the contempt motion of August 25, 2014. Compl. Ex. C ECF No. 1-4 at 2.

102. On August 13, 2014, Taylor County corporation counsel filed a "Motion to Take Expectant Mother into Immediate Custody" on behalf of TCDHS. Compl. , Ex. D ECF No. 1-5.

103. The Motion stated as grounds that Ms. Loertscher had not been in contact with TCDHS and had otherwise failed to comply with the earlier Order for her placement at the Fahrman Center. Compl., Ex. D ECF No. 1-5 at 3.

104. On August 13, 2014, the court granted the TCDHS Motion and entered an Order to Take Expectant Mother into Immediate Custody. Compl., Ex. E ECF No. 1-6.

105. The Order stated that it was "contrary to the unborn child's best interest for [the] mother to be released from custody and returned home due to the expectant mother's habitual use of controlled substances and her violation of the TPC [Temporary Physical Custody] Order."

Compl., Ex. E ECF No. 1-6.

106. Ms. Loertscher had been home from the hospital for about a week when she was served with the Notice of Motion and Motion for Remedial Contempt. Loertscher Decl. ¶ 63.

107. Ms. Loertscher did not understand the documents, but saw that they had an August 25, 2014, court date on them. Loertscher Decl. ¶ 63.

108. Ms. Loertscher wanted to hire a lawyer to get advice; she met in person with a lawyer in Wausau, but was unable to hire him because she could not afford the retainer fee. Loertscher Decl. ¶ 63.

109. The afternoon after she received the Notice, a police officer came to Ms. Loertscher's grandparents' house, where she had been staying; Ms. Loertscher was upstairs at the time, and did not come down. Loertscher Decl. ¶ 63.

110. The police officer returned three times, and told Ms. Loertscher's family that he had come to arrest her pending a court date, scheduled for a week later. Loertscher Decl. ¶ 64.

111. Ms. Loertscher's grandfather assured the police officer that Ms. Loertscher would appear at the scheduled hearing, and the officer left without arresting her. Loertscher Decl. ¶ 65.

112. Ms. Loertscher was horrified and humiliated; she did not understand what was happening, and felt extremely frightened and distressed. Loertscher Decl. ¶ 66.

113. On August 25, 2014, Ms. Loertscher appeared in Taylor County Circuit court for the hearing. Loertscher Decl. ¶ 67; Compl., Ex. F, ECF No. 1-7 at 2:6-9.

114. Present at the August 25, 2014, hearing were the GAL on behalf of Ms. Loertscher's fetus, Corporation Counsel for TCDHS, and two TCDHS social workers, along with Ms. Loertscher, her boyfriend, her mother, and her mother's boyfriend. Loertscher Decl. ¶ 67; Compl., Ex. F, ECF No. 1-7 at 2:10-3:10.

115. Ms. Loertscher was not represented by counsel at the August 25, 2014 hearing on the GAL's motion for contempt. Loertscher Decl. ¶ 67; Compl., Ex. F ECF No. 1-7 at 2:9-3:10.

116. Ms. Loertscher did not fully understand what was happening at the August 25, 2014, hearing on the GAL's motion for contempt. Loertscher Decl. ¶ 67.

117. Ms. Loertscher requested that a different judge hear the case, and the August 25, 2014, hearing was then cut short. Loertscher Decl. ¶ 68; Compl., Ex. F ECF No. 1-7 at 5:21-6:5 & 7:7-8:17.

118. The court rescheduled the hearing for September 4, 2014, before a different judge. Loertscher Decl. ¶ 69 ; Compl., Ex. G ECF No. 1-8.

119. During the evening of August 25, 2014, another police officer came to Ms. Loertscher's grandparents' home, and stated that there was a warrant out for her arrest. Loertscher Decl. ¶ 69.

120. Ms. Loertscher and her family explained that she had just been in court that day and had a new hearing coming up. Loertscher Decl. ¶ 69.

121. The police officer said "I don't know anything, I just know that there's a warrant." Loertscher Decl. ¶ 69.

122. Ms. Loertscher's family explained that she was pregnant and stressed and did not need to be in jail, and the police officer agreed to leave without arresting Ms. Loertscher. Loertscher Decl. ¶ 70 & 71.

123. On September 4, 2014, Ms. Loertscher appeared without counsel in Taylor County Circuit Court for the hearing on the contempt motion. Compl., Ex. G ECF No. 1-8 at 1.

124. Also present at the September 4, 2014, hearing were the GAL on behalf of Ms. Loertscher's fetus, TCDHS Corporation Counsel, TCDHS social workers, Ms. Loertscher's

boyfriend, her mother, and her mother's boyfriend. Compl., Ex. G ECF No. 1-8 at 1 & 3:4-4:3.

125. At the hearing, the court asked the GAL what his plea was "on behalf of the child," and the GAL admitted all the allegations against Ms. Loertscher on behalf of her fetus. Compl., Ex. G ECF No. 1-8 at 10:8-11.

126. The court then heard testimony from a TCDHS social worker, who testified that Ms. Loertscher had not followed the August 5, 2014, Order because she did not take a TB test, did not go to the in-patient treatment at the Fahrman Center, and did not respond to TCDHS attempts to contact her. Compl., Ex. G ECF No. 1-8 at 14:12-16:15.

127. Ms. Loertscher then testified in her own defense. Ms. Loertscher attempted to counter the contempt charge against her, as well as the underlying proceedings alleging abuse and neglect of her fetus. Compl., Ex. G ECF No. 1-8 at 17:10-21:23.

128. Ms. Loertscher had very little understanding of what was happening at the September 4, 2014, hearing. Loertscher Decl. ¶ 72

129. Ms. Loertscher attempted to answer the claim that she needed drug treatment. Compl., Ex. G ECF No. 1-8 at 18:7-11, 19:6-17, 21:10-14, 23:25-24:4 & 24:10-16.

130. Ms. Loertscher testified at the September 4, 2014 hearing: "I don't feel like I need treatment. Like I feel like I went to the hospital and sought treatment and then they violated my rights and all these people got this information that I feel they shouldn't have gotten. And I feel my whole stay there was made worse[.]" Compl., Ex. G ECF No. 1-8 at 18:7-11.

131. At the conclusion of the hearing, the juvenile court found Ms. Loertscher in contempt of court and ordered her to either cooperate with TCDHS and go to the Fahrman Center, or serve 30 days in jail. Compl., Ex. G ECF No. 1-8 at 27:2-10 & 27:21-28:12.

132. The GAL appointed for Ms. Loertscher's fetus made no objection to sending Ms.

Loertscher to jail as sanction for contempt. Compl., Ex. G ECF No. 1-8 at 27:2-28:23.

133. Immediately following the September 4, 2014, hearing, Ms. Loertscher was led to a conference room in the courthouse where she met with TCDHS social workers. Ms. Loertscher asked them what they wanted from her. One of them responded, “we just want a healthy baby.” Ms. Loertscher said that this is what she wanted, too. Loertscher Decl. ¶ 73.

134. Ms. Loertscher asked if “this would all go away if I had an abortion?” The social workers responded, “Yes” it would. Loertscher Decl. ¶ 74.

MS. LOERTSCHER’S INCARCERATION UNDER THE ACT

135. On the evening of September 4, 2014, Ms. Loertscher decided that she did not wish to go to the Fahrman Center because she knew she was not addicted to drugs and therefore did not want whatever kind of drug treatment they purportedly provided. Loertscher Decl. ¶ 77.

136. Instead, Ms. Loertscher surrendered to the Taylor County Jail. Loertscher Decl. ¶ 77.

137. Ms. Loertscher was not released from jail until September 22, 2014. Compl., Ex. K ECF No. 1-12 at 2.

138. During her stay in jail, Ms. Loertscher received no prenatal care. Loertscher Decl. ¶ 83.

139. During the first day of her incarceration, the Taylor County Jail did not provide Ms. Loertscher with her thyroid medication and wouldn’t allow her family to bring it to her. Loertscher Decl. ¶ 80.

140. Later during Ms. Loertscher’s stay in jail, after she had been forced to wait for the prescription for thyroid medication to be refilled, jail staff refused to give her the medication when it arrived. Loertscher Decl. ¶ 81.

141. Taylor County Jail personnel told Ms. Loertscher it was okay for her to miss a dose and that this would keep the medication on schedule, but Ms. Loertscher has always been advised by her doctors that she should take the medication as soon as possible after a missed dose, and that it is not okay to miss a dose. Loertscher Decl. ¶ 81.

142. Ms. Loertscher was also forced to miss two previously scheduled prenatal care appointments while she was incarcerated at the Taylor County Jail. Loertscher Decl. ¶ 82.

143. Ms. Loertscher had asked jail staff to take her to these appointments, but was told that missing them was her own fault because she was in jail. Loertscher Decl. ¶ 82.

144. Ms. Loertscher began to experience a lot of pain and cramping while she was incarcerated in the Taylor County Jail. Loertscher Decl. ¶ 84.

145. The cramping became especially severe toward the end of the first week of her incarceration, and she became frightened that she might have a miscarriage. Loertscher Decl. ¶ 84.

146. Ms. Loertscher asked repeatedly to see an obstetrician, and finally was told that she could see the jail doctor, who was not an obstetrician gynecologist. Loertscher Decl. ¶ 84 & 86.

147. The doctor that visited Ms. Loertscher at the Taylor County Jail did not examine her, other than to feel her stomach, and then stated “if you’re going to miscarry while you’re here, there’s nothing that I can do about it.” Loertscher Decl. ¶ 86.

148. The doctor’s response made Ms. Loertscher extremely upset and frightened for her pregnancy. Loertscher Decl. ¶ 86.

149. This same doctor then demanded that Ms. Loertscher take a pregnancy test. Believing this absurd, Ms. Loertscher refused. Loertscher Decl. ¶ 87.

150. After she refused to take the pregnancy test, a prison guard threatened to tase her and that guard and other jail personnel put her in solitary confinement. Loertscher Decl. ¶¶ 88-89.

151. Taylor County Jail kept Ms. Loertscher in solitary confinement for more than 24 hours, in a filthy room with nothing but a toilet and a metal bed frame (and, briefly, a mattress pad and thin blanket). Loertscher Decl. ¶¶ 89 & 92.

152. Ms. Loertscher was released from solitary confinement after the same doctor who had demanded that Ms. Loertscher take a pregnancy test confirmed to jail staff that Ms. Loertscher had the right to refuse to take the pregnancy test. Loertscher Decl. ¶ 91-92.

153. While she was in jail, Ms. Loertscher found a list by the phone of all the public defenders in Taylor County; she called the telephone number on the list, and explained to an intake worker that she was in jail and needed representation. Loertscher Decl. ¶ 96.

154. A public defender was then appointed to represent her in the contempt proceeding. Loertscher Decl. ¶ 96; Compl., Ex. I ECF No. 1-10.

THE CONSENT DECREE AND CONTINUING STATE ENFORCEMENT OF THE ACT

155. Upon the advice of her newly appointed attorney, Ms. Loertscher signed a consent decree so that she could be released from jail. Loertscher Decl. ¶ 97.

156. The Consent Decree permitted Ms. Loertscher to go home so long as she agreed to: undergo an Alcohol and Other Drug Abuse (AODA) Assessment; comply with any recommended treatment resulting from the AODA Assessment; submit to drug testing on at least a weekly basis at her own expense; sign any and all releases necessary for transfer of drug test results to TCDHS; and sign any other releases as requested by TCDHS. The Consent Decree also provides that a GAL will remain appointed for Ms. Loertscher's fetus for the duration of her

pregnancy. Compl., Ex. L ECF No. 1-13 at 3-4.

157. The Consent Decree also provides that any violation of its terms is contempt of court. Compl., Ex. L ECF No. 1-13 at 4.

158. Ms. Loertscher was willing to agree to the terms of the Consent Decree because she wanted to leave jail and she knew she was not using drugs or alcohol and did not have a problem with drug use. Loertscher Decl. ¶ 97 & 98.

159. At a hearing on September 22, 2014, a Taylor County Circuit Court adopted the Consent Decree and made compliance with its terms sufficient to purge the earlier finding of contempt. Compl., Ex. K ECF No. 1-12 at 3:23-4:4.

160. Ms. Loertscher has complied with, and is continuing to comply with, all the terms of the Consent Decree entered on September 22, 2014. Loertscher Decl. ¶¶ 99 & 100.

161. She has taken numerous drug tests, which have all returned negative results, and has completed the required AODA assessment. Loertscher Decl. ¶¶ 99 & 100.

162. By a notice dated September 29, 2014, Taylor County Department of Human Services informed Ms. Loertscher that it had issued an administrative determination that she had committed “child maltreatment.” Compl., Ex. M ECF No. 1-14; Loertscher Decl. ¶ 101.

163. The September 29, 2014, Notice of Child Maltreatment Determination and Right to Appeal quotes Wis. Stat. Section 48.133 in its entirety as the stated “basis” for the determination. Compl., Ex. M ECF No. 1-14.

164. The September 29, 2014, Notice of Child Maltreatment Determination and Right to Appeal states that the finding is appealable within 30 days, and Ms. Loertscher appealed it. Compl., Ex. M ECF No. 1-14; Loertscher Decl. ¶ 102.

165. By letter dated November 10, 2014, Taylor County Department of Human

Services notified Ms. Loertscher that its Agency Director had conducted a “desk review” of her appeal and affirmed the finding that Ms. Loertscher had committed child maltreatment of her fetus. Compl., Ex. N ECF No. 1-15; Loertscher Decl. ¶ 102.

166. The November 10, 2014, “desk review” states that the “preponderance of the evidence” drawn from Ms. Loertscher’s medical records “indicates that prior to conception illicit drug use and alcohol were misused habitually.” Compl., Ex. N ECF No. 1-15.

167. The November 10, 2014, “desk review” letter also states that “the notation in the record that there was a time where you as the mother ‘feels guilty for taking illicit drugs during pregnancy,’ is a clear indication of a lack of self-control.” Compl., Ex. N ECF No. 1-15 at 2.

168. In fact, medical records from Ms. Loertscher’s stay at the Mayo Clinic do not indicate that she has a substance use disorder. Terplan Decl. ¶¶ 13, 16, 19 & 20.

169. Substance use is not medically the same thing as substance use disorder, also called addiction by medical experts. Terplan Decl. ¶ 14.

170. Prior use of drugs does not, alone, provide the necessary information to make a medical diagnosis of substance use disorder, nor does a urine toxicology test. Terplan Decl. ¶¶ 16 & 20.

171. Ms. Loertscher’s medical records from her stay in the Mayo Clinic indicate that no one at the hospital screened her for or diagnosed her with a substance use disorder, or treated her for such a diagnosis while she was in that hospital. Terplan Decl. ¶¶ 17 & 18.

172. Inpatient drug treatment is a medically unnecessary and inappropriate treatment recommendation for a patient like Ms. Loertscher with no medical diagnosis of a substance use disorder. Terplan Decl. ¶ 20.

173. When she sought care at the Mayo Clinic on August 1, 2014, Ms. Loertscher’s

untreated hypothyroidism posed a far greater risk to her pregnancy than did her prior drug and alcohol use. Terplan Decl. ¶ 21-27.

LEGISLATIVE AND MEDICAL BACKGROUND

174. Prior to enactment, Wisconsin legislative counsel warned the Legislature that 1997 Wisconsin Act 292 (“the Act”) had a “reasonable probability” of being found unconstitutional “as applied to preivable unborn children.” Plaintiff’s Brief In Support of Motion for Preliminary Injunction, Appendix 1 (filed herewith).

175. After the Act went into effect, Linda Hisgen the Director of the Bureau of Programs and Policies at the State of Wisconsin Department of Health and Family Services, drafted a memorandum to the Directors of the Departments of Human Services and Social Services, noting that determining under the statute whether the woman’s drug use poses a serious physical harm to her fetus or future child “would have to be done on speculation, since fetal impact research is not conclusive”). Plaintiff’s Brief in Support of Motion for Preliminary Injunction, Appendix 2 (filed herewith) at 2.

176. “Unborn child” is a term without medical meaning. In obstetrics and gynecology the essential biological inter-relationship between the fetus, the placenta and the pregnant woman is referred to as the “maternal-fetal unit.” Terplan Decl. ¶ 43.

177. Pregnancy occurs when a fertilized ovum successfully implants in a woman’s uterus. Terplan Decl. ¶¶ 41 & 42.

178. Fertilization is an event that precedes, but does not necessarily result in, pregnancy. Unless fertilization takes place in a laboratory (as it does for in vitro fertilization), there is no medical test to determine whether it has occurred. Terplan Decl. ¶ 41.

179. Once a woman is actually pregnant, the developing zygote begins to go through a

procession of stages, developing into both the placenta and the embryo, and, if the pregnancy progresses, eventually developing into a fetus. Terplan Decl. ¶ 42.

PREGNANCY, DRUG USE, AND THE MEDICAL COMMUNITY'S RESPONSE

180. Scientific studies do not support the claim that methamphetamine exposure will likely result in cognitive delay in infants or children after they are born. Terplan Decl. ¶ 32 & 34.

181. The one consistent finding of studies on methamphetamine and pregnancy is that infants exposed to methamphetamine in utero are born at a lower than average weight for their gestational age. This is also an effect from tobacco smoking, and since women who use methamphetamine in pregnancy also commonly smoke cigarettes, it is not known whether this affect is a result of tobacco use alone. Terplan Decl. ¶ 33.

182. Tobacco use is demonstrably associated with stillbirth, low birth weight, miscarriage, and pre-term delivery. Terplan Decl. ¶ 35.

183. The best source of data on newborn and child outcomes for methamphetamine, known as “the IDEAL” Study, cannot account for the caregiving environment and the role it plays in child development, nor could it disaggregate the effects of cigarette and alcohol use, which were higher in the methamphetamine group than the control group. Terplan Decl. ¶ 34.

184. The IDEAL Study considered only women and their babies where one or the other or both had tested positive for drugs at the time of delivery, so the results are difficult to generalize to exposure that occurs only early in pregnancy. Terplan Decl. ¶ 34.

185. Prenatal marijuana exposure is not linked to birth defects. Terplan Decl. ¶ 35.

186. Although some studies suggest that marijuana use during pregnancy may lead to lower birth weight, other studies counter that conclusion. Terplan Decl. ¶ 35.

187. There is no conclusive evidence that marijuana use is likely to harm a developing fetus. Terplan Decl. ¶ 35.

188. Compared to marijuana, the risks of harm from cigarettes have been shown to be more significant and are well established. Terplan Decl. ¶ 35.

189. While fetal alcohol syndrome is a documented consequence of prenatal exposure to large quantities of alcoholic beverages, whether moderate or limited alcohol consumption during pregnancy causes any harm to a developing fetus is not well established. Terplan Decl. ¶ 37.

190. Punitive responses to substance use during pregnancy may discourage women from seeking prenatal care. Terplan Decl. ¶ 45.

191. The biological interdependency of the maternal-fetal unit is critical to rendering appropriate health care decisions related to pregnancy. Legislation that pits a pregnant woman's maternal interests vis-à-vis her own pregnancy against those of others whose authority is inserted between her and her pregnancy essentially attempts to cleave the maternal-fetal unit. Terplan Decl. ¶ 43-45.

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Respectfully submitted,

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