UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

TAMARA M. LOERTSCHER

Plaintiff,

v.

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.

CIVIL ACTION

Case No. 14-cv-870

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATUTES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

INTRODUCTION

In Wisconsin, an adult woman alleged to have consumed alcohol or drugs during pregnancy may be forced, without the benefit of counsel, into secret juvenile court proceedings originally designed to protect abused children, in which she faces severe penalties. As detailed below, under 1997 Wisconsin Act 292 ("the Act"), judicial officers, state and local officials, hospital staff, social workers, or law enforcement personnel can initiate legal proceedings against a pregnant woman alleged to "habitually lack self-control" in the use of alcohol or controlled substances. Once such allegations have been made, a juvenile court may order the woman into custody and then keep her detained if that court is "satisfied" that the woman may pose "substantial risk" to the fertilized egg, embryo, or fetus inside of her. The juvenile court then holds a series of confidential proceedings to determine whether the woman should be maintained in custody, ordered into a mandatory treatment facility, placed under the control of a friend or relative, or have other restrictions placed upon her freedom of movement or activity. At each of these hearings, the fertilized egg, embryo or fetus must be represented by a guardian ad litem, but in the critical early hearings, the pregnant woman herself is not provided counsel.

The legal standards employed in these proceedings are vague and undefined, but the consequences for the woman subjected to them are concrete, severe and long-lasting. She may be detained, forced to undergo medically unnecessary and/or inappropriate drug and alcohol treatment, denied appropriate prenatal and other medical care, and subjected to findings of fact and legal orders that may impact her employment or result in termination of parental rights. Because the juvenile court system, to which these unusual proceedings are assigned, was designed to protect the privacy of potentially abused children, all of this occurs in secret, through confidential proceedings that preclude public scrutiny.

Plaintiff Tamara Loertscher is a 30-year-old pregnant woman currently subjected to state control under this Act in clear violation of her constitutional rights. Last August, when she realized she might be pregnant, Ms. Loertscher voluntarily sought medical assistance from a hospital in Taylor County. In the course of providing information to further that treatment, she confided that she had used controlled substances and a small amount of alcohol prior to learning she was pregnant. Under authority granted by the Act, state actors then used Ms. Loertscher's private medical information for law enforcement purposes without her consent, appointed a guardian ad litem to represent her then 14-week fetus, and initiated proceedings under the Act.

A juvenile court held adversarial proceedings against Ms. Loertscher, who was without counsel, and as a result, Ms. Loertscher was ordered detained, coerced into unwanted medical treatment, arrested, and ultimately jailed. While she was incarcerated, state actors deprived her of necessary medical and prenatal care and subjected her to harassment and abuse, jeopardizing her health and the health of her future child. Ms. Loertscher was released only after she agreed to a consent decree authorizing continued state control over her private medical decisions. A guardian ad litem remains appointed to represent Ms. Loertscher's fetus for the duration of her pregnancy, and Ms. Loertscher must comply with the terms of the consent decree upon pain of renewed incarceration and possible suspension or loss of parental rights with regard to her child when born. Ms. Loertscher therefore brings this facial constitutional challenge under 42 U.S.C. § 1983 and seeks an immediate statewide injunction against enforcement of the Act.

On its face, the Act is plainly unconstitutional. It violates some of the most basic fundamental Constitutional rights recognized by the Supreme Court, including the right to be free from bodily restraint, the right to freedom from coerced medical treatment, the right to procreate, and the right to control and custody of one's children. None of these intrusions are

narrowly tailored to serve a compelling state interest, the level of scrutiny demanded by the fundamental nature of the rights at stake. By its terms, the Act applies to women from the moment they are carrying a fertilized egg, and it imposes draconian punishments and Kafkaesque legal proceedings on adult women without any regard for their actual impact on maternal and fetal health. In fact, many of the proceedings and their consequences reduce the likelihood that a pregnant woman will receive appropriate prenatal care, undermining, rather than promoting, the objective the Act purports to address.

In addition, the Act violates several other constitutional protections. The Act imposes an undue burden on a woman's right to choose to terminate her pregnancy because it subjects her to detention and forced medical treatment without any provision for her exercise of her right to choose to have an abortion. Moreover, nothing in the Act prohibits the guardian ad litem tasked with representing the interests of the fertilized egg, embryo, or fetus, from challenging a woman's right to exercise her right to terminate a pregnancy. The Act is also void for vagueness on due process grounds because it fails to provide adequate notice of prohibited conduct and encourages arbitrary and discriminatory enforcement. The Act violates the Equal Protection Clause by infringing fundamental rights, imposing substantial burdens on women alone, and by subjecting pregnant women to byzantine proceedings with due process protections far below those available to people facing involuntary civil commitment proceedings for mental health reasons, none in the service of a state interest that justifies the intrusion.

Ms. Loertscher is likely to prevail on the merits of each of these constitutional claims. Furthermore, she has suffered irreparable harm through the deprivation of her constitutional rights and has no adequate remedy at law. Without preliminary injunctive relief from this Court, those constitutional violations will continue, preventing her from making her own medical

decisions, forcing her to submit to regular drug testing, and subjecting her to continued supervision by local officials. Because Ms. Loertscher's child is due on January 29, 2015, she also faces the prospect of giving birth under the supervision of state actors authorized to enforce the Act against her. These include the guardian ad litem, who is empowered to override her medical decisions, including potentially how she gives birth, if he unilaterally decides that his decisions are in the best interests of her fetus. Ms. Loertscher therefore requests that this Court declare the Act unconstitutional, enjoin further enforcement of the Act throughout the State of Wisconsin, and order Defendants to release her immediately from state supervision and control.

SUMMARY OF THE CHALLENGED ACT

Originally passed as 1997 Wisconsin Act 292, and codified at *inter alia*, Wis. Stat. § 48.01 *et seq.*, the Act explicitly gives juvenile courts exclusive original jurisdiction over fertilized eggs, embryos, and fetuses—from the moment of fertilization—under the State's child abuse and neglect code, whenever lack of "self-control" regarding drug or alcohol use is alleged against a pregnant woman. *See* Wis. Stat. § 48.133 (providing for juvenile court jurisdiction over "adult expectant mother" of an "unborn child"); Wis. Stat. § 48.02(19) ("'Unborn child' means a human being from the time of fertilization to the time of birth.").[1]

The Act was passed in direct response to the Wisconsin Supreme Court's decision in *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wis. 1997), which held that the

[1] Plaintiff uses the phrase "fertilized egg, embryo, or fetus" to accurately describe the reach of this Act, rather than the medically inappropriate term "unborn child." (*See* PFOF 176). In reality, pregnancy does not occur when an ovum is fertilized, but rather at the point when a fertilized egg (a blastocyst, or pre-embryo) successfully implants in a woman's uterus; once a woman is actually pregnant, the developing zygote begins to go through a procession of stages with enormous biological differences. (PFOF 177-179). The Act's use of the term "unborn child" to describe this process reflects the attempt of proponents of the Act to define human life and personhood as existing from the moment of fertilization. Such an endeavor is contrary to the express directive of *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."). Moreover, it pits the interest of the pregnant woman against that of the fertilized egg, embryo, or fetus she carries, despite the biological fact that these interests are intimately intertwined, no matter one's beliefs concerning the beginning of human life. (*See* PFOF 191).

Wisconsin children's code did not authorize a juvenile court to exercise jurisdiction over an adult pregnant woman in connection with a proceeding regarding a "child alleged to be in need of protection or services," also known as a "CHIPS" proceeding. *See* Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. Med. & Ethics 332, 332 (1999) (Appendix 3, attached). The Legislature then passed the Act to authorize the very jurisdiction the state supreme court had rejected, granting juvenile courts jurisdiction over "an unborn child" and the "adult expectant mother" when that expectant mother

> habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control.

Wis. Stat. § 48.133.

When a court takes jurisdiction over a pregnant woman pursuant to Section 48.133, the court must appoint a guardian ad litem ("GAL") to represent the interests of the fertilized egg, embryo, or fetus. Wis. Stat. §§ 48.235(1)(f) & 48.02(19). The Act does not require the GAL or any other state actor to act on behalf of or in the interests of the pregnant woman. In fact, the GAL for the fertilized egg, embryo, or fetus may file a petition against the pregnant woman alleging abuse and neglect of the fertilized egg, embryo, or fetus she is carrying. Wis. Stat. § 48.25(1). A district attorney, corporation counsel for a county or state department of human services, or any other "appropriate" government official representing the "interests of the public" may also file such a petition as specified under Section 48.09. Wis. Stat. § 48.25(1).

Any juvenile court that has exercised this jurisdiction over a pregnant woman and her fertilized egg, embryo, or fetus under Section 48.133 may also issue a warrant to take that

pregnant woman into custody based upon a "showing satisfactory" to the judge that the woman meets the criteria granting the court jurisdiction under Section 48.133. Wis. Stat. § 48.193(1)(a)-(c). In addition, law enforcement personnel may themselves take a pregnant woman into custody if, in their independent judgment, "reasonable grounds" exist to believe that the conditions for jurisdiction under § 48.133 are satisfied. Wis. Stat. § 48.193(1)(d)(2). The Act even grants human services intake workers "the power of police officers or deputy sheriffs" to take a pregnant woman into custody if they believe the conditions for jurisdiction under Section 48.133 have been satisfied. Wis. Stat. § 48.08(3). After a pregnant woman is taken into custody, an intake worker with the state or county department of human services may unilaterally decide to "release the adult expectant mother to an adult relative or friend of the adult expectant mother," or may decide to keep the pregnant woman detained. Wis. Stat § 48.203(1)&(2).

If a pregnant woman is detained under Section 48.203, a court must hold a hearing within 48 hours to determine if probable cause exists for her continued detention as set out in Section 48.205(1m). Wis. Stat. § 48.213(1)(a). Pregnant women are not entitled to appointment of counsel for this hearing. Wis. Stat. § 48.213(2)(e). A juvenile court judge presiding over a probable cause hearing may order a pregnant woman into an inpatient facility as described in Section 48.207(1m). Wis. Stat. § 48.213(3)(b). The court may also order the pregnant woman to be placed outside her home at the home of a friend or relative selected by the court. Wis. Stat. § 48.213(3)(b); Wis. Stat. § 48.207(1m)(a). Alternatively, the court may opt to release the pregnant woman but impose unspecified restrictions on her "travel, association with other persons or places of abode." Wis. Stat. § 48.213(3)(a). It may also require her to return to custody, subject her to the supervision of a state agency, and place other unspecified restrictions on her "conduct." *Id.*

Within 30 days of the filing of a CHIPS petition under the Act, a court must hold a hearing for a pregnant woman to enter a plea responding to the petition alleging child abuse or neglect regarding her fertilized egg, embryo, or fetus. Wis. Stat. § 48.30(1). At the plea hearing, the pregnant woman must be advised of the rights afforded her under 48.243, which includes the right to court-appointed counsel in certain circumstances. *See* Wis. Stat. § 48.23(2m). However, the pregnant woman is not entitled to representation by court-appointed counsel at the plea hearing, even if she qualifies for the appointment in connection with a subsequent fact-finding hearing. *See* Wis. Stat. §§ 48.23(2m)(b) & (4). At the plea hearing, she must decide how to plead in response to the allegations against her, whether to invoke or waive her right to a jury trial, and whether to request substitution of the judge. Wis. Stat. § 48.30(2).

Finally, the court must hold a fact-finding hearing to determine if the allegations in the CHIPS petition under the Act have been established by "clear and convincing" evidence. Wis. Stat. § 48.31(1). If a woman is threatened with placement outside her home under the Act, then she is entitled to court-appointed counsel for the first time in the course of the proceedings against her, provided she meets the statutory criteria for indigency. *See* Wis. Stat. §§ 48.23(2m)(b) &(4). If she is threatened with state supervision or involuntary court-ordered counseling or medical treatment, *see* Wis. Stat. §§ 48.347(1), (2), (4) & (5), then she is not entitled to court-appointed counsel. If the pregnant woman invoked her right to a jury trial during the prior plea hearing, then a jury is tasked with fact-finding concerning the allegations in the petition, although the ultimate decision regarding whether the fertilized egg, embryo, or fetus, is in need of protection or services is reserved for the juvenile court. Wis. Stat. § 48.31(2) & (4).

Ultimately, over a pregnant woman's objection and regardless of any denial of the allegations against her set out in the petition, and without any requirement that it consider

scientifically reliable evidence, the juvenile court may order a pregnant woman to undergo counseling, supervision, or drug and alcohol treatment— including involuntarily at an inpatient facility—for the duration of the woman's pregnancy. *See* Wis. Stat. § 48.347. Further, Section 48.347(7) authorizes a court, during a woman's pregnancy, to order services or treatment for the child when born including removal from the home and substitution of legal custody. *See* Wis. Stat. § 48.345. Moreover, the Act provides for permanent involuntary termination of parental rights based solely on the fact that the mother was previously placed outside her home during her pregnancy. Wis. Stat. § 48.415(2)(a). At any time, a GAL appointed to represent a fertilized egg, embryo, or fetus, may, among other actions, petition for revision or extension of a dispositional order, and may also petition for termination of parental rights of a pregnant woman over her child once born. Wis. Stat. § 48.235(4m)(a). A woman subject to the Act may also be subject to a determination, separate and apart from a CHIPS proceeding, that she has abused her unborn child. *See* Wis. Stat. §§ 48.981(3)(c)(1)(a) & (5m).

Wisconsin courts are empowered to order remedial and punitive sanctions for contempt of court in cases where a pregnant woman is deemed to have intentionally disobeyed any order issued by the court under the jurisdiction conferred by Section 48.133. *See* Wis. Stat. §§ 785.01 & 785.02. Penalties for contempt include up to 1 year of jail time. *See* Wis. Stat. § 785.04.

STATEMENT OF FACTS

A. Background

Tamara Loertscher is a 30 year-old pregnant resident of Taylor County, Wisconsin (PFOF 1). She is currently pregnant with her first child, which is due January 29, 2015. (PFOF 7).

Due to radiation treatment Ms. Loertscher had as a teenager, she is without a functioning

thyroid. (PFOF 8). As a result, Ms. Loertscher suffers from severe hypothyroidism, and cannot produce vital thyroid hormones without medication. (PFOF 9). She also understood that hypothyroidism would make it difficult or impossible for her to become pregnant. (PFOF 10). (Indeed, it is well established that hypothyroidism can disrupt ovulation, leading to irregular periods; it is also a cause of infertility. (PFOF 11)). Without her thyroid medication, Ms. Loertscher experiences severe symptoms of depression and fatigue. (PFOF 13 & 14). Ms. Loertscher also has a history of clinically diagnosed depression, a condition that is compounded by the symptoms of untreated hypothyroidism (PFOF 12-14).

Ms. Loertscher has been unemployed since February 2014. (PFOF 15). Previously, she worked as a certified nurse's aide. (PFOF 16). When Ms. Loertscher became unemployed, she was no longer able to pay for her thyroid medication and related blood testing. (PFOF 17). She attempted to apply for BadgerCare, Wisconsin's version of Medicaid, but was told by officials that there was a waiting list of more than a year to process any new applications (PFOF 18). Accordingly, she was without any medical treatment for her hypothyroidism beginning in February 2014. (PFOF 19).

Without treatment for her thyroid condition, Ms. Loertscher sank into a deep depression. (PFOF 19). She also began to experience severe fatigue, as well as head and neck pain. (PFOF 20). During this time period, Ms. Loertscher began to use methamphetamine about two or three times per week to help her get out of bed in the morning. (PFOF 21). Ms. Loertscher had no history of drug dependency or addiction, and had never even used methamphetamine or any other illegal drug —except marijuana very occasionally—in her life before February 2014. (PFOF 22). Ms. Loertscher used marijuana during this time period as well, but very intermittently—fewer than 10 times in the year preceding the end of July 2014. (PFOF 23 & 24).

Ms. Loertscher did not, however, feel much like drinking alcohol during this time period. In fact, she only had a beer on occasion 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.

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. (PFOF 27). However, she 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 at that time. (PFOF 28).

Ms. Loertscher used methamphetamine again approximately two or three times after taking the pregnancy test in early July. (PFOF 29). On approximately July 30, 2014, Ms. Loertscher took another pregnancy test, just in case she might be pregnant. (PFOF 30). When that test was also positive, she believed for the first time that she might actually be pregnant. (PFOF 31). Ms. Loertscher has not used methamphetamine, marijuana, or any other illegal drug, nor consumed any alcohol, since the day she took the second pregnancy test on July 30, 2014. (PFOF 32).

B. Ms. Loertscher Seeks Medical And Prenatal Care

Two days later, on August 1, 2014, Ms. Loertscher went to the Taylor County Department of Human Services ("TCDHS") for help. (PFOF 33). She 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. (PFOF 34). 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.

(PFOF 35).

At the emergency room, Ms. Loertscher explained to medical personnel that she needed medical and psychiatric care. (PFOF 36). She told also told them 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. (PFOF 36). At the request of Mayo Clinic personnel, Ms. Loertscher provided a urine sample that day. (PFOF 37). No one at the hospital informed Ms. Loertscher that her urine would be tested for drugs. (PFOF 38). 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. (PFOF 39) Ms. Loertscher has had serious medical problems in her life, but has never struggled with drug addiction. (PFOF 40).

Mayo Clinic personnel used Ms. Loertscher's urine sample to perform a drug screen. 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." (PFOF 41).

A doctor informed Ms. Loertscher that the pregnancy test was positive, and that "trace amounts" of methamphetamine and marijuana had been found in her urine; the doctor advised Ms. Loertscher that drug use is very bad for a baby, but that if she stopped now everything should be okay. (PFOF 42 & 43). Ms. Loertscher responded that she wanted more than anything for her baby to be okay. (PFOF 44). 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.

(PFOF 45).

Later that evening, Ms. Loertscher was admitted to the Mayo Clinic Behavioral Health Unit. (PFOF 46). The next morning, she was given levothyroxine to treat her hypothyroidism. (PFOF 47). 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. (PFOF 48). Indeed, maternal hypothyroidism has been associated with a wide range of adverse outcomes including miscarriage, stillbirth, and impaired cognitive function in newborns. (PFOF 51). Ms. Loertscher's hypothyroidism upon admission to the Mayo Clinic was exceptionally severe; in fact, Ms. Loertscher's TSH levels were so extraordinarily high they were literally out of range of the assay as it was higher than the cut point for the test. (PFOF 49 & 50).

The psychiatrist also asked Ms. Loertscher about her past drug use. (PFOF 52). Ms. Loertscher candidly explained that she had been self-medicating her depression and extreme lethargy with occasional marijuana but mainly with methamphetamine. (PFOF 53). She emphasized that she had only done this before she became convinced she might actually be pregnant. (PFOF 54). Ms. Loertscher was very worried about her pregnancy because she did not know what affect her hypothyroidism and depression might have on her pregnancy. (PFOF 56). She was also worried about her past drug use and its impact on the baby (PFOF 57). Accordingly, she was very honest with the psychiatrist 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. (PFOF 55).

Later that evening, Ms. Loertscher met with an obstetrician, who showed Ms. Loertscher the ultrasound images of her fetus and told her the baby looked fine; Ms. Loertscher was so relieved she started to cry. (PFOF 58 & 59). Then the doctor asked Ms. Loertscher about her

alcohol use. (PFOF 60). Ms. Loertscher explained that during the time she was pregnant, but did not know it yet, she drank one half of a glass of wine. (PFOF 60).

C. Legal Proceedings Begin Against Ms. Loertscher Under the Act

While Ms. Loertscher was in the hospital, personnel from the Mayo Clinic, without Ms. Loertscher's knowledge or consent, shared her 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. (PFOF 61). Sometime thereafter, a Taylor County commissioner appointed a GAL on behalf of Ms. Loertscher's fetus. (PFOF 62).

On approximately the third or fourth day of Ms. Loertscher's stay at the Mayo Clinic, she met with a hospital social worker. (PFOF 63). Ms. Loertscher felt the social worker was asking her questions that were inappropriately focused on her past drug use, rather than her health. (PFOF 64). She advised hospital staff that she did not wish to speak to the social worker again, because the social worker had been judgmental and unhelpful. (PFOF 65). Around this time, Ms. Loertscher began to feel that she was not receiving the care she needed for her health concerns because the hospital staff were focused on her past drug use, and that the hospital staff did not really care about her baby's health at all. (PFOF 66). On approximately the fourth day of her hospital stay she informed hospital staff that she wished to leave. (PFOF 67). The nursing manager then told her 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. (PFOF 68).

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

also placed some kind of legal papers on the table in front of Ms. Loertscher, but Ms. Loertscher did not understand what they were. (PFOF 72). Ms. Loertscher stated 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. (PFOF 73). She then returned to her hospital room. (PFOF 74). The social worker followed Ms. Loertscher to her hospital room, and tried to continue the telephone call with the judge from there. (PFOF 75). Ms. Loertscher laid down on the bed facing away from the social worker and pleaded "just please leave, just leave me alone." (PFOF 76).

In fact, the legal documents placed in front of Ms. Loertscher in the conference room of the Mayo Clinic Behavioral Health Unit were a Temporary Physical Custody Request and an as-yet-unfiled "Petition for Protection or Care of an Unborn Child" ("the Petition") against Ms. Loertscher. (PFOF 69 & 77). The Temporary Physical Custody Request stated that Ms. Loertscher had been taken into custody at the hospital on the basis of a serious health risk to [an] unborn child. (PFOF 78). The Petition alleged that if Ms. Loertscher were no 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 79).

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. (PFOF 80). On the other end of the phone were the Taylor County Court Commissioner, TCDHS Corporation Counsel, the court-appointed GAL on behalf of Ms. Loertscher's fetus, and three TCDHS personnel. (PFOF 81).

After Ms. Loertscher stated that she would not participate without counsel and returned to her hospital room, the court found that Ms. Loertscher had waived her appearance at the hearing

and that the hearing would continue in her absence. (PFOF 82). The court then heard testimony from a Mayo Clinic obstetrician, responding to questions from counsel for TCDHS concerning Ms. Loertscher's personal medical information and health history. (PFOF 83). The doctor stated that she did not have Ms. Loertscher's authorization to discuss her personal medical information, but, once Taylor County counsel said that Ms. Loertscher's authorization was not needed, the doctor responded to questions concerning drug use and pregnancy, and further testified that her greatest concern for Ms. Loertscher's pregnancy related to her hypothyroidism and her ability to get appropriate prenatal care. (PFOF 84-86). Although no one at the Mayo Clinic had evaluated Ms. Loertscher for a substance use disorder (*see* PFOF 88), the obstetrician testified that she recommended inpatient drug treatment for Ms. Loertscher. (PFOF 87). At the close of the August 5, 2014, hearing, the juvenile court entered an order of "Temporary Physical Custody" against Ms. Loertscher. (PFOF 90). 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. (PFOF 91).

On August 6, 2014, a Mayo Clinic social worker informed 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. (PFOF 92); *see* http://www.lsswis.org/LSS/Services/Addiction/Inpatient-Treatment1.htm). The next day, Mayo Clinic personnel informed Ms. Loertscher that she would need to submit to a blood test for tuberculosis before she could be admitted to that facility. (PFOF 93). 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. (PFOF 94). She also informed hospital personnel that she wanted to stay on her thyroid medication, start prenatal vitamins, choose her own health care

providers, and leave the hospital immediately. (PFOF 95). Ms. Loertscher was given a prescription for levothyroxine and iron, and was released from the hospital that day. (PFOF 96). No one advised her that by leaving the hospital she would be doing anything wrong, or that she could be subjected to arrest for doing so. (PFOF 97). At that time, she believed the whole episode was over. (PFOF 97).

D. Further Legal Proceedings Against Ms. Loertscher Under The Act

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. (PFOF 98). The GAL 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, which could include a jail term of up to 6 months. (PFOF 99). Attached to the Notice 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. (PFOF 100). The Notice set a hearing date on the contempt motion of August 25, 2014. (PFOF 101).

On August 13, 2014, Taylor County Corporation Counsel filed a "Motion to Take Expectant Mother into Immediate Custody" on behalf of TCDHS. (PFOF 102). 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. (PFOF 103). The same day, the court granted the TCDHS Motion and entered an Order to Take Expectant Mother into Immediate Custody. (PFOF 104). The Order stated that it was "contrary to the unborn child's best interests for the expectant mother to have been 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." (PFOF 105).

When she received the Notice of Motion and Motion for Remedial Contempt, Ms. Loertscher saw that the documents had an August 25, 2014, court date on them. (PFOF 106 & 107). But she did not understand the documents and therefore 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. (PFOF 108).

The afternoon after she received the Notice, a police officer came to Ms. Loertscher's grandparents' house, where she had been staying. (PFOF 109). Ms. Loertscher was upstairs at the time, and did not come down. (PFOF 109). 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. (PFOF 110). Ms. Loertscher's grandfather assured the police officer that Ms. Loertscher would appear at the scheduled hearing, and the officer left without arresting her. (PFOF 111). Ms. Loertscher was horrified and humiliated; she did not understand what was happening, and felt extremely frightened and distressed. (PFOF 112).

On August 25, 2014, Ms. Loertscher appeared in Taylor County Circuit Court for the hearing. (PFOF 113). Present were the GAL on behalf of Ms. Loertscher's fetus, Corporation Counsel for TCDHS, and two TCDHS social workers. (PFOF 114). Ms. Loertscher was not represented by counsel, and did not understand what was happening during the hearing. (PFOF 115 & 116). Ms. Loertscher requested that a different judge hear the case, and the hearing was then cut short. (PFOF 117). The court rescheduled the hearing for September 4, 2014, before a different judge. (PFOF 118).

During the evening of August 25, 2014, another police officer came to Ms. Loertscher's

grandparents' home, stating he had a warrant for her arrest. (PFOF 119). Ms. Loertscher and her family explained that she had been in court that day and had an upcoming hearing. (PFOF 120). The officer said "I don't know anything, I just know that there's a warrant." (PFOF 121). Ms. Loertscher's family explained that she was pregnant and stressed and did not need to be in jail. (PFOF 122). Ultimately, the police officer agreed to leave without arresting Ms. Loertscher. (PFOF 122).

On September 4, 2014, Ms. Loertscher appeared, without counsel, in Taylor County Circuit Court for the hearing on the contempt motion. (PFOF 123). Present were the GAL, TCDHS Corporation Counsel, as well as Ms. Loertscher's boyfriend, her mother, and her mother's boyfriend. (PFOF 124). The court asked the GAL what his plea was "on behalf of the child." (PFOF 125). The GAL admitted all the allegations against Ms. Loertscher on behalf of her fetus. (PFOF 125). The court then heard testimony from a TCDHS social worker, who testified that Ms. Loertscher had not complied with the August 5, 2014, Order because she did not take a TB test, did not go to inpatient treatment at the Fahrman Center, and otherwise failed to comply with TCDHS directives. (PFOF 126). Without the benefit of counsel, Ms. Loertscher then tried to counter the contempt charge against her, as well as the underlying proceedings alleging abuse and neglect of her fetus. (PFOF 127).

Ms. Loertscher had very little understanding of what was happening at the hearing, but tried to answer the claim that she needed drug treatment. (PFOF 128 & 129). She testified: "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[.]" (PFOF 130). At the end of the hearing, the court found Ms. Loertscher in contempt and ordered her to either cooperate with

TCDHS and go to the Fahrman Center, or to serve 30 days in jail.[2] (PFOF 131).

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. (PFOF 133). Ms. Loertscher asked them what they wanted from her; one of them responded, "we just want a healthy baby." (PFOF 133). Ms. Loertscher said that this is what she wanted, too. (PFOF 133). Ms. Loertscher then asked if "this would all go away if I had an abortion?" The social workers responded, "Yes, it would." (PFOF 134).

E. Ms. Loertscher's Incarceration Under the Act

On the evening of September 4, 2014, Ms. Loertscher surrendered herself to the Taylor County Jail, (PFOF 135 & 136), where she was held for a total of 19 days, (*see* PFOF 137). During her stay in jail, Ms. Loertscher received no prenatal care. (PFOF 138). She was denied her thyroid medication on two occasions: during the first day of her incarceration, the Taylor County Jail failed to provide it to her and wouldn't allow her family to bring it to her (PFOF 139); later, after Ms. Loertscher had been forced to wait for the prescription to be refilled, jail staff refused to give her the medication when it arrived. (PFOF 140). They told her it was okay for her to miss a dose and that this would keep the medication on schedule. (PFOF 141). Ms. Loertscher has always been advised by her doctors that she should take the medication as soon as possible after a missed dose. (PFOF 141). Ms. Loertscher was also forced to miss two previously scheduled prenatal care appointments while she was in jail; she asked jail staff to take her to these appointments, but they refused, and told her that missing them was her own fault because she was in jail. (PFOF 142 & 143).

[2] The GAL appointed to represent the interests of the fetus made no objection to sending the fetus and the woman carrying it to jail for 30 days, (PFOF 132), where, as will be explained below, Ms. Loertscher was denied access to prenatal care.

Ms. Loertscher began to experience a lot of pain and cramping while she was in jail. (PFOF 144). It became especially severe toward the end of the first week of her incarceration, and she became frightened that she might have a miscarriage. (PFOF 145). She asked repeatedly to see an obstetrician, and finally was told that she could see the jail doctor, who was not an obstetrician. (PFOF 146). The jail doctor 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." (PFOF 147). This response made Ms. Loertscher extremely upset and frightened for her pregnancy. (PFOF 148).

This same doctor then demanded that Ms. Loertscher take a pregnancy test. Believing this absurd, Ms. Loertscher refused. (PFOF 149). After this refusal, a guard threatened to tase Ms. Loertscher and that guard and other jail personnel put her in solitary confinement. (PFOF 150). She was kept 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 thin blanket and mattress pad), and released when the same doctor told jail staff that Ms. Loertscher had the right to refuse to take the pregnancy test. (PFOF 151 & 152).

While she was in jail, Ms. Loertscher found a list by the phone of all the public defenders in Taylor County. (PFOF 153). She called the telephone number on the list, and explained to an intake worker that she was in jail and needed representation. (PFOF 153). A public defender was then appointed to represent her in the contempt proceeding. (PFOF 154).

F. The Consent Decree And Continuing State Enforcement Of The Act

Upon the advice of her newly appointed attorney, Ms. Loertscher signed a consent decree so that she could be released from jail. (PFOF 155). The Consent Decree permitted Ms. Loertscher to go home so long as she agreed to complete an Alcohol and Other Drug Abuse

(AODA) Assessment; comply with any recommended treatment resulting from that 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. (PFOF 156). The Consent Decree also provides that the GAL will remain appointed for Ms. Loertscher's fetus for the duration of her pregnancy, and that any violation of its terms is contempt of court. (PFOF 157). Ms. Loertscher agreed to these terms because she wanted to leave jail and she was not using drugs or alcohol and did not have a problem with drug use. (PFOF 158).

At a hearing on September 22, 2014, the juvenile court adopted the Consent Decree and made compliance with its terms sufficient to purge the earlier finding of contempt. (PFOF 159). Ms. Loertscher was released from the Taylor County Jail that day. (PFOF 137). Ms. Loertscher has complied with, and is continuing to comply with, all the terms of the Consent Decree. She has taken numerous drug tests, which have all returned negative results, and has completed the required AODA assessment. (PFOF 160 & 161).

By notice dated September 29, 2014, Ms. Loertscher was informed that TCDHS issued an administrative determination that she had committed "child maltreatment." (PFOF 162). Wisconsin Statute Section 48.133 was quoted in its entirety as the "basis" for the determination. (PFOF 163). The notice stated that the finding was appealable within 30 days, and Ms. Loertscher appealed it. (PFOF 164). By letter dated November 10, 2014, Ms. Loertscher received notice that the TCDHS Agency Director had conducted a "desk review" of her appeal and affirmed the finding that Ms. Loertscher had committed child maltreatment of her fetus, stating 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." (PFOF

165 & 166). It further 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." (PFOF 167).

In fact, the records from Ms. Loertscher's stay at the Mayo Clinic do not indicate that she has a substance use disorder (PFOF 168). Whatever the terms of the Act may mean (they are undefined in the statute), substance use is not medically the same thing as a substance use disorder (also called addiction) (PFOF 169). Prior use of drugs does not, alone, provide the necessary information to make a medical diagnosis of substance use disorder. (PFOF 170). Nor does a urine toxicology test. (PFOF 170). Further, nothing in Ms. Loertscher's medical records from her stay in the Mayo Clinic indicates that she was screened for, or received, a diagnosis of substance use disorder; nor is there anything to indicate that she received treatment for such a diagnosis while she was in the hospital. (PFOF 171). 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. (PFOF 172).

Ms. Loertscher remains subject to the Act and the Consent Decree's terms, including drug testing, restrictions on her freedom of movement, continued state supervision, and potential intervention by the GAL (*see* PFOF 156). Ms. Loertscher is due to give birth on January 29, 2015. (PFOF 7). She faces the prospect of state officials overriding her medical decisions during that birth and imposing restrictions on her relationship with her newborn child, including potential loss of that child.

ARGUMENT

Ms. Loertscher is entitled to a declaration that the Act is facially unconstitutional and to a statewide preliminary injunction against any further enforcement of the Act. A facial

constitutional challenge to a statute is appropriate when there are "no set of circumstances [] under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), and the law is "unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). As the Seventh Circuit has explained, in the context of a facial challenge, "the claimed constitutional violation inheres in the terms of the statute, not its application." *Ezell v. Chicago*, 651 F.3d 684, 698 (7th Cir. 2011). Thus "[f]acial challenges are to constitutional law what res ipsa loquitur is to facts—in a facial challenge, *lex ipsa loquitur*: the law speaks for itself." *Id*. at 697 (emphasis in original). Accordingly, a court adjudicating a facial challenge need "have only the [statute] itself," and the "statement of basis and purpose that accompanied its promulgation." *Reno v. Flores*, 507 US. 292, 300-01 (1993). Further, the remedy for the constitutional violation "is necessarily directed at the statute itself and *must* be injunctive and declaratory; a successful facial attack means the statute is wholly invalid and cannot be applied *to anyone*." *Ezell*, 651 F.3d. at 698 (emphasis in original).

In this case, the plain text of the statute leaves no question that the Act is unconstitutional on its face. The Act expressly authorizes multiple infringements of fundamental substantive due process rights, including the right to liberty and to be free from bodily restraint, the right to bodily integrity and to refuse unwanted medical treatment, the right to procreate, the right to family unity, and the right to decide whether to carry a pregnancy to term. Thus the Act is subject to strict scrutiny, a standard of constitutional adjudication it cannot survive because it neither serves a compelling state interest nor is it narrowly tailored to serve the interests it purports to advance. Further, the plain text of the statute demonstrates that it is void for vagueness under the Due Process clause because it does not provide constitutionally adequate notice to citizens of what conduct it prohibits, and because it authorizes arbitrary and

discriminatory enforcement.

Finally, the statute on its face violates the Equal Protection Clause: first, because the law infringes pregnant women's fundamental rights, and cannot survive strict scrutiny; second, because the law discriminates on the basis of gender, and cannot survive intermediate scrutiny; and third, because its denial to pregnant women of the procedural protections afforded others facing involuntary civil commitment is not rationally related to any legitimate governmental interest, and thus the Act also cannot withstand even rational basis review.

The Seventh Circuit has explained that in the context of a facial challenge, "[o]nce standing is established, the plaintiff's personal situation becomes irrelevant." *Ezell*, 651 F.3d at 697. Nonetheless, the facts in Ms. Loertscher's case support the facial challenge here. The Seventh Circuit has cautioned that, in connection with adjudicating a facial challenge, a court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 476 (7th Cir. 2012) (citing *Washington State Grange*, 552 U.S. at 450). Ms. Loertscher's case demonstrates that the constitutional violations expressly authorized by the plain terms of the Act are neither hypothetical nor imaginary, but in fact have been, and are currently being, inflicted on a Wisconsin citizen under the terms of the Act.

Accordingly, this Court should enjoin enforcement of the Act because, as set forth below, Ms. Loertscher can demonstrate that she is likely to succeed on the merits of her constitutional claims, has no adequate remedy at law, and will suffer irreparable harm in the absence of immediate injunctive relief. *See, e.g.*, *ACLU v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012).

I. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS OF HER CLAIM THAT THE ACT VIOLATES FUNDAMENTAL SUBSTANTIVE DUE PROCESS RIGHTS

The Due Process Clause of the Constitution, applied to the states through the Fourteenth Amendment, protects certain rights and liberties that [are] "deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). These rights are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), and so "implicit in the concept of ordered liberty," that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937). Among these fundamental rights are the right to freedom from bodily restraint, *Foucha v. Louisiana*, 504 U.S. 71 (1992); the right to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and freedom from coerced medical treatment, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990); the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); the right to control and custody of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and the right to continue a pregnancy to term and the right to have an abortion, *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833 (1992).

Consistent with the recognition that "the right to be let alone" is perhaps "the right most valued by civilized [society]," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), "the Fourteenth Amendment forbids the government to infringe fundamental liberty interests *at all*, no matter what process is provided, unless the interest is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation omitted). (emphasis in original). The Act infringes numerous fundamental rights. Because it is not narrowly tailored to serve a compelling interest, it cannot withstand strict scrutiny review.

A. The Act Infringes Numerous Fundamental Substantive Due Process Rights

As the Supreme Court recognized more than a century ago, "[n]o right is held more sacred, or is more carefully guarded… than the right of every individual to the possession and control of his own person, free from all restraint or interference of others[.]" *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891). Thus the Supreme Court has repeatedly placed the right to be free from bodily restraint among the most central fundamental substantive due process rights. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.") (internal citations omitted); *Youngsberg v. Romeo*, 457 U.S. 307, 316 (1982) ("[L]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental intervention.") (citation omitted). The constitutional protections afforded by this right apply regardless of whether the government seeks detention for criminal or civil purposes. *See Foucha*, 504 U.S. at 80*; Jones v. United States*, 463 U.S. 354, 361 (1983) ("commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *accord Addington v. Texas*, 441 U.S. 418, 425 (1979). Even in the civil setting, the Court has recognized "the individual's strong interest in liberty," and cautioned that courts must "not minimize the importance and fundamental nature of this right." *United States v. Salerno*, 481 U.S. 739, 750 (1987).

The plain text of the Act demonstrates that it impinges upon the fundamental right to freedom from bodily restraint. It authorizes multiple enforcers to take a pregnant woman into physical custody. *See* Wis. Stat. § 48.193(1)(a)-(c) (juvenile court may issue warrant based on "satisfactory showing" that woman meets statutory criteria of § 48.133); Wis. Stat. § 48.193(1)(d)(2) (law enforcement may take pregnant woman into custody if they believe

"reasonable grounds" exist to believe § 48.133 criteria are satisfied); Wis. Stat. § 48.08(3) (granting human services personnel "the power of police officers and deputy sheriffs" to take pregnant woman into custody if they believe § 48.133 criteria are satisfied). Strikingly, the Act authorizes the placement of pregnant women in physical custody, either in an inpatient drug treatment facility or in the home of a friend or relative. *See* Wis. Stat. § 48.203 (1) & (2) (intake worker may unilaterally "release adult expectant mother to an adult relative or friend of the adult expectant mother" or may decide to keep the pregnant woman detained); Wis. Stat. § 48.207(1m) (listing places where adult expectant mother may be held in custody); Wis. Stat. § 48.347(3) (authorizing ultimate out-of-home "placement" of adult expectant mother). It also explicitly authorizes the juvenile court to impose restrictions on a pregnant woman's right to travel and associate with other persons. *See* Wis. Stat. § 48.213(3)(a) (court may impose restrictions on pregnant woman's "travel, association with other persons or places of abode," require a return to custody, or place other unspecified restrictions on a pregnant woman's "conduct"). A pregnant woman deemed to have intentionally violated any order issued by the juvenile court is subject to remedial and punitive sanctions for contempt, which may include incarceration for up to one year. *See* Wis. Stat. §§ 785.01-785.05.

What happened to Ms. Loertscher in this case demonstrates the magnitude of the restraint on liberty authorized by the Act's plain terms: the juvenile court ordered that she be detained at the Eau Claire Mayo Clinic (where she had voluntarily sought medical treatment), from which she was to be transported to an inpatient facility against her will (PFOF 91) and, when she declined to accept the unwanted confinement in an inpatient drug treatment facility, she was found in contempt of court and ordered to jail. (PFOF 131).

But the Act authorizes more than detention; it also requires pregnant women to submit to

medical treatment, in direct contravention of the right to refuse unwanted medical treatment. *See Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment."). Accordingly, the Court has held that a prisoner "possesses a significant liberty interest in avoiding the unwanted administration of anti-psychotic drugs," *Washington v. Harper*, 494 U.S. 210, 221 (1990), and has recognized a fundamental substantive due process right to bodily integrity among criminal suspects, *Rochin v. California*, 342 U.S. 165, 209-210. Moreover, in *Parham v. J.R.*, 442 U.S. 584, 600 (1979), the Court held that both children and adults have "a substantial liberty interest in not being confined unnecessarily for medical treatment." The Court has also specifically recognized that "mandatory behavior modification as a treatment for mental illness" is a deprivation of liberty. *Vitek v. Jones*, 445 U.S. 489, 494 (1980). Consistent with this Supreme Court precedent, the Seventh Circuit has held that "any medical procedure implicates an individual's liberty interests in personal privacy and bodily integrity" because "there is a general liberty interest in refusing medical treatment." *United States v. Husband*, 226 F.3d 626, 632 (7th Cir. 2000) (citing *Cruzan*, 497 U.S. at 278).

Infringement of this liberty interest is the core function of the Act. The Act expressly strips a pregnant woman of her right to medical decision-making, forcing her to submit to medical testing and treatment against her will. *See* Wis. Stat. § 48.205(1m) (permitting an intake worker to take a pregnant woman into custody if "there is probable cause to believe that" the "adult expectant mother is refusing or has refused to accept any alcohol or other drug abuse

services offered to her . . ."); Wis. Stat. § 48.203(3) (authorizing the intake worker or "other appropriate person" to deliver the expectant mother to a hospital or physician's office for diagnosis and treatment); Wis. Stat. § 48.347 (authorizing "placement" of adult expectant mother outside her home if "she is refusing or has refused to accept any alcohol or drug abuse services offered to her," and permitting court to mandate counseling, supervision, "special treatment or care," alcohol or drug treatment education, and inpatient drug or alcohol treatment).

Moreover, once a guardian ad litem (GAL) is appointed to advocate for the fertilized egg, embryo, or fetus, that GAL may challenge any medical decisions by the pregnant woman. *See* Wis. Stat. §§ 48.235(3)(b)(2) (directing GAL to make "clear and specific recommendations" to the court concerning "best interest of the …unborn child at every stage of the proceeding"); 48.235(4m)(4) & (5) (authorizing GAL to petition court for revision or extension of dispositional orders, which may include forced medical treatment); 48.235 (4m)(8) (authorizing GAL to "[p]erform any other duties consistent with this chapter."). The GAL is required by statute to consider *only* the best interests of the fertilized egg, embryo, or fetus. *See* Wis. Stat. § 48.01(1) ("the best interests of the… unborn child shall always be of paramount consideration"); Wis. Stat. § 48.235(3)(a) (GAL shall be an advocate for "best interests of …unborn child for whom the appointment is made"). Nowhere does the Act require the GAL or other state actors to consider the interests of the pregnant woman. The consequences of appointing a GAL to override a pregnant woman's medical decision-making can be deadly, as demonstrated by the use of a similar mechanism in the District of Columbia. In *In re A.C.*, 533 A.2d 611 (D.C. 1987), *vacated*, 573 A.2d 1235 (1990), GAL appointed for a fetus successfully argued for forced cesarean surgery, contributing to the death of both the pregnant woman and the fetus.

Here, as expressly authorized by the Act, the GAL appointed to represent Ms.

Loertscher's fetus actively, and successfully, sought to substitute his decisions concerning Ms. Loertscher's medical treatment for her own. Ms. Loertscher, ill and in the hospital while the Temporary Physical Custody hearing was held at the Taylor County Circuit Court, was not represented by counsel when the juvenile court ordered her involuntary placement in an in-patient drug-treatment facility. The state-appointed GAL appeared at the hearing on behalf of her fetus only, completely separate from and adverse to Ms. Loertscher. Shortly thereafter, the GAL initiated the contempt proceedings against Ms. Loertscher, resulting in her incarceration in Taylor County Jail without access to prenatal care or to the prescribed thyroid medication so essential to her health and to her pregnancy. As authorized under the Act, the GAL currently remains empowered to override Ms. Loertscher's medical decision-making throughout the remainder of her pregnancy and during childbirth, (*see* PFOF 156 (GAL remains appointed under the Consent Decree)), which is why urgent preliminary injunctive relief is needed in this case. (*See* Section IV, *infra*).

An inevitable consequence that flows from the Act's infringement of the right to freedom from bodily restraint and to refuse unwanted medical treatment is an additional burden on the fundamental due process liberty interest in procreation. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that procreation is "one of the basic civil rights of man"). The Act authorizes state actors to take a woman into custody and order coerced medical treatment upon finding (based on unconstitutionally vague criteria (*see* Section II, *infra*)) that she is pregnant and that her past or present use of controlled substances or alcohol rises to a level permitting governmental action. Women subject to the Act who choose to continue their pregnancies are exposed to arrest and detention, *see, e.g.*, Wis. Stat. §§ 48.193(1)(a)-(c), 48.193(1)(d)(2), 48.08(3), 48.203(2); the indignity of an abuse or neglect determination, *see* Wis. Stat.

48.981(3)(a) & (3)(c)(5m); imposition of involuntary medical treatments, *see, e.g.*, Wis. Stat. § 48.347; possible loss of custody during pregnancy, *see* Wis. Stat. §§ 48.347(7) & 48.345; and permanent involuntary termination of parental rights after the child is born, *see* Wis. Stat. § 48.415(2)(a). *See* Dorothy E. Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," 104 *Harv. L. Rev.* 1419, 1445 (1991) ("It is the *choice of carrying a pregnancy to term* that is being penalized") (emphasis in original).

As the Supreme Court has recognized, penalizing a woman for the decision to remain pregnant and give birth infringes the right to procreate. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (noting "[*Roe v. Wade*, 410 U.S. 113 (1973)] has been sensibly relied upon to counter…suggestions [that] the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974) (holding of an employment policy, "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of [] protected freedoms."). Yet a pregnant woman subject to the Act faces a stark choice: subject herself to arrest, civil detention, and imposition of involuntary medical treatment under threat of contempt proceedings and incarceration, or terminate a wanted pregnancy. Because both outcomes burden fundamental rights, the ultimatum is unconstitutional. *See New York v. United States*, 505 U.S. 144, 176 (1992) (noting that "[a] choice between two unconstitutional[] [alternatives] is no choice at all.").

Similarly, the Supreme Court has also made clear that a state may not coerce a woman to terminate her pregnancy. *See Casey*, 505 U.S. at 859 (citing with approval circuit court decisions finding state-compelled abortion unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973)); *Carey*, 431 U.S. at 687-90; *Roe*, 410 U.S. at 153 (holding right of privacy "broad enough to

encompass a woman's decision whether *or not* to terminate her pregnancy.") (emphasis added); *see also Arnold v. Bd. of Educ. of Escambia Cnty. Ala.*, 880 F.2d 305, 311 (11th Cir. 1989) (permitting lawsuit against public school officials accused of coercing a young woman into having an abortion and holding that, "[t]here simply can be no question that the individual must be free to decide to carry a child to term."). In fact, the definition of refugee in the United States Immigration and Nationality Act explicitly defines "a person who has been forced to abort a pregnancy" as someone "persecuted on account of political opinion." 8 U.S.C. § 1101(a)(42)(B); *see also Zhang v. Gonzales*, 434 F.3d 993, 1002 (7th Cir. 2006) ("Again, the pain, psychological trauma, and shame are combined with the irremediable and ongoing suffering of being permanently denied the existence of a son or daughter. Thus, forced abortions, without more, also likely will result in statutory entitlement to asylum eligibility and withholding of removal." (quoting *Qu v. Gonzales*, 399 F.3d 1195, 1202 n.8 (9th Cir. 2005)).

Here, the Act pressures women to abort wanted pregnancies in order to escape the Act's invasion of fundamental personal freedoms. Ms. Loertscher's case demonstrates that this pressure is not merely speculative: Ms. Loertscher asked state social workers after her contempt hearing, just before she was incarcerated, whether "this would all go away if I had an abortion"? The answer from county social workers was "Yes." (PFOF 134).

Finally, the Act's infringement of substantive due process rights extends far beyond a woman's pregnancy to burden the fundamental right to familial relations, including later relations with her child after birth. As the Seventh Circuit has made clear, "[t]he fundamental right to familial relations is an aspect of substantive due process." *Hernandez v. Foster*, 657 F.3d 463, 478 (7th Cir. 2011). Thus it has held that "the most essential and basic aspect of familial privacy" is "the right of the family to remain together without the coercive interference of the

awesome power of the state." *Doe v. Heck*, 327 F.3d 492, 524 (7th Cir. 2003). The Supreme Court, too, has repeatedly recognized the fundamental right to familial relations. Accordingly, the Court deemed the right to bring up one's children "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and described the right to custody of one's children as "far more precious… than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). *See also Troxel v. Granville*, 530 U.S. 57, 57 (2000) (recognizing "parents' fundamental right to make decisions concerning the care, custody, and control of their children"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing the "fundamental liberty interest of natural parents in the care, custody and management of their child"); *accord Moore v. East Cleveland*, 431 U.S. 494, 503-504 (U.S. 1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

The Act undermines the sanctity of the family unit by attacking parental fitness during pregnancy and exposing a woman to separation from her newborn or even a loss of custody *during pregnancy*. A pregnant woman deemed to "habitually" lack "self-control" in the use of drugs or alcohol "to a severe degree" and in a manner that creates a "substantial risk that the physical health of the unborn child and of the child when born, will be seriously affected or endangered," *see, e.g.*, Wis. Stat. § 48.133, may lose custody of her future child *while she is still pregnant*, *see* Wis. Stat. §§ 48. 347(7) & 48.345, and a woman placed outside her home under the Act during her pregnancy is exposed to permanent involuntary termination of her parental rights after her child is born based solely on the fact of that placement, *see* Wis. Stat. 48.415(2)(a). Moreover, the GAL appointed under the Act is independently authorized to petition for termination of a woman's parental rights once the child is born. *See* Wis. Stat. §§ 48.235(4m)(3). As discussed in Section II, *infra*, the Act's vague terms authorize these severe

consequences on the basis of highly questionable "findings" with multiple opportunities for arbitrary and discriminatory enforcement. Such "findings" under the Act may also form the basis for a determination that a woman has committed child maltreatment, a determination that will follow her indefinitely. *See* Wis. Stat. § 48.981(3)(a) & (3)(c)(5m).

The effects of these proceedings linger long after a woman's pregnancy is over and can permanently burden a woman's fundamental right to custody of, and to care for, her children. Indeed, Ms. Loertscher has already been subject to an initial determination by TCDHS that she has committed "child maltreatment" based upon her preconception conduct and her conduct before she knew she was pregnant. (*See* PFOF 166 & 167). If this determination is allowed to stand, Ms. Loertscher will be prohibited from seeking certain types of employment, including working in her previous profession as a nurse's aide. *See* Wis. Stat. § 50.065(4m)(b)(4) (entity that provides care for individuals cannot employ caregiver who has been found to have committed child abuse). And under the Consent Decree, the GAL remains appointed in this case, and thus remains empowered under the Act to seek termination of Ms. Loertscher's parental rights as soon as her child is born. Wis. Stat. §§ 48.235(4m)(3); (*see* PFOF 156).

B. The Act's Infringement Of Fundamental Substantive Due Process Rights Cannot Survive Strict Scrutiny

As the Seventh Circuit has recognized, the due process clause "forbids the government to infringe fundamental liberty interests, *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Russ v. Watts*, 414 F.3d 783, 789 (7th Cir. 2005) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (emphasis in original); *see also Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (observing that "the substantive component of the [Due Process] Clause [] protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them")

(citations omitted). Because the Act does not further a compelling governmental interest, nor is it narrowly tailored to achieve even the interests it claims to advance, the Act is unconstitutional and its enforcement should be enjoined by this Court.

The Act was purportedly passed out of concern for the health and development of fertilized eggs, embryos, fetuses, and the eventual health of a child when born. *See, e.g.*, Wis. Stat. §§ 48.01(1)(a) ("the paramount goal of this chapter is to protect…unborn children"); 48.01(am)(Act's purpose is "to recognize that unborn children have certain basis needs which must be provided for, including the need to develop physically to their potential and the need to be free from physical harm…"); 48.01(bm) (Act's purpose is "[t]o ensure that unborn children are protected against the harmful effects resulting from the habitual lack of self-control of their expectant mothers…"). The Act's Statement of Legislative Purpose does not express a concern for maternal health. But as the Supreme Court made explicit in *Casey*, even in the limited context of abortion, where courts have recognized that states have an interest in potential life after viability that provides them with the option of restricting one procedure (abortion), any such restrictions must remain subordinate to the woman's own right to life and health. 505 U.S. at 870-71. *See also Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (recognizing that a prohibition on certain abortion procedures would be unconstitutional "if it subjected women to significant health risks"). No Supreme Court decision recognizes a state interest in fetal life that justifies depriving women of their fundamental civil rights at any stage of their pregnancies (and even in the context of abortion post-viability, no state interest justifies depriving a pregnant woman of her right to have an abortion necessary to protect health or life.

Here, the Act not only deprives pregnant women of their civil rights throughout pregnancy, it subjects a woman to its strictures from the moment of fertilization—which means

that all Wisconsin women capable of becoming pregnant are subject to the Act before they are even pregnant. (*See* PFOF 177 & 178 (fertilization precedes pregnancy, which only occurs if the fertilized egg successfully implants in the uterus)). The state simply has no recognized compelling interest that justifies the Act's sweeping deprivations of fundamental constitutional rights of women both before and during pregnancy. [3]

Moreover, even if the Act did serve a compelling governmental interest (which it does not), it is not narrowly tailored to serve even its articulated interest in fetal health and thus cannot withstand strict scrutiny review for that independent reason. *See Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006) ("To survive strict scrutiny review, [a statute] must be narrowly tailored to promote a compelling Government interest."). The Act's claimed interest in fetal health, separated from maternal health, is medically unsupportable; to effectuate any interest in fetal health, prenatal care for the pregnant woman is essential. (*See* PFOF 190 & 191). Yet the Act subjects women who become pregnant and use some (undefined) amount of controlled substances or alcohol to state custody and involuntary medical treatment, in direct contradiction of the medical and public health consensus regarding appropriate prenatal care.

Authorizing health care providers to report pregnant patients to child welfare authorities, who collaborate with law enforcement, as the Act specifically provides, *see* Wis. Stat. § 48.981(2)(d), is antithetical to the physician/patient trust relationship. As the Supreme Court recognized in *Jaffe v. Redmond*, 518 U.S. 1, 10 (1997), "the mere possibility of disclosure [of

[3] Wisconsin legislative counsel partially recognized this problem, warning the Legislature that the Act had a "reasonable probability" of being found unconstitutional "as applied to previable unborn children." Gordon Malaise, Senior Legislative Attorney, Drafter's Note from the Legislative Reference Bureau, November 12, 1997 (Appendix 1); (PFOF 174). But this analysis was only partially correct, because it misinterpreted the state's interest in fetal life in the abortion context to mean that there is a stage of pregnancy during which a state can strip women of virtually all of their constitutional rights. Abortion jurisprudence merely provides that a state may prohibit abortion of a viable fetus when a woman's life or health is not at stake; it is a gross misreading of the decisions to suggest that the state has *carte blanche*, upon the point of fetal viability, to subject a pregnant woman to multiple violations of established constitutional liberties in the name of "fetal health."

patients' confidences] may impede development of the relationship necessary for successful treatment." Indeed, there is an overwhelming consensus among medical and public health organizations that threats of arrest, detention, and loss of parental rights *undermine* maternal, fetal, and child health by deterring women from seeking prenatal care or from speaking honestly with health care providers.[4] Among the organizations and individuals in this consensus are leaders in the care and treatment of pregnant women, including the American Congress of Obstetricians and Gynecologists.[5] Thus the Act actually undermines its alleged purpose, which necessarily means that it fails the narrow tailoring requirement of strict scrutiny review.

Not only does it undermine maternal, fetal and child health, the Act cannot survive strict scrutiny review for the additional reason that it mistakenly focuses on factors not scientifically proven to have a significant or unique impact on fetal health. The Act's Statement of Legislative Purpose says that it was enacted "[T]o ensure that unborn children are protected against the harmful effects resulting from the habitual lack of self-control of their expectant mothers in the

[4] *See, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67, 85 n.23 (2001) (noting the "near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health"); National Perinatal Association, Position Statement, *Substance Abuse Among Pregnant Women* (December 2013); American College of Obstetricians and Gynecologists Committee on Ethics, *Committee Opinion 321, Maternal Decision Making, Ethics, and the Law* (Nov. 2005); National Organization on Fetal Alcohol Syndrome, Policy Statement, *Pregnant Women Who Drink Alcohol Need Treatment, Not Prison* (March 23, 2004); American Psychiatric Association, Position Statement, *Care of Pregnant and Newly Delivered Women Addicts*, APA Document Reference No. 200101 (March 2001); American Nurses Association, *Position Statement on Opposition to Criminal Prosecution of Women for Use of Drugs While Pregnant and Support for Treatment Services for Alcohol and Drug Dependent Women of Childbearing Age* (Apr. 5, 1991); U.S. Gen. Accounting Office, GAO/HRD-90-138, Report to the Chairman, Comm. on Finance, U.S. Senate, *Drug-Exposed Infants: A Generation at Risk* 9 (1990); Report of American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 267 (1990); American Medical Association, *Treatment Versus Criminalization: Physician Role in Drug Addiction During Pregnancy*, Resolution 131 (1990); American Academy of Pediatrics, *Committee on Substance Abuse, Drug Exposed Infants*, 86 Pediatrics 639, 641 (1990); American Public Health Association, Policy Statement No. 9020, *Illicit Drug Use by Pregnant Women*, 8 Am. J. Pub. Health 240 (1990); March of Dimes, *Statement on Maternal Drug Abuse* (1990); National Association for Perinatal Addiction Research and Education, *Criminalization of Prenatal Drug Use: Punitive Measures Will Be Counterproductive* (1990); (Appendix 8, Medical Groups Position Statements).

[5] Am. Coll. of Obstetricians & Gynecologists, Comm. on Health Care for Underserved Women, Committee Opinion 473, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 Obst. & Gyn. 200 (2011) ("Seeking obstetric–gynecologic care should not expose a woman to criminal or civil penalties, such as incarceration, involuntary commitment, loss of custody of her children, or loss of housing.") (Appendix 6).

use of alcohol beverages, controlled substances or controlled substance analogs exhibited to a severe degree." Wis. Stat. § 48.01(bm). However, the popular conception that drug use and any amount of alcohol ingestion during pregnancy automatically lead to "harmful effects" is not supported by reputable scientific analysis and evidence-based research. In fact, a quantifiable, definitive connection between ingestion of illegal drugs during pregnancy and particular negative pregnancy outcomes is not supported as a matter of science.

While a newborn exposed in utero to *opiates* – a controlled substance that may either be prescribed to the pregnant woman or used illegally – may experience neonatal abstinence syndrome, that condition is diagnosable and treatable and is not associated with long-term ill health effects. Robert Newman, et al., *Open Letter to the Media and Policy Makers Regarding Alarmist and Inaccurate Reporting on Prescription Opiate Use by Pregnant Women*, (March 11, 2013) (Appendix 7) ("[W]hen controlling for factors such as economic status, access to healthcare, and concomitant medical problems, including use of nicotine products and alcohol, decades of studies reported in the professional literature have failed to demonstrate *any* long-term adverse sequelae associated with prenatal exposure to opiates, legal or illegal.") (emphasis in original). No such symptoms have been found to occur following prenatal cocaine or methamphetamine exposure. David C. Lewis, et al., *Open Letter to the Media*, (Feb. 25, 2004) (Appendix 4) & *Open Letter from Doctors Scientists, & Specialists Urging Major Media Outlets Not to Create "Meth Baby" Myth*, (July 27, 2005) (Appendix 5).

Even at the time the Act was passed, researchers had long been calling for caution and pointing to a lack of scientific basis for the disproportionate public concern about the effects of drug use, particularly cocaine, by pregnant women. *See, e.g.*, Deborah A. Frank & Barry S. Zuckerman, *Children Exposed to Cocaine Prenatally: Pieces of the Puzzle*, 15 Neurotoxicology

and Teratology 298-300 (1993) (concluding that a rush to judgment based on insufficient evidence "ultimately discredits our scientific endeavor and may inflict immeasurable and unjustifiable social damage"); Linda C. Mayes et al., *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 JAMA 406 *passim* (1992) (recommending "suspension of judgment about the developmental outcome of cocaine-exposed babies until solid scientific data are available"). In the decades since, this solid data has yet to materialize. Robert Newman, et al., *Open Letter*, *supra*. (Appendix 7).

Similar assumptions about other drugs, while widely held, have not been supported by medical research. *See* David C. Lewis, et al., *Open Letter re "Meth Baby" Myth*, *supra*. (Appendix 5). While no one recommends use of a wide variety of legal or illegal controlled substances during pregnancy, researchers have simply not found that exposure to any of the criminalized drugs—including methamphetamine and marijuana—pose risks of harm greater than or substantially different from exposure to cigarettes (nicotine). Indeed, risks of harm from cigarettes have been shown to be more significant and are far better established. (PFOF 182 & 188).

Although one study has suggested that low birth weight may be an effect of prenatal methamphetamine exposure, it 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. (PFOF 181, 183 & 184). This study considered only women and their babies where one or the other or both had tested positive for drugs at birth. (PFOF 184). Thus, the study results cannot be extrapolated to exposure that occurs only early in pregnancy. (PFOF 184). As for marijuana, prenatal exposure is not linked to birth defects. (PFOF 185). Although some studies suggest that marijuana use

during pregnancy may lead to lower birth weight, other studies counter that conclusion. (PFOF 186). There is no conclusive evidence that marijuana use is likely to harm a developing fetus. (PFOF 187).

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. (PFOF 189).[6] Tobacco use, on the other hand, which is not covered by the Act, is demonstrably associated with stillbirth, low birth weight, and other negative pregnancy outcomes. (PFOF 182 & 188).

In short, the overwhelming consensus among medical experts and social scientists is that punitive laws like the Act are detrimental to fetal health because they discourage women from seeking prenatal care, and research indicates that risks associated with the use of controlled substances and alcohol during pregnancy are not unique, quantifiable, necessarily substantial, or certain. A statute seeking to address some kind of problem is only "narrowly tailored," for the purposes of strict scrutiny review, "if it targets and eliminates no more than the exact source of the evil it seeks to remedy." *Entm't Softward Ass'n*, 469 F.3d 641. Because the Act does not advance the interests of maternal, fetal, or child health, but in fact penalizes women like Ms. Loertscher who seek prenatal care, all in the name of addressing a problem—the harms wrought by drug and alcohol use by pregnant women—that has been disproportionately overstated, the Act is not narrowly tailored to serve any state interest.

The Act's infringement of a woman's fundamental liberty interests is extreme: state custody, incarceration, state control of medical decision making, coercion to terminate a pregnancy, and potential loss of a child, all burden "those fundamental rights and liberties which

[6] In Ms. Loertscher's case her untreated hypothyroidism posed a far greater risk to her pregnancy than did her drug and alcohol use. (PFOF 173).

are, objectively, deeply rooted in this Nation's history and tradition," *Glucksberg*, 521 U.S. at 720-21, and significantly encroach on "the respect the Constitution demands for the autonomy of the person." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). Any state law that so heavily burdens "the exercise of a fundamental liberty interest requires a commensurably substantial justification in order to place the legislation within the realm of the reasonable." *Glucksberg*, 521 U.S. at 767 n.8 (Souter, J. concurring). Because no such justification exists for the heavy burden the Act places on fundamental liberties, the Act is unconstitutional on its face.

C. The Act Places An Undue Burden On A Woman's Substantive Due Process Right To Decide to Terminate A Pregnancy

Yet another inevitable consequence flowing from the terms of the Act is an undue burden on a woman's right to choose to terminate a pregnancy. In *Planned Parenthood v. Casey*, the Supreme Court held that "where state regulation imposes an undue burden on a woman's ability to [obtain an abortion,] the power of the State reach[es] into the heart of the liberty protected by the Due Process Clause." 505 U.S. at 874. A restriction amounts to an "undue burden" if its "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id*. at 878. The substantial obstacle must be present within "a large fraction of the cases in which [it] is relevant." *Id*. at 895.

On its face, the Act places just such a substantial obstacle in the path of women seeking to end a pregnancy. The Act authorizes detention of pregnant women throughout pregnancy, without any guidance as to whether and how an abortion may be obtained, *see, e.g*, Wis. Stat. §§ 48.193(1)(d)(2), 48.207(1m), 48.347(3); it authorizes appointment of GALs to act in the supposed best interests of fertilized eggs, embryos and fetuses, and thus presumably would oppose efforts to end a pregnancy, *see* Wis. Stat. § 48.235(1)(f); Wis. Stat. § 48.235(3)(b)(2) (GAL must make "clear and specific recommendations" to the court concerning "best interests of

the …unborn child at every stage of the proceeding"); and it makes access to abortion subject to state approval and modification of a court order if a pregnant woman has been ordered to inpatient drug treatment, *see* Wis. Stat. § 48.357(1) & (2m) (juvenile court must approve change in placement of adult expectant mother).

Selecting the most troubling provisions of this Act's violations of pregnant women's constitutional rights is a challenge, but one of the more disturbing terms of the Act empowers courts to impose "rules for the adult expectant mother's conduct, designed for the physical well-being of the unborn child" whenever a pregnant woman is placed under the "supervision" of a state agency or "an adult relative or friend of the adult expectant mother." *See* Wis. Stat. § 48.347(2). As the Supreme Court held in *Casey*, a State cannot give even the presumed father (a husband) "the kind of dominion over his wife that parents have over their children." *Casey*, 505 U.S. at 898 (striking down Pennsylvania's husband-notification abortion requirement). State authorization of others to control her "conduct" *vis a vis* her pregnancy impermissibly burdens a woman's due process right to terminate a pregnancy and thus the Act should be enjoined. *See Planned Parenthood of Wisconsin v. J.B. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) (affirming preliminary injunction against enforcement of state law requiring that doctors performing abortions have admitting privileges at hospital within 30 miles from clinic in which abortion is performed because requirement was likely an undue burden on right to abortion); *McCormack v. Hiedeman*, 694 F.3d 1004, 1014-15 (9th Cir. 2012) (holding that imposing criminal penalties on pregnant women for self-inducing an abortion creates an undue burden); *Jackson Women's Health Org. v. Currier*, 2013 WL 1624365, at *5 (S.D. Miss. Apr. 15, 2013) (granting preliminary injunction against regulation of abortion providers which created an undue burden by forcing all women to leave the state to obtain abortion services); *accord Monmouth*

Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988) (finding deliberate indifference to serious medical need in violation of the Eighth Amendment in a prison's policy of providing abortion only after court-ordered release).

II. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS OF HER CLAIM THAT THE ACT IS VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE

The Act is void for vagueness on due process grounds because, on its face, it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits," and because it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Because, as discussed in Section I.A, above, the Act threatens the exercise of constitutionally protected rights, the Due Process Clause demands stringent review for vagueness. *See Vill. of Hoffman Estates*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights"); *Record Head Corp. v. Sachen*, 682 F.2d 672, 674 (7th Cir. 1982) ("[V]agueness is tested by more exacting standards when constitutionally protected rights are threatened[.]").

First, the Act is void for vagueness because it fails to provide Wisconsin women capable of becoming pregnant with constitutionally adequate notice of what conduct might subject them to its enforcement. [7] Yet "[d]ue process requires that all be informed as to what the State commands or forbids." *Smith v. Goguen*, 415 U.S. 566, 574 (1974). "The dividing line between what is lawful and unlawful cannot be left to conjecture," and a citizen cannot be deprived of her liberty based upon "statutes whose mandates are so uncertain that they will reasonably admit of

[7] The Act by its terms applies from the instant of fertilization and thus renders a woman subject to its enforcement before she could possibly know she is pregnant. *See* Wis. Stat. §§ 48.01(1); 48.02(19) (PFOF 178). Indeed, the proceedings against Ms. Loertscher all flowed from conduct occurring before she knew she was pregnant and in fact believed she was not likely to become pregnant.

different constructions." *Connally v. General Const. Co.*, 269 U.S. 385, 393 (1926); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

The Act authorizes courts and other state actors to forcibly take pregnant women into state custody and subject them to involuntary medical treatment and state supervision on the basis of five highly-subjective, standard-less, terms: that a woman (1) "*habitually* lacks (2) *self-control*" (3) "to a *severe* degree" in a manner creating (4) "a *substantial* risk" that the pregnancy will be (5) "*seriously* affected or endangered." Wis. Stat. § 48.133. (emphasis added). None of these terms is defined in the Act, and these terms are not consistent with the medical definition of substance use disorders or the current scientific consensus regarding the documented impacts of the use of various substances during pregnancy. *See* Section I.B, *supra*; *accord* Linda Hisgen, Director, Bureau of Programs and Policies, State of Wis. Dep't of Health and Fam. Serv's, *1997 Wisconsin Act 292*, at 1-2 (Memorandum, July 23, 1998) (Appendix 2) (noting that determining under the statute whether the woman's drug use poses serious physical harm, "would have to be done on speculation, since fetal impact research is not conclusive").

Notably, the Act does not use the medically recognized terms "drug-dependent," "alcoholic," and "alcoholism," which *are* significant diagnoses with established criteria defined in Wisconsin's Mental Health Act, which governs civil commitment. *See* Wis. Stat. §§ 51.01(1), (1m) & (8); *c.f.* Wis. Stat. §§ 48.135(1), 48.203(4) (using the terms "drug dependent" and "alcoholism" in provisions of the Act addressing when application of Wisconsin's civil commitment statute, Wis. Stat. § 51, is appropriate). And the Act applies to the use of "controlled substances," a term that includes numerous medications that may be prescribed or obtained over-

the-counter without a prescription. *See* Wis. Stat. § 961.04(4).[8] It also applies to the use of "alcohol beverages." *See* Wis. Stat. § 48.133. Thus merely obeying Wisconsin's criminal prohibition against illegal possession of controlled substances[9] will not ensure that a Wisconsin woman capable of becoming pregnant will not be subject to the Act. Indeed, one of the stated grounds for subjecting Ms. Loertscher to the Act in this case was her alleged misuse of alcohol during pregnancy—her consumption of one half of one glass of wine after she became pregnant but before she knew she was pregnant. (PFOF 26).

Further, the absence of a definition for the term "habitually" stands in stark contrast to all other Wisconsin statutes using that term, which make clear the term applies when an individual has acted in a particular manner which can, and has been, documented a specific number of

[8] Wisconsin's Uniform Controlled Substances Act ("UCSA") defines a "controlled substance" as any substance included in one of the five schedules provided under Chapter 961. Wis. Stat. § 961.01(4). Modeled on the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq*., the UCSA organizes substances into particular schedules based on the perceived risk of abuse associated with a given drug, classifying the most dangerous substances in Schedule I and the least dangerous substances in Schedule V. Specifically, the UCSA defines Schedule I substances as substances with a high potential for abuse, not currently accepted for medical use in treatment in the United States, and lacking acceptable safety for use in treatment under medical supervision. Wis. Stat. § 961.13. Examples include heroin, lysergic acid diethylamide (commonly known as LSD), and tetrahydrocannabinols (commonly known as THC) in any form, including tetrahydrocannabinols contained in marijuana. Wis. Stat. §§ 961.14(3)(k), (4)(j), (t). Similarly, Schedule II substances are defined as substances with a high potential for abuse that can lead to severe dependence; however, unlike Schedule I substances, Schedule II substances have a currently accepted medical use in treatment in the United States. Wis. Stat. § 961.15. Schedule II drugs include morphine, oxycodone, amphetamine ("Adderall"), methamphetamine, ("Desoxyn"), and methylphenidate ("Ritalin"). *Id.* §§ 961.16(2)(a)(10)-(11), (5)(a)-(b), (d); *see also* Controlled Substance Schedules, U.S. Dep't of Jus., Office of Diversion Control, http://www.deadiversion.usdoj.gov/schedules/. Schedule III substances include products containing less than 90 milligrams of codeine per dosage unit, such as Tylenol with codeine. Wis. Stat. §§ 961.18(5)(a)-(b); *see also* Controlled Substance Schedules, U.S. Dep't of Jus., Office of Diversion Control, http://www.deadiversion.usdoj.gov/schedules. Schedule IV drugs include common prescription medications, such as alprazolam ("Xanax"), which is used to treat anxiety, and zolpidem ("Ambien"), which is used to treat insomnia. Wis. Stat. §§ 961.20(2)(a), (p); *see also* Controlled Substances Schedule, U.S. Dep't Jus., Office of Diversion Control, http://www.deadiversion.usdoj.gov/schedules/; Medication Guide: Ambien, FDA, http://www.fda.gov/downloads/Drugs/DrugSafety/ucm085906.pdf. Schedule V drugs include certain cough medicines containing not more than 200 milligrams of codeine per 100 milliliters or per 100 grams, such as "Robitussin AC," and pseudoephedrine ("Sudafed"), a decongestant used to treat the common cold. §§ 961.22(2)(a), (2m); *see also* Controlled Substances Schedule, U.S. Dep't Jus., Office of Diversion Control, http://www.deadiversion.usdoj.gov/schedules/.

[9] Wis. Stat. § 961.41(1) criminalizes illegal "manufacture, distribution, or delivery" of controlled substances. Wis. Stat. § 961(1m) criminalized illegal "possession with intention to manufacture, distribute or deliver" controlled substances. Nowhere does Wisconsin's UCSA penalize mere use of any controlled substance.

times. *See e.g.* Wis. Stat. § 125.04 & *State ex rel. Smith v. City of Oak Creek*, 139 Wis. 2d 788, 798-99 (1987) (person has "habitually been a law offender," for purposes of liquor licensing statute, when that individual has been documented to have previously violated the law); Wis. Stat. § 118.16 (a "habitual truant" is "a pupil who is absent from school… for part or all of 5 or more days…"); Wis. Stat. § 351.02 (a "habitual traffic offender" is an individual who has accumulated a certain number of specified violations within a five-year period). By contrast, nowhere does the Act provide guidance as to when an individual may be found to "habitually lack self-control." Thus there is no way for a Wisconsin woman to know the number of times or degree of alcohol or controlled substance use during her lifetime (including the use of drugs prescribed to her by her physician) that could render her subject to the Act in the event she ever becomes pregnant. Ms. Loertscher's case demonstrates that this risk is real: the "desk review" of the TCDHS "child maltreatment" determination cited Ms. Loertscher's use of alcohol "prior to conception" as one of the bases for the Department's determination, pursuant to Section 48.133, that she had maltreated her fetus due to her "habitual" misuse. (PFOF 166).

Not only does the Act fail to provide constitutionally adequate notice to those who may be swept within its ambit, it is void for vagueness for the independent reason that by "fail[ing] to provide a definite standard of conduct," it gives its multiple statutorily-authorized enforcers "unfettered freedom to act on nothing but their own preferences and beliefs." *Karlin v. Foust*, 188 F.3d 446, 465 (7th Cir. 1999) (citations omitted). Drug and alcohol use generally is a highly charged, politicized issue about which people often hold strong opinions that do not rely on scientific research or medical criteria. Indeed, many people are dramatically misinformed about the effects of in-utero drug and alcohol exposure, and moral outrage often substitutes for

scientific justification in discussions of drug and alcohol use by pregnant women.[10] Thus it is highly likely that there will be widely divergent views as to what degree of use is "habitual" or "severe," whether there is any risk to a pregnancy or a future child from that use, and what degree of risk is "substantial." Moreover, what constitutes "self-control," or its absence, is almost entirely in the eye of the beholder or—as is the case under the Act—the enforcer.

As the Supreme Court and the Seventh Circuit have made clear, a law delegating unfettered discretion to those enforcing it to determine to whom, and on what grounds, the law should be applied cannot survive due process vagueness review. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"); *Record Head Corp.*, 682 F.2d at 678 (A law is unconstitutionally vague when it "leaves to the arresting or prosecuting authorities the job of determining, essentially without legislative guidance, what the prohibited offense is."). The Act does exactly this by inviting arbitrary and discriminatory enforcement under its standardless terms at all stages of proceedings under its auspices, from initial jurisdiction over pregnant women (or a woman hosting fertilized eggs prior to pregnancy) under Section 48.133, to their arrest, *see, e.g.*, Wis. Stat. § 48.193, detention, *see, e.g.*, Wis. Stat. § 48.205, involuntary treatment, *see., e.g.*, Wis. Stat. § 48.347, adjudication as abusers, *see* 48.981(3)(c)(5m), and eventual loss of their newborns. *See* Wis. Stat. §§ 48.347(7) & Wis. Stat. § 48.415(2)(a).

The opportunity for arbitrary and discriminatory enforcement extends beyond police officers to a host of health care providers, social workers, and legal system actors who are

[10] *See, e.g* David C. Lewis et al., *Open Letter to the Media*, (Feb. 25, 2004) (Appendix 4); David C. Lewis et al., *Open Letter From Doctors, Scientists & Specialists Urging Major Media Outlets Not to Create "Meth Baby" Myth*, (July 27, 2005) (Appendix 5); Robert G. Newman, et, al, *Open Letter to the Media and Policy Makers Regarding Alarmist and Inaccurate Reporting on Prescription Opiate Use by Pregnant Women*, (March 11, 2013) (Appendix 7).

granted enormous discretion by the Act to determine who should be subject to state custody and control, and what deprivation of a woman's constitutional liberties the enforcers believe should be inflicted. With its undefined, open-ended terminology the Act violates "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Instead of providing such constitutionally required guidelines, the Act's "standardless sweep" simply allows its multiple enforcers "to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974). Thus, the Act is unconstitutional on its face because it is void for vagueness in violation of the Due Process Clause.

III. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS OF HER CLAIM THAT THE ACT IS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE

The Act targets pregnant women for unequal treatment and infringes numerous fundamental rights. Subjecting pregnant women to select burdens violates their right to equal protection of the laws, in furtherance of no compelling, important, or even legitimate state interest. First, when state laws directed at a class of people infringe the fundamental rights of the targeted group, these laws violate the Equal Protection Clause unless they can satisfy strict scrutiny. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969). As described above, the Act strips Wisconsin pregnant women of a host of fundamental rights, in service of no compelling interest. For that reason, the Act violates the Equal Protection Clause and is facially unconstitutional.

The Act also specifically targets Wisconsin citizens on the basis of gender, and thus is also subject to heightened, or "intermediate" scrutiny under the Equal Protection clause. *See U.S. v. Virginia*, 518 U.S. 515, 555 (1996) ("all gender-based classifications today warrant heightened scrutiny") (citation omitted); *Hayden v. Greensburg Community School Corporation*, 743 F.3d 569, 577 (7th Cir. 2014) ("Gender is a quasi-suspect class that triggers intermediate scrutiny in the equal protection context."). The Act fails this level of scrutiny, because it is not substantially

related to an important governmental objective. *See Craig v. Boren*, 429 U.S. 190, 197-8 (1976).

Finally, the Act does not afford pregnant women targeted under the Act with the same procedural protections guaranteed by Wisconsin's Mental Health Act to individuals facing involuntary civil commitment. This arbitrary denial is not rationally related to any legitimate governmental interest, and thus the Act cannot withstand rational basis review. *See Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

A. The Act Violates Pregnant Women's Rights To Equal Protection By Infringing On Their Fundamental Rights In Service Of No Compelling Interest

As described in Section I, the Act violates numerous recognized fundamental rights, including rights to freedom from bodily restraint, bodily integrity, medical decision-making, and procreative freedom. These impositions are also invalid under the Equal Protection Clause, which requires strict scrutiny of any state classification that infringes fundamental rights. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (state exclusion of new residents from receiving welfare violated the new residents fundamental right to travel); *see also M.L.B. v. S.L.J.* 519 U.S. 102 (1996) (failure to provide a transcript for indigent parent whose parental rights were terminated precluded her from appealing the termination, thus violating the Equal Protection Clause by burdening her fundamental right to care, custody and control of her children). As in these cases, the fundamental rights burdened by the Act require its justification by a compelling state interest. *Shapiro*, 394 U.S. at 638. As set forth in Section I, no compelling interest justifies the Act's incursions into the fundamental constitutional rights of pregnant women, nor is the Act narrowly tailored to achieve the interests it purports to advance. Accordingly, the Act violates the rights of Ms. Loertscher —and all Wisconsin women whose liberties are infringed by the Act— to equal protection of the laws.

B. The Act Targets People With The Capacity To Become Pregnant: Women

The Act's provisions apply only to "expectant mothers." *See, e.g.*, Wis. Stat. § 48.205(1m) (authorizing holding an "adult expectant mother" in custody). While the term is undefined, it applies only to people that could be "expectant mothers," namely, women.[11] Indeed, it applies to Wisconsin women even *before* they are pregnant, as the Act defines an "unborn child" as existing from the moment of fertilization (as noted above, pregnancy is a post-fertilization event that may or may not happen) (*See* PFOF 177 & 178); Wis. Stat. § 48.02(19).

The Act's targeting of "expectant mothers" translates directly into obligations and potential penalties on Wisconsin women who have the capacity to become pregnant, risks that Wisconsin men with procreative capacity will never face. In addition to the numerous deprivations of civil rights permitted by the Act, this law requires all Wisconsin women to be ever vigilant, and correct, concerning whether they might be pregnant or carrying a fertilized egg—the latter a biological event that cannot be detected by any medical test. (PFOF 178). If they are not, Wisconsin women might consume controlled substances (including common prescription and over-the-counter drugs) or alcohol while pregnant or carrying a fertilized egg, and thereby become subject to the Act with its attendant losses of liberty and other deprivations of constitutional rights. (This is exactly what happened to Ms. Loertscher—her use of drugs and

[11] In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Supreme Court held that a state benefit scheme for employee disability that excluded coverage for pregnancy did not discriminate on the basis of gender, reasoning that not every classification on the basis of pregnancy is necessarily discriminatory in violation of the Equal Protection clause. *Id.* at 497, n.20. Shortly after the Supreme Court extended this reasoning to a claim against a private employer brought under Title VII of the Civil Rights Act in *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), Congress enacted the Pregnancy Discrimination Act ("PDA"), to expressly overrule *Gilbert* and affirm Congress' understanding that, under Title VII, discrimination based on pregnancy is sex discrimination. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (U.S. 1983). Although *Geduldig* concerned the Equal Protection Clause rather than Title VII, its questionable holding has been only rarely relied upon in the decades since. But this is not a case where state employment benefits are at stake between otherwise similarly situated employees; rather, this is a case where women's civil rights are burdened in ways that no man would ever face. Here, the Act distinguishes between the people who have the capacity to become pregnant (women) and those who cannot (men). Accordingly, *Geduldig v. Aiello*, whatever vitality its reasoning retains, is inapposite.

alcohol before she was pregnant and before she knew she was pregnant became the basis for the multiple deprivations the state subjected her to under the Act.)[12] In short, the Act imposes unique obligations and potential penalties only on those with the capacity to become pregnant.

Wisconsin men, who lack the capacity to become pregnant, face no similar deprivation of their constitutional rights for procreating and using alcohol or controlled substances. Alcohol use by adults is legal in Wisconsin, and controlled substances other than those enumerated in Schedule I are also legally available in the state. *See* Wis. Stat. § 961.01 *et seq.* Moreover, while the State criminalizes illegal possession of controlled substances with the intent to sell them, mere use of these substances alone is not itself criminalized. *See* Wis. Stat. § 961.41. Thus the Act exposes all Wisconsin women capable of becoming pregnant to a significant risk of deprivation of their fundamental rights, and holds them to a different standard of conduct than state law requires of Wisconsin men who are capable of procreating.

C. The Act's Gender-Based Classification Is Not Substantially Related To The Achievement Of An Important Governmental Objective

The Supreme Court has made clear that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). This burden may be met only by demonstrating that the classification serves "important governmental objectives," and that the discriminatory means employed in furtherance of those objectives are "substantially related to the achievement of those objectives." *Id*. Defendants cannot meet this burden, as singling out pregnant women for the massive intrusions permitted by the Act are not justified by any interest.

First, as discussed above in Section I.B, the Act does not advance any purported state

[12] As noted in Section II, *supra*, the child maltreatment determination issued by the TCDHS cited Ms. Loertscher's preconception conduct as one of the bases for the determination that she had maltreated her fetus. (PFOF 166).

interest in maternal, fetal, or child health, *because* threats of arrest, detention, and loss of parental rights are likely to deter women from approaching medical personnel with candor about private matters during pregnancy, or even seeking prenatal care at all. Similarly, as explained above, the Act targets women who have allegedly used substances during their pregnancy, even though the substances targeted by the Act are not more or even as dangerous to fetal health as other prenatal exposures, including lack of prenatal care—the very thing the Act makes more likely by undermining women's trust in their health care providers.

Moreover, the Act's usurpation of a woman's fundamental right to make her own medical decisions and to determine what course of treatment is best for herself and her pregnancy is not only contrary to accepted standards of medical treatment and medical ethics, it also actually increases risks of negative health outcomes for pregnant women and the fertilized eggs, embryos, and fetuses that they carry and sustain. (*See* PFOF 190 & 191). For example, the Act authorizes appointment of a GAL as the independent representative of the fertilized egg, embryo, or fetus, *see* Wis. Stat. § 48.235, and requires that the interests of the fertilized egg, embryo or fetus "shall always be of paramount consideration," *see* Wis. Stat. § 48.01(1). The Act thus presumes that a GAL—who is not required to hold any special qualifications in obstetrics and gynecology, prenatal care, or drug treatment, and has no statutory obligation to consult with any experts in those fields—is in a better position than the woman, who carries the pregnancy and its attendant risks, to decide what is best for the fetus she carries. In carrying out their duties, GALs have no statutory obligation to consider the impact of their decisions on the health of the pregnant women carrying the fetuses the GALs represent.

But this Court need not look very far to see the ways in which the Act harms maternal and fetal health. Ms. Loertscher's situation demonstrates precisely what the Act was designed to

do. Ms. Loertscher voluntarily sought medical help for her severe hypothyroidism, depression and associated mental health symptoms, and severe head and neck pain. (PFOF 33-36). She sought this care for the purpose of protecting both her health and, in the event that her then-suspected pregnancy might be confirmed, the health of her pregnancy. (PFOF 36). Taking immediate steps to safeguard her health and the health of her pregnancy is what any rational state actor interested in furthering fetal health would want a pregnant woman in Ms. Loertscher's situation to do. Rather than support her in this endeavor, the State's response under the Act was to interrupt her chosen course of treatment with state efforts to collect medical information that could be and then was used to invoke the Act.

Under the Act's authority, Defendants ordered Ms. Loertscher detained in the hospital where she had sought treatment, and then ordered her moved to a behavioral drug treatment facility in the absence of any evidence she had an actual substance use disorder. (PFOF 68, 69, 90, 91, 168 & 171). When she declined to accept this forced treatment, state actors ultimately placed her in jail[13]—as state law authorizes for any woman deemed non-compliant with a court order issued under the Act. *See* Wis. Stat. §§ 785.01-785.04.

In effect, the Act treats the woman, once pregnant, as automatically subject to deprivation of core constitutional liberties. This alone should confirm the Act's unconstitutionality as sex discrimination. But this course of action also profoundly undermines state interests, because it is

[13] Predictably, once the state jailed Ms. Loertscher, the threats to her health increased dramatically. *See, e.g.*, Rachel Roth and Sara Ainsworth, *"If They Hand You a Paper, You Sign It": A Call To End the Sterilization of Women in Prison*, 26 Hastings Women's L.J. 7, 27 (2015) (noting that prison is a dangerous place to be pregnant, "as demonstrated in numerous lawsuits brought by women whose experiences of substandard or total denial of care resulted in miscarriages, stillbirths, or the deaths of their newborn babies."). Ms. Loertscher was put in solitary confinement for a day and a half (PFOF 150-152); denied her prescription medication for hypothyroidism, a condition that heightens risk of miscarriage (PFOF 11, 139-141); denied access to any prenatal care and forced to miss scheduled appointments with her OB GYN (PFOF 138, 142 & 143); treated with deliberate indifference by jail staff and the jail doctor when she exhibited troubling pregnancy symptoms (PFOF 143 & 147); and subjected to extreme and needless stress (PFOF 148-151). While the specifics of her incarceration may have been unique to this case, incarceration is authorized for any woman deemed in contempt of a court order infringing her fundamental rights under the Act.

diametrically opposed to the interests of a woman's health, the wellbeing of her pregnancy, and, potentially, to the wellbeing of her future child. (*See, e.g.*, PFOF 190 & 191). In short, what happened to Ms. Loertscher under the Act demonstrates that the Act is not "substantially related" to furthering any type of governmental interest in the health of a pregnancy or the health of a child resulting from that pregnancy. Because there is no "exceedingly persuasive" justification for this gender-based discrimination, the Act is unconstitutional under the Equal Protection Clause.

D. There Is No Rational Basis For Denying Pregnant Women The Same Procedural Protections Afforded Individuals Facing Civil Commitment Under Wisconsin's Mental Health Act

The Act also violates Equal Protection because it restrains pregnant women's liberty without affording them the same procedural protections as individuals who are involuntarily committed under Wisconsin's Mental Health Act. *See* Wis. Stat. § 51.01 *et seq*. Wisconsin Statute Section 51.20 sets out procedures for civil commitment on the basis of drug or alcohol use, mental illness, or other factors, when an individual is demonstrated by clear and convincing evidence to be a danger to herself or others. The Mental Health Act provides important procedural protections to individuals threatened with civil commitment that are not available to pregnant women similarly threatened with involuntary confinement and medical treatment under the Act, including the right to immediate appointment of counsel without regard to indigency, and the protections afforded by the requirement that qualified state-appointment experts examine the individual and provide reliable scientific testimony at the hearing to determine whether the statutory requirements have been met.

Denying pregnant women the same procedural protections guaranteed all other Wisconsin citizens facing involuntary confinement and forced medical treatment is not rationally related to any legitimate state interest, and thus violates the constitutional right to equal

protection under even the lenient rational basis test. *See Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike.").

The Wisconsin Mental Health Act provides for the appointment of counsel *immediately* upon the filing of a petition for commitment, without regard to proof of indigency. Wis. Stat. § 51.20(3) ("At the time of the filing of the petition the court *shall* assure that the subject individual is represented by adversary counsel by referring the individual to the state public defender, who *shall* appoint counsel for the individual without a determination of indigency[.]") (emphasis added). By contrast, under the Act, pregnant women are not guaranteed counsel until a fact-finding hearing at which they face involuntary placement outside their home. If the state seeks to restrain a pregnant woman's liberty and medical-decision making without attempting to place her outside the home, she is not entitled to the appointment of counsel at all. *See* Wis. Stat. § 48.23(2m). Additionally, appointment of counsel under the Act is limited to individuals who can prove indigency as statutorily defined. Wis. Stat. § 48.23(4). By the time a pregnant woman is appointed counsel under the Act, if she even qualifies for the appointment, she may have been held in custody for up to 30 days, *see* Wis. Stat. § 48.305, and will have faced an initial "plea hearing" at which she must make crucial decisions about defending herself, including invoking or waiving her right to a jury trial and entering a plea on her own behalf—all without the benefit of legal representation, *see* Wis. Stat. § 48.30(1) &(2).

In fact, Ms. Loertscher faced that proceeding without legal representation, despite having repeatedly expressed her desire for counsel (*see* PFOF 73); the GAL appointed to represent Ms. Loertscher's fetus appeared at the plea hearing and entered a plea on behalf of her fetus

admitting all the allegations against Ms. Loertscher. (PFOF 125). Denying a pregnant woman facing involuntary commitment, confinement, and forced medical treatment the representation guaranteed to other individuals facing involuntary civil commitment cannot be rationally related to any legitimate state interest in protecting her health or the health of her pregnancy.

Wisconsin's Mental Health Act also provides for the automatic appointment of two experts (psychiatrists and/or psychologists) to personally examine the individual subject to involuntary commitment, and requires that the appointed experts "shall have specialized knowledge determined by the court to be appropriate to the needs of the subject individual." Wis. Stat. § 51.20(9)(a)(1). Additionally, an individual facing involuntary commitment has a right to retain an additional expert, or to petition the court for the appointment of an additional expert if the individual is indigent. *See* Wis. Stat. § 51.20(9)(3). By contrast, the Act makes no such provision for the appointment of experts and does not require expert testimony at the fact-finding hearing determining whether a woman should be subject to the Act. *See* Wis. Stat. § 48.31.

However, the Act requires proof not only of "habitual" controlled substance or alcohol use by a pregnant woman deemed to lack "self-control," but also evidence of some (undefined) degree of harm or risk of harm to a fetus or child resulting from that use. *See* Wis. Stat. § 48.133. Yet establishing whether exposure to a particular drug during pregnancy is causally related to harm to a fetus or child requires reliable, scientifically grounded expert testimony. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), concerned this exact issue: the plaintiffs in that case alleged that Merrell Dow's antinausea drug, Bendectin, had caused birth defects when taken during pregnancy. *Id*. at 582. The Supreme Court held that proof of causation must be established by "reliable" expert testimony based on scientific knowledge:

> The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or

> unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted truths on good grounds.

Id. at 590.[14] Wisconsin has adopted the *Daubert* standard for determining the scientific reliability of expert testimony. *See* Wis. Stat. § 907.02.

Establishing by clear and convincing evidence that a pregnant woman's use of controlled substances or alcohol poses a "substantial risk" of harm to her fertilized egg, embryo, or fetus, or to her future child, necessitates the use of reliable, scientifically grounded expert testimony every bit as much as establishing that the standards have been met for involuntary commitment under the Mental Health Act. Yet before an individual may be involuntarily committed, he or she must have been examined by at least two, and potentially three, qualified experts who will assist the court in determining whether the standards for involuntary commitment have been met; the Act provides no such safeguard of evidentiary reliability for a pregnant woman who, once subjected to the Act, faces loss of her liberty, and even the loss of her future child.

As the Supreme Court has made clear, "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Sweatt v. Painter*, 339 U.S. 629, 635 (1950). By requiring under the rational basis test that a "classification bear a rational relationship to an independent and legitimate legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Accordingly, a state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446.

[14] Ultimately, the Ninth Circuit on remand determined that Plaintiffs' proffered testimony was insufficiently reliable under the new evidentiary standard announced by the Supreme Court to allow them to establish a triable issue of fact as to whether Bendectin had caused their birth defects. *See Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir.1995).

In this case, denying pregnant women the procedural protections afforded individuals facing civil commitment under Wisconsin's Mental Health Act bears no relationship to furthering maternal and fetal health. Indeed, arbitrarily denying pregnant women the same protections afforded other state citizens facing involuntary confinement and forced medical treatment under Wisconsin's Mental Health Act suggest a separate, non-legitimate purpose for the Act: the establishment of separate rights for fertilized eggs, embryos, and fetuses as part of a long-term plan to overturn *Roe v. Wade. See, e.g.*, Nora Caplan-Bricker, *How the "Crack Baby" Scare Armed the Pro-Life Cause*, New Republic, October 29, 2013, http://www.newrepublic.com/article/115396/how-crack-baby-scare-armed-pro-life-cause; Lynn D. Wardle, *Restricting Abortion Through Legislation*, *in* To Rescue The Future 101, 108 (Dave Andrusko ed., 1983) (describing how state legislatures can contribute to overturning *Roe v. Wade*, identifying one method as enacting legislation "to extend the maximum permissible protection for the unborn"); Mark S. Kende, *Michigan's Proposed Prenatal Protection Act: Undermining a Women's Right to an Abortion*, 5 Am. U. Gender & L. 247, 249 (1996) (describing a bill that would treat fetuses as persons, and punish a third party who injures a fetus, as having "received great support from 'Right to Life' groups").

But regardless of the true legislative intent of the Act, its denial to pregnant women of the procedural protections afforded other similarly situated individuals under the Mental Health Act cannot survive rational basis review under the equal protection clause. As the Supreme Court has made clear: "A law declaring that in general it shall be more difficult for one group of citizens to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. The guaranty of equal protection of the laws is a pledge of the protection of equal laws." *Romer*, 517 U.S. at 633. Because the Act violates this fundamental pledge to Wisconsin's

citizens, its violates the Equal Protection Clause.

IV. PLAINTIFF HAS NO ADEQUATE REMEDY AT LAW AND WILL SUFFER IRREPARABLE HARM IF THE ACT IS NOT ENJOINED

Ms. Loertscher has demonstrated that the Act is invalid on its face and that its enforcement violates her constitutional rights. Injunctive relief is necessary to protect her from irreparable injuries arising from these constitutional violations. It is well established that, for the purposes of obtaining injunctive relief, a plaintiff has no adequate remedy at law when an award of monetary damages would not adequately make her whole for the harm she has suffered. *See, e.g., Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 (7th Cir. 1984). The Seventh Circuit has also made clear that monetary damages alone cannot remedy infringements of vital constitutional liberties. *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011). Thus, in cases such as this one seeking preliminary injunctive relief from the violation of constitutional liberties, the inadequate remedy at law and irreparable harm factors converge. *See, e.g., id*; *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012). Indeed, once a constitutional violation is established, no further showing of irreparable injury is necessary. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional "freedoms… unquestionably constitutes irreparable injury"); *Ezell*, 651 F.3d at 699 (7th Cir. 2011) (holding that the infringement of constitutional rights by a facially invalid law causes irreparable harm); *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm.").

Absent preliminary injunctive relief from this Court, the violation of Ms. Loertscher's constitutional rights will continue. She is currently deprived of the ability to make her own medical decisions, and is forced to submit to regular drug testing and to continued supervision by TCDHS personnel, all under threat of being held in contempt of court if she fails to comply with

any of these conditions. (PFOF 156 & 157). And, critically, Ms. Loertscher faces undergoing the impending birth of her first child, due January 29, 2015, (PFOF 7), under the supervision of state actors authorized to enforce the Act against her and supplant her own medical decision-making with their own; these actors include a GAL who remains appointed under the Consent Decree, and who is empowered by the Act to potentially override her decisions regarding her own health and the health of her child during the birthing process, if he unilaterally decides that his own decisions are in the best interests of the fetus. *See, e.g*, Wis. Stat. §§ 48.235(3)(b)(2) (GAL to assert "best interests of the …unborn child at every stage of the proceeding"); 48.235(4m)(4) & (5) (authorizing GAL to petition court for revision or extension of dispositional orders, which may include forced medical treatment); 48.235 (4m)(8) (authorizing GAL to "[p]erform any other duties consistent with this chapter.").

The danger to Ms. Loertscher is acute, because the GAL is not required to consider her interests at all when overriding her medical decisions about childbirth. Indeed, the GAL is constrained by statute to consider *only* the best interests of the fertilized egg, embryo, or fetus. *See* Wis. Stat. § 48.01 ("the best interests of the… unborn child shall always be of paramount consideration"); Wis. Stat. § 48.235(3) (GAL shall be an advocate for "best interests of …unborn child for whom the appointment is made").

Under the terms of the Act Ms. Loertscher also potentially faces loss of her newborn, if the GAL or other state actors decide to petition for a change in custody or even termination of her parental rights under the Act. *See* Wis. Stat. §§ 48.347(7), 48.345, 48.415(2)(a). Finally, unwanted intrusion by *anyone* during childbirth, whether the person is a state actor or not, inherently violates the privacy and dignity of the birthing process, one of the most momentous occasions in any parent's lifetime. Such harms are profound and irreparable. Accordingly, urgent

preliminary injunctive relief is warranted.

V. ENJOINING THE CHALLENGED ACT WILL NOT HARM THE PUBLIC INTEREST

As set out above, Ms. Loertscher has demonstrated a strong likelihood that she will win on the merits of her facial constitutional challenge to the Act. Thus, the balance of harms need not weigh significantly in her favor. *See, e.g., Planned Parenthood of Wis., Inc. v. J.B. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013) ("[T]he more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side."). Nonetheless, the balance of harms favor enjoining enforcement of the Act.

As the Seventh Circuit has repeatedly held, the public interest is served, not harmed, by enjoining enforcement of an unconstitutional law. *See Alvarez*, 679 F.3d at 589-90 ("if the moving party establishes a likelihood of success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional"); *Preston*, 589 F.2d at 303 n.3 (noting that remedying a constitutional violation "certainly would serve the public interest"); *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (holding that there can be no irreparable harm to the state "when it is prevented from enforcing an unconstitutional statute because it is always in the public interest to protect [constitutional] liberties.") (citations omitted). Because the Act is unconstitutional on its face, enjoining its enforcement serves the public interest.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's Motion for Preliminary Injunction.

Dated this 7th day of January, 2015.

Respectfully submitted,

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