UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Alicia BELTRAN	)	
	)	
Applicant,	)	
	)	**Docket No.___________**
vs.	)	
	)	
Jamie LOEHNIS, in his official capacity as Executive Director of the Casa Clare Treatment Center; Jim STRACHOTA, in his official capacity as Director of Human Services for Washington County, WI; Mark D. BENSEN, in his official capacity as District Attorney for Washington County, WI; the WASHINGTON COUNTY CIRCUIT COURT; and John DOE, in his official capacity as immediate custodian of Applicant Alicia Beltran,	)	
	)	
Respondents.	)	

MEMORANDUM OF LAW
IN SUPPORT OF
APPLICATION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241
BY A PERSON IN CUSTODY
AND
MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY AND PERMANENT INJUNCTION

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I. PRELIMINARY STATEMENT

Alicia Beltran is a 28-year old pregnant woman who is currently confined in violation of her constitutional rights. The following Memorandum of Law is submitted in support of Ms. Beltran's Application for Writ of Habeas Corpus and Motion for Temporary Restraining Order and Preliminary and Permanent Injunction.

Ms. Beltran is confined pursuant to 1997 Wisconsin Act 292 (hereinafter "The Act"), a statute passed in direct response to State ex rel. Angela M.W. v. Kruzicki, 561 N.W.2d 729 (Wis. 1997) which held that the legislature did not intend to include "fetus" within the definition of "child." Id. at 740. 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). The Act authorizes Wisconsin law enforcement and others acting at their behest to seize control of women who become pregnant that the State believes have some history or present use of drugs or alcohol. It is in accordance with this authority that Ms. Beltran has been arrested and is detained these past 10 weeks while awaiting trial.

Ms. Beltran's present detention is illegal and void under federal law. The Act is unconstitutional on its face and as applied in violation of Ms. Beltran's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Ms. Beltran, who is 25 weeks pregnant at the time of this filing, has no adequate remedy in Wisconsin state proceedings because of the extraordinary circumstances of this case. Accordingly, she requests the relief of immediate release, declaration of the Act as unconstitutional, null, and void, and injunction against further harassment or proceedings against Ms. Beltran in particular.

II. STATEMENT OF FACTS

Ms. Beltran is a 28-year old woman from Jackson, Wisconsin. On May 18, 2013, she discovered she was pregnant via home pregnancy test. (Beltran Dec. ¶ 3). Ms. Beltran informed her mother Sonia Fritsche who had been and continues to be an important source of support in her life. (Fritsche Dec. ¶¶ 3-4). Ms. Beltran then promptly went for an initial ultrasound at Wheaton Franciscan St. Joseph's Campus in Milwaukee, WI, at the referral of ob/gyn Dr. Karen Gotwalt on May 21, 2013, Ex. 1), and then for a follow-up exam with Dr. Gotwalt on May 21, 2013, (Ex. 1), and a follow-up exam with Dr. Gotwalt on May 31, 2013. (Fritsche Dec. ¶ 4); (Beltran Dec. ¶ 4); (Ex. 2). By use of ultrasound, radiologist Dr. Christopher Canitz confirmed Ms. Beltran was six weeks pregnant on May 21, 2013, providing her with an estimated due date of January 14, 2014. (Ex. 1).

During the May 31 appointment, Ms. Beltran told Dr. Gotwalt about prior, limited use of prescription pain medication. (Ex. 19); (Beltran Dec. ¶ 4). She informed Dr. Gotwalt that she had considered her use problematic and had successfully stopped taking prescription pain medication in November of the previous year. (Beltran Dec. ¶ 4). To assist in this regard, Ms. Beltran stated that she had been obtaining and taking Suboxone without a prescription. (Id.). Suboxone is the standard formulation of buprenorphine, a member of the opioid family used and prescribed to help patients stop taking illicit opioids. (Stancliff Dec. ¶¶ 8, 10); (Schauberger Dec. ¶¶ 7-8). Suboxone decreases cravings and blocks the effects of opioids if they are taken concurrently, and contains a small amount of naloxone, which is a deterrent to misuse. (Schauberger Dec. ¶¶ 7-8). Suboxone itself does not cause intoxication. (Id.). It is a medication indicated for pregnant women who are dependent on illicit opioids, and likely would have been prescribed to Ms. Beltran had she sought assistance of a physician. Use of Suboxone or a similar

medication-assisted treatment throughout pregnancy is the standard of care for opioid-dependent pregnant women. (Id. at ¶¶ 7-8, 13) . Neither opioids nor naloxone are associated with birth defects and there are no known long term consequences to their use. (Stancliff Dec. ¶¶ 8-9); (Frank Dec. ¶¶ 10); (Imseis Dec. ¶ 7).

Upon learning that she was pregnant, Ms. Beltran reported that she very much wanted to stop taking Suboxone immediately; however, she understood that slowly terminating all use was a medically safer course of action for both herself and her pregnancy. (Beltran Dec. ¶ 4). In response, Dr. Gotwalt suggested Ms. Beltran seek outpatient drug treatment to support her in the process, but she was encouraging when Ms. Beltran explained that she had successfully diminished her intake already and was confident she could safely terminate all use of Suboxone independently. (Id.). Ms. Beltran's preference for self-treatment is not unusual, and self-treatment over prescribed use is not uncommon for people with limited financial resources. (Stancliff Dec. ¶ 11); (Frank Dec. ¶ 7). Ms. Beltran did not have health insurance, and she and Ms. Fritsche understood that prescription Suboxone would cost $600 a month. (Fritsche Dec. ¶ 6).

Because Dr. Gotwalt's office is located approximately two hours from her home, Ms. Beltran scheduled her next prenatal check up on July 2, 2013 at the West Bend Clinic at St. Joseph's Hospital in West Bend, Wisconsin. (Beltran Dec. ¶ 5); (Ex. 3). At the time of that visit, Ms. Beltran was forthcoming with the fact that she had previously used pain medication, that she had successfully stopped in November 2012, and that she had been taking Suboxone. (Beltran Dec ¶ 6). As of that July date, Ms. Beltran had completely ceased use of Suboxone, and she stated this, as well. (Id.). After hearing this information, Stephanie Weiss, a Physician's Assistant, told Ms. Beltran she needed to obtain a prescription for Suboxone. (Id. at ¶ 5). Ms.

Beltran responded that she no longer needed Suboxone, had not taken any for three days, and that she did not want to go back on it during her pregnancy. (Id. at ¶ 6). Ms. Weiss was apparently displeased with Ms. Beltran's medical decision-making. (Id.); see (Ex. 3) (report prepared by Ms. Weiss after this visit notes Ms. Beltran "REFUSES to see [*sic*] medical attention for this addiction.") (emphasis in original).

Moments after leaving the clinic on July 2, Ms. Beltran received a phone call from Ms. Weiss requesting that she return to the clinic for urinalysis. Ms. Beltran complied, returning to the clinic immediately for what she believed to be necessary testing for medical purposes. (Beltran Dec. ¶ 9). The drug test was positive for metabolites of Suboxone,[1] but negative for all other substances. (Id.). Ms. Beltran's test results thus confirmed her self-report. (Stancliff Dec. ¶ 6); (Frank Dec. ¶ 4).

At no point during her visit, or at any time thereafter, was Ms. Beltran seen by Dr. Angela Breckenridge, the physician with whom she had a scheduled the pre-natal checkup. (Beltran Dec. at ¶ 8). Even so, in a letter dated July 16, 2013 – two weeks after Ms. Beltran's visit to the West Bend Clinic – Dr. Brekenridge provided Jodi Liddicoat, a Washington County Social Worker, a version of the confidential information Ms. Beltran had disclosed to Ms. Weiss. (Ex. 4). In the letter, Dr. Breckenridge noted that Ms. Beltran "refuses the treatment we have offered" and asked Ms. Liddicoat to, "remove the child and place them somewhere safe," further recommending "mandatory inpatient drug treatment program or incarceration." (Id.).

Ms. Liddicoat visited Ms. Beltran at her home on July 16, 2013. (Beltran Dec. at ¶ 13). Ms. Liddicoat made her purpose plain in short order, commanding Ms. Beltran to obtain a

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[1] Given the rate at which Suboxone is metabolized, the July 2 positive test could have indicated Suboxone use as long as seven days prior to administration of the test itself. (Stancliff Dec. ¶ 6); see (Frank Dec. ¶ 7). A positive drug test only indicates that a particular substance is present in the person's body tissue. "It does not indicate abuse or addiction; recency; frequency, or amount of use; or impairment." (Stancliff Dec.¶ 5 citing U.S. Dept. of Justice, "Drugs, Crime, and the Justice System: A National Report from the Bureau of Justice Statistics" 119 (1992).

prescription for Suboxone. (Id.) Ms. Beltran responded that she had not used Suboxone for two weeks and had no intention of resuming use. Ms. Liddicoat was insistent, however, and threatened Ms. Beltran that if she did not comply, Ms. Liddicoat would get the courts involved. Ms. Beltran was upset by this and abruptly ended the encounter.

The next day, Ms. Beltran went to Milwaukee to spend some time with her mother, Sonia Fritsche, and the father of her child, Brian Maaga. (Id. at ¶ 14). While Ms. Beltran was in Milwaukee, Ms. Liddicoat prepared a referral memo on behalf of the Washington Country Human Service Department for Mandy Schepper, an Assistant District Attorney at Washington County District Attorney's Office, requesting that the Court accept jurisdiction over Ms. Beltran and asserting that there was a reasonable basis for a Child in Need of Protective Services (CHIPS) petition. (Ex. 5). Ms. Schepper, who received Ms. Liddicoat's referral on July 17, 2013, filed a Petition for Protection or Care of An Unborn Child on the very same day; an order for Ms. Beltran's arrest was then issued. (Ex. 6); see (Ex. 13).

On the morning of July 18, 2013, Ms. Beltran received a phone call from her father, with whom she lived. He stated that two police officers had been at their apartment looking for her at one o'clock in the morning. (Beltran Dec. ¶ 14). Ms. Beltran immediately called the police department to ask what was going on. Though her call was answered, no one could explain to her why two officers had been to her home. (Id.).

Ms. Beltran returned to her apartment later that same morning between 9:30 and 10:30 am. (Id. at ¶ 15). When she arrived, two Washington County Officers informed her that there was a warrant for her arrest and instructed Ms. Beltran to sit on the patio and wait for officers from the Sheriff's Office. (Id.). A short time later, at least five sheriff vehicles surrounded her home,

and three deputy sheriffs approached her; they handcuffed her, read her Miranda rights, and informed her that she was being taken to St. Joseph's Hospital for drug testing. (Id.).

Upon arrival at the St. Joseph's Hospital emergency room, Ms. Beltran allowed herself to be examined but refused to speak to anyone because she had not been provided a lawyer. (Id. at ¶ 16). She was seen by an emergency room physician, Dr. Erik J. Amoroso, remaining handcuffed throughout. (Id.); (Ex. 15). Upon examining Ms. Beltran, he stated that the baby sounded healthy and there was no need for drug testing. (Beltran Dec. at ¶ 16). He further declared it unnecessary to place Ms. Beltran in any drug treatment program. (Id.). The medical report concluded, "The patient's exam is largely benign and does not reveal any acute medical issues. Specifically, none of the patient's vitals or exam are consistent with any sort of withdrawal." (Ex. 15).

Ms. Beltran was then transported by sheriff's deputies to the Washington County Jail, where she was booked, fingerprinted and photographed. (Beltran Dec. ¶ 17). She told several law enforcement officers that she was very hungry, not having eaten that day. (Id.). She was placed in a holding cell and informed that she would get something to eat, be seen by a nurse, and provided a public defender for her upcoming hearing. (Id. at ¶¶ 17-18). Instead, Ms. Beltran remained alone in the holding cell for several hours without food, water, medical attention, or access to counsel. (Id. at ¶ 18). She was eventually collected by sheriff's deputies who placed her in handcuffs and leg shackles and transported her to an adjacent courtroom, where she remained shackled throughout the proceedings. (Id. at ¶ 19). Inside, Ms. Beltran against invoked her right to counsel, but she was told by presiding Family Court Commissioner Dolores Bomrad that counsel would not be appointed for the proceeding that day. (Id. at ¶ 21).

Although Ms. Beltran had no counsel, a Guardian Ad Litem, Deborah Strigenz had already been appointed for the 14 week fetus and appeared on its behalf. (Ex. 12) (providing payment of $70 per hour). Also present in the courtroom were Assistant District Attorney Mandy Schepper, Guardian Ad Litem Strigenz, and Washington County Social Worker Ms. Jodi Liddicoat. (Beltran Dec. at ¶ 20). Along with Commissioner Bomrad, these individuals conferred solely amongst one another, not explaining to Ms. Beltran the nature of the proceedings or even the allegations, if any, against her. (Id. at ¶ 22). Although Ms. Beltran apparently signed a form that day entitled " Notice of Rights and Obligations," (Ex. 7), this form only addressed actions involving a "child" or "juvenile" and provides no information regarding proceedings to determine deprivations of a pregnant woman's liberty. Ms. Beltran sat, in shackles, at a table by herself and was not consulted throughout the hearing. (Beltran Dec. ¶¶ 19, 22). She was unable to grasp much of what transpired and understood only in a general sense that the proceedings pertained to her pregnancy. (Id. at ¶ 22). Ms. Beltran grew upset and asked of Commissioner Bomrad if she did not have a right to an abortion. (Id.). No one responded to this question, but Ms. Beltran felt that following this question the Commissioner and other participants to the hearing then made up their minds. (Id.). Commisioner Bomrad ordered Ms. Beltran confined to Casa Clare, a women's drug treatment facility in Appleton, WI. (Id.); (Exs. 10, 14). Commissioner Bomrad also scheduled a CHIPS plea hearing for August 15, 2013 and directed Ms. Beltran to provide a Statement of Income, Assets, Debts and Living Expenses at least five days before the hearing. (Exs. 8, 11).

At approximately 5:30 PM that evening, Ms. Beltran was transported to a halfway house, Calm Harbor, in West Bend. (Beltran Dec. ¶ 23). Upon arrival, she was allowed to eat for the first time since her arrest approximately eight hours prior. (Id.). The following morning, July 19,

2013, County Social Worker Ms. Liddicoat arrived at Calm Harbor to speak with Ms. Beltran. (Id. at ¶ 24). Ms. Beltran refused to speak with her in the absence of counsel. (Id.). Ms. Beltran was then handcuffed and transported to Casa Clare, a facility located approximately two hours away. (Id.); (Ex. 16). Ms. Beltran was handcuffed and shackled for the duration of the drive. (Beltran Dec. ¶ 24).

At Casa Clare, Ms. Beltran was given a drug test. (Id. at ¶ 25). She was not assessed, examined, or interviewed by a physician. (Id.). She was again presented with a consent form, but she refused to sign anything until she could speak with counsel. (Id. at ¶ 26). Four days later, on July 23, 2013, Ms. Beltran was told that she could either sign the forms or be taken from Casa Clare and placed in jail. (Id. at ¶ 27). Ms. Beltran then complied. (Id.).

Casa Clare does not provide any medication assisted treatments for people with opiate dependency or addiction problems. (Id. at ¶ 30). In fact, it does not supply over-the-counter medicines unless detainees purchase them with their own money. (Id. at ¶ 31). Casa Clare is not authorized to provide Suboxone, the treatment Ms. Liddicoat and others insisted she receive. (Stancliff Dec. ¶¶ 14-15).

Ms. Beltran has been held continuously at Casa Clare for over two months. (Beltran Dec. ¶ 28). She does not receive prenatal care at Casa Clare. (Id. at ¶ 30). To be seen by a physician, it is necessary for her to file a written request to leave the premises. (Id. at ¶¶ 29, 32). Casa Clare does not facilitate transportation to and from these appointments. (Id. at ¶ 37). Instead, Ms. Beltran's mother transports her to Dr. Gotwalt's office, which entails eight hours of driving for Ms. Fritsche. (Fritsche Dec. ¶ 24). If an emergency related to Ms. Beltran's pregnancy were to occur, Ms. Beltran would be responsible for securing her own transportation to a hospital.

(Beltran Dec. ¶ 37). At Casa Clare, Ms. Beltran is not receiving Suboxone or any other medication, nor has she been prescribed same. (Id. at ¶ 30).

On July 25, 2013, Ms. Beltran made an appointment on advice of counsel for an independent drug assessment with Genesis Behavior Services, Inc. (Ex. 20). Ms. Beltran received a pass from Casa Clare to leave for the assessment on August 20, 2013. (Ex. 25). Despite attempts by Ms. Liddicoat to get Ms. Beltran to cancel the appointment, (Beltran Dec. ¶¶ 34-35); (Fritsche Dec. ¶ 27), Ms. Beltran attended the appointment on August 20, 2013. (Ex. 25). The evaluation was performed by psychotherapist Christopher Borden, who concluded that Ms. Beltran's placement in an in-patient facility was unnecessary. (Ex. 26). Instead, he recommended outpatient treatment and weekly drug testing. (Fritsche Dec. ¶ 28); (Exs. 25-26).

Ms. Beltran was employed in the service industry prior to her arrest and detention. Given the length of her civil incarceration, she believes her employment has likely been terminated. (Beltran Dec. ¶ 38).

Ms. Beltran has undergone extreme emotional and psychological stress as a result of her arrest, shackling, detention, subjection to court proceedings in the absence of counsel, separation from family, forced medical examination and treatment, and detention. (Id. at ¶ 39). Since arriving at Casa Clare, Ms. Beltran has been subject to several drug tests, all of which have come back negative. (Ex. 28).

As clearly demonstrated in the medical records available in this case, Ms. Beltran did not "habitually lack self-control," in the language of Wisconsin law, in use of controlled substances. (Frank Dec. ¶¶ 6, 8); (Schauberger Dec. ¶ 13); (Stancliff Dec. ¶¶ 6,11, 20, 21) (Hartke Dec ¶ 4). Nor did her use create a "substantial risk" to the health of her pregnancy. (Hartke Dec. ¶ 4); (Stancliff Dec. ¶¶ 8-9, 17); (Frank Dec. ¶¶ 11-12); (Imseis Dec. ¶¶ 4, 5, 7); (Ex. 15). While

opiate use and treatment for that use can have side effects on the fetus and newborn, known as neonatal abstinence syndrome (NAS), those effects do not occur in every case and are both transitory and treatable according to well-established procedures for the care of NAS. (Frank Dec. ¶ 10); (Stancliff Dec. ¶¶ 8-9); (Imseis Dec. ¶¶ 7); (Ex. 34). Opiate exposure does not cause congenital defects. (Frank Dec. ¶ 10); (Ex. 34).

Drug and alcohol use are by no means the lone or even greatest factors affecting pregnancy and pregnancy outcome. Virtually everything a pregnant woman does, does not do, and experiences may have an impact on her pregnancy. Many factors have been demonstrated to create risks of harm, including poverty, inadequate nutrition, deficient medical care, victimization, homelessness, and standing for long periods. (Exs. 32, 33, 34); (Frank Dec ¶ 16). Additionally, stress has been correlated to negative pregnancy outcomes such as miscarriage and low birth weight. (Frank Dec. ¶¶ 15-16). Special emphasis on use of controlled substances in the interest of the health of fertilized eggs, embryos, and fetuses is not supported by medical evidence. (Id.); (Ex. 32). The established science and medical community believe that prioritizing the health and well-being of a pregnant woman, as opposed to punishment, is the best way to optimize chances of a healthy baby in all circumstances. (Hartke Dec. ¶ 7-8); (Schauberger Dec. ¶¶ 6, 12); (Frank Dec. ¶ 13)' (Exs. 29, 30). Ms. Beltran's self-care was thus superior to the complete lack of attention she has received since her involuntary detention, and her detention was and remains medically unwarranted and hazardous to her pregnancy. (Stancliff Dec. ¶ 12); (Frank Dec. ¶ 14).

III. PROCEDURAL HISTORY

Proceedings in this case began on July 2, 2013, when Physician's Assistant Stephanie Weiss, acting under color of state law, insisted that Ms. Beltran seek further Suboxone treatment

and, when Ms. Beltran declined, ordered a urinalysis. Ms. Weiss then and initiated the process of referring Ms. Beltran on allegations of child abuse and neglect on the basis of that test and Ms. Beltran's confidential medical disclosures. The proceeding continued when Dr. Angela Breckenridge, who had never actually met with or examined Ms. Beltran, wrote a letter to Social Worker Jodi Liddicoat alleging that Beltran "exhibits lack of self control and refuses the treatment we have offered her… I would recommend a mandatory inpatient drug treatment program or incarceration in order to protect her unborn child." (Ex.4). The proceeding continued on July 16, when Social Worker Jodi Liddicoat confronted Ms. Beltran at her home and threatened to initiate judicial action against her if Ms. Beltran did not follow PA Weiss's treatment plan of taking Suboxone. (Beltran Aff. at ¶ 13). When Ms. Beltran declined, Ms. Liddicoat referred the matter to the District Attorney's office (Ex. 5) and Assistant District Attorney Mandy Schepper filed a Petition for Protection or Care of an Unborn Child on July 17th, 20132, (Ex. 6).

On July 18, 2013, Ms. Beltran was arrested, detained in jail, and brought to appear before Family Court Commissioner Dolores Bomrad. The precise nature of that court proceeding is uncertain. Ms. Beltran was not represented by counsel and was unable to understand much of what was happening. Counsel for Ms. Beltran have been unsuccessful in efforts to secure a transcript of proceedings to date. (Vanden Heuvel Dec. ¶ 7). All that is certain is that at the close of that hearing, Commissioner Bomrad ordered Ms. Beltran committed to Casa Clare, a women's drug treatment facility in Appleton, WI, where she has been held continuously since July 19, 2013. (Ex. 10).

Ms. Beltran was returned to family court on August 15, 2013 for a plea hearing. (Ex. 11). At that time, she denied all allegations against her. Ms. Beltran was then represented by counsel

at her own expense, who advised Commissioner Bomrad that the petition filed against Ms. Beltran by ADA Ms. Schlepper contained a serious error: it falsely stated that Ms. Beltran had tested positive for opiates on July 2, 2013, when she had not. (Ex. 6); see (Ex. 3). Commissioner Bomrad did not respond to this information; instead, she informed the parties that the matter would be set for trial, and she ordered Ms. Beltran returned to her place of detention in the interim.

Ms. Beltran has been scheduled to appear for a status hearing on October 7, 2013, (Exs. 21, 24), and for jury trial on October 29-30, 2013 on a Child in Need of Protective Services (CHIPS) petition filed against her by ADA Ms. Schlepper. (Exs. 22, 24). During the pendency of those proceedings, Ms. Beltran was ordered to remain confined at Casa Clare. (Ex. 23).

IV. EXHAUSTION OF STATE REMEDIES

This is an exceptional case. The State of Wisconsin has deprived Alicia Beltran of her liberty by taking her from her home, away from her family, and detaining her in a civil institution for no valid reason. Every step of the State's action against her has brought violation of her constitutional rights. In the collection of evidence against her, Wisconsin violated fundamental rights to privacy and against illegal search and self-incrimination. In bringing proceedings against her without the assistance of counsel, the State violated that right, as well. The law used to effect Ms. Beltran's arrest and civil incarceration is in breach of her fundamental rights to privacy, to bear and beget children, and to equal protection of the laws, among others. Her current detention is cruel and unusual punishment. Ms. Beltran must be heard in this Court. Dismissal of her cause of action would be certain to result in further denial of her rights as well as State-created and enhanced risks to her well-being and that of her future child.

Ms. Beltran is aware of the doctrine requiring exhaustion of state remedies. Though petitions under § 2241 are not subject to the statutory rule of exhaustion, exhaustion is nonetheless required as a matter of comity. Neville v. Cavanaugh, 611 F.2d 673, 675 (7th Cir. 1979). Ms. Beltran does not take this doctrine lightly – she well understands that states should generally be given the opportunity to determine the constitutionality of their laws in the first instance. In this particular case, however, Ms. Beltran has no real opportunity for relief in state court during the pendency of her pregnancy. As a result, she has not exhausted state remedies, and seeks permission from this Court to be excused of the exhaustion requirement.

This Court has legal authority to decide this case. Because the exhaustion doctrine is not statutory in the case of § 2241 petitions, "it is to be applied with due regard for its underlying purpose and for considerations that may in particular cases counsel for a waiver." Glisson v. United States Forest Service, 55 F.3d 1325, 1327 (7th Cir. 1995). Courts of this Circuit recognize exceptions in cases of "excessive delay," United States ex rel. Pisciotti v. Cooper, 790 F. Supp. 178, 181 (N.D. Ill. 1992), or in light of "circumstances rendering [State] process ineffective," Gray v. Greer, 707 F.2d 965, 967 (7th Cir. 1983), more commonly known as "the futility exception," see, e.g., Almy v. Kickert School Bus Line, Inc., 722 F.3d 1069, 1075 (7th Cir. 2013).

The facts of this case suggest both excessive delay and, for the same reason, futility. Ms. Beltran, at the time of this filing, is 25 weeks pregnant. She is due to give birth in mid-January 2014. Were Ms. Beltran to pursue remedies in the courts of Wisconsin, she would need to file a motion to dismiss the Child in Need of Protective Services (CHIPS) petition filed against her alleging the same constitutional violations raised in this Court. Final resolution of that motion by Wisconsin's highest court would, even on an expedited basis, without question occur well passed

the date of Ms. Beltran's childbirth. This would render her challenge moot, as the only alleged basis for her current detention is to 'protect' her pregnancy from her "habitual lack of self-control." See WIS. STAT. ANN. § 48.133. This fact is evidenced by the case of State ex rel. Angela M.W. v. Kruzicki, 561 N.W.2d 729, 733 (Wis. 1997). In Angela M.W., in a manner exactly parallel to the present case, the State of Wisconsin initiated a CHIPS petition against a pregnant woman.[2] The Petitioner in that case challenged the proceedings against her on numerous state and federal grounds. The Wisconsin Supreme Court reached an opinion on April 22, 1997 – over 19 months after the CHIPS petition was filed. By that time, the Petitioner had long since given birth, and while her litigation remained relevant in the context of state law, the decision was powerless to address the harms she had suffered while carrying her pregnancy to term in the interim. A decision in California provides similar warning. Under analogous circumstances, the California Supreme Court decided constitutional questions concerning the validity of proceedings against a pregnant woman 18 months after initiation of her claims. In re. Steven S., 178 Cal. Rptr. 525 (Cal. Ct. App. 1981). In that case, too, the Petitioner had of course already given birth, and received no personal protection from harms suffered while a final determination in state court was pending. See also In the Matter of the Unborn Child of Julie, 18 P.3d 342 (Okla. 2001) (under factually analogous circumstances, remanding the Petitioner's case for dismissal 17 months after initiation of proceedings and almost 15 months after she had given birth).

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[2] That decision concerned a now superseded version of a similar State law. In fact, the present Act was formulated in direct response to the Angela M.W. decision by the Wisconsin legislature. 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). After the Wisconsin Supreme Court ruled that Chapter 48 could not be applied to fertilized eggs, embryos, or fetuses, the legislature created the Act to explicitly authorize the control and detention of pregnant women challenged in this pleading. Id. The Wisconsin Supreme Court did not address constitutional issues in Angela M.W., so the State has not issued an opinion on the constitutionality of the issues raised by the Act.

If Ms. Beltran is required to plead her federal claims in state court, she will thus be pleading for posterity's sake. None of the harms attendant to operation of the Wisconsin Statute will be relieved in her case. Those harms are grave. Ms. Beltran is in the midst of pregnancy, an experience that is itself daunting, but which has potential for great joy. In her current place of detention in state custody, Ms. Beltran is isolated from everyone she knows or cares about. Her family is over two hours' drive away. To see them and leave the grounds of her place of commitment, even for prenatal appointments, she must submit a written request, which may be denied on a discretionary basis. She is thus without an effective support network during a critical time.

This situation is made dramatically worse by continued operation of Wisconsin law. Wisconsin is seeking to declare Ms. Beltran a negligent mother – before she has even birthed a child – by proof to a jury in open court. The trial which she is currently facing on October 29-30 of this year would mean further dissemination of her confidential medical information. If the State is successful, it may not only retain Ms. Beltran in physical custody, but it may also use the result against her to initiate a petition for termination of parental rights – again, before she has so much as laid eyes on any child. <u>See</u> Wis. Stat. Ann. § 48.235.

But even now, the State is actively endangering Ms. Beltran's pregnancy. Ms. Beltran has experienced tremendous stress as a result of the State's conduct towards her. She has been bullied, harassed, shackled, led blindly through court proceedings in the absence of counsel, jailed, civilly committed, and generally treated, alternatively, as a criminal and a *non-entity*. The stress resulting from this uncertainty and emotional abuse is medically proven to be hazardous to the health of both Ms. Beltran and her pregnancy. The insult of this continued condescension, degradation, and dehumanization by the State thus stands to further traumatize Ms. Beltran,

trample her rights, sully what should be the special, *private* experience of becoming a parent, and put the health of herself and her pregnancy at risk.

Moreover, Ms. Beltran is without access to medical treatment in her current place of detention. She is required to secure permission to travel a distance of two hours each way for regular prenatal visits. She receives no prenatal care at Casa Clare, and if she were in need of emergency assistance, she would need to secure her own transit.

Ms. Beltran and her family have also been severely financially affected by not having transportation provided to her for her prenatal care visits. In addition, Ms. Beltran believes that she has lost her job because of the significant length of her absence. Not only is she thus facing the lost wages from the past two months and any future time in detention, she will be unemployed upon resolution of this case, endangering her ability to support a new baby.

"Equity suffers not a right without a remedy." R. Francis, MAXIMS OF EQUITY 29 (1st Am. ed. 1823); see CIGNA Corp. v. Amara, 131 S.Ct. 1866, 1879 (2011). If this Court requires Ms. Beltran to exhaust state remedies, it will violate this staunch principle, holding in effect that the federal courts will turn a blind eye to contemporaneous violations of the rights of pregnant women, coming in only after the fact to resolve questions that must, by then, be academic.

V. LEGAL STANDARD

Ms. Beltran seeks the relief of a temporary restraining order and preliminary injunction against operation of the Act and related proceedings against her; declaratory judgment that the Act is unconstitutional in numerous respects; and permanent injunction against operation of the Act against Ms. Beltran or any other pregnant women in the State of Wisconsin.

A motion for preliminary injunction is judged against four criteria: (1) the likelihood of success on the merits; (2) the inadequacy of remedy at law; (3) the balance of irreparable harms

as between the parties; and (4) the public interest. Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 382-83 (7th Cir. 1984). Courts are to analyze these factors on a sliding scale, such that a particular strong showing under one factor may render a substantial showing under another factor unnecessary. Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Dept. of Health, 699 F.3d 962, 972 (7th Cir. 2012).

In special circumstances, the emergency relief of a temporary restraining order is appropriate pending a hearing or merits determination. See American Can Co. v. Mansukhani, 742 F.2d 314, 321 (7th Cir. 1984). The critical factor in determining the propriety of a temporary restraining order is the degree to which time is of the essence. Id.

VI. ARGUMENT

The Act is unconstitutional on many fronts, both on its face and as applied in this case. A statute is unconstitutional on its face when "no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Each and every challenge asserted against the Act herein meets that standard, and this Court should accordingly strike the Act down in its entirety as applied not only to Ms. Beltran, but to all women.

As a preliminary matter, the Act is void for vagueness. It also provides insufficient procedural protections in the face of infringements on liberty. More centrally, in purpose and effect, it tramples numerous substantive due process rights. It also violates equal protection. Because the Act's operation entails reporting by medical professionals, it transforms these professionals into state actors. Accordingly, Fourth and Fifth Amendment rights are implicated, and were infringed on the facts of this case. Finally, because the Act is a penal one in effect, it is subject to review under the Sixth and Eighth Amendments. Here too, the Act falls short. These failings are detailed in turn, below. Under established doctrines, this Act, on its face, is a bold-

faced attempt to subordinate, infantilize, and ultimately treat pregnant women in a manner that not only deprives them of their status as constitutional persons, but also increases rather than reduces risks to maternal, fetal, and child health. For these reasons, it must be struck down.

Accordingly, Ms. Beltran has a high likelihood of success on the merits in consideration of her request for a temporary restraining order and preliminary injunction. Because she also satisfies the other factors incidental to that analysis, Ms. Beltran is entitled to immediate release from state custody.

(1) Likelihood of Success on the Merits

Ms. Beltran asserts that several provisions of the Act are unconstitutional, as follows.

(A) The Act is void for vagueness.

The Act prescribes a standard and procedure by which the State may control certain pregnant women under the guise of protecting fertilized eggs, embryos, and fetuses from prenatal exposure to alcohol and controlled substances. This law, passed in response to perceived problems of drug and alcohol use by pregnant women, 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, 332-33 (1999), specifically grants state authority over pregnant women during "all stages of pregnancy," WIS. STAT. ANN. § 48.01(1), and unborn children "from the time of fertilization." Id. at 48.02(19).

The Act is unconstitutionally vague in the manner it identifies those women, who from the moment of fertilization, may become subject to its control. Section 48.133 is representative. That Section initiates the State's proceedings against pregnant women by stating the grounds for jurisdiction over them and their pregnancies:

> The court has exclusive original jurisdiction over an unborn child alleged to be in need of protection or services which can be ordered by the court whose 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 the habitual lack of self-control.

WIS. STAT. ANN. § 48.133 (1998) (emphasis added). The manner of identifying the individuals and conduct that invoke the Act's application is repeated in §§ 48.193 (permitting a judge or law enforcement officer to take a pregnant woman into custody), 48.205 (permitting a pregnant women to be detained in physical custody), and 48.207 (listing permissible placements for pregnant women, including mandatory in-patient treatment facilities).

In effect, then, the Act permits Wisconsin courts and law enforcement to control, detain, and subject to involuntary treatment a pregnant woman on the basis of four highly subjective, standard-less, undefined terms: that she (1) "*habitually* lacks self-control (2) "to a *severe* degree" in a manner creating (3) "a *substantial* risk" that the pregnancy will be (4) "*seriously* affected or endangered." By stacking these discretionary terms on top of one another, the Act suggests only an indefinite, amorphous criteria for the pregnant women who may fall within its reach, ultimately standing for little more than the proposition that pregnant women with any history of alleged use of drugs or alcohol may be deprived of all autonomy at the State's say-so. In fact, none of these terms is medically recognized as meaningful in a clinical or diagnostic sense. (Stancliff Dec. ¶ 3).[3] Significantly, for purposes of arresting and detaining women from the earliest stages of pregnancy, the Act explicitly eschews the medically recognized terms "drug-dependent," "alcoholic," and "alcoholism," which *are* significant diagnoses with established criteria defined in Wisconsin's mental health law. See WIS. STAT. ANN. §§ 51.01(1) & (1m); see

[3] See also Linda Hisgen, STATE OF WIS. DEP'T OF HEALTH AND FAM. SERV'S, 1997 WISCONSIN ACT 292, at 1-2 (Memorandum, July 23, 1998) (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").

id. at §§ 48.135(1), 48.203(4) (using the terms "drug dependent" and "alcoholism" in provisions of the Act addressing when application of Wisconsin's mental health law, WIS. STAT. ANN. § 51, is appropriate). For these reasons, the Act must be held void for vagueness in violation of the United States Constitution. See U.S. CONST. amend. V.

A statute is unconstitutionally vague if it (a) "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or (b) "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." City of Chicago v. Morales, 527 U.S. 41, 56 (1999). See also F.C.C. v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012) (quoting U.S. v. Williams, 533 U.S. 285, 304 (2008)). The Supreme Court has held that in analyzing under these prongs, lower courts should employ a sliding scale that reflects the type of regulation and coextensive private interests. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982). Accordingly, economic and civil legislation is permitted greater imprecision than criminal law, whereas law that "threatens to inhibit the exercise of constitutionally protected rights" requires the greatest definition of all. Id. at 499-500. As detailed in what follows, this statute addresses constitutional matters and fails both prongs.

(i) *The Act threatens constitutionally protected rights and thus draws the most stringent review for vagueness.*

The Act permits Wisconsin to intrude upon core liberties. Specifically, it permits the State access to pregnant women's bodies and to their confidential medical files, and it authorizes their arrest, civil detention, and involuntary medical treatment. Much of this Memorandum of Law is devoted to dissecting this Statute's multiple constitutional infringements. For present purposes, though, it is sufficient to say that the intended function of the law "threatens to inhibit the exercise of constitutionally protected rights," Village of Hoffman Estates, 455 U.S. at 499,

e.g., the rights to liberty, privacy, equal protection of the laws, and freedom from cruel and unusual punishment, among others. See De Ville & Kopelman, Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy, 27 J.L. MED. & ETHICS at 332 ("By their very nature, fetal protection laws intrude on the most protected right in Western culture – the right to be free from bodily restraint."). As a result, in determining whether the Act is too vague to (1) provide fair notice or (2) guide official discretion, an exacting standard of review is required.

(ii) *The Act does not give fair notice.*

Due process requires specificity in statutory language because constitutional deprivations may not hinge on 'speculation'; it is a basic tenet of fairness that those held to comply with law under threat of penalty must be properly informed as to what conduct is required. Lanzetta v. N.J., 306 U.S. 451, 453 (1939). The Act fails in this regard. It gives notice to women that they may be subjected to state custody, control, and medical treatment upon becoming pregnant and for use of some undefined quantum of drugs or alcohol, but what degree of use, and as determined by whom, is unclear. Moreover, though the Act assumes jurisdiction from the instant of fertilization, it contains no requirement that a women even know she is pregnant before making her subject to state control. Accordingly, the group who requires adequate notice must be defined as all women capable of becoming pregnant.

The relevant parameters inhere in the four terms "habitual", "severe", "substantial", and "seriously." These are highly subjective terms in the abstract. But when applied to the specific context of drug and alcohol use by women who become pregnant, they have even less meaning. Drug and alcohol use generally is a highly charged, politicized issue about which people often hold strong opinions that are not informed by scientific, evidence-based research or medical

criteria.[4] The subject of drug use by pregnant women in particular is one where many are dramatically misinformed about the effect of in utero drug and alcohol exposure, and where an element of moral outrage often plays a role.[5] See De Ville & Kopelman, Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy, 27 J.L. Med. & Ethics at 337 ("Given popular misconceptions regarding the probability and magnitude of the harm posed by substance use on fetal health, judges' ability to estimate accurately the risk posed to the fetus should be questioned."). In such a context, it is highly likely that there will be widely divergent views as to what degree of use is "habitual" or "severe," and as to what resulting harms are "substantial" or "serious." In cases such as this, where ordinary people are likely to disagree profoundly as to a statute's meaning, the statutory text is impermissibly imprecise. See Connally v. Gen Constr. Co., 269 U.S. 385, 391 (1926).

Ms. Beltran's case is a prime example. By the time Ms. Beltran was reported to state authorities and subsequently taken into custody, she was not using any controlled substances at all. Before even becoming pregnant, Ms. Beltran pursued a responsible self-help strategy that involved ending her use of Percocet. Having believed that she had inadvertently become dependent to Percocet, she initiated use of Suboxone in decreasing doses in order to ultimately become independent of both drugs. Months after initiating this strategy, she was down to a very low daily dose of Suboxone when she learned that she was pregnant. She continued with her strategy, and by July 2, 2013 had not been using any controlled substance for several days. Yet *after* complete cessation, she was arrested and ordered detained. Whether because of her

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[4] As acknowledged by the White House Office of National Drug Control Policy, "discussion of substance use disorders is too often relegated to the shadows, steeped in stigma and misunderstanding." http://www.whitehouse.gov/ondcp/drugpolicyreform.

[5] See, e.g., Open Letter to the Media by David C. Lewis et al., Physicians, Scientists to Media: Stop Using the Term "Crack Baby" (2004), (Ex. 32); Open Letter to the Media by David C. Lewis et al., Top Medical Doctors, Scientists & Specialists Urge Major Media Outlets Not to Create "Meth Baby" Myth (2005) (Ex. 33); Open Letter to the Media and Policy Makers by Robert G. Newman, et, al, Science and Medical Leaders Urge Media to End Inaccurate Reporting on Prescription Opiate Use by Pregnant Women (2013) (Ex. 34).

admission to health care providers of prior use, or because she declined recommendations to re-initiate Suboxone use, or because of statements she later made in court concerning her right to abortion, the precise reasons for Ms. Beltran's detention have never been clearly articulated. In any event, nothing in the Act could reasonably have suggested to Ms. Beltran that her strategy of *ceasing* all drug use was likely to be deemed "habitual" or "substantial" and construed against her. The Act does not make plain that total abstinence is required, nor is it clear that any prior use must be treated with continued, prescribed use under physician supervision. In this manner, application of the Act to Ms. Beltran makes evident its failure to provide fair notice.

(iii) *The Act not only authorizes, but also encourages arbitrary and discriminatory enforcement.*

The Act allows for arbitrary and discriminatory enforcement at all stages of the process, from initial jurisdiction over pregnant women under § 48.133 to their arrest (§ 48.193), detention (§ 48.205), and involuntary treatment (§ 48.207). Because of the undefined, open-ended terminology of these sections, nurses, physician's assistants, doctors, social workers, law enforcement, family court commissioners and judges, and other persons have enormous discretion in whom to subject to state interference and control.

The State's actions against Ms. Beltran are again illustrative. If the statutory language of the Act has any inherent meaning, Ms. Beltran's conduct is surely well outside its scope. Her use of Suboxone, a controlled substance for purposes of ultimately achieving total abstinence from all drugs, shows not "habitual lack of self-control" but it's opposite: a disciplined, successful effort to be drug-free. Any reasonable assessment requires the conclusion that Ms. Beltran took responsible and effective steps to promote the welfare of her pregnancy. See (Hartke Dec. ¶ 5); (Stancliff Dec. ¶ 11-12). How, then, could Ms. Beltran have become ensnared in the Act's provisions for state custody and control? The facts suggest a combination of

condescension, ignorance of established science, and retaliation. Ms. Beltran sought early prenatal care and exhibited both concern for her pregnancy and trust in the medical profession when she truthfully disclosed her medical history, inclusive of information concerning use of controlled substances. When Ms. Beltran described her treatment plan to a particular care provider, she was met with an immediate threat: adopt the State's preferred treatment or risk the consequences. In keeping with this threat, Ms. Beltran's commitment to her own regimen resulted in an immediate response, first in the form of heightened, at-home pressure and interrogation by county social worker Ms. Liddicoat, then by the rapidly escalating means of arrest and shackling at the hands of five law enforcement agents, detention, and civil incarceration. This sequence of events suggests that the Act authorized an extreme State response in the belief that it can make better health care decisions for women who become pregnant than each woman can make for herself, and moreover, that punishment is appropriate where the pregnant woman disagrees with the state's decision about her health. The Constitution does not permit states to "set a net large enough to catch all" and "leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." City of Chicago v. Morales, 527 U.S. 41, 60 (quoting United States v. Reese, 92 U.S. 214, 221 (1876)). Yet, on the facts of this case, it is evident that this is precisely what Wisconsin has done. For these reasons, the Act must be invalidated as void for vagueness.

(B) The Act is unconstitutional under standards of procedural due process.

The Act lacks proper procedural safeguards against wrongful deprivations of liberty. This violates the Fifth Amendment Due Process Clause. U.S. CONST. amend. V ("No person shall… be deprived of life, liberty, or property, without due process of law…"). Under Mathews v. Eldridge, "governmental decisions which deprive individuals of 'liberty' or 'property'

interests within the meaning of the Due Process Clause" must provide proper procedural safeguards against erroneous deprivations. 424 U.S. 319, 332 (1976). Because the amount of process due "is flexible and calls for such procedural protections as the particular situation demands[,]" id. at 334 (internal citation omitted), courts must employ a three-factor balancing test to determine the sufficiency of process in a given situation, considering:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Ms. Beltran steadfastly maintains, as detailed below, Part VI(1), *infra*, that the Act is unconstitutional in all circumstances as a violation of numerous fundamental rights. Nothing in this section should be construed to suggest that the existence of adequate procedures would somehow legitimize or render constitutional this extraordinary Act. For present purposes, Ms. Beltran simply argues that, in addition, the Act is unconstitutional on its face because it provides insufficient process in light of the liberty interests at stake.

(i) *The Act concerns private interests of the greatest importance.*

The Act permits arrest, detention, civil incarceration, and forced medical treatment. As previously noted, see Parts VI(1)(B)(i), (ii), & (v) , *supra*, the Act thus touches upon the fundamental rights to: be free from bodily restraint; privacy in one's body and confidential medical information; and determine one's own medical treatment. The private interest in this case is therefore the strongest possible, and should be considered to weigh very heavily in favor of substantial procedural protections under Matthews v. Eldridge. See Turner v. Rogers, 131 S. Ct. 2507, 2518 (2011) ("The interest in securing…freedom 'from bodily restraint,' lies 'at the

core of the liberty protected by the Due Process Clause.'") (internal citation omitted); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (same); United States v. Salerno, 481 U.S. 739, 750 (1987) (same); Ferguson v. City of Charleston, 532 U.S. 67, 76 (2001) (right of privacy, bodily integrity); Cruzan by Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 279 (1990) (right to choose own medical treatment, bodily integrity); Moore v. East Cleveland, 431 U.S. 494, 503-504 (U.S. 1977) (interest in family sanctity).

(ii) *The Act entails an unacceptable risk of wrongful deprivation.*

The risk of erroneous deprivation under the Act is extremely high. As previously noted, the standard by which a pregnant woman may become embroiled in this statute is vague. See Part VI(1)(A), *supra*; WIS. STAT. ANN. § 48.19(1)(cm). In the face of these risks, Wisconsin provides minimal procedural safeguards. The decision that a pregnant woman is a "substantial risk" to her pregnancy – a decision which permits her being taken into custody – need not be made by a neutral fact-finder; it can be made by an officer of law enforcement. WIS. STAT. ANN. § 48.19(1)(d)(8). Further, the Act does not guarantee counsel prior to determinations of custody and detention. This is in opposition to the holding of Lassiter v. Dept. of Social Servs. of Durham City, N.C., 452 U.S. 18, 26-27 (1981) (recognizing "an indigient's right to appointed counsel . . . where the litigant may lose his physical liberty if he loses the litigation.").

Perhaps most critically, however, is the very low burden of proof that the Act places between pregnant women and civil incarceration. Under Supreme Court law, the minimal burden of proof allowable under the Constitution in civil incarceration cases is "clear and convincing evidence." Foucha v. Louisiana, 504 U.S. 71, 81 (1992); United States v. Salerno, 481 U.S. 739, 750 (1987). The Court's decision in Salerno specifically emphasized the importance of this burden of proof in permitting a narrow exception to the general ban against

detention prior to criminal conviction: "In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." 481 U.S. at 750. Moreover, the type of evidence necessary to meet that burden was not open-ended in Salerno, but rather carefully defined. Id. at 742-43 ("The judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision.").

The Wisconsin Statute falls critically short of this standard. The State may arrest and detain pregnant women upon belief of "probable cause," WIS. STAT. ANN. §§ 48.205, 48.207, 48.213, or a "showing satisfactory to the judge," id. at § 48.193, or a law enforcement officer's belief in "reasonable grounds." id. Similarly, "probable cause" will suffice to authorize a social worker or judge to determine that continued detention pretrial is appropriate, id. at §§ 48.205(1m), 48.213(1)(b), 48.213(3). These are considerably lower burdens of proof than "clear and convincing evidence." Moreover, the Act provides no guidance as to the type of evidence that should be considered in reaching these low thresholds. "[N]o medical testimony is specifically required. No expert witness, for example, is required to establish the probability or magnitude of harm represented by the woman's behavior."[6] De Ville & Kopelman, Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy, 27 J.L. MED. & ETHICS at 337. This makes resulting decisions particularly untrustworthy, since, "[t]he legislation may allow decision-makers to base their judgments of 'substantial' and 'risk,' not on the complicated and sometimes equivocal medical and scientific evidence regarding maternal

[6] The Supreme Court's opinion in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), is instructive on this score. Though Daubert is best known for providing the standard by which expert testimony is determined to be admissible, the decision also held on the specific facts that expert scientific testimony was necessary to prove a causal link between *in utero* drug exposure and harm to a child after birth.

substance use, but rather on their view of what constitutes appropriate behavior for an 'expectant mother.'" Id. Furthermore, court proceedings under the Act do not even provide the basic evidentiary protections required in ordinary civil and criminal proceedings. Wis. Stat. Ann. § 48.299(4)(b) ("Neither common law nor statutory rules of evidence are binding;" "hearsay evidence may be admitted").[7]

In sum, then, the Act permits pretrial custody and detention on the basis of: probable cause determinations; by non-neutral fact-finders; in the absence of counsel; on the basis of personal opinions; regarding medical matters that may be completely unsupported by scientific evidence; and which are subject to court proceedings that do not adhere to the rules of evidence. The Act thus poses an unacceptable risk of liberty deprivations in clear violation of procedural due process rights as expounded in Salerno.

(iii) *The State's interest is extremely low.*

The State does not have an interest sufficient to save this Statute under Matthews v. Eldridge. As discussed in further detail below, Part VI(1)(C)(vii), *infra*, the State may have a legitimate interest in promoting healthy pregnancies, but this interest is not compelling from the moment of conception, and Wisconsin has not enacted legislation that is rationally related to that alleged interest in any event. As pertains to the present inquiry regarding procedural protections, the State has no interest whatsoever in conserving procedural protections at the cost of detaining pregnant women in physical custody.

[7] Proceedings described in this action occurred under the Act and should not be confused with civil commitment proceedings under Chapter 51, which provides significantly more procedural protections, and notably entails a "clear and convincing evidence" burden of proof. WIS. STAT. ANN. § 51.20 (13)(e). Also, the civil commitment statute guarantees that from the time of filing of a petition for civil commitment, the individual to be committed must be "represented by adversary counsel." Id. at § 51.20(3). Indeed, Chapter 48 makes explicit that all adults *except for pregnant women* may be detained in inpatient treatment *only* in accordance with Chapter 51. See id. at § 48.45 (1m)(b).

For these reasons, the Act is unconstitutional in violation of the Due Process Clause because it provides inadequate procedural safeguards in the face of drastic deprivations of liberty.

(C) The Act violates fundamental substantive due process rights.

The Constitution recognizes a number of substantive due process rights as fundamental. These rights cover broad terrain, protecting elements of what can alternatively be described as the values of liberty, privacy, self-determination, and personal autonomy. See Loving v. Virginia, 388 U.S. 1 (1976) (right to marry); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to have children); Meyer v. Nebraska, 262 U.S. 390 (1923) (parental rights to care and control of one's children, including right to impart useful knowledge); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (same); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to marital privacy and contraception). In 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), infringements of these core rights of personhood are subject to strict scrutiny. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (discussing "the respect the Constitution demands for the autonomy of the person"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992).

The Act infringes on several such rights. Specifically, the Act intrudes upon protection of (i) freedom from bodily restraint; (ii) selection and refusal of medical treatment; (iii) the decision to bear or beget children; (iv) election of abortion prior to viability; (v) confidential information and communications; and (vi) parental care and decision-making. In what follows, this Memorandum proceeds by explaining how each of these rights is violated. Thereafter, it turns to the question of whether the Act may nonetheless be justified under the requisite strict

scrutiny of review. Because Wisconsin invades protected areas without either a compelling interest or a narrowly tailored statute, this part concludes that the Act is invalid as in breach of substantive due process. Moreover, in the final analysis, the Act cannot be sustained under even the most permissive constitutional standard, rational basis review. This is for the reason that the Act is not rationally related to any legitimate government objective.

(i) *The Act violates the right to be free from bodily restraint.*

The right to be free from bodily restraint is perhaps the most central of the fundamental rights protected by principles of substantive due process. As the Supreme Court has recognized:

> [T]he Due process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the procedures used to implement them.' Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. 'It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.

Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (internal citations omitted). The constitutional protections afforded by this right apply regardless of whether the government seeks detention for criminal or civil purposes. Id., United States v. Salerno, 481 U.S. 739, 749-50 (1987); Vitek v. Jones, 445 U.S. 489, 492 (1980).

The Act unquestionably infringes on freedom from bodily restraint. As evidenced in Ms. Beltran's case, and as apparent on the face of the plain text, WIS. STAT. ANN. §§ 48.205, 48.207, the Act clearly endorses the placement of pregnant women in physical custody. It also explicitly authorizes restrictions on a pregnant woman's right to travel and associate with other persons. See id. § 48.213(a). Accordingly, it is invalid as in breach of the substantive due process right of freedom from bodily restraint unless it passes constitutional strict scrutiny review.

(ii) *The Act infringes on the right to bodily integrity and to choose one's own medical treatment.*

Individuals have a due process right to bodily integrity which encompasses the right to choose one's own medical treatment, and by extension, to refuse treatment that is unwanted. Cruzan by Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 279 (1990); Union Pacific Ry. v. Botsford, 141 U.S. 250, 251 (1891) ("No 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 and interference of others[.]"). Infringement of this right is the very *modus operandi* of Wisconsin's Statute. By its own terms, the Act wrests control over a pregnant woman's medical decision-making away from her, forcing her to submit to medical testing and treatment without her consent. See WIS. STAT. ANN. § 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 . . ."); id. at § 48.20 (4m) (authorizing the intake worker or other appropriate person to deliver the expectant mother to a hospital as defined in § 50.33 (2)(a) and (c) or physician's office); id. at §48.203 (3) (authorizing intake worker or other "appropriate person" to deliver the pregnant woman to a hospital or physician's office); id. at § 48.347 (2) (placing "the adult expectant mother under supervision" pursuant to conditions prescribed by the judge designed for the physical well-being of the unborn child and that may include such things as an order to participate in mental health treatment). Moreover, once a guardian ad litem is appointed to advocate for the best interests of the fertilized egg, embryo, or fetus, that individual may challenge, and must approve, all medical decisions by the pregnant woman. Id. at § 48.235(3); see also § 48.01 (the best interests of the . . . unborn child shall always be of paramount consideration.). The consequences to women's right to medical decision making, and even of the right to life, are demonstrated by the use of this authority in In re A.C., 533 A.2d 611

(D.C. 1987), *vacated*, 573 A.2d 1235 (1990). In that case, a guardian ad litem was appointed for a fetus and successfully argued for forced cesarean surgery, contributing to the death of the pregnant woman without saving the fetus.

Ms. Beltran's experience clearly demonstrates loss of rights to bodily integrity and medical decision-making. Ms. Beltran elected – and succeeded in executing – a course of treatment for self-perceived dependence on a controlled substance. The State of Wisconsin took issue with this, recommending, then insisting, then punishing her for declining the State's preferred treatment, instead.[8] When Ms. Beltran refused, as was her right, she was arrested and stripped of essential civil liberties. She has been subjected to non-consensual medical examinations and testing. This unabashed intrusion on the right bodily integrity and the associated right to elect – and refuse – medical treatment is invalid unless justified pursuant to strict scrutiny analysis.

(iii) *The Act is unconstitutional because it penalizes women for choosing to carry their pregnancies to term.*

The Act authorizes Wisconsin courts to control and detain women upon finding, under amorphous criteria, that they are pregnant and that their use of controlled substances or alcohol rises to a level permitting statutory action. Pregnant women at risk of such a finding face a grave choice: arrest, civil detention, and imposition of involuntarily medical treatment, or termination of a wanted pregnancy. Because both choices violate fundamental privacy rights, the ultimatum is unconstitutional. See New York v. United States, 505 U.S. 144, 176 (1992) (noting in a different context, "[a] choice between two unconstitutional[] [alternatives] is no choice at all.").

[8] In spite of the State's initial insistence that Ms. Beltran resume Suboxone under supervision of a physician, she has only been seen by a physician at the behest of the State on one occasion for a brief check-up since her placement in Casa Clare, (Beltran Dec. ¶ 33), and she is being detained in a program that does not provide and is not authorized to provide Suboxone or any other medication-assisted treatment. (Stanton Dec. ¶ 15).

Women have a fundamental right to procreate that includes the right to carry pregnancies to term. The fundamental right to privacy, including the right to procreate, has long been recognized as protected by the Fourteenth Amendment to the United States Constitution. In Paul v. Davis, the Supreme Court recognized a constitutionally protected interest in making independent decisions in "matters relating to marriage, procreation, conception, family relationships, and child rearing and education." 424 U.S. 693, 713 (1976). The Court has specifically recognized the right to procreate as a fundamental civil liberty. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). See also Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) ("[t]he decision whether or not to beget or bear child is at the very heart" of the right of privacy); United States v. 12 200-Foot Reels, 413 U.S. 123, 127 n.4 (1973) (constitutional right of privacy "encompasses the intimate medical problems of family, marriage, and motherhood"); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (recognizing "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child") (emphasis omitted). This right is violated when a woman is penalized for the decision to remain pregnant and go to term. 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 in education 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.").

The Act does just that, penalizing certain women for the decision to remain pregnant. Specifically, the Act provides that women who are deemed to fall within reach of the statutory language may be subjected to the penalties of arrest; detention; resulting loss of employment; isolation from personal support networks, including family, friends, and chosen medical practitioners; the indignity of trial for abuse and/or neglect; imposition of involuntary medical treatments that have no necessary basis in medical research or evidence; and possible loss of custody upon childbirth. 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).

Ms. Beltran's case is demonstrative. Had she decided to terminate her pregnancy after her encounter with either physician's assistant Ms. Weiss or county social worker Ms. Liddicoat, Ms. Beltran would not have been arrested, shackled, brought to court, detained in jail, moved to an involuntary in-patient facility two hours from home, and confined to the present day, resulting in alienation from family and friends, and likely loss of employment

But the right to carry a pregnancy to term is also breached when a woman terminates her pregnancy in response to State pressure. Casey, 505 U.S. at 859 (citing with approval circuit court opinions finding state-compelled abortion unconstitutional under Roe); 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 County 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.")

Wisconsin places just such pressure to abort on pregnant women who would otherwise face the penalties noted above. Again, Ms. Beltran's case is evidentiary. Upon being warned by Ms. Liddicoat of pending court intervention should she not obey state medical prescriptions, Ms. Beltran responded, "I should just have an abortion." (Beltran Dec. ¶ 3). A few days later, when the situation had deteriorated rapidly (subsequent to Ms. Beltran's arrest, shackling, incarceration, court hearing without counsel, and civil incarceration), Ms. Beltran told her mother by phone, "I would rather have an abortion" than endure further penalty. (Id. at ¶ 23).

Because Wisconsin law thus forces women to choose between alternatives which both infringe on a fundamental right, the law must be reviewed under the strictest scrutiny. See Carey, 431 U.S. at 686.

(iv) *The Act unconstitutionally denies the right to choose to have an abortion.*

Wisconsin's Statute also infringes on the fundamental right to privacy by imposing an undue burden on the right to abortion. In Planned Parenthood v. Casey, the Supreme Court held that state regulation must not impermissibly burden a woman's ability to obtain an abortion in the pre-viability phase of pregnancy. 505 U.S. at 874 ("[W]here 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."). 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.

To grant unqualified jurisdiction over a woman while she is pregnant is to place a substantial obstacle in the path of that woman should she seek abortion. That fact is plain from Ms. Beltran's case. From the time she was arrested, she has been detained continuously pursuant

to court order. She has had no access to abortion services while in state custody, and was not permitted to leave her place of detention for the first 28 days. Even now, she is allowed temporary leave only upon discretionary approval of a filed request. Whether she would be permitted leave to attain an abortion is uncertain, but must be considered doubtful since the entire purpose of her detention is, at least nominally, to give authority to the state, partially through appointment of a guardian ad litem who is legally bound to advocate for the best interests of the fertilized egg, embryo, or fetus as though it were separate from the pregnant woman. Indeed, at the time of her initial detention hearing when she was 12 weeks pregnant, Ms. Beltran pointedly asked the District Attorney, Guardian Ad Literm, County Social Worker, and presiding Commissioner if she didn't have the right to an abortion. Her question was met with silence, and she has been detained ever since. (Beltran Dec. ¶ 22); (Fritche Dec. ¶ 14). Indeed, the Act is itself silent as to if and how a woman may obtain an abortion once proceedings against her are initiated under § 48.133. Consequently, Ms. Beltran's case is not unique.

By permitting detention of pregnant women without any guidance as to whether and how abortion may be obtained; by appointing guardians ad litem who must act in the best interest of fertilized eggs, embryos and fetuses and presumably oppose efforts to end a pregnancy; and by making access to an abortion subject to a court order – the Act creates not so much a "substantial obstacle" as an all-out bar to abortion. Looking at appellate court decisions both before and after Casey, it is clear that by making it impossible or virtually impossible for a pregnant woman to obtain an abortion once she is subject to the Act, the Act creates an undue burden and violates the right to choose to have an abortion. See Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988) (finding violation of the Eighth Amendment – specifically, deliberate indifference to serious medical need – in a

prison's policy of providing abortion only after court-ordered release); Zbaraz v. Hartigan, 763 F.2d 1532, 1537 (7th Cir. 1985) (finding a mandatory waiting period of 24 hours to be "a direct and substantial burden on women who seek to obtain an abortion."); McCormack v. Hiedeman, 694 F.3d 1004, 1014-15 (9th Cir. 2012) (finding that imposing criminal penalties on pregnant women themselves for having an illegal 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 a regulation of abortion providers which created an undue burden by forcing all women to leave the state to obtain abortion services).

The Act is thus subject to strict scrutiny on this basis, as well – laws which violate Casey's "undue burden" rule are subject to this most stringent constitutional standard because they are in breach of the right to privacy.

(v) *The Act invades privacy rights to medical information and communications with health care providers.*

The Supreme Court has repeatedly assumed, without specifically enunciating, a right of informational privacy in certain "personal matters." National Aeronautics and Space Admin. v. Nelson, 131 S.Ct. 746, 756-57 (2011); Nixon v. Administrator of General Services, 433 U.S. 425, 457 (1977); Whalen v. Roe, 429 U.S. 589, 599-600 (1977); see also Big Ridge, Inc. v. Federal Mine Safety and Health Review Com'n, 715 F.3d 631, 648 (7 th Cir. 2013) ("Medical records can contain some of the most private information about a person. Any scheme that puts those records in the hands of a stranger, even a government agency, is a serious matter."). More specifically, the Court has determined in the Fourth Amendment context that individuals have a reasonable expectation of privacy in their bodily fluids for purpose of drug testing and that women who become pregnant have no less of such an interest than others. Ferguson v. City of Charleston, 532 U.S. 67, 76 (2001) ("The reasonable expectation of privacy enjoyed by the

typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent."); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). This body of precedent clarifies that operation of the Act violates privacy rights in a manner requiring strict scrutiny.

Ms. Beltran is being held based on reports made by health care providers regarding the results of urinalysis confirming that she had used Suboxone. Ms. Beltran did not consent to the disclosures of her private medical information to law enforcement officials or to any other third parties.

The Act predicates court jurisdiction over pregnant women on proof pertaining to their pregnancy and some allegation of use of an unspecified quantum of drugs and alcohol. Specifically, the Act links jurisdiction to evidence that a pregnant woman "habitually lacks self-control" in the use of such substances in a manner allegedly affecting a fertilized egg, embryo, or fetus. Once under the court's jurisdiction, State authorities pursuant to the Act are required to "keep informed concerning the conduct and condition of a[n]. . . expectant mother of an unborn child;" in furtherance of this duty, the Act places no limit on the medical and personal information to which those authorities are apparently entitled. WIS. STAT. ANN. § 48.08(1); see also, id. at §48.069(a) (detailing "supervision" of pregnant women). Necessarily, evidence under the ambiguous standard for initial application of the Act and ongoing proceedings pursuant to it depend on private medical information about pregnant women.

Moreover, as evidenced by the facts in Ms. Beltran's case, operation of the Act relies on medical practitioners to uncover this information. Without consent, medical professionals receiving highly personal medical information in confidence are to turn that information over directly to law enforcement or individuals and agencies working under their direction.

Furthermore, since the Act provides no other means by which to determine drug and alcohol use, it must be assumed that examination by and communication with health care practitioners is the State's primary means of data collection, excepting only perhaps the criminal justice system. Moreover, once subject to court jurisdiction, it would appear that a guardian ad litem and others may have continuous, unfettered access to the pregnant woman's medical records.

The proof relied upon by the State – testing of bodily fluids and personal communications reported and recorded in medical files -- is, without question, "personal matters" implicating the right to privacy. See Nixon v. Administrator of General Services, 433 U.S. 425, 457 (1977). More specifically, precedent is clear that the right to bodily integrity protects against drug tests through urinalysis – this protection is constitutional, and state intrusions are therefore subject to strict scrutiny. Ferguson, 532 U.S. at 76; Skinner, 489 U.S. at 626-27.

As to the constitutional right of privacy in medical records, case law establishes not a bright line rule but a standard. The Supreme Court has presumed without squarely deciding the existence of this right. Nixon, 433 U.S. at 457; Whalen, 429 U.S. at 599-600. The Seventh Circuit, however, has suggested a multifactor analysis to determine when the privacy interest in one's medical records rises to the level of a constitutional right, listing:

> [T]he type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access.

Big Ridge, 715 F.3d at 650. Without exception, these factors support the presence of a fundamental right here. The medical records requested may contain information about pregnancy as well as drug and alcohol use which is personal and potentially damaging if

exposed. Repercussions for exposure could include loss of employment or employment prospects and social stigma, not to mention the penalties endorsed by the Act itself. The Act expressly contemplates arrest, detention, civil incarceration, and possible loss of child custody immediately upon childbirth. See WIS. STAT. ANN. § 48.235(4)(7). Operation of the Act in this manner is certain to chill communications between pregnant women and their prenatal care providers, resulting in suboptimal care in direct contravention of the Act's stated purpose. As the United States Supreme Court recognized, a "confidential relationship" is necessary for "successful [professional] treatment," and "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." Jaffee v. Redmond, 518 U.S. 1, 10 (1996) (upholding confidentiality of mental health records).[9]

Moreover, the Act establishes no procedures for discovery or safekeeping of such records – their security is, like enforcement of the Act generally, apparently left to the discretion of individual state actors. Finally, whether the Act is supported by public interest is a question addressed at the end of this section of Ms. Beltran's Memorandum of Law. For present purposes, Ms. Beltran very much contests that the people of Wisconsin have any interest in using state coercion or threats of same to promote fetal health. In sum, then, the Big Ridge factors universally suggest a fundamental right to privacy in medical records in the context of the Act.

As a result, operation of the Act requires invasion of the right to privacy against disclosure of personal matters. Accordingly, the Act must be subjected to strict scrutiny review.

(vi) *The Wisconsin Statute violates rights to family relationships.*

Proceedings under this Statute create the basis for determining, while a woman is still pregnant, her right to parent and her future child's right to be parented by her. Parents have a

[9] See also Ferguson, 532 U.S. at 78 n.14. ("In fact, we have previously recognized that an intrusion on that expectation may have adverse consequences because it may deter patients from receiving needed medical care.") (internal citations omitted).

fundamental right to raise their children without state interference. Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest . . . of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court."); Moriarty v. Bradt, 177 *N.J.* 84, 101 (2003) ("The right to rear one's children . . . has been identified as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment."). Moreover, Supreme Court jurisprudence recognizes "the sanctity of the family" as a unit. 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."); see also, Santosky v. Kramer, 455 U.S. 745, 753 (1982) (noting an "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"). Collectively, this jurisprudence stands for the proposition that, as in the case of other fundamental rights, state action is subjected to strict scrutiny when it threatens to come between parents and their children.

Wisconsin law comes between new mothers and their newborns by attacking parental fitness during pregnancy. Sections 48.133, 48.235, and 48.415 achieve this result in concert. Whereas § 48.133 entails collection of proof to determine a pregnant woman "habitually" reckless in the use of drugs or alcohol in a manner deleterious to fetal health, §§ 48.235 and 48.415 permit evidence from these proceedings to be used against a pregnant woman in future *and even contemporaneous* custody proceedings. See § 48.235(a)(3) (Guardian ad litem may be reappointed and may petition for termination of parental rights); § 48.415(2)(a) (permitting termination of parental rights *during* pregnancy contingent in part on "the level of cooperation of

the parent or expectant mother"). This unprecedented interference with parental rights and family sanctity during pregnancy could be justified, if at all, only under strict scrutiny review.

(vii) *The Act cannot be justified under any standard of constitutional review.*

State action that trammels fundamental rights is unconstitutional unless it can be justified under strict scrutiny review. Clark v. Jeter, 486 U.S. 456, 461 (1988). To survive this exacting standard, Wisconsin would need to demonstrate that the Act is "'narrowly tailored' to achieve a recognized 'compelling' government interest[.]" Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 720 (2007) (internal citation omitted). Analysis of the Act reveals, however, that it cannot be justified even under the most lenient constitutional standard, rational basis review. This is because the Act lacks rational relation to any legitimate government interest. Heller v. Doe by Doe, 509 U.S. 312, 320 (1993) (defining rational basis review in the Equal Protection context as the search for a rational relation to a legitimate governmental objective).

(a) The Act is not justified by a compelling state interest.

Giving the Act the benefit of the doubt, it suggests a state interest in the health and development of fertilized eggs, embryos, and fetuses. The Supreme Court made explicit in Casey that even in the context of abortion states do not have a compelling interest in fetuses until after pregnancy reaches the stage of viability. 505 U.S. at 870-71. The Act operates without regard to any particular stage of pregnancy. Accordingly, even assuming the state interest recognized in Casey has any bearing outside the abortion context, the State does not have a compelling interest in implementation of the Act, and for this reason alone it must fail strict scrutiny review.

Casey does recognize, however, that, in the context of decisions regarding abortion, states have some "legitimate interest in potential life" without regard to the stage of pregnancy. Id. at 871 (internal citation omitted). Because this interest is not compelling, the Supreme Court has never recognized it as sufficient to intrude upon any fundamental rights of women. If the interest in fertilized egg, embryo, or fetal health pre-viability permits any state action at all, it must be action that does not deprive women of their rights, and must furthermore be rationally related to the governmental objective of promoting the health of fertilized eggs, embryos, and fetuses.

(b) The Act is not rationally related to any governmental objective.

The Act has no rational connection whatever to any legitimate government interest. In purpose and effect, the Act isolates pregnant women with supposed drug and alcohol problems for state jurisdiction, arrest, custody, and medical control. As a response to concerns for fetal health, this is irrational.

The relevant science consistently finds that concern over drug and alcohol ingestion during pregnancy is unhinged from reputable scientific analysis and research-based data. Research overwhelmingly finds that risks to pregnancy associated with drug use are not unique, substantial, or certain, and that those conditions that may sometimes occur as a result of prenatal exposure to opiates are transitory and treatable with no long-term consequences. (Frank Dec. ¶ 10); (Stancliff Dec. ¶ 8-9); (Imseis Dec. ¶ 7). Research finds that a number of more common behaviors are equally or potentially more deleterious to pregnancy, including stress, cigarette smoking, poor nutrition, and poverty. (Frank Dec. ¶¶ 15-16).

Moreover, 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. (Frank Dec. ¶ 17); (Hartke Dec. ¶¶ 7-8); (Imseis Dec. ¶ 8); (Schauberger Dec. ¶ 9-13). Among the organizations and individuals in this consensus are leaders in the care and treatment of pregnant women, including the American College of Obstetricians and Gynecologists.[10]

The emphasis on drug and alcohol use during pregnancy thus comes not from the scientific community, but rather from sensationalist media and the "War on Drugs." See, e.g., Craig Reinarman & Harry G. Levine, CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE (Craig Reinarman & Harry G. Levine eds., 1997); Drew Humphries, CRACK MOTHERS: PREGNANCY DRUGS, AND THE MEDIA (1999) . That Wisconsin specifically targets drug and alcohol use suggests either that it is an unwitting perpetrator of misinformation, or that its interest is less in promoting fetal health than in establishing precedent for controlling women who become pregnant. See (Schauberger Dec. ¶ 13).

Moreover, the Act is highly irrational in its proposed method of "safeguarding" the health of fertilized eggs, embryos, and fetuses. The Act authorizes appointment of a guardian ad litem as the independent representative of the fertilized egg, embryo, or fetus, WIS. STAT. ANN. § 48.235, permitting the guardian ad litem to control and punish pregnant women in ways that are contrary to accepted standards of addiction treatment and medical ethics, and which actually increase risks to pregnant women and the fertilized eggs, embryos, and fetuses that they carry and sustain. (See Frank ¶¶ 13-15); (Hartke ¶ 7); (Imseis Dec. ¶ 8); (Stancliff ¶¶ 12, 21); (Schauberger Dec. ¶ 13).

[10] 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 Obstetrics & Gynecology 200, 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.") (emphasis added). (Hartke Dec. ¶ 6-8); (Ex. 29).

In the case of Ms. Beltran, this effect is striking. Ms. Beltran's health, well-being, and the state of her pregnancy were initially in excellent condition. She became drug free, her pregnancy was healthy as reported by all medical examiners, she was surrounded by a support network of family and friends, and had regular access to prenatal care. By contrast, upon arrest, Ms. Beltran has been isolated from her support network and medical care providers and given no direct access to prenatal medical care by State custodians. Inexplicably, despite assertions that Ms. Beltran needed to be prescribed Suboxone for continued, supervised use, she has been ordered detained at an institution that does not provide such treatment. (Stancliff Dec. ¶¶ 13-15). Furthermore, it should go without saying, the process of arrest, shackling, court proceedings, lack of legal counsel, shuffling to and from various institutions, and prolonged civil detention has been enormously stressful to Ms. Beltran. See (Frank Dec. ¶ 15). In response, she has resorted to smoking cigarettes in a higher quantity as a coping mechanism. (Beltran Dec. ¶ 39). The negative impact to her pregnancy of this stress and nicotine exposure is significant and the direct result of the State's coercive intervention.

In this manner, it is evident that the Act is not rationally related to any legitimate governmental objective. To the contrary, as previously noted, it is either a pre-textual power-grab with regard to the autonomy of pregnant women, represents popular misconceptions of the scientific reality, or both. In any event, the Act cannot survive any level of constitutional review.

(D) The Act is in violation of Equal Protection.

The Act contains numerous provisions that apply only to "expectant mothers," giving Wisconsin family courts direct jurisdiction to supervise pregnant women from the moment they conceive. In numerous respects, this effects a classification on the basis of gender, a classification calling for heightened scrutiny under the Equal Protection Clause. U.S. v.

Virginia, 518 U.S. 515, 533 (1996); Mississippi Univ. for Women v. Hogan, 457 U.S. 718, 724 (1982). In particular, by asserting a state jurisdiction over woman who become pregnant and are alleged to have used alcohol or controlled substances, the State draws myriad distinctions in the treatment of the sexes that cannot be justified.

One example can be found in the fact that, under § 48.133, women must be ever vigilant in determining whether they are currently pregnant. Otherwise, they risk consuming drugs or alcohol after conception and thereby becoming subject to the Wisconsin Statute with its attendant losses of liberty. Men, by contrast, need never worry that by procreating and using alcohol and drugs they might be deprived of constitutional rights. Alcohol use is legal in Wisconsin, and while the State criminalizes possession and sale of controlled substances, neither use nor dependency alone carries any penalty. See WIS. STAT. ANN. § 961.41 (criminalizing possession, but not use).[11]

The Act also creates divergent rules of medical privacy and doctor-patient confidentiality along gender lines. From the moment of pregnancy, Wisconsin law transforms a woman's prenatal and other health care into an arm of law enforcement; once subject to the law, intake workers and guardians ad litem have full access to private medical information and more. Medical information, including confidences shared with health care providers, results of intimate medical exams, and test results are shared between medical personnel, police, the district attorney's office, county social workers, family court judges, and so on, without obstacle. By contrast, the medical files of expectant fathers remain confidential. Men are protected though any number of facts pertaining to their medical health – including drug use, dependency or

[11] Previously, Wisconsin law stated that, ""No person shall take or use narcotic drugs habitually or excessively or except in pursuance to a prescription for permitted use as prescribe in this chapter," id. at § 161.01 (14); Browne v. State, 131 N.W.2d 169, 169 (Wis. 1964), but this language was repealed in 1951. WIS. CONST. ART. I, § 11, case note 136 (2013).

addiction, mental illness, genetic disorder – that might reasonably be expected to negatively impact the health of the pregnant woman and the developing fetus or infant after childbirth.

The Act also creates vastly different rules regarding consent to medical tests and treatment. Under the Act, expectant mothers but not fathers may be required to undergo medical exams and treatment without their consent. This form of intervention is not limited to the context of suspected use of drugs and alcohol. According to the Act, a guardian ad litem, once appointed, is required to act on behalf of the best interests of the fertilized egg, embryo, or fetus in general, and to subject every decision the pregnant woman makes to scrutiny and potential challenge.

Wisconsin also provides divergent levels of protection with regard to termination of parental rights. Under § 48.235, a guardian ad litem may be appointed to represent the interests of a fertilized egg, embryo, or fetus as against the putative mother. No such assignment is contemplated with respect to the expectant father with regard to his parental rights. Additionally, that Section specifically allows a guardian ad litem to petition for termination of parental rights on the basis of evidence and determinations pertaining to court proceedings at which a pregnant women need not be represented by counsel. By contrast, fathers are required to be represented by counsel in any proceedings relative to termination of custody or parental rights. See WIS. STAT. ANN. § 48.23(2).

The Act also presumes without scientific support that only the actions and conditions of expectant mothers, and not of expectant fathers, can affect pregnancy and pregnancy outcome. This is not so. See International Union v. Johnson Controls, 499 U.S. 187, 198 (1991); Cynthia R. Daniels, EXPOSING MEN AND POLITICS OF MALE REPRODUCTION (2006).

Finally, the Act codifies what can only be described as a sweeping statement of condescension and disregard for the personhood of pregnant women which can be found nowhere in all of Wisconsin law with respect to treatment of men. No provision or set thereof in Wisconsin law so completely strips men, whether expecting or not, of their most basic liberties, including freedom from bodily constraint, rights pertinent to selection of medical treatment, rights to due process in advance of commitment, and so forth.

In this manner, Wisconsin law distinguishes on the basis of gender in violation of the Fourteenth Amendment. Such discrimination requires invalidation of the Act unless it is substantially related to an important government interest. As noted above in Part VI(1)(C)(vii), *supra*, the Act in question is not rationally related to any legitimate governmental objective. As a result, heightened scrutiny mandates finding that the Act is unconstitutional. In addition, it bears noting that, however the classifications of the Act are defined, its failure to survive rational basis review means that it is unconstitutional in violation of Equal Protection regardless.

(E) The Act is in breach of the Fourth Amendment.

The Act is in violation of the Fourth Amendment right "against unreasonable searches and seizures[.]" U.S. CONST. amend. IV. Under the Fourth Amendment, individuals may not be subjected to government search or seizure absent a warrant or probable cause, unless a narrow "special needs" exception applies.[12] Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080-81 (2011). In the case of the Wisconsin law at issue, reporting medical personnel must be considered state actors in light of the specific operation of the Act. Moreover, individuals have a legitimate privacy interest in bodily fluids taken for the purpose of drug testing, so drug-testing is a search that

[12] The Supreme Court also recognizes an exception to the warrant and probable cause requirements in the case of administrative searches. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2081 (2011). Because the Act plainly does not concern administrative searches, that exception is not discussed in this part.

requires a warrant, probable cause, or "special needs" justification. Because none of the above is present in the case of the Act, the Act is void in violation of the Fourth Amendment.

(i) *Operation of the Act transforms medical personnel providing prenatal care into state actors.*

In certain circumstances, private individuals must be treated as state actors for constitutional purposes. This is true when private conduct is "so entwined with governmental policies or so impregnated with a governmental character[.]" Evans v. Newton, 382 U.S. 296, 299 (1966); accord Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528 (1967) (the Fourth Amendment right "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government *or those acting at their direction*.") (emphasis added). The ultimate question is "the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.'" Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614 (1989) (internal citations omitted). Government compulsion of private party action is not necessary or determinative of this inquiry. Id., at 615.

Enforcement of the Act depends almost entirely on medical personnel. From the initial determination giving the Wisconsin court jurisdiction over a pregnant woman, § 48.133, to the standard permitting that she be taken into custody, § 48.193, to the decision that she may be civilly detained, § 48.205(d), the Act turns on proof that the pregnant woman has shown "habitual lack of self-control" in the use of drugs and alcohol in a manner deleterious to pregnancy. As a theoretical matter, it is obvious that the State is reliant on medical reporting for such proof. Law enforcement is unlikely to gather substantial evidence on this front because drug use in Wisconsin, unlike possession, is not illegal. Furthermore, arrests for drug offenses would not necessarily yield any direct proof of use, particularly not sufficient use to establish "*habitual*

lack of self-control," whatever that phrase may be understood to mean. So it must be concluded that the relevant proof of drug or alcohol use is to come from health care providers of pregnant women.

Ms. Beltran's case bears this out. Ms. Beltran met with a physician's assistant and nurse at a prenatal checkup on July 2, 2013. (Ex. 3). At that time, she was urged to begin a Suboxone prescription under physician supervision. Ms. Beltran declined, and immediately after leaving the facility, she was recalled for the purpose of submitting to urinalysis to test for the presence of drugs. (Beltran Dec. ¶ 9) As a result of this data collection and its subsequent disclosure to third parties, Ms. Beltran was visited at home by a county social worker, arrested, and taken into custody by law enforcement within a matter of days. In precisely this manner, under the Act, medical personnel and law enforcement work seamlessly in tandem to collect evidence, initiate state proceedings, and effectuate arrest and civil detention of pregnant women. For this reason, private medical personnel must be treated as state actors in this instance.

(ii) *Wisconsin violated Ms. Beltran's rights under the Fourth Amendment.*

In order to claim protection under the Fourth Amendment, an individual must first show a "legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143 (1978). The Court has held that a legitimate expectation of privacy exists when the individual seeking Fourth Amendment protection maintains a "subjective expectation of privacy" in the area searched that "society [is] willing to recognize ... as reasonable." California v. Ciraolo, 476 U.S. 207, 211 (1986).

Individuals have a reasonable and legitimate expectation of privacy in their bodily integrity, an expectation that includes drug testing. See Part VI(1)(C)(v), *supra*; Missouri v. McNeely, 133 S. Ct. 1552, 1558 (2013) (calling drug-testing an "invasion of bodily integrity

[that] implicates an individual's most personal and deep-rooted expectations of privacy.") (internal citation omitted) ; see also Skinner, 489 U.S. at 617 ("it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable.").

Individuals also have a reasonable and legitimate expectation of privacy in their medical records. As previously discussed, see Part VI(1)(C)(v), *supra*, the Seventh Circuit balancing test employed in Big Ridge suggests a constitutional right to the privacy of a pregnant woman's medical records under the circumstances of the Act. 715 F.3d 631, 649-50 (7th Cir. 2013); see also Doe v. Broderick, 225 F.3d 440, 451 (4th Cir. 2000) (noting that a pregnant woman had a reasonable expectation of privacy in her medical records because "medical treatment records contain intimate and private details that people do not wish to have disclosed, expect will remain private, and, as a result, believe are entitled to some measure of protection from unfettered access by government officials.").[13]

For these reasons, Ms. Beltran had a legitimate expectation of privacy in her bodily integrity and medical records. She was therefore entitled to protection against search of these areas absent a judicial warrant, probable cause, or "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable." Griffin v. Wisconsin, 483 U.S. 868, 873 (1987). In this case, Wisconsin procured no warrant for access to drug testing or medical records, so the only question is whether the relevant statute is justified by "special needs."

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[13] Indeed, it was this expectation of privacy that led Ms. Beltran to speak openly with her doctors about her medical history and to permit them to conduct a drug test. Without question, one of the more invidious elements of The Act is its apparent reliance on and exploitation of this mistaken assumption of confidentiality. See Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001) (finding an intrusion of privacy "far more substantial" where there is "misunderstanding about the purpose of the test or the potential use of the test results").

The Supreme Court's opinion in Ferguson v. Charleston, is instructive here. 532 U.S. 67 (2001). That decision clearly held that a state hospital's performance of a diagnostic test to obtain evidence of a patient's condition or conduct for law enforcement purposes could not be classified as a "special needs" search. Id. at 83. Even if the hospital's ultimate purpose was to protect the health of both pregnant woman and pregnancy, the Court reasoned, this purpose was not determinative, given that the clear and immediate purpose of the searches "was to generate evidence *for law enforcement purposes*." Id. (emphasis in original). Here, despite the fact that the Act is part of Wisconsin civil law, it anticipates and requires collaboration between health care professionals, law enforcement officials, and agencies working in cooperation with law enforcement officials. Id. (citing "the extensive involvement of law enforcement officials at every stage" as a major reason for the decision that "this case simply does not fit within the closely guarded category of 'special needs.'"). And, indeed, this form of collaboration is exactly what happened in Ms. Beltran's case.

For these reasons, Wisconsin law does not fall within the narrow "special needs" exception, and search of Ms. Beltran required either a warrant or probable cause. Since both of these hypothetical justifications were absent, operation of the Act against Ms. Beltran was in violation of the Fourth Amendment.

(F) Operation of the Act was in violation of Ms. Beltran's Fifth Amendment right against self-incrimination.

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that law enforcement cannot initiate custodial interrogation without first obtaining a waiver of Miranda rights. To be informed of one's Miranda rights, "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id. at 445. The Court

defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 445. Although the language in Miranda suggests that only law enforcement officers can subject a person to custodial interrogation, since that initial decision, courts have found that a "custodial interrogation" may be conducted by a broad range of government agents and private actors performing law enforcement functions. See, e.g. United States v. Garlock, 19 F.3d 441 (8th Cir. 1994).

For the reasons elaborated above, see Part VI(1)(E)(i), *supra*, medical personnel at West Bend St. Joseph's Hospital – who took Ms. Beltran's medical history, recalled her to the hospital for urinalysis, and presumably turned over Ms. Beltran's medical records to law enforcement – were acting as agents of law enforcement. In essence, the Act transformed Ms. Beltran's prenatal care visit on July 2, 2013 into a station house investigation. Questioning by medical personnel was therefore custodial interrogation which required Miranda warnings to comply with the Fifth Amendment right against self-incrimination. This point is underscored by the Seventh Circuit opinion in United States v. D.F., 63 F.3d 671 (7th Cir. 1995). In that decision, the court reasoned that Miranda warnings are required when medical personnel serve a "dual" role:

> If it can be reasonably concluded that the caregiver goes beyond these accepted medical roles and affirmatively takes on the role of delivering someone who is in his care and custody to the prosecutor, the district court is entitled to determine that the caregiver has changed his role substantially. As the district court recognized, the most obvious example of this dual prosecutorial/healer role is when there is a specific arrangement between law enforcement and medical personnel to collaborate in the prosecution of an individual. If those efforts are the cause of the confession, the Fifth Amendment's Due Process Clause is certainly implicated. Even if there is no explicit agency arrangement, the medical staff of a state facility can nevertheless decide that its cooperation in the prosecution of patients is part of its responsibility, and can include such a goal among its activities. In such a circumstance, the absence of a formal agreement with prosecutorial authorities cannot be deemed outcome determinative.

Id. at 684; accord Ferguson, 532 U.S. at 69 (noting that when medical personnel "undertake to obtain such evidence from their patients for the specific purpose of incriminating those patients, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.").

The Seventh Circuit decision's focus on state hospitals is attributable to the facts of that particular case, and is in any event not controlling, given the precedential authority that private medical personnel may function as state actors. Accordingly, Ms. Beltran's case falls squarely within the ambit of D.F.: Ms. Beltran made statements concerning her drug use and complied with a drug test on the reasonable but mistaken assumption that such information would be kept privileged and confidential. To the contrary, her caretakers promptly turned her medical file over to law enforcement, including the local district attorney, precisely as in D.F.. Ms. Beltran's healthcare providers thus served a "dual" role requiring Miranda warnings prior to any questioning or discussion related to Ms. Beltran's prior drug use. Since no warnings of any kind were provided, application of the Act against Ms. Beltran infringes on her rights under the Fifth Amendment.

(G) Ms. Beltran's Sixth Amendment right to counsel has been violated.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for [her] defense." U.S. CONST. amend. VI. The right to counsel attaches at all critical stages once adversarial judicial proceedings have been commenced. Maine v. Moulton, 474 U.S. 159, 170, (1985). The Supreme Court has also held that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." Id. at 176. Accordingly, states infringe on the right to counsel by

subjecting an accused to questioning by a covert government informant after initiation of adversarial proceedings. United States v. Henry, 447 U.S. 264 (1980).

Ms. Beltran's right to counsel was violated because the Act is a criminal statute in design and effect. Accordingly, Ms. Beltran had the right to an attorney at all critical stages once proceedings against her were initiated. This right was violated when medical personnel acted as covert government agents and questioned her in the absence of counsel. It was violated again when she was questioned by social worker Ms. Liddicoat and then deprived the right to counsel at a preliminary proceeding that resulted in her detention and civil incarceration.

(i) *The Act is a criminal law in purpose and effect.*

The question of whether an act is civil or criminal is one of statutory construction. Kansas v. Hendricks, 521 U.S. 346, 361 (1997). In this analysis, "the legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character." Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994). Specifically, courts reject a legislature's alleged intent where a party challenging the Act provides the "clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention." United States v. Ward, 448 U.S. 242, 248-249, (1980). In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) the Court set forth a seven-factor test to guide this analysis, emphasizing consideration of:

> (1) Whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69. While the Kennedy factors are neither "exhaustive nor dispositive," Ward, 448 U.S. at 249, their analysis in the present case is telling.

First and foremost, Wisconsin law imposes arrest, detention, and trial. These are the hallmarks of criminal proceedings and punishment, and thus weigh heavily under the first two Kennedy factors. With regard to the third factor – a scienter requirement – the Act triggers proceedings against a pregnant woman only upon a finding of "habitual lack of self-control," a vague requirement that belies the mental state of recklessness. Under the fourth Kennedy factor, Wisconsin's Statute is doubtless designed to punish and deter. This, too, is evident from the sort of penalties imposed, those being the type most commonly employed by the justice system for purposes of retribution and deterrence. In the law's effort to control the bodies of pregnant women, it also focuses on alleged drug and alcohol use, areas that are traditional targets of the criminal justice system, and which are popularly considered *malum in se* in the context of pregnancy.

Relatedly, Kennedy factor (5) is also applicable in the sense that possession and sale of drugs are indeed already criminalized. The Act works in tandem with those regulations to criminalize use, though only in the case of women. Indeed, because of statutory vagueness, as demonstrated in this case, use prior to pregnancy provides grounds for arrest. Factor (6) – whether an alternative purpose is assignable – might initially seem to weigh against classification as criminal. The Act, after all, is nominally designed to promote the health of fertilized eggs, embryos, and fetuses. But the science simply doesn't support such a purpose. (Ex. 29); (Frank Dec. ¶ 14-16); (Schauberger Dec. ¶¶ 9-13). And moreover, whatever validity there may be to the state's proffered interest, the proposed means of addressing it is clearly excessive and even counterproductive. See Part VI(1)(C)(vii)(b), *supra*. All available evidence suggests that arrest,

detention, and civil incarceration are completely unnecessary to promote fetal health in the cases which the Act envisions, and to the contrary, these penalties are likely to promote stress that is known to impact pregnancy negatively. Id. As a result, consideration of Wisconsin's statute under the Kennedy factors leads inevitably to the conclusion that Wisconsin has endeavored not to protect pregnancy against health risks, but rather to punish pregnant women for alleged alcohol and substance use.

(ii) *Operation of Wisconsin law has deprived Ms. Beltran of the right to counsel.*

Ms. Beltran's right to counsel was violated when medical personnel, working in collaboration with and at the direction of law enforcement, deliberately elicited information from her about prior drug use. In United States v. Henry, the Supreme Court held that an individual's Sixth Amendments rights are violated when a "government informant" solicits information from the accused for purposes of relaying that information to law enforcement to be used in a formal adversarial proceeding. That formulation of events describes Ms. Beltran's path to incarceration precisely. Here, Ms. Beltran's medical practitioners acted as government informants in a manner analogous to the prison informants in Henry, deliberately eliciting information from Ms. Beltran to be used in future adversarial proceedings.

Moreover, Ms. Beltran was denied access to counsel at the July 18, 2013 hearing resulting in her detention. The facts in this regard could not be any plainer. Ms. Beltran expressly, repeatedly asked for the assistance of an attorney. These pleas were alternatively ignored or denied. This deprivation worked greatly to her detriment, as she had no understanding of the allegations against her, was not told or permitted of any rights to present witnesses or evidence or confront same as presented by the State, and was finally committed to

detention with no knowledge of the grounds or the basis to appeal. Under these circumstances, application of the Act was in violation of Ms. Beltran's Sixth Amendment rights.

(H) The Act is in breach of the Eighth Amendment.

The Eighth Amendment offers broad protections against a variety of state criminal law measures. Because the Act must be considered criminal, see Part VI(1)(G)(i), *supra*, the Eighth Amendment is applicable in this context. In particular, the Act violates the Eighth Amendment prohibitions of status offenses and disproportionate punishment. Furthermore, as applied to Ms. Beltran, application of the Act works a deliberate indifference to serious medical need.

(i) *The Act is an unconstitutional status offense.*

Statutes that penalize "status," as opposed to conduct, are inherently void in violation of the Eighth Amendment prohibition of cruel and unusual punishment. Robinson v. California, 370 U.S. 660 (1962). In Powell v. Texas, the Supreme Court limited this doctrine, holding that states may punish some act, even if a particular status renders avoidance of that act improbable. 392 U.S. 514, 533 (1986). Under Robinson as clarified by Powell, the Act is unconstitutional.

The Act attaches penalties to the twin statuses of pregnancy and being a person who uses or may be dependent upon drugs or alcohol. The law contains no requirement, on its face, of any actus reus. To the contrary, it uses language that attempts, through vague terms, to denote a status related to drug use, dependency, or addiction: "habitually lacks self-control." See, e.g., WIS. STAT. ANN. § 48.133. Ms. Beltran's is proof positive: Ms. Beltran was completely drug-free at the time of her arrest. The State's response under the Act was not to any actual drug use, but rather to the fact that Ms. Beltran was a pregnant woman whose admission suggested that she had formerly been drug-dependent. Accordingly, this case falls squarely within the admonition of Robinson. The same reasons that forbid punishment of individual status equally foreclose

criminalization of two distinct statuses simultaneously. As a result, the Act must be invalidated as a cruel and unusual status offense.

(ii) *The Act is cruel and unusual under proportionality analysis.*

As stated in Part VI(1)(C)(vii)(b), *supra*, the Act is not rationally related to any legitimate government objective. When this fact is coupled with the understanding that the Act is in effect a criminal law with criminal law penalties, the irrationality of that law must be considered unconstitutional in violation of the Eighth Amendment.

Punishment is "excessive" and unconstitutional when it makes no measurable contribution to acceptable goals of punishment and hence is nothing more than a needless, purposeless imposition of pain and suffering, or is grossly out of proportion with the severity of the crime. Coker v. Georgia, 433 U.S. 584 (1977); Dearman v. Woodson, 429 F.2d 1288, 1291 (10th Cir. 1970) ("[P]unishment may be cruel and unusual when, although applied in pursuit of legitimate penal aims, it goes beyond what is necessary to achieve those aims."); United States v. Gonzalez, 922 F.2d 1044, 1053 (2d Cir. 1991) ("When offense causes less revulsion than the punishment imposed for its commission, grossly disproportionate punishment has been inflicted.").

In the abstract, punishment of pregnant women alleged to use drugs and alcohol makes little sense. As previously noted, see Part VI(1)(C)(v), *supra*, such punishment will only serve to deter open communication between pregnant women and their physicians, and to stigmatize, isolate, and traumatize pregnant women – all of which are hazardous, not protective, to fetal health. In the specific case of Ms. Beltran, the point is even stronger. Ms. Beltran has completely ceased all use of controlled substances before her arrest and detention. Though she was nominally arrested for failure to resume use of Suboxone under supervision of a physician,

she has not been prescribed or provided any such treatment. In sum, then, her current commitment serves no lawful purpose. Under these circumstances, the Act is clearly excessive in violation of the Eighth Amendment.

(iii) *Operation of the Act constitutes deliberate indifference to serious medical need.*

The Eighth Amendment requires that states meet certain minimal standards of care in their treatment of persons in physical custody. This includes the prohibition against cruelty and deprivation of human dignity through "deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 104 (1976). State actors behave with deliberate indifference when they "know of and disregard excessive risk to inmate health and safety." Chavez v. Cady, 207 F.3d 901, 904 (7th Cir. 2000) (internal citation omitted). "The official must know of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and the inference must have been drawn." Farmer v. Brennan, 511 U.S. 825, 837 (1994).

This inquiry, however, does not occur in a vacuum. In determining whether punishment is cruel and unusual in violation of the Eight Amendment, "courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" Graham v. Florida, 130 S. Ct. 2011, 2021 (U.S. 2010) (quoting Estelle, 429 U.S. at 102). Federal courts, including the Supreme Court, have found the practice of other nations, as well as international covenants and treaties, to be instrumental in determining prevailing concepts of decency. Id. at 2034 (noting that international agreements are relevant to the Eighth Amendment even when they are not binding, because the "judgment of the world's nations" is relevant to the question of whether a punishment is cruel and unusual). The International Covenant on Civil and Political Rights, which the United States ratified in 1992, requires that "no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." International Covenant

on Civil and Political Rights (ICCPR), art. 7, Dec. 19, 1966, 999 U. N. T. S. 171 (entered into force Mar. 23, 1976). The Human Rights Committee, which monitors compliance with the ICCPR, has specifically identified pregnant women as needing protection from cruel, inhuman, and degrading treatment during incarceration. Human Rights Committee*,* General Comment No. 28: Equality of rights between men and women (Art. 3), (68th Sess., 2000) ¶15, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) at 230 (2008). This echoes the admonition of the Universal Declaration of Human Rights, which recognizes that motherhood is "entitled to special care and assistance." G.A. Res. 217A (III), art. 25(2) U.N. Doc. A/810 (Dec. 10, 1948). Neither treaty law nor customary law suggests that "special care" should have any restrictive or punitive component. Rather, this promise reflects an understanding that pregnancy is a vulnerable time, requiring—among other things—special health care and adequate nutrition.

In the present case, there is no question that the relevant officials were aware of Ms. Beltran's pregnancy. Her pregnancy was the very basis for the State's proceedings against her. Yet the State repeatedly shackled Ms. Beltran; deprived her of food or water for an extensive period after arrest; housed her in an in-patient facility with no direct access to prenatal care for a 28 day period; after the initial 28-day period, requires her to seek advance permission to leave and travel for any prenatal care at her own expense; is prepared to offer no emergency medical services in her in-patient placement at any time; and shows utter disregard for the psychological impact of these proceedings against her as to both her and her pregnancy. Under these circumstances, the State has shown deliberate indifference of a serious medical need – i.e., the need for ready, sufficient prenatal care over an extended period – in breach of the Eighth Amendment.

(2) Inadequacy of Remedies at Law

In her discussion of the impropriety of an exhaustion of state remedies requirement in this case, see Part IV, *supra*, Ms. Beltran explained the reasons why the only meaningful remedy to violation of her constitutional rights lies in redress by this Court. Those same reasons – in short, that Ms. Beltran is being held subject to her pregnancy, and that she will surely give birth before her claims may be resolved on the merits – apply equally here. Full resolution of Ms. Beltran's constitutional claims after discovery, a briefing schedule, and evidentiary hearing would without question place a final decision well beyond her due date of January 14, 2014. If Ms. Beltran is to be relieved of the harms of physical custody, state intrusion, and restraint during her pregnancy, it must be by this Court as quickly as possible. For this reason, the emergency relief of a temporary restraining order is absolutely warranted in this case.

(3) Balance of Harms

The State has no interest in this matter on a par with that of Ms. Beltran's. As previously noted, Ms. Beltran is currently being deprived of adequate medical treatment, is suffering strain on her body and her pregnancy resulting from dramatically increased levels of stress, is sustaining financial prejudice, and has been subjected to repeated psychological and emotional abuses. This practice is certain to continue if she remains in state custody, and clearly constitutes irreparable harm.

In contrast, the State stands to suffer no harm whatever from injunction against enforcement of the Act in this or any case. The simple fact, as attested by numerous medical health experts on behalf of Ms. Beltran, is that penalization of pregnant women is the wrong course of action to protect the State's interest in healthy pregnancies. The best way to secure healthy fetal development is through support services directed towards pregnant women, not, as Wisconsin has opted, through hostile and adversarial proceedings by use of force. As a result,

the State's interest in fetal health is disserved by operation of the Act. That Statute endangers women and their pregnancies by increasing stress in individual cases, promoting abortion to avoid penalty, and deterring honest communication between pregnant women and their health care providers.

In the case of Ms. Beltran, the futility of continued operation of the Act is even more stark. Ms. Beltran has voluntarily, independently ceased all use of controlled substances. Her pregnancy is healthy, and would only be more so if she were removed from current environment and permitted to resume her life amidst the family, friends, and medical care providers that make up her network of support. In spite of arresting and proceeding against Ms. Beltran for her refusal of a prescription to Suboxone, the State is not providing any prescription medication to her at this time, and indeed, is doing little more than holding her against her will. Numerous independent health care experts have, upon assessing Ms. Beltran, opined that her detention is completely unwarranted. See generally, (Frank Dec.); (Hartke Dec.); (Imseis Dec.); (Stancliff Dec.); (Schauberger Dec.). Under these circumstances, it is evident that the State will suffer no harm if a temporary restraining order and preliminary injunction are granted.

(4) Public Interest

Relief in this case would not harm the public interest but rather serve it. In analyzing under this factor, the Court should take into account the broader issues of women's health and the "freedom to seek pregnancy-related services." Schenck v. Pro-Choice Network Of W. New York, 519 U.S. 357, 376 (1997) (upholding a preliminary injunction against anti-abortion protestors partially out of concern for the impact on women's reproductive decision-making). Denying the preliminary injunction would send the message to women that they should avoid prenatal care because it might end in forced civil incarceration. It would say that women should

not communicate with healthcare professionals openly and honestly. It would encourage women ensnared in the system to terminate their pregnancies rather than face the privations and humiliation that operation of the law entails. And it would send the message to women that the fact of pregnancy makes them subordinate in the eyes of the State to their pregnancies.

It harms the public interest for the State to rely on outdated and bad science in its policy determinations. Such misinformed policy stands to undermine the public's trust in the State. More specifically, the use of bad policy to effect moral legislation reeks of misogyny in this case. The State appears to be saying to women that it is more beholden to its morals and outdated beliefs than it is willing to respect the scientific data as to the best way to care for women and their pregnancies. Additionally, this policy disproportionately affects poor women. Poor women are more likely to have social workers and other State agents involved in their lives. To communicate to them that the State will inappropriately detain pregnant women would discourage them from seeking state assistance if they need it, and would otherwise subject them to condescension. In this manner, the denial of a temporary restraining order and preliminary injunction would hold great ramifications for pregnant women, and truthfully all women, and thus the public interest is actively served by granting it.

VII. CONCLUSION

For the foregoing reasons, this Court must find the Act to be unconstitutional.

Dated: September_______, 2013

Respectfully submitted,

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* The Reproductive Justice Clinic is part of the NYU School of Law Clinical Law Program which trains law students in the practice of law through work on actual cases representing clients under attorney faculty supervision. The Reproductive Justice Clinic specializes in legal and policy work relating to reproductive freedom, equality, and liberty. The Clinic is part of Washington Square Legal Services, Inc. (WSLS), a not-for-profit entity under which the Law School's clinical law legal practice is conducted. The Student Practice Order issued by the Supreme Court of New York Appellate Division, First Department, to WSLS authorizes its supervision of law students in the practice of law in the State of New York according to the guidelines set forth in the Order. As is true with all briefs, publications and reports from clinics and centers at NYU School of Law, this attorney work product does not purport to present the school's institutional views, if any. All counsel would like to acknowledge and thank the following NYU Law students for their work on this matter: Danielle DeBold, Erin Gallagher, Emily Juneau, Marcella Kocolatos, Katherine Mitchell and Amy Wolfe.

** Admission to the federal district court for the Eastern District of Wisconsin currently pending.