No. 17-1936

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

TAMARA M. LOERTSCHER,
PLAINTIFF-APPELLEE,

v.

ELOISE ANDERSON, SECRETARY, DEPARTMENT OF CHILDREN AND FAMILIES, AND BRAD D. SCHIMEL, ATTORNEY GENERAL,
DEFENDANTS-APPELLANTS

On Appeal From The United States District Court
For The Western District Of Wisconsin

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL IN SUPPORT OF PLAINTIFF-APPELLEE

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Pursuant to Federal Rule of Appellate Procedure 29(b), the National Coalition for a Civil Right to Counsel ("NCCRC") respectfully requests leave to file the accompanying *amicus* brief in support of Plaintiff-Appellee Tamara M. Loertscher. The NCCRC sought consent from the parties for the filing of its *amicus* brief pursuant to Rule 29(a). Plaintiff-Appellee consents to the filing of the NCCRC's *amicus* brief. Defendants-Appellants take no a position as to whether the NCCRC should be granted leave to file an *amicus* brief.

STANDARD

An organization may file a brief as *amicus curiae* by leave of court when "the movant [has an] interest," the "*amicus* brief is desirable," and "the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a). Leave to file an *amicus* brief is granted where "the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs," such as when the *amicus* brief offers a "unique perspective or specific information that can assist the court beyond what the parties can provide." *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in chambers); *see also Ryan v. Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers).

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Formed in 2004, the National Coalition for a Civil Right to Counsel ("NCCRC") advocates for the recognition of the right to counsel for indigent litigants in civil cases involving basic human needs, such as shelter, safety,

sustenance, health, child custody, and physical liberty. The NCCRC worked closely with the American Bar Association's Presidential Task Force on Access to Justice on its unanimous 2006 Resolution addressed to federal, state and territorial governments regarding the right to counsel in basic human needs cases. The NCCRC includes civil legal services attorneys, public defenders, nonprofit attorneys, and members of the private bar, academy, state and local bar associations, and access to justice commissions from 38 states. The NCCRC supports litigation, legislation, and advocacy regarding the civil right to counsel, including *amicus* briefing where appropriate. The NCCRC submits this *amicus* brief because, although appropriately raised below and alluded to in the briefs of the parties, the issue of the right to counsel has not been the focus of any of the parties in briefing before this Court.

LEAVE TO FILE NCCRC'S *AMICUS* BRIEF SHOULD BE GRANTED

The NCCRC is particularly well-suited to assist the Court because the NCCRC's expertise in the civil right to counsel can provide the Court with unique perspectives and insights not found in the parties' briefs. The NCCRC, as putative *amicus curiae*, can offer the Court a focused look at how the Act unconstitutionally denies pregnant women the right to counsel at critical junctures, and the effects of that denial. Additionally, the NCCRC has an interest in this case as an organization that advocates for recognition of the right to counsel in civil proceedings implicating basic human needs, such as the proceedings at issue here.

The question of whether the 1997 Wisconsin Act 292 (the "Act") violates

pregnant women's fundamental right to counsel, which will be the sole focus of NCCRC's *amicus* brief, is both live and crucially important in this case. It is live because, as set forth in their opening submission, Defendants-Appellants have requested that this Court certify the meaning of the Act to the Wisconsin Supreme Court for a "narrowing construction" to avoid the constitutional vagueness of the Act. A "narrowing construction" will not, however, cure the fundamentally flawed facets of the statute insofar as right to counsel is concerned. The NCCRC's brief would, therefore, assist the Court in deciding a crucial and necessary issue raised by Appellants' opening submission, namely, whether the matter should be referred to the Wisconsin Supreme Court.

The right to counsel aspects of this case are also fundamentally important. As set forth more fully in the NCCRC's brief, the Act violates the Equal Protection Clause because it restrains pregnant women's fundamental rights to physical liberty without providing them with the same right to appointed counsel as individuals in several similar contexts, including individuals who are involuntarily committed under Wisconsin's Mental Health Act, Wis. Stat. § 51.01 *et seq.*, or under Wisconsin's Sexually Violent Person's Law, Wis. Stat. § 980.01 *et seq.* Because the Act deprives pregnant women of such fundamental rights, the Act is subject to strict scrutiny. Applying that standard, the State does not have a compelling interest in involuntarily committing pregnant women without providing appointed counsel, nor is the State's denial of counsel for pregnant women narrowly tailored to achieving the State's purported interest in protecting the health of a fetus.

As set forth more fully in the NCCRC's brief, the Act also deprives pregnant women of Procedural Due Process by failing to provide for appointed counsel from the outset of proceedings. In particular, without a right to appointed counsel at every meaningful stage of the proceedings, a pregnant woman's fundamental rights to physical liberty and meaningful judicial access, and the risk of an erroneous deprivation of such rights, strongly outweigh the State's purported interest in protecting the health of a fetus. The NCCRC's brief examines the right to counsel in the civil commitment context in federal and state courts across the country, in order to assist the Court in viewing this fundamental right from a national perspective.

The effects of the improper denial of the right to counsel under the Act are significant, and are illustrated in multiple aspects of this case. For example, while the district court found the Act's use of the phrases "habitual lack of self-control" and "substantial risk" to be unconstitutionally vague in her subsequent civil lawsuit, that was not until *after* the deprivation of Ms. Loertscher's right to counsel denied her the ability to cogently argue and present evidence during the pendency of the underlying litigation that she does not have a "habitual lack self-control" or that her behavior did not pose a "substantial risk" to the health of the fetus. What is more, because Ms. Loertscher refused to participate without counsel in the hearing held on August 5, 2014 on the Petition for Protection or Care of an Unborn Child, the court continued that hearing in her absence, thereby depriving Ms. Loertscher of meaningful judicial access. At the conclusion of that *ex parte* hearing,

the court issued a Temporary Physical Custody Order directing that Ms. Loertscher be transferred to a residential addiction treatment facility, thereby depriving her of her physical liberty. Thereafter, as a result of the State's refusal to appoint counsel for Ms. Loertscher, she was ultimately held in contempt of court – and ordered to serve 30 days in jail if she refused treatment – for her purported violation of the Temporary Physical Custody Order. This harrowing experience imposed on Ms. Loertscher by the State shows how vitally important it is for the Court to decide whether the Act's failure to provide for counsel at every significant stage of proceedings comports with due process and equal protection. Neither of these issues are the focus of Ms. Loertscher's primary brief.

CONCLUSION

For the foregoing reasons, NCCRC respectfully requests that its motion for leave to file the accompanying brief as *amicus curiae* be granted.

Dated: July 27, 2017

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EXHIBIT A

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STATEMENT OF INTEREST

Formed in 2004, the National Coalition for a Civil Right to Counsel ("NCCRC") advocates for the recognition of the right to counsel for indigent litigants in civil cases involving basic human needs, such as shelter, safety, sustenance, health, child custody, and physical liberty. The NCCRC worked closely with the American Bar Association's Presidential Task Force on Access to Justice on its unanimous 2006 Resolution addressed to federal, state and territorial governments regarding the right to counsel in basic human needs cases. The NCCRC includes civil legal services attorneys, public defenders, nonprofit attorneys, and members of the private bar, academy, state and local bar associations, and access to justice commissions from 38 states. The NCCRC supports litigation, legislation, and advocacy regarding the civil right to counsel, including *amicus* briefing where appropriate. The NCCRC submits this *amicus* brief because, although appropriately raised below and alluded to in the briefs of the parties, the issue of the right to counsel has not been the focus of any of the parties in briefing before this Court.

PRELIMINARY STATEMENT

The NCCRC submits this *amicus* brief in support of Plaintiff-Appellee Tamara M. Loertscher and more specifically to assist the Court in determining whether the 1997 Wisconsin Act 292, Wis. Stat. §§ 48.01 *et seq.* (the "Act"), unconstitutionally deprives pregnant women of the right to appointed counsel at critical stages of proceedings.

The Act does not provide for a right to appointed counsel at any point

prior to the fact-finding or dispositional stages of the relevant proceedings, or *at all* if the State ultimately obtains forced medical treatment rather than confinement, or if the pregnant woman is not indigent. To make matters worse, under the Act, the State can, in certain situations, involuntarily confine a pregnant woman *indefinitely* in advance of a fact-finding hearing without appointing counsel to contest the detention. During the period before the fact-finding hearing, a detained pregnant woman must make crucial legal decisions – such as what evidence to submit, how to plead, and whether to demand a jury – all without any right to appointed counsel.

The Act's woefully inadequate provision for the appointment of counsel violates the Constitution in two ways:

First, the Act violates the Fourteenth Amendment's Equal Protection Clause because it significantly limits the right of pregnant women to appointed counsel as compared to individuals subject to a similar threat of civil commitment under Wisconsin's Mental Health Act and Sexually Violent Persons Law. In contrast to the Act, the Mental Health Act and Sexually Violent Persons Law both provide for the right to appointed counsel at *all* significant stages of proceedings, and both provide that the merits hearing always must be held within a set period of time, thereby ensuring that a person is not confined indefinitely without counsel before being heard on the merits. Moreover, the Mental Health Act and the Sexually Violent Persons Law do not condition the appointment of counsel on a condition subsequent (actual commitment). Finally, the Mental Health Act does not

require a person to be indigent in order to be appointed counsel.

The Act's unequal treatment of pregnant women infringes, at a minimum, the fundamental rights to physical liberty and privacy, which subjects the equal protection claim to strict scrutiny. Under strict scrutiny review, the Act's limitations on appointment of counsel are not narrowly tailored to serve the State's purported interest in protecting fertilized eggs, embryos, and fetuses from the harmful effects of substance use. What is more, the State's purported interest is not a compelling one. But even if the Act is reviewed under the less exacting rational basis standard, the Act's appointment of counsel provision nevertheless violates the Equal Protection Clause because the State does not have a rational basis for limiting the right of pregnant women to appointed counsel as compared to individuals subject to civil commitment under the Mental Health Act or the Sexually Violent Persons Law.

Second, the Act's appointment of counsel provisions violate the Fourteenth Amendment's Due Process Clause. Under the balancing test for procedural due process claims, *see Mathews v. Eldridge*, 424 U.S. 319 (1976), the physical liberty at stake and the dangerously high risk of erroneous deprivation of such liberty outweigh the State's purported interest in protecting a pregnant woman's fertilized egg, embryo, or fetus, especially where the Act does not require the State to take a corresponding interest in protecting the health of the pregnant woman. Where, as here, "the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to

see that a subject of an involuntary commitment proceedings is afforded the opportunity to the guiding hand of legal counsel *at every step of the proceedings*." *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968) (emphasis added). Because the Act fails to provide such guiding hand of legal counsel, the Act violates the Due Process Clause.

ARGUMENT

I. THE ACT'S RIGHT TO COUNSEL PROVISIONS VIOLATE EQUAL PROTECTION.

The Act violates the Equal Protection Clause by providing a much more limited right to appointed counsel for pregnant women than is afforded to persons subject to civil commitment under Wisconsin's Mental Health Act and Sexually Violent Persons Law. In particular, as discussed below, a pregnant woman must participate in a probable cause hearing and plea hearing without the benefit of appointed legal representation, and the resulting detention can potentially last *indefinitely*. Thus, the Act forces pregnant women to make crucially important legal decisions without the assistance of counsel. Moreover, the Act does not guarantee appointment of counsel *at all* if she is not (i) ultimately placed out of her home (even though she can still be subjected to forcible medical treatment) and (ii) indigent.

In sharp contrast, the Mental Health Act provides that a person subject to civil commitment is entitled to appointed counsel from the outset of proceedings, without regard to indigency. Similarly, the Sexually Violent Persons Law provides for the appointment of counsel for indigent persons at *any* hearing

and provides that the trial must be held within a set period of time, thereby ensuring that a person is not detained indefinitely before being heard on the merits.

A. Appointment of Counsel Under the Act

Under the Act, a pregnant woman does not have the right to appointed counsel under any circumstances until the fact-finding stage, or later if the petition is not contested. Even then, her statutory right to counsel under the Act is violated *only if* the she is actually detained and she proves indigency. Wis. Stat. § 48.23(2m)(b), (4).[1]

When a court takes jurisdiction over a pregnant woman pursuant to the Act – and *before* a pregnant woman has any right to counsel – the court *must* appoint a guardian ad litem ("GAL") to represent the fetus, who may separately respond to the allegations against the pregnant woman. Wis. Stat. §§ 48.235(1)(f), 48.02(19). Under the Act, the GAL must "be an attorney admitted to practice in [Wisconsin]." Wis. Stat. § 48.235(2). Thus, a fetus is entitled to counsel well before a pregnant woman.

Within 48 hours of being taken into custody, a petition must be filed and a probable cause hearing must be held to determine whether the pregnant

[1] Under Wis. Stat. § 48.23(2m)(b):

> If a petition under s. 48.133 is contested, no expectant mother may be placed outside of her home unless the expectant mother is represented by counsel at the fact-finding hearing and subsequent proceedings.
>
> If the petition is not contested, the expectant mother may not be placed outside of her home unless the expectant mother is represented by counsel at the hearing at which the placement is made.

woman should continue to be held in custody.[2] Wis. Stat. § 48.213(1). Notably, the petition to commit a pregnant woman can be filed not only by the State, but also by the GAL of the pregnant woman's fetus. Wis. Stat. § 48.25(1). Thus, the Act immediately puts the pregnant woman and her own fetus in an adversarial relationship before the pregnant woman has any right to counsel. The instant case is a dramatic illustration of this issue: a GAL was appointed for Ms. Loertscher's fetus, who then entered a plea on behalf of the fetus admitting all the allegations against Ms. Loertscher and filed a motion to hold Ms. Loertscher in contempt – all *before* Ms. Loertscher was entitled to the appointment of her own counsel.

Under the Act, a pregnant woman is not entitled to the appointment of counsel at the probable cause hearing. Moreover, the Act provides that "[i]f the adult expectant mother is not represented by counsel at the [probable cause] hearing and the adult expectant mother is continued in custody as a result of the hearing," she may request a rehearing *only* "through counsel subsequently appointed or retained or through a guardian ad litem." Wis. Stat. § 48.213(2)(e). As described *infra*, this means the rehearing may not happen until significantly later or not at all.

After the probable cause hearing, the court must hold a plea hearing. Wis. Stat. § 48.30. As with the probable cause hearing, the Act does not give a pregnant woman the right to appointed counsel at the plea hearing. If the pregnant woman is not in custody, the plea hearing must be held within 30 days. Wis. Stat. §

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[2] If no petition is filed by the time of the hearing, then the pregnant woman can be held in custody for *an additional* 72 hours after the time of the hearing, if the judge at the hearing finds probable cause. Wis. Stat. § 48.213(1)(b).

48.30(1). If, however, the pregnant woman is in custody, the Act does not specify a time by which the plea hearing must be held unless the pregnant woman requests one, at which point the hearing must be scheduled within 30 days. Wis. Stat. § 48.305. But, if the pregnant woman is not represented by counsel, she is unlikely to know of her right to demand that a plea hearing be scheduled within 30 days, or whether she should exercise such a right, which could lead to the State holding her in custody *indefinitely* before a plea hearing is held. At the plea hearing, a pregnant woman must make crucial decisions as to how to plead, whether to demand a jury, and whether to request substitution of the judge – all without any right to appointed counsel. *See* Wis. Stat. § 48.30.

After the plea hearing, the Act provides for a fact-finding hearing if the petition is contested.[3] Wis. Stat. § 48.31. Only at this fact-finding hearing – for the first time – does the pregnant woman *potentially* have a right to appointed counsel under the Act, and then *only if* (i) the woman is ultimately "placed outside of her home"; *and* (ii) she is able to prove she is indigent. Wis. Stat. § 48.23(2m)(b) (specifying that "no expectant mother may be placed outside of her home unless the expectant mother is represented by counsel at the fact-finding hearing and subsequent proceedings"); *id.* § 48.23(4) (indigency requirement). Thus, a pregnant woman is not entitled to the appointment of counsel *at all* if she is threatened with outpatient involuntary counseling or medical treatment, *see* Wis. Stat. § 48.347(1), (2), (4), (5), or if she is unable to prove that she is indigent, *see* Wis. Stat. § 48.23(4).

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[3] Where the petition is not contested, the matter goes straight to a dispositional hearing. Wis. Stat. § 48.30(6)(a).

Moreover, while the court cannot ultimately order out-of-home placement unless the woman was represented by counsel at the fact-finding and/or dispositional phases of the proceedings, there is nothing preventing the State from *pursuing* out-of-home placement and threatening an unrepresented woman with such placement as a way of coercing a plea agreement for inpatient or outpatient treatment. In other words, a woman who is threatened with out-of-home placement, yet remains unrepresented for the entirety of the proceedings, will have no claim on appeal for the denial of counsel if in the end she was not "placed outside her home," because of the wording of Wis. Stat. § 48.23(2m)(b).

Notably, the Act does not provide a specific timetable as to when a fact-finding hearing must be held unless the pregnant woman specifically requests such a hearing, in which case it must be scheduled within 30 days of the request. Wis. Stat. § 48.305. Thus, like the plea hearing, unless the pregnant woman has legal representation, she is unlikely to know of her right to demand a fact-finding hearing within 30 days. Accordingly, a pregnant woman can be held in custody and deprived of physical liberty *indefinitely* before she is potentially appointed counsel for the fact-finding hearing.

After the fact-finding hearing, there is a dispositional hearing. Wis. Stat. § 48.31(7). As with the earlier stages, there is no specific timetable as to when a dispositional hearing must be held unless a) the pregnant woman is *not* in custody, in which case it must be scheduled within 30 days of the fact-finding hearing; or b) all parties consent to it being held immediately. Wis. Stat. §

48.31(7)(a). The limitations on a woman's right to counsel at the dispositional hearing are the same as at the fact-finding hearing, described above.

B. Appointment of Counsel Under the Mental Health Act

Wisconsin's Mental Health Act, Wis. Stat. § 51.01 *et seq.*, sets forth the procedures for civil commitment based on drug or alcohol use, mental illness, or other factors, when clear and convincing evidence shows that an individual is a danger to him- or herself or others. Unlike the Act, the Mental Health Act provides for the appointment of counsel *immediately* upon a person's detention, without regard to proof of indigency. Unlike the Act, the right to counsel under the Mental Health Act attaches regardless of what is sought by the State or ultimately ordered by the court. Specifically, the Mental Health Act provides: "At the time of arrival at the facility . . . the individual shall be informed by the director of the facility or such person's designee, both orally and in writing, of his or her . . . *right to have an attorney provided at public expense*, as provided under s. 51.60." Wis. Stat. § 51.15(9) (emphasis added). Section 51.60, in turn, provides: "In any situation under this chapter in which an adult individual has a right to be represented by counsel, the individual *shall* be referred as soon as practicable to the state public defender, who *shall* appoint counsel for the individual under s. 977.08 without a determination of indigency." Wis. Stat. § 51.60(1) (emphasis added).

Moreover, unlike the Act, the Mental Health Act also explicitly states that an individual is entitled to the appointment of counsel, without regard to proof of indigency, *before* the probable cause hearing. Wis. Stat. § 51.20(3) ("At the time of the filing of the petition the court *shall* assure that the subject individual is

represented by adversary counsel by referring the individual to the state public defender, who *shall* appoint counsel for the individual without a determination of indigency[.]") (emphasis added). Thereafter, if the court finds probable cause, a final hearing must be held within 14 days from the time of detention – which is in stark contrast to the potentially *indefinite* periods of time that a pregnant woman can be detained before and after the fact-finding hearing under the Act.

C. Appointment of Counsel Under the Sexually Violent Persons Law

Wisconsin's Sexually Violent Persons Law, Wis. Stat. § 980.01 *et seq.*, provides:

> Except as provided in ss. 980.038(2) [State's evidence of refusal to participate in mental examination] and 980.09 [committed person's petition for discharge] and without limitation by enumeration, at *any* hearing under this chapter, the person who is the subject of the petition has the right to: (a) Counsel. If the person claims or appears to be indigent, the court shall refer the person to the authority for indigency determinations under s. 977.07 (1) and, if applicable, the appointment of counsel.

Wis. Stat. § 980.03(2) (emphasis added). Thus, an indigent person alleged to be a sexually violent person has the right to appointed counsel "at *any* hearing" – including the probable cause hearing and trial on the merits.[4] *See also* Wis. Stat. § 980.04(5) ("If the person named in the petition claims or appears to be indigent, the court shall, prior to the probable cause hearing under sub. (2)(a), refer the person to the authority for indigency determinations under s. 977.07(1) and, if applicable, the appointment of counsel."). As with the Mental Health Act, the right to counsel

[4] Unlike the Act, the Sexually Violent Person's Law does not provide for an intermediate "plea hearing" between the probable cause and fact-finding hearings.

attaches even if the person is only *threatened* with commitment, regardless of whether commitment is actually subsequently ordered.

Moreover, unlike the Act, under which a pregnant woman can be detained without counsel for an *indefinite* period of time before the fact-finding hearing if she does not know to request a hearing, the Sexually Violent Persons Law provides that the trial must be held within 90 days after the probable cause hearing. Wis. Stat. § 980.05.

D. The Act's Unequal Treatment of Pregnant Women With Respect to the Appointment of Counsel Violates the Equal Protection Clause.

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). As set forth above, the Act does not treat pregnant women similarly to those who are committed under either the Mental Health Law or the Sexually Violent Persons Law with respect to the right to appointed counsel. There can be little question that pregnant women who are subject to the Act are similarly circumstanced to those who are civilly committed under the Mental Health Law or the Sexually Violent Persons Law, at a minimum, with respect to the physical liberty interest at stake. The question, then, is whether the unequal treatment of pregnant women under the Act as compared to other statutes concerning civil commitment is permissible under the Equal Protection Clause. As set forth below, it is not.

Under the Equal Protection Clause, government classifications that infringe fundamental rights are subject to strict scrutiny. *See, e.g.*, *Att'y Gen. of*

New York. v. Soto-Lopez, 476 U.S. 898, 904 (1986); *Plyler*, 457 U.S. at 216-17 & n.15; *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 258 (1974).

Here, the Act infringes the fundamental right to be free from physical restraint by providing that pregnant woman can be involuntarily confined if they *allegedly* use drugs or alcohol habitually. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) ("[T]he interest in being free from physical detention by one's own government" is "the most elemental of liberty interests."); *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (White, J., plurality opinion) ("Freedom from physical restraint [is] a fundamental right."). The Act also infringes the fundamental right to privacy by providing for forced medical treatment on pregnant women. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.") Accordingly, the Act is subject to strict scrutiny.

"Strict scrutiny is a searching examination" under which governmental infringements of a fundamental right "are constitutional only if they are narrowly tailored to further compelling governmental interests." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (citation omitted). Here, the Act is neither designed to advance a compelling governmental interest nor is it narrowly tailored to any such interest.

The State's legislative purpose for the Act is to protect "unborn children" – defined to include fertilized eggs, embryos, and fetuses – from "the harmful effects resulting from the habitual lack of self-control of their expectant

mothers in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree." Wis. Stat. § 48.01(2)(bm); *see also id.* § 48.01(1)(a), (am). That is not a compelling governmental interest for denying counsel to pregnant women because, as the Supreme Court has held, states do not have a compelling interest in pregnancy before viability. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) ("Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.").

Even assuming the State's interest were compelling, the Act's unequal treatment of pregnant women with respect to the right to counsel as compared to the Mental Health Act and Sexually Violent Persons Law is not narrowly tailored to achieve the State's purported interest in protecting fertilized eggs, embryos, and fetuses. Indeed, it is hard to understand how the Act's provision for the involuntary detention of a pregnant woman – perhaps *indefinitely* – before she has the right to appointed counsel at the fact-finding hearing furthers the State's purported interest in protecting her fertilized egg, embryo, or fetus. To the contrary, as is demonstrated by Ms. Loertscher's experience (where her request for counsel fell on deaf ears, she was subsequently incarcerated while unrepresented, and, while incarcerated, was not provided the care of an obstetrician despite experiencing significant pain and cramps) pregnant women who are incarcerated may receive less than ideal medical care for themselves and their fertilized eggs, embryos, or

fetuses. In fact, a recent study has shown that "[p]regnant women in prison are exposed to many stressors that could harm them *and their fetuses*, such as social isolation, psychological stress, overcrowding and communicable diseases," and that "[e]ven when [prenatal] care is available [in prison], the quality and timing is often inadequate." Rebecca Shlafer & Laurel Davis, *Pregnant, In Prison, and Facing Health Risks: Prenatal Care for Incarcerated Women*, The Conversation (Feb. 19, 2016, 6:01 AM), http://theconversation.com/pregnant-in-prison-and-facing-health-risks-prenatal-care-for-incarcerated-women-45034 (emphasis added). Thus, even if, for the sake of argument, the State has a compelling interest in pregnancy *after* viability, the Act nevertheless is unconstitutional because the denial of appointed counsel is not narrowly tailored to the State's purported interest in protecting viable fetuses.

Denying a pregnant woman appointed counsel until the late stages of proceedings also potentially increases the length of her detention by increasing the chances that she will be unaware of or not know whether to exercise her right to demand that the plea and fact-finding hearings be scheduled within 30 days. *See* Wis. Stat. § 48.305. Moreover, such denial of appointed counsel at the probable cause hearing and plea hearing is likely to impede the search for truth and proper administration of justice that normally would be facilitated through the effective assistance of counsel.

Even if the Act were reviewed under the rational basis standard, the Act's inferior provisions for the appointment of counsel as compared to the Mental

Health Act and Sexually Violent Persons Law has no rational basis. *See Baxstrom v. Herold*, 383 U.S. 107, 111-12 (1966) (holding that equal protection was violated by denying jury right for civil commitment of criminal convicts who served their sentences while providing jury right for non-convicts because "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments" and "the State, having made [the right to a jury] . . . generally available on this issue [of mental illness], may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some"); *Johnson v. Solomon*, 484 F. Supp. 278, 291 (D. Md. 1979) (finding that the right to counsel for involuntarily committed juveniles "is similarly warranted on equal protection grounds since counsel is already required for juvenile commitments pursuant to" other statutes). Denying a pregnant woman facing involuntary commitment and forced medical treatment the same legal representation guaranteed to other individuals similarly facing involuntary commitment is not rationally related to any legitimate state interest in protecting a pregnant woman's fertilized egg, embryo, or fetus.

The State argued in the district court that because states are not obligated to provide counsel for a probable cause hearing in the criminal context, they should not be so required in the civil commitment process. This argument, however, has no relevance for the Equal Protection Clause analysis, where the relevant comparators are the two other civil commitment laws that provide a right to counsel at the probable cause stage.

The State also argued that the Act's indigency requirement, as compared to the Mental Health Act, does not violate the Equal Protection Clause because a "commitment proceeding moves much more quickly than a criminal prosecution" and therefore the legislature purportedly decided that the appointment of counsel under the Mental Health Act should not include a time-consuming indigency determination. In contrast, the State argues, the "same speed and urgency" is not required for proceedings under the Act because a pregnant woman purportedly "is not subject to a custody order under the Act until efforts at voluntary compliance have failed." Putting aside that the State's purported "speed and urgency" interest with respect to indigency determinations does not appear in the Mental Health Act's legislative history, the State's argument makes little sense because under the Act, the very first step is to detain the pregnant woman, and once a pregnant woman is detained, she is potentially subject to a custody order at the probable cause hearing within 48 hours. *See* Wis. Stat. § 48.213. Accordingly, like the Mental Health Act, the State should have an interest in appointing counsel for pregnant women under the Act with the same "speed and urgency" to ensure that pregnant women are not erroneously or unnecessarily detained.

In sum, under either strict scrutiny or rational basis review, the Act's failure to provide for appointed counsel until the fact-finding hearing or later fails to provide the equal protection of laws guaranteed under the Constitution. *See, e.g.*, *In re Fisher*, 313 N.E.2d 851, 857-58 (Ohio 1974) ("Ohio statutes dealing with psychopathic offenders and persons convicted of sex crimes provide a greater degree

of constitutional protection prior to, at and subsequent to hearing to those persons convicted of specified crimes and referred for psychiatric examination for purposes of determining if indefinite commitment is necessary than is provided in noncriminal civil commitment proceedings. It seems incongruous to protect the constitutional rights of those convicted of crimes and subsequently confined to a mental institution and not provide the same or more extensive protection to noncriminals.").

II. THE ACT'S FAILURE TO PROVIDE FOR COUNSEL UNTIL THE LATE STAGES OF PROCEEDINGS VIOLATES DUE PROCESS.

The Act's denial of the appointment of counsel until the fact-finding hearing and/or dispositional hearing violates the Due Process Clause. Procedural due process claims are analyzed under the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Under that test, the Court balances three factors: (i) "the private interest that will be affected by the official action"; (ii) "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 (iii) "the Government's interest." *Sonnleitner v. York*, 304 F.3d 704, 712 (7th Cir. 2002) (quoting *Gilbert v. Homar*, 520 U.S. 924, 932 (1997). For procedural due process claims related to appointment of counsel in civil cases, those factors also must be weighed against "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26-27 (1981).[5]

[5] Concededly, a threat to liberty does not "automatically" guarantee the right to appointed counsel. *Turner v.*

As set forth below, these factors weigh heavily in favor of finding that due process requires the appointment of counsel at all significant stages of proceedings.

A. Private Interests Affected by the Act

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Moreover, the Supreme Court has recognized that civil commitment is a "massive curtailment of liberty" and "is more than a loss of freedom from confinement"; it is also a "stigma" that "can engender adverse social consequences to the individual." *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980). As such, civil commitment is "the kind of deprivation[] of liberty that requires procedural protections." *Id.* at 494. Accordingly, the private rights implicated by the Act weigh heavily in favor of appointing counsel.

B. Risk of Erroneous Deprivation of Liberty

"Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). Failing to provide for appointed counsel until the later stages of proceedings poses a dangerously high risk of erroneous deprivation of liberties.

A pregnant woman – particularly an indigent one – who is subject to the threat of the deprivation of physical liberty and forced medical treatment undoubtedly "needs the assistance of counsel to cope with problems of law, to make

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Rogers, 564 U.S. 431, 448 (2011).

skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [s]he has a defense and to prepare and submit it." *In re Gault*, 387 U.S. 1, 36 (1967); *see also Vitek v. Jones*, 445 U.S. 480, 496-97 (1980) ("A prisoner [subject to civil commitment] probably has an even greater need for legal assistance, for such a prisoner is more likely to be unable to understand or exercise his rights. In these circumstances, it is appropriate that counsel be provided to indigent prisoners whom the State seeks to treat . . . .").

Moreover, litigating *pro se* is much more difficult while involuntarily confined than while not confined. *See* Michael W. Martin, *Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 Fordham L. Rev. 1219, 1226 (2011) ("[I]ncarceration itself imposes upon pro se prisoners another layer of steep disadvantages that non-prisoner pro se litigants do not face. They have restricted access to libraries, legal materials, the internet, and telephones. The limited resources available within prisons are often inadequate to allow prisoners to navigate the complex legal system and consistently contribute to their losing cases on procedural grounds before ever reaching a decision on the merits."). Even prisoners, however, have a constitutional right to access to a law library, *Bounds v. Smith*, 430 U.S. 817, 828 (1977), which suggests that *pro se* litigation for pregnant women under the Act may be even more difficult than it is for criminal prisoners.

Under the Act, a pregnant woman is not entitled to appointed counsel (i) when first confined; (ii) at the probable cause hearing; or (iii) at the plea hearing. During those stages of proceedings, the State is not required to schedule a plea or

fact-finding hearing for a detained pregnant woman *unless* she specifically requests such hearings. Wis. Stat. § 48.305. However, without any legal representation, a pregnant woman – while detained – is unlikely to know of her right to request that such hearings be held within 30 days. As a result, under the Act, a pregnant woman can be erroneously detained *indefinitely* before the plea or fact-finding hearings.

Moreover, the risk of an erroneous deprivation of liberty is especially high at the plea hearing, where a pregnant woman must make crucial decisions – without any right to appointed counsel – regarding how to plead and whether to invoke her jury right. *See* Wis. Stat. § 48.30; *see also Lessard v. Schmidt*, 349 F. Supp. 1078, 1100 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974) ("The need for counsel at an early stage is also apparent from the provision for a jury trial on demand. Clearly, the subject of the civil commitment proceeding cannot competently decide whether to exercise that right without the aid of counsel . . . . The right to a jury trial has been shown to be critical, numerous studies indicating that the exercise of that right may well mean the difference between release and commitment."). Under the Act, at the plea hearing, a pregnant woman – without the benefit of legal representation – could unknowingly forfeit her right to a fact-finding hearing by consenting to the petition. Wis. Stat. § 48.30(6)(a) (if petition not contested, no fact-finding hearing is held).

Additionally, by not requiring appointment of counsel in every case where out-of-home placement is *sought*, but rather conditioning the right on

whether out-of-home placement is ultimately *granted*, Wis. Stat. § 48.23(2m)(b), the Act increases the likelihood that a woman will erroneously "consent" to forced medical treatment to avoid the threat of civil commitment, even where the other elements of the statute are not met.

The Act also insidiously pits the interests of a pregnant woman against the interests of her own fetus, and places the pregnant women at a significantly unfair disadvantage, by providing that the State *must* appoint a GAL for the fetus when jurisdiction is asserted over the pregnant woman. Wis. Stat. § 48.235(1)(f). As the Supreme Court has noted in the context of juvenile civil commitment, "[p]itting the parents and child as adversaries often will be at odds with the presumption that parents act in the best interests of their child" and the "notion that governmental power should supersede parental authority . . . is repugnant to American tradition." *Rogers v. J. R.*, 442 U.S. 584, 603 & 610 (1979).

The Act's provision for a GAL to represent the interests of the pregnant woman's fetus before she is even entitled to her own counsel exponentially increases the chances of an erroneous deprivation of liberty. The Act does not require the GAL to consider the interests of the pregnant woman. In fact, the Act requires the GAL to consider *only* the best interests of the fertilized egg, embryo, or fetus, and not the interests of the pregnant woman. Wis. Stat. § 48.01(1) ("[T]he best interests of the . . . unborn child shall always be of paramount consideration"); § 48.235(3)(a) (GAL shall be an advocate for "best interests of . . . unborn child for whom the appointment is made"). To further the purported interests of the fetus

over the interests of the pregnant woman, the Act authorizes the GAL to file a petition against the pregnant woman to seek her civil confinement. Wis. Stat. § 48.25(1). The Act also authorizes the GAL to take legal action against the pregnant woman to challenge her medical decisions and force her into treatment. Wis. Stat. § 48.235(3)(b)(2). Because the GAL – who is required to be a licensed attorney – is authorized to take such legal action against the pregnant woman before the pregnant woman herself is entitled to an attorney, the risk of an erroneous deprivation of liberties posed by the Act is unacceptably high.

In fact, Ms. Loertscher's ordeal – which the court below rightfully characterized as a "disturbing story" (Dkt. 61 at 2) – provides a real-life illustration of how the Act's failure to provide for a right to counsel until the fact-finding hearing can result in an erroneous deprivation of liberty. When Ms. Loertscher appeared by telephone – without counsel – at the Temporary Physical Custody hearing, the GAL appeared at the hearing on behalf of the fetus. At that hearing, Ms. Loertscher demanded counsel. When that request was denied, Ms. Loertscher refused to participate in the hearing without counsel. Rather than appoint counsel for Ms. Loertscher, the court held the hearing *without Ms. Loertscher present* and found that there was probable cause to continue to keep Ms. Loertscher in involuntary confinement. Moreover, while Ms. Loertscher was without counsel, the GAL successfully imposed *his* decisions concerning Ms. Loertscher's medical treatment over her own. The GAL also initiated contempt proceedings against Ms. Loertscher for her refusal of forced medical treatment, resulting in her

incarceration. The GAL even entered a plea on behalf of the fetus admitting all the allegations against Ms. Loertscher. All of this occurred while Ms. Loertscher was without *any* legal representation, despite her repeated requests that counsel be appointed for her.

C. The Government's Interest

As discussed *supra* Point I.D, the State's purported interest in the Act is to protect pregnant women's fertilized eggs, embryos, and fetuses, without a corresponding interest in protecting the health of pregnant women. *See* Wis. Stat. §§ 48.01(2)(bm), 48.01(1)(a), (am). Denying pregnant women the right to appointed counsel at all significant stages of proceedings does not advance that purported State interest, even to the extent that is a legitimate government interest. In fact, as was the case with Ms. Loertscher, denying pregnant women counsel can result in the worsening of the woman's health and denial of appropriate medical care for the fertilized eggs, embryos and fetuses that are purportedly the central concern to the State. Accordingly, the State's purported interest is not strong.

D. Numerous Courts Have Found a Due Process Right to Counsel in Civil Commitment Proceedings.

Federal courts have repeatedly held that individuals subject to civil commitment are entitled to appointed counsel at *all* significant stages of proceedings as a matter of due process. *See, e.g.*, *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968) ("It matters not whether the proceedings be labeled 'civil' or 'criminal,'" because where "the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to

see that a subject of an involuntary commitment proceedings is afforded the opportunity to the guiding hand of legal counsel *at every step of the proceedings*.") (emphasis added); *Lynch v. Baxley*, 386 F. Supp. 378, 389 (M.D. Ala. 1974) ("The subject of an involuntary civil commitment proceeding has the right to the effective assistance of counsel at *all significant stages* of the commitment process. . . . Counsel must be made available far enough in advance of the final commitment hearing to ensure adequate opportunity for preparation.") (emphasis added); *Bell v. Wayne Cty. Gen. Hosp.*, 384 F. Supp. 1085, 1093 (E.D. Mich. 1974) (a person subject to civil commitment "has the right to legal counsel and, if indigent, to appointed counsel, to assist him at *every step* of the commitment proceedings," which "is of paramount importance") (emphasis added); *see also Lessard v. Schmidt*, 349 F. Supp. 1078, 1099 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974) ("[T]he importance of the interests involved make imperative the assistance of counsel as soon after [civil commitment] proceedings are begun as is realistically feasible. Certainly the detained individual must have counsel at the preliminary hearing on detention, with time enough before that hearing to prepare any initial defenses which may be available. Otherwise the right to representation by counsel may be a 'formality [and a] grudging gesture to a ritualistic requirement.'"); *Dixon v. Att'y Gen. of Pennsylvania*, 325 F. Supp. 966, 972 & 974 (M.D. Pa. 1971) (due process requires "an attorney shall be appointed to represent [an individual subject to civil commitment] unless he can afford to retain an attorney himself" because "[w]e are unimpressed by the [State's] parens patria argument and strong courts

have not been persuaded by it"); *see also Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1127 & 1129 (D. Haw. 1976), *abrogation on other grounds recognized by United States v. Sahhar*, 917 F.2d 1197 (9th Cir. 1990) (due process requires "that counsel must be appointed if the individual cannot afford retained counsel" for "nonconsensual commitment of persons pursuant to mental health laws").[6]

CONCLUSION

For the foregoing reasons, the Court should find that the Act's failure to provide a right to appointed counsel at all significant stages violates the Equal Protection and Due Process Clauses of the Constitution. The Court should not certify the meaning of the Act to the Wisconsin Supreme Court for a "narrowing construction" to avoid the constitutional vagueness of the Act because such "narrowing construction" will not cure the Act's unconstitutional denial of appointed counsel.

[6] Additionally, every state court but one that has ruled on the issue has held that due process requires the appointment of counsel in civil commitment proceedings. *See Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 383 (Alaska 2007); *In re Hop*, 623 P.2d 282, 289 (Cal. 1981); *Pullen v. State*, 802 So. 2d 1113, 1119 (Fla. 2001); *F. J. v. State*, 411 N.E.2d 372, 383 (Ind. Ct. App. 1980); *Merryfield v. State*, 241 P.3d 573, 578-80 (Kan. Ct. App. 2007); *Denton v. Commonwealth*, 383 S.W.2d 681, 682 (Ky. Ct. App. 1964); *In re Simons*, 698 P.2d 850, 851 (Mont. 1985); *Rashid v. J.B.*, 410 N.W.2d 530, 532 (N.D. 1987); *In re Civil Commitment of D.Y. SVP 491-08*, 45 A.3d 394 (N.J. Super. Ct. App. Div. 2012), *rev'd on other grounds*, *In re Civil Commitment of D.Y. SVP 491-08*, 95 A.3d 157 (N.J. 2014); *People ex rel Rogers v. Stanley*, 217 N.E.2d 636, 636 (N.Y. 1966); *In re Fisher*, 313 N.E.2d 851, 854 (Ohio 1974); *State v. Collman*, 497 P.2d 1233, 1236-37 (Or. Ct. App. 1972); *Commonwealth ex rel. Finken v. Roop*, 339 A.2d 764, 770 (Pa. Super. Ct. 1975); *In re Chapman*, 796 S.E.2d 843, 846 (S.C. 2017); *Johnson v. Nelms*, 100 S.W.2d 648, 652 (Tenn. 1937); *Ex parte Ullmann*, 616 S.W.2d 278, 283 (Tex. App. 1981); *Jenkins v. Director of Virginia Ctr. for Behavioral Rehab.*, 624 S.E.2d 453, 460 (Va. 2006); *Tetro v. Tetro*, 544 P.2d 17, 19 (Wash. 1975); *State ex rel. Memmel v. Mundy*, 249 N.W.2d 573, 576 (Wis. 1977); *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109, 126 (W. Va. 1974); *contra Beaulieu v. Minn. Dep't of Human Servs.*, 798 N.W.2d 542, 549 (Minn. Ct. App. 2011) (declining to recognize right to counsel, but erroneously stating that right to counsel in civil commitments "has not been adopted by the supreme courts of 48 of the 50 states.").

Dated: July 27, 2017

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify pursuant to FED. R. APP. P. 32(a)(7) and Circuit Rule 32(b) that the attached brief is proportionally spaced of 12 points for the text and 11 points for the footnotes, and contains 6,969 words (excluding, as permitted by FED. R. APP. P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

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CERTIFICATE OF SERVICE & CM/ECF FILING

U.S. Court of Appeals Docket No.: 17-1936

I hereby certify that on July 27, 2017, I electronically filed the foregoing Motion for Leave to File Brief of *Amicus Curiae* National Coalition for a Civil Right to Counsel in Support of Plaintiff-Appellee with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.:

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