
**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Appeal No. 17-1936

**TAMARA M. LOERTSCHER,
PLAINTIFF-APPELLEE,**

VS.

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

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN, CASE No. 14-CV-870
THE HONORABLE JAMES D. PETERSON, JUDGE

**MOTION OF AMNESTY INTERNATIONAL, HUMAN
RIGHTS AND GENDER JUSTICE CLINIC AT THE CITY
UNIVERSITY OF NEW YORK LAW SCHOOL AND CENTER
FOR REPRODUCTIVE RIGHTS FOR LEAVE TO FILE
AMICUS-CURIAE BRIEF IN SUPPORT OF PLAINTIFF-
APPELLEE**

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FEDERAL AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel of record for amicus Amnesty International, Human Rights and Gender Justice Clinic at the City University of New York Law School, and Center for Reproductive Rights,¹ hereby furnish the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party or amicus the attorney represents:

- a. Amnesty International Limited;
- b. Human Rights and Gender Justice Clinic at the City University of New York Law School; and
- c. Center for Reproductive Rights.

(2) If any such party or amicus is a corporation:

- a. Its parent corporation, if any: None. None of the proposed amici have parent corporations.
- b. A list of stockholders that are publicly held companies owing 10% or more of stock in a party: None. No publicly held company has any ownership interest in any of the proposed amici.

(3) The names of all law firms whose partners or associates have appeared for the party or amicus in the case or are expected to appear for the party in this Court:

¹ Disclosures for each counsel for the Amicus Curiae are included in the proposed brief.

- a. Human Rights and Gender Justice Clinic at the City University of New York Law School; and
- b. Jack Law Office LLC.

None of the amici appeared in the court below.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(b), Amnesty International, Human Rights and Gender Justice Clinic at the City University of New York Law School, and Center for Reproductive Rights (collectively “Amici”) respectfully request leave to file the accompanying Brief as Amicus Curiae in Support of Plaintiff-Appellee Tamara Loertscher. The Amici urges the affirmance of the district court.

I. IDENTITY AND INTERESTS OF THE AMICI

Amicus Curiae Amnesty International Limited (“Amnesty International”) is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all. Amnesty International is a not-for-profit company registered in England and Wales with its registered office at 1 Easton St, London WC1X 0DW. It reaches almost every country in the world and has more than 2 million members and supporters and more than 5 million activists. Amnesty International works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights

law and international humanitarian law and standards, and it works to prevent and end abuses of human rights and to demand justice for those whose rights have been violated. Amnesty International recently published a report *Criminalizing Pregnancy*, which documents the impact of U.S. laws criminalizing and regulating pregnant women suspected of using controlled substances and provides an analysis of the impact of the laws on human rights and public health. Amnesty International has filed amicus briefs in a number of U.S. court cases including at the U.S. Supreme Court, Federal Appellate Court and State Court levels. In particular, the organization has submitted information and analysis in related cases, *Patel v. Indiana*, 60 N.E.3d 1041 (Ind. 2016), which vacated Patel's convictions for class A felony neglect of a dependent and feticide, *Mississippi v. Buckhalter*, 119 So.3d 1015 (Miss. 2013), which overturned an indictment for culpable-negligence manslaughter following a stillbirth, as well as other landmark cases such as *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), *Rasul v. Bush*, 542 U.S. 466 (2004), *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *Roper v. Simmons*, 543 U.S. 551 (2005), *Samantar v. Yousuf*, 130 S.Ct. 2278 (2010), and *Bimenyimana v.*

Holder, Case Nos. 13-1676L, 14-2212, U.S. Court of Appeals (4th Cir. 2015).

Amicus Curiae Human Rights and Gender Justice Clinic (“the HRGJ”) is devoted to defending and implementing the rights of women under U.S. and international law and ending all forms of discrimination. HRGJ is part of Main Street Legal Services, a non-profit, third year clinical program at the City University of New York School of Law, organized under the laws of New York and based in Long Island City, New York. HRGJ engages in litigation and advocacy, in conjunction with women’s rights advocates, human rights lawyers, and grassroots organizations to promote women’s human rights and gender justice. HRGJ is widely recognized for its expertise and contributions to gender jurisprudence and human rights practice and frequently provides expert testimony and files *amicus curiae* briefs in cases involving women’s rights and reproductive health issues, including cases involving forced sterilization, the rights of pregnant women and violence against women.

Amicus Curiae the Center for Reproductive Rights (the “Center”) is a nonprofit organization incorporated and headquartered in New

York that uses the law to advance reproductive freedom as a fundamental human right that all governments are legally obligated to respect, protect and fulfill. The Center has undertaken a variety of initiatives, both in the U.S. and around the globe, to ensure that women do not lose their core rights to autonomy, dignity, or equality when they become pregnant. The Center has advocated against the shackling of women in prison during childbirth in the U.S., and challenged the detention of postpartum women for failure to pay medical bills in Kenya. To carry out its work, the Center promotes the domestic and international application of international human rights instruments and consideration of related precedent in comparative law. The Center has developed a special degree of knowledge and expertise in the international human rights framework as well as in comparative law standards and U.S. constitutional law.

II. THE AMICUS BRIEF PROVIDES THE UNIQUE PERSPECTIVE OF AN INTERNATIONAL HUMAN RIGHTS ANALYSIS

The Amicus brief will help inform the Court's resolution of this appeal by providing a "unique perspective" that "can assist the court of appeals beyond what the parties are able to do[.]" *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (citing *Ryan v.*

Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997)). Specifically, the brief provides information about international human rights standards concerning arbitrary detention, forced medical treatment and privacy rights to confidential medical information, including U.S. human rights obligations under international treaties it has ratified. These sources establish the fundamental nature of the rights to physical liberty, bodily integrity and privacy which is directly relevant to the Court's consideration of the importance of the interests at stake when it determines whether 1997 Wisconsin Act 292, Wis. Stat. §48.193 ("Act 292") is unconstitutionally vague.

Further consideration of international and regional human rights authorities can assist the Court in its analysis of how these fundamental rights continue to apply to women during pregnancy. In particular, human rights standards and the analysis of respected human rights bodies can provide the court with the experience and reasoning of respected international bodies and courts and comparative models that "cast an empirical light on the consequences of different solutions to a common legal problem." *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

The U.S. Supreme Court routinely looks to international and foreign law and decisions of regional human rights bodies for guidance in analyzing constitutional claims. See, e.g., *Graham v. Florida*, 560 U.S. 48, 80 (2010) (noting the “longstanding” practice of considering international and foreign law); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (characterizing international authority as “instructive for [the Court’s] interpretation” of the Constitution); *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (citing a European Court of Human Rights decision); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing to international disapproval of the practice of executing developmentally disabled individuals); Sarah H. Cleveland, *Our Int’l Constitution*, 31 *Yale J. Int’l L.* 1, 88–100 (2006) (detailing the U.S. Supreme Court’s “longstanding tradition of relying on international law to inform constitutional meaning”).

Finally, amici’s proposed brief provides a useful perspective “that are not to be found in the parties’ briefs.” *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in chambers). Amici have specific expertise in human rights and international law that the parties do not have. Because the proposed amicus brief offers

an in-depth international law analysis of the issues of this case, it avoids duplication and provides the Court with unique information and a perspective that would not otherwise be before the it.

CONCLUSION

For the foregoing reasons, the motion for leave to file a brief as amicus curiae should be granted. If such relief is granted, Amici request that the accompanying brief be considered filed as of the date of this Motion's filing.

Dated: July 27, 2017.

Respectfully submitted:

s/ Cynthia Soohoo

s/ Amanda B. Dysart

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 27, 2017, the undersigned electronically filed with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that services will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

By: s/ Kathrine D. Jack

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CENTER FOR REPRODUCTIVE RIGHTS**

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RULE 26.1 DISCLOSURE STATEMENTS**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**Appellate Court No: 17-1936Short Caption: LOERTSCHER v. ANDERSON et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

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HUMAN RIGHTS AND GENDER JUSTICE CLINIC AT THE CITY UNIVERSITY OF NEW YORK LAW SCHOOL

CENTER FOR REPRODUCTIVE RIGHTS

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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JACK LAW OFFICE LLC

- (3) If the party or amicus is a corporation:

- i) Identify all its parent corporations, if any; and

None of the amici has a parent corporation.

- ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None of the amici have shares of stock.

Attorney's Signature: s/ Kathrine D. Jack

Date: 7-27-17

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Attorney's Signature: s/ Cynthia Soohoo Date: 7-27-17

Attorney's Printed Name: Cynthia Soohoo

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes No

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Attorney's Signature: s/ Amanda B. Dysart

Date: 7-27-17

Attorney's Printed Name: Amanda B. Dysart

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes [] No [x]

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STATEMENT OF INTEREST AND AUTHORITY TO FILE

Amici curiae Amnesty International, Human Rights and Gender Justice Clinic at the City University of New York Law School, and the Center for Reproductive Rights are human rights organizations that engage in litigation, education and advocacy to promote respect for international human rights law and principles by all nations, including the United States, with particular expertise on women's rights and reproductive health.¹ *Amici* have an interest in ensuring that women's rights to be free from arbitrary detention and forced medical treatment and to confidential medical information are respected on an equal basis with men. *Amici* submit this brief to inform the Court about international law and human rights standards that establish the fundamental nature of these rights and provide the Court with standards and comparative models to assist its analysis of how these rights continue to apply to women during pregnancy.

Amici request authority to file this brief in a motion for leave to file pursuant to Rule 29(a)(3).

RULE 29(a)(4)(E) Statement - No party's counsel has authored this brief, in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person – other than the *amicus curiae*, its members and its counsel – contributed money that was intended to fund the preparation or submission of this brief.

¹ More detailed descriptions of the particular mission and interest of each *Amicus Curiae* are provided in the Motion of Amnesty International et al for Leave to File Amicus-Curiae Brief.

SUMMARY OF ARGUMENT

This case considers the constitutionality of 1997 Wisconsin Act 292, Wis. Stat. §48.193 (“Act 292”), which authorizes Wisconsin’s juvenile court to treat a fertilized egg, embryo or fetus at any gestational stage as a child in need of protection or services if a pregnant woman

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

Wis. Stat. § 48.133. An “unborn child” is defined as “a human being from the time of fertilization to the time of birth.” Wis. Stat. § 48.02. Once a court asserts jurisdiction, it may order that a pregnant woman be detained in an inpatient drug treatment center, forcing her to leave her home and family and undergo forced medical treatment. The statute also allows the state to obtain confidential medical information without the woman’s consent. If the woman fails to comply with the court’s order she may be held in contempt and incarcerated.

As discussed in her brief, when Appellee Tamara Loertscher sought to confirm her pregnancy and obtain health care at the Mayo Clinic Hospital (“Mayo”), she was reported to Taylor County Human Services (“TCHS”) for using controlled substances and alcohol during her pregnancy. A hold was instituted prohibiting her from leaving Mayo, and a guardian ad litem (“GAL”) was appointed to represent her fetus. On August 5, 2014, after a telephonic hearing that took place without Ms. Loertscher, a court ordered placement in an inpatient drug facility. Ms. Loertscher

told Mayo staff that she did not wish to enter an inpatient facility and would seek medical care on her own. Her treating physician determined that she was not “an imminent danger to herself or others” and the fact that she had “used in [t]he past does not mean she will again” and discharged her. However, the GAL and TCHS brought contempt proceedings against Ms. Loertscher for failing to report to the inpatient facility. At a subsequent contempt hearing, the court ordered that Ms. Loertscher submit to inpatient treatment or serve 30 days in jail. She did not have counsel during any of these proceedings. Ms. Loertscher spent 18 days in jail where she was denied prenatal care, including access to an obstetrician, and placed in solitary confinement. She was released after signing a consent degree mandating that she submit to weekly drug testing at her own expense and release her medical records to TCHS. In January of 2015, she gave birth to a healthy baby boy.

The extraordinary powers granted to the juvenile court violate core rights to liberty, privacy, personal autonomy and non-discrimination protected by the Constitution. While the District Court struck down Act 292 because it is unconstitutionally vague, the essential question in this case is whether Act 292 may strip a woman of fundamental constitutional and human rights simply because she is pregnant. *Loertscher v. Anderson*, No. 14-cv-870-jdp, 2017 U.S. Dist. LEXIS 65443, at *32 (W.D. Wis. April 28, 2017) (holding that the case requires an exacting vagueness standard because it implicates constitutional rights). The rights to be free from arbitrary detention and forced medical treatment and to privacy in personal medical information and non-discrimination are universally recognized

and protected by human rights law. In considering these rights, human rights bodies have emphasized that a gender perspective is necessary to ensure that physical differences between women and men, such as the capacity to be pregnant, as well as stereotypical attitudes about women's ability and right to make their own health care decisions do not undermine women's equal enjoyment of human rights. In particular, human rights bodies have rejected the idea that fetal interests can be considered separately from, or promoted to the detriment of, pregnant women.² Human rights standards also emphasize that pregnant women must be treated with dignity and respect.

Human rights experts have expressed particular concern that Act 292 authorizes arbitrary detention. Following an October 2016 visit to the U.S., the U.N. Working Group on Arbitrary Detention noted troubling aspects of Wisconsin's law including confidential proceedings and lack of meaningful standards, procedural protections, and legal representation of pregnant woman.³ U.N. Working Group on Arbitrary Detention, *Preliminary Findings from its visit to the United States of America* (October 11-24, 2016), <http://www.ohchr.org/EN/>

² Indeed, international human rights bodies reject the notion that human rights protections can apply prenatally. Center for Reproductive Rights, *Whose Right to Life? Women's Rights and Prenatal Protections under Human Rights and Comparative Law* (2014), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/GLP_RTL_ENG_Updated_8%2014_Web.pdf (surveying authoritative sources for international and regional human rights treaties establishing that human rights protections do not apply before birth); Amnesty International, *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA*, 48 (2017), https://www.amnesty.be/IMG/pdf/criminalizing_pregnancy.pdf ("Criminalizing Pregnancy").

³ The U.N. Working Group on Arbitrary Detention is composed of independent human rights experts who investigate alleged instances of arbitrary deprivation of liberty.

NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E (“WGAD, Preliminary Findings on U.S.”).

Similarly, a recent report by Amnesty International looked at the unique forms of regulation imposed on pregnant women suspected of substance abuse in the U.S., including forced state intervention and criminalization. The report concluded that rather than promoting the health and rights of pregnant women, these laws violate women’s human rights and are a mistaken legal response to address individual and public health issues. *Criminalizing Pregnancy*, 65.

Given the gravity of the legal questions and the unique legal issues raised by a law that diminishes the rights of women because of pregnancy, this brief provides information about relevant international human rights law and standards to aid the Court in its analysis.

ARGUMENT

I. INTERNATIONAL HUMAN RIGHTS STANDARDS CAN INFORM THIS COURT’S ANALYSIS OF THE CONSTITUTIONALITY OF THE WISCONSIN STATUTE

This Court can be aided in its analysis of the constitutional questions before it by considering international human rights law and the decisions of regional human rights bodies as sources of persuasive authority.

The United States is a party to international human rights treaties that impose international legal obligations concerning issues at the heart of this case, including the right to be free from arbitrary detention, the right to be free from forced medical treatment, the right to privacy of medical information, and the right

to non-discrimination based on gender. Specifically, the United States ratified and has an obligation to comply with the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 (“ICCPR”) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85 (“CAT”). In addition, the U.S. has signed but not ratified other treaties that safeguard these rights, including the Convention on the Elimination of all Forms of Discrimination Against Women, *opened for signature* July 17, 1980, 1249 U.N.T.S. 14 (“CEDAW”) and the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (“CESCR”) as well as the Organization of American States (OAS), American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“American Convention on Human Rights”). Under international law, the U.S. has an obligation not to act in ways that would defeat the object and purpose of treaties it has signed, even if they have not been ratified. *See*, Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (“Vienna Convention”), art. 18.

The U.S. Supreme Court routinely looks to international and foreign law and decisions of regional human rights bodies for guidance in analyzing constitutional claims. *See*, e.g., *Graham v. Florida*, 560 U.S. 48, 80 (2010) (noting the “longstanding” practice of considering international and foreign law); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (characterizing international authority as

“instructive for [the Court’s] interpretation” of the Constitution); *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (citing a European Court of Human Rights decision); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing international disapproval of practice of executing developmentally disabled individuals).

International law and the reasoning of international and regional human rights bodies and experts can provide a useful perspective for the court to consider, particularly when dealing with novel legal issues, as the experience of respected international bodies and courts can “cast an empirical light on the consequences of different solutions to a common legal problem.” *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

II. THE WISCONSIN STATUTE VIOLATES INTERNATIONAL LAW PROHIBITIONS ON ARBITRARY DETENTION

As the District Court recognized, involuntarily detaining a pregnant woman for drug treatment clearly implicates her constitutional right to be free from physical restraint. *Loertscher*, 2017 U.S. Dist. LEXIS 65443, at *20. *See, Reno v. Flores*, 507 U.S. 292, 315-16 (1993) (O’Connor, J., concurring) (recognizing that a person’s “core liberty interest” is not limited to the criminal context and includes confinement in other custodial institutions). International law also unequivocally prohibits arbitrary detention because it violates an individual’s right to liberty and freedom from physical restraint. ICCPR Art. 9(1) states that, “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”

U.S. courts recognize that the right to be free from arbitrary detention rises to the level of customary international law.⁴ See, e.g., *Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (“clear international prohibition” exists against prolonged and arbitrary detentions); *De Sanchez v. Blanco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (“the right not to be arbitrarily detained” is among the small group of “basic rights” that have been “generally accepted”); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (“no principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.”). Indeed, the customary international law prohibition against arbitrary deprivation of liberty is so strong that it is recognized as a *jus cogens* norm.⁵ U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/22/44 (December 24, 2012) (“WGAD, Deliberation No. 9”), para. 51.

As discussed below, international law requires that any detention scheme be reasonable and proportionate and provide adequate due process protections. Because Act 292 subjects women to involuntary detention through a statutory scheme that is neither reasonable nor proportionate, is fatally vague, and lacks due

⁴ Customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.” American Law Institute, *Restatement of the Law (Third), Foreign Relations Law of the United States* (1987), § 102(c)(2).

⁵ A *jus cogens* norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” *Vienna Convention*, art. 53; see, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir.1992).

process protections, Wisconsin violated Ms. Loertscher's right to be free from arbitrary detention. *See*, WGAD, Preliminary Findings on U.S.

A. International standards require that detention schemes be reasonable and proportionate and provide adequate due process protections.

International treaties and human rights bodies and experts have regularly noted that any detention, whether civil or criminal, must be reasonable and proportionate and ensure full due process protections. The U.N. Human Rights Committee, which monitors implementation of the ICCPR, explained that a law may be arbitrary if it is inappropriate, unjust, lacks predictability, or fails to provide due process as well as elements of reasonableness, necessity and proportionality. U.N. Human Rights Committee, *General Comment No 35: Article 9*, U.N. Doc. CCPR/C/GC/35 (December 16, 2014) ("HRC GC 35"), para. 12. *See also*, U.N. Human Rights Committee, *Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/d/458/1991 (July 21, 1994), para. 9.8 (stating the ICCPR's drafting history "confirms that arbitrariness is to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law").

1. Involuntary hospitalization must be necessary and proportionate for the purpose of protecting the detainee from serious harm or injury to others.

The U.N. Human Rights Committee recognizes that involuntary hospitalization may constitute arbitrary detention and emphasized that in the context of involuntary hospitalization "deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious

harm or preventing injury to others.” HRC GC 35, para. 19. According to the Working Group on Arbitrary Detention, compulsory detention for the purpose of drug rehabilitation is “contrary to scientific evidence and inherently arbitrary” and drug use or dependence alone “is not sufficient justification for detention.” U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/30/36 (July 10, 2015) (“WGAD Report on Drug Control”), paras. 59-60.

Further, human rights law emphasizes that the state should make less restrictive alternatives available before involuntarily detaining someone. HRC GC 35, para. 19. Involuntary detention should always be a last resort and used for the shortest appropriate period. *Id.*

2. The law must provide predictability and comply with due process.

An involuntary hospitalization scheme also must be predictable and provide due process protections to ensure that it is fairly applied to a specific individual. HRC GC 35, para. 12. Predictability requires that the statute cannot be so vague that it fails to provide notice of what is prohibited. *Loertscher*, 2017 U.S. Dist. LEXIS 65443, at *19. (“Due process requires that a law clearly define its prohibitions.”)

ICCPR Art. 9(4) provides that anyone deprived of liberty “shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention” As the District Court noted, although Act 292 “is nominally a civil statute . . . , its consequences are nearly equivalent to criminal

sanctions,” requiring heightened due process protections. *Loertscher*, 2017 U.S. Dist. LEXIS 65443, at *20. Under such circumstances, human rights law recognizes a right to counsel. U.N. Human Rights Committee, *General Comment No 32: Article 14: Right to equality before courts and tribunals to a fair trial*, U.N. Doc. CCPR/C/GC/32 (August 23, 2007), para. 10; U.N. Human Rights Committee, *Osiyuk v. Belarus*, Communication No. 1311/2004, U.N. Doc. CCPR/C/96/D/1311 (2004), para. 7.3. Indeed, the U.N. Basic Principles and Guidelines on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court provides that access to legal counsel shall be provided “immediately after the moment of deprivation of liberty.” U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/30/37 (July 6, 2015), Guideline 8. Further, “any determination with respect to the need for treatment [should] be carried out by qualified professionals.” WGAD, Preliminary Findings on U.S.

B. Act 292’s detention provisions are neither reasonable nor proportionate.

Human rights law provides that involuntary detention for medical reasons is only permitted to protect an individual from harm or to prevent immediate injury to others, and a woman’s drug use, or even drug dependence, does not justify involuntary detention for drug treatment. *See* WGAD Report on Drug Control, paras. 59-60. And, indeed, Ms. Loertscher’s treating physician determined that she was not an imminent danger to herself or others. *Loertscher*, 2017 U.S. Dist. LEXIS 65443, at *12. To the extent that the state claims an interest in protecting an

“unborn child,” Act 292 is neither a reasonable nor proportionate means to achieve the state’s purported purpose.

Act 292 is not reasonable because it does not further maternal and fetal health. As established by experts in public health, forced treatment actually dissuades pregnant women from seeking prenatal care and drug treatment undermining health goals. American Medical Association, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2667 (1990); *Loertscher*, 2017 U.S. Dist. LEXIS 65443, at *4. Further, the statute is not written, nor was it applied, to promote a healthy pregnancy. Ms. Loertscher was jailed for 18 days, denied pre-natal care and placed in solitary confinement, undermining a healthy pregnancy and directly contradicting the statute’s stated goal.

The statute is not proportionate because it encompasses a pregnant woman’s use of a wide range of substances without proof that all, or any of them, actually pose a danger to a developing fertilized egg, embryo or fetus, or what level of use is dangerous. Center for the Evaluation of Risks to Human Reproduction, *Report of the NTP-DEHR Expert Panel on the Reproductive & Developmental Toxicity of Amphetamine and Methamphetamine* 163, 174 (2005); *Loertscher*, 2017 U.S. Dist. LEXIS 65443, at *17. The District Court noted that, “All agree that medical science can draw no reasonably precise line where consumption levels transition from benign to seriously risky.” *Id.* Furthermore, the statute’s breadth allows arbitrary and unreasonable enforcement by non-medical professionals. Anyone, regardless of medical expertise or credentials, may initiate enforcement by reporting a pregnant

woman to the authorities. This resulted in the state issuing an order of temporary custody and mandating treatment in Ms. Loertscher's case even though she did not have a substance use disorder. Further, Ms. Loertscher was never offered non-coercive medical treatment and services as an alternative.

C. The Wisconsin statute violates due process as it lacks adequate procedural safeguards and failed to provide adequate notice

Act 292 fails to provide adequate procedural safeguards. As the District Court noted, rather than providing a person a reasonable opportunity to know what is prohibited, the statute is fatally vague. *Id.* at 31. Further, it fails to provide other basic due process protections, including immediate appointment of counsel and state appointed experts to examine the individual and provide reliable scientific testimony. Under Act 292, a pregnant woman is only entitled to counsel if she is placed outside the home, even if court orders substantially infringe upon her liberty and medical decision making. Wis. Stat. § 48.23(2m). Moreover, a woman who qualifies for appointed counsel is not entitled to representation at the initial plea hearing and may be held in custody for up to 30 days before counsel is appointed. Wis. Stat. §§48.30 (1) & (2), 48.305. Expert testimony is not required to prove that a woman "habitually lacks self-control" in the use of alcohol or controlled substances or that there is a substantial risk to the health of the fetus.

Ms. Loertscher was denied adequate procedural safeguards on multiple occasions. During the telephonic temporary physical custody hearing, Ms. Loertscher stated she would not participate in a hearing without legal representation, which was not provided. Similarly, no counsel was appointed for

Ms. Loertscher during her contempt hearing, despite the fact that a holding of contempt can and did lead to incarceration. Moreover, the obstetrician who testified at the initial hearing had only met Ms. Loertscher once and did not understand the purpose or implications of the hearing and disclaimed that she was “not an expert witness” on the impacts of methamphetamines and THC on a fetus.

Following its recent visit to the U.S., the Working Group on Arbitrary Detention considered Act 292 and the laws of four other states that allow confinement and involuntary treatment of pregnant women suspected of substance use. It specifically expressed concerns about key aspects of Act 292, including the fact that detaining pregnant women removed women “from their homes, families and employment” pursuant to procedures that “are often confidential, lack meaningful standards, provide few procedural protections, and may take place without legal representation.” WGAD, Preliminary Findings on U.S. The Working Group emphasized that statutory schemes like Act 292 “should be replaced with alternative measures that protect women without jeopardizing their liberty.” *Id.*

III. ACT 292 VIOLATES INTERNATIONAL LAW PROHIBITIONS ON FORCED MEDICAL TREATMENT

The District Court properly recognized that coerced medical treatment implicates important liberty interests that are protected by the Constitution. *Loertscher*, 2017 U.S. Dist. LEXIS 65443, at *21. In *United States v. Husband*, this Court stated that “[b]ecause any medical procedure implicates an individual’s liberty interests in personal privacy and bodily integrity, the Supreme Court has indicated that there is a ‘general liberty interest in refusing medical treatment.’”

226 F.3d 626, 632 (7th Cir. 2000) (quoting *Cruzan by Cruzan v. Dir., Mi. Dep't of Health*, 497 U.S. 261, 278 (1990)). International human rights standards also consistently recognize that forced medical treatment violates an individual's liberty interests in privacy and bodily integrity.

A. International Standards Protect Autonomous Health Care Decisions As Integral to the Rights to Personal Integrity and Privacy

The right to personal integrity is a key concept of human rights law that is both explicitly protected by human rights treaties and an underlying principle of human rights, closely linked with human dignity.⁶ Bodily autonomy and personal integrity, including informed consent for medical treatment, are protected under multiple provisions of human rights treaties including the right to privacy, the right to health, and the right to be free from torture and cruel, inhuman and degrading treatment (“CIDT”).⁷ In particular, the right to privacy and the right to be free from torture and CIDT are protected by Articles 7 and 17(1) of the ICCPR and Article 16 of CAT. Regional human rights treaties also specifically guarantee these rights. *See*, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, *as amended by* Protocols Nos. 11 and 14, November 4,

⁶ For instance, the European Court of Human Rights describes “respect for human dignity and human freedom and the notions of self-determination and personal autonomy” as the “very essence” of the European Convention on Human Rights. *Jehovah's Witnesses of Moscow v. Russia*, App. No. 302/02, Council of Europe: European Court of Human Rights (June 10, 2010), para. 135.

⁷ Because of the relationship between physical integrity and torture and CIDT, the American Convention on Human Rights contains provisions on physical integrity and torture and CIDT in the same article:

Art. 5(1): “Every person has the right to have his physical, mental or moral integrity respected.”

Art. 5(2): “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.”

1950, ETS 5 (“European Convention on Human Rights”), art. 3 (prohibition of torture and cruel, inhuman and degrading treatment) and art. 8 (privacy and family life); American Convention on Human Rights, art. 5 (personal integrity, right to humane treatment), art. 11 (privacy).⁸

Because the right to decide whether to undergo medical treatment goes to the heart of privacy and bodily integrity,⁹ human rights law prohibits forced medical interventions and requires informed consent for medical treatment, with very narrow exceptions inapplicable here. Thus, ICCPR, Article 7 explicitly prohibits nonconsensual medical experimentation, and the U.N. Human Rights Committee has repeatedly recognized that nonconsensual medical treatment violates the

⁸ The U.S. has signed ICESCR and CEDAW, human rights treaties that recognize the right to autonomous health care decisions. ICESCR, art. 12; CEDAW, art. 12. *See*, Convention on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (“CESCR, GC 14”), para. 8 (right to health includes “the right to control one’s health and body . . . and the right to be free from interference, such as the right to be free from . . . non-consensual medical treatment . . .”); Convention on Economic, Social and Cultural Rights, *General Comment 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/22 (May 2, 2016), para. 10; Convention on the Elimination of all Forms of Discrimination Against Women, *General Recommendation 24: Article 12 of the Convention (Women and Health)*, U.N. Doc. A/54/38/Rev.1 (1999) (“CEDAW, GR 24”), 31(e) (women’s health services must respect the “rights to autonomy, privacy, confidentiality, informed consent and choice”).

⁹ The U.N. Special Rapporteur on Health has explained that “guaranteeing informed consent is a fundamental feature of respecting an individual’s autonomy, self-determination and human dignity.” Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. A/64/272 (August 10, 2009) (“SR on Health, Informed Consent Report”), para. 18. *See*, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/22/53 (February, 1, 2013), para. 28 (“Guaranteeing informed consent is a fundamental feature of respecting an individual’s autonomy, self-determination and human dignity in an appropriate continuum of voluntary health-care services . . .”).

ICCPR.¹⁰ Cases decided by the European Court of Human Rights and the Inter-American Court of Human Rights have also held that forced medical treatment violates the right to privacy and to be free from torture and CIDT,¹¹ and that informed consent is essential to respect a patient's autonomy and dignity.¹²

International treaties and consensus documents on bioethics similarly recognize that human dignity and integrity and personal autonomy require informed consent for any medical intervention.¹³ See, e.g., UNESCO, Universal Declaration on Bioethics and Human Rights (2005), arts. 2(c), 3, 5; Council of Europe, Convention on the Protection of Human Rights and Dignity of the Human Being with regard to

¹⁰ U.N. Human Rights Committee, *Concluding Observations of the Fourth Periodic Report of France*, U.N. Doc. CCPR/C/FRA/CO/4 (August 17, 2015), para. 20 (DNA testing should be subject to informed consent); U.N. Human Rights Committee, *Concluding Observations on the Third Periodic Report of Latvia*, U.N. Doc. CCPR/C/LVA/CO/3 (April 11, 2014), para. 16 (expressing concern about forced medication in high dosages for adults with mental disabilities); U.N. Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Ireland*, U.N. Doc. CCPR/C/IRL/CO/4 (August 19, 2014), para. 11 (expressing concern about performance of symphysiotomy on women without their free and informed consent); U.N. Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Spain*, U.N. Doc. CCPR/C/ESP/CO/6 (August 14, 2015), para. 10 (expressing concern about forced sterilization of persons with disabilities).

¹¹ *I.V. v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, No. 329, Inter-Am. Ct. H.R. (ser. A) (November 30, 2016), paras. 256, 270 (forced sterilization violates the right to personal integrity, privacy and to be free from torture or CIDT under American Convention on Human Rights, arts. 5.1, 5.2 and 1); *V.C. v. Slovakia*, App. No. 18968/07, European Court of Human Rights (Feb. 8, 2012), paras. 120, 155 (forced sterilization violates European Convention on Human Rights, arts. 3 and 8); *G.B. v. Moldova*, App. No. 16761/09, European Court of Human Rights (1999), para. 29 (administering medical treatment against patient's will interferes with rights under European Convention on Human Rights, art. 8).

¹² *I.V. v. Bolivia*, para. 159; *Jehovah's Witnesses of Moscow v. Russia*, para. 136 ("The freedom to accept or refuse specific medical treatment, or to select an alternative form of treatment, is vital to principles of self-determination and personal autonomy.")

¹³ Universal Declaration on Bioethics and Human Rights, Art. 6 provides that "Any preventative, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information." Similarly, Convention on Human Rights, Biology and Medicine, Art. 5 states that "Any intervention in the health field may only be carried out after the person concerned has given free and informed consent to it."

the Application of Biology and Medicine, January 12, 1999, ETS 164 (“Convention on Human Rights, Biology and Medicine”), art. 1.

Human rights bodies and international health experts also explicitly find that forced drug treatment violates human rights. The U.N. Special Rapporteur on Torture states that “subjecting persons to [drug] treatment or testing without their consent may constitute a violation of the right to physical integrity.” Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/10/44 (January 14, 2009). World Health Organization (“WHO”) guidelines specifically require that drug treatment should not be compulsory and should only be undertaken with informed consent. World Health Organization, *Guidelines for the Psychosocially Assisted Pharmacological Treatment of Opioid Dependence* (2009), pp. 9, 15. The U.N. Special Rapporteur on Health has emphasized that compulsory testing for purposes of drug treatment is counter-productive and that drug dependence should be treated like other health-care conditions. *See*, SR on Health, Informed Consent Report, para. 32. Pregnancy does not change or diminish a woman’s right to be free from forced drug treatment.

B. Wisconsin’s Purported Interest in Protecting Fetal Health Does Not Justify Forced Drug Treatment

Given the importance of the right to bodily integrity and privacy, forced medical interventions are only justified in very limited circumstances that do not apply to Ms. Loertscher’s forced drug testing and treatment.

ICCPR, Art. 17 protects against “arbitrary or unlawful interference” with the right to privacy. The Human Rights Committee has emphasized that any state interference with an individual’s privacy must be consistent with the “aims and objectives” of the ICCPR and “reasonable in the particular circumstances.”¹⁴ Similarly, Art. 8 of the European Convention on Human Rights provides that interference with the right to privacy is only justified if it is “in accordance with the law” and “necessary in a democratic society [including] for the protection of health or morals.” According to the European Court of Human Rights, necessity implies “interference that corresponds to a pressing social need and . . . is proportionate to the legitimate aim pursued.” *Pretty v. United Kingdom*, App. No. 2346/02, European Court of Human Rights (April 29, 2002), para. 70; *V.C. v. Slovakia*, para. 139. In addition, because of the importance of personal integrity and bodily autonomy, the European Court of Human Rights has made clear that due process protections must be provided. *V.C. v. Slovakia*, para. 141.

Medical treatment without consent cannot be justified even if authorities view treatment as being in the patient’s best interests. In *Jehovah’s Witnesses of Moscow v. Russia*, the European Court of Human Rights rejected a ban on the activities of Jehovah’s Witnesses that was based on their religious prohibition of blood transfusions. The court emphasized that for freedom to make one’s medical decisions to be meaningful “patients must have the right to make choices that accord with their own views and values, regardless of how irrational, unwise or

¹⁴ U.N. Human Rights Committee, *General Comment No 16: Article 17 “The Right to Privacy”*, U.N. Doc. INT/CCPR/CEC/662.E (1988) (“HRC GC 16”), para. 4.

imprudent such choices may appear to others.” *Jehovah’s Witnesses v. Russia*, para. 135. *See, V.C. v. Slovakia*, para. 105. The court wrote:

[T]he refusal to accept a particular treatment might, inevitably lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person’s physical integrity in a manner capable of engaging [the right to privacy].

Jehovah’s Witnesses v. Russia, para.135.

To the extent that the state claims an interest in the health of an “unborn child” separate from the pregnant woman, Act 292 is not a reasonable or proportionate measure to protect that interest and does not provide adequate due process protection. The U.N. Special Rapporteur on Health has stated that in the public health context, “[a]ny limitations of informed consent must be substantiated by scientific evidence and implemented with participation, transparency and accountability to the principles of gradualism and proportionality.” SR on Health, Informed Consent Report, para. 31. As discussed above, Act 292 is not substantiated by scientific evidence and does not require expert testimony in specific cases. The statute is neither reasonable, nor proportionate, because rather than promoting healthy pregnancies it is likely to have the opposite effect and fails to provide alternative, less coercive means to promote its objectives. Finally, the statute is fatally vague and does not provide adequate due process protections.

IV. ACT 292 VIOLATES PREGNANT WOMEN’S RIGHTS TO CONFIDENTIALITY OF MEDICAL RECORDS

As set forth in Ms. Loertscher’s brief, women have a reasonable expectation of privacy in their medical information, and Act 292 violates their Fourth Amendment

right to be free from nonconsensual searches without a valid warrant. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001); *Denius v. Dunlap*, 209 F.3d 944, 956 (7th Cir. 2000). When Ms. Loertscher was sent to Mayo by TCHS to confirm her pregnancy and receive medical care, unbeknownst to her Mayo staff also conducted a drug test. Subsequently, without Ms. Loertscher's consent, hospital staff informed TCHS of her pregnancy and positive test for controlled substances, which was used as evidence against her to obtain a court order to detain her and force her into a drug treatment program. *Loertscher*, 2017 U.S. Dist. LEXIS 65443, at *8. TCHS then obtained medical records from Mayo, *id.* at 9, and an obstetrician testified about Ms. Loertscher's confidential health information without her consent. *Id.* at 11.

Human rights law and international standards support a patient's right to maintain the confidentiality of medical information. The World Medical Association requires that "all identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a personal kind must be kept confidential, even after death." World Medical Association, *Declaration of Lisbon on the Rights of the Patient, as revised in 2005 and reaffirmed in 2015*, para. 8. The right to confidential personal information is protected by the right to privacy under ICCPR Art. 17(1). HRC GC 16, para. 7. The Human Rights Committee has specifically criticized laws that require doctors to report medical information about women, such as having undergone abortions. HRC, GC 28, para. 20.

In addition to privacy concerns, human rights standards recognize that medical confidentiality is an important component of the right to health because failure to protect patient confidentiality adversely affects patient health and well-being. *See*, CESCR, GC 14, para. 12(c) (“All health facilities, goods and services must be . . . designed to respect confidentiality.”) The Special Rapporteur on Health has noted that “lack of confidentiality may deter individuals from seeking advice and treatment, thereby jeopardizing their health and well-being.” Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. E/CN/4/2004/49 (Feb. 16, 2004), para. 40.

V. ACT 292 REFLECTS DISCRIMINATORY ATTITUDES TOWARDS WOMEN AND VIOLATES EQUAL PROTECTION

Rather than respecting the dignity, liberty, privacy and rights to personal integrity of women, Act 292 imposes a unique burden on these rights because of women’s capacity to become pregnant and stereotypical ideas surrounding women’s ability to make their own health care decisions. This discrimination both supports an equal protection challenge to the statute and informs our understanding of how and why the statute allows the violation of women’s other fundamental rights.

U.N. human rights bodies and experts repeatedly warn that gender discrimination – and in particular stereotyped views about women – can lead to violations of a woman’s rights to make autonomous health decisions and to have the

confidentiality of her health information respected.¹⁵ They caution that this is particularly the case in reproductive health contexts¹⁶ and emphasized that a woman seeking health care “is entitled to be treated as an individual in her own right, the sole beneficiary of the service provided by the health-care practitioner and fully competent to make decisions concerning her own health.”¹⁷

The likelihood of such violations increases when states adopt the view that fetal interests can be separated from the interests of the women who carry them. This view is flawed from both a rights and public health perspective. *See*, American College of Obstetricians & Gynecologists, *Refusal of Medically Recommended Treatment During Pregnancy*, ACOG Committee Opinion, No. 664 (June 2016), citing H. Minkoff & M.F. Marshal, *Fetal Risks, Relative Risks, and Relatives’ Risks*, 16 AM J. Bioethics 3 (2016) (stating that “questions of how to care for [a] fetus cannot be viewed as a simple ratio of maternal and fetal risks but should account for the need to respect fundamental values, such as the pregnant woman’s autonomy and control over her body”); Lisa H. Harris, *Rethinking Maternal-Fetal*

¹⁵ Convention on the Elimination of all Forms of Discrimination Against Women, *General Recommendation 34: On the Rights of Rural Women*, U.N. Doc. CEDAW/C/GC/32 (March 4, 2016), paras. 22, 31(e); U.N. Human Rights Committee, *General Comment No 28: Article 3 (The equality of rights between men and women)*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (March 29, 2000) (“HRC GC 28”), para. 20; SR on Health, Informed Consent Report, para. 54 (“Gender *inequities* reinforced by political, economic and social structures result in women being routinely coerced and denied information and autonomy in the health-setting.”)

¹⁶ HRC GC 28, para. 20 (expressing concern about spousal authorization laws, requirements that women have a certain number of children before sterilization, and laws requiring doctors to report abortions).

¹⁷ U.N. Working Group on the issue of discrimination against women in law and practice, *Report of the Working Group on the issue of discrimination against women in law and practice*, U.N. Doc. A/HRC/32/44 (April 8, 2016), para. 86.

Conflict: Gender and Equality in Perinatal Ethics, 96 *Obstetrics & Gynecology* 786 (2000) (stating that “clinically sound medical practices focus on the mutual interests of pregnant women and their fetuses”). The Special Rapporteur on Health has warned that pregnant women can be improperly denied full autonomy in health care settings when states purport to be acting in “the best interests of the unborn child.” SR on Health, Informed Consent Report, para. 54. Rather than assuming a conflict between a pregnant woman and her fetus, the Special Rapporteur recommends that health care initiatives designed to protect fetal health emphasize counseling and support services to “mitigate restrictions of autonomous decision-making of the woman and any potential harmful effects to the child.” *Id.* at para. 60.

As discussed in Ms. Loertscher’s brief, there is no rational basis to deny pregnant women the same procedural protections afforded to individuals facing civil commitment under Wisconsin’s Mental Health Act. Brief in Support of Motion for Summary Judgment by Plaintiff Tamara M. Loertscher, *Loertscher v. Anderson*, No. 14-cv-870-jdp, ECF No. 177, at *30 (W.D. Wis. April 28, 2017). Because women are singled out for fewer protections, the Working Group on Arbitrary Detention described laws like Act 292 as “gendered and discriminatory” in their “reach and application.” WGAD, Preliminary Findings on U.S.

Human rights law also emphasizes that pregnant women must have appropriate health care services and be treated with dignity. CEDAW, Art. 12; HRC GC 28, para. 15. Human rights bodies prohibit solitary confinement of pregnant women. Special Rapporteur on Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc.

A/HRC/31/57 (January 5, 2016). Yet, rather than promoting Ms. Loertscher's access to health care, the state's enforcement of Act 292 resulted in denial of prenatal care and solitary confinement.

CONCLUSION

Act 292 empowers a juvenile court to impose unconstitutional restrictions on a woman's right to liberty, privacy, personal autonomy and non-discrimination because she is pregnant. International law and human rights bodies and experts make clear that involuntary hospitalization and forced drug treatment violate a woman's right to liberty, personal integrity and privacy and that the state cannot take away a woman's ability to make her own health care choices, even if it disagrees with them. Further, any involuntary detention and forced medical treatment scheme must be necessary, reasonable, proportionate, imposed as a last resort, and satisfy due process. Act 292 fails each of these requirements.

Human rights standards also require that pregnant women be treated with dignity and respect, and not subject to discrimination. Rather than considering fetal interests separately from the women who carry them, human rights bodies emphasize that states seeking to promote healthy pregnancies should adopt measures that maximize maternal well-being and support autonomous health care decision-making by providing meaningful access to health care, including prenatal care and voluntary, non-coercive drug treatment and counseling.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure and Circuit Rule 29. The brief contains 6,991 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32.

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Respectfully submitted,

By: s/ Kathrine D. Jack

Date: July 27, 2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 27, 2017, the undersigned electronically filed with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that services will be accomplished by the appellate CM/ECF system.

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