



## National Advocates for Pregnant Women

March 31, 2021

Dear Representative Leach and Members of the Committee:

My name is Kendall Bentsen. I am a 6th generation Texan and the Organizer for National Advocates for Pregnant Women (NAPW), an organization devoted to protecting pregnant and parenting women and their families' civil and human rights. I write to oppose House Bill 1171, which seeks to authorize the appointment of an attorney ad litem or guardian ad litem to represent a fertilized egg, embryo, or fetus during a court proceeding authorizing a pregnant minor to consent to an abortion without parental notification or consent.

House Bill 1171 is a perfect example of a law that would undermine women's personhood (including their constitutional rights) under the guise of protecting the fetuses that they carry.

Many of the women NAPW represent and for whom we advocate are mothers. Most profoundly oppose abortion. While the language of HB 1171 focuses on abortion, it is, in fact, legislation that will greatly impact the lives of Texas's mothers. The fact is that the majority of women who get abortions are already mothers, and for those who are not, many will go on to become mothers.<sup>1</sup> In other words, women who have abortions and women who have babies are the same women—just at different points in their lives.

House Bill 1171 promotes the fantasy that fertilized eggs, embryos, and fetuses exist separately from pregnant women. In doing so, this bill provides the basis for state control, surveillance, and detention of pregnant women and mothers. As our peer-reviewed research confirms, laws that assert separate rights for fertilized eggs, embryos, and fetuses provide the legal argument for subjecting women to arrest and other forms of state control because of pregnancy.<sup>2</sup>

### **House Bill 1171 Would Set Precedent for Providing an Attorney Ad Litem or Guardian Ad Litem for a Fertilized Egg, Embryo, or Fetus in Every Context**

For the first time in Texas's history, the law would require that “unborn children” have an appointed representative in a legal proceeding. If the Legislature takes this unrepresented step, what is to say that courts won't start requiring representatives for fertilized eggs, embryos, and fetuses in any context in which a pregnant woman may be making a decision—including whether or not to continue working, whether or not to take certain medications while pregnant, whether or not to accept advice to get bed rest or stay in a hospital,<sup>3</sup> whether or not to consent to cesarean surgery or any other procedure someone believes would be beneficial to the fetus.<sup>4</sup>

When fetuses are granted attorneys, the consequences can be devastating. In the Angela Carder case, a pregnant woman with cancer refused a cesarean surgery at 27 weeks in the hopes of continuing her pregnancy to improve the chances of a healthy outcome. A hospital lawyer sought an emergency hearing at which the court appointed a lawyer for Ms. Carder and a lawyer for the fetus. Arguing that because Ms. Carder was going to die eventually anyway (though she was in fact very much alive and at times able to communicate her wishes), the lawyer for the fetus urged the court to order the major surgery over Ms. Carder's objections and those of her parents, husband, and attending physicians. The judge agreed with the fetus's lawyer and ordered the surgery knowing it could kill Ms. Carder. The surgery was performed and both Ms. Carder and the baby tragically died.<sup>5</sup>

To treat fertilized eggs, embryos, and fetuses as if they are already outside of a woman's body and entitled to separate legal representation creates the basis for subverting the woman's *life and personhood* in insidious, dangerous, and virtually limitless ways. This is because there is no way to add fertilized eggs, embryos, and fetuses still inside of women's bodies to the community of people entitled to independent legal rights, such as the right to counsel, without subverting the rights of pregnant women who carry, nurture, and sustain their pregnancies at considerable risk, especially for Black women,<sup>6</sup> to their own lives.

## **House Bill 1171 is Just Another Attempt to Establish Personhood in Texas**

House Bill 1171 is an end run to establish “fetal personhood” rights in Texas that, in the last 6 years, has been introduced by this Legislature and rejected no less than 20 times. After a hospital in Tarrant County, Texas appropriated a dead pregnant woman's body to incubate the fetus inside of her, against her own wishes and those of her husband and parents,<sup>7 8 9</sup> the Texas Legislature attempted to strengthen existing law by “appointing attorneys for the fetuses of brain-dead pregnant people.”<sup>10</sup> The bill failed to pass both times.

As NAPW's peer-reviewed research has documented in Texas and cases across the country,<sup>11</sup> when laws asserting separate rights for fertilized eggs, embryos, and fetuses are enacted, prosecutors and courts use them as the basis for expanding existing criminal laws to prosecute women for “crimes” in relation to their own pregnancies.

Texas's feticide law (SB 319), enacted as the Prenatal Protection Act, was used in precisely this way. As the Austin Chronicle reported, “The bill passed, was signed into law by Gov. Rick Perry, and took effect on Sept. 1, 2003. A mere three weeks later, 47th District Attorney Rebecca King (prosecuting in Potter and Armstrong counties) penned a letter to ‘All Physicians Practicing in Potter County’—Amarillo—informing them that under SB 319 ‘it is now a legal requirement for anyone to report a pregnant woman who is using or has used illegal narcotics during her pregnancy.’”<sup>12</sup>

Rather than refuse this demand from the district attorney, health care providers complied. As a result, more than 50 Potter County women were reported, charged with crimes, and in many cases incarcerated.<sup>13</sup> Some of these arrests were challenged. In 2006, a Texas Court of Appeals finally held that the Prenatal Protection Act did not authorize the arrests. In spite of this decision, however, some of the women were incarcerated for years while their cases worked their way through the court system.<sup>14</sup>

Laws identifying fertilized eggs, embryos, and fetuses as entitled to separate rights have also been used around the country to arrest and prosecute pregnant women for things including falling down the stairs,<sup>15</sup> eating a poppy seed bagel,<sup>16</sup> being in a “dangerous” location, and taking medications during pregnancy prescribed by their doctors.<sup>17</sup>

Texas has tried and failed time and time again to amend the state constitution to establish that “life begins at conception” and that the rights and privileges of the state constitution apply to fertilized eggs, embryos, and fetuses. HB 1171 is a cynical attempt to create fetal personhood in a state that has resoundingly rejected it and it leaves young people, some of the most vulnerable in our state, as collateral damage in this attempt.

## **House Bill 1171 Could Lead to the Criminalization and Imprisonment of Pregnant Women**

If Texas law creates a precedent that fertilized eggs, embryos and fetuses are considered “unborn children” who must be assigned representatives to advocate for them and place them in opposition to the pregnant women carrying them, then it takes no stretch of the imagination to see how the state could apply the same logic to prosecute women for the outcomes of their pregnancies.

No pregnant person can guarantee a healthy birth outcome: 15-20% of all pregnancies end in a miscarriage or a stillbirth. HB 1171 will open the door for pregnant women to be held criminally responsible for their pregnancy outcomes. A pregnant woman could face criminal prosecution for every action and inaction that is believed by her partner, law enforcement, or prosecutors to result in a miscarriage or stillbirth, even if she intended to go to term.

Women across the state of Texas have already been prosecuted and/or detained because they were pregnant. This measure will undoubtedly lead to more such prosecutions.<sup>18</sup> Such draconian measures undermine the doctor-patient relationship and deter pregnant women from obtaining prenatal care.<sup>19</sup> Intended or not, this legislation will further promote state surveillance to police pregnancy.

## **House Bill 1171 Will Waste Taxpayer Money and Deny Young Pregnant Women their Rights**

House Bill 1171 would make it so the state would pay “the cost of any attorney ad litem and any guardian ad litem appointed for an unborn child.”<sup>20</sup> How much will the Legislature allocate in the state budget for these attorneys? How does that compare to how much is allocated for addressing Texas’ maternal and infant mortality crisis, providing comprehensive prenatal and postnatal care, for rural healthcare more generally, and for critically-needed resources for low-income families and children?

## **Conclusion**

As U.S. Supreme Court decisions regarding pregnant minors make clear, young people do not, by virtue of becoming pregnant, lose their constitutional rights directly or through the imposition of parental notice or consent laws.<sup>21</sup> The purpose of judicial bypass is to ensure that pregnant teenagers’ rights, health, and lives are protected. The rights, lives, and health of pregnant teenagers will be subverted if this law passes. Without an actual client able to communicate its wishes, and one unlike any other client recognized in our system of law—inside and totally dependent upon another person’s body and life—the law will simply grant lawyers, under the guise of representing unborn children, the power to oppose and prevent exactly what pregnant teen girls are entitled to, to make mature decisions in the interest of their own lives and health.

National Advocates for Pregnant Women strongly opposes HB 1171. Whether intended this way or not, it amounts to nothing more than a thinly veiled attempt to further entrench hostility towards pregnant women into Texas law. Rather than further curtailing access to abortion for young women, the Texas Legislature should focus on the true threats to women and infant health, including access to quality healthcare, intimate partner violence, and maternal mortality, of which Texas ranks in the top 20% in the country. If you really value life, value the people who create life: mothers.

<sup>1</sup> Jenna Jerman, et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Inst. (May 2016), [https://www.guttmacher.org/sites/default/files/report\\_pdf/characteristics-us-abortion-patients-2014.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf); Tara C. Jatlaoui, et al. *Abortion Surveillance – United States, 2016*, Morbidity and Mortality Weekly Report, Centers for Disease Control and Prevention, [https://www.cdc.gov/mmwr/volumes/68/ss/ss6811a1.htm#T18\\_down](https://www.cdc.gov/mmwr/volumes/68/ss/ss6811a1.htm#T18_down), (last reviewed, Dec. 2, 2020); Rachel Jones et al, Guttmacher Inst., *Characteristics of U.S. Abortion Patients*, 8 (May 2010), [https://www.guttmacher.org/sites/default/files/report\\_pdf/us-abortion-patients.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/us-abortion-patients.pdf).

<sup>2</sup> Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. Health Pol. Pol’y dL. 299, (2013).

<sup>3</sup> Susan Donaldson James, *Pregnant Women Fights Court-Ordered Bed Rest*, ABC News (January 14, 2010), <https://abcnews.go.com/Health/florida-court-orders-pregnant-woman-bed-rest-medical/story?id=9561460>

<sup>4</sup> Molly Redden, *New York hospital’s secret policy led to woman being given C-section against her will*, The Guardian (October 5, 2017), <https://www.theguardian.com/us-news/2017/oct/05/new-york-staten-island-university-hospital-c-section-ethics-medicine>

<sup>5</sup> Terry E. Thornton & Lynn Paltrow, *Carder Case Brings Bold Policy Initiatives*, HealthSpan, Volume 8, Number 5, (1991) [https://www.nationaladvocatesforpregnantwomen.org/the\\_rights\\_of\\_pregnant\\_patients\\_carder\\_case\\_brings\\_bold\\_policy\\_initiatives/](https://www.nationaladvocatesforpregnantwomen.org/the_rights_of_pregnant_patients_carder_case_brings_bold_policy_initiatives/)

<sup>6</sup> *Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths*, CDC (September 5, 2019), <https://www.cdc.gov/media/releases/2019/p0905-racial-ethnic-disparities-pregnancy-deaths.html>

<sup>7</sup> In 2013, a Texas hospital forced Marlise Muñoz’s family to look on as it literally appropriated her lifeless body to try to keep her 14-week fetus alive. Attorneys for the hospital argued that Texas’ advance directive law required this gruesome and costly experiment. While the state of Texas may be especially aggressive in denying pregnant women access to abortion and other health services, it is not an outlier when it comes to discriminatory advance directive laws. Today, over 30 states have laws that require a pregnant woman to be kept on life support no matter what her living will says, or what her health care proxy decides if her wishes are unknown. These explicitly sex discriminatory laws finally gained widespread public attention when the Texas hospital invoked such a law not to sustain Ms. Muñoz’s life over her objections, but to use her dead body for almost nine weeks as what the family’s attorney described as a “dysfunctional incubator.” Her husband challenged this in court. After 9 weeks of “living hell” for the family, a judge found that the law did not apply because Ms. Muñoz was dead. (Katherine Taylor & Lynn Paltrow, *It’s Time to Repeal State Advance Directive Laws That Discriminate Against Women*, Rewire News Group, April 10, 2014, <https://rewirenewsgroup.com/article/2014/04/10/time-repeal-state-advance-directive-laws-discriminate-women/>)

<sup>8</sup> In 2015, Marlise’s law (HB 3183) was introduced; the bill would have gotten rid of the Texas gender discriminatory (pregnancy excluding) advance directive law, but it failed to pass. (<https://legiscan.com/TX/text/HB3183/2015>)

<sup>9</sup> As of February 2021, Marlise’s law (now HB 102) has been referred to the House Public Health Committee. (<https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB102>)

<sup>10</sup> In 2015 and again in 2017, and in direct response to this case, HB 1901 was introduced which would have “strengthened the existing law by appointing attorneys for the fetuses of brain-dead pregnant people, forcing mourning families to go to court to allow their loved ones’ wishes to be observed.” HB 1901 would have required a hospital to keep a pregnant woman on life support “regardless of whether there [was] irreversible cessation of all spontaneous brain function of the pregnant patient” and “if the life-sustaining treatment [was] enabling the unborn child to mature.” (Andrea Grimes, *‘Marlise’s Law’ Would Give Pregnant Texans Advance Directive Rights*, Rewire News Group, March 12, 2015, <https://rewirenewsgroup.com/article/2015/03/12/marlises-law-give-pregnant-texans-advance-directive-rights/>)

<sup>11</sup> Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. Health Pol. Pol’y L. 299, 324(2013).

<sup>12</sup> Jordan Smith, *Naked City: Save the Fetus—from Mom?*, Austin Chronicle, September 10, 2004.

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<sup>13</sup> Sean Thomas, *Court: Drugs through Birth Not a Crime*, Lubbock Avalanche Journal, October 31, 2006.

<sup>14</sup> *Ward v. State*, 188 S.W.3d 874 (Tex. App. 2006); *see also Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007) (citing with approval *Ward v. State*, 188 S.W.3d 874); *Smith v. State*, No. 07-04-0490-CR, 2006 WL 798069 (Tex. App. Mar. 29, 2006) (mem.) (incorporating *Ward v. State*, 188 S.W.3d 874)

<sup>15</sup> Amie Newman, *Pregnant? Don't Fall Down the Stairs*, Rewire News Group (February 15, 2010), <https://rewirenewsgroup.com/article/2010/02/15/pregnant-dont-fall-down-stairs/>

<sup>16</sup> Russell Goldman, *Mother Settles Suit Over Poppy Bagel Drug Test*, ABC News (July 3, 2013), <https://abcnews.go.com/US/mother-settles-suit-poppy-bagel-drug-test/story?id=19567956>

<sup>17</sup> *Pregnant on Opiates: When Following Doctors Orders Breaks the Law*, NBC News (May 8, 2014), <https://www.nbcnews.com/news/us-news/pregnant-opiates-when-following-doctors-orders-breaks-law-n100781>

<sup>18</sup> In 2008, in Nueces County, TX, Amber Lovill, while on probation, was working to recover from a methamphetamine dependency when she experienced a relapse. Although probationers who relapse are often given another chance and the ability to continue treatment, the state successfully argued that Ms. Lovill should be incarcerated because she was pregnant. As a result, Ms. Lovill was imprisoned at the Nueces County Jail, where she received no drug treatment, inadequate prenatal care, and was separated from her child only days after giving birth. (*LOVILL v. Ex parte Amber Lovill*, 2008, <https://caselaw.findlaw.com/tx-court-of-appeals/1025138.html>)

<sup>19</sup> Alma Baker, a thirty-four-year-old white woman in Texas, was arrested on charges of delivering a controlled substance to a minor when her twins were born and tested positive for THC, a chemical compound found in marijuana. Baker squarely addressed how fear of reporting and punishment may have a deterrent effect when she said, "If I would have known that I'd get in trouble for telling my doctor the truth [that she was using cannabis to calm her nausea] I would have either lied or not gone to the doctor" (Gorman, Peter. 2004. "The Case of Alma Baker." High Times, September 28).

<sup>20</sup> TX HB 1171 (2021-2022, 87th Legislature) <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB1171>

<sup>21</sup> *See, e.g., Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Hodgson v. Minnesota*, 497 U.S. 417 (1990).