IN THE SUPREME COURT OF PENNSYLVANIA

No. 10 MAP 2018

In the Interest of: L.J.B., a minor

Appellant: A.A.R., Natural Mother

BRIEF OF AMICI CURIAE *AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA AND FEMINIST MAJORITY FOUNDATION*

Appeal from the Order of the Superior Court Entered on December 27, 2017, at No. 884 MDA 2017, Vacating the Order Entered May 24, 2017, of Clinton County Court of Common Pleas, Juvenile Division, at No. CP-18-DP-0000009-2017, and Remanding for Further Proceedings

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF *AMICI CURIAE*

ACLU of Pennsylvania

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.75 million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty and equality embodied in the United States Constitution and civil-rights laws. The ACLU of Pennsylvania is one of its state affiliates, with more than 59,000 members throughout Pennsylvania. The ACLU and ACLU of Pennsylvania have appeared many times as *amicus curiae* in federal and state courts at all levels, including both civil and criminal proceedings, in cases involving the rights of women, including pregnant women, to equal treatment under the law. The proper resolution of this case is thus a matter of substantial importance to the ACLU and its members.

Feminist Majority Foundation

Founded in 1987, the Feminist Majority Foundation (FMF) is a national organization dedicated to women's equality, reproductive health, and the empowerment of women and girls in all sectors of society. FMF engages in research and public policy development, public education programs,

grassroots organizing projects, and leadership training and development programs. Through its work, FMF seeks to end sex discrimination and advance the legal, social, economic, and political equality of women, people of color, and LGBTQ individuals.

STATEMENT OF JURISDICTION

Amici incorporate the Statement of Jurisdiction in Appellant's Brief.

ORDER OR OTHER DETERMINATION IN QUESTION

Amici incorporate the statement of the Order or Other Determination in Question in Appellant's Brief.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Amici incorporate the Statement of the Scope and Standard of Review in Appellant's Brief.

STATEMENT OF THE QUESTIONS PRESENTED[1]

1. Under 23 Pa. C.S. § 6303 et seq., can a woman be a "perpetrator" of "child abuse" for her actions while pregnant that might affect the health of her newborn?

2. Under 23 Pa. C.S. § 6386, is the consequence of a mandatory report for children experiencing neonatal withdrawal symptoms limited to providing protective services to newborns and their families or is this section an indication that the General Assembly believes that the mother should be found to have committed child abuse?

STATEMENT OF THE CASE

Amici rely on the facts and procedural history in the Statement of the Case in Appellant's Brief.

[1] These are the Questions Presented as stated in Appellant's Brief. The language differs slightly from the Court's grant of allocatur but presents the same issues.

SUMMARY OF ARGUMENT

This is a case of statutory interpretation. Despite explicitly acknowledging the Pandora's box of privacy-invading interpretations its decision would open, the Superior Court interpreted the definition of "child abuse" in the Child Protective Services Law ("CPSL") to include any act or failure to act that "creates a reasonable likelihood of bodily injury to a child once he or she is born, so long as she consciously disregards a substantial and unjustifiable risk that such an injury may result." As Judge Strassburger noted in his concurrence, which was joined by Judge Moulton, "[t]his is quite broad indeed."

But this Court can and should interpret the CPSL far more narrowly. In holding that any act or omission while pregnant, or even the existence of an underlying health condition that might affect the health of a child once born, could form the basis of a charge of child abuse, the Superior Court decision violates a number of fundamental principles of statutory interpretation. First, under the CPSL, findings of child abuse may only lie against "perpetrators" of abuse, a limited category of people defined by their relationship to a *child*. This Court granted allocatur on precisely this issue: Whether a woman can be a "perpetrator" of child abuse for her actions while pregnant that might affect the health of her newborn. Accordingly, the definition of

"perpetrator"—which is set forth in the CPSL, but was not addressed at all by the Superior Court—is central to the decision in this case.

Contrary to the Superior Court decision below, when the provisions of the CPSL are read together, the plain language of the statute provides that an individual cannot be a perpetrator of child abuse for acts undertaken before any of the statutorily recognized relationships to the child exist.

But even if the plain language of the CPSL were ambiguous, this Court should hold that it does not apply to acts or omissions that occur before the birth of the child. First, for the reasons set forth in Appellant's Brief, the General Assembly never intended to include acts or omissions during pregnancy within the definition of child abuse.

And second, the cardinal principle of constitutional avoidance requires this Court to reverse the decision below. To hold otherwise, would violate fundamental notions of due process, as well as the right to procreative and medical privacy, the right to parent, and the right to equal protection under the Fourteenth Amendment and the Pennsylvania Equal Rights Amendment.

For these reasons, this Court should reverse the Superior Court's decision and hold that acts or omissions taken while pregnant, or even underlying health conditions of a pregnant woman, that could cause harm to

a child once born cannot form the basis of a finding of child abuse under the law.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE CPSL DEMONSTRATES THAT WOMEN CANNOT BE "PERPETRATORS" OF CHILD ABUSE FOR PRENATAL ACTS OR OMISSIONS OR UNDERLYING HEALTH CONDITIONS.

The threshold question in this case, which the Superior Court failed to address, is whether a pregnant woman may be considered a "perpetrator" of child abuse on the basis of acts or omissions while pregnant, or underlying health conditions, that could have an impact on a child once born. The plain language of the CPSL demonstrates that she cannot.[2]

A finding of child abuse against any parent in a dependency adjudication requires the court to find that the parent was a "perpetrator" of child abuse.[3] As set forth more fully in Appellant's brief, the statutory

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[2] *See, e.g.*, *Phillips v. Cricket Lighters*, 883 A.2d 439, 444 n.3 (Pa. 2005) (in construing a statute, courts "are to follow the plain meaning of the provision's language when the words are free from ambiguity").

[3] *In re L.B.*, 177 A.2d 308, 311 (Pa. Super. Ct. 2017) ("'As part of [a] dependency adjudication, a court may find a parent to be the perpetrator of child abuse,' as defined by the CPSL"); *J.G. v. Dep't of Pub. Welfare*, 795 A.2d 1089, 1093 (Pa. Commw. Ct. 2002) ("Where, however, a founded report is based upon a judicial adjudication in a non-criminal proceeding, such as a dependency action, in which the court enters a finding that the child was abused, but does not issue a corresponding finding that the named perpetrator was responsible for the abuse, a named perpetrator is entitled to an administrative appeal before the secretary to determine whether the underlying adjudication of child abuse supports a founded report of abuse.").

definition of perpetrator plainly requires a statutorily defined relationship to a *child* at the time the act or failure to act giving rise to the injury occurred.[4] Without such a statutorily defined relationship, an individual cannot be a perpetrator. As the Superior Court properly recognized, a fetus is not a child for purposes of the CPSL.[5] Thus, under the plain language of the CPSL, a woman cannot be a perpetrator for acts or omissions during pregnancy that could harm a child once born because she has no statutorily defined

[4] 23 Pa. Cons. Stat. § 6303 defines "perpetrator" as "a person who has committed child abuse as defined in this section. The following shall apply:
(1) The term includes only the following:
(i) A parent of the child.
(ii) A spouse or former spouse of the child's parent.
(iii) A paramour or former paramour of the child's parent.
(iv) A person 14 years of age or older and responsible for the child's welfare or having direct contact with children as an employee of child-care services, a school or through a program, activity or service.
(v) An individual who is 14 years of age or older who resides in the same home as the child.
(vi) An individual 18 years of age or older who does not reside in the same home as the child but is related within the third degree of consanguinity or affinity by birth or adoption to the child.
(vii) An individual 18 years of age or older who engages a child in severe forms of trafficking in persons or sex trafficking, as those terms are defined under section 103 of the Trafficking Victims Protection Act of 2000 (114 Stat. 1466, 22 U.S.C. § 7102).

(2) Only the following may be considered a perpetrator for failing to act, as provided in this section:
(i) A parent of the child.
(ii) A spouse or former spouse of the child's parent.
(iii) A paramour or former paramour of the child's parent.
(iv) A person 18 years of age or older and responsible for the child's welfare.
(v) A person 18 years of age or older who resides in the same home as the child."

[5] *In re L.B.*, 177A.2d at 311 ("a 'fetus' or 'unborn child' does not meet the definition of 'child' under the CPSL").

relationship to a *child* at the time the act or omission occurs. Indeed, under the plain language of the CPSL, a pregnant woman is no more a perpetrator of child abuse than a neighbor who fails to intervene to stop a child from being abused—even if that neighbor was later to become the child's legal guardian. Neither had a statutorily defined relationship to a child at the time that the act or failure to act occurred. Accordingly, this Court should rule based on the statute's plain language that women are not perpetrators of child abuse for acts or omissions, or underlying health conditions, that could affect the health of a child once born.

But even if the Court determines that the statute is unclear on this point and consequently engages in the analysis under 1 Pa. Cons. Stat. § 1921(c) to determine the intention of the General Assembly, as it must, it will arrive at the same ruling.[6] This analysis includes a consideration of the consequences of interpreting the definition of perpetrator to apply to prenatal conduct.[7] For

[6] *Amici* agree with Appellant's conclusion that the General Assembly did not intend to define "child abuse" or "perpetrator" to include acts or omissions during pregnancy. Because Appellant's Brief ably analyzes the intent of the General Assembly, *amici* will not repeat those arguments here.

[7] 1 Pa. Cons. Stat. § 1921(c)(6).

the reasons set forth below, such an interpretation would violate both the federal and Pennsylvania Constitutions, and must therefore be avoided.[8]

II. APPLYING THE CPSL TO ANY PRENATAL ACTS OR OMISSIONS OR UNDERLYING HEALTH CONDITIONS THAT COULD AFFECT A CHILD ONCE BORN VIOLATES DUE PROCESS BECAUSE IT IS IMPERMISSIBLY VAGUE AND FAILS TO GIVE FAIR NOTICE OF PROHIBITED CONDUCT.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[9] A statute will be void for vagueness (1) if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," [10] or (2) if it encourages arbitrary and discriminatory enforcement by failing to provide explicit standards for those who apply them.[11] The Superior Court's construction of the CPSL to apply to any act or

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[8] *Hartford Acci. & Indem. Co. v. Ins. Comm'r of Commonwealth*, 482 A.2d 542, 549 (Pa. 1984) ("It is a cardinal principle that ambiguous statutes should be read in a manner consonant with the Constitution."); *Atlantic-Inland, Inc. v. Board of Supervisors of West Goshen Township*, 410 A.2d 380, 382 (Pa. Commw Ct. 1980) (courts have an "obligation to adopt a reasonable construction which will save the constitutionality of a statute").

[9] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *accord Fabio v. Civil Serv. Comm'n*, 414 A.2d 82, 84-85 (Pa. 1980).

[10] *Grayned*, 408 U.S. at 108.

[11] *See id.*; *see also FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 254 (2012) ("even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way"); *Kolender v.*

omission that could harm an embryo or fetus and thereby cause bodily injury to a child once born would fail to satisfy either constitutional requirement.

The nature of the penalty imposed by the CPSL—being listed as a perpetrator of child abuse on the statewide registry and barred from certain types of employment—does not deprive those affected by the statute of due process, as the validity of a vague statute under the Due Process Clause does not hinge on whether the statute is criminal in nature. The Supreme Courts of the United States and Pennsylvania have applied the void-for-vagueness doctrine to regulations that carry only civil penalties or can result in the loss of employment.[12] Here, a finding of child abuse may not only affect an individual's parental rights, but will result in the individual's placement on the statewide child abuse registry as either an indicated or founded perpetrator of child abuse.[13] An individual who must obtain a child abuse clearance for

Lawson, 461 U.S. 352, 357 (1983); *Colautti v. Franklin*, 439 U.S. 379, 390 (1979); *Fabio*, 414 A.2d at 85.

[12] *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (applying "most exacting vagueness standard" to removal cases even though immigration violations are civil in nature); *id.* at 1229 (Gorsuch, J., concurring) ("This Court has made clear … that due process protections against vague laws are 'not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute.'"); *Fox TV Stations, Inc.*, 567 U.S. at 258 (explaining that "even when speech is not at issue," void for vagueness doctrine applies and holding FCC regulations that carried possibility of civil penalties violated due process); *Fabio*, 414 A.2d at 84-85 (analyzing whether police department regulation was void for vagueness).

[13] *See* 23 Pa. Cons. Stat. §§ 6303 (relating to definitions); 6338 (relating to indicated reports); 6341(c.1) (relating to founded reports).

her employment would likely lose her job or not be hired in the first instance if her name appears on the registry. Being labeled a child abuser also causes reputational injury.[14] Both of those penalties are sufficiently severe that stringent due-process protections would apply.[15]

A. The CPSL, as Interpreted by the Superior Court, Fails to Provide Notice that Acts, or Failures to Act, in the Two Years Prior to a Child's Birth Can Constitute Child Abuse.

First, as set forth in Appellant's Brief, the language of the CPSL gives no indication that the term "perpetrator" includes the parent or guardian of an unborn child.[16]

Moreover, as the concurrence correctly recognized, the Superior Court's construction of the CPSL necessarily expands the statute to cover any knowing, intentional or even reckless act or omission by a pregnant woman—even continuing a pregnancy despite an underlying health condition, such as

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[14] *Fox TV Stations, Inc.*, 567 U.S. at 255-56 (explaining that reputational harm provided grounds for broadcaster to challenge vague regulation it was threatened with civil penalty for violating).

[15] *Dimaya*, 138 S. Ct. at 1229 (Gorsuch, J., concurring) (explaining that heightened standard of review for due process claims should not be reserved solely for criminal cases because today's civil laws regularly impose penalties far more severe than those found in criminal statutes, including "remedies that strip persons of their professional licenses and livelihoods").

[16] *Compare* Crimes Against the Unborn Child Act, 18 Pa. Cons. Stat. § 2602 (adopting definition of "unborn child" found in Abortion Control Act, 18 Pa. Cons. Stat. § 3203, which means "an individual organism of the species homo sapiens from fertilization until live birth") *with* 23 Pa. Cons. Stat. § 6303 *et seq.* (defining child as "an individual under 18 years of age" but making no reference to "unborn child" or "fetus").

substance dependency or addiction—that could pose a risk of harm to a child once born. The decision thus subjects women to the risk that they will be reported to the statewide child abuse registry for virtually anything they do (or do not do) during pregnancy—even the decision to continue the pregnancy itself. Justice Strassburger's concurring opinion acknowledges this uncertainty:

> There are many decisions a pregnant woman makes that could be reasonably likely to result in bodily injury to her child after birth, which may vary depending on the advice of the particular practitioner she sees and cultural norms in the country where she resides. Should a woman engage in physical activity or restrict her activities? Should she eat a turkey sandwich, soft cheese, or sushi? Should she drink an occasional glass of wine? What about a daily cup of coffee? Should she continue to take prescribed medication even though there is a potential risk to the child? Should she travel to countries where the Zika virus is present? Should she obtain cancer treatment even though it could put her child at risk? Should she travel across the country to say goodbye to a dying family member late in her pregnancy? Is she a child abuser if her partner kicks or punches her in her abdomen during her pregnancy and she does not leave the relationship because she fears for her own life?[17]

The examples of conduct that could constitute child abuse under the Superior Court's interpretation are practically endless and *amici* will not go into all of them here. Suffice it to say, the Superior Court's decision "open[s] the door to interpretations of the statute that intrude upon a woman's private decision-

[17] *In re L.B.*, 177 A.2d at 314 (Strassburger, J., concurring).

making as to what is best for herself and her child."[18] That susceptibility to such broad interpretation would inevitably render the statute void for vagueness.[19]

Numerous courts in other states have similarly held that prosecutions of women for prenatal conduct that causes harm to the subsequently born child violate principles of due process.[20] And at least one Pennsylvania court has held that the prosecution of a woman for recklessly endangering another

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[18] *Id.* at 314 (Strassburger, J., concurring).

[19] *See Com. v. Kemp*, 18 Pa. D & C. 4th 53, 63 (Westmoreland C.C.P. 1992) (applying statutes at issue to prenatal conduct "might lead to a 'slippery slope' whereby the law could be construed as covering the full range of a pregnant woman's behavior—a plainly unconstitutional result that would, among other things, render the statutes void for vagueness"); see also *State v. Louk*, 786 S.E.2d 219, 225 (W.Va. 2016) ("Were we to extend the statute to prenatal conduct that affects a fetus in a manner apparent after birth—conduct that would be defined solely in terms of its impact on the victim—the boundaries of proscribed conduct that would subject a pregnant woman to prosecution under [the statute] would become impermissibly broad and ill-defined."); *Reinesto v. Superior Court*, 894 P.2d 733, 737 (Ariz. Ct. App. 1995) ("Allowing the state to define the crime of child abuse according to the health or condition of the newborn child would subject many mothers to criminal liability for engaging in all sorts of legal or illegal activities during pregnancy. We cannot, consistent with the dictates of due process, read the statute that broadly.").

[20] *See, e.g.*, *Louk*, 786 S.E.2d at 225 (conviction for "child neglect resulting in death" based on prenatal drug use "would offend due process notions of fundamental fairness and render the statute impermissibly vague" because statutory reference to "child" did not include any mention of "unborn child" or "fetus"); *id.* 226-27 (collecting cases and noting that "overwhelming majority of the jurisdictions confronted with the prosecution of a mother for prenatal conduct causing harm to the subsequently born child, refuse to permit such prosecutions"); *Reinesto*, 894 P.2d at 736 (because criminal child abuse statute referred to "child" rather than "fetus," application to pregnant woman's conduct would offend due process); *Sheriff v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (principles of due process prevented court from interpreting child endangerment statute to reach transfer of drugs from mother to newborn through umbilical cord in moments immediately after birth).

person and delivery of a controlled substance based on her use of cocaine while pregnant violated her right to due process guaranteed by the federal and Pennsylvania Constitutions.[21]

But the reach of the CPSL under the Superior Court's interpretation, if it stands, will extend far beyond these already unconstitutional results. Because there is nothing in the statute itself that would cabin it to conduct by women during pregnancy, the Superior Court's construction could apply to an individual's acts or omissions before pregnancy. Obvious examples of acts or omissions that could cause individuals to reported as perpetrators of child abuse under the statute abound. They include the woman who intends to become pregnant but knowingly and intentionally fails to take folic acid to prevent neural tube defects[22]; the woman who takes medication for an underlying health condition that could cause severe birth defects, but fails to use birth control to prevent pregnancy[23]; or even the man who travels to a country where the Zika virus is present but fails to use birth control to prevent

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[21] *See Com. v. Kemp*, 18 Pa. D & C. 4th at 61-62.

[22] *See* Centers for Disease Control and Prevention, *Folic Acid: Recommendations*, available at https://www.cdc.gov/ncbddd/folicacid/recommendations.html.

[23] *See* Centers for Disease Control and Prevention, *Treating for Two: Medicine and Pregnancy*, available at https://www.cdc.gov/pregnancy/meds/treatingfortwo/index.html.

pregnancy.[24] As construed by the Superior Court, if a pregnancy results and the woman decides to continue her pregnancy to term, rather than have an abortion, these individuals could each be considered perpetrators of child abuse under the CPSL once a child is born.

Indeed, because the definition of perpetrator includes people who reside in the same home as the child,[25] the reach of the statute is even broader and the lack of notice more profound. For instance, the children of women who are exposed to second-hand smoke during pregnancy may experience, among other problems, low birth weight, which is a major factor in infant mortality.[26] Given these well-known risks, anyone who lives with a pregnant woman and smokes cigarettes inside the home would be engaging in conduct that "intentionally, knowingly, or recklessly" creates a reasonable likelihood of bodily injury to a child once born.

Accordingly, if the Superior Court's expansive interpretation of the CPSL is permitted to stand, pregnant women, their partners—and even their roommates—could be reported as child abusers for "a whole host of

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[24] *See Zika Virus and Pregnancy: What Obstetric Health Care Providers Need to Know*, 127 Obstetrics & Gynecology 642 (2016).

[25] 23 Pa. Cons. Stat. § 6303.

[26] Los Angeles Biomedical Research Institute at Harbor-UCLA Medical Center (LA BioMed), *'Thirdhand smoke' poses danger to unborn babies' lungs, study finds.* ScienceDaily, Apr. 19, 2011, available at www.sciencedaily.com/releases/2011/04/110419101231.htm.

intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature."[27] That would cause the boundaries of proscribed conduct under the CPSL to become impermissibly broad and ill-defined, leading to absurd or unreasonable results, as several courts have pointed out.[28]

B. The Superior Court's Construction of the CPSL Will Result in Arbitrary Enforcement and Delegate the Legislature's Power to the Judiciary.

In addition to fair notice, due process requires "precision and guidance … so that those enforcing the law do not act in an arbitrary or discriminatory way."[29] The Superior Court's interpretation of the CPSL is highly likely to

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[27] *Kilmon v. State*, 905 A.2d 306, 311-12 (Md. Ct. App. 2006) (explaining that, if interpreted to apply to a pregnant woman's conduct on the child she is carrying, reckless endangerment statute could be construed to include "everything from … the continued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child. Such ordinary things as skiing or horseback riding could produce criminal liability.").

[28] *See Louk*, 786 S.E.2d at 225-26; *Reinesto*, 894 P.2d at 736 (explaining that "[m]any types of conduct can harm a fetus, causing physical or mental abnormalities in a newborn," including smoking during pregnancy; drinking alcoholic beverages during pregnancy; failing to obtain prenatal care or proper nutrition; and possibly drinking caffeine); *Kemp*, 18 Pa. D& C.4th at 62-63 (noting that many "over-the-counter cold remedies and sleep aids contain warnings that pregnant women should not use them without medical supervision" and that it is "common knowledge that cigarette smoking and the use of alcohol during pregnancy may cause harm to the fetus").

[29] *Fox TV Stations, Inc.*, 567 U.S. at 254.

result in arbitrary or discriminatory enforcement. As Judge Strassburger noted in his concurrence, "reasonable people may differ as to the proper standard of conduct" by a pregnant woman.[30] But the Superior Court's interpretation of the statute would nevertheless allow CYS agencies to report women as child abusers for prenatal conduct that, in the caseworker's view, recklessly created a likelihood of bodily injury to the newborn child. That is an invitation to arbitrary and discriminatory enforcement by caseworkers that will disproportionately impact poor parents and parents of color.[31]

It will then be up to judges to determine what prenatal conduct, in their view, recklessly creates a likelihood of bodily injury to a child once born. By leaving these important policy decisions up to judges, the Superior Court's interpretation of the CPSL usurps the power of the legislature to determine the conduct to which the law applies and shields the important issue of

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[30] *In re L.B.*, 177 A.2d at 314 (Strassburger, J., concurring).

[31] *See Commonwealth v. Pugh*, 969 N.E.2d 672, 693 (Mass. 2012) (explaining that imposing a duty to summon medical treatment during labor "raises issues of due process, for such a duty would be impossible to cabin and would be highly susceptible to selective application. … Given the socially freighted nature of questions surrounding a pregnant woman's relationship to her fetus, it is not difficult to foresee a patchwork of unpredictable and conflicting prosecutorial and judicial actions" that would result); Brief of *Amici Curiae*, National Advocates for Pregnant Women and Community Legal Services *et al.* ("NAPW/CLS Brief") at 16-21.

whether a woman should be penalized for prenatal conduct from the political process. Justice Gorsuch recently explained the dangers of that approach:

> Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of open and public debate among a large and diverse number of elected representatives. Allowing the legislature to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to 'condem[n] all that [they] personally disapprove and for no better reason than [they] disapprove it.' Nor do judges and prosecutors act in the open and accountable forum of a legislature, but in the comparatively obscure confines of cases and controversies.[32]

Laws that "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis" are by definition vague.[33]

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For the reasons set forth above, the Superior Court's construction of the CPSL in this case would render the statute overly vague, depriving individuals of fair notice and encouraging discriminatory and arbitrary enforcement. For these reasons, the Court should reverse the Superior Court's decision below.

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[32] *Dimaya,* 138 S. Ct. at 1228. (Gorsuch, J., concurring).

[33] *Id.*

III. APPLYING THE CPSL TO WOMEN FOR ACTS OR OMISSIONS DURING PREGNANCY VIOLATES THEIR RIGHT TO PRIVACY.

Courts have an "obligation to adopt a reasonable construction which will save the constitutionality of a statute."[34] Interpreting the CPSL to apply to a woman's acts or omissions before or during pregnancy would violate this principle of statutory construction, as it would render the CPSL unconstitutional.

Labeling as "perpetrators of child abuse" women who choose to continue their pregnancy while suffering a substance use disorder or other medical condition or while working in a job that could cause harm to a child once born penalizes women for exercising their fundamental right to procreative privacy. Women in these circumstances are forced to choose between terminating their pregnancies or being reported to the statewide child abuse registry. In order to justify this extraordinary burden on women's decisions to carry their pregnancies to term, the Commonwealth must demonstrate that it has a compelling state interest in labeling women as perpetrators of child abuse for intentionally, knowingly, or recklessly engaging in conduct while pregnant that could result in harm to a child once

[34] *Atlantic-Inland, Inc.*, 410 A.2d at 82.

born. Because the Commonwealth cannot meet that burden, interpreting "perpetrator" to apply to prenatal acts or omissions that create a risk of bodily injury to a child once born would render the statute unconstitutional.

It is well-settled that the Fourteenth Amendment to the United States Constitution protects the fundamental right to procreate.[35] The constitutional guarantee of procreative privacy specifically protects women from measures that burden or penalize the decision to carry a pregnancy to term.[36] These protections have equal, if not greater, force in Pennsylvania, as "our Constitution provides more rigorous and explicit protection for a person's right of privacy" than the federal Constitution.[37] The right of privacy "protects the privacy of intimate relationships like those existing in the family, marriage, motherhood, procreation, and child rearing.[38] Even when the government acts expressly in the name of protecting the embryo or fetus and the child that may subsequently be born—and even when the government's

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[35] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart" of the right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

[36] *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (noting that *Roe v. Wade* decision "has sensibly been relied upon to counter" attempts to interfere with a woman's decision to become pregnant or to carry her pregnancy to term).

[37] *In re "B"*, 394 A.2d 419, 425 (Pa. 1978).

[38] *Id.* at 424.

asserted concern is prenatal exposure to illegal drugs—the U.S. Supreme Court has clearly recognized that pregnant women are entitled to the full protections of the Constitution.[39]

For example, in *Cleveland Board of Education v. LaFleur*,[40] the U.S. Supreme Court held unconstitutional a rule that required pregnant schoolteachers to take unpaid maternity leave.[41] The Court held that by "penaliz[ing] the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of those protected freedoms," particularly the "freedom of personal choice in matters of marriage and family life."[42] The question was not whether the policy's "goals [were] legitimate, but rather, whether the particular means to achieve those objectives unduly infringe upon the [woman's] constitutional liberty."[43] Thus, "where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a

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[39] *See Ferguson v. City of Charleston*, 532 U.S. 67, 81-86 (2001) (holding that joint public hospital/law enforcement policy to drug-test pregnant women was subject to Fourth Amendment warrant and consent requirements, notwithstanding government's asserted interest in protecting embryo or fetus).

[40] 414 U.S. 632 (1974).

[41] *Id.*

[42] *Id.* at 639-40.

[43] *Id.* at 648.

burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[44]

Like the maternity-leave policy in *LaFleur*, applying the child abuse law to a woman's acts or omissions while pregnant imposes a burden on the right to procreate. The risk of being permanently listed as a perpetrator of child abuse on the statewide registry and potentially denied the opportunity to enter a number of professions[45] is sufficiently punitive to deter women struggling with drug dependency, domestic violence, or any number of medical conditions to continue their pregnancies.

Because such an interpretation would implicate fundamental privacy rights, the Commonwealth bears the heavy burden of proving that applying the CPSL in this manner furthers a compelling interest.[46] Here, however, the Commonwealth cannot establish that placing women on the child abuse registry for conduct while pregnant actually advances any legitimate, let alone compelling, governmental interest. The purpose of the child abuse registry is

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[44] *Carey*, 431 U.S. at 686.

[45] *See* NAPW/CLS Brief at 5-7.

[46] *See Carey*, 431 U.S. at 685-86; *Stenger v. Lehigh Valley Hosp. Ctr.*, 609 A.2d 796, 802 (Pa. 1992) ("Under the law of this Commonwealth only a compelling state interest will override one's privacy rights."); *id.* ("Whether or not a given state interest justifies such an intrusion depends, in part, 'on whether the state's intrusion will effect its purpose; for if the intrusion does not effect the state's purpose, it is a gratuitous intrusion, not a purposeful one.'") (quoting *Denoncourt v. Commonwealth*, 470 A.2d 945, 949 (Pa. 1983).

to flag individuals who have a history of child abuse to prevent future abuse from occurring. A finding of child abuse is not necessary to protect the safety of a newborn child, as the Juvenile Act and CPSL offer a legal framework for the safety and protection of infants that does not hinge on a finding of child abuse.[47] A finding of child abuse will, however, result in the parent's name being placed on the statewide child abuse registry for the rest of the parent's life.[48]

Because the state interest in placing women on the child abuse registry for acts or omissions while pregnant is virtually nonexistent, penalizing women for continuing their pregnancies would violate their Fourteenth Amendment rights. This Court should thus reject an interpretation of "perpetrator" that would result in the violation of women's Fourteenth Amendment rights and reverse the Superior Court's decision below.

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[47] *See* NAPW/CLS Brief at 4-5.

[48] Penn. Dept. of Human Services, ChildLine and Abuse Registry, http://www.dhs.pa.gov/provider/childwelfareservices/childlineandabuseregistry.

IV. APPLYING THE CPSL TO WOMEN FOR ACTS OR OMISSIONS DURING PREGNANCY VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Despite the Superior Court's statement that "[t]he sole question before us is whether a mother's illegal drug use while pregnant may constitute child abuse under the CPSL,"[49] its decision in the affirmative necessarily opens the statute up to a much broacher interpretation. But even if the statute could be limited to "a mother's illegal drug use while pregnant," it would nevertheless be unconstitutional. Any interpretation of the statute that would apply only to women who choose to continue their pregnancies would result in unconstitutional sex discrimination under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Equal Rights Amendment to the Pennsylvania Constitution.

State action that subjects pregnant women to increased criminalization and control "in order to preserve the strength and vigor of the race,"[50] is no longer permissible under the Constitution. In *Nevada Department of Human Resources v. Hibbs,*[51] the United States Supreme Court recounted with disapproval the long and damaging history of state actors treating women

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[49] *In re L.B.,* 177 A.2d at 312-313.

[50] *Muller v. Oregon,* 208 U.S. 412, 421 (1908).

[51] 538 U.S. 721 (2003).

more restrictively based on the view that the "'proper discharge of [a woman's] maternal functions—having in view not merely her own health, but the well-being of the race—justif[ies]'" government intervention.[52] It is now well-settled, however, that state action that places additional restrictions on women to which men are not subject in "rel[iance] on invalid gender stereotypes," "warrant[s] heightened scrutiny" by the courts.[53] Such suspect restrictions include those based on stereotypes about "women's roles … when they are mothers *or mothers-to-be*."[54]

Under the CPSL, child abuse can be committed by a perpetrator's act *or failure to act* that recklessly creates a risk of bodily injury to a child. Limiting the definition of perpetrator to include only prenatal conduct by women—but not the prospective biological father who uses drugs alongside the pregnant woman, provides her with illegal drugs, or fails to intervene to stop her from using drugs—also discriminates against women on the basis of

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[52] *Id.* at 729 (quoting *Muller*, 208 U.S. at 422).

[53] *Id.* at 730.

[54] *Id.* at 736 (internal citations omitted) (emphasis added); *see also Casey*, 505 U.S. at 896 (that women's reproductive capacities preclude "full and independent legal status under the Constitution … [is] no longer consistent with our understanding of the family, the individual, or the Constitution") (citation omitted).

sex because men could never be perpetrators of child abuse for their conduct during a woman's pregnancy.

Gender-based classifications are presumptively unconstitutional under the Pennsylvania Equal Rights Amendment.[55] The Pennsylvania Supreme Court has stated that "[t]he sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman."[56] In a variety of contexts, the Pennsylvania Supreme Court has applied the ERA to prohibit using a person's sex to determine the rights and benefits to which he or she is entitled.[57]

To be sure, the ERA does not prohibit classifications of individuals based on their sex for the purpose of conferring benefits or imposing burdens when the sex-based classification is "reasonably and genuinely based on

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[55] PA. CONST. Art. I, § 28.

[56] *Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974).

[57] *See, e.g., Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990) (relating to prenuptial agreements); *Hartford Acci. & Indem. Co.*, 482 A.2d 542 (upholding insurance commissioner's invalidation of gender-based insurance rates); *Commonwealth v. Santiago*, 340 A.2d 440 (Pa. 1975) (eliminating presumption that wife's criminal activity in presence of husband is product of coercion); *DiFlorido v. DiFlorido*, 331 A.2d 174 (Pa. 1975) (eliminating presumption that husband owns all jointly possessed household goods); *Commonwealth v. Butler*, 328 A.2d 851 (Pa. 1974) (striking down statute permitting women but not men to seek immediate parole eligibility).

physical characteristics unique to one sex."[58] But the fact that only women can become pregnant does not save the Superior Court's sex-based classification, as both men and women can engage in acts, or failures to act, during the prenatal period that intentionally, knowingly, or recklessly create a risk of bodily harm to a child once born. Penalizing women, but not men, for prenatal conduct is thus an unconstitutional sex-based classification in violation of the ERA.

An interpretation of "perpetrator" that would include pregnant women but not the biological father would also violate the federal Constitution's Equal Protection Clause by imposing a greater burden on women during the prenatal period than men.[59] No governmental objective is served by applying the CPSL to the conduct of women but not men during the prenatal period. The purposes of the registry are not served when women are reported to the registry for conduct that would not constitute child abuse but for their pregnant condition. On the other hand, the risk that they may be reported by their caregivers and subject to findings of child abuse is likely to deter pregnant women from seeking drug treatment or prenatal care,[60] thereby causing the

[58] *Bartholomew v. Foster*, 541 A.2d 393, 397 (Pa. Commw. Ct. 1988), *aff'd* 563 A.2d 1390 (Pa. 1989).

[59] *See, e.g., United States v. Virginia*, 518 U.S. 515, 555 (1996) (sex-based classifications "warrant heightened scrutiny").

[60] *See* NAPW/CLS Brief at 23-26.

very harm that the CPSL is intended to prevent. It is for this reason that public health and medical groups are nearly unanimous in their opposition to penalizing pregnant women for conduct that could harm an embryo or fetus.[61]

To avoid a construction of the statute that would violate principles of equal protection, this Court should reject a definition of "perpetrator" that would apply only to women for conduct during pregnancy and reverse the Superior Court's decision.

V. APPLYING THE CPSL TO WOMEN FOR ACTS OR OMISSIONS DURING PREGNANCY VIOLATES THEIR SUBSTANTIVE DUE PROCESS RIGHT TO MAKE MEDICAL DECISIONS.

Both the federal and Pennsylvania Constitutions protect the right to refuse medical treatment.[62] In Pennsylvania, this right is subject to strict scrutiny.[63] Pennsylvania courts have recognized that "[t]he right to control and refuse medical treatment is also founded on the common law of this Commonwealth, which has long provided that other than in an emergency,

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[61] *See id.* at 24.

[62] *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) ("competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment").

[63] *Commonwealth v. Nixon*, 761 A.2d 1151, 1156 (Pa. 2000) ("In this Commonwealth, only a compelling state interest will override one's privacy rights.").

medical treatment may not be given without the informed consent of the patient."[64]

The application of the CPSL to prenatal conduct would violate women's rights under the federal and Pennsylvania Constitutions to refuse medical care by penalizing women for declining care that doctors recommend for the health of their embryo or fetus. Women could be reported as perpetrators of child abuse for making decisions about their own medical care, including choosing to take a medication that is contraindicated during pregnancy or refusing to take a medication that is prescribed; choosing to give birth unassisted and/or at home rather than in a hospital; and refusing to consent to a surgical procedure, such as a C-section, or undergoing surgery or other medical treatments that may pose a risk to the embryo or fetus.[65]

Penalizing a pregnant woman for choosing—or refusing—medical care that could create a risk of bodily harm to a child once born violates her fundamental right under the Pennsylvania Constitution to make medical decisions.[66] It also contravenes the common law rule that "one human being

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[64] *In re Fiori*, 652 A.2d 1350, 1354 (Pa. 1995).

[65] *See Pugh*, 969 N.E.2d at 694-95 (reversing conviction of woman for involuntary manslaughter for the death of her viable fetus during unassisted childbirth); Kathy Pollit, *Pregnant and Dangerous*, The Nation, April 26, 2004 (describing case of Melissa Rowland, who was charged with murder for death of viable fetus following her refusal to undergo C-section).

[66] *Nixon*, 761 A.2d at 1156.

is under no legal compulsion to give aid or to take action to save another human being or to rescue."[67] As one Pennsylvania court has explained, this rule, which on its surface appears "revolting in the moral sense" is essential to a free society:

> Our society, contrary to many others, has as its first principle, the respect for the individual, and that society and government exist to protect the individual from being invaded and hurt by another. … In preserving such a society as we have, it is bound to happen that great moral conflicts will arise and will appear harsh in a given instance. … For our law to *compel* defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.[68]

The court in that case declined to order a man to donate bone marrow to save the life of his 15-year-old cousin.[69] But its reasoning is no less applicable to pregnant women.

Coercing a pregnant woman to undergo or refrain from undergoing medical treatments for the health of her fetus by threatening to report her to the statewide child abuse registry will result in the state substituting its judgment for that of pregnant women, in violation of fundamental

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[67] *McFall v. Shimp,* 10 Pa. D. & C.3d 90, 91 (Allegheny Co. C.C.P. 1978).

[68] *Id.*

[69] *Id.*

constitutional principles of privacy and due process. This Court should reverse the decision of the Superior Court to avoid the serious and predictable interference in women's medical decision-making that would result from such an interpretation of the CPSL.

VI. APPLYING THE CPSL TO ANY ACT OR OMISSION BEFORE OR DURING PREGNANCY VIOLATES THE FUNDAMENTAL RIGHT TO PARENT.

The right of a parent to care for his children "is perhaps the oldest of the fundamental liberty interests recognized by [the U.S. Supreme Court]."[70] The Due Process Clause of the Fourteenth Amendment protects the relationship between parent and child[71] and encompasses both "the interest of a parent in the companionship, care, custody, and management of his or her children" [72] and children's "corresponding familial right to be raised and nurtured by their parents." Consequently, the U.S. Supreme Court has

[70] **Error! Main Document Only.***Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Croft v. Westmoreland County Children and Youth Serv.*, 103 F.3d 1123, 1125 (3d Cir. 1999).

[71] *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'") (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977)).

[72] *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

repeatedly struck down governmental practices and policies that infringe upon a parent's right to the care, control, and custody of her children. [73]

To be sure, the right to family integrity is not absolute: It is limited by the compelling governmental interest in the protection of children.[74] But any interference by the government in familial relationships must adhere to the requirements of procedural and substantive due process in order to satisfy the Fourteenth Amendment.[75]

Allowing CYS agencies or courts to make a child abuse finding based on a parent's pre-birth conduct would undermine fundamental parental rights, as such findings are likely to lead to unnecessary intrusions into the parent-child relationship. State law currently provides for mandatory reporting when a health care provider cares for a newborn affected by "withdrawal symptoms resulting from prenatal drug exposure" and a subsequent safety assessment or risk assessment by the county CYS agency.[76] Interpreting the statute to apply to pre-birth conduct would allow CYS to investigate any new parent who, in the two years *before* their child's birth, engaged in an activity that created a

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[73] *Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002); *see Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) ("right to the preservation of family integrity encompasses the reciprocal rights of both parent and children").

[74] *Croft*, 103 F.3d at 1125.

[75] *Id.*

[76] 23 Pa. Cons. Stat. § 6386(a)(2).

risk of bodily injury to the newborn—even if there is no reason to believe that the parent poses an imminent risk of abuse to the child after birth.

As noted above, the targets of CYS investigations could include parents who chose a home birth over a hospital birth, parents who smoked cigarettes during pregnancy, mothers who lived or worked with people who smoked cigarettes, mothers who used lawful medications that are contraindicated during pregnancy, and on and on. This would not only cause CYS resources to be diverted to families who do not need their services but would constitute a serious intrusion on the rights of parents who pose no risk of harm to their children. This Court should thus reverse the decision of the Superior Court to avoid the unconstitutional interference into the parent-child relationship that would result from applying the CPSL to pre-birth conduct.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Superior Court and hold that individuals cannot be found to be perpetrators of child abuse under the CPSL for acts or omissions before or during pregnancy that could affect the health of a child once born.

Respectfully submitted,

Date: May 3, 2018

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CERTIFICATION OF COMPLIANCE

Pursuant to Rules 531(b)(3) and 2135(d) of the Pennsylvania Rules of Appellate Procedure, I, Sara Rose, hereby certify that the foregoing Brief of *Amici Curiae* complies with the applicable word count limit. This certificate is based on the word count of the word processing system used to prepare the brief.

Date: May 3, 2018

/s/ Sara J. Rose
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CERTIFICATE OF SERVICE

I, Sara Rose, hereby certify that I caused the foregoing Brief of *Amici Curiae* to be served upon the following counsel of record via the Court's electronic filing system or United States mail.

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