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The Honorable Kim L. Ward
Majority Chair, Senate Aging and Youth Committee
Senate Box 203039
Harrisburg, PA 17120-3039

The Honorable LeAnna M. Washington
Minority Chair, Senate Aging and Youth Committee
Senate Box 203004
Harrisburg, PA 17120-3004

Dear Senator Ward and Senator Washington:

Thank you for the opportunity to submit written testimony for the Senate Aging and Youth Committee's hearing on Senate Bill 753, which would expand the definition of child abuse under the state Child Protective Services Law to include newborns who test positive for controlled substances, resulting in the inclusion of their mothers on the state child abuse registry. Founded in 1920, the American Civil Liberties Union is one of the nation's oldest civil rights organizations. We submit these comments on behalf of the 18,000 members of the ACLU of Pennsylvania.

The ACLU of Pennsylvania opposes SB 753 because it is harmful to babies and to women. First, SB 753 raises serious constitutional concerns because it punishes drug-dependent women who choose to carry their babies to term by labeling them as child abusers for the rest of their lives and is likely cause unnecessary separations of parents from their children. Second, SB 753 will deter drug-dependent pregnant women from obtaining prenatal care and delivering their babies in hospitals, thus leading to worse outcomes for infants. Finally, SB 753 will result in racial and ethnic discrimination because it contains no guidelines for deciding which infants should be tested for controlled substances.

Pennsylvania's Child Protective Services Law requires county agencies to investigate all reports of child abuse. If there is "substantial evidence" that a parent abused her child, then the agency must list the parent on the statewide central register as a perpetrator of child abuse.¹ Unless the agency's determination is overturned on appeal, the parent will remain on the state child abuse registry for the rest of her life, barring her from employment with child care agencies as well as any other position that requires

¹ 23 Pa. Cons. Stat. § 6303 *et seq.*

prospective employees to obtain child abuse clearances. Accordingly, any woman who gives birth to a newborn who tests positive for a non-prescribed controlled substance will be labeled a child abuser for the rest of her life for actions that occurred before the child was born. There is no other type of child abuse in the CPSL that is defined as occurring before a child is born. For example, a father who abuses a baby's mother while it is *in utero* is not considered a perpetrator of child abuse under the CPSL even if the baby suffers harm as a result of the abuse. Yet SB 753 punishes women for behavior that they engage in while pregnant even if it does not result in any harm to their babies.²

SB 753 would thus impose a burden on women's fundamental right to procreate and discriminate against women. The constitutional guarantee of procreative privacy specifically protects women from measures that burden or penalize the decision to carry a pregnancy to term.³ The consequence under SB 753 for a woman who gives birth to an infant who tests positive for a controlled substance — being permanently listed as a child abuser on the statewide registry and potentially denied the opportunity to enter a number of professions — is sufficiently punitive to deter women struggling with drug dependency to continue their pregnancies. Because the state interest in placing such women on the child abuse registry is virtually nonexistent — evidence that a woman used drugs while pregnant does not suggest that she is likely to abuse a child and labeling such women as child abusers is likely to lead to worse outcomes for infants — punishing drug-dependent women for continuing their pregnancies would violate their Fourteenth Amendment rights.

By directly linking penalties for their conduct to the status of being pregnant, SB 753 also violates women's right to equal protection because the state imposes no comparable punishment on men who use drugs. It is well settled that, when states place additional restrictions on women to which men are not subject "in rel[iance] on invalid gender stereotypes," this constitutes potentially unconstitutional "gender discrimination" and "warrant[s] heightened scrutiny."⁴ Defining a pregnant woman's conduct as child abuse — when that conduct would not be considered abuse, without more, if engaged in by a man or non-pregnant woman — violates the Fourteenth Amendment guarantee of Equal Protection. Indeed, because nearly every act, omission, or medical condition experienced by a pregnant woman affects embryonic or fetal health, subjecting women to punitive measures for behavior while pregnant that *may* affect their newborns would subject women's liberty to unprecedented and potentially limitless control by the government.

In addition, labeling women as child abusers simply because a hospital reports that they gave birth to a newborn who tested positive for a controlled substance will likely result in the unnecessary and unconstitutional separation of parents from their children. As an

² See American College of Obstetricians and Gynecologists Committee on Ethics, Committee Opinion No. 321 at 7 (November 2005) ("[E]vidence-based medicine has revealed limitations in the ability to concretely describe the relationship of maternal behavior to perinatal outcome.").

³ 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).

⁴ *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 730 (2003).

initial matter, drug test results are not always accurate. The ACLU of Pennsylvania currently represents the parents of a newborn girl who was removed from them and placed in foster care for five days after Lawrence County Children and Youth Services received an erroneous report from the hospital where she was born that the mother had tested positive for opiates. In fact, the mother's positive drug test was caused by the consumption of a *poppy-seed bagel* shortly before she was admitted to the hospital. One of the reasons why the hospital reported the drug test as positive is because the cut-off level it used for determining whether the test was positive is several times lower than the level used by the federal government. SB 753 does not contain any requirements regarding the type of drug testing that health care providers must use or the cut-off levels for determining whether a newborn has tested "positive" for a controlled substance. Without these safeguards in place, many women will be reported to the state as child abusers based on false positive results.

More importantly, public health groups oppose relying on drug tests alone to determine a woman's parenting ability:

Prenatal substance abuse by an addicted mother does not reflect willful maltreatment of a fetus, nor is it necessarily evidence that the mother will abuse her child after birth. A woman with a substance abuse problem may genuinely desire to terminate the use of such substances prenatally but may be unable, without access to substance abuse treatment programs, to act on her desire. However, after the child is born, the mother may be able to provide the child with an adequate home environment.⁵

To be sure, the presence of a controlled substance in a newborn is sufficient to trigger an investigation of the child's living situation to ensure that he or she can be properly cared for, especially when the newborn exhibits symptoms that suggest that he or she has been affected *in utero* by a controlled substance. But relying on a positive drug test alone in making the decision to remove a newborn from his or her parents raises serious constitutional concerns given the fundamental liberty interest that parents have in the care and custody of their children.⁶ While SB 753 does not mandate the removal of newborns who test positive for controlled substances, it is likely to lead to the removal of such children from their parents because it defines them as victims of child abuse and provides no guidance to county agencies about how to handle such reports (other than to list their mothers on the state child abuse registry). Indeed, we know of at least one county agency — Lawrence County Children and Youth Services — that has a policy of immediately removing the newborns of women with a positive prenatal drug test without any investigation whatsoever. That policy resulted in the illegal deprivation of our clients' constitutional right to care for their newborn baby. SB 753 will likely cause more county

⁵ *Amicus Curiae* Brief of California Medical Ass'n and American College of Obstetricians and Gynecologists, District 9, at 3-4, *In re Adrianna May H.*, No. 3 Civil CO14203 (Cal. Ct. App. 3d App. Div. filed June 17, 1993).

⁶ *See, e.g., Croft v. Westmoreland County Children & Youth Svcs.*, 103 F.3d 1123 (3d Cir. 1997).

agencies to adopt that practice without providing any more resources to the agencies to handle the influx of children into the child welfare system.

Punishing pregnant women who use controlled substances is likely to lead to worse outcomes for infants because it will deter pregnant women from seeking prenatal care, entering drug treatment, candidly discussing drug use with their doctors, and delivering their babies in hospitals. One federal report found that “women are reluctant to seek treatment if there is a possibility of punishment” and noted that “some women are now delivering their infants at home in order to prevent the state from discovering their drug use.”⁷ That is why leading medical and public health groups, such as the American Academy of Pediatrics, the American Public Health Association, the American College of Obstetrics and Gynecology, and the March of Dimes,⁸ oppose punitive responses to prenatal drug use. As the American College of Obstetrics and Gynecology’s Committee on Ethics explained, “[c]oercive and punitive policies are potentially counterproductive in that they are likely to discourage prenatal care and successful treatment, adversely affect infant mortality rates, and undermine the physician-patient relationship.”⁹ A pregnant woman who fears that she will be forever labeled by the state as a child abuser and potentially lose custody of her infant will likely avoid any medical interventions that could lead to that result.

SB 753 provides no guidance for hospitals regarding which newborns should be tested for controlled substances or whether parental consent is required for such testing. Because testing all newborns is cost-prohibitive, and the bill contains no funding for such testing, it is unlikely that hospitals or insurance companies will pay for universal testing. Given the financial constraints on state-funded medical assistance for pregnant women and newborns, requiring the state to pay for drug-testing of all newborns would be very expensive: In 2005-06, more than 50 percent of newborns in 21 Pennsylvania counties were covered by medical assistance, and medical assistance paid for 41 percent of newborn discharges from hospitals statewide.¹⁰ The Department of Public Welfare estimated the number of newborns covered by medical assistance in 2008 to be even higher.¹¹

As a result, it is highly likely that doctors and hospitals will use their discretion in deciding which newborns to test. Such decisions are fraught with bias and lead to substantially more testing of newborns whose mothers are racial or ethnic minorities and poor than those of white, affluent women despite the fact that drug use and addiction occur consistently across racial and socioeconomic status. Indeed, one study found that

⁷ See U.S. General Accounting Office (1990, pp. 20, 37).

⁸ See attached list of medical and public health statements addressing prosecution and punishment of pregnant women.

⁹ “Maternal Decision Making, Ethics, and the Law,” American College of Obstetricians and Gynecologists Committee on Ethics, Committee Opinion No. 321 at 8 (November 2005).

¹⁰ “Medical Assistance Coverage of Pregnant Women and Newborn Children in Pennsylvania,” Pennsylvania Medicaid Policy Center, at 3 (2008), available at http://www.pamedicaid.pitt.edu/documents/Pregnant%20and%20Newborn_fs_08.pdf.

¹¹ *Id.* at 4 n.9.

despite similar rates of substance abuse across racial and socioeconomic status, African-American women were 10 times more likely than white women to be reported to public health authorities for substance abuse during pregnancy.¹²

Other states have established guidelines for screening newborns for exposure to controlled substances that include specific risk factors for when testing should be considered. For example, Arizona established a committee to make recommendations to health care providers regarding screening of newborns to determine whether they have been affected by substance abuse. That committee recommended that newborn toxicology testing be performed only if the results would influence management of medical care for the mother and newborn and cited specific risk factors that would justify screening. The committee also recommended that health providers obtain informed consent from the mother of an infant before drug testing the infant.¹³

Similarly, Washington state has directed that newborn drug testing should be performed only with evidence of newborn and/or maternal risk indicators. Moreover, the state has required such drug testing to be “based on specific criteria and medical indicators, not open-ended criteria such as ‘clinical suspicion’ that invite discriminatory testing.”¹⁴ In addition, Washington’s guidelines explicitly state that reporting of positive toxicology tests “is not an allegation of abuse or neglect.”¹⁵

Defining child abuse to include newborns who test positive for controlled substances without providing any guidelines for health care providers about when such testing should be done and whether informed parental consent is required will lead to racial and socioeconomic bias in decisions whether to test, which will then result in disproportionate numbers of poor women and women of color being labeled child abusers by the state and denied the ability to work in many professions.

While the problem of drug-affected newborns is a serious one, SB 753 is not the answer. It will result in worse outcomes for infants and compromise the constitutional rights of pregnant women. Instead, the Commonwealth should follow the example of California,

¹² Chasnoff IJ, Landress HJ, Barrett ME, The prevalence of illicit-drug or alcohol use during pregnancy and discrepancies in mandatory reporting in Pinellas County, Florida. *N. Engl. J. Med.* 1990; 322:1202-6.

¹³ “Guidelines for Identifying Substance-Exposed Newborns,” Governor’s Action Plan on Child Protective Services Reform Substance-Exposed Newborn Committee, at 6-9, January 2005.

¹⁴ Guidelines for Testing and Reporting Drug Exposed Newborns in Washington State, Washington State Department of Health, Division of Community and Family Health, Office of Maternal and Child Health, at 1, June 2011.

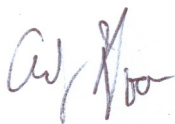
¹⁵ *Id.* (“A positive drug test is not in itself a diagnosis, not does substance abuse by itself prove child neglect or inadequate parenting capacity.”) (citing American College of Obstetricians and Gynecologists, 2005); *see also* “Screening for Substance Abuse During Pregnancy: Guidelines for Screening,” Vermont Department of Health, at 16 (2009) (“Reporting toxicology screens to [the Department of Children and Families] does not represent an allegation of child abuse or neglect.”); Center for Future of Children, Recommendations, *Future Children* 1:8 (1991) (“[A]n identified drug-exposed infant should be reported to child protective services only if factors in addition to prenatal drug exposure show that the infant is at risk for abuse or neglect.”). California law specifically prohibits the use of a single positive drug test of a newborn as the basis for a report to child welfare authorities. *Cal. Penal Code* § 11165.13 (1995).

which enacted legislation explicitly stating that “a positive toxicology screen at the time of the delivery of an infant is not in and of itself a sufficient basis for reporting child abuse or neglect.”¹⁶ The statute requires such reports to be made only if other factors are present that indicate risk to a child. It also provides for an assessment of the needs of the mother and child if there is any indication of maternal substance abuse. California’s approach is far more likely to protect the welfare of infants than SB 753. By using a public-health, rather than punitive, approach to the problem of drug-dependent pregnant women, California ensures that pregnant women will not be deterred from seeking prenatal care or drug treatment, discussing issues related to drug dependence with their health care providers, or delivering their babies in hospitals.

The legislature should also direct the Department of Welfare to establish guidelines for health care providers to follow when drug testing newborns, including specific risk factors that justify testing and informed consent requirements.

The ACLU of Pennsylvania appreciates the efforts by the authors of SB 753 to deal with the problem of drug-affected newborns. But SB 753 is not the answer. Rather than protecting newborns, this legislation would harm them and their mothers. On behalf of the 18,000 members of the ACLU of Pennsylvania, we urge the committee members to oppose SB 753.

Sincerely,



Andy Hoover
Legislative Director

Sara J. Rose
Staff Attorney

¹⁶ Cal. Penal Code § 11165.13 (1995).