



April 15, 2014

The Honorable Bill Haslam
Governor of Tennessee
Office of Governor Bill Haslam
1st Floor, State Capitol
Nashville, TN 37243

Dear Governor Haslam,

On behalf of thousands of ACLU-TN supporters, I write to urge you to veto SB1391 which would punish a pregnant woman who decides to remain pregnant despite suffering from a substance abuse problem. We oppose this legislation not only because it raises serious constitutional concerns about equal treatment under the law, but because it would jeopardize the health and well-being of Tennesseans.

Both the United States and Tennessee constitutions protect the fundamental right to procreate,¹ a right that specifically protects women from measures like SB 1391 that burden or penalize the decision to carry a pregnancy to term. Even when the state acts expressly in the name of protecting a woman's pregnancy – and even when the State's asserted concern is prenatal exposure to illegal drugs – the Supreme Court has clearly recognized that pregnant women are entitled to the full protections of the Constitution.²

This legislation also defies long-standing Supreme Court precedent affirming that states may not make it a crime simply to suffer from the disease of drug addiction.³ Consistent with that precedent, current Tennessee law does not permit criminal conviction of a person simply for an addiction to controlled substances.⁴ In contrast, this bill would inflict extraordinary penalties on a woman solely because she continues her pregnancy despite an underlying health problem: drug dependency.

¹ *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

² See *Ferguson v. City of Charleston*, 532 U.S. 67, 81-86 (2001).

³ *Robinson v. California*, 370 U.S. 660 (1962) (holding that the Eighth Amendment prohibits status crimes, which criminalize the 'status' of narcotic addiction).

⁴ See TENN. CODE ANN. § 39-17-417 (criminalizing knowingly manufacturing a controlled substance, delivering a controlled substance, selling a controlled substance, or possessing a controlled substance with intent to manufacture, deliver or sell the controlled substance); TENN. CODE ANN. § 39-17.418 (criminalizing knowingly possessing or casually exchanging a controlled substance).

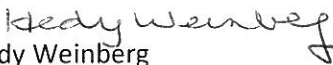
Moreover, the bill violates due process because it is unconstitutionally vague.⁵ SB 1391 permits criminal prosecution when the infant is “born addicted to or harmed by the narcotic drug.” However, the law fails to define the terms “addicted to” or “harmed by” thus giving prosecutors and law enforcement unlimited discretion to determine whether and when an alleged violation has occurred. Indeed, an infant may be harmed by any number of factors during a pregnancy and it is notoriously difficult to isolate and identify any one these factors in a specific case.⁶ Here, the standard is even more vague because the bill does not define the type or minimum degree of harm that would be necessary for a prosecution to be lawful. This lack of clarity will almost certainly lead to arbitrary and unfair enforcement.

We all want to promote healthy pregnancies by providing pregnant women struggling with a drug or alcohol dependency with the opportunity to seek the best possible pre-natal care and substance abuse treatment. However, policies that threaten women with criminal prosecution and the loss of their children drive women away from health care and discourage them from seeking invaluable prenatal and pregnancy-related care.

By threatening punitive sanctions, legislation like SB 1391 fosters a climate of fear and mistrust between doctors and patients and keeps women from receiving the healthcare they need. For this reason, public health groups are nearly unanimous in opposing such prosecutions.⁷ As the American Academy of Pediatrics has concluded: “Punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health.”⁸ Prosecutions of pregnant women who are dependent on drugs are both ineffective and counterproductive. That’s why the major medical groups supported last year’s “Safe Harbor Act” as a compromise measure to help ensure that pregnant women have real access to treatment.

SB1391 is constitutionally unsound and enacting this law would threaten the health and wellbeing of Tennessee women and their families. We urge you to veto this dangerous legislation.

Sincerely,


Hedy Weinberg
Executive Director

⁵ See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”).

⁶ See e.g., *McKnight v. State*, 661 S.E.2d 354, 358 n.2 (S.C. 2008). (reversing criminal conviction of woman who used cocaine during pregnancy because defense counsel failed to introduce evidence showing that cocaine is “no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor.”).

⁷ See, e.g., *Am. Coll. Obstetricians and Gynecologists, At-Risk Drinking and Illicit Drug Use: Ethical Issues in Obstetric and Gynecologic Practice*, ACOG COMMITTEE OPINION, No.422, Dec.2008, at 6 (“Putting women in jail, where drugs may be available but treatment is not, jeopardizes the health of pregnant women and that of their existing and future children.”); *Am. Coll. Obstetricians & Gynecologists, Maternal Decision Making, Ethics, and the Law*, ACOG COMMITTEE OPINION, No. 321, Nov. 2005 at 9 (“Pregnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.”); see also *Am. Med. Ass’n, Legal Intervention During Pregnancy*, 264 JAMA 2663, 2670 (1990) (reporting AMA resolution that “[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus is inappropriate.”); *Am. Psychiatric Ass’n, Care of Pregnant and Newly Delivered Women Addicts: Position Statement*, APA Document Reference No. 200101 (2001) (policies of prosecuting pregnant women “are likely to deter pregnant addicts from seeking either prenatal care or addiction treatment, because of fear of prosecution and/or civil commitment.”).

⁸ *Am. Acad. of Pediatrics, Committee on Substance Abuse, 1994 to 1995, Drug Exposed Infants*, 96 PEDIATRICS 365-66 (1995).