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March 28, 2022

The Honorable Tara Schillari Rich, J.S.C.
Hudson County Superior Court Administration Building
595 Newark Avenue
Jersey City, New Jersey 07306

Re: Jiaxin Liu v. Elliot David Brown
Docket No. FM-09-1126-22

Dear Judge Schillari Rich:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief on behalf of *amici curiae* the American Civil Liberties Union of New Jersey, the American Civil Liberties Union, and National Advocates for Pregnant Women.

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PRELIMINARY STATEMENT

Neither the court nor any party to a divorce proceeding have the jurisdiction or authority to control a pregnant woman or her right to make her own medical decisions, much less limit her fundamental rights to travel and privacy.

STATEMENT OF FACTS

The American Civil Liberties Union of New Jersey, the American Civil Liberties Union, and National Advocates for Pregnant Women (hereinafter, "*Amici*") accept and incorporate the statement of facts set forth in Plaintiff's Certification in Opposition to Defendant's Order to Show Cause as well as in the letter brief filed contemporaneously to that Certification.

LEGAL ARGUMENT

POINT I

DEFENDANT'S ORDER TO SHOW CAUSE IS VOID AS NO JURISDICTION EXISTS OVER THE FETUS.

The Order to Show Cause ("OSC") improperly designates a specific custody arrangement for a fetus. No support exists in either state or federal law for this legal duty that Defendant seeks to impose on this court and Ms. Liu.

A. New Jersey Law Only Permits Custody Determinations Regarding Children Already Born.

New Jersey's courts are clear and unambiguous: government interference with a woman's protected right to control her body during her pregnancy is not permitted. *See Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609, 631–632 (2000). Rather, "[t]he right to make [a medical] decision is part of her constitutional right to privacy, which includes her right to control her own body and destiny." *N.J. Div. of Youth & Fam. Servs. v. L.V.*, 382 N.J. Super. 582, 590–91 (Ch. Div. 2005). New Jersey courts thus have no jurisdiction over a fetus, as the

court cannot ignore the personhood of the pregnant woman and treat the fetus, not yet born, as a separate legal person. *See e.g., Acuna v. Turkish*, 192 N.J. 399, 416-417 (2007).

In multiple contexts, both the legislature and courts have rejected efforts to judicially expand state law to reach fetuses. In construing New Jersey's Wrongful Death Act, the New Jersey Supreme Court concluded that the Legislature did not intend to include a fetus within the definition of a "person" covered by the Act. *Giardina v. Bennett*, 111 N.J. 412, 420-21 (1988). Citing the Final Report of the New Jersey Criminal Law Revision Commission: Commentary 150 (1971), the court underscored "that at common-law[,] homicide could be committed only against a 'human being' and that [a human being] did not include a fetus." *Ibid*; *see also Matter of D.K.*, 204 N.J. Super. 205, 212-14 (Ch. Div. 1985), (refusing to interpret New Jersey's civil commitment rules as authorizing the appointment of guardians to fetuses). With specific regard to child custody arrangements, the personhood of a fetus must also be rejected as the required best interest evaluation cannot be conducted before the fetus is born: "[s]ince the vast majority of the factors by their plain meaning cannot be determined pre-birth, the court finds that the claim is not fit for judicial review at this time." *Plotnick v. Deluccia*, 434 N.J. Super. 597, 605, (Ch. Div. 2013). In *Plotnick*, whose facts mirror the instant case, this court found that a putative father's order to show cause seeking a temporary mandatory injunction to obtain a parenting-time schedule was invalid. Noting that there is no "statute, case law, or controlling authority stating that such a right . . . exists," this court held that because: "a fetus is not yet born and entering a parenting time schedule at this time would not be feasible . . . this court declines to impose an unenforceable order."[1] *Plotnick*, 434 N.J. Super. at 617–18.

[1] In declaring a fetus as one "not yet born," the caselaw follows the statutes, which note, as a matter of public policy, that a minor child must have "frequent and continuing contact with both parents after the parents have separated or dissolved their marriage" (N.J.S.A. § 9:2-4) and define a "minor child" as "any *person* under 18 years of age." N.J. Stat. Ann. § 9:2-13. (Emphasis added).

In light of this plain language, the court should vacate its order, follow *Plotnick*'s ruling, and apply statutory directive regarding the application of jurisdiction over a not yet born fetus.

B. The Order to Show Cause Violates Plaintiff's Fundamental Rights to Travel, Privacy, Medical Decision Making, and Equal Protection.

Article 1, Paragraph 1 of the New Jersey Constitution safeguards values which are broader than those provided in the federal analogue. *Greenberg v. Kimmelman*, 99 N.J. 552, 568 (1985); N.J. Const., art. I, ¶ 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty . . ."). These broader protections extend to pregnant women. The OSC places unlawful restrictions on several of Ms. Liu's fundamental rights, unconstitutionally limiting her right to travel before the birth, placing unlawful conditions on the manner and place of birth, and unlawfully giving Defendant authority to make decisions about Ms. Liu's medical care. Women's constitutionally protected liberties do not evaporate in pregnancy. These restrictions have no basis in law.

Other courts have rejected the proposition that putative fathers can restrict a pregnant woman's travel or movement. In *Wilner v. Prowda*, a New York appeals court denied a married putative father's request to restrain his then-pregnant wife from leaving New York City. *Wilner*, 158 Misc. 2d 579, 581 (Sup. Ct. 1993). In *Sara Ashton McK. v. Samuel Bode M.*, a New York intermediate appellate court reversed a family court judge who refused to exercise jurisdiction in a custody case brought by a mother residing in New York with her child who was born there after the father of the child had obtained a custody determination from a California court while the appellant mother was still pregnant. The court recognized that "[u]nder the UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act], courts cannot exercise subject matter jurisdiction over custody proceedings filed prior to the birth of a child."

Sara Ashton McK. v. Samuel Bode M., 974 N.Y.S.2d 434, 475 (App. Div. 2013). Citing *Waltenburg v. Waltenburg*, 270 S.W.3d 308, 316-317 (Tex. App. 2008), the court explained:

> We . . . disagree with the Referee's finding that the mothers 'appropriation of the child while in utero was irresponsible' and 'reprehensible' and warranted a declination of jurisdiction in favor of the California court. Rather, the mother's conduct at issue here amounts to nothing more than her decision to relocate to New York during her pregnancy . . . Putative fathers have neither the right nor the ability to restrict a pregnant woman from her constitutionally-protected liberty.
>
> [*McK*., 111 A.D.3d 474, 475, (2013).]

As the cases show, at no stage of pregnancy do husbands or the state have dominion and control over a pregnant person, including during the birthing process. Both the New Jersey and United States Constitutions forbid expectant fathers from controlling pregnant women's medical decisions or interfering with their right to procreative privacy—which encompasses both the right to abortion and the right to carry a pregnancy to term. As the United States Supreme Court has made clear, "a State may not give to a man the kind of dominion over his wife that parents exercise over their children." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 898 (1992).

Here, the OSC states that Defendant "shall participate jointly with Plaintiff in any decisions affecting the health of their child during the birthing process." (OSC at 1). In so stating, the OSC sets a dangerous and unconstitutional precedent that would permit putative fathers to file for custody and gain control over the pregnant woman's life and medical decision making and also subject these decisions to judicial control. *See 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."). Appellate courts have repeatedly and overwhelmingly rejected the argument that women lose their rights to medical decision-making during pregnancy, labor,

and the birth process. *See e.g.*, *In re A.C.*, 573 A.2d 1235 (D.C. App. 1990) (en banc); *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. 1994); *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. 1997).

Finally, the Order violates the Equal Protection Clause by drawing a sex-based distinction between the two expectant parents. The Order imposes unique restrictions on Ms. Liu's fundamental right to travel and medical decision making that are not similarly imposed on Defendant. The Order provides that Ms. Liu "shall not travel more than 100 miles from Morristown during pregnancy, or after the birth of the parties' child, without the express written consent of defendant or a court order." In contrast to these striking limitations on Ms. Liu's rights, the Order merely prohibits Defendant from "relocat[ing] out of the State of New Jersey with the child." (OSC at 2). This sex-based classification can only withstand federal constitutional scrutiny if it is supported by an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 524 (1996). Here, as described *supra*, there is no rational, let alone "exceedingly persuasive" justification for such a draconian limitation on Ms. Liu's fundamental rights; instead, by preventing Ms. Liu from traveling or returning to her job, the OSC merely "perpetuate[s] the legal, social, and economic inferiority of women" by imposing differential treatment merely because of Ms. Liu's pregnancy status. *Id*.

New Jersey's equal protection jurisprudence requires that where legal authority distinguishes between two classes of people, that authority must bear a substantial relationship to a legitimate governmental purpose. *Caviglia v. Royal Tours of Am.*, 178 N.J. 460, 472–73 (2004). Applied to equal protection claims, the relevant test weighs three factors: the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction. *Robinson v. Cahill*, 62 N.J. 473, 491–92, *cert. denied*, 414 U.S. 976 (1973). Under the flexible nature of this approach, measuring the right against the

need for governmental restriction, each claim is examined "on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction." *Sojourner A. v. N.J. Dep't of Hum. Servs*., 177 N.J. 318, 333 (2003). Accordingly, "the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right." The right at issue here is decidedly personal; it involves a pregnant woman's ability to make her own decisions regarding where she may travel and where she may seek medical care, and thus any State action prescribed in this case must be deemed arbitrary. *Lewis v. Harris*, 188 N.J. 415, 443–44 (2006). The Order violates Ms. Liu's right to equal protection based on sex under both the state and federal constitutions.

POINT II

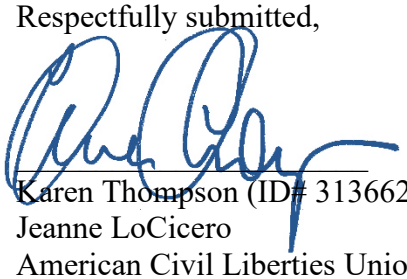
MS. LIU'S VERBAL CONSENT TO THE IMPOSED CONDITIONS SHOULD BE DISREGARDED.

This case came to the court's attention on an emergency basis, which was, apparently, Ms. Liu's impending delivery date. This ground for imposing the jurisdiction of the court has no authority in law and, if permitted, would open the floodgates to actions by putative fathers, medical personnel, or anyone who might disagree with a pregnant woman's birth plans. *In re A.C.*, 573 at 1248. While the parties may have privately consented to certain terms, those terms are unenforceable and unconscionable. *Bergen Cnty. Welfare Bd. v. Cueman*, 164 N.J. Super. 401, 404, (Juv. & Dom. Rel. 1978). Should the proceedings continue as ordered, they would deny Ms. Liu the basic hallmarks of due process: (1) her fundamental liberty interest in her relationship with her child (*Santoski v. Kraemer*, 455 U.S.745, 753 (1982)); (2) her fundamental liberty interest in making informed decisions about the welfare of her child (*Meyer v. Nebraska*, 262 U.S. 390 (1922)); and (3) her fundamental liberty interest in her own health (*Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278 (1990)).

CONCLUSION

For the aforementioned reasons, *Amici* respectfully submit that the court deny the relief sought by Defendant in its entirety and dissolve the temporary restraints set forth in the March 11, 2022, Order.

Respectfully submitted,



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