

Docket Number: _____

**The Supreme Court of the United States
of America**

**In the Interest of: L.J.B., a Minor
Appeal of: Clinton County Children and
Youth Social Services Agency**

**On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania**

Petition for Writ of Certiorari

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I. QUESTION PRESENTED

1. Whether a state violates the constitutional guarantees of the Fourteenth Amendment of the United States Constitution when it denies the protections afforded under the law to a population of children who suffer bodily injury, based solely on the fact that the injury suffered by the children was inflicted prenatally?
2. Whether the Pennsylvania Supreme Court's decision interpreting the state's child protective services law in reliance upon amended 23 Pa.C.S. § 6386, violates the Supremacy Clause of Article 6 of the United States Constitution as said state statute conflicts with 42 U.S.C.A. § 5106a?

II. PARTIES

The parties before this Court are as follows:

1. Clinton County Children and Youth Social Services Agency, Petitioners, represented by Amanda Beth Browning-Richardson, Esquire
2. A.A.R. (Mother), Respondent, represented by David Samuel Cohen, Esquire; Robert H. Lugg, Esquire; and Carol E. Tracy, Esquire, Women's Law Project
3. J.W.B. (Father), Respondent, represented by Trisha Hoover Jasper, Esquire
4. Guardian Ad Litem, Charles Rock Rosamilia II, Esquire

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V. CITATION OF ORDERS

The Pennsylvania Supreme Court's decision in In the Interest of L.J.B., a Minor; Appeal of: A.A.R., Natural Mother, is reported at 2018 WL 6816576 (2018), and is reprinted in the Appendix hereto at A1.

The Pennsylvania Superior Courts decision in In the Interest of: L.B., a Minor; Appeal of: CCCYS, is reported at 177 A.3d 308, (Pa.Super.2017), and is reprinted in the Appendix hereto at A2.

The Order of the Juvenile Court in In the Interest of L.J.B., a minor, No. CP-18-DP-0000009-2017, (5/24/2007), is reprinted in the Appendix hereto at A3.

VI. STATEMENT OF JURISDICTION

The opinion of the Pennsylvania Supreme Court from which petitioner Agency seeks review was issued on December 28, 2018. This petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). 28 U.S.C. 2403(b) may apply and this document shall be served on the Attorney General of Pennsylvania.

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1 to the United States Constitution, states as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 6 of the United States Constitution provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The text of the aforementioned Constitutional provisions, along with 23 Pa.C.S.A. § 6302, 6303, and 6386 (both pre October 2, 2018, version and post October 2, 2018, version), and 42 U.S.C.A. § 5106a, are set forth in the Appendix at A4 through A10.

VIII. STATEMENT OF THE CASE

In 2017, A.A.R. (Mother) gave birth to L.J.B (Child) at the Williamsport Hospital located in Williamsport, Pennsylvania. While pregnant with Child, Mother was prescribed subutex for treatment of drug addiction during pregnancy; however, urine screens revealed that Mother was likely not taking the subutex at the level prescribed. Furthermore, during her pregnancy with Child, Mother also tested positive for opiates, benzodiazepines, and marijuana, none of which were prescribed for her. At the time of Child's birth, Mother tested positive for marijuana. Following her birth, Child remained at the Williamsport Hospital for nineteen days while she suffered from symptoms of

Neonatal Abstinence Syndrome,¹ including tremors, excessive suck, increased muscle tone and loose stools, which the doctors treated with morphine.

On February 7, 2017, the Clinton County Children and Youth Social Agency (CYS) sought and was granted emergency protective custody of Child. Following a shelter care hearing on February 10, 2017, the juvenile court ordered Child to remain in the legal and physical custody of CYS. CYS then filed a dependency petition on February 13, 2017, alleging that 1) the Child was dependent as Child was “without proper parental care or control...as required by law”

¹ Neonatal abstinence syndrome is the withdrawal syndrome suffered by infants after birth who have been exposed in utero to drug use. See Neonatal abstinence Syndrome. MedlinePlus. US Library of Medicine. (December, 2017), <https://medlineplus.gov/ency/article/007313.htm>

pursuant to section 6302(1) of the Juvenile Act (42 Pa.C.S. § 6301-6375) and 2) that Child was a victim of child abuse as defined in the Child Protective Services Law (CPSL) as Mother “caused bodily injury to a child through any recent act or failure to act” (23 Pa.C.S. § 6303(b.1)(1)). Said child abuse allegation was based on the fact that the Child remained in the hospital for a period of nineteen (19) days after birth, suffering from withdrawal due to substances Mother ingested while pregnant with her. The Agency alleged that L.J.B. was the victim of child abuse, precipitating Mother as the perpetrator, the same way it would for any child found to suffer bodily injury due to the action of their parent. The initial dependency hearing was continued due to concerns that Mother and J.W.B. (Father) did not receive proper notice. Prior to the rescheduled dependency hearing, CYS filed an

amended dependency petition containing the original allegations of dependency and child abuse, and adding information concerning visitation between the parents and Child and Mother's admitted continued drug use.

On March 15, 2017, by agreement of all parties, the juvenile court adjudicated Child dependent pursuant to section 6302(1) of the Juvenile Act (42 Pa.C.S. § 6302(1)), but deferred decision on the child abuse question to a later time, and subsequently ordered the parties to file memoranda of law for the court's review. On March 23, 2017, CYS filed a brief in support of the assertion that Mother perpetrated child abuse as her conduct satisfied subsections (1) and (5) of the definition of child abuse in that her "recent act" caused or created a reasonable likelihood of causing bodily injury to Child. See 23 Pa.C.S. §

6303(b.1)(1) and (5). Mother's attorney then filed a brief claiming that the CPSL did not protect a fetus or unborn child, and therefore Mother's actions could not constitute child abuse. The juvenile court heard oral argument on the issue on May 9, 2017, and thereafter issued an opinion and order finding that "the law does not provide for [a] finding of abuse due to actions taken by an individual upon a fetus." In the Interest of L.J.B., a minor, No. CP-18-DP-0000009-2017, (5/24/2007). The juvenile court held that CYS "cannot establish child abuse in this matter on the actions committed by Mother while [C]hild was a fetus." Juvenile Court Order, 05/24/2017.

CYS then appealed the juvenile court decision to the Pennsylvania Superior Court, which reversed. In a unanimous decision, the Superior Court found, "[U]nder the plain language of the statute, Mother's

illegal drug use while pregnant may constitute child abuse if the drug use caused bodily injury to Child.”

In the Interest of L.B., a minor, appeal of: CCCYS, 177 A.3d 308, 311 (Pa.Super.2017). The Superior Court agreed with Mother and CYS that the definition of “child” in the CPSL does not include a fetus or unborn child, but found that “Mother’s drug use is a ‘recent act or failure to act’ under 6303(b.1)(1) and (5),” and that her conduct caused or was reasonably likely to cause injury to Child who, now born, constituted a “child.” Id. The Superior Court held that “a mother’s use of illegal drug while pregnant may constitute child abuse under the CPSL if CYS establishes that, by using the illegal drugs, the mother intentionally, knowingly, or recklessly caused, or created a reasonable likelihood of, bodily injury to a child **after** birth.” Id. at 309 (emphasis in original).

Thereafter, Mother filed an appeal to the Pennsylvania Supreme Court, which granted review of two issues: 1) Does [the CPSL] allow a mother be found a perpetrator of “child abuse” in the event she is a drug addict while her child is a fetus? And 2) Is the intent of 23 Pa.C.S. § 6386 limited to providing “protective services” to addicted newborns and their families and not so expansive to permit alcoholic or addicted mothers be found to have committed child abuse while carrying a child in her womb? See In Interest of L.J.B., a minor, appeal of A.A.R., Natural Mother, 183 A.3d 971, 972 (Pa. 2018) (per curiam).

On December 28, 2018, the Pennsylvania Supreme Court issued an opinion reversing the decision of the Superior Court and remanding the matter for reinstatement of the trial court’s order. Writing for the majority in a decision joined by two

justices, concurred with by two justices, and with which two justices dissented, Justice Donohue stated that “[b]ased on the relevant statutory language, that a mother cannot be found to be a perpetrator of child abuse against her newly born child for drug use while pregnant.” In the Interest Of: L.J.B., a Minor, Appeal of: A.A.R., Natural Mother, 199 A.3d 868, (2018) (hereinafter cited as In the Interest of: L.J.B.). In reaching this conclusion, the Pennsylvania Supreme Court (hereinafter referred to as “L.J.B. Court”) determined that,

[a] ‘perpetrator’ is ‘[a] person who has committed child abuse’ under the CPSL.

23 Pa.C.S. § 6303(a). Thus, at the time the individual committed the act that caused or was reasonably likely to have caused bodily injury to a child, he or she

must have been a “perpetrator,” as defined. The delineation of each individual who is permissibly identified as “perpetrator” under the CPSL is based on his or her relationship to a “child” – in Mother’s case, as “[a] parent of a child.” Reading the clear and unambiguous language of the relevant definitions together, a person cannot have committed child abuse unless he or she was a perpetrator, and a person cannot be a perpetrator unless there is a “child” at the time of the act. See 23 Pa.C.S.A. § 6303(a), (b.1).

Id. Using this reasoning, the L.J.B. Court concluded that as Mother’s actions of ingesting drugs occurred while she was pregnant, which was while Child was a

fetus, and as a fetus is not included within the definition of “child” in the CPSL, then Mother cannot be found a “perpetrator.” Id.

In her dissenting opinion, Pennsylvania Supreme Court Justice Mundy concluded that “the individual is a perpetrator at the time the injury is manifested, not solely at the time of the act or failure to act that caused the injury.” See In the Interest of L.J.B. (Mundy, J., dissenting). Justice Mundy reasoned that “[d]etermining whether a child is a victim of child abuse first requires a determination that there is abuse, followed by a determination of who perpetrated the abuse.” Id. Justice Mundy cited to the case In re L.Z., 111 A.3d 1164, 1165 (Pa.2015), examining “whether the child at issue in this case suffered abuse and whether that abuse was perpetrated by his mother”, and found that,

L.J.B. suffered bodily injury after birth when she began exhibiting withdrawal symptoms. The bodily injury L.J.B. suffered was a direct result of a recent act of Mother, the use of illegal narcotics.

Therefore, Mother was the perpetrator of the abuse on L.J.B., after birth, notwithstanding the fact that she ingested the drugs prior to birth.

Accordingly, Mother was "a parent of the child" and "caused bodily injury through a recent act." See 23 Pa.C.S. § 6303(a),(b.1)(1).

See In the Interest of L.J.B. (Mundy, J., dissenting).

IX. REASONS FOR GRANTING THE WRIT

1. Whether a state violates the constitutional guarantees of the Fourteenth Amendment of the United States Constitution when it denies the protections afforded under the law to a population of children who suffer bodily injury, based solely on the fact that the injury suffered by the children was inflicted prenatally?

Children have legal and constitutional rights and child protective service laws were written to empower the states to provide for the care and protection of this county's children. "A child, merely on account of his minority, is not beyond the protection of the Constitution." Bellotti v. Baird, 443 U.S. 622, 99 S.Ct. 303, 561 L.Ed.2d 797 (1979). As stated by the United States Supreme Court in In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d

527 (1967), “whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.” The rights and protections afforded under child protective service laws were designed to protect all children, and the Fourteenth Amendment of the United States Constitution mandates that states provide to the children within its jurisdiction the equal protection of these laws:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or

property, without due process of law; nor
deny to any person within its jurisdiction
the equal protection of the laws.

U.S. Const. Amend. XIV.

The authority of the state to protect its children
has long been recognized by the Supreme Court,
“[A]nd neither rights of religion nor rights of
parenthood are beyond limitation. Acting to guard the
general interest in youth's well being, the state as
parens patriae may restrict the parent's control by
requiring school attendance, regulating or prohibiting
the child's labor, and in many other ways.” Prince v.
Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed.
645 (1944). With the passage of the Child Abuse

Prevention and Treatment Act of 1974 (CAPTA)², the federal government recognized the issue of child abuse and took steps to address it.

The legislative intent of the Child Abuse Prevention and Treatment Act was the establishment of a broad and uniform definition of child abuse and neglect; nationwide coordination of efforts to identify, treat, and prevent child abuse and neglect; research leading to new knowledge and demonstration of effective ways to identify, treat, and prevent child maltreatment; compilation of existing knowledge and dissemination

² 42 U.S.C.A. § 5106a. Grants to States for child abuse or neglect prevention and treatment programs is included within CAPTA, which is found at 42 U.S.C.A. Ch. 67.

of information about successful methods and programs; training of professionals, paraprofessionals, and volunteers; encouragement of states, as well as private agencies and organizations to improve their services for identifying, treating, and preventing child maltreatment; and a complete and full study of the national incidence of child abuse and neglect.

See Debra T. Todd, *Sentencing of Adult Offenders In Cases Involving Sexual Abuse of Children: Too Little, Too Late? A View From the Pennsylvania Bench*, 109 Penn St. L.Rev. 487 (2004). Following the passage of CAPTA, all fifty states enacted laws requiring child protective services by either state or local departments of social services, and mandating that

the child protective services workers “comply with these laws by investigating each report of suspected child abuse, neglect, and/or exploitation.” Id. at 497.

In the Commonwealth of Pennsylvania, the Child Protective Services Law (CPSL) was written in response to the finding that, “[A]bused children are in urgent need of an effective child protective service to prevent them from suffering further injury and impairment.” 23 Pa.C.S.A. § 6302. The defined purpose of the CPSL being, “...to establish in each county protective services for the purpose of investigating the reports swiftly and competently, providing protection for children from further abuse...” 23 Pa.C.S.A. § 6302.

In the case of L.J.B., the Agency assumed custody of a child who remained hospitalized for 19

days suffering pain, bodily injury³, because of actions taken by the mother. The Agency sought to apply the protections and rights afforded under the CPSL to this child, the same way it would to any other child found to have suffered abuse at the hand of a perpetrator.

As the child was born, it was now a “child” defined by 23 Pa.C.S.A. § 6303(a) as “an individual under 18 years of age.” As the child suffered bodily injury due to actions taken by a perpetrator, in this case the mother,⁴ the Agency asserted that the child was a victim of child abuse.⁵

³ The CPSL defines “Bodily injury” as “Impairment of physical condition or substantial pain.” 23 Pa.C.S.A. § 6303(a).

⁴ The CPSL defines a “perpetrator” of child abuse as “a parent of a child.” 23 Pa.C.S.A. § 6303(a).

⁵ The CPSL defines “child abuse” as intentionally, knowingly or recklessly doing any of the following:

However, the L.J.B. Court determined that the CPSL and the protections and rights provided therein do not extend to this child. The L.J.B. Court decision declines to extend the protections to be afforded all children to *all* children, based on the Court's focus on the definition of "perpetrator" and the timing of the action, rather than on the definition of "child abuse."

The Pennsylvania Supreme Court's decision in L.J.B. restricts the ability of the state to protect its children, and in so doing, denies children their constitutional

(1) Causing bodily injury to a child through any recent act or failure to act.... or (5) Creating a reasonable likelihood of bodily injury to a child through any recent act or failure to act. 23 Pa.C.S.A. § 6303(b.1)(1)and(5).

right to life, liberty, and the equal protection of the law.⁶

⁶ In focusing on what this case represents, it is important to point out what this case is not; this is not an abortion issue case nor is it an unborn child case. As Justice Thomas stated in his dissent from denial of certiorari in Gee v. Planned Parenthood of Gulf Coast Inc., et al, 139 S.Ct. 408 (2018), “[S]ome tenuous connection to a politically fraught issue does not justify abdicating our judicial duty. If anything, neutrally applying the law is all the more important when political issues are in the background. The Framers gave us lifetime tenure to promote ‘that independent spirit in the judges which must be essential to the faithful performance’ of the courts’ role as ‘bulwarks of a limited Constitution,’ unaffected by fleeting ‘mischiefs.’ The Federalist No. 78, pp. 469–470 (C. Rossiter ed. 1961) (A. Hamilton). We are not ‘to consult popularity,’ but instead to rely on ‘nothing ... but the Constitution and the laws.’” Id. at 471.

Analysis of State's Justification for the Decision

The L.J.B. Court cites the CPSL definition of a “perpetrator” as a “[p]erson who has committed child abuse.” 23 Pa.C.S. § 6303(a). The L.J.B. Court reasons that “at the time the individual committed the act that caused or was reasonably likely to have caused bodily injury to a child he or she must have been a ‘perpetrator’ as defined.” In the Interest of: L.J.B. at 5. The CPSL delineation of a “perpetrator” is based on his or her relationship to a child, and in the case of L.J.B., as “[a] parent of a child.” 23 Pa.C.S. § 6303(a)(1). Id. at 5. Considering these definitions, the L.J.B. Court inferred that “[a] person cannot have committed child abuse unless he or she was a perpetrator, and a person cannot be a ‘perpetrator’ unless there is a ‘child’ at the time of the act.” Id. at 5. As the mother in L.J.B. ingested drugs while she

was pregnant, and as the child was a fetus at the time mother was pregnant, the L.J.B. majority stated that the child was not a “child,” defined as a person who is under eighteen (18) years of age, at the time of the mother’s action. Id. at 5. The L.J.B. Court therefore concluded that “[M]other cannot be found to have committed child abuse against Child based on her illegal drug use while pregnant because she was not a ‘perpetrator’ at the time of the act.” Id. at 5.

The L.J.B. Court’s determination that all components of child abuse must exist concomitantly offers nothing but its own weight as support, serving as a classic example of circular reasoning. See In re Benjamin M., 310 S.W.3d 844, 848-849 (2009) finding that this reasoning “[p]roceeds along the line that fetus is not a child, therefore, harm to a child knowingly inflicted before birth cannot be harm to, or

abuse of, a child, and, therefore, the child must be a child and not a fetus when the knowing act or failure to act happens.” As the Court in Benjamin M. points out, acceptance of such an argument clearly ignores the intent of CPSL and serves to “tie the hands of anyone trying to ‘[p]rovide for the care, protection, and wholesome moral, mental, and physical development of children.’” Id. at 849.

Furthermore, the L.J.B. Court’s interpretation of the CPSL infers requirements simply not stated within the statute. The CPSL does not require that a parent inflict injury after birth. The CPSL simply requires that the child suffer bodily injury due to a recent act or failure to act, committed within two years of the date of the report, on the part of the perpetrator. See 23 Pa.C.S.A. § 6303. As Justice Mundy points out in the State Court’s dissenting

opinion, the CPSL focuses on the status of the child, not on the timing of the injury's infliction. See In the Interest of L.J.B. (Mundy, J., dissenting).

Equal Protection of the Laws

In reaching its decision, the L.J.B. Court denies equal protection of the CPSL to *all* of children absent a legitimate government interest for doing so. The L.J.B. decision declines to extend the protections and rights of the CPSL to children who suffer bodily injury as a result of a parent's drug use simply because the parent took the drugs while pregnant. This decision is alarming, since if a child were to be exposed to a drug following its birth and this exposure resulted in bodily injury to the child, the child would without doubt be considered an abused child. In B.K. v. Department of Public Welfare, 36 A.3d 649 (Cmwth.Crt.2012), the Pennsylvania Commonwealth

Court⁷ upheld an indicated report of child abuse⁸ against a mother who exposed her 17 month old child

⁷ The Commonwealth Court in Pennsylvania heard the B.K. case under its jurisdiction to hear direct appeals from government agencies. 42 Pa.C.S. § 763. In the case of L.J.B., the child abuse matter was initiated in the court of common pleas pursuant to the power of the court in a dependency proceeding to determine that the child subject to said proceeding has been abused. See 23 Pa.C.S. § 6303(a) “Founded Report.” As such, the L.J.B. appeal case proceeded from the court of common pleas to the Superior Court initially, rather than the Commonwealth Court. See 42 Pa.C.S. § 742 Appeals from courts of common pleas.

⁸ In making its determination, the B.K. Court referred to 23 Pa.C.S. § 6303(b)(1)(i) defining child abuse as “[a]ny recent act or failure to act by a perpetrator which causes nonaccidental serious physical injury to a child under 18 years of age,” and 23 Pa.C.S. § 6303(a)(1) defining serious physical injury as “[a]n injury that...[s]ignificantly impairs a child’s physical function, either temporarily or permanently.” Id. at 654.

to cocaine. In that case, the evidence demonstrated that the mother used cocaine in the presence of the child, and that the child was then taken to the hospital where his urine tested positive for the presence of cocaine. Id. The child's treating medical provider testified that the child could have cocaine in his system either by ingestion or inhalation, but there was no medical reason for the cocaine to be in his system. Id. at 652. The medical provider further testified that the change in the child's neurological status reflected in the medical records, "agitation, unusual behaviors, hyperactivity", indicated a significant impairment, even if only temporary, due to his exposure to cocaine. Id. at 654-655. Based on these facts, the B.K. Court found that the evidence demonstrated that child's exposure to cocaine resulted in a significant impairment of his physical function

and upheld the indicated report of child abuse against the mother. Id. at 655.

In the instant matter, the L.J.B. Court justified the selective application of the CPSL by citing to the purpose of the CPLS “[t]o protect the abused child and other children from suffering further abuse at the perpetrator’s hands...6302(b).” See In the Interest of: L.J.B. at 7. The L.J.B. Court reasoned that “[l]abeling a woman as a perpetrator of child abuse does not prevent her from becoming pregnant or provide any protection for a later conceived child while in utero. It also does not ensure that the same woman will not use illegal drugs if she does again become pregnant.” In the Interest of: L.J.B. at 7. The L.J.B. Court went further to state that the label of a perpetrator of child abuse will make it difficult for the mother to find employment or participate in the child’s life activities,

and would “contravene the laudatory goal of preserving family unity and a supportive environment for the child.” In the Interest of: L.J.B. at 7.

The L.J.B. Court’s reasoning, however, begins with the premise that the child in L.J.B. and the bodily harm she suffered is somehow distinguishable from the bodily harm suffered by other children. It is not. The CPSL should apply the same to all children.

The CPSL was written with its defined purpose:

[t]o encourage more complete reporting of suspected child abuse; to the extent permitted by this chapter, to involve law enforcement agencies in responding to child abuse; and to establish in each county protective services for the purpose of investigating the reports swiftly and competently, providing

protection for children from further abuse and providing rehabilitative services for children and parents involved so as to ensure the child's well-being and to preserve, stabilize and protect the integrity of family life wherever appropriate or to provide another alternative permanent family when the unity of the family cannot be maintained.

23 Pa.C.S.A. § 6302. Contrary to the reasoning of the L.J.B. Court, which implies a punitive measure to child abuse findings, it is imperative to focus on the purpose of such findings: to protect children from abuse; to provide rehabilitative services to families; to preserve the family unit where appropriate; and to provide an alternative permanent family to a child

when the family unit cannot be maintained. A finding of child abuse is not a finding of criminal conduct, nor is it automatic grounds for termination of parental rights. Rather, a finding of child abuse results in the abuser's registration on the statewide central registry for the maintenance of indicated and founded reports of child abuse, which is intended to protect children.

Furthermore, Pennsylvania law is well settled that:

[t]he Commonwealth's interests in the need to prevent child abuse and to protect abused children from further injury is fostered by maintenance of the statewide central registry identifying perpetrators of abuse. The government's interest in addressing the urgent need of abused children for protection from further injury and impairment

encompasses both the child or children who were actually abused by the perpetrator, as well as any children who may potentially be abused by the perpetrator.

G.V. v. Department of Public Welfare, 625 Pa. 280, 291, 91 A.3d 667, 673-674 (Pa. 2014). If the CPSL and the established child abuse system is effective for one child, then the same system is effective for all children. To find otherwise, as the L.J.B. Court did, violates the constitutional guarantees of equal protection of the law.

Remarkably, the L.J.B. Court itself contemplates that a finding of child abuse could be made to a *different child* upon investigation of a report involving a child born experiencing withdrawal symptoms. The L.J.B. Court stated “child protective

services' could be instituted after notification that a child was born experiencing symptoms of withdrawal if the county agency discovered, through its risk and/or safety assessment, indicia of child abuse as it relates to other children in the home." In the Interest of: L.J.B. at 6. As argued above, if a finding of child abuse can be made to one child, then the same finding should be made to all children when the same facts and circumstances are therein involved.

The Question Presented is of Overriding Public Importance

This case presents an overwhelmingly important question of national significance “that has not been, but should be, settled by this Court” at this time. S. Ct. Rule 10(c); Pharm. Research & Mfrs. Of Am. v. Walsh, 538 U.S. 644, 650 (2003) (granting certiorari “because the questions presented are of national importance”); Olmstead v. Zimring, 527 U.S. 581, 596 (1999) (“We granted certiorari in view of the importance of the questions presented to the States and affected individuals.”) The L.J.B. Court has created an unendurable conflict among the nation’s state high courts regarding the scope of the federal constitutional guarantees encompassed in the Fourteenth Amendment.

According to the Guttmacher Institute, twenty-three (23) states and the District of Columbia

specifically recognize that substance use during pregnancy can be child abuse. (See The Guttmacher Institute, State Laws and Policies, Substance Use During Pregnancy (January, 2019), <https://www.guttmacher.org/statepolicy/explore/substance-use-during-pregnancy>.) This recognition respects the fact that the rights and protections afforded to children under child protective services laws should be available to all children and not limited to certain populations. See In re Baby Boy Blackshear, 90 Ohio St.3d 197, 200, 736 N.E.2d 462, 465 (Ohio 2000), wherein the Supreme Court of Ohio held that when a child is born and the child tests positive for an illegal drug due to the mother's prenatal drug abuse, the child is per se an "abused child" for purposes of the civil child abuse statute at Ohio R.C. § 2151.031(D). (Said statute states an

“abused child” includes any child who, “because of the acts of his parents...suffers physical or mental injury that harms or threatens to harm the child’s health or welfare” and a “child” means “a person who is under eighteen years of age.” See also Ohio R.C. § 2151.011(B)(6)). The Blackshear Court found that the action causing injury to the child, the prenatal drug use, was taken by one of his parents, and that said action caused injury both pre and post birth. Id. at 220, 464-465. The Blackshear Court reasoned that an alleged abused child, once born, falls under the jurisdiction of the appropriate juvenile court. Id. at 200, 465. Even dissenting Justice Cook in Blackshear determined that “[e]ven if fetuses were excluded from the definition, a reasonable construction of the statute could support the adjudication of a newborn as an abused child for injuries inflicted prebirth.”

Blackshear at 202, 466 (Cook, J. dissenting). Justice Cook dissented from the Blackshear majority in his determination that in order to make a child abuse finding based on prenatal drug use, evidence of actual harm to the newborn child must exist, rather than a mere positive test for an illegal substance. Blackshear at 202-203, 466 (Cook, J. dissenting). See also In re E.M. 31 N.E.3d. 204, 207 (Ohio 2010), wherein the Ohio Supreme Court declined to extend the holding of the Blackshear court and make a finding of child abuse in a situation where a mother used drugs while pregnant, but the child was born and did not test positive for drugs and did not exhibit symptoms of withdrawal.⁹

⁹ The Court in In re E.M. applied the same definition of child abuse and child as the Blackshear Court, R.C. § 2151.031(D) and R.C. § 2151.011(B)(6).

In In re M.M. and C.M., Juveniles, 200 Vt. 540, 547, 133 A.3d 379, 385-386 (VT. 2015), the Supreme Court of Vermont found that the “[t]rial court did not improperly conclude that child was child in need of care or supervision (CHINS) based solely on being born addicted to opioids,” when the mother was kicked out of treatment, used opioids obtained off the street, and only returned to a medically monitored treatment program shortly before the child was born.¹⁰ The In re M.M. and C.M. Court distinguished the facts of that case with those of situation involving a mother who actively seeks out and participates in a treatment program while pregnant. Id. at 547, 385-386. See New

¹⁰ Although the finding in In re M.M. and C.M. related to a finding of “a child in need of care or supervision,” the factual circumstances of the case and the reasoning of the In re M.M. and C.M. Court lend credence to the Agency's position in this appeal.

Jersey Division of Child Protection and Permanency

v. Y.N., 220 N.J. 165, 185-186, 104 A.3d 244, 256 (New Jersey 2014), wherein the New Jersey Supreme Court held “[a]bsent exceptional circumstances, a finding of abuse or neglect cannot be sustained based solely on a newborn’s enduring methadone withdrawal following a mother’s timely participation in a bona fide treatment program prescribed by a healthcare professional to whom she has made full disclosure.”

The Y.N. Court reasoned that the failure to distinguish between situations in which a pregnant mother uses drugs taken from a legal versus an illicit source creates a disincentive for a pregnant woman to seek medical help and engage in treatment to address her and her baby’s needs. Id. at 183, 255. The Y.N. Court was careful to note that their decision did not address whether a finding of abuse or neglect could be

made on another basis, such as whether a pregnant mother's unjustified delay in seeking treatment could have negatively impacted the newborn's withdrawal symptoms. Id. at 186, 256. Subsequently, in an unpublished decision, the Superior Court of New Jersey determined that, absent a mother's participation in a genuine, physician approved treatment program, evidence supports a finding that a mother abused or neglected their child by ingesting drugs while pregnant that caused actual harm to the newborn baby. See New Jersey Division of Child Protection and Permanency v. Z.S., 2017 WL 5248414 (NJ. Sup. 2017).¹¹

¹¹ The New Jersey Courts in both Y.N. and Z.S. applied the statutory definition of child abuse found at N.J.S.A. 9:6–8.21(c)(4)(b) “Abused or neglected child” means a child less than 18 years of age whose parent or guardian, as herein defined... (4)

See also In re A.L.C.M., 239 W.Va. 382, 383, 801 S.E.2d 260, 262 (West Virginia 2017), wherein the Supreme Court of West Virginia held that when a child is born alive, the presence of illegal drugs in the child's system at the time of birth provides sufficient evidence to support a finding that the child is abused and/or neglected, and the filing of an abuse/neglect petition. The A.L.C.M. Court reasoned that “[t]he presence of illegal drugs in a child's system at birth is

or a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, as herein defined, to exercise a minimum degree of care (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court.

indicative of the mother's use of such substances during her pregnancy, which conduct satisfies both the statutory definition of 'abused child,'....and the statutory definition of 'neglected child'..."¹² Id. at 384-385, 262-263. See also People v. Interest of T.T., 128 P.3d 328, 329 (Col.App.2005), wherein the mother alleged "that exposure of a fetus to controlled substances does not constitute mistreatment or abuse of a 'child' and cannot form the basis of a dependency

¹² The A.L.C.M. Court cited to the relevant portions of the definition of "abused child" as "[a] parent ... who knowingly ... inflicts ... physical injury ... upon the child," W. Va. Code § 49-1-201, and "neglected child" as a child "[w]hose physical ... health is harmed ... by a present refusal [or] failure ... of the child's parent ... to supply the child with necessary ... supervision [or] medical care ... when that refusal [or] failure ... is not due primarily to a lack of financial means." W. Va. Code § 49-1-201.

See A.L.C.M. at 391, 269.

and neglect proceeding.” However, the Colorado Court of Appeals rejected mother’s contention and found that the law permitted a petition in a dependency and neglect action for a child now born to be based on evidence of a parent’s prenatal drug use despite the fact that the child was not born at the time the alleged abuse or neglect took place. Id. at 330. In making this finding, the T.T. Court applied the definition of a dependent or neglected child found at C.R.S.A § 19–3–102(1)(a)–(c), as “one who has been subjected to mistreatment or abuse by a parent, one who lacks proper parental care through the actions or omissions of the parent, or one whose environment is injurious to his or her welfare.” Id. at 329-330. The T.T. Court distinguished the facts of that case with those of People in Interest of H., 74 P.3d 494 (Col.App.2003), wherein the Colorado Court of

Appeals held that a petition in dependency or neglect could not be filed with respect to an unborn child because a fetus is not specifically included in the statutory definition of “child.” See C.R.S.A. § 19–1–103(18). Id. at 329-330.

2. Whether the Pennsylvania Supreme Court's decision interpreting the state's child protective services law in reliance upon amended 23 Pa.C.S. § 6386, violates the Supremacy Clause of Article 6 of the United States Constitution as said state statute conflicts with 42 U.S.C.A. § 5106a?

The L.J.B. Court, in reaching its decision in this matter, relied on the language of the revised state statute at 23 Pa.C.S. § 6386. See In the Interest of: L.J.B. at n.9. Said statute fails to comply with the requirements of the federal government at 42 U.S.C.A. § 5106(a). As such, the L.J.B. Court's reliance thereon was misplaced in violation of the Supremacy Clause of United States Constitution, found in Article 6, which provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. Const. art. 6.

Since its initial passage in 1974, CAPTA has been amended several times, most recently by the Comprehensive Addiction and Recovery Act of 2016 (P.L. 114-198, 7/22/16). Title V, Section 503 of this Act modified CAPTA to mandate that states wishing to receive federal funding for their child protective

services programs include provisions in their state plans for infants born and identified as being affected by substance abuse or withdrawal symptoms or Fetal Alcohol Spectrum Disorder. Under the federal law entitled “Grants to States for child abuse or neglect prevention and treatment programs,” state plans must include the following:

(B) an assurance in the form of a certification by the Governor of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program, relating to child abuse and neglect that includes--

(i) provisions or procedures for an individual to report known and suspected instances of child abuse

and neglect, including a State law for mandatory reporting by individuals required to report such instances;

(ii) policies and procedures (including appropriate referrals to child protection service systems and for other appropriate services) to address the needs of infants born with and identified as being affected by substance abuse or withdrawal symptoms resulting from prenatal drug exposure, or a Fetal Alcohol Spectrum Disorder, including a requirement that health care providers involved in the delivery or care of such infants

notify the child protective services system of the occurrence of such condition in such infants, except that such notification shall not be construed to--

(I) establish a definition under Federal law of what constitutes child abuse or neglect; or

(II) require prosecution for any illegal action;

(iii) the development of a plan of safe care for the infant born and identified as being affected by substance abuse or withdrawal symptoms, or a Fetal Alcohol Spectrum Disorder to ensure the

safety and well-being of such infant following release from the care of health care providers, including through--

(I) addressing the health and substance use disorder treatment needs of the infant and affected family or caregiver; and

(II) the development and implementation by the State of monitoring systems regarding the implementation of such plans to determine whether and in what manner local entities are providing, in

accordance with State requirements, referrals to and delivery of appropriate services for the infant and affected family or caregiver;

(iv) procedures for the immediate screening, risk and safety assessment, and prompt investigation of such reports;

(v) triage procedures, including the use of differential response, for the appropriate referral of a child not at risk of imminent harm to a community organization or voluntary preventive service;

(vi) procedures for immediate steps to be taken to ensure and

protect the safety of a victim of
child abuse or neglect and of any
other child under the same care
who may also be in danger of child
abuse or neglect and ensuring
their placement in a safe
environment...

42 U.S.C.S. § 5106(a)(B). In Pennsylvania, the child protective services system is governed by the Child Protective Services Law (CPSL) at title 23 of the Pennsylvania Consolidated Statutes, chapter 63. As noted above, Pennsylvania is required to comply with the federal mandates of 42 U.S.C.A. § 5106(a) in order to receive federal funding to support its child protective services system. In addition to the general reporting and investigation requirements under the CPSL, Pennsylvania enacted a specific statute at 23

Pa.C.S. § 6386 relating to the treatment of infants born and identified as being affected by being affected by drug or alcohol use. Prior to October 2018, this Pennsylvania statute was entitled “Mandatory reporting of children under one year of age.”²³ Pa.C.S. § 6386.¹³ Said statute largely followed the federal mandates of 42 U.S.C.S. § 5106(a), and required that: 1) health care providers report to the county agency when involved in the delivery or care of infants under one year of age born and identified as being effected by illegal drug use, prenatal drug use, or fetal alcohol spectrum disorder; 2) the county agency complete a safety or risk assessment, or both, and determine whether child protective services or

¹³ At the time the parties submitted their briefs to the state Supreme Court, this prior version of the statute was in effect.

general protective services are warranted; and 3) the county agency ensure the safety of the child, determine whether emergency protective custody was warranted, and physically see the child and contact the parents. However, this statute was amended in October of 2018, and now fails to include many of the provisions mandated by the federal government.

Writing for the majority in In the Interest of L.J.B., Justice Donohue referenced the Pennsylvania legislature's recent amendment to 23 Pa.C.S. § 6386, which was passed in July 2018, and took effect October 2, 2018. See In the Interest of: L.J.B. at n.9. As described by Justice Donohue, the state legislature "completely overhauled" section 6386, and even changed the title of the statute to read "Notification to department and development of plan of safe care for children under one year of age. Id. at n9. The L.J.B.

Court's reference to this amended statute was to point out that the new language included therein "resolves any ambiguity that may have arisen from the language used in the prior version of section 6386 entirely." Id. at n9. However, as the newly written Pennsylvania statute fails to comply with the requirements outlined by the federal government in 42 U.S.C.S. § 5106(a), the reliance of the L.J.B. Court on said statute is improper.

The current version of 23 Pa.C.S.A § 6386, removes the requirement that health care providers make a report to the appropriate county agency when they are involved in the delivery or care of a child under one year of age who is born and identified as being affected by substance or alcohol abuse. Instead, the statute now requires that such reports are to be made to the "department" with a possible transmittal

to the appropriate county agency, and removes the requirement that the county agency perform a safety and risk assessment upon receipt of such reports.¹⁴

See 23 Pa.C.S.A. § 6386. However, the federal law at 42 U.S.C.A. § 5106(a), with which the state law is required to conform, mandates that these reports be made to the child protective services system.¹⁵ As such, Pennsylvania's statute attempts to circumvent this mandatory requirement. In addition, the child protective services system must have in place a procedure for “the immediate screening, risk and

¹⁴ In Pennsylvania, child protective services are performed by the county agencies. See 23 Pa.C.S. § 6302(b).

¹⁵ See 42 U.C.S.A. § 5106(a)(B)(II) including a requirement that health care providers involved in the delivery or care of such infants notify the **child protective services** system of the occurrence of such condition (emphasis added).

safety assessment, and prompt investigation of such reports,” 42 U.S.C.A. § 5106(a)(B)(iv). The revised Pennsylvania statute at 23 Pa.C.S.A. § 6386 completely removes this federally mandated component, and as the L.J.B. Court notes, mainly focuses on the “[d]evelopment of interagency protocols and plan of safe” to ensure that the child’s needs, as well as those of the child’s parents and immediate caregivers, are appropriately met. See In the Interest of: L.J.B. at n.9. See also 23 Pa.C.S. § 6386(b.1).

Notably, while the development of a plan of safe care is a requirement of the federal law, it is only **one of many** requirements mandated by 42 U.S.C.S. § 5106(a). In addition to the federal mandates for the screening, risk and safety assessments, and investigation of such reports, the federal law also requires that states have in place “procedures for

immediate steps to be taken to ensure and protect the safety of a victim of child abuse or neglect and of any other child under the same care who may also be in danger of child abuse or neglect and ensuring their placement in a safe environment.” 42 U.S.C.S. § 5106(a)(B)(vi). Pennsylvania’s statute at 23 Pa.C.S. §6386 fails to meet many of the requirements of the federal law, and the L.J.B. Court’s reliance upon this statute in reaching their decision constitutes a violation of Supremacy Clause of Article 6 of the United States Constitution.

X. CONCLUSION

The foundation of our country rests on the Constitution and in the promise that the rights and liberties guaranteed therein are available equally to all citizens. When the state unjustifiably infringes upon those rights and liberties, as was done in L.J.B., it is the responsibility of this Honorable Court to rectify that injustice. The selective application of the laws and regulations written to protect the most vulnerable among us has no place in our democracy.

“A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.” Prince at 168.

Based on the foregoing, this Honorable Court should
grant the petition for writ of certiorari.

Respectfully submitted,

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