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Wisconsin Department of Health Services
Division of Medicaid Services
P.O. Box 309
Madison, WI 53707-0309

Transmitted electronically only:
Wisconsin1115CLAWaiver@dhs.wisconsin.gov

RE: Draft 1115 Demonstration Waiver Amendment Application

Dear DHS:

Since 1920, the American Civil Liberties Union has been the nation's guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee to all persons in this country. The ACLU of Wisconsin is the state affiliate of the national ACLU and is a non-profit, non-partisan, private organization with more than 21,000 member households, and is dedicated to defending the civil liberties and civil rights of all Wisconsin residents. Those rights include racial justice, fair treatment of persons with disabilities, protection of privacy, and freedom from unreasonable searches and seizures.

We concur with comments on the department's waiver application made by many others: BadgerCare is working as intended, and the proposed changes are far less likely to improve the health of low income Wisconsin residents than to drive them off of BadgerCare. At the same time, precious budget dollars will be used to create a bigger bureaucracy, rather than to improve health care services for Wisconsin residents. We submit these comments because imposing time limits on health care access, imposing premiums on persons living in or near poverty, requiring drug screening and testing, and penalizing the failure to disclose personal behaviors to agency workers, will adversely affect the civil rights and civil liberties of Wisconsin's most vulnerable residents.

The cruel effort to force indigent persons to pay premiums – at risk of loss of health care access if they are unable to do so – and to strip those persons of health care coverage after four years will harm persons with disabilities. The exception for persons receiving Social Security Disability Insurance (SSDI) does not eliminate this problem, since the definition of "disability" under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act is far broader than the standards for receipt of Social Security Disability and SSI.

Moreover, many of the persons who will be pushed off BadgerCare are seeking SSDI or SSI – a process that can take years – and without the health care coverage BadgerCare provides will be less likely to have a treating physician and thus less likely to be able to establish eligibility for disability benefits. Other persons with disabilities are not necessarily "unable to work" - even if they work for fewer than 80 hours per month - and the loss of access to health care will inevitably cause the deterioration of physical or mental health for many of them and potentially result in a loss of even that limited ability to work. We note that the cost of health care has, in the past, precluded nearly one-quarter of Wisconsin adults with disabilities from obtaining medical care.[1]

In addition, reducing BadgerCare access will likely exacerbate the disparate health conditions and disparate health outcomes for communities of color in Wisconsin. Recent American Community Survey Data shows that Blacks, Latinos and Native Americans in Wisconsin are *already* far more likely than white non-Hispanic persons to be uninsured.[2] Persons of color who are insured in Wisconsin have, historically, been disproportionately reliant on Medicaid, as the state's data show.[3] Thus the waiver request may constitute a policy or method of administration that has a racially discriminatory effect, in violation of Title VI of the Civil Rights Act and its implementing regulations.

We also object to the proposal to impose substance abuse screening and drug testing on BadgerCare applicants and recipients as a condition of eligibility. If the screening purports to identify a substance abuse disorder, the individual must submit to a drug test or be denied health care coverage, and enter into treatment if it is available. Drug testing of public benefit

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[1] *See, e.g., Healthiest Wisconsin 2020 Baseline and Health Disparities Report* – People with Disabilities at 19 (Wisc. Dept. of Health Services, 2014) http://www.slideserve.com/dillon/healthiest-wisconsin-2020-baseline-and-health-disparities-report-people-with-disabilities (viewed 5/18/17).

[2] *See, e.g.*, American Fact Finder S2701, "Selected Characteristics of Health Insurance Coverage in the United States" (2011-2015 American Community Survey 5-Year Estimates) for Wisconsin (94% of white non-Hispanic Wisconsin residents have health insurance, compared to only 88% of African-Americans, 79% of Native Americans, and 77% of Latinos); Wisconsin Family Health Survey 2015, Key Findings on Insurance and Health Care (finding African-Americans and Latinos were less likely than whites to have had health insurance in the prior year, as well as that poor and near-poor families were less likely to have had health insurance than non-poor families), at https://www.dhs.wisconsin.gov/publications/p45369a-15.pdf (viewed 5/18/17).

[3] *Healthiest Wisconsin 2020 Baseline and Health Disparities Report* - Hispanics/Latinos at 20 (Wisc. Dept. of Health Services, 2014) at http://www.slideserve.com/allan/healthiest-wisconsin-2020-baseline-and-health-disparities-report-hispanics-latinos (viewed 5/18/17).

applicants and recipients is based on the false and insidious premise that impoverished individuals are more prone to drug use than the general population. However, there is no reliable evidence to support that claim. And the SASSI Institute, which developed a tool that some states use for public assistance drug screening, has stated that "when public assistance is made contingent on participation in the [substance abuse] assessment and treatment process, it increases the risk for violations of ethical principles and applicants' rights."[4]

Further, suspicionless drug testing raises constitutional concerns. The government should not be forcing thousands of innocent and law-abiding BadgerCare applicants to submit to a drug test absent probable cause. That unreasonable invasion of privacy also comes at a high cost to the state, with few benefits to anyone, as public assistance drug testing routinely identifies only a tiny percentage of substance abusers. People have the right to be secure from unreasonable government searches, including searches that implicate their bodily privacy, absent sufficient legal justification. Federal courts have concluded that public assistance drug testing fails to meet that standard.[5]

Nor does screening eliminate these concerns. Many test instruments simply do not provide probable cause for drug testing, especially if they are administered outside the healthcare setting. Such tools are typically designed to give clinicians, in a treatment setting, information that can lead to further questions that could guide advice and treatment decisions in a therapeutic

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[4] https://www.sassi.com/customer-support/clinical-support/screening-issues/ (viewed 5/18/17).

5 *See, Lebron v. Sec. of Fla. Dep't of Children and Families*, 772 F.3d 1352, 1364 (11th Cir. 2014) (affirming summary judgment for plaintiff; "citizens do not abandon all hope of privacy by applying for government assistance. By virtue of poverty, TANF applicants are not stripped of their legitimate expectations of privacy—they are not employees in dangerous vocations or students subject to the *parens patriae* power of the state. And 'the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable.'"); *Lebron v. Sec. of Fla. Dep't of Children and Families*, 710 F.3d 1202, 1211 (11th Cir. 2013) (affirming preliminary injunction where "the State argues that there is a 'special need' to test TANF applicants because TANF funds should not be used for drugs as drug use undermines the program's goals of moving applicants into employment and promoting child welfare and family stability. But this argument, which assumes drug use, begs the question. The question is *not* whether drug use is detrimental to the goals of the TANF program, which it might be. Instead, the only pertinent inquiry is whether there is a substantial special need for mandatory, suspicionless drug testing of TANF recipients when there is no immediate or direct threat to public safety, when those being searched are not directly involved in the frontlines of drug interdiction, when there is no public school setting where the government has a responsibility for the care and tutelage of its young students, or when there are no dire consequences or grave risk of imminent physical harm as a result of waiting to obtain a warrant if a TANF recipient, or anyone else for that matter, is suspected of violating the law. We conclude that, on this record, the answer to that question of whether there is a substantial special need for mandatory suspicionless drug testing is 'no.'"); *Marchwinski v. Howard*, 113 F.Supp.2d 1134, 1140 (E.D.Mich. 2000), *aff'd by an equally divided court*, 60 Fed. Appx. 603 (6th Cir. 2003) ("The State's desire to address substance abuse as a barrier to employment is laudable and understandable in view of the Federal mandate to move welfare recipients to work. Yet, it does not constitute a special need sufficient to warrant a departure from the Fourth Amendment's main rule. Where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.") (internal quotations omitted).

setting, not to allow bureaucrats to deny eligibility for public benefits or establish legally sufficient suspicion for a search. Many do not differentiate among alcohol use (which is legal), prescription drug use (which is also legal under most circumstances), and illegal drug use. As the SASSI Institute makes clear, "[t]he purpose of the SASSI is to help people who have substance use disorders. *To use the SASSI to discriminate against individuals, such as disqualifying job applicants or to deny public assistance, violates the purpose of the SASSI and is a violation of the Americans with Disabilities Act.*"[6] (emphasis in original). *See also, e.g.*, Substance Abuse and Mental Health Services Administration & U.S. Dept. of HHS, Health Services and Resources Administration, "Screening Tools" (discussing benefits of "screenings in primary care and other healthcare settings" to facilitate diagnosis and treatment)(emphasis added).[7]

The drug screening and testing process also unreasonably intrudes on personal privacy by forcing individuals to disclose private health and medical issues to government bureaucrats. This is simply an unwarranted invasion of privacy that will do nothing to improve health outcomes. Drug screening and testing, for example, require applicants to share private and personal health conditions – such as mental health or other sensitive health problems – with agency workers rather than with health care professionals, to explain the presence of *lawful* prescription medication. In addition, drug testing may reveal private medical conditions, such as pregnancy status and genetic predispositions to certain diseases or conditions.

The "healthy behaviors" disclosure requirements are similarly intrusive. For example, having to discuss one's weight or eating habits with a bureaucrat in order to explain obesity will force many people to disclose underlying physical or mental health conditions in which their condition is rooted. Moreover, a bureaucratic determination of which behaviors may or may not be healthy will, as others have noted, inevitably fail to account for differing cultural norms and differing situations (*e.g.*, living in a "food desert"), and may therefore also have disparate racial effects.

Finally, we note that the waiver proposals have nothing to do with the issues and priorities the state itself identified. As the Wisconsin Department of Health Services made clear in 2014:

> Social determinants of health drive at least 50% of morbidity and mortality rates. Social determinants of health include socioeconomic status (SES), usually measured by income, employment, education, or housing. Groups with lower SES typically have significantly shorter life expectancy, higher rates of infant mortality, higher rates of chronic disease, and significantly lower self-rated health status.
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> Health inequities are costly. The Joint Center for Political and Economic Studies estimates that the combined costs of health inequalities and premature death in the United States during 2003-2006 were $1.24 trillion. Further, addressing social determinants of

[6] https://www.sassi.com/customer-support/clinical-support/screening-issues/ (viewed 5/18/17).

[7] http://www.integration.samhsa.gov/clinical-practice/screening-tools#drugs (viewed 5/18/17).

health is an essential component of several key principles of the Public Health Code of Ethics which frame the ethical practice of public health.

Healthiest Wisconsin 2020, the State Health Plan, lists two crosscutting focus areas: 1) Health Disparities, and 2) Social, Economic and Educational Factors that Influence Health. These broad focus areas have the potential to affect both the health focus area and public health infrastructure components of the plan and help set priorities in order to achieve large, equitable changes in health outcomes while saving health care dollars in Wisconsin.[8]

For these reasons, and the reasons set forth by many others, we urge the state to use its resources to provide more and better health care coverage to Wisconsin residents, rather than embarking on this unnecessary, costly and bureaucratic waiver process.

Sincerely,

Karyn L. Rotker
Senior Staff Attorney

[8] *Healthiest Wisconsin 2020 Baseline and Health Disparities Report Demographic Overview* (Wisc. Dept. of Health Services, 2014), Speaker's Notes at 9 (footnotes omitted) at http://www.slideserve.com/trixie/healthiest-wisconsin-2020-baseline-and-health-disparities-report-demographic-overview (viewed 5/18/17).