National Advocates for Pregnant Women

N A P W

Testimony of National Advocates for Pregnant Women before the Louisiana House of Representatives in Support of HB 1027: Preventing Criminal Liability based on Pregnancy Outcomes

Thank you for the opportunity to testify in support of HB 1027, a bill that would, among other things, expressly prevent state actors in Louisiana from targeting pregnant and postpartum people with arrest or criminal prosecution as a result of their pregnancy outcomes, including "stillbirth, miscarriage, intentional termination of a pregnancy, or any other pregnancy outcome that does not result in a live birth." National Advocates for Pregnant Women (NAPW) is a non-partisan legal advocacy organization dedicated to promoting the human rights and welfare of pregnant people and their families throughout the United States. Our testimony draws on over 20 years of experience litigating and supporting cases in which state actors have arrested or prosecuted pregnant women for experiencing a pregnancy loss or engaging in acts or omissions that presumably posed some risk of harm to their fetus. State actors in Louisiana and beyond have continued to try to bring cases against pregnant women based on pregnancy outcomes, even when doing so is clearly beyond the scope of the statutory language or legislative intent of current state laws. Women were criminalized for the outcomes of their pregnancies before *Roe v. Wade* and are still being criminalized for those outcomes today. That's why it is critical that Louisiana pass HB 1027 - to protect women and their families from the devastating consequences that result from treating pregnancy outcomes as a criminal, rather than medical or public health concerns.

NAPW has documented more than 1,600 instances since 1973 in which women were arrested, prosecuted, convicted, detained, or forced to undergo medical interventions that would not have occurred but for their status as a pregnant person.[1] Women have been charged with crimes including murder, depraved heart homicide, manslaughter, and feticide because they experienced miscarriages and stillbirths, or because they were unable to "guarantee" that their newborn babies could survive. These prosecutions have been brought under laws that were never intended to criminalize women for experiencing pregnancy losses and despite the fact that pregnancy losses are dishearteningly common, with miscarriages (a loss before 20 weeks gestation) occurring in an estimated 10-15% of all pregnancies and stillbirths (a loss after 20 weeks gestation) occurring in an estimated 0.6% of pregnancies.[2]

Unfortunately, Louisiana is not exempt from this disturbing national trend to criminalize women for their pregnancy decisions or their pregnancy outcomes. NAPW has documented at least 8 cases from Louisiana over the past 15 years where women have been deprived of their physical liberty on the basis of their pregnancies. For example, in 2015, a 27-year-old Acadia woman was charged with second degree murder after her newborn baby died in the course of labor and delivery. In this case, the district attorney tried to expand the language of the second degree murder statute to include a child who died due to cardiac arrest shortly after birth, claiming – without scientific support - that the mother's actions immediately prior to delivery caused the neonatal death. The court, however, ruled that "the criminal code 'may not be extended by analogy so as to create crimes not provided for'" and there was no offense that was punishable under Louisiana law.[3] While this conclusion was ultimately right, it's important to remember what this woman was forced to endure in the wake of a personal tragedy – that in the course of coping with the unimaginable pain and heartache of losing a newborn baby, she was simultaneously forced to undergo the extremely invasive, terrifying, and traumatic experience of defending a criminal investigation and prosecution against her. Legislative language, like that proposed by HB 1027, could have prevented this prosecution in the first place by creating a clear policy in Louisiana against criminalizing women for pregnancy outcomes that are simply outside of their control.

This is why it is important to be clear about what HB 1027 actually does and the very real dangers of not codifying this bill. Passage of HB 1027 would ensure that no pregnant or postpartum person is subjected to the trauma of criminal investigation or other rights violations upon experiencing the trauma of a pregnancy loss. This is happening right now, in nearly every Southern state and across the nation. At NAPW, we are in the process of documenting an alarming increase in the number of prosecutions of people in relation to their pregnancies. In just the past 15 years, we have identified nearly 1,300 such cases, including pregnant women who have been arrested for falling down stairs, drinking alcohol, giving birth at home, being in a "dangerous" location, having HIV, experiencing a drug dependency problem, or attempting suicide. Of course, none of these actions are illegal, yet because the individual was pregnant, criminal or civil charges were brought against them. When challenged, the vast majority of these prosecutions and state interventions fail, in part because *Roe* and *Casey* established a rule of law that prohibits treating pregnant people as a special, lesser class of persons. Yet, these 1,600+ cases that NAPW has documented since 1973 are a harbinger of what is to come. If the Supreme Court overturns *Roe*, we know that police, prosecutors, and judges will feel even more empowered to criminalize pregnancy and all pregnancy outcomes.

Moreover, HB 1027 simply represents sound public policy, consistent with the recommendations of every leading medical and public health organization. The American

Medical Association,[4] American Nurses Association,[5] American Psychological Association,[6] American Psychiatric Association,[7] American Academy of Pediatrics,[8] and every other major public health and medical group to address this issue unanimously oppose punitive responses to pregnancy, finding that such responses are harmful to the health of women and children, and diminish families' access to safe and, sometimes, life-saving healthcare. As the American College of Obstetricians and Gynecologists explains, punitive responses pose "serious threats to people's health and the health system itself … [by] erod[ing] trust in the medical system [and] making people less likely to seek help when they need it."[9]

Facilitating punitive actions against pregnant people and new parents causes real and devastating health consequences by deterring them from seeking necessary healthcare.[10] In particular, the fear that medical providers will report their patients to State authorities or criminal law enforcement deters pregnant women from seeking essential prenatal care or drug treatment services. This fear of penalties also deters parents from bringing their children in for medical care, further undermining family health. It creates a disincentive for pregnant women with actual drug dependency problems from having an open and honest relationship with their prenatal care providers out of fear that disclosure will lead to criminal prosecution.[11] Punitive laws that drive a wedge between patients and their doctors have demonstrable negative impacts on fetal and neonatal health. For example, empirical research found that Tennessee's "fetal assault" law actually "resulted in twenty fetal deaths and sixty infant deaths" in 2015 alone.[12] Another empirical study found a higher prevalence of neonatal abstinence syndrome (or "NAS") in states with punitive policies in effect.[13] HB 1027 would bolster the patient-physician relationship in Louisiana, improving perinatal outcomes and promoting equal access to crucial healthcare.

For all of these reasons, NAPW strongly supports HB 1027 and urges the Louisiana Legislature to codify it into law. HB 1027 guards against traumatizing criminal investigations of vulnerable populations, prioritizes maternal and infant health, and will ensure that the rapidly expanding prosecutorial playbook that targets pregnant people for criminalization will have no place in the great state of Louisiana.

Thank you so much for your time.

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[1] NAPW, *Arrests and Deprivations of Liberty of Pregnant Women, 1973-2020* (Sept. 2021), bit.ly/arrests1973to2020; Paltrow & Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. Health Politics, Pol. & L. 299, 323 (2013).

[2] Dugas & Slane, Miscarriage, Nat'l Library of Medicine (last updated June 29, 2021), https://www.ncbi.nlm.nih.gov/books/NBK532992/; Hoyert & Gregory, Nat'l Ctr for Health Statistics, *Cause of Fetal Death: Data From the Fetal Death Report, 2014*, Nat'l Vital Statistics Rpt, 4 (Oct. 31, 2016), https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_07.pdf.

[3] Minute Entry Granting Def.'s Motion to Quash at 1, *State v. Chriceol*, No. 83833 (La. Dist. Ct. Parish of Acadia June 29, 2016) (also on file at NAPW).

[4] Am. Med. Ass'n, Policy Statement H-420.962, *Perinatal Addiction - Issues in Care and Prevention* (last modified 2019) ("Transplacental drug transfer should not be subject to criminal sanctions or civil liability…."); Am. Med. Ass'n, Policy Statement H-420.969, *Legal Interventions During Pregnancy* (last modified 2018) ("Criminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate. Pregnant substance abusers should be provided with rehabilitative treatment appropriate to their specific physiological and psychological needs.").

[5] Am. Nurses Ass'n, Position Statement, *Non-punitive Treatment for Pregnant and Breast-feeding Women with Substance Use Disorders* (2017) ("Contrary to claims that prosecution and incarceration will deter pregnant women from substance use, the greater result is that fear of detection and punishment poses a significant barrier to treatment.").

[6] Am. Psych. Ass'n, *Pregnant and Postpartum Adolescent Girls and Women with Substance-Related Disorders* (updated: 2020) ("Punitive approaches result in women being significantly less likely to seek substance use treatment and prenatal care due to fear of prosecution and fear of the removal of children from their custody. This places both the mother and her children at greater risk of harm.") (internal citation omitted).

[7] Am. Psychiatric Ass'n, Position Statement, *Assuring the Appropriate Care of Pregnant and Newly-Delivered Women with Substance Use Disorders* (2019) ("A public health response, rather than a punitive legal approach to substance use during pregnancy is critical.").

[8] Am. Acad. of Pediatrics, Comm. on Substance Use and Prevention, Policy Statement, *A Public Health Response to Opioid Use in Pregnancy* (2017) ("The existing literature supports the position that punitive approaches to substance use in pregnancy are ineffective and may have detrimental effects on both maternal and child health.").

[9] ACOG, *Opposition to Criminalization of Individuals During Pregnancy and Postpartum Period* (2020), https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period. For similar reasons, ACOG has also specifically opposed criminal penalties for people who have abortions outside of approved medical settings. *See* ACOG, Decriminalization of Self-Induced Abortion (2017), https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2017/decriminalization-of-self-induced-abortion.

[10] Boone & McMichael, *State-Created Fetal Harm*, 109 Georgetown L. J. 475 (2021); Faherty et. al., *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy With Rates of Neonatal Abstinence Syndrome*, JAMA Open Network (2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755304; Martha A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. Drug Issues 285 (2003) (finding that women identified fear of punitive actions from helping institutions and individuals as a major barrier to prenatal care); Sarah Roberts, *"You Have to Stop Using Before You Go to the Doctor": Barriers to Prenatal Care for Women Who Use Drugs During Pregnancy*, Presentation at Am. Public Health Ass'n Annual Meeting (Nov. 6, 2007), *available at* http://apha.confex.com/apha/135am/techprogram/paper_149351.htm ("For women who want a healthy baby and want to reduce or stop their drug use, fear of being reported to CPS is an additional barrier to care.").

[11] *Id*.; *see also* Sarah E. Wakeman et al., *When Reimagining Systems of Safety, Take a Closer Look at the Child Welfare System*, Health Affairs (Oct. 7, 2020), https://www.healthaffairs.org/do/10.1377/hblog20201002.72121/full/; Sheigla Murphy & Marcia Rosenbaum, *Pregnant Women on Drugs*: *Combating Stereotypes and Stigma*, at 89 (1998) (concluding based on interviews with 120 women who were pregnant and used drugs that "[t]he women most in need of services – those most heavily involved in the drug life – were most alienated from prenatal care. Few felt they could disclose their drug use without risking custody loss or stigma.").

[12] Boone & McMichael, *supra* note 10 at 501, 514; *see also* Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 William & Mary L. Rev. 3 (2019); SisterReach et. al., *Tennessee's Fetal Assault Law: Understanding its impact on marginalized women* (Dec. 14, 2020), https://www.nationaladvocatesforpregnantwomen.org/tennessees-fetal-assault-law-understanding-its-impact-on-marginalized-women/.

[13] Faherty et al.; *supra* note 10; *see also* Roberts & Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 Maternal Fetal Health J. 33 (2011).