

Memorandum in Support

A.109 (Rosenthal) / S.320 (Salazar) *Relates to prohibiting drug or alcohol testing and screening of pregnant women*

Physicians for Reproductive Health (PRH) is a physician-led national advocacy organization working to ensure access to equitable, comprehensive reproductive health care for the communities we serve. Our network includes physicians of various specialties from across the country, including New York, committed to meeting the needs of the patients they serve. As doctors we know that trust is the foundation of patient-provider relationships, and the current practice of imposing uninformed, nonconsensual drug testing of patients erodes that trust. Distrust in the health care system and health care providers makes medical care less safe and less accessible as pregnant people avoid seeking help for fear of state involvement. Turning medical spaces into sites of surveillance and criminalization is antithetical to medical and public health principles. Our patients deserve to be trusted and deserve full autonomy over their health care.

We support the work of the Informed Consent Coalition, a coalition of people impacted by the family regulation system,¹ organizers, activists, doulas, physicians, nurses, social workers, public defenders, civil rights and reproductive health, rights, and justice organizations, in calling on the Legislature to pass and the Governor to sign the Informed Consent Bill (A.109/S.320). The Informed Consent Bill prioritizes support, not surveillance, in caring for prenatal and postpartum people by requiring that health care providers obtain written and verbal specific informed consent before drug testing pregnant people, new parents, and their newborns.

The practice of drug testing pregnant people and reporting test results to state authorities has become common practice for many people seeking care, despite the fact that medical and scientific evidence does not show any long-term benefit in clinical care outcomes. Moreover, testing is rarely necessary or clinically indicated as it relates to treatment plans and reporting is often not legally required. Non-consensual drug testing of pregnant people, new parents,² and their newborns is a violation of individual bodily integrity, undermines maternal-fetal health, and unnecessarily exposes new families to the risk of criminalization and traumatic family separation which is harmful to families. A drug test is not a parenting test; a positive drug test says nothing about a parent's capacity to parent their child or a parent's love for their child. In fact, the American College of Obstetricians and Gynecologist states that harm reduction strategies should be implemented in order to reduce negative consequences and support the agency and autonomous decision making of pregnant and parenting people.³ Furthermore, the U.S. Department of Health and Human Services states that positive screening and testing does not imply and should not be used to assess child social welfare risk or status, nor to prosecute or punish the pregnant person nor used as evidence to remove an infant from their parents' custody.⁴ Criminalized responses to

¹ Many, including scholar Professor Dorothy Roberts, have come to refer to the so-called "child welfare" system as the family regulation system, given the harms historically and currently perpetuated by the system. *See e.g.*, Dorothy Roberts, "Abolishing Policing Also Means Abolishing Family Regulation," *The Imprint* (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480>

² Throughout this memo, "new parents" will refer to parents immediately before and after birth (perinatal people).

³ "Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period," ACOG. [https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period#:~:text=ACOG%20believes%20that%20it%20is,the%20postpartum%20period%20\(11\)](https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period#:~:text=ACOG%20believes%20that%20it%20is,the%20postpartum%20period%20(11)).

⁴ "HSS Announces a Standard Clinical Definition for Opioid Withdrawal in Infants," U.S. Department of Health and Human Services (January 31, 2022). <https://www.hhs.gov/about/news/2022/01/31/hhs-announces-standard-clinical-definition-for-opioid-withdrawal-in-infants.html>

drug use, family separation, and punishment do not reduce the use of illegal substances, improve the health and well-being of children and families, or decrease the risk of substance misuse and abuse.

This concern is greatly exacerbated when outcomes are evaluated through a racialized lens. New York, and indeed the whole country, is grappling with the racial disparities present in our health care system.⁵ We are seeing a reexamination of how some health care practices erode patients' trust, increase health inequities, and cause trauma and harm to people who are seeking care in the very system tasked with providing support. Among the practices receiving additional attention and concern is the targeting of pregnant people, new parents, and their newborns. Despite robust evidence showing equivalent rates of substance use across various demographics, overwhelmingly those targeted for screening and reporting are people who are Black and Latinx, Indigenous, and living on low-incomes. This screening and testing often occurs without explicit written or verbal informed consent - considered a best practice in all medical care.

A call to "Child Protective Services" (CPS), regardless of whether the report is substantiated or harm has been found to occur, results in traumatic investigations, family scrutiny and surveillance, and unnecessary family separation in the critical days following birth, not in the support, referrals or connections to rehabilitative services that many providers seek when they make the report. Instead of connecting the pregnant or parenting person to treatment when needed or desired, newly parenting people are met by a CPS caseworker at their bedside. They are interrogated, sometimes mere hours after giving birth, only to be separated from their newborn shortly thereafter pending the outcome of the investigation.

Instead of increasing resources and supports for those using or misusing substances during pregnancy or the postpartum period, many health care systems have instead adopted a "test and report" approach. This is complicated by the fact that many hospitals and providers wrongly assume that legislation like the Child Abuse Prevention and Treatment Act ("CAPTA") and the Comprehensive Addiction and Recovery Act ("CARA") require the reporting of all newborns who are exposed to substance to child welfare agencies. That is simply not true. These laws only require hospitals to develop policies for notification, not requirements for testing. The harms of this "test and report" practice are myriad. The practice of "test and report" has expanded the surveillance responsibilities of health care providers and has made providers *de facto* agents of the family regulation system. This erodes trust between patient and provider and discourages people from seeking critical prenatal care and treatment. The practice puts families at risk of traumatic family separation, which, even in cases of short separations, has long lasting consequences.⁶ And finally, "test and report" normalizes the violation of the bodily autonomy of pregnant people and their newborns and is inconsistent with treating substance use disorder (SUD) as a health condition with social and behavioral dimensions.

Informed consent is a core component of providing person centered, compassionate care. This is especially true for care during and following pregnancy. By ensuring that patients are fully informed of the consequences of prenatal/postpartum drug testing and screening as well as the medical reason for

⁵ Jamila Perritt, M.D., M.P.H., *#WhiteCoatsForBlackLives — Addressing Physicians' Complicity in Criminalizing Communities*, *New England J. of Medicine* (Nov. 5, 2020), https://www.nejm.org/doi/full/10.1056/NEJMp2023305?query=recirc_inIssue_bottom_article.

⁶ See Allison Eck, *Psychological Damage Inflicted by parent-Child Separation is Deep, Long-Lasting*, NOVA (June 20, 2018), https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/?utm_source=FBPAGE&utm_medium=social&utm_term=20180620&utm_content=1603761016&linkId=53285432&utm_source=FBPAGE&utm_medium=social&utm_term=; see also *Trauma Caused by Separation of Children From Parents*, American Bar Association (Last updated Jan. 2020), available at https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf; and see Emma Ketteringham et al., *Healthy Mothers Healthy Babies: A Reproductive Justice Response to the "Womb-to-Foster Care Pipeline,"* 20 CUNY L.R. 77, 100-101 (2016)

testing and screening, allows the decision regarding disclosure of substance use to be a fully informed one. Although New York Public Health Law and Civil Rights Laws set forth general informed consent requirements in the health care setting, pregnant people, new parents, and their newborns are nevertheless drug tested without notice, much less explicit informed consent. There is often no explanation given as to the medical necessity of the test, and in many circumstances, there is no treatment provided in response to a positive drug test. **This occurs even though New York law makes clear that a positive toxicology test alone does not in and of itself suggest that an infant is harmed or is at risk of harm.**⁷

The Informed Consent Act requires medical providers to obtain oral and written consent from pregnant and perinatal people before performing biological drug tests on them or their newborns. Importantly, this legislation also requires health care providers to obtain oral and written consent from pregnant and perinatal people and their newborns in a hospital setting, and oral consent in a non-hospital setting, prior to providing verbal screening. This is not outside the standard of care for many procedures performed when individuals are seeking care. The bill is carefully crafted to ensure that the consent process does not create a delay in care in cases of medical emergencies. Under these circumstances, providers may test or verbally screen individuals without their specific and informed consent. Obtaining specific and informed consent prior to administering a drug test is recommended by several leading medical associations, including the American College of Obstetricians and Gynecologists (ACOG)⁸, and the American Academy of Pediatrics.⁹ ACOG has developed ethical standards around seeking informed consent and opposes non-consensual drug testing as a response to parental drug use.

We urge the New York State Legislature to pass the Informed Consent Act [A.109 / S.320] to guarantee that pregnant and parenting people have, at a minimum, the ability to make an informed decision about their family's health at a critical moment. Receiving information about what is being done to your body or your child's body, the medical reason for the procedure and the consequences—medical or otherwise—that may result are critical pieces of information that make for well-informed patients and good health care.

We urge the Governor and the Legislature to prioritize maternal and fetal health and prevent the destruction of families by supporting the Informed Consent Bill.

Respectfully,

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⁷ New York law does not require reporting to the State SCR a positive drug test of a mother or newborn at birth. Still, nearly 27,000 new reports are added to the SCR each year, many of those related to drug use and positive tests at birth.

⁸ American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women, *Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period*, Statement of Policy (Dec. 2020), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period>.

⁹ American Academy of Pediatrics, *A Public Health Response to Opioid Use in Pregnancy* (2017), <https://publications.aap.org/pediatrics/article/139/3/e20164070/53768/A-Public-Health-Response-to-Opioid-Use-in>.