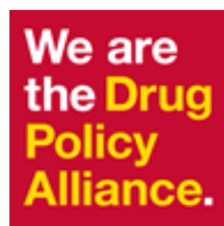

Testimony of National Advocates for Pregnant Women, the Drug Policy Alliance, Movement for Family Power, JMacForFamilies, the Informed Consent Campaign-New York State, Dr. Mishka Terplan, and Dr. Carolyn Sufrin to the Maryland Senate in Support of SB 843, Perinatal Care - Drug and Alcohol Testing and Screening - Consent

National Advocates for Pregnant Women (NAPW)[1] the Drug Policy Alliance (DPA),[2] Movement for Family Power,[3] JMacForFamilies,[4] the Informed Consent Campaign-New York State,[5] Dr. Mishka Terplan,[6] and Dr. Carolyn Sufrin[7] respectfully submit this written testimony in support of SB 843, a bill that would require prior written informed consent by a pregnant or perinatal person for drug testing of themselves or their newborn. NAPW is a non-partisan legal advocacy organization dedicated to the welfare of pregnant people and their families. Our testimony draws on over 20 years of experience on cases in which state actors intervened in a pregnant woman's medical decision making or punished a pregnant or postpartum woman on the basis of something she may have or may not have done while pregnant. This includes but is not

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[2] DPA is the nation's leading organization working to advance policies and attitudes that best reduce the harms of both drug use and drug prohibition and to promote the sovereignty of individuals over their minds and bodies.

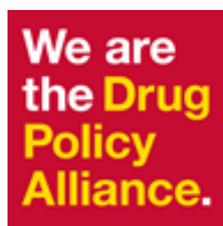
[3] Movement for Family Power works to end the Foster System's policing and punishment of families and to create a world where the dignity and integrity of all families is valued and supported.

[4] JMacForFamilies works to abolish the current punitive child welfare system and to strengthen the systems of supports that keep families and communities together.

[5] The Informed Consent Campaign-New York State is a coalition of organizations and individuals that is raising awareness of and fighting back against drug testing of pregnant people and new mothers at birth and reporting to child protective services in New York State.

[6] Dr. Mishka Terplan is the Associate Medical Director of Friends Research Institute. Dr. Terplan is board certified in both Obstetrics and Gynecology and Addiction Medicine. His primary clinical, research and advocacy interests lie along the intersections of reproductive and behavioral health. Dr. Terplan is nationally recognized as an expert in the care of pregnant and parenting people with substance use disorder. He has been central to guidance document development at the American Congress of Obstetrician Gynecologists (ACOG), the American Society of Addiction Medicine (ASAM) and the Substance Abuse and Mental Health Services Administration (SAMHSA) and has participated in expert panels at Center for Disease Control, Office of the National Drug Control Policy, Office of Women's Health, US Food and Drug Administration and the National Institutes of Health primarily on issues related to gender and addiction. Dr. Terplan has active grant funding and has published over 100 peer-reviewed articles with emphasis on addiction medicine, drug use in pregnancy, health disparities, stigma, and access to treatment.

[7] Carolyn Sufrin, M.D., Ph.D., is an associate professor of gynecology and obstetrics at the Johns Hopkins University School of Medicine and of health, behavior, and society at the Johns Hopkins Bloomberg School of Public Health. As a board-certified obstetrician and gynecologist, her areas of clinical expertise include family planning, general obstetrics and gynecologic care. Dr. Sufrin's research focuses on reproductive health care for incarcerated women.



limited to using substances while pregnant. DPA is the leading organization in the U.S. promoting alternatives to the war on drugs.

SB 843 would provide long-overdue protections for pregnant and postpartum patients whose rights, privacy, and wellbeing are far too often discarded by the hospitals in which they give birth. Hospitals routinely drug test pregnant and postpartum patients without their knowledge or informed consent and in the absence of any medical justification for the test. Hospitals proceed to report the results of these tests to child welfare authorities, thereby exposing new families to traumatizing investigations and in some cases, family separation.[8] This practice—commonly known as "test and report"—has a negative impact on both maternal and neonatal health.

Drug testing perinatal patients without a specific medical concern and without their informed consent is widely opposed by leading medical organizations. For instance, the American College of Obstetricians and Gynecologists (ACOG) provides that drug testing "should be performed only with the patient's consent" and that "[p]regnant women should be informed of the potential ramifications of a positive test result, including any mandatory reporting requirements."[9] ACOG has also stated, "[T]esting and reporting puts the therapeutic relationship between the obstetrician–gynecologist and the patient at risk, potentially placing the physician in an adversarial relationship with the patient."[10] In addition to eroding patient-provider trust, ACOG recognizes that testing and "reporting during pregnancy may dissuade women from seeking prenatal care and may unjustly single out the most vulnerable, particularly women with low incomes and women of color." [11] ACOG concludes that "[d]rug enforcement policies that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus."[12]

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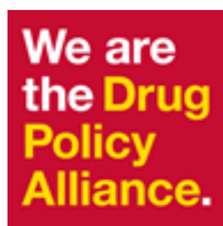
[8] Lisa Sangoi, *"Whatever they do, I'm her comfort, I'm her protector." How the Foster System Has Become Ground Zero for The U.S. Drug War*, Movement for Family Power (June 2020).

[9] American College of Obstetricians and Gynecologists, *ACOG Committee Opinion: Opioid Use and Opioid Use Disorder in Pregnancy* (reaffirmed Oct. 2021), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/08/opioid-use-and-opioid-use-disorder-in-pregnancy; American College of Obstetricians and Gynecologists, *Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period* (Dec. 2020) ("Before performing any test on the pregnant individual or neonate, including screening for the presence of illicit substances, informed consent should be obtained from the pregnant person or parent."), https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period.

[10] American College of Obstetricians and Gynecologists, *ACOG Committee Opinion: Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician–Gynecologist* (reaffirmed June, 2019), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/01/substance-abuse-reporting-and-pregnancy-the-role-of-the-obstetrician-gynecologist.

[11] *Id*.

[12] *Id*.; *see also* American College of Obstetricians and Gynecologists, *Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period* (Dec. 2020) ("Criminalization of pregnant people for actions allegedly aimed at harming their fetus poses serious threats to people's health and the health system itself. Threatening patients with criminal punishment erodes trust in the medical system, making people less likely to seek



Similarly, the National Perinatal Association (NPA) warns that treating perinatal substance use "as a deficiency in parenting that warrants child welfare intervention results in pregnant and parenting people avoiding prenatal and obstetric care and putting the health of themselves and their infants at increased risk."[13] As NPA recognizes, the "threats of discrimination, incarceration, loss of parental rights, and loss of personal autonomy are powerful deterrents to seeking appropriate prenatal care."[14] Accordingly, NPA advises: "Perinatal providers promote better practices when they adopt language, attitudes, and behaviors that reduce stigma and promote honest and open communication about perinatal substance use."[15] Informed consent is a critical component of building trusting relationships between pregnant patients and their medical providers, which in turn is essential to advancing maternal and neonatal health.

The establishment of testing and reporting practices dates back to President Nixon's declaration of a "war on drugs" in the 1970s as well as media outlets' perpetuation of racist and scientifically-unsupported myths regarding "crack babies" in the 1980s and 1990s. The New York Times has since recognized that that these sensationalized reports were based on "equal parts bad science and racist stereotypes."[16] Indeed, scientific evidence has compellingly refuted beliefs that such substances cause fetal harm or pregnancy loss, and establishes that associated risks are no greater or less than those for other non-scheduled substances.[17] Yet the moral panic led to the creation of draconian social welfare policies, criminal laws, and hospital practices that continue to vest pregnant women of basic rights—including the right to informed consent—and tear apart families.

To this day, Black and brown families disproportionately experience the punitive effects of these systems. Studies show that hospitals disproportionately subject women who do not fit the white, middle-class stereotype of the "good" American mother to drug testing and reporting.[18] Indeed, in one study in which urine toxicology tests were collected over a 6-month period, it was found that despite similar rates of substance use among Black patients and white patients in the study, Black women were reported to social services at approximately 10 times the rate for white

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help when they need it."), https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period.

[13] National Perinatal Association, Position Statement, Perinatal Substance Use (2017).

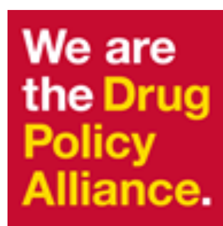
[14] *Id*.

[15] *Id*.

[16] New York Times Editorial Board, *Slandering the Unborn: How Bad Science and a Moral Panic, Fueled in Part by the News Media, Demonized Mothers and Defamed a Generation*, New York Times (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html.

[17] *See* Terplan et al., *The Effects of Cocaine and Amphetamine Use During Pregnancy on the Newborn: Myth versus Reality*, 30 J. Add. Dis. 1 (2011); *see also* NAPW, *Drug Use and Pregnancy* (Sept. 2021), bit.ly/pregnancyandruguse.

[18] Max Jordan Nguemeni Tiako & Lena Sweeney, *The Government's Involvement in Prenatal Drug Testing May Be Toxic*, Maternal and Child Health Journal (Dec. 7, 2020).



women.[19] Peer-reviewed research also establishes that Black women disproportionately face criminal prosecutions and other punitive state actions tied to their pregnancies.[20]

Safeguards on drug testing and reporting are essential in light of the punitive outcomes that pregnant and postpartum patients face as a result of the test and report system. 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 pregnant persons whose rights state actors assumed could be denied in the interest of fetal protection.[21] Those assumptions are wrong and violate pregnant women's constitutional and civil rights. A significant number of the arrests and prosecutions identified involved allegations of the use of controlled substances, even though the vast majority of state criminal laws do not make using drugs—as opposed to possessing drugs—illegal. Accordingly, these prosecutions sought to transform drug use or dependency by one group of people—pregnant women—into criminal "child abuse," "chemical endangerment" or "drug distribution."[22] Moreover, a significant number of these cases originated from reports from health care providers or hospital social workers, indicating that the prosecutions would never have been brought were it not for test and report practices.[23]

Maryland is not exempt from these disturbing national trends regarding the criminalization of pregnancy. The Maryland Court of Appeals unanimously reversed the convictions of two mothers, Kelly Lynn Cruz and Regina Kilmon, whose newborns were drug tested without their consent.[24] Both mothers were prosecuted for and convicted of reckless endangerment on the basis of positive drug tests. On appeal, the American Academy of Addiction Psychiatry and fifty-two other medical, public health, and advocacy organizations and experts filed an amicus brief in support of the mothers warning of the dangerous adverse maternal and neonatal health consequences of such prosecutions. In reversing the convictions, the Maryland Court of Appeals held that the legislature did not intend the reckless endangerment statute to apply to pregnant women in relationship to the fetuses they carry because the legislature chose to treat drug use and pregnancy as a public health matter rather than criminal justice matter. The court recognized that the prosecution's interpretation could lead to judicial scrutiny of every aspect of a pregnant woman's life—from "smoking, to not maintaining a proper and sufficient diet, to avoiding proper

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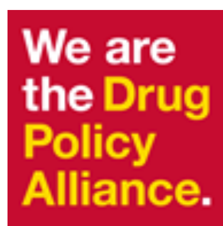
[19] Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use during Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, NEW ENGLAND JOURNAL OF MEDICINE (Oct. 11, 1990), https://www.nejm.org/doi/full/10.1056/NEJM199004263221706.
[20] Lynn M. Paltrow & Jeanne 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, 310-11. (2013)
[21] NAPW, *Arrests and Deprivations of Liberty of Pregnant Women, 1973-2020* (Sept. 2021), bit.ly/arrests1973to2020.
[22] Paltrow & Flavin, *supra* note 20 at 323.
[23] *Id*. at 311.
[24] *Kilmon v. State*, 905 A.2d 306 (Md. 2006).



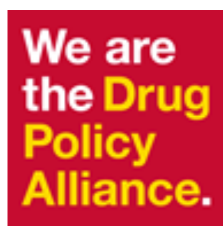
and available prenatal medical care, to failing to wear a seat belt while driving," among many other examples.[25] Although the *Kilmon* decision provides critical protections for Maryland women against criminal charges based on pregnancy and substance use, it does not prevent hospitals from engaging in nonconsensual test and report practices in the first instance or prevent families from facing traumatizing child welfare investigations and potential family separation.

Test and report practices also fail to account for the fact that a positive toxicology test does not, and cannot, distinguish between a single instance of substance use versus a substance use disorder. The latter is a medical condition that meets diagnostic criteria in the Diagnostic Statistic Manual (DSM), and—like other medical and behavioral health conditions—is best addressed through supportive healthcare approaches rather than punitive responses. Moreover, a positive toxicology test does not provide any indication of parenting ability.[26] As reported by the Substance Abuse and Mental Health Services Administration (SAMHSA), in 2018, 164.8 million Americans ages 12 and older, or 60.2%, reported using tobacco, alcohol, or an illicit drug in the past month.[27] With substance use so widespread, there is no doubt that over the course of most people's lifetimes, they will engage in alcohol or drug use. Many of these people are, or will become, parents. Contrary to misleading media coverage, systemic racist practices, and stigma surrounding drug use, there is no support for the belief that a parent who uses drugs is more likely to abuse or neglect their child than one who does not.

Moreover, nonconsensual testing and reporting practices often violate patients' constitutional rights. The Supreme Court has held that the nonconsensual testing and reporting of pregnant women to state authorities involves a "substantial" invasion of privacy, as the "reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." *Ferguson v. City of Charleston*, 532 U.S. 67, 78, 80 (2001). Despite this holding more than twenty years ago, the nonconsensual testing and reporting of pregnant patients remains commonplace. Many hospitals remain unaware of the *Ferguson* decision, and in any event, its constitutional holding only applies to public hospitals. State informed consent legislation like SB 843 thus remains critical for protecting perinatal patients' rights and safeguarding the wellbeing of new families.

Finally, despite common misconceptions, no federal law requires testing or reporting. Hospital officials often cite the federal Child Abuse Prevention and Treatment Act (CAPTA) as a

[25] *Id*. at 311.
[26] *See* Sangoi, *supra* note 8.
[27] Substance Abuse and Mental Health Services Administration, *Key Substance Use and Mental Health Indicators in the United States: Results from the 2018 National Survey on Drug Use and Health* (2019), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf.



putative justification for their test and report practices.[28] These hospitals wrongly assume that CAPTA requires them to drug test perinatal patients and/or newborns and to report all substance-exposed newborns to child welfare agencies as being abused or neglected.[29] In fact, CAPTA requires no such thing.[30] Only recently have states begun to correct hospitals' common misunderstanding regarding CAPTA to ensure that families are not needlessly subjected to traumatizing child welfare investigations. For instance, the New York State Department of Health released guidance specifying that CAPTA does not require hospitals to drug test pregnant women *or* file abuse or neglect reports against parents of drug-exposed newborns.[31] That guidance also emphasized that "[t]oxicology testing should only be performed when medically indicated" and directed each hospital to "develop policies and procedures for obtaining informed consent prior to substance use assessment."[32]

We urge Maryland to act as a national a leader in protecting perinatal patient's right to make informed decisions about their medical care, including the right to written informed consent prior to toxicology testing or screening of themselves or their newborn. We strongly support SB 843 as a significant step forward in recognizing the rights and wellbeing of pregnant patients and families.

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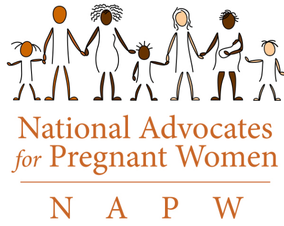
[28] 42 U.S.C. § 5106a.
[29] Movement for Family Power, Drug Policy Alliance, JMacForFamilies, & The Bronx Defenders, *Family Separation in the Medical Setting: The Need for Informed Consent* (Nov. 24. 2019), https://bit.ly/39NYnjd ("[S]tudies confirm that that doctors frequently misunderstand their responsibility under [the Child Abuse Prevention and Treatment Act], and States have widely expanded the scope of this law further consecrating a practice of drug testing and reporting in hospital settings that is not legally required, and further that risks the wellbeing of parents and their newborns.") (citing Lloyd, et al., *The Policy to Practice Gap: Factors Associated with Practitioner Knowledge of CAPTA 2010 Mandates for Identifying and Intervening in Cases of Prenatal Alcohol and Drug Exposure*, 99(3) J. CONTEMP. SOC. SERVS., 232-243 (2018) https://doi.org/10.1177/1044389418785326).
[30] NAPW, *Understanding CAPTA and State Obligations* (Oct. 2020), https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2020/11/2020-revision-CAPTA-requirements-for-states-10-29-20-1-1.pdf.
[31] New York Dep't of Health, *NYS CAPTA CARA Information & Resources*, https://health.ny.gov/prevention/captacara/index.htm.
[32] *Id*.



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