



Testimony of National Advocates for Pregnant Women in Support of HB 0626, Pregnant
Person's Freedom Act

National Advocates for Pregnant Women (NAPW) respectfully submits this written testimony in support of HB 0626, a bill that protects pregnant people from criminalization related to pregnancy and pregnancy outcomes, including miscarriages, stillbirths, and abortions. 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 arrested and prosecuted pregnant or postpartum women for experiencing pregnancy losses or engaging in acts or omissions that posed some imagined risk of harm to a fetus. State actors continue to try to bring cases against pregnant women based on the perceived risk of harm to the fetus and/or based on pregnancy outcomes even when it is beyond the scope of the statutory language and clear legislative intent of state criminal and civil laws. Women were criminalized for the outcomes of their pregnancies before *Roe v. Wade* and are still being criminalized for those outcomes today.

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.¹ Women have been charged with crimes like murder, depraved heart homicide, manslaughter, and feticide because they experienced miscarriages and stillbirths, or because they were unable to “guarantee” that babies they gave birth to would survive. These prosecutions are brought despite the fact that pregnancy losses are dishearteningly common, with miscarriages (a loss before 20 weeks gestation) occurring in an estimated 10% to 15% of pregnancies and stillbirths (a loss after 20 weeks gestation) occurring in an estimated 0.6% of pregnancies.²

Despite the fact that pregnancy losses can rarely—if ever—be attributed to anything that a pregnant woman did or did not do, these prosecutions are brought based on the theory that once a woman becomes pregnant, her otherwise legal acts or omissions may be viewed as crimes. These

¹ NAPW, *Arrests and Deprivations of Liberty of Pregnant Women, 1973-2020* (Sept. 2021), [bit.ly/arrests1973to2020](https://www.napw.org/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, Carla & Slane, Valori H, *Miscarriage*, (Jan. 29, 2021), <https://www.ncbi.nlm.nih.gov/books/NBK532992/>; Hoyert, D. L., Ph.D., & Gregory, E. C., M.P.H, *Division of Vital Statistics. Cause of Fetal Death: Data from the Fetal Death Report, 2014*, (Oct. 30, 2016), https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_07.pdf.



prosecutions have been brought under laws that were never intended to criminalize women for experiencing pregnancy losses or for any action or failure to act during pregnancy. Moreover, as explained further below, these prosecutions have dangerous implications for maternal and neonatal health.

Maryland is not exempt from these disturbing national trends regarding the criminalization of pregnancy and pregnancy outcomes. In 2006, the Maryland Court of Appeals unanimously reversed the convictions of two mothers, Kelly Lynn Cruz and Regina Kilmon, who were convicted of reckless endangerment after they and/or their newborns were drug tested without their consent.³ 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 a criminal 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 and available prenatal medical care, to failing to wear a seat belt while driving, exercising too much or too little," or even "skiing or horseback riding."⁴ As the Court noted, "If the State's position were to prevail, there would seem to be no clear basis for categorically excluding any [allegedly risky] activities from the ambit of the statute; criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be."⁵ Although the *Kilmon* decision provides critical protections for pregnant people against criminal reckless endangerment charges, prosecutors may still try to misapply other criminal statutes to criminalize pregnant people for acts or omissions that create a perceived risk of harm.

For instance, Christy Freeman of Ocean City, MD was prosecuted for first degree murder, second degree murder, and manslaughter after she was admitted to the hospital for experiencing a stillbirth in 2007. Ms. Freeman's boyfriend had called 911 because she was experiencing excessive vaginal bleeding and severe abdominal pain. Ms. Freeman's body was covered in bruises and the

³ *Kilmon v. State*, 905 A.2d 306 (Md. 2006).

⁴ *Id.* at 311.

⁵ *Id.*



police acknowledged the possibility of domestic violence. Ms. Freeman told police that her baby was born stillborn, the state's medical examiners confirmed the baby was born stillborn, and Maryland's fetal homicide law states that it does not apply "to an act or failure to act of a pregnant woman with regard to her own fetus."⁶ The Worcester County State's Attorney nonetheless claimed that the prosecution would prevail if it proved that "she did something to cause that baby to be stillborn."⁷ Ms. Freeman was incarcerated without bail despite the fact that she had four children at home and pled with the judge to release her because she was not a flight risk and would show up to clear her name.⁸ The prosecution eventually dropped the charges related to the 2007 stillbirth, and filed new first degree murder charges related to a stillbirth that Ms. Freeman had experienced in 2004.⁹ Prosecutors later dropped that charge as well, yet the resolution did not undo the trauma inflicted upon Ms. Freeman and her family. In total, Ms. Freeman was incarcerated without bail for roughly six weeks.¹⁰

Passage of HB 0626 would ensure that no pregnant or postpartum person would be subjected to the same traumatizing and degrading treatment as Ms. Freeman. Although legislators may be tempted to view the existing fetal homicide statute as sufficiently protective of pregnant women, Ms. Freeman's story makes clear that rogue prosecutors will seek to stretch existing laws beyond recognition, and will incarcerate innocent pregnant and postpartum women and separate them from their families in the process.

Examples from other states also demonstrate the risk that prosecutors will seek to criminalize pregnancy losses, even under seemingly clear criminal statutes that were never intended to authorize the prosecution of pregnant women for their own pregnancy outcomes. This includes so-called "blue" states with legislatures that are overwhelmingly supportive of women's reproductive health, like Maryland. In California, Adora Perez and Chelsea Becker were prosecuted and incarcerated for murder after they experienced stillbirths that prosecutors blamed—

⁶ Md. Code Crim. Law § 2-103.

⁷ David Dishneau, *Legal Experts Confounded By Maryland Fetal Murder Charge*, Associated Press (July 31, 2007); CBS, *Infants' Bodies Examined; Digging Goes On*, CBS News (Aug. 1, 2007), <https://www.cbsnews.com/news/infants-bodies-examined-digging-goes-on/>.

⁸ Dispatch Admin, *New Charges Filed in Christy Freeman Case*, The Dispatch (Aug. 2, 2007), <https://mdcoastdispatch.com/2007/08/02/new-charges-filed-in-christy-freeman-case/> (describing how Ms. Freeman pled at her bond hearing, "The purpose of a bond is to make sure I show up for my court appearances, right? I promise I will do that. I need to clear my name in this case. I guarantee I'm going to clear this situation up. All my ties are here. My family, my house, my business—everything I have is here. I've lived here 15 years and would never run away.")

⁹ *Id.*

¹⁰ Steven Green, *A Timeline of Christy Freeman's Case*, The Dispatch (Sept. 20, 2007), <https://mdcoastdispatch.com/2007/09/20/thursday-september-20-a-timeline-of-christy-freemans-case/>.



without scientific evidence—on their use of methamphetamine. Like Maryland Criminal Code § 2-103, California Penal Code § 187 punishes the “unlawful killing of a human being, or a fetus, with malice aforethought” but states that it cannot be used to prosecute the “mother of the fetus.” Ms. Perez and Ms. Becker were both prosecuted and incarcerated despite the fact that the California legislature has consistently refused to adopt any criminal law that would penalize a woman for experiencing a pregnancy loss or for being pregnant and using drugs. A court dismissed the murder charge against Ms. Becker, but not until she had already spent 16 months locked in a county jail in the midst of the pandemic. Ms. Perez was convicted and is currently serving an 11-year sentence. Even the California Attorney General has expressed opposition to the misuse of the state’s homicide law to respond to pregnancy losses and is supporting post-conviction relief efforts through amicus briefs filed in her case. Her final hope hinges on a writ of habeas corpus that remains pending before the trial court. The cases of Adora Perez and Chelsea Becker—like those of Ms. Freeman—make clear the need to pass HB 0626 to ensure that no prosecutor can investigate or charge a woman for experiencing a pregnancy loss based on any claimed ambiguity in the law.

HB 0626 also represents good public policy, consistent with the recommendations of every leading medical and public health organization. The American Medical Association,¹¹ American Nurses Association,¹² American Psychological Association,¹³ American Psychiatric Association,¹⁴ American Academy of Pediatrics,¹⁵ and every other major public health and medical group unanimously oppose punitive responses to pregnancy, finding that such responses

¹¹ 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.”).

¹² 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.”).

¹³ 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).

¹⁴ 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.”).

¹⁵ 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.”).



are harmful to the health of women and children, and diminish families' healthcare access. 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, making people less likely to seek help when they need it."¹⁶

Facilitating punitive actions against pregnant people and new parents causes real and devastating health consequences by deterring them from seeking healthcare.¹⁷ In particular, the fear that medical authorities will report them to child welfare providers or criminal law enforcement deters pregnant women from seeking prenatal care or drug treatment services.^[1] 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 healthcare providers out of fear that disclosure will lead to criminal prosecutions or loss of custody of their children.¹⁸ 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 "resulted in twenty fetal deaths and sixty infant

¹⁶ 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>.

¹⁷ Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 *Georgetown L. J.* 475 (2021); Rebecca L. Haffajee et al., *Pregnant Women with Substance Use Disorders—The Harm Associated with Punitive Approaches*, 384 *N. ENGL. J. MED.* 2364 (2021); Laura J. 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.");

¹⁸ *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/doi/10.1377/hblog20201002.72121/full/>; Sheigla Murphy and 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.").



deaths” in 2015 alone.¹⁹ Another empirical study found a higher prevalence of neonatal abstinence syndrome (NAS) in states with punitive policies in effect.²⁰

We strongly support HB 0626 and urge the Maryland Legislature to pass it to prevent the insidious prosecution of people for experiencing pregnancy loss. HB 0626 will guard against traumatizing criminal investigations and family separation, and prioritizes maternal and infant health.

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¹⁹ Boone & McMichael, *supra* note 17 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/>.

²⁰ Faherty et al.; *supra* note 17; *see also* Haffajee et al., *supra* note 17; Sarah C.M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 Maternal Fetal Health J. 33 (2011).