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Memorandum in Support of AB 1094 (Wicks)
Consent and Reproductive Equity (CARE) for Families Act

Legal Momentum, the Women's Legal Defense and Education Fund, is the nation's first and longest-serving legal advocacy organization for women. Among our primary focus areas is reproductive justice and protecting women and their families from being penalized for their pregnancies and pregnancy outcomes by combating discrimination in the systems that serve them.

Through our national Helpline, our impact litigation, and our policy advocacy, we have seen firsthand how nonconsensual drug testing negatively impacts pregnant persons and their families, particularly low-income families and families of color. We call on the Legislature to pass, and the Governor to sign, the Consent and Reproductive Equity (CARE) for Families Act (AB 1094), which moves prenatal and perinatal health care away from surveillance and toward support by requiring that health care providers obtain written and verbal informed consent before drug testing pregnant people, new parents, and their newborns—a critical measure for ensuring bodily autonomy and reproductive freedom.

It is essential for pregnant and perinatal individuals to have the opportunity to consent to drug or alcohol testing and screening and that such testing is within the scope of medical necessity. Nonconsensual pregnant and perinatal drug testing targets women[1] and constitutes unlawful sex and pregnancy discrimination. While other patients are afforded the opportunity to receive information as to the medical reason(s) for a treatment or procedure, including the possible benefits and risks associated with that treatment or procedure, pregnant patients are routinely denied this and thus deprived of their bodily autonomy. Denying pregnant and perinatal individuals informed consent leads to deep and long-lasting consequences, including erosion of trust in medical providers; deprivation of bonding and breastfeeding at a critical time in a newborn's life; stigmatizing medical notations that remain in prenatal and newborn medical records marking women as drug abusers and negatively impacting future care; lengthy and intrusive child protective services and/or law enforcement investigations and family separation; and records indicating a history of suspicion of child abuse remaining available to state authorities for years, if not decades, even where no evidence of child abuse or neglect is ever observed.

We have seen that across the nation, women, particularly Black, Latina, Indigenous, and low-income pregnant and newly parenting people and newborns are drug tested in health care settings without their knowledge or consent. Pregnant and newly parenting people should have a clear, accessible understanding of the potential risks and negative consequences associated with drug and alcohol testing and screening, only be tested or screened if there is a medical necessity, and have the right to refuse testing or screening and still receive equal access to medical treatment. Providing informed consent to pregnant and newly parenting people will preserve pregnant patients' privacy and bodily autonomy.

[1] We recognize that there are people of all genders who have the capacity to become pregnant. Throughout this letter we often refer to pregnant "women," as women are overwhelmingly represented in the pregnant patient population.

In our experience, nonconsensual drug tests are typically administered without a medical reason and positive results do not trigger any medical guidance or treatment. Rather, newly parenting people are met by a child protective services caseworker at their bedside, where they are interrogated, sometimes mere hours after giving birth setting off a cascade of unwarranted intrusion into the families' privacy. The practice of routinely testing patients and their newborns without their informed consent and then reporting them to the family regulation system has expanded the surveillance responsibilities of health care providers and has made health care providers de facto arms of the family regulation system—a system in which families of color are disproportionately reported, investigated, and separated.[2]

Sex and Race Disparities

In performing nonconsensual drug tests on pregnant patients, a practice which is rightfully not used on all patients, health care providers make a treatment distinction based on sex and pregnancy, a clear violation of California's nondiscrimination laws.[3] The consequences of this overtly discriminatory practice have a disproportionate impact on women, particularly women of color. Those patients who have a positive toxicology result after nonconsensual drug testing are most often not provided any medical counseling or treatment. Rather, they are exclusively reported to child protective services or law enforcement. Drug testing pregnant patients not for any medical necessity but for solely punitive purposes amounts to an unlawful search and seizure,[4] and undermines the health and wellbeing of the mother and the child. The absence of informed consent, combined with the secretive ways in which we have seen women coerced into providing their urine for drug testing purposes, makes clear that these practices are being used to "catch" pregnant women and report them to CPS.

Numerous studies and investigative reports have found that Black parents are more likely to be screened, tested, and reported for illicit drugs than their white counterparts, even though race is not associated with a positive result, and despite similar rates of use across racial and ethnic groups,[5] and we have found that these practices are often more prevalent in hospitals serving lower-income Black and Brown communities. Because drug screening criteria are not standardized across hospitals, health care providers often have discretion in determining whether or not to screen a pregnant patient, making way for implicit bias and discriminatory practices. From our experience, these discretionary practices have, in fact, disproportionately targeted women of color. Further, the disproportionate impacts are compounded by the inequities in the family regulation system. Black children are more likely to be subjected to a child protective investigation[6] and parental substance use is one of the primary examples of disproportionate child welfare surveillance.[7]

Exacerbation of Health Disparities and Barriers to Health Care Access

This practice of drug testing pregnant patients without their knowledge or consent has eroded trust between women and their healthcare providers, discouraged women from seeking prenatal and other care and treatment, and instilled fear among many patients and families.[8] In the nation with the highest

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[2] Assembly Budget Subcommittee No. 1 on Health and Human Services Handout, Legislative Analyst's Office, Initial Analysis and Key Questions: Racial Disproportionalities and Disparities in California's Child Welfare System (Mar. 9, 2022), https://lao.ca.gov/handouts/socservices/2022/CWS-Analysis-Questions-030922.pdf; Emily Putnam-Hornstein et al., *Cumulative Rates of Child Protection Involvement and Terminations of Parental Rights in a California Birth Cohort, 1999–2017*, 111 Am. J. Pub. Health 1157, 1157–63 (2021), https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2021.306214?role=tab.

[3] Unruh Civil Rights Act, Cal. Civ. Code § 51.

[4] *Ferguson v. Charleston*, 532 U.S. 67, 86 (2001).

[5] Hillary Veda Kunnis et al., *The Effect of Race on Provider Decisions to Test for Illicit Drug Use in the Peripartum Setting*, 16 J. Women's Health 245, 245–255 (2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2859171/.

[6] Kathi L. H. Harp & Amanda M. Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, 27 Soc. Pol. 258, 260–73 (2020).

[7] Brittany Paige Mihalec-Adkins et al., Nat'l Council on Fam. Relations, Juggling Child Protection and the Opioid Epidemic: Lessons From Family Impact Seminars 2 (2020), *available at* https://www.ncfr.org/policy/research-and-policy-briefs/juggling-child-protection-and-opioid-epidemic-lessons-family-impact-seminars.

[8] National Advocates for Pregnant Women, *Fact Sheet: Clinical Drug Testing of Pregnant Women and Newborns* (March 2019), https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2019/10/NAPW202522Clinical20Drug20Testing20of20Pregnant20Women20and20Newborns252220March202019.pdf.

maternal mortality rate in the industrialized world, with Black women three times more likely to die from pregnancy than white women,[9] it is critical to eradicate the pernicious practices that give pregnant patients more reason to distrust health care providers and avoid seeking critical care. We have heard from women across the country who have been drug tested during pregnancy and labor and now distrust the medical care system. As a result of nonconsensual drug testing and governmental surveillance, one of Legal Momentum client's in New York described, she "could not trust anybody," and felt like the health care providers assisting her while she was in labor were "trying to get [her]," and "wanted to see [her] baby get taken away." After a multi-month child protective services investigation despite a total lack of evidence of any child abuse or maltreatment and relying solely on a positive toxicology test during labor and delivery care, her son's medical records still list her as a drug abuser, and she has been left with a generalized fear and anxiety to seek medical treatment for herself and her young children.

Consistent with several other jurisdictions, California law makes clear that a positive toxicology screen alone is not in and of itself a sufficient basis for reporting child abuse or neglect.[10] Yet across the country we have witnessed child protective services surveillance of families resulting from drug test results based on consumption of poppy seeds, women seeking drug treatment, and women who were prescribed lifesaving medication for pregnancy-induced symptoms. Among the lasting harms to patients affected by these nonconsensual drug tests, the pregnant patient's and newborn's medical records include notations indicating maternal drug use. These notations are seen by subsequent medical providers and lead to bias in the provision of medical care in perpetuity.

Violation of Bodily Autonomy and Privacy

Subjecting pregnant individuals to drug testing without their informed consent is a clear violation of their bodily autonomy and privacy. Because pregnant patients are carrying a fetus, medical providers uniquely disregard their opinions, choices, and right to information regarding medical care, tests, and procedures to be conducted on their bodies in a way that deviates significantly from their treatment of non-pregnant patients. In doing so, health care providers are depriving women of the right to make their own informed decisions about their health care in a context where the testing is not even used to provide medical care to either the mother, the fetus, or to newborns. Moreover, these reports to child protective services of prenatal drug tests, if even reliable, relate to substance consumption before any child within the legal purview of child protective services in California actually yet exists and absent any actual indication of abuse or neglect to a child. Prioritizing the rights of the fetus over the privacy and bodily autonomy of the mother creates a slippery slope and opens the door to surveil, critique, and penalize women for a range of choices made during the course of pregnancy, including eating foods suspected of causing developmental problems, lifting heavy boxes for work, or working in an environment with toxins. Drug testing pregnant patients without their knowledge or consent deprives them of the right to have information about the purpose, risks, and consequences of the testing and to make an informed decision to testing performed on their bodies and bodily fluids. The condition of being pregnant does not negate your rights as a medical patient to choose and be informed about what can be done to and taken from your body.

It is crucial that patients be fully informed of the consequences of prenatal/perinatal and newborn drug testing and screening as well as the medical reason(s) for testing and screening, and that they be provided the opportunity to decline consent to the drug test and/or screen without fear they will not receive appropriate medical care as a result. Patients receive this type of informed consent for other routine procedures and testing and there is no valid ground to deprive pregnant and perinatal patients of the same rights.

[9] Latoya Hill, Samantha Artiga & Usha Ranji, Kaiser Family Foundation, *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them* (2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/.
[10] Cal. Pen. Code § 11165.13.

The Consent and Reproductive Equity (CARE) for Families Act will require health care providers to obtain verbal and written consent from pregnant and perinatal individuals before drug testing them or their newborns and require that testing is within the scope of medical care. The bill is carefully crafted to ensure that in case of a medical emergency, health care 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), and the American Academy of Pediatrics.[11] ACOG has developed ethical standards around seeking informed consent and opposes nonconsensual drug testing as a response to parental drug use.[12]

Recently California has made important steps to protect the bodily autonomy, privacy, and dignity of pregnant individuals.[13] It is imperative that part of this commitment to strengthening reproductive freedom include curbing the pervasive practice of subjecting perinatal patients and newborns to drug testing without their knowledge and consent—and often intrusive and unjustified governmental surveillance as a result. These practices amount to a clear violation of women's rights to bodily autonomy and reproductive freedom. We urge the Legislature, and Governor Newsom, to swiftly enact the Consent and Reproductive Equity (CARE) for Families Act and end this unlawful surveillance scheme of pregnant women that is exacerbating discriminatory family separations and undermining reproductive justice.

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[11] *ACOG Committee Opinion: Informed Consent and Shared Decision Making in Obstetrics and Gynecology*, Am. Coll. of Obstetricians & Gynecologists e34–e39 (Feb. 2021), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2021/02/informed-consent-and-shared-decision-making-in-obstetrics-and-gynecology.pdf; Aviva L. Katz & Sally A. Webb, *Informed Consent in Decision-Making in Pediatric Practice*, 138(2) Pediatrics e1–e4 (2016), https://publications.aap.org/pediatrics/article/138/2/e20161485/52519/Informed-Consent-in-Decision-Making-in-Pediatric.

[12] *ACOG Committee Opinion: Informed Consent and Shared Decision Making in Obstetrics and Gynecology*, Am. Coll. of Obstetricians & Gynecologists e34–e39 (Feb. 2021), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2021/02/informed-consent-and-shared-decision-making-in-obstetrics-and-gynecology.pdf.

[13] *New Protections for People Who Need Abortion Care and Birth Control*, State of California (Sept. 27, 2022), https://www.gov.ca.gov/2022/09/27/new-protections-for-people-who-need-abortion-care-and-birth-control/.