

Testimony of Pregnancy Justice to the Maine Senate Committee on Criminal Justice and Public Safety in Opposition of LD 761 - An Act to Amend the Laws Governing the Crime of Endangering the Welfare of a Child and to Create the Crime of Aggravated Endangering the Welfare of a Child

March 27, 2023

Thank you for the opportunity to address this committee.

On behalf of Pregnancy Justice, we respectfully submit this written testimony in opposition of Legislative Document 761. We are a non-partisan legal advocacy organization dedicated to the welfare of pregnant people and their families. Our testimony draws on over 20 years of work on cases in which state actors intervened in a pregnant person's medical decision-making or punished them and their family based on something they may have or may not have done while pregnant. And since 1973, we have documented over 1,700 cases in which birthing people were arrested, prosecuted, convicted, detained, or forced to undergo medical interventions¹ because state actors assumed their rights could be denied in the interest of infant or fetal protection.

This bill creates three new crimes related to child endangerment that result in serious bodily injury and/or death. While it aims to prioritize the safety of children, it will only harm Maine by opening the door to criminalizing any action perceived as harmful to a child. The broad and highly strong language of the bill not only has the potential to criminalize victims of domestic violence or prevent people from seeking medical care for their children, but also infant loss or injury, particularly in instances when a person may have used substances during pregnancy.

Science refutes myths that prenatal drug and alcohol can cause unique, certain, or irreparable harm for fetuses exposed to these substances in utero.

No substance, including cocaine, methamphetamine, opioids, cannabis, or alcohol, has been shown to pose a certain or unique harm to a fetus.² Exposure of a fetus to a drug or alcoholic substance does not necessarily mean the baby will be harmed. Therefore, if substance use is present and an infant presents with an adverse health condition after birth, it cannot be confidently concluded that the cause was the substance.

Although not all substance use indicates dependence, women with substance use disorders (SUD) also experience poverty, family history, housing instability, lack of support, or other social determinants of health.³ These social determinants, particularly when multiple interact with one another, increase an infant's risk for mortality or other

¹ Pregnancy Justice, 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 Pregnancy Justice, Prenatal Drug and Alcohol Exposure: Science Refutes Media Hype and Enduring Myths, 2022.

³ Social determinants of mental health. Allen, J, et al. 4, 2014, International Review of Psychiatry, Vol. 26, pp. 392- 407.

adverse health outcomes.⁴ Rather than focusing on intentional and knowledgeable harm done to a child, laws like LD 761 will further criminalize parents who are already at high risk for negative health outcomes due to reasons outside of their control.

Laws that criminalize infant loss threaten maternal and child health and could lead to further deprivations of liberty related to all actions taken during pregnancy.

All pregnant individuals face a certain risk of infant loss, and residents of Maine experience a rate nearly identical to the national average, which was 5.2 deaths per 1,000 live births in 2022.⁵ LD 761 would subject postpartum individuals to unnecessary suspicion, harassment, or criminalization for lawful behavior and infant loss.⁶

States that have attempted to criminalize substance use during pregnancy have shown statistically significant worse fetal and maternal health outcomes. This was seen in cases such as Tennessee's fetal assault law, which was so harmful to babies' health that the state allowed it to expire after only two years.⁷ Further studies show that it deterred pregnant women from accessing prenatal care or appropriate drug treatment and increased the number of fetal and infant deaths.⁸ For example, in 2015 alone, the year after the law went into effect, twenty more fetal deaths and sixty more infant deaths occurred than would have otherwise.⁹

In addition to ACOG, nearly all major U.S. medical associations agree that criminalization is not a valid solution for pregnant people who use substances.¹⁰ Moreover, experts suggest that criminalization discourages pregnant people from seeking prenatal care and substance use treatment, further harming the patient-provider relationship.¹¹

Although LD 761 only applies to children and not fetuses, pregnant individuals can still face criminalization through prosecutorial discretion and politically motivated judges if

⁴ Cadez-Martin, A. & Tan, B. & Fox, S. & Matusko, N. & Gadepalli, S., (2022) "Effects of Social Determinants of Health on Infant Mortality in Washtenaw and Wayne County, Michigan", Undergraduate Journal of Public Health 6. doi: <https://doi.org/10.3998/ujph.2313>

⁵ Maine Maternal, Fetal, and Infant Mortality Review Panel (MFIMR), Annual Report, 2023

⁶ Pregnancy Justice, *supra* note 1.

⁷ Meghan Boone & Benjamin J. McMichael, State-Created Fetal Harm, 109 Georgetown L. J. 475 (2021)

⁸ *Id.*

⁹ *Id.*

¹⁰ See American Medical Association, Policy Statement - H-420.962, Perinatal Addiction - Issues in Care and Prevention (last modified 2017); American Medical Association, Policy Statement - H-420.969, Legal Interventions During Pregnancy (2016); American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women, Committee Opinion 473, Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist (2011, reaffirmed 2014); American Academy of Family Physicians, Policy, Substance Abuse and Addiction, section entitled "Pregnant Women, Substance Use and Abuse by" (2003, 2016 COD).

¹¹ See Report of American Medical Association Board of Trustees, Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women, JAMA Vol. 264, No. 20 p.2667 (1990); American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women, Committee Opinion 473, Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist (2011, reaffirmed 2014); American College of Obstetricians and Gynecologists Committee on Obstetric Practice, Committee Opinion 524, Opioid Use and Opioid Use Disorder in Pregnancy (2017); National Perinatal Association, Position Statement, Perinatal Substance Use (2017); American Society of Addiction Medicine, Public Policy Statement on Chemically Dependent Women and Pregnancy (1989).

they are accused of causing significant bodily harm or infant loss during their pregnancy. Moreover, based on the outcomes of laws that criminalize pregnant people, we can expect similar results from laws that criminalize parents for drug use.

Conclusion

In the end, the message is clear: substance use should be treated as a public health issue rather than a punitive one, even when it occurs during pregnancy or with parents of young children. We urge the legislature to reject LD 761 and any other attempt to criminalize a person from infant loss or any other social outcome beyond their control. Experience from other states that have used existing laws and/or created new laws to criminalize pregnancy and drug use shows clearly that maternal, fetal, and infant health outcomes will only get worse; patient-provider relationships will be harmed; people will avoid necessary care; and families will suffer devastating consequences.

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