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MEMORANDUM OF SUPPORT

S.845 (Salazar) / A.860 (Rosenthal)

The Maternal Health, Dignity, and Consent Act prohibits drug, cannabis or alcohol testing of pregnant individuals, new parents, and newborns, unless the individual consents and it is within the scope of medical care, or testing is necessary for a medical emergency.

The New York State Defenders Association (NYSDA) strongly supports S.845/A.860, which would preserve the trust between a pregnant or perinatal person and their healthcare provider by prohibiting drug testing without informed consent. Black, brown, and low-income pregnant or perinatal individuals and their newborns are regularly and disproportionally targeted for random drug testing by healthcare providers. This arbitrary and racist practice has the effect of endangering the life and health of these individuals by making them afraid to seek medical attention for themselves or their children because of a lack of trust in the healthcare profession. Enactment of this bill will be a huge step towards ensuring that the focus of pre-and post-natal medical care stays where it belongs, on the health of the patient(s). It is unconscionable that new parents, who should be focusing on bonding with their infants, instead must worry about whether they will be forcibly separated from their newborns because of racial and socio-economic profiling in the healthcare system[1] and, more notably, in the child welfare system. The latter is referred to by some as the family regulatory system because of the punitive way it treats low-income, Black, and brown families, focusing on punishment rather than support.[2]

NYSDA, through our Public Defense Backup Center and Veterans Defense Program, provides comprehensive services to the approximately 6,000 public defenders, legal aid society lawyers, and court-appointed attorneys in over 130 county-based programs who represent people accused of crime and adults involved in family court cases who cannot afford to hire an attorney. We offer training, legal research, a statewide clearinghouse, and substantial technical and legal assistance that is critical to the effectiveness of overburdened defenders and vital for improving racial and social justice.

New York law makes clear that a positive toxicology test alone does not suggest that an infant is harmed or at risk of harm.[3] Despite this fact, every day, Black, brown, and low-income pregnant individuals and their newborns are tested for drugs in medical settings without consent, reported to child protective services (CPS), and subjected to family separation based on test results. A drug test is not a parenting test; a positive drug test does not measure a parent's capacity to parent their child or a parent's love for their child. To create a world where the dignity and integrity of all families are valued and supported, we must end punitive and criminalizing responses to drug use.

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[1] Jamila Perritt, M.D., M.P.H., *#WhiteCoatsForBlackLives — Addressing Physicians' Complicity in Criminalizing Communities*, New England J. of Medicine (Nov. 5, 2020), 383:1804-1806 https://www.nejm.org/doi/full/10.1056/NEJMp2023305?query=recirc_inIssue_bottom_article.

[2] New York Committee to Investigate State's Child Welfare System: Impacted Parents, Advocates Speak on Racial Disparities, Harm to Black Families, Hina Naveed, Human Rights Watch (May 20, 2022) https://www.hrw.org/news/2022/05/20/new-york-committee-investigate-states-child-welfare-system.

[3] New York law does not require reporting to the State Central Register (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.

It is crucial that patients be fully informed of the consequences of prenatal/postpartum drug testing and screening and any medical reason for testing and screening, and that they be allowed to consent to the drug test and/or screen. Although New York's Public Health Law and Civil Rights Law set forth general informed consent requirements in the healthcare setting, pregnant people, new parents, and their newborns are nevertheless drug tested without notice, much less specific 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. Even though positive drug tests often do not lead to any medical intervention, hospitals routinely report positive drug tests to CPS.

We call on the New York Legislature to pass the Maternal Health, Dignity, and Consent Act, S.845/A.860, to require that healthcare professionals obtain informed consent before performing drug tests on pre-and post-natal individuals and their babies. Pregnant and parenting people must, at a minimum, be able 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 necessary for well-informed patients and good health care.

This proposed legislation will not put the health of newborns at risk. There are times when drug testing may be needed for the health and welfare of the newborn or parent, which is addressed by the carve-out language in the Maternal Health, Dignity, and Consent Act: "[d]rug, cannabis or alcohol testing … may be performed without consent of the patient or the individual authorized to consent for a newborn when, in the health care professional's judgment, an emergency exists and the patient or newborn is in immediate need of medical attention …."

Currently, New York law does not explicitly protect the rights of pregnant and postpartum people who are drug tested or subject to drug screening while seeking medical care during the prenatal and postpartum periods, and this must stop. This bill must be passed to take a step towards better health outcomes for all families and will help low-income, brown, and Black families by restoring trust between healthcare providers and patients.

For all these reasons, NYSDA calls on the Legislature to pass the Maternal Health, Dignity, and Consent Act, S.845 (Salazar) /A.860 (Rosenthal), this session.

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