

**COURT OF APPEALS  
STATE OF NEW YORK**

---

In the Matter of LUKAS B.,

JOE B.,

*Respondent-Appellant,*

– against –

NEW YORK ADMINISTRATION FOR  
CHILDREN’S SERVICES,

*Petitioner-Respondent.*

---

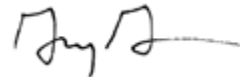
First Dept. Appellate Case No.:  
2023-03054

NY Cty. Family Ct. Docket No.:  
NN-15499/18

**NOTICE OF MOTION FOR  
LEAVE TO FILE AS AMICI  
CURIAE TO THE COURT OF  
APPEALS**

**PLEASE TAKE NOTICE** that, upon the accompanying affirmation of Grey Gardner, sworn to on March 5, 2025, and the accompanying proposed brief, the undersigned will move this Court, at 20 Eagle Street, Albany, New York 12207, on March 24, 2025, for an order pursuant to Rule 500.23 of the Rules of Practice of the Court of Appeals of the State of New York granting the motion by Drug Policy Alliance et al. as *amici curiae* in support of Appellant’s motion for leave to appeal to the Court of Appeals in the above-entitled action.

Dated: March 5, 2025



---

Grey Gardner  
DRUG POLICY ALLIANCE  
131 West 33rd Street, 15th Fl  
New York, NY 10001  
Tel.: (212) 613-8020

*Counsel for Proposed Amici Curiae*

**COURT OF APPEALS  
STATE OF NEW YORK**

---

In the Matter of LUKAS B.,

JOE B.,

*Respondent-Appellant,*

– against –

NEW YORK ADMINISTRATION FOR  
CHILDREN’S SERVICES,

*Petitioner-Respondent.*

---

First Dept. Appellate Case No.:  
2023-03054

NY Cty. Family Ct. Docket No.:  
NN-15499/18

**AFFIRMATION OF GREY  
GARDNER IN SUPPORT OF  
MOTION FOR LEAVE TO  
FILE AS *AMICI CURIAE***

I, Grey Gardner, an attorney admitted to practice in the State of New York,  
hereby affirms the following to be true under the penalties of perjury:

1. I am an attorney at the Drug Policy Alliance, counsel for proposed *amici*. I submit this affirmation in support of a motion by Drug Policy Alliance et al. for leave to file as *amici curiae*, pursuant to 22 N.Y.C.R.R. § 500.23(a)(1), in support of Appellant’s motion for leave to appeal to the Court of Appeals in the above-entitled action.

**I. Interest in Filing an Amicus Brief**

2. Proposed *amici* include national and state medical and public health organizations with recognized expertise and longstanding concern in the areas of maternal, fetal, and neonatal health, and on the effects of alcohol

and controlled substances on families and society. *Amici* also include organizations committed to supporting the rights and health of parents, children, women, and families. Together, *amici* represent thousands of healthcare providers in New York and tens of thousands across the country. *Amici* recognize a strong societal interest in protecting the health of women, children, and families. Those interests are undermined, not advanced, by laws that permit the unjust and unnecessary separation of a parent from a child based on a woman's illicit substance use during pregnancy or, as in this case, the separation of a father from his child based on the State's demand that he exercise control over a pregnant woman's behavior.

3. Proposed *amicus* **Drug Policy Alliance** is a 501(c)(3) nonprofit organization that leads the nation in promoting drug policies that are grounded in evidence, health, equity, and human rights. Established in 1994, DPA is a non-partisan organization with tens of thousands of members nationwide. DPA is dedicated to addressing the harms of drug use and drug criminalization through policy solutions, organizing, and public education. The organization regularly files legal briefs as *amicus curiae*, including in other cases pertaining to parents who use drugs. We advocate for a holistic approach to drugs that prioritizes health, social supports, and community

wellbeing. DPA opposes punitive approaches that destabilize people, block access to care, and drain communities of resources.

4. Proposed *amicus* **Association for Multidisciplinary Education and Research in Substance use and Addiction** (AMERSA) is a 501(c)(3) nonprofit organization founded in 1976 and guided by the mission to improve health and well-being through leadership in substance use education, research, clinical care, and policy. It is a professional home to a thriving multidisciplinary national community of health professionals interested in the development and dissemination of evidence-based substance use education and research. AMERSA is committed to supporting and advocating for the parental rights for people and families affected by substance use.
5. Propose *amicus* the **Beyond Do No Harm Network** (BDNHN) is a project incubated under the organization Interrupting Criminalization, which is fiscally sponsored by SEE (Social and Environmental Entrepreneurs). The BDNHN is a group of U.S.-based health care providers, public health workers, impacted community members, advocates, and organizers working across racial, gender, reproductive, migrant and disability justice, drug policy, sex worker, and anti-HIV criminalization movements to address the harm caused when health care providers, public health researchers and

institutions facilitate, participate in and support criminalization. BDNHN's professional expertise and lived experience compels them to continue their collective work of providing holistic support rather than punitive approaches that stigmatize people who use drugs and parents, especially parents of color.

6. Proposed *amicus* **Civil Rights Corps** (CRC) is a national civil rights non-profit legal organization dedicated to challenging systemic injustice in the American legal system. It works with individuals directly impacted by the legal system, their families and communities, activists, organizers, judges, and government officials to create a legal system that promotes equality and freedom. Since its founding in 2016, the organization has sought to end the criminalization of poverty and has filed successful lawsuits in federal and state courts around the country challenging systemic practices that are unjust, unconstitutional and that separate families.
7. Proposed *amicus* **Doing Right by Birth** (DRBB), a non-profit, seeks to shift the conversation from drugs in pregnancy and parenting to an emphasis on family and child wellbeing and development. DRBB will accomplish this through cross-sector collaborations, legal-medical-partnerships, and health professional convenings and trainings. DRBB envisions a world where the families of people who use drugs have equitable access to all the

nonpunitive, developmentally, culturally, and linguistically effective supports they need to stay together and thrive.

8. Proposed *amicus* **Elephant Circle** is a birth justice nonprofit that is rooted in Colorado with national reach. Elephant Circle mobilizes a reproductive justice, design-thinking approach in their public health law and policy advocacy with the goal of improving health for multiple generations at once.
9. Proposed *amicus* **Housing Works** is a healing community of people living with and affected by HIV/AIDS. Their mission is to end the dual crises of homelessness and AIDS through relentless advocacy, provision of lifesaving services, and entrepreneurial businesses that sustain our efforts. Founded in 1990, Housing Works serves nearly 20,000 clients annually in New York City through primary and mental healthcare, case management, substance use treatment, harm reduction services, the provision of supportive housing, peer and vocational education, reentry services, and client legal assistance. Housing Works is nationally recognized for our advocacy on behalf of member communities through path-breaking organizing, policy, research, and litigation efforts. By grounding their services and advocacy in the principles of harm reduction, Housing Works acknowledges the crucial importance of meeting people where they are at, building the trust necessary

to address substance use and its underlying causes and move individuals to embrace higher levels of treatment and care.

10. Proposed *amicus* **JMACforFamilies** (Just Making a Change or JMAC) is a non-profit organization that works to abolish the current, punitive child welfare system while simultaneously strengthening and investing in supports that keep families and communities together. JMAC works towards accomplishing these goals through efforts including, but not limited to, legislative change; advocacy on local, state, national, and even international levels; and programming for people directly impacted, such as their innovative H.E.A.L program. JMAC also leads the Parent Legislative Action Network (PLAN), a coalition of people impacted by the family policing/regulation system, advocates, attorneys, social workers, and academics working to push for legislative change to child welfare while changing the narrative regarding child welfare to reflect the truth of what families experience.

11. Proposed *amicus* **Legal Action Center** (LAC) is a national non-profit law and policy organization with offices in New York and Washington, D.C. Founded in 1973, LAC uses legal and policy strategies to fight discrimination, build health equity, and restore opportunity for people with arrest and conviction records, substance use disorders, and HIV or AIDS.

For decades, LAC has advocated to expand treatment opportunities for people with substance use disorders and to oppose legislation and other measures that employ a punitive, rather than public health, approach to addiction. LAC also has represented individuals and alcohol/drug treatment programs who face discrimination based on inaccurate and outmoded stereotypes about the disease of addiction. The question posed in this case is of vital concern to LAC's constituency across the country.

12. Proposed *amicus* **Legal Momentum** is the nation's first and longest serving non-profit legal organization dedicated to advancing the rights of women and girls. Founded as the NOW Legal Defense and Education Fund in 1970, Legal Momentum has been at the forefront of this movement for over 50 years. Utilizing the law to advance gender justice, Legal Momentum is dedicated to creating a society where all women and girls are empowered to thrive. Through innovative litigation, legislative advocacy, and educational initiatives, we champion gender equity and challenge discrimination in every sphere of life. Our mission is to advance gender equity for all by advocating for economic justice and workplace equality, reproductive freedom, equitable education, fairness in the courts, and the elimination of gender-based violence. Through expert legal advocacy, Legal Momentum is working towards a future where everyone has the opportunity, resources,



and autonomy to make choices about their lives and achieve their full potential.

13. Proposed *amicus* **Movement for Family Power** (MFP) is a national, abolitionist movement hub and incubator, cultivating and harnessing community power to end family policing and build a world where all families can thrive. Founded in 2018, MFP shifts narratives and supports grassroots organizers and lived experts on the frontlines of dismantling the family policing system through our three-pronged approach--connection, capacity, and care. MFP advocates for family safety and well-being outside of carceral systems and believes that drug tests are not parenting tests. MFP regularly supports *amicus curiae* briefs and other legal briefings that challenge pervasive and ongoing threats to family integrity.

14. Proposed *amicus* the **National Black Harm Reduction Network** (NBHRN) is dedicated to advancing harm reduction principles that optimize health and wellness for Black people who are disproportionately harmed by public health initiatives, the criminal legal system, and drug policies. NBHRN believes that simply avoiding or reducing the effects of structural racism — manifesting as criminalizing substance use and mental illness — stops short of our mandate as Black harm reductionists. Reducing harm isn't enough — it must be eliminated. NBHRN is a unified coalition of Black

harm reductionists, advocates, and stakeholders working to advance harm reduction principles in Black communities. NBHRN formed to preserve the history and legacy of Black harm reduction work while elevating and shaping the current and future national discourse around Black harm reduction.

15. Proposed *amicus* the **National Coalition for Child Protection Reform**

(NCCPR) is an organization of professionals, drawn from the fields of law, academia, psychology and journalism, who are dedicated to improving child welfare systems through public education and advocacy. NCCPR, a tax-exempt non-profit organization founded at a 1991 meeting at Harvard Law School, is incorporated in Massachusetts and headquartered in Alexandria, Virginia. NCCPR devotes much of its attention to public education concerning widespread public misconceptions about the child protective system and its impact on the children it is intended to serve. Lawyer members of NCCPR also individually have litigated numerous precedential cases involving child protection policies and proceedings.

16. Proposed *amicus* the **National Health Law Program (NHLP)**, a public interest law organization, has engaged in education, litigation, and policy analysis to advance access to quality healthcare and protect the legal rights of low-income and underserved people for more than 55 years.

NHeLP has recognized expertise in the rights of people with substance use disorders, pregnant people, and youth in the child welfare system.

17. Proposed *amicus* the **Network for Public Health Law** (Network) provides visionary leadership in the use of law to protect, promote, and improve health and health equity. The Network provides non-partisan legal technical assistance and resources, collaborating with a broad set of partners to expand and enhance the use of practical legal and policy solutions to improve public health. The Network is committed to using public health law and policy to improve the conditions, as well as strengthen the services and systems, that make our communities safer, healthier, stronger and more equitable.

18. Proposed *amicus* **A New PATH** (Parents for Addiction Treatment & Healing) is a non-profit organization of parents, concerned citizens, individuals in recovery, healthcare professionals and community leaders working to educate the public and decision makers about the true nature of substance use disorders. Founded in 1999, A New PATH's mission is to reduce the stigma associated with addictive illness through education and compassionate support and to advocate for therapeutic rather than punitive drug policies. Through our national collaborative campaign, Moms United to End the War on Drugs, started in 2009, A New PATH works to end the stigmatization and criminalization of people who use drugs or who have a

substance use disorder. Through parent-driven advocacy, A New PATH promotes strategies that reduce the harms associated with drug use.

19. Proposed *amicus* **New York Midwives** (NYM) is the state affiliate of the American College of Nurse Midwives (ACNM), the national organization that represents licensed midwives. NYM advocates for the welfare of women, birthing people, children, and families in New York State. Midwives practice in both community and hospital settings, providing the full range of sexual, reproductive, and primary care services through the lifespan. New York Midwives is an expansive, diverse, and anti-racist organization dedicated to fostering culturally humble, empowered, and safe healthcare that holistically fulfills every New Yorker. NYM's focus is to combat the root causes of racialized health disparities and inequities, thereby reducing New York State's perinatal morbidity and mortality rates. NYM strives to amplify historically excluded voices in our education programs, workplaces, and care spaces throughout the state and transform laws, regulations and structures that do not promote human rights and individual wellbeing. NYM advocates for a holistic approach to addiction/chemical dependency and treatment that prioritizes health, social supports, and community wellbeing. NYM opposes punitive approaches that destabilize people, block access to care, and drain communities of resources.

20. Proposed *amicus* **Our Bodies Ourselves** (OBOS), active since 1970, is now an initiative of the Center for Women’s Health and Human Rights at Suffolk University. OBOS is nationally and internationally renowned for transformative feminist health and sexuality advocacy.

Ourbodiesourselves.org features accurate information, compelling personal stories, and incisive, intersectional feminist analysis on the health and sexuality of women and gender-expansive people. OBOS creates and shares resources that support health, sexuality, and human rights and advocate for reproductive, sexual, and health justice.

21. Proposed *amicus* **Physicians for Reproductive Health** (“PRH”) is a doctor-led nonprofit that seeks to ensure meaningful access to comprehensive reproductive healthcare services, including contraception and abortion. Since its founding in 1992, PRH has organized and amplified the voices of medical providers to advance reproductive health, rights, and justice. PRH’s network is comprised of physicians in all 50 states, the District of Columbia, and Puerto Rico, and includes over 500 fellows. PRH has unique insight into the harms of pregnancy discrimination and criminalization, including when people are criminalized for using controlled substances while pregnant.

22. Proposed *amicus* **the REACH Project Inc.** is a nonprofit organization with the belief that all individuals deserve respectful, equitable, access to compassionate healthcare in a setting where they will not be stigmatized or judged based on drug use, homelessness, or any other issue that may cause less than adequate care in today's healthcare environment. The REACH Project owns and operates the first low threshold, harm reduction medical practice in Ithaca, NY: REACH Medical. REACH Medical offers a wide range of services including: Medication-Assisted Therapy (MAT), Hep C treatment, primary care, and behavioral services in a stigma-free, inclusive setting. The REACH Project collaborates with other service-based organizations in our community to implement various programs which increase awareness around this issue, provide medical care, and solve critical problems facing individuals we serve.

23. Proposed *amici* are uniquely positioned to speak to the questions presented in this case and the harmful, stigmatizing application of laws intending to protect the health and wellbeing of children and families in ways that contribute to a wide range of negative health impacts. Proposed *amici* can detail for the Court the accepted medical and public health approach to substance use during pregnancy and how misapplication of existing laws can contradict this approach and harm women, children, and families. *Amici* urge

this Court to grant Appellant's motion for leave to appeal and to correct the lower court's harmful and unworkable misapplication of the law governing neglect.

## II. **Desirability and Relevance of *Amici*'s Proposed Brief**

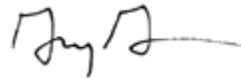
24. Proposed *amici* seek leave to submit the attached brief to correct several of the lower court's false assumptions underlying the neglect finding and to elucidate the expected medical and public health ramifications of punishing pregnant women who have used drugs or punishing a partner for failing to exercise control over the behavior of a pregnant woman. Proposed *amici* seek to demonstrate that coercive responses to drug use during pregnancy can place not only the pregnant woman but also her pregnancy, her future children, and her family at greater risk of harm, including family separation, avoidance of prenatal treatment and other medical care, or in some cases, termination of their pregnancy.
25. Proposed *amici* further seek to present the explicit and historical opposition by scientific, medical, and public health experts to statutory interpretations such as the one put forward by the State in the instant case. Proposed *amici* seek to demonstrate to the Court how the lower court's ruling conflicts with the standards of care for pregnant women with substance use disorders and contributes to harmful short- and long-term health consequences.

26. Attached hereto is the proposed *amici*'s brief.
27. No party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner.
28. No previous application for the relief requested herein has been made.

**WHEREFORE**, proposed *amici* respectfully request that this Court grant their Motion for Leave to File as *Amicus Curiae* and grant such other and further relief as this Court deems just and proper.

Dated: March 5, 2025

Respectfully submitted,



---

Grey Gardner  
DRUG POLICY ALLIANCE  
131 West 33rd Street, 15th Fl  
New York, NY 10001  
Tel.: (212) 613-8020  
ggardner@drugpolicy.org

*Counsel for Proposed Amici Curiae*



**Court of Appeals**

of the

**State of New York**

---

In the Matter of LUKAS B.,

A Child Under Eighteen Years of Age Alleged to Be Neglected Pursuant to Article  
10 of the Family Court Act,

JOE B.,

*Respondent-Appellant,*

– against –

NEW YORK ADMINISTRATION FOR CHILDREN’S SERVICES,

*Petitioner-Respondent.*

---

**[PROPOSED] BRIEF OF *AMICI CURIAE* DRUG POLICY ALLIANCE ET  
AL. IN SUPPORT OF APPELLANT’S MOTION FOR LEAVE TO APPEAL  
TO THE COURT OF APPEALS**

---

Grey Gardner  
DRUG POLICY ALLIANCE  
131 West 33rd Street, 15th Floor  
New York, NY 10001  
Tel.: (212) 613-8020  
ggardner@drugpolicy.org  
*Counsel for Proposed Amici Curiae*

Dated: March 5, 2025

---

## **DISCLOSURE STATEMENT**

Pursuant to 22 N.Y.C.R.R. Part 500.1(f), the Drug Policy Alliance, Association for Multidisciplinary Education and Research in Substance use and Addiction, Civil Rights Corps, Doing Right by Birth, Elephant Circle, Housing Works, JMACforFamilies, Legal Action Center, Legal Momentum, Movement for Family Power, the National Black Harm Reduction Network, the National Coalition for Child Protection Reform, the National Health Law Program, the Network for Public Health Law, A New PATH, New York Midwives, Physicians for Reproductive Health, and the REACH Project Inc. disclose that they are non-profit organizations with no parents, subsidiaries or affiliates.

The Beyond Do No Harm Network is a project incubated under the organization Interrupting Criminalization, which is fiscally sponsored by Social and Environmental Entrepreneurs. Social and Environmental Entrepreneurs is a non-profit organization with no parents, subsidiaries, or affiliates.

Our Bodies Ourselves is an initiative of the Suffolk University Center for Women's Health & Human Rights. Suffolk University is a non-profit organization with no parents, subsidiaries, or affiliates.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
ARGUMENT .....	2
I. MEDICAL AND PUBLIC HEALTH EXPERTS UNEQUIVOCALLY OPPOSE PUNITIVE RESPONSES TO SUBSTANCE USE DURING PREGNANCY BECAUSE THEY THREATEN WOMEN’S AND CHILDREN’S HEALTH. ...	2
A. Punitive Responses to Drug Use During Pregnancy Directly Inflict Substantial Harm on Women, Children, and Families.....	5
B. The Threat and Prospect of Punishments Deter Women from Securing Treatment and Prenatal Care and Undermine Maternal and Fetal Health.	8
II. NO MEDICAL OR SCIENTIFIC EVIDENCE JUSTIFIES A PUNITIVE, NON-THERAPEUTIC APPROACH TO PREGNANT WOMEN WHO USE DRUGS.....	12
A. Substance Use Disorders are Chronic Health Conditions.....	13
B. Medical and Scientific Evidence Does Not Show that Substance Use During Pregnancy Causes Uniquely Certain or Severe Harms.....	17
C. Methadone and Buprenorphine are the Recommended Treatment for Opioid Use Disorder During Pregnancy. ....	20
III. THE WAR ON DRUGS HAS USED STIGMATIZING NARRATIVES TO TARGET PARENTS OF COLOR BASED ON ALLEGED SUBSTANCE USE AND HAS CAUSED LASTING DAMAGE THROUGH FAMILY SEPARATIONS. ....	22
A. The War on Drugs Has Perpetuated Racist Narratives About Parents Who Use Drugs. ....	23
B. Removals Are Often Unnecessary, Cause Significant Damage to Children, and Expose Children to the Negative Effects of the Foster System. ....	26
CONCLUSION .....	29

## TABLE OF AUTHORITIES

### Statutes

N.Y. Family Court Act § 1012.....1

### Cases

*Matter of L.B.*, 226 AD3d 554, 554 (1st Dept 2024)..... 1

*McKnight v. State*, 661 S.E.2d 354 (S.C. 2008)..... 19

*National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) ..... 16

### Other Authorities

*A Child Welfare Timeline*, NAT’L COAL. FOR CHILD PROT. REFORM (2021) <https://nccpr.org/a-child-welfare-timeline/> ..... 24

AM. ACAD. ADDICTION PSYCHIATRY, USE OF ILLEGAL AND HARMFUL SUBSTANCES BY PREGNANT WOMEN (2018)..... 3

Am. Coll. Obstetricians & Gynecologists, *Committee Opinion 479: Methamphetamine Abuse in Women of Reproductive Age*, 117 OBSTETRICS & GYNECOLOGY 751 (2011)..... 18

Am. Coll. Obstetricians & Gynecologists, *Committee Opinion 637: Marijuana Use During Pregnancy and Lactation*, 126 OBSTETRICS & GYNECOLOGY 234 (2015)..... 18

Am. Coll. Obstetricians & Gynecologists, *Committee Opinion, Refusal of Medically Recommended Treatment During Pregnancy*, 127 OBSTETRICS & GYNECOLOGY e175 (2016);.. ..... 5

AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION: OPIOID USE AND OPIOID USE DISORDER IN PREGNANCY (2017)..... 20

AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, OPPOSITION TO CRIMINALIZATION OF INDIVIDUALS DURING PREGNANCY AND THE POSTPARTUM PERIOD: STATEMENT OF POLICY (2024). ..... 2

AM. MED. ASS’N, POLICY, H-420.969: LEGAL INTERVENTIONS DURING PREGNANCY (1990) (reaffirmed 2024) ..... 3

AM. NURSES ASS’N (ANA), POSITION STATEMENT: NON-PUNITIVE TREATMENT FOR PREGNANT AND BREAST-FEEDING WOMEN WITH SUBSTANCE USE DISORDERS (2017) ..... 3, 4

AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed., 2013)..... 15

AM. PSYCHIATRIC ASS’N, POSITION STATEMENT: ASSURING THE APPROPRIATE CARE OF PREGNANT AND NEWLY-DELIVERED WOMEN WITH SUBSTANCE USE DISORDERS (2019)..... 3

AM. PUB. HEALTH ASS’N (APHA), POLICY No. 9020: ILLICIT DRUG USE BY PREGNANT WOMEN (1990). ..... 3, 5

AM. SOC’Y ADDICTION MED., PUBLIC POLICY STATEMENT ON SUBSTANCE USE DISORDER AMONG PREGNANT AND POSTPARTUM PEOPLE (2022). ..... 3

Andrew Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 J. AM. MED. ASS’N 1581 (1993) ..... 10

Ariadna Forray et al., <i>Perinatal Substance Use: A Prospective Evaluation of Abstinence and Relapse</i> , 150 <i>DRUG &amp; ALCOHOL DEPENDENCE</i> 147 (2015). .....	14
Arons, A., <i>An Unintended Abolition: Family Regulation During the COVID-19 Crisis</i> , 12 <i>COLUMBIA J. RACE &amp; LAW</i> (2022) .....	26
Ashley H. Schempf & Donna M. Strobino, <i>Drug Use and Limited Prenatal Care: An Examination of Responsible Barriers</i> , 200 <i>AM. J. OBSTETRICS &amp; GYNECOLOGY</i> 412.e1 (2009) .....	8, 9
Ashley H. Schempf, <i>Illicit Drug Use and Neonatal Outcomes: A Critical Review</i> , 62 <i>OBSTETRICAL &amp; GYNECOLOGICAL SURV.</i> 749 (2007) .....	17, 18
Ass'n of Women's Health, Obstetric & Neonatal Nurses (AWHONN), <i>Optimizing Outcomes for Women with Substance Use Disorders in Pregnancy and the Postpartum Period</i> , 48 <i>J. OBSTETRIC, GYNECOLOGIC &amp; NEONATAL NURSING</i> 583 (2019). .....	2, 8, 14, 16
Ayman El-Mohandes et al., <i>Prenatal Care Reduces the Impact of Illicit Drug Use on Perinatal Outcomes</i> , 23 <i>J. PERINATOLOGY</i> 354 (2003).....	9, 10
Azi Paybarah, <i>Judge Dismisses Murder Charge Against California Mother After Stillbirth</i> , <i>N.Y. TIMES</i> (May 20, 2021), <a href="https://www.nytimes.com/2021/05/20/us/chelsea-becker-stillbirth-murder-charges-california.html">https://www.nytimes.com/2021/05/20/us/chelsea-becker-stillbirth-murder-charges-california.html</a> .....	19
Barbara A. Hotelling, <i>Perinatal Needs of Pregnant, Incarcerated Women</i> , 17 <i>J. PERINATAL EDUC.</i> 37 (2008) .....	6
BRITTANY PAIGE MIHALEC-ADKINS ET AL., <i>NAT'L COUNCIL ON FAM. RELATIONS, JUGGLING CHILD PROTECTION AND THE OPIOID EPIDEMIC: LESSONS FROM FAMILY IMPACT SEMINARS</i> (2020). .....	25
Carol E. Tracy & Harriet C. Williams, <i>Social Consequences of Substance Abuse Among Pregnant and Parenting Women</i> , 20 <i>PEDIATRIC ANNALS</i> 548 (1991) .....	10
Catherine R. Lawrence, Elizabeth A. Carlson & Byron Egeland, <i>The Impact of Foster Care on Development</i> , 18 <i>DEV. &amp; PSYCHOPATHOLOGY</i> 57 (2006).....	27
CHAPIN HALL AT THE UNIV. CHICAGO, <i>MISSED OPPORTUNITIES: PATHWAYS FROM FOSTER CARE TO YOUTH HOMELESSNESS IN AMERICA</i> (2019).....	27
Christian S. Hendershot et al., <i>Relapse Prevention for Addictive Behaviors</i> , 6 <i>SUBSTANCE ABUSE TREATMENT, PREVENTION &amp; POL.</i> no. 17, 1 (2011). .....	15
Christopher Wildeman & Natalia Emanuel, <i>Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children, 2000–2011</i> , 9 <i>PLoS ONE</i> no. 3, 1 (2014). .....	7
Christopher Wildeman & Natalia Emanuel, <i>Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children</i> , 9 <i>PLoS ONE</i> 1 (2014) .....	24
Comm. on Health Care for Underserved Women, Am. Coll. Obstetricians & Gynecologists (ACOG), <i>Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist</i> , 117 <i>OBSTETRICS &amp; GYNECOLOGY</i> 200 (2011) (reaffirmed 2022).....	4, 6, 9
COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, <i>RACIAL AND ETHNIC INEQUITIES IN OBSTETRICS AND GYNECOLOGY</i> (2024) ...	12
Daisy Goodman, Bonny Whalen & Lucy C. Hodder, <i>It's Time to Support, Rather than Punish, Pregnant Women with Substance Use Disorder</i> , 2 <i>JAMA NETWORK OPEN</i> e1914135 (2019)....	11

Daniel S. Messinger et al., <i>The Maternal Lifestyle Study: Cognitive, Motor, and Behavioral Outcomes of Cocaine-Exposed and Opiate-Exposed Infants Through Three Years of Age</i> , 113 PEDIATRICS 1677 (2004) .....	18
Danielle E. Ramo & Sandra A. Brown, <i>Classes of Substance Abuse Relapse Situations: A Comparison of Adolescents and Adults</i> , 22 PSYCH. ADDICTIVE BEHAV. 372 (2008) .....	10
DeAnna Y. Smith & Alexis Roane, <i>Child Removal Fears and Black Mothers' Medical Decision-Making</i> , 22 CONTEXTS 18 (2023) .....	9
Deborah A. Frank et al., <i>Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure</i> , 285 J. AM. MED. ASS'N 1613 (2001) .....	17
<i>Definition of Addiction</i> , AM. SOC'Y ADDICTION MED. (Sept. 15, 2019), <a href="https://www.asam.org/resources/definition-of-addiction">https://www.asam.org/resources/definition-of-addiction</a> .....	15, 16
DOROTHY ROBERTS, <i>SHATTERED BONDS: THE COLOR OF CHILD WELFARE</i> (2002) .....	24, 28
DOROTHY ROBERTS, <i>TORN APART, HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES--AND HOW ABOLITION CAN BUILD A SAFER WORLD</i> (2022).....	23
Editorial Board, <i>Slandering the Unborn</i> , N.Y. TIMES (Dec. 28, 2018), <a href="https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html">https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html</a> .....	18, 23
EILEEN TRZCINSKI ET AL., <i>MICHIGAN FAMILY IMPACT SEMINARS, BRIEFING REPORT NO. 2002-1: WHAT ABOUT ME? CHILDREN WITH INCARCERATED PARENTS</i> (2002) .....	7
Elena Hontoria Tuerk & Ann Booker Loper, <i>Contact Between Incarcerated Mothers and Their Children: Assessing Parenting Stress</i> , 43 J. OFFENDER REHABILITATION 23 (2006) .....	6
Elizabeth Howell & Jennifer Zeitlin, <i>Quality of Care and Disparities in Obstetrics</i> , 44 OBSTETRICS & GYNECOLOGY CLINICS N. AM. 13 (2017).....	12
<i>Examining the New York Child Welfare System and Its Impact on Black Children and Families</i> , A Report of the New York Advisory Committee to the U.S. Commission on Civil Rights (May 2024).....	23
FED. INTERAGENCY FORUM ON CHILD & FAM. STATS., <i>AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING</i> (2021) .....	24
Gary D. Helmbrecht & Siva Thiagarajah, <i>Management of Addiction Disorders in Pregnancy</i> , 2 J. ADDICTION MED. 1 (2008) .....	17, 18
Harold W. Goforth et al., <i>Neurologic Aspects Of Drug Abuse</i> , 28 NEUROLOGIC CLINICS 199 (2010) .....	15
Henrietta S. Bada et al., <i>Impact of Prenatal Cocaine Exposure on Child Behavior Problems Through School Age</i> , 119 PEDIATRICS e328 (2007).....	18
Howard Minkoff & Mary F. Marshall, <i>Fetal Risks, Relative Risks, and Relatives' Risks</i> , 16 AM. J. BIOETHICS 3 (2016).....	6
HUM. RTS. WATCH & AM. CIV. LIBERTIES UNION, <i>YOU MISS SO MUCH WHEN YOU'RE GONE: THE LASTING HARM OF JAILING MOTHERS BEFORE TRIAL IN OKLAHOMA</i> (2018).....	7
Jennifer L. Hook & Mark E. Courtney, <i>Employment outcomes of former foster youth as young adults: The importance of human, personal, and social capital</i> , 33 CHILDREN & YOUTH SERVS. REV. 1855 (2010) .....	27
Joseph J. Doyle, Jr., <i>Child Protection and Child Outcomes: Measuring the Effects of Foster Care</i> , 97 AM. ECON. REV. 1583 (2007).....	26

K. Chase Stovall & Mary Dozier, <i>Infants in Foster Care: An Attachment Theory Perspective</i> , 2 ADOPTION Q. 55 (1998). .....	28
Kathi L. H. Harp & Amanda M. Bunting, <i>The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies</i> , 27 SOC. POL. 258 (2020).....	24
Kimberly Howard et al., <i>Early mother–child separation, parenting, and child well-being in Early Head Start families</i> , 13 ATTACHMENT & HUM. DEV. 5 (2011).....	7
Kristin Turney & Christopher Wildeman, <i>Mental and Physical Health of Children in Foster Care</i> , 138 PEDIATRICS 1 (2016). .....	27
Laura J. Faherty et al., <i>Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy With Rates of Neonatal Abstinence Syndrome</i> , 2 JAMA NETWORK OPEN e1914078 (2019) .....	5, 11, 16
LEROY PELTON, FOR REASON OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES (1989).....	24
LOREN SIEGEL, DRUG POL’Y ALLIANCE, THE WAR ON DRUGS MEETS CHILD WELFARE (2021).....	22, 23, 24
Loren Siegel, <i>The Pregnancy Police Fight the War on Drugs, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE</i> (Craig Reinerman & Harry G. Levine, eds., 1997).....	23
Lynda M. Sagrestano & Ruthbeth Finerman, <i>Pregnancy and Prenatal Care: A Reproductive Justice Perspective, in REPRODUCTIVE JUSTICE: A GLOBAL CONCERN</i> (Joan C. Chrisler, ed., 2012).....	7
Lynn M. Paltrow & Jeanne Flavin, <i>Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health</i> , 38 J. HEALTH POLITICS, POL’Y, & L. 299 (2013).....	19
MARCH OF DIMES, 2023-2024 POLICY PRIORITIES, SUPPORT HEALTHY WOMEN AND BABIES 1 (2022). .....	3
Margaret H. Lloyd & Jody Brook, <i>Drug testing in child welfare: A systematic review</i> , 104 CHILDREN & YOUTH SERVS. REV. 104389 (2019). .....	25
Mari Golub et al., <i>NTP-DERHR Expert Panel Report on the Reproductive and Developmental Toxicity of Amphetamine and Methamphetamine</i> , 74 BIRTH DEFECTS RSCH. PART B DEVELOPMENTAL & REPROD. TOXICOLOGY 471 (2005).....	18
Marilyn L. Poland et al., <i>Punishing Pregnant Drug Users: Enhancing the Flight from Care</i> , 31 DRUG & ALCOHOL DEPENDENCE 199 (1993).....	8
Martha A. Jessup et al., <i>Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women</i> , 33 J. DRUG ISSUES 285 (2003) .....	8
Melissa Friedman & Danielle Rohr, <i>Reducing Family Separations in New York City: The COVID-19 Experiment and a Call for Change</i> , 123 COLUMBIA L. REV. 52 (2023).....	26
Michael S. Gordon et al., <i>A Randomized Clinical Trial of Methadone Maintenance for Prisoners: Findings at 6 Months Post-Release</i> , 103 ADDICTION 1333 (2008).....	10
Michael T. Kinsella & Catherine Monk, <i>Impact of Maternal Stress, Depression &amp; Anxiety on Fetal Neurobehavioral Development</i> , 52 CLINICAL OBSTETRICS & GYNECOLOGY 425 (2009) .	7
Mishka Terplan & Tricia Wright, <i>The Effects of Cocaine &amp; Amphetamine Use During Pregnancy on the Newborn: Myth versus Reality</i> , 30 J. OF ADDICTION DISEASES 1 (2011).....	18

Mishka Terplan et al., <i>Methamphetamine Use Among Pregnant Women</i> , 113 OBSTETRICS & GYNECOLOGY 1285 (2009).....	9, 10
MOVEMENT FOR FAM. POWER, “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 (2020) .....	25
N.Y. ADVISORY CMTE. TO THE U.S. COMM. ON CIVIL RIGHTS, EXAMINING THE NEW YORK CHILD WELFARE SYSTEM AND ITS IMPACT ON BLACK CHILDREN AND FAMILIES (2024).....	23, 28
N.Y. DEP’T OF HEALTH AIDS INSTITUTE, CLINICAL GUIDELINES PROGRAM, SUBSTANCE USE DISORDER TREATMENT IN PREGNANT ADULTS (2021). .....	20
Nancy K. Young, Sharon M. Boles & Cathleen Otero, <i>Parental Substance Use Disorders and Child Maltreatment: Overlap, Gaps, and Opportunities</i> , 12 CHILD MALTREATMENT 137 (2007). .....	25
NAT’L CTR. ADDICTION & SUBSTANCE ABUSE, SUBSTANCE ABUSE & THE AMERICAN WOMAN (1996) .....	10
NAT’L PERINATAL ASS’N, POSITION STATEMENT: PERINATAL SUBSTANCE USE (2017) .....	3
<i>Neonatal opioid withdrawal syndrome and medication-assisted treatment with methadone and buprenorphine</i> , U.S. FOOD & DRUG ADMIN. (May 26, 2016), <a href="https://www.fda.gov/drugs/drug-safety-and-availability/neonatal-opioid-withdrawal-syndrome-and-medication-assisted-treatment-methadone-and-buprenorphine">https://www.fda.gov/drugs/drug-safety-and-availability/neonatal-opioid-withdrawal-syndrome-and-medication-assisted-treatment-methadone-and-buprenorphine</a> . .....	21
NEW YORK STATE DEP’T OF HEALTH AIDS INST., SUBSTANCE USE DISORDER TREATMENT IN PREGNANT ADULTS (2021) .....	21
Nora D. Volkow, <i>Pregnant people with substance use disorder need treatment, not criminalization</i> , STAT (Feb. 8, 2023), <a href="https://www.statnews.com/2023/02/08/addiction-pregnancy-treatment-not-criminalization/">https://www.statnews.com/2023/02/08/addiction-pregnancy-treatment-not-criminalization/</a> .....	4, 13
OFF. OF THE N.Y. STATE COMPTROLLER, DIV. OF STATE GOV’T ACCOUNTABILITY, AUDIT OF MATERNAL HEALTH, REPORT 2022-S-25 (2024).....	12
Paul Moran et al., <i>Substance Misuse During Pregnancy: Its Effects and Treatment</i> , 20 FETAL & MATERNAL MED. REV. 1 (2009).....	10
<i>Pregnant and Parenting Persons</i> , N.Y. OFF. OF ADDICTION SERVS. & SUPPORTS <a href="https://oasas.ny.gov/treatment/pregnant-and-parenting-persons">https://oasas.ny.gov/treatment/pregnant-and-parenting-persons</a> (last visited March 4, 2025) .	21
Rebecca Stone, <i>Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care</i> , 3 HEALTH & JUSTICE 1 (2015).....	9
Rosemary H. Kelly et al., <i>The Detection &amp; Treatment of Psychiatric Disorders and Substance Use Among Pregnant Women Cared for in Obstetrics</i> , 158 AM. J. PSYCH. 213 (2001) .....	10
Sarah C. M. Roberts & Amani Nuru-Jeter, <i>Women’s Perspectives on Screening for Alcohol and Drug Use in Prenatal Care</i> , 20 WOMEN’S HEALTH ISSUES 193 (2010) .....	8, 9
Shahla M. Jilani et al., <i>Standardizing the Clinical Definition of Opioid Withdrawal in the Neonate</i> , 243 J. Pediatrics 33.e1 (2022).....	22
Shanta Trivedi, <i>The Harm of Child Removal</i> , 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019).....	8, 26, 27, 28
SHELLY GEHSAN, S. REG’L PROJECT ON INFANT MORTALITY, A STEP TOWARD RECOVERY: IMPROVING ACCESS TO SUBSTANCE ABUSE TREATMENT FOR PREGNANT AND PARENTING WOMEN (1993) .....	8, 10



STEPHEN R. KANDALL, <i>SUBSTANCE &amp; SHADOW: WOMEN &amp; ADDICTION IN THE UNITED STATES</i> (rev. ed. 1999) .....	9
Stephen W. Patrick et al., Comm. on Substance Abuse, Am. Acad. of Pediatrics, <i>A Public Health Response to Opioid Use in Pregnancy</i> , 139 PEDIATRICS no. 3, 1 (2017) .....	3
SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., CLINICAL GUIDANCE FOR TREATING PREGNANT AND PARENTING WOMEN WITH OPIOID USE DISORDER AND THEIR INFANTS (2018) .....	20
<i>Treatment of Opioid Use Disorder Before, During, and After Pregnancy</i> , CTRS. DISEASE CONTROL & PREVENTION (May 15, 2024), <a href="https://www.cdc.gov/opioid-use-during-pregnancy/treatment/index.html">https://www.cdc.gov/opioid-use-during-pregnancy/treatment/index.html</a> .....	20
U.S. DEP’T HEALTH & HUM. SERVS. & OFF. OF THE SURGEON GEN., <i>FACING ADDICTION IN AMERICA: THE SURGEON GENERAL’S REPORT ON ALCOHOL, DRUGS, AND HEALTH</i> (2016) .....	15, 16
U.S. DEP’T HEALTH & HUM. SERVS., ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN’S BUREAU, <i>THE AFCARS REPORT</i> (2023) .....	24, 27
U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-816, <i>AFRICAN AMERICAN CHILDREN IN FOSTER CARE</i> (2007). .....	28
URBAN INST., <i>CHILDREN AFFECTED BY PARENTAL SUBSTANCE USE</i> (2023). .....	25
Vivek Sankaran, Christopher Church & Monique Mitchell, <i>A Cure Worse Than the Disease? The Impact of Removal on Children and Families</i> , 102 MARQ. L. REV. 1161 (2019).....	26
Wendy Chavkin, <i>Drug Addiction and Pregnancy: Policy Crossroads</i> , 80 AM J. PUB. HEALTH 483 (1990). .....	8
WOMEN IN PRISON PROJECT, CORR. ASS’N OF N.Y., <i>WHEN “FREE” MEANS LOSING YOUR MOTHER: THE COLLISION OF CHILD WELFARE AND THE INCARCERATION OF WOMEN IN NEW YORK STATE</i> (2006) .....	7
WORLD HEALTH ORG. ET AL., <i>SUBSTITUTION MAINTENANCE THERAPY IN THE MANAGEMENT OF OPIOID DEPENDENCE AND HIV/AIDS PREVENTION</i> (2004).....	16

## PRELIMINARY STATEMENT

This case arises out of a family court decision in which a father was found to have neglected his child under Family Court Act § 1012 for failing to stop the child’s mother from using illicit drugs while she was pregnant.<sup>1</sup> *Matter of L.B.*, 226 AD3d 554, 554 (1st Dept 2024). The New York legislature did not intend § 1012 to support a finding of child neglect against a father for his failure to control the behavior of a woman pregnant with his future child. It is not only unclear how the legislature could require a person to assert control over the behavior of another adult person’s bodily autonomy, but also counter to the recommendations of medical and public health experts who have counseled against establishing sanctions related to substance use during pregnancy. The unequivocal consensus among *amici curiae* and every medical or public health organization to address the issue in the United States is that the use of controlled substances during pregnancy is a medical and public health issue that should focus on fostering open communication between family members and healthcare providers to encourage support and access to treatment during pregnancy. It is not an issue that should be subject to criminal intervention, state control, automatic loss of custody, or findings of neglect.

---

<sup>1</sup> This brief uses the terms “pregnant woman” and “father” because those terms fit the parties in this case.

*Amici*'s brief will demonstrate to the Court how the misapplication of existing law by the lower court will lead to lasting, harmful health consequences for women, children, and families. *Amici* urge this Court to consider Appellant's motion in view of the widespread opposition from the medical and scientific community to punishing pregnant people for having a substance use disorder or punishing their partners for failing to control their behavior and somehow stop their substance use.

## **ARGUMENT**

### **I. MEDICAL AND PUBLIC HEALTH EXPERTS UNEQUIVOCALLY OPPOSE PUNITIVE RESPONSES TO SUBSTANCE USE DURING PREGNANCY BECAUSE THEY THREATEN WOMEN'S AND CHILDREN'S HEALTH.**

Major medical and public health organizations in New York and throughout the country oppose punishing pregnant people who use controlled substances. Among them are the American College of Obstetricians and Gynecologists (ACOG);<sup>2</sup> Association of Women's Health, Obstetrics and Neonatal Nurses;<sup>3</sup>

---

<sup>2</sup> AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, OPPOSITION TO CRIMINALIZATION OF INDIVIDUALS DURING PREGNANCY AND THE POSTPARTUM PERIOD: STATEMENT OF POLICY (2024).

<sup>3</sup> Ass'n of Women's Health, Obstetric & Neonatal Nurses (AWHONN), *Optimizing Outcomes for Women with Substance Use Disorders in Pregnancy and the Postpartum Period*, 48 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 583, 584 (2019).

American Academy of Addiction Psychiatry;<sup>4</sup> American Society of Addiction Medicine;<sup>5</sup> American Psychiatric Association;<sup>6</sup> American Medical Association;<sup>7</sup> American Academy of Pediatrics;<sup>8</sup> American Nurses Association (ANA);<sup>9</sup> American Public Health Association;<sup>10</sup> March of Dimes;<sup>11</sup> and the National Perinatal Association.<sup>12</sup>

Based on the relevant scientific and medical research discussed below, authorities agree that punitive approaches are inappropriate and harmful to the health of women, fetuses, and newborns. Punitive approaches separate newborns

---

<sup>4</sup> AM. ACAD. ADDICTION PSYCHIATRY, USE OF ILLEGAL AND HARMFUL SUBSTANCES BY PREGNANT WOMEN 2 (2018).

<sup>5</sup> AM. SOC'Y ADDICTION MED., PUBLIC POLICY STATEMENT ON SUBSTANCE USE DISORDER AMONG PREGNANT AND POSTPARTUM PEOPLE 1 (2022).

<sup>6</sup> AM. PSYCHIATRIC ASS'N, POSITION STATEMENT: ASSURING THE APPROPRIATE CARE OF PREGNANT AND NEWLY-DELIVERED WOMEN WITH SUBSTANCE USE DISORDERS 3 (2019).

<sup>7</sup> AM. MED. ASS'N, POLICY, H-420.969: LEGAL INTERVENTIONS DURING PREGNANCY 1 (1990) (reaffirmed 2024).

<sup>8</sup> Stephen W. Patrick et al., Comm. on Substance Abuse, Am. Acad. of Pediatrics, *A Public Health Response to Opioid Use in Pregnancy*, 139 PEDIATRICS no. 3, at 1, 1, 4 (2017).

<sup>9</sup> AM. NURSES ASS'N (ANA), POSITION STATEMENT: NON-PUNITIVE TREATMENT FOR PREGNANT AND BREAST-FEEDING WOMEN WITH SUBSTANCE USE DISORDERS 1 (2017).

<sup>10</sup> AM. PUB. HEALTH ASS'N (APHA), POLICY NO. 9020: ILLICIT DRUG USE BY PREGNANT WOMEN (1990).

<sup>11</sup> MARCH OF DIMES, 2023-2024 POLICY PRIORITIES, SUPPORT HEALTHY WOMEN AND BABIES 1 (2022).

<sup>12</sup> NAT'L PERINATAL ASS'N, POSITION STATEMENT: PERINATAL SUBSTANCE USE 3 (2017).

from their parents, subject pregnant women to stress, deny pregnant women prenatal and medical care and access to appropriate substance use disorder treatment, and erode the doctor-patient relationship. Accordingly, ACOG opposes punitive state laws and policies because “use of the legal system to address perinatal alcohol and substance abuse is inappropriate.”<sup>13</sup> The ANA has also called upon registered nurses who work with pregnant women who use controlled substances to seek out providers that offer clinically “appropriate rehabilitative therapy, rather than law enforcement or the judicial system.”<sup>14</sup>

Nora Volkow, director of the National Institute on Drug Abuse, states:

Having a substance use disorder during pregnancy is not itself child abuse or neglect. Pregnant people with substance use disorders should be encouraged to get the care and support they need — and be able to access it — without fear of going to jail or losing their children. Anything short of that is harmful to individuals living with these disorders and to the health of their future babies. It is also detrimental to their families and communities, and contributes to the high rates of deaths from drug overdose in our country.<sup>15</sup>

This point is borne out by research. One cross-sectional study of nearly 4.6 million births in eight states found that policies that criminalize substance use

---

<sup>13</sup> Comm. on Health Care for Underserved Women, Am. Coll. Obstetricians & Gynecologists (ACOG), *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 *OBSTETRICS & GYNECOLOGY* 200, 201 (2011) (reaffirmed 2022).

<sup>14</sup> ANA, *supra* note 9.

<sup>15</sup> Nora D. Volkow, *Pregnant people with substance use disorder need treatment, not criminalization*, STAT (Feb. 8, 2023), <https://www.statnews.com/2023/02/08/addiction-pregnancy-treatment-not-criminalization/>.

during pregnancy, consider it grounds for civil commitment, or consider it child abuse or neglect were associated with significantly greater rates of neonatal abstinence syndrome.<sup>16</sup>

**A. Punitive Responses to Drug Use During Pregnancy Directly Inflict Substantial Harm on Women, Children, and Families.**

Physical and mental health professionals' widespread opposition to coercive responses to drug use during pregnancy stems from the scientific and medical research confirming the risks that the legal system poses to the health of pregnant women, their pregnancies, and their future children. The notion that punishing a father for failure to control or coerce a pregnant woman would benefit the fetus drastically misperceives the interests of pregnant women and their fetuses; it is also medically unsupported.<sup>17</sup>

Laws and policies that attempt to promote fetal wellbeing by punishing pregnant women for substance use or prospective parents for failure to exercise control over a pregnant partner misunderstand this unique relationship between fetal and maternal health and ignore the often-interdependent nature of maternal

---

<sup>16</sup> See Laura J. Faherty et al., *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy With Rates of Neonatal Abstinence Syndrome*, 2 JAMA NETWORK OPEN e1914078 (2019).

<sup>17</sup> See, e.g., Am. Coll. Obstetricians & Gynecologists, Committee Opinion, *Refusal of Medically Recommended Treatment During Pregnancy*, 127 OBSTETRICS & GYNECOLOGY e175 (2016); APHA, *supra* note 10.

and fetal interests. A fertilized egg, embryo or fetus is physiologically dependent on the pregnant woman, and any intervention by the State, or state mandate on a prospective partner's actions, ostensibly on behalf of a fertilized egg, embryo, or fetus, "must be undertaken through the pregnant woman's body."<sup>18</sup> Anything that affects the pregnant woman's health, autonomy, and privacy, in turn, affects her pregnancy, and so "questions of how to care for the fetus cannot be viewed as a simple ratio of maternal and fetal risks but should account for the need to respect fundamental values, such as the pregnant woman's autonomy and control over her body."<sup>19</sup>

For a pregnant woman who must contend with the physical aspects of pregnancy, added concerns for the health of her fetus, her autonomy to make medical decisions for herself and her pregnancy, and her prospects of retaining parental authority, the psychological strains of control and coercion by the State or by a partner on behalf of the State are exacerbated.<sup>20</sup> Stress, both chronic and acute, can cause physical and chemical changes in a pregnant woman's body,

---

<sup>18</sup> ACOG, *supra* note 13 (citing Howard Minkoff & Mary F. Marshall, *Fetal Risks, Relative Risks, and Relatives' Risks*, 16 AM. J. BIOETHICS 3 (2016)).

<sup>19</sup> *Id.*

<sup>20</sup> Barbara A. Hotelling, *Perinatal Needs of Pregnant, Incarcerated Women*, 17 J. PERINATAL EDUC. 37 (2008); Elena Hontoria Tuerk & Ann Booker Loper, *Contact Between Incarcerated Mothers and Their Children: Assessing Parenting Stress*, 43 J. OFFENDER REHABILITATION 23, 28 (2006).

which has implications for both maternal and fetal health and is associated with increased rates of infant mortality, low birthweight, preterm birth, hypertension, developmental delays, and congenital heart defects.<sup>21</sup>

The adverse effects of punishing women for purported risk of harm to their pregnancies continue to affect mothers, their newborns, and their other children long after the pregnancy ends, especially where parents lose temporary or permanent custody of their children.<sup>22</sup> Young children separated from their parents experience traumatic stress with lifelong consequences, even if they are eventually reunified.<sup>23</sup> Research shows that newborns have better outcomes if they remain with their parents, and that family separation policies triggered by positive drug

---

<sup>21</sup> See Michael T. Kinsella & Catherine Monk, *Impact of Maternal Stress, Depression & Anxiety on Fetal Neurobehavioral Development*, 52 CLINICAL OBSTETRICS & GYNECOLOGY 425 (2009); Lynda M. Sagrestano & Ruthbeth Finerman, *Pregnancy and Prenatal Care: A Reproductive Justice Perspective*, in REPRODUCTIVE JUSTICE: A GLOBAL CONCERN 211 (Joan C. Chrisler, ed., 2012).

<sup>22</sup> HUM. RTS. WATCH & AM. CIV. LIBERTIES UNION, YOU MISS SO MUCH WHEN YOU'RE GONE: THE LASTING HARM OF JAILING MOTHERS BEFORE TRIAL IN OKLAHOMA (2018); EILEEN TRZCINSKI ET AL., MICHIGAN FAMILY IMPACT SEMINARS, BRIEFING REPORT NO. 2002-1: WHAT ABOUT ME? CHILDREN WITH INCARCERATED PARENTS (2002).

<sup>23</sup> WOMEN IN PRISON PROJECT, CORR. ASS'N OF N.Y., WHEN "FREE" MEANS LOSING YOUR MOTHER: THE COLLISION OF CHILD WELFARE AND THE INCARCERATION OF WOMEN IN NEW YORK STATE (2006); Kimberly Howard et al., *Early mother-child separation, parenting, and child well-being in Early Head Start families*, 13 ATTACHMENT & HUM. DEV. 5 (2011); Christopher Wildeman & Natalia Emanuel, *Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children, 2000–2011*, 9 PLoS ONE no. 3, at 1 (2014).



tests cause irreparable harm.<sup>24</sup> Thus, the harms of punishing pregnant women and removing children from the care of their parents are serious and apparent.

**B. The Threat and Prospect of Punishments Deter Women from Securing Treatment and Prenatal Care and Undermine Maternal and Fetal Health.**

Women and mothers who use drugs are, like other women and mothers, concerned about their own health, their fetuses, and their children's mutual wellbeing.<sup>25</sup> Clear evidence establishes that women who desire drug treatment and prenatal care are dissuaded from seeking it when faced with the threat of prosecution and its attendant harms to themselves, their pregnancies, their future children, and their families.<sup>26</sup> Studies consistently show that "fear of being reported to the police or child welfare authorities [is] related strongly to a lack of prenatal

---

<sup>24</sup> Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019).

<sup>25</sup> Martha A. Jessup et al., *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. DRUG ISSUES 285, 291 (2003); see also Ashley H. Schempf & Donna M. Strobino, *Drug Use and Limited Prenatal Care: An Examination of Responsible Barriers*, 200 AM. J. OBSTETRICS & GYNECOLOGY 412.e1 (2009); Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 DRUG & ALCOHOL DEPENDENCE 199 (1993); Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM J. PUB. HEALTH 483 (1990).

<sup>26</sup> See Sarah C. M. Roberts & Amani Nuru-Jeter, *Women's Perspectives on Screening for Alcohol and Drug Use in Prenatal Care*, 20 WOMEN'S HEALTH ISSUES 193 (2010); AWHONN, *supra* note 3; SHELLY GEHSAN, S. REG'L PROJECT ON INFANT MORTALITY, A STEP TOWARD RECOVERY: IMPROVING ACCESS TO SUBSTANCE ABUSE TREATMENT FOR PREGNANT AND PARENTING WOMEN 6 (1993).

care.”<sup>27</sup> Even a small number of stories of women losing custody of their children or being subjected to state coercion may have a chilling effect on a woman’s likelihood of accessing medical care while pregnant if she has used or is using criminalized substances.<sup>28</sup> Women who use controlled substances during pregnancy fear that if their doctor discovers any drug use, it would result in a referral to state child protective services and eventual removal of their child. They may therefore try to avoid intervention by withholding their drug use or forgoing prenatal care altogether.<sup>29</sup>

Women who do seek prenatal care are likely to be discouraged from truthfully discussing their drug use by fear that they will be prosecuted or shamed, labeled “neglectful,” or branded as harmful to their own children.<sup>30</sup> These barriers to trust and communication are particularly damaging because access to early and comprehensive prenatal care is one of the most effective tools for reducing infant

---

<sup>27</sup> Schempf & Strobino, *supra* note 25; *see also* DeAnna Y. Smith & Alexis Roane, *Child Removal Fears and Black Mothers’ Medical Decision-Making*, 22 CONTEXTS 18, 20 (2023); Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 HEALTH & JUSTICE 1 (2015); Mishka Terplan et al., *Methamphetamine Use Among Pregnant Women*, 113 OBSTETRICS & GYNECOLOGY 1285, 1290 (2009).

<sup>28</sup> *See* Stone, *supra* note 27, at 1

<sup>29</sup> Roberts & Nuru-Jester, *supra* note 26; Ayman El-Mohandes et al., *Prenatal Care Reduces the Impact of Illicit Drug Use on Perinatal Outcomes*, 23 J. PERINATOLOGY 354 (2003).

<sup>30</sup> *See* STEPHEN R. KANDALL, SUBSTANCE & SHADOW: WOMEN & ADDICTION IN THE UNITED STATES 278-79 (rev. ed. 1999); ACOG, *supra* note 13.

mortality, whether or not the pregnant woman uses drugs.<sup>31</sup> Studies also show that prenatal care substantially reduces risks of low birthweight and prematurity among infants born to women experiencing a substance use disorder.<sup>32</sup> Open communication is also especially critical for women who do seek, or who would otherwise seek, treatment for a substance use disorder.<sup>33</sup> Women who have a substance use disorder also face higher rates of depression, increasing the importance of a strong “therapeutic alliance” between patient and healthcare provider for ensuring successful completion of treatment.<sup>34</sup> By contrast, threats of criminal sanctions have been shown to increase women’s stress and thereby increase their risk of relapse.<sup>35</sup>

---

<sup>31</sup> See, e.g., GEHSAN, *supra* note 26, at 6; Paul Moran et al., *Substance Misuse During Pregnancy: Its Effects and Treatment*, 20 FETAL & MATERNAL MED. REV. 1 (2009); Andrew Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 J. AM. MED. ASS’N 1581, 1585-86 (1993).

<sup>32</sup> El-Mohandes et al., *supra* note 29; see also Terplan et al., *supra* note 27.

<sup>33</sup> See Rosemary H. Kelly et al., *The Detection & Treatment of Psychiatric Disorders and Substance Use Among Pregnant Women Cared for in Obstetrics*, 158 AM. J. PSYCH. 213 (2001).

<sup>34</sup> See NAT’L CTR. ADDICTION & SUBSTANCE ABUSE, *SUBSTANCE ABUSE & THE AMERICAN WOMAN* 64 (1996); Carol E. Tracy & Harriet C. Williams, *Social Consequences of Substance Abuse Among Pregnant and Parenting Women*, 20 PEDIATRIC ANNALS 548 (1991).

<sup>35</sup> See Danielle E. Ramo & Sandra A. Brown, *Classes of Substance Abuse Relapse Situations: A Comparison of Adolescents and Adults*, 22 PSYCH. ADDICTIVE BEHAV. 372, 377 (2008); Michael S. Gordon et al., *A Randomized Clinical Trial of Methadone Maintenance for Prisoners: Findings at 6 Months Post-Release*, 103 ADDICTION 1333 (2008).

Using a pregnant woman’s partner’s support in obtaining substance use disorder treatment for the pregnant woman as evidence that the partner knew of drug use during pregnancy, and was therefore neglectful, discourages partners from providing support and further reduces the likelihood that pregnant women will access necessary care. A policy that chills open communication between a father and his pregnant partner about her health, or that punishes the father for a failure to control the behavior of his pregnant partner, is harmful to both maternal and fetal health. The negative health impacts of the fear of punishment and loss of custody due to substance use while pregnant undermine the State’s objectives to protect health.<sup>36</sup> Directly threatening parents with findings of neglect and loss of custody undermines pregnant women’s physical and psychological wellbeing, discourages women from obtaining prenatal care or substance use treatment, discourages their partners from supporting them, and instead demands that their partners control them.

Finding that parents neglected their children over matters of maternal and fetal healthcare or over failure to control the behavior and health of a pregnant woman exacerbate the economic and racial disparities that are already pervasive in

---

<sup>36</sup> Faherty et al., *supra* note 16 ; Daisy Goodman, Bonny Whalen & Lucy C. Hodder, *It’s Time to Support, Rather than Punish, Pregnant Women with Substance Use Disorder*, 2 JAMA NETWORK OPEN e1914135 (2019).

the healthcare and family regulation systems (also referred to as the child welfare system). For example, obstetric and gynecologic outcomes and care are marked by racial and ethnic disparities, with people of color, and especially Black women, experiencing higher rates of adverse maternal, fetal, and newborn health outcomes and less access to healthcare services.<sup>37</sup> New York State currently faces a maternal mortality crisis that is exponentially dire for Black women. New York is ranked 15th among all states with a maternal mortality rate at 19.3 deaths per 100,000 live births, with Black women dying at a rate over four times higher than white women.<sup>38</sup> Discouraging men from supporting their pregnant partner's bodily autonomy will only exacerbate adverse health outcomes and create additional barriers to care for an already underserved population of women.

## **II. NO MEDICAL OR SCIENTIFIC EVIDENCE JUSTIFIES A PUNITIVE, NON-THERAPEUTIC APPROACH TO PREGNANT WOMEN WHO USE DRUGS.**

Preeminent healthcare organizations agree that drug use during pregnancy is a medical and public health issue that calls for non-punitive, family-centered responses and, if necessary, voluntary treatment. The consensus is that an

---

<sup>37</sup> See COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, RACIAL AND ETHNIC INEQUITIES IN OBSTETRICS AND GYNECOLOGY (2024); Elizabeth Howell & Jennifer Zeitlin, *Quality of Care and Disparities in Obstetrics*, 44 OBSTETRICS & GYNECOLOGY CLINICS N. AM. 13 (2017).

<sup>38</sup> See OFF. OF THE N.Y. STATE COMPTROLLER, DIV. OF STATE GOV'T ACCOUNTABILITY, AUDIT OF MATERNAL HEALTH, REPORT 2022-S-25 (2024).

appropriate response should ensure access to quality prenatal and primary medical care, evidence-based education on drug use during pregnancy, comprehensive drug treatment programs that keep parents and children together, and social service programs such as life skills training, mental health services, and strategies for managing relapse and stress.<sup>39</sup>

Addiction does not show a pregnant woman to be more morally weak, condemnable, or unconcerned with the development of her fetus than any pregnant woman who chooses to carry a pregnancy to term with a disease, condition, or circumstance like diabetes, obesity, tobacco use, or a high-risk occupation. “[I]f the patient is viewed as being the problem or having a problem, as opposed to the substance being a problem,” the risk cannot be most effectively addressed.<sup>40</sup> A prospective father who respects his pregnant partner’s autonomy and agency rather than seeking to exercise control over her body and behavior is similarly not immoral, weak, irresponsible, or condemnable.

#### **A. Substance Use Disorders are Chronic Health Conditions.**

Substance use may be a medically complex matter with a wide variety of causes, risk factors, and prognoses. The once-popular misconception of substance

---

<sup>39</sup> Volkow, *supra* note 15.

<sup>40</sup> *Id.*

use as a failure of moral grit or determination has long been abandoned by medical professionals, social scientists, and most courts. It is medically unrealistic to assume that all women who use substances can or even should simply choose to immediately abstain the moment they become pregnant. It is similarly unrealistic to assume that a woman's partner can force the woman to stop using substances or should exert such control even if they were able to.

Due to the nature of addiction, most pregnant women, even those who seek out treatment for substance use disorders, cannot achieve abstinence totally and immediately. In one study of women receiving treatment for substance use disorder during pregnancy, the average amount of time needed to achieve abstinence from cocaine and marijuana was approximately five months.<sup>41</sup> Substance use disorders are chronic health conditions influenced by sociocultural, economic, biological, and psychological factors.<sup>42</sup> The American Society of Addiction Medicine, the nation's largest organization representing medical professionals who specialize in addiction prevention and treatment, defines addiction as "a treatable, chronic disease involving complex interactions among brain circuits, genetics, the

---

<sup>41</sup> Ariadna Forray et al., *Perinatal Substance Use: A Prospective Evaluation of Abstinence and Relapse*, 150 DRUG & ALCOHOL DEPENDENCE 147 (2015).

<sup>42</sup> AWHONN, *supra* note 3.

environment, and an individual's life experiences.”<sup>43</sup> The most recent Diagnostic and Statistical Manual of Mental Disorders defines a substance use disorder as “a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems.”<sup>44</sup> A person with a substance use disorder may experience a physical need for the controlled substance, which results in cravings and withdrawal symptoms.<sup>45</sup> “People with addiction use substances or engage in behaviors that become compulsive and often continue despite harmful consequences.”<sup>46</sup> Studies have increasingly found that, even when a person experiencing a substance use disorder pursues treatment, relapses are a normal, even expected, part of recovery.<sup>47</sup>

---

<sup>43</sup> *Definition of Addiction*, AM. SOC'Y ADDICTION MED. (Sept. 15, 2019), <https://www.asam.org/resources/definition-of-addiction>; U.S. DEP'T HEALTH & HUM. SERVS. & OFF. OF THE SURGEON GEN., *FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH* (2016).

<sup>44</sup> AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 481, 483 (5th ed., 2013).

<sup>45</sup> Harold W. Goforth et al., *Neurologic Aspects Of Drug Abuse*, 28 *NEUROLOGIC CLINICS* 199 (2010).

<sup>46</sup> AM. SOC'Y ADDICTION MED., *supra* note 43.

<sup>47</sup> Christian S. Hendershot et al., *Relapse Prevention for Addictive Behaviors*, 6 *SUBSTANCE ABUSE TREATMENT, PREVENTION & POL.* no. 17, 1, 2 (2011).



Under the criminal justice theory of deterrence, punitive sanctions are used to lessen the likelihood of similar crimes in future. But as a matter of both law and medicine, people suffering from a substance use disorder “may be unable to abstain even for a limited period.” *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 676 (1989). “[T]he inability to control drug use regardless of consequences is a key feature of substance and alcohol use disorders.”<sup>48</sup> An instance of drug use by a pregnant woman therefore does not necessarily reflect a decision about how to treat her own body or that of her developing fetus but should instead be understood to reflect a symptom of a chronic health condition that can and should be managed as such.<sup>49</sup> And research shows that punishing women for this behavior leads to worse health outcomes.<sup>50</sup>

The physiological and psychological characteristics of substance use disorders do not cease to apply and transform into a matter of willpower just because a person becomes pregnant. For pregnant women who experience substance use disorders, as for pregnant women experiencing all other chronic

---

<sup>48</sup> AWHONN, *supra* note 33.

<sup>49</sup> AM. SOC’Y ADDICTION MED., *supra* note 43; U.S. DEP’T HEALTH & HUMAN SERVS., *supra* note 43; WORLD HEALTH ORG. ET AL., SUBSTITUTION MAINTENANCE THERAPY IN THE MANAGEMENT OF OPIOID DEPENDENCE AND HIV/AIDS PREVENTION 7 (2004).

<sup>50</sup> Faherty et al., *supra* note 16.

disorders, negative outcomes for both mothers and children are most effectively avoided or diminished with medical and public health strategies.

**B. Medical and Scientific Evidence Does Not Show that Substance Use During Pregnancy Causes Uniquely Certain or Severe Harms.**

A common misconception, reflected in the myth of the “crack baby,” is that prenatal exposure to any amount of a controlled substance necessarily causes negative health impacts in newborns, and that these health impacts are unusually certain, unusually severe, and distinct from harms associated with social and environmental factors or other actions taken by pregnant women. This perception is false. Medical consensus does not identify a safe level of alcohol use and other substances during pregnancy, and studies have failed to isolate the harms caused by prenatal drug exposure from the effects of exposure to other pregnancy risk factors, such as poverty and lack of access to prenatal care.<sup>51</sup> Scientific studies have failed to prove that *in utero* exposure to controlled substances—including

---

<sup>51</sup> See, e.g., Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure*, 285 J. AM. MED. ASS'N 1613 (2001); Gary D. Helmbrecht & Siva Thiagarajah, *Management of Addiction Disorders in Pregnancy*, 2 J. ADDICTION MED. 1 (2008); Ashley H. Schempf, *Illicit Drug Use and Neonatal Outcomes: A Critical Review*, 62 OBSTETRICAL & GYNECOLOGICAL SURV. 749 (2007).

cocaine,<sup>52</sup> methamphetamine,<sup>53</sup> heroin and other opioids,<sup>54</sup> and marijuana<sup>55</sup>—is the clear cause of any severe or certain harms. Many pregnancy complications and adverse outcomes experienced by women who have used substances during pregnancy may be attributable to risk factors other than substance use, including social determinants and environmental factors such as poverty, lack of access to medical care, malnutrition, or chronic stress, each of which may cause fetal and maternal harm.<sup>56</sup> Drug use during pregnancy is a medical and public health concern requiring the attention of medical providers. Extraordinary measures—

---

<sup>52</sup> See, e.g., Henrietta S. Bada et al., *Impact of Prenatal Cocaine Exposure on Child Behavior Problems Through School Age*, 119 PEDIATRICS e328 (2007); Daniel S. Messinger et al., *The Maternal Lifestyle Study: Cognitive, Motor, and Behavioral Outcomes of Cocaine-Exposed and Opiate-Exposed Infants Through Three Years of Age*, 113 PEDIATRICS 1677 (2004); Mishka Terplan & Tricia Wright, *The Effects of Cocaine & Amphetamine Use During Pregnancy on the Newborn: Myth versus Reality*, 30 J. OF ADDICTION DISEASES 1 (2011); Editorial Board, *Slandering the Unborn*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html>.

<sup>53</sup> Mari Golub et al., *NTP-DEHR Expert Panel Report on the Reproductive and Developmental Toxicity of Amphetamine and Methamphetamine*, 74 BIRTH DEFECTS RSCH. PART B DEVELOPMENTAL & REPROD. TOXICOLOGY 471 (2005); Am. Coll. Obstetricians & Gynecologists, *Committee Opinion 479: Methamphetamine Abuse in Women of Reproductive Age*, 117 OBSTETRICS & GYNECOLOGY 751 (2011); Terplan & Wright, *supra* note 52.

<sup>54</sup> Helmbrecht & Thiagarajah, *supra* note 51.

<sup>55</sup> See, e.g., Schempf, *supra* note 51; Am. Coll. Obstetricians & Gynecologists, *Committee Opinion 637: Marijuana Use During Pregnancy and Lactation*, 126 OBSTETRICS & GYNECOLOGY 234 (2015).

<sup>56</sup> Am. Pub. Health Ass'n, *Transforming Public Health Works: Targeting Causes of Health Disparities*, 46 THE NATION'S HEALTH 1 (2016); Marleen M. H. J. van Gelder et al., *Characteristics of Pregnant Illicit Drug Users And Associations Between Cannabis Use and Perinatal Outcome in A Population-Based Study*, 109 DRUG & ALCOHOL DEPENDENCE 243 (2010).

which are supposed to “protect” an embryo or fetus—cannot be justified on the unfounded belief that drug use causes universal and uniquely devastating harms to fetal development.

In a large majority of cases in which women have been prosecuted for being pregnant and using a criminalized substance, no adverse pregnancy outcome as a result of that drug use was ever reported.<sup>57</sup> Among many of the remaining cases, including those involving stillbirths or other adverse outcomes, prosecutions have proceeded without any causal evidence that the woman’s drug use or other criminalized conduct caused the harm.<sup>58</sup> But higher courts have now recognized, after reviewing the relevant scientific research, that such prosecutions should not and cannot be sustained based on untested, and now disproven, assumptions about the harms of drug use during pregnancy.<sup>59</sup>

---

<sup>57</sup> 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’Y, & L. 299, 318 (2013).

<sup>58</sup> Azi Paybarah, *Judge Dismisses Murder Charge Against California Mother After Stillbirth*, N.Y. TIMES (May 20, 2021), <https://www.nytimes.com/2021/05/20/us/chelsea-becker-stillbirth-murder-charges-california.html>.

<sup>59</sup> See, e.g., *McKnight v. State*, 661 S.E.2d 354 (S.C. 2008).

### **C. Methadone and Buprenorphine are the Recommended Treatment for Opioid Use Disorder During Pregnancy.**

Methadone and buprenorphine are the recommended treatments for opioid use disorder (OUD) during pregnancy by both United States and New York health officials and are supported by extensive research and clinical guidelines. The Centers for Disease Control and Prevention, the Substance Abuse and Mental Health Services Administration, and the American College of Obstetricians and Gynecologists recommend methadone or buprenorphine as first-line therapy options for pregnant women addicted to opioids.<sup>60</sup> These medications are considered the standard of care for managing OUD during pregnancy, as they help prevent complications associated with opioid use, addiction, and withdrawal.<sup>61</sup>

New York State guidelines align with these national recommendations.<sup>62</sup>

The New York State Office of Addiction Services and Supports advises:

The standard of care for pregnant persons with opioid use or opioid use disorder is medication for opioid use disorder (MOUD) with either methadone or buprenorphine, with psychosocial treatment and supports as needed. Pregnant persons should be advised that MOUD is safe and

---

<sup>60</sup> SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., CLINICAL GUIDANCE FOR TREATING PREGNANT AND PARENTING WOMEN WITH OPIOID USE DISORDER AND THEIR INFANTS (2018); *Treatment of Opioid Use Disorder Before, During, and After Pregnancy*, CTRS. DISEASE CONTROL & PREVENTION (May 15, 2024), <https://www.cdc.gov/opioid-use-during-pregnancy/treatment/index.html>.

<sup>61</sup> AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION: OPIOID USE AND OPIOID USE DISORDER IN PREGNANCY (2017).

<sup>62</sup> N.Y. DEP'T OF HEALTH AIDS INSTITUTE, CLINICAL GUIDELINES PROGRAM, SUBSTANCE USE DISORDER TREATMENT IN PREGNANT ADULTS (2021).

promotes healthier outcomes for both the pregnant person and the newborn.<sup>63</sup>

Notably, New York health officials advise women to refrain from stopping opioid use on their own. The state's office website directs:

If you are pregnant, do not try to stop using opioids on your own. Opioid withdrawal, whether experienced on your own in attempting to stop opioid use or with medically supervised withdrawal (“detox”) likely leads to poor outcomes for the pregnant person and the developing fetus, including miscarriage, premature delivery, and risk of fatal overdose for the pregnant person and the developing fetus with return to opioid use.<sup>64</sup>

Yet, the lower court found that Mr. B neglected his child because he failed to force Ms. W to stop using drugs despite the State's own health guidance that this approach is to be avoided because opioid withdrawal can lead to miscarriage, premature delivery, and death. Babies born with methadone in their system and with neonatal withdrawal syndrome are expected and manageable outcomes of the recommended and medically supervised treatment for OUD during pregnancy.<sup>65</sup>

The U.S. Department of Health and Human Services advises:

---

<sup>63</sup> *Pregnant and Parenting Persons*, N.Y. OFF. OF ADDICTION SERVS. & SUPPORTS <https://oasas.ny.gov/treatment/pregnant-and-parenting-persons> (last visited March 4, 2025).

<sup>64</sup> *Id.*

<sup>65</sup> NEW YORK STATE DEP'T OF HEALTH AIDS INST., *SUBSTANCE USE DISORDER TREATMENT IN PREGNANT ADULTS* (2021); *Neonatal opioid withdrawal syndrome and medication-assisted treatment with methadone and buprenorphine*, U.S. FOOD & DRUG ADMIN. (May 26, 2016), <https://www.fda.gov/drugs/drug-safety-and-availability/neonatal-opioid-withdrawal-syndrome-and-medication-assisted-treatment-methadone-and-buprenorphine>.

A diagnosis of [neonatal abstinence syndrome] or [neonatal opioid withdrawal syndrome] does not imply harm, nor should it be used to assess child social welfare risk or status. It should not be used to prosecute or punish the mother or as evidence to remove a neonate from parental custody.<sup>66</sup>

In this case, the presence of methadone in the newborn's system indicates both that the mother was in treatment and that she was engaged in what health authorities view as the standard of care for treating OUD during pregnancy. Allowing this to be used as evidence of neglect not only defies best practice for achieving healthy outcomes for parents and babies but also forces pregnant women and their partners to make the impossible choice of foregoing what is best for their health and their child's health or risking state intervention.

### **III. THE WAR ON DRUGS HAS USED STIGMATIZING NARRATIVES TO TARGET PARENTS OF COLOR BASED ON ALLEGED SUBSTANCE USE AND HAS CAUSED LASTING DAMAGE THROUGH FAMILY SEPARATIONS.**

The war on drugs and its racist underpinnings and narratives have fueled family separation.<sup>67</sup> This has resulted in significant increases in the number of children within the foster system, exposing greater numbers of children to its harmful effects. These significant and long-lasting harms are particularly

---

<sup>66</sup> Shahla M. Jilani et al., *Standardizing the Clinical Definition of Opioid Withdrawal in the Neonate*, 243 J. Pediatrics 33.e1 (2022).

<sup>67</sup> LOREN SIEGEL, DRUG POL'Y ALLIANCE, THE WAR ON DRUGS MEETS CHILD WELFARE (2021).

burdensome for young children and have been disproportionately borne by children of color.<sup>68</sup>

**A. The War on Drugs Has Perpetuated Racist Narratives About Parents Who Use Drugs.**

The war on drugs has long relied on stigmatizing narratives regarding the capacity of parents. In addition to establishing harsh criminal penalties for possession and distribution of substances, the war on drugs has infiltrated the family regulation system (also known as the child welfare system), resulting in the separation of families based on the perceived risks associated with parental drug use.<sup>69</sup> These actions were partly spurred by racist stereotypes regarding low-income communities of color that took root in the 1980s.<sup>70</sup> Specifically, media coverage around the so-called “crack baby” epidemic constructed an exaggerated view of Black mothers poisoning their children and provided justification for punitive state intervention.<sup>71</sup>

---

<sup>68</sup> See N.Y. ADVISORY CMTE. TO THE U.S. COMM. ON CIVIL RIGHTS, EXAMINING THE NEW YORK CHILD WELFARE SYSTEM AND ITS IMPACT ON BLACK CHILDREN AND FAMILIES (2024).

<sup>69</sup> SIEGEL, *supra* note 67, at 1-3; Loren Siegel, *The Pregnancy Police Fight the War on Drugs*, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 249 (Craig Reinerman & Harry G. Levine, eds., 1997).

<sup>70</sup> See Editorial Board, *supra* note 52.

<sup>71</sup> DOROTHY ROBERTS, TORN APART, HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES--AND HOW ABOLITION CAN BUILD A SAFER WORLD 2 (2022).



In the decades that followed, these sensationalized depictions contributed to the rapid growth of the number of children, particularly Black children, in foster care.<sup>72</sup> These narratives coincided with increases in federal funding for family separation and decreases in funding for basic health and social services, such as drug treatment, housing, and childcare.<sup>73</sup>

Removals from parental custody have become commonplace and continue to disparately affect communities of color. In fiscal year 2022, 186,603 children entered the foster care system, which totaled 368,530 children.<sup>74</sup> Despite representing 14 percent of the child population, Black children comprised 23 percent of the total foster child population.<sup>75</sup> Between 2000 and 2011, one out of every 17 white children, one out of every nine Black children, and one out of every seven Indigenous children were taken from their parents' custody.<sup>76</sup> Many family

---

<sup>72</sup> 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).

<sup>73</sup> DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 174-177 (2002); LEROY PELTON, FOR REASON OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 6-7, 10-13 (1989); *A Child Welfare Timeline*, NAT'L COAL. FOR CHILD PROT. REFORM (2021) <https://nccpr.org/a-child-welfare-timeline/>; see SIEGAL, *supra* note 67.

<sup>74</sup> U.S. DEP'T HEALTH & HUM. SERVS., ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT 1 (2023).

<sup>75</sup> *Id.* at 2; FED. INTERAGENCY FORUM ON CHILD & FAM. STATS., AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING xiv-xv (2021).

<sup>76</sup> Christopher Wildeman & Natalia Emanuel, *Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children*, 9 PLOS ONE 1, 5 (2014).

regulation system inquiries are associated with parental drug use, with nearly 80 percent of foster system cases involving allegations of drug use by caretakers.<sup>77</sup> As in the present case, these inquiries are often initiated by a positive drug test, rather than any articulated harm to a child.<sup>78</sup> Parental substance use has become the “second most common circumstance associated with child removal.”<sup>79</sup> For children under the age of one, removals for parental alcohol or drug use comprised a shocking 51 percent of cases.<sup>80</sup> The war on drugs is a primary driver of family separations.

Inaccurate assumptions about parents who use drugs routinely result in findings of neglect and subsequent custody removals. As the current case demonstrates, without clear guidance, courts will continue to perpetuate family separations based on stigma born from the deleterious legacy of the war on drugs.

---

<sup>77</sup> Nancy K. Young, Sharon M. Boles & Cathleen Otero, *Parental Substance Use Disorders and Child Maltreatment: Overlap, Gaps, and Opportunities*, 12 CHILD MALTREATMENT 137, 145 (2007).

<sup>78</sup> MOVEMENT FOR FAM. POWER, “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 30-33, 88 (2020); Margaret H. Lloyd & Jody Brook, *Drug testing in child welfare: A systematic review*, 104 CHILDREN & YOUTH SERVS. REV. 104389, at 7-11 (2019).

<sup>79</sup> 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).

<sup>80</sup> URBAN INST., CHILDREN AFFECTED BY PARENTAL SUBSTANCE USE 1 (2023).

**B. Removals Are Often Unnecessary, Cause Significant Damage to Children, and Expose Children to the Negative Effects of the Foster System.**

The theory used to justify removing large numbers of children from their parents' care is that removal is necessary to keep children safe. This theory was recently tested in New York City and proved to be unsupported. During the COVID-19 pandemic starting in March 2020, the number of children removed from their homes fell by over 50 percent.<sup>81</sup> The data now shows that children's safety was not comprised. Rather children remained safe across a range of metrics.<sup>82</sup>

In contrast, separating children from their families causes long-lasting disruption and trauma.<sup>83</sup> One study showed children at the margin of removal from their parents' custody and placement in the foster system may have better life outcomes when they remain at home.<sup>84</sup> Even if young children are eventually

---

<sup>81</sup> Melissa Friedman & Danielle Rohr, *Reducing Family Separations in New York City: The COVID-19 Experiment and a Call for Change*, 123 COLUMBIA L. REV. 52 (2023).

<sup>82</sup> *Id.*; Arons, A., *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUMBIA J. RACE & LAW (2022); Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Families*, 102 MARQ. L. REV. 1161, 1166–67 (2019).

<sup>83</sup> Trivedi, *supra* note 24, at 527-552.

<sup>84</sup> Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1584 (2007).

reunified with their parents, they can experience traumatic stress and other lifelong consequences due to separation.<sup>85</sup>

Many of these negative outcomes are connected to placement within the foster system.<sup>86</sup> Being in the foster system is associated with significant and lasting negative effects, including increased behavioral problems,<sup>87</sup> criminal involvement,<sup>88</sup> and homelessness.<sup>89</sup> A 2012 survey showed that children placed in foster care generally had more mental and physical conditions than children not placed in the foster system.<sup>90</sup> These children were approximately twice as likely to have asthma, speech problems, and learning disabilities, as well as three times as likely to have hearing and vision problems.<sup>91</sup> Particularly for infants, foster care

---

<sup>85</sup> Trivedi, *supra* note 24, at 527-28, 530-31.

<sup>86</sup> U.S. DEP'T HEALTH & HUM. SERVS., *supra* note 74, at 1.

<sup>87</sup> Catherine R. Lawrence, Elizabeth A. Carlson & Byron Egeland, *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57, 71 (2006).

<sup>88</sup> Jennifer L. Hook & Mark E. Courtney, *Employment outcomes of former foster youth as young adults: The importance of human, personal, and social capital*, 33 CHILDREN & YOUTH SERVS. REV. 1855, 1863 (2010).

<sup>89</sup> CHAPIN HALL AT THE UNIV. CHICAGO, MISSED OPPORTUNITIES: PATHWAYS FROM FOSTER CARE TO YOUTH HOMELESSNESS IN AMERICA (2019).

<sup>90</sup> Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, 138 PEDIATRICS 1, 8-10 (2016).

<sup>91</sup> *Id.*

has significant lasting negative impacts on children’s attachment with caregivers.<sup>92</sup> Even if young children are eventually reunified with their parents, they can experience traumatic stress and other lifelong consequences due to separation,<sup>93</sup> leading scholars to proclaim, “If a child survives foster care it’s not because of the system, it’s despite the system.”<sup>94</sup>

Furthermore, these outcomes are not evenly distributed.<sup>95</sup> The foster system disproportionately burdens children of color. The U.S. Government Accountability Office found that Black children were more than twice as likely to be foster children and stayed in foster care an average of nine months longer than white children.<sup>96</sup> It follows that Black children are disparately more exposed to the risks of harm from the foster system.

In this case, infant L.B. was ordered removed from Father’s custody without any articulable evidence of risk of harm and placed in the custody of the state. This removal actually places L.B. in harm’s way due to the myriad harms associated

---

<sup>92</sup> K. Chase Stovall & Mary Dozier, *Infants in Foster Care: An Attachment Theory Perspective*, 2 ADOPTION Q. 55, 82-84 (1998).

<sup>93</sup> Trivedi, *supra* note 24, at 523.

<sup>94</sup> ROBERTS, *supra* note 73, at 223 (quoting author Jennifer Toth).

<sup>95</sup> N.Y. ADVISORY CMTE. TO THE U.S. COMM. ON CIVIL RIGHTS, EXAMINING THE NEW YORK CHILD WELFARE SYSTEM AND ITS IMPACT ON BLACK CHILDREN AND FAMILIES (2024).

<sup>96</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE 1, 26 (2007).

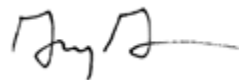
with severance of parental relationships. Courts will continue to utilize the arbitrary and stigmatizing approach adopted by the lower court in this case and justify findings of neglect and custody removals based solely on drug use and the requirement of prospective fathers to control the bodies and actions of pregnant women, placing more children at risk of entering the foster system, unless this Court provides clarity. If this Court does not intervene, these scientifically unsound and discriminatory assumptions of the war on drugs will continue to separate families and cause lasting harm to children, particularly children of color.

### **CONCLUSION**

For these reasons, *amici* respectfully urge the Court to grant Appellant's motion for leave to appeal.

Dated: March 5, 2025

Respectfully submitted,



---

Grey Gardner  
DRUG POLICY ALLIANCE  
131 West 33rd Street, 15th Fl  
New York, NY 10001  
Tel.: (212) 613-8020

*Counsel for Proposed Amici Curiae*

NEW YORK STATE COURT OF APPEALS  
CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to 22 N.Y.C.R.R. Part 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

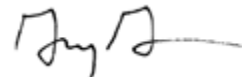
*Type.* A proportionately spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

*Word Count.* The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, corporate disclosure statement, signature blocks, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 6,854 words.



---

Grey Gardner  
DRUG POLICY ALLIANCE  
131 West 33rd Street, 15th Fl  
New York, NY 10001  
(212) 613-8020  
ggardner@drugpolicy.org