

Testimony of Pregnancy Justice to the Colorado Senate Judiciary Committee in Support of HB23-1187 - Alternatives in Criminal Justice System and Pregnant Persons

March 14, 2023

Thank you for the opportunity to address this Committee.

On behalf of Pregnancy Justice, we respectfully submit this written testimony in support of CO House Bill 23-1187. We are a non-partisan legal advocacy organization dedicated to the welfare of pregnant people and their families. Our testimony draws on over 20 years of work on cases in which state actors intervened in a pregnant person's medical decision-making or punished them and their family based on something they may have or may not have done while pregnant. And since 1973, we have documented over 1,700 cases in which birthing people were arrested, prosecuted, convicted, detained, or forced to undergo medical interventions¹ because state actors assumed their rights could be denied in the interest of fetal protection².

This bill provides crucial clarifications to the criminal justice process. It recognizes that the pregnant and postpartum period should be explicit qualifications for alternative sentencing options at every stage of the process. HB23-1187 seeks to ensure that women in the criminal justice system receive the care and support they deserve during this critical period of their lives. Furthermore, one's substance use while pregnant should not be a determining factor in their qualification for alternative sentencing nor it deter the committee's judgement on the merits of this bill.

Colorado has already taken the stance that pregnant people have the right to make autonomous choices without penalty of prosecution or punishment. This stance is supported by major medical organizations.

In April of 2022, the Colorado legislature passed the Reproductive Health Equity Act. This Act states that public entities shall not deprive a person's right, through punishment or prosecution, to engage in acts during their pregnancy based on any potential or perceived impact that act may have on the pregnancy³. Colorado's stance is clear: pregnant people deserve autonomy and should not be penalized for actions they take during pregnancy, regardless of the potential or actual outcomes. Thus, HB23-1187's

¹ Pregnancy Justice, Arrests and Deprivations of Liberty of Pregnant Women, 1973-2020 (Sept. 2021), bit.ly/arrests1973to2020; Paltrow & Flavin, Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health, 38 J. Health Politics, Pol. & L. 299, 323 (2013).

² A significant number of the arrests and prosecutions identified involved allegations of the use of controlled substances, even though the vast majority of state criminal laws do not make using drugs—as opposed to possessing drugs—illegal. Accordingly, these prosecutions sought to transform drug use or dependency by one group of people—pregnant women—into criminal “child abuse,” “chemical endangerment” or “drug distribution.”

³ Colo. Rev. Stat. § 25-6-404.

presumption against incarceration for pregnant or postpartum people should apply to people who used substances while pregnant as well. Criminal penalties are not the solution when it comes to substance use during pregnancy.

Many of the major U.S. medical associations agree that criminalization is never a valid solution for pregnant people who use substances.⁴ Such a legal regime serves only to erode patient trust in medical providers and to deter pregnant people from seeking prenatal care and substance use treatment.⁵

Both the science and outcomes in other states make clear that imposing criminal penalties for substance use during pregnancy do not achieve the purported means of protecting fetal and maternal health.

Exempting pregnant people who have used substances from HB23-1187's presumption requirement would have no positive outcome. Contrary to popular belief criminalization of substance use during pregnancy does not facilitate treatment⁶ and in fact, can lead to worse fetal and maternal health outcomes, as seen in cases like Tennessee's fetal assault law.⁷ This law was so harmful to the health of babies that the state allowed it to sunset after a mere two years⁸. Further studies show that it deterred pregnant women from accessing prenatal care or appropriate drug treatment and increased the number of fetal and infant deaths⁹. For example, in 2015 alone, the year after the law went into effect, twenty more fetal deaths and sixty more infant deaths occurred than would have otherwise¹⁰.

⁴ See American Medical Association, Policy Statement - H-420.962, Perinatal Addiction - Issues in Care and Prevention (last modified 2017); American Medical Association, Policy Statement - H-420.969, Legal Interventions During Pregnancy (2016); American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women, Committee Opinion 473, Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist (2011, reaffirmed 2014); American Academy of Family Physicians, Policy, Substance Abuse and Addiction, section entitled "Pregnant Women, Substance Use and Abuse by" (2003, 2016 COD).

⁵ See Report of American Medical Association Board of Trustees, Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women, JAMA Vol. 264, No. 20 p.2667 (1990); American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women, Committee Opinion 473, Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist (2011, reaffirmed 2014); American College of Obstetricians and Gynecologists Committee on Obstetric Practice, Committee Opinion 524, Opioid Use and Opioid Use Disorder in Pregnancy (2017); National Perinatal Association, Position Statement, Perinatal Substance Use (2017); American Society of Addiction Medicine, Public Policy Statement on Chemically Dependent Women and Pregnancy (1989).

⁶ Am. Nurses Ass'n, Position Statement, Non-punitive Treatment for Pregnant and Breast-feeding Women with Substance Use Disorders (2017) ("Contrary to claims that prosecution and incarceration will deter pregnant women from substance use, the greater result is that fear of detection and punishment poses a significant barrier to treatment.")

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

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Not only does criminalization not work as a solution, but there is also “no scientific evidence of unique, certain, or irreparable harm for fetuses exposed to cocaine, methamphetamine, opioids, or cannabis in utero,” contrary to popular belief.

Conclusion

Pregnant and postpartum individuals in Colorado deserve better. Being incarcerated should never be a reason to deny someone the right to choose their medical care, location of birth, decision to breastfeed, or postpartum recovery options. Nor should their status as someone who uses substances during pregnancy be a factor in this decision. The legislature has already taken the quintessential first step in ensuring that no birthing Coloradans will be deprived of their right to make their own decisions during pregnancy and HB23-1187 goes even further to ensure that residents can safely carry out their pregnancies as they wish.

In the end, prisons are not designed or built for pregnant or postpartum individuals. And if a prison is the only option for giving birth, it would be a tremendous failure of our institutions. HB23-1187 provides Colorado with the opportunity to be a leader in advocating for birthing individuals within the criminal legal system, while emphasizing non-punitive responses for individuals who use substances while pregnant.

Any questions can be directed to Lauren Wranosky at Pregnancy Justice.

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