

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

AMERICAN CIVIL LIBERTIES UNION
OF NEW MEXICO, MICAELA CADENA,
in her capacity as STATE REPRESENTATIVE,
and LINDA LOPEZ, in her capacity
as STATE SENATOR

Petitioners,

v.

MICHELLE LUJAN GRISHAM, in her
capacity as GOVERNOR, and
VALERIE SANDOVAL, in her capacity
as ACTING CABINET SECRETARY
for the CHILDREN, YOUTH, AND FAMILIES
DEPARTMENT,

No. S-1-SC-41428

Respondents.

**MOTION OF PREGNANCY JUSTICE AND IVES & FLORES
FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE***

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**Pro hac vice admission pending*

Proposed *amici curiae* Pregnancy Justice and Ives & Flores, P.A. respectfully move under Rule 12-320(A) NMRA for leave to file their conditionally filed *amici curiae* brief. In support of this motion, *amici* state as follows:

1. *Amicus* Pregnancy Justice is a New York-based nonprofit legal organization that defends and advocates for the rights of pregnant women and all pregnancy-capable people facing civil or criminal prosecution in connection with their pregnancies and pregnancy outcomes. Pregnancy Justice works nationwide to decriminalize pregnancy while upholding the rights and personhood of pregnant women and pregnant people.
2. *Amicus* Ives & Flores P.A. is a New Mexico-based law firm that advocates for New Mexico residents who have experienced harm and losses through negligence and the violation of civil rights.
3. *Amici* have a well-established interest in opposing policies that criminalize pregnancy and upholding the personhood of pregnant people, an interest directly implicated by the CYFD Directive at issue. Here, *amici* pursue that interest by urging this Court to exercise mandamus jurisdiction over the Emergency Petition and stay implementation of the Directive in order to protect New Mexicans' inalienable rights to reproductive freedom and the care and custody of their children.

WHEREFORE, *amici* respectfully ask this Court to grant them leave to file the conditionally filed *amici curiae* brief, attached as **Exhibit A**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that a true copy of the foregoing Motion for Leave to File Brief of *Amici Curiae* was filed electronically and served to all counsel of record this 28th day of May 2026 via the Odyssey e-filing/service system.

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EXHIBIT A

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-320(D)(3) NMRA, this Amicus brief complies with the limitations set forth under Rule 12-318(F), (G) NMRA:

1. This Amicus brief was prepared using Times New Roman typeface set at a 14-point font size.
2. This Amicus brief does not exceed the thirty-five-page limitation.
3. This Amicus brief contains a total of 8,062 words.
4. The word count was obtained using Microsoft Word for Microsoft 365 MSO's word-count feature.

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INTEREST OF *AMICI CURIAE*

Pregnancy Justice is a New York-based nonprofit legal organization that defends and advocates for the rights of pregnant women and all pregnancy-capable people facing civil or criminal prosecution in connection with their pregnancies and pregnancy outcomes. Pregnancy Justice works nationwide to decriminalize pregnancy while upholding the personhood of pregnant women and pregnant people.

Ives & Flores P.A. is a New Mexico-based law firm that advocates for New Mexico residents who have experienced harm and losses through negligence and the violation of civil rights.

This case involves important constitutional principles regarding the inalienable rights informing reproductive freedom and justice, namely the right to have children and to raise them in safe and healthy environments. *Amici* hold an interest in ensuring that these rights—which are safeguarded by New Mexico’s statutes and Constitution and a deep well of jurisprudence—are not overridden by the directive relating to substance-exposed infants (hereinafter, the “Directive”) which requires the Secretary of the Children, Youth and Families Department (“CYFD”) to file abuse and neglect petitions at birth and immediately separate parents from an infant who tests positive for the substances enumerated in the Directive.

Should the Directive be allowed to stand, New Mexico will undermine the personhood of pregnant people, violate their constitutional and statutory rights, and impose an unjustifiable and discriminatory enforcement and surveillance mechanism on all New Mexico parents.

FACTUAL BACKGROUND

Amici adopt the Factual Background laid out in Petitioner’s Emergency Petition for Writ of Mandamus and Request for Stay.

SUMMARY OF ARGUMENT

On July 7, 2025, the “Filing Petitions for Drug Exposed Infants” Directive was issued by the Acting Chief General Counsel of CYFD stating that “[e]ffective immediately,” CYFD would take into custody and file an abuse/neglect petition prior to discharge from any hospital for any “children born exposed to methamphetamines, fentanyl, poly-substance, or diagnosed with fetal alcohol syndrome . . .”¹ *Id.* In a follow-up memorandum issued four days later by Teresa Casados, the CYFD Cabinet Secretary, Ms. Casados further explained that child separation was “necessary to prevent *potentially* imminent physical harm. Importantly, removal is not based solely on a finding that a *mother* is using or abusing drugs. Rather, the safety and risk concerns concomitant with exposure to

¹ The Directive, which was addressed to All Protective Services Staff, defined “poly-substance” as “the presence of two or more illegal substance or the presence of one illegal substance with THC and/or alcohol.” Memorandum from the Acting Chief General Counsel of Children, Youth, and Families Dept. (July 7, 2025) (on file with the CYFD).

these substances are unacceptably high and indicate that a child is *at risk* of suffering serious harm, which is how our laws define an ‘abused child.’” Memorandum from the Secretary of Children, Youth, and Families Dept. (July 11, 2025) (on file with the CYFD) (emphasis added).²

Rather than provide whole family care to parents who use during pregnancy, the Directive undermines true efforts to address the impact of substance use on born infants. The Directive instead imposes irremediable harm upon New Mexico families without any justifiable basis while undermining decades of precedent and violating 2023’s Reproductive and Gender-Affirming Health Care Freedom Act (the “Act”), as well as New Mexico’s unenumerated constitutional protections for the right to bodily autonomy. Further, the Directive undermines federal and New Mexico law establishing the obligations of child welfare agencies to make best efforts to prevent the need for family separation and concerning states’ obligations to identify and assist substance-exposed newborns and their families.

² It should also be noted that on March 10, 2026, the New Mexico Health Care Authority issued a notice of rulemaking to promulgate New Mexico Administrative Code (“NMAC”) rule 8.3.2: Family Health and Well Being, Plan of Safe Care for Substance-Exposed Infants, which, if codified, would expand the definition of “substance-exposed infant” to include any infant “who was exposed in utero to a substance that has the potential to impact the health or development of the infant, including an illicit substance such as fentanyl, methamphetamine or heroin, prescribed medications such as opioids, methadone, buprenorphine, or legal substances including alcohol, tobacco, and marijuana.” While this rule has not been finalized, it articulates and illustrates efforts by the State to explicitly include the conduct of pregnant women and people during their pregnancies within the ambit of the Directive.

ARGUMENT

This Court should use its mandamus power and grant the requested stay. Without this Court's intervention, New Mexico's hospitals will separate newborn infants from their parents while robbing them of the ability to determine whether such separations violate the protections of the Constitution and the precepts of the Act, protections that all New Mexicans are entitled to enjoy.

I. THE DIRECTIVE VIOLATES NEW MEXICO'S STATUTORY AND CONSTITUTIONAL PROTECTIONS FOR REPRODUCTIVE HEALTH AND JUSTICE.

In determining whether to exercise its original jurisdiction, this Court applies the *Sandel* test, a multi-factor, discretionary, and flexible analysis not meant to be applied in an "overly formalistic" manner:

[W]hen the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.

State ex rel. Sandel v. N.M. Pub. Util. Comm'n, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55; *State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 25, 487 P.3d 815 ("mandamus is a discretionary writ and flexible by nature, and thus we do not apply those factors in an overly formalistic way.").

Under New Mexico’s Constitution, all people, including pregnant women,³ are fundamentally entitled to bodily integrity, a right refracted through the Act’s pregnancy protections. N.M. Const. art. II, § 23 (“The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people.”). Because the facts here are fully undisputed (*see* Petitioners’ Br. at 5-7), because the Directive implicates constitutional and statutory questions of great public importance regarding the violation of a pregnant woman’s bodily integrity and personhood by granting legal rights to her fetus, and because New Mexico’s hospitals will continue to separate newborn infants from their parents without the luxury of expeditious resolution, this Court’s mandamus jurisdiction is established.

A. The CYFD Directive Violates Article II, Section 23 of the New Mexico Constitution.

This Court recognizes greater protections of rights under the New Mexico Constitution than the federal constitution. *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 22, 142 N.M. 89, 163 P.3d 476. This Court has also recognized that “some rights of a ‘personal nature’ are entitled to constitutional protection.” *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 23, 356 P.3d 564, *aff’d*, 2016-NMSC-027, 376

³ *Amici* use “pregnant woman” or “women” interchangeably with pregnant people to ensure transgender men and gender-diverse people who will also be harmed by the Directive are included within the scope of this argument. *Amici* also recognize the specific and unique harms imposed on women generally and pregnant women in particular that are separate and apart from the trans experience and situated in millennia-long oppressions and socializations based in both sex and gender.

P.3d 836. These rights include the fundamental liberty interest of parents in the care, custody, and control of their children (*In re Pamela A.G.*, 2006–NMSC–019, ¶ 11, 139 N.M. 459, 134 P.3d 746), and the freedom of personal choice in matters of family life and the right to familial integrity. *Oldfield v. Benavidez*, 1994–NMSC–006, ¶ 14, 116 N.M. 785, 867 P.2d 1167.

A mother’s personhood during pregnancy falls within this scope. Indeed, “[s]ince time immemorial, women’s biology and ability to bear children have been used as a basis for discrimination against them,” particularly where her rights are removed from her because of a belief that a particular act she takes might “damage the fetus.” *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 41, 126 N.M. 788, 975 P.2d 841 (citation omitted). As the United States Supreme Court has held, “[i]t is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty . . . as the State has touched . . . upon . . . the very bodily integrity of the pregnant woman.” *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 896, 112 S. Ct. 2791, 2830, 120 L. Ed. 2d 674 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022). Through Article II, Section 23, New Mexico’s Constitution creates a fundamental,

unenumerated right to bodily integrity,⁴ particularly during the course of a woman’s pregnancy. The application of the Directive violates this right by allowing the State to separate babies from their mothers based on allegations of prenatal substance use.⁵

1. The Directive is Not the Least Restrictive Means to Protect Infants from Abuse or Neglect.

The Directive fails to satisfy any level of scrutiny, though such analysis is unnecessary here. While it is not in question that the State “has a compelling interest in the health, education, and welfare of its children,” *Oldfield*, 1994-NMSC-006, ¶ 15, the Directive is, in fact, the most restrictive and damaging means to achieve that interest. *See* § II, *infra*.

⁴ Several sister states have found that a foundational right to bodily integrity exists within the context of reproductive freedom. *See, e.g., Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) (“[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”) (citation omitted); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 484 (Kan. 2019) (“At the core of the natural rights of liberty and the pursuit of happiness is the right of personal autonomy, which includes the ability to control one’s own body, to assert bodily integrity, and to exercise self-determination. . . . Each of us has the right to make self-defining and self-governing decisions about these matters.”); *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645, 653 (Miss. 1998) (“Protected within the right of autonomous bodily integrity is an implicit right to have an abortion.”)

⁵ It should be noted that the language of the Directive is directed at the behavior of mothers, not fathers. Per the issued memoranda, removal is based on infants “born exposed”, and notes that removal is “not based solely on a finding that a *mother* is using or abusing drugs.” Memorandum from the Acting Chief General Counsel of Children, Youth, and Families Dept. (July 7, 2025) (on file with the CYFD); Memorandum from the Secretary of Children, Youth, and Families Dept. (July 11, 2025) (on file with the CYFD) (emphasis added). Additionally, in the March 10, 2026 notice of rulemaking issued by the New Mexico Health Care Authority attempting to codify the Directive, the implicit is made explicit, including any infant “*exposed in utero* to a substance that has the potential to impact the health or development of the infant . . .” NMAC 8.3.2 (proposed Mar. 10, 2026). As there is no mechanism introduced by the State to surveil or initiate separation proceedings on the basis of fathers who are using substances, this act constitutes sex discrimination under Article II, Section 18 of New Mexico’s Constitution.

B. The Directive Violates the Reproductive and Gender-Affirming Health Care Freedom Act.

The Act underscores the bodily integrity protections afforded by Article II, Section 23 of the New Mexico Constitution. As this Court has stated: “we cannot address the question presented—whether [a statute] may constitutionally be applied in the circumstances presented here—without first determining what the statute proscribes. We also must interpret statutes in a manner that avoids, to the extent possible, raising constitutional concerns.” *Morris*, 2015-NMCA-100, ¶ 16. Reading the Act both for what it provides and for what it proscribes and interpreting the statute accordingly creates constitutional concerns when applied to the Directive.

The Act states that a public body “shall not deprive, *through prosecution, punishment or other means*, a person’s ability to act or refrain from acting during the person’s pregnancy based on the potential, actual or perceived effect on the pregnancy.” N.M. Stat. Ann. § 24-34-3(C) (West 2023) (emphasis added). The Act also states that “a public body shall not impose . . . any law . . . policy or regulation that violates or conflicts with the provisions of the . . . Act.” *Id.* at (D). As this Court recently held: “Under the . . . Act, the Legislature *explicitly preempted conflicting laws or policies implemented by other public bodies.*” *State ex rel. Torrez v. Bd. of Cnty. Comm’rs for Lea Cnty.*, 2025-NMSC-011, ¶ 45, 572 P.3d 837 (emphasis added). By requiring that newborns be automatically separated from their parents and an abuse and neglect petition filed when a baby tests positive for substances, the

Directive prosecutes moms for using during their pregnancies based on potential or perceived threats to their pregnancies and thus constitutes an action explicitly proscribed and preempted by § 24-34-3(C) of the Act, and unconstitutionally undermines the Act's protections for the bodily integrity of pregnant people.

The Directive creates aggressive civil liability that is entirely at odds with the purpose and intention of the Act, which explicitly protects against the very prosecutions CYFD is currently pursuing. Without judicial prophylaxis, there is no bottom to the civil pregnancy criminalization at play here. As the Maryland Supreme Court wrote:

[I]f, as the State urges, the [child abuse] statute is read to apply to the effect of a pregnant woman's conduct on the child she is carrying, it could well be construed to include not just the ingestion of unlawful controlled substances but a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature—everything from . . . the continued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child. Such ordinary things as skiing or horseback riding could produce criminal liability. If the State's position were to prevail, there would seem to be no clear basis for categorically excluding any of those activities from the ambit of the statute; criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be.

Kilmon v. State, 905 A.2d 306, 311-12 (Md. 2006). The sidestepping of the Act becomes an unconstitutional justification for stripping personhood and bodily integrity from pregnant people without making available any of the care the CYFD was meant to provide.

1. The CYFD Directive Illegally Criminalizes Mothers and Gives Rights to Fetuses.

The Directive requires public bodies to file abuse/neglect petitions “in all instances where an infant was born exposed to methamphetamines, fentanyl, poly-substance, or diagnosed with fetal alcohol syndrome.” Memorandum from the Acting Chief General Counsel of Children, Youth, and Families Dept. (July 7, 2025). The reasoning provided by Secretary Casados for this separation is the “continuously growing threat to the safety of children in New Mexico posed by *pre-natal* ingestion of alcohol, fentanyl and other high-potency synthetic drugs.” Memorandum from the Secretary of Children, Youth, and Families Dept. (July 11, 2025) (emphasis added).

Justifying the filing of a child abuse/neglect petition based solely on prenatal behavior removes personhood from women and assigns it instead to their fetuses, a fringe legal perspective New Mexico law has long rejected. Indeed, as a preliminary matter, in New Mexico, the term “human being” does not include an unborn fetus. *State v. Willis*, 1982-NMCA-151, ¶ 10-11, 98 N.M. 771, 652 P.2d 1222 (noting that “[t]he Legislature had treated human beings and unborn infant children differently for over one hundred years.”). New Mexico’s child abuse statute provides that

“[a]buse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting *a child* to be . . . placed in a situation that may endanger the child’s life or health[.]” N.M. Stat. Ann. § 30–6–1(D) (West 2009). Because the Legislature did not intend for a viable fetus to be included within the statutory definition of a child for the purposes of the child abuse statute, a pregnant woman cannot “reasonably know[] that her conduct was criminal” and any postnatal prosecution based on any alleged prenatal acts a woman might take is forbidden under both the Act and existing caselaw.⁶ *State v. Martinez*, 2006-NMCA-

⁶ Here again, the overwhelming majority of jurisdictions asked to prosecute a mother for prenatal actions—*whether legal or illegal*—refuse to provide legitimacy to such bodily incursions. *See Arms v. State*, 471 S.W.3d 637, 641-42 (Ark. 2015) (defendant’s unborn child was not a “person” for purposes of statute governing criminal offense of introduction of a controlled substance into the body of another person, and thus none of defendant’s actions prior to birth of child violated statute; criminal code expressly limited criminalizing conduct with respect to unborn child to homicide offenses and even then did not allow a mother to be charged or convicted of any homicide offense while her child was in utero); *State v. Stegall*, 828 N.W.2d 526, 533 (N.D. 2013) (an unborn fetus is not a “child” within meaning of child endangerment statute, and thus “a pregnant woman is not criminally liable for endangerment of a child for prenatal conduct that ultimately harms a child born alive”); *Kilmon*, 905 A.2d at 315 (a mother may not be held criminally liable under a reckless endangerment statute for prenatal drug ingestion); *State v. Luster*, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992) (pregnant woman could not reasonably have known use of illegal drugs that affected the fetus could subject her to criminal prosecution for drug distribution); *State v. Aiwohi*, 123 P.3d 1210, 1223 (Haw. 2005) (a fetus is not a person within the meaning of the reckless manslaughter statute); *State v. Ashley*, 701 So.2d 338, 342 (Fla. 1997) (“to allow prosecution for manslaughter [based on a mother’s prenatal conduct] would require that this Court extend the ‘born alive’ doctrine in a manner that has been rejected by every other court to consider it.”); *State v. Dunn*, 916 P.2d 952, 955 (Wash. Ct. App. 1996) (an unborn fetus is not a “child” for purposes of criminal prosecution of mistreatment of a child); *Reinesto v. Superior Ct. of Ariz.*, 894 P.2d 733, 736 (Ariz. Ct. App. 1995) (“Because the statutory reference to ‘child’ does not include a fetus, petitioner could not reasonably have known she could be prosecuted for child abuse because of her prenatal conduct.”); *Collins v. State*, 890 S.W.2d 893, 897-98 (Tex. Ct. App. 1994) (a fetus is not a child, person, or individual for purposes of criminal prosecution under the reckless injury to a child statute); *Sheriff, Washoe Cnty. v. Encoe*, 885 P.2d 596, 599 (Nev. 1994) (a criminal charge of endangerment of a child does not apply to a pregnant woman who ingests an illegal substance that results in the transmission of drugs to her child through the umbilical cord); *Commonwealth v. Welch*, 864 S.W.2d 280, 284-85 (Ky. 1993) (a mother’s ingestion of a controlled substance while pregnant does not constitute child abuse, as an unborn child is not a person for purposes of criminal prosecution); *State v. Gray*, 584 N.E.2d 710, 711 (1992) (Ohio’s child endangerment statute does not apply to mothers who use drugs during pregnancy); *People v. Morabito*, 580 N.Y.S.2d 843, 847 (N.Y. City Ct. 1992) (defendant mother could not

068, ¶ 11, 139 N.M. 741, 137 P.3d 1195; *see also State v. Mondragon*, 2008-NMCA-157, ¶ 13, 145 N.M. 574, 203 P.3d 105 (“... although the State alleged that Defendant’s actions resulted in the death of a child, the alleged injuries were inflicted on a fetus, which is not a child under Section 30–6–1.”). While the Directive claims that “removal is not based solely on a finding that a mother is using or abusing drugs,” Secretary Casados clearly states that custody is to be taken and abuse/neglect petitions issued by CYFD where a child is “*born exposed*.” Memorandum from the Secretary of Children, Youth, and Families Dept. (July 11, 2025) (emphasis added). Any prenatal action a pregnant woman takes during her own pregnancy cannot legally constitute the basis for postnatal removal; to the contrary, postnatal sanction must be rooted in postnatal action.

It must also be noted that it is not illegal for a pregnant woman to use substances during her pregnancy. While “[i]t is unlawful for a person intentionally to possess a controlled substance” (N.M. Stat. Ann. § 30-31-23), “the mere presence of drugs in the urine or bloodstream does not constitute possession” and “a positive drug test standing alone does not prove that a defendant had knowledge of the drugs in his or her body or that a defendant intended to possess the drugs.” *State v. McCoy*,

be charged with endangering the welfare of a child based upon prenatal acts endangering an unborn child); *State v. Gethers*, 585 So.2d 1140, 1143 (Fla. Ct. App. 1991) (child abuse statute does not apply to prenatal drug use); *People v. Hardy*, 469 N.W.2d 50, 53 (Mich. App. 1991) (a pregnant woman who used cocaine was not criminally liable for delivery of a controlled substance); *Reyes v. Super. Ct. of San Bernardino Cnty.*, 75 Cal.App.3d 214, 218-19 (1977) (a mother was not criminally liable for child endangerment for ingesting heroin while pregnant).

1993-NMCA-064, ¶ 15, 21, 116 N.M. 491, 864 P.2d 307, *rev'd on other grounds sub nom. State v. Hodge*, 1994-NMSC-087, 118 N.M. 410, 882 P.2d 1. “To support a conviction for possession of [substances] there must also be corroborating evidence to prove that the defendant knowingly, intentionally, and voluntarily possessed the drug at the time it was ingested.” *State v. Ware*, 1994-NMCA-132, ¶ 5, 118 N.M. 703, 884 P.2d 1182. Corroborating evidence cannot simply be a positive toxicology test, a baby, and a postpartum woman. The state’s intervention must begin at the point of birth and be rooted in a clear medical diagnostic regarding the impact of withdrawal on a newborn and the clinically prescribed analyses that may legitimately determine the ability of an individual to parent their child once born.

II. CIVIL PROSECUTION IN THE FORM OF FAMILY SEPARATION DOES NOT COMPORT WITH PUBLIC HEALTH PRINCIPLES AND UNDERMINES FEDERAL AND STATE LAWS AROUND CHILD REMOVAL.

The idea that prenatal substance use is child abuse or neglect is rooted in the concept of maternal-fetal conflict, which frames “people with the capacity for pregnancy as threatening, potential perpetrators of harm to their ‘unborn children.’”⁷ Thus, in order to protect the fetus from its mother’s drug use, the state must intervene, either via prosecution or removal of custody.⁸ Drug use, however, is not

⁷ Grace Howard, *THE PREGNANCY POLICE: CONCEIVING CRIME, ARRESTING PERSONHOOD* 70 (2024).

⁸ Dorothy Roberts, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES AND HOW ABOLITION CAN BUILD A SAFER WORLD* 153, 159 (2022).

necessarily a measure of parenting ability, and there is little evidence that a parent who uses drugs is more likely to abuse or neglect their child than one who does not.⁹ Leading medical organizations, including the American College of Obstetricians and Gynecologists (“ACOG”), state that a positive drug test should not be construed as child abuse or neglect.¹⁰

As Dorothy Roberts explains, “a positive toxicology (which may be false) reveals only that the mother ingested drugs shortly before delivery. It tells us nothing about the extent of the mother’s drug use, any harm to the baby, or the mother’s parenting abilities.”¹¹ Classifying substance use as child abuse or neglect also is contrary to the concept of substance use disorder as a chronic disease, as no other medical condition automatically results in a report to child protective services,

⁹ The source most often cited for the claim that drug use increases the likelihood of child abuse is a self-published report that was not subject to peer review. NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE, COLUM. U., NO SAFE HAVEN: CHILDREN OF SUBSTANCE-ABUSING PARENTS 9 (1999), <https://files.eric.ed.gov/fulltext/ED449278.pdf>. Its major publicized finding, that children whose parents abuse drugs and alcohol are three times more likely to be physically or sexually assaulted and more than four times more likely to be neglected than are children of parents who are not substance abusers, was based on what amounted to an opinion survey of people working in the child welfare field. But not only did this survey fail to qualify as reliable scientific evidence, the report itself noted that those who were surveyed were the least qualified to draw conclusions about causation and associations because few had any training in issues concerning drug use and addiction. *Id.* at 32-33 (“Most child welfare workers and family court judges base their critical decision of child custody when a parent has a substance abuse problem by relying on on-the-job experience and making their best guess.”). PREGNANCY JUST., PARENTING AND DRUG USE 2 (2022), <https://www.pregnancyjusticeus.org/resources/parenting-and-drug-use/>.

¹⁰ *Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period*, ACOG (July 2024), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period>.

¹¹ ROBERTS, *supra* note 8, at 153, 160.

including those that could potentially result in harm to another person, like narcolepsy.

Indeed, the “assumption that women who use drugs are impaired in their ability to mother displays a complex and deep bias in our society.”¹² While no research confirms the safety of most drugs used by pregnant people, legal and illegal, research also does not support widely held, unscientific beliefs about the relative risks of harm from prenatal exposure to criminalized controlled substances. Carefully constructed, unbiased, scientific research has not found that prenatal exposure to any criminalized drugs causes specific or unique harms.¹³ While numerous studies report findings that certain substances *may* increase a particular risk of harm, such as lower birth weight, research has not found that any criminalized substances are abortifacients, cause miscarriages or stillbirths, or cause specific harms or impairments to prenatally exposed children.¹⁴

Even where newborns are prenatally exposed to substances and may experience treatable and transitory withdrawal symptoms, the risks generally associated with prenatal exposures have been found to be comparable to or less than

¹² Mishka Terplan & Tricia Wright, *The Effects of Cocaine and Amphetamine Use during Pregnancy on the Newborn: Myth versus Reality*, 30 J. ADDICTIVE DISEASES 1 (2011).

¹³ See Deborah A. Frank et al., *Growth, development, and behavior in early childhood following prenatal cocaine exposure: a systematic review*, 285 JAMA 1613, 1613–25 (2001).

¹⁴ See Tricia E. Wright et al., *Methamphetamines and pregnancy outcomes*, 9 J. ADDICTION MED. 111, 111-17 (2015).

those associated with legal substances much more commonly used.¹⁵ Moreover, the recommended treatment for withdrawal symptoms in newborns is skin-to-skin contact and “rooming in” with the mother, which—unlike family separation—results in fewer pharmacological interventions and shorter hospital stays for infants.¹⁶

Lastly, and most importantly here, these babies simply do not develop any differently from other children.¹⁷ There is no scientifically supportable basis for separating babies from their mothers due to “imminent physical harm” for conditions that are both non-permanent and easily treatable. There is certainly no basis for finding a mom to be abusive or neglectful solely because she uses substances during her pregnancy.¹⁸

¹⁵ Walter K. Kraft & John N. van den Anker, *Pharmacologic Management of the Opioid Neonatal Abstinence Syndrome*, 59 PEDIATR. CLIN. NORTH AM. 1147, 1147-65 (2012); Matthew Grossman et al., *An Initiative to Improve the Quality of Care of Infants With Neonatal Abstinence Syndrome*, 139 PEDIATRICS (2017); Ciara Torres et al., *Totality of the Evidence Suggests Prenatal Cannabis Exposure Does Not Lead to Cognitive Impairments: A Systematic and Critical Review*, 11 FRONT. PSYCHOL. (2020).

¹⁶ Adam I. Newman et al., *Rooming-in for Infants at Risk for Neonatal Abstinence Syndrome: Outcomes 5 Years following Its Introduction as the Standard of Care at One Hospital*, 39 AM. J. PERINATOL. 897, 897-903 (2022); Kathryn Dee L. MacMillan et al., *Association of Rooming-In with Outcomes for Neonatal Abstinence Syndrome: A Systematic Review and Meta-analysis*, 172 JAMA PEDIATR. 345, 345-51 (2018).

¹⁷ See Editorial Board, *Slandering the Unborn*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html> (admitting that “The New York Times, The Washington Post, Time, Newsweek and others [] demonized black women ‘addicts’ by wrongly reporting that they were giving birth to a generation of neurologically damaged children who were less than fully human and who would bankrupt the schools and social service agencies once they came of age.”)

¹⁸ Proponents of family separation have asserted in media reports that draconian remedies are necessary because substance-exposed newborns have been released to their parents’ care and subsequently died. See Julian Paras, *Target 7: Officials say the CARA law in New Mexico isn’t working*, KOAT (Jul. 5, 2025), <https://www.koat.com/article/target-7-why-are-babies-still-dying-in-the-care-of-cyfd-koat-cara/65258428>. This purported “investigation” concluded that 15 substance-exposed newborns died in their parents’

A. The CYFD Directive Undermines Federal Child Welfare Laws and Substance-Exposed Newborn Reporting Requirements.

In light of this background, it is not surprising that both federal and New Mexico law require state child welfare agencies receiving federal funds to take steps to avoid imposing the most restrictive, punitive intervention: removal of a child from her parent’s custody and separation of the family. These reasonable and active efforts requirements are grounded in a robust body of research cautioning against the unnecessary removal of children from their homes. Separating a child from her parent—even a newborn,¹⁹ and even for a short time²⁰—can inflict lasting harm.²¹ Most children in foster care, if not all, experience feelings of confusion, fear, apprehension of the unknown, loss, sadness, anxiety, and stress.²² Research has also

custody over a two-year period. *Id.* Even accepting these reports at face value—a dubious proposition given the lack of apparent methodology and data supporting causation—that number is roughly equal to the number of youths who died in CYFD custody over a two-year period, according to New Mexico’s Department of Justice. *See* CYFD, SYSTEMIC FAILURES: HOW CYFD ENDANGERS THE CHILDREN IT’S MEANT TO PROTECT (2026), <https://nm DOJ.gov/publications/cyfd-report/>. The level of intervention regarding dangers to children is singularly focused on women who use substances during pregnancy. Indeed, New Mexico’s Department of Health recently issued an advisory after the death of a newborn from a *Listeria* infection due to the mother’s ingestion of raw milk during pregnancy. Stephanie Soucheray, *New Mexico warns raw milk linked to infant death, while FDA announces new testing of baby formula*, CIDRAP (Feb. 4, 2026), <https://www.cidrap.umn.edu/listeria/new-mexico-warns-raw-milk-linked-infant-death-while-fda-announces-new-testing-baby-formula>. The incident did not result in a CYFD directive that newborns exposed to raw milk during pregnancy be removed from their parents’ custody. *See id.*

¹⁹ Ksenia Bystrova et al., *Early Contact versus Separation: Effects on Mother-Infant Interaction One Year Later*, 36 BIRTH 97, 97-109 (2009); Yuan Zhang et al., *Maternal separation as early-life stress: Mechanisms of neuropsychiatric disorders and inspiration for neonatal care*, 217 BRAIN RESEARCH BULLETIN (2024).

²⁰ Vivek Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care*, 19 U. PA. J. L. & SOC. CHANGE 207 (2016).

²¹ *Id.* at 210-11 (collecting research).

²² Delilah Bruskas, *Children in foster care: a vulnerable population at risk*, 21 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 70, 70-77 (2008); *see also* Catherine R. Lawrence et al., *The impact of foster care*

uncovered a negative association between the number of unique caregivers for a child and their capacity of social and emotional functioning, adaptive coping, self-regulation, decision making, developing secure attachments, and maintaining healthy relationships.²³ Additionally, for children who are ultimately removed from their parents, family separation has been shown to result in “detrimental, long-term emotional and psychological consequences that may be worse than leaving the child at home” due to the trauma of removal and high rates of instability and abuse *within* the foster care system.²⁴ Removal is simply not the way for CYFD to “ensure the safety and well-being” of infants. Memorandum from the Secretary of Children, Youth, and Families Dept. (July 11, 2025). In recognition of these and other negative impacts of family separation on the very children child welfare agencies are tasked with protecting, both Congress and New Mexico lawmakers have enshrined a prevention principle in federal and state law governing child welfare agencies.

on development, 18 DEV. PSYCHOPATHOL. 57, 57-76 (2006) (finding elevated levels of behavior problems and internalizing problems among foster youth).

²³ See, e.g., Katherine Kortenkamp & Jennifer Ehrle, *The Well-Being of Children Involved with the Child Welfare System: A National Overview*, URBAN INST. (2002), <https://www.urban.org/sites/default/files/publication/59916/310413-The-Well-Being-of-Children-Involved-with-the-Child-Welfare-System.PDF>.

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

1. CYFD is Legally Obligated to Avoid Unnecessary Family Separation, and Newborns are No Exception.

In enacting the Adoption Assistance and Child Welfare Act of 1980, Congress created Title IV-E of the Social Security Act, providing for reimbursements to the states for payments made to house children in foster care. Pub. L. No. 96-272, § 101, 94 Stat. 500, 501–13 (1980). To be eligible for such reimbursements, a state must create a plan meeting the requirements of 42 U.S.C. § 671(a). Under § 672(a)(1), foster care maintenance payments are to be made only if the child entered custody pursuant to a voluntary agreement with the parents, or the removal was the result of “a judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child and that reasonable efforts of the type described in section 671(a)(15) of this title for a child have been made.” 42 U.S.C. § 672(a)(2)(A). Section 671(a)(15), added by the Adoption and Safe Families Act of 1997, requires states to ensure that “*reasonable efforts* shall be made to preserve and reunify families [] prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home[.]”²⁵ 42 U.S.C. § 671(a)(15)(B)(i) (emphasis added).

²⁵ Congress carved out certain circumstances in which reasonable efforts are not required if a judicial determination is made that the parent has subjected the child to aggravated circumstances, committed one of several enumerated crimes, or the parental rights to a sibling have been involuntarily terminated. 42 U.S.C. § 671(a)(15)(D).

In accordance with these federal requirements, New Mexico law also requires, following a dispositional hearing, a judicial determination as to “whether reasonable efforts were made by [CYFD] to prevent removal of the child from the home prior to placement in substitute care[.]” N.M. Stat. Ann. § 32A-4-22(A)(11) (West 2022). The New Mexico Children’s Code embodies a legislative purpose of providing “for the care, protection and wholesome mental and physical development of children . . . and then to preserve the unity of the family whenever possible.” N.M. Stat. Ann. § 32A-1-3(A) (West 2009).

CYFD’s obligation to make efforts to avoid the need to remove an Indian child from her home are even greater: the Indian Child Welfare Act (“ICWA”) requires that the child protection agency make “active efforts” to prevent such removal and the consequent “breakup of the Indian family[.]” 25 U.S.C. § 1912(d). Federal regulations define “active efforts” as “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.” 25 C.F.R. § 23.2. Given that Native peoples—across twenty-three tribes—make up over 12% of New Mexico’s population,²⁶ the Directive also carries with it the specter of disproportionate racial impact on a community that has already been

²⁶ *Tribal Directory*, N.M. INDIAN AFFAIRS DEP’T. (last visited May 28, 2026), <https://www.iad.nm.gov/nations-pueblos-and-tribes/tribal-directory/> (based on data from the 2020 census).

deeply and negatively impacted, for centuries, by racist, colonial family separation abuses and policies.

2. The CYFD Directive Unreasonably Instructs CYFD to Disregard its Obligations under Federal and State Law to Make “Reasonable” or “Active” Efforts to Prevent Child Removal.

Both the reasonable efforts scheme and ICWA’s active efforts requirement impose a duty to avoid unnecessary family separation upon child protective agencies. These statutes also provide for judicial oversight over agency decision-making to guarantee the protection of parents’ constitutional rights. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 533-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). The Directive actively undermines this legislative goal and directs CYFD to violate federal and state law.

The Directive expressly instructs CYFD to disregard these serious obligations when filing for custody of drug-exposed newborns:

If the family has CPS history, the reasonable efforts section of the affidavit [seeking custody] should reflect *the prior services offered and efforts made*. If the family does not have any prior CPS history, *the reasonable efforts section of the affidavit should reflect that due to the serious nature of these types of drugs, the department is taking custody to ensure the safety of the child and to ensure that the parent(s) will be court ordered to obtain necessary treatment to alleviate potential substance abuse risks*.

Memorandum from the Acting Chief General Counsel of Children, Youth, and Families Dept. (July 7, 2025) (emphases added). In other words, the Directive instructs CYFD to forgo its statutorily-mandated reasonable or active efforts and instead present to the court either (a) an irrelevant statement of efforts made with respect to previous children—not the one being removed (if the family has prior CPS history), or (b) a conclusory statement that the reasonable or active efforts required by federal and New Mexico law are, effectively, not required “due to the serious nature of these types of drugs” (if the family has no prior CPS history). This scheme comports with neither the letter nor the spirit of the law. If reasonable or active efforts are to be given meaning, family separation at birth is impermissible absent an emergency. CYFD cannot ignore its obligation to engage in efforts to prevent the need to remove custody, and because an unborn fetus is not a child under New Mexico law (*see* § I(B)(1), *supra*), such efforts must begin at the moment of birth, not before.

3. The CYFD Directive Undermines the Prevention, Education, and Treatment Goals of CAPTA/CARA by Punishing Pregnant and Parenting Women Who Use Drugs.

The federal Comprehensive Addiction and Recovery Act of 2016 (Pub. L. No. 114-198, § 130 Stat. 695) (“CARA”) was a bipartisan measure passed by Congress to bolster policy efforts to prevent and treat opioid addiction, “including programs to increase education on drug use, to expand medication-assisted treatment, to improve prescription drug monitoring programs, and to promote comprehensive state responses to the opioid crisis.”²⁷ It included several amendments to the Child Abuse Prevention and Treatment Act (Pub. L. No. 111-320 (2010)) (“CAPTA”), thus impacting policy directed toward identifying and assisting substance-exposed newborns and their families. CARA and its amendments to CAPTA indicate a strong legislative and policy preference for evidence-based and individualized best practices to address appropriate care for substance-exposed infants—not punitive, one-size-fits-all, automatic family separation.

The 2010 reauthorization of CAPTA required states to develop policies and procedures “to address the needs of infants born with and identified as being affected by substance abuse or withdrawal symptoms resulting from prenatal drug exposure,

²⁷ Press Release, Sen. Sheldon Whitehouse, Whitehouse Applauds Signing of Comprehensive Addiction and Recovery Act into Law (July 23, 2016), <https://www.whitehouse.senate.gov/news/release/whitehouse-applauds-signing-of-comprehensive-addiction-and-recovery-act-into-law/>.

or a Fetal Alcohol Spectrum Disorder . . .” 42 U.S.C. § 5106a(b)(2)(B)(ii); CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320 (2010). CAPTA requires that health care providers *notify* CPS of all infants born and identified as affected by substance abuse, but “[s]uch notification need not be in the form of a *report* of suspected child abuse or neglect. It is ultimately the responsibility of CPS staff to assess the level of risk to the child . . . and determine whether the circumstance constitutes child abuse or neglect under State law.” U.S. Dep’t of Health & Human Servs., Admin. for Child. & Fams., Child Welfare Policy Manual § 2.1F, <https://cwpm.acf.gov/> (emphasis added).

CAPTA also mandated states enact policies on “the development of a plan of safe care”²⁸ for infants born and identified as being “affected by substance abuse[.]” 42 U.S.C. § 5106a(b)(2)(B)(iii). CARA expanded on CAPTA’s requirement for plans of safe care to include a focus on *both* the infant and the mother. 42 U.S.C. § 5106a(b)(2)(B)(iii)(I). In implementing CARA, New Mexico law mandates that a hospital “complete a written plan of safe care for a substance-exposed newborn or a pregnant person who agrees to creating a plan of safe care[.]” N.M. Stat. Ann. 32A-4-3(H)(1) (West 2025). It also requires health care providers to notify New Mexico’s

²⁸ “Plan of safe care” is not defined by federal law, but New Mexico defined it through S.B. 42 to mean “a written plan created by a health care professional intended to ensure the immediate and ongoing safety and well-being of a substance-exposed newborn or to provide perinatal support to a pregnant person with substance use disorder by addressing the treatment needs of the child and any of the child’s parents, relatives, guardians, custodians or caretakers to the extent those treatment needs are relevant to the safety of the child.” N.M. Stat. Ann. § 32A-1-4(Y) (West 2025).

health care authority of substance-exposed infants but cautions that such notifications “shall not be construed as a report of child abuse or neglect.” *Id.* at (H)(2).²⁹ Subsection 32A-4-3(I) confirms this interpretation, stating that such notification “shall comply with federal guidelines and shall not constitute a report of child abuse or neglect.” *Id.* at (I). Moreover, a “finding that a pregnant woman is using or abusing drugs made pursuant to an interview, self-report, clinical observation or routine toxicology screen *shall not alone form a sufficient basis to report child abuse or neglect[.]*” *Id.* at (G) (emphasis added).

In 2023, CARA in New Mexico was incompletely implemented and severely underfunded. A study conducted by New Mexico’s own Department of Health found that “[p]rogram funding, limited system capacity, lack of systematic screening for prenatal substance use, regional differences in access to care, and provider biases toward pregnant people using substances affected health-care workers’ ability to identify at-risk families and develop plans of safe care.”³⁰ The study’s authors recommended that healthcare systems “implement universal prenatal substance use screening, increase the level of anti-bias training pertaining to substance use,

²⁹ Further underscoring the difference between a *notification* and a *report* of child abuse or neglect is New Mexico’s own legislative choice to transfer operation of the CARA program in 2024 from CYFD to a different state agency, the Health Care Authority. *See* N.M. Stat. Ann. 32A-4-3(I) (West 2025).

³⁰ Nicholas Sharp et al., *An Implementation Evaluation of the Comprehensive Addiction Recovery Act (CARA) Policy in New Mexico*, 27 MATERNAL & CHILD HEALTH J. S113, S113 (2023).

increase hospital supports, and improve data management systems.”³¹ As of 2023, only four inpatient programs existed in-state for pregnant and postpartum people that would also accept an infant alongside its parent and only one existed in the southern part of the state,³² demonstrating the futility of removing custody to purportedly force mothers into treatment programs that do not actually exist.

Rather than provide robust funding and implementation of New Mexico law enshrining CARA/CAPTA principles, CYFD chose instead to issue a draconian Directive that stymies the very purpose of the law, relying on punitive family separation to address a public health crisis. These punitive policies that criminalize substance use during pregnancy, define prenatal substance use as child abuse or neglect, or require healthcare providers to report prenatal substance exposure to CPS often deter pregnant women from seeking out prenatal care and treatment for substance use disorders,³³ and are associated with higher rates of neonatal abstinence syndrome.³⁴

Experts universally oppose such punitive policies.³⁵ The American Medical Association “oppose[s] any efforts . . . that imply a positive verbal substance use

³¹ *Id.*

³² *Id.* at S117.

³³ Laura J. Faherty et al., *Consensus Guidelines and State Policies: The Gap Between Principle and Practice at the Intersection of Substance Use and Pregnancy*, 2 AM. J. OBSTET. GYNECOL. MFM 1 (2020).

³⁴ 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 1 (2019).

³⁵ See Faherty, *supra* note 33.

screen, a positive toxicology test, or the diagnosis of substance use disorder during pregnancy automatically represents child abuse or neglect.”³⁶ According to the American College of Obstetricians and Gynecologists, “[s]eeking obstetric–gynecologic care should not expose a woman to criminal or civil penalties, such as incarceration, involuntary commitment, loss of custody of her children, or loss of housing.”³⁷ Furthermore, the American Society of Addiction Medicine asserts that “[c]hild protection system agencies should not use evidence of substance use to implement sanctions on parents, especially child removal. Such sanctions should only be made when other risk factors or harms have been assessed or identified, and there is objective evidence of abuse, neglect, or other danger to the child.”³⁸ According to the American Psychological Association, “[p]unitive approaches result in women being significantly less likely to seek substance use treatment and prenatal care due to fear of prosecution and fear of the removal of children from their custody (Faherty et al., 2019). This places both the mother and her children at greater risk of harmLegislatures should decriminalize substance use during pregnancy and support more funding and programs that offer specialized substance use treatment to

³⁶ AM. MED. ASSOC., SUBSTANCE USE DISORDERS DURING PREGNANCY H-420.950 (2024).

³⁷ ACOG COMMITTEE ON HEALTH CARE FOR UNDERSERVED WOMEN, COMMITTEE OPINION 473, SUBSTANCE ABUSE REPORTING AND PREGNANCY: THE ROLE OF THE OBSTETRICIAN-GYNECOLOGIST 1 (2011) (reaffirmed 2022).

³⁸ AM. SOC’Y OF ADDICTION MED., PUBLIC POLICY STATEMENT ON SUBSTANCE USE AND SUBSTANCE USE DISORDER AMONG PREGNANT AND POSTPARTUM PEOPLE 6 (2022).

pregnant women and girls.”³⁹ The American Psychiatric Association agrees, stating that “[s]ubstance use during pregnancy should not . . . be considered child abuse or neglect.”⁴⁰ Indeed, supportive policies that create or fund prenatal substance use disorder treatment programs increase access to medication-assisted treatment and decrease opioid overdoses.⁴¹

Screening for maternal substance use is not universal or standardized in New Mexico, and the resulting arbitrary testing has led to prenatal care providers conducting selective screening of pregnant people.⁴² As noted *supra*, the counterproductive and harmful impact of punitive policies on babies and mothers affected by substance use disorders falls disproportionately on people living in poverty as well as Black, Indigenous, and other people of color,⁴³ who are more likely to be criminalized,⁴⁴ reported to child welfare,⁴⁵ and tested for drugs during

³⁹ AM. PSYCHOLOG. ASS’N, PREGNANT AND POSTPARTUM ADOLESCENT GIRLS AND WOMEN WITH SUBSTANCE-RELATED DISORDERS 1 (2020).

⁴⁰ AM. PSYCHIATRIC ASS’N, POSITION STATEMENT ON ASSURING THE APPROPRIATE CARE OF PREGNANT AND NEWLY-DELIVERED WOMEN WITH SUBSTANCE USE DISORDERS 1 (2025).

⁴¹ Nadia Tabatabaeepour et al., *Impact of prenatal substance use policies on commercially insured pregnant females with opioid use disorder*, 140 J. SUBSTANCE ABUSE TREATMENT 1, 10 (2022).

⁴² Sharp, *supra* note 30, at S117.

⁴³ Cecily May Barber & Mishka Terplan, *Principles of care for pregnant and parenting people with substance use disorder: the obstetrician gynecologist perspective*, 11 FRONT. PEDIATRICS 1, 1 (2023).

⁴⁴ PREGNANCY JUST., THE RISE OF PREGNANCY CRIMINALIZATION: A PREGNANCY JUSTICE REPORT 3 (2023).

⁴⁵ Nora Volkow, *Pregnant People With Substance Use Disorders Need Treatment, Not Criminalization*, NIDA (Feb. 15, 2023), <https://nida.nih.gov/about-nida/noras-blog/2023/02/pregnant-people-substance-use-disorders-need-treatment-not-criminalization>.

delivery.⁴⁶ Implementation of the Directive will only serve to deepen these disparities and contribute to the unjustifiable breakup of families and communities of color in New Mexico. It directly contravenes the preventive purpose underlying CARA/CAPTA and New Mexico's legislative choices implementing those laws.

CONCLUSION

For the foregoing reasons, this Court should exercise its mandamus jurisdiction and order a stay of the implementation of the Directive.

Respectfully submitted,

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**Pro hac vice admission pending*

⁴⁶ Marian Jarlenski et al., *Association of Race With Urine Toxicology Testing Among Pregnant Patients During Labor and Delivery*, 4 JAMA Health Forum (2023), <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2803729>.