



FLORIDA HEALTH  
JUSTICE PROJECT

## **Racial Injustices in Maternal and Reproductive Health in Florida**

**Shadow Report Submission to the  
Committee on the Elimination of Racial Discrimination (CERD)  
For the United States Review**

Submitted on July 14, 2022, by:

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## I. INTRODUCTION

1. The University of Miami School of Law Human Rights Clinic (“HRC”) and the Florida Health Justice Project (“FHJP”) are pleased to submit this shadow report to the Committee on the Elimination of Racial Discrimination (hereinafter “CERD” or the “Committee”) for the United States (“U.S.”) Review. This report is based on research in the U.S., and specifically Florida, where maternal and reproductive health is marked by racial injustice.
2. This analysis addresses the U.S.’s obligations under Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), which provides that all “State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, . . . in the enjoyment of . . . [t]he right to public health, medical care, social security and social services.”<sup>1</sup>
3. In its prior reviews, this Committee has noted its concern “at the persistence of racial disparities in the field of sexual and reproductive health” and underscored the need to address “the high maternal and infant mortality among African American communities.”<sup>2</sup>
4. Despite spending more than any other developed nation in the world on healthcare, the U.S. remains in the midst of a maternal and infant health crisis.<sup>3</sup> The U.S. has the highest rate of maternal and infant mortality<sup>4</sup> of any developed country.<sup>5</sup> Counter to international trends, pregnancy-related deaths have increased from 7 deaths per 100,000 live births in 1987 to 24 deaths per 100,000 live births in 2020.<sup>6</sup>
5. The current average U.S. infant mortality rate is two times the average of other Organization of Economic Cooperation and Development (“OECD”) countries, ranking 33 out of the 36 OECD nations.<sup>7</sup> For infants, or children younger than the age of one, the most common causes of death

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<sup>1</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 5(e)(iv), *ratified* Oct. 21, 1994, 660 U.N.T.S. 1.

<sup>2</sup> Comm. On Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, ¶15, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014) [hereinafter CERD Concluding Observations: Seventh to Ninth Periodic Reports of the U.S.A.]; Comm. On Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination, ¶¶ 32,33, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008) [hereinafter CERD Concluding Observations: U.S.A.].

<sup>3</sup> Jessica Brown, *The Fight for Birth: The Economic Competition That Determines Birth Options in the United States*, 52 U.S.F. L. REV. 1, 1 (2018).

<sup>4</sup> The mortality rates are determined by the number of deaths divided by the number of live births multiplied by 1,000. Florida Health, *Infant Mortality and Adverse Birth Outcomes*, <http://www.floridahealth.gov/diseases-and-conditions/infant-mortality-and-adverse-birth-outcomes/data/documents/racial-disparities-infant-mortality-rates-2007-2018.pdf>.

<sup>5</sup> Brown, *supra* note 3.

<sup>6</sup> Center for Disease Control and Prevention, *Pregnancy Mortality Surveillance System*, <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm>. NBC News, *Pregnancy-Related Deaths Rose for Mothers in the Pandemic’s First Year, Report Shows*, <https://www.nbcnews.com/news/us-news/pregnancy-related-deaths-us-mothers-rose-pandemics-first-year-report-s-rcna17313>.

<sup>7</sup> America’s Health Rankings Annual Report, International Comparison, United Health Foundation, (2019).

cited by the Centers for Disease Control and Prevention (“CDC”) are birth defects, preterm birth and low birth weight, maternal pregnancy complications, sudden infant death syndrome, and injuries.<sup>8</sup> In 2018, more than 21,000 infants died from one of these five causes.<sup>9</sup>

6. While the infant mortality rate in the U.S. has gradually decreased, as of 2019, the U.S. still ranks 33 out of the 36 OECD nations.<sup>10</sup>
7. The maternal and infant mortality rate in the U.S. is similarly dire in Florida. From 2013 to 2017, Florida ranked 32<sup>nd</sup> in the U.S. in terms of highest maternal mortality rates. In 2019, Florida had an infant mortality rate of 6.01 for every 1,000 live births.<sup>11</sup> In 2018, Florida experienced an infant mortality rate of 615.7 deaths per every 100,000 live births.<sup>12</sup>
8. The maternal and infant health crisis disproportionately impacts marginalized populations in the U.S., most especially Black and Native American communities and, to a lesser extent, rural communities and low-income individuals.<sup>13</sup> According to the CDC, Black women<sup>14</sup> are about four times more likely to die from pregnancy-related issues than white women,<sup>15</sup> and Native American women are more than twice as likely to die due to pregnancy related issues than white women.<sup>16</sup>
9. In Florida, women of color likewise experience significantly higher rates of maternal and infant mortality compared to white women<sup>17</sup> In 2016, 41% of Floridians who died of pregnancy-related

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<sup>8</sup> Center for Disease Control and Prevention, Reproductive Health, Infant Mortality, cdc.gov, Sep. 09, 2021, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm>.

<sup>9</sup> Esther Jean-Baptiste, *Racial Disparities in Infant Mortality Rates for Florida Compared to All Other States Combined 2007-2018*, Florida Health, Bureau of Family Health Services, Jan. 28, 2020.

<sup>10</sup> America’s Health Rankings Annual Report, *supra* note 7. In its submission to the Committee on June 2, 2021, the U.S. noted that “[a] Health, United States, 2018, infant mortality figures decreased by an average of 2.9% per year from 2007 to 2011 and then decreased by an average of 0.6% per year to 5.79 infant deaths per 1,000 live births in 2017.” The United States of America Submission to the Committee on the Elimination of Racial Discrimination Tenth, Eleventh, and Twelfth Periodic Reports on the International Convention on the Elimination of All Forms of Racial Discrimination United States Department of State June 2, 2021, ¶70. The rate of infant deaths further fell to 5.52 per 1,000 live births in 2019. United Nations Inter-Agency Group for Child Mortality Estimation (2021). IGME, *UN Inter-agency Group for Child Mortality Estimation*, <https://childmortality.org/data/United%20States%20of%20America>.

<sup>11</sup> Center for Disease Control and Prevention, *Infant Mortality Rates by State*, cdc.gov, Mar. 12, 2021, [https://www.cdc.gov/nchs/pressroom/sosmap/infant\\_mortality\\_rates/infant\\_mortality.htm](https://www.cdc.gov/nchs/pressroom/sosmap/infant_mortality_rates/infant_mortality.htm).

<sup>12</sup> Jean-Baptiste, *supra* note 10.

<sup>13</sup> National Partnership for Women and Families, *Improving Our Maternity Care Now: Four Care Models Decisionmakers Must Implement for Healthier Moms and Babies*, 1, 14-16 (2020) [hereinafter referred to as NPWF].

<sup>14</sup> **It is important to note that while we refer to childbearing individuals as women in this document, we recognize that childbearing individuals are generally, but not always women. The analysis here also applies to other childbearing individuals.**

<sup>15</sup> Centers for Disease Control and Prevention, *Reproductive Health, Pregnancy-Related Deaths*, cdc.gov, Feb. 26, 2019, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-relatedmortality.htm>.

<sup>16</sup> Kyley Warren, *Native American Women Tackle High Rate of Maternal Mortality*, U.S.News.com, Dec. 17, 2019, <https://www.usnews.com/news/best-states/new-mexico/articles/2019-12-17/native-american-women-tackle-high-rate-of-maternal-mortality>.

<sup>17</sup> *Black-White Disparities in Maternal Mortality*, Florida Department of Health, 2015 Title V Needs Assessment, [https://www.floridahealth.gov/PROGRAMS-AND-](https://www.floridahealth.gov/PROGRAMS-AND-SERVICES/womens-health/pregnancy/42015-title-v-brief-bw-disparities-in-maternal-mortality-final-11-06-2014.pdf)

complications were Black, despite making up just 16% of the state’s population.<sup>18</sup> Moreover, Black Floridians were almost three times more likely to die from pregnancy-related complications and more than twice as likely to endure infant mortality than their white counterparts.<sup>19</sup> In 2018, Black infants in Florida had a 2.4 times greater risk of infant mortality than white infants.<sup>20</sup>

10. Women frequently experience abuse and coercion at the hands of healthcare providers during childbirth, and these trends are exacerbated for women of color.<sup>21</sup> In the U.S., 28% of women birthing in hospitals report mistreatment.<sup>22</sup> Moreover, up to 34% of women describe their birthing experience as “traumatic”<sup>23</sup> and women frequently refer to violations of their dignity.<sup>24</sup> In one study, nearly 20% of women reported postpartum post-traumatic stress disorder (PTSD) symptoms following their pregnancy.<sup>25</sup> Latin American advocates have coined this abuse, coercion, and disrespect women face while giving birth “obstetric violence.”<sup>26</sup> Women of color and women who experience intersecting discrimination are more likely to incur obstetric violence in addition to an increased risk of maternal and infant mortality.<sup>27</sup> One study found that disrespect and abuse were nearly four times more likely among women with low socioeconomic status, who are disproportionately women of color.<sup>28</sup>
11. The U.S. suffers from similar racial and ethnic disparities when it comes to reproductive health services.<sup>29</sup> This is a result of divisive politicization of reproductive care, overburdened health systems, and unequal access to necessary services.<sup>30</sup>

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SERVICES/womens-health/pregnancy/4\_\_2015-title-v-brief-bw-disparities-in-maternal-mortality-final-11-06-2014.pdf.

<sup>18</sup> Leticia Hernandez, and Angela Thompson. Issue brief. Florida’s Pregnancy-Associated Mortality Review 2016 Update, May 2018, [https://www.floridahealth.gov/statistics-and-data/PAMR/\\_documents/pamr-2016-update.pdf](https://www.floridahealth.gov/statistics-and-data/PAMR/_documents/pamr-2016-update.pdf); “U.S. Census Bureau QuickFacts: Florida.” Census Bureau QuickFacts, <https://www.census.gov/quickfacts/fact/table/FL/RHI225219>.

<sup>19</sup> Florida Health, *Maternal Deaths*, FLHealthCHARTS Data Viewer, <http://www.flhealthcharts.com/charts/DataViewer/InfantDeathViewer/InfantDeathViewer.aspx?indNumber=0392>; Florida Health, *Neonatal Infant Deaths*, FLHealthCHARTS Data Viewer, <http://www.flhealthcharts.com/charts/DataViewer/InfantDeathViewer/InfantDeathViewer.aspx?indNumber=0392>.

<sup>20</sup> Jean-Baptiste, *supra* note 10.

<sup>21</sup> Elizabeth Kukura, *Obstetric Violence*, *The Georgetown Law Journal* 106(3) 721, 724 (2018).

<sup>22</sup> Saraswathi Vedam et al., *The Giving Voice to Motehr Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States*, 16 *REPORT. HEALTH*, June 11, 2019, at 1, 8.

<sup>23</sup> Debra Creedy, Ian Shochet, and Jan Horsfall, *Childbirth and the Development of Acute Trauma Symptoms: Incidence and Contributing Factors*, *Birth* 27(2), 104-111 (2000).

<sup>24</sup> Kukura, *supra* note 21 at 754.

<sup>25</sup> Johanna Soet and Gregory Brack, Colleen Dilorio. *Prevalence and Predictors of Women’s Experience of Psychological Trauma During Childbirth*, *Birth*, 30(1): 36-46 (2003).

<sup>26</sup> Kukura, *supra* note 21 at 724.

<sup>27</sup> Hum. Rts. Council, Report of the Special Rapporteur on violence against women, its causes and consequences on a human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence. ¶¶ 43 & 45, U.N. Doc. A/HRC/74/50 (2019).

<sup>28</sup> *Id.* at ¶ 45.

<sup>29</sup> Madeline Y., Sutton, et al., “Racial and Ethnic Disparities in Reproductive Health Services and Outcomes, 2020.” *Obstetrics & Gynecology*, Vol. 137, Iss. 2, [https://journals.lww.com/greenjournal/Fulltext/2021/02000/Racial\\_and\\_Ethnic\\_Disparities\\_in\\_Reproductive.5.aspx](https://journals.lww.com/greenjournal/Fulltext/2021/02000/Racial_and_Ethnic_Disparities_in_Reproductive.5.aspx).

<sup>30</sup> Sophia Sadinsky & Zara Ahmed, “A Time for Change: Advancing Sexual and Reproductive Health and Rights in a New Global Era,” *Guttacher Institute*, Vol. 24, Feb. 24, 2021, <https://www.guttacher.org/gpr/2021/02/time-change-advancing-sexual-and-reproductive-health-and-rights-new-global-era>.

12. In Florida, the costs and challenges of both family planning and parenthood are “myriad and monumental.”<sup>31</sup> Women in Florida are far less likely to have healthcare coverage than women in other parts of the country.<sup>32</sup> As of 2020, an estimated 1.2 million Floridian women living at or below 250% of the poverty level in the state live in contraceptive deserts, or counties with no reasonable access to health centers with a full range of contraceptive and family planning services.<sup>33</sup> Moreover, 20% of Florida’s children live in poverty, and the government does little to support struggling families.<sup>34</sup>

## II. RACIAL INJUSTICE IN THE MATERNAL AND INFANT HEALTH CRISIS

13. In its submission to the Committee in June 2021, the U.S. acknowledged its commitment “to reducing the country’s unacceptably high maternal mortality and morbidity rates, and the racial disparities that particularly impact Black and Native American communities.”<sup>35</sup> While the U.S. has taken some efforts to improve access to quality health coverage,<sup>36</sup> these do not go far enough with regards to maternal health.

### A. THE AFFORDABLE CARE ACT AND THE NEED FOR MEDICAID EXPANSION

14. In 2014, this Committee commended the U.S. on adopting the Affordable Care Act (“ACA”) to increase affordable health insurance coverage for individuals with incomes up to 138% of the Federal Poverty Level (“FPL”) by expanding the Medicaid program.<sup>37</sup> It also expressed concern regarding the U.S. Supreme Court’s decision in *National Federation of Independent Business v. Sebelius* (“*National Federation v. Sebelius*”), which left Medicaid expansion to the individual states.<sup>38</sup>

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<sup>31</sup> Alison Yager, “Florida should improve health of children and families, not limit access to abortion,” *Miami Herald*, Feb. 23, 2022,

Florida\_should\_improve\_health\_of\_children\_and\_Miami\_Herald\_The\_FL\_February\_23\_2022.pdf.

<sup>32</sup> “1.2 Million Women in Florida Live in Contraceptive Deserts,” *Power to Decide*, Mar. 31, 2020, <https://powertodecide.org/about-us/newsroom/12-million-women-florida-live-contraceptive-deserts>.

<sup>33</sup> *Id.*

<sup>34</sup> Yager, *supra* note 31.

<sup>35</sup> The United States of America Submission to the Committee on the Elimination of Racial Discrimination, *supra* note 10 at ¶68.

<sup>36</sup> *Id.* at ¶67.

<sup>37</sup> Issued by the Department of Health and Human Services, the Federal Poverty Level is an economic measure indicating the minimum amount of annual income of an individual or family to pay for necessities required to live, such as utilities, clothing, food, and shelter. The FPL is used to determine eligibility for government subsidies. As of January 12, 2022 the FPL for a family of 4 living at 100 percent of the FPL is \$27,750. *2022 Federal Poverty Levels/Guidelines & How They Determine Medicaid Eligibility*, MedicaidPlanningAssistance.org.

<sup>38</sup> CERD Concluding Observations: Seventh to Ninth Periodic Reports of the U.S.A., *supra* note 2 at ¶ 15 (“While commending the adoption of the Patient Protection and Affordable Care Act (ACA) in March 2010, the Committee is concerned that many states with substantial numbers of racial and ethnic minorities have opted out of the Medicaid expansion programme following the Supreme Court decision of June 2012 in the *National Federation of Independent Business v. Sebelius*, thus failing to fully address racial disparities in access to affordable and quality healthcare.”).

15. Subsequent to passage of the ACA, most U.S. states enacted the ACA expansion of Medicaid to minimize the rate of uninsured individuals and reduce barriers to access to healthcare.<sup>39</sup> Medicaid expansion further provided coverage to marginalized communities that have been historically excluded. As a result, enrollment in health coverage increased by 35% for Black Americans and 26% for Hispanic Americans.<sup>40</sup>
16. However, 12 states have failed to opt into Medicaid expansion (“non-expansion states”).<sup>41</sup> This Committee expressed its concern that these states, “with substantial numbers of racial and ethnic minorities,” have resulted in the U.S. “failing to fully address racial disparities in access to affordable and quality health care.”<sup>42</sup>
17. The lack of access to healthcare exacerbates the maternal and infant health crisis for marginalized populations. Due to the Medicaid “coverage gap,”<sup>43</sup> across the non-expansion states healthcare access is out of reach for an estimated 800,000 women aged 19-44 (“reproductive age” group), two-thirds of whom are women of color.<sup>44</sup>
18. Florida is a non-expansion state.<sup>45</sup> Further, Florida sets stringent eligibility standards for Medicaid.<sup>46</sup> Qualifying parents of a minor child must be extremely low income. A single parent of two children, for instance, must have a household income of less than one-third of the Federal Poverty Level—no more than \$582/month (less than \$7,000/year)—to qualify.<sup>47</sup> Thus, healthcare coverage is out of reach for many.
19. In Florida, 66% of those in the coverage gap are in families with at least one employed individual, 25% of those in the coverage gap are parents with children at home, and 31% are women of reproductive age.<sup>48</sup> In 2019, 1 in 5 Floridian women between the ages of 15 and 44 were

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<sup>39</sup> *Statement by President Joe Biden on the 12<sup>th</sup> Anniversary of the Affordable Care Act*, Statements and Releases, The White House, Mar. 23, 2022.

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

<sup>41</sup> *Status of State Medicaid Expansion Decisions: Interactive Map*, Kaiser Family Foundation (KFF), Nov. 19, 2021, <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/>.

<sup>42</sup> CERD Concluding Observations: Seventh to Ninth Periodic Reports of the U.S.A., *supra* note 2 at ¶ 15.

<sup>43</sup> Adults who fall into the coverage gap have incomes above their state’s eligibility threshold for Medicaid but below the poverty line. Rachel Garfield & Kendall Orgera, *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KFF (Jan 21, 2021), <https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/>.

<sup>44</sup> Judith Solomon, *Closing the Coverage Gap Would Improve Black Maternal Health*, Center on Budget and Policy Priorities, cbpp.org, Jul. 26, 2021, <https://www.cbpp.org/research/health/closing-the-coverage-gap-would-improve-black-maternal-health>.

<sup>45</sup> KFF, *supra* note 43.

<sup>46</sup> *Id.*

<sup>47</sup> Florida Voices for Health, *Urge Congress to Close the Coverage Gap*, HealthyFLA.org, 2021, <https://www.healthyfla.org/closethegap>. See also *Family Related Medicaid Income Limits*, My Florida Families (Feb. 3, 2022), [https://www.myflfamilies.com/service-programs/access/docs/esspolicymannual/a\\_07.pdf](https://www.myflfamilies.com/service-programs/access/docs/esspolicymannual/a_07.pdf).

<sup>48</sup> Center on Budget and Policy Priorities, *The Medicaid Coverage Gap in Florida*, cbpp.org, Jul. 8, 2021, <https://www.cbpp.org/research/health/the-medicaid-coverage-gap>.

uninsured.<sup>49</sup> In 2020 an estimated 28,000 children would have gained coverage in Florida if Medicaid expansion was adopted.<sup>50</sup>

20. Medicaid expansion would enable access to healthcare before, during, and after pregnancy, vital in addressing the risk factors leading to the maternal and infant health crisis.<sup>51</sup> According to the Center for American Progress, if non-expansion states opted into Medicaid expansion, they would avert 141 infant deaths per year.<sup>52</sup> If Florida opted into Medicaid expansion, research estimates more than a third of pregnancy-related deaths could be prevented.<sup>53</sup>
21. Women of color are disproportionately impacted by the gap in health coverage. In Florida, 58% of those in the coverage gap are people of color.<sup>54</sup> As of April 2019, over 20% of Black women in the state were uninsured.<sup>55</sup> A lack of access to healthcare correlates with greater maternal and infant mortality. In 2018, Florida experienced 36 pregnancy-related deaths, with 48.6% of these deaths among non-Hispanic Black women.<sup>56</sup> The rate of death among Black infants was twice as high as among white infants.<sup>57</sup> Closing the coverage gap would reduce disparities in health outcomes and save lives.<sup>58</sup>
22. Although Florida has notably extended Medicaid's pregnancy coverage to one year postpartum, providing new mothers the ability to access care for a year after the end of pregnancy, Floridians lack access to continuous care and critical preventive measures.<sup>59</sup> Continuous healthcare coverage can address preconception health risk factors which contribute to maternal mortality, such as obesity, diabetes, and heart disease, as well as improve the timeliness of prenatal care.<sup>60</sup>

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<sup>49</sup> March of Dimes Peristats, *Health Insurance/Income*, <https://www.marchofdimes.org/Peristats/ViewSubtopic.aspx?reg=12&top=11&stop=158&lev=1&slev=4&obj=1>.

<sup>50</sup> Center on Budget and Policy Priorities, *supra* note 48.

<sup>51</sup> Solomon, *supra* note 44.

<sup>52</sup> Jamila Taylor, et al., *Eliminating Racial Disparities in Maternal and Infant Mortality A Comprehensive Policy Blueprint*, Center for American Progress, May 2, 2019, <https://www.americanprogress.org/issues/women/reports/2019/05/02/469186/eliminating-racial-disparities-maternal-infant-mortality/>.

<sup>53</sup> Solomon, *supra* note 44.

<sup>54</sup> Center on Budget and Policy Priorities, *supra* note 48.

<sup>55</sup> *Black Women Experience Pervasive Disparities in Access to Health Insurance*, National Partnership for Women & Families, Apr. 2019, <https://www.nationalpartnership.org/our-work/resources/health-care/black-womens-health-insurance-coverage.pdf>.

<sup>56</sup> Leticia Hernandez, and Angela Thompson, *Florida's Pregnancy-Associated Mortality Review 2018 Update*, Florida Department of Health, May 2020, [http://www.floridahealth.gov/statistics-and-data/PAMR/\\_documents/pamr-2018-update.pdf](http://www.floridahealth.gov/statistics-and-data/PAMR/_documents/pamr-2018-update.pdf).

<sup>57</sup> *Id.*

<sup>58</sup> Center on Budget and Policy Priorities, *supra* note 48.

<sup>59</sup> Issac Morgan, *FL moms have gotten expanded Medicaid coverage following childbirth, but not many people knew it*, FloridaPhoenix.com, Sep. 29, 2021, <https://floridaphoenix.com/2021/09/29/fl-moms-have-gotten-expanded-medicaid-coverage-following-childbirth-but-not-many-people-knew-it/>. Effective as of July 21, 2021, Florida has extended Medicaid coverage from 60 days postpartum to 12 months, this will allow for continuous access to healthcare but will not essentially close the coverage gap. *Medicaid postpartum coverage extension, postpartum optimization, and promoting birth equity*, Simply Healthcare Plans and Clear Health Alliance, June 2021, [https://provider.simplyhealthcareplans.com/docs/gpp/FL\\_SMH\\_CHA\\_PU\\_HealthCareBillcomeseffect.pdf/](https://provider.simplyhealthcareplans.com/docs/gpp/FL_SMH_CHA_PU_HealthCareBillcomeseffect.pdf/).

<sup>60</sup> Erica L. Eliason, *Adoption of Medicaid Expansion is Associated with Lower Maternal Mortality*, *Women's Health Issues* Vol. 30, 3, Feb. 25, 2020.

Fluctuations in access to healthcare can exacerbate existing health conditions, which ultimately increases the cost of care.<sup>61</sup>

## **B. THE NEED TO EXPAND ACCESS TO MIDWIVES AND DOULAS**

23. Addressing the high maternal and infant mortality rates among communities of color requires expanding access to community-based, culturally congruent midwives and doulas. A midwife is a health professional who cares for birthing individuals and newborns and can assist in births at a hospital, birthing center, or individual's home.<sup>62</sup> Midwives are trained to identify when higher levels of more specialized care are needed and may consult, share care, or transfer when deemed appropriate.<sup>63</sup> Doulas are specially trained birth companions who provide continuous physical and emotional labor support and help meet meet psychological and socioeconomic needs pre- and post-partum.<sup>64</sup> Doulas do not perform medical tasks or give medical advice to their clients.<sup>65</sup>
24. We further urge this Committee to highlight the phenomenon of obstetric violence—sometimes amounting to a violation of the right to freedom from cruel, inhuman, and degrading treatment<sup>66</sup>—committed by the overmedicalized maternal care system in the U.S.

### **i. The Power of Midwives and Doulas**

25. Expanding access to midwifery care and doula services is an effective strategy for improving health outcomes and reducing disparities for women of color with *low-risk* pregnancies.<sup>67</sup> Midwives offer a high-touch, low-intervention approach to maternity care,<sup>68</sup> while doulas meet various physical and psychosocial needs during labor and even during abortions and miscarriages.<sup>69</sup> Doulas also enhance communication with family and healthcare staff and can empower and inform the client about birthing options throughout the pregnancy.<sup>70</sup> Midwives and doulas enable holistic maternal care and provide individualized, respectful, relationship-based care that can improve health outcomes and address disparities.<sup>71</sup>

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<sup>61</sup> Adam Searing and Donna Cohen Ross, *Medicaid Expansion Fills Gaps in Maternal Health Coverage Leading to Healthier Mothers and Babies*, Georgetown University Health Policy Institute Center for Children and Families, May 2019, 8.

<sup>62</sup> NPWF, *supra* note 13 at 23.

<sup>63</sup> *Id.*

<sup>64</sup> DONA International, Position Paper, DONA International Position Paper: The Postpartum Doula's Role in Maternity Care, 1, 2 (2018) [hereinafter DONA]; Amy Chen, National Health Law Program, Routes to Success for Medicaid Coverage of Doula Care, 1 [hereinafter NHLP].

<sup>65</sup> *Id.* at 1.

<sup>66</sup> Universal Declaration of Human Rights art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights art. 7, *ratified* Jun. 8, 1992, 1999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, *ratified* Oct. 21, 1994, 1465 UNTS 85, 113 [hereinafter CAT].

<sup>67</sup> NPWF, *supra* note 13 at 23.

<sup>68</sup> *Id.* at 23.

<sup>69</sup> DONA, *supra* note 64 at 1.

<sup>70</sup> *Id.* at 1.

<sup>71</sup> NPWF, *supra* note 13 at 7; NHLP, *supra* note 64 at 2.



26. Evidence from other developed countries indicates that midwife and doula care improve numerous health outcomes without diminishing safety and that midwives are cost-effective compared to obstetrician-led deliveries for low-risk pregnancies.<sup>72</sup> Midwifery care resulted in less electronic fetal monitoring, less epidural or spinal analgesia, less use of pain medication overall, fewer episiotomies, and increased spontaneous vaginal birth (with neither forceps nor vacuum). Medical authorities, scholars, and advocates endorse the use of midwives and doulas.<sup>73</sup> Their use is further in line with international human rights standards and the World Health Organization's recommendations.<sup>74</sup>

## ii. The Over-Medicalization of Childbirth in the U.S. and Florida

27. Florida's maternal care system is over-medicalized, ultimately restricting access to midwives and doulas. This over-medicalization is reinforced by physicians' and hospitals' economic interests, the maternal medico-legal framework, and gaps in provider and public education. As a result, expectant mothers, and most especially individuals of color and low-income, too often lack access to midwifery or doula services.
28. Childbirth in the U.S. is highly medicalized, leading to high costs and low access to midwifery and doula care, particularly for individuals of color. Of the four million births that occur each year in the U.S., 98.6% occur within hospitals, with the vast majority attended by obstetricians, trained surgeons.<sup>75</sup> In comparison, in Belgium, Denmark, Finland, France, Germany, Great Britain, Netherlands, Norway, and Sweden, where maternal and infant mortality rates are lower than the U.S., 75% of women had a midwife-assisted hospital birth,<sup>76</sup> and for low-risk pregnancies, midwives were the only caregivers most women in these countries saw.<sup>77</sup> Generally, pregnant women of color who depend on the limited provider networks offered by a given Medicaid managed care organizations have little access to midwifery care and/or doula services.<sup>78</sup>
29. Overmedicalization results in the overuse of potentially harmful practices and underuse of beneficial practices, ultimately resulting in more maternal and infant complications and increased cost compared to midwifery-based models.<sup>79</sup> Overuse occurs when a medical practice has no clear benefit and has associated complications that may cause harm.<sup>80</sup> Overused practices include labor induction, scheduled births, Cesarean birth, repeat Cesarean birth, continuous electronic fetal

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<sup>72</sup> *Id.*; Brown, *supra* note 3 at 2.

<sup>73</sup> The United States Commission on Civil Rights, *Racial Disparities in Maternal Health: 2021 Statutory Enforcement Report*, Sept. 2021, <https://www.usccr.gov/files/2021/09-15-Racial-Disparities-in-Maternal-Health.pdf>.

<sup>74</sup> World Health Organization, *WHO recommendations: intrapartum care for a positive childbirth experience* (2018), <https://apps.who.int/iris/bitstream/handle/10665/260178/9789241550215-eng.pdf>.

<sup>75</sup> Brown, *supra* note 3 at 5 & 8.

<sup>76</sup> United Nations Population Fund, 2021 State of World's Midwifery report, <https://www.unfpa.org/sowmy>.

<sup>77</sup> Brown, *supra* note 3 at 6-7.

<sup>78</sup> Katy Backes Kozhimannil & Rachel Hardeman, *How Medicaid Coverage for Doula Care Could Improve Birth Outcomes, Reduce Costs, and Improve Equity*, Health Affairs, Jul. 1, 2015, <https://www.healthaffairs.org/doi/10.1377/forefront.20150701.049026/full/>; Brigitte Courtot, et. al., *Midwifery and Birth Centers Under State Medicaid Programs: Current Limits to Beneficiary Access to a High-Value Model of Care*, The MilBank Quarterly, Dec. 2022, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7772638/>.

<sup>79</sup> NPWF, *supra* note 13 at 19.

<sup>80</sup> *Id.*

monitoring, and the admission of healthy babies to the neonatal intensive care units.<sup>81</sup> Underuse happens when safe, beneficial, health-enhancing practices are underutilized.<sup>82</sup> Underused practices include planned labor after one or two cesareans, smoking cessation interventions upon pregnancy, continuous support during labor, hand maneuvers to turn a fetus to headfirst position at term, intermittent auscultation with a handheld device for fetal monitoring, being upright and mobile during labor, and screening for and treating perinatal depression.<sup>83</sup> Overmedicalization is also cyclic as one medical intervention during childbirth increases the chance of complications, the need for additional medical interventions,<sup>84</sup> and the chances of incurring obstetric violence.

30. Paternalism, racism, and misogyny have shaped modern maternal care. White, male obstetricians were responsible for taking labor and delivery care out of the hands of midwives and into the hospital setting.<sup>85</sup> Hospitals and the American Medical Association rewrote the narrative of homebirth and midwifery care.<sup>86</sup> The shift to physician-assisted births resulted in diminished access to midwifery care.<sup>87</sup> Black midwives, who once delivered most of the babies in the U.S., lost their ability to work due to physician-driven lobbying and advocacy.<sup>88</sup>
31. Florida's regulation of midwives and birthing centers restricts access to midwifery care, particularly for women of color who depend on Medicaid coverage, or who lack health coverage entirely during pregnancy. Currently, Florida fails to license all eligible midwives.<sup>89</sup> Florida's restrictive licensure regime unduly decreases the number of midwives and unnecessarily restricts women's access to care options where often no services exist.<sup>90</sup>
32. Tort law distorts childbirth by restricting the choice of birthing options for expecting mothers though its creation of a narrow standard of care (SOC). This narrow SOC causes physicians to practice defensive medicine and provides a legal and economic incentive to prioritize the fetus's safety over the birthing woman's.<sup>91</sup> Tort law also fails to hold physicians to an adequate standard for informed consent.<sup>92</sup> In some cases, courts have gone so far as to dictate that patient's requests be overridden and enforced compliance with the prescribed hospital birth by court order.<sup>93</sup> A court order mandating hospital birth is just one tool healthcare providers use to get women to comply

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Kukura, *supra* note 21 at 775.

<sup>86</sup> Brown, *supra* note 3 at 4.

<sup>87</sup> Brown, *supra* note 3 at 4.

<sup>88</sup> Successful racist and misogynistic smear campaigns, strategically designed for political persuasion and law reform, described Black midwives as unhygienic, barbarous, ineffective, non-scientific, dangerous, and unprofessional. Michele Goodwin, American Civil Liberties Union, *The Racist History of Abortion and Midwifery Bans*, <https://www.aclu.org/news/racial-justice/the-racist-history-of-abortion-and-midwifery-bans/>.

<sup>89</sup> § 467, Fla. Stat. (2021); Fla. Admin. Code R. 64B24.

<sup>90</sup> The Legal Infrastructure at 2222.

<sup>91</sup> *Id.* at 2214.

<sup>92</sup> *Id.* at 2220. Florida, like other states, requires that physicians must disclose the material risks, benefits, and *alternatives to treatment*. § 766.103, Fla. Stat. (2021); *Id.* at 2215; Kukura, *supra* note 21 at 780. However, this rarely occurs in the childbirth setting as individuals are often not informed of their other birthing options and of all the risks associated with hospital birth. *Id.* at 2216.

<sup>93</sup> *Id.* at 2217.

with a recommended/ordered hospital birth. Other methods include terminating care for the pregnant women and threatening to take children away via child protective services.<sup>94</sup>

33. Florida’s fetal homicide laws impact a pregnant woman’s right to choose childbirth interventions, especially during the final stages of pregnancy and birth.<sup>95</sup> Florida law dictates that anyone who commits a criminal offense (i.e. violating a court order) that “causes bodily injury to or the death of an unborn child commits a separate offense.”<sup>96</sup> Florida defines the unborn child as “a member of the species *Homo sapiens*, at any stage of development, whom is carried within the womb.”<sup>97</sup> This threat of criminal sanction has limited women’s birthing choices.<sup>98</sup>
34. Both midwives and doulas experience significant challenges with insurance coverage and reimbursement. First, a lack of sufficient insurance reimbursement for midwives raises the price of midwives’ services and reduces the availability of midwives, creating insurmountable financial barriers for providers and underserved individuals.<sup>99</sup> Medicaid reimbursements are low and midwives and birthing centers often struggle financially.<sup>100</sup> Additionally, Florida is one of a handful of states that requires midwives to carry malpractice insurance with expensive premiums that decrease the financial viability of midwifery practice.<sup>101</sup> While Florida is one of the few states that mandates health insurers’ plans to cover midwifery services and prohibits the outright ban of community births, its law allows significant discretion for insurers to determine when midwives are reimbursed and the amount of reimbursement paid to the midwives.<sup>102</sup> Moreover, some Florida Medicaid Managed Care Organizations (MCOs) fail to maintain accurate provider directories, as required, while others fail to meet network adequacy standards.<sup>103</sup> Accordingly, even when midwives are covered, patients may struggle to easily identify midwives that may provide the desired services. When insurers fail to reimburse midwives for the true cost of their services, those costs must be absorbed either by the midwives themselves, or their patients. As a result, midwifery practices, particularly those that seek to serve women covered by Medicaid, struggle to remain financially viable. The end result is limited access for lower-income women of color.

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<sup>94</sup> *Id.* at 2220.

<sup>95</sup> Erin K. Duncan, *The United States’ Maternal Care Crisis: A Human Rights Solution*, 93 OR. L. REV. 403, 428 (2014).

<sup>96</sup> § 775.021, Fla. Stat. (2021).

<sup>97</sup> § 775.021(5)(e), Fla. Stat. (2021).

<sup>98</sup> Duncan, *supra* note 95 at 427.

<sup>99</sup> NPWF, *supra* note 13 at 38.

<sup>100</sup> *Id.* at 38.

<sup>101</sup> O.M. Campbell, *Might Midwives Help Fill Rural Maternity Care Gaps?* Rural Health Quarterly.

<https://ruralhealthquarterly.com/home/2018/07/09/might-midwives-help-fill-rural-maternity-care-gaps/>. The cost can be high — over a decade ago, a fifth-year midwife working in Miami could pay \$30,000 a year for \$250,000 in coverage. Suzette Laboy, *Florida Insurance Requirement One of Many Issues for Midwives*, Insurance Journal, Feb. 24, 2009, <https://www.insurancejournal.com/news/southeast/2009/02/24/98080.htm>.

<sup>102</sup> § 627.6754(7)(1), Fla. Stat. (2021); <https://www.magnoliabirthhouse.com/cost-of-childbirth>.

<sup>103</sup> To satisfy both federal and state law, a MCO must: (1) maintain an accurate and complete online provider directory, and (2) maintain a region-wide network of providers in sufficient numbers to meet the network capacity and geographic access standards for services. § 409.967(2), Fla. Stat. (1973); 42 C.F.R. 438.68. However, a survey of Miami-Dade County found that many Medicaid managed care organizations (MMCOs) were violating these network adequacy standards. Only 45% of the midwifery facilities listed could be reached. Moreover, just 27% of midwives were accepting new patients. Furthermore, only 44% of midwives were in the plan’s in-network. Florida Health Justice Project (FHJP), *Access to Midwifery Services*, 1, 10 (2020).

35. Despite having for centuries played a critical role in improving birthing outcomes, Black midwives currently face unnecessary and often insurmountable challenges to practicing and serving families in need of their care<sup>104</sup> due to structural racism and the associated prevailing socioeconomic inequality. Birth workers of color who share common bonds with and understand the needs of people of color lead to better birthing outcomes.<sup>105</sup> Despite a long history of midwifery in the Black community, Black women currently represent less than 2% of the nation's reported 15,000 midwives. Black doulas face similar structural racism and socioeconomic barriers.<sup>106</sup>
36. Doulas face additional barriers to insurance coverage and reimbursement, which restrict access to their services. Very few private health insurance companies reimburse for doula services, and often reimbursement is not guaranteed and occurs retroactively after the patient has paid out-of-pocket.<sup>107</sup> Accordingly, most clients must pay upfront, with doula service prices ranging widely.<sup>108</sup> Grant funding for doula services is rarely available.<sup>109</sup> Subsequently, the most vulnerable and underserved populations often cannot afford doula care and trained professional doulas are often forced to volunteer or to waive fees to work with low-income women.<sup>110</sup>
37. Florida does not mandate doula services be covered by private insurers or Medicaid.<sup>111</sup> Recently, Florida's Agency for Healthcare Administration (AHCA) included doula care as an expanded benefit that Medicaid MCO plans *could* include.<sup>112</sup> While all Medicaid Managed Care Organizations have stated their intent to cover doula services, Medicaid MCOs individually negotiate reimbursement rates, creating a further differentiated range in service availability depending on the rate offered.<sup>113</sup> Additionally, the MCOs have the ability to impose specific certification requirements on doulas that may further restrict access.
38. Unlike midwives who have numerous recognized credentials, doulas' lack of an official licensure or standard credentialing process prevents them from receiving federal government reimbursement directly for the services they provide.<sup>114</sup> Regardless of the insurance coverage, doulas must be recommended by a licensed provider to receive federal or state reimbursement, and worse,

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<sup>104</sup> C. C. D. Terreri, *Black History Month: The Importance of Black Midwives, Then, Now and Tomorrow*. *Lamaze International* (2020), <https://www.lamaze.org/Connecting-the-Dots/black-history-month-the-importance-of-black-midwives-then-now-and-tomorrow-1#:~:text=Midwives%20and%20specifically%20Black%20midwives,in%20need%20of%20their%20care.>

<sup>105</sup> E. A. Howell (2018). Reducing Disparities in Severe Maternal Morbidity and Mortality. *Clinical obstetrics and gynecology*, 61(2), 387–399. <https://doi.org/10.1097/GRF.0000000000000349>

<sup>106</sup> Keisha La'Nesha Goode, *Birthing, Blackness, and the Body: Black Midwives and Experiential Continuities of Institutional Racism*, (2014), CUNY Academic Works, [https://academicworks.cuny.edu/gc\\_etds/423](https://academicworks.cuny.edu/gc_etds/423).

<sup>107</sup> NHLP, *supra* note 64 at 11.

<sup>108</sup> NHLP, *supra* note 64 at 11; DONA, *supra* note 64 at 4.

<sup>109</sup> DONA, *supra* note 64 at 4.

<sup>110</sup> NHLP, *supra* note 64 at 2, 11.

<sup>111</sup> Nora Ellmann and Jamille Fields Allsbrook, *States' Essential Health Benefits Coverage Could Advance Maternal Health Equity*, Center for American Progress (Apr. 3, 2021), <https://www.americanprogress.org/article/states-essential-health-benefits-coverage-advance-maternal-health-equity/>.

<sup>112</sup> Alexis Robles-Fradet, *Medicaid Coverage for Doula Care: State Implementation Efforts*, National Health Law Program (Dec. 8, 2021), <https://healthlaw.org/medicaid-coverage-for-doula-care-state-implementation-efforts/>; Doula Series Footnotes, *Medicaid coverage of doula services in the United States*, Jul. 19, 2021, <https://doulaseriesfootnotes.com/national-overview.html>.

<sup>113</sup> NHLP, *supra* note 64 at 11.

<sup>114</sup> NHLP, *supra* note 64 at 6.

reimbursement is often provided first to the licensed provider for distribution to the doulas.<sup>115</sup> This creates additional barriers to reimbursement by adding an intermediary to the billing and reimbursement process for government-reimbursed doula care.<sup>116</sup> Like with midwives, the restricted insurance coverage leads to out-of-pocket payments that cause a disparate provision of doula services to often less affluent and marginalized women of color.

39. The lack of consistent, systemic support and education limits the supply of midwives and doulas.<sup>117</sup> Unlike hospitals, which receive Medicare support for their medical residencies, no comparable support for midwifery training amounts to a functional disincentive to train midwives.<sup>118</sup> In essence, midwifery training lacks a subsidy program offered to obstetrics programs, unnecessarily inflating the tuition of midwifery students and limiting the midwifery pipeline.<sup>119</sup> Consequently, there is a shortage of midwife educators to share their knowledge and approaches to maternal-newborn care with medical students and trainees, and nursing and other students.<sup>120</sup> Moreover, the lack of awareness by healthcare providers and the general public of the services provided by both midwives and doulas also prohibits their utilization.<sup>121</sup> As a result, health consumers and even many healthcare providers lack a nuanced understanding of midwifery and doula care. This de facto bias in favor of physician care limits consumer access.<sup>122</sup>

### **III. RACIAL INJUSTICE IN ACCESS TO REPRODUCTIVE HEALTH**

41. Racial and ethnic disparities in women's access to and use of reproductive health services prevail in the U.S.<sup>123</sup> These disparities impact not just maternal mortality, but also access to contraception, Pap tests, mammograms,<sup>124</sup> and HIV preventative care,<sup>125</sup> as well as unintended pregnancies. Florida's refusal to expand Medicaid under the ACA impacts access to critical reproductive healthcare for women, particularly from low-income communities and communities of color. Medicaid expansion would enable many low-income women of color to benefit from affordable reproductive healthcare,<sup>126</sup> including family planning.<sup>127</sup> Inadequate access to these reproductive services contributes to racial disparities in reproductive and maternal health outcomes.<sup>128</sup> Moreover, Florida's recent passage of a ban on abortions after 15 weeks<sup>129</sup> further restricts access to essential reproductive services, undermining the health of women and families and disproportionately harming low-income women and women of color.

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<sup>115</sup> NHLP, *supra* note 64 at 13.

<sup>116</sup> NHLP, *supra* note 64 at 19.

<sup>117</sup> NPWF, *supra* note 13 at 29.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> NHLP, *supra* note 64 at 3.

<sup>122</sup> Brown, *supra* note 3 at 14.

<sup>123</sup> Sutton, *supra* note 29.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Closing the Medicaid Coverage Gap in FLORIDA Would Increase Access to Necessary Sexual and Reproductive Healthcare*, Planned Parenthood, 2021, [https://www.plannedparenthood.org/uploads/filer\\_public/af/51/af511954-355f-4f4a-baeb-64a0cb6d6fc5/florida-state-stats-medicaid-expansion.pdf](https://www.plannedparenthood.org/uploads/filer_public/af/51/af511954-355f-4f4a-baeb-64a0cb6d6fc5/florida-state-stats-medicaid-expansion.pdf).

<sup>127</sup> Solomon, *supra* note 44.

<sup>128</sup> *Id.*

<sup>129</sup> Fla. Stat. § 390.0111 (2022).

## A. THE NEED TO IMPROVE FLORIDA’S FAMILY PLANNING WAIVER PROGRAM

42. Florida’s Family Planning Waiver Program (“the Waiver Program”) was established in 1998 to address the lack of access to family planning services in Florida, particularly for marginalized communities.<sup>130</sup> Women between the ages of 14 and 55, who have incomes at or below 191% of the Florida Poverty Level are eligible to receive Waiver Program services.<sup>131</sup> According to the Department of Health & Human Services, the objectives of the Waiver Program are to (1) increase access to family planning services, (2) reduce the number of unintended pregnancies, (3) increase child spacing intervals through contraception, and (4) reduce costs by reducing unintended pregnancies by women who would be eligible for Medicaid pregnancy related services.<sup>132</sup> The services available through the Waiver Program include sexually transmitted disease testing and treatment; breast cancer and colposcopy screening; medications, antibiotics, supplies, and pregnancy tests; contraception and birth control supplies; physical exams, such as a pap smear, breast exam, or STD testing, and counseling; education.<sup>133</sup> All services are confidential.<sup>134</sup> With a few exceptions, the Waiver Program provides access to these services up until pregnancy.<sup>135</sup>
43. Studies have demonstrated several benefits to family planning services. A 2014 study on family planning programs across the country found an association for individuals born after federal family planning programs began and a decreased likelihood of living in poverty in childhood and adulthood.<sup>136</sup> Moreover, family planning is imperative to the health and well-being of families by allowing individuals and couples to avoid unintended pregnancies,<sup>137</sup> attain their desired number of children, and determine the spacing and timing of their births.<sup>138</sup> Access to contraception reduces the need for unsafe abortions<sup>139</sup> and protects girls and women from risky pregnancies.<sup>140</sup> Family planning further reduces the spread of sexually transmitted diseases and reduces rates of

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<sup>130</sup> Department of Health and Human Services [hereinafter referred to as DHHS], *FL FPW Evaluation Design Approval Letter*, Jul. 13, 2020, <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/fl/fl-family-planning-ca.pdf>.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Florida Health, *Medicaid Family Planning Waiver Program*, <http://www.floridahealth.gov/programs-and-services/womens-health/family-planning/fp-medicaid.html>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* The Waiver Program does not provide services once pregnancy occurs, even though women’s needs related to family planning do not end once a baby is born. On July 26, 2021, an Amendment Request was submitted to extend services and update the Waiver Program’s eligibility language to expand postpartum coverage from 60 days to 12 months. Agency for Healthcare Administration [hereinafter referred to as AHCA], *Florida Family Planning Waiver: Amendment Request*, Jul. 26, 2021, [https://ahca.myflorida.com/medicaid/family\\_planning/pdf/FPW\\_Amendment\\_Request\\_PND\\_Postpartum.pdf](https://ahca.myflorida.com/medicaid/family_planning/pdf/FPW_Amendment_Request_PND_Postpartum.pdf).

<sup>136</sup> Martha J. Bailey, et al., National Institute of Health *Do Family Planning Programs Decrease Poverty? Evidence from Public Consensus Data*, 2014, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4206087/pdf/nihms602597.pdf>.

<sup>137</sup> A review of the HHS Family Planning Program: Mission, Management and Measurement of Results, *Overview of Family Planning in the United States*, <https://www.ncbi.nlm.nih.gov/books/NBK215219/#:~:text=Family%20planning%20serves%20three%20critical,helps%20reduce%20rates%20of%20infertility>.

<sup>138</sup> World Health Organization, *Contraception*, [https://www.who.int/health-topics/contraception#tab=tab\\_1](https://www.who.int/health-topics/contraception#tab=tab_1).

<sup>139</sup> A review of the HHS Family Planning Program, *supra* note 137.

<sup>140</sup> *Id.*

infertility, in part by treating sexually transmitted diseases.<sup>141</sup> Research has consistently found that women’s ability to use contraceptives and to control when to have children, enhances education and employment opportunities, as well as family stability, mental health, and overall well-being.<sup>142</sup>

44. For enrollees, the Waiver Program has had important benefits. Enrollees experienced slightly lower rates of “low birth weight” and “pre-term births.”<sup>143</sup> Additionally, the average length of inter-birth intervals has gradually increased among the Waiver Program’s enrollees, as opposed to non-enrollees.<sup>144</sup> Increase in inter-birth intervals correlates with improved maternal and child health.<sup>145</sup>
45. However, Florida suffers from low service utilization of the Waiver Program and its services. According to a Florida State University (“FSU”) evaluation, a very small number of eligible people utilize the services provided by the Waiver Program.<sup>146</sup> From 2019 to 2020, just 13% of individuals enrolled in the Waiver Program utilized one or more service(s).<sup>147</sup> Among the most utilized services were STD testing and cervical cancer screening.<sup>148</sup> When women who were eligible for but unenrolled in the Waiver Program’s services were asked why they had not enrolled, nearly all responded that they were not aware of the Waiver Program.<sup>149</sup> When women who were enrolled but did not participate were asked why, nearly all responded that they were not aware they were enrolled or not aware of the full range of services offered.<sup>150</sup> Fortunately, a recent change requires automatic enrollment in the waiver program for those losing Medicaid. This is expected to increase enrollment, though awareness of enrollment and benefits is still critical.<sup>151</sup>
46. Enrollment in the waiver program is marked by racial disparities. According to the 2019-2020 Evaluation Report, The Waiver Program enrollees mostly identified as white (34.4%), followed

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<sup>141</sup> *Id.*

<sup>142</sup> See, e.g., United Nations Population Fund, *New Study Shows Benefits of Family Planning to the Well-Being of Women, Families, and Economies*, Mar. 21, 2013, <https://www.unfpa.org/news/new-study-shows-benefits-family-planning-well-being-women-families-and-economies>.

<sup>143</sup> “Low birth weight” occurs when a new-born weighs less than 2,500 grams. “Pre-term births” are classified as births occurring before 37 weeks gestation, which is calculated using the estimated clinical conception dates and dates of birth. Low birth weight and pre-term births are not mutually exclusive categories and may overlap. AHCA, *Florida Medicaid Family Planning Waiver Program: Family Planning Waiver DY 22 (SFY 2019-2020) Evaluation Report*, Dec. 7, 2021,

[https://ahca.myflorida.com/Medicaid/Family\\_Planning/pdf/Final\\_Evaluation\\_Report\\_2020.pdf](https://ahca.myflorida.com/Medicaid/Family_Planning/pdf/Final_Evaluation_Report_2020.pdf).

<sup>144</sup> *Id.*

<sup>145</sup> Amon Exavery, et al., *Levels and correlates of non-adherence to WHO recommended inter-birth intervals in Rufiji, Tanzania*, Dec. 13, 2012, <https://pubmed.ncbi.nlm.nih.gov/23237623/>.

<sup>146</sup> AHCA, *Annual Monitoring Report*,

[https://ahca.myflorida.com/medicaid/family\\_planning/pdf/DY22\\_Q4\\_and\\_Annual\\_Report\\_Final.pdf](https://ahca.myflorida.com/medicaid/family_planning/pdf/DY22_Q4_and_Annual_Report_Final.pdf).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> AHCA, *supra* note 146.

<sup>150</sup> *Id.*

Approximately 13% of women enrolled in the Waiver Program utilized at least one service – approximately 5% were tested for an STD and 2% obtained a cervical cancer screening. AHCA, *Medical Care Advisory Committee Meeting*, Jan. 25, 2021, [https://ahca.myflorida.com/medicaid/mcac/docs/2021-01-25\\_Meeting/MCAC\\_January\\_2021-Meeting\\_Presentation.pdf](https://ahca.myflorida.com/medicaid/mcac/docs/2021-01-25_Meeting/MCAC_January_2021-Meeting_Presentation.pdf).

<sup>151</sup> AHCA, *supra* note 146.

by Black (29.4%), and Hispanic (27.0%) women.<sup>152</sup> Whereas, those who were unenrolled but eligible women identified as Hispanic (33.8%), followed by white (31.4%) and Black (23.7%) women.<sup>153</sup>

47. The Waiver Program covers only the most basic services. While there are federally specified benefits that are required to be covered, namely access to contraceptives, screening services, and counseling,<sup>154</sup> there is no official federal definition of “family planning.”<sup>155</sup> This ambiguity gives states immense discretion to determine the services covered by their programs.<sup>156</sup> As a result, the state misses an opportunity to provide essential services including transportation, emergency room visits, in-patient services, and access to postpartum healthcare.<sup>157</sup>
48. The Waiver Program currently neglects critical mental health services, including access to medication and counseling. Family planning services that support mental health positively impact maternal and child health.<sup>158</sup>
49. Numerous policies in Florida limit access to abortion for Florida residents. Florida has implemented various abortion restrictions through health and safety codes and zoning requirements, despite already-existing federal regulations.<sup>159</sup> Fla. Stat. Ann. §§ 390.014(3) requires that any facility with abortion services must obtain an “abortion clinic” license from the state and comply with a unique licensure scheme that is not required of other medical providers.<sup>160</sup> Florida also prohibits certain qualified healthcare professionals from providing abortion services. Only a physician licensed by the state of Florida in medicine or osteopathy and employed in the U. S. may provide abortion care.<sup>161</sup> The Florida Constitution protects the right to choose, but physicians are strictly prohibited from performing abortion services on minors, with few exceptions.<sup>162</sup> Additionally, as of April 14, 2022, a ban on abortions after fifteen weeks of pregnancy was signed into law, further restricting this procedure.<sup>163</sup> These limitations impede abortion access for Florida residents, most acutely low-income women and women of color.

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> AHCA, *Medicaid Family Planning Waiver Program*,

[https://ahca.myflorida.com/Medicaid/Family\\_Planning/index.shtml](https://ahca.myflorida.com/Medicaid/Family_Planning/index.shtml).

<sup>155</sup> Jenna Walls, et al., *Medicaid Coverage of Family Planning Benefits: Results from a State Survey*, Kaiser Family Foundation, Sep. 15, 2016, <https://www.kff.org/womens-health-policy/report/medicaid-coverage-of-family-planning-benefits-results-from-a-state-survey/>.

<sup>156</sup> *Id.*

<sup>157</sup> AHCA, *supra* note 154.

<sup>158</sup> Satija DC, *Psychological aspects of family planning*, *Rajasthan Med J.*, Apr. 1973, <https://pubmed.ncbi.nlm.nih.gov/12261341/>.

<sup>159</sup> *State Laws: Florida*, NARAL Pro-Choice America, <https://www.prochoiceamerica.org/state-law/florida/>.

<sup>160</sup> *Id.* For example, hospitals and physician’s offices are exempted from the licensure requirement, unless they provide abortion services. See Fla. Stat. Ann § 390.011(2).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*; “A physician may not perform or induce the termination of a pregnancy on a minor unless the physician has complied with the notice and consent requirements...” Fla. Stat. § 390.01114.

<sup>163</sup> Dareh Gregorian, *Florida Gov. Ron DeSantis signs 15-week abortion ban into law*, NBC News (Apr. 14, 2022), <https://www.nbcnews.com/politics/politics-news/florida-gov-ron-desantis-signs-15-week-abortion-ban-law-rcna24416>.



50. The Waiver Program has also not evolved to address COVID-19 and future pandemics. The National Family Planning and Reproductive Health Association (“NFPRHA”) has provided resources on how to implement COVID-19 measures and precautions,<sup>164</sup> which include health center operations, online clinical guidance, virtual information on billing and coding, telehealth, virtual Medicaid assistance, and a focus on health equity.<sup>165</sup> The Waiver Program could utilize NFPRHA’s model to create its own set of resources for Florida participants. In particular, the Waiver Program should allow for more accessible services through coverage of telehealth and the use of virtual communication, which would eliminate transportation costs and unnecessary exposure to COVID-19 risks, particularly for women with pre-existing conditions, or intending to become pregnant.
51. The current Waiver Program is set to expire on June 30, 2023,<sup>166</sup> providing the opportunity to address these gaps in its renewal. Addressing these gaps and increasing service utilization would improve maternal and infant health in Florida without raising costs and may result in budget savings.<sup>167</sup>

#### **IV. RECOMMENDATIONS**

52. All levels of government within the U.S. should recognize the right to the highest attainable standard of physical and mental health, requiring the provision of healthcare that is available, accessible, acceptable and of high quality.<sup>168</sup>
53. To address the maternal and infant health crisis and reduce racial disparities, Florida should opt into the expansion of Medicaid under the Affordable Care Act, enabling continuous access to healthcare before, during and after pregnancy.

##### **A. EXPANDING ACCESS TO MIDWIVES AND DOULAS**

54. To respect, protect, and fulfill the rights to health and equality for women, infants, and families, and address the maternal and infant health disparities that most acutely impact Black and Indigenous communities, Florida should expand access to midwives and doulas for women of color. This requires realigning economic incentives, reforming the maternal medico-legal framework, and filling gaps in both the public’s and healthcare providers’ education on midwives and doulas.
55. To realign economic incentives and the politico-economic structure surrounding childbirth, Florida should take the following steps:
- Establish metrics around quality care.

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<sup>164</sup> *Health Center COVID-19 Resources*, National Family Planning & Reproductive Health Association, <https://www.nationalfamilyplanning.org/covid-19-resource-hub>.

<sup>165</sup> *Id.*

<sup>166</sup> AHCA, *supra* note 146.

<sup>167</sup> *Id.*

<sup>168</sup> Committee on Economic, Social, and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12) ¶12 (a)-(d), U.N. Doc., E/C/GC/14.

- Provide for reimbursement for midwives and doulas based on services provided.
- Florida’s Department of Health should work with Florida’s Perinatal Quality Collaborative to support an independent panel consisting of obstetricians and perinatologists, nurses, midwives, doulas, lactation specialists, and public health professionals to determine best, evidence-based, holistic practices for integrated maternal care.<sup>169</sup>
- Florida’s Department of Health and the Perinatal Quality Collaborative should work collaboratively with Florida’s Maternal Mortality Review Committee to examine intrapartum healthcare more comprehensively.<sup>170</sup> It should obtain individual and aggregate level data on obstetric violence; the utilization of overused and underused maternal care services; the utilization of midwifery and doula services; pregnancy-related maternal complications, including severe maternal morbidity; pregnancy-related infant complications and mortality; women’s satisfaction with prenatal care and labor care; and breastfeeding initiation and other significant indicators of both prenatal and postnatal indicators of maternal health. Moreover, it should make this data available to the public and researchers.
- Florida Department of Health should incentivize entry into maternity healthcare professions for low-income women and women of color.<sup>171</sup>
- Florida Department of Health should collaborate with hospitals to implement a patient safety bundle on obstetric care to improve maternal health through education, care coordination, and patient safety protocols, inclusive of midwifery and doula services.<sup>172</sup>

56. Florida should utilize available federal funding to build capacity for and support for community birthing options and to build key community partnerships in under-served communities of color.
- Florida should use its Title V Maternal and Child Health (MCH) Block Grant program funding to build capacity for community-based doula and midwife programs, including birthing centers and community-based perinatal health worker organizations.<sup>173</sup>
  - Florida should also apply for funding provided by the State Maternal Health Innovation program administered by the Health Resources and Services Administration. This program supports states by fostering partnerships with maternal health experts and optimizing their resources to support programs, such as midwifery and doula services, that help prevent maternal mortality and severe maternal morbidity and reduce disparities in maternal health outcomes.<sup>174</sup>
  - Florida should combine multiple funding streams to fund initiatives related to expanding access to midwifery and doula services, including Medicaid, Section 1115 Medicaid Waiver Programs, CHIP, the Title V MCH Block Grant and the State Maternal Health Innovation Program. Florida should incentivize and encourage community development

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<sup>169</sup> Kukura, *supra* note 21 at 796.

<sup>170</sup> Taylor Platt & Carrie Hanlon, *State Maternal Mortality Review Committees Address Substance Use Disorder and Mental Health to Improve Maternal Health*, National Academy of State Health Policy, 1, 1 (2021). MMRCs are multidisciplinary committees in states and cities that perform comprehensive reviews of pregnancy-related deaths occurring within a year of the end of a pregnancy.

<sup>171</sup> Taylor Platt and Neva Kaye, *Four State Strategies to Employ Doulas to Improve Maternal Health and Birth Outcomes in Medicaid*, National Academy for State Health Policy, 1, 10 (2020).

<sup>172</sup> Platt, *supra* note 170 at 5.

<sup>173</sup> Platt, *supra* note 171 at 4-5. One example of a state that utilized the Title V MCH Block Grant funds is Indiana via its Safety Pin Program and The Speak Life Program.

<sup>174</sup> The United States Commission on Civil Rights, *supra* note 73.

endeavors, pursuant to the Community Reinvestment Act, to fund programs that expand access to midwifery and doula services.<sup>175</sup>

57. Florida should reform the restrictive regulations of community birthing options. Florida should expand licensure to include Certified Midwives and Community Midwives, and allow them to practice to the full scope of their abilities. Midwives' right to work includes the right to practice to their full scope.<sup>176</sup> Florida should reevaluate each restrictive regulation to determine its impact on maternal health outcomes and its utility.
58. Florida should assess the role of tort law and malpractice insurers in minimizing access to midwives and rising C-section rates. The state should aim to support the rights of birthing people and their families in the case of malpractice resulting in harm, while simultaneously ensuring that providers, particularly midwives, are not unduly burdened by rising costs of malpractice insurance.
59. Florida's Office of Court Education should ensure its judges receive training in birth justice, specifically, human rights-based education on the deprivation of rights of pregnant and birthing people.
60. Florida must expand medical insurance coverage and reimbursement for midwives and doulas to ensure access to these services for underserved communities of color.
  - For all private insurance beneficiaries, Florida should ensure midwives and birthing centers are covered in its state benchmark plans for low-risk pregnancies.<sup>177</sup>
  - To remedy the issue of insurance companies' and Medicaid MCOs' failure to provide sufficient network adequacy for midwifery services, Florida's Agency for Healthcare Administration should assess its network adequacy standards for these providers, to ensure that they are in fact adequate, and should strengthen its enforcement of its network adequacy standards, ensuring midwives and birthing centers are accessible.<sup>178</sup>
  - Florida should mandate coverage for extended-model doula support to ensure coverage for *all* Medicaid beneficiaries.
  - Florida should mandate coverage for doulas by designating doula services as a "preventative service" via a State Plan Amendment.<sup>179</sup>
  - To ensure coverage for all private insurance beneficiaries, Florida should cover extended model doulas services, providing coverage in the prenatal, childbirth, and postnatal periods,

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<sup>175</sup> Karen Kali & Samantha Autar, *The Community Reinvestment Act and Its Connections to Health Outcomes*, National Community Reinvestment Coalition (2022).

<sup>176</sup> Studies have found that states with a regulatory framework allowing autonomous midwifery practice have more midwives and a higher proportion of midwife-attended births, as compared to states with more restrictive regulations. Yang et. al., *State Scope of Practice Laws, Nurse-Midwifery Workforce, and Childbirth Procedures and Outcomes*, 26 *Women's Health Issues* 262, 265 (2016). States promoting autonomous midwifery practice had double the number of midwife providers; Brittany Ranchoff and Eugene Declercq, *The Scope of Midwifery Practice Regulations and the Availability of the Certified Nurse-Midwife and Certified Midwifery Workforce, 2012-2016*. *Journal of Midwifery and Women's Health* 65, 119, 123 (2020).

<sup>177</sup> Ellmann, *supra* note 111. "Specifically, the [Affordable Care Act] requires small group and individual market plans to cover maternity and newborn care among the required essential health benefits (EHBs), but states are able to select a benchmark plan to define the specific services covered under each category."

<sup>178</sup> Platt, *supra* note 171 at 42.

<sup>179</sup> See, e.g., DHHS, *SPA #10-20011*, Center for Medicaid & CHIP Services (Feb. 19, 2021), <https://www.medicaid.gov/Medicaid/spa/downloads/NJ-20-0011.pdf>.

in its state benchmark plans for all pregnancies.<sup>180</sup> Moreover, once doula coverage is mandated and licensed, network adequacy standards should be assessed to ensure for true adequacy and enforced to ensure expecting mothers have access to doulas.

61. Florida should remedy gaps in education among healthcare providers and the public on community birthing options and maternal care, focusing on the most impacted communities of color.
  - The state legislature should appropriate funding to support midwives' and doulas' trainings and certifications, particularly in marginalized communities.<sup>181</sup>
  - Florida should impose additional medical education requirements for medical students and nurses to learn about the role, benefits, and scope of midwifery and doula care, as this would help increase their acceptance amongst medical professionals.<sup>182</sup>
  - Florida DOH and AHCA should encourage Medicaid MCOs to educate members about the benefits of midwifery and doula care.

## **B. INCREASING ACCESS TO THE FAMILY PLANNING WAIVER PROGRAM**

62. Florida should increase participation in the Waiver Program through increased advertisement, communication, and innovation. The Waiver Program should publicize its services and outcomes with advertisements, social media, maternal health campaigns, and partnerships.
63. Florida should improve accessibility of covered services, especially in light of COVID-19,<sup>183</sup> through remote options and increased telecommunication availability. If remote service and telecommunication are not feasible options, then Florida should provide free, safe, and accessible transportation, as well as protective items, such as masks.
64. Moreover, Florida should clarify any ambiguous terms or language related to family planning. For example, “counseling services” and “laboratory tests” should be defined to clarify the various opportunities available to beneficiaries. Moreover, the term “family planning” should be defined.
65. Florida should protect the right to safely obtain abortions by providing affordable access to abortion facilities, adequate education regarding the process and, if necessary, alternative services; increasing the number of clinics in “abortion desert” counties.<sup>184</sup> The Family Planning Waiver should ensure access to abortion services currently covered under Medicaid. Moreover, Florida’s state medical schools must include abortion within the obstetric training.
66. Florida should expand services offered by the Waiver Program to include pre-partum and mental health services. Moreover, information should be provided on the full range of birthing options, including midwife and doula services.

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<sup>180</sup> Ellmann, *supra* note 111; NPWF, *supra* note 13 at 11.

<sup>181</sup> *Id.* at 29.

<sup>182</sup> NHLP, *supra* note 64 at 3.

<sup>183</sup> Florida Health, *supra* note 133.

<sup>184</sup> See generally *State Facts About Abortion: Florida*, Guttmacher Institute, Jan. 2022, <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-florida> (providing statistics on Florida’s abortion rates).