

IN THE
SUPREME COURT OF THE STATE OF UTAH

PLANNED PARENTHOOD ASSOCIATION OF UTAH,
on behalf of itself and its patients, physicians, and staff,
Respondent,

v.

STATE OF UTAH, et al.,
Petitioners.

BRIEF OF AMICI CURIAE

IF/WHEN/HOW and UTAH ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On appeal from the Third Judicial District Court, Salt Lake County,

Honorable Andrew Stone, District Court No. 220903886

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CONSENT AND AUTHORSHIP

According to Utah Rule of Appellate Procedure 25, timely notice of filing was provided to all parties on January 20, 2023, and all parties consented. No counsel of a party authored this brief in whole or part, and no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTEREST OF AMICI CURIAE

If/When/How is a non-profit organization that provides comprehensive legal support for people criminalized for self-managing abortions, including: a legal advice hotline, criminal defense for people prosecuted for self-managing abortions, a legal defense fund, training and support for criminal defense attorneys to represent people prosecuted for pregnancy outcomes, education for policymakers about the harmful effects of criminalization of reproductive outcomes, and mixed-methods research analyzing the extent, causes, and consequences of criminalization of people who self-manage abortions. **If/When/How** brings a unique perspective, based on its direct legal services and research, on the harmful reverberations of the threat of criminalization on people's lives and health.

Utah Association of Criminal Defense Lawyers (UACDL) is a non-profit voluntary professional legal organization dedicated to the development

of legal education, support, and advocacy for criminal defense lawyers in Utah. Because of its defense focus on the legal system, UACDL is acutely aware of the negative, collateral consequences of criminal charges that are often overlooked by the legislature, prosecutors, and even the courts. Criminal defense is entwined with a host of constitutional rights including equal protection and the right to privacy. UACDL's interest in this issue is closely connected with the privacy concerns that this law encroaches upon.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2020, the Utah Legislature passed Senate Bill 174, a “trigger ban” intended to prohibit health care providers from performing abortions except under a narrow set of circumstances if U.S. Supreme Court precedent protecting pre-viability abortion were overturned. SB 174, and the felony penalties it imposed on health care providers who performed abortions, was activated on June 24, 2022 after the U.S. Supreme Court announced its decision to overturn *Roe v. Wade* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Plaintiff-Respondent Planned Parenthood Association of Utah (PPAU) filed a complaint in state district court based on several provisions of the Utah Constitution, and was granted a preliminary injunction on July 19, 2022. One of the issues raised by the State in its appeal to this Court is whether enforcement of SB 174 causes irreparable harm to Utahns.

Respondents and other *amici* have outlined the manifold injuries to health, rights, and dignity that Utahns will face if the state abdicates its responsibility to their wellbeing by preventing them from accessing abortion care. *Amici* submit this brief to urge this Court to consider the additional severe and irreparable harms that Utahns may face, directly at the hands of the state, if they are criminalized when they address their reproductive health care needs on their own.

Banning abortion creates conditions that lead to people being criminally punished for ending their pregnancies, or for merely being suspected of it based on a reproductive outcome. This is true globally, and U.S. trends suggest it will be true in Utah as well.

Criminalization of reproductive outcomes has devastating, even life-threatening, consequences. It prevents people from seeking medical care when they need it, subjects them to cruel and humiliating investigations in the midst of medical emergencies, and consigns them to stigma and condemnation in their communities. Worse, the harms of criminalization are disproportionately borne by people who are already marginalized due to racism, sexism, and socioeconomic disadvantage. These outcomes violate human rights, and cause needless, irreparable harm.

ARGUMENT

I. **When Formal Channels to Abortion Are Unavailable or Inaccessible, People End Their Own Pregnancies**

People who need to end a pregnancy will find a way to do so. This reality has existed throughout history, and transcends borders, politics, and culture. Where the law creates barriers to access, people will do their best to circumnavigate them; where the law bans abortion in the formal medical system, people will find a way to self-determine their reproductive lives outside of that system.¹ This is known as “self-managing” abortion: ending one’s own pregnancy, through whatever means, outside of the formal medical system.

A. ***People in the U.S. Self-Manage Abortions, and Will Continue to Do So***

It is difficult to accurately count how many people² end their own pregnancies outside the medical system in the U.S., but research suggests that it is only becoming more common as access to abortion diminishes across vast swaths of the country. A study conducted in 2020 estimated that that 7% of

¹ See Heidi Moseson et al., *Self-Managed Abortion: A Systematic Scoping Review* 3, UCSF (Nov. 4, 2019), <http://escholarship.org/uc/item/1mj5832t> (“Regardless of the legal climate, people may seek alternative models of abortion provision, such as self-managed abortion, when they cannot or do not want to access facility-based abortion care.”).

² People with a range of gender identities become pregnant. The risks of criminalization for self-managed abortion apply irrespective of gender identity.

U.S. women will attempt a self-managed abortion.³ Between 2018 and 2020, just one online service received more than 57,000 requests—from all fifty states—for medication to self-manage abortion.⁴

People may have a variety of reasons for self-managing an abortion. Even when people have access to clinically-managed health care, they may self-manage because of stigma related to the circumstances of the pregnancy or to having an abortion, to avoid detection by an abusive partner, or to have a more private experience.⁵ They may do so for health reasons: demand to one online source for abortion medications increased by 27% in the month after COVID stay-at-home orders began.⁶

³ Lauren Ralph et al., *Prevalence of Self-Managed Abortion Among Women of Reproductive Age in the United States*, 3 JAMA Network Open e2029245, at 1, 7–11 (2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774320>.

⁴ Abigail Aiken et al., *Factors Associated with Use of an Online Telemedicine Service to Access Self-managed Medical Abortion in the US*, 4 JAMA Network Open e2111852, at 1 (2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2780272>.

⁵ See Abigail Aiken et al., *Demand for Self-Managed Medication Abortion Through an Online Telemedicine Service in the United States*, 110 Am. J. Pub. Health 90, 94–95 (2020).

⁶ Abigail Aiken et al., *Demand for Self-Managed Online Telemedicine Abortion in the United States During the Coronavirus Disease 2019 (COVID-19) Pandemic*, 136 Obstetrics and Gynecology 835, 835–36 (2020).

Unsurprisingly, demand for self-managed abortion is higher in states with abortion restrictions.⁷ In fact, one study found that in the immediate aftermath of *Dobbs*, the rate of people requesting pills from an international telehealth nonprofit citing “current abortion restrictions” as a reason for needing services leapt 31% in states with bans.⁸ In fact, trends in internet searches as the threat to abortion rights suggested that people were bracing for the bans. Internet searches for terms like “misoprostol” and “medical abortion” grew by more than 5,000% after the announcement that the U.S. Supreme Court granted certiorari in *Dobbs*.⁹ In the hours after the decision was leaked on May 2, 2022, internet searches for information related to abortion pills were 162% higher than the anticipated baseline.¹⁰

⁷ See Aiken et al., *supra* note 5, at 92 (76% of U.S.-based requests came from states that heavily restrict abortion).

⁸ Abigail Aiken et al., *Requests for Self-managed Medication Abortion Provided Using Online Telemedicine in 30 US States Before and After the Dobbs v Jackson Women’s Health Organization Decision*, 328(17) *JAMA* 1768-1770 (Nov. 1, 2022) <https://jamanetwork.com/journals/jama/article-abstract/2797883>

⁹ Robert Hart, *Searches for Self-Induced Abortions Surge After SCOTUS Accepts Mississippi’s Roe v. Wade Challenge*, *Forbes* (May 18, 2021), <https://www.forbes.com/sites/roberthart/2021/05/18/searches-for-self-induced-abortions-surge-after-scotus-accepts-mississippi-roe-v-wade-challenge>.

¹⁰ Adam Poliak et al., *Internet Searches for Abortion Medications Following the Leaked Supreme Court of the United States Draft Ruling*, 182(9) *JAMA* 1002 (June 29, 2022) <https://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2793813>.

B. People Turn to Abortion Pills as a Safe Option for Self-Managed Abortion

In a previous era, increasing rates of self-managed abortion would have been cause for alarm about health risks. Although unsafe methods remain a possibility, self-managed abortion is safer than ever.¹¹ People in the U.S. who self-manage abortion frequently do so by purchasing misoprostol and mifepristone from online pharmacies outside the U.S.—the same pills they would receive from a clinic. These medications have been in use in the U.S. for more than twenty years. Abortion pills are effective, successfully ending a pregnancy more than 95% of the time.¹² And they are safe: side effects are comparable to those of a miscarriage,¹³ and are generally treatable in an outpatient setting.¹⁴

Recent changes to regulations around abortion pills reflect the growing consensus that these medications can be used safely with less medical supervision than previously believed. One U.S. study found that remote

¹¹ See Moseson et al., *supra* note 1, at 3 (discussing methods used to end pregnancies outside of medical setting).

¹² See Melissa Chen & Mitchell Creinin, *Mifepristone with Buccal Misoprostol for Medical Abortion: A Systematic Review*, 126 *Obstetrics & Gynecology* 12, 12–13 (2015).

¹³ Nat'l Acads. of Scis., Eng'g, & Med., *The Safety and Quality of Abortion Care in the United States* 54 (Nat'l Acads. Press 2018).

¹⁴ Paul Blumenthal et al., *Providing Medical Abortion in Low-Resource Settings: An Introductory Guidebook* 5–6 (Hillary Bracken ed., Gynuity Health Projects 2d ed. 2009).

consultation with abortion pills delivered by mail is “feasible, safe, and efficacious.”¹⁵ That study found a 95% efficacy rate, similar to that of in-person provision of abortion pills, with only 5% of patients requiring medical care, and no reports of major complications.¹⁶ The Food and Drug Administration recently permanently lifted the requirement that abortion pills be dispensed in person, permitting prescribers to send medications by mail after a telehealth consultation, and, in January of 2023, authorized the pills for sale at retail pharmacies.¹⁷

Experience in other countries affirms that abortion pills can be safely used at home, even without a medical provider.¹⁸ This fact has markedly changed the global abortion landscape: researchers attribute the worldwide

¹⁵ Ushma Upadhyay et al., *Safety and Efficacy of Telehealth Medication Abortions in the US During the COVID-19 Pandemic*, 4 JAMA Network Open e2122320, at 2 (2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2783451>.

¹⁶ *Id.* at 2, tbl. 2.

¹⁷ U.S. Food & Drug Admin, *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, Jan. 4, 2023, <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation>.

¹⁸ Kinga Jelinska & Susan Yanow, *Putting Abortion Pills into Women’s Hands: Realizing the Full Potential of Medical Abortion*, 97 *Contraception* 86, 86 (2018); Bela Ganatra et al., *Global, Regional, and Subregional Classification of Abortions by Safety, 2010–14: Estimates from a Bayesian Hierarchical Model*, 390 *Lancet* 2372, 2377–79 (2017).

decrease in mortality associated with self-managed abortion to the use of abortion pills.¹⁹ In 2022, the World Health Organization issued guidance recommending self-managed abortion with pills up to 12 gestational weeks as a safe option which “must be recognized as a potentially empowering and active extension of the health system.”²⁰ Unfortunately, the mitigation of medical risk promised by abortion pills is undermined by another risk: that of criminal prosecution for self-managing abortion.

II. People Who End Their Own Pregnancies Face Legal Risk

Global maternal mortality due to unsafe abortion has decreased as a result of the trend toward liberalizing access to legal abortion²¹ and an increased use of safer methods to self-manage.²² But Utah threatens to move

¹⁹ Mariana Prandini-Assis & Sara Larrea, *Why Self-Managed Abortion Is So Much More Than a Provisional Solution for Times of Pandemic*, 28 *Sexual & Reprod. Health Matters* 37, 38 (2020).

²⁰ World Health Org., *Abortion Care Guideline* 98 (2022), <https://apps.who.int/iris/bitstream/handle/10665/349316/9789240039483-eng.pdf>.

²¹ See International Conference on Population and Development Programme of Action (2014) https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf (2014). In 1994, 179 nations, including the U.S., joined the Programme of Action, committing to advance reproductive health by preventing unsafe abortion.

²² Patty Skuster, *How Laws Fail the Promise of Medical Abortion: A Global Look*, 18 *Geo. J. Gender & L.* 379, 383–84 (2017).

against this positive trend by restricting safe abortion and criminalizing people who successfully access it.

A. Utah’s Law Poses Unique Risks of Criminalization to People who Self-Manage Abortions

By eliminating most access to legal abortion, SB 174 creates a statutory scheme that places people who seek abortions on a collision course with the law. Under its provisions, abortions are “carried out by a physician” or “under the direction of a physician.” Utah Code § 76-7a-101(1)(a)(i)-(iii). According to this definition, people who self-manage an abortion using the exact same pill regimen a physician would provide for them are not having an abortion. Instead, existing law places them under the ambit of provisions governing criminal homicide. Utah Code § 76-7-301.5(2) (“The killing or attempted killing of a live unborn child in a manner that is not an abortion shall be punished as provided in Title 76, Chapter 5, Part 2, Criminal Homicide.”)

Utah Code § 76-5-201 defines certain criminal homicide offenses and makes them applicable to causing the death of “an unborn child at any state of the unborn child’s development.” Utah Code § 76-5-201(1)(a)(ii). This provision excepts fetal deaths “caused by a criminally negligent act or reckless act of the woman.” Utah Code § 76-5-201(3)(c)(i). The statute specifies that, in order to avoid prosecution, the pregnancy loss must *not* be “caused by an intentional or knowing act of the woman.” Utah Code § 76-7-301 (3)(c)(ii). Taken together,

these provisions paint a picture striking in its harshness: Utahns who cannot afford to leave the state to seek abortion care must either remain pregnant against their will, or risk being charged with murder. And, because the provision makes no distinction as to gestational age, a murder charge could lie against a person who ends their pregnancy even at its earliest phases.

This act of legislative cruelty is an example of the maxim that hard cases make bad law. Until 2010, Utah, like the vast majority of states with criminal statutes penalizing harm to fetuses, did not explicitly provide for the prosecution of pregnant people in connection to their own pregnancies. This changed after the 2009 prosecution of a teenager, identified in court records as J.M.S., who was arrested after being severely beaten in an attempt to end her pregnancy. The girl was living in a condemned house with no electricity or running water with her mother and siblings when she was impregnated by a man who had been using her and another child to make pornography.²³ She discovered the pregnancy after becoming involved in a new relationship with a high school classmate. Ashamed and worried that her boyfriend would not want to raise another man's child, she broke off the relationship and dropped out of school. She sought an abortion in a clinic, but was turned away because

²³ Nina Liss-Schultz, *She Was Desperate. She Tried to End Her Own Pregnancy. She Was Thrown in Jail*, Mother Jones, (May/June 2017), <https://www.motherjones.com/politics/2017/05/fetal-homicide-abortion-rights-restrictions/>.

she was too far along. The girl tried to kill herself by overdosing on medication. She decided to run away to Florida to live with her estranged father.

Distraught at a gas station a block away from home, the girl was approached by a 21-year-old man. She explained her situation, and the two agreed that, in exchange for all the money she had—\$150—he would physically assault her in an attempt to provoke a miscarriage and she would report being raped by a stranger. The girl agreed to have sex with the man to corroborate the story. He took her to his parents’ basement, where he kicked, punched, slapped, and bit her.²⁴ She was frightened and appalled, later telling media that she “felt awful” for having agreed to the assault, but also “felt like a victim.”²⁵

The girl told her mother she had been raped and beaten by a stranger, and was taken to the police station. After hours of interrogation into the night, she admitted that she had agreed to the assault. Only after she broke down was she taken to the hospital, where it was determined that her fetus was unharmed. The following day she was arrested, and was eventually charged with solicitation of murder. Upon the advice of her public defender, she pleaded no contest and was sentenced to detention until age 21. The girl was

²⁴ Melinda Rogers, *Supreme Court Hears Case of Teenager Who Hired Man to Beat Her to Cause Miscarriage*, Salt Lake Tribune, April 13, 2011.

²⁵ Liss-Schultz, *supra* note 23.

incarcerated for months until she went into labor and was transported, in handcuffs and leg irons, to deliver at the hospital. She gave birth to a healthy baby girl, whom she held and breastfed while shackled to the bed.

Eventually she found an attorney who helped her reverse the plea deal. The juvenile court granted her motion to dismiss the delinquency petition on the basis that her actions constituted seeking an abortion and were therefore not a crime. *See State in Int of J.M.S.*, 2011 UT 75, ¶1, 280 P.3d. 410(reversing juvenile court order and remanding for further proceedings). In response to the dismissal, Representative Carl Wimmer launched a campaign to “close the loophole” that prohibits people from being charged with crimes for their pregnancy outcomes. Amid public outcry from people concerned that it could lead to criminal prosecutions for miscarriages,²⁶ the law was amended.

While Rep. Wimmer claimed that the newly-amended laws would only be used in “glaring” cases like J.M.S.’s,²⁷ there are no such guardrails in the statute. This statutory scheme has never faced constitutional scrutiny; fortunately, it appears thus-far unused. But if SB 174 is permitted to go into

²⁶ Kirk Johnson, *Utah Anti-Abortion Bill Citing ‘Reckless Act’ is Withdrawn*, NY Times, Mar. 4, 2010.

²⁷ Kirk Johnson, *Utah Bill Would Criminalize Illegal Abortions*, NY Times, Feb. 28, 2010.

effect, experiences from around the country suggest it will only be a matter of time prosecutions take place.

B. Prosecutors in the U.S. Already Target People for Self-Managing Abortion, Even Where Prohibited by Law

Utah is the only state in the country that has defied the unmistakable trend toward ensuring that people who seek abortions are not criminally prosecuted. As the U.S. Supreme Court observed in *Roe v. Wade*, under most statutes prohibiting abortion, “the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.” *Roe v. Wade*, 410 U.S. 113, 151 (1973); see also *State v. Carey*, 56 A. 632, 636 (Conn. 1904) (“an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body”); *Hillman v. State*, 503 S.E.2d 610, 612–13 (Ga. Ct. App. 1998) (the person who had an abortion was neither principal nor accomplice); *State v. Barnett*, 437 P.2d 821, 822 (Or. 1968) (prohibited acts are “performed upon the mother rather than any action taken by her.”). This understanding has held to the modern era. When Florida’s Supreme Court considered whether a teenager could be charged with criminal abortion as the predicate offense for a felony murder charge, it called the principle that pregnant people cannot be charged with a crime against their

own fetuses a “centuries-old principle of the common law [. . .] grounded in the wisdom of experience[.]” *State v. Ashley*, 701 So. 2d 338, 342 (Fla. 1997).

Over the past five years, there have been repeal efforts in most of the remaining states with laws criminalizing self-managed abortion, irrespective of political leaning. In 2019, New York repealed its criminal self-abortion law. S.B. 240, Reg. Sess. § 5 (N.Y. 2019). Delaware and Arizona followed suit in 2021. *See* H.B. 31, 151st Gen. Assm. (Del. 2021); S.B. 1457, 55th Leg. (Ariz. 2021). Even Oklahoma, in enacting a trigger ban eliminating access to virtually all abortions, repealed a pre-*Roe* statute criminalizing self-managed abortion. S.B. 918, 58th Leg., (Okla. 2021). Only three other states—Idaho, Nevada, and South Carolina—retain laws that purport to criminalize people who self-manage abortion. Of those three, two have been deemed unconstitutional by a court, *see McCormack v. Hiedeman*, 694 F.3d 1004, 1015–18 (9th Cir. 2012), or other authoritative interpretation of law. *See* Nev. Att’y Gen. Op. No. 114 at 16–17 (Feb. 2, 1973).²⁸

Unfortunately, those repeals or legal pronouncements either came too late or were ignored, in favor of subjecting people to arrest, prosecution, and in some cases, incarceration, for allegedly self-managing abortion. Between the

²⁸ The constitutionality of Nevada’s law is currently being challenged before the Nevada Supreme Court. *See Howell v. Frazier*, No. 83224 (Nev. Sup. Ct., 2022).

year 2000 and 2020, at least 61 people have faced criminal investigation or prosecution for having self-managed an abortion or helping a loved one do so.²⁹ For example, in 2004, a 22-year-old South Carolina immigrant mother served four months in jail after being charged with self-inducing an abortion for using abortion pills mailed from Mexico.³⁰ In 2011, New York prosecutors charged a 20-year-old immigrant with “first degree self-abortion” for allegedly drinking an herbal tea to terminate her pregnancy.³¹ In Idaho, a low-income single mother of three took pills purchased online to end her pregnancy, and was subsequently arrested and charged with “criminal abortion”—a prosecution held unconstitutional in 2012 by the Ninth Circuit Court of Appeals. *McCormack*, 694 F.3d at 1015–18. In 2020, a Nevada woman was arrested for allegedly taking “drugs . . . to miscarry her pregnancy.”³²

But even in the states that lack any statutory authority, prosecutors have attempted to punish people believed to have ended a pregnancy by

²⁹ Laura Huss et al., *Self-Care, Criminalized: August 2022 Preliminary Findings* (2022).

³⁰ Rick Brundrett, *Woman’s Abortion is Unique S.C. Case*, *The State* (Columbia, S.C.), May 1, 2005.

³¹ *NYPD: Manhattan Woman Charged with Performing Self-Abortion*, CBS N.Y. (Dec. 1, 2011), <http://cbsloc.al/2pxAnrZ>.

³² *Woman Released After Being Arrested for Allegedly Inducing Miscarriage, Freezing Fetus*, 2News (July 16, 2020), <https://www.ktvn.com/story/42379251/carson-city-sheriffs-arrest-woman-for-allegedly-freezing-fetus-after-miscarriage>.

turning to inapposite or arcane criminal statutes. *See, e.g., Patel v. State*, 60 N.E.3d 1041, 1045–46, 1056–62 (Ind. Ct. App. 2016) (overturning conviction for feticide for taking abortion pills); *Bynum v. State*, 546 S.W.3d 533, 536, 541–43 (Ark. Ct. App. 2018) (reversing evidentiary rulings in conviction for “concealing a birth” for using pills to induce labor but experiencing a stillbirth).³³ When criminal codes contain no clear path to prosecution, prosecutors have ignored facts and law and charged women with murder.³⁴

In 2021, in response to these prosecutorial abuses, the American Bar Association (ABA) resolved to “oppose[] the criminal prosecution of any person for having an abortion, or for experiencing a miscarriage, stillbirth, or other

³³ *See also* N.Y. Times Ed. Bd., *How My Stillbirth Became a Crime*, N.Y. Times (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/stillborn-murder-charge.html>.

³⁴ *See Press Release*, Dougherty Cty. Dist. Attorney’s Office (Jun. 10, 2015) (dropping homicide charge against a woman who allegedly used abortion pills to induce labor; noting that Georgia, along with “an overwhelming majority of jurisdictions,” does not criminalize pregnancy outcomes); *see also* Lauren Rankin, *How An Online Search for Abortion Pills Landed This Woman in Jail*, FastCompany (Feb. 26, 2020), <https://www.fastcompany.com/90468030/how-an-online-search-for-abortion-pills-landed-this-woman-in-jail> (describing dismissal of second degree murder charges against a Mississippi woman who had a stillbirth); Caroline Kitchener et al., *A Call, A Text, An Apology: How An Abortion Arrest Shook Up A Texas Town*, Washington Post, Apr. 13, 2022, <https://www.washingtonpost.com/nation/2022/04/13/texas-abortion-arrest/> (describing arrest and subsequent release of Texas woman incorrectly charged with homicide for alleged self-managed abortion).

pregnancy outcome[.]”³⁵ Because, as the ABA recognized, the law does not typically support these prosecutions, their perpetuation is essentially a manifestation of abortion stigma. The ABA’s Resolution grounds its opposition in the understanding that prosecutions outside the bounds of statutory authority undermine constitutional rights and the rule of law.³⁶

C. Criminalizing Abortion Makes All Pregnancy Outcomes Susceptible to Criminalization.

When the law allows criminal prosecutions for acts that end a pregnancy, *any* pregnancy loss is potentially subject to criminalization. Since 1973, more than 1,700 people have been arrested on the basis of a pregnancy outcome or allegedly risking harm to their pregnancy, for offenses ranging from feticide to child abuse to poisoning.³⁷ The circumstances vary. They may have suffered a mental health crisis and attempted suicide, *see B.S. v. State*, 966 N.E.2d 619, 622–25 (Ind. Ct. App. 2012); they may have used a criminalized drug during pregnancy and given birth to a healthy baby, *see Ex parte Hicks*, 153 So. 3d 53, 55 (Ala. 2014) (upholding chemical endangerment conviction, noting that the

³⁵ American Bar Association, *Resolution 107A* (Feb. 22, 2021), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/107a-midyear-2021.pdf>.

³⁶ *See id.*, Report at 7–9.

³⁷ Pregnancy Justice, *Fact Sheet: Arrests and Other Deprivations of Liberty of Pregnant Women, 1973-2020* (Sept. 18, 2021), https://www.pregnancyjusticeus.org/wp-content/uploads/2021/09/FINAL_1600cases-Factsheet.docx.pdf

baby was “doing fine” since birth). They may have expressed ambivalence about pregnancy while seeking help for falling down a flight of stairs,³⁸ or had a precipitous birth at home that ended in a stillbirth, *see Commonwealth v. Pugh*, 969 N.E.2d 672, 677 (Mass. 2012) (reversing manslaughter conviction for breech delivery that ended in stillbirth).

Pregnant people risk being criminalized for their pregnancy outcomes even when it results from violence against them. An Alabama woman lost her pregnancy after another person shot her in the stomach, only to then be charged with homicide and incarcerated on a \$50,000 bond.³⁹ Though the prosecutor eventually dismissed the indictment, she should never have been indicted in the first place: Alabama’s homicide statute specifically prohibits homicide charges against “any woman with respect to her unborn child.” Ala. Code § 13A-6-1.

Because prosecutions like these are based on stigma rather than sound legal principles, they are frequently overturned on appeal. *See, e.g., Arms v.*

³⁸ *See* Kevin Hayes, *Did Christine Taylor Take Abortion into Her Own Hands?*, CBS News (Mar. 2, 2010), <http://www.cbsnews.com/news/did-christine-taylor-take-abortion-into-her-own-hands> (woman arrested for attempted feticide after falling down stairs while pregnant).

³⁹ Vanessa Romo, *Woman Indicted for Manslaughter After Death of Her Fetus, May Avoid Prosecution*, NPR (Jun. 28, 2019), <https://www.npr.org/2019/06/28/737005113/woman-indicted-for-manslaughter-after-death-of-her-fetus-may-avoid-prosecution>.

State, 471 S.W.3d 637, 641–43 (Ark. 2015) (rejecting application of poisoning crime between a woman and her fetus); *State v. Louk*, 786 S.E.2d 219, 228 (W. Va. 2016) (overturning conviction for child neglect resulting in death based on overdose during pregnancy); *People v. Jorgensen*, 41 N.E.3d 778, 781–82 (N.Y. 2015) (overturning manslaughter conviction of woman involved in car accident whose baby died shortly after emergency delivery); *State v. Stegall*, 828 N.W.2d 526, 529–33 (N.D. 2013) (holding child endangerment statute does not apply to acts by pregnant people in relation to their pregnancies, regardless of birth outcome); *but see Ex parte Ankrom & Kimbrough*, 152 So. 3d 397, 421 (Ala. 2013) (permitting child endangerment charges for prenatal exposure to controlled substances); *Whitner v. State*, 492 S.E.2d 777, 778 (S.C. 1997) (extending criminal child abuse laws to reach acts that affect a viable fetus), *State v. Green*, 474 P.3d 886, 891 (Okla. Crim. App. 2020) (holding that a child neglect statute may apply to a fetus). But the wait for vindication lasts months or years.

This is what happened to a 16-year-old Mississippi girl who was indicted on “depraved heart murder” charges after experiencing a stillbirth at home.⁴⁰ She waited seven years facing the possibility of life in prison until a trial court

⁴⁰ Nina Martin, *A Stillborn Child, A Charge of Murder and the Disputed Case Law on ‘Fetal Harm,’* ProPublica (Mar. 18, 2014), <https://www.propublica.org/article/stillborn-child-charge-of-murder-and-disputed-case-law-on-fetal-harm>.

dismissed the case.⁴¹ Another Mississippi woman, whose internet search history for information about self-managed abortion was used to prosecute her for second degree murder for a stillbirth, had her charges dropped after more than a year only to have the state convene a second grand jury, which refused to indict.⁴²

Not only do prosecutions for pregnancy loss go forward without statutory endorsement: these prosecutions also violate human rights.

III. Criminalizing People Who End Their Pregnancies Irrevocably Harms Their Health and Wellbeing, Violating Their Human Rights

Prosecutions of people who end their pregnancies proceed despite the fact that the U.S. Supreme Court has never endorsed criminalizing people who have abortions. *See McCormack*, 694 F.3d at 1018 (noting that, although the U.S. Supreme Court has authorized abortion restrictions, “it has not authorized the criminal prosecution of women seeking abortion care”). But it is not enough to rely on prosecutorial forbearance. Criminalizing people for ending their pregnancies violates their human rights and must be avoided.

⁴¹ Sarah Fowler, *Judge Dismisses Rennie Gibb’s Depraved Heart Murder Case*, The Dispatch (Apr. 3, 2014), <https://cdispatch.com/news/2014-04-03/judge-dismisses-rennie-gibbs-depraved-heart-murder-case/>.

⁴² Nat’l Ass’n of Criminal Defense Lawyers, *Abortion in America: How Legislative Overreach Is Turning Reproductive Rights into Criminal Wrongs* 37 n.12 (2021), www.NACDL.org/AbortionCrimReport.

The threat to human rights posed by criminalizing abortion is evident in the unequivocal accord by international human rights authorities that governments must prevent the harms criminalization causes. As the U.N. Working Group on Discrimination Against Women (WGDAW) has identified, criminalizing reproductive outcomes is “discriminatory per se” and uniquely harmful because of the stigma it perpetuates.⁴³ Criminalization is “one of the most damaging ways of instrumentalizing and politicizing women’s bodies and lives,” and “does grave harm to women’s health and human rights by stigmatizing a safe and needed medical procedure.”⁴⁴

U.S. courts have long “looked beyond our Nation’s borders” to international law to illuminate the nature of the state’s obligation to protect fundamental rights. *See, e.g., Graham v. Florida*, 560 U.S. 48, 80 (2010) (acknowledging the practice of looking to consensus among nations to determine evolving standards against cruel and unusual punishment).⁴⁵ The message is clear: criminalizing people for abortions violates the rights to the

⁴³ U.N. Working Group on Discrimination Against Women, *Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice*, ¶ 78, U.N. Doc. A/HRC/32/44 (Apr. 8, 2016) [hereinafter WGDAW Report].

⁴⁴ *Id.*, ¶ 79-80.

⁴⁵ *See also* Sarah H. Cleveland, *Our International Constitution*, 31 *Yale J. Int’l L.* 1, 33–87 (2006) (discussing the U.S. Supreme Court’s history of examining foreign law in constitutional interpretation).

highest attainable standard of health, freedom from discrimination, freedom from cruel, inhuman, and degrading treatment, and the right to life.

A. Criminalizing People for Ending Pregnancies Violates Their Right to Health by Deterring Them from Seeking Health Care

Every person has the right to the “highest attainable standard of physical and mental health” under the International Covenant on Economic, Social and Cultural Rights, a treaty signed by the U.S.⁴⁶ As the treaty’s monitoring committee has observed, this guarantee extends to reproductive health, which is “intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy[.]”⁴⁷

Criminalizing people for ending their pregnancies has consistently been cited as an example of a violation of the right to health.⁴⁸ The U.N. Special Rapporteur on the right to health has identified laws authorizing the criminalization of abortion as “paradigmatic examples of impermissible barriers to the realization of women’s right to health[.]”⁴⁹ This is because

⁴⁶ Int’l Covenant on Economic, Social & Cultural Rights, art. 12, Dec. 16, 1966, 6 I.L.M. 360, 993 U.N.T.S. 3.

⁴⁷ U.N. Comm. on Economic, Social and Cultural Rights, *Gen. Comment No. 22 (2016) on the Right to Sexual & Reproductive Health (art. 12)*, ¶ 10, U.N. Doc. E/C.12/GC/22 (May 2, 2016).

⁴⁸ *Id.*, ¶ 57

⁴⁹ Anand Grover, *Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 21, U.N. Doc. A/66/254 (Aug. 3, 2011).

“stigma resulting from criminalization [of abortion] creates a vicious cycle,” preventing people from seeking treatment when complications arise.⁵⁰ Similarly, the WGDAW has recognized that criminalizing reproductive health care violates the right to equal access to health care services.⁵¹ It identified the use of criminal sanctions against people who terminate pregnancies as a “severe and unjustified form of State control,” which “generates stigma and discrimination and violates women’s human rights.”⁵² The excess health risks created by criminalizing abortion may even violate the right to life under the International Covenant on Civil and Political Rights, which the U.S. ratified.⁵³

The barriers posed to the right to health by inserting the fear of criminal prosecution into seeking post-abortion care are not hypothetical. Already, people who fear arrest avoid the health care system, even in the absence of a law that would criminalize them. For example, people who could die from a drug overdose are still unlikely to seek medical care for fear of arrest, even

⁵⁰ *Id.*, ¶ 35.

⁵¹ WGDAW Report, *supra* note 43, at ¶ 14.

⁵² *Id.*, ¶ 76.

⁵³ Human Rights Comm., *Gen. Comment No. 36 (2018) on the Right to Life (art. 6)*, ¶8, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

when laws encourage them to seek such care.⁵⁴ The same is true of people who fear being criminalized for their pregnancy outcomes.⁵⁵

Although self-managed abortion is generally safe, the state must not deter people from seeking care in the event of a complication. The need to ensure that people can access care without hesitation has led medical associations to decry the criminalization of self-managed abortion. As the American College of Obstetricians and Gynecologists has explained, “[t]he threat of prosecution [for self-managed abortion] may result in negative health outcomes by deterring women from seeking needed care[.]”⁵⁶ The American Medical Association shares this position, because criminalizing self-managed abortions “increases patients’ medical risks and deters patients from seeking

⁵⁴ Stephen Koester et al., *Why Are Some People Who Have Received Overdose Education and Naloxone Reluctant to Call Emergency Medical Services in the Event of Overdose?*, 48 Int’l J. Drug Pol’y 115, 116 (2017).

⁵⁵ Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 Health & Just. 1, 2–8, 14 (2015) (pregnant drug users delayed or avoided prenatal care out of fear of criminal punishment, though they were likelier to experience positive birth outcomes when they received prenatal care).

⁵⁶ Am. Coll. of Obstetricians & Gynecologists, *Decriminalization of Self-Induced Abortion: Position Statement* (Dec. 2017), <https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2017/decriminalization-of-self-induced-abortion>.

medically necessary services[.]”⁵⁷ Unfortunately, based on the experiences of individuals criminalized for their pregnancy outcomes in the U.S., the fears that drive people away from medical care are well-founded.

B. Criminal Investigations and Prosecutions Following Abortion or Pregnancy Loss Are Cruel, Inhuman, and Degrading Treatment

International law prohibits governments from inflicting torture and other forms of cruel, inhuman, and degrading treatment. U.N. treaty bodies have interpreted this prohibition to extend to situations in which restrictions on abortion threaten pregnant people’s physical and mental health.⁵⁸ Encompassed within this prohibition are mistreatment by both health care providers and agents of punitive state systems. As the U.N. Special Rapporteur on torture has noted, humiliation in health care institutions and breaches of medical privacy when patients are believed to have had illegal abortions “can cause tremendous and lasting physical and emotional suffering, inflicted on

⁵⁷ Am. Med. Ass’n, *Oppose the Criminalization of Self-Induced Abortion H-5.980* (2018), <http://policysearch.ama-assn.org/policyfinder/detail/abortion?uri=%2FAMADoc%2FHOD.xml-H-5.980.xml>. See also Physicians for Reprod. Health, *Self-Managed Abortion Statement 7* (Nov. 2018), <http://prh.org/wp-content/uploads/2018/12/Self-Managed-Abortion-Position-Statement-2018.pdf> (“No person should be subject to legal action for decisions they make about ending a pregnancy.”).

⁵⁸ See, e.g., U.N. Comm. Against Torture, *Conclusions and Recommendations: Peru*, ¶ 23, U.N. Doc. CAT/C/PER/CO/4 (Jul. 25, 2006).

the basis of gender.”⁵⁹ This is especially so when confessions are extracted from people seeking care for obstetric emergencies.⁶⁰

The harms these international bodies warn against are characteristic of arrests for suspected self-managed abortions in the U.S. Like one Indiana woman, patients may be interrogated while “[g]rief stricken and under heavy sedation” from labor or an obstetric emergency.⁶¹ Like another, they may have recorded “confessions” extracted by police without *Miranda* warnings, in the middle of the night while in post-operative recovery from “sedation and severe blood loss.”⁶² Or, like a Georgia woman after she delivered a 5-month gestation

⁵⁹ Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 46, UN. Doc. A/HRC/22/53 (Feb. 1, 2013).

⁶⁰ Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 44, UN. Doc. A/HRC/31/57 (Jan. 5, 2016); *see also* U.N. Comm. Against Torture. *Conclusions and Recommendations: Chile*, ¶ 7(m), U.N. Doc. CAT/C/CR/32/5 (Jun. 14, 2004) (urging Chile to end interrogations of patients believed to have had illegal abortions, and nullify convictions where this occurred).

⁶¹ Ed Pilkington, *Indiana Prosecuting Chinese Woman for Suicide Attempt That Killed Her Foetus*, *The Guardian* (May 30, 2012), <https://www.theguardian.com/world/2012/may/30/indiana-prosecuting-chinese-woman-suicide-foetus> (although the woman was so distraught after the death of her infant following her suicide attempt that she was “instantly transferred to the mental health wing,” a detective was dispatched to the maternity ward to question her “within half an hour of her baby’s death”).

⁶² *See* Amy Gastelum, *Purvi Patel Faces 20 Years in Prison for Feticide and Child Neglect*, *The World* (Mar. 31, 2015), <https://www.pri.org/stories/2015-03-30/purvi-patel-faces-20-years-prison-feticide-and-child-neglect>; *Patel*, 60 N.E.3d at 1047.

fetus en route to the emergency room, they may be transferred directly from the hospital to jail, still bleeding, and held without bond.⁶³

As the U.S. Supreme Court has recognized, even when charges are dropped, the mere fact of an arrest causes ongoing harm. *See, e.g., Michelson v. United States*, 335 U.S. 469, 482 (1948) (“Arrest without more may nevertheless impair or cloud one’s reputation.”); *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (even the innocent “experience the ‘civil death’ of discrimination by employers, landlords, and whoever else conducts a background check”) (Sotomayor, J., dissenting). Given the Internet’s indelible record, cruel and degrading treatment is ongoing, as the names, mugshots, and private medical information of people criminalized for self-managing abortion remain online in perpetuity. As a result, the accused face stigma, ostracism, and threats. An Idaho mother criminalized after self-managing an abortion, was “turned [] into a pariah” and forced to quit her job at a dry cleaner because “clients said they didn’t want her handling their clothes.”⁶⁴ When an Alabama mother, who nearly lost her pregnancy after a life-threatening drug overdose,

⁶³ *Official: 5-Month-Old Fetus Lived 30 Minutes After ‘Abortion Pill’ Delivery*, WALB News (Jun. 8, 2015), <https://www.walb.com/story/29263746/official-5-month-old-fetus-lived-30-minutes-after-abortion-pill-delivery/>.

⁶⁴ *See* Kim Murphy, *Idaho Woman’s Case Marks a Key Abortion Challenge*, L.A. Times (Jun. 16, 2012), <http://www.latimes.com/archives/la-xpm-2012-jun-16-la-na-idaho-abortion-20120617-story.html>.

was arrested, “[r]eaders of the local paper were calling for [her] to be sterilized, hung with piano wire or shot in the back of the head.”⁶⁵

C. Racial Bias in Law Enforcement Means That the Harms Related to Criminalization of Abortion and Miscarriages Are Disproportionately Borne by People of Color

International human rights law requires that governments work to eradicate all forms of racial discrimination. Critically, human rights authorities have identified law enforcement and the administration of the criminal justice system as key sites of harmful racial profiling and discrimination that can occur as a matter of practice even without being codified in law.⁶⁶ Recently, several U.N. bodies have demanded action against such harms, including specifically calling upon the U.S. to investigate discrimination in its administration of criminal justice.⁶⁷

International law further acknowledges that racial discrimination is intersectional, meaning that it is exacerbated by other forms of discrimination,

⁶⁵ N.Y. Times Ed. Bd., *The Mothers Society Condemns*, N.Y. Times (Dec. 28, 2018), <http://www.nytimes.com/interactive/2018/12/28/opinion/abortion-law-poverty.html>.

⁶⁶ Comm. on Elimination of Racial Discrimination [hereinafter C.E.R.D.], *General Recommendation No. 31*, in U.N. Doc. A/60/18 (2005–2006).

⁶⁷ See C.E.R.D., *General Recommendation No. 36*, U.N. Doc. CERD/C/GC/36 (Dec. 17, 2020); Nick Cumming-Bruce, *U.N. to Form Panel to Investigate Systemic Racism in Policing*, N.Y. Times (Jul. 13, 2021), <https://www.nytimes.com/2021/07/13/world/united-nations-panel-human-rights-council-racism.html>.

such as sexism. The Committee on Elimination of Racial Discrimination has noted that “[t]here are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way” requiring special attention to the different life experiences of men and women.⁶⁸ The compounding nature of discrimination on the bases of race and sex yields disproportionate criminalization and punishment. People of color and low-income people are exponentially more likely to be arrested, charged, prosecuted, convicted, and more heavily punished.⁶⁹

Unsurprisingly, then, criminalizing people for their pregnancy outcomes disproportionately impacts people of color. One study found that, among women seeking medical care related to pregnancy, women of color were significantly more likely to be reported to law enforcement *by the very people they turned to for help* than were white women.⁷⁰ Axiomatically, this results in

⁶⁸ C.E.R.D., *General Recommendation No. 25*, ¶ 1, in U.N. Doc. A/55/18 (2000).

⁶⁹ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (Jun. 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> (Black people are more than five times likelier than white people to be imprisoned; Latinx people are 1.4 times as likely); *see also* Lakota People’s Law Project, *Native Lives Matter* 6 (Feb. 2015), <https://s3-us-west-1.amazonaws.com/lakota-peoples-law/uploads/Native-Lives-Matter-PDF.pdf> (Indigenous women are imprisoned at six times the rate of white women).

⁷⁰ *See* Lynn Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for*

disproportionate punishment. In Florida, where Black people constitute only 15% of the population, they accounted for 75% of arrests related to pregnancy.⁷¹ In South Carolina, where Black people constitute only 30% of the population, they accounted for 74% of arrests related to pregnancy.⁷² The potential punishment women of color face is significantly harsher as well: among people criminalized for alleged self-managed abortion, a homicide charge was twice as likely to be considered for a person of color as for a white person.⁷³

CONCLUSION

Whatever interest the State claims in the protection of potential life, it has an obligation to protect the lives and health of pregnant individuals. It violates that obligation by placing Utahns in a double-bind: unable to obtain an abortion within the bounds of law, but at risk of criminal punishment for seeking abortions outside the law's dictates. As human rights bodies and experts have admonished countries that have taken this treacherous path, the obligation to uphold human rights is not diminished if a person ends their pregnancy. The protections for the right to make reproductive decisions have

Women's Legal Status and Public Health, 38 J. Health Pol., Pol'y & L. 299, 326–27 (2013).

⁷¹ *Id.* at 311.

⁷² *Id.*

⁷³ Huss et al., *supra* note 29.

been stripped from the U.S. Constitution after nearly a half-century, but by upholding the protections provided by the Utah Constitution, this Court can prevent devastating, irreparable harm.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Utah R. App. P. 25(e)(f) and 24(a)(11) and contains 6,976 words, excluding the table of contents, table of authorities, and certificates of compliance and delivery.

In compliance with the typeface requirements of Utah R. App. P. 27(b), I also certify that this brief has been prepared in a proportionally spaced font using Microsoft Word in Century Schoolbook 13 point.

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I certify that on January 27, 2023, this brief was filed with the Court by email in a searchable PDF attachment and served upon counsel at:

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