In The

# Supreme Court of Maryland

**No. 7**

September Term, 2024

MOIRA E. AKERS,

*Petitioner,*

*vs.*

STATE OF MARYLAND,

*Respondent.*

## BRIEF OF AMICI CURIAE IF/WHEN/HOW AND RESEARCHERS, HEALTHCARE PROVIDERS, AND ADVOCATES IN SUPPORT OF PETITIONER MOIRA E. AKERS


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## INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici are researchers, healthcare providers, attorneys, and advocates, united in their opposition to criminalizing people for experiencing a miscarriage or stillbirth, or considering, seeking, or obtaining an abortion. Among those joining this brief in support of Moira Akers – and against the admission of abortion evidence in this and other cases – are the U.S.'s foremost authorities on the safety, efficacy, and prevalence of self-managed abortion. As their work demonstrates, self-managed abortion and searches for information about it are common and on the rise.

More than most, Amici recognize that the appellate court's decision will be used against other people accused of crimes for having an abortion or experiencing a pregnancy loss. Amicus If/When/How operates a legal helpline, funds bail and litigation expenses, and defends people nationwide who have been criminalized for having an abortion or for experiencing a pregnancy loss. Research by If/When/How found that more than 61 people in the U.S. were criminalized for allegedly ending their own pregnancies or helping someone else do so between 2000 and 2020, research that revealed patterns like those in this case. *See* Laura Huss et al., *Self-Care, Criminalized: The Criminalization of Self-Managed Abortion from 2000 to 2020*, If/When/How: Lawyering for Reproductive Justice (2023).[1] As that research shows, using a defendant's abortion history or pregnancy ambivalence to argue intent to commit a crime against a fetus or a newborn is a known prosecutorial tactic. *Id*. at 46-50. Courts should resoundingly reject

[1] https://ifwhenhow.org/resources/selfcare-criminalized/.

this tactic, and its illogical notion that contemplating terminating one's own pregnancy – a normal, common part of people's reproductive lives – demonstrates homicidal intentions toward one's infant.

On August 5, 2024, Amici received the written consent of all parties to the filing of this brief as required by Maryland Rule of Appellate Procedure 8-511(a)(1). Individual statements of interest of Amici are set forth in Appendix A.

## STATEMENTS OF THE CASE, FACTS, AND QUESTION PRESENTED

Amici adopt and incorporate by reference Petitioner's Statements of the Case and the Facts, and the Question Presented.

## SUMMARY OF ARGUMENT

Moira Akers, a mother of two, is serving thirty years in prison because a jury believed that she intentionally harmed her newborn. To convince that jury, the state sought to admit evidence that Ms. Akers had considered abortion, researched self-managed abortion, and did not obtain prenatal care. Over her counsels' objection that such evidence was irrelevant and prejudicial, and thus inadmissible under Maryland Rules 5-402 and 5-403, the trial court allowed the state to do so. Affirming the trial court, the Appellate Court of Maryland held that information about Ms. Akers' contemplation of and research into abortion, and lack of prenatal care, was relevant and not prejudicial. *State v. Moira Akers*, CSA-REG-0925-2022 (Jan. 30, 2024).

That decision – no matter how narrowly cast – is out of step with the decisions of nearly every other appellate court in the country to consider the question. As these courts have recognized, it is illogical to draw a conclusion of homicidal intent from evidence that

a person considered an abortion or acted to end their pregnancy. And for good reason: if one accepts the false premise that considering or having an abortion is tantamount to murderous intent, then the thousands of Marylanders who have abortions each year – and the even larger percentage of people who only *consider* having an abortion – would be vulnerable to the use of such evidence against them in legal proceedings. Rather than indicating intent to harm a newborn, considering or having an abortion is a common part of people's reproductive lives.

Just as illogical is the attempt to tie lack of prenatal care to homicidal intent towards a child once born – an argument that is particularly pernicious given that, in 2021, 1 in 6 infants in Maryland was born to a woman who received no prenatal care. Nor does looking for information about how one might self-manage abortion bear any connection to homicidal intent toward one's newborn; thousands of people in the U.S. have conducted such searches, and more are expected to do so as the legal landscape for abortion access remains uncertain.

Unfortunately, jurors may accept this fallacious logic because abortion in the U.S. is highly stigmatized. Although abortion is a protected right in Maryland and in most states, it remains controversial. As courts throughout the country recognize, abortion evidence carries the potential to "inflame the passions" of a jury and to evoke bias, not just against defendants in criminal trials, but also against victims, witnesses, and plaintiffs in civil cases. And abortion stigma is likely to worsen in an environment where state legislatures now have no federal constitutional check on their desire to treat abortion as "murder" and to criminalize those who provide abortion care or help others access it.

This stigma informs criminalization in the first place. Experiences like having an abortion, miscarrying or having a stillbirth, self-managing abortion, not getting prenatal care, or behaving during pregnancy or in childbirth in ways that defy gender stereotypes, are not crimes. But they are too often treated as suspicious, even when the law prohibits (as Maryland's does) criminalizing someone for their pregnancy outcomes.

In those cases, as here, prosecutors have sought to introduce evidence that a defendant had or intended an abortion as evidence of criminality. But it is the admission of precisely this kind of inflammatory evidence – and its irrelevance to proving the elements of a crime – that the Rules of Evidence are designed to prevent. Amici urge this Court to reverse Ms. Aker's conviction, and to hold, as other jurisdictions have, that abortion evidence is inadmissible because it is irrelevant and highly prejudicial.

## ARGUMENT

### I. The commonplace experiences of considering, researching, or having an abortion are irrelevant to whether a person intended to harm their infant.

As the State surely knew when it argued to a jury that Ms. Akers' abortion research proved that she "intended [her baby's] death" (E 308), such an argument invokes dangerous and inaccurate stereotypes about people's reasons for seeking abortions, suggesting that considering abortion is abnormal or associated with homicidal intent. To the contrary, abortion is common, legally protected healthcare in Maryland, and for nearly 50 years was protected by the U.S. Constitution. People's need to seek abortion is based not on feelings they have toward the fetus, but on the circumstances of the pregnancy and their understanding of their ability to care for a child once born.

### A. Abortion is a common part of people's reproductive experiences.

Having an abortion is a common event in the reproductive lives of millions of people in the U.S. Nearly a quarter of U.S. women will have an abortion by age 45. Guttmacher Institute, *Fact Sheet: Induced Abortion in the United States* (June 2024).[2] Abortion is also common among people who have already had children; 55% of women in the U.S. who have abortions already have at least one child. *Id*.

Even now, two years since the U.S. Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), with 14 states enforcing near-total bans on abortion, abortion rates are rising. Isaac Maddow-Zimet & Candace Gibson, Guttmacher Institute, *Despite Bans, Number of Abortion in the United States Increased in 2023* (May 2024).[3] There were over one million abortions provided in the U.S. in 2023. *Id*. Abortion rates have also increased in Maryland, as healthcare providers in this state step in to meet the overwhelming need created in the aftermath of *Dobbs*. Society of Family Planning, *#WeCount Report: April 2022 to June 2023* 15 (October 2023).[4] And those figures do not include self-managed[5] abortions. *Id*. at 8.

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[2] https://www.guttmacher.org/fact-sheet/induced-abortion-united-states#.

[3] https://www.guttmacher.org/2024/03/despite-bans-number-abortions-united-states-increased-2023.

[4] https://societyfp.org/wp-content/uploads/2023/10/WeCountReport_10.16.23.pdf.

[5] A "self-managed abortion" is "any action a person takes to end a pregnancy without clinical supervision." Caitlin Gerdts, Kylee Sunderlin, & Nancy Cardenas-Pena, *Self-Managed Abortion and Criminalization in the Post-Dobbs U.S.*, 7 JAMA Network Open (2024), doi:10.1001/jamanetworkopen.2024.24298. People have self-managed abortions

Researchers estimate that in the six months after *Dobbs,* provision of medication to self-manage abortion rose significantly, to an additional 26,055 such provisions over pre-*Dobbs* levels. Abigail Aiken et al., *Provision of Medications for Self-Managed Abortion Before and After the Dobbs v Jackson Women's Health Organization Decision*, 331 JAMA 1558, 1561 (2024). All told, 10.7% of U.S. women will attempt to self-manage an abortion during their lifetimes. Lauren Ralph et al., *Self-Managed Abortion Attempts Before vs After Changes in Federal Abortion Protections in the US*, 7 JAMA Network Open e2424310, 6 (2024).[6]

**B. Seeking information about abortion - including self-managed abortion - is also common.**

The Appellate Court purported to craft a holding of "exceedingly narrow scope," limited to the circumstances of Ms. Akers' pregnancy and subsequent loss. Slip Op. at 24. Specifically, it noted that she "considered surreptitiously inducing a miscarriage," and that the evidence in question "involved a self-induced abortion not under the direction of a medical professional." *Id*. This characterization fundamentally misunderstands the prevalence of and reasons for self-managed abortions and suggests nefariousness where none exists. Self-managed abortion, or considering it, is not unusual. It is in fact more common, safer, and more sought–after than ever before.

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for millennia, with a variety of methods, some less safe and effective than others. *Id*. Decades of evidence shows that self-managed abortion with modern abortion pills (mifepristone and misoprostol, or misoprostol alone) is safe and effective. *Id*.

[6] https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2821654.

One study documented 210,000 internet searches for self-managed abortion information in a one-month period. *See* Jenna Jerman et al., *What are People Looking for When They Google "Self- Abortion"?*, 97 Contraception 510, 512 (2018). Even before *Dobbs* precipitated a need for alternatives to clinic-based care, one online service received more than 57,000 requests—from all fifty states—for medication to self-manage abortion. 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 1 (2021). [7] Unsurprisingly, rates of requests to international nonprofits that prescribe medication to self-manage abortion soared 261% immediately after *Dobbs*. 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 (2022).

Of the people who search online for information about self-managed abortion, 28% follow through with the process. Ushma Upadhyay et al., *Barriers to Abortion Care and Incidence of Attempted Self-Managed Abortion Among Individuals Searching Google for Abortion Care: A National Prospective Study*, 106 Contraception 49, 53 (2021). People's reasons for self-managing vary. Many face barriers to clinic-based abortion care, such as distance to a clinic, financial challenges, or availability of childcare. *Id.* at 52, 55. One in eight people seeking abortion care consider a self-managed abortion before going to a clinic, often because a clinic is inaccessible. Abigail Aiken et al., *Factors Associated With*

[7] https://jamanetwork.com/journals/jamanetworkopen/fullarticle/ 2780272.

*Knowledge and Experience of Self-managed Abortion Among Patients Seeking Care at 49 US Abortion Clinics*, 6 JAMA Network Open e238701, 6 (2023).[8] Others 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. *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); Nisha Verma & Daniel Grossman, *Self-Managed Abortion in the United States*, 12 Current Obstetrics & Gynecology Rep. 70 (2023). The reasons people cited for considering self-managing an abortion had everything to do with their reasons for needing an abortion and challenges getting one, and nothing from which criminal intent can be inferred.

**C. People have abortions for various and complex reasons.**

People's reasons for seeking abortion care – whether self-managed or with clinical support – reflect their individual assessment of their ability to care for a child. Far from indicating ill intent toward the fetus, people's reasons are based on life circumstances that would make it difficult or impossible for the abortion seeker to provide for a child, including financial stress and timing of the pregnancy. *See* M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the U.S.,* 13 BMC Women's Health 1, 4 (2013) (finding 64% of women surveyed reported multiple reasons for needing an abortion). Responsibility to one's existing children is frequently cited as a reason for

[8] https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2803942.

seeking abortion. *Id.* at 1, 6. This reasoning is reflected in the demographics of people who have abortions: 75% of people who had abortions in the U.S. in 2014 were experiencing economic distress, and nearly half had incomes below the federal poverty line. Guttmacher Institute, *Fact Sheet: Induced Abortion in the United States* (September 2019).[9] Their concerns for financial health are justified: being denied an abortion increases the likelihood of future economic insecurity. Diana Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 Am. J. Public Health 407, 410-11 (2018).

Others seek abortion for health-related reasons. Twelve percent of people surveyed for the *Understanding* study, noted above, indicated that their own health or the health of the fetus was a reason to consider abortion. Biggs et al. at 7. Notably, carrying a pregnancy to term is significantly more dangerous to physical health than an abortion. *See, e.g.*, Elizabeth Raymond & David Grimes, *The comparative safety of legal induced abortion and childbirth in the United States*, 119 Obstetrics & Gynecology 215, 215-19 (2012) (finding the risk of death from carrying a pregnancy to term is 14 times higher than the risk from having an abortion).

Black women, in particular, because of longstanding structural inequities and discrimination, face significant health risks from pregnancy. *See generally* Marcella Howell et al., *Addressing America's Black Maternal Health Crisis*, In Our Own Voice:

[9] https://www.guttmacher.org/fact-sheet/induced-abortion-united-states#.

National Black Women's Reproductive Justice Agenda (2020).[10] It is by now well understood that the maternal mortality rate in the U.S. is shamefully high, especially for Black women. *Id*. at 1. In Maryland, between 2014 and 2018, pregnant Black women were *four times* more likely to die than pregnant white women. Maryland Department of Health, *Maryland Maternal Mortality Review: 2020 Annual Report* 6 (2020). Certainly, Black women have varied and complex reasons for considering abortion, but the stark reality is that the health risks of pregnancy for Black women remain disproportionately severe. To equate contemplating an abortion with ill intent towards a fetus ignores the serious, even lifesaving, decisions pregnant people must make.

**D. People who carry pregnancies to term may also experience ambivalence.**

Of course, millions of people ultimately carry their pregnancies to term. And among them, as among those who decide to have an abortion, are people who experience uncertainty, fear, and distress, and may contemplate terminating their pregnancy. *See generally* Abigail Cutler et al., *"I Just Don't Know:" An Exploration of Women's Ambivalence About a New Pregnancy*, 28 Women's Health Issues 75 (2018) ("Women's decisions to have or to not have another child were deeply rooted in their sense of themselves as good mothers, often defined in relation to existing children who required their time, attention, love, and resources."). Carrying a pregnancy to term, having an abortion, or deliberating either, is a normal aspect of millions of people's reproductive lives.

[10] https://blackrj.org/wp-content/uploads/2020/04/6217-IOOV_Maternal_trifold.pdf.

*Id*. at 81; *see also* Danielle Campoamor, *What is pregnancy ambivalence? It's a lot more common than people know*, TODAY (May 1, 2023)[11] (noting that pregnancy ambivalence is not related to how the person experiencing it will parent). Considering abortion has no bearing on whether that person would neglect or kill their child. The notion that it might is best understood as a manifestation of the stigmatized status of abortion in the United States.

## II. Although it is common, abortion is stigmatized in the U.S.

Abortion stigma ascribes "negative attribute[s] . . . to women who seek to terminate a pregnancy that marks them . . . as inferior to ideals of womanhood." Anuradha Kumar et al., *Conceptualising Abortion Stigma*, 11 Culture, Health & Sexuality 625, 628 (2009); Paula Abrams, *The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma*, 19 Mich. J. Gender & L. 293, 299 (2013). Regardless of abortion's legal status, people who have abortions are frequently stigmatized, or fear such stigma. Alison Norris et al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences,* 21(3 Supp.) Women's Health Issues S49 (2011) (citing research revealing that "two out of three women having abortions anticipate stigma if others were to learn about it; 58% felt they needed to keep their abortion secret from friends and family"). Stigma, or fear of it, is heightened for some because of their religious beliefs or those of their families. *See e.g.,* Lori Frohwirth et al., *Managing Religion and Morality Within the Abortion Experience: Qualitative Interviews With Women Obtaining Abortions in the U.S.*, 10:4 World Med. and & Health Pol. 381, 397 (2018) (noting a report that some

[11] https://www.today.com/parents/pregnancy/pregnancy-ambivalence-rcna81221.

abortion seekers spoke " to abortion clinic staff about their spiritual discomfort with their abortion decision. . . mainly because abortion was so stigmatized in their own communities that they literally had no other space in which to have these discussions."). As researchers have found, religious background, abortion stigma, and gender stereotypes interact to inform beliefs that abortion should be banned or criminalized. Alison J. Patev et al., *The Interacting Roles of Abortion Stigma and Gender on Attitudes Toward Abortion Legality*, 146 Personality and Individual Differences 87 (2019).

Abortion bans, in turn, contribute to stigma by falsely exceptionalizing abortion as something that is uniquely unsafe, and therefore wrong and harmful. Janet Turan & Henna Bhudwani, *Restrictive Abortion Laws Exacerbate Stigma, Resulting in Harm to Patients and Providers,* 111 Am. J. Public Health 1, 37-39 (2021); *see also* Paula Abrams, *Abortion Stigma: The Legacy of* Casey, 35 Women's Rts. L. Rep. 299, 301 (2014); Tracy A. Weitz & Katrina Kimport, *The Discursive Production of Abortion Stigma in the Texas Ultrasound Viewing Law*, 30 Berkeley J. Gender L. & Just. 6, 8–10 (2015); Rebecca J. Cook, *Stigmatized Meanings of Criminal Abortion Law*, in *Abortion Law in Transnational Perspectives: Cases and Controversies* 349 (Rebecca J. Cook et al. eds., 2014) ("The criminal prohibition of abortion contributes to exceptionalizing women seeking abortion as deviant[.]").

The political climate post-*Dobbs* has worsened the conflation of criminality with abortion. Two years since the *Dobbs* decision, fourteen states in the U.S. are enforcing

total bans on abortion;[12] others enacted total bans that are enjoined pending litigation;[13] others are enforcing bans after a certain point in pregnancy;[14] and three states passed laws that purport to allow any person to civilly sue anyone who provides or helps another person have an abortion.[15] Subsequent media reporting frequently misconstrues these bans as criminalizing people who have abortions, although, in fact, nearly every abortion

[12] *See* Alabama, Ala. Code § 26-23H-4; Arkansas, Ark. Code Ann. § 5-61-301 to -304; Idaho, Idaho Code § 18-622(1)(a); Indiana, S.B. 1, 122nd Leg., 1st Spec. Sess. (Ind. 2022); Kentucky, Ky. Rev. Stat. § 311.772; Louisiana, LA. Stat. Ann. §§ 40.87.7, 14.87.8, 40:1061; Mississippi, Miss. Code Ann. § 41-41-45; Missouri, Mo. Rev. Stat. § 188.017(2); North Dakota, S.B. 2150, 68th Leg. Sess., Reg. Sess. (N.D. 2023); Oklahoma, Okla. Stat. tit. 21, § 861; South Dakota, S.D. Codified Laws § 22-17-5.1; Tennessee, Tenn. Code Ann. § 39-15-213; Texas, Tex. Health & Safety Code §§ 170A.001-7; West Virginia, W. Va. Code §16-2R-3.

[13] *See e.g, Johnson v. State*, No. 18853 (Wy. Dist. Ct. of Teton Cnty. Mar. 22, 2023) (order temporarily enjoining Wyoming's total abortion ban).

[14] *See* Arizona, 15-week ban, Ariz. Rev. Stat. § 36-232-36-2326; Florida, 6-week ban, FLA. STAT. § 390.0111; Georgia, 6-week ban, H.B. 481, 2019 Leg., Reg. Sess. (Ga. 2019); Iowa, 6-week ban, Iowa Code § 146E.2; Nebraska, 12-week ban, L.B. 574, 108th Leg., 1st Reg. Sess. (Neb. 2023); North Carolina, 12-week ban, N.C. Gen. Stat. § 90-21.81B(2); South Carolina, 6-week ban, S. 474, 125th Gen. Assemb., Spec. Sess. (S.C. 2023); and Utah, 18-week ban, Utah Code Ann. § 76-7-302.5; *id*. § 76-7-302.

[15] *See* Texas, Tex. Health & Safety Code §§ 171.204- 12; Oklahoma, Okla. Stat. tit. 63, § 1-745.31 (held unconstitutional in *Okla. Call v. State*, 2023 OK 60); and Idaho, Idaho Code §§ 18-8804, 18-8807.

ban explicitly exempts them from criminal liability.[16] Yet, the aura of illegality taints those who seek to end their pregnancies and provokes hostility toward them.

[16] *See e.g.*, Alabama Code § 26-23H-5 ("No woman upon whom an abortion is performed or attempted to be performed shall be criminally or civilly liable"); Arkansas. Code Ann. § 5-61-304(c) ("this section does not. . . [a]uthorize the charging or conviction of a woman with any criminal offense in the death of her own unborn child"); Idaho Code § 18-622(5) ("Nothing in this section shall be construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction and penalty"); Kentucky Rev. Stat. § 311.7705 (4) ("A pregnant woman on whom an abortion is intentionally performed or induced" is not guilty of violating or conspiring to violate the law and cannot be held civilly liable); Louisiana Rev. Stat. Ann. § 40:1061 H ("Nothing in this Section may be construed to subject the pregnant mother upon whom any abortion is performed or attempted to any criminal conviction and penalty."); Mississippi Code Ann. § 41-41-45(4) ("Any person, except the pregnant woman" who provides an abortion can be held criminally liable); Missouri Rev. Stat. § 188.017(2) ("A woman upon whom an abortion is performed or induced in violation of this subsection shall not be prosecuted for a conspiracy to violate the provisions of this subsection"); North Dakota, S.B. 2150, Section 1, 68th Leg. Sess., Reg. Sess. (N.D. 2023) (it is a Class C felony for any person, other than the pregnant female upon whom the abortion was performed, to perform an abortion); Oklahoma Stat. tit. 21, § 861 (by its terms, does not apply to person who has abortion; case law affirms this reading at *Cahill v. State*, 1947 OK CR 27, 84 Okla. Crim. 1, 178 P.2d 657); South Dakota Codified Laws § 22-17-5.1 (by its terms, does not apply to person who has an abortion, because criminalizes "providing to or procuring for"); Tennessee Code Ann. § 39-15-213(e) ("This section does not subject the pregnant woman upon whom an abortion is performed or attempted to criminal conviction or penalty"); Texas Health & Safety Code §§ 170A.003 ("This chapter may not be construed to authorize the imposition of criminal, civil, or administrative liability or penalties on a pregnant female on whom an abortion is performed, induced, or attempted"); West Virginia, W. Va. Code §16-2R-3 (by its terms, applies only to performing or providing abortion to another person).

## III. Courts should reject the admission of abortion-related evidence because it is irrelevant and highly prejudicial.

### A. Abortion evidence is irrelevant because it is not indicative of whether a person committed a crime.

It should go without saying that having had previous abortions or contemplating one has no tendency to prove whether that person would commit a crime against their infant. That inference is based on stigma and impermissible gender stereotypes. As a Florida appeals court explained when reversing as "fundamental error" the admission of abortion evidence in a prosecution of a woman for aggravated manslaughter of her premature infant,

> not only is there no permissible relevance to the mother's consideration of abortion to the legal issues at hand, but its only *arguable* relevance makes its admission all the more inappropriate: it is apparently the thought that a person who considers abortion is more likely to have killed the child not aborted.

*Stephenson v. State*, 31 So. 3d 847, 851 (Fla. Dist. Ct. App. 2010), *rehearing denied*, *Stephenson v. State*, 2010 Fla. App. LEXIS 6101 (emphasis in original).

That lack of any meaningful, non-stigmatizing relevance is why other courts, when faced with this issue, have also reversed trial court decisions allowing the use of abortion history against a defendant. *See, e.g.*, *Hudson v. State*, 745 So. 2d 1014, 1999 Fla. App. LEXIS 13364 (reversing defendant's conviction for manslaughter for allegedly hiding her pregnancy, giving birth unattended, and concealing the infant's body in plastic bags, because evidence of defendant's prior abortions, admitted for impeachment purposes, was irrelevant and highly prejudicial); *People v. Ehlert*, 274 Ill.App.3d 1026, 1034, 654 N.E.2d 705 (1995) (reversing defendant's homicide conviction for allegedly causing her

newborn's death after an unassisted birth, because admission of defendant's abortion history was of "negligible" probative value and highly prejudicial; ); *Bynum v. State*, 2018 Ark. App. 201, 546 S.W.3d 533 (2018) (reversing conviction for "concealing a birth" because admission of evidence that defendant had an abortion and took a labor-inducing drug to end the pregnancy at issue was irrelevant and highly prejudicial); *Houselog v. State*, 2024 Ark. App. 393, 18 (reversing a trial court's denial of a teenage girl's motion to transfer to juvenile court her prosecution for abuse of a corpse, in part because "[e]vidence of planning to terminate a pregnancy is not evidence of planning to abuse a corpse. Whether a person medically induces an abortion is irrelevant to charges outside of that action.").[17]

### B. Evidence that a witness, litigant, or criminal defendant had or contemplated an abortion is highly prejudicial.

Because of abortion stigma, evidence that a person charged with a crime considered or had an abortion is precisely the kind of evidence that invokes the potential for unfair prejudice. "Courts have long acknowledged that the topic of abortion sharply divides Americans, with 'virtually irreconcilable points of view' on each side of the debate, so that the risk of prejudice from admitting evidence on the subject is great." *Brummett v. Burberry*

[17] Even where the accused is not the person who had an abortion, at least one appellate court has excluded abortion-related evidence as irrelevant and prejudicial in a criminal case when raised for similar reasons (an inference of how one would treat a child once born). *See Wilkins v. State*, 607 So. 2d 500, 501 (Fla. Dist. Ct. App. 1992) (reversing convictions for first degree murder and aggravated child abuse, in part because of the admission of evidence that the defendant and his wife contemplated an abortion when she was pregnant with the child victim, which the court called "an impermissible assault on the defendant's character and . . . otherwise irrelevant and inflammatory.").

*Ltd*., 597 S.W.3d 295, 304 (Mo.App. 2019) (citing *Stenberg v. Carhart*, 530 U.S. 914, 920-21, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000)) (allowing evidence about a prior abortion in a civil case because plaintiff had raised abortion in her own testimony).[18] As a Michigan appeals court explained when reversing admission of evidence that a defendant had abortions in a trial for first degree murder, "the existing strong and opposing attitudes concerning the issue of abortion clearly make any reference thereto potentially very prejudicial." *People v. Morris*, 92 Mich. App. 747, 751, 285 N.W.2d 446, 447-48 (1979), *leave to appeal denied*, *People v. Morris*, 408 Mich. 919 (1980) (noting that "in fact, one prospective juror at defendant's trial was peremptorily challenged. . . for having affirmed that she would 'go into trial with the attitude that [defendant has] already committed a murder' by virtue of her abortions.").

The attempted uses of such stigmatizing evidence – and appellate courts' recognition of its dangers – demonstrates its potential for prejudice. In numerous cases in recent history, lawyers have sought to admit evidence that a woman had an abortion as

[18] Another appellate court also affirmed the admission of evidence of abortion in a medical malpractice case charging misuse of the labor-inducing drug Pitocin, where the defendant doctor said he would not have prescribed Pitocin to the plaintiff had she informed him that she had had prior abortions. *Davila v. Bodelson*, 103 N.M. 243, 249, 704 P.2d 1119, 1125 (1985). Even so, the court took pains to explain that "[w]e can, and do, note that abortion is an issue which sparks emotional controversy in society. . .and consequently, has the potential for inflaming passions of a jury." *Id*.

proof of her intent to commit a crime;[19] to undermine her credibility;[20] to justify her murder;[21] and even to devalue her life.[22] Appellate courts generally reverse trial courts' admission of such evidence, because the stigma attached to having an abortion is so great that it can improperly influence the outcome of a case. *See, e.g*., *Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875, 885 (8th Cir. 1998) (explaining that "[i]nforming the jury that [plaintiff] had an abortion presented the danger of provoking 'the fierce emotional reaction that is

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[19] *See, e.g., Bynum* at 542-543; *Hudson, supra; Houselog, supra.*

[20] *See, e.g., Jones v. Rent-A-Ctr., Inc.,* 281 F.Supp.2d 1277, 1284 (D. Kan. 2003) (refusing to allow jury to consider that plaintiff in sexual harassment case had an abortion, explaining that "knowledge of plaintiff's abortion could have caused the jury to decide the case on an improper basis by making a value judgment regarding plaintiff"); *see also Kirk v. Wash. State Univ.*, 746 P.2d 285 (Wash. 1987) (affirming refusal to admit evidence that college student, suing the university for sports-related injuries, had abortions, explaining that the prejudicial nature of evidence of abortion "is beyond question"); *Billett v. State*, 317 Ark. 346, 349, 877 S.W.2d 913, 915 (1994) (affirming trial court's refusal to admit evidence that witness in a murder trial had had prior abortions, explaining that even if marginally relevant, any relevance was "clearly outweighed by the danger of unfair prejudice.").

[21] *See, e.g.*, *Marquez v. State*, 2019 Alas. LEXIS 182 (Alaska 2019) (in homicide prosecution of defendant for killing his girlfriend, court reversed denial of defendant's request for discovery of victim's medical records to show that she had an abortion. Defendant, convicted of first-degree murder of his girlfriend, raised a "heat of passion" defense, claiming that his girlfriend's disclosure to him of her abortion just before he killed her was "serious provocation." *Id*. at *2-3 (Bolger, C.J., dissenting)).

[22] *See, e.g., Brock v. Wedincamp*, 558 S.E.2d 836, 843-844 (Ga. App. 2002), *cert. denied*, *Wedincamp v. Brock*, 2002 Ga. LEXIS 455 (May 28, 2002) (affirming a trial court's refusal to admit evidence of a decedent's abortion in a wrongful death action and rejecting the defendants' attempts to "mark the decedent with a scarlet letter." *Id*. at 843).

engendered in many people when the subject of abortion surfaces in any manner'") (quoting *Nickerson v. G.D. Searle & Co*., 900 F.2d 412, 418 (1st Cir.1990)). *Accord: Garcia v. Providence Med. Ctr.*, 60 Wash.App. 635, 644, 806 P.2d 766, 771 (1991) ("declining to accept" an inference that a person who had a previous abortion will feel the loss of a child less than a person who did not have an abortion, and explaining "it is difficult to imagine how [prior abortion] evidence would not have an extremely prejudicial effect on the jury"); *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977) (affirming trial court's refusal to admit, for purposes of impeachment, evidence of a rape survivor's prior abortion as "irrelevant and manifestly prejudicial").

Even if evidence of a previous abortion is tangentially relevant, the danger of unfair prejudice far outweighs the probative value of such evidence in a criminal case, and therefore, it must be prohibited. *See, e.g*., *Old Chief v. United States*, 519 U.S. 172, 185 (1997) (finding that "there can be no question" that evidence of unrelated past acts merely suggestive of the crime at issue carries a risk it will impermissibly "lure a juror into a sequence of bad character reasoning"). And abortion is not the only act during pregnancy which might impermissibly lead jurors to incorrect conclusions about the accused's intent toward a pregnancy. While nearly every act or omission on the part of the pregnant person can affect the fetus, the law creates protection around intimate decisions regarding one's health care and body that must not be undermined by presenting them as suggestive of criminality.

## IV. People's decisions about pregnancy and pregnancy-related care are protected by Maryland law.

Everyone has a right, under the Constitution and common law, to make decisions about medical care, and what care they will accept or refuse. The right is rooted in "the patient's right to exercise control over his own body [. . . by deciding . . .] whether or not to submit to the particular therapy." *Sard v. Hardy*, 281 Md. 432, 439, 379 A.2d 1014, 1019 (1977). *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 289 (1990)(O'Connor, J., concurring) ("[T]he liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment. . ."). And while the right to refuse medical treatment is not absolute, it is protected even when the individual's decision is ultimately detrimental to their health. *Stouffer v. Reid*, 184 Md. App. 268, 283, 965 A.2d 96, 104 (2009). No Maryland law abridges this fundamental right for people who are or may become pregnant.

In fact, Maryland courts and the legislature have already determined that a pregnant person's conduct or omissions during pregnancy – even if they result in fetal harm or death – cannot be criminalized. *See, e.g.*, Md. Crim. Law § 2-103 (expressly exempts from criminal prosecution any act or omission of the pregnant person with respect to their own fetus, even if fetal death results.). As the Maryland Supreme Court explained in *Kilmon v. State*, holding that a pregnant person who used criminalized drugs during pregnancy could not be held criminally liable for reckless endangerment, to read the law otherwise would permit prosecution for "a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation

of the Legislature [from] avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving. . . " *Kilmon v. State*, 394 Md. 168, 177-78, 905 A.2d 306, 311-12 (2006). Allowing a jury to consider lack of prenatal care in determining guilt for an alleged crime not only flouts the law, it has dangerous policy implications. It wrongly conflates lack of access to medical care, and the barriers that make such access hard or impossible for too many, with negative intent towards a child subsequently born.

Prenatal care is not equally available throughout the U.S.; people of color, low-income people, and people living in rural communities are more likely to lack access. Rachel Treisman, *Millions of Americans are Losing Access to Maternal Care. Here's What Can Be Done*, Minnesota Public Radio News, Oct. 12, 2022. Lack of health insurance is one of the reasons. 11 million women in the U.S. lack health insurance; 22 percent of Black women, 12 percent of Latina women, and 7 percent of white women are uninsured. Every Mother Counts, *Giving Birth in America* (accessed May 27, 2023). According to the March of Dimes, in 2021, 1 in 7 infants was born to a woman who lacked adequate prenatal care; 1 in 16 infants was born to a woman with no prenatal care. March of Dimes, *Peristats 2021* (accessed May 27, 2023). Marylanders fare slightly better on adequacy, but slightly worse in access; in 2021, 1 in 6 infants in Maryland was born to a woman who received no prenatal care. *Id.* Maryland has tried to address this gap (in 2022, the legislature passed the Healthy Babies Equity Act, to ensure that immigration status is not a barrier to receiving prenatal care, Rosanne Skirble, *With 'Healthy Babies Equity Act,' Maryland Will Join Other States that Provide Prenatal Care Regardless of*

*Immigration Status,* Maryland Matters (May 26, 2022)[23] but the fact remains that prenatal care is not accessible to all.

## V. The assumptions a jury may have about a person who considers an abortion or does not seek prenatal care are grounded in gender bias.

Importantly, this kind of evidence is also prejudicial because it is based on stereotypes of how pregnant people are expected to behave. Reliance on such stereotypes about pregnancy and mothering underlie pervasive sex-based discrimination that decades of law and policy-making have sought to eradicate.

The presumed capacity for pregnancy has been the justification for sex-based discrimination that relegated women to a subordinate status throughout history. *See e.g., Muller v. Oregon*, 208 U.S. 412, 421 (1908) (women's work hours were capped in service of "proper discharge of [their] maternal functions"); *Bradwell v. State*, 83 U.S. 130, 141 (1873) (Bradley, J, concurring) (women forbidden from legal practice due to "duties, complications, and incapacities arising out of the married state"). Fortunately, Supreme Court jurisprudence now rejects the notion that women may be deprived of opportunities or be forced to endure burdens because of notions of their roles as "mothers or mothers to be." *See Nevada Dep't of Human Res. v Hibbs*, 538 U.S. 721, 736 (2003). Courts have deemed policies created in the name of protecting fetuses to be impermissible discrimination. *See Int'l Union v. Johnson Controls*, 499 U.S. 187 (1991) (polices prohibiting women from certain positions based on their ability to become pregnant

[23] https://marylandmatters.org/2022/05/26/with-healthy-babies-equity-act-maryland-will-join-other-states-that-provide-prenatal-care-regardless-of-immigration-status/.

violate the Pregnancy Discrimination Act); *AT&T Corp. v. Hulteen*, 556 U.S. 701, 724 (2009) (Ginsburg, J., dissenting). Yet the notion that women who decline prenatal interventions are acting in a way that is "unnatural" or "deviant" persists. *See* Lisa Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 Ohio St. L.J. 1205, 1250-51 (1992) (describing the biases and prejudices underlying legal surveillance, control, and coercion of pregnant women).

With such biases and prejudices at play, the role of the trial court in ensuring that the jury is not inflamed by evidence of decisions about pregnancy – decisions that are not only irrelevant but are within the Constitution and common law's protections of medical autonomy – is critical.

## CONCLUSION

Ms. Akers may have experienced pregnancy ambivalence, considered abortion, and lacked prenatal care. These considerations – commonplace and based on important factors including economic insecurity, health risks, and the needs of one's family – are not probative of whether Ms. Akers committed the crimes the State accused her of. The trial court's admission of this irrelevant evidence was an error of law. *See Smith v. State,* 218 Md. App. 689, 704, 98 A.3d 444 (2014) (a trial court does not have discretion to admit irrelevant evidence); *see* Md. Rule 5-402 (irrelevant evidence is inadmissible).

Not only is contemplating or having an abortion irrelevant, its admission is so prejudicial as to require reversal. *See id.* at 705 (even where potentially probative, highly inflammatory evidence should be excluded); *see* Md. Rule 5-403. Abortion is a normal

event in people's reproductive lives, but it remains deeply stigmatized in the United States. That is why courts throughout the country refuse to admit such evidence. Because the admission of this evidence deprived Ms. Akers of a fair trial, Amici urge this Court to reverse her conviction.

Respectfully submitted,

/s/ Robert Baldwin III

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## APPENDIX A

## INDIVIDUAL STATEMENTS OF INTEREST OF AMICI CURIAE

**The Gender, Prison, and Trauma Clinic at the University of Maryland Carey School of Law** represents incarcerated survivors of various forms of gender-based violence. Our clients' cases are regularly affected by the inappropriate use of gender-based stereotypes to support their prosecution.

**If/When/How: Lawyering for Reproductive Justice** is a national nonprofit organization working to change the law so that everyone has the power to determine if, when, and how to define, create, and sustain families with dignity. If/When/How works through litigation, advocacy, legal services, and public education to end the devastating and discriminatory criminalization of people who end or lose their pregnancies.

**Physicians for Reproductive Health** ("PRH") is a doctor-led nonprofit that seeks to ensure meaningful access to comprehensive reproductive health care services, including contraception and abortion. Since 1992, PRH has organized and amplified the voices of medical providers to advance reproductive health, rights, and justice. PRH's network is comprised of physicians in all 50 states, D.C., and Puerto Rico, and includes over 500 fellows. PRH has unique insight into the harms of pregnancy discrimination and criminalization, including when people are criminalized for self-managing their abortions.

**Plan C** is a public health creative campaign that works to transform access to abortion in the U.S. by normalizing the self-directed option of abortion pills by mail. Plan C believes that people have a right to access accurate information about self-managed

abortion. As courts and politicians have limited access to abortion, traffic to our website has soared. Millions of people visit our website, plancpills.org; some will use our information to self-manage an abortion, and many others simply want to learn how clinicians and community members help each other access this basic care.

**Amy Allina** is an expert in women's rights and health care access, and a former member of the Maryland Women's Coalition for Healthcare Reform, who works to advance a vision of access to abortion care that includes self-managed abortion as a safe and accessible option, alongside safe and accessible abortion services offered in the formal health care system. Criminalizing people for considering, researching, or having an abortion, including a self-managed abortion, puts the health and lives of pregnant people and those who support them at risk and undermines reproductive and bodily autonomy.

**M. Antonia Biggs, PhD**, focuses her research on better understanding the challenges faced by people wanting to access sexual and reproductive health services. Dr. Biggs is currently leading studies examining the psychosocial burden experienced by people accessing abortion care and assessing interest in alternative models of medication abortion provision and changes in prevalence of self-managed abortion.

**Caitlin Gerdts, PhD, MHS** is an epidemiologist and the Vice President for Research at Ibis Reproductive Health. Dr. Gerdts has contributed to the field of global sexual and reproductive health, rights, and justice through collaborative work on novel research methods, documenting the safety and effectiveness of self-managed abortion, and evaluations of the impact of abortion restrictions across the globe. Caitlin has

authored/co-authored more than 100 peer reviewed publications and is the recipient of the 2023 Society for Family Planning Lifetime Achievement Award.

**Daniel Grossman, MD,** is the Director of Advancing New Standards in Reproductive Health, and a Professor in the Department of Obstetrics, Gynecology & Reproductive Sciences at the University of California San Francisco. Dr. Grossman is a practicing obstetrician-gynecologist, and he conducts research on abortion and miscarriage aimed at improving access to contraception and safe abortion in the United States, Latina America, and sub-Saharan Africa. He has served on committees for professional organizations such as the American Public Health Association and the American College of Obstetricians and Gynecologists.

**Heidi Moseson, PhD, MPH,** is an epidemiologist who has studied self-managed abortion for over a decade. Dr. Moseson and her colleagues' research makes clear that self-managed abortion is a safe and increasingly preferred model of abortion care in the U.S., and that online searches for information on self-managed abortion are normal and common. Additionally, her research highlights the many barriers that people with marginalized identities face in accessing any form of pregnancy-related care, whether prenatal care or abortion care.

**Lauren Ralph, PhD, MPH**, is an epidemiologist whose research focuses on young people's access to abortion and experiences making decisions around pregnancy. Her research has examined the impact of policies mandating parental involvement on young people's experience accessing abortion, how being denied an abortion impacts maternal health outcomes and educational trajectories, and on levels of decision certainty and

among people seeking abortion. She is currently engaged in research to better understand trends in prevalence of and experiences with self-managed abortion in the U.S.

**Ushma Upadhyay, PhD, MPH**, has expertise in abortion safety, abortion access in the U.S., medication abortion, and state-level abortion restrictions. Her current research focuses on the safety, efficacy, and acceptability of telehealth for abortion care and the telehealth for reproductive health equity. Dr. Upadhyay's research on the incidence of self-managed abortion found that greater barriers to abortion care are linked to higher incidence of self-managed abortion.

**Nisha Verma, MD, MPH**, is a board-certified, fellowship trained OB/GYN providing full-spectrum reproductive healthcare. She is particularly passionate about improving access to needed medical care in the U.S. Southeast, which is her home, and has a research grant to explore the impact of Georgia's six-week abortion ban on people with high-risk pregnancies in the state.

**Susan Yanow, MSW,** is a longtime reproductive justice activist, co-founder of Women Help Women and the founder/coordinator of SASS - Self-managed Abortion; Safe & Supported. She has authored/co-authored numerous articles about self-managed abortion.

## CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 6,461words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Robert Baldwin III.
Robert Baldwin, III

## CERTIFICATION REGARDING RESTRICTED INFORMATION

I HEREBY CERTIFY that this document contains no restricted information.

/s/ Robert Baldwin III.
Robert Baldwin, III

# CERTIFICATE OF SERVICE

Supreme Court of Maryland
No. SCM-PET-20-2024
----------)
Moira Akers

*v.*

State of Maryland
----------)

I, Brittany Lewis, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by If/When/How: Lawyering for Reproductive Justice, counsel for Amicus to print this document. I am an employee of Counsel Press.

On the **7th Day of August, 2024**, the within Amici Curiae have been filed and served electronically via the Court's MDEC system. Additionally, I will serve paper copies upon:

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**via Federal Express,** by causing 2 true copies of each to be deposited, enclosed in a properly addressed wrapper, in an official depository of the United States Postal Service.

Unless otherwise noted, 8 copies of the documents have been sent to the Court on this day via overnight delivery.

August 7, 2024

/s/ Brittany Lewis
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