

No. 19-1392

**In The
Supreme Court of the United States**

THOMAS E. DOBBS, M.D., M.P.H., in his official
capacity as State Health Officer of the
Mississippi Department of Health, et al.,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

**BRIEF OF EXPERTS, RESEARCHERS, AND
ADVOCATES OPPOSING THE CRIMINALIZATION
OF PEOPLE WHO HAVE ABORTIONS AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENTS**

PAUL J. LAWRENCE
JESSICA A. SKELTON
ALANNA PETERSON
PACIFICA LAW GROUP LLP
1191 Second Avenue,
Suite 2000
Seattle, WA 98101
(206) 245-1700

FARAH DIAZ-TELLO*
SARA L. AINSWORTH
YVEKA PIERRE
IF/WHEN/HOW: LAWYERING
FOR REPRODUCTIVE JUSTICE
1714 Franklin Street,
#100-393
Oakland, CA 94612
(347) 974-7337
farah@ifwhenhow.org

Counsel for Amici Curiae

**Counsel of Record*

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INTEREST OF AMICI CURIAE¹

Amici are healthcare professionals, researchers, attorneys, and advocates for sexual and reproductive health, rights, and justice. They work to eliminate stigma, defend rights, and ensure access to healthcare. *Amici* are united in opposition to the criminalization of people who end their own pregnancies or experience a pregnancy loss.

If/When/How: Lawyering for Reproductive Justice is a non-profit organization that works to transform the law and the legal profession in service of reproductive justice. IWH defends individuals prosecuted for self-managing abortions.

Project SANA (Self-Managed Abortion Needs Assessment) is an interdisciplinary research group examining the motivations and experiences of people who self-manage abortion in the U.S. Project SANA's research demonstrates that safe self-management is a critical option for people who are unable to access abortion within the formal healthcare setting, most often due to restrictive laws.

The Center for Advancing Innovative Policy is a grassroots policy firm that develops strategies to advance people's right to self-determination over their

¹ The parties to this case have each filed blanket consents to the filing of *amicus* briefs. 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.

bodies and lives, and opposes the criminalization of people's pregnancy outcomes.

Collective Power for Reproductive Justice is a national organization that educates, trains, and inspires new leadership to advance reproductive justice for all. Collective Power opposes any measure that further limits access to abortion or increases prosecution or stigmatization of accessing abortion.

Movement for Family Power works to end the foster system's policing and punishment of families and to create a world where the dignity of all families is valued and supported, and people can seek the healthcare they need.

National Lawyers Guild is the nation's oldest and largest progressive bar association. NLG's membership has resolved to oppose the criminalization of people's reproductive lives.

Plan C is a team of public health advocates, researchers, and activists working toward a world in which the ability to end an early pregnancy is in the hands of those who need it.

Positive Women's Network—USA is a national membership body of women and transgender people living with HIV that works to strengthen the strategic power of all women living with HIV in the U.S. PWN opposes the criminalization of abortion.

SASS is part of an international non-profit, Women Help Women, that seeks to expand access to

safe abortion by providing information about self-managed abortion.

Amy Allina, M.A., is an expert in U.S. healthcare rights, access, and coverage, who works to prevent the criminalization of people who self-manage abortion.

Jamila Perritt, M.D., M.P.H., F.A.C.O.G., is a physician and public health expert. Banning, restricting, or criminalizing abortion, including self-managed abortion, harms patients and undermines the patient-provider relationship.

Cari Sietstra, J.D., is an attorney and researcher who advocates for reproductive health access in countries where abortion is restricted or criminalized.

Ushma Upadhyay, Ph.D., M.P.H., is an Associate Professor at the University of California, San Francisco. Her most recent research study found that facing multiple barriers to abortion access was associated with higher likelihood of attempting self-managed abortion.

◆

INTRODUCTION AND SUMMARY OF ARGUMENT

Mississippi's enactment of HB 1510 and request to overrule *Roe v. Wade* would place the United States on a dangerous path. To uphold this ban would permit states, for the first time in nearly half a century, to ban pre-viability abortions. Respondents and other *amici* have outlined the manifold injuries to health, rights,

and dignity that Mississippians will face if the state abdicates its responsibility to their well-being by preventing them from accessing abortion care. *Amici* submit this brief to urge this Court to consider the additional harms that Mississippians—and others living in states that follow its lead—may face, directly at the hands of the state, if they are criminalized when they address their reproductive healthcare 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 in criminalizing people who end or lose pregnancies suggest that it will be true here 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.



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 ways to self-determine their reproductive lives outside of that system.² 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 people³ end their own pregnancies outside the medical system in the U.S., but research suggests that it commonly occurs. Between 2018 and 2020, one online service received more than 57,000 requests—from all fifty

² 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.”).

³ People with a range of gender identities become pregnant. The risks of criminalization for self-managed abortion apply irrespective of gender identity.

states—for medication to self-manage abortion.⁴ A 2020 study estimates that 7% of U.S. women will attempt a self-managed abortion.⁵ The need for stay-at-home healthcare, including abortion, only increased during the COVID-19 pandemic; demand to one online source for abortion medications increased by 27% in the month after stay-at-home orders began.⁶

People who self-manage abortions do so for a variety of reasons. Even when people have access to clinically-managed healthcare, 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.⁷ They may do so for health reasons, such as avoiding exposure to COVID-19.⁸ Unsurprisingly,

⁴ Abigail R. A. 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 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>.

⁶ Abigail R. A. 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).

⁷ See Abigail R. A. 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).

⁸ See Aiken et al., *supra* note 6, at 835, 837.

demand for self-managed abortion is higher in states with abortion restrictions.⁹ In Texas, a state that imposed significant barriers on abortion care even prior to passing Senate Bill 8,¹⁰ between 100,000 and 240,000 women of childbearing age have attempted self-managing an abortion.¹¹ From 2018 to 2020, Mississippi was second only to Louisiana as the state with the highest rate of inquiries to an online source of self-managed abortion medication.¹²

In fact, Internet searches for terms like “miso-prostol” and “medical abortion” grew by more than 5,000% after the announcement that this Court granted certiorari in this case.¹³ This suggests that people are either confused about whether abortion is

⁹ See Aiken et al., *supra* note 7, at 92 (76% of U.S.-based requests came from states that heavily restrict abortion).

¹⁰ See *Whole Woman’s Health et al. v. Jackson et al.*, No. 21A24, 2021 WL 3910722, at *3–4 (U.S. 2021) (Sotomayor, J., dissenting).

¹¹ Daniel Grossman et al., *Research Brief: Knowledge, Opinion and Experience Related to Abortion Self-Induction in Texas*, Tex. Pol’y Evaluation Project (Nov. 17, 2015), http://liberalarts.utexas.edu/txpep/_files/pdf/TxPEP-Research-Brief-Knowledge-OpinionExperience.pdf.

¹² Aiken et al., *supra* note 4, at 1.

¹³ 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/?sh=470ce7d60a0a>.

legal,¹⁴ or preparing for an anticipated decrease in access by finding self-managed alternatives.¹⁵

B. People Turn to 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 for the most part no longer means the dangers of an earlier time.¹⁶ Instead, 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.¹⁷ And they are safe: side effects are comparable to those of a

¹⁴ See Jenna Jerman et al., *What are People Looking for When They Google “Self-Abortion”?*, 97 *Contraception* 510, 513 tbl. 3 (2018) (one-third of people searching for information about self-managed abortion were unsure about the legality of abortion in their states or thought it was illegal).

¹⁵ See, e.g., Megan Menchaca & María Méndez, *Confusion, Uncertainty: Options Narrow as Texas Abortion Law Takes Hold*, *Austin American-Statesman* (Sept. 3, 2021), <https://www.statesman.com/story/news/2021/09/03/texas-abortion-law-texans-look-out-state-options-narrow/5698810001/>.

¹⁶ See Moseson et al., *supra* note 2, at 3 (discussing methods used to end pregnancies outside of medical setting).

¹⁷ See Melissa J. Chen & Mitchell D. Creinin, *Mifepristone with Buccal Misoprostol for Medical Abortion: A Systematic Review*, 126 *Obstetrics & Gynecology* 12, 12–13 (2015).

miscarriage,¹⁸ and are generally treatable in an outpatient setting.¹⁹

Recent experience during the COVID-19 pandemic—which stymied access to most routine medical care—demonstrates that these medications can be used safely with less medical supervision than previously believed. One U.S. study found that remote consultation with abortion pills delivered by mail is “feasible, safe, and efficacious.”²⁰ 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.²¹ Currently, the federal Food and Drug Administration is reevaluating whether to permanently end its restrictions requiring in-person dispensation of mifepristone.²²

Experience in other countries affirms that abortion pills can be safely used at home, even without a medical provider.²³ This fact has markedly changed the

¹⁸ 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).

¹⁹ 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).

²⁰ Ushma D. 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>.

²¹ *Id.* at 2, tbl. 2.

²² *Id.* at 2.

²³ Kinga Jelinska & Susan Yanow, *Putting Abortion Pills into Women’s Hands: Realizing the Full Potential of Medical*

global abortion landscape: researchers attribute the worldwide decrease in mortality associated with self-managed abortion to the use of abortion pills.²⁴ Where people lack access to medically-managed abortion, the World Health Organization recommends self-administered use of abortion pills as an option, provided people have “access to a source of accurate information and to a health-care provider (should one be needed or wanted at any stage of the process)[.]”²⁵ Unfortunately, the mitigation of medical risk promised by abortion pills is undermined by another risk: that of criminal prosecution for self-managed abortion.

II. People Who End Their Own Pregnancies Face Legal Risk

While global maternal mortality due to unsafe abortion has decreased as a result of the global trend toward liberalizing access to legal abortion²⁶ and an

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).

²⁴ 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).

²⁵ World Health Org., *Medical Management of Abortion* 29 (2018), <http://apps.who.int/iris/bitstream/handle/10665/278968/9789241550406-eng.pdf>.

²⁶ See Int’l Conference on Population and Development Programme of Action, 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

increased use of safer methods to self-manage,²⁷ where abortion is banned, or where full decriminalization has not been achieved, people risk criminalization to end unwanted pregnancies.

A. Where Abortion Is Banned, People Who End Their Pregnancies Are Criminalized

Global trends of criminalizing the self-management of abortion provide a preview of what likely would happen in the event of a U.S. abortion ban. Laws imposing penalties for abortions performed outside certain parameters inevitably lead to prosecutions for abortions, or even for spontaneous pregnancy losses.²⁸

Only El Salvador and Nicaragua have in recent decades imposed total abortion bans, moving against the trend of liberalization of abortion laws. In 1998, El Salvador banned abortion in all circumstances, criminalizing people who have abortions and anyone who assists them.²⁹ From 2000 to 2019, 181 women

Action, committing to advance reproductive health by preventing unsafe abortion.

²⁷ Patty Skuster, *How Laws Fail the Promise of Medical Abortion: A Global Look*, 18 *Geo. J. Gender & L.* 379, 383–84 (2017).

²⁸ *See id.* at 386–90.

²⁹ Amnesty Int'l, *On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador* 10–11 (2014), <https://www.amnesty.org/en/wp-content/uploads/2021/06amr290032014en.pdf>.

were prosecuted for having lost or ended a pregnancy.³⁰ Many were charged with homicide crimes, carrying up to fifty-year sentences. Some were prosecuted after losing pregnancies to accidents, illnesses, or unknown causes.³¹ Nicaragua similarly provides no option for legal abortion; a 2008 law prescribes prison sentences of up to two years for anyone who consents to or seeks an abortion.³² Healthcare providers report that this leads to pregnant individuals avoiding care for fear of being reported for abortion.³³ The Nicaraguan government does not publish data on abortion criminalization, but a 2016 report found evidence that 290 people were accused or detained between 2003 and 2013.³⁴

Criminalization of people who end their own pregnancies is not limited to countries where abortion is banned. It remains a possibility anywhere that abortions occurring outside legal parameters lead to criminal penalties, even in countries that have undertaken

³⁰ Agrupación Ciudadana por la Despenalización del Aborto en El Salvador, *Del Hospital a la Cárcel: Consecuencias para las Mujeres por la Penalización, Sin Excepciones, de la Interrupción del embarazo en El Salvador 1998-2019* (3d ed. 2019) <https://agrupacionciudadana.org/download/del-hospital-a-la-carcel-tercera-edicion>.

³¹ Sara Rogel, *El Salvador Frees Woman Accused of Abortion*, BBC News (Jun. 8, 2021), <https://www.bbc.com/news/world-latin-america-57384064>.

³² Amnesty Int'l, *The Total Abortion Ban in Nicaragua* 7, 15 (2009), <https://www.amnestyusa.org/pdfs/amr430012009en.pdf>.

³³ *Id.* at 21.

³⁴ Human Rights Watch, *Nicaragua: Abortion Ban Threatens Health and Lives* (Jul. 31, 2017), <https://www.hrw.org/news/2017/07/31/nicaragua-abortion-ban-threatens-health-and-lives>.

major reforms to expand abortion access.³⁵ For instance, in Rwanda, in spite of a 2012 reform permitting abortion in cases of sexual assault or risk to life or health,³⁶ a person who wants an abortion must seek approval of two doctors—but there is only one doctor per 17,000 people in the country, leading many people to self-manage.³⁷ As a result, a study conducted in 2013-2014 found that as many as one in four women in prison were incarcerated for self-managing an abortion.³⁸ Many were victims of rape who would have qualified for a legal abortion had they been able to apply for one.³⁹

But the trend of criminalization of people who have abortions in spite of legal protections for reproductive rights is not limited to foreign countries—it happens in the U.S. as well.

B. Prosecutors in the U.S. Already Target People for Self-Managed Abortion, Despite Longstanding Prohibitions

Even prior to this Court’s articulation of constitutional protections for the right to seek an abortion, “the pregnant woman herself could not be prosecuted for

³⁵ See Skuster, *supra* note 27, at 386–90.

³⁶ Gillian Kane, *When Abortion is a Crime: Rwanda 1* (2015), <https://www.ipas.org/wp-content/uploads/2020/06/CRMWRWD2E15-WhenAbortionIsaCrimeRwanda.pdf>.

³⁷ *Id.* at 1, 12.

³⁸ *Id.* at 9–10.

³⁹ *Id.* at 12.

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) (noting that 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). Yet, since 2000, at least 21 women have been arrested for allegedly self-managing an abortion or helping a loved one do so.⁴⁰

Only a small number of U.S. women criminalized for self-managed abortion in the 21st century were prosecuted under laws purporting to criminalize ending one’s own pregnancy. In 2004, a 22-year-old South Carolina immigrant mother was charged with performing an unlawful abortion for allegedly

⁴⁰ Farah Diaz-Tello et al., *Fulfilling Roe’s Promise: 2019 Update* 1 (2019), <http://bit.ly/2Wu2F6m>.

terminating her pregnancy with abortion pills mailed from Mexico.⁴¹ She served four months in jail.⁴² The statute under which she was charged is the only remaining such law in the U.S. that has not been held unconstitutional by a court, repealed by a legislature, or otherwise deemed unenforceable. In 2019, New York repealed its criminal self-abortion law. S.B. 240, Reg. Sess. § 5 (N.Y. 2019). Delaware followed suit this summer. *See* H.B. 31, 151st Gen. Assem. (Del. 2021). Only three other states—Idaho, Nevada, and Oklahoma—retain laws that purport to criminalize people who self-manage abortion; all of these outlier statutes have been deemed unconstitutional by a court, *see McCormack v. Hiedeman*, 694 F.3d 1004, 1015–18 (9th Cir. 2012) and *Henrie v. Derryberry*, 358 F. Supp. 719, 724–25 (N.D. Okla. 1973), or other authoritative interpretation of law. *See* Nev. Att’y Gen. Op. No. 114 at 16–17 (Feb. 2, 1973), https://ag.nv.gov/uploadedFiles/agnv.gov/Content/Publications/opinions/1973_AGO.pdf.

Unfortunately, those legal pronouncements either came too late or were ignored, in favor of subjecting people to arrest, prosecution, and in some cases, incarceration, for alleged self-managed abortion. 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.⁴³

⁴¹ Rick Brundrett, *Woman’s Abortion is Unique S.C. Case*, *The State* (Columbia, S.C.), May 1, 2005.

⁴² *Id.*

⁴³ *NYPD: Manhattan Woman Charged with Performing Self-Abortion*, CBS N.Y. (Dec. 1, 2011), <http://cbsloc.al/2pxAnrZ>.

In Idaho, a low-income single mother of three took pills purchased from an online pharmacy 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 mother of a toddler was arrested for allegedly taking “drugs . . . to miscarry her pregnancy.”⁴⁴

But even in the states that lack any statutory authority, prosecutors have attempted to punish people believed to have ended a pregnancy by 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 Purvi Patel’s conviction for “feticide,” a crime intended to protect pregnant people from violence, for taking abortion pills to end her own pregnancy); *Bynum v. State*, 546 S.W.3d 533, 536, 541–43 (Ark. Ct. App. 2018) (reversing evidentiary rulings in Anne Bynum’s conviction for “concealing a birth,” a 17th-century crime for which no other person in Arkansas had been charged since 1944, for using pills to induce labor but experiencing a stillbirth).⁴⁵ When criminal codes contain no clear path to prosecution,

⁴⁴ *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>.

⁴⁵ *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>.

prosecutors have ignored facts and law and charged women with murder.⁴⁶

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 pregnancy outcome[.]”⁴⁷ 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.⁴⁸ Because, as the ABA recognized, the law does not typically support these prosecutions, their perpetuation is essentially a manifestation of abortion stigma.

⁴⁶ See *Press Release*, Dougherty Cty. Dist. Attorney’s Office (Jun. 10, 2015) (dropping homicide charge against Kenlissia Jones, who allegedly used abortion pills to induce labor; noting that Georgia, along with “an overwhelming majority of jurisdictions,” does not criminalize pregnant people for actions related to their own pregnancies); 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 Latice Fisher, a Mississippi woman who had a stillbirth; indictment was predicated in part on claims that she searched online for abortion medications during pregnancy).

⁴⁷ Am. Bar Ass’n, *Resolution 107A* (Feb. 22, 2021), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/107a-midyear-2021.pdf>.

⁴⁸ See *id.*, Report at 7–9.

III. Abortion Bans Exacerbate the Risk That People Will Be Criminalized for Self-Managing Abortions

Like the vast majority of U.S. abortion codes, HB 1510 does not criminalize people who have abortions. Instead, the law renders abortion care completely inaccessible after 15 weeks' gestation, and creates confusion about the legality of abortion among Mississippians. Research and common sense dictate that more people will self-manage abortions if it goes into effect. In a jurisdiction where existing law has already deeply stigmatized abortion, arrests are likely to ensue despite the letter of the law.

A. Stigma Leads to Discrimination in the Legal System

Stigma arises when society devalues certain populations.⁴⁹ Because of the legal system's vast power over people's lives, stigma within it results in devastating discrimination.⁵⁰ This is apparent in the way the legal system has criminalized people for status, rather than actions, including people who use drugs,⁵¹ have

⁴⁹ See Stacey Hannem, *Theorizing Stigma and the Politics of Resistance: Symbolic and Structural Stigma in Everyday Life*, in *Stigma Revisited: Implications of the Mark* 10–28 (Stacey Hannem & Chris Bruckert eds., U. Ottawa Press 2012).

⁵⁰ See Scott Burris, *Stigma and the Law*, 367 *Lancet* 529, 530 (2006).

⁵¹ See, e.g., Global Comm'n on Drug Pol'y, *The World Drug Perception Problem* 27–29 (2017), http://www.globalcommissionon drugs.org/wp-content/uploads/2018/01/GCDP-Report-2017_Perceptions-ENGLISH.pdf.

HIV,⁵² experience mental illness,⁵³ or live in poverty.⁵⁴ This Court has recognized the relationship between stigma and discriminatory results. *See, e.g., Robinson v. California*, 370 U.S. 660, 666 (1962) (“in the light of contemporary human knowledge, a law which made a criminal offense of such a disease [addiction] would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments”); *Tate v. Short*, 401 U.S. 395, 398 (1971) (“the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full” (quotations omitted)); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (holding laws criminalizing same sex intimate conduct unconstitutional, explaining that criminalization “is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres”).

⁵² See U.S. Dep’t of Justice, Civil Rights Division, *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically Supported Factors* (2014), <https://www.hivlawandpolicy.org/sites/default/files/DOJ-HIV-Criminal-Law-Best-Practices-Guide.pdf> (laws motivated by stigma criminalize behaviors that pose no risk of HIV transmission).

⁵³ See Ashley B. Batastini et al., *Mental Illness in the Eyes of the Law: Examining Perceptions of Stigma Among Judges and Attorneys*, 24 *Psychol., Crime & L.* 673, 675–76, 680–83 (2018).

⁵⁴ See Magdalena Sepúlveda, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, U.N. Doc. A/66/265 (Aug. 4, 2011) (discussing connection between criminalization and poverty stigma).

B. Abortion Stigma Negatively Influences Legal System Responses to People Who Have Abortions

Abortion is deeply stigmatized in the U.S.⁵⁵ Abortion stigma ascribes “negative attribute[s] . . . to women who seek to terminate a pregnancy that marks them . . . as inferior to ideals of womanhood.”⁵⁶ Abortion bans contribute to this stigma by falsely exceptionalizing abortion as something that is uniquely and presumptively unsafe, and as a result wrong and harmful.⁵⁷ This aura of illegality taints those who seek to end their pregnancies, and provokes hostility toward them.⁵⁸

This stigma is apparent in the legal system’s treatment of people who have abortions. In recent history, lawyers have attempted to use a woman’s prior

⁵⁵ M. Antonia Biggs et al., *Perceived Abortion Stigma and Psychological Well-Being Over Five Years After Receiving or Being Denied Abortion*, 15 PLoS ONE No. 1, at 2 (2020).

⁵⁶ 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).

⁵⁷ Paula Abrams, *Abortion Stigma: The Legacy of Casey*, 35 *Women’s Rts. L. Rep.* 299, 301 (2014); see also 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[.]”).

⁵⁸ Cook, *supra* note 57, at 349.

abortion as proof of her intent to commit a crime, to undermine her credibility, to justify a crime committed against her, or even to undervalue her life. *See, e.g., Bynum*, 546 S.W.3d at 542–43 (reversing conviction for “concealing a birth” because evidence of defendant’s abortion history was highly prejudicial); *Hudson v. State*, 745 So. 2d 1014, 1015–16 (Fla. Dist. Ct. App. 1999) (reversing manslaughter conviction for death of defendant’s infant child because evidence of her abortions was irrelevant and prejudicial); *Jones v. Rent-A-Ctr., Inc.*, 281 F. Supp. 2d 1277, 1284 (D. Kan. 2003) (refusing to allow jury to consider plaintiff’s abortion, explaining that “knowledge of plaintiff’s abortion could have caused the jury to decide the case on an improper basis”); *Kirk v. Wash. State Univ.*, 746 P.2d 285, 293–94 (Wash. 1987) (excluding evidence of abortion because the prejudicial nature of such evidence is “beyond question”); *Marquez v. State*, No. A-11925, 2019 WL 211490, at *1–3 (Alaska Ct. App. Jan. 16, 2019) (defendant, convicted of first-degree murder, claimed that his girlfriend’s disclosure of her abortion just before he killed her was “serious provocation”); *Brock v. Wedincamp*, 558 S.E.2d 836, 843–44 (Ga. Ct. App. 2002) (affirming refusal to admit evidence of a decedent’s abortion in a wrongful death action, because “defendants want to unfairly devalue the decedent’s life to the jury[.]”). The stigma attached to having an abortion is so great that it may improperly influence the outcome of a case. *See, e.g., Garcia v. Providence Med. Ctr.*, 806 P.2d 766, 771 (Wash. Ct. App. 1991) (“[I]t is difficult to imagine how such evidence would not have an extremely prejudicial effect on the jury.”); *see also Nichols*

v. Am. Nat'l Ins. Co., 154 F.3d 875, 885 (8th Cir. 1998) (“Informing the jury that [plaintiff] had had an abortion presented the danger of provoking the fierce emotional reaction that is engendered in many people when the subject of abortion surfaces in any manner.” (quotations omitted)).

In short, people who have abortions face unjust bias when that fact is known to the legal system. This bias explains why, in spite of constitutional protections and prohibitions on criminalization of abortion, prosecutors continue to punish people for their pregnancy outcomes, even when those outcomes are unintentional.

C. Abortion Stigma Leads to Pervasive Discriminatory Prosecutions in the U.S.

When stigma influences a legal response, *any* pregnancy loss is potentially subject to criminalization. Since 1973, more than 1,200 people suspected of having caused their own miscarriages or allegedly risking harm to their pregnancies have been arrested for offenses ranging from feticide to child abuse to poisoning.⁵⁹ The circumstances vary. They may have

⁵⁹ See Farah Diaz-Tello, *Roe Remains for Now . . . Will it Be Enough?*, Human Rights (Sept. 7, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/health-matters-in-elections/roe-remains-for-now-will-it-be-enough/; see also Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. Health Pol., Pol'y & L. 299, 309 (2013).

suffered a mental health crisis and attempted suicide. *See Shuai 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 baby was “doing fine” since birth). They may have expressed ambivalence about pregnancy while seeking help for falling down a flight of stairs,⁶⁰ or had a precipitous birth at home that ended in 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. Marshaé Jones lost her pregnancy after another person shot her in the stomach.⁶¹ Compounding the trauma of being shot and losing a pregnancy, the state of Alabama indicted Ms. Jones for homicide and incarcerated her on a \$50,000 bond. Though the prosecutor eventually dismissed the indictment, Ms. Jones should never have been indicted in the first place: Alabama’s homicide statute

⁶⁰ *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).

⁶¹ 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>.

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. 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 on appeal lasts months or years.

This is what happened to Rennie Gibbs, a 16-year-old Mississippi girl who was indicted on “depraved heart murder” charges after experiencing a stillbirth

at home.⁶² Despite the conclusion by multiple experts that the cause of the stillbirth was umbilical cord compression, the state chose to rely on the coroner's indefensible conclusion that trace amounts of cocaine byproduct caused the fetal death. Ms. Gibbs faced the possibility of life in prison until a trial court dismissed the case.⁶³

Another Mississippi woman, Latice Fisher, was indicted for second-degree murder for a stillbirth she experienced at home.⁶⁴ The indictment was partially based on the mistaken assumption that her stillborn infant was born alive—but also on an allegation that she had searched online for information about self-managed abortion.⁶⁵ The state dropped the charges, but later convened a second grand jury, which refused to indict.⁶⁶ The focus on the search history regarding self-managed abortion on Ms. Fisher's phone⁶⁷ belies

⁶² 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>.

⁶³ 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/>.

⁶⁴ 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.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Rankin, *supra* note 46.

the true impetus for this prosecution: abortion stigma.

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

IV. Criminalization of People Who End Their Pregnancies Irrevocably Harms Their Health and Well-Being, Violating Their Human Rights

Prosecutions of people who end their pregnancies proceed despite the fact that this Court has never endorsed criminalizing people who have abortions. *See McCormack*, 694 F.3d at 1018 (noting that, although this 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.

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.⁶⁸

⁶⁸ U.N. Working Group on Discrimination Against Women, *Report of the Working Group on the Issue of Discrimination*

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.”⁶⁹

This Court has 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).⁷⁰ The message is clear: criminalizing people for abortions violates the rights to the 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 Healthcare

Every person has the right to the “highest attainable standard of physical and mental health” under the

Against Women in Law and in Practice, ¶ 78, U.N. Doc. A/HRC/32/44 (Apr. 8, 2016) [hereinafter WGDAW Report].

⁶⁹ *Id.*, ¶ 79-80.

⁷⁰ *See also* Sarah H. Cleveland, *Our International Constitution*, 31 *Yale J. Int’l L.* 1, 33–87 (2006) (discussing this Court’s history of examining foreign law in constitutional interpretation).

International Covenant on Economic, Social and Cultural Rights, a treaty signed by the U.S.⁷¹ 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[.]”⁷²

Criminalizing people for ending their pregnancies has consistently been cited as an example of a violation of the right to health.⁷³ 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[.]”⁷⁴ This is because “stigma resulting from criminalization [of abortion] creates a vicious cycle,” preventing people from seeking treatment when complications arise.⁷⁵ Similarly, the WGDAW has recognized that criminalizing reproductive healthcare violates the right to equal access to healthcare services.⁷⁶ It identified the use of criminal sanctions

⁷¹ Int’l Covenant on Economic, Social & Cultural Rights, art. 12, Dec. 16, 1966, 6 I.L.M. 360, 993 U.N.T.S. 3.

⁷² 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).

⁷³ *Id.*, ¶ 57

⁷⁴ 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).

⁷⁵ *Id.*, ¶ 35.

⁷⁶ WGDAW Report, *supra* note 68, at ¶ 14.

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.”⁷⁷ 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.⁷⁸

The barriers posed to the right to health by inserting the fear of criminal prosecution into seeking post-abortion care are not hypothetical. People in the U.S. who fear arrest avoid the healthcare 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 when laws encourage them to seek such care.⁷⁹ The same is true of people who fear being criminalized for their pregnancy outcomes.⁸⁰

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

⁷⁷ *Id.*, ¶ 76.

⁷⁸ 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).

⁷⁹ 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).

⁸⁰ 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).

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[.]”⁸¹ The American Medical Association shares this position, because criminalizing self-managed abortions “increases patients’ medical risks and deters patients from seeking medically necessary services[.]”⁸² 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.

⁸¹ 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>.

⁸² 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.”).

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.⁸³ Encompassed within this prohibition are mistreatment by both healthcare providers and agents of punitive state systems. As the U.N. Special Rapporteur on torture has noted, humiliation in healthcare 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 the basis of gender."⁸⁴ This is especially so when confessions are extracted from people seeking care for obstetric emergencies.⁸⁵

⁸³ See, e.g., U.N. Comm. Against Torture, *Conclusions and Recommendations: Peru*, ¶ 23, U.N. Doc. CAT/C/PER/CO/4 (Jul. 25, 2006).

⁸⁴ Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 46, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013).

⁸⁵ Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 44, U.N. 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

The harms these international bodies warn against are characteristic of arrests for suspected self-managed abortions in the U.S. Like Bei Bei Shuai in Indiana, patients may be interrogated while “[g]rief stricken and under heavy sedation” from labor or an obstetric emergency.⁸⁶ Like Purvi Patel, 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.”⁸⁷ Or, like Kenlissia Jones after she delivered a 5-month gestation fetus en route to the emergency room, they may be transferred directly from the hospital to jail, still bleeding, and held without bond.⁸⁸

This Court has recognized that even when charges are dropped, the mere fact of an arrest causes ongoing harm. *See, e.g., Michelson v. United States*, 335 U.S.

Chile to end interrogations of patients believed to have had illegal abortions, and nullify convictions where this occurred).

⁸⁶ 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 Ms. Shuai 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”).

⁸⁷ *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.

⁸⁸ *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/>.

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. Jennie McCormack, criminalized in Idaho 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.”⁸⁹ When Kasey Dischman, who nearly lost her pregnancy after a life-threatening drug overdose, was arrested, “[r]eaders of the local paper were calling for Ms. Dischman to be sterilized, hung with piano wire or shot in the back of the head.”⁹⁰

⁸⁹ 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>.

⁹⁰ 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>.

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.⁹¹ 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.⁹²

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

⁹¹ Comm. on Elimination of Racial Discrimination [hereinafter C.E.R.D.], *General Recommendation No. 31*, U.N. Doc. A/60/18 (2005–2006).

⁹² 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>.

men and women.⁹³ 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 than are white, wealthier women.⁹⁴

Unsurprisingly, 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.⁹⁵ Axiomatically, this results in disproportionate punishment. In Florida, where Black people constitute only 15% of the population, they accounted for 75% of arrests related to pregnancy.⁹⁶ In South Carolina, where Black people

⁹³ C.E.R.D., *General Recommendation No. 25*, ¶ 1, U.N. Doc. A/55/18 (2000).

⁹⁴ 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> (Native American women are imprisoned at six times the rate of white women).

⁹⁵ *See* Paltrow & Flavin, *supra* note 59, at 326–27.

⁹⁶ *Id.* at 311.

constitute 30% of the population, they accounted for 74% of arrests related to pregnancy.⁹⁷

If HB 1510 is permitted to take effect, these existing disparities are likely to be compounded, as the people who will lose access to clinic-based abortions in Mississippi are predominantly Black women.⁹⁸

◆

CONCLUSION

Whatever interest Mississippi 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 Mississippians 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 other countries that have taken this treacherous path, the obligation to uphold human rights is not diminished if a person ends their pregnancy. The constitutional protections for the right to make reproductive decisions have been

⁹⁷ *Id.*

⁹⁸ While approximately 38% of Mississippi's population identified as Black in 2018, see U.S. Census Bureau, *ACS Demographic and Housing Estimates* (2018), <https://data.census.gov/cedsci/table?g=0400000US28&tid=ACSDP1Y2018.DP05&hidePreview=true>, nearly 72% of the abortions performed in Mississippi that year were performed on Black women. Katherine Kortsmitt et al., *Abortion Surveillance—United States, 2018*, 69 *MMWR* *Surveill. Summ.* 1, 19 tbl. 5 (2020), <https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6907a1-H.pdf>.

an imperfect bulwark against criminalization for people seeking abortions in Mississippi and across the nation. But if they are further eroded, the stakes are dire.

Respectfully submitted,

PAUL J. LAWRENCE
JESSICA A. SKELTON
ALANNA PETERSON
PACIFICA LAW GROUP LLP
1191 Second Avenue,
Suite 2000
Seattle, WA 98101
(206) 245-1700

FARAH DIAZ-TELLO*
SARA L. AINSWORTH
YVEKA PIERRE
IF/WHEN/HOW: LAWYERING
FOR REPRODUCTIVE JUSTICE
1714 Franklin Street,
#100-393
Oakland, CA 94612
(347) 974-7337
farah@ifwhenhow.org

Counsel for Amici Curiae

**Counsel of Record*