Nos. 18-1323, 18-1460

IN THE

Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., *et al.*,

Petitioners,

v.

DR. REBEKAH GEE, Secretary, Louisiana Department of Health and Hospitals,

Respondent.

DR. REBEKAH GEE, Secretary, Louisiana Department of Health and Hospitals,

Cross-Petitioner,

v.

JUNE MEDICAL SERVICES L.L.C., *et al.*,

Cross-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE, *ET AL.* AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are health care professionals, researchers, attorneys, and advocates in the field of sexual and reproductive health, rights, and justice. They work to eliminate stigma, defend rights, and ensure access to necessary health care. *Amici* are united in the belief that no one should be criminalized for having an abortion or for experiencing a pregnancy loss.

If/When/How: Lawyering for Reproductive Justice is a non-profit working to transform the law and policy landscape so that all people have the power to determine if, when, and how to define, create, and sustain families with dignity and to actualize sexual and reproductive wellbeing on their own terms.

Ipas is an international non-profit organization that promotes safe abortion access by training providers, connecting people to information and services, and advocating for laws and policies that enable safe abortion.

Jamila Perritt, M.D., M.P.H., is a reproductive health and family planning specialist who works to ensure that policies, practices, and legislation support,

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[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.

rather than punish, women who manage their own abortions and those who support them.

Project SANA is an interdisciplinary research group at the University of Texas at Austin examining the who, what, and why of self-managed abortion in the United States. (University affiliation is for identification purposes only.)

Positive Women's Network-USA seeks to advance policies that uphold sexual and reproductive health and rights for people living with HIV, including access to non-stigmatizing care that affirms the rights to sexual intimacy and reproductive self-determination.

INTRODUCTION AND SUMMARY OF ARGUMENT

Louisiana's medically unnecessary hospital admitting privileges requirement (Act 620) does not expressly make having an abortion a crime. But it does two things that contribute to the criminalization of people who have abortions, even in the absence of a law that actually targets them. First, by falsely suggesting that abortion is uniquely unsafe, laws like Act 620 create stigma and a false aura of illegality around abortion. This misperception that abortion is illegal increases the likelihood that people will be criminally investigated and possibly charged if someone suspects that they have had an abortion. This has harmful consequences, even if the charge is ultimately recognized as improper. Second, by forcing abortion

clinics in Louisiana to close, Act 620 will drive people to self-manage abortions, increasing their exposure to this kind of criminalization.[2]

The risks of self-managing abortion are generally no longer medical, but legal. Even in the absence of laws that criminalize self-managed abortion, over the last two decades people have been investigated, prosecuted, and jailed on suspicion of having ended their own pregnancies, causing enduring harm even when cases are dismissed or convictions overturned. In addition, and ironically, the fear of criminal punishment for ending one's own pregnancy dissuades people self-managing abortions from seeking medical attention if they need it, putting their safety and the public health at risk.

If allowed to stand, Act 620 will both unduly burden a pregnant person's ability to obtain an abortion in Louisiana *and* exacerbate the stigma, suspicion, and confusion that lead to the criminalization of people who have or are thought to have had an abortion. *Amici* urge this Court to reverse the Fifth Circuit's end-run around *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016), and hold Act 620 unconstitutional.

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[2] "Self-managed abortion" describes ending one's own pregnancy outside the medical system. See Section 0, *infra*.

ARGUMENT

I. ACT 620 EXACERBATES ABORTION STIGMA AND ENGENDERS CONFUSION ABOUT ITS LEGALITY

A. Act 620 and Restrictions Like It Contribute to Abortion Stigma

Act 620 incorrectly suggests that abortion is uniquely and presumptively unsafe[3] and that the providers of abortion care should be subject to extraordinary scrutiny. See *June Med. Servs. LLC* v. *Kliebert*, 250 F. Supp. 3d 27, 56–57 (M.D. La. 2017), rev'd on other grounds, 905 F.3d 787 (2018) (explaining that before passing Act 620, Louisiana legislative committees heard testimony that "[a]bortion carries the risk of serious complications that could require immediate hospitalization" and that "[r]equiring outpatient abortion providers to have admitting privileges benefits the safety of women seeking abortion and also enhances regulation of the medical profession").[4] Laws, like Act 620, that falsely equate

[3] In fact, abortion is safe. See, *e.g.*, Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstetrics & Gynecology 175, 180–82 (2015) (observing a rate of major complications of just 0.23 percent).

[4] These false claims belie the real reason for Act 620: hostility to abortion. *June Med. Servs. LLC* v. *Gee*, 913 F.3d 573, 574 (5th Cir. 2019) (Dennis, J., dissenting) ("Act 620 reflects its legislative environment and Louisiana's longstanding opposition to abortions.").

abortion with danger exacerbate stigma toward abortion and suspicion of individuals who will inevitably find ways to end unintended pregnancies when faced with clinic closures.

"Abortion stigma" is "ascribed to women who seek to terminate a pregnancy [and] marks them, internally or externally, as inferior to ideals of womanhood." Anuradha Kumar et al., *Conceptualising Abortion Stigma*, 11 Culture, Health & Sexuality 625, 628–29 (2009); see also Kate Cockrill et al., *The Stigma of Having an Abortion: Development of a Scale and Characteristics of Women Experiencing Abortion Stigma*, 45 Persp. on Sexual & Reprod. Health 79, 80 (2013); Paula Abrams, *The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma*, 19 Mich. J. Gender & L. 293, 299 (2013). Laws like Act 620 that exceptionalize abortion and treat it (contrary to fact) as uniquely dangerous flow from and perpetuate that stigma. 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). This, in turn, reinforces negative stereotypes about people who have an abortion. Weitz & Kimport, 30 Berkeley J. Gender L. & Just. at 6–9.

Stigma is not only perpetuated by laws like Act 620; that stigma has a direct impact on how a person is treated by the legal system. This is apparent, for example, in the way the legal system has treated

people who use drugs,[5] and in policies targeting people living with HIV.[6] And it is apparent in the way the legal system has treated people who have abortions. In numerous cases in recent history, lawyers have attempted to argue the fact that a woman had an abortion proves her intent to commit a crime[7];

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[5] See, *e.g.*, Global Comm'n on Drug Policy, *The World Drug Perception Problem* 29 (2017), http://www.globalcommissionondrugs.org/wp-content/uploads/2018/01/GCDP-Report-2017_Perceptions-ENGLISH.pdf (perception of people who use drugs led to "tough on drugs" campaigns and mandatory minimum sentencing for drug offenders); Global Comm'n on Drug Policy, *The War on Drugs* 4–5 (June 2011), http://www.globalcommissionondrugs.org/wp-content/uploads/2017/10/GCDP_WaronDrugs_EN.pdf ("war on drugs" policies promoted a cycle of stigma and discrimination, to no benefit).

[6] See generally U.S. Dep't of Justice, Civil Rights Div., *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors*, http://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).

[7] See, *e.g.*, *Bynum* v. *State*, 546 S.W.3d 533, 542–43 (Ark. Ct. App. 2018) (reversing conviction for crime of "concealing birth" because admission of information about defendant's abortion history was highly prejudicial, "as shown by the four-minute verdict and maximum prison sentence allowed by law"); see also *Hudson* v. *State*, 745 So. 2d 1014, 1015–16 (Fla. Dist. Ct. 1999) (reversing defendant's conviction of manslaughter for death of her infant child because evidence of her abortions was irrelevant and prejudicial).

undermines her credibility[8]; justifies a crime committed against her;[9] or even diminishes the value of her life.[10] While some courts have rejected these efforts, others have not. See, *e.g.*, *Davila* v. *Bodelson*, 704 P.2d 1119, 1125 (N.M. Ct. App. 1985) (while noting that abortion "has the potential for inflaming passions of a jury[,]"

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[8] 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 had an abortion to impugn her credibility on her claim of sexual harassment, 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, 293–94 (Wash. 1987) (affirming refusal to admit evidence that plaintiff, suing the university for sports-related injuries, had abortions; court rejected defendants' arguments that abortion, rather than the fact that her elbow was shattered causing permanent pain, was the reason plaintiff suffered psychological distress, and explained that the prejudicial nature of evidence of abortion is "beyond question").

[9] See, *e.g.*, *Marquez* v. *State*, No. A-11925, 2019 WL 211490, at *1–*3 (Alaska Ct. App. Jan. 16, 2019) (In homicide prosecution, 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, 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.").

[10] See, *e.g.*, *Brock* v. *Wedincamp*, 558 S.E.2d 836, 843–44 (Ga. Ct. App. 2002) (affirming a trial court's refusal to admit evidence of a decedent's abortion in a wrongful death action, holding that evidence "which improperly tend[s] to reflect adversely on the victim's character, which destroy[s] a juror's impartiality, or which only excite[s] the passions of the jurors should not be admitted" and rejecting the defendants' attempts to "mark the decedent with a scarlet letter." *Id.* at 843.).

affirming trial court's decision to allow a jury to hear that plaintiff in a medical malpractice action had not told her doctor she had previous abortions). This occurs despite the fact that 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 engendered in many people when the subject of abortion surfaces in any manner'") (citation omitted); see also *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.").

B. Restrictions Like Act 620 Also Sow Confusion About the Legality of Abortion

In addition to perpetuating harmful stereotypes about people who provide or have abortions, Act 620 and laws like it generate confusion as to whether abortion remains legal at all. For example, when Alabama recently passed the most restrictive abortion ban in the nation, long before the law was to go into effect, clinics were flooded with calls asking whether abortion was still legal in the state. Catherine Trautwein, *After Abortion Ban Attempt in Alabama, a Flood of Confusion and Phone Calls*, Frontline (Aug. 27, 2019), http://www.pbs.org/wgbh/frontline/article/alabama-abortion-ban-clinic. This confusion occurs in a

context in which there is already extensive misinformation regarding the legality of abortion. According to one survey, one-third of people searching the internet for information about self-managed abortion either were not sure about the legality of abortion in their states or thought it was illegal. Jenna Jerman et al., *What Are People Looking for When They Google "Self-Abortion"?*, 97 Contraception 510, 513 tbl. 3 (2018). Such confusion will lead more people to self-manage abortion because they erroneously believe that abortion is prohibited in Louisiana, and it is also likely to influence the hospital personnel they turn to for assistance in the event of a complication, further increasing the risk of criminalization. See 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, 311 tbl. 1 (2013) (finding, in a study of 413 cases in which pregnant women were arrested or otherwise deprived of liberty on the basis of harm or perceived harm to a fetus, 58 percent were reported by hospital personnel).

II. THIS STIGMA AND CONFUSION CONTRIBUTE TO THE CRIMINALIZATION OF PEOPLE WHO END OR ARE SUSPECTED OF ENDING THEIR OWN PREGNANCIES

If upheld, Act 620 would have the dual effect of increasing the number of people who self-manage abortions, as well as heightening suspicion of any person who arrives at an emergency room with symptoms similar to those of an abortion complication. The impact of this suspicion surpasses mere prejudice; it leads to criminalization of people who have ended pregnancies or experienced pregnancy loss.

A. Restrictions Like Act 620 Increase the Likelihood That People Will Seek Self-Managed Abortion

Today, most people in the United States live in states that heavily restrict abortion. Elizabeth Nash et al., *Policy Trends in the States, 2017*, Guttmacher Inst. (Jan. 2, 2018), http://www.guttmacher.org/article/2018/01/policy-trends-states-2017. Like Act 620, the goal and effect of many of these restrictions is to limit abortion access. As this Court has held, such restrictions—especially requirements that abortion providers have admitting privileges at nearby hospitals—have led to the shuttering of abortion clinics and, predictably, to reduced accessibility to abortion providers. See *Hellerstedt,* 136 S. Ct. at 2312–13.

Clinic closures and lack of access to clinic-based abortions will be the inevitable result in Louisiana if Act 620 is allowed to take effect. *June Med. Servs. LLC* v. *Gee*, 280 F. Supp. 3d 849, 861 (M.D. La. 2017). Indeed, during the nine days that Act 620 was in effect in Louisiana, three clinics were compelled to stop providing abortion care and had to redirect their patients to the two remaining clinics in the state. Jessica Williams & Andrea Gallo, *Baton Rouge's Delta Clinic No Longer Performing Abortions Because of New Louisiana Law, Will Refer Women to New Orleans Location*, The Advocate (Mar. 3, 2016), http://www.theadvocate.com/baton_rouge/news/article_095953ee-c57b-5859-9551-bb353bd882c0.html. Those two clinics were overwhelmed by demand, and a provider at one of these clinics expressed concern that it, too, would be forced to close because only one physician held the admitting privileges required by Act 620. Campbell Robertson, *Appeals Court Upholds Law Restricting Louisiana Abortion Doctors*, N.Y. Times (Feb. 25, 2016), http://www.nytimes.com/2016/02/26/us/appeals-court-upholds-law-restricting-louisiana-abortion-doctors.html.

Research and common sense indicate that as restrictions increase and clinics close, more people turn to self-managed abortion. See Abigail R.A. Aiken et al., *Demand for Self-Managed Medication Abortion Through an Online Telemedicine Service in the United States,* Am. J. Pub. Health e3 (Oct. 17, 2019),

http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2019.305369 (finding that 76 percent of U.S.-based requests for abortion medications come from states that heavily restrict abortion access). A 2017 study estimated that 1.4 percent of women nationally have tried to self-manage an abortion. Daniel Grossman et al., *Lifetime Prevalence of Self-Induced Abortion Among a Nationally Representative Sample of U.S. Women*, 97 Contraception 460, 460 (2018). Unsurprisingly, these numbers appear to be higher in states with more abortion restrictions. In Texas, a state with significant barriers to clinic access, between 100,000 and 240,000 women of childbearing age (1.7 to 4.1 percent) have attempted to end a pregnancy outside of the clinic setting. Daniel Grossman et al., *Texas Policy Evaluation Project Research Brief*, Univ. of Tex. 2 (Nov. 17, 2015), http://liberalarts.utexas.edu/txpep/_files/pdf/TxPEP-Research-Brief-KnowledgeOpinionExperience.pdf. These figures are likely an underestimate. Given abortion stigma, people may be unwilling to participate in such studies. See Sarah K. Cowan, *Secrets and Misperceptions: The Creation of Self-Fulfilling Illusions*, 1 Soc. Sci. 466, 476 (2014) (noting that in 2014, 31 percent of people who had an abortion reported not telling anyone about it).

Additional research suggests an increasing interest in obtaining information about self-managed abortion, especially where access to clinic-based abortion is limited. Google searches for terms such as "home abortion methods" increased nearly six-fold

between 2011 and 2015 and were higher in areas where abortion is most restricted. For example, Mississippi, which has only one abortion clinic today, had the highest rate of searches for self-managed abortion. Seth Stephens-Davidowitz, *The Return of the D.I.Y. Abortion*, N.Y. Times (Mar. 5, 2016), http://www.nytimes.com/2016/03/06/opinion/sunday/the-return-of-the-diy-abortion.html; see also *State Facts About Abortion: Mississippi*, Guttmacher Inst. (Sept. 2019), http://www.guttmacher.org/fact-sheet/state-facts-about-abortion-mississippi. In 2017, researchers found that over 32 days, individuals searched for terms relating to self-managed abortion 210,000 times. Jerman et al., 97 Contraception at 512.

B. Criminalization Is the Primary Risk of Self-Managed Abortion, Because People May Now Self-Manage an Abortion Safely and Effectively

In a previous era, these statistics would be cause for alarm about medical risk. Today, the primary concern is that people who self-manage abortion will become victims of the criminal legal system, because although unsafe methods remain a reality, "self-managed abortion" for the most part no longer means the coat-hangers and back alleys emblematic of an earlier time. See Heidi Moseson et al., *Self-Managed Abortion: A Systematic Scoping Review* 3, UCSF (Nov. 4, 2019), http://escholarship.org/uc/item/1mj5832t (discussing various methods people use to end pregnancies outside of a medical setting).

The advent of abortion pills is the primary reason for this significant change. Among the methods people use for self-managing abortion are the "abortion pills" misoprostol and mifepristone. These are the same medications people receive from a clinic. To date, the FDA has approved misoprostol and mifepristone for use by prescription to induce abortion through 10 weeks gestation. See *Mifeprex (Mifepristone) Information,* FDA (Feb. 5, 2018), http://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information. Abortion pills are used for about one-third of all abortions in the United States that are done within eight weeks of gestation. *Medication Abortion*, Kaiser Family Found. (June 1, 2018), http://www.kff.org/womens-health-policy/fact-sheet/medication-abortion/.

These medications are safe. Complications are rare, and serious complications even rarer. Ctr. for Drug Eval. & Res., FDA, *Clinical Review: Mifeprex* 12 (Mar. 29, 2016), http://www.accessdata.fda.gov/drugsatfda_docs/nda/2016/020687Orig1s020MedR.pdf (the pills' "efficacy and safety have become well-established by both research and experience, and serious complications have proven to be extremely rare"). These medications are more than 95 percent effective at ending pregnancies through 10 weeks gestation without further intervention. See Melissa Chen & Mitchell Creinin, *Mifepristone with Buccal Misoprostol for Medical Abortion: A Systematic Review*, 126 Obstetrics & Gynecology 12, 12–13 (2015). The

National Academies of Sciences, Engineering, and Medicine concluded that complications "occur[] in no more than a fraction of a percent of patients." Comm. on Reprod. Health Servs., Nat'l Acads. of Scis., Eng'g, & Med., *The Safety and Quality of Abortion Care in the United States* 55 (Nat'l Acads. Press 2018). Any side effects are comparable to those of a miscarriage, see *id.* at 54, and are generally readily treatable in an outpatient setting. 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).

Research demonstrates that these drugs can be used safely and effectively without an in-clinic visit with a medical provider. For example, a recent report from the National Academies of Sciences, Engineering, and Medicine indicates the medicines are safe and effective whether the entire regimen is ingested in a clinic or partially ingested at home. See*, e.g.*, Comm. on Reprod. Health Servs., *The Safety and Quality of Abortion Care in the United States* at 56–57 (concluding that home administration of misoprostol can be as effective as administration in a clinic, and serious side effects occur in fewer than one percent of patients). In a study of 578 abortion patients in Iowa, 98.7 percent of patients who participated in online telemedicine—the use of technology to provide support from physicians who review medical information and write prescriptions for abortion medication—had a successful abortion, a rate comparable to clinic outcomes. Daniel

Grossman et al., *Effectiveness and Acceptability of Medical Abortion Provided Through Telemedicine*, 118 Obstetrics & Gynecology 296, 297, 299 (2011).

Experience in other countries affirms that abortion pills not only can be used safely under remote supervision of a health care professional but also can be used safely without a medical provider, a fact that is changing the global abortion landscape. Increasingly, in addition to telemedicine, people are obtaining abortion pills directly through pharmacies (brick and mortar or online) or other avenues. See IIana G. Dzuba et al., *Medical Abortion: A Path to Safe, High-Quality Abortion Care in Latin America and the Caribbean*, 18 Eur. J. Contraception & Reprod. Health Care 441, 443–45 (2013); Rebecca J. Gomperts et al., *Using Telemedicine for Termination of Pregnancy with Mifepristone and Misoprostol in Settings Where There Is No Access to Safe Services*, 115 BJOG 1171, 1171–72 (2008); Katherine S. Wilson et al., *Misoprostol Use and Its Impact on Measuring Abortion Incidence and Morbidity*, Guttmacher Inst. 191–92, http://www.guttmacher.org/sites/default/files/pdfs/pubs/compilations/IUSSP/IUSSP-Chapter14.pdf (last visited December 1, 2019). Evidence from these contexts indicates that using abortion medication outside of the clinic setting is safe and effective. Kinga Jelinska & Susan Yanow, *Putting Abortion Pills into Women's Hands: Realizing the Full Potential of Medical Abortion*, 97 Contraception 86, 86 (2018); Bela Ganatra et al., *Global, Regional, and Subregional Classification of Abortions by Safety, 2010–*

14: Estimates from a Bayesian Hierarchical Model, 390 Lancet 2372, 2377–79 (2017). In Ireland and Northern Ireland, where abortion has been prohibited until very recently, individuals have relied for more than a decade on online providers, with demonstrated success rates (94.7 percent) similar to clinics and similarly low instances of negative outcomes. Abigail R.A. Aiken et al., *Self Reported Outcomes and Adverse Events After Medical Abortion Through Online Telemedicine: Population Based Study in the Republic of Ireland and Northern Ireland*, 357 Brit. Med. J. 1, 2–5 (2017). Researchers have attributed a worldwide decrease in mortality associated with self-managed abortion to the use of abortion pills. See Bela Ganatra et al., *Global, Regional, and Subregional Classification of Abortions by Safety, 2010-2014: Estimates from a Bayesian Hierarchical Model* at 2377–79. In fact, the World Health Organization recommends self-administered use of abortion pills as an option when 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)[.]" World Health Org., *Medical Management of Abortion* 29 (2018), http://apps.who.int/iris/bitstream/handle/10665/278968/9789241550406-eng.pdf?ua=1; see also World Health Org., *Health Worker Roles in Providing Safe Abortion Care and Post-Abortion Contraception* 41 (2015), http://apps.who.int/iris/bitstream/handle/10665/181041/9789241549264_eng.pdf?sequence=1.

Throughout the world, people may have no other option than to self-manage abortions where access is legally restricted or otherwise difficult. See R.K. Sneeringer et al., *Roles of Pharmacists in Expanding Access to Safe and Effective Medical Abortion in Developing Countries: A Review of the Literature*, 33 J. Pub. Health Pol'y 218, 218–19 (2012). They may have no other option because of a lack of health care professionals to provide abortion care, either because some are opposed to or unable to provide it, see Wendy Chavkin et al., *Conscientious Objection and Refusal to Provide Reproductive Healthcare: A White Paper Examining Prevalence, Health Consequences, and Policy Responses*, 123 Int'l J. Gynecology & Obstetrics S41, S41, S44 (2013), or because there is a shortage of health care workers, see World Health Org. & Global Health Workforce Alliance, *A Universal Truth: No Health Without a Workforce* vii (2013), http://www.who.int/workforcealliance/knowledge/resources/GHWA_AUniversalTruthReport.pdf. Even when people have access to health care professionals, they may self-manage abortions as a matter of preference because of stigma related to the circumstances of the pregnancy or having an abortion, to avoid detection by an abusive partner, or to have a more private and self-directed experience. See Aiken et al., *Demand for Self Managed Medication Abortion Through an Online Telemedicine Service in the United* States, Am. J. Pub. Health at e6 tbl. 3 (describing reasons people cited for self-managing abortions).

These realities are no different in the United States than in other countries. *Ibid.* at e5 tbl. 2; see also Courtney Kerestes et al., *Prevalence, Attitudes and Knowledge of Misoprostol for Self-Induction of Abortion in Women Presenting for Abortion at Midwestern Reproductive Health Clinics*, 27 Sexual and Reprod. Health Matters 1, 3 (2019). It is unsurprising then that people in the United States also seek abortion pills without in-clinic visits with a medical provider, such as by purchasing them from online pharmacies outside the United States, just as individuals do in other countries where abortion access is limited. See Farhad Manjoo, *Abortion Pills Should Be Everywhere*, N.Y. Times (Aug. 3, 2019), http://www.nytimes.com/2019/08/03/opinion/abortion-pill.html (noting that one online source had provided pills to 2,581 pregnant individuals in the United States in 2018); Chloe Murtagh et al., *Exploring the Feasibility of Obtaining Mifepristone and Misoprostol from the Internet*, 97 Contraception 287, 290 (2018) (finding that "obtaining mifepristone and misoprostol pills from on-line pharmaceutical websites without a prescription is feasible" in the United States).[11] Further, research indicates that pills obtained online likely are the same safe and effective medications that the FDA has approved. Murtagh et al.,

[11] Abortion pills are just one of many prescription medications that U.S. residents purchase from sources outside the United States. See, *e.g.*, Bram Sable-Smith, *American Travelers Seek Cheaper Prescription Drugs in Mexico and Beyond*, NPR, Feb. 11, 2019, https://www.npr.org/sections/health-shots/2019/02/11/691467587/americans-seek-cheaper-meds-in-mexico.

97 Contraception at 291 (finding "no evidence" that the mifepristone and misoprostol purchased online were dangerous or ineffective).

C. People Who Self-Manage Their Abortions Face Risks of Unjust Criminalization Fueled by Abortion Stigma and Confusion

The increased interest in and safety of self-managed abortion has not led to a decline in stigma, however. To the contrary, stigma has precipitated humiliating, cruel, and unjust criminal investigations, prosecutions, and imprisonment. See Farah Diaz-Tello et al., Roe*'s Unfinished Promise: Decriminalizing Abortion Once and For All*, SIA Legal Team (2018), http://bit.ly/2Vjp62g. Since 2000, at least 21 individuals have been arrested for allegedly ending pregnancies on their own or helping a loved one do so. *Fulfilling* Roe*'s Promise: 2019 Update*, If/When/How 1 (2019), http://bit.ly/2Wu2F6m.

1. *Because these prosecutions are generally not supported in law, they are best understood as a manifestation of abortion stigma*

This trend is contrary to the historical approach. As this Court has observed, historically, even when abortion was criminalized, the people who had abortions generally were not. *Roe* v. *Wade*, 410 U.S.

113, 151 (1973) ("[B]y statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another."); see generally Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise From the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971). Under common law, "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." *State* v. *Carey*, 56 A. 632, 636 (Conn. 1904). The person who had the abortion was neither principal nor accomplice. See *Hillman* v. *State*, 503 S.E.2d 610, 612–13 (Ga. Ct. App. 1998); see also *State* v. *Barnett*, 437 P.2d 821, 822 (Or. 1968) ("[T]he acts prohibited are those which 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 was confronted with the question of 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); see also *Press Release*, Dougherty Cty. Dist. Attorney's Office (June 10, 2015), http://web.archive.org/web/201509052

32947/http://ftpcontent4.worldnow.com/walb/pdf/abortion_pill_release_edwards_06102015.pdf (reporting that Georgia prosecutor dropped homicide charge against woman who allegedly used abortion pills to induce labor, acknowledging that Georgia, along with "an overwhelming majority of jurisdictions," does not criminalize pregnant people for actions in relation to their own pregnancies). Few states ever departed from this common law understanding, and those that did used language that is explicit and unequivocal. See Del. Code Ann. tit. 11, § 652 (defining "self-abortion"); S.C. Code Ann. § 44-41-80(b) (defining "soliciting unlawful abortion"); Okla. Stat. Ann. tit. 21, § 862 (defining "[s]ubmitting to or soliciting" abortion), Ariz. Rev. Stat. § 13-3604 (defining "[s]oliciting abortion"); Idaho Code Ann. § 18-606(2) (criminalizing a person who "submits to" or "solicits of another" an abortion); Nev. Rev. Stat. Ann. § 200.220 (defining "[t]aking drugs to terminate pregnancy"). Nearly all of these outlier statutes have been deemed unconstitutional by a court, see *McCormack* v. *Hiedeman*, 694 F.3d 1004, 1015 (9th Cir. 2012); *Nelson* v. *Planned Parenthood Ctr. of Tucson, Inc.*, 505 P.2d 580, 588 (Ariz. Ct. App. 1973); *Henrie* v. *Derryberry*, 358 F. Supp. 719, 726 (N.D. Okla. 1973), or other authoritative interpretation of law. See *Del. Women's Health Org., Inc.* v. *Wier*, 441 F. Supp. 497, 499 n.9 (D. Del. 1977); Op. No. 114 (Abortion) at 16, Nev. Att'y Gen. (Feb. 2, 1973), http://ag.nv.gov/uploadedFiles/agnvgov/Content/Publications/opinions/1973_AGO.pdf.

With the law typically in firm opposition to charges against those who end their pregnancies, these arrests—charged under a variety of laws intended to target the actions of *other* parties—are essentially a manifestation of abortion stigma. Arrests occur when state and private actors, including health care providers, police, and prosecutors, treat an abortion or unintended pregnancy loss that occurs outside of the medical system as a crime committed by the individual who had the abortion or pregnancy loss.

2. *These prosecutions are brought under a range of inapposite statutes*

Because almost no U.S. jurisdictions authorize criminal punishment of people for having abortions, prosecutors have turned to arcane and unexpected provisions to criminalize people. These might include charges under little-used nineteenth-century abortion laws (for drinking an herbal tea some believe causes miscarriages), see *NYPD: Manhattan Woman Charged with Performing Self-Abortion*, CBS N.Y. (Dec. 1, 2011), http://cbsloc.al/2pxAnrZ; charges under feticide laws passed in the name of protecting pregnant people from violence (for taking abortion pills to end a pregnancy), *Patel* v. *State*, 60 N.E.3d 1041, 1045–46 (Ind. Ct. App. 2016); and charges related to desecration of human remains (for using pills to induce labor but experiencing a stillbirth), *Bynum* v. *State*, 546 S.W.3d 533, 536 (Ark. Ct. App. 2018); N.Y. Times Ed. Bd., *How My Stillbirth Became a Crime*, N.Y. Times (Dec. 28, 2018),

http://www.nytimes.com/interactive/2018/12/28/opinion/stillborn-murder-charge.html ("Her case is one of only four that have ever been reported in Arkansas; the three others occurred between 1884 and 1944."). The impossibility of anticipating whether or how one might be charged creates the ultimate "jurisprudence of doubt." See *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 844 (1992).

For instance, many provisions in Louisiana law prohibit criminal charges for people who have abortions. See, *e.g.*, La. Stat. Ann. § 14:32.9(D)(2) (criminal abortion with exception for "[a]ny act taken or omission by a pregnant woman with regard to her own unborn child"); *id.* § 14:32.9.1(D)(2) (aggravated criminal abortion with same exception); *id.* § 14:32.10(C) (partial birth abortion, noting exception that "a woman upon whom the partial birth abortion is performed shall not be subject to prosecution . . . as a principal, accessory, or coconspirator"); *id.* § 14:32.11(D) (partial birth abortion, noting same exception); *id.* § 40:1061(H) (prohibiting subjecting "the pregnant mother upon whom any abortion is performed or attempted to any criminal conviction and penalty"). Nonetheless, in 2003, a Louisiana woman was arrested because emergency personnel were suspicious of her explanation of her abdominal pain and bleeding. Paltrow & Flavin, J. Health Pol., Pol'y & L. at 308–09 (citing *State* v. *Greenup,* No. 2003-300B (La. Dist. Ct. St. John the Baptist Parish Aug. 16, 2004)). She "confessed" under police interrogation that she had

delivered an infant that "died because she had failed to provide it with proper care," and was charged with second-degree murder. *Id.* It was only after she had spent a year incarcerated that a review of her medical records revealed that she had in fact experienced a first-trimester miscarriage. Jeanne Flavin, *Our Bodies, Our Crimes: The Policing of Women's Reproduction in America* 84 (N.Y. Univ. Press 2009). Prosecutions like this demonstrate how stigma and suspicion lead criminal legal system actors to defy both law and logic.

3. *These prosecutions extend beyond abortion and perceived abortion, to potentially any pregnancy loss*

Because there is often little or no difference between the symptoms of a spontaneous and an induced abortion, when stigma and confusion replace a reasonable legal and medical response, any pregnancy loss is potentially subject to criminalization. Since 1973, more than 1,200 people, suspected of having caused their own miscarriages or having risked harm to their pregnancies notwithstanding a lack of any evidence that they desired to terminate their pregnancies, have been arrested for offenses ranging from feticide to child abuse to poisoning. See Paltrow & Flavin, J. Health Pol., Pol'y & L. at 309; Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, ProPublica (Sept. 23, 2015), http://www.propublica.org/article/when-the-womb-is-a-crime-scene. The circumstances vary. 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 and three-year prison sentence, noting that the baby was "doing fine" since birth); expressed ambivalence about the pregnancy while seeking help for falling down a flight of stairs;[12] or had a precipitous breech birth at home that ended in a stillbirth, see *Commonwealth* v. *Pugh*, 969 N.E.2d 672, 677 (Mass. 2012) (reversing manslaughter conviction for breech delivery that ended in stillbirth).

But two things unite each such prosecution: a reliance on arguments that fetuses should be treated as though they have rights enforceable against the people who carry them, and the recognition by virtually every reviewing appellate court that these prosecutions were not authorized by the charging statutes. See generally, *e.g.*, *Arms* v. *State*, 471 S.W.3d 637 (Ark. 2015) (rejecting application of poisoning crime between a woman and her fetus)*; State* v. *Louk*, 786 S.E.2d 219 (W. Va. 2016) (overturning conviction for negligent homicide based on an overdose during pregnancy);

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[12] See Kevin Hayes, *Did Christine Taylor Take Abortion into Her Own Hands?*, CBS News (Mar. 10, 2010), http://www.cbsnews.com/news/did-christine-taylor-take-abortion-into-her-own-hands (woman arrested for feticide after falling down stairs during her pregnancy); *Burlington Woman Will Not Be Charged with Feticide*, Radio Iowa (Feb. 10, 2010), http://www.radioiowa.com/2010/02/10/burlington-woman-will-not-be-charged-with-feticide (feticide charges dropped based on apparent gestational age of fetus; fetus was unharmed).

People v. *Jorgensen*, 41 N.E.3d 778 (N.Y. 2015) (overturning manslaughter conviction of woman involved in a car accident for giving birth to a baby who died shortly after emergency delivery); *State* v. *Stegall*, 828 N.W.2d 526 (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 (Ala. 2013) (permitting child endangerment charges for prenatal exposure to criminalized drugs); *Whitner* v. *State*, 492 S.E.2d 777 (S.C. 1997) (extending criminal child abuse laws to reach acts that affect a viable fetus).

Judicial rejection of such prosecutions has not put an end to them. Louisiana provides yet another example of prosecutors attempting to bend the law to enforce stigma. A Baton Rouge woman was arrested in 2013 after delivering a stillborn infant by emergency cesarean and admitting to having used cocaine during pregnancy. *Woman Held on $100K Bond for Death of Unborn Baby Due to Cocaine Use*, WAFB (Nov. 16, 2013), http://www.wafb.com/story/23989452/woman-held-on-100k-bond-for-death-of-unborn-baby-due-to-cocaine-use. Prosecutors charged her with second-degree feticide, which carries a penalty of up to 10 years of imprisonment at hard labor, La. Stat. Ann. § 14:32, even though this law defines feticide as an act committed by "a person other than the mother of the unborn child." *Id.* § 14:32.5(A). In addition to the criminal charge, the details of her loss and her mugshot

were printed in the paper, and she was held on $100,000 bond. *Woman Held on $100K Bond for Death of Unborn Baby Due to Cocaine Use*, *supra.* After a week in pre-trial detention, she was released after a court ruled that there had been no probable cause to arrest her under the statute in question. *Baton Rouge Woman Freed After Judge Rejects Feticide Charge*, The Advocate (Nov. 23, 2013), https://www.theadvertiser.com/story/news/2013/11/23/baton-rouge-woman-freed-after-judge-rejects-feticide-charge/3688587/. For her, like so many others accused of a crime related to their pregnancies, even the acknowledgment by a court that she had committed no crime could not remove the specter of criminalization.[13]

III. CRIMINALIZATION, EVEN WHEN CHARGES ARE DISMISSED, HAS HARMFUL CONSEQUENCES

Regardless of the outcome of a prosecution, people who have been subjected to interrogations, arrest, and incarceration suffer a range of legal and dignitary harms that persist. Indeed, it is not even necessary to be arrested to experience enduring harm: the *fear* of arrest creates harm by discouraging people

[13] After dismissal, the prosecutor insisted that the ruling would not prevent his office from pursuing the case. *Baton Rouge Woman Freed After Judge Rejects Feticide Charge*, The Advocate (Nov. 23, 2013), http://www.theadvertiser.com/story/news/2013/11/23/baton-rouge-woman-freed-after-judge-rejects-feticide-charge/3688587.

from seeking medical assistance when they most need it. And even when courts (correctly) reject such prosecutions, the people arrested suffer ongoing harm and stigmatization.

A. Fear of Criminalization Keeps People from Seeking Medical Care When They Need It, Threatening Individual and Public Health

People who fear arrest will avoid the health care system. Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 Health & Just. 2, 6, 15 (2015) (pregnant people who used drugs delayed or avoided prenatal care out of fear of criminal punishment, though they were more likely to experience positive birth outcomes when they received prenatal care). This is so 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. Stephen Koester et al., *Why Are Some People Who Have Received Overdose Education and Naloxone Reticent to Call Emergency Medical Services in the Event of Overdose?*, 48 Int'l J. Drug Pol'y 115, 116 (2017) (people did not seek emergency care because they still feared arrest despite Colorado's "Good Samaritan" law). Similarly, pervasive fears of being reported to immigration authorities prevent many immigrants from obtaining health care, even when they are not actually legally at risk. See*, e.g.*, Krista M. Pereira et al., *Barriers to*

Immigrants Access to Health and Human Services Programs, Office of Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs. 11 (May 2012), http://aspe.hhs.gov/basic-report/barriers-immigrants-access-health-and-human-services-programs. The same is true of people who fear being criminalized for their pregnancy outcomes. See generally Rebecca Stone et al., *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care,* 3 Health & Just. at 6, 15.

Although self-managed abortion is generally safe, it is important that people be able to access medical assistance without hesitation in the event of a complication. That is why major medical associations decry the criminalization of people for self-managed abortion. As the American College of Obstetricians and Gynecologists has explained, "The threat of prosecution [for self-managed abortion] may result in negative health outcomes by deterring women from seeking needed care." *Decriminalization of Self-Induced Abortion: Position Statement*, Am. Coll. of Obstetricians & Gynecologists 1 (2018), http://www.acog.org/Clinical-Guidance-and-Publications/Position-Statements/Decriminalization-of-Self-Induced-Abortion. The American Medical Association shares this position, because criminalizing people for self-managed abortion "increases patients' medical risks and deters patients from seeking medically necessary services[.]" *Oppose the Criminalization of Self-Induced Abortion H-5.980*, Am. Med. Ass'n (2018), http://policysearch.ama-

assn.org/policyfinder/detail/abortion?uri=%2FAMADoc%2FHOD.xml-H-5.980.xml.[14] Rather than promoting health and safety, medically unnecessary restrictions like Act 620 endanger public health by stigmatizing both providers and people who seek abortions, and make it less likely that people who experience complications from self-managed abortion or other pregnancy loss will seek help due to fear of criminalization.

B. Criminal Investigations and Prosecutions Following Abortion or Pregnancy Loss Are Humiliating and Cause Irreparable Harm

While having just experienced labor, delivery, and in some cases, the shock and grief of a stillbirth or neonatal loss, women have been subjected to hospital bedside interrogations, arrested, and/or jailed. See, *e.g.*, *Woman Held on $100K Bond*, *supra*; *Patel*, 60 N.E.3d at 1047 (reversing Purvi Patel's feticide conviction, and explaining that she "was interviewed by police at the hospital" after surgery); *Shuai* v. *State,* 966 N.E.2d 619, 622–25 (Ind. Ct. App. 2012) (Bei Bei Shuai attempted

[14] Other major health associations also oppose the criminalization of people who self-manage abortion. See, *e.g.*, *Self-Managed Abortion Statement*, Physicians for Reprod. Health 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.").

suicide while pregnant; her baby died three days after birth. Within a month of her loss she was arrested, charged with "feticide" for her attempted suicide, and held without bail. The bail denial was reversed on appeal, but not until Ms. Shuai had spent almost a year in jail.).

Even when charges are dropped, the targeted women's names, mugshots, and private medical information remain online.[15] In other cases, abortion stigma motivates prosecutions to go forward, even in spite of a tenuous legal argument. This has led to women serving time in prison before seeing their charges reduced or overturned on appeal. See, *e.g.*, *Bynum*, 546 S.W.3d at 542–43; *Patel*, 60 N.E.3d at 1048 (Ms. Patel was sentenced to more than 20 years in prison for "feticide" and "neglect of a dependent" for taking abortion pills to end her pregnancy; she spent three years in prison before an appellate court reversed her feticide conviction and reduced her sentence). Spending years in prison—separated from family and children—is a harm not obviated by subsequent reversal of a conviction. See*, e.g.*, *Bynum*, 546 S.W.3d at

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[15] See, *e.g.,* Lauren Gambino, *Georgia Woman Who Took Abortion Pill Has Murder Charges Dismissed*, The Guardian (June 10, 2015), http://www.theguardian.com/us-news/2015/jun/10/georgia-woman-abortion-pill-murder-charge-dismissed
(Kenlissia Jones was arrested and charged with first degree homicide after taking pills to end her pregnancy, and her mugshot and arrest details were reported in national news; three days after her arrest, the county prosecutor publicly announced that Georgia law did not support such a charge).

536 (Ms. Bynum was living with her four-year-old son and family when arrested. Ms. Bynum was jailed for 59 days before an appellate court reversed her conviction and six-year sentence for "concealing a birth" after delivering a stillborn baby.); see also Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, N.Y. Times Mag. (Sept. 22, 2014), http://www.nytimes.com/2014/09/22/magazine/a-mother-in-jail-for-helping-her-daughter-have-an-abortion.html (Jennifer Whalen was sentenced to 9–18 months in jail for trying to help her daughter safely end a pregnancy with abortion pills ordered from an online pharmacy. As she told a reporter, "I'm scared . . . [a]nd I'm hurt because I can't be with my family." At the time, she had a young child and a 19-year-old at home.).

C. After a Criminal Case Ends—Even When Charges Are Dismissed—the Harms of Criminalization Continue

This Court has repeatedly recognized that even if a criminal case is dismissed or the person is acquitted, arrests and prosecutions have inordinate and lasting collateral consequences. See, *e.g.*, *Michelson* v. *United States*, 335 U.S. 469, 482 (1948) ("Arrest without more may nevertheless impair or cloud one's reputation."); *Utah* v. *Strieff*, 136 S. Ct. 2056, 2070 (2016) ("Even if you are innocent, you will now . . . experience the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check.") (Sotomayor, J., dissenting) (citation omitted); *cf. Lawrence* v. *Texas*, 539 U.S. 558, 575–76 (2003)

(criminalization of private conduct is "an invitation" to subject individuals to "discrimination both in the public and in the private spheres"; stigma created even by a misdemeanor "is not trivial," and has consequences for the dignity of people so charged, "underscor[ing] the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition"); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1971) (public censure for risky behavior can be "such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard").

As recent cases demonstrate, people arrested or charged for self-managing abortions, regardless of the outcomes of legal proceedings, face being stigmatized and ostracized and becoming the subject of sensationalized news stories. See, *e.g.*, Kim Murphy, *Idaho Woman's Case Marks a Key Abortion Challenge*, L.A. Times (June 16, 2012), http://www.latimes.com/archives/la-xpm-2012-jun-16-la-na-idaho-abortion-20120617-story.html (Jennie McCormack, a mother of three charged with violating an antiquated abortion criminal law 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"); 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 (Kasey Dischman, who

had a heart attack while seven months pregnant due to a drug overdose, and whose baby survived, 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.").

D. Harms of Criminalization Disproportionately Affect People of Color

And as in other contexts, the harms of criminalizing people for their pregnancy outcomes have a disproportionate impact on people of color, who are already over-surveilled and over-incarcerated.[16] 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. See Paltrow & Flavin, J. Health Pol., Pol'y & L. at 326–27. Axiomatically, this results in disproportionate punishment. In Florida, where Black people constitute only 15 percent of the population, they

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[16] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons (Black people in the United States are more than five times as likely as white people to be imprisoned; Latinx people are more than twice as likely); see also *Native Lives Matter*, Lakota People's Law Project 6 (Feb. 2015), http://s3-us-west-1.amazonaws.com/lakota-peoples-law/uploads/Native-Lives-Matter-PDF.pdf (Native American women are six times as likely as white women to be imprisoned).

accounted for 75 percent of arrests related to pregnancy. *Id.* at 311. In South Carolina, where Black women constitute only 30 percent of the population, they accounted for 75 percent of arrests related to pregnancy. *Id.* If Act 620 is upheld, these existing disparities are likely to be compounded, as the majority of people who will lose access to clinic-based abortions in Louisiana are women of color.[17]

In short, criminalizing and imprisoning people for having abortions is not in keeping with U.S. history or common law, and it harms people, their families, and the public health.

CONCLUSION

By singling out abortion providers for unnecessary regulation, Act 620 will increase abortion stigma and lead more people to seek self-managed abortions when access to clinics is diminished. While self-managed abortion has the potential to be safe, the air of illegality created by Act 620 will increase the risk of criminalization. No one should be criminalized for ending a pregnancy, and no one should have to forego

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[17] Although Louisiana's Black population amounted to 32.1 percent of the state's population in 2015, see Am. Fact Finder, U.S. Census Bureau, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF, those seeking abortion care identifying as Black amounted to 62.1 percent of residents' abortions. Tara C. Jatlaoui et al., *Abortion Surveillance - United States, 2015*, 67 MMWR Surveillance Summaries 1, 35 tbl. 13 (2018).

medical care for fear of arrest. By reversing the Fifth Circuit and striking down Act 620, this Court can safeguard the dignity of people's intimate experiences of abortion and pregnancy loss and ensure that those in Louisiana can make their own reproductive decisions free from criminalization.

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