
In The
Supreme Court of Maryland

No. 20

September Term, 2024

MOIRA E. AKERS,

Appellant,

vs.

STATE OF MARYLAND,

Appellees.

**BRIEF OF AMICUS CURIAE IF/WHEN/HOW IN
SUPPORT OF PETITION FOR CERTIORARI**

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STATEMENT OF INTEREST OF AMICUS CURIAE

If/When/How: Lawyering for Reproductive Justice is a national nonprofit organization working to transform law and policy so that everyone has the power to determine if, when, and how to define, create, and sustain families with dignity.

If/When/How provides legal services, conducts strategic advocacy and public education, and organizes the legal profession to end the criminalization of people for their pregnancy outcomes.

INTRODUCTION

Amicus urges this Court to grant Moira Akers' Petition for a Writ of Certiorari, because the issue decided by the Appellate Court of Maryland (ACM) is of substantial public importance.

In affirming her conviction, the ACM held that evidence that Ms. Akers considered terminating her pregnancy was relevant and not prejudicial. *State v. Moira Akers*, CSA-REG-0925-2022 (Jan. 30, 2024). That decision is out of step with nearly every other court to have considered the question.

Having had an abortion, or contemplating one, has no tendency to prove whether a person would commit a crime against their infant. Rather, having an abortion is a common part of people's reproductive lives. Nor does looking for information about how one might self-manage abortion bear any connection to homicidal intent toward one's newborn; thousands of people in the U.S. have conducted such searches, and more are expected to do so as the legal landscape for abortion access remains uncertain. As a Florida appellate court has explained, "the only *arguable* relevance [of such evidence]

makes its admission all the more inappropriate.” *Stephenson v. State*, 31 So. 3d 847, 851 (Fla. Dist. Ct. App. 2010), *rehearing denied*, *Stephenson v. State*, 2010 Fla. App. LEXIS 6101 (emphasis in original). And such evidence is invariably so prejudicial that it should categorically outweigh any theoretical relevance.

Recognizing the logic of this argument, and the authorities supporting it, the ACM cast its decision as a narrow ruling that applied only to this case. But sadly, these circumstances are not unique. Ms. Akers, like others around the country who have been prosecuted for a miscarriage, stillbirth, or perinatal death, was wrongly criminalized, and her actions and considerations during her pregnancy were wrongly (and illogically) used to suggest homicidal intent. Allowing the jury to consider this evidence deprived her of a fair trial. Because the ACM’s decision risks imposing that deprivation on future defendants in Maryland and in other states, this Court should grant Ms. Akers’ petition.

ARGUMENT

I. The decision below will have an impact beyond this case.

More than most, Amicus is aware that the ACM’s decision will be used against other people accused of crimes for having an abortion or experiencing a pregnancy loss. Amicus operates a legal helpline, funds bail and litigation expenses, and provides legal representation for people nationwide who have been criminalized for having an abortion or for experiencing a pregnancy loss. In addition, Amicus recently published research that found that more than 61 people in the U.S. were criminalized for allegedly ending their own pregnancies or helping someone else do so between 2000 and 2020, research that revealed patterns like those in this case. *See* Laura Huss et al., *Self-Care, Criminalized:*

The Criminalization of Self-Managed Abortion from 2000 to 2020, If/When/ How:

Lawyering for Reproductive Justice (2023).¹ As that research details, using a defendant's abortion history or pregnancy ambivalence to argue intent to commit a crime against a fetus or a newborn is a known prosecutorial tactic. *Id.* at 46-50. The ACM's decision, while not binding precedent in Maryland, is widely available and its illogic could be used to argue the admission of such evidence in future cases here and in other states.

II. Abortion is commonplace, and contemplating one has no tendency to prove that a person would commit a crime against their newborn.

Abortion is common, legally protected medical care in Maryland and most states. People's need to seek abortion is based not on feelings they have toward the fetus, but on the circumstances of the pregnancy and their understanding of their ability to care for a child once born.

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

Having an abortion is a normal event in the lives of millions of people in the U.S. Nearly a quarter of U.S. women will have an abortion by age 45. Guttmacher Institute, *Fact Sheet: Induced Abortion in the United States* (September 2019).² Abortion is also common among people who have children; 59% of women in the U.S. who have abortions already have at least one child. *Id.*

¹ <https://ifwhenhow.org/resources/selfcare-criminalized/>.

² <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states>.

People’s reasons for seeking abortion care are varied and often complex, reflecting their individual assessment of their ability to care for a child. Far from being indicative of ill intent toward the fetus, reasons are often based on circumstances such as financial stress, timing of the pregnancy, and partner relationships. M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the U.S.*, 13 *Contraception* 29, 1, 11 (2013) (finding 64% of women surveyed reported multiple reasons for needing an abortion). Responsibility to one’s existing children was frequently cited as a reason for seeking an abortion. *Id.* at 1, 6. 75% of people who had abortions in the U.S. in 2014 were experiencing economic distress, and nearly half had incomes below the poverty line. Guttmacher Institute, *supra*. Concern for financial health is justified: being denied an abortion increases the likelihood of future economic insecurity. Diana Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 *Am. J. Public Health* 407, 410-11 (2018).

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

The ACM purports to craft a holding of “exceedingly narrow scope” based on the circumstances of Ms. Akers’ pregnancy and subsequent loss. *Slip Op.* at 24. Specifically, it notes that she “considered surreptitiously inducing a miscarriage,” and that the evidence in question “involved a self-induced abortion not under the direction of a medical professional.” *Id.* This characterization fundamentally misunderstands the prevalence of and reasons for self-managed abortions. Research shows that it is not the rarity the ACM

suggests; it is more common, safer, and – in light of increasing abortion restrictions – more sought-after than ever before.

Neither internet searches about self-managed abortion, nor attempts to do so, are uncommon. One study documented 210,000 such internet searches in a one-month period. See Jenna Jerman et al., *What are People Looking for When They Google “Self-Abortion”?*, 97 *Contraception* 510, 512 (2018). Even before the U.S. Supreme Court’s overruling of *Roe v. Wade*³ precipitated a need for alternatives to clinic-based care, one online service received more than 57,000 requests—from all fifty states—for medication to self-manage abortion. Abigail Aiken et al., *Factors Associated with Use of an Online Telemedicine Service to Access Self-managed Medical Abortion in the US*, 4 *JAMA Network Open* e2111852, 1 (2021).⁴ And of the people who search the internet for information about self-managed abortion, 28% follow through with the process. Ushma Upadhyay et al., *Barriers to Abortion Care and Incidence of Attempted Self-Managed Abortion Among Individuals Searching Google for Abortion Care: A National Prospective Study*, 106 *Contraception* 49, 53 (2021). All told, an estimated 7% of women in the U.S. have attempted to self-manage an abortion. Lauren Ralph et al., *Prevalence of Self-Managed Abortion Among Women of Reproductive Age in the United States*, 3 *JAMA Network Open* e2029245 1, 7–11 (2020).⁵

³ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

⁴ <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2780272>.

People’s reasons for self-managing vary. Many face barriers to clinic-based abortion care, such as distance to a clinic, financial challenges, or availability of childcare. Upadhyay et al., at 52, 55. Others may self-manage because of stigma related to the circumstances of the pregnancy or to having an abortion, to avoid detection by an abusive partner, or to have a more private experience. See Abigail Aiken et al., *Demand for Self-Managed Medication Abortion Through an Online Telemedicine Service in the United States*, 110 Am. J. Pub. Health 90, 94–95 (2020). The reasons people cited for searching for self-managing an abortion had everything to do with their reasons for needing an abortion and challenges getting one, and nothing from which criminal intent can be inferred. To suggest that it can be so inferred is best understood as a manifestation of abortion stigma.

III. Evidence that a defendant had or contemplated an abortion is prejudicial because of abortion stigma.

While the majority of people in the U.S. support a legal right to end a pregnancy, people who have abortions are frequently stigmatized. Alison Norris et al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21(3 Supp.) Women’s Health Issues S49 (May 1, 2011)⁶ (citing research revealing that “58% of women felt they needed to keep their abortion secret from friends and family”). Abortion stigma ascribes “negative attribute[s] . . . to women who seek to terminate a pregnancy

⁵ <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774320>.

⁶ <https://www.whijournal.com/article/S1049-3867%2811%2900033-8/abstract>.

that marks them . . . as inferior to ideals of womanhood.” Anuradha Kumar et al., *Conceptualising Abortion Stigma*, 11 *Culture, Health & Sexuality* 625, 628 (2009).⁷ Abortion bans have contributed to this stigma by falsely exceptionalizing abortion as something that is uniquely and presumptively unsafe, and as a result wrong and harmful. Janet Turan and Henna Bhudwani, *Restrictive Abortion Laws Exacerbate Stigma, Resulting in Harm to Patients and Providers*, 111 *Am. J. Public Health* 1, 37-39 (2021).

Because of abortion stigma, evidence that a person charged with a crime considered or had an abortion is precisely the kind of evidence that invokes unfair prejudice. “Courts have long acknowledged that the topic of abortion sharply divides Americans, with ‘virtually irreconcilable points of view’ on each side of the debate, so that the risk of prejudice from admitting evidence on the subject is great.” *Brummett v. Burberry Ltd.*, 597 S.W.3d 295, 304 (Mo.App. 2019) (citing *Stenberg v. Carhart*, 530 U.S. 914, 920-21, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000)).

Courts have rejected admission of abortion histories of civil litigants, witnesses, crime victims, and decedents, because the stigma attached to having an abortion is so great that it can improperly influence the outcome of a case. *See, e.g., Nichols v. Am. Nat’l Ins. Co.*, 154 F.3d 875, 885 (8th Cir. 1998) (explaining that “[i]nforming the jury that [plaintiff] had an abortion presented the danger of provoking ‘the fierce emotional reaction that is engendered in many people when the subject of abortion surfaces in any

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https://www.researchgate.net/publication/24422526_Conceptualizing_Abortion_Stigma.

manner”) (quoting *Nickerson v. G.D. Searle & Co.*, 900 F.2d 412, 418 (1st Cir. 1990)); *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977) (affirming trial court’s refusal to admit, for purposes of impeachment, evidence of a rape survivor’s prior abortion as “irrelevant and manifestly prejudicial”).

CONCLUSION

The stigmatized nature of abortion in the U.S. renders evidence that a defendant had or considered an abortion “manifestly” prejudicial. Here, the trial court denied Moira Akers a fair trial by allowing the jury to consider irrelevant and prejudicial information about abortion. Amicus urges this Court to grant her petition for a writ of certiorari, because the issue raised by the ACM’s decision affirming that ruling is of substantial importance.

Respectfully submitted,

/s/ Sara L. Ainsworth

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STATEMENT OF INTENT TO FILE AMICUS BRIEF

If this Court grants the petition, If/When/How will seek the consent of the parties or file a motion for leave to file an amicus brief on the issues before the Court. *See* MD Rule 8-511(e)1.

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 1, 849 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the requirements stated in Rule 8-112.

/s/ Robert Baldwin III
Robert Baldwin, III

CERTIFICATE OF SERVICE

Supreme Court of Maryland

No. SCM-PET-0000-2024

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Moira Akers

v.

State of Maryland
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I, Elissa Diaz, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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

On the **25th Day of March, 2024**, the within Amicus Curiae have been filed and served electronically via the Court’s MDEC system. Additionally, I will serve paper copies upon:

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

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

March 25, 2024

/s/ Elissa Diaz
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