

IN THE SUPREME COURT OF MARYLAND

No. 0020
September Term, 2024

MOIRA AKERS,
Petitioner,

v.

STATE OF MARYLAND
Respondent.

CORRECTED
BRIEF OF AMICUS CURIAE PREGNANCY JUSTICE
IN SUPPORT OF PETITIONER

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**Special admission sought*

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STATEMENT OF INTEREST OF AMICUS CURIAE

Pregnancy Justice is a national non-profit organization dedicated to protecting the rights of pregnant people, focused on criminal defense for people charged with crimes in connection with their pregnancies. This brief is filed in support of Petitioner, Moira E. Akers.

STATEMENT OF PERTINENT FACTS

Amicus adopts the Statement of Pertinent Facts laid out in Petitioner's brief.

ARGUMENT

The Appellate Court of Maryland's (ACM) holding that Ms. Akers' lack of prenatal care and internet search history regarding abortion were evidence "of intent during [Ms. Akers'] pregnancy" to murder Baby A, constitutes an error of law demanding that this Court grant Ms. Akers' Petition for Writ of Certiorari. *See Akers v. State*, No. 0925, 2024 WL 338958, at *10, 13 (Md. Ct. App. Jan. 30, 2024). By using her actions during pregnancy as evidence of intent to murder post-birth, the ACM converts Ms. Akers' jurisdiction over her own reproduction into proof of motive and preparation for murder. Similarly, by permitting the State to define Ms. Akers' trustworthiness through the lens of her prenatal choices, the ACM endorsed an evidentiary presentation that inherently confers personhood on Ms. Akers' fetus and permitted the jury to base their conviction not on competent evidence, but on stereotypes about women and the stigma associated with the failure to have the "right" attitude toward one's pregnancy. The substantially inflammatory nature of this evidence contradicts Maryland's

unequivocal rejection of fetal personhood principles and unfairly prejudiced Ms. Akers, and thus demands this Court's review and reversal.

I. BY CONVERTING HER DECISIONS AROUND HER PREGNANCY INTO EVIDENCE OF INTENT TO MURDER, THE STATE CONTRAVENES MARYLAND LAW REJECTING FETAL PERSONHOOD PRINCIPLES.

The ACM treats Ms. Akers' fetus as a living person in ruling that seeking information about pregnancy termination evinced an intent to kill the person to whom she eventually gave birth. The State's premise of guilt, adopted by the ACM, relies on fetal personhood principles expressly rejected by Maryland's civil and criminal legal frameworks. *See* Md. Code Ann., Crim. Law § 2-103 (“[n]othing in this section shall be construed to confer personhood or any rights on the fetus.”); *see also Kilmon v. State*, 394 Md. 168 (2006) (rejecting application of reckless endangerment statute to a woman accused of ingesting cocaine while pregnant); *Kandel v. White*, 339 Md. 432, 441 (1995). This espousal of fetal personhood is contrary to Maryland law and invites further criminalization of prenatal conduct.

A. Maryland Rejects the Concept of Fetal Personhood.

Fetal personhood laws normalize the prosecution of prenatal conduct and pregnancy loss. *Who Do Fetal Homicide Laws Protect?* PREGNANCY JUST. (Aug. 17, 2022) <https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-homicide-brief-with-appendix-UPDATED.pdf>. When a fetus is given the rights of a person, those rights inevitably clash with the rights of a pregnant woman. Maryland law rightly rejects this quagmire and instead protects and prioritizes the rights of pregnant people. *See* Md.

Code Ann., Health-Gen. § 20-209.¹ This protective scheme demands rejection of any theory that a woman’s actions or intent regarding her pregnancy constitute admissible indicia of her potential actions or intent regarding her child once born.

B. The ACM Invites Pregnancy Criminalization by Conflating Actions During Pregnancy With Post-birth Intent.

The ACM opens the door to broader pregnancy criminalization by placing Ms. Akers’ charge on a continuum of fetal personhood and determining that Ms. Akers’ approach to her pregnancy permitted “an inference that she would be inclined to harm or cause the death of the child to keep the pregnancy and birth secret.” *Akers*, 2024 WL 338958 at *10. In stating that “Appellant’s intent *during her pregnancy* is unambiguously a ‘fact of consequence’ in this case,” *id.* (emphasis added), the court conflates Petitioner’s intent *regarding her pregnancy* and her intent after birth. The evidence was not that Ms. Akers searched, while pregnant, for internet tips on how to murder a baby, but only for options regarding termination of a pregnancy. The court’s failure to recognize this conceptual break shows the degree to which its decision was based, not on relevance, but on ingrained judgment surrounding the “correct” behavior of pregnant women.

¹ This November, a constitutional amendment securing reproductive freedoms is subject to a ballot initiative. *See* S.B. 0798, 445th Gen. Assemb. Reg. Sess. (Md. 2023); *see also* Adam Thompson, *Reproductive rights up for vote on Maryland's 2024 ballot*, CBS NEWS (Mar. 4, 2024), <https://www.cbsnews.com/baltimore/news/maryland-reproductive-freedom-amendment-abortion-ballot-2024-roe-wade-baltimore>. While its content reflects Maryland’s existing statutory scheme, should Maryland voters enshrine it, such passage would reflect the wholesale rejection of efforts to establish fetal personhood as a legal precept.

Indeed, the appellate court recognized the fundamental right of a woman to both terminate her pregnancy and refuse healthcare as she deems appropriate, noting that either factor is “typically either irrelevant or minimally probative of a mother’s intent to subsequently harm her child after birth.” *Id.* at *9, *11. Rather than affirm that Ms. Akers holds the same right, however, the court departs on the ground that “the pregnancy Appellant considered terminating resulted in the birth of Baby A, the same child she was alleged to have murdered *immediately* after the child’s birth in her home.” *Id.* (emphasis in original). This supposed temporal link is insufficient to overcome the presumption that a person’s lawful and protected actions regarding pregnancy have no bearing on any subsequent intent to harm a born child. Indeed, this Court has already rejected the continuum of personhood on which this assertion relies. *See Kilmon*, 394 Md. at 173 n.2.

In *Kilmon*, this Court considered the ramifications of permitting the State to prosecute people on the basis of their conduct while pregnant and rightly determined that, if that position “were to prevail, there would seem to be no clear basis for categorically excluding any [prenatal] activities from the ambit of [criminal liability]; criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be.” *Id.* at 178. The *Kilmon* Court’s concern is a reality in much of the country, where pregnancy criminalization has been on the rise. Purvaja S, Kavattur, et al. *The Rise of Pregnancy Criminalization: A Pregnancy Justice Report*, PREGNANCY JUST. (2023), <https://www.pregnancyjusticeus.org/rise-of-pregnancy-criminalization-report>. “Prosecutors are increasingly bringing criminal charges against pregnant women who struggle with drug addiction or who engage in behaviors that otherwise would not be a

crime, such as failing to go to a doctor, refusing to follow a doctor's orders, or driving without a seatbelt." Carrie N. Baker, *Research Reveals Increasing Criminalization of Pregnant Women*, WOMEN'S MED. CTR. (Oct. 5, 2023),

<https://womensmediacenter.com/news-features/new-research-reveals-increasing-criminalization-of-pregnant-women>; *see also* Nick Divito, *Mom's Conviction Tossed for Baby's Death in Crash*, COURTHOUSE NEWS SERV. (Oct. 23, 2015),

<https://www.courthousenews.com/moms-conviction-tossed-for-babys-death-in-crash>.

This case again presents the risk that prosecutors will pursue criminal convictions for actions deemed insufficiently deferential to a pregnancy and, according to the logic of the ACM, the child borne of that pregnancy. Ms. Akers' rights as a human being and as a criminal defendant should not be sidestepped for those of her fetus.

II. THE ACM'S EVIDENTIARY HOLDING IS ROOTED IN GENDERED STEREOTYPES.

The ACM's evidentiary determinations also rely on the assumption that a person considering an abortion, or failing to obtain prenatal care, is capable of murder.

The court's inference that Ms. Akers' choice to forgo prenatal care and contemplation of abortion is evidence of murderous intent breathes new life into the centuries-old belief that women who veer from their "destined course" as mothers are deviant and suspect. In the late nineteenth century, advocates for the criminalization of abortion argued that a woman who chose to terminate her pregnancy was "shrink[ing] from the pains and responsibilities of maternity." Reva Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL.

L. REV. 991, 1053 (2007) (citations omitted). Because these deeply gendered Victorian ideas persist today, nearly any evidence regarding a woman’s attitude toward her own pregnancy that deviates from a “norm,” including abortion contemplation, creates unfair prejudice in the minds of a jury. *See Bynum v. State*, 546 S.W.3d 533, 543 (Ark. Ct. App. 2018) (holding that defendant was “clearly prejudiced” by use of evidence of abortion history). Facing this social burden, it would not “be ‘unreasonable’ for a pregnant woman, faced with the prospect of post-natal civil liability according to community standards of propriety, to assume that the only safe course of behavior is to lie prone for nine months.” Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 625 (1986).

The ACM’s conclusion that Ms. Akers’ approach to pregnancy “could lead to an inference that Appellant did not [obtain prenatal care] . . . because of her intent to cause the death of the child once born,” *Akers*, 2024 WL 338958, at *19, is similarly prejudicial and unavailing. Implicit in this inference is the assumption that women who fail to receive “adequate” prenatal care are motivated by a desire to harm their future child. In reality, 16.5% of birthing people in Maryland receive no or “inadequate” prenatal care, for any number of entirely non-criminal reasons.² Jazmin Fontenote et al., *Where You Live Matters: Maternity Care Deserts and the Crisis of Access and Equity in Maryland*,

² See Christina Brigrance et al., *Nowhere to Go: Maternity Care Deserts Across the U.S. (Report No. 3)*. MARCH OF DIMES 5 (2022), <https://www.marchofdimes.org/research/maternity-care-deserts-report.aspx>.

MARCH OF DIMES (2023). Forgoing prenatal care reflects the pressing reality of a pregnant woman's lived circumstances, not her post-birth intent.

The same is true for women considering abortion, with nearly one in four women having undergone the procedure by age 45. *Abortion is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates*, GUTTMACHER INST. (Oct. 19, 2017), <https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates>. Indeed, "its only arguable relevance makes its admission all the more inappropriate: it is apparently the thought that a person who considers abortion is more likely to have killed the child not aborted." *Stephenson v. State*, 31 So.3d 847, 851 (Fla. 2010). The presentation of these substantially inflammatory issues to the jury demands review and reversal.

CONCLUSION

Amicus curiae respectfully urge this Court to grant Ms. Akers' Petition.

Respectfully submitted,

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**Special admission sought*

STATEMENT RE INTENT TO FILE AMICUS BRIEF IF PETITION GRANTED
PURSUANT TO RULE 8-511(E)(2)

If the writ is issued, Amicus Curiae intend to seek written consents or leave to file an Amicus brief on the issues before the Court.

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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 1,672 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 20-201(g), on March 22, 2024 the foregoing Brief of Amicus Curiae in Support of Petitioner was served via the MDEC File and Serve Module, which sent electronic notification of filing to all persons entitled to service, listed below. Amicus will also serve copies of the filing to all persons entitled to service via electronic mail.

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