

IN THE
INDIANA COURT OF APPEALS

Cause No. 71A04-1504-CR-00166

PURVI PATEL,)
)
) *Appellant,*) Appeal from the St. Joseph Superior Court
)
 v.) Cause No. 71D08-1307-FA-000017
)
 STATE OF INDIANA,) Hon. Elizabeth C. Hurley, Judge
)
) *Appellee.*)

**BRIEF IN SUPPORT OF APPELLANT PURVI PATEL
BY AMICI INTERNATIONAL WOMEN'S HUMAN RIGHTS CLINIC,
AMNESTY INTERNATIONAL, AND THE CENTER FOR REPRODUCTIVE RIGHTS**

Cynthia Soohoo, Atty. No. 5270-95-TA
International Women's Human Rights Clinic
City University of New York Law School
2 Court Square
Long Island City, NY 11101
Phone: 718-340-4329
Fax: 718-340-4478
Email: cynthia.soofoo@law.cuny.edu

Sandra L. Blevins, Atty. No. 19646-49
BETZ + BLEVINS
One Indiana Square, Suite 1660
Indianapolis, IN 46204
Phone: 317-687-2222, ext. 110
Fax: 317-687-2221
Email: sblevins@betzadvocates.com

*Attorneys for Amicus
International Women's Human Rights Clinic
City University of New York Law School¹*

¹ Law students Elisabeth Wise and Katy Naples-Mitchell contributed to this brief under the direction of Cynthia Soohoo.

TABLE OF CONTENTS

STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. THE COURTS OF INDIANA REGULARLY ENGAGE IN COMPARATIVE LEGAL ANALYSIS TO INTERPRET STATE LAW AND THIS COURT SHOULD CONSIDER HUMAN RIGHTS LAW HERE AS A SOURCE OF COMPARATIVE ANALYSIS.	3
A. The U.S. legal tradition has long embraced looking to foreign and international precedent for guidance on domestic legal questions.	5
B. As a matter of general practice, Indiana courts look to other jurisdictions for guidance, especially when there is a dearth of directly relevant Indiana case law on a novel legal question.	6
II. HUMAN RIGHTS STANDARDS AND COMPARATIVE LAW SUPPORT THAT THE CRIME OF FETICIDE SHOULD NOT APPLY TO A WOMAN FOR HARM TO HER OWN FETUS.	7
A. Criminalizing Ms. Patel for a poor birth outcome would make Indiana an outlier on human rights issues in the U.S. and the world.	8
B. Criminalizing Ms. Patel for purportedly terminating her own pregnancy would make Indiana an outlier on human rights issues in the U.S. and the world.	9
1. Human rights bodies and peer countries recognize that women should not be criminalized for ending their own pregnancies.	9
2. Experience in other countries shows that when pregnant women are prosecuted for terminating pregnancies, laws are unfairly and selectively enforced.	11
III. CRIMINALIZING WOMEN FOR TERMINATING THEIR OWN PREGNANCIES AND FOR FAILURE TO ACT DURING AN EMERGENCY DELIVERY DISCRIMINATES AGAINST WOMEN, WITH A DISPARATE IMPACT ON WOMEN OF COLOR.	13
A. Singling out pregnant women for unique criminal prosecutions constitutes gender discrimination and violates women's rights to dignity and bodily autonomy.	13

B. Imposing criminal liability creates a grave danger of impermissible discrimination based on race.	15
IV. HUMAN RIGHTS EXPERTS HAVE RECOGNIZED THAT CRIMINALIZING WOMEN FOR TERMINATING THEIR OWN PREGNANCIES PLACES WOMEN'S LIVES AND HEALTH AT RISK.	18
A. Criminalization deters women from seeking medical care.	18
B. Criminalization risks violation of women's right to confidential health information and to be free from torture and cruel, inhuman and degrading treatment or punishment.	20
CONCLUSION	22

TABLE OF AUTHORITIES

Cases

<i>Baird v. State</i> , 831 N.E.2d 109 (Ind. 2005)	4
<i>Bob Anderson Pontiac, Inc. v. Davidson</i> , 155 Ind. App. 395, 293 N.E.2d 232 (1973).....	6
<i>Bott v. DeLand</i> , 922 P.2d 732 (Utah 1996)	5
<i>Bridgestone Americas Holding, Inc. v. Mayberry</i> , 878 N.E.2d 189 (Ind. 2007).....	6
<i>Bush v. State Farm Mut. Auto. Ins. Co.</i> , 905 N.E.2d 1003 (Ind. 2009).....	7
<i>Conley v. State</i> , 972 N.E.2d 864 (Ind. 2012).....	7
<i>Graham v. Florida</i> , 560 U.S. 48 (2010), <i>as modified</i> (July 6, 2010)	6
<i>Grimes v. Kennedy Krieger Inst.</i> , 366 Md. 29 (Md. 2001)	5
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	6
<i>Jogi v. Voges</i> , 480 F.3d 822 (7th Cir. 2007).....	4
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	6
<i>Lehman v. State ex rel. Miller</i> , 45 Ind. App. 330, 88 N.E. 365 (1909)	4
<i>Matthew v. State</i> , 892 N.E.2d 695 (Ind. Ct. App. 2008)	7
<i>McCormack v. Hiedeman</i> , 694 F.3d 1004 (9th Cir. 2012)	9, 10
<i>Moore v. Ganim</i> , 233 Conn. 557 (Conn. 1995).....	4, 5
<i>Planned Parenthood of Southeastern Pa. v. Casey</i> , 505 U.S. 833, 112 S. Ct. 2791 (1992).....	2
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	4, 5, 6
<i>Shuai v. State</i> , 966 N.E.2d 619 (Ind. Ct. App. 2012)	7, 15, 17
<i>Simmons v. Roper</i> , 112 S.W.3d 397 (Mo. 2003).....	5
<i>Sivels v. State</i> , 741 N.E.2d 1197 (Ind. 2001).....	6
<i>Spackman v. Bd. of Educ.</i> , 16 P.3d 533 (Utah 2000).....	5
<i>Stallman v. Youngquist</i> , 125 Ill.2d 267, 531 N.E.2d 355 (1988).....	8
<i>State v. Romano</i> , 114 Haw. 1, n. 14, (Haw. 2007), <i>as amended</i> (Mar. 30, 2007).....	4

Statutes

Ind. Code § 34	2
Ind. Code § 35-42-1-6	1
Ind. Code § 35-46-1-4(b)	1

International and Foreign Law

Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation 24, U.N. Doc. HRI/GEN/1/Rev.6 (1999)	10, 14, 21
Committee on the Elimination of All Forms of Discrimination Against Women, Concluding Observations to Brazil UN Doc. CEDAW/C/BRA/6 (2007).....	10
Committee on the Elimination of All Forms of Discrimination Against Women, Concluding Observations to Burkina Faso U.N. Doc. CEDAW/C/BFA/CO/6 (2010)..	10
Committee on the Elimination of All Forms of Discrimination Against Women, Concluding Observations Chile UN Doc. CEDAW/C/CHI/Co/4 (2006)	10
Committee on the Elimination of All Forms of Discrimination Against Women, Concluding Observations Liechtenstein U.N. Doc. CEDAW/LIE/CO/3 (2007)	10

Committee on the Elimination of All Forms of Discrimination Against Women, Concluding Observations Mauritius UN Doc. CEDAW/C/MAR/CO/5 (2006)	10
Committee on the Elimination of All Forms of Discrimination Against Women, Concluding Observations Nicaragua UN Doc. CEDAW/C/NIC/CO/6 (2007).....	10
Committee on the Elimination of All Forms of Discrimination Against Women, Concluding Observations Pakistan, UN Doc. CEDAW/C/PAK/CO/3 (2007)	10
Committee on the Elimination of All Forms of Discrimination Against Women, Concluding Observations Philippines, UN Doc. CEDAW/C/PHI/CO/6 (2006).....	10
Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation 33, U.N. Doc. CEDAW/C/GC/33 (2015).....	10, 14, 17
Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh and ninth periodic reports of the United States of America, U.N. Doc. CERD/C/USA/CO/7-9 (September 25, 2014)	17
Committee on the Elimination of Racial Discrimination, General Recommendation No. 34 adopted by the Committee: Racial discrimination against people of African descent, U.N. Doc. CERD/C/GC/34 (3 Oct. 2011)	16
Committee Against Torture, Concluding Observations to Chile, CAT/C/CR/32/5 (2004).....	22
Committee Against Torture, Concluding Observations to Paraguay, CAT/C/PRY/CO/4-6	22
Committee Against Torture, Concluding Observations to Peru, CAT/C/PER/CO/5-6 (2013).....	22
Committee Against Torture, General Comment 2, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007).....	21
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture” or “CAT”), <i>opened for signature</i> Dec. 10, 1984, 1465 U.N.T.S. 85	4
<i>Dobson v. Dobson</i> , [1999] 2 S.C.R. 753 (Can.)	8, 9, 15, 16
Human Rights Committee, Concluding Observations on Argentina, CCPR/CO/70/ARG (2000).....	10
Human Rights Committee, Concluding Observations on Chile, CCPR/C/79/Add.104, (1999).....	10, 19
Human Rights Committee, Concluding Observations on Costa Rica, CCPR/C/79/Add.107, (1999)	10
Human Rights Committee, Concluding Observations El Salvador, UN Doc. CCPR/C/SLV/CO/6 (2010)	22
Human Rights Committee, Concluding Observations on Peru, CCPR/C/PER/CO/5, (2013).....	10
Human Rights Committee, Concluding Observations on United Republic of Tanzania, CCPR/C/79/Add.97, (2013).....	10
Human Rights Committee, Concluding Observations on Venezuela, CCPR/CO/71/VEN, (2001).....	10, 19
International Covenant on Civil and Political Rights, <i>opened for signature</i> Dec. 16, 1966, 999 U.N.T.S. 171	4, 14
International Covenant on Economics, Social, and Cultural Rights Committee, General Comment No. 14, U.N. Doc. E/C.2/2000.....	18-19

International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195.....	4
Law No. 50 of 13 June 1975 on the termination of pregnancy, as amended through 19 June 2009, §13 (Norway).....	11
Public Health Code, Legislative part, Second part, Book II, Title II, Chapters II-III, Art. L222-2; L-2222-4 (France).....	11
<i>R. v. Drummond</i> , [1996] 143 D.L.R. 4 th 368 (Ont. Ct. Just.).....	11
Rep. of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20/Rev/ I at 95 (Sept. 15, 1995).....	15, 18-19
Rep. of the Int'l Conference on Population and Dev., U.N. Doc. A/CONF.171/13 at 7.3 (Oct. 18, 1994).....	14, 18-19
Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (February 1, 2013).....	22
Special Rapporteur on the Right to Health, <i>The right of everyone to the enjoyment of the highest attainable standard of physical and mental health</i> , E/CN.4/2004/49 (February 16, 2004).....	11
Special Rapporteur on the Right to Health, <i>Right of everyone to the enjoyment of the highest attainable standard of physical and mental health</i> , U.N. Doc. A/66/254 (August 2011).....	10, 11, 15, 19, 20, 21
Special Rapporteur on Independence of Judges and Lawyers, U.N. Doc. A/66/289 (2011).....	14
Special Rapporteur on violence against women, its causes and consequences, A Human Rights Based Approach to Maternal Mortality and Morbidity (2011), available at http://www.ohchr.org/Documents/Issues/Women/WRGS/MortalityAndMorbidity/SRViolenceAgainstWomen.pdf	13
Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).....	4
<i>Vo v. France</i> , Eur. Ct. H.R., No. 53924/00, para. 80 (July 8, 2004).....	9
WHO, <i>Constitution of the World Health Organization</i> , in Basic Documents (45th ed., Supp. Oct. 2006) (1946).....	18

Other Authorities

American College of Obstetricians and Gynecologists, Committee On Ethics, Opinion No. 321 (November 2005) available at http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Maternal-Decision-Making-Ethics-and-the-Law	2, 7
Amnesty International, <i>On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador</i> (2014).....	12, 20
Amnesty International, Hundreds of thousands of people join the struggle to put an end to El Salvador's brutal abortion ban, Press Release, April 15, 2015, available at https://www.amnesty.org/press-releases/2015/04/hundreds-of-thousands-of-people-join-the-struggle-to-put-an-end-to-el-salvadors-brutal-abortion-ban/	13
Amnesty International, <i>The Total Abortion Ban in Nicaragua: Women's Lives and Health Endangered, Medical Professionals Criminalized</i> (2009).....	19
Claire Provost, El Salvador: Meet the women who dare to challenge the anti-abortion statute, THE GUARDIAN, April 17, 2014, available at	

http://www.theguardian.com/global-development/2014/apr/17/beatriz-case-resistance-el-salvador-abortion-law	13
Center for Disease Control and Prevent, QuickStats: Infant Mortality Rates, by Race and Hispanic Ethnicity of Mother – 2000, 2005 and 2010 (January 10, 2014), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6301a9.htm	16
Center for Reproductive Rights, <i>In Harms Way: The Impact of Kenya’s Restrictive Abortion Law</i> (2010)	19
Center for Reproductive Rights, <i>Marginalized, Persecuted and Imprisoned</i> (2014).....	12
Center for Reprod. Rights, Punishing Women for Their Behavior During Pregnancy: An Approach That Undermines Women’s Health and Children’s Interest 2 (2000) (hereinafter Punishing Women], available at http://reproductiverights.org/en/document/punishing-women-for-their-behavior-during-pregnancy-an-approach-that-undermines-womens-heal	15
Dorothy E. Roberts, <i>Unshackling Black Motherhood</i> , 95 Mich. L. Rev. 938 (1997).....	17
James R. Zazzali, Chief Justice, Supreme Court of New Jersey, <i>International Human Rights: An Overview: Annual Vanderbilt Address to the New Jersey Alumni of Harvard Law School</i> , 37 Seton Hall L. Rev. 661 (2007).....	5
Joy Lawn, M.D. et al., Stillbirths: Where? When? Why? How to make the Data Count? http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(10)62187-3/abstract	12
Kathy Bougher, Woman in El Salvador Acquitted of Homicide Charges for Pregnancy Complications, RH REALITY CHECK, May 6, 2015 (quoting Jose Santos Guardado) http://rhrealitycheck.org/article/2015/05/06/woman-el-salvador-acquitted-homicide-charges-pregnancy-complications/	13
Linda C. Fentiman, <i>Pursuing the Perfect Mother Why America’s Criminalization of Maternal Substance Abuse is Not the Answer – A Comparative Approach</i> , 15 Mich. J. Gender & L. 389 (2009)	8
Margaret H. Marshall, Chief Justice, Supreme Judicial Court of Massachusetts, <i>"Wise Parents Do Not Hesitate to Learn From Their Children": Interpreting State Constitutions in An Age of Global Jurisprudence</i> (Feb. 9, 2004), 79 N.Y.U. L. Rev. 1633 (2004).....	5
Penny J. White, Justice, Tennessee Supreme Court, <i>Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them)</i> , 71 U. Cin. L. Rev. 937 (2003)	5
Shirley S. Abrahamson, Chief Justice, Wisconsin Supreme Court & Michael J. Fischer, <i>All the World’s a Courtroom: Judging in the New Millennium</i> , 26 Hofstra L. Rev. 273 (1997)	5
Shyam Thapa, <i>Abortion Law in Nepal: the Road to Reform</i> , Reproductive Health Matters Journal. Available at http://www.jstor.org/stable/3776119?seq=1#page_scan_tab_contents	12
WHO, <i>Safe Abortion: Technical and Policy Guidance for Health Systems</i> (2d Ed. 2012)	20, 21

STATEMENT OF INTEREST

Amicus curiae the International Women's Human Rights Clinic at the City University of New York Law School joined by Amnesty International and the Center for Reproductive Rights submit this brief to inform the Court about human rights concerns raised by the prosecutions in this case. Amici's statements of interests are attached as Appendix A.

SUMMARY OF ARGUMENT

This case involves the novel application of Ind. Code § 35-42-1-6 ("the Feticide Statute") and Ind. Code § 35-46-1-4(b) ("the Child Neglect Statute") to criminally prosecute a woman for seeking to terminate her own pregnancy and for failing to obtain medical assistance in the one to two minute period in which her premature baby may have been alive following an unexpected emergency delivery.² The judicial expansion of these statutes to impose severe criminal penalties on a woman for failing to follow regulatory requirements for an abortion and for failing to follow proper medical procedures during an emergency delivery raises serious human rights issues. Given the gravity of the legal question before this Court, this brief provides information about relevant international human rights law and standards and the experience of other countries for interpretative guidance.

It is inappropriate to criminalize women for their pregnancy or childbirth outcomes, particularly through statutes designed to regulate the conduct of individuals in other contexts. The impact of these measures on pregnant women is distinct in nature and scope from their impact on third parties in other contexts. A fetus cannot be viewed as a separate entity from a

² Dr. Teas testified that her review of the evidence suggested a stillbirth. TR d352:7. Drs. Prahlow and Teas testified that if a live baby was born there was only one to two minutes to correct the situation. TR 995:20-22, 996:1-2; D305:14-6.

pregnant woman.³ Any regulation or restriction to protect a fetus will inevitably interfere with a pregnant woman's ability to control her body and health and to make autonomous decisions about her life. For this reason, the U.S. Constitution protects a woman's right to terminate a pregnancy prior to fetal viability (as well as the right to terminate a pregnancy post-viability if the pregnancy endangers her health). Before a fetus has obtained viability, the state cannot impose any law that constitutes an undue burden on a woman's ability to obtain an abortion. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992).

Given a woman's right to autonomy and bodily integrity, it is manifestly unfair to expand the scope of the Feticide Statute from third-parties who commit violence against a pregnant woman to pregnant women who seek to terminate their own pregnancies but fail to follow the regulatory requirements for a legal abortion in Article 34 of the Health Code, Ind. Code §16-34. As discussed in Ms. Patel's brief, not only would this criminalize pregnant women for violating laws designed to protect their health, it also would impose substantially greater criminal penalties on them than the penalties imposed on health care providers who violate the same provisions of Article 34 of the Health Code. Application of the Child Neglect Statute to a woman's conduct during an unexpected emergency delivery poses similar due process and human rights concerns.

International human rights bodies and courts in other countries have denounced criminalization of women in these circumstances. *See infra*. Section II.B. International human rights experts and these courts recognize that the criminalization of women for conduct during pregnancy, abortion and poor pregnancy outcomes, including infant mortality or failure to

³ American College of Obstetricians and Gynecologists, Committee On Ethics, Opinion No. 321 (November 2005) *available at* <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Maternal-Decision-Making-Ethics-and-the-Law> (pregnancy is marked by a "particular and particularly thoroughgoing kind of intertwinement" between a pregnant woman and her fetus).

deliver a healthy baby, violates women's right to dignity, bodily integrity and autonomy, privacy, and health. They have also noted that laws that unfairly target women's unique reproductive capabilities discriminate against women and violate their right to equality before the law. *See infra*. Section III.A. Human rights experts have expressed concern about prosecution and enforcement of laws such as these that disproportionately impact poor and minority women. *See infra*. Section III.B. Finally, health and human rights experts have emphasized that criminalization undermines women's health by discouraging women from seeking health care for fear of criminal prosecution and that violation of women's right to confidential health information and extracting confessions in health care settings can constitute cruel, inhuman and degrading treatment. *See infra*. Section IV.

ARGUMENT

I. THE COURTS OF INDIANA REGULARLY ENGAGE IN COMPARATIVE LEGAL ANALYSIS TO INTERPRET STATE LAW, AND THIS COURT SHOULD CONSIDER HUMAN RIGHTS LAW HERE AS A SOURCE OF COMPARATIVE ANALYSIS.

This Court can enrich its analysis by looking to foreign and international human rights law for interpretive guidance. The U.S. Supreme Court and numerous state courts have recognized that foreign law can be a useful source of comparative law, especially in instances where the laws of other nations recognize and seek to protect similar rights. Courts in 46 states and the U.S. Supreme Court have recognized international human rights law as having persuasive authority.

The international human rights treaties ratified by the United States reflect core commitments to civil and political rights, non-discrimination, and the prohibition of torture and cruel and unusual punishment, which are shared by the U.S. and Indiana Constitutions. The United States has ratified three relevant treaties: the International Covenant on Civil and Political

Rights ("ICCPR"), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, the International Convention on the Elimination of All Forms of Racial Discrimination ("Convention Against Racial Discrimination" or "CERD"), Jan. 4, 1969, 660 U.N.T.S. 195, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT"), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85. As early as 1909, an Indiana Appellate Court recognized "[t]reaties are a part of the supreme law of the land. State laws must give way to treaties made by the federal government." *Lehman v. State ex rel. Miller*, 45 Ind. App. 330, 88 N.E. 365, 367 (1909); *see also Jogi v. Voges*, 480 F.3d 822, 831 (7th Cir. 2007). However, although courts have held these treaties impose an international legal obligation on the U.S., they are not directly actionable. *Cf. Baird v. State*, 831 N.E.2d 109 (Ind. 2005) (rejecting the ICCPR, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("UDHR"), and CAT as sources of obligations enforceable in American courts).

Other international treaties that the United States has not ratified do not create legally binding obligations, but do provide evidence of international legal norms that can be persuasive authority in U.S. courts. *See e.g. Roper v. Simmons*, 543 U.S. 551, 576 (2005) (citing to the Convention on the Rights of the Child ("CRC"), *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3); *State v. Romano*, 114 Haw. 1, n. 14, (Haw. 2007), *as amended* (Mar. 30, 2007) (citing the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* July 17, 1980, 1249 U.N.T.S. 14 ("Women's Rights Convention" or "CEDAW")); *Moore v. Ganim*, 233 Conn. 557, 637 (Conn. 1995) (Peters, J., concurring) (citing to the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3).

A. The U.S. legal tradition has long embraced looking to foreign and international precedent for guidance on domestic legal questions.

Foreign and international law offer “respected and significant” persuasive authority that courts should consider. *Roper*, 543 U.S. at 554. Both state and federal courts increasingly look to international law to illuminate relevant international standards and demonstrate international consensus on particular issues.

The highest courts of states across the country have considered international law in interpreting constitutional and statutory language. *See, e.g., Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003) (considering the CRC and other international agreements in holding the juvenile death penalty unconstitutional), *aff'd*, 543 U.S. 551 (2008); *Grimes v. Kennedy Krieger Inst.*, 366 Md. 29, 113 (Md. 2001) (relying on the Nuremberg Code in finding a greater duty toward subjects in nontherapeutic research programs); *Bott v. DeLand*, 922 P.2d 732, 740 (Utah 1996) (consulting the UDHR and other international agreements in determining standards for the treatment of prisoners), *overruled in part by Spackman v. Bd. of Educ.*, 16 P.3d 533 (Utah 2000); *Moore*, 233 Conn. at 637 (Peters, J., concurring) (looking to the UDHR and the ICESCR to determine the scope of government obligations to provide for the poor). State court justices have similarly discussed that international and foreign law can be helpful comparative sources in interpreting state constitutional rights.⁴

⁴ *See, e.g.,* James R. Zazzali, *International Human Rights: An Overview: Annual Vanderbilt Address to the New Jersey Alumni of Harvard Law School*, 37 Seton Hall L. Rev. 661, 679 (2007); Margaret H. Marshall, “Wise Parents Do Not Hesitate to Learn From Their Children”: *Interpreting State Constitutions in An Age of Global Jurisprudence* (Feb. 9, 2004), 79 N.Y.U. L. Rev. 1633, 1639-41 (2004); Penny J. White, *Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them)*, 71 U. Cin. L. Rev. 937, 946 (2003); Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 Hofstra L. Rev. 273, 285-86 (1997).

For its part, the U.S. Supreme Court has been especially willing to consider the laws of other nations and international bodies when defining fundamental rights. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 344-45 (2003) (Ginsburg, J., concurring) (citing CERD and CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13); *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (observing the actions of the European Court of Human Rights and other nations). Courts have also looked to foreign jurisdictions in interpreting rights protected by the Eighth Amendment of the Constitution. *See, e.g., Graham v. Florida*, 560 U.S. 48, 80-82 (2010), *as modified* (July 6, 2010) (noting the Court's "longstanding practice" of "look[ing] beyond our nation's borders" to determine whether a punishment is cruel and unusual and that "the laws and practices of other nations and international agreements [are] relevant to the Eighth Amendment" because "the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it"); *Roper*, 543 U.S. at 575-78.

B. As a matter of general practice, Indiana courts look to other jurisdictions for guidance, especially when there is a dearth of directly relevant Indiana case law on a novel legal question.

The Indiana Supreme Court often engages in comparative analysis by looking to decisions of other state high courts in interpreting Indiana law. *See Bridgestone Americas Holding, Inc. v. Mayberry*, 878 N.E.2d 189, 193-94 (Ind. 2007); *see also Sivels v. State*, 741 N.E.2d 1197, 1200 (Ind. 2001); *Bob Anderson Pontiac, Inc. v. Davidson*, 155 Ind. App. 395, 401, 293 N.E.2d 232, 235 (1973). Foreign law and international law provide similar sources for comparative legal analysis and may be considered persuasive authorities. These laws can provide judges with diverse experiences from which to draw a global picture of emerging rights and norms.

Indiana judges have considered international human rights law as persuasive authority in a handful of cases. In a case involving a juvenile who received a life without parole sentence, a dissenting justice emphasized the interpretation strategy of “reviewing accepted practice in the international community” in U.S. Supreme Court Eighth Amendment jurisprudence. *Conley v. State*, 972 N.E.2d 864, 882 (Ind. 2012) (Rucker, J., dissenting). *See also Matthew v. State*, 892 N.E.2d 695, 701 (Ind. Ct. App. 2008) (Baker, J., dissenting) (citing U.N. recommendations banning corporal punishment and the fact that 16 nations have banned the practice).

International law is especially valuable as persuasive authority here because the Court is dealing with a novel legal issue. Only one other Indiana appellate court has considered whether the Indiana feticide statute applies to the actions of a pregnant woman. *Shuai v. State*, 966 N.E.2d 619, 630 (Ind. Ct. App. 2012). It is therefore highly appropriate for this Court to look to jurisprudence from other jurisdictions, including foreign jurisdictions. *See Bush v. State Farm Mut. Auto. Ins. Co.*, 905 N.E.2d 1003, 1007 (Ind. 2009) (stating that “although this issue is one of first impression in Indiana, our conclusion is consistent with the substantial majority of other states that have addressed the issue”).

II. HUMAN RIGHTS STANDARDS AND COMPARATIVE LAW SUPPORT THAT THE CRIME OF FETICIDE SHOULD NOT APPLY TO A WOMAN FOR HARM TO HER OWN FETUS.

As set forth in Ms. Patel’s brief, Indiana law should not be interpreted to allow the prosecution of a woman for harm to the fetus she carries or for seeking to terminate her own pregnancy. Medical experts have recognized that pregnancy is marked by a “particular and particularly thoroughgoing kind of intertwinement” between a pregnant woman and her fetus.⁵ Imposition of criminal sanctions impermissibly ignores this reality and improperly punishes

⁵ American College of Obstetricians and Gynecologists, Committee On Ethics, Opinion No. 321, 4.

women for their decisions about, and treatment of, their own bodies. International human rights law and comparative foreign law recognize women's right to bodily autonomy regardless of pregnancy and discourage criminalization of women in such circumstances.

A. Criminalizing Ms. Patel for a poor birth outcome would make Indiana an outlier on human rights issues in the U.S. and the world.

As discussed in Ms. Patel's brief, the vast majority of states in the U.S. have refused to criminalize women for poor pregnancy outcomes. Countries with cultural and social structures similar to the U.S. have recognized that because of the unique maternal-fetal relationship "there is but one legal person" and it does not make sense to criminalize women for causing poor birth outcomes.⁶ *Cf. Stallman v. Youngquist*, 125 Ill.2d 267, 531 N.E.2d 355, 359 (1988) ("[T]he law will not treat a fetus as an entity which is entirely separate from its mother."). These cases recognize that it is impossible to police a woman's behavior during pregnancy without violating her right to personal and bodily autonomy.

In *Dobson v. Dobson*, [1999] 2 S.C.R. 753 (Can.), the Supreme Court of Canada found that a woman cannot be held liable for tortious conduct that affects the fetus in utero. The court wrote "[t]he inseparable unity between an expectant woman and her foetus distinguishes the situation of the mother-to-be from that of a negligent third-party." *Id.*, para. 25. The court declined to recognize a tort action against a pregnant woman because "[t]o do so would result in very extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women." *Id.*, para. 23. Given the unprecedented impact on women's privacy, bodily integrity and autonomous decision making, the court deemed it inappropriate to extend the rules for third-party liability for harm to a fetus to a pregnant woman without explicit authorization from the

⁶ Linda C. Fentiman, *Pursuing the Perfect Mother Why America's Criminalization of Maternal Substance Abuse is Not the Answer – A Comparative Approach*, 15 Mich. J. Gender & L. 389, 428 (2009).

legislature. *Id.*, paras. 78-79 (stating that extending liability from third-parties to pregnant women “cannot be characterized as the simple application of existing tort rules...Rather it constitutes a severe intrusion into the lives of pregnant women.”)

The European Court of Human Rights has also recognized a similar principle. *See Vo v. France*, Eur. Ct. H.R., No. 53924/00, para. 80 (July 8, 2004) (observing that an unborn child's right to life is “implicitly limited by the mother's rights and interests”). *Cf. Id.*, para. 55 (noting French government’s position that “in French law the foetus was protected indirectly through the woman’s body of which it was an extension.”)

B. Criminalizing Ms. Patel for terminating her own pregnancy would make Indiana an outlier on human rights issues in the U.S. and the world.

Assuming the jury found that Ms. Patel intentionally self-induced the early termination of her pregnancy, she should not be criminalized. Courts considering this issue in countries in which women have the right to terminate their pregnancies without restrictions as to reason and international human rights bodies have consistently concluded that women should not be criminalized for intentionally ending their own pregnancies.

1. *Human rights bodies and peer countries recognize that women should not be criminalized for ending their own pregnancies.*

Although peer countries⁷ and human rights bodies recognize that states may have a legitimate interest in regulating abortions, they have consistently emphasized that women who undergo abortions should not be criminalized. This is because laws regulating abortion historically sought to protect pregnant women from unsafe abortions and “traditionally criminalized the behavior of third parties to protect the health of pregnant women.” *McCormack v. Hiedeman*, 694 F.3d 1004, 1010-11 (9th Cir. 2012). Many criminal statutes regulating

⁷ We define peer countries as countries in which women have the right to terminate their pregnancies without restrictions as to reason.

abortion expressly exempt women, and where “state statutes do not expressly exempt pregnant women, state courts interpreting them have concluded that pregnant women are exempted from criminal prosecution.” *Id.* at 1011-12.

The U.N. Committee on the Elimination of All Forms of Discrimination Against Women (“CEDAW Committee”), which oversees countries’ compliance with the Women’s Rights Convention, has recognized that imposing criminal penalties on women who seek or undergo abortions violates their human rights and has repeatedly urged countries to repeal laws that criminalize women.⁸ The UN Human Rights Committee, which oversees countries’ compliance with the International Covenant on Civil and Political Rights (to which the USA is a party) has also expressed concern about the impact of criminal abortion laws on women’s and girls’ health and lives and called on countries to make efforts to decriminalize abortion.⁹

Similarly, the U.N. Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (“S.R. on Health”) has stated that “[c]riminal laws penalizing and restricting induced abortion are the paradigmatic examples of

⁸ CEDAW Committee, General Recommendation 24, para. 31(c) (1999); CEDAW Committee, General Recommendation 33, para. 48, U.N. Doc. CEDAW/C/GC/33 (2015) (“CEDAW General Recommendation 33”); Committee on the Elimination of All Forms of Discrimination Against Women, Concluding Observations to Burkina Faso U.N. Doc. CEDAW/C/BFA/CO/6 (2010), para. 40(b) (urging the state to reconsider criminalization of women who undergo abortions); Liechtenstein U.N. Doc. CEDAW/LIE/CO/3 (2007), para. 26 (same); Nicaragua UN Doc. CEDAW/C/NIC/CO/6 (2007), para. 17 (same); Mauritius UN Doc. CEDAW/C/MAR/CO/5 (2006), para. 31 (same); Chile UN Doc. CEDAW/C/CHI/CO/4 (2006), para. 20 (same); Philippines, UN Doc. CEDAW/C/PHI/CO/6 (2006), para. 28 (same); Honduras UN Doc. CEDAW/C/HON/CO/6 (2007), para. 25 (same); Brazil UN Doc. CEDAW/C/BRA/6 (2007), para. 30 (same); Pakistan UN Doc. CEDAW/C/PAK/CO/3 (2007), para. 41 (same).

⁹ Human Rights Committee, Concluding Observations on Chile, CCPR/C/79/Add.104, para. 15 (1999); Concluding Observations on Argentina, CCPR/CO/70/ARG, para. 14 (2000); Concluding Observations on Costa Rica, CCPR/C/79/Add.107, para. 11 (1999); Concluding Observations on Peru, CCPR/C/PER/CO/5, para. 14 (2013); Concluding Observations on United Republic of Tanzania, CCPR/C/79/Add.97, para. 14 (2013); Concluding Observations on Venezuela, CCPR/CO/71/VEN, para. 19 (2001).

impermissible barriers to the realization of women's right to health" and that "[p]unitive provisions against women who undergo abortions must be removed."¹⁰

In peer countries where women are allowed to terminate their pregnancies without restrictions as to reason, women are not prosecuted for abortions or seeking to end their own pregnancies. *See e.g. R. v. Drummond*, [1996] 143 D.L.R. 4th 368 (Ont. Ct. Just.) (holding that mentally ill woman could not be charged with attempted murder for intentionally seeking to end her pregnancy by shooting a pellet rifle into her vagina). Although peer countries may impose criminal penalties for failing to meet regulatory requirements concerning how abortions are performed (e.g. limitations on the health care professionals who may perform abortions or facilities), they generally do not criminalize women. *See e.g.* Public Health Code, Legislative part, Second part, Book II, Title II, Chapters II-III, Art. L222-2; L-2222-4 (France) (imposing criminal penalties for terminating another person's pregnancy in violation of abortion regulations and furnishing a woman with materials to terminate her own pregnancy, but explicitly exempting women from accomplice liability under French law); Law No. 50 of 13 June 1975 on the termination of pregnancy, as amended through 19 June 2009, §13 (Norway) (providing that criminal penalties for terminating a pregnancy in violation of Norwegian law and regulations shall not apply to a woman for terminating her own pregnancy).

2. *Experience in other countries shows that when pregnant women are prosecuted for terminating pregnancies, laws are unfairly and selectively enforced.*

Even in countries with laws that criminalize abortions, very few actually prosecute women for ending pregnancies or obstetric emergencies. The refusal to prosecute women results

¹⁰ *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Rep. of the Special Rapporteur, Anand Grover*, Comm'n on Human Rights, U.N. Doc A/66/254 (Aug. 3, 2011) para. 21 ("S.R. on Health 2011 Report"); *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Report of Special Rapporteur, Paul Hunt*, E/CN.4/2004/49 (February 16, 2004), para. 30.

from recognition that when pregnant women are criminally prosecuted under homicide, feticide, manslaughter or criminal abortion laws, there is a high risk that the laws will be unfairly and selectively enforced. Many pregnancies naturally end in fetal demise through miscarriages (which occur in 15% of known pregnancies) and stillbirths,¹¹ and in many places in the world and among minority communities in the U.S. infant mortality rates are unacceptably high. See *infra* III.B. Prosecution of women under criminal abortion, feticide and homicide laws make all women who do not deliver a healthy baby a suspect. Because of their lack of access to health care and resources and often discriminatory attitudes of authorities, it is poor and marginalized women who are prosecuted for miscarriages, obstetric emergencies and abortions. The historic experience in Nepal and the current experience of El Salvador are instructive.¹²

Prior to the repeal of a criminal abortion ban in Nepal, women who lost pregnancies routinely faced the risk of criminal prosecution regardless of the circumstances. According to one scholar, the prosecutions were often brought for invidious reasons, and miscarriages and abortions

would be deliberately misclassified as a crime of infanticide, willful killing or murder, in order to have a woman convicted and incarcerated, so that she would lose her rights to any family property. . . . Often, these injustices were perpetrated by greedy in-laws working in collusion with litigators and others connected with the courts, so that the family would not have to share land or other property with the hapless woman.¹³

¹¹ In 2008, at least an estimated 2.65 million stillbirths occurred worldwide. Dr. Joy Lawn et al., Stillbirths: Where? When? Why? How to make the Data Count? [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(10\)62187-3/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(10)62187-3/abstract)

¹² Shyam Thapa, *Abortion Law in Nepal: the Road to Reform*, Reproductive Health Matters Journal. Available at http://www.jstor.org/stable/3776119?seq=1#page_scan_tab_contents; Amnesty International, *On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador* (2014); Center for Reproductive Rights, *Marginalized, Persecuted and Imprisoned* (2014).

¹³ Thapa, *Abortion Law in Nepal: the Road to Reform*.

Today, El Salvador is one of the few countries that actively prosecute women following fetal demise. Several highly publicized cases involving the imprisonment of poor women for homicide following miscarriages, stillbirths and obstetric emergencies that occurred in the absence of medical attention have led to widespread international criticism from human rights organizations and U.N. human rights experts.¹⁴ The attorney for a woman who was convicted and sentenced to thirty years in prison for aggravated homicide only to be acquitted on re-trial has emphasized that prosecutions in El Salvador are only brought against poor women seeking emergency care in public hospitals. He states:

We were adamant that it is not illegal to be young, vulnerable, poor, and frightened when facing a pregnancy under precarious circumstances, nor is it illegal to hide a pregnancy or go without prenatal care. It's a reflection on the socio-economic conditions of poor women in our country, not on their guilt.¹⁵

III. CRIMINALIZING WOMEN FOR TERMINATING THEIR OWN PREGNANCIES AND FOR FAILURE TO ACT DURING AN EMERGENCY DELIVERY DISCRIMINATES AGAINST WOMEN, WITH A DISPARATE IMPACT ON WOMEN OF COLOR.

A. Singling out pregnant women for unique criminal prosecutions constitutes gender discrimination and violates women's rights to dignity and bodily autonomy.

¹⁴ Special Rapporteur on violence against women, its causes and consequences, A Human Rights Based Approach to Maternal Mortality and Morbidity (2011), p. 2, available at <http://www.ohchr.org/Documents/Issues/Women/WRGS/MortalityAndMorbidity/SRViolenceAgainstWomen.pdf>; Claire Provost, El Salvador: Meet the women who dare to challenge the anti-abortion statute, THE GUARDIAN, April 17, 2014, available at <http://www.theguardian.com/global-development/2014/apr/17/beatriz-case-resistance-el-salvador-abortion-law>; Amnesty International, Hundreds of thousands of people join the struggle to put an end to El Salvador's brutal abortion ban, Press Release, April 15, 2015, available at <https://www.amnesty.org/press-releases/2015/04/hundreds-of-thousands-of-people-join-the-struggle-to-put-an-end-to-el-salvadors-brutal-abortion-ban/>

¹⁵ Kathy Bougher, Woman in El Salvador Acquitted of Homicide Charges for Pregnancy Complications, RH REALITY CHECK, May 6, 2015 (quoting Jose Santos Guardado) <http://rhrealitycheck.org/article/2015/05/06/woman-el-salvador-acquitted-homicide-charges-pregnancy-complications/>.

Prosecuting pregnant women for harm to their fetuses in utero and during obstetric emergencies discriminates against women and violates their right to dignity and bodily autonomy. International human rights law recognizes that women should not be discriminated against or subject to unique criminal penalties because of their reproductive capabilities.¹⁶

The CEDAW Committee has specifically stated that criminal codes discriminate against women “by criminalizing behaviours that can only be performed by women such as abortion.”¹⁷ The U.N. Special Rapporteur on Independence of Judges and Lawyers has echoed these concerns stating that legal provisions such as those that “criminaliz[e] . . . abortion, including in cases of miscarriages” discriminate against women and are applied in a discriminatory manner.¹⁸

Under international human rights law, the U.S. and countries around the world have an obligation to ensure that women can equally enjoy fundamental human rights. ICCPR, Art. 3 (“[Parties to the treaty] undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth [in the treaty.]”). Following the 1995 Fourth World Conference on Women in Beijing and the 1994 International Conference on Population and Development in Cairo, the international community recognized that autonomy and freedom from discrimination require that women have the right “to make decisions concerning reproduction free from discrimination, coercion, and violence, as expressed in human rights documents.”¹⁹

Human rights experts also have emphasized that criminally prosecuting a pregnant woman

¹⁶ See CEDAW Committee, *General Recommendation 24*, para. 6, U.N. Doc. HRI/GEN/1/Rev.6 (1999) (stating that equality requires that biological differences between men and women be taken into account); *id.*, para.14 (criticizing laws that “criminalize medical procedures only needed by women and that punish women for undergoing those procedures.”).

¹⁷ CEDAW *General Recommendation 33*, para. 48.

¹⁸ A/66/289 (2011), para. 74.

¹⁹ Rep. of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20/Rev/ I at 95 (Sept. 15, 1995); Rep. of the Int’l Conference on Population and Dev., U.N. Doc. A/CONF.171/13 at 7.3 (Oct. 18, 1994).

for terminating her own pregnancy violates her dignity and right to bodily autonomy, among other human rights. The SR on Health has stated that

Dignity requires that individuals are free to make personal decisions without interference from the State, especially in an area as important and intimate as sexual and reproductive health. . . . Criminal laws penalizing and restricting induced abortion . . . infringe women's dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health.²⁰

Cf. Dobson, 2 S.C.R. at para. 23 (rejecting tort action against pregnant women because it would result in “very extensive and unacceptable intrusions into bodily integrity, privacy and autonomy rights of women.”).

Allowing the prosecution of a woman for harm to the fetus she carries denies women of their fundamental rights to privacy and bodily autonomy and imposes a unique criminal penalty on women because of their ability to become pregnant. Upholding Ms. Patel's conviction will have broad and sweeping ramifications for all pregnant women. Because such prosecutions discriminate against women and violate their fundamental rights, this Court should reverse her conviction.

B. Imposing criminal liability creates a grave danger of impermissible discrimination based on race.

As discussed in the Ms. Patel's Brief, the novel application of criminal statutes to women who seek to terminate their pregnancies and women who suffer obstetric emergencies creates the risk of arbitrary and discriminatory enforcement.²¹ There is medical uncertainty about the causes of miscarriages and stillbirths, and it is difficult for any woman to know how to respond to an

²⁰ SR on Health 2011 Report, paras. 15-16 and 21. SR on Health 2011 Report, para. 21.

²¹ Ctr. for Reprod. Rights, *Punishing Women for Their Behavior During Pregnancy: An Approach That Undermines Women's Health and Children's Interest 2* (2000) (hereinafter *Punishing Women*), available at <http://reproductiverights.org/en/document/punishing-women-for-their-behavior-during-pregnancy-an-approach-that-undermines-womens-health>; *See Shuai v. Indiana*, 966 N.E.2d 619, 633, 635 (Ind. 2012) (Riley, J., concurring in part and dissenting in part).

obstetric emergency. Given the higher likelihood that poor and minority women will not have private health care providers that they can turn to for prenatal, abortion or emergency obstetric care, giving prosecutors the ability to choose whether to prosecute women following fetal demise can result in the targeting of poor women of color, whose behavior does not conform to the white, middle-class expectations about how a pregnant woman should behave. *Cf. Dobson v. Dobson*, 2 S.C.R., at paras. 54-55 (declining to impose tort liability on pregnant women for harm to her fetus because a reasonable pregnant woman standard would inevitably be interpreted based on the trier of fact's prejudices about the proper behavior of pregnant women). Further within the U.S. there are vast racial disparities in infant mortality caused by socio-economic factors, including poverty and lack of access to prenatal care. For instance, the infant mortality rate among non-Hispanic black women is more than twice as great as the rate for non-Hispanic white women.²² Given these disparities, allowing prosecution of women for failure to deliver a healthy baby will likely have a disparate and discriminatory impact on minority women.

The U.N. Committee on the Elimination of Racial Discrimination, which oversees countries' compliance with the Convention Against Racial Discrimination, has emphasized that the U.S. and other parties to the treaty have an obligation to prevent racially discriminatory application of criminal laws. The Committee's General Recommendation 34 makes clear that parties to the treaty must ensure that measures taken to fight crime do not have a racially discriminatory effect.²³ In 2014, the Committee explicitly expressed concern that members of

²² Center for Disease Control and Prevent, QuickStats: Infant Mortality Rates, by Race and Hispanic Ethnicity of Mother – 2000, 2005 and 2010 (January 10, 2014) (stating that in 2010 the rate non-Hispanic black infant mortality rates were 2.4 times the non-Hispanic white rate), available at: <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6301a9.htm>

²³ Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 34 adopted by the Committee: Racial discrimination against people of African descent, para. 38, U.N. Doc. CERD/C/GC/34 (3 Oct. 2011), available at: <http://www.refworld.org/docid/4ef19d592.html>. (stating that State Parties must ensure that

racial and ethnic minorities in the United States are “disproportionately arrested, incarcerated and subjected to harsher sentences.”²⁴

The CEDAW Committee also has recognized that gender stereotyping about appropriate behavior for women can unfairly influence prosecutors’ investigations and judicial decision making when women’s behavior does not conform to these stereotypes.²⁵ At the same time negative stereotypes about women of color can also impact judicial proceedings. Historically, prosecutions of pregnant women in the United States have been driven by racial stereotypes about minority women.²⁶

Ms. Patel is only the second pregnant woman prosecuted under Indiana’s feticide law. Both prosecutions were of women of color, specifically Asian women.²⁷ Interpreting Indiana’s Feticide and Child Neglect Statutes in the novel manner proposed in this case would give prosecutors broad discretion to charge and investigate women who seek to terminate their pregnancies or experience poor pregnancy outcomes, creating a strong risk of race discrimination in violation of Indiana, federal, and international law.

their criminal justice systems and “measures taken in the fight against crimes... do not discriminate in purpose or effect on the grounds of race and colour”) (emphasis added).

²⁴ U.N. Committee Against Racial Discrimination, Concluding observations on the combined seventh and ninth periodic reports of the United States of America, U.N. Doc. CERD/C/USA/CO/7-9 (September 25, 2014), para. 20.

²⁵ CEDAW General Recommendation 33, para. 26.

²⁶ See, e.g., Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 Mich. L. Rev. 938, 947-950 (1997) (describing how the image of the “monstrous crack-smoking mother was added to the iconography of depraved black maternity,” fueling prosecutions of black women).

²⁷ Bei Bei Shuai, a Chinese immigrant, was charged with murder and feticide after she attempted suicide causing the premature birth and subsequent death of her pre-mature baby. *Shuai*, 966 N.E.2d 619.

IV. HUMAN RIGHTS EXPERTS HAVE RECOGNIZED THAT CRIMINALIZING WOMEN FOR TERMINATING THEIR OWN PREGNANCIES PLACES WOMEN'S LIVES AND HEALTH AT RISK.

The international community recognizes the right to health as a fundamental right and that sexual and reproductive rights are an integral part of the right to health.²⁸ Reproductive rights, including the right to access health care following adverse pregnancy outcomes and to receive care for post-abortion complications, have been recognized by the international community following the 1994 International Conference on Population and Development in Cairo and the 1995 Fourth World Conference on Women in Beijing. Consensus documents from these conferences recognize “the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth,”²⁹ and “access to quality services for the management of complications arising from abortion.”³⁰

A. Criminalization Deters Women From Seeking Medical Care.

Article 34 of the Health Code imposes conditions on how abortions are performed in order to safeguard women's health. However, at present, enforcement of Indiana's Feticide Statute against Ms. Patel would set the precedent for criminalizing women who seek medical care for abortion-related complications following abortions that failed to meet Health Code requirements, placing their lives and health in danger. Similarly, prosecuting women for child neglect for failing to follow proper procedures during an unexpected emergency delivery will deter women from seeking necessary post-obstetric care, also placing their lives and health in jeopardy.

International human rights bodies have recognized that criminalizing women for failing to deliver a healthy baby, based either on their choice to terminate the pregnancy or their conduct

²⁸ See e.g., WHO, *Constitution of the World Health Organization*, in *Basic Documents* (45th ed., Supp. Oct. 2006) (1946) (declaring the "right to enjoyment of the highest attainable standards

during pregnancy, undermines health outcomes. The S.R. on Health has emphasized that laws criminalizing conduct during pregnancy “impedes access to health-care goods and services” and that it is “well documented that public health goals are not realized through criminalization; rather, they are often undermined by it.”³¹ Additionally, research indicates that restrictive abortion laws prevent women from having safe abortions and seeking life saving post-abortion care, implicating their rights to health and life.³² Furthermore, international standards are clear that women should never be criminalized for seeking post-abortion care.³³

The U.N. Human Rights Committee, which oversees the U.S. and other countries’ compliance with the International Covenant on Civil and Political Rights, has stated that the criminalization of abortion can place women’s lives at risk because it prevents women from seeking medical care.³⁴ As discussed above in Section II.B.1, the S.R. on Health has called laws criminalizing abortion the “paradigmatic examples of impermissible barriers to the realization of women’s right to health.” The S.R. has explained that:

of physical and mental health" for all people); Universal Declaration of Human Rights (1948), available at <http://www.un.org/en/documents/udhr/> (affirming that "[e]veryone has the right to a standard of living adequate for the health and well-being of [her]self and of [her] family"); ESCR Committee, General Comment No. 14, para. 14, U.N. Doc. E/C.2/2000.

²⁹ Rep. of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20/Rev/ I at 97 (Sept. 15, 1995).

³⁰ Rep. of the Int’l Conference on Population and Dev., U.N. Doc. A/CONF.171/13 at 8.25 (Oct. 18, 1994).

³¹ S.R. on Health 2011 Report, paras. 41- 42 (citation omitted).

³² See generally Center for Reproductive Rights, *In Harms Way: The Impact of Kenya’s Restrictive Abortion Law* (2010); Amnesty International, *The Total Abortion Ban in Nicaragua: Women’s Lives and Health Endangered, Medical Professionals Criminalized* (2009).

³³ S.R. on Health 2011 Report, para. 30 (“Regardless of the legal status of abortion, women . . . are entitled to have access to quality health services for management of complications, including those arising from unsafe abortions and miscarriages.”).

³⁴ See Human Rights Committee, Concluding Observations, Venezuela UN Doc. CCPR/C/71/VEN (2001), para. 19; Chile UN. Doc. CCPR/C/79/Add.104 (1999), para. 15.

[s]uch laws consistently generate poor physical health outcomes, resulting in deaths that could have been prevented, morbidity and ill-health, as well as negative health outcomes, not least because affected women risk being thrust into the criminal justice system.³⁵

The World Health Organization (WHO) also has explicitly criticized criminal abortion provisions because they increase the number of women having illegal and potentially unsafe abortions and discourage women who experience complications from abortions or miscarriages from seeking medical help.³⁶

Criminalization of women also reinforces stereotypes about abortion that dissuade women from seeking medical interventions. The S.R. on Health has noted a causal relationship between gender stereotyping, discrimination, and marginalization of women and girls and their enjoyment of their right to sexual and reproductive health.³⁷ Criminal laws and other legal restrictions on access to reproductive healthcare “disempower women, who may be deterred from taking steps to protect their health, in order to avoid liability and out of fear of stigmatization.”³⁸ Criminalization of women who terminate their own pregnancies is thus both caused by, and reinforces, stereotypes and stigmatization, which in turn also deter women from seeking healthcare.³⁹

B. Criminalization risks violation of women’s right to confidential health information and to be free from torture and cruel, inhuman and degrading treatment or punishment.

Human rights bodies have expressed concern that in addition to placing women’s health at risk, criminalizing women for abortions, complications during pregnancy or poor

³⁵ S.R. on Health 2011 Report, para. 21.

³⁶ WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2d Ed. 2012) (“WHO, *Safe Abortion*”) p. 90.

³⁷ S.R. on Health 2011 Report, at para. 17.

³⁸ *Id.*

³⁹ Amnesty International, *On the Brink of Death*.

pregnancy outcomes can result in other human rights violations when health care professionals and facilities are treated as a source of evidence for potential prosecutions.

The WHO has emphasized that “[c]onfidentiality is a key principle of medical ethics and an aspect of the right to privacy and must be guaranteed.”⁴⁰ “Women who present with complications from an unsafe or illegal abortion must be treated urgently and respectfully, as any other emergency patient, without punitive, prejudiced or biased behaviours.”⁴¹ The S.R. on Health has specifically criticized the use of information obtained in management of complications that arise from unsafe abortions and miscarriages as evidence, stating that such health care “must be unconditional even where the threat of criminal punishment is present” and that medical care “should not be contingent on a woman’s cooperation in any subsequent criminal prosecution, or *used as evidence in any proceeding against her.*”⁴² These breaches of confidentiality compound the risk that women will be deterred from seeking medical care for abortion complications and obstetric emergencies.⁴³

The Committee Against Torture, which oversees the U.S. and other countries’ compliance with the Convention Against Torture has recognized that mistreatment of women in health care settings can constitute cruel, inhuman and degrading treatment.⁴⁴ The Committee Against Torture and the Human Rights Committee have specifically expressed concern about health care workers reporting or extracting confessions from

⁴⁰ WHO, *Safe Abortion*, p. 68.

⁴¹ *Id.* 69.

⁴² SR on Health 2011 Report, para. 30 (emphasis added); See Human Rights Committee, General Comment 28, para. 20 (noting that women’s right to privacy can be violated when doctors and health care providers have a legal obligation to report abortions).

⁴³ See CEDAW General Recommendation 24, para 12(d) (noting that violations of confidentiality will deter women from seeking health and medical care “for contraception or for incomplete abortion”).

⁴⁴ CAT General Comment 2, para. 22.

women seeking medical care who are suspected of abortions and have emphasized that health care workers have an obligation to protect confidential medical information and to provide unconditional emergency health care.⁴⁵

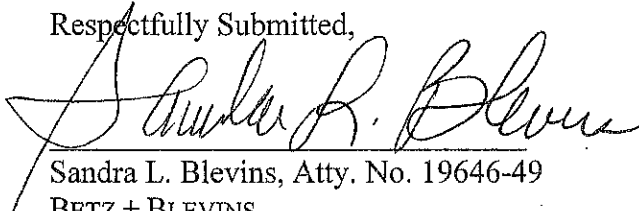
CONCLUSION

This case involves the novel application of the Indiana's Feticide and Child Neglect Statutes to a woman for seeking to terminate her own pregnancy and failing to get medical assistance in the one to two minute period that her premature baby may have been alive following an unexpected emergency delivery. It would be manifestly unjust to expand these criminal provisions to a woman's termination of her own pregnancy and to her actions during an unexpected delivery. International human rights bodies recognize that criminal prosecution of women in such circumstances violates their right to dignity, bodily integrity and autonomy, privacy, health and equality under the law and may constitute cruel, inhuman and degrading treatment. Further, the experience of other countries illustrates that criminalization of abortion and expansion of general criminal laws to women's conduct during pregnancy and delivery pose a grave risk of selective, discriminatory and unfair prosecution of poor and minority women. Finally, health and human rights experts have emphasized that criminalization undermines rather than promotes women's health by discouraging women from seeking post-abortion and delivery health care. Accordingly, we urge the Court to reverse Ms. Patel's convictions and hold that the

⁴⁵ See Committee Against Torture Concluding Observations to Chile, CAT/C/CR/32/5 (2004), paras. 6(j), 7(m); Peru, CAT/C/PER/CO/5-6, para 15 (2013); Paraguay, CAT/C/PRY/CO/4-6, para. 22. Human Rights Committee, Concluding Observations El Salvador, UN Doc. CCPR/C/SLV/CO/6 (2010) para. 10. *See also* Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (February 1, 2013), para. 50.

Feticide Statute does not apply to pregnant women and that the Child Neglect Statute does not apply to a woman's conduct during an emergency delivery.

Respectfully Submitted,



Sandra L. Blevins, Atty. No. 19646-49

BETZ + BLEVINS

One Indiana Square, Suite 1660

Indianapolis, IN 46204

Phone: 317-687-2222 ext. 110

Fax: 317-687-2221

Email: sblevins@betzadvocates.com

Cynthia Soohoo, Atty. No. 5270-95-TA

Cynthia.SooHoo@law.cuny.edu

International Women's Human Rights Clinic

Main Street Legal Services

2 Court Square

Long Island City, NY 11101

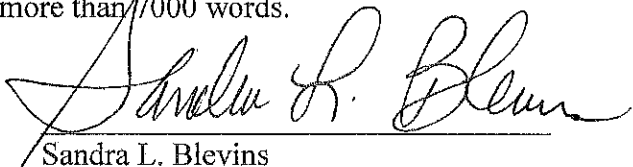
Phone: (718) 340-4329

Facsimile: (718) 340-4478

Attorneys for *Amici Curiae*

WORD COUNT CERTIFICATE

I verify that this brief contains no more than 7000 words.



Sandra L. Blevins

BETZ + BLEVINS

One Indiana Square, Suite 1660

Indianapolis, IN 46204

Phone: 317-687-2222 ext. 110

Fax: 317-687-2221

Email: sblevins@betzadvocates.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been deposited in the First Class U.S. Mail, postage prepaid, this 2nd day of October, 2015, addressed to the following:

Lawrence C. Marshall
559 Nathan Abbott Way
Stanford, CA 94305

Joel M. Schumm
530 West New York Street, #229
Indianapolis, IN 46202

Laura Paul
407 Fulton Street
Indianapolis, IN 46202

Gregory F. Zoeller
Ellen Hope Meilaender
Attorney General of Indiana
Indiana Government Center South
302 W. Washington St., 5th Floor
Indianapolis, IN 46204

Kathrine D. Jack
National Advocates for Pregnant Women
LAW OFFICE OF KATHRINE JACK
P.O. Box 813
Greenfield, IN 46140

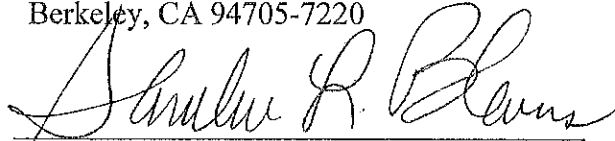
Lynn Paltrow
Sara Ainsworth
NATIONAL ADVOCATES FOR PREGNANT WOMEN
875 6th Ave, Suite 1807
New York, New York, 10001

Grace Atwater
KAMMEN & MOUDY
135 N Pennsylvania St, Ste 1175
Indianapolis, IN 46204

Reena Bajowala
Barry Levenstam
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, Illinois 60654-3456

Devi M. Rao
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, D.C. 20001-4412

Jill E. Adams
Melissa A. Mikesell
Wendy Fu
Center on Reproductive Rights and Justice
University of California, Berkeley School of Law
2850 Telegraph Avenue, Suite 500
Berkeley, CA 94705-7220


Sandra L. Blevins

BETZ + BLEVINS
One Indiana Square, Suite 1660
Indianapolis, IN 46204
Phone: 317-687-2222 ext. 110
Fax: 317-687-2221
Email: sblevins@betzadvocates.com

APPENDIX

A. *AMICI CURIAE* STATEMENTS OF INTEREST.....A1-2

A

***AMICI CURIAE* STATEMENTS OF INTEREST**

AMICI CURIAE STATEMENTS OF INTEREST

Amicus Curiae International Women's Human Rights Clinic of the City University of New York Law School engages in litigation and advocacy, locally and globally to promote women's human rights and gender justice. In conjunction with women's and LGBTQ advocates, human rights lawyers, and grass-roots organizations in the United States and abroad, the Clinic advocates on behalf of individual clients and groups in the context of promoting the human rights of women, LGBTQ individuals and youth. In the United States, the Clinic represents victims of human rights abuses with international and domestic claims in U.S. courts, and files *amicus curiae* briefs in domestic cases with significant and otherwise overlooked international dimensions.

Amicus Curiae Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all. It reaches almost every country in the world and has more than 2 million members and supporters and more than 5 million activists. Amnesty International works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. Amnesty International has intervened in a number of US court cases including at the US Supreme Court, Federal Appellate Court and State Court levels. In particular, the organization has submitted information and analysis in a related case, *Mississippi v. Buckhalter*, Supreme Court of Mississippi, No. 2012-CA-000725 (2013), which overturned an indictment for culpable-negligence manslaughter following a stillbirth, as well as other landmark cases such as *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), *Rasul v. Bush*, 542 U.S. 466 (2004), *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *Roper v. Simmons*, 543 U.S. 551 (2005), *Samantar v. Yousuf*, 130 S.Ct. 2278 (2010), and *Leonidas Bimenyimana et al. v Eric Holder, Jr.*, Case Nos. 13-1676L, 14-2212, US Court of Appeals (4th Cir., 2015).

Amicus Curiae The Center for Reproductive Rights (the "Center") is a nonprofit organization that uses the law to advance reproductive freedom as a fundamental human right that all governments are legally obligated to respect, protect and fulfill. The Center has undertaken a variety of initiatives, both here and around the globe, to ensure that women do not lose their core rights to autonomy, dignity or equality when they become pregnant. For example, the Center has advocated against the shackling of women in prison during childbirth in the U.S., and challenged the detention of postpartum women for failure to pay medical bills in Kenya. The Center has decried the criminalization of pregnant women, which results in the disproportionate prosecution of poor and marginalized women, and

exacerbates economic, social and racial disparities. Recently, the Center called for the release from prison of women in El Salvador convicted of homicide for having suffered miscarriages as a result of emergency obstetric complications.