

## JOINT STATEMENT FROM ELECTED PROSECUTORS

October 2020

As elected prosecutors, we are committed to protecting the safety and well-being of all individuals in our communities. We are also charged with protecting the integrity of our justice system and upholding the Constitution and rule of law. Fulfilling these obligations goes hand-in-hand. We know from our collective experience that when communities trust us and see the fair, equitable, and sensible exercise of prosecutorial discretion, they are more inclined to work with all parts of our justice system as we seek to promote safer and healthier communities.

Recent years have seen the passage of laws across the nation imposing broad restrictions on abortion. Many of these new enactments are ambiguous or silent as to whom they would hold criminally responsible, leaving open the potential for criminalizing patients, medical professionals, healthcare providers, and possibly others who assist in these medical procedures.

Although some of the statutes listed below have been deemed unconstitutional, the recent and ongoing enactment of restrictive laws demonstrates the ways that reproductive rights have been, and will continue to be, under assault, and the willingness of state legislatures around the nation to criminalize these personal healthcare decisions – as well as actions by healthcare professionals:

- In July 2020, Tennessee enacted a “heartbeat” law imposing extreme restrictions on performing abortions, including gestational bans as early as six weeks; under the law, those convicted can face prison time of 3 to 15 years and fines of up to \$10,000.<sup>1</sup>
- Idaho and Utah recently enacted “trigger bans” that would ban abortion with limited exceptions if *Roe v. Wade* were overturned or a constitutional amendment restricting abortion rights were passed.
  - The Idaho law could result in felony charges for health care providers who administer abortions in violation of the law, and penalties of 2 to 5 years in prison.<sup>2</sup>
  - The Utah law could result in felony charges for a physician or woman terminating her own pregnancy, penalties of 1 to 15 years in prison, and fines of up to \$10,000.<sup>3</sup>

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<sup>1</sup> Tennessee S.B. 2196, H.B.2263 (2020), [wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB2196&GA=111](http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB2196&GA=111); Tenn. Code Ann. § 40-35-111; note that this law is being challenged in the court and, as of early October, 2020, the law is on hold pending resolution of that litigation.

<sup>2</sup> Idaho S.B. 1385 (2020), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1385.pdf>.

<sup>3</sup> Utah S.B. 174 (2020), <https://le.utah.gov/~2020/bills/static/SB0174.html>; Utah Code Ann. §§ 76-3-203, 76-3-301.

- Alabama’s 2019 law imposed penalties of a minimum of 10 years and up to 99 years imprisonment for doctors who perform abortions – and contained no carve out for victims of rape or incest.<sup>4</sup>
- Missouri’s 2019 law banned abortion starting at around eight weeks of pregnancy, which is often before a woman even knows she is pregnant, with no exceptions for rape or incest – and doctors face between 5 to 15 years in prison.<sup>5</sup>
- Under Georgia’s 2019 measure, a District Attorney would have the discretion to bring criminal charges and seek imprisonment against anyone and everyone involved in performing and assisting with an abortion; moreover, there was no explicit prohibition under this law against criminalizing women and patients who make these medical choices.<sup>6</sup>
- In the midst of the global pandemic, the state of Arkansas moved to ban abortion procedures during the onset of the COVID-19 pandemic by labeling abortion care as non-essential.<sup>7</sup>

Doctors, nurses, anesthetists, health care providers, office receptionists – virtually anyone who either performs or assists in performing or arranging what is currently a legal medical procedure based on precedent for almost a half century – and in some states, even the patient herself, could face criminal liability under these statutes.

As elected prosecutors, we took an oath to uphold both the U.S. Constitution and the Constitutions of our individual states. Our U.S. Supreme Court, in deciding *Roe v. Wade*, determined that every woman has a fundamental right to privacy which is “broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”<sup>8</sup> As some elected prosecutors have noted, the broad restrictions in the laws passed by these states appear to be unconstitutional under *Roe v. Wade*.<sup>9</sup> Many of us share those legal views, but our commitment to

<sup>4</sup> Alabama House Bill 314, May 15, 2019, available at <https://legiscan.com/AL/text/HB314/jd/2018876/Alabama-2019-HB314-Enrolled.pdf>. See also, Michelle Lou, “Alabama doctors who perform abortions could face up to 99 years in prison -- the same as rapists and murderers,” CNN, May 15, 2019, available at <https://www.cnn.com/2019/05/15/us/alabama-abortion-law-felony-trnd/index.html>; Caroline Kelly, “Alabama governor signs nation's most restrictive anti-abortion bill into law,” CNN, May 16, 2019, available at <https://www.cnn.com/2019/05/15/politics/alabama-governor-signs-bill/index.html>.

<sup>5</sup> Missouri House Bill No. 126, April 18, 2019, available at <https://www.house.mo.gov/billtracking/bills191/hlrbillspdf/0461S.04C.pdf>; Associated Press, “Missouri bill banning abortions at 8 weeks signed into law by Gov. Mike Parson,” CBS, May 24, 2019, available at <https://www.cbsnews.com/live-news/missouri-abortion-law-mike-parson-signs-bill-banning-abortions-8-weeks-today-2019-05-24-live-updates/>.

<sup>6</sup> Georgia House Bill 481, May 7, 2019, available at <http://www.legis.ga.gov/Legislation/en-US/display/20192020/HB/481>. See also Kathryn Tucker, “DA Warns Women They Can Be Charged With Murder Under New Abortion Law,” Law.com, May 22, 2019, available at <https://www.law.com/dailyreportonline/2019/05/22/da-warns-women-they-can-be-charged-with-murder-under-new-abortion-law/>.

<sup>6</sup> American Civil Liberties Union (2020), *Federal Appeals Court Reverses Ruling That Blocked Arkansas Abortion Restrictions*, <https://www.aclu.org/press-releases/federal-appeals-court-reverses-ruling-blocked-arkansas-abortion-restrictions>.

<sup>7</sup> American Civil Liberties Union (2020), *Federal Appeals Court Reverses Ruling That Blocked Arkansas Abortion Restrictions*, <https://www.aclu.org/press-releases/federal-appeals-court-reverses-ruling-blocked-arkansas-abortion-restrictions>.

<sup>8</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>9</sup> Statement of Salt Lake County District Attorney Sim Gill on Order Entered Today in Planned Parenthood’s Legal Challenge to HB136, “Abortion Amendments,” Office of the Salt Lake City District Attorney, May 13, 2019, available at <https://slco.org/district-attorney/press-releases/Order-Entered-PP/>; Morgan Gstalter, “District attorneys near Atlanta vow

not prosecute women who obtain abortions and health care professionals who provide treatment is not predicated on these concerns alone – and, indeed, would hold even if the protections of *Roe v. Wade* were to be eroded or overturned.

Not all of us agree on a personal or moral level on the issue of abortion. And not all of us are in states where women's rights are threatened by statutes criminalizing abortion. What brings us together is our view that *as prosecutors* we should not and will not criminalize healthcare decisions such as these – and we believe it is our obligation as elected prosecutors charged with protecting the health and safety of *all* members of our community to make our views clear.

Prosecutors are entrusted with immense discretion. With this discretion, comes the obligation to use it wisely to seek justice. And, at the heart of the pursuit of justice, must necessarily be the furtherance of policies and practices that protect the well-being and safety of all members of our community.

Resources in our criminal justice system are inherently limited. We believe that the wise use of discretion requires balancing these limited resources, while meeting the safety needs of our communities. In our view, resources are better utilized to prevent and address serious crimes that impact our community rather than enforcing laws such as these that divide our community, create untenable choices for women and healthcare providers, and erode trust in the justice system.

Further, these measures fail to consider the needs and suffering of victims of child molestation, rape, incest, human trafficking, or domestic violence, many of whom experience long-term trauma.<sup>10</sup> Over the past several decades, law enforcement has rightly worked to adopt evidence-based, trauma-informed approaches that include recognizing that not all victims of such crimes are able or willing to immediately report them, and that delays in reporting, or a reticence to report, are consistent with the experience of trauma.<sup>11</sup> We also know, as prosecutors, that all too often the process of reporting is retraumatizing and not consistent with the needs of victims.<sup>12</sup> Although some states have carved out exceptions for victims of rape and incest, these recent enactments by and large ignore the reality and suffering of victims. These laws do not take into account that victims may not report an incident of sexual assault within the laws' specified time, or even report at all, and essentially force victims to live with the choice of reporting and disclosing the details of their sexual assault, or risk being connected to their abuser for life.

Laws that revictimize and retraumatize victims are unconscionable. It is a prosecutor's obligation to protect and seek justice on behalf of all members of our community, including victims who

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not to prosecute women who get abortions," The Hill, May 18, 2019, available at <https://thehill.com/homenews/state-watch/444403-district-attorneys-near-atlanta-vow-not-to-prosecute-women-who-get>.

<sup>10</sup> Stare Vartan, "The Lifelong Consequences of Rape," Pacific Standard, Jun. 14, 2017, available at <https://psmag.com/social-justice/lifelong-consequences-rape-96056>.

<sup>11</sup> Robert Muller, "Rape Victims' Reactions Misunderstood by Law Enforcement," Psychology Today, Jan. 11, 2019, available at <https://www.psychologytoday.com/us/blog/talking-about-trauma/201801/rape-victims-reactions-misunderstood-law-enforcement>.

<sup>12</sup> Office on Violence Against Women, "The Importance of Understanding Trauma-Informed Care and Self-Care for Victim Service Providers," U.S. Department of Justice, July 30, 2014, available at <https://www.justice.gov/archives/ovw/blog/importance-understanding-trauma-informed-care-and-self-care-victim-service-providers>.

are often the most vulnerable and least empowered. The wise exercise of discretion suggests focusing prosecutorial resources on the child molester or rapist, and not on prosecuting the victim herself, or the healthcare professionals who provide that victim with needed care and treatment.

Keeping communities safe inherently requires promoting trust,<sup>13</sup> which would be deeply eroded by the enforcement of these laws. To best promote public safety, prosecutors must be perceived by their communities as trustworthy, legitimate, and fair – values that would be undermined by the enforcement of laws which harm and force unnecessarily difficult and traumatizing decisions on many in our community.

In sum, as elected prosecutors with charging discretion, we choose not to prosecute individuals pursuant to these deeply concerning laws. Legal precedent, as established by the highest court in the land, has held for nearly 50 years that women have a right to make decisions about their own medical care including, but not limited to, seeking an abortion. Enforcement of laws that criminalize healthcare decisions would shatter that precedent, impose untenable choices on victims and healthcare providers, and erode trust in the integrity of our justice system. To fulfill our obligations as prosecutors and ministers of justice to preserve the integrity of the system and keep our communities safe and healthy, it is imperative that we use our discretion to decline to prosecute personal healthcare choices criminalized under such laws.

Respectfully,

**Michaela Andruzzi**

County Attorney, Carroll County, New Hampshire

**Xavier Becerra**

Attorney General, California

**Diana Becton**

District Attorney, Contra Costa County, California

**Wesley Bell**

Prosecuting Attorney, St. Louis County, Missouri

**Buta Biberaj**

Commonwealth's Attorney, Loudoun County, Virginia

**Sherry Boston**

District Attorney, DeKalb County, Georgia

**Chesa Boudin**

District Attorney, City and County of San Francisco, California

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<sup>13</sup> Yucel Ors, "6 Essential Tenets for Effective Community Policing," National League of Cities, March 21, 2016, available at <http://www.nlc.org/article/6-essential-tenets-for-effective-community-policing>.

**Aisha Braveboy**  
State's Attorney, Prince George's County, Maryland

**Danny Carr**  
District Attorney, Jefferson County, Alabama

**John T. Chisholm**  
District Attorney, Milwaukee, Wisconsin

**John Choi**  
County Attorney, Ramsey County, Minnesota

**Dave Clegg**  
District Attorney, Ulster County, New York

**Shameca Collins**  
District Attorney, 6<sup>th</sup> Judicial District, Mississippi

**David Cooke**  
District Attorney, Macon Judicial Circuit, Georgia

**John Creuzot**  
District Attorney, Dallas County, Texas

**Satana Deberry**  
District Attorney, Durham County, North Carolina

**Parisa Dehghani-Tafti**  
Commonwealth's Attorney, Arlington County and the City of Falls Church, Virginia

**Steve Descano**  
Commonwealth's Attorney, Fairfax County, Virginia

**Thomas J. Donovan, Jr.**  
Attorney General, Vermont

**Michael Dougherty**  
District Attorney, 20<sup>th</sup> Judicial District, Colorado

**Mark Dupree**  
District Attorney, Wyandotte County, Kansas

**Keith Ellison**  
Attorney General, Minnesota

**Kimberly M. Foxx**

State's Attorney, Cook County, Illinois

**Glenn Funk**

District Attorney, Nashville, Tennessee

**Sarah George**

State's Attorney, Chittenden County, Vermont

**Joe Gonzales**

District Attorney, Bexar County, Texas

**Eric Gonzalez**

District Attorney, Kings County, New York

**Mark Gonzalez**

District Attorney, Nueces County, Texas

**Christian Gossett**

District Attorney, Winnebago County, Wisconsin

**Andrea Harrington**

District Attorney, Berkshire County, Massachusetts

**Maura Healey**

Attorney General, Massachusetts

**Paul Howard**

District Attorney, Fulton County, Georgia

**John Hummel**

District Attorney, Deschutes County, Oregon

**Natasha Irving**

District Attorney, Sixth Prosecutorial District, Maine

**Letitia James**

Attorney General, New York

**Kathleen Jennings**

Attorney General, Delaware

**Melinda Katz**

District Attorney, Queens County, New York

**Zachary Klein**  
City Attorney, Columbus, Ohio

**Justin F. Kollar**  
Prosecuting Attorney, Kauai County, Hawaii

**Lawrence S. Krasner**  
District Attorney, Philadelphia, Pennsylvania

**Beth McCann**  
District Attorney, Second Judicial District, Colorado

**Ryan Mears**  
Prosecuting Attorney, Marion County, Indiana

**Brian Middleton**  
District Attorney, Fort Bend County, Texas

**Stephanie Morales**  
Commonwealth's Attorney, Portsmouth, Virginia

**Michael W. Morrissey**  
District Attorney, Norfolk County, Massachusetts

**Marilyn J. Mosby**  
State's Attorney, Baltimore City, Maryland

**Jody Owens**  
District Attorney, Hinds County, Mississippi

**Joseph Platania**  
Commonwealth's Attorney, City of Charlottesville, Virginia

**Bryan Porter**  
Commonwealth's Attorney, City of Alexandria, Virginia

**Karl A. Racine**  
Attorney General, District of Columbia

**Kwame Raoul**  
Attorney General, Illinois

**Rachael Rollins**  
District Attorney, Suffolk County, Massachusetts

**Jeff Rosen**

District Attorney, Santa Clara County, California

**Ellen Rosenblum**

Attorney General, Oregon

**Marian T. Ryan**

District Attorney, Middlesex County, Massachusetts

**Dan Satterberg**

Prosecuting Attorney, King County, Washington

**Mike Schmidt**

District Attorney, Multnomah County, Oregon

**Josh Shapiro**

Attorney General, Pennsylvania

**Daniella Shorter**

District Attorney, 22<sup>nd</sup> Judicial District, Mississippi

**Carol A. Siemon**

Prosecuting Attorney, Ingham County, Michigan

**Jack Stollsteimer**

District Attorney, Delaware County, Pennsylvania

**David E. Sullivan**

District Attorney, Northwestern District, Massachusetts

**Shannon Taylor**

Commonwealth's Attorney, Henrico County, Virginia

**Raúl Torrez**

District Attorney, Bernalillo County, New Mexico

**Gregory Underwood**

Commonwealth's Attorney, City of Norfolk, Virginia

**Matthew Van Houten**

District Attorney, Tompkins County, New York

**Cyrus R. Vance, Jr.**

District Attorney, New York County, New York

**Phil Weiser**

Attorney General, Colorado

***\*\*Additional elected prosecutors interested in joining the statement should contact FJP Executive Director Miriam Krinsky at [mkrinsky@fairandjustprosecution.org](mailto:mkrinsky@fairandjustprosecution.org) to be added.***