IN THE UTAH SUPREME COURT

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BRIEF OF *AMICUS CURIAE* INDEPENDENT WOMEN'S LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Independent Women's Law Center ("IWLC") is a project of Independent Women's Forum, a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic issues. Independent Women's Forum promotes policies that advance women's interests by expanding freedom, encouraging personal responsibility, and limiting the reach of government. IWLC supports this mission by advocating for equal opportunity, individual liberty, and respect for the rule of law. IWLC agrees with appellants that sexual assault is not health care and submits this brief to highlight the serious problem of sexual abuse in the medical profession and to detail the harm sexual assault causes its victims, which renders it the antithesis of any medical care.[1]

SUMMARY

Sexual assault does not constitute health care under any plausible definition of that term, and nothing in this Court's precedent interpreting the Utah Health Care Malpractice Act ("Malpractice Act" or "Act") or medical guidelines governing care provides otherwise. In fact, sexual assault is diametrically opposed to health care: rather than helping patients,

[1] Counsel for all parties have received timely notice of IWLC's intent to file this brief. Plaintiffs and Defendant Intermountain Healthcare, Inc. dba Utah Valley Hospital have consented to the filing of this brief, but Defendants David H. Broadbent, M.D. and HCA Healthcare, Inc., dba MountainStar Healthcare have not. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, has made any monetary contribution toward the preparation or submission of this brief.

it causes significant physical and psychological harm. Nor does sexual assault become related to health care when it is committed by an obstetrician-gynecologist. This Court should reverse the decision below and hold that sexual assault is not health care as defined by the Malpractice Act.[2]

ARGUMENT

I. SEXUAL ASSAULT IS NOT HEALTH CARE UNDER ANY PLAUSIBLE DEFINITION OF THAT TERM.

A. Nothing in Utah Precedent Supports Defendants' Claim that Dr. Broadbent's Sexual Assault of Plaintiffs Constitutes Health Care.

The district court held that "Dr. Broadbent provided 'health care' to Plaintiffs within the meaning of" the Malpractice Act. Order Granting Defs.' Mot. to Dismiss 15 ("Order"). That was error. When interpreting a statute, this Court looks to the "plain language" of the

[2] The Legislature recently passed a bill that, if signed by the Governor, will amend the Malpractice Act to make clear that "health care" does not include an act that "is sexual in nature" even if the act was "committed under the auspice of providing professional diagnosis, counseling, or treatment" and even if "at the time the act occurred, the victim believed that the act was for medical or professionally appropriate diagnosis, counseling, or treatment." S.B. 247, 65th Leg., 2023 Gen. Sess. (Utah 2023). This ratification of the proper interpretation of the Malpractice Act should be celebrated. It should not, however, be taken as legislative recognition that the district court's erroneous interpretation of the Act was correct under its prior language. *See, e.g.*, *State v. Bryant*, 965 P.2d 539, 546 (Utah Ct. App. 1998) (quoting 1A Norman J. Singer, *Sutherland Statutory Construction* § 22.01 (5th ed.1993)) ("when a statute is ambiguous, amendment of the statute may indicate a legislative purpose to clarify the ambiguities in the statute rather than to change the law"). And regardless whether the Legislature's amendment becomes law, this case remains critically important. The amendment covers only acts of a sexual nature. S.B. 247, 65th Leg., 2023 Gen. Sess. (Utah 2023). This Court's interpretation of the Act—including what constitutes "treatment" or what actions may be "related to" health care generally—will thus have consequences not only for the scores of plaintiffs in this case, but also for others who seek to hold physicians liable for their criminal and tortious acts—including, perhaps, victims of other types of criminal, intentional harm.

law, not "in isolation," but in "the relevant context of the statute (including, particularly, the structure and language of the statutory scheme)." *Scott v. Wingate Wilderness Therapy, LLC*, 2021 UT 28, ¶ 2, 493 P.3d 592 (citing *Olsen v. Eagle Mountain City*, 2011 UT 10, ¶ 9, 248 P.3d 465). If a "proposed reading" of a statute "would lead to absurd results," this Court will reject it. *Dowling v. Bullen*, 2004 UT 50, ¶ 11, 94 P.3d 915.

In *Dowling*, therefore, this Court recognized that the Malpractice Act would not apply to a patient's tort claim for conversion based on a physician stealing her wallet during an appointment. *Id.* The Court reasoned that "the stated purpose of the [Malpractice Act] is to alleviate health care costs via the establishment of a fixed window of time 'in which actions may be commenced against health care providers[,] while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated.' . . . . Its purpose is not to confer the benefit of a shorter statute of limitations upon medical professionals whose alleged transgressions are only tangentially related to their provision of health care services." *Id.* As the Court later explained in *Scott*, "[t]heft cannot reasonably be said to be an act or treatment 'for, to, or on behalf of' the patient, nor in the course of or 'during the patient's medical care, treatment or confinement,'" because "[t]here is no conceivable medical or health purpose of theft; nor is theft an omission of or a negligent version of an act that does have a medical or health purpose." 2021 UT 28 ¶ 69.

The same is true here. The district court identified "no conceivable medical or health purpose of" sexual assault. *See id.* On the contrary, as explained below, sexual assault often leads to negative medical outcomes. Nor is sexual assault "an omission of"

or "negligent version" of an act that does have a medical purpose. *See id.* Sexual assault is a crime, committed "with the intent to arouse or gratify the sexual desire" of the perpetrator or "with intent to cause substantial emotional or bodily pain." Utah Code § 76-5-404 (defining "forcible sexual abuse"). That was true here, where Plaintiffs specifically alleged in their complaint that they were injured by "unlawful actions Broadbent performed for no other reason than his own sexual gratification." Br. for Plaintiffs-Appellants 6 (quoting R. 43-44, ¶¶ 76-78). Those allegations must be accepted as true for purposes of Defendants' motion to dismiss. *See State v. Apotex Corp*., 2012 UT 36, ¶ 3, 282 P. 3d 66 (quoting *Peck v. State*, 2008 UT 39, ¶ 2, 191 P.3d 4) ("On appeal from a motion to dismiss, we review the facts only as they are alleged in the complaint. We accept the factual allegations as true and draw all reasonable inferences from those facts in a light most favorable to the plaintiff."). Simply put, Plaintiffs would not have needed to include a "Content Warning" at the beginning of their brief before this Court had they been provided with health care, rather than brutally assaulted. Br. for Plaintiffs-Appellants 1.

It is unsurprising, therefore, that medical professional liability insurance policies often exclude sexual assault—and other criminal and intentionally harmful acts—from coverage. *See*, *e.g.*, *Rivera v. Nevada Med. Liab. Ins. Co.*, 814 P.2d 71, 72-74 (Nev. 1991) (holding sexual assault was not covered by a policy that excluded claims resulting from (1) "the performance of a criminal act"; (2) acts "intended . . . to inflict injury or damage"; or (3) "sexual assault"); *Chicago Ins. Co. v. Manterola*, 955 P. 2d 982, 986 (Ariz. Ct. App. 1998) (holding that "the sexual acts exclusion of the [medical malpractice] policy at issue does not violate Arizona public policy"). Indeed, "[t]he average law-abiding professional

would not desire to pay more so that the policy would cover their own criminal or intentionally tortious conduct." *Rivera*, 814 P.2d at 74. Insurers do not need the Malpractice Act to protect them from later-filed claims of sexual assault, therefore; they can (and often do) exclude those claims from coverage in the first instance.

That frequent exclusion confirms that sexual assault does not "relate to" or "arise under" healthcare for the purposes of the Malpractice Act, which was expressly enacted to limit the time that malpractice actions can be commenced "to a specific period for which *professional liability insurance premiums* can be reasonably and accurately calculated." Utah Code § 78B-3-402(3) (emphasis added). As in *Dowling,* then, Defendants' interpretation of the Act is not "consistent with either the plain language or the legislative intent." *Dowling*, 2004 UT 50, ¶ 11. "[I]n keeping with [this Court's] obligation to avoid statutory constructions that 'render some part of a provision nonsensical or absurd,'" the Court should reject Defendants' strained interpretation of the Act. *Id.* (quoting *Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980)).

B. Medical Ethics Prohibit Sexual Assault.

The ethical rules governing the practice of medicine likewise confirm that sexual assault does not constitute health care in any way, shape, or form. Under the Hippocratic Oath, doctors pledge that they "will abstain from every voluntary act of mischief and corruption; and, further from the seduction of females or males, of freemen and slaves."[3]

[3] Vera Clemens et al., *#patientstoo—Professional Sexual Misconduct by Healthcare Professionals Towards Patients: A Representative Study*, 30 Epidemiology & Psychiatric Sci. 1, 1 (2021).

In this way, "the exclusion of sexually motivated contact with patients has been existing for over 2000 years."[4]

That prohibition exists for good reason: sexual assault causes victims significant medical harm. For example, one study found that "people exposed to SA [sexual assault] were significantly more symptomatic than unassaulted comparisons across a range of forms of psychopathology, including" anxiety, depression, bipolar conditions, disordered eating, obsessive-compulsive conditions, trauma conditions including posttraumatic stress disorder, and substance abuse and dependence.[5] Another review "found that 73-82% of sexually assaulted adults develop fear/anxiety, 12-40% reported generalized anxiety, 17-65% evidenced PTSD, 13-49% developed alcohol dependence, and 28%-61% used drugs."[6] Sexual assault is thus the antithesis of health care: it harms, rather than heals.

Yet sexual assault remains a serious problem within the medical profession. "Anonymous surveys of physicians estimate that 3.3-14.5% of physicians have performed PSM [professional sexual misconduct]."[7] One study of ethical violations in medicine (including sexual assault) found that "nearly all cases involved *repeated* instances (97%)

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[4] *Id.*

[5] Emily R. Dworkin, *Risk for Mental Disorders Associated with Sexual Assault: A Meta-Analysis*, 21 Trauma Violence & Abuse 1011, 1011 (2020).

[6] *Id.* (citing Rebecca Campbell et al., *An Ecological Model of the Impact of Sexual Assault on Women's Mental Health*, 10 Trauma Violence & Abuse 225, 225-26 (2009)).

[7] Clemens, *supra* note 3, at 4.

of intentional wrongdoing."[8] Another determined that "physicians disciplined for sex-related offenses were more likely to practice in the specialties of . . . obstetrics and gynecology," among others.[9] Plaintiffs' case, unfortunately, is not an outlier. That makes it critical that "health care" as defined by the Malpractice Act is interpreted correctly—and not absurdly—for the countless patients that have been victimized by predatory physicians.

II. SEXUAL ASSAULT DOES NOT BECOME HEALTH CARE WHEN COMMITTED BY AN OBSTETRICIAN-GYNECOLOGIST.

As the district court acknowledged, Order 10, this Court has "expressly rejected the notion that the [Malpractice] Act applies to 'any' and 'every' act a health care provider performs." *Scott v. Wingate Wilderness Therapy, LLC*, 2021 UT 28, ¶ 32 (citing *Dowling v. Bullen*, 2004 UT 50, ¶ 11). The district court also reasoned that the sexual assault alleged in this case would not constitute health care if committed by doctors practicing in another specialty, such as podiatry, explaining that "[a] layperson would understand that the alleged misconduct here would not be necessary for, *or related to*, medical treatment regarding podiatry." Order at 17 (emphasis in original).

But the same is true for *any* specialty, including obstetrics and gynecology: a layperson would understand that sexual misconduct is not "necessary for" or "related to"

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[8] James M. DuBois et al., *Serious Ethical Violations in Medicine: A Statistical and Ethical Analysis of 280 Cases in the United States from 2008-2016*, 19 Am. J. Bioeth. 16, 16 (2019) (emphasis added).

[9] Christine E. Dehlendorf & Sidney M. Wolfe, *Physicians Disciplined for Sex-Related Offenses*, 279 J. Am. Med. Ass'n 1883, 1883 (1998).

that practice. Again, sexual assault is a crime, committed with malicious intent. Nothing of that sort is "necessary for" or "related to" the practice of any type of medicine.

The district court nonetheless suggested that sexual assault is "related to" health care performed by obstetricians-gynecologists because "OBGYNs commonly examine sensitive, otherwise private areas of a woman's person." *Id.* at 16. But sexual assault and gynecological care are not related to each other simply because they may involve the same parts of an individual's anatomy. And assault is not treatment, no matter whether the abuser is an obstetrician-gynecologist, a podiatrist, a pediatrician, or any other kind of doctor.

Other courts' decisions recognize this commonsense principle. *See, e.g.*, *D.D. v. Ins. Co. of N. Am.*, 905 P.2d 1365, 1368, 1370 (Alaska 1995) (adopting the "majority rule" that that "a gynecologist's sexual assault of his patient is not 'medical treatment,'" and explaining that the gynecologist "did not injure [the patient] by treating her; he injured her during the time he was supposed to be treating her"); *St. Paul Fire & Marine Ins. Co. v. Mori*, 486 N.W.2d 803, 807-09 (Minn. Ct. App. 1992) (family practitioner's sexual assault of patients during the course of pelvic exams did not "aris[e] out of" the doctor's provision of medical treatment).[10] The district court's assertion that *Princeton Insurance Company*

[10] One of the only cases that *did* draw a distinction between sexual abuse committed by gynecologists and that committed by other doctors, *St. Paul Fire & Marine Ins. Co. v. Asbury*, 149 Ariz. 565 (Ct. App. 1986), has been almost universally disparaged by other courts. *See Princeton Ins. Company v. Chunmuang*, 151 N.J. 80, 91-92 (1997); *Snyder v. Major*, 789 F. Supp. 646, 650 (S.D.N.Y. 1992), *on reargument,* 818 F. Supp. 68 (S.D.N.Y. 1993) (whether sexual assault falls within the scope of healthcare cannot rest upon such "amorphous boundaries" as whether a "sexual incident aris[es] out of treatment of

v. Chunmuang supports departing from that straightforward proposition misreads that case. *See* Order 15. In fact, the *Chunmuang* court specifically declined to make a distinction based on the specialty of the defendant, not only when reviewing the criminal exclusion of the insurance policy at issue, as Appellants explain, Br. for Plaintiffs-Appellants 39, but also for purposes of determining of whether sexual assault was a "medical incident." *Princeton Ins. Company v. Chunmuang*, 151 N.J. 80, 97 (1997). The court expressly stated that "we do not find it necessary to rely on the reasoning . . . that a sexual assault during a gynecological examination is more intertwined with the professional services sought than a sexual assault in the course of another type of physical examination." *Id.* The district court's reasoning to the contrary in this case was flawed and unsupported. This Court should reject it and instead hold that the abuse Plaintiffs suffered was not health care in any sense of the word, including as that term is used in the Malpractice Act.

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erogenous zones"); *St. Paul Ins. Co. of Illinois v. Cromeans*, 771 F. Supp. 349, 353 (N.D. Ala. 1991) (calling *Asbury*'s distinction on the basis of whether "the physician is treating a *sexual* part of the patient's body" "illogical"); *Physicians Ins. Co. v. Pistone*, 555 Pa. 616, 623 (1999) ("to hold that a urologist who inappropriately touches a patient's genitalia during an examination is covered pursuant to a professional liability policy while a cardiologist who engages in the same activity is not, has no basis in logic"); *New Mexico Physicians Mut. Liab. Co. v. LaMure*, 116 N.M. 92, 97 (1993) ("we are uncertain of [the *Asbury*] test's workability or its support in public policy").

CONCLUSION

For the reasons set forth in this brief and the Brief of the Plaintiffs-Appellants, the Court should reverse the decision of the district court and hold that the sexual assault alleged by Plaintiffs does constitute "health care" as defined by the Malpractice Act.

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CERTIFICATE OF SERVICE

I certify that on the 15 day of March 2023, the foregoing document was filed with the Court and true and accurate copies of the same were served on counsel of record by email.

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of Utah Rule of Appellate Procedure 25(f), as it contains 2,683 words, excluding the parts of a brief exempted from this limit—that is, the table of contents, the table of authorities, and required certificates of counsel.

This brief complies with Utah Rule of Appellate Procedure 21(h), as it contains no non-public information as defined by the rule.

I certify to the best of my knowledge that the information in this certification is true and accurate.

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