

STATE OF MICHIGAN
IN THE 67TH DISTRICT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

NICOLAS LEONARD LYON,

Defendant.

Case No. 17T-01355-FY

Hon. David J. Goggins

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AMICUS CURIAE BRIEF FOR THE
ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS

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STATEMENT OF INTEREST

I. ASTHO is a national nonprofit representing public health agencies and professionals across the country.

Friend of the Court the Association of State and Territorial Health Officials (“ASTHO”) is a national nonprofit organization representing public health agencies in the United States, the U.S. Territories, and the District of Columbia, as well as over 100,000 public health professionals employed by these agencies. Our members include epidemiologists and other scientific and medical experts, academics, and experienced public health administrators. ASTHO’s mission is to support, equip, and advocate for state and territorial health officials in their work of advancing the public’s health and well-being. As part of that mission, ASTHO advises its members and assists in policy development at all levels of government to support best practices in public health.

II. This prosecution greatly concerns ASTHO and its members, who fear that the criminalization of professional, discretionary decisionmaking will harm, not help, public health.

ASTHO has a significant interest in the outcome of this case because a fundamental issue before the Court is whether ASTHO’s members—public health officials—should face criminal charges and trial for their professional decisions. In seeking to punish public health officials for their administration of their professional responsibilities, this case could cause a threat to public health nationwide. As discussed below, this risk would create a serious obstacle to the life-and-death decisions that public health officials inevitably face when a serious public health crisis arises.

In providing this analysis to the Court, ASTHO has drawn on the extensive clinical, epidemiological, and programmatic expertise of its members. Its board has carefully considered the allegations in the case and concluded that criminal prosecution of public health administrators’ responses to public health crises presents a major risk to public health practice and the public welfare.

INTRODUCTION

Criminalizing discretionary decisionmaking in a public health crisis will impair, rather than advance, the quality of response to such crises. In the midst of a public health crisis, public health decisionmakers need room to think and respond rationally and creatively to the specific threats before them. Criminally charging public health officials for their professional decisions will impair the decisionmaking of those officials, and the current prosecution illustrates why. The State claims that Director Lyon had “a duty to notify the public of any and all serious health concerns.” **Exhibit 1**, Probable Cause Statement at 9. But public health decisionmaking does not fit within a one-size-fits-all model, such that public health officials have an unbending duty to “notify the public of any and all serious health concerns,” regardless of whether such notice may be unwarranted or even harmful to public health. Depending upon the circumstances, unthinking public notice could cause widespread panic, render impossible meaningful communication about public health risks, and impede proper efforts to address the crisis at hand. If public health and criminal law are to coexist and work together to protect the public welfare, public health officials must be able to use their professional judgment to find the correct balance between the public’s right to know about potential public health threats and the need for public health officials to investigate and effectively respond to such threats. This type of discretionary and nuanced analysis cannot thrive in the face of criminal liability and certainly does conform to the prosecution’s mandatory duty of public notice.

We respectfully urge the Court to halt this criminalization of public health practice.

ARGUMENT

I. The Theory of the Case Violates Fundamental Criminal Law Principles.

A. Criminalizing public health analysis would be impermissibly vague.

One of the bedrock tenets of criminal law “is that conduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal.” § 1.2(b) Nature of criminal law—Basic premises, 1 Subst. Crim. L. § 1.2(b) (3d ed.); *id.* § 1.2(e) Purpose of criminal law—Prevention of harm (“Of course, not all harmful conduct is criminal. There is the basic requirement that harmful conduct, to be criminal, must be prohibited by law.”). Due process does not permit a law so vague that a person cannot understand its meaning and application. See *Connally v Gen Const Co*, 269 US 385, 391; 46 S Ct 126; 70 L Ed 322 (1926).

The concept of a criminally enforceable duty in public health decisionmaking is too vague and uncertain to satisfy due process requirements, absent willfully improper conduct. Effective public health administration involves scientific ambiguity, debate, calm crisis management, and unflinching evaluation of how to respond better in the future. Because science is constantly evolving and the events in a crisis situation can change rapidly, public health officials must make decisions with information that is incomplete or subject to change. For example, the nature and means of transmission of an illness may be uncertain, as was the case with AIDS for many years, or Lyme disease, or even Legionnaires’ disease. These gaps must be filled with the scientific and experiential expertise of public health officials until more information is gathered.

This principle applies with equal force to communicating with the public. “The basis for responsible public health communication is scientific knowledge and consensus. ... Practitioners have a responsibility to examine the quality of the available scientific information *prior to performing any communication activity.*” David E. Nelson et al., *Communicating Public Health Information Effectively: A Guide for Practitioners* 609 (Kindle ed. 2002) (emphasis added). This

is a basic tenet of public health. Sometimes public disclosure is important because the means of transmission is known and is largely preventable with simple precautionary measures. An example of this would be the Zika virus and mosquito control. But often, and especially in a crisis, the means of transmission and proper precautions are unknown. If there is no public health justification for informing the public of a problem that has no identified source and no identified precautions for the public to take, notification of the public may be unnecessary or even harmful, causing hysteria, false reports of additional cases, and other counterproductive reactions.¹

Given this type of evolving analysis, pinpointing when a public health decision becomes criminal is untenable and thus violates due process. This prosecution provides no guidance as to when a decision to pursue scientific inquiry in lieu of rash public announcements is criminal and when it is merely open to simple criticism or debate. Public health officials have no way of knowing which conduct and what decisions, made in the ordinary course of performing their duties, would cross the invisible line. The little guidance the State provides—mandatory, immediate disclosure “of any and all serious health concerns,” without any guidance as to what constitutes a “serious health concern”—is overly simplistic, at odds with the realities of public health crisis management, and consequently unprecedented. The careful deliberation,

¹ This case falls firmly into the latter category. As discussed in more detail in [Epi Amicus], Legionnaires’ disease cannot be transmitted person to person. In order to cause illness, *Legionella*, the bacteria responsible for causing Legionnaires’ disease, usually must be inhaled, which requires aspirating or inhaling microscopic droplets of infected water. *Control of Communicable Diseases* 336 (David L. Heymann, MD, ed. 2015). Thus, responding to a Legionnaires’ disease outbreak requires identifying the physical source of the contaminated water. *Id.* Until the source is identified, no action can reduce the risk. The most typical sources of Legionnaires’ disease are the industrial heating and cooling systems of hospitals or hotels. *Id.*; *Legionella (Legionnaires’ Disease and Pontiac Fever)*, Centers for Disease Control and Prevention, <https://www.cdc.gov/legionella/about/causes-transmission.html> (last visited June 12, 2018). Public health officials reasonably look for a source in places known to present potential risks, because otherwise the potential sources are overwhelming, as water is ubiquitous.

investigation, and judgment of public health officials is inherently discretionary and subjective. A criminal courtroom should be the last place to decide questions of sound science and epidemiology. Incarceration should not be one of the consequences for making professional decisions grounded in concern for how best to serve the public.

B. Post hoc criminal evaluation of public health decisions is unjust.

Criminalization of public health decisions poses a second problem. Even if an official makes a decision without complete information—which often is necessary—the analysis of the available information can take time. Therefore, the immediate focus during a public health event is to identify the source of the harm and keep it from spreading to other areas. Public health officials must focus their energy and resources on interventions that will reduce risk to as many people as possible. Whether an intervention will reduce the risk to the public depends on the type of threat and the specifics of the situation. In hindsight, another response may be shown to have been more effective, but officials typically have no way to know for sure. Any attempt to impose criminal punishments for such actions likely would be tainted by information discovered after the fact, when there is more complete information. We do not see how public health decisions can be equitably or effectively policed in hindsight using the unambiguous and inflexible framework of criminal law.

Of course, sometimes decisionmakers make mistakes. This is inevitable, and there are adequate existing institutional means to address such errors. Among other things, there is a culture within the public emergency response system pursuant to which, following an emergency, a “hot wash” does or should occur to assess what could have been done better, as there will always be room for improvement. This framework has historically supported positive evolution in public health response. It preserves the discretion needed during a crisis while recognizing the need to identify lessons learned to inform future responses. Imposing criminal liability, post hoc, for

decisions that occurred in the middle of a crisis, by contrast, would not improve decisionmaking, but will chill effective response and undermine the type of honest and candid post-event analysis that is both commonplace and essential to improving our public health systems.

For example, in this case, whether the harm could have been prevented using other means is highly debated. Were there effective precautionary measures that the public could have taken based on the information available at the time? This is a question the public health community is seeking to answer through scientific means. On its face, such an analysis is ill-suited to resolution in a courtroom. The scientific basis for public health theory and practice, which requires exploration and elimination of potential answers through research and analysis, would be hampered by the threat of prosecution, and subjecting public health officials to criminal sanctions for engaging in this necessary and invaluable analysis would be patently unjust.

C. The prosecution of health officials for their decision not to publicize an issue of public health is unprecedented and violates due process.

This prosecution crosses the long-settled line protecting public officials against punishment for their performance of their duties. An official's exercise of judgment, made in good faith, has never been subject to criminal sanctions in this country. Reversing that principle now, in a field rife with uncertainty and in a case where there still are no clear answers, would not only violate due process, but it would make it impossible for public health officials to perform their duties responsibly. Instead of basing decisions on what is best for the public, the officials would be forced to consider whether a decision, regardless of its merit, would invoke a criminal charge. By any perspective, this prosecution is unprecedented. Even under civil standards, we are unaware of any case that has ever imposed liability on a public health official under comparable facts. Director Lyon had no reason to know that his decisions were wrongful, let alone potentially criminal. The law does not permit such a prosecution.

Applying a criminal statute to the regular exercise of public duties, without fair notice, violates due process. See *Cline v Frink Dairy Co*, 274 US 445, 465; 47 S Ct 681; 71 L Ed 1146 (1927) (holding state criminal statute unconstitutional because it would “hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge, involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result”); *United States v Cohen Grocery Co.*, 255 US 81, 89; 41 S Ct 298; 65 L Ed 516 (1921) (same; striking statute where criminal enforcement “leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against” as the very “to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury”).

Even in a clear case of misconduct, criminal sanctions are not warranted unless the conduct is forbidden by law that gives advance warning that such conduct is criminal. See *Morden v Grand Traverse Co*, 275 Mich App 325, 343; 738 NW2d 278 (2007) (explaining that a doctor was entitled to immunity in a suit based on specific treatment decisions alleged to violate the Constitution “[b]ecause there was no court precedent predating [the doctor’s] actions that clearly established that such actions by a psychiatrist constitute deliberate indifference”); see also *Harlow v Fitzgerald*, 457 US 800, 818; 102 S Ct 2727; 73 L Ed 2d 396 (1982) (“If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.”). The type of surprise criminal liability in this case violates basic

principles of fairness and due process for any individual, but even more so for public officials, who typically rely on immunity from civil suits in order to best perform their jobs.

D. The prosecution demonstrates the motivating purposes of civil immunity for government officials.

The very notion of imposing criminal punishment for decisions that have never been deemed wrongful by any court, criminal or civil, would upend basic immunities afforded to public officials under the common law. Public officials have qualified immunity protecting them from civil liability for actions or decisions that, in hindsight, were not clearly established as wrongful at the time they occurred. By extension, this limited protection applies to criminal law as well.

The core reason for civil immunity is to protect officials and allow them to exercise their best judgment in performing their duties. See *Harlow*, 457 US at 806 (“As recognized at common law, public officers require this [immunity] protection to shield them from undue interference with their duties and from potentially disabling threats of liability.”); *id.* at 807 (“[H]igh officials require greater protection than those with less complex discretionary responsibilities.”); see also *Sayre v City of Ann Arbor*, unpublished opinion per curiam of the Court of Appeals, issued April 2, 2000 (Docket No. 212632) (explaining that qualified immunity “gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law”) (internal quotation marks and citations omitted), attached as **Exhibit 2**.

Courts have long recognized that the threat of civil liability and trial poses great harm to an official’s service to the public, including “distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.” *Harlow*, 457 US at 816-17. This is especially true regarding “judgments surrounding discretionary action [which] almost inevitably are influenced by the decisionmaker’s experiences, values, and emotions.” *Id.* Absent clear and flagrant misconduct, criminalizing a public officer’s exercise of

judgment has been consistently deemed inappropriate. *See, e.g., People v Coutu*, 235 Mich App 695, 705; 599 NW2d 556 (1999) (explaining that the common law crime of official misconduct requires improper or corrupt motives or violations of statutory duties); *id.* at 706 (“[The crime of official misconduct] does not encompass erroneous acts done by officers in good faith or honest mistakes committed by an officer in the discharge of his duties.”). The exercise of judgment makes this case distinct from other misdemeanor crimes in which officials willfully neglect to perform their duties. *See* MCL 750.478 (prohibiting “willful” neglect by a public official); MCL 752.11 (West) (prohibiting “wilfully and knowingly fail[ing] to uphold or enforce the law”); MCL 750.481 (West) (prohibiting an officer from “wilfully” neglecting to execute process). The prosecution’s theory of the case leaves no room for professional judgment.

There could conceivably be a case in which a public health officer willfully fails to perform a duty or so endangers the public health through willful acts as to warrant criminal sanctions. For example, if a public health official learned of a confirmed case of the Ebola virus in a local hospital but deliberately took no precautions to warn the medical community or other individuals who had had close contact with the patient, the official’s inaction would constitute knowing indifference to the serious risk of fatality. From a medical perspective, the failure to warn would be inexcusable. So, too, would a failure to isolate the patient from access to unprotected contact with the public. *See Control of Communicable Disease* 177 (stating that proper patient management for Ebola requires “immediate strict isolation in a private hospital room away from traffic patterns” and extensive use of isolation procedures, among other precautions). This type of behavior would truly present an official who either is “asleep on the job” or operating with total disregard for the safety of the community. Prosecution for such a dereliction of duty is not out of bounds, as the existence

of misconduct is indisputable, and the proper course of action would have been clearly established at the time the dereliction occurred.

But the response to Legionnaires' disease is not as clear-cut. *See id.* at 336 ("Two or more cases of legionellosis occurring among travelers to the same destination during a 1-year period or single case of laboratory-confirmed health care-associated Legionnaires' disease *should trigger additional case finding measures and an environmental assessment.*") (emphasis added). Unfortunately, during this assessment period, people can continue to contract the disease. This outcome, though tragic, does not demonstrate willful neglect on the part of public health officials. Instead, it is a consequence of the disease at issue and the way it must be addressed. Punishing public health officials because the characteristics of a disease made it difficult to ascertain the proper course of action serves no societal purpose. Liability should not attach where there is nothing an official should have done differently. Nor should the response to this problem be to eliminate the ability of public health officials to use their professional judgment. Such a drastic response would cause only more harm.

II. This Prosecution Threatens the Core Function of Public Health Nationwide.

The process of investigating the common sources of an outbreak and informing the public of how best to avoid transmission is fundamental to public health crisis management. Deciding how best to inform the public requires a careful balance of numerous considerations, with one overriding objective of protecting public health. If this prosecution is allowed to proceed, it will have an immediate effect on public health officials and the health of the public. Public health officials will need to notify the public of any and all public health threats regardless of whether such communication is advisable or beneficial. There are numerous risks to the public inherent in

subjecting officials to criminal liability for exercising their judgment in performing this crucial analysis.

First, for public health messages to be effective, they must be correct. Otherwise, there is a risk of public mistrust. But the messages often will *not* be correct when information is lacking and public health officials are unable to use their skills and judgment without fear of prosecution. As discussed above, the investigatory process cannot occur effectively when faced with potential criminal punishment for errors. Without proper investigation, the risk of error is significant.

Second, public health messages must be strategic. Inundating the public with premature warnings will diminish the effect of truly urgent information. Accordingly, officials must be given wide latitude to determine what needs to be said publicly, and when.

Finally, public health messages must consider the public's reaction and how to reduce the likelihood that the response will overshadow the message. Public notifications can have tremendous costs to public health even if the notice is correct. From AIDS to Ebola to Zika, we have seen repeated examples where public fear of the unknown impedes sound public health decisionmaking and intervention. The reality of public health decisionmaking is that members of the public may become angry about public health decisions or scared about the implications. Sometimes, public health officials must limit individual freedom (such as limiting travel to or from areas of extreme concentration of a disease), cause financial harm (such as when a restaurant or public attraction must be closed for health violations), or make strategic use of resources (such as determining where to concentrate testing or vaccinations). For example, if a public health official warns that a particular hospital is the source of a contagious disease outbreak, patients may refuse to receive care there, even though the outbreak has been safely contained. Although some patients may be able to obtain care elsewhere, others will not be able to do so, risking further negative

outcomes (perhaps even greater than those posed by the original threat). It is difficult enough for public health officials to resist the natural temptation to bow to the pressures of political influence or popular demand without having to consider whether the power of the state will be used to punish them for their mistakes. Criminal liability would further polarize the issues by adding the threat of punishment and incarceration in an atmosphere already thick with intense public scrutiny, heated emotions, and life-or-death consequences. This sends a chilling effect throughout the public health community.

There also is a real risk that such prosecutions will be influenced by the public's demand and the resulting political pressures. In situations where people are likely to be harmed, regardless of the decision; where a leader must make an unpopular decision; or where a leader must make a decision before all the information is obtained, the temptation to scapegoat the decisionmaker is always present. People understandably want an explanation of why a negative outcome happened and find someone to blame. But public health crises rarely present such clear-cut answers.

This case certainly is no exception. There is reasonable outrage about what happened with Flint's water supply. The public and the State seek to hold someone responsible. This is evident in the charging documents, which spend a disproportionate amount of time discussing the unrelated issue of lead in the water. See Probable Cause Statement at 2, 5. But criminal sanctions are not an appropriate mechanism to cure a system-wide failure, particularly criminal charges focusing on a tangential issue. The broad scope of the charging documents evinces the State's intent to use this prosecution as a political deflection, rather than to punish the alleged acts of individuals. In the process, though, the State is risking great harm to public health practice and society and eroding the protections necessary for officials to serve the public.

Had the officials in this case been required to announce that there had been instances of Legionnaires' disease, before determining the source of the outbreak or conducting a proper investigation, they could not have informed the public how to prevent transmission; they did not know. Speculation and panic would be almost certain. Had the officials made a "best guess" based on available research, they might have stated that Legionnaires' disease is commonly found in hotels and hospitals. This, in turn, would likely have caused the public to shun local hotels, causing wholly unnecessary grave economic harm to innocent businesses, or, even worse, to recklessly avoid hospitals, thereby *worsening* public health. Not only does the prosecution's theory of the case—that the transmission was through municipal water—indicate that such a warning would have been futile, it is entirely conceivable that the injured businesses or individuals would have sued and claimed that the official acted too quickly and made a mistake.

This type of amorphous liability is inappropriate for civil penalties, but it is frightening when the penalty sought by the State could be incarceration. Nor is there any reason for the State to limit prosecutions to communication. If this prosecution is permitted to go forward, any exercise of an official's discretion would carry the potential for criminal sanctions. The officials would face enormous pressure to shift their focus away from scientific analysis and toward reducing liability. Defensive public health practice inevitably would distort officials' responses to risks and their willingness to assess and reassess their decisions.

None of these considerations seek to diminish or obstruct the public's right to know about public health issues. Rather, they seek to ensure that the public is informed and educated in the most effective way possible, with the least amount of harm to other essential variables, such as

individual privacy, personal freedom, or public health resources. Ignoring these issues harms the public and ultimately distracts from the critical information public health officials need to convey.

For all of these reasons, the State's prosecution is at direct odds with basic tenets of public health regarding whether and when the public should be informed of public health hazards. Criminal prosecution is not the proper means of policing officials whose decisions apply core principles that guide public health administration. As national, state, and local experts in public health who must make decisions like these as part of our regular work, we are deeply concerned that the State is criminalizing our exercise of professional judgment.

CONCLUSION

The events at issue were tragic. But criminalizing a public health official's decision to analyze the situation before informing the public will not prevent these types of events from occurring again. Even in hindsight, there is no warning sign that, had it been recognized, should have caused officials to react differently. The nature of the situation, including the circumstances of the outbreak and the type of disease, required a cautious approach. The State's theory of the case ignores this reality and instead jeopardizes the practice of public health officials and the welfare of the people they serve.

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