

# Screwed But Not Even Kissed: The Parade of Reproductive and Economic Horribles Likely to Follow *Dobbs*

Deborah Machalow\*

## Abstract:

In the Supreme Court’s highly anticipated decision, *Dobbs v. Jackson Women’s Health Organization*, the Court overturned *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, discarding the constitutionally protected right to access abortion and turning access over to the states to legislate as they see fit. In doing so, the Court threw reproductive rights into complete disarray, endangered pregnant people’s health and lives, limited their ability to participate fully in society, and undermined the Court’s own legitimacy. In short, the repercussions and reverberations of this decision will be felt nationwide and much more broadly than most realize.

This Article seeks to predict and explore the reproductive and economic consequences of *Dobbs*. First, it examines future anti-abortion legislation, including the realistic possibility of a federal abortion ban, increased criminalization of pregnancy, and threats to contraception. Second, it describes much of the unnecessary pregnancy-related suffering caused by restrictive abortion laws, including unforeseen threats to fertility treatment, the physical and economic consequences of being denied a wanted abortion, challenges in treating pregnancy loss, and the empty promise of “life of the mother” and “medical emergency” exceptions.

In short, the *Dobbs* decision has opened the door to a parade of reproductive and economic horrors that most people did not expect or consider when thinking about abortion access. Some of these consequences are starting to come to the forefront. This Article seeks to enlighten and encourage the United States’ pro-choice majority to make abortion access a voting priority, as that is the only way to reverse course.

INTRODUCTION ..... 82

---

\* Deborah Machalow graduated *summa cum laude* from Indiana University Maurer School of Law in 2015 and *summa cum laude* from Stony Brook University in 2012. She would like to thank everyone who made publication of this Article possible, including family, friends, and *The Journal of Gender, Race & Justice* editorial team. The opinions and conclusions expressed herein are the author’s alone.

I. CIRCUMSTANCES SURROUNDING *DOBBS V. JACKSON WOMEN'S HEALTH*..... 84

*A. The Growing Divide Between Red States and Blue States Before Dobbs*..... 84

*B. The Dobbs Decision*..... 88

*C. Resulting Chaos and Further Violence*..... 89

II. FUTURE ANTI-ABORTION LEGISLATION..... 94

*A. Preventing Residents from Accessing Abortion in Other States* ..... 95

        1. Banning Travel to Other States for Abortion..... 97

        2. Penalizing Employers Offering Abortion Benefits to Employees..... 100

*B. Criminalizing Abortion Seekers and Those Experiencing Unintentional Pregnancy Loss*..... 101

*C. Federal Abortion Ban*..... 108

*D. Banning Emergency Contraception or Contraception More Broadly*..... 110

III. UNNECESSARY PREGNANCY-RELATED SUFFERING, DISABILITY, AND DEATH..... 115

*A. Unforeseen Threats to Fertility Treatment Banning Travel to Other States for Abortion* ..... 116

*B. Consequences of Being Denied an Abortion*..... 117

        1. Negative Health Outcomes Banning Travel to Other States for Abortion ..... 118

        2. Worse Outcomes for Children ..... 118

        3. Worse Professional and Economic Outcomes..... 119

        4. Consequences for Teenage Pregnancies ..... 123

*C. Forced Continuation of Non-Viable Pregnancies*..... 123

*D. Miscarriage Mismanagement*..... 126

*E. The Empty Promise of “Life of the Mother” and “Medical Emergency” Exceptions & Increased Maternal Mortality*..... 128

CONCLUSION..... 132

INTRODUCTION

In overturning *Roe v. Wade*, the Supreme Court has thrown reproductive

rights into complete disarray, endangered pregnant people’s lives, hampered their ability to engage fully in society, and undermined the Court’s own legitimacy.<sup>1</sup> While disheartening, the Court’s decision in *Dobbs v. Jackson Women’s Health Organization* was not unexpected as the current Court was assembled with the goal of overturning *Roe*. The writing was on the wall when the Supreme Court refused to enjoin the Texas Heartbeat Law long before the draft *Dobbs* opinion was leaked. Republican-controlled states began racing to restrict or ban abortion, while some Democratic-controlled states continued efforts to protect and expand access within their borders. *Dobbs* marks not the end of the “national controversy that has embittered our political culture,”<sup>2</sup> but rather the beginning of a new, more dangerous stage in the abortion wars.

While the Court stated that “[w]e do not pretend to know how our political system or society will respond to [the] decision overruling *Roe* and *Casey*,”<sup>3</sup> some consequences are clear. Without *Roe* guaranteeing abortion access nationwide, less than half the women<sup>4</sup> of reproductive age live in a state protecting abortion access<sup>5</sup> and “the number of legal abortions in the

---

<sup>1</sup> Zoha Qamar, *Americans’ Views on Abortion Are Pretty Stagnant. Their Views on the Supreme Court Are Not*, FIVETHIRTYEIGHT (July 1, 2022, 6:00 AM), <https://fivethirtyeight.com/features/americans-views-on-abortion-are-pretty-stagnant-their-views-on-the-supreme-court-are-not> [<https://perma.cc/D957-5JDY>] (“Strikingly, according to an NPR/PBS News Hour/Marist College poll conducted June 24-25, 57[%] of Americans said that overturning *Roe* was ‘politically motivated and not motivated by the law.’”); see also Craig Gilbert, *Abortion Decision Has Tanked Approval of the Supreme Court, but So Far There’s Little Evidence It’s Transforming Election, New Poll Finds*, MILWAUKEE J. SENTINEL (July 21, 2021, 5:02 AM), <https://www.jsonline.com/story/news/politics/analysis/2022/07/21/supreme-court-approval-plummets-after-overturning-roe-v-wade-marquette-poll/10090372002> [<https://perma.cc/8YZ9-ZXR>] (reporting that in July 2022, “38% of Americans approve of how the court is handling its job and 61% disapprove . . .” which are “the worst numbers this national poll has recorded”); *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RES. CTR. (Sept. 1, 2022), <https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling> [<https://perma.cc/C5W5-3BYV>] (“Americans’ ratings of the Supreme Court are now as negative as—and more politically polarized than—at any point in more than three decades of polling on the nation’s highest court.”).

<sup>2</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2241 (2022).

<sup>3</sup> *Id.* at 2279.

<sup>4</sup> The author recognizes that not every person capable of getting pregnant identifies as a woman and tries to use the phrase “pregnant person” where able. However, for simplicity’s sake or when quoting sources, the author sometimes uses the word “women,” but does not mean it in an exclusionary sense.

<sup>5</sup> *How State Abortion Laws Could Change if Roe Is Overturned*, N.Y. TIMES (June 3, 2022), <https://web.archive.org/web/20220604003737/https://www.nytimes.com/interactive/2022/06/03/us-abortion-laws-roe-v-wade.html> [<https://perma.cc/98EE-C2SG>] (showing 26.5 million women of reproductive age living in the twenty states and D.C. that have expanded or protected abortion access).

country [will] fall by at least 13[%].”<sup>6</sup> Those unable to access abortion legally in their home states will be left with two options: (1) bear unwanted children or (2) find another way to terminate their pregnancies.<sup>7</sup> This Article seeks to predict the parade of horrors that is likely to follow unless and until the pro-choice silent majority of United States voters intervene and permanently make abortion access a voting priority.<sup>8</sup>

This Article will begin with a discussion of the circumstances preceding the *Dobbs* decision, a high-level summary of the Court’s opinion, and the chaos immediately following its announcement. Then, this Article will predict the reproductive ramifications of *Roe*’s demise: First, this Article considers the impending cascade of Republican-led legislative efforts to stymie access to abortion and contraception, to further criminalize pregnancy, and even to institute a national abortion ban. Second, this Article will examine the pregnancy-related suffering and death that will result from states being able to restrict or ban abortion, including implications for infertility treatment; negative health, social, and economic consequences for involuntarily pregnant persons and their families; and increased maternal mortality. In short, those capable of getting pregnant are screwed but not even kissed. The situation will only get worse unless and until pro-choice citizens make abortion a voting priority and demand change.

## I. CIRCUMSTANCES SURROUNDING *DOBBS V. JACKSON WOMEN’S HEALTH*

### *A. The Growing Divide Between Red States and Blue States Before Dobbs*

Even before the Court released its decision in *Dobbs*, Republican-

---

<sup>6</sup> Claire Cain Miller & Margot Sanger-Katz, *What an America Without Roe Would Look Like*, N.Y. TIMES (Dec. 9, 2021), <https://www.nytimes.com/2021/12/05/upshot/abortion-without-roe-wade.html> [<https://perma.cc/HX4R-CUQ5>]. In the first two months following *Dobbs*, legal abortions fell by more than 10,000 procedures or 6%. Margot Sanger-Katz & Claire Cain Miller, *Legal Abortions Fell Around 6 Percent in Two Months after End of Roe*, N.Y. TIMES (Oct. 30, 2022), <https://www.nytimes.com/2022/10/30/upshot/legal-abortions-fall-roe.html> [<https://perma.cc/DN56-DZBG>].

<sup>7</sup> Cain Miller & Sanger-Katz, *supra* note 6.

<sup>8</sup> Admittedly, this Article only skims the surface since it focuses solely on reproductive healthcare and the impact on women’s role in society—the true consequences of the *Dobbs* decision could extend much further. See *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married persons to obtain contraceptives), *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (right to same-sex marriage)]. Because any substantive due process decision is ‘demonstrably erroneous,’ . . . we have a duty to ‘correct the error’ established in those precedents.”).

controlled states began taking aim at abortion access.<sup>9</sup> In fairness, the attacks began in earnest following the Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the Court adopted the “undue burden” standard for analyzing abortion regulations while upholding numerous provisions of the 1989 Pennsylvania Abortion Control Act.<sup>10</sup> Thereafter, “[s]tates seeking to regulate or restrict abortion had a new standard to meet, and a template for a law that met this standard,” resulting in the rapid spread of restrictions modeled on the Pennsylvania law challenged in *Casey*.<sup>11</sup> In addition to enacting laws specifically targeting regulation of abortion providers, 13 states enacted “trigger laws,” designed to immediately (or quickly) restrict access to abortion upon *Roe*’s overruling in the hope that the Court would eventually issue a decision like *Dobbs*.<sup>12</sup>

Attacks on abortion access intensified after the Supreme Court permitted the Texas Heartbeat Law to take effect in September 2021,<sup>13</sup> and reached a fever-pitch following the May 2, 2022 leak of the draft *Dobbs* decision.<sup>14</sup> During this period, multiple states considered or enacted Texas-style

---

<sup>9</sup> See, e.g., Caitlin Myers, *Measuring the Burden: The Effect of Travel Distance on Abortions and Births*, INST. LAB. ECON. 1 (2021) (“[T]he number of abortion clinics has declined in regions with the most legislative activity, by 27% in the Midwest and 20% in the South between 2011 and 2017.”); Nicole Blanchard, *1 of Idaho’s 3 Planned Parenthood Clinics Has Closed as Abortion Access Fears Grow*, IDAHO STATESMAN (June 9, 2022, 8:29 PM), <https://www.spokesman.com/stories/2022/jun/09/1-of-idahos-3-planned-parenthood-clinics-has-close> [<https://perma.cc/4E83-2PE8>].

<sup>10</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46, 876 (1992). Justice O’Connor’s lead opinion explained: “Only where state regulation imposes an undue burden on a woman’s ability to make this decision [to have an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”

<sup>11</sup> Rebecca J. Mercier et al., *TRAP Laws and the Invisible Labor of US Abortion Providers*, 26 CRITICAL PUB. HEALTH 77, 79 (2016).

<sup>12</sup> See Nate Cohn, *Do Americans Support Abortion Rights? Depends on the State*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/upshot/polling-abortion-states.html> [<https://perma.cc/D8JB-SF6C>] (identifying Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming as states with trigger bans). In some of these states, support for legal abortion is significantly underwater, while in others, opinions are more narrowly divided. In Louisiana, for example, support for legal abortion stood at -23%, while in Oklahoma it was at +5%. *Id.*

<sup>13</sup> *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2495–96 (2021); see Nina Totenberg, *Supreme Court Upholds New Texas Abortion Law, For Now*, NPR (Sept. 2, 2021, 12:20 PM), <https://www.npr.org/2021/09/02/1033048958/supreme-court-upholds-new-texas-abortion-law-for-now> [<https://perma.cc/C97D-ATUC>].

<sup>14</sup> Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/E77B-698T>].

heartbeat laws.<sup>15</sup> For instance, Oklahoma became the first state to outlaw abortion—except to save the life of the pregnant person or in cases of rape or incest (but only if the crime was reported to law enforcement).<sup>16</sup> The anti-abortion movement could sense victory due to the Court's changed composition.<sup>17</sup>

On the other end of the ideological spectrum, other jurisdictions intensified their efforts to protect abortion access within their borders.<sup>18</sup> Multiple states codified the right to abortion or expanded access, while others began the process to amend their constitutions to explicitly protect abortion.<sup>19</sup> California, Colorado, Connecticut, Illinois, Maryland, New York, and Washington recognized their imminent roles as abortion sanctuary states.<sup>20</sup> Likewise, other state actors such as state attorney generals, county-level prosecutors, and city officials either promised not to enforce pre-*Roe*

---

<sup>15</sup> See, e.g., Thomas Fuller, *Oklahoma Bans Abortion After About Six Weeks of Pregnancy*, N.Y. TIMES (May 3, 2022), <https://www.nytimes.com/2022/05/03/us/oklahoma-abortion-ban.html> [<https://perma.cc/U8WH-FE8Y>] (“The law, the Oklahoma Heartbeat Act, was modeled on the one that came into force in Texas last year, with both banning abortions after fetal cardiac activity is detected, and requiring enforcement from civilians rather than government officials.”); Okla. H.B. 4327, 2022 Reg. Sess. (2022) (banning abortion starting at fertilization, except in cases of rape, incest, or to preserve the life of the pregnant person, and allowing private-citizen enforcement); Shawn Hubler & Jill Cowan, *Flurry of New Laws Move Blue and Red States Further Apart*, N.Y. TIMES (Apr. 3, 2022), <https://www.nytimes.com/2022/04/03/us/state-laws-republican-democrat-division.html> [<https://perma.cc/EC2A-TFBH>] (reporting that Idaho proposed a ban on abortions that would empower relatives to sue anyone assisting with a termination beyond six weeks’ gestation).

<sup>16</sup> See Fuller, *supra* note 15; see also Okla. H.B. 4327 (banning abortion after fertilization except in cases of rape or incest reported to law enforcement or to save the life of the pregnant person).

<sup>17</sup> See Deborah Machalow, *Religious Diversity and a Woman’s Right to Choose: The Religious Right’s Mistakenly Assumed Monopoly on Belief and Religious Support for Abortion*, RUTGERS J. L. & RELIGION 476, 476–77 (2022) (explaining that the conservative Supreme Court was established with the explicit purpose of overturning *Roe*).

<sup>18</sup> See *id.* at 489–90 (describing efforts of states and cities to protect abortion access, including codifying the right to abortion, repealing unenforced criminal abortion laws, increasing insurance coverage for abortion, expanding the types of medical professionals permitted to provide abortion care, and allocating funds to support abortion access).

<sup>19</sup> See, e.g., Cohn, *supra* note 12. See also Fahima Haque, *Which States Are Reinforcing Abortion Rights?*, N.Y. TIMES (May 11, 2022), <https://www.nytimes.com/2022/05/04/us/abortion-rights-protections.html> [<https://perma.cc/3UXV-6DP5>] (describing efforts of states to protect or expand abortion access); Rae Ellen Bichell, *Colorado Braces to Become Refuge for Abortion Access if ‘Roe’ Is Weakened*, NPR (May 3, 2022, 4:23 PM), <https://www.npr.org/sections/health-shots/2022/03/29/1089280422/colorado-abortion-access> [<https://perma.cc/ZX2N-2R5R>]; Hubler & Cowan, *supra* note 15. In these states, public opinion shows support for the legality of abortion by wide margins. Connecticut, Maryland, Massachusetts, New York, and Vermont have net support for legal abortion at over 30% (or over 40% for Massachusetts and Vermont). Cohn, *supra* note 12.

<sup>20</sup> See, e.g., Haque, *supra* note 19.

abortion bans or otherwise sought to prevent future abortion prosecutions.<sup>21</sup>

Interestingly, this spate of state action followed a sudden increase in abortions after 30 years of steady decline in the United States. The rate of abortions began rising in 2017 until one-fifth of all pregnancies in 2020 ended in abortion—during “a time when many conservative states were placing new restrictions on the procedure.”<sup>22</sup> Importantly, increases in abortion were not only concentrated in Democratic-controlled states but were also seen in the Republican states where abortion is now restricted or banned: “[T]he percentage increase in the number of abortions in [California, Illinois, and New York] was less than in some conservative states, like Mississippi, where the number of abortions increased 40[%] from 2017 to 2020, and Oklahoma, where the number of abortions rose 103[%] during that time.”<sup>23</sup> According to the Guttmacher Institute, during this period, “births nationwide declined by [six] percent, meaning that ‘fewer people were getting pregnant and, among those who did, a larger proportion chose to have an abortion.’”<sup>24</sup>

<sup>21</sup> See, e.g., Shirin Ali, *American Medical Association Declares Abortion Bans ‘Violation of Human Rights’*, THE HILL (June 15, 2022), <https://thehill.com/changing-america/well-being/prevention-cures/3525017-american-medical-association-declares-abortion-bans-violation-of-human-rights> [<https://perma.cc/GDZ4-BE6M>] (Austin, Texas, has “proposed an act that would prevent the prosecution of so-called abortion crimes” to “restrict city funds from being used to investigate any kind of alleged abortion crimes and would instruct the city’s police department to treat abortion as the ‘lowest priority’ for criminal enforcement, arrest and investigation.”); Mitchell Schmidt, *Attorney General Josh Kaul: No DOJ Resources to Enforce Abortion Ban if Roe Overturned*, WISC. STATE J. (May 4, 2022), [https://madison.com/news/local/govt-and-politics/attorney-general-josh-kaul-no-doj-resources-to-enforce-abortion-ban-if-roe-overturned/article\\_76b0211b-e399-5d80-b9e9-6d982f1ea99d.html](https://madison.com/news/local/govt-and-politics/attorney-general-josh-kaul-no-doj-resources-to-enforce-abortion-ban-if-roe-overturned/article_76b0211b-e399-5d80-b9e9-6d982f1ea99d.html) [<https://perma.cc/4MX6-3YCV>]; David Eggert, *Michigan Governor Sues to Secure Abortion Rights*, NOW THIS NEWS (Apr. 7, 2022, 12:10 PM), <https://nowthisnews.com/news/michigan-governor-sues-to-secure-abortion-rights> [<https://perma.cc/ZD5F-RUVT>]. Non-prosecution promises, unfortunately, are of limited comfort. Prosecutors are elected officials who could be voted out of office. Even if they keep their roles in some jurisdictions, other state agencies can step in to prosecute. See Safia Samee Ali, *Prosecutors in States Where Abortion Is Now Illegal Could Begin Building Criminal Cases Against Providers*, NBC NEWS (June 24, 2022, 6:17 PM), <https://www.nbcnews.com/news/us-news/prosecutors-states-abortion-now-illegal-begin-prosecute-abortion-provi-rcna35268> [<https://perma.cc/CEP9-ZFUY>]; see also Matt Dixon, *DeSantis Suspends State Attorney Who Vowed Not to Enforce Florida’s New Abortion Law*, POLITICO (Aug. 4, 2022, 6:33 PM), <https://www.politico.com/news/2022/08/04/desantis-suspends-prosecutor-floridas-new-abortion-law-00049852> [<https://perma.cc/24J5-UWPW>] (reporting Florida Governor’s suspension of a Tampa-area elected attorney who objected to prosecuting people under the state’s 15-week abortion ban).

<sup>22</sup> Pam Belluck, *Abortions Increase in the U.S., Reversing a 30-Year Decline, Report Finds*, N.Y. TIMES (June 15, 2022, 10:42 AM), <https://www.nytimes.com/2022/06/15/health/abortion-rate-increase.html> [<https://perma.cc/Y3E3-6AZ5>]. Specifically, “the number of abortions increased to 930,160 in 2020, from 862,320 in 2017. The number increased in every region of the country: by 12[%] in the West, by 10[%] in the Midwest, by 8[%] in the South and by 2[%] in the Northeast.” *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Even so, the anticipated demise of *Roe* and *Casey* had its intended impact: some abortion providers ceased offering services before the final opinion was announced.<sup>25</sup>

### B. *The Dobbs Decision*

In *Dobbs*, Mississippi asked the Supreme Court to uphold its statute prohibiting abortion after the fifteenth week of pregnancy and thereby revisit and overrule *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* so that each state could “regulate abortion as its citizens wish.”<sup>26</sup> The Court took the bait, holding that “*Roe* and *Casey* must be overruled,” in part, because “[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.”<sup>27</sup> The Court added that the right to access abortion was neither “deeply rooted in this Nation’s history and tradition” nor “implicit in the concept of ordered liberty.”<sup>28</sup> According to the Court, “*Roe* was egregiously wrong from the start,” with “exceptionally weak” reasoning, resulting in the “damaging consequences” of “enflamed debate and deepened division.”<sup>29</sup> As such, the Court determined “[i]t is time to heed the Constitution and return the issue of abortion to the people’s elected representatives” because that is “what the Constitution and the rule of law demand.”<sup>30</sup>

The Court’s liberal wing “sorrow[fully]” dissented, bemoaning the majority’s disregard of *stare decisis*, mourning “the curtailment of women’s

<sup>25</sup> See, e.g., Claire Cain Miller & Margot Sanger-Katz, *Some Clinics Aren’t Waiting for Roe Decision to Stop Abortions*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/15/upshot/abortion-clinics-roe-wade.html> [<https://perma.cc/C3C9-AGQL>] (reporting that as of mid-June 2022, pregnant persons could no longer schedule abortions in Missouri, Oklahoma, South Dakota, and Wisconsin, while access was also reduced in Idaho); Devi Shastri, *Bracing for Roe’s Fall, Planned Parenthood of Wisconsin’s Sets June 25 as Last Day for Abortions*, MILWAUKEE J. SENTINEL (June 17, 2022, 7:43 PM), <https://www.jsonline.com/story/news/health/2022/06/17/planned-parenthood-wisconsin-stop-scheduling-abortions-june-25/7665059001> [<https://perma.cc/76SD-3TB2>]; Morgan Matzen, *Planned Parenthood Stops Abortion Services in South Dakota Ahead of Supreme Court Action on Dobbs*, SIOUX FALLS ARGUS LEADER (June 16, 2022, 10:26 AM), <https://www.argusleader.com/story/news/2022/06/15/south-dakota-abortion-laws-abortions-stop-planned-parenthood-waits-roe-v-wade-decision/7641139001> [<https://perma.cc/NQS3-F9NY>].

<sup>26</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 2282–83. Whether the Court was correct that abortion is not deeply rooted in our history is another matter. See Jennifer L. Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, ORG. OF AM. HISTORIANS, <https://www.oah.org/tah/issues/2016/november/abolishing-abortion-the-history-of-the-pro-life-movement-in-america> [<https://perma.cc/R59T-RP3Z>].

<sup>29</sup> *Dobbs*, at 2243.

<sup>30</sup> *Id.*



rights, and their status as free and equal citizens,”<sup>31</sup> and predicting many of the negative consequences discussed below.<sup>32</sup>

### *C. Resulting Chaos and Further Violence*

Immediately after the Court issued the *Dobbs* decision, the legal landscape shifted.<sup>33</sup> Trigger laws activated and some pre-*Roe* bans reactivated.<sup>34</sup> Courts lifted injunctions enjoining laws under *Roe*.<sup>35</sup> States moved to further revise their laws to either restrict or protect access to abortion.<sup>36</sup> Reproductive

<sup>31</sup> *Id.* at 2350, 2318 (Breyer, Sotomayor, and Kagan, J., dissenting).

<sup>32</sup> *See id.* at 2318–50.

<sup>33</sup> *See, e.g.,* Kate Zernike, *The Long Path to Reclaim Abortion Rights*, N.Y. TIMES (July 2, 2022), <https://www.nytimes.com/2022/07/02/us/abortion-rights-roe-v-wade.html> [<https://perma.cc/7HG6-DPQS>] (“In the week since the court overturned *Roe v. Wade*, litigators for abortion rights groups have rolled out a wave of lawsuits in nearly a dozen states to hold off bans triggered by the court’s decision, with the promise of more suits to come . . . . Advocates of abortion rights are also working to defeat ballot initiatives that would strip away a constitutional right to abortion, and to pass those that would establish one, in states where abortion access is contingent on who controls the governor’s mansion or the state house.”).

<sup>34</sup> *See, e.g.,* Erum Salam, *Texas Sheriff Says He ‘Will Not Persecute’ Those Seeking an Abortion*, THE GUARDIAN (June 29, 2022, 5:00 AM), <https://www.theguardian.com/us-news/2022/jun/29/texas-sheriff-abortion-javier-salazar> [<https://perma.cc/2JMN-4DTL>] (reporting that Texas Attorney General Ken Paxton responded to the *Dobbs* decision by stating that under “pre-*Roe* statutes, abortion providers could be criminally liable for providing abortions . . . .”); Adam Edelman, *With Roe v. Wade Overturned, Here’s Where Things Stand with ‘Trigger’ Laws and Pre-Roe Bans*, NBC NEWS (June 24, 2022, 10:02 PM), <https://www.nbcnews.com/politics/politics-news/roe-v-wade-overturned-things-stand-trigger-laws-pre-roe-bans-rcna35282> [<https://perma.cc/K7DL-Z26S>] (reporting that “[t]rigger laws took effect Friday [June 24, 2022] in Arkansas, Kentucky, Louisiana, Missouri, Oklahoma, South Dakota and Utah.”).

<sup>35</sup> *See, e.g.,* *Court Lifts Injunction on State Abortion Law*, WSFA (June 24, 2022, 6:34 PM), <https://www.wsfa.com/2022/06/24/alabama-files-emergency-motion-lift-injunction-state-abortion-law> [<https://perma.cc/S26P-PXUK>] (reporting that “U.S. District Judge Myron H. Thompson dismissed the lawsuit against the Alabama Human Life Protection Act” and permitted enforcement of “Alabama’s law making elective abortions a felony . . . .”).

<sup>36</sup> *See, e.g.,* Keshia Clukey, *New York Moves to Add Reproductive Rights, Equality to State’s Constitution*, BLOOMBERG (July 2, 2022, 1:27 AM), <https://www.bloomberg.com/news/articles/2022-07-01/n-y-moves-to-add-reproductive-rights-equality-to-constitution> [<https://perma.cc/LYD4-CD8P>] (reporting that New York is seeking to add protection for abortion to its state constitution as soon as fall 2023); *South Carolina Introduces New Bill to Fully Outlaw Abortions, Allow Civil Penalties*, WSOC-TV (June 28, 2022, 9:48 PM), <https://www.wsoc.tv/news/local/south-carolina-introduces-new-bill-fully-outlaw-abortions-allow-civil-penalties/CVQ3IGSFWJHVJHYI2BMFNYOGHM> [<https://perma.cc/4JT9-GQKB>] (describing proposed legislation to ban abortion; criminalize aiding, abetting, or conspiring with someone to have an abortion; criminalize taking a minor out of state to access abortion; restrict communications about abortion; and authorize wrongful death claims); Melody Gutierrez, *Newsom Signs Bill Protecting California Abortion Providers from Civil Liability*, L.A. TIMES (June 24, 2022, 2:57 PM), <https://www.latimes.com/politics/story/2022-06-24/newsom-signs-bill-protecting-california-abortion-providers-from-civil-liability>

freedom ballot measures received newfound attention.<sup>37</sup> Local government bodies considered their law enforcement priorities and how to aid their employees who needed abortion care.<sup>38</sup> State-court litigation erupted, resulting in temporary restraining orders and preliminary injunctions, which were frequently dissolved on appeal.<sup>39</sup> And, finally, the federal government scrambled, lacking a clear path forward to reestablish access to care.<sup>40</sup> “While the Supreme Court said it wanted to end five decades of bitter debate on abortion, its decision has set up a new fight, one that promises to be long and

---

[<https://perma.cc/6PGQ-TAGX>] (reporting that California’s governor signed legislation protecting abortion providers and patients from civil liability judgments in other states).

<sup>37</sup> See, e.g., Laura Daniella Sepulveda & Sam Burdette, *These Arizona Businesses Are Collecting Signatures to Put Abortion Rights on the Ballot. Here’s Why*, ARIZ. REPUBLIC (June 29, 2022, 7:47 AM), <https://www.azcentral.com/story/news/local/arizona/2022/06/27/arizona-businesses-collect-signatures-abortion-ballot-measure/7749261001> [<https://perma.cc/SJQ9-DFTA>] (reporting signature collection efforts to put a state constitutional amendment on the ballot which would deny the state power to “restrict, penalize, frustrate or otherwise interfere’ with . . . pre-viability abortions . . . [and] nonmedical reproductive services.”); Joyce E. Cutler, *California Puts Constitutional Abortion Right on November Ballot*, BLOOMBERG (June 27, 2022, 5:59 PM), <https://news.bloomberglaw.com/us-law-week/california-puts-constitutional-abortion-right-on-november-ballot> [<https://perma.cc/9AIJ-U4QP>] (describing ballot initiative providing that the state “shall not deny or interfere with an individual’s reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives.”).

<sup>38</sup> See, e.g., Elizabeth Campbell, *These Texas Cities Consider Resolutions to Decriminalize Abortion after Denton Vote*, FORT WORTH STAR-TELEGRAM (July 3, 2022, 8:54 AM), <https://www.star-telegram.com/news/politics-government/article263076163.html> [<https://perma.cc/8QC5-M4WA>] (reporting that the Denton City Council voted not to prioritize enforcement of abortion bans, and El Paso and Austin were considering following suit); Cortlynn Stark, *KC Council Says Abortion Is a Human Right, Could Reimburse Travel and Care Costs for Staff*, KANSAS CITY STAR (June 30, 2022, 9:33 PM), <https://www.kansascity.com/news/politics-government/article263070448.html> [<https://perma.cc/QSK4-R77F>] (reporting that Kansas City, Missouri’s council “unanimously passed a resolution declaring reproductive rights are human rights” and approved an ordinance permitting the city to reimburse its employees for healthcare-related travel expenses); Salam, *supra* note 34 (reporting the Bexar County Sheriff responsible for San Antonio, Javier Salazar, promised not to “persecute Texas women or anyone else” seeking to control their bodies).

<sup>39</sup> See, e.g., Isabella Kwai, *Texas Supreme Court Lifts Freeze on Abortion Ban*, N.Y. TIMES (July 2, 2022), <https://www.nytimes.com/2022/07/02/us/texas-supreme-court-abortion-ban.html> [<https://perma.cc/P2JC-KHTD>]; Grace Panetta, *Judges in 5 States Have Temporarily Blocked State Laws that Would Restrict or Ban Abortions*, BUS. INSIDER (June 30, 2022, 9:38 AM), <https://www.businessinsider.com/states-where-judges-have-blocked-abortion-bans-roe-v-wade-2022-6> [<https://perma.cc/H7BN-WWA5>] (reporting on injunctions issued in Florida, Kentucky, Louisiana, Utah and Texas); Caroline Vakil, *Whitmer Files Motion Asking State Supreme Court to Quickly Take Up Lawsuit over Abortion Rights*, THE HILL (June 25, 2022, 1:42 PM), <https://thehill.com/homenews/state-watch/3537027-whitmer-files-motion-asking-state-supreme-court-to-quickly-take-up-lawsuit-over-abortion-rights> [<https://perma.cc/3RRP-2X5K>] (reporting that Governor Whitmer asked the Michigan high court to clarify the status of the 1931 abortion ban unless “necessary to preserve the life of [the pregnant person] . . .”).

<sup>40</sup> See Proclamation No. 14076, *Protecting Access to Reproductive Services*, 87 Fed. Reg. 42,053 (July 13, 2022).

equally bitter.”<sup>41</sup> The landscape continues to shift too quickly for this Article to do it justice.<sup>42</sup> Suffice it to say that the ensuing chaos is challenging for laypeople and lawyers alike to track and understand.<sup>43</sup>

With more than half the country moving to restrict or ban abortion,<sup>44</sup> these restrictions may embolden further anti-abortion violence and harassment.<sup>45</sup> Between 1977 and 2020, “anti-abortion activists committed at

---

<sup>41</sup> Zernike, *supra* note 33 (“Polls show that Americans overwhelmingly say that the decision to have an abortion should be made by women and their doctors rather than state legislatures. But Republican-controlled state legislatures have passed hundreds of restrictions on abortion over the last decade, and legislative districts are heavily gerrymandered to protect Republican incumbents. Litigation in state courts will be decided by judges who in many cases have been appointed by anti-abortion governors.”).

<sup>42</sup> See, e.g., Leah Willingham, *West Virginia Gov. Jim Justice Signs Abortion Ban into Law*, AP NEWS (Sept. 16, 2022), <https://apnews.com/article/abortion-us-supreme-court-health-legislature-west-virginia-85283cf498eee8c116d3f1cc8de4a0fb> [<https://perma.cc/FGS8-6PSN>] (reporting on West Virginia as the second state to enact an abortion ban following the *Dobbs* decision); Lizzie Kane et al., *Indiana Abortion Ban Goes into Effect in September: What You Need to Know*, INDIANAPOLIS STAR (Aug. 9, 2022, 11:43 AM), <https://www.indystar.com/story/news/local/indianapolis/2022/08/06/indiana-abortion-bill-ban-law/65394328007> [<https://perma.cc/VRE7-NZ2E>] (reporting on Indiana’s abortion ban, the first post-*Dobbs* ban).

<sup>43</sup> See, e.g., Kate Wells, *Confusion Roiled Michigan for Days as Abortion Rights Changed Hour to Hour*, NPR (Aug. 5, 2022, 12:12 PM), <https://www.npr.org/2022/08/05/1115666725/confusion-roiled-michigan-for-days-as-abortion-rights-changed-hour-to-hour> [<https://perma.cc/R82M-C44V>] (“When Dr. Audrey Lance, an OB-GYN at Northland Family Planning Centers in Metro Detroit, got to work Monday morning, abortion was legal in the state of Michigan. By noon, it wasn’t. Then by 5 p.m., it was legal again, with at least some certainty it would probably stay that way, at least until a hearing Wednesday.”); Christina Hall, *Michigan’s Largest Health System Reverses Course on Abortion Stance*, DETROIT FREE PRESS (June 27, 2022, 11:31 AM), <https://www.freep.com/story/news/local/michigan/2022/06/26/michigan-spectrum-beaumont-health-system-reverses-course-abortion-stance/7738499001> [<https://perma.cc/XVH5-PXYF>] (reporting that following the *Dobbs* decision, the health system announced it would abide by Michigan’s 1931 law banning abortion except when necessary to preserve the life of the pregnant person, even though the 1931 law was enjoined by a temporary injunction, before reversing course a few hours later). A Michigan Court of Claims judge has since concluded that the state’s 1931 abortion ban violated the Michigan constitution and a reproductive freedom ballot initiative will appear on the November ballot. See, e.g., Jonathan Weisman & Nick Corasaniti, *First Kansas, Next Michigan and Beyond as Abortion Ballot Measures Spread*, N.Y. TIMES (Sept. 9, 2022), <https://www.nytimes.com/2022/09/09/us/politics/michigan-abortion-referendum.html> [<https://perma.cc/232X-B8NJJ>]; Rick Pluta, *A 1931 Law Criminalizing Abortion in Michigan Is Unconstitutional, a Judge Rules*, NPR (Sept. 7, 2022, 7:31 PM), <https://www.npr.org/2022/09/07/1121600908/michigan-abortion-law-struck-down> [<https://perma.cc/S54Y-UNE3>].

<sup>44</sup> See e.g., *After Roe Fell: Abortion Laws by State*, CTR. REPRO. RIGHTS, <https://reproductiverights.org/maps/abortion-laws-by-state> [<https://perma.cc/X2VJ-SK4P>].

<sup>45</sup> See David S. Cohen et al., *States Want to Ban Abortions Beyond Their Borders. Here’s What Pro-Choice States Can Do.*, N.Y. TIMES (Mar. 13, 2022), <https://www.nytimes.com/2022/03/13/opinion/missouri-abortion-roe-v-wade.html> [<https://perma.cc/C334-84KN>] (“In a post-Roe

least 11 murders, 26 attempted murders, 956 threats of harm or death, 624 stalking incidents and four kidnappings”; they have also “bombed 42 abortion clinics, set 194 on fire, attempted to bomb or burn an additional 104 and made 667 bomb threats.”<sup>46</sup> While members of “the wider anti-abortion movement have often condemned this terror,” they at other times have “signaled their tacit, or even explicit, support.”<sup>47</sup>

Shortly before the *Dobbs* decision was announced, the National Abortion Federation released a report finding that, in 2021, abortion providers in the United States “faced significant increases in violence and disruptions to their work . . . compared to the previous year.”<sup>48</sup> Abortion clinics also reported vandalism, including “multiple incidents of bullets being fired through clinic windows, damage to HVAC equipment, cutting of power sources, bricks and rocks thrown through or at windows, and signs damaged.”<sup>49</sup> Physical altercations “included pushing, shoving, slapping, kicking, use of pepper spray and physical fights outside clinics” and occurred “between anti-

---

future, anti-abortion extremism is likely to rise, putting abortion providers operating in safe states at risk of being personally targeted.”); Christopher Mathias, *The Anti-Abortion Movement Killed People. Now Victims’ Families Face a Post-Roe World*, HUFFPOST (June 13, 2022, 5:45 AM), [https://www.huffpost.com/entry/anti-abortion-violence-murdered-families-roe-v-wade\\_n\\_62a37f2ac4b0cdccbe4fa969](https://www.huffpost.com/entry/anti-abortion-violence-murdered-families-roe-v-wade_n_62a37f2ac4b0cdccbe4fa969) [https://perma.cc/6R]F-NS2C] (explaining that “the decision [in *Dobbs*] could embolden anti-abortion extremists, who will feel validated by the Supreme Court opinion and who then might focus their attention on clinics . . . where abortions will still be legal and accessible—at least until Republicans can consolidate enough power in Washington to pass a blanket national abortion ban” or could initiate “a period where they feel like, you know, we won, and we’re winning, so we don’t need to resort to violence to get what we want.”); see also Sam Sabin, *Lock it Down Right Now: Abortion Rights Advocates Prepare for a New Wave of Digital Security Threats*, POLITICO (June 17, 2022, 6:16 PM), <https://www.politico.com/news/2022/06/17/abortion-rights-advocates-digital-security-threats-00040654> [https://perma.cc/Q643-GT3Y]. (“[S]ince POLITICO reported on the draft Supreme Court decision that would overturn *Roe* in May, online harassment and other digital threats to advocates are already spiking . . .”).

<sup>46</sup> Mathias, *supra* note 45; see also Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. TIMES (Nov. 29, 2015), <https://www.nytimes.com/interactive/2015/11/29/us/30abortion-clinic-violence.html> [https://perma.cc/Y439-DBY9] (providing overview “of deadly violence against abortion clinics, their staff members, patients and their guests in the United States and Canada).

<sup>47</sup> Mathias, *supra* note 45; see also Haven Orecchio-Egrestiz & Charles R. Davis, *A 2021 North Carolina Bill Would Authorize Deadly Force to Stop an Abortion—But Is Not Likely to See a Vote*, INSIDER (July 19, 2022, 7:05 PM), <https://www.insider.com/north-carolina-bill-death-to-abortion-seekers-circulating-online-2022-7> [https://perma.cc/5CQV-7CFP] (describing H.B. 158 from the 2021 legislative session that would authorize the use of deadly force to prevent someone from accessing abortion, define abortion as first-degree murder, and define life as beginning at the moment of fertilization).

<sup>48</sup> See Julianne McShane, *Abortion Providers Face Significant Increase in Violence, Report Finds*, NBC NEWS (June 24, 2022, 3:39 PM), <https://www.nbcnews.com/news/us-news/abortion-providers-face-significant-increase-violence-report-finds-rcna35261> [https://perma.cc/CL9Y-C5QF].

<sup>49</sup> *Id.*

abortion protesters and clinic escorts and staff, as well as patients and their companions.”<sup>50</sup> The report concluded that “overall, harassment and violence have steadily increased in the last 45 years and remain a part of daily life for many abortion providers.”<sup>51</sup>

The *Dobbs* decision has not ended anti-abortion violence.<sup>52</sup> Unfortunately, it is unlikely that violence will only be committed by those opposed to abortion. Anti-abortion groups and crisis pregnancy centers have been targeted nationwide since the leak of the draft Alito opinion.<sup>53</sup> These attacks—in Amherst, New York; Charlotte, North Carolina; Madison, Wisconsin; Gresham, Oregon, and elsewhere—have included Molotov cocktails, arson, property damage and graffitied messages such as: “If abortions aren’t safe then you aren’t either” and “Jane was here.”<sup>54</sup> Many of these instances have been linked to Jane’s Revenge, a militant pro-choice group that explained its motives: “This is not a mere ‘difference of opinion’ as some have framed it. We are literally fighting for our lives. We will not sit still while we are killed and forced into servitude.”<sup>55</sup> Protests, vandalization, and another firebombing occurred in the days after the Court issued its *Dobbs* decision.<sup>56</sup> In fact, in Rhode Island, a state senate candidate attacked his pro-

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See Ryan Barber, *A Michigan Man Who Referred to Abortion as ‘Genocide’ Was Charged with Setting Fire to a Planned Parenthood*, BUS. INSIDER (Aug. 4, 2022, 6:10 PM), <https://www.businessinsider.com/planned-parenthood-fire-abortion-justice-department-arsen-charge-2022-8> [https://perma.cc/W6CS-L73A].

<sup>53</sup> See, e.g., Caroline Downey, *Pro-Abortion Terrorists Firebomb Oregon Pregnancy Center*, NAT’L REV. (June 13, 2022, 12:44 PM), <https://www.nationalreview.com/news/pro-abortion-terrorists-firebomb-oregon-pregnancy-center> [https://perma.cc/BCS2-6GXT]. See also Poppy Noor, *Pro-choice Militants Are Targeting Pregnancy Crisis Centers’ Across US*, THE GUARDIAN (June 11, 2022, 2:00, AM), <https://www.theguardian.com/world/2022/jun/11/pro-choice-militants-pregnancy-crisis-centers-attacks-us> [https://perma.cc/8WW3-XU5N]; Alexander Shur, *Madison Anti-Abortion Headquarters Hit by Apparent Molotov Cocktail, Vandalism, Graffiti*, WISC. STATE J. (May 9, 2022), [https://madison.com/news/local/crime-and-courts/watch-now-madison-anti-abortion-headquarters-hit-by-apparent-molotov-cocktail-vandalism-graffiti/article\\_526660ea-776d-50ca-9baa-4b4a9337dca7.html](https://madison.com/news/local/crime-and-courts/watch-now-madison-anti-abortion-headquarters-hit-by-apparent-molotov-cocktail-vandalism-graffiti/article_526660ea-776d-50ca-9baa-4b4a9337dca7.html) [https://perma.cc/99ZU-3U7V]. This trend has continued months after *Dobbs*. See Timothy H.J. Nerozzi, *Pro-Life Centers Targeted by 70% of Abortion-Related Violent Threats Since Dobbs Decision: FBI*, FOX NEWS (Nov. 17, 2022, 2:49 PM), <https://www.foxnews.com/politics/pro-life-centers-targeted-70-abortion-related-violent-threats-dobbs-decision-fbi> [https://perma.cc/6S2L-GXAU].

<sup>54</sup> See Noor, *supra* note 53.

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., Molly Davis et al., *This Is Terrorism’: Molotov Cocktail Thrown into Tennessee Pregnancy Resource Center*, USA TODAY (July 1, 2022, 12:59 PM), <https://www.usatoday.com/story/news/nation/2022/07/01/nashville-molotov-cocktail-abortion-tennessee/7788434001> [https://perma.cc/HY67-SRWQ] (reporting an unignited firebomb found in the Hope Clinic

choice opponent, prompting his withdrawal from the race.<sup>57</sup> While violence seems likely to continue, it is important to recognize it is not equal on both sides, as the pro-choice property damage to crisis pregnancy centers pales in comparison to the long and deadly history of the anti-abortion movement, as discussed above.<sup>58</sup>

With this background in mind, the remainder of this Article seeks to predict some of the more insidious results of the *Dobbs* decision, including attempts to further curtail access to reproductive care and the catastrophic consequences created by restrictive abortion laws.

## II. FUTURE ANTI-ABORTION LEGISLATION

If the Supreme Court thought that turning the legality of abortion over to “the people’s elected representatives” would stymie debate or otherwise settle any aspect of this contentious issue, it was woefully (and quite naively)

---

for Women in Nashville with the message “Jane’s Revenge”); Gary White, *We’re Coming for U: Winter Haven Pregnancy Center Vandalized with Graffiti*, THE LEDGER (June 27, 2022, 3:49 PM) <https://www.theledger.com/story/news/local/2022/06/27/winter-haven-florida-lifechoice-pregnancy-center-vandalized-graffiti-janes-revenge/7744257001> [<https://perma.cc/KPT3-ZHN3>] (reporting that LifeChoice Pregnancy Center was “defaced by spray-painted symbols and messages,” including “Your time is up,” “Jane’s revenge,” and “We’re coming for U”); Assoc. Press, *Vermont Statehouse Vandalized in Apparent Abortion Reaction*, BURLINGTON FREE PRESS (June 27, 2022, 8:52 AM), <https://www.burlingtonfreepress.com/story/news/2022/06/27/vermont-statehouse-vandalized-in-apparent-abortion-reaction/65363923007/> [<https://perma.cc/M88S-X6MA>] (reporting that the Vermont Statehouse was vandalized with the message “If abortions aren’t safe you’re not either”); Caroline Downey, *Violent Portland Pro-Abortion Protesters Destroy, Vandalize Property*, NAT’L REV. (June 26, 2022, 12:41 PM), <https://www.nationalreview.com/news/violent-portland-pro-abortion-protesters-destroy-vandalize-property> [<https://perma.cc/JHE9-B5FL>] (reporting that “Pro-abortion protestors in Portland, Oregon charged through the city . . . damaging and vandalizing property . . .”); Lawrence Richard, *Colorado Pregnancy Center Vandalized, Set Ablaze Hours After Supreme Court Announced Abortion Decision: Police*, FOX NEWS (June 26, 2022, 12:18 AM), <https://www.foxnews.com/us/colorado-pregnancy-center-supreme-court-abortion-crime-police> [<https://perma.cc/GEL7-9YVV>] (reporting that a Longmont, Colorado pregnancy center’s fire was being investigated as arson following vandalism, including the message “If abortions aren’t safe, neither are you.”).

<sup>57</sup> See Minyvonne Burke & Tom Winter, *Rhode Island Officer Arrested in Alleged Assault of Senate Opponent at Abortion Rally*, NBC NEWS (June 25, 2022, 11:10 PM), <https://www.nbcnews.com/news/us-news/-duty-rhode-island-officer-running-state-senate-accused-attacking-oppo-rcna35355> [<https://perma.cc/5W8L-B2JE>].

<sup>58</sup> See Mathias, *supra* note 45 (“I think we’re going to start seeing the anti-abortion side and conservatives say ‘Well, look, pro-choice people are just as violent and just as extreme as anti-abortion extremists.’ And that’s just not true. You know, obviously, if we talk in five years and there’s been 11 murders of anti-abortion, politicians or activists or something, then we’d be close to being the same thing, but right now it’s not the same thing. Like we have a couple of freak people who’ve done some bad things, as opposed to the decades-long extremist movement to target, harass, sometimes violently, abortion providers and those who work with them. The two are not the same thing. They should not be equated.” (quoting David Cohen, the author of *Living in the Cross Hairs: The Untold Stories of Anti-Abortion Terrorism*)).

mistaken. Anti-abortion legislators are not satisfied with merely overturning *Roe*. Rather, they want to limit access to abortion in states where it remains legal, contemplating a nationwide ban on abortion, and targeting some (if not all) forms of contraception.

*A. Preventing Residents from Accessing Abortion in Other States*

Anti-abortion legislators are not content to prohibit abortions within their states' borders. They want to stop "abortion tourism," defined as "travel for the purpose of obtaining an abortion where it's legal."<sup>59</sup> While previous research has indicated that access to abortion decreases as the travel distance increases,<sup>60</sup> many pregnant people crossed state borders to access care before *Dobbs*—and that number is bound to increase.<sup>61</sup> For example, in the immediate aftermath of the Texas Heartbeat Law, which became effective in September 2021, abortion clinics in the District of Columbia and 11 states that do not border Texas provided increased numbers of abortions to Texas residents.<sup>62</sup> According to data released in February 2022, the Heartbeat Law reduced Texas in-state abortions by 60%, while "Planned Parenthood clinics

<sup>59</sup> See Marissa Postell, *What Is Abortion Tourism?*, ETHICS & RELIGIOUS LIBERTY COMM'N (Apr. 5, 2022), <https://erlc.com/resource-library/articles/what-is-abortion-tourism> [https://perma.cc/4F5X-VB9F]. This is not a new phenomenon: before *Roe* "over 100,000 women traveled to New York City for abortions, half of whom traveled more than 500 miles . . ." *Id.*

<sup>60</sup> See Myers, *supra* note 9, at 12 ("For many women seeking abortions, travel distances that may seem modest to some observers in fact pose insurmountable obstacles."). Specifically, increasing the "travel distance from 0 to 100 miles" causes approximately a 20–25% decline in abortion, while increasing travel distance from 100 to 200 miles decreases abortions by 12.7%. *Id.* at 2–3. Conversely, increasing travel distance from 0 to 100 miles also "increases births by 2.4%, while the next 100 miles of travel distance (from 100 to 200 miles) is estimated to . . . increase births by 1.6%." *Id.* at 3. "Counties where travel distances decreased exhibited a 12.3% increase in resident abortion rates." *Id.* at 7.

<sup>61</sup> See Sarah McCammon, *Even Before the Dobbs Ruling, More Americans Were Traveling for Abortions*, NPR (July 21, 2022, 8:00 AM), <https://www.npr.org/2022/07/21/1112609958/even-before-the-dobbs-ruling-more-americans-were-traveling-for-abortions> [https://perma.cc/25KJ-UMPC] (reporting the Guttmacher Institute found that nearly ten percent of abortion-seekers sought care out of state in 2020—up from only six percent in 2011); see also Diana Greene Foster, *Six Predictions About the End of Roe, Based on Research*, POLITICO (June 8, 2022, 4:32 AM), <https://www.politico.com/news/magazine/2022/06/08/the-end-of-roe-wont-cause-birth-rates-or-adoptions-to-spike-00037864> [https://perma.cc/PT9G-EQSK] (predicting that "people with the information, financial resources and physical capability will travel hundreds of miles to get an abortion in another state or find a way to access medication abortion pills online," while "people without the means to circumvent their state's laws will give birth instead"). Professor Greene Foster is the lead author of *The Turnaway Study: Ten Years, a Thousand Women, and the Consequences of Having—or Being Denied—An Abortion*, which is discussed *infra*.

<sup>62</sup> Rachel K. Jones et al., *New Evidence: Texas Residents Have Obtained Abortions in at Least 12 States That Do Not Border Texas*, GUTTMACHER INST. (Nov. 9, 2021), <https://www.guttmacher.org/article/2021/11/new-evidence-texas-residents-have-obtained-abortions-least-12-states-do-not-border> [https://perma.cc/7FES-MLJQ].

in neighboring states . . . reported an 800[%] increase in women seeking abortions.”<sup>63</sup> In fact, each month, an average of 1,400 Texans traveled to states nearby, including Arkansas, Colorado, Kansas, Louisiana, Mississippi, New Mexico, and Oklahoma, representing “a 12-fold increase [i]n out-of-state abortions compared to before the law was enacted in September [2021].”<sup>64</sup> Since *Dobbs*, of course, some of these states are no longer options for individuals seeking abortions.<sup>65</sup>

In the months following *Dobbs*, the number of facilities offering abortion services dropped, increasing the time pregnant people must travel to access care. Facilities offering abortion care dropped by approximately 10% (from 749 to 671), increasing the average travel time from ~28 minutes to 100 minutes.<sup>66</sup> For pregnant persons in states banning abortion at 6 weeks’ gestation or entirely, travel time increased by an average of over four hours.<sup>67</sup> Unsurprisingly, some abortion providers in states where abortion remains legal are having trouble keeping up with demand stemming from an influx of out-of-state patients.<sup>68</sup>

Recognizing that patients often need to travel, abortion providers are strategically opening clinics in or relocating to states where abortion remains legal to better provide care.<sup>69</sup> For example, in November 2022, Partners in Abortion Care opened in College Park, Maryland, which “is within 40 miles

<sup>63</sup> Kate Zernike & Adam Liptak, *Texas Supreme Court Shuts Down Final Challenge to Abortion Law*, N.Y. TIMES (Mar. 11, 2022), <https://www.nytimes.com/2022/03/11/us/texas-abortion-law.html> [<https://perma.cc/89DD-36WG>].

<sup>64</sup> Monique Beals, *Most Texas Women Were Able to Get Abortions Despite New Law: Studies*, THE HILL (Mar. 6, 2022, 10:47 PM), <https://thehill.com/homenews/state-watch/597101-most-texas-woman-were-able-to-get-abortions-despite-new-law-studies> [<https://perma.cc/6TVV-PGZU>].

<sup>65</sup> See e.g., *After Roe Fell: Abortion Laws by State*, *supra* note 44 (showing that abortion is prohibited in Arkansas, Louisiana, Missouri, and Oklahoma).

<sup>66</sup> Christine Fernando, *Travel Times to Abortion Facilities Surged Significantly After Overturn of Roe v. Wade, Study Finds*, USA TODAY (Nov. 19, 2022, 6:00 AM), <https://www.usatoday.com/story/news/nation/2022/11/19/travel-times-abortion-increase-after-roe-wade-overturned/10704034002/> [<https://perma.cc/62RQ-BNSY>].

<sup>67</sup> *Id.* For those in Texas and Louisiana, the travel time increased from 15 minutes to over six hours. *Id.*

<sup>68</sup> See *id.*

<sup>69</sup> Jamie Ducharme, *New Abortion Clinics Are Opening Near Borders and Airports to Stretch Access as Far as It Will Go*, TIME (June 9, 2022, 3:31 PM), <https://time.com/6185519/abortion-clinics-travel-state-borders> [<https://perma.cc/38QG-JYQM>]; see also Ella McCarthy, *Abortion ‘Travel Agent’ Helps Women Come to Kansas and Beyond to Get the Procedure*, KANSAS CITY STAR (June 17, 2022, 12:59 PM), <https://web.archive.org/web/20220617144213/https://www.kansascity.com/news/business/health-care/article262453077.html> [<https://perma.cc/VZF3-A89M>] (describing logistics support offered by Planned Parenthood to help patients access care out-of-state).



of three major airports and close to several highways, making it a relatively easy destination for travelers.”<sup>70</sup> Another clinic opened in October 2022 (with another anticipated soon) in Carbondale, Illinois, which is “about a two-hour drive from St. Louis and a three-hour drive from both Memphis and Nashville.”<sup>71</sup> One estimate predicts that “an additional 14,000 patients each year will cross state lines to terminate pregnancies in southern Illinois” alone.<sup>72</sup>

Other providers are thinking more creatively. Just the Pill’s Abortion Delivered initiative relies on mobile clinics that can deploy to state borders, “remain[ing] in states where abortion is legal but position[ing] themselves as close as possible to state lines to cut down on travel time for patients.”<sup>73</sup> Dr. Meg Autry, inspired by casino boats, is fundraising to create a floating abortion clinic for the Mississippi River similar to Women on Waves, a Dutch group that docks a ship about 12 miles off the coast of countries where abortion is illegal in order to provide care to patients.<sup>74</sup>

### 1. Banning Travel to Other States for Abortion

States and anti-abortion organizations are already contemplating ways to limit the ability of people to travel to access abortions in other states. Earlier this year, Missouri considered legislation based on the Texas Heartbeat Law that would permit its citizens to “sue doctors who perform an abortion on a Missouri resident *in a different state*,” as well as “anyone who facilitated the

<sup>70</sup> See Ducharme, *supra* note 69; see also PARTNERS IN ABORTION CARE, <https://www.partnersinabortioncare.com> [<https://perma.cc/PQ7F-V7DK>] (“We are open and scheduling appointments.”).

<sup>71</sup> See Ducharme, *supra* note 69; Chris Kenning, *Amid Growing ‘Abortion Deserts,’ a Haven in Small-Town Illinois Takes Shape*, USA TODAY (Oct. 12, 2022, 7:00 AM), <https://www.usatoday.com/story/news/nation/2022/10/12/carbondale-illinois-abortion-clinic-opens/10459202002> [<https://perma.cc/KR2P-2WBQ>]; Brian Munoz, *In One Southern Illinois Town, Residents Grapple with Abortion’s Past and Future*, ST. LOUIS PUB. RADIO (Aug. 5, 2022, 4:03 AM), <https://news.stpublicradio.org/health-science-environment/2022-08-05/carbondale-faces-complicated-abortion-history-and-prepares-for-post-roe> [<https://perma.cc/8ZST-VRWS>].

<sup>72</sup> Angie Leventis Lourgou, *Missouri, Louisiana, Arizona, Patients Are Already Traveling Hundreds of Miles to Have Abortions in Illinois*, CHI. TRIBUNE (May 12, 2022, 5:00 AM), <https://www.chicagotribune.com/news/breaking/ct-roe-southern-illinois-abortion-clinic-20220512-fri5cc2mpnau5n3tuvqepwaaqi-story.html> [<https://perma.cc/DH3S-ZX2S>]. “In 2020, nearly 10,000 patients crossed state lines to have an abortion in Illinois” and “[that] number has increased every year since 2014.” *Id.*

<sup>73</sup> Garnet Henderson, *How Providers Are Planning to Innovate Around Abortion Access Deserts*, MOTHER JONES (July 12, 2022), <https://www.motherjones.com/politics/2022/07/abortion-access-dobbs-roe-desert-pill-medication> [<https://perma.cc/3PE8-WUVB>].

<sup>74</sup> See Rachel Treisman, *A Floating Abortion Clinic Is in the Planning Stage, and People Are Already on Board*, NPR (July 20, 2022, 11:21 AM), <https://www.npr.org/2022/07/19/1112219566/floating-abortion-clinic-roe-v-wade> [<https://perma.cc/4V6K-EM79>].

abortion, including the friend or family member who transported the patient across state lines.”<sup>75</sup> Likewise, the Thomas More Society “is drafting model legislation for state legislators that would allow private citizens to sue anyone who helps a resident of a state that has banned abortion from terminating a pregnancy outside of that state,” while the National Association of Christian Lawmakers is “working with the authors of the Texas abortion ban to explore model legislation that would restrict people from crossing state lines for abortions.”<sup>76</sup>

From the anti-abortion perspective, these proposals make sense: “If fetuses are legal ‘citizens,’ then states could argue that they must be protected from out-of-state abortion providers.”<sup>77</sup> States could then seek extradition of the abortion provider (or patient) from the state where abortion is legal, or merely threaten to prosecute a provider who stepped within its borders.<sup>78</sup> These proposals are intended to chill conduct by tapping into doctors’ fear of liability, prompting “doctors in surrounding states to stop performing abortions before courts have an opportunity to intervene.”<sup>79</sup> Unfortunately, these proposals are succeeding.<sup>80</sup>

Abortion sanctuary states, however, have started trying to mitigate these risks.<sup>81</sup> Their actions largely track recommendations from experts on

<sup>75</sup> Mark Joseph Stern, *How Red States Plan to Reach Beyond Their Borders and Outlaw Abortion in America*, SLATE (Apr. 13, 2022, 4:44 PM), <https://slate.com/news-and-politics/2022/04/abortion-bans-out-of-state-missouri-texas-oklahoma.html> [<https://perma.cc/HV2B-FBXC>] (citing Paige Sutherland & Meghna Chakrabarti, *Inside Missouri’s Push to Ban Out-of-State Abortions*, WBUR (Mar. 24, 2022), <https://www.wbur.org/onpoint/2022/03/24/inside-missouris-push-to-ban-out-of-state-abortions> [<https://perma.cc/3S5E-5DXA>]).

<sup>76</sup> Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022, 8:30 AM), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines> [<https://perma.cc/GK24-MT5F>]. See also *infra* note 91, and surrounding text.

<sup>77</sup> Stern, *supra* note 75.

<sup>78</sup> *Id.*

<sup>79</sup> See Kitchener & Barrett, *supra* note 76.

<sup>80</sup> Pilar Melendez & Emily Shugerman, *This Planned Parenthood Is Now Demanding Proof of Residency for Some Abortions*, DAILY BEAST (June 30, 2022, 6:49 PM), <https://www.thedailybeast.com/montana-planned-parenthood-demands-proof-of-residency-for-medication-abortions-email-shows> [<https://perma.cc/5E3J-5XPJ>] (reporting that “Planned Parenthood of Montana will no longer provide medication abortions for patients from South Dakota, Arkansas, Missouri, and Oklahoma, and will now require proof of residency” due to the “rapidly changing” landscape and fears “of crackdowns by states with harsh abortion bans—and attempts at prosecution across state lines.”).

<sup>81</sup> See, e.g., Gutierrez, *supra* note 36; Spencer Soper, *Washington to Block Anti-Abortion States from Accessing ID Data*, BLOOMBERG (June 25, 2022, 1:07 PM), <https://news.bloomberglaw.com/>

abortion interstate conflicts, such as recommendations to:

[(1)] prohibit their courts from cooperating with out-of-state civil and criminal cases that stem from abortions that took place legally within their borders . . . [(2)] block their law enforcement agencies from cooperating with out-of-state investigations related to the provision of otherwise lawful abortions . . . [(3)] change their extradition laws to refuse to extradite abortion providers as long as they are not fleeing justice . . . [and (4)] instruct their medical boards and in-state malpractice insurance companies to abstain from taking any adverse action against providers who give out-of-state patients abortions that are legal in the provider's state.<sup>82</sup>

This is uncharted territory. “The Supreme Court has never addressed whether states can bar their residents from traveling to another state to obtain a medical procedure or punish out-of-state physicians who perform that procedure.”<sup>83</sup> In a concurring opinion in *Dobbs*, Justice Kavanaugh wrote: “[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.”<sup>84</sup> Yet, because “there’s no real clear precedent on this issue,” United States residents should be concerned that the “anti-abortion court . . . might find enough wiggle room in the past cases to say it’s not unconstitutional because states are allowed to have [an] extraterritorial

---

privacy-and-data-security/washington-to-block-anti-abortion-states-from-accessing-id-data [https://perma.cc/6BSY-8LC4] (Governor Inslee vowed to “plug any gaps” in privacy law to protect people accessing abortion in Washington state from repercussions in states hostile to abortion, as well as to order the state police to not cooperate with law enforcement of other states); Joe Hernandez, *Connecticut Looks to Expand Abortion Rights in Response to Out-of-State Restrictions*, NPR (May 1, 2022, 1:31 PM), <https://www.npr.org/2022/05/01/1095813226/connecticut-abortion-bill-roe-v-wade> [https://perma.cc/2T55-VYP3] (Connecticut will permit people or organizations sued for providing support for, performing, or receiving abortions to countersue for damages; prevent extradition for conduct legal in Connecticut; and protect medical records from subpoena in patients’ home states).

<sup>82</sup> See Cohen et al., *supra* note 45. As the authors recognize, “these actions could threaten basic principles of cooperation and comity . . . [b]ut these principles already have been frayed by anti-abortion states like Missouri attempting to legislate outside their borders.” *Id.*

<sup>83</sup> See Stern, *supra* note 75.

<sup>84</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct 2228, 2309 (2022) (Kavanaugh, J., concurring); see also Alan B. Morrison, *No, South Dakota Can’t Ban its Residents from Traveling to Get an Abortion*, SLATE (June 28, 2022, 5:40 PM), <https://slate.com/news-and-politics/2022/06/brett-kavanaugh-abortion-travel-ban-dobbs.html> [https://perma.cc/GS97-982Z] (discussing *Bigelow v. Virginia*, which held that “[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State,” while recognizing that “after *Dobbs*, it is unclear that any prior precedent in this area of law should be considered a settled issue . . .”).

effect [to] their laws.”<sup>85</sup> Accordingly, only time will tell whether these proposals will succeed.<sup>86</sup>

## 2. Penalizing Employers Offering Abortion Benefits to Employees

In light of the leaked *Dobbs* draft and the final published opinion, some companies have publicly promised to help their employees access abortion care.<sup>87</sup> Since May 2022, over fifty companies have promised to reimburse employees and their dependents for abortion-related travel.<sup>88</sup> In a notably detailed example, Match Group partnered with Planned Parenthood Los Angeles to help its Texas-based employees: Employees or their dependents who require abortion care call a specific number at PPLA and “PPLA will then do the leg work of arranging and paying for travel and verifying with an employee’s insurance about which services are covered—all without sharing

<sup>85</sup> Kathryn Rubino, *Red States Aren’t Going to Be Satisfied with Overturning Roe. Next Up: Travel Bans*, ABOVE THE LAW (May 4, 2022, 11:16 AM), <https://abovethelaw.com/2022/05/red-states-arent-going-to-be-satisfied-with-overturning-roe-next-up-travel-bans> [<https://perma.cc/BXN5-S3BM>] (quoting Professor David S. Cohen).

<sup>86</sup> Senate Republicans have already blocked a federal attempt to protect pregnant people’s right to travel to seek abortion care. See Ali Zaslav, *Republicans Block Taking Up Senate Bill to Guarantee Freedom to Travel Across States for Abortion*, CNN (July 14, 2022, 2:12 PM), <https://www.cnn.com/2022/07/14/politics/republicans-block-senate-bill-abortion-travel-states/index.html> [<https://perma.cc/3TQS-W45Q>].

<sup>87</sup> See, e.g., Maggie McGrath & Jena McGregor, *These Are the U.S. Companies Offering Abortion-Related Benefits*, FORBES (May 7, 2022, 6:30 AM), <https://www.forbes.com/sites/maggiemcgrath/2022/05/07/these-are-the-us-companies-offering-abortion-related-benefits> [<https://perma.cc/GH4N-QYJL>]; Emma Goldberg et al., *Corporate America Doesn’t Want to Talk Abortion, but It May Have To*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/business/abortion-corporate-america-silence.html> [<https://perma.cc/2EDR-H8L2>]; Rebecca Ungarino et al., *How Wall Street Firms from Goldman Sachs to JPMorgan Are Responding to the End of Roe v. Wade*, BUS. INSIDER (July 1, 2022, 12:27 PM), <https://www.businessinsider.com/goldman-sachs-bank-of-america-jp-morgan-roe-v-wade-2022-6> [<https://perma.cc/KN36-62t8>] (describing responses to the *Dobbs* decision from Bank of America, BlackRock, BNY Mellon, Citi, Deutsche Bank, Evercore, Goldman Sachs, Invesco, Jefferies, JPMorgan, Morgan Stanley, and Wells Fargo).

<sup>88</sup> See, e.g., Elizabeth C. Tippet, *Abortion Benefits: Companies Have a Simple and Legal Way to Help their Workers Living in Anti-Abortion States—Expand Paid Time Off*, THE CONVERSATION (June 30, 2022, 2:18 PM), <https://theconversation.com/abortion-benefits-companies-have-a-simple-and-legal-way-to-help-their-workers-living-in-anti-abortion-states-expand-paid-time-off-185917> [<https://perma.cc/G2A8-ZK2F>]; Karl Evers-Hillstrom, *These Companies Will Cover Abortion Travel Costs for Employees*, THE HILL (June 24, 2022, 12:23 PM), <https://thehill.com/business-a-lobbying/business-lobbying/3535965-these-companies-will-cover-abortion-travel-costs-for-employees> [<https://perma.cc/QSV7-E6HS>] (describing policies of Amazon, Apple, Citigroup, Dick’s Sporting Goods, JPMorgan Chase, Levi Strauss & Co., Lyft, Mastercard, Microsoft, Netflix, Starbucks, Tesla, and Yelp).

information with Match Group.”<sup>89</sup>

However, these efforts could be stymied by legislation that would “bar companies from doing business in [a given state] if they pay for residents of the state to receive abortions elsewhere.”<sup>90</sup> In early July 2022, the Texas Freedom Caucus represented that it intends to introduce legislation that will: (1) “prohibit any employer in Texas from paying for elective abortions or reimbursing abortion-related expenses—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs,” imposing “felony criminal sanctions on anyone who pays for these abortions”; and (2) “allow private citizens to sue anyone who pays for an elective abortion performed on a Texas resident, or who pays for or reimburses the costs associated with these abortions” under the same circumstances.<sup>91</sup> Such legislation will make accessing abortion harder for many, and likely inaccessible for some, due to their inability to afford care.

#### *B. Criminalizing Abortion Seekers and Those Experiencing Unintentional Pregnancy Loss*

While the mainstream anti-abortion movement has typically preferred to punish abortion providers, shying away from penalizing pregnant persons who access care, a growing number of Republicans have voiced support for punishing those who obtain abortions and have begun proposing legislation to do just that. During the 2016 presidential campaign, then-candidate Donald Trump stated “that women who seek abortions should be subject to ‘some form of punishment’ if the procedure is banned.”<sup>92</sup> Further, “Texas Congressman Ron Wright has stated that he ‘absolutely’ believes women should be punished for having abortions. Catherine Davis, founder of the anti-abortion Restoration Project, said she wouldn’t rule out one day

---

<sup>89</sup> Monica Torres, *What You Need to Know About Using Your Company’s Abortion Benefits*, HUFFPOST (June 24, 2022), [https://www.huffpost.com/entry/abortion-insurance-job-benefits\\_1\\_628e5fa8e4b0cda85db96217](https://www.huffpost.com/entry/abortion-insurance-job-benefits_1_628e5fa8e4b0cda85db96217) [https://perma.cc/QR8E-T86T].

<sup>90</sup> Tippet, *supra* note 88.

<sup>91</sup> Letter from Texas Freedom Caucus to Yvette Ostolaza, Mgmt. Comm. Chair, Sidley Austin (July 7, 2022), *available at* <https://abovethelaw.com/2022/07/texas-legislators-threaten-sidley-over-abortion-care-travel-costs> [https://perma.cc/2YPB-CCDF]. The Texas Freedom Caucus also seeks to “require the State Bar of Texas to disbar any lawyer who has violated article 4512.2 by ‘furnishing the means for procuring an abortion knowing the purpose intended,’ or who violates any other abortion statute enacted by the Texas legislature.” *Id.*

<sup>92</sup> Matt Flegenheimer & Maggie Haberman, *Donald Trump, Abortion Foe, Eyes ‘Punishment’ for Women, Then Recants*, N.Y. TIMES (Mar. 30, 2016), <https://www.nytimes.com/2016/03/31/us/politics/donald-trump-abortion.html> [https://perma.cc/4K6R-K69P] (reporting that he recanted following backlash). Any such backlash has since lost its coercive or persuasive power.

punishing women who induce their own abortions.”<sup>93</sup> More recently, in May 2022, a Republican Louisiana state representative proposed the Abolition of Abortion in Louisiana Act, which would have permitted formerly pregnant persons who obtained abortions to be charged with homicide.<sup>94</sup>

Threats of criminal prosecution would serve as a deterrent against people self-managing their own abortions—and before *Dobbs* several people were jailed for using abortion pills (misoprostol and mifepristone) without a doctor’s involvement.<sup>95</sup> However, medication abortion is very effective and safer than Tylenol,<sup>96</sup> and the FDA prescribing guidelines now permit abortion pills “to be prescribed by any certified health provider” and without an in-person appointment.<sup>97</sup> While courts will ultimately need to decide whether states can limit access to FDA-approved medications,<sup>98</sup> people can

---

<sup>93</sup> MARTIN ANTONIO SABELLI ET AL., NAT’L ASS’N CRIM. DEF. LAWS, ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS 4 (2021) <https://www.nacdl.org/getattachment/ce0899a0-3588-42d0-b351-23b9790f3bb8/abortion-in-america-how-legislative-overreach-is-turning-reproductive-rights-into-criminal-wrongs.pdf> [<https://perma.cc/6FJL-5GXU>]. Over the years, Texas legislators have proposed varying bills that would penalize women who receive abortion. See Shannon Najmabadi, *Another Texas GOP Lawmaker Is Attempting to Make Abortion Punishable by the Death Penalty*, TEX. TRIBUNE (Mar. 9, 2021, 2:00 PM), <https://www.texastribune.org/2021/03/09/texas-legislature-abortion-criminalize-death-penalty> [<https://perma.cc/33NE-2S59>] (explaining a proposed law that would punish abortion by the death penalty).

<sup>94</sup> Oriana Gonzalez, *Louisiana Abortion Bill Allowing Homicide Charges Against Patients Stopped for Now*, AXIOS (May 13, 2022), <https://www.axios.com/2022/05/13/louisiana-abortion-bill-homicide-patient-roe> [<https://perma.cc/M4JH-ZY97>]; see H.B. 813 (La. 2022).

<sup>95</sup> Clyde Haberman, *Code Name Jane: The Women Behind a Covert Abortion Network*, N.Y. TIMES (Oct. 14, 2018), <https://www.nytimes.com/2018/10/14/us/illegal-abortion-janes.html> [<https://perma.cc/353M-4QJE>].

<sup>96</sup> Alanna Vagianos, *Here’s What You Should Know About Medication Abortion*, HUFFPOST (May 10, 2022, 3:56 PM), [https://www.huffpost.com/entry/medication-abortion\\_n\\_627aa0cae4b0b7c8f08a87e1](https://www.huffpost.com/entry/medication-abortion_n_627aa0cae4b0b7c8f08a87e1) [<https://perma.cc/4CPS-2X2K>]. Medication abortion induces abortion via misoprostol with or without mifepristone—although, most clinics will use both because misoprostol is not FDA-approved alone. *Id.* Using only misoprostol “is often used in countries abroad or when people are forced to self-manage their own abortions at home.” *Id.* “When used together, mifepristone and misoprostol are more than 95% effective.” *Id.*

<sup>97</sup> Debra Cassens Weiss, *Can Mississippi Trump FDA Regulations to Restrict Abortion Pills? Federal Judge Considers the Issue*, A.B.A. J. (May 26, 2022, 11:48 AM), <https://www.abajournal.com/news/article/can-mississippi-trump-fda-regulations-to-restrict-abortion-pills-federal-judge-considers-the-issue> [<https://perma.cc/2K8V-UUT9>].

<sup>98</sup> See Maryn McKenna, *Abortion Pills May Force States and the FDA into a Standoff*, WIRED (July 7, 2022, 7:00 AM), <https://www.wired.com/story/abortion-pills-may-force-states-and-the-fda-into-a-stand-off> [<https://perma.cc/JLT8-Y6BE>] (“Despite the White House and federal agencies promising unfettered access to the drugs, by mail if necessary, legal scholars are predicting court battles between states opposed to abortion and the US Food and Drug Administration—battles that, if they go badly, could undermine the FDA’s authority to regulate whole categories of drugs.”); see also Greg Hilburn, *Louisiana Legislature Passes Bill to*

still “purchas[e] abortion pills from overseas pharmacies like Aid Access” or request them from foreign organizations like the Red Transfronteriza—even in states that prohibit the provision of medication abortion via telehealth or entirely ban abortion, such as Texas.<sup>99</sup> In mid-May 2022, Aid Access was sending 1,200 to 1,600 pill packets out per month—which is more than it used to send in an entire year—with “[b]etween 5% and 10% of requests” coming “from women who want to have pills on hand just in case they get pregnant and face abortion restrictions triggered by the end of Roe.”<sup>100</sup> Mexican members of the Red Transfronteriza are willing to send “everything” needed to manage abortions to United States residents in need who cannot travel: “sanitary napkins, chewing gum for nausea, pills for pain,” plus the abortion pills themselves along with the World Health Organization’s abortion-pill protocol.<sup>101</sup> In addition to its safety, efficacy, and accessibility, medication abortion has a significant upside: it triggers the same biological process as a spontaneous miscarriage meaning that it is not medically detectable.<sup>102</sup>

---

*Ban Mail-Order Abortion Drugs*, LAFAYETTE DAILY ADVERTISER (June 3, 2022, 6:46 PM), <https://www.theadvertiser.com/story/news/2022/06/03/louisiana-legislature-passes-bill-ban-mail-order-abortion-drugs/7506485001> [<https://perma.cc/Q57E-XHX6>] (reporting that the Louisiana legislature approved a bill “mak[ing] it illegal for companies to provide the two drugs—mifepristone and misoprostol—through the mail with criminal penalties as consequences” because legislators wanted to prevent “mail-order, do-it-yourself chemical abortions without oversight”). Before *Dobbs*, GenBioPro, the manufacturer of mifepristone, sued to challenge Mississippi’s restrictions on access to abortion pills, but has since voluntarily dismissed its lawsuit due to “the changed national landscape.” See Brendan Pierson, *Abortion Drug Maker Drops Challenge to Mississippi Ban*, REUTERS (Aug. 19, 2022, 3:38 PM), <https://www.reuters.com/legal/abortion-drug-maker-drops-challenge-mississippi-ban-2022-08-19> [<https://perma.cc/6GFX-4M6D>].

<sup>99</sup> See Cecilia Nowell, *How Mexican Feminists Are Helping Americans Get Abortions*, THE GUARDIAN (June 10, 2022, 5:00 AM), <https://www.theguardian.com/world/2022/jun/10/mexico-abortion-access-americans> [<https://perma.cc/WU9B-CTFG>] (explaining the impact of international organizations to access to abortion pills); Vagianos, *supra* note 96. Of course, as discussed below, there are legal risks to obtaining abortion pills on one’s own.

<sup>100</sup> See Nina Shapiro, *Washington Doctor on Leading Edge of Abortion Rights Turns to Next Frontier After Roe: Pills*, SEATTLE TIMES (June 2, 2022, 8:53 AM), <https://www.seattletimes.com/seattle-news/politics/washington-doctor-on-leading-edge-of-abortion-rights-turns-to-next-frontier-after-ro-pills> [<https://perma.cc/QZC7-8V5W>].

<sup>101</sup> See Nowell, *supra* note 99. For those able to travel to Mexico, the organization will provide in-person assistance. *Id.*

<sup>102</sup> See Shapiro, *supra* note 100. In fact, Aid Access warns its patients “If you seek emergency care, do *not* say anything about taking pills. No one can detect them. And you will be treated much more nicely.” *Id.*; see also Erick Boodman, *In a Doctor’s Suspicion After a Miscarriage, a Glimpse of Expanding Medical Mistrust*, STAT (June 29, 2022), <https://www.statnews.com/2022/06/29/doctor-suspicion-after-miscarriage-glimpse-of-expanding-medical-mistrust> [<https://perma.cc/ZEH2-S4GM>] (“Some obstetrician-gynecologists are starting to counsel patients that they don’t need to be honest with providers about whether they experienced an abortion or a miscarriage because there’s no way to clinically tell the difference after the fact.”).

Yet, the technology that makes safe medication abortion accessible can—and likely will—be used by law enforcement to prosecute people self-managing their abortions, as “there is likely no way to [purchase abortion pills online] anonymously.”<sup>103</sup> In 2015, “Google had more than 700,000 searches for self-induced abortions, many of them for ways to ‘buy abortion pills online.’”<sup>104</sup> Law enforcement can build a case using: (1) search engine records;<sup>105</sup> (2) “shopping records to prove that people bought or sold abortion-inducing medications or to prove they were pregnant in the first place”;<sup>106</sup> (3) electronic communications such as text messages, emails, social media posts, video game messages, and even encrypted messages if saved on a device;<sup>107</sup> (4) period-tracking apps;<sup>108</sup> (5) telehealth appointments, mail-in pharmacy requests, and other electronic medical records;<sup>109</sup> and

<sup>103</sup> ALBERT FOX CAHN & ELENI MANIS, SURVEILLANCE TECH. OVERSIGHT PROJECT, THE HANDMAID’S TRAIL: ABORTION SURVEILLANCE AFTER ROE 4 (May 24, 2022), [https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/628cee30c18a56354ed189/1653403185261/2022.5.24\\_STOP+Embargoed+Report\\_The+Handmaids+Trail\\_FOURTH+REVISED+FINAL.pdf](https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/628cee30c18a56354ed189/1653403185261/2022.5.24_STOP+Embargoed+Report_The+Handmaids+Trail_FOURTH+REVISED+FINAL.pdf) [<https://perma.cc/5N2D-M4MU>].

<sup>104</sup> Haberman, *supra* note 95.

<sup>105</sup> CAHN & MANIS, *supra* note 103, at 3. This is not a hypothetical concern: “In one 2018 case, Mississippi police used a woman’s own search history to charge her with second degree murder following a miscarriage, relying on queries about miscarriages and how to purchase abortion-inducing pills.” *Id.*

<sup>106</sup> *Id.* at 4. This applies to in-person purchases as well when made via credit card or store loyalty card because they are linked to the purchaser. *Id.*

<sup>107</sup> *See id.* at 4–5 (“Electronic communications are a particularly potent policing tool, particularly unencrypted formats like text messages and email.”); *id.* at 10–11 (explaining that Meta’s WhatsApp collects data about when and with whom users communicate and permits staff to read message content, while encrypted material saved to the iCloud becomes accessible to Apple). Again, this is not a hypothetical concern: “In 2015, Indiana prosecutors used Purvi Patel’s text messages to convict her of murder for terminating her pregnancy with abortifacients ordered from Hong Kong.” *Id.* at 4; *see also* Caroline Bologna, *Without Roe v. Wade, Pregnant Women May Face Arrest for All Kinds of Behaviors*, HUFFPOST (June 24, 2022) [https://www.huffpost.com/entry/roe-v-wade-pregnancy-criminalization-arrest\\_1\\_629f6619e4b0c184bdd5b0df](https://www.huffpost.com/entry/roe-v-wade-pregnancy-criminalization-arrest_1_629f6619e4b0c184bdd5b0df) [<https://perma.cc/T9MP-X53K>] (“In a high-profile case out of Indiana, Purvi Patel’s text messages to a friend expressing ambivalence about her pregnancy were used as evidence that led to her conviction and 20-year sentence for feticide and child neglect.”).

<sup>108</sup> *See* CAHN & MANIS, *supra* note 103, at 12 (describing period tracking apps as “a potent source of data for police” without greater privacy protections).

<sup>109</sup> *See* Tami Abdollah, *Online Data, Medical Records Could Be Used to Put Women in Jail Under New Abortion Laws*, USA TODAY (June 12, 2022, 5:48 PM), <https://www.usatoday.com/story/news/nation/2022/06/12/new-abortion-laws-could-see-many-women-doctors-face-criminal-charges/7571034001> [<https://perma.cc/9SUE-43VB>]. Some “women’s health clinics [have recently decided] to move to paper records or encrypted communication” to make it harder for law enforcement to build a case against their patients. *Id.*



(6) information collected by anti-abortion pregnancy centers.<sup>110</sup> In fact, “[a] top health official in Missouri . . . said in 2019 that his office has monitored detailed information about Planned Parenthood’s patients, including the timing of their menstrual cycle[s], to determine if they’ve had failed abortions,” while other “[p]rosecutors have also relied on online searches and patient data to inform abortion-related arrests.”<sup>111</sup>

Importantly, states do not need to amend their criminal laws, as prosecutors can target pregnant (or formerly pregnant) people and many others using existing laws. According to the National Association of Criminal Defense Lawyers, in 2021 there were “more than 4,450 crimes in the federal criminal code, tens of thousands of state criminal provisions . . . as well as state conspiracy, attempt, and accomplice statutes that could subject a wide range of individuals to criminal penalties” without *Roe*.<sup>112</sup> After *Dobbs*, abortion can be treated “as homicide, and in some cases, a death penalty-eligible offense.”<sup>113</sup> For example, a “murder in the second degree” charge in Georgia for “causing the death of a human during the commission of cruelty to children in the second degree” could apply to the pregnant person and her partner “or anyone caring for the pregnant woman (and therefore her ‘unborn child’)” who failed to stop her from obtaining an abortion.<sup>114</sup> Likewise, “conduct by family or household members who aid a woman in securing an abortion may be criminalized under domestic violence

---

<sup>110</sup> Abigail Abrams & Vera Bergengruen, *Anti-Abortion Pregnancy Centers Are Collecting Troves of Data that Could Be Weaponized Against Women*, TIME (June 22, 2022, 12:02 PM), <https://time.com/6189528/anti-abortion-pregnancy-centers-collect-data-investigation> [<https://perma.cc/TPF2-EM7V>] (reporting that pregnancy centers “collect personal data from the millions of women they interact with every year” including “sexual and reproductive histories, test results, ultrasound photos, and information shared during consultations, parenting classes, or counseling sessions”—yet, because they are not medical clinics, they are not bound by federal health data privacy laws—and they “now use data-collection interfaces to track women who interact with their organization in person, on the phone or online.”).

<sup>111</sup> Sabin, *supra* note 45.

<sup>112</sup> SABELLI ET AL., *supra* note 93 at 3. Many criminal statutes “treat even minor participants no differently than the abortion providers themselves and impose penalties equally as severe”; as such, “anyone working at an abortion clinic could be considered to have aided and abetted in the commission of the illegal abortion . . . from the receptionist who scheduled the appointment to the nurse who assisted the physician,” with liability also extending “to the person who drove the pregnant woman to the clinic, the person who paid for the procedure, the friend or loved one who counseled the woman to obtain the abortion, and to countless others.” *Id.* at 11.

<sup>113</sup> *Id.* at 23.

<sup>114</sup> *Id.* at 24. This possibility should not be discounted “as an extreme or unlikely hypothetical considering the sixteen states in which courts have held in the civil context that a father may be found guilty of child neglect for failing to prevent the woman he impregnated from using drugs, or for failing to force her to obtain drug treatment while pregnant.” *Id.*

statutes.”<sup>115</sup> For example, Ohio’s domestic violence law criminalizes knowingly causing or attempting to cause, or recklessly causing physical harm to a family or household member.<sup>116</sup> “The future is clear, without *Roe*, states across the nation are prepared to arrest and prosecute women, their friends, their providers, and all those who assist them [in] obtain[ing]” abortions.<sup>117</sup>

These are not outlandish hypotheticals. Even while a constitutionally protected right to abortion existed, between 1973 and 2020, there were over 1,700 cases—arrests, prosecutions, and other civil or criminal consequences—in which pregnant persons were penalized for “some action or behavior that law enforcement claimed caused harm to the fetus,” such as “falling down stairs; giving birth at home; exposing a fetus to dangerous ‘fumes’; having HIV; not resting enough during the pregnancy; not getting to a hospital fast enough while in labor; being the victim of a shooting; and self-inducing an abortion.”<sup>118</sup> A particularly disturbing example occurred in 2019 when a resident of Alabama “was charged with manslaughter because she suffered a pregnancy loss after being shot in the abdomen five times” and the grand jury determined she had “intentionally caused the death” of her fetus by “initiating a fight knowing she was five months pregnant.”<sup>119</sup>

Likewise, prosecution for inducing one’s own abortion is not a new threat. For example, in 2015, Dougherty County, Georgia charged Kenlissia Jones with “malice murder” alleging that she obtained and used misoprostol to end her own pregnancy.<sup>120</sup> Or, in 1978, Marla Pitchford was tried in

<sup>115</sup> *Id.* at 29.

<sup>116</sup> *Id.* at 30.

<sup>117</sup> *Id.* at 34.

<sup>118</sup> Sam Levin, *She Was Jailed for Losing a Pregnancy. Her Nightmare Could Become More Common*, THE GUARDIAN (June 4, 2022, 1:00 AM), <https://www.theguardian.com/us-news/california-stillborn-prosecution-roe-v-wade> [<https://perma.cc/M77H-WC69>] (describing the story of Chelsea Becker who was charged with “murder of a human fetus” after she suffered a “suspicious” stillbirth at eight months’ gestation in California and spent sixteen months in jail before the charges were dismissed); see also *Arrests and Other Deprivations of Liberty of Pregnant Women, 1973–2020*, NAT’L. ADVOC. FOR PREGNANT WOMEN, <https://www.nationadadvocatesforpregnantwomen.org/arrests-and-prosecutions-of-pregnant-women-1973-2020> [<https://perma.cc/2CKM-2765>] (identifying sources documenting “over 1700 cases between 1973–2020” of “arrests, detentions, and equivalent deprivations of physical liberty . . . in which being pregnant was a necessary element of the crime or a ‘but for’ reason for the coercive or punitive action taken.”).

<sup>119</sup> See Bologna, *supra* note 107.

<sup>120</sup> See SABELLI ET AL., *supra* note 93, at 25. While the malice murder charge was dismissed upon the prosecutor concluding that “there was no legal authority in Georgia for charging a pregnant woman with the crime of murder for having terminated her own pregnancy” Ms. Jones faced a charge of possession of a dangerous drug before that charge was also dropped. *Id.* See also Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women*

Kentucky for terminating her pregnancy without being a licensed physician.<sup>121</sup> Anti-abortion pregnancy centers now have an additional incentive to collect information about pregnant people: such information can be used by law enforcement for prosecution.<sup>122</sup>

Experts predict that the “criminalization of pregnancy is going to get worse” without *Roe*.<sup>123</sup> As Afsha Malik, an associate at the National Advocates for Pregnant Women, explained, “people with capacity for pregnancy can and will become targets by the state for criminal prosecution, legal surveillance and civil detention if *Roe* is off the books.”<sup>124</sup> States will have “the power to criminalize anything they think is harmful to the fetus,” including “everyday things” like “[h]aving a glass of wine, eating deli meats and soft cheeses, exercising too hard, getting up to take care of [] other children during . . . bedrest, [and] taking [] prescribed antidepressants” as they “are all actions that can have a negative impact on pregnancy and thus could serve as grounds for arrest in the future.”<sup>125</sup>

To be clear, state interference with pregnancy will *not* be limited to those actively seeking abortion, which is particularly concerning given that “[a]t least 20% of all pregnancies in the US end in miscarriages and stillbirths, often with unknown causes.”<sup>126</sup> Of the 1,700 cases referenced above, at least 62 “involved women who experienced miscarriage, stillbirth, or infant death”

---

*in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL., POL’Y & L. 299, 317, 321–22 (2013) (reporting eight cases involving women who allegedly “self-induced an abortion that the state claimed violated the state’s abortion laws,” including four in which the defendant “was also charged under murder or manslaughter statutes.”).

<sup>121</sup> See Katherine van Wormer, *The Criminal Abortion Trial that Happened in Kentucky in 1978 and Why It Matters*, COURIER J. (June 26, 2022, 10:26 AM), <https://www.courier-journal.com/story/opinion/2022/06/24/what-kentuckys-1978-criminal-abortion-trial-means-after-roe-wade/7634612001> [<https://perma.cc/5GWA-5YRX>].

<sup>122</sup> See Abrams & Bergengruen, *supra* note 110 (“Heartbeat International also runs an ‘abortion-pill reversal’ hotline directed at women who have started medical abortions” even though there is “no scientific evidence suggesting that abortion-pill reversal works” and noting that where abortion is illegal such information could be used to prosecute).

<sup>123</sup> Bologna, *supra* note 107. “The American College of Obstetricians and Gynecologists defines the criminalization of pregnancy as ‘the punishing or penalizing of individuals for actions that are interpreted as harmful to their own pregnancies, including enforcement of laws that punish actions during pregnancy that would not otherwise be criminal or punishable.’” *Id.* See also Cahn & Manis, *supra* note 103, at 6 (predicting that law enforcement will rely on geofence warrants to track those seeking reproductive healthcare even out of state, as well as keyword search warrants and computer monitoring software in schools and libraries to identify those researching abortion).

<sup>124</sup> See Bologna, *supra* note 107.

<sup>125</sup> *Id.*

<sup>126</sup> See Levin, *supra* note 118; see also Boodman, *supra* note 102 (miscarriages “typically occur in 11% to 16% of known pregnancies, and in an estimated 30% of pregnancies overall.”).

and the “prosecutors attributed the loss[es] entirely to actions or inactions that occurred during the woman’s pregnancy.”<sup>127</sup> In 48 of these cases, the “women were charged under variations of the state’s homicide laws, including crimes [such] as feticide, manslaughter, reckless homicide, homicide by child abuse, and first-degree murder.”<sup>128</sup> In numerous instances, these “cases proceeded without any evidence, much less scientific evidence, establishing a causal link between the harm and the pregnant woman’s alleged action or inaction.”<sup>129</sup> These prosecutions are bound to become more frequent in the future.

### C. Federal Abortion Ban

Now that the anti-abortion movement has achieved its goal of overturning *Roe* it will turn its sights on a national ban.<sup>130</sup> This is the obvious next step because the anti-abortion movement dreams of “making abortion not merely illegal but ‘unthinkable.’”<sup>131</sup> The Susan B. Anthony List and National Right to Life are “hoping to build support in Congress for a national abortion ban” and already have the support of numerous Republicans who have proclaimed their belief that life begins at conception.<sup>132</sup> The National

<sup>127</sup> Paltrow & Flavin, *supra* note 120, at 321.

<sup>128</sup> *Id.* at 321–22.

<sup>129</sup> *Id.* at 318.

<sup>130</sup> See, e.g., Elizabeth Dias & Ruth Graham, *Where Does the Anti-Abortion Movement Go After Roe?*, N.Y. TIMES (May 11, 2022), <https://www.nytimes.com/2022/05/11/us/anti-abortion-movement-roe-v-wade.html> [<https://perma.cc/SH4R-CQN3>] (“A vocal faction is talking about ‘abortion abolition,’ proposing legislation to outlaw abortion after conception, with few if any exceptions in cases of rape or incest.”); Jonathan Cohn, *Here’s Why You Should Take the Possibility of a National Abortion Ban Seriously*, HUFFPOST (May 12, 2022) [https://www.huffpost.com/entry/will-republicans-ban-abortion\\_n\\_627c0a51e4b046ad0d856439](https://www.huffpost.com/entry/will-republicans-ban-abortion_n_627c0a51e4b046ad0d856439) [<https://perma.cc/SB4F-JBPN>] (“[F]ollowing the leak of a draft Supreme Court opinion that would overturn *Roe v. Wade*, McConnell said that it was ‘possible’ Republicans would seek to enact a national ban on abortion.”); Travis Waldron, *The U.S. Is One of the Only Countries Moving Backwards on Abortion Rights*, HUFFPOST (May 3, 2022, 2:45 PM), [https://www.huffpost.com/entry/us-abortion-rights-roe-v-wade\\_n\\_627165aae4b0cca6755af102](https://www.huffpost.com/entry/us-abortion-rights-roe-v-wade_n_627165aae4b0cca6755af102) [<https://perma.cc/BRP7-5HQR>] (“Conservative activists have begun advocating for national legislation to ban abortion should Republicans win control of the House and the Senate in November’s midterm elections . . . And while President Joe Biden or any other Democrat wouldn’t sign such a ban into law, a future Republican trifecta seems likely to at least try to outlaw abortion nationwide.”).

<sup>131</sup> Dias & Graham, *supra* note 130.

<sup>132</sup> *Id.*; see also Amanda Terkel, *GOP Crusade Against Abortion Could Lead to Contraception Bans*, HUFFPOST (May 11, 2022, 10:01 AM), [https://www.huffpost.com/entry/republicans-supreme-court-contraception\\_n\\_627ab11fe4b046ad0d829a0a](https://www.huffpost.com/entry/republicans-supreme-court-contraception_n_627ab11fe4b046ad0d829a0a) [<https://perma.cc/F5UU-W4XM>]; Michelle Goldberg, *The Authoritarian Plan for a National Abortion Ban*, N.Y. TIMES (Apr. 25, 2021), <https://www.nytimes.com/2021/04/05/opinion/us-abortion-bans.html>

Right to Life Committee “proposes a total nationwide ban on abortion with no exceptions other than to prevent the death of the mother,” a prohibition on “prescription and distribution of mifepristone and misoprostol,” and criminalization of providing “instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortions or means to obtain an illegal abortion.”<sup>133</sup> In mid-September 2022, Senator Lindsey Graham introduced a bill which would ban abortions nationwide after 15 weeks’ gestation, but that is unlikely to go anywhere in the near future given voters’ current focus on reproductive rights.<sup>134</sup>

These proposals are not popular,<sup>135</sup> but that is unlikely to stop Republicans long-term. They “have multiple layers of protection from [any public] backlash” because of the “built-in partisan advantage in the Senate and Electoral College” resulting from the disproportionate power given to low-population states that tend to tilt Republican.<sup>136</sup> Even if mainstream

---

[<https://perma.cc/ME68-PJNS>]; Sanctity of Human Life Act, H.R. 212, 112th Cong. § 2(B) (2011) (“[T]he life of each human being begins with fertilization . . . at which time every human being shall have all the legal and constitutional attributes and privileges of personhood . . .”); Jerusalem Demsas, *The Fate of States’ Rights After Roe*, THE ATLANTIC (July 18, 2022), <https://www.theatlantic.com/newsletters/archive/2022/07/republicans-expose-their-hypocrisy-on-abortion/670562> [<https://perma.cc/GF2A-UXAT>] (reporting that “the president of a prominent anti-abortion group ha[d] been in conversations with [ten] potential Republican presidential candidates[,]” a majority of whom “assured her that they would be supportive of a national ban and would be eager to make that policy a centerpiece of a presidential campaign.”).

<sup>133</sup> Tessa Stuart, *Ban Abortion Pills, Prosecute Planned Parenthood: This Is the Future Republicans Want*, ROLLING STONE (June 25, 2022), <https://www.rollingstone.com/politics/politics-features/roe-wade-abortion-rights-supreme-court-1374276> [<https://perma.cc/WNX6-SLG8>]; see generally Memorandum from James Bopp, Jr., et al., to National Right to Life Committee and Whom it May Concern on NRLC Post-Roe Model Abortion Law (June 15, 2022), <https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf> [<https://perma.cc/9KWF-X6MS>] (discussing a group of pro-life movement lawyers’ model law for a post-Roe abortion law).

<sup>134</sup> See, e.g., Kelsey Snell, *GOP Sen. Lindsey Graham Introduces 15-Week Abortion Ban in the Senate*, NPR (Sept. 13, 2022, 1:49 PM), <https://www.npr.org/2022/09/13/1122700975/gop-sen-lindsey-graham-introduces-15-week-abortion-ban-in-the-senate> [<https://perma.cc/2D4U-5TA8>]. Senator Graham’s proposal would allow states to ban abortion earlier in pregnancy but would not allow states to permit the procedure later than 15 weeks—except to save the life of the pregnant person or if the pregnancy resulted from rape or incest. Jonathan Allen, et al., *‘Bad Idea’: Republicans Pan Lindsey Graham’s 15-Week Abortion Ban*, NBC NEWS (Sept. 15, 2022, 1:58 PM), <https://www.nbcnews.com/politics/congress/sen-graham-introduces-bill-ban-abortion-nationwide-15-weeks-rcna47530> [<https://perma.cc/CC5M-TS2J>].

<sup>135</sup> See, e.g., Qamar, *supra* note 1 (“[A] greater share of Americans consistently think abortion should be mostly or always legal (an average of 58[%] across all surveys) than think it should be mostly or always illegal (an average of 39 [%]).”).

<sup>136</sup> Cohn, *supra* note 130. Put another way, because every state has the same number of senators, low-population states have power disproportionate to their populations. As one progressive strategist noted, “a Democratic presidential candidate would need to win 52% of the popular vote just to have a 50-50 shot at winning the Electoral College.” *Id.*

Republicans did not want to risk any potential political fallout, they seem likely to go along with the extreme members of their party for fear of intraparty confrontations and, of course, the fear of being unseated by a more extreme challenger.<sup>137</sup> Further, the minority of United States residents who do not believe abortion should be legal is comprised “disproportionately [of] white evangelicals [] who, in turn, may be the single most influential constituency within the Republican Party” and “86% [of whom] say the statement that ‘a fetus is a person with rights’ captures their perspective extremely well, very well or somewhat well.”<sup>138</sup> Put simply, “Republican leaders have spent decades appealing to this constituency by promising to stop abortions. [Following *Dobbs*], GOP leaders will have a hard time explaining why they’re not taking advantage of it.”<sup>139</sup> When Republicans take control of Congress (with or without occupying the White House), they will seek to ban abortion nationwide, making the efforts of abortion sanctuary states obsolete and greatly increasing the nation’s maternal mortality rate.<sup>140</sup> To prevent this, abortion must be as much of a voting priority on the left as it is on the right and remain so long-term.

#### *D. Banning Emergency Contraception or Contraception More Broadly*

Social conservatives want to change the definition of pregnancy so that it begins at fertilization—instead of at implantation—threatening “access to a number of contraceptive methods that prevent implantation, including emergency contraceptives and intrauterine devices, which disturbingly would be redefined as abortifacients.”<sup>141</sup> Republicans have long sought to advance personhood legislation which would include fertilized eggs as persons under

<sup>137</sup> *See id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See* Amanda Jean Stevenson, *Study Shows an Abortion Ban May Lead to a 21% Increase in Pregnancy-Related Deaths*, THE CONVERSATION (Sept. 22, 2021, 8:55 AM), <https://theconversation.com/study-shows-an-abortion-ban-may-lead-to-a-21-increase-in-pregnancy-related-deaths-167610> [<https://perma.cc/GU5C-GANT>] (estimating that a nationwide ban on abortions would result in 140 additional pregnancy related deaths by the second year of the ban, increasing maternal mortality by 21% due *only* to the complications of being pregnant and delivery; any increase in deaths due to unsafe abortion attempts would be in addition to this estimate).

<sup>141</sup> Terkel, *supra* note 132 (quoting Osub Ahmed, the Center for American Progress’s Associate Director for Women’s Health and Rights); *see also* Laura Sanders, *5 Misunderstandings of Pregnancy Biology That Cloud the Abortion Debate*, SCIENCE NEWS (June 24, 2022, 1:58 PM), <https://www.sciencenews.org/article/abortion-roe-v-wade-pregnancy-biology-supreme-court-ruling> [<https://perma.cc/V2CB-93NM>] (Fertilization, the moment that sperm and egg fuse together, “does not automatically lead to a pregnancy” as “[u]p to 50[%] of fertilized eggs do not implant in the uterus.” Instead, “[t]he growing ball of cells needs to travel to the uterus and implant itself in the right spot,” with “the right balance of hormones . . . to support the pregnancy.”).

the U.S. Constitution, making abortion illegal, and also banning intrauterine devices (“IUDs”) and Plan B.<sup>142</sup> These forms of contraception are specifically targeted due to their ability to prevent the implantation of a fertilized egg.<sup>143</sup> Unsurprisingly, many who believe that life begins at conception object to the prevention of implantation.<sup>144</sup>

Some anti-abortion legislators have already proposed legislation that “explicitly stated that a fertilized egg should be recognized as a person whose right to life should be protected” or legislation banning abortion “from the moment of fertilization,” which would criminalize the aforementioned forms of contraception.<sup>145</sup> In fact, for a brief period after the *Dobbs* decision, a major health system in Kansas City, Missouri, stopped offering emergency contraception, explaining: “To ensure we adhere to all state and federal laws—and until the law in this area becomes better defined—Saint Luke’s will not provide emergency contraception at our Missouri-based locations,” since “the Missouri law is ambiguous but may be interpreted as criminalizing

---

<sup>142</sup> See Amanda Terkel & Igor Bobic, *Trump-Endorsed Candidate Backs Banning Birth Control*, HUFFPOST (May 20, 2022, 11:43 AM), [https://www.huffpost.com/entry/birth-control-ban-abortion\\_n\\_6287a89ae4b01a50ab579e39](https://www.huffpost.com/entry/birth-control-ban-abortion_n_6287a89ae4b01a50ab579e39) [<https://perma.cc/V6ZK-VT2R>].

<sup>143</sup> Adrianna Rodriguez, *What to Know About Birth Control as Americans Await Supreme Court Decision on Roe v. Wade*, USA TODAY (June 18, 2022, 11:51 AM), <https://web.archive.org/web/20220630175705/https://www.usatoday.com/story/news/health/2022/06/18/roe-v-wade-what-know-abortion-plan-b-birth-control/9940959002/?gnt-cfr=1> [<https://perma.cc/4PLG-MLF4>] (identifying the morning-after pill and copper IUDs as “emergency contraception” that can be used “within three to five days of having unprotected sex” and explaining that Plan B “is a hormone-based contraceptive that prevents or delays ovulation,” while the copper IUD “releases ions into the uterus, changing the fluids in the fallopian tube and uterus to make an inhospitable environment for sperm” thereby preventing implantation).

<sup>144</sup> See Sarah McCammon, *What Would Overturning Roe Mean for Birth Control?*, NPR (May 11, 2022, 9:31 AM), <https://www.npr.org/2022/05/11/1097666334/roe-birth-control> [<https://perma.cc/AXJ5-JB7V>].

<sup>145</sup> Andrea Michelson, *Contraception Is Already Restricted in Many States, and It Could Be the Next Battleground. Here’s What You Need to Know.*, BUS. INSIDER (June 29, 2022, 3:24 PM), <https://www.businessinsider.in/science/health/news/contraception-is-already-restricted-in-many-states-and-could-be-the-next-battleground-heres-what-you-need-to-know-/articles/how/92527097.cms> [<https://perma.cc/AK2W-YQMM>] (explaining that “[e]mergency contraception, such as the Plan B pill, and some IUDs could be the first birth-control methods under restriction, solely based on the language of state laws that outlaw abortion ‘from the moment of fertilization’” and identifying legislative proposals in Louisiana and Idaho that would ban emergency contraception); Gonzalez, *supra* note 94; see also Paul Braun, *Louisiana Bill Would Allow Murder Charges for Abortions; Opponents Call It ‘Barbaric’*, NEW ORLEANS PUB. RADIO (May 5, 2022, 2:36 PM), <https://www.wvno.org/2022-05-05/louisiana-bill-would-allow-murder-charges-for-abortions-opponents-call-it-barbaric> [<https://perma.cc/7L79-DA MK>] (discussing proposed legislation to define the start of life at fertilization and allow for prosecution of people who receive abortions).

emergency contraception.”<sup>146</sup> While Saint Luke’s reversed this decision less than a day later,<sup>147</sup> its initial reaction validates United States residents’ concerns about the future of emergency contraception.

Multiple states have already implemented restrictions on emergency contraception or have statutes permitting health care providers to decline contraception-related service based on the provider’s beliefs.<sup>148</sup> Even before *Dobbs*, Republican legislators targeted IUDs and emergency contraception.<sup>149</sup> In fact, Texas’s family-planning program does not cover emergency contraception at all.<sup>150</sup>

People in the United States recognize the realistic possibility that emergency contraception could be banned. In the immediate aftermath of the *Dobbs* decision, consumer demand for emergency contraceptives skyrocketed, prompting some retailers to limit sales to individual customers.<sup>151</sup> Some of this demand can be traced to social media campaigns urging people to stock up while the pills are still available.<sup>152</sup> Instead of

<sup>146</sup> Jonathan Shorman, *Kansas City Area Health System Stops Providing Plan B in Missouri Because of Abortion Ban*, KAN. CITY STAR (June 29, 2022, 4:59 PM), <https://www.kansascity.com/news/politics-government/article262988028.html> [https://perma.cc/CFM2-YZ7X].

<sup>147</sup> *Id.*

<sup>148</sup> Oriana Gonzalez, *Dems Fear Red States Banning Abortion Will Zero in on Birth Control Next*, AXIOS (Jul. 28, 2022, 4:39 PM), <https://www.axios.com/2022/07/28/abortion-birth-control-red-states-democrats> [https://perma.cc/KZ2T-CEPQ].

<sup>149</sup> *Id.*; Michael Ollove, *Some States Already Are Targeting Birth Control*, PEW TRUSTS: STATELINE BLOG (May 19, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/19/some-states-already-are-targeting-birth-control> [https://perma.cc/7TM7-DBKF] (describing efforts in Missouri, Idaho, and Louisiana targeting IUDs or emergency contraception).

<sup>150</sup> Gonzalez, *supra* note 148; *see generally* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>151</sup> *See, e.g.*, Amrita Khalid, *Amazon to Limit Purchases of Plan B Emergency Contraceptive Pills*, ENGADGET (June 28, 2022), <https://www.engadget.com/amazon-limits-plan-b-roe-wade-demand-surge-234711157.html> [https://perma.cc/RQQ6-RSDF] (reporting that Amazon, Rite-Aid, Walmart, Target, Walgreens and CVS had limited “sales of Plan B and other emergency contraceptives . . . in the wake of increased demand” immediately following the *Dobbs* decision due to “a spike in sales of Plan B and other generic brands of levonorgestrel morning-after pills”) A similar surge followed the leak of the draft *Dobbs* decision in May 2022. *See id.* *See generally* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>152</sup> *See* Kelsee Majette, *CVS Limits Purchases of Plan B Pill Following Supreme Court Ruling on Abortion*, THE WEEK (June 28, 2022), <https://theweek.com/speed-reads/1014727/retailcvscapping-purchases-of-plan-b-pills-to-ensure-consistent-supply> [https://perma.cc/2E9V-HU25]; Katherine Rosman & Gina Cherelus, *Women on Why They’re Stocking up on the Morning-After Pill*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/27/style/plan-b-stockpile-roe-abortion.html> [https://perma.cc/JRF3-7M92] (reporting that after the *Dobbs* decision was announced, “the morning-after contraception pill has emerged as a sought-after



hoarding emergency contraception, others are seeking permanent sterilization or are changing their sexual behaviors.<sup>153</sup>

Notably, there are some in the Republican Party that would go further and ban *all* birth control if given the chance.<sup>154</sup> Republicans have already started talking about *Griswold v. Connecticut* as another case they want the Supreme Court to overturn after *Roe v. Wade*.<sup>155</sup> In *Griswold*, the Supreme Court concluded that a statute banning the use of contraception was unconstitutional because it violated “the notions of privacy surrounding the marriage relationship.”<sup>156</sup> In his concurrence in *Dobbs*, Justice Thomas communicated his support for overturning *Griswold*, as well as other substantive due process precedents.<sup>157</sup> While some Republicans contend that

---

purchase for many people worried about access to reproductive health care,” including some “creating a small stockpile in anticipation of possible restrictions on contraception as Justice Clarence Thomas suggested in a concurring opinion . . .”).

<sup>153</sup> Meena Venkataramanan, *Men Rush to Get Vasectomies After Roe Ruling*, WASH. POST (Jun. 29, 2022, 3:12 PM), <https://www.washingtonpost.com/health/2022/06/29/abortion-vasectomies-roe-birth-control> [<https://perma.cc/8VLA-K75A>] (reporting that one medical practice saw a 300–400% increase in requests for vasectomies after *Dobbs* and that “[m]en under the age of 30 who do not have children are requesting vasectomies in greater numbers than before . . . .”); see also Jamie Ballard, *Gen Z Is More Pro-Abortion Than Any Other Generation—and the SCOTUS Decision Has Them Making Plans*, COSMOPOLITAN (Jun. 27, 2022), <https://www.cosmopolitan.com/politics/a40362009/roe-v-wade-abortion-gen-z-survey-poll> [<https://perma.cc/K7VV-4UCM>] (reporting that approximately “[one] in [six] Gen Zers [say] [sic] they would consider getting their tubes tied or having a vasectomy” and “[one] in [ten] say they will consider abstaining from penetrative sex altogether”); Isabella Zavarise, *Since the Roe Ruling a Gynecology Clinic in Texas Says It Has Received Increased Requests for Permanent Sterilization: I Sense That They’re Scared*, BUS. INSIDER (Jun. 26, 2022, 10:15 PM) <https://www.businessinsider.com/texas-health-clinic-has-increased-requests-for-permanent-sterilization-abortion-2022-6> [<https://perma.cc/3SCV-KTH8>] (reporting experience of Women’s Health Domain in Austin, Texas, which “received dozens of requests for permanent sterilizations” immediately after the *Dobbs* decision).

<sup>154</sup> Terkel & Bobic, *supra* note 142 (quoting Michigan Senate Candidate Jacky Eubanks as saying “People believe that birth control . . . gives people the false sense of security that they can have consequence-free sex, and that’s not true and that’s not correct. Sex ought to be between one man and one woman in the confines of marriage” and that she “would have to side with [the position that birth control] should not be legal.”).

<sup>155</sup> *Id.* (“Sen. Marsha Blackburn (R-Tenn.), for example, recently called *Griswold* ‘constitutionally unsound.’ Arizona GOP Senate candidate Blake Masters’ campaign website said he would only support judges ‘who understand that *Roe* and *Griswold* and *Casey* were wrongly decided . . . .”). See generally, *Roe v. Wade*, 410 U.S. 113 (1973). See generally, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>156</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). The Court later expanded this right to access birth control to unmarried individuals in 1972 in *Eisenstadt v. Baird*: “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>157</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

access to birth control is “[i]n no way, shape, or form . . . limited or at risk of being limited.”<sup>158</sup> U.S. residents have good reason to be skeptical. For years, Republicans have blurred the lines between contraception and abortion (especially related to emergency contraception and IUDs) and have made accessing birth control more difficult.<sup>159</sup> More recently, Senate Republicans blocked passage of the Right to Contraception Act which would have codified “a person’s ability to access contraceptives and . . . a health care provider’s ability to provide contraceptives” under federal law.<sup>160</sup> As one observer predicted, “[c]ontraception will once again be up for debate, access to it eroded with the same methodical approach the GOP took with abortion.”<sup>161</sup> Ironically, but unsurprisingly, decreasing access to birth control will increase the number of unintended pregnancies, thereby increasing demand for abortion.<sup>162</sup> At present, “[t]he unintended pregnancy rate in the United States is about 21[%] higher than in the average Western country, where national insurance or other universal health care programs are

---

<sup>158</sup> Julie Rovner, *A GOP Talking Point Suggests Birth Control Is Not at Risk. Evidence Suggests Otherwise.*, KAISER HEALTH NETWORK (Aug. 5, 2022), <https://khn.org/news/article/republican-talking-point-birth-control-risk-abortion-false-claim> [<https://perma.cc/E7LE-R6H5>].

<sup>159</sup> See Molly Jong-Fast, *The Anti-Birth Control Movement Is the New Anti-Abortion Movement*, VOGUE (Jul. 1, 2021), <https://www.vogue.com/article/anti-birth-control-movement> [<https://perma.cc/9HMT-3QPF>]; Amanda Marcotte, *Why Are Republicans Taking Away Birth Control? Because They Don't Want Women to Have It*, SALON (Aug. 20, 2019, 1:30 PM), <https://www.salon.com/2019/08/20/why-are-republicans-taking-away-birth-control-because-they-dont-want-women-to-have-it> [<https://perma.cc/3BLB-8ZEX>].

<sup>160</sup> Oriana Gonzalez, *Senate Republicans Block Dem Request to Pass Birth Control Access Bill*, AXIOS (Jul. 27, 2022), <https://www.axios.com/2022/07/27/birth-control-bill-senate> [<https://perma.cc/WP7H-TVHS>]. In the House of Representatives, the vast majority of Republicans voted against it. See Annie Karni, *House Passes Bill to Ensure Contraception Rights After Dobbs*, N.Y. TIMES (Jul. 21, 2022), <https://www.nytimes.com/2022/07/21/us/politics/house-contraception.html> [<https://perma.cc/GN3F-XFFY>].

<sup>161</sup> Jessica Valenti, *Republicans Won't Stop at Abortion*, MEDIUM (May 31, 2019), <https://gen.medium.com/republicans-wont-stop-at-abortion-2271e997b80b> [<https://perma.cc/SD5D-6TPR>].

<sup>162</sup> See DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION* 53 (2020) (“[T]wo in five women seeking abortions report some problem accessing contraceptives.”); Vandana Ravikumar, *Birth Control Pills Should Be Easier to Get, Doctors Say, as Abortion Ruling Looms*, MIAMI HERALD (Jun. 16, 2022, 1:16 PM), <https://www.miamiherald.com/news/nation-world/national/article262577872.html> [<https://perma.cc/7UV3-39G5>] (reporting that the American Medical Association urged the FDA to make birth control pills accessible over-the-counter because the risks of using birth control are significantly outweighed by the risks of pregnancy and increasing access should decrease the number of unintended pregnancies).

common.”<sup>163</sup> The United States’ “large drop in unintended pregnancy rates” between 2008 and 2011 “was correlated to an increase in the use of long-term, reversible methods of birth control, such as IUDs or implants, which have low[er] failure rates” than other forms of birth control.<sup>164</sup> Whether *Griswold* goes the way of *Roe*, of course, remains to be seen.

The rest of this Article will examine the physical and economic effects of restrictive abortion laws on people seeking to conceive via infertility treatments and those unable to terminate pregnancies.

### III. UNNECESSARY PREGNANCY-RELATED SUFFERING, DISABILITY, AND DEATH

Pregnancy is more dangerous than abortion. The national case-fatality rate from 2013–2018 was 0.41 abortion-related deaths per 100,000 legal abortions, which is a small fraction compared to the 17.35 pregnancy-related deaths per 100,000 live births during that time period.<sup>165</sup> Medication abortions are even safer: A 2013 study of 45,000 women concluded that medication abortion is “14 times safer than childbirth,” with only 0.3% of users ending up hospitalized.<sup>166</sup> Without *Roe*, “[s]ome people forced to carry a pregnancy to term will die” and “those who don’t experience serious medical complications” will still endure “significant lasting effects on [their] health” because during pregnancy, the “body literally depletes and reshapes itself to create a new being—taking calcium from bones, increasing blood volume, lowering immune defenses to tolerate the new occupant, and rearranging internal organs, muscles, ligaments, and bones.”<sup>167</sup> This section seeks to explain the pregnancy-related ramifications of *Dobbs*, starting with unforeseen consequences for fertility treatment, before turning to consequences after pregnancy is established.

<sup>163</sup> Maggie Koerth & Amelia Thomson-DeVeaux, *Better Birth Control Hasn’t Made Abortion Obsolete*, FIVETHIRTYEIGHT (May 19, 2022, 6:00 AM), <https://fivethirtyeight.com/features/better-birth-control-hasnt-made-abortion-obsolete> [<https://perma.cc/9K5N-C38J>].

<sup>164</sup> *Id.* Although, notably, even these forms of birth control are not fail-proof. *Id.*

<sup>165</sup> See Mary Kekatos, *Why Doctors Say the ‘Save the Mother’s Life’ Exception of Abortion Bans Is Medically Risky*, ABC NEWS (Jun. 13, 2022, 5:03 AM), <https://abcnews.go.com/Health/doctors-save-mothers-life-exception-abortion-bans-medically/story?id=84668658> [<https://perma.cc/NN8J-TEZA>]. This 17.35 maternal deaths per 100,000 live births represents a maternal mortality rate of approximately double what it was in 1987. See GREENE FOSTER, *supra* note 162, at 151.

<sup>166</sup> Katie MacBride, *What Overturning Roe Means for Medication Abortion*, INVERSE (May 6, 2022, 2:05 PM), <https://www.inverse.com/mind-body/overturning-roe-medication-abortion> [<https://perma.cc/S6LT-B4VY>].

<sup>167</sup> Greene Foster, *supra* note 61.

*A. Unforeseen Threats to Fertility Treatment Banning Travel to Other States for Abortion*

As discussed above, some states have banned abortion starting at fertilization, raising concerns about fertility treatment and embryos created in labs.<sup>168</sup> In in vitro fertilization (IVF), embryos are created in a lab before one or more of them are transferred to a uterus to try to achieve pregnancy.<sup>169</sup> IVF often involves creating more embryos than can be used at once, which allows (1) intended parents to test embryos for a variety of genetic diseases and (2) providers to pick the embryos with the best chance of establishing a pregnancy.<sup>170</sup> Access to fertility treatment is not a fringe issue: “Birth rates and fertility rates have been steadily declining for the past eight years,”<sup>171</sup> and the CDC estimates that seven million people in the United States experience infertility.<sup>172</sup>

In states with legislation defining personhood as beginning at conception, there often “isn’t a clear distinction between embryos that are discarded in the case of abortion and those that are discarded at fertility clinics” during IVF and that “ambiguity could lead to physicians being charged for a crime.”<sup>173</sup> These laws also, typically, do not address what happens to unused embryos. If intended parents do not want to use their

<sup>168</sup> Aria Bendix, *States Say Abortion Bans Don’t Affect IVF. Providers and Lawyers Are Worried Anyway.*, NBC NEWS (Jun. 29, 2022, 11:56 AM), <https://www.nbcnews.com/health/health-news/states-say-abortion-bans-dont-affect-ivf-providers-lawyers-worry-rcna35556> [<https://perma.cc/F3XJ-QND2>].

<sup>169</sup> *Id.*

<sup>170</sup> *See id.*; Rebecca Cohen, *Will IVF and Birth Control Be Affected by Roe v. Wade SCOTUS Decision? Experts Warn These Reproduction Options Might Be at Risk Next.*, BUS. INSIDER (Jun. 27, 2022), <https://www.businessinsider.com/roe-v-wade-private-reproduction-decisions-supreme-court-experts-2022-5> [<https://perma.cc/JRD2-WRW9>] (explaining that “less than 20% of fertilized eggs will result in a live birth and that while fertilization happens 70-85% of the time . . . only a fraction of those embryos are capable of developing into a pregnancy” because many are chromosomally abnormal; of those that are chromosomally normal, only 50–70% “will result in a live birth.”); Sarah Al-Arshani, *Abortion-Ban ‘Trigger Laws’ with ‘Very Broad Language About When Life Begins’ Could Disrupt Procedures like IVF at a Time When Fertility Rates Are Declining, Experts Say*, BUS. INSIDER (Jun. 27, 2022, 3:29 PM), <https://www.businessinsider.com/experts-concerned-overturning-roe-v-wade-would-impact-fertility-care-2022-5> [<https://perma.cc/XYB4-YB8M>].

<sup>171</sup> Al-Arshani, *supra* note 170.

<sup>172</sup> Cathryn Oakley, *Not Just Abortion: Overturning Roe v. Wade Puts Your Right to Conceive Babies at Risk, Too*, USA TODAY (Jun. 24, 2022, 12:21 PM), <https://www.usatoday.com/story/opinion/contributors/2022/06/23/overturning-roe-v-wade-could-outlaw-ivf/7627665001> [<https://perma.cc/FRU2-TRBK>].

<sup>173</sup> Al-Arshani, *supra* note 170; *see also* Bendix, *supra* note 168 (quoting Yale Law School’s director of the Program for the Study of Reproductive Justice: “If a law is written to establish personhood of a fertilized egg or an embryo, for example, then discarding an embryo would violate that law. It would be considered homicide”).

embryos, what happens? Can the embryos be transferred out of state for disposal? Must they be kept on ice, and, if so, who pays for that? Or, will intended parents “be forced to relinquish control over [such embryos] to a doctor or clinic, as is already the case under Louisiana law?”<sup>174</sup> Unresolved questions like these will make IVF more expensive and less accessible. Additionally, “[c]ompanies may also be less inclined to cover the costs of IVF for employees as a benefit if they fear legal repercussions or significantly higher costs.”<sup>175</sup> If legislators, prosecutors, and judges read abortion bans beginning at fertilization literally, giving embryos “full legal rights as people, IVF could, overnight, become effectively impossible to perform”<sup>176</sup> and fertility clinics may choose to close or relocate.<sup>177</sup>

While “some lawmakers are carving out exceptions for IVF and assisted reproduction in their personhood bills, even though [doing so] is not consistent with their belief that life begins at conception,” others are declining to carve out similar exceptions.<sup>178</sup> The Alabama, Arkansas, Oklahoma, and Tennessee attorneys general have said that their respective abortion bans have no impact on IVF, but these statements are not entirely reassuring since future attorneys general could reinterpret the same statutes and other attorneys general in other states could read their statutes differently.<sup>179</sup> Intended parents should think carefully about potential long-term storage costs or other unforeseen ramifications following *Dobbs*.

The rest of this section will address the repercussions of abortion bans after pregnancy is established.

### *B. Consequences of Being Denied an Abortion*

Being unable to access abortion negatively impacts the pregnant person’s health, children, and finances. The negative consequences of abortion denial are particularly acute for teenagers. These negative outcomes will be discussed *seriatim*.

---

<sup>174</sup> See Bendix, *supra* note 168; see also LA. REV. STAT. ANN. § 9:126 (2022) (“If the in vitro fertilization patients fail to express their identity, then the physician shall be deemed to be temporary guardian of the in vitro fertilized human ovum until adoptive implantation can occur.”).

<sup>175</sup> Bendix, *supra* note 168.

<sup>176</sup> See Oakley, *supra* note 172.

<sup>177</sup> Al-Arshani, *supra* note 170.

<sup>178</sup> See Cohen, *supra* note 170.

<sup>179</sup> See Bendix, *supra* note 168; see also Mariah Timms & Melissa Brown, *Tennessee Abortion Ban Would Not Apply to Unused IVF Embryos, AG Says*, TENNESSEAN (Nov. 2, 2022, 10:15 AM), <https://www.tennessean.com/story/news/politics/2022/11/01/abortion-ban-tn-attorney-general-unused-ivf-embryos-not-impacted/69611412007> [https://perma.cc/CW4C-ZJSM].

### 1. Negative Health Outcomes Banning Travel to Other States for Abortion

According to the Turnaway Study, “women who were denied an abortion endured more serious pregnancy complications, more chronic pain, and more short-term anxiety” than those who accessed the procedure.<sup>180</sup> The Turnaway Study, which began in 2007, “was the first of its kind to investigate how abortion affects women by comparing those who get an abortion to those who want one but don’t get it”<sup>181</sup> and followed over “1,000 women for five years to assess how their lives had been altered, if at all, by the provision or the denial of an abortion.”<sup>182</sup> It found that a higher percentage of women giving birth sustained life-threatening complications compared to those with complications resulting from an abortion.<sup>183</sup> Women unable to access abortion had higher incidence of hypertension during pregnancy (9.4%) compared to women who had first and second trimester abortions (1.9% and 4.2% respectively).<sup>184</sup> While maternal mortality is discussed in more detail below, pregnancy can be a life-threatening undertaking and poses health risks extending beyond the pregnancy’s termination.<sup>185</sup>

### 2. Worse Outcomes for Children

Inability to access a wanted abortion negatively impacts the pregnant

<sup>180</sup> Dylan Scott, *The Dire Health Consequences of Denying Abortions, Explained*, VOX (June 24, 2022, 10:38 AM), <https://www.vox.com/policy-and-politics/23055300/supreme-court-overturn-roe-wade-abortion-bans-health-care> [<https://perma.cc/EB7M-TVSN>]; see generally, GREENE FOSTER, *supra* note 162 (outlining the mental and physical impacts on women, men, and children when people are denied abortions).

<sup>181</sup> GREENE FOSTER, *supra* note 162, at 6.

<sup>182</sup> Scott, *supra* note 180. The Turnaway Study was “[l]aunched” in response to Justice Kennedy’s opinion in *Gonzalez v. Carhart*, 550 U.S. 124 (2007), and involved “more than 40 scientists from nine universities and four research institutes.” See Diana Greene Foster, *The Court Is Ignoring Science*, 376 SCIENCE 779, 779 (2022). It has led to the publication of “almost 50 academic papers in leading medical, public health, and sociology journals.” GREENE FOSTER, *supra* note 162, at 7.

<sup>183</sup> See GREENE FOSTER, *supra* note 162, at 146 (noting 6.3% suffered life-threatening complications of giving birth compared to approximately 1% suffering an abortion complication). Of the 1,000 women in the study, two died due to complications from childbirth. *Id.* at 149–50.

<sup>184</sup> *Id.* at 148. “Having gestational hypertension in one pregnancy puts women at increased risk for having it in subsequent pregnancies. So denial of abortion may put subsequent pregnancies at higher risk.” *Id.* at 149.

<sup>185</sup> Li Cohen, “*People Will Die*”: OB-GYNs Explain How Ectopic Pregnancy and Other Complications Threaten Lives Without Abortion Care, CBS NEWS (July 1, 2022, 1:58 PM), <https://www.cbsnews.com/news/abortion-doctors-ectopic-pregnancy-risk> [<https://perma.cc/8CVP-JHUZ>]; Warren M. Hern, *Pregnancy Kills. Abortion Saves Lives.*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/opinion/alabama-law-abortion.html> [<https://perma.cc/7HYB-TKTM>].

person's children. "Children whose mothers were denied an abortion were less likely to accomplish fine motor, gross motor, receptive language, expressive language, self-help, and social-emotional developmental milestones on time than the children of women who did receive an abortion."<sup>186</sup> These findings are not surprising since women denied abortions "were much more likely to answer survey questions in a way that signaled a failure to emotionally bond with their new baby than the women who received an abortion and went on to have another baby later in their lives."<sup>187</sup> Notably, "poor parent-child attachment" is associated with "children's long-term psychological and developmental outcomes."<sup>188</sup> Additionally, preexisting children were more likely to (1) live in poverty during the next five years (72%, compared to the 55% of children of women who obtained an abortion) and (2) "live with adults who don't have enough money to pay for food, housing, and transportation (87% vs. 70%)."<sup>189</sup> Further, by denying people the choice to delay childbearing, restrictive abortion laws force "people [to] have children before they're ready" meaning that they are then "less likely to have children later, either because they have had all the children they can care for or because, although they may want more children, their life circumstances don't improve to a point where they can do so."<sup>190</sup>

### 3. Worse Professional and Economic Outcomes

Denying people control over the decision whether and when to have children has educational and economic ramifications as well. Women presently constitute approximately half the work force, and their participation increased greatly after *Roe*.<sup>191</sup> In fact, "the ability to access a legal abortion in the wake of *Roe* increased women's likelihood of completing college by almost 20% and getting a professional job by almost 40%."<sup>192</sup> "Women who were able to delay motherhood through legal access to abortion were much more likely to finish college, pursue higher degrees, spend longer in the labor

---

<sup>186</sup> See Scott, *supra* note 180; GREENE FOSTER, *supra* note 162, at 202–03.

<sup>187</sup> See Scott, *supra* note 180.

<sup>188</sup> *Id.*; GREENE FOSTER, *supra* note 162, at 206, 208.

<sup>189</sup> GREENE FOSTER, *supra* note 162, at 202.

<sup>190</sup> See Greene Foster, *supra* note 61; GREENE FOSTER, *supra* note 162, at 214 ("Enabling women to have abortions when they want them increases the chance that they will become pregnant later when they are ready and prepared to parent.").

<sup>191</sup> See Goldberg et al., *supra* note 87.

<sup>192</sup> Charisse Jones, *What Overturning Abortion Law Means in a Nation Without Child Care Aid or Family Leave*, USA TODAY (Jun. 24, 2022, 1:50 PM), <https://www.usatoday.com/story/money/2022/05/09/roe-v-wade-overturn-abortion-financial-impacts/9643666002> [<https://perma.cc/N5JX-AD64>].

force, and enter higher-paying occupations; [further,] they were much less likely to fall into poverty later in life.”<sup>193</sup> Likewise, “women living in states with greater access to reproductive health care have higher earnings, higher rates of full-time employment, and greater job opportunities.”<sup>194</sup> Being unable to control if and when to have a baby directly impacts career advancement.<sup>195</sup> Not only do women face the “motherhood penalty,” which recognizes the phenomenon that a woman’s income drops each time she adds another child to her family,<sup>196</sup> but because women both tend to shoulder the responsibilities of childrearing and on average earn less with lower occupational status than their partners, many choose to drop out of the workforce entirely after becoming parents.<sup>197</sup> The Turnaway Study found that women who were turned away from receiving abortions “took four years . . . to catch up to the level of employment experienced by women” able to access abortion.<sup>198</sup>

<sup>193</sup> Sheelah Kolhatkar, *The Devastating Economic Impacts of an Abortion Ban*, NEW YORKER (May 11, 2022), <https://www.newyorker.com/business/currency/the-devastating-economic-impacts-of-an-abortion-ban> [<https://perma.cc/F3A2-VD4Y>] (quoting Caitlin Myers, economics professor at Middlebury College who studies gender, race, and the effects of reproductive-health policies on people’s lives).

<sup>194</sup> See Amiah Taylor, *The Great Resignation Resulted in Women Leaving the Workforce in Droves. Denying Them Abortion Care Could Dent the Labor Market*, FORTUNE (June 3, 2022, 3:14 PM), <https://fortune.com/2022/06/03/great-resignation-resulted-in-women-leaving-workforce-denying-abortion-care-could-dent-labor-market> [<https://perma.cc/9WDV-VBKD>]. Recognizing the negative impacts of restrictive abortion laws on businesses, states that have sought to protect abortion access are inviting businesses headquartered in Republican-controlled states to relocate. See, e.g., Stephen Singer, *Lamont Links Abortion Access to Economic Development, Inviting Businesses to CT, Abandon States with Restrictive Policies*, HARTFORD COURANT (July 1, 2022, 7:59 AM), <https://courant.com/business/hc-biz-abortion-economic-development-20220701-zxocbqitgie35jxkpqp3jvh7nu-story.html> [<https://perma.cc/BS2R-JFGR>]; Joe Hernandez, *New Jersey Touts Abortion Protections to Lure Businesses*, NPR (June 15, 2022, 5:00 AM), <https://www.npr.org/2022/06/15/1105101331/new-jersey-touts-abortion-protections-to-lure-businesses> [<https://perma.cc/TG83-8GUX>].

<sup>195</sup> See Jones, *supra* note 192. As explained by Nicole Mason, the CEO of the Institute for Women’s Policy Research, “[T]aking away that choice [when to start a family] will definitely have an adverse effect on women’s participation in the labor market, their career mobility, and being able to stay in the workforce. We already know that women are more likely than their male counterparts to leave the workforce as a result of having a child. So, restricting abortion access for women will definitely increase the likelihood that they will exit the workforce if they’re forced to carry unintended babies to term.” Taylor, *supra* note 194.

<sup>196</sup> Shawna Chen, *Fall of Roe Will Have Immediate Economic Ramifications, Experts Say*, AXIOS (June 25, 2022), <https://www.axios.com/2022/06/25/roe-abortion-economy-impact> [<https://perma.cc/BH4S-FSER>].

<sup>197</sup> See Jones, *supra* note 192. “In the United States, the employment rate of women relative to men drops 20 to 25 percentage points when children are born, and their earnings drop 35 points.” Claire Cain Miller, *Mississippi Asks: If Women Can Have It All, Is Roe Necessary?*, N.Y. TIMES (Dec. 3, 2021), <https://www.nytimes.com/2021/12/01/upshot/mississippi-abortion-case-roe.html> [<https://perma.cc/6E3R-L477>].

<sup>198</sup> GREENE FOSTER, *supra* note 162, at 175.



Being pregnant and giving birth also have immediate financial consequences. The United States has “some of the worst records in the world in terms of pregnancy and birth-related workplace benefits.”<sup>199</sup> Only 30 states (plus the District of Columbia and four other cities) have laws “requiring some employers to provide reasonable accommodations to pregnant workers” or workers recovering from childbirth.<sup>200</sup> The Family Medical Leave Act does not cover an estimated 40% of workers because it only provides (unpaid) leave to those who have worked for a full year for employers with more than 50 employees,<sup>201</sup> while 11 states (and the District of Columbia) have paid leave programs on the books (but fewer are operational).<sup>202</sup> Only “the top 10[%] of earners in the country” have “anything close to guaranteed leave” and “36[%] of those highest earners also have paid family leave,” compared to the “only [five] percent [of the lowest paid workers who] had paid family leave in 2020.”<sup>203</sup> Compare that to the almost two-thirds of United States voters who believe that “they would face serious financial hardship if they had to take up to a few months of unpaid leave for family or medical reasons,”<sup>204</sup> with women being more likely than men to express that view.<sup>205</sup> Further, the cost of giving birth can be staggering—even for those with insurance.<sup>206</sup>

<sup>199</sup> Chabeli Carrazana, *Here's How the Right to Abortion Is Also an Economic Issue*, PBS (May 5, 2022, 9:03 AM), <https://www.pbs.org/newshour/economy/heres-how-the-right-to-abortion-is-also-an-economic-issue> [https://perma.cc/53RT-TQG8].

<sup>200</sup> See NAT'L P'SHIP FOR WOMEN & FAMS., REASONABLE ACCOMMODATIONS FOR PREGNANT WORKERS: STATE AND LOCAL LAWS 1 (2022), <https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf> [https://perma.cc/GRL5-NSUT].

<sup>201</sup> Tara Siegel Bernard, *Divided Over Abortion, but Joining Forces for Women's Workplace Rights*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/your-money/abortion-pregnancy-work.html> [https://perma.cc/FF7Z-Q36G].

<sup>202</sup> NAT'L P'SHIP FOR WOMEN & FAMS., STATE PAID FAMILY & MEDICAL LEAVE INSURANCE LAWS 1 (2022) <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/state-paid-family-leave-laws.pdf> [https://perma.cc/ARH3-DDVE] (identifying California, Connecticut, District of Columbia, Massachusetts, New Jersey, New York, Rhode Island, and Washington as having effective programs, with Colorado, Delaware, Maryland, and Oregon having programs set to begin in the future).

<sup>203</sup> See Carrazana, *supra* note 199.

<sup>204</sup> NAT'L P'SHIP FOR WOMEN & FAMS. VOTERS' VIEWS ON PAID FAMILY + MEDICAL LEAVE: FINDINGS FROM A NATIONAL SURVEY 4 (2018), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/voters-views-on-paid-family-medical-leave-survey-findings-august-2018.pdf> [https://perma.cc/ZY7E-BDV7].

<sup>205</sup> *Id.* at 11.

<sup>206</sup> See Megan Cerullo, *What It Costs to Have a Baby in the U.S.*, CBS NEWS (July 13, 2022, 4:18 PM), <https://www.cbsnews.com/news/giving-birth-costs-nearly-3000-with-insurance> [https://perma.cc/FBC5-3MXF] (“The cost of giving birth in the U.S., including pregnancy-related

The economic impact of being unable to access abortion continues beyond childbirth. The Turnaway Study found a “long-lasting economic impact of being denied an abortion”: an increased chance of living in poverty, being unemployed, having overdue debt, and having experienced eviction or bankruptcy.<sup>207</sup> Specifically, “[a]fter being denied an abortion, women had three times greater odds of being unemployed than those who obtained abortions and had four times higher odds of being below the federal poverty level.”<sup>208</sup> The National Bureau of Economic Research found “that being denied an abortion has large and persistent negative effects on a woman’s financial well-being,” including: (1) “a significant increase in financial distress during the year that they give birth (or, in some cases, would have given birth[.]”); (2) the doubling of “[u]npaid debts that are 30 or more days past due”; (3) a substantial increase in the number of public records on credit reports, reflecting negative events such as bankruptcies, court judgments, tax liens, and evictions; and (4) being “significantly less likely to have a prime credit score.”<sup>209</sup> These impacts continued for years after being denied an abortion.<sup>210</sup> Interestingly, “the financial consequences of giving birth” following a typical pregnancy appear to be “less severe . . . suggest[ing] that more wanted or optimally timed births may impose a smaller financial penalty.”<sup>211</sup> Notably, states restricting or banning abortion are less likely to offer protections for pregnant workers, paid family leave, Medicaid expansion or extension, tax credits aimed at helping families, or universal pre-

---

care, the delivery process and post-partum services is, on average, \$18,865. Of that total, women enrolled in large employer-sponsored insurance plans are responsible for paying an average of \$2,854 out of pocket, according to a new analysis from the Kaiser Family Foundation . . . . Caesarean-section deliveries are more expensive, costing \$26,280 on average, \$3,214 of which is paid out of pocket.”)

<sup>207</sup> See Cain Miller, *supra* note 197.

<sup>208</sup> GREENE FOSTER, *supra* note 182, at 779.

<sup>209</sup> See Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion* 1, 17 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26662, 2020) (“provid[ing] the first causal evidence on the economic and financial consequences of being denied an abortion”). As points of comparison, “denying a woman an abortion reduces her credit score by more than the impact of a health shock resulting in a hospitalization or being exposed to high levels of flooding following Hurricane Harvey.” *Id.* (citations omitted).

<sup>210</sup> *Id.*; see also GREENE FOSTER, *supra* note 162, at 179 (“[W]omen denied abortions experienced a shock to their economic well-being and did not catch up to those who received an abortion even five years later.”); Andrew Van Dam, *Women Denied Abortion Struggled More Financially After, Study Shows*, WASH. POST (May 6, 2022, 1:49 PM), <https://www.washingtonpost.com/business/2022/05/06/economic-impact-of-denied-abortion/> [https://perma.cc/9YKH-YWVD] (Pregnant people “who sought an abortion and didn’t get one became significantly more likely to miss bill payments or have other black marks on their credit reports” and “[t]hat pattern remained for the five years researchers tracked the women.”).

<sup>211</sup> Miller et al., *supra* note 209, at 37.

K compared to states that are seeking to protect abortion access.<sup>212</sup>

#### 4. Consequences for Teenage Pregnancies

The consequences of denying teenagers access to abortion are particularly dire: “Early childbearing can lead to a range of negative outcomes for the teenage mother and her child, including lower rates of school completion, higher rates of single motherhood, higher rates of preterm birth and low birth weight, increased rates of incarceration among male children and more.”<sup>213</sup> A *Journal of Adolescent Health* study also “found that young men who were involved with a pregnancy and whose partners had an abortion were nearly four times more likely to graduate from college than those whose partners gave birth” and “suggests that males under the age of 20 who were affected by an abortion were likely to earn more money than those who became parents but did not live with their child.”<sup>214</sup>

In summary, access to abortion protects health and permits pregnant people control over their life trajectories, so that they can “more often go on to accomplish other life goals such as finding a full-time job, finding more satisfying romantic relationships, and achieving other aspirational plans.”<sup>215</sup> In the following sections, this Article will address other ways restrictive abortion laws threaten women’s health.

#### C. Forced Continuation of Non-Viable Pregnancies

Many (especially recent) abortion bans do not make exceptions for pregnancies that will not result in healthy, viable children. “[O]nly five states with abortion bans and Republican-controlled legislatures—South Carolina, Louisiana, Utah, Mississippi and Georgia—have some exceptions for fatal fetal defects” while others “make no exception for cases where a fetus is

---

<sup>212</sup> Amanda Terkel, *States Set to Ban Abortions Offer Little Support for Parents and Children*, HUFFPOST (June 24, 2022), [https://www.huffpost.com/entry/states-ban-abortion-little-support-families\\_n\\_62966434e4b016c4eef26b81](https://www.huffpost.com/entry/states-ban-abortion-little-support-families_n_62966434e4b016c4eef26b81) [<https://perma.cc/4LWL-9D4Y>] (“Three states—Mississippi, South Dakota and Wyoming—didn’t offer any of the seven benefits . . . Louisiana, Oklahoma[,] and West Virginia scored the best, with four benefits. In comparison, for example, California and New York—both states with abortion protections on the books—provide every single one of the [seven] benefits.”).

<sup>213</sup> Shirin Ali, *Pediatricians Warn Roe v. Wade Reversal Has ‘Grave Consequences’ for Teens*, THE HILL (June 28, 2022), <https://thehill.com/changing-america/well-being/prevention-cures/3539412-pediatricians-warn-roe-v-wade-reversal-has-grave-consequences-for-teens> [<https://perma.cc/U7CP-33MY>].

<sup>214</sup> Juliana Kim, *The End of Roe v. Wade Has Huge Economic Implications for Male Partners, Too*, NPR (July 3, 2022, 5:34 PM), <https://www.npr.org/2022/06/27/1107715589/abortion-access-impact-on-men> [<https://perma.cc/V9BE-SKFT>].

<sup>215</sup> Greene Foster, *supra* note 61; *see* GREENE FOSTER, *supra* note 162, at 21.

unlikely to survive.”<sup>216</sup> Likewise, Arizona and Ohio, specifically prohibit abortion “based on a diagnosis of Down syndrome or other nonlethal conditions,”<sup>217</sup> while North Dakota expressly prohibits abortions based on genetic anomaly—“even where the fetus cannot survive outside the womb.”<sup>218</sup>

While the vast majority of pregnancies will result in a healthy baby, “[l]ess than [one] percent of pregnancies lead to conditions of the child [that] physicians might consider incompatible with life.”<sup>219</sup> Pregnant persons faced with a serious prenatal diagnosis until recently had two options: (1) let the pregnancy take its natural course, whether that be miscarriage, stillbirth, or death of the baby after birth or (2) termination.<sup>220</sup> Without exceptions for fetal abnormality, abortion bans may prevent expectant parents from making decisions to prevent future suffering or make such choices significantly harder.<sup>221</sup> “Fetal anomalies are seldom discovered before week 12 [of pregnancy]. In many cases, they remain undetectable until week 20 or beyond.”<sup>222</sup> The resulting “children will have special needs, and special needs demand extra resources—both emotional and material”<sup>223</sup>—and their families are the only people who can fairly decide if they are capable of caring for these children or if termination is a more compassionate decision for all

<sup>216</sup> Jack Healy, *With Roe Set to End, Many Women Worry About High-Risk Pregnancies*, N.Y. TIMES (June 26, 2022), <https://www.nytimes.com/2022/06/20/us/abortion-high-risk-pregnancy.html> [<https://perma.cc/Y86A-RSY2>]. Notably, these provisions predate *Dobbs*, and some have since been superseded by other, more restrictive abortion laws and Florida’s recent 15-week abortion ban adds the Sunshine State to this list. See FLA. STAT. § 390.0111(1)(c) (2022); GA. CODE ANN. § 16-12-141(b)(3) (2020); LA. REV. STAT. ANN. § 40:1061.1 (2015); MISS. CODE ANN. § 41-41-191(4) (2018); S.C. CODE ANN. § 44-41-680 (2021); UTAH CODE ANN. § 76-7-302(3)(a) (2022). See also LA. REV. STAT. ANN. § 40:1061 (2018); MISS. CODE ANN. § 41-41-45 (2022).

<sup>217</sup> Healy, *supra* note 216; see ARIZ. REV. STAT. ANN. § 13-3603.02(A)(2) (2021); ARIZ. REV. STAT. ANN. § 13-3603.02 (G)(2) (2022); OHIO REV. CODE ANN. § 2919.10(B) (2018).

<sup>218</sup> SABELLI ET AL., *supra* note 93, at 19 (citing N.D. CENT. CODE § 14-02.1-04.1 (2022)); see also N.D. CENT. CODE § 14-02.1-02(7) (2022) (defining genetic abnormality as “any defect, disease, or disorder that is inherited genetically” (emphasis added)).

<sup>219</sup> Ashley Fetters Maloy, *She Ended a Pregnancy So Her Child Wouldn’t Suffer. Now She Helps Others Like Her*, WASH. POST (Apr. 26, 2022, 6:00 AM), <https://www.washingtonpost.com/lifestyle/2022/04/26/tfmr-pregnancy-termination-for-medical-reasons/> [<https://perma.cc/X7MY-FL3G>].

<sup>220</sup> See *id.*

<sup>221</sup> See, e.g., R. Peña, *Woman Forced to Travel to NY to Abort Fetus with No Skull*, TRAVEL NOIRE (Sept. 23, 2022), <https://travellnoire.com/woman-forced-to-travel-to-ny-to-abort-fetus-with-no-skull> [<https://perma.cc/AX8J-QUJD>].

<sup>222</sup> Jennifer Senior, *The Hidden Consequences of the New Abortion Laws*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/2019/05/29/opinion/abortion-birth-defects.html> [<https://perma.cc/C733-LNTM>].

<sup>223</sup> *Id.*

involved.<sup>224</sup> For example, fetuses with anencephaly develop without a brain; the condition, which is usually diagnosed no earlier than at a twelve-week ultrasound, is always fatal either during the pregnancy or shortly thereafter, with the “median survival rate” of 24 hours.<sup>225</sup> Or, “[c]onsider Trisomy 13.50[%] of the babies born with this chromosomal condition do not live beyond two weeks.”<sup>226</sup> As a final example, take “infantile Tay-Sachs, in which babies have a normal early infancy and then rapidly deteriorate, experiencing seizures, paralysis and sensory loss before dying in early childhood.”<sup>227</sup> In cases like these, parental authority to make healthcare decisions for themselves and their family is denied.

In a similar, but distinct, category are the approximately two percent of pregnancies that are ectopic—when the “fertilized egg implants somewhere outside the uterus—usually in the fallopian tube.”<sup>228</sup> These pregnancies cannot continue, nor can they become healthy pregnancies.<sup>229</sup> Once diagnosed, “time is of the essence” because the “fallopian tubes cannot stretch very much,” so that continuation of the pregnancy can lead to fallopian tube rupture, hemorrhage, and even death for the pregnant person.<sup>230</sup> Frequently, the only treatment for ectopic pregnancy is through surgery or medication abortion.<sup>231</sup> Despite the clear threat to the pregnant

---

<sup>224</sup> See also Nancy Kaffer, *Michigan Woman: Hear My Story, Feel My Pain Before Outlawing Abortion*, DET. FREE PRESS (June 2, 2022, 3:29 PM), <https://www.freep.com/in-depth/opinion/columnists/nancy-kaffer/2022/05/25/abortion-late-term-michigan-roe/9715844002> [<https://perma.cc/7FKV-4QRT>] (describing parents’ decision to terminate where fetus was diagnosed with aortic stenosis (a heart defect), agenesis of the corpus callosum (a brain defect resulting in disconnection between brain hemispheres), and cysts stunting further brain development such that, if born, the child’s life “would be defined by suffering, caused not just by the conditions concealed within her tiny body, but from the medical care required to preserve her life.”).

<sup>225</sup> Senior, *supra* note 222.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Anna North, *This Life-Threatening Pregnancy Complication Is the Next Frontier in the Abortion Debate*, VOX (Sept. 11, 2019, 12:30 PM), <https://www.vox.com/2019/9/11/20859034/ectopic-pregnancy-abortion-federalist-intrauterine-ohio-surgery> [<https://perma.cc/K49B-YNGE>].

<sup>229</sup> *Id.* (According to Dr. Daniel Grossman, a professor of obstetrics, gynecology, and reproductive services at the University of California, San Francisco, “[o]nce a diagnosis of ectopic [pregnancy] is made, that pregnancy cannot continue.”); Sanders, *supra* note 141.

<sup>230</sup> North, *supra* note 228. In fact, “ectopic pregnancy is the top cause of maternal mortality in the first trimester.” *Id.*

<sup>231</sup> *Id.* Unlike a typical medication abortion, termination of an ectopic pregnancy relies on “an injection of methotrexate,” which prompts the body to “reabsorb[] the pregnancy on its own.” *Id.* Methotrexate is also used to treat lupus, rheumatoid arthritis, certain types of cancer, and

person's life, some do not consider ectopic pregnancy to be a sufficient justification for ending a pregnancy.<sup>232</sup>

#### *D. Miscarriage Mismanagement*

By restricting abortion access, states are making it harder for patients to access medications and competent medical care to manage pregnancy loss.<sup>233</sup> As noted previously, a significant percentage of pregnancies end spontaneously.<sup>234</sup> Competency in abortion care translates to other aspects of obstetrics and gynecology: Different types of abortion—"spontaneous, threatened, incomplete, missed, septic, [and] elective"—can all be handled the same way.<sup>235</sup> Likewise, "[s]urgical abortion procedures 'are also procedures used to manage miscarriage, or in the second trimester or later, fetal demise'—stillbirth."<sup>236</sup> As such, "[a]bortion is one of the most common medical procedures."<sup>237</sup> States' restrictive abortion laws are already impacting patient care, causing some doctors to be less willing to provide care in cases

---

other inflammatory conditions; it "inhibits an enzyme called dihydrofolate reductase," which is used to create DNA. See Korin Miller, *What Is Methotrexate, What Does It Treat, and How Does It Play Into America's Abortion Conversation?*, PREVENTION (June 29, 2022), <https://www.prevention.com/health/a40459154/what-is-methotrexate-uses-side-effects> [<https://perma.cc/PM5S-7TLH>]. "If the tube has already ruptured, and in some other cases, surgery is necessary to remove the pregnancy and sometimes a portion of the tube." North, *supra* note 228. In a minority of cases, "careful monitoring" may be appropriate if a miscarriage is already occurring, as reflected by decreasing pregnancy hormones. *Id.*

<sup>232</sup> See, e.g., Mo. H.B. 2810 (2022) (proposing to make "trafficking abortion-inducing devices or drugs" a class B felony if "[t]he abortion was performed or induced or was attempted to be performed or induced on a woman who has an ectopic pregnancy.").

<sup>233</sup> See Rebecca Cohen, *It May Soon Be Harder to Access Medications Used in Miscarriages and Ectopic Pregnancies Because They're Also Used to Treat Abortions*, BUS. INSIDER (June 24, 2022, 12:23 PM), <https://www.businessinsider.com/miscarriage-medications-could-be-restricted-abortion-bans-2022-5> [<https://perma.cc/ABM8-L8B9>].

<sup>234</sup> See *supra* note 126, and surrounding text.

<sup>235</sup> Allison LaCross, *I'm a Midwife and I Wish More People Knew the Way I Handle Miscarriages and Terminations Can Be the Same*, INSIDER (June 29, 2022, 1:12 PM), <https://www.insider.com/midwife-language-procedures-miscarriage-or-termination-can-be-the-same-2022-6> [<https://perma.cc/7TCU-FEBS>].

<sup>236</sup> See Erik Gunn, *Medical Training Programs Teach Abortion Procedures. What Happens if Abortion Is Outlawed?*, WIS. EXAMINER (June 13, 2022, 6:35 AM), <https://wisconsinexaminer.com/2022/06/13/medical-training-programs-teach-abortion-procedures-what-happens-if-abortion-is-outlawed> [<https://perma.cc/2QFK-DK6A>].

<sup>237</sup> Lindsey Tanner, *Abortion Training Under Threat for Med Students, Residents Across US*, MADISON.COM (May 9, 2022), [https://madison.com/news/national/abortion-training-under-threat-for-med-students-residents-across-us/article\\_903fd80d-a379-5c1e-9714-697c8f7a60d2.html](https://madison.com/news/national/abortion-training-under-threat-for-med-students-residents-across-us/article_903fd80d-a379-5c1e-9714-697c8f7a60d2.html) [<https://perma.cc/F9MK-YGUQ>]; Roshan M. Burns & Kate A. Shaw, *Standardizing Abortion Education: What Medical Schools Can Learn from Residency Programs*, 32 CURRENT OPIN. OBSTETRICS GYNECOLOGY 387, 387 (2020).

of miscarriage for fear of violating the law.<sup>238</sup>

Restrictive abortion laws may also limit access to competently trained doctors. “OB-GYN residency programs are required by an accrediting group to provide access to abortion training, though residents who object can opt out of performing abortions.”<sup>239</sup> An April 2022 study concluded that without *Roe* providing federal protection for abortion, no more than 56% of OBGYN residents would have access to abortion training—compared to the 92% who did in 2020.<sup>240</sup> Following *Dobbs*, “almost half of the nation’s medical residents in obstetrics and gynecology are certain or likely to lack access to in-state abortion training,” which raises “questions about how those programs can be accredited when a procedure required to be taught is illegal where they are based.”<sup>241</sup> The Accreditation Council for Graduate Medical Education is revising its standards to “allow programs in jurisdictions that legally restrict such clinical experience to let residents travel to be trained in jurisdictions where abortion is legal” and “[i]f a resident can’t travel to be trained, the programs must instead offer lectures and training on simulation models.”<sup>242</sup> However, the associated logistics will be formidable and it remains to be seen

---

<sup>238</sup> See, e.g., Frances Stead Sellers & Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022, 9:09 AM), <https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care> [<https://perma.cc/L478-8H6F>] (providing examples of how “[m]iscarriages, ectopic pregnancies and other common complications are now scrutinized, jeopardizing maternal health,” including a Wisconsin woman who “bled for more than 10 days from an incomplete miscarriage after emergency room staff would not remove the fetal tissue,” which increased her risk of infection and severe bleeding); Katie Kindelan, *Women’s Health Doctors Say They Feel Increased Scrutiny Amid Abortion Bans*, GOOD MORNING AM. (Aug. 1, 2022), <https://www.goodmorningamerica.com/wellness/story/womens-health-doctors-feel-increased-scrutiny-amid-abortion-87625799> [<https://perma.cc/WW36-2GQR>] (According to Dr. Jill Gibson, the medical director of Planned Parenthood of Arizona, doctors “are, out of fear, making patient care decisions that they would not have made” before *Dobbs* and “are really worried that their actions will be interpreted as providing or assisting in care that could be considered abortion.”); Timothy Bella, *Woman Says She Carried Dead Fetus for 2 Weeks After Texas Abortion Ban*, WASH. POST (July 20, 2022, 4:16 PM), <https://www.washingtonpost.com/politics/2022/07/20/abortion-miscarriage-texas-fetus-stell> [<https://perma.cc/43BW-RZWB>] (describing Marlena Stell’s inability to obtain a D&C after suffering a miscarriage about nine and a half weeks into her pregnancy, resulting in her being “forced to carry her dead fetus for two weeks before she could find a provider” willing to provide care).

<sup>239</sup> See Tanner, *supra* note 237.

<sup>240</sup> See Elizabeth Weise, *Abortion Bans Could Leave Close to Half of US Obstetrics Residents with Inadequate Training*, USA TODAY (June 27, 2022, 5:00 AM), <https://www.usatoday.com/story/news/2022/06/27/abortion-bans-obstetrics-students-poor-training/7489706001> [<https://perma.cc/G9UQ-XLXK>].

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* The opt-out option for those with “religious or moral objections” remains. *Id.*

whether these options will be sufficient.<sup>243</sup>

Even where competently trained medical professionals are available, anti-abortion laws hamstringing them and preclude compassionate, evidenced-based care.<sup>244</sup>

*E. The Empty Promise of “Life of the Mother” and “Medical Emergency” Exceptions & Increased Maternal Mortality*

Anti-abortion legislation—even if purporting to create exceptions “to save the mother’s life” or in cases of “medical emergency”—will worsen the United States’ maternal mortality rate.<sup>245</sup> According to one estimate, abortion bans existing before *Dobbs* “could lead to an additional 75,000 births a year” and “will disproportionately affect younger, poorer people of color and those who already have children.”<sup>246</sup> The United States is already the most

<sup>243</sup> See Nick Anderson, *The Fall of Roe Scrambles Abortion Training for University Hospitals*, WASH. POST (June 30, 2022, 10:32 AM), <https://www.washingtonpost.com/education/2022/06/30/abortion-training-upheaval-dobbs> [<https://perma.cc/92LK-2HZL>].

<sup>244</sup> See Charlotte Huff, *In Texas, Abortion Laws Inhibit Care for Miscarriages*, NPR (May 10, 2022, 5:00 AM), <https://www.npr.org/sections/health-shots/2022/05/10/1097734167/in-texas-abortion-laws-inhibit-care-for-miscarriages> [<https://perma.cc/G37F-TU9C>] (predicting that Texas-style bans open doctors to more malpractice suits due to their concerns about the legality of providing treatment); see also Anna Medaris, *A US Tourist in Malta Has Been Refused a Life-Saving Abortion, and Is Struggling to Get Permission to Fly*, INSIDER (June 22, 2022, 5:06 PM), <https://www.insider.com/american-tourist-malta-denied-life-saving-abortion-illegal-2022-6> [<https://perma.cc/FN3G-MU78>] (recounting a story of woman whose water broke at 16 weeks gestation, who was told the pregnancy had no chance of survival, and who “was diagnosed with a ruptured membrane and a protruding umbilical cord,” yet had to wait until there was no fetal heartbeat or she developed an infection before she could receive care due to Malta’s abortion ban); Theresa Prenger, *I Was Forced to Obey Men’s Demands in My Harrowing Miscarriage. That Isn’t Pro-Life*, KAN. CITY STAR (May 6, 2022, 5:00 AM), <https://www.kansascity.com/opinion/readers-opinion/guest-commentary/article261096527.html> [<https://perma.cc/7A6F-9M5R>] (recounting a woman’s experience at a Catholic hospital with a miscarriage at 21 weeks: the hospital could not stop her labor but refused to speed it up and ease her pain with Pitocin because the hospital considered it a form of abortion; the woman labored “for 12 hours, monitored but unassisted, at increased risk of infection,” after which her son was offered no medical care “because a 21-week fetus is ‘incompatible with life’”).

<sup>245</sup> Maggie Koerth & Amelia Thomson-DeVeaux, *Overturning Roe v. Wade Could Make Maternal Mortality Even Worse*, FIVETHIRTYEIGHT (May 31, 2022, 6:00 AM), <https://fivethirtyeight.com/features/overturning-roe-v-wade-could-make-maternal-mortality-even-worse> [<https://perma.cc/2TFP-JXXD>] (“Multiple studies have found that the states that already have the tightest restrictions on abortion also have the highest rates of maternal and infant mortality. And that correlation stubbornly persists even after researchers account for some of the other differences between states, like racial demographics and health care policy.”).

<sup>246</sup> Melody Schreiber, *‘A Matter of Life and Death’: Maternal Mortality Rate Will Rise Without Roe, Experts Warn*, THE GUARDIAN (June 27, 2022, 6:00 AM), <https://www.theguardian.com/us-news/2022/jun/27/roe-v-wade-overturned-maternal-mortality-rate-will-rise> [<https://perma.cc/B7ZZ-SEYU>].



dangerous developed country in which to give birth.<sup>247</sup> After years of declining, maternal mortality began increasing in 2000—and the CDC has concluded that two-thirds of these deaths were preventable.<sup>248</sup> In the United States, “the maternal mortality rate in 2020 was 23.8 deaths per 100,000 live births,” which is much higher than “3.2 deaths per 100,000 live births in Germany in 2019 and 7.9 deaths per 100,000 live births in France in 2015.”<sup>249</sup> Further, “[c]arrying an unplanned pregnancy involves shouldering increased risks of depression, preterm birth, lower birth weight and other complications,” including a higher risk of death.<sup>250</sup>

Exceptions to restrictive abortion laws in cases of “medical emergency” or to protect the life of the pregnant person are not the salve abortion foes suggest because the language of these laws is often vague and fails to indicate how serious a condition must be before intervention is permissible.<sup>251</sup> For example, the Texas Heartbeat Law permits an abortion for a “medical emergency,” but does not define the term—nor does it protect physicians from having their determinations second-guessed.<sup>252</sup> Missouri’s law prohibits all abortions “except in cases of medical emergency,” defining “medical emergency” as:

A condition which, based on reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the pregnant woman or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman.<sup>253</sup>

---

<sup>247</sup> *Id.* (reporting that the United States has the highest maternal mortality rate of any developed country and that Black people are over three times more likely to die than their white peers due to pregnancy and childbirth).

<sup>248</sup> Nathalie Baptiste, *The End of Roe v. Wade Would Be a Disaster for Black Mothers*, HUFFPOST (June 16, 2022, 5:45 AM), [https://www.huffpost.com/entry/black-women-abortion-maternal-mortality\\_n\\_62aa145de4b06594c1d14b34](https://www.huffpost.com/entry/black-women-abortion-maternal-mortality_n_62aa145de4b06594c1d14b34) [<https://perma.cc/BR8H-3F5C>].

<sup>249</sup> Koerth & Thomson-DeVeaux, *supra* note 245. The maternal mortality rate in 2020 was higher than between 2013 and 2018. *See* note 165, *supra*, and surrounding text. As a point of comparison, in 2018 only two people died as a result of legal abortions. *See* Baptiste, *supra* note 248.

<sup>250</sup> *See* Koerth & Thomson-DeVeaux, *supra* note 245.

<sup>251</sup> *See* Kekatos, *supra* note 165 (explaining that “laws that only allow exceptions to save the mother’s life will put the onus on the provider to prove the pregnant person is in danger of dying” or “face charges.”).

<sup>252</sup> *See* TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) (2021). Ironically, the statute details the “written notations” required in the patient’s medical chart. *See id.* §§ 171.205, 171.008.

<sup>253</sup> *See* MO. REV. STAT. §§ 188.015(7), 188.017(2) (2022).

Notably, “reasonable medical judgment” can vary, giving prosecutors leeway to file charges and to argue that an abortion was not appropriate since the consulting physicians did not all agree that the patient’s life was sufficiently endangered.<sup>254</sup> As maternal-fetal specialist Dr. Leilah Zahedi put it: “How almost dead does someone need to be? . . . Am I to just watch someone bleed to death? Or provide the care and then be reported and go to jail? I don’t know.”<sup>255</sup>

Doctors categorize pregnant people who need abortions to save their lives into three categories: (1) people with serious conditions that existed before they got pregnant, such as heart disease, pulmonary hypertension, and kidney failure; (2) people who developed conditions during pregnancy, such as placenta accreta and preeclampsia; and (3) pregnancies that will not result in a viable child, such as an ectopic pregnancy.<sup>256</sup> How close to death must a pregnant person be before a doctor can intervene and provide an abortion? Dr. Zahedi provided an illustrative example:

When I see patients, for instance, who have a major cardiac problem, a lot of the time they have a risk of a major cardiac event of up to 15% to 25%, even up to 50% . . . . At the moment they’re fine. But as they get further into pregnancy, that’s going to put their life more and more at risk. . . . So do I have to wait until they’re on death’s doorstep, or can I intervene at that point to prevent more harm and more damage to them?<sup>257</sup>

Dr. Lisa Harris, an obstetrics and gynecology professor at the University of Michigan, identified two more illustrative examples. First, a pregnant person diagnosed with placenta accreta, a condition where the placenta grows through the uterine wall, would not be in imminent danger of dying during the first 20 weeks of pregnancy: “There is a threat to their life, but it might be months away. . . . How imminent does that threat have to be for you to

---

<sup>254</sup> Sara Boboltz, *People Will Still Die in Anti-Abortion States That Have ‘Lifesaving’ Exceptions*, HUFFPOST (July 2, 2022, 8:00 AM), [https://www.huffpost.com/entry/death-risk-pregnancy-despite-lifesaving-exceptions-for-abortion\\_n\\_62b715c9e4b04a61736b0aa9](https://www.huffpost.com/entry/death-risk-pregnancy-despite-lifesaving-exceptions-for-abortion_n_62b715c9e4b04a61736b0aa9) [<https://perma.cc/TEJ3-3USV>].

<sup>255</sup> Healy, *supra* note 216; *see also, e.g.*, Stephanie Whiteside, *Doctors Struggle with Exceptions to Abortion Bans*, THE HILL (Nov. 21, 2022, 12:44 PM), <https://thehill.com/homenews/3744993-doctors-struggle-with-exceptions-to-abortion-bans> [<https://perma.cc/44JY-XFKD>] (“A growing number of physicians and families tell similar stories as a post-Roe fear comes to pass: Pregnant women with dangerous medical conditions are showing up in hospitals and doctors’ offices only to be denied the abortions that could help treat them. . . . Some women are facing harmful, potentially deadly delays.”).

<sup>256</sup> *See* Kekatos, *supra* note 165.

<sup>257</sup> *Id.*

qualify for an abortion under the term ‘lifesaving?’<sup>258</sup> Second, a pregnant person diagnosed with cancer could want an abortion in order to start treatment immediately. As Professor Harris explained,

The threat to the life of the patient isn’t imminent, meaning the pregnancy and illness are not life-threatening at the moment. . . . But if someone, for example, were to delay treatment for eight or nine months, the cancer may advance in that instance and then they have a worse cancer when they begin to treat it. . . . In the case of cancer, it may be that someone survived their cancer only two years as opposed to 20 years because they delayed treatment.<sup>259</sup>

This is a dangerous situation for pregnant people.<sup>260</sup> Put simply, “[w]hen it’s not clear what is legal, patients are often treated as though nothing is” because “[u]ncertainty breeds fear and stigma for doctors, who might delay treatment so they can evaluate just how close a person is to dying. In some situations, patients are simply shuttled from one facility to the next like a hot potato until they find a place willing to offer care.”<sup>261</sup> Delayed treatment can have dire consequences: “A condition that wasn’t immediately dangerous two weeks ago might be life and death today. And with every week that passes, the fetus gets bigger and abortion becomes more complicated and riskier.”<sup>262</sup>

This is not fearmongering. Similar exceptions to protect the life or health of the pregnant person existed in some state abortion laws before *Roe* but “doctors became concerned that too many abortions were being approved” and “feared that their reputations, the reputations of their hospitals and even their licenses could be in jeopardy,” so many hospitals created therapeutic

---

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> See Pilar Melendez, *Healthy Pregnant Women Beg Docs in Anti-Abortion States: Don’t Let Me Die*, DAILY BEAST (July 21, 2022, 10:07 AM), <https://www.thedailybeast.com/healthy-pregnant-women-in-anti-abortion-wisconsin-and-indiana-are-now-begging-doctors-not-to-let-them-die> [<https://perma.cc/HYG6-962K>].

<sup>261</sup> Maggie Koerth & Amelia Thomson-DeVaux, *Even Exceptions to Abortion Bans Pit a Mother’s Life Against Doctors’ Fears*, FIFETHIRTYEIGHT (June 30, 2022, 6:00 AM) <https://fivethirtyeight.com/features/even-exceptions-to-abortion-bans-pit-a-mothers-life-against-doctors-fears> [<https://perma.cc/5ESP-GF3A>]; see also Danielle Campoamor, *Post-Roe, Doctors Are Delaying Care For Pregnancy Complications*, TODAY (July 22, 2022 12:55 PM), <https://www.today.com/health/post-roe-doctors-are-delaying-care-pregnancy-complications-rcna38796> [<https://perma.cc/U8Q7-KJN8>] (describing situation where an Ohio maternal-fetal medicine specialist “knew her patient’s life was at stake, but still left her patient’s side to call her lawyers” to make sure she could provide an abortion to a patient who developed a life-threatening infection after her water broke at 19 weeks’ gestation).

<sup>262</sup> Koerth & Thomson-DeVaux, *Even Exceptions to Abortion*, *supra* note 261.

abortion committees.<sup>263</sup> This resulted in the number of approved abortions falling from approximately 30,000 in the early 1940s to approximately 8,000 by the mid-1960s and more women seeking abortion care through other means.<sup>264</sup> Accordingly, restrictive abortion laws—even if purporting to make exceptions to protect the life or health of the pregnant person—will worsen the United States’ already abysmal maternal mortality rate.<sup>265</sup>

#### CONCLUSION

In overturning *Roe* and *Casey*, the Supreme Court has made the United States an international outlier joining the ranks of “backsliding democracies”; the clear global trend has been “in favor of expanded reproductive rights.”<sup>266</sup> As this Article has shown, permitting states to greatly restrict or ban abortion will “negatively impact women and other pregnant people’s economic prospects, their mental health, their physical health, and ultimately their lives.”<sup>267</sup> While the future may look bleak, it is not hopeless. The Court-led rightward shift is not popular as clear majorities: (1) support legal access to abortion in some or all circumstances,<sup>268</sup> (2) did not want *Roe* overturned,<sup>269</sup> and (3) disapprove of the outcome of the *Dobbs* decision.<sup>270</sup> These majorities can only grow as more people recognize the ramifications of restrictive

<sup>263</sup> Carole Joffe & Jody Steinauer, *Even Texas Allows Abortions to Protect a Woman’s Life. Or Does It?*, N.Y. TIMES (Sept. 12, 2021), <https://www.nytimes.com/2021/09/12/opinion/abortion-texas-roe.html> [<https://perma.cc/H8B5-87VE>].

<sup>264</sup> *Id.* (also noting that “what counts as a threat to someone’s life or health is often subjective, and those who mak[e] such judgments [are] not immune from political pressure.”).

<sup>265</sup> See Baptiste, *supra* note 248 (“States that have the poorest maternal health outcomes also have the most draconian abortion restrictions.”). This is true even if competently trained practitioners are available. See *supra* notes 240–244, and surrounding text.

<sup>266</sup> See Waldron, *supra* note 130 (since 1994, only the United States, El Salvador, Nicaragua, and Poland “have meaningfully curtailed abortion rights” compared to the fifty-nine other “countries [that] have expanded abortion rights by either legalizing or decriminalizing it . . .”).

<sup>267</sup> Kolhatkar, *supra* note 193 (quoting Tiffany Green, a University of Wisconsin School of Medicine and Public Health economist and population-health scientist).

<sup>268</sup> See, e.g., McGrath & McGregor, *supra* note 87 (“Americans favor legislation that would legalize abortion nationwide by a nearly 20-point margin; a recent Morning Consult poll found that by a two-to-one margin.”).

<sup>269</sup> Domenico Montanaro, *Poll: Two-Thirds Say Don’t Overturn Roe; The Court Leak Is Firing up Democratic Voters*, NPR (May 19, 2022, 5:00 AM), <https://www.npr.org/2022/05/19/1099844097/abortion-polling-roe-v-wade-supreme-court-draft-opinion> [<https://perma.cc/3B8C-N6XC>] (reporting that 64% of U.S. adults opposed overturning *Roe*).

<sup>270</sup> See Qamar, *supra* note 1 (reporting that “[m]ore Americans disapprove of the [*Dobbs*] ruling than approve of it” and that a poll giving respondents eleven choices to describe their reaction to the decision found: “Americans reported feeling disgusted (34[%]) at a higher rate than any other emotion,” which was “closely followed by feeling sad (33[%]), angry (32[%]) and outraged (31[%]).”).

abortion laws.<sup>271</sup> Accordingly, the only way to halt the parade of horrors described above is for the pro-choice majority to keep their apathy at bay and participate in our polity—vote, call their legislators, protest, and publicly share the abortion stories that touched their hearts and lives—and to not allow time to dampen their anger and resolve.<sup>272</sup>

Public disbelief and outcry about the consequences of abortion restrictions can prompt change<sup>273</sup> in the United States like they did in Ireland.

---

<sup>271</sup> See Alison Durkee, *Americans' Support for Government Action on Abortion Surges After Roe v. Wade Decision, Poll Finds*, FORBES (July 1, 2022, 10:25 AM), <https://www.forbes.com/sites/alisondurkee/2022/07/01/americans-support-for-government-action-on-abortion-surges-after-roe-v-wade-decision-poll-finds> [<https://perma.cc/37E2-672U>] (reporting that a growing number of U.S. adults listed abortion as a priority and “the most anti- and pro-abortion rights respondents were roughly equally as likely to say the government should work on abortion—which is notable because those with the most conservative abortion views have historically been more likely to prioritize the issue.”).

<sup>272</sup> Unfortunately, individuals can no longer rely on state courts to protect abortion rights. See Michael Wines, *Next Front Lien in the Abortion Wars: State Supreme Courts*, N.Y. TIMES (July 6, 2022), <https://www.nytimes.com/2022/07/06/us/abortion-state-supreme-courts.html> [<https://perma.cc/5GL7-WP4W>] (“The increasing political pressure on justices—and the rightward drift of some courts—suggests that options for abortion rights advocates to soften the impact of the federal abortion ruling may be limited.”); see also Katie Akin & William Morris, *Iowa Supreme Court Says Fundamental Right to Abortion Not Guaranteed Under State Constitution*, DES MOINES REGISTER (June 17, 2022, 5:34 PM), <https://www.desmoinesregister.com/story/news/2022/06/17/iowa-supreme-court-abortion-law-ruling-planned-parent-hood-kim-reynolds/7646049001> [<https://perma.cc/2B59-K8KW>] (“The state Supreme Court on Friday overturned its 2018 decision that said Iowans had a fundamental right to abortion under the state constitution.”).

<sup>273</sup> The beginning of this shift may already be underway. See Amelia Thomson-DeVeaux & Zoha Qamar, *The Supreme Court Is More Unpopular Than Ever. That Could Help Democrats*, FIVETHIRTYEIGHT (Sept. 9, 2022, 6:00 AM), <https://fivethirtyeight.com/features/the-supreme-court-is-more-unpopular-than-ever-that-could-help-democrats> [<https://perma.cc/H7A9-EH7K>] (While “the economy remains voters’ top issue overall, . . . the share of Democrats who say abortion is a very important issue for the midterm elections rose from 46[%] in March to 71[%] in August.” Further, a Kaiser Family Foundation poll found that “nearly three-quarters (72[%]) of Democratic voters and 56[%] of independent voters say the Supreme Court’s decision in Dobbs has made them more motivated to consider a candidate’s position on abortion.”); Julia Mueller, *Abortion Rises on List of Americans’ Most Important Problems: Gallup*, THE HILL (Aug. 1, 2022, 12:45 PM), <https://thehill.com/blogs/blog-briefing-room/3582787-abortion-rises-on-list-of-americans-most-important-problems-gallup> [<https://perma.cc/EM64-FP7N>] (reporting that “[eight] percent of Americans listed abortion as the most important problem facing the U.S.,” which is “the highest number of respondents who have said that since Gallup began tracking the issue in 1984” and “Democrat respondents were more likely to list abortion as a top issue than their Republican counterparts, with 13[%] of Democrats and Democratic-leaning independents saying abortion is the country’s top concern—compared to just [four] percent of Republicans.”); see also, e.g., Annalisa Merelli, *Abortion Rights Won the US Midterms*, QUARTZ (Nov. 9, 2022), <https://qz.com/abortion-rights-won-the-us-midterms-1849762288> [<https://perma.cc/NP96-BYJP>] (“Questions pertaining abortion were on the ballot in five states, and two gubernatorial races posed immediate consequences in terms of access to abortion. All of them, including in the Republican

The shocking story of a woman's unnecessary death following doctors' refusal to terminate a pregnancy that was "inevitably" going to end in miscarriage "set off outrage across the country and gave momentum to a growing call for change."<sup>274</sup> Savita Halappanavar's story changed public opinion, leading to a landslide vote to repeal the country's abortion ban.<sup>275</sup> Following the 2022 midterm elections, things are looking up,<sup>276</sup> yet the question remains: How many people need to suffer before the tide changes conclusively and permanently in the United States as well?

---

stronghold of Kentucky, went in favor of preserving abortion rights."); Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in Its Constitution*, N.Y. TIMES (Aug. 2, 2022, 10:45 PM), <https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html> [<https://perma.cc/R9WR-Y2NP>]. Only time will tell whether the *Dobbs*-fueled anger will continue motivating voters in the long-run.

<sup>274</sup> Megan Specia, *How Savita Halappanavar's Death Spurred Ireland's Abortion Rights Campaign*, N.Y. TIMES (May 27, 2018), <https://www.nytimes.com/2018/05/27/world/europe/savita-halappanavar-ireland-abortion.html> [<https://perma.cc/8ASH-E742>]; *Stuff Mom Never Told You*, iHEARTPODCASTS (June 13, 2018) (downloaded using Google Podcasts).

<sup>275</sup> Specia, *supra* note 274.

<sup>276</sup> Lisa Lerer, *Abortion on the Ballot*, N.Y. TIMES (Nov. 10, 2022), <https://www.nytimes.com/2022/11/10/briefing/abortion-midterm-elections.html> [<https://perma.cc/D45U-L6YX>] ("Support for abortion rights now appears to be one of the big reasons Democrats defied history and staved off deep midterm losses. . . . In several states where the future of abortion rights rested on the outcomes of state legislative and governor's races, voters said the issue was pivotal. . . . The midterm results suggest that Democrats have upended the status quo on the issue—and that abortion rights could remain a source of motivation in the next election, when the possibility of a nationwide ban is on the ballot.").