

UNDUE BURDENS: HOW THE TEXAS ABORTION  
BAN (SB 8) DISPROPORTIONATELY AFFECTS  
LOW-INCOME WOMEN

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ABSTRACT

A source of seemingly endless controversy, the legal status of abortion is of great importance, particularly for low-income women. Anti-abortion measures have consistently proven to disproportionately effect low-income women; one example of this is the Hyde Amendment passed in 1977, just three years after *Roe v. Wade* was decided. The Hyde Amendment barred the use of federal dollars for abortion services except in limited circumstances. except for when the life of the mother would be endangered by carrying the pregnancy to term. This Note highlights that the effects of the Hyde Amendment, combined with state restrictions on abortion services, results in significant consequences for low-income women seeking essential reproductive healthcare. Moreover, this Note focuses on how Texas Senate Bill 8 (“SB 8”) disproportionately affects low-income women in all aspects of life. For instance, the costs of taking off work, traveling, and making the necessary arrangements to obtain an abortion are often affordable for middle- and upper-class women but the same cannot be said for a low-income woman choosing between securing needed reproductive healthcare and paying rent. The Author argues that because SB 8 is the most restrictive abortion

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law post *Roe v. Wade*, more low-income women will be forced to give birth to children for whom they may not be in a financial position to care, contributing further to the pernicious force of cyclical poverty. Furthermore, the Author proposes that *Roe v. Wade* be codified into federal law to break the cycle of poverty perpetuated by restrictive abortion bans such as SB 8.

Disclaimer: This analysis was done in 2021 before the Supreme Court decided *Dobbs v. Jackson Women's Health* in June of 2022 wherein *Roe v. Wade* was overturned. It is important to note that regardless of the *Dobbs* decision, this note focuses on the economic impact that restricted access to reproductive healthcare has on low-income women. In states where abortion is banned outright, that financial burden has since only grown.

## INTRODUCTION

Abortion is a highly divisive issue in the United States. It always has been, and it likely always will be. Regardless of if an individual is pro-choice or pro-life, the crippling financial strain of carrying, delivering, and raising a child is an indisputable reality. Anti-abortion measures have consistently been found to disparately impact low-income women. The most salient example of this impact is the Hyde Amendment passed in 1977, just three years after *Roe v. Wade* was decided.<sup>1</sup> The Hyde Amendment barred the use of federal Medicaid funds for abortion except for when the life of the mother would be endangered by carrying the pregnancy to term.<sup>2</sup> Naturally, when Medicaid and other federal and state public funding is restricted, the most vulnerable Americans suffer the harshest consequences. As explained by the ACLU, "In practice, these women do not have the same rights as other American women who can finance an abortion out-of-pocket or through private insurance coverage."<sup>3</sup> The Hyde Amendment, paired with further state restrictions on abortions, results in grave consequences for

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1. *Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion*, ACLU, <https://www.aclu.org/other/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion> [https://perma.cc/76S7-2T2N] (last visited Feb. 6, 2022).

2. *Id.*

3. *Id.*

low-income women who attempt to obtain essential reproductive healthcare.

Texas Senate Bill 8 (“SB 8”) prohibits most abortions after about six weeks of pregnancy with no exceptions for pregnancies resulting from incest or rape.<sup>4</sup> Additionally, it places a monetary bounty on anyone that aids and abets an abortion, including doctors, healthcare staff, and Uber drivers, among others.<sup>5</sup> Those who have standing to sue include anyone who has connection to the abortion or can show injury from it.<sup>6</sup> Plaintiffs need not live in Texas, and they are entitled to no less than \$10,000 in statutory damages as well as their legal fees if they prevail in court.<sup>7</sup> The pervasive issue of the cycle of poverty that anti-abortion laws perpetuate is only exacerbated by the Supreme Court’s shadow docket decision in *Whole Woman’s Health v. Jackson* which refused to block the enforcement of the Texas abortion law.<sup>8</sup> This law is very unique in that it relies on citizens for its enforcement rather than state officials.<sup>9</sup> Therefore, in a lawsuit aiming to overturn this law as unconstitutional, *Whole Woman’s Health* or other opponents to the law have a significant challenge in that they cannot name state officials as their defendants.<sup>10</sup> Challenges to the law on constitutional grounds are extremely difficult to pursue.<sup>11</sup>

The central issue in this note will be how SB 8 disproportionately affects low-income women. For instance, the costs of taking off work, traveling, and making the necessary arrangements to obtain an abortion are often affordable for middle- and upper-class women. However, these

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4. Adam Liptak, J. David Goodman & Sabrina Tavernise, *Supreme Court, Breaking Silence, Won’t Block Texas Abortion Law*, N.Y. TIMES, <https://www.nytimes.com/2021/09/01/us/supreme-court-texas-abortion.html> [<https://perma.cc/77SB-UMUV>] (“The Texas law, known as Senate Bill 8, amounts to a nearly complete ban on abortion in Texas because 85 to 90 percent of procedures in the state happen after the sixth week of pregnancy, according to lawyers for several clinics.”) (Nov. 1, 2021).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494 (2021); Reese Oxner, *Key U.S. Supreme Court justices express concern about Texas abortion law’s enforcement*, TEX. TRIB., <https://www.texastribune.org/2021/11/01/texas-abortion-law-supreme-court/> [<https://perma.cc/V328-WSYA>].

9. *Id.*

10. *Id.*

11. Liptak et al., *supra* note 4. (“The immediate question for the justices was not whether the Texas law is constitutional, but whether it may be challenged in federal court. The law’s defenders say that, given the way the law is structured, only Texas courts can rule on the matter and only in the context of suits against abortion providers for violating the law.”)

arrangements become much more burdensome if one must choose between seeking out and obtaining reproductive healthcare and paying rent or food costs for that month. Because SB 8 is the most restrictive abortion law post *Roe v. Wade*, more low-income women will be forced to give birth to children for whom they may not be in a financial position to care. It is thus inevitable that SB 8 will perpetuate the vicious cycle of poverty already entrapping these families.

This note will walk through a proposal that *Roe v. Wade* be codified into federal law to break the cycle of poverty perpetuated by restrictive abortion bans such as SB 8. The passage of the Women's Health Protection Act in the House is one step in that direction, but it faces less than favorable odds in the Senate.<sup>12</sup> Even if this bill is not successful in the Senate, however, there are several elements of the act that, if codified, would lead to a beneficial result in superseding SB 8. For instance, the bill reads: "A health care provider has a statutory right under this Act to provide abortion services and may provide abortion services, and that provider's patient has a corresponding right to receive such services, without any of the following limitations or requirements . . . ."<sup>13</sup> Though the bill goes in-depth on the many ways in which SB 8 infringes upon constitutional rights, this sentence alone is sufficient to supersede SB 8.<sup>14</sup> Thus, the most effective way by which to codify *Roe v. Wade* would be for Congress to pass the Women's Health Protection Act.<sup>15</sup>

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12. Barbara Sprunt, *The House Passes a Bill to Counter Texas-Style Abortion Bans*, NPR (Sept. 24, 2021, 11:58 P.M.), <https://www.npr.org/2021/09/24/1038931908/house-democrats-abortion-rights-bill> [<https://perma.cc/Q9MR-HF63>] ("The bill passed the House mainly along party lines, 218-211, with one Democrat voting with Republicans. The vote was largely symbolic as the bill is unlikely to advance in the Senate, where 10 Republicans and all Democrats would need to back the bill in order to meet the sixty-vote threshold to beat a filibuster.").

13. Women's Health Protection Act of 2021, H.R.3755, 117th Cong. § 4(a) (2021).

14. *See id.* § 2(a)(11) ("Abortion is essential health care and one of the safest medical procedures in the United States."); *see also id.* § 2(a)(12) ("[T]hese restrictions have the purpose and effect of unduly burdening people's personal and private medical decisions to end their pregnancies by making access to abortion services more difficult, invasive, and costly, often forcing people to travel significant distances and make multiple unnecessary visits to the provider, and in some cases, foreclosing the option altogether.").

15. *What Would It Mean to Codify Roe v. Wade?*, BU TODAY: QUESTION OF THE WEEK PODCAST, at 01:20 (Sept. 27, 2021), <https://www.bu.edu/articles/2021/what-would-it-mean-to-codify-roe-v-wade/> [<https://perma.cc/5638-HM34>]. Linda McClain, a Boston University School of Law professor explained, "The Supreme Court temporarily has hindered the challenge to the Texas [Abortion] Law by letting it go into effect right away and all this damage is going to be done, but what

To set the stage for this proposal, this note will be broken into three sections. Part I of this note will examine the history and jurisprudence of abortion in the United States from *Roe v. Wade* to the present day. It will also include a discussion on the economic reasons as to why women seek abortions and the impact that abortion bans can have on low-income mothers and unwanted children. Part II will provide an analysis of recent case law surrounding women's access to abortion in the United States. Finally, Part III of this note will provide a policy proposal codifying *Roe v. Wade* and access to abortion and essential reproductive health care for American women. It is important to bear in mind that this note will be rather *gender essentialist* in that the term "women" will be used consistently to mirror the language of SB 8.<sup>16</sup>

## I. HISTORY

### *A. Abortion in America: Roe v. Wade-Now*

In 1965, illegal abortions were so unsafe that at least seventeen percent of all deaths due to pregnancy and childbirth were the result of abortions performed unlawfully.<sup>17</sup> The landmark case *Roe v. Wade* was decided in January of 1973. This decision empowered women with vital autonomy and safer options in the face of an unplanned pregnancy. The central question in *Roe v. Wade* was whether or not the constitutional right to privacy is broad enough to "encompass a woman's decision to terminate her pregnancy."<sup>18</sup>

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it means is that blue states are likely to pass more laws codifying *Roe v. Wade* or some type of access to abortion rights." *Id.*

16. *SB8: Whole Woman's Health v. Jackson*, 5-4 POD, at 00:49 (Sept. 3, 2021), <https://www.fivefourpod.com/episodes/sb8--whole-woman's-health-v-jackson/> [<https://perma.cc/TCZ7-NQQC>].

17. REBECCA BENSON GOLD, THE ALAN GUTTMACHER INST., ABORTION AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA 13 (1990) ("Epidemiologists believe the actual number was likely much higher, but that many deaths were officially attributed to other causes, perhaps to protect women and their families.").

18. *Roe v. Wade*, 410 U.S. 113, 119 (1973).

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy

*Id.* at 153.

The relevant statute in the Texas Penal Code, Article 1196, restricted legal abortions to those “procured or attempted by medical advice for the purpose of saving the life of the mother.”<sup>19</sup> Roe, a pregnant single woman, brought suit against Wade, a Texas state official, on the grounds that the statute was an unconstitutional restriction on her right to obtain an abortion.<sup>20</sup> Writing for the Supreme Court, Justice Blackmun laid out a trimester approach to the issue.<sup>21</sup> For the first trimester, the abortion decision was left to the medical judgment of the woman’s attending physician.<sup>22</sup> For the second trimester, the state could regulate abortion in ways that were “reasonably related” to the woman’s health.<sup>23</sup> For the third trimester, the state could prohibit abortions, subject to exceptions for the woman’s health.<sup>24</sup> Justice Blackmun called the decision “a step that had to be taken as we go down the road toward the full emancipation of women.”<sup>25</sup>

*Roe* was two steps forward; however, subsequent case law took the issue of abortion one step back. The Supreme Court decided *Planned Parenthood v. Casey* in 1992. The Court’s decision allowed for further restrictions to reproductive healthcare that, prior to this case, had been struck down. The question at hand was whether a state restriction on abortion that requires informed consent and a twenty-four hour waiting period was unconstitutional.<sup>26</sup> Writing for the Supreme Court, Justice O’Connor explained that the State has a “profound interest in potential life.”<sup>27</sup> Consequently, the Court explained that “the informed consent requirements, the 24-hour waiting period, parental consent provision, and the reporting and recordkeeping requirements of the Pennsylvania statute”

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19. TEX. PENAL CODE ANN. § 1196 (West 1973).

20. *Roe*, 410 U.S. at 113.

21. *Id.* at 164. (“A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.”).

22. *Id.*

23. *Id.*

24. *Id.* at 164-65.

25. Linda Greenhouse, *The Supreme Court: The Legacy; Justice Blackmun’s Journey: From Moderate to a Liberal*, N.Y. TIMES (Apr. 7, 1994), <https://www.nytimes.com/1994/04/07/us/supreme-court-legacy-justice-blackmun-s-journey-moderate-liberal.html> [<https://perma.cc/DQT5-45SM>].

26. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833 (1992).

27. *Id.* at 878. “Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose” *Id.* at 877.

did not impose an undue burden on a woman seeking an abortion.<sup>28</sup> Thus, the new test for the constitutionality of an abortion restriction became whether the regulation placed an “undue burden” on a woman’s right to an abortion.<sup>29</sup> Though the Court reaffirmed the core holding in *Roe*, that the constitutionally protected right to privacy implies a right to abortions, *Casey* made it much more difficult to exercise this right.

Unfortunately, the Court’s jurisprudence continued to chip away at *Roe*. In 2007, the Supreme Court issued an opinion in *Gonzales v. Carhart* upholding the Partial-Birth Abortion Ban Act of 2003 (“PBABA”).<sup>30</sup> The question in this case was whether Congress could ban a specific type of partial-birth abortion provided that its restrictions on the practice are narrow and clear, and the ban does not constitute an undue burden on a woman’s right to an abortion in accordance with *Casey*. Writing for the majority, Justice Kennedy answered yes, stating: “[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman.”<sup>31</sup> Though the Supreme Court struck down a similar law in 2000, upholding the PBABA through the *Gonzales* decision made it a federal crime to take certain steps when performing a second-trimester abortion.<sup>32</sup>

Nevertheless, if one were to take stock of the effects of overturning *Roe v. Wade* in the early 2000s, the restriction of access would not have been entirely dire. According to Paul Benjamin Linton, an attorney who has represented *amici curiae* in landmark cases in the Supreme Court such as *Planned Parenthood v. Casey* (1992) and *Gonzales v. Carhart* (2007), the

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28. *Id.* The Court, however, ruled that a spousal notification provision did impose an undue burden and was invalid. *Id.* at 898.

29. *Id.* at 877.

30. Partial-Birth Abortion Ban Act of 2003 requires that “a living fetus be delivered vaginally to one of two anatomical landmarks depending on the fetus’ presentation.” The statute requires performance of an “overt act other than completion of delivery that kills the partially delivered living fetus.” The statute also contains scienter requirements concerning actions involved in prohibited abortion such that physicians will know that if they do not deliver a living fetus to an anatomical landmark, they will not face criminal liability. 18 U.S.C.A. § 1531(b)(1)(A) (West 2003).

31. *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

32. PLANNED PARENTHOOD FED’N OF AM., *ROE V. WADE: ITS HISTORY AND IMPACT 3* (2014), [https://www.plannedparenthood.org/uploads/filer\\_public/c6/59/c65961ce-447c-48e1-b315-79bfae151e42/abortion\\_roe\\_history.pdf](https://www.plannedparenthood.org/uploads/filer_public/c6/59/c65961ce-447c-48e1-b315-79bfae151e42/abortion_roe_history.pdf) [https://perma.cc/FCF6-DVCW]. See also *supra* text accompanying note 30.

immediate impact of an overruling decision would have been modest.<sup>33</sup> Roughly two-thirds of states had mended their abortion statutes to reflect the *Roe v. Wade* standard which allows abortion for any reason before viability and for virtually any reason after viability.<sup>34</sup> In total, twelve states had enforceable statutes on the books that prohibit most abortions in the event that *Roe v. Wade* was overturned.<sup>35</sup>

Access to reproductive health care continued to be defended by the Supreme Court when they explored Targeted Restrictions on Abortion Providers (“TRAP laws”). The 2016 case *Whole Woman's Health v. Hellerstedt* analyzed the constitutionality of two provisions in Texas’s House Bill 2: the admitting privileges requirement<sup>36</sup> and the surgical center requirement.<sup>37</sup> Writing for the majority, Justice Breyer explained:

[N]either of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, *Casey, supra*, at 878, 112 S.Ct. 2791 (plurality opinion), and each violates the Federal Constitution. Amdt. 14, § 1.<sup>38</sup>

He noted that where provisions lead to the closure of clinics, the quality-of-care declines and the result would be harmful—not supportive of—women’s health.<sup>39</sup> This holding demonstrated that the standards created by *Roe* and *Casey* would still stand.

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33. Paul Benjamin Linton, *The Legal Status of Abortion in the States if Roe v. Wade Is Overruled*, 27 ISSUES L. & MED. 181, 182 (2012) (“In sum, no more than eleven States, and very possibly as few as eight, would have laws on the books that would prohibit most abortions if *Roe* were overruled.”).

34. *Id.* at 183.

35. *Id.* at 224.

36. “A physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced.” TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2021) (effective Oct. 29, 2013) (subsection breaks omitted).

37. “[T]he minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers.” TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West 2021) (effective Apr. 2, 2013); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

38. *Whole Woman's Health*, 136 S. Ct. at 2300.

39. *Id.* at 2318.



Following this trend, *June Medical Service v. Russo* (2020) affirmed that the Supreme Court would continue to test the constitutionality of abortion laws by analyzing the burden placed on women. Similar to *Whole Woman's Health*, an almost word-for-word copy of Texas's *admitting privileges* requirement was at issue.<sup>40</sup> Again, the Court explained that such a law places an "undue burden on women's constitutionally protected right to choose to have an abortion."<sup>41</sup> In his concurrence, Chief Justice Roberts reemphasized the importance of the undue burden standard laid out in *Casey* as opposed to a balancing test.<sup>42</sup> He wrote that because there was no way a court could adequately balance benefits and restrictions, the court should therefore look at the restriction and determine if it poses a substantial obstacle for women to access abortions.<sup>43</sup>

In 2021, the impacts of not codifying *Roe v. Wade* are far from modest. SB 8 takes the United States back in time. Gone are the days when late-term abortion restrictions seemed unreasonable. SB 8 prohibits abortion after six to eight weeks of pregnancy—the same time at which fetal heartbeats first become detectable<sup>44</sup> and when many women realize that they have missed their periods.<sup>45</sup> Dr. Jen Villavicencio, a fellow with the American College of Obstetricians and Gynecologists, offers several explanations as to why women may not know they are pregnant at this early stage: (1) the "[p]regnancy isn't anticipated or confirmed"; (2) "[p]eriods can be unpredictable"; and (3) "[l]ack of education[.]"<sup>46</sup> Nevertheless, SB 8

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40. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2108 (2020).

41. *Id.* at 2132.

42. *Id.* at 2135.

43. *Id.* at 2136.

[C]ourts applying a balancing test essentially would be asked to weigh the State's interests in 'protecting the potentiality of human life' and the health of the woman, on the one hand, against the woman's liberty interest in defining her 'own concept of existence, of meaning, of the universe, and of the mystery of human life' on the other.

*Id.*

44. S. 8, 87th Leg., 87th Spec. Sess. (Tx. 2021); *How Early Can You Hear Baby's Heartbeat on Ultrasound and By Ear?*, HEALTHLINE, <https://www.healthline.com/health/pregnancy/when-can-you-hear-babys-heartbeat> [<https://perma.cc/NTV9-N9XE>].

45. Jessica Ravitz, *Reasons a Woman May Not Know She's Pregnant at Six Weeks*, CNN (May 9, 2019), <https://www.cnn.com/2019/05/09/health/pregnancy-at-six-weeks/index.html>. [<https://perma.cc/3BE8-4GJJ>].

46. *Id.* ("The reality is that nearly half of all pregnancies are unintended or, more specifically, 45-49% of the time they are unplanned.").

deputizes private individuals to bounty hunt abortion providers, activists, and even rideshare drivers for intending to help someone get an abortion after six weeks of pregnancy.<sup>47</sup> This private enforcement scheme has essentially allowed Texas to avoid judicial review through carefully constructed procedural confusion.<sup>48</sup> There are two very unique aspects to this law:

- (1) private citizens are given the right to sue instead of the state; and
- (2) everyone could be held liable for aiding and abetting an abortion except for the person getting the abortion.<sup>49</sup>

In response to the law, Whole Woman's Health, an abortion provider in Texas, was joined by several other advocacy organizations and abortion providers in filing for a stay of SB 8.<sup>50</sup>

Whole Woman's Health argued that "the implementation of the law should be halted until the Court makes a final determination about the constitutionality of the law."<sup>51</sup> In a very brief decision, the Supreme Court responded that the law is allowed to stand, "at least for now."<sup>52</sup> Writing for a five-four majority, Justice Alito stated that the "application also presents complex and novel antecedent procedural questions on which they have not

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47. 5-4 POD, *supra* note 16 at 01:36.

The law is written very broadly, so literally anyone can sue and the people who can be sued include anyone who helps pay for the abortion, helps the person get to the facility, let your imagination run wild in terms of who can be sued. And of course, it would hold abortion doctors themselves liable, which has resulted in nearly every abortion provider in Texas halting abortion services after six weeks.

48. *Id.* at 02:52.

49. *Id.* at 02:00.

The purpose is to create a bit of a procedural loophole, because it's very unclear under the law who can sue and who can be sued. When challenging a law for constitutionality, generally the person whose rights are violated would sue the state official who enforces the law, but here, state officials are not enforcing the law, private citizens are enforcing the law, and moreover, the person whose constitutional rights are at issue is the person who's getting the abortion, but if you recall, they can't actually be sued under the law, it's only doctors and anyone else who was helping aid and abet the abortion.

*Id.*

50. *Id.* at 03:30.

51. *Id.* at 03:44.

52. *Id.*

carried their burden,” maintaining that “this order [was] not based on any conclusion about the constitutionality of Texas’s law.”<sup>53</sup> In her dissent, Justice Sotomayor stated that despite the “flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand.”<sup>54</sup> In his dissent, Justice Breyer stated, “[S]ince the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person . . . to prevent abortion during that same period.”<sup>55</sup> Similarly, Justice Kagan dissents, criticizing the insufficient opinion of the majority, and stating that “it barely bothers to explain its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail.”<sup>56</sup> Finally, Chief Justice Roberts emphasizes in his dissent, “the Court’s order is emphatic in making clear that it cannot be understood as sustaining the constitutionality of the law at issue.”<sup>57</sup> As a result, this leaves the history of abortion rights in America in a very precarious position. Women in Texas are the first to suffer these repercussions, but it is foreseeable that laws such as SB 8 will be implemented elsewhere because of how the Supreme Court responded.<sup>58</sup>

For instance, the Supreme Court will soon decide on *Dobbs v. Jackson Women’s Health*.<sup>59</sup> This case deals with the constitutionality of a 2018

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53. *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2495-96 (2021).

54. *Id.* at 2498-99 (Sotomayor, J., dissenting). She proceeds, “It cannot be the case that a State can evade federal judicial scrutiny by outsourcing the enforcement of unconstitutional laws to its citizenry.” *Id.*

55. *Id.* at 2497 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976) (internal quotation marks omitted)).

56. *Id.* at 2500.

57. *Id.* at 2496.

58. 5-4 POD, *supra* note 16, at 16:34, 17:06.

And back to this bill originating in a uniquely Texas context, Texas passes bills that are like a prophecy into the future. Texas is a battleground where conservative fanatics enact policies that are then copied across the country...Florida, the president of the Florida State Senate already announced yesterday that they were working on a similar statute. The legislature in Georgia goes into session very soon, they are working on a very similar statute, and that’s because of the Supreme Court’s decision here.

59. Nancy Northup, *Dobbs v. Jackson Women’s Health Organization: The Case in Depth*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/case/scotus-mississippi-abortion-ban/dobbs-jackson-womens-health/> [https://perma.cc/83TV-7Q5P] (Jan. 31, 2023).

Mississippi state law that bans abortions at fifteen weeks.<sup>60</sup> *Dobbs v. Jackson* marks the first time in which the Court will rule on the constitutionality of a pre-viability abortion ban since *Roe v. Wade*.<sup>61</sup> Oral arguments were heard in December of 2021, with a decision expected by the end of the 2021-2022 term.<sup>62</sup> If the Supreme Court overturns *Roe*, only fifteen states and the District of Columbia will have laws on the books that protect the right to an abortion.<sup>63</sup> It is foreseeable that trigger laws will be enacted the moment *Roe* is overturned banning all or nearly all abortions in twelve states; currently, ten states are working on passing similar laws.<sup>64</sup> Only time will tell whether and in what circumstances the right to a safe and legal abortion will stand.

### *B. Why Abort? Economic Reasons For Which Women Get Abortions*

Women seek abortions for a plethora of reasons. Some because the child was a product of a sexual assault, some because the child was conceived outside of a stable partnership, and others because their bodies cannot handle the inherent strain that a child would place on their health—the list goes on. However, this section is dedicated to the analysis of the economic strain a child has on its mother, father, and guardians. There are infinite reasons why women get abortions, but the resources available to properly raise and care for children are, of course, finite.

Helping to explain the socioeconomic consequences of being denied an abortion is a five-year longitudinal study known as the *Turnaway Study* that began in 2008.<sup>65</sup> This study included a sample of 954 women from thirty different abortion facilities across the U.S.<sup>66</sup> These women were asked two

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60. *Id.*

61. *Id.*

62. *Id.*

63. Devin Dwyer, *2021 Was Pivotal Year for Abortion Laws in America*, ABC NEWS (Dec. 28, 2021), <https://abcnews.go.com/US/2021-pivotal-year-abortion-laws-america/story?id=81860784> [<https://perma.cc/4DXR-KSE3>].

64. *Id.*

65. M Antonia Biggs, Heather Gould & Diana Greene Foster, *Understanding Why Women Seek Abortions in the US*, BMC WOMEN'S HEALTH, July 5, 2013, at 1, <https://bmcwomenshealth.biomedcentral.com/articles/10.1186/1472-6874-13-29#citeas> [<https://perma.cc/8VA2-K23T>].

66. *Id.*

open-ended questions as to why they chose to terminate their pregnancies.<sup>67</sup> Financial reasons were cited by forty percent of women and the need to focus on other children was cited by twenty-nine percent of women.<sup>68</sup> Previous studies in 1987 and 2004 outlined very similar findings.<sup>69</sup>

The extent to which women will have to suffer grave financial consequences of a forced birth as required by SB 8, of course, varies based on income. Across the board, however, women seeking an abortion are the best judges of their own circumstances. Women who are denied access to reproductive healthcare are more likely to spend years living in poverty than women who have abortions.<sup>70</sup> In fact, one study showed that carrying an unwanted pregnancy to term quadrupled the likelihood that a new mother and her child would live below the federal poverty line.<sup>71</sup> As explained by the study's lead author Diana Greene Foster, "When [women] receive an abortion, they slowly gain employment, and their income goes up. But when

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67. *Id.* The first question that was asked was "What are the reasons that you decided to have an abortion?" followed by a prompt asking for any other reasons until the respondent says that is all." The second question that was asked was "What would you say was the *main reason* you decided to have an abortion?" The answers to both questions were "combined to identify all reasons given by respondents for seeking abortion." *Id.*

68. *Id.*

Most women (38%) cited general financial concerns which included responses such as 'financial problems,' 'don't have the means,' 'It all boils down to money' and 'can't afford to support a child.' As one unemployed 42-year-old woman with a monthly household income of a little over \$1,000 describes '[It was] all financial, me not having a job, living off death benefits, dealing with my 14-year-old son. I didn't have money to buy a baby spoon.'

69. *Id.*

The top three reason categories cited in both studies were: 1) 'Having a baby would dramatically change my life' (i.e., interfere with education, employment and ability to take care of existing children and other dependents) (74% in 2004 and 78% in 1987), 2) 'I can't afford a baby now' (e.g., unmarried, student, can't afford childcare or basic needs) (73% in 2004 and 69% in 1987), and 3) 'I don't want to be a single mother or am having relationship problems' (48% in 2004 and 52% in 1987).

70. Ronnie Cohen, *Denial of Abortion Leads to Economic Hardship for Low-income Women*, REUTERS (Jan. 18, 2018), <https://www.reuters.com/article/us-health-abortion-hardship/denial-of-abortion-leads-to-economic-hardship-for-low-income-women-idUSKBN1F731Z> [<https://perma.cc/N8ST-KUA5>].

71. *Id.* Lead author Diana Greene Foster, a professor at Advancing New Standards in Reproductive Health, a research group at the University of California, San Francisco explained, "The things they worry about coming through are exactly the things they experience when they're denied an abortion and carry the pregnancy to term. They tell us they can't afford a baby, and we find they become poorer." *Id.*

they're denied an abortion, they're set back economically, and it takes them years to get where they would have been if they had received an abortion."<sup>72</sup> The study ultimately proved that for women with limited economic sustenance, carrying and rearing a child can be burdensome. Access to reproductive healthcare can be a significant determinant in a woman's economic stability as well as that of her existing dependents.

When the government restricts access to crucial reproductive healthcare, there are major consequences for the mother, the child, and society at large.<sup>73</sup> Take, for instance, the impact of legalized abortion on crime. Legalized abortion appears to account for as much as a fifty percent drop in crime.<sup>74</sup> This is due, in part, to the circumstances surrounding the women who seek abortions. The research reflects that the categories of women who are most likely to seek abortions are teenagers, single women, and lower income women.<sup>75</sup> Further, the early life circumstances of those children on the margin of abortion are difficult along many dimensions: infant mortality, growing up in a single-parent home, and experiencing poverty.<sup>76</sup> Indeed, recent studies have found children born to low-income mothers to be at higher risk for committing crime in adolescence and condemned to repeat a potentially inter-generational cycle of addiction, poverty, and incarceration.<sup>77</sup> Hence, the focus of law makers when

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72. *Id.*

73. *See* 5-4 POD, *supra* note 16 at 11:30. ("And again, over the course of American history, we've seen this and it's happening again in this situation, that it's compounding the oppression of people who are already struggling. This disproportionately impacts and burdens people who already live in poverty, and once again, sort of the culture war, the changing of the rules of democracy, the changing of the Constitution and what it means is happening again on women's bodies, on pregnant people's bodies.").

74. John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.J. ECON., 379, 389 (2001), <https://pricetheory.uchicago.edu/levitt/Papers/DonohueLevittTheImpactOfLegalized2001.pdf> [<https://perma.cc/YT6B-SRG2>] ("Previous researchers have studied (1) how legalized abortion affects birth rates across different groups, and (2) crime rates across groups. By combining these two sets of estimates, we can obtain a crude prediction of the impact of legalized abortion on crime.").

75. *Id.* at 381 (citing Jonathan Gruber, Phillip Levine, & Douglas Staiger, *Abortion Legalization and Child Living Circumstances: Who Is the "Marginal Child?"*, 114 Q.J. ECON. 263 (1999)).

76. *Id.*

77. Donohue, *supra* note 74, at 381 ("Extrapolating our results out of sample to a counterfactual in which abortion remained illegal and the number of illegal abortions performed remained steady at the 1960s level, we estimate that (with average national effective abortion rates in 1997 for all three crimes ranging from between 142 and 252) crime was almost fifteen to twenty-five percent lower in 1997 than it would have been absent legalized abortion.").

regulating reproductive healthcare should be on obtaining the best outcomes over the entire life of the child rather than forcing their birth.

*C. The Aftermath—Exploring the Quality of Life For Low/No-Income Mothers and Their Unwanted Fetuses After Denial of an Abortion*

Protecting the fetus in utero without considering the circumstances into which that child will eventually be born is detrimental. A study done by various scholars at the University of California, San Francisco based on the aforementioned *Turnaway Study* reveals such impacts of abortion restrictions.<sup>78</sup> They found:

[W]omen denied abortions who gave birth had higher odds of poverty 6 months after denial . . . than did women who received abortions; women denied abortions were also more likely to be in poverty for 4 years after denial of abortion. Six months after denial of abortion, women were less likely to be employed full time . . . and were more likely to receive public assistance . . . than were women who obtained abortions, differences that remained significant for 4 years.<sup>79</sup>

Thus, laws that restrict access to abortion may, and in many cases, do, result in worsened economic outcomes for women.<sup>80</sup> Legislators would be remiss in failing to further research the outcomes that forced births have on children in forced birth circumstances.

Diana Greene Foster published research on the outcomes faced by children of women who were denied abortion. She divided these children into three camps: the existing child/children, the child born from an unwanted pregnancy, and the child/children born from a pregnancy after an abortion.<sup>81</sup> Foster found that, consistent with mothers' concerns that raising

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78. Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407 (2018).

79. *Id.*

80. *Id.*

81. Diana Greene Foster, *When Women Are Denied an Abortion, Their Children Fare Worse than Peers*, STAT (Dec. 5, 2018), <https://www.statnews.com/2018/12/05/how-abortion-denial-affects-children-well-being/> [https://perma.cc/PFZ3-ESZS] (“The research is clear: Restricting access to abortion doesn’t just harm women—it harms their children as well.”).

a new child would limit their ability to care for their existing children, there were significantly worse socioeconomic outcomes for children whose mothers were denied abortions than those who received them.<sup>82</sup> In addition, developmental milestones were significantly reduced among children whose mothers were denied an abortion compared to those who received them.<sup>83</sup>

Turning now to children born to women as a result of a forced birth, the research reveals more grim outcomes. Not surprisingly, these children are more likely to live in low-income households, the consequences of which included not having enough money to pay for basic living expenses.<sup>84</sup> A novel effect is the poor maternal bonding that a mother has with her unwanted child, and the inevitable impact this has on the child.<sup>85</sup> Research done by Zdenek Dytrych and his colleagues at the Psychiatric Research Institute in Prague shows that such children are born into a “potentially handicapping situation.”<sup>86</sup> The notion that “the birth of a child causes a complete change in attitude and that every woman who becomes a mother will love her child” is untrue.<sup>87</sup>

Comprised of unwanted children at the age of nine, Dytrych’s work also notes a difference in unwanted boys in comparison to unwanted girls.<sup>88</sup> More specifically, he noted that “boys born from unwanted pregnancies [were] more endangered in the development of their personalities than girls.”<sup>89</sup> The significant difference in being wanted and sex was confirmed during the study when the boys exhibited more pronounced reactions and less adaptive behavior.<sup>90</sup> For instance, the boys were rated the lowest on

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82. *Id.* (“[A] greater chance of living below the poverty level (72 percent compared to 55 percent) or living in a household without enough money to cover food, housing, and transportation (87 percent compared to 70 percent).”).

83. *Id.* The reduction in achieving these milestones is likely related to the increased financial strain on the family. *Id.*

84. *Id.*

85. *Id.* (“Women are also much more likely to report poor maternal bonding — feeling trapped as a mother, resenting their baby, or longing for the ‘old days’ before they had the baby — with the child born after abortion denial than with the next child born following a wanted abortion.”).

86. Zdenek Dytrych et al., *Children Born to Women Denied Abortion*, 7 FAM. PLAN. PERSPS. 165, 165-71 (1975), <https://doi.org/10.2307/2133895> [<https://perma.cc/95GB-SP86>].

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* (“The early and frequent need of such children, especially boys, to achieve satisfaction and to assert themselves is a strong source of stimulation leading to a certain behavior pattern which, in a given situation, is systematically enhanced and may become a more or less permanent trait.”).



diligence, concentration, initiative, self-confidence, and tidiness.<sup>91</sup> The girls born to mothers who were denied an abortion scored the highest on initiative and self-confidence.<sup>92</sup> Regardless of gender, the study concluded that the common denominator amongst unwanted children was an increased defensive position when faced with stress and frustration.<sup>93</sup> Dytrych emphasized that there may be a question concerning the future development of these children.<sup>94</sup>

Finally, the child or children born from a post-abortion pregnancy tend to have better developmental outcomes.<sup>95</sup> Post-abortion pregnancies are much more likely to be intentional than those for which an abortion was sought.<sup>96</sup> Such pregnancies are often paired with more financial stability, better partners, and more maternal bonding.<sup>97</sup> Naturally, all these factors together set both the children and their mothers up for success.

When controversy arises, it is important to look for answers in objective data. This is no more evident than through the actions taken by Washington D.C. firm Feldesman Tucker Leifer Fidell LLP, among others, which filed an amicus brief ahead of *Dobbs v. Jackson*.<sup>98</sup> This brief was signed by nearly “550 researchers in public-health, reproductive-health, and health policy, along with the American Public Health Association and two research institutes.”<sup>99</sup> It began with a focus on both prenatal care and developmental

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91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

The higher incidence of illness and hospitalization despite the same biological start in life, slightly poorer school marks and performance despite the same level of intelligence, somewhat worse integration in the peer group—all these point to a higher-risk situation for the child and the family, as well as for society.

95. *Foster*, supra note 78.

96. *Id.* (“As we wrote in the journal *Contraception*, women who received a wanted abortion were more likely to have an intended pregnancy in the next five years than women who carried an unwanted pregnancy to term.”).

97. *Id.*

98. Brief for 547 Deans, Chairs, Scholars & Public Health Professionals, the American Public Health Ass’n, the Guttmacher Institute & the Center for U.S. Policy, as Amici Curiae Supporting Respondents, *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392).

99. See Amy Maxmen, *Hundreds of Scientists Weigh In on a High-Stakes U.S. Abortion Case*, SCIENTIFIC AMERICAN (Oct. 28, 2021), <https://www.scientificamerican.com/article/hundreds-of-scientists-weigh-in-on-a-high-stakes-u-s-abortion-case/> [<https://perma.cc/Y3UT-RPVR>] (citing Feldesman Tucker Leifer Fidell LLP Counsel, Rosie Griffin, who noted firm’s support of scientists’ efforts to weigh in on the decision despite Justices having no obligation to rely on amicus briefs).

outcomes of children born from unintended pregnancies. The brief explained, “[N]early all peer-reviewed studies find a strong relationship between unintended pregnancy and late entry into prenatal care, and an even stronger relationship among women with unwanted pregnancies.”<sup>100</sup> Emphasized in the brief is the reality that comprehensive prenatal care is a “major determinant of women’s and infants’ health.”<sup>101</sup> Indeed, the child’s development after birth is dependent upon its healthcare before birth. Thus, unintended and unwanted pregnancies come with dire consequences for the mother and the child alike starting before the fetus is even born.

## II. ANALYSIS

*Roe v. Wade*, the core case underpinning abortion discussions in the United States, originated out of the Northern District of Texas—a state that has long been a battleground for anti-abortion laws and that shows no sign of changing in the near future. Since *Roe*, there have been three major abortion laws passed:

- (1) the establishment of legislation in 1977 that protected the right of medical personnel who either refused to participate in abortion procedures or those who did participate;
- (2) the Texas Abortion Facility Reporting and Licensing Act of 1985, which stipulated that all abortion facilities must report extensive information about each patient; and
- (3) the banning of third trimester abortions in

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100. *Id.* (citing INST. OF MED., THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES, (1995), <https://doi.org/10.17226/4903> [<https://perma.cc/V5CJ-MMR5>]); see also Diana Cheng et al., *Unintended Pregnancy and Associated Maternal Preconception, Prenatal and Postpartum Behaviors*, 79 *CONTRACEPTION* 194, 195 (2009), <https://pubmed.ncbi.nlm.nih.gov/19185672/> [<https://perma.cc/32ZM-62Z8>] (finding mothers with unwanted pregnancies less likely to receive prenatal care during the first trimester, compared to women with intended pregnancies); Kathryn Kost & Laura Lindberg, *Pregnancy Intentions, Maternal Behaviors, and Infant Health: Investigating Relationships with New Measures and Propensity Score Analysis*, 52 *DEMOGRAPHY* 83, 89 (2015), <https://doi.org/10.1007/s13524-014-0359-9> [<https://perma.cc/2QRJ-PSR6>] (assessing U.S. National Survey of Family Growth 2015 data and finding fewer unwanted births received early prenatal care, as compared to wanted births).

101. Brief for 547 Deans, *supra* note 98 (citing CDC, *Timing and Adequacy of Prenatal Care in the United States*, 2016 (2018), [https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67\\_03.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_03.pdf) [<https://perma.cc/CPD9-L4V7>])

1987, thus closing a loophole left by this historic [*Roe*] decision.<sup>102</sup>

The list of anti-abortion legislation goes on as Texas chipped away at abortion access until the unprecedented SB 8 law virtually eliminated the right entirely.

Unfortunately, the nation has its eyes on Texas when it comes to restrictive abortion laws. Texas leads, and other states follow. Republicans copy and paste laws from Texas into the fabric of their own states time and time again.<sup>103</sup> SB 8 has already proven to be no exception. In fact, after SB 8 went into effect, Republican lawmakers in at least six states said vowed to consider introducing similar bills, with the objective being the kind of abortion crackdown they have sought for years: to end the constitutional right to an abortion altogether.<sup>104</sup>

At a federal level, with cases including *Planned Parenthood v. Casey*, and *Gonzales v. Carhart*, *Roe* and its impacts have been diminished. However, the repercussions of such cases are not the same for all women. For instance, waiting periods that require an individual to make multiple trips to an abortion clinic prior to administration of the procedure impact low-income women more than middle- and upper-class women. It is difficult to imagine a government that forces women give birth regardless of their financial, medical, religious, or personal positions, when that same government does not also provide sufficient resources for that mother to properly care for the child it forced her to have. As was raised during the oral arguments of *Dobbs v. Jackson*, many conservatives suggest adoption, arguing that it lessens the burdens of an unwanted pregnancy. In response to the issue of the inherent burdens of forced motherhood, Justice Amy

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102. Alt HA, *Abortion Laws in Texas*, TEX. MED., Mar. 1988, at 63-5.

The following information about each patient in a yearly report: the license status of the facility; patient's year of birth, race, marital status, state and country of residence; type of abortion procedure; date abortion was performed; post-operative status of patient and cause of death when applicable; period of gestation at time of procedure; date of patient's last menstrual cycle; number of previous live births to patient; number of previous abortions performed on patient.

103. 5-4 POD, *supra* note 16, at 16:34.

104. Paul J. Weber, *EXPLAINER: The Texas Abortion Law's Swift Impact, and Future*, AP NEWS (Oct. 9, 2021), <https://apnews.com/article/abortion-coronavirus-pandemic-us-supreme-court-austin-health-6256c7cd37d86ec93bcfa511cebdb1f0> [<https://perma.cc/T3G8-WQ9S>]. (“Those states include Arkansas, Florida, Indiana, Mississippi, North Dakota, and South Dakota.”)

Coney Barrett asked, “Why don’t the safe haven laws take care of that problem?”<sup>105</sup> Julie Rikelman, who represented the abortion clinics, responded to Justice Barrett by citing the pressing health concerns that face pregnant women in Mississippi. She reminded Justice Barrett that safe haven laws only address part of the problem, stating, “It’s 75 times more dangerous to give birth in Mississippi than it is to have a pre-viability abortion, and those risks are disproportionately threatening the lives of women of color.”<sup>106</sup> Additionally, people are simply not adopting children at a rate sufficient enough to meet the needs of the state’s children. For example, in Mississippi alone at the time of the 2020 U.S. Census, 4,084 children were in foster care and 1,384 children were waiting for adoption.<sup>107</sup> Thus, at the national level, adoption and safe haven laws are not an equal or just solution to abortion bans and forced births.

SB 8 will impact low-income women, children, and families more severely than it would any other party. If Texas is going to put a law as restrictive as SB 8 into place, one would expect the expansion of social safety nets such as financial assistance, housing, and childcare. However, Texas does not even have the proper Medicaid expansion in place to allow pregnant women to have access to the insurance needed for pre- and postnatal care.<sup>108</sup> Further, even if this Medicaid expansion were in place, it would not cover abortions due to the Hyde Amendment.<sup>109</sup> Without proper Medicaid expansion in the South, citizens of many states are left without the reproductive care that they require.<sup>110</sup> At the very least, more pregnancies could be mitigated altogether with a more robust Medicaid

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105. Transcript of Oral Argument at 56, *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392). Justice Barrett explains, “[I]n all 50 states, you can terminate parental rights by relinquishing a child after abortion, and I think the shortest period might have been 48 hours if I’m remembering the data correctly.” *Id.*

106. *Id.* at 58. Ms. Rikelman also explained, “[T]he idea that a woman could place a child up for adoption has, of course, been true since Roe, so it’s a consideration that the Court already had before it when it decided those cases and adhered to the viability line.” *Id.* at 57.

107. MISSISSIPPI, CHILD WELFARE OUTCOMES STATE DATA REVIEW PORTAL, <https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/mississippi.html> [https://perma.cc/V78V-MKUV] (last visited March 5, 2023).

108. Rachel M. Cohen, *In the Fight for Reproductive Rights, Don’t Forget the Medicaid Gap*, INTERCEPT (Oct. 1, 2021), <https://theintercept.com/2021/10/01/abortion-medicaid-expansion-reconciliation/> [https://perma.cc/JC6L-3EP2].

109. *Id.* See also ACLU, *supra* note 1.

110. *Id.*

program as birth control would be more widely available and accessible.<sup>111</sup> In other words, restricting abortions without expanding social safety nets will likely create a cascading effect, resulting in widespread harm. It is unfathomable to continue restricting access to abortion while also gatekeeping birth control.

Moreover, according to the Guttmacher Institute, abortion rates in countries where abortion is legal are similar to those in countries where it is illegal.<sup>112</sup> In parts of the world where abortion is illegal, botched abortions cause about eight to eleven percent of all maternal deaths, or about 30,000 victims each year.<sup>113</sup> Abortion bans do not stop abortions; they only stop safe abortions. If a woman is from the middle or upper class of society, she likely will have the means to travel to another state, stay in a hotel, make additional arrangements at home or at work, and obtain a safe abortion. A low-income woman will not have these same options. She will be forced to give birth to a child for whom she does not have the means or, in some cases, the will to properly care. If she has been raped by her partner, father, or other bad actor, she will be forced to raise the child of her abuser. If she does not raise the child, the child will be put into the foster care system—a system that fails children every day. As outlined earlier by Diana Foster, women are the best judges of their circumstances. If they decide that an abortion is the most sensible route for their own futures and the future of their unwanted children, we should trust them.

### III. PROPOSAL

The codification of *Roe v. Wade* through the Women's Health Protection Act or some sufficiently equivalent legislation.

Codifying *Roe v. Wade* would take the question of safe and legal abortion out of the Supreme Court's hands and guarantee a fundamental

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111. *Id.* (“Health and economics researchers also found that low-income women in expansion states were more likely to use effective birth control methods during their postpartum period than their counterparts in holdout states and were more likely to use long-acting reversible contraception, considered among the best methods for preventing unwanted pregnancies.”).

112. Olga Khazan, *When Abortion Is Illegal, Women Rarely Die. But They Still Suffer*, ATLANTIC (Oct. 11, 2018), <https://www.theatlantic.com/health/archive/2018/10/how-many-women-die-illegal-abortions/572638/> [<https://perma.cc/3PF5-BS5D>].

113. *Id.* (“While fewer women are perforating their uterus or dying of sepsis, if women who attempt to perform their own abortion are taken to the hospital with complications, they might be reported to the authorities and face jail time.”).

aspect of the right to privacy for women in every state.<sup>114</sup> This would protect the right to choose even in the event that *Roe v. Wade* is overturned.<sup>115</sup> Though the trimester system set up in *Roe* is not expansive enough in terms of an ideal, unadulterated access to abortion, it is certainly better than SB 8's ban at six weeks. Women and families have relied on access to abortion in their life planning. SB 8 virtually takes this right away, especially for low-income women in Texas and other states that follow suit. The choice to have an abortion is no doubt an extremely difficult and personal one. Nevertheless, that choice belongs to none other than the woman whose womb is carrying the fetus.

Simply put, anything less than *Roe* imposes an undue burden on low-income women. The *Casey* court kept *Roe* in name only, and subsequent cases have continued to chip away at the fundamental right to abortion.<sup>116</sup> The impacts of this are widespread. For instance, the state of Missouri currently has one reproductive health clinic in the entire state.<sup>117</sup> This means that some individuals may have to travel hundreds of miles before they see a physician who will provide them with the essential reproductive healthcare. Additionally, Missouri imposes a seventy-two-hour waiting period from the time the individual first sees their provider until the time at which the abortion can be performed.<sup>118</sup> This could mean staying in a hotel for a minimum of three days, as well as taking off work and arranging childcare, among other things. Not surprisingly, the costs of time, energy, and money are more affordable when the individual does not have to choose between the abortion procedure and paying rent.

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114. MARIE LODI AND ERICA SCHWIEGERSHAUSEN, *Democratic Candidates Have Promised to 'Codify' Roe v. Wade. What Does That Mean?*, CUT (Oct. 16, 2019), <https://www.thecut.com/2019/10/what-does-codify-roe-v-wade-mean-from-democratic-debate.html> [https://perma.cc/FJ79-SWJH].

115. *Id.*

116. See PLANNED PARENTHOOD FED'N OF AM., *supra* note 32; Joan Biskupic, *Roe and Casey: The Two Abortion Precedents the Supreme Court May Overturn*, CNN (Dec. 1, 2021) <https://www.cnn.com/2021/12/01/politics/abortion-rights-cases-supreme-court-explainer/index.html> [https://perma.cc/SS3J-QDU7].

117. John Eligon, *Missouri Enacts 72-Hour Wait for Abortion*, N.Y. TIMES (Sept. 11, 2014), <https://www.nytimes.com/2014/09/12/us/72-hour-wait-for-abortion-is-enacted-in-missouri.html> [https://perma.cc/8F74-LCKZ] (“Abortion rights supporters have argued that the law hampers women’s access to the procedure because they often have to travel far to have one, and the waiting period could force them to incur extra travel and lodging costs and perhaps take time off work.”).

118. *Id.* (“‘I believe that that particular bill is a way to shame and demean women into changing their minds about abortion,’ said Representative Judy Morgan, a Democrat from Kansas City.”).

Further, *Roe* must be codified because a law like SB 8 creates a very slippery slope for the rest of our country.<sup>119</sup> Copycat states have laws already on the books. Three states have abortion bans at conception, six states have 6-week bans, one state has an 8-week ban, and another state at 12-weeks.<sup>120</sup> With the addition of SB 8, private individuals are now deputized to bounty hunt abortion providers, activists, and rideshare drivers for even attempting to help someone get an abortion after six weeks of pregnancy.<sup>121</sup> Texas is more interested in paying \$10,000 or more per report to restrict abortion access than it is in expanding social safety nets for the thousands of unwanted children who are already born. This is precisely why *Roe* should be codified as soon as possible to ensure low-income women have access to safe abortions.

### CONCLUSION

The right to an abortion is not real if only certain people can access it. In continuing to restrict access to essential reproductive health services, the legislatures are perpetuating the cycle of poverty for low-income women. Not surprisingly, providing women with the fundamental right to choose the appropriate time to bring a child into the world leads to better outcomes for the mother and the child alike. Specifically, denying women desired abortions may be associated with poorer maternal bonding and greater poverty than enabling women to postpone childbearing.<sup>122</sup> Additionally,

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119. Jon D. Michaels, *If the Supreme Court Lets Other States Copy Texas's Abortion Law, It'll Be Chaos*, WASH. POST (Jan. 10, 2022), <https://www.washingtonpost.com/outlook/2022/01/10/court-legal-vigilantes-polarize/> [https://perma.cc/6XKU-RK3F]

Already Alabama, Arkansas, Florida, and Ohio are fashioning their own versions of SB 8. Florida and Tennessee have ventured further, empowering and subsidizing community members to sue schools that accommodate transgender students. And, most recently, Florida has joined a growing number of states seeking to allow parents to sue schools that teach the realities of race in America. (To further entice private enforcement, both government agencies and private organizations are providing additional support, instruction and resources, including extra bounties.)

120. Denise Lieberman, Professor, Wash. Univ., Class Lecture for Sexuality and the Law: Theory & Practice (Jan. 26, 2022) (notes on file with author).

121. 5-4 POD, *supra* note 16.

122. Diana Greene Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion*,

children are a serious financial commitment, and the cost of living in America is only climbing. Across multiple studies, financial reasons are cited as the top motivating factor for abortion.<sup>123</sup> The poorest twelve percent of women account for almost fifty percent of abortions, and the poorest thirty percent account for seventy-five percent of abortions.<sup>124</sup> If this essential right to choose is taken away from our nation's most vulnerable populations, the result will be inter-generational poverty, back-alley abortions, and an exponential death toll.

Texas's SB 8 law must be deemed unconstitutional because it infringes upon a woman's right to privacy and disproportionately impacts low-income women. If this law is allowed to stand, it will be replicated in dozens of other states across the country. It is racist, classist, misogynistic, and, above all, unjust. *Roe v. Wade* must be codified.

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*JAMA PEDIATR.* (2018), 172(11):1053–1060, <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2698454> [<https://perma.cc/XHP5-M7WT>] (“In this quasi-experimental study of 146 children born after denial of abortion and 182 children from subsequent pregnancies in women who received an abortion, higher proportions of children born after denial of abortion experienced poor maternal bonding and lived in subjective poverty.”).

123. C.E. UZOGWE & CARLOS SANCHEZ LC, *Rapid Response: Poverty is the Commonest Reason For Abortion: This is not a choice*, *THE BMJ* (Nov. 17, 2019), <https://www.bmj.com/content/367/bmj.l6424/tr> [<https://perma.cc/824D-YYYY>]. “However, the evidence has consistently shown that the vast majority of women request abortions due to a lack of financial resources. A Guttmacher Institute study reported that 73% of women cited this as the motivating factor for abortion.” See also M ANTONIO BIGGS, *supra* note 65.

124. *Id.* (“This may be inconceivable for the privileged, but the evidence suggests that this is a reality for many, if not the vast majority of women who seek termination of pregnancy. 75% of women requesting abortion in the US are in poverty or in the low-income bracket.”).