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# Protecting a Woman's Right to Abortion During a Public Health Crisis

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# COMMENTS

## PROTECTING A WOMAN'S RIGHT TO ABORTION DURING A PUBLIC HEALTH CRISIS

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I wrote this piece to inspire others to always question the motivations and legitimacy of our laws, to research unfamiliar issues in search for truth, to stand by their convictions, and to continue fighting for what they believe in.

## PREFACE

I'd like to start by acknowledging the sensitive nature of the abortion controversy. Abortion is, and likely always will be, a divisive issue.

"One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion."[1]

I have often been asked to explain why I defend abortion. After all, I was raised Catholic and currently attend a private Catholic institution. The answer is simple. *My* philosophy, *my* experiences, *my* religious training, and *my* attitudes toward life are *mine* and mine alone and they are not to be imposed on another person when they are making decisions on whether to bear or beget a child.

I do not pretend to know the answer of when life begins. "When those trained in the disciplines of medicine, philosophy, and theology are unable to arrive at any consensus," I am in no position to speculate as to the answer. But how *I* feel about abortion should have no bearing on a person making a decision as important as this one.

I defend abortion because it is a constitutionally protected right and has been since *Roe* was decided in 1973 and reaffirmed nineteen years later in *Casey*. I defend abortion because it is repeatedly under attack.[2] I defend abortion because I believe in bodily autonomy and reproductive freedom and a person's right to choose.

## INTRODUCTION

On March 11, 2020, the novel Coronavirus Disease, COVID-19, was declared a pandemic by the World Health Organization.[3] COVID-19 is a highly contagious and life-threatening respiratory disease caused by SARS-CoV-2 and transmitted through respiratory transmission, including droplet and possibly aerosolized transmission, and the touching

1. *See* Roe v. Wade, 410 U.S. 113, 116 (1973).

2. *See id.* at 159.

3. *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19*, WORLD HEALTH ORG. (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—-11-march-2020 [https://perma.cc/M32P-NXSQ] (declaring the COVID-19 outbreak a pandemic and calling on countries to scale up emergency response mechanisms).

of contaminated surfaces.[4] The Centers for Disease Control and Prevention ("CDC") reports that there have been over thirteen million cases of COVID-19 and over 250,000 deaths across the nation since the first confirmed case reported in the United States in late January 2020.[5] Within the first week of 2021, the CDC reported that Texas saw a total of 1,843,153 confirmed cases.[6] As COVID-19 infected our nation, states were quick to issue executive orders restricting various aspects of daily life under the pretense of public safety.[7] It was clear at the outset that certain civil liberties were going to be tested.[8] Among them, a woman's constitutional right to an abortion.[9]

On March 22, 2020, in response to the pandemic, Texas Governor Greg Abbott issued Executive Order GA-09.[10] The order pertained to preserving hospital capacity and postponing non-essential surgeries and procedures until 11:59 p.m. on April 21, 2020.[11] The language of the order stated surgeries and procedures to be postponed were those deemed, "not immediately medically necessary to correct a serious medical condition, or to preserve the life of a patient who without immediate

4. *See* Ranjan K. Mohapatra et al., *The Recent Challenges of Highly Contagious COVID-19, Causing Respiratory Infections: Symptoms, Diagnosis, Transmission, Possible Vaccines, Animal Models, and Immunotherapy*, 96 CHEM. BIOLOGY & DRUG DESIGN 1187, 1188 (2020) (expanding on the origin, transmission, symptoms, and diagnosis of the coronavirus).

5. *See United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, CDC, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days [https://perma.cc/33GV-VHPK] (last updated Oct. 16, 2021) (providing the number of COVID-19 cases by state).

6. *See id.* (identifying the total number of confirmed coronavirus cases in Texas).

7. *See Stay at Home: These States Have Issued Orders for Residents Not to Go Out Amid COVID-19 Pandemic*, FOX10 PHX., https://www.fox10phoenix.com/news/stay-at-home-these-states-have-issued-orders-for-residents-not-to-go-out-amid-covid-19-pandemic [https://perma.cc/VA66-4QWX] (last updated April 9, 2020) (providing a list of states where executive orders have been issued ordering or encouraging residents to stay at home due to health and safety concerns).

8. *See, e.g.*, Laurie Sobel et al., *State Action to Limit Abortion Access During the COVID-19 Pandemic*, KAISER FAM. FOUND. (Aug. 10, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/ [https://perma.cc/WSB9-VE2X] (describing how states justify the ban on abortion due to the COVID-19 pandemic).

9. *See id.* (discussing the limited accessibility of abortions in states that have imposed restrictions due to the pandemic).

10. *See* The Governor of the State of Tex., Exec. Order No. GA-09, 45 Tex. Reg. 2271, 2272 (2020) [hereinafter GA-09] (referring to Chapter 81 of the Texas Health and Safety Code's definition of a public health disaster).

11. *See id.* (stalling surgeries and procedures not "immediately medically necessary").

performance of the surgery or procedure would be at risk for serious adverse medical consequences or death."[12]

Physicians and medical professionals who violated the law were subject to criminal penalties, including fines up to $1,000 and imprisonment for up to 180 days.[13] The day after Governor Abbott gave the order, Texas Attorney General Ken Paxton issued a press release stating that the prohibition applied to all surgeries and procedures, including any type of abortion that was not necessary to preserve the life or health of the mother.[14]

Across the nation, other states issued similar orders that attempted to restrict abortion access: Alabama, Arkansas, Iowa, Louisiana, Ohio, Tennessee, and West Virginia.[15] Three days after Executive Order GA-09 was issued, several Texas abortion providers filed suit in federal district court in response to Paxton's interpretation of the order.[16] The providers sought a temporary restraining order prohibiting GA-09 from applying to medication and procedural abortions, which the district court granted.[17] Governor Abbott and state officials subsequently petitioned

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12. *Id.*

13. *See* Tex. Gov't Code Ann. § 418.173 (creating a penalty for violation of an emergency management plan).

14. *See* Press Release, Ken Paxton, Att'y Gen., Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic, (Mar. 23, 2020), (https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all) [https://perma.cc/77QY-3N8E] [hereinafter Medically Unnecessary Surgeries] (warning that the prohibition on all medically unnecessary surgeries, including abortion procedures, applies throughout the State).

15. *See* Jessica Glenza, *States Use Coronavirus to Ban Abortions, Leaving Women Desperate: 'You Can't Pause a Pregnancy,'* GUARDIAN (Apr. 30, 2020, 7:00 AM), https://www.theguardian.com/world/2020/apr/30/us-states-ban-abortions-coronavirus-leave-women-desperate [https://perma.cc/V38W-3DFD] (conveying the American Medical Association's view that state abortion restrictions are exploiting the pandemic).

16. *See* M. Tyler Gillett, *Texas Providers File Lawsuit Against Executive Order Banning Abortions*, JURIST (Mar. 26, 2020, 5:44 AM), https://www.jurist.org/news/2020/03/texas-providers-file-lawsuit-against-executive-order-banning-abortions/ [https://perma.cc/5HSL-DWDU] (detailing the procedural litigation that ensued after Executive Order GA-09 was issued).

17. *See* Planned Parenthood Center for Choice v. Abbott, 450 F. Supp.3d 753, 757 (W.D. Tex. 2020) (issuing a temporary restraining order based on the findings that plaintiffs can show "(1) a likelihood of success on the merits, (2) that they will suffer irreparable harm if the temporary relief is not granted, (3) that the injury to the Plaintiffs outweighs any harm the temporary relief might cause Defendants, and (4) that a temporary restraining order will not disserve the public interest.").

for a writ of mandamus to the Fifth Circuit and filed an emergency motion to stay the district court's order.[18] Ultimately, the Fifth Circuit held that the district court had "abused its discretion by failing to apply the framework governing emergency exercises of state authority during a public health crisis."[19]

This comment provides an overview of the litigation that ensued following the issuance of Executive Order GA-09 and focuses on the unprecedented restriction to a woman's right to an abortion under the guise of public safety. It will attempt to address the legitimacy of the "public health concerns" listed in executive orders issued throughout numerous states and will discuss the pertinent legal framework and judicial scrutiny to apply.

## I. A WOMAN'S RIGHT TO AN ABORTION

The issue of a woman's constitutional right to abortion was decided in *Roe v. Wade*, wherein the Supreme Court established the trimester framework and announced that a state's interest in potential life begins at viability, not before.[20] Nineteen years later, the Supreme Court reaffirmed a woman's constitutional right to abortion in *Planned Parenthood v. Casey*.[21] The Court in *Casey*, however, rejected the trimester construct in *Roe* and held a woman's liberty is not as unlimited.[22] *Casey* clarified that a state's interest in potential life has sufficient force to restrict a woman's right to an abortion before viability so long as it does not place an undue burden on a woman's ability to make

18. *See In re* Abbott, 954 F.3d 772, 778 (5th Cir. 2020) (issuing a writ of mandamus based on the extraordinary nature of the COVID-19 pandemic and the state's interest in protecting public health).

19. *Id.* at 783; *see also* David Lee, *Fifth Circuit Lets Texas Limit Abortions During Covid-19 Crisis*, COURTHOUSE NEWS SERV. (Apr. 20, 2020), https://www.courthousenews.com/fifth-circuit-rules-texas-can-restrict-medication-abortions-during-covid-19-crisis/ [https://perma.cc/5UQD-825B] (announcing the Fifth Circuit's decision to restore Texas' ban on most abortions during pandemic).

20. *See* Roe v. Wade, 410 U.S. 113, 163–64 (1973) (determining that a state's legitimate interest in potential life begins at viability).

21. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 879 (1992) (reasoning that the adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*).

22. *See id.* at 872 (modifying *Roe* by holding that a state can express its concern for potential life prior to fetal viability).

that decision.[23] Therefore, a statute which furthers a valid state interest but has the effect of placing a substantial obstacle in the path of a woman's choice, is an undue burden, and cannot be considered a permissible means of serving its legitimate interests.[24] The Court held that the new "undue burden" analysis did not disturb the central holding in *Roe*, regardless of whether exceptions were made for specific circumstances.[25]

COVID-19 introduced an unprecedented challenge to a woman's constitutional right to an abortion during a public health crisis.[26] According to the Fifth Circuit, the applicable legal framework to apply to the question of whether a state may restrict access to a pre-viability abortion during a pandemic was set out in *Jacobson v. Commonwealth of Massachusetts*.[27] In *Jacobson*, the Supreme Court considered a 1905 Massachusetts compulsory regulation that required citizens to get vaccinated in an attempt to combat a smallpox epidemic.[28] The defendant argued that the regulation violated his Fourteenth Amendment rights, but the Supreme Court disagreed and held that the liberty to be secured by the Constitution does not import an absolute right free from restraint.[29] The Court went on to say a state may exercise its police power to enact quarantine and health laws related to and protecting public

23. *See id.* at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of liberty protected by the Due Process Clause.").

24. *See id.* at 878 (explaining that a finding of an undue burden standard is equivalent to a state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion).

25. *See id.* at 879 ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.").

26. *See* Joanna L. Grossman & Mary Ziegler, *Unconstitutional Chaos: Abortion in the Time of COVID-19*, JUSTICIA: VERDICT (Apr. 15, 2020), https://verdict.justia.com/2020/04/15/unconstitutional-chaos-abortion-in-the-time-of-covid-19 [https://perma.cc/DE3X-FYHQ] (describing the effects state executive orders had on abortion access during the pandemic).

27. *See In re* Abbott, 954 F.3d 772, 785 (5th Cir. 2020) (declaring the restriction of abortion access during a public health crisis must be analyzed under the standards set out in *Jacobson v. Commonwealth of Massachusetts*).

28. *See generally* Jacobson v. Massachusetts, 197 U.S. 11, 11–12 (1905) (considering the constitutionality of a state's compulsory vaccination laws during a smallpox outbreak).

29. *See id.* at 26 ("There are manifold restraints to which every person is necessarily subject for the common good.").

health and safety.[30] Relying on *Jacobson*, the Fifth Circuit reasoned that "*all* constitutional rights may be reasonably restricted to combat a public health emergency" and that abortion is no exception.[31]

The question then turns to whether these two distinct legal standards are diametrically opposed to one another or whether the language set out in Jacobson must be reconciled with more recent cases concerning a woman's constitutional right to abortion.[32] I examine each of these distinct legal standards in further detail.

## II. *JACOBSON* AND A STATE'S POLICE POWERS

Although *Jacobson* established state authority during a public health crisis, it also set out the instance in which a court could review the actions of a legislature.[33] The Court appeared to anticipate a state's ability to abuse its police power and deemed it appropriate to clarify that if the state exerted its police power in an arbitrary and oppressive manner, it would justify interference of the courts to prevent wrong and oppression.[34] The Supreme Court cautioned:

> [I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to [that] object, or is beyond all question, a plain palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution.[35]

30. *See id.* at 38 (holding that a community has the right to protect itself against an epidemic of disease which threatens the safety of its members).

31. *In re* Abbott, 954 F.3d at 786.

32. *Cf.* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 194 (2020) (recognizing the Fifth Circuit's reliance on a Supreme Court decision which the Fifth Circuit uses to support their claim that *Jacobson* relaxes standards of scrutiny was misled.) ("The Supreme Court has *never* said that *Jacobson* applies to all constitutional rights.").

33. *See* Jacobson, 197 U.S. at 31 (allowing judiciary review of legislative acts purporting to relate to the welfare of the state when such acts have no real or substantial relationship to the welfare of the state or its citizens).

34. *See id.* 38 (emphasizing instances for judicial intervention).

35. *Id.* at 31 (first quoting Mugler v. Kansas, 123 U. S. 623, 661(1887); then quoting Minnesota v. Barber, 136 U. S. 313, 320 (1890); and then quoting Atkin v. Kansas, 191 U. S. 207, 223 (1903)).

Nonetheless, the Fifth Circuit determined the district court had "usurped the state's authority to craft emergency health measures,"[36] and the proper inquiries under *Jacobson* would consider whether 1) GA-09 lacked a real or substantial relation to the COVID-19 crisis, and 2) whether GA-09 was beyond question, in palpable conflict with the Constitution.[37] After applying *Jacobson*, the Fifth Circuit held Executive Order GA-09 was not an outright ban on pre-viability abortions but rather a "temporary postponement" on "non-essential abortions" that bore a real and substantial relation to the public health crisis and was not, beyond question, in palpable conflict with the Constitution.[38]

### *A. Whether Restricting Access to Abortion Bears a Real or Substantial Relation to Combatting COVID-19*

The first *Jacobson* inquiry asks whether GA-09 lacks a "real or substantial relation" to the crisis Texas faces.[39] GA-09's purported purpose was to allow for maximum hospital capacity in anticipation of those affected by the virus *and* to maintain a supply of personal protective equipment ("PPE").[40] PPE refers to N95 respirators, surgical masks, non-sterile and sterile gloves, disposable protective eyewear, gowns, and hair and shoe covers.[41] According to GA-09, a shortage of hospital capacity or PPE would hinder efforts to cope with COVID-19.[42] While it is undeniably true that a shortage of hospital capacity would hinder COVID-19 efforts, both medication and procedural abortions afforded to

36. *See In re* Abbott, 954 F.3d 772, 778 (5th Cir. 2020) (discussing deference afforded to the states and implying that the district court substituted its own view of the efficacy of GA-09).

37. *See id.* (suggesting courts may not second-guess the wisdom or efficacy of the measures taken by a state's response to emergency measures).

38. *See id.* at 788 (stressing that those characteristics, which the district court failed to mention, placed GA-09 in contrast with restrictions set out in prior court decisions).

39. *See* Jacobson 197 U.S. at 31 (cautioning that statutes that have no real or substantial relation warrant judicial intervention); *see also In re* Abbott, 954 F.3d at 787 (describing the current state of the Texas public health crisis).

40. *See* GA-09, *supra* note 10, at 2271 (claiming hospital capacity and personal protective equipment were being depleted by unnecessary surgeries and procedures).

41. *See In re* Abbott, 954 F.3d at 794 (discussing the PPE required for procedural abortions and stating abortion is a common procedure in Texas).

42. *See* GA-09, *supra* note 10, at 2271 (acknowledging the need for increased amounts of protective equipment, such as masks, to combat COVID-19).

women seeking to terminate a pre-viable pregnancy are not typically performed in hospitals but instead in clinical out-patient settings.[43]

Typically, pregnancy is measured from the first day of a pregnant woman's last menstrual period ("LMP").[44] Texas prohibits abortion after twenty weeks from the first day of the pregnant woman's LMP.[45] Up until ten weeks LMP, women wishing to terminate their pregnancy can choose between medication abortion[46] and procedural abortion.[47] Texas restricts medication abortion to the first ten weeks of pregnancy, and after ten weeks, only procedural abortion is available.[48] Past sixteen weeks, only a licensed ambulatory surgical center or hospital may perform an abortion.[49] "[P]rocedural abortion is not what is commonly understood to be 'surgery'[.][50] It involves no incision, no need for general anesthesia, and no requirement of a sterile field."[51]

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43. *See* Nat'l Acad. of Scis., Eng'g, & Med., *The Safety and Quality of Abortion Care in the United States*, NCBI (2018), https://www.ncbi.nlm.nih.gov/books/NBK507229/ [https://perma.cc/38K5-MBCH] (reporting fewer than five percent of abortions were provided in hospitals in 2014).

44. *See* Natalia Viarenich, M.D., *Gestational Age: How Do You Count Pregnancy Weeks?*, FLO, https://flo.health/pregnancy/week-by-week/gestational-age [https://perma.cc/W68M-LGNQ] (last updated Mar. 10, 2021) (defining gestational age as a way to determine how far along a pregnancy is).

45. *See* Tex. Health & Safety Code Ann. § 171.044 (forbidding abortion once the probable post-fertilization age of the fetus is twenty or more weeks).

46. *See How Does the Abortion Pill Work?,* PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/how-does-the-abortion-pill-work [https://perma.cc/BG82-E4RY] (explaining how the "abortion pill" is actually a misnomer because there are two pills one must take. The first pill, called mifepristone, stops the pregnancy from growing. The second pill, misoprostol, helps expel the pregnancy.).

47. *See* Planned Parenthood Center for Choice v. Abbott, 450 F. Supp.3d 753, 757 (W.D. Tex. 2020) ("Under the attorney general's interpretation, the Executive Order either bans all non-emergency abortions in Texas or bans all non-emergency abortions in Texas starting at 10 weeks of pregnancy, and even earlier among patients whom medication abortion is not appropriate."); *see also In-Clinic Abortion,* PLANNED PARENTHOOD https://www.plannedparenthood.org/uploads/filer_public/38/e0/38e00243-38bc-4e36-be90-745285238985/in_clinic_abortion_information-.pdf [https://perma.cc/535X-N5KY] (describing the differences between aspiration abortion and D&E abortion, where a clinician uses gentle suction at times accompanied with medical tools to empty the patient's uterus).

48. *See generally* Tex. Health & Safety Code Ann. § 171.063 (ordering that only a physician may administer the abortion-inducing drug after assessing the pregnant woman).

49. *See* Tex. Health & Safety Code Ann. § 171.004 (establishing the specific requirements on when and where an abortion may be performed).

50. Order Granting Plaintiffs' Second Motion for a Temporary Restraining Order at 6, *In re* Abbott, 954 F.3d 772 (5th Cir. 2020), (No. A-20-CV-323-LY), 2020 WL 1815587.

51. *Id.*

The only abortions required in ambulatory surgical centers or hospitals are those past sixteen weeks LMP.[52] Furthermore, abortion providers in this suit declared they were taking measures to protect the health and safety of patients and staff by: screening patients for COVID-19 symptoms before each visit, reducing patient volume, and/or increasing appointment spacing between patients to comply with social distancing precautions.[53] Abortion providers also required patients to wait in their cars rather than in the waiting room after checking in for an appointment, and also implemented techniques to minimize PPE use.[54] Compulsory pregnancy equates to more, not less medical care.[55]

Even if concerns of sufficient PPE were legitimate, Governor Abbott announced in a press conference—held while GA-09 was in effect—that there were "more than 20,000 hospital beds available with 2,448 intensive care unit beds available and 7,834 ventilators."[56] Abbott also stated that Texas companies had stepped up to increase PPE production by distributing more than three million masks, four million gloves, and 78,000 coveralls to health care facilities.[57] Moreover, on March 31, 2020

52. *See* Tex. Health & Safety Code Ann. § 171.004 (requiring abortions be performed in certain hospitals and surgical centers after sixteen weeks since a woman's last menstrual period).

53. *See* Second Amended Complaint for Injunctive and Declaratory Relief at 51, *In re* Greg Abbott, et al, (No. 1:20-cv-00323-LY), 2020 WL 1815587 at 17 (underscoring the commitment Plaintiffs have made in responding to the current public health crisis, including preserving medical resources in short supply during the pandemic).

54. *See id.* at 17 (implementing additional COVID-19 precautions to ensure the health and safety of Plaintiffs' patients); *see also* Jordan Smith, *Abortion Providers File Emergency Lawsuit Challenging Texas Coronavirus Restrictions*, THE INTERCEPT (Mar. 26, 2020, 12:55 PM), https://theintercept.com/2020/03/26/coronavirus-texas-abortion-lawsuit/ [https://perma.cc/Y5U3-ATB7] (suggesting abortion providers had taken precautions to maximize safety and limit PPE since the beginning of the outbreak).

55. *See* Daniel Grossman, *Abortions Don't Drain Hospital Resources*, BOS. REV. (Apr. 17, 2020), https://bostonreview.net/science-nature-politics-law-justice/daniel-grossman-abortions-dont-drain-hospital-resources [https://perma.cc/EA36-GE7A] (narrating a gynecologist's routine when providing a first trimester abortion, noting the PPE required. The gynecologist compares the amount used for continued pregnancies and declares more PPE will be used, not less.).

56. Shawna M. Reding & Sammy Turner, *Executive Order Regarding Texas Businesses Reopening Could Be Coming, Gov. Greg Abbott Says*, KVUE (Apr. 10, 2020, 2:32 PM), https://www.kvue.com/article/news/health/coronavirus/coronavirus-texas-covid19-cases-update/269-f1c36a64-eedc-4d08-bf40-97c62ffcb39b [https://perma.cc/NJY7-XQNU].

57. *See* Press Release, Off. of the Tex. Governor, Governor Abbott Announces Incoming Shipments of PPE, Provides Update on Distrib. in Tex. (Apr. 6, 2020), (https://gov.texas.gov/news/post/governor-abbott-announces-incoming-shipments-of-ppe-provides-update-on-distribution-in-texas) [https://perma.cc/2N6S-CQ52] (announcing PPE to be received in the coming weeks).

(nine days after GA-09 was issued), Abbott issued Executive Order GA-14 relating to the statewide continuity of essential services and activities during the COVID-19 disaster, which included religious services conducted in churches, congregations, and houses of worship.[58] Furthermore, on April 17, 2020, Abbott issued several executive orders to coincide with the first phase of his plan to reopen Texas.[59] Loosening restrictions on businesses and religious services creates a heightened risk of exposure that could—and ultimately did—lead to a surge in hospitalizations, which in turn required use of PPE.[60]

Nonetheless, the Fifth Circuit reasoned that while GA-09 was a drastic measure, the order aligned with those similarly passed by other states.[61]

58. *See* Proclamation, Off. of the Tex. Governor, Governor Abbott Issues Exec. Ord. Implementing Essential Serv. & Activities Protocols (Mar. 31, 2020), https://gov.texas.gov/news/post/governor-abbott-issues-executive-order-implementing-essential-services-and-activities-protocols [https://perma.cc/Y96U-FUUB] (defining as essential services, among other things, religious services conducted in churches, congregations, and houses of worship); *see also* Tara Haelle, *Texas Governor Says Attending Church is 'Essential' but Abortions Can Wait Indefinitely*, FORBES (Apr. 1, 2020, 6:11 AM), https://www.forbes.com/sites/tarahaelle/2020/04/01/texas-governor-says-attending-church-is-essential-but-abortions-can-wait-indefinitely/#19769a488ab3 [https://perma.cc/2CT5-YWLY] (asserting that both free exercise of religion and a woman's right to terminate pregnancy are constitutionally guaranteed but only the former is accommodated for).

59. *See* Executive Orders by Governor Greg Abbott, LEGIS. REFERENCE LIBR., https://lrl.texas.gov/legeLeaders/governors/displayDocs.cfm?govdoctypeID=5&governorID=45 [https://perma.cc/P7ZN-JUCB] (providing a list of all executive orders issued by Governor Greg Abbott beginning March of 2016 to the present date); *see also* Brittany Taylor, *Gov. Abbott Says He Will Sign Executive Order Next Week on How Texas Businesses Will Begin to Reopen*, CLICK2HOUSTON (Apr. 10, 2020, 2:09 PM), https://www.click2houston.com/news/exas/2020/04/10/live-gov-abbott-to-provide-coronavirus-update/ [https://perma.cc/EP23-JCDT] (discussing the possibility of reopening businesses in the state).

60. *See* Fadel Allassan, *Texas Pauses Its Reopening as Coronavirus Cases Surge*, AXIOS, https://www.axios.com/texas-governor-suspends-elective-surgeries-bc5621ea-4e2b-4bd7-a05e-b56bd8bdcedd.html [https://perma.cc/PJ39-L46Q] (last updated June 25, 2020) (reporting Governor Abbott once again suspended elective surgeries to ensure hospitals continue to have the ability to treat COVID-19 patients); *see also* Corky Siemaszko, *Texas Pauses Reopening as Hospitals Inundated with 'Explosion' of COVID-19 Cases*, NBC NEWS (June 5, 2020, 11:04 AM), https://www.nbcnews.com/news/us-news/texas-governor-pauses-state-s-reopening-due-spike-new-covid-n1232118 [https://perma.cc/9YT2-Y6DF] (quoting Governor Abbott as saying, "the last thing we want to do as a state is go backwards and close down business." State officials reported a daily record of nearly 6,000 infections.).

61. *See In re* Abbott, 954 F.3d 772, 787 (5th Cir. 2020) (observing that while these measures would be constitutionally intolerable in ordinary times, they're recognized as appropriate, and even necessary, during the coronavirus pandemic due to the risk of transmission).

Oklahoma, Ohio, and Alabama all passed similar orders.[62] Those orders equally brought concerns and claims of Fourteenth Amendment violations.[63] The U.S. District Court for the Western District of Oklahoma held that while the current public health emergency allowed the state to impose some measure, the state's police power is not unfettered.[64] There, the district court held that the executive order in question would deny the Fourteenth Amendment right to abortion access and the prohibition on medication abortion was improper under both *Jacobson* and *Casey*.[65] It went on to say the state acted in an unreasonable, arbitrary, and oppressive way and imposed an undue burden on abortion access.[66] Similarly, the Alabama State Public Health Officer set forth an order restricting all surgical procedures subject to emergency exceptions.[67] There, the state's attorney general interpreted the order as implementing a blanket postponement on all abortions, medication or procedural, that were not necessary to preserve the life or health of the mother.[68] The United States District Court for the Middle District of Alabama held that because Alabama law imposes time limits on when women can obtain abortions, the required delay may have posed an undue burden that was not justified by the state's purported rationales.[69]

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62. *See id.* at 796–97 (Dennis, J., dissenting) (listing states that have attempted to limit access to abortion in response to the COVID-19 pandemic).

63. *See* Temporary Restraining Order at 2, S. Wind Women's Ctr. v. Stitt, (W.D. Okla.) (No. CIV-20-277-G), 2020 WL 1677094, at *2–3, *appeal dismissed*, 808 F. App'x 677 (10th Cir. 2020) (reviewing the validity of an Oklahoma executive order limiting access to abortion, which was enacted in response to the COVID-19 public health emergency); *see also* Robinson v. Marshall, 450 F.Supp.3d 1293, 1297 (M.D. Ala. 2020), *stay granted, order amended,* No. 2:19CV365-MHT, 2020 WL 1659700 (M.D. Ala. Apr. 3, 2020) (issuing a temporary restraining order to enjoin a Alabama public health order which postponed abortion).

64. *See* Temporary Restraining Order, *supra* note 63, at 1 (stating that although a court should not substitute its opinion for that of the legislatures, it also shouldn't sanction invasion of rights).

65. *See id.* at 6 (concluding that the executive order was invalid as an unreasonable use of the state's emergency powers and invalid as an undue burden on a woman's right to abortion).

66. *See id.* at 2 (stressing that the measures taken in delaying abortion procedures in effect denied access to abortion).

67. *See generally* Robinson, 450 F.Supp.3d at 1296 (pertaining to an Alabama state order mandating postponement of surgeries, including abortion).

68. *Id.* (reiterating the state's argument that the order's constitutionality rested upon its emergency powers).

69. *Id.* (noting the order was, "likely to fully prevent some women from exercising their right to obtain an abortion.").

Although GA-09 was undoubtedly enacted due to the state's interest in combatting the COVID-19 pandemic, the state's insistence that preventing women from obtaining an abortion furthers that interest goes beyond the necessity of the case considering (1) the amount of PPE used for abortions, (2) the locations that perform abortions, and (3) the measures implemented at abortion clinics to maximize patient and staff health and safety.[70] If a state were truly interested in combatting the pandemic, it would not force a woman already under a time constraint to seek refuge in another state, further imposing additional risks associated with travel.[71] A Colorado abortion provider stated they had patients travel as far as fifteen hours by car to get an available appointment solely to obtain a medication abortion.[72] In *Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin.*, the United States District Court of Maryland issued a nationwide injunction against an FDA regulation which required women to obtain medication used to induce an abortion in person.[73] There, the court held the burdens of the in-person requirement in light of the COVID-19 pandemic were significant and likely to place a substantial obstacle in the path of a woman's choice.[74]

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70. *See, e.g.*, Grossman, *supra* note 55 (rejecting the notion that abortions deplete PPE or hospital space); *see also* Jen Villavicencio, *Opinion: I'm an OB-GBYN. Halting Abortions Won't Help Supply Shortage,* BRIDGE MICH. (Apr. 8, 2020), https://www.bridgemi.com/guest-commentary/opinion-im-ob-gyn-halting-abortions-wont-help-supply-shortage [https://perma.cc/V4V2-YXNH] (listing the PPE needed for medication and procedural abortions).

71. *See* Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin., 472 F. Supp. 3d 183, 196 (D. Md. 2020) (relying on expert opinions regarding additional risks associated with travel including stops at gas stations, restrooms, public transportation, and sharing an enclosed car with others).

72. *See* Claire Cleveland, *Colorado's Abortion Providers See More Out-of-State Patients During the Coronavirus Pandemic*, CPR NEWS (Apr. 15, 2020), https://www.cpr.org/2020/04/15/colorado-abortion-providers-are-seeing-more-out-of-state-patients-during-the-coronavirus-pandemic/ [https://perma.cc/63QE-DTYG] ("Medication abortion is typically a very straight forward process . . . [t]he fact that that individual had to go through so much to obtain something that is typically a very straightforward process. It was just heart wrenching.").

73. *See* Am. Coll. of Obstetricians & Gynecologists., 472 F. Supp. 3d at 229 (finding plaintiffs had satisfied all four required elements to grant a preliminary injunction after presenting extensive evidence to support the "common sense inference" that the burdens of the in-person requirement during the pandemic presented a substantial obstacle).

74. *See id.* at 211–23 (considering a range of relevant factors including, "increases in travel distance or time to an abortion facility, greater difficulties in securing transportation to the facility, the need to arrange for childcare during visits relating to abortion procedures, additional costs associated with the abortion, the ability of abortion providers to keep up with patient demand and other practical considerations in light of the reality on the ground.").

It cannot be said that preventing a woman from obtaining an abortion in a clinical setting—with little to no PPE—bears a real or substantial relationship to the state's purported interests of maximum hospital capacity and PPE preservation.[75]

### *B. Whether There is a Plain and Palpable Invasion of a Constitutional Right*

Although the Fifth Circuit held the applicable framework governing emergency exercises of state authority during a public health crisis was established in *Jacobson*, laws that violate rights secured by the Constitution are invalid.[76] According to the Fifth Circuit, the district court erred in determining that GA-09 conflicted with the Constitution because it grossly misread GA-09 as, "an 'outright ban' on all pre-viability abortions."[77] Instead, the Fifth Circuit attempted to reason that GA-09 was not a ban but rather a mere postponement of certain non-essential abortions.[78]

If we accept the Fifth Circuit's contention that the executive order is a mere postponement of non-essential abortions, under GA-09, "non-essential abortions" would include abortion surgeries and procedures that do not deplete PPE, and are not immediately medically necessary to correct a serious medical condition or preserve the life of a

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75. *See* Lauren Young, *'Not the Time to Play Politics': The False Premise Behind Texas' Anti-Abortion COVID-19 Order*, REWIRE NEWS GRP. (Mar. 27, 2020, 2:06 PM), https://rewire.news/article/2020/03/27/not-the-time-to-play-politics-the-false-premise-behind-texas-anti-abortion-covid-19-order/ [https://perma.cc/5SZQ-U3CA] (asserting GA-09 was made in bad faith considering reproductive clinics rarely need the equipment in demand at hospitals).

76. *See* Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905) (distinguishing a state's attempt to pass laws that regulated transportation of cattle brought within its limits for the purpose of preventing infectious diseases from entering the state. The regulation was deemed an invalid exercise of police power because it went beyond the necessity of the case, invaded federal authority, and violated rights secured by the Constitution. (citing Hannibal & St. J.R. Co. v. Husen, 95 U.S. 465, 471–73 (1877)).

77. *See In re* Abbott, 954 F.3d 772, 788 (5th Cir. 2020) (opining GA-09 was not an outright ban because it differed in three key respects to other regulations which were held to be invalid. According to the Fifth Circuit, GA-09 was not an outright ban because it was set to expire, included an emergency exception, and contained a separate exception for procedures that would not deplete hospital capacity or PPE.).

78. *See id.* at 788 (reasoning that because GA-09 had an expiration date, it could not be a ban).

patient.[79] In effect, every woman seeking an abortion in Texas would either need to 1) be at the stage of pregnancy where they could receive a drug-induced abortion with no PPE required, or 2) be on the verge of a serious medical condition.[80] But those emergency exceptions are at odds with abortion constitutional doctrine, which states that regardless of whether exceptions are made for certain circumstances, a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.[81] Furthermore, "the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[82]

The Fifth Circuit ironically proclaimed the ban was only temporary, and that time was of the essence when combatting COVID-19.[83] The order went into effect on March 22, 2020, and expired at 11:59 p.m. on April 21, 2020.[84] However, the state could have modified or extended the order.[85] This kept a woman from exercising her right to an abortion for an entire month merely because she had not manifested a severe adverse medical condition.[86] The American College of Obstetricians and

79. *See* GA-09, *supra* note 10, at 2271, 2272 (setting out the applicable procedures to be performed and their exceptions); *see also In re* Abbott, 954 F.3d at 788 (explaining the order contains a broad exception for procedures that would not deplete medical resources).

80. *See* GA-09, *supra* note 10, at 2271, 2272 (instructing health care professionals and licensed health care facilities to postpone surgeries not immediately medically necessary); *see also* Medically Unnecessary Surgeries, *supra* note 14 (announcing unnecessary surgeries and procedures to include any type of abortion).

81. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 837 (1992) (revealing several guiding principles for the undue burden test).

82. *See id.* at 894 (explaining that while the spousal requirement at issue would not impose a burden for all women, the burden imposed by legislation is measured by the impact on those it does affect).

83. *See In re* Abbott, 954 F.3d at 794 (citing the rise of confirmed COVID-19 cases as a justification for the state's inability to wait until the expiration of the temporary restraining order).

84. *See* GA-09, *supra* note 10, at 2271, 2272 (decreeing the order was to remain in effect and in full force unless modified, amended, rescinded, or superseded).

85. *See* Emma Platoff, *Texas Can Enforce Abortion Ban During Coronavirus Pandemic, Federal Appeals Court Rules*, TEX. TRIB. (Apr. 7, 2020, 5:00 PM), https://www.texastribune.org/2020/04/07/texas-abortion-ban-can-remain-place-during-coronavirus-court-rules/ [https://perma.cc/ZTC5-TJJA] (highlighting that prohibiting abortion for any period of time would leave many unable to terminate their pregnancies at all).

86. *See* María Méndez, *The Fight Over Texas' Abortion Ban During the COVID-19 Pandemic is Over, but What Did It All Mean?*, DALL. MORNING NEWS (Apr. 28, 2020, 1:40 PM), https://www.dallasnews.com/news/public-health/2020/04/28/the-fight-over-texas-abortion-ban-

Gynecologists, along with others, released a statement regarding delaying abortion procedures,[87] wherein they stated abortion is, "a time-sensitive service for which a delay of several weeks, or in some cases days, may increase the risks or potentially make it completely inaccessible."[88] What the Fifth Circuit failed to realize is that a "mere postponement" easily manifests itself into an outright ban if a woman is kept waiting long enough along her pregnancy so that her constitutional right to abortion is no longer afforded to her.[89]

The fact of the matter is that this order and others like it attempt to prevent women from exercising their right to obtain an abortion, and they do so under the illusion of public health.[90] Orders like GA-09 prevent a woman from accessing abortion within her state, force her to travel to a neighboring state without similar restrictions, or wait until the state rescinds the order.[91] They place an undue burden on her choice to

during-the-covid-19-pandemic-is-over-but-what-did-it-all-mean/ [https://perma.cc/Q7Q8-GZ85] (discussing the effects and impact of not having access to abortion).

87. *See Joint Statement on Abortion Access During the COVID-19 Outbreak*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak [https://perma.cc/87FQ-FB65] (asserting abortion should not be categorized as a non-essential procedure).

88. *See id.* (illustrating the consequences of being unable to procure an abortion).

89. *See In re* Abbott, 954 F.3d 772, 803 (5th Cir. 2020) (Dennis, J., dissenting) ("[I]t is painfully obvious that a delayed abortion procedure could easily amount to a total denial of that constitutional right: If currently scheduled abortions are postponed, many women will miss the small window of opportunity they have to access a legal abortion.").

90. *See* Emma Day, *The Coronavirus Is a Flimsy Excuse to Ban Abortion*, WASH. POST (Apr. 8, 2020, 5:00 AM), https://www.washingtonpost.com/outlook/2020/04/08/covid-19-is-flimsy-excuse-ban-abortion/ [https://perma.cc/PH98-2PLB] (insinuating states took advantage of the situation to limit abortion access); *see also* Katelyn Burns, *Republicans Are Using the Pandemic to Push Anti-abortion and Anti-trans Agendas*, VOX (Mar. 26, 2020, 2:50 PM), https://www.vox.com/2020/3/26/21195308/republicans-coronavirus-anti-abortion-trans [https://perma.cc/5KGN-X32M] (accusing Ken Paxton of exploiting the pandemic to end abortion in the state); *see also* Ashoka Mukpo, *Defying Medical Experts, Lawmakers Are Weaponizing COVID-19 to Restrict Abortion Access*; ACLU (Apr. 21, 2020), https://www.aclu.org/news/reproductive-freedom/defying-medical-experts-lawmakers-are-weaponizing-covid-19-to-restrict-abortion-access/ [https://perma.cc/G95E-F3WD] (suggesting the pandemic is a cover that is helping conservatives accomplish their objective to eliminate abortion access).

91. *See e.g.*, Pavithra Mohan, *For Many Women, Abortion Access Was Already Limited. Then COVID-19 Hit*, FAST CO. (Apr. 28, 2020), https://www.fastcompany.com/90496986/for-many-women-abortion-access-was-already-limited-then-covid-19-hit [https://perma.cc/9B7E-LX2L] (telling the story of a Houston woman who had to travel 1,500 miles to get an abortion despite living three miles from a clinic).

terminate her pregnancy.[92] Assuming this was merely a temporary ban and not an outright ban as the Fifth Circuit declared, what relief will the women forced into full-term pregnancies be entitled to?[93]

Executive Order GA-09, though potentially well-intentioned to serve the state's interest of preserving PPE, does not bear a substantial relation[94] to combatting the COVID-19 pandemic; it is a plain and palpable invasion of a constitutional right under *Casey's* undue burden standard.[95] Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden, which amounts to an unconstitutional burden.[96]

## III. *CASEY* AND THE UNDUE BURDEN STANDARD

In *Casey*, the Court clarified that not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right.[97]

92. *See* Robinson v. Marshall, 450 F.Supp.3d 1293, 1297 (M.D. Ala.), *stay granted, order amended,* No. 2:19CV365-MHT, 2020 WL 1659700 (M.D. Ala. 2020) (finding plaintiffs had established a likelihood of success on the merits of their claim that an executive order violated a woman's constitutional right to an abortion).

93. *See e.g.,* Aleem Maqbool, *Coronavirus: Texas Banned Abortion—How Did that Affect Women?*, BBC NEWS (May 6, 2020), https://www.bbc.com/news/world-us-canada-52535940 [https://perma.cc/AD63-6H62] (illustrating the lengths a woman in Austin had to go through to obtain an abortion of a fetus that had already passed away and another that was destined to die at birth); *see also* Kevin Clark, *Texas Clinics: Abortions Later in Pregnancy Increased After Temporary Ban*, KXAN (Aug. 12, 2020, 6:16 PM), https://www.kxan.com/investigations/texas-clinics-abortions-later-in-pregnancy-increased-after-temporary-ban/ [https://perma.cc/843W-PALN] (reporting that many women who did not have the financial means to travel to another state were forced to seek second-trimester abortions); *see also* Galina Espinoza, '*Total Panic': How One Texas Woman Sought an Abortion After Her State Banned Them*, REWIRE NEWS GRP. (Apr. 6, 2020, 1:55 PM), https://rewire.news/article/2020/04/06/total-panic-how-one-texas-woman-sought-an-abortion-after-her-state-banned-them/ [https://perma.cc/TP9V-PS5H] (portraying a woman's five-day journey to procure an abortion).

94. *See* Michelle J. Bayefsky et al., *Abortion During the Covid-19 Pandemic—Ensuring Access to an Essential Health Service*, NEW ENG. J. MED. (May 7, 2020), https://www.nejm.org/doi/full/10.1056/NEJMp2008006 [https://perma.cc/Z6H8-Z2YS] (rebutting the argument that the restriction of abortion will allow increase in availability of PPE by showing restriction to abortion leads to greater need for PPE).

95. *See generally* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877–78 (1992) (holding a statute that furthers a valid state interest but nonetheless places a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends).

96. *Id.* at 877–78 ("[A]n undue burden is an unconstitutional burden.").

97. *See id.* at 873–74 (recognizing states have substantial flexibility in regulating liberties and concluding that not all such regulations are necessarily infringements of those rights).

Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedures.[98]

The Fifth Circuit conflates *Whole Woman's Health v. Hellerstedt* with *Casey* when it states GA-09 would constitute an undue burden if it were proven "'beyond question,' [that] GA-09's burdens outweigh its benefits[.]"[99] The concept of an undue burden has been utilized by the Court in ways that could be considered inconsistent.[100] But in setting forth the undue burden standard, the Court in *Casey* clarified that:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus . . . And a statute which, while furthering some valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.[101]

Though the undue burden analysis set out in *Casey* takes the benefits and burdens into consideration, these benefits "were not placed on a scale opposite [to] the law's burdens."[102] "Rather, *Casey* discussed benefits in considering the threshold requirement the state has a 'legitimate purpose' and that the law is 'reasonably related to that goal.'"[103]

The issue then is whether GA-09 places a substantial obstacle in the path of a woman's choice.[104] GA-09 does more than make it difficult

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98. *Id.* at 874 (stating an incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate a law).

99. *See In re* Abbott, 954 F.3d 772, 788–91 (5th Cir. 2020) (citing Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016)) ("Under *Casey*, courts must ask whether an abortion restriction is 'undue,' which requires consider[ing] the burdens a law imposes on abortion access together with the benefits those laws confer."); *see also* Stephen G. Gilles, *Restoring Casey's Undue Burden Standard After Whole Women's Health v. Hellerstedt*, 35 QUINNIPIAC L. REV. 701, 709 (2017) (addressing Justice Thomas's dissent which argued the majority had "radically rewrit[ten]" the undue-burden test by requiring courts to compare the burdens and benefits of a challenged regulation).

100. Casey, 505 U.S. at 876 (citing several Supreme Court opinions which have created inconsistent applications of the undue burden standard).

101. *Id.* at 877.

102. June Med. Servs. v. Russo, 591 U.S. ___, 140 S. Ct. 2103, 2138 (2020) (Roberts, C.J., concurring) (analyzing how the Court in *Casey* focused on the "substantial obstacle" standard).

103. *Id.*

104. *Compare* GA-09, *supra* note 10, at 2271, 2272 (establishing a woman cannot receive an abortion during the COVID-19 pandemic because it is considered a surgery or procedure

for a woman to procure an abortion; it expressly forbids her from doing so until the state decides otherwise.[105] Therefore, the decision to get an abortion before viability is no longer within a woman's control but within the control of the state.[106] The Court in *Casey* emphasized a woman's right to terminate her pregnancy before viability is the rule of law and a component of liberty that could not be renounced.[107] The majority suggested that a woman who fails to act before viability has consented to the state's intervention.[108] But the suggestion set out in *Casey* is far more lenient than the real-world application of GA-09.[109] Governor Abbott's order does not afford a woman the opportunity to fail to act.[110] Instead, the order *prevents* a woman from acting altogether and assaults her constitutional right without her consent.[111] This order causes women to lose their bodily autonomy and forces them to continue their pregnancies.[112]

Similarly, in *Casey*, the Court upheld Pennsylvania's twenty-four-hour mandatory waiting period which the state argued furthered their

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"not immediately necessary to correct a serious medical condition. . ."), *with* Casey, 505 U.S. at 877 (holding a woman has a right to choose to have an abortion before fetal viability and to obtain it without undue interference from the state).

105. *See* GA-09, *supra* note 10, at 2271, 2272 (requiring women to abstain from elective abortions to prevent the depletion of hospital capacity and PPE); *see also* Medically Unnecessary Surgeries, *supra* note 14 (warning no one is exempt from Governor Abbott's executive order banning elective procedures, including abortion providers).

106. *See* GA-09, *supra* note 10, at 2271, 2272 (prohibiting all abortions which are not immediately medically necessary); *see also* Medically Unnecessary Surgeries, *supra* note 14 (reiterating the ban on elective procedures issued in Abbott's executive order and underlining that women will be forced to carry a pregnancy to term during the pandemic if that pregnancy does not pose a health emergency).

107. *See* Casey, 505 U.S. at 871 (stressing a woman's right to pre-viability termination is the central principal of *Roe v. Wade* and a component of liberty which cannot be renounced).

108. *See id.* at 870 (implying that the viability line has an element of fairness because it enables a woman to act before the state can intervene).

109. *Compare id.* at 871 (giving a woman the ultimate authority before viability to terminate her pregnancy), *with* GA-09, *supra* note 10, at 2271, 2272 (prohibiting a woman from exercising her right to an abortion during the height of COVID-19).

110. *See* GA-09, *supra* note 10, at 2271, 2272 (ordering postponement of all unnecessary surgeries and procedures during a public health disaster).

111. *See id.* (threatening those who fail to comply with the order with punishment by fine and/or jail time).

112. *See generally id.* (banning all elective procedures, including abortions, not immediately medically necessary); *contra* Casey, 505 U.S. at 928 (Blackmun, J., concurring) ("The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course.").

legitimate interest in maternal health and in unborn life.[113] The mandatory period was said to delay, but not prohibit, abortions and was therefore found not to impose a health risk or a substantial obstacle.[114] But a twenty-four-hour waiting period varies drastically from a thirty-day waiting period.[115] Compelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm.[116] The Court has ruled that a state must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion.[117] If forced to wait until GA-09's expiration date, a woman at nine weeks LMP would be forced to procure a procedural abortion instead of a medication one.[118] A woman who had every intention to seek a procedural abortion at sixteen weeks LMP would be forced to travel to another state before she reaches twenty weeks and is therefore no longer eligible to obtain an abortion in Texas.[119] Likewise, if a woman were unable to procure an abortion due to GA-09, or any other order, she would require ongoing in-person

113. *See* Casey, 505 U.S. at 885 ("The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision.").

114. *See id.* at 969 (claiming the 24-hour waiting period ensured a woman's decision to abort was a well-considered one).

115. *Compare id.* at 885 (justifying the 24-hour waiting period as a reasonable measure that does not impede too greatly on a woman's choice), *with* GA-09, *supra* note 10, at 2271, 2272 (enforcing an indefinite executive order that could be extended).

116. *See* Casey, 505 U.S. at 927 (Blackmun, J., concurring) (emphasizing how state restrictions on abortion violate a woman's right to privacy).

117. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 78–79 (1976) (holding a ban on abortion which would force women to terminate their pregnancies through a more dangerous method unconstitutional).

118. *See* Tex. Health & Safety Code Ann. § 171.063(a)(2) (showcasing how the executive order changes the time frame for when a woman can no longer receive a medical abortion); *see also Mifeprex (mifepristone) Information*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information [https://perma.cc/2TUC-AZ5K] (last updated Apr. 13. 2021) (advising people not to use abortion pills after seventy days has elapsed since the first day of their last menstrual period).

119. *See* Tex. Health & Safety Code Ann. § 171.004 ("An abortion of a fetus age 16 weeks or more may be performed only at an ambulatory surgical center or hospital licensed to perform the abortion.").

healthcare, lab tests, ultrasounds, and ultimately more PPE at each stage of the pregnancy.[120]

Court rulings concerning abortion have demonstrated that an undue burden exists in situations involving absolute obstacles and severe limitations on individuals' abortion decisions.[121] "In *Roe*, the Court invalidated a Texas statute that criminalized *all* abortions except those necessary to save the life of the mother."[122] GA-09 imposes penalties for all abortions performed except those necessary to save the life of the mother.[123] What is GA-09, if not the Texas statute in *Roe*, by a different name?[124] GA-09 constitutes an undue burden.[125]

## IV. STARE DECISIS: A TALE OF TWO DOCTRINES

Before constructing its undue burden framework in *Casey*, the Court goes into a lengthy discussion regarding its obligation to follow the precedent set out in *Roe*.[126] It notes that stare decisis is not an "inexorable command," but rather an examination informed by a series of pragmatic considerations that include: whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or

120. *See* Bayefsky et al., *supra* note 94 ("Women who are unable to obtain abortions will either remain pregnant and require prenatal care and support during delivery or may use dangerous methods to induce an abortion on their own . . . Both these scenarios could lead to much more contact with clinicians and greater need for PPE, thereby increasing risks to both patients and staff.").

121. *See* Akron v. Akron Ctr. for Reprod. Health, Inc., 463 U.S. 416, 464 (1983), *overruled by* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (O'Connor, J., dissenting) (suggesting the Court upholds restrictions on abortion unless unduly burdensome).

122. *Id.*

123. *See* GA-09, *supra* note 10, at 2271, 2272 (imposing obstacles on a woman's constitutional right to obtain an abortion during a pandemic).

124. *Compare* Roe v. Wade, 410 U.S. 113, 113–14 (1973) (describing the Texas statute at issue, namely, that it bans abortions and attempted abortions except for the purpose of saving the life of the pregnant person), *with* GA-09, *supra* note 10, at 2271, 2272 (mandating all health care facilities cease all medically unnecessary surgeries, including abortions).

125. *See* Young, *supra* note 75 ("Texas's decision bans nearly all abortions . . . "); *see generally* GA-09, *supra* note 10, at 2271, 2272 (banning abortions deemed not medically necessary); *cf.* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992) ("A finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion . . . ").

126. *See* Casey, 505 U.S. at 854 (recognizing that no judicial system could do society's work if it viewed each issue afresh).

come to be seen so differently, as to have robbed the old rule of significant application or justification.[127]

> [A] court can either "retain or overrule" its precedents. If the former path is chosen, a court can operate within existing precedent in four distinct ways—by following, distinguishing, extending, or narrowing it. A court that *follows* precedent applies the principle of an earlier case when it is best understood to apply. A court that *distinguishes* precedent declines to apply the principle of an earlier case when that principle is best understood not to apply; that is, the court offers a persuasive explanation as to why the principle does not govern the present circumstances. A court that *extends* precedent applies the principle of an earlier case even when it is best understood not to reach the present fact pattern. And a court that *narrows* precedent declines to apply the principle of an earlier case even when it is properly regarded as controlling. Extending and narrowing are the inverse of one another; each subtly reformulates the original principle, either broadening or diminishing its scope, such that the modified principle either governs or fails to govern the present circumstances.[128]

Both *Jacobson* and *Casey* remain valid precedents and raise the issue of whether individuals possess a constitutional right to non-interference from the state.[129] So, how do we determine which of the two precedents to apply?[130] Are the frameworks set out within *Jacobson* and *Casey* in conflict with one another?[131] On one end lies the bodily autonomy cases that hold no right is more sacred or is more carefully guarded than the

127. *See id.* at 854–55 ("[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.").

128. Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 885 (2019).

129. *Compare* Casey, 505 U.S. at 846 (discussing the validity of a state's interest regarding interference with abortion access), *with* Jacobson v. Massachusetts, 197 U.S. 11, 24 (1905) (questioning a state's ability to compel vaccination in the interest of the public health).

130. *See* Casey, 505 U.S. at 870 (drawing the line for state interference concerning abortion at fetal viability); *see also* Jacobson, 197 U.S. at 38 (holding that mandatory vaccinations were a legitimate exercise of the state's powers to protect the health and safety of the people).

131. *Compare* Casey, 505 U.S. at 860–61 (reinforcing the Court's previous decision in *Roe v. Wade*), *with* Jacobson, 197 U.S. at 25 ("According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.[132] On the other end are public health cases established by *Jacobson* during the nineteenth century *Lochner* era.[133] The former is subject to the undue burden analysis, while the latter is subject to the more lenient rational basis test.[134] *Jacobson* emphasized the police power and duty of states to protect citizens from threats to their health, taking primarily a "population" view.[135] During the era *Jacobson* was decided:

> [J]udges believed that the legislative authority to promote the health, safety, and morality of the community—the 'police power'—was not limited by theories and doctrines that attempted to identify a discrete set of inviolable 'fundamental rights' or 'preferred freedoms.' Instead, the police power was limited by assuming that a person's presumptive rights to livery and property were nevertheless subordinate to the laws of the land that actually advances the general welfare of the community as a whole . . .[136]

But just how far-reaching are the state's police powers, and furthermore, when must state powers yield to the Constitution?[137] Texas courts have recognized that police powers are both broad and

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132. *See* B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 278 (2007) (opining there are two distinct lines of constitutional doctrine touching on the right to make medical treatment decisions).

133. *See id.* at 295 (emphasizing that the public health cases view sick individuals not as autonomous decision makers, but rather as public health problems and threats that must be controlled).

134. *See id*. at 294–95 ("The first is the 'public-health' line of cases, beginning with *Jacobson v. Massachusetts*, which dealt with the constitutionality of mandatory-vaccination laws. These cases emphasize the police power of the state over individual rights. The second is the newer 'autonomy' lines of case, beginning with *Griswold v. Connecticut*, which emphasizes individual dignity and autonomy interests.").

135. *See id.* 295 (explaining how cases such as *Jacobson* set the stage for right to access and freedom of choice in medical decisions).

136. Symposium, *What Is, and Isn't, Currently Disputed About Lochner-Era Police-Powers Jurisprudence*, 26 GEO. MASON L. REV. 1049, 1051 (2019) (expounding on the dynamic between an individual's fundamental rights and how the subordination of those rights by the police power in the nineteenth century).

137. *See generally* Randy E. Barnett & Heather Gerken, *Article I, Sec. 8: Federalism and the Overall Scope of Federal Power*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/article-i/section/8712 [https://perma.cc/HP7H-XZKP] (outlining the Fourteenth Amendment and the interaction of federal constraints it places on things such as the state's police power).

comprehensive.[138] Although broad, the power is not without its limits.[139] Public necessity alone can justify the exercise of a state's police powers.[140] Such exercises of a state's police power "hinges upon the public need for safety, health, security, and protection of the general welfare of the community."[141] However, if a statute claims it was enacted for these purposes yet bears no substantial relation to them, the statute must yield to the Constitution.[142] It does not follow that every statute enacted for the promotion of these ends should be accepted as a legitimate exertion of the state's police powers.[143]

In *Buck v. Bell*, the Supreme Court relied on *Jacobson* to justify sterilization of those deemed feeble-minded.[144] There, the Court stated that, "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."[145] Fifteen years later, in *Skinner v. Oklahoma*, the Supreme Court emphasized that marriage and procreation are vital to the preservation of humans.[146] The Court mentioned these matters not to reexamine the scope of the police powers of a state, but rather to emphasize their view that it was essential that *strict scrutiny* be the framework used when reviewing a sterilization law.[147] In *Satterfield v. Crown Cork & Seal Co.*, the Texas Court of

138. *See* Travelers' Ins. Co. v. Marshall, 76 S.W.2d 1007, 1011 (Tex. 1934) (recognizing the police power but forbidding its exercise when the result is the destruction of rights, guaranties, privileges, and restraints).

139. *E.g.,* Satterfield v. Crown Cork & Seal Co., 268 S.W.3d 190, 215 (Tex. App.—Austin 2008, no pet.) (emphasizing the police power may not render the Constitution meaningless in that it may not disregard fundamental rights).

140. *See* Tex. State Bd. of Pharmacy v. Gibson's Disc. Ctr. 541 S.W.2d 884, 887 (Tex. App.—Austin 1976, writ ref'd n.r.e.) (acknowledging that the police power is grounded upon public necessity).

141. *Id.* (citing City of Coleman v. Rhone, 222 S.W.2d 646 (Tex. App.—Eastland 1949, writ ref'd)).

142. *See id.* (explaining statutes that inhibit fundamental rights under the guise of the police power are invalid).

143. *See generally id.* (revealing some laws enacted under a state's police power as illegitimate exertions of said power).

144. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

145. *Id.* (holding the public welfare justifies compulsory sterilization).

146. *See, e.g.,* Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 541 (1942) (acknowledging the importance of procreation in the survival of the human race).

147. *See id.* (emphasis added) ("We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest

Appeals stated, "[t]he legislature, in exercising its police power, 'cannot, by its mere fiat,' make reasonable that which is indisputably unreasonable, or unconstitutional."[148] The court in *Satterfield* also noted:

> For a statute or regulation to be a proper exercise of police powers, it must (i) be appropriate and reasonably necessary to accomplish a purpose within the scope of police power and (ii) be reasonable and not arbitrary or unjust in the manner it seeks to accomplish the goal or statute or so unduly harsh that it is out of proportion to the end sought to be accomplished.[149]

### *A. Is GA-09 an Arbitrary, Unjust, or Unduly Harsh Exercise of the State's Police Powers?*

GA-09 caused women with unwanted pregnancies to travel to other states to obtain abortion care.[150] Abortion providers declared they had turned away hundreds of patients seeking abortion care.[151] Since issuance of GA-09, Colorado abortion providers saw an increase in patients from states like Texas.[152] A thirty-four-year-old woman who lived near Austin, Texas was told that one of the twins she was carrying had died and the other twin was given a diagnosis of lethal skeletal dysplasia, a condition incompatible with life.[153] Devastated, she attempted to obtain an abortion in Texas, but her doctor informed her that the state banned the procedure and she would have to seek the abortion

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unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.").

148. Satterfield v. Crown Cork & Seal Co., 268 S.W.3d 190, 215 (Tex. App.—Austin 2008, no pet.).

149. *Id.*

150. *See* Glenza, *supra* note 15 (sharing stories of women who boarded planes or drove out of state seeking abortions); *see also* Maqbool, *supra* note 93 (describing the lengths some women have gone through to receive reproductive health care in New Mexico).

151. *See* Order Granting Plaintiffs' Second Motion for a Temporary Restraining Order at 10, *In re* Abbott, 954 F.3d 772 (5th Cir. 2020), (No. A-20-CV-323-LY), 2020 WL 1815587 (order granting temporary restraining order) (spotlighting the tremendous need for abortion care).

152. *Cf.* Cleveland, *supra* note 72 (stressing that Texas' restrictions on abortions due to COVID-19 forced women to seek solutions elsewhere).

153. *See* Maqbool, *supra* note 93 (discussing one woman's shock about her inability to procure an abortion considering her circumstances. "We were told that condition was incompatible with life and that the baby would suffocate upon being born and never be able to draw their first breath.").

elsewhere.[154] The woman and her husband ultimately traveled thirteen hours to New Mexico, the closest state without a ban in place, to procure the procedure she was unable to obtain in Texas.[155] Another woman from Waco, Texas had an appointment that was set to take place two days after GA-09 went into effect.[156] After her appointment was canceled due to the restrictions, the woman looked to neighboring states, including New Mexico, Oklahoma, Nevada, and Louisiana, which all had long wait times or restrictions of their own.[157]

In *In re Abbott*, the district court's temporary restraining order stated, "[p]atients delayed past [ten] weeks LMP are no longer eligible for a medication abortion."[158] The order further stated, "[p]atients delayed past [fourteen] to [sixteen] weeks LMP are no longer eligible for an aspiration abortion and must instead have a [dilation and evacuation procedure (D&E)], which is lengthier and more complex."[159] Patients delayed past sixteen weeks are no longer eligible for an abortion at a clinic and must obtain care from a surgical center.[160] Patients delayed past twenty weeks LMP are no longer eligible to obtain an abortion in Texas at all, absent exceptional circumstances.[161] Women delayed past the legal limit for abortion will have to carry the baby to term which will require extensive use of PPE.[162]

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm

154. *See id.* (detailing the tragedies one family faced during pregnancy and their frustration with restrictions on abortions in Texas during the height of the COVID-19 pandemic).

155. *See id.* (illustrating the difficulty placed upon families already struggling through difficult situations to secure abortion care).

156. *See, e.g.,* Cleveland, *supra* note 72 (expressing women's frustrations with regulations regarding abortions during the pandemic).

157. *See id.* (stressing the overload other states experienced due to orders like GA-09).

158. Order Granting Plaintiffs' Second Motion for a Temporary Restraining Order at 11, *In re* Abbott, 954 F.3d 772 (5th Cir. 2020), (No. A-20-CV-323-LY), 2020 WL 1815587.

159. *Id.*

160. *See* Texas Health & Safety Code Ann. § 171.004 (indicating the point during a pregnancy when abortions may only be performed at an ambulatory surgical center or hospital licensed to perform the procedure).

161. *See* Texas Health & Safety Code Ann. § 171.046 (listing exceptions to the general rules prohibiting abortion after 20 weeks).

162. *Cf.* Order Granting Plaintiffs' Second Motion for a Temporary Restraining Order at 11, *In re* Abbott, 954 F.3d 772 (5th Cir. 2020), (No. A-20-CV-323-LY), 2020 WL 1815587 (emphasizing these regulations would overall hinder hospital resources and not conserve PPE).

> medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically, and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[163]

GA-09 had the potential to compel a woman into an extended pregnancy and place her in harm's way.[164] The power to compel pregnancy, like the power to sterilize, may have far-reaching and devastating effects.[165] There is no redemption for whom the law touches, only deprivation of a basic liberty.[166]

> By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course.[167]

During the time GA-09 was in effect, abortions declined in Texas.[168] According to a study, after the order expired, abortions at twelve weeks

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163. Roe v. Wade, 410 U.S. 113 (1973), *modified*, 505 U.S. 833 (1992).

164. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 927 (1992) (Blackmun, J. concurring in part, concurring in the judgment in part, and dissenting in part) ("During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labor and delivery pose additional health risks and physical demands. In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts.").

165. *Cf.* Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 541 (1942) (comparing forced sterilization to compulsory pregnancy).

166. *See id.* (suggesting the state's experiment will conclusively deprive the individual of their liberty).

167. Casey, 505 U.S. at 928 (Blackmun, J. concurring in part, concurring in the judgment in part, and dissenting in part).

168. *See, e.g.,* Kari White et al., *Changes in Abortion Following an Executive Order Ban During the Coronavirus Pandemic*, JAMA, Feb. 16, 2021, at 691 (noting stay-at home orders, facilities' coronavirus precautions, and patients' reluctance to seek in person care may also have contributed to the decline).

or more increased.[169] This increase was likely due to facilities' limited capacity to meet back-logged patient needs.[170]

### *B. Is GA-09 Appropriate and Reasonably Necessary to Accomplish a Purpose Within the Scope of the State's Police Power?*

In describing a state's police power to combat an epidemic, the Court in *Jacobson* explained that the rights of an individual in respect to his or her liberty, may at times under the pressure of great dangers, be subject to restraint enforced by *reasonable* regulations.[171] The Court has acknowledged a state may interfere wherever public interests demand it.[172] The Fifth Circuit clarified that rights secured by the Constitution do not disappear during a public health crisis but can be *reasonably* restricted.[173] The Fifth Circuit maintained that GA-09 was both appropriate and reasonably necessary to accomplish its purported purpose of preventing the spread of COVID-19.[174] The purpose of GA-09, according to the state, was furthered by "restricting" abortions because abortions: (1) reduce the scarce supply of PPE available to healthcare providers, (2) result in the hospitalization of women, thereby reducing hospital capacity, and (3) contribute to the spread of the virus.[175]

The Court in *Jacobson*, did not provide a different deferential framework for the intrusion on fundamental rights, but rather remained

169. *See*, e.g., *id.* at 691 ("Texas residents receiving care at out-of-state facilities increased from 157 in February 2020 to 947 in April 2020.").

170. *See id.* at 692 (outlining the rise in abortion cases following the removal of the order and the suspected reasons for the increase).

171. *See* Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (posing the following hypothetical: "an American citizen arriving at a port on a vessel in which during the voyage, there had been cases of yellow fever or Asiatic cholera, he, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared.").

172. *See id.* (clarifying that although the Fourteenth Amendment secures certain liberties, one may be compelled, "by force if need be," against his will and without regard to his personal wishes or even religious or political convictions for the purpose of protecting the collective public).

173. *See In re* Abbott, 954 F.3d 772, 784 (5th Cir. 2020) (justifying "reasonable" restrictions on rights secured by the Constitution and describing the scope of judicial authority to review under certain circumstances).

174. *See id.* at 787 (stating that GA-09 would be constitutionally intolerable in ordinary times but is a proper response to emergencies like the COVID-19 crisis).

175. *Id.* at 802 (Dennis, J., dissenting).

committed to the normal scrutiny required by the Constitution.[176] Preventing a woman from procuring an abortion during a pandemic is not a valid exercise of police power under *Jacobson*.[177] Although *Jacobson* emphasizes deference to legislatures,[178] the mere assertion by the legislature that a statute relates to the public health, safety, or welfare does not in and of itself bring such statute within the police powers of a state.[179] Police powers must not invade or intrude upon the constitutional rights of citizens.[180] Nonetheless, the Fifth Circuit turned to cases that were upheld against Fourteenth Amendment challenges and referred to or relied on *Jacobson*, in order to justify GA-09's regulations.[181] However, GA-09 is unlike any of those exercises of police power for one distinct reason; the implication of this regulation is compulsory pregnancy.[182] A woman's right to an abortion was not

176. *See* Jeffrey D. Jackson, *Tiered Scrutiny in a Pandemic*, 12 CONLAWNOW 39, 41 (2020) (examining the powers possessed by government during times of emergency and determining whether Supreme Court jurisprudence in *Jacobson* mandates a more deferential standard for government action during those times); *see generally* Jacobson, 197 U.S. at 20 ("If they act in an arbitrary manner, depriving any individual of a right protected by the Fourteenth Amendment, their action in such individual case is void.").

177. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. ___ (2020), 141 S.Ct. 63, 70 (2020) (Gorsuch, J. concurring) (opining that *Jacobson* did not seek to depart from normal rules during a pandemic and reiterating the scrutiny test set forth by the Court for all future cases).

178. *See* Hill, *supra* note 132, at 282 (suggesting the question of deference boils down to the question of who decides whether a medical treatment has therapeutic merit and arguing that legislatures are particularly ill suited to this task).

179. *See* Satterfield v. Crown Cork & Seal Co., 268 S.W.3d 190, 215 (Tex. App.–Austin 2008, no pet.) (detailing the circumstances in which a statute would fall under police powers of state. Emergency circumstances may allow for the exercise of police powers, but those powers cannot exceed rights secured by the Constitution).

180. *See* Laura D. Heard, *Education-House Bill 72-Teacher Competency Testing Is Valid Exercise of State Legislative Police Power. Texas State Teacher's Ass'n v. State, 711 S.W. 2d 421 (Tex. App.–Austin 1986, No Writ)*, 18 ST. MARY'S L.J. 661, 662 (1986) (indicating there is no exception for the state to interfere with constitutional rights under the Texas Constitution or the U.S. Constitution).

181. *See In re* Abbott, 954 F.3d 772, 784 (5th Cir. 2020) (citing Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380, 393 (1902) as an example of how the Fourteenth Amendment may falter during a pandemic).

182. *See, e.g.,* Temporary Restraining Order, *supra* note 63, at 2 (indicating a plaintiff would suffer imminent irreparable harm if the court did not grant relief because she would be delayed or prevented from exercising her right.) ("A disruption or denial of these patients' health care cannot be undone.").

afforded to her until 1973.[183] Constitutional jurisprudence revolving around bodily autonomy, procreation, and due process has evolved immensely since *Jacobson* was decided in 1905.[184] GA-09 prevents a woman from abortion access in Texas[185] and attempts to disguise itself as a valid exercise of police power by focusing on the exception set out by its construction.[186] This order forces a woman into a position where her only options are to: (1) travel out of state to get an abortion, (2) carry the baby to term, or (3) find the means to procure an abortion in an illegal and unsafe manner.[187] GA-09 is nothing more than a ruse intended to convince us that the state can impinge on a woman's constitutional right.[188] "This effective denial of the Fourteenth Amendment right to abortion access represents the type of 'plain, palpable invasion of rights' identified in *Jacobson* as beyond the reach of even the considerable powers allotted to a state in a public health emergency."[189] The order is neither appropriate nor reasonable to accomplish the purpose within the scope of the police powers.[190] *Jacobson* does not grant a plenary

183. *See* Roe v. Wade, 410 U.S. 113 (1973) (holding women have a constitutional right to abortion), *modified*, 505 U.S. 833 (1992).

184. *See generally* Hill, *supra* note 132, at 306–10 (exploring the line of bodily autonomy cases beginning with *Griswold* to show the advancement of jurisprudence in these areas).

185. *See generally* Medically Unnecessary Surgeries, *supra* note 14 (proclaiming GA-09 requires all medically unnecessary procedures, including abortions of any kind, immediately cease).

186. *See* Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) ("It will always be presumed that the legislature intended exceptions to its language which would avoid results of this character."); *see also In re* Abbott, 954 F.3d 772, 788 (5th Cir. 2020) ("GA-09 includes an emergency exception for the mother's life and health based on the determination of the administering physician.").

187. Chantal Da Silva, *Pregnant Women in Texas Considering Home Abortions, Traveling Out of State After Coronavirus Ban*, NEWSWEEK (Apr. 3, 2020, 11:35 AM), https://www.newsweek.com/pregnant-women-texas-considering-home-abortions-traveling-out-state-after-coronavirus-ban-1495989 [https://perma.cc/2QUF-R9YM] (reporting the harrowing requests one doctor received for at-home and alternative abortion remedies); *see also* Bayefsky et al., *supra* note 94 (implying women could resort to dangerous methods to induce abortions on their own).

188. *Cf.* Robinson v. Marshall, 450 F.Supp.3d 1293, 1297 (M.D. Ala.), *stay granted, order amended,* No. 2:19CV365-MHT, 2020 WL 1659700 (M.D. Ala. 2020) ("[I]n evaluating a *ban* on pre-viability abortion, no state interest can prevail: 'Before viability, the State's interests are not strong enough to support a prohibition of abortion . . . '.").

189. Temporary Restraining Order, *supra* note 63, at 5.

190. *See* Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (establishing the police power and its limit in relation to rights and privileges protected by the Constitution of the United States).

override of rights protected by the Constitution even though there is a valid state interest in public health and safety.[191]

Even if this order was within the state's police powers, GA-09 accomplishes the opposite of its purported interests.[192] Individuals with ongoing pregnancies require more in-person healthcare at each stage of pregnancy than individuals who have pre-viability abortions.[193] Therefore, delaying access to abortion will not conserve PPE.[194] Individuals with ongoing pregnancies are also more likely to seek treatment in a hospital for various conditions than individuals who have pre-viability abortions.[195] Although GA-09 was arguably well-intentioned to preserve PPE, hospital capacity, and reduce the spread of COVID-19, the regulation was far from a reasonable restriction.[196] Days before GA-09 was set to expire, the Texas legislature passed another executive order on April 17, 2020, which eased restrictions on surgical procedures and allowed for operations to be performed in facilities that certified in writing that they would reserve at least twenty-five percent of their capacity for COVID-19 patients and would not request PPE from any public source.[197] Why was this order their last resort and not their first?[198]

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191. *See* Roman Cath. Diocese of Brooklyn, 141 S.Ct. at 70 (Gorsuch, J. concurring) (questioning the attempt to use *Jacobson* to justify departing from the normal scrutiny required for First Amendment rights).

192. *Compare* GA-09, *supra* note 10, at 2271 (listing PPE preservation as a reason to limit abortion procedures and surgeries), *with* Young, *supra* note 75 (rejecting the notion that abortions require extensive amounts of PPE).

193. *See* Young, *supra* note 75 (noting the amount of PPE needed throughout a person's pregnancy and delivery is much greater than the amount of PPE used by individuals who elect pre-viability abortions).

194. *See id.* (providing reasons why delaying abortion will deplete, rather than conserve, PPE in the long run).

195. *See* Order Granting Plaintiffs' Second Motion for a Temporary Restraining Order at 9, *In re* Abbott, 954 F.3d 772 (5th Cir. 2020), (No. A-20-CV-323-LY), 2020 WL 1815587 (listing reasons why a woman who has a full-term pregnancy might require more frequent doctor and hospital visits than a woman who elects to terminate her pregnancy.).

196. *See* Jackson, *supra* note 176, at 46 (stating that although an act may be purported to be for the greater good of public safety, if it is a palpable invasion of rights, it is unreasonable, and the courts must step in to correct the error).

197. *See* GA-09, *supra* note 10, at 2271, 2272 (detailing new policies for surgical procedures).

198. *See* Executive Orders by Governor Greg Abbott, LEGIS. REFERENCE LIBR., https://lrl.texas.gov/legeLeaders/governors/displayDocs.cfm?govdoctypeID=5&governorID=45 [https://perma.cc/P7ZN-JUCB] (notifying the general public of the changes and restrictions on non-

Despite GA-09's purported purpose of public safety, health, and the conservation of hospital capacity and PPE, the order was inappropriate, unnecessary, arbitrary, unjust, and so unduly harsh that it cannot be viewed as a proper exercise of police powers.[199]

### *C. Classifying* Jacobson: *Rational Basis or Something More?*

The Fifth Circuit articulated how the *Jacobson* framework would apply to the *Casey* undue burden analysis and explained that this analysis would consider whether GA-09 imposes burdens on abortion that, beyond question, exceed its benefits in combating the epidemic Texas faced.[200] The Fifth Circuit attempted to use three principal abortion cases' (*Roe*, *Casey*, and *Carhart*) mention of *Jacobson* to suggest no rights—including fundamental rights—are completely free from state intervention.[201]

> [All] cite *Jacobson* with approval and without suggesting that abortion rights are somehow exempt from its framework. In *Roe*, the Supreme Court cited *Jacobson* as one example of the Court's refusal to recognize an 'unlimited right to do with one's body as one pleases.' The Court reasoned that the right to abortion 'is not unqualified and must be considered against important state interests in regulation.' Similarly, in *Casey*, the plurality cited *Jacobson* as one example of the Court's balance between 'personal autonomy and bodily integrity' on one hand and 'governmental power to mandate medical treatment or to bar its rejection' on the other. Finally, in the course of upholding a federal restriction on certain abortion methods in *Carhart*, the Court cited *Jacobson* to show it had 'given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.'[202]

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essential surgical procedure including abortions); *see also* GA-09, *supra* note 10, at 2271, 2272 (removing some of the restrictions on non-essential surgical procedures by placing policies for conservation of PPE into place).

199. *Cf.* Jacobson v. Massachusetts, 197 U.S. 11, 28–29 (1905) (requiring emergency measures enacted by the state during a public health crisis be reasonably related to the state's interest).

200. *See In re* Abbott, 954 F.3d 772, 790 (5th Cir. 2020) (discussing the district court's failure to apply right analysis to GA-09 in light of the COVID-19 pandemic).

201. *See id.* at 785 (recognizing the abortion right in all three cases but noting that none of the cases involved postponement of procedures in response to a public health crisis).

202. *Id.*

The scrutiny applied to the vaccination law in *Jacobson* was arguably stricter than its deferential language indicates and is often treated as precedent that places limitations on state powers rather than a vindication of unlimited state powers.[203] The Court in *Jacobson* used arbitrariness as a guidepost—a standard associated with rational basis scrutiny.[204]

The standard for abortion cases is not strict scrutiny, nor is it the rational basis test.[205] The constitutional test for abortion is the *undue burden* standard.[206] To read *Jacobson* as the Fifth Circuit did takes the standard used in that case out of context and ignores decades of constitutional jurisprudence relating to fundamental rights.[207]

Because COVID-19 tested boundaries of state interference into constitutional liberties, it was clear that other liberties, aside from abortion, would also be tested.[208] In *South Bay Pentecostal Church v. Newsom*, the Governor of California issued an executive order which attempted to limit the spread of COVID-19 by placing temporary restrictions on public gatherings, including limiting attendance at places of worship to twenty-five percent of building capacity or a maximum of

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203. B. Jessie Hill, *Essentially Elective: The Law and Ideology of Restricting Abortion During the Covid-19 Pandemic*, 106 VA. L. REV. ONLINE 99, 106 (2020) (noting the central question in *Jacobson*, "was decided long before the Court recognized an individual right to bodily integrity and decisional autonomy.").

204. *See, e.g., id.* at 107 (implying a lack of fundamental comprehension regarding the application of *Jacobson).*

205. *See generally* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 874–76 (1992) ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

206. *See id.* (identifying the undue burden standard as a new level of scrutiny, focusing on a woman's fundamental right instead of the government's interest).

207. *See* Jackson, *supra* note 176, at 41 ("The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law.").

208. *See* Food and Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists, 592 U.S. ___ (2021), 141 S.Ct. 10 (2020) (concerning contraception availability and FDA regulations during the COVID-19 pandemic); *see also* Republican Nat'l. Comm. v. Democratic Nat'l. Comm., 589 U.S.___ (2020), 140 S.Ct. 1205 (2020) (Ginsburg, J., dissenting) (addressing the 2020 presidential election and voting rights during the COVID-19 crisis); *see also* S. Bay Pentecostal Church v. Newsom, 590 U.S. ___ (2020), 140 S.Ct. 1613 (2020) (challenging religious freedom during the COVID-19 pandemic as officials limited the number of individuals allowed into religious establishments).

one hundred attendees.[209] There, the applicants sought to enjoin enforcement of the Governor's executive order.[210] In denying the order, Chief Justice Roberts cited *Jacobson* and stated the, "Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the states to 'guard and protect.'"[211] But six months later, in *Roman Cath. Diocese of Brooklyn v. Cuomo*, a New York church and synagogue filed a civil action against Governor Cuomo's emergency executive order that similarly imposed occupancy restrictions on houses of worship during the pandemic claiming the order violated the Free Exercise Clause of the Constitution.[212] Although the church and synagogue sought temporary restraining orders and preliminary injunctions, the district court denied both.[213] On appeal, the Supreme Court held: (1) both houses of worship were likely to succeed on their merits, (2) both houses would be irreparably harmed in the absence of injunctive relief, and (3) the public interest favored injunctive relief.[214] The Supreme Court granted the injunction in part because the restrictions were not neutral and did not meet the strict scrutiny requirements.[215] In his concurring opinion, Justice Gorsuch stated that the opinion in *South Bay* was "mistaken from the start," and that *Jacobson*, "hardly supports cutting the Constitution loose during a pandemic."[216] Justice Gorsuch further questioned why some have mistaken the Court's decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic and went on to state:

209. *See* S. Bay Pentecostal Church, 140 S.Ct. at 1613 (imposing blanket restrictions on all places of gathering including, but not limited to, factories, offices, supermarkets, and restaurants).

210. *See id.* (clarifying that injunctions are solely used in the context of exigent circumstances where the legal rights are "indisputably clear").

211. *Id.* (providing state officials with broad deference not "subject to second-guessing"); Jacobson v Massachusetts, 197 U.S. 11, 38 (1905).

212. *See* Roman Cath. Diocese of Brooklyn, 141 S.Ct. at 63 (referencing the state's decision to cap the number of people who could attend religious services based on the house of worships' location within a designated zone).

213. *See id.* (Breyer, J., dissenting) (asserting religious services are not "essential businesses").

214. *Cf. id.* (proving the restrictions violated the Free Exercise Clause of the First Amendment).

215. *Cf. id.* at 67 (noting that the challenged restrictions and categorizations treated stores and other establishments less harshly than the Diocese's churches and Agudath Israel's synagogues).

216. *Id.* at 70 (Gorsuch, J., concurring).

> Although *Jacobson* pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that, in light of an ongoing smallpox pandemic, required individuals to take a vaccine, pay a $5 fine, or establish they qualified for an exemption. Rational basis review is the test this Court *normally* applies to Fourteenth Amendment challenges . . . Put differently, *Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue—exactly what the court does today.[217]

Justice Gorsuch discerns *Jacobson* to convey that states do not necessarily have more authority or deference during a pandemic when determining to restrict certain rights, but rather *Jacobson* reinforces what we already know.[218] A state must meet the corresponding level of judicial scrutiny depending on the constitutional freedom in question.[219] Put simply, the judicial scrutiny that must be applied when a state attempts to interfere with a constitutional liberty depends on the liberty in question.[220] Justice Gorsuch indicates even if judges may impose emergency restrictions on rights found in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise because religious rights are subject to a heightened level of scrutiny.[221] Accordingly, abortion would not all of a sudden be subject to the less stringent rational basis test.[222] The Court and its individual Justices have repeatedly utilized the "unduly burdensome" standard in abortion cases.[223]

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217. *Id.*

218. *Cf. id.* ("[*J*]*acobson* hardly supports cutting the Constitution loose during a pandemic.").

219. *Accord id.* (insisting strict scrutiny apply due to the infringement on a fundamental right).

220. *See id.* (emphasizing how strict scrutiny must be narrowly tailored to satisfy a compelling state interest when applied to religious liberty).

221. *See id.* at 70–71 (Gorsuch, J., concurring) (distinguishing the bodily integrity right in *Jacobson* with the fundamental right to religious exercise).

222. *Cf. id.* at 70 (stating *Jacobson* does not stand for the proposition that the level of scrutiny depends on whether there is a public health crisis, but instead depends on the constitutional right in question).

223. *E.g.,* Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 453 (1983), overruled by Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (O'Connor, J., dissenting) ("Irrespective of what we may believe is wise or prudent policy in this difficult area,

Therefore, the framework in *Jacobson* does not permit a state's police powers to impose blanket infringements on fundamental rights.[224] Instead, it explicitly sets out an exception to prevent arbitrary abuse.[225] Nonetheless, while it is true that no right is absolute, a statute or regulation enacted which attempts to impede on a fundamental right must be met with the highest level of judicial scrutiny.[226] In order to satisfy strict scrutiny requirements, a rule or regulation must be narrowly tailored to serve a compelling state interest.[227] Even though the Court in *Roe* recognized a woman's right to an abortion as fundamental,[228] *Casey* and constitutional jurisprudence surrounding abortion rights have failed to uphold this classification and have stopped applying strict scrutiny.[229]

Instead, the Court in *Casey* appeared to strip the designation of a right to abortion as fundamental and instead devised the undue burden test to determine whether a state infringes on a woman's right.[230] If our laws recognize the right of an individual to be free from unwarranted

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'the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy. 'wisdom' or 'common sense.'").

224. *See* Roman Cath. Diocese of Brooklyn, 141 S.Ct. at 70 (Gorsuch, J., concurring) (questioning why some have mistaken the Court's decision in *Jacobson* as towering authority that overshadows the Constitution during a pandemic).

225. *See* Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905) (reiterating that police powers could be used in an arbitrary and unreasonable manner that would authorize courts to interfere. The Court recognizes there could be necessities of a case that require protecting citizens, but it cannot go beyond what is reasonable.).

226. *See generally* Reno v. Flores, 507 U.S. 292, 301–02 (1993) ("'Substantive due process' analysis must begin with a careful description of the asserted right, for 'the doctrine of judicial self-restraint requires us to exercise the utmost ground in this field.'").

227. *See, e.g.,* Washington v. Glucksberg, 521 U.S. 702, 767 (1997) ("This approach calls for a court to assess the relative 'weights' or dignities of the contending interests, and to this extent the judicial method is familiar to the common law.").

228. *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (recognizing that regulations of fundamental rights may be justified only by a compelling state interest. The Court proceeds to apply this level of judicial scrutiny and concludes that the regulations in question swept too broadly and that the compelling state interest began at the end of the first trimester, not before.), *modified*, 505 U.S. 833 (1992).

229. *Cf.* Lawrence v. Texas, 539 U.S. 558, 585 (2003) (noting the Court has since rejected *Roe's* holding that abortion regulations must be narrowly tailored to serve a compelling state interest, and therefore rejected the notion that the right abortion is a fundamental right).

230. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 874–76 (1992) (urging courts to recognize not all regulations are unwarranted when a state has a substantial interest; therefore, not all burdens are undue when deciding the right to terminating a pregnancy).

governmental intrusion into matters that fundamentally affect a person, including the decision whether to bear or beget a child,[231] why is a woman's constitutional right to an abortion deemed any different from other fundamental rights protected under the rubric of personal privacy and reproductive autonomy?[232] Should this designation be reinstated so that a state cannot easily reattempt to pass regulations under the guise of public health?[233] Why is this particular branch of reproductive autonomy not afforded equal protection under the law?[234]

## V. REPRODUCTIVE AUTONOMY AS A FUNDAMENTAL RIGHT

If a right is deemed fundamental, the government only prevails if it meets strict scrutiny.[235] But when is a right deemed fundamental?[236] According to the Supreme Court in *Lawrence v. Texas*, the Court in *Roe* failed to establish the right to abortion was 'deeply rooted' in this nation's history and tradition, but instead simply based its conclusion on the Fourteenth Amendment's concept of personal liberty being broad enough to encompass a woman's decision on whether or not to terminate

231. *Cf.* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (disregarding marital status as a consideration when evaluating unwarranted governmental intrusion on privacy).

232. *Compare* Casey, 505 U.S. at 926 (applying the undue burden analysis in matters concerning whether to bear or beget a child), *with* Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 541 (1942) (emphasizing marriage and procreation as fundamental and assigning strict scrutiny as the proper test for evaluating sterilization laws).

233. *Compare* Casey, 505 U.S. at 926–27 (prohibiting the government from intruding into intimate matters including procreation) *with* Skinner, 316 U.S. at 541 (upholding a sterilization law under the guise of public safety).

234. *Compare* Casey, 505 U.S. at 928 (utilizing the undue burden standard), *with* Skinner, 316 U.S. at 542 (applying strict scrutiny), *and* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (concluding legislation prohibiting contraception conflicted with fundamental human rights and therefore warranted strict scrutiny).

235. *E.g.,* Reno v. Flores, 507 U.S. 292, 301–02 (1993) (reaffirming due process under the Fifth and Fourteenth Amendments forbids the government from infringing on certain fundamental liberty interests unless the government's infringement is narrowly tailored to serve a compelling state interest).

236. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (recognizing the established method of substantive due process analysis has two primary features. First, the Due Process Clause protects fundamental rights which are objectively deeply rooted in this nation's history and tradition. Second, substantive due process cases must have a "careful description" of asserted fundamental liberty interest.).

her pregnancy.[237] However, the Court in *Roe* discusses at length the history of abortion in English common law and in America, and notes the criminal abortion laws in effect at the time *Roe* was decided were of "relatively recent vintage."[238]

### *A. A History of Abortion*

In America, the law in effect in all but a few states reflected the English common law until the mid-nineteenth century.[239] At common law, abortions performed before 'quickening'—the point at which a pregnant woman could feel the movements of the fetus (approximately four months)—were not a crime.[240]

> The common law's attitude toward pregnancy and abortion was based on an understanding of pregnancy and human development as a process rather than an absolute moment . . . Quickening was a moment recognized by women and by law as a defining moment in human development. Once quickening occurred, women recognized a moral obligation to carry the fetus to term. This age-old idea underpinned the practice of abortion in America . . . By the mid-eighteenth century, the most common means of inducing abortion——by taking drugs—was commercialized . . . Furthermore, abortifacients were a profitable product sold by doctors, apothecaries, and other healers. The first statutes governing abortion in the United States . . . were poison control measures designed to protect pregnant women . . . by controlling the sale of abortifacient drugs which often killed women who took them.

By the 1840s, the market for abortions "boomed."[241] Abortifacients were advertised and available for purchase, despite laws forbidding the

237. Lawrence v. Texas, 539 U.S. 558, 595 (2003) (acknowledging that although the Court in *Roe* found abortion was not "deeply rooted" in history, a woman's right to abortion was nonetheless protected under the Fourteenth Amendment).

238. *See* Roe v. Wade, 410 U.S. 113, 129–47 (1973) (discussing at length the history and development of abortion and regulations on abortion in the United States), *modified*, 505 U.S. 833 (1992).

239. *See id.* at 138 (illustrating the approaches several states took regarding the implementation of abortion laws and how those approaches compared to the English common law).

240. *See* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME 8 (U.C. Press ed., 1998) (tracing the criminalization of abortion to the eighteenth and early nineteenth century English common law).

241. *See id.* (demonstrating the growth of the abortion business despite efforts to curtail it).

sale.[242] If abortifacients failed, women could obtain instrumental abortions through practitioners and midwives who specialized in the procedure.[243]

In 1857, the American Medical Association led a crusade to make abortion illegal at every stage.[244] The campaign was due in large part to physicians' desires to control medical practice and restrict their competitors.[245] Dr. Horatio R. Storer, the leader of the medical campaign against abortion, aimed to sway public opinion against abortion, pushed for increased legal restrictions, and argued that life *must* begin at conception rather than at quickening.[246] According to the Court in *Roe*, "it is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the nineteenth century . . . a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most states today."[247] The option to choose whether to have an abortion was present well into the nineteenth century.[248] Accordingly, the history and origin of abortion was not

242. *See id.* (proving laws passed to prevent the sale of these medicines did not stop them from being sold).

243. *E.g., id.* (listing abortion alternatives available to women if abortifacient drugs did not work).

244. *See id.* at 10–11 (explaining the antiabortion campaign was created partially as an attempt to make up for the decline in birth rates among the Yankee class. Dr. Horatio R. Storer, the leader of the antiabortion campaign, envisioned the spread of civilization west and south by native born white Americans and suggested that those regions should be filled by their "own" children not those of aliens. Reagan asserts therefore, white male patriotism demanded maternity be enforced among white Protestant women.).

245. *See id.* at 10 (indicating regular physicians had come under attack as elitist and faced competition from a variety of practitioners including midwives and homeopaths).

246. *See* Richa Venkatraman, *Horatio Robinson Storer (1830-1922),* THE EMBRYO PROJECT ENCYC. (Sept. 21, 2020), https://embryo.asu.edu/pages/horatio-robinson-storer-1830-1922 [https://perma.cc/JL2W-QPRQ] ("[Storer] argued that the fetus could not be considered dead before quickening and therefore must be considered alive, and that abortion was murder because it involved willingly terminating a life in its early stages of existence.").

247. *See* Roe v. Wade, 410 U.S. 113, 140 (1973) ("It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the nineteenth century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it a different way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most states today."), *modified*, 505 U.S. 833 (1992).

248. *See id.* at 140 (stating women had the choice to get an abortion without interference by the state for the majority of the nineteenth century. Even after the nineteenth century, women still faced less punitive consequences for obtaining an abortion.).

always deemed immoral.[249]

### *B. Procreation, Contraception, & Abortion: One of These Things is Not Like the Other. Or is It?*

Procreation is defined as the decision to bear or beget a child and is deemed fundamental to the very existence of the human race.[250] In *Griswold v. Connecticut*, the Supreme Court held matters concerning contraception are subject to strict scrutiny because they involve the decision whether to have a child.[251] In *Skinner v. Oklahoma*, the Supreme Court held government-imposed sterilization is subject to strict scrutiny because it deprives an individual of the right to have a child.[252] What is abortion but another personal decision regarding whether to have a child?[253] How do these three reproductive autonomy rights—procreation, contraception, and abortion—differ, and how are they alike?[254]

According to the Supreme Court, abortion is inherently different from sterilization and contraception because abortion involves the purposeful

249. *See* Reagan, *supra* note 240, at 6 (dispelling the idea that hostility to abortion is almost an absolute value in history. Reagan asserts that the illegality of abortion has hidden the existence of an unarticulated, alternative, popular morality which supported women who had abortions despite it being against the law.).

250. *See* Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 541 (1942) (defining procreation and claiming marriage and procreation are both fundamental to the existence and survival of the human race).

251. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) ("Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'").

252. *See* Skinner, 316 U.S. at 541 (instituting a statute allowing government-imposed sterilization will necessarily require review under strict scrutiny, otherwise, invidious discriminations may be made against groups or individuals).

253. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 169–70 (1973) ("[W]e recognized 'the right to 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.' That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy."), *modified*, 505 U.S. 833 (1992); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 840 (discussing that ultimately a woman must make the decision as to whether or not to have an abortion and finding there to be no undue burden where a state requires her to make a fully informed decision).

254. *See generally* Susan Bernstein, *What Are Reproductive Rights?*, WEBMD (May 25, 2021), https://www.webmd.com/sex/what-are-reproductive-rights [https://perma.cc/SQM5-6JVG] (detailing reproductive rights as including all decisions concerning whether or not to have children).

termination of a potential life.[255] But when we examine the root cause of why these three rights are similar, we find they all concern the fundamental decision on whether to bear a child.[256] Executive Order GA-09 effectively prevented a woman from procuring an abortion and, in essence forced her to seek refuge in another state, obtain an abortion later in pregnancy (after lifting the order), or compel her into a pregnancy she did not want.[257] If we compare the forced sterilization of a man to a woman forced to carry a pregnancy to term, don't we find both are deprived of the fundamental right to decide whether to have a child?[258] Yet, in this instance, only the man's sterilization would be afforded heightened scrutiny.[259]

That is not to say that women cannot be forcibly sterilized.[260] But there is a natural difference between men and women; only women have the capacity to bear children.[261] In *Bell v. Low Income Women of Texas*, the Supreme Court of Texas held that the biological truism that abortions can only be performed on women does not necessarily mean that governmental action restricting abortion discriminates on the basis of gender.[262] Similarly, in *Bray v. Alexandria Women's Health*

255. *See* Casey, 505 U.S. at 952 (Rehnquist, C.J., concurring in part, dissenting in part) (noting the abortion decision must be recognized as *sui generis*, different in kind from the rights protected in the earlier cases under the rubric of personal or family privacy and autonomy); *see also* Roe, 410 U.S. at 159 ("The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . . ).

256. *See generally* Bernstein, *supra* note 244 (highlighting reproductive rights to include access to more than just abortion services and include the legal ability to make decisions on having children).

257. *See* Medically Unnecessary Surgeries, *supra* note 14 (threatening all abortion providers to postpone procedures not immediately medically necessary to preserve the life or health of the mother); *see also* Glenza, *supra* note 15 (describing the choices women are forced to make when the ability to obtain an abortion is removed locally).

258. *See generally* Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535 (1942) (holding procreation and the decision whether to bear a child to be a fundamental right); *see generally* Casey, 505 U.S. at 833 (stripping abortion of its designation as a fundamental right under *Roe*).

259. *Compare* Skinner, 316 U.S. at 541 (utilizing strict scrutiny to determine whether the sterilization is constitutional), *with* Casey, 505 U.S. at 874 (protecting a woman's right to abortion where a state regulation imposes an undue burden on a woman's ability to decide).

260. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) (holding society can prevent those who are manifestly "unfit" from continuing their kind by sustaining compulsory sterilization).

261. Hodgson v. Minnesota, 497 U.S. 417, 434 (1990) (emphasizing the fact that only women are able to give birth).

262. *See* Bell v. Low Income Women of Tex., 95 S.W.3d 253, 260 (Tex. 2002) (failing to acknowledge abortion regulations discriminate based on gender).

*Clinic*, the Supreme Court held the goal of preventing abortion does not qualify as an invidiously discriminatory animus directed at women in general.[263] They went on to state:

> Opposition to abortion cannot reasonably be presumed to reflect a sex-based intent; there are common and respectable reasons for opposing abortion other than a derogatory view of women as a class. This Court's prior decisions indicate that the disfavoring of abortion, although only women engage in the activity, is not ipso facto invidious discrimination against women as a class.[264]

According to the Court in *Casey*, the decision in *Roe* undervalued the state's interest in the potential life within the woman, and the very notion that a state has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted.[265] The Court went on to say, "[a] woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted."[266] If the reason for hostility towards abortion is not due to a derogatory view of women, but instead due to opposition of termination of potential life, then why are women seeking IVF not given the same amount of resistance when excess embryos not used in the process are destroyed?[267]

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263. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 263 (1993) (emphasizing that restrictions on abortion do not meet the elements of class based invidiously discriminatory animus).

264. S*ee id.* at 263–64 ("The record indicates that petitioners' demonstrations are not directed specifically at women, but are intended to protect the victims of abortion, stop its practice, and reverse legislation.").

265. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 875–76 (1992) (arguing the Court in *Roe* set out a contradiction by recognizing the state's interest yet forbidding any regulation designed to advance that interest before viability).

266. *Id.* at 869.

267. *See* Jennifer Wright, *Why Anti-Choice People Are Okay with IVF*, HARPER'S BAZAAR (June 14, 2019), https://www.harpersbazaar.com/culture/politics/a27888471/why-anti-choice-people-against-abortion-are-okay-with-ivf/ [https://perma.cc/96JB-Z5XW] (emphasizing that although destroying embryos is not substantially different than an abortion, the latter results in immense rage in the pro-life community); *see also* Andrew Hough, *1.7 Million Human Embryos Created for IVF Thrown Away*, TEL. (Dec. 31, 2012, 6:15 AM), https://www.telegraph.co.uk/news/health/news/9772233/1.7-million-human-embryos-created-for-IVF-thrown-away.html

In *Davis v. Davis*, the Supreme Court of Tennessee acknowledged, "the United States Supreme Court has never addressed the issue of procreation in the context of *in vitro* fertilization."[268] In *Davis*, the Tennessee Supreme Court held that the right of procreational autonomy is composed of two equally significant rights—the right to procreate and the right to avoid procreation.[269] The court balanced the interest of the woman's desire and right to procreate against her divorced husband's right not to procreate and held the party wishing to avoid procreation should prevail.[270] Accordingly, the unused embryos were destroyed.[271]

Similarly, in *J.B. v. M.B.*, a woman became pregnant through the IVF process but later sought to destroy the excess embryos that were cryogenically frozen after she and her husband divorced.[272] The husband asserted his right to procreation outweighed his former wife's right not to procreate because her right to bodily integrity was not implicated, and his religious beliefs regarding the protection of potential life superseded her limited interests.[273] Nonetheless, the court asserted the woman's right not to procreate could be lost if the embryos were used or donated.[274] The court further explained compelling biological parenthood would violate public policy.[275]

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[https://perma.cc/UGN4-972C] (reporting that almost half of embryos used to help a woman conceive through IVF were thrown away during or after the process).

268. *See* Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992) (recognizing the inherent tension between the right to procreate and the right to avoid procreation in the context of IVF).

269. *See id.* (acknowledging the two rights in procreational autonomy when a divorced couple could not agree on the disposition of their unused cryopreserved embryos).

270. *See id.* at 604 (Tenn. 1992) (assuming the adverse party has a reasonable possibility of achieving parenthood by means other than using the embryos in question, the party wishing to avoid procreation should prevail).

271. *See id.* at 605 (Tenn. 1992) (instructing the Knoxville Fertility Clinic to proceed with its normal procedure in dealing with unused embryos).

272. *See* J.B. v. M.B., 783 A.2d 707, 711 (N.J. 2001) (finding that the parties engaged in IVF to create a child within the context of their marriage but did not have the same objectives after divorce).

273. *See id.* at 712 (considering the two competing interests at stake with regards to the disposition of cryopreserved embryos).

274. *See id.* at 719–20 (granting his former wife the right to prevent implantation of the embryos, because the husband was already a father and was capable of fathering additional children without the embryos).

275. Wright, *supra* note 267 ("[C]linics that provide IVF (in vitro fertilization) extract eggs, fertilize them in a lab, and then implant them in a womb.").

Clinics that provide IVF extract eggs, fertilize them in a lab, and then implant them in a womb.[276] Most people generate more than one viable embryo, and those excess embryos can be cryogenically frozen and stored in case IVF implementation does not initially work.[277] When it does work, however, people can choose to donate their excess embryos for scientific research, which often leads to their destruction.[278] If the interest that states repeatedly assert revolves around the theory of life at conception, why is it that destroying embryos is acceptable when it comes to IVF but otherwise wicked and immoral when it comes to abortion?[279] When it comes to IVF, a person seeking to avoid procreation is given higher deference than one wanting to procreate.[280] In effect, one set of rules applies to those attempting to avoid procreation through IVF than those trying to avoid procreation through abortion.[281] This disparity reveals a great deal about whose bodies our laws restrict.[282] Thus, "unlike IVF patients, who are primarily wealthy and white, women who have abortions are disproportionately poor and women of color."[283]

Could it be that IVF patients make less attractive targets because they do not challenge the expectation that women want to be mothers?[284]

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276. *See id.* (listing the steps in vitro fertilization clinics take).

277. *Id.* ("Most people produce more than one viable embryo. Those excess embryos can be saved in case IVF implementation doesn't work the first time.").

278. *See id.* (noting alternative ways to get rid of the excess embryos, such as donating them for scientific research, keeping them for future use, or offering them to other couples).

279. *Compare* Gonzales v. Carhart, 550 U.S. 124, 145 (2007) ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."), *with* Davis v. Davis, 842 S.W.2d 588, 604 (1992) (allowing embryos that were produced during IVF to be discarded when a person did not want to procreate).

280. *See generally* J.B. v. M.B., 783 A.2d 707, 718 (2001) (finding that compelling parenthood was against public policy); *see also* Davis, 842 S.W.2d at 604 (holding that the party wishing to avoid procreation should prevail).

281. *Compare* Davis, 842 S.W.2d at 604–05 (favoring a person who wants to avoid procreation by ordering embryos be discarded), *with* Gonzales, 550 U.S. at 145 (asserting that a state has an interest at the outset of a pregnancy).

282. *See* Margo Kaplan, *Fertility Clinics Destroy Embryos All the Time. Why Aren't Conservatives After Them?*, WASH. POST (Aug. 14, 2015), https://www.washingtonpost.com/opinions/fertility-clinics-destroy-embryos-all-the-time-why-arent-conservatives-after-them/2015/08/13/be06e852-4128-11e5-8e7d-9c033e6745d8_story.html [https://perma.cc/2VDY-J8PF] (suggesting abortion restrictions are often less about protecting life and more about controlling women's bodies).

283. *Id.*

284. *See id.* (recounting one woman's personal experience of donating her excess embryos to research. The woman realized the huge disparity between how the law treats IVF patients and

Abortion, on the other hand, challenges conservative ideals regarding a woman's proper role as a wife and mother.[285] "[T]his way of thinking reflects ancient notions about women's place in the family and under the constitution—ideas that have long since been discredited."[286] If the state truly had an interest in potential life, it would treat all embryos, IVF and abortion, alike.[287] Instead, it favors the destruction of embryos only when a woman is likely to conceive a child.[288] The state assumes women should be forced to accept the "natural" status and incidents of motherhood—an assumption that rests upon a women's role that has triggered the protection of the Equal Protection Clause.[289]

## VI. EQUAL PROTECTION CLAIM

The Equal Protection Clause of the Fourteenth Amendment instructs that no state shall deny any person within its jurisdiction the equal protection of the laws.[290] In applying the Equal Protection Clause, the Supreme Court has consistently recognized that the Fourteenth Amendment does not deny states the power to behave differently toward

abortion patients and noted all she had to do was sign a form to donate her embryos, whereas women seeking abortions often encounter state-directed counseling, mandatory waiting periods, and medically inaccurate information.).

285. *See id.* ("Abortion, on the other hand, thwarts conservative ideals about a woman's proper role as a wife and mother.").

286. *See* Gonzales v. Carhart, 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting) ("[T]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society[.]").

287. *See* Emma Scornavacchi, *The Glaring Exception in the Coming Battle Over Reproductive Rights*, NEW REPUBLIC (Aug. 8, 2018), https://newrepublic.com/article/150545/glaring-exception-coming-battle-reproductive-rights [https://perma.cc/UT5Y-MLQ5] (showing the embryos being discarded after IVF are the same type being extracted in abortion clinics).

288. *See* Whole Woman's Health v. Smith, 338 F.Supp.3d 606, 641–42 (W.D. Tex. 2018) ("[T]he State chose to draw a line between in vitro tissue cultures (pre-implantation embryos) and post-implantation embryos and thus drew a line between the different types of facilities that handle these embryos.").

289. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (suggesting the state conscribes women's bodies into their service by forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care).

290. U.S. CONST. amend. XIV, § 1.

various classes of persons.[291] The Equal Protection Clause does, however, deny the state, "the power to legislate that different treatment be accorded to persons, placed by statute into different classes, on the basis of criteria wholly unrelated to the objective of that statute."[292] As such, a plaintiff asserting a violation of the Equal Protection Clause must demonstrate that they have been treated differently from others who are similarly situated.[293]

Is a woman's decision not to bear a child by seeking an abortion treated differently from a similarly situated person who chooses not to bear a child through contraception or sterilization?[294] The Supreme Court devotes a great deal of attention insisting abortion is different from other bodily autonomy cases and offers only one justification for why that is.[295] In *Casey*, the Court swiftly concludes abortion involves the purposeful termination of potential life and therefore cannot fall under the same rubric as other bodily autonomy cases.[296] If abortion differs from contraception and sterilization because it involves the termination of potential life, then a fortiori, abortion and IVF are the same because both involve the purposeful termination of embryos.[297] Then, the question is whether a woman deciding not to bear a child by seeking an abortion is treated differently from a woman deciding not to bear all excess embryos produced during in vitro fertilization.[298]

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291. Reed v. Reed, 404 U.S. 71, 75 (1971).

292. *Id.* at 75–76.

293. *Id.* at 77 (ruling the treatment regarding sex violated the Equal Protection Clause).

294. *See id.* at 75 (holding that an Idaho statute, which provided that as between persons equally qualified to administer estates, males were preferred to females, was based solely on discrimination prohibited by and violative of the Equal Protection Clause of the Fourteenth Amendment); *see also* Wienberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) (invalidating a statute that failed to grant a woman worker the same protection a "similarly situated" male worker would have received).

295. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 839 (1992) (clarifying the Court in *Roe* reached too far when it determined abortion was a fundamental, all-encompassing right of privacy).

296. *Id.*

297. *See* Scornavacchi, *supra* note 287 (posing the puzzling challenge conservative groups face when confronted with the following question: "How do organizations that liken embryos to people reckon with a technology that creates babies for families but destroys embryos along the way?").

298. *See* Reed, 404 U.S. at 77 ("By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.").

### *A. Whether Women Who Seek to Procure Abortions Are a Subclass of Women Discriminated Against*

In *Bray v. Alexandria Women's Health Clinic*, the Supreme Court reasoned abortion opposition cannot reasonably be presumed to reflect a sex-based intent, and the disfavoring of abortion is not ipso facto invidious discrimination against women as a class.[299] But the court's decision in *Bray* fails to question whether discrimination is aimed against a subclass of women as opposed to women as a class.[300] While abortions are only performed on women, that does not preclude discrimination against a subclass of women because subclasses of women have experienced discrimination on numerous occasions.[301]

In *Arnett v. Aspin*, a woman brought a Title VII gender discrimination claim alleging the defendant maintained a hiring policy of rejecting women over the age of forty in favor of younger women.[302] Title VII of the 1964 Civil Rights Act prohibits employers from discriminating against employees because of their race, color, religion, sex, or national origin.[303] The defendant asserted the plaintiff could not establish a prima facie case of gender discrimination because the person ultimately selected for the position was a woman.[304] Rejecting this argument, the United States District Court for the Eastern District of Pennsylvania held the plaintiff could bring a Title VII claim for "sex-plus" discrimination if she establishes discrimination against a subclass of women based on either

299. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 263–64 (1993) (holding there are "common and respectable" reasons for opposing abortion that do not reflect "animus" against women based on their gender).

300. *See id.* at 264 (dismissing "women seeking abortion" as a qualifying class under 42 U.S.C. §1958(3) because the record shows the demonstrations in question are not directed at women by reason of their sex).

301. *See* Plyler v. Doe, 457 U.S. 202, 207, 213 (1982) (examining a state's decision to identify subclasses of persons whom it would define as beyond its jurisdiction. The Court held that a state's attempt to do so would undermine the principal purpose for which the Equal Protection Clause was incorporated).

302. *See* Arnett v. Aspin, 846 F. Supp. 1234, 1236 (E.D. Pa. 1994) (referencing the employer's answer in the suit that all women hired were under the age forty, while all men hired for the same position were over the age of forty).

303. *See* Eric Bachman, *What Is "Sex-Plus" Discrimination and Why Are These Employment Claims on the Rise?*, FORBES (July 30, 2020, 11:53 AM), https://www.forbes.com/sites/ericbachman/2020/07/30/what-is-sex-plus-discrimination—and-why-are-these-employment-claims-on-the-rise/?sh=716541e37357 [perma.cc/YYX8-GRMC] (defining the purpose of Title VII and who it aims to protect).

304. Arnett, 846 F. Supp. at 1237.

an immutable characteristic or the exercise of a fundamental right.[305] Sex-plus discrimination claims expand Title VII to protect a subgroup of employees suffering discrimination based on multiple characteristics.[306] The rationale behind this "sex-plus" theory of gender discrimination is to enable Title VII plaintiffs to survive summary judgment where an employer does not discriminate against all members of the same sex.[307]

In addition to recognizing subclasses could be subject to discrimination, the Supreme Court has also recognized discrimination on the basis of "gender stereotypes" as invalid.[308] In *Nev. Dep't of Hum. Res. v. Hibbs*, the Supreme Court faced an Equal Protection challenge and upheld legislation enacted to combat the stereotype that women's family duties trump those of the workplace.[309] The Court noted the state's continued reliance on invalid gender stereotypes in the employment context could not justify the state's gender discrimination.[310]

Women seeking in vitro fertilization destroy multiple excess embryos.[311] Yet, these women are not subjected to the same mandatory counseling, waiting periods, visits, or pamphlets discussing the

305. *See id.* at 1239 (describing the requirements necessary for a plaintiff to bring a successful Title VII claim for sex discrimination).

306. Bachman, *supra* note 303 (describing the effect sex-plus discrimination claims have on the scope of Title VII's protections and the new subclass of employees who are now protected).

307. *See* Arnett, 846 F. Supp. at 1240 ("The reasoning behind the holdings of Phillips and its progeny is that when an employer discriminates against members of one sex, the victims of such discrimination should have a remedy under Title VII which expressly prohibits discrimination on the basis of sex. The point behind the establishment of the sex-plus discrimination theory is to allow Title VII plaintiffs to survive summary judgment when the defendant employer does not discriminate against all members of the sex.").

308. *See* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 754 (2003) ("The application of heightened scrutiny is designed to ensure gender-based classifications are not based on the entrenched and pervasive stereotypes which inhibit women's progress in the workplace.") (reviewing a case concerning gender stereotypes and discrimination in the workplace).

309. *See generally id.* at 732 (observing the history of many state laws which limited women's employment opportunities due to beliefs that women should remain the center of home and family life).

310. *See id.* at 730 (claiming the continued reliance by states on unconstitutional discrimination based on gender stereotypes justifies legislation passed by Congress to end this type of discrimination).

311. *See* Kaplan, *supra* note 282 ("Conservatives are clearly not concerned about the process of tissue donation; they are targeting Planned Parenthood alone and ignoring the hundreds of fertility clinics that legally destroy and donate embryos that women do not want or are unable to carry to term.").

implications of their decision to destroy potential life that women who procure abortions are.[312] Could it be social conservatives have no concern for the moral status of the human embryo but rather oppose access to abortion because it threatens traditional and distinctive gender roles?[313]

> The continued hostility toward abortion, even to the earliest form of possible abortion embodied in emergency contraception, coupled with the absence of attacks on IVF, can best be described as a relative indifference to the moral status of the embryo, but rather a great deal of hostility toward economic equality of women, sexual activity outside of marriage, and marriages that are not organized along traditional gender lines. When conservative activists see abortion, they see the destruction of embryos, yes, but they also see women who are insisting on their equality in the workplace and on marriages that are not organized around strong gender roles. When conservatives see IVF, they largely ignore the destruction of embryos, because they see heterosexual married couples going to great lengths to have children. Thus, it appears that the crucial variable in the equation is not the destruction of the embryo, but the behavior and roles and possibilities open to women. Anti-abortion activists claim to be motivated purely by concern for the unborn, but in fact they are motivated primarily by concerns for the shape of society and for the preservation of traditional gender roles.[314]

The state's insistence that it can insert itself at the outset of pregnancy because it has a legitimate interest in the life of the embryo is hypocritical at most and suspect at the very least.[315] This disparity is further evidence in *Whole Woman's Health v. Smith.*[316] There, Texas enacted Senate Bill

312. *See id.* (describing the various steps a women seeking an abortion must go through to have an abortion).

313. *See* Dena S. Davis, *The Puzzle of IVF*, 6 HOUS. J. HEALTH L. & POL'Y 275, 294 (2006) (asserting conservatives are not concerned with what happens to embryos during abortion; rather, they are concerned with how abortion disrupts gender roles in modern society).

314. *Id.* at 297.

315. *See* Jessica Valenti, *Anti-Abortion Hypocrisy Has Never Been Clearer*, GEN (June 13, 2019), https://gen.medium.com/anti-abortion-hypocrisy-has-never-been-clearer-c7b621db7ab5 [https://perma.cc/2DMV-V6TZ] (quoting a Republican lawmaker's response to being questioned about the failure to punish IVF clinics who discard embryos, "The egg in the lab doesn't apply. It's not in a woman. She's not pregnant.").

316. *See generally* Whole Woman's Health v. Smith, 338 F.Supp.3d 606, 606 (W.D. Tex. 2018) (scrutinizing Texas' attempt to implement different standards for IVF clinics and abortion clinics when fetal tissue is disposed).

8, which created a new chapter in the Texas Health and Safety Code and modified the state's rules for embryonic and fetal tissue disposal.[317] The purported purpose of the new chapter was to express the state's profound respect for the life of the unborn by providing for the dignified disposition of embryonic and fetal tissue remains.[318] Four days before the intention of SB 8 taking effect, the Texas Health and Human Services Commission (HHSC) published rules necessary to implement the new chapter.[319] The district court found the state chose to distinguish between in vitro tissue cultures (pre-implantation embryos) and post-implantation embryos.[320] The state also drew a line between healthcare facilities and IVF clinics for the purpose of disadvantaging those healthcare clinics that most regularly deal with embryonic and fetal tissue remains (i.e., abortion clinics).[321] Texas argued the distinction was rational because the potential for life is more fully realized after implantation, but the court stated they could not discern a legitimate state interest in distinguishing between identical tissue solely because the state believed the tissue in one context had a greater potential for life.[322] "Regardless of a state's ability to express respect for potential life, the state may not compel its philosophical or religious answer concerning the degree of life present in pre-implantation compared to post-implantation embryos under current law."[323]

317. *See id.* at 615 (discussing the implementation of Senate Bill 8 and the impacts the bill has on existing laws in Texas).

318. *See* Tex. Health & Safety Code Ann. § 697.001, *invalidated by* Whole Woman's Health v. Smith, 338 F.Supp.3d 606 (2018) ("The purpose of this chapter is to express the state's profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains.")

319. *See generally* 25 Tex. Admin. Code § 138.1–.7 (Tex. Dep't of State Health Services), *invalidated by* Whole Woman's Health v. Smith, 338 F.Supp.3d 606 (2018) (listing the various definitions, rules, and procedures implemented by HHSC in anticipation of Senate Bill 8).

320. *See* Smith, 338 F.Supp.3d at 641 (noting the state's decision to distinguish between in vitro tissue cultures and post-implantation embryos, thereby drawing a line between different types of facilities handling embryos).

321. *See id*. at 641–42 (W.D. Tex. 2018) (examining the state's decision to treat healthcare facilities different than IVF clinics and the arguments made by the state to support this distinction).

322. *See id.* ("[T]he Court can discern no legitimate state interests in distinguishing between identical tissue and thus between the facilities that handle that tissue because the State believes the tissue in one context previously had a greater potential for life. The philosophical or religious question of the degree of potential life in an embryo is distinct from the scientific question of whether tissue is an embryo and had the potential for life.").

323. *Id.* at 642.

If we believe states have an interest at conception, as they often assert, then there is no difference between the embryo disposed of through IVF and the embryo disposed of through abortion.[324] A woman undergoing IVF and a woman obtaining an abortion are similarly situated, yet the latter is subject to strenuous hurdles to accomplish what the former can accomplish with a signature.[325] Therefore, we should classify women attempting to procure an abortion as a subclass of women subjected to discrimination.[326] A policy that classifies on the basis of gender violates the Equal Protection Clause unless the state can provide an "exceedingly persuasive justification" for the classification.[327] The state must show the challenged classification (1) serves important governmental objectives, and (2) the discriminatory means employed are substantially related to achieving those objectives.[328]

### *B. Whether Allowing for the Destruction of Embryos in the Context of In Vitro Fertilization, But Not in the Context of Abortion, Serves Important Governmental Objectives*

In *Maher v. Roe*, indigent women brought a suit challenging a Connecticut regulation prohibiting the funding of abortions that were not medically necessary.[329] Appellees claimed the state must accord equal treatment to both abortion and childbirth and may not evidence a policy

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324. *See* Wright, *supra* note 267 (suggesting that if anti-choice protestors truly believed every fertilized egg is a person, they would be protesting "en masse" because IVF clinics donate and destruct embryos); *see also* Valenti, *supra* note 315 ("There is no difference between a fertilized egg in a lab and a fertilized egg in a person . . . ").

325. *See* Kaplan, *supra* note 282 (comparing and contrasting the requirements associated with donating embryos which requires nothing more than signing a form to the requirements of women seeking an abortion, which requires waiting periods, ultrasounds, and lectures claiming that personhood begins at conception).

326. *See id.* (describing the discrimination those seeking an abortion face compared to those going through IVF treatment).

327. *See* United States v. Virginia, 518 U.S. 515, 534 (1996) (holding the Commonwealth of Virginia failed to show an exceedingly persuasive justification for excluding women from citizen-soldier program offered at Virginia military college in violation of equal protection).

328. *See id.* at 533 ("The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.").

329. *See* Maher v. Roe, 432 U.S. 464, 464 (1977) (summarizing the facts of the suit brought by two indigent women against the state of Connecticut for restricting Medicare benefits for abortions in the first trimester to only those deemed medically necessary).

preference by funding only medical expenses incident to childbirth.[330] The Court reasoned a woman's right to an abortion did not imply a limitation on a state's authority to make a value judgment favoring childbirth over abortion.[331] According to the Court, Connecticut's regulation was rationally related to furthering its interest in encouraging normal childbirth.[332] The Court held that although Connecticut attempted to make childbirth a more attractive alternative, it had not imposed any restriction on abortion access.[333] But whether the state has an important governmental interest in promoting childbirth is not the issue in question.[334] Rather, the issue is whether allowing for the destruction of embryos in the context of IVF but not abortion accomplishes the government's objective of protecting potential life.[335] It appears the state seems to care about the protection of potential life only when a woman is seeking an abortion and not in vitro fertilization.[336] Does the state believe some embryos are more valuable than others, *or* does the state suggest that so long as one embryo results in a pregnancy, the excess embryos and their potential for life can be discarded?[337]

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330. *See id.* at 470 (advancing the claim to challenge the classification under the Equal Protection Clause of the Fourteenth Amendment).

331. *See id.* at 474 (holding the Connecticut regulation did not place an obstacle to a women's access to abortion and did not violate a fundamental right).

332. *See id.* 464 ("Roe itself explicitly acknowledged the State's strong interest in protecting the potential life of the fetus.").

333. *See id.* 474 (asserting an indigent woman seeking an abortion would not be disadvantaged by the state's decision to fund childbirth because she would continue to be dependent on private sources).

334. *Cf.* Roe v. Wade, 410 U.S. 113, 162 (1973) (repeating that the state does have an important and legitimate interest in protecting the potentiality of human life), *modified*, 505 U.S. 833 (1992).

335. *Cf. id.* at 159 ("Texas urges that . . . life begins at conception and is present throughout the pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception.").

336. *Compare* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 870 (1992) (acknowledging the state's legitimate interest in promoting and protecting potential life) *with* Davis v. Davis, 842 S.W.2d 588, 602 (1992) (allowing a Tennessee fertility clinic to destroy embryos to preserve a spouse's right not to procreate).

337. *See* Valenti, *supra* note 315 (suggesting the latter is true because women seeking IVF are not subject to mandatory counseling or a forty-eight-hour waiting period for discarding unused embryos).

### C. *Whether Subjecting a Woman Procuring an Abortion to Different Regulations Than a Woman Seeking IVF is Substantially Related to the Achievement of the Governmental Objective of Protecting Potential Life*

The state relies on a false premise that it is interested in potential life in order to regulate abortion.[338] But the state's insistence that it cares about the potential for life appears to exist *only* when it suits their narrative.[339] In *Whole Woman's Health v. Smith*, the state tried to rationalize their decision to differentiate between pre- and post-implantation tissues when determining whether IVF clinics were subject to the same regulations as abortion clinics because they believed the potential for life was more fully realized *after* implantation.[340] But this differs from what we've heard from pro-life proponents in the past.[341] Generally, the argument states use to justify interference in the abortion decision is that they consider human life to be present from the moment of conception, and this suffices to constitute a compelling state interest.[342] Why, then, are embryos fertilized during IVF less of a compelling state interest?[343] It simply does not follow logically. If the state asserts an interest at the outset for potential life, then subjecting a woman obtaining an abortion to different regulations than a woman seeking IVF—when both result in the destruction of embryos—is not

338. *See id.* (implying lawmakers don't care when life begins).

339. *See id.* (quoting a lawmaker who stated a fertilized egg does not matter when it's in a lab because it's not inside a woman. The writer asserts that the fight to end abortion was never about when life begins but instead was about controlling women.).

340. *See* Whole Woman's Health v. Smith, 338 F.Supp.3d 606, 642 (W.D. Tex. 2018) ("Regardless of a state's ability to express respect for potential life via dignified disposition, the State may not compel its philosophical or religious answer concerning the degree of life present in pre-implantation compared to post-implantation embryos under current law.").

341. *See The Pro-Life Response to the IVF Dilemma*, STUDENTS FOR LIFE (July 21, 2019), https://studentsforlife.org/2019/07/21/the-pro-life-response-to-the-ivf-dilemma/ [https://perma.cc/2MYQ-4DXL] ("A consistent, intellectually-honest stance holds that human life begins at conception/fertilization, which means that destroying embryos is killing human beings at our very earliest phase.").

342. *See* Roe v. Wade, 410 U.S. 113, 162 (1973) (reviewing Texas' argument that a fetus is a "person" within the meaning of the Fourteenth Amendment), *modified*, 505 U.S. 833 (1992).

343. *See* Valenti, *supra* note 315 (hinting that the government's agenda, and to some extent their governmental objective, isn't about life, but about forced motherhood and returning to traditional gender roles).

substantially related to its objective of protecting potential life.[344] If we permitted states to enact any statute that reasonably furthered its interest in potential life, and if that interest arose at conception, no statute would fail to pass constitutional muster.[345]

### *D. Whether Women Making the Decision Not to Bear a Child Through Procuring an Abortion Are Afforded Less Protection Than Those Deciding to Do the Same Through Contraception or Sterilization*

Because the state cannot legitimately claim that it has an interest in potential life while allowing IVF clinics to destroy embryos, the abortion decision consisting of whether to bear or beget a child does not differ in kind from other reproductive and bodily autonomy cases.[346] Either the state claims to have an interest in potential life at the outset and uses that supposed interest to regulate abortion but not in vitro fertilization (thereby effectively discriminating against a subclass of women), *or* it does not hold the interest in potential life it claims to have, and abortion should be afforded the designation as a fundamental right alongside contraception and sterilization.[347]

## CONCLUSION

"Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."[348] The COVID-19 crisis continues to this day and fundamental rights continue to be called into question.[349] The

344. *See* Kaplan, *supra* note 282 (suggesting that if lawmakers cared about protecting life, they could promote laws that prevent unwanted pregnancy including insurance coverage for contraception and comprehensive sex education).

345. *See* Webster v. Reprod. Health Serv., 492 U.S. 490, 556 (1989) ("It is impossible to read the plurality opinion . . . without recognizing its implicit invitation to every State to enact more and more restrictive abortion laws, and to assert their interest in potential life as of the moment of conception.").

346. *Cf.* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 839 (1992) (asserting abortion be recognized as *sui generis*, different in kind than rights protected under the rubric of family privacy and autonomy).

347. *E.g.* Kaplan, *supra* note 282 (suggesting if potential life were truly the legitimate interest of the state, anti-choice groups would target IVF embryo destruction at the forefront of their efforts).

348. Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. ___ (2020), 141 S.Ct. 63, 70 (2020) (Gorsuch, J., concurring).

349. *See id.* (questioning the validity of an executive order restricting religious services due to the pandemic).

Court makes clear that while courts are to give the states' discretion in determining the mode or manner to enact regulations to protect the public health and safety, it may not go beyond the necessity of the case and violate rights secured by the Constitution.[350] That is why it is so important to note the disparity and hypocrisy rooted in a woman's right to an abortion.[351] The Court in *Roman Catholic Diocese of Brooklyn v. Cuomo* acknowledges that *Jacobson* does not grant a plenary override of the Constitution, and it clarifies that the proper test to apply when assessing whether a state has exerted an improper use of its police power depends on the constitutional right in question.[352] And while the constitutional test for abortion is the undue burden set out in *Casey*, the Fifth Circuit was nonetheless able to justify and uphold GA-09 as a legitimate exertion of a state's police power despite it constituting more than an undue burden on a woman.[353] GA-09 fully prevented a woman from obtaining an abortion.[354] The constitutional right to an abortion was not offered the same courtesy or respect that the Free Exercise Clause of the First Amendment right was given when the Court assessed whether the state had impeded on that right.[355] Instead, the COVID-19 crisis was a state's latest attempt in a long line of attacks against a woman's right to bodily integrity and autonomy.[356] That is why it is so important to note

350. *See* Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905) (finding the regulation in question necessary to ensure public health and safety and therefore justified).

351. *See generally* Valenti, *supra* note 315 (unveiling the disparity in the concern for embryos in the IVF context as compared to the abortion context).

352. *See* Roman Cath. Diocese of Brooklyn, 141 S.Ct. at 70 (Gorsuch, J., concurring) (stating *Jacobson* applied what would become the traditional legal test associated with the right at issue, thus not stepping away from precedent).

353. *See In re* Abbott, 954 F.3d 772, 792 (5th Cir. 2020) (indicating it is up to the governing state authorities and not the courts to determine what would be most effective to protect the public against a public health crisis).

354. *See* Shannon Najmabadi, *Early in the Pandemic, Texas Banned Most Abortions. After the Ban Lifted, Second-trimester Abortions Jumped, a New Study Shows.*, TEX. TRIB. (Jan. 4, 2021, 2:00 PM), https://www.texastribune.org/2021/01/04/texas-abortions-coronavirus-pandemic/ [https://perma.cc/P43X-F45W] (reporting second-trimester abortions increased sixty-one percent after the GA-09 expired, likely due to care delays, waiting times, and capacity issues).

355. *Compare In re* Abbott, 954 F.3d at 788–89 (upholding GA-09 as a permissible exercise of the state's police powers), *with* Roman Cath. Diocese of Brooklyn, 141 S.Ct. at 67 (subjecting the challenged restriction to strict scrutiny and concluding that although stemming the spread of COVID-19 was a compelling interest, the regulation could not be regarded as narrowly tailored).

356. Nora Ellmann, *State Actions Undermining Abortion Rights in 2020,* AMERICAN PROGRESS (Aug. 27, 2020, 9:04 AM), https://www.americanprogress.org/issues/women/reports/2020/08/27/489786/state-actions-undermining-abortion-rights-2020/ [https://perma.cc/3STJ-38

that the logic behind the state's position that it has an interest in potential life is inherently flawed.[357] If the state truly cared about the interest in potential life, it would scorn all women seeking IVF treatment for discarding and disposing of their unused embryos.[358] Instead, it turns a blind eye and grants her a pass because she fulfills her assigned role of mother and wife.[359] Abortion regulation cannot rest on this false premise of protection of potential life.[360] It is the only argument preventing it from being afforded the same level of protection as procreation and contraception.[361] It must have its fundamental right designation reinstated so that it may sit in its rightful place alongside other privacy and bodily autonomy cases. If abortion was deemed a fundamental right, as it once was in *Roe*, the Court would have rightfully asserted that while a state has broad discretion in regulating abortion, the proper test to apply is strict scrutiny—subsequently holding GA-09 to be an invalid use of the state's police power.[362] Instead, the state exploits a public health crisis and uses it as their latest ploy to attack women's constitutional right to abortion.[363]

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5D] ("At the outset of the coronavirus crisis in the United States, 11 governors explicitly excluded abortion care from the essential services that were allowed to operate amid shutdowns, essentially manipulating the pandemic response to ban abortion care from being provided in their states.").

357. *E.g. id.* (exploring the disproportionate effect of the supposed protection of potential life when the affected minority communities seeking abortions are the ones suffering from an already limited access to health care on top of the current pandemic that is harming them disproportionately).

358. *See* Valenti, *supra* note 315 (suggesting the anti-abortion movement's legislative apathy toward IVF proves the fight to end abortion was never about when life begins).

359. *E.g. id.* ("[C]onservative legislators roll back abortion rights while ignoring the millions of embryos at U.S. clinics that are frozen or destroyed because their agenda is not about 'life' but forced motherhood and a return to traditional gender roles.").

360. *See* Kaplan, *supra* note 282 (pointing out the disparity between how the law treats abortion patients and IVF patients).

361. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 839 (1992) (distinguishing abortion from other privacy and autonomy cases).

362. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. ___ (2020), 141 S.Ct. 63, 68 (2020) (evaluating whether the state had shown that public health would be imperiled if less restrictive measures were imposed).

363. *See* Glenza, *supra* note 15 (listing Alabama, Arkansas, Iowa, Louisiana, Ohio, Tennessee, and West Virginia as states that categorized abortion services as non-essential).