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Abortion Access: A Strain on the Most Vulnerable Women in Texas Post-Dobbs

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COMMENTS

ABORTION ACCESS: A STRAIN ON THE MOST VULNERABLE WOMEN IN TEXAS POST-*DOBBS*

ALEEA COSTILLA*

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* St. Mary's University School of Law, J.D. Candidate, May 2024. St. Mary's University, B.A., 2021. As a second-generation Mexican American whose family came to the United States for "the American Dream," this piece is for the women who struggle to arrive and, when they do, are still deprived of something. Your fight is recognized.

With the deepest of gratitude, thank you to my mother and father, Angelita and Ricardo Costilla, who continue to encourage and support me on the toughest of days. Your sacrifices do not go unnoticed, and for this, I will forever be indebted to you both. Thank you to Thomas Vargas for your unwavering love and for cheering me on while writing this piece. I would also like to thank my grandparents, Olivia and Nicandro Costilla and Angela and Roberto Gonzalez, for whose strength and bravery I am privileged to be where I am today.

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*“Undocumented communities continuously face assaults on their human rights and their dignity, and this is just one more manifestation of what they have to deal with.”*¹

INTRODUCTION

The initial draft of the *Dobbs v. Jackson’s Women’s Health Organization* opinion, leaked to the general public by undisclosed sources, marked a paradigm shift and a troubling new reality for women.² The Supreme Court’s official publication of its judgment validated the fears of women across the United States.³ The judiciary took away the right to access a

1. Alexandra Martinez, *Undocumented People Have Already Been Living in a Post-Roe World*, PRISM (June 3, 2022), <https://prismreports.org/2022/06/03/undocumented-people-already-living-post-roe/> [<https://perma.cc/6FPS-BL8L>] (calling attention to the fact that undocumented communities already faced significant barriers to abortion care prior to *Roe*’s downfall) (emphasis added).

2. See generally Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO, <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/7A4D-N6CW>] (last updated May 3, 2022, 2:14 PM) (reporting on the draft opinion of *Dobbs v. Jackson Women’s Health Organization* obtained by Politico).

3. See generally Nina Totenberg & Sarah McCammon, *Supreme Court Overturns Roe v. Wade, Ending Right to Abortion Upheld for Decades*, NPR, <https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn> [<https://perma.cc/9NA9-PXDF>] (last updated June 24, 2022, 10:43 AM) (underscoring the legal uncertainty ahead).

safe and legal abortion from those of childbearing age, overturning a nearly fifty year precedent established by *Roe v. Wade*.⁴ Although *Dobbs* marked an extraordinary shift for the general public, a subset often unrecognized by the mainstream media was all too familiar with the fear and uncertainty in a post-*Roe* reality: the undocumented population in America.⁵

For example, prior to the *Dobbs* opinion, an abortion under Texas law was subject to restrictions, prohibiting the termination of a pregnancy once a fetus's heartbeat was detected.⁶ In other words, for unwanted pregnancy, Texas law necessitated a prompt response before an in-state abortion became impermissible.⁷ Once a fetal heartbeat was detected, seeking an abortion required traveling across state lines, a highly unfeasible avenue for most women.⁸ For undocumented women in Texas, an out-of-state abortion was never a viable alternative—even pre-*Dobbs*.⁹

Undocumented immigrants, particularly women, face insurmountable risks on the treacherous journey to the United States in search of a better

4. See *Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services*, WHITE HOUSE (July 8, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/08/fact-sheet-president-biden-to-sign-executive-order-protecting-access-to-reproductive-health-care-services/> [https://perma.cc/8CDF-HRSW] (“This decision expressly took away a right from the American people that it had recognized for nearly 50 years—a woman’s right to make her own reproductive health care decisions, free from government interference.”).

5. See, e.g. *id.* (recognizing the decision’s effect on “women of color, low-income women, and rural women” but not undocumented immigrants).

6. See Texas Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, secs. 171.201–171.211, 2021 Tex. Gen. Laws 125, 125–31 (current version at TEX. HEALTH & SAFETY CODE §§ 171.201–171.211) (“A physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat[.]”).

7. See generally *id.* (current version at TEX. HEALTH & SAFETY CODE §§ 171.201–171.211) (acknowledging the limited time frame available for pregnant women to have an abortion before a heartbeat is detected).

8. See Lindsay Johnson, *The Disparate Impact of Texas’ Abortion Ban on Low-Income and Rural Women*, GEO. L. ON POVERTY & POL’Y (Feb. 24, 2022), <https://www.law.georgetown.edu/poverty-journal/blog/the-disparate-impact-of-texas-abortion-ban-on-low-income-and-rural-women/> [https://perma.cc/KX49-HB2H] (highlighting how strenuous the journey to obtain an out-of-state abortion is for impoverished communities).

9. See generally Kate Huddleston, *Border Checkpoints and Substantive Due Process: Abortion Rights in the Border Zone*, 125 YALE L.J. 1744, 1752 (2016) (illustrating the impossibility for women within the border zone to travel for an abortion out of the 100-mile radius).

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life.¹⁰ Tragically, women of childbearing age frequently encounter sexual abuse on the pilgrimage to cross the United States-Mexico border.¹¹ Inevitably, some women arrive in Texas facing an unexpected and unwanted pregnancy with limited options for dealing with it due to significant restrictions.¹² Post-*Dobbs*, Texas's "trigger" law forced women in onerous situations to adhere to the ultra-conservative ideals of the state legislature.¹³ Consequently, their options are to risk deportation or carry an unwanted pregnancy to term, leaving their lives clouded with fear.¹⁴

Coercing a woman to carry a child can impede her financial, physical, and mental disposition.¹⁵ More specifically, undocumented women will find it arduous to pursue opportunities in the United States that may lead to lawful documentation due to the fiscal constraints of caring for a newborn.¹⁶ Furthermore, it is doubtful that an undocumented woman will receive the necessary prenatal care to ensure a safe and healthy pregnancy.¹⁷ The harmful repercussions of the trigger ban in Texas affect

10. See, e.g., Jude Joffe-Block, *Women Crossing the U.S. Border Face Sexual Assault with Little Protection*, PBS NEWS HOUR (Mar. 31, 2014, 1:49 PM), <https://www.pbs.org/newshour/nation/facing-risk-rape-migrant-women-prepare-birth-control> [<https://perma.cc/6UAG-ZW43>] (providing an immigrant woman's perspective on the journey to the United States, which she described as "awful" and stated she "wouldn't wish it on anyone").

11. See *id.* (detailing that pharmacists and border-crossing guides, or "coyotes," recommend women start taking birth control or administer a pregnancy prevention injection prior to embarking on their journey).

12. See *id.* (identifying immigrant women who did not become pregnant on the journey but were nevertheless subjected to appalling and violent situations).

13. See generally Human Life Protection Act, 87th Leg., R.S., ch. 800, § 2, secs. 170A.002, 2021 Tex. Gen. Laws 1886, 1886 (current version at TEX. HEALTH & SAFETY CODE § 170A.002) (banning almost all abortions in the state upon *Roe*'s demise).

14. See Eleanor Klibanoff ET AL., *With Roe v. Wade on the Line, Some Texans Look South of the Border for Abortion Drugs*, TEX. TRIB. (May 6, 2022, 5:00 AM), <https://www.texastribune.org/2022/05/06/south-texas-mexico-abortion-drugs/> [<https://perma.cc/8PGK-2SYK>] (describing the desperate measures women in border zones must take to end an unwanted pregnancy).

15. See generally Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 GUTTMACHER POL'Y REV. 46, 47 (2016), https://www.guttmacher.org/sites/default/files/article_files/gpr1904616_0.pdf [<https://perma.cc/WSC6-H6CM>] (expressing one reason women opt for an abortion is their recognition of the underlying economic impact of an unwanted pregnancy).

16. See generally *id.* (recognizing that most women who sought abortions felt "that having a baby would interfere with their work [or] school" commitments).

17. See Rachel Fabi, *Undocumented Immigrants and Health Care Access in the United States*, HASTINGS CTR., <https://undocumented.thehastingscenter.org/issuebrief/undocumented-immigrants-in-the-united-states-access-to-prenatal-care/> [<https://perma.cc/QM8R-XGHB>] (last

undocumented women beyond comprehension and will be discussed further.¹⁸ The scope of this Comment assesses how the constitutional rights of undocumented women in Texas' border region and throughout the state are infringed upon.¹⁹ The Comment's purview seeks to be inclusive of women in Texas who may have lost "legal" status and are likewise constrained from traveling to another state.²⁰

Section II of this Comment explores the historical framework of abortions in the United States, beginning with its origins in English common law.²¹ A brief discussion of abortion jurisprudence at the federal level precedes an exploration of the current state of abortion politics in Texas.²² Section III identifies the most vulnerable population as undocumented immigrants residing in the border zone of an abortion-restricted Texas.²³ Next, the Comment examines the due process and equal protection rights of this vulnerable class, ultimately concluding that those rights are unduly

updated Sept. 12, 2014) ("[U]ndocumented immigrants living in the U.S. are significantly less likely to have 'adequate' prenatal care, compared to other immigrants and to U.S. born citizens.").

18. *See generally* Boonstra, *supra* note 15, at 46–47 (stressing the heightened financial obstacles faced by low-income women seeking to terminate an unwanted pregnancy); *see also* Fabi, *supra* note 17 (reporting the physical detriments women face during a pregnancy without prenatal care).

19. *See generally* U.S. CONST. amend. XIV, § 1 (assuring that the phrase "any person" includes undocumented immigrants, designating them as a protected class under the Fourteenth Amendment).

20. *See generally* *What's the Difference Between Legal and Undocumented Immigrants?*, WASH. STATE DEP'T OF SOC. & HEALTH SERVS., <https://www.dshs.wa.gov/faq/what's-difference-between-legal-and-undocumented-immigrants> [<https://perma.cc/HYR5-BHDC>] (detailing the various statuses an immigrant in the United States can have. Thus, the undocumented status refers to people who "do not possess a valid visa or other immigration documentation . . . stayed longer than their temporary visa permitted, or otherwise violated the terms under which they were admitted.").

21. *See infra* II. History; *see generally* Sybil Shainwald, *Reproductive Injustice in the New Millennium*, 20 WM. & MARY J. WOMEN & L. 123, 131 (2013) (chronicling the inception of the criminalization of abortions in the United States).

22. *See generally* KAREN J. LEWIS & JON O. SHIMABUKURO, CONG. RSCH. SERV., 95-724, ABORTION L. DEV.: A BRIEF OVERVIEW (2009) ("The Supreme Court's decisions . . . did not address a number of important abortion-related issues which have been raised subsequently by state actions seeking to restrict the scope of the Court's rulings.").

23. *See infra* III. Analysis; *see, e.g.*, Amanda Su, *Challenges Increase for Immigrants Accessing Abortion After Roe Reversal*, ABC NEWS (July 17, 2022, 6:00 AM), <https://abcnews.go.com/US/challenges-increase-immigrants-accessing-abortion-rore-reversal/story?id=86404717> [<https://perma.cc/A7PR-UJQ2>] (depicting the story of an undocumented immigrant in Houston who was restricted from traveling out of the state for an abortion).

infringed upon by *Dobbs* and its preceding line of cases.²⁴ Section III further describes the suboptimal alternatives available to undocumented persons seeking abortion care.²⁵

Section IV offers potential remedial actions the Executive and Legislative Branches could adopt.²⁶ The Biden Administration has three options at their disposal that would immediately alleviate this public health crisis: (1) utilize federal lands for abortion care; (2) declare a federal emergency to expand abortion care via telehealth services; and (3) push for the codification of *Roe* or similar legislation to provide blanket protection of abortion rights across all fifty states.²⁷ The primary goal of this Comment is to draw attention to the precarious situation faced by this vulnerable group of individuals.²⁸

24. See *infra* III. Analysis; see *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 215–16, 231 (2022) (denying the right to an abortion previously guaranteed by the Due Process and Equal Protection Clauses).

25. See *infra* III. Analysis; see Klibanoff ET AL., *supra* note 14 (describing the limited choices available to obtain abortion medication such as traveling to Mexico); see also *Abortion in Texas: Find Assistance for Cost, Travel, and More*, ABORTION FINDER, <https://www.abortion-finder.org/abortion-guides-by-state/abortion-in-texas/funds-support-organizations> [<https://perma.cc/33WS-6GTK>] (listing the limited organizations and resources available to assist women seeking an abortion in Texas).

26. See *infra* IV. Solution; cf. *Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services*, *supra* note 4 (outlining the Biden Administration's plan of action, which has failed to make a remedial difference).

27. See David S. Cohen ET AL., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 80–81 (2023) (suggesting the federal government could promote access to abortion care by the use of federal land: “[T]he Biden Administration could deploy its power to declare a public health emergency[.]”); see also 42 U.S.C. § 5122(1) (providing that the President determines whether an “emergency” exists); see also Kathryn N. Peachman, *The Need to Codify Roe v. Wade: A Case for National Abortion Legislation*, 45 J. LEGIS. 272, 288 (2019) (advocating for Congress to enact legislation that permits women the right to access an abortion in their state).

28. See Press Release, United States: Abortion Bans Put Millions of Women and Girls at Risk, UN Experts Say, U.N. Hum. Rts. Off. of the High Comm’r (June 2, 2023), <https://www.ohchr.org/en/press-releases/2023/06/united-states-abortion-bans-put-millions-women-and-girls-risk-un-experts-say> [<https://perma.cc/5F3W-JS8C>] (relaying that U.N. experts found that women and girls from marginalized communities are disproportionately affected by abortion bans).

I. HISTORY

A. *The Legality and Illegality of Abortions Prior to Roe v. Wade*

Prior to 1812, American common law failed to address whether abortion was a legitimate alternative for expectant women.²⁹ Surprisingly, between 1607 and 1830, women in the United States were afforded the right to have an abortion.³⁰ Until the mid-nineteenth century, most states relied on English common law as the foundation for their abortion precedent.³¹ For instance, in 1821, Connecticut enacted abortion legislation that adopted the “quick with child” ideology found in Lord Ellenborough’s Act.³² Under this ideology, women seeking abortions were punished on a sliding scale, wherein those who terminated their pregnancy after “quickening” were more harshly punished.³³ As of 1840, few states had statutes relating to abortion, including Texas.³⁴ But by the onset of the twentieth century, nearly all states, with the exception of Kentucky, had enacted statutes prohibiting abortion.³⁵ Justice Rehnquist noted that prior to the 1973 *Roe v. Wade* decision, twenty-one out of thirty-six anti-abortion state laws predated 1868 and remained in effect at the time of

29. See *Commonwealth v. Bangs*, 9 Mass. 387, 388 (1812) (referencing abortion for the first time in American jurisprudence).

30. See Shainwald, *supra* note 21, at 127 (describing the bases for common law protections of abortion in the United States from 1607 to 1830).

31. See *Roe v. Wade*, 410 U.S. 113, 138 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (discussing the historical development of abortion laws in the United States).

32. See *id.* at 138, 174 (citing Conn. Stat. Tit. 20, ss 14, 16 (1821), the first state law dealing with abortion); see also Brandon “Bo” F. Pons, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go from Here?*, 58 S.D.L. REV. 119, 126 (2013) (describing Lord Ellenborough’s Act of 1803, which criminalized all abortions, but based the severity of the punishment on whether the mother was “quick with child”).

33. See Pons, *supra* note 32, at 126 (explaining that the quickening distinction initially had a significant effect in early American jurisprudence); see also *Quickening*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining quickening as “[t]he first motion felt in the womb by the mother of the fetus, usually occurring near the middle of the pregnancy”).

34. See *Roe v. Wade*, 410 U.S. 113, 138 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (indicating the scarcity of abortion laws in the United States in the mid-nineteenth century).

35. See *generally* LEWIS & SHIMABUKURO, *supra* note 22, at 1–2 (tracking the historical progression of abortion law in the United States).

the ruling.³⁶ For example, Texas promulgated its first criminal abortion statute in 1854, and it persisted without modification for over a century.³⁷

B. Abortion Precedent in the United States

Griswold v. Connecticut pioneered a series of Supreme Court cases addressing the topic of abortion.³⁸ The *Griswold* Court grappled with whether the Fourth Amendment safeguarded the right of a married couple to use contraceptives.³⁹ The Court held that the Bill of Rights has penumbras, guaranteeing zones of privacy and justifying contraceptives as a form of protection within these zones.⁴⁰ Thus, the Court decided that Connecticut's law prohibiting contraceptives in marriage violated the sanctity of privacy inherent in the fundamental union of two people.⁴¹ In deciding *Griswold*, the Supreme Court took it upon itself to decide the metes and bounds of women's reproductive rights.⁴² Less than a decade after *Griswold*, the Supreme Court granted certiorari to hear *Roe v. Wade*, challenging the restricted right to an abortion.⁴³

The 1973 case concerned Jane Roe (a pseudonym), a woman seeking a voluntary abortion from a licensed physician—a procedure prohibited by Texas criminal statutes, which allowed abortions only in the case of

36. See *Roe v. Wade*, 410 U.S. 113, 174–76 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (“By the time of the adoption of the Fourteenth Amendment in 1868, there were at least [thirty-six] laws enacted by state or territorial legislature limiting abortion. While many States have amended or updated their laws, [twenty-one] of the laws on the books in 1868 remain in effect today.”).

37. See *generally id.* at 119 (touching upon the history of abortion laws in Texas).

38. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (introducing the right to privacy argument as it pertains to reproductive rights within a marital relationship).

39. See *id.* at 484–85 (referring to precedent where the Court found the Fourth Amendment created a right to privacy).

40. See *id.* at 485–86 (citing the First, Third, Fourth, Fifth, and Ninth Amendments).

41. See *id.* at 484–85 (finding that the Connecticut law forbidding the use of contraceptives had a “maximum destructive impact upon the [marital] relationship”).

42. See *generally id.* at 485 (“The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”).

43. Compare *Griswold*, 381 U.S. at 485 (granting the right to marital privacy, allowing married couples to decide whether to use contraceptives without government interference); *with* *Roe v. Wade*, 410 U.S. 113, 154 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (extending the right to privacy by granting women the right of personal privacy to decide whether to get an abortion).

an emergency.⁴⁴ Consequently, Roe argued that the Texas statutes violated her right to personal privacy as enumerated in the Bill of Rights and the Fourteenth Amendment.⁴⁵ The Supreme Court conducted thorough historical analysis of abortion jurisprudence, explaining the rationale behind criminal abortion statutes thus far.⁴⁶ For example, when abortion laws first originated, the procedure posed grave risks to women and frequently resulted in death, so it had been argued that the laws restricting abortion were aimed at protecting pregnant women by prohibiting a procedure that placed her life in danger.⁴⁷ However, contemporary abortion procedures carried out in the first trimesters are relatively safe and pose little danger to the health of pregnant women.⁴⁸ Thus, the state's more compelling interest is preserving the life of the fetus past the point of viability.⁴⁹ Accordingly, the Court held there is a *limited* right to an abortion.⁵⁰ The state has a compelling interest in preserving the viability of the fetus beyond the point of viability, but up to that point, a physician and her patient are free to determine whether abortion is a suitable option.⁵¹

Although abortion issues were hotly contested in the lower courts in the wake of *Roe*, the Supreme Court did not rigorously tackle the issue

44. See *Roe*, 410 U.S. at 120 (discussing the circumstances that restricted *Roe* from obtaining an abortion in Texas).

45. See *id.* (detailing *Roe*'s argument that the Texas law violated her First, Fourth, Fifth, Ninth, and Fourteenth Amendment rights and the rights of "all other women similarly situated").

46. See *id.* at 129–47 (utilizing a historical framework to arrive at three reasons that "have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence").

47. See *id.* at 148–49 (detailing the second reason abortion laws were first enacted in the 19th century).

48. See *id.* at 149–50, 163 (asserting the end of the first trimester is the "compelling point" at which the state's legitimate interest in the health of the mother begins; thus, the state may regulate abortion "from and after this point . . . to the extent that the regulation reasonably relates to the preservation and protection of maternal health").

49. See *Roe* 410 U.S. at 163–64 (finding that a state interested in protecting fetal life after viability may do so as it sees fit so long as it allows abortions when "it is necessary to preserve the life or health of the mother").

50. See *id.* at 154, 155 (stating that the right to personal privacy with regard to the abortion decision is "subject to some limitations" in the courts) (emphasis added).

51. See *id.* at 163 (drawing a bright line at the end of the first trimester).

again for nearly two decades.⁵² In *Planned Parenthood of Southern Pennsylvania v. Casey*, the Court granted certiorari to review certain provisions of the Pennsylvania Abortion Control Act of 1982 that required: (1) pregnant women to give their “informed” consent to an abortion after a 24-hour waiting period; (2) pregnant minors to obtain consent from a parent; (3) married women to notify her husbands of their intention to obtain an abortion; and (4) abortion facilities to meet strict reporting requirements.⁵³ The first three provisions could be waived only in limited circumstances, such as in the case of a medical emergency.⁵⁴ Ultimately, the Court reaffirmed *Roe*’s essential holding but abandoned the trimester framework.⁵⁵ In its place, the “undue burden” standard was adopted as the appropriate measure for determining whether the state placed an unconstitutional barrier in the way of reproductive care.⁵⁶ Under the new standard, only the third provision failed to pass muster, while remaining provisions were deemed constitutional.⁵⁷

The Supreme Court did not revisit the precedent established in *Roe* and *Casey* until the twenty-first century.⁵⁸ In *Dobbs v. Jackson Women’s Health Organization*, the Supreme Court granted certiorari to review the constitutionality of a Mississippi law prohibiting abortion after the fifteenth week of pregnancy.⁵⁹ Consequently, if the Mississippi law were

52. See generally *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (remarking upon the fact that the Court’s decision in *Roe* “is still questioned” even nineteen years later).

53. See *id.* at 844 (listing the five provisions of the Pennsylvania Abortion Control Act of 1982 at issue in the case).

54. See *id.* at 844 (noting the exemptions in the Pennsylvania Abortion Control Act of 1982).

55. Compare *Roe*, 410 U.S. at 164 (establishing a trimester framework to describe when governmental intervention is allowed); with *Casey* 505 U.S. at 846, 872 (criticizing *Roe*’s trimester approach as rigid and contradictory).

56. See *Casey*, 505 U.S. at 876–77 (holding that the undue burden standard is the proper means for determining when the state has made it unjustifiably difficult for a woman to receive an abortion).

57. See *id.* at 896–900 (holding the spousal notice requirement unconstitutional because it allows a husband to veto his wife’s decision, which the Court finds outdated and dangerous to women).

58. See *Roe*, 410 U.S. at 163 (holding a woman has a right to an abortion based on the trimester framework); see also *Casey*, 505 U.S. at 876–77 (keeping *Roe*’s essential holding but establishing an undue burden standard for women seeking abortion).

59. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 230 (2022) (acknowledging that the fifteen week timeline in Mississippi’s law occurs well before the fetus is considered viable).

overruled, *Roe* and *Casey* would be as well.⁶⁰ *Dobbs* sought to overturn decades of precedent established in *Roe* and upheld in *Casey*, asking whether “all pre-viability prohibitions on elective abortions are unconstitutional.”⁶¹ After refusing to engage in “judicial policymaking,” the Court decided that the term “liberty” in the Fourteenth Amendment did not extend to the right to an abortion as indicated by precedent.⁶² Justice Alito, writing for a 6-3 majority, relied heavily on history to conclude that “a right to an abortion is not deeply rooted in the Nation’s history and traditions.”⁶³ *Dobbs* overruled *Roe* and *Casey*, abolishing the constitutional right to an abortion and effectively deferring the issue to the states.⁶⁴

C. *Abortion Policies in Texas*

Meanwhile, Texas Representatives sought to circumvent *Roe* for decades by promulgating legislation that unduly burdens a woman’s right to an abortion.⁶⁵ The legislature curated their approaches by structuring abortion regulations without overextending established precedent from *Roe* and *Casey*.⁶⁶ In 1999, Texas launched its tirade against *Roe* with Senate Bill 30 (SB 30), informally known as the Parental Notification Bill.⁶⁷ The bill required unemancipated minors to notify the minor’s

60. *See id.* at 231 (explicitly overruling *Roe* and *Casey*).

61. *See id.* at 234 (expressing the question before the Court and briefly summarizing the arguments on both sides).

62. *See id.* at 241 (arguing that the *Roe* and *Casey* Courts misconstrued history as it relates to the Fourteenth Amendment and the right to an abortion).

63. *See id.* at 241–50 (summarizing Justice Alito’s historical argument, which led him to conclude that case law and statutory law never granted abortions, but rather, assumed it to be a crime).

64. *See Dobbs*, 597 U.S. at 292 (holding that the Constitution does not grant the right to an abortion, leaving “the authority to regulate abortion . . . to the people and their elected representatives”).

65. *See generally History of Abortion Laws*, TEX. STATE L. LIBR., <https://guides.sll.texas.gov/abortion-laws/history-of-abortion-laws> [https://perma.cc/UP27-F3LF] (last updated Dec. 12, 2023, 3:29 PM) (providing an overview of Texas abortion laws through the years).

66. *See id.* (detailing how “Pre-*Roe*” abortion laws in Texas were either changed or overruled by Supreme Court precedents).

67. *See id.* (describing the parental notification bill, which requires physicians to notify the parent or guardian of unemancipated minors of the minor patient’s abortion).

parents at least forty-eight hours before the anticipated abortion.⁶⁸ However, the requirement for parental notification can be waived if the unemancipated minor receives a court order known as a “judicial bypass,” which is subject to a stringent review of the circumstances by the court.⁶⁹

Four years later, the Texas Legislature passed the “Woman’s Right to Know Act,” which required an attending physician to convey certain information to patients seeking an abortion.⁷⁰ The purported purpose of the Act was to inform women of the risks associated with the abortion procedure.⁷¹ Women seeking an abortion would receive alarming information detailing the medical risks of both the abortion and carrying the child to full-term, the gestational age of the unborn fetus at the time of the abortion, and various options for care if abortion was not chosen.⁷² The Act was nothing more than a thinly veiled attempt to dissuade women from an abortion, masquerading under the guise of informed consent.⁷³ In 2011, Texas amended the law to further require physicians to perform a sonogram and display the resulting image to the woman seeking an abortion.⁷⁴

Shortly thereafter, the Texas Legislature passed HB 2, a law that was subsequently invalidated in part by the Supreme Court in *Whole Woman’s*

68. See Act of May 26, 1999, 76th Leg., R.S., ch. 395, § 1, sec. 33.002, 1999 Tex. Gen. Laws 2466, 2466–67 (current version at TEX. FAM. CODE § 33.002) (noting that physicians must notify the parent or guardian of the minor patient seeking an abortion via phone or in person).

69. See *id.* at 2468–69 (current version at TEX. FAM. CODE § 33.003) (requiring the reviewing court to determine by a preponderance of evidence that they are mature and well-informed to make the decision of an abortion without a parent or guardian).

70. See Woman’s Right to Know Act, 78th Leg., R.S., ch. 999, § 1, sec. 171.012, 2003 Tex. Gen. Laws 2930, 2931–32 (current version at TEX. HEALTH & SAFETY CODE § 171.012) (specifying the necessary elements to satisfy “Voluntary and Informed Consent” for an abortion).

71. See *generally id.* at 2931–32 (establishing what information the physician must disclose to the pregnant woman receiving the abortion procedure).

72. See *id.* (requiring physicians to provide a great deal of in-depth information regarding the abortion).

73. See *generally id.* (creating a long list of requirements before a woman can receive an abortion).

74. See Act of May 7, 2011, 82d Leg., R.S., ch. 73, § 2, sec. 171.012(a)(4)–(5), 2011 Tex. Gen. Laws 342, 342–45 (current version at TEX. HEALTH & SAFETY CODE § 171.012(a)(4)–(5)) (requiring physicians to show a sonogram to the patient unless the pregnancy is a result of sexual assault, incest, qualifies under the Penal Code, or the woman is a minor obtaining the abortion as a result of a judicial bypass).

Health v. Hellerstedt.⁷⁵ One provision of the Act prohibited abortions after twenty weeks post-fertilization, citing medical evidence indicating the fetus may feel pain at that stage of development.⁷⁶ The Act also mandated physicians performing or inducing the abortion to have “admitting privileges” at a hospital within thirty miles of the abortion facility.⁷⁷ Unsurprisingly, obtaining admitting privileges involved an “extensive application process” and was “not guaranteed.”⁷⁸ Furthermore, the Act imposed an additional burden on abortion care facilities by requiring them to comply with the same standards as ambulatory surgical centers.⁷⁹ In other words, HB 2 heightened the standards for abortion care facilities, placing another heavy burden on clinics.⁸⁰

After the Supreme Court invalidated certain provisions of HB 2, the Texas Legislature’ revised 1999 SB 30 and, in 2016, came up with HB 3994.⁸¹ HB 3994 created stricter guidelines for proof of identity and age,

75. See generally Act of July 15, 2013, 83d Leg., 2d C.S., ch. 1, §§ 2, 4, secs. 171.0031, 171.044, 245.010(a), 2013 Tex. Gen. Laws 5013, 5013–14, 5017 (providing higher standards for abortion facilities and physicians performing abortions, prohibiting abortions twenty weeks post-fertilization, and increasing the minimum standards required for an abortion facility); *but see* Whole Women’s Health v. Hellerstedt, 579 U.S. 582, 623 (2016), *abrogated by* Dobbs v. Jackson Women’s Health Org., 597 U.S. 215 (2022) (striking down the admitting-privileges requirement and clinic standards of HB 2 because they were an “undue burden” on pregnant women’s constitutional right to an abortion).

76. See Preborn Pain Act, 83d Leg., 2d C.S., ch. 1, § 2, sec. 171.044, 2013 Tex. Gen. Laws 5013, 5014 (attempting to establish a compelling state interest to protect the unborn fetus from pain).

77. See Act of July 15, 2013, 83d Leg., 2d C.S., ch. 1, § 2, sec. 171.0031(a)(1)(A), 2013 Tex. Gen. Laws 5013, 5013–14 (creating additional ways to restrict a physician’s ability to care for their patients).

78. See *History of Abortion Laws*, *supra* note 65 (summarizing the requirements for admitting privileges).

79. See Act of July 15, 2013, 83d Leg., 2d C.S., ch. 1, § 4, sec. 245.010(a), 2013 Tex. Gen. Laws 5013, 5017 (claiming that these stricter standards are meant “to protect the health and safety of a patient of an abortion facility”).

80. See *Hellerstedt*, 579 U.S. at 623 (acknowledging how burdensome requirements for abortion clinics made safe abortions scarcely available to women).

81. See *id.* at 584 (declaring the admitting privileges and surgical requirements for abortion clinics from HB 2 unconstitutional because they placed an undue burden on abortion access); *compare* Act of May 26, 1999, 76th Leg., R.S., ch. 395, § 1, sec. 33.002, 1999 Tex. Gen. Laws 2466, 2466–69 (current version at TEX. FAM. CODE § 33.002) (creating parental notification requirements for unemancipated minors seeking an abortion); *with* Act of June 1, 2015, 84th Leg., R.S., ch.436, § 3, sec. 33.002, 2015 Tex. Gen. Laws 1697, 1697–98 (current version at TEX. FAM. CODE

required parental notification in the case of a medical emergency abortion, required parental consent before obtaining an abortion, and further complicated the judicial bypass route.⁸² Thus, despite the Supreme Court's criticisms of HB 2, Texas Representatives continued to pave a path towards obstructing a woman's right to an abortion.⁸³

Notably, in 2021, Texas passed SB 8, also referred to as the Texas Heartbeat Act, and HB 1280, known as Texas's trigger law because overturning *Roe* would "trigger" it into effect.⁸⁴ The disputed legislation imposed some of the most stringent limitations on abortion care in the nation, seemingly disregarding established precedent.⁸⁵ More specifically, SB 8 restricted abortions after the detection of a fetal heartbeat, citing dubious legislative findings that once a heartbeat develops, a fetus can achieve birth.⁸⁶ SB 8 subjected anyone who facilitates an abortion or an attempt thereof to a \$10,000 penalty.⁸⁷ Thus, forcing women to face the

§ 33.002) (imposing stricter age requirements and complicating the process for obtaining a judicial bypass).

82. See Act of June 1, 2015, 84th Leg., R.S., ch.436, § 3, sec. 33.002, 2015 Tex. Gen. Laws 1697, 1697–98 (current version at TEX. FAM. CODE § 33.002) (requiring physicians to provide actual notice to a minor's parent forty-eight hours prior to performing the abortion).

83. See *History of Abortion Laws*, *supra* note 65 (explaining the historical aftermath of *Whole Women's Health*).

84. See *id.* (detailing the specifics of the latest abortion legislation in Texas, which imposed heightened restrictions for women seeking abortions).

85. Compare *Roe v. Wade*, 410 U.S. 113, 166 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (granting women the right to an abortion using the trimester framework); and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 979 (1992), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (establishing an undue burden standard for women seeking abortion access); with Texas Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, secs. 171.201–171.211, 2021 Tex. Gen. Laws 125, 125–31 (current version at TEX. HEALTH & SAFETY CODE §§ 171.201–171.211) (prohibiting an abortion after the fetal heartbeat is detected).

86. See Texas Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, secs. 171.202, 171.204, 2021 Tex. Gen. Laws 125, 126–27 (current version at TEX. HEALTH & SAFETY CODE §§ 171.202, 171.204) (justifying the state's compelling interest in protecting the woman and the fetus).

87. See *id.* at secs. 171.208, 2021 Tex. Gen. Laws 125, 12–29 (current version at TEX. HEALTH & SAFETY CODE § 171.208) (allowing anyone—other than government employees—to bring a civil action against anyone who performs an abortion or aids or abets the performance of an abortion).

arduous task of knowing exactly when they became pregnant to avoid civil liability.⁸⁸

The trigger law was created solely in anticipation that a newly conservative majority on the Supreme Court would overrule *Roe*.⁸⁹ In essence, the trigger law, completely banned abortions from the moment of conception with very narrow exceptions in the case of medical emergencies.⁹⁰ In the aftermath of *Dobbs*, which effectively overturned *Roe* and *Casey*, Texas women must now confront the grim reality of forced childbirth.⁹¹ The once fundamental liberty enjoyed by millions was abruptly taken away, placing the heaviest burden on the most vulnerable.⁹²

II. ANALYSIS

Since *Dobbs*, states across the U.S. have imposed a variety of restrictive policies on abortion, with some of the “most restrictive” states neighboring Texas.⁹³ The individuals shouldering the greatest burden are the women who cannot readily travel across state lines.⁹⁴ Of the four states bordering Texas, three—Arkansas, Louisiana, and Oklahoma—also have

88. See generally *id.* at secs. 171.201–171.211, 2021 Tex. Gen. Laws 125, 125–31 (current version at TEX. HEALTH & SAFETY CODE §§ 171.201–171.211) (restricting an abortion once a fetal heartbeat is detected, which can occur as early as six weeks into a pregnancy).

89. See Human Life Protection Act, 87th Leg., R.S., ch. 800, § 2, secs. 170A.002, 2021 Tex. Gen. Laws 1886, 1887 (specifying the Act would take effect thirty days after *Roe* and *Casey* are overturned).

90. See Human Life Protection Act, 87th Leg., R.S., ch. 800, § 2, secs. 170A.002, 2021 Tex. Gen. Laws 1886, 1886 (current version at TEX. HEALTH & SAFETY CODE § 170A.002) (creating only one exception to perform an abortion—“a life-threatening physical condition aggravated by . . . the pregnancy”).

91. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 292 (2022), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (returning “the authority to regulate abortion . . . to the people and their elected representatives”).

92. See generally *id.* at 407–08 (Breyer, J., dissenting) (stressing that “the greatest burden will fall” on impoverished women because they cannot afford to travel to obtain abortion care services).

93. See, e.g., *Interactive Map: US Abortion Policies and Access After Roe: Texas*, GUTTMACHER, <https://states.guttmacher.org/policies/texas/abortion-policies> [<https://perma.cc/VGN7-WRLL>] (last updated Dec. 20, 2023) (displaying Texas along with its bordering states of Louisiana, Oklahoma, and Arkansas as states with the “most restrictive” laws).

94. See generally *id.* (summarizing the difficulties women now face when “forced to navigate around abortion bans and restrictions”).

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trigger bans.⁹⁵ New Mexico is the sole state bordering Texas where women of childbearing age can access less restrictive abortion care.⁹⁶ Thus, Texas women seeking an abortion must travel great distances to out-of-state clinics, often requiring multiple trips over multiple days.⁹⁷ Generally, the further along a woman is in her pregnancy, the greater the distance she must travel to reach an abortion care facility.⁹⁸ HB 1280 left Texas women with very limited access to intrastate abortion care.⁹⁹ Thus, thanks to the Texas Legislature, seven million Texas women of reproductive age, forty-three percent of which are Hispanic, may be forced to carry unwanted or dangerous pregnancies to term, particularly if they cannot afford the luxury of interstate travel for such care.¹⁰⁰

A. *The Most Vulnerable*

Together, SB 8 and HB 1280 significantly eradicated abortion care clinics from the state of Texas.¹⁰¹ The most vulnerable populations, highly affected by this lack of access, are “low-income women and women of color, who may lack the financial capacity to travel out of the state.”¹⁰² For example, women earning a minimum wage of \$7.25 an hour

95. See ELIZABETH SEPPER ET AL., AFTER *ROE*: CRIMINAL ABORTION BANS IN TEXAS 5 TEX. POL'Y EVALUATION PROJECT (2022) (noting that Texans don't have many options available for obtaining an out-of-state abortion after *Roe*).

96. See generally *id.* (mapping travel distances from major cities in Texas to New Mexico with distances ranging from 33 miles from El Paso to over eight-hundred miles from McAllen).

97. See *Interactive Map: US Abortion Policies and Access After Roe: Texas*, *supra* note 93 (identifying Texas policies burdening most Texans seeking access to abortion care).

98. See Elizabeth Nash ET AL., *Impact of Texas' Abortion Ban: A 14-Fold Increase in Driving Distance to Get an Abortion*, GUTTMACHER (Aug. 4, 2021), <https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion> [<https://perma.cc/M3H9-V3EZ>] (“Due to the many barriers to abortion care in Oklahoma and Louisiana . . . some people traveling from Texas likely would need to go even farther than one state away for care.”).

99. See SEPPER ET AL., *supra* note 95, at 3 (analyzing the narrowing exceptions for an abortion to be provided under HB 1280).

100. See *Interactive Map: US Abortion Policies and Access After Roe: Texas*, *supra* note 93 (exhibiting the demographical information of women in Texas who are of reproductive age, specifically fifteen to forty-nine years old).

101. See Johnson, *supra* note 8 (reporting the impending impact SB 8 will have on the number of abortion clinics across Texas, increasing traveling distance from seventeen to almost two-hundred and fifty miles).

102. See *id.* (giving a voice to a Black reproductive justice activist who indicated that SB 8 was the latest attack on women of color).

in Texas must allocate more than their daily income to travel just one way for an abortion.¹⁰³ Although HB 1280 does not directly penalize those who assist in the abortion process financially or otherwise, its former counterpart SB 8 does penalize those who aid or abet an abortion, reducing the likelihood of financial assistance being provided to these women.¹⁰⁴ Naturally, family or friends may be wary of the steep civil penalties imposed by the remnants of SB 8 and private citizens who may attempt to report that an abortion was sought.¹⁰⁵ Hence, lower-income individuals must rely solely on their own finances to procure an out-of-state abortion if they wish to avoid implicating others.¹⁰⁶

Even if a woman was capable of traveling to an abortion-friendly state, the procedure remains an out-of-pocket expense.¹⁰⁷ Nevertheless, a myriad of abortion seekers fall beneath the federal poverty line, presumably seeking an abortion to avoid the additional economic burden of an unwanted pregnancy.¹⁰⁸ In the years following *Roe*, most state Medicaid

103. *See id.* (calculating round trip expenses to be more than a full day's minimum wage earnings).

104. *Compare* Human Life Protection Act, 87th Leg., R.S., ch. 800, § 2, secs. 170A.004–170A.005, 2021 Tex. Gen. Laws 1886, 1887 (current version at TEX. HEALTH & SAFETY CODE §§ 170A.004–170A.005) (charging only the physician who performs the procedure); *with* Texas Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.208, 2021 Tex. Gen. Laws 125, 127–29 (current version at TEX. HEALTH & SAFETY CODE § 171.208) (charging anyone who “aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise”).

105. *See* Texas Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.208, 2021 Tex. Gen. Laws 125, 127–29 (current version at TEX. HEALTH & SAFETY CODE § 171.208) (providing that “any person . . . may bring a civil action” against a person who aids or abets in the abortion procedure).

106. *See generally* *QuickFacts: Texas*, U.S. CENSUS BUREAU (2020), <https://www.census.gov/quickfacts/fact/table/TX/PST045221> [<https://perma.cc/RG6M-3W6W>] (reporting that approximately fourteen percent of Texans live in poverty, a category within which many abortion seekers fall).

107. *See* Julie Appleby, *Three Things to Know About Health Insurance Coverage for Abortion*, NPR: HEALTH NEWS (July 13, 2022, 5:00 AM), <https://www.npr.org/sections/health-shots/2022/07/13/1111078951/health-insurance-abortion> [<https://perma.cc/3MHA-8QZB>] (clarifying that even individuals whose insurance does not cover an abortion may still receive one if they can travel to a state that provides the procedure and can afford to pay out of pocket).

108. *See* Boonstra, *supra* note 15, at 47 (comparing the unintended pregnancy rate among women below the poverty with the rate for women living above the poverty line).

programs routinely covered abortion care.¹⁰⁹ For example, in 1977, Medicaid funded a quarter of abortions in the United States.¹¹⁰ Unfortunately, states began revoking coverage for the low-income segment of women relying on these funds.¹¹¹ By 1976, Congress passed the Hyde Amendment, prohibiting the use of federal funds to pay for an abortion, unless a woman was facing life-threatening complications.¹¹² Shortly thereafter, women like Rosaura “Rosie” Jiménez suffered as a direct result of the congressional amendment, which left them unable to financially access abortion care in the United States.¹¹³

Uninsured abortion seekers are even less likely to be able to afford an abortion.¹¹⁴ According to the U.S. Census, Texas is home to the highest uninsured demographic.¹¹⁵ Most uninsured Texans live in counties along the Texas-Mexico border where about one-third of the population is uninsured.¹¹⁶ Additionally, healthcare providers and employers are under no obligation to cover “elective abortions,” with eleven states barring private insurers from including such procedures.¹¹⁷ As a result, the

109. See Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*, 15 CUNY L. REV. 391, 401 (2012) (echoing a period when the federal government funded abortion care).

110. See *id.* at 401–02 (noting the high portion of abortions Medicaid previously covered).

111. See *id.* at 402 (bemoaning the downward trend of states choosing not to fund abortions).

112. See *id.* (tracing the introduction of the Hyde Amendment into Congress and its passage).

113. See *Remembering Rosie Jiménez, Honoring Her Life Through Our Work*, NAT’L NETWORK OF ABORTION FUNDS (Oct. 3, 2011), <https://abortionfunds.org/remembering-rosie/> [<https://perma.cc/85U8-NSA7>] (memorializing Rosie, the first woman known to die by an illegal abortion in response to the formation of the Hyde Amendment, effectively warning of the danger of not providing federal Medicaid funds for abortions).

114. See generally Appleby, *supra* note 108 (providing an overview of insurance coverage for abortion, which varied greatly before *Dobbs* and has become increasingly convoluted post-*Dobbs*).

115. See *Small Area Health Insurance Estimates (SAHIE)*, U.S. CENSUS BUREAU (2020), <https://www.census.gov/data-tools/demo/sahie/#/> [<https://perma.cc/Q33Y-3KJD>] (reporting that about one in five Texans are uninsured).

116. See *id.* (showcasing a disproportionately high rate of uninsured people along the Texas-Mexico border, where many undocumented people reside).

117. See Appleby, *supra* note 108 (shedding light on whether health plans or employers must offer coverage for elective abortions).

oppressive restrictions in Texas are only half the battle for low-income women.¹¹⁸

Furthermore, within this cohort of low-income women, women of color bear additional burdens, such as the mortality risk associated with forced pregnancies.¹¹⁹ In considering the possibility of a total abortion ban in the United States, Dr. Amanda Stevenson's research revealed alarming implications for women of color.¹²⁰ The study's findings indicated that a total abortion ban would lead Non-Hispanic Black individuals to experience the greatest increase in pregnancy mortality at thirty-three percent.¹²¹ Second only to Non-Hispanic Blacks, Hispanics would experience pregnancy mortality at a rate of eighteen percent.¹²² Notably, the study did not incorporate mortality rates due to "unsafe abortion[s]," which would likely increase the overall calculations.¹²³ Dr. Stevenson recognized the implications of these findings for state-level abortion bans, particularly in Texas.¹²⁴ Her research persisted in demonstrating that carrying a pregnancy to term poses a higher risk to women than seeking a necessary abortion.¹²⁵ Considering that as of 2020, the maternal mortality rate in Texas stands at 18.4% per one-thousand births, HB 1280

118. *See generally id.* (reinforcing the uncertainty surrounding coverage of abortion care).

119. *See generally* Amanda Jean Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, 58 DEMOGRAPHY 2019, 2024 (2021) (quantifying the difference between estimated deaths before and after the abortion ban).

120. *See id.* at 2023 (explaining that denying "abortions in the United States would increase the risk exposure of pregnancy-related death by causing more pregnancies to be continued, and estimate[ing] how this increase in exposure would impact the annual number of pregnancy related deaths by racial and ethnic group[s]").

121. *See id.* (highlighting that among Non-Hispanic Black women risk of mortality would rise to one in one thousand).

122. *See id.* at 2023 (showing that Hispanic women in the first year of a complete abortion ban would expect a 6% increase in mortality, followed by 18% in the subsequent year).

123. *See id.* at 2020 (underestimating the true mortality rate since the research methodology did not account for unsafe abortion procedures).

124. *See* Stevenson, *supra* note 120, at 2020, 2026 (suggesting the possibility of a federal-level abortion ban but focusing on consequences at the state-level).

125. *See* Black Women Over Three Times More Likely to Die in Pregnancy, Postpartum Than White Women, *New Research Finds*, PRB (Dec. 6, 2021), <https://www.prb.org/resources/black-women-over-three-times-more-likely-to-die-in-pregnancy-postpartum-than-white-women-new-research-finds/> [<https://perma.cc/AD8N-FJME>] (finding that carrying pregnancy to term can be approximately fourteen times more hazardous than having an abortion).

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will undoubtedly adversely impact the current statistics.¹²⁶ Thus, mandating women to carry pregnancies to term under restrictive laws places low-income women, especially Black and Hispanic women, in a life-threatening position.¹²⁷

Within the cohort of low-income Hispanic women is a subset of undocumented immigrant women in Texas.¹²⁸ The difference between legal and undocumented immigrants is as follows:

Legal immigrants are foreign-born people legally admitted to the U.S. Undocumented immigrants, also called illegal aliens, are foreign-born people who do not possess a valid visa or other immigration documentation, because they entered the U.S. without inspection, stayed longer than their temporary visa permitted, or otherwise violated the terms under which they were admitted.¹²⁹

In essence, either one crosses the United States border unauthorized or, more commonly, one overstays their visa to be in the United States.¹³⁰ Congress created this entry distinction in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).¹³¹ According to the Migration Policy Institute, the number of unauthorized immigrants in Texas is estimated to be about 1.7 million people, with about forty-six percent being female.¹³² The data estimates that over one-half million

126. See Jesus Vidales, *Delayed: Mandatory Maternal Mortality Rate Data Won't Be Ready*, TEX. TRIB. (Sept. 16, 2022, 5:00 PM), <https://www.texastribune.org/2022/09/14/maternal-mortality-data-texas/> [<https://perma.cc/K5GK-G8KT>] (discussing the high rate of mortality in Texas, which is concentrated among women of color).

127. See generally *Stevenson*, *supra* note 120, at 2026 (forewarning how restrictions of the sort will continue to expose women to mortality risks).

128. See generally *Huddleston*, *supra* note 9, at 1776–81 (explaining how HB 2's undue restrictions on abortion care affects undocumented immigrants in south Texas, illustrating a broader pattern of unconstitutionally coercive choices imposed by internal checkpoints, state legislation, and unequal access to abortion healthcare).

129. *What's the Difference Between Legal and Undocumented Immigrants?*, *supra* note 20.

130. See Zoe Graham, *Judicial Line-Drawing and the Court's Failure to Protect Immigrants*, 43 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 96, 99 (2021) (distinguishing the ways an immigrant can become "undocumented" and how separation attributes to afforded rights).

131. See *id.* at 100 (utilizing the distinction codified by Congress to critique its usage by the courts).

132. See *Profile of the Unauthorized Population: Texas*, MIGRATION POL'Y INST. (2019), <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/TX> [<https://perma.cc/FNJ4-PDHU>] (estimating the number of unauthorized people in Texas, detailing that almost seventy percent were born in Mexico).

undocumented women of reproductive age live in Texas where they face the onerous burden of an imposed pregnancy.¹³³ Despite the financial strain, interstate travel remains an option for documented or legal immigrants seeking abortion care.¹³⁴ However, for undocumented immigrants, interstate travel is not a viable alternative.¹³⁵

In their pursuit of accessing necessary abortions in a highly restrictive state, these women's struggles are further exacerbated by language barriers and a time-consuming and convoluted immigration process.¹³⁶ The main obstacle preventing many undocumented immigrant women from accessing safe abortion care is grounded in their inability to pass federal immigration checkpoints without fear of deportation or jeopardizing their immigration status.¹³⁷ The hundred-mile border zone is home to 2.4 million residents who must navigate through federal checkpoints to leave the area.¹³⁸ At these checkpoints, border patrol agents ask if the individuals in the vehicle are United States citizens and are authorized to conduct a more thorough search of the vehicle or the individuals' person if they have "probable cause."¹³⁹ As a result, undocumented immigrants face significant limitations on abortion access because they are often barred from traveling out of state.¹⁴⁰

B. *Rights Afforded to Undocumented Immigrants*

The conversation must begin by comparing the rights of citizens with the rights of undocumented immigrants to determine the freedoms

133. *See generally id.* (presenting the data for immigrants aged sixteen to forty-four, and estimating about forty-six percent of all immigrants to be women).

134. *See Su, supra* note 23 (reporting a physician at a Planned Parenthood in Houston could suggest the patient travel interstate for their abortion care).

135. *See id.* (writing that the Planned Parenthood physician could not recommend interstate travel to a patient with a pending immigration case).

136. *See id.* (noting that every time a new immigration law is passed, advocacy organizations receive multiple calls from women expressing fear to go to healthcare appointments and seeking guidance in a time of uncertainty).

137. *See Huddleston, supra* note 9, at 1770 (reasoning why women are deterred from crossing checkpoints even when their lives depend on it).

138. *See id.* at 1752 (describing the high influx of people in the border zone that must pass through checkpoints).

139. *See id.* (highlighting that people have died trying to evade federal border checkpoints).

140. *See generally Su, supra* note 23 (noting that language barriers can misdirect immigrants by leading them to unreliable resources on abortion safety or dissuasive pregnancy crisis centers).

curtailed for both groups by the overturning of *Roe* and the enactment of HB 1280.¹⁴¹ The *Dobbs* decision has empowered states to adjudicate their standards regarding abortion, terminating a once protected right to personal privacy grounded in the Fourteenth Amendment's Due Process Clause and the Equal Protection Clause.¹⁴² The IIRIRA categorizes individuals who are eligible for Fourteenth Amendment protections based on their method of "entry" into the United States.¹⁴³ An individual who gained entry by overstaying their visa is entitled to Fourteenth Amendment protections.¹⁴⁴ However, individuals who gained entry via unauthorized crossing at the border are not entitled to the same constitutional protections.¹⁴⁵ This discrepancy unfairly targets undocumented immigrants who do not have the financial resources to properly await the immigration system's lengthy visa application processes.¹⁴⁶ Even so, the Fourteenth Amendment employs the term "persons," not "citizens," thereby leaving the door open to interpreting the due process and equal protection clauses as applicable to *all persons* within the United States, regardless of citizenship status.¹⁴⁷

1. *Due Process*

In recent years, the Supreme Court has ruled on the due process rights of undocumented immigrants, most notably in *Zadvydas v. Davis* and

141. See generally Act HB 1280, 87th R.S., ch. 170A, §§ 170A.001-170A.007, 2021 Tex. Gen. Laws 1 (restricting all Texas women from obtaining an abortion, infringing on their right to personal privacy once granted by *Roe*).

142. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 217–18 (2022), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (holding that the states' elected representatives now have the authority to regulate abortion rights); see also U.S. CONST. amend. XIV, § 1 (stating any state cannot "deprive any person of life, liberty, or property, without due process of law").

143. See generally *Graham*, *supra* note 131, at 101 (commenting on the legal fiction created by the legislature to deprive certain individuals of their Due Process rights).

144. See *id.* (reasoning that undocumented immigrants that have overstayed their visas "physically and legally entered the country").

145. See *id.* (deducing undocumented immigrants who crossed the border without authorization are the equivalent of someone not in the country).

146. See *id.* at 101 n.17 (2021) (contending the United States creates visa programs that cater to the "global north" and not developing countries).

147. See U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.") (emphasis added).

Department of Homeland Security v. Thuraissigiam.¹⁴⁸ In *Zadvydas*, the Court stated undocumented immigrants are entitled to the constitutional protections of due process of law.¹⁴⁹ However, the Court failed to address whether those who entered in an unauthorized manner were also protected.¹⁵⁰ The case arose from the detainment of Kestutis Zadvydas and Kim Ho Ma, both classified as “resident aliens.”¹⁵¹ Zadvydas immigrated to the United States as a young child and had lived there ever since, and Ma entered as a refugee, also as a young child.¹⁵² The statute in question sought to allow the indefinite detention of undocumented immigrants, a deeply concerning prospect to the Court as it would deprive such immigrants of their due process rights.¹⁵³

Nearly two decades later, in *Thuraissigiam*, the Court clarified when undocumented immigrants have due process of the law.¹⁵⁴ The case concerned a Sri Lankan National whom authorities had detained after crossing the California-Mexico border without entry documents, claiming asylum due to fear of persecution in his home country.¹⁵⁵ The Court held that he was not entitled to due process of the law because he was “an alien who trie[d] to enter illegally.”¹⁵⁶ The dissent argued that “noncitizens” have always had due process rights, and the majority was blatantly disregarding a prior precedent established by the same court.¹⁵⁷ The right to

148. See *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (holding undocumented immigrants had due process of the law); see also *Dep’t of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (rejecting due process of the law from “unentered” immigrants).

149. See *Zadvydas*, 533 U.S. at 682 (finding that detaining immigrants indefinitely “would raise serious constitutional concerns”).

150. See *id.* (highlighting the Court’s refusal to address undocumented immigrants “who have not gained initial admission to this country,” but noting that it “would present a very different question”).

151. See generally *id.* at 684–85 (addressing the cases of two residential undocumented immigrants who arrived in the United States as children and have lived in the country for decades).

152. See *id.* (describing how Zadvydas and Ma achieved their current immigration status).

153. See *id.* at 690 (notating the horrendous nature of the statute at bar).

154. See generally *Dep’t of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1963 (2020) (reversing the lower court’s holding that the asylum seeker’s due process rights were violated).

155. See *id.* at 1967 (recounting the respondent’s circumstances that led to the case).

156. See *id.* at 1982 (declaring that an undocumented immigrant entering the country illegally is merely an “applicant for admission”).

157. See *id.* at 2012 (Sotomayor, J., dissenting) (arguing that noncitizens have had Due Process rights since the nineteenth century).

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due process should apply to all undocumented immigrants, but it is severely limited by the ever-changing judiciary to only a limited subset of immigrants.¹⁵⁸

2. Equal Protection

Courts contested the application and limitations of Fourteenth Amendment's Equal Protection Clause for decades.¹⁵⁹ However, the Supreme Court has held that undocumented immigrants are a protected class under the Equal Protection Clause.¹⁶⁰ In particular, a state law that discriminates on this status must "withstand judicial scrutiny" and "advance a compelling state interest by the least restrictive means available."¹⁶¹ However, as seen in *Plyler v. Doe*, the standard of review for discrimination against undocumented immigrants requires only a rational basis, a less stringent standard of review.¹⁶² Regardless, all persons within the territory of the state are protected by the constitutional guarantee of Equal Protection.¹⁶³

In *Dandamudi v. Tisch*, the Second Circuit found that states have the freedom "to deny opportunities and benefits" to this subset under the Equal Protection Clause.¹⁶⁴ The lower court held that a New York statute restricting who could obtain a pharmacist's license to only "U.S. Citizens or Legal Permanent Residents" was unconstitutional.¹⁶⁵ On appeal, the Second Circuit was asked to determine whether state statutes that discriminate based on alienage should be the subject of strict judicial

158. See Graham, *supra* note 131, at 101 n.17 (contemplating the bleak outlook of any "meaningful jurisprudence" for undocumented immigrants).

159. See generally, e.g., *Plyler v. Doe*, 457 U.S. 202, 208 (1982) (contemplating the scope of the Equal Protection Clause).

160. See 16C C.J.S. *Constitutional Law* § 1594 (recognizing the inclusion of undocumented immigrants in the Equal Protection Clause).

161. See *id.* (indicating the standard required in matters of state laws discriminating based on alienage).

162. See generally *id.* (referencing *Plyler* as an instance when the standard can be lowered and stressing the exceptions of standards for undocumented immigrants).

163. See 16B C.J.S. *Constitutional Law* § 1259 (contending the established certainty of the Equal Protection Clause).

164. See *Dandamudi v. Tisch*, 686 F.3d 66, 74 (2d Cir. 2012) (highlighting the court's crafted exception).

165. See *id.* at 69, 81 (paraphrasing the law in question and the court's holding).

review.¹⁶⁶ The appellate court determined that nonimmigrant aliens who possess the right to work within the states, bear a resemblance to citizens and thus, the discrimination should be subject to strict scrutiny.¹⁶⁷ As a result, the court concluded that the statute violated the Equal Protection of the plaintiffs in question.¹⁶⁸ Therein, *Plyler* specifically addresses the Equal Protection rights of undocumented immigrants, as referenced in *Tisch*.¹⁶⁹

In *Plyler*, the Court held that to deny enrollment and withhold state funds from local school districts for children who were undocumented in the United States is a violation of the Equal Protection Clause.¹⁷⁰ The appellants attempted to persuade the Court by the contention that undocumented aliens were not “persons within the jurisdiction” in the state to qualify for equal protection of the state law.¹⁷¹ The Court decided the appellants’ judgment was not well-reasoned in through prior cases or any interpretation of the Fourteenth Amendment.¹⁷² Rather the Court reasoned, “aliens whose presence in this country is unlawful have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”¹⁷³ Therefore, in employing a rational basis level of scrutiny, the Court concluded that the denial of an education to undocumented children lacked a rational basis.¹⁷⁴

166. *See id.* at 70 (expressing the court’s duty to evaluate the standard of review for discrimination based on alienage).

167. *See id.* at 75 (comparing the similarities between nonimmigrant aliens and citizens in the right to work to justify the court’s reasoning).

168. *See id.* at 70, 81 (reasoning the state law could not deprive nonimmigrants the ability to work if they are already granted permission from the federal law).

169. *See Dandamudi*, 686 F.3d at 69, 74 (citing *Plyler* when the Supreme Court applied strict scrutiny to a state statute that prohibited a public education to undocumented students).

170. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982) (reviewing the standard that the Court uses in applying the Equal Protections Clause for undocumented individuals).

171. *See id.* (illustrating the argument of the appellant to interpret the Fourteenth Amendment to exclude undocumented persons).

172. *See id.* at 212 (denying the appellant arguments that persons illegally in the United States are not “within its jurisdiction”).

173. *See id.* at 210 (referencing *Shaughnessy v. Mezei* in the majority opinion).

174. *See id.* at 224–225 (ruling that an undocumented status of a child was not reason enough to establish a sufficient rational basis for denying benefits).

In essence, the Court broadened the protected class to include all persons “within the jurisdiction” of the state regardless of status.¹⁷⁵ Hence, the scope of Article 1 of the Fourteenth Amendment is interpreted comprehensively, so as not to exclude the right to this fundamental protection on the basis of presence alone.¹⁷⁶ The states have a binding authority from the Supreme Court to follow the constitutional guarantee as a standard with *Plyler*.¹⁷⁷ Likewise, other courts utilize the agreed upon understanding of the phrase “within its jurisdiction” in varying circumstances.¹⁷⁸

C. *Impingement on Rights of the Undocumented*

Undocumented immigrants have rights of Due Process and Equal Protection; however, these rights are subject to limited protection and scrutiny.¹⁷⁹ In comparison, citizens and immigrants of the United States are undoubtedly guaranteed such protections under the Fourteenth Amendment.¹⁸⁰ Consequently, regardless of citizenship status, the Court has deprived those capable of bearing children of their Equal Protection and Due Process rights.¹⁸¹ Supporters of the respondents and dissenters in *Dobbs* agree that the right to choose to terminate one’s pregnancy originated in these constitutional protections.¹⁸² By relying on an outdated

175. *See generally* *Plyler*, 457 U.S. at 211 (confirming the standard of what is the protected class).

176. *See id.* at 214–215 (“[T]hat debate clearly confirms the understanding that the phrase ‘within its jurisdiction’ was intended in a broad sense[.]”).

177. *See id.* (clarifying the congressional debate surrounding who is a part of the “within its jurisdiction” standard of the Fourteenth Amendment).

178. *See River Vale v. Orangetown*, 403 F.2d 684, 687 (2d Cir. 1968) (finding the Fourteenth Amendment is confined to persons in the jurisdiction of the “enacting state”).

179. *See generally id.* (extending a municipal corporation to be a “person” as defined in the Fourteenth Amendment and entitled to Equal Protection).

180. *See generally* U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

181. *See generally* Brief for Respondent, *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228 (2022) (No. 19-1392), 2021 WL 4340072 at 6 (citing *Gonzales v. Carhart* and other precedent to show courts have typically assumed citizenship in questions of abortions).

182. *See generally* Huddleston, *supra* note 9, at 1750 (concerning Due Process rights of undocumented immigrants seeking abortion care).

analysis of fundamental rights, the Court's majority inflicted irreparable harm to many people in the United States, both seen and unseen.¹⁸³

1. *The Dobbs Majority on Due Process*

Regarding the Due Process Clause, the *Dobbs* majority refused to extend the "liberty" granted by the Clause as relied on by the *Roe* and *Casey* Courts.¹⁸⁴ Rather, their interpretation of what is an encompassed liberty protected under the clause used the standard of whether the right has been "deeply rooted in [our] history and tradition."¹⁸⁵ Notably the Court referred to *Washington v. Glucksberg*, where the Supreme Court held that adults do not have a constitutionally protected right to state-assisted suicide.¹⁸⁶ Thereby supporting the reasoning that Due Process did not extend to such acts as it did not meet the standard of "rooted in history."¹⁸⁷ In *Dobbs*, the Court declined to recognize abortion as a liberty protected by the Due Process Clause of the Constitution.¹⁸⁸

2. *Supporters of the Respondents on Due Process*

Supporters of the respondents contend that the liberty to make decisions regarding abortion is rooted in the bedrock of Due Process.¹⁸⁹ Constitutional precedent established the foundation of such freedom.¹⁹⁰

183. See generally Brief for Respondent, *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022) (No. 19-1392), 2021 WL 4340072 at 7 (concluding that Supreme Court Justices have "long acknowledged the fundamental equality principles that underlie the constitutional right to an abortion"); see also *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2324, 2343 (2022) (arguing Equal Protection and Due Process rights in the dissenting opinion).

184. See *Dobbs*, 142 S.Ct. at 2242 (rejecting the ability to extend Due Process rights to the action of an abortion).

185. See *id.* at 2246 ("In deciding whether a right falls into either of these categories, the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'").

186. See *Wash. v. Glucksberg*, 521 U.S. 702, 709 (1997) (reasoning that Washington's ban is important and legitimate to the state's various interests).

187. See *Dobbs*, 142 S.Ct. at 2247 (emphasizing that the *Glucksberg* Court surveyed more than 700 years of "Anglo-American common law tradition").

188. See *id.* at 2248 (concluding that abortion is not an explicit right because it is not a liberty interest rooted in history).

189. See Brief for Respondent, *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022) (No. 19-1392), 2021 WL 4311857 at 2 (expressing that denying reproductive health decisions is "inconsistent with the right to [D]ue [P]rocess under the U.S. Constitution").

190. See *id.* at 20 (pointing to *Roe* and *Casey* as constitutional precedent).

Supporters point to *Bolling v. Sharpe*, which states that the liberty extends to a “range of conduct which [an] individual is free to pursue.”¹⁹¹ Similarly, the Court ought to have turned to precedent established in *Griswold*, which held depriving married couples the decision of contraceptives was a blatant infringement upon the liberties protected by the Due Process Clause, as described in Justice White’s concurrence.¹⁹² Thus, the Clause has been found to safeguard personal decision regarding reproductive health.¹⁹³ If the Court were to restrict essential liberties solely to those deeply rooted in tradition and history, it would enable the Court to limit additional liberties not explicitly enumerated in the United States Constitution.¹⁹⁴

3. *The Dobbs Majority on Equal Protection*

The Court contemplates the conferred right to Equal Protection under the law in *Dobbs*; however, the Justices argue that the right to an abortion is not subject to heightened scrutiny since it is not a sex-based classification.¹⁹⁵ The majority turns to *Geduldig v. Aiello*, which declares pregnancy should not be a compensable disability and is distinguishable from prior precedents that rely on other pregnancy considerations as sex-based classifications.¹⁹⁶ Inherently, the Court rejects evaluating abortion under the Equal Protection Clause to avoid satisfying heightened scrutiny.¹⁹⁷

191. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (presuming that “liberty under the law” encompasses a broad range of conduct).

192. See generally *Griswold v. Connecticut*, 381 U.S. 479, 503 (1965) (reviewing Connecticut’s statute as a violation of liberty).

193. See generally *id.* (stressing how denying “access to medical assistance” is a violation of the Due Process Clause).

194. See generally U.S. CONST. amend. XIV, § 1 (claiming Due Process and Equal Protection should be read more broadly, rather than narrowly to encompass every changing inherent right).

195. See *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 2235 (2022) (questioning the Court’s precedent that abortion is not a sex-based classification to give access to heightened scrutiny).

196. See *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974) (differentiating the California insurance program that removes the physical condition of pregnancy, which is not similar to other precedents that clearly contain gender-based discrimination).

197. See *Dobbs*, 142 S.Ct. at 2246 (denying laws prohibiting or regulating abortion as subject to a heightened scrutiny since it does not “invidious[ly] discriminat[e]” according to the Court).

4. *The Dobbs Dissenters on Equal Protection*

Regardless of the Court's refusal, the dissenting opinion combats the majority on their interpretation of Equal Protection.¹⁹⁸ Justice Breyer, Justice Sotomayor, and Justice Kagan's unified dissent questions the use of a ratifier argument in the twenty-first century.¹⁹⁹ By implying that the Framers did not recognize reproductive rights as a guaranteed liberty, the majority effectively concedes that such rights did not exist during that period.²⁰⁰ The dissenters also point to *Reed v. Reed*, where the Court held an Idaho statute preferring males over females as administrators of an estate to be unconstitutional because it violated the Equal Protection Clause.²⁰¹ The *Reed* Court states that different treatment based on sex requires a sex-based classification of scrutiny under Equal Protection.²⁰² Similarly, the present case also concerns sex-based treatment of a law that governs people capable of childbearing.²⁰³ Therefore, the *Dobbs* majority is mistaken in neglecting to classify the Mississippi statute as a sex-based classification to warrant an inquiry under the Equal Protection Clause.²⁰⁴

5. *Supporters of the Respondents on Equal Protection*

Supporters of the Respondents also argue that the Court's precedent previously recognized the right to an abortion as grounded in Equal Protection and subject to heightened scrutiny.²⁰⁵ Specifically, they point to

198. *See id.* at 2324, 2343 (critiquing the majority's use of a ratifier argument).

199. *See id.* at 2324 (questioning how the ratifiers did not understand "something as central to freedom").

200. *See id.* (suggesting that "people" in the Fourteenth Amendment, according to the ratifiers, only included men; thus, reproductive rights for women's liberty were far from recognized).

201. *See Reed v. Reed*, 404 U.S. 71, 73, 77 (1971) (prohibiting "dissimilar treatment for men and women").

202. *See id.* at 75 (targeting the Idaho statute's gender discrimination).

203. *See generally Dobbs*, 142 S.Ct. at 2243–44 (commenting the Mississippi law only targets women as child bearers and thus qualifies as gender discrimination).

204. *See generally id.* at 2235 (proffering the majority's contention that abortion is not a sex-based classification).

205. *See Brief of Equal Protection Constitutional Law Scholars Serena Mayerie ET AL. as Amici Curia in Support of Respondents, Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022) (No. 19-1392), 2021 WL 4340072, at 2–3 (addressing the Court's "[E]qual [P]rotection jurisprudence" to argue "sex-including laws that regulate pregnancy are subject to heightened scrutiny").

U.S. v. Virginia, when the Court held Virginia Military Institute's (VMI) exclusive male admission policy violated the Equal Protection Clause of the Fourteenth Amendment.²⁰⁶ The Court's noteworthy differentiation solidified post-*Reed* decisions by focusing on gender-based treatment that denies individuals of opportunity.²⁰⁷ In such circumstances, the court then utilizes heightened scrutiny to avoid perpetrating the "inferiority of women."²⁰⁸ Supporters also present *Nevada Department of Human Resources v. Hibbs*, when the Court held Congress could regulate the Family and Medical Leave Act (FMLA) to prevent gender-based classification discrimination.²⁰⁹ It is evident the FMLA previously targeted sexism of women as mothers first.²¹⁰ This demonstrates how "archaic" gender roles regarding pregnancy regulations can violate the Equal Protection Clause.²¹¹

In light of the Court's own precedent, the inconsistent treatment over the decisions of women's bodies jeopardizes their livelihood.²¹² The majority's deprivation of child-bearing individuals' Due Process, liberty, and Equal Protection of the law from sex-based classification, endangers a vast majority of women.²¹³ Within the majority of women who may want or need an abortion, there is a subgroup of immigrants, specifically undocumented immigrants, who come to the United States seeking a

206. See *U.S. v. Virginia*, 518 U.S. 515, 523, 534 (1996) (reasoning that Virginia Military Institute (VMI) had no "exceedingly persuasive justification" for its exclusive male-only admissions policy).

207. See *id.* at 532–33 (exploring the "carefu[l] inspection" of state laws that deny opportunity based on sex post-*Reed*).

208. See *id.* at 533–34 (1996) (supporting their reasoning to be diligent with regulations and laws that discriminate on sex-based classifications).

209. See *Nev. Dep't. of Hum. Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003) ("The FMLA aims to protect the right to be free from gender-based discrimination in the workplace.").

210. See *id.* at 736 (referring to the history of denying women employment opportunities to uphold their domestic roles).

211. See generally Brief of Equal Protection Constitutional Law Scholars Serena Mayerie ET AL. as Amici Curia in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022) (No. 19-1392), 2021 WL 4340072 (finding that when laws further "sex-role stereotypes," they greatly injure both sexes).

212. See generally *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2242 (2022) (revoking a woman's right to choose and overturning decades of precedent).

213. See generally *id.* at 2336 (emphasizing the extremes the Court is willing to let triumph with regard to women's lives).

better life full of opportunities.²¹⁴ Unfortunately, the misconception of essential health care is merely a glimpse of the horrendous reality for women in America.²¹⁵ Thus, much like the absence in the *Dobbs* opinion, undocumented immigrants have been disregarded as an impacted group, and unless action is taken, they will continue to be the most oppressed and vulnerable class in the post-*Roe* era.²¹⁶

D. *Current Paths for the Undocumented*

Women from diverse backgrounds are forced to decide their fate when faced with an undesired pregnancy in Texas.²¹⁷ Activists paint a clearer picture of the unfortunate reality that *Dobbs* has now imposed upon women on a state-wide scale and a narrow subset of undocumented women in the Rio Grande Valley (RGV).²¹⁸ Specifically, the National Latina Institute for Reproductive Justice is a non-profit organization with a presence in multiple states, including Texas, Washington, D.C., Florida, New York, and Virginia.²¹⁹ The group has field organizers and state policy experts at the state level who mobilize to transform the systems that have dictated the fates of women and their bodies.²²⁰ The organization works diligently to supply information and tools to the community at the intersection of immigration and reproductive healthcare issues.²²¹

214. See Huddleston, *supra* note 9, at 1750 (analyzing previous abortion laws in Texas and their effect on undocumented immigrants).

215. See *Dobbs*, 142 S.Ct. at 2301 (Thomas, J., concurring) (referencing Justice Thomas's concurring opinion and his suggestion for the Court to reconsider other substantive Due Process precedents).

216. See *id.* at 2255 (showcasing the lack of emphasis on marginalized communities affected by the Court's judgment by only mentioning "immigrants" once in the entire *Dobbs* opinion).

217. See *id.* at 2323 (referencing the majority's lack of empathy for women forced into childbirth).

218. See *Where We Are*, NAT'L LATINA INST. FOR REPROD. JUST., <https://www.latinainstitute.org/en/who-we-are> [<https://perma.cc/WX47-Z6G2>] (showing an organization's mobility across the United States).

219. See *id.* (listing the state offices of the organization).

220. See *id.* (paraphrasing what the organization does to build its activist base).

221. See Telephone Interview with Nancy Cárdenas Peña, Texas Director for Policy & Advocacy, National Latina Institute for Reproductive Justice (Oct. 11, 2022) (pinpointing the type of work the organization focuses on).

Recently, women in the RGV have been subjected to targeted prosecution under Texas state laws such as SB 8.²²² Ms. Peña notes those part of the Latinx community have “fear about what they can do and not do” with scarce avenues for resources because of the increased criminalization of abortion in the state.²²³ Hence, the degree of fear and confusion is only heightened regarding undocumented immigrants seeking such care.²²⁴ Ms. Peña specifically highlights the apparent difficulties faced by this group of individuals that cannot travel outside the state for an abortion care appointment.²²⁵ Prior to the enactment of SB 8, undocumented immigrants in the RGV could access two abortion clinics without crossing the border zone.²²⁶ Despite the limited availability at the time, women under eighteen were required to receive parental consent or a judicial bypass by the local courts, an impossibility for the undocumented.²²⁷ Now, the only alternatives for these women are the illegal use of abortion medication or to carry an unwanted pregnancy to term.²²⁸

For those residing outside of the RGV but within Texas, interstate travel has remained a possibility, though not accessible to most due to the restrictions imposed by HB 1280.²²⁹ Attorney General Merrick Garland points to the constitutional protection for women who reside in states

222. *See id.* (noting the strict applicability of SB 8 of a woman who did not fall within the jurisdiction to be prosecuted).

223. *See id.* (mentioning the language barrier for Latinx people trying to seek care).

224. *See generally id.* (distinguishing women who are undocumented as more fearful of the abortion process).

225. *See id.* (commenting on the inability and fear of women with regard to attending abortion care appointments).

226. *See* Telephone Interview with Nancy Cárdenas Peña, *supra* note 222 (comparatively to the now zero abortion care facilities available to border-bound women in the Rio Grande Valley).

227. *See* Klibanoff ET AL., *supra* note 14 (“There [was] only one clinic in the Rio Grande Valley, and she would need to get parental consent or a judicial bypass granted by a court.”).

228. *See generally* Telephone Interview with Nancy Cárdenas Peña, *supra* note 222 (denouncing the lack of avenues for undocumented women, specifically within the Rio Grande Valley).

229. *See* Attorney General Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women’s Health Organization*, U.S. DEP’T OF JUST. OFF. OF PUB. AFFS. (June 24, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s> [<https://perma.cc/WR22-633D>] (“We recognize that traveling to obtain reproductive care may not be feasible in many circumstances.”).

where there is a ban on such access.²³⁰ Nonetheless, it remains exceedingly obvious of the burdensome effect the trigger laws to those most vulnerable.²³¹ The availability of information on cost, travel arrangements, and other aspects of obtaining an abortion outside of Texas is beginning to dwindle.²³² Multiple funds listed on publicly available websites to women in Texas and from the national level have been “temporarily paused” from helping as they reassess the extent of their services in the political climate.²³³ This continues to be an unfortunate burden on undocumented immigrants, because they could once receive aid from certain funds that did not require residency status.²³⁴ Thus, only a privileged few, with the means to travel across state lines, have the option to access abortion care.²³⁵

Regardless of state law, individuals still seek abortions, and it is apparent that the majority of abortions in the United States are now medicated.²³⁶ Methods for obtaining medicated abortion are risky because of the legal repercussions of state laws SB 8 and HB 1280.²³⁷ Typically,

230. *See id.* (confirming the “bedrock constitutional principles” to travel interstate to seek care).

231. *Cf. Find Assistance for Cost, Travel, and More, supra* note 25 (displaying the lack of resources statewide).

232. *See id.* (signifying the multiple services not available, such as financial assistance and judicial bypass support).

233. *See id.* (signifying the multiple services not available such as financial assistance and judicial bypass support).

234. *See* Telephone Interview with Marlon Duran, Local Activist (Oct. 14, 2022) (empathizing with undocumented women who used to be able to receive financial assistance from the Frontera Fund that is now “temporarily paused”).

235. *See* Telephone Interview with Nancy Cárdenas Peña, *supra* note 222 (“Now you must take funds out of your own pocket . . . find your own transportation, and find childcare.”).

236. *See* Rachel K. Jones ET AL., *Medication Abortion Now Accounts for More Than Half of All US Abortions*, GUTTMACHER (last updated Mar. 2, 2022), <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions> [<https://perma.cc/JN3M-W3Q3>] (referring to preliminary data from 2020 that shows up to 54% of all abortions in the United States are medicated abortions).

237. *See* Tex. S.B. 8, 87th Leg., R.S. 2021 Tex. Gen. Laws 1 (Texas Heartbeat Act) (enacted) (providing punishment in the amount of \$10,000 for each violation of the state law for aiding or abetting an abortion procedure); *see also* Tex. H.B. 1280, 87th Leg., R.S. 2021 Tex. Gen. Laws 1 (Human Life Protection Act) (enacted) (burdening with a punishment of \$100,000 for each violation); *see also* Act HB 1280, 87th R.S., ch. 170A, § 170A.001-170A.007, 2021 Tex. Gen. Laws 1 (explaining the legal repercussions of seeking an abortion as a result of these pieces of legislation).

women would need to cross the Texas-Mexico border or order abortion pills online and illicitly self-administer them in the state.²³⁸ Expert Elizabeth Sepper states SB 4 bans medication abortion through the mail in Texas.²³⁹ Thus, the site of the crime is where the abortion medication is self-administered and could be punishable by means of long-arm jurisdiction against the provider.²⁴⁰ However, the enforceability of such a ban in Texas is difficult if women receive the medication from outside state lines.²⁴¹ Evidently, undocumented women who do cross the border for the medication will not be able to return to the United States.²⁴²

The most vulnerable women inherently face adversity by mere consequence of their status, and this can lead to detrimental outcomes.²⁴³ Many questions whether or not to attend appointments for prenatal care due to the risk of deportation.²⁴⁴ These women are unable to safely seek prenatal care, and this will leave them in dangerous conditions during their forced pregnancies.²⁴⁵ Medical scholars found that women who do not receive such care can lead to “premature pregnancy, intrauterine growth retardation, low birth weight, and maternal and child mortality as a result of

238. See generally Carrie Baker, *Educating Texans on How to Get Abortion Pills Online: “Your Nearest Provider is in Your Pocket”*, MS. MAGAZINE (Aug. 31, 2021), <https://msmagazine.com/2021/08/31/how-to-get-abortion-pills-online-texas/> [<https://perma.cc/KFS3-2F47>] (emphasizing the lack of resources after SB 8 and educating how sites like Plan C can be used as a resource for abortion pills).

239. See Bonnie Petrie, *If Roe Falls, How Would States Regulate Mail-Order Abortion Pills? Look to Texas*, TEX. PUB. RADIO (May 5, 2022, 1:27 PM), <https://www.tpr.org/bioscience-medicine/2022-05-05/if-roe-falls-how-would-states-regulate-mail-order-medication-abortion-look-to-texas> [<https://perma.cc/7SPH-3RYR>] (“In fact, Senate Bill 4 makes it a crime to send abortion medication through the mail at all in Texas. That’s a practice that became common nationwide after the FDA approved it in April 2021 to limit in-person doctor visits during the COVID-19 pandemic.”).

240. See *id.* (“You might say that’s the site of the crime; where the death of the fetus or the embryo occurred.”).

241. See *id.* (theorizing it would be difficult for Texas authorities to enforce the ban).

242. See Klibanoff ET AL., *supra* note 14 (observing the limitation for undocumented people who may go south for the pill because they generally cannot return legally to the U.S.).

243. See generally *id.* (analyzing the overwhelming risks for undocumented women in Texas).

244. See *id.* (“Do people attend their abortion appointment? Or do they risk being placed in deportation proceedings?”).

245. See generally *id.* (writing of Ms. Pratt’s experiences of women seeking advice on whether to attend their abortion appointments).

infections in the perinatal and postnatal periods.”²⁴⁶ The state legislature’s purported goal protecting pregnancies is undermined when compulsory pregnancy is not accompanied by accessible prenatal care, jeopardizing the health of undocumented women and fetuses.²⁴⁷ The conspicuous predicament requires grassroots activists and others alike to force the hand of Executive and Legislative bodies to remedy such conditions now faced by millions.²⁴⁸

III. SOLUTION

A. *The Executive*

President Joe Biden is at the forefront of change.²⁴⁹ The most recent release from the White House is a signed Executive Order “Protecting Access to Reproductive Health Care Services” in response to the overturning of *Roe v. Wade*.²⁵⁰ The goals listed aim to solidify issues the administration previously took such as safeguarding access to abortions and contraceptives, guaranteeing privacy and correct information, encouraging safety measures, and the coordinating of federal efforts in protecting “reproductive rights and access to health care.”²⁵¹ Primarily, the order directs the Secretary of Health and Human Services (HHS) to formulate appropriate actions on such goals.²⁵² HHS stated a summary of efforts, such as reaffirming the Emergency Medical Treatment and Active

246. See CRISTIANE QUADRADO DA ROSA ET AL., FACTORS ASSOCIATED WITH LACK OF PRENATAL CARE IN A LARGE MUNICIPALITY, 48 REVISTA DE SAÚDE PÚBLICA 977, 980–81 (2014) (listing the risks of the deprivation of prenatal care).

247. See generally Fabi, *supra* note 17 (“The reasons for this gap include lack of means to pay for prenatal care, lack of access to sources of prenatal care, and mistrust of the [healthcare] system.”).

248. See generally *Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services*, *supra* note 4 (referring to the solutions and actions of the Executive Branch).

249. See generally *id.* (examining the Biden Administration’s solutions to protect woman’s rights).

250. See *id.* (pointing to the various proposed solutions to protect access to reproductive health services within weeks after the overturning of *Roe*).

251. See *id.* (“Coordinating the implementation of Federal efforts to protect reproductive rights and access to [healthcare].”).

252. See *id.* (directing the Secretary of Health and Human Services to act and submit a report to President Biden within thirty days).

Labor Act (EMTALA), intended to protect frontline healthcare providers' judgment and actions in stabilizing medical treatment for a pregnant patient in any state.²⁵³ Additionally, the Executive Order notes the protection of mobile clinics along borders for out-of-state patients and the issuance of three million dollars in funding for family planning services.²⁵⁴ Nonetheless, no action is suggested for remedial change to increase access to women border-bound in their abortion-less state.²⁵⁵

Good intentions do not suffice to provide women access to abortion care.²⁵⁶ HHS advised state governors of the requirement of emergency medical care for an abortion, even in states that banned abortion as required by the EMTALA.²⁵⁷ Reactively, Republicans from state and federal levels combated efforts taken by the administration.²⁵⁸ The state of Texas recently filed suit for a preliminary injunction of the Executive's broadening of EMTALA to encompass abortions in situations where Texas has outlawed them.²⁵⁹ The Northern District of Texas granted the motion, and currently Texas abortion laws are now not preempted by

253. See Letter from Xavier Becerra, Sec'y of Health and Hum. Serv., to Health Care Providers (July 11, 2022) (on file with Dep't of Health and Hum. Serv.) ("[T]he federal EMTALA statute protects your clinical judgment and the action that you take to provide stabilizing medical treatment to your pregnant patients, regardless of the restrictions in the state where you practice.").

254. See *Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services*, *supra* note 4 (describing the mobile clinics as extra care for out-of-state patients, but not resources to help women traveling far distances).

255. *Cf. id.* (asserting the failure to help women unable to travel outside of their state).

256. See *id.* (suggesting that the measures taken by the Biden Administration are insufficient to protect access to reproductive healthcare services).

257. See generally *Texas v. Becerra*, 623 F. Supp. 3d 696, 708 (N.D. Tex. 2022), *appeal filed*, *Texas v. Becerra*, 2023 WL 2366605 at *1 (5th Cir. Tex. 2023) ("Reminding providers of their obligation to ensure that women in states that have banned abortion have access to health and life-saving care is essential.").

258. See *id.* (showcasing the plaintiffs' complaint alleging EMTALA's guidance to be full of defects and moving for a temporary restraining order and preliminary injunction).

259. See *id.* (expressing Texas's claims that the "[g]uidance unlawfully requires abortion in situations where Texas outlaws them, thus infringing on Texas's rights to legislate and enforce its abortion laws.").

EMTALA.²⁶⁰ Awaiting further litigation, the Biden Administration has failed to provide effective aid to Texas women.²⁶¹

The Executive Branch could potentially utilize federal land to facilitate access to abortion care in states where abortion is currently outlawed.²⁶² There is sufficient federal lands in all fifty states.²⁶³ Presently, the federal government owns 2,977,950 acres, or 1.77%, of Texas's total land.²⁶⁴ In a legal analysis by David Cohen, Greer Donley, and Rachel Rebouché, there is not a federal abortion prohibition, rather there is only a prohibition on using federal dollars on certain abortion procedures.²⁶⁵ The only avenue possible under federal law is to lease space on federal lands for abortion facilities.²⁶⁶

Yet, the authors point to the Assimilative Crimes Act, which states any action that is not considered a crime by federal law but “would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated . . . shall be guilty of a like offense and subject to a like punishment.”²⁶⁷ Essentially, although state law would still apply on federal land, the matter would be litigated in federal court where a presidential pardon is available or federal prosecutors could be discretionary.²⁶⁸ Accessing federal land for such purposes in Texas would

260. See Memorandum from Directors, Quality, Safety & Oversight Group (QSOG) and Survey & Operations Group (SOG). Ctr. For Medicare and Medicaid Serv., on Preliminary Injunction in *Texas v. Becerra*, No. 5:22-CV-185-H (N.D. Tex.) to State Survey Agency Directors (August 25, 2022) (on file with Dep't of Health and Humn. Serv.) (citing the revised Memorandum of the reinforcement of EMTALA due to *Texas v. Becerra*'s district court ruling).

261. *Contra id.* (distinguishing the lack of aid to women without the enforcement of EMTALA in Texas).

262. See *Federal Land Policy in Texas*, BALLOTPEDIA https://ballotpedia.org/Federal_land_policy_in_Texas#cite_ref-CRSownershipserv_1-0 [<https://perma.cc/99LV-XD5C>] (showing the ability to utilize the abundant federal lands in Texas).

263. See *id.* (“As of 2012, the federal government owned between 635 million to 640 million acres, or [28%] of the 2.27 billion acres of land in the United States.”).

264. See *id.* (finding that federal land is present in multiple regions of Texas such as within the border zone).

265. See Cohen ET AL., *supra* note 27, at 80 (limiting the use of federal dollars to perform abortions under Hyde Amendment's restrictions).

266. See *id.* (holding that the federal government could lease space to private entities on federal land).

267. 18 U.S.C. § 13(a) (1996).

268. See Cohen ET AL., *supra* note 27, at 82 (suggesting that a presidential pardon to providers on federal land for “all potential abortion-related crimes under the ACA.”).

allow women border-bound to travel intrastate for an abortion procedure.²⁶⁹ *Texas v. Becerra* demonstrates that the use of federal land will provoke litigation from states, but the Executive Branch must act despite the anticipated resistance.²⁷⁰

Additionally, the Executive could allow access to medicated abortions to avoid the stringent restrictions applied by state law.²⁷¹ The oral administration of Mifepristone and Misoprostol is the most commonly used medicated abortion method.²⁷² Women seeking healthcare can receive the medication from a doctor and pharmacy where abortion is legal.²⁷³ However, in states like Texas, receiving abortion medication through the mail can lead to legal repercussions.²⁷⁴ The legal repercussions include civil penalties, criminal punishment, and fines.²⁷⁵ Although this route may be convenient for most, it necessitates continued medical attention to ensure proper healing and mitigating the risk of infection.²⁷⁶ Women

269. *See generally id.* (finding that the use of federal lands could be beneficial to undocumented immigrants seeking an abortion in Texas).

270. *See* U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the state respectively, or to the people.”); *see also* *Texas v. Becerra*, 623 F. Supp. 3d 696, 713 (N.D. Tex. 2022), *appeal filed*, *Texas v. Becerra*, 2023 WL 2366605, at *1 (5th Cir. Tex. 2023) (“The Court finds that the three situations injuring sovereign interests as outlined by Texas . . .”).

271. *See* Act SB 8, 87th R.S., ch. 171, §§ 171.201-171.008, 2021 Tex. Gen. Laws 1 <https://capitol.texas.gov/tlodocs/87R/billtext/html/SB00008F.htm> [<https://perma.cc/WS7W-Z24C>] (providing a solution that could be enacted by the federal government in response to state law for seeking an abortion); *see also* Act HB 1280, 87th R.S., ch. 170A, §§ 170A.001-170A.007, 2021 Tex. Gen. Laws 1 (asserting that the federal government possesses the power to enable women seeking an abortion to get around restrictive state laws).

272. *See generally* *Medical Abortion*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/medical-abortion/about/pac-20394687?p=1> [<https://perma.cc/4HXN-MLWL>] (clarifying that multiple medications may be used for medical procedures such as oral and vaginal medications).

273. *See generally* Cohen ET AL., *supra* note 27, at 88–89 (exploring the expansion of access to medication abortion).

274. *See* Petrie, *supra* note 240 (emphasizing that under SB 4, it is a crime to send abortion medication through the mail in Texas).

275. *See* Act HB 1280, 87th R.S., ch. 170A, §§ 170A.001-170A.007, 2021 Tex. Gen. Laws 1 (addressing the possibility of facing a criminal penalty of a felony in the first or second degree).

276. *See* *Medical Abortion*, *supra* note 272 (“After a medical abortion, you’ll need a follow-up visit with your provider to make sure you’re healing properly and to evaluate your uterine size, bleeding, and any signs of infection.”).

closer to the border look to Mexico for abortion medication.²⁷⁷ However, these medications may be risky because they are not necessarily FDA approved.²⁷⁸

The Biden Administration should look to the declaration of a federal emergency and its powers.²⁷⁹ The Stafford Disaster Relief and Emergency Assistance Act (The Stafford Act) is enforceable in the circumstances defined as an emergency and could use governmental resources for “both public and private losses sustained.”²⁸⁰ The administration could provide the assistance of medication to those in all states where healthcare is needed while permanent remedies are pursued, akin to an emergency injunction.²⁸¹ Nonetheless, its implementation would be challenged by states immediately; thus, the Executive Branch should pursue other methods of support.²⁸²

The FDA expanded abortion medication in states where abortion is legal by removing an in-person dispensing requirement and allowing pharmacy certification.²⁸³ Similarly, the United States Office of Legal

277. See John Burnett, *Texas' Abortion Law Led Some to Get Abortion Pills in Mexico, with Grim Consequences*, NPR (May 6, 2022, 5:18 PM), <https://www.npr.org/2022/05/06/1097261242/texas-abortion-law-led-some-to-get-abortion-pills-in-mexico-with-grim-consequenc#:~:text=Under%20the%20new%20law%2C%20physicians,forbidden%20from%20prescribing%20abortion%20pills> [<https://perma.cc/A5BF-DFHZ>] (“A woman down in the Rio Grande Valley who wants to visit a clinic with the fewest restrictions has to drive [fourteen] hours to Las Cruces, New Mexico, or she can drive a half hour to the border and visit a Mexican pharmacy.”).

278. See *id.* (expressing the profound lack of proper care in Mexico when workers are unable to provide medical advice to customers purchasing medication abortion).

279. See generally Robert T. Stafford Disaster Relief Emergency Assistance Act, Pub. L. No. 93-288 § 101(b), 1 (2021) (mentioning the ability of the federal government to assist state and local governments).

280. See *id.* (reporting that the government is working towards “providing Federal assistance programs for both public and private losses sustained in disasters”).

281. See generally *id.* at § 101, 1 (analyzing that with the permissions granted in the Stafford Act, medication abortions could be distributed in Texas for the purposes of disaster relief).

282. See *id.* (referring to the definition of disaster that is broadly defined to be inclusive but leaves room for argument).

283. See *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, FDA (last updated Jan. 4, 2023), <https://www.fda.gov/drugs/post-market-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation#The%20January%202023%20REMS%20Modification> [<https://perma.cc/4QX6-Y8BF>] (“Under the Mifepristone REMS Program, as modified, Mifeprex and its approved generic can be dispensed by certified pharmacies or under the supervision of a certified prescriber.”).

Counsel notes that such medication is not prohibited by the Comstock Act when the sender “lacks the intent that the recipient of the drugs will use them unlawfully,” thereby establishing that mailing abortion medication to a particular jurisdiction does not establish that the sender intended to send the medication unlawfully.²⁸⁴ The Executive should align itself with such proactive endeavors to permit medication abortion through the exercise of emergency powers rather than opting for the path of least resistance.²⁸⁵

The COVID-19 pandemic demonstrated that modern medical practices can quickly evolve through telehealth.²⁸⁶ For instance, the “use of videoconferencing and telephone consultations to administer medical abortions and to supervise the use of abortion pills to terminate the pregnancy.”²⁸⁷ Prior to *Dobbs*, most states during the pandemic restricted abortions since it was qualified as a non-essential service.²⁸⁸ Nonetheless, a study in early 2020 showed the demand for a self-managed abortion increased when in-clinic availability became scarce.²⁸⁹ Texas experienced the most significant escalation of medicated abortions, although

284. See Memorandum Opinion from Christopher H. Schroeder Assistant Att’y Gen. to the Gen. Couns. U.S. Postal Service (Dec. 23, 2022) (on file with author) (approving the sending of abortion medication to states where medication abortion is illegal if the sender does not have the intent that the recipient will use them unlawfully, thus creating a contradictory loophole).

285. See generally *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, supra note 283 (“The January 2023 modification to the Mifepristone REMS Program removed the requirement that did not allow mifepristone to be dispensed from retail pharmacies.”).

286. See Abigail R. A. Aiken ET AL., *Demand for Self-Managed Online Telemedicine Abortion in the United States During the Coronavirus Disease 2019 (COVID-19) Pandemic*, 136 OBSTETRICS & GYNECOLOGY 835, 835 (2020) (tracing the increased development of telehealth back to the Coronavirus Pandemic).

287. See Hina Mohiuddin, Comment, *The Use of Telemedicine During a Pandemic to Provide Access to Medication Abortion*, 21 HOUS. J. HEALTH L. & POL’Y 483, 497 (2022) (“Telemedicine is an effective method in filling gaps in access for patients by healthcare providers during the pandemic.”).

288. See *id.* at 494 (highlighting the limitations the Coronavirus Pandemic caused by requiring some states to stop or delay abortion procedures).

289. See Aiken ET AL., supra note 286, at 837 (presuming the shift to self-managed abortions due to risk of infection or inability to travel to a clinic).

COVID burdens were minimal.²⁹⁰ This study demonstrates an increase in telehealth medicine use.²⁹¹

Legal scholars recommend the Biden Administration utilize its public health emergency powers or executive orders to push the implementation of telehealth initiatives.²⁹² Currently, to receive telehealth care as a resident of an abortion-restricted state, women are required to be physically present in a state where such access is legal.²⁹³ This limits access to telehealth for non-border-bound women to New Mexico as a bordering state of Texas.²⁹⁴ Broadening telehealth medicine would enhance health equity, reduce abortion-related costs, and strengthen reproductive infrastructure.²⁹⁵

The invocation of a national emergency declaration would enable utilizing federal funds to be employed towards telehealth services in states where its accessibility is currently outlawed.²⁹⁶ Medications could be prescribed out-of-state and dispensed in states with heavy restrictions.²⁹⁷ Unfortunately, President Biden commented this solution is ineffective

290. *See id.* (“Texas, the state with the most restrictive measures, showed the largest increase in requests, despite a relatively low burden of COVID-19 during the study timeframe.”).

291. *See id.* (“Our findings suggest that telemedicine models for medication abortion should be a policy priority . . .”).

292. *See* Cohen ET AL., *supra* note 27, at 91 (comparing the use of public health emergency or executive orders by the Executive during the Coronavirus Pandemic).

293. *See* Farah Yousry, *Telemedicine Abortions Just Got More Complicated for Health Providers*, NPR <https://www.npr.org/sections/health-shots/2022/09/26/1124360971/telemedicine-abortion-medication-ban> [<https://perma.cc/6G3N-5D8U>] (last updated Sept. 26, 2022, 1:57 PM) (“In many states, patients seeking a telehealth abortion have to be physically present in a state where telemedicine abortion is legal . . .”).

294. *See generally* Interactive Map: *US Abortion Policies and Access After Roe: Texas*, *supra* note 93 (identifying only New Mexico as a state along the border of Texas which is protective of abortion rights).

295. *See* Katherine Fang & Rachel Perler, *Abortion in the Time of COVID-19: Telemedicine Restrictions and the Undue Burden Test*, 32 YALE J.L. & FEMINISM 133, 146 (2021) (“Teleabortion can (1) improve health equity; (2) reduce costs associated with seeking an abortion; and (3) create a stronger reproductive health infrastructure.”).

296. *See* Nancy Northup, *Biden Must Declare a Public Health Emergency for Abortion—Immediately*, WASH. POST (June 30, 2022, 11:14 AM), <https://www.washingtonpost.com/opinions/2022/06/30/declare-abortion-public-health-emergency/> [<https://perma.cc/Q7WZ-VBND>] (pointing to the Public Readiness and Emergency Preparedness Act that Becerra would have to act under to provide federal protections).

297. *See id.* (detailing how the PREP Act could “shield providers, pharmacists, patients and others from liability”).

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because there is a lack of public health emergency funds.²⁹⁸ Members of Congress have urged the Executive Branch to declare a state of national emergency to provide federal funds. Yet, President Biden deferred to Congress as the true authority of remedial change.²⁹⁹

B. *The Legislative*

The Biden Administration notes the most efficacious course of action lies with the Legislative Branch, because it is able to codify judicial precedents such as *Roe* and *Casey*.³⁰⁰ Codification means passing a federal act, which would be binding to all states.³⁰¹ By solidifying such cases, state laws banning abortion would be null and void in retrospect.³⁰² Previously, legislatures attempted to codify *Roe* and its similarities, but they failed to receive codification due to the strenuous approval process by both the House and Senate.³⁰³ Congress's first attempt was the Freedom of Choice Act of 2004.³⁰⁴ Congress reintroduced the Act in 2007, but it never came to a vote.³⁰⁵ Recently, Congress introduced the Women's Health Protection Act of 2021.³⁰⁶ Unfortunately, the Senate voted against

298. See Associated Press, *Biden Says He's Mulling Health Emergency for Abortion Access*, POLITICO (Sept. 10, 2022, 4:34 PM), <https://www.politico.com/news/2022/07/10/biden-health-emergency-abortion-access-00044936> [<https://perma.cc/JC4X-BFEF>] (“[T]here’s very little money—tens of thousands of dollars in it.”).

299. See *id.* (“I don’t have authority to say that we’re going to reinstate *Roe v. Wade* as the law of the land.”).

300. See *id.* (emphasizing the need for the Legislature to take action to codify *Roe* to see actual change of law).

301. See generally Peachman, *supra* note 27, at 288 (writing that Congress should enact legislation that permits access to abortion on a nationwide scale).

302. See generally *id.* at 294 (comparing the extent of state’s abilities to restrict abortion while *Roe* was active law).

303. See Freedom of Choice Act, S.2020, 108th Cong. § 2 (2004) (showing that once the Act was read twice, it was directly sent to the Committee on the Judiciary and failed to see other action); see also Women’s Health Protection Act of 2021, H.R. 3755, 117th Cong. § 2 (2021) (commenting on the cloture of the motion that led to a vote of forty-six to forty-eight).

304. See generally *id.* (referring to the Act’s sponsorship by Senator Barbara Boxer from California).

305. See Peachman, *supra* note 27, at 290–91 (“The bill solidifies as law that every woman has the fundamental right to choose to terminate a pregnancy prior to fetal viability, or to terminate post-viability when necessary to protect her life or health.”).

306. See Women’s Health Protection Act of 2021, H.R. 3755, 117th Cong. § 2 (2021) (“To protect a person’s ability to determine whether to continue or end a pregnancy, and to protect a health care provider’s ability to provide abortion services.”).

its passage with a slim Republican majority, and a single democratic vote.³⁰⁷

Narrower legislation must be drafted to potentially codify necessary protections.³⁰⁸ Senators quickly began drafting a narrower bill to potentially receive bipartisan support.³⁰⁹ The result was the Reproductive Freedom for All Act.³¹⁰ Any future legislative action must guarantee minimal protections for women in all fifty states.³¹¹ If the Reproductive Freedom for All Act does not pass the Legislature, members of Congress must aim their efforts toward curating increasingly bipartisan legislation.³¹² Legal scholar Kathryn N. Peachman proposes blanket rights, in which states could then apply differing requirements and restrictions so long as the federal code is abided.³¹³ This alternative approach may garner enough support from Republican representatives to succeed in the legislative process.³¹⁴

In his concurring opinion, Justice Kavanaugh reiterates that states cannot bar residents from traveling to an abortion-legal state due to the principle of interstate travel.³¹⁵ Congress should continue arguing that complete abortion bans affect interstate commerce, which grants the Legislature the power to “regulate commerce . . . among the several states.”³¹⁶ Peachman describes the impact of abortion policy on neighboring states although abortion is a purely local activity; thus,

307. See generally *id.* (criticizing the one “nay” democratic vote to be Senator Manchin from West Virginia).

308. See generally Reproductive Freedom for All Act, S.4688, 117th Cong. §§ 2–4 (2022) (portraying Congress’ first attempt at bipartisan abortion legislation).

309. See *id.* (acknowledging the sponsorship by Senator Tim Kaine from Virginia).

310. See *id.* (“This bill establishes a general right of all persons to make certain reproductive decisions without undue government interference.”).

311. See Peachman, *supra* note 27, at 289 (explaining that a federal statute is the only way to guarantee protection to all women).

312. See generally *id.* at 290 (evaluating the failure of legislation in the past twenty years).

313. See *id.* at 294 (“[S]tates may still have different requirements regarding waiting periods, parental consent or notification, sonogram requirements, etc.”).

314. See generally *id.* at 295 (agreeing with Peachman’s assessment of achieving a bipartisan stance on abortion legislation).

315. See *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 2309 (2022) (“For example, may a State bar a resident of that [s]tate from traveling to another [s]tate to obtain an abortion? In my view, the answer is ‘no’ based on the constitutional right to interstate travel.”).

316. See U.S. CONST. art. I, § 8, cl. 3 (outlining how the Commerce Clause can apply to abortion bans).

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congressional authority is readily available.³¹⁷ To ensure the protection of reproductive rights, legislative efforts should focus on utilizing the Commerce Clause as the basis for codifying *Roe*.³¹⁸ If we yield to impasse, the lives of women across the country will remain subject to restrictive state legislatures.³¹⁹

President Biden's assessment to rely on the Legislature is correct for a long-term solution to abortion rights, but the Executive is the solution for immediate assistance.³²⁰ Considering the uncertainty surrounding the 2024 presidential election, it is imperative the current Administration fully utilize their democratic favor.³²¹ The Executive may still act within its reach as shown while the Legislature works to pass bipartisan legislation.³²² The branches of government must work concurrently to effectuate relief for the most vulnerable people affected.³²³ The time for action is now.³²⁴

CONCLUSION

Dobbs continues to have sweeping ramifications on the most vulnerable populations.³²⁵ Undocumented immigrants, facing the incessant threat of deportation, will be driven to pursue abortion care that is

317. See Peachman, *supra* note 27, at 293 (supporting that abortion affects interstate travel by the "volume of abortions performed nationally and the interstate travel that occurs due to stark contrasts in abortion policy by neighboring states").

318. See Freedom of Choice Act, S.2020, 108th Cong. § 2(15) (2004) (affirming senators' ability to regulate interstate commerce as a finding for S.2020).

319. See *id.* at § 2(11) ("Legal barriers to the full range of reproductive services endanger the health and lives of women.").

320. See generally Associated Press, *supra* note 298 (showcasing the extent to which the Executive can provide action as compared to the Legislature).

321. See generally *id.* (pointing the political advantage the Democratic Party currently holds).

322. See generally *id.* (recommending concurrent action by both branches of the government to arise at the appropriate time).

323. See generally *id.* (determining both branches should make remedial change rather than one).

324. See *id.* ("Biden said Congress would have to codify that right and for that to have a better chance in the future, voters would have to elect more lawmakers who support abortion access.").

325. See *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2345 (2022) ("In States that bar abortion, women of means will still be able to travel to obtain the services they need. It is women who cannot afford to do so who will suffer the most.").

suboptimal, if not outright deadly.³²⁶ Pregnant women face three options: (1) bear the child, (2) self-inflict an abortion, or (3) risk deportation.³²⁷ These options violate traditional notions of Due Process and Equal Protection.³²⁸ The scale of this problem cannot be overstated.³²⁹ With nearly “two-thirds of the country’s population” living within a 100-mile radius of the U.S. border, undocumented women will be compelled into an unwanted pregnancy—or deportation.³³⁰

The Biden Administration has tools at their disposal to remedy this public health crisis.³³¹ The Executive Branch can authorize the use of federal lands for abortion care.³³² Moreover, Biden’s declaration of a federal emergency would be instrumental in expanding access to abortion medication via telehealth services.³³³ These solutions would alleviate the issue in the interim for citizens and noncitizens alike.³³⁴ The best avenue is codifying *Roe v. Wade*.³³⁵ Only then would the reproductive rights of

326. See generally *Stevenson, supra* note 120, at 2026 (predicting a total abortion ban would expose women to high mortality risks).

327. See *Huddleston, supra* note 9, at 1748 (highlighting how women in the border zone would be unable to obtain an abortion without risking deportation by traveling through check-points).

328. See generally *Dobbs*, 142 S.Ct. at 2235, 2242 (denying the right to an abortion previously guaranteed by the Due Process and Equal Protection Clauses).

329. See *id.* at 2345 (“After today, in States where legal abortions are not available, they will lose any ability to obtain safe, legal abortion care.”).

330. See *Carmen Sesin, Two-Thirds of Americans Live in a Border Zone; What Are Their Rights?*, NBC NEWS (Jan. 26, 2018, 7:41 AM), <https://www.nbcnews.com/news/amp/ncna841141> [<https://perma.cc/HP8B-EXKB>] (“[A]bout two-thirds of the country’s population or about 200 million people live within the [one hundred]-mile zone.”).

331. See generally *Cohen ET AL., supra* note 27, at 63 (recommending the Biden Administration utilize its executive powers to aid in the anti-abortion crisis); see also Robert T. Stafford Disaster Relief Emergency Assistance Act, Pub. L. No. 93-288 § 101, 1 (2021) (stating the abilities to effectuate a public emergency).

332. See *Cohen ET AL., supra* note 27, at 63 (proposing the use of federal land in states where abortion is illegal).

333. See generally *id.* at 70 (highlighting the significance of declaring a federal emergency in improving telehealth infrastructure).

334. See generally *Associated Press, supra* note 298 (advocating for the election of “law-makers who support abortion access”).

335. See generally *Peachman, supra* note 27, at 290 (discussing the need to aid women by “maintaining *Roe* in American jurisprudence”).

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women be beyond the reach of a reactionary Supreme Court.³³⁶ These measures are necessary to confront an obstinate opposition lacking in moral clarity.³³⁷ It is crucial to emphatically advocate for the reproductive rights of the undocumented because progress is not linear, and this advocacy will prevent these rights from eroding.³³⁸

336. *See generally* *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2319 (2022) (“[N]o one should be confident that this majority is done with its work.”).

337. *See id.* at 2343 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting) (“The most striking feature of the [majority] is the absence of any serious discussion of how its ruling will affect women.”); *contra* James E. Bond, *Multiculturalism: American's Enduring Challenge*, 1 SEATTLE J. FOR SOC. JUST. 59, 60 (2002) (disagreeing with the melting pot multiculturalist outlook); *see generally* *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (exemplifying the introduction of rights for undocumented children in the American legal system).

338. *See generally* *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (espousing the importance of advocating for the reproductive rights of undocumented individuals); *see also* Rachel Ellner, *Growth is Not Linear*, MEDIUM (Oct. 2, 2016), <https://rlebensohn.medium.com/growth-is-not-linear-952fe269606d#:~:text=Growth%2C%20success%2C%20achievement%2C%20and,order%20to%20ultimately%20move%20forward> [<https://perma.cc/P36T-K3QP>] (emphasizing that progress is not always a straightforward path).