

CENTER *for*
REPRODUCTIVE
RIGHTS



The Constitutional Right to Reproductive Autonomy:

Realizing the Promise of the 14th Amendment

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Introduction

The Center for Reproductive Rights (the Center) works to ensure that reproductive rights are guaranteed in law as fundamental human rights around the world. Our litigation, legal policy, and advocacy work—combined with unparalleled expertise in constitutional, international, and comparative human rights law—has transformed how reproductive rights are understood by courts, governments, and human rights bodies. Through our work across five continents, we have played a critical role in securing legal victories before national courts, United Nations committees, and regional human rights bodies on reproductive rights issues, including access to life-saving obstetrics care, contraception, maternal health, and safe abortion services, as well as the prevention of forced sterilization and child marriage. In the United States, we build, defend, and enforce the fundamental right to reproductive autonomy under the U.S. Constitution, state constitutions, federal and state law, and under international human rights law.

“Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.”

- Justices Breyer, Sotomayor and Kagan dissenting opinion in *Dobbs v. Jackson Women's Health Organization*

As this Report was being finalized, the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, concluding there is no federal constitutional right to abortion and overruling *Roe v. Wade* and *Planned Parenthood v. Casey*. As the joint dissent warns, the majority's callous decision relegates women to second-class status; defies “the ‘Court’s precedents about bodily autonomy, sexual and familial relations, and procreation. . . all parts of the fabric of our constitutional law;” is “catastrophic . . . as a matter of constitutional method;” and means “young women will come of age with fewer rights than their mothers and grandmothers had.”¹ This cataclysmic retrogression of rights in the United States – never before has the Court eliminated a fundamental liberty right – is contrary to the overwhelming global legal trend of liberalizing access to abortion as a matter of human rights.

For reasons the dissent so powerfully explains, the right to reproductive autonomy is deeply grounded in the U.S. Constitution and is about much more than *Roe* and the right to abortion. To be clear, *Roe*'s holding that this right is part of the liberty guaranteed by the Fourteenth Amendment of the Constitution was correct in its recognition that decisions about childbearing rise to the level of constitutional importance. The Supreme Court's watershed reproductive rights cases – from *Griswold v. Connecticut* to *Roe v. Wade* – grounded reproductive rights in federal constitutional rights of privacy and liberty. But in the more than fifty years since those initial decisions, even before *Dobbs* ended *Roe*, courts failed to enforce a robust constitutional doctrine that guarantees reproductive autonomy for all people.²

Instead, the Court's early and repeated constriction of *Roe* left many people behind. Just a few years after the Supreme Court decided *Roe*, and even before it reduced the legal standard protecting the right to abortion in *Casey*, the Court wrongly upheld restrictions that put abortion out of reach for many people. And decades of restrictive state and federal legislation targeting abortion have imposed a web of unnecessary hurdles and financial costs that those who face systemic barriers to health care are least able to overcome, including people of color, people living on low incomes, people with disabilities, immigrants, young people, and LGBTQIA+ people.

Further, the liberty jurisprudence following *Roe* has failed to protect individuals from being prosecuted for their conduct during pregnancy or for experiencing miscarriages or stillbirths. It also has failed to grapple with the historical record and present reality that government policies such as coercive contraception or sterilization have had the intent and impact of discriminating against people of color and people with disabilities.

It was against this backdrop that, in the 1990s, a group of Black women in the United States created the reproductive justice framework, which

women of color-led organizations later defined to include the right to have a child, to not have a child, and to parent one's children in a safe and healthy environment.³ Since then, the reproductive justice movement and other social justice movements have consistently elevated how the Court's jurisprudence has fallen short of securing all aspects of this right in a society where sexism, racism, ableism, economic exploitation, and anti-immigrant bias flourish.⁴

The Court's decimation of 50 years of precedent requires a rebuilding of jurisprudence to align with the promise of the Fourteenth Amendment. The Fourteenth Amendment's guarantee against state deprivation of liberty, including a right to privacy and to control one's body, must remain a core pillar of reproductive autonomy. But it should not be the only pillar. Multiple legal rights establish that government restrictions on reproductive autonomy constitute sex, race, and economic discrimination, and that such restrictions can deny people their lives, as well as their ability to live a life with dignity.

Protecting reproductive autonomy requires leadership and engagement by multiple stakeholders, including communities most impacted, grassroots activists, researchers, policymakers, legal scholars, cultural influencers, and more. And courts, too, must remain key rights-protecting institutions in our democracy. Thus, an egregiously wrong decision, such as *Dobbs v. Jackson Women's Health Organization*, is no time to turn away from the courts. It is a critical moment to insist that courts fulfill their role in ensuring equal justice for all.

In support of building stronger, future jurisprudence, this Report provides an exploration of constitutional rights and legal principles in U.S. law that undergird the right to reproductive autonomy. In doing so, it draws on instructive international and comparative law and the Center's experience and expertise as a global legal organization dedicated to protecting reproductive rights as human rights.

Why Reproductive Autonomy Matters

The power to make and act on decisions about reproduction is central to how people shape their lives. Everybody needs and deserves affordable and accessible comprehensive reproductive health care regardless of where they live, their economic status, their race, or their identity and background. This requires that the government respect, protect, and fulfill reproductive autonomy rights. Indeed, the history of reproductive oppression in the United States and modern-day realities for people with the capacity to become pregnant confirm the devastating and lasting harms that come when the government does not.

People of all gender identities can become pregnant and are harmed by restrictions of reproductive autonomy.⁵ Yet many restrictions have explicitly targeted women. Recognizing both of these truths, this Report refers to women when describing historical and present-day discrimination that targets women in particular and when discussing case law or other sources that do the same. But throughout, this Report embraces all people with the capacity for pregnancy.

The Historical Context of Reproductive Control

For centuries, laws and policies at all levels of government enforced the second-class status of women and, for categories of women the state deemed “fit,” the stereotype that a woman’s primary role was to be a wife and mother. Laws and policies perpetuated these stereotypes and women’s second-class status in myriad ways, from limiting women’s ability to own property,⁶ to vote,⁷ to pursue an education,⁸ to work,⁹ and to participate fully in civic life.¹⁰ For centuries, those seeking to restrict women’s reproductive autonomy have explicitly invoked these stereotypes, which often appear in the text of laws themselves.¹¹ For example, the anti-abortion movement in the U.S. began in the mid-1800s with a campaign focused on the alleged

harms to women of avoiding their “natural” roles.¹² The physician who led this campaign claimed that “childbearing was ‘the end for which [married women] are physiologically constituted and for which they are destined,’” and that avoiding this pre-ordained role “must necessarily cause [a woman’s] derangement, disaster, or ruin.”¹³ The notion that women could not be trusted with a decision to end a pregnancy, given the harm that it would supposedly cause to their “mental, moral, and physical well-being,” was part and parcel of this campaign.¹⁴ Similar arguments were made in support of the related anti-contraception and purity campaigns of the time that sought to stigmatize nonmarital and non-procreative sex as immoral, unhealthy, physically dangerous, and contrary to women’s primary and natural childbearing role.¹⁵ These campaigns led to the proliferation of laws prohibiting education and information about pregnancy prevention; use and distribution of contraception, even for married couples; and criminalization of abortion.¹⁶ Reflecting these discriminatory views of women’s “proper” role, to this day, abortion restrictions discuss women as “mothers” or “maternal patients” who need the state’s “protection” in making the decision whether to continue or end a pregnancy.¹⁷

At the same time, laws and policies at all levels of government authorized coercive and brutal means to control the childbearing and childrearing of women the government viewed as “unfit.” Enslaved Black women were forced to give birth for their oppressor’s profit, under the cover of state laws that viewed them and their children as property and did not recognize the rape of enslaved women as a crime.¹⁸ In the 1900s, the United States government and many state governments targeted Black women through federal and state sterilization programs, as well as with policies that penalized Black women for having children by withdrawing public benefits that their families needed.¹⁹ These policies took various forms, including laws that denied benefits to unmarried mothers, who were predominantly women of color. For example, Louisiana purged tens of thousands of African American children from the welfare rolls in 1960 because their parents were not married.²⁰ Modern versions of these harmful types of policies remain in place today, including “family caps” in more than a dozen states that disproportionately impact

people of color and that disallow additional assistance to children born while a family is receiving certain public benefits.²¹ Further, Black parents and children continue to be separated at disproportionately high rates, including by removing Black children from their homes, often based on state allegations that penalize families who are living on low incomes.²²

Other women of color have also experienced profound government abuse. Racially restrictive immigration policies like the Chinese Exclusion Act of 1882 and the Page Act of 1875 explicitly excluded Asian American women, including wives of those already living in the U.S., from entering the country and therefore controlled the ability of certain communities to bear and rear children.²³ As concerns about immigration and welfare costs intensified in the mid-20th century, physicians routinely coercively sterilized Mexican American and Puerto Rican women, often after they gave birth in public hospitals.²⁴ And “[p]hysicians in the Indian Health Service sterilized an estimated 25 to 42 percent of Native American women who were of childbearing age between 1970 and 1976 alone.”²⁵ This sterilization abuse followed the government’s actions in forcibly removing Native American children from their families and communities to send them to boarding schools in the late 19th and early 20th century.²⁶

Beginning in the early 1900s, more than 30 states also passed involuntary sterilization laws targeting people with actual or perceived disabilities and others in marginalized communities on the ground that they “were socially inadequate and should be prevented from procreating.”²⁷ Ignoring these egregious violations of reproductive autonomy, the U.S. Supreme Court upheld such a law over equal protection and due process challenges in *Buck v. Bell*, a decision that has never been overturned.²⁸ Although nearly all states have now repealed their involuntary sterilization statutes, most states still permit forcible sterilization with prior judicial authorization.²⁹ “[D]isabled women, especially those with intellectual disabilities, are significantly more likely than nondisabled women to be sterilized and at younger ages.”³⁰

These abuses have continued into the 21st century. Just a decade ago, California involuntarily sterilized prisoners, a policy that disproportionately harms women of color.³¹ And as recently as September 2020, immigrant rights organizations filed a federal complaint³² documenting medical neglect and abuse in an Immigration and Customs Enforcement facility, including forced sterilization through non-consensual hysterectomies being performed on those detained at the facility, who are disproportionately women of color.³³

Finally, states have enforced civil or criminal penalties on people who experience miscarriages or stillbirths, or who engage in behaviors that allegedly threaten the health of their pregnancies, contrary to the recommendations of major medical organizations.³⁴ Invariably, it is women of color and others in marginalized communities who are targeted by the government with such punitive and harmful policies.³⁵

Reproductive Autonomy is Critical to Health, Life, and Economic and Family Wellbeing

Bringing a child into the world, raising, and nurturing children, building families and communities are, for many, among the most joyful and meaningful experiences in life. At the same time, these life-changing events bring challenges and risks. That is why, for people who can become pregnant, control over fertility and decisions about their body and health care are critical for determining if, when, and how to start or expand a family, and for preserving their own life and health.

For these reasons, pregnancy and childbirth should be a safe, healthy, and supported experience. Even in the best of circumstances, pregnancy carries the potential for significant health risks. In addition to exacerbating underlying health conditions, pregnancy can cause new health conditions to develop, such as new-onset hypertension and gestational diabetes (diabetes during pregnancy), which frequently leads to maternal and fetal complications, including increasing the risk of developing diabetes later in life.³⁶ Further, childbirth imposes its own physical risks: extreme pain; hours and often days

of labor or delivery by cesarean surgery; and, risks of severe complications, including death.³⁷ And many people can have long-lasting health impacts even after a seemingly healthy pregnancy and safe delivery. For example, vaginal childbirth can cause long-term pelvic floor damage that can result in serious conditions such as uterine prolapse years later in life.³⁸ Yet, while most of these risks can be safely managed and the rate of maternal mortality is decreasing in most countries, maternal mortality and morbidity are on the rise in the United States.³⁹ The majority of maternal deaths in the U.S. are preventable,⁴⁰ yet the maternal health crisis disproportionately impacts Indigenous and Black women in particular, who are respectively two to three times more likely to die from pregnancy-related causes than white women.⁴¹

Research demonstrates that Black, Indigenous, and other people of color face the greatest health risks in pregnancy and childbirth due to structural racism, inadequate access to services, and underinvestment in overall care, and they often experience discrimination, ill-treatment, abuse, and coercion in maternal health care settings.⁴² Further, many individuals who give birth in the U.S. do not have a meaningful choice in where and how they give birth, or in who assists them with birth, which also can contribute to negative maternal health outcomes.⁴³

To address this maternal health crisis, it is essential that individuals have access to affordable, comprehensive, culturally appropriate, high quality, evidence-based health care, wherever they live, throughout their lives.⁴⁴ But too many states instead pursue policies that limit individuals' options and access to health care. Evidence shows that the states that more heavily restrict abortion tend to have fewer supportive policies for women and families and also have worse maternal and child health outcomes.⁴⁵ And the move backward to criminalizing abortion will only make maternal mortality worse,⁴⁶ particularly for Black women and other people of color. Before *Roe* legalized abortion nationwide, lack of access to safe abortion care was a significant cause of maternal mortality, especially for Black women.⁴⁷

Likewise, any rollback of legal protection and policies supporting access to

contraception would be devastating for reproductive, maternal, and newborn health. More than 99% of reproductive-aged women who “have ever had sexual intercourse with a male have used at least one contraceptive method.”⁴⁸ They do so to plan the timing and spacing of pregnancies and to have healthier pregnancies and newborns when they are ready. They also use contraception to reduce the risk of unplanned pregnancies, the risks of adverse pregnancy outcomes, and to manage other health conditions.⁴⁹ In addition, access to reliable and affordable contraception has empowered women to decide and plan their family, education, and career paths and “helped reshape societal expectation of and opportunities for women.”⁵⁰

Alongside substantial physical health risks and consequences, being pregnant and having a child bring life-changing impacts on the economic and social wellbeing of pregnant people and their families. There are myriad ways government can support people who are pregnant or parenting as equal participants in economic, social, and public life,⁵¹ but taking away the right to abortion is not one of them. For people who decide to end a pregnancy, abortion is safe, and nearly one in four women will have an abortion in their lifetime.⁵² Legalization of abortion has had measurable and significant positive impact on women’s socioeconomic standing⁵³ and on gender equality overall.⁵⁴ The legal availability of abortion has enabled generations of women to plan and control if or when to start a family, to participate more fully in society, and to attain higher levels of education,⁵⁵ employment,⁵⁶ and economic security.⁵⁷ These impacts are particularly strong for young women – research has shown that for young women who experienced an unintended pregnancy, access to abortion increased the probability they finished college by nearly 20% and the probability they entered a professional occupation by 40%; these effects were even greater among young Black women.⁵⁸

Despite these important gains for women since *Roe*, and despite the known socioeconomic risks of being denied access to abortion,⁵⁹ widespread disparities in abortion access persist. And those disparities are getting worse. Nationwide, the more than 10.5 million women of reproductive age who qualify for federally funded health programs, for example federal employees

and those in the Medicaid program, are denied coverage for abortion. The majority are people who are living in poverty or on low incomes and are women of color.⁶⁰ At the state level, anti-abortion lawmakers, predominately in the South and Midwest, have passed hundreds of laws designed to restrict and ban access – 2021 saw the passage of a historic number of such laws, the most since *Roe* was decided in 1973.⁶¹ Abortion restrictions disproportionately harm people who already face discrimination and disparate health outcomes – especially Black,⁶² Indigenous,⁶³ and other people of color,⁶⁴ LGBTQIA+ people,⁶⁵ people with disabilities,⁶⁶ young people,⁶⁷ immigrants,⁶⁸ people in abusive situations,⁶⁹ and people living on low incomes.⁷⁰

Today, as in the past, these efforts to police and punish bodies and reproduction significantly harm people’s health and wellbeing and deny individuals the reproductive autonomy essential to control their own bodies, lives, and futures.



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The Human Right to Reproductive Autonomy

The right to reproductive autonomy is grounded in international human rights, which are recognized and accepted norms and standards setting forth basic rights, freedoms, and state obligations. International human rights promote and protect the dignity and equality of all people and are inherent to every person. They provide for the freedom to choose how to live and express oneself, as well as the right to the means necessary to meet basic needs. Human rights are enshrined in international and regional declarations and treaties, including several human rights treaties that the United States has ratified. Thus, human rights are recognized in law and create binding obligations on governments.

The United States has ratified three core human rights treaties with important protections for reproductive autonomy: the International Covenant on Civil and Political Rights (ICCPR),⁷¹ the Convention Against Torture and Other Cruel, Inhuman,

or Degrading Treatment or Punishment (CAT),⁷² and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).⁷³ It has signed but not yet ratified a number of other human rights treaties that likewise contain critical protections for reproductive autonomy, including the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁷⁴ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁷⁵ and the Convention on the Rights of Persons with Disabilities (CRPD).⁷⁶

The U.S. has attached conditions to the human rights treaties it has ratified so as to preclude the treaties' direct enforcement in litigation in U.S. courts or in actions against the United States before United Nations (UN) human rights treaty bodies (committees of independent experts that monitor implementation of the human rights treaties).⁷⁷ Nevertheless, human rights law provides constructive

grounding for a more robust constitutional right to reproductive autonomy in the United States. International law and the reasoning of international and regional human rights bodies and UN independent human rights experts offer useful guidance and persuasive authority for U.S. courts assessing constitutional questions. For example, in *Lawrence v. Texas*, the U.S. Supreme Court looked to the European Court of Human Rights among other sources in holding that a Texas law criminalizing consensual sexual conduct between same-sex partners violates the liberty interests protected by the Fourteenth Amendment.⁷⁸ In her concurrence in *Grutter v. Bollinger*, concerning the University of Michigan Law School's use of affirmative action, Justice Ruth Bader Ginsburg cited to international human rights treaties and noted that affirmative action measures are consistent with governments' human rights obligations to guarantee the equal enjoyment of rights.⁷⁹ Justice Ginsburg spoke often and publicly of her appreciation for and

approach to comparative law and human rights.⁸⁰ Justice Stephen Breyer, too, has noted how the experience of respected international bodies and courts can “cast an empirical light on the consequences of different solutions to a common legal problem.”⁸¹

State courts, too, can look to international law for such guidance and persuasive authority.⁸² For example, in *In re Marriage Cases*, the California Supreme Court looked to the Universal Declaration of Human Rights and international and regional human rights treaties to support its holding that a ban on same-sex marriage violated the California state constitution.⁸³

Treaties that the U.S. has ratified, including the ICCPR, CAT, and CERD, are perhaps more persuasive to U.S. courts than treaties that have been signed, but not yet ratified. Nevertheless, the United States has an obligation under international law not to defeat the object and purpose of treaties it has signed even if not yet ratified,⁸⁴

and this Report draws its analysis from the full scope of human rights protections for reproductive autonomy.

International human rights law protects people’s access to reproductive health care and the exercise of reproductive decision-making. For example, UN human rights treaty bodies have found that restrictive abortion laws violate a range of human rights, including rights to life, privacy, health, equality and non-discrimination, and freedom from cruel, inhumane, and degrading treatment.⁸⁵ Under human rights law, abortion, like other reproductive health services, must be available, accessible (including affordable), acceptable, and of good quality.⁸⁶ UN human rights experts have expressed concern about the impact of severe legal restrictions, barriers, and stigma on abortion access⁸⁷ and called for states to remove such legal and policy barriers.⁸⁸

Likewise, human rights law protects the right to contraception and to safe and respectful maternal health care, free from discrimination,

coercion, and violence. UN human rights treaty bodies have recognized the prevention of maternal mortality and morbidity and the right to safe pregnancy and childbirth as part of a pregnant person’s rights to life, health, equality and nondiscrimination, and freedom from cruel, inhumane, and degrading treatment.⁸⁹ Like abortion care, to align with international human rights standards, contraception and maternal health care must be available, physically, economically, and culturally accessible, medically and ethically acceptable, and of good quality.⁹⁰ Human rights treaty bodies also emphasize that governments must ensure that use of contraceptives is voluntary, fully informed, and without coercion or discrimination.⁹¹ Forced sterilization violates the right to be free from torture or ill-treatment.⁹²

Independent human rights experts appointed by the UN Human Rights Council have applied these protections to assess reproductive rights violations in the United States. For example, in September

2021, following the enactment and implementation of Texas Senate Bill 8, which bans abortion after six weeks of pregnancy and shifts enforcement to individuals rather than the state, a group of independent UN human rights experts condemned the law as a violation of international human rights and called on the United States to halt its implementation, prevent retrogression in access to abortion, and enact positive measures to ensure access to abortion.⁹³ The statement noted the law's particularly devastating impact on marginalized communities.⁹⁴

UN independent human rights experts and human rights treaty bodies have similarly noted concern at the persistence of racial disparities in sexual and reproductive health outcomes, noting alarm over high maternal mortality rates among Black women in the United States.⁹⁵ Drawing on the United States' human rights treaty obligations, they have recommended that the United States take action to address disparities in maternal

health, for example by ensuring access to affordable health care and sufficient resources for maternal mortality review boards.⁹⁶

The U.S. Supreme Court has not, to date, incorporated international human rights law into its decision-making on reproductive rights, even while other national courts look to it in their constitutional jurisprudence protecting reproductive autonomy. For example, the Supreme Court of Mexico drew upon international human rights law in its 2021 groundbreaking decision that recognizes a constitutional right to safe, legal, and free abortion services in early pregnancy and in other situations. The decision imposes obligations on all states in Mexico to fulfill this right to abortion, including by providing free abortion services in early pregnancy.⁹⁷ Similarly, in deciding the 2009 *Lakshmi Dhikta* case, the Supreme Court of Nepal drew upon human rights to guarantee economic access to safe and legal abortion services for women living in poverty in Nepal, ordering the government to establish

a national fund to pay for abortion costs for women living in poverty.⁹⁸ And, in 2022, the High Court of Kenya in Malindi relied on international human rights treaties and the guidance of the human rights treaty bodies in affirming that abortion care is a fundamental right under the Constitution of Kenya and that arbitrary arrests and prosecution of patients and health care providers for seeking or offering abortion care is illegal.⁹⁹

As these national courts have done, and federal and state courts in the U.S. can do, this Report draws on international human rights law and principles to advance a robust right to reproductive autonomy in the United States.

Core Human Rights Principles

Several core human rights principles and obligations animate our analysis of the right to reproductive autonomy in the United States.

Universality

Human rights are universal. They recognize the dignity and humanity of all people and do not depend on citizenship or other status.

Equality and Non-discrimination

Human rights require that no one suffer discrimination on the basis of race, color, ethnicity, gender, gender identity, age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth, or other status as established by human rights standards. This non-discrimination principle applies to intentional discrimination as well as policies and practices that have a discriminatory result, or disparate impact. And it requires that governments take affirmative measures to diminish or eliminate conditions that cause or perpetuate discrimination. States must address structural and systemic discrimination resulting in a disparate impact on marginalized individuals and communities. States also must address multiple and intersecting forms of discrimination, which create combined or overlapping systems and experiences of discrimination or disadvantage. Human rights also recognize the need for a substantive equality approach, which addresses and remedies the root causes of discrimination and seeks to ensure equality of outcomes.

Interdependence and indivisibility

Human rights are interconnected and indivisible. Each right contributes to the realization of the other, and the fulfilment of one right often depends, wholly or in part, upon the fulfilment of others. In addition, all human rights have equal status and cannot be positioned in a hierarchical order. One right cannot be compromised at the expense of other rights.

Government obligations, including the obligation to fulfill rights

Human rights law places a specific set of obligations on governments, namely the obligation to respect, protect, and fulfill rights. States' obligation to respect human rights means that states must refrain from directly or indirectly interfering with individuals' exercise of rights. States' obligation to protect human rights means that they must take measures to prevent third parties from directly or indirectly interfering with the enjoyment of rights. The obligation to fulfill human rights requires governments to adopt appropriate legislative, administrative, budgetary, judicial, and other measures to ensure the full realization of rights. The obligation to fulfill also requires states to take measures to eliminate practical barriers to the full realization of rights.

Rule of law and accountability

Human rights require good governance, transparency, access to justice, and conditions in which people can meaningfully demand and seek their rights. This requires mechanisms, processes, and opportunities to ensure that governments implement laws and policies, and that individuals are able to claim their rights and report violations when they occur. Accountability requires states to provide victims of rights violations redress and appropriate remedies, as well as take steps to prevent repetition of future harms.

Participation of and centering those most impacted

Human rights require a participatory approach to the development of laws, policies, and programs. Those who are impacted must have a meaningful opportunity to engage in decision making that affects them. Participation of key stakeholders ensures that the needs and priorities of those who are most affected by policies inform their development and the delivery of services.

Non-retrogression

Human rights law prohibits retrogression, or backwards steps in law or policy that impede or restrict the enjoyment of a right.

Constitutional and Human Rights Bases of the Right to Reproductive Autonomy

Given the impact that pregnancy and having children has on an individual's health, work, family, and ability to chart one's own life course, the right to reproductive autonomy must be protected by the life, liberty, *and* equal protection clauses of the Fourteenth Amendment to the U.S. Constitution, as well as by similar protections in state constitutions and federal and state statutes. In evaluating restrictions on reproductive autonomy, courts must be clear that people do not lose their legal rights when they become pregnant or because they have the capacity to become pregnant – they have an equal claim to all recognized rights.

“...nor 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.”

- U.S. Constitution, Amendment XIV (1868)

In evaluating restrictions on reproductive autonomy, courts must be clear that **people do not lose their legal rights when they become pregnant** or because they have the capacity to become pregnant – **they have an equal claim to all recognized rights.**

Just like other decisions related to one's body and family that are protected by rights to liberty and privacy, individuals must be able to make decisions related to pregnancy and childbearing without government coercion.

Although the government should provide people with accurate, evidence-based information, it must not pressure individuals' decisions related to pregnancy or penalize or control their conduct based solely on an asserted interest in protecting potential life.

Also, reproductive autonomy is necessary to protect against persistent government efforts to use control of reproduction as means of subordinating women and marginalized communities. Under the right to equal protection, the law must address the reproductive coercion that is both driven by and results in intersecting forms of discrimination. The right to reproductive

autonomy must account for real-world access and ensure that the government must adopt laws and policies that enable, rather than impede, such access.

Further, given that decisions about pregnancy, childbirth, and parenting are critical to living a life with dignity; and given that every pregnancy bring risks of death and serious harm, the right to life must also protect reproductive autonomy.

The Right to Liberty: Personal Decision-Making and Bodily Autonomy

The Court's conclusion that the Fourteenth Amendment's Liberty Clause protects bodily autonomy dates back to 1891. As the Court held in *Union Pacific v. Botsford*, "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person."

The U.S. Supreme Court was correct decades ago when it concluded that the Fourteenth Amendment's Liberty Clause protects individual decisions about whether and when to have a child. Indeed, for more than 100 years, the Supreme Court has interpreted the Constitution's textual protection for liberty to include the right to make personal decisions related to family, marriage, and childrearing, as well as as the right to control one's body.¹⁰⁰ Many state courts, interpreting their similar state constitutions, have done the same.¹⁰¹ These well-established rights of personal decision-making and bodily integrity support a broad right to reproductive autonomy, including the right to have or not have children, to make one's own health care decisions related to pregnancy, and the rights to access contraception and abortion. The *Dobbs* Court's rejection of this understanding of liberty is wrong and contravenes decades of prior precedent.

As the U.S. Supreme Court correctly explained in *Casey*, the federal Constitution's protection against state deprivation of liberty includes "the right to make family decisions and the right to physical autonomy."¹⁰² The Court's conclusion that the Fourteenth Amendment's Liberty Clause protects bodily autonomy dates back to 1891. As the Court held in *Union Pacific v. Botsford*, "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person."¹⁰³ Relying on principles of bodily autonomy, for example, the Court has recognized that the right to liberty protects against state-forced intrusions into the body¹⁰⁴ and reserves to the individual the ability to decide whether to

accept medical treatment.¹⁰⁵ In recent years, multiple federal decisions have reinforced the principle that “physical autonomy” and “bodily integrity” are integral components of liberty.¹⁰⁶

Cases establishing that liberty protects the right to make decisions related to marriage, family, and childrearing also extend back more than a century. From when the Court first held that parents could direct the upbringing of their children by sending them to private schools,¹⁰⁷ to its decisions legalizing interracial marriage¹⁰⁸ and contraception,¹⁰⁹ it has been clear that the individual, not the government, must be in control of decisions about family life and children. In a less well-known decision, the Court also relied on the Liberty Clause to invalidate public school policies that forced pregnant teachers into unpaid leave months before their delivery dates on the ground that such policies “unduly penalize[d] [them] for deciding to bear a child.”¹¹⁰ Again, the Court has extended this jurisprudence in recent years. It has relied on the “constitutional protection [for] personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education”¹¹¹ to recognize a right to sexual intimacy between consenting adults and to marry someone of the same sex.¹¹²

This century-long line of case law interpreting the Liberty Clause to protect both bodily autonomy and personal decisions related to family, marriage, and childbearing is rooted in the purpose of the Fourteenth Amendment.¹¹³ Following the Civil War, the Framers of the Fourteenth Amendment designed it to secure ““for every citizen of the United States, everywhere . . . full and complete protection in the enjoyment of life, liberty, property, [and] the pursuit of happiness.””¹¹⁴ In particular, the historical record demonstrates that the Fourteenth Amendment was a response to *all* the horrific abuses of slavery, which denied Black people the right to control their bodies, as well as the ability to form families, legally marry, and make their own decisions about having and raising children.¹¹⁵ The liberty and equality clauses in the Amendment were drafted and understood to protect these basic rights of what it means to be free and not enslaved: the right to control one’s body and the “rights of heart and home.”¹¹⁶

For all these reasons, the Supreme Court’s liberty jurisprudence must provide sturdy support for the right to reproductive autonomy. The right to bodily integrity is, of course, a cornerstone for all decisions related to pregnancy. That includes the right to decide to have a child and protection from coercive state sterilization, the right to make one’s own health care decisions during pregnancy, and the right to a safe and healthy pregnancy and childbirth. Contraception and abortion are no different, and the Court was right to hold that liberty includes the individual’s right to use contraception in order to prevent or delay pregnancy,¹¹⁷ and the right to end a pregnancy.¹¹⁸ As Justice John Paul Stevens wrote so powerfully thirty years ago, “[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men’s minds. The same holds true for the power to control women’s bodies.”¹¹⁹ Accordingly, the government may pursue its interest in fetal life by providing evidence-based information and by enacting policies that support families, newborns, and individuals who are carrying a pregnancy to term, but it cannot further fetal life by forcing people to become or remain pregnant or by “inject[ing] into a woman’s most personal deliberations [the State’s] own views of what is best.”¹²⁰

Further, the Court’s seminal decisions protecting contraception and abortion fall squarely in the middle of its more than 100 years of liberty jurisprudence. As the Court correctly ruled, these rights logically follow from the recognition of a liberty right in bodily integrity and in making decisions related to “intimate relationships, the family,” and the right to make the decision to have a child.¹²¹ Excising the right to abortion as a component of personal liberty undermines decades of jurisprudence about the meaning of liberty, including the protection of rights to sexual intimacy between consenting adults and to marry the person of one’s choice.

State courts throughout the country also have consistently held that rights to bodily autonomy and personal decision-making in matters related to childbearing and intimate relationships are protected under the liberty clauses of their independent state constitutions. For example, the Kansas Supreme Court interpreted its inalienable natural rights and liberty guarantees to include

“the ability to control one’s own body, to assert bodily integrity, and to exercise self-determination . . . about issues that affect one’s physical health, family formation, and family life,” and explicitly the right to abortion.¹²² Similarly, the Georgia Supreme Court has held that its constitution’s text providing that no person shall be deprived of liberty “except by due process of law” protects a right to sexual intimacy between consenting adults,¹²³ and the right to refuse medical treatment.¹²⁴

Likewise, courts around the country have recognized that people do not lose their liberty rights when they become pregnant. For example, Washington D.C.’s highest court, relying on principles of bodily integrity and the related right to refuse or accept medical treatment, vacated an order requiring a pregnant, dying woman to undergo a cesarean section because her fetus was potentially viable. In so doing, it held that a competent pregnant woman’s decision to refuse medical treatment should control “in virtually all cases.”¹²⁵ Similarly, an Illinois appellate court concluded that a woman’s health care decisions must be respected, even in circumstances where that decision may be harmful to her fetus.¹²⁶ As the court explained, “a woman’s right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy. The woman retains the same right . . . that she can exercise when she is not pregnant . . . [we] reject[] the view that the woman’s rights can be subordinated to fetal rights.”¹²⁷

International human rights treaty bodies have likewise made clear that governments must protect, respect, and fulfill the right to make personal decisions, including regarding reproductive capacity.¹²⁸ As noted by the Committee on Economic, Social and Cultural Rights, “the right of women to sexual and reproductive health is indispensable to their autonomy and their right to make meaningful decisions about their lives and health.”¹²⁹ Governments must guarantee that these decisions are free of coercion, discrimination, violence, intimidation, and deception.¹³⁰ People are deprived of dignity and autonomy when they are restricted from decision-making over their reproductive capacity.¹³¹ For example, the treaty bodies have found that third-party authorization requirements, mandatory delay periods, biased

counseling, and inadequately regulated refusals of care based on conscience impose arbitrary and unlawful barriers to the right to access sexual and reproductive health services.¹³²

In short, decisions related to pregnancy deserve constitutional protection under the Liberty Clause because they have deep roots in the fundamental rights to bodily integrity and personal autonomy in matters of family, medical care, and conscience.¹³³

The Right to Equal Protection and Freedom from Discrimination

As discussed, government control of reproductive capacity has long been a tool for subordination, denying women and people in marginalized communities equal status in society. The Supreme Court has acknowledged aspects of this history. For example, in *Nevada Dep't of Human Resources v. Hibbs*, the Supreme Court recognized that the assumption that “a woman is, and should remain, ‘the center of home and family life,’” had long shaped the law and its own decisions.¹³⁴ Thus, despite some erroneous earlier decisions of the Court, a body of judicial opinions and scholarship confirms a correct understanding of the right to equal protection, which requires heightened scrutiny when the government discriminates against individuals who are pregnant or who have the capacity to become pregnant.

SEX STEREOTYPING AND GENDER DISCRIMINATION

As evidenced by the historical context of reproductive coercion, government control of decisions related to pregnancy has been a tool to maintain the legal, social, and economic inferiority of women. Such control is a type of sex discrimination.

Under current federal constitutional standards, the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment protect against government discrimination on the

Government classifications on the basis of sex **cannot “create or perpetuate the legal, social, and economic inferiority of women.”**

- Justice Ginsburg majority opinion in *United States v. VMI*

basis of sex. Specifically, laws that discriminate on the basis of sex are subject to heightened scrutiny and must have an “exceedingly persuasive justification.”¹³⁵ For such laws to be valid, the burden is on the government to show that its sex-based law or policy serves important governmental objectives and “that the discriminatory means employed are substantially related to the achievement of those objectives.”¹³⁶ Further, “the classification must substantially serve an important governmental interest *today*,” because the Court has “recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.”¹³⁷ This means that, in seeking to justify sex discrimination, the government cannot “rely on overbroad [and outdated] generalizations about the different talents, capacities, or preferences of males and females.”¹³⁸

Federal equal protection jurisprudence recognizes that laws that discriminate based on sex are unconstitutional if they are based on stereotypes about men, women, and traditional gender roles,¹³⁹ or if they would perpetuate second-class status for women. As to the first ground, the Supreme Court recently emphasized “that if a statutory objective is to exclude or protect members of one gender in reliance on fixed notions concerning that gender’s roles and abilities, the objective itself is illegitimate.”¹⁴⁰ Laws that rely on discredited gender stereotypes should be presumptively unconstitutional because they would not further any valid state interests.¹⁴¹

As to the second ground, the Court’s decisions emphasize that the Equal Protection Clause prohibits laws that would reinforce or contribute to the second-class status of women.¹⁴² As Justice Ginsburg wrote in her majority opinion in *United States v. Virginia* (*VMI*), government classifications on the basis of sex cannot “create or perpetuate the legal, social, and economic inferiority of women.”¹⁴³

Further, and contrary to the dicta in *Dobbs*, decisions of the U.S. Supreme Court recognize that laws that discriminate on their face *on the basis of pregnancy* can be discrimination on the basis of sex under the Equal Protection Clause.¹⁴⁴ For example, in *Hibbs*, the Supreme Court concluded that Congress

had properly exercised its power to remedy sex discrimination under Section 5 of the Fourteenth Amendment to enact the Family Medical Leave Act. In so holding, the Court approved Congress’s conclusion that “the pervasive presumption that women are mothers first, and workers second . . . has in turn justified discrimination [in the workplace] against women when they are mothers or *mothers-to-be*.”¹⁴⁵ It thus recognized that employers’ policies based on pregnancy or childbearing could be unconstitutional sex discrimination, especially when they are “not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”¹⁴⁶ Similarly, in distinguishing between constitutional and unconstitutional sex classifications in *VMI*, the Court acknowledged that a state law that required employers to provide leave and reinstatement to pregnant workers classified on the basis of sex; it noted, however, that such laws are permissible because they are not based on outdated stereotypes and “promot[e],” rather than undermine, “equal employment opportunity,” thus furthering an important government interest today.¹⁴⁷ These federal decisions make clear that laws and policies based on a person’s capacity for pregnancy and childbearing are a core feature of the “long and extensive history of sex discrimination” that is the very reason that sex classifications are suspect.¹⁴⁸

Over the past five decades, multiple U.S. Supreme Court Justices have recognized that an individual’s ability to access contraception and abortion “implicate[s] [these] constitutional guarantees of gender equality.”¹⁴⁹ As Justice Harry Blackmun noted in his separate opinion in *Casey* thirty years ago:

“By restricting the right to terminate pregnancies, the State conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and, in most instances, provide years of maternal care. . . . This assumption – that women can simply be forced to accept the ‘natural’ status and incidents of motherhood – appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause.”¹⁵⁰

Justice Ginsburg continued to develop the equality principles undergirding reproductive autonomy, writing, for example, that access to contraception not only protects women’s health but also “improves women’s social and economic status” by “allow[ing] [them] to invest in higher education and a career with far less risk of an unplanned pregnancy.”¹⁵¹ Similarly, her opinions emphasize that “legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal [status].”¹⁵² And as Justice Thurgood Marshall repeatedly made clear in numerous dissenting opinions, restrictions on reproductive health care deeply impact a woman’s economic security and educational and career opportunities.¹⁵³

Notably, state court decisions have reached the same conclusion.¹⁵⁴ For example, cases from Connecticut and New Mexico provide powerful legal recognition of the coercive impact of abortion coverage restrictions on women living on low incomes and identify the state’s coercive actions as sex discrimination. In *Doe v. Maher*, a Connecticut court held that the coverage restriction “discriminates on the basis of sex in several ways,”¹⁵⁵ including because “[s]ince time immemorial, women’s biology and ability to bear children have been used as a basis for discrimination against them.”¹⁵⁶ It concludes that Connecticut’s Equal Rights Amendment (ERA) prohibits the state from “disadvantag[ing] women because of their sex including their reproductive capabilities.”¹⁵⁷ Relying on *Doe*, the New Mexico Supreme Court similarly held that “classifications based on the unique ability of women to become pregnant and bear children” should be subject to searching judicial scrutiny under the state’s ERA,¹⁵⁸ suggested that government should not have the power “to turn the capacity to bear children . . . into a source of social disadvantage,”¹⁵⁹ and found that neither of the state’s asserted interests in saving money or protecting potential life were enough to justify the restriction.¹⁶⁰

Equality as a basis for reproductive autonomy is also grounded in human rights. The rights to equality and non-discrimination are tenets of international human rights law, and the human rights treaty bodies have made clear that gender equality includes the right to substantive equality.¹⁶¹ This requires addressing the historical roots of gender discrimination, gender stereotypes, and traditional understandings of gender roles that perpetuate discrimination and inequality.¹⁶² Governments have an obligation to address and dismantle stereotypes under the treaties the United States has ratified,¹⁶³ and human rights treaty bodies have recognized the negative impact that harmful stereotypes have on access to sexual and reproductive health services.¹⁶⁴ Drawing on the substantive equality approach to ensure gender equality, the human rights treaty bodies have called on governments to fulfill the need for modern contraceptives and lower the rates of maternal mortality.¹⁶⁵ They have recognized that restrictive laws and policies on abortion are often rooted in gender discrimination and gender stereotypes of women’s role as caregivers and their ability to make decisions about sexuality and reproduction.¹⁶⁶ In articulating the contours of governments’ obligations to realize the right to sexual and reproductive health, UN treaty bodies have called on governments to eliminate discriminatory stereotypes, assumptions, and norms that underlie restrictive laws and undermine the realization of sexual and reproductive health;¹⁶⁷ framed the right to abortion, in particular, as an aspect of women’s autonomy;¹⁶⁸ and emphasized that a state’s failure or refusal to provide reproductive health services constitutes gender discrimination.¹⁶⁹

PROHIBITING REPRODUCTIVE RESTRICTIONS THAT CONSTITUTE SEX DISCRIMINATION

Many restrictions of reproductive autonomy fail these constitutional and human rights standards.¹⁷⁰ First, laws or policies related to any aspect of reproduction, including contraception, abortion, and giving birth, that allow the state or others to override reproductive decisions to “protect” women, rather than accepting women’s equal ability to make such decisions, are ripe for equal protection challenges. Such laws rest on invalid sex stereotypes, including that women are incompetent decision-makers, that a decision not to

have a child or another child will always harm women given their “natural” maternal role, or that only certain types of women will be “successful” mothers.¹⁷¹ As Justice Ginsburg put it, “depriv[ing] women of the right to make an autonomous choice. . . reflects ancient notions about women[] . . . that have long since been discredited.”¹⁷²

Second, abortion bans and other coercive government actions justified solely on the government’s interest in potential life, including penalizing people for their conduct during pregnancy, are at bottom based on the assertion that once a person becomes pregnant, the government is entitled to take control of their body. But judicial validation of such an assertion would mean that women and others with the capacity to become pregnant would never be fully equal under the law. Although not applying a sex discrimination analysis, a federal court recently recognized this principle. It held that a state law overriding an individual’s advanced health directive not to administer life-saving treatment to a pregnant person is unconstitutional under the Fourteenth Amendment because it violates a competent individual’s right to refuse unwanted medical treatment. As the federal court reasoned, “[w]omen do not lose the[ir] [constitutional] rights because they are pregnant. . . .”¹⁷³

Government efforts to coerce women into pregnancy and childbirth to further an asserted interest in potential life are particularly indefensible given failures by the federal government and many states to enact policies that support families and protect the lives and health of those who give birth and their newborns.¹⁷⁴ Lack of financial resources is one of the most common reasons that women provide for ending a pregnancy, yet the United States remains one of the few wealthy nations to have no national paid family leave policy, and many states similarly lack such a policy;¹⁷⁵ further, a number of states, including states with many abortion restrictions, maintain “family caps” that limit benefits for additional children born into families that receive public assistance, despite evidence that these policies harm children’s health and deepen poverty.¹⁷⁶ And many of the very same states that regularly enact abortion restrictions refuse to enact policies that would support safe and healthy pregnancies, deliveries, and newborn and child health, including

by refusing to extend postpartum coverage under Medicaid.¹⁷⁷ Accordingly, although the government can and should enact laws to support pregnant people and families, it cannot do so in a way that ignores or overrides their equal claims to control their bodies, health, and life course.

Third, numerous restrictions on reproductive autonomy constitute sex discrimination because they perpetuate the legal, social, and economic inferiority of women, and others with the ability to become pregnant, as a class.¹⁷⁸ The relationship between reproductive autonomy and sex equality has long been a theme within federal and state jurisprudence. For example, decades ago, federal courts struck down as invalid under the Equal Protection Clause a local Mississippi school district policy that excluded unmarried parents from working in the school and was enforced only against Black women.¹⁷⁹ The federal courts recognized that such a policy denied equal economic opportunities to women based on their reproductive decisions, while imposing no such penalty on men.¹⁸⁰ Similarly, in interpreting its state's constitution, the Colorado Supreme Court struck down as sex discrimination an employer's refusal to cover in its insurance policy the usual costs of pregnancy, noting that such a policy not only failed to cover the health care needs of women on an equal basis with men, but also that it harmed women economically and was tantamount to providing "female employees a lower wage on the basis of sex."¹⁸¹ Additionally, in *Casey*, the U.S. Supreme Court found that allowing a spouse to override a woman's decisions related to pregnancy reflects a view of women that is now "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution,"¹⁸² including notions that a woman had "no legal existence separate from her husband" and that her role "as the center of home and family life" precluded her "full and independent legal status."¹⁸³

As the U.S. Supreme Court correctly stated thirty years ago: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."¹⁸⁴ The ability to control if, when, and how many children to have is critical to sex equality.¹⁸⁵ Accordingly, laws that perpetuate the unequal status of

“[R]eproductive capacity has constituted both a **key engine for white power and wealth** historically and a touchstone for those who want to distinguish the ‘value’ of women’s reproductive bodies by race.”

- Loretta Ross and Rickie Solinger, *Reproductive Justice: An Introduction*

women and others with the ability to become pregnant by restricting their reproductive autonomy are invalid sex discrimination.

RACE DISCRIMINATION

The constitutional guarantee of equal protection also requires redressing reproductive oppression targeting Black women and other people of color, and the ongoing impact of systemic racism on reproductive health and rights.

Reproductive justice advocates and scholars have chronicled how state interventions in virtually every aspect of reproduction and family life – sexual activity, contraception, fertility, pregnancy, abortion, childbirth, adoption, and parenting – subordinate Black women, Indigenous communities, and other people of color.¹⁸⁶ As legal scholar Dorothy Roberts writes, “regulating Black women’s reproductive decisions has been a central aspect of racial oppression in America.”¹⁸⁷ Her research documents that racism is at the root of numerous policies to control Black women’s bodies and ability to have and raise children, including “distribut[ing] [contraception] in Black communities as a means of addressing their poverty, law enforcement practices that penalize Black women for bearing a child, and welfare reform measures that cut off assistance for children born to welfare mothers.”¹⁸⁸ As Loretta J. Ross and Rickie Solinger describe, control of “reproductive capacity has constituted both a key engine for white power and wealth historically and a touchstone for those who want to distinguish the ‘value’ of women’s reproductive bodies by race.”¹⁸⁹ Thus, as Roberts rightly argues, where laws, “perpetuate racial subordination through the denial of procreative rights, which threaten both racial equality and privacy at once,” they must be subject to the “most intense” scrutiny.¹⁹⁰

Yet, there is not a well-developed body of case law that directly addresses reproductive oppression as a product and driver of racial inequality. Although many of the pre-*Roe* cases made equality claims, they did not squarely center race discrimination.¹⁹¹ And a majority of the Supreme Court sidelined race shortly after *Roe*, in its decision to uphold a ban on public insurance coverage

“[R]egulating Black women’s reproductive decisions has been a central aspect of racial oppression in America.”

- Dorothy Roberts,
Killing the Black Body

for abortion,¹⁹² despite clear evidence of the Hyde Amendment’s racially discriminatory impact.¹⁹³ Among the milieu of political, strategic, and legal forces at play was the Court’s increasingly constricted equal protection jurisprudence.¹⁹⁴ Just a few years after deciding *Roe*, the Court held in *Washington v. Davis* that litigants must prove *intentional* “discriminatory racial purpose” to trigger protection under the Equal Protection Clause.¹⁹⁵ Under this standard, a constitutional race discrimination claim could not prevail based upon proof of racially discriminatory effects alone.

In the decades since, few reproductive rights cases explicitly asked courts to decide claims of race discrimination. And when they did, courts have refused to do so. For example, over 20 years ago, in *Ferguson v. City of Charleston*, a group of patients challenged a search and arrest policy designed by law enforcement officials in conjunction with medical personnel from the local public hospital. The policy mandated the testing for cocaine use without consent of pregnant women meeting certain non-medical criteria. The patients brought constitutional, statutory, and common law claims, including claims that the policy discriminated against them on the basis of race under the Fourteenth Amendment and under Title VI.¹⁹⁶ In support of the race discrimination claims, the patients presented evidence of racial profiling and racial animus shown by the nurse who implemented the policy, as well as statistical proof of disparate impact.¹⁹⁷ After losing the race discrimination claims in both lower courts, and concerned with the Court’s hostility to such claims, the patients focused their Supreme Court appeal on their strong Fourth Amendment claim. Their briefs included evidence that the policy’s subjective testing criteria coupled with the nurse’s racial animus resulted in the targeting of Black women for search and for arrest.¹⁹⁸ Yet none of the Justices’ opinions acknowledged this evidence of racism underlying the policy and its discriminatory application to and impact on Black women.¹⁹⁹

More recently, a local chapter of the National Association for the Advancement of Colored People (NAACP) and the National Asian Pacific American Women’s Forum (NAPAWF) brought equal protection claims against a law criminalizing the provision of so-called race- and sex- selective

abortions. Plaintiffs argued that the law was based on racial stereotypes and had the effect of stigmatizing Black and Asian American and Pacific Islander (AAPI) women.²⁰⁰ Yet the trial court did not reach, let alone decide, the merits of these claims, instead dismissing for lack of standing, a decision affirmed on appeal.²⁰¹

Given the high barriers to prevailing on race discrimination claims, impacted communities and legal advocates often have emphasized the harms of racially disparate impacts in support of other legal claims. Led by the work of reproductive justice advocates, litigants and amici have presented courts with abundant evidence of how reproductive restrictions especially harm Black, Indigenous, Latina, AAPI, and other communities of color. This includes expert testimony to trial courts as well as briefing based on peer-reviewed scientific studies, state and national health data, investigative reporting, historical records, legislative histories, and personal stories of lived experiences.²⁰²

Because this body of evidence demonstrates the ways that abortion bans, disparities in maternal and newborn health, and government policies that coerce or penalize pregnant, birthing, and parenting people all disproportionately harm Black and Brown communities,²⁰³ courts can and should address those effects on their own terms. And a correct interpretation of the Equal Protection Clause justifies doing so.

PROTECTION AGAINST DISCRIMINATORY EFFECTS

As an initial matter, despite the Court’s decision in *Washington v. Davis* to impose a judicially defined intent requirement, nothing in the Equal Protection Clause requires it. As constitutional scholar Aziz Huq explains, an intent requirement is not grounded in the text of the Constitution and the “central role of intent in the doctrinal framing of individual rights against unconstitutional discrimination is a surprisingly recent doctrinal innovation.”²⁰⁴ Thus, he argues, “it is quite possible to imagine a jurisprudence of constitutional equality for natural persons that does not hinge upon the

subjective psychological state of the defendant state actor.”²⁰⁵ And other constitutional scholars have written extensively on the real-world need, and doctrinal grounding, for an equal protection doctrine that accounts for the racially discriminatory effects of indifference, devaluation, and both intentional and unintentional bias against disfavored groups.²⁰⁶

Constitutional remedies for racially discriminatory effects under a Fourteenth Amendment analysis would align with the approach taken under human rights law. The Committee overseeing implementation of the International Convention on the Elimination of Racial Discrimination (CERD), a treaty ratified by the United States, has interpreted the prohibition on race discrimination to include policies that have a disparate impact, but not necessarily discriminatory intent.²⁰⁷ The UN Human Rights Committee, which oversees implementation of the International Covenant on Civil and Political Rights, a treaty also ratified by the United States, draws on this understanding as well.²⁰⁸ The CERD Committee has expressed particular concern over the narrow, intent-based definition of race discrimination under U.S. law.²⁰⁹

PROTECTION AGAINST DISCRIMINATORY INTENT

While the above jurisprudential course-correction for U.S. constitutional doctrine is vitally needed, there is room within current precedent for courts to consider equal protection challenges to laws that discriminate against Black women and other people of color seeking to control their procreative lives and bodily autonomy.

There is rarely ‘smoking gun’ evidence that lawmakers passed a facially neutral law with racial animus. Thus, the Supreme Court has recognized that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”²¹⁰ But in a constriction of this standard, the Court also has insisted that “invidious intent” requires showing more than knowledge of a law or decision’s discriminatory impact. This requires proof that the state acted “at least in part ‘because of,’ not

merely ‘in spite of’ its adverse effects upon an identifiable group.”²¹¹

While this malice-like standard is exceedingly difficult to satisfy, if a court does find that “a discriminatory purpose has been a motivating factor . . . judicial deference is no longer justified.”²¹²

Applying this standard to equal protection claims in reproductive rights cases would draw on an established body of law. In *Village of Arlington Heights v. Metropolitan Housing Development Corp* – a case about a discriminatory decision to deny zoning for multi-family housing – the Court set out a test that requires courts to engage in a “sensitive inquiry” of all available direct and circumstantial evidence of discriminatory intent.²¹³ The non-exhaustive set of criteria to guide courts making this equal protection inquiry includes 1) the historical background of the challenged law or decision; 2) the “specific sequence of events leading up” to it; 3) departures from substantive norms or “normal procedural sequence”; 4) the administrative or legislative history, “especially where there are contemporary statements by members of the decisionmaking body”; 5) and whether there is a disproportionate impact on one race more than another.²¹⁴

Courts have relied on *Arlington Heights* to decide race discrimination claims in a variety of contexts. For example, there is an extensive body of case law examining facially neutral election regulations that disproportionately disenfranchise people of color. As the U.S. Court of Appeals for the Fifth Circuit explained in striking down a voter identification law that suppressed minority voting, “[t]o require direct evidence of intent would essentially give legislatures free rein to racially discriminate. . . so long as they proffer a seemingly neutral reason for their actions. This approach would ignore the reality that neutral reasons can and do mask racial intent, a fact we have recognized in other contexts that allow for circumstantial evidence.”²¹⁵

Among the circumstantial evidence relied upon by the Fifth Circuit, was “contemporary examples . . . as late as 1975” of efforts to suppress minority voting.²¹⁶ The court also considered evidence that proponents of the voting law were “aware of the likely disproportionate effect of the law on minorities”

yet rejected ameliorative changes and gave shifting rationales in defense of the law.²¹⁷ Citing similar types of evidence, the U.S. Court of Appeals for the Fourth Circuit held a North Carolina voting law racially discriminatory. In particular, it emphasized that the legislature made “requests for and use of race data” related to different forms of voting and, relying on this, “enacted legislation restricting all—and only—practices disproportionately used by African Americans.”²¹⁸ Notably, it roundly rejected the lower court’s refusal to make the “inference that undeniably flows” from evidence of “socioeconomic disparities.” In other words, it was relevant to the court’s discriminatory intent analysis that the legislature knowingly restricted the voting mechanisms that would not notably impact white voters but, according to the socioeconomic evidence, would severely affect Black voters.²¹⁹

Similar discriminatory patterns exist among states denying people their reproductive rights. The forced sterilization of Black women in Mississippi in the 1960s and non-consensual drug testing of primarily Black pregnant women in South Carolina in the 1990s,²²⁰ are just two examples of “contemporary” histories of states’ targeting Black women’s procreative autonomy. Today, both states persist as leading offenders in denying reproductive autonomy to Black women and people of color. For example, in Mississippi where Black women are nearly three times more likely to die from pregnancy related causes than white women and more than twice as likely to live below the poverty line compared to white women, the legislature passed multiple abortion bans while rejecting a bill that would have expanded Medicaid coverage for postpartum care.²²¹ In South Carolina, 45% of women who rely on Medicaid for health care are Black (over half are women of color) and it ranks “40th in the country on maternal mortality, with Black women dying at rates four times higher than white women in the State.”²²² Like Mississippi, South Carolina has passed some of the harshest abortion restrictions in the country while rejecting expansion of Medicaid under the Affordable Care Act and limiting the scope and availability of family planning services under the state health plan.²²³

Consistent with the *Arlington Heights* standard for conducting a “sensitive” contextual consideration of the totality of the circumstances, courts

can evaluate whether these types of state policies, rooted in a history of reproductive coercion and known to disproportionately impact Black women and people of color,²²⁴ violate the Equal Protection Clause.

ECONOMIC INEQUALITY

For people who are living on low incomes, the right to freely decide if, when, or how to become a parent, and safely raise the children they have, is often nonexistent.²²⁵ State action debasing the equal human worth, dignity, and autonomy of people having difficulty making ends meet has ranged from forced sterilization, to coerced childbearing, to policing of people for having “too many” children, to separating children from parents, to making health care unavailable and inaccessible.²²⁶ The Supreme Court’s early abortion decisions are part and parcel of this legal injustice. In a series of cases between 1977 and 1980, the Court upheld laws denying public insurance coverage to women seeking abortion and held that poverty did not constitute a suspect class under the Constitution.²²⁷ The Court rejected plaintiffs’ related equal protection and liberty claims, raised together to demonstrate how these laws impermissibly discriminated against people living in poverty as they sought to exercise a fundamental right.²²⁸

These decisions were wrong when they were decided and are wrong now. As Justice Marshall wrote in dissent, such laws are plainly “designed to deprive poor and minority women” of their constitutional rights.²²⁹ And, as he forewarned, it has had a “devastating impact”²³⁰ on their reproductive lives, health, dignity, and autonomy in the decades since.²³¹

But those erroneous decisions do not preclude constitutional consideration of how laws deny equal protection to people living on lower incomes. As Cary Franklin demonstrates in her scholarship, “long-standing doctrine still constrains state action that infringes the rights of the financially disadvantaged.”²³² For this reason, equal protection often requires holding states accountable for providing services, funding, or other resources necessary to ensure non-discriminatory access to constitutional rights.²³³

Outside the reproductive rights context, the Court has ordered such remedies even when doing so would require the government to expend funds. These remedies have ranged from desegregation of public schools to ensure equal treatment of Black students,²³⁴ to the provision of public defenders in criminal cases, to the waiver of fees related to appeals or costs of trial transcripts in civil cases.²³⁵

Indeed, concern about economic inequality animated seminal Supreme Court decisions grounded primarily in liberty and due process. For instance, the Court has long recognized that preventing “discrimination against the indigent” in the context of criminal proceedings—where physical liberty is at stake—requires special protection under the Constitution. Since the 1950s, the Court has applied heightened scrutiny in this context, invoking both equal protection and due process under the Fourteenth Amendment.²³⁶ The Court also has applied heightened scrutiny under the Equal Protection Clause outside of the criminal law context, striking down state laws designed to deter people living on low incomes or in poverty from exercising fundamental rights, including the right to vote and the right to freely travel and establish residence in another state.²³⁷

Especially relevant, the Court repeatedly has held that the Constitution requires addressing the barriers of financial disadvantage when fundamental family-relationship rights are at stake.²³⁸ Justice Ginsburg writing for a majority of the Court explained in *M.L.B. v. S.L.J.*, “we place decrees forever terminating parental rights in the category of cases in which the State may not ‘bolt the door to equal justice’” solely on the “ability to pay.”²³⁹ Because reproductive autonomy is foundational to intimate personal decisions about family formation and relationships, courts must likewise ensure people living on low incomes or in poverty can exercise the right to determine their reproductive lives and health.

In the decades since the Court upheld bans on public insurance coverage for abortion, litigants and parties participating as amicus have, with some success, convinced courts to consider the inequity of abortion restrictions for people

living on low incomes or in poverty. They have presented extensive evidence showing how the higher costs and barriers created by laws that impose two trips and associated delays in turn require extra travel, overnight lodging, additional childcare coverage, and more lost wages from time off work – all burdens that fall hardest on people living on lower incomes.²⁴⁰ Both federal and state courts have given great weight to such evidence.²⁴¹ For example, a federal district court in Tennessee heavily relied on expert testimony establishing the socioeconomic barriers and burdens of a 48-hour two-trip and delay law created. Based on that evidence, the judge concluded the law worked to either “place abortion beyond the reach of many low-income patients” or force them to “put themselves, and their families at risk . . . as many will go without basic necessities, take out predatory loans, or borrow money from abusive partners or ex-partners” in order to cover increased expenses.²⁴²

In addition to considering the impact of abortion restrictions on people living in poverty, courts should apply heightened scrutiny to all policies that deprive people living on low incomes of decisional autonomy, dignity, and non-discriminatory health care during pregnancy, childbirth, and postpartum. The body of Supreme Court case law discussed above²⁴³ demonstrates that courts can hold governments accountable for remedying—even at a cost as they have done outside the reproductive rights context—the laws, systems, and institutions that make it harder, or impossible, for people to exercise their reproductive autonomy.²⁴⁴

This too would be consistent with human rights law, which recognizes the relationship between economic inequality and the realization of reproductive rights. UN human rights treaty-monitoring bodies have been particularly attentive to the barriers people living in poverty face in accessing abortion, establishing that abortion must be available, accessible (including affordable), acceptable, and of good quality.²⁴⁵ And they have urged countries to provide financial support for those who cannot afford abortion services.²⁴⁶ Importantly, the treaty bodies recognize that laws prohibiting abortion—thereby forcing people to choose between continuing a pregnancy and travelling to another country to access legal abortion services—can cause anguish and suffering,

including financial, social, and health-related burdens and hardships.²⁴⁷ In articulating the contours of states' obligations to realize the right to sexual and reproductive health, the Committee overseeing implementation of the International Covenant on Economic, Social and Cultural Rights notes that equality is a cross-cutting objective requiring states to devote resources to traditionally neglected groups, including women living in poverty, in order to address systemic discrimination.²⁴⁸ The Committee describes the right to sexual and reproductive health, in particular, as “deeply affected by ‘social determinants of health,’” including poverty and income inequality.²⁴⁹

Guaranteeing Economic Access to Abortion: *Lakshmi Dhikta v. Nepal*

In the case of *Lakshmi Dhikta*, the Supreme Court of Nepal drew upon human rights to guarantee economic access to safe and legal abortion services for women living in poverty in Nepal.²⁵⁰ Despite the decriminalization of abortion in Nepal in 2002, and the subsequent constitutional recognition of reproductive rights as fundamental rights, many people in Nepal remained unable to obtain abortions because of prohibitive fees, physically inaccessible facilities, and because they

were unaware of the legal status of abortion. *Lakshmi Dhikta v. Nepal* was filed in Nepal's Supreme Court on behalf of a woman with five children who was denied an abortion because she could not afford the fee. One central goal of the litigation was to ensure that abortion was available to all women, regardless of socioeconomic status and geographic location.²⁵¹ In 2009, the Supreme Court of Nepal issued a decision reiterating the link between the right to abortion and other

rights. Stating that “the right to abortion can be realized only if it is accessible and affordable,” the Court noted that “it is the primary obligation of the state to prioritize the implementation of these rights.”²⁵² Based on these affirmative obligations, the Court directed the government to introduce a comprehensive abortion law and create a fund to cover the cost of services for women living on low incomes or women without income.

INTERSECTING FORMS OF DISCRIMINATION AND INTERDEPENDENT RIGHTS

The law also should recognize intersectional claims under the Fourteenth Amendment. Intersectional discrimination, a term coined by Professor Kimberlé Williams Crenshaw,²⁵³ recognizes the “multidimensionality” of individuals’ experiences of discrimination and does not treat different prohibited grounds of discrimination “as mutually exclusive categories of experience and analysis.”²⁵⁴ A correct equal protection jurisprudence should embrace this holistic approach in two important ways. First, under an equal protection analysis, courts can address the impact of laws that perpetuate multiple, compounding forms of discrimination – such as sex, sexual orientation, gender identity, race, disability, and class. Second, when equal protection is at issue, courts can draw on precedent that recognizes the interdependent and inseparable nature of the Fourteenth Amendment’s liberty, life, and equality clauses. This approach further builds on the work of reproductive justice scholars who explore why realization of reproductive autonomy requires an intersectional analysis much like the human rights framework.²⁵⁵ Grounded in this scholarship and building on decades of case law as well as human rights principles, discussed below, an intersectional analysis provides a stronger legal framework for securing reproductive autonomy through multiple and interdependent constitutional guarantees.

INTERSECTIONAL DISCRIMINATION CLAIMS

Federal courts of appeals have considered intersectional discrimination claims brought under federal civil rights statutes like Title VII. In these cases, courts have recognized that “to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.”²⁵⁶ Accordingly, the judicial inquiry accounts for the reality of intersecting forms of discrimination – for example, that “Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women,”²⁵⁷ and that “discrimination against black females can exist even in the absence of discrimination against black men or white

women.”²⁵⁸ As Justice Ginsburg observed, recognition of intersecting forms of discrimination is correct “as a matter of precedent and logic.”²⁵⁹

This approach logically extends to constitutional equality protection. Justice Marshall’s prescient dissents in the abortion insurance coverage cases explained the related constitutional harms at stake. He denounced the withholding of publicly funded insurance coverage as state action that denied poor and minority women basic equality in controlling their bodies and lives. And he urged an approach that would weigh these intersecting harms together. In his view, the disparate impact on poor people and predominantly people of color must surely “be relevant” in the equal protection inquiry and justify higher scrutiny under the Equal Protection Clause.²⁶⁰ While his opinion did not carry the day then, subsequent decisions from state supreme courts have followed this approach when interpreting state constitutional guarantees of equality and reproductive autonomy.²⁶¹

Recently, Justice Sonia Sotomayor similarly identified the inter-relationship between race, gender, and class as worthy of the Court’s careful attention. At the height of the COVID-19 pandemic, reproductive justice and medical groups challenged the government’s unique restrictions on medication abortion, which made it impossible to obtain this medication by mail. In dissent, Justice Sotomayor wrote:

“[M]ore than half of women who have abortions are women of color, and COVID–19’s mortality rate is three times higher for Black and Hispanic individuals than non-Hispanic White individuals. On top of that, three-quarters of abortion patients have low incomes, making them more likely to rely on public transportation to get to a clinic to pick up their medication. . . . Finally, minority and low-income populations are more likely to live in intergenerational housing, so patients risk infecting not just themselves, but also elderly parents and grandparents.”²⁶²

Human rights principles underlying equality likewise recognize that many people may experience multiple and intersecting forms of discrimination. The UN Committee overseeing implementation of the Convention on the Elimination of Racial Discrimination (CERD) recognizes the importance of analyzing racial discrimination from a gender perspective. It recognizes the importance of addressing the “circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men.”²⁶³ Human rights treaty monitoring bodies have specifically recognized that intersectional discrimination can hinder women’s access to reproductive health services and the full realization of sexual and reproductive rights.²⁶⁴ They have thus recommended that states put a particular focus on the maternal health needs of marginalized groups of women, including adolescents, women living in poverty, minority women, rural women, and women with disabilities.²⁶⁵ The Committee on Economic Social and Cultural Rights has expressly articulated government’s obligations to address intersectional forms of discrimination in access to sexual and reproductive health services.²⁶⁶

Relatedly, the Committee on the Rights of Persons with Disabilities has noted that women and girls with disabilities face multiple barriers to the enjoyment of sexual and reproductive health and rights, often because of harmful stereotypes, and due to barriers including a failure to respect their legal capacity and a lack of accessibility of facilities, services, and information.²⁶⁷ In a joint statement issued in 2018, the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of All Forms of Discrimination Against Women reiterated that “gender equality and disability rights are mutually reinforcing concepts” and reminded governments of their obligation to address the root causes of discrimination against women and persons with disabilities, and to respect, protect, and fulfill the rights of all women, including women with disabilities, with respect to sexual and reproductive health and rights.²⁶⁸

“Each concept—
liberty and equal
protection— leads
to a stronger
understanding of
the other.”

- Justice Kennedy opinion for
the majority in *Obergefell v.*
Hodges

RECOGNIZING INTERDEPENDENT RIGHTS

Watershed Supreme Court decisions establish that when the state discriminates against traditionally subordinated groups seeking to make deeply personal, intimate decisions, the protections of the Liberty and Equal Protection Clauses are mutually reinforcing.²⁶⁹ Thus, when these interdependent constitutional rights are at stake, courts should apply heightened scrutiny.

Over seventy-five years ago, in *Skinner v. Oklahoma*, the Court applied strict scrutiny to invalidate a law authorizing sterilization of people convicted three times of crimes involving “moral turpitude,” which included crimes associated with people living in poverty, such as stealing chickens; but not those associated with people who were employed and educated, such as embezzlement or political offenses.²⁷⁰ The Court held the law violated rights of liberty and equality, because it both “touches a sensitive and important area of human rights . . . the right to have offspring” and “has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”²⁷¹ Twenty-five years later, in *Loving v. Virginia*, the Court declared Virginia’s law criminalizing interracial marriage unconstitutional under both the Equal Protection and Liberty Clauses. The Court held: “To deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.”²⁷² Most recently, this reinforcing “legal double helix”²⁷³ of liberty and equality shaped the *Obergefell v. Hodges* decision recognizing the constitutional right of same-sex marriage: “Each concept—liberty and equal protection—leads to a stronger understanding of the other.”²⁷⁴

As in these cases, when courts are reviewing reproductive restrictions challenged as violating equal protection, they should apply heightened scrutiny to any that impose multiple forms of discrimination on marginalized groups, or that limit reproductive autonomy in unequal ways.

The Right to Life of the Pregnant Person

Although undertheorized in U.S. law, international human rights law recognizes that the right to life provides critical protections for one's reproductive autonomy.

The U.S. Supreme Court has not directly recognized the Fourteenth Amendment right to life as a limit on government interference with personal decisions about pregnancy or medical care. Prior to *Dobbs*, it had ruled in numerous cases that “a State may not restrict access to abortions that are necessary, in appropriate medical judgment, for the preservation of the *life or health*” of the woman.²⁷⁵ California's high court has recognized that both abortion bans²⁷⁶ and coverage restrictions²⁷⁷ implicate the state constitutional right to life for this very reason: Pregnancy and childbirth involve “risk of death” and “even when a life-threatening condition is not present, the constitutional choice directly involves the woman's fundamental interest in the preservation of her personal health.”²⁷⁸ Additionally, the U.S. Supreme Court has recognized that a substantive due process right to life protects against official action that is lethal, “unjustifiable by any government interest,” and rises to “the conscience-shocking level.”²⁷⁹

Some scholars argue that U.S. Supreme Court precedent supports a right to medical decision-making necessary to prevent death, or even more broadly to preserve health.²⁸⁰ Some have urged the importance of understanding and framing abortion as medically necessary health care.²⁸¹ Others have argued for an understanding of the right to health care as integral to the constitutional right to reproductive autonomy.²⁸²

The potential application of these lines of argument to the various contexts in which state policies or official actions threaten the health, safety, and lives of individuals who are pregnant, giving birth, and postpartum are ripe for

Human rights bodies have long **recognized the connection** between restrictive abortion laws, high rates of unsafe abortion, and maternal mortality, and found that **restrictive abortion laws violate a range of human rights, including the right to life.**

development. One important guide in doing so is the strong recognition under human rights law of the right to life as a critical protection for reproductive autonomy.

Under international human rights law, right to life protections are rooted in Article 6 of the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by the United States in 1994. Article 6 provides that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”²⁸³ The right should not be interpreted narrowly.²⁸⁴ And it is not subject to derogation,²⁸⁵ which means that the right is absolute and cannot be suspended or restricted. Critically, human rights experts confirm that right to life protections grounded in the human rights treaties do not apply prenatally.²⁸⁶

Human rights bodies have long recognized the connection between restrictive abortion laws, high rates of unsafe abortion, and maternal mortality, and found that restrictive abortion laws violate a range of human rights, including the right to life. The 2022 World Health Organization’s Abortion Care Guideline notes that between 4.7% and 13.2% of all maternal deaths are attributed to unsafe abortions, with the proportion of unsafe abortions significantly higher in countries with highly restrictive abortion laws than in those with less restrictive laws.²⁸⁷ The UN Human Rights Committee, which is charged with overseeing interpretation and implementation of the ICCPR, has confirmed that the right to life contains important protections for access to abortion. It limits the restrictions that states can place on abortion access, and it obligates governments to ensure access to abortion services.²⁸⁸

Specifically, in General Comment 36,²⁸⁹ the Committee stated that abortion restrictions cannot imperil the right to life, including by forcing women to undertake unsafe abortion.²⁹⁰ At a minimum, the right to life requires states to provide safe, legal, and effective access to abortion where a person’s life and health is at risk, or when carrying a pregnancy to term would cause them substantial pain or suffering.²⁹¹ The Committee noted that state parties to the treaty “may not regulate pregnancy or abortion in all

other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their laws accordingly.²⁹² In addition, the Committee noted that states may not introduce new barriers to abortion and should remove existing barriers that deny effective access to safe and legal abortion.²⁹³ It noted, too, that states should prevent the stigmatization of people seeking abortion.²⁹⁴ Finally, the Committee noted that, in order to fulfill the right to life and protect against unsafe abortion, governments should ensure the availability of, and effective access to information and education on sexual and reproductive health, a wide range of contraceptive methods, and quality prenatal and post-abortion health care.²⁹⁵ Other treaty bodies also have found that access to safe and legal abortion is essential to reproductive health and a prerequisite for safeguarding the right to life, among other rights.²⁹⁶

International human rights bodies have likewise made clear that the right to life includes important protections for maternal health, requiring governments to address both the causes and prevalence of maternal mortality.²⁹⁷ The Human Rights Committee has consistently expressed concern about high rates of maternal mortality,²⁹⁸ which it considers a violation of women's right to life.²⁹⁹ It has made clear that the right to life requires governments to ensure the availability of, and effective access to, quality prenatal health care, on a confidential basis,³⁰⁰ and to develop plans for improving access to medical examinations and treatments designed to reduce maternal and infant mortality.³⁰¹ Invoking the right to life, the Committee has recommended that governments take efforts to effectively eliminate preventable maternal mortality and ensure non-discriminatory access to affordable quality health care, including prenatal and emergency obstetric care.³⁰²

Indeed, the duty to protect life requires governments to take affirmative measures both to protect the right to life and to advance the enjoyment of a life with dignity.³⁰³ The UN Human Rights Committee has noted that these measures include ensuring access to essential goods and services, such as food, water, shelter, and health care, and taking positive steps to

reduce maternal mortality.³⁰⁴ Jurisprudence by the Committee further affirms governments' obligation to take measures to protect the right to life and underscores the indivisibility and interdependence of the right to life with other rights, including economic, social, and cultural rights.³⁰⁵

National courts have similarly interpreted right to life protections under national constitutions. For example, the Supreme Court of India has recognized the right to health as an aspect of the right to life with dignity, and specifically recognized women's right to reproductive health as being a facet of the right to life protected under Article 21 of India's constitution.³⁰⁶ Courts in India have found that the denial of access to reproductive health care, including maternal health care and abortion care, violates the right to life under Article 21.³⁰⁷

In the context of the prevalence of uterine prolapse in pregnant women in Nepal, the Supreme Court of Nepal held that the right to health, including the right to reproductive health, is a part of the right to life, along with the right to live a dignified life.³⁰⁸ And, in *Lakshmi Dhikta v. Nepal*, discussed earlier, the Supreme Court of Nepal grounded the right to access safe and legal abortion services in a constellation of rights contained in Nepal's constitution, including the right to live with dignity and personal liberty, and held that these human rights place affirmative obligations on the government to ensure access to abortion. Accordingly, the Court directed the government to introduce a comprehensive abortion law based on international human rights principles, and to create a fund to cover the cost of services for women living on low incomes or women without income.

In the case of *PAK and Salim Mohammed v. the Attorney General and 3 Others*, the High Court of Kenya in Malindi affirmed that abortion care is a fundamental right under the Constitution of Kenya and that arbitrary arrests and prosecution of patients and health care providers for seeking or offering abortion care is illegal. In reaching its decision, the High Court engaged an analysis of the right to life under the Constitution of Kenya,

drawing, in part, on the UN Human Rights Committee’s General Comment 36 and noting that the right to life obligates governments to ensure women and girls do not have to undertake unsafe abortions, as well as to take affirmative steps to provide access to abortion.³⁰⁹

Such analysis can guide an understanding and application of the right to life to similarly protect reproductive autonomy under the Fourteenth Amendment.

Conclusion

The Constitution requires the government to respect—and courts to protect—the human right to reproductive autonomy. The Fourteenth Amendment ensures this right through its multiple and interdependent guarantees of life, liberty, and equal protection. As does international human rights law. Each of these foundational sources support a broad right to reproductive autonomy under law that advocates, scholars, and jurists must defend against further retrogression and strengthen for future generations.



Endnotes

1 *Compare Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022) (majority opinion), *with id.* at *72, *78, *82, *93 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (“[O]ne result of today’s decision is certain: the curtailment of women’s rights, and of their status as free and equal citizens.”). For more information on the case and decision see [U.S. Supreme Court Takes Away the Constitutional Right to Abortion](#), CTR. FOR REPROD. RTS. (June 24, 2022). Legal scholars, human rights experts, and leaders from the legal community, among others, immediately and resoundingly denounced the decision as constitutionally and doctrinally wrong and devastating in effect – for its “erasure of Black women from the Constitution,” Michele Goodwin, [No Justice Alito, Reproductive Justice is in the Constitution](#), N.Y. TIMES (June 26, 2022); as a “blow to women’s human rights and gender equality,” [Comment by UN High Commissioner for Human Rights](#) (June 24, 2022); as a “potential assault on the legal doctrine protecting a wide array of Americans’ civil rights,” Jazmine Ulloa and Stephanie Lai, [Jim Obergefell and L.G.B.T.Q. groups warn that abortion ruling could impact other rights](#), N.Y. TIMES (June 24, 2022); and as a “plainly political project” untethered from constitutional history and interpretation, Reva Siegel, [The Trump Court Limited Women’s Rights Using 19th-Century Standards](#), WASH. POST (June 25, 2022).

2 See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 229, 312 (1997) (chronicling the legacy of regulation of Black women’s bodies, critiquing constitutional jurisprudence that enables government to oppress and deny equal rights to communities deemed unworthy of dignity, including poor women, people of color, and people with disabilities, and calling on theorists to advance a “radical vision of reproductive justice”).

3 See Loretta J. Ross, [Understanding Reproductive Justice](#), SISTERSONG: WOMEN OF COLOR REPRODUCTIVE HEALTH COLLECTIVE (2006); see also generally ROBERTS, *supra* note 2.

4 LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 124 (2017).

5 See, e.g., *Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1246 n.2 (11th Cir. 2021); see also Heidi Moseson et al., *Abortion Experiences and Preferences of Transgender, Nonbinary, and Gender-Expansive People in the United States*, 224 AM. J. OBSTETRICS & GYNECOLOGY 376, 376 (2021).

6 William Blackstone, *Commentaries on the Laws of England, Book the First: Chapter the Fifteenth: Of Husband and Wife* (1765-1769) (coverture laws, adopted from English common law, dictated that a married woman was “covered” under her husband’s legal identity and therefore did not have her own legal identity, restricting her from owning property and obtaining other legal rights).

7 U.S. Const. amend. XIX (federal Constitution did not grant women right to vote until 1920, after decades of advocacy by women’s suffrage movement).

8 See *United States v. Virginia (VMI)*, 518 U.S. 515, 536 & n.9 (1996) (describing historic exclusion of women from higher education based on view that “physiological effects of hard study and academic competition with boys would interfere with the development of girls’ reproductive organs” and “incapacitate[] them for the adequate performance of the natural functions of their sex”).

9 See, e.g., *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (striking down employer’s “fetal-protection policy,” which barred women from certain jobs, nothing that it was not for “employers to decide whether a woman’s reproductive role is more important to herself and her family than her economic role”); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 648 (1974) (striking down as unconstitutional under Fourteenth Amendment’s Due Process Clause public school policies that required pregnant teachers to take unpaid leave beginning four or five months before their

expected delivery date and, in some circumstances, also prohibiting them from returning to work until at least three months after delivery and concluding that such policies “unduly penalize[d] a female teacher for deciding to bear a child”).

10 See *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (justifying discriminatory policies regarding women jurors because a “woman is still regarded as the center of home and family life”); see also *J.E.B. v. Alabama*, 511 U.S. 127, 141–42 (1994) (recognizing history of sex discrimination in jury service and that many states had prohibited women from serving on juries or imposed barriers to their service until late into 20th century, and holding that Equal Protection Clause prohibits sex discrimination of targeting peremptory challenges against male jurors).

11 See Br. of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 13–16, 30 (discussing campaign in late 1800s to criminalize abortion on grounds that “nature’s laws” required women to be wives and mothers and emphasizing campaign’s goal to increase birthrate of Protestant women, as compared to “foreign” and Catholic women, based on anti-immigrant, anti-Catholic views).

12 See *id.* at 14.

13 See *id.*

14 See *id.* at 15.

15 See Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century*, 47 CONN. L. REV. 971, 974, 979–992 (2015) (discussing campaigns and ensuing legislation, including the “federal Comstock Act, which banned the distribution of contraception and information regarding contraception, as well as state-level mini-Comstock laws”).

16 *Id.*; see also Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 293–314 (1992).

17 See, e.g., Miss. Code Ann. § 41-41-191(2)(a) (referring to person obtaining abortion as “mother”); see also *id.* at (2)(b)(ii) (referring to “maternal patient”); see also *id.* at (2)(b)(v) (claiming that purpose of ban is to “protect[] the health of women”).

18 See ROBERTS, *supra* note 2, at 29, 42, 54; Br. of the Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 6–7.

19 See Br. of the Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 12 (“The law thus endorsed both forced procreation and forced sterility for Black women.”); see also, e.g., Br. of Reproductive Justice Scholars as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 20–26 (describing legal history of reproductive control of Black women); *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974) (in case challenging statutes and regulations authorizing sterilization under federal law on behalf of plaintiffs including Black women, the court found that in just “the last few years” approximately 100,000 to 150,000 people with low-incomes were sterilized annually under federally funded programs, and that there was “uncontroverted evidence” that “an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization”).

20 See Decl. of Serena Mayeri, J.D., PH.D., Supporting Plaintiffs’ Motion for Partial Summary Judgment ¶¶ 17–18, *Dobbs v. Jackson Women’s Health Org.*, No. 3:18-cv-00171 (S.D. Miss. Apr. 29, 2021).

- 21 See *id.* ¶ 52.
- 22 See generally MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2020).
- 23 See Catherine Lee, “Where the Danger Lies”: Race, Gender, and Chinese and Japanese Exclusion in the United States, 1870-1924, 25 SOCIO. F. 248 (2010).
- 24 See Decl. of Serena Mayeri, J.D., PH.D., Supporting Plaintiffs’ Motion for Partial Summary Judgment ¶ 22, *Dobbs v. Jackson Women’s Health Org.*, No. 3:18-cv-00171 (S.D. Miss. Apr. 29, 2021).
- 25 *Id.*; see also Br. Of Cecilia Fire Thunder et al. as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 12–14; Sally J. Torpy, *Native American Women and Coerced Sterilization: On the Trail of Tears in the 1970s*, 24 AM. INDIAN CULTURE AND RES. J., no. 2, 2000, at 1, 14.
- 26 See Rukmini Callimachi, *Lost Lives, Lost Culture: The Forgotten History of Indigenous Boarding Schools*, N.Y. TIMES (July 19, 2021).
- 27 Robyn M. Powell, *From Carrie Buck to Britney Spears: Strategies for Disrupting the Ongoing Reproductive Oppression of Disabled People*, 107 VA. L. REV. ONLINE 246, 250 (2021).
- 28 See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (including maligned holding that “[i]t is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind”); see also Br. Of The Autistic Self Advocacy Network and The Disability Rights Education and Defense Fund as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 3–4, 7–10; Powell, *supra* note 27, at 251.
- 29 Powell, *supra* note 27, at 252.
- 30 *Id.* at 254.
- 31 CAL STATE AUDITOR, *Sterilization of Female Inmates: Some Inmates Were Sterilized Unlawfully, and Safeguards Designed to Limit Occurrences of the Procedure Failed, Report 2013-120* (2014).
- 32 PROJECT SOUTH, ET AL., *Complaint Re: Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against COVID-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center* (Sept. 2020).
- 33 *Id.*; see also PROJECT SOUTH, ET AL., *Violence & Violation: Medical Abuse of Immigrants Detained at the Irwin County Detention Center* (2021). Although Irwin detention center has since been closed, concerns remain about conditions at other immigration detention facilities. See Press Release, Dep’t Homeland Sec., *ICE to Close Two Detention Centers* (May 20, 2021).
- 34 See NAT’L ADVOCATES FOR PREGNANT WOMEN, *Arrests and Other Deprivations of Liberty of Pregnant Women*, 1973-2020 (Sept. 2021); ACOG, *Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period* (Dec. 2020).
- 35 See *id.*; see generally GOODWIN, *supra* note 22.
- 36 See Br. of Am. Coll. of Obstetricians & Gynecologists et al. as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 19.
- 37 See CDC, *Pregnancy Complications* (2022); Elizabeth Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215–19 (2012) (A person’s risk of death associated with childbirth is approximately 14 times higher than any risk of death from an abortion).
- 38 See Br. of Birth Equity Organizations and Scholars as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 7.
- 39 Donna Hoyert, *Maternal Mortality Rates in the United States, 2020*, CDC (2022); see generally Eugene Declercq & Laurie Zephyrin, *Maternal Mortality in the United States: A Primer*, THE COMMONWEALTH FUND (Dec. 16, 2020).
- 40 Marian MacDorman et al., *Racial and Ethnic Disparities in Maternal Mortality in the United States Using Enhanced Vital Records, 2016-2017*, 111 AM. J. OF PUB. HEALTH 1673 (2021).
- 41 *Id.*; see also Katy Kozhimannil et al., *Severe Maternal Morbidity and Mortality Among Indigenous Women in the United States*, 135 OBSTETRICS & GYNECOLOGY 294 (2020).
- 42 See, e.g., Jamila K. Taylor, *Structural Racism and Maternal Health Among Black Women*, 48 J. L., MED. & ETHICS 506 (2020); Saraswathi Vedam, et al., *The Giving Voice to Mothers Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States*, 16 REPROD. HEALTH 77 (2019); Judith A. Lothian, *The Continued Mistreatment of Women During Pregnancy and Childbirth*, 28 J. PERINATAL EDUC., 183 (2019).
- 43 Elizabeth Howell et al., *Black-White Differences in Severe Maternal Morbidity and Site of Care*, 214 AM. J. OF OBSTETRICS & GYNECOLOGY 122.e1 (2015).
- 44 Surveying and addressing the myriad range of potential policy solutions is beyond the scope of this Report. For example, state and federal law can require or support policies such as paid family leave, affordable quality childcare, expansion of health coverage for and access to comprehensive health services and addressing social determinants of health. See generally Jodie G. Katon, et al., *Policies for Reducing Maternal Morbidity and Mortality and Enhancing Equity in Maternal Health*, THE COMMONWEALTH FUND (Nov. 16, 2021); see also Nancy Northup, *Foreword: The Politics of Pregnancy*, 14 HARV. L. & POL’Y REV. 261, 263–67 (2020). Policies must also directly address racial disparities in maternal care. See BLACK MAMAS MATTER ALLIANCE, *Advancing Holistic Maternal Care for Black Women Through Policy* (Dec. 2018); H.R. 959, *Black Maternal Health Omnibus Act of 2021*, 117th Cong. (2021).
- 45 CTR. FOR REPROD. RTS. & IBIS REPROD. HEALTH, *Evaluating Priorities* (2022); Dovile Vilda et al., *State Abortion Policies and Maternal Death in the United States, 2015–2018*, 111 AM. J. OF PUB. HEALTH 1696, 1700–01 (2021); Br. of 547 Deans, Chairs, Scholars, and Public Health Professionals, et al. as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 23.
- 46 WORLD HEALTH ORG., *Abortion Care Guideline* 24–25 (2022) (A review of 22 studies found that criminalization of abortion limits access to safe and legal abortion, increases the incidence of unsafe abortion, imposes burdens on pregnant people, and disproportionately impacts young people, people facing financial hardship, and people with less access to education).
- 47 Sherajum Monira Farin et al., *The Impact of Legal Abortion on Maternal Health: Looking to the Past to Inform the Present*, at 1 (2021) (Non-white women experienced a 30 to 40% decline in maternal mortality due to legalization of abortion.).
- 48 See INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 103 (2011).
- 49 *Id.* at 103–07.
- 50 Adam Sonfield et al., *The Social and Economic Benefits of Women’s Ability to Determine Whether and When to Have Children*, GUTTMACHER INST. 3–4 (Mar. 2013).
- 51 See, e.g., *The Wage Gap: The Who, How, Why, and What to Do*, NAT’L WOMEN’S L. CTR. (Oct. 2020); Robert Paul Hartley et al., *A Lifetime’s Worth of Benefits: The Effects of Affordable, High-Quality Child Care on Family Income, the Gender Earnings Gap, and Women’s Retirement Security*, NAT’L WOMEN’S L. CTR. & CTR. ON POVERTY AND SOCIAL POL’Y (2021).
- 52 See, e.g., Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 AM. J. OF PUB. HEALTH 1904–1909 (2017).
- 53 See Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM J. OF PUB. HEALTH 407–413 (2018); see also Br. of Social Scientists as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021).
- 54 See generally Br. of Economists as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021).

55 See, e.g., Kelly Jones, *At a Crossroads: The Impact of Abortion Access on Future Economic Outcomes*, AM. UNIV. WORKING PAPER, at 14–15 (2021) (finding that access to abortion increased the probability that young women who experienced an unintended pregnancy finish college by nearly 20 percentage points); Anna Bernstein & Kelly M. Jones, *The Economic Effects of Abortion Access: A Review of the Evidence*, CTR. ON ECON. OF REPROD. HEALTH, 7 (2019) (finding that abortion access led to significant increases in high school graduation and college entrance, particularly among Black women).

56 See, e.g., Jones, *supra* note 55, at 14–16; Jason M. Lindo et al., *Legal Access to Reproductive Control Technology, Women's Education, and Earnings Approaching Retirement*, 110 AEA PAPERS & PROC. 231 (2020); Ali Aboub, *The Impact of Early Fertility Shocks on Women's Fertility and Labor Market Outcomes*, at 4 (2019) (finding that young women who utilized legal abortion to delay an unplanned start to motherhood by just one year realized an 11% increase in hourly wages later in their careers).

57 Bernstein & Jones, *supra* note 55, at 3 (“[D]elayed childbearing and reduced fertility allow women to invest more heavily in their human capital, including increased schooling and job training, which can lead to higher-paying jobs and greater economic security. . .”).

58 See, e.g., Jones, *supra* note 55, at 14–15.

59 Research shows that people who make the decision to end a pregnancy but are denied access to abortion experience a range of harms to themselves and their families. They are more likely to experience economic insecurity and raise their existing children in poverty (See, e.g., Christine Dehlendorf, et al., *Disparities in Abortion Rates: A Public Health Approach*, 103 AM. J. OF PUB. HEALTH 1772, 1775 (2013)); experience interpersonal violence (See, e.g., Sarah C.M. Roberts, et al., *Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion*, 12 BMC MED., no. 144, at 1, 5 (2014)); lose access to educational opportunities (See, e.g., Lauren J. Ralph et al., *A Prospective Cohort Study of the Effect of Receiving Versus Being Denied an Abortion on Educational Attainment*, 29 WOMEN'S HEALTH ISSUES 455 (2019)); and have decreased opportunities to pursue their full career potential (See, e.g., Christine Dehlendorf, et al., *Disparities in Abortion Rates: A Public Health Approach*, 103 AM. J. OF PUB. HEALTH 1772, 1775 (2013)).

60 See Megan K. Donovan, *In Real Life Federal Restrictions on Abortion Coverage and The Women They Impact*, 20 GUTTMACHER POL'Y REV. 1, 3–4 (2017) (reporting data over half of the 7.5 million women aged 15-44 enrolled in Medicaid are women of color and over 3 million more women receiving some or all health coverage through other federal programs).

61 See generally CTR. FOR REPROD. RTS., *Center Report: More State Abortion Restrictions Passed in 2021 Than in Any Year Since Roe v. Wade* (Jan. 4, 2021); PLANNED PARENTHOOD ACTION FUND, *Timeline of Attacks on Abortion: 2009-2021* (2021); CTR. FOR REPROD. RTS., *After Roe Fell* (2022).

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63 Luna Reyna, *Recent Abortion Bans Highlight the Continued Barriers to Reproductive Justice for Indigenous People*, PRISM REPORTS (Jan. 27, 2022).

64 Marcela Howell & Ann M. Stars, *For Women of Color, Access to Vital Health Services is Threatened*, GUTTMACHER INST. (July 2017).

65 Ruth Dawson & Tracy Leong, *Not Up for Debate: LGBTQ People Need and Deserve Tailored Sexual and Reproductive Health Care*, GUTTMACHER INST. (Nov. 16, 2020); see also Heidi Moseson, et al., *Abortion Attempts Without Clinical Supervision Among Transgender, Nonbinary and Gender-Expansive People in the United States*, 48 BMJ SEXUAL AND REPROD. HEALTH 22 (2022).

66 Powell, *supra* note 27.

67 ADVOCATES FOR YOUTH, *Abortion and Young People in the United States* (2019).

68 Kinsey Hasstedt, et al, *Immigrant Women's Access to Sexual and Reproductive Health Coverage and Care in the United States*, THE COMMONWEALTH FUND (Nov. 20, 2018); NAT'L WOMEN'S L. CTR., *Immigrant Rights and Reproductive Justice: How Harsh Immigration Policies Harm Immigrant Health* (Apr. 2017).

69 Gretchen Ely & Nadine Murshid, *The Association Between Intimate*

Partner Violence and Distance Traveled to Access Abortion in a Nationally Representative Sample of Abortion Patients, 36 J. OF INTERPERSONAL VIOLENCE 663 (2017).

70 Usha Ranji, et al., *Beyond the Numbers: Access to Reproductive Health Care for Low-Income Women in Five Communities*, KAISER FAMILY FOUNDATION (Nov. 2019).

71 International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

72 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

73 International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

74 International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

75 Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

76 Convention on the Rights of Persons with Disabilities, *adopted on* Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

77 See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (1995).

78 539 U.S. 558, 572–73 (2003); see also *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (citing international and comparative foreign law as further support and confirmation for the Court's holding that the juvenile death penalty violates the 8th Amendment); *Graham v. Florida*, 560 U.S. 48, 80 (2010) (citing international and comparative law in a case challenging the practice of sentencing juveniles to life in prison without the possibility of parole, noting the U.S. Supreme Court's "longstanding practice" of looking "beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual"); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing international disapproval of the practice of executing developmentally disabled individuals, as detailed in the filing of amicus European Union).

79 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

80 See, e.g., Ruth Bader Ginsburg & Deborah Jones Merritt, *Cardozo Memorial Lecture: Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999); Ruth Bader Ginsburg, Assoc. Just., U.S. Sup. Ct., Speech at Columbia University School of Law: *Brown v. Board of Education in International Context* (Oct. 21, 2004); Ruth Bader Ginsburg, Assoc. Just., U.S. Sup. Ct., Speech at University of Pretoria, South Africa: *Brown v. Board of Education in International Context* (Feb. 7, 2006).

81 *Printz v. United States*, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting) (arguing that looking to the federalist systems of other countries might provide insight into the question of whether U.S. Constitutional law permits Congress to impose an obligation on state governments); see also Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 12–88 (2006) (cataloging the ways in which the Supreme Court has drawn on foreign and international law in cases throughout its history).

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83 *In re Marriage Cases*, 183 P.3d 384, 426 n.41, 433–34 (Cal. 2008); see also I. India Thusi and Martha F. Davis, *Human Rights in State Courts* (Ne. U. School of L. Research Paper, Paper No. 290-2017, 2016) (providing a comprehensive map and discussion of state court decisions citing to international and foreign law).

84 Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); see also Michael H. Posner, Assistant Sec'y of State, Bureau of Democracy, Hum. Rts. & Labor, Address to the American Society of International Law: *The Four Freedoms Turn 70* (Mar. 24, 2011) (“While the United States is not a party to the [ICESCR], as a signatory, we are committed to not defeating

the object and purpose of the treaty.”).

85 See generally CTR. FOR REPROD. RTS., [Breaking Ground 2020: Treaty Monitoring Bodies on Reproductive Rights](#) (2020) [hereinafter Breaking Ground]; see also Br. of United Nations Mandate Holders as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 7–31. The World Health Organization’s 2022 Abortion Care Guideline is undergirded by international human rights, and affirms that human rights are foundational to the provision of and access to quality abortion care. See WORLD HEALTH ORG., *supra* note 46.

86 Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social, and Cultural Rights)*, ¶¶ 11–21, U.N. Doc. E/C.12/GC/22 (2016) [hereinafter CESCR, *Gen. Comment No. 22*].

87 See Breaking Ground, *supra* note 85, at 12–15.

88 CESCR, *Gen. Comment No. 22, supra* note 86, at ¶¶ 33–49.

89 See Breaking Ground, *supra* note 85, at 10–11.

90 CESCR, *Gen. Comment No. 22, supra* note 86, at ¶¶ 11–21.

91 See, e.g., *id.* at ¶¶ 57–58.

92 See CAT Committee, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Peru*, ¶19, U.N. Doc. CAT/C/PER/CO/5-6 (2013); CAT Committee, *Concluding Observations of the Committee Against Torture: Czech Republic*, ¶ 12, U.N. Doc. CAT/C/CZE/CO/4-5 (2012).

93 U.N. HUM. RTS. EXPERTS, [United States: UN Experts Denounce Further Attacks against Right to Safe Abortion and Supreme Court Complicity](#) (Sept. 14, 2021).

94 *Id.*

95 See, e.g., Philip Alston (Special Rapporteur), *Report of the Special Rapporteur on Extreme Poverty and Human Rights on his Mission to the United States of America*, ¶ 57, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018); Human Rights Council, *Report of the Working Group of Experts on People of African Descent, on its Mission to the United States*, ¶ 117, UN Doc. A/HRC/33/61/Add.2 (Aug. 18, 2016); Human Rights Council, *Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice, on its Mission to the United States*, ¶ 72, UN Doc. A/HRC/32/44/Add.2 (Jun. 7, 2016); Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh and Ninth Periodic Reports of the United States*, ¶ 15, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014) [hereinafter CERD Committee, *Concluding Observations on U.S. Periodic Reports*]; Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States*, ¶¶ 32–33, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

96 See CERD Committee, *Concluding Observations on U.S. Periodic Reports, supra* note 95.

97 Acción de Inconstitucionalidad 148/2017, Pleno de la Suprema Corte de Justicia de la Nación [SCJN], Décima Época, Sentencia de 7 de septiembre de 2017 (Mex.).

98 *Lakshmi Dhikta v Government of Nepal*, Writ petition no. WO-0757, 2067 (2009) (Supreme Court of Nepal).

99 *PAK and Salim Mohammed v. the Attorney General and 3 Others* (2022) 262 K.L.R 18, ¶¶ 53–54, 66–69, 78–89, 164 (Kenya).

100 CTR. FOR REPROD. RTS., [Roe and Intersectional Liberty Doctrine](#) (2018).

101 CTR. FOR REPROD. RTS., [State Constitutions and Abortion Rights](#) (2022).

102 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022). See also, e.g., *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Rochin v. California*,

342 U.S. 165, 172–73 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 25–31 (1905).

103 141 U.S. 250, 251 (1891).

104 *Rochin*, 342 U.S. at 172–73.

105 *Riggins*, 504 U.S. at 135; *Cruzan*, 479 U.S. at 279.

106 See *Sell v. United States*, 539 U.S. 166, 178–79, 183 (2003); *Ferguson v. City of Charleston*, 532 U.S. 67, 78 & n.14 (2001) (citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

107 *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names*, 268 U.S. 510, 534–35 (1925).

108 *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

109 See *Eisenstadt*, 405 U.S. at 453; *Carey v. Population Servs. Int’l*, 431 U.S. 678, 687 (1977).

110 *LaFleur*, 414 U.S. at 648.

111 *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003) (citing *Casey*, 505 U.S. at 851). See also, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 665–66, 675 (2015); *United States v. Windsor*, 570 U.S. 744, 772 (2013); *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

112 *Lawrence*, 539 U.S. at 574; *Obergefell*, 576 U.S. at 665–66.

113 See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 90–91 (1998) (explaining how the “constitutional right to be a parent . . . has ample, but heretofore unacknowledged support in the history of antislavery and Reconstruction” and describing how enslaved people’s “denial of parental ties . . . impos[ed] a social construction by which s/he would be defined as a commodity rather than as the child of a family, community, and nation”); see also David H. Gans, *Reproductive Originalism: Why the Fourteenth Amendment’s Original Meaning Protects the Right to Abortion*, 75 SMU L. REV. F. 191, 192 (2022) (“The Framers of the Fourteenth Amendment recoiled at the treatment of enslaved families. Enslaved women were forced to bear children against their will, parents were denied the right to marry and often separated, and children were taken from their parents. Against the backdrop of these cruel abuses, the 39th Congress wrote the Fourteenth Amendment to protect the full scope of liberty, guaranteeing basic rights of personal liberty and bodily integrity to all.”); Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299 (1993) (drawing on the history underlying the Fourteenth Amendment to demonstrate the ways in which its supporters understood the rights to family, including procreation, contraception and abortion, as fundamental aspects of liberty); Peggy Cooper Davis, [Overturning Abortion Rights Ignores Freedoms Awarded After Slavery’s End, Says Peggy Cooper Davis](#), THE ECONOMIST (Jun. 13, 2022).

114 Gans, *supra* note 113, at 196. See also *id.* at 194–96, 198, 201 (citing various historical materials, including Senate debates, speeches by legislators and contemporary newspaper articles concerning the 14th Amendment).

115 See Davis, *Neglected Stories, supra* note 113, at 378–86 (discussing how the framers of the Fourteenth Amendment were informed and motivated by an understanding of the cruelty by which enslaved people experienced the abrogation of their rights to form and sustain their families); Gans, *supra* note 113, at 199 (arguing that “one of the cruelest aspects of slavery was the horrific denial of reproductive autonomy and free choice in family life,” including the rape and forced childbearing of enslaved women to perpetuate slavery, and the forced separation of enslaved families).

116 Gans, *supra* note 113, at 202–03 (discussing historical record, including the Black Codes enacted in many states, testimony submitted to federal bodies, historical accounts, and quoting extensively from numerous Senators who participated in the debates over the Fourteenth Amendment, including Senator Jacob Howard); see also Davis, *Neglected Stories, supra* note 113, at 389 (noting that “the Reconstruction Amendments were a culmination of struggle, not only to assure that no person’s labor was owned, but also to assure that each person was self-defining”).

117 See *Eisenstadt*, 405 U.S. at 453; *Carey*, 431 U.S. at 687.

118 *Roe v. Wade*, 410 U.S. 113, 153 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022); *Casey*, 505 U.S. at 846.

119 *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part) (internal citations omitted).

120 *Id.* at 916.

121 *Id.* at 857 (plurality opinion); *see also generally* Br. for Constitutional Law Scholars as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021); Br. for Am. Civil Liberties Union & Am. Civil Liberties Union of Miss. as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021).

122 *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 486 (Kan. 2019) (recognizing right to abortion under state's constitution).

123 *See Powell v. State*, 510 S.E.2d 18, 21–24 (Ga. 1998) (striking down criminal sodomy ban).

124 *State v. McAfee*, 385 S.E.2d 651, 651–52 (Ga. 1989) (holding plaintiff could be allowed to turn off his ventilator based on his rights to liberty and privacy and “concomitant right to refuse medical treatment”).

125 *See In re A.C.*, 573 A.3d 1235, 1243, 1247, 1249 (D.C. 1990) (en banc). By the time the appeals court issued its decision in the case protecting the bodily integrity of pregnant people, the hospital had carried out the trial court's order requiring the caesarean section. Thus, the hospital forced A.C., a woman dying from cancer, to endure a major surgery in the last days of her life; following the operation, “the baby lived for only a few hours, and A.C. succumbed to cancer two days later.” *Id.* at 1241.

126 *In re Baby Boy Doe*, 632 N.E.2d 326, 332 (Ill. App. Ct. 1994).

127 *See id.*; *see also Taft v. Taft*, 446 N.E.2d 395, 396–97 (Mass. 1983) (vacating order compelling procedure involving stitching together a woman's cervix to “hold the pregnancy,” finding that any interest state might have in requiring competent, adult woman to submit to operation against her will was not established); *In re Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997) (holding woman could not be compelled to undergo blood transfusion for benefit of her viable fetus because it is an invasive medical procedure that “interrupts a competent adult's bodily integrity”); *cf. Ferguson*, 532 U.S. at 86 (finding unconstitutional, in Fourth Amendment context, policy requiring physicians to conduct urine screens for drug use on pregnant women seeking prenatal care at state hospital, without their consent, in order to use test results to send women to jail or state-ordered drug treatment).

128 *See* Committee on the Elimination of Discrimination Against Women, *General Recommendation 24: Article 12 of the Convention (Women and Health)*, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶¶ 12(d), 17, 31(e), U.N. Doc. A/54/38/Rev.1, chap 1 (1999) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*] (urging that States parties should “[r]equire all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice”); *see generally* CESCR, *Gen. Comment No. 22, supra* note 86, at ¶ 25 (“Due to women's reproductive capacities, the realization of the right of women to sexual and reproductive health is essential to the realization of the full range of their human rights. The right of women to sexual and reproductive health is indispensable to their autonomy and their right to make meaningful decisions about their lives and health.”).

129 CESCR, *Gen. Comment No. 22, supra* note 86, at ¶ 25.

130 *See id.*, at ¶ 29.

131 Anand Grover (Special Rapporteur), *Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 21, U.N. Doc. A/66/254 (2011); *see also* CEDAW Committee, *Gen. Recommendation No. 24, supra* note 128, at ¶ 31(e).

132 Breaking Ground, *supra* note 85, at 17.

133 *Casey*, 505 U.S. at 857–59.

134 *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (citing *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)); *see also Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973) (discussing “our Nation[’s] . . . long and unfortunate history of sex discrimination” often grounded in “gross, stereotyped distinctions between the sexes”); *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (a woman is “[d]ifferentiated by” “her physical structure and a proper discharge of her maternal functions,” which “having in view not merely her own health, but the well-being of the race – justify legislation to protect her”); *Bradwell v. State of Illinois*, 83 U.S. 130, 139 (1872) (upholding state's denial of law license to woman based on sex and including infamous concurrence that “[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother”).

135 *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017); *VMI*, 518 U.S. at 531.

136 *Morales-Santana*, 137 S. Ct. at 1690 (internal citations and quotations omitted).

137 *Id.* (internal citations and quotations omitted).

138 *VMI*, 518 U.S. at 533.

139 Indeed, it has been fifty years since the U.S. Supreme Court first recognized that laws denying women equal treatment based on stereotypes about their “proper” role violate equal protection. *See Reed v. Reed*, 404 U.S. 71 (1971) (striking down statute preferring men to women as administrators of estates).

140 *Morales-Santana*, 137 S. Ct. at 1692 (internal quotations and citations omitted); *see also, e.g., Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

141 *See, e.g., Morales-Santana*, 137 S. Ct. at 1692 (“For close to a half century . . . this Court has viewed with suspicion laws that rely on ‘overbroad generalizations about the different talents, capacities, or preferences of males and females.’” (internal citation omitted)); *VMI*, 518 U.S. at 540–42 (rejecting Virginia's assertions about “tendencies” of men and women as valid justification for excluding all women from VMI's unique, adversarial educational method); *Craig v. Boren*, 429 U.S. 190, 197–204 (1976) (summarizing Court's sex discrimination cases and highlighting anti-stereotyping language).

142 *See VMI*, 518 U.S. at 532.

143 *Id.* at 534.

144 *Hibbs*, 538 U.S. at 736; *VMI*, 518 U.S. at 533 (characterizing laws that classify based on pregnancy as examples of laws that classify based on sex). *Hibbs* and *VMI* do not mention *Geduldig v. Aiello*, 417 U.S. 484 (1974), and indicate that *Geduldig* has little continued relevance. Although some rely on *Geduldig* for the argument that pregnancy classifications do not classify based on sex, *Geduldig* stated only “it does not follow that every legislative classification concerning pregnancy is a sex-based classification.” *Id.* at 496 n.20. In any event, *Geduldig* was wrongly decided, and the Supreme Court has not cited it in a majority opinion in an equal protection case in over 40 years. *See generally* Reva Siegel, *The Pregnant Citizen from Suffrage to the Present*, 19TH AMEND. SPECIAL EDITION GEO. L. J. 167 (2020). The dicta in *Dobbs* suggesting that *Geduldig* forecloses a sex discrimination claim against abortion bans or against *any* non-pretexual “regulation of a medical procedure that only one sex can undergo,” fails to address *Hibbs* and *VMI* and wholly ignores the development of sex discrimination law and precedent over the past 50 years. *Compare Dobbs*, 2022 WL 2276808, at *10–11, with Br. of Equal Protection Constitutional Law Scholars et al. as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021).

145 538 U.S. at 736 (emphasis added) (internal citations omitted).

146 *Id.* at 731.

147 518 U.S. at 533.

148 *Hibbs*, 538 U.S. at 730 (citing congressional findings). The Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), although arising under Title VII and not the Equal Protection Clause, provides further

support for the conclusion that discrimination on the basis of pregnancy can be discrimination on the basis of sex. In *Bostock*, the Supreme Court interpreted the text of Title VII and held that discrimination because of a person’s sexual orientation or transgender status is discrimination “because of sex”; as it explained, being gay or transgender is “inextricably bound up” with sex, whether it be the sex of the person one is attracted to or the sex one is assigned at birth. *See id.* at 1737, 1741–42. Likewise, the capacity for pregnancy is “inextricably bound up” with an individual’s sex and frequently a target of discrimination for that reason. *See* Br. for LGBTQ Organizations and Advocates as Amicus Curiae in Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 33 (citing *Bostock*, 140 S. Ct. at 1742; and then citing *Hibbs*, 538 U.S. at 721, 733 n.6) (making this argument regarding abortion bans).

149 *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part and dissenting in part).

150 *Id.* (citing *Hogan*, 458 U.S. at 724–26; and then citing *Boren*, 429 U.S. at 190).

151 *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2402 (Ginsburg, J., dissenting) (internal citations omitted).

152 *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

153 *Maher v. Roe*, 432 U.S. 464, 458–69 (1977) (Marshall, J., dissenting).

154 *See, e.g., N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 844 (N.M. 1998) (striking down restriction on Medicaid funding for abortion under state Equal Rights Amendment (ERA)); *Doe v. Maher*, 515 A.2d 134, 159–160 (Conn. Super. Ct. 1986) (striking down Medicaid funding restriction on abortion under both state equal protection clause and ERA); *Delva v. Cont’l Grp., Inc.*, 137 So. 3d 371, 376 (Fla. 2014) (holding pregnancy discrimination constitutes sex discrimination under Florida’s Civil Rights Act); *Mass. Elec. Co. v. Mass. Comm’n Against Discrimination*, 375 N.E.2d 1192, 1198 (Mass. 1978) (holding that “any classification which relies on pregnancy as the determinative criteria is a distinction based on sex”).

155 515 A.2d at 159.

156 *Id.*

157 *Id.* at 160.

158 *N.M. Right to Choose*, 975 P.2d at 855.

159 *Id.* at 854 (internal citations omitted).

160 *Id.* at 856–57.

161 Human Rights Committee, *General Comment No. 28, Equality of Rights Between Men and Women (Art. 3)*, U.N. Doc. CCPR/C/21/Rev/1/Add.10 (2000) [hereinafter Hum. Rts. Comm., *General Comment No. 28*]; Human Rights Committee, *General Comment No. 18: Non-Discrimination (37th Sess., 1989)*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 195–98 (2008); CESCR, *General Comment No. 16: The Equal Right to Men and Women to the Enjoyment of All Economic, Social, and Cultural Rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2005/4 (2005) [hereinafter CESCR, *General Comment No. 16*]; CEDAW Committee, *General Recommendation No. 25: on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women, on Temporary Special Measures*, U.N. Doc. HRI/GEN/1/Rev.7, at 282–90 (2004).

162 *See* CESCR, *Gen. Comment No. 22, supra* note 86, at ¶ 27.

163 Committee Against Torture, *General Comment 2: Implementation of Article 2 by States Parties*, ¶ 22, U.N. Doc. CAT/C/GC/2 (2008); Human Rights Committee, *Gen. Comment No. 28, supra* note 161, at ¶ 5. This is true, as well, for human rights treaties the U.S. has signed but not yet ratified; *see also* CEDAW, *supra* note 75, at art. 5; CESCR, *General Comment No. 22, supra* note 86, at ¶¶ 27, 35–36.

164 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 35, on Gender-Based Violence Against Women, Updating General Recommendation No. 19*, ¶¶ 26(c), 30(d)(i), 30(e)(i),

U.N. Doc. CEDAW/C/GC/35 (2017); *see also* CESCR, *General Comment No. 22, supra* note 86, at ¶¶ 27, 35; CESCR, *General Comment No. 16, supra* note 161, at ¶¶ 5, 29; Committee on the Rights of the Child, *General Comment No. 20: The implementation of the Rights of the Child During Adolescence*, ¶¶ 27–28, U.N. Doc. CRC/C/GC/20 (2016); Committee on the Rights of the Child, *General Comment No. 15: The Right of the Child to the Highest Attainable Standard of Health (Art. 24)*, ¶¶ 9–10, U.N. Doc. CRC/C/GC/15 (2013) [hereinafter CRC Committee, *General Comment No. 15*]; Human Rights Committee, *Gen. Comment No. 28, supra* note 161, at ¶ 5.

165 CEDAW Comm., *Gen. Recommendation No. 24, supra* note 128, at ¶ 21, 31(c); CESCR, *Gen. Comment No. 16, supra* note 161, at ¶ 29; *see also* Breaking Ground, *supra* note 85, at 19.

166 CESCR, *Gen. Comment No. 22, supra* note 86, at ¶ 27.

167 *Id.* at ¶¶ 27, 35, 36.

168 *See, e.g.,* Committee on Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: New Zealand*, ¶ 35(a), U.N. Doc. CEDAW/C/NZL/CO/7 (2012).

169 CEDAW Comm., *Gen. Recommendation No. 24, supra* note 128, at ¶ 11; Committee on Elimination of Discrimination Against Women, *Communication No. 22/2009: L.C. v. Peru*, ¶¶ 7.7, 7.12, 8.17, 9, 12(iii), U.N. Doc. CEDAW/C/50/D/22/2009 (2011).

170 For recent briefs applying a sex discrimination analysis in a reproductive autonomy context, *see* Mem. Supp. Pls.’ Mot. for Partial Summ. J., *Jackson Women’s Health Org. v. Currier*, No. 3:18cv171 (S.D. Miss. Apr. 29, 2021); Br. of Equal Protection Constitutional Law Scholars et al. as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021).

171 *See* Br. of Equal Protection Constitutional Law Scholars et al. as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 12–20; Br. of Reproductive Justice Scholars as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 21–23.

172 *Carhart*, 550 U.S. at 184–85 (Ginsburg, J., dissenting).

173 *See Almerico v. Denney*, 532 F. Supp. 3d 993, 1002 (D. Idaho 2021).

174 *Infra* notes 221–23; *see also, e.g., Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536, 540 n.22 (S.D. Miss. 2018) (noting that Mississippi’s asserted interest in health and life to justify abortion ban were unpersuasive given alarming maternal and newborn mortality rates in the state and the state’s failure to enact policies, such as expanding Medicaid coverage, to protect health and life “on the other side of the delivery room”); Br. of Reproductive Justice Scholars as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 31–35; Br. of Birth Equity Organizations and Scholars as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 26–27.

175 Br. of Reproductive Justice Scholars as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 28.

176 *See* Br. of Equal Protection Constitutional Law Scholars et al. as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 26.

177 *See* Br. of Birth Equity Organizations and Scholars as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 26–27.

178 *See generally* Decl. of Serena Mayeri, J.D., PH.D., Supporting Plaintiffs’ Motion for Partial Summary Judgment, *Dobbs v. Jackson Women’s Health Org.*, No. 3:18-cv-00171 (S.D. Miss. Apr. 29, 2021).

179 *Andrews v. Drew Mun. Separate Sch. Dist.*, 371 F. Supp. 27 (N.D. Miss. 1973), *aff’d*, 507 F.2d 611 (5th Cir. 1975). The district court linked the policy to broader efforts to resist desegregation of the state’s public schools.

180 *See id.* at 31. The *Andrews* case was decided at a time when the Supreme Court had just begun developing its sex discrimination jurisprudence,

and thus relied on rational basis equal protection principles.

181 *Colorado Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1363 (Colo. 1988).

182 *Casey*, 505 U.S. at 898.

183 *Id.* at 897 (internal citations omitted); *see also Currier*, 349 F. Supp. 3d at 540 n.22 (noting that state's ban on abortion after 15 weeks "is closer to the old Mississippi—the Mississippi bent on controlling women and minorities," and citing to state's history of restricting women's legal rights).

184 *Casey*, 505 U.S. at 856.

185 *See, e.g., Morales-Santana*, 137 S. Ct. at 1692–93 (laws based on "[s]tereotypes about women's domestic roles" and other "generalizations about the different talents, capacities, or preferences of males and females" are "anachronistic"); *cf. Nat'l Coal. For Men v. Selective Serv. Sys.*, 141 S. Ct. 1815 (2021) (Sotomayor, J., joined by Breyer and Kavanaugh, JJ., concurring) (citing *Morales-Santana*).

186 *See* ROBERTS, *supra* note 2; ROSS & SOLINGER, *supra* note 4; REPRODUCTIVE RIGHTS AND JUSTICE STORIES (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019); Khiara M. Bridges, *Towards a Theory of State Visibility: Race, Poverty, and Equal Protection*, 19 COLUM. J. OF GENDER & L. 964 (2010); GOODWIN, *supra* note 22; BRIANA THEOBALD, REPRODUCTION ON THE RESERVATION: PREGNANCY, CHILDBIRTH, AND COLONIALISM IN THE LONG TWENTIETH CENTURY (2019).

187 ROBERTS, *supra* note 2, at 6.

188 *Id.* at 7.

189 ROSS & SOLINGER, *supra* note 4, at 11.

190 ROBERTS, *supra* note 2, at 308

191 *See* Reva Siegel, *Roes' Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875, 1888–91, and n.66 (2010) (recounting equality arguments in legal briefing from several abortion cases predating *Roe*, citing one example of a specific allegation of racially disparate impact).

192 *See infra* notes 225–49 and accompanying text.

193 *See* Khiara M. Bridges, *Elision and Erasure: Race, Class, and Gender in Harris v. McCrae*, in REPRODUCTIVE RIGHTS AND JUSTICES STORIES 118–23, 126–27 & n.41 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019) (citing evidence of racially disparate impacts of Hyde Amendment in congressional record; trial court decision noting racially unjust impacts; and amicus briefs to the Supreme Court in *Harris v. McCrae*, 448 U.S. 297 (1980)); *cf. infra* notes 260–61 and accompanying text (quoting Justice Marshall dissent addressing racially discriminatory impact).

194 Bridges, *supra* note 193, at 123–27 (discussing shifts in equal protection jurisprudence that posed barriers to race, gender, and class discrimination claims).

195 426 U.S. 229, 241 (1976). Three years later, in *Personnel Administrator of Massachusetts v. Feeney*, the Court recast the intent requirement of *Davis* in terms akin to a desire to cause harm or malice. 442 U.S. 256, 260–61 (1979).

196 *Ferguson v. City of Charleston*, 186 F.3d 469, 473–74 (4th Cir. 1999).

197 *Id.* at 480–81; *see also* Priscilla A. Ocen, *Pregnant While Black: The Story of Ferguson v. City of Charleston*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 176–78 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019) (detailing history of *Ferguson* litigation from trial through Supreme Court).

198 *See* Br. for Petitioners, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936), 2000 WL 728149, at *1–2, *41–43 & n.10 (citing record evidence below "sufficient to establish a prima facie case of disparate impact discrimination" and of "racist views," including that of nurse implementing the policy who noted if a white patient had a Black partner in the medical chart; who believed that "interracial relationships were 'against God's way,'" and who "raised the option of sterilization for

Black women testing positive for cocaine, but not for white women") (June 2000); *see Ocen, supra* note 197, at 177–78.

199 *See generally Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

200 *NAACP v. Horne*, No. CV13-01079-PHX-DGC, 2013 WL 5519514, at *3–4 (D. Az. Oct. 3, 2013).

201 *Id.*; *NAACP v. Horne*, 626 F. App'x 200 (9th Cir. 2015).

202 For some of the most recent examples, *see e.g.*, Decl. of Serena Mayeri, J.D., PH.D., Supporting Plaintiffs' Motion for Partial Summary Judgment at 2, *Dobbs v. Jackson Women's Health Org.*, No. 3:18-cv-00171 (S.D. Miss. Apr. 29, 2021); Br. of Asian Pacific American Women's Forum, et al. as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021); Br. of the National Birth Equity Collective et al. as Amicus Curiae In Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021); Br. of the Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae In Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021); Br. of Reproductive Justice Scholars as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021); Br. of Organizations Dedicated to the Fight for Reproductive Justice as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021); Br. of Advocates for Youth et al. as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 17, 2021); Br. of Cecilia Fire Thunder et al. as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 17, 2021). For an example of this type of evidence presented to human rights bodies, *see, e.g.*, CTR. FOR REPROD. RTS., NAT. LATINA INSTIT. FOR REPROD. HEALTH & SISTER-SONG WOMEN OF COLOR REPROD. JUSTICE COLLECTIVE, *Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care, A Shadow Report for the UN Committee on the Elimination of Racial Discrimination* (2014).

203 *See supra* note 202.

204 Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1213, 1225–31 (2018) (discussing unsettled doctrine of discrimination in late twentieth century and use of disparate impact standard by lower courts before *Washington v. Davis*).

205 *Id.* at 1213. For a critique of why the modern intent doctrine contravenes the constitutional goal of equal protection and a corrective reading of *Davis*, *see* Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1785–86 (2012) (arguing *Davis* "did not demand proof regarding individual mindsets," but formalized a longstanding "contextual approach to proving intent," which was a "broadly informed inferential approach" and one that worked reasonably well at detecting structural race discrimination).

206 *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1131–45 (1997); David A. Strauss, *Discriminatory Intent and The Taming of Brown*, 56 U. CHI. L. REV. 935, 937–39, 963 (1989); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5–8 (1976). More recent scholarship traces how the Court has revitalized effects-oriented analysis for free exercise claims based on jurisprudence historically developed in parallel with and reliance on equal protection cases and why this development should apply similarly in modern equal protection cases. *See* Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L. J. (forthcoming 2023); *cf.* Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2458–63 (2021) (proposing that the principle of "equal value," which has been used to enhance protections for free exercise could be incorporated in equal protection and reproductive freedom doctrine but cautioning it is likely to be applied selectively by the judiciary and thus "not likely to benefit Black and brown people anytime soon").

207 Committee on the Elimination of Racial Discrimination, *General Recommendation 14, Definition of Racial Discrimination* (Forty-Second Session, 1993), ¶ 2, U.N. Doc. A/48/18, at 115 (1994); *see also* Committee on the Elimination of Racial Discrimination, *General Recommendation 25, Gender-Related Dimensions of Racial Discrimination* (Fifty-sixth Session, 2000), ¶ 3, U.N. Doc. A/55/18, annex V at 152 (2000).

208 Human Rights Committee, *General Comment No. 18*, *supra* note 161, at ¶ 6.

209 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, ¶ 5, U.N. Doc. CERD/C/USA/CO/7-9 (2014).

210 *Washington v. Davis*, 426 U.S. 229, 242 (1976).

211 *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (internal quotation marks omitted).

212 *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (emphasis added).

213 *Id.* at 266.

214 *Id.* at 265–68.

215 *Veasey v. Abbott*, 830 F.3d 216, 235–36 (5th Cir. 2016) (discussing *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973) and use of circumstantial evidence to prove pretext in statutory claims of employment discrimination).

216 *Id.* at 239.

217 *Id.* at 236–40.

218 *See N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 230, 242 (4th Cir. 2016) (“We thus take seriously, as the Constitution demands, any infringement of [the voting] right. We cannot ignore the record evidence that, because of race, the legislature enacted one of the largest restrictions of the franchise in modern North Carolina history.”)

219 *Id.* at 232–33.

220 *See supra* notes 18–22, 196–98 and accompanying text.

221 *See Br. of Birth Equity Organizations and Scholars In Support of Respondents, Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 12, 14; Aisha Nyandoro, *The Latest Way Mississippi Lawmakers are Failing Women*, *Ms. Magazine* (Mar. 22, 2022); Isabelle Taft, *House Kills Effort to Extend Healthcare Coverage for New Moms*, *Miss. Today* (Mar. 9, 2022).

222 *See Br. of Reproductive Rights and Justice Organizations and Allied Organizations as Amici Curiae In Support of Plaintiffs-Appellees at 16–20, Planned Parenthood South Atlantic v. Baker*, 941 F.3d 687 (4th Cir. 2019) (No. 18-2133).

223 *Id.*

224 *See also supra* notes 6–35 and accompanying text (discussing government policies perpetuating reproductive control of Black, Latina, Indigenous, and immigrant women).

225 *See Michele Goodwin & Erwin Chemerinsky, Pregnancy, Poverty, and the State: The Poverty of Privacy Rights by Khiara M. Bridges Stanford University Press*, 127 *YALE L. J.* 1270, 1284–93 (2018).

226 *Id.*; *see also* Jill E. Adams and Melissa Mikesell, *And Damned If They Don’t: Prototype Theories To End Punitive Policies Against Pregnant People Living in Poverty*, 18 *GEO. J. GENDER & L.* 283, 286–95 (2017) (discussing “[h]ow the poor get punished for reproductive decisions”).

227 *Maher*, 432 U.S. at 471, 474; *Harris v. McRae*, 448 U.S. 297, 323 (1980) (relying on *Maher* to conclude that “poverty, standing alone is not a suspect classification”); *see also Beal v. Doe*, 432 U.S. 438 (1977); *Williams v. Zbaraz*, 448 U.S. 358 (1980).

228 For a first-hand account of the litigation strategy, *see Rhonda Copelon and Sylvia Law, “Nearly Allied to Her Right to Be”—Medicaid Funding for Abortion: The Story of Harris v. McRae*, in *WOMEN & LAW STORIES* 207 (Elizabeth M. Schneider and Stephanie M. Wildman eds., 2011).

229 *Harris v. McRae* 448 U.S. 297, 344 (1980) (Marshall, J., dissenting). Both before and after the *McRae* decision, leading scholars have written extensively on the constitutional principles that justify including people who are poor or low-income as a protected class under the Equal Protection Clause. *See, e.g., Frank I. Michelman, Foreword: On Protecting The Poor Through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7 (1969);

Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 *HASTINGS L.J.* 1, 3–8 (1987); Erwin Chemerinsky, *Making the Right Case for a Constitutional Right to Minimum Entitlements*, 44 *MERCER L. REV.* 525 (1993); Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 *HARV. L. REV.* 4, 7, 21–46 (2007); Julie A. Nice, *Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection*, 60 *DRAKE L. REV.* 1023, 1050–67 (2012).

230 *McRae*, 448 U.S. at 344.

231 *See supra* notes 36–70 and accompanying text.

232 Cary Franklin, *The New Class Blindness*, 128 *YALE L.J.* 2, 7 (2018). For a theory of heightened scrutiny triggered by the apparatus of state surveillance of poor, pregnant women—and discussion of many scholars who argue that the Court should apply heightened scrutiny to laws that discriminate against the poor as a class, *see Bridges, supra* note 186, at 968–69, 1008–15.

233 *See* Kenneth Agran, *When Government Must Pay: Compensating Rights and the Constitution*, 22 *CONST. COMM.* 97, 109 (2005).

234 *Brown v. Bd. of Educ.*, 349 U.S. 294, 298–300 (1969) (opinion of the Court addressing “the manner in which relief is to be accorded” to effectuate “[f]ull implementation” of its 1954 decision that “racial discrimination in public education is unconstitutional” and remanding for lower courts to “be guided by equitable principles” that “may call for elimination of a variety of obstacles” to integration).

235 *See Douglas v. California*, 372 U.S. 353, 355–57 (1963) (holding that equal protection requires state-funded appellate counsel for indigent criminal defendants); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that indigent criminal defendants have a due process right to state-funded trial counsel); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (finding an equal protection violation where indigent prisoners were denied cost-free access to trial transcripts necessary for appellate review); *see also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 *HARV. L. REV.* 1131, 1182–83 (1999) (discussing cases).

236 *See cases cited supra* note 235.

237 In *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966), the Court held that a poll tax imposed on voting was discrimination “on the basis of wealth” of the type “traditionally disfavored.” A few years later, the Court held welfare residency requirements, that discouraged people from migrating between states, constituted invidious discrimination because it penalized the fundamental right to travel without a compelling justification. *See Shapiro v. Thompson*, 394 U.S. 618, 627 (1969); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974).

238 *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding state must waive fees related to divorce proceedings for indigent persons); *Lassiter v. Department of Social Services of Durham*, 452 U.S. 18 (1981) (holding state must determine if there is a need for court-appointed counsel in cases seeking termination of parental rights); *Little v. Streater*, 452 U.S. 1, 13, 16 (1981) (holding state must pay for a blood test for an indigent putative father seeking to contest a state paternity action); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–17 (1996) (requiring state to waive costs for indigent mother’s appeal of order terminating her parental rights).

239 519 US. at 124 (internal citation omitted).

240 For amicus briefs compiling this body of evidence, *see e.g., Br. of 547 Deans, Chairs, Scholars, and Public Health Professionals, et al. as Amici Curiae In Support of Respondents, Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021); *Br. of Social Science Experts as Amici Curiae In Support of Respondents, Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021); *Br. of National Women’s Law Center, et al. as Amici Curiae In Support of Respondents, Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021); *Br. of Abortion Funds and Practical Support Organizations as Amici Curiae In Support of Respondents, Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021).

241 *See* Joel Dodge, *The Supreme Court & Abortion Access for Women Living in Poverty*, *AM. CONST. SOC’Y* (Oct. 2019); Franklin, *supra* note 232, at 47–63.

242 *Adams & Boyle P.C. v. Slatery*, 494 F. Supp. 3d 488, 562, 564 (M.D.

Tenn. 2020) (findings of fact on financial burdens); *id.* at 562–65 (concluding the law’s burdens are “especially difficult, if not impossible, for low-income women to overcome”). On appeal, the Sixth Circuit Court of Appeals credited the trial court’s finding of facts regarding increased costs as “true” and “especially severe for women with low incomes and in precarious social situations” but nonetheless reversed and upheld the law on the rationale that those burdens were analogous to ones held permissible in *Casey*. See *Bristol Regional Women’s Center, P.C. v. Slatery*, 7 F.4th 478, 485–86 (6th Cir. 2021).

243 See *supra* notes 234–39 and accompanying text discussing cases.

244 See *supra* notes 60–70 and accompanying text.

245 See *Breaking Ground*, *supra* note 85, at 13.

246 *Id.* at 14.

247 See Human Rights Committee, *Siobhán Whelan v Ireland: Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2425/2014*, ¶¶ 7.5–7.7, 7.9, 7.11–7.12, U.N. Doc. CCPR/C/119/D/2425/2014 (2017); Human Rights Committee, *Amanda Jane Mellet v Ireland: Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2324/2013*, ¶¶ 7.4–7.6, 7.8, 7.10–7.11, U.N. Doc. CCPR/C/116/D/2324/2013 (2016).

248 CESCR, *General Comment No. 22*, *supra* note 86, at ¶¶ 2, 23, 34, 40; see also Committee on Economic, Social, and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 12, U.N. Doc. E/C.12/2000/4 (2000).

249 CESCR, *General Comment No. 22*, *supra* note 86, at ¶ 8.

250 Supreme Court of Nepal, *Lakshmi Dhikta v Government of Nepal*, Writ petition no. WO-0757, 2067 (2009).

251 Melissa Upreti, *Toward Transformative Equality in Nepal: The Lakshmi Decision*, in *TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES* 279, 284 (Rebecca J. Cook et al. eds., 2014).

252 Supreme Court of Nepal, *Lakshmi Dhikta v Government of Nepal*, *supra* note 250, at 9–10.

253 Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

254 *Id.*

255 See ROBERTS, *supra* note 2, at 305 (“Governmental standards for procreation implicate both equality and privacy interests by denying human dignity.”); Powell, *supra* note 27; Crenshaw, *supra* note 253, at 150–52.

256 *Lam v. Univ. of Hawai’i*, 40 F.3d 1551, 1562 (9th Cir. 1994); see also *Mosley v. Ala. Unified Jud. Sys., Admin. Off. of Cts.*, 562 F. App’x 862, 866 (11th Cir. 2014); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987); *Jefferies v. Harris Cnty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980).

257 *Lam*, 40 F.3d at 1562.

258 *Jefferies*, 615 F.2d at 1032; see also *Hicks*, 833 F.2d at 1416.

259 *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 n.10 (1999) (deciding in favor of plaintiffs under the Americans with Disabilities Act and rejecting dissent’s view that the Court has never recognized discrimination on the basis of disparate treatment among members of the *same* protected class).

260 *Maher*, 432 U.S. at 460; *McRae*, 448 U.S. at 342–44.

261 Consistent with Justice Marshall’s opinion, multiple state supreme courts explicitly have rejected the majority reasoning in *McRae* and held their state constitutional guarantees required public funding for abortion. See, e.g., *Comm. to Def. Reprod. Rts. v. Myers*, 625 P.2d 779, 799 (Cal. 1981) (“Indeed, the statutory scheme before us is all the more invidious because its practical effect is to deny to poor women the right of choice guaranteed to the rich.”); *Women of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995) (“*McRae* has the practical effect of not protecting

a woman’s fundamental right to choose to have an abortion and allowing funding decisions to accomplish its nullification of that right.”); *State v. Planned Parenthood of the Great NW.*, 436 P.3d 984, 1002 (Alaska 2019) (holding that by denying funding for abortion but not other pregnancy care, “the State burdens the exercise of a fundamental right for indigent people” in violation of the state constitutional guarantee of equal protection).

262 *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 582 (2021) (Sotomayor, J., dissenting from grant of application for stay) (dissenting from Court’s emergency stay of a lower court order temporarily lifting the in-person requirement for dispensing medication abortion during the pandemic).

263 Committee on Elimination of Racial Discrimination, *General Recommendation XXV on Gender-Related Dimensions of Racial Discrimination (Fifty-Sixth Sess. 2000)*, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.6, at 214–15 (2003).

264 CESCR, *General Comment No. 22*, *supra* note 86, at ¶ 30; CRC Committee, *General Comment No. 15*, *supra* note 164, at ¶¶ 8–11; Committee on the Rights of Persons with Disabilities, *General Comment No. 3 (2016) on Women and Girls with Disabilities*, ¶ 2, U.N. Doc. CRPD/C/GC/3 (2016) (noting barriers that “create situations of multiple and intersecting forms of discrimination against women and girls with disabilities”); Hum. Rts. Comm., *General Comment No. 28*, *supra* note 161, at ¶ 30; Human Rights Committee, *K.L. v. Peru: Communication No. 1153/2003*, ¶¶ 6.3–6.5, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); Hum. Rts. Comm., *Mellet v. Ireland*, *supra* note 247, at ¶ 7.11 (finding differential treatment where Ireland “failed to adequately take into account [woman’s] medical needs and socioeconomic circumstances”); Hum. Rts. Comm., *Whelan v. Ireland*, *supra* note 247, at ¶ 7.12 (same).

265 See, e.g., Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Thailand*, ¶¶ 42–43, U.N. Doc. CEDAW/C/THA/CO/6-7 (2017); Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Lesotho*, ¶¶ 32–33, U.N. Doc. CEDAW/C/LSO/CO/1-4 (2011).

266 CESCR, *General Comment No. 22*, *supra* note 86, at ¶¶ 8, 10, 30–32.

267 CRPD Committee, *General Comment No. 3*, *supra* note 264, ¶¶ 30, 33, 38–46.

268 Committee on the Rights of Persons with Disabilities & Committee on the Elimination of all Forms of Discrimination Against Women, *Joint Statement: Guaranteeing Sexual and Reproductive Health and Rights for all Women, in Particular Women with Disabilities*, U.N. Doc. INT/CEDAW/STA/8744/E (2018) [hereinafter CRPD and CEDAW Joint Statement].

269 See Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015); Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1541 (2002); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 106 (2007); Siegel, *supra* note 16, at 276–77.

270 See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

271 *Id.* at 536, 541 (holding the law deprived defendant of a “basic liberty” in violation of “the equal protection clause” of the Fourteenth Amendment).

272 388 U.S. 1, 12 (1967).

273 Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897–98 (2004); see also Tribe, *supra* note 269, at 17.

274 576 U.S. 644, 672–73 (2015) (relying on *Loving, M.L.B.* and other precedent blending due process and equal protection).

275 *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 327 (2006) (emphasis added) (internal quotation marks omitted). The Supreme Court first set forth this principle in *Roe*, 410 U.S. at 163–65, and reaffirmed it multiple times since, see *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 768–71 (1986); *Casey*, 505 U.S. at 879; cf. *Dobbs*, 2022 WL 2276808, at *79 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (“The majority does not say—which is itself ominous—whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment.”). See also Elyssa Spitzer, *Pregnancy’s Risks and the Health Exception in Abortion Jurisprudence*, 22 GEO.

J. GENDER & L. 127 (2020).

276 *People v. Belous*, 458 P.2d 194, 199–200 (Cal. 1969) (drawing on federal and state constitutional precedents in holding criminal ban unconstitutional prior to *Roe*).

277 *Myers*, 625 P.2d at 792–93 (holding ban on public insurance coverage for abortion unconstitutional under state constitutional guarantees and explicitly rejecting *McRae* reasoning).

278 *Id.* at 791 n.21, 792.

279 See *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (describing when an official act violates substantive due process right to life and outlining various standards for liability under that rule).

280 For a discussion of different jurisprudential approaches to the right to make medical decisions in certain circumstances including abortion, see B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277 (2007); see also B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L., no. 2, 2009.

281 See B. Jessie Hill, *Essentially Elective: The Law and Ideology of Restricting Abortion During the COVID-19 Pandemic*, 106 VA. L. REV. ONLINE 99 (2020).

282 See Yvonne Lindgren, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right*, 64 HASTINGS L.J. 385 (2013).

283 ICCPR, *supra* note 71, at art. 6.

284 Human Rights Committee, *General Comment No. 36 on the Right to Life*, ¶ 3, U.N. Doc. CCPR/C/GC/36 (2018).

285 *Id.* at ¶ 2.

286 Br. of United Nations Mandate Holders as Amici Curiae In Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021) at 21–22.

287 WORLD HEALTH ORG., *supra* note 46, at 2.

288 Hum. Rts. Comm., *Gen. Comment No. 36, supra* note 284, at ¶ 8.

289 General Comments and General Recommendations are interpretations of human rights treaty provisions published by the human rights treaty bodies. They are considered authoritative guidance.

290 Hum. Rts. Comm., *Gen. Comment No. 36, supra* note 284, at ¶ 8.

291 *Id.*

292 *Id.*

293 *Id.*

294 *Id.*

295 *Id.*

296 See CRPD and CEDAW Joint Statement, *supra* note 268.

297 See Hum. Rts. Comm., *Gen. Comment No. 36, supra* note 284, at ¶ 26; Hum. Rts. Comm., *General Comment No. 28, supra* note 161, at ¶ 10; Radhika Coomaraswamy (Special Rapporteur), *Integration of the Human Rights of Women and the Gender Perspective Violence Against Women*, ¶ 66, U.N. Doc. E/CN.4/1999/68/Add.4 (1999) (noting “[g]overnment failure to take positive measures to ensure access to appropriate health-care services that enable women to safely deliver their infants as well as to safely abort unwanted pregnancies may constitute a violation of a woman’s right to life”).

298 See, e.g., Human Rights Committee, *Concluding Observations: Bolivia*, ¶ 22, U.N. Doc. CCPR/C/79/Add.74 (1997); Human Rights Committee, *Concluding Observations: Guatemala*, ¶ 19, U.N. Doc. CCPR/CO/72/GTM (2001); Human Rights Committee, *Concluding Observations: Hungary*, ¶ 11, U.N. Doc. CCPR/CO/74/HUN (2002); Human Rights Committee, *Concluding Observations: Libyan Arab Jamahiriya*, ¶ 9, U.N. Doc. CCPR/C/79/Add.101 (1998); Human Rights Committee, *Concluding Observations: Mali*, ¶ 14, U.N. Doc. CCPR/CO/77/MLI (2003); Human

Rights Committee, *Concluding Observations: Mongolia*, ¶ 8(b), U.N. Doc. CCPR/C/79/Add.120 (2000); Human Rights Committee, *Concluding Observations: Paraguay*, ¶ 123, U.N. Doc. A/51/38 (1996); Human Rights Committee, *Concluding Observations: Senegal*, ¶ 12, U.N. Doc. CCPR/C/79/Add.82 (1997); Human Rights Committee, *Concluding Observations: Zambia*, ¶ 18, U.N. Doc. CCPR/C/ZMB/CO/3 (2007).

299 See, e.g., Human Rights Committee, *Concluding Observations: Mali*, ¶ 14, U.N. Doc. CCPR/CO/77/MLI (2003).

300 Hum. Rts. Comm., *Gen. Comment No. 36, supra* note 284, at ¶ 8.

301 *Id.* at ¶ 26.

302 See Human Rights Committee, *Concluding Observations: Lao*, ¶ 22, U.N. Doc. CCPR/C/LAO/CO/1 (2018); Human Rights Committee, *Concluding Observations: Gambia*, ¶ 18, U.N. Doc. CCPR/C/GMB/CO/2 (2018); Human Rights Committee, *Concluding Observations: Romania*, ¶ 26, U.N. Doc. CCPR/C/ROU/CO/5 (2017); Human Rights Committee, *Concluding Observations: Mali*, ¶ 14, U.N. Doc. CCPR/CO/77/MLI (2003); Human Rights Committee, *Concluding Observations: Peru*, ¶ 14, U.N. Doc. CCPR/C/PER/CO/5 (2013); Human Rights Committee, *Concluding Observations: Mongolia*, ¶ 8, U.N. Doc. CCPR/C/79/Add.120 (2000).

303 Hum. Rts. Comm., *Gen. Comment No. 36, supra* note 284, at ¶¶ 2–3, 26.

304 *Id.* at ¶ 26.

305 See, e.g., Human Rights Committee, *Toussaint v. Canada Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol Concerning Communication No. 2348/2014*, ¶ 11, U.N. Doc. CCPR/C/123/D/2348/2014 (2018) (noting that “the right to life concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity,” and holding that the right to life requires, at a minimum, that governments have the “obligation to provide access to existing health care services that are reasonably available and accessible, when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in the loss of life); see also Human Rights Committee, *Teito v. New Zealand Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol Concerning Communication No. 2728/2016*, ¶ 9.4, U.N. Doc. CCPR/C/127/D/2728/2016 (2020) (“The Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures.”).

306 [CTR. FOR REPROD. RTS. & CENTRE FOR CONST. L., POL’Y AND GOVERNANCE, SECURING REPRODUCTIVE JUSTICE IN INDIA: A CASEBOOK 7](#) (2019).

307 See, e.g., *id.* (finding that “‘shortage not only of the infrastructure but of the manpower’ to implement maternal health schemes led to the ‘inability of women to survive pregnancy and child birth [which] violates her fundamental right to live as guaranteed under Article 21 of the Constitution of India’” (quoting *Sandesh Bansal v. Union of India*, W.P. No. 9061 of 2008 (Order dated 6 February 2012) (High Court of Madhya Pradesh))).

308 *Advocate Prakash Mani Sharma v. Government of Nepal*, ¶ 16, WN 64 WO 0230 (1999).

309 Malindi HC Const. Pet No E009 of 2020 Judgment, 17–21; see also Hum. Rts. Comm., *Gen. Comment No. 36, supra* note 284, at ¶ 8.